

## **Appellate Bench Orders Before the Appellate Bench No.1**

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*April 25, 2002*

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Mr. Tariq Baig, Managing Director,  
Tariq Glass Industries Limited.....Appellant

### ***Versus***

Executive Director (SM),  
Securities and Exchange Commission of  
Pakistan, Islamabad.....Respondent

**Date of Hearing**.....April 11, 2002

### **Present:**

1. Mr. Umar Mahmud Qasuri, Advocate alongwith Mr. Mujahid Eshai, FCA for the Appellant
2. Mr. Muhammad Ayub Qureshi, Director and Mr. Muhammad Farooq, Deputy Director on behalf of the Respondent

### **Order**

This is an appeal against the order (impugned order) dated 25 July 2001 passed by the then Executive Director (SM), whereby Mr. Tariq Baig, Chief Executive of M/s. Tariq Glass Industries Limited formerly M/s. Nasir Siddiq Corporation (Pakistan) Limited (the "Company") to tender Rs. 2,260,000/- (Rupees two million two hundred sixty thousand only) to the Securities and Exchange Commission of Pakistan being tenderable gain as provided under section 224 (2) of the Companies Ordinance, 1984 ("the Ordinance").

2. The brief facts, leading to the filing of the Appeal are that on examination of return in Form 32 made as at 28.5.1994, filed by the Appellant with the Corporate Law Authority (now dissolved) in pursuance of the requirements of section 222 of the Ordinance an amount of Rs. 2,860,000/- was detected as a tenderable gain. Accordingly to the said return of beneficial ownership, a purchase of 280,000 shares of the company was reported as made on 28.5.1994 at the rate of Rs. 10/- per share whereas a sale of 500,000 shares was also notified as made during the same month at the various rates ranging from Rs.9.00 to Rs.21.50 per share. On inquiry, the Appellant provided the copy of an agreement dated 25.10. 1993 executed between him and Pak Libya Holding Company Limited (the "PLHC") for the purchase of said 280,000 shares. According to the agreement down payment of Rs. 600,000/- was

made on November 15, 1993, while remaining amount was to be paid in four installments commencing from September 15, 1994, with last installment to become due on June 15, 1995. However, the Director (Coordination) rejecting the plea taken by the Appellant directed him vide an order dated June 26, 1995 to tender Rs. 2,860,000/- to the Federal Government as provided under section 224 (2) of the Ordinance. When, the Appellant agitated that he is being punished unheard, the case was reopened and opportunity of personal hearing was accorded afresh. Subsequently, hearings in the matter were held before Mr. Khalil Masood, ex-Chairman, CLA, Mr. Shamim Ahmed Khan, ex-Chairman, CLA and Mr. Tariq Iqbal Khan, ex-Commissioner(SM) of the Commission. According to representatives of the Respondent a hearing was fixed before the Commissioner(SM) on 27.10.2000 wherein Mian Safiullah appearing on behalf of the Appellant was provided a choice to avail one of the following two options:

- i) The entire proceedings be carried out afresh right from the beginning; or
- ii) The proceedings be conducted in the light of the earlier order dated June 26, 1995

3. The Appellant opted for the second proposal. As a result a final hearing was fixed before the Executive Director (SM) on 12.6.2001 who heard the Appellant and passed the impugned order dated 25.7.2001 directing for deposit of Rs. 2,260,000/- with the Commission as tenderable gain in terms of the provisions of section 224(2) of the Ordinance.

4. The Appellant challenged the impugned order through the instant appeal, which came up for hearing before us today. Mr. Umar Mahmud Kasuri, Mr. Mubashir Latif, Advocates, and Mr. Mujahid Eshai, FCA appeared on behalf of the Appellant whereas Mr. M. Ayub Qureshi, Director (SM) and Mr. Muhammad Farooq, Deputy Director represented the Respondent.

5. Mr. Mujahid Eshai, FCA while arguing the case submitted that the Company was taken over by the Appellant and his associates in 1993 after it had remained closed since 1987. The Appellant despite injecting funds from private sources sought help of financial institutions and was required to create charge over the assets of the Company. While going through the records of Registrar, Joint Stock Companies, Lahore it was found that a first charge in the favour of Pak Libya Holding Company (PLHC) already existed against a bridge finance facility provided to the Company whereas the Appellant was informed that the said sum of money has been repaid/adjusted in the year 1984. Holding of shares by PLHC, therefore, was not lawful. The Appellant requested the PLHC to vacate the charge however PLHC disputed the same. A suit against the previous sponsors was already pending in the court. The contention was finally resolved through a settlement of dues payable to PLHC in five installments concluding on June 15, 1995, whereby 280,000 shares of the Company were redeemed by the Appellant as the same were held by PLHC as underwriter of the issue since 1984. It has been argued that the shares were purchased under an agreement and sale was made out of previous holding purchased on 20.3.1993. Therefore, in accordance with the proviso to sub-section (1) of section 224 of the Ordinance, the purchase of 280,000 shares acquired in satisfaction of debt previously contracted is thus exempted from the application of provisions of Section 224 *ibid*.

6. While elaborating under the grounds of Appeal, the counsel for the Appellant argued that the contract to purchase shares was executed well over 6 months prior to the actual date of sale of the shares, i.e., May 28, 1994; the Appellant involuntarily and perforce of the buy-back agreement had to purchase the said shares in good faith and in satisfaction of debt was safeguarded. This also reflected from the fact that the Appellant had written off personal loan in the amount of Rs. 28.534 Million to the Company free of interest. As regards the suit for recovery filed against the Company and its previous sponsors, it was argued that this supports the fact that the Company was heavily indebted and in order to satisfy its liabilities and make it operational, the sale of shares was made. The audited accounts of the Company for the year 1994, 95 and 96 were also referred in this regard. The counsel for the Appellant, Mr. Umar Mahmud Kasuri, Advocate added that the intention of the legislature in respect of section 224 of the Ordinance is that if any of the seven persons mentioned therein, who in their fiduciary position towards the company is likely to have the inside information of the company's securities position/placing, takes undue advantage of such inside information and makes a purchase/sale of the shares and as a result thereof makes a personal gain, he should be made liable to tender the same to the company. It is argued that the position of the Appellant is different in the matter, as he was obliged to purchase the shares under the buy-back agreement and later, beyond the statutory period sold the same and placed it in the Company in the form of loan which was subsequently waived off.

7. Mr. M. Ayub Qureshi, Director (SM), representing the Respondent while supporting the impugned order stated that Securities are fungible, therefore, no discrimination can be made between previous holding and newly purchased shares; the buy-back, agreement does not constitute a debt agreement, therefore, this transaction could not be given the claimed exemption. Moreover, the agreement made by Mr. Tariq Baig with PLHC is entirely dissimilar with that made by out going management with PLHC; the appellant purchased these shares @ Rs.10/- only per share and paid total amount Rs.2,800,000/- to PLHC, whereas, the previous management was liable to purchase these shares within three years of the date of subscription in three equal lots @ Rs. 11.75, 13.50 and 15.25 per share per lot respectively and in case of default in making payment the management was liable to pay 4% interest over and above the bank rate per annum from its due date to the date of actual payment together with the penal interest @ 5%. The Appellant, however, has not paid any such interest at the time of acquiring these shares. In the suit filed by the PLHC, the PLHC request for recovery of Rs.9.032 million against the company and its ex-sponsors was made, whereas, the Appellant paid only, Rs.2.800 million. The Appellant was required to make the down payment by 15.11.1993, while the last installment in this respect was due by 15.6.1995. The Appellant decided to acquire these shares on 28.5.1994 on the basis of privileged information, as transaction track of the company at KSE reflected that the market price of the scrip was only Rs.7.50 in November, 1993, which touched Rs.25.00 in April 1994 and declined to Rs.10.50 per share in December, 1994 as the Company declared nil pay out for the year ended December, 1993. The whole episode of acquisition of shares, in some what hasty manner (on 28.5.1994) by making payment prior to due date i.e. 15.6.1995, to PLHC constitutes sale and purchase transaction. The said transactions were executed within a period of less than six months attracting provision of section 224 of the Ordinance.

8. Having heard the parties at length and reviewing the relevant documents available on record, the main issue that arises, in our view is to consider the

applicability of the proviso of Section 224 of the Ordinance. The question, therefore, is whether the purchase of shares by the Appellant can be termed as being acquired in satisfaction of debt previously contracted and further that the same was done in good faith. The Appellant has taken contradictory stance. On the one hand it has been argued that the holding of the first charge by PLHC was unlawful after satisfaction of their debt by the ex-sponsors and the Appellant involuntarily and perforce of the buy-back agreement had to purchase the said shares. On the other hand it is argued that the purchase was made in good faith and in satisfaction of debt previously contracted. In our view either there was debt or it did not exist. Appellant's voluntary commercial decision of entering into a settlement and purchase of shares, which otherwise they were not legally bound to honour cannot be termed as acquiring a security in satisfaction of a debt. Even if it is assumed that the purchase was in a satisfaction of debt previously contracted the crucial factor still needs to be satisfied i.e. whether it was done in "good faith". The matter further needs examination taking in to account the objective of the said provision, which as rightly pointed out by the Appellant, is to put a check on the directors who in their fiduciary function are likely to obtain inside information of the company's securities. In order to see whether such advantage has been taken on the part of Chief Executive of the Company by virtue of the information available, it is important to highlight the fact that the buy back facility @ Rs.10 was availed of when market value was at @ Rs. 18.00. This indicates the malafide of the Appellant. The Appellant has argued that the profit made from such transaction was tendered to the company in the form of interest free loan and subsequently waived off the same. However, the Appellant has failed to prove the said assertions from record, as a personal loan to the company even existed prior to the transaction. It would have been a different situation if only the purchase of shares was made but the manner in which the purchase has been made and the sale was affected clearly shows that it was done to gain profits which was not lawfully tendered to the company. The plea that the statutory period has lapsed is also not correct as the transaction of purchase was not made according to the terms of the settlement and the Impugned Order has already given the benefit of the down payment made on November 15, 1993 treating the same as falling beyond the statutory period of six months.

9. In view of the foregoing we do not find any merit in the Appeal and uphold the Impugned Order of the Executive Director. The Appeal is disposed off accordingly.

**Announced :Islamabad**  
25 April, 2002

**( N.K. SHAHANI )**  
Commissioner  
(Insurance & Information Technology)

**( ABDUL REHMAN QURESHI )**  
Commissioner  
(Enforcement & Monitoring)