SUPREME COURT OF INDIA

Kosha Investments Ltd.

Vs.

Securities & Exchange Board of India & Anr.

C.A.No.3219 of 2006

(Vikramajit Sen and Shiva Kirti Singh,JJ.,)

18.09.2015

JUDGMENT

Shiva Kirti Singh,J.,

1.Both the appeals have been preferred by the same appellant under Section 15Z of the Securities & Exchange Board of India Act, 1992 (for short, 'SEBI Act'). The main appeal is of 2006 and requires detailed consideration. It is directed against order dated 08th August 2005 passed by the Securities Appellate Tribunal upholding and confirming the order of Securities & Exchange Board of India (SEBI) dated 27th January 2004 directing the appellant to make public announcement in terms of Regulation 11(1) of the Securities & Exchange Board of India (Substantial Acquisition of Shares & Takeovers) Regulations, 1997 (hereinafter referred to as 'the Regulations of 1997). The other appeal is directed against orders passed by SEBI and confirmed by the Tribunal to impose penalty upon the appellant for non-compliance with the order which is subject matter of the earlier appeal. It goes without saying that the latter appeal will follow the fate of the main appeal.

2. Before adverting to the issues of law raised on behalf of the appellant, the essential facts may be noticed only in brief. The appellant, Kosha Investments Ltd., acquired shares of another company Snowcem India Ltd. (hereinafter referred to as 'SIL') from one of the original promoters of SIL and thus itself became one of the promoters. An investigation by SEBI covered the period June 1999 to August 1999 when there was an initial upward movement in the price of shares of SIL and also substantial increase in the volume of their trade. As a result of such investigation the appellant faced charges in another proceeding under SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 and was also served with a show cause notice dated 14.11.2002 for alleged breach of provisions of Regulation 44 and 45(6) of the Regulations of 1997 read with provisions of Section 11 and 11B of the SEBI Act. The proposed action under Regulations of 1997 was based upon report of investigation showing that appellant had consistently bought and sold shares of SIL prior to June 1999 and also after August 1999. As per record it was holding 21,32,900 shares of SIL constituting 20.29% of total paid up capital of SIL. The appellant made additional purchase of shares amounting to 10.81% of the paid

up capital of SIL in violation of Regulation 11(1) of the Regulations of 1997 as it failed to make the required public announcement in terms of the said Regulation. After granting personal hearing and considering the appellant's reply to the show cause notice, in the final order SEBI came to a finding that as on 31st March 1999 appellant was actually holding only 21,32,900 shares as shown by SEBI and not 31,84,228 shares which was claimed by the appellant on the ground that it had already pledged its shares to lenders who had lent money to SIL. The plea of pledge raised by the appellant was found without any substance and only an attempt to conceal subsequent purchase. Hence, SEBI came to a conclusion that the appellant was already holding between 15% to 75% shares of the target company SIL and it could acquire additional shares of this company through creeping acquisition mode, that is, without public announcement only upto 5% of its paid up capital during the period of 12 months ending on 31st March 2000. However, by acquiring 11,36,700 shares of SIL during June 1999 to August 1999 it acquired shares constituting more than 5% of the paid up capital of SIL. For making such acquisition, the appellant was liable to make public announcement as required by Regulation 11(1) of the Regulations of 1997. Since the appellant failed to do so, the Whole Time Member of SEBI held it guilty and issued the following directions on 27 th January 2004 :

> "15. In view of the findings above and in exercise of the powers conferred upon me under Section 19 read with Section 11B of SEBI Act read with regulations, I hereby direct the acquirer viz., Kosha Investments Ltd. to make public announcement in terms of regulation 11(1) of the said Regulations taking June 29, 1999 as the reference date for calculation of offer price. The public announcement shall be made within 45 days of passing of this order.
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> 16 The ,Acquirers are hereby accordingly directed to pay interest @ 15% per annum to the share holders for the loss of interest caused to the shareholders from October 28, 1999 till the date of actual payment of consideration for the shares to be tendered and accepted in the offer directed to be made by the Acquirers.
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> 17. It is also noted that an order dated 3.12.03 was passed by me restraining the Kosha Investments Ltd. from buying, selling or dealing in securities in any manner, directly or indirectly, for a period of two years for violating the provisions of SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 1995. However, I direct the said order dated 3.12.2003 shall not hamper the implementation of this order."

3. The appellant preferred an appeal before the Securities Appellate Tribunal to challenge the order dated 27 th January 2004 passed by Whole Time Member of SEBI. The main contention of the appellant before the Tribunal is recorded in paragraph 7 of the impugned judgment and is as follows :

> "Learned counsel for the appellant argued that KIL had been regularly purchasing and selling shares of SIL. He also argued that KIL had not acquired 5% or more than 5% shares or voting rights in respect of shares of SIL at any point of time in the period of

12 months. He submitted that out of 11,36,700 shares which were purchased during June, 1999 to August, 1999 during the same period KIL also sold number of shares of SIL. He pointed out that KIL was not holding more than 5% shares of SIL at any point during the year and therefore the provisions of Takeover Code did not trigger. He further argued that even if SEBI did not take into account the repurchases of pledged shares as return of shares, SEBI should accept that KIL did not acquire 5% or more shares at any point of time since sale and purchase of shares was being done simultaneously and did not trigger the Takeover Code. He argued that SEBI ought to have taken into account that KIL also sold shares during the relevant period. He went on to argue that it was erroneous to determine the total share holding of KIL at any given point of time during the investigation by completely ignoring the sale of shares made by it during the relevant period. He said that such a lopsided interpretation of Takeover Code would be erroneous and not maintainable. He said that determining the shareholding of a person without netting off would give a distorted picture. He therefore concluded that for the reason mentioned above, the provisions of Takeover Code were not applicable in this case and no violation of SEBI Regulations has taken place."

4. The Tribunal accepted the counter arguments advanced on behalf of the SEBI to the effect that even during the period June 1999 to August 1999 the appellant had acquired 6,61,800 shares which constituted 6.29% of the paid up capital of SIL which was beyond the permissible limit of 5% and hence the requirement of making public announcement in terms of Regulation 11(1) had to be met by the appellant which the appellant failed to do.

5. Before the Tribunal as well as before us the main contention of the appellant is that SEBI failed to consider that the appellant was not only a promoter having more than 15% shares of SIL but it was also in the business of sale and purchase of shares which was being done simultaneously and hence exceeding the limit of 5% at any one point of time was immaterial unless on a net accounting it could be found that such ceiling of 5% had been violated by appellant on account of its retaining more than 5% shares of SIL at the end of a financial year. On the other hand SEBI have reiterated their stand before the Tribunal that the ceiling of making acquisition of only up to 5% of the paid up capital of target company was no doubt to be reckoned during a period of 12 months, that is, a financial year but the requirement of Regulation 11(1) of the Regulations of 1997 of making a public announcement was triggered not only on actual acquisition beyond the 5% limit but even on entering into an agreement for such acquisition or deciding to acquire such volume of shares or voting rights, in view of provisions of Regulation 14(1) of the Regulations of 1997. A strong emphasis was laid on Regulation 14(1) which requires the public announcement referred to in Regulation 10 or Regulation 11 to be made by the acquiring company (through its merchant banker), not later than four working days of the agreement or decision to acquire the requisite number of shares or voting rights which by itself triggers the requirement of Regulation 11. (emphasis added) Let us conceptualize the case of an entity holding 20 per cent of shareholding in a target company on 1st April of a given year. If it were to increase its holding by say 3 per cent and subsequently reduce it to 2 per cent. It at that point it intended to purchase 4 per cent shares again, whether by way of fractions or otherwise, it

would cross the threshold of 5 per cent. It would then have to make compliance with Regulation 11. We hasten to clarify that if the aggregate percentage of acquisitions at any point of time during the financial year exceeds 5 per cent, the provision would get triggered. In other words, the provision of Regulation 11 mandating a public announcement will kick in at any stage, whence the shareholding of the said entity in the target company would exceed 25 per cent.

6. It will be relevant at this stage to extract Regulations 11(1), 13, 14(1) and 14(2) in order to appreciate the submissions. These read as follows :

> "11. (1) No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, 15 per cent or more but less than fifty five per cent (55%) of the shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise more than 5 per cent of the voting rights, in any financial year ending on 31st March unless such acquirer makes a public announcement to acquire shares in accordance with the regulations.
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> 13. Before making any public announcement of offer referred to in regulation 10 or regulation 11 or regulation 12, the acquirer shall appoint a merchant banker in Category I holding a certificate of registration granted by the Board, who is not an associate of or group of the acquirer or the target company.
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> 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:
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> Provided that in case of disinvestment of a Public Sector Undertaking, the public announcement shall be made by the merchant banker not later than four working days of the acquirer executing the Share Purchase Agreement or Shareholders Agreement with the Central Government or the State Government as the case may be, for the acquisition of shares or voting rights exceeding the percentage of shareholding referred to in regulation 10 or regulation 11 or the transfer of control over a target Public Sector Undertaking.
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> (2) In the case of an acquirer acquiring securities, including Global Depository Receipts or American Depository Receipts which, when taken together with the voting rights, if any already held by him or persons acting in concert with him, would entitle him to voting rights, exceeding the percentage specified in regulation 10 or regulation 11, the public announcement referred to in sub-regulation (1) shall be made not later than four working days before he acquires voting rights on such securities upon conversion, or exercise of option, as the case may be."

7. A careful reading of the aforesaid Regulations discloses that the public announcement should not be delayed beyond four working days of the agreement or decision to acquire the requisite number of shares or voting rights. We are in agreement with the finding of the Tribunal on this issue and find no merit in the contentions of the appellant. If the plea of appellant will be accepted then an acquirer can keep on violating Regulation 11(1) with impunity on as many occasions as he/it wants and avoid letting the public have the required knowledge through public announcements by simply making subsequent sale or transfer to another entity so as to reduce the so-called net acquisition in a financial year to within 5%. This interpretation will defeat the purpose of Regulation 11(1) and shall also render Regulation 14(1) otiose. The concept of permitting creeping acquisitions by permitting not more than 5% of the shares or voting rights in a company limits the period for such acquisition to a financial year ending by 31st March. But such concept does not dilute the requirement of making a public announcement within the time mentioned in Regulation 14(1) if the acquisition even if only once made and divested, is of more than 5% of shares or voting rights in the target company. In other words, even if such acquisition is followed by sale in the same financial year, the liability of making the public announcement would remain unaffected and shall attract action, as in this case.

8. Hence, the main contention advanced on behalf of the appellant is found to be without any merit. The other contention is that Regulation 14(2) of the Regulations of 1997 postpones the time for required public announcement to acquisition of voting rights when purchased securities are actually converted. According to the contention, only when securities or shares are converted by the acquirer into voting rights by getting it registered or upon exercise of option to acquire voting rights, the liability of making public announcement can be fastened.

9. Aforesaid plea has been rightly countered by learned Senior Advocate for SEBI, Mr. C.U. Singh by pointing out that in case of acquisition of shares or voting rights the appropriate applicable provision is Regulation 14(1) and not Regulation 14(2) which applies only when the acquisition is of other securities including Global Depository Receipts, American Depository Receipts. It is only such securities which require conversion or exercise of option which is contemplated by Regulation 14(2). He also pointed out that no such plea was raised before the SEBI or the Tribunal and rightly because in the present case only Regulation 14(1) is applicable as it covers acquisition of either the shares or the voting rights or both which are the subject matter of Regulation 11(1). Mr. Singh has also referred to a judgment of this Court in the case of *Swedish Match AB and Another vs. Securities & Exchange Board of India and Another*[1],. This judgment in paragraphs 90 onwards considered the purpose and effect of Regulations 10, 11 and 12 of the Regulations of 1997 and in paragraph 102 held them to be mandatory statutory provisions. However this judgment needs no elaborate consideration because no plea has been raised on behalf of appellant that the Regulations are directory or do not require compliance.

10. We find that the plea that the matter at hand relates to Regulation 14(2) was not raised before the original authority or the Tribunal. We also find that it is a plea of desperation and undeserving of acceptance.

11. In the final analysis we find no merit in these appeals and hence they are dismissed with consolidated cost of Rs. 50,000/¬to be paid by the appellant to SEBI within eight weeks.

[1]*(2004) 11 SCC 0641*