BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No.108 of 2008

Date of decision: 15.10.2008

Mr. Sohel Malik ……..Appellant

Versus

The Securities and Exchange Board of India …..Respondent No.1
Fedex Securities Limited .... Respondent No.2

Mr. N. H. Seervai, Senior Advocate with Mr. Zerick Dastur, Advocate for the Appellant.

Mr. J.J. Bhatt, Senior Advocate with Ms. Sejal Shah, Advocate for Respondent no.1.

None for Respondent no.2.

Coram: Justice N.K. Sodhi, Presiding Officer
Arun Bhargava, Member
Utpal Bhattacharya, Member

Per: Utpal Bhattacharya, Member

The appellant is an acquirer of the shares of Genesis International Corporation Ltd. (hereinafter referred to as the target company) within the meaning of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (Regulations for short). He is also a promoter of the target company. Fedex Securities Ltd. (respondent no.2) is the merchant banker appointed by the appellant for the public offer to acquire shares of the target company. Being aggrieved by certain directions contained in the communication dated September 9, 2008 from respondent no.1 addressed to respondent no. 2, the appellant has filed this appeal under section 15T of the Securities and Exchange Board of India Act, 1992 and Regulation 46 of the Regulations. The main grievance of the appellant is against the direction contained in the impugned communication whereby respondent no.1 has directed that the price offered in the public announcement for acquisition of 20 per cent equity shares of the target company should be recalculated by reckoning the date of the public announcement as the reference date in terms of Regulation 20 of the Regulations. The appellant is also aggrieved by the direction

contained in the impugned communication to the effect that the letter of offer should be dispatched to the shareholders within 10 days after carrying out necessary changes and that the offer should open within 5 days thereafter failing which the appellant would be liable to pay interest at the rate of 10% per annum to all the shareholders for the delay in payment.

2. We may now notice the facts of the case in brief. In a meeting held on 16.12.2006, the Board of Directors (BoD for short) of the target company decided to convene an extraordinary general meeting (EGM) of the members of the company to consider, inter alia, allotment of 35,30,000 warrants to the appellant. On 15.1.2007 the members of the target company passed a resolution at the EGM purporting to be under section 81(1A) of the Companies Act, 1956 authorising the BoD to issue by way of preferential allotment 35,30,000 warrants to the appellant which would entitle the appellant to subscribe to 35,30,000 equity shares of Rs.10 each of the company for cash at a price of Rs.19 per share (including a premium of Rs.9 per share). On 27.1.2007 the BoD made the preferential allotment of the warrants to the appellant. The appellant having partially exercised his right to convert 5,75,000 warrants to equity shares on 30.3.2007, the BoD allotted the same number of equity shares of the target company to him. Thereafter, the appellant decided to exercise his right to convert the remaining 29,55,000 warrants to equity shares. The BoD allotted these shares to the appellant on 28.6.2008. With this conversion, the voting rights of the promoter group of the company would increase from 50.38 per cent to 60.48 per cent. Accordingly, before actually acquiring voting rights upon conversion of these warrants, the appellant made a public announcement on 21.6.2008 through respondent no.2 for acquisition of 29,04,752 equity shares from the public shareholders as required in terms of Regulation 14 (2) of the Regulations. The price offered to the public shareholders was Rs.19 per equity share, the same as payable by the appellant for the preferential allotment. The price was calculated, according to the public announcement, as per the parameters laid down in Regulation 20 (4) and Explanation (ii) below Regulation 20 (11) of the Regulations. On 26.6.2008 respondent no.2 submitted the draft letter of offer to respondent no.1 to which the latter responded with the impugned communication dated 9.9.2008. Two paragraphs of this communication with which the appellant is aggrieved are reproduced below for facility of reference:-

"The letter of offer may be dispatched within 10 days from the date of our letter conveying comments/changes and offer may open within 5 days thereafter, failing which the acquirer will be liable to pay the interest @ 10% p.a. to all the shareholders for the delay in payment. Suitable amendments regarding the revised activity schedule and consequential effects/compliance on other obligations like escrow etc., be made in the offer document, wherever required.

……

4. Offer price and Financial arrangement:

a. Under point 7 – Re-calculate the offer price by reckoning the date of PA as the reference date in terms of regulation 20 and offer the revised price as re-calculated to all the shareholders. Further, necessary changes in terms of the escrow account and other disclosures may be made at all the relevant places in the offer document."

3. The dispute between the appellant and Respondent no.1 is essentially about the method of pricing of the public offer. However, both sides agree that the price in this case is to be determined in accordance with Regulation 20(4) and Explanation (ii) below Regulation 20(11) of the Regulations which are reproduced below:-

"**Offer Price**

20. (1) The offer to acquire shares under regulation 10, 11, or 12 shall be made at a price not lower than the price determined as per sub-regulations (4) and (5).

(2) …….

(3) ……..…

(4) For the purposes of sub-regulation (1), the offer price shall be the highest of-

(a) the negotiated price under the agreement referred to in sub-regulation (1) of regulation 14;

(b) price paid by the acquirer or persons acting in concert with him for acquisition, if any, including by way of allotment in a public or rights or preferential issue during the twenty-six week

period prior to the date of public announcement, whichever is higher;

(c) the average of the weekly high and low of the closing prices of the shares of the target company as quoted on the stock exchange where the shares of the company are most frequently traded during the twenty-six weeks or the average of the daily high and low of the prices of the shares as quoted on the stock exchange where the shares of the company are most frequently traded during the two weeks preceding the date of public announcement, which ever is higher:

……..

……..

(11) The letter of offer shall contain justification or the basis on which the price has been determined.

Explanation:

(i) …….

(ii) Where the public announcement of offer is pursuant to acquisition by way of firm allotment in a public issue or preferential allotment, the average price under clause (c) of sub-regulation (4) shall be calculated with reference to twenty-six week period preceding the date of the board resolution which authorized the firm allotment or preferential allotment.

……..”

In the offer document the price has been calculated by Respondent no.2 as under:-

“Since the Equity Shares of the Target Company has not been infrequently traded as per explanation (i) to Regulations 20(5) at BSE during the 6 calendar months preceding the month in which the Board of Directors decided to convene Extraordinary General Meeting of Members to consider the preferential allotment, the Offer price has been justified, taking into account, the following

parameters, as set out under Regulation 20(4) read with Reg.20(11) under para “explanations”

1	Negotiated price paid by the Acquirer or Persons Acting in Concert under any Agreement referred to in sub regulation (1) of Regulation 14.	N.A.
2	Highest price paid by the Acquirer or PAC for acquisition of Shares or voting rights including by way of allotment in a Public or Rights issue or preferential allotment, if any, during the twenty-six week period prior to the date of PA.	N.A.
3	The average of the weekly high and low of the closing prices at BSE in the 26 weeks preceding the date of Board meeting which authorized the preferential allotment	Rs.15.16
4	The average of the daily high and low prices at BSE in the 2 weeks preceding the date of Board meeting which authorized the preferential allotment	Rs.17.98
5	The price at which Equity Shares are allotted to the Acquirer, upon exercise of Warrants allotted on a preferential basis.	Rs.19.00
6	Highest of the above	Rs.19.00

……..”

The appellant has taken the date of the meeting of the BoD which made the allotment of warrants as the reference date in items 3 and 4 in the above table. Respondent no.1 has directed the appellant to change this reference date of 16.12.2006 to the date of the public announcement which was 21.6 2008. This change, according to the appellant, would impose an additional liability of more than Rs. 24 crores on him since the price of the scrip went up substantially during the intervening period.

4. We have heard the arguments of the learned senior counsel on both sides. The learned senior counsel appearing for the appellant argued that in case of acquisition in any manner other than through a public issue or a preferential allotment, the information about such a transaction triggering the Regulations comes to the public domain for the first time through the public announcement. Regulation 20(4)(c) stipulates that the reference date for the purpose of computing the offer price in such cases is the date of the public announcement and the offer price is to be computed on the basis of the price movement before that date i.e. before the knowledge of the transaction has become public. Once the knowledge becomes public, the market would react and the price of the scrip would move up or down. If the price moves up, the offer price would be lower than the current market

price and the acquirer would not be required to pay the higher price; in such a scenario, the public shareholders also would not have the need for an exit route to be provided by the acquirer. On the other hand, if the price falls, the offer price would be more than the current price and the acquirer would be obliged to provide an exit route to the public shareholders by paying a higher price. In case of acquisition through a preferential allotment, the reference date for the purpose of computing the offer price has been changed, under Explanation (ii) below Regulation 20(11) of the Regulations, to the date of the BoD resolution authorizing the preferential allotment when information about such allotment reaches the public domain for the first time. According to the learned senior counsel for the appellant, in the present case this date was 16.12.2006 when the BoD of the target company decided to convene an EGM of members to consider the preferential allotment of warrants because the information was immediately made available to all members and to the stock exchanges. The learned senior counsel also argued that changing this date to 21.6.2008, the date of the public announcement, as directed by respondent no.1, would be wholly irrational since it would violate the basic principle that during a public offer, the price to be offered by the acquirer must be based on price movement of the scrip prior to the knowledge of the acquisition becoming public.

5. Defending the impugned directions, the learned senior counsel for respondent no.1 pointed out that the case of the appellant had been argued entirely on the basis of the understanding that it was the acquisition of warrants by the acquirer that triggered Regulation 11(1) of the Regulations and led to the public offer. According to him, this is not correct and it is the acquisition of voting rights by the acquirer with the issue of shares on conversion of warrants that the Regulations are triggered. On this basis, the learned senior counsel argued that two views are possible. Since the Regulations are triggered only with the acquisition of shares, a view can be taken that the date of allotment of shares to the acquirer by the BoD should be the reference date for the purpose of computing the offer price. An alternative view could be that the preferential allotment was only of warrants and not of shares; in other words, there was no preferential allotment of shares. In that case, the pricing of the public offer would be governed solely by Regulation 20(4)(c) and Explanation (ii) below Regulation 20(11) would not come into the picture at all. The reference date should,

therefore, be the date of the public announcement following the acquirer's decision to convert the warrants. The impugned direction to the appellant is based on the latter view.

6. We agree with the learned senior counsel for respondent no.1 that it is the acquisition of voting rights that triggers the provisions regarding public announcements and public offers contained in the Regulations. Acquisition of securities without voting rights, including convertible warrants as in the present appeal, will not, by itself, necessitate any public announcement or public offer. In the circumstances of the present case, it becomes clear from a plain reading of Regulation 11(1), which is reproduced below, that the acquirer has to make a public announcement only when he becomes "entitled to exercise more than 5 per cent of the voting rights**.**"

"Consolidation of holdings

> 11(1) No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, 15 per cent or more but less than fifty five per cent (55%) of the shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise more than 5 per cent of the voting rights in any financial year ending on 31st March unless such acquirer makes a public announcement to acquire shares in accordance with the Regulations."

The above reading of Regulation 11(1) is in complete harmony with Regulation 14(2) which deals with the timing of the public announcement of offer in case of securities which confer voting rights on the acquirer only upon conversion or exercise of option, as the case may be. When an acquirer acquires such securities in excess of the percentage specified in Regulation 10 or Regulation 11, he is required to make a public announcement not immediately but, as laid down in Regulation 14(2), "not later than four working days before he acquires voting rights on such securities upon conversion or exercise of option, as the case may be." This provision reinforces our view that it is the acquisition of voting rights that triggers the public announcement and not mere acquisition of securities without voting rights. Therefore, in the present case, the requirement of public announcement arises only with the allotment of shares and not with the allotment of warrants.

7. The next question to be addressed in this case is what should be the date with reference to which the offer price is to be determined. Respondent no.1 has directed the appellant to treat the date of the public announcement as the reference date on the premise that the allotment of shares to the appellant on conversion of the warrants was not a

preferential allotment and, therefore, pricing of the public offer should be strictly on the basis of Regulation 20(4)(c). We do not agree with this proposition. The target company initially made a preferential allotment of warrants to the appellant as approved by the members of the target company in the EGM held on 15.1.2007. The warrants had a lock in period of three years and could be converted to shares upon exercise of option by the appellant at any time within 18 months from their date of issue. The allotment of these converted shares to the appellant by the BoD after the appellant exercised his option was thus clearly on a preferential basis. The allotment of the converted shares was made in two tranches. The allotment of 5,75,000 shares in the first tranche did not trigger the Regulations but the second tranche of allotment of 29,55,000 shares did and the appellant made the public announcement on 21.6.2008 as required under the Regulations. However, the reference date for the purpose of computing the offer price was taken as 16.12.2006, the date of the BoD meeting in which it was decided to convene the EGM for seeking the approval of the members for the allotment of warrants. The reason for this, as the learned senior counsel for the appellant clarified, was that the information about the BoD meeting and the allotment of convertible warrants was immediately sent to the members of the company and to the stock exchange(s) and the allotment became public knowledge. Therefore, in accordance with Explanation (ii) below Regulation 20(11), the reference date for computing the offer price was taken as the date of the BoD meeting. We are unable to agree with this reasoning. We have already taken the view that the Regulations are triggered only with the acquisition of voting rights which did not take place when the warrants were issued. Voting rights were acquired only when shares were actually allotted. It is true that information about issue of warrants became public with the holding of the BoD meeting of 16.12.2006 but that cannot be taken as information about issue of shares. The issue of shares was contingent on the warrant holder exercising the option to convert the warrants and cannot be taken as a mere formality. It was, in fact, an event quite distinct from the issue of warrants. Therefore, the reference date for computing the offer price should be 28.6.2008, the date of the BoD meeting when the shares were allotted and not 16.12.2006, as the appellant has taken nor 21.6.2008, the date of the public announcement, as decided by respondent no.1.

8. We have noted the appellant's grievance regarding payment of interest to the shareholders but are not separately dealing with it in view of the direction that we are going to issue to respondent no.1 to send a fresh communication to the appellant.

9. In the result, we do not consider the calculation of the offer price by the appellant to be correct and accordingly dismiss the appeal. At the same time we set aside the impugned communication and direct respondent no.1 to issue a fresh communication within a period of two weeks from the date of this order incorporating 28.6.2008 as the reference date for calculation of the offer price and allowing the appellant a reasonable time for opening the offer before imposing the liability for payment of interest keeping in view the time required for the amended public offer to reach the shareholders and the time required by them to consider their option afresh, given the change in the offer price. No order as to costs.

Sd/-
Justice N.K. Sodhi
Presiding Officer

Sd/-
Arun Bhargava
Member

Sd/-
Utpal Bhattacharya
Member

RHN
15.10.2008