BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No. 149 of 2009

Date of decision : 6.1.2010

1) OC Oerlikon Corportion AG, Pfaffikon
Churerstrasse 120, 8808 Pfaffikon SZ
(Community of Freienbach),
Switzerland.

2) W. Reiners Verwaltungs GmbH
Blumbergerstrasse 143-145, 41061,
Monchengladbach. …Appellants

Versus

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

Mr. Venkatesh Dhond, Advocate with Ms. Bhumika Batra, Advocate for Appellants.
Mr. Shiraz Rustomjee, Advocate with Ms. Harshada Nagare, Advocate for the Respondent.

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

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

Saurer AG, a Swiss company holds 100% shareholding of W. Reiners Verwaltungs GmbH Germany, a German company which is the second appellant before us. The second appellant in turn holds 53.78 per cent of the share capital of Schlafhorst Engineering (India) Limited (hereinafter referred to as the target company). OC Oerlikon Corporation AG, another Swiss company, which is the first appellant before us acquired in January 2007 Saurer AG in a global acquisition outside India. With this acquisition, the first appellant indirectly acquired the target company which triggered the provisions of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (for short the takeover code). Consequently, the first appellant and the second appellant acting in concert with it made a mandatory open offer under Regulations 10 and 12 of the takeover code for acquiring 20 per cent of the shareholding of the target

company. This public announcement was made on February 9, 2007. It is common ground between the parties that the appellants deposited on June 22, 2007 in an escrow account, hundred per cent of the consideration payable in cash to the public shareholders of the target company who would offer their shares in response to the public announcement. Under Article 136 of the Articles of Association of the target company, the second appellant (person acting in concert with the first appellant) had a right to appoint two non-rotational directors on the board of directors of the target company. Pursuant to the powers vested under the Articles, the appellants appointed more than one director but in this appeal we are only concerned with the appointment of Mr. Dirk Burger which is the subject matter of the show cause notice culminating in the passing of the impugned order. It is not in dispute that the second appellant in exercise of its powers under the Articles read with Section 255(2) of the Companies Act, 1956 appointed Mr. Dirk Burger as additional director on April 19, 2007 on the board of directors of the target company. This appointment came to an end on June 4, 2007 on which date the annual general meeting of the target company was held. In this annual general meeting, Mr. Dirk Burger was again appointed a director of the target company. The Securities and Exchange Board of India (for short Sebi) was of the view that the appointment of Mr. Dirk Burger was contrary to the provisions of Regulation 22(7) of the takeover code in as much as the appointment was made by the appellants during the offer period. The offer period for our purposes means the period between the date of public announcement and the date of completion of offer formalities relating to the offer made under the takeover code. It is again not in dispute that when Mr. Dirk Burger was appointed a director first in April 2007 and then on June 4, 2007, the offer period was still continuing as the offer formalities had not been completed. Sebi initiated adjudication proceedings under Chapter VIA of the Securities and Exchange Board of India Act, 1992 (for short the Act) and appointed an adjudicating officer who issued a notice dated August 13, 2007 to the appellants calling upon them to show cause why proceedings be not held against them for violating Regulation 22(7) of the takeover code. The appellants filed a detailed reply on August 30, 2007 in which they made the following two prayers:-

"Prayers:

In view of the above, and considering the facts and circumstances of the case, the Acquirer prays that:

1. Considering that the Acquirer /Oerlikon has not violated any provision of the Regulations including Regulation 22(7), no proceedings and / or enquiry ought to be held against the Acquirer and the Notice be withdrawn;

2. Without prejudice, if it is considered that the Acquirer has violated the provisions of Regulation 22(7), considering that it is only unintentional, inadvertent and a technical violation, the same may be pardoned without imposing any penalty."

The adjudicating officer afforded an opportunity of personal hearing to the representative of the appellants and on a consideration of the material collected by him during the course of the enquiry, he concluded that the appellants had violated Regulation 22(7) of the takeover code when they appointed Mr. Dirk Burger as a director on the board of directors of the target company. Accordingly, by his order dated June 23, 2009 he imposed a monetary penalty of Rs.15 lacs each on the two appellants. It is against this order that the present appeal has been filed under Section 15T of the Act.

2 We have heard the learned counsel for the parties who have taken us through the record including the impugned order. At the outset, it is necessary to refer to the provisions of Regulation 22(7) which are said to have been violated by the appellants. The relevant part of the Regulation reads as under:-

"22(7) 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."

A reading of the aforesaid regulation alongwith the second proviso makes it clear that the acquirer or persons acting in concert are barred from appointing a director on the board of directors of the target company during the offer period but this bar is not absolute. They can appoint a director provided following the two conditions are fulfilled.

1. The acquirer, after assuming full acceptance, has deposited in the escrow account hundred per cent of the consideration payable in cash/securities to the public shareholders who offer their shares in pursuance to the open offer, and

2. Such appointments can be made only after a period of 21 days from the date of public announcement after fulfilling the first condition.

In the case before us, the public announcement was made on February 9, 2007 and Mr. Dirk Burger was appointed director on the Board of the target company on April 19, 2007 and again on June 4, 2007 and hundred per cent deposit was made in the escrow account on June 22, 2007. As already noticed, the "offer period" was still continuing when the appointment of Mr. Burger was made. It is, thus, clear that when Mr. Burger was first appointed a director on April 19, 2007 only the second condition referred to in the second proviso to Regulation 22(7) of the takeover code had been fulfilled but not the first one. Thus, his appointment was clearly in violation of Regulation 22(7). However, in the facts and circumstances of the present case we are satisfied that the breach was only technical and that the appellants did not intend to violate the Regulation. We say so because the bar contained in Regulation 22(7) is not absolute and had the appellants fulfilled both the conditions by the time the appointment was made there would have been no breach. Again, the violation was unintentional because the first condition was also fulfilled on June 22, 2007 when the escrow account was hundred per cent funded to meet the claims of the public shareholders who would offer their shares in response to the open offer. We are not viewing this violation very seriously because neither the interest of the shareholders nor that of the target company had been prejudicially affected during the period when Regulation 22(7) had been violated from April 19, 2007 to June 22, 2007 whereafter the violation came to an end. It is not in dispute that during the period from April 19, 2007 to June 22, 2007 the board of directs of the target company met twice and Mr. Dirk Burger did not attend either of the two

meetings. In these two meetings no decisions were taken or approved by the Board which directly or indirectly affected the interest of the shareholders of the target company. We are also satisfied that the appointment of Mr. Dirk Burger did not impact the acquisition process in accordance with the takeover code. Since Regulation 22(7) of the takeover code had been violated, penalty must follow as observed by the Supreme Court in Chairman SEBI vs. Shriram Mutual Fund and Anr. AIR 2006 SC 2287. We have already observed that the violation was only technical and unintentional. Therefore, the penalty imposed by the adjudicating officer deserves to be reduced considerably. Having regard to the facts and circumstances of the case, we are of the view that the ends of justice would be adequately met if the penalty is reduced to Rs.5 lacs for each of the appellant. We order accordingly. The appeal is disposed of in these terms and the impugned order stands modified with no order as to costs.

Sd/-
Justice N. K. Sodhi
Presiding Officer

Sd/-
Samar Ray
Member

6.1.2010
ptm

Prepared & Compared by
ptm