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SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN

Adjudication Department- I
Adjudication Division

ORDER	
Name of Company:	M/s. Sarmaya Microfinance (Pvt.) Limited
Show Cause Notice No. & Date:	No. SECP/SCD/ADJ-I/Sarmaya/68/2022-107 dated February 22, 2024
Respondents:	(i) M/s. Sarmaya Microfinance (Pvt.) Limited
Date(s) of Hearing(s):	(i) May 13, 2024; and (ii) May 2, 2025.
Case represented by:	(i) Mr. Muhammad Sohaib; and (ii) Ms. Nazish Fattah. (as the Authorized Representatives)
Provision of law involved:	Section 153(i) and Section 175 of the Companies Act, 2017, read with Section 479 thereof.
Date of Order	May 23, 2025

This Order shall dispose of the proceedings initiated by the Securities and Exchange Commission of Pakistan (the "Commission") through the Show Cause Notice No. SECP/SCD/ADJ-I/Sarmaya/68/2022-107 dated February 22, 2024 ("SCN") against the M/s. Sarmaya Microfinance (Pvt.) Limited (the "Company/Respondent"), under Section 153(i) read with Section 175 of the Companies Act, 2017 (the "Act").

2. The Company was incorporated on November 29, 2021 as a private limited company under the Act and licensed by the Commission to undertake Non-Banking Microfinance business under the Non-Banking Finance Companies (Establishment and Regulation) Rules, 2003 (the "NBFC Rules") on February 01, 2022. The principal line of business of the Company is providing microfinance to individuals for small businesses who lack access to banking services.

3. In terms of Section 153 (i) of the Act, a non-member is not qualified for being a director of a company; where there are certain exceptions from the subject requirement are provided for a person representing a member which is not a natural person, a whole-time director who is an employee of the company, a chief executive, or a person representing a creditor or other special interests by virtue of contractual arrangements. Moreover, Section 175 of the Act, provides that if a person who is not qualified to be a director or has otherwise vacated the office of director but acts as a director, or allows or causes himself to be described as such, shall be liable to a penalty of level 1 on the standard scale. The said provisions of law are reproduced as under:

Section 153(i) of the Act:

"Ineligibility of certain persons to become director.—

A person shall not be eligible for appointment as a director of a company, if he —

(i) is not a member:

Provided that clause (i) shall not apply in the case of,—

(i) a person representing a member which is not a natural person;

(ii) a whole-time director who is an employee of the company;

(iii) a chief executive; or

(iv) a person representing a creditor or other special interests by virtue of contractual arrangements;"

Section 175 of the Act

"Penalty for unqualified person acting as director – "If a person who is not qualified to be a director or chief executive or who has otherwise vacated the office of director or chief executive describes or represents himself or acts as a director or chief executive, or allows or causes himself to be described as such, shall be liable to a penalty of level 1 on the standard scale."

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4. Brief facts leading to this case are that an Enquiry of the Company was ordered under Section 282 I of the Companies Ordinance, 1984 (the "Ordinance") vide Enquiry Order bearing number OD(NBFC)/SD/SMPL/2023/33 dated August 16, 2023. Scope of the Enquiry included to check the status of compliance with the applicable regulatory framework, along with review of operational activities, governance, internal control environment, AML CFT compliance. The said Enquiry covered the period started from the dated of incorporation of the Company till July 31, 2023 (review period). The Enquiry Team (the Team) submitted the Enquiry Report dated January 25, 2024.

5. A review of Form-A of the Company filed with the Companies Registration Office (CRO) and made up to October 28, 2023 (date of AGM) transpired that Mr. Sher Ahmed a director of the Company does not hold any shares in the Company and is not a member of the Company and that the said director also did not meet criteria for any of the exceptions as provided in the proviso to the said provisions.

6. While taking cognizance of the alleged violations, proceedings under Section 175 of the Act were initiated against the Company through SCN dated February 22, 2024 requiring it to show cause in writing within fourteen (14) days as to why action should not be taken against it. In response to the SCN, the Company vide its letter dated March 6, 2024 requested to provide a copy of Enquiry Report. In response to which the Commission via letter dated March 29, 2024 informed the Respondent that the relevant portion of the Enquiry Report regarding the alleged violations is appropriately and comprehensively incorporated in the SCN. Accordingly, the Respondent was advised to submit the written response to SCN, despite which Respondent did not submit the written reply to the SCN.

7. In order to provide an opportunity for personal representation, hearing in the matter was fixed for May 13, 2024; where Mr. Muhammad Sohaib appeared as an Authorized Representative of the Respondent and submitted a copy of Honorable Islamabad High Court (Court) Order dated May 7, 2024; wherein the Court stayed the SCN proceedings and issued the notice for May 27, 2024 in respect of Writ Petition filed by the Respondent for provision of the Enquiry Report. Subsequently the copy of Enquiry Report was provided to the Respondent on May 27, 2024 in the Court and the Court vide its Order dated May 27, 2024 disposed of the said Writ Petition and subsequently there was no further reservation upon continuing with the proceedings.

8. Thereafter, a written reply to the SCN was submitted on August 21, 2024, wherein the Respondent inter alia submitted the following:

PRELIMINARY OBJECTIONS:

- (i) *The SCN has been issued erroneously since Mr. Sher Ahmed is an Independent Director of the Company and thus he is governed under Section 166 of the Act, and not under Section 153 thereof.*
- (ii) *SCN has been issued with disregard to the factual and legal position that Mr. Sher Ahmed is an independent director and need not to be a shareholder of the Respondent Company.*
- (iii) *The Act, specifically mandates under Section 166 that an Independent Director must not have any relationship with the Company, therefore, it is required by law that independent director should not own any shares of the company he is the director of.*
- (iv) *Section 153(i) pertains to the general qualifications and disqualifications for directorship and does not address the criteria for independent directors. The Commission's attempt to apply this section to independent directors is against the letter and spirit of law.*

On Merits:

Section 153 (i) of the Act:

- (i) *The allegation regarding Mr. Sher Ahmed position as a director of the Respondent Company despite not holding any shares and not being a member of the Company is vehemently denied on the following grounds.*
- (ii) *It is crucial to emphasize that Mr. Sher Ahmed holds the position of independent director in the Respondent Company. His status as independent director was well specified in the Form 29 dated 12-05-2022 by the Respondent Company and the Commission duly accepted the said Form 29. This fact is also supported by the letter No. SECP/LRD/60/SMPL/2022/101 dated 14-11-2022 addressed to the Commission wherein permission was sought from the Commission to appoint the Mr. Sher Ahmed as independent director. Section 153 of the Act does not provide that independent director must also be a*

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member of the Company. Instead, it focuses on the ineligibility criteria for certain individuals to become directors.

- (iii) The conditions for the appointment of independent directors are set forth in Section 166 (2) of the Act. The relevant portion is reproduced hereunder for ease of reference:

“166. Manner of selection of independent directors and maintenance of databank of independent directors -

(2) For the purpose of this section, an independent director means a director who is not connected or does not have any other relationship, whether pecuniary or otherwise, with the company, is associated companies, subsidiaries, holding company or directors; and he can be reasonably perceived as being able to exercise independent business judgment without being subservient to any form of conflict of interest:”

It is clear from the language of the above referred highlighted part that an independent director must not have any other relationship with the company as Section 166(2) clearly bars the same. Shareholding of a company is the strongest relationship a person can have with a company, therefore, by no stretch of interpretation, an independent director can be required to have the shareholding of a company. To the contrary, the same is barred by law.

- (iv) *The invocation of Section 153(i) of the Act in this context is incorrect view of law by the Commission, Section 153(i) outlines the qualifications and disqualifications for directorship but does not apply to independent director. The Act is completely silent on this issue and the Commission cannot extend the scope of Section 153(i) to independent directors and subsequently penalize the Respondent company based on this incorrect interpretation. The Act clearly delineates the criteria for independence in Section 166, focusing on the independence and impartiality of the director, rather than membership status. The application of Section 153(i) to independent directors is, therefore, unfounded and against the letter and spirit of the law.*

9. In order to meet the end of justice another hearing opportunity was provided to the Company and the hearing into the matter was fixed for May 02, 2025. The hearing was attended by Mr. Muhammad Sohaib and Ms. Nazish Fattah as the Authorized Representatives of the Respondents. During the course of the hearing, the Authorized Representatives argued that Section 166 of the Act, being a specific provision dealing with the Independent Directors' qualification, should take precedence over the general provision of Section 153(i) of the Act which deals with qualification of all categories of directors in totality, thereby making the application of Section 153(i) to independent directors legally untenable. However, it was informed to the Authorized Representatives that shareholding by an independent director does not amount to a pecuniary relationship as prohibited under Section 166(2). The Authorized Representative assured that the Respondent will ensure compliance with the requirements of Section 153(i) of the Act and shall intimate the Commission accordingly by May 9, 2025. However, no intimation has been received by the Commission in this regard, till date.

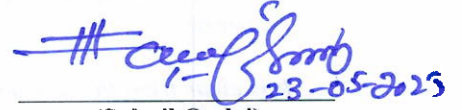
10. I have examined the facts of the case in light of the applicable provisions of the law and have given due consideration to the written as well as verbal submissions and arguments of the Respondent and its Authorized Representatives. It is important to observe that the Company's argument that Section 166 overrides Section 153 is misplaced, as Section 153 of the Act lays down the fundamental eligibility criteria for all directors, including the requirement of being a member, unless explicitly exempted. Section 166 of the Act, which defines the standards for independent directors, does not contain any clause exempting them from the membership requirement under Section 153 of the Act. Both provisions must be read harmoniously, with Section 166 of the Act adding conditions for independence, not replacing the baseline eligibility in Section 153 of the Act. Furthermore, holding a nominal share solely to fulfill legal eligibility does not, in itself, constitute a pecuniary relationship that compromises independence under Section 166(2) of the Act. Therefore, the Company's failure to ensure that its independent director was a shareholder constitutes a violation of Section 153(i) of the Act. It is also pertinent to observe that the provisions of Section 153 of the Act clearly narrate the exception as well, thereby leaving no room for any other understanding of the law as such.

11. In view of the foregoing facts, circumstances, and the submissions made by the Respondent and its Authorized Representatives, it is evident that the Respondent admittedly appointed a director of the Company

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who was not qualified for being a non-member / shareholder, in contravention of the requirements of Section 153 (i) of the Act, which attracts the penal action in terms of Section 175 of the Act. I, therefore, in exercise of the powers conferred upon me under Section 175 of the Act, vide S.R.O. 1545(I)/2019 dated December 06, 2019, hereby, imposed a penalty of **Rs. 10,000/- (Rupees Ten Thousand only)** on the Company on account of established default. The Respondent is further advised to take necessary rectification measures to ensure compliance within thirty (30) days and submit a report in this regard along with necessary record with Supervision Division of the Commission.

12. The Company is hereby directed to deposit the aforesaid fine in the designated bank account maintained in the name of Securities and Exchange Commission of Pakistan with MCB Bank Limited or United Bank Limited within thirty (30) days from the date of this Order and furnish receipted voucher issued in the name of the Commission for information and record. In case of failure to deposit the penalty, the proceedings under Section 485 of the Act will be initiated for recovery of the fines as arrears of land revenue pursuant to provisions of Section 42 of the Securities and Exchange Commission of Pakistan Act, 1997.


23-05-2025

(Sohail Qadri)
Director/ Head of Department
Adjudication-1

Announced:
May 23, 2025
Islamabad.