



# Securities and Exchange Commission of Pakistan

## BEFORE APPELLATE BENCH NO. IV

In the matter of

Appeal No. 12 of 2014

1. Mr. Zahur Ahmed, Apollo Textile Mills Limited
2. Mr. Ikram Zahur, Apollo Textile Mills Limited
3. Mr. Abdul Rehman Zahur, Apollo Textile Mills Limited  
(Directors of Apollo Textile Mills Limited)

.... Appellants

Versus

The Commissioner (Company Law Division)  
SECP, Islamabad

.... Respondent

Date of hearing

15/04/2015

### ORDER

#### Present:

#### Appellant:

Mr. Khurram Chughtai, for the Appellants

#### For the Respondent

1. Mr. Imran Iqbal Panjwani, Executive Director (CSD)
2. Ms. Amina Aziz, Director (CSD)
3. Ms. Khalida Perveen, Joint Director (CSD)



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1. This Order is in Appeal No. 12 of 2014 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 against the order dated 14/12/12 (the "Impugned Order") passed by the Respondent.
2. The brief facts of the instant Appeal are that Apollo Textile Mills Limited (the "Company") has four major shareholders who collectively held 90.60% of share capital of the Company as follows:

| S# | Name of shareholder   | % age of shares held |
|----|---|----------------------|
| 1  | Zahur Ahmed, Ikram Zahur and Abdul Rehman Zahur<br>(Zahur Family) | 11.48                |
| 2. | Consolidated Overseas Investment & Finance<br>("COIF")            | 29.46                |
| 3. | Habib Bank AG Zurich  | 27.26                |
| 4. | National Investment Trust ("NIT")                                 | 21.90                |
|    | Total   | 90.60                |

3. Subsequently, COIF increased its shareholding from 29.46% (2003) to 57.22 (2004), through purchase of 2.3 million shares (27.26% of share capital) from Habib Bank A.G. Zurich. This shareholding further increased to 79.12% in 2006, through purchase of another 1.814 million shares (21.90% of the share capital) from National Investment Trust (NIT). However, record of the Commission revealed that mandatory compliance with the relevant requirements of the Listed Companies (Substantial Acquisition of Voting Shares and Take-overs) Ordinance, 2002 ("the Takeover Ordinance"), in respect of the aforesaid acquisition, was not made by COIF.



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4. Mr. Zahur Ahmad together with his two sons namely Mr. Ikram Zahur and Mr. Abdul Rahman Zahur (Zahur Family) who are also the existing directors/shareholders of the Company, held 11.48% shares till 2003, which stood increased to 18.31% by 30/06/11. The remaining five directors of the Company held only qualification shares.
5. During the course of inspection of books of accounts and records of the Company, conducted by the officers of the Commission (during June 06 - August 2011) under section 231 of the Companies Ordinance, 1984 (the "Ordinance"), the Company failed to provide the relevant information required by the Inspection Team divulging the identity of COIF, being the major shareholder of 79.12%. This information included the very basic corporate record which is always available with the Company to conduct its corporate obligations including the attendance list of general meetings of the Company, list of proxies on behalf of COIF being the shareholder of 79.12% shares of the Company and any signed letter for appointing proxy.
6. As per list of members filed by the Company with the Commission, and information provided by the Company, COIF is based in Switzerland at the following address:  
  
"Establishment S.T.A Salmaan Trust,  
Aktiengesellachaf Dufourstrase 101  
P.O.Box 393, Ch-8034, Zurich, Switzerland"
7. Swiss Financial Market Supervisory Authority ("FINMA") Switzerland has informed that COIF has not been registered in any commercial register in Switzerland. It has been further observed from NIT that the purchase of 1,814 million shares held by NIT was negotiated by Mr. Zahur Ahmed (been one of the directors of the Company at the relevant time). In view of the above, it was apprehended that COIF is merely a



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conduit used by the Zahur family in connivance with other directors to acquire control of the Company, while acting behind the cover of COIF.

8. Show Cause Notice dated 29/03/12 ("SCN") was served to Mr. Zahur Ahmed, Mr. Ikram Zahur and Mr. Abdul Rahman Zahur under section 26 read with section 25 of the Takeover Ordinance. Mr. Kazim Hasan, Barrister at law, ("Legal Counsel") vide letter dated 12/04/12 requested for extension in time to respond to the SCN on the ground that he received the notice late and need to refer to extensive documentation in order to respond. The request was acceded and extension up till 21/04/12 was granted. However, no reply was received within the extended time period. Therefore, the matter was fixed for personal hearing on 31/05/12. In response to the hearing notice, a letter was received stating that the Legal Counsel is out of the country; therefore, extension of one month may be granted. The requisite extension was granted. Subsequently, reply to the SCN was received from the Appellants vide letter dated 28/06/12. The case was again fixed on 12/09/12 wherein neither any one appeared nor any communication was received. The case was re-fixed for hearing on 02/10/12. It had been stated in the hearing notice that in case of failure to appear on the said date the matter will be decided on its merits. However, no one appeared on the date of hearing to argue the case nor any communication was received.
9. The Respondent dissatisfied with the response of the Appellants held that default under section 6 of the Takeover Ordinance is established necessitating action under section 25 and section 26 of the Takeover Ordinance and a fine of Rs.500,000/- was imposed on each of the Appellants with the total amount aggregating to Rs.1,500,000/-.
10. The Appellants aggrieved of the Impugned Order has preferred the instant Appeal against the Respondent, on the following grounds:



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- i. The Impugned Order was passed on the SCN issued on 29/03/2012 and that the final hearing was held by the Respondent on 2/10/2012. The allegations contained in the SCN were based on an inspection of the records of the Company conducted between 6/06/2006 and 26/08/2011, allegedly under Section 231 of the Ordinance. The requirements of Section 231 were not complied with by the persons conducting the inspection.
- ii. SCN and the entire proceedings which were conducted on the basis of the SCN were solely based on the contention that COIF is not registered in any commercial register in Switzerland. Respondent neither had independent information that COIF was not registered nor there was any evidence with the Respondent that COIF was used "as a conduit to acquire control of the Company".
- iii. Submission made on behalf of the Petitioners vide letter dated 28/06/2012 were completely ignored and overlooked which are as follows:
  - a. SCN appears to have been issued on the basis of a misunderstanding and is not a consonance with the directives of SECP in other similar matters. It is essential that, as part of good governance, SECP must have consistent policies. What is permitted and waived in certain given situations must not be made the subject of dispute in similar situations between different parties.
  - b. It is to be noted that a petition was filed before the Honorable Lahore High Court, which was listed as writ petition No. 1163 of 2011. This petition challenged an SECP letter permitting a waiver of the applicability of the Takeover Ordinance. The date of the aforesaid SECP waiver is 1/12/2010. The SCN was issued on 29/03/2012. It is abundantly clear that the

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provisions of the Takeover Ordinance have already been waived by the SECP in order to favor a particular shareholder.

- c. SCN is without substance and is based on incorrect information as well as lacking in material particulars. One example of this failure to substantiate the SCN is that the correspondence between SECP and the Swiss Financial Regulatory Authority has not been shown nor has been filed in support of the SCN. That being so, it is impossible to refute. Accordingly the SCN, being deficient, is illegal and unlawful and must be discharged.
  - d. Moreover, securities market has not been affected by the actions taken by the management of the Company. In any event, there has been no violation of the Section 25/and or Section 26 of the Takeover Ordinance.
  - e. A copy of the judgment passed by the Honorable Lahore High Court, deciding the writ petition No. 1163 of 2011 is annexed to this reply. It would be appropriate to defer any decision on the SCN until a decision is made by the SECP in compliance with the aforesaid judgment of the Court. It must be stressed that a discriminatory action by SECP would be unconstitutional, illegal and without lawful effect.
- iv. The conclusion by the Respondent that the Takeover Ordinance has been violated by the Appellants has no substance. Further, no cogent reasons have been given by the Respondent for concluding, "the plea that securities market has not been affected by this acquisition cannot be accepted as a tenable defence".
- v. The penalty of PKR 500,000/- on each petitioner is excessive.
- vi. Further, that the Petitioners have been denied a fair hearing. The manner in which the hearing was conducted is violative of Article 10A of the

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Constitution. The Petitioners were entitled to fair trial which has not been provided to them.

11. The Respondent refuted the contents of the instant Appeal and contended as follows:

- i. Inspection of records of the Company was conducted pursuant to an order dated September 16, 2010 passed by the competent authority in accordance with the aforesaid provisions of the Ordinance. Moreover, the appellants have not mentioned any particular requirements of Section 231 that were not complied with by the Inspection Team. It is also pertinent to mention that SCN was not based solely on the findings of the inspection of records of the Company. Company's failure to provide any information about the identity of COIF compelled the Inspection Team of the Commission to obtain information from independent sources which formed the basis of the SCN.
- ii. SCN proceedings were based not only on the fact that COIF was not registered. Instead, the SCN proceedings were initiated as it was evident from the circumstances of the case, as mentioned below, that COIF and Zahur Family acted in concert and acquired shareholding and control of the Company:
  - The purchase of 1.814 million shares held by NIT (21.90% of the share capital) was negotiated by Mr. Zahur Ahmed (been one of the directors of the Company at the relevant time)
  - The Company refused to provide the identity of COIF
  - In response to the SCN the appellants did not deny connection with COIF. Instead the main plea of the appellants was that information from Swiss regulatory authority was not shared with them



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- The appellants had not refuted that deal with NIT was negotiated by Mr. Zahur Ahmed on behalf of COIF. No explanation was furnished by the appellants as to why and in what capacity Mr. Zahur Ahmed acted on behalf of COIF
  - In response to the SCN, Zahur Family had not denied connection with COIF which is indeed admission of the fact that Zahur Family and COIF are connected parties who while acting in concert have acquired the control of the Company without mandatory compliance with the Takeover Ordinance
- iii. The submission made by the appellants have been duly considered and discussed in detail in Para 15-19 of the Impugned Order. Moreover, writ petition No. 1163 of 2011, as referred by the appellants in response to the SCN as a basis of non-applicability of Takeover Ordinance on them, has been decided by the Honorable Court. However, as discussed in the Impugned Order, the said judgment is not applicable in the instant case. The case that is the subject matter of the said petition deals with a situation where there was an internal restructuring of shareholding between two consortium members. These consortium members jointly acquired more than 50% shareholding and control of the target company through participation in privatization process. The subsequent restructuring of shareholding within the consortium was without any change in cumulative shareholding or control being exercised by the same consortium by virtue of a management agreement therefore it was held by the Commission that provisions of Takeover Ordinance were not applicable. The same understanding has been upheld by the Honorable Court. However, the case in hand is entirely different as it involves further acquisition of shares by Zahur Family along with COIF to acquire controlling interest in the Company. It is also important to mention that reference by the





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appellants to the said petition is itself admission of the fact that COIF and Zahur Family have acted in concert to acquire controlling shareholding in the Company.

- iv. The appellants by violating the Takeover Ordinance have deprived the shareholders of the Company from the right that they are entitled under the Takeover Ordinance i.e. the right to participate in the public offer on change of control of the Company.
  - v. The maximum penalty provided under the Takeover Ordinance in the instant matter is Rs. 50 million, while only Rs. 500,000 has been imposed on each Appellant. Therefore, penalty of Rs. 500,000/- on each Appellant cannot be considered as excessive.
  - vi. Fair opportunity of personal hearing was provided to the Appellants. However they neither attended the hearing nor made any request for adjournment.
12. We have heard the parties and taken into consideration written submission by the Appellant and Respondent. We have also perused the relevant provisions of the Takeover Ordinance and the Ordinance which have been referred above. Our observations are as follows:
- i. The appellants while alleging the non-compliance of Section 231 of the Ordinance by the Inspection Team of the Commission have neither produced any proof nor have they been able to point out an instance where such non-compliance can be established. The inspection conducted under Section 231 of the Ordinance is an administrative authority granted to the Commission under the statute through which inspection of the "books and papers" and

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“books of accounts” of a company are undertaken. The inspection proceeded under Section 231 thereof transpires into a report which is considered a statutory report and is authenticated by the inspectors so appointed. Henceforth, any adjudicatory action taken pursuant to an inspection report by issuing a show cause notice to a company cannot be denied recognition.

- ii. The documentary proof that COIF is not registered in any commercial register in Switzerland has been provided by the respondent. Further, the appellants have not disputed their connection with the COIF, rather pleaded the assumption that the documentary evidence is not available with respondent. Furthermore, the information concerning negotiation of purchase of 1.814 million shares held by NIT (21.90% of the share capital) by Mr. Zahur Ahmed (been one of the directors of the Company at the relevant time) has not been refuted by the appellants.
- iii. The contention of the appellants that there reply to the SCN dated 28/06/2012 has not been considered is not tenable as the same has been refuted in the Impugned Order. Moreover, with reference to the writ petition No. 1163 of 2011, we have perused the entire case where the Commission had been made a party. The said writ petition was “disposed of” through Order dated 11/04/2012 by the Honorable High Court, Lahore with the directions that the issues raised in the writ petition were remanded to SECP where the objections raised by the petitioner would be considered by the Competent Authority under the law and in line with the statutory principle enshrined in Section 22(3) of the SECP Act, 1997 (“SECP Act”). However, the Petitioner aggrieved of the said order preferred an “Intra Court Appeal” before the Division Bench of the Lahore High Court through “ICA No. 290 of 2012 (“ICA”)” and impugned the said Order. The Division Bench of the Lahore



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High Court after detailed discussions on the merit of the ICA “disposed of” the matter through Order dated 11/09/2012 whereby the Honorable Bench remanded the matter to be heard by the “Commission” instead of Commissioner CLD and held that the SECP being the “primary regulatory authority” under the SECP Act and the Takeover Ordinance has the requisite authority and mandate to decide the matters agitated before it in accordance with law. Henceforth the Honorable Court consented to the jurisdictional parameters of the SECP with respect to the Takeovers Ordinance.

- iv. Fair opportunity of hearing was given to the appellants however they had not participated in the proceedings held before the Respondent.
  - v. Appellants while contending the instant Appeal have not been able to clarify their position with respect to the acquisition of additional shareholding in the Company while acting in concert with COIF which makes them liable to the violation of mandatory provisions of the Takeover Ordinance.
13. In view of the foregoing, we see no reason to interfere with the Impugned Order. The instant Appeal is accordingly dismissed.

(Fida Hussain Samoo)  
Commissioner (Insurance)

(Zafar Abdullah)  
Commissioner (SCD)

Announced on: **15 MAY 2015**