



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO. IV

In the matter of

Appeal Nos. 10 and 11 of 2011

1. Mr. K. Ali. Kazilbash

2. Mr. Javed A. Kayani

..... Appellants

Versus

Executive Director (Registration)

Securities and Exchange Commission of Pakistan

.....

Respondent

ORDER

Date of hearing

03/02/15

Present:

Appellant No 2:

Mr. Javed A. Kiyani

For the Appellants:

Mr. Rashid Sadiq

Department representatives: (through video conference)

Mr. Mubbashar Saeed Saddozai, Director (C&CD)

Mr. Muhammad Akram, Assistant Director (C&CD)

Appellate Bench No. IV

Appeal Nos. 10 & 11 of 2011

Page 1 of 9



Securities and Exchange Commission of Pakistan

1. This order is in appeal No. 10 and 11 of 2011 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 against the order dated 30/12/10 (the "Impugned Order") passed by the Respondent.
2. The facts leading to the case are that the honorable Supreme Court of Pakistan (the "honorable Supreme Court") vide its order dated 02/10/09 passed in Constitutional Petition No. 1709 of 2009 titled *M/s. Pakistan Sugar Mills Association vs. Federation of Pakistan through Secretary Finance & others*, directed the Commission to conduct an inquiry and thereafter submit a report along with note of action on the matter with regard to the passing of so called resolution approved by the Central Executive Committee (the "CEC") of Pakistan Sugar Mills Association ("PSMA") in its meeting allegedly held on 09/09/09. The honorable Supreme Court also directed the Commission to proceed against the individuals or against PSMA as the case may be. The Constitutional petition was filed in the honorable Supreme Court by PSMA on appeal from Order dated 03/09/09 passed by Lahore High Court (LHC) in W.P No. 16096/2009 & W.P No. 15744-Suo Moto 2009. The petition was also accompanied by a resolution dated 09/09/09 allegedly passed by the CEC of PSMA and was signed by the acting chairman, Mr. Javed A. Kayani and Mr. K. Ali Qazilbash, secretary general of PSMA ("Appellants") authorizing the secretary general of PSMA to file appeal against the order of LHC. On perusal of the aforesaid resolution and further from the contradictory statements made by the Appellants before the honorable Supreme Court, it was observed by the honorable Supreme Court that no meeting for passing of the said resolution was convened as neither any minutes of the said meeting were recorded under section 173 of the Companies Ordinance, 1984 (the "Ordinance") nor any notice for attending the meeting was issued as required by law. Further, an attempt to misguide the honorable Supreme Court



Securities and Exchange Commission of Pakistan

was made by producing fake and forged documents and prima facie a criminal offence was committed.

3. The Commission through its Additional Registrar of Companies, Islamabad, conducted an inquiry into the matter and a report dated 15/10/09 was submitted to the honorable Supreme Court which concluded that no valid meeting of the CEC of PSMA was held on 09/09/09 at Lahore.
4. Show Cause Notice dated 18/10/10 ("SCN 2") was issued to the Chairman and other members including the secretary of PSMA under sections 492 and 173 read with section 476 of the Ordinance advising them to explain as to why action may not be taken and penalty as provided under the aforesaid provisions of the Ordinance may not be imposed for making a false statement before the honorable Supreme Court and for non-complying with the mandatory requirements of section 173 of the Ordinance. It is pertinent to mention that earlier a show cause notice dated 19/10/09 ("SCN 1") on the aforesaid provisions was issued by the then Registrar of Companies. The SCN 1 remained inconclusive due to absence of Executive Director (Registration), being the lawful authority to dispose such matters under section 492 of the Ordinance, and therefore, fresh proceedings were initiated. Hearing proceedings in the matter were held on 03/11/10, 08/12/10 and 21/12/10 which were attended by Mr. Athar Minallah, along with Mr. Kayani and Mr. Iskandar of PSMA who explained in detail the circumstances with regard to calling and holding meeting of CEC of PSMA and passing of resolution for filing an appeal before the honorable Supreme Court.
5. The Respondent, dissatisfied with the response, held that: neither formal notice was issued to the members for a meeting of CEC of PSMA to be held on 09/09/09, nor proper minutes recorded and circulated to the members within the time period stipulated under section 173(1) of the Ordinance. Consequently, based on the failure of the CEC of PSMA to observe



Securities and Exchange Commission of Pakistan

procedural requirements laid down in the articles of association of PSMA and the provisions of the Ordinance prior to the presentation of the alleged CEC resolution of PSMA dated 09/09/09 before the honorable Supreme Court, no valid meeting was held on 09/09/09 and no valid resolution was passed. Further, it was concluded that a false resolution was presented before the honorable Supreme Court by deliberately concealing the material facts about the procedural lapse in calling and convening of meeting which was material in nature and attract the penal provisions as contained in section 492 read with section 476 of the Ordinance. The Respondent in exercise of the powers conferred under section 492 of the Ordinance, imposed a penalty of Rs.100,000 on Appellant No. 1 and Rs. 500,000 on Appellant No.2 with the total amount aggregating to Rs. 600,000. Further, all members of PSMA were also advised to comply with the mandatory requirements of law in future.

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

a. In reaching the conclusion that valid meeting was not held, the Commission concerned itself with purely factual controversies without even a hint of legal analysis of the situation. The Commission has not adverted to take notice of the well-established law that in the absence of any objection by a director, no meeting of directors or proceedings can be challenged under any law, as has been clearly stated in the Ramaiya's Guide to Companies Act, 3512 as follows:

"Where notice is not given as required but all directors attend the meeting and do not object to the absence of notice, or where the absentee directors do not complain of want of notice, the proceedings at the meeting will not be invalid, especially, if they are ratified at a subsequent meeting at which the absentee directors are present."



Securities and Exchange Commission of Pakistan

In *Lackawanna Pants Manufacturing Co. v. Wiseman*, 133 F.2d 482 (6th Cir. 1943), the court stated that a special meeting of directors held without notice to a director was valid when no director or shareholder objected and when there had been subsequent tacit approval by the corporation.

In the instant case, since no director objected to the directors' resolution dated 9 September 2009 to file an appeal before the Supreme Court and since, for avoidance of doubt, the full-strength of the CEC ratified the said resolution, there was no legal justification whatsoever to question or challenge the authenticity of the directors' meeting or resolutions passed therein on 9 September 2009. Being the apex corporate regulator, it was responsibility of the Commission to have presented the true legal status, powers and discretions of company directors' to the Honorable Supreme Court in light of the Companies Ordinance, 1984, legal precedents, business judgment rule, indoor management rule, and other elements of corporate jurisprudence. However, the Commission instead chose to rely purely on minor technical issues with the aim of declaring the meeting "invalid", which was an incorrect statement of law.

Further, the Commission's view in the Revised Report to the Honorable Supreme Court that "the law and articles of association require and proprietary demands that proper notice of meeting must be given" is contrary to the law.

There is nothing in the Companies Ordinance, 1984, the Articles of Association of PSMA or any rules, regulations of SECP that a meeting cannot be held without a notice.

It is a well-established law that Notice of meeting is an entitlement and it can be waived and attendance at meetings and concurrence of the



Securities and Exchange Commission of Pakistan

members/directors is treated as waiver of notice. Even in the case of listed companies, the Code of Corporate Governance states that "All written notices, including the agenda, of the meetings shall be circulated at least seven days prior to the meetings, except in the case of emergency meetings, where notice period may be reduced and waived."

In terms of Articles of Association of PSMA and general law, the Executive Committee is fully authorized for conduct of its meeting in the manner, it thinks appropriate. The Impugned Order, therefore, is not sustainable.

- b. the members of CEC of PSMA informed the Respondent that a decision for filing the appeal before the honorable Supreme Court was made in an emergent meeting called at Lahore with concurrence of all the members of CEC of PSMA. In terms of the articles of association of PSMA, five (5) members were present at the time of the meeting, which constituted the required quorum for the meeting. Moreover, another five (5) members had also consented to the resolution passed at Lahore for filing the appeal before the honorable Supreme Court against the order dated 03/09/09. The decision was later ratified by a duly convened and held meeting of CEC of PSMA on 12/10/09. The issue of procedural formalities and lapses in passing a resolution or holding a meeting of CEC of PSMA is something which does not invalidate a resolution. Neither the Ordinance nor the articles of association of PSMA provides any form of notice or mode of service of meeting of directors. In the circumstances, if the directors are informed over phone about the meeting with a shorter notice, the same is acceptable. Reliance was placed on Table C of the Ordinance, containing model article of association for a company limited by guarantee. The model articles does not require any formality with regard to the mode and manner of notice and length of notice. Moreover, if the minutes are delayed or not prepared, the provisions of section 173(1) of the Ordinance are attracted and in such a



Securities and Exchange Commission of Pakistan

situation, it cannot be concluded that the meeting is not held as there was no notice issued or minutes prepared. In such a situation, the statements of persons present in the meeting whether board or shareholders meetings would be sufficient evidence of holding of the meeting. The declaration in the Impugned Order that the resolution of CEC of PSMA was fake resolution on the basis of a procedural lapse is highly unjustified;

- c. there are two show cause notices in field. SCN 1 was issued by the Registrar of Companies under section 173, 492 read with section 476 of the Ordinance. Hearing in the SCN 1 was held on 05/11/09, however, no order was passed. The SCN 2 was issued after one year for which the hearing was held and later the Impugned Order was passed. The issuance of SCN 2 without concluding the SCN 1 was abuse of the process and as a result both show cause notices should be deemed bad at law; and
- d. the basic fact finding inspection report does not allege violation of section 492 of the Ordinance and the report of the Additional Registrar of Companies before the honorable Supreme Court also does not allege violation of section 492 of the Ordinance. The Respondent, erred in holding that violation of section 492 of the Ordinance was committed as the decision of filing an appeal before the honorable Supreme Court was made by all the CEC members of PSMA on 09/09/09. The Respondent failed to appreciate that this provision is applicable only, where any false statement is knowingly and willfully made.

7. The department representative argued that:

- a & b) the meeting held on 09/09/09 was a zonal meeting of PSMA and not CEC meeting of PSMA. Neither a formal notice as required by the articles of association of PSMA was issued to the members of the CEC of PSMA, nor



Securities and Exchange Commission of Pakistan

proper minutes prepared and circulated to the members within 14 days of the meeting as required under section 173(1) of the Ordinance. On the basis of contradictory statements of the members of CEC of PSML and the non-production of record/documents by PSMA, the Respondent concluded that no valid meeting of CEC of PSMA was held on 09/09/09;

- c) the SCN 1 was issued on the basis of inspection report as well as the observation of the honorable Supreme Court in two orders dated 01/10/09 and 02/10/09. The SCN 1 was issued by the then Registrar of Companies but remained inconclusive due to absence of the Executive Director (Registration), being the lawful authority to dispose such matters under section 492 of the Ordinance. In order to conclude the matter SCN 2 was issued by the Respondent. The Appellants did not raise the objection on the issuance of SCN 2 before the Respondent and cannot legally raise the issue at the appellate level; and
- d) the Appellant has not acknowledged the revised report dated 20/10/09 submitted before the honorable Supreme Court of Pakistan which states that *prima facie* violation of section 492 of the Ordinance has been committed and a show cause notice has also been issued to the Appellants. The provisions of section 492 of the Ordinance clearly provides that, whoever, in any report required under the Ordinance makes a statement which is false, shall be punishable. The fake resolution dated 09/09/09 was presented before the honorable Supreme Court and the Additional Registrar of Companies by deliberately concealing the material fact about the procedural lapse in calling and convening of meeting which was material in nature and attract penal provisions of section 492 of the Ordinance.

8. We have heard the parties and have gone through the record. In terms of article 39 (iii) of the articles of association of PSMA, the secretary of PSMA



Securities and Exchange Commission of Pakistan

is required to issue and give notices of all general meetings and meetings of the committee, standing committee, sub-committee, however, it has been noted that no such notice was served for the meeting held on 09/09/09. The statement of Mr. K Ali Qazilbash, Secretary to PSML before the Additional Registrar of Companies that no meeting of CEC of PSML was held on 09/09/09 and the meeting was in fact of the 'Zonal Committee of Punjab' of PSML, which was endorsed by another member namely Mr. Muhammad Shahid Shafi cannot be ignored. However, the fact that majority of directors stated that meeting was held and the decision was later ratified by a duly convened and held meeting of CEC of PSMA on 12/10/09 holds ground. The issue of procedural formalities and lapses in passing a resolution or holding a meeting of CEC of PSMA does not invalidate a resolution.

9. In view of the fact that no member objected to the decision and the same was later ratified by a duly convened and held meeting of CEC of PSMA on 12/10/09, we are of the view that a valid meeting was held and that the procedural lapse in passing a resolution or holding a meeting of CEC of PSMA does not invalidate a resolution. The Impugned Order is set aside with no order as to cost.

(Fida Hussain Samoo)
Commissioner (Insurance)

(Zafar Abdullah)
Commissioner (SMD)

Announced on: **24 APR 2015**