



BEFORE
RE-CONSTITUTED APPELLATE BENCH NO. III

In the matter of

Appeal No. 11 of 2004

Industrial Development Bank of Pakistan
through its Chief Manager
Corporate Branch, Hassan Plaza,
2-Arbab Road, Peshawar Cantt.....Appellant

Versus

1. Shaf Industries (Pvt) Limited
2. Commissioner (Company Law) SEC Respondents

Date of Impugned Order April 27, 2004

Date of Hearing of Appeal June 6, 2004

Present:

For the Appellant

Qazi Jawad Ehsanullah, Advocate
Mr. Tahir Latif

For the Respondent No. 1

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For the Respondent No. 2

Mr. Munawar Ali Bhatti, Joint Registrar, SEC



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ORDER

This order will dispose off the instant Appeal No. 11 of 2004 filed under Section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 by Industrial Development Bank of Pakistan (the Appellant) against the order dated April 27, 2004 passed by Commissioner (Company Law).

1. Brief facts of the case are that Shaf Industries (Pvt) Limited (the Company) had obtained a finance facility from the Appellant in year 1992. The repayment of the said facility was secured by mortgage on all present and future assets of the Company amounting to Rs. 37.42 million in favor of the Appellant. The charge created in favor of the Appellant was registered with Joint Registrar, Company Registration Office (CRO), Peshawar. Later on the Company received an equity contribution of Rs. 1.5 million from the NWFP Equity Fund for which the Appellant was acting as the lead manager and the funds were provided by the Government. The charge already created on the assets of the Company to the tune of Rs. 37.42 million in favor of the Appellant was enhanced by Rs. 1.50 million to Rs. 38.92 million and a charge modification certificate was issued by the CRO.
2. In June 2001, the original facility provided by the Appellant was settled by the Company. The Company requested the Appellant on October 27, 2003 to issue a Final Clearance of Liability Certificate to the Company with regards to its liabilities owed to the Appellant as it intended to avail another facility from Muslim Commercial Bank (MCB). The clearance certificate dated October 27, 2003 was issued by the Appellant on the very same day. The clearance certificate was delivered to the Joint Registrar, CRO, Peshawar by the Company along with Form-17 (Memorandum of complete satisfaction of Charge) which was duly



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registered by the Registrar. Thereafter the Appellant filed an application under Section 131 of the Companies Ordinance, 1984 before Commissioner (Company Law) seeking rectification of the register of mortgage/charge of the Company. The Commissioner after hearing the Appellant rejected the application on the ground that the Registrar was justified in recording Form-17 on the production of clearance certificate issued by the Appellant. The Appellant has now come in appeal before us against this order dated April 27, 2004 (the Impugned Order) passed by the Commissioner. The Appeal was heard on June 24, 2004 when Qazi Jawad Ehsanullah, Advocate and Mr. Tahir Latif, Chief Manager of the Appellant appeared before us.

3. Mr. Ehsanullah contended that the Impugned Order was against law, facts and the available record. He argued that the charge should not have been vacated by the Joint Registrar on the basis of the clearance certificate alone as it was not addressed to the Joint Registrar but the Company. He sought to argue that the clearance certificate was with regard to the liabilities of the Appellant only and was not meant for clearing the dues of NWFP Equity Fund. He further argued that the vacation of charge by the Joint Registrar was in violation of the requirements of Section 132 of the Ordinance which provides;

132. Registration of payment or satisfaction of mortgages and charges. - (1) It shall be the duty of a company to give intimation to the registrar of the payment or satisfaction, in full, of any charge or mortgage created by the company and requiring registration under Sections 121 and 122 within twenty-one days from the date of the payment or satisfaction, in full, thereof.

(2) The registrar shall on receipt of such intimation cause a notice to be sent to the holder of the charge or mortgage calling upon him to show cause, within a time, not exceeding fourteen days, to be fixed by such notice, why the payment or satisfaction of the charge or mortgage should not be recorded.



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4. He stated that the requirement of sub-section (2) of Section 132 was not fulfilled by the Joint Registrar and no notice was sent to the Appellant to confirm whether the charge should or should not be recorded.
5. Mr. Munawar Bhatti appearing on behalf of the concerned department and the Commissioner stated that the requirement to issue a notice to holder of the charge or mortgage under sub-section (2) of Section 132 is only in those cases where no intimation has been received from the holder of the charge. He stated that in the present case the Appellant being the holder of the charge had issued a final clearance certificate, which was provided along with Form-17 to the Joint Registrar. That being the case therefore there was no further need to write again to the Appellant. He stated that this was the normal procedure, which was followed by the Companies Registration Offices.
6. After having heard the parties in detail, we believe that the Commissioner has rightly rejected the application of the Appellant for rectification of the register of charges/mortgages. In our opinion, the requirement of the notice to be sent to the holder of the charge under sub-section (2) of Section 132 was fulfilled by the clearance certificate issued by the Appellant. The clearance certificate issued by the Chief Manager of the Appellant states, *"After payment of Rs. 9.950 Million in connection with settlement of IDBP dues, nothing is outstanding against M/s. Shaf Industries (Pvt) Limited in respect of IDBP liabilities only."* The Appellant's contention that the words 'IDBP liabilities only' meant that the liability under NWFP Equity Fund was still payable is incorrect and misconceived due to the fact that Rs. 1.5 million represented an investment in the equity and not a loan from NWFP Equity Fund. The Appellant confirmed that shares were issued by the company accordingly. We are of the view that the law does not provide for creation of charge in favor of a shareholder in respect of equity investment.



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Further the initial charge documents as well as subsequent enhancement of charge was registered in favor of the Appellant only. The onus of due diligence while issuing the clearance certificate was on the Appellant and it should have put it in clear and certain terms if any liability (if the Appellant deemed the equity investment as Liability) was still outstanding. Besides we have also examined the letter dated October 27, 2003 written by the Company to the Appellant for the issuance of the Final Clearance of Liability Certificate. The Company has made its intention very clear that in order to avail a finance facility from MCB it will be creating a charge on the same property and for that purpose it needed a final clearance certificate from the Appellant. The clearance certificate as requested by the Company was issued on the very same day by the Appellant. In the circumstances, we are not inclined to order rectification of the register when a charge has been created and registered in favor of MCB on the same assets, who being an innocent party has relied on the clearance certificate issued by the Appellant and the Memorandum of Complete Satisfaction of Charge (Form-17) issued by the Joint Registrar.

This appeal is dismissed accordingly.

(ETRAT H. RIZVI)

Commissioner (Specialized Companies)

(SHAHID GHAFFAR)

Commissioner (Securities Market)

Announced in Islamabad on July 20, 2004

