

BEFORE THE SECURITIES APPELLATE TRIBUNAL  
MUMBAI

**Appeal No. 138 of 2008**

**Date of decision: 08.09.2009**

M. Z. Khan  
S/o M. A. Khan  
R/o 133, Mehdi Nawaz,  
Banjara Hills, Hyderabad.

.....Appellant

Versus

1. Securities and Exchange Board of India  
Plot No. C4-A, 'G' Block,  
Bandra Kurla Complex,  
Bandra (East), Mumbai.

2. Burren Energy India Limited,  
Kierran Cross, 11, Strand,  
London WC2N 5HR.

3. Unocal Bharat Limited,  
Clarendon House,  
2, Church Street  
Hamilton HM11,  
Bermuda.

4. Hindustan Oil and Exploration Company  
HOEC House, Tandalja Road,  
Vadodara 390020, India.

5. E.n.i. S.p.A.  
Piazzale Mattei,  
1 – 00144, Rome.

.....Respondents

Mr. Sunil Mathews, Advocate with Mr. Hardik Sanghavi, Advocate for the Appellant.

Dr. Poornima Advani, Advocate with Ms. Harshada Nagare, Advocate for Respondent no. 1.

Mr. Soli Cooper, Advocate with Mr. Indranil Deshmukh, Mr. Aditya Mehta, Advocates for Respondents no. 2 & 3.

Mr. Prashant Beri, Advocate with Mr. Kaustubh Athalye, Advocate for Respondent no. 4.

Mr. Tejas Karia, Advocate for Respondent no. 5.

CORAM : Justice N. K. Sodhi, Presiding Officer  
Samar Ray, Member

Per : Justice N. K. Sodhi, Presiding Officer (Oral)

Burren Energy India Limited (Burren), the second respondent herein is a private limited company with its registered office in London. It was formed to acquire the entire equity share capital of Unocal Bharat Limited (for short UBL). UBL was incorporated in

Mauritius in July 1996. On February 14, 2005, the second respondent acquired the entire share capital of UBL which holds 26.01% of the share capital of Hindustan Oil Exploration Company (for short the target company). As a result of this acquisition, Burren made a public announcement to acquire further shares of the target company and its present holding therein is 27%. The acquisition by the second respondent was challenged by Hardy Oil & Gas plc. (for short Hardy Oil), another company registered in London. Appeal No. 132 of 2005 filed by Hardy Oil was dismissed by this Tribunal on March 8, 2006. Thereafter, the appellant filed number of complaints with the Securities and Exchange Board of India (for short the Board) alleging that the acquisition by the second respondent violated Regulations 12, 22(7) and 23(3) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as the takeover code). According to the appellant, the Board was taking no action on the complaints filed by him and therefore, he approached the High Court of Bombay by filing Writ Petition no. 1402 of 2008 for a mandamus directing the Board to deal with his complaints and dispose them off on merits. During the course of the proceedings before the High Court, the Board filed a detailed affidavit in response to the writ petition. It was pointed out in the affidavit that similar violations had been alleged by Hardy Oil in its complaints which were considered and rejected by the Board and that order of the Board was the subject matter of Appeal no. 132 of 2005. Reiterating that there was no violation of Regulation 23(3) of the takeover code, the Board in paragraph 13 of the affidavit stated as under:

13. "That there is no question of violation of regulation 23(3) of the Takeover Regulations. It has been mentioned by the petitioner that the only difference between regulation 22(7) and regulation 23(3) is that the offender in respect of former is acquirers whereas in respect of latter the offender is target company. Therefore, if SEBI had initiated adjudication for regulation 22(7) it should have also initiated adjudication for violation of regulation 23(3). This interpretation given by the petitioner is wrong as 22(7) creates a prohibition on the acquirers on appointing directors on the Board of target company during the "offer period" whereas the regulation 23(3) prohibits the target company from appointing any director on its Board as representing or having interest in the acquirer "after making of public announcement". Since in the present case acquirers appointed their two directors on the Board of the target company before making of public announcement, regulation 23(3) was not attracted."

The learned Judges of the High Court who dealt with the Writ Petition took note of the order passed by the Board rejecting the plea of Hardy Oil regarding the violation of Regulation 12 and observed that that issue had since been negated by the Board. The learned Judges of the High Court also took note of paragraph 13 of the affidavit of the Board and made the following observations in paragraphs 7 and 8 of their order:-

7. "Therefore, this part of the Affidavit is actually an adjudication of the point raised by the petitioner. Hence we observe that keeping in mind this Affidavit and treating this as an order of SEBI, the petitioner may follow an appropriate remedy available to him, in law."

8. "In the result we find that all the points which have been raised by the petitioner for being considered as SEBI have been answered directly and/or impliedly by SEBI and this Petition seeking directions against SEBI to consider these grievances of the petitioner does not survive."

The Writ Petition was disposed off with liberty to the appellant herein to pursue any alternative remedy available to him. In pursuance to the observations made by the High Court, the appellant filed Appeal no. 97 of 2008 before this Tribunal challenging the acquisition by the second respondent only on the ground that it violated Regulation 23(3) of the takeover code. The Tribunal did not agree with the appellant and dismissed the appeal on September 12, 2008. Not only did the appellant file the appeal before this Tribunal, he also challenged the order of the High Court dated June 13, 2008 in the Supreme Court by filing Special Leave Petition no. 15404 of 2008. This Special Leave Petition came up for hearing on September 19, 2008 when the learned counsel for the appellant sought permission to withdraw the same with a view to approach this Tribunal. The permission was granted and the following order was passed by the Hon'ble Supreme Court:-

"The learned counsel for the petitioner seeks permission to withdraw the special leave petition with a view to approach the appellate authority as stated by the High Court in the order impugned in the present special leave petition.

It is clarified that if the petitioner approaches the appellate authority, the authority will decide the matter without being influenced by any observations made by the High Court.

The special leave petition is dismissed as withdrawn accordingly. All contentions of the parties are kept open."

After withdrawing his Special Leave Petition, the appellant filed the present appeal on 4.11.2008 before this Tribunal.

We have heard Mr. Sunil Mathews, Advocate on behalf of the appellant, Mr. Soli Cooper, senior Advocate on behalf of the second respondent and Dr. Poornima Advani, Advocate on behalf of the Board. The appeal deserves to be dismissed on the short ground that the appellant while withdrawing his Special Leave Petition in the Supreme Court against the order of the Bombay High Court had suppressed material facts from their Lordships. He withdrew the Special Leave Petition with a view to approach this Tribunal. He did not disclose to the Supreme Court that he had already filed an appeal in pursuance to the observations made by the High Court challenging the acquisition by the second respondent and that the same had already been dismissed on September 12, 2008. If he had informed the Apex Court that he had approached this Tribunal and his appeal had already been dismissed, the order could have been different. As already noticed, the appellant had filed Appeal no. 97 of 2008 which had been dismissed by this Tribunal on September 12, 2008 and it was known to him on the day when he withdrew the Special Leave Petition. Be that as it may, the appeal deserves to be dismissed on other grounds as well. When the appellant filed Appeal No. 97 of 2008, it was open to him to challenge the acquisition by the second respondent on the ground that it violated Regulation 12 of the takeover code as well. He did not take up this plea. He challenged the acquisition only on the ground that it violated Regulation 23(3) of the takeover code which plea was rejected by this Tribunal. Not having raised the plea of violation of Regulation 12 in the earlier appeal which plea was available to him then, he cannot raise that plea in the present appeal. The present appeal is, therefore, barred on the general principles of constructive res judicata and the principles underlying Order 2 Rule 2 of the Code of Civil Procedure. The plea which could be raised and ought to have been raised in the earlier appeal but not raised cannot be allowed to be raised in this appeal. In any case, in the light of the observations made by the High Court, the plea that the acquisition was violative of Regulation 12 was not open to the appellant even if he had raised it in the earlier appeal. As noticed above, the learned Judges of the High Court took note of paragraph 13 of the affidavit filed by the Board and it was to that limited extent that the appellant was given liberty to file an appeal before the Tribunal. On

this ground as well, the plea regarding the violation of Regulation 12 is not open to the appellant.

There is yet another ground on which the appellant must fail. An appeal to this Tribunal lies under Section 15T of the Securities and Exchange Board of India Act, 1992. It provides that any person aggrieved “by an order of the Board” or by an order made by an adjudicating officer under this Act can prefer an appeal to this Tribunal. It is, therefore, necessary that there has to be an order passed by the Board against which an appeal could lie. In the instant case, there is no order of the Board that is being impugned. The grievance of the appellant, as can be seen from the memorandum of appeal, is that the Board is not taking any action on his complaints regarding the violation of Regulation 12 of the Takeover Code. This is what the appellant has said in his memo of appeal:-

c. “This appeal seeks to challenge the inaction of the Respondent no. 1 – SEBI in not, till date, adjudicating on the issue of violation of regulation 12 of the SEBI Takeover Code despite the issue being raised repeatedly by the Petitioner for over two years. The Appellant submits that, as explained hereafter, the present issue arises out of an illegal acquisition of control by Burren, a company that is incorporated in the United Kingdom, in an Indian Company HOEC (the Target Company).”

It is, thus, clear that what is sought to be challenged in the appeal is the inaction of the Board and not any order passed by it. The question whether inaction on the part of the Board can be challenged in appeal came up for our consideration in Appeal No. 140 of 2009 decided on August 28, 2009 and this is what we observed.

4. “It is further clear that the first respondent has not taken any final decision on the matter and has passed no order which could said to be adversely affecting the rights of the appellant or any other shareholder of Bharti. The informal guidance given by the general manager is not an “order” which could entitle any one to file an appeal. The word “order” is defined in Black’s Law Dictionary (Eight Edition) as “1. A command, direction, or instruction. 2. A written direction or command delivered by a court or judge. The word generally embraces final decrees as well as interlocutory directions or commands.” In the case before us, the first respondent has not issued any command or direction. An occasion to issue a direction or pass an order may arise, if any when, the proposal that is being discussed between the two companies is finalized. If and when, such a direction is issued or any order passed, it shall be open to any person who feels aggrieved by that order or direction to come in appeal before the Tribunal.

When faced with this situation, the learned counsel for the appellant contended that paragraph 12(i) and 14 of the affidavit filed by the Board in response to the Writ Petition in the High Court of Bombay should be treated as the order against which the present appeal has been filed. We are afraid we cannot accept such a contention. The submission made by the Board in its affidavit before the High Court cannot be taken as an order for the purposes of the present appeal, particularly when the Supreme Court has directed that we should not be influenced by any observation made by the High Court. The earlier appeal (Appeal no. 97 of 2008) filed by the appellant was entertained in view of the directions issued by the High Court observing that the plea made in paragraph 13 of the affidavit be taken as the decision of the Board for the purposes of the appeal. There is no such direction regarding violation of Regulation 12 of the Takeover Code. Therefore, we have no hesitation in holding that the present appeal is not maintainable.

In the result, the appeal fails and the same is dismissed. Since the appellant suppressed material facts from the Apex Court, he shall bear the costs of the respondents which are assessed at Rs.50,000/- to be shared by them equally. The application filed by the appellant seeking to raise additional grounds in the appeal also stands dismissed.

Sd/-  
Justice N. K. Sodhi  
Presiding Officer

Sd/-  
Samar Ray  
Member

08.09.2009  
ptm/ddg

Prepared and compared by