

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 183 of 2009

Date of decision: 9.2.2010

Triumph International Finance India Ltd.
Oxford Centre,
10, Shroff Lane,
Colaba Causeway, Colaba,
Mumbai.

...Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No. C-4A,
G-Block, Bandra Kurla Complex,
Bandra (East), Mumbai.

...Respondent

Mr. Zal Andhyarujina, Advocate with Mr. Dhawal Kenia, Advocate for the Appellant

Mr. Kumar Desai, Advocate with Ms. Daya Gupta, Advocate for the Respondent.

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

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

Whether the appellant was a “person acting in concert” with five other entities when it acquired shares of Adani Exports Ltd. (hereinafter called the target company) is the short question that arises for our consideration in this appeal filed under section 15T of the Securities and Exchange Board of India Act, 1992. The appeal is directed against the order dated June 30, 2009 passed by the adjudicating officer holding that the appellant had acted in concert with other entities when it acquired the shares and that it did not make the necessary disclosures to the target company thereby violating Regulation 7 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (for short the takeover code). In order to appreciate the aforesaid question and the circumstances in which it arises, it is necessary to first notice some facts.

2. The Securities and Exchange Board of India (for short the Board) carried out investigations into the dealings in the shares of the target company to find out the

role played by Ketan Parekh and his entities while trading in the scrip. Investigations revealed that substantial quantity of shares of the target company had been acquired by the Ketan Parekh group including the appellant herein. The six companies that were included in the Ketan Parekh group were Classic Credit Ltd., Classic Share & Stock Broking Services Ltd., Panther Fincap & Management Services Ltd., Panther Investrade Ltd., Triumph International Finance Ltd. (the appellant) and Triumph Securities Ltd. which have been referred to by the Board as Ketan Parekh entities / groups. It transpired that all these entities together acquired a large number of shares while acting in concert with each other and that their total acquisition was more than 5 per cent of the shares or voting rights in the target company and that they did not disclose the aggregate of their holdings to the company thereby violating Regulation 7 of the takeover code. Accordingly, a show cause notice dated June 14, 2005 was issued to the appellant and the other five entities alleging that they had all associated themselves with Ketan Parekh in acquiring the shares and that they acquired shares during the period from November 1999 to January 2001. The appellant is alleged to have acquired shares from July 1, 2000 to October 16, 2000. The total acquisition of the six acquirers including the appellant on six dates mentioned in para 5 of the show cause notice is said to have exceeded the limit of 5 per cent prescribed by Regulation 7 of the takeover code. As no other entity has come up in appeal, we are only concerned with the appellant. Before we refer to the reply filed by the appellant to the show cause notice, it is pertinent to mention that one Ketan Parekh through his investment and broking companies which have been clubbed with the appellant in the present proceedings is said to have manipulated the securities market in different scrips including that of the target company during the period from 1999 to 2001-02 and the Board by its order dated December 12, 2003 had found him and his entities guilty of manipulating the market in a big way and debarred them from accessing the same for a period of 14 years and that order was upheld by this Tribunal in Ketan Parekh vs Securities and Exchange Board of India Appeal no. 2 of 2004 decided on 14.7.2006.

3. The appellant filed a detailed reply to the show cause notice denying the allegations made therein. The appellant specifically denied that it had acted in

concert with Ketan Parekh entities. It also denied having acted with any of the companies with which it has now been clubbed. The learned counsel for the appellant however admitted during the course of the hearing that the appellant had acted as a broker for some of the investment companies owned and controlled by Ketan Parekh which were its valued clients.

4. On a consideration of the material collected by the adjudicating officer during the course of the enquiry and also the material that was gathered during the investigations and taking note of the reply filed by the appellant, he came to the conclusion that the appellant along with the other entities to whom the show cause notice had been issued had acquired shares of the target company which crossed the threshold limit of 5 per cent of the paid up share capital of the target company and since they all failed to disclose their holdings to the target company, they violated Regulation 7 of the takeover code. He also found that the appellant and the other noticees were acting in concert with each other and that all the companies including the appellant were closely associated with Ketan Parekh. On the basis of these findings he imposed the maximum monetary penalty of Rs. 5 lakhs on the appellant. Hence this appeal. It is pertinent to mention that no order was passed against the other noticees (companies which were clubbed with the appellant) as they all filed applications for a consent order and the proceedings qua them have ended in a consent order.

5. We have heard the learned counsel for the parties. The fact that the appellant acquired shares of the target company is not in dispute. It is also not in dispute that the total shares acquired by the appellant and the other noticees taken together exceed 5 per cent of the paid up share capital of the target company on all the six days as mentioned in para 5 of the show cause notice. Again, it is common case of the parties that the total number of shares acquired only by the appellant do not exceed the 5 per cent limit prescribed by Regulation 7 of the takeover code. In view of this admitted position, the only question that we need to answer is whether the appellant was acting in concert with the other noticees as alleged in the show cause notice and found by the adjudicating officer in the impugned order. Learned counsel for the parties are agreed that if the answer to this question is in the negative, the

impugned order cannot be sustained. On the other hand, if the appellant acted in concert with the other entities, it is guilty of violating Regulation 7.

6. We have carefully perused the show cause notice which was common to all the six entities including the appellant who were alleged to have acted in concert with each other in the acquisition of the shares of the target company. Apart from making a bald assertion in para 5 of that notice that all the noticees were acting in concert, there is nothing else in the show cause notice to suggest that the appellant was acting in concert with the other noticees. As already observed, the notice was issued to Panther Investrade Ltd., Classic Share and Stock Broking Services Ltd., Panther Fincap & Management Services Ltd., Classic Credit Ltd. and Triumph Securities Ltd. besides the appellant and they all have been found to be companies associated with and controlled by Ketan Parekh. The appellant seriously challenges the finding that it is controlled by Ketan Parekh or by any of his entities. Since none of the noticees other than the appellant has come up in appeal, we shall proceed to dispose off this appeal on the basis that the other entities were Ketan Parekh controlled entities. This apart, this Tribunal while disposing off Ketan Parekh's case (supra) has already upheld the findings that some of the noticees other than the appellant were Ketan Parekh controlled companies. The appellant was not involved in Ketan Parekh's case nor in any other appeal decided along with that case. A reading of the show cause notice makes it clear that the adjudicating officer is throughout referring to all the noticees as close associates of Ketan Parekh. However, in the impugned order he has referred to several facts in para 19 to hold that the appellant was connected / affiliated to Ketan Parekh atleast from the year 1999 onwards and that its plea that it was not acting in concert with other noticees could not be accepted. Since the shares of the target company had been acquired with a common objective of the Ketan Parekh group, it is necessary to refer to the facts noticed in para 19 of the impugned order and the same reads as under:-

“19. However, it was observed from the records made available even to the noticee that:

- i. 15.84% (7.92% each) of the equity share capital of the Company were held by Mrs. Mamta Parekh

- (wife of Mr. Ketan) and Mrs. Ami Parekh (wife of Mr. Kartik), where Mr. Ketan and Mr. Kartik were cousins.
- ii. The noticee held 49% in TSL, which was under the management and control of Mr. Ketan and Mr. Kartik. An Option agreement dated March 18, 1999, was executed by and between the noticee and Mr. Ketan. The noticee paid consideration to Mr. Ketan to acquire 51% equity share capital of TSL on 21/03/1999. TSL was to become a 100% subsidiary of the noticee by June 2001. The noticee had earlier admitted to have nominated 2 directors on the Board of TSL.
 - iii. The noticee did not have membership of the Bombay Stock Exchange Limited and TSL did not have membership of the National Stock Exchange of India Limited. Both the entities complemented each other in executing trades in the other stock exchanges as admitted by the noticee on earlier occasions. Both, the noticee and TSL, shared a common address and employee.
 - iv. For the promoters of Aftek, the Company belonged to Mr. Ketan.
 - v. Koproan had advanced an Inter Corporate deposit of Rs. 78 crores to Classic Credit Ltd. – controlled by Mr. Ketan. It was stated by Koproan that Classic Credit Ltd. was represented by Mr. Ketan, Mr. Dharmesh Doshi and Ms. Aditi. Mr. Dharmesh Doshi was the Managing Director of the Company and he was neither a director nor an employee of Classic Credit Ltd.
 - vi. During October 1999, Mr. Ketan had approached the promoters of Lupin Laboratories and dealt on behalf of the noticee for the transaction of 60,000 shares of Lupin Laboratories between Zyma Laboratories and Almel Investments which were executed by the noticee. This shows that Mr. Ketan was working for the noticee even in 1999, when he was neither an employee nor a director of the noticee, during that period.
 - vii. The noticee and TSL were enjoying a joint overdraft facility of Rs. 50 crores each from Global Trust Bank Ltd. against a common security to be provided by either of them.
 - viii. It was also noticed that on 08.03.2001, the noticee had pledged 75,50,000 shares of Global Ecomm. to Global Trust Bank Ltd. for the loan taken by it. Prior to this pledge, Panther Fincap & Management Services Ltd. (which had Mr. Ketan as director) had transferred these shares to the noticee.
 - ix. Also Classic Share and Stock Broking Services Ltd., Panther Investrade Ltd., Classic Credit Ltd. and TSL, all had the same address, i.e. Radha Bhavan, 121, Nagindas Master Road, Fort, Mumbai – 400023.
 - x. All the entities, Classic Share and Stock Broking Services Ltd., Panther Investrade Ltd., Classic Credit Ltd., Panther Fincap & Management Services Ltd., TSL and the noticee, had either Mr. Ketan or Mr. Kartik or both as Directors. Kirti

Parekh was also a Director in 4 of the above entities.”

Having noticed the aforesaid facts, the adjudicating officer records his findings in para 20 which is also reproduced hereunder for facility of reference.

“20. Hence all the above point out to the fact that the noticee was connected / affiliated to Mr. Ketan at least from the year 1999 onwards. Thus, the noticee’s plea that it was not affiliated to or managed by Mr. Ketan Parekh or Mr. Kartik Parekh does not hold ground. Neither does the plea that the noticee was not acting in concert with the other entities as mentioned in the above paragraphs hold ground, since the shares had been acquired with a common objective of the Ketan Parekh group, of which the noticee also forms a part. Also the noticee’s claim that Classic Credit Ltd. and Panther Fincap & Management Services Ltd. had been its clients and the noticee had no relationship with them other than that as clients cannot be accepted in view of the facts discussed in the previous paragraphs.”

Let us now examine whether all the facts referred to in para 19 taken collectively or individually establish the allegation that the appellant was acting in concert with the other noticees. “Person acting in concert” has been defined in the takeover code to mean persons who for a common objective or purpose of substantial acquisition of shares or voting rights pursuant to an agreement or understanding (formal or informal) directly or indirectly cooperate by acquiring or agreeing to acquire shares or voting rights in the target company. It is, thus, clear that before two or more persons can be said to be acting in concert with each other they must have a common objective and that common objective should be substantial acquisition of shares. The shares then should be acquired pursuant to an agreement or an understanding which could be formal or informal. Sub section (2) of clause (2)(1)(e) of the takeover code then gives us the list of persons who shall be deemed to be acting in concert with each other. Before a charge of acting in concert is levied, it has to be alleged that the delinquent had a common objective pursuant to an agreement or understanding with another person for substantial acquisition of shares of the target company. This element is missing in the show cause notice that was issued to the appellant though a bald assertion had been made in para 5 of the show cause notice that all the noticees were acting in concert. This apart, the facts referred to in para 19 of the impugned

order and reproduced hereinabove taken collectively or individually do not, in our opinion establish the fact that the appellant was acting in concert with other entities including Triumph Securities Ltd. Association between persons is one thing but their acting in concert with a common objective to acquire substantial number of shares in a company in pursuance to an understanding or an agreement between them is altogether different. Merely because the appellant acted as a broker of some of the companies owned / controlled by Ketan Parekh does not make it a 'person acting in concert' with those companies. This could, if at all, mean association with those companies. Close business association between two or more persons does not by itself make them persons acting in concert. The facts noticed hereinabove were considered by this Tribunal in Triumph International Finance Ltd. vs Securities and Exchange Board of India Appeal no. 35 of 2002 decided on May 4, 2007 which had been filed by the appellant herein. Its certificate of registration as a stock broker had been cancelled. One of the questions that arose for the consideration of the Tribunal was whether the appellant was controlled and managed by Ketan Parekh and / or his entities. The facts now referred to in para 19 of the impugned order had been made the basis of holding the appellant to be a company controlled by Ketan Parekh and that finding was reversed in the appeal holding that the appellant was not under the control of Ketan Parekh though it was a close associate of his investment / broking companies. This is what the Tribunal has observed in its order dated May 14, 2007.

“ We have heard the learned counsel for the parties who have taken us through the voluminous record of this case. The first argument of the learned counsel for the appellant is that the Board has grossly erred in recording a finding that the appellant was being controlled by Ketan Parekh and that it was difficult to believe that it was an independent body run absolutely with no control of Ketan Parekh. We have perused paragraphs 10.4.1 to 10.4.9 of the impugned order and agree with the learned counsel for the appellant that the findings of the Board in this regard cannot be upheld. It is not in dispute that Mrs. Mamta Parekh wife of Ketan Parekh holds 7.92% of the share capital of the appellant and an equal percentage of shares are held by Mrs. Ami Parekh wife of Kartik Parekh who is a cousin brother of Ketan Parekh from the paternal side (father's brother's son). The two ladies, thus, hold 15.84% of the total share capital in the appellant company. This by itself does not give Ketan Parekh a controlling stake in the company. It is also true that Ketan Parekh was a director of the appellant from 16.12.2000 upto 31.3.2001 but did not attend any board meeting during this period. This, again, is not indicative of any control over the company. Merely because a person is on the board of directors of a company does not lead to the conclusion that he is in control of that company. The appellant holds 49% shares in Triumph

Securities Pvt. Ltd. (TSL) which is admittedly a Ketan Parekh entity and the former (appellant) had entered into an agreement with TSL to acquire 51% shares of Ketan Parekh. The reason for this agreement is that the appellant is a member of the NSE whereas TSL was operating on the Bombay Stock Exchange (BSE) and with a view to expand its business so as to operate on both the exchanges, the appellant decided to takeover TSL. This fact also does not lead us to the conclusion that Ketan Parekh was controlling the appellant. The Board has relied upon the statements of some persons who had dealt with Ketan Parekh and/or his investment companies and/or the appellant prior to April, 2001 who stated that they regarded the appellant as one of the entities of Ketan Parekh which was under his control like any of his investment/broking companies. We were also taken through those statements but that is only the perception of those persons. What appears to us is that because of the close business relations between the appellant and Ketan Parekh and his other entities, the persons dealing with them generally believed that it was Ketan Parekh who was controlling the appellant as well but we do not find any such material on the record. The perception of some of those who dealt with the appellant and Ketan Parekh is not enough for us to record such a finding.

The learned counsel for the appellant, however, conceded before us during the course of the hearing that the appellant which was a stock broker had close business relations with Ketan Parekh and his investment companies for which it had acted as a broker. The business which Ketan Parekh gave to the appellant was substantial and, therefore, the appellant regarded Ketan Parekh and his investment companies as its valued and important clients. This is what appears to be so. There is ample material on the record to show that Ketan Parekh and his investment companies which had subsequently been debarred from accessing the capital market had been operating through the appellant as their broker. It is not necessary for us to discuss that material in view of the admission made by the learned counsel for the appellant. These business dealings howsoever close they may have been also do not lead us to conclude that Ketan Parekh was controlling the appellant company. The fact that the appellant and TSL (Ketan Parekh entity) had close business association is further clear from the fact that they were enjoying a joint overdraft facility from Global Trust Bank Ltd. against common security to be provided by either of them. We agree with the learned counsel for the appellant that this again is no proof of Ketan Parekh having control over the appellant. We have examined the facts noticed by the Board in paragraphs 10.4.1 to 10.4.9 of the impugned order and find that none of them independently or collectively conclusively establish the fact that the appellant was under the actual control of Ketan Parekh. We are also of the view that the finding whether the appellant was being controlled by Ketan Parekh or not is not material for deciding the issues that have been raised in this appeal. We have examined this aspect of the matter in detail only because great emphasis was laid by the appellant in challenging the finding recorded by the Board that the appellant being a Ketan Parekh entity was actually controlled by him. In view of the above discussion we have no hesitation to hold that the appellant was not under the actual control of Ketan Parekh though it was a close associate of his and his investment / broking companies with which it had substantial business dealings. This apart, Ketan Parekh has financial interest in the appellant.”

In view of our findings recorded earlier in Appeal no. 35 of 2002, we are satisfied that none of the factors referred to in para 19 in the impugned order either collectively or taken individually would establish the fact that the appellant was acting in concert with Ketan Parekh or his entities. As already noticed, the learned

counsel for the appellant admitted before us that the investment companies of Ketan Parekh were valued clients of the appellant which was a broker and they had close business relations. This is precisely what this Tribunal had held in the earlier appeal filed by the appellant. Close business relations between persons / parties cannot by themselves lead us to conclude that they were acting in concert with each other for the purpose of acquiring the shares under the takeover code.

7. Shri. Kumar Desai, learned counsel for the respondent Board then contended that the appellant and Triumph Securities Ltd. in which Ketan Parekh had 51 per cent shareholding enjoyed an over draft facility of Rs. 50 crores each from Global Trust Bank Ltd. against a common security which was to be provided by either of them. He referred to the demat account statement of the appellant which account is maintained with Global Trust Bank Ltd. as a participant of the National Securities Depository Ltd. and contended that the shares in the account of the appellant had come from Classic Credit Ltd. and Panther Investrade Ltd. and the same were pledged with the Bank. The argument is that since the shares were credited to the proprietary account of the appellant they belonged to it and when the pledge was redeemed the shares were given back to Classic Credit Ltd. only. This fact, according to the learned counsel, is sufficient to establish that the appellant was acting in concert with Classic Credit Ltd. and Panther Investrade Ltd. We regret our inability to accept this argument. Merely because the appellant and Triumph Securities Ltd. enjoyed a joint over draft facility does not lead to the conclusion that they were acting in concert for acquiring the shares of the target company. Such dealings, at the most, indicate close business association between the entities which, we have already held, do not establish the fact that they were acting in concert with each other. Even if one were to assume that the appellant and Triumph Securities Ltd. were acting in concert, it would not follow that the shares acquired by the other entities to whom the common show cause notice had been issued were to be clubbed with the shares acquired by the appellant. It is pertinent to mention here that it is common case of the parties that the shareholding of the appellant together with that of Triumph Securities Ltd. also did not exceed the threshold limit of 5 per cent prescribed by Regulation 7 of the takeover code.

8. No other point was raised.
9. For the reasons recorded above we cannot uphold the findings recorded by the adjudicating officer that the appellant was acting in concert with the said entities which were managed and controlled by Ketan Parekh.
10. Before concluding we may notice an argument that was raised on behalf of the appellant. Mr. Zal Andhyarujina, learned counsel for the appellant, contended that even if it be assumed that the appellant was acting in concert with the other entities to whom the common show cause notice had been issued, the shares held by them in their respective names could not be clubbed with the shares of the appellant for the purpose of making disclosures under Regulation 7 of the takeover code. The argument is that Regulation 7 applies only to the shares acquired by the acquirer and does not take into account the shares of persons acting in concert with the other entities. Since we have held that the appellant was not acting in concert with the other entities, it is not necessary for us to deal with this argument.

In the result, the appeal is allowed and the impugned order set aside. There is no order as to costs.

Sd/-
Justice N. K. Sodhi
Presiding Officer

Sd/-
Samar Ray
Member

9.2.2010
Prepared and compared by:
msb/-