



SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN

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Adjudication Department-I
Adjudication Division

Before Ali Azeem Ikram – Executive Director

In the matter of

Khyber Textile Mills Limited

Number and date of notice: CSD/ARN/214/2015-127-133 dated July 25, 2019
Date of hearings: January 06, 2020
Authorized representatives: Mr. Sadaqat Khan, Company Secretary (Authorized Representative)

ORDER

Under Section 134 and Section 140 read with Section 479 of the Companies Act, 2017

This Order shall dispose of proceedings in the matter of Show Cause Notice (“SCN”) dated July 25, 2019 under Section 134 and Section 140 read with Section 479 of the Companies Act, 2017 (the “Act”) issued to board of directors (collectively called the “Respondents”) of Khyber Textile Mills Limited (“the Company”).

2. The facts leading to this case, briefly stated, are that the Company through its letter dated October 16, 2019 filed the notice of its annual general meeting (“AGM”) stated to be held on October 29, 2018. The agenda item no. 4 to agenda no. 8 of the said notice were to be transacted in the AGM for seeking approval of the shareholders, briefly stated below:

- Discuss discontinued production, litigation, credit restrictions, rehabilitation, revival of textile unit and current business climate.
- Utilization of available resources for income generation e.g. using Mills land & building for agriculture use, livestock rearing and renting warehousing storage.
- Discuss progress on alternative business activities on mills excess land and empty building for activities like land cultivation, livestock and warehousing rentals.
- Discuss and approve any alterations, changes or amendments that are required in the Company’s name in the memorandum of association (“MOA”) and articles of association (“AOA”) in light of additional business taking place.
- Invite and discuss exploring joint venture opportunities with investors in view of CPEC.

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3. It was however observed that the Company failed to annex the statement of material facts with the notice of AGM in respect of above agenda item which were special business which was in contravention to the requirements of sub-section (3) of Section 134 of the Act. Moreover, the notice of AGM did not contain draft resolution for the special business of alterations, amendments in the memorandum and articles of the Company which was in contravention to the requirements of Section 140 of the Act.

4. In this regard, SCN dated July 25, 2019 was served on the Respondents under Section 134 and Section 140 read with Section 479 of the Act as to why penal action may not be taken against you for violating the aforesaid provisions of the Act. SCN was responded by the Company vide its letter dated August 06, 2019, brief of which is as follows:

- (i) The Company convened its AGM on October 29, 2018 wherein all matters regarding the order of the Commission dated January 26, 2019 were discussed, in particular change of name, alternations to the MOA and AOA to bring them in line with new line of business i.e. agriculture business.
- (ii) Directors were not involved or associated with the preparation of agenda and documentation for the AGM nor was SECP examination of notice letter addressed to the directors as this was management's responsibility.
- (iii) Any oversight is due to amount of work involved in drafting MOA and AOA by Chief Executive Officer ("CEO") and Company Secretary for the board of directors and for AGM regarding the change of line of business. Essentially miscommunication occurred between the CEO and Company Secretary leading to unintentional lapse.
- (iv) The Company is constrained to keep skeleton staff to conduct its affairs owing to financial constraints resulting the staff is required to do multitasking raising the probability of lapses that in no way were intended. The lapse is regretted.
- (v) The issuance of addendum would not have satisfied the period of circulation of notice specified under the law.
- (vi) The matter of change in line of business was discussed in detail in AGM as well as in previous annual reports of 2016, 2017 and 2018. Therefore the participants of the AGM were fully aware of the background of agenda item and hence the intention of law is complied as the stakeholders were fully aware of the material facts.
- (vii) Non-compliance with the requirements of section 140 of the Act regarding alteration/ amendment in MOA and AOA is acknowledged but regretted. However the Company shared the draft resolution during the AGM thoroughly discussing the different names for the Company and amendments proposed with the shareholders.
- (viii) The Company committed to be more vigilant in compliance of law in future.

5. In view of the aforesaid submissions, the Company was provided opportunity of hearing on January 06, 2020 wherein Mr. Sadaqat Khan appeared on date of hearing as Authorized Representative, reiterating the submission provided earlier through letter dated August 06, 2019. It was repeated that the subject matter was more of a procedural error and was unintentional which is regretted primarily owing

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to efforts regarding revival of Company through new line of business. Moreover it was stated that considering the efforts of the Company to revive business in constrained resources, the unintentional lapse on part of the Company may be condoned.

6. Before proceeding ahead, it is necessary to advert to the following relevant provisions of the Ordinance:

"134. Provisions as to meetings and votes.—

(3) Where any special business is to be transacted at a general meeting, there shall be annexed to the notice of the meeting a statement setting out all material facts concerning such business, including, in particular, the nature and extent of the interest, if any, therein of every director, whether directly or indirectly, and, where any item of business consists of the according of an approval to any document by the meeting, the time when and the place where the document may be inspected, shall be specified in the statement.

*(12) Any contravention or default in complying with requirement of this section shall be an offence liable—
(a) in case of a listed company, to a penalty of level 3 on the standard scale;*

140. Notice of resolution.—

(1) The notice of a general meeting of a company shall state the general nature of each business proposed to be considered and dealt with at a meeting, and in case of special resolution, accompanied by the draft resolution."

*(3) Any contravention or default in complying with requirement of this section shall be an offence liable—
(a) in case of a listed company, to a penalty of level 2 on the standard scale.*

7. In terms of the Commission's notification SRO 1545 (I)/ 2019 dated December 06, 2019, the powers to adjudicate cases under section 134 and 140 of the Act have been delegated to the undersigned as Executive Director (Adjudication Department-I).

8. Based on the facts of the case stated above and requirements of the Act, it is evident that the Company has admitted default in meeting the requirements of annexing statements of material facts with respect to agenda items pertaining to special business i.e. change in line of business as enumerated under agenda no. 4 to agenda number 8 of the notice of subject AGM. The aforesaid failure by the Company tantamount to contravening the requirements of sub-section (3) of Section 134 of the Act. Further, the Company has also admitted failure to circulate the draft resolution with the notice of AGM thereby contravening the requirements of subsection (1) of Section 140 of the Act.

9. The Respondents in written response as well as during hearing proceeding submitted that the aforesaid violations were procedural error on part of management of the Company and maybe condoned as an unintentional default. This submission of the Respondents is not justified and acceptable. It is hereby pointed out that the Company has itself stated that it is in an effort to revive the Company, by initiating

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alternative business activity through livestock farming and fodder cultivation on the vacant land. Furthermore, this alternate line of business was the basis for withdrawing proceedings initiated for winding up of the Company through order of the Commission dated January 26, 2018 and that the directors had proposed change of name of the Company. Needless to mention that this required that relevant clauses in MOA and AOA be amended thereby adding the separate line of business, change in name of the company etc. Therefore disclosure of material facts pertaining to such special business to only the participating shareholders in the general meeting neither meets the purpose nor explicit requirements of dissemination of such information to all the shareholders. Without prejudice to the above, the Company has raised the question of purpose of the requirements of Section 134 and Section 140 of the Act and that intent of respondents in compliance with law to preclude liability under the law. In this regard, I am of the view that the object of the aforesaid requirement of the Act is to ensure that all material and relevant facts, which have a bearing on the issue on which the shareholders have to form their judgement, are brought to the notice of the shareholders at the stipulated time under the law so that the shareholders can make informed decision. Superior courts have held a stringent view on failure to appropriately disclose material facts to shareholders to the extent of barring the company to deal in such business to be transacted and declaring such matter as void. In matter *Centron Industrial Alliance Ltd. v. Pravin Kantilal Vakil, (1985) 57 Com Cases 12 (Bom)* it was held that where the explanatory statement is vague and tricky, or insufficient and misleading, the related resolution is bad in law.

10. It is pertinent to mention that a company, though a legal entity, can act only through its directors. Therein, the directors, both individually and as a board, must act within the strict terms of their mandate, exercise due care and skill in carrying out their functions, use their discretionary powers in good faith & for proper purposes and to act loyally in advancing interest of their company. The board of directors are also responsible to ensure that proper systems are in place that do not restrain shareholders from exercising their right to all material information or hampering their decision making powers entrusted under the law. In establishing intent, it is imperative to note that it has been held by superior courts that breach of fiduciary duty is considered willful. *In case of City Equitable Fire Insurance Co. Ltd, Re, 1925 Ch 407*, it was held that a default, in case of breach of duty, will be considered 'willful' even if it arises out of being recklessly careless, even though there may not be knowledge or intent. The Company has been negligent in complying with relevant requirements of the Act, has accepted contravention of the requirements of Section 134 and Section 140 of the Act and failed to provide cogent reasons for such default.

11. From the above discussion and after careful consideration of all the facts of this case, I am of the view that the provisions of Section 134 and Section 140 of the Act have been contravened and the respondents are liable under the Act. Taking cognizance of the submissions of the respondents and in exercise of the powers conferred under aforesaid provisions of the Act, I hereby impose an penalty of Rs. 50,000 on Chief Executive of the Company for violating the provisions of Section 134 and Section 140 of the Act. The respondents are cautioned to ensure meticulous compliance of law in future.

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The aforesaid fines must be deposited in the designated bank account maintained with MCB Bank Limited in the name of the *Securities and Exchange Commission of Pakistan* within thirty days from the receipt of this order and furnish receipted bank vouchers to the Commission. In case of non-deposit of the penalties, proceedings for recovery of the fines as arrears of land revenue will be initiated. It may also be noted that the said fines are imposed on respondents in their personal capacity, therefore, they are required to pay the said amount from personal resources.

Ali Azeem Ikram

Executive Director

Adjudication Department -I

Announced:

January 16, 2020

Islamabad