BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on: 02.04.2019

Date of Decision : 20.05.2019

Appeal No. 385 of 2017

1. Mr. Ganesh Singhania
2. Ms. Anita Singhania
   Shah & Ramaiya Chartered Accountants,
   36/227, RDP 10, Sector VI,
   Charkop, Kandivali (W),
   Mumbai – 400 067. …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. Ravi Ramaiya, Chartered Accountant with Mr. Saurabh Bachhawat, Advocate i/b Shah & Ramaiya Chartered Accountants for Appellants.

Mr. Gaurav Joshi, Senior Advocate with Mr. Chirag Bhavsar and Mr. Saurabh Pakale, Advocates i/b MDP & Partners for the Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Dr. C.K.G. Nair, Member
Justice M.T. Joshi, Judicial Member

Per : Dr. C.K.G. Nair, Member

1. This appeal has been filed challenging the order of the Adjudicating Officer ('AO' for short) of Securities and Exchange Board of India ('SEBI' for short) dated June 15, 2017. By the said order a total penalty of Rs. 2,07,00,000/- (Rupees Two Crore Seven Lakh Only) has been imposed on the appellants jointly and severally for violating certain provisions of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 ('Takeover Regulations, 1997' for short) relating to disclosure and open offer.

2. The appellants are promoters of a company, namely, M/s. Square Four Projects (India) Ltd. (formerly known as Essen Supplements India Ltd. ('company' for short). While perusing documents relating to a public announcement made on October 20, 2010 SEBI noticed that the appellants had failed to comply with provisions of Takeover Regulations on an earlier occasion. Accordingly, a show cause notice was issued to the appellants on September 29, 2013 calling upon to show cause as to why an enquiry should not be initiated and penalties imposed under the relevant sections of the SEBI Act, 1992 for the alleged violations of Takeover Regulations, 1997. The said alleged violations are as follows:-

(i) Delay of one day in disclosing the acquisition under Regulation 7(1) read with 7(2) of the Takeover Regulations of 53.14% of the shares acquired on July 24, 2009 by the acquirers / appellants.

(ii) Failure to disclose under 7(1) & 7(1A) read with 7(2) of the Takeover Regulations of 5.35% of the shares acquired by the acquirers / appellants during 1 – 20 October, 2009.

(iii) Failure to make a public announcement for open offer regarding 0.39% of shares under Regulation 11(2) read with 14(1) of the Takeover Regulations acquired on February 18, 2010.

3. As is evident from the record and as admitted there was a delay of one day in disclosing the acquisition of 53.14% of the equity capital of the target company and therefore the appellants violated the provisions of Regulation 7(1) read with Regulation 7(2) of the Takeover Regulations. Disclosure under Section 7(1), the same was never made. Since an open offer pursuant to this acquisition was made by the appellants during October, 2009 through a public announcement there was no violation of

Regulation 11(2) of Takeover Regulations. Further, another acquisition of 22730 shares made on February 18, 2010 off market whereby the total shareholding of the appellants promoters increased from 58.49% to 58.88% triggered another open offer which was not made and thereby the appellants violated Regulation 11(2) read with Regulation 14(1) of Takeover Regulations.

4. Before proceeding further the relevant provisions of the Takeover Regulations 1997 are reproduced for convenience:-

> ***"Acquisition of 5 per cent and more shares or voting rights of a company.***
>
> *7.(1) 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 per cent or ten per cent or fourteen per cent [or fifty four per cent or seventy four per cent] shares or voting rights in a company, in any manner whatsoever, shall disclose at every stage the aggregate of his shareholding or voting rights in that company to the company and to the stock exchanges where shares of the target company are listed.]*
>
> *(1A) Any acquirer who has acquired shares or voting rights of a company under sub-regulation (1) of regulation 11, [or under second proviso to sub-regulation 2 of regulation 11] shall disclose purchase or sale aggregating two per cent or more of the share capital of the target company to the target company, and the stock exchanges where shares of the target company are listed within two days of such purchase or sale along with the aggregate shareholding after such acquisition or sale.*
>
> *Explanation.— For the purposes of sub-regulations (1) and (1A), the term 'acquirer' shall include a pledgee, other than a bank or a financial institution and such*

pledgee shall make disclosure to the target company and the stock exchange within two days of creation of pledge.

(2) The disclosures mentioned in [sub-regulations (1) and (1A) shall be made within [two days] of,—

(a) the receipt of intimation of allotment of shares; or

(b) the acquisition of shares or voting rights, as the case may be.

Consolidation of holdings.

11. (1) -

[(2) No acquirer, who together with persons acting in concert with him holds, fifty -five per cent (55%) or more but less than seventy-five per cent (75%) of the shares or voting rights in a target company, shall acquire either by himself or through [or with] persons acting in concert with him any additional shares [entitling him to exercise voting rights] or voting rights therein, unless he makes a public announcement to acquire shares in accordance with these Regulations:

Provided that in a case where the target company had obtained listing of its shares by making an offer of at least ten per cent (10%) of issue size to the public in terms of clause (b) of sub-rule (2) of rule 19 of the Securities Contracts (Regulation) Rules, 1957, or in terms of any relaxation granted from strict enforcement of the said rule, this sub-regulation shall apply as if for the words and figures 'seventy-five per cent (75%)', the words and figures' ninety per cent (90%)'were substituted.]

[Provided further that such acquirer may, [notwithstanding the acquisition made under regulation 10 or sub-regulation (1) of regulation 11,] without making a public announcement under these Regulations, acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him upto five per cent. (5%) voting rights in the target company subject to the following:-

(i) the acquisition is made through open market purchase in normal segment on the stock exchange but not through bulk deal /block deal/ negotiated deal/ referential allotment; or the increase in the shareholding or voting rights

of the acquirer is pursuant to a buy back of shares by the target company;

(ii) the post acquisition shareholding of the acquirer together with persons acting in concert with him shall not increase beyond seventy five per cent.(75%).]

Timing of the public announcement of offer.

14. (1) The public announcement referred to in regulation 10 or regulation 11 shall be made by the merchant banker not later than four working days of entering into an agreement for acquisition of shares or voting rights or deciding to acquire shares or voting rights exceeding the respective percentage specified therein:

5. Shri Ravi Ramaiya, Chartered Accountant appearing on behalf of the appellants submitted that these violations were not intentional. There is delay of only one day as far as the first violation is concerned, it was unintentional and occurred due to operational reasons. As far as the second alleged violation is concerned disclosure was made under Regulation 7(3) of the Takeover Regulations by the company to the Stock Exchange and therefore the spirit of the disclosure requirement was complied with. A letter to this effect written by the company on February 19, 2010 to BSE Limited is produced on record to prove this submission. The alleged third violation was not a violation at all because there was no such acquisition separately from what was acquired as part of 5.35% (307666 shares) acquired on February 18, 2010. This confusion happened inadvertently because the first

Share Purchase Agreement (SPA) was cancelled and a second SPA was entered into wherein some shares of the cancelled SPA (first SPA) crept in. Learned counsel for the appellants also cited the relevant data relating to the discrepancy between both the SPAs dated September 4, 2008 and July 24, 2009 which are on record. In any case another open offer was made by a public announcement on October 20, 2010.

6. Learned counsel for the appellants further submitted that the impugned order has travelled beyond the remit in calculating the loss to the shareholders who sold shares during February 18, 2010 to October 20, 2010. These calculations are incorrect. These shareholders had the option of selling their shares in the open offer made in October, 2009 or in the second open offer announced in October 2010. Since they did not offer their shares in the first open offer and sold at the market price on a date of their choice such sale cannot be treated as their loss or gain to the appellants. In the alternative, the learned counsel further submitted that even assuming some loss has been incurred by some investors the penalty imposed in the impugned order is too harsh and disproportionate.

7. In support of their submission that the penalty imposed is disproportionate and too harsh the appellants relied on the order of Adjudicating Officer of SEBI dated May 23, 2018 in the matter of ***Shri Fateh Lal Shah & Ors.*** and contended that it is also a similar case where a penalty of only Rs. 6 lakh has been imposed while in yet another similar matter ***Anikkumar Nandkumar Harchandani & Ors.*** dated May 24, 2018 Adjudicating Officer of SEBI imposed a penalty of only Rs. 25 lakh.

8. In short, the learned counsel submitted that there was an inadvertent delay of disclosure in the first instance by one day; the spirit of the disclosure in the second instance has been complied with and there is no violation in the third instance.

9. Learned senior counsel Shri Gaurav Joshi appearing on behalf of SEBI submitted that the delay in both first and second instances is admitted; and since in the first instance delay is that of only one day the minimum penalty applicable under Section 15A(b) only has been imposed. As far as the second violations is concerned the submission of the appellants cannot be accepted as it is obligatory for the acquirers to make disclosures under Regulation 7(1) and 7(1A) in addition to disclosure under Regulation 7(3) made by the Company to the Stock Exchange.

However, despite it being a continuing violation after considering the mitigating factors penalty of only Rs. 3 lakh each has been imposed where the penalty could have been upto Rs. One crore. As regards the third violation the argument of the appellants that it was a confusion arising from the two SPAs has no meaning because it is an admitted fact that the first SPA was cancelled and thereafter that document has no relevance and there are records clearly available that an off market acquisition of 22730 consisting of 0.39% shares was made on February 18, 2010 whereby the total acquisition had gone up from 58.49% to 58.88% of the total share capital. This necessitated an open offer since such off market transactions were not eligible for exemption, which was not done. However, after considering the mitigating factor the AO has imposed only a monetary penalty of Rs. 2 crore when the penalty could have been upto Rs. 25 crore or even another open offer could have been ordered. Therefore, the appellants fail on all these grounds and the appeal is liable to be dismissed forthwith.

10. Further, learned senior counsel for the respondent submitted that the orders relied on by the appellants are distinguishable since in those matters a delayed open offer was made by the appellants

therein and payment with interest was given to investors while in the instant matter no open offer has been made at all.

11. Having perused various documents and having heard both the counsel extensively we do not find any merit in the contentions made by the counsel for the appellants. Disclosure requirements are very clear and obligatory under the Takeover Regulations considering the importance of substantial acquisitions in a Company and its implications on shareholders and the market. Here is a case of initially acquiring 53.14% (majority stake) share capital of a company by the appellants. Any delay in disclosing such a fact is detrimental to the interest of the investors at large when the regulations specifically state that disclosure should be made within two days which is the outer limit; anything beyond is a violation and such a violation is admitted. Accordingly imposition of a penalty of Rs. 1 lakh cannot be faulted. Similarly, the submission that the company had made the disclosure to the Stock Exchange under regulation 7(3) and hence the spirit of the Regulation is followed even if disclosure under 7(1) and 7(1A) was not made by the acquirers is not a legitimate argument when the acquirers have also the obligation to make the disclosures under Regulation 7(1) and 7(1A). However, in any case taking this as a mitigating factor a penalty of only Rs. 3 lakh each has been

imposed for this violation when the penalty of upto Rs. 1 crore could have been imposed.

12. Similarly, the submission that there was no acquisition of additional share capital to the tune of 22730 shares on February 18, 2010 is not supported by the facts on record. Rather the appellants themselves make contradictory submissions regarding the acquisition itself; July, 2009, October, 2009 and February, 2010 etc. Facts are clear on this that the said acquisition has been made off market on February 18, 2010. Hence the argument that there was no obligation to make an open offer consequently fails. Further, penalty for failure to make a public announcement to acquire shares at the minimum price under Section 15H(ii) is Rs. 25 crore or three times the amounts of profits made out of such failure, whichever is higher.

13. In the impugned order it is held that the loss incurred by the investors who sold the shares between the acquisition date off market on February 18, 2010 and the next date of public announcement, October 20, 2010 was Rs. 65 lakh. Though prima facie it could be taken that this amount of loss could be the profit made by the appellants in terms of their failure to make a public announcement for open offer within 4 days of the trigger came

into existence on February 18, 2010, some of those investors might not have tendered the shares in the open offer and may go by their liquidity / financial requirements. This was the situation when many of these shareholders who had the option of tendering their shares in the October, 2009 open offer but still did not tender. Therefore, we are of the view that taking such an arithmetical calculation fully to its logical end may be too harsh on the appellants particularly when it is on record that the appellants did not sell any shares acquired. We also consider that such a benefit of doubt to the appellants is justified also because the appellants came out with another public announcement eight months later in October, 2010 though in response to a subsequent trigger event, a preferential issue. Moreover, the acquisition is only 22730 shares constituting 0.39% of the share capital of the target company. Such an acquisition if made through the exchange mechanism would have been eligible for exemption from open offer under the provisions of creeping acquisition. Given these facts we are of the view that the penalty of Rs. 2 crore imposed under Section 15H(ii) is too harsh. At the same time since it is a violation of Takeover Regulations, which is a serious offence irrespective of the quantum of acquisition, the penalty has to be commensurate with the offence.

14. Taking all the above facts into account, while upholding the impugned order on merit we reduce the penalty of Rs. 2 crore imposed under Section 15H(ii) of SEBI Act to Rs. 1 crore. However, penalty of Rs. 7 lakh imposed under Section 15 A(b) of SEBI Act remains as such. Given the facts and circumstances this would do justice in the present matter. Appellants are directed to pay the total amount of penalty of Rs. 1.07 crore jointly and severally within 4 weeks from today.

15. Appeal is partly allowed. No order on costs.

Sd/-
Justice Tarun Agarwala
Presiding Officer

Sd/-
Dr. C.K.G. Nair
Member

Sd/-
Justice M.T. Joshi
Judicial Member

20.05.2019
Prepared and compared by:msb