BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on: 21.11.2019
Date of Decision: 29.1.2020

Appeal No.443 of 2018

SBEC Systems (India) Ltd.
1400, Modi Tower,
98, Nehru Place,
New Delhi – 110012. ... Appellant

Versus

Securities & Exchange Board of India
SEBI Bhavan, Plot No.C4-A,
G Block, Bandra-Kurla Complex,
Bandra (East), Mumbai 400051. … Respondent

Mr. P.N. Modi, Senior Advocate with Ms. Kalpana Desai and Mr. Rajesh Khandelwal, Advocates i/b. Juris Link for the Appellant.

Mr. Pradeep Sancheti, Senior Advocate with Mr. Vivek Shah, Advocate i/b. ELP for the Respondent.

With
Appeal No.444 of 2018

1. Umesh Kumar Modi
   36, Amrita Shregill Marg,
   New Delhi – 110 003.

2. Kumkum Modi
   36, Amrita Shregill Marg,
   New Delhi – 110 003.

3. Jayesh Modi
   36, Amrita Shregill Marg,
   New Delhi – 110 003.

4. Longwell Investments Pvt. Ltd.

Modi Bhawan, Modi Nagar,
Uttar Pradesh – 201204.

5. A to Z Holdings Pvt. Ltd.
1400, Modi Tower,
98 Nehru Place,
New Delhi – 110012.

6. Moderate Leasing & Capital Services Ltd.
415, Modi Tower,
98 Nehru Place, New Delhi – 110012. ...Appellants

Versus

Securities & Exchange Board of India
SEBI Bhavan, Plot No.C4-A,
G Block, Bandra-Kurla Complex,
Bandra (East), Mumbai 400051. … Respondent

Mr. Ankit Lohia, Advocate with Mr. Kanishk V. Shahi and Mr. Neeraj Malik, Advocates i/b. Khaitan & Khaitan for the Appellants.

Mr. Pradeep Sancheti, Senior Advocate with Mr. Vivek Shah, Advocate i/b. ELP for the Respondent.

CORAM: Dr. C.K.G. Nair, Member
Justice M.T. Joshi, Judicial Member

Per : Justice M.T. Joshi

1. Aggrieved by the direction of the Whole Time Member of respondent Securities and Exchange Board of India (hereinafter referred to as 'SEBI') dated 17th September, 2018 vide the impugned order directing all the present appellants in both the appeals to jointly and severally make a public announcement to acquire the shares of SBEC Sugar

Ltd. (hereinafter referred to as 'target Company') in accordance with the provisions of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (hereinafter referred to as 'SAST Regulations') within a period of 45 days alongwith payment of interest at the rate of 10% p.a. on the offer price the present appeals are filed.

2. The facts of the case would reveal that all the present appellants are promoters of the target Company. They were holding 54.46% of the share capital of the target Company in the year 2014. Additionally, appellant Moderate Leasing & Capital Services Ltd. and appellant A to Z Holding Pvt. Ltd. acquired additional shares during August 25, 2014 to September 16, 2014 increasing their shareholding from 54.46% to 63.86%. As the acquisition was of additional 9.4% of the voting rights it was claimed by the Respondent to be in breach of the SAST Regulations, 2011 and, therefore, the proceedings were launched. Notices were issued to all the appellants. The appellants while admitting all the transactions also additionally submitted that appellant Moderate Leasing & Capital Services Ltd. had also additionally acquired 1.31% shares of the target Company

during March 18, 2015 to March 23, 2015 which additionally increased the shareholding of the promoter group.

Regulation 3 of the SAST Regulations, 2011 provides as under:-

> Substantial acquisition of shares or voting rights.
>
> 3. (1) No acquirer shall acquire shares or voting rights in a target company which taken together with shares or voting rights, if any, held by him and by persons acting in concert with him in such target company, entitle them to exercise twenty-five per cent or more of the voting rights in such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations.
>
> (2) No acquirer, who together with persons acting in concert with him, has acquired and holds in accordance with these regulations shares or voting rights in a target company entitling them to exercise twenty-five per cent or more of the voting rights in the target company but less than the maximum permissible non-public shareholding, shall acquire within any financial year additional shares or voting rights in such target

company entitling them to exercise more than five per cent of the voting rights, unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations:

Provided that such acquirer shall not be entitled to acquire or enter into any agreement to acquire shares or voting rights exceeding such number of shares as would take the aggregate shareholding pursuant to the acquisition above the maximum permissible non-public shareholding.

Explanation.—For purposes of determining the quantum of acquisition of additional voting rights under this sub-regulation,—

(i) gross acquisitions alone shall be taken into account regardless of any intermittent fall in shareholding or voting rights whether owing to disposal of shares held or dilution of voting rights owing to fresh issue of shares by the target company.

(ii) in the case of acquisition of shares by way of issue of new shares by the target company or

where the target company has made an issue of new shares in any given financial year, the difference between the pre-allotment and the post-allotment percentage voting rights shall be regarded as the quantum of additional acquisition.

(3) For the purposes of sub-regulation (1) and sub-regulation (2), acquisition of shares by any person,such that the individual shareholding of such person acquiring shares exceeds the stipulated thresholds, shall also be attracting the obligation to make an open offer for acquiring shares of the target company irrespective of whether there is a change in the aggregate shareholding with persons acting in concert.

7 (4) Nothing contained in this regulation shall apply to acquisition of shares or voting rights of a company by the promoters or shareholders in control, in terms of the provisions of Chapter VI-A of Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009.

3. It is an admitted fact that the shares were acquired without making any public announcement of an offer for acquiring shares of the target Company as provided by

Sub-Regulation (2) above. The appellants however explained that due to continued losses the net worth of the Company was completely eroded. The target Company was therefore compelled to file a reference with Board of Industrial and Financial Reconstruction ("BIFR"). The Board vide order dated February 4, 2014 declared the target Company as sick. IDBI was appointed as operating agency for the preparation of Rehabilitation Scheme for revamping the position of the Company to normal. The two appellants who had acquired the disputed shares had lent some funds to one ABC Holdings Pvt. Ltd. and another Kumabhi Investments Pvt. Ltd. These two Companies failed to repay the funds. Therefore these promoters had to acquire the shares held by these borrower companies. It led to an increase in the shareholding. Thus, the increase in the shareholding was not due to purchase of shares but due to adjustment against loans outstanding. It was further pleaded that for any acquisition of shares pursuant to the scheme framed under Section 8A of the Sick Industrial Companies (Special Provisions) Act, 1985(SICA), general exemption is provided from the provisions of SAST Regulations vide Regulation 10(1)(d)(i) and, thus, the acquisition of the shares would not attract the

provisions of Takeover Regulations. During personal hearing however the appellant submitted that rehabilitation scheme was not finalized but only draft rehabilitation scheme was prepared though in fact the Company was declared sick by BIFR during the relevant period.

4. The WTM held that in view of the fact that no rehabilitation scheme was formulated there cannot be any exemption from the SAST Regulations as claimed by the appellant. It was therefore held that the acquisition of the shares were against Regulation 3(2) of the SAST Regulations.

5. As regards the liability of all the appellants, the WTM held that other appellants being promoters of the target Company would be persons acting in concert with appellant nos.5 and 6 as explained in Regulation 2(1)(q) as defined in the SAST Regulations, 2011. The relevant provision is as under:-

> (q) "persons acting in concert" means,—
>
> (1) persons who, with a common objective or purpose of acquisition of shares or voting rights in, or exercising control over a target company, pursuant to an agreement or understanding, formal or informal, directly or indirectly co-operate for acquisition of shares or voting rights in, or exercise of control over the target company.

(2) Without prejudice to the generality of the foregoing, the persons falling within the following categories shall be deemed to be persons acting in concert with other persons within the same category, unless the contrary is established,—

(i) a company, its holding company, subsidiary company and any company under the same management or control;

(ii) a company, its directors, and any person entrusted with the management of the company;

(iii) directors of companies referred to in item (i) and (ii) of this sub-clause and associates of such directors;

(iv) promoters and members of the promoter group;

(v) immediate relatives;

(vi) a mutual fund, its sponsor, trustees, trustee company, and asset management company;

(vii) a collective investment scheme and its collective investment management company, trustees and trustee company;

(viii) a venture capital fund and its sponsor, trustees, trustee company and asset management company;

(ix) 5 [***]

(x) a merchant banker and its client, who is an acquirer;

(xi) a portfolio manager and its client, who is an acquirer;

(xii) banks, financial advisors and stock brokers of the acquirer, or of any company which is a

holding company or subsidiary of the acquirer, and where the acquirer is an individual, of the immediate relative of such individual:

Provided that this sub-clause shall not apply to a bank whose sole role is that of providing normal commercial banking services or activities in relation to an open offer under these regulations;

(xiii) an investment company or fund and any person who has an interest in such investment company or fund as a shareholder or unit holder having not less than 10 per cent of the paid-up capital of the investment company or unit capital of the fund, and any other investment company or fund in which such person or his associate holds not less than 10 per cent of the paid-up capital of that investment company or unit capital of that fund:

Provided that nothing contained in this sub-clause shall apply to holding of units of mutual funds registered with the Board;

Explanation.—For the purposes of this clause "associate" of a person means,—

(a) any immediate relative of such person;

(b) trusts of which such person or his immediate relative is a trustee;

(c) partnership firm in which such person or his immediate relative is a partner; and

(d) members of Hindu undivided families of which such person is a coparcener;

6. Relying on sub-Regulation 2(iv) the WTM held that since all promoters and members of the promoter group are deemed to be persons acting in concert, all the present

appellants would be liable to make offer as detailed supra. It was observed that these provisions would raise rebuttable presumption. However, as the appellant failed to place any evidence that they were acting independent of each other except taking a plea, the presumption does not stand rebutted. Hence the WTM eventually concluded that all the appellants were acting in concert and, therefore, all of them would be liable.

7. In Appeal no.443 of 2018 the learned counsel for the appellant SBEC Systems (India) Ltd. i.e one of the promoter of the target Company submitted that the WTM failed to take note of the fact that the appellant is a Company. The intention of the Company of acting in concert with some of the appellants in Appeal no.444 of 2018 in acquiring additional shares could have been gathered only through the resolution or through the act of Board of Directors of the present appellant Company. He further submitted that to rebut the presumption, the appellant Company cannot place any material except claiming that it has not taken part in acquisition of additional shares as thought process of the appellant Company could be visible only through resolution etc. He therefore submitted that the conclusion of the WTM

that the present appellant failed to rebut the presumption is wrong.

8. The learned counsel additionally referred to the para 3(f) of the rejoinder affidavit and submitted that the Appellant Company had not acquired a single additional share. It was never consulted in the acquisition of the shares. There is not a single letter/communication between the lending promoters and the appellant in relation to the loan given by lending promoters for acquisition of shares by the appellant. He submits that if this positive evidence is considered in right spirit then the order of the WTM cannot be sustained so far as the present appellant is concerned. The learned counsel further submitted that since the present appellant Company was not able to pay the listing fee it was delisted from the stock exchanges and, therefore, relying on the ratio of Supreme Court's decision in the case of M/s. Daichii Sankyo Company Ltd. v. N. Narayanan and Anr. AIR (2010) SC 3089, this Tribunal's decisions in the cases of Modipon Ltd. v. SEBI, Appeal No.34 of 2001 decided on 31st July, 2001 and Mr. Raghu Hari Dalmia & Ors. vs SEBI, Appeal no.134 of 2011 decided on 21.11.2011 he submitted that the appeal be allowed.

9. In reply learned counsel for the respondent SEBI submitted that very fact that common reply was filed by SEBI by all the appellants and in the reply they made the common plea regarding acquisition of shares by two appellants would show that all the appellants were acting in concert. The reply would show that no statements are made by the present appellant Company that it was not aware of the acquisition of additional shares. The present appellant was admittedly one of the promoters. Therefore appellant cannot escape the liability.

10. Upon hearing both the sides in our view Appeal no.443 of 2018 requires to be allowed for the following reasons. It is to be noted that before the WTM all the appellant including the present appellant Company had taken a plea that they were not acting in concert so far as the acquisition of additional shares is concerned. Admittedly, the present appellant is a public limited Company. The fact as to whether it was acting in concert with the other appellant would be discernable only by the resolution of the Board of Directors of the Company and any correspondent between the acquiring appellant and the present appellant Company. Merely because the present appellant is a promoter of the

target Company of which additional shares were acquired by two other appellants, would not mean that the present appellant would be a person acting in concert with them. The learned WTM had rightly held that the presumption raised vide different provision is rebuttable, but failed to take into consideration the above facts. In the case of Diachi cited supra in para 47 the Supreme Court observed as under:-

> *47. Then what does the deeming provision do? The deeming provision simply says that in case of nine specified kinds of relationships, in each category, the person paired with the other would be deemed to be acting in concert with him/it. What it means is that if one partner in the pair makes or agrees to make substantial acquisition of shares etc. in a company it would be presumed that he/it was acting in pursuance of a common objective or purpose shared with the other partner of the pair. For example, if a company or its holding company makes or agrees to make a move for substantial acquisition of shares etc. of a certain target company then it would be presumed that the move is in pursuance of a common objective and purpose jointly shared by the holding company and the subsidiary company. But the mere fact that two companies are in the relationship of a holding company and a subsidiary company, without anything else, is not sufficient to comprise "persons acting in concert". The Attorney General is quite right in his submission that something more is required to comprise "persons acting in concert" than the mere relationship of a holding company and a subsidiary company. There may be hundreds of instances of a company having a subsidiary company but to dub them as "persons acting in concert" would be quite ridiculous unless another company is identified as the target company and either the holding company or the subsidiary make some positive move or show some definite inclination for substantial acquisition of shares etc. of the target company*.

11. The learned counsel for the respondent submitted that the above referred appeal was decided not on this issue but on another issue that the deeming fiction under Sub-Regulation (2) was not at all applicable in the said case. However, the observation of the Apex Court in para 47 are based on the similar facts as raised in the present case as detailed supra.

In the case of Mr. Raghu Hari Dalmia cited supra inter alia it was held that an increase in the percentage of shares held by the promoters, due to reduction of share capital upon buy back, would not amount to an acquisition. In the case of Modipon Ltd. this Tribunal highlighted in para no.33 that the promoters need not be an acquirer automatically. The conduct of the parties will have to be taken into consideration.

Thus, though a presumption that the promoters would be persons acting in concert can be raised the same can be rebutted either by positive evidence or by negative facts discernable through the conduct of the parties. The fact that the appellant Company did not participate in acquisition of additional shares by two of the other appellants, the fact that there is no resolution passed by the present appellant and fact

that there is no communication on record from the appellant Company would show that present appellant Company cannot be termed as person acting in concert. The present appeal will have to be allowed.

12. So far as Appeal no.444 of 2018 is concerned it can be seen that the Appellant nos.5 and 6 had acquired the shares. It is their case that since their borrower failed to repay the amount of loan lent to them, these appellants were required to accept the shares of the Company in lieu of the repayment. Their further case is that for infusion of funds into the Company for the purpose of keeping it operational the repayment of loans was demanded. The letters dated 15th July, 2014 and 16th July, 2014 from the borrowers in this regard were filed on record. In the circumstances according to all the appellants there was no meeting of minds or acting in concert with each other in acquisition of shares.

13. The impugned order however would show that as all the present appellants are the promoters of the appellant Company, by invoking the principle of presumption the order came to be passed against all the present appellants also. The above fact however would clearly show that acquisition of the shares by Appellant nos.5 & 6 was their individual action

forced by the circumstances and as such Appellant nos.1 to 4 in Appeal no.444 of 2018 cannot be called as persons acting in concert with the rest of the appellants.

It is however an admitted fact that the Appellant nos.5 and 6 had acquired the additional shares without following the provisions of the SAST Regulations, 2011 as detailed supra. The issue is as to whether these Appellant nos.5 and 6 can be directed to make public announcement to acquire shares of the target Company in accordance with the provisions of the Takeover Regulations, 2011. The WTM relying on the ratio of Nirvana Holdings Pvt. Ltd. vs. SEBI Appeal no.31 of 2011 decided on 8th September, 2011 held that such a direction would be a normal rule and having deviation from the same can be permitted only if issuance of such a direction is not for protection of the securities market or is not for the protection of interest of investors. The learned counsel for the appellant however pointed out that the effect and operation of the order in Nirvana is stayed by the Supreme Court. It was submitted by the appellant that even Nirvana does not declare that a sole available mode would be a direction to make a public announcement ignoring other

alternatives provided by Regulation 32 of the SAST Regulations, 2011.

14. In the present case, what we find is that Appellant nos.5 and 6 had not deliberately acquired the shares of the target Company but they were willy nilly required to accept the shares due to inability of the borrowers to repay the loan amount. Besides this the target Company was declared as sick Company under the BIFR and draft rehabilitation scheme was also under consideration. Thus, the act of the Appellant nos. 5 and 6 cannot be equated with corporate raiders trying to circumvent the provision of Regulation in order to seek control of the target Company. They were already promoters of the target Company and they had acquired the shares beyond the limits permitted by the creeping acquisition method. In the circumstances, the direction of the WTM cannot be sustained.

15. In the result the following order:-

Appeal no.443 of 2018 is hereby allowed. The direction of the WTM to the appellant therein is hereby quashed and set aside. Appeal no.444 of 2018 is partly allowed. The direction of the WTM so far as Appellant nod.1, 2 to 4 are concerned is hereby set aside.

16. As regards the appellant nos.5 and 6 the direction of the WTM is modified. In terms of Regulation 32(1)(b) the Appellant nos.5 and 6 are directed to sell the shares acquired in violation of the Regulation and to transfer the proceeds of the same to the Investor Protection Fund established under the Securities and Exchange Board of India (Investor Protection and Education Fund) 2009 within a period of six months from the date of this order.

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

Sd/-
Justice M.T. Joshi
Judicial Member

29.1.2020
Prepared and compared by
RHN