



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO. IV

In the matter of

Appeal No. 29 of 2010

1. D.S Industries Limited
2. D.S Textile Limited
3. Ali Pervez Capital (Pvt) Ltd
(All through Company Secretary)

.... Appellants

Versus

Executive Director (Enforcement), Securities and Exchange Commission of
Pakistan.

.... Respondent

Dates of hearing:

28/06/12, 16/07/12, 02/01/15,
15/01/15, 13/05/15 and 14/10/15

Present:

For Appellants:

Mr. Adil Bandial, Advocate High Court, CLM

For Respondent:

- i. Mr. Nasir Askar, Director (LCID-SMD)
- ii. Mr. Moeed Hassan, Assistant Director (LCID-SMD)

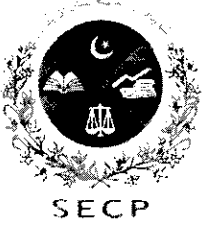
ORDER

1. This order shall dispose of Appeal No. 29 of 2010 filed under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 against the order dated 11/06/10 (the Impugned Order) passed by the Respondent, wherein an aggregate penalty of

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Rs.1,100,000 was imposed on the D.S. Industries (Appellant no.1), D.S. Textile Limited (Appellant no.2) and Ali Pervez Capital (Pvt) Limited (Appellant no.3) for the contravention of the provisions of Listed Companies (Substantial acquisition of voting shares and Takeovers) Ordinance, 2002 (the Takeovers Ordinance).

2. The brief facts of the case are that review of the statutory returns and pattern of shareholding annexed with annual reports for the year ended 30/06/07 and 30/06/08 of the Pervez Ahmed Securities Limited (the Target Company) revealed that collective shareholding of sponsors, directors and associated companies/related parties has increased from 40.46 % to 62.96 % in the aforesaid period. The substantial increase in holding was attributed mainly to the increase in holding of associated companies i.e. Appellant no.1, Appellant no.2 and Appellant no.3. The collective shareholding of the Appellant no.1, 2 and 3 prior to the aforesaid consolidation was prima facie, less than 51% of the paid up capital of the Target Company and they were required to make a public announcement of offer before acquisition of voting shares of the Target Company in terms of section 6 of Takeovers Ordinance.
3. The Respondent vide its letter dated 17/09/09 advised Mr. Pervez Ahmed Chief Executive Officer of the Target Company and the director of Appellant no.1, 2 and 3 to provide details of the acquisition to ascertain the compliance or non-compliance of the Takeovers Ordinance provisions, particularly Section 6(1) by the Appellant no.1, 2, and 3. The company secretary of the Target Company replied vide letter dated 22/10/09 and explained the details and manner of share purchase. The reply revealed that the Appellants had complied with the Section 4 of the Takeovers Ordinance in isolation and failed to comply with the requirements of section 6 of the Takeovers Ordinance. Therefore, a Show Cause Notice (the SCN) was issued to the Appellants under section 25 read with section 26 (1) and (2) of the Takeovers Ordinance for non-compliance. A written reply to the SCN was submitted by the Appellants and hearing in the matter was held on 21/05/10. The Respondent being dissatisfied with response of the Appellants

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passed the Impugned Order and imposed a collective penalty of Rs.1,100,000 under section 26(3) of the Takeovers Ordinance on the Appellants.

4. The Appellant has preferred the instant appeal against the Impugned Order on the following grounds:

- a. The Appellants were charged with the same offence, however quantum of penalty was calculated on the basis of number of directors of each Appellant and no rational was provided in this regard. Thus, the different quantum of penalty for each Appellant rendered the Impugned Order illegal and discriminatory and liable to be set aside to the extent of the excess penalties imposed therein.
- b. The Respondent has not observed the principle of double jeopardy and corporate veil in the present case.
- c. The Respondent has failed to establish the willful default on the part of the Appellants therefore Impugned Order is liable to be set aside.
- d. The Appellants had made disclosure in terms of section 4 of the Takeovers Ordinance which indicates lack of intent to defraud.
- e. Without prejudice to the foregoing grounds, the Appellants acted in good faith for the betterment of the Target Company and its stakeholders particularly minority shareholders. Furthermore acquisition of shares was done in open market transaction through different stockbrokers therefore, this fact negates the possibility of willful default by the Appellants.
- f. That the Impugned Order is beyond jurisdiction, invalid, without lawful authority and void as a consequence.

5. The Respondent has denied and rebutted the grounds of appeal in the following manner;

a&b. The penalty was imposed on the directors of the Appellants who were responsible to control the affairs of their respective companies.

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- c. Denied. It is important to state that the Appellants (through legal counsel) had admitted that the threshold prescribed in the Takeovers Ordinance had indeed been breached, admitted their default and requested lenient view.
 - d. Compliance of Section 4 of the Takeovers Ordinance by Appellants cannot be justified due to the fact that these companies have acted in concert since the very inception of the Target Company and it is this concert that has enabled the directors to be on the Board of Target Company and control and manage the affairs.
 - e. The instant ground of appeal itself is admission of the default. The purpose and objectives of Takeovers Ordinance is not for putting restraint on the sponsors from any transactions regarding acquisition of shares, rather it provides a fair and equal treatment to all the investors as well as a transparent and efficient system for substantial acquisition of voting shares and take-over of companies providing a level playing field to the minority shareholders. This right of minority shareholders cannot be neglected on the plea of betterment of company or unintentional default.
 - f. The Respondent has power under the Takeovers Ordinance to issue directions and impose penalties on the acquirers who have failed to execute their responsibility to comply with the prescribed legal requirements. Furthermore, the competent authority ensures judicious use of these powers while making a decision keeping in view the specific circumstances of each case.
6. We have heard the Appellants and Respondent (the parties) at length and perused the relevant record with the assistance of the parties.
7. One of the grounds raised by the Appellants is imposition of different quantum of penalty on each Appellant for the same default, which needs consideration. We find it appropriate to discuss this issue without prejudice to the merits of the case for future guidance of operational departments of the Securities and Exchange Commission of Pakistan. We are unable to find out the rationale behind the imposition of penalty on the basis of number of directors of the Appellants. In our view the quantum of penalty should have been even for same degree of default. As per settled legal principle uneven imposition of penalties in

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same nature default cannot be sustained. For just conclusion of cases penalties should be imposed in equitable manner while adjudicating the violations of same nature committed by different persons or entities.

8. As per the record and the contents of the Impugned Order it is undisputed fact that the Appellants have complied with section 4 of the Takeovers Ordinance and failed to comply with Section 6 of the Takeovers Ordinance. Therefore, in view of non-compliance of relevant provisions of law, the Appellants cannot be absolved from the admitted default and established violation. However, as discussed in para above, the penalty cannot be imposed on the basis of number of directors of the Appellants, as it has been calculated in the Impugned Order.
9. Therefore, in view of the aforesaid, we find no reason to interfere with the findings of the Impugned Order, however it would be appropriate and just to reduce the total quantum of penalty, imposed through the Impugned Order to Rs.600,000 i.e. Rs.200,000 on each Appellant and direct them to comply with the required laws in future to avoid any penal action. The appeal is disposed of.
10. Parties to bear their own cost.

(Fida Hussain Samoo)
Commissioner (Insurance)

Announced on:

20 NOV 2015

(Zafar Abdullah)
Commissioner (SCD)