BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No. 145 of 2012

Date of Decision : 20.12.2012

Shri R. Shankar
c/o P V Sundarakrishnan,
No. 9, Ramiah Road,
Flat No. 103, Divya Land mark,
Yashwantpuram,
Bangalore – 560022. …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. Rajeev Kumar, Advocate for the Appellant.

Dr. Mrs. Poornima Advani, Advocate with Mr. Ajay Khaire and Ms. Rachita Romani, Advocate for the Respondent.

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

Per : P.K. Malhotra

This order will dispose of five Appeal nos. 145 to 149 of 2012. We find that a common show cause notice was issued to nine entities and a common order has been passed against all these entities out of which only five are in appeal before us. Counsel for the parties agree that since these appeals arise out of common set of facts, they can be disposed of by a common order and facts can be taken from Appeal no. 145 of 2012. When these appeals were fixed for hearing learned counsel for the appellant has taken a preliminary objection with regard to appeal being heard by this bench in the absence of a regular Presiding Officer. It was stated by him that a Writ Petition No. 5847 of 2012, Sandeep Jain vs. Union of India has been filed in the Bombay High Court challenging jurisdiction of the Tribunal to hear appeal in the absence of a regular Presiding Officer. At the request of the learned counsel for the appellant, the appeals were kept pending awaiting outcome of the writ petition.

The Hon'ble High Court, by its order dated November 26, 2012, has dismissed the writ petition holding that there is no impediment in the appeal being heard by the appellate tribunal which presently consists of two members, one of whom is authorized to preside over the sitting of the appellate tribunal.

2. With the consent of counsel for the parties, now we proceed to dispose of these appeals. The appellants in these appeals are aggrieved by the order dated April 26, 2012 passed by the adjudicating officer of the Securities and Exchange Board India (the Board) against nine entities, including five appellants before us, holding them guilty of violating regulations 7 and 10 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 ₹ 4 lacs each under section 15 A(b) and 15 H of the Securities and Exchange Board of India Act, 1992 (the Act).

3. The facts of the case, in brief, are that the Board carried out investigation in the matter of Datasoft Application Software (India) Limited (the company) for the period 2000-2001. At the relevant time the scrip of the company was listed on the Bombay Stock Exchange and Ahmedabad Stock Exchange. The Board observed that on January 28, 2000 the company made preferential allotment of 1,20,00,000 shares for cash @ 10/- per share with a premium of ₹ 17/- per share. The share capital of the company was 1,50,00,000 out of which 30,00,000 shares were fully paid up at ₹ 10/- each and rest of 1,20,00,000 shares were partly paid up to the extent of 10%. The total paid-up capital of the company amounted to ₹ 4,20,00,000/-. The details of the preferential allotment to the nine entities, as stated in the impugned order, is as under:

No.	Noticees.	No. of shares allotted.	Total no. of shares allotted.	% of the paid up share capital
1.	Burlington Financial Services (P) Ltd.	7,45,000	66,56,000 shares.	15.85%
2.	Dwarkadhish Import & Export (P) Ltd	7,43,000		
3.	R Shankar	7,45,000		
4.	GS Sridhar	4,46,000		
5.	PV Muralikrishna	7,40,000		
6.	A Rajendra Prasad	7,00,000		
7.	Hemdil Financial Services Ltd	7,40,000		
8.	Ekveera Computers (P) Ltd.	7,48,500		
9.	Prathakal Comm. & Ag. (P) Ltd.	7,48,500		

4. It was observed by the Board that a total of 60,56,000 shares of the company were allotted to nine entities / acquirers and this constituted 15.85% of the total shareholding of the company. It was further observed by the Board that these nine entities were known / connected to each other and were linked to the core group consisting of Mr. Sridhar, Mr. Rajendra Prasad and Mr. Muralikrishna and their companies known as Harsha Pranav Securities Pvt. Ltd., Narvin Finance and Investments Ltd., Newfin Financial Services Ltd. and Vivenasri Financial Services Ltd. The linkages / connection between the appellants and these companies are discussed in detail in the impugned order. With the acquisition of these shares, the provisions of regulation 7 and regulation 10 of the takeover code got triggered and the acquirers were supposed to comply with the requirements laid down therein including making of a public offer. Apparently, this was not done. A show cause notice dated February 25, 2009 was issued asking the appellants to show cause as to why enquiry should not be held against them and penalty imposed for violating the provisions of the takeover code. The appellants denied the charges. The appellants replied to the show cause notice, also appeared for personal hearing and made their submissions before the adjudicating officer. After considering their reply, the adjudicating officer of the Board found the appellants guilty of violating the provisions of the takeover code and imposed the penalty as stated above. Hence, this appeal.

5. We have heard Mr. Rajeev Kumar, counsel for the appellant and Dr. (Mrs.) Poornima Advani, counsel for the respondent Board, who have also taken us through the record. Learned counsel for the appellant has also filed his written submissions. In brief, challenge to the impugned order is on the grounds that the penalty imposed on the appellants is based on conjectures and surmises and there is no proof of any wrong doing on their part. He has also pleaded that the findings given by the adjudicating officer are based on various documents, bank statements and oral testimony of the directors of the company collected behind the back of the appellant and, therefore, the adjudication order is passed without following principles of natural justice. It was further submitted by him that the adjudicating officer has failed to

apply her mind to the facts of the case and the provisions of the Act and regulations made therein. He has also submitted that as per Board's own conclusion, all the nine entities, including the five appellants, are acquirers and held them to be 'connected entities' acting in concert. They have collectively acquired 15.85% shares of the company. According to him, this may be a single violation and the maximum penalty that could have been imposed under section 15H at the relevant time was only ₹ 5 lacs whereas a total penalty of ₹ 36 lacs has been imposed. It is submitted that the penalty is highly excessive and grossly disproportionate to the acts allegedly done by the appellants. He further submitted that while imposing the penalty, the adjudicating officer has ignored the mandatory provisions of section 15 J of the Act.

6. Learned counsel for the respondent Board supported the order passed by the adjudicating officer and stated that the adjudicating officer has clearly brought on record the violation on the part of the appellant and also the connection / relation between the entities who have collectively acquired 15.85% of the share capital of the company. There has been no violation of the principles of natural justice as the appellant was given opportunity of cross-examination of persons whose statements have been relied upon. Copies of relevant documents were also made available. While imposing the penalty, the adjudicating officer has also considered the provisions of section 15 J of the Act and also imposed penalty under section 15 A(b) and section 15 H of the Act as they existed at the relevant time. Learned counsel for the Board, therefore, submitted that no interference is called for by this Tribunal and findings arrived at by the adjudicating officer needs to be upheld.

7. After considering the rival submissions and perusing the material available on record, we are of the considered view that the findings arrived at by the adjudicating officer with regard to violation of the provisions of takeover code calls for no interference. The allotment of shares on preferential basis to the appellants before us is not in dispute. The allotment of preferential shares was made to the connected parties as concluded by the adjudicating officer in the impugned order. The interconnection between them has also been clearly brought out by the adjudicating

officer in the impugned order. The order itself records that the appellants were granted an opportunity to cross-examine Mr. Ashok Sethi, Mr. Anil Doshi and Mr. Mahesh Khandelwal. The allotment of shares to the appellants by the company is also not in dispute. The provisions of regulation 7(1) of the takeover code specifically provide that any acquirer, who acquires shares or voting rights which, taken together with shares or voting rights, if any, held by him, would entitle him to more than five percent shares or voting rights in a company, in any manner whatsoever, shall disclose the aggregate of a shareholding or voting rights in that company, to the company. Regulation 10 of the takeover code provides that no acquirer shall acquire shares or voting rights which taken together with shares or voting rights, if any held by him or by persons acting in concert with him, entitle such acquirer to exercise fifteen per cent or more of the voting rights in a company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the regulations. Violation of these two provisions by the appellant before us it is writ large on the face of it. We are also not inclined to agree with the learned counsel for the appellant that the order has been passed merely on conjectures or surmises. We are not inclined to agree with him that the adjudicating officer has relied on documents or material collected behind the back of the appellant. As stated in the impugned order itself, which is not disputed, the appellants were afforded opportunity to cross-examine the persons whose statements were recorded and consequent to the cross-examination, the appellants filed their reply. It is not clear what further principles of natural justice were required to be complied with. We are also unable to agree with the argument of learned counsel for the appellant that all the nine entities, including the five appellants who acted in concert committed only one violation and therefore a maximum penalty of ₹ 5 lacs could have been imposed on them under section 15 H of the Act. We are of the view that each of the violator is liable to the penalty in accordance with law and such penalty cannot be clubbed treating it as a single violation. On merits we are, therefore, not inclined to interfere with the findings arrived at by the adjudicating officer.

8. However, we are constrained to note that in such a straight forward case where alleged violation took place in the year 2000 and the Board started investigation into the matter as early as in 2003, it issued the show cause notice to the appellant only in February, 2009 and passed the impugned order only in April, 2012. There is no justification available on record to explain this inordinate delay on the part of the respondent Board. Expediency is one of the essential elements in a fast moving economy to check and punish the wrongdoer in the market. The laxity on the part of the Board to punish the guilty within reasonable time is not a good practice. The very purpose of taking action gets defeated in case of inordinate delay especially in matters where the facts are simple and investigation can be concluded within a short time. We have not found any justification on record as to why the show cause notice was issued after nine years of violation of the regulations and then taking another three years to pass a final order. At the relevant time, the maximum penalty that could have been imposed under the Act was ₹ 5 lacs for violation under section 15 H of the Act and ₹ 25,000/- under section 15 A(b) of the Act. Keeping in view the penalty that could have been imposed at the relevant time and the inordinate delay in finalization of the case; we are of the considered view that the ends of justice would be met by reducing the penalty to ₹ 1 lac in respect of each of the appellant. We order accordingly.

In the result, while upholding the findings of the adjudicating officer, the penalty is reduced to ₹ 1 lac in respect of each of the appellants in these appeals. No costs.

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

Sd/-
S.S.N. Moorthy
Member

20.12.2012
Prepared and compared by:
msb