



# Securities and Exchange Commission of Pakistan

## BEFORE APPELLATE BENCH NO. IV

In the matter of

Appeal No. 18 of 2014

Mr. Muhammad Sohail Tabba

.... Appellant

Versus

Director Enforcement, SECP

.... Respondent

Date of hearing

06/04/15

### ORDER

#### Present:

#### For Appellant:

1. Mr. Muhammad Waseem, Partner, Rahman Sarfaraz Rahim Iqbal Rafiq, Chartered Accountants
2. Mr. Muhammad Toufique Yusuf, Director Finance and Company Secretary, Fazal Textile Mills Limited

#### For the Respondent

1. Mr. Ali Azeem Akram, Director Enforcement
2. Ms. Ayesha Riaz, Joint Director Enforcement

1. This order shall dispose of Appeal No. 18 of 2014 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 against the order dated 31/03/14 (the "Impugned Order") passed by



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the Respondent for non-compliance with the provisions of 160 and 208 of the Companies Ordinance 1984 (“the Ordinance”).

2. The appeal was fixed on 06/04/15 and parties were heard at length. As per pleadings and submissions made by the parties, facts pertaining to the appeal are that the Respondent carried out the examination of the audited financial statements of Fazal Textile Mills Limited (“the Company”) for the year ended June 30, 2012 filed with the Commission in terms of section 233 of the Ordinance and statement under section 160(1)(B) of the Ordinance, a certified true copy of the minutes of Extra Ordinary General Meeting (“EOGM”) submitted via letter dated June 20, 2012 by M/s Rahman Sarfraz Rahim Iqbal Rafiq Chartered Accountants on behalf of Appellant. On review of the previous records of the Company submitted to the Commission it was noted that the Company was granted approval by the shareholders under Section 208 of the Ordinance at EOGM dated September 14, 2010 for equity investment of Rs. 500 million in an associated company namely Lucky One (Private) Limited (“Lucky One”) to build, construct and develop a mega mall and residential towers project on the Company’s 10.22 acres of land and subsequently run, manage and maintain the same upon terms to be agreed.
3. The aforesaid approval for equity investment in Lucky One was obtained in connection with an earlier approval granted by the shareholders of the Company in their meeting held on October 28, 2008 to enter into a joint venture agreement with Lucky Textile Mills Limited for construction and development of mall/residential towers project to be executed through incorporation of a private limited company (Lucky One) being a special purpose vehicle. As per terms of the Joint Venture Agreement, annexed to the notice of EOGM, Lucky One had to be jointly owned and controlled by the Company and Lucky Textile who shall invest and share profit and loss of the



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Project in 66.28% and 33.72% ratio respectively (determined on the basis of land contributed to the project by both the entities).

4. However, on review of the annual audited accounts of the Company for the year ended June 30, 2012 and 2013 it was noted that following amounts were advanced to Lucky One:

Year	2013	2012
Mobilization advance in Rupees	655,612,000	157,075,000

5. It was also noted that the Company had not acted in accordance with the shareholders' approval of EOGM dated September 14, 2010 and has not made equity investment of Rs. 500 million in Lucky One. Further the Company has not fulfilled requirement of disclosures as outlined in S.R.O. 865(I)/2000 dated December 06, 2000 ("the S.R.O.") and the Regulation 4(2) of the Companies (Investment in Associated Companies or Associated Undertakings) Regulations, 2012 ("the Regulations") in subsequent general meetings for June 30, 2011 and June 30, 2012. Requirements of aforementioned the S.R.O and the Regulations are as follows:

- a. As per S.R.O. disclosure of following material facts in the statement under section 160 of the Ordinance, annexed with the notice of meeting seeking shareholders' approval under Section 208 of the Ordinance:

*"2. In case any decision to make investment under authority of a resolution is not implemented till the holding of a subsequent general meeting, its status including the following must be explained to the shareholders through a statement under sub-section (1) of section 160 of the Companies Ordinance, 1984 (XLVII of 1984), namely:-*

- i. Reasons for not having made investment so far; and*



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ii. *Major change in financial position of Investee Company since date of last resolution.*

3. *In the event of default in complying with this Order, the Company, and every officer of the company who willfully authorizes or permits default shall be liable to a fine which may extend to one thousand rupees for every day during which the default continues”.*

- b. Regulation 4(2) of the Companies (Investment in Associated Companies or Associated Undertakings) Regulations, 2012, repealing SRO 865 also require similar disclosures and states:

*“In case any decision to make investment under the authority of a resolution passed pursuant to provisions of section 208 of the Ordinance is not implemented either fully or partially till the holding of subsequent general meeting(s), the status of the decision must be explained to the members through a statement having the following details namely:-*

- a. *Total investment approved;*
- b. *Amount of investment made to date;*
- c. *Reasons for not having made complete investment so far where resolution required it to be implemented in specified time; and*
- d. *Material change in financial statements of associated company or associated undertaking since date of the resolution passed for approval of investment in such company.”*

6. After examination of aforementioned record, the Respondent vide letter dated September 02, 2013, sought explanation from the Company on the issue in controversy. In response the Company submitted that it has decided not to



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make equity investment in Lucky One, but to directly fund the project cost. It was further informed that the share capital of Lucky One was subscribed by two shareholders of the Company and one shareholder of Lucky Textile Mills Limited instead of the Companies themselves. Revised joint venture agreement was also submitted dated February 23, 2013 in which Lucky One was granted project supervision and was entitled to project supervision fee@ 0.25% of payments made to sub-contractors on quarterly basis. This arrangement of direct funding the cost of the project and consequently granting mobilization advances to Lucky One instead of equity injection was prima facie against the above referred approval granted by shareholders under section 208 of the Ordinance.

7. After receipt of the above referred examination letter, the Company published a notice of Annual General Meeting on October 07, 2013 in the newspapers, seeking shareholders' approval for modifications to resolution passed on September 14, 2010. The Company sought shareholders' approval for making direct funding for meeting the cost of the project, instead of making equity investment in Lucky One, in accordance with agreement dated February 23, 2013, entered into by joint venture parties for payment of supervision fee to Lucky One.
8. In the above stated circumstances, consequently, a Show Cause Notice ("SCN") was issued on October 11, 2013 to the Directors of the Company, pointing out the non-compliance of requirements contained in section 160 and 208 read with section 476 of the Ordinance. For reference sections 160(1)(b) and 208 of the Ordinance are reproduced respectively:

*"Section 160(1)(b) Provisions as to meetings and votes. where any special business, that is to say business other than consideration of the*



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*accounts, balance-sheets and the reports of the directors and auditors, the declaration of a dividend, the appointment and fixation of remuneration of auditors, and the election or appointment of directors, is to be transacted at a general meeting, there shall be annexed to the notice of the meeting a statement setting out all material facts concerning such business, including, in particular, the nature and extent of the interest, if any, therein of every director, whether directly or indirectly, and, where any item of business consists of the according of an approval to any document by the meeting, the time when and the place where the document may be inspected shall be specified in the statement”*

***“Section 208 Investments in Associated companies and undertaking;***

*(1) Subject to sub-section (2A) a company shall not make any investment in any of its associated companies or associated undertakings except under the authority of a special resolution which shall indicate the nature period and amount of investment and terms and conditions attached thereto.*

*Provided that the return on investment in the form of loan shall not be less than the borrowing cost of investing company.*

***Explanation:*** *The expression ‘investment’ shall include loans, advances, equity, by whatever name called, or any amount, which is not in the nature of normal trade credit.*

*(2) No change in the nature of an investment or the terms and conditions attached thereto shall be made except under the authority of a special resolution.*



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*(2A) The Commission may-*

*(a) by notification in the official Gazette, specify the class of companies or undertakings to which the restriction provided in sub-section (1) shall not apply; and*

*(b) through regulations made thereunder, specify such conditions and restrictions on the nature, period, amount of investment and terms and conditions attached thereto, and other ancillary matters, companies as it deems fit.*

*(3) If default is made in complying with the requirements of this section, or regulations, every director of a company who is knowingly and wilfully in default shall be liable to fine which may extend to ten] million rupees and in addition, the directors shall jointly and severally reimburse to the company any loss sustained by the company in consequence of an investment which was made without complying with the requirements of this section."*

9. The Company submitted its reply to SCN vide letter dated November 02, 2013. In reply it was stated that the provisions of Section 160 and Section 208 of the Ordinance were complied with. However, the Respondent being dissatisfied with the reply of the Company imposed penalty of RS. 100,000 under sections 160 and 208 of the Ordinance on the Chief Executive Officer of the Company and Directors were warned to ensure strict compliance with the relevant provisions of the Ordinance in future.

10. The Appellant has preferred this appeal on the following legal grounds. They stated that the respondent has:

- i. totally disregarded the fact that the appellant had been confirmed with the required authority by the shareholders vide Special Resolution dated



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September 14, 2010 singly to do, perform and take any and all acts, deals and decisions from time to time as may be required vis-à-vis the management/affairs of Lucky One (Pvt) Limited.

- ii. failed to appreciate the submissions made by the Appellant that the management of the Company holds more than 92% shareholding of the company and 100% of its Joint Venture Partner, Lucky Textile Mills limited and they have majority in Directors meeting as well as on general meetings due to which they could not have faced any difficulty for approval of any special resolution or changes in any special resolution if at all required to be approved by the shareholders.
- iii. not appreciated the fact that the appellant has always kept informed the shareholders about the progress of the project through Director's Reports and modification in the best interest of the Company were also duly approved by the shareholders.
- iv. failed to appreciate the fact that the appellant belongs to a renowned Y.B. Group i.e. Younus Brothers Group established about 50 years ago and is one of the largest business groups of Pakistan enjoying reputation for best practices, ethical standards and professional management. A glance at the Group's performance is evident of its market standing and reputation.
- v. by imposing penalty of Rs.100,000/- without any cogent premise on the appellant has failed to appreciate its damaging effect to the prestige and reputation to the Group in Pakistan or Internationally.



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11. On the basis of above mentioned grounds and verbal submissions made by the Appellant, it was requested to set aside the Impugned Order being unlawful.
12. The Respondent denied the claim of Appellant that the requirements of sections 160 and 208 were not violated and therefore categorically rebutted the arguments made on behalf of Appellant during the course of hearing and grounds taken in appeal. The Respondent stated that:
- i. submission made by the Company that it was authorized by Special Resolution dated September 14, 2010 (“the Resolution”) to perform all acts, deals and take decisions from time to time as may be required for the management of Lucky One, is against the express provisions envisaged in Section 160 of the Ordinance. Section 160 which clearly require the Company to provide and update of resolutions passed thereunder to its shareholders.
  - ii. mandate accorded vide Special Resolution dated September 14, 2010, the Company had to invest up to Rs.500 million jointly in Lucky One, against issuance of ordinary shares of Rs. 10 each, however no such investment was ever made, rather investment in Lucky One was made through mobilization advance, which was contrary to the aforesaid Special Resolution.
  - iii. initially approval of project was granted by the shareholders of the Company in their meeting held on October 28, 2008, thereafter aforesaid approval for equity investment in Lucky One was obtained through the Resolution, therefore it could be safely concluded that the Company was fully aware of the requirement of law and they have previously practiced the same, therefore willful default on part of the Company is established.



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iv. Company published notice of Annual General Meeting on October 07, 2013, after explanation letter of the Commission, to seek shareholders' approval for modifications to resolution passed on September 14, 2010 which is evident of the fact that the Company has committed the willful default and relevant provisions were not complied with. Therefore, the Respondent requested to dismiss the appeal.

13. We have heard the parties and the perused the record and carefully considered the facts of the case and the submissions placed before the Bench by the parties.

14. Appellant submitted that the company was authorized by Special Resolution dated September 14, 2010 singly to do, perform and take any and all acts, deals and decisions from time to time as may be required for the management of Lucky One. The Appellant were authorized by the resolution to perform work in accordance with the approval of the shareholders only. In accordance with provisions of section 160 of the Ordinance, the Company was required to provide an update on resolutions passed thereunder to its shareholders in the manner specified therein. However, the Company failed to establish its claim and to produce any evidence in this regard. As matter of fact shareholders were never updated on the progress of the project as required under the relevant law.

15. Further, the Company had to invest up to Rs.500 million jointly in the newly incorporated associated company Lucky One, however no such investment was made in accordance with the mandate accorded vide the resolution. The statement under section 160(1)(b) stated that the investment in Lucky One had to be done against issuance of ordinary shares of Rs. 10 each, but Note 4.2.7 of the financial statements disclosed that the Company has given mobilization



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advance amounting to Rs. 157M to Lucky One, which was beyond the mandate conferred through above stated resolution.

16. The Appellant further submitted that “the management of the Company holds more than 92% shareholding of the Company and 100% of its Joint Venture Partner, Lucky Textile Mills limited and they have majority in Directors meeting as well as in general meetings they could not have face any difficulty for approval of any Special Resolution or changes in any Special Resolution if at all required to be approved by the shareholders. Instant ground of appeal is self-explanatory that the Company had no issue or hindrance to pass subsequent Special Resolution, however it failed to comply with the relevant provisions of law which clearly establish the willful default on part of the Company.
17. The Appellant also submitted that “it is on record that the appellant has always kept informed the shareholders about the progress of the project through Directors’ Reports and modification in the best interest of the Company were also duly approved by the shareholders.” Appellant has tried to establish that shareholders were taken into confidence through Directors’ Report regarding modifications and shareholders duly approved the same, however Appellant has failed to produce any evidence that shareholders have passed any further Special Resolution to override the effect of the earlier Resolution of September 14, 2010.
18. In our view, as per facts, shareholders of the Company accorded approval for investment in Lucky One in terms of section 208 of the Ordinance and the S.R.O. which require a listed Company to give an update on the status of implementation of the project approved by the shareholders through a resolution in subsequent general meeting including reasons for not investing



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in the project so far and major change in the financial position of the investee, however the Company failed to do so.

19. Appellant further submitted that the Respondent has not considered the fact that Appellant belongs to renowned Y.B.Group. Appellant has taken an Interesting ground of Appeal and tried to get benefit over others, therefore it is necessary to make it clear that Appellate Bench has to decide the appeals on merit independently without considering the consequences. Here we would refer a guided famous legal maxim "Fiat justitia, ruat coelum: Let justice be done, though the heavens should fall".
20. Appellant Bench has to decide the case on the basis of facts and without getting influenced by the status of group companies. Further, Appellate Bench is committed to implement the established principle of jurisprudence which says that;  
  
"Justice should not only be done, but should manifestly and undoubtedly be seen to be done."
21. The Company committed willful default and it is evident from the fact that after receipt of the Respondent letter dated September 02, 2013, the Company published notice of Annual General Meeting on October 07, 2013 in the newspapers, seeking shareholders' approval for modifications to the earlier Resolution of September 14, 2010.
22. The above facts of the case establish that the Appellant has committed willful default by not complying with the requirements contained in section 160 and 208 of the Ordinance and failed to timely intimate the shareholders, about the status of their approved equity investment in associated company, through



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notices of following AGMs, in accordance with the applicable requirements, therefore penalty was rightly imposed on the Company by the Respondent.

23. In view of the aforesaid, we see no reason to interfere with the Impugned Order dated 31/03/14 passed by the Respondent for non-compliance of the provisions of sections 160 and 208 of the Ordinance, therefore appeal is dismissed with no order as to cost.

( **Fida Hussain Samoo** )  
Commissioner (Insurance)

( **Zafar Abdullah** )  
Commissioner (SCD)

Announced on: **24 APR 2015**