BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No. 66 of 2012

Date of Decision : 25.07.2012

Hanumesh Realtors Pvt. Ltd.
Regd. Off. at Raaj Chambers,
SKM Fabrics, (Andheri) Premises,
Plot No. 115, 115/1 to 3,
R.K. Paramhans Marg,
Andheri (E), Mumbai – 400 069.
(Formerly at Padam 1, Flat No. 17,
4-B.G. Deshmukh Marg, Mumbai – 400 026) …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. Gaurav Joshi, Advocate with Mr. Lalit Katariya, Mr. S.R. Garud and Mr. A. Surve, Advocates for the Appellant.

Mr. Shiraz Rustomjee, Senior Advocate with Ms. Harshada Nagare, Advocate for the Respondent.

CORAM : P.K. Malhotra, Member & Presiding Officer (*Offg.*)
S.S.N. Moorthy, Member

Per : P.K. Malhotra

The issues that arise for our consideration in this appeal are (1) whether the appellant has violated provisions of regulation 11(1) read with regulation 14(1) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (the takeover code) and (2) whether the Securities and Exchange Board of India (the Board) was justified in imposing a penalty of ₹ 1.87 crore on the appellant under Section 15H of the Securities and Exchange Board of India Act, 1992 (the Act).

2. The facts of the case fall in a narrow compass. The appellant is a company registered under the Companies Act, 1956 and engaged in the business of builders

and developers. S Kumars Online Ltd. (the target company) is a company listed on the Bombay Stock Exchange Ltd. (BSE). Out of the equity capital of the company consisting of 2,58,00,000 shares, the promoter group, including the appellant, held 1,28,01,010 shares which amounts to 49.62 per cent shares in the equity capital of the company. The shareholding of the appellant in the target company for the quarter ending December 31, 2009 was 94,47,814 shares (36.62 per cent). The company proposed to issue equity shares on preferential basis to raise funds for its ongoing project of e-commerce and for payment of existing liabilities. After following due procedures under the Companies Act, the appellant was allotted 28,25,000 shares at par on preferential allotment basis on March 3, 2010. Subsequent to this preferential allotment, the shareholding of the appellant in the target company increased to 1,22,72,814 shares. With this allotment of shares to the appellant on preferential basis, while the total shareholding of the promoter group increased from 49.62 per cent to 54.59 per cent, the individual shareholding of the appellant in the promoter group increased from 36.62 per cent to 42.87 per cent. Thus, pursuant to the said preferential allotment, the shareholding and voting rights of the appellant in the target company increased by 6.25 per cent. On such increase, according to the Board, regulation 11(1) of the takeover code got triggered. As the appellant had acquired more than 5 per cent shares, it was required to make an open offer which should have been made not later than four working days as required by regulation 14(1) of the takeover code. This, not having been done, a show cause notice dated November 22, 2010 was issued by the Board to the appellant calling upon it to show cause as to why action should not be taken for the aforesaid violations and penalty imposed under Section 15H of the Act. The appellant filed its reply dated December 8, 2010 denying the allegations that it has violated the provisions of regulation 11(1) and 14(1) of the takeover code. However, the adjudicating officer, after considering the reply of the appellant, held it guilty of violating the aforesaid provisions and imposed a penalty of ₹ 1.87 crore under Section 15H(ii) of the Act. Hence, this appeal.

3. We have heard Mr. Gaurav Joshi, Advocate for the appellant and Mr. Shiraz Rustomjee, Senior Advocate for the respondent Board. It is the case of the appellant

that the promoter group, including the appellant, held 49.62 per cent share capital of the target company before the allotment of preferential shares to the appellant. Pursuant to the allotment of preferential shares to the appellant, the promoter group shareholding increased to 54.59 per cent which was an increase of 4.97 per cent only and hence regulation 11(1) of the takeover code was not attracted. Although the individual holding of the appellant increased by more than 5 per cent, the overall promoter holding had not exceeded 5 per cent due to corresponding drop in percentage terms of other shareholders' holding. As the overall promoters' holding has not exceeded 5 per cent, according to appellant, the provisions of regulation 11(1) read with regulation 14(1) of the takeover code are not attracted. On the other hand, the case of the Board is that on allotment of preferential shares to the appellant, the shareholding of the appellant in the target company increased from 36.62 per cent to 42.87 per cent, which is more than 5 per cent, and therefore, the provision of regulation 11(1) got triggered and the appellant was required to make an open offer within the period stipulated in regulation 14(1) of the takeover code irrespective of the fact, whether the increase in the shareholding of the total promoter group was less than 5 per cent. In support of his contentions and interpretation of regulation 11(1) of the takeover code, learned counsel for the appellant has relied on the interpretive letter dated April 2, 2009 issued by the Board in favour of Suryajyoti Spinning Mills Ltd. and also on the order dated August 28, 2008 passed by the adjudicating officer in the case of Jamnalal Sons Private Limited. Under similar circumstances, in the case of Suryajyoti Spinning Mills Ltd., where the shareholding of the acquirers increased more than 5 per cent after preferential issue but overall increase in holding of the promoter group remained within 5 per cent, the interpretive letter expressed the view as under:

> 4.1 In terms of Regulation 11(1) of the Regulations, an acquirer (including persons in concert with him) who has acquired 15% or more but less than 55% shares or voting rights in a target company may acquire upto 5% shares or voting rights in a financial year ending 31st March, without making a public announcement in terms of the Regulations. In case of acquisitions through preferential allotment, the said creeping limit of 5% is reckoned with respect to enhanced equity share capital of the target company pursuant to the preferential allotment.

> 4.2 In the case described in your request, pursuant to proposed preferential allotment of equity shares, the promoters (along with persons acting in concert) shareholding in the target company will increase from 36.39% to 41.33% of the enhanced capital. Since the said increase would be within the creeping limit of 5% as provided in regulation 11(1) of the Regulations, regulation 11 would not be triggered pursuant to preferential allotment and further it is observed that there is no consequent change in control and as such, the acquirers (promoters) will not be required to make a public announcement under the Regulations."

In the case of Jamnalal Sons also where, after the rights issue, shareholding of the acquirers increased by more than 5 per cent but total increase in holding of the promoter group was below 5 per cent, the adjudicating officer has held that question of claiming exemption by the acquirer from the applicability of regulation 11(1) of the takeover code does not arise. The appellant had also placed on record statement showing shareholder pattern of Bajaj Hindustan Limited, another company, where under similar circumstances, no action was initiated by the Board against that company. It was therefore strenuously argued by Mr. Joshi that, in the facts and circumstances of the case, the provisions of regulation 11(1) of the takeover code are not attracted and even the Board has also been consistently taking this stand under similar circumstances in the cases cited above. Therefore, there is no justification for the Board to give a different interpretation to the provisions of the regulations and punish the appellant.

4. Mr. Shiraz Rustomjee, learned senior counsel for the Board, supported the order passed by the adjudicating officer stating that the interpretive letter dated April 2, 2009 issued by the Board to Suryajyoti Spinning Mills Ltd. is of no help to the appellant as the position explained therein was based on the representation made by the applicant in that case and the letter clearly states that it does not express decision of the Board on the question referred. He further stated that the view taken by the adjudicating officer in its order dated August 28, 2008 in the case of Suryajyoti Spinning Mills Ltd. is not correct appreciation of the provisions of regulation 11(1) of the takeover code and is not binding either on the Board or on this Tribunal. With regard to the statement showing shareholding pattern of Bajaj Hindustan Limited, it

was stated by the learned senior counsel that this statement is of no help to the appellant as this was never under scrutiny or examination by the Board and no order, either accepting or rejecting the said statement, is available on record. Learned senior counsel for the Board has also drawn our attention to the judgment of the Apex Court in the case of **Swedish Match AB vs. Securities & Exchange Board of India (Civil Appeal No. 2361 of 2003 decided on August 25, 2004)** in which the Supreme Court has interpreted the provisions of regulation 11 of the takeover code and has observed that if the additional shares are acquired entitling an acquirer to exercise more than 5 per cent of the voting rights, the statutory embargo to the effect that the acquirer must make a public announcement to acquire shares in accordance with the Regulation comes into operation. The decision of the Apex Court is of 2004 which has not been considered either while issuing the interpretive letter dated April 2, 2009 or while passing the order by the adjudicating officer on August 28, 2008. The Supreme Court judgment makes it clear that even when a single acquirer acquires more than 5 per cent voting rights, irrespective of the total voting rights of the promoter group, the acquirer is under an obligation to make public announcement under regulation 11 of the takeover code.

5. After hearing learned counsel on both sides and perusing the material on record we are of the opinion that the view taken by the adjudicating officer in the impugned order needs to be upheld. The takeover code obligates acquirer of shares or voting rights of a company in three different scenarios which are discussed in regulations 10, 11 and 12 of the takeover code. They operate in different areas of acquisition and consolidation of holdings of a listed company. Regulation 10 provides for making the public announcement in cases where acquisition of shares or voting rights of the company is 15 per cent or more by the acquirer or by persons acting in concert with him. Regulation 12 makes a provision for public announcement in case of acquisition of “control” over the target company. Regulation 11 makes provision for public announcement in case of consolidation of holdings. For the purpose of present case, we are concerned with regulation 11(1) of the takeover code which reads as under:

> "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, with post acquisition shareholding or voting rights not exceeding fifty five per cent in any financial year ending on 31st March unless such acquirer makes a public announcement to acquire shares in accordance with the regulations."

6. A bare reading of the aforesaid provisions will make it clear that the provisions of this regulation apply to an acquirer when he is acting (i) by himself or (ii) through persons acting in concert with him, or (iii) with persons acting in concert with him. Hon'ble Supreme Court, while interpreting the provision of regulation 11 in the case of Swedish Match AB (supra), has observed that the pre-conditions attracting regulation 11 are:

> "(i) that an acquirer had acquired shares in concert with another; (ii) such acquisition was more than 15% but less than 50% of the shares or voting rights in a company; (iii) in the event, the acquirer intends to acquire such additional shares or voting rights which would allow him to exercise more than 5% of the voting rights within a period of 12 months, public announcement is required to be made therefor. (iv) such acquisition of additional shares contemplates three different situations, i.e., **the acquisition may be by acquirer himself or through or with the person acting in concert with the person with whom they had acquired shares earlier in concert with each other."** (emphasis supplied)

The Court has also observed that regulation 11 does not brook any other interpretation. The Apex Court further observed that if additional shares are acquired entitling an acquirer to exercise more than 5 per cent of the voting rights, the statutory embargo to the effect that the acquirer must make a public announcement to acquire shares in accordance with the regulation comes into operation.

7. In view of the clear position, as emerging from the aforesaid decision of the Apex Court, we are inclined to uphold the view expressed by the adjudicating officer that when the appellant, while holding 36.62 per cent of the shares / voting rights of the company, acquired further shares increasing his shareholding to 42.87 per cent, which is more than 5 per cent of the shareholding, it was under an obligation to

comply with the provisions of regulation 11(1) read with regulation 14(1) of the takeover code. We therefore uphold this finding.

8. It was then argued by the learned counsel for the appellant that the penalty of ₹ 1.87 crore imposed on the appellant is not only contrary to the provisions of Section 15H(ii) of the Act, it is also excessive and has no correlation with the violation alleged to have been committed. It was submitted that once the Board has come to the conclusion that there was no unfair gain made by the appellant, the question of making any profit for computation of penalty under Section 15H of the Act does not arise. Even the factors for determining the penalty, more particularly the factor enumerated in Section 15J(b) of the Act, refer to the actual amount of loss caused to the investors and not a notional loss which has been considered by the adjudicating officer while arriving at the amount of penalty. It was further argued by him that the appellant acted bonafide based on the three instances mentioned above including the order passed by the adjudicating officer of the Board on August 28, 2008 in the case of Jamnalal Sons Private Limited. According to learned counsel, the appellant has acted in good faith based on the interpretation of the other instances and no penalty could be imposed on the appellant for an alleged technical violation.

9. Learned senior counsel for the Board, however, submitted that the adjudicating officer has strictly applied the principle as laid down in Section 15H and 15J of the Act while arriving at the penalty. The adjudicating officer has specifically observed that by not making a public offer the appellant has caused notional loss to the investors and he has accordingly calculated the penalty.

10. We have given our thoughtful consideration to this aspect of the matter and are of the view that there being violation of the regulatory framework, penalty must follow. However, in the facts and circumstances of the case, the adjudicating officer has failed to consider the mitigating factors and has imposed maximum penalty that could have been imposed under the law. The adjudicating officer has specifically recorded that the price of acquisition was above the prevailing market price and,

therefore, it cannot be concluded that the appellant had made any unfair gain. He has also stated that the loss to the investors is a notional loss and not the actual loss. If the Board felt that non-compliance on the part of appellant will lead to loss to the investors, it could have very well issued a direction to the appellant to come out with an open offer as stipulated by regulation 11(1) of the takeover code. There is nothing on record to show that any such step was taken by the Board. The Board itself has chosen not to issue any direction to the acquirer to come out with a public offer under section 11(1) but decided to initiate adjudication proceedings and levied penalty. While deciding the quantum of penalty, the stand taken by the Board in its interpretive letter dated April 2, 2009 issued to Suryajyoti Spinning Mills Ltd. and the order dated August 28, 2008 passed by the adjudicating officer in the case of Jamnalal Sons Private Limited can definitely be considered as other mitigating factors. We are, therefore, of the considered view that in the facts and circumstances of the case, ends of justice would be met by reducing the penalty to ₹ 10 lakh. We order accordingly.

In the result, while upholding the order of the adjudicating officer on the issue of violation / contravention of the provisions of regulation 11(1) read with regulation 14(1) of the takeover code, we reduce the penalty to ₹ 10 lakh. No costs.

Sd/-
P.K. Malhotra
Member &
Presiding Officer (*Offg.*)

Sd/-
S.S.N. Moorthy
Member

25.07.2012
Prepared and compared by:
msb