

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 3 of 2013

Date of Decision: 19.06.2013

M/s. Akshya Infrastructure Private Limited
414, Bharathi Street,
Puducherry- 605 001

...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. Somasekhar Sundaresan, Advocate with Mr. Paras Parekh,
Advocate for the Appellant.

Mr. Prateek Seksaria, Advocate with Ms. Virakthi S. Hegde, Advocate
for the Respondent.

CORAM : Jog Singh, Member & Presiding Officer (*Offg.*)
A.S. Lamba, Member

Per : Jog Singh

1. The Appellant i.e. M/s. Akshya Infrastructure Private Limited is aggrieved by the direction issued by the Securities and Exchange Board of India, hereinafter referred to as ‘the Respondent’, vide letter dated November 30, 2012 through M/s. Motilal Oswal Investments Advisors Private Limited, the Managers to the Issue, hereinafter referred to as ‘Merchant Banker’. The impugned direction is pertaining to a voluntary public announcement made by the Appellant on October 20, 2011,

hereinafter referred to as 'Public Announcement', in relation to an open offer made to the shareholders of MARG Limited, hereinafter referred to as 'Target Company'. The open offer was made by the Appellant to acquire 20% of the fully diluted equity capital of the Target Company. It is submitted by the Appellant that the Public Announcement was made by it with a view to consolidate its holding in the Target Company. The said open offer gives a commercially reasonable opportunity to the public shareholders of the Target Company to exit at the offer price of Rs. 91 per equity share of the said Target Company which represented a premium of 10.30% over the market average closing price for the two weeks preceding the Public Announcement. The tendering period was scheduled to commence on December 1, 2011 and conclude on December 20, 2011. The consideration for the tendered shares was to be paid before January 4, 2012.

2. The Appellant submits that the impugned direction, albeit, in the form of 'comments', 'observations' and advice on the draft letter of offer, hereinafter referred to as 'Draft LO', filed by the Appellant in connection with the voluntary Public Announcement is really a diktat. Further, the Appellant submits that because of the lapse of a period of more than one year from the date of the open offer, the same has been rendered non-feasible and now remains only academic in nature. In addition, it is stated that the impugned letter contains serious directions which have the effect of binding the Appellant, thereby constituting an order by which the Appellant is aggrieved, forcing him to prefer the present Appeal. This contention has been put forth by the Appellant

because the impugned letter, inter alia, alleges that the Appellant and the promoter-group entities of the Target Company have violated Regulation 11(1) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, hereinafter referred to as Takeover Regulations of 1997 on three occasions, i.e., March 30, 2007, October 12, 2007 and February 19, 2011. The Appellant denies that there was any requirement to make any open offer in the past with respect to the three alleged acts of acquisition in question.

3. Further, the Appellant states that the submissions presented by the Appellant before the Respondent have not been considered while issuing the impugned letter. In this background, the Appellant challenges the impugned letter dated November 30, 2012 under Section 15T of the Securities and Exchange Board of India Act, 1992, hereinafter referred to as ‘the SEBI Act’. The Appellant has, thus, prayed for the following reliefs:-

- “(a) That this Hon’ble Tribunal be pleased to set aside the Impugned Direction;
- (b) That this Hon’ble Tribunal be pleased to order and direct the Respondent to allow the Appellant to withdraw the Open Offer without any adverse orders or directions against the Appellant or the Promoter Group;
- (c) That this Hon’ble Tribunal be pleased to order and direct the Respondent to allow the Appellant to withdraw the amount of Rs. 17.46 crores deposited in escrow in lieu of the Open Offer;
- (d) That this Hon’ble Tribunal be pleased to award costs to the Appellant for having to challenge the Impugned Direction;
- (e) For such other and further reliefs as the nature and circumstances of the case may require.”

4. The case of the Appellant is that it made a Public Announcement on October 20, 2011 for the purpose of consolidating its shareholding in the Target Company through the Merchant Banker. Vide letter dated October 28, 2011, the Appellant filed the Draft LO, through the Merchant Banker, with the Respondent along with a due diligence certificate and other connected relevant documents. Some more details were filed vide letter dated November 4, 2011 with the Respondent. In the meanwhile, the Respondent vide letter dated October 25, 2011 sought certain details relating to an earlier change in the shareholding of the Promoter Group. The same were provided forthwith by the Merchant Banker on behalf of the Appellant vide letter dated November 8, 2011. The Respondent, however, vide letter dated November 11, 2011, inter alia, stated that the Promoter Group appeared to have acquired shares in excess of the limits prescribed by Regulations 11(1) and 11(2) of the Takeover Regulations of 1997 on March 30, 2007, October 12, 2007 and February 19, 2011, hereinafter referred to as “Alleged Triggers”.

5. The Appellant, including the Promoter Group, responded to the said communication referring to the Alleged Triggers by letter dated December 14, 2011 stating that the details in relation to the transactions pertaining to the three Alleged Triggers had already been provided to the Respondent on time as and when required by law. It was also pointed out to the Respondent that at no point of time was there any acquisition by the Promoter Group which could lead to its shareholding going

beyond the threshold of 5% during any financial year. In this regard, the

Appellant has stated as under:-

“6.10 It is submitted that the Hon’ble Supreme Court of India has in the case of Clariant International Ltd. & Anr. V. Securities and Exchange Board of India (2004) 8 SCC 524 clarified that the direction to make an open offer ought not to be resorted to where the public shareholding of the target company has altered since the time of requirement to make an open offer. The provisions of the 1997 Regulations therefore clearly contemplate the making of an open offer within four days. Assuming whilst denying that there was any requirement to make open offers in relation to the Alleged Triggers, the same cannot be directed to be made in case of the present shareholders of the Target Company. It is submitted that it was always open for the Respondent to separately initiate proceedings in relation to the Alleged Triggers. There was no requirement for the Respondent to have held up its comments on the Draft LO on that count. The impugned Direction does not consider or appreciate this important aspect of the matter and its therefore vitiated.”

6. It is submitted by the Appellant that despite the timely submission of all the details as required by the Respondent, there was no clear indication as to when the Draft LO would be cleared by them. The representatives of the Appellant as well as the Merchant Banker met the Respondent from time to time, sadly no purpose was served at these meetings. The Appellant, therefore, addressed a letter dated March 29, 2012 through the Merchant Banker stating that the open offer in question, which was voluntarily made, had become outdated thereby outliving its necessity and therefore the same ought to be allowed to be withdrawn. Also, it was put forth that an amount of Rs. 17.46 crore deposited by the Appellant in an escrow account in relation to the open offer was also lying dormant without any productive use and, therefore, it be allowed to be withdrawn. It was also stated by the Appellant that

the Promoter Group would not derive any benefit out of withdrawal of the open offer and, therefore, in view of the changed scenario and fallen price of the scrip of the Target Company, the Appellant be permitted to withdraw its offer.

7. It is in response to this letter dated March 29, 2012 that the Respondent issued impugned letter dated November 30, 2012 impliedly declining the request of the Appellant to withdraw the open offer and directing the Appellant to go ahead with the same offer after making certain modifications as per the comments contained in the impugned letter dated November 30, 2012. It also contains an annexure, para 4(a) which notably provides as under:-

“4.a It has been observed that pursuant to acquisition of shares by the promoter group on March 30, 2007, October 12, 2007 and February 19, 2011, prima facie Regulation 11(1) of the Takeover Regulations, 1997 has been violated. The MB is advised to make appropriate disclosures in the offer document regarding the violation of regulation 11(1) of the Takeover Regulations, 1997.

Also disclose that SEBI may initiate appropriate penal action against the promoter/acquirer for violation of Regulation 11(1) of the Takeover Regulations, 1997 and failing to make a public announcement under regulation 14(1) of the Takeover Regulations, 1997 on account of such triggers.

In addition, the MB is advised (to) revise the offer price.

MB may also be advised to make a corrigendum to the Public Announcement (PA) in all newspapers, in which the original PA was made, incorporating revised figures of offer price, before the date of opening of the offer.”

8. The Respondent has also filed a reply-affidavit dated April 12, 2013 stating that, *“whilst the Merchant Banker vide its letter dated April 12, 2012 forwarded the Appellant’s prior letter dated March 29, 2012 to*

the Respondent requesting a withdrawal of the open offer due to the delay in clearance, under the provisions of Regulation 27(1) of the 1997 Takeover Code, no public offer can be withdrawn except under the contemplated circumstances being that the statutory approvals necessary have been refused, the sole acquirer of shares (if a natural person) has died or the existence of such circumstances as in the opinion of the Respondent/Board merit withdrawal. I submit that none of the contemplated circumstances exist(s) for the withdrawal of the public offer in the present case, and the Respondent has exercised its discretion in relation to the same after careful consideration and found that no circumstance(s) exist(s) which merit(s) withdrawal of the said public offer.”

9. Regarding the opportunity of being heard to be given to the Appellant before making any observation/direction on the question of the three Alleged Triggers, the Respondent submits that, “*Regulation 16 of the 2011 Takeover Code does not envisage or necessitate the grant of an opportunity to be heard to an acquirer prior to comments being made by the Respondent under Regulation 16(4) thereof. In this regard, the written representation made by the Appellant was duly considered by the Respondent. It is well-settled that, depending on the facts and circumstances of each case, the absence of a personal hearing is not fatal and so long as a party has been given the opportunity to present its case, the principles of audi alteram partem and natural justice are fulfilled. I humbly submit that the argument of the Appellant is utterly ill-founded and ought not to be countenanced by this Hon’ble Tribunal.*”

In this connection, the Respondent further submits that, “*Regulation 11(1) makes reference to the acquisition of shares or voting rights entitling an acquirer to exercise more than 5% of the voting rights ‘in any financial year ending on 31st March.’ In canvassing the aforementioned argument, the Appellant is inviting this Hon’ble Tribunal to read the words ‘in any financial year’ as ‘at the end of any financial year’ which is entirely impermissible. I state that on a plain reading of the language of Regulation 11(1), it is clear that the purpose and object of the said provision is to place a limit on the percentage of acquisition in a given year, with the said limit of 5% being reckoned without making allowances for decrease in shareholding or disinvestment.*”

10. Lastly, the Respondent has contended that the impugned letter dated November 30, 2012 is not ‘an order’ within the meaning of Section 15T of the SEBI Act. It is contended that the impugned letter is only advisory in nature and hence not binding. It is also argued that the SEBI Act does not intend to give locus to each and every person who may be aggrieved by a mere letter of SEBI’s.

11. We have heard both the learned counsel for the parties at length and have minutely perused the pleadings and documents attached therewith.

12. At the outset, we may deal with the contention of the learned counsel for the Respondent that the impugned letter dated November 30, 2012 is merely advisory in nature and as such does not amount to ‘an

order’ within the meaning of Section 15T of the SEBI Act, which causes them to believe that this Tribunal would lack the jurisdiction to entertain the present Appeal. We have given our thoughtful consideration to this aspect of the matter and have minutely perused the impugned letter dated November 30, 2012. The subject of the said letter is, **“Public offer for acquisition of 20% of the equity share capital of MARG Limited (Target Company) by Akshya Infrastructure Private Limited (Acquirers) in terms of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (Takeover Regulations).”** Paras 1 to 6 of the said letter mainly require the Appellant, through the Merchant Banker, to incorporate certain changes in terms of the proviso to Regulation 16(4) of the Regulations. Para 7 pertinently states that *“failure to carry out the suggested changes in the letter of offer as well as violation of provisions of the Regulations will attract appropriate action. Please also ensure and confirm that apart from above, no other changes are carried out in the letter of offer submitted to us.”* A plain reading of para 7 of the impugned letter dated November 30, 2012 makes it abundantly clear that it is binding in nature and failure to carry out the suggested changes would attract appropriate action as per the Takeover Regulations. Therefore, in our opinion, mere use of the expression “comments” in the impugned letter would not make it advisory. Consequently, the contention of the Respondent in this regard is liable to be rejected. In this connection, it may also be noted that this Tribunal while deciding the case of the National Securities Depository Ltd. vs. Securities and Exchange Board of India on September 29, 2006

(Appeal No. 207 of 2005) has categorically noted that the Tribunal cannot deny right of appeal to an aggrieved party by giving a restrictive meaning to the words “an order” used in Section 15T of the SEBI Act. In fact, the jurisdiction of Civil Courts to entertain a suit with respect to the subject matter falling within the jurisdiction of this Tribunal has already been excluded by Section 15Y of the SEBI Act. Similarly, the jurisdiction conferred upon any Hon’ble High Court under Articles 226/227 does not fall within the purview of jurisdiction being exercised by this Tribunal as an expert appellate forum. Moreover, the appellate jurisdiction of the Hon’ble Supreme Court is available to a party only once an order is passed by this Tribunal in respect of any subject matter.

13. The scope of Section 15T of the SEBI Act was elucidated upon by this Tribunal in the order pertaining to the National Securities Depository Ltd. case referred to above on a preliminary objection being raised by the Advocate General on behalf of SEBI which was concerned with whether or not the impugned circular reviewing the dematerialization charges, in the form of a circular, was in the interest of the investor or not. While dealing with that preliminary objection, this Tribunal relying upon the judgments of State of Maharashtra vs. Marwanjee P. Desai, AIR 2002 SC 456, and Clariant International Ltd. and Anr. vs. Securities and Exchange Board of India AIR 2004 SC 4236, held in para 5 as under:-

“5. What is contended by the learned Advocate General is that the circulars issued by the Board and policy decisions taken by it are beyond the appellate jurisdiction of this Tribunal. We are not impressed with this argument. The word “circular” according to Chambers Dictionary means “a

letter or notice sent to a number of persons". The Concise Oxford Dictionary (Ninth Edition) defines the word 'circular' to mean a letter, decision or order "for distribution to a large number of people". The Board had taken a decision reviewing dematerialization charges and instead of issuing separately an order to each and every intermediary affected thereby had passed a general order and circulated the same for the benefit of all; it makes no difference and it remains a decision of the Board against which any person feeling aggrieved could come up in appeal. Merely because the Board issued a circular would not take away the right of the aggrieved party to challenge the same in appeal. Can the Board clothe its orders in the garb of a circular and deny the aggrieved party the right of appeal. It cannot be so. The order may be a policy decision, as contended by the learned Advocate General, but that, too, would make no difference. If we accept the argument of the learned Advocate General that all administrative orders and policy decisions of the Board are beyond the pale of jurisdiction of this Tribunal, we would not only be doing violence to the language of section 15T but also deprive the aggrieved party of any forum to challenge the said decision or order. This could not have been the intention of Parliament. Surely, the orders and decisions of the Board are not immune from challenge. Then, where does the aggrieved party go? He/it had to be provided with a forum to redress his/its grievances. The Supreme Court has quite often observed that at least one right of appeal should be given to an aggrieved party and we cannot deny that right by giving a restrictive meaning to the words "an order". We are, therefore, clearly of the view that this Tribunal is the only forum for redressing the grievances of an aggrieved party in as much as the appellate jurisdiction of the Supreme Court is available only on a question of law and the jurisdiction of the Civil Court to entertain a suit is also ousted under section 15Y of the Act. The jurisdiction exercised by the High Court under Articles 226 and 227 is not the same as is exercised by an expert appellate body in appeal. As already observed, the words "an order" in section 15T would include every order and we have to read those words without any limitation. It is true that the Board is an expert body, so is the Tribunal, and from the scheme of the Act it is clear that Parliament in its wisdom wanted every order passed by the Board to be scrutinized in appeal by the Tribunal. We may observe that even though every order passed by the Board is amenable to the appellate jurisdiction of this Tribunal, due weight has to be given to the views expressed by the former as a body of experts in its administrative orders, policy decisions and regulations."

14. To any reasonable person who were to sit in judgment, it is clear that this Tribunal, while delivering the aforesaid judgment, had but one thing in mind, viz. every entity ought to be given at least one opportunity to be heard and to have their side of the story brought out in the open in every forum where it is their legal right to do so. It has been succinctly stated that the words “an order” in Regulation 15T must be read without any limitation while bringing every comment/observation put forth in the garb of mere advice within their ambit, and that is precisely what this Tribunal intends to do. The mandatory nature of the impugned communication cannot be denied by clothing it as mere innocuous advice. In light of the aforesaid observations, we hold that the impugned letter dated November 30, 2012 is an order within the meaning of Section 15T of the SEBI Act and hence appealable before this Tribunal.

15. Now we may analyze the contentions of the learned counsel for both the parties pertaining to the validity of the Impugned letter. It is an admitted position that the Public Announcement was made by the Appellant on October 20, 2011 voluntarily in order to afford an opportunity to the shareholders of the Target Company to exit at the offer price of Rs. 91 per equity share at a premium of 10.30% over the market average closing price calculated on the basis of the trend of price fluctuations in the preceding two weeks from the date of the Public Announcement. It is, thus, evident from this fact alone that the open offer in question was not triggered by any crossing of the statutory limit to acquire the shares in question. The open offer was a conscious decision on the part of the Appellant and its promoter group taken with a

view to consolidate its holding in the Target Company as per law. This move was considered viable as on the date of the Public Announcement. However, due to the long lapse of time in securing the Respondent's approval the same was rendered futile. It was, therefore, sought to be withdrawn. In our opinion, the records do reveal that the request for withdrawal by the Appellant was bona fide and made owing to the fact that the time-frame prescribed for a smooth completion of the process of open offer and exit, if any, by the public shareholders at large had already lapsed and the open offer had become redundant. In the circumstances, the Respondent should have considered the case of the Appellant in view of the provisions of Regulation 27 of the Takeover Regulations of 1997 and graciously granted permission to withdraw the voluntary open offer. The provisions of Regulation 27, which deal with the withdrawal of offer, are reproduced hereinbelow for the sake of convenience:-

“Withdrawal of offer.

27. (1) No public offer, once made, shall be withdrawn except under the following circumstances:-

(a).....

(b) the statutory approval(s) required have been refused;

(c) the sole acquirer, being a natural person, has died;

(d) such circumstances as in the opinion of the Board merit withdrawal.

(2) In the event of withdrawal of the offer under any of the circumstances specified under sub-regulation (1), the acquirer or the merchant banker shall,-

(a) make a public announcement in the same newspapers in which the public announcement of offer was published, indicating reasons for withdrawal of the offer;

(b) simultaneously with the issue of such public announcement, inform-(i) the Board, (ii) all the stock exchanges on which the shares of the company are listed; and (iii) the target company at its registered office.”

16. A perusal of the above Regulation clearly reveals that a public offer once made shall not be withdrawn except under certain eventualities mentioned in sub-regulations (b), (c) and (d) of Regulation 27(1). Regulation 27(1) (b) lays down that if statutory approval has been refused, the offer can be withdrawn. It is pertinent to point out in this regard that Regulation 6(2) of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009, hereinafter referred to as “ICDR Regulations” deals with the time period within which the Respondent should deliver its comments on a draft offer document submitted to it by an issuer of securities. For the sake of convenience Regulation 6(2) of the ICDR Regulations is reproduced hereinbelow:-

“6(2) The Board may specify changes or issue observations, if any, on the draft offer document within thirty days from the later of the following dates:

(a) the date of receipt of the draft offer document under sub-regulation (1); or

(b) the date of receipt of satisfactory reply from the lead merchant bankers, where the Board has sought any clarification or additional information from them; or

(c) the date of receipt of clarification or information from any regulator or agency, where the Board has sought any clarification or information from such regulator or agency; or

(d) the date of receipt of a copy of in-principle approval letter issued by the recognised stock exchanges.”

17. After perusing all the documents and relevant material available with this Tribunal it seems to be quite plainly a matter of record, undisputed by the Respondent, that the last letter sent by the Appellant communicating certain details sought by the Respondent was dated February 3, 2012, by which day the open offer period as contemplated by the Appellant had already expired. The time period prescribed by

Regulation 6(2) of the ICDR Regulations has been ignored by the Respondent with impunity since the impugned letter dated November 30, 2012 was issued at an utterly late stage in the proceedings, 8 months after the public offer was sought to be withdrawn by the Appellant vide letter dated March 29, 2012. In these matters, time is of the essence and it is our considered opinion that the Respondent's silence for months together in this case would tantamount to refusal of the Appellant's offer. We fail to understand the reason behind the Respondent's indifference in responding to the Appellant's Draft LO. For, how long was the Appellant expected to wait on the Respondent's comments while hoping for an appropriate response. The Appellant was, thus, justified in desiring to withdraw the public offer in question. Similarly, Regulation 27(1)(d) provides that if there exist circumstances which in the opinion of the Board merit withdrawal, the Board may allow withdrawal. The scope of this provision is wide enough for the Board to have considered the reasonable request of the Appellant and subsequently allow him to withdraw the public offer in question, especially considering the Appellant's rightful averment that the open offer had long since outlived its purpose. Most importantly, this would not have caused prejudice to anybody involved, particularly the investors. Therefore, we feel that the Appeal deserves to be allowed on this count as well.

18. Turning to the second issue of the Alleged Triggers raised by the Respondent in para 4(a) of the annexure annexed with the impugned letter dated November 30, 2012, we are of the considered view that such allegations, although stated to be prima facie, go to the root of the matter

and may lead to adverse monetary consequences on the Appellant and the Promoter-Group, particularly as they would not be a result of lawfully conducted proceedings. The said allegations levelled against the Appellant with respect to the violation of Regulations 11(1) and (2) could have been proceeded with only as per law laid down in the SEBI Act, particularly provisions of Regulation 11C, 15I and 15J read with provisions of Chapter V of the Takeover Regulations which deal with investigations conducted into questionable acts of corporate houses while trying to circumvent the law. In the instant case, however, regrettably so, it is the Respondent which has failed to act as per law. Being the corporate watchdog of the country, it does not behove the Respondent to make such observations without recourse to the due process of law.

19. Regulations 15I and 15J of the SEBI Act empower the Respondent to adjudicate and while doing so take certain factors into account. Section 15I(1) specifically provides that for the purposes of acting under various preceding sections from 15A to 15HB, the Respondent is required to appoint an officer not below the rank of Divisional Chief to be an adjudicating officer for holding an enquiry in the prescribed manner after giving reasonable opportunity of being heard to the person concerned. The adjudicating officer is also entitled to impose any penalty if the facts of the case so require. Similarly, Chapter V of the Takeover Regulations of 1997 deals with investigations conducted and actions taken by the Respondent. Regulation 38 deals with the Respondent's right to investigate matters and lays down that it may appoint a person as

investigating officer to undertake investigations into complaints regarding substantial acquisition of shares and takeovers by an entity/person or do so on its own knowledge and in the interest of the securities market or in the investors' interest. Regulation 39(1) requires notice of 10 days to be given to the acquirer, the seller, the target company, the merchant banker, as the case may be. However, Regulation 39(2) empowers the Board to dispense with the requirement of such a notice for reasons to be recorded in writing. Provisions of Regulation 40 broadly require the acquirer, the seller, the target company or the merchant banker, whose affairs are being investigated to fully cooperate in the investigation by providing all the relevant material/documents in their custody to an investigating officer as per his requirement. After completion of the investigation, the investigating officer is required to submit a report to the Respondent which in turn shall communicate the same to the person concerned and give him an opportunity of being heard. On receipt of a reply from the said person/entity, the Respondent may call upon him/it to take such measures as may be deemed fit in the interest of the securities market and for due compliance with the provisions of the SEBI Act and Takeover Regulations.

20. The above said provisions have admittedly not been followed by the Respondent in issuing the observation/comments/advice contained in para 4(a) of the annexure annexed with the impugned letter dated November 30, 2012. The Appeal, therefore, deserves to succeed in terms of prayer clauses (a),(b) & (c) of para 7 of the Appeal. Ordered accordingly. We, however, make it clear that we do not intend to make

any observation on the merit of the issue regarding the three Alleged Triggers dated March 30, 2007, October 12, 2007 and February 19, 2011 and the contentions of parties in this regard are kept open. The Appeal, thus, stands allowed in terms of prayers contained in paras 7(a), 7(b), & 7(c) thereof. No costs.

Sd/-
Jog Singh
Member &
Presiding Officer (*Offg.*)

Sd/-
A S Lamba
Member

19.06.2013
Prepared & Compared By: Pk