



SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN

Before the Commissioner (Securities Market Division)

In the matter of Show Cause Notice No.SMD/TO/02/2005 dated February 11, 2005 issued to Arif Habib Securities Ltd. through its Chief Executive, Mr. Shunaid Qureshi, Mr. Abdul Ghani and Motiwala Securities (Pvt.) Ltd. through its Chief Executive under Section 26 read with Section 25 of the Listed Companies (Substantial Acquisition Of Voting Shares and Takeovers) Ordinance, 2002 in the matter of acquisition of shares of Essa Cement Industries Ltd

Date of Hearing:

February 17, 2005

Present at Hearing:

Representing the acquirers:

- (i) Mr. Arif Habib, Chief Executive, Arif Habib Securities Ltd.
- (ii) Mr. Akmal Jameel, SVP, Arif Habib Securities Ltd.;
- (iii) Mr. Abdul Ghani Usman.

Representing the Manager to the Offer:

- (i) Mr. Shahid Ali Habib, Chief Executive, Motiwala Securities (Pvt.) Ltd.;

ORDER

1. The matter arises from a show cause notice No.SMD/TO/02/2005 dated February 11, 2005 issued by the Securities and Exchange Commission of Pakistan (the Commission, SECP) to Arif Habib Securities Ltd. through its Chief Executive, Mr. Abdul Ghani, Mr. Shunaid Qureshi and Motiwala Securities (Pvt.) Ltd through its Chief Executive.

2. The facts of the case are that the Commission on February 04, 2005 received a letter dated February 03, 2005 from the Chief Executive of Motiwala Securities (Pvt.) Ltd. (the Manager to the Offer), alongwith enclosures. From the contents of the said letter it appeared that Arif Habib Securities Ltd.; Mr. Shunaid Qureshi, his family and associates and Mr. Abdul Ghani Usman, his family and associates (together, "the acquirers") had acquired 20 million shares of Essa Cement Industries Ltd.(the

Target Company) representing a percentage interest of 52.5% through a share purchase agreement dated January 18, 2005 at a price of Rs. 30/- per share for a total consideration of Rs. 600 million. Further, the acquirers intended to make a public announcement for 7,147,191 shares held by the minority shareholders at a price of Rs. 30/- per share.

3. The contents of the letter dated February 03, 2005 prima facie pointed towards the failure of the acquirers to comply with the requirements of Sections 5 of the Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Ordinance, 2002 (the Ordinance) which failure provides for action against the acquirers in terms of Section 25 & 26 of the Ordinance.

4. In addition, the public announcement submitted to the Commission lacked a number of statutory disclosures or contained such material which was contradictory to various provisions of the Ordinance which are as follows:

- (a) Disclosure regarding firm financial arrangements for the fulfillment of the obligations under the public offer as required under Section 13(9) of the Ordinance was not made;
- (b) Disclosure as required under Section 13(5) of the Ordinance regarding acceptance of responsibility of the correctness of the disclosure by the directors of Arif Habib Securities Ltd. one of the acquirers was not made in the public announcement;
- (c) In the public announcement, in the summary of the Offer, it was mentioned that payment for shares shall be made "Through crossed cheques within the period of the offer or by 15 days of the end of the offer period". The payment procedure was not as per the requirements of Section 13(10) and Section 20 of the Ordinance;
- (d) The offer period was mentioned as 21 days, whereas the number of days from February 09, 2005 to March 2, 2005 were 22 days;

5. Further, several other deficiencies were also observed in the public announcement. Consequently, a show cause notice dated February 11, 2005 was served on the Arif Habib Securities Ltd. through its Chief Executive, Mr. Shunaid Qureshi, Mr. Abdul Ghani Usman and Manager to the Offer calling upon them to show cause in writing as to why action may not be taken against the acquirers and manager to the offer under Section 25 and sub-sections (1) & (3) of Section 26 of the Ordinance for the aforesaid contraventions/violations. It was further stated that in case they wished to be heard in person or through authorized representatives, they should appear before the undersigned on February 15, 2005.

6. Arif Habib Securities Ltd. vide its letter dated February 16, 2005 requested for a hearing in the matter to be held on February 17, 2005, on which date Mr. Arif Habib, Chief Executive, Arif Habib Securities Ltd., Mr. Akmal Jameel, SVP, Arif Habib Securities Ltd., Mr. Abdul Ghani Usman, and Mr.

Shahid Ali Habib, Chief Executive, Motiwala Securities (Pvt.) Ltd.; appeared before me. Further Mr. Arif Habib also submitted a written reply dated February 17, 2005 on behalf of the acquirers, wherein, it was stated that:

- i. the acquirers have made attempt to be fair to all parties concerned and have remained within the spirit of the law and have in particular sought to ensure that they make full disclosure to the general public and SECP and that the interest of public shareholders are taken care of. It was also emphasized that there is no legal obligation on them to make this offer and as such they have not violated any provision of the Ordinance.
- ii. the Ordinance, though it has come into force, cannot be given effect to due to the fact that no Rules have been made under it and no mode and manner of doing acts that it requires have been prescribed to date. The Ordinance is replete with acts and things that are to be done in manners prescribed by Rules yet to be framed. As Rules have not been framed as yet, the Ordinance cannot be given effect to the piecemeal.
- iii. Mr. Abdul Ghani Usman and Mr. Shunaid Qureshi who are associated in the Al-Abbas Group were the principals who conceived and negotiated the transaction. As such their names appear in the share purchase agreement. However, following normal practices of Groups the shares were then distributed among family, associates and partner organizations. As all these persons are acting in concert to acquire control of the Company, the spirit of the Ordinance, required that a full disclosure be made to the stock exchange(s) and SECP. The difference thus reflects the disclosure required by the spirit of the Ordinance and an attempt to provide full disclosure to the public and not any attempt to mislead. Thus the difference in the share purchase agreement and the proposed announcement of offer does not in any way violate the Ordinance.
- iv. in Section 5(1) it has been mentioned that **no person** shall acquire voting shares, which means that this section applies to acquisition of shares or control by “a Person” i.e by One Person. Whereas in the present case no single person has acquired more than 25% shares and hence this section has no application to the present case.
- v. the proposed public announcement of offer is being made only to ensure that the minority shareholders do not suffer. This was not required to be done by the Ordinance and is only being done in good faith and conscience and in furtherance of the spirit of the Ordinance.
- vi. it is also worthwhile to submit that similar practices followed in the past in the case of Allied Motors Limited and Bengal Fibre Industries Limited were permitted by the SECP.

- vii. notwithstanding our legal stand aforesaid, we fully accept that the SECP is the regulator in charge of administering the Ordinance and we commit to follow any rules or guidelines laid down by the SECP in accordance with the Ordinance for any future offers.
- viii. they are agreeable to make necessary changes in the Public Announcement as pointed out by SECP vide its Show Cause Notice dated February 11, 2005.

7. During the course of the hearing, Mr. Arif Habib submitted that the agreement to purchase shares from the sellers could not be left open and had to be fully executed prior to making the public announcement to avoid complications. He further stated that they protected the transaction by entering into an agreement as well as making payment there by and then making the public announcement to get shares from the minority shareholders/public. He was of the view that SECP deals with the acquisition of additional shares under section 5 of the Ordinance, whereas, in the instant case there was no additional acquisition of shares but the shares were acquired in one single transaction. Hence they are required to follow the requirements of Section 4 of the Ordinance only and not Section 5.

8. On query, Mr. Arif Habib provided the names of acquirers and shares acquired by them as under:

	<u>Name of Company/individuals</u>	<u>Number of Shares acquired</u>
i.	Arif Habib Securities Ltd.	4,000,000
ii.	Abdul Ghani Usman	3,000,000
iii.	Ayub Yunus	3,000,000
iv.	Tariq Usman	2,000,000
v.	Salman Rashid	2,000,000
vi.	Shunaid Qureshi	2,000,000
vii.	Mamuna Shunaid	2,000,000
viii.	Duraid Qureshi	2,000,000
	TOTAL	<u>20,000,000</u>

9. Concluding his remarks Mr. Arif Habib submitted that it was never their intention to violate the Ordinance. They have acquired majority shares of Essa Cement Industries Ltd. in good faith and in the best interest of the Capital Market. He further stated that the operating position of the Target Company

has not been good as it is operating at a capacity of 600 tons as opposed to its actual capacity of 1600 tons. He further submitted that in order to make the unit viable they would be required to inject additional resources into the Target Company. He therefore, requested SECP not to take action against the acquirers under Section 25 as the same would not be in the interest of the securities market. He further submitted that they have tried to follow the spirit of the law and requested the Commission not to take any action under section 26 as their act of acquisition was not wilful.

10. I have considered the arguments presented before me quite carefully. Before proceeding further I consider it important to point out that the purpose of this Ordinance is “to provide a fair and equal treatment to all the investors as well as a transparent and efficient system for substantial acquisition of voting shares and takeovers of listed companies”.

11. Chapter II of the Ordinance deals with disclosure of shareholders in a listed company. A plain reading of Section 4 under the main heading “**Disclosure of shareholding in a listed Company**” with sub-heading “**Acquisition of more than 10% voting shares of a company**” reveals the followings:-

- (i) acquisition of up to 10% shares does not require any reporting under this Ordinance;
- (ii) acquisition of more than 10% voting shares would require an acquirer to disclose his shareholding to the target company and to the stock exchange;

Chapter III deals with **substantial acquisition of voting shares and acquisition of control of a listed Company**. A plain reading of Section 5 would reveal that the trigger of substantial acquisition will start once an acquirer crosses the threshold of 25% and once any person(s) cross the threshold, he has to make a public announcement of offer to acquire voting shares. Section 5 of the Ordinance clearly states that “No person shall, directly or indirectly, acquire—

- a) voting shares, which (taken together with voting shares, if any, held by such person) would entitle such person to more than twenty five per cent voting shares in a listed company; or
- b) control of a listed company,

unless such person makes a public announcement of offer to acquire voting shares or control of such company in accordance with this Ordinance.”

The plain reading of Section 5 make the intention of the Legislature sufficiently clear and there cannot be two opinions about its interpretation. I have, therefore, no doubt in my mind about the applicability of Section 5 in the instant case. The requirements of public announcement and offer to acquire is a must under Section 5 of the Ordinance. Therefore, the argument by the acquirers that they have acquired 52.5% shares under Section 4 and not Section 5 of the Ordinance is not tenable.

13. The argument by the acquirers that they have only acquired 52.5% shares and hence not acquired any additional shares over and above 52.5% till date and as such Section 5 is not applicable on them is not

based on correct interpretation of Section 5, as Section 5 deals with “**Substantial Acquisition of Voting Shares and Acquisition of Control of a Listed Company**” which triggers only when an acquirer exceeds the threshold of 25%. If the interpretation of the acquirers is accepted, then the Ordinance will become redundant.

14. The understanding of the acquirers that Section 5 is not applicable on them as it applies to one person only whereas in the subject case there are more than one person, is totally incorrect. The Ordinance clearly provides for the acquirer acting either by himself and/or through other person in concert, which admittedly is the case in the instant matter.

15. The argument that the shares were acquired before making the public announcement of offer to avoid complication in the agreement is not tenable as agreement is a contract between two parties and in case of violation, either party has a recourse in the court of law. Simply under the fear that there are going to be complications does not give license to anybody to violate the Ordinance. I have, therefore, no doubt in my mind that the acquirers have acquired 52.5% shares of the target company in violation of the Ordinance.

16. With respect to the two previous instances of acquisition handled by Arif Habib Securities Ltd. in the past, it is stated that wrong act of the past cannot be recognized as precedence.

17. Mr. Arif Habib has also stated that since the Rules have not been framed under the Ordinance, the Ordinance cannot be given effect piecemeal. I would like to state that in sub-section (3) of Section 1 of the Ordinance, it has been stated that the Ordinance comes into force at once. Hence with the promulgation of the Ordinance, it comes in to effect in October 2002 and non-framing of the Rules does not make the Ordinance ineffective.

18. It is clear that the acquirers had knowledge that they were required to make a public announcement of an offer and that is the reason that they submitted the public announcement along with the offer to acquire 7,147,191 shares from the general public to the stock exchanges and the Commission.

19. In view of the facts stated above, I have no doubt in my mind that the default on the part of the acquirers is willful. Though, I am convinced that the acquirers have violated various provisions of the Ordinance and as such they can be punished under Section 25(c) of the Ordinance, by directing them to sell the voting shares acquired in violation of the Ordinance. However, I am not inclined to direct the acquirers to sell the shares as in my view it could have adverse repercussion on the prevailing price of the shares, as the shares of the target company are not actively traded, which may not be in the interest of the

minority shareholders. Further, the sponsors have also indicated that they intend to inject more resources into the Target Company to improve its operating and financial health. I have also noted that price of the shares has shown improvement after acquisition of the controlling shares by the acquirers and, therefore, in my view invoking of Section 25(c) of the Ordinance will not be in the interest of the Securities Market and the minority shareholders. Therefore, taking a lenient view, the acquirers are hereby directed under Section 25(b) of the Ordinance not to dispose of any of the 20 million shares of the Target Company acquired by them for a period of three years from the date of acquisition without the prior approval of the Commission. Further, as I have no doubt in my mind that the violation on part of the acquirers was willful, I impose a collective penalty of one million rupees under Section 26 (3) of the Ordinance on the acquirers in proportion to the voting shares acquired by them in violation of the Ordinance as under:

	<u>Name of Company/individuals</u>	<u>Number of Shares acquired</u>	<u>Penalty (in Rupees)</u>
i.	Arif Habib Securities Ltd.	4,000,000	200,000
ii.	Abdul Ghani Usman	3,000,000	150,000
iii.	Ayub Yunus	3,000,000	150,000
iv.	Tariq Usman	2,000,000	100,000
v.	Salman Rashid	2,000,000	100,000
vi.	Shunaid Qureshi	2,000,000	100,000
vii.	Mamuna Shunaid	2,000,000	100,000
viii.	Duraaid Qureshi	<u>2,000,000</u>	<u>100,000</u>
	TOTAL	<u>20,000,000</u>	<u>1,000,000</u>

20. The Manager to the Offer has to ensure compliance with the provisions of the Ordinance. The Manager in this case has failed to fulfill his obligations as required under Section 15 of the Ordinance.

Therefore a penalty of Rs. 200,000 is imposed under section 26(3) of the Ordinance on Motiwala Securities(Pvt) Ltd the Manager to the Offer for violation of Section 15 of the Ordinance.

21. The acquirers are also directed to make the public announcement for offer of 7,147,191 shares after making the necessary corrections as intimated by the Commission.

22. The acquirers and Manager to the Offer are hereby directed to deposit the aforesaid fine in the designated bank account maintained in the name of Securities and Exchange Commission of Pakistan with Habib Bank Limited within thirty days from the receipt of this Order and furnish receipted challans to the Commission failing which proceedings for recovery of the fine as arrears of land revenue will be initiated.

23. The Order is being issued without prejudice to any or all actions that may be required to be taken under the law against individual director(s)/officers(s) or any other person involved in violation of any other securities laws which may have been committed.

Shahid Ghaffar
Commissioner (Securities Market Division)

Announced:
February 23, 2005
Karachi