



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO. IV

In the matter of

Appeal No. 35 of 2016

Shireen Arshad Khan, Chairperson Aik Hunar Aik Nagar (AHAN) ...Appellant

versus

Director, (Corporatization & Compliance Department)

Securities and Exchange Commission of Pakistan ...Respondent

Date of Hearing 23/06/16

Present:

For the Appellant:

(i) Mr. Ashraf Tiwana, Advocate High Court

For the Respondent:

(i) Mr. Mubasher Saddozai, Director (CCD)

(ii) Ms. Beenish Waqas, Assistant Director (CCD)

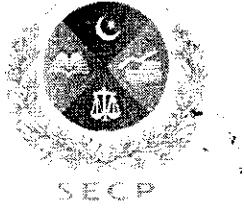
ORDER

1. This order is in appeal No. 35 of 2016 filed under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 against the order dated 31/05/16 (Impugned Order) passed by the Respondent.
2. Brief facts of the case are that the Ministry of Industries & Production (MoIP) vide its letter dated 04/04/16 had informed the Respondent that Aik Hunar Aik Nagar (Company) has been paying huge perks to its Chairperson/Director Ms. Shireen Arshad Khan (Appellant) which constitutes a contravention of condition of license imposed in pursuance of Rule 6 of the Companies (General Provisions & Forms)

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Rules, 1985 (Rules). Details of the benefits drawn by the Appellant as given by the MoIP are as follows:

Sr. No.	Head of Expenses	Amount in Rs.
1.	Vehicles Fuels, R&M	3,608,429
2.	TA/DA	2,712,000
3.	Two Drivers Salaries	833,000
4.	Mobile Expenses	187,321
5.	Air Travelling	121,130
6.	Hotel Bills	77,113
7.	Supplied finished and unfinished goods	2,040,367
	Total	9,579,377

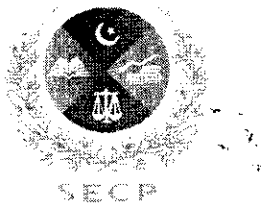
The provisions of Rule 6(4)(ii) of the Rules states that the "Payment of the remuneration for the services or otherwise to its members, whether holding an office in Company or not, shall be prohibited". Any violation of the Rules attract penal provisions as contained in Rule 35 which states that whoever fails or refuses to comply with, or contravenes any provision of these rules, or knowingly and willfully authorizes or permits such failure, refusal or contravention shall, in addition to any other liability under the Ordinance, be also punishable with fine and, in the case of continuing failure, to a further fine, as provided in section 506(2) of the Companies Ordinance, 1984 (Ordinance).

3. Show Cause Notice dated 15/04/16 (SCN) was issued to the Company as to why penalties for the aforesaid violation might not be imposed. The Chief Executive Officer (CEO) of the Company submitted his response vide letter dated 29/04/16 and hearing in the matter was fixed on 11/05/16. The CEO along with Finance Manager appeared on behalf of the Company and made their submissions. In order to meet the ends of justice, an opportunity of hearing was also provided to the Appellant to defend her case and on 24/05/16 the Appellant appeared and argued the case. Further, the

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Appellant to defend her case and on 24/05/16 the Appellant appeared and argued the case. Further, the Appellant also submitted her written response which was received by the Respondent on 26/05/16 and reiterated the same arguments as were presented at the time of hearing. The Appellant's stance was found unsatisfactory.

4. The Respondent in exercise of powers conferred under Rule 35 of the Rules read with section 506(2) of the Ordinance imposed a penalty of Rs.200,000 on the Appellant/Chairperson of the Company. The Appellant was liable to refund the amounts as received from the Company in violation of the conditions of licence and the provisions of memorandum of association of the Company. Further, the Appellant was directed to deposit the amount of penalty in the Commission's account within 30 days of receipt of the Order and furnish original receipt/challan of the same to the Respondent for record. The Appellant was also directed to refund the unauthorized amounts as received from the Company in the Company's account within 30 days of the date of the order and submit proof of the same to the Respondent for record. The Chief Executive and other directors were also advised to remain careful in the compliance of law in future and refrain from approving the agenda items which are not supported by law. Further, the Order was issued without prejudice to any actions that may be initiated against the Company, its Chairperson and its directors responsible for the violations of the aforesaid provisions of the law.

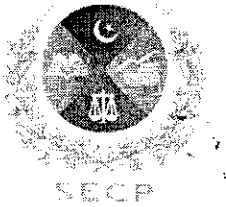
5. The Appellant has preferred the instant appeal on the following grounds:

- a) SCN was not issued to the Appellant thereby rendering the entire proceedings and the Impugned Order against principles of natural justice and without lawful authority. Non issuance of the SCN is a direct violation of 476(3) of the Ordinance which gives the power to the Commission and its authorized officers to impose a penalty for violation of the provisions of the Ordinance. The entire proceedings against the Appellant as well as the Impugned Order are therefore void and without lawful authority.
- b) The frivolous complaint filed by the official of MoIP, the stance taken by the CEO in the proceedings before the Respondent without informing the Board and the Appellant,

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and the actions of the Respondent in denying the Appellant any meaningful opportunity to defend herself as required by law shows that the entire proceedings are concocted, malicious, biased, unfair and based on malafide.

- c) The imposition of penalty and the direction given to the Appellant to refund the reimbursements received by her is in violation of Rule 6(4)(ii) of the Rules since the Appellant is not a member of the Company. The prohibition contained in Rule 6(4)(ii) does not apply to the Appellant and no case is made out against the Appellant. The Impugned Order, therefore, is void and ultra vires of the Rules.
- d) The imposition of penalty and the direction given to the Appellant to refund the reimbursements is in contravention of the precedent set by the Appellate Bench in the case of Farooq Hassan Executive Director (Management Association of Pakistan) vs. Director (CLD) cited at 2011 CLD 1228 which is binding upon the Respondent. In the said case, a similar order was set aside by the Appellate Bench as the accused was also not a member of the Company.
- e) The prohibition contained in Rule 6(4)(ii) of the Rules is against payment of "remuneration" and not reimbursement of expenses incurred in official matters. The Appellant has not received any remuneration from the Company and, therefore, the prohibition does not apply to her. The SCN and the Impugned Order are, therefore, misconceived and illegal.
- f) The Respondent has unilaterally and without lawful authority expanded the definition of the terms "member" and "remuneration" contained in Rule 6(4)(ii) of the Rules to include the Appellant within the scope of the prohibition. It is an established principle of law that prohibitory and penal clauses are always strictly construed in favour of the accused. The actions of the Respondent and the Impugned Order are, therefore, unlawful.
- g) Rule 6(4)(ii) of the Rules formulated in pursuance of section 42 of the Ordinance which places a prohibition on payment of "remuneration" to members for work done or services provided, is ultra vires of section 42 as it goes beyond its scope. Section 42 of the Ordinance only places a restriction on payment of dividend to members of not-for-profit companies and not on remuneration. No penalty, therefore, can be imposed under the said rule and the Impugned Order is without lawful authority.

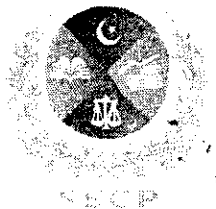


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- h) Rule 6(4)(ii) of the Rules which prohibits payment of "remuneration" to directors for extra work done or services provided is ultra vires of section 191 of the Ordinance, which specifically allows such remuneration. A rule being a sub-ordinate legislation cannot override a statutory provision, being the primary legislation. No action can be initiated in pursuance of the said rule and, therefore, the SCN and Impugned Order are void ab initio and without lawful authority.
- i) The prescription of conditions of licence under section 42 for not-for-profit companies through Rules framed under section 506 of the Ordinance by the Federal Government is ultra vires of section 42 of the Ordinance. Section 42 of the Ordinance specifically provides that the conditions if any, may be prescribed through regulations made by the Commission and not rules. The penalty, therefore, prescribed under rule 30 read with section 506(2) for a contravention of conditions prescribed pursuant to the Rules cannot be imposed on the Appellant. Further, Section 506(2) of the Ordinance was amended through Finance Act, 2007 to increase the penalty prescribed therein from Rs.50,000 to Rs.500,000 which is ultra vires of Articles 73 & 75 of the Constitution as held by the Supreme Court in the matter of Muhammad Ashraf Tiwana & others versus Pakistan & others cited at 2013 SCMR 1159 etc. The imposition of the penalty amounting to Rs.200,000 on the Appellant is, therefore, illegal.
- j) MoIP cannot be made a party to the proceedings as argued by the Respondent. MoIP was not a party in the original proceedings, therefore, cannot be made a party at the Appellate Forum.

6. The Respondent's representatives rebutted the arguments as follows:

- a) The SCN dated 15/04/16 was duly issued to the Company mentioning therein that the SCN may be circulated to all the directors of the Company; therefore, issued to the Company and its directors.
- b) The Appellant was given hearing opportunity vide hearing notice dated 17/05/16 and in response to the request of the Appellant for adjournment; the Appellant was conveyed vide letter dated 23/05/16 to submit a suitable date for hearing. However, the Appellant



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herself appeared on 24/05/16, a day before the date fixed for hearing, which was conducted on her request.

- c) Section 187 of the Companies Ordinance, 1984 provides that no person shall be appointed as a director of a company if he is not a member, however, certain exemptions are provided under the law which *inter alia* include a person representing the Government or an institution or authority which is a member. In the instant case, the Appellant is the nominee director appointed by the MoIP, Federal Government which is a member in the Company as per Form A.
- d) Rule 6(4)(ii) of the Rules provides that the payment of the remuneration for the services or "otherwise" to its members is prohibited. The Appellant has not been paid any direct remuneration, however, she has availed certain facilities, thus falling within the other payments, as specifically stated under the law. Therefore, if such facilities benefits/are allowed to members, this will defeat the spirit of a not for profit company.
- e) The roles and responsibilities of Chief Executive and Chairperson/Chairman of the Board are clearly separated/distinct for smooth running of these companies under the provision of Rule 4 of Public Sector Companies (Corporate Governance) Rules, 2013 (PSC). The Appellant went beyond the scope/function of her office, as envisaged under PSC which are mandatory on public sector companies.
- f) The Impugned Order advised the Board of Directors to remain careful in future and refrain from approving any such agenda items not supported by law. However, Rule 4 (c) of PSC provides that it is the duty of the Chairperson/Chairman to lead the Board and ensure its effective functioning. Therefore, if this negligence has been made by the Board, it is the duty of the Appellant to ensure that the decisions are taken in the right manner. As regards subsequent ratification of the act by the Board of Directors, it is pointed out that an authority subsequently acquired cannot be termed as an act "under the authority" and doctrine of substantial compliance cannot stand where there has been a clear violation of mandatory provisions. Reliance is place on the judgment of the Appellate Bench in the matter of Gharibwal Cement versus Executive Director (Enforcement) SECP cited at 2003 CLD131. The Appellant has failed to perform her assigned duties and instead remained involved in day to day operations of the Company, which is the duty of the Chief Executive.

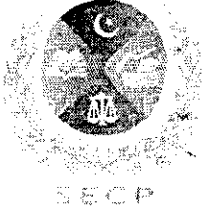


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- g) Section 163(1) of the Ordinance provides that, "The Federal Government, or a Provincial Government, as the case maybe, if a member of a company, may appoint such person as it thinks fit to act as its representative at any meeting of the company or at any meeting of any class of members of the company." Further, section 163(2) of the Ordinance provides that, "A person appointed to act as aforesaid shall, for the purpose of the Ordinance, be deemed to be a member of such a company...." In the instant case, the Appellant is deemed to be member of the Company by virtue of her appointment by the Federal Government.
- h) The instant appeal is hit by the provision of non-joinder of parties as the Appellant has not made MoIP a necessary party in the proceedings.

7. We have heard the parties.

8. Before going into merits of the instant appeal, it is important to determine whether the show cause proceedings were initiated and subsequently the Impugned Order was passed in accordance with the law. We place our reliance on section 476(3) of the Ordinance which states "The fine as aforesaid shall be imposed after giving the person concerned an opportunity to show cause why he should not be punished for the alleged offence, contravention, default or non-compliance and, if he so requests, after giving him an opportunity of being heard personally or through such person as may be prescribed in this behalf." The Appellant has argued that the SCN was never issued to the Appellant. The Respondent has argued that SCN was issued to the Company, wherein, it was stated that, "SCN may be circulated to all the directors of the Company." We are of the view that in the instant case, the SCN was only issued to the Company and cannot be deemed to have been served on the Appellant against whom the Impugned Order was passed. Therefore, penal action cannot be taken against the Appellant on whom SCN was not served in accordance with the law even if subsequently it was brought to the notice of the Appellant. We, therefore, concur with the Appellant that the entire proceedings against the Appellant are void and without lawful authority.



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9. In view of the above, we set aside the Impugned Order.

(Fida Hussain Samoo)
Commissioner (Insurance)

(Zafar Abdullah)
Commissioner (SCD)

Announced on: 12 JUL 2016