

Appellate Bench Orders

Before Appellate Bench No.3

October 22, 2002

Before Appellate Bench No. 3

In the Matter of

Appeal No. 64 of 2002

Mr. Muhammad Amin Dadabhoy,
Chief Executive,
Dadabhoy Cement Industries Limited
5th Floor, Maqbool Commercial
Complex
Jinnah Housing Co-operative Society
Block No. 7 & 8, Shahrah-e-Fasial
Karachi

.....

Appellant

Versus

Executive Director (Enforcement &
Monitoring) SEC

.....

Respondent

Date of Impugned Order

August 12, 2002

Date of Hearing of appeal

October 17, 2002

Present:

For the Appellant:

Mr. Yousaf Adil, FCA

For the Respondent

1. Mr. Ashfaq A. Khan (Director)
2. Mr. Mubashar Saeed Saddozai (Joint Director)
3. Ms. Uzma Hayat (Joint Director)

Order

This matter before us arises from an appeal by the Appellant against the Order dated August 12, 2002 (the "Impugned Order") of the Executive Director (Enforcement & Monitoring) under sub-section (5) of Section 208 read with Section 476 of the Companies Ordinance, 1984. Brief facts leading to this appeal are as follows:

1. An examination of the annual financial statements of M/s Dadabhoy Cement Industries Limited here-in after called "(company)" for the year ended June 30, 2000 conducted by the Commission revealed that the company had made investments advances to its associated undertakings namely Dadabhoy Construction and Technologies (Pvt.) Ltd., Dadabhoy Trading Corporation (Pvt.) Ltd., Pak German Prefab Limited and Dadabhoy Sack Ltd.

2. The investments advances were found to be higher than the permissible statutory limit of 30% of the paid up capital plus free reserves of the company whose paid up capital plus free reserves as on June 30, 2000 stood at Rs.407.930 million. The investments advances were therefore prima facie in violation of Section 208 of the Ordinance as the said investments advances lacked proper authorization by way of special resolution as required under sub-section (1) of Section 208 of the Ordinance and the company had not recovered any return on these advances.

3. Accordingly a Show Cause Notice was issued to the Chief Executive of the company, by the Respondent, who was called upon to explain the position. Duly authorized representatives of the Chief Executive before the Respondent for hearings held on different dates.

4. The Chief Executive of the company (hereinafter called Appellant) in his reply to the Show Cause Notice and during the hearings before the Respondent pleaded that advances to associated companies were made in normal course of business but he undertook to recover fully the said advances from the associated companies namely Dadabhoy Construction and Technologies (Pvt.) Ltd., Dadabhoy Trading Corporation (Pvt.) Ltd. and Pak German Prefab Limited along with markup. However in case of Dadabhoy Sack Limited advances only in excess of three months' purchases were undertaken to be recovered along with markup as it was pleaded by the Appellant that advances equivalent to three months' purchases were necessarily normal trade credits. In return, Appellant wanted a very lenient view by the Respondent and expected that no penalty would be imposed upon him. The Respondent however considered the subject investments to be in naked violation of section 208 of the Companies Ordinance and imposed penalty of Rs. 300,000/- on the Appellant. The Respondent also continued his action in the matter by directing the Appellant in para 22 of his order to provide the industrial norms prevalent in the cement industry about procurement of paper bags holding that if there is no industrial norm for such huge advances, the company shall recover even advances against three months' purchases along with the mark-up. This appeal lies against imposition of penalty of Rs. 300,000 on the Appellant.

5. Mr. Yousaf Adil, FCA appeared before us on behalf of the Appellant and argued the case. He contended that though the advances provided by Dadabhoy Cement Industries Limited to its associated companies including Dadabhoy Sack Limited were 'normal trade credits', the company preferred to respect regulator's views in the matter instead of disputing it and

recovered the advances along with markup from associated companies and after this response and good gesture of Appellant there was no justification for the penalty which had been imposed by the Respondent.

6. Mr. Ashfaq A. Khan appearing on behalf of the Respondent contended that the Appellant was required to provide the norm prevalent in the cement industry about procurement and supply of paper bags duly certified by their auditors within one month of the Impugned Order, which he failed to provide. He asserted that instead of advances by cement companies for purchases of paper bags, the industry norms suggests that 30-90 days credit is allowed by paper bag manufacturers to cement companies. He pleaded that advances to associated undertakings including Dadabhoy Sack limited were not in the nature of normal trade credits. He further asserted that the Appellant beside making huge advances for purchase of paper bags, made payments to Dadabhoy Sack Limited on day-to-day basis including payments for expenses which could not be treated as normal trade credit and lacked arm's length criterion.

7. As to the assertion of the Appellant that since the Appellant had honoured and accepted the Respondent's views and recovered the advances along with interest there was no justification for the penalty, Mr. Ashfaq A. Khan argued that the violation committed by the Appellant had been established and therefore the Impugned Order was passed in accordance with the provisions of law. He pleaded that Section 208 (5) of Companies Ordinance provides penalty up to Rs. one million for such default and a lenient view was taken by Executive Director (E&M) as company recovered these advances on initiation of proceedings by respondent.

8. Replying to the argument of the Respondent that other cement units in the country instead of paying advance were purchasing paper bags on credit, the Appellant argued that probably the sacks being provided by other sack units in the country were not of the specification required by the Appellant.

9. We have heard both the parties at length and also examined the relevant documents produced by them in support of their contentions. There is a letter on record of the Enforcement Division received from another cement companies i.e. DG Khan Cement Limited in response to an inquiry by the Division in the same matter which indicates that D.G Cement Ltd., purchases paper sack on average credit of 30 to 90 days and no advance is being made to Paper Sack Manufacturers by that company. In these circumstances, huge advances by Dadabohy Cement Ltd., to its associated undertaking does not carry any commercial justification and cannot be termed as normal trade credit. Besides, the company also made advances to other associated companies namely Dadabohy Construction and Technologies (Pvt.) Ltd., Dadabohy Trading Corporation (Pvt.) Ltd. and Pak German Prefab Limited in violation of section 208 of the Companies Ordinance 1984. In view of violations of law to such an extent, we think that Respondents has already taken much lenient view by imposing penalty of Rs. 300,000/- only on the Chief Executive of the company and we therefore, find no reason to interfere with the impugned order of the Executive Director (Enforcement). The order of Executive Director (Enforcement & Monitoring) dated August 12, 2002 is accordingly upheld.

(M. ZAFAR-UL-HAQ HIJAZI)

Commissioner
(Company Law)

(Etrat H. Rizvi)

Commissioner
(Insurance)

Islamabad

Announced : October 22, 2002