



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

BEFORE APPELLATE BENCH NO. III

In the matter of

Appeal No. 04 of 2011

1. Mahboob Elahi, Chief Executive
2. Mahfooz Elahi, Director
3. Mahmood Elahi, Director
4. Samina Begum, shareholder
of Elahi Cotton Mills Limited

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Appellants

Versus

Commissioner (CLD)

Securities and Exchange Commission of Pakistan

Respondent

Date of hearing

24/05/12

ORDER

Present:

Appellant

Mahmood Elahi, CEO

For the Appellant:

M Javed Panni, Consultant

Department representative:

Tariq Ahmad, Deputy Director (Enforcement)



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

1. This order shall dispose of appeal No. 04 of 2011 filed under section 33 of the Securities and Exchange Commission of Pakistan (the "Commission") Act, 1997 (the "Act") against the order dated 15/12/10 (the "Impugned Order") passed by the Respondent.
2. On the examination of statutory returns, documents filed with the Commission and pattern of shareholding annexed with annual reports for the year ended 30/06/07, 30/06/08 and 30/06/09 of Elahi Cotton Mills Limited ("Target Company") it was revealed that shareholding of Mr. Mahboob Elahi increased substantially from 8.92 % to 28.54% in the paid up capital of the Target Company in the aforesaid periods. The substantial increase in shareholding was attributed to the information provided by Mr. Mahboob Elahi for the acquisition of 255,000 shares through broker as well as through the purchase of physical shares against cash, between 08/08/07 to 29/05/08. Mr. Mahboob Elahi, thereby, crossed the threshold level of 25% holding of voting shares in the Company set out in section 5 of the Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Ordinance, 2002 ("Takeovers Ordinance"), which requires the disclosure to the Target Company and to the stock exchange on which the voting shares of the Target Company are listed, as well as public announcement of offer.
3. The aforesaid cumulative review further revealed the increase in the shareholding of the Appellants from 26.26 % (year 2007) to 48.19 % (2008), and subsequently to 78.59 %, mainly due to the increase in holding of three directors, all of them are forming a group ("Elahi Group"). The increase in shareholding required compliance of section 6 of the Takeovers Ordinance i.e. the disclosure to the Company and to the



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

stock exchange on which the voting shares of the Company are listed, as well as the making of a public announcement of offer. Year –wise Comparison of accumulation of shareholding by the group is depicted as follows:

Year-wise comparison of shareholding of the directors						
Categories of Share Holders	2008				June 30, 2009	
	Number of shares	% of holding	Number of shares	% of holding	Number of shares	% of holding
Mr. Mahboob Elahi, CEO	116,000	8.92 %	371,000	<u>28.54 %</u>	548,200	42.17 %
Mr. Mahfooz Elahi, Director	77,675	5.98 %	77,675	5.98 %	199,675	<u>15.36 %</u>
Mr. Mahmood Elahi, Director	74,250	5.71 %	104,250	8.02 %	200,250	<u>15.40 %</u>
Mrs. Samina Begum w/o Mr. Mahboob Elahi	73,500	5.65 %	73,500	5.65 %	73,500	5.65 %
Director, CEO & their spouse & children	341,425	26.26 %	625,425	<u>48.19 %</u>	1,021,625	<u>78.59 %</u>

4. Show cause notice dated 02/09/10 (“SCN”) was issued to the Appellants under section 25 read with section 26 of the Takeovers Ordinance. Appellants filed reply to the SCN and hearing in the matter was held. The Respondent, dissatisfied with response of the Appellants, passed the Impugned Order and in terms of section 26(3) of the Takeovers Ordinance, imposed a penalty of Rs. 200,000 on Appellant No 1 for violation of section 5 of the Takeovers Ordinance and penalty of Rs. 5,00,000 each on the Appellants for violation of section 6 of the Takeovers Ordinance.
5. The Appellants preferred to file the instant appeal against the Impugned Order. The Appellants’ counsel argued that:
 - a) the definition of acquirer clearly states that an acquirer for all practical purposes has to be an ‘Outsider’ who is striving to acquire shares by



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

offering attractive share price to allure shareholders of a target company to sell their shareholding to the acquirer. The core objective is to wrest management and control of the target company. The threshold have been wrongly applied in the instant case, which are only applicable in cases where an outsider is intending to take over management and control of existing listed company. The threshold in the instant case are irrelevant as the sponsors/group already have absolute management control;

- b) the Elahi Group has been holding unfettered and unhindered management and control for fairly long period of 30 years. The Company has been in dire financial straits since its inception. It has been an unviable entity with huge accumulated losses increasing every year. A company with 6000 spindles and host of problems could never be of attraction for any would be acquirer; and
- c) the Appellant No 4 is a family member and is neither a director nor a majority shareholder in the Company. Appellant No 4 held 86,760 ordinary shares (13.35%) in 1980 which stood reduced to 73,500 ordinary shares (5.66%) in 2007 and continued to remain the same up to 08/10/09 and thereafter. The Appellant No 4 was wrongly assumed as an acquirer, as such, the penalty imposed on her is without lawful authority.

6. The department representative argued that:

- a) the Takeovers Ordinance law addresses both the issues i.e. acquisition of shares beyond specified threshold and acquisition of control. The violation cannot be exempted on the ground that the control rest with



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

the acquirers. An acquirer need not always be an 'outsider' and the sitting management can also be an acquirer;

- b) the management gradually increased their shareholding from 1980 till 2009. The viability of the Company and the decision of Elahi Group to consolidate their shareholding in the Company is a business decision and has not been called into question by the Respondent. The manner in which the acquisition of shares has taken place was violation of section 5 and 6 of the Takeovers Ordinance, as such the penalty was rightly invoked; and
- c) the Elahi Group was represented through the shareholders namely Mr. Mehboob Elahi, Mr. Mahfooz Elahi, Mr. Mahmood Elahi and Mrs. Samina Begum and all of them acted in concert to acquire the shares. The Elahi Group acted as acquirers and contravened the provisions of section 6 of the Takeovers Ordinance by consolidating its shareholding from 26.26% to 48.19 % and finally 78.59% in the years 2007, 2008 and 2009. Ms Samina Begum was part of the Elahi Group and the penalty was rightly invoked against her

7. We have heard the parties. Before proceeding to decide the merits of the case, we would like to cite the judgment of our predecessors in the case of *Wazir Ali Industries vs. Executive Director (Enforcement)*, wherein, the rationale of the Takeovers Ordinance was discussed in the following manner:

"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



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

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”

- a) the issue of ‘control’ raised by the Appellants’ counsel has been examined and the definition of ‘acquirer’ under the Takeover Ordinance adequately explains the issue , which has been reproduced for ease of 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;

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, Takeover Ordinance does not classify acquirer as an ‘outsider’ and an acquirer could be any person who acquires the shares for the purposes stated above;

- b) Mr. Mahboob Elahi acquired voting shares in the Target Company as his shareholding increased from 8.92% to 28.54% and in doing so it crossed the threshold of 25% of voting shares in the Company. Mr. Mahboob Elahi was required to comply with the requirements of section 5 of the Takeovers Ordinance, which includes the disclosure to the Target Company and to the stock exchange on which the voting shares of the Target Company are listed, as well as public announcement of offer, however, he failed to comply with the said requirement. Elahi Group acted in concert and acquired voting shares in the Target Company, which has been established as the shareholding of the Elahi Group increased from 26.26% to 48.19% and subsequently to 78.59%, due to increase in holding of three directors. In doing so Elahi Group failed to comply with the requirements of section 6 of the Takeovers Ordinance, which includes the disclosure to



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

the Target Company and to the stock exchange on which the voting shares of the Target Company are listed, as well as public announcement of offer. The decision to acquire the shares of Company has not been questioned by the Respondent, neither it is the subject matter discussed in the Impugned Order, as such, the argument as to viability of business vis-à-vis the acquisition of shares is not tenable; and

- c) the case of Appellant No 4 has been reviewed in light of the facts of the case and it has transpired that Appellant No 4 held 86,760 ordinary shares (13.35%) in 1980 which stood reduced to 73,500 ordinary shares (5.66%) in 2007 and continued to remain the same up to 08/10/09. The Appellant No 4 was part of Elahi family, however, there is no evidence to suggest that she acted in concert with other directors (Elahi Group) as there was no increase in the shares held by the Appellant No 4.

In view of the foregoing, the appeal is accepted to the extent of Appellant No 4 on the grounds stated in para 7(c) above. The Impugned Order is upheld with no order as to cost.

(Mohammed Asif Arif)
Commissioner (Insurance)

(Imtiaz Haider)
Commissioner (SMD)

Announced on: 17th Oct. 2012