



BEFORE APPELLATE BENCH NO. III

In the matter of

Appeal No. 11 of 2005

Climax Engineering Company Ltd.

Climaxabad, G.T Road

Gujaranwala.....Appellant

Versus

Executive Director (Company Law), SEC.....Respondent

Date of Impugned Order

April 08, 2005

Date of hearing of appeal

June 08, 2005

Present:

Hammad Raza, FCMA for the Appellant

Mubasher Saeed Joint Director for the Respondent



ORDER

1. This appeal No. 11 of 2005 has been filed under sub-section (1) of section 33 of the Securities & Exchange Commission of Pakistan Act, 1997 by Climax Engineering Company Ltd ('Company') against the order dated 08-04-2005 ('Impugned Order') passed by Executive Director (Company Law).

2. Brief facts of the case are that the notice of Annual General Meeting (AGM) of the Company held on 31-10-2004 revealed that the management of the Company intended to obtain permission of the shareholders through a special resolution for disposal of Company's surplus land, building, plant and machinery. However, the statement of facts required under section 160(1)(b) of the Companies Ordinance, 1984 ('Ordinance') did not provide the required information. The examination of the financial statements of the Company for the year ended 30-06-2004 revealed that the auditors of the Company had qualified their report due to reasons that the Company had not revalued its whole land and had excluded certain portion of the asset which was a violation of IAS-16. The Enforcement & Monitoring Department on 21-10-2004 directed the Company not to proceed with the sale of the land and advised it to provide certain information. The Company clarified that it intended to sell only a piece of surplus land measuring 68 kanals through private negotiations with brokers. With regards the value of land, the Company referred to the value of Rs.102 million given in the annual accounts. However, it was noted that this value of land was different from the information provided in the statement of material facts attached with the notice of meeting. Moreover, note 5 to the annual accounts for the year ended 30-06-2004 was related to surplus on revaluation of the assets and did not provide information regarding market value of the land to be sold.



3. The Enforcement & Monitoring Department was of the view that selling the land through negotiations instead of tender in the newspapers may lead to doubts that best possible price has not be obtained from the market. The Company had also not carried out any fresh valuation of the land to be sold, in order to ascertain the present market price in a rapidly changing property prices. Therefore, the Enforcement & Monitoring Department advised the Company not to proceed in the matter as passing of such a resolution would be unlawful and prejudicial to the interest of the shareholders of the Company. Subsequently, a letter dated 10-11-2004 was received by the Enforcement & Monitoring Department which stated that the Company had passed the special resolution in the AGM. However when the Department asked the Company to provide a certified copy of the minutes of the annual general meeting the consultant of the Company stated that Company had not passed any resolution for sale of assets and that the Company intended to hold an EOGM for passing the resolution for sale of the said assets.

4. The Department apprehended that (i) the business of the Company was being conducted with intent to defraud its creditors and members, in a manner oppressive of its members; (ii) the affairs of the Company are not being managed in accordance with the sound business principles and prudent commercial practices; (iii) the affairs of the Company have been so conducted and managed as to deprive the members thereof of a reasonable return; and (iv) the members of the Company have not been given all the information with respect to its affairs, which they might reasonably expect. Consequently, a show cause notice dated 14-12-2004 under section 265 of the Ordinance was issued to the Company asking it to explain why an inspector may not be appointed to investigate the affairs of the Company. After providing an opportunity of being heard to the Company, the Executive Director (CL) appointed Ford Rhodes Sidat Hyder & Company, Chartered Accountants to act as the Inspector and conduct an investigation on all aspects of the operations of the Company. The



Company not being satisfied with the Impugned Order has preferred the present appeal before the Appellate Bench.

5. On the date of hearing, Mr. Hammad Raza appeared before us on behalf of the Company. He stated that he had not been given a proper opportunity of hearing by the Executive Director (CL). He stated that he had requested for an adjournment of the case as he was busy on the particular dates, however his request was denied and he had to cancel his earlier appointments in order to represent the Company. He contended that the Executive Director had prejudged the case and did not consider his arguments. He informed the Bench that the primary business of the Company was production of electric transformers for WAPDA and KESC and due to non-payment of dues by WAPDA and KESC, the financial position of the Company had deteriorated. He stated that Habib Bank Limited had obtained a decree from the High Court against the Company for an amount of Rs.204 million and as a result of negotiations had agreed to settle the liability for Rs.162 million. The sale of surplus land was for the purpose of making the payment to Habib Bank Ltd, so that the banking facility suspended due to the Company's default could be restarted. He stated that the appointment of inspector at this time when the management is making efforts to revive the Company and seek financial facilities would jeopardize all these efforts. He stated that the Company had a clean record and had never failed to file the statutory returns. Moreover, except for one observation, the auditors had never given an adverse report in the accounts. Therefore in light of these facts, the Executive Director's decision to appoint an inspector to investigate all aspects of the operations of the Company was excessive and uncalled for.

6. Mr. Raza further argued that the surplus land of the Company had been sold in a transparent manner and after complying with all legal requirements. The sale of the land had been approved by the shareholders of the Company. He informed the Bench that a statement of material facts was issued under section 160 (1)(b) of the



Ordinance to the shareholders but could not be published in the newspaper. When the irregularity was pointed out by the Commission, instead of taking on the agenda in the AGM, the Company called an EOGM and accordingly the statement of material facts was published in the newspaper. Even then the Company was penalized Rs.20,000/- by the Commission for not publishing the statement of material facts the first time. He argued that the investigation ordered by the Executive Director amounted to punishing the Company twice for the same offence.

7. He stated that the land had been revalued in 2003 by professional valuers and there was no legal requirement to get the land valued again before the sale. He further stated that the auditors of the Company had accepted the value of the assets on the basis of the above revaluation done in 2003. In any case the land had been sold at a price which was higher than the value given in the 2003 re-valuation. He further informed the Bench that the proceeds of the sale of land had been utilized only for two purposes i.e. for repayment of dues to Habib Bank Ltd and to meet the working capital requirements of the Company. He prayed that the Impugned Order be set aside.

8. Mr. Mubasher Saeed, Joint Director (EMD) appearing on behalf of the Executive Director stated that a proper opportunity of hearing was provided to the Appellant by the Executive Director. Mr. Hammad Raza had appeared on the date fixed for hearing and all his arguments were considered by the Executive Director. He stated that as per business practices, the land should have been revalued before sale especially since currently the market value of the land was changing so rapidly. He stated that the auditors of the Company had qualified the valuation of the land stating that the entire land had not been revalued. He further stated that the Commission feared that the land which had been sold was the very same land which had not been revalued in 2003. He argued that selling the land through private negotiations with property dealers was not the proper way and the



Company should have advertised it in the newspaper. He contended that the only way of ascertaining whether there was any discrepancy in the sale of the land was by appointing an inspector. He stated that the appointment of inspector did not amount to penalizing the Company and was only a fact finding exercise. He stated that inspector had been appointed to ascertain whether the sale of land had been done in a transparent manner or not. He prayed that the appeal be rejected and the Impugned Order appointing the Inspector be up held.

9. We have heard the parties at length and also perused the documents on record. It is clear that the appointment of inspector has been made solely for the reason that the Enforcement & Monitoring Department views the sale of land by the Company with suspicion. No other grounds have been made out against the Company for reaching the conclusion that there are circumstances which suggest that any of the grounds mentioned in section 265 (b) exist. However on the basis of reasons given below, we are of the view that the transaction involving sale of land by the Company do not lead to such a suggestion that these grounds exist.

10. What happened with regards to non-publication of the statement of material facts required to be issued under section 160 (1)(b) of the Ordinance is sufficiently clear from the facts stated by both parties. The Company did not follow the laid down procedure and was accordingly penalized for the violation. However, the default was corrected by the Company and the special resolution for disposal of Company's surplus land was later passed by the shareholders in an EOGM and not AGM after it was properly published. The Department insists that the land should not have been sold without carrying out the revaluation, however, it has failed to point out any requirement of law in this regard. Land is required to be re-valued after every three years under the International Accounting Standards and in this case the revaluation was carried out in 2003, just one year before the sale transaction. We also do not find any merit in the argument that the entire piece of 140.10 kanals of



land was not revalued in 2003 and some of it was left out. The Department has not provided any evidence to this effect. Besides the valuation report of Iqbal A. Nanjee & Co. gives the value of entire 140.10 kanals of land as it mentions the value at Rs.140.10 million at the rate of Rs.1 million per kanal.

11. The land has been sold by the Company after completing the legal requirements and for the purpose of paying off a liability which had been reduced through negotiation from Rs.204 million to Rs.162 million. To our minds, this seems like a fair business decision in the interest of the shareholders. Also, the value at which the land has been sold is higher than the value assigned to it by the valuer. We have also noted that although, as mentioned above, the sole reason for appointment of inspector is the doubts with regards to the sale of land, however the terms of reference set for the inspector are very wide. The inspector has been directed to investigate all aspects of the operations of the Company. In our view, the reasons for investigation and the scope of investigation do not correspond with each other. Since no other valid reasons for appointment of inspector have been made out, we set aside the Impugned Order passed by the Executive Director (CL). The appeal is disposed of.

(Shahid Ghaffar)
Commissioner

(Etrat H. Rizvi)
Commissioner

Announced in Islamabad on July 6, 2005