



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN
APPELLATE BENCH REGISTRY

BEFORE APPELLATE BENCH NO. II

In the matter of

Appeal No. 44 of 2007

M. A. Jameel, Chief Executive

Zeal Pak Cement Factory Limited, 7th Floor, PIC Tower, 32-A, Lalazar Drive,

Moulvi Tamiz-ud-din Khan Road, Karachi

.....

Appellant

Versus

Executive Director (Enforcement)

Securities and Exchange Commission of Pakistan

NIC Building, Jinnah Avenue, Blue Area, Islamabad

.....

Respondent

ORDER

Date of Hearing

02-12-09

Present:

For the Appellant:

Mr. Shafiq Ahmad

Advocate

Departmental representatives:

Ms. Amina Aziz, Joint Director (Enforcement)

Ms. Zohra Sarwar, Deputy Director (Enforcement)



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1. This order shall dispose of appeal No. 44 of 2007 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 against the order dated 20-11-07 (the "Impugned Order") passed by the Respondent.
2. On examination of the annual accounts for the year ended 30-06-05 of Zeal Pak Cement Factory Limited (the "Company"), it was found that the Company is in contravention of section 226 of the Companies Ordinance, 1984 (the "Ordinance") as the security or deposits of cement stockists were not kept in a separate account with a scheduled bank. The Company was issued a direction under section 473 of the Ordinance in the following terms:
 - (a) Amend the agreements with the cement stockists for utilization of the security deposits or otherwise keep the same in a separate account with a scheduled bank;
 - (b) Submit statutory auditors' certificate confirming either amendments have been made in agreements or otherwise security deposits have been kept in a separate bank account with a scheduled bank as the case may be;
 - (c) Submit the auditors' certificate within two (2) months from the date of this order i.e. on or before 16-04-06.

The directions were not complied with by the Company as examination of annual accounts for the year ended 30-06-06 of the Company also revealed an amount of Rs.5.316 million as long term deposits from cement stockists.



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3. Show cause notice dated 01-03-07 (“SCN”) was issued to the Appellant under section 495 read with section 476 of the Ordinance for failure to comply with the aforementioned direction. The Appellant submitted a written reply to the SCN and the Appellant’s counsel was also heard by the Respondent. The Respondent dissatisfied with the response of the Appellant passed the Impugned Order and imposed a fine of Rs. 10,000 on the Appellant under section 495 of the Ordinance. The Appellant was also directed to verify the outstanding balance of security deposits from the statutory auditors of the Company and deposit the same in a separate bank account with a scheduled bank and to submit the auditors’ certificate along with evidence of deposit of aforementioned security deposits.

4. The Appellant has preferred the instant appeal against the Impugned Order. The Appellant’s counsel appeared before the Appellate Bench (the “Bench”) and argued that:
 - a) The Company was established in the year 1957, thereafter, it remained in the administrative control of the Ministry of Industries & Production and was a state owned unit of State Cement Company of Pakistan. In the year 1992, the Appellant’s holding company namely Sardar M. Ashraf D. Baluch (Pvt.) Limited took over majority shares, assets, liabilities and management of the Company through privatization process. At the time of transferring over the books, assets and liabilities in the year 1992 the Company inherited a colossal amount as securities and other deposits of cement stockists.

 - b) In November 2005, a fire erupted in the office of the Company and most of the record was lost including the agreements of the cement stockists



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were destroyed as such the Appellant has no record available with it to ascertain the amount of security deposits due to the cement stockists.

- c) Section 226 of the Ordinance requires that there should be a contract in writing pertaining to money received as security or deposit and in absence of a contract in writing, section 226 of the Ordinance should have been considered inapplicable.
- d) The Company was incorporated and the deposits were received before the Ordinance was promulgated, therefore, the provisions of the Ordinance are inapplicable in the instant case. Even otherwise, the Ordinance does not act retrospectively.

5. In response to the arguments of the Appellant's counsel, the departmental representatives stated that:

- a) The balance sheet of the Company for the year ended 30-06-06 reflects an amount of Rs. 5.316 million as security deposits. The amount, even if inherited, remains a security deposit and should have been subsequently treated in terms of section 226 of the Ordinance.
- b) The Appellant provided a list of cement stockists containing name and city of each cement stockists to the Commission under cover of letter dated 20-8-07. The Appellant should have made serious efforts to contact the cement stockists on the list to amend the agreements and or to return the deposits. Nothing was produced before the Respondent to show that any move was made in this direction. The Appellant on the other hand appears to have enjoyed interest earned on the deposits over the past many years.



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- c) The Appellant has admitted that the amount of Rs 5.316 million had been shown in the accounts as security deposit. Even in absence of a contract, the nature of the security deposit will not change and the Appellant was, therefore, required to keep the deposit in separate bank account with a scheduled bank.
- d) The deposits should have been treated in accordance with section 226 of the Ordinance after the promulgation of the Ordinance. Section 1(3) of the Ordinance clearly states that it comes into force at once after being promulgated; thereafter the companies were required to update the books of account in accordance with the provisions of the Ordinance. The Appellant had sufficient time to comply with the requirements of section 226 of the Ordinance since 1992, when the management of the Company was taken over from the Privatization Commission.

6. Our findings on the issues raised in the appeal are:

- a) The annual accounts for the year ended 30-06-06 of the Company reveals Rs.5.316 million as long term deposits from cement stockists. The argument of the Appellant that at time of transferring over the books, assets and liabilities in the year 1992, the Company inherited an amount of Rs 5.316 million as security deposits without details of such deposits and therefore it cannot comply with the requirements of the Ordinance is without merit. The security deposits belong to the cement stockists and not to the Company. The Company is under an obligation to return the security deposits as and when demanded by the cement stockists. The Company has failed to provide any evidence of its effort to find details of



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the security deposits inherited and has shown complete disregard of the requirements of the Ordinance.

b) Section 226 of the Ordinance is reproduced for ease of reference:

226. Securities and deposits, etc.- No company, and no officer or agent of a company, shall receive or utilise any money received as security or deposit, except in accordance with a contract in writing; and all moneys so received shall be kept or deposited by the company or the officer or agent concerned, as the case may be, in a special account with a scheduled bank:

Provided that this section shall not apply where the money received is in the nature of an advance payment for goods to be delivered or sold to an agent, dealer or sub-agent in accordance with a contract in writing.

Emphasis added

The requirement of the aforementioned section is that no company, officer or agent of a company shall receive or utilise any money received as security or deposit, except in accordance with a contract in writing. The Appellant's counsel admitted and clarified during the course of hearing before the Respondent that the Company was in possession of the contracts with the cement stockists but these were destroyed after a fire erupted in the office of the Company in November 2005. In the instant case whether there was a contract in writing or not, all money received as security or deposit should have been kept in a special account with a scheduled bank.



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- c) The security deposits may relate to any year prior to promulgation of the Ordinance, however, after coming into force of the Ordinance, the Appellant should have complied with the requirements stated in section 226 of the Ordinance. Section 513 of the Ordinance is reproduced for ease of reference:

513. Transitional provisions.- *Within one year from the commencement of this Ordinance, all companies shall alter their memorandum and articles or any existing contract or agreement and shall take such other actions as are necessary to bring the constitution, working and procedures of the company in conformity with the provisions of this Ordinance:*

Provided that, notwithstanding the fact that such actions have not been taken or such changes have not been made, the companies shall comply with the provisions of this Ordinance as if they were registered under this Ordinance.

The Ordinance came into force on 8-10-84 and the Appellant was required to comply with the provisions of the Ordinance latest by 7-10-85. The Appellant, however, failed to comply with the provisions of section 226 of the Ordinance and was rightly proceeded against by the Respondent.

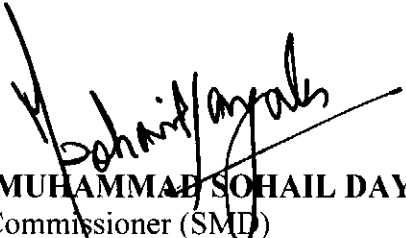
- d) The Appellant had violated section 226 of the Ordinance as such the maximum penalty of Rs 5000/- under section 229 of the Ordinance could have been imposed. Instead, penalty of Rs 10,000/- was imposed under section 495 of the Ordinance for having failed to comply with the direction under section 473 of the Ordinance. The Appellant should have been penalized under section 229 of the Ordinance, which is special penal

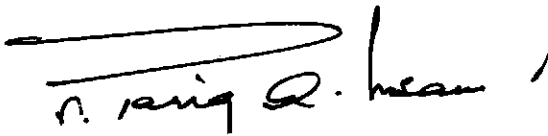


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provision for violation of section 226 as opposed to section 495 of the Ordinance which is a general provision.

In view of the above, we hereby modify the Impugned Order to the extent of the penalty imposed and impose maximum penalty of Rs 5000/- only under section 229 of the Ordinance. The Appellant is, however, directed i) to get an advertisement published in two leading Urdu and English newspapers that have the widest circulation in the cities where the stockists are located as per the list of stockists furnished to the Commission, calling upon those who are no longer stockists of the Appellant to get refund of their deposits made either with the Appellant or the merged entities which now constitute the Appellant. The advertisements should be placed each week over a three months period. The Appellant shall further get the wordings of the advertisement approved from the Enforcement department of the Commission ii) to get the outstanding balance of security deposits verified by the statutory auditors of the Company and; iii) to place the security deposits in a special account of a scheduled bank and inform the Enforcement department of the Commission of having complied with the orders of the Appellate Bench within 15 days of receiving this order.


(MUHAMMAD SOHAIL DAYALA)
Commissioner (SMD)


(S. TARIQ ASAF HUSAIN)
Commissioner (LD)

Announced on: 18-3-10