



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN
APPELLATE BENCH REGISTRY

BEFORE APPELLATE BENCH NO. II

In the matter of
Appeal No.3 of 2007

Investec Mutual Fund Limited
406, 4th Floor, Trade Centre
I.I Chundrigar Road
Karachi.....Appellant

Versus

Director (NBFC Department)
Securities and Exchange Commission of Pakistan
NIC Building Jinnah Avenue, Islamabad.Respondent

Date of Hearing

June 9, 2009

ORDER

Present:

For the Appellant:
Shafiq Ahmed
Advocate

For the Respondents:
Rashid Paracha
Director (NBFC)

Syed Asad Haider
Joint Director (NBFC)

Vinod Sitani
Joint Director (NBFC)



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1. This order will dispose of the appeal No. 3 of 2007 filed under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 by the Appellant against the order dated 18-10-2006, (the "Impugned Order") passed by Ms. Jaweria Ather, the then Director NBFC (the "Respondent").
2. Investec Mutual Fund Limited (the "Company") was registered on 24-8-1992 as an Investment Company with erstwhile Corporate Law Authority (presently Securities and Exchange Commission of Pakistan, the "Commission") under the Investment Company and Investment Advisor Rules, 1971 (the "ICIA Rules") to carry out the business of close end fund.
3. Show cause notice 8-8-05 was issued to the Company on the grounds that it:
 - a) was managed by an Investment Advisor, namely, Investec Securities Limited ("ISL") since 31-12- 2003 which had not been licensed by the Commission.
 - b) failed to appoint custodian with the prior written approval of the Commission.
 - c) in terms of rule 40(1) of the Non-Banking Finance Companies (Establishment and Regulation) Rules, 2003 (the "NBFC Rules") and condition no. 10 of registration as an Investment Company under ICIA Rules.
 - d) failed to register itself with the Commission as an Investment Company afresh under rule 38 of the NBFC Rules.
 - e) failed to hold its Annual General Meetings (the "AGMs") for the year ended June 30, 2004 as required by section 158 of the Companies Ordinance 1984 (the " Ordinance").



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- f) failed to prepare annual accounts for the year ended June 30, 2004 and lay them before the AGMs as required under section 233 of the Ordinance.
 - g) failed to prepare and circulate quarterly accounts since September 2003 as required under section 245 of the Ordinance.
 - h) accumulated losses amounted to Rs. 97.66 million as per audited accounts of the Company of 30-6-2003 against paid up capital amounting to Rs. 50 million. The Company's equity as on 30-6-2003 stood at Rs. 35.67 million which was far below the minimum prescribed equity level of Rs. 100 million in terms of rule 37(b) of the NBFC Rules.
 - h) distributed only 2% dividend during the last five years amounting to Rs. 2.66 million amongst its shareholders. The shareholders fund had eroded by Rs. 97.66 million as of 30-6-2003, which works out to be 73 % of the paid-up capital.
 - i) Net Assets Value per share as on 30-9-2004 was Rs. 2.27 which is far below the par value of Rs. 10/- per certificate.
4. The Appellant filed written response to the aforementioned show cause and also argued its case before the Respondent. The Respondent after considering the response and being dissatisfied by the averments made by the Appellant passed the Impugned Order and appointed M/s Anjum Asim Shahid Rehman, Chartered Accountants (the "Inspector") under section 265 of the Ordinance to investigate into the affairs of the Appellant as per the Terms of Reference (the "TOR"). The Inspector was appointed on lump sum professional fee of Rs. 300,000/- to be paid by the Company.



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5. Appellant's counsel contended that arguments made in appeal No 84 of 2006 may be adopted, which are reproduced as under:

a) That the Impugned Order was passed without jurisdiction as there was no complaint by members. The action taken falls foul of section 265 of the Ordinance which require that before proceeding under section 265 (b) of the Ordinance some action under section 265(a) of the Ordinance must have been taken. The Commission could have called for investigation only on the basis of resolution passed by members in general meeting or on a declaration by the court in this respect.

b) That the Company and the shareholders have been put under unnecessary expense by imposing a fee of Rs. 300,000/- for appointment of inspector and the cost amounts to penalty on the Appellant.

6. The Appellant's counsel also invited our attention to section 277 of the Ordinance and contended that the inspection fee ought to be have been defrayed by the Commission initially, which could later be recovered from the Appellant.

7. In response to the arguments of the Appellant's counsel the department representative Mr. Asad Haider stated that there is no requirement prescribed in clause (a) of section 265 of the Ordinance which ought to be complied before proceeding under clause (b) of section 265 of the Ordinance. Clause (b) of section 265 of the Ordinance is an independent clause. The power to conduct inspection is however not unfettered as sub clause (i) to (vii) of section 265(b) of the Ordinance provides the pre-conditions for initiation of suo-moto action by the Commission. The departmental representative stressed that the conditions for ordering investigation were fully met and are enumerated in the show cause notice dated 21-6-2005 (referred to in paragraph 3 of this order) as such the case was fit for investigation.



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8. The Appellant's counsel relied on the arguments advanced in appeal No 84 of 2006, and our view is consistent in the instant case :

a) The Appellant's counsel contention on the action taken by the Respondent department directing inspection under section 265 (b) of the Ordinance has been reviewed. Section 265 of the Ordinance is reproduced for ease of reference:

265. Investigation of company's affairs in other cases.- Without prejudice to its power under section 263, the Commission—

(a) shall appoint one or more competent persons as inspectors to investigate the affairs of a company and to report thereon in such manner as the Commission may direct, if—

(i) the company, by a resolution in general meeting, or

(ii) the Court, by order,

declares that the affairs of the company ought to be investigated by an inspector appointed by the Commission; and

(b) may appoint one or more competent persons as inspectors to investigate the affairs of a company and to report thereon in such manner as the Commission may direct if in the opinion of the Commission there are circumstances suggesting—

(i)

(ii)



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(iii) *that the affairs of the company have been so conducted or managed as to deprive the members thereof of a reasonable return; or*

(iv)

(v)

(vi) *that the affairs or the company are not being managed in accordance with sound business principles or prudent commercial practices; or*

(vii) *that the financial position of the company is such as to endanger its solvency:*

Provided that, before making an order under clause (b), the Commission shall give the company an opportunity to show cause against the action proposed to be taken.

Emphasis Added

It is clear from the bare reading of section 265 of the Ordinance that the Commission is entrusted with the powers to appoint an inspector, if it is satisfied that any of the conditions set out in sub clause (i) to (vii) of 265(b) of the Ordinance are met. The Appellant in response to the show cause notice failed to deny the factual allegations referred to in paragraph 3 above. The Appellant in fact responded to the show cause notice by raising irrelevant and immaterial arguments. The other contention raised before us is that the Commission cannot suo moto initiate action under section 265 of the Ordinance. We find this argument bordering on the ridiculous. The Commission as a regulator is obliged to look into the affairs of the entities it regulates, to ensure that their affairs are not being managed in a manner





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which would deprive its members of a reasonable return on their investment; the affairs of the company are managed in accordance with sound business principles and prudent commercial practices; that the financial position is not such as to endanger its solvency, apart from other functions it is required to perform to meet the various objectives of the law. The provisions of section 265 of the Ordinance clearly give the Commission the powers it has sought to exercise in this case. We therefore find no cogent grounds to stop the investigation ordered by the Respondent.

- b) On the issue of cost of investigation to be borne by the Company. We agree with the Appellant's counsel contention that where an investigation is ordered by the Commission itself, the cost ought to be initially defrayed by it and can later be recovered from the Company under section 277 (1) (c) of the Ordinance.

For the foregoing, the Impugned Order is modified to the extent that the investigation shall be conducted by a team comprising of authorized officer/s of the Commission, to be appointed by Director (NBFC). The expenses incurred on the investigation by the Commission shall however be reimbursed by the Company on the conclusion of investigation. The investigation must be conducted keeping in view the guidelines in the TOR and report furnished to the concerned director within 30 days.


(MUHAMMAD SOHAIL DAYALA)
Commissioner (SMD)


(S. TARIQ. A HUSAIN)
Commissioner (LD)

Announced on: 20-7-09