BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No. 205 of 2009

Date of decision: 06.05.2010

M/s. Punrasar Holding Pvt. Ltd.
(formerly Punrasar Stock Broking Pvt. Ltd.)
404, Vaishno Chambers,
6, Brabourne Road,
Kolkata – 700 001. …… Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No.C-4A, "G" Block,
Bandra Kurla Complex, Bandra (East),
Mumbai – 400 051. …… Respondent

Mr. Nand Lal Shah, Practicing Chartered Accountant with
Mr. Vijay Kumar Chandak, Chartered Accountant for the Appellant.

Dr. Mrs. Poornmia Advani, Advocate with
Mr. Debasish Kotoly, Advocate for the Respondent.

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

Per : Justice N.K. Sodhi, Presiding Officer

Whether the appellants in these two appeals (no. 205 and 206 of 2009) were appointed to the board of directors of Winsome International Limited (for brevity the target company) during the offer period and thereby violated the provisions of Regulation 22(7) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (referred to hereinafter as the takeover code) is the short question before us. These appeals raise common questions of law and fact and are being disposed of by this order. Facts leading to the filing of the appeals are these.

2. M/s. Punrasar Holding Pvt. Ltd., the appellant in Appeal no. 205 of 2009 together with Shri Sheo Ratan Agarwal, the appellant in the connected appeal entered into a share purchase agreement on April 19, 2006 with the promoters of the target company for acquiring 40.70 per cent of its paid-up equity capital amounting to 7,00,000 shares at a

price of Rs.11.50 per share on a spot delivery contract basis. This acquisition triggered Regulations 10 and 12 of the takeover code and, therefore, the appellants made a public announcement on April 24, 2006 to the shareholders of the target company to purchase upto 3,44,000 fully paid-up equity shares of Rs.10 each representing 20 per cent of its paid-up equity share and voting capital at a price of Rs.12 per share payable in cash. The draft letter of offer which has eventually to go to the shareholders has first to be sent to the Securities and Exchange Board of India (for short the Board) for its comments under Regulation 18 of the takeover code. It was sent on May 5, 2006 by Sumedha Fiscal Services Limited, the Manager to the offer on behalf of the appellants. It appears that while scrutinising the draft letter of offer, the Board noticed that Shri Prakash Chand Choraria, a director of Punrasar Holding Pvt. Ltd. and Shri Sheo Ratan Agarwal were appointed as directors on the board of the target company on April 19, 2006, the day the share purchase agreement was executed. This, according to the Board, was in violation of Regulation 22(7) of the takeover code and, therefore, two identical notices both dated March 14, 2008 were issued to the appellants to show cause why an enquiry should not be held against them and why penalty should not be imposed on them under section 15HB of the Securities and Exchange Board of India Act, 1992 (for short the Act) for this violation. They filed separate but identical replies dated April 4, 2008 pointing out that they had been appointed to the board of directors of the target company in the meeting held on April 19, 2006 which was held prior to the board meeting for considering the share purchase agreement and that it was a matter of coincidence that their appointment was made on the same day on which the share purchase agreement had been executed. It was further pointed out that both the appellants had undertaken not to participate in any matter(s) concerning or relating to the offer including any preparatory steps leading to the offer and also abstained from all proceedings relating to the offer as per Regulation 22(9) of the takeover code. On a consideration of the reply filed by the appellants and after affording them a personal hearing on November 7, 2008, the adjudicating officer concluded that the appellants had not placed any material on record to establish that they were appointed directors to the board of the target company prior to the execution of the share purchase agreement as alleged by them and observed “As the

Noticee has failed to produce any material in his defence, I am unable to accept the contentions raised by the Noticee". The adjudicating officer further observed that it was quite curious that the target company would have two board meetings in a day, one for the appointment of new directors and the other for considering the offer of the acquirers when the new directors are themselves the acquirers. He also referred to the provisions of the Companies Act and observed that the appointment of a director of a public limited company is not made instantaneously. He further observed that the share purchase agreement could not have been entered into without proper negotiations and discussions and since the appellants are a party to the agreement, it could be assumed that they would have participated in the negotiations and discussions and that they must be well aware that they would be entering into the agreement to acquire a substantial amount of shares of the target company. The adjudicating officer concluded that the appellants violated Regulation 22(7) of the takeover code and that the violation warranted the imposition of monetary penalty. After taking into account the factors enumerated in section 15J of the Act, he imposed a monetary penalty of Rs.3 lacs on each of the appellants by his two separate orders both dated August 14, 2009. It is against these orders that the present appeals have been filed.

3. We have heard the authorized representative appearing on behalf of the appellants and the learned counsel for the respondent Board and are of the view that the appeals deserve to be dismissed. Before we state our reasons for dismissing the appeals, it is necessary to refer to the relevant provisions of the takeover code. Regulation 22(7) which is said to have been violated by the appellants reads as under:

> "During the offer period, the acquirer or persons acting in concert with him shall not be entitled to be appointed on the board of directors of the target company:
> Provided …….
> Provided further that where the acquirer, other than the acquirer who has made an offer under regulation 21A, after assuming full acceptances, has deposited in the escrow account hundred per cent of the consideration payable in cash where the consideration payable is in cash and in the form of securities where the consideration payable is by way of issue, exchange or transfer of securities or combination thereof, he may be entitled to be appointed on the Board of Directors of the target company after a period of twenty-one days from the date of public announcement."

The offer period referred to in the aforesaid provision has been defined in clause (f) of Regulation 2(1) of the takeover code and the same reads as under:

> "2.(1) In these regulations, unless the context otherwise requires:-
> (a) to (e)……
> (f) "offer period" means the period between the date of entering into Memorandum of Understanding or the public announcement, as the case may be and the date of completion of offer formalities relating to the offer made under these regulations.
> (g) ……."

The contention of the authorized representative of the appellant is that the word 'between' in the definition of offer period signifies that it does not start from the date of the share purchase agreement but from the day immediately following that day. He argued that had the intention of the framers been to cover the offer period from the date of the agreement, the definition of offer period would have read "the period from the date of entering into Memorandum of Understanding……....." and not "between the date of entering into Memorandum of Understanding……...". We cannot agree with the authorized representative. In what other way the term 'offer period' could be defined is not for us to guess and we have to read the definition as it is. A plain reading of the aforesaid provisions makes it clear that the framers of the takeover code did not want the acquirer or any person acting in concert with him to be appointed to the board of directors of the target company during the offer period. Offer period means the period between the date of entering into memorandum of understanding and the date of completion of offer formalities relating to the offer made under the takeover code. The word 'between' used in the definition of offer period qualifies the date of entering into the memorandum of understanding and the date on which the offer formalities are completed. According to the calendar that we follow, the date would commence from the midnight and, therefore, the bar would commence from the midnight of the day when the memorandum of understanding is signed and the same would continue till the end of the day at midnight on which the offer formalities are completed. If at any time during this period the acquirer is appointed to the board of directors of the target company, Regulation 22(7) would get violated. In the case before us, the appellants claim that the meeting of the board of directors of the target company in which they were appointed additional

directors was held at 10.30 a.m. on April 19, 2006 and the share purchase agreement was signed thereafter on that day. Assuming this to be so, the appointment of the appellants as directors of the target company was made after the offer period had commenced at midnight on April 19, 2006 and, therefore, their appointment on the board of directors of the target company was in violation of Regulation 22(7) of the takeover code. We cannot agree with the authorized representative of the appellant that this violation was only technical in nature. The bar contained in Regulation 22(7) has a laudable object behind it and the Board cannot be expected to treat such violations as a technical breach. The object is that the target company should be allowed to function as usual and the acquirers should not be in a position to influence any of its decisions till such time the offer formalities are completed. If the acquirers are allowed to intermeddle with the affairs of the target company by getting themselves appointed on its board before the offer formalities are completed, the same could be detrimental to the interests of the shareholders/investors and that is what is sought to be prohibited. We are also of the view that the circumstances of the present case do not call for any reduction in the amount of penalty imposed by the adjudicating officer. He has already taken a lenient view because the maximum penalty for such violations could go upto Rs.one crore. In this view of the matter, we cannot find any fault with the impugned order holding the appellants guilty of violating Regulation 22(7) of the takeover code. For the view that we have taken, it is not necessary to deal with the case law cited by the learned counsel for the respondent Board.

In the result, we answer the question posed in the opening part of our order in the affirmative and dismiss the appeals with no order as to costs.

Sd/-
Justice N. K. Sodhi
Presiding Officer

Sd/-
Samar Ray
Member

6.5.2010
Prepared & compared by ddg/-