Securities and Exchange Commission of Pakistan

SECP

BEFORE THE APPELLATE BENCH

In the matter of

(Appeal No. 75 of 2021)

Mr. Muhammad Farukh and Others

.... Appellants

Versus

HOD (Adjudication Department-I)

.... Respondent

Date of hearing: 26/12/2024

For the Appellants:

Mr. Rashid Sadiq (Authorized Representative)

For Respondent:

1. Mr. Sohail Qadri, Director/ HOD, Adjudication Department-I
2. Mr. Mahboob Ahmad, Additional Director, Adjudication Department-I
3. Mr. Rizwan-Ul-Haq, Additional Joint Director, Adjudication Department-I

ORDER

1. This Order is in Appeal No. 75 of 2021 filed by Mr. Muhammad Farukh and Others ("Appellants") in the matter of Unity Foods Limited ("the Company") through Mr. Rashid Sadiq ("the Authorized Representative") against order dated April 30, 2021 ("the Impugned Order") passed by the Executive Director Adjudication Department-I ("the Respondent") under section 218, 219 and 479 of the Companies Act, 2017 ("the Act").

2. The brief facts of the appeal are that a review of the annual audited financial statements for the year ended June 30, 2019 ("the Accounts") of the Company indicated that in Note 14 to the Accounts, an amount of Rs.13.149 million was disclosed as 'provident fund payable'. The Corporate Supervision Department of the Securities and Exchange Commission of Pakistan ("the Commission"), vide letter dated October 18, 2019, sought clarification from the Company regarding compliance with Section 218 of the Act. The Company, vide letter dated November 11, 2019, submitted that the formal establishment and registration formalities of the provident fund trust were in process as of June 30, 2019 and all amounts available with the company were deposited in the accounts of the employee's provident fund trust subsequent to June 30, 2019.

3. The Inspection report noted that as per Note 5.18 to the Accounts of 2019, the Company operates a provident fund for its permanent employees and it appeared that the amount of contributions of provident fund of employees were not deposited by the Company within fifteen days of the date of contribution, rather the cumulative amount of Rs.12 million was deposited on July 2, 2019, with a significant delay from the due dates, which *prima facie* was in contravention of the requirements of Section 218 of the Act.

4. In view thereof, a Show-Cause Notice dated December 13, 2019 ("the SCN") was served on the Company and Appellants for the aforementioned contraventions of Sections 218, 219 and 479 of the Act and show-cause proceedings were initiated against the Appellants

and the Company. The hearing in the matter was fixed for April 26, 2021 which was attended by the Authorized Representative. The Respondent considered the arguments presented by the Authorized Representative during the hearing but did not find sufficient justification to absolve the violation of Section 218 of the Act, therefore, in exercise of powers conferred in terms of Section 219 of the Act, imposed a penalty of Rs.25,000/- (Rupees Twenty-Five Thousand Only) on Mr. Muhammad Farrukh Chief Executive Officer and the remaining Appellants were warned to be careful and ensure compliance of law in future.

5. The Authorized Representative appearing on behalf of the Appellants *inter alia* contended that the Impugned Order does not meet the requirements of Section 22(3) & (5) of the Securities and Exchange Commission of Pakistan Act 1997 ("the SECP Act") and Section 24A of the General Clauses Act, 1897 ("the GCA"). The Authorized Representative stated that the SCN proceedings were initiated against the directors of the Company which is entirely contrary to the express provisions of Section 218 and 219 of the Act which clearly stipulates that penalty in case of contravention or default will be imposed on the Company and not on its directors. The Authorized Representative further stated that the Impugned Order is contrary to the rules of natural justice and the right to equal treatment enshrined under Article 25 of the Constitution of the Islamic Republic of Pakistan ("the Constitution") as embodied in Section 20(6)(c) of the SECP Act and uniform application of the law. The Authorized Representative also stated that the Respondent failed to distinguish, mention or even allude to the precedents of the Commission and the superior judiciary as provided in the reply and at the time of hearing of the case. The Authorized Representative argued that the Respondent also failed to address the submission that 'monies or securities deposited by employees' pursuant to their contract of service is different from 'monies contributed by employees to provident fund' constituted by a company. The Authorized Representative of the Appellants further argued that under Sections 218 and 219 of the Act, individual officers or directors of a company cannot be directly impleaded in the SCN, therefore, the issuance of the SCN to the directors, the

proceedings initiated pursuant to it, and the resulting Impugned Order are entirely contrary to the explicit provisions of Sections 218 and 219, as well as Section 484 of the Act. The Authorized Representative further stated that there is no time limit in Section 218(2) which is applicable in this particular case. The Authorized Representative further added that there is a difference between deposit and contribution and where there is a voluntary contribution there is no time limit provided by the legislature to deposit the such amount. The Appellant further argued that in previous cases, such as in the matters of Askari General Insurance and Azgard Nine case, the Respondent did not impose penalties on the parties for the non-compliances.

6. The Respondent has rebutted the arguments and stated that the reasons for passing the Impugned Order have been adequately mentioned in the Impugned Order and the Appellants' contention with regard to violation of the requirements of Section 22(3) & (5) of the SECP Act and Section 24A of the GCA is incorrect. The Respondent further argued that as a matter of fact, three hearing opportunities were provided to the Appellants and thereafter, after considering the verbal and written submissions of the Appellants the Impugned Order has been passed in a fair and transparent manner. The Respondent reiterated the fact that the submissions of the Appellants were duly considered while passing the Impugned Order. The Respondent further stated that the law does not specifically hold a company responsible for a violation of Section 218 of the Act. The Respondent also stated that as a matter of fact, a Company cannot proceed to comply with the requirements of Section 218 of the Act, unless the Appellants approve collection of contributions with respect to the creation of such fund and the opening of a bank account to keep such contributions. Furthermore, it has been argued by the Respondent that creation of a trust, approval of FBR, registration of trust deed and opening of a bank account are all dependent on the decision of the Appellants. It was further added by the Respondent that, for all practical purposes, the Appellants are responsible for failure to meet the requirements of Section 218 of the Act. The Respondent further stated that the requirements of natural justice with respect to the opportunity of hearing and passing of

the well-reasoned order were duly met. It has been further argued by the Respondent that during the SCN proceedings and while passing the Impugned Order, no discrimination has been made and the Appellants were treated in a fair and transparent manner while providing them an opportunity of hearing. It is also argued by the Respondent, that no violation of Article 25 of the Constitution of 1973 and Section 20(6)(c) of the SECP Act may be attributed to the Respondent in reference to the proceedings of the SCN and the Impugned order where the Appellant alleged that the uniform applicability of law has not been made. It is also argued by the Respondent that the precedents referred by the Appellants were not relevant to the facts of the case; therefore, the Respondent has not considered them. It has been further argued by the Respondent that Section 218(1) pertains to "all monies or securities deposited and "All monies" includes contributions of provident fund whereas, "Securities Deposit" specifically pertains to the deposit by the employees in reference to the terms of service, however, in the latter part of Section 218(1) it has been particularly elaborated that in case of breach of contract of services, how security deposit is to be treated. Furthermore, the Respondent added that Section 218(2) of the Act, specifically addresses the use and treatment of the monies received as contributions to the employees' provident fund. The Respondent further stated that as per the applicable scheme of law, the process of collection of contributions by the Company or creation of employees' provident fund trust may not be initiated unless the Appellants have complied with the applicable procedural requirements. The Respondent stated that the SCN has been rightly issued to the Appellants, therefore, its proceedings and the Impugned Order are as per the relevant provisions of the law. The Respondent also added that, corrective measures and subsequent compliance does not exonerate the Appellants from the consequences of Section 219 of the Act. Moreover, the Respondent stated that in the case laws of Askari General Insurance and Azgard Nine cited by the Appellant , violations were admitted by the companies and their directors, therefore, a lenient view was taken, and instead of a penalty, a warning was issued but the Appellants are of the view that no violations have been committed and issuance of an SCN and the Impugned Order are illegal, deem the cited case laws as not relevant to the facts of the appeal at hand. The Respondent stated that as a matter of fact,

treatment of the amount received as contributions of employees and employers with respect to provident fund has been provided to ensure segregation of accounts and to ensure that such amount is not used for ordinary and day-to-day affairs of the Company. The Respondent while concluding their arguments prayed for dismissal of the instant appeal.

7. The Appellate Bench ("Bench") has reviewed the record and heard the arguments of the parties. The Bench is of the view that the SCN issued to the Appellants is as per law under Sections 218 and 219 of the Act. Perusal of Sections 218 and 219 show that it does not restrict the Respondent to impose a penalty on the Appellants or the Company. The intent of legislature is to protect the money of the employees, and the Appellants, being in charge of the relevant operations, bear direct responsibility for the delays and consequent non-compliance. It is evident from the record that the employees' funds were received prior to the establishment of the provident fund account. The Bench emphasizes that, where employees' monies are involved, it is the fiduciary duty of the Company's Board to act diligently and take proactive measures to secure both the funds and the trust of its employees. However, in this instance, the Appellants failed to adopt appropriate measures to prevent the non-compliance and instead sought to absolve themselves from accountability. The Bench further observes that Section 218 of the Act prescribes a clear timeline for the deposit of all monies into the requisite account within 15 days. The Appellants' contention—that the legislature, if so intended, should have explicitly defined separate timelines for "contributions"—is untenable in light of the clear statutory mandate. Additionally, the Bench notes that under the applicable legal framework, the process of collecting employee contributions or establishing an employee provident fund trust cannot commence unless the Appellants have fulfilled the requisite procedural requirements. The Bench finds no cogent argument for the purported inequitable treatment alleged by the Appellants and is satisfied that the due process of law has been adhered to at all stages of the proceedings. Finally, the Bench determines that the case law cited by the Appellants is distinguishable on the merits and does not lend support to their arguments in the instant matter.

8. In view of the above the Bench hereby dismiss the appeal without any order as to cost.

(Akif Saeed)
Chairman/Commissioner

(Zeeshan Rehman Khattak)
Commissioner

Announced on: 21 JAN 2025