

Before Abid Hussain, Director (Enforcement)

In the matter of

Gharibwal Cement Limited

Number and date of show cause notice:	EMD/233/378/2002-386-3836 dated April 30, 2008
Date of hearing:	June 26, 2008
Present:	Mr. Iqbal Ahmed Rizvi

ORDER

Under

Section 227 read with Section 229 and Section 476 of the Companies Ordinance, 1984

The case before me pertains to the proceedings initiated against all the directors including the Chief Executive of Gharibwal Cement Limited (“the Company”) under provisions of Section 229 of the Companies Ordinance, 1984 (the “Ordinance”) for violating the provisions of Section 227 of the Ordinance.

2. The facts leading to this case, briefly stated, are that examination of annual audited accounts (the “accounts”) of the Company for the year ended June 30, 2007 revealed that in note 15.7 an amount of Rs.17.5 million was disclosed as payable to Provident Fund Trust (“Trust”) by the Company and it carried mark-up at the rate of 10% per annum. In response to the Commission’s query, the Company vide its letter dated February 06, 2008 submitted the loan agreement with the Trust. Following observations were noted:

- (i) The Trust shall provide finance amounting to Rs. 17.5 million to the Company on a mark-up @ 10% per annum and its repayment shall commence from July 01, 2003;
- (ii) The Company shall repay the principal finance along with mark-up till December 31, 2003 in installments @ Rs. 125,000 per working day;
- (iii) If the Company fails to comply with any of the covenants of this agreement, the aforesaid financial facility with mark-up shall become payable along with the liquidation damages @ 10% per annum.



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On further examination, it was noticed that the Company had not repaid the loan along with the mark-up till December 31, 2003 as the accounts were disclosing an outstanding balance of Rs. 15.843 million. Liquidation damages @ 10% per annum had also not been paid by the Company after the year 2003.

3. In view of these facts, it was considered necessary to ascertain the extent of violation committed by the Company, as the Company had obtained loan facility from the Trust contrary to the provisions of Sub-section (2) of Section 227 of the Ordinance, which clearly explains the manner in which provident fund could be utilized, and failed to repay the loan amount along with the liquidation damages to the Trust in accordance with the loan agreement, therefore, a show cause notice under the provisions of Section 227 read with Sections 229 and Section 476 of the Ordinance dated April 30, 2008 was issued to all the directors of the Company namely:

1. Mr. Mohammad Tousif Peracha, Chairman & CEO;
2. Mr. A. Rafique Khan, Director;
3. Mr. Tabassum Tousif Peracha, Director;
4. Mr. A. Shoeb Peracha, Director;
5. Mr. M. Saleem Peracha, Director;
6. Mr. Aameen Taqi Butt, Director;
7. Mr. Ishaque Khokhar, Director

4. The Company Secretary of the Company responded the show cause notice, through letter dated May 17, 2008. He argued that the Trust was independent of the Company and managed by the trustees who were the employees of the Company and board of directors of the Company had no influence over the board of trustees of the Trust. He further explained that the Trust had invested in the Company by sanctioning a loan facility up to Rs. 17.50 million under a duly executed loan agreement dated April 03, 2003. Trustees of the Trust also approved this loan in their meeting held on March 31, 2003. The loan carried mark-up @ 10% per annum. He emphasized that if the Trust invested this money in a National Savings Scheme or a special bank account as required by Section 227 of the Ordinance, the rate of return would be from 5% to 6.5% per annum, therefore, the Trust had made a good investment. At the end, he pointed out that on the complaints from the employees regarding misallocation of the moneys of the Trust among its members and some others; an investigation was carried out by the Chief Financial Officer of the Company, who pointed out serious irregularities in the books of accounts and records of the Trust.



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5. In order to provide an opportunity of personal representation, it was decided to fix a hearing in the matter, and through a letter dated June 11, 2008, a hearing was fixed for June 26, 2008, at Head Office, of the Commission at Islamabad. The hearing was conducted as per schedule. The hearing was attended by Mr. Iqbal Ahmad Rizvi, General Manager Audit & Taxation as an authorized representative on behalf of all directors. The representative informed that the trustees of the Trust are members of labor union and the management of the Company has found serious irregularities in the operations of the Trust and it was observed that the Trust had granted loans to its members in excess of their contributions and even loans have been granted to certain non-members of the Trust. The trustees of the Trust immediately withdrew the entire amount deposited in terms of provident fund contribution. The management of the Company had tried its best to resolve the matters with the Trust however non-cooperation is faced on the part of the trustees. The trustess has even refused to provide details of the trust account to the Company stating that the trust is an independent entity and its accounts are audited by the auditor appointed by the trustees. He further added that the management had a fear that the amount in question, if repaid to the trust, would be misapplied by the trustees and would be a loss to the employees of the Company.

6. Further, the Company Secretary of the Company through letter dated July 16, 2008 submitted the details of various allowances paid by the Company to the unionized workers. He informed that the trustees of the Trust were appointed under the influence of CBA workers and, therefore, the management of the Company had no control over the trustees and trust moneys. On the basis of pointed misallocations, an investigation was carried out by the Chief Financial Officer of the Company, who pointed several lapses in the workers contributions, interest on interest paid to the members, non-reconciliations of the banks statements, excessive loans made by the Trust, and a difference in interest payable etc. Moreover, that the management is considering to discontinue the provident fund scheme of the Company, if approved by the board of directors.

7. Before proceeding further, it is necessary to advert to the relevant provisions of law, which have been violated by the directors of the Company. These provisions are contained in Section 227 of the Ordinance, which are reproduced as follows:

“227. Employees’ provident funds and securities:

(1) All moneys or securities deposited with a company by its employees in pursuance of their contracts of service with the company shall be kept or deposited by the company within fifteen



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days from the date of deposit in a special account to be opened by the company for the purpose in a scheduled bank or in the National Saving Schemes, and no portion thereof shall be utilized by the company except for the breach of the contract of service on the part of the employee as provided in the contract and after notice to the employee concerned

(2) Where a provident fund has been constituted by a company for its employees or any class of its employees, all moneys contributed to such funds, whether by the company or by the employees, or received or accruing by way of interest profit or otherwise from the date of contribution, receipt or accrual, as the case may be, shall either

(a) be deposited

(i) in National Savings Scheme;

(ii) in a special account to be opened by the company for the purpose in a scheduled bank; or

(iii) where the company itself is a scheduled bank, in a special account to be opened by the company for the purpose either in itself or in any other scheduled bank; or

(b) be invested in Government securities.

(c) in bonds, redeemable capital, debt securities or instruments issued by the Pakistan Water and Power Development Authority and in listed securities subject to the conditions as may be prescribed by the Commission.

(3) Where a trust has been created by a company with respect to any provident fund referred to in sub-section (2), the company shall be bound to collect the contribution of the employees concerned and pay such contributions as well as its own contributions, if any, to the trustees within fifteen days from the date of collection, and thereupon, the obligations laid on the company by that sub-section shall devolve on the trustees and shall be discharged by them instead of the company.”

8. The aforesaid provisions of the Ordinance are clear and unambiguous. The objective of these provisions is to keep the management away from utilizing any portion of the moneys collected as contributions to a provident fund and to secure the amounts collected from the employees of the company for the benefits of the employees of the Company only. Therefore the arguments advanced by the respondents that the loan amount, interest and the liquidated damages were not paid to the trust due to a fear of ‘misallocation’ of funds by the trustees, is not acceptable. The management of the Company has all the remedies available with it if irregularities were observed in the provident fund trust. The alleged irregularities were never reported to the Commission by the management before the initiation of the proceeding under Section 227 of the Ordinance. If such a situation exists in the provident fund trust since long it tantamount to failure on the part of the management and it cannot be made an excuse for violating the provisions of the law.



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9. For the forgoing, I am of the view that the directors have failed to comply with the mandatory requirements of Section 227 of the Ordinance by availing the loan amounting to Rs. 17.50 million from the Trust. The default of the aforesaid provisions of the Ordinance is established. I, however, taking a lenient view instead of imposing penalty on all the directors hereby impose a fine of Rs.5,000/- (Rupees five thousands only) on the Chief Executive only and warn the rest of the directors to observe compliance of law in letter and spirit. The Chief Executive is required 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 within thirty days from the receipt of this order and furnish receipted bank vouchers to the Commission, failing which proceedings for recovery of the fines as an arrears of land revenue will be initiated. It may also be noted that the said penalty is imposed on the Chief Executive in his personal capacity; therefore, he is required to pay the said amount from his personal resources.

10. Before departing with the order, I hereby invoke provisions of Section 473 of the Ordinance and direct the Chief Executive of the Company to arrange for a special audit of the provident fund trust through the statutory auditors of the Company within 30 days from the date of this order who will submit its report to the management, along with a copy to this office, on the following items:

- (a) Total amount i.e. principal along with mark-up and the liquidated damages to be payable to the provident fund trust, in accordance with the loan agreement dated April 03, 2003. The amount so reported by the auditor must be paid to the Trust within fifteen days of the receipt of such report and evidence of such payment should be provided to the Commission.
- (b) Complete audit of the provident fund trust for last five years in order to observe the allegation of the management against the trustees of the Trust.

Abid Hussain
Director (Enforcement)

Announced on:
September 15, 2008