



**BEFORE
RE-CONSTITUTED APPELLATE BENCH NO. I**

In the matter of

Appeal No. 85 of 2006

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| 1. Shaikh Abdul Wahid
Chairman
Ahmed Spinning Mills Ltd | 5. Mrs. Abida Saeed
Director
Ahmed Spinning Mills Ltd |
| 2. Shaikh Muhammad Saeed
Chief Executive
Ahmed Spinning Mills Ltd | 6. Mrs. Fouzia Begum
Director
Ahmed Spinning Mills Ltd |
| 3. Mrs. Qaiser Begum
Director
Ahmed Spinning Mills Ltd | 7. Shaikh Abdul Rauf
Director
Ahmed Spinning Mills Ltd |
| 4. Mrs. Nasreen Wahid
Director
Ahmed Spinning Mills Ltd | 8. Ahmed Spinning Mills Ltd
53-A, Depot Lines
Soldier Bazaar, Karachi |

.....Appellants

Versus

Commissioner (SMD & CLD)Respondent

Present:

1. Arshad Tayebaly, Advocate for the Appellants
2. Syed Ahmad Hassan Shah Advocate, Mr. Tariq Bakhtawar, Director SECP & Tariq Ahmed, Deputy Director SECP for the Respondent



ORDER

1. This order will dispose off the appeal filed under sub-section (1) of section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 by Ahmed Spinning Mills Limited and its directors against the order dated 13-11-2006 passed by Commissioner (Securities Market Division).

2. The facts leading to this appeal are that Ahmed Spinning Mills Limited (ASML) held 673,268 ordinary shares constituting 22.44% shares of United Sugar Mills Limited (USML). These shares amounted to 61% of the total assets of ASML as per its audited accounts for the year ended 30 September 2004. Pursuant to an agreement dated 10-11-2004, these 22.44% shares were sold by ASML to a UK registered company named Clearshore Ltd at the rate of Rs.16 per share. Subsequently, in October 2005, Mr. Shaikh Abdul Wahid and Mr. Shaikh Muhammad Saeed who were directors of ASML when the above shares were sold to Clearshore, and have also been directors of USML through out the relevant period, entered into a share sale agreement with JDW Sugar Mills Ltd (JDW) to sell 75% shares of USML, which included the 22.44% acquired by Clearshore plus 53% shares owned by the Shaikh brothers, to JDW at the rate of Rs.333.33 per share.

3. The "Form 34" provided by USML along with the annual accounts for the period ended 30 September 2004, as well as 30 September 2005, showed that the Shaikh brothers along with the other persons named in the share purchase agreement only held 16.52% of the total shares of USML. Consequently, a show cause notice dated 14-07-2006 was issued by the Commission to ASML and its directors namely, Shaikh Abdul Wahid, Shaikh Muhammad Saeed, Mrs. Qaiser Begum, Mrs. Nasreen Wahid, Mrs. Abida Saeed, Mrs. Fouzia Begum and Sh. Abdul Raof in the matter of acquisition of 75% shares of USML in violation of the



provisions of the Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Ordinance, 2002 (the "Takeovers Law").

4. In addition to the above, another notice dated 14-07-2006 was issued by the Commission to Clearshore Limited and its sponsors and directors namely Taj Mahmood Yayha and Nasir Mahmood Yahya which required them to show cause why action should not be taken against them for contravening the provisions of the Takeovers Law in the acquisition of 22.44% shares of USML from ASML.

5. The show cause notice issued to ASML and its directors required them to explain their position in respect of the following:

- (a) ASML and the Directors to show cause as to why each of them should not be proceeded against for acting in concert with Clearshore Limited in the matter of acquisition of 22.44% shares of USML from ASML in contravention of the provisions of the Takeovers Law;
- (b) Shaikh Abdul Wahid and Shaikh Muhammad Saeed to show cause as to why they should not be proceeded against in the matter of acquisition of more than 25% shares in USML in contravention of the provisions of the Takeovers Law;
- (c) Shaikh Abdul Wahid and Shaikh Muhammad Saeed to show cause as to why they should not be proceeded against in the matter of acquiring direct or indirect control over not less than 75% shares in USML in contravention of the provisions of the Takeovers Law.

6. In response to the show cause notice, ASML and the directors vide their letter dated 05-08-2006 admit that:



- (a) ASML and USML were associated companies;
- (b) ASML has had a long standing investment in USML by way of holding 22.44% shares of USML;
- (c) the 22.44% shares held by ASML were sold to Clearshore at Rs.16 per share in terms of the Clearshore Sale Agreement dated 10-11-2004;
- (d) the directors of ASML held approximately 16.5% of the total issued shares of USML which were later sold at the rate of Rs.333 per share; and
- (e) Shaikh Wahid and Shaikh Saeed exercised control over not less than 75% shares of USML, including the shares acquired by Clearshore from ASML for purposes of sale of such shares along with management control of USML to JDW.

7. However, ASML and the Directors claimed that:

- (a) Clearshore is represented by one Mr. Shahid Hussain and the company was introduced to Shaikh Wahid and Shaikh Saeed by “mutual contacts”. They stated that the Commission has misunderstood the relationship between the directors of Clearshore namely Taj M. Yahya and Nasir M. Yahya and (i) Sh. Wahid and Sh. Saeed; and (ii) ASML. Further the Takeovers Law requires the acquirer to file the prescribed returns, and ASML or its directors are not responsible or liable in this regard. They further asserted that the sale of the shares to Clearshore was motivated by efforts on part of ASML to satisfy the Commission, which was contemplating winding up of ASML and the revenue generated by the sale was used to meet expenses and pay dividends to shareholders.



- (b) Prior to 19-01-2000, Sh. Wahid and Sh. Saeed jointly owned 16% shares of USML and that they jointly became entitled to beneficial ownership of more than 50% shares of USML by way of oral gift from Shaikh Maqbool Ahmed, their father. However, such joint beneficial interest was not reported in time as the prescribed return under Section 222 of the Companies Ordinance, 1984 (the "Ordinance") was not filed until much later than the actual date of gift. It was further stated that the Takeovers Law does not apply once shareholding of 51% or more is acquired. Since 36% shares of USML were received by them as gift from their (now deceased) father, there was no purchase price paid or acquisition agreement entered into and as a consequence thereof, there could be no possibility of any public offer to purchase shares, and therefore, the Takeovers Ordinance has not been violated.
- (c) Shareholding of the Directors in ASML and USML along with other disclosures required under law, and from time to time made by ASML and USML are a matter of record, which speaks for itself.

8. Pending disposal of the proceedings, the Commissioner (Securities Market Division) pursuant to the powers conferred under Section 25 of the Takeovers Law read with Section 20(4)(g) and (j) and Section 20(6)(b) and (g) of the Securities and Exchange Commission of Pakistan Act, 1997 on 14-07-2006 directed JDW not to make all or any part of the outstanding payment of Rs.330 million under the JDW share purchase agreement. Later through the impugned order, the Commissioner restrained appellants from receiving Rs.213.43 million out of this Rs.330 million from JDW (being the difference between the total value of 22% shares sold to Clearshore at the rate of Rs.16 per share by the Appellants, and the value of these shares calculated at the rate of Rs.333.33 per share for which they were sold to JDW). This amount was later surrendered by JDW to the Commission.



9. After taking into consideration the replies filed by ASML and its directors, the Commissioner concluded that:

- (a) Clearshore acted in contravention of Section 4 of the Takeovers Law in the matter of the acquisition of the shares from ASML, and ASML and the directors acted in concert with Clearshore and its directors to acquire 22.44% shares of USML; and
- (b) Sh. Wahid and Sh. Saeed acquired more than 25% shares of USML each in contravention of Section 5 of the Takeovers Law.
- (c) Sh. Wahid and Sh. Saeed in exercising control over 75% shares of USML for purposes of sale of the same to JDW contravened the provisions of Section 6 of the Takeovers Law.

10. In view of the above violations, the Commissioner imposed the following fines:

(i)	Clearshore Limited for violation of Section 4 of the Takeovers Law	Rs.1,000,000 (Rupees one million)
(ii)	Each director/sponsor of Clearshore, namely: Mr. Taj M. Yahya and Mr. Nasir M. Yahya for violation of Section 4 of the Takeovers Law	Rs.1,000,000 (Rupees one million) each
(iii)	For contravention of Section 5 of the Takeovers Law, namely Shaikh Abdul Wahid, Shaikh	Rs.1,000,000 (Rupees one million)



	Muhammad Saeed	million) each
(iv)	For contravention of Section 6 of the Takeovers Law (a) Shaikh Abdul Wahid (b) Shaikh Muhammad Saeed (c) Mrs. Qaiser Begum (d) Mrs. Nasreen Wahid (e) Mrs. Abida Saeed (f) Mrs. Fouzia Begum (g) Sh. Abdul Rauf (h) Clearshore Limited (i) Taj Mahmood Yahya (j) Nasir Mahmood Yayha	Rs.5,00,000 (Rupees five hundred thousand) each

11. Not being satisfied with the findings of the Commissioner, ASML and its directors have preferred this appeal, whereas Clearshore and its directors have not challenged the impugned order. On the date of hearing of the appeal, Mr. Arshad Tayebaly, Advocate appeared for ASML and its directors. Mr. Tayebaly argued that the Commissioner while imposing the penalties has gone beyond the scope of the Takeovers Law. The entire focus of the Impugned Order appears to be in relation to ASML and the alleged loss if any, caused to its shareholders which is not the listed company in question as far as the show cause notice is concerned. He contended that the objective and the purpose of the show cause notice alleging violation of sections 4, 5 and 6 of the Takeovers Law was to protect the interest of shareholders of USML and not ASML.



12. Mr. Tayebaly further contended that the Commissioner erred in coming to the conclusion that Appellants No.1 and 2 should be treated independently and individually for purposes of assessing the controlling interest in the shares of USML, while on the other hand both these appellants are alleged to have jointly acted in concert with Clearshore. He further stated that the Commissioner failed to recognize that the sale of shares of USML to Clearshore by ASML took place in November 2004, whereas the onwards sale of these shares by Clearshore and Appellants No.1 & 2 to JDW took place in October 2005. This gap of one year shows that there was no scheme or concert at the time of acquisition of shares for causing loss to the shareholders of ASML. He argued that in any case, the issue of alleged loss caused to ASML shareholders was beyond the scope of the Takeovers Law and the powers vested in the Commission under that law. As a consequence, the direction issued by Commissioner to JDW to withhold payments to the Appellants No.1 & 2 was also beyond the power of the Commission. He argued that there is nothing in the Takeovers Law that allows the Commission to issue such directions. He further asserted that the Commissioner's direction that the payment withheld by JDW and later deposited with the Commission, should be held on account of the so called unknown shareholders of ASML of a previous date rather than ASML itself, is beyond logic and legal principles. He stated that even if the finding in the impugned order that the Appellants acted in concert with Clearshore is accepted, the amount of Rs.213.43 million can only belong to ASML and no other person.

13. Arguing against the finding of the Commissioner that Appellants No.1 and 2 acted in concert with Clearshore in acquiring controlling interest in USML, Mr. Tayebaly stated that the Appellants already owned and controlled 51% shares of USML at the time of sale of shares of USML to Clearshore. Furthermore, they also owned and controlled 87% shares in ASML and therefore indirectly beneficially owned and controlled the 22.44% shares of USML which were allegedly acquired in concert with Clearshore. Therefore if the Appellants did act in concert with



Clearshore, in essence there had been no change in the ownership of the shares. He argued that since the shareholding of USML in the hands of the Shaikh brothers had always been more than 50%, the provisions of the Takeovers Law did not apply to them in the first place.

14. Mr. Tayebaly stated that the Commissioner failed to establish that the shares acquired by the Shaikh brothers through gift from their father were actually acquired through any other arrangement, or the Appellants paid any consideration for the acquisition of these shares. Further the Commissioner, while penalizing the Appellants in the impugned order, failed to demonstrate as to what actions the Appellants may have taken to fulfill the requirements of the Takeovers Law or to protect the interest of the minority shareholders. He argued that the penalty imposed on the Appellants was therefore unwarranted. Mr. Tayebaly prayed that the impugned order passed by the Commissioner be set aside and the sum of Rs.213.43 million held by the Commission be released to Appellants No.1 and 2 along with interest/profit.

15. Syed Ahmad Hassan Shah and Mr. Tariq Bakhtawar appearing for the Commissioner stated that JDW was directed by the Commissioner not to pay the balance sale consideration prior to the date agreed in the sale purchase agreement, which did not impinge any rights of the parties. Such direction was given in exercise of the powers duly vested in the Commission for the overall interest of the securities market. It was further stated that the shareholding patterns recorded in statutory returns filed with the Company Registration Office from the year 2000 up to the acquisition of USML by JDW show that Appellants No.1 and 2 held 7.66% and 7.94% shareholding in USML, respectively and not jointly. Further both brothers did not jointly acquire any beneficial ownership of more than 50% by way of the oral gift dated 19-01-2000 from their father. As per clause 2 of the Declaration of oral gift, 1,087,130 shares of USML, which comes to approximately 36% shares of USML, were



distributed equally between Appellants No.1 and 2. If these purported beneficially owned shares are added to each brother's then existing shareholding, Appellants No.1 and No.2's shareholding aggregates to 25.66% and 25.94% shares of USML respectively and these are in the nature of individual rights and not joint shareholding or entitlement. Hence it was established clearly from the very start that both the Appellants No. 1 & 2 own directly and beneficially not more than approximately 26% shares of USML. As for the matter of jointly acting in concert with Clearshore, they contended that it is not a matter of shares held but that of relationship which they developed and exploited as discussed in Para 39 & 40 of the impugned order.

16. In response to the argument by the Appellants' counsel that Sh. Wahid and Sh. Saeed are at times treated independently and at times collectively, Mr. Ahmed Hassan stated that there are three different violations, each under Section 4, 5 and 6. Since the acquisition done by the Appellants was staggered, the facts and circumstances were applied accordingly by the Commissioner to arrive at the conclusion.

17. Mr. Ahmed Hassan argued that the direction given to JDW to withhold payment did not impinge on any rights of the parties as it only restrained the parties from not acting otherwise than agreed in the JDW share purchase agreement. In fact, the Impugned Order permitted the Appellants to receive balance sale price of over Rs. 100 million. Only the monies that Clearshore is entitled to receive as per the case of the Appellants have been held in trust. If the case of the Appellant is assumed valid, it has no right to claim these funds as they purportedly belong to Clearshore.

18. We have heard the parties in detail. The main argument of the Appellants is that the proceedings under the provisions of the Takeovers Law are misconceived as



the Commission seems to be focused on the protection of interest of ASML and its shareholders, whereas the target company was USML. It seems that the reason for this impression of the appellants is the direction given by the Commissioner restraining the Appellants from receiving the amount of Rs.213.43 million, which the Commissioner held was payable to the shareholders of ASML. We do not agree that the proceedings are misconceived. The facts clearly demonstrate that this case squarely falls within the ambit of the Takeovers Law and the direction to withhold the payment was an ancillary but a necessary direction. The most glaring contradiction in the Appellants' cause is that at one hand they deny acting in concert with Clearshore in acquiring the 22.44% shares from ASML, while on the other they have not only entered into an agreement to sell those shares to JDW, but are also claiming that money deposited with the Commission which in their own view is payable to Clearshore. It is an elementary rule of logic that a person cannot be allowed to 'blow hot and cold' with reference to the same transaction. In fact, the Legal Maxim *Allegans Contraria Non Est Audiendus* provides that 'he is not to be heard who alleges things contradictory to each other'. The Appellants' counsel contended that the gap of one year between the sale of shares to Clearshore and the sale to JDW proved there was no cooperation between Clearshore and the Appellants. However, the request made by Clearshore to JDW to make the payment for the 22.44% shares under the share purchase agreement to Shaikh brothers is clear evidence that the parties were acting in concert. It is clear that Clearshore is nowhere to be seen in this entire scheme of events. No one appeared before the Commissioner on behalf of Clearshore, and no appeal has been filed against the findings given against Clearshore in the impugned order. In addition, the relations between the Appellants and the sponsors/directors of Clearshore stated in the impugned order, clearly point to the fact that these parties were acting in concert to acquire the 22.44% shares of USML from ASML. In our view, the Appellants could very well have been penalized along with Clearshore for this violation, however since the



Commissioner has not imposed any penalty, we are not inclined to impose it at the appeal stage.

19. The penalty under section 5 of the Takeovers Law has been imposed on the Shaikh brothers for acquiring shares in their individual names from their father by way of Declaration of Oral Gift. The counsel for the Appellants argued that since these shares were acquired without consideration, no public offer could have been made by them. Although transfer of voting shares to relatives through Oral Gift is not expressly excluded under section 3 of the Takeovers Law, there is some weight in the argument that, in such case, making a public offer may not be a practical requirement. However, what needs to be remembered is that the Takeovers Law not only requires the acquirers to make public offer when acquiring voting shares or control of a company, but it also requires that proper disclosures should be made. And this, it seems, is the reason why no exemption has been provided under section 3 for such acquisitions. We also agree with the Commissioner that the voting shares received by the Shaikh brothers through Oral Gift were in the nature of individual rights and not joint shareholding. The Declaration of the Oral Gift itself very clearly states that fact. Even if, for arguments sake, their contention is accepted that the brothers received the shares as joint shareholding, it would still mean that they together acquired the shares and the control of the company without complying with the disclosure requirements, and therefore would be liable to be penalized. Both the brothers have admittedly not made proper disclosures under the Takeovers Law for acquiring more than 25% shares in their individual names and therefore the penalty imposed on them under section 5 of the Takeovers Law is maintained.

20. On the issue of penalty imposed on the Appellants under section 6 of the Takeovers Law, we agree with the Appellant's counsel that penalties under both section 5 and section 6 should not be imposed on the Appellants. The penalty under section 6 on the Appellants is therefore set aside.



21. Coming to the issue of the amount withheld by the Commission, we are very clear that it cannot be handed over to the Appellants at least for the time being. Firstly because in their own words it does not belong to them and belongs to Clearshore with whom they do not have any relations, and secondly and more importantly because prima facie it appears that the sale of 22.44% shares to Clearshore was not a bona fide transaction. We agree principally with the Commissioner that the withheld money ultimately belongs to the shareholders of ASML. However, we believe it is too early to conclude as to how it should be distributed. This is a question which would be answered once the competent forum decides whether the directors of ASML have conspired with Clearshore to defraud the shareholders of ASML.

22. The appeal is disposed off in the above manner.

(RAZI-UR-RAHMAN KHAN)
Chairman/Commissioner

(SALMAN ALI SHAIKH)
Commissioner

Announced on 31 May 2007