



BEFORE APPELLATE BENCH NO. 1

In the matter of

Appeal No. 17 of 2008

Asian Mutual Insurance Company (Guarantee) Limited

APPELLANT

Versus

Chairman (Insurance Division) Securities and Exchange Commission of Pakistan NIC
Building , Jinnah Avenue, Blue Area, Islamabad.....

RESPONDENT

ORDER

Date of Hearing

21 October 2008

Present:


For the Appellant:


Asjad Saeed
Advocate

Rashid Mirza
Chief Executive (Appellant Company)

For the Respondent Department:

Ali Azeem Ikram
Uzma Farogh

 Appellate Bench No. 1

 Appeals No.17 of 2008



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1. This order shall dispose of the appeal No. 17 of 2008 filed under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 by Asian Mutual Insurance Company (Guarantee) Ltd (the "Appellant") against the directive of the Chairman, Securities Exchange Commission of Pakistan ("SECP"), (the " Impugned Directive") dated 06-05-2008.
2. The Appellant is a mutual insurance company incorporated on 23-02-1951 and was later registered under the provisions of section 6 of the Insurance Ordinance 2000 (the "Ordinance"). The Appellant was allowed to transact business of "motor class of insurance including motor 3rd party compulsory business", under the certificate of registration issued on 01-01-2001.
3. That after coming into force of the Ordinance, the Insurance Division of SECP sent a notice dated 30-12-02 calling upon the Appellant to comply with the provisions of section 29 of the Ordinance read with Rule 9 of the Securities and Exchange Commission of Pakistan (Insurance) Rules 2002 (the "Rules") and submit the statutory deposit of two and half million (2.5) million as then required. However, the Appellant in its reply to the aforesaid notice dated 09-01-2003 stated that it is a mutual insurance company and it is not required to comply with the requirements of section 29 of the Ordinance, which only applies to the companies with a paid up capital.
4. SECP in pursuance of its earlier communication and in exercise of its powers under section 63 of the Ordinance called upon the Appellant through the Impugned Directive dated 6-5-2008 to comply with the requirements of section 11 of the Ordinance within one month of the issuance of the Impugned Directive, failing which the Appellant was



directed to cease entering into new contracts of insurance. The Impugned Directive was issued on the basis that the Appellant had:

- a) Failed to maintain statutory deposit of Rs.5 million, as provided in 11 (1)(b) of the Ordinance with State Bank of Pakistan;(**Note: It may be clarified by us here that the amount of statutory deposit had been raised to five (5) million rupees as per rule 9(3) of the Rules at the time of issuance of the Impugned Directive**)
 - b) Failed to meet the minimum solvency requirement as set forth in section 11(1) (c) and section 36 of the Ordinance;
 - c) Failed to pay the Commission Rs. 200,000/- on account of annual supervision fee for the years 2005 and 2006, as provided in section 11(3) of the Ordinance;
 - d) Failed to deposit with the Government, an amount of Rs. 27,697/- as levy of 1% Federal Insurance Fee collected from its policy holders for the period from 1st January 2006 to 30th September 2007, as set forth in section 8 of the Finance Act, 1989.
5. The Appellant being aggrieved by the Impugned Directive, preferred a writ petition No 5846/08 before the Lahore High court, Lahore, which was dismissed with the observation:



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"Petitioner has assailed the order of Chairman dated 06-05-08, whereby the company was directed to cease entering into new contract of insurance.

2. *Learned counsel, when confronted that the remedy of appeal before the Appellate Bench of the Commission, in terms of section 33 of SECP Act 1997, is available to the petitioner, learned counsel contended that the Chairman has passed the impugned order and appeal only lies against the order passed by the Commissioner.*
3.
4. *Commissioner as defined in section 2(h) of the Securities and Exchange Commission of Pakistan Act, 1997, is Commissioner of the Commission and includes the Chairman thereof, Chairman, by virtue of his office, is a Commissioner and his decision in that capacity is assailable in appeal under section 33 ibi.*
5. *This petition, in view of alternate remedy of appeal is not competent and is accordingly dismissed."*
6. *The Appellant, thereafter, filed the instant appeal which was fixed for hearing before the Appellate Bench ("Bench") on 25-6-08. The parties were heard at length, however, before an order could be passed the then Commissioner (CLD), Mr. Rashid I Malik died in a tragic accident on 20-7-08. The instant appeal was therefore again fixed for hearing on 21-10-08 before the reconstituted Bench.*



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7. The counsel for the Appellant, Mr. Asjad Ali argued that the Appellant is limited by guarantee and all policy holders are its members. The Appellant is not allowed to raise capital by issue of shares and therefore the requirements of section 28 and 29 of the Ordinance do not apply to it.
8. The counsel for the Appellant placed reliance on proviso of section 29 (2) (b) of the Ordinance and stated that the Appellant achieved the level of solvency as required by the SECP and was therefore entitled to reduction of statutory deposit up to zero. The counsel alleged that there was no criterion given by the SECP as to when the deposit levels can be reduced to zero. He stated that absence of any such criterion, the principle laid down in 1986 PLD S upreme Court 14 applies, where it is held that:

" Although the presumption is that redundancy is not to be imputed to an enactment nor ignorance of law is to be imputed to the law-making Agency; but this presumption can differ from case to case....."

The counsel argued that the redundancy must not be imputed to the Parliament. He contended that proviso to section 29(2) (b) of the Ordinance should not be deemed as redundant and the discretion available with SECP to reduce the deposit level to zero should be exercised in favour of the Appellant. The counsel also placed reliance on PLD 1999 Karachi 433 where it has been held that

"all public powers and administrative discretions ought to be exercised fairly and reasonably and the burden imposed must bear a reasonable nexus with the harm caused....."



9. Mr. Ali Azeem Ikram, on behalf of Respondent department stated that the requirements of section 11 of the Ordinance, except the requirement of having a paid up share capital are all applicable to mutual insurance companies. Mr. Ali argued that the Appellant has not only failed to maintain the statutory deposit with the State Bank of Pakistan in clear violation of section 11 of the Ordinance. The amount of statutory deposit required to be maintained with the State Bank of Pakistan after the issue of Impugned Directive stand raised to ten (10) million Rupees. It was also argued that Appellant is in violation of other statutory requirements such as not being able to meet minimum solvency requirement, non submission of annual supervision fee and non payment of Federal Insurance Fee.
10. Mr. Ali contended that criteria for solvency stated in the proviso to section 29(2) (b) of the Ordinance, in order to be entitled to reduction of statutory deposit up to zero is in section 36(2) of the Ordinance, which requires the Appellant to maintain at all times admissible assets in excess of its liabilities of an amount greater than or equal to minimum solvency requirement. The minimum solvency requirement has also been laid down in rule 13 (1) (b) (iv) of the Rules which is fifty (50) million rupees for the year 2005 and onward. This effectively means that the assets of the Appellant ought to be greater than the minimum solvency level of fifty (50) million Rupees for the SECP to consider reduction in the level of statutory deposit.
11. The record shows that Appellant has paid the Federal Insurance Fee from 1st January 2006 to 30th September 2007. The Appellant however, has not submitted the annual supervision fee of Rs. 200,000/- upto the year 2006 and has also failed to submit it for the year 2007 and 2008. Effectively, therefore an amount of Rs. 400,000/- is due from the Appellant. The



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statutory deposit of five (5) million Rupees at the time when the Impugned Directive was passed and which now stands at ten (10) million Rupees has not been deposited with the State Bank of Pakistan. Finally the Appellant has also failed to meet the minimum solvency requirement of fifty (50) million Rupees. The total admissible assets of the Appellant, as per the record available with Insurance Department of SECP is five million two hundred and sixty eight thousand (5,268) Rupees for the year ending 2007 which is far less than the required level of fifty (50) million Rupees. None of this is disputed by the Appellant.

12. Rule 9(3) of the Rules, as then in existence lays down the threshold of statutory deposits. Rule 9 reads as follows :

9. Minimum statutory deposit levels. - (1) Subject to sub-rules (2) and (3), for the purposes of clause (b) of sub-section (2) of section 29 of the Ordinance, the prescribed amount shall be five million rupees.

(2) For an insurance company which has, for two years immediately preceding the end of any calendar year, maintained not less than the minimum level of paid up capital applicable to that company under section 28 of the Ordinance and not less than the minimum level of solvency applicable to that company under section 35 or 36 of the Ordinance, in both cases without applying the proviso to section 28 of the Ordinance, the prescribed amount in respect of that company under sub-rule (1) shall be zero.

(3) Subject to sub-rule (2), with immediate effect the amount of statutory deposit shall be one million rupees and from then for the period until the 31st December, 2002, two and half million rupees,



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until the 31st December, 2003, three and half million rupees and until the 31st December, 2004, and thereafter five million rupees.

Emphasis Added

Rule 9 of the Rules was apparently introduced to reduce the burden of the minimum statutory requirement of ten (10) million Rupees provided by section 29 of the Ordinance. The insurance companies were therefore required to increase the statutory deposits gradually, starting from one (1) million Rupees and raise it each year until it reached five (5) million Rupees between the years 2002 until 2004. Thereafter, in the year 2008, rule 9 of the Rules was done away with vide SRO No 682 (1)/2008 dated 25th June 2008. This resulted in the limit of statutory deposit as provided in section 29 (2) (a) of the Ordinance becoming applicable. Section 29(1) and (2) of the Ordinance stipulate:

29. Deposits.-(1)..Every insurer shall, in respect of the insurance business carried on by him in Pakistan, deposit and keep deposited with the State Bank of Pakistan, in one of the offices in Pakistan of the State Bank of Pakistan for and on behalf of the Federal Government the required minimum amount specified in sub-section (2), either in cash or in approved securities estimated at the market value of the securities on the day of deposit, or partly in cash and partly in approved securities so estimated.

(2) For the purposes of this section the required minimum amount is, either:

(a) the higher of ten million rupees and ten per cent. (10%) of the insurer's paid-up capital; or



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Emphasis Added

(b) such amount as may be prescribed by the Commission:

Provided that the Commission may, subject to achievement of levels of solvency as required by this Ordinance, abolish the requirement for deposits specified by this section by reducing the required minimum amount to zero.

All insurance companies are thus required to keep a deposit of ten (10) million Rupees with State Bank of Pakistan from the date of the aforementioned notification of 25th June 2008 in terms of section 29 (2) (a) or 10% the insurers paid up capital whichever is higher. The wording of 29 (2) (a) would have been clearer, had the words "or ten percent" been used instead of "and ten percent". Nevertheless, the intent of the legislature is clear i.e all insurance companies are required to make a deposit of ten (10) million Rupees, however, where such companies have a paid up capital; the statutory deposit must be ten percent of the insurers paid up capital where such percentage works out to more than ten (10) million Rupees.

In any case the above brief discussion by us on the notification of 25-6-08 and section 29 (2) (a) of the Ordinance are academic, as they for the present purposes are neither applicable nor material to the case.

13. On the issue of whether the Appellant meets the minimum solvency level, it transpires from the Appellant own record that it does not meet the solvency level as prescribed by law. Section 36 which lays down the criteria for solvency, reads as follows:



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36. *Insurers of non-life insurance business to have assets in excess of minimum solvency requirement.- (1) An insurer registered under this Ordinance to carry on non-life insurance business shall at all times have admissible assets in Pakistan in excess of its liabilities in Pakistan of an amount greater than or equal to the minimum solvency requirement.*

(2) An insurer incorporated in Pakistan and registered under this Ordinance to carry on non-life insurance shall at all times have admissible assets in excess of its liabilities of an amount greater than or equal to the minimum solvency requirement.

(3) For the purposes of this section, the minimum solvency requirement is the greatest of:

(a) such required minimum amount as may be prescribed by the Commission;

Emphasis Added

(b)

(c)

(4)

The minimum solvency has been prescribed by the Commission in Rule 13(1) (b) of the Rules, which states:

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13. Solvency of non-life insurer.- (1) For the purposes of clause (a) of sub-section (3) of section 36 of the Ordinance, the following shall be the prescribed amount, namely:-

(a) In the case of an insurance company registered after the commencement date, fifty million rupees; and

(b) In the case of an insurance company registered at the commencement date-

- (i) the amount applicable under the repealed Act, until the 31st December, 2002;*
- (ii) fifteen million rupees until the 31st December, 2003;*
- (iii) twenty-five million rupees until the 31st December, 2004; and*
- (iv) fifty million rupees until the 31st December, 2005, and thereafter.*

Emphasis Added

The minimum solvency level has been raised gradually from year 2003, where it was fifteen (15) million Rupees to fifty (50) million Rupees by the year 2005 and beyond. The Appellant's record illustrates admissible assets of five million two hundred and sixty eight thousand (5.268) Rupees for the year 2007 which are to be considered for the purposes of solvency. The Appellant has therefore failed to maintain and gradually enhance its assets and as result could not meet the solvency level laid down in rule 13 (1) (b) of the Rules and thus not entitled to the waiver of statutory deposit as provided in proviso to section 29 (2) (b).

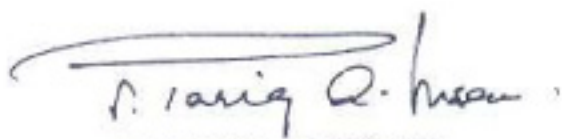
14. We have also examined the status of mutual insurance companies, to see whether the intention of the legislature was to treat them differently from the insurance companies with a paid up capital. We find that the Ordinance does not distinguish between an insurance company with a paid

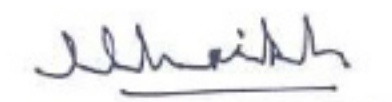


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up capital and one which does not have a paid up capital, as such all requirements of the C finance other than maintaining paid up capital mutatis mutandis apply to mutual insurance companies.

15. For the reasons stated the appeal is not maintainable. The Appellant had sufficient time to comply with the requirements of law and which it has failed to do. The Appellant is directed to strictly comply with the Impugned Directive. We further direct that the Appellant shall cease to carry out any kind of Insurance business.


(S. TARIQ. A HUSAIN)
Commissioner (LD)


(SALMAN ALI SHAIKH)
Commissioner (SCD)

Announced on: 12 November 2008