
(2021) 10 SEBI CK 0167

In the Securities Appellate Tribunal Mumbai

Case No : Miscellaneous Application No. 637 Of 2019, Appeal No. 582 Of 2019

Rishi Raj Agarwal And Others

APPELLANT

Vs

Securities And Exchange Board Of India

RESPONDENT

Date of Decision : 22-10-2021

Acts Referred:

Securities And Exchange Board Of India (Substantial Acquisition Of Shares And Takeovers) Regulations, 1997 — Regulation 11, 11(1)
Securities And Exchange Board Of India Act, 1992 — Section 11, 11B

Citation : (2021) 10 SEBI CK 0167

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

Bench : Division Bench

Advocate : Aditya Thakkar, Siddha Pamecha, Aliva Mishra, Ramesh Chandra Mishra, Lokanath Mishra, Pradeep Sancheti, Nishit Dhruva, Hridhay Khurana, Yash Garach

Judgement

Tarun Agarwala, Presiding Officer

1. For the reasons stated in the application, the delay in filing the appeal is condoned. The application is allowed.
2. The present appeal has been filed against the order dated 6th February, 2019 passed by the Whole Time Member ('WTM' for short) directing the appellants to make the open offer for acquiring the shares of the target company in terms of Regulation 11(1) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as the 'SAST Regulations').
3. The facts leading to the filing of the present appeal is, that the appellants are part of the promoter group of Gremach Infrastructure Equipments and Projects Ltd. As on 1st April, 2009 the promoter/promoter group were holding 54.90% of the total share capital of the Company. The target company decided to allot 4,90,00,000 warrants to the promoters and foreign institutional investors. These warrants were subsequently converted into equity shares on 12th June, 2009,

22nd June, 2009, 24th October, 2009 and December 8, 2009. By virtue of the conversion of warrants into equity shares on 12th June, 2009 and 22nd June, 2009 it is alleged that certain promoter/promoter group holding increased by 6.87%. On this basis, a show cause notice dated 22nd September, 2017 was issued to the members of the promoter group which included the appellant calling upon them to show cause as to why suitable directions under Sections 11 and 11B of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as the 'SEBI Act') read with SAST Regulations should not be issued for alleged violations of Regulation 11(1) of the SAST Regulations. According to the show cause notice, the relevant transaction of 12th June and 22nd June, 2009 triggered the obligation of the promoter group to make a public announcement to make an open offer for acquiring the shares of the target company in terms of Regulation 11(1) of the SAST Regulations.

4. The WTM after considering the replies and after considering the relevant judgment of the Supreme Court on this issue found that the acquisition made by the appellants had triggered Regulation 11(1) and since they failed to make the open offer, directions were issued by the WTM to make an open offer in terms of Regulation 11 (1) of the Regulations.

5. We have heard Mr. Aditya Thakkar, Advocate assisted by Mr. Siddha Pamecha, Ms. Aliva Mishra, Advocates and Mr. Ramesh Chandra Mishra, Practicing Company Secretary for the appellants and Mr. Pradeep Sancheti, Senior Advocate assisted by Mr. Nishit Dhruva, Mr. Hridhay Khurana and Mr. Yash Garach, Advocates for the Respondent.

6. Before us, the learned counsel has placed the following contentions, namely, that there was a gross delay in the initiation of the proceedings. The alleged transactions had occurred in 2009 whereas the show cause notice was issued on 22nd September, 2017 after more than eight years. In support of his submission, the learned counsel has placed reliance upon a decision in *Ashlesh Gunvantbhai Shah vs. Securities and Exchange Board of India*, appeal no. 169 of 2019 order dated 31st January, 2020. It was also alleged that there was no creeping acquisition beyond five percent and, consequently, there was no violation of Regulation 11(1). Further, the Company has been wound up and, therefore, it does not exist and, consequently, the question of making an open offer pursuant to the impugned order does not arise. It was also urged in the alternative that at best it was a technical breach for which the direction of making an open offer was disproportionate. It was also contended that pursuant to the conversion of the warrants the capital of the Company was also enhanced. Thus, not only there was increase in the shareholding of the appellant but also there was an increase in the capital of the Company and, therefore, the percentage of the shareholding of the appellant as a promoter group had dropped.

7. In support of his submission on the issue that there was no creeping acquisition the learned counsel for the appellant has relied upon the decision of the Supreme Court in *Kosha Investment Ltd. vs. SEBI* (2016) 1 SCC 542.

8. On the other hand, the learned senior counsel for the respondent contended that the impugned order does not suffer from any error of law and that the WTM while relying upon the decision in Kosha has clearly found that the appellants had made a creeping acquisition which was beyond five percent in a financial year and, therefore, the direction to the appellants to make an open offer was rightly made in terms of the SAST Regulations. It was also contended that the question of delay was never raised before the WTM and no facts have been placed in the memo of appeal except in ground no.'A'. It was thus contended that sine no details of prejudice has been raised the question of delay cannot be considered. In support of his contention the learned counsel placed reliance on the decision of this Tribunal in Pooja Vinay Jain v. SEBI, appeal no.152 of 2019 decided on 17th March, 2020, the decisions of the Supreme Court in SEBI v. Bhavesh Pabari, (2019) 5 SCC 90. It was also contended that the Company is not in liquidation in as much as according to the information displayed on the website of the Ministry of Corporate Affairs the balance sheet of the year 31st March, 2021 has been filed which indicates that last AGM was held on 10th October, 2020 and that certain directors were appointed. It was also contended in the alternative that in any case, substantial change in the events even if assuming that the Company has gone into liquidation will not make any change in so far as the direction to make an open offer was concerned.

9. Having heard the learned counsel for the parties it would be appropriate for this Tribunal to straight away deal with the issue as to whether there was a creeping acquisition made by the appellants under the SAST Regulations. For facility Regulation 11(1) of the SAST Regulations is extracted hereunder:

"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, 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% 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."

10. Under Regulation 11(1) an acquirer holding 15 percent or more but less than 55 percent of the shares or voting rights in a target Company could acquire an additional 5% shares or voting rights, in any financial year ending on 31st March. This acquisition of 5 percent in every financial year is commonly called a creeping acquisition. The pre-condition attracting Regulation 11 is, that an acquirer has acquired shares in concert with another; such acquisition was more than 15% but less than 50% of the shares or voting rights in a Company; in the event the acquirer intends to acquire such additional shares or voting rights which will allow him to exercise more than 5 percent of the voting rights in a financial year ending on 31st March shall be required to make a public announcement.

11. Before we proceed further, we must understand the issue that was involved in Kosha (supra). In that case Kosha was holding 20.29% of the total paid up capital of the target Company. Kosha purchased additional shares amount to 10.81%. Since it failed to make a public announcement under Regulation 11(1) appropriate directions were issued to make an open offer. The contention of Kosha was that they had not exceeded 5 % during the financial year. It was contended that they not only purchased the shares but also sold the shares during the financial year and, therefore, they were below the creeping acquisition of 5 percent in the financial year. It was contended that the sale of shares made by them is also required to be set off while calculating the creeping acquisition of 5 percent towards purchase of shares during the financial year. This contention of Kosha was not accepted by this Tribunal and was affirmed by the Supreme Court. The Supreme Court held that only the aggregate percentage of the acquisition is required to be considered and if it exceeds 5 percent at any point of time during the financial year then the provision of Regulation 11(1) of the SAST Regulations gets triggered and the acquirer would be required to make an open offer. In this regard, the Tribunal conceptualised the case by giving an example which is extracted hereunder:

"Let us conceptualise the case of an entity holding 20 percent of shareholding in a target company on 1st April of a given year. If it were to increase its holding by say 3 percent and subsequently reduce it to 2 percent. If at that point it intended to purchase 4 percent shares again, whether by way of fractions or otherwise, it would cross the threshold of 5 percent. 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 percent, 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 percent."

12. From the aforesaid example, it is clear that where an entity is holding 20 percent of the shareholding in a target Company and had acquired 3 percent and thereafter 4 percent taking the total acquisition to 7 percent which was beyond 5 percent and, therefore, was required to make an open offer, The Supreme Court clearly held that any shares sold by the entity during that period will not be taken into consideration.

13. In the light of the aforesaid we find that the WTM has calculated 6.87% of the acquisition of shares by the appellants in the financial year 2009-2010 which has been narrated in para 16 and is extracted hereunder:

Date of transaction

No. of shares acquired

No. of shares sold

Pre - promoter holding

Post - promoter holding

% change in promoter holding

23-Apr-09

12,109

-

83,54,175 (54.90%)

83,66,284 (54.98%)

0.08%

12-Jun-09

52,00,000 (Conversion of Warrants)

20,000

71,77,337 (47.16%)

1,23,57,337 (51.77%)

4.61%

22-Jun-09

60,00,000 (Conversion of Warrants)

87,287

1,16,94,939 (49.00%)

1,76,07,652 (51.18%)

2.18%

TOTAL

6.87%

14. From a perusal of the aforesaid, we find that the WTM has taken into consideration the shares sold by the appellant during the financial year which as per Kosha's judgment cannot be taken into consideration.

15. According to the appellant the creeping acquisition made by the appellants during the financial year 2009-2010 is only 3.89%. According to the appellant the percentage calculated is as under:

Date of transaction

No. of shares acquired

No. of shares sold

Pre - promoter holding & (%)

Post - promoter holding & (%)

% change

23.04.2009

12,109

-

83,54,175 (54.90%)

83,66,284 (54.98%)

0.08%

12.06.2009

5,20,000 (Conversion of Warrants)

-

1,35,54,175 (56.78%)

1,35,54,175 (56.78%)

1.80%

22.06.2009

60,00,000 (Conversion of Warrants)

-

1,95,54,175 (58.79%)

1,95,54,175 (58.79%)

2.01%

3.89%

16. Without commenting on the veracity of the calculation made by the appellant we prima facie find that the calculation of percentage made by the WTM in paragraph 16 is in direct contradiction with the law propounded by the Supreme Court in Kosha. We also find that in this regard the WTM has totally misread and misconstrued the decision of the Supreme Court in Kosha while considering the same in paragraph 19 the impugned order. We are constrained to observe that the WTM has extracted portions of paragraph nos.4 and 8 of the judgment of the Supreme Court and has painted a picture which does not exist. The WTM has not taken into consideration the finding given by the Supreme Court in paragraph nos.6 and 8.

17. Thus, the impugned order cannot be sustained. The appeal is allowed. The

matter is remitted to the WTM to redecide the matter and calculate the percentage of creeping acquisition made by the appellants in the financial year 2009-2010 without taking into consideration the sale of the shares made by them in that financial year. If the percentage exceeds 5 percent in that financial year the WTM will then take into consideration the delay as a mitigating factor in the issuance of any direction. The WTM will also take into consideration as to whether the Company has been wound up or is still an existing Company and, in the event, it has been wound up, whether it would be fruitful to issue a direction to make an open offer, if any. While considering the aforesaid it would also be open to the appellant to raise such other grounds as permissible to them in law. In the circumstances of the case, there shall be no order as to costs.

18. 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.