(2021) 09 SEBI CK 0168

In the Securities Appellate Tribunal Mumbai

Case No : Appeal No. 618 Of 2019

Victor Fernandes And Others — APPELLANT

Vs

Securities & Exchange Board Of India And Others — RESPONDENT

Date of Decision : 28-09-2021

Acts Referred:

Citation : (2021) 09 SEBI CK 0168

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

Bench : Division Bench

Advocate : Victor Fernandes, Sangeeta Fernandes, Fredun DeVitre, Mihir Mody, Arnav Misra, Mayur Jaisingh, K. Ashar, Janak Dwarkadas, Rohan Rajadhyaksha, Sonali Mathur, Vivek Shetty, Cheryl Fernandes, Harshit Jaiswal, Amey Nabar,

Final Decision : Dismissed

Judgement

M. T. Joshi, J

1. Aggrieved by the decision of the respondent Nos. 1 Securities and Exchange Board of India (hereinafter referred to as 'SEBI') dated November 15, 2019, the present appeal is preferred by the original complainants. Respondent Nos. 2 National Stock Exchange of India Ltd. (hereinafter referred to as 'NSE') appears to have been made party as originally the complaint was made to it and respondent Nos. 3 Reliance Industries Ltd. (hereinafter referred to as 'RIL') being the party against whom the relief was sought is added as a party.

2. The proceedings have a chequered history as can be seen by the order of this Tribunal in appeal No. 42 of 2017 dated June 22, 2018 directing respondent Nos. 1 SEBI to pass a reasoned and detailed order in the complaint of the appellants.

3. It is necessary to note the facts on record to appreciate the dispute between the parties.

On November 22, 2011, a Deed of Trust was executed for the sole beneficiary respondent Nos. 3 RIL,under which Indian Media Trust (hereinafter referred to as

'IMT') was floated.One Nirlab Consultancy Pvt. Ltd. (hereinafter referred to as 'Nirlab Consultancy') was appointed as a trustee. Nirlab Consultancy was controlled by Mr. Raghav Bahl. This Mr. Raghav Bahl appears to have worn many hats in various transactions concerning the trust and the IMT with his spouse or independently as can be seen herein below.

4. On November 23, 2011, he entered into Single Unit Agreement (hereinafter referred to as 'SUA') on behalf of IMT as well as six entities (hereinafter referred to as 'holding companies') controlled by him and TV18, NW18. Mr. Raghav Bahl also represented TV18, NW18 . As per the said SUA, the parties thereto were to act as largest Indian shareholders of NW18. Thereafter, again on February 27, 2012, the disputed Investment Agreement i.e. Zero Coupon, Optionally & Fully Convertible Debentures Agreement ((hereinafter referred to as 'ZOCD Agreement') was entered into between these holding companies which were owned and controlled by Mr. Raghav Bahl and IMT as well as the wife of Mr. Raghav Bahl in their individual capacity. Under this ZOCD Agreement, IMT agreed to invest that subscribing to Zero Coupon, Optionally & Fully Convertible Debentures (hereinafter referred to as 'ZOCDs') of the holding companies. These companies were required to utilize the funds to subscribe to the right issues of NW18 and TV18. The holding companies were declared as promoters of these two entities. The issue went to the Competition Commission of India (hereinafter referred to as 'CCI'). On May 28, 2012, CCI observed that the said ZOCD Agreement is in the nature of indirectly acquiring control by IMT of NW18 and TV18. The CCI, however, ultimately held that this indirect control in not violation of provision contained in Competition Act, 2002.

5. In such situation, the appellants filed the complaint before respondent Nos. 2 NSE on March 24, 2014. They complained that respondent Nos. 3 RIL, the ultimate beneficiary of IMT failed to disclose that it had acquired indirect control as detailed (supra) and, thus, violated Clause 36 of the Listing Agreement. While the said complaint remained pending with respondent Nos. 2 NSE, on May 29, 2014 the Share Purchase Agreement (hereinafter referred to as 'SPA') was entered into between these parties i.e. IMT, holding companies, etc. Under the said agreement, IMT agreed to acquired 100% shares of the holding companies and another private companies controlled by Mr. Raghav Bahl and his wife. This transaction triggered the open offer obligation under Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (hereinafter referred to as 'SAST Regulations'). Accordingly, by making a public announcement, a draft letter of offer was submitted to SEBI for seeking the approval. The price of the shares of NW18 was quantified at Rs. 41.04 as an offer price from the shareholders of NW18. The appellants again complained to SEBI on June 25, 2014. It was complained that respondent Nos. 3 RIL should revise the open offer price from Rs. 41.04 per share to Rs. 5,68,430.32 per share. By the said complaint, it was also reiterated that respondent Nos. 3 RIL failed to disclose that it had acquired indirect control over NW18 earlier through IMT and had violated Clause 36 of the Listing Agreement. This complaint remains

pending before the respondent Nos. 1 SEBI. Vide on November 17, 2014, respondent Nos. 1 SEBI approved that acquisition of shares by respondent Nos. 3 RIL at the price offered by it. Aggrieved by the said decision, the present appellants filed appeal No. 55 of 2015 challenging the said open offer price. During the pendency of the appeal, respondent Nos. 1 SEBI rejected the complaint of the appellants vide communication dated February 9, 2015. The appellants tried to agitate before this Tribunal in the said appeal the issue of rejection of their complaint. The Tribunal declined to consider the issues of rejection of the complaint and dismissed the appeal as regard the open offer price.

However, while considering the facts, this Tribunal found that the open offer price was based on some clauses of ZOCD Agreement. Therefore, the said agreement was perused by the Tribunal. The, prima-facie, conclusion was drawn that vide the said ZOCD Agreement control over NW18 was indirectly divested in favor of IMT. The Tribunal also observed that the communication issued by the respondent Nos. 1 SEBI rejecting the complaint had not considered the clauses contained in the ZOCD Agreement. Therefore, though the Tribunal refused to record any final order as regards the said complaint and its dismissal, deemed it fit in public interest, to direct SEBI to reinvestigate the issue relating to the said indirect acquisition. In deference to the said order dated April 13, 2016, respondent Nos. 1 SEBI submitted a report in the form of an affidavit and declared that the control over NW18 was not divested from execution of the ZOCD Agreement dated February 27, 2012. While the appeal was pending, the appellants forwarded the copy of their complaint dated March 24, 2014 originally filed before respondent Nos. 2 NSE to respondent Nos. 1 SEBI alleging that respondent Nos. 2 NSE had failed to take any decision on the same. By communication dated January 9, 2017, respondent Nos. 1 SEBI rejected this complaint also by recording that IMT was not a subsidiary of RIL and, therefore, no disclosure was required to be made. This communication was impugned by the appellants in appeal No. 42 of 2017.

6. This Tribunal on June 22, 2018 passed the final order in the appeal. Thereunder, detailed directions were given to the respondent Nos. 1 SEBI to pass a reasoned order afresh. While remanding the matter to respondent Nos. 1 SEBI, this Tribunal made certain observations that, prima-facie, the ZOCD Agreement was in the nature of acquiring indirect control over NW18 by respondent Nos. 3 RIL through IMT. Vide paragraph No. 17(d) of the order this Tribunal, however, clarified that the said, prima-facie view will not be binding on respondent Nos. 1 SEBI and if SEBI would not be agreeable to the said view or the view taken by the CCI on May 28, 2012, it shall record its reasons for taking the contrary view.

7. Upon remand, the learned Whole Time Member (hereinafter referred to as 'WTM') of respondent Nos. 1 SEBI conducted the proceedings, heard the parties, took into consideration the, prima-facie view expressed by this Tribunal, the observation of the CCI, and concluded that the said ZOCD Agreement read

independently or combined with the SUA did not triggered any open offer nor any disclosure under Clause 36 of the Listing Agreement was required. Thus, the complaint was dismissed. Hence the present appeal.

8. We have heard Mr. Victor Fernandes, appellant in person for both the appellants and Mr. Fredun DeVitre, the learned senior counsel with Mr. Mihir Mody, Mr. Arnav Misra, Mr. Mayur Jaisingh, the learned counsel for the respondent Nos. 1 SEBI and Mr. Janak Dwarkadas, the learned senior counsel with Mr. Rohan Rajadhyaksha, Ms. Sonali Mathur, Mr. Vivek Shetty, Ms. Cheryl Fernandes, Mr. Harshit Jaiswal, Mr. Amey Nabar, the learned counsel for the respondent Nos. 3 RIL through video conference.

9. Mr. Victor Fernandes, the appellant no.1, arguing for both the appellants, minutely took us through the terms of IMT Trust Deed, SUA and ZOCD Agreement. He submitted that these terms of SUA and ZOCD Agreement would clearly show that total control of TV18, etc. was divested to IMT of which the sole beneficiary is respondent Nos. 3 RIL. He further submitted that the CCI has also closely scrutinized all the transactions and had observed that indirect control vested with respondent Nos. 3 RIL through IMT. In the circumstances, he submitted that the appeal be allowed.

10. On the other hand, the learned counsel for the respondents submitted that the appellants are indulging into speculative litigation. It was submitted that the present appeal is the 5th round of litigation In the first round of litigation the issue of open offer, was taken by the appellants to the Hon'ble Supreme Court of India. The appeal was dismissed by the Hon'ble Supreme Court of India and even issued a warning to the appellants.

Mr. Dwarkadas, the learned senior counsel for the respondent Nos. 3 submitted that the appellants are indulging in speculative litigation only with a view of seeking inflated price of the shares purchased by them. They submitted that the reading of ZOCD Agreement would show that it was merely an investment made by IMT in the concerned entities. The control of the affairs of these entities, TV18, etc. remain with the holding companies held by Mr. Raghav Bahl, etc. They submitted that in terms of ZOCD Agreement ultimately respondent Nos. 3 RIL took a decision to acquire 100% shares of the NV18 etc. and, therefore, in regular manner the public announcement and open offer was made, which was confirmed by this Tribunal and the Supreme Court of India. It was therefore, submitted that the appeal be dismissed with the costs.

11. Upon hearing both the sides, in our view, the appeal lacks merit and the same is, therefore, dismissed without any order as to costs for the following reasons.

12. The impugned order of the learned WTM would show that the learned WTM has gone through the terms and conditions of the ZOCD Agreement. The learned WTM has considered the plea of the respondent as to why ZOCD Agreement and SUA were required to be executed in view of the up linking guidelines of Ministry

of Information and Broadcasting. The said guidelines required that at least 51% of the total equity share capital of such a media company was required to be held by largest Indian shareholders. All those terms are put in the order. Further, the learned WTM had considered the report in form of an affidavit which was filed before this Tribunal in the earlier proceedings as well as the observation made by the CCI. Upon going through the terms and conditions of ZOCD Agreement, the learned WTM found that Mr. Raghav Bahl continued to be in control of TV 18, NW18 etc. on behalf of the holding companies. IMT and RIL did not had any say in the management affairs of TV 18, NW18 under the said ZOCD Agreement. The underlying existing shareholding continued to be in the hands of Mr. Raghav Bahl and the holding entities. It was found that ZOCD Agreement did not carry any voting rights. The voting rights of Mr. Raghav Bahl entities were not stifled by the said agreement. Thus, there was not any effective change in control of NW18 as a result of the execution of the ZOCD Agreement.

13. CCI had observed that in view of the conversion option contained in ZOCD Agreement to receive equity shares of the target company, the said amounted to the indirect acquisition of shares of the target company. The learned WTM considered the same. He observed that the ZOCDs were in the nature of convertible into equity shares at any time, and only upon conversion of the same IMT would have been able to hold more than 99.99% shares of the diluted equity of the promoter company of NW18 etc. This option however was not exercised at any time before making the public announcement as detailed (supra) and, thus, the ZOCD Agreement itself did not entail into any indirect control of IMT or RIL in NW18 and, therefore, no disclosure was required to be made.

14. In our view, the reasoning of the learned WTM cannot be faulted with. The ZOCD Agreement was in the nature of investment by IMT in the holding companies ofTV18, NW18. Said ZOCD Agreement had given right to IMT, the subscriber of the ZOCDs to convert ZOCDs into equity in a given period. The control of TV18 and NW18, continued with Mr. Raghav Bahl and his entities. IT had no say in the voting rights etc. and, therefore, the conclusion of the learned WTM cannot be faulted with.

15. While claiming cost from the appellants, the respondents blamed the appellants for indulging into speculative litigation. As detailed earlier, Mr. Dwarkadas even pointed out the observations of the Hon'ble Supreme Court of India in the earlier round of litigation made against the present appellants. We however find that in so far as the present round is concerned the appellants' case was strengthened by the observation of the CCI as well as the, prima- facie, observation made by this Tribunal earlier. In the circumstances, we do not find that the present litigation is also a speculative litigation. In the circumstances, the following order :-

ORDER

16. The appeal is hereby dismissed without any order as to costs.

17. 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.

