Securities and Exchange Commission of Pakistan
Enforcement and Monitoring Division
7th Floor, NIC Building, Jinnah Avenue, Blue Area, Islamabad.

Before Rashid Sadiq, Executive Director

In the matter of
GHARIBWAL CEMENT LIMITED

Number and date of show cause notice	19(161) CF/ISS/2001 dated March 27, 2001
Date of hearings	May 04, 2001 and June 18, 2001
Present	Dr. Parvez Hassan assisted by Mr. Mujtaba Jamal, advocate

ORDER UNDER SUB-SECTION (5) OF SECTION 208 READ WITH SECTION 476 OF THE COMPANIES ORDINANCE, 1984

This order will dispose of the issue pertaining to contravention of the provisions of Sub-section (1) of Section 208 of the Companies Ordinance, 1984 (the "Ordinance"), which has arisen out of the show cause notice No. 19(161) CF/ISS/2001 dated March 27, 2001 served on all the Directors including the Chief Executive of M/S Gharibwal Cement Limited (the "Gharibwal") for making unauthorized investments in its associated undertaking, namely Dandot Cement Company Limited (the "Dandot"). Gharibwal is a public company limited by shares incorporated on December 29, 1960 having authorized and paid up share capital of Rs. 500 million and Rs. 168.764 million respectively, as per its Audited Balance Sheet for the year ended June 30, 2000.

2. Gharibwal is listed on Karachi and Lahore Stock Exchanges since 1962 and is engaged in the business of production and sale of Cement. It is pertinent to mention here that Gharibwal was a project of State Cement Corporation, which was privatized by the Government during the year 1992. The project was acquired by the present management of Gharibwal from Privatization Commission through acquisition of 51 % shares for a consideration of Rs. 847.363 million, the payment for which was made by the following foreign investors through remittances from abroad:

M/S Astoria Investments Limited	US $ 14,068,289	Rs. 423,681,475
M/S Topaz Holdings Limited	US $ 14,068,289	Rs. 423,681,475
Total	US $ 28,136,578	Rs. 847,362,950

3. The Board of Directors of the Gharibwal as per latest Form 29 (Particulars of Directors) dated January 04, 2001 comprises of the following:

i) Mr. Mohammad Tousif Peracha-Chairman/Director

ii) Mr. Farooq Zaman-Chief Executive/Director

iii) Mr. Abdul Rafiq Khan-Director

iv) Mr. Tabassum Tousif Peracha-Director

v) Mr. M. Niaz Peracha-Director

vi) Mr. Anis Wahab Zuberi-Director (Nominee NIT)

vii) Mr. Mohammad Saeed Akhtar-Director (Nominee SLIC)

These Directors except Mr. Mohammad Saeed Akhtar were elected by the members of Gharibwal to take office effective February 29, 2000. Mr. Mohammad Saeed Akhtar was co-opted as Director in place of Mr. Imtiaz Rasool on January 04, 2001. Mr. Mohammad Tousif Peracha and Mr. Farooq Zaman were appointed as Chairman and Chief Executive respectively of Gharibwal for a term of three year commencing from February 29, 2000.

4. The examination of Annual Audited Accounts (the "Accounts") of Gharibwal for the year ended June 30, 2000 revealed that an investment of Rs. 172.973 million was made by Gharibwal in Dandot for purchase of its 11,429,708 shares, which is 43.54 % of the total paid up capital of Dandot.

5. Note No.17.1 of the Accounts of Gharibwal further disclosed the following information regarding this investment:

QUOTE

"(a) *The Company during the year, executed a share purchase agreement with the directors of Dandot whereby it acquired 11,550,000 shares of Dandot. Accordingly, the Company acquired the management and control of Dandot with effect from March 06, 2000. The Company also purchased 1,766,500 shares from stock market. The total investment of 13,316,500 shares of Dandot represented 50.73 % share in the total paid up capital of Dandot. The Company before June 30, 2000 sold 1,886,792 shares of Dandot at a price of Rs. 13.25 per share to Saudi Pak Leasing Company Limited (SPLC) against settlement of Dandot's lease liabilities and debited Dandot accordingly.*

In terms of the Memorandum of Understanding dated April 26, 2000 entered into between Dandot, SPLC and the Company, the Company has the option to repurchase 1,886,792 shares of Dandot over a period of five years sold to SPLC against settlement of Dandot's lease liabilities as detailed in the above paragraph. The year end investment of 11,429,708 shares represents 43.54 % share in the total paid up capital of Dandot.

(b) The quantum of impairment of the Company's investment in Dandot has not been worked out as required by IAS 28 (Accounting for Investment in Associates). The value of the Company's investment in Dandot, based on published quotation of July 01, 2000, amounted to Rs. 105.725 million. Provision of diminution in the value of investment amounting to Rs. 67.248 million has not been made in these accounts as this investment has been held for strategic purposes."

UNQUOTE

6. The Accounts of Gharibwal further unfolded that Gharibwal has also provided advances/loans amounting to Rs. 337.8 million to Dandot as stands admitted vide Note No. 23.1 reproduced below:

QUOTE

"(a) advances and long term investments in Dandot, an associated undertaking at year end aggregated Rs 510.841 million. These advances and investments have been made in contravention of Section 208 of the Companies Ordinance, 1984, which requires that aggregate investments in associated undertakings should not exceed 30 % of the paid up capital plus free reserves of the investing company at any point of time.

(b) the Company during the year, charged mark up on the associated undertaking's balances at the rate of 12 % per annum.

(c) due from Dandot as at June 30, 2000 has been fully adjusted by transfer of the Company's bank credit facilities to Dandot subsequent to the balance sheet date."

UNQUOTE

7. The above quoted Note No. 23.1 clearly, categorically and unequivocally admits and acknowledges the contravention of the provisions of Section 208 of the Ordinance.

8. The Auditors of Gharibwal namely M/S Hameed Chaudhri & Co., Chartered Accountants in their report on the Accounts have reported to the members in the following terms:

QUOTE

"Investment in Dandot, an associated company, which comprised of equity investments and advances were made without the approval of the company's shareholders as required by Section 208 of the Companies Ordinance, 1984. However, after the financial closing, the Company has sought and received the said approval of the company's shareholders at the Extraordinary General Meeting held on December 08, 2000."

UNQUOTE

9. The Auditors have also qualified their opinion contained in their report to the members signed on January 04, 2001 in the following words:

QUOTE

" in our opinion and to the best of our information and according to the explanations given to us, the balance sheet, profit and loss account, cash flow statement and statement of changes in equity together with the notes forming part thereof conform with the approved accounting standards as applicable in Pakistan, and, give the information required by the Companies Ordinance, 1984, in the manner so required and, except for the facts stated above and the contents of notes 17.1 (b) and 23.1 (a) and the extent to which these may affect the annexed accounts, respectively give a true and fair view of the state of the company's affairs as at June 30, 2000 and of the profit, its cash flows and changes in equity for the year then ended."

UNQUOTE

10. The Directors Report attached to the Accounts under Section 236 of the Ordinance did not give fullest information and explanation in regard to the auditors' qualification as is evident from the following paragraph of the said Report:

QUOTE

"The auditors have expressed opinion in terms of non compliance of Section 208 of the Companies Ordinance, 1984 for the investment made by the company in Dandot Cement Company Limited, stating that such investments, were required to be approved under the special resolution by the members in their meeting to be held for this purpose. Consequently, in an Extraordinary General Meeting called on December 08, 2000, the members approved all such acts and actions which have been undertaken by the directors in regard to the acquisition of shares and investments made in Dandot Cement Company Limited."

UNQUOTE

11. The Directors Report only discussed the approval of members, which is one of the several requirements and it stands omitted from its consideration the other requirements and their compliance under Section 208 of the Ordinance. It was also noted that the Directors Report also suffered from the following legal infirmities involving grave consequences:

i) Non-disclosure of the material changes and commitments, particularly regarding acquisition of Dandot, affecting the financial position of the company which have interest occurred between the end of the financial year of the company to which the balance sheet relate and the date of the report;

ii) Non-disclosure of the changes that have occurred during the financial year concerning the business in which the company has interest as a member of another company i.e., Dandot;

iii) Rationale for huge investments in Dandot, a sick industrial unit, by way of acquisition of the majority stake in Dandot, massive loans/advances to Dandot and the detail of transactions for the appreciation of the state of the company's affairs by the members.

12. On the issue of investments in associated undertaking, the Directors did not deny in the Directors Report that Dandot was not an associated company of Gharibwal at the time of making investments in Dandot. It, therefore, stands admitted without doubt that the Directors always considered and treated Gharibwal and Dandot as associated undertakings.

13. It has also been discovered from the perusal of the financial statements that:

i) Gharibwal has suffered loss of Rs. 3.547 million on the sale of a part of its investments in Dandot; and

ii) The cash flows of Gharibwal for the year ended June 30, 2000 were negative and, therefore, Gharibwal has resorted to heavy borrowings to pay the acquisition cost of Dandot.

14. The Commission, after noticing the above blatant violations of the mandatory provisions of the Ordinance, further felt concerned in the matter for the following reasons:

i) Gharibwal has borrowed huge funds for making investments in Dandot and was paying mark up on these borrowed funds;

ii) Gharibwal has suffered loss on sale of a part of its investments in Dandot;

iii) Gharibwal's investments in the equity of Dandot has undergone considerable impairment;

iv) the Audited Annual Accounts of Dandot for the year ended June 30, 2000 presented a very bleak picture. Dandot has accumulated staggering losses to the tune of Rs. 1,090.949 million against the equity of only Rs. 262.500 million;

v) the auditors of Dandot have raised doubt about the company's ability to continue as a 'going concern.'

15. It appeared to the Commission that notwithstanding the noted violations of law, the investments in Dandot have been prejudicial to the interest of Gharibwal and its shareholders. The above mentioned circumstances necessitated the examination of the matter to determine the extent of violations of the mandatory provisions of Section 208 of the Ordinance and whether these investments were in the interest of the shareholders of Gharibwal?

16. Consequently, a show cause notice No.19 (161)/CF/ISS/2001 dated March 27, 2001 was issued to the Chief Executive and all Directors of the Company calling upon them "to show cause in writing within ten days as to why fine may not be imposed on every Director of the Company and the loss sustained by the company in consequence of the investments which were made without complying with the requirements of this Section may not be recovered from them, jointly and severally, under Sub-section (5) of Section 208 of the Ordinance for knowingly and willfully becoming the cause of the aforesaid default."

17. In response to the aforesaid show cause notice, the Learned Counsel stated vide his letter dated April 09, 2001 as follows:

i) In March 2000, Gharibwal acquired the management and control of Dandot. The said decision was motivated by the twin goals of availing a commercial opportunity and acting, in overall national interest, as a catalyst for the revival of a sick unit. Gharibwal has made a contribution towards the rehabilitation of a sick and closed unit stuck in a financial quagmire.

ii) When Gharibwal acquired the shareholding in Dandot, the two companies were not associated companies. None of the relationship, as stipulated under Clause (2) of Subsection (1) of Section 2 of the Ordinance, existed between Gharibwal and Dandot at the time of acquisition of shares of Dandot by Gharibwal. Section 208, therefore, was not applicable to the acquisition, which covered the purchase by the company of 11,550,000 shares of Dandot for Rs 190 million.

iii) Gharibwal has obtained credit facilities of Rs. 337.8 million for Dandot in order to help Dandot, which under its previous management was experiencing closure as a sick unit and undergoing financial collapse. The major creditors of Dandot have a decree by the Lahore High Court against Dandot. The bank accounts of Dandot were frozen and Dandot was listed a defaulter in the CIB reports. The above said financial facilities were arranged for resuscitating Dandot.

iv) The liability for the above said credit facilities along with any mark up accruing thereon were transferred to Dandot by November 2000. By this help, the sick unit was helped and the sponsor did not incur any liability as the whole credit facility along with mark up thereon was soon assumed by Dandot. No cost direct or indirect, of this credit facility remains with the shareholders of Gharibwal and its directors. Gharibwal, therefore, has not suffered any loss due to this investment in Dandot.

v) The shareholders of Gharibwal in their Extraordinary General Meeting held on December 08, 2000 approved and ratified the actions in relation to Dandot. The statement under Section 160 of the Ordinance sent for this meeting gave a detailed and transparent background of this transaction. In fact, the shareholders commended the Board of Directors of Gharibwal for arranging an emergency bailout package for about nine months. By helping Dandot, Gharibwal has improved the value of its shareholdings in Dandot.

vi) The ratification by the shareholders had a retrospective effect and it rectified any irregularity that could arguably be ascribed to the investment in Dandot by Gharibwal.

vii) All necessary information relating to the transactions of Gharibwal with Dandot were duly disclosed in the Annual Report of Gharibwal for the year 2000. Full disclosure to and approval as well as ratification by the shareholders of Gharibwal reflect that the requisite level of transparency has been maintained.

viii) The High Courts of Pakistan while considering the provisions of Section 208 of the Ordinance have held that the purpose of this Section is to secure the funds of the company, curb abuse of powers by the directors who hold interest in more than one company and make the matters as regards investment by a company in its associated company transparent as was held in Shahbaz-ud-Din Chaudhary vs. Service Industries Textiles Limited, PLD 1988 Lahore 1 and M. Shahid Saigol vs. Kohinoor Textile Mills Limited, PLD 1995 Lahore 264.

ix) All actions and transactions of Gharibwal regarding Dandot complied with the spirit of Section 208 of the Ordinance in that by virtue of such actions neither Gharibwal has suffered any loss nor any director of the company enriched him/herself.

x) It is denied that Gharibwal has sustained any loss in consequence of its investment in Dandot, which was made without complying with the requirements of Section 208 of the Ordinance.

xi) The director, Mr. Saeed Akhtar, nominee director of State Life Insurance Corporation was not a director of Gharibwal at the time of the impugned investments.

xii) The provisions of Section 488 of the Ordinance is also invoked to seek relief from liability, if any to be attracted for non-compliance by Gharibwal with the provisions of Section 208 of the Ordinance.

18. The Learned Counsel also requested for a personal hearing. The case was, therefore, heard on May 04, 2001 and June 18, 2001. On the hearing held on June 18, 2001, the Learned Counsel also filed supplemental written submissions. During the course of hearings so held, the Learned Counsel relied upon several documents, as discussed hereinafter, in support of his contentions.

19. The contentions raised by Gharibwal, in the supplemental written submissions and during the course of hearings, briefly stated, are as follows:

i) Gharibwal purchased 11,550,000 (44 %) shares of Dandot for Rs. 190 million vide agreement dated *November 22, 1999* (amended March 03, 2000) entered into between Gharibwal and Chakwal Group people. Board of Directors of Gharibwal approved the purchase through resolution dated *November 24, 1999*. 7,726,400 shares of Dandot were transferred to Gharibwal on March 06, 2000; balance 3,823,600 shares were transferred by April 25, 2000. *These investments are not covered by Section 208*

ii) Gharibwal purchased 800,000 shares of Dandot from the market for Rs. 7.3 million prior to March 06, 2000. *This investment is also not covered by Section 208*.

iii) Gharibwal became associated undertaking of Dandot on March 06, 2000 because on that date Gharibwal reached, for the first time, a shareholding of 20% in Dandot and its nominees are appointed as directors of Dandot.

iv) Gharibwal purchased 966,500 shares from the market between March 07 to June 30, 2000 for Rs. 7.3 million. *This purchase is covered by Section 208*.

v) Gharibwal sold 1,886,792 shares of Dandot to Saudi Pak Leasing Company Limited at Rs 13.25 per share.

vi) Gharibwal provided financial facilities to Dandot to the tune of Rs. 337.8 million at the rate of mark up of 12% per annum whereas average rate of mark up charged by banks to Gharibwal was 11.74% per annum. These financial facilities are in the nature of normal trade credit covered by Commercial Trade Agreement dated July 07, 2000 between Gharibwal and Dandot. Hence, these are not covered by Section 208.

vii) All liabilities of Rs.337.8 million were transferred to Dandot as per Citibank/Dandot agreement dated November 02, 2000.

viii) All transactions not covered by Section 208, including financial facilities were, out of abundant caution, got ratified by the Extraordinary General Meeting of Gharibwal held on December 08, 2000.

ix) Gharibwal is operating, at present; an old technology of wet process of manufacturing as against Dandot, which is based on the latest technology of dry process manufacturing.

x) Gharibwal acted *bona fide* to revive a sick unit which was in fact a commercial opportunity as the present cost of a project similar to Dandot estimated at Rs 4.5 billion excluding the cost of time for getting such project started.

xi) Section 195 and, particularly, Section 195(5) of the Ordinance is also applicable.

xii) Ratification, even subsequently, validates all actions of a company ((a) Gower, LCB, Gower's Principles of Modern Company Law, at 177, Fifth Ed. 1992; (b) Grant v. United Kingdom Switchback Railways Co. (1888) 40 Ch D 135 (Court of Appeal) cited in Sealy, LS, Cases and Materials in Company Law, at 192-93, Fifth Ed. 1992; and (c) Parmeshwari Prasad Gupta vs. The union of India, AIR 1973 SC 2389).

xiii) Section 488 of the Ordinance is invoked to seek the approval of the SECP for the *technical non-compliance* with the transactions. Reliance is placed on these case laws:

((a) Chief Executive, National Tanker Company (pvt) Ltd. Vs. Registrar of Companies. 1997 CLC, Karachi 1347; (b) In re: Al-Hilal Vegetable Ghee Mills Limited PLD 1977 Lahore 1367: (c) Burno Ragazzi vs. the Registrar of Joint Stock Companies, Karachi PLD 1959 (W.P.) Karachi 48: and (d) In the matter of Elahee Baksh & Co Limited PLD 1958 Dacca 378)

20. In the context of aforesaid arguments, the following were the main issues, which required determination:

i) When did Gharibwal and Dandot become associated undertakings?

ii) What was the time of making investments in Dandot? Were Gharibwal and Dandot associated undertakings at the time of making of investments by Gharibwal in Dandot?

iii) Whether the financial facilities provided by Gharibwal to Dandot were in the nature of 'normal trade credits'

iv) Whether approval of the members was obtained through Special Resolution for investments in Dandot and the disposal of a part of these investments in accordance with Section 208?

v) Whether investments by Gharibwal in Dandot exceeded 30% threshold fixed by Section 208 of the Ordinance?

vi) Whether the mark up charged on advances/loans to Dandot is less than borrowing cost of the Dandot?

vii) Whether Gharibwal has suffered any loss on the investments made in Dandot?

viii) Whether the ratification by the shareholders rectifies the default made under Section 208 and legalizes the investments made by a company in excess of 30% threshold?

ix) Whether actions and transactions of Gharibwal pertaining to Dandot complied with the spirit of Section 208 of the Ordinance.

x) Whether Section 195 (5) of the Ordinance is applicable in this case.

xi) Whether any relief could be given in this case in terms of Section 488 of the Ordinance?

21. After having considered the pleadings of the case, the perusal of the submitted documents and the cited case laws, the undersigned holds on each issue as under:

(i) DANDOT AS ASSOCITED COMPANY OF GHARIBWAL. The first point in discussion is when did Gharibwal and Dandot become associated undertakings/companies? The Learned Counsel has contended that Dandot became associated company of Gharibwal on March 06, 2000. In this regard, it would be appropriate to look at the relevant provisions of law for determination of this question, which are embodied in Clause (2) of Sub-section (1) of Section 2 of the Ordinance. According to this, any two or more companies/undertakings can be considered associated companies/undertakings if *interalia*, they are inter-connected with each other because of Common ownership, C*ommon directorship, a* person holding or controlling, directly or indirectly, 20% or more of the shares of both the companies/undertakings, Common management, Common control or one company, directly or indirectly, controls, beneficially owns or holds more than fifty percent of the voting securities of the other company or otherwise has power to elect and appoint more than fifty percent of its directors (i.e., holding and subsidiary relationship). According to the record of Dandot maintained at the Company Registration Office, Lahore, the following Directors of Gharibwal were co-opted as Directors of Dandot on March 06, 2000:

i) Mr. Abdul Rafiq Khan

ii) Mr. M. Tousif Peracha

iii) Mr. Farooq Zaman

iv) Mr. M. Niaz Peracha

Gharibwal and Dandot, therefore, became formally associated undertakings on March 06, 2000 due to inter-connecting relationship of common directorship. However, it appears that even prior to this formal association, they were acting as such and treating one and other as associated companies.

(ii) TIME OF MAKING INVESTMENT BY GHARIBWAL IN DANDOT AS ITS ASSOCIATED UNERTAKING. The next question is the time of making investments and whether both the companies were 'associated companies/undertakings' at the time the investments were made by Gharibwal in Dandot? In this regard, it is noted that admittedly Gharibwal has made investments for purchase of shares of Dandot as well as investments in the form of advances/loans to Dandot.

(a) Gharibwal has entered into a share purchase agreement dated November 22, 1999 with the sponsors/directors of Dandot for initial purchase of 44 % shares (11,550,000 in number) of Dandot. The consideration for purchase of the said shares was agreed at Rs.160 million.

This agreement was amended by two supplemental agreements of March 03, 2000. As per stipulations given in the Supplemental Agreement-I, the sale price of shares was enhanced from Rs. 160 million to Rs. 190 million.

According to Supplemental Agreement-II, 7,726,400 shares were to be transferred to Gharibwal along with transfer of management and physical possession of assets of Dandot, on March 06, 2000 against the payment of Rs 100.343 million. The balance 3,823,600 shares were to be transferred in favour of Gharibwal within two months from the date of execution of the agreement.

In this regard, the Supplemental Agreement-II establishes that Gharibwal has agreed to place a sum of Rs 49.657 million with Jahangir Siddiqui Investment Bank Limited (JSIBL) in an Escrow Account to be disbursed to the sellers provided that 3,823,600 shares are transferred in favour of Gharibwal. In case of failure of sellers to perform their obligation, the agreement further stipulated, that JSIBL will refund the amount of Rs 49.657 million then lying in Escrow Account along with profit, however, the sellers would not be entitled to receive the accrued profit/any benefit of the said Escrow Account. **This payment of Rs 49.657 million was not made to the concerned party and, therefore, cannot be treated as investment in Dandot prior to it becoming associated company of Gharibwal because of the simple reason that according to the mandate given to JSIBL, the payment was to be made only on receipt of shares from the sellers and further the profit on the said amount was paid**

to Gharibwal. The record of the purchase of shares, i.e., copies of the broker memo also lends support that investments for purchase of 3,823,600 shares were made after March 06, 2000.

Out of the total 11,550,000 shares, 7,726,400 shares were transferred on March 06, 2000, as per minutes of the meeting of the Board of Directors of Dandot held on March 06, 2000. **In view of the admitted position as established from the record submitted by Gharibwal, it is apparent that the investments of Rs101.502 million pertaining to 7,726,400 shares were made by Gharibwal in Dandot when both Gharibwal and Dandot were not associated undertakings. However, this clearly establishes also that the same would not be the case when investments amounting to Rs.50.231 million for purchase of 3,823,600 shares were made by Gharibwal in Dandot(The balance amount of Rs. 40 million paid/to be paid subsequent to June 30, 2000 will be in addition to this amount). This is because by the time of these investments, Gharibwal and Dandot had already become associated companies. As regard to investment of Rs. 7.3 million for purchase of 966,500 shares of Dandot from the open market, it is admitted that these investments were made after March 06, 2000 when both Gharibwal and Dandot had become associated undertakings. Therefore, the investments for purchase of 4,790,100 shares were made after March 06, 2000 in violation of the provisions of Section 208 of the Ordinance.**

(b) The perusal of the minutes of the Board of Directors Meeting of Dandot held on March 06, 2000 reveals that in the said meeting first agenda was the transfer of 7,726,400 shares and the next agenda items related to co-option of nominee Directors of Gharibwal on the Board of Dandot which resulted in inter-connecting relationship of common directorship between Gharibwal and Dandot. This is thus apparent that the share purchase agreement was not even partially enforced when both Gharibwal and Dandot became associated undertakings on March 06, 2000. It was incumbent on the Directors to get shareholders approval before taking any decision to make investments in Dandot. It was, however, not done which shows that the Directors have disregarded the mandatory requirements of the provisions of Section 208 of the Ordinance.

(c) As to the argument that the provisions of Section 208 were not applicable to the acquisition which covered the purchase by the company of 11,550,000 shares of Dandot for Rs 190 million and that although the payment of 11,550,000 shares and its transfer were effected on different dates, some of which falls after the relationship of associated undertakings was established between Gharibwal and Dandot, it remained a part of the transaction agreed under the share purchase agreement dated November 22, 2000 is not convincing. **The undersigned is of the considered view that once the inter-connecting relationship, as stipulated in Clause (2) of Sub-section (1) of Section 2 of the Ordinance, is established, then the provisions of Section 208 of the Ordinance immediately comes into play. Any investment made thereafter without complying with the said provisions would be violative of the said provisions of law. The view taken by the undersigned finds support from the Judgment in the case law; Brook Bond India Ltd. Vs. UB Ltd., (1994) 79 Com Cases 346: (1994) wherein it was held that Section 372 of the Indian Companies Act, 1956 (corresponding to Section 208 of the Ordinance) comes into play only when the investment actually takes place and not at the stage of an 'agreement to invest'.**

(d) **With regard to the timing of investments made in the form of loans/advances, it is admitted that these transactions were made from February 17, 2000 even before the formal transfer of management and control of Dandot to Gharibwal and continued till June 30, 2000 and may be thereafter. Gharibwal has admitted in Note 23.1 of the Accounts that these advances/facilities have been made in contravention of the provisions of the Ordinance. It is, therefore, held that these investments were made in violation of the provisions of Section 208 of the Ordinance.**

(iii) NATURE OF CREDIT FACILITIES PROVIDED BY GHARIBWAL TO DANDOT.

As far as the investment made in the form of advances/loans is concerned, the perusal of documents, including copies of the ledger account of Dandot and the flow of funds, indicates that Gharibwal has been making payment on behalf of Dandot to suppliers, workers, leasing companies, financial institutions, and on account of excise duty and for other expenses and miscellaneous payments. These transactions were made from February 17, 2000 to June 30, 2000.

Total payments made according to the information provided by Gharibwal, is Rs 485.239 million against which Rs.147.371 million were received or adjusted against several transactions. As regards to the timing of the investments made in the form of advances/loans, it is not denied that these were made when both Gharibwal and Dandot had formally become associated undertakings.

Gharibwal has submitted that the financial facilities of Rs. 337.8 million were in the nature of 'normal trade credit, covered by the Commercial Trade Agreement dated July 04, 2000 between Gharibwal and Dandot. It is evident that the said agreement was signed after June 30, 2000, the time up to which Gharibwal has made payments aggregating Rs. 485.239 million to Dandot on different dates. The nature of such financing transactions as described above is such that it cannot be considered normal trade credits. The words 'normal trade credit' suggest a credit, which is given in the normal course of business. Incurring expenses like salaries and wages, utilities bills, etc by a cement manufacturing company on behalf of its associated company would not fall under 'normal trade credit.' In this regard, the statement of Gharibwal contained in Note 23.1 is relevant which admits, beyond any doubt, that advances to Dandot were made in contravention of the provisions of the Ordinance. **The undersigned, therefore, holds that these financing transactions are advances/loans and do not fall under 'normal trade credit.' In addition to the aforesaid, this relationship in itself shows that both these companies i.e., Gharibwal and Dandot had come under the common management and were being run and treated as such.**

(iv) APPROVAL OF MEMBERS IN ACCORDANCE WITH SECTION 208. The next matter of discussion is whether shareholders approval through 'Special Resolution' was obtained for investments in Dandot and disposal of a part of the said investments?

(a) It would be beneficial to look at the relevant provisions of law for making investment in associated undertakings. Under Section 208 of the Ordinance, it is mandatory that a 'Special Resolution' be passed for making investment in associated undertakings. It is also one of the conditions precedent for making investment that the Resolution shall indicate the nature and amount of the investment and terms and conditions attached thereto. It has further been provided that aggregate investment in associated companies, except a wholly owned subsidiary company, shall not exceed thirty percent of the total paid

up capital and free reserves of the investing company at any point of time. According to Sub-section (2) of the aforesaid Section, no change in the nature of an investment or the terms and conditions attaching thereto is to be made except under the authority of a Special Resolution.

(b) Section 208 responds to the potential a group of people/ companies in control of more than one companies may direct their funds in such a manner that accommodates their own interest rather than interest of all the shareholders. The Directors under the Ordinance are required to discharge their obligations and fiduciary duties to act in the interest up of the company and its shareholders. However, Section 208 does not rely on the directors in order to secure the confidence of minority shareholders and make it mandatory that such transactions must be approved by them.

(c) These provisions of law, therefore, have been enacted with a view to make the matters concerning investments by companies in their associated companies transparent and at arm's length. These provisions are mandatory and no investments in associated companies can be made without getting prior approval from the shareholders. A plain reading of the said provisions shows that these are conditions precedent to be fulfilled before the investing company can make any investments in its associated undertakings. These have been violated as follows:

(i) Gharibwal has made investments for purchase of 4,790,100 shares of Dandot during the period March 06, 2000 to June 30, 2000 when Gharibwal and Dandot had formally associated undertakings and disposed of 1,886,792 shares of Dandot to Saudi Pak Leasing on June 30, 2000 under a buy back arrangement without approval of shareholders.

(ii) Gharibwal has also made payments of over Rs. 485 million on behalf of Dandot without shareholders approval.

(d) Gharibwal has, on objection raised by the auditors convened a meeting of the shareholders of Gharibwal on December 08, 2000 wherein special resolutions were passed to ratify the investment transactions. **This clearly establishes that investments and disposal of a part of the said investments (under buy-back agreement with Saudi Pak Leasing) were made without first obtaining approval of the shareholders as required by law. The manner of the investment, the disregard to the compliance**

of the provisions mandatory in nature, the subsequent ratification on the objection of auditors, show that all along the Directors were fully conscious of the factum of violation and disregarding the same with impunity

(e) A scrutiny of the 'Special Resolutions' passed by the shareholders of Gharibwal to ratify investments in Dandot is also essential. It is apparent from the agenda disclosed in the notice of the EGM held on December 08, 2000, the draft resolutions, the statement appended to the said notice under Section 160 (1) (b) of the Ordinance, the minutes of the said meeting and the Special Resolutions filed by Gharibwal with Company Registration Office, Lahore, that the shareholders considered and approved the following transactions:

i) ratification of purchase of 966,500 shares of Dandot from the open market for Rs. 7.3 million during the period March 07, 2000 to June 30, 2000.

ii) ratification of sale of 1,886,792 shares of Dandot at Rs. 13.25 per shares to Saudi Pak Leasing under buy-back arrangement through agreement dated April 26, 2000.

iii) ratification of all actions done and decisions taken by Gharibwal for advancing/ arranging financial facilities through different transactions aggregating Rs 337.8 million pursuant to Commercial Trade Agreement during March-June 2000.

(g) After viewing the resolutions, the statement of material facts and the arguments of Gharibwal, the following shortcomings/inconsistencies/self-contradictory statements are apparent:

i) the Resolution speaks about ratification of purchase of only 966,500 shares of Dandot whereas the information given under S.R.O. No. 634(1)/96 states nature, amount and extent of investment as 'Long term investment (44%) of the equity of Dandot which refers to 11,550,000 shares. It does not say anything about 966,500 shares of Dandot purchased by Gharibwal.'

ii) The Resolution further seeks approval of the shareholders for the sale of 1,886,792 shares. However, the information given under S.R.O. referred above is silent on this issue.

iii) The shareholders have not passed any resolution pertaining to investments made for purchase of 11,550,000 shares in Dandot out of which 3,823,600 shares were purchased when Gharibwal and Dandot had formally become associated companies.

iv) The ratification of financing facilities were done for transactions aggregating Rs. 337.8 million whereas Gharibwal has made payments to Gharibwal much more than this amount as is obvious from the copy of current account of Dandot placed on record. At one time, these transactions were more than Rs. 383 million and aggregate of such transactions for the period of March 06-June 30, 2000 even exceeded Rs. 485 million.

v) Statement of material facts states that Dandot and Gharibwal became associated undertakings after the consummation of the delivery and transfer of 11,550,000 shares under the agreements whereas it is admitted by Gharibwal that both the companies become associated companies on March 06, 2000 when only 7,726,400 shares were transferred/delivered.

(h) **It is thus apparent and duly established indeed that all investments except for 7,726,400 shares were made by Gharibwal in Dandot without getting prior permission of the shareholders through Special Resolution. Moreover, no resolution has been passed even for the investment of 3,823,600 shares of Dandot and financial facilities provided to Dandot in excess of Rs 337.8 million. The essential requirements of Section 208 were, therefore, not complied with.**

(v) THE STATUTORY INVESTMENT LIMIT. The following figures provided by the company in its Accounts for the year ended June 30, 2000 are relevant:

	Rupees in '000'
Paid up capital	168,764
General reserves	332,000
Accumulated loss	(434,068)
Total	**66,696**

The total investments made by Gharibwal in Dandot, after adjusting the loan amount, is Rs. 201.520 million. It has already been held that investments of Rs. 103.951 million were made before Gharibwal and Dandot became associated companies. **The remaining investments of Rs. 97.569 million (Rs. 40 million paid after June 30, 2000) are more than 108% of the total paid up capital and free reserves of Gharibwal. These investments, therefore, have been made in contraventions of the provisions of Section 208 of the Ordinance which has fixed an upper ceiling for such investments at 30 % of the paid up capital and free reserves of the investing company at any point of time.**

(vi) RETURN ON INVESTMENTS. The next point is whether the return on advances/loans to Dandot was at not less than the borrowing cost of Gharibwal, which is also a mandatory requirement of the proviso to Sub-section (1) of Section 208 of the Ordinance. The weighted average borrowing cost of the Gharibwal as per its Audited Annual Accounts for the year ended June 30, 2000 works out to be 15% per annum approximately.

(a) The Learned Counsel has contended that financial facilities of Rs 337.8 million were provided to Dandot at the mark up rate of 12% per annum as against the rate of mark up of 11.74% charged by banks to Gharibwal for these facilities. **The undersigned agrees to this stance of the Learned Counsel.**

(b) The undersigned, however, is not convinced as to whether Gharibwal has charged mark up on all the advances/loans provided to Dandot. It has been contended that Gharibwal has provided financial facilities of only Rs. 337.8 million to Dandot which were obtained from financial institutions for the said purpose. From the perusal of the documents and the record of Gharibwal, it is evident that Gharibwal has made payments to/on behalf of Dandot aggregating Rs. 485.239 million during the period March 06, 2000 to June 30, 2000. At one point of time such financing facilities outstanding were even more than Rs. 383 million, which shows that the Gharibwal's own funds were also utilized in making advances/loans to Dandot. This also find support from the statement of Gharibwal and the statement of material facts annexed to the notice of Extraordinary General Meeting held on December 08, 2000 that the financing for the investments were *substantially* obtained from ABN AMRO Bank and Citibank. **This, therefore, establishes that Gharibwal's own funds were also utilized for the purposes of investments in**

Dandot. Mark up on such advances/loans should not have been less than borrowing cost of Gharibwal, which is worked out at 15% per annum approximately. It is, therefore, clear that the aforesaid provisions of the Ordinance were violated by Gharibwal deliberately and intentionally over a substantial period of time.

(vii) LOSS SUFFERED BY GHARIBWAL ON ITS INVESTMENTS IN DANDOT. It has been denied that Gharibwal has suffered any loss, direct or indirect, in consequence of its investments in Dandot, which were made without complying with the requirements of Section 208 of the Ordinance.

(a) It is evident from Note No. 32 of the Accounts of the Gharibwal that the company has suffered loss of Rs 3.547 million on sale of a part of its investments in Dandot. This issue at least has not been controverted by Gharibwal either verbally or through documents.

(b) It may also be noted, as has been held above, that Gharibwal has charged mark up on some of the loans/advances at less than its borrowing cost.

(c) In addition, Gharibwal is borrowing at an average rate of 15% for its own requirements whereas for the purpose of making advances/loans to its associated undertaking, it has obtained funds at cheaper rates, which is also a loss to Gharibwal.

(d) The value of investments in the shares of Dandot, on the basis of the value of its share as quoted on KSE on December 03, 2001, is only Rs 50.291 million, which shows substantial impairment.

(e) Gharibwal has also been incurring substantial cost on borrowed funds for making investments in Dandot. This cost is being charged to the profit and loss account of Gharibwal.

(f) Also, according to the agreement with Saudi Pak Leasing, Gharibwal will buy-back 1,886,792 shares sold to it under buy-back arrangement at a price of Rs 19 per share which also exposes Gharibwal to substantial loss.

(g) Gharibwal has also undertaken with Saudi Pak Leasing to provide additional shares in case the share price of Dandot is less than Rs 10 per share at June 30, 2001. The share price of Dandot as on that date was Rs. 5.50 which suggests that Gharibwal must have provided further shares to Saudi Leasing on behalf of Dandot, which again exposes Gharibwal to loss.

(h) Gharibwal has resorted to borrowings for its own requirements and also to finance the investments in Dandot. The financial position of Dandot at the moment is such that it is unlikely to provide any return to its shareholders, including Gharibwal, in the near future. Gharibwal has already realized this situation and that is why it has, while giving reasons of reversal of financing transactions of Rs. 337.8 million, stated in the statement of material facts that

QUOTE

" But the Company soon found that, due to recessionary trends in cement market, it could not cause cement to be lifted from Dandot. The Board of the Company has promptly reversed the action and Dandot has assumed liability for the full Rs. 337.8 million."

UNQUOTE

While this action is appreciable, it also shows and establishes that loss has been curtailed. **In view of the above discussion, the contention that Gharibwal has not sustained any loss, direct or indirect, on its investments in Dandot is not acceptable. No benefits, as envisaged in the statement of material facts, has so far accrued to Gharibwal on its investments in Dandot. Actually, as the above stated facts establish, Gharibwal has not only suffered loss on its investments in Dandot but also it is still exposed to substantial losses, being major shareholder of Dandot, which has also been a cause of great concern.**

(viii) RATIFICATION ISSUE. The question whether the shareholders could rectify the irregularity/default already made by a company now requires consideration. In this respect the contention of the Learned Counsel is that ratification, even subsequently, validates all actions of a company. It is a well settled principle, laid down by the Superior Courts, that when law requires something to be done in a particular way, it should be done in that specified manner and none other. The plain reading of the provisions of Section 208 of the Ordinance also indicates clearly that the words *'a company SHALL not make any investment in any of its associated companies or undertakings except under the authority of a special resolution'* have been used to show the intention of the legislator that it is a mandatory restriction on the companies for making investments in their associated companies. These provisions are mandatory

is also established by the fact that these entail penal provisions for their violation. This restriction can be removed only when the pre-conditions set out in Section 208 are fulfilled. The undersigned is, therefore, of the firm view that 'prior approval' of the shareholders through 'special resolution' is a condition precedent for making investments in terms of Section 208 of the ordinance otherwise the investment is *ultra vires* of the said provisions. Moreover, the shareholders cannot ratify an act, which is outside the powers of the company. The undersigned has considered the submissions in the light of the judgments on which reliance has been placed by the learned counsel. The reference of page 117 of Gower, LBC, Gower's Principles of Modern Company Law, Fifth Ed. 1992, pointed out by the learned counsel in his written submissions, is a commentary on the amendment made in Section 35 of the English Companies Act on the subject of *ultra vires* acts. There are no corresponding provisions in the Ordinance, therefore, the same does not appear to be applicable to the case in hand. In the case of Grant vs. United Kingdom Switchback Railways Co. (1888), it was held that if the Board of Directors of a company have acted on behalf of the company outside their actual authority, their act may be ratified by the members in general meeting by ordinary resolution. Another case law, Parmeshwari Prasad Gupta vs. The Union of India, AIR 1973 SC 2389 referred to by the learned counsel to support his arguments also laid down that a regularly constituted meeting of the Board of Directors can ratify that action which, though unauthorized, was done on behalf of the company and further ratification would always relate back to the date of the act ratified. **These case laws are not relevant in view of the particular circumstances of this case. Even if it is so assumed that ratification validates all actions, the same is of no avail to the defaulting Directors as they have acted outside their statutory powers and the essential requirements of Section 208 were not fulfilled while passing special resolutions in Extraordinary General Meeting held on December 08, 2000.**

(ix) SPIRIT OF SECTION 208. From the above, it is abundantly clear that all actions and transactions of the management of Gharibwal pertaining to Dandot did not comply with the mandatory provisions of Section 208 of the Ordinance. The Directors of Gharibwal have admitted and acknowledged violation of the mandatory requirements of law as already noted above in their own

statutory record. It may be noted that it is only after making investments in Dandot that the shareholders were approached for ratification of the investments already made by the Board of Directors, apparently on the objection of Auditors of the Company.

(x) APPLICATION OF SECTION 195. The Learned Counsel has also argued that Section 195 (5) of the Ordinance is also applicable on the financing facilities provided by Gharibwal to Dandot. This Section generally put bar on the extension of loans to directors and provision of guarantees/securities to their firms, private limited companies inter-connected with each other on the basis of common directorship. Sub-section (1) and (5) thereof reads as under:

> 195. Loans to directors, etc.—(1) Save as otherwise provided in Sub-section (2), no company, hereinafter in this Section referred to as "lending company" shall, directly or indirectly, make any loan to, or give any guarantee or provide any security in connection with a loan made by any other person to, or to any other person by,
>
> (a) any director of the lending company or of accompany which is its holding company or any partner or relative of any such director;
>
> (b) any firm in which any such director or relative is a partner;
>
> (c) any private company of which any such director is a director or member;
>
> (d) any body corporate at a general meeting of which not less than twenty five percent of the total voting power may be exercised or controlled by any such director or his relative, or by two or more such directors together or by their relatives; or
>
> (e) any body corporate, the directors and chief executive whereof are or is accustomed to act in accordance with the directions or instructions of the chief executive, or of any director or directors, of the lending company;
>
> (5) Every person who is knowingly a party to any contravention of this section, including in particular any person to whom the loan is made or who has taken the loan in respect of which the guarantee is given or security is provided, shall be punishable with fine which may extend to five thousand rupees or with simple imprisonment for a term which may extend to six months.

The aforesaid Section prohibit the loans/guarantees/security to private companies and other body corporate whose 25% or more voting power can be exercised by the lending company or in cases where the Directors or Chief Executive are accustomed to act in accordance with the directions or instructions of the Chief Executive or Directors of lending company (implying companies under common management or control). Section 208, on the other hand, specifically deals with investments in associated companies or undertakings. According to the well-accepted principles of interpretation, where a specific provision of law would govern a situation, general provision of law would stand excluded. A**pplying the said principle of interpretation, special vs. general, the transactions of financing more appropriately falls under the provisions of Section 208, which is specific for investment in associated undertakings.**

(xi). APPLICATION OF SECTION 488. The learned counsel has lastly also invoked Section 488 to seek relief from liability for *technical non-compliance* with the provisions of Section 208 of the Ordinance. He has also placed reliance on the case laws; ((a) Chief Executive, National Tanker Company (pvt) Ltd. Vs. Registrar of Companies. 1997 CLC, Karachi 1347; (b) In re: Al-Hilal Vegetable Ghee Mills Limited PLD 1977 Lahore 1367: (c) Burno Ragazzi vs. the Registrar of Joint Stock Companies, Karachi PLD 1959 (W.P.) Karachi 48: and (d) In the matter of Elahee Baksh & Co Limited PLD 1958 Dacca 378).

(a) **The undersigned disagrees with the contention of the Gharibwal that violation of the provisions of Section 208 of the Ordinance is a mere technical non-compliance. These provisions of law are mandatory and, therefore, their violation is a SUBSTANTIAL NON-COMPLINACE.**

(b) Now coming to the cited case laws, these judgments only allow regularization of technical non-compliance, however, herein the contrary is true. Grave and serious violations are outside the scope of Section 488 of the Ordinance.

(c) In one case cited as Burno Ragazazzi PLD 1959, it was held that punishment has not been prescribed by law out of vindictiveness but with the intention that the law should be observed. There is no cavil with this judgment. However, the judgments are to be applied keeping in view the facts and

circumstances of each case. Securities and Exchange Commission of Pakistan has been established under the Securities and Exchange Commission of Pakistan Act, 1997 for the beneficial regulation of the capital market, superintendence and control of the corporate entities and for matters connected therewith and incidental thereto. **It is also one of the functions of the Commission to ensure observance of law and to impose fine and to prosecute the persons found guilty and not to overlook the violations of law.**

(d) To avail the relief under Section 488, one has to establish that he has acted 'honestly and reasonably' which implies that bona fide has to be established, it must be shown that due care has been exercised which an ordinary reasonable and prudent person could have exercised in the similar circumstances or else it was beyond his control to comply with the provisions of law. **The conduct of the directors has been totally inappropriate and they have consciously and deliberately disregarded the mandatory provisions of Section 208 of the Ordinance. The Directors, therefore, have failed to make out a case under Section 488 of the Ordinance.**

23**.** The Learned Counsel has also argued that the purpose of Section 208 of the Ordinance is to secure the funds of the company, curb abuse of powers by the directors who hold interest in more than one company and make the matter as regards investments by a company in its associated companies transparent. He has also referred to the following Judgments: Shahbaz-ud-Din Chaudhry vs. Service Industries Textiles Limited, PLD 1988 Lahore 1 and M. Shahid Saigol vs. Kohinoor Textile Mills Limited, PLD 1995 Lahore 264. The facts of the first cited judgment are materially different from the facts of the case in hand. In the other Judgment, the complaint was that the notice of Extraordinary General Meeting, the proceedings of the same and the special resolution passed therein authorizing additional investment by the investing company in its associated company suffered from material defects, omission, irregularity and illegality and, therefore, the same shall be declared void and nullity. Based on the facts and circumstances of the said case, the notice of the Extraordinary General Meeting and the resolution passed therein were declared to be invalid with the direction to the respondent to hold fresh Extraordinary General Meeting for the purpose after making compliance with the mandatory provisions

of Section 160 (1) (b) and Section 208 of the Ordinance. **The undersigned is of the view that the action initiated by the Commission is strengthened by these judgments.**

24. Before concluding, it would be beneficial to look at the proceedings of the meetings of the Board of Directors regarding investments in Dandot. The provisions of Sub-section (2) of Section 196 of the Ordinance requires that the directors shall exercise the power to invest the funds of a company by means of resolutions passed at their meetings subject of course, to the shareholders approval in case of investments in associated companies. According to statement of the Company Secretary, Gharibwal attached with the Learned Counsel's letter dated June 09, 2001 and the information provided by Gharibwal, only nine meetings of the Board of Directors have been held during the period July 14, 1999 to February 20, 2001. The only meeting of the Board of Directors which discussed the investments to be made by Gharibwal in Dandot is of November 24, 1999. Minutes of all other meetings of the Board of Directors are silent on this issue. The undersigned could not find any decision in the minutes of the meetings held before November 24, 1999, which gave mandate to the Chairman and the Chief Executive of Gharibwal to negotiate the acquisition of Dandot. The share purchase agreement was signed between Garibwal and the sponsors/Directors of Dandot on November 22, 1999 whereas the Board Resolution in this respect was passed on November 24, 1999, which indicates that the Board of Directors of Gharibwal were informed of the acquisition of Dandot after the execution of share purchase agreement on November 22, 1999. The Resolution and discussion in the Board Meeting held on November 24, 1999 also do not indicate that the issue of taking over of Dandot was ever discussed before the date of the said meeting. Moreover, the said resolution was for the acquisition of 11,550,000 shares (44%). Gharibwal has also purchased 1,766,500 shares from the stock market, which also required approval of the Board, which the undersigned could not find in the aforesaid minutes of the meetings of the Board of Directors of Gharibwal. Also the minutes are silent on the issue of advances/loans of Rs 337.8 million to Dandot except the minutes of the meeting of Directors held on November 07, 2000 which indicates recommendation to shareholders for ratification of the investment transactions through a Special

Resolution. It appears that these transactions/investments were made by the management without the knowledge of its Board of Directors. It is also manifest from the Resolution passed by the Board of Director of Gharibwal in their meeting held on November 24, 1999 that the decision to acquire 44 % (11,550,000) shares of Dandot was made by majority of directors representing sponsors of Gharibwal. There are two nominees on the Board of Gharibwal, one representing State Life Insurance Corporation (SLIC) holder of more than 19 % shareholding in Gharibwal and other representing National Investment Trust (NIT) which holds about 10 % of the paid up capital of Gharibwal. Mr. Imtiaz Rasool, nominee director of SLIC did not agree to the decision of making equity investment in Dandot. According to minutes/resolution provided by Gharibwal, Mr. Anis Wahab Zuberi, nominee NIT initially did not agree to the proposal of acquisition of Dandot discussed on November 24, 1999, however, later on he consented to the said proposal through his letter dated December 03, 1999. Accordingly the Resolution passed at the meeting of directors on November 24, 1999 was with dissent of both the nominee directors. Minutes of the Board of Directors Meetings of Gharibwal amply demonstrate lack of information, lack of interest and non-application of mind to such a serious issue of major investments in Dandot. In fact, good governance appears to be totally absent.

25. The argument that the decision to acquire management and control of Dandot was motivated by twin goals of availing a commercial opportunity and acting, in overall interest, as a catalyst for the revival of a sick unit now requires consideration. I am of the view that the law is supreme and there appears no justification to violate the mandatory provisions of law under the camouflage of so called 'over interest up' and 'revival of a sick unit.' The shareholders of Gharibwal have never given any mandate nor the objects of Gharibwal as contained in its Memorandum of Association allow its directors to embark on such adventures, which could jeopardize their interest. It could be a matter of personal interest for the directors of Gharibwal to acquire Dandot. The execution of the share purchase agreement before getting Boards approval, entering into purchase of shares from the open market, huge transactions without the knowledge of the Board of Directors, dissent of nominee directors creates doubts about the transparency

of the transactions and reasonableness of the price paid for the shares of Dandot. Although Dandot is based on the latest technology of dry process of manufacturing, the financial position of Dandot is dismal and it has accumulated staggering losses to the tune of Rs. 1,090.949 million. The Directors, therefore, have jeopardized the interest of the shareholders and deprived them from an opportunity provided by law to consider and approve a major investment prior to its being made in Dandot.

26. **CONCLUSION.** (a) The net result of the above discussion is that it is demonstrably established that Gharibwal has contravened the provisions of Section 208 of the Ordinance as under:

i) Investments for purchase of 4,790,100 shares of Dandot without passing special resolution.

ii) Investment in excess of 30 % threshold.

iii) Huge advances to Dandot in excess of prescribed ceiling and without authority of special resolution

iv) Sale of shares to Saudi Pak Leasing without special resolution.

v) Mark up charged on advances to Dandot at less than borrowing cost.

(b) In view of the foregoing reasons, the Directors and Chief Executive are held responsible for the violation of Section 208 read with Section 476 of the Ordinance and are liable for punishment under Sub-section (5) there under. The undersigned, therefore, in exercise of the power conferred on me under Sub-section (5) of Section 208 of the Ordinance hereby impose a fine of Rs 300,000 (Rupees three hundred thousand only) on each of the following directors including the Chief Executive of Gharibwal who are responsible for glaring violations of the provisions of the Ordinance:

1.	Mr.Mohamamd Touseef Peracha, Chairman/Director	Rs. 300,000
2.	Mr. Farooq Zaman, Chief Executive/Director	Rs. 300,000
3.	Mr. Abdul Rafiq Khan, Director	Rs. 300,000
4.	Mrs. Tabassum Tousif Peracha	Rs. 300,000
5.	Mr. M. Niaz Peracha	Rs. 300,000

(b) As regards to the nominee directors, namely Mr. Anis Wahab Zuberi, representing NIT and Mr. Imtiaz Rasool, representing SLIC, both of these Directors were apparently misled and deprived of the opportunity of applying their mind on the issue of investments in Dandot especially when they do not appear to be privy to this deliberate default and they also dissented from the Board in this regard. The undersigned, therefore, consider it sufficient to issue a WARNING to both of them to be more cautious, careful and prudent in future.

(c) As Mr. Saeed Akhtar, nominee SLIC was not a director of Gharibwal at the time of making investments, therefore, the show cause proceedings initiated against him are hereby closed.

(d) The Chief Executive and Directors of the Company are directed to deposit the above stated fine in the following head of account within 30 days of the date of this order:

Account No. 10464-6
Habib Bank Limited
Habib Bank Plaza, I. I. Chundrigar Road,
KARACHI.

27. The Learned Counsel, through supplemental written submission, has also drawn my attention towards the fact that Gharibwal has foreign investment constituting 50.747% of its paid up capital. It has been prayed that proviso to Clause (a) of Sub-section (1) of Section 208 of the Ordinance empowers the Commission, in respect of any company having foreign investment, to relax the application of clause (a) of proviso to Sub-section (1) of Section 208 of the Ordinance and, therefore, this is a fit and proper case for granting exemption as aforesaid. As per my understanding, the above provisions of law contemplate prior approval of the Commission. Irrespective of the aforesaid application of Gharibwal, in view of the glaring violations of Section 208 of the Ordinance, which clearly stand established from the above discussion, the undersigned proceed to order as follows:

28. In view of the grave violations by Gharibwal, the validity of investments subsisting till now which have been made without prior approval of the shareholders/SECP assumes importance and requires a decision. The undersigned hereby in terms of Section 473 of the Ordinance directs as follows:

(a) The amount invested by Gharibwal in Dandot after both the companies became associated undertakings should be brought back to Gharibwal along with mark up paid by Gharibwal on the borrowed funds utilized for these investments within six months from the date of this order. Mark up on Gharibwal's own funds utilized for investments in Dandot shall not be less than borrowing cost of Gharibwal and any shortfall should also be recovered from Dandot within the aforesaid time period.

(b) Within fifteen days from the date of this order, Gharibwal shall submit a certificate of its auditors confirming the actual amount to be brought back to Gharibwal in terms of this order.

(c) Monthly progress report on the implementation of the aforesaid direction shall be submitted to the Commission on the 5th of every month till the whole amount is recovered.

(d) In the event of failure to comply with the above said directions, the amounts or shortfall, if any would be recovered from the Directors who have been declared responsible for making unauthorized investments and for loss suffered by Gharibwal on these investments. In case of default in their obligation, they shall be liable to punishment under Section 495 of the Ordinance.

29. During the course of these proceedings, it appeared that certain other violations have also been committed by Gharibwal. The undersigned hereby direct the relevant official of this office to look into the record to ascertain the same and if found, these may be taken up with Gharibwal.

RASHID SADIQ
Executive Director (Enforcement and Monitoring)

Announced
December 05, 2001
ISLAMABAD