

2010 C L D 355

[Lahore]

Before Nasir Saeed Sheikh, J

Lt. Gen.(Retd.) ALI KULI KHAN KHATTAK, CHAIRMAN, GENERAL TYRE & RUBBER COMPANY OF PAKISTAN LTD. KARACHI and 4 others ---Appellants

Versus

APPELLATE BENCH No.II, SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN, ISLAMABAD---Respondent

Commercial Appeal No.8 of 2009 decided on 31st December, 2009.

Companies Ordinance (XLVII of 1984) ---

---S.196(4) & 208(3)--Securities and Exchange Commission of Pakistan Act (XLII of 1997), S.34---Shares of associated company sold by directors of company (appellants) to another associated company at a lower price than market price without any special resolution of Board of Directors--Such transaction unscrubbed by Board of Directors in its subsequent meeting---Imposition of penalty on appellants for their such illegal act---Validity---Appellants through such act had pocketed huge amount as profit at the cost of shareholders of company--Subsequent "unscrubbling" of illegality already committed could not rectify earlier violation of law nor such rectification was recognized by provisions of Companies Ordinance, 1984---Appellants had wilfully and knowingly committed such act, for which maximum penalty as provided in S.208(3) of Companies Ordinance, 1984 had not been imposed upon them High Court dismissed appeal in limine.

Pakistan Industrial Promoters Limited v. Monopoly Control Authority 1990 CLC 1008 ref.

Jewed Hassan for the Appellants.

ORDER

NASIR SAEED SHEIKH, J.---The appellants Nos. 1 to 5 are respectively the Chairman and Directors of General Tyre and Rubber Company of Pakistan Limited. They have preferred this Commercial Appeal under section 34 of the Securities and Exchange Commission of Pakistan Act, 1997 against the order dated 30-10-2009, passed by the Appellate Bench No. 2, Securities and Exchange Commission of Pakistan, Islamabad, whereby the Appeals Nos.10, 11, 12, 13 and 14 of 2008, preferred by the appellants before the said Appellate Bench of the Commission, were dismissed.

2. The -brief facts necessary for the instant Commercial Appeal are that the appellants subscribed in 302,100 right of shares of an associated company namely Ghandhara Company Limited and paid Rs.3.021 million as consideration of those shares on 13-7-2006 out of the funds of the company of which the appellants were respectively the Chairman and Directors. This huge investment was drawn by the appellants from the company funds without any resolution passed by the Board of Directors of the Company as was required in section 208 of the Companies Ordinance, 1984. After subscribing the rights of the shares of GIL, the appellants company disposed of the shares to another associated company namely Bibojee Services Private Limited (BSL) for consideration of 3.074 million including 0.053 million mark up. It was observed by the Securities and Exchange Commission of Pakistan that the shares of GIL were sold by the company to BSL at a lower price than the market price at that time. It is also an admitted position as stated in the memorandum of appeal in para 4 of the narration of facts that the Board of Directors in its meeting dated 29-8-2006 "unscrambled" the above transaction and obtained a refund from the appellants. Vide a show-cause notice dated 26-2-2008 by the Director (Enforcement) of the Securities and Exchange Commission of Pakistan, the appellants were called upon to explain as to why the penalties in terms of section 196(4) and section 208(3) of the Companies Ordinance, 1984 may not be imposed on them for violations mentioned in para. 3 of the show-cause notice. After filing of the reply, hearing the appellants, the Securities and Exchange Commission imposed a collective penalty of Rs.5,000,000 on directors for violation of section 196 of the Ordinance and a collective penalty of Rs.1,000,000 on directors for violation of section 208(1) of the Ordinance vide Order dated 23-4-2008 passed by the Director (Enforcement) Securities and Exchange Commission of Pakistan, Islamabad.

3. The appellants preferred Appeals Nos.10, 11, 12, 13 and 14 of 2008 against the said order dated 23-4-2008 before the Appellate Bench of Securities and Exchange Commission of Pakistan under section 33 of the SECP Act of 1997. All the appeals were heard together by a Division Appellate Bench of the Commission and were dismissed vide order dated 30-10-2009.

4. The learned counsel for the appellants has argued that admittedly no resolution by the Board of Directors of the appellants' company was passed before making use of the funds of the company and its investment in the shares of GIL. The learned counsel argued that this violation was not wilful, therefore, the provisions of section 208(3) of SECP were not applicable. The learned counsel further argued that the matter of subscribing from the funds of the company was taken up in the meeting of the Board of Directors held on 29-8.-2006 and the transaction was "unscrambled". The learned counsel thus argued that the imposition of the penalty upon the appellants vide order of the Director (Enforcement) dated 23-4-2008 is illegal and that the dismissal of the appeals by the Division Appellate Bench against the said order is also illegal. The learned counsel for the appellants relied upon Pakistan Industrial Promoters Limited v. Monopoly Control Authority [1990 CLC 1008] to contend that in a parallel statute of Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance (V of 1970), the term "wilful" or "wilfully" has been used in section 19(a) and have been interpreted by a learned Single Judge of this Court and applying the said interpretation, the learned counsel argued that the act of the present appellants of subscribing to the right of shares of GIL without resolution being passed from the Board of Directors was not wilful violation of Section 208 of Companies Ordinance, 1984.

5. I have considered the arguments of the learned counsel for the appellants and have gone through the record.

6. The appellants have admittedly made investment, in question, out of the funds of their company without getting it approved through the prior required resolution from the Board of Directors and have thus violated section 208(1) of the Ordinance. The judgment cited by the learned counsel for the appellants is distinguishable from the facts of the present case. However, in paragraph No.11, at page 1013, the following observations were made by the Court:-

"11. The word 'wilful' or 'wilfully' has been used in many enactments, particularly in the provisions of penal nature, and it has many a time been judicially interpreted. In the ordinary dictionary sense it means intentional or deliberate. The term, as used in different statutes and judicial precedents, means deliberate or intentional and not accidental or by inadvertent. It connotes a conscious act signifying something more than a mere omission, default or inaction on the part of a person who is under a legal obligation to do or not to do a particular thing. In other words, an act done intentionally, knowingly or purposely as distinct from the one done carelessly, thoughtlessly, heedlessly or inadvertently."

7. The learned Director (Enforcement) in the order dated 23-4-2008 in paragraph No.6 (iv) and (v) has observed as follows:

"Loss caused to the shareholders of the Company: 5,520,745.

(iv) It has also been concluded that Directors of the Company namely Mr. Ali Kuli Khan Khattak, Mr. Ahmed Kuli Khan Khattak and Mr. Raza Kuli Khan Khattak who are also representing in the Board of BSL, earned Rs. 5, 520, 745 at the cost of Company's shareholders by disposing of the Company's entitlement of GIL's right shares to another Associated Company wherein they are also Directors;

(v) The above facts while clearly proving that the afore-said transaction was not carried out prudently and complying with the legal formalities but also raise serious doubts on the validity of the transaction reported by the Company."

8. Similarly, the learned Appellate Bench in paragraph No.7(a) of the Order dated 30-10-2009 held as follows:--

"7(a) The Company after subscribing the rights of GIL at Rs.3.021 million disposed of the shares to BSL at price including markup of Rs.3.074 million. It is not disputed that the market price of GIL shares on 29-8-2006 stood at Rs.8.594 million resultantly the disposal of shares to BSL, at price below the market price caused a loss of Rs.5.520 million to the Company. BSL is a private limited company with directors namely Mr. Ali Kuli Khan Khattak, Mr. Ahmed Kull Khan Khattak and Mr. Raza Kull Khan Khattak, who are also on BoD of the Company. The afore-said directors had a fiduciary relationship with the Company and should have acted in the best interest of the Company instead they acted collusively in their personal interest and sold the shares of the Company to BSL at minimum price and earned profit of Rs.5.520 million at the cost of

the shareholders of the Company. The letter dated 27-2-2008 has been perused which confirms the view of the departmental representative that the shares were allotted to the Company and were later transferred to BSL. The department has also placed reliance on letter dated 26-3-2008 written by Mr. Raza Kuli Khan Khattak, the Chief Executive of BSL, wherein he has confirmed the allotment of shares to BSL. The respondent rightly proceeded against the appellants by imposing fine under section 196(4) of the Ordinance and directing the appellants to make good the loss of Rs.5.520."

9. Section 208 of the Companies Ordinance, 1984 reads as follows:--

"208. Investments in Associated Companies and undertakings.

(1) 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.

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

(3) If default is made in complying with the requirements of this section, every Director of a Company who is knowingly and wilfully in default shall be liable to fine which may extend to one 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.

10. The appellants, who are respectively Chairman and Directors of the General Tyre and Rubber Company of Pakistan Limited have thus made use of the funds of the company without any special resolution having been passed as per requirement of the law, which fact has been concurrently held by the two forums below to have been committed by the appellants and is also not disputed by the learned counsel for the appellants before this Court. This act has also earned to the appellants an undue profit of Rs.5.520 million at the cost of the shareholders of the company. The subsequent "unscrambling" of the illegality already committed cannot rectify the earlier violation of the law nor such a rectification is recognized by the provisions of Companies Ordinance, 1984.

11. The facts noted by the Director Securities and Exchange Commission of Pakistan as well as by the Appellate Bench of the Commission in the orders passed in the matter fully established that the appellants have consciously and wilfully violated the provisions of section 208 of the Companies Ordinance, 1984 and who further pocketed a huge amount as profit through the illegal acts committed by them. There is no force in the contention of the learned counsel for the appellants that the appellants did not wilfully and knowingly committed the acts complained for which the penalty has been imposed upon them. The Director Securities and Exchange Commission of Pakistan has already taken a very lenient view of imposing not the maximum penalty provided in section 208(3) of the Companies Ordinance, 1984 upon the appellants.

12. In view of all the above discussion, the instant appeal is, therefore, without any merits and is dismissed in limine.

S.A.K/A-6/L

Appeal dismissed.