

*Before*

**Amir M. Khan Afridi, Director/Head of Department**

*In the matter of*

**Babri Cotton Mills Limited**

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Dates of Hearings	March 03, 2020; March 24, 2020; April 30, 2020; June 5, 2020; January 29, 2021; February 16, 2021; March 5, 2021; and May 3, 2021.
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**Order-Redacted Version**

Order dated March 14, 2022 was passed by Director/Head of Department (Adjudication-I) in the matter of Babri Cotton Mills Limited. Relevant details are given as hereunder:

Nature	Details
1. Date of Action	Show Cause Notice dated January 21, 2020
2. Name of Company	Babri Cotton Mills Limited
3. Name of Individual*	The proceedings were initiated against the Board of Directors of the Company.
4. Nature of Offence	The proceedings were initiated against the Respondents for <i>prima facie</i> , contraventions of Section 153(i), Section 171(1)(a), Section 166(1), Section 168 and Section 179(1) of the Companies Act, 2017 (the Act) through the SCN and they were called upon to show cause in writing within fourteen days of the date of the SCN as to why penalties may not be imposed in terms of the applicable provisions of the Act.
5. Action Taken	<p>Key findings are as hereunder:</p> <p>I have gone through the facts of the case, written submissions by the Respondents and the arguments made by the Representative during the hearings and state that ***, ex-director of the Company and the Complainant filed a complaint with the Commission wherein he alleged that:</p> <p>(A) the Board's Resolution by Circulation passed for filling two casual vacancies through appointment of *** and ***, as independent directors, with effect from May 6, 2019 and May 14, 2019 respectively, was not got signed from ***, one of the directors of the Company;</p> <p>(B) the individuals appointed as independent directors namely ***, ***, *** and *** were not members of the Company;</p> <p>(C) the individuals appointed as independent directors were not from the list of the individuals maintained by PICG for the purpose of appointing as independent directors;</p>

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- (D) for appointment of independent directors and to fill the casual vacancy on the Board, full Board meeting was required to be convened instead of passing the Board's Resolution through Circulation; and
- (E) his dissenting note was not incorporated in the minutes of the Board meeting held on October 17, 2019.

**With regard to point No. (A) above** of the complaint, I refer to Section 179(1) of the Act which requires that the Board's Resolution by Circulation must be signed by all the directors for the time being entitled to receive notice of a meeting of the Board. The said Section does not provide any exception with regard to signing of the Board's Resolution by Circulation. In case there is any exception under the Articles of Association of the Company, such exception will not help the respondent owing to the reason that Section 4 of the Act has overriding effects over any such provision. The said Section 4 of the Act is reproduced as under:

Section 4 of the Act:

*"Save as otherwise expressly provided herein- (a) the provisions of this Act shall have effect notwithstanding anything contained in any other law or the memorandum or articles of a company or in any contract or arrangement executed by it or in any resolution passed by the company in general meeting or by its directors, whether the same be registered, executed or passed, as the case may be, before or after the coming into force of the said provisions; and (b) any provision contained in the memorandum, articles, contract, agreement, arrangement or resolution aforesaid shall, to the extent to which it is repugnant to the aforesaid provisions of this Act become, or be, void, as the case may be"*.

Keeping in view the provisions of the above referred Section 4 of the Act, I am of the view that the Board's Resolution through Circulation must have to be signed from all the directors who were entitled, at that time, to receive notice of the Board meeting. By appointing independent directors on the basis of the Board's Resolution through Circulation which was not signed by one of the directors, is non-compliance of Section 179(1) of the Act.

However, keeping in view the fact that: (a) appointment of the aforesaid two directors i.e. \*\*\* and \*\*\*, as submitted by the Representatives, was ratified in subsequent Board meeting held on October 17, 2019; (b) the amended Section 179(1) of the Act no more require signing of a Board Resolution through Circulation by all the directors; (c) the Board has rectified the aforesaid non-compliance by ratifying the said Resolution through Circulation, therefore, I hereby conclude this matter, of appointing two independent directors based on a Board's Resolution through Circulation which was not signed by one of the directors of the Company, by issuing warning to the Respondents to ensure compliance with all the regulatory requirements in litter and spirit, in future.

**With regard to point No. (B) above** of the complaint i.e. appointment of four non-member directors namely, \*\*\*, \*\*\*, \*\*\*, and \*\*\*; I refer to Section 153(i) of the Act which says that an individual who is not member of the company is not eligible to be appointed as a director on the Board of such company. Relevant provision of the said Section 153(i) is reproduced as under:

*“Section 153. A person shall not be eligible for appointment as a director of a company, if he –  
(a) to (h) ...  
(i) is not a member. ... ”*

In this regard, the Representatives submitted that:

- (i) as per understanding of the Respondents, Section 153(i) of the Act does not apply to the appointment of the independent directors;
- (ii) Section 166 of the Act overrides, Section 153(i) of the Act;
- (iii) qualification shares were not issued to the independent directors, as they were of the view that issuance of such shares would result in some pecuniary relationship with the Company;
- (iv) appointment of other two directors \*\*\* and \*\*\* were approved in the Board meeting held on October 17, 2019; and
- (v) qualification shares were issued to all the elected directors on March 5, 2020.

Keeping in view the above, it is stated that the aforesaid arguments of the Respondents cannot be agreed to. The reason being that appointment of non-member as a director of a company is clearly prohibited under Section 153(i) of the Act. At the time of appointing as directors, these individuals were not members of the Company, therefore, violation of Section 153(i) is established. However, taking corrective measures, the Company issued qualification shares to the said non-member directors on March 05, 2020, therefore, I hereby conclude this matter, of appointing four independent directors, not being member of the Company, by issuing warning to the Respondents to ensure compliance with all the regulatory requirements in letter and spirit, in future.

**With regard to point No. (C) above** of the complaint, that the independent directors namely \*\*\*, \*\*\*, \*\*\*, and \*\*\* were not selected from the databank of a notified institute, it is stated that at the time of appointment of the said individuals as independent directors, it was not ensured that names of the said individuals are registered in the databank maintained by a notified institute i.e. Pakistan Institute of Corporate Governance (PICG), for this purpose. I refer to sub-section (1) of Section 166 of the Act and state that in terms of the said sub-section, the Respondents were required to appoint such persons as independent directors whose names are included in the said data bank OR get their names registered in the said data bank before appointment. The stance of the Respondents that they were not aware of the databank information, press release dated 16 July 2018, and SRO of 2018; does not hold merit. However, the Company vide letter dated June 14, 2021 intimated that all the said four directors were later on registered with the databank of PICG. Keeping in view the corrective measure taken by the Company, I hereby conclude this matter i.e. appointing independent directors but not from the

database of the notified institute, by issuing warning to the Respondents to ensure compliance with the regulatory laws in letter and spirit, in future.

**With regard to point No. (D) above** of the complaint, it is stated that in terms of Section 179(1) of the Act, a Board's Resolution through Circulation in writing signed by all the directors for the time being entitled to receive notice of meeting of the board of directors shall be as valid and effectual as if it had been passed at a meeting of the directors duly convened and held.

Keeping in view the stance of the complainant that for appointing independent directors and filling the casual vacancies on the Board, full Board meeting was required instead of the Board's Resolution through Circulation, cannot be agreed to.

**With regard to point No. (E) above** of the complaint, the Representative submitted that:

- (i) the dissenting notes written himself by the complainant on the Board's Resolutions through Circulation, still exist and maintained;
- (ii) the said Board Resolutions through Circulation were circulated to the Board Members along with the notice of the meeting of the Board held on October 17, 2019. Since the Complainant resigned from the position as director on the Board, on August 27, 2019 i.e. prior to the Board meeting dated October 17, 2019 and was not part of the Company's Board at the time of holding of the said Board meeting, his dissenting notes could not have been recorded in the minutes of the Board meeting dated October 17, 2019;
- (iii) the Board in its meeting held on October 17, 2019 (of which the Complainant is not part) unanimously ratified and adopted the said two (2) Board's Resolutions through Circulation without any dissent. Since there was no dissent of any Board member in the meeting held on October 17, 2019, therefore, no dissent was recorded in the minutes of the Board meeting held on October 17, 2019;
- (iv) the Company is willing to revise the minutes of the Board Meeting held October 17, 2019 by appending any dissenting note of the Complainant if he approaches the Company Secretary; and
- (v) the dissenting notes of the Complainant were circulated along with the notice of the Board meeting held on October 17, 2019.

I have gone through the Board's Resolutions through Circulation wherein \*\*\* and \*\*\* were appointed as independent directors. The said Board's Resolutions through Circulation contain dissenting notes of the Complainant as under:

- (a) *"this require full BoD meeting and not by circulation and I do not agree we need an independent director from list of SECP.";*
- (b) *"I don't not agree all casual vacancy to filled in BoD meeting."*

In view of the aforesaid, I am of the view that the complainant himself wrote the dissenting note on the Resolutions through Circulation dated May 06, 2019 and May 14, 2019 and both the said dissenting notes exist and maintained on the respective Resolutions through Circulations, therefore, I hereby conclude this point with **the direction** to the Respondents that in

	<p>terms of sub-section (3) of Section 179 of the Act, both the Resolutions through Circulation dated May 06, 2019 and May 14, 2019 be made part of the minutes of the Board's meeting held on October 17, 2019.</p> <p>With regards to <i>ipso facto</i> cease of office of non-member four directors under Sections 168 and 171 of the Act, it is stated that all the four directors were issued qualification shares and so the non-compliance has been rectified, therefore, I hereby conclude this matter without any adverse impact of the Respondents.</p> <p>With regards to ***, the Company Secretary, it is stated that he didn't submit his response in writing and placed reliance on written submissions of other Respondents. I hereby warn the Company Secretary to ensure timely compliance with all the applicable regulatory requirements in letter and spirit in future.</p> <p>Nothing in this Order may be deemed to prejudice the operation of any provision of the Act/Ordinance providing for imposition of penalties in respect of any default, omission, violation thereof.</p>
6. Penalty Imposed	/-
7. Current Status of Order	No appeal was filed.