



# Securities and Exchange Commission of Pakistan

## BEFORE THE APPELLATE BENCH

In the matter of

### Appeal No. 85 of 2022

Tandlianwala Sugar Mills Limited

...Appellant

versus

SECP and another

...Respondents

### Date of hearing:

December 06, 2023

### For the Appellant:

Barrister Iftikharuddin Riaz, ASC

### For the Respondents:

1. Mr. Mahboob Ahmad, Additional Director, Adjudication-I, SECP
2. Mr. Muhammad Anwar Hashmi, Additional Joint Director, Adjudication-I, SECP
3. Mr. Raja Farukh Ahmad, Additional Joint Director, Adjudication-I, SECP

## ORDER

1. This Order shall dispose of Appeal No. 85 of 2022 filed by M/s. Tandlianwala Sugar Mills Limited (the "Appellant") under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 (the "SECP Act").
2. Brief facts leading to the instant Appeal are that the Appellant is aggrieved of the order dated July 20, 2022 (the "Impugned Order") passed by the Director, Adjudication-I under regulation 37 of the Listed Companies (Code of Corporate Governance) Regulations, 2019 (the "CCG Regulations") read with

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section 512 of the Companies Act, 2017 (the “Act”) on account of contravention of regulation 6(1) and regulation 27(1) of the CCG Regulations.

3. The Counsel for the Appellant submitted that appointment of independent director(s) is not a requirement under the Act and this aspect has not been considered by the Respondents while passing the Impugned Order. He further argued that the Act, being a primary legislation, does not require appointment of an independent director and even for the sake of argument if it is inferred that the appointment of an independent director is a requirement under section 166 of the Act, then the same is not mandatory and rather directory in nature. The Counsel for the Appellant submitted that penalty under regulation 37 of Regulations read with section 512 of the Act are circular and of no effect as the CCG Regulations, to the extent of appointment of an independent director, are *ultra vires* of the Act. The Counsel summed up his arguments that the Impugned Order is hit by the ‘Principle of Doubtful Penalisation’ and submitted that that the Securities and Exchange Commission of Pakistan (the “Commission”) has not yet decided the Appellant’s application under section 166(6)(b) of the Act and on that account imposition of penalty vide the Impugned Order is against the law till decision of the aforementioned application. In support of the above submissions, Counsel for the Appellant has *inter alia* relied upon various judgments of the superior courts as well as judgments from foreign jurisdictions.
4. Controverting the submissions of the Appellant, the Respondent submitted that the application under section 166(6)(b) of the Act, as referred by the Appellant, was filed as part of the Appellant’s written reply to the show-cause notice dated May 18, 2021 (the “SCN”) which clearly indicates that the same was not filed prior to the issuance of the SCN. The Respondent further submitted that section 166 of the Act clearly envisages that it is mandatory for a company to appoint an independent director where the same is *inter alia* required under the CCG Regulations. The Respondent argued that the legislative intent behind the words ‘to be appointed’ used in section 166(1) of the Act is further strengthened with the word ‘shall’ used in section 166(3) of the Act.



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5. The Appellate Bench (the “Bench”) has heard the parties and perused the record. In order to decipher the issue at hand, it would be apt to have a glance at the relevant legal provisions of the Act and the same are reproduced as hereinunder:

**“166. Manner of selection of independent directors and maintenance of databank of independent directors.—***(1) An independent director to be appointed under any law, rules, regulations or code, shall be selected from a data bank containing names, addresses and qualifications of persons who are eligible and willing to act as independent directors, maintained by any institute, body or association, as may be notified by the Commission, having expertise in creation and maintenance of such data bank and post on their website for the use by the company making the appointment of such directors:*

*Provided that responsibility of exercising due diligence before selecting a person from the data bank referred to above, as an independent director shall lie with the company or the Government, as the case may be, making such appointment...*

*(3) The independent director of a listed company shall be elected in the same manner as other directors are elected in terms of section 159 and the statement of material facts annexed to the notice of the general meeting called for the purpose shall indicate the justification for choosing the appointee for appointment as independent director...*

*(5) The manner and procedure of selection of independent directors on the databank who fulfill the qualifications and other requirements shall be specified by the Commission...” (emphasis provided)*

6. It is quite clear that sub-section (1) of section 166 of the Act *inter alia* recognizes the requirement of appointment of an independent director in a company under any law, rules, regulations, or code, whereas, sub-section (3) *ibid* provides the manner of election of an independent director of a listed company. Going forward, sub-section (5) *ibid* is an enabling provision whereby the Commission is empowered to specify the manner and procedure of selection of independent directors through regulations and thus in this context CCG Regulations contain therein provisions pertaining to independent directors, such as regulation 6 which states that:

**“6. Independent Director.-** *(1) It is mandatory that each listed company shall have at least two or one third members of the Board, whichever is higher, as independent directors...”*

7. Regulation 6 of the CCG Regulations when read with sub-sections (3) and (5) of the Act, as reproduced above, makes it incumbent upon a listed company to elect independent directors. The use of words



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'shall' (in sub-section (3) of section 166 of the Act) and 'mandatory' (in regulation 6 of the CCG Regulations) leave no room for any ambiguity that the legislative intent behind the said provision is to have independent directors on the Board of a listed company and the same is not directory in nature. The contention of the Appellant that the Act itself does not require having independent directors in a listed company is not tenable as the same is unequivocally mandated under sub-section (3) of section 166 of the Act. Moreover, the CCG Regulations having provisions regarding independent directors, are in harmony with the powers conferred upon the Commission by virtue of sub-section (5) of section 166 of the Act to make regulations which under regulation 6 makes it mandatory upon each listed company to have independent directors as provided therein.

8. As far as the contention of the Appellant with respect to its application for relaxation is concerned, the Bench is of the view that the applicant being a listed company is required to have independent directors under the CCG Regulations wherein regulation 38 of the CCG Regulation deals with an application for relaxation from the provisions of the CCG Regulation to be filed before the Commission. As admitted by the Appellant, the application for relaxation from the requirement to have independent directors was filed by the Appellant with the reply to SCN and not earlier, and thus the same does not vitiate the SCN proceedings which culminated into the Impugned Order whereunder the Appellant was rightly penalized in terms of section 512 of the Act read with regulation 37 of the CCG Regulations on account of contravention of provisions of the CCG Regulations.
9. In light of the foregoing, the Bench does not find any reason to interfere with the Impugned Order and thus upholds the same. Accordingly, the instant Appeal being without any merit is **dismissed** with no order as to costs.

(Akif Saeed)  
Chairman/Commissioner

(Mujtaba Ahmad Lodhi)  
Commissioner

Announced on: 13 FEB 2024