
(2021) 07 SEBI CK 0173

In the Securities Appellate Tribunal Mumbai

Case No : Miscellaneous Application No. 738 Of 2021, Appeal No. 96, 221 Of 2019

Nikhil Mansukhani And Others

APPELLANT

Vs

Securities And Exchange Board Of India

RESPONDENT

Date of Decision : 26-07-2021

Acts Referred:

Securities Contracts (Regulation) Rules, 1957 — Rule 19(2)
Securities And Exchange Board Of India Substantial Acquisition Of Shares And Takeovers) Regulations, 1997 — Regulation 2(1)(e), 2(1)(e)(1), 2(1)(e)(2), 2(1)(e)(2)(v), 10, 11, 11(1), 11(2), 12, 13, 18
Companies Act, 1956 — Section 6

Citation : (2021) 07 SEBI CK 0173

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

Bench : Division Bench

Advocate : Pesi Mod, Kunal Katariya, Vikas Bengani, Dr. S. K. Jain, Pradeep Sancheti, Nishit Dhruva, Hridhay Khurana, Chirag Bhavsar, Yash Garach, Aalisha Shah, Mona Vora

Final Decision : Allowed

Judgement

Tarun Agarwala, Presiding Officer

Â 1. The present appeals have been filed against a common order dated December 21, 2018 passed by the Adjudicating Officer (â??AOâ?? for

short) of the Securities and Exchange Board of India (â??SEBIâ?? for short) imposing a penalty of Rs. 10 crore to be paid jointly and severally by

the appellants for failure to make an open offer under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (â??SAST

Regulationsâ?? for short).

2. The facts leading to the filing of the present appeal is, that SEBI conducted an investigation in the dealings of the shares of the Company during the

period June 1, 2010 to September 30, 2010 and observed that pursuant to acquisition of shares by the entities of promoter group and allotment of shares pursuant to conversion of 10 lakh warrants to entities of promoters group on June 19, 2010 had led to an increase in the shareholdings of the promoters from 51.29% to 55.18% thereby crossing the threshold limit of 55% and, thus, violated Regulations 11(1) and 11(2) of the SAST Regulations.

3. On this basis, a show cause notice dated May 11, 2011 was issued to show cause as to why penalty should not be imposed for failure to make a public announcement to the acquisition of shares in accordance with SAST Regulations.

The AO, after considering the material evidence on record, passed an order dated September 30, 2011 finding the appellants to be guilty and imposed a penalty of Rs. 10 crore.

4. The appellants filed Appeal no. 196 of 2011 and 8 of 2012 which was decided by this Tribunal by an order dated May 11, 2012 in which the impugned order of the AO was set aside and the matter was remitted to the AO to decide the matter afresh in accordance with the observations and directions given by this Tribunal. For facility, paragraph 6 and 7 of the order of this Tribunal is extracted hereunder:-

6. Having considered the rival submissions and material placed on record, we are of the view that the adjudicating officer, while passing the impugned order, has not dealt with or considered the principles of law laid down in the above noted two judgements. No doubt, the appellant informed about the split in the promoter group to the stock exchanges only in April 22, 2011, the fact remains that there was sufficient material available on record to show that the dispute between the two promoter groups is continuing since 2009. In view of this fact, it was for the Board to bring sufficient material on record to show that inspite of conflict among the promoters, the members of the two groups were acting in concert while acquiring the shares for the purpose of increasing their voting rights for gaining control over the company or they had common objective or purpose for substantial acquisition of shares. The appellants, vide their reply dated June 20, 2011 in response to the show cause notice have specifically taken this ground

and referred to the above noted two judgements. However, the adjudicating officer while passing the order has not dealt with the same. Neither he has made any reference to the two judgements noted above nor he has recorded any finding as to how the three acquirers of the shares, against whom the impugned order has been passed, are a person acting in concert? within the meaning of the takeover code. We are, therefore, of the considered view that the impugned order has been passed without taking into consideration the material available on record and the legal position set out above.

7. We, therefore, set aside the impugned order and remand the matter to the Board for passing a fresh order dealing with the submissions made by the appellants in their reply dated June 20, 2011 and other documents submitted by them, more particularly, the law laid down in the two judgments referred to above. The Board may call for further information from the appellant, if it is felt necessary for passing a fresh order in accordance with law.

5. This Tribunal directed the AO to deal with the submissions of the appellants and the principles laid down by the Bombay High Court in case of K.K. Modi vs. Securities Appellate Tribunal [(2003) 113 Com. Cases 418 Bom.] and by the Supreme Court in Daiichi Sankyo Company Limited vs Jayaram Chigurupati and Ors. [(2010) 7 SCC 449].

6. Subsequent to the remand, the AO after considering the matter, again passed the impugned order dated December 21, 2018 imposing the same penalty of Rs. 10 crore. The appellants, being aggrieved, have filed separate appeals.

7. Before we go into the merits of the case, it would be essential to give a brief factual background. The Company is known as Man Industries (India) Limited. J.L. Mansukhani who the head, being the father and his two sons R.C. Mansukhani who was the Chairman of the Company and J.C.

Mansukhani was the Vice Chairman and Managing Director. The two brothers were not seeing eye to eye with each other and there were some disputes between them with regard to the running of the Company. Two separate groups were formed, namely, R C group and J C group. Nikhil

Mansukhani, one of the appellants, is part of the R C group and Anita Mansukhani and JPA Solutions Private Limited is other set of appellants are

part of the J C group.

8. Since 2009 disputes had arisen between the two brothers and they were not on good terms with each other. Previously, the Company had issued

warrants to the two groups which were to be converted into equity shares. On June 19, 2010 the Board of Directors of the Company met and

resolved to convert the warrants into equity shares in favour of the R C group and J C group. Accordingly, 5 lakh shares were allotted to Nikhil

Mansukhani of the R C group and 2.5 lakh shares each were allotted to JPA Solutions Private Limited and Anita Mansukhani of the J C group. Prior

to this meeting, the Assistant Company Secretary of the Company informed the promoters by e-mail dated June 15, 2010 and June 17, 2010 that only a

small margin was available with the promoters for acquisition of shares otherwise the threshold would be breached and therefore the promoters were

advised to take pre-clearance in the event of any acquisition were being made by them.

9. J.C. Mansukhani acquired 47,402 shares on June 17, 2010 and another 43,000 shares on June 18, 2010. The acquisition of these shares was not

intimated by J.C. Mansukhani either to the promoters or to the Company and was disclosed at a later point of time. Thus, the purchase of shares by

J.C. Mansukhani breached the threshold on June 19, 2010 when other shares were allotted to Nikhil Mansukhani, JPA Solutions Private Limited and

Anita Mansukhani. As a result of this acquisition and not informing the Company or the Stock Exchange, proceedings were initiated against J.C.

Mansukhani. The AO found that J.C. Mansukhani had neither informed the Company nor the stock exchange about his acquisition of shares and

accordingly passed an order penalizing him for Rs. 24 lakhs. J.C. Mansukhani filed Appeal no. 195 of 2011. This Tribunal by an order dated June 26,

2012 upheld the finding of the AO with regard to the non-disclosure by J.C. Mansukhani either to the Company or to the stock exchange but reduced

the penalty from Rs. 24 lakh to Rs. 5 lakh.

10. With regard to inter se dispute between the two groups namely R C group and J C group, we find that the Board of Directors suspended J.C.

Mansukhani from Vice Chairman and Managing Director on account of his non-disclosure of the acquisition of the shares. The said suspension was

revoked on October 15, 2010 but on May 19, 2011 the Board of Directors again

withdrew the power of Managing Director from J.C. Mansukhani. It was subsequently revoked on November 23, 2011 and eventually on September 8, 2012, J.C. Mansukhani was removed as Vice Chairman and Managing Director. The Company Law Board by an order of May 30, 2013 upheld the removal of J.C. Mansukhani from the post of Vice Chairman and Managing Director. Eventually, on September 15, 2013 a family settlement took place, as a result of which, J.C. Mansukhani resigned from the directorship of the Company. The inter se dispute between two groups of promoters was intimated to the Stock Exchange by the Company on April 22, 2011 informing the Stock Exchange that the two groups were not acting in concert.

11. The AO after reconsidering the matter held that there was no evidence before the Stock Exchange to show family friction between the two groups prior to September 27, 2010. The AO further found that both groups were acquirers when warrants were converted into shares and that frequent changes in the executive powers of J.C. Mansukhani and reconciliation shows that the two groups were acting in concert. The AO further came to the conclusion that mere presence of any disagreement or dispute does not mean absence of commonality of intention to exert control over a Company and that frequent reconciliation meant that the two groups were acting in concert together. The AO further came to the conclusion that both the groups, being promoters, are of a homogeneous group and therefore the two groups have to be taken together and that together they have breached the threshold of 55% and therefore violated the provisions of SAST Regulations. The AO further found that since 20% of the shareholding of the Company is worth Rs. 95 crore therefore a penalty of Rs. 10 crore would be appropriate.

12. We have heard Shri Pesi Modi, the learned senior counsel in Appeal no. 96 of 2019 for the appellant and Ms. Mona Vora, the learned counsel for the appellants in Appeal no. 221 of 2019 and Shri Pradeep Sancheti, the learned senior counsel for the respondents.

13. Before we proceed on the merits of the case, it would be appropriate to take a look at some of the provisions of the Regulations.

â??2(1) In these regulations, unless the context otherwise requires:-

(a) â?|â?|.

(b) "acquirer" means any person who, directly or indirectly, acquires or agrees to acquire shares or voting rights in the target company, or

acquires or agrees to acquire control over the target company, either by himself or with any person acting in concert with the acquirer;

(e) "person acting in concert" comprises, -

(1) persons who, for a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target

company, pursuant to an agreement or understanding (formal or informal), directly or indirectly co-operate by acquiring or agreeing to

acquire shares or voting rights in the target company or control over the target company.

(2) Without prejudice to the generality of this definition, the following persons will be deemed to be persons acting in concert with other

persons in the same category, unless the contrary is established :

(i) a company, its holding company, or subsidiary of such company or company under the same management either individually or together

with each other;

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

(iii) directors of companies referred to in sub-clause (i) of clause (2) and their associates;

(iv) mutual fund with sponsor or trustee or asset management company;

(v) foreign institutional investors with sub account(s);

(vi) merchant bankers with their client(s) as acquirer;

(vii) portfolio managers with their client(s) as acquirer;

(viii) venture capital funds with sponsors;

(ix) banks with financial advisers, stock brokers of the acquirer, or any company which is a holding company, subsidiary or relative of the

acquirer.

Provided that sub-clause (ix) shall not apply a bank whose sole relationship with the acquirer or with any company, which is a holding

company or a subsidiary of the acquirer or with a relative of the acquirer, is by way of providing normal commercial banking services or

such activities in connection with the offer such as confirming availability of

funds, handling acceptances and other registration work.

(x) any investment company with any person who has an interest as director, fund manager, trustee, or as a shareholder having not less

than 2 per cent of the paid-up capital of that company or with any other investment company in which such person or his associate holds

not less than 2 per cent of the paid up capital of the latter company.

Note: For the purposes of this clause 'associate' means:

(a) any relative of that person within the meaning of section 6 of the Companies Act, 1956 (1 of 1956); and

(b) family trusts and Hindu Undivided Families.â??

â??Consolidation of holdings.

11. (1) No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, [15per

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%]]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.

(2) No acquirer, who together with persons acting in concert with him holds, fifty five per cent. (55%) or more but less than seventy five per

cent.

(75%) of the shares or voting rights in a target company, shall acquire either by himself or through persons acting in concert with him any

additional shares [entitling him to exercise voting rights] or voting rights therein, unless he makes a public announcement to acquire shares

in accordance with these Regulations:

Provided that in a case where the target company had obtained listing of its shares by making an offer of at least ten per cent. (10%) of

issue size to the public in terms of clause (b) of sub-rule (2) of rule 19 of the Securities Contracts (Regulation) Rules, 1957, or in terms of

any relaxation granted from strict enforcement of the said rule, this sub-regulation shall apply as if for the words and figures seventy five

per cent. (75%), the words and figures ninety per cent. (90%) were substituted.

[Provided further that such acquirer may, [notwithstanding the acquisition made under regulation 10 or sub-regulation (1) of regulation

11,] without making a public announcement under these Regulations, acquire, either by himself or through or with persons acting in

concert with him, additional shares or voting rights entitling him upto five per cent. (5%) voting rights in the target company subject to the

following:-

i) the acquisition is made through open market purchase in normal segment on the stock exchange but not through bulk deal /block deal/

negotiated deal/ preferential allotment; or the increase in the shareholding or voting rights of the acquirer is pursuant to a buy-back of

shares by the target company;

(ii) the post acquisition shareholding of the acquirer together with persons acting in concert with him shall not increase beyond seventy five

per cent.(75%).]

(2A) Where an acquirer who (together with persons acting in concert with him) holds fifty five per cent. (55%) or more but less than seventy

five per cent. (75%) of the shares or voting rights in a target company, is desirous of consolidating his holding while ensuring that the

public shareholding in the target company does not fall below the minimum level permitted by the Listing Agreement, he may do so only by

making a public announcement in accordance with these regulations:

Provided that in a case where the target company had obtained listing of its shares by making an offer of at least ten per cent. (10%) of

issue size to the public in terms of clause (b) of sub-rule (2) of rule 19 of the Securities Contracts (Regulation) Rules, 1957, or in terms of

any relaxation granted from strict enforcement of the said rule, this sub-regulation shall apply as if for the words and figures seventy five

per cent. (75%), the words and figures ninety per cent. (90%) were substituted.

[(3)Notwithstanding anything contained in Regulations10, 11 and 12, in case of disinvestment of a Public Sector Undertaking , an acquirer

who together with persons acting in concert with him, has made a public announcement, shall not be required to make another public

announcement at the subsequent stage of further acquisition of shares or voting rights or control of the Public Sector Undertaking

provided:-

(i) both the acquirer and the seller are the same at all the stages of acquisition, and

(ii) disclosures regarding all the stages of acquisition, if any, are made in the letter of offer issued in terms of Regulation 18 and in the first

public announcement.]

Explanation:- For the purposes of Regulation 10 and Regulation 11, acquisition shall mean and include,-

(a) direct acquisition in a listed company to which the Regulations apply;

(b) indirect acquisition by virtue of acquisition of companies, whether listed or unlisted, whether in India or abroad.â??

14. Admittedly, the consolidated shareholdings of the promoters as on March 31, 2010 was 51.29% and as on June 30, 2010 the total shareholding of

the promoters rose to 55.18% and thus there was an increase by 3.89%. In Daiichi Sankyo Company Limited (supra), the Supreme Court explained

the concept of persons acting in concert under Regulation 2(1)(e) and held as follows:-

â??48. To begin with, the concept of â??person acting in concertâ? under Regulation 2(1)(e)(1) is based on a target company on the one

side, and on the other side two or more persons coming together with the shared common objective or purpose of substantial acquisition of

shares, etc. of the target company. Unless there is a target company, substantial acquisition of whose shares, etc. is the common objective or

purpose of two or more persons coming together there can be no â??persons acting in concertâ?. For, dehors the target company the idea

of â??persons acting in concertâ? is as irrelevant as a cheat with no one as victim of his deception. Two or more persons may join hands

together with the shared common objective or purpose of any kind but so long as the common object and purpose is not of substantial

acquisition of shares of a target company they would not comprise â??persons acting in concertâ?.

49. The other limb of the concept requires two or more persons joining together with the shared common objective and purpose of

substantial acquisition of shares, etc. of a certain target company. There can be no “persons acting in concert” unless there is a shared common objective or purpose between two or more persons of substantial acquisition of shares, etc. of the target company. For, dehors the element of the shared common objective or purpose the idea of “person acting in concert” is as meaningless as a criminal conspiracy without any agreement to commit a criminal offence. The idea of “persons acting in concert” is not about a fortuitous relationship coming into existence by accident or chance. The relationship can come into being only by design, by meeting of minds between two or more persons leading to the shared common objective or purpose of acquisition or substantial acquisition of shares, etc. of the target company. It is another matter that the common objective or purpose may be in pursuance of an agreement or an understanding, formal or informal; the acquisition of shares, etc. may be direct or indirect or the persons acting in concert may cooperate in actual acquisition of shares, etc. or they may agree to cooperate in such acquisition. Nonetheless, the element of the shared common objective or purpose is the sine qua non for the relationship of “persons acting in concert” to come into being.

55. Regulation 2(1)(e)(2) defines “person acting in concert”. It is a deeming provision. It has to be read in conjunction with Regulation 2(1)(e)(1) which states that person acting in concert comprises of persons who in furtherance of a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target company, pursuant to an agreement or understanding (formal or informal), directly or indirectly cooperate by acquiring or agreeing to acquire shares or voting rights in the target company or to acquire control over the target company.

57. Whether a person is or is not acting in concert with the acquirer would depend upon the facts of each case. In order to hold that a person is acting in concert with the acquirer or with another person it must be established that the two share the common intention of acquisition of shares of some target company. For example, there is no hard-and-fast rule that every foreign institutional investor (FII) would share with the sub-account(s) the common objective of acquiring

substantial stakes or control in some target company. Whether in a given case an FII and its sub-account(s) have a common objective of making investment in India to earn profits in unit holders or whether they have a common objective of acquiring substantial stakes or control in some target company would depend on the facts of each case. In the former case Regulation 2(1)(e)(2)(v) would not apply whereas in the latter case the said sub-regulation would apply. The above illustration brings out the true purport of the expression "unless the contrary is established" which expression finds place in Regulation 2(1)(e)(2).

15. The Supreme Court in brief held that two or more persons may join hands together with the shared common objective or purpose of any kind but so long as the common object and purpose is not of a substantial acquisition of shares of a target company they would not comprise persons acting in concert. The Supreme Court further held that there can be no persons acting in concert unless there is a shared common objective or purpose between two or more persons of substantial acquisition of shares of the target company.

16. In *K.K. Modi (supra)*, the Bombay High Court observed that a co-promoter of the target company, by reason of his being a co-promoter cannot be said to be a person acting in concert with the acquirer who also happens to be one of the promoters of the target company, unless the evidence on record clearly establishes that the promoters share the common objective or purpose of substantial acquisition of shares of voting rights for gaining control over the target company with the acquirer.

17. In this light, the finding of the AO that the appellants were acting in concert at the time when the warrants were being converted being common objective cannot be faulted in as much as it was the Company who were allotting the shares to the two groups and no one in the two groups could have any objection on that. However, it does not mean that the two groups were acting in concert.

18. The crux of the matter which breached the threshold limit of 55% was not the conversion of warrants into shares. The said allotment of shares was below the threshold limit of 55%. It is the acquisition of 95,000 shares by J.C. Mansukhani which triggered the obligation to make a public offer

under the SAST Regulations.

19. The short question that arises is, whether the acquisition by J.C. Mansukhani of the 95,000 shares of the target company, namely, Man Industries

(India) Limited was made while acting in concert with the other promoters, namely, the rival R C group. The deeming fiction of acting in concert

would not apply in the instant case when there has been a consistent stand by the parties, namely, that the R C group and J C group were not acting in

concert; that there were internal disputes between the two parties.

20. We find that in the instant case, the acquisition of 95,000 shares by J.C. Mansukhani was not intimated to the Company or to the Stock Exchange.

Thus, a clear cut evidence is on the record to indicate that the other promoters were unaware of the acquisition made by J.C. Mansukhani when the

shares were allotted on June 19, 2010. If the R C group was unaware or the Company was unaware, the question of acting in concert by the

promoters cannot happen and the finding that the promoters, as a homogeneous group, have to be taken together and are deemed to be acting in

concert is, thus, patently erroneous.

21. In this regard, this Tribunal in its order of May 11, 2012 clearly held:

â??that there was sufficient material available on record to show that the dispute between the two promoter groups is continuing since

2009. In view of this fact, it was for the Board to bring sufficient material on record to show that in spite of conflict among the promoters,

the members of the two groups were acting in concert while acquiring the shares for the purpose of increasing their voting rights or for

gaining control over the Company or they had common objective or purpose for substantial acquisition of sharesâ??.

This direction was required to be considered by the AO in the remand proceedings which has been conveniently ignored.

We find that apart from the evidence the Tribunal had recorded earlier that the dispute between the two promoters were continuing since 2009, we

find that the dispute continued till 2013. J.C Mansukhani was removed as Vice Chairman and Managing Director of the Company and that led him to

file a petition for oppression and mismanagement before the Company Law Board. His removal was upheld by the Company Law Board by an order

dated May 30, 2013 and eventually J.C. Mansukhani resigned on September 15,

2013 from the directorship of the Company. The chain of events

clearly indicates that the dispute which had started in 2009 continued till 2013 and therefore the finding of the AO that the reconciliation between the

two groups between 2009 and 2013 leads to an inference that the two groups were acting in concert is patently erroneous and based on surmises and

conjectures. The disputes which has come on record and has been noticed by this Tribunal clearly indicates that it was not a friction or disagreement

between the two groups but the same was contentious leading to litigation and removal of one group from the affairs of the Company.

22. Thus, from the aforesaid we can safely conclude that quite apart that the two groups were not acting in concert there was no meeting of minds

between the two groups leading to share a common objective or purpose for acquisition or substantial acquisition of shares of the target Company. In

the absence of a shared common objective or purpose, the idea of the two groups acting in concert becomes meaningless.

23. We further find that direction of this Tribunal to consider the evidence of dispute and consider the principles evolved in the judgment of K.K. Modi

(supra) and Daiichi Sankyo Company Limited (supra) was deliberately not considered. Merely, incorporating a portion of one paragraph of the

decision of the Supreme Court in Daiichi Sankyo Company Limited (supra) without considering the conclusion drawn by the Supreme Court, in our

opinion, amounts to judicial dishonesty by the AO. Further, the decision of K.K. Modi (supra) was not considered at all. There is yet another aspect.

J.C. Mansukhani admittedly did not make a disclosure of the acquisition of the shares either to the Company or to the Stock Exchange as per the

Regulation 13 of the SAST Regulations. The AO penalized him which finding was affirmed by this Tribunal and it was found that J.C. Mansukhani

had failed to prove that he had communicated the acquisition of the shares to the Company or to the Stock Exchange. Thus, this non-disclosure by the

rival group, namely, J.C. Mansukhani leads to an inference that J.C. Mansukhani was acting alone and was not acting in concert with the other

promoter groups. J.C. Mansukhani did not disclose the creeping acquisition that he was making of the target company.

24. Consequently, the charge for non-disclosure of acquisition of shares in violation of the SAST Regulations is not proved. The impugned order is

accordingly quashed. The appeal is allowed with no order as to costs.

25. 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.