Securities and Exchange Commission of Pakistan

SECP

BEFORE LARGER APPELLATE BENCH

In the matter of

Appeal No. 2 of 2018

Sheraz Jehangir Monnoo

Appellant

Versus

The Commissioner (SMD), SECP, Islamabad.

Respondent

Dates of hearing: 12/3/19, 19/9/19 and 5/11/19

Present:

For Appellant:

i. Muhammad Hayat Jasra-FCMA
ii. Qaiser Imam, Advocate High Court
iii. Shujah Ullah, Advocate High Court

For Respondent:

i. Adil Anwar, Director Adjudication (SMD)
ii. Muhammad Farooq, Additional Director (SMD)
iii. Mehwish Naveed, Management Executive (SMD)

ORDER

1. This Order shall dispose of Appeal No. 2 of 2018 filed by Sheraz Jehangir Monnoo (Appellant) in the matter of Drekkar Kingsway Limited (Company) against the Order dated December 8, 2017 (Impugned Order) passed by the Commissioner, SMD, (Respondent) under Section 26 read with section 25 of the Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Ordinance, 2002 (Takeovers Ordinance) and Regulation 24 of the Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Regulations, 2008.

2. The Appeal was initially heard by a two member Appellate Bench on March 12, 2019. The Bench consisted of Mr. Shaukat Hussain, Commissioner and Mr. Aamir Ali Khan, Commissioner. Both commissioners were divided in their opinion with regard to the decision of this Appeal. Therefore, on August 23, 2019, the Registrar Appellate Bench referred the matter under Rule 16, sub-rule 6 to the Chairman, Securities and Exchange Commission of Pakistan (Chairman) for constitution of a larger bench in order to decide the instant Appeal. The Chairman constituted a larger bench consisting of the two Commissioners who had already heard the matter and Mr. Tahir Mahmood, Commissioner. Hearing of the larger bench was held on September 19, 2019 however, appellants of the connected appeals *(Appeal No. 8 of 2018 and Appeal No.9 of 2018)* sought adjournment. Meanwhile, due to retirement of Mr. Tahir Mahmood, Commissioner, the bench was dissolved. Thereafter, the Registrar Appellate Bench once again referred the matter under Rule 16, sub-rule 6 to the Chairman for constitution of a larger bench. The Chairman constituted a larger bench consisting of the two Commissioners who had initially heard the matter and Mr. Farrukh H. Sabzwari, Commissioner. Thereafter, the Appeal was re-fixed and heard by the Larger Appellate Bench (Larger Bench) on November 5, 2019.

FACTS OF THE CASE

3. Brief facts of the case are that the Company was on the defaulter counter of the Pakistan Stock Exchange Limited (PSX) and trading of its shares was suspended, since March 22, 2012. On December 9, 2014, the Company was moved to the normal counter of the PSX. Opening price of the Company's share was Rs. 1.13 whereas, the closing price of was recorded at Rs. 2.1 with nil volume. However, by December 16, 2014, the Company's share price had witnessed a sharp increase to Rs. 12.24, which represented a 983.18% rise, with a cumulative trading volume of 29,000 shares in 13 trading sessions. During the period December 9, 2014 to December 16, 2014, large buy orders were placed by M/s. Noor Capital (Pvt.) Limited (Noor Capital). In view of the above circumstances and facts, the Securities and Exchange Commission of Pakistan (Commission), in exercise of powers conferred under Section 139 read with Section 137 of the Securities Act, 2015 (Securities Act), ordered an investigation vide order dated October 9, 2015 (Investigation), to enquire into the dealing, business and other transactions pertaining to the shares of the Company, during the period from June 30, 2013 to February 12, 2015.

4. During the Investigation, it was revealed that on July 18, 2014, the Company's Board of Directors appointed Bilal Aurangzeb Noor, Aurangzeb Noor and the Appellant as directors of the Company

against casual vacancies and each of them was holding 500 shares of the Company. On December 24, 2014, the Appellant acquired 350,000 (15.63%) shares of the Company, whereas Noor Capital acquired 220,000 (9.82%) shares of the Company on December 26, 2014 [on January 8, 2015, Noor Capital shareholding was reduced to 219,500 (9.80%)]. On January 8, 2015, Bilal Aurangzeb Noor acquired 214,800 (9.59%) shares of the Company. It also came on record that Bilal Aurangzeb Noor and Aurangzeb Noor had 80% shareholding in Noor Capital. Bilal Aurangzeb Noor appeared before the investigation team on February 26, 2016 and stated that he bought the Company from Mr. Humayun Gauhar. He further stated that the Appellant and he injected money and made the Company profitable. The Appellant also appeared before the investigation team on March 30, 2016 and stated that Bilal Aurangzeb Noor is his long-time friend and he came up with a plan to re-vamp the Company therefore, Appellant injected about Rs. 11 to 14.5 million against Company's equity. On January 8, 2015 Bilal Aurangzeb Noor, Aurangzeb Noor, the Appellant and Noor Capital had collective shareholding of 784,800 shares (214,800 + 500 + 350,000 + 219,500) in the Company. As per the contents of the Impugned Order, their shareholding constituted about 35% of the total issued voting shares of the Company, which they acquired while acting in concert. Appellant and others were required to make a public announcement of the offer under Section 5 of the Takeovers Ordinance, prior to acquiring more than 25% shares, however, they failed to do so.

5. In the light of above facts, the Commission took cognizance of the aforementioned violation and served a Show Cause Notice dated June 5, 2017 (SCN) on Bilal Aurangzeb Noor, Aurangzeb Noor, the Appellant and Noor Capital. Mr. Ahmed Bashir, Advocate High Court, filed a written reply to the SCN on behalf of Bilal Aurangzeb Noor, Aurangzeb Noor, the Appellant and Noor Capital, vide four separate letters dated October 30, 2017. Hearing in the matter was held on November 2, 2017. The Respondent being dissatisfied with the reply of the Appellant, Bilal Aurangzeb Noor, Aurangzeb Noor and Noor Capital, imposed a penalty in the following manner;

Sr. No.	Name	Shares Acquired	Penalty (Rs.)
1)	Bilal Aurangzeb Noor	214,800	2,148,000
2)	Aurangzeb Noor	500	5,000
3)	**Sheraz Jehangir Monnoo (Appellant)**	**350,000**	**3,500,000**
4)	Noor Capital (Pvt.) Limited	219,500	2,195,000
	Total	784,800	7,848,000

GROUNDS OF APPEAL AND ARGUMENTS

6. The Appellant has challenged the Impugned Order *inter alia* on the grounds that after the repeal of the Takeovers Ordinance, the Respondent was not authorized to take cognizance of the matter under said law, rather, he was required to proceed under the relevant provisions of the Securities Act. Furthermore, the Appellant stated that the Respondent had wrongly construed the effect of repeal described under Section 6 of the General Clauses Act, 1897 (GC Act) and the Respondent had abused the power conferred upon him, by initiating SCN proceedings under the repealed law. The Appellant claimed that issuance of the SCN was *void ab initio* because on the date of issuance of the SCN, the Takeovers Ordinance stood repealed. The Appellant stated that action under the repealed law was tantamount to violation of the fundamental rights, guaranteed by the Constitution of the Islamic Republic of Pakistan. The Appellant had also raised "questions of law" with respect to application of GC Act to special laws, rule of prospective application of substantive law, illegal coexistence of repealed law and repealing law and preference of repealed law provisions (Takeovers Ordinance) over the repealing law provisions (Securities Act). Although, the Appellant's Counsel (Counsel) has not pressed such questions, however, coming paras of this order, shall address these questions.

7. In addition to the above submissions, the Counsel also adopted the arguments of Mr. Faisal Khan, Advocate (Counsel in Appeal No. 9 of 2018; a connected appeal). Arguments of Mr. Faisal Khan, Advocate are quoted below;

"The Investigation, into the affairs of the Company was commenced on October 9, 2015 under Section 139, read with Section 137, of the Securities Act and eventually, a SCN was issued for the alleged violation of Section 5 of the Takeovers Ordinance on June 5, 2017. At this point, the Counsel emphasized that the Takeovers Ordinance was repealed by Section 178(1) of the Securities Act on May 13, 2015, therefore, issuance of a SCN under the repealed law was void. Furthermore, investigation under Section 139 of the Securities Act could be initiated against the violations of the Securities Act, therefore, the investigation with respect to violations of Takeovers Ordinance was illegal.

The Counsel argued that where legislature provides one method of dealing with a matter, the other is excluded and when the law specifies a particular procedure, it is obligatory to adhere to the same; Any negligence, failure or omission to do so invalidates the proceedings on account of which the whole superstructure raised on such defective foundation automatically crumbles. (Reliance is placed 2011 PTD (Trib) 2297). The Counsel stated that all statements recorded during the investigations were without any legal backing, therefore, cannot be relied upon.

The Counsel further argued that Sections 139 & 137 of the Securities Act do not operate retrospectively because investigation under these sections would affect or prejudice Appellant's substantive rights. In support of assertion, the Counsel has relied upon PLD 1998 SC 1. The Counsel argued that Respondent had wrongly assumed that under Section 6 of the GC Act he was authorized to initiate fresh proceedings under the Takeovers Ordinance. However, he failed to appreciate that fresh proceedings could not be initiated under a repealed law unless there were pending investigations or enquiries. In support of this argument the Counsel relied upon the case laws cited as PLD 1980 Lah 195 (Para 16); 1992 PTD 1001 (Para 16); PLD 1959 (WP) Kar 94; 2016 PLC 168 (SC) (Para 6); 1997 YLR 1627.

The Counsel further argued that if we accept that Respondent was authorized to initiate fresh proceedings under the Takeovers Ordinance, then instead of Section 137 and 139 of the Securities Act, investigation / enquiry should have been initiated under Section 21 of the Takeovers Ordinance.

The Counsel argued that the requirement to make a public announcement of offer is applicable in a situation where, a person, himself, acquires more than 25% shares in the target company. Therefore, Appellant can only be held liable under this section, if Appellant had acquired more than 25% shares of the target company without co-operation from persons acting in concert. Furthermore, shares owned by others does not entitle Appellant to claim such shares, therefore, this section also does not cover the requirement of "acting in concert".

The Counsel also argued that addition and subtraction of a word in a statute is not permissible. Statute has to be read literally by giving the words used therein, ordinary, natural and grammatical meaning(PLD 2011 SC 260). The Counsel contended that the terms "person" and "acquirer" used in Section 4 and 5 of the Takeovers Ordinance are not analogues therefore, to differentiate each other the phrase "persons, other than the acquirer" has been used in Section 13(7) and 16(1) of the Takeovers Ordinance. The term "Acquirer" has been defined under Section 2(1) (a) of the Takeovers Ordinance, which states that acquirer is a person who himself or through "any person acting in concert" acquires shares of the target company. Similarly, "persons acting in concert" has also been specifically defined in Section 2(1)(j), which state that "a person who co-operates with the acquirer". "Person" and "acquirer" are different terms therefore, to differentiate each other the phrase "persons, other than the acquirer" has been used in Section 13(7) and 16(1) of the Takeovers Ordinance.

The Counsel also argued that Respondent had ignored the fact that Bilal Aurangzeb Noor

was not a shareholder of Noor Capital on January 8, 2015 (the day when he acquired 9.59% shares of Company). Therefore, both (Noor Capital and Bilal Aurangzeb Noor) cannot act in concert. The Counsel further stated that Noor Capital and Sheraz Jehangir Monnoo had acquired the shares of the Company, prior to Bilal Aurangzeb Noor. Sheraz Jehangir Monnoo and Noor Capital acquired shares of the Company on December 24, 2014 and December 26, 2014, respectively. They paid the subscription amount out of their own funds and nothing is on record to suggest that they are not the legal and beneficial owners of the same. As required by Section 5 of the Takeovers Ordinance, the Respondent had failed to prove the Appellant's entitlement with respect to 35% acquired voting shares of the Company. The Counsel concluded the arguments and stated that in simple dictionary meaning, the word "entitled" is defined in Shorter Oxford English Dictionary as "having a title to something". (PLD 1976 Supreme Court 6 (Para 66)). The Counsel argued that Penalties are not commensurate with the alleged violations. In this regard reliance has been placed on 2012 CLD 873, 2011 CL,D 537, 2010 CLD 262, 2009 CLD 970, 2007 CLD 306 and 2006 CLD 408."

RESPONDENT'S REBUTTAL AND ARGUMENTS

8. The Respondent's representatives (the Representatives) have vehemently denied and rebutted the grounds of Appeal and arguments of the Counsel. The Respondent had stated in the written reply of the Appeal that mere mentioning of "questions of law" without addressing the same in his favor is of no use and such questions should have been elaborated in support of his case. The Representatives stated that the Impugned Order had been passed in accordance with the law as Section 6 of the GC Act, saves rights created and liabilities incurred on account of a statute that has been repealed and, therefore, the Appellant was rightly penalized under the Takeovers Ordinance.

9. The Representatives contended that the Securities Act has enhanced the quantum of penalty form fifty million[1] to one hundred million[2] and threshold of voting shares from 25%[3] to 30%[4]. Therefore, the Respondent was not authorized to impose new penalty and revised threshold of voting shares, on account of violations committed during the existence of the Takeovers Ordinance.

[1] Under Section 26 of the repealed Takeovers Ordinance
[2] Under Section 126 of the repealing Securities Act
[3] Under Section 5 of the repealed Takeovers Ordinance
[4] Under Section 111 of the repealing Securities Act

10. The Representatives further argued that investigation under Section 139 read with Section and 137 of the Securities Act was not initiated on account of the Takeovers Ordinance violations, rather it was initiated to probe the trading activities in the shares of the Company. In support of this assertion, the Representatives presented a copy of investigation order dated October 9, 2015 before the Larger Bench. The Representatives argued that it transpired during the Investigation that the Appellant, along with others, while acting in concert and without making public announcement of the offer, had acquired 35% voting shares of the Company, hence, breached the threshold of 25%, contained in Section 5 of the Takeovers Ordinance. The Representatives concluded that the violation attracted penal provisions of section 26 read with section 25 of the Takeovers Ordinance, therefore, SCN was issued and after due process, the Impugned Order was passed.

11. The Representatives argued that Section 4 and 6 of the Ordinance impose an obligation on the "acquirer", who acquired the shares in the target company, whereas Section 5 puts an obligation on a "person" who is intending to acquire shares of the target company. The Representatives stated that the Appellant is misconstruing the principles of interpretation, by reading sections 4 and 5 of the Takeover Ordinance in isolation. As, the interpretation of law stresses that the law has to be read in its entirety and no provision of any statute has to be read in isolation (2014 MLD 1515 ISLAMABAD). The Representatives claimed that the Appellant is misinterpreting the established principle of law intentionally, to defeat the purpose of the law. The Representatives further argued that the words "Person", "acquirer" and the term "person acting in concert" are substitutable as both "acquirer" and "person acting in concert" are defined as a person at the outset of each definition respectively. The Representatives contended that the language and reference used in Section 8[5] of the Takeovers Ordinance suffices to dislodge the Appellant's argument, with respect to "acquirer" and "person"; *"Section 8; Timing of the public announcement. (1) Before acquisition of voting shares beyond the threshold specified in section 5 or section 6, the acquirer shall……."* The Representatives concluded that the referred section elucidates the intention of the legislature that the word 'acquirer' and 'person' are interchangeable.

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[5] **Section 8; *Timing of the public announcement.*** *— (1) Before acquisition of voting shares beyond the threshold specified in section 5 or section 6, the acquirer shall, after giving notice to the Commission as required by sub-section (3) of section 9, make a public announcement of such an intention forthwith. (2) In case of an acquirer acquiring Global Depository Receipts or American Depository Receipts which, when taken together with the voting shares, if any, already held by the acquirer, would entitle the acquirer to voting shares, exceeding the percentage specified in section 5 or section 6, the public announcement referred to in subsection (1) shall be made not later than two working days before he acquires voting shares on such securities upon conversion or exercise of option as the case may be.*

12. The Representatives stated that in order to defeat the requirements of the Takeovers Ordinance, the Appellant and others had structured the acquisition transaction with *mala fide* intention whereby, firstly, Bilal Aurangzeb Noor had transferred his entire shares in Noor Capital on August 29, 2014 (Form-A made up to October 30, 2012 and submitted on September 18, 2014), secondly re-acquired the transferred shares on October 20, 2015 (Form -A made up to October 31, 2015 and submitted on November 15, 2015) after acquisition of Company's shares. The Representatives lastly argued that the circumstances suggest, that acquisition of Company's shares was a deliberate act of the Appellant and others.

UNANIMOUS VIEW OF LARGER BENCH

13. We have heard the parties (Appellant & Respondent) and perused the record with their able assistance. The Counsel's argument that Respondent had wrongly invoked the provisions of Takeovers Ordinance is not tenable because the alleged violation pertains to the period December, 2014 to January, 2015, and at that time Takeovers Ordinance was in operation. It is very important to understand that a violation always leads towards a liability and resulting in penalty. Therefore, by virtue of Section 6, clause "c" of GC Act, the Respondent had rightly proceeded against the Appellant and others under the repealed Takeovers Ordinance. The Larger Bench has noted that instead of mentioning clause "c" of Section 6 of GC Act, the Respondent had referred to clause "e", however, it is an inadvertent and immaterial mistake that has not affected the rights of the Appellant and merits of the case. In the circumstances, the Respondent was duly authorized to proceed under the repealed Takeovers Ordinance. For reference relevant provision of the GC Act is reproduced below;

> *"**6. Effect of repeal;** the repeal shall not–*
>
> *(a) ……..*
>
> *(b) ……..*
>
> *(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed;"*
>
> ***Emphasis Added***

14. The takeover and acquisition provisions of the Securities Act are not applicable to the Appellant's case because, its provisions have enhanced the quantum of penalty and threshold of acquisition of voting shares. Furthermore, requirements of Section 5 of the repealed Takeovers Ordinance were violated prior to its repeal however, such violations were revealed after its repeal. Article 12(1)(b) of the Constitution of the Islamic Republic of Pakistan, 1973, prohibits imposition of a penalty, of a

kind different from the penalty prescribed at the time the offence was committed, therefore, Respondent was not authorized to impose a penalty or any other condition, which was nonexistent at the time violations were committed. The relevant part of the Article is reproduced below for ready reference;

> *"Protection against retrospective punishment. (1) No law shall authorize the punishment of a person;*
> *(b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.*
>
> ***Emphasis Added***

15. We are of the view that the record does not support the Appellant's assertion that violations of Takeovers Ordinance were investigated under the Section 139 of the Securities Act. As a matter of fact, the investigation order, dated October 9, 2015 was not issued to investigate the alleged violations of Takeovers Ordinance, rather investigation was ordered to probe into the trading activities of Company's shares during the period from June 30, 2013 to February 12, 2015. However, the investigation revealed that the Appellant along with others while acting in concert had acquired 35% voting shares of the Company, hence, violated the requirement of Section 5 of the Takeovers Ordinance. Takeovers Ordinance violations were exposed during the Investigation, therefore, enquiry under Section 21 of the Takeovers Ordinance was not necessary or required. The Appellant's liability for the violation of Takeovers Ordinance was incurred and accrued during the existence of the Takeovers Ordinance therefore, SCN proceedings and the Impugned Order are fully protected under Article 264 (c) of the Constitution and Section 6(c) of the GC Act. In light of the above facts and circumstances, the cited case laws PLD 1980 Lah 195 (Para 16); 1992 PTD 1001 (Para 16); PLD 1959 (WP) Kar 94; 2016 PLC 168 (SC) (Para 6); 1997 YLR 1627, are not applicable in this case.

16. We have no doubt, that Section 139 and 137 of the Securities Act are procedural and can operate retrospectively, therefore, initiation of Investigation under such provisions was not prejudicial to the Appellant's substantive rights. The Commission had started the Investigation, to probe the trading activities in the shares of the Company, therefore, we endorse the Counsel's argument, that under Section 139 of the Securities Act, only those offences and violations could be investigated, that had been committed under the Securities Act or under any rules or under any regulations made thereunder.
17. We are of the view that the Counsel's argument with regard to the Respondent's reliance on the statements recorded during the Investigations is valid to an extent. The statements were recorded during the Investigation under Section 139 of the Securities Act, which was conducted in the context

of trading activities in the shares of the Company, therefore, these may not be used as core evidence to penalize the Appellant and others for the alleged violations of the Takeovers Ordinance. In our view, such statements could be treated as a relevant fact, therefore, to prove the alleged violations of the Takeovers Ordinance, the Respondent was required to rely upon other corroborated and independent evidence. In this case, the Respondent had not passed the Impugned Order, merely on the basis of such statements, rather he relied upon independent documentary evidence of the Appellant and others shareholding in the Company.

MAJORITY VIEW OF COMMISSIONERS MR. SHAUKAT HUSSAIN AND MR. FARRUKH H. SABZWARI

18. The Counsel's argument with regard to different meaning and application of terms "acquirer" used in Section 2(a) and Section 4 of the Takeovers Ordinance and "Person" used in Section 5 of the Takeovers Ordinance is based on misconception, therefore, we reject it. The Counsel's argument that definition of "acquire" is not applicable to Section 5 of the Takeovers Ordinance is against the rules of interpretation, intent of the legislature and contrary to the scheme of law. In our view, the phrase started with "No person....." in Section 5 of the Takeovers Ordinance means "no acquirer.....". This observation is also supported by the wording of Section 6(1) of the Takeovers Ordinance, which says that; *" No Acquirer, who has acquired more than twenty-five percent but less than fifty-one percent of the voting shares....."*. Originally, the word "person" was used under Section 5 of the Takeovers Ordinance for the one who acquires more than 25% voting shares of a company, however, while explaining the acquisition requirement of more than 25% voting shares under Section 6(1) of the Takeovers Ordinance, the word "person" has been replaced with the word "acquirer". Therefore, acquirer or person have been used interchangeably. We concur with the Respondent's view that interpretation of law stresses that the law has to be read in its entirety and no provision of any statute be read in isolation. In view of the aforestated facts, we believe that in violation of Section 5 of the Takeovers Ordinance, the Appellant while acting in concert with Bilal Aurangzeb, Aurangzeb Noor and Noor Capital had acquired 35% voting shares of the Company.

19. The Appellant's contention that Respondent had failed to establish the Appellant's entitlement with regard to 35% shareholding of the Company is misconceived and incorrect. Requirement of Section 5 of Takeover Ordinance is applicable to all persons, who acted in concert and, directly or indirectly, had acquired shares beyond the prescribed limit of 25% voting shares. Therefore, the Respondent

was not required to establish entitlement of any single person with regard to 35% shareholding of the Company. Section 5 of the Takeovers Ordinance says that *"No person shall, directly or indirectly acquire- **a)** voting shares……"* therefore, this section is applicable to persons acting in concert. In the circumstance, it was irrelevant whether Bilal Aurangzeb, Aurangzeb Noor and Noor Capital had purchased shares of Company with their own resources or funds provided by the Appellant.

20. The Counsel's argument that on January 8, 2015 Bilal Aurangzeb Noor was not a shareholder of Noor Capital, therefore, their *(Bilal Aurangzeb Noor and Noor Capital)* shareholding in the Company, cannot be considered to constitute the offence of acting in concert, is *prima facie* in the Appellant's favor. However, circumstances suggest that transfer of Bilal Aurangzeb Noor's shares was a deliberately structured transaction to defeat the requirement of Section 5 of the Takeovers Ordinance. As per Form-A, filed by Noor Capital (Form -A made up to October 30, 2012 and submitted on September 18, 2014) Bilal Aurangzeb Noor (Appellant in Appeal No. 9 of 2018) transferred his entire shareholding on August 29, 2014 to Aurangzeb Noor, Mrs. Mudassara Aurangzeb and Mrs. Azmat Akbar. Thereafter, Noor Capital filed Form-A (Form -A made up to October 31, 2015 and submitted on November 15, 2015) whereby Mr. Aurangzeb Noor, Mrs. Mudassara Aurangzeb and Mrs. Azmat Akbar transferred their shareholding to Bilal Aurangzeb Noor on October 20, 2015. In view of the aforesaid, it is apparent that both share transfer transactions were executed to avoid the consequences of breach of the requirement contained under Section 5 of the Takeovers Ordinance, therefore, the Appellant, Bilal Aurangzeb Noor, Aurangzeb Noor and Noor Capital cannot be exonerated from the violation of Section 5 of the Takeovers Ordinance, whereby, while acting in concert and without public announcement of the offer, had acquired 35% voting shares of the Company.

21. In the light of above discussion and findings, we are of the view that the Appellant has failed to demonstrate any concrete defense against the Impugned Order, therefore, we hereby dismiss this Appeal, without any order as to cost.

DISSENTING VIEW OF COMMISSIONER MR. AAMIR ALI KHAN

22. The Counsel's argument with regard to different meaning and application of terms "acquirer" used in Section 4 of the Takeovers Ordinance and "Person" used in Section 5 of the Takeovers Ordinance are important to decide the fate of this case. I endorse the Counsel's argument that allegation of "acting in concert" is not applicable under Section 5 of the Takeovers Ordinance rather, it is

applicable under Section 4 of the Takeovers Ordinance. The definition of "acquire" has been provided under Section 2(1)(a) of the Takeovers Ordinance and in said definition a phrase "acting in concert" has been used, which indicates that only the acquirer can be charged with the violation of "acting in concert". Therefore, the Respondent was not authorized to allege violation of "acting in concert" under Section 5 of the Takeovers Ordinance.

23. I have also carefully examined the contents of the Impugned Order and found that, the Respondent had expressly alleged that on January 8, 2015 the Appellant, Bilal Aurangzeb Noor, Noor Capital and Aurangzeb Noor had collective shareholding of 35% voting shares of the Company, which they acquired while acting in concert. However, the record speaks otherwise, because on January 8, 2015, Bilal Aurangzeb Noor was not a shareholder of Noor Capital. Perusal of Form-A of Noor Capital (Form -A made up to October 30, 2012 and submitted on September 18, 2014) revealed that Bilal Aurangzeb Noor had transferred his entire shareholding on August 29, 2014 to Mr. Aurangzeb Noor, Mrs. Mudassara Aurangzeb and Mrs. Azmat Akbar. Whereas, Form-A of Noor Capital (Form -A made up to October 31, 2015 and submitted on November 15, 2015) showed that Mr. Aurangzeb Noor, Mrs. Mudassara Aurangzeb and Mrs. Azmat Akbar transferred their shareholding to Bilal Aurangzeb Noor on October 20, 2015. It is evident from the data of above mentioned forms that on January 8, 2015 *(the day when Bilal Aurangzeb Noor acquired 9.59% shares of Company)* Bilal Aurangzeb Noor was not a shareholder of Noor Capital. Therefore, the Respondent had wrongly included Bilal Aurangzeb Noor's and Noor Capital's shareholding in the Company, to prove the alleged violation of Section 5 of the Takeovers Ordinance. Accordingly, the Respondent's contention with regard to 80% shareholding of Bilal Aurangzeb Noor and Aurangzeb Noor in Noor Capital was also not proved. In the above circumstances, allegation that while acting in concert, Bilal Aurangzeb Noor, Noor Capital, Aurangzeb Noor and the Appellant had breached the requirement of Section 5 of the Takeovers Ordinance is not established.

24. The Representatives' argument that Bilal Aurangzeb Noor had transferred and re-acquired shares of Noor Capital with mala *fide* intention are neither permissible nor cogent, because this aspect had not been deliberated by the Respondent in the Impugned Order. Furthermore, it is important to note here that Bilal Aurangzeb Noor had transferred his shares in Noor Capital more than two months before acquisition of the Company's shares, whereas he re-acquired Noor Capital's shares eleven months after the acquisition of Company's shares. There is a thirteen-month period between shares transfer and re-acquisition, therefore, I am not inclined to believe that Bilal Aurangzeb Noor along with others

had intentionally executed said transactions to avoid the consequences of breach of the Takeover Ordinance's requirements. In the circumstances, I am of the view that there was no reason to include shareholdings of Bilal Aurangzeb Noor (9.59%) and Noor Capital (9.80%) with the shareholding of the Appellant (15.63%), to establish the alleged violation of breach of 25% threshold envisaged under Section 5 of the Takeovers Ordinance. As per record, the Appellant had duly disclosed his shareholding in the Company under Section 4 of the Takeovers Ordinance (Form-31). Therefore, circumstances and record suggest, that the Respondent had failed to establish that the Appellant and others had acted in concert and violated the requirement of Section 5 of the Takeovers Ordinance.

25. Furthermore, the Respondent had failed to establish the entitlement of a particular person who in violation of Section 5 of the Takeovers Ordinance, had directly or indirectly, acquired 35% voting shares of the Company. Therefore, without establishing the entitled person, violation of "acting in concert" cannot be attributed to anyone.

26. In view of above discussion, I hereby, accept this Appeal and set aside the Impugned Order, without any order as to cost.

DECISION OF THE APPEAL

27. The Appeal is dismissed with the majority view of two to one.

(Shaukat Hussain)	**(Farrukh Hamid Sabzwari)**	**(Aamir Ali Khan)**
Commissioner (CLD-C&CD)	Commissioner (SCD,AML)	Commissioner (CLD-CSD)

Announced on: 20 DEC 2019