



# Securities & Exchange Commission of Pakistan

NIC Building, Jinnah Avenue, Blue Area, Islamabad

## **BEFORE** **RECONSTITUTED APPELLATE BENCH NO. III**

In the matter of

### **Appeal No. 36 of 2003**

Valika Wollen Mills Limited

Suite B/4, 54/A

Queens Road, Lalazar

Karachi.....Appellants

Versus

Commissioner (Enforcement & Monitoring) SEC.....Respondent

Date of Impugned Order

June 24, 2003

Date of Hearing

November 21, 2003

### **Present:**

#### **For the Appellant**

Naveed A. Siddiqi, Advocate

#### **For the Respondent**

Mr. Mubasher Saeed, Joint Director (EMD) SEC



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## **ORDER**

This order will dispose off appeal No. 36 of 2003 filed under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 by Valika Wollen Mills Limited (the “Appellant”) against the order dated June 24, 2003 (the ‘Impugned Order’) passed by Commissioner (Enforcement & Monitoring).

1. The facts leading to this appeal are that the Appellant, which is a listed company, has failed to hold its annual general meetings for the last 11 years. Appellant’s business has been suspended for a long period and it has not filed any statutory returns with the CRO for the last 11 years. In addition, it is not maintaining its registered office at the notified address. The Appellant has had no chief executive officer since 1990 and no election for directors had been held since the expiry of the term of directors in April 1990. The financial condition of the Appellant as on June 1992 showed that the accumulated losses of the Appellant stood at Rs.39.157 million as compared to its paid up capital of Rs.10.00 million. It was in light of all these facts that the concerned Registrar approached the Commission for grant of sanction in terms of clause (b) of section 309 of the Companies Ordinance, 1984 for winding up the Appellant. A notice dated June 11, 2003 was issued by the Commissioner (Enforcement & Monitoring) to the Appellant and its management to show cause as to why the sanction may not be granted to the Registrar. However, no one appeared on the said date of hearing before the Commissioner (Enforcement & Monitoring) and consequently a sanction was granted to the Registrar by the Commissioner vide the Impugned Order.

2. Aggrieved by the Impugned Order, the Appellant has preferred this appeal. Mr. Naveed A. Siddiqi, Advocate for the Appellant appeared before us on November 21,



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2003. Mr. Siddiqi contended that the Impugned Order was passed in violation of the principles of natural justice as no opportunity of hearing was provided to the Appellant. He stated that the Appellant had received the hearing notice and had requested for an adjournment in the hearing. However the Commissioner (Enforcement & Monitoring) turned down the request and granted sanction to the Registrar for winding up. He stated that an ex-parte order for winding up on the first date of hearing without consideration of material facts, legal and technical issues was illegal and unjust and should be set aside. He argued that law favored adjudication on merits of the case and that a knock out on technical grounds was not allowed. In support of his contention, he relied on numerous judgments of the superior courts.

3. Mr. Siddiqi further stated that although the Appellant was a listed company, however 80% of its shares were held by the Valika family and therefore no public interest was involved. He contended that the position taken by the Commissioner about the financial condition of the Appellant was not true as presently the Appellant is not liable to any financial institution and has paid off its entire liability to all its creditors. He further stated that the good intention of the management of the Appellant can be judged from the fact that the surplus amount received from the sale of the property after payment of all dues and liabilities of the creditors was distributed among the shareholders. He further stated that the management of the Appellant was not liable for the statutory defaults like non-holding the AGM, non-filing the annual accounts, non-holding of the election for directors as the circumstances concerning these defaults were beyond the control of the management and the defaults were not willful.

4. He stated that the Appellant was incorporated as a company in 1948/49 and had played a major part in the industrial development and uplift of the country. The Appellant had a good track record of payment of dividends to its shareholders. He argued that the shift in the Government policy from industrialization to nationalization was the real reason for the Appellant's miseries as major companies within the



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Appellant's group were nationalized by the Government without proper and adequate compensation to its owners. He claimed that the Company and its management had been politically victimized by a certain political group and the management was forced to seek protection by leaving the country. He further claimed that all records, papers and files of the Company had been confiscated by the said group and its offices were sealed. He claimed that the management had been implicated in several litigations by this particular group, and the management had to obtain bail before arrest. He also stated that the Investigating Officer in his report No. D2/SDPO/KPT/C-38 Karachi dated 21-03-1998 had admitted that the management of the Appellant had been restrained from entering into the building where the registered office of the Appellant company was situated. He produced a number of documents in support of his assertions.

5. Mr. Siddiqi prayed that the Impugned Order may be set aside and the Appellant Company may be allowed to apply for delisting and to buy back shares of the general public and be converted into a private limited company. He pleaded that in the alternative, the Company may be allowed to proceed with a voluntary winding up rather than a compulsory one.

6. Mr. Mubasher Saeed, Joint Director appearing on behalf of Commissioner (Enforcement & Monitoring) denied that the Commissioner failed to observe the principles of natural justice in passing the Impugned Order. He stated that the show cause notice dated June 11, 2003 was duly served on the Appellant and hearing date was fixed on June 24, 2003 giving Appellant more than two weeks to prepare written submissions and depute someone to attend the hearing on its behalf. However the Appellant chose not to file any submissions and requested for an adjournment. He contended that the reason given for request of adjournment, namely that the absence of one director being out of country disabled the Company from preparing its case was found to be spurious. He stated that erstwhile CLA and the Commission had sent



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several notices and letters to the Appellants, which remained un-responded. In this situation, the only logical conclusion that could be reached by the Commissioner was that the Company was not properly managed as per law and the adjournment was being sought to merely prolong the proceedings.

7. He argued that sub-clause (b) of Section 305 states that a company may be wound up by the Court, if inter *alia*, default is made in holding any two consecutive annual general meetings, and/or if the company suspends its business for a whole year. In the case at hand, the Company failed to hold 11 consecutive AGMs and has suspended its business for more than 11 years. He argued that for the purposes of granting the sanction under clause (b) of section 309 of the Ordinance, the Commissioner was not required to prove that the failure to hold AGM by the Company's management was willful and deliberate. It is merely required to establish that two consecutive AGMs were not held and Company's business was suspended for at least one year. He stated that all the material facts and circumstances, legal and technical issues as to the state of company's affairs were considered by the Commissioner before passing the Impugned Order. He asserted that the company exists on paper only as it is a mere empty shell, which does not have resources and capital to continue as a going concern. He pleaded that the appeal should be dismissed and the Impugned Order be upheld.

8. We have heard both the parties in quite detail and considered their arguments. We have also perused the documents and taken into account the case law produced by the Appellant's counsel in support of his arguments. Although we can understand the problems faced by the Appellant company and its management, however there is no doubt in our mind that the Appellant company needs to be wound up. The facts show that it is no longer a going concern and is merely a shell company. This fact has not been denied even by the Appellant in its appeal. The Appellant has been in constant default as to the mandatory statutory requirements. It has not held its AGM or prepared



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its accounts for the past eleven years making it virtually impossible for the shareholders to know about the affairs of the Company or make any decisions regarding its future or their own investments in the Company. This situation cannot be allowed to carry on by the Commission, as one of the Commission's foremost duties is to protect the interest of the investors. However, having said that we are inclined to take a lenient view towards the Appellant keeping in view the difficult circumstances that the Appellant was placed in. Although we doubt that the outcome would have been any different, we also feel that the Commissioner should have granted the adjournment to the Appellant and decided the case after hearing it. In view of the statement given by the Appellant in appeal that it is not liable to any financial institution and has paid off its entire liability to all its creditors, we accept the plea of the Appellant that it should be allowed to proceed with a voluntary winding up rather than a compulsory one. However, this shall be done on the fulfillment of the following conditions.

(a) The directors of the Appellant must make a declaration of solvency under section 362 of the Companies Ordinance, 1984 within 7 working days of the receipt of this order.

(b) The Appellant company must within 14 working days of the declaration of solvency by the Directors, pass the special resolution required under clause (b) of section 358 of the Ordinance to voluntarily wind up the company.

(c) The voluntary winding up shall be subject to the supervision of the Court as given in section 396 of the Ordinance.

9. Once the Appellant company has passed the special resolution under clause (b) of section 358 of the Ordinance within the time prescribed above, the Commission shall seek permission of the Hon'ble High Court to withdraw the winding petition against the Appellant company. If allowed by the Hon'ble High Court, the Appellant company



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will be allowed to proceed with a voluntary winding up. In case if the Appellant fails to apply to the Court under section 396 of the Ordinance to make the voluntary winding up subject to the supervision of the Court, the Registrar may apply to the Court to do the same.

This appeal is disposed off accordingly.

**(ETRAT H. RIZVI)**

Commissioner (Specialized Companies)

**(SHAHID GHAFAR)**

Commissioner (Securities Market)

Announced in Islamabad on December 31, 2004