



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN
APPELLATE BENCH REGISTRY

BEFORE APPELLATE BENCH

In the matter of

Appeal No. 37 of 2011

1. Mr. Younus Dawood (Chief Executive)
2. Mr. Amanuallah Haji Sattar
3. Mr. Abdul Ghaffar Dawood
4. Mr. Bilal Yunus
5. Mr. Muhammad Anwer Fatani
6. Mr. Iqbal Raza Kazi
7. Mr. Muhammad Zaheer

(Appellant No. 2 to 7 are directors of Balochistan Engineering Works Limited)

..... Appellants

VERSUS

Director (Enforcement)/Addl. Registrar of Companies
Securities and Exchange Commission of Pakistan Respondent

ORDER

Date of hearing

28-04-11

Present:

For the Appellant:

K.D Rajani, Advocate High Court

Respondent:

Bilal Rasul, Additional Registrar/ Director (Enforcement)



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1. This order shall dispose of appeal No. 37 of 2011 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 against the order dated 11-01-11 (the "Impugned Order") passed by the Respondent.
2. The Enforcement Department of the Commission (the "department") while examining the annual audited accounts for the year ended 30-06-08 (the "Accounts") of Balochistan Engineering Works Limited (the "Company") observed that the Company has made equity investment of Rs. 248,248,972/-, in DYL Motorcycles Limited, Elecom (Pvt.) Limited, Omega Forging Limited, Micado (Pvt.) Limited, Autocity (Pvt.) Limited, Central Trading (Pvt.) Limited, CNPS Associates (Pvt.) Limited and TGL Limited ("associated companies") and advanced an amount of Rs. 52,500,000/- to another associate company namely; ALT Source Communication (Pvt.) Limited at a mark-up of 14% for a period upto one year. The department vide its letter dated 29-10-09 advised the Company to clarify its position with regard to compliance of section 208 of the Companies Ordinance, 1984 (the "Ordinance"). The Company along with its letter dated 18-11-09 submitted a copy of the minutes of the Extraordinary General Meeting held on 23-06-08 ("EOGM") and a copy of Form 30 (resolution passed by members pursuant to section 208 of the Ordinance) filed on 14-11-09. The relevant contents of the aforementioned letter are reproduced as under:

"Investment - held for sale, amounting to Rs. 248.2 million consists of investment in shares of the following Associated Companies:

- a. DYL Motorcycles Limited
- b. Elecom (Pvt.) Limited



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- c. Omega Forging Limited
- d. Micado (Pvt.) Limited
- e. Autocity (Pvt.) Limited
- f. Central Trading (Pvt.) limited
- g. CNPS Associates (Pvt.) Limited
- h. TGL Limited

Certified copy of BOD resolution for investment in the above mentioned associated undertakings and copy of Form 30 is enclosed with this letter (Marked as Annexure-E)”

3. The department analyzed the documents and the reply submitted by the Company which revealed that the special resolution passed in the EOGM for equity investment in associated companies does not indicate:

- i) The extent of investment in each investee company;
- ii) The terms and conditions of each investment as prescribed in section 208(1) of the Ordinance;
- iii) The advance of Rs. 52,500,000/- granted to ALT Source Communication (Pvt.) Limited (associated company) at a mark-up of 14% for a period upto one year is below the borrowing cost of the Company; and
- iv) Form 30 of the said special resolution passed by the members pursuant to section 208 of the Ordinance has been filed by the Company on 14-11-09, which is after the issue of examination letter to the Company on 29-10-09.

4. In light of above, Show cause notice (“SCN”) was issued to the Company, its Chief Executive and directors, calling upon them to show-cause as to why



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necessary penal action may not be taken against them. The Appellants filed reply to the SCN and hearing in the matter was held. The Respondent, dissatisfied with the response of the Appellants, passed the Impugned Order and imposed a fine of Rs. 70,000/- on the Appellants for the contravention of section 208 (3) read with section 476 of the Ordinance.

5. The Appellants have preferred the instant appeal against the Impugned Order. The Appellants' counsel argued that:

- a) the Respondent's observation in the Impugned Order regarding failure of the Appellants to comply with the provisions of section 208 of the Ordinance in respect of equity investment and advance extended to its associated companies is baseless as the shareholders in the EOGM had approved the aforementioned equity investment and advances;
- b) the Respondent ignored the fact that the Company has filed Form-30 with the Company Registration Office, Karachi and that only its filing in terms of Rule 15 of the Companies (General Provisions and Form) Rules, 1985 is subject matter of default and not the provisions of section 208 of the Companies Ordinance, 1984;
- c) section 208 of the Ordinance does not require prior approval as contended in the Impugned Order and further in absence of any complaint by the shareholders against the Appellants for having made the investment, no penalty should have been imposed.

6. The Respondent in response to the above averments argued that:



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- a) the Appellants did not comply with the requirements of section 208 of the Ordinance. The special resolution passed in the EOGM was deficient as it did not disclose the names of the associated companies, the extent of investment in each investee company and failed to disclose the terms and conditions of each investment. Moreover, the markup charged to ALT Source Communication (Pvt.) Limited, an associated company was below the borrowing cost of the Company;
 - b) the Appellants had belatedly filed Form 30 on 14-11-09 only after the issue of examination letter by the department to the Company;
 - c) plain reading of section 208 of the Ordinance shows that prior approval of the shareholders is required for investment in associated companies. The receipt of complaint from the shareholders against the Appellants is not a pre-condition for enforcing the provisions of section 208 of the Ordinance, as such, the penalty was rightly imposed on the Appellants.
7. We have heard the parties. The relevant provision of section 208 of the Ordinance is reproduced for ease of reference:

208. Investments in Associated companies and undertaking.- (1) *Subject to sub-section (2A) a company shall not make any investment in any of its associated companies or associated undertakings except under the authority of a special resolution which shall indicate the nature, period and amount of investment and terms and conditions attached thereto:*

Provided that the return on investment in the form of loan shall not be less than the borrowing cost of investing company.

Explanation: *The expression 'investment' shall include loans, advances, equity, by whatever name called, or any amount, which is not in the nature of normal trade credit.*



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- (2) *No change in the nature of an investment or the terms and conditions attached thereto shall be made except under the authority of a special resolution.*
- (2A) *The Commission may-*
- (a) *by notification in the official Gazette, specify the class of companies or undertakings to which the restriction provided in sub-section (1) shall not apply; and*
- (b) *through regulations made thereunder, specify such conditions and restrictions on the nature, period, amount of investment and terms and conditions attached thereto, and other ancillary matters, companies as it deems fit.*
- (3) *If default is made in complying with the requirements of this section, or the regulations, every director of a company who is knowingly and wilfully in default shall be liable to fine which may extend to ten million rupees and in addition, the directors shall jointly and severally reimburse to the company any loss sustained by the company in consequence of an investment which was made without complying with the requirements of this section.*

Emphasis added

The Appellants have failed to comply with the substantial requirements of section 208 of the Ordinance read with SRO 865(I)/2000 dated 06-12-00. In the instant case, perusal of the statement required to be sent to the shareholders under section 160(1) (b) of the Ordinance and the special resolution passed by the Appellants shows that the information provided to the shareholders was insufficient, therefore, the Respondent rightly proceeded against the Appellants.

On the issue on whether or not prior approval is required we place our reliance on 2003 CLD 131 in case titled *Messrs Gharibwal Cement Limited and Others vs. Executive Director (Enforcement and Monitoring), Securities and Exchange Commission of Pakistan*, where our predecessors have decided the

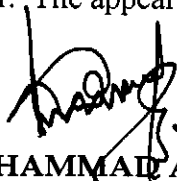


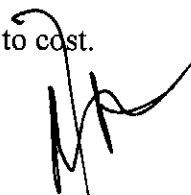
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question on whether or not prior approval is required and have made a comparative analysis of the provision with the Indian Companies Act 1956; the relevant extract is reproduced for ease of reference:

"We have considered the arguments and rationale from both sides and closely examined the provision of section 208 under the Ordinance and section 372(4) under the Indian Companies Act. It needs to be appreciated that the principle of plain and ordinary meaning from reading of section 208 of the Ordinance appears none other than seeking prior permission of both the shareholders as well as the Commission. In our view the two provisions are distinguishable. The words "under the authority" as used in section 208 of the Ordinance are much stronger than the word "sanctioned" used in section 374 of the Indian Companies Act. In our view, by no stretch of imagination an act can be termed as "under the authority" when the authority is subsequently acquired. The appellant has also submitted his arguments regarding the interpretation and relevance of the word "prior" and "previous" "approval" which does not appear convincing to us. The expression "approval" has nowhere been used in section 208 of the Ordinance, therefore, applying the principle of plain and ordinary meaning and the principle of redundancy we should not read into a statute words that are not provided for. It is relevant to see the context in which a word is used and only then a word should be interpreted or a meaning can be assigned to it. To us, the plain and ordinary meaning of the words "under the authority" means having consent of the shareholders prior to investment."

In view of the above, we do not see any reason to interfere with the Impugned Order. The appeal is dismissed with no order as to cost.


(MUHAMMAD ALI)
Chairman


(MR. TAHIR MEHMOOD)
Commissioner (CLD)

Announced on: 26th May 2011