



Securities and Exchange Commission of Pakistan
Company Law Division
(Enforcement Department)

[Islamabad]

Before Mr. Tahir Mahmood, Executive Director (Enforcement)

Order

In the matter of

M/s KOHINOOR POWER COMPANY LIMITED

Under Sub-Section (1) Of Section 495 Read With Section 476
Of The Companies Ordinance, 1984

Show Cause Notice No. and Date: EMD/233/404/2002-755-61
Dated 28.07.2006

Date of final hearing: 21.06.2007

Present: Mr. Liaqat Ali, Sr. Manager Taxation and Mr. Khawaja
Safee Sultan, Manager Corporate Affairs on behalf of Chief
Executive and all the directors of M/s Kohinoor Power
Company Limited

Date of Order: 17.07.2007

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This order will dispose of the proceedings initiated against the Chief Executive and directors of M/s Kohinoor Power Company Limited (the "Company") under section 495 of the Companies Ordinance, 1984 (the "Ordinance") for not complying with the directions of this Commission issued vide Order dated 2.10.2000 in respect of recovering the unauthorized investments made without complying with the requirements of section 208 of the Ordinance.

2. The Company is principally engaged in generation and sale of electric power. The Company has shareholders comprising individuals, foreign companies, financial institutions, insurance companies, etc., as per pattern of shareholding as on 31.10.2006. As per Additional Information provided under Circular 4 of 1992, associated companies and directors hold around 45.65% of the paid up capital. This indicates that there is a substantial public interest in the shares of this Company.



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3. The brief facts leading to this case are that the Chief Executive and directors of the Company made unauthorized investments in the associated company, Kohinoor Industries Limited (“KIL”) for which the Commission issued an Order on 2.10.2000 which includes the following:

“(a) Start recovering markup on the outstanding balances w.e.f.1.7.2000 at a rate not less than company’s own borrowing cost;

(b) Recover outstanding balance (treating 3 months sales to be normal trade credit) in 4 years time i.e. recovery of atleast Rs.75 million per annum.”

Proceedings under section 208 of the Ordinance were dropped, however, it was stated that if default is made in complying with the undertaking given by the Company in its letter dated 20.09.2000 appropriate action will be taken.

4. However, representatives of the Company, Mr. Muhammad Umer Farooq, Manager Corporate Affairs and Mr. Asad Iqbal, Chief Operating Officer, appeared before Mr. Rashid Sadiq, the then Executive Director Enforcement, at Lahore (the “Hearing”), wherein it was agreed that the Company be allowed time up to 31.12.2005 to recover the said outstanding balance along with the said mark up thereon.

5. Review of second quarter accounts of the Company for the period ended 31.12.2005 revealed that the Company on one hand has not followed the directions of this Commission based upon the undertakings of Company’s management and on the other hand have also contravened the mandatory requirements of section 208 of the Ordinance. Their non-compliance of the directions and contravention of the requirements of section 208 of the Ordinance is depicted in the aforesaid quarterly accounts as follows:

(5) Trade Debts - Due from Associated Companies	31.12.2005	30.06.2005
<i>(Unsecured - Considered Good)</i>	Rupees	Rupees
<i>Kohinoor Industries Limited</i>	188,208,723	219,207,480
<i>Azam Textile Mills Limited</i>	2,123,667	9,958,413
<i>Saritow Spinning Mills Limited</i>	-	3,029,447
	190,332,390	232,195,340

“The amount due from Kohinoor Industries Limited was not recovered in accordance with the directive of Securities & Exchange Commission of Pakistan. The amounts due from associated companies were also given without authority of special resolution as required u/s 208 of The Companies Ordinance, 1984.”

(6) Mark up accrued	162,407,968	155,745,083
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“The amount consists of interest receivable from the associated companies which has been calculated @ 8 % per annum which is less than the borrowing cost of the company.”



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The authority in respect of investment under section 208 of the Ordinance vests with the shareholders and this authority was abused by the directors as they invested funds of the Company without taking approval of the shareholders into the said associated company and moreover, the directions of the Commission remained unattended.

6. The aforesaid situation required corrective action and in view of these state of affairs evident from the latest available audited accounts of the Company at that time a show cause notice dated 28.07.2006 under section 495 (1) of the Ordinance was served to the Chief Executive and directors of the Company. Section 495 (1) of the Ordinance provides that:

“Where any directive is given or order is issued by the Court, the officer, the Commission, the registrar or the Federal Government under any provision of this Ordinance, non-compliance thereof within the period specified in such direction or order shall render every officer of the company or other person responsible for non-compliance thereof punishable, in addition to any other liability, with fine not exceeding fifty thousand rupees and, in the case of a continuing non-compliance, to a further fine not exceeding two thousand rupees for every day after the first during which such non-compliance continues.”

7. Even after allowing various extensions in submission of reply, the Company failed to respond, therefore, an opportunity of hearing was given by the undersigned on 21.06.2007 to the Chief Executive and directors of the Company. Mr. Liaquat Ali, Senior Manager Taxation and Mr. Khwaja Safee Sultan, Manager Corporate Affairs appeared on behalf of Chief Executive and all the directors of the Company at the hearing. The main contentions in their written submission as well at the time of hearing are that the Company:

- a. as per directive of this Commission, tried its level best to recover outstanding amount from KIL (the “Buyer”) and it has succeeded to a reasonable extent.
- b. was struggling on two fronts, one was to recover the outstanding balance and the other was to negotiate with Faysal Bank Limited (the “Lender”) to charge a reasonable mark up on the outstanding loan.
- c. is in the process of recovering the outstanding balance from the Buyer and that almost all the outstanding amount will be recovered in the month of July 2007.
- d. also entered into settlement agreement with the Lender and the Company will pay off all its liability to the Lender through recovery from the Buyer by July 2007.
- e. requested to allow it time till 31.07.2007 and have assured that it shall manage the recovery of outstanding balances and settlement of loan by July 2007.



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- f. is in a process of recovering the mark up balance due from KIL but with interest under and below their borrowing cost and it would ensure strict compliance of the provisions of the Ordinance in future.

The proposals submitted by the Company's representatives have been considered and I am of the view that the proposal does not seem to be the effective solution of the breach committed by the directors as all the proposed actions are directed toward correcting the situation by indirect means and not by way of cash inflow from KIL. Moreover, the proposed solutions have their own limitations as explained below:

- a. KIL is not in a good financial position.
- b. Negotiation with the Lender has no relevance to the recovery of abnormal trade credit and mark up thereon from KIL.
- c. Mark up charged to KIL is less than the borrowing cost of the Company

8. The arguments extended by the authorized representative of the Company have been analyzed and not found satisfactory due to the following reasons:

- (i) Company has still not complied with the direction given vide Commission's Order dated 2.10.2000 and the subsequent one given during the aforementioned 'Hearing' conducted at Lahore by Mr. Rashid Sadiq, the then Executive Director. The Company has been consistently disclosing an outstanding balance of abnormal trade debts which are more than the 3 months sales of the Company and the markup thereon has been accrued below the cost of borrowing and still not recovered thus the rights of the shareholders were continuously abused.
- (ii) Sufficient time has been given to the Company to recover the outstanding amount and markup not less than borrowing cost from the said associated company. The direction was given on 2.10.2000 and time given to the Company for recovery was four years (i.e. 1.07.2000 to 30.06.2004) but the Company has not achieved the requirements of the said directions and instead of recovering the markup have accrued more markup for the period ended 31.12.2005 which was charged at a rate of 8% which was less than the borrowing cost of the Company. This practice by the Company has resulted in understatement of the "Operating Other Income". The Company did not take any corrective measures and never turned back to the Commission and the shareholders.
- (iii) Negotiation with the Lender with regard to markup on long term loan and its pay off has no relevance to the aforesaid case and therefore is a non cogent submission.



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The aforesaid default of the noncompliance of the directions of this Commission are also evident from the subsequent annual audited accounts for the year ended 30.06.2006 and quarterly accounts for the period ended 31.12.2006.

9. The directors owe fiduciary duties to the company they serve and its shareholders. They must discharge their statutory obligations in good faith with fairness, morality and honesty. In this particular case:

- a) The directors have failed to exercise reasonable care to see that mandatory provisions of law were being violated and have disrespected the mandate of the shareholders.
- b) The directors have breached their fiduciary duties, which they owed to Kohinoor Power Company Limited and its shareholders.
- c) The directors repeatedly made unauthorized transactions out of the funds of the Company.
- d) The directors have not complied with the directions of the Commission.

10. On the basis of the relevant facts, reply of the directors and acceptance of default during the course of hearing, I am of the view that the default is established and directors are liable for penalty under the provisions of section 495 (1) of the Ordinance. However, considering the fact that the management is making efforts for revival of the Company, I, instead of imposing maximum fine not exceeding fifty thousand rupees and, in the case of a continuing non-compliance, to a further fine not exceeding two thousand rupees for every day after the first during which such non-compliance continues on the Chief Executive and each director as prescribed by section 495 (1) of the Ordinance, impose a fine of Rs.50,000 on each of the directors in the following manner:

Sr.No.	Name	Penalty (Rupees)
1.	Mr. M. Naseem Saigol, Chief Executive	50,000
2.	Mr. Azam Saigol, Director	50,000
3.	Mr. Shahid Sethi, Director	50,000
4.	Mr. Muhammad Omer Farooq, Director	50,000
5.	Mr. Rashid Ahmad Javaid, Director	50,000
6.	Mr. Muhammad Athar Rafiq, Director	50,000
7.	Mr. Muhammad Asif Bajwa, Director	50,000
Total		<u>350,000</u>

Further, all the directors are hereby warned to be careful and vigilant in future and comply with the requirements of the law in letter and spirit. The afore-named directors are directed to deposit the aforesaid fine in the designated bank account maintained in the name of Securities & Exchange Commission of



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Pakistan in Habib Bank Limited within thirty days of the date of this order and furnish a receipted challan to the Commission in this regard failing which proceedings for recovery of the fines as an arrear of land revenue will be initiated. It may also be noted that the said penalty is imposed on the Chief Executive and directors in their personal capacity; therefore, they are required to pay the said amount from their personal resources.

11. This Order shall be without prejudice to the penal and civil consequences of the defaults already made by the company and its management in complying with the provisions of the Ordinance. The Chief Executive and directors are also directed to follow the commitment given by the representatives of the Company at the time of the aforesaid hearings and recover the said outstanding balances in the light of direction given in the Order of 2.10.2000 latest by 31.07.2007.

Tahir Mahmood
Executive Director (Enforcement)

Announced
17.07.2007
Islamabad