



BEFORE APPELLATE BENCH NO. I

In the matter of

Appeal No. 35 and 37 of 2007

1. Mr. Iqbal Latif
103-A, Phase II
G.E.H.S
Link Road
Model town
Lahore

2. Air Commodore (Retd) Pervaiz Akhtar Khan
12 Gulbahar, Coloney No 2
Peshawar

3. Major General (Retd) Shujat Ali Khan
House No 122, Street No 65
F-11/3, Islamabad

..... Appellants

Versus

1. Mr. Rashid I. Malik
Commissioner (SMD)
Securities and Exchange Commission of Pakistan
NIC Building Jinnah Avenue, Islamabad.

2. Mian Muhammad Ilyas Mehraj

3. Mian Muhammad Ijaz Mehraj

4. Mian Muhammad Riaz Mehraj

5. Mrs. Shehzadi Ilyas

6. Mrs. Ayesha Ijaz

7. Mrs. Yasmeen Riaz

8. Mrs. Bano Begum

9. Mr. Haseeb Ilyas



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

NIC Building, Jinnah Avenue, Blue Area, Islamabad

10. Mr. Abdullah Ilyas
11. Mrs. Zainab Waqas
12. Miss Zakia Ilyas
13. Miss Sidra Ilyas
14. Mian Waqas Riaz
15. Mst Maiza Riaz
16. Hafiz M. Irfan Hussain Butt
17. M/s Abdullah Sugar Mills Limited
18. M/s Haseeb Waqas Engineering Limited

All resident of 103 B/1 , M.M Alam Road
Gulberg III, Lahore

..... Respondents

Date of Impugned Order
U/S 33 of the SEC Act, 1997.

October 1, 2007

Date of Hearings

21-11-07, 16-1-07

Present:

1. Dr Pervez Hassan, Ahmad I. Aslam and Iqbal Bawani Advocates for Appellants
2. Syed Mansoor Ali Shah, Syed Ahmed Hassan Advocates and Mr. Imran Inayat Butt, Director, SECP and Muhammad Farooq, Joint Director, SECP for Respondents



ORDER

1. This order shall dispose of the appeal No. 35 and 37 of 2007 filed under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 by the Appellants against the order dated October 1, 2007 “Impugned Order” passed by Commissioner, Securities Market Division (SMD).
2. The brief facts of the case are that a complaint was filed by the Respondent No 2 to 18 with the Securities and Exchange Commission of Pakistan (the “**Commission**”) under section 4 and 5 read with section 21 and 25 of the Listed Companies (substantial acquisition of voting shares and takeovers) Ordinance 2002.(“the Takeover Ordinance”).The Commission in terms of its letter dated 24 November 2005 observed that no case was made out for breach of section 4 and 5 of the Takeover Ordinance against the five alleged individual acquirers namely: (i) Mr. Iqbal Latif, (ii) Syed Akbar Naqi Zaidi, (iii) Air Commodore (Rtd.) Pervaiz Akhtar, (iv) Major General (Rtd.) Shujaat Ali Khan, and (v) Mr. Taufique Habib because each had less than 10% shareholding in HWSM. However, the Commission observed that it would further investigate the alleged acquisition of 5.4 million shares held in the House Account of First Capital Equities Limited (“**FCEL**”).
3. The Complainants, however, feeling aggrieved by the above decision of the Commission, invoked writ jurisdiction of the Honorable Lahore High Court in Writ Petition No. 19657 of 2005, which was disposed of by the Honorable Lahore High Court in terms of its order dated 26 January 2006 whereby the Commission agreed to consider all points of the Complainants in the then pending enquiry.



4. The aforesaid enquiry report was consequently submitted to the Commission on 25 July 2006 with the findings that no case was made out for violation of Section 4 and 5 of the Takeover Ordinance against the Respondents; that Respondents had not acted in concert to acquire shares in Haseeb Waqas Sugar Mills limited (“HWSM”) as mere procurement of proxies does not tantamount to the same; and that 5.4 million shares of HWSM held in the House Account of FCEL too were not in violation of the Takeover Ordinance. Based on the enquiry findings, the Commissioner (SMD), SECP vide order dated 17 November 2006 dismissed the subject complaints.
5. The Complainants moved Appeal No. 87 of 2006 against the above order before the Appellate Bench of the Commission. The Appellate Bench vide order dated 22 February 2007 remanded the case to the Commissioner (SMD), SECP for fresh proceedings with direction to afford due opportunity of hearing to the parties
6. It is also pertinent to mention that alongside these subject proceedings, the Commission had initiated proceedings against the HWSM and its directors for not convening Annual General Meeting for the year ended 30 September 2004. The Director (Enforcement) vide order dated 8-12-05 imposed penalty against the directors of HWSM. A revision was filed before the Appellate Bench, which concluded that there was no reason to delay the AGM and it should be held forthwith.
7. The decision was, however, challenged by the said respondents before the Honorable Lahore High Court in Commercial Appeal No. 1 of 2007. The Honorable Lahore High Court vide its order dated 20 February 2007 required the Commissioner (SMD) SECP, to proceed expeditiously in the matter



8. Following the remand of the matter by the Appellate Bench vide its order dated 22 February 2007, hearing in the matter was fixed on 5 March 2007 for which notices were issued to all Complainants and 33 Respondents. In the said hearing, all Complainants were duly represented by their counsel and 17 Respondents out of the 33 Respondents appeared before the Commissioner SMD, (themselves or through authorized persons) as per the attendance sheet comprising the record. These Respondents represent majority of the impugned shareholding in HWSM, therefore Commissioner SMD proceeded with the matter accordingly in the interest of substantial justice. Following the said hearing written comments and submissions were also invited. The Complainants through counsel, Syed Mansoor Ali Shah, the principal Respondents through counsel, Mr. Iqbal Bawany, FCEL and Fortune Securities Limited (“FSL”) made detailed written submissions, which were duly examined. The information on the issue was also called from several of the respondents, related parties as well as the State Bank of Pakistan (the “SBP”) and the Central Board of Revenue (the “CBR”).
9. The Commissioner SMD, SECP after detailed deliberation on the merits of the case concluded in para 15 and 16 of the impugned order dated 1 October 2007 that:
15. It is pertinent to note that a fundamental ingredient of a ‘person acting in concert’, as per the definition of the said term in the Take-overs Ordinance, is that there has to be demonstrated co-operation with the acquirer to acquire voting shares or control of a target company. In the instant case, control of HWSM is not an issue, however, the Complainants vehemently allege that the Respondents have acted in concert to acquire up to 39% shares of HWSM. FCEL and other Respondents on the other hand maintain that there is no breach of the Take-overs Ordinance, that is, they have not acted in concert to acquire any shares in HWSM. On the basis of the record on file, however, it cannot be ruled out that there was no “co-operation” between the Respondents in acquiring approximately 39% shares of HWSM without regard to the provisions of the Take-overs Ordinance. To the contrary, the transactions above noted point out that there has been significant interaction between the Respondents *vis-à-vis*



dealings in HWSM shares, which require further reconciliation and clarification from FCEL and certain of the Respondents named in the paragraph 16 below.

16. It is also considered appropriate to mention that the Take-overs Ordinance does not provide for any specific provision whereby the Commission is required to entertain complaints, as in the present case. However, two provisions of the Take-overs Ordinance are relevant and provide the Commission statutory basis to proceed in such matters. First, section 21 (c) grants the Commission the power to enquire *suo moto* or upon information received. Alternatively, the Commission may issue show cause notice under section 26 of the Take-overs Ordinance. Given the peculiar facts of this case and keeping in view that the undersigned has called upon substantial information in the matter already from all sources concerned, including the Respondents, various institutions/companies extending finance for *Badla* transactions and also relevant information from the SBP and the CBR, it is not appropriate that these proceedings culminate in to another enquiry under section 21. Since there is sufficient information available on file, which has been readily provided by relevant parties, it would be more appropriate to proceed under Section 26 of the Take-overs Ordinance.

10. The Commissioner (SMD), SECP in the concluding para of the impugned order directed the department to initiate show cause proceedings against Mr. Iqbal Latif, Mr. Shahid Hussain, Mr. Farhan Usman, Mr. M. Aslam, Mr. M. Shoaib Bashir, Air Commodore (Rtd.) Pervaiz Akhtar, Major Gen (Rtd.) Shujaat Ali Khan, Mr. Muhammad Junaid, Mr. Farooq Habib, First Capital Equities Limited and its directors, group companies of First Capital Equities Limited namely, Shaheen Insurance Company Limited, World Call Communication Limited and World Call Telephony (Private) Limited and their directors. The Respondents in the hearing were called upon to furnish such other information or document or evidence as may be required by the Commission for purposes, and due discharge, of the said show cause. The Respondents named above were also directed not



to further deal in securities of HWSM and were prohibited from disposing of any securities held by them in HWSM acquired from the period of July 2004 up to the date of the order.

11. The Appellants have preferred these appeals before the Appellate Bench against the Impugned Order. The matter was fixed for hearing on 21-11-07. However, the case was adjourned on the request of counsel for the Respondent No 2 to 18. The Appellate Bench on the application of the Appellant suspended the impugned order till the next date of hearing. The case was again fixed for hearing on 12-12-07, which was adjourned once gain on the request of the parties. The case was finally heard on 16-1-08. On the day of hearing the Appellant, Mr. Iqbal Latif was represented by Dr. Pervez Hassan, Advocate and the Appellants namely, Air Commodore (Rtd) Perviaz Akhtar Khan and Major General (Retd) Shujat Ali Khan were represented by Mr. Iqbal Bawani, Advocate. The Respondent department was represented by Mr. Ahmed Hassan, Advocate and Respondent No 2 to 18 were represented by Syed Mansoor Ali Shah, Advocate.

12. Dr. Pervez Hassan, counsel for Appellant, submitted an application under rule 21 of Securities and Exchange Commission of Pakistan (Appellate Bench Procedure) Rules 2003 read with Order 1 Rule 10 of CPC for impleading First Capital Equities Limited ("FCEL") in the appeal. The counsel argued that since the Appellants have been accused of acting in concert with FCEL and others in the matter of acquisition of large number of shares of HWSM in violation of section 4 and 5 of the Take over Ordinance, therefore, the appeal shall be gravely prejudiced if FCEL is not impleaded as a proper and necessary party in the proceedings.

13. Mr. Mansoor Ali Shah, the counsel for Respondents, vehemently opposed the application on the ground that since the appeal is not maintainable, therefore the application can only be taken up after the issue of maintainability is decided.



14. The bench concurred with the view of the Respondents counsel and observed that before going into the merits, the issue of maintainability should be decided. The parties were asked to argue on maintainability of the appeal.
15. Mr. Mansoor Ali Shah argued that the appeal is not maintainable on two grounds. Firstly, the appeal is premature as it merely impugns the issuance of show cause notice. The learned Commissioner in the impugned order has directed the department to issue show cause notice, which does not of itself make the Appellant aggrieved. Mr. Mansoor Ali Shah referred to case law cited at **2007 PTD 1347, 1993 SCMR 29, 2000 SCMR 1017, 1998 SCMR 1934** in support of his arguments. Secondly, the appeal fails on the score of non joinder of necessary parties. The counsel argued that show cause was issued to 13 persons/entities and the present appeals are filed by only 3 Appellants, as such the appeals merit rejection on the non-joinder of necessary parties.
16. Mr. Ahmed Hassan, counsel for the department argued at length on the issue of maintainability. Mr. Ahmed observed that the appeal is not maintainable under proviso (a) and (d) of sub section (1) of section 33. Mr. Ahmed emphasized that the order of the Commissioner can at best be termed as interim order under clause (d) as it does not dispose of the entire matter and is therefore not appealable. Moreover, the direction to issue show cause notice also falls under clause (a) as it is an administrative direction given by the Commissioner. Mr. Ahmed Hassan also referred to case law cited at **2007 PTD 1211** in support of his arguments.
17. Dr. Pervez Hassan opposed the contention of the counsel for Respondents by stating that the learned Commissioner in the impugned order has gone beyond his ambit by calling additional evidence and information. Dr. Pervez, observed that the enquiry officers considered all the evidence available to them. The enquiry officers gave detailed findings on all issues and concluded that Appellant had not violated the Take over Ordinance.



18. Mr. Iqbal Bawani, counsel for the other Appellants, argued at length and observed that the learned Commissioner in the impugned order failed to dilate upon the evidence produced before him and therefore the order of issuance of the show cause notice is uncalled for.
19. Dr. Pervez Hassan later on took the stance that his client is interested in expeditious disposal of the matter. The case may be adjudicated by the learned Commissioner (SMD) after issuing show cause notice and hearing the parties in show cause proceedings. However the proceedings should not linger on, as the delay in proceedings is causing great hardship to his client. On the other hand, Mr. Iqbal Bawani maintained that the instant appeal is maintainable and it should be decided only after hearing the parties on merits of the case.
20. We have heard the parties at length on the issue of maintainability of the appeals. Instead of dilating on the merits of the case, we would like to decide the issue of maintainability first. The maintainability of the appeal at this stage has being challenged by the Respondents. In the impugned order the learned Commissioner has instructed the department to issue show cause notice to large number of persons/ entities including the Appellant.
21. It is a settled principle that the direction to issue show cause proceeding is itself inquisitorial in nature and does not amount to indictment. The appeal is premature at this stage as no cause of action has accrued to the Appellants. The above findings are also in line with the case law cited by the Respondents. We would like to highlight relevant portion of case law cited in Para 3 at 2007 PTD 1211:

“.....all the petitioner is being asked to do is to answer the impugned show-cause notice. No final action against the petitioner has yet been taken by the respondents. Also the proceedings under the impugned show- cause notice are



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subject to hearing the petitioner. All objections by the petitioner are liable to be heard and decided in those proceedings in accordance with law.....”

In the instant appeals, even the show cause has not been issued. The merit of the case is not required to be discussed at this stage.

22. Moreover, the appeal has been filed under section 33 of the Securities Commission of Pakistan Act 1997. Proviso (a) of subsection (1) of section 33 states that no appeal shall lie against an administrative direction given by the Commissioner or an officer of the Commission. The order directing issuance of show cause is essentially an “Administrative Order”. Appellants have failed to show any prejudice being caused to them as result of the direction as such the appeal is not maintainable.

23. In view of the foregoing, the impugned order is upheld and the instant appeals are hereby dismissed. The contention of Dr. Pervez Hassan on expediting the show cause proceedings is accepted and the department is hereby directed to issue show cause notice within 2 weeks of the order. The reply to the show cause notice should be submitted within 2 weeks of its receipt. The learned Commissioner (SMD) is also requested to proceed with the matter expeditiously and to hear the case on day to day basis.

(Mr. Razi- ur-Rehman Khan)
Chairman, SECP

(Mr. Salman Ali Shaikh)
Commissioner SCD

Date of Order: 6-3-08