



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN  
APPELLATE BENCH REGISTRY

**BEFORE APPELLATE BENCH NO. II**

In the matter of

**Appeal No. 8 of 2006**

1. Mr. Shehryar Saeed, Chairman/CEO
2. Mr. Nadeem S. Qureshi, Director
3. Sardar Muhammad Muzafar Sukera, Director
4. Mr. Abdul Rafiq, Director
5. Mr. Rehan Sadiq, Director
6. Mr. U.U. Khawaja, Director
7. Mr. Buriar Haider Naqvi, Director

.....

Appellants

Versus

Director (Enforcement) .....  
Securities and Exchange Commission of Pakistan

Respondent

**ORDER**

Date of Hearing

23 -11-2009

**Present:**

**For the Appellants:**

Furkan Ali  
Advocate

**Respondent:**

Tariq Bakhtawar  
Director (Enforcement)

**Departmental representative**

Shahzad Afzal Khan  
Deputy Director (Enforcement)



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1. This order shall dispose of appeal No. 8 of 2006 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 against the order dated 29-12-2005 (the "Impugned Order") passed by the Respondent.
2. It transpired from the examination of annual accounts of Johnson & Phillips (Pakistan) Limited (the "Company") for the year ended 30-06-04 that an amount of Rs. 3.589 million is payable to provident fund by the Company. Note 14.4 of the financial statement dated 30-06-04 of the Company stated that:

*"The Company obtained loan amounting to Rs.6.93 million which is repayable in full after a period of five years commencing from December 03, 1999 upto June 30, 2004. The Company has paid 3.34 million. The rate of interest is 9 % per annum (2003: 13% per annum)."*

The auditors qualified the Company financial report and expressed the opinion in the following terms:

*"The Company has obtained long term loan from Staff Provident Fund Trust, at terms disclosed in Note 14.4. In our opinion, section 227 of the Companies Ordinance, 1984 does not have any provision authorizing such loan"*

3. Show cause notice dated 17-10-05 ("SCN") was issued to the Company and the Appellants under sub-sections (2) and (3) of section 227 and 229 read with section 476 of the Companies Ordinance, 1984 (the "Ordinance"). The Company and the Appellants filed reply to SCN and their counsel appeared before the



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Respondent and admitted the default. It was contended that the Company has been paying interest on the said loan, therefore, the value of the provident fund has not diminished in any manner. It was further requested that the Company may be allowed to pay the outstanding amount in the next nine (9) months. The Company and the Appellants gave an undertaking in this regard. The Respondent passed the Impugned Order and imposed penalty of Rs. 5,000/- each on the Company and the Appellants under section 229 of the Ordinance, due to breach of mandatory requirements of section 227 of the Ordinance. Further, he gave directions under section 472 of the Ordinance to settle the outstanding amount as per the agreed timeframe.

4. The Appellants preferred appeal against the Impugned Order before the Appellate Bench (the "Bench"). The Appellants' counsel contended:
  - a) No loss has been caused to the employees of the Company as prevailing bank interest was paid by the Company to the fund;
  - b) Penalty has been imposed on non-executive directors, who are not engaged in day to day management of the Company;
  - c) It was first default of the Company and the management; as such maximum penalty should not have been imposed. In cases reported at 2008 CLD 731, 2007 CLD 1667 and 2006 CLD 454, no penalty was imposed by the Commission, even after observing that violation under section 227 of the Ordinance had been committed.
5. The Respondent argued that the Appellants admitted violation of section 227 of the Ordinance and no grounds were made out for the waiver of the penalty. The Company was directed to pay back the principle amount along with interest



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in nine (9) monthly installments, which were paid by the Company. The Bench was also informed that the Company has again violated section 227 of the Ordinance, which has been highlighted in note 21 of the financial statement of the Company for the year ended 30-06-09, where an outstanding balance of Rs. 5.703 million is reflected in the accounts as payable to the provident fund.

6. We have heard the parties and have gone through the record. Section 227 of the Ordinance is reproduced for ease of reference:

*227. Employees' provident funds and securities.- (1) All moneys or securities deposited with a company by its employees in pursuance of their contracts of service with the company shall be kept or deposited by the company within fifteen days from the date of deposit in a special account to be opened by the company for the purpose in a scheduled bank or in the National Saving Schemes, and no portion thereof shall be utilized by the company except for the breach of the contract of service on the part of the employee as provided in the contract and after notice to the employee concerned.*

*(2) Where a provident fund has been constituted by a company for its employees or any class of its employees, all moneys contributed to such funds, whether by the company or by the employees, or received or accruing by way of interest, profit or otherwise from the date of contribution, receipt or accrual, as the case may be, shall either—*

*(a) be deposited—*

*(i) in a National Savings Scheme;*



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- (ii) *in a special account to be opened by the company for the purpose in a scheduled bank; or*
- (iii) *where the company itself is a scheduled bank, in a special account to be opened by the company for the purpose either in itself or in any other scheduled bank; or*
- (b) *be invested in Government securities; or*
- (c) *in bonds, redeemable capital, debt securities or instruments issued by Pakistan Water and Power Development Authority and in listed securities subject to the conditions as may be prescribed by the Commission.*

(3) .....

Emphasis added

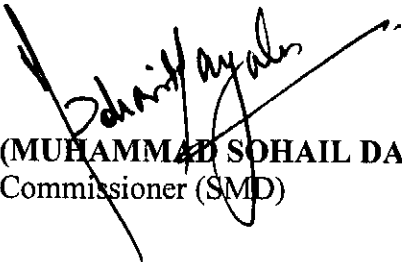
No amount shall be utilized from the provident fund except for the purposes stated in sub section (1) of section 227 of the Ordinance as reproduced above. The provident fund belongs to the employees and not to the Company. The objective of section 227 of the Ordinance is to secure the provident fund of the employees and to ensure that the provident fund is not depleted due to any exigency of the Company. The directors are under a duty to protect the provident fund; the non-executive directors are as much responsible for the decisions of the board as an executive director. The law does not distinguish between an executive and non-executive director as such the plea of the Appellants' counsel is not tenable. The facts leading to the instant appeal can be distinguished from the cases cited by the Appellants' counsel i.e. 2008 CLD 731, 2007 CLD 1667 and 2006 CLD 454. In cases cited above section 227 of the Ordinance was

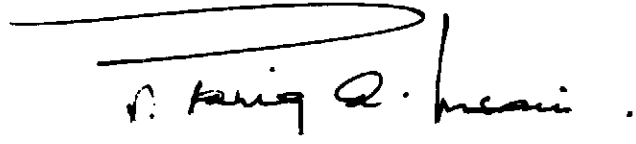


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violated as the companies were not making timely payment to the provident fund and there was outstanding balance payable to the provident fund, however, no penalty was imposed. The violators of section 227 should not have been left scot free merely on the ground that they are willing to pay the outstanding liability towards the provident fund. In this case, however, loan has been disbursed to the Company from the provident fund, which is blatant violation of section 227 of the Ordinance and penal provision of section 229 of the Ordinance was rightly invoked by the Respondent.

In view of the foregoing, we do not find any ground to interfere with the Impugned Order. The appeal is dismissed with no order as to cost.

  
(MUHAMMAD SOHAIL DAYALA)  
Commissioner (SMD)

  
(S. TARIQ ASAF HUSAIN)  
Commissioner (L.D)

Announced on: 14-1-10