

SECURITIES & EXCHANGE COMMISSION OF PAKISTAN
APPELLATE BENCH REGISTRY

BEFORE APPELLATE BENCH NO. II

In the matter of

Appeal No. 27 of 2008

1. Muhammad A Jamal
2. Yasien A Jamal
3. Mustafa Pyarali

..... APPELLANT NO 1
..... APPELLANT NO 2
..... APPELLANT NO 3

Versus

Rizwan Ali Sherali

..... RESPONDENT

Date of Hearing

July 30, 2009

ORDER

Present:

Appellants:

Mr. Mustafa Pyarali
Mr. Yasien A Jamal
Mr. Mustafa Pyarali

Respondents:

Rizwan Ali Sherali

For the Respondents:

Syed Irshad ur Rehman
Advocate



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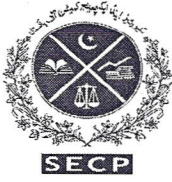
1. This order will dispose of the appeal no. 27 of 2008 filed by the Appellants against the order dated 10-4-2008, (the "Impugned Order") passed by Executive Director, Registration (the "E.D Registration").
2. The Appellants filed an application under section 263 of the Companies Ordinance, 1984 (the "Ordinance") with the Securities and Exchange Commission of Pakistan (the "Commission"). It was alleged that the shares in M/s Cott Knit (Pvt) Ltd. (the "Company") have been transferred from Appellant no 1 and 2 to the Respondent fraudently and in contravention of the articles of association and therefore an investigation should be ordered by the Commission.
3. The E.D Registration sought the reply of the Respondent on the application filed by the Appellants and after hearing the parties dismissed the application through the Impugned Order on two grounds; firstly, the Appellants were not holding 10% shares in the company and in terms of section 263 of the Ordinance, a member holding less than one-tenth of the total voting power is not entitled for making application for investigation of the affairs of the company; secondly, the dispute between the parties relates to shareholding as such the Appellant can seek the relief under section 152 of the Ordinance.
4. Appellant No 3 in support of the appeal against the objections in the Impugned Order stated that:
 - a) E.D Registration at the time of making the Impugned Order did not take into account the fact that the Appellants were holding more than 10% shares. Reliance was placed on authority letter dated 9-5-07 filed by Appellant No 3 along with the amended complaint authorizing him to take action against the Respondent. It was contended that E.D Registration was provided the authority letter which was not taken into account. The shareholding of Respondent No 3 including those who had authorized him to file the complaint was more than 27% of the total shareholding at that time.



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b) The application should have been decided after looking into the facts as serious violation of the Ordinance and articles of association of the company have been made by the Respondent. On facts the Appellants made the following arguments before the Appellate Bench (the "Bench") and followed it with the written arguments:

- i) Respondent in violation of article 12 and 13 of the articles of association of the Company entered into an agreement dated 23-4-2004 with Appellant no 1 and 2 for acquiring their entire shareholding. Appellant No 3 upon receiving the information of the agreement called upon Appellant No 1 and 2 to cancel the agreement which was in violation of the articles of association as notice of transfer of shares was not served on other shareholders. The Appellant No 1 and 2 decided to cancel the agreement as it was against the articles of association of the Company and informed the Respondent accordingly. Company Registration Office ("CRO") Karachi was also informed, however, the officers of CRO Karachi failed to take any action on the complaint of the Appellants and the shares were transferred in the name of the Respondent.
- ii) The agreement dated 23-4-2004 is not a valid agreement as it has not been properly signed. The transfer deed is forged as it has been made on 7-1-05 after lapse of one year and seven months and the consideration alleged to have been paid as per the transfer deed has actually not been paid till date to Appellant No 1 and 2.
- iii) The Respondent has made fabricated notices in order to comply with the requirements of the articles of association and therefore the matter should be independently investigated by the Commission in order to ascertain the true facts.

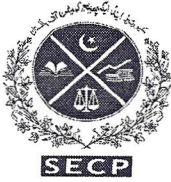


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- iv) That the Respondent filed form 29 with the CRO Karachi showing that Appellant No 3 had resigned from the office of CEO/Director and declared himself as CEO, when in fact Appellant No 3 had never resigned. The CRO Karachi was asked to provide form 29 showing the resignation letter, however, only revised form filed by the Company after the resignation of the Appellant No 3 was available and form 29 showing resignation of the Appellant No 3 has not been provided despite a written request.
- v) Notices of AGM dated 29-10-05 were not sent in accordance with the requirements of section 158, 232 and 233 of the Ordinance and were also in violation of clause 29 of Articles of Association.
- vi) In the AGM dated 29-10-05, Mr. Sadiq Husain was appointed as proxy for late Ghulamali Rehmattulah who passed away on 14-6-96, whereas his shares were transferred in the year 2005 by his attorney Mr. Sadiq Hussain. The attorney given by late Ghulamali Rehmattulah became void on his death and only the legal heirs could have transferred the shares.

5. The counsel for the Respondent stated that:

- a) The case for initiating investigation under section 263 of the Ordinance is not made out as the Appellants do not have 10% shareholding. The application for investigation was made by the Appellants after the shares of Appellant No 1 and 2 were transferred to the Respondent as such the Appellants are not holding more than 10% shares.
- b) The counsel for Respondent on facts stated that:
 - i) The Respondent entered into an agreement dated 23-4-2004 with Appellant no 1 and 2 for acquiring their entire shareholding. Part



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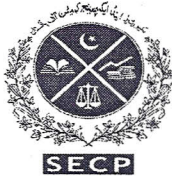
consideration was paid by the Respondent at the time of the agreement. The shares were transferred as per the terms of the agreement, however, Appellant No 1 and 2 on being incited by Appellant No 3 are not ready to receive the balance consideration. It was contended that the Respondent is ready to pay the balance consideration to Appellant No 1 and 2.

- ii) The counsel for the Respondent denied the allegations made by the Appellants regarding contravention of article of association of the Company, issuance of fabricated notices, holding of AGM in violation of the provisions of the Ordinance.

7. We have heard the parties at length. Our findings on the issues are as under:

- a) The application for investigation was made by the Appellants and as per the record available with the department, revised and amended complaint was filed by the Appellant on 16-5-2007. The revised and amended complaint was supported by an authority letter dated 9-5-07 from eight shareholders who along with Respondent No 3 held more than 27% of the total shareholding at that time and had authorized Appellant No 3 to take action against the Respondent. This aspect was ignored in the Impugned Order and the application of the Appellants was dismissed on ground that the Appellants were not holding 10% shareholding. We believe that the authority letter should have been taken into account and therefore do not concur with the views of E.D (Registration) that Appellants did not have sufficient shareholding for making an application for investigation.
- b) Respondent No 1 entered into agreement dated 23-4-2004 with Appellant No 1 and 2 in contravention of article 12 and 13 of the articles of association of the Company which require that proposing transferor should give a notice to the Company and the Company should within 28 days after being served with the notice find a member willing to purchase the

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shares. In our view the contravention of the articles has made the agreement void especially in light of objections by over 27% shareholders. The Appellants should however approach the Court of competent jurisdiction for declaration to the effect.

- c) We are also inclined to look into the other ground for dismissal of the application of section 263 of the Ordinance as stated in the Impugned Order that since the dispute relates to shareholding therefore the Appellants should seek the relief provided under section 152 of the Ordinance. Section 152 of the Ordinance is reproduced for ease of reference:

152. Power of Court to rectify register. - (1) If--

- (a) *the name of any person is fraudulently or without sufficient cause entered in or omitted from the register of members or register of debenture-holders of a company; or*
- (b) *default is made or unnecessary delay takes place in entering on the register of members or register of debenture-holders the fact of the person having become or ceased to be a member or debenture-holder;*

the person aggrieved, or any member or debenture-holder of the company, or the company, may apply to the Court for rectification of the register.

(2) *The Court may either refuse the application or may order rectification of the register on payment by the company of any damages sustained by any party aggrieved, and may make such order as to costs as it in its discretion thinks fit.*

(3) *On any application under sub-section (1) the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or debenture-holders or alleged members or debenture-holders, or between members or alleged members, or debenture-holders or alleged debenture-holders, on the one hand and the company on the other hand; and generally may*



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decide any question which it is necessary or expedient to decide for rectification of the register.

(4) An appeal from a decision on an application under sub-section (1), or on an issue raised in any such application and tried separately, shall lie on the grounds mentioned in section 100 of the Code of Civil Procedure, 1908 (Act V of 1908),--

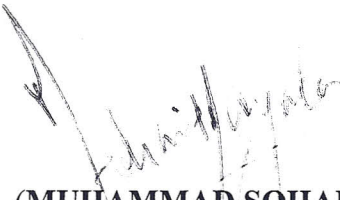
- (a) if the decision is that of a civil court subordinate to a High Court, to the High Court; and*
- (b) if the decision is that of a Company Bench consisting of a single Judge, to a Bench consisting of two or more Judges of the High Court.*

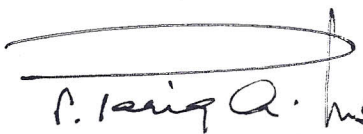
Emphasis added

The Appellants No 1 and 2 have contended that names are fraudulently omitted from the register of members. In terms of section 152 (1) of the Ordinance, where the name of any person is fraudulently or without sufficient cause entered in or omitted from the register of members, the aggrieved person may approach the Court of competent jurisdiction for relief.

8. The Appellant may seek the relief from the Court of competent jurisdiction.

9. In view of the above, the appeal is dismissed. No order as to cost.


(MUHAMMAD SOHAIL DAYALA)
Commissioner (SMD)


(S. TARIQ ASAF HUSAIN)
Commissioner (LD)

Announced on: 21-10-09