SUPREME COURT OF INDIA

A.R.Dahiya

Vs.

SEBI

C.A.No.2727 of 2006

(Vikramajit Sen and Shiva Kirti Singh, JJ.)

26.11.2015

JUDGMENT

Vikramajit Sen, J.

1. This Appeal assails the Judgment dated 19.4.2006 of the Securities Appellate Tribunal which upheld the order of the Securities and Exchange Board of India dated 1.8.2003. The factual matrix is that one Mr. V.P. Garg (hereinafter referred to as 'Garg') entered into an 'Assisted Sector Agreement' with the Haryana State Industrial Development Corporation Limited (hereinafter referred to as 'HSIDC') on 4.1.1993, for the purpose of setting up a modern resort hotel complex at Village Chowky, Tehsil Kalka, Haryana. The parties agreed to collaborate for the profitable implementation and operation of the project in the assisted sector through a company already incorporated by Garg under the name and style of Polo Hotels Ltd. (hereinafter referred to as the 'Target Company'). HSIDC extended a term loan to Garg and also subscribed to 3,00,000 shares of Rs. 10/- each of the Target Company. Clause 24 of the Agreement provided for buy¬back of the shares of HSIDC. The said clause is reproduced for facility of reference:

BUY BACK ARRANGEMENT: -

> "24 (a) At any time after the Company goes in for commercial production, the Corporation may with the consent of the Collaborator offload its shareholding in the Company partially or fully in such manner as it may deem fit. The Collaborator will however have the pre-emptive right to buy the shareholding of the Corporation. Similarly, after the shares of the Company are duly listed on the Stock Exchange/DTCET, and with the consent of the Corporation, the Collaborator may buy its shareholding at a mutually agreed price which shall be equal to or higher than that provided under sub clause (c).
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> (b) After expiry of five years from the date of commencement of commercial production by the Company or at the expiry of seven years from the date of its

incorporation whichever is earlier, the Collaborator shall be bound to purchase the Equity share holding of the Corporation in the Company. Provided that the Corporation may at its discretion retain the shares acquired by it through over subscription or rights issue or bonus shares.

(c) On buy back of shareholding of the Corporation by the Collaborator under sub clause

(b), the price to be paid shall be highest of the:

i) Issue price of the share plus simple interest for the period at the lowest normal lending rate of interest on term loans under refinance scheme of IDBI prevailing at the time of first issue of shares to the Corporation under its agreement. OR

ii) The highest price of the shares ruling on any Indian Stock Exchanges for a period of two months preceding the date on which the Collaborator ought to purchase the shares held by the Corporation as provided in Clause (b) above. OR

iii) Assessed value of the shares as determined by the Auditors of the Company on the basis of net worth, of the Company on the date of sale of the shares."

2. Garg defaulted in repayment of loan as well as in buying back the shares of HSIDC in the Target Company. In March 1999, Garg entered into an agreement with Mr. A.R. Dahiya (the 'Appellant') for the sale of Garg's entire shareholding of 28.09% in the Target Company. This agreement was subject to the approval of HSIDC and contained a clause that Garg would be absolved of fulfilling the buy¬back obligation, provided HSIDC agreed to accept the Appellant in place of Garg. Garg wrote a letter to HSIDC dated 31.3.1999 stating that on account of his deteriorating financial condition, he had decided to transfer his equity shareholding in the Target Company to the Appellant and that the Appellant had agreed to furnish his personal guarantee for buy-back of the three lac equity shares held by HSIDC. In the letter Garg requested HSIDC to accept the personal guarantee of the Appellant in lieu of his buy-back guarantee and to absolve him from the obligation.

3. The Appellant also wrote a letter to HSIDC dated 15.4.1999, informing it that he and Garg had entered into an agreement for purchase of equity shareholding of Garg and for complete takeover of the management of the Target Company. The Appellant confirmed that he was prepared to buy-back the equity holding of HSIDC as provided for in the assisted sector agreement instead of Garg, under similar terms and conditions. The Appellant also requested that since he was facing a stringent liquidity problem, the payment for the buy-back which was due in April 1999 be instead made in monthly instalments of Rs.20 lacs each with effect from September 1999. Enclosed with the letter were four post-dated cheques in respect of the said buy-back obligations, amounting to a total of Rs.71,25,466/-. HSIDC, vide its letter dated 19.4.1999 to Garg, accepted the joint request made by him and the Appellant.

Subsequently, the Appellant, Garg and HSIDC entered into a tripartite financial collaboration agreement, whereby HSIDC consented to the Appellant stepping into the shoes of Garg.
4 On 20.4.1999, Garg and the Appellant entered into an agreement whereby the Appellant agreed to purchase the entire share capital of 28.09% held by Garg at the rate of Rs. 8.50 per fully paid up equity share. Since this acquisition was in excess of 15% of the total shareholding of the Target Company, the Regulations under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, were attracted. In order to comply with the Regulations, the Appellant made a public announcement on 24.4.1999 making an offer to the remaining shareholders of the Target Company to purchase a minimum of 20% shares of the said company at an offer price of Rs. 8.75 per equity share.

5. On 5.5.1999, a draft letter of offer was sent by the merchant banker of the Appellant to SEBI for its approval. Neither in the public announcement nor in the letter did the Appellant disclose the fact that he and his associates had already bought back the shares of HSIDC. SEBI reverted with a letter dated 26.5.1999 seeking clarifications from the merchant banker of the Appellant. The letter stated that the price at which the Appellant proposed to acquire the shares from HSIDC as per the agreement dated 19.4.1999, had to be calculated and specified upfront in the offer document. Further, if the price payable to HSIDC as per the said agreement was higher than the present offer price of Rs. 8.75 per share, then the offer price must be justified as required under Regulation 20(6). The draft letter of offer dated 5.5.1999 was approved by the SEBI subject to certain changes vide its communication dated 30.9.1999. As it transpired in response to the public announcement, the Appellant could acquire only 2.42% of the shares of the Target Company, as the shareholders were not willing to offer their shares at Rs.8.75 when their face value was Rs.10/-.

6. SEBI received a complaint from Mr. Komlam Sardana alleging that the Appellant had acquired three lac equity shares from HSIDC for Rs. 71,25,466/- at the rate of Rs. 23.75 per share, whereas the shares were not offered at the same price to the existing shareholders. The complainant alleged that the Appellant was suffering from a liquidity crunch and had requested HSIDC to receive the consideration amount with respect to the transfer of shares in monthly instalments. The complainant also brought to the notice of SEBI that the post-dated cheques through which the Appellant had tendered consideration had subsequently been dishonoured and criminal proceedings had been initiated against him. A copy of the said complaint was forwarded to the Appellant through his merchant banker.

7. The Appellant moved an application on 2.12.1999 stating that he was covered under the ambit of Regulation 3(1)(i), and as a result was immune to the provisions under Regulations 10, 11 and 12. The relevant provisions have been reproduced as under:

> "3. Applicability of the Regulation.- (1) Nothing contained in the Regulations 10, 11 and 12 of these Regulations shall apply to:
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> xxx xxx xxx

(i) Transfer of shares from state level financial institutions, including their subsidiaries to co-promoter(s) of the company pursuant to an agreement between such financial institution and such co-promoter(s);

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xxx xxx xxx

CHAPTER III

SUBSTANTIAL ACQUISITION OF SHARES OR VOTING RIGHTS IN AND ACQUISITION OF CONTROL OVER A LISTED COMPANY"

10. Acquisition of 15% or more of the shares or voting rights of any company.- 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 fifteen per cent or more of the voting rights in a company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the Regulations.

11. Consolidation of holdings.- (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 75% 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% of the voting rights, in any period of 12 months, unless such acquirer makes a public announcement to acquire shares in accordance with the Regulations.
(2) No acquirer who, together with persons acting in concert with him has acquired, in accordance with the provisions of law, 75% of the shares or voting rights in a company, shall acquire either by himself or through persons acting in concert with him any additional shares or voting rights, unless such acquirer makes a public announcement to acquire shares in accordance with the regulations.

xxx xxx xxx

12. Acquisition of control over a company.- Irrespective of whether or not there has been any acquisition of shares or voting rights in a company, no acquirer shall acquire control over the Target Company, unless such person makes a public announcement to acquire shares and acquires such shares in accordance with the regulations: Provided that nothing contained herein shall apply to any change in control which takes place in pursuance to a resolution passed by the shareholders in a general meeting. SEBI sought a clarification from the merchant banker on 29.2.2000, regarding the non-disclosure of the payment of Rs.71,25,466/- by the Appellant through post¬dated cheques. The merchant banker in its letter dated 13.4.2000 informed SEBI that the Appellant had not informed him about the payment made through post¬dated cheques. Subsequently, SEBI wrote a letter to HSIDC dated 2.6.2000 asking whether the letter dated 15.4.1999 pertained to the buy-back of shares and whether the post-dated cheques were deposited with HSIDC as security for the buy-back obligations. The HSIDC in its reply via letter dated 1.8.2000, stated that the post¬dated cheques had been issued towards the purchase consideration for the buy-back of three lac

equity shares held by HSIDC in the Target Company. SEBI, on being satisfied that a prima facie case of non-disclosure of material facts in the public announcement and a violation of Regulations exists, issued a show cause notice to the Appellant. The Appellant filed his reply to the show cause notice after which SEBI by its order dated 1.8.2003 issued directions to the Appellant under Section 4(3) read with Section 11B of the Act and Regulations 44 and 45 of the Regulations. The Appellant was directed to make a fresh public announcement for 20% shares as required under Chapter 11 of the Regulations in accordance with Regulation 10 and offer to the shareholders of the Target Company the price of Rs. 23.75 per share along with interest at the rate of 15% per annum for the period from 16.11.1999 to the actual date of payment of consideration. SEBI further directed the Appellant to pay the balance amount at the aforesaid rate to all the shareholders who had offered their shares in pursuance to the public announcement dated 24.4.1999 along with interest. Aggrieved by this order, the Appellant preferred an appeal. 8 Before the Securities Appellate Tribunal the Appellant contended that the amount deposited with HSIDC via post-dated cheques was not in consideration for the buy-back of shares. Instead it was deposited by way of comfort/security for the buy-back obligation so as to demonstrate to HSIDC that the Appellant was a man of means who could buy-back the shares subsequently (an assertion which in any case stood belied by the dishonour of the cheques). The Tribunal rejected this contention by placing reliance on two letters. The first letter, issued by the Appellant on 15.4.1999, was addressed to HSIDC, where in no uncertain terms the Appellant had stated that the payment by means of post-dated cheques was in consideration for the buy-back of shares. The second letter referred to by the Tribunal was issued by HSIDC on 11.1.2001, where in its reply to SEBI's clarificatory letter, HSIDC categorically stated that the payment by the Appellant was consideration for the buy-back of the shares. The Tribunal also indicated that if the said amount had been deposited by way of comfort or security was being contended by the Appellant, then it would have been a lump sum figure and not an amount as precise as Rs. 71,25,466/-. In light of the above stated facts, it was held to be beyond doubt that the Appellant had paid the said sum as a consideration for the buy-back of shares at a rate of Rs. 23.75 per share. Thus as a necessary corollary, the said transaction had to be disclosed at the time of public announcement as provided under Regulation 16(viii). The Tribunal observed that as the said transaction and its details were neither disclosed in the public offer nor in the letter of offer made to the other shareholders, SEBI was correct in directing the Appellant to go in for a fresh public announcement and offer to the remaining shareholders of the Target Company the rate of Rs. 23.75 per share.

> "9 .The Appellant also contended that the said post-dated cheques had subsequently been dishonoured, hence no payment could be said to have been made in respect of the buy-back of shares. Furthermore, the shares held by HSIDC had not been transferred in the name of the Appellant or his associates, so the acquisition had not reached its stage of fruition. Resultantly, the price offered to HSIDC could not be taken into consideration as provided under Regulation 20(2) (b) of the Regulations to determine the minimum offer price."

20. Minimum offer price.—(1) The offer to acquire the shares under regulation 10, 11 or 12 shall be made at a minimum offer price which shall be payable—

(a) In cash; or
(b) By exchange and/or transfer of shares of the acquirer company, if the person seeking to acquire the shares is a listed body corporate; or
(c) by exchange and/or transfer of secured instruments with a minimum of "A" grade rating from a credit rating agency;
(d) a combination of clause (a), (b) or (c) :

Provided that

(2) For the purposes of sub-regulation (1), the minimum offer price shall be the highest of—
(a) the negotiated price under the agreement referred to in sub-regulation (1) of regulation 14;
(b) the highest price paid by the acquirer or persons acting in concert with him for any acquisitions, including by way of allotment in a public or rights issue, if any, during the 26 week period prior to the date of public announcement;

(c) the price paid by the acquirer under a preferential allotment made to him or to persons acting in concert with him at any time during the twelve months period up to the date of closure of the offer;

(d) the average of the weekly high and low of the closing prices of the shares of the Target Company as quoted on the stock exchange where the shares of the company are most frequently traded during the 26 weeks preceding the date of public announcement."

Explanation

10. The Tribunal observed that from a perusal of Regulation 20(2)(b) it was clear that the highest price paid by an acquirer for any acquisition would be taken into consideration for determining the minimum offer price. As the Appellant had paid Rs.23.75 per share to HSIDC within the period of 26 weeks prior to the date of public announcement, this transaction had to be taken into consideration for determining the minimum offer price. The Tribunal negated the specific contention of the Appellant, finding that irrespective of whether acquisition took place or not, Regulation 20(2)(b) stood attracted as the amount was paid for the purpose of the acquisition. The Appellant contended that as his buy-back from HSIDC, was a transfer of shares from a State level financial institution to a co-promoter of the Target Company, it was exempt under Regulation 10. Thus in turn, the same transaction need not be taken into consideration to determine the minimum offer price. The Tribunal dismissed this contention by stating that the exemption under Regulation 10 was only with respect to

making a public announcement. The said exemption does not permit the Appellant from not disclosing the transaction for the purpose of calculating the minimum offer price.

11. Aggrieved by the decision of the Tribunal, the Appellant has now filed this Appeal. Counsel for the Appellant contends that Regulation 20(2)(b) uses the expression "acquisition" and submits that as the said acquisition was to happen in the future, the Regulation was not applicable to him. Further, the post-dated cheques that had been deposited were given in the form of a guarantee to HSIDC. Counsel submits that the buy-back was initially due in April 1999, but was subsequently postponed till November 1999, and thus as the buy-back was to take place in November, it is then that the rate would have been calculated and determined. Reliance has been placed on a letter issued by HSIDC dated 1.6.1999 addressed to the Appellant stating that the purchase consideration of the shares under buy-back agreement could not be determined as on date, and the equity had to be bought back by the promoters at a purchase consideration which would be calculated as per the terms contained in Clause 15 of the Tripartite agreement. Counsel relies on a letter issued by HSIDC dated 9.12.1999 wherein it was communicated to the Appellant that the post-dated cheques which he had deposited were dishonored on presentation due to non-availability of sufficient funds with the accounts, and thus as there had been no payment no acquisition had taken place. To further buttress this contention Learned Counsel relied on a letter issued by HSIDC dated 11.1.2001 addressed to SEBI, wherein it was averred that the transfer of shares to the incoming collaborators would be effected only on the deposit of the entire amount of purchase consideration.

12. Learned Senior Counsel for the Respondent contends that the Regulations were triggered when the purchase was made by one promoter from another, that is by the Appellant from Garg, and not from the purchase by the Appellant from HSIDC. Evidence was placed on record to prove that the Appellant was still carrying on business of the Target Company. Counsel contended that on 31.3.1999, the Appellant agreed to step into the shoes of Garg. On 15.4.1999 HSIDC received intimation from the Appellant regarding the agreement and also received four post¬dated cheques amounting to Rs.71,25,466 as consideration for the purchase of three lac equity shares in the Target Company, thus taking his share in the Target Company to 8.83%. On 19.4.1999, the Tripartite agreement between the Appellant, Garg and HSIDC was entered into. Subsequently, on 20.4.1999, the Appellant and Garg entered into an agreement as per which the Appellant purchased Garg's entire share capital of 9,54,450 shares amounting to 28.09% share in the Target Company at the rate of Rs. 8.50 per fully paid up equity share. It was this transaction which triggered Regulation 10, as there was an acquisition of more than 15% of the total shareholding of the Target Company. In order to comply with Regulation 10, the Appellant made a public announcement within four working days as prescribed in Regulation 14(1) on 24.4.1999. The rate that was being offered by the Appellant at which he would acquire shares from the public was Rs. 8.75. In response to the public announcement,

the Appellant could only acquire 2.42% of the shares of the Target Company, which was not surprising as the rate at which the shares were being offered to be purchased by the Appellant was lower than the face value of the shares. Counsel relied on a letter issued by HSIDC to SEBI dated 11.1.2001, wherein it was categorically mentioned that the cheques issued by the Appellant to HSIDC were consideration for the buy-back of the shareholding held by HSIDC in the Target Company. Finally, Learned Senior Counsel places reliance on Regulation 16 which provides the contents of the public announcement, of which one of the disclosures that a company had to make is to state the highest and the average price paid by the acquirer or persons acting in concert with him for acquisition, if any, of shares of the Target Company made by him during the twelve month period prior to the date of public announcement."

13. The first issue that has to be addressed before us is whether the transaction of buy-back of shares which transpired between the Appellant and HSIDC was required to be disclosed in the public announcement dated 24.4.1999. In order to determine this requirement, we must examine the operative clauses of the relevant Regulations. Regulation 3 states that Regulations 10, 11 and 12 shall have no applicability to any transfer of shares from state level financial institutions, including their subsidiaries, to co-promoter(s) of the company pursuant to an agreement between such financial institution and such co-promoter(s). Regulations 10, 11 and 12 mandate the making of a public announcement, if any of the criteria mentioned therein are satisfied. Regulation 16 provides the contents and essential disclosures that are to be made at the time of making a public announcement. Regulation 20 establishes the method of computation to be employed in order to determine the minimum offer price which the acquirer must offer to purchase shares in a public announcement under Regulation 10, 11 or 12. It is evident from a reading of the above Regulations that the buy-back transaction between the Appellant and HSIDC was incapable of triggering Regulation 10, as the said transaction was protected by Regulation 3. However, the acquisition of the entire share capital of Garg by the Appellant attracted Regulation 10 as the acquisition was in excess of 15%. Further, as this transaction was between two promoters, it did not have the protection of Regulation 3. As required under Regulation 10, the Appellant did make a public announcement, but did not disclose its buy-back transaction with HSIDC. The Appellant has vainly and incorrectly attempted to justify his act of non-disclosure by stating that the transaction with HSIDC was protected by Regulation 3, which placed it beyond the ambit of Regulation 10, 11 and 12. In our view, Regulation 3 only protects a transaction between a co¬promoter and a State financial institution to the extent that, as a consequence of such transaction a public announcement will not be required to be made as provided under Regulations 10, 11 and 12. However, it does not imply that the said transaction is to be protected from the rigours of other Regulations provided for under the Act. Thus, the transaction between the Appellant and HSIDC will have to be subject to Regulations 16 and 20, and the rate at which the Appellant bought back the shares from HSIDC had to be disclosed in the public announcement.

14. We also find no force whatsoever in the contention of the Learned Counsel for the Appellant that the post-dated cheques forwarded to HSIDC enclosed with letter dated 15.4.1999 were given by way of a guarantee, especially in light of the fact that the same was denied by HSIDC in its letter to SEBI dated 11.1.2001, wherein HSIDC stated that the post-dated cheques had been issued in consideration of the buy-back of shares.

15. The next contention that was raised by the Counsel for the Appellant was that as the cheques presented had been dishonored on presentation, the said transaction did not culminate in an acquisition. It has already been held beyond doubt that the post-dated cheques issued by the Appellant in favor of HSIDC were in consideration of the buy-back of the shares held by HSIDC in the Target Company. The Appellant had submitted that the cheques were post-dated because he was suffering from a liquidity crunch. In our view, the post-dated cheques amounted to a promise to pay and that promise would be fulfilled on the date mentioned on the cheque. Thus, this promise to pay amounted to a sale of shares/equity. The subsequent dishonouring of the post-dated cheque would have no bearing on the case. At the time of making the public announcement the Appellant had bought back the shares of HSIDC by making payment via the said post-dated cheques. Further, as the buy-back was in pursuance of an agreement, there was consensus ad idem. The Appellant has subsequently shirked his responsibility and has tried to slither away from honouring the agreement, which he cannot be allowed to gain from, as is established by the legal maxim commodum ex injuri su non habere debet. While interpreting the term acquisition, we must conceptualize the intention behind these Regulations which, it seems to us, is to safeguard the shareholders from adverse consequences of acquisitions and takeovers as far as the value of the shares is concerned. Not infrequently, the new management's endeavour is to manipulate the market price of the shares in a manner calculated to induce the existing shareholders to off load their holdings at a low price. This is achieved by portraying a false picture of their value. In the background of such an intention it would fallacious to suggest that the said transaction did not tantamount to an acquisition.

16. In order to dispel doubts regarding the term 'acquisition', the same was subsequently defined in the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. Under Regulation 2 Clause (1) Sub-clause (a)- 'acquisition' means directly or indirectly acquiring or agreeing to acquire shares or voting rights in, or control over, a Target Company. This definition clarifies that an acquisition takes place the moment the acquirer decides or agrees to acquire, irrespective of the time when the transfer stands completed in all respects. The definition explicates that the actual transfer need not be contemporaneous with the intended transfer and can be in future.

17. Further, the letter on which the Counsel for the Appellant had placed reliance to prove that there was no acquisition, is dated 9.12.1999, which was well after the public announcement dated 24.4.1999 where the Appellant was required to make disclosures in compliance with the Regulations. This clearly indicates, that at the date of making the public announcement the Appellant was under the impression that the acquisition has taken place.

18. We neither find any merit in the appeal, nor any infirmity in the order of SEBI dated 1.3.2003. Thus Appeal is dismissed.