

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 8 of 2012

Date of decision: 11.05.2012

Nikhil Mansukhani
101, MAN House,
SV Road,
Vile Parle (West),
Mumbai – 400 056.

.....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. J. J. Bhatt, Senior Advocate with Dr. S. D. Israni, Mr. Satyam S. Israni,
Ms. Isha Gada, Advocates for the Appellant.

Mr. Shiraz Rustomjee, Senior Advocate with Mr. Mihir Mody,
Mr. Mobin Shaikh, Advocates for the Respondent.

CORAM : P. K. Malhotra, Member & Presiding Officer (*Offg.*)
S. S. N. Moorthy, Member

Per : P. K. Malhotra

This order will dispose of two appeals no. 8 of 2012 and 196 of 2011 which arise out of a common order dated September 30, 2011 passed by the adjudicating officer of the Securities and Exchange Board of India (for short the Board) holding the appellants in these two appeals, alongwith one other entity, guilty of violating regulation 11(1) read with second proviso to regulation 11(2) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (for short takeover code) and imposing a penalty of ₹ 10 crores on them under Section 15H of the Securities and Exchange Board of India Act, 1992 (the Act). Counsel for the parties agree that since a

common show cause notice was issued and a common order was passed by the Board, the appeals can also be disposed of by a common order.

2. The facts of the case, in brief, are that on receipt of a complaint dated October 1, 2010 from the Company Secretary of M/s MAN Industries (India) Limited (the company) regarding certain irregularities committed by Mr. J. C. Mansukhani, Vice Chairman and Managing Director of the company and by JPA Holdings Pvt. Ltd. (appellant in Appeal no. 196 of 2011), the Board conducted investigations into the transactions in shares of the company for the period June 2010 to September 2010. It was noted that on June 16, 2010 the company informed the Bombay Stock Exchange Limited (BSE), where its shares are listed, that the board of directors of the company, in the meeting held on June 15, 2010 had considered and approved allotment of 2,50,000 equity shares of ₹ 5/- each at a premium of ₹ 30/- per share to Mr. Nikhil Mansukhani, a promoter (appellant in appeal no. 8 of 2012) upon conversion of 2,50,000 warrants by way of preferential allotment. Again, on June 21, 2010 the company informed BSE outcome of the board meeting held on June 19, 2010 regarding allotment of 10 lacs shares of ₹ 5/- each at a premium of ₹ 30/- per share to Nitin Mansukhani, Anita Mansukhani and JPA Holdings Ltd. upon conversion of 10 lacs warrants. It was further observed during the course of investigations that as per shareholding pattern of the promoters of the company for the quarters ending March 2010, June 2010 and September 2010, the aggregate promoter holding as on June 30, 2010 was 53.36 per cent which, in the subsequent quarter i.e. quarter ending September 30, 2010, went up to 55.18 per cent. The increase in the total promoter shareholding was due to conversion of warrants into shares as stated above and acquisition of shares from the market by J. C. Mansukhani. When the total promoter shareholding increased to 55.18 per cent, it crossed the threshold limit of 55 per cent and the acquirers were required to make a public announcement in accordance with the provisions of regulation 11(1) read with second proviso to regulation 11(2) of the takeover code. Since no such public

announcement was made, the acquirers allegedly violated provisions of the said code.

3. A common show cause notice dated May 11, 2011 was issued to all the three entities asking them to show cause as to why an enquiry should not be held against them and penalty imposed under relevant provisions of the Act for the aforesaid violation. The two appellants before us filed their replies and denied the charge. They denied that they were ‘persons acting in concert’ within the meaning of regulation 11(1) read with second proviso to regulation 11(2) of the takeover code. It was also submitted by them that Mr. J. C. Mansukhani, another entity against whom the impugned order is passed, did not disclose the acquisition of shares by him and his associate company from the market purchases a few days earlier to the conversion of warrants into shares as stated above. The total shareholding of the promoter group, consequent to the allotment against conversion of warrants, increased to 54.93 per cent only of the total capital of the company which was well within the permissible limits. Mr. J. C. Mansukhani did not disclose the acquisition of shares made by him and his associate company from the market and, therefore, the Board approved the conversion of the warrants without being aware of the market acquisition made by Mr. J. C. Mansukhani just two days before the board meeting. It was also submitted by them that there was a serious rift between R. C. Mansukhani and J. C. Mansukhani, two of the promoters of the company since October 2009 when R. C. Mansukhani attempted to interfere with and curtail powers of Mr. J. C. Mansukhani. Since the three entities were not acting in concert, they have not violated the provisions of the takeover code. The adjudicating officer did not accept the explanation given by the appellant and, by the impugned order, held all the three entities, including the two appellants before us, guilty of violating regulation 11(1) read with second proviso to regulation 11(2) of the takeover code and imposed a penalty of ₹ 10 crores on them under Section 15H of the Act on the basis of joint and several liability. The main finding holding the appellant guilty reads as under:-

“18. I find from the material available on record that, on June 21, 2010 the Company informed BSE the outcome of Board Meeting held on June 19, 2010 regarding allotment of 10 lakh shares to the Noticees upon conversion of 10 lakh warrants. I find that aggregate promoter holdings as on June 30, 2010 went up to 55.18% due to conversion of warrants by the Noticees on June 19, 2010. Therefore, since the total promoters’ shareholding increased to 55.18%, the same crossed the threshold limit of 55% stipulated under SAST Regulations requiring the Noticees to make public announcement to acquire the shares. Further, as the allotment of shares to the Noticees occurred upon conversion of warrants issued on preferential allotment basis, the same doesn’t fall under proviso to Regulation 11(2) of the SAST Regulations, thus requiring the Noticees to make public announcement on exceeding 55% threshold limit laid down in SAST Regulations.

19. The Noticees have not denied that pursuant to allotment of shares on conversion of warrants, the total promoter group shareholding has exceeded 55% of paid up capital of the company. They have also not denied that increase in promoter shareholding over 55% through preferential allotment does result in triggering the obligation for making public announcement for acquiring further shares from public. However, no announcement has been made till date. If the Noticees had no intention of acquiring more than 55% of the share capital, on becoming aware of the violation they could have taken appropriate corrective action as per law. There is no document/statement on record to signify such an intention. This indicates that they wish to continue to hold these shares which have resulted in the promoters’ holding exceeding 55% of the paid up share capital.

20. The main contention of AM & JPA is that the RCM group is in control of the company and is systematically trying to marginalize the JCM group including them. This contention is not acceptable as the same seems to be an internal conflict among two promoter groups of the company and it is only vide letter dated April 22, 2011 that the stock exchanges were informed by the company about the formation of two different promoter groups and their constitution, before which the company is deemed to have only one promoter group. However, the liability of the acquirers does not change due to the abovementioned state of affairs in the company.

21. NM has contended that Mr. J. C. Mansukhani did not disclose the acquisition of shares made by him and his associate company a few days earlier to the Company due to which the conversion of the warrants was approved by the Board and shares were allotted. In my view, it is inappropriate for NM to state in his reply that had the company known about the acquisition by J C Mansukhani, it would have allotted lesser number of shares. As submitted by him, he had applied for conversion of warrants and the company had done so. There is no liability on the company to ensure/monitor the promoters’ holdings. The liability pursuant to acquisition is that of the acquirer.”

Mr. J. J. Bhatt learned senior counsel for the appellant in Appeal no. 8 of 2012

seriously disputed the findings arrived at by the adjudicating officer of the Board.

It was argued by him that promoters and directors of the company had long standing dispute since 2009 and, therefore, it is incorrect to think that they had common objective or purpose of *interalia* gaining control on the company or were persons acting in concert. Referring to the facts, as pointed out in the reply dated June 20, 2011 in response to the show cause notice, it was submitted by him that the company was promoted by members of Mansukhani family i.e. Mr. J. L. Mansukhani and his two sons Mr. R. C. Mansukhani and Mr. J. C. Mansukhani. Mr. R. C. Mansukhani is the Chairman of the company and Mr. J. C. Mansukhani was Vice Chairman and Managing Director of the company till May 19, 2011. Although Mr. R. C. Mansukhani and Mr. J. C. Mansukhani are brothers and were disclosed as a part of the promoter group of the company at the relevant time, various differences cropped up between them sometime in the year 2009. In view of the full scale dispute between Mr. R. C. Mansukhani and Mr. J. C Mansukhani, the Mansukhani family had split into two promoter groups and it was disclosed to the stock exchange vide letter dated April 22, 2011 as under:-

Sr. No.	RCM Group	JCM Group
1	Mr. Rameshchandra Mansukhani	Mr. Jagdishchandra Mansukhani
2	Mrs. Deepa Mansukhani	Mrs. Anita Mansukhani
3	Mr. Nikhil Mansukhani	Mr. Priyal Mansukhani
4	Rameshchandra Mansukhani HUF	Jagdish Mansukhani HUF
5	Mr. Jhamaklal M. Mansukhani	JPA Holdings Pvt. Ltd.
6	Mrs. Kematdevi J. Mansukhani	
7	J. Mansukhani HUF	
8	MAN Global Ltd.	

Extensively referring to the judgment of the Hon’ble Supreme Court in the case of **Daiichi Sankyo Co. Ltd. vs. Jayaram Chigurupati & Ors.** [(2010) 7 SCC 449], it was pointed out by him that the concept of ‘persons acting in concert’ under

regulation 2(1)(e)(1) of the regulations is based on a target company on the one side and on the other side two or more persons coming together with a common objective for purpose of substantial acquisition of shares of the target company. According to him, there can be no persons acting in concert unless they share common objective or purpose of substantial acquisition of shares of the target company. The element of sharing a common objective or purpose is the sine qua non in the relationship of persons acting in concert. Although this argument was advanced before the adjudicating officer and the judgment of the Supreme Court was also referred, the adjudicating officer has failed to deal with the same and has arrived at a conclusion which is contrary to the principles laid down by the Supreme Court in the aforesaid judgement. It was further submitted by him that there being a dispute in the Mansukhani family and the promoter group having split into two way back in 2009, it was not possible for them to act in concert for the purpose of acquisition of shares of the company. J. C. Mansukhani had acquired shares independent of the other shareholders and he had not intimated this acquisition to the company or the stock exchange. Since he was not a person acting in concert and if his acquisition was taken out, the remaining shareholding of the promoter group works out to only 54.93 per cent i.e. below 55 per cent. Hence, there was no requirement of making a public announcement as contemplated by regulation 11(1) read with second proviso to regulation 11(2) of the takeover code. Mr. Zal Andhyarujina, learned counsel for the appellant in Appeal No. 196 of 2011 also made his submissions almost on the same lines.

4. Mr. Shiraz Rustomjee, learned senior counsel for the respondent Board supported the order passed by the adjudicating officer and submitted that as per appellant's own admission, intimation to the stock exchange about internal conflict among the two promoter groups was conveyed only on April 22, 2011 i.e. much after acquisition of shares by the promoter group entities. The Board as a regulator is not concerned about the internal conflict between the promoter

entities and such conflict cannot be a ground for not complying with the requirements under the regulations.

5. We have considered the rival submissions and have also perused the material available on record. It is not in dispute that pursuant to the allotment of shares on conversion of warrants and purchase of shares from the market by J. C. Mansukhani, the total promoter group shareholding exceeded 55 per cent of the paid up capital of the company. In view of the factual position on record, we have to see whether the three entities found guilty by the adjudicating officer for violating the regulatory provisions were ‘person acting in concert’ within the meaning of regulation 2(1)(e) so as to attract the provisions of regulation 11 of the regulations. Relevant portion of regulation 2(1)(e) reads as under:-

“2(1)(e) “person acting in concert” comprises, -

- (1) persons who, for a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target company, pursuant to an agreement or understanding (formal or informal), directly or indirectly co-operate by acquiring or agreeing to acquire shares or voting rights in the target company or control over the target company,
- (2) without prejudice to the generality of this definition, the following persons will be deemed to be person acting in concert with other persons in the same category, unless the contrary is established.
 - (i) a company, its holding company, or subsidiary or such company or company under the same management either individually or together with each other;
 - (ii)
 - (iii) directors of companies referred to in sub-clause (i) of clause (2) and their associates;

Note : For the purposes of this clause “associate” means, -

- (a) any relative of that person within the meaning of section 6 of the Companies Act, 1956 (1 of 1956); and
- (b)

While interpreting the aforesaid provision the Supreme Court in the case of Daiichi Sankyo Co. Ltd. (supra) had observed as under:-

“48. To begin with, the concept of “person acting in concert” under Regulation 2(1)(e)(1) is based on a target company on the one side, and on the other side two or more persons coming together with the shared common objective or purpose of

substantial acquisition of shares, etc. of the target company. Unless there is a target company, substantial acquisition of whose shares, etc. is the common objective or purpose of two or more persons coming together there can be no “persons acting in concert”. For, dehors the target company the idea of “persons acting in concert” is as irrelevant as a cheat with no one as victim of his deception. Two or more persons may join hands together with the shared common objective or purpose of any kind but so long as the common object and purpose is not of substantial acquisition of shares of a target company they would not comprise “persons acting in concert”.

49. The other limb of the concept requires two or more persons joining together with the shared common objective and purpose of substantial acquisition of shares, etc. of a certain target company. There can be no “persons acting in concert” unless there is a shared common objective or purpose between two or more persons of substantial acquisition of shares, etc. of the target company. For, dehors the element of the shared common objective or purpose the idea of “person acting in concert” is as meaningless as a criminal conspiracy without any agreement to commit a criminal offence. The idea of “person acting in concert” is not about a fortuitous relationship coming into existence by accident or chance. The relationship can come into being only by design, by meeting of minds between two or more persons leading to the shared common objective or purpose of acquisition or substantial acquisition of shares, etc. of the target company. It is another matter that the common objective or purpose may be in pursuance of an agreement or an understanding, formal or informal; the acquisition of shares, etc. may be direct or indirect or the persons acting in concert may cooperate in actual acquisition of shares, etc. or they may agree to cooperate in such acquisition. Nonetheless, the element of the shared common objective or purpose is the sine qua non for the relationship of “person acting in concert” to come into being.

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55. Regulation 2(1)(e)(2) defines “person acting in concert”. It is a deeming provision. It has to be read in conjunction with Regulation 2(1)(e)(1) which states that person acting in concert comprises of persons who in furtherance of a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target company, pursuant to an agreement or understanding (formal or informal), directly or indirectly cooperate by acquiring or agreeing to acquire shares or voting rights in the target company or to acquire control over the target company.

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57. Whether a person is or is not acting in concert with the acquirer would depend upon the facts of each case. In order to hold that a person is acting in concert with the acquirer or with another person it must be established that the two share the common intention of acquisition of shares of some target company. For example, there is no hard-and-fast rule that every foreign institutional investor (FII) would share with the sub-accounts(s) the common objective of acquiring substantial stakes or control in some target company. Whether in a given case an FII and its sub-

accounts(s) have a common objective of making investment in India to earn profits in unit holders or whether they have a common objective of acquiring substantial stakes or control in some target company would depend on the facts of each case. In the former case Regulation 2(1)(e)(2)(v) would not apply whereas in the latter case the said sub-regulation would apply. The above illustration brings out the true purport of the expression “unless the contrary is established” which expression finds place in Regulation 2(1)(e)(2).”

Learned counsel for the appellants have also referred to the judgement of the Bombay High Court in the case of **K. K. Modi vs. Securities Appellate Tribunal** [(2003) 113 Com. Cases 148 Bom.] wherein the Court had observed that a co-promoter of the target company, by reason of his being a co-promoter cannot be said to be a person acting in concert with the acquirer who also happens to be one of the promoters of the target company, unless the evidence on record clearly establishes that the promoters share the common objective or purpose of substantial acquisition of shares or voting rights for gaining control over the target company with the acquirer. The question whether promoter is acting in concert with the acquirer, is a question of fact and the answer, therefore, must depend on the facts of each case.

6. Having considered the rival submissions and material placed on record, we are of the view that the adjudicating officer, while passing the impugned order, has not dealt with or considered the principles of law laid down in the above noted two judgements. No doubt, the appellant informed about the split in the promoter group to the stock exchanges only in April 22, 2011, the fact remains that there was sufficient material available on record to show that the dispute between the two promoter groups is continuing since 2009. In view of this fact, it was for the Board to bring sufficient material on record to show that in spite of conflict among the promoters, the members of the two groups were acting in concert while acquiring the shares for the purpose of increasing their voting rights for gaining control over the company or they had common objective or purpose for substantial acquisition of shares. The appellants, vide their reply

dated June 20, 2011 in response to the show cause notice have specifically taken this ground and referred to the above noted two judgements. However, the adjudicating officer while passing the order has not dealt with the same. Neither he has made any reference to the two judgements noted above nor he has recorded any finding as to how the three acquirers of the shares, against whom the impugned order has been passed, are 'person acting in concert' within the meaning of the takeover code. We are, therefore, of the considered view that the impugned order has been passed without taking into consideration the material available on record and the legal position set out above.

7. We, therefore, set aside the impugned order and remand the matter to the Board for passing a fresh order dealing with the submissions made by the appellants in their reply dated June 20, 2011 and other documents submitted by them, more particularly, the law laid down in the two judgments referred to above. The Board may call for further information from the appellant, if it is felt necessary for passing a fresh order in accordance with law.

The appeals stand disposed of accordingly with no order as to costs.

Sd/-
P. K. Malhotra
Member &
Presiding Officer (*Offg.*)

Sd/-
S. S. N. Moorthy
Member

11.05.2012
Prepared & Compared by
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