



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

\*\*\*

BEFORE APPELLATE BENCH NO. 1

In the matter of

Appeal No. 05 of 2007

Syed Yawar Ali & Others  
Resident of SAHADAB" Canal Bank,  
Aziz Avenue, Gulberg V,  
Lahore..... Appellants

Versus

The Commissioner  
Securities Market Division  
Securities and Exchange Commission of Pakistan  
NIC Building Jinnah Avenue, Islamabad. .... Respondent

ORDER

Date of Hearing March 27, 2008 and February 6, 2009

Present:

Syed Yawar Ali  
Appellant

For the Appellant:

Mr. Iqbal Haider  
Advocate

For the Respondent Department:

Mr. Rashid Paraacha  
Mr. Sajid Imran  
Ms .Sumaira Siddique



## SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

\*\*\*

1. This order shall dispose of the appeal No. 05 of 2007 filed under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 by Syed Yawar Ali & Others (the "Appellants") against the order dated March 02 2007, ("Impugned Order") passed by Commissioner, Securities Market Division ("SMD").
2. Brief facts leading to the case are that the audited annual accounts ending June 30, 2005 of Wazir Ali Industries Limited (the "Target Company") revealed that Savola Edible Oil Company, of Saudi Arabia ("SEOC") which held 40% equity shares in the Target Company had sold these to the Appellants. The shares were purchased vide three separate agreements all dated September 16 2004, by Syed Yawar Ali, Chief Executive Officer of the Target Company and his sons Syed Hasnain Ali and Syed Maratab Ali. The agreement between SEOC and Syed Yawar Ali and family was for the sale of 1,521,135 ordinary shares (20%), the one between SEOC and Syed Maratab Ali and family was for the sale of 533,295 ordinary shares (7.01%) and the one between SEOC and Syed Hasnain Ali and family was for the sale of 987,840 ordinary shares (12.99%). Syed Yawar Ali signed the agreements on behalf of Syed Maratab Ali and Syed Hasnain Ali, his sons, and the transaction was notified to Company Registration Office by filing Form-32 on September 29, 2004.
3. The Executive Director SMD, Securities and Exchange Commission (the "Commission") vide letter dated March 29, 2006 requested the Appellants to provide evidence that requirements of section 5 of the Listed Companies (Substantial acquisition of voting shares and Takeovers) Ordinance, 2002 ("Takeovers Ordinance") have been complied with before the acquisition of 40% shares of the Target Company. The Appellants in response vide letter dated 17 April 2006 stated that the shares were purchased by them in their individual capacity and were not greater than 25% in any



## SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

\*\*\*

individual case; therefore the provisions of the Takeovers Ordinance are not attracted or violated .

4. The Commissioner (SMD) not satisfied with the reply of the Appellants, issued a show cause notice dated 16-8-08 calling upon the Appellants to explain why action should not be taken against them under section 25 and subsection (1) and (3) of section 26 of the Takeovers Ordinance, for violations of the following:
  - a. In terms of Section 5(1) of the Takeovers Ordinance, a person may not acquire more than 25% of a company's share either directly or indirectly, unless such person makes a public announcement of the offer to acquire shares in accordance with the Takeovers Ordinance.
  - b. Under sub section (1) of Section 7 of the Takeovers Ordinance, the acquirer was required to appoint a bank, financial institution or a member of a stock exchange as manager to the offer before making a public announcement;
  - c. Under sub section (3) of Section 9 of the Takeovers Ordinance the acquirer was 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;
  - d. Under sub section (1) of Section 13 of the Takeovers Ordinance the acquirer was required to send a copy of the proposed offer letter within two working days of the announcement to the Target Company at its registered office address, all the Stock Exchanges where the voting shares of the company are listed and the Commission;
  - e. Under sub section (8) of Section 13 of the Takeovers Ordinance the acquirer was required to create a security as provided in the of the Takeovers Ordinance on or before the date of issue of public announcement;



# SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

\*\*\*

The Appellants in response to the show cause notice reiterated the stance earlier taken by them.

5. The Commissioner (SMD) after hearing the parties passed the Impugned Order and held that the Appellants had failed to comply with various provisions of the Takeovers Ordinance as referred to in paragraph 4 above and as such had violated the law. The learned Commissioner however, took a lenient view as according to him the company was under the same management since 1992 and there was no change in the control of the management of the Target Company because of the Appellants having purchased 40% shares (acting in concert) held by SEOC, he therefore imposed a meager penalty of Rupees 200,000/- under section 26(3) of the Takeovers Ordinance, in the following manner: Syed Yawar Ali, Rs. 100,000/-, Syed Hanain Ali, Rs.35,000/- and Syed Maratab Ali, Rs.65000/-
6. Mr. Iqbal Haider, counsel of the Appellants, in support of the appeal against the Impugned Order made the following submissions:
  - a) Section 4 of the Takeovers Ordinance was applicable and the provisions of which were complied with. The counsel in this connection referred to the letter dated 17 September, 2004 addressed to the Karachi Stock Exchange ("KSE"), wherein the company secretary of the Target Company informed KSE that Syed Yawar Ali and Syed Hasnain Ali have privately acquired 1,521,135 and 987,840 ordinary shares respectively.
  - b) That the Appellants exercised control over the Target Company even before the acquisition of SEOC shares, as such section 5 of the Takeovers Ordinance is not applicable in this case and consequently all other sections under which the Appellants have been charged are not attracted.



- c) The counsel argued that the definition of *person acting in concert*, can only be made use of, if the question is of the acquisition of shares for purposes of taking control and not otherwise.
- d) That if for the sake of arguments, it is presumed that section 5 of the Takeovers Ordinance is attracted, even then there is no contravention as none of the acquirers held more than 25% shares in their individual capacity.
- e) That section 26 (3) of the Takeovers Ordinance is not attracted in the instant case as there was no willful contravention of the provisions of the Takeover Ordinance. The counsel argued that at worst it can be considered as a bonafide default.
- f) That since no rules have been framed under the Takeovers Ordinance which is pre-condition for its enforcement, no action can be taken against the Appellants.
- g) Finally that since provisions of section 5 of the Takeovers Ordinance are neither attracted nor violated in any manner. Consequently, the provisions of section 7, 9 and 13 of the Takeover Ordinance are also not applicable or relevant.
7. Mr. Sajid Imran from SMD opposed the position taken by the Appellant counsel, on the following grounds:
- a) our attention was invited to the definition of *acquirer* as given in the Takeovers Ordinance, which is reproduced for reference:



## SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

\*\*\*

*“acquirer” means 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.*

*Emphasis added.*

It was contended that the definition of *acquirer* as given in the Takeovers Ordinance does not limit the application of the word *acquirer* to a situation where the acquirer has proceeded to acquire control of the target company but also applies where the acquirer has proceeded to acquire voting shares in the target company. Moreover, in both instances, the word *acquirer* shall include, the person himself and/or any person acting in concert.

b) He next submitted that the shares were purchased vide three separate agreements dated 16 September 2004, all three agreements were signed by Syed Yawar Ali. The payment to SEOC was made by Syed Yawar Ali through his own account, as such all three members of the same family acted in concert to acquire 40% shares in addition to those already held by them, the Appellants therefore violated the Takeovers Ordinance.

c) That the Impugned Order is in accordance with law and may be upheld.

8. We have heard the parties at length and have also perused the record. The rationale as stated in the preamble read with other provisions of the Takeovers Ordinance is to provide for a fair and equal treatment to all the investors as well as a transparent and efficient system for substantial acquisition of voting shares and take-over of listed companies. The preamble read with the provisions of the Takeovers Ordinance makes us conclude: that the Takeovers Ordinance was promulgated to develop a transparent system, where substantial acquisition of voting rights or control of listed companies was about to take place. In such an instance the investors (in the company



whose share or control is being acquired) are provided with the opportunity to dispose of their share holdings, where they are not confident of the merits, with the acquisition of voting rights or control by one or more individuals. The disclosure requirements to be complied with under the Takeovers Ordinance have been designed to attain the overall objective to promote, in conjunction with other regulatory regimes, the integrity of the financial markets. The commercial advantages or disadvantages are not of concern to the Takeovers Ordinance. The purpose of the Takeovers Ordinance unless looked at in light of the foregoing can neither be appreciated nor understood, as procedures would appear merely procedural and mundane. Globally in the advanced financial markets there are more stringent laws which address every small aspect that need to be complied with, prior to an individual or group taking control or obtaining shares beyond certain threshold percentages. In the UK for example any acquirer crossing the threshold of 30% of issued capital of a company must make a mandatory bid for the entire residual shareholding of the target company

9. While examining the submissions of the counsel for the Appellants referred to in paragraph 6(a) above, the first question that arises is whether section 4 of the Takeovers Ordinance is applicable in this case or section 5 of the Takeovers Ordinance. Section 4 of the Takeovers Ordinance is attracted in cases where the acquirer crosses the threshold of 10% and is therefore, required to disclose the aggregate of his shareholding to the Target Company and the relevant stock exchange. This effectively meant that the Appellants should have disclosed the total share holdings held by them prior to acquisition, plus the shares acquired by them. The notice of acquisition was sent to the KSE by the Target Company and not by the acquirers and only discloses the number of shares acquired by Syed Yawar Ali, Appellant 1 and Syed Hasnain Ali, Appellant 3, without specifying the shares already held by them, as such the total aggregate of shares held was not disclosed by the Target Company and by either the Appellant 1 or 3. Thus the requirements of



section 4 of the Takeovers Ordinance were not met by the Appellants 1 and 3 as they failed to disclose their total aggregate share holdings in the Target Company to the stock exchange and the Target Company. It was also for the acquirers to have made the disclosure to the stock exchange and the Target Company, neither of which was done.

10. The next question before us is whether section 5 of the Takeovers Ordinance is applicable or not. The contention of the Appellants that since they were in control of the Target Company at the time of acquisition of 40% shares, therefore section 5 of the Takeovers Ordinance is not applicable. The argument is flawed as only control is not pre-condition for application of section 5 of the Takeovers Ordinance, which states:

*5. Additional Acquisition of Voting Shares (1) 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 25% voting share 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.*

*(2) Before making announcement under subsection (1), such person shall make disclosure in the manner specified in section 4.*

The plain reading of the section leads to the conclusion that both clauses (a) and (b) of section 5 of the Takeovers Ordinance have to be read separately.



## SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

\*\*\*

Any person acquiring voting shares without having control must comply with the requirements laid down in the Takeovers Ordinance.

In the instant case we believe that the Appellants are in violation of clause (a) of section 5(1) of the Takeovers Ordinance. The shares were purchased by the Appellants vide three separate agreements dated September 16, 2004. All three agreements were signed by Syed Yawar Ali. One was signed by Syed Yawar Ali for Syed Yawar Ali & Family, whereas two were signed by Syed Yawar Ali on behalf of his sons Syed Maratab Ali & family and Syed Hasnain Ali & family. The Commissioner (SMD) states that during the course of hearing of the show cause notice on being queried

*"...who paid for the acquisition of said 40% shares, the acquirer (Appellant No 1) informed that the payment was made through his own account. However the money was from the individual resources of the person acting in concert..."*

The admission in the show cause proceedings is sufficient proof on the issue of payment from one account. More over the Appellants have not raised the issue in the appeal itself and have merely relied on the assertion that tax return of the Appellants can be produced to show that they were beneficiary of the transactions in individual capacity. The tax documents are immaterial, as far as the issue of payment from one account is concerned. Once it is concluded that Appellants acted in concert in acquiring the shares than any subsequent event cannot undo the position prior to that.

The shares were acquired by the Appellants collectively. To say that the Appellants acted in their independent capacity would defeat the very purpose of the definition of "acting in concert" as given in section 2 (1) (h) of the Takeovers Ordinance:



(h) "person acting in concert" means a person who co-operates with the acquirer to acquire voting shares or control of the target company.

*Emphasis Added*

The Appellants acted in concert to acquire the voting shares by defeating the provisions of section 5 of the Takeovers Ordinance. No public announcement was made in pursuance of the said section. Moreover, the relationship between the parties and the circumstances leads us to believe that there was active co-operation between the Appellants.

11. The argument of the counsel for the Appellant that the term *acting in concert* is only applicable where the question is of acquisition of shares for purpose of taking control and not otherwise, is based on misinterpretation of law. As discussed above, control is not an essential ingredient for the purposes of application of section 5 of the Takeovers Ordinance and neither the application of term *acting in concert* is dependent on control.

Each Appellant, according to Appellant No 1, was not in control of the Target Company in his individual capacity and neither the Appellants were in control together as father and sons as the total shareholding between all three was 9.3% before the acquisition of the additional 40% shares. Furthermore the Appellant No 1 vide letter dated 17 April 2006 addressed to the Executive Director SMD, stated in the penultimate paragraph as follows:

*"We hope you would appreciate that none of our Directors/Family shareholders own or control 25% of the voting shares of Wazir Ali Industries Limited. It is also a fact, which can be verified from the record that none of the person/Directors who were addressed your letter under reply, is in control of the Wazir Ali Industries in their individual right. In view of this undisputed fact, provisions of the said Ordinance 2002 are neither attracted nor violated in any manner."*



The Appellants cannot be allowed to take a plea that they were acting in their individual capacity while acquiring shares as father and sons and therefore should not be treated as a family while in the same breath say that they were already in control, when none of them in individual capacity or together as father and sons were in control of the Target Company. Neither have the shareholdings of the extended family of the Appellants been claimed as shares of Wazir Ali family and registered as joint share holdings. The Appellants appear unsure of the stand they wish to take. Be that as it may, the violation of the Takeovers Ordinance does not revolve around this point only and there appears little purpose to dilate further on this.

12. We agree with the contention of the Appellants counsel in para 6 (d) that none of the acquirers/Appellants held more than 25% shares in their individual capacity. An interesting fact however, that came to light during the course of the hearing was, that the Appellant No 1, Syed Yawar Ali who held 6.44% shares prior to the acquisition of additional 20% shares on 16.9.04 i.e. just three days prior to the additional acquisition, sold 6.27% of his earlier shareholding. Had this not been done, the Appellant No 1 would have in his individual capacity been in violation of section 5 of the Takeovers Ordinance. However, as discussed earlier the Appellants contravened section 5 of the Takeovers Ordinance by acting in concert
13. The other issue highlighted by the counsel for the Appellants is on the application of section 26(3) of the Takeovers Ordinance. The Appellants counsel contends that that the penalty can only be imposed if contravention of the Takeovers Ordinance is *wilful*. The Appellants counsel also contends that the target company reported the acquisition of shares to KSE, and therefore an attempt was made by the Appellants to comply with section 4 of the Takeovers Ordinance.



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

\*\*\*

The Appellants counsel requested in the hearing held on February 6, 2009 for time to present relevant case law which would support Appellants contention. - The case law on the word *wilful* was provided to us on 16<sup>th</sup> February 2009. In one of the cases titled *Shaukat Baig vs. Shahid Jamil*, PLD 2005 SC 530, it has been held that the term *wilful* means in common sense, voluntary or intentional. The Appellants counsel also relied on case titled *Muhammad Moin Siddiqui vs. Government of Pakistan*, 1989 CLC 1415 where it is held that wilful default or wilful breach is that default or breach which is done intentionally and will is party to such act.

14. In order to reach a conclusion whether an act was wilful or not one needs to look at the intention in the light of surrounding facts. The Appellants have not come forward to show and infact have neither pleaded any fact which would reveal that the violation of section 4 and 5 of the Takeovers Ordinance was not wilful. The fact that the Appellant No 1 was a director of the target company and which in turn had informed the KSE cannot be termed partial compliance of the Takeovers Ordinance by the Appellants as we have already held in paragraph 9 above. In *Jalaluddin F.C.A vs. Commissioner SEC*, 2005 CLD 333, where the meaning of wilful in context of duty of an auditor has been discussed, it was held that

*"whereas intent is a necessary ingredient of willfulness, impropriety is not (1960) 30 Com cases 523. It is therefore not necessary to prove that the default committed by the Appellant was mala fide."*

We would also rely on case titled *City Equitable Fire Insurance Co Ltd Re*, 1925 Ch 407, referred to in 2005 CLD 333

*"that a default, in case of breach of duty, will be considered 'wilful' even if it arises out of being recklessly careless, even though there may not be knowledge or intent."*



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

The Appellants by not complying with the requirements of section 4 and 5 of the Takeover Ordinance are in violation of the law and their in action can be termed as being recklessly careless in light of the case law cited above.

15. With reference to the Appellants counsel argument that in absence of rules the provisions of the Takeovers Ordinance could not be invoked or enforced. The Takeovers Ordinance does not provide that framing of rules is a pre-condition to its enforcement. The Appellants were obliged to act in accordance with provisions of the Takeovers Ordinance, which are clear and unambiguous. We could understand the ground taken by the Appellants counsel, if he had pointed out some ambiguity, owing to absence of rules, which prevented the Appellants from complying with the provisions of the Takeovers Ordinance and specially its section 5. On querying from the Appellants counsel which provision of the Takeovers Ordinance prevented the Appellants from compliance in absence of the rules, he was unable to respond other than say that the Appellants were unaware of the form of advertisement of the public notice as no form is provided under the Takeovers Ordinance and would have found place in the rules, had they been in existence. The Appellants were not issued a show cause notice for not having a public notice issued in a particular format. In absence of a specified form, the Appellants were at liberty to place a public notice in any form they desired, so long as one was placed in compliance of section 5 of the Takeovers Ordinance and provided to the Commission in terms of section 9 of the Takeovers Ordinance. Acquirer's have given public notice through advertisement in the past and continue to do so, therefore absence of rules cannot be made ground for non-compliance. The counsel has not been able to show us any law that prevented the purpose of Takeovers Ordinance from taking effect.

16. The argument of the Appellant counsel that since provisions of section 5 of the Takeovers Ordinance are neither attracted nor violated in any manner



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN  
\*\*\*

consequently the provisions of section 7, 9 and 13 of the Takeovers Ordinance are not applicable or relevant also does not carry weight in light of the above findings.

17. It would only be just to dispel the concern of the Appellants, expressed by their counsel during the hearing that on imposition of penalty under subsection (3) of section 26 of the Takeovers Ordinance, the other provisions of section 26 of the Takeovers Ordinance will automatically come into effect. The Appellants were initially show caused under section 26 (1) and (3) of the Takeovers Ordinance, however the Commissioner (SMD) in the Impugned Order taking a lenient view only decided to penalize the Appellants under section 26(3) of the Takeovers Ordinance. We would like to make it clear that provisions of section 26(1) of the Takeovers Ordinance, debarring the Appellants as acquirers for the next three years and section 26(2) of the Takeovers Ordinance, disqualifying the Appellants as Chief Executive or Directors for the next two years in a listed company are not to be enforced against the Appellants.
18. In view of the foregoing, we hereby uphold the Impugned Order passed by the then Commissioner (SMD).

  
(MR. SALMAN ALI SHAIKH)  
Chairman

  
(S. TARIQ. A HUSAIN)  
Commissioner (L.D/ C.L.D)

Announced on: 15-4-09