

IN THE HIGH COURT OF SINDH, K A R A C H I

M. A. No.04 OF 2007

Present: Mr. Chief Justice Sabihuddin Ahmed &
Mr. Justice Faisal Arab

Appellants: Sheikh Abdul Wahid & others
through Mr. ArshadTayyabali Advocate.

Respondents: Securities & Exchange Commission of
Pakistan through Mr. Ijaz Ahmed Advocate.

Date of hearing: 13.09.2007.

J U D G M E N T

Faisal Arab, J: Ahmed Spinning Mills Limited, which is Appellant No.8 in this case held 673,268 ordinary shares in United Sugar Mills Limited. These shares constituted 22.4% of United Sugar Mills total paid up capital. The Appellant No.1 and 2 who are Chairman and Chief Executive respectively of Appellant No.8 together with their family members also held 53% of the entire shareholding in the United Sugar Mills.

2. In November 2004 Appellant No.8 sold all its shares in United Sugar Mills at the rate of Rs.16/- per share to Clearshore Limited, a company incorporated in the United Kingdom. The Clearshore Limited then in October 2005 sold these shares to JDW Sugar Mills Limited at the rate of Rs.333.33 per share. In this manner the share which were sold at the rate of Rs.16/- fetched Rs.333.33 to Clearshore Limited within a span of less than one year. When this huge price differential in the two transactions was detected by Respondent No.1 from its statement of account, it doubted the intentions of Appellants No.1 and 2, the Chairman and Chief Executive of Appellant No.8. This prompted Respondent

No.1 to issue show cause notice dated 14.07.2006 to the Appellants wherein following allegations were made:

Show Cause Notice:

Whereas Ahmed Spinning Mills Limited (ASML) and United Sugar Mills Limited (USML) are listed companies, which were associated companies within the meaning of the Companies Ordinance, 1984 (the Ordinance) by virtue of common directorship (the common Directors) until USML was taken over by JDW Sugar Mills Limited.

Whereas, for over 22 years ASML held 673,268 ordinary shares constituting 22.44% shares of USML which amounted to 61% of the total assets of ASML as per its audited accounts for the year ended 30 September 2004.

Whereas pursuant to the sale agreement dated 10th November 2004 (Clearshore Sale Agreement) directors of ASML, including the Common Directors, caused ASML, to sell the shares to a UK registered company named Clearshore Limited (Clearshore) at the rate of Rs.16 per share.

Whereas as disclosed in Form A made up to March 29, 2005 and as per the pattern of shareholding provided in Form 34 along with the annual accounts for the period ended September 30, 2004 and September 30, 2005, the following common directors held 16.52% shareholding of USML as under:

Name of Director	Percentage (%)	Number of Shares Held
Shaikh Abdul Wahid	7.66	229,720
Shaikh Muhammad Saeed	7.94	238,120
Mrs. Qaiser Begum	0.48	14,280
Mrs. Nasreen Wahid	0.07	2,500
Mr. Abida Saeed	0.08	2,500
Mr. S. A. Rauf	0.08	2,500
Syed Maqbool Ahmed	0.20	6,000
Total	16.52	495,620

Whereas on 21 October 2005, certain of the common directors, namely Shaikh Abdul Wahid and Shaikh Muhammad Saeed, for

themselves and purportedly acting on behalf of certain others executed a Share Purchase Agreement where under they unequivocally undertook to sell 75% shares in USML to JDW at the rate of Rs.333.33 per share as per the following approximate break up:

Particulars	Percentage	Number of Shares
Sheikh Abdul Wahid	8% shares	229,720
Sheikh Muhammad Saeed	8% shares	238,120
Beneficial Shares of Sheikh Abdul Wahid	18% shares	542,330
Beneficial Shares of Sheikh Muhammad Saeed	18% shares	544,800
Shares held by other directors:-		
i. Mrs. Qudsia Begum 14,280		
ii. Mrs. Abida Saeed 2,500		
iii. Mrs. Nasreen Wahid 2,500		
iv. Shaikh Abdul Raof 2,500		
	1% Shares	21,780
Clearshore Limited	22% shares	673,268

And whereas, Shaikh Abdul Wahid and Shaikh Muhammad Saeed maintain that they acquired the beneficial shareholding of approximately 36 percent through oral gift from their father on 19 January 2000, but the returns filed by USML, particularly Form 34 along-with the annual accounts for the period ended September 30, 2005 and Form A made up to March 29, 2005 do not support this position. In fact, these returns reflect the following shareholding:

Categories of Shareholders	Percentage %	Number of Shares
Directors, Chief Executive Officers, and their spouse and minor children	16.60	498,120
Associated Company, undertakings and related parties	32.63	978,928
NIT and ICP	0.03	965
Banks, DFIs, NBFIs	Nil	
Insurance Companies	Nil	
Modarabas and Mutual Funds	Nil	
General Public-Local	47.49	1,424,997
Others-Joint Companies	3.20	96,030
Stock Abandoned Properties	0.03	960
Total	100	3,000,000

Whereas pursuant to a company search conducted by the commission, it has transpired that Clearshore is a dormant company in the UK. It has two directors namely; Mr. Taj M. Yahya and Mr. Nasir M. Yahya son of Mr. Taj M. Yahya is the brother-in-law of Shaikh Muhammad Saeed and Shaikh Abdul Wahid. Furthermore, Clearshore has advised JDW to make payment of the shares to Shaikh Muhammad Saeed and Shaikh Abdul Wahid instead of direct payment to Clearshore, whereby it appears that the common directors have conspired to make colossal gains and caused resultant losses of approximately Rs.213.6 million to the shareholders of ASML on account of sale of the shares on the basis of the sale price of Rs.333.33 per share received from JDW after adjusting the difference of the sale price received from Clearshore at the rate of Rs.16 per share.

Whereas, it appears that directors of ASML have acted in concert with Clearshore in the acquisition by Clearshore of more than 10% share in USML in contravention of the provisions of Section 4 of the Takeovers Ordinance.

Whereas, it appears that Shaikh Muhammad Saeed and Sheikh Abdul Wahid have acquired more than 25% voting shares (including the voting shares already held by them in USML) in contravention of the provisions of Section 5 of the Ordinance.

And whereas the common directors acquired control of not less than 75% shares in USML in contravention of the provisions of Section 5 of the Ordinance.

Now, therefore, pursuant to the powers conferred upon me under Section 27, I, call upon:

(a) the directors of ASML, being addressees 1 through 8 above, to show cause as to why each of them should not be proceeded against under Section 25 and Section 26 of the Takeovers Ordinance for acting in concert with Clearshore in the matter of the acquisition of 22.4% shares of USML from ASML in contravention of the provisions of Section 4 of the Takeovers Ordinances; and/or,

(b) ASML to show cause as to why it should not be proceeded against under Section 25 and Section 26 of the Takeovers Ordinance for acting in concert with Clearshore in the matter of the acquisition of 22.4% shares of USML from ASML in

contravention of the provisions of Section 4 of the Takeovers Ordinances; and/or

- (c) Sheikh Abdul Wahid to show cause as to why he should not be proceeded against under Section 25 and Section 26 of the Takeovers Ordinance in the matter of acquisition of more than 25% shares in USML in contravention of the provisions of Section 5 of the Takeovers Ordinance; and/or*
- (d) Sheikh Muhammad Saeed to show cause as to why he should not be proceeded against under Section 25 and Section 26 of the Takeovers Ordinance in the matter of acquisition of more than 25% shares in USML in contravention of the provisions of Section 5 of the Takeovers Ordinance; and/or*
- (e) Sheikh Abdul Wahid and Shaikh Muhammad Saeed to show cause as to why each of them should not be proceeded against under Section 25 and Section 26 of the Takeovers Ordinance in the matter of acquiring direct or indirect control over not less than 75% shares in USML, in contravention of the provisions of Section 6 of the Takeovers Ordinance.*

Each of the addresses above named is hereby advised to show cause in writing on or before August 8, 2006 and or appear in person or through authorized representatives before me at 10.30 a.m. on August 8, 2006 in office of the Securities and Exchange Commission of Pakistan, NIC Building, Blue area, Islamabad to explain why action may not be taken for the aforesaid contraventions/violations.

Rashid I. Malik

Commissioner (CL/SM)

3. Show cause notice was also issued to Clearshore Limited and its directors but they chose not to contest the proceedings.

4. While the proceedings initiated under the Show Cause Notices were still pending, Respondent No.3 i.e. the Commissioner at the Securities and Exchange Commission gave directions to JDW Sugar Mills Limited to withhold a sum of 213.43 million rupees out of the sale consideration that was payable to Clearshore Limited. This amount was the difference in the value of shares sold by Appellant No.8 to Clearshore Limited and the value which these shares fetched

when they were sold by Clearshore Limited to JDW Sugar Mills Limited. This differential amount was later directed by Respondent No.3 to be deposited with the Commission.

5. The Appellants contested the proceedings before Respondent No.3 whereas Clearshore Limited chose not to and was therefore proceeded *ex-parte*. The Respondent No.3 vide his decision dated 13.11.2006 held that in the matter of sale of the shares to Clearshore Limited, the Appellants No.1 and 2 acting in consort with the directors of Clearshore Limited sold Appellant No.8's valuable share worth more than Rs.300/- per share for only Rs.16/- per share thereby causing huge loss to the ordinary shareholders of Appellant No.8. It was also held that in the process of such sale Clearshore Limited committed contravention to the provisions of Section 4 of Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Ordinance, 2002. The gift of 36% shares held by Appellants No.1 and 2's father to them being more than 25% of the shares in United Sugar Mills was also held to be in contravention to the provisions of Section 6 of the Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Ordinance, 2002.

6. The decision of Respondent No.3 was appealed before Respondent No.2 which is an appellate bench of the Commission. The appellate bench concurred with the findings of Respondent No.3 hence this appeal before us under Section 34 of the Securities and Exchange Commission of Pakistan Act, 1997.

7. The main allegation of the Securities and Exchange Commission against the Appellants and Clearshore Limited was that the directors of Appellant No.8 and Clearshore Limited conspired among themselves to make unlawful gains by selling Appellant No.8's shares worth Rs.333 per share for

only Rs.16 per share thereby pocketing the difference at the expense of the ordinary shareholders of Appellant No.8.

8. Mr. Arshad Tayyabali, learned counsel for the Appellants at the very outset argued that in the show cause notice dated 14.07.2006 the sale of shares from Clearshore Limited to JDW Sugar Mills has not been questioned and therefore the transaction between these two companies should not have been made basis for taking punitive action against the Appellants. In support of his case Mr. Tayyabali relied upon the cases of the Collector Central Excise & Land Customs vs. Rahim Din (1987 SCMR 1840); Exide Pakistan vs. Deputy Collector Adjudication (2004 PTD 1449); Muhammad Zaman vs. Collector of Customs (1981 CLC 991); Muhammad Amin vs. The Province of Sindh (1992 MLD 671) and Islamabad Club vs. Punjab Labour Court (PLD 1980 SC 307). None of these cases have any relevance to the facts of the present case as the actions that were taken against the Appellants are well within the allegations contained in Show Cause Notice dated 14.07.2006.

9. Here we may point out that the rate at which the shares were sold by Clearshore Limited to JDW Sugar Mills was made basis to question the earlier sale transaction of the very same between Appellant No.8 and Clearshore Limited at the rate of Rs.16/- per share and it was this huge difference in two sale prices which triggered the proceedings against the Appellant No.8 and Clearshore Limited along-with their respective directors. There was no need to at all to question the second sale transaction between Clearshore Limited and JDW Sugar Mills Limited. Therefore the case law cited by the learned counsel for the Appellants has no relevance to the present case.

10. Mr. Arshad Tayyabali then argued that the reason for the difference in the price of two transactions was a gap of eleven

months, which elapsed between them and therefore the first sale cannot be termed as an attempt to defraud the ordinary shareholders of Appellants No.8. Mr. Arshad Tayyabali further argued in the alternative that even if the shareholders of Appellant No.8 were deprived of the true value of their shares the price differential in any case has to be returned to Appellant No.8.

11. The two sale transactions i.e. first between Appellant No.8 and Clearshore Limited and the second between Clearshore Limited and JDW Sugar Mills though took place with a gap of 11 months but the payment under the first sale agreement was to be made in five months. Hence the time span between the two transactions was virtually of only six months. The statement of accounts of Clearshore Limited further show that it was a dormant company with no commercial activity and had a cash balance of only 112 Pound Sterling and hence it was not financially sound to purchase shares even at the rate of Rs.16.00 per share. This may be the reason that Clearshore Limited did not make any payment to Appellant No.8 at the time of execution of sale agreement. Whether any payment was made by Clearshore Limited to Appellant No.8 before it entered into sale agreement with JDW Sugar Mills Limited is also not clear. In any event, no plausible justification for the phenomenal increase of more than 20 times in the value of shares within a span of few months has been given by the Appellants in order to establish that it occurred either on account of sudden surge in the growth of the sugar industry in general or there was increase in the commercial activity of United Sugar Mills Limited which resulted in spectacular increase in its share value. In absence of any justification for such phenomenal increase, the price differential of the two transactions i.e. Rs.333.33 per share as against Rs.16.00 per share leads to the irresistible conclusion that shares of Appellant No.8 were sold by its management for a song to the prejudice of its ordinary shareholders.

12. All this cannot be termed anything other than abuse and exploitation of the fiduciary position of the management of Appellant No.8. There was a clear and deliberate diversion of valuable asset belonging to Appellant No. 8 worth Rs.224,420,422/- to Clearshore Limited for a sum of Rs.10,772,288/- only. Even under the second transaction, the sale consideration was to be received by Appellants No.1 and 2 instead of Clearshore Limited though according to Appellants No.1 and 2 themselves they had no connection with Clearshore Limited or its directors. Why would Clearshore Limited choose not to receive the amount directly from JDW Sugar Mills to which shares were sold and once its sale consideration was stuck-up with Respondent No.1 why Clearshore Limited failed to come forward and seek release of money or for that matter why would Appellants No.1 and 2 continue to remain interested in the release of the money belonging to Clearshore to Appellant No.8 when as per their own case the sale transactions were clean and the amount payable by JDW Sugar Mills Limited legitimately belonged to Clearshore Limited. On the other hand Clearshore Limited also did not care to defend the proceedings before the Commission apparently for the reason that it would have exposed itself to answer many questions.

13. Furthermore, Serious allegations were made against Clearshore Limited, one such being that one of the directors of Clearshore Limited i.e. Mr. Taj M. Yahya was in fact brother-in-law of Appellants No.1 and 2 and they conspired among themselves to sell Appellant No.8's share much below their real worth. No one appeared on behalf of Clearshore to rebut allegations against it. No company would risk its huge capital by opting not to contest the allegations made against it. It seems that Clearshore Limited deliberately stayed away in order to avoid disclosures as to interests of the persons who were the real beneficiaries of the questionable

transaction. All this show that the first transaction i.e. sale from Appellant No.8 to Clearshore Limited was not a commercial misjudgment on the part of Appellant No.1 and 2 that adversely impacted Appellant No.8 but was as deliberate attempt on the part of Appellants No.1 and 2 in collusion with the directors of Clearshore Limited to make windfall profits for themselves at the expense of ordinary shareholders of Appellant No.8. Beyond shadow of doubt the first transaction between Appellant No.8 and Clearshore Limited lacked probity and fair deal. It is also quite surprising that the Appellants are interested in the release of the amount in favour of Appellant No.8 when according to their case it belongs to Clearshore Limited and that there exists no commonality of interests between Clearshore Limited and Appellant No.8 or their directors. The transfer of the price differential of the two transactions in favour of Appellant No.8 which is now being sought only establishes the fact that transaction between Appellant No.8 and Clearshore Limited was not real but was a financial rip-off on the part of Appellants No.1 and 2.

14. Mr. Ijaz Ahmed, learned counsel for the Respondents has pointed out that after selling Appellants No.8's shares at throwaway price and making the company almost worthless Appellants No.1 and 2 went on to purchase shares from the ordinary shareholders of Appellant No.8 thereby increased their shareholding from 13.32% to 85.69%. According to Mr. Ijaz Ahmed this was done so that in the event of detection of the undervalued sale they could still seek return of the price differential back to Appellant No.8 and in this manner they would still be able to reap the benefits of their own exploits. In support of this argument Mr. Ijaz Ahmed referred to two Account Statements for the years 2004 and 2005 which show that Appellant No.1 to 7 who held only 13.32% shares in Appellant No.8 at the time of sale to Clearshore Limited in November 2004 became owners of 85.69% shares by June

2005. Mr. Ijaz Ahmed also argued that the right to claim differential amount only belongs to such shareholders who on the date of the first transaction i.e. 10.11. 2004 held shares in Appellant No.8 as they are the ones who were deprived of the true value of their shares and not Appellant No.1 to 7 who as directors of Appellant No.8 were responsible for the scam.

15. It has become quite apparent that Appellants No.1 to 7 had visualized that in the event of detection of their sham transaction they should still be in a position to reap its benefit and therefore within a span of few months of the first transaction they raised their shareholdings in Appellant No.8 from 13.32% to 85.69% so that in case the benefit is returned back to shareholders of Appellant No.8, they as its shareholders be there to receive it. This seems to be the precise reason for going on a buying spree within a span of few months otherwise there was no sense in purchasing huge numbers of shares from the ordinary shareholders in such a desperate hurry when according to the Appellant No.8's Auditors Report and final accounts the company had already suspended its commercial activity way back in 1984 due to non availability of finances and its plant and machinery had been disposed off and was continuously into losses.

16. Mr. Arshad Tayyabali lastly argued that after the first transaction the Security and Exchange Commission has itself valued Respondent No.8's share at Rs.32 and therefore if at all share was sold for Rs.16/-, the undervaluation at best is only to the extent of Rs.16/- and not to the extent of more than Rs.300/- as was alleged by the Commission in the show cause notice.

17. It is an admitted position that when the shares were sold to JDW Sugar Mills Limited they fetched Rs.333.33 per share. This undisputedly was the actual transactional value. In fact the Appellants No.1 to 7 had themselves sold their own

shares along-with Clearshore Limited at such rate to JDW Sugar Mills and this transaction took place on the very same day under a common sale agreement. Therefore the earlier estimation at Rs.32/- per share by the Commission which was made prior to the second sale transaction loses its significance and the Appellants cannot now rely on Commission's evaluation in ignorance to the actual worth of Appellant No.8's share which Appellants No.1 to 7 themselves received when they sold their own shares to from JDW Sugar Mills Limited.

18. Every shareholder that entrusts his money to a company as an investment expects that its management would follow sound standards of fair dealing in its affairs. However in the present case, the transaction in question eroded the true worth of Appellant No.8's shares. The manner in which the sale of Appellant No.8's shares came about it became apparent that benefit of shares was intended to be transferred to Appellant No.1 and 2 through Clearshore Limited which was only used as a façade to cover-up the financial rip-off. This became evident when Clearshore Limited first purchased shares from Appellant No.8 at Rs.16/- per share and that too without paying a single rupee to Appellant No.8 and then sold the shares at the rate of Rs.333.33 per share to JDW Sugar Mills Limited and surprisingly Clearshore made Appellants No.1 and 2 as recipients of the sale consideration belonging to Clearshore Limited.

19. Mr. Arshad Tayyabali tried to explain this by saying that merely being a recipient of money on behalf of Clearshore Limited does not mean that Appellant No.1 and 2 were the real beneficiaries of the money belonging to Clearshore Limited as it only shows that they were acting as agents of Clearshore Limited. However, we are of the opinion that the conduct of Clearshore Limited suggests otherwise. We have noted that Clearshore Limited neither approached

Respondent No.1 for release of its stuck up money nor it even bothered to contest the present proceedings before the Commission. In fact it did not even initiate any legal proceedings to seek release of the sale consideration and disappeared from the scene altogether without being concerned with the fate of the proceedings against it. All this leads to the conclusion that Clearshore Limited had no stake of its own in the transaction but was used only as a conduit to siphon-off the windfall profits that Appellant No.1 and 2 intended to make at the cost of the ordinary shareholders of Appellant No.8. In the circumstances, Appellants No.1 to 7 who as directors of Appellants No.8 cannot be allowed to reap benefit of their own wrong.

20. It is one of the duties of the Securities and Exchange Commission to ensure adequate protection to the investors by detecting unfair trade practices. In case any unfair practice is detected it should take all necessary measures to undo the wrong. This is necessary in order to maintain the confidence of ordinary shareholders of a company who are sitting at a distance waiting to reap the fruits of their investments. They not being part of every decision making process of the company repose faith in the management which is expected to make sound commercial decisions for the collective benefit of all the shareholders. Such faith and trust cannot be allowed to be breached with impunity. The detection of scam by the officers of the Commission in the present case is commendable.

21. As we are inclined to hold that the sale in favour of Clearshore was not clean and has to be set at naught, the allegations with regard to contravention of the provisions of Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Ordinance, 2002 need not to be gone into. However with regard to the similar contravention as to the gift of 36% shares held by Appellants No.1 and 2's father to them

is concerned since it is made by father to sons i.e. such a close blood relation, the same cannot be said to be in contravention of the provisions of the Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Ordinance, 2002.

22. In view of the above discussion we hold that the shares of Appellant No.8 were sold to Clearshore Limited below their value that deprived the ordinary shareholders of Appellant No.8 the true worth of their shares. The right to claim the price differential between the two sale transactions therefor belongs to the such shareholders in proportion to their respective shareholdings which they held in Appellant No.8 as on 10.11.2004 and not to those who purchased the shares in Appellant No.8 after 10.11.2004. This appeal therefore has no merits and therefore is liable to be dismissed.

23. The Respondent No.1 is directed to deposit the price differential of 213.43 million rupees alongwith any income / interest accrued thereon with the Nazir of this Court. Nazir shall then invest this amount in some profit bearing government securities. In case any of the shareholders, who held shares as of 10.11.2004, approaches the Commission, the same shall first verify his claim and thereafter submit his claim to the Nazir of this Court who after his verification shall place his report before this Court for appropriate directions.

24. This appeal stands dismissed.

Dated: 12.10.2007


JUDGE

CHIEF JUSTICE