



Securities and Exchange Commission of Pakistan

BEFORE THE APPELLATE BENCH

In the matter of

Appeal Nos. 60, 61 and 62 of 2021

1. Crescent Star Insurance Limited (Appeal No. 60 of 2021)
2. Naim Anwar (Appeal No. 61 of 2021)
3. Nadeem Ansar (Appeal No. 61 of 2021)
4. Dr. Fahmim Laskkerwala (Appeal No. 61 of 2021)
5. Tanveer Ahmed (Appeal No. 61 of 2021)
6. Suhail Elahi (Appeal No. 62 of 2021)
7. Rashid Malik (Appeal No. 62 of 2021)
8. Sheikh Waqar Ahmad (Appeal No. 62 of 2021)

.....Appellants

Versus

The Executive Director/HOD, Adjudication Department-I, SECP, Islamabad.

.....Respondent

Date of hearing:

May 30, 2024

Present:

For the Appellant:

Mr. Saadat Ali Saeed, Advocate

For the Respondent:

1. Mr. Mahboob Ahmad, Additional Director, Adjudication-I, SECP
2. Mr. Shafiq -ur- Rehman, Additional Joint Director, Adjudication-I, SECP



Securities and Exchange Commission of Pakistan

ORDER

1. This consolidated order shall dispose of Appeal Nos. 60, 61 and 62 of 2021 filed under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 by the Crescent Star Insurance Company Limited (the Company) and its Directors (the Appellants) against the Order dated March 1, 2021 (the Impugned Order) passed by the Executive Director/HOD, Adjudication Department-I (the Respondent) under Sections 11, 12, 29, 36, 45 read with Section 156 of the Insurance Ordinance, 2000 (the Ordinance).
2. The brief facts of the case are that;
 - i. Review of the Annual Audited Accounts of the Company for the year ended December 31, 2018 (the Accounts) the Company provided advances/investments approximately amounting to Rs. 427 million (Advances: Rs. 277 million and Investments: Rs. 150 million) to three subsidiaries namely; Crescent Star Foods (Pvt.) Limited (the CSF), Crescent Star Luxury (Pvt.) Limited and Crescent Star Technology (Pvt.) Limited. Furthermore, the Company also provided advance/loan amounting to approximately Rs. 460 million (Principal: Rs.354 million and Mark-up: Rs. 106 million) to its associated company namely; Dost Steels Limited (the DSL). The subsidiaries incurred an aggregate loss of Rs. 445 million before closing their operations in 2018 whereas its associated company had further assigned aggregate amounts of Rs. 247,995,000 and Rs. 57,768,000 to Dynasty Trading (Private) Limited and Din Corporation (Private) Limited. In view thereof, violations of Sections 12(5)(b), 12(1)(a), 12(4) and 11(1)(f) of the Ordinance concerning supervision of the activities of subsidiaries and conduct of business in a sound and prudent manner were alleged by the Respondent.
 - ii. the Accounts further revealed that advances/investments in subsidiaries (amounting to Rs. 427 million) were neither adjusted for any loss nor impairment



Securities and Exchange Commission of Pakistan

testing was carried out as per International Accounting Standards 36 (IAS-36). In the absence of any impairment testing and failure to make adequate provisions for bad debts, the Accounts have resulted in an understatement of loss and an overstatement of solvency. Therefore, violations of the requirement of Section 45 of the Ordinance were also alleged in the SCN.

- iii. due to inadmissible balances of the investment and advances/loan provided to subsidiaries and the DSL, there was a shortfall of Rs. 268 million in total admissible assets of the Company against its liabilities as of December 31, 2018. Therefore, the violations of the requirements of Section 36 of the Ordinance were alleged in the SCN. In the Accounts, the Company has reported the aforesaid amount of loan to the DSL as an advance against issuance of shares, however, shares were not issued within the stipulated time. Regulation 5(3) of the Companies (Investment in Associated Companies or Associated Undertakings) Regulations, 2017 (the Investment Regulations) requires that if shares are not issued within ninety days or within the time prescribed by the relevant legal and regulatory framework, whichever is later, such amount against the issuance of shares shall be treated as a loan. As this advance/share deposit money was transferred to the DSL in 2016, therefore, after the lapse of ninety days it should have been accounted for as a loan. Resultantly the loan will be subject to admissibility limits prescribed under Rule 12(t) of the Insurance Rules, 2017 i.e. only 1% of total investments would be admissible for solvency purposes. Hence, after applying the admissibility limits on the said loan amount of Rs. 460 million (Principal: Rs.354 million and Mark-up: Rs.106 million), the Company does not meet the solvency requirements in terms of the Ordinance.
- iv. the Company has also not complied with the statutory deposit requirements as per Section 29 of the Ordinance and there was a shortfall of Rs. 3.76 million as on December 31, 2018.



Securities and Exchange Commission of Pakistan

3. In view of the above violation, a show-cause notice dated November 5, 2019 under Sections 11, 12, 29, 36 and 45 of the Ordinance (the SCN) was issued to the Appellants. A written reply to the SCN was received vide a letter dated July 13, 2020. A hearing in the matter was held on October 20, 2020. The Appellants also submitted further written submissions via email dated October 31, 2020. The Respondent concluded the SCN proceedings and imposed a fine in the following manner;

S. No.	Names	Penalty (Rs.)
1.	Mr. Naim Anwar, CEO	310,000/-
2.	Mr. Nadeem Ansar, Director	310,000/-
3.	Ms. Shayanne Malik, Director	310,000/-
4.	Dr. Fahim Lashkarwala, Director	310,000/-
5.	Mr. Tanveer Ahmed, Director	310,000/-
6.	Mr. Suhail Elahi, Director	310,000/-
7.	Mr. Rashid Malik, Director	310,000/-
8.	Sheikh Waqar Ahmed, Director	310,000/-
9.	Crescent Star Insurance Limited	310,000/-
	Total	2,790,000/-

4. The Appellants have preferred this Appeal, *inter alia*, on the grounds that while proceeding against them, the Respondent has violated the procedural requirements. The Appellants stated that the SCN was issued on November 5, 2019 whereas, the Off-Site Department of the Securities and Exchange Commission of Pakistan had sought clarifications on December 13, 2019, therefore, issuance of SCN before the Off-Site Department's inspection is *mala fide*. The Appellants stated that, in violation of the established principle of law, the Respondent has not provided the material on which the SCN was based, therefore, the Respondent has violated the requirement of Article 10A of the Constitution of the Islamic Republic of Pakistan, 1973 (the Constitution). The Appellants further argued that without applying an independent mind, the SCN has been issued on the basis of the qualified opinion of the Auditors, therefore, the SCN is not maintainable.



Securities and Exchange Commission of Pakistan

5. The Appellants further stated that the Respondent has failed to establish that the requirements of Sections 12(1)(a), 12(4) and 12(5)(b) of the Ordinance concerning integrity, policyholders' interest, sound and prudent manner, due care in the supervision of subsidiaries activities and diligence, had been violated. The Appellants stated that the mere fact that subsidiaries are making losses cannot be treated as conclusive evidence that the Appellants have failed to supervise activities with due care and diligence. The Appellants further stated that Section 12(5)(b) of the Ordinance cannot be invoked for the Company's investment in DSL because the DSL cannot be classified as its subsidiary. The Appellants further stated that under Section 12(5)(b) of the Ordinance while supervising the activities of the subsidiary, no determinantal impact on the business of the Company is proved and overall business performance of the Company has improved on the basis of the premium underwritten. The Appellants further argued that the Respondent ignored the nature of the business of the subsidiary while establishing contravention of Section 12(5)(b) of the Ordinance. The Appellants also argued that the CSF which is a retail food company and retail food business requires massive investment in the initial years, and to 'break-even', takes several years. The Appellants said that this fact was even highlighted by the auditors in the impairment report of the CSF. The Appellants stated that CSF is merging with PICIC Insurance Limited, making the Company a major shareholder in the serving entity. The Appellants further added that due care and diligence has been ensured prior to the merger and the Company has sold its future shareholding in merging entity for the sum of Rs. 500 million, which establishes that the matters of the subsidiary are managed with due care.
6. The Appellants stated that the Respondent misread the provision of law as Section 45 of the Ordinance which only requires to maintain proper books and records, however, it has no reference to comply with the requirements of IAS 36 which deals with impairment of the assets. The Appellants added that impairment testing is only required where any of the external or internal indication sources exist, however, in the absence of any such sources, it is the complete discretion of the Board of Directors (the BOD) whether to conduct



Securities and Exchange Commission of Pakistan

impairment testing of the investment in subsidiaries. The Appellants stated that in this case the BOD felt it was not necessary to carry out impairment of assets and this fact was subsequently established from impairment reports (shared with SECP) that impairment testing was not required, therefore, the Respondent's reliance on the auditor's opinion was misplaced.

7. The Appellants stated that the Respondent also ignored the fact that as a standard practice confirmation requests are sent to clients, however, only a limited number of clients reply to such requests, therefore, only a few verifications were available to the auditors. The Appellants said that the BOD has adopted a prudent policy for provisioning bad debts and accordingly, 33 percent of the premium receivable was provisioned as bad debt. The Appellants further added that it is illogical to assume that 100% of the premium receivable should be provided simply because confirmations are not available. The Appellants stated that the Respondent's stance is not backed by any accounting principle. The Appellants also stated that in this case Section 45 of the Ordinance is not applicable and the Impugned Order has violated the requirements of Section 24-A of the General Clauses Act, 1867.
8. The Appellants further added that the Respondent has failed to establish as to how the Company does not meet the minimum solvency requirement under Section 36 of the Ordinance. The Appellants added that in paragraph 18 of the SCN it is stated that the Company is insolvent by Rs. 268 Million, however, no calculation was provided to the Appellants as to how this figure has been derived. The Appellants argued that to treat the investment as a loan, the Respondent has relied upon the provision of the Investment Regulations. The Appellants argued that as per the definition of the associated companies and associated undertakings provided under the Regulations and Section 1(4) of the Companies Act 2017, DSL is not an associated company or associated undertaking of the Company because it has no common management or control of twenty percent of voting power. The Appellants stated that in view of the order dated December 19, 2019 passed in Appeal No. 27 of 2018 the investment in DSL cannot be treated as a loan. The Appellants



Securities and Exchange Commission of Pakistan

further stated that the question of solvency of the Company has already been decided in the aforementioned appeal, therefore, re-opening of this matter amounts to double jeopardy. The Appellants stated that an express definition of loan is provided under Section 2(xxxvi) of the Ordinance, and in the presence of an express definition under the statute, the Adjudicating Authority cannot rely on the definition provided in any other statute or regulation to establish a particular amount as a loan.

9. The Appellants further added that the Company has not violated the requirements of Section 29 of the Ordinance because a shortfall of Rs. 3.76 Million in statutory deposit was caused due to the State Bank's certificate showing deposit wherein the amount of Rs. 2,634,793/- representing 46,869.0018 units available with MCB-Arif Habib before December 2018 was not included. The Appellants argued that new certificates issued by the State Bank clearly indicate that now the Company complies with provisions of Section 29 of the Ordinance and the earlier non-compliance was not intentional and was merely due to a technical glitch which was resolved as soon as the Appellants acquired knowledge.
10. The Appellants in Appeal No. 62 of 2021 stated that the alleged violations pertain to the year ended December 31, 2018, whereas their appointments were made in 2019, hence, the Respondent cannot proceed against them. In this regard, Mr. Suhail Elahi, Mr. Rashid Malik and Sheikh Waqar Ahmed relied upon Form-29 and Form-28 filed with the Commission at the time of their appointment.
11. The Respondent countered the grounds of the Appeal by asserting that, the SCN was issued after the observations highlighted by off-site inspection in its report and comments of the Company. The Respondent further asserted that the alleged violations were based on the deficiencies highlighted in the inspection report. Moreover, the Respondent stated that the SCN was issued with a proper review of the processes and guidelines, therefore, the SCN is maintainable. The Respondent stated that Section 12(5)(b) of the Ordinance requires that an insurer shall not be regarded as conducting its business in a sound and prudent manner



Securities and Exchange Commission of Pakistan

if it fails to supervise the activities of its subsidiary with due care and diligence and without detriment to the insurer's business. The Respondent added that in this regard, it has been observed that the Company provided advances/investments to its subsidiaries and transferred advances/loans to its associated company. The Respondent stated that subsidiaries of the Company incurred an aggregate loss of Rs. 445 million before closing their operations in 2018 whereas its associated company had further assigned aggregate amounts of Rs. 247,995,000 and Rs. 57,768,000 to Dynasty Trading (Private) Limited and Din Corporation (Private) Limited. The Respondent further stated that such adverse financial position of the subsidiaries and routing of funds through associated companies further strengthens the assertion that the Company did not conduct its business in a sound and prudent manner thereby failing to supervise the activities of its subsidiary with due care and diligence and without detriment to the insurer's business. The Respondent further added that in view of the above, it was established that the Appellants have violated the requirements of Sections 12(1)(a) and 12(4) of the Ordinance and failed to ensure that that business is carried on with integrity, due care and the professional skills and in a sound and prudent manner/ in the interests of policyholders and potential policyholders. The Respondent stated that the Company's investments in loss making subsidiaries from 2015 to 2018 reflect that the operations of the Company were not conducted with due care, professional skills and the interests of the policyholders were compromised. The Respondent further stated that the investment decision of the Company appears to be irrational and devoid of reasoning or justification because it cannot be comprehended as to why all of the Company's ventures in its subsidiaries and associated undertakings have resulted in losses and erosion of the funds invested /advanced.

12. The Respondent further stated that the Company was required to undertake impairment testing of advance against the issue of shares and accrued mark-up . The Respondent further stated that in the absence of any impairment testing, the amounts of the carrying values of the amounts of advance against the issue of shares and accrued mark-up reported in the Accounts have resulted in an understatement of loss for the year and overstatement of its



Securities and Exchange Commission of Pakistan

solvency. The Respondent further stated that though a copy of the impairment testing report dated January 20, 2020 was submitted along with a reply from the Company subsequently, the Company did not undertake the required impairment testing at the time the review was conducted. The Respondent stated that based on the above facts, it was observed that the Appellants failed to maintain proper books and records in violation of Section 45 of the Ordinance.

13. The Respondent stated that due to inadmissible balances of the investment in shares of subsidiaries, advances for the issue of shares provided to the subsidiaries and advances against the issue of shares provided to DSL and accrued markup, there is a shortfall in total admissible assets of the Company against its liabilities as at December 31, 2018. Therefore, the requirement Section 36 of the Ordinance has been violated. The Respondent stated that the Company transferred the amount to DSL as an advance against the issuance of shares in 2016, however, no shares were transferred within ninety days as required under Regulation 5(3) of the Investment Regulations, therefore, this amount is treated as a loan. The Respondent further stated that subject to the admissibility limits prescribed under Rule 12(t) of the Insurance Rules, 2017 i.e. only 1% of the total investments would be admissible for solvency purposes. The Respondent further stated that after applying the admissibility limits on the said loan amount, the Company does not meet the solvency requirements in terms of the Ordinance. The Respondent further stated that the auditor in their review report on the statement of compliance with Sections 11 and 12 of the Ordinance highlighted that the Company has not complied with the statutory deposit requirements as per Section 29 of the Ordinance and there was a shortfall of Rs. 3.76 as on December 31, 2018.

14. The Respondent further stated that the Auditors' Report highlighted that the Company has recorded premium receivable amounting to Rs. 229.133 million (2017: Rs. 227.780 million) out of which Rs. 75.613 million (2017: Rs. 62.427 million) have been provided as bad debts. However, the Respondent stated, that in the absence of reconciliation, correspondence with the customer and subsequent clearance the Respondent were unable



Securities and Exchange Commission of Pakistan

to verify the remaining balance of Rs. 139.084 million. The Respondent stated that the Company was required to make adequate provision for bad debts, however, adequate and appropriate provisions have not been made, therefore, the Appellants have not maintained proper books of accounts and have, thus, violated the provisions of Section 45 of the Ordinance. The Respondent further stated that the Impugned Order is a well-reasoned and speaking order. The Impugned Order has been passed after providing ample opportunity of hearing and due consideration of the submissions made by the Appellants, facts of the case, material available on record and the relevant provisions of the law.

15. The Respondent while rebutting the ground of appeal in the matter of Mr. Suhail Elahi, Mr. Rashid Malik and Sheikh Waqar Ahmed stated that the Appellants had not taken the plea during the SCN proceedings that they were not the directors at the time the alleged violations were committed. Therefore, it may not be considered at this stage.
16. The Appellate Bench (the Bench) has heard the parties and perused the record. The Bench refutes the Appellants' argument that by initiating the SCN proceedings, the Respondent has violated procedural requirements. The Bench has reviewed the contents of a letter dated December 13, 2019 issued to the Company whereby *inter alia* certain information was required regarding the Management letter issued by the Auditor and Company's response, Management representation in case of movement of 10% or more shareholding pattern, explanation on not having a minimum number of directors, composition of the audit committee and compliance report of unclaimed dividend under section 244 of the Act. Although, the matters alleged in the SCN and the matters highlighted in the letter dated December 13, 2019 pertain to the year ended December 31, 2018, however, both sets of proceedings are separate and independent, therefore, no procedural lapse exists in the SCN proceedings. In view thereof, the Bench rejects the Appellants' argument that by issuing the SCN the Respondent has violated the requirements of 'fair trial' envisaged in Article 10A of the Constitution. Furthermore, the Appellants' arguments that the SCN and the Impugned Order are based on the "Qualified Report" of the auditor is misplaced and does



Securities and Exchange Commission of Pakistan

not correspond with the record and hold merit therefore, is not tenable. In Bench's view, the Appellants not only failed to satisfy the qualifications raised by the Auditor but they also failed to provide the requisite information and record to the Respondent after issuance of the SCN. The Bench believes that auditors' role as examiners of the accounts cannot be undermined because their observations and qualifications enable shareholders and the regulator to look critically at the affairs of a company. In the present case, the qualified report pushed the Respondent to probe the matter and take appropriate legal action, hence, the sanctity of the SCN and the Impugned Order cannot be challenged.

17. The Bench has observed that the Appellants' argument regarding the misapplication of Section 12(5)(b) of the Ordinance is misconceived because the Respondent has proceeded against the Appellants under Sections 12(1) (a), 12(4) and 12(5) (b) of the Ordinance and these provisions adequately cover financial dealings of the Company with its subsidiaries and associated companies. For reference, the relevant provision is reproduced below;

12. Criteria for sound and prudent management.- (1) For the purposes of this Ordinance, the following shall, without limitation, be recognised as criteria for sound and prudent management of an insurer or applicant for registration as a person authorised to carry on insurance business:

(a) the business of the insurer or applicant is carried on with integrity, due care and the professional skills appropriate to the nature and scale of its activities;

(4) The insurer or applicant shall not be regarded as conducting its business in a sound and prudent manner if it fails to conduct its business with due regard to the interests of policy holders and potential policy holders.

(5) The insurer or applicant shall not be regarded as conducting its business in a sound and prudent manner if it:

(b) fails to supervise the activities of a subsidiary with due care and diligence and without detriment to the insurer's or applicant's business.



Securities and Exchange Commission of Pakistan

18. The Bench is of the view that as per the facts of the case, it is evident that the Company provided advances and made investments in its loss-making subsidiaries from 2015 to 2018 which eventually closed business operations in 2018. In view thereof, it appears that the Company was not conducting its business with due care, professional skills and in the interest of policyholders. The Bench is of the view that the investment decision of the Company in loss-making subsidiaries cannot be considered a rational decision, therefore, the Appellants are responsible for violation of the requirements of section 12(5)(b) of the Ordinance. In view thereof, the Bench has no doubt that the Respondent rightly proceeded against the Appellants. The Appellants plea that the CSF sustained losses due to nature of food business that required massive investment in the initial years to reach a breakeven point, is a baseless argument, therefore, we reject it. The Company was responsible to supervise the activities of its subsidiary with due care, diligence and without detriment to its own business, however, it failed to ensure compliance of Section 12(5)(b) of the Ordinance. Furthermore, the Bench is of the view that the Appellants' decision to invest in loss-making subsidiaries was against the requirements contained under Section 12(5) (b) of the Ordinance. The Bench is of the view that the Appellants' arguments with regard to merger of CSF with PICIC Insurance Limited is a separate transaction having no bearing on the facts of this case. Furthermore, any benefit drawn during the merger transaction cannot lessen the severity of the violations committed by the Appellants earlier.
19. The Bench has noted that the Company transferred advances/loan of Rs. 354 million (approximately) to its associated company i.e DSL and thereafter, DSL dispensed aggregate amounts of Rs. 247,995,000 and Rs. 57,768,000 to Dynasty Trading (Private) Limited and Din Corporation (Private) Limited. The Bench is of the view that routing of the Company's funds through associated companies depicts that the Appellants failed to ensure sound and prudent business operations of the Company. The Bench has further noted that accrued markup of Rs. 106 million has also not been recovered from DSL, therefore, it is evident that the Appellants conduct lacks integrity, due care and professional skills thus violating the requirements contained in Sections 12(1)(a) and 12(4) of the



Securities and Exchange Commission of Pakistan

Ordinance. The Bench has noted that the Appellants had not denied that subsidiaries and associated companies were making losses and taken a plea that mere loss-making may not be treated as a violation of Sections 12(1)(a), 12(4) and 12(5)(b) of the Ordinance is a misconceived notion. In our view, investment/transfer of the Company's funds to its loss-making subsidiaries and associated companies had caused erosion of the Company's funds, therefore, it cast doubts that such decisions were made without considering the Company's and its policyholders' interest. The Bench believes that although investment/transfer of funds to subsidiaries and associated companies (eventually closed operations in 2018 due to accumulated losses) is not restricted under the law, however, investment/transfer of funds in entities making continuous losses cannot be considered as prudent and rational decisions. Therefore, it appears that the Company's and its policyholders' interest has not been adequately protected by the Appellants.

20. The Bench is of the view that the Appellants' argument that the Respondent has misread Section 45 of the Ordinance is an utter misconception and misinterpretation of the law. The Bench has noted that that the Appellants failed to carry out impairment testing of advances against the issue of shares (approximately 354 Million) and accrued/receivable markup (approximately 106 million), hence, the Accounts are misstated. The Bench has noted that not carrying out the impairment test has resulted in an understatement of loss (Rs. 39.765 million) and an overstatement of the Company's solvency (Rs. 106.348 million), therefore, the Company's book and records are not maintained as required under Section 45 of the Ordinance. In view thereof, the Appellants violated the requirements of Section 45 of the Ordinance. As far as the Appellants' objection with regard to non-application of IAS 36 to Section 45 of the Ordinance is concerned it is important to understand here that proper books and records may not be ensured without impairment testing as required under IAS 36, therefore, the Appellants' objection is without any substance. Moreover, the auditor's review report on the statement of compliance with Sections 11 and 12 of the Ordinance also disclosed that the Company has made investment/advances in the subsidiaries, however, the BOD has not carried out impairment testing as required by IAS 36. The Bench



Securities and Exchange Commission of Pakistan

has further noted that the auditor was unable to reconcile and verify receivables of Rs. 139.084 million because relevant and necessary record to establish whether the debtors will pay the debts were not available in the Company's record. The amount was reflected as premium receivable in the Accounts which cannot be considered as an admissible asset because the premium was due and payable as it has not been paid for more than three months from the date due and payable. The Bench notes that the Company's financial year ended on December 31, 2018, therefore, the premium due should have been paid by the customers on or before the said date. The scheme of law is very clear, non-verification of receivables within the due time may not be considered as an admissible asset for the calculation of solvency requirements, therefore, for all practical reasons the unverified amount of "receivables" should have been treated as "bad debts". In view thereof, instead of considering unverified amounts as "receivables", the Company was required to declare unverified amounts as "bad debts", however, it failed to do so. The Bench rejects the Appellants' stance that 33% provision of bad debts approved by the BOD was adequate and the Company was not required to make a 100% provision of bad debts for the amount not verified and reconciled by the auditor.

21. The Bench has also deliberated over the facts related to advance/loan provided by the Company to DSL. As per facts and record, the Company provided advances against the issue of shares to DSL amounting to Rs. 354 million and accrued markup of approximately Rs. 106 million, however, the Bench has noted that the amount provided to DSL is also not fully admissible to meet the solvency requirement on the ground that the amount was provided to the DSL in the year 2016 as advance against the issuance of shares, however, all shares were not issued against the said amount, therefore, as per Regulation 5(3) of the Investment Regulations remaining amount is to be treated as loan because shares are not issued within ninety days or within the time prescribed by the relevant legal and regulatory framework. In view thereof, the loan amount is subject to the admissibility limit prescribed under Rule 12(t) of the Insurance Rules, 2017 i.e. only 1 % of total investments would be admissible for solvency purposes, therefore, after applying the admissibility limits on the



Securities and Exchange Commission of Pakistan

said loan amount (Principal: Rs. 354 million and Mark-up: Rs. 106 million), the Company does not meet the solvency requirements. In the circumstances, there is a shortfall of Rs. 268 million in total admissible assets of the Company against its liabilities as on December 31, 2018. The Bench has noted that the Appellants' argument pertaining to non-provision of calculation of inadmissible assets to meet the solvency requirements is against the record because in paragraph 9(d) of the Impugned Order, the Respondent has adequately explained how the Company does not meet the requirement of solvency under Section 36 of the Ordinance. Therefore, as per the record, the Bench has no doubt that the Company has violated the provisions of Section 36 of the Ordinance.

22. The Bench has also pursued the Appellate Bench's order dated December 18, 2019 passed in Appeal No. 27 of 2018 because the Appellants are of the view that in the said order the Appellate Bench expressly stated that the amount provided to DSL cannot be treated as a loan. However, contrary to the Appellant's claim, the Appellate Bench has observed that the respondent has failed to determine whether such an amount be treated as an investment or loan. The Bench has noted that it came on record during the above-referred proceedings that upon DSL's failure to issue all shares to the Company, the remaining amount of advance was unilaterally converted into a loan by the Company and thereafter, once again it was converted as advance. The Bench believes that the referred verdict (Appellate Bench's order dated December 18, 2019 passed in Appeal No. 27 of 2018) may not serve the purpose intended by the Appellants, therefore, due to different facts it is not applicable in the present case. The Bench also wants to make it clear that in the referred case law (Appellate Bench's order dated December 18, 2019 passed in Appeal No. 27 of 2018) the Appellate Bench has neither decided the question of the solvency of the Company nor these proceedings amounts to double jeopardy. Furthermore, the order impugned through Appeal No. 27 of 2018 was *set aside* by the Appellate Bench, therefore, the Appellants' argument with respect to double jeopardy is misconceived and against the facts. , The Bench further refutes the argument of the Appellants that in the presence of an express definition of 'loan' provided under Section 2(xxxvi) of the Ordinance, the Respondent cannot rely on the



Securities and Exchange Commission of Pakistan

definition provided in any other statute or regulation in order to establish a particular amount as a loan. In addition to the analysis of the Bench regarding advance/loan to DSL for the purchase of shares contained in paragraph 21 of this order, we want to state that the case against the Appellant is not that it provided the loan to DSL, rather the case is based on the fact that due to non-transfer of shares after ninety days, the amount of advance should have been converted as a loan under Regulation 5(3) of the Investment Regulations. Therefore, instead of using the definition provided under the Ordinance, which purely deals with the loan transactions, the Respondent had invoked the provision of the Investment Regulations because, in this case initially, the Company provided advance to DSL. As a matter of fact, provisions invoked to determine the status of the amount whether it is an advance or a loan, the relevant law i.e. the Investment Regulations has been invoked.

23. The Bench has further observed that at the time of review/off-site inspection, the Company had a shortfall of Rs. 3.76 million with regard to the statutory deposit requirement under Section 29 of the Ordinance, therefore, subsequent compliance does not exonerate the Appellants from the consequences of the earlier non-compliance.
24. Notwithstanding anything contained hereinabove, the above analysis and findings of the Bench are not applicable in the case of Mr. Suhail Elahi, Mr. Rashid Malik and Sheikh Waqar Ahmed because they were not the directors of the Company when the provisions of the Ordinance were violated. The Bench has pursued Form-29 and Form-28 produced by the Appellants that indicate their appointments were made in 2019, therefore, initiation of SCN proceedings against them is *void ab initio*. In the circumstances, the Impugned Order and the SCN are *set aside* to the extent of Mr. Suhail Elahi, Mr. Rashid Malik and Sheikh Waqar Ahmed because they were neither the directors of the Company nor had they signed the Accounts.
25. In view of the above, the Bench believes that by investing in loss-making subsidiaries, transfer of huge funds on the pretext of advance for the purchase of shares of the associated



Securities and Exchange Commission of Pakistan

company i.e. DSL and non-recovery of such amount and mark-up upon DSL's failure to transfer shares, clearly reflect that the Appellants acted in violation of the requirements of Sections 11, 12, 29, 36 and 45 of the Ordinance. Except as provided in the paragraph above, the Bench finds no reason to interfere in the Impugned Order. Therefore, the Appeal Nos. 60 and 61 of 2021 are dismissed without any order as to costs, whereas, Appeal No. 62 of 2021 is allowed.

(Abdur Rehman Warriach)
Commissioner

(Akif Saeed)
Chairman/Commissioner

Announced on:

25 SEP 2024