



# Securities and Exchange Commission of Pakistan

## BEFORE APPELLATE BENCH NO. I

In the matter of

### Appeal No. 37 of 2006

Bestway (Holdings) Limited ..... Appellant

Versus

Executive Director ..... Respondent

Securities Market Division, SECP

Islamabad

### ORDER

Date of Hearing

04/02/14

Present:

For the Appellant:

1. Mr. Irfan A. Sheikh (Bestway Cement Ltd)
2. Mr. Haleem Ashraf (Bestway (Holdings) Limited)

For the Respondent:

1. Mr. Muhammad Farooq, Joint Director (SMD)
2. Mr. Nazim Ali, Assistant Director (SMD)



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1. This order shall dispose of appeal No. 37 of 2006 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 against the order dated 29/12/05 (the "Impugned Order") passed by the Respondent.
2. Brief facts of the case are that in response to letter from the Commission dated 22/03/05, Bestway (Holdings) Limited ("BHL") filed returns of beneficial ownership as a more than ten percent shareholder of Bestway Cement Limited ("BCL"), as required under section 222 of the Companies Ordinance (the "Ordinance"). It was noticed from the examination of the said returns that among others the Appellant inter alia has made the following transactions within the period of six months:-

Nature of Transaction	Date of Transaction	No. of Shares	Rate per Share (Rs.)
Sale	24.05.2002	1,000	25.40
Sale	27.05.2002	67,000	24.80
Purchase	17.09.2002	27,104	12.00

The aforesaid purchase and sale transactions resulted in gain of Rs.347,531,00 (rupees Three hundred forty seven thousand Five hundred and thirty one only) to the Appellant, computed in the manner prescribed in Rule 16 of the Companies (General Provisions and Forms) Rules, 1985 (the "Rules").

3. Section 224 of the Ordinance provides that where inter alia a more than ten percent shareholder of a listed equity security makes any gain by purchase and sale, or the sale and purchase, of any such security within a period of less than six months, such shareholder is required to make a report and tender the amount of such gain to the company and simultaneously send intimation to



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that effect to the Registrar of Companies and the Commission. Further, where such shareholder fails or neglects to tender or the company fails to recover, any such gain within a period of six months after its accrual, or within sixty days of a demand thereof, whichever is later, such gain shall vest in the Commission and unless such gain is deposited in the prescribed account, the Commission may direct recovery of the same as an arrear of land revenue. Since neither the Appellant tendered the gain to the issuer nor the issuer recovered it as provided in section 224(2) of the Ordinance, therefore, the Appellant was intimated on 08/04/05 that the amount of gain has vested in the Commission. Mr. Khalid Majid Rehman, Chartered Accountants ("KMR") on behalf of the Appellant submitted in their written response to the Commission that neither the transactions were made on the basis of inside information nor were made with the motives of profit making, therefore, the gain in question does not qualify to be deposited in the Commission and requested the proceedings be dropped against the Appellant. The response of KMR was not considered tenable by the Respondent.

4. Show Cause Notice dated 15/11/05 ("SCN") under section 224(2) of the Ordinance was served upon the Appellant. Hearing on the matter was held on 27/12/05. On the date of hearing Mr. M.Irfan Sheikh, Director Finance of BCL and Mr. M. Musaddaq Ali Khan, Financial Controller of the issuer (the "Authorised Representatives") appeared on behalf of the Appellant and raised the main points raised by KMR in its written reply. The Respondent dissatisfied with the response of the Appellant held that the arguments presented by the Authorised Representatives of the Appellant did not have any merit or substance. The request to drop the proceedings was rejected and the Appellant was directed to tender Rs. 347,531,00 (rupees Three hundred forty seven thousand Five hundred and thirty one only) to the Commission as



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provided in section 224(2) of the Ordinance through a demand draft in favour of the Commission within thirty days of the issue of the Order.

5. The Appellant preferred to file the instant appeal against the Impugned Order. The Appellant's counsel argued that BHL had sold 1000 shares of Bestway Cement Ltd (BCL) @Rs 25.40 per share on 24/05/02. Similarly another 67000 shares of BCL were sold @Rs. 24.80 per share on 27/05/02 in the open market at Karachi Stock Exchange. Subsequent to the said sale of shares, BHL through a private deal in United Kingdom had purchased 27, 104 repatriable ordinary shares of Bestway Cement @ Rs. 12.00 per share on 13/03/02. These were a small number of shares and were held by Sheikh Abdul Rauf, a U.K resident who wanted to sell the shares and since he was unable to send his shares to Pakistan to sell them at Karachi Stock Exchange, the sponsors of BCL decided to help him by purchasing the shares in the portfolio of BHL. The number of shares was very small and the primary objective was to help an overseas shareholder and neither the transactions were made on the basis of inside information nor were made with the motives of profit making.

Furthermore, it was held by the Supreme Court of Pakistan in the matter of *The Securities and Exchange Commission of Pakistan through Commissioner versus First Capital Securities Corporation Limited and another in Civil Appeal No. 946/2005* cited at *PLD 2011 Supreme Court 778*, that, "...the gains will remain under all circumstances the property of the company and SECP has no right or entitlement thereto..." In the instant case, the Impugned Order has become a nullity in light of the aforementioned judgment as the gains are no longer tenderable to the Commission.

6. The department's representative argued that no transaction is exempt from the application of section 224 of the Ordinance unless it is a security acquired in good faith in satisfaction of a debt previously contracted. The return of



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beneficial ownership filed by the beneficial owner on Form-32 as at 31/03/05 clearly indicated that the tenderable gain was accrued to the beneficial owner on account of sale and purchase of transactions made during May-September 2002. Thus the plea that the transactions were made in good faith, and earning of the profit was not the motive of the beneficial owner does not result in the non-application of section 224 of the Ordinance and, as such, no such exceptions exist in the stated law.

7. We have heard the parties. Section 224 of the Ordinance applies to specified categories of persons, namely, a director, chief executive, managing agent, chief accountant, secretary, or auditor of a listed company or a person who is directly or indirectly, the beneficial owner of not less than 10% shares of its listed equitable securities. The section is applicable when there is sale or purchase of any shares of the company in question within a period of less than 6 months by the person making the gain. In the event of such a sale or purchase taking place, the person making the gain is obligated to tender the amount of gain, if any, made by him to the company under intimation to the Registrar and the Commission. Further, in terms of section 224(2) of the Ordinance, such gains if not tendered to the Company within a period of six months after the accrual, shall vest in the Commission.

In the matter of *The Securities and Exchange Commission of Pakistan through Commissioner versus First Capital Securities Corporation Limited and another* in Civil Appeal No. 946/2005 cited at *PLD 2011 Supreme Court 778*, it was held that in the event the gains are not tendered to the Company within a period of six months or the fact of the gain was not brought in the notice of the Company and the Commission, the gains at all times shall remain the property of the Company. It was held that , “...the entitlement of SECP to recover the amount in question from the company would be treated as being

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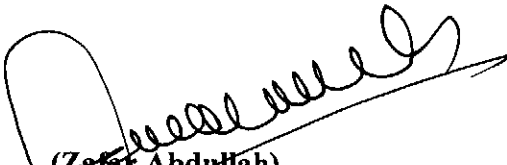



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*in the nature of an enforcement mechanism to ensure that the wrongful gains do not remain with the person who has violated the section but are transferred to or for the benefit of the Company...”*

The aforementioned para of the judgment has spelled out the purpose of section 224 of the Ordinance. The question of whether the transactions were bona fide or not have to be decided on the threshold of the judgment mentioned in paragraph 6(a) above. In the instant case, the Appellant has made gains and it is difficult to establish whether or not the transactions were bonafide. Therefore, leaving the argument of the bona fide of the transactions aside, the aforementioned para of the judgment mentioned in paragraph 6(a) above has spelled out the purpose of section 224 of the Ordinance which states that that the gains made shall at all times remain the property of the Company and SECP has no entitlement thereto. We are of the view that in the instant case the transactions were done in the ordinary course of business; however, any gains made by the Appellant shall vest in the Issuer Company.

In view of the above, the Impugned Order is set aside. The gains shall be transferred to the Issuer Company.

  
(Zafar Abdullah)  
Commissioner (SMD)

  
(Tahir Mahmood)  
(Chairman)

Announced on: 01/12/14