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SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN  
(Enforcement & Monitoring Division)  
State Life Building, 7-Blue Area

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The Ex-Member (Securities) erstwhile Corporate Law Authority vide his order date May 05, 1990, under section 472 of the Companies Ordinance, 1984 directed the following directors of M/s. Pioneer Cement Limited to deposit in the company's accounts an amount of Rs. 17.325 million from their own resources within thirty days from the date of the Order:-

1. Mr. Javed Ali Khan, Chief Executive.
2. Mr. Manzoor Hayat Noon, Director.
3. Mr. K. Iqbal Talib, Director,
4. Mr. Muhammad Anwar Mir, Director.
5. Dr. Pervez Hassan, Director.
6. Lt. Col. (Retd.)M. Bashir Ahmed, Director.

2. The said amount of Rs. 17.325 million was spent on the medical treatment of late Malik Nur Hayat Noon, ex-director and chairman of the company regarding which the company failed to provide details of expenditure and justification thereof. Member(Securities), erstwhile Corporate Law Authority held that late Malik Nur Hayat Noon was not a working director/chairman and had performed no services for which any remuneration or benefit could be authorized. He further held that the said expenditure was not for the purpose, benefit and business of the company and could not be charged to company's profit and loss account.

3. The said directors (being aggrieved with the directions under section 472), filed a revision petition under section 484(1) of the Companies Ordinance, 1984 and the Chairman, Corporate Law Authority vide his orders dated 11-12-1998 held that before passing the order by ex-Member, (Securities), Corporate Law Authority under section 472 ibid. an opportunity of hearing should have been provided to the

said directors. Chairman, CLA, accordingly remanded the case (the order of Member, CLA dated 5-5-1998) to the undersigned with the directions to process the case afresh.

4. To provide an opportunity of being heard personally or through an authorized attorney, hearings were held on 24.05.1999, 10.07.1999, 21.08.1999 and 18-09-1999 when the aforesaid directors appeared before me through their counsel, Mr. Umar Ata Bandial, Advocate and explained their view point. The learned Counsel also made a representation vide their letter dated 31-7-1999 and 09-09-1999.

5. The back-ground of the case is that while examining the annual accounts of M/s. Pioneer Cement Limited for the year ended 30<sup>th</sup> June, 1996, it was noticed by ex-Member (Securities), Corporate Law Authority that an expenditure of Rs. 17.325 million was charged to profit and loss account under the head "other charges" (Note No. 28) and by way of foot note i.e. Note 28.1 it was stated that the expenditure of Rs. 17.325 million represented medical and related travel and boarding and lodging expenses of Malik Nur Hayat Noon (late) who was the Chairman of the company. The erstwhile Corporate Law Authority asked the company to provide details of the expenditure and justify it with reference to objects and business of the company. The company failed to provide the required details and pleaded that these expenses had been approved by the board of directors on December 05, 1995 and by the share-holders in the A.G.M. on December 08, 1996. The company further pleaded that (late) Malik Nur Hayat Noon had got no return on his investment in the company and that he did not derive any other benefit in the form of salary or allowances. (The said Malik Noor Hayat Noon (late) continued as a chairman/chief executive till 1<sup>st</sup> November, 1994 and after this date he was no more Chief Executive of the company but was Chairman of the Company).

6. The erstwhile CLA also required the auditor of the company to comment as to how the expenses on the medical treatment of a person who was not a working director was

considered to have been incurred for the purposes of business of the company and charged to profit and loss account. It was also pointed out to the auditors of the company that the company has not furnished to the Authority date-wise details of the expenditure. The auditors of the company explained their viewpoint about the chargeability of expenses but failed to report about the record on the basis of which the said expenditure had been charged to the profit and loss accounts. The auditors who did not provide any details/break-up of expenditure replied to the Authority through their letter dated February 25, 1998 that they had intimated their client about the query and information would be provided soon but no information was provided till 5-5-1998 when Member, CLA, passed his order holding that the expenses were not chargeable to the profit and loss account of the company as Malik Nur Hayat Noon (late) was not a working director/Chairman and that the company did not possess any documents for verification of expenses.

7. Mr. Umar Ata Bandial, Advocate, Supreme Court of Pakistan has through his letter dated 31-07-1999 and the verbal arguments at the time of hearings emphasized the following points:-

- (i) That as the case has been remanded the scope of the inquiry may not be legally extended beyond the grounds existing at the time of the impugned order.
- (ii) That the jurisdiction under section 472 of the Companies Ordinance, 1984 is to enforce compliance with the provisions of the Ordinance, accordingly the scope of the inquiry is limited.
- (iii) That since the liabilities imposed pursuant to the impugned order are criminal in nature so the accused must be confronted with the material existing at the time of impugned order which may be provided to the accused.

- (iv) That late Malik Nur Hayat Noor made huge investments in the equity of the company and rendered valuable services to the company till 1<sup>st</sup> November, 1994 as Chief Executive for which he never received any benefit.
- (v) That late Malik Nur Hayat Noon (late) was really an asset for the company and his survival would have been in larger interest of the company.
- (vi) That even on humanitarian grounds, it was an obligation of the company to save the life of Mr. Nur Hayat Noon (late) who had really devoted himself to the purposes of the company.
- (vii) That the board of directors of the company consisted of such persons who had legal background and have repute in understanding the corporate laws and that the expenses were approved by that board twice. Mr.I.H Shamsi who represented creditors also supported the resolution.
- (viii) That article 53(a) of the Articles of Association of the company provides for determination of remuneration of a director including Chairman for providing extra services by directors and the directors had used their powers in lawful manner.
- (ix) That the board of directors and the members of the company are vested with full powers to do any act and to approve any expenditure, can dispose off its assets, can pay charity and can liquidate the company and this power cannot be taken away from them by any one.
- (x) That the expenses were duly disclosed in audited accounts for the year 1996, which were approved by the shareholders of the company after due

diligence.

8. I have carefully examined the issue and the arguments advanced by the learned counsel. Of course the scope of inquiry should not be extended beyond the grounds existing at the time of the impugned order and as such the scope of inquiry is restricted to the original grounds. The powers conferred on the Commission under section 472 ibid., various section of the Companies Ordinance, 1984 which have been violated will be discussed in later part of the Order. As regards confronting on the material existing at the time of impugned order, no material was used against the accused except the published accounts of the company and the replies given/documents filed by the company and its auditor in response to the letters from CLA. This fact was duly disclosed to the learned counsel during the hearing.

9. The arguments advanced by the learned counsel require a consideration in the light of following basic facts:-

(a) The expense in question was not charged to the profit and loss account as remuneration (which was shown in Note 30 of the notes to account under the head "Remuneration of the Managing Director/Chief Executive and Directors". Instead, the expense was shown as "other charges" in note No. 28 of the notes to the account.

(b) No remuneration was ever fixed in terms of Article 53(a) of the Article of the Association in case of Malik Nur Hayat Noon (late). The only material available is board's resolutions dated 5-12-1995 and 8-12-1996. In para 6.7 (page-18) of the prospectus issued by the company it was stated that chief executive is not drawing any remuneration.

(c) This extra-ordinary expenditure never came

under consideration of the shareholders in the meeting of the company in which accounts were approved. The minutes of this meeting are silent on the matter. In this meeting the accounts were approved without any specific reference to the said item of expense.

10. The admitted position in this case is that the expenses on account of medical treatment of Malik Nur Hayat Noon (late) were charged to the profit and loss account not as "remuneration" but as "other charges" and the board of directors of the company never resolved/decided/determined any remuneration including any entitlement to reimbursement of medical expenses in the case of Malik Nur Hayat Noon(late) in terms of Article 53(a) of the Articles of Association of the company before 5-12-1995. So the payment to/on behalf of directors of any amount other than "remuneration" is an act ultra vires of the company (as discussed in the later part of this order), which was not considered in AGM for ratification.

11. As regards the matter of remuneration to directors, I think the provisions of law and company's Articles are very clear. A company may pay remuneration to its directors for "extra services" as "determined" by the board of directors. The dictionary meanings of word "determined" are "settled". In this case, nothing was so settled before the date of expenses. The board of directors of the company considered the matter firstly on 5-12-1995 and approved the expenses "incurred or to be incurred". So expenses had already been incurred partially. Then the board of directors passed another resolution on 8-12-1996 after the death of Malik Nur Hayat Noon (late) who died in September, 1996 and approved expenses. So the expenses do not meet this test of law that "remuneration" must have been determined. It is to be for extra services - currently rendered and not for some act done in the past. Similarly remuneration cannot be paid for services in future. The arguments advanced by the learned counsel that: (i) the expense was paid because the deceased Chairman never received any return on his huge investment in the company; (ii) he did

not receive any remuneration when he was the Chief Executive; (iii) that he was an asset for the company and (iv) that even on humanitarian grounds, the company should have looked after him, are not tenable. As an investor he was entitled to dividend like other shareholders (who also did not get any dividend on their investment) and if he accepted to work as Chief Executive without any remuneration in past, it was his own decision. The factual position is that in para 6.7 at Page 18 of the prospectus, a very loud claim was made that the chief executive (Malik Nur Hayat Noon) was not drawing any remuneration from the company as chief executive. This statement was made to induce the investors to make investment in the equity of the company. Poor investors preferred to invest in a company the management of which was so sincere and dedicated that it was not even drawing any remuneration for services. After having induced poor investors to invest on the basis of such claim, it is highly un-ethical and immoral to charge huge amounts as compensation for previous services. Similarly, he (Malik Nur Hayat Noon) may be an "asset" but the factual position is that the shareholders of the company never received return on their investment in a company managed by him. As regards the argument that board of directors is empowered to pay any amount as charity and may do any act they like, the contention of learned counsel is not correct. The Board of Directors does not have unlimited powers in respect of the affairs of a company as its powers are circumscribed by the parameters of the legal framework. Legally, a company can pay donation/charity only if it is authorized by its memorandum and there is no logic or rationale for donation/charity if investors/shareholders have not received any return on their investment. Similar is the matter of powers of directors to pay "any remuneration". The scheme of law provides for a check even on loans to directors (under section 195 of the Companies Ordinance, 1984) and it cannot be presumed that mere leaving the matter of determination of director's remuneration to board of directors provides to the board a blank cheque to distribute the company's assets amongst themselves. Acts of directors should be banafide and must carry rationale. As regards the powers of shareholders to

distribute company's funds law even provides a check upon them that they cannot increase the rate of dividend recommended by directors. The arguments advanced by the learned counsel on these lines do not carry any weight. After 30-11-1994, the deceased Chairman only presided over meetings of board as Chairman for which he was entitled only to "meeting fee". This is also an admitted fact that during the period from July, 1995 onwards he remained mostly abroad.

12. In a number of cases decided by the Courts, it has been held that the directors have no right to pay for their services to each other or give presents out of company assets unless authorized by the instrument which regulates the company or by the shareholders at properly convened meeting. The payment of some remuneration to a director, implies the existence of an agreement subject to the entitlement under the Articles of the company. In this case expenses can not be considered to be in the interest of the company and was accordingly not chargeable to profit and loss account of the company. If such expenses are allowed to be charged to the profit and loss accounts of the companies, the total structure of corporate sector will collapse and it will become precedent for abuse of powers in corporate sector. It is pity that the management of the company pleads over the chargeability of such a big size of expenditure of a Director/Chairman not realizing that company has not paid any dividend to its shareholders since listing. The argument that (late) Malik Nur Hayat Noon invested a huge amount in equity on which he did not receive any return does not hold good as an investor he stood equally with other investors/shareholders and law and Articles of the company do not recognize any mode of compensation or return except dividend declared and paid in accordance with provision of law. Similarly a director cannot be compensated for any services rendered by him except by way of remuneration determined in accordance with the law and the Articles of association and once accounts of the company for a period are approved/adopted by members in annual general meeting, the charge in these accounts on account of, directors remunerate becomes final and matter cannot be reopened to



remunerate a director for his past services.

13. The money and the other assets of a company cannot, as a rule, be employed for any purposes other than those pertaining to the objects specified in the memorandum of association of the company, or purposes, incidental to those purposes. Neither the directors, nor the company, in general meeting by an ordinary or special resolution, can authorize the use or payment of the company's money so as to bind the minority shareholders outside the company's objects except in the case of a scheme of arrangement sanctioned by the Court.

(Page-1799 of Ramaiya's Guide to the Companies Act-Thirteenth Edition). In this case clause 13 of the Memorandum of Association of the company authorises the company to remunerate its manager, officers, employees and servants of the company and article 53(a) of the Articles of Association of the company finalizes the issue of the "director remuneration" by laying down that board of directors may determine the terms and conditions and remuneration of a director/chairman for performing "extra services". The memorandum of association which authorises expenses and the activities under a number of heads including "charity" does not lay any other head under which payment may be made to its director/chairman except remuneration. The powers of a company incorporated under the Companies law are bounded by the memorandum of association, and any contract made otherwise than in the exercise of such powers is ultra vires of the company and void, even if the whole body of shareholders assent to it and such a contract is incapable of rectification. Ashbury Railway Carriage & iron Co. v. Riche, (1875) LR III 653: Attorney-General v. Great Eastern Railway Co. (1880) 5 App Cases 473: Attorney-General v. Mersey Railway Co. (1907) 1 Ch 81 : (1907) AC 415: London Country Council v. Attorney General (1902) AC 165: Re Lee Behrens & Co. (1932) 2 Ch 46: (1932) 2 Com Cases 588. Ratification is possible only where the contracts within the powers of the company but it has been entered into by its agents either without authority or otherwise irregularly. Grant v. United Kingdom Switchback, etc., (1888) 40 Ch D 135 (AC): Liberats Kommerz Gmbtl, 1978

**SLT 223: 1977 SC of Scotland 191.** (Page 362 of Ramiyas Guide to Companies Act-Thirteenth Edition). The expenses on medical treatment of Malik Nur Hayat Noon (late) is admittedly not "remuneration" and as stated it was "compensation/reward in acknowledgment of past services of Malik Nur Hayat Noon (late)", hence a it was an expense ultra vires the company for which the directors of the company are personally liable to meet the obligation under section 496 ibid.

14. At the time of hearing on September 18, 1999 the Learned Council filed an application praying that the proceedings should not be carried out till decision of ICAP on the reference filed by erstwhile Corporate Law Authority against the auditors of the company in same matter. The background of the application is that at the time of hearing on 21.08.1999, the Learned Counsel pointed out that similar matter is under consideration of ICAP and suggested that it would be better if the decision of ICAP is awaited for. The request to adjourn the case was accepted but subsequently I, realized that it would be against the interest of justice to get influence from any decision of ICAP and also that the proceeding going on at ICAP were against auditors and not directors, hence the scope of both proceedings is quite different. The case was re-fixed through letter dated 01.09.1999 by DC-A/cs-I under my instructions and even the draft of the letters was approved by me. The Learned Counsel has termed this letter as "completely at variance" with decision of 21.08.1999 and has tried to prove malafide on the part of DC-A/cs-I requesting that DC-A/cs-I should be disassociated from the adjudicative process. The adjournment on 21.08.1999 was a routine matter of the proceeding and does not mean that the case must be pended indefinitely. The apprehension of the Learned Council about malafide or any predetermination is unfounded and strongly rejected. The learned counsel also cited some cases in support of his contentions but these were not found to be relevant to the circumstances in this case.

15. Section 233 of the Companies Ordinance, 1984

provides that directors shall be responsible for laying before the company in AGM balance sheet and profit and loss account giving a "true and fair" view of affairs of the company and "true and fair" view of the company 's profit and loss (sub-section(1) of Section (234) of the Companies Ordinance, 1984), after having them audited by an auditors (sub-section (3) of section 233 of the Companies Ordinance, 1984), about which auditor will report whether or not:-

- (a) the expenditure incurred during the year was for the purpose of the company's business; and
- (b) the business conducted, investment made and expenditure incurred during the year were in accordance with the objects of the company.

16. In my view, directors committed irregularities by incurring expenses which were neither in accordance with the objects of the company nor for company's business, (about which section 496 ibid. provides that directors will be personally liable to meet the obligations) prepared profit and loss account which does not give true and fair view of the company's profit and loss as to this profit and loss account an expense which was not incurred for the purpose of company business had been Charged, hence the aforesaid director of M/s. Pioneer Cement limited be served with a notice under section 472 ibid. read with the Section 496 ibid. to make good the irregularity and to deposit into company's account on amount of Rs. 17.325 million from their own resources within thirty days from the date of the notice.

**(M. Zafar - ul - Haq Hijazi)**  
**Commissioner (Enforcement)**

Place: Islamabad  
Date: 22<sup>nd</sup> September, 1999