REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 361 OF 2007

SECURITIES & EXCHANGE BOARD OF INDIA ...APPELLANT

VERSUS

BURREN ENERGY INDIA LTD. & ORS. ...RESPONDENTS

JUDGMENT

RANJAN GOGOI, J.

1. The challenge in this appeal is to an order of the learned Securities Appellate Tribunal, Mumbai (hereinafter referred to as "the Tribunal") reversing the order of the Adjudicating Officer dated 25th August, 2006 holding the respondents guilty of contravening the provisions of Regulation 22(7) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and

Takeovers) Regulations, 1997 (hereinafter referred to as "the Regulations"). A penalty of Rs.25 lakhs has been imposed on each on the respondents herein for the aforesaid violation. Aggrieved by the aforesaid reversal, Securities & Exchange Board of India (hereinafter referred to as "SEBI") is in appeal before us.

2. The relevant facts are not in dispute. The first respondent herein – Burren Energy India Ltd. (hereinafter referred to as "Burren") was incorporated in December, 2004 under the laws of England and Wales with its registered office in London. Burren was formed to acquire the entire of the equity share capital of one Unocal Bharat Limited (hereinafter referred to as "UBL"), incorporated in Mauritius in July, 1996. The shares of the aforesaid UBL were acquired in September, 1996 by one Unocal International Corporation (for short

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"UIC") incorporated in California in USA.

3. Admittedly, UBL did not carry out any business activity but, at the relevant time, held 26.01% of the issued share capital of Hindustan Oil Exploration Co. Ltd. (hereinafter referred to as "the target company").

4. Burren entered into a share purchase agreement with UIC on 14th February, 2005 to acquire the entire equity share capital of UBL. This agreement was entered into in England and by virtue thereof all the shares of UBL were registered in the name of Burren on the same day itself i.e. 14th February, 2005. On account of this transformation Burren came to hold 26.01% of the share capital in the target company. As the acquisition was beyond the stipulated 15% of the equity share capital of the target company the Regulations got attracted

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making it obligatory on the part of Burren to make a public announcement in accordance with the Regulations. Such public announcement in the form of a public offer for sale/purchase of 20% of the shares of the target company at a determined price of Rs.92.41 per fully paid up equity share was made on 15th February, 2005 by Burren and UBL acting as a person acting in concert.

5. On 14th February, 2005 i.e. date of execution of the share purchase agreement Burren appointed two of its Directors (Mr. Finian O'Sullivan and Mr. Atul Gupta) on the board of UBL and on the same date UBL, which is a person acting in concert with Burren, appointed the same persons on the board of directors of the target company. This, according to SEBI, amounted violation of Regulation 22(7) of the Regulations inasmuch as the said appointment was made during the offer

period which had commenced on and from 14th February, 2005 i.e. date of execution of the share purchase agreement.

6. To appreciate the issue the provisions of Regulation 2(1)(f) of the Regulations which defines 'offer period' and Regulation 22(7) of the Regulations alleged to have been violated by the respondents may be extracted below:

> **"2(1)(f) "Offer period" means the period between the date of entering into Memorandum of Understanding or the public announcement, as the case may be and the date of completion of offer formalities relating to the offer made under these regulations"**

> **22. General obligations of the acquirer.-(1).....**
> **(2) .....**
> **.....**
> **(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:**

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Provided that in case of acquisition of shares or voting rights or control of a Public Sector Undertaking pursuant to a public announcement made under the proviso to sub-regulation (1) of Regulation 14, the provisions of sub-regulation (8) of Regulation 23 shall be applicable:

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.

7. The Tribunal hearing the matter in appeal took the view that under Regulation 2(1)(f) of the Regulations 'offer period' is clearly defined as the period of time between the date of entering into

Memorandum of Understanding or the public announcement, as the case may be, and the date of completion of offer formalities. The learned Tribunal was of the view that when there was no ambiguity or uncertainty in the provisions of the Regulations the definition of 'offer period' has to be literally interpreted. The learned Tribunal went into the dictionary meaning of the expression 'Memorandum of Understanding' and went on to hold that the same falls short of a concluded contract. As there was no Memorandum of Understanding between the parties it is the date of public announcement that would trigger of the commencement of the 'offer period'. As the appointment of the Directors in the target company was made on 14th February, 2005 and the public announcement was made on 15th February, 2005 the learned Tribunal was of the view that the respondents (appellants before it) cannot be held liable for violating

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Regulation 22(7) of the Regulations, as found by the Adjudicating Officer.

8. The main thrust of the contentions advanced on behalf of the appellant before us appears to be that the words 'Memorandum of Understanding' are not words of Art conveying a single meaning. In an appropriate situation a 'Memorandum of Understanding' may also include a concluded agreement between the parties. Even in a given case where a Memorandum of Understanding is to fall short of a concluded agreement and, in fact, the concluded agreement is executed subsequently, the 'offer period' would still commence from the date of the Memorandum of understanding. If the offer period commences from the date of such Memorandum of Understanding, according to the learned counsel, there is no reason why the same should not commence from the date of the share purchase agreement when the parties had not executed a Memorandum

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of Understanding. It is also submitted that the commencement of the 'offer period' from the date of public announcement would primarily have relevance to a case where acquisition of shares is from the market and there is no Memorandum of Understanding or a concluded agreement pursuant thereto.

9. In reply, Shri Shyam Divan, learned Senior Counsel appearing for the respondents has urged that Regulation 22(7) of the Regulations can have no application to the present case inasmuch as the disqualification from appointment on the board of directors of the target company will operate only when the acquirer or persons acting in concert are individuals and not a corporate entity. This is because under Section 253 of the Companies Act, 1956 (corresponding to Section 149 of the Companies Act, 2013) there is an embargo on a body corporate from being appointed as a director. Shri

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Divan has also drawn the attention of the Court to the provisions of Regulation 22(7) of the Regulations as it originally existed; its amendment in the year 2002 (which provision is relevant for the purposes of the present case) and the subsequent amendment effected in the year 2011. Shri Divan has submitted that meaning sought to be attributed to the Regulations relevant to the present case i.e. 2002 Regulations has been specifically incorporated in the Regulations amended in the year 2011. That the concluded share purchase agreement would be the starting point of the 'offer period' is mandated under the 2011 Regulations and not under the 2002 Regulations.

10. We have considered the submissions of the parties.

11. In the present case, while Burren

was the acquirer, UBL was the person acting in concert. This is evident from the letter of offer (public announcement) dated 15th February, 2005. The embargo under Section 22(7) is both on the acquirer and a person acting in concert. The expression 'person acting in concert' includes a corporate entity [Regulation 2(1)(e)(2)(i) of the Regulations] and also its directors and associates [Regulation 2(1)(e)(2)(iii) of the Regulations]. If this is what is contemplated under the Regulations we do not see how the first argument advanced by Shri Divan on behalf of the respondents can have our acceptance.

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12. Insofar as the second argument advanced by Shri Divan is concerned it is correct that in the definition of 'offer period' contained in Regulation 2(1)(f) of the Regulations, relevant for the present case, a concluded agreement is not

contemplated to be the starting point of the offer period. But such a consequence must naturally follow once the offer period commences from the date of entering into a Memorandum of Understanding which, in most cases would reflect an agreement in principle falling short of a binding contract. If the offer period can be triggered of by an understanding that is yet to fructify into an agreement, we do not see how the same can be said not to have commenced/started from the date of a concluded agreement i.e. share purchase agreement as in the present case.

13. On the view that we have taken we will have to hold that the learned Tribunal was incorrect in reaching its impugned conclusions and in reversing the order of the Adjudicating Officer. Consequently the order of the learned Tribunal is set aside and that of the Adjudicating Officer is restored. The

penalty awarded by the Adjudicating Officer by order dated 25th August, 2006 shall be deposited in the manner directed within two months from today.

14. The appeal consequently is allowed in the above terms.

.....,J.
(RANJAN GOGOI)

.....,J.
(N.V. RAMANA)

NEW DELHI
DECEMBER 2, 2016

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