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BEFORE APPELLATE BENCH NO. I

In the matter of

Appeal No. 86 of 2006

Rehan Ahmed, Chief Executive Officer

Mubarak Textile Mills Limited

.....

Appellant

Versus

Commissioner (SMD)

.....

Respondent

Date of hearing

15-11-11

ORDER

Present:

For the Appellant:

Mr. Faisal Latif, Chartered Accountant

For the Respondent Department:

Mr. Abid Hussain, Director

Mr. Aqeel A. Zeshan, Deputy Director



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1. This order shall dispose of appeal No. 86 of 2006 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 against the order dated 10-11-06 (the "Impugned Order") passed by the Respondent.

2. On examination of the annual audited accounts of Mubarak Textile Mills Limited (the "Target Company") for year ended 30-06-03, 30-06-04 and 30-06-05 it transpired that the Appellant's shareholding had increased from 599,000 (22.19%) shares as on 30-06-04 to 839,500 (31.09%) shares as on 30-06-05, thus, attracting Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Ordinance, 2002 (the "Takeover Ordinance"). The Commission, vide letter dated 17-11-05, requested Hameed Majeed Associates (Pvt.) Limited (the "Appellant's Consultant") to intimate whether the Appellant had complied with the provisions of the Takeover Ordinance. The Appellant's Consultant, vide letter dated 05-12-05, intimated that the transactions which caused increase in shareholding of the Appellant were receipt of 439,000 (16.26%) shares from his parents as gift during the year 2003 and purchase of 240,500 (8.9%) shares on 14-01-05 from his brother namely Mr. Ahmed Faraz. The Appellant's Consultant further stated that these were all inter family transactions/arrangements and no general public acquisition or takeover had taken place. The Appellant's Consultant stated that the percentage of major sponsor/promoter had almost remained the same; therefore, public offer announcement was not made by the Company.

3. Show cause notice dated 16-08-06 ("SCN") under section 25 and 26 of the Takeover Ordinance was issued to the Appellant for violation of section 4, 5, 7(1), 9(3), 13(1) and section 13(8) of the Takeover Ordinance and hearing in the matter was held. The Respondent, dissatisfied with the



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response of the Appellant, passed the Impugned Order and imposed a penalty of Rs. 100,000 on the Appellant.

4. The Appellant preferred the instant appeal against the Impugned Order. The Appellant's representative argued that the shareholding of the Appellant increased by 439,000 (16.26%) shares due to transfer of shares as gift from his parents pursuant to a gift deed and claimed that the said transaction falls under section 3(e) of the Takeovers Ordinance which exempts acquisition of voting shares by succession or inheritance. Regarding the second transfer of shares, the Appellant's representative argued that the Appellant purchased 240,500 (8.9%) shares from his brother at a price of Rs. 10/- each and that although the shareholding of the Appellant increased to more than 25% in the Company, these were all inter family transactions/arrangements and the intention of the Appellant was not to take over the Company since the Appellant is already a promoter / director of the Company. The Appellant's representative requested that a lenient view be taken and penalty may be reduced.
5. The department representatives argued that the intention of the legislature is clear by plain reading of section 4 and section 5 of the Takeover Ordinance which clearly specifies the threshold of acquisition of voting shares i.e. 25 % shares of a company. It does not matter how the acquirer reaches that threshold as section 4 and 5 of the Takeover Ordinance do not differentiate between shares acquired from general public and shares acquired through a gift from parents or purchase from a brother. The Appellant representative's interpretation that the Ordinance is not applicable in this case is incorrect. The Appellant was, therefore, required to make a disclosure to the stock exchange and to the Company as required under section 4 of the Takeover Ordinance upon acquisition of more than 10% shares of the Company and was required to make a public



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announcement of offer under section 5 of the Takeover Ordinance upon acquisition of more than 25% shares of the Company. It was further argued that the Respondent has already taken a lenient view as the penalty was only 10% of the maximum penalty which could have been imposed.

6. We have heard the parties. The relevant sections of the Takeover Ordinance are reproduced for ease of reference:

4. Acquisition of more than ten per cent voting shares of a company. — (1) Any acquirer who acquires voting shares, which (taken together with voting shares, if any, held by the acquirer) would entitle the acquirer to more than ten per cent voting shares in a listed company, shall disclose the aggregate of his shareholding in that company to the said company and to the stock exchange on which the voting shares of the said company are listed as provided in sub-section (2).

(2) The disclosure mentioned in sub-section (1), shall be made within two working days of,—

(a) the receipt of intimation of allotment of voting shares; or

(b) the acquisition of voting shares, as the case may be.

Explanation. — For the purposes of this section expression "acquisition" shall include purchases confirmed by the member of a stock exchange in accordance with sub-rule (4) of rule 4 of the Securities and Exchange Rules, 1971.

(3) Any acquirer may acquire additional voting shares in any period of twelve months after acquisition of voting shares pursuant to sub-section (1) without making disclosure as required by sub-section (1) in case the total acquisition does not exceed an aggregate of twenty five per cent.



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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 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.

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

7. Appointment of manager to the offer. — (1) Before making any public announcement the acquirer shall appoint a bank, or financial institution, or a member of a stock exchange who is not an associate, or group, of the acquirer or the target company, as a manager to the offer.

(2) The manager to the offer shall be deemed to be the agent of the acquirer.



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9. Public announcement. — (1) The public announcement shall be published at least in one issue each of a daily newspaper in English language and a daily newspaper in Urdu language having circulation in the Province or Provinces in which the stock exchange, on which the target company is listed, is situated.

(2) The public announcement shall contain such information as may be prescribed.

(3) A copy of the public announcement shall be submitted to the Commission through the manager to the offer at least two working days before its issuance.

(4) Simultaneous with the submission of the public announcement to the Commission, the public announcement shall also be sent to all the stock exchanges on which the voting shares of the target company are listed for being notified on the notice board and on the automated information system thereof, and to the target company at its registered office for being placed before the board of directors of such company.

(5) A public offer under this Ordinance shall be deemed to have been made on the date on which the public announcement is made in any of the newspapers as required by sub-section (1).

13. General obligations of the acquirer. — (1) Within two working days of the public announcement, the acquirer shall send a copy of the proposed offer letter to the target company at its registered office address and all the stock exchanges, where the voting shares of the company are listed, and the Commission.

[.....]



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(8) On or before the date of issue of public announcement, the acquirer shall create a security as provided in this Ordinance.

[Emphasis added]

The Takeover Ordinance provides a threshold of shareholding in a company for the applicability of its provisions. A plain reading of section 4 of the Takeover Ordinance reveals that: (a) acquisition of up to 10% voting shares does not require any reporting under the Takeover Ordinance; and (b) acquisition of more than 10% voting shares would require an acquirer to disclose his shareholding to the target company and to the stock exchange.

Further, plain reading of section 5 of the Takeover Ordinance reveals that the trigger of substantial acquisition starts once an acquirer crosses the threshold of 25% and once the threshold on 25% voting shares is crossed, the acquirer has to make a public announcement of offer to acquire voting shares.

On the argument raised by the Appellant's representative that the Takeover Ordinance does not apply in the instant case as the Appellant acquired the voting shares through inter family transactions/arrangements which is exempted under section 3(e) of the Takeover Ordinance, we have examined section 3(e) of the Takeover Ordinance, as was in force at the time of issuance of the SCN, which has been reproduced for ease of reference:

3. Ordinance not to apply to certain transactions. — Nothing contained in this Ordinance shall apply to—


(e) acquisition of voting shares by succession or inheritance;



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In the instant case, the shares in question were transferred to the Appellant as a gift from the Appellant's parents during their lifetime; hence, the aforementioned sub-section is inapplicable. Section 3 of the Takeover Ordinance lists down certain transactions which are exempt from the provisions of the Takeovers Ordinance and inter family transactions/arrangements do not fall under any of these exempted transactions. The Respondent has already taken a lenient view in the Impugned Order by imposing a penalty of Rs. 100,000 on the Appellant when the maximum penalty could have been one million rupees (at the time of issuance of SCN).

In view of the above, we uphold the Impugned Order. The appeal is dismissed with no order as to costs.


(Tahir Mahmood)
Commissioner (CLD)


(Mohammed Asif Arif)
Commissioner (Insurance)

Announced on: 12-01-12