BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No. 142 of 2012

Date of decision: 01.11.2012

1. Unijules Life Sciences Ltd.
   Universal Square, 1505-1,
   Shantinagar,
   Nagpur 440 002.

2. Zakir S. Vali,
   Bagh-E-Afifa,
   Shantinagar,
   Nagpur 440 002.

3. Anwar S. Daud,
   Pilla Bangalor,
   Opp. Husamia High School,
   Main Road, Shantinagar,
   Nagpur 440 002. ……Appellants

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. Vivek Menon, Advocate for Appellants.

Mr. Kumar Desai, Advocate with Mr. Mobin Shaikh, Advocate for the Respondent.

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

Per : P. K. Malhotra

This appeal has been filed against the order dated April 23, 2012 of the adjudicating officer of the Securities and Exchange Board of India (for short the Board) holding the appellants guilty of violating Regulation 14(2) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers)

Regulations, 1997 (for short takeover code) and imposing a penalty of ₹ 50 lacs under Section 15H(ii) of the Securities and Exchange Board of India Act, 1992 (the Act).

2. Appellant no. 1 is a public limited company carrying on business of manufacture of pharmaceutical preparations and of their marketing and distribution. It is also stated to be a major shareholder of ZIM Laboratories Ltd. (the target company). Appellant no. 2 is the promoter and shareholder of the target company. Appellant no. 3 is the managing director and also a shareholder of the target company. It is alleged that the target company made preferential allotment of shares to appellants on December 7, 2001, March 1, 2007 March 21, 2008 and May 20, 2008 which resulted in crossing the threshold limits as prescribed in Regulations 10 and 11 of the takeover code. As per Regulation 14(2) thereof, these appellants (the acquirers) were required to make public announcement of open offer within four working days of the acquisition of voting rights. The appellants failed to do so. The appellants did make a public announcement on April 21, 2009 under Regulations 11(1) and 11(2) of the takeover code. However, the Board felt that such public offer was made with the intention to regularize the acquisitions violating regulations 10 and 11 read with regulation 14(2) of the takeover code. The Board also considered request of the appellants to delist the shares of the target company in terms of the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009 and conveyed its decision, vide its letter dated December 3, 2009 as under :-

> "I. In terms of Regulation 27(1) (d) of SEBI (Substantial Acquisition of Shares and Takeover) Regulation, 1997, you are directed to withdraw the Public Announcement dated April 21, 2009 in respect of the captioned open offer and accordingly issue a corrigendum to this effect, within a period of 15 days from receipt of this letter.
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> II. Provide an exit opportunity to the shareholders of the Target Company by making a delisting offer in terms of SEBI (Delisting of Equity Shares) Regulations, 2009. The Public Announcement in this regard shall be made within 30 days from the date of the corrigendum referred in (I) above for withdrawal of the Open offer made vide Public Announcement dated April 21, 2009.

III. In addition to parameters specified for determination of floor price for the delisting offer of an infrequently traded shares as per regulation 15(3)(b) of SEBI (Delisting of Equity Shares) Regulations, 2009, you are directed to include the price of Rs. 35.22/- per share i.e. the price disclosed by you in your letter dated May 22, 2009 as one of the parameters.

The aforesaid directions of SEBI, is without prejudice to any action which might be initiated by SEBI for violation of the provisions of SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997 with regard to the captioned open offer and past violations of SEBI (Substantial Acquisition of Shares and Takeovers), Regulations, 1997, if any."

3. The Board also issued a show cause notice dated November 17, 2011 asking the appellants to show cause as to why an inquiry should not be held against them under the Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 and penalty imposed for violating provisions of the takeover code. After considering the reply filed by the appellants and granting them personal hearing, the adjudicating officer of the Board held the appellants guilty of the charge and imposed the penalty as stated above. Hence this appeal.

4. We have heard Mr. Vivek Menon, Advocate for the appellants and Mr. Kumar Desai, Advocate for the respondent Board who have also taken us through the records. The admitted position on record is that acquisition of shares by the appellants as alleged by the Board is not in dispute. It is also not in dispute that the shareholding of these appellants in the target company which was only 0.47 per cent rose to 74.99 per cent after the four acquisitions mentioned in the impugned order. It is not in dispute that in the facts and circumstances of the case, the takeover code got triggered and public announcement was required to be made by the acquirer. In fact, the company secretary, in his note dated January 1, 2009 addressed to the managing director, attached opinion of a practicing company secretary pointing out that public announcement in respect of the acquisition in question should have been made. These facts are not disputed by learned counsel for the appellants. However, he strenuously argued that the scrip of the target company is listed only on Over The

Counter Exchange of India (OTCEI), which is a defunct exchange and the scrip has not been traded. The 46,90,590 preferentially allotted shares were not listed till February 3, 2011. Only 13,19,311 shares were listed till February 3, 2011 since the initial public offering in 1994. According to learned counsel for the appellants, the provisions of the takeover code cannot apply to a scrip in letter and spirit. The appellants had made a public announcement on April 21, 2009, though belatedly but the respondent Board directed the company to withdraw the public announcement and provide exit opportunity to the shareholders of the target company by making a delisting offer in terms of delisting regulations. The appellants complied with this direction. Therefore, no further direction/action was called for. The question of imposing a penalty or initiation of adjudication proceedings, therefore, does not arise. In support of his argument, learned counsel for the appellants also relied on the order of the Tribunal in the case of **Contact Consultancy Services Pvt. Ltd., (Appeal no. 138 of 2004 decided on November 17, 2004)** where, according to the counsel, the Tribunal held that the Board may adopt either of the two courses of action either to give directions to make public offer or initiate proceedings for imposing penalty and it cannot do both. Therefore, he submitted that compliance by the appellants of the direction contained in the letter dated December 3, 2009 renders the adjudication proceedings and the penalty unsustainable.

5. Mr. Kumar Desai, learned counsel for the Board supported the order passed by the adjudicating officer and submitted that the appellants have defaulted in complying with the provisions of the takeover code. The holding of the appellants after acquisition had reached 74.99 per cent and the public announcement would have resulted in breach of the minimum public shareholding requirement. Therefore, vide letter dated December 3, 2009, the appellants were directed to withdraw the public announcement by making a delisting offer under the delisting regulations. This direction, by any stretch of imagination, cannot be said to regularize the breach of provisions of the takeover code by the appellants. Therefore, the letter itself made it clear that the direction in the letter is without prejudice to any action which might be

taken by the Board under the takeover code. The adjudication proceedings were initiated against the acquirers (appellants) for violation of the provisions of regulations 10 and 11 read with regulation 14(2) of the takeover code. Learned counsel for the Board further submitted that the target company is a listed company on OTCEI. Admittedly, there is no trading in the shares since July 1998. However, that by itself is no reason for the appellants not to comply with statutory requirements. The target company is listed since 1994. The appellants acquired voting rights in the target company and pursuant to such acquisition, crossed the threshold limits prescribed under the takeover code. Learned counsel for the Board also distinguished the order of this Tribunal in the case of the Contact Consultancy Services Pvt. Ltd. (supra) stating that order was passed in that case on different facts. In that case, the Tribunal was satisfied with the bonafides of the appellants whereas in the case in hand, bonafides of the appellants are questionable. Secondly, in Contact case, there was broad consensus between the parties that Board should either direct the party to go for a public announcement or initiate penalty proceedings. Above all, the order of the Tribunal was passed on November 17, 2004. Situation has now changed and the Supreme Court in the case of **The Chairman, SEBI vs. Shriram Mutual Fund (AIR 2006 SC 2287)** has observed that once the contravention is established, penalty has to follow.

6. Having considered the rival submissions and having perused the record, we are inclined to agree with the submissions made by learned counsel for the respondent Board. While acquiring shares of the target company on different dates, as stated in the impugned order, it is not denied that the provisions of the takeover code were violated, as alleged. We are unable to accept the argument of learned counsel for the appellants that since shares of the target company were not traded since 1998 or that there is no allegation of market manipulation, the penalty proceedings cannot be initiated. We are also unable to agree with him that in view of the direction of the respondent Board in the letter dated December 3, 2009 to provide an exit opportunity to the shareholders of the target company under the delisting

regulations, penalty proceedings cannot be initiated. Direction to provide exit opportunity to the shareholders was on the facts and circumstances of the case and not with a view to condone the violation of the takeover code. This was made clear in the said letter itself. We are also inclined to agree with learned counsel for the respondent Board that the facts of the appellants' case are not the same as in the case of Contact Consultancy (supra) and order in that case cannot apply to facts of the present case. We are also guided by the observations of the Supreme Court in the case of Shriram Mutual Fund (supra) which read as under:-

> "In our view, the penalty is attracted as soon as contravention of the statutory obligations as contemplated by the Act is established and, therefore, the intention of the parties committing such violation becomes immaterial. In other words, the breach of a civil obligation which attracts penalty under the provisions of an Act would immediately attract the levy of penalty irrespective of the fact whether the contravention was made by the defaulter with any guilty intention or not."

7. The Court has further observed that once the contravention is established, then the penalty has to follow and only the quantum of penalty is discretionary.

8. Having said so, let us now see whether, in the facts and circumstances of the case, penalty of ₹ 50 lacs is justified on these appellants. Learned counsel for the respondent Board contended that under Section 15H of the Act, a penalty of ₹ 25 crore rupees or three times the amount of profits made, whichever is higher could have been imposed. Although the violation is repetitive in nature, the Board has imposed a penalty of ₹ 50 lacs only which is quite justified.

9. We have given our thoughtful consideration to this aspect. Simply, because law empowers imposition of a severe penalty it does not mean that the adjudicating officer should impose a higher penalty. While considering the factors enumerated in Section 15J of the Act, the competent authority should also give due weightage to aim and object of the Act, the impact of the violation and other mitigating factors. No exhaustive list of such mitigating factors can be given. It will depend on the facts

and circumstances of each case. Examined in that perspective, in the case in hand, we find that learned counsel for the appellants has rightly argued that in the facts and circumstances of the present case, the fact that there was no trading in the scrip of the company since 1998, the shares allotted on preferential basis to the appellants were not listed on the stock exchange till February 3, 2011 are mitigating factors. It is also not a case of market manipulation or of investor's interest having been adversely affected. There is no change in the management. Perhaps, for these reasons, the Board has not thought it fit to give any direction to the appellants to make a public announcement as required under the takeover code. We are, therefore, of the view that ends of justice would be met by reducing the penalty to ₹ 10 lacs.

While upholding the findings of the adjudicating officer in the impugned order, we reduce the penalty to ₹ 10 lacs. The appeal stands disposed of as above with no order as to costs.

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

Sd/-
S. S. N. Moorthy
Member

01.11.2012
Prepared & Compared by
ptm