



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO. IV

In the matter of

Appeal No. 56 of 2010

(i) Muhammad Zafar Saeed

(ii) Chaudry Abdul Aziz

..... Appellants

Versus

Commissioner (CLD)

Securities and Exchange Commission of Pakistan

..... Respondent

Date of Hearing

12/08/15

Present:

Appellant No (i):

(i) Mr. M. Zafar Saeed

For the Respondent:

(i) Mr. Imran Iqbal Panjwani, Executive Director (CSD)

(ii) Mr. Rohail Abbas, Deputy Director (CSD)

(iii) Mr. Moeed Hasan, Assistant Director (CSD)

ORDER

1. This order is in appeal No. 56 of 2010 filed under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 against the order dated 20/10/10 (Impugned Order) passed by the Respondent.

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2. The facts of the case are that the review of the annual audited accounts for the year ended 30/06/09 (Accounts) of Hamid Textile Mills Limited (Target Company) revealed that Mr. Khawar Almas Khwaja, Mr. Abdul Aziz and Mr. Muhammad Zafar Saeed have been appointed on the Board of Directors (BoD). The Company Secretary of Target Company namely, Mr. Zahid Latif submitted form 29 to CRO Lahore dated 21/05/08, 27/06/08 and 27/08/08 under section 205 of the Companies Ordinance, 1984 (Ordinance), indicating new appointments of Mr. Khawar Almas Khwaja as Chief Executive Officer (CEO) and Mr. Muhammad Zafar Saeed and Mr. Abdul Aziz (Appellants) as directors, respectively. The Commission has, on record, letter written by National Bank Limited (NBP) dated 10/03/08 addressed to the Target Company and a letter addressed to Registrar CRO Lahore dated 28/05/09 containing information regarding change in management. The aforesaid letters disclosed that as per tripartite agreement, NBP, being major creditor has agreed change of management/directorship with transfer of 7,250,000 shares representing 54.65% of the paid up capital of the Target Company from existing directors/shareholders to the CEO, and the Appellants (the "Acquirers"). Letter dated 05/04/10 addressed to Company Secretary of Target Company from the Appellants with copy endorsed to the Commission indicated that both Appellants collectively held 34.53% of Company shares transferred from the defunct management in the manner as follows:

Shares Transferred to Mr. M. Zafar Saeed on 08-04-2008, Folio No 00441

S No	Names of transferors/sellers	From	To	No of Shares	No of Transfer
1.	Sardar Mohammad Omar	501	184,450	183,950	125
2.	Sardar Mohammad Omar	1,281,501	1,890,960	609,460	125
3.	Mrs Shahida Talib	829,501	932,000	102,500	126



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4.	Mrs Shahida Talib	3,277,901	3,739,350	461,450	126
5.	Ms Zainab Omer	4,892,351	5,236,300	343,950	127
6.	Ms. Monazza Omar	5,236,301	5,516,300	280,000	128
7.	Ms. Rabia Hassan	5,516,301	5,796,300	280,000	129
8.	Other Shares			97,000	
Total Holding				2,358,310	
Mr. Zafar % Share holding				17.77%	

Shares Transferred to Mr. Ch Abdul Aziz on 08-04-2008, Folio No 00442

S No	Names of transferors/sellers	From	To	No. of Shares	No. of Transfer
1.	Sardar Abdul Hamid	1	500	500	135
2.	Sardar Abdul Hamid	1,035,001	1,281,500	246,500	135
3.	Sardar Talib Hussan	184,451	368,300	183,850	136
4.	Sardar Talib Hussan	1,890,961	2,595,310	704,350	136
5.	Sardar Ahmad Jamal	368,301	547,650	179,350	137
6.	Sardar Ahmad Jamal	2,595,311	2,871,730	276,420	137
7.	Brig (R) Saadullah Khan	547,651	727,000	179,350	138
8.	Brig (R) Saadullah Khan	2,871,731	2,950,400	78,670	138
9.	Alia Khan	6,056,301	6,316,300	260,000	139
10.	Other Shares			115,100	
Total Holding				2,224,090	
Ch Abdul Aziz % Share holding				16.76%	

The Acquirers, while acting in concert with each other have acquired 54.65% shareholding in March 2008, which necessitated compliance of the mandatory provisions of the Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Ordinance, 2002 (Takeovers Ordinance). The records available with the Commission

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indicate that the requisite compliance of Takeovers Ordinance was not made by the Acquirers. The Acquirers have failed to comply with the following requirements of the Takeovers Ordinance:

- (i) Section 4(1) - the Acquirers were required to intimate the Target Company and the Stock Exchanges regarding acquisition of voting shares;
- (ii) Section 5(1) - the Acquirers were required to make a public announcement of offer to acquire voting shares of the Target Company;
- (iii) Section 7(1) - the Acquirers were required to appoint a bank, financial institution or a member of a stock exchange as Manager to the Offer before making any public announcement;
- (iv) Section 8(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 section 9(3), make a public announcement of such as intention forthwith;
- (v) Section 9(1) - the Acquirers were required to make a public announcement to be published in one issue each of a daily newspaper in English language and a daily newspaper in Urdu language having circulation in the province or provinces in which the stock exchange, on which the Target Company is listed is situated;
- (vi) Section 9(3) - the Acquirers were required to submit to the Commission a copy of the public announcement through the Manager to the Offer at least two working days before its issuance;
- (vii) Section 9(4) - the Acquirers were also required to send the public announcement shall be sent to all the stock exchanges on which the voting shares of the Target Company are listed for being notified on the notice board and on the automated information system thereof, and to the Target Company at its registered office for being placed before the board of directors of such company;
- (viii) Section 13(1) - the Acquirers were required to send a copy of the proposed offer letter within two working days of the announcement to the Target Company at its



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registered office address, all the Stock Exchanges where the voting shares of the Company are listed and the Commission;

- (ix) Section 13(2) - the Acquirers were required to specify in the public announcement the entitlement of shareholders for receiving the offer letter;
- (x) Section 13(8) - the Acquirers were required to create a security as provided in the Ordinance on or before the date of issue of public announcement;
- (xi) Section 13(9) - the Acquirers were required to ensure that firm financial arrangement for fulfillment of obligations under the public announcement and disclosure to this effect should have been made in the announcement.

3. Show Cause Notice dated 05/05/10 was served upon the Acquirers as to why action may not be taken against the Acquirers acting in concert under section 25 and section 26(1) and (3) of the Takeovers Ordinance for non-compliance under the Takeover Ordinances. The Appellants filed reply to the SCN and hearing in the matter was held. The Respondent after hearing the parties passed the Impugned Order and imposed a penalty of Rs.500,000 on each of the three Acquirers under section 26(3) of the Takeovers Ordinance.

4. The Appellants have preferred the instant appeal against the Impugned Order. The Appellants have argued that they have been illegally kept out of the affairs of the Company by the CEO from the very inception despite huge investment on their part in the Target Company. The entire process of transfer of shares by the Appellants was under direct scrutiny of the NBP being manager to the offer of shares; however, the tripartite agreement with NBP was neither properly executed nor signed by the Appellants. The CEO never informed the Appellants of the requirements of the Takeovers Ordinance to be complied with. The CEO has admitted that under the advice of the Company Secretary of the Target Company, he intentionally did not report the true accounts of shares transferred in the Target Company to the Commission. Further, the Appellants also came to know of large scale fraud in the



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affairs of Target Company. The CEO conducted the affairs of the Company in a manner oppressive to its members including minority shareholders such as the Appellants. Further, he refused to act in accordance with the Memorandum and Articles of Association of the Target Company and directions of the Commission. The Appellants have filed petition vide Company Application No. 27/2010 under section 152 and 153 of the Ordinance for rectification of the Register of Members, which is pending before the Honourable Company Judge, Lahore High Court (Court). The Appellants have made an application under section 265 and 290 of the Ordinance and has also been preferred for appointment of inspectors and regulating the affairs of the Company. The Appellants have time and again approached the Commission for redressal of their grievances and brought the mismanagement of the affairs of the Company by the CEO to the notice of the Commission vide their "Application for holding of Extra Ordinary General Meeting and Election of Directors" dated 16/03/10 to save the company from impending default. Therefore, a lenient view should be taken in favour of the Appellants and the Impugned Order set aside.

5. The department's representatives argued that the Acquirers while acting in concert with each other have acquired 54.65% shareholding in 2008, which necessitated compliance of the mandatory provisions of the Takeovers Ordinance but the records available with the Commission indicates that the requisite compliance of Takeovers Ordinance was not made by the Acquirers. As per record, NBP was signatory to the tripartite agreement as major creditor not as manager to the offer. The Acquirers could have been directed under the provisions of section 25 of the Takeovers Ordinance to sell the voting shares acquired in violation of the provisions of the Takeovers Ordinance. However, the Respondent was not inclined to direct the Acquirers to disinvest the shares acquired through an agreement but instead penalty was imposed on the CEO and the Appellants.



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6. We have heard the arguments. Sections 25, 26(1) and (3) of the Takeovers Ordinance are reproduced for ease of reference:

25. Directions by the Commission. — The Commission may, in the interests of the market, give such directions as it deems fit including—

- (a) directing the person concerned not to further deal in securities;
- (b) prohibiting the person concerned from disposing of any of the securities acquired in violation of provisions of this Ordinance;
- (c) directing the person concerned to sell the voting shares acquired in violation of the provisions of this Ordinance; and
- (d) taking such action against the person concerned as may be necessary.

26. Penalties for non-compliance. —

(1) In the event of withdrawal of public offer, except as provided in section 18, or contravention of any provision of this Ordinance, the acquirer and any person acting in concert shall stand debarred as acquirers for the next three years.

(3) If any person—

- (a) refuses or fails to furnish any document, paper or information which he is required to furnish by, or under, this Ordinance;
- (b) refuses or fails to comply with any order or direction of the Commission made or issued under this Ordinance;
- (c) contravenes or otherwise fails to comply with the provisions of this Ordinance, the Commission may, if satisfied, after giving the person an opportunity of being heard, that the refusal, failure or contravention was wilful, impose penalty which may extend to one million rupees as may be specified in the order and, in the case of a continuing default, a further sum calculated at the rate of ten thousand rupees for every day after the issue of such order during which the refusal, failure or contravention continues.

Emphasis Added

Section 25(c) of the Takeovers Ordinance provides that, “...The Commission may, in the interests of the market, give such directions as it deems fit including directing the person concerned to sell the voting shares acquired in violation of the provisions of this Ordinance;...” The term “acquirer” is defined in the Takeovers Ordinance as, “... any person who, directly or indirectly, acquires or has proceeded to acquire voting shares in the target company, or acquires or has proceeded to acquire control of the target company, either by himself or through any person acting in concert.” The Appellants have argued they cannot be made responsible for compliance of the provisions of the Takeovers Ordinance as the Register of Members or Register of Transfer of shares of the Target Company is in dispute and petition for rectification vide Company Application No. 27/2010 is pending before the Court. The management affairs of the Company are not



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within their control as they have been a victim of fraud by the CEO of the Target Company and have approached the Commission previously for reprieve. The Respondent has confirmed that the Register of members is in dispute and has been challenged before the Court. Further, we have reviewed the tripartite agreement which is neither properly executed nor signed by the Appellants.

In view of the foregoing, it has not been proven to our satisfaction that the Appellants have willfully violated the provisions of the Takeovers Ordinance; we take a lenient view and set aside the Impugned Order to the extent of penalty imposed on the Appellants with no order as to costs.

(Fida Hussain Samoo)
Commissioner (Insurance)

(Zafar Abdullah)
Commissioner (SCD)

Announced on: **26 AUG 2015**