BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No.103 of 2008

Date of Decision: 23.10.2008

M/s. Subhkam Holding Pvt. Ltd. .....Appellant

Versus

The Securities and Exchange Board of India ……Respondent

Mr. Somasekhar Sundaresan Advocate with Mr. Ravi Hegde Advocate for the Appellant.

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

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

Per: Justice N.K. Sodhi, Presiding Officer

MSK Projects India Ltd. is the target company. It allotted 44.5 lac fully paid up equity shares of Rs.10 each on preferential basis for cash at a price of Rs.84 per share (including premium of Rs.74 per share). The appellant was allotted 40 lac shares representing 17.9 percent of the post preferential issue equity capital of the target company. This allotment was made after the shareholders of the target company had passed a special resolution at an Extraordinary General Meeting held on August 27, 2007 under section 81 (1-A) of the Companies Act, 1956. A share subscription and shareholders agreement was entered on October 20, 2007 between the appellant, the promoters of the target company and the target company. The acquisition of 40 lac shares triggered the provisions of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (for short the Regulations). According to the appellant, Regulation 10 got triggered and it came out with a public announcement on October 24, 2007. Thereafter, it prepared a draft letter of offer and filed the same through its merchant banker with the Securities and Exchange Board of India (for short the Board) under Regulation 18 of

the Regulations. There was then a spate of correspondence between the appellant through its merchant banker and the Board and their representatives had a few meetings as well whereafter the Board took the view that Regulation 12 of the Regulations had also triggered in addition to Regulation 10. The merchant banker was informed as per letter dated April 28, 2008 that, among others, Regulation 12 also be mentioned in the letter of offer in addition to Regulation 10 and the acquirer was required to modify the public announcement accordingly. The appellant contested this position and continued to assert that it was only Regulation 10 which got triggered and that on the basis of the share subscription and shareholders agreement of October 20, 2007, the appellant did not acquire control over the target company. It seems that the Board is not willing to accept the stand of the appellant and by its communication dated August 13, 2008 has directed the appellant to abide by the comments made in its earlier letter dated April 28, 2008. It is against this communication that the present appeal has been filed.

2. We have heard the learned counsel for the parties and for the view that we are taking, it is not necessary to examine the contentions advanced by them. The core issue between the parties is whether Regulation 12 also got triggered in addition to Regulation 10 when the appellant acquired 40 lac shares in a preferential allotment from the target company. The answer to this question will depend upon the fact whether with the acquisition, the appellant acquired control over the target company. The case of the appellant is that it has not acquired any control nor does it intend to control the target company and reliance in this regard is placed on the share subscription and shareholders agreement. The Board, however, contends to the contrary. Since the appellant says that it has not acquired control over the target company, it does not want to disseminate this wrong information to the public shareholders and to the public at large. If the appellant is required to mention also Regulation 12 in the letter of offer and amend the public announcement accordingly, it would be acknowledging the fact that it has acquired control over the target

company which, according to it, is not correct. It does not want to take the responsibility for conducting the affairs of the target company and being responsible for the same. Mentioning of Regulation 12 in the letter of offer will definitely affect its rights. If the Board wants the appellant to mention Regulation 12 in the letter of offer, it must give reasons for the same. We have perused the impugned communication dated August 13, 2008 and also the earlier letter dated April 28, 2008 which was first sent to the merchant banker suggesting modifications/changes in the letter of offer and find that the Board has given no reasons in support of its conclusion that Regulation 12 had also triggered when the appellant acquired 40 lac shares. It is not enough for the Board to say that Regulation 12 also needs to be mentioned in the letter of offer. It must also communicate to the appellant its reasons as to how Regulation 12 got triggered. Had the reasons been given by the Board for arriving at its conclusion, the appellant could have challenged the correctness of those reasons in appeal before us. Absence of reasons in the impugned communication deprives the appellant of its right to have effective recourse to judicial review by way of appeal before this tribunal. We are also handicapped in the absence of reasons and are deprived of the benefit of the factors which weighed with the Board in arriving at the impugned decision. While dealing with the general rule that reasons should be given for decisions, WADE & FORSYTH in their book on Administrative Law (Eighth Edition) have this to say:

> "The principles of natural justice do not, as yet, include any general rule that reasons should be given for decisions. Nevertheless there is a strong case to be made for the giving of reasons as an essential element of administrative justice. The need for it has been sharply exposed by the expanding law of judicial review, now that so many decisions are liable to be quashed or appealed against on grounds of improper purpose, irrelevant considerations and errors of law of various kinds. Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law. A right to reasons is therefore an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice. It is also a healthy discipline for all who exercise power over others."

In MP. Industries v. Union of India, AIR 1966 SC 671 it was contended that the obligation to give reasons may involve delay. Rejecting this argument, the learned Judges of the Apex Court observed as under:

> "The least a tribunal can do is to disclose its mind. The compulsion of disclosure guarantees consideration. The condition to give reasons introduces clarity and excludes or at any rate minimizes arbitrariness; it gives satisfaction to the party against whom the order is made; and it also enables an appellate or supervisory Court to keep the tribunals within bounds. A reasoned order is a desirable condition of judicial disposal."

In Bhagat Raja v. Union of India, (1967) 2 S.C.R. 302, it was held that the absence of any requirement in the relevant statutory provision to give reasons was immaterial and that even when a quasi judicial tribunal affirms the order of an inferior authority, it was bound to give its reasons in short though it might not be required to write out a judgment as a court of law. In Siemens Co. v. Union of India, AIR 1976 S.C. 1785, a general obligation to give reasons has been raised to the pedestal of a basic principle of natural justice like the principle of audi alteram partem. It has been held that such reasons must be sufficiently clear and explicit. This requirement would apply not only to quasi judicial functions but would extend to all administrative decisions which would affect the civil rights of persons. In this view of the matter, we have no hesitation in setting aside the impugned decision of the Board which we hereby do and remand the case back to it with a direction to pass a fresh order in accordance with law after giving reasons. In case the appellant makes any representation to the Board within two weeks from the date of receipt of this order, the same shall also be considered. Let the fresh order be passed expeditiously and preferably before the end of this year. No costs.

Sd/-
Justice N.K. Sodhi
Presiding Officer

Sd/-
Utpal Bhattacharya
Member

23.10.2008
rhn & ddg