

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 118 of 2013

Date of Hearing: 27.08.2013

Date of Decision: 04.09.2013

Vitro Commodities Private Limited
11/1, Sarat Bose Road,
Ideal Plaza,
Suit No. 314,
Kolkata- 700 020.

...Appellant

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. Paras Parekh, Advocate for the Appellant.

Mr. Prateek Seksaria, Advocate with Mr. Tomu Francis, Advocate for
the Respondent.

CORAM : Justice J.P. Devadhar, Presiding Officer
Jog Singh, Member
A.S. Lamba, Member

Per : A S Lamba

1. Being aggrieved by order dated March 28, 2013 impugned order passed by adjudicating officer of respondent imposing monetary penalty of ₹10,00,000/- upon appellant, under Section 15I of Securities and Exchange Board of India Act, 1992 read with Rule 5(1) of Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995; the present

appeal has been preferred by appellants before Securities Appellate Tribunal (SAT).

2. Facts of the case in brief are:

respondents conducted investigation in trading of the company (appellant) for period April 28, 2000 and August 31, 2009 (Relevant Period) and issued show cause notice (SCN) to appellant, alleging acquisition of 5.36% of shares of the company without making requisite disclosures under Regulation 7(1) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (“Takeover Regulations” for short) and Regulation 13(1) of SEBI (Prohibition of Insider Trading) Regulations, 1992 (“PIT” for short) calling upon appellant to show cause as to why monetary penalty ought not be imposed upon appellant under Section 15A(b) of SEBI Act.

3. Appellant explains that reply to SCN was prepared but was not filed before SEBI due to negligence of one of their employees, but they were under the impression that reply had been filed, and consequently were surprised to receive impugned order imposing fine and realized, at that point of time, that reply had not been filed.

4. Appellant holds that it is not an active acquirer in relation to shares in question and had purchased only 50,000 shares of the company, which constituted 0.33673% of paid up capital of the company on November 12, 2008, from open markets and due disclosure to the company for this acquisition was made. Appellant has not bought shares of the company thereafter and increase in appellant shareholding

of shares of the company was on account of shares allotted to it by way of bonus shares and amalgamation of the company with other companies, due to Court Orders and that it believed “bonafide” that no disclosure was required due to such acquisition of shares.

5. The appeal was taken on hearing by SAT on August 27, 2013, wherein the appellant stated that it admits that the company had acquired shares amounting to 5.36% of shares i.e., the voting right of the paid up capital of the company, during the “relevant period” and were required to make disclosures as per extant law, but since these shares were not acquired as an active acquirer, but as a result of bonus allotment of shares and as part of amalgamation proceedings, it was under the impression that such acquisitions of shares do not attract requirement of disclosure as per law and hence did not made these disclosures. It was also represented that they did not willfully replied to SCN or appear before proceedings before SEBI, due to inadvertent failure of its employee to submit reply to SCN, after it was prepared and its non-appearance before adjudicating officer of SEBI in proceedings in this matter, was due to non-receipt of notices to this effect.

6. Learned counsel for respondent presenting case of respondent stated that appellant had purchased 50,000 shares of GEE from open market on November 12, 2008 and was thereafter allotted 50,000 bonus shares of GEE on January 10, 2009 taking its shareholding in GEE to 1,00,000 shares. Further in February 2009, Ferroseal India Pvt. Ltd, Filarc Eng. Pvt. Ltd. and Sagar Merchandise Pvt. Ltd. were

amalgamated with GEE and due to this amalgamation, appellant was allotted 7,94,093 shares of GEE on February 28, 2009 and due to amalgamation were allotted 1,58,819 bonus shares; which brought its shareholding at 10,12,912 shares in GEE, constituting 5.36% of share capital of GEE.

7. Learned counsel for respondent also stated that appellant had made disclosure of initial share acquisition from open market of 50,000 shares on November 12, 2008; but no further disclosure of subsequent shares taking its share holding to 5.36% of paid up capital of GEE, was made and appellant had violated provision of Regulation 7(1) of Takeover Regulations, 1997 and Regulation 13(1) of PIT Regulations, 1992.

8. Learned counsel for respondent thereafter recounted efforts of respondent to send SCN, subsequent dates of hearing etc, which failed and when appellant were sent notices through its Eastern Regional Office (ERO) of SEBI but notice could not be served on appellant for hearing on October 11, 2011. Subsequently, vide notice dated September 19, 2011, appellant was informed of hearing on October 11, 2011, but this notice could not be served and was returned as undelivered. Further, more attempts were made to send notice of hearing to appellant and finally the same was served on appellants through this stock brokers, but this also did not succeed. Subsequently, appellants informed SEBI, vide letter dated January 17, 2011 that they had not

received any notice till date at correspondence address and sought time to file reply to SCN.

9. Similar hide and seek and asking for time for reply to SCN, carried in between appellant and respondent and during final hearing on April 11, 2012; appellant did not appear or filed any reply to SCN and hence it can be concluded that appellant did not cooperate with respondent and order against appellant was passed, ex-parte.

10. Issues for consideration are really not disputed since appellant has admitted charge of violation of relevant provisions of Rule 7(1) of Takeover Regulations, 1997 of not making requisite disclosure due to acquisition of 5.36% of shares of GEE by appellants during the relevant period and have given reasons for same, being due to non-appreciation of relevant provision of Takeover Regulations, 1997 and requisite disclosures, which have been dealt earlier above. Respondents' case is also the same and its efforts to serve SCN and hearing notices on appellants have been dealt with above, at great length.

11. It is an admitted fact that appellant acquired 5.36% of share capital of GEE but failed to make disclosures regarding this to GEE and BSE as specified under Regulation 7(1) of Takeover Regulations, 1997 which is reproduced below:

“7.(1) Any acquirer, who acquires shares or voting rights which(taken together with shares or voting rights, if any, held by him) would entitle him to more than five per cent or ten per cent or fourteen percent or fifty four per cent or seventy four per cent shares or voting rights in a company, in any manner whatsoever, shall disclose at every stage

the aggregate of his shareholding or voting rights in that company to the company and to the stock exchanges where shares of the target company are listed.

Further, as per the requirement of Regulation 13(1) of the PIT Regulations, any person who holds more than 5% shares or voting rights in any listed company shall disclose to the company in Form A, the number of shares or voting rights held by such person, on becoming such holder within two working days of the receipt of intimation of allotment of shares; or the acquisition of shares or voting rights, as the case may be. Upon considering the material made available on record and in the absence of any reply from the noticee establishing the contrary, it was concluded that appellant has failed to make disclosure regarding acquisition of 5.36% of shares capital of GEE to GEE as specified under Regulation 13(1) of the PIT Regulations. The text of Regulation 13(1) of the PIT Regulations is reproduced below:

“Disclosure of interest or holding in listed companies by certain persons- Initial Disclosure

*13. (1) Any person who holds more than 5% shares or voting rights in any listed company shall disclose to the company in Form A, the number of shares or voting rights held by such person, on becoming such holder, within 2 working days of:-
(a) the receipt of intimation of allotment of shares;
or
(b) the acquisition of shares or voting rights, as the case may be.”*

In view of above facts and material available on record, it was rightly concluded by Adjudicating Officer that Regulation 7(1) of Takeover Regulations, 1997 and Regulation 13(1) of PIT Regulations, 1992 have not been complied by appellant.

12. Regarding quantum of penalty under Section 15(J) of SEBI Act, 1992 and Rule 5 of Rules require that while adjudicating quantum of penalty, adjudicating officer shall have due regard to following factors:

- a) *the amount of disproportionate gain or unfair advantage wherever quantifiable, made as a result of the default;*
- b) *the amount of loss caused to an investor or group of investors as a result of the default;*
- c) *the repetitive nature of the default.*

Having regard to these while determining quantum of penalty, it was noted that Investigation Report (IR) has not quantified disproportionate gains or unfair advantage and amount of loss caused to an investor or group of investors as result of failure by appellant and that also is difficult to quantify unfair advantage by appellant or loss caused to investors in default of this nature.

13. In view of above considerations, penalty of ₹ 5,00,000/- for failure to comply with Regulation 7(1) of Takeover Regulations and penalty of ₹ 5,00,000/- for failure to comply with Regulations 13(1) of PIT Regulations, has been imposed on appellant by Adjudicating Officer.

14. However, it is seen that no effort to quantify disproportionate form or unfair advantage, wherever quantifiable, made as result of default of disclosure under Regulation 7(1) of Takeover Regulations, 1997 or 13(1) of PIT Regulations, 1992 has been made; but it is admitted that it is difficult to make such quantification. It is noticed that no effort has been made to even prove that any unfair advantage or

disproportionate gain has come to appellant on a result of non-disclosure of acquisition of 5.36% stake in GEE by appellant.

15. Similarly, no mention of any loss caused to an investor or group of investors as a result of default exists. Hence no cause for any harm to any investors due to non-disclosure has been made. In absence of such mention, it is seen that no such gain or advantage has occurred to appellants or any loss caused to an investor or a group of investors due to acquisition of 5.36% shares or voting rights by appellant in GEE. This is also to be seen from admission of appellant that acquisition of 5.36% of stake by appellant and its non-disclosure was due to their ignorance or non-appreciation of requirement of disclosure, since same occurred mostly by not as active action by appellant but as on result of bonus shares, shares allotted due to amalgamation and again by issue of bonus shares. Respondent have also not contested/refuted the above mode of acquisition of shares by appellant or placed any document on record to show any motive behind such acquisition like creeping acquisition to gain control over GEE etc.

16. It may be noticed that provisions of Regulations 7(1) of Takeover Regulations, 1997 and Regulation 13(1) of PIT Regulations, 1992 are not substantially different, since violation of first automatically triggers violation of second and hence there is no justification for imposition of penalty for second violation when penalty for first violation has been imposed. It may be seen that Regulation 7(1) of Takeover Regulations,

1997 and Regulation 13(1) of PIT Regulations, 1992 are not stand alone Regulations and one is corollary of other.

17. In view totality of circumstances and in interest of justice we are of the considered view that it is adequate to impose a token penalty of ₹ 1 lac on appellant for technical and inadvertent violation of Regulation 7(1) of Takeover Regulations, 1997 and for violation of Regulation 13(1) of PIT Regulations, 1992 .

In view of above, appeal is dismissed with reduction of penalty imposed to ₹ 1 lac only for violation of Regulation 7(1) of Takeover Regulations, 1997 and violation of Regulation 13(1) of PIT Regulations, 1992. With aforesaid modification of penalty the impugned order dated March 28, 2013 is upheld. No order as to costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

Sd/-
A S Lamba
Member

04.09.2013

Prepared & Compared By: Pk