

Mills vs. Its Workmen, 1961 PLC 737 Supreme Court (DB).

d) The superior Courts of Pakistan have also validated allegedly “illegal” and “void” agreements (under Section 23 of the Contract Act, 1872) requiring approvals by public authorities on the basis of their ex post facto approvals; see generally Manzoor Hussain vs. Wali Mohammad, PLD 1965 SC 425: “It is now well settled that the provisions of Section 23 of the Contract Act have to be construed strictly and the Courts should not invent new categories or heads of public policy in order to invalidate a contract”, id at 433), and Yusuf Habib vs. Sarmad Associates, PLD 1987 Karachi 139.

iii. **Doctrine of substantial compliance/waiver/equitable construction.**

The Appellants invoked the doctrine of substantial compliance, reliance has been placed on McDermott vs. Bear Fil Co., 219 Cal. App. 2nd 607 and Nishat Mills Limited vs. Superintendent of Central Excise Circle II and three others, PLD 1989 Supreme Court 222.

Further, the beneficiaries of a statutory provision, even a mandatory one, may waive the protection offered to them by the said provisions; reliance placed on Vellayan Chettiar vs. Government of the Province of Madras, PLD 1947 PC 160. The shareholders of Spencer are the beneficiaries of Section 208 of the Ordinance; they waived the protection offered to them under Section 208 of the Ordinance by passing the special resolution in the EGM held on 20 June, 2001. *Cuilibet licet renuntiar juri prose introducto (“Any one may waive or renounce the benefit of a principle or rule of law that exists only for his protection”).*

The principle of equitable construction agreeable to justice and reason supports the proposition that the principal object behind all legal formalities is to safeguard the paramount interest of justice – technical hurdles should not defeat justice; Manager, Jammu & Kashmir, State Property in Pakistan vs. Khuda Yar, PLD 1975 SC 678; Syed Israr Ahmad vs. Muhammad Shafi, 1997 SCMR 1934; and Imtiaz Ahmad vs. Ghulam Ali, PLD 1963 SC 382, at 400.

iv. **Plea of res judicata and promissory estoppel.**

In this respect, the correspondence exchanged between the Appellants and the Corporate Law Authority (CLA), predecessor of the Commission, and its effect on the impugned order requires scrutiny. On 3 August 1998, the CLA wrote to Spencer raising queries in respect of the investments made by it in Spencer Powergen as disclosed in the annual report of the Spencer for the year ending 30 June, 1997. The said annual account disclosed advances to Spencer Powergen of Rs 446,164,638. Spencer, in response to this notice from CLA, explained that the investments mentioned had been approved under Section 208 of the Ordinance. Spencer had relied on its notice dated 4 February, 1996 for the EGM to be held on 29 February, 1996 and the statement under Section 160 that accompanied the said notice. Copies of both the notice and the statement under Section 160 were available in the records of the CLA (now the Commission). Following a review of the reply, the CLA, through its Assistant Chief, informed Spencer about its decision that stated: “Please refer to your letter No. Nil dated 3.11.1998 on the above subject and to say that the reply of your company has been examined thoroughly and found satisfactory.” Clearly, CLA had taken a decision in respect of the matters raised by it. It, therefore, follows that

the Commission cannot resurrect an issue that had already been decided by it previously.

The general principles of res judicata are available to contest the reopening of the settled matters. Accordingly all Spencer's investments made up to the period ending 30 June, 1997 have been approved and cannot be called to question or raised in the present proceedings.

The general principle of res judicata (see Section 11 of Civil Procedure Code, 1908) provides that no court or regulatory agency shall try or consider any matter or issue that has previously been directly, substantially and finally decided by such court or regulatory agency:

- a) Where the competent authority, after scrutiny, held the claim of the petitioners to be genuine and issued an entitlement certificate in pursuance thereof, the order could not be objected to in any manner - Balqees Begum vs. D.C./Collector, Muzaffargarh, 1999 CLC 93.
- b) Law intends finality of settlement of disputes and no one should be vexed twice for the same cause of action. Respondent could not be allowed to get the controversy reopened and to that extent such order was without lawful authority - Feroze Din vs. Administrator R.P., 1992 CLC 2430.
- c) A final order in previous proceedings not in the nature of a suit can bar a subsequent suit with regard to the same matter. On Respondent's application, the competent authority scrutinized allotment in favour of original allottee and concluded that allotment was in order and petitioners were lawful vendees from original allottee. No further inquiry was permissible in the wake of such positive finding and second application of Respondent was not legally competent and barred by principle of res judicata - Nazir Ahmad vs. Border Area Committee, 1988 CLC 2277.
- d) The doctrine of res judicata is not confined to Section 11 of the CPC. The doctrine is based on general principles of law. A plea of res judicata can be founded in earlier decisions of courts or tribunals of exclusive jurisdiction. All that has to be shown is that the previous decision was competently taken and has attained finality - Rahat Mahmood vs. Tariq Rashid, PLD 1993 Karachi 648.

#### v. **Foreign Investment.**

Attention was drawn to the second proviso to sub section 1 of Section 208 of the Ordinance, which provides for the relaxation of the application of Clause (a) of the first proviso when the investor company has foreign investment in it. Spencer is a company that has "foreign investments" of about 45%; Pinap BV is a Netherland Company whose ownership of 44.99% of the paid up capital of Spencer was consistently disclosed in all the returns filed with the Commission. The information about the shareholders of Spencer, which includes the foreign shareholder, was also provided to the Respondent.

It is settled law that courts must dispense justice and, where a public authority is empowered to grant relief, it should do so even if technicalities such as the making

of an application for such relief have not been complied with; see Syed Israr Ahmed vs. Mohammad Shafi, 1997 SCMR 1934, at 1950.

It is noted that the second proviso to sub section 1 of Section 208 of the Ordinance does not provide for an application; this suggests that the impugned order should have factored the second proviso suo moto in granting relief to the Appellants.

vi. **Relief sought under Section 488 of the Ordinance.**

The Spencer Powergen project was genuine, bona fide endeavour supported by a foreign debt arrangement which was obtained after their due scrutiny. If at all there has been any contravention, it is not with the intent to defraud the shareholders. On the contrary, it was aimed at protecting their interests. Reliance has been placed on the following for invoking Section 488 of the Ordinance: -

- a) Chief Executive, National Tanker company (Pvt) Ltd. Vs. Registrar of Companies, 1997 CLC [Karachi] 1347
- b) In re: Al-Hilal Vegetable Ghee Mills Ltd., PLD 1977 Lahore 1367.
- c) Burno Ragazzi vs. The Registrar of Joint Stock Companies, Karachi, PLD 1959 (WP) Karachi 48, and
- d) d) In the matter of Elahee Buksh & Co. Ltd., PLD 1958 Dacca 378.

vii. **The Appellants have pleaded to take notice of the amendments proposed by the Commission for Section 208 of the Ordinance on 25 October, 2001.**

Appellants urged that notice must also be taken of the amendments to Section 208 proposed by the Commission itself in its over-all proposals for amendments to the Ordinance announced on 25 October, 2001, whereby the rigours of Section 208 of the Ordinance are to be diluted in the public interest.

viii. **Value of land and Resumption of project.**

The cancellation of the Spencer Powergen project in August, 1996 is under challenge before Lahore High Court; both the associated companies are agreeable to amalgamate such that the land valued between Rs 518 million and 602 million becomes the property of Spencer. It has a clear title to the land, the market value of which is realisable.

5. The Representative of the Respondent rebutted the arguments made by the learned senior counsel to the Appellants on each of the points made by him as follows: -

i. **Protection of minority shareholders' interest:**

Mr. Ashfaq Ahmed Khan, Director (E&M) asserted that the Regulator is required to protect the interest of minority shareholders even if such minority shareholder holds a single share in the capital of the Company. The Board or management holding

majority shares cannot override the basic requirements of law. If allowed to do so, then the Board or management of such a Company having less than 10% minority shareholders would be exercising a carte blanche to trample on minority shareholders' interests. It further follows that the Regulator, despite having knowledge of such violation, is barred from taking action, which is clearly not the letter or spirit of law.

The general public and Premier Insurance Company together held 10.65% of shares and the sponsors appeared to have purchased about 6% shares after passing of the impugned order. The unsecured investment of Rs 504 million was neither approved by the shareholders of Spencer nor the Commission, contrary to the requirements of law. The invested company, Spencer Powergen, has an issued, subscribed and paid up capital of Rs 7,000/= with an authorized capital of Rs 100,000,000/= in which the Appellant continued to make investment from 1996 onward, despite cancellation of the power project of the Spencer Powergen in August, 1996. The earnings per share (EPS) of Spencer suffered on account of this bad investment; it fell from Rs 68 per share in the year 1996 to minus (-) 23.5 per share in the year 2001. Dividends reduced from 45% in 1998 to naught (0%) in subsequent years. Although Spencer has been paying interest on its borrowings for investment in Spencer Powergen ranging from 20% to 22% per annum, it did not receive any amount against its outstanding advances to Spencer Powergen. The accounts for the year ended 30 June, 1998 indicates that Spencer Powergen repaid all advances made by various parties except the Appellant. No benefits have accrued to the shareholders of Spencer rather massive losses have been suffered by spencer on its huge advances.

ii. **Principle of ratification.**

By the words 'shall not make any investment' appearing in Section 208 of the Ordinance, the legislator mandates the investment with the prior approval of the shareholders and the Commission.

Further, if such prior approval is not mandatory, then, in case of winding up of a company, where prior approval of the shareholders by a special resolution under Section 358 of the Ordinance is not obtained, it is conceivable that the management may wind up a company, sell its assets, etc. and validate such an act of winding up the company by ratification through a subsequent special resolution of the shareholders; this would render the whole process as an absurdity.

The Respondent submitted that the well settled principles of interpretation of statute entails that the plain and ordinary meaning is to be assigned to a provision therein, that no word is redundant and that nothing should be read in a statute which is not expressly stated therein. By applying these principles to the Section 208 of the Ordinance in the context of the present case, obtaining of the special resolution and relaxation by the Commission vis-à-vis the requirement of Section 208 of the Ordinance is a condition precedent and not a condition subsequent to the act of investments.

Reliance has been placed on Indian case law, which in fact are clearly distinguishable and, if at all, strengthens the view taken by Executive Director E&M).

Attention was drawn to Section 208 of the Ordinance and the corresponding provision of Section 372(4) under the Indian Companies Act (Act).

While Section 208 of the Ordinance relates to investment in associated companies, Section 372 of the Indian Act relates to investment in shares of any body corporate. Further, under Section 208 of the Ordinance, investment in associated company exceeding 30% of paid up capital plus free reserves of the investing company cannot be made except under the authority of special resolution, which requires twenty-one days' notice and approval by three-fourths majority. The Federal Government may relax this restriction of investment to 30% of paid up capital plus free reserves in case of foreign shareholding. Obtaining approval subsequent to investment would defeat the object of the Section. Section 372 of the Indian Companies Act stipulates: "investment is sanctioned by a resolution." In other words, unlike the Pakistan statute, it is not a special resolution that is required; further, the word "sanctioned" is distinct from the words "under the authority" as used under the Ordinance. Furthermore, the expression previously approved by the Central Government appears in the Indian Act as opposed to the expression "Federal Government may.....relax" in the Ordinance.

The words "approval" and "permission" are not relevant since they have not been used in Section 208 of the Ordinance. By the principle of redundancy, one cannot read into a statute words that are not provided for. The plain and ordinary meaning of the words "under the authority" envisages having consent of the shareholders prior to making such investment.

As for the judgement in Case PLD, 1997 Peshawar 93, relied upon by the Appellants, wherein it was observed that the expression 'approval' means the act of confirming, ratifying, sanctioning or consenting to some act or thing done by another..." is not relevant since the interpretation of the word, "approval" is out of context in so far as Section 208 of the Ordinance is concerned.

Attention was drawn to the word, "authority" as defined under the Black's law Dictionary Seventh Edition wherein "authority" means " the right or permission to act legally on another's behalf....". By reading it with the word "under" it categorically requires the consent of the shareholders as a condition precedent.

The Respondent submitted that it is a well-settled principle that Indian Case Law has only persuasive value and is not binding in Pakistan. This persuasiveness of the judgement cited by the Appellants is marred by the following factors (a) the distinctions in terms of scope and use of the language/expression that has already been explained (b) the Mathura Prasad case of Calcutta High Court in the year 1979 relied upon by the Appellant is of a single judge who has validated the investments made by obtaining subsequent approval. However, the East Indian Case of Calcutta High Court in the year 1988 by a Division Bench, which expressly approves the view taken by the Executive Director (E&M) as follows: *"in our view from reading of Section 372 of Companies Act, a conclusion may be drawn that in the absence of the resolution of the investing company in its general meeting and approval of the Central Government, such investment in shares of other body corporate in excess of 10% of the subscribed capital of such other body corporate cannot be made"* and *"in our view the approval of the Central Government is not idle formality. Before according approval, the Central Government may have to examine whether the investing company exceeding the prescribed ceiling and further whether there is any proper resolution sanctioning such investments. These are requirements to be taken into consideration before such investments are given"*.

The fact that no definite finding was given on this issue in East Indian Case was no finding on this issue was required as the Appellant company had not stated that its investment in shares of the said company has been approved by the shareholders or by the Central Government and it was presumed that there were no approvals to this effect required. However, it is to be noted that the Court has expressed its approval for treating the requirement as the condition precedent and also discussed its rational. Thus the persuasiveness of Mathura Prasad case cannot be asserted.

As for the reliance on the Pakistani case law Shahbazudin Chaudhry vs. M/s. Service Industry Textile Ltd. PLD 1988 Lahore-1, the arguments given by the learned senior counsel has been clearly distinguished in the impugned order, the relevant portion is reproduced hereunder:

*"The undersigned has considered the submissions in the light of the judgment on which reliance has been placed by the learned counsel. In the said case the issue was violation of the provisions of Section 208 of the Ordinance. It was decided by the Honourable Court on the basis of facts and circumstances of the said case, that on the promulgation of the Companies Ordinance, 1984, it was open to the lending company either to enforce the repayment of the loan under Sub-section (3) of Section 195 of the Ordinance or have the investments made regularized by passing a special resolution with the requisite majority under Section 208 of the Ordinance. As the respondent company has chosen the second course and passed a resolution to which petitioners were party, therefore, they were stopped to challenge the action of advancing the loan to the associated companies. It was also observed by the Honourable Court that the purpose of Section 208 is to secure the funds of the company and to curb the abuse of powers by the Directors who hold interest in more than one company. As is evident from the above, the facts of the cited Judgment are materially different from the facts of the case in hand. This Judgment, therefore, does not lend any support to the arguments of the Learned Counsel that subsequent resolutions passed by the shareholders have rectified the irregularity. Rather, the action initiated by the Commission is strengthened by this Judgment"*

iii. **Doctrine of substantial compliance.**

This doctrine couldn't be applied where mandatory provisions of law have been violated both in letter and spirit. It has also been argued that the Appellant Company's Memorandum of Association does not envisage making loans and advances at less than the borrowing costs.

Any departure from the scope and object of the Company is ultra vires Memorandum of Association and cannot be validated even if assented by all the members of the Company. Reliance has been placed on Trevor Vs Whitworth (1887 12AC409) and AIR 1963 SC 1185.

It has been observed in the impugned order that *'during the course of successive hearings held in this matter, the management of Spencer appear to have realized the grave violations of Section 208 of the Ordinance that have been committed, it promptly convened the aforesaid general meeting for which a notice issued on May 13, 2001 to pass resolution for investments already made in Spencer Powergen during the period July 1, 1994 to June 13, 2000.'*

It has further been observed *'that the passing of the resolution for mark up free advances, which also substantially exceeds the statutory limit, by Spencer to Spencer Powergen is a gross violation and abuse of law. Also the resolution as indicated above suffer from acute illegality for non compliance with the mandatory provisions of Clause (b) of sub section (1) of Section 160 and Section 208 of the Ordinance and SRO No.865(I)/2000 dated December 06, 2000. The manner of investment, the disregard to the compliance of the provisions which are mandatory in nature, the subsequent ratification, that the directors were fully conscious of the violation and disregarded the same deliberately.'*

vi. **Pleas of res judicata.**

For the principle of res judicata, certain essentials need to be satisfied, viz.

- a) the issue should be substantially the same,
- b) issue/matter must have been heard and finally decided, and
- c) the matter must have been decided by the competent authority.

These essentials are not satisfied in the present case as the letter was written in only administrative capacity and the person writing such letter was not the competent authority. There was no show cause notice served nor any proceedings took place. Therefore, the matter was not heard or finally decided. Whereas the letter of CLA admittedly restricted the issue to the period till 30 June, 1997, the present violations also relate to subsequent periods as elaborated in the impugned order.

v. **Plea of promissory estoppel.**

The Appellant has committed blatant, gross and glaring violations of Section 208 of the Ordinance. CLA's letter cannot be used as an umbrella to estop the Respondents to take cognizance of such violations and proceed in accordance with law. Reliance is placed on case reported at PLD 1963 Lahore 606.

vi. **The Appellants have pleaded that notice of the amendments proposed by the Commission for Section 208 of the Ordinance on 25 October, 2001 be considered.**

It is rather surprising that the learned counsel of the Appellant is relying on Commission's proposed amendments to section 208 of the Ordinance. Amendments are made prospectively and cannot be enacted retroactively. It is a well-settled principle that the law governing the proceedings is that which was in force at the relevant time and not the law that subsequently comes into force or is yet to be promulgated. In this context, attention is drawn to Section 6 of the General Clauses Act, 1897.

vii. **Value of land sufficient to recover advances made.**

The Appellant's plea that the value of land is sufficient to recover the huge advance given to Spencer Powergen is not correct as the value shown in the books of accounts is just Rs. 75 million which represents cost value. Further, the land was

allotted by SITE for specific purpose i.e. establishment of Power Project and is subject to cancellation in case the project is not constructed or cancelled by the approving authority. Since the Federal Government has cancelled the project, it is likely that the competent authority may cancel the allotment of land; the company may thus be entitled to the bare amount paid to SITE for land. Further, the company has provided no evidence as to whether Spencer Powergen holds the title to the land.

**viii. Lending by the Appellant at less than borrowing costs.**

The Appellants have not pressed any argument in defence to the observation held by the Executive Director that there was no basis available to the Appellant to advance loans in the amount of over Rs. 500 million on less than borrowing cost or, for that matter, free of mark up. The findings would therefore stand admitted. Proviso (b) to sub section (1) of Section 208 provides that return on investment shall not be less than the borrowing cost of the investing Company. Spencer advanced huge loans and before 1 January, 1998 charged mark up at less than its borrowing cost and thereafter ceased charging interest from the Spencer Powergen on the plea that Spencer was experiencing difficulties in the recovering advances from the Spencer Powergen. This act clearly contravenes the requirements of the proviso (b) to sub section I of Section 208.

**ix. Foreign Investment.**

This is an additional ground taken by the Appellants before the Bench for the first time and cannot be allowed at this stage. In any event, approval of the Commission has not been obtained and has not even been applied for till date. The provision envisages a certain mechanism including application by the Appellants, special resolution of the shareholders and justification for the said investment and benefit to the shareholders of the Company.

**x. Advances included deposit for shares.**

This is an additional ground taken by the Appellants before the Bench for the first time and cannot be allowed at this stage. Out of investment of Rs. 486 million, an amount of Rs. 306.94 million was made towards the equity of Spencer Powergen against which shares were to be issued by them; notwithstanding the fact that such deposits were not returned despite cancellation of the project and the fact that authorized capital of Spencer Powergen was Rs. 100 million that was insufficient to allot shares. If it so intended, no steps were taken to enhance the authorized capital.

**xi. Relief by invoking Section 488 of the Ordinance.**

This plea has been raised for the first time and, since such relief was not sought from the Executive Director, it is not maintainable. Further, this section relates to criminal proceedings and is, therefore, not relevant to these proceedings.

6. We have carefully considered the arguments made by both parties, that is to say the representatives of the Appellant and Respondent, as dilated in the foregoing paragraphs. Our views on each of the issues raised by them are as follows: -

**i. Whether protection of minority shareholders' interest is restricted to minimum threshold:**

Holding of a brute majority of 96% cannot suppress the minority interest even if it is 4% or, for that matter, holder of a single share. All regulatory action would come to naught if an arbitrary threshold of minority shareholdings in a company were to form the basis for a Regulator to take cognisance of a violation of Section 208 of the Ordinance. Further, the Appellants have not substantiated as to how the foreign shareholder, Pinap B.V., holding 44.9% shareholding in Spencer, could possibly turn a blind eye to the resultant loss of their investments with little or no prospect to revive the project. We are of the considered view that Spencer's investments in Spencer Powergen has shattered investor confidence, having acted in a manner prejudicial to shareholders' interest, particularly the minority shareholders.

**ii. Whether principle of ratification can be invoked for the purposes of Section 208 of the Ordinance:**

An examination of section 208 of the Ordinance and corresponding section 372 of the Indian Companies Act, 1956 (Act) draws certain distinctions. Whereas section 208 of the Ordinance relates to investment in an associated company or associated undertaking, section 372 of the Act relates to investment in shares of any other body corporate. Whereas the expression used in section 208 of the Ordinance is "*under the authority of a special resolution,*" section 372 of the Indian Companies Act the words used are "*unless investment is sanctioned by a resolution.*" Whereas the expression used in section 208 of the Ordinance is "*Federal Government may... relax,*" section 372 of the Act the words used are "*previously approved by the Central Government.*"

In our view, the principle of redundancy does not allow reading into a statute words that are not provided for. A plain and ordinary meaning is to be assigned to the provisions of a statute. Since none of the words, 'previous' or 'prior,' 'approval' or 'permission,' appears in Section 208 of the Ordinance, they cannot be read into the statute and any imputed meaning so drawn bears no relevance. By the plain and ordinary meaning and its usage in the language of the words and phrases "under the authority of special resolution," no other meaning than passing of the resolution before and not subsequent can be drawn there from. The resolution cannot be said to be "under the authority" if such authority is subsequent to investment made under Section 208 of the Ordinance. Such authority must necessarily be exercised once the shareholders are placed in a position to ponder and consider the viability of making the investments and the ensuing benefits. Therefore, the case law relied upon by the Appellant are rendered irrelevant.

The argument made by the Appellants' counsel that since the East Indian Case did not render any definite finding, the decision in Mathura Parasad case by a single judge still holds the field. We must point out that in the latter case, since the company had not stated whether its investment in shares was approved or not, it was presumed that there were no approvals by the shareholders or the Central Government; therefore, a finding was not required to be made. However, the Mathura Parasad case is diluted in view of the observations made by the Division Bench on this particular aspect in the East Indian Case, which categorically warrants prior approval of the Central Government, as reproduced in the following excerpt: "*in our view the approval of the Central Government is not idle formality. Before*

*according approval the Central Government may have to examine whether the investing company exceeding the prescribed ceiling and further whether there is any proper resolution sanctioning such investments. These are requirements to be taken into consideration before such investments are given.*” Further the intent of legislature was clarified with the subsequent in law by expressly adding the word “previous” to the approval requirement.

The issue in Shahbazudin Chaudhry vs. M/s. Service Industry Textile Ltd. PLD 1988 Lahore-1 is clearly distinguishable. As Section 195 came into existence with the promulgation of the Ordinance, the court held that investments made prior to the promulgation of the Ordinance could be regularized by a resolution passed under Section 208 *ibid* or the repayment of loan would be enforceable under sub section 3 of Section 195 *ibid*. As for Shahid Saigol's case (PLD 1995 Lah 264) the issue was entirely different. The case relates to declaring the proceeding of the general meeting as invalid by reasons of the material defects under Section 160(1)(b) of the Ordinance. No implied inference can be made where the issue of ratification under Section 208 was not even examined. The cases relating to ex-post facto approval validating unauthorized actions of the directors of a company are distinguishable. None of the cases point out that even an illegal and unlawful acts can be validated. To the contrary AIR 1934 Bombay 243 it has been held that *“it is clear on the authorities that a company cannot confer or ratify anything which is beyond its power express or implied in the memorandum or conferred by statute. Short of that a transaction by the Directors which is beyond their own power but within the powers of the company can be ratified by a resolution”*. Reliance on PLD 1965 SC 425 and PLD 1987 Karachi 139 is misplaced. The scheme of Companies Ordinance unlike Foreign Exchange Regulation Act is different. Section 208 of the Ordinance clearly states that investment in associated company should be subject to the prescribed procedure. Failure to comply with the mandatory provisions amount to contravention for which penalty has been stipulated. No sanctity can be given to transactions, which are carried out in breach of law.

We are, therefore, of the considered view that principle of ratification cannot be applied to Section 208 of the Ordinance.

**iii. Whether the doctrine of substantial compliance can be invoked in the circumstances:**

In our considered view, where the violations are not merely technical but there is a substantial non-compliance, the Appellants cannot invoke the doctrine of substantial compliance. As for the case laws cited by the Appellants we have reviewed the same and find the same distinguishable. For instance in Syed Israr Ahmed's case 1997 (SCMR 1934) the formality of filing of an application was dispensed with in view of the fact because such an application was deemed a non essential formality. For the purpose of Section 208 of the Ordinance, approval of the Commission is not merely a non-essential formality but a mandatory requirement, which requires consideration of many factors. In the Privy council case of PLD 1947 PC 160, the issue is different it relates to the waiver of notice on behalf of those for whose benefit the provision is required to be complied with. As for other cases, such as McDermotts case what needs to be understood is that Section 208 is not only mandatory in requiring shareholders' consent but also in specifying the procedure for consent. By stating that the procedure for obtaining consent is merely directory cannot minimize the provisions expressly provided in Section 208 of the Ordinance. Similarly, in view of

Imtiaz Ahmed case it would be incorrect to say that by holding the requirements of Section 208 of the Ordinance as mandatory, the Bench would be giving effect to the form and not the substance.

**iv. Whether the plea of res judicata can be availed of.**

The plain and ordinary meaning of the word "decision" under Black's Law Dictionary is a 'judicial determination after consideration of the facts and the law; especially a ruling, order or judgement pronounced by a court when considering or disposing of a case. The letter of the CLA is not a decision or a speaking order. Therefore, it falls short of the required ingredients for the principle of res judicata to be invoked. The rule of res judicata ought to be strictly interpreted and, unless the trial of a cause necessarily necessitates the reopening of a decision, the door should not be slammed. Finis litium is intended as protective fortress and not as an indiscriminate hatchet. Even if we were to assume that investments made up to 30 June, 1997 were in accordance with a purported approval of the then CLA, Spencer's investments made thereafter were not supported by the requirements of the legislative amendments made by, particularly Section 208 of the Ordinance.

**v. Whether the plea of promissory estoppel is applicable.**

We have carefully considered the arguments enunciated by both the parties as well as the legal position. The present proceedings are barred under the principle of promissory estoppel fully adopted by our Supreme Court in legion decisions. Reliance has been placed in this regard on the case, Army Welfare Sugar Mills Limited vs. Federation of Pakistan, 1992 SCMR 1652. In our view, estoppel cannot operate against law. Since the appellants have committed violations of law, the plea of promissory estoppel does not come into play.

**vi. Whether the amendments proposed by the Commission encompassing Section 208 of the Ordinance has any bearing in the Appeal.**

In our considered view the violations committed cannot be condoned on account of a proposed amendment in law, which are not yet enacted. Enforcement of law ensues in accordance with the provisions in force at the relevant time. The objective of law would be vitiated if decisions were made on the expectation that a particular provision of law would be in force.

**vii. Value of land as security.**

No reasonable explanation has been provided on behalf of the Appellant as to why the aforesaid advances were shown as secured in the accounts for the year 30 June, 1997 and 30 June, 1998 but shown as unsecured in the accounts for the following year i.e. ended 30 June, 1999. Revival of project appears to be doubtful in view of protracted litigation as indicated during the course of hearings.

**viii. Whether the Appellants have violated proviso (b) to sub section (1) to Section 208 of the Ordinance by making advances at less than borrowing costs.**

The Appellants have not pressed any argument in defence to the violation held by the Executive Director whereby Spencer advanced loans of over Rs. 500 million to Spencer Powergen at either less than borrowing cost or without any mark up. We are of the opinion that by not charging mark up after 1 January, 1998, the Appellants violated the provision of law.

**ix. Whether an application is required to invoke relaxation provided in the second proviso to sub section 1 of Section 208 of the Ordinance.**

The mere involvement of foreign investment ipso facto does not allow Spencer to continue exceeding the stipulated statutory threshold or deem that relaxation has been granted. The Commission is not required to consider this fact suo moto or overlook the laid down procedure for obtaining such relaxation, which would entail the submission of an application and complying with the expressed provisions of law.

**x. Whether advances included deposit for shares that were deliberately not repaid.**

The accounts of Spencer Powergen for the year ending 30 June, 1998 reveals that the advance against the shares amounting to Rs 3.122 billion appearing therein was reduced to Rs 1.054 billion as on 30 June, 1999 and further reduced to Rs 434.149 million as on 30 June, 2000. However, Spencer did not receive any amount from its outstanding advances from Spencer Powergen. Repayments to all other promoters/sponsors are indicated except Spencer, thereby indicating that advances were not being repaid proportionately. It appears that sponsors/other promoters of Spencer Powergen were being bailed out at the cost of Spencer. Despite the cancellation of the power project of Spencer Powergen, investment by Spencer continued, the company, which had a commendable track record of dividend payment to its shareholders, went into losses owing to imprudent and unlawful investments. Clearly, the management of Spencer has failed to protect the interest of the shareholders of Spencer. It has not only exceeded the threshold of 30% in violation of Section 208 but has also advanced the loans on less than borrowing cost or even without charging any mark up, while Spencer itself was paying mark up on its borrowing from associated company @20 to 22% per annum.

**xi. Whether the Appellant can obtain relief by invoking Section 488 of the Ordinance.**

By an examination of Section 488 indicates that it is applicable solely to a criminal proceeding as opposed to civil proceedings. The term 'criminal proceeding' has been defined under the Black's Law Dictionary, Seventh Edition as 'a proceeding instituted to determine a person's guilt or innocence or to set a convicted person's punishment; a criminal hearing or trial.' Therefore, under Pakistani law, a criminal proceeding would entail a criminal hearing or trial held under Criminal Procedure Code. Since the Regulator cannot invoke the Criminal Procedure Code, we have pondered over the question as to the need for the legislature to grant powers under Section 488 to the Commission. In our view, Section 488 of the Ordinance would be attracted to such proceedings where a criminal proceeding has to be initiated by the Commission in a Court of Session. The objective is to provide protection against undue hardship in deserving cases and grant relief from liability to a person who, though guilty of defaults, negligence and breach of duty or breach of trust, are able to convince the conscience of the Commission that they have acted honestly and reasonably and,

having regard to the circumstances of the case, they ought fairly to be excused from the charge so that no criminal proceedings or complaint is initiated before the court. In the present case before us, there is no penalty for imprisonment for which complaint has to be filed or proceeding to be initiated before the Court of Session; therefore, in our view, Section 488 cannot be invoked for the purpose of Section 208 of the Ordinance.

7. After carefully examining the arguments and counter arguments advanced by the parties and the relevant law, as exhaustively dilated herein, we are convinced that the Appellants have committed contraventions of law. However, the sentence containing the word 'FRAUD,' appearing in capital letters in paragraph 24 headed 'CONCLUSION' of the impugned order, shall be taken as expunged there from. Accordingly, we do not find any merit to interfere in the decision made by the Executive Director (Enforcement & Monitoring). The Appeal stands so disposed off.

**Announced :** Islamabad  
24 April, 2002

**( SHAHID GHAFFAR )**  
Commissioner  
(Securities Market)

**( N.K. SHAHANI )**  
Commissioner  
(Insurance & Information Technology)