



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO. 1

In the matter of
Appeal No. 96 of 2017

World Call Telecom Limited

...Appellant

Versus

Assistant Director (PRPD), Securities and
Exchange Commission of Pakistan

...Respondent

Date of Hearing: 11/10/17

Present:

For the Appellant:

- (i) Mr. Rashid Sadiq, CEO R.S. Corporate Advisory Limited
- (ii) Mr. Sajid Hashmi, Advisor, World Call Telecom Ltd

For the Respondent:

- (i) Mr. Muhammad Farooq, Additional Director (SMD)
- (ii) Mr. Asif Khan, Deputy Director (SMD)

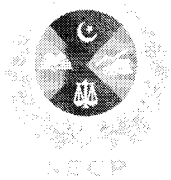
ORDER

1. This Order is passed in the matter of Appeal No.96 of 2017 filed under section 33 of the Securities and Exchange Commission of Pakistan (Commission) Act, 1997 (SECP Act) against the letter (Impugned Letter) dated May 17th, 2017 passed by the Respondent.
2. Facts leading to this case are that WorldCall Services (Pvt.) Limited (the 'Acquirer') made a public announcement of offer to acquire upto 185,866,042 ordinary shares of Worldcall Telecom Limited (the 'Company') through its manager to the offer Arif Habib Limited (the 'AHL'). The Acquirer made the public announcement of intention on September 06, 2016 and vide letter dated March 04, 2017, the manager to the offer, AHL made filing with the Securities and Exchange Commission of Pakistan (hereinafter the 'Commission'), the Pakistan Stock Exchange (hereinafter the 'PSX') and the Company informing about the public offer and providing all relevant documents required under the Listed Companies (substantial Acquisition of Voting Shares & Takeovers) Regulations, 2008 (hereinafter the 'Regulations'). The Respondent vide letter dated 21 April, 2017 informed AHL about the existence of the trust deed dated March 03, 2008 entered into between the Company and IGI investment Bank Limited as the trustee (the 'Trustee') as amended by the supplemental trust deed dated 03 April, 2015 (the 'Trust Deed') and the complaint of the Federal Employees

Appellate Bench No. 1

Appeal No.96 of 2017

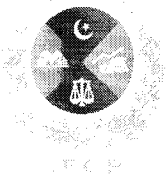
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Benevolent Fund and Group Insurance (the 'Fund') claiming non-compliance by the Company of a term of the Trust Deed and directed that before proceeding with the public offer they should ensure compliance with the requirement of the Trust Deed. In response to the Respondent's communication, AHL, through its letter dated April 27, 2017, intimated to the Commission that it understood that the onus for the requirement to seek approval rested with the Company and not the shareholders. Based on this understanding along with the response of the Company dated April 22, 2017, AHL stated that they would be continuing with the process for public offer on behalf of the Acquirer. Subsequently, AHL, through its letter dated April 29, 2017, informed the Commission and the PSX of the dispatch of letters of offer along with instructions and acceptance forms to all shareholders of the Company. In accordance with the requirements of the public offer process, payments for purchase of shareholding through public offer were made to all participating shareholders and a letter was issued by AHL dated May 22, 2017 confirming compliance with all obligations of the Acquirer arising under the Securities Act, 2015 and the Regulations. The shares tendered by the public were duly transferred to the Acquirer in their account with the CDC. The Respondent has not objected to the above process and the Acquirer has proceeded to complete the process of acquisition of substantial shareholding and control as per procedure laid down under the Securities Act, 2015 and the Regulations.

3. The Acquirer having completed all formalities required of an acquirer under the takeover law regime of the Securities Act, 2015, became entitled to transfer of 488,839,429 ordinary shares pursuant to the terms of the share purchase agreement entered into between the Acquirer and the Seller. Accordingly, the Seller entered a transaction order in the Central Depository Company of Pakistan Limited (hereinafter the 'CDC') in favour of the Acquirer for transfer of the said shareholding (hereinafter the 'TO'). The Respondent through its letter dated 17 May, 2017 directed the Company and its Share Register to ensure the compliance of the Trust Deed before transfer of majority shareholding to the Acquirer. A copy of this direction was also sent to the CDC, which vide its most recent communication dated September 12, 2017 refused to honour TO in the absence of a specific order by the SECP referring to the various correspondence of the Respondent.
4. The Respondent has not controverted these facts of the case in hand.
5. The Appellant's representative preferred the appeal on the following grounds:
 - a. The Respondent has no power to interfere in the matter of Trust Deed - a private agreement - and the Impugned Letter has suspended the transaction of substantial Acquisition and control of the Company despite the Acquirer completing all the requirements of the Securities Act, 2015 and the Regulations. The Impugned Letter issued by the Respondent has huge negative implications for the Company as the Seller has taken the exit and there is no recourse available against the Seller in the Trust Deed and the Acquirer is unable to take complete control of the Company till such time that the shares are transferred into its name, thereby impacting the Company's cash flow and operations as the commitments made by the Acquirer cannot be translated into actions unless the shares are transferred into the Acquirer's name.



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- b. The complaint is unlawful, as the Fund has not followed the mandatory requirements of law as embodied in the Securities and Exchange Commission (Conduct of Business) Regulations 2000 for filing of application to the Commission. The complaint was liable to be rejected by the Respondent for failure to meet the legal requirements as per disposal of application regulation. It was also stated that the Fund is a TFC Holder through the secondary market and was not a purchaser of the TFCs when the Prospectus was published. The Fund, when investing in the TFCs, was fully aware of the financial soundness of the investment and took on the risks associated with such investment.
- c. The Commission cannot legitimately interfere with disputes that may arise in arrangements entered into between the issuer and the investor on the basis of agreements reached between them. The Trust Deed as per its Clause 10 thereof states as follows:

“This Second Supplemental Trust Deed shall be governed by and construed in accordance with the laws of Pakistan and the courts at Lahore shall have non-exclusive jurisdiction to resolve any disputes arising hereunder”

The Impugned Letter has the effect of giving a stay to the complainant against transfer of majority shareholding in favour of Acquirer whereas the Court as per above clause of the Trust Deed has jurisdiction to resolve any dispute arising out of the Trust Deed. It was further argued that the Commission cannot seek compliance by an issuer of terms of agreements reached between an investor and the issuer. Only the agreement itself will determine the mode of redressal of grievances and disputes. The Commission, therefore, cannot exercise jurisdiction over this matter as it is to be resolved in accordance with the terms of the Trust Deed.

- d. The Clause 3.2.4 of the Trust Deed further provides as under:

“3.2.4 Subject to the provisions of the Security Documents, the Trust Deed and, in particular to the provisions of Clause 3.2.1 and 3.2.2 above the Trustee shall:

- (i) act as trustee in accordance with any instructions given to it by the TFC Holders;*
- (ii) if so instructed by the TFC Holders, refrain from exercising a right, power or discretion vested in it as trustee under these presents.*

The instructions of the TFC Holders for the purposes of this clause and the Trust Deed shall be deemed to be given in writing by TFC Holders holding together at least 51% of the total outstanding face value of the TFCs or supported by an Extra Ordinary Resolution passed at a meeting of the TFC Holders.”



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It was also argued that the Fund is acting in blatant disregard of the terms of the governing Trust Deed by approaching the Commission and if the Fund requires action to be taken to ensure payment of dues against TFCs, the Trust Deed provides that at least 51% of TFC Holders approach the Trustee with the instructions to initiate proceedings against the issuer for the occurrence of an event of default.

- e. The Authorized Representative further states that the Commission itself has in the guidance it provides regarding submission of complaints. The Commission clarifies in the guidance available online as follows:

“What does not qualify as a complaint:

Any issue that does not fall within the regulatory domain of the SECP such as:

1.

2. *Disputes arising out of private agreement with companies/intermediaries, such as terms of employment or compensation and benefits, contractual obligations etc.*

(emphasis provided)

3.....”

- f. The Authorized Representative also placed reliance the Appellate Bench decision in the matter of *Appeal No. 1 of 2016 titled JS Bank Limited v. (i) Commissioner Company Law Division, Securities and Exchange Commission of Pakistan; (ii) Chenab Limited* order dated 2 August, 2016 as under:

“On merits of the instant case, we concur with both Respondent No. 1 and 2 that the Respondent No. 1 only has powers to enforce the existing provisions of the law but cannot decide on disputes between the Appellant and Respondent No. 2 pertaining to the Prospectus. Further, the Appellant has failed to state any specific provision of the law that has been violated by the Respondent No. 1.”

- g. In support of the argument that the Respondent has withheld the transfer of shares, the Authorized Representative placed on record copy of the letter by the department sent to the Deputy Managing Director of the Fund, bearing Ref. No. SMD/Misc.(Prsp.)/062002(1) with the following contents:

“3. It is further stated that transaction regarding takeover of WTL has been concluded pursuant to the compliance with takeover laws and transfer of majority shareholdings in WTL cannot be held for an indefinite period... It may be noted that the takeover regulatory framework does not empowers the SECP to halt the transfer of shares acquired either through public offer or under shares purchase agreement. The Commission would, therefore, not be able to restrain the transfer of



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majority shareholding in the instant matter, if no decision is taken and conveyed by FEBF&GI, within the stipulated time limit."

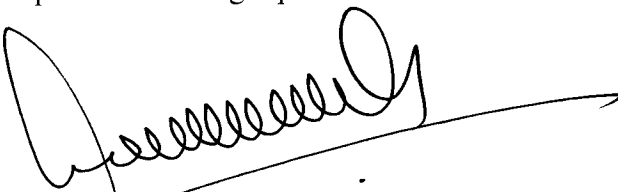
- h. The Authorized Representative states that the Respondent has frustrated a legitimate private transaction between a transferor of shares and the acquirers of such shares. The Acquirer is not a party to the Trust Deed and cannot be held liable for any non-performance of any obligations arising thereunder. The Acquirer has fulfilled all its obligations in relation to the public offer arising under the takeover law provisions as prescribed by Part IX of the Securities Act, 2015 and is, therefore, entitled to get the shares transferred in its name. The delay in the matter was unjustifiable and amount to giving time to the complainant and a violation of the rights of the Acquirer not to mention violations of the applicable law. In requiring the CDC to withhold the transfer of the shares into the name of the Acquirer, the Commission is assuming the jurisdiction of the Courts by seeking to interpret the provisions of the Trust Deed.
 - i. The Company has survived because of this acquisition transaction as this has enabled the Company to service its debt/obligations of approximately PKR 1.628 billion. Furthermore, the Acquirer has made further commitments post acquisition, which cannot be materialised due to the Impugned Letter.
 - j. The Company has successfully negotiated two restructurings and so far paid PKR 4.5 billion (Principal PKR 2.3 billion and interest PKR 2.96 million) out of total amount of TFCs of PKR 3.837 billion. However, due to the restraint on transfer of shares as directed in the Impugned Letter, the Acquirer cannot make further commitments until shares are transferred into his name.
6. The Respondent rebutted the arguments of the Appellant/Company as follows:
- a. The Commission has no power nor any intention to interfere in the trust deed and obligations pertaining thereto and the Impugned Letter was only to bring into notice of all concerned about the requirements of trust deed regarding transfer of majority shareholding.
 - b. The Impugned Letter was not issued to restrain CDC from transferring shares to the Acquirer who have completed all the requirements of the Securities Act, 2015 and the Regulations relating to substantial acquisition and take over of the Company.
7. We have heard the parties and have gone through the Impugned Letter and the relevant facts and the arguments put forth by the parties. The Impugned Letter has been perused and it is observed that:
- a) The complaint was not competent for two reasons. Firstly, it was not filed as per the requirements of law and secondly it was also contrary to the requirements of the Trust Deed, which provides that action should be taken by a resolution of the TFC Holders passed by majority of 51% and through trustee.




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- b) Although in its reply to the Appeal, the Respondent has categorically stated that the department had neither any power nor have they interfered in the contractual obligations under the trust deed, however, the Impugned Letter of the Respondent clearly directed the Company and its Share Registrar to ensure compliance with the requirement of the Trust Deed which amounts to interference in the private agreement i.e., Trust Deed despite the fact that the Acquirer has completed all the formalities required under the Securities Act, 2015 and the Regulations which fact has been admitted by the Respondent.
- c) The Trust Deed clearly states that the Courts at Lahore shall have exclusive jurisdiction to resolve any disputes arising under the trust deed. We also refer to the letter dated 31/08/17 of the Deputy Managing Director (Investment) of the Fund addressed to the Trustee and copied to the Commission, wherein, it was communicated that the Investment Committee has decided to initiate legal proceedings for calling the default of the Company against TFCs investments along with other TFC Holders. The Respondent has admitted in the Reply to the Appeal that the Commission has no power to interfere in the trust deed.

8. In view of the above, we are of the view that the withholding of transfer of shares in the name of Acquirer when all the legal formalities have been completed under the Securities Act, 2015 is not lawful. We also place reliance on our earlier decision in Appeal No 01 of 2016 titled *JS Bank Limited v. (i) Commissioner Company Law Division, Securities and Exchange Commission of Pakistan; (ii) Chenab Limited*, wherein, it was decided that the Commission is not empowered to interfere in private agreements. As the trustees have decided to initiate action as per provisions of the trust deed, therefore, the Commission should not become a party and let the Courts decide this matter.
9. For the foregoing, we hereby set aside the Impugned Letter. The Registrar is instructed to send a copy of this Order to the Chief Executive of the Central Depository Company of Pakistan Limited for transfer of shares in the name of the Acquirer subject, however, to completion of all legal/procedural formalities.


(Zafar Abdullah)
Acting Chairman/Commissioner (SCD)


(Tahir Mahmood)
Commissioner (CCD-CLD)

Announced on: 17 OCT 2017