(2021) 10 SEBI CK 0100

In the Securities Appellate Tribunal Mumbai

Case No : Appeal No. 151 Of 2019

Fawn Trading Co. Pvt. Ltd And Others — APPELLANT

Vs

Securities And Exchange Board Of India — RESPONDENT

Date of Decision : 20-10-2021

Acts Referred:

Securities And Exchange Board Of India (Substantial Acquisition Of Shares And Takeovers) Regulations, 1997 — Regulation 3, 3(1), 3(1)(c), 3(1)(c)(ii), 10, 11, 12, 23(c), 44, 44(a), 44(b), 44(c), 44(d)
Companies Act, 1996 — Section 81(1A)
Securities And Exchange Board Of India Act, 1992 — Section 12, 11A, 11B, 15H, 24

Citation : (2021) 10 SEBI CK 0100

Hon'ble Judges : Tarun Agarwala, Presiding Officer;M. T. Joshi, J

Bench : Division Bench

Advocate : Pesi Modi, Neville Lashkari, Deepak Dhane, Ravi Kant Purohit, Shyam Mehta, Mihir Mody, Arnav Misra, Mayur Jaisingh, K. Ashar

Final Decision : Partly Allowed

Judgement

M.T. Joshi, J

1. Aggrieved by the order of the learned Whole Time Member ('WTM' for short) of the respondent Securities and Exchange Board of India (hereinafter referred to as 'SEBI') dated 17th January, 2019 to make a public announcement/open offer to acquire shares of Saurashtra Cement Ltd. (hereinafter referred to as the Company/target Company) as directed long back vide respondent's first order dated 15th January, 1999 alongwith interest at the rate of 10 percent per annum from the date when the appellants allegedly incurred the liability to make the public announcement to be paid to the shareholders who were then holding the shares of the Company the present appeal is preferred.

2. The case has a chequered history. The case suffered remand at the hands of Bombay High Court vide order dated 3rd March, 2011, this Tribunal's orders dated 10th March 2014 and 6th September, 2016.

3. The facts of the case would reveal that in the year 1998 there was apparently a tussle between the original promoters of the Company (appellants are/were subsidieries of the promoter) a new group consisting of Shri Praful M. Patel over the control of the Company. On March 17, 1998 said Praful Patel group submitted to SEBI a draft of the public announcement of the offer for acquisition of the shares of the Company. The offer was for acquisition of 20% of the shares of the Company consisting of 1,19,92,181 at a price of Rs.75 for the shares having a face value of Rs.10. While the said open offer documents were in process, merchant banker to the offer on 30th March, 1998 brought to the notice of respondent SEBI that the fully paid up equity shares were not 1,19,92,181 as the Company has advised it to state that those are in fact 1,99,99,181. This naturally caused the respondent SEBI to obtain clarification from the Company. It was found that between 11th March, 1998 to 31st March, 1998 preferential allotment of shares to the promoters and other was made in three tranches by the Company. Upon further enquiry it was gathered that in annual general meeting dated 31st December, 1997 a resolution was approved authorising the Board of Directors or its committee to allot such number of equity shares in one or more tranche for an aggregate amount not exceeding Rs.400 crores at a price not less than Rs.30/-. Earlier the Company asked these subsidiary companies of the main promoter to contribute 10% of the promoter's contribution of Rs.35.7 crores for certain project cost of Rs.296.54 crores. Vide this letter the Company also promised that subject to the approval of the Board of Directors equity shares of Rs.10 at a premium of Rs.20 would be issued to them as a preferential allotment. In reply to the said letter this subsidiary of the main promoter mainly appellant applied for allotment in aggregate of 80,00,000 equity shares of Rs.10 each at a price of Rs.30 per share. They enclosed cheques for an aggregate amount of Rs.240 lakhs being payment of Rs.3 per share. Consequent to it the Board of Directors of the Company resolved the issue of 3,50,00,000 shares of Rs.10 each at a premium of Rs.20 to such class of persons namely foreign companies, banks as well as promoters . It also resolved to allot 80,00,000 shares at the same price to the appellant. The five preferential allottees (appellants) are as under:

Pallor Trading Co. Pvt. Ltd. 7996000 shares

Fern Trading Co. Pvt. Ltd. 1000 shares

Fawn Trading Co. Pvt. Ltd. 1000 shares

Tejashree Trading Co. Pvt. Ltd. 1000 shares

Willow Trading Co. Pvt. Ltd. 1000 shares

80,00,000 shares

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4. While the process of approving the draft of the public announcement was pending before the respondent SEBI one of the present appellant filed a civil suit in the court at Porbandar on 25th March, 1998. The civil court restrained the parties from taking any steps to acquire the shares on the basis of the public announcement made by Shri Praful M. Patel and others. Thereafter, the committee of the directors of the Company on 27th March, 1998 resolved to allot 40 lakh shares to Tejashree Trading Co. Pvt. Ltd. On 31st March, 1998 it resolved to allot 19,05,300 shares to other foreign investors etc.

5. In view of all these facts the merchant banker to the open offer of Shri Praful M. Patel group wrote a letter to the respondent SEBI alleging violation of Regulation 23(c) and Regulation 3(1)(c)(ii) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as 'SAST Regulations'). Thereafter, the proceedings against the appellant were started by issuing show cause notice to the appellants.

6. Upon hearing the parties the then WTM vide order dated 15th January, 1999 came to the conclusion that the appellants were required to make open offer in terms of the SAST Regulations as the preferential allotment were made to the promoters i.e. to the appellants without disclosing the details of the same in the notice for calling general meeting of the shareholders as required by Regulation 3(1)(c)(ii) of the SAST Regulations. Therefore, he directed the appellants to make a public announcement to acquire shares of the remaining shareholders from the target Company and aggregate 20% of the voting rights within two months at a price fixed in accordance with the SAST Regulations.

7. Aggrieved by the said order the appellants preferred two appeals to the Central Government which was the appellate authority at that time. The Central Government vide order dated 5th April, 1999 dismissed both the appeals. The appellants challenged the said order by way of Writ Petition bearing no.1080 of 1999 before the Bombay High Court. The Bombay High Court stayed the effect and operation of the impugned order. It ultimately came for final hearing before the Bombay High Court on 3rd March, 2014. The Bombay High Court passed the following order:

"2. We have been informed that this order has also been confirmed by the Appellant Authority. This order admittedly was stayed by this court in the year 1999 itself and that stay continues to operate even till today. After having heard learned counsel appearing for both the sides, we find that due to passage of time and that the circumstances have changed, it is for SEBI to consider whether even after lapse of so many years it still wants, the Petitioner to make offer to the public, as is directed by the order impugned in the Petition. In our opinion, due to passage of time and change in the circumstances, following order would meet the ends of justice:

i) The Petitioner shall be at liberty to make the representation to the SEBI within a period of six weeks from today seeking appropriate reliefs from SEBI. In case, such a representation is made, the SEBI shall consider it in accordance with law and make appropriate orders. In case, the representation is made within the aforesaid period, the interim order passed by this court shall continue to operate till SEBI takes a decision on the representation.

ii) In case, the decision of the SEBI is adverse to the interest of the Petitioner, the Petitioner shall be entitled to adopt such remedies as may be available to them in law.

iii) All the contentions of both the sides are kept open.

.........."

8. The appellants therefore filed a representation before SEBI. The then learned WTM of SEBI again considered the material on record. Vide order dated 25th April, 2013 he confirmed the earlier order directing to make public offer. He however observed that in view of the fact that the order was stayed by the Bombay High Court and the said stay remained for a long period it would not be reasonable to direct the appellant to pay of interest on the consideration amount.

9. This second order of respondent SEBI was challenged by the appellant before this Tribunal. This Tribunal remanded the matter to SEBI vide order dated 10th March, 2014 finding that the directions contained in the Bombay Court order were not considered by the learned WTM and there were certain inconsistencies in the order of the WTM in para nos.23 and 24 of the impugned order.

10. After the remand the learned WTM asked the appellant to clarify as to how many were the then present shareholders of the company, their composition and out of the then shareholders how many shareholders continued on the trigger date etc. The appellant Fawn Trading gave the details as sought. It also submitted that the target company was unable to trace very old records and it would take time to collect details from target company and collate the same. It was also submitted that since in the meantime the shares were dematerialised and fungible it cannot be assumed that the said shareholders who were shareholders at the time of alleged trigger are still holding all or any part of the shares which they were holding in 1998. The learned WTM took into consideration the material on record and vide order dated 31st December, 2014 again directed the appellant to make an open offer to all shareholders of the target company. This time however he directed the appellant to pay interest at the rate of 10% p.a.

11. This third order of SEBI was challenged by the appellant before this Tribunal. The Tribunal decided the said appeal on 6th September, 2016 and again set aside the said order. This Tribunal noted that while in the earlier order respondent SEBI had observed that the appellant would not be liable to pay interest, in the third order direction was issued to pay interest. Further, no reasons were recorded for issuing the said direction. In the circumstances, the entire order was quashed and the case was again remitted back for fresh consideration.

After this remand the impugned order is passed. Hence the present appeal.

12. We have heard Mr. Pesi Modi, Senior Advocate assisted by Mr. Neville Lashkari, Mr. Deepak Dhane, Mr. Ravi Kant Purohit, Advocates for the appellants and Mr. Shyam Mehta, Senior Advocate assisted by Mr. Mihir Mody, Mr. Arnav Misra, Mr. Mayur Jaisingh, Advocates for the Respondent.

13. The shareholding pattern before the preferential allotment of shares to the appellants and after the same has been reproduced in para (f) of the first order of the SEBI. It would show that before the first allotment the voting rights of the promoters was 48.64%. Upon first allotment the voting right of the promoter group increased to 69.19% and 57.20% respectively. Upon the second allotment of preferential shares on 27th March, 1998 the voting rights of the promoter increased to 74.33% and 60.50% respectively. Upon third allotment to foreign institution etc. the promoter group holdings reduced to 64.14%.

It is not in dispute that in absence of exemption granted under regulation 3 of the SAST Regulations, 1997 these allotments would have an effect of making an open offer by the appellants though they claim before the respondent SEBI that they were not acting in concert. This plea however was not taken before this Tribunal. What is claimed is that particularly in view of Regulation 3(1)(c) (ii) the preferential allotment was exempted and, therefore, the appeal is required to be allowed in toto. . It was also claimed that during the relevant period SEBI was not empowered to direct the appellant to make the open offer. In the alternative, it was claimed that due to the passage of time; due to the fact that the target company in the meantime had undergone BIFR process and that the original shareholders had also exited, now the direction to make open offer is not feasible and not required. In the alternative, it was submitted that direction to pay interest in the impugned order is not warranted.

14. On the other hand, the learned counsel for the respondent supported the reasoning of the order buttressed by the judgments cited before us.

15. Regulation 3(1) of the SAST Regulations, 1997 as existed at the relevant time had provided for exemption from applicability of the SAST Regulations, 1997. More particularly Regulation 3(1)(c) provides as under:

"Applicability of the Regulations

Nothing contained in Regulation 10, 11 and 12 of these Regulations shall apply to ......

Preferential allotment, made in pursuance of a resolution passed under Section 81(1A) of the Companies Act, 1996 (1 of 1956). Provided that

....

Full disclosures of the identity of the class of the proposed allotee(s) is made, and if any of the proposed allollee(s) is to be allotted such number of shares as would increase his holding to 5% or more of the post issued capital, then in such cases, the price at which the allotment is proposed, the identity of such person(s), the purpose of and reason for such allotment, consequential changes, if any, in the board of directors of the company and in voting rights, the shareholding pattern of the company, and whether such allotment would result in change in control over the company are all disclosed in the notice of the General Meeting called for the purpose of consideration of the preferential allotment;"

16. The learned counsel for the appellant submitted that substantive compliance of the above provisions is made. On the other hand, the impugned order as well as the submissions of the respondent would show that while calling for a general meeting of the shareholders for approving such preferential allotment a full disclosure is required to be made. Most importantly identity of the proposed allottees should be known to the shareholders and the same should be disclosed in the notice which admittedly was not made while calling the AGM. The exemption clause provides that if the number of shares would increase the holding of five percent or more post issued capital, in that case, not only the price of the proposed allotment but the identity of the persons, the purpose etc. are required to be furnished to the shareholder while calling the general meeting. Admittedly such details were not given. Before us, however, the main thrust of the submissions of the appellant is that even if it is held that strict compliance of Regulation 3(1)(c) is not made but a substantive compliance is made, it may only call for imposition of a monetary penalty of Rs.5 lakhs under Section 15H the SEBI Act as it stood then. It was urged that during the relevant period the respondent SEBI had no power to direct the appellant to make the open offer. In any case, in number of cases SEBI had imposed the penalty and in some of the cases this Tribunal had reduced the same. The appellant has supported its case of imposition of penalty by SEBI itself for failure to comply with Regulation 3(1)(c)(ii) strictly, in scores of cases as listed in the submissions made on behalf of the appellant.

17. On the other hand the learned counsel for the respondent submitted that Regulation 44 of the SAST Regulations, 1997 as well as provisions of Section 11B of the SEBI Act empowers respondent SEBI to make such a direction to make an open offer. Regulation 44 as it existed then though did not specifically provide for issuing such directions. It was however urged by the respondent SEBI that the very nature of the Regulation 44 was inclusive, therefore that respondent SEBI was empowered to take such measures as it deemed fit including the measure which were enumerated in the then Regulation 44 (a) to (d). In view of this inclusive nature of the provisions coupled with the provisions of Section 11B, according to the learned counsel for the respondent SEBI was very well empowered to direct the appellant to make the open offer.

18. Section 11B of the SEBI Act runs as under:

"Power to issue directions.

11B. Save as otherwise provided in section 11, if after making or causing to be made an enquiry, the Board is satisfied that it is necessary,-

(i) in the interest of investors, or orderly development of securities market; or

(ii) to prevent the affairs of any intermediary or other persons referred to in section 12 being conducted in a manner detrimental to the interest of investors or securities market; or

(iii) to secure the proper management of any such intermediary or person,

it may issue such directions,-

(a) to any person or class of persons referred to in section 12, or associated with the securities market; or

(b) to any company in respect of matters specified in section 11A, as may be appropriate in the interests of investors in securities and the securities market.

Explanation.-For the removal of doubts, it is hereby declared that the power to issue directions under this section shall include and always be deemed to have been included the power to direct any person, who made profit or averted loss by indulging in any transaction or activity in contravention of the provisions of this Act or regulations made thereunder, to disgorge an amount equivalent to the wrongful gain made or loss averted by such contravention."

19. Regulation 44 of the SAST 1997 as it stood then was as under:

"44. Directions by the Board.-The Board may, in the interests of the securities market, without prejudice to its right to initiate action including criminal prosecution under section 24 of the Act give such directions as it deems fit including:

(a) directing the person concerned not to further deal in securities;

(b) prohibiting the person concerned from disposing of any of the securities acquired in violation of these Regulations;

(c) directing the person concerned to sell the shares acquired in violation of the provisions of these Regulations;

(d) taking action against the person concerned."

20. In the case relied on by the appellant on the issue of imposition of penalty it could be seen that in all those cases the respondent SEBI imposed penalty for not strictly complying with the Regulation 3 (1) (c) (ii) of SAST Regulation. In some of the cases the noticees therein had challenged the quantum of penalty which came to be reduced by this Tribunal in the facts and circumstances of those cases. The issue as to whether the respondent SEBI was then empowered to make direction for making open offer had not emerged in those cases. It would however show that in case of absence of strict compliance with the provisions of Regulation 3(1)(c)(ii) the penalty as provided under Section 15H of

the SEBI Act can be imposed.

21. In view of the provisions of Section 11B of the SEBI Act and inclusive nature of provision of Regulation 44 of the SAST Regulations 1997 it however cannot be gainsaid that SEBI had vast power to issue directions as it may deem fit under Regulation 44, though such measure may not have been specifically then enumerated in Regulation 44 of SAST Regulation. Therefore, the submission of the appellant that there was absence of any authority will have to be rejected.

22. The issue therefore remains is not as to whether SEBI is empowered to direct the appellants to make open order but as to whether in the given facts and circumstances of the case, whether it was feasible at the relevant time or as to whether it has lost the relevance later on due to the change in the circumstances.

23. As detailed supra Bombay High Court in its order dated 3rd March, 2021 indicated that there had been change in the circumstances but declared that it was for the respondent SEBI to consider those circumstances. Thereafter, the case has seen several rounds as detailed supra between this Tribunal and SEBI for one reason or the other. The learned counsel for the respondent however emphatically relying on the decisions as detailed hereinafter submitted that if the acquirer does not comply with the SAST Regulations, SEBI would be perfectly justified in considering the non-compliance while considering the feasibility of open offer.

24. Reliance was placed in the case of SEBI v. Akshya Infrastructure P. Ltd. (2014) 11 SCC 112 and the decision of this Tribunal in the case of M/s. Nirvana Holdings Pvt. Ltd. vs. Securities and Exchange Board of India decided on 8th September, 2011 etc. It is no doubt true that SEBI is required to take into consideration non-compliance of the acquirer while considering the feasibility of the direction to make open offer. In the case of Nirvana Holdings this Tribunal has held that if it is in the interst of shareholders the direction of public offer is must. The decision of Nirvana is presently stayed by the Hon'ble Supreme Court.

25. Be that as it may, direction to make an open offer would in many cases be in the interest of the shareholders. However, changes in the circumstances are required to be taken into consideration by the respondent SEBI while choosing the alternative as detailed supra. It is to be noted that the preferential allotment had occurred in the year 1997-1998, perhaps due to the tussle of acquiring control over the Company by a new group. The decision of SEBI as well as the Central Government was stayed by the Bombay High Court from the year 1999 till the disposal of the writ petition on 3rd March, 2011. Thereafter, SEBI was required to pass two more orders in view of the remand of the case by this Tribunal.

26. The learned WTM in the impugned order had blamed the appellants for indulging in the litigation and therefore responsible for the delay. It should however be noticed that every citizen has right to have access the court or Tribunal to get redressal of his grievance. In the first round which went up to the

Bombay High Court, the High Court deemed it fit to remit the matter to respondent SEBI for considering the effect of passage of time and changed circumstances. Thereafter for the reasons as detailed supra appeals of the appellants were allowed by this Tribunal. The orders of respondent SEBI were quashed and the case was again remanded back to SEBI. Thus, the litigation cannot be called as frivolous one. There was no specific enumeration in Regulation 44 empowering respondent SEBI to direct the acquirer to make open offer. In that view of the matter the appellant litigated over the said issue.

27. The learned counsel for the respondent submitted and also reiterated in the written submissions on behalf of the respondent that respondent SEBI had issued first order to make an open offer in a timely manner with intent to repair the damage done. However, due to the litigation caused by the appellant the time has lapsed. Modification of direction therefore would send a wrong precedent. The case of the appellant that they discontinued to be the shareholder in the target Company is not relevant. Further their case that the target company itself as to undergo the process of BIFR is also irrelevant.

28. However, considering the lapse of time; the fact that the original shareholders had exited and that respondent SEBI itself had chosen the option to impose penalty in numerous cases as detailed in the written submission of the appellant, in our view, this also is a fit case where respondent SEBI ought to have directed the appellant to pay penalty as provided under Section 15H instead of affirming the earlier order of direction to make an open offer. In the result, the following order:

ORDER

29. The appeal is hereby partly allowed. The decision of the respondent SEBI that the appellants had not followed the provisions of Regulation 3 of the SAST Regulation is affirmed. However the direction of the respondent to the appellant to make an open offer as detailed in the impugned order is hereby set aside. The case is remitted back to the respondent SEBI only to the extent of taking decision on the quantum of penalty as provided under Section 15H of the SEBI Act as it existed at the relevant time. The apellants shall appear before the respondent on 22nd November 2021. In the meantime, the appellants are directed to deposit an amount of Rs.5 lakhs with respondent SEBI within a period of two months from the date of this order. The amount so deposited shall be invested by SEBI in an interest bearing account. The amount and interest shall be subject to the decision of the respondent SEBI. Upon failure of the appellant to deposit the amount within the period as prescribed above, the appeal shall stand dismissed in toto.

30. The present matter was heard through video conference due to Covid-19 pandemic. At this stage it is not possible to sign a copy of this order nor a certified copy of this order could be issued by the registry. In these circumstances, this order will be digitally signed by the Private Secretary on

behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Parties will act on production of a digitally signed copy sent by fax and/or email.

