BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No.66 of 2010

Date of decision: 28.12.2010

BNS Tour & Travel Pvt. Ltd.
Having its Registered Office at
B-201, Gayatri Heritage, Plot No.3,
Sector 20, Khargarh,
Navi Mumbai. ….. Appellant

Versus

1. Securities and Exchange Board of India
   SEBI Bhavan, Plot No.C-4A,
   G Block, Bandra Kurla Complex,
   Bandra (East),
   Mumbai – 400 051.

2. M/s. Bhushan Energy Ltd.
   F-Block, 1st Floor,
   International Trade Tower,
   Nehru Place,
   New Delhi – 110 019.

3. M/s. Bhushan Steel Ltd.
   F-Block, 1st Floor,
   International Trade Tower,
   Nehru Place,
   New Delhi – 110 019.

4. Shri. Brij Bhushan Singhal
   W-29, Greater Kailash Part-II,
   New Delhi – 110 019.

5. Shri. Neeraj Singhal
   W-29, Greater Kailash Part-II,
   New Delhi – 110 019.

6. M/s. BNS Steel Trading Pvt. Ltd.
   315, 3rd Floor, E-Block,
   International Trade Tower,
   Nehru Place,
   New Delhi – 110 019.

7. M/s. BBN Transportation Pvt. Ltd.
   315, 3rd Floor, E-Block,
   International Trade Tower,
   Nehru Place,
   New Delhi – 110 019.

8. M/s. BNR Infotech Pvt. Ltd.
   315, 3rd floor, E- Block,
   International Trade Tower,
   Nehru Place,
   New Delhi – 110 019.

9. M/s. BNR Consultancy Services Pvt. Ltd.
Flat No. 111, Lotus Building,
Bhushan Garden, Village – Savroli & Nifan,
Khalapur Taluk,
Raigad – 410 202. Maharashtra …...Respondents

Mr. Deepak Dhane, Advocate for the Appellant.

Mr. Kumar Desai, Advocate with Ms. Harshada Nagare, Advocate for Respondent no.1.
Ms. Ranjana Roy Gawai, Advocate for Respondent nos. 2 to 9.

CORAM : Justice N.K. Sodhi, Presiding Officer
Samar Ray, Member
P.K. Malhotra, Member

Per : Justice N.K. Sodhi, Presiding Officer (Oral)

Same order as in Appeal no.65 of 2010 decided on 28.12.2010.

Sd/-
Justice N.K.Sodhi
Presiding Officer

Sd/-
Samar Ray
Member

Sd/-
P.K. Malhotra
Member

28.12.2010
Prepared & Compared by
RHN

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Navi Mumbai – 410 210. ....Respondents

Mr. P.N. Modi, Advocate with Mr. Naveil Daftari and Ms. Ranjana Roy Gawai, Advocates for Appellant no. 1 to 8.

Mr. Kumar Desai, Advocate with Ms. Harshada Nagare, Advocate for Respondent no. 1.
Mr. Deepak Dhane, Advocate for Respondent no.2.

CORAM : Justice N.K. Sodhi, Presiding Officer
Samar Ray, Member
P.K. Malhotra, Member

Per : Justice N.K. Sodhi, Presiding Officer

Whether the appellants had violated on January 29, 2009, the provisions of Regulation 10 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1996 (referred hereinafter as the takeover code) is the question that arises before us in these two connected Appeals no. 65 and 66 of 2010. Appellants in Appeal no.65 are a part of the Bhushan group and BNS Tour and Travel Pvt. Ltd. which is the second respondent in this appeal is the appellant in the other appeal. Both the appeals are directed against the same order of the adjudicating officer imposing a monetary penalty of ₹ 4.5 lacs on the appellants making them liable jointly and severally. Since arguments were addressed in Appeal no.65 of 2010, the facts are being noticed from this case. The answer to the question posed above would depend upon whether the second respondent was a part of the Bhushan group on January 29, 2009. Counsel for the parties agree that if the second respondent was a part of that group, the provisions of Regulation 10 stood violated but not otherwise.

2. Orissa Sponge Iron and Steel Ltd. is a listed company which shall be referred to hereinafter as the target company whose shares were acquired over a period of time by the Bhushan group (the appellants) and the second respondent. It is common ground between the parties that on January 29, 2009 which is the material date for our purpose, the Bhushan group and the second respondent were holding 14.85 and 2.56 per cent shares respectively of the target company. It is, thus, clear that if the second respondent also

belonged to the Bhushan group on the material date, it would be regarded as a person acting in concert with that group and its shareholding would be clubbed with that of the Bhushan group in which case the shareholding of the two would exceed 15 per cent of the voting rights in the target company and Regulation 10 of the takeover code would get triggered. Regulation 10 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 15 per cent or more of the voting rights in a company, unless such acquirer makes a public announcement to acquire shares of that company in accordance with the takeover code. Admittedly, the Bhushan group did not make any public announcement within four days from January 29, 2009 which it would have had to make under Regulation 14(1) of the takeover code if Regulation 10 had got triggered. The case of the Securities and Exchange Board of India (for short the Board) is that the second respondent was a part of the Bhushan group on the material date and their combined shareholding being in excess of the threshold limit prescribed by Regulation 10, they were required to make a public announcement and not having done so, they all violated Regulation 10 of the takeover code. The case of the appellants (Bhushan group) and respondent no.2, on the other hand, is that the second respondent, a private limited company was a part of the Bhushan group prior to October 6, 2008 on which date the shares of the second respondent held by this group were sold to M/s. Prime Nutrient Pvt. Ltd. and Hariom Yarns Pvt. Ltd. both of which shall collectively be referred to hereinafter as the Jain group. According to the appellants, the second respondent came to be owned and controlled by the Jain group with effect from October 6, 2008 and was not a part of their group on January 29, 2009 and, therefore, the shares of the target company held by this respondent could not be clubbed with their shareholding. The adjudicating officer has not accepted this claim of the appellants and has found the appellants and the second respondent guilty of violating Regulation 10 of the takeover code and by his order dated January 18, 2010 imposed a monetary penalty of ₹ 4.5 lacs. Their liability is joint and several. This order is now under challenge in these appeals.

3. Having noticed the rival stands of the parties, we may now examine which of the two is correct. The total issued share capital of respondent no.2 is 19,60,000 shares of ₹ 10

each which was held by four different companies namely, Adamine Construction Pvt. Ltd., Starlight Consumer Electronics Pvt. Ltd., Super Star Agency Pvt. Ltd. and Goldstar Cement Pvt. Ltd. which also form part of the Bhushan group of companies. All these four companies transferred their shareholding in respondent no.2 to the Jain group and we have on record copies of share transfer forms/deeds by which the shares were transferred in favour of this group. The share transfer forms are dated October 4, 2008 and the approval date on them is October 6, 2008. These share transfer forms are duly stamped and were executed by the transferor and the transferee as is the requirement of Section 108(1) of the Companies Act, 1956. We also have on record copy of the resolution passed by the board of directors of respondent no.2 in their meeting held on October 6, 2008 approving the transfer of 19,60,000 shares from the Bhushan group of companies to the Jain group. It is clear from this resolution that the entire share capital was transferred. On receipt of duly executed transfer deeds along with the share certificates, the names of the transferees were entered in the register of members maintained by the second respondent. The genuineness of the share transfer deeds transferring the shares has not been disputed or doubted by the adjudicating officer. The only ground on which he does not accept October 6, 2008 as the date of transfer is that the consideration for the transfer of shares was paid by the transferees on February 27 and February 28, 2009 which date is subsequent to the material date (January 29, 2009). His findings in this regard are contained in paragraphs 25 and 26 of the impugned order which are reproduced hereunder:

> "25. In the instant case, I find that there was an offer for sale of shares of BNSTTPL by Bhushan1 to Jain Group (or vice-versa) and that the said offer for sale was accepted by Jain Group (or vice-versa) and the mutual consideration for the aforesaid transaction was the delivery of the share certificates against payment of Rs.1.96 Crore. Although, the date of aforesaid offer, the acceptance thereof and the date of delivery of the share certificates cannot be ascertained from the evidence on record for reasons enumerated above, the fact remains that there was a delayed payment of consideration of Rs.1.96 Crore on February 27 and 28, 2009.
>
> 26. From the aforesaid, it can be seen that there was an offer and acceptance. Under normal contracts without any specific terms regarding the performance of the contract, the performance of the contract should happen simultaneously. The natural following action of the simultaneous reciprocity of actions of performance of the contract is a sine qua non for the transaction to have been complete. In the instant case, in the absence of any other specific date, the date of realisation of the payment can be considered to be the determining date of performance of mutual obligation. Therefore, it follows that the transaction of sale of all the shares of BNSTTPL was complete only on February 28, 2009."

We are afraid that the adjudicating officer has misdirected himself and has not appreciated the legal position correctly while recording the aforesaid findings. There is on record a share purchase agreement (SPA) dated October 4, 2008 between the Jain group on the one hand and the aforesaid four companies of the Bhushan group on the other in regard to the transfer of shares. The two relevant clauses of this agreement are clauses 1 and 5 which are reproduced hereunder for facility of reference.

> "1. Subject to the provisions of this Agreement and against payment of the Consideration Amount to the Sellers on the payment due date, **the Purchasers have become legal and beneficial owners of the entire shareholding of BNS on the date of execution of this Agreement.** The Sellers shall transfer and execute the transfer deed and to do all acts and things and deliver the share certificates free from all Encumbrances, all rights, titles and interests of the Sellers connected with the shares.
>
> 5. **The Purchasers and Sellers have mutually agreed that the consideration amount as stated in para 4(a) and 4(b) above shall be paid by the purchasers to the Sellers on or before 28th February, 2009 being the Due Date.** The Purchasers and Sellers may further extend the Due Date from 28th February, 2009 to any further date as may be mutually agreed between the Purchaser and Sellers." (emphasis supplied)

A reading of the aforesaid clauses of SPA leave no room for doubt that the parties intended that the property in the shares would get transferred on the date of execution of the agreement and that payment shall be made by the purchasers to the sellers on or before February 28, 2009. Shares of limited companies are 'goods' within the meaning of the Sale of Goods Act, 1930 and Section 19 of this Act stipulates that property in the goods is transferred to the buyer at such time as the parties to the contract intend it to be transferred and Section 20 makes it clear that in a contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment of the price or the time of delivery of the goods or both is postponed. In view of this legal position, the adjudicating officer was not right in holding that "the transaction of sale of all the shares of BNSTTPL was complete only on February 28, 2009." We cannot, therefore, uphold the findings of the adjudicating officer which have been reproduced hereinabove.

4. The adjudicating officer has in para 23 (b) of the impugned order observed that "the possibility of the SPA having been created as an afterthought cannot be ruled out completely". This observation has been made by him because the SPA was not produced during the course of the investigations and the same was produced only at the time of

personal hearing on November 27, 2009. It is the case of the appellants that on November 16, 2009 when they appeared for personal hearing before the adjudicating officer, the latter asked them to produce such other documents that may support their claim and it was thereafter that on the next date of personal hearing, the SPA was produced along with some other documents. This fact is borne out from the letter of November 27, 2009 along with which the documents were produced and this letter is on the record. It will not be out of place to mention here that the share transfer deeds duly stamped and executed by the parties and a copy of the board resolution of respondent no.2 approving the transfer were already on the record. In this view of the matter, we do not think that the adjudicating officer was justified in doubting the authenticity of the SPA. Let us not forget that according to Section 108 of the Companies Act, shares get transferred on the execution of duly stamped transfer deeds. Once that was done on October 6, 2008, the SPA becomes immaterial. In any case, despite doubting the authenticity of the SPA, the adjudicating officer has considered the same and recorded his findings in paragraphs 25 and 26 reproduced hereinabove which are not warranted by law.

5. We have heard the learned counsel for the parties and what emerges from the record is this. Four companies belonging to the Bhushan group entered into SPA on October 4, 2008 for the transfer of their shares of respondent no.2 in favour of the Jain group. In pursuance to this agreement, the parties executed share transfer deeds on October 6, 2008 duly stamped whereafter the board of directors of respondent no2. on the same day by their resolution approved the transfer. After the approval of the transfer, the names of the transferees (Jain group) were entered in the register of members maintained by the second respondent. Transfer of shares, thus, got completed and respondent no.2 came to be owned and controlled by the Jain group with effect from October 6, 2008. It is common ground between the parties that payment of consideration for the sale of shares was made on February 27 and 28, 2009 which was in accordance with clause 5 of SPA. In this view of the matter, we answer the question posed in the opening part of the order in the negative and hold that respondent no.2 ceased to be a part of the Bhushan group with effect from October 6, 2008. In view of this finding of ours, respondent no.2 could not be said to be acting in concert with the appellants on January 29, 2009 and the shares of the target

company held by this respondent could not be clubbed with those of the appellants (Bhushan group). It is, thus, clear that the shareholding of the Bhushan group on January 29, 2009 was 14.85 per cent and being less than 15 per cent, Regulation 10 of the takeover code was not attracted. It follows that neither the appellants nor respondent no.2 violated Regulation 10 of the takeover code and the charge against them must fail.

6. Before concluding, we may take note of another fact that stands established on the record. The Bhushan group has been purchasing shares of the target company from the open market from time to time and eventually on February 28, 2009, this group made a voluntary public announcement to the public shareholders at an offer price of ₹ 330 per share which was later increased to ₹ 359.95 per share. If the appellants had come out with a public offer within four days of January 29, 2009, as is the case of the Board, the price that would have been offered to the shareholders would have been ₹ 142.22 per share as per the pricing formula. Instead, the Bhushan group has offered a much higher price to the public shareholders which obviously benefits them. In this background, we are satisfied that there was no attempt on the part of the appellants either to dodge the provisions of the takeover code or to compromise the interest of the investors.

For the reasons recorded above, the impugned order cannot be sustained. Accordingly, the appeals are allowed and the impugned order set aside leaving the parties to bear their own costs.

Sd/-
Justice N.K.Sodhi
Presiding Officer

Sd/-
Samar Ray
Member

Sd/-
P.K. Malhotra
Member

28.12.2010
Prepared & Compared by
msb/ddg/rhn