

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

DATE : 04.03.2016

Appeal No. 449 of 2014

1. Vaman Madhav Apte
2. Devaki Laxman Apte
3. Vikram Vaman Apte
4. Mithila Vaman Apte

24B, Woodlands, Pedder Road,
Mumbai – 40 026.

..... Appellants

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. Ankit Lohia, Advocate with Mr. Deepak Dhane, Advocate for the
Appellant.

Mr. Kumar Desai, Advocate with Mr. Tomu Francis, Advocate for the
Respondent.

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

Per : Justice J. P. Devadhar (Oral)

1. Appellants are aggrieved by the order passed by the Adjudicating Officer ('AO' for short) of the Securities and Exchange Board of India ('SEBI' for short) on October 31, 2014. By the said order, penalty of ₹ 25,00,000/- is imposed on the appellants to be paid jointly and severally under Section 15H(ii) of Securities and Exchange Board of India Act, 1992 ('SEBI Act' for short) for violating Regulation 11(2) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 ('Takeover Regulations, 1997' for short) read with

Regulation 35 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ('Takeover Regulations, 2011' for short).

2. Appellants were the promoters of Apte Amalgamations Ltd. ('Company' for convenience) a company registered under the Companies Act, 1956. The shares of Apte Amalgamations Ltd. are listed on the Bombay Stock Exchange ('BSE' for short) since 1983. However, trading in the shares of the said company was suspended by the BSE in the year 2001 and the said suspension was revoked only in the year 2010.

3. Appellants as promoters, held shares of the company in excess of 55%. During the year 2009, the appellants acquired additional shares of the company to the extent of 2.44% through off market. Regulation 11(2) of the Takeover Regulations, 1997 provides that no acquirer who together with persons acting in concert with him holds 55% or more but less than 75% of shares or voting rights in a target company shall acquire either by himself or through persons acting in concert with him any additional shares, unless he makes a public announcement to acquire shares in accordance with the Takeover Regulations, 1997. However, the second proviso to Regulation 11(2) provides that an acquirer covered under Regulation 11(2) may acquire additional shares, upto 5%, without making a public announcement, provided the acquisition is made through open market purchase in normal segment on the stock exchange.

4. Since the additional shares to the extent of 2.44% were acquired by the appellants in the year 2009 not through the stock exchange but in the off market it is apparent, that the said acquisitions were not covered under the second proviso to Regulation 11(2) of the Takeover Regulations, 1997.

5. Sometime in May 2010, the appellants sought to sell the shares of the company to purchasers which were in excess of the limits prescribed under Regulation 10 of the Takeover Regulations, 1997 and hence offer obligations under the Takeover Regulations, 1997 got triggered. Thereupon, the purchasers made public announcement on May 19, 2010 and the open offer was made on June 29, 2010.

6. On perusal of the documents annexed to the open offer, it was noticed by SEBI that the appellants had acquired shares of the company in the year 2009 in contravention of Regulation 11(2) of the Takeover Regulations, 1997. Accordingly, AO was appointed to inquire into and adjudge on the alleged violations. Thereupon, the AO issued show cause notice on May 6, 2014, calling upon the appellants to show cause as to why action should not be taken against the appellants for violating the provisions contained in the Takeover Regulations, 1997.

7. In their respective reply filed on July 28, 2014, the appellants denied the allegations set out in the show cause notice and further stated that assuming there is any violation, the said violation being technical in nature, the show cause notice be discharged. Thereafter, personal hearing was granted to the appellants and by the impugned order it is held that the appellants have violated Regulation 11(2) of the Takeover Regulations, 1997 and, therefore, by virtue of the powers conferred under Regulation 35 of the Takeover Regulations, 2011, penalty of ₹ 25 lac has been imposed on the appellants under Section 15H (ii) of the SEBI Act.

8. Mr. Ankit Lohia, learned counsel appearing on behalf of the appellants submitted as follows :-

- a) The charge of alleged violation levelled against the appellants relate to the year 2009, whereas, the proceedings are initiated

against the appellants in the year 2014 i.e. after of about 5 years from the date of alleged violation. Inordinate delay in initiating proceedings against the appellants is in gross violation of the principles of natural justice and has caused serious prejudice to the appellants and hence the impugned order which suffers from gross delay and laches is liable to be quashed and set aside.

- b) Admittedly, the trading in the shares of the target company were suspended during the relevant period and, therefore, it was not possible to acquire shares of the company through the stock exchange. In such a case, acquisition of shares through off market cannot be faulted.
- c) Impugned acquisition of shares to the extent of 2.44% i.e. within the permissible limit of 5%, was made under the bonafide belief that since trading on the stock exchange being suspended, acquisition of shares through off market would not attract obligation to make public announcement. Thus, the impugned acquisition in the facts of present case being covered under the second proviso to Regulation 11(2), the AO ought not to have held that the appellants have failed to make public announcement.
- d) Even if it is held that in the facts of present case, acquisition through off market was in violation of Regulation 11(2), the said violation would be technical, procedural and venial breach because, in view of the trading in the shares of the company being suspended, the appellants inadvertently believed that the off market purchases would be covered within the sweep of second proviso to Regulation 11(2) and hence no fault could be found with the appellants.

- e) The alleged violations are not deliberate and intentional and in contumacious disregard of provisions of law.
- f) The AO failed to consider the submission of the appellants that at the relevant time the company was in financial shambles and as a result of the financially weak and unviable position, many employees had left the company. Appellants had also to suffer financial difficulties since they were trying to run the company by some means.
- g) The AO failed to consider that the alleged violations committed by the appellants had no impact on the price of the shares of the company.
- h) The AO failed to consider that there is no investor complaint against the appellants till date and no investor is aggrieved by the alleged violations committed by the appellants.
- i) The AO has failed to appreciate that the appellants had no intention of making any undue benefit and, therefore, the question of disproportionate gain or unfair advantage or loss to investors or shareholders of the company on account of the alleged violations does not arise.
- j) In the facts and circumstances of the present case, imposing penalty of ₹ 25 lac is not only unwarranted but also disproportionate to the violations allegedly committed by the appellants.

9. We see no merit in the above contentions.

10. It is well established in law that in order to claim exemption, the claimant must strictly comply with the terms of the exemption provisions.

In the present case, to claim exemption from complying with the open offer

obligation contained in Regulation 11(2) of the Takeover Regulations, 1997, the appellants ought to have acquired additional shares in the manner specified under the second proviso to Regulation 11(2). As per the second proviso to Regulation 11(2), an acquirer holding 55% or more but less than 75% shares or voting rights in a target company could acquire additional shares upto 5% without making public announcement only if the additional shares were acquired through open market in normal segment on the stock exchange.

11. In the present case, admittedly, the additional shares have not been acquired through open market in normal segment on the stock exchange, but the said shares have been acquired by the appellants through off market. Thus, the acquisition of additional shares by the appellants cannot be said to be in compliance with the provisions contained in the second proviso to Regulation 11(2) of the Takeover Regulations, 1997.

12. Argument of the appellants that since the trading in the shares of the company were suspended during the relevant period, the appellants bonafide believed that the shares could be purchased through off market is without any merit, because, under the second proviso to Regulation 11(2) exemption from making open offer is available only if the acquisition is made through open market purchase in normal segment on the stock exchange and not by any other method. Therefore, if the trading in the shares of the company were suspended during the relevant period it could not be presumed that the appellants could acquire shares through off market. The language of the second proviso to Regulation 11(2) being clear and unambiguous, the appellants are not justified in contending that in the absence of trading in the shares of the company on the stock exchange, the appellants could acquire shares in the off market.

13. If there was genuine need to purchase the shares, then the appellants could have approached SEBI seeking relaxation of the condition set out under the second proviso to Regulation 11(2). Without seeking relaxation of the conditions set out in the second proviso to Regulation 11(2) appellants could not have acquired shares through off market and still claim that the said acquisitions are in compliance with the second proviso to Regulation 11(2).

14. Argument of the appellants that the proceedings initiated against the appellants suffer from gross delay and laches and, therefore, the impugned order is liable to be quashed and set aside is without any merit, because, firstly, neither the SEBI Act nor the regulations framed thereunder prescribe any time limit for initiating proceedings against the persons who have violated the securities laws. Secondly, neither the SEBI Act nor the regulations framed thereunder provide that if there is delay in initiating proceedings, no action can be taken against the person who has committed violations of the securities laws.

15. Appellants contend that even if acquisition of shares through off market is not in consonance with Regulation 11(2), the said violation would be technical, procedural and venial breach and hence no action need be taken. There is no merit in the above contentions, because, the Parliament has considered such violations to be serious violations and, accordingly, provided penalty of ₹ 25 crore under Section 15H(ii) of SEBI Act. Therefore, argument of the appellants that the violations committed by them are technical, procedural or venial in nature cannot be accepted.

16. Various arguments advanced on behalf of the appellants namely (one) that there was no intention to violate the provisions of law, (two)

there were financial difficulties in running the company, (three) the violations did not have any impact on the price of the shares of the company, (four) there were no investor complaints, (five) there was no undue profits made by appellants and (six) the penalty imposed is disproportionate to the violations committed are totally unsustainable, because, once the violations are committed, then whether there was any intention to violate the provisions or not, whether there were financial difficulties or not, whether the violation had any impact on the share price or not, whether there was any investor compliant or not and whether, there was any undue profit or not, penalty imposable for violating Regulation 11(2) of the Takeover Regulations, 2011 would be not less than ₹ 25 crore.

17. In the instant case, SEBI by misconstruing the provisions contained in Section 15H(ii) of SEBI Act, has erroneously imposed penalty of ₹ 25 lac by treating the above factors as mitigating factors. In view of the decision of the Apex Court in case of SEBI vs. Roofit Industries Ltd. reported in (2016) 194 Comp. Cas. 186 (S.C.) which holds that mitigating factors set out in Section 15J are not applicable to violations covered under Section 15H(ii) as it stood prior to September 8, 2014, we were inclined to remand the matter to enable SEBI to take corrective measures. However, counsel for SEBI was not in favour of remand and sought dismissal of the appeal. Thus, in the facts of present case, where penalty of ₹ 25 lac is imposed as against the imposable penalty of ₹ 25 crore, the appellants are not justified in contending that the penalty imposed is disproportionate to the violations committed.

18. On account of certain arguments advanced by the counsel for appellants which were inconsistent with the pleadings on record, we, on conclusion of arguments had declared that we are dismissing the appeal

with costs quantified at ₹ 15,000/-. However, considering that for the lapse on part of the counsel, it would be improper to penalize the appellants, we refrain from imposing costs.

19. Accordingly, for all the aforesaid reasons, the appeal is dismissed with no order as to costs.

Sd/-
Justice J. P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

04.03.2016
Prepared & Compared by
PTM