

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on : 05.11.2013

Date of Decision : 13.11.2013

Appeal No. 169 of 2013

1. P. B. Jain Investment Pvt. Ltd.
103, Pratik Chamber, Hathi Falia,
Zampa Bazar, Surat : 395 003.
2. Nakoda Syntex Pvt. Ltd.
101, Thakkar Palace, Ghod Dod Road,
Surat : 395 003.
3. G. P. Shah Investment Pvt. Ltd.
107, Pratik Chamber, Hathi Falia,
Zampa Bazar, Surat : 395 003.
4. B. G. Jain Investment Pvt. Ltd.
101, Pratik Chamber, Hathi Falia,
Zampa Bazar, Surat : 395 003.
5. Varju Investment Pvt. Ltd.
101, Thakkar Palace, Ghod Dod Road,
Surat : 395 001.
6. Mr. Babulal G. Jain
101, Thakkar Palace, Ghod Dod Road,
Surat : 395 001.
7. B. G. Jain HUF
101, Thakkar Palace, Ghod Dod Road,
Surat : 395 001.
8. Ms. Pushpadevi B. Jain
101, Thakkar Palace, Ghod Dod Road,
Surat : 395 001.
9. Mr. Devendra B. Jain
101, Thakkar Palace, Ghod Dod Road,
Surat : 395 001.
10. Mr. Kartik B. Jain
101, Thakkar Palace, Ghod Dod Road,
Surat : 395 001.

11. Ms. Shilpa B. Jain
101, Thakkar Palace, Ghod Dod Road,
Surat : 395 001.

12. Ms. Neetu D. Jain
101, Thakkar Palace, Ghod Dod Road, ...Appellants
Surat : 395 001.

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No. C-4A, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai - 400 051. Respondent

Mr. Keyoor Bakshi, Practicing Company Secretary for the Appellants.

Mr. Shiraz Rustomjee, Senior Advocate with Mr. Pratham V. Masurekar,
Advocate for the Respondent.

CORAM : Jog Singh, Member
A. S. Lamba, Member

Per : Jog Singh

The present appeal is preferred by twelve appellants who acted together to acquire certain shares in the target company, namely, Nakoda Ltd. The appeal is preferred against the impugned order dated July 8, 2013 passed by the learned Whole Time Member (WTM) under Sections 11 and 11B of the SEBI Act, 1992 read with Regulation 32 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (Takeover Regulations, 2011). By the said order, appellants have been called upon to make a combined public announcement to acquire shares of the target company in terms of Regulation 3(2) of the Takeover Regulations, 2011 within 45 days from the date of the order. It is also directed to pay interest at the rate of 10% p.a. from March 13, 2012 to the date of payment to the shareholders who were holding shares in the target

company on the date of said violation of the Takeover Regulations, 2011 and whose shares have been accepted in the open offer, after adjustment of dividends paid, if any.

2. The facts of this case, in brief, are as follows:

3. A resolution was passed by the target company in its Annual General Meeting (AGM) held on June 10, 2010, by which 2,70,00,000 warrants were allotted to promoters i.e. P. B. Jain Investments Pvt. Ltd. and Nakoda Syntex Pvt. Ltd. i.e. appellant nos. 1 and 2 in the present appeal. 90,00,000 additional warrants were allotted to non-promoters. The allotment of these 3,60,00,000 warrants was made by the target company on June 23, 2010. Similarly, 20,00,000 Global Depository Receipts (GDRs) with 6,00,00,000 underlying shares were further allotted by the target company to non-promoters on November 26, 2010.

4. According to respondent, pursuant to the abovesaid allotment of warrants convertible into equity shares on December 19, 2011, the collective shareholding of the promoters increased from 26.38% to 44.03% and their collective voting rights in the target company increased from 50.23% to 62.92%. This being in excess of the permissible creeping limit of 5% in a financial year, the promoters were required to make a public announcement in tune with the provision of Regulation 3(2) of the Takeover Regulations, 2011. Accordingly, a show cause notice (SCN) dated September 27, 2012 was issued to the promoter group of the target company i.e. the appellants calling upon them to show cause as to why suitable action should not be taken against them under Sections 11, 11B and 11D of the SEBI Act, 1992 read with Regulation 32 of the Takeover

Regulations, 2011. The appellants filed their reply dated November 21, 2012 denying the charges levelled against them by the abovesaid SCN. They were also granted a personal hearing by the learned WTM on March 26, 2013. After considering the material before him and the replies etc. and oral submissions made during the personal hearing, the learned WTM has come to the conclusion that the appellants have violated Regulation 3(2) of the Takeover Regulations, 2011 and hence directions have been issued to the appellants to make combined public announcement to acquire shares of the target company and also to pay interest to those shareholders who were in possession of the shares in the target company on the date of alleged violations.

5. The case of the appellants is that they had agreed to acquire equity shares on June 23, 2010 and as such Takeover Regulations, 1997 will apply. In terms of Regulation 2(1)(b) of the Takeover Regulations, 1997, the term ‘acquirer’ include a person who ‘agrees to acquire’ the shares or voting rights of a target company. In terms of Regulation 2(1)(a) of the Takeover Regulations, 2011 also the term acquirer includes a person who ‘agrees to acquire’ shares or voting rights of the company. The said Takeover Regulations, 2011 had come into force by the time of the allotment of equity shares on December 19, 2011 was actually made.

6. The appellants contend that by agreeing to acquire shares or voting rights in the target company on June 23, 2010, they had already become acquirers. Therefore, they are deemed to be the acquirers on the date when they subscribed to the warrants and not on the date i.e. December 19, 2011 when the equity shares were allotted to them on conversion of the warrants.

7. The appellants have also relied upon the case of **Sharad Doshi vs. The Adjudicating Officer and Ors. decided by this Tribunal on April 7, 1998 in Appeal no. 1 of 1998**. Relying upon the said judgment of Sharad Doshi, it is submitted by the appellants that the time limit prescribed for public announcement to acquire shares is relatable to the finalization of the negotiations or entering into the agreement or memorandum of understanding to acquire shares. Date of registration of shares acquired in the Company's register is not the starting point.

8. The appellants, therefore, submit that even the finalization of negotiation to acquire shares should be the trigger point; the appellants herein had actually paid 25% money and subscribed to the warrants which were to be automatically converted in to the equity shares. Accordingly, the date of trigger or acquisition should be the date of subscription to the warrants, and not the date of their conversion into equity shares.

9. Relying upon para 4 of the said judgment in Sharad Doshi, wherein the appellants submitted that the purchase of shares of ATL was conditional one subject to compliance of the SEBI regulations and approval, that in the event of non compliance or SEBI rejecting the deal, the shares would revert to the sellers, and that the shares will carry voting rights only on entering the transfer of shares in the company's record. This argument was rejected by this Tribunal. The Tribunal held that even ad hoc acquisition must also be considered under Takeover Regulations, 1994.

10. Thus, based on the abovesaid judgment of Sharad Doshi, the appellants in their submissions contended that Sharad Doshi's case emphasizes on two crucial elements i.e. transparency and benefit of the shareholders at large for interpreting the Takeover Regulations. In the instant case, the entire process was carried out with total transparency and the shareholders of the target company were fully aware that the shareholding of the appellants would go on from 50.23% to 44.03% upon implementation of the simultaneous proposal of preferential issue of warrants and issue of GDRs. The same shareholders who were sought to be protected under the Takeover Regulations had duly approved the proposal. Merely the conversion of warrants into equity shares during the next financial year than the financial year during which issue of GDRs was completed did not violate the spirit of Takeover Regulations.

11. Further, the target company had raised a sum of ₹ 216 crore through the simultaneous offer of GDRs and warrants out of which a sum of ₹ 81 crore is contributed by the appellants. The said funds have been deployed by the target company for the purpose of its business and growth. Accordingly, their subscription which was duly approved by the shareholders of the target company has been to the benefit of all the shareholders at large of the target company.

12. The appellants contend that it would be improper and unfair to take a narrow view with rigid interpretation that the Takeover Regulations would not trigger if the warrants were converted into shares on March 31, 2011 but it would trigger if they were converted on the next day i.e. on April 1, 2011 and that such a narrow view would neither benefit the shareholders at

large, nor would the contrary practical view harm the interest of any shareholders.

13. Another contention of the appellants is that the issue of GDRs and warrants was a simultaneous and composite issue and the conversion of warrant on December 19, 2011 was merely a consequence of decision already taken on the date of AGM authorising the allotment of GDRs and warrants. The appellants have further contended that as acknowledged in the SCN, the warrants were to be automatically converted, without any further application by them, on payment of 75% balance subscription money. According to the appellants, in terms of regulation 2(1)(b) of the Takeover Regulations, 1997 the term ‘acquirer’ includes a person who ‘agrees to acquire’ shares or voting rights of the target company. Since the warrants allotted to them had in-built features of the equity shares, and in effect, they were as good as partly paid-up shares, the appellants had agreed to acquire equity shares in the target company at the time of allotment of warrant on June 23, 2010 though the actual allotment of equity shares happened in the financial year 2010-11 i.e. on December 19, 2011. Accordingly, it was the Takeover Regulations, 1997 that was applicable on the acquisition of the two entities of the promoter group.

14. Before we deal with the contentions of the parties, it is appropriate to reproduce the relevant provisions of Takeover Regulations, 1997 as well as that of amended Takeover Regulations, 2011 :-

Takeover Regulations, 1997

“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 55 per cent 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 per cent of the voting rights, in any financial year ending on 31st March unless such acquirer makes a public accouchement to acquire shares in accordance with the regulations.”

“Timing of the public accouchement of offer.

14. (1) The public announcement referred to in regulation 10 or regulation 11 shall be made by the merchant banker not later than four working days of entering into an agreement for acquisition of shares or voting rights or deciding to acquire shares of voting rights exceeding the respective percentage specified therein:

(2) In the case of an acquirer acquiring securities, including Global Depository Receipts or American Depository Receipts which, when taken together with the voting rights, if any already held by him or persons acting in concert with him, would entitle him to voting rights, exceeding the percentage specified in regulation 10 or regulation 11, the public announcement referred to in sub-regulation (1) shall be made not later than four working days before he acquires voting rights on such securities upon conversion, or exercise of option, as the case may be:

Provided that in case of American Depository Receipts or Global Depository Receipts entitling the holder thereof to exercise voting rights in excess of percentage specified in regulation 10 or regulation 11, on the shares underlying such depository receipts, public announcement shall be made within four working days of acquisition of such depository receipts.”

Takeover Regulations, 2011

Substantial acquisition of shares or voting rights.

3.(1)

(2) No acquirer, who together with persons acting in concert with him, has acquired and holds in accordance with these regulations shares or voting rights in a target company entitling them to exercise twenty-five per cent or more of the voting rights in the target company but less than the maximum permissible non-public shareholding, shall acquire within any financial year additional shares or voting rights in

such target company entitling them to exercise more than five per cent of the voting rights, unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations:

Provided that such acquirer shall not be entitled to acquire or enter into any agreement to acquire shares or voting rights exceeding such number of shares as would take the aggregate shareholding pursuant to the acquisition above the maximum permissible non-public shareholding.

Explanation. For purpose of determining the quantum of acquisition of additional voting rights under this sub-regulation,

- (i) gross acquisition alone shall be taken into account regardless of any intermittent fall in shareholding or voting rights whether owing to disposal of shares held or dilution of voting rights owing to fresh issue of shares by the target company.
- (ii) in the case of acquisition of shares by way of issue of new shares by the target company or where the target company has made an issue of new shares in any given financial year, the difference between the pre allotment and the post-allotment percentage voting rights shall be regarded as the quantum of additional acquisition.

(3) For the purposes of sub-regulation (1) and sub-regulation (2), acquisition of shares by any person, such that the individual shareholding of such person acquiring shares exceeds the stipulated thresholds, shall also be attracting the obligation to make an open offer for acquiring shares of the target company irrespective of whether there is a change in the aggregate shareholding with persons acting in concert.”

Timing.

13.(1) The public announcement referred to in regulation 3 and regulation 4 shall be made in accordance with regulation 14 and regulation 15, on the date of agreeing to acquire shares or voting rights in, or control over the target company.

(2) Such public announcement, -

(b) pursuant to an acquirer acquiring shares or voting rights in, or control over the target company upon converting convertible securities without a fixed date of conversion or upon conversion of depository receipts for the underlying shares of the target company shall be made on the same day as the date of exercise of the option to convert such securities into shares of the target company;

.....”

15. Similarly, definitions of ‘acquirer’ in Regulation 2(1)(b) and ‘target company’ in Regulation 2(1)(o) of the Takeover Regulations, 1997 and 2011 are also reproduced hereinbelow for the sake of convenience :-

Takeover Regulations, 1997

“2(1)(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.”

“2(1)(o). “target company” means a listed company whose shares or voting rights or control is directly or indirectly acquired or is being acquired.”

Takeover Regulations, 2011

“2(1)(a). “acquirer” means any person who, directly or indirectly, acquires or agrees to acquire whether by himself, or through, or with persons acting in concert with him, shares or voting rights in, or control over a target company.”

“2(1)(z). “target company” means a company and includes a body corporate or corporation established under a Central legislation, State legislation or Provincial legislation for the time being in force, whose shares are listed on a stock exchange.”

16. On an analysis of the abovesaid submissions made by the parties and the perusal of the pleadings, the main issue which emerges for consideration by this Tribunal is that whether the appellants have breached Regulation 3(2) of the Takeover Regulations, 2011 on account of conversion of shares and by acquiring additional voting rights during the financial year, 2011-12 on December 19, 2011.

17. At the outset, it may be noted that the issue involved in this appeal is no more res integra. This Tribunal has consistently held that it is only on conversion of warrants that the Takeover Code is triggered. In the case of **Shri Ch. Kiron Margadarsi Financiers vs. Adjudicating Officer, SEBI [Appeal No. 21 of 2001 decided on August 28, 2001]**, this Tribunal has considered two imports of Regulation 10 of Takeover Regulations, 1997. In the light of definition of acquirer as infringed under Regulation 2(1)(b) of the Code and held that in terms of regulation 10 “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 ten percent (15% with effect from 28.10.1998) 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” (emphasis supplied). On a perusal of regulation 2(1)(b), it is clear that a person is an acquirer who acquires or agrees to acquire shares or voting rights/control in the target company. **The mode of acquisition of shares or the purpose of acquisition is of not much significance to identify the acquirer.** As has been held in the case of *Joshi Jayantilal v. State of Gujarat* (AIR 1962 Gujarat 297) and as per the Blacks Law Dictionary acquisition is the act of becoming the owner of certain property, the act by which one acquires or procures the property in any thing. In this context, it is to be noted that the act of acquisition of shares or voting rights by itself will not attract the provisions of regulation 10, though the person who acquired the shares or voting rights may fall within the definition of the expression ‘acquirer’. **Each and every acquisition by an acquirer need not necessarily attract the provisions of regulation 10. What attracts**

the regulation is the acquisition of shares/voting rights which will entitle the person acquiring the shares to exercise voting rights beyond certain limits specifically provided in the regulation, say ten percent in regulation 10. Thus, it is clear that a plain acquisition even if it exceeds 10% of the paid up capital of the company will not attract regulation 10, unless the acquisition entitle the acquirer to exercise ten percent or more of the voting rights in the company.

18. Similarly, in the case of **Mr. Sohel Malik vs. SEBI & Anr. [Appeal No. 108 of 2008 decided on October 15, 2008]**, this Tribunal has held that the reference date for attracting the provisions of Takeover Regulations for the purpose of crossing the threshold limits prescribed therein should be the acquirer's decision to convert the warrants. This is so because the acquirer in fact acquisition the voting rights on the date of conversion and not on mere allotment of warrants or debentures convertible into shares. It is undisputed by the parties that mere allocation of warrants to an acquirer does not give voting rights to him. We have, therefore, no hesitation in holding that acquisition of voting rights is the prerequisite for invoking Takeover Code. Similarly, it can be safely concluded that the requirements of public announcement / public offer arises only on allotment / conversion of shares and not on the allotment of warrants or debentures.

19. Further, while considering the case of convertible debentures, in the case of **Eight Capital Master Fund Ltd. & Ors. Vs. SEBI [Appeal No. 111 of 2008 decided on July 22, 2009]**, this Tribunal has categorically held that the BOD meeting of July 21, 2006 only authorized the preferential allotment of convertible debentures and not the voting rights. Therefore,

the Takeover Code was attracted not on July 21, 2006 but on completion of a period of eighteen months i.e. on January 26, 2008 when the compulsorily convertible debentures got converted automatically and the BOD in its meeting on the same day allotted actual equity shares to the appellants. Therefore, it was January 26, 2008 which was held to be relevant for considering the trigger of Takeover Regulations of 1997 in that case.

20. Turning to the facts of the present case, we hold that the concept of principles of acquirer acquiring 5% voting rights has not changed in the Takeover Regulations of 2011 and remains the same as it was in Takeover Regulations, 1997 except minor variation that Regulation 2(1)(a) of Takeover Regulations, 2011 provides that an acquirer means any person who, directly or indirectly, acquires or agrees to acquire whether by himself, or through, or with persons acting in concert with him, shares or voting rights in, or control over a target company. It is para materia to the provision in the Takeover Regulations, 1997.

21. In the case in hand, it is pertinently noted that as on March 31, 2011 and just prior to allotment of 5,40,00,000 equity shares consequent to conversion of 2,70,00,000 warrants of said two entities of the promoter group of the target company, the appellants were holding 3,33,49,600 shares and this shareholding increased to 8,73,49,600 shares on December 19, 2011 pursuant to the conversion of the said warrants. Consequent to conversion of those warrants during the financial year 2011-12 their voting rights in the target company increased from 50.23% (as on March 31, 2011 and just prior to conversion of warrants on December 19, 2011) to 62.92% during the financial year 2011-12.

22. It is, therefore, December 19, 2011 on which date the appellants have attracted the provisions of Regulation 3(2) of the Takeover Regulations, 2011 and have consequently incurred an obligation to make a combined public announcement to acquire shares of the target company as per law. Therefore, we do not find any fault with the impugned order dated July 8, 2013 passed by the learned WTM.

23. Similarly, it is evident from the records that appellant no. 1 i.e. P. B. Jain Investment Pvt. Ltd. and appellant no. 2 i.e. Nakoda Syntex, Pvt. Ltd. are part and parcel of the same promoter group consisting of twelve appellants. They formed a homogenous class and hence are persons acting in concert under Regulation 2(1)(q)(2)(iv) of the Takeover Regulations, 2011. It is also the admitted position that prior to the conversion of warrants in question by the two appellants, the collective shareholding and voting rights of the appellants as a promoter group got increased from 50.23% of voting rights to that of 62.92%. Therefore, the findings by the learned WTM in the impugned order are absolutely correct and are hereby upheld.

24. Lastly, deriving the strength from the judgments of this Tribunal in the case of **Sunil Khaitan vs. SEBI [Appeal no. 23 of 2013 decided on June 19, 2013]**, the appellants have submitted that instead of directing them to make combined public announcement, a suitable monetary penalty can be imposed. We have considered this contention and also gone through the judgment in the case of Sunil Khaitan (supra) and we note that in Khaitan, the acquisitions/incidents pertain to the year 2006-07 and the action was sought to be taken against them by way of show cause notice

dated March 26, 2012 i.e. after lapse of five to six years by passing an impugned order on December 31, 2012. Therefore, keeping in view such an inordinate and unexplained delay by the respondent, it was considered by the Tribunal to impose a heavy monetary penalty of ₹ 25 lac and the direction regarding the making a combined public announcement to acquire shares was considered iniquitous in regard to the peculiarity of facts and circumstances of that case. The same is, therefore, not applicable in the present case where the proceedings have been promptly initiated and expeditiously completed by the respondent against the appellants. Moreover, there is no grievance raised by the present appellants as regards delay in concluding the proceedings in question against them. Therefore, the ratio of Sunil Khaitan is rendered inapplicable and does not hold good in the instant case.

The appeal is, accordingly, dismissed with no order as to costs.

Sd/-
Jog Singh
Member

Sd/-
A. S. Lamba
Member

13.11.2013
Prepared & Compared by
ptm