

Securities and Exchange Commission of Pakistan



BEFORE THE APPELLATE BENCH III

In the matter of

APPEAL No 09 of 2013

M/s Nazir Cotton Mills Limited Appellant

VERSUS

1. Securities and Exchange Commission of Pakistan
2. Director (Enforcement)
3. Commissioner (CLD) Respondents

Date of hearing 27/02/13

For the Appellant:

Mian M Tariq Hassan, Advocate High Court
Mr. Jabran Tariq But, Advocate High Court

For the Respondents:

Mr. Shahzad Afzal, Joint Director (Enforcement)
Mr. Amir Saleem, Deputy Director (Enforcement)

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1. This orders shall dispose of appeal No. 09 of 2013 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 (the "SECP Act") against the order dated 21/01/13 (the "Impugned Order") passed by Respondent No 3.

2. The brief facts of the case are that accounts of M/s Nazir Cotton Mills Limited (the "Appellant") in 2011 portrayed a dismal financial position of the Appellant. It appeared that the Appellant was in downward spiral and apparently no step had been taken by its management to reverse the trend of losses and put the Appellant back on the recovery path. The accounts of the Appellant revealed accumulated losses of Rs. 384.241 million while its paid-up capital stood at Rs. 230.000 million, which shows that the Appellant's capital has been completely eroded by its losses. The Appellant's auditors namely Aslam Malik & Company, Chartered Accountants (the "Auditor") have expressed an adverse opinion on the Accounts 2011 by stating that "*the balance sheet, profit & loss account, cash flow statement and statement of changes in equity together with the notes forming part thereof do not give a true and fair view of the state of the Company's affairs as at June 30, 2011 and of the loss, its cash flows and changes in equity for the year then ended*". The Auditor in its report to the members for the year ended 30/06/11 went on to reveal the true economic state of the Appellant. It was reported that the Appellant:
 - a) has incurred after tax loss of Rs 8.247 million for the year and its accumulated losses as at 30/06/11 aggregated to Rs 384.241 million. The total liabilities of the Appellant exceed its total assets by Rs. 111.224 million and current liabilities of Rs. 31.515 million exceed the current assets of Rs. 25.019 million by Rs. 6.496 million. Further the management has closed down the factory and till date of signing of audit report, production activities remained suspended;

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- b) the balances of bank loan amounting Rs 70.210 million, sponsors' loan Rs 27.477 million and related party loan Rs 1.55 million, sundry creditors Rs 4.861 million, accrued mark-up Rs 0.967 million, short term running finance Rs 10 million, long term investment of Rs 0.771 million, Deposit prepayment and other receivable Rs 14.901 million remained unverified and unsubstantiated for the want of confirmatory certificates;
- c) the Appellant has not provided the current mark up on the bank loans and has thus understated its liability and consequential losses to that extent. The Appellant has reduced its liability by reducing the amount of loan from Habib Bank Ltd and Samba Bank by Rs 3.58 million and Rs 17.308 million respectively, due to settlement through State Bank of Pakistan ("SBP") on 29/12/04. The Appellant defaulted in payment of settlement installments. So the above settlement stood cancelled as per provision of Order No. 9043 of SBP;
- d) the Appellant had reversed frozen mark up in June 2006 amounting to Rs 26.332 million without any settlement agreement with the Bank, which practice in our opinion is not in accordance with International Financial Reporting Standards;
- e) the balance of trade debt of Rs 3.2 million and balance of Rs 5.6 million of payables are static from June 2007 and the Appellant has not made any provision for bad debt and credit balances also stand time barred;
- f) the value of the store and spare and stock in trade of Rs 3.1 million and Rs 1.16 million are according to valuation carried out in year June 2009, since then no valuation has been carried out;

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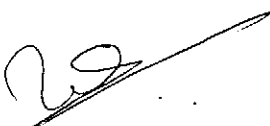


- g) current portion of Rs 60.532 million of long term loans has not been reclassified as current liabilities. Had the current portion been provided, long term loans would have been lower by Rs 60.532 million and current liabilities would have been higher by the same amount;
- h) the Appellant has not provided depreciation to the extent of Rs 2.740 million (2010: Rs 3.045 million) relating to plant and machinery, which remained close during the year, which is not in accordance with IAS 16. Had this depreciation been provided, loss for the year would have been higher by the same amount. The accumulated effect of not providing depreciation on profit and loss account would have been Rs 36.501 million (2010: Rs 33.760 million).
3. The directors of the Appellant in their report to the members of the Appellant were not able to furnish satisfactory reply to the observations of the Auditor.
4. In addition to the above, record available to the Commission also revealed a lot of irregularities on part of the Appellant such as:
- a) last election of directors was held in March 2008 and the Appellant has not convened a general meeting for election of directors which were due in March 2011;
- b) an amount of Rs 0.544 million has been classified as Employee Advances – considered good, whereas the Appellant does not have any employee. Moreover, the Appellant in its reply dated 20/03/12 admitted that these advances are not considered good and will not be recovered;


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- c) the Appellant has not declared any dividend for last many years and the trading in shares of the Appellant are suspended on Karachi Stock Exchange since 26/10/09;
- d) the operations of the Appellant are suspended for last few years and the directors of the Appellant have not devised any concrete strategy for revival of the Appellant's operations;
- e) number of shareholders mentioned in the pattern of shareholding attached with the Accounts 2011 show varied numbers. The first part shows that there are 420 shareholders of the Appellant, whereas, the second portion shows that there are 924 shareholders of the Appellant;
5. Show Case Notice dated 21/05/12, ("SCN") under section 265 of the Ordinance was issued to the Appellant and hearing in the matter was held on 23/10/12. During the hearing proceeding, the Authorized Representative informed the Commission that the Honorable Lahore High Court, Lahore has issued an order to auction all the assets of the Appellant. He further informed that despite publishing the auction notice; no party has yet come up to purchase the Appellant's assets. The Appellant is in dispute with its banks for settlement of liabilities and the cases are not yet decided and matter is sub-judice before the Lahore High Court. He further stated that the Appellant has been closed for last 6 -7 years and there has been no business activity since then. The Respondent, dissatisfied with the response of the Appellant and in exercise of powers under section 265(b) of the Ordinance passed an order dated 21/11/12 and appointed Mr. Wiqar Avais, Partner of Avais Hyder Liaquat Nauman, Chartered Accountant to act as an inspector to investigate into the affairs of the Appellant and bring into light the actual state of affairs of the Appellant.


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6. The Appellant filed a revision application against the order dated 21/11/12 before Respondent No 3 under section 484 of the Ordinance. The Respondent No 3 after hearing the Appellant held that:

- “a) the ground of illegal assumption of jurisdiction is not valid as SRO 323(I)/2002 dated 14th June 2002 relied upon by the Applicant is not in force. The SRO under which the Head of Department has passed the order is SRO 706(I)/2011 dated 13th July 2011. The said SRO authorizes the Head of Department (Enforcement) to pass an order under section 265 of the Ordinance, when the post of Executive Director (Enforcement) is vacant, as was, at the time of passing of the Impugned Order;
- b) the Applicants have preferred the Revision application under section 484 of the Ordinance against the Impugned Order. The Impugned Order has held that an investigation under section 265 of the Ordinance be initiated against the Applicant (the grounds on the basis of which the Impugned Order was passed have not been reproduced for the sake of brevity). In the matter of investigation under section 265 of the Ordinance, I am guided by the judgment in the matter of *Attock Oil Refinery vs. Executive Director (Enforcement) and Monitoring Division, S.E.C.P. and another* cited at *PLD 2010 SC 946*, wherein, the honorable judge of the Supreme Court of Pakistan upheld the order of the High Court and stated that the appeal was rightly dismissed by the High Court on the threshold of the proviso of section 485 of the Ordinance, reproduced below for ease of reference:

"Provided that no appeal under subsection (1) shall lie from an order

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which does not dispose of the entire case before the [Commission] or the Federal Government, as the case may be."

It was observed by the honorable judge of the Supreme Court that:

"..... In the proviso section 485(1) ibid the use of the words "dispose of the entire case" is a significant manifestation of the legislative intent that the appellate jurisdiction of the Courts under the said provision is not to be invoked (in the context of the present case) until the investigators have done their job of investigating the affairs of the company. We at present, are not called upon to comment on the point of time when the entire case will stand disposed of by the SECP. It is sufficient to note that the conduct of the investigation, once the investigator is appointed, is still very much part of the case pending with the SECP for investigating the affairs of the petitioner company."

The honorable judge of the Supreme Court of Pakistan has observed that the orders appointing the investigator (in investigations under section 265 of the Ordinance) does not dispose of the entire case before the Commission and are not appealable in terms of proviso to section 485(1) of the Ordinance. I concur with the views of the honorable judge of the Supreme Court of Pakistan and am of the considered view that the Revision petition against such order before higher forum (Appellate/ Revisional) is not maintainable. The order cited by the Applicant's counsel in appeal No 43 of 2006 dated 13/04/06 was passed before the aforementioned judgment and cannot be made the basis of granting an interim stay in the instant matter."

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7. The Appellant has preferred the instant appeal against the Impugned Order. The Appellant's counsel argued that:
- a) the Appellant was not provided an opportunity of hearing before passing the Impugned Order. The Appellant was deprived the right to agitate all the grounds made in the revision application and the Impugned Order only addressed the issue of assumption of jurisdiction. Reliance was placed on case titled *Sartaj Hussain versus Assistant Administrator, Evacuee Trust property* cited at 1994 MLD 2195, wherein, it was held that judicial tribunals or quasi-judicial tribunal or even executive authority should pass an order after affording an opportunity of hearing;
 - b) the judgment relied upon in the Impugned Order i.e. *Attock Oil Refinery vs. Executive Director (Enforcement) and Monitoring Division, S.E.C.P. and another* cited at *PLD 2010 SC 946* is not attracted to the instant case. The aforementioned judgment held that no appeal shall lie against the order of investigation as it does not dispose of the entire case before the Commission and such orders are not appealable in terms of proviso to section 485(1) of the Ordinance. The Appellants preferred a revision application under section 484 of the Ordinance and not an appeal under section 485(1) of the Ordinance before Respondent No 3, as such, the revision application was maintainable;
 - c) the SRO 323(I)/2002 dated 14th June 2002 relied upon by the Appellant in the Impugned Order was the only notification available on the website of the Commission in respect of the powers exercisable by the officer/s of Company Law Division. The SRO 706(I)/2011 dated 13th July 2011 relied upon in the Impugned Order also does not entrust the powers to pass an order in respect of section 265 of the Ordinance to the Head of Department (HoD). The HoD cannot pass an order in absence of any one of two Executive Director in a Division. Emphasis was made on the phrase '*Executive Director in a Division*' and it was argued that since there are

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two *Executive Directors in a Division*, in absence of one of the Executive Directors the order should have been passed by the other Executive Director and not the HoD of the department concerned;

- d) the appeal is maintainable under section 33 of the SECP Act. Reliance was placed on the matter of *Waseem Ahmed Siddiqi versus Zafar-ul-Haq Hijazi* cited at 2006 CLD 298, wherein, an order of revision under section 477 of the Ordinance passed by Commissioner (CLD) was challenged before the Appellate Bench of the Commission under section 484 of the Ordinance. The Appellate Bench of the Commission heard the parties and decided the case on merits.
8. The department representative argued that the appeal is not maintainable in terms of section 33 (1) (b) of the SECP Act. The relevant provision specifically states that no appeal shall lie against an order passed in exercise of powers of revision or review. It was further argued that the HoD had rightly assumed the jurisdiction in terms of *SRO 706(I)/2011* dated 13th July 2011, as such, the ground of illegal assumption of jurisdiction is not attracted to the case.
9. We have heard the parties and have gone through the facts and the orders passed in the matter. Our para-wise findings on the issues raised are as under:
- a) the Appellant preferred a revision application before Respondent No 3 and the revision application was dismissed on two grounds reproduced in para 6 above. The *preliminary* arguments on the exercise of jurisdiction and the maintainability of the revision application were made by the Appellant's counsel, which have been reproduced in para 2 of the Impugned Order. The scope of *revision* is only limited to the exercise of jurisdiction and cannot go beyond it. Reliance is placed in the matter of *Muhammad Boota and 48 others versus Allah Ditta and 14 others* cited at 1998 SCMR 2764, wherein, it was held that the *revision* can only be preferred in cases

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involving illegal assumption, non-exercise or irregular exercise of jurisdiction. The Appellant's counsel agitated the ground of jurisdiction, which was decided against the Appellant after hearing the Appellant's counsel. The other ground agitated by the Appellant in the revision application are beyond the scope of *revision* and were accordingly not considered by the Respondent No 3;

- b) the judgment relied upon by the Commissioner (CLD) in the matter of *Attock Oil Refinery vs. Executive Director (Enforcement) and Monitoring Division, S.E.C.P. and another* cited at *PLD 2010 SC 946* has been perused. In our view, the *ratio decidendi* set out in the aforementioned judgment is that the order of investigation should not be interfered with, as it does not dispose of the entire case before the Commission. The interference in the order of investigation is not warranted by the law, be it in exercise of powers in revision or appeal before the Commission or before the Court;
- c) the SRO 323(I)/2002 dated 14th June 2002 relied upon by the Appellant was not in force at the time of passing of the Impugned Order and the Impugned Order rightly dismissed the ground of lack of jurisdiction of HoD. The belated stance taken by the Appellant at the appellate stage is also ill founded as in terms of SRO 706(I)/2011 dated 13th July 2011, the powers of Executive Director in a Division are exercised by the HoD, in case the position of Executive Director is vacant. In the instant case the post of Executive Director (Enforcement) is vacant, as such, the order dated 21/11/12 was rightly passed by the HoD (Enforcement);
- d) the case relied upon by the Appellant's counsel titled *Waseem Ahmed Siddiqi versus Zafar-ul-Haq Hijazi* cited at *2006 CLD 298* is not relevant as section 33 of SECP Act has been amended since then. Section 33 (1) of the SECP Act is reproduced for ease of reference:

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33. Appeal to the Appellate Bench of the Commission.- (1) Except as otherwise provided any person aggrieved by an order of the Commission passed by one Commissioner or an officer authorized in this behalf by the Commission, may within thirty days of the order, prefer an appeal to an Appellate Bench of the Commission constituted under sub-section (2)

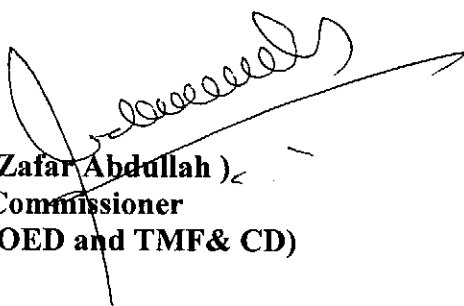
Provided that no appeal shall lie against ----

- (a)
- (b) an order passed in exercise of the powers of revision or review;
- (c)
- (d).....

Emphasis added

The Appellant has preferred the instant appeal against the Impugned Order passed by Respondent No 3 in exercise of the powers of *revision*. In terms of section 33 (1) (b) of the SECP Act, no appeal shall lie against the order of *revision*, as such, the appeal is not maintainable.

In view of the above the appeal is dismissed with no order as to cost. The investigator Mr. Wiqar Avais, Partner of Avais Hyder Liaquat Nauman, Chartered Accountant is directed to investigate into the affairs of the Appellant forthwith, in terms of order dated 21/11/12.


(Zafar Abdullah)
Commissioner
(OED and TMF& CD)


(Imtiaz Haider)
Commissioner (SMD)

Announced on: 14/03/13