BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on: 29.3.2019
Date of Decision : 1.5.2019

Appeal No.349 of 2018

M/s. Therm Flow Engineers Pvt. Ltd.
5th Floor, Kalpana Complex,
Near Memnagar Fire Station,
Navrangpura, Ahmedabad-380 009. ….. Appellant

Versus

Securities and Exchange Board of India
SEBI Bhawan, Plot C4-A,
G Block, Bandra-Kurla Complex,
Bandra (E), Mumbai - 400 051. …… Respondent

Mr. Somasekhar Sundaresan, Advocate with Mr. Abishek Venkataraman, Mr. Joby Mathew, Mr. Nikhil Shah, Advocates i/b. Joby Mathew & Associates for the Appellant.

Mr. Gaurav Joshi, Senior Advocate with Mr. Mihir Mody and Mr. Sushant Yadav, Advocates i/b. K. Ashar & Co. for the Respondent.

CORAM: Justice Tarun Agarwala, Presiding Officer
Dr. C.K.G. Nair, Member
Justice M.T. Joshi, Judicial Member

Per : Justice M.T. Joshi

1. The appellant is aggrieved by the order of the Whole Time Member (referred to hereinafter as 'WTM') in WTM/GM/EFD/442/ 2018-19 passed under Section 11 and 11B

of the Securities and Exchange Board of India Act, 1992 (referred to hereinafter as 'SEBI Act') and Regulation 32 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulation, 2011 (referred to hereinafter as the 'Takeover Regulations') dated July 25, 2018 whereunder the present appellant was directed to make public announcement to acquire shares of M/s. Patel Airtemp (India) Limited (hereinafter referred to as "Target Company") within a period of 45 days from the date of the order and to pay interest at the rate of ten percent per annum as detailed in the order. The appellant is promoter of the Target Company consisting of a consortium of individual promoters.

The Target Company in the disclosure made on 4th December, 2014 under Regulation 29(2) of the Takeover Regulations disclosed to SEBI that the appellant's holding in the Target Company increased from 24.74 percent to 25.04 percent as on December 3, 2014. This has occasioned due to acquisition of 15,000 shares (0.30%) from one promoter Prakash Patel through an inter se transfer between promoters made in the open market. The total promoter holding, however remained the same. However, since the shares were purchased for a price exceeding the exempted limit, in view of Regulation 3(1) read

with Regulation 3(3) of the Takeover Regulations the acquisition has allegedly triggered an open offer.

2. In view of the aforesaid fact, a show cause notice was issued on 29th July, 2016. The appellant pleaded that since the total holding of the promoters as collective unit remained the same, the provisions would not be applicable.

3. It is further claimed that under Regulation 3(1), the obligation to make a public announcement to acquire shares in accordance with the Takeover Regulations arises only when shareholding/voting rights of the acquirer to be clubbed with that of all persons acting in concert with the acquirer exceeds 25% or more of the voting rights of the target company. Therefore it wanted that the proceedings be dropped.

4. In the show cause notice, it was mentioned that the acquisition of 15,000 shares by inter se transfer on 26th November, 2014 was for Rs.180.15 per share. The volume-weighted average market price ("VWAMP") for the sixty trading days preceding the date of issuance of notice for the proposed inter se transfer i.e. preceding November 26, 2014 was Rs.141.40/- per share. As the acquisition price was more than 125 percent of the VWAMP it was not exempt under Regulation

10(1)(a)(ii) of the Takeover Regulations from the open offer obligation.

The appellant submitted that the actual price is higher beyond permissible limit of 125 percent of VWAMP by just Rs.3.40 per share. By implication the total consideration paid is higher by only Rs.51,000/- and, therefore, the appellant showed, his willingness to pay the said amount to the Investor Protection and Education Fund if so directed by SEBI.

5. The WTM took into consideration the provisions of the Takeover Regulations as detailed in the order. He came to the conclusion that in view of the provisions of the Takeover Regulations as the acquisition in question was inter se transfer of shares from one promoter entity to another promoter entity it could not be termed promoter entities having a common objective or purpose of acquisition but were rather acting in opposite directions. In the circumstances, it was found that there would be no exemption and the obligation of making an open offer of shares of the target company had triggered.

6. The next question remained regarding the action to be taken. WTM relied on the decision of this Tribunal in Appeal No.31 of 2011, Nirvana Holdings Pvt. Ltd. vs. Securities and Exchange Board of India decided on 8th September, 2011. It

was observed in this case that in case of violation of the Takeover Regulations, the normal rule would be to direct the entity to make public offer, and deviation from this rule can be made only on recorded findings that it would not be in the interest of the securities market.

7. In view of this ratio the WTM directed the appellant to make a public announcement to acquire the shares of the target company in accordance with the regulations within a period of 45 days.

8. The appellant was directed that alongwith the offer price, it shall pay interest at the rate of 10 percent from the date when it incurred liability to make the public announcement till the payment to the shareholders who were holding the shares in the target company on the date of violation after adjustment of dividend paid, if any. Hence the appeal.

9. Heard learned counsel Mr. Somasekhar Sundaresan assisted by Mr. Abishek Venkataraman, Mr. Joby Mathew, and Mr. Nikhil Shah for the Appellant and Mr. Gaurav Joshi, Senior Advocate assisted by Mr. Mihir Mody and Mr. Sushant Yadav, for the Respondent.

Mr. Somasekhar Sundaresan, learned counsel for the appellant submitted before us that the appellant now does not

dispute that the acquisition of 0.30 percent of the shares had triggered Regulation 3(1) read with Regulation 3(3) of the Takeover Regulations though the sale and purchase of shares was between the promoters through open market. He however submitted that the considering the nature and extent of the transaction that the same was between the promoters and only to the extent of 0.30 percent, the WTM ought to have taken route of directing to deposit the amount of Rs.51,000/- to the Investor Protection and Education Fund as established by SEBI as per the provisions of Rule 32(1)(b) instead of issuing directions to make public announcement to acquire shares or to pay interest as detailed above. He submitted while the WTM has placed reliance on the decision Nirvana (supra), this decision in the said case is already stayed by the Hon'ble Supreme Court.

10. He points out that subsequent to the impugned order the WTM in another case i.e. WTM/RKA/CFD-DCR/01/2015 dated 5th January, 2015 did not direct for public announcement to acquire shares or to pay interest as directed in the present case but directed to disinvest the shares through sale to different parties and to transfer of the entire proceeds of such sale of shares to the Investor Protection and Education Fund. He

therefore submitted that the appeal may be allowed on the above terms.

11. Learned senior counsel for the respondent Mr. Gaurav Joshi however relying on the decision in SEBI vs. Kishore R. Ajmera [(2016) 6 SCC 368] and Nirma Industries Ltd and Anr vs. SEBI [(2013) 8 SCC 20] submitted that the order of the WTM cannot be faulted with.

12. In our considered opinion the direction of the WTM needs to be varied for the following reasons.

Reasons

13. Rule 32 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 provides as under:

"Power to issue directions.

32.(1) Without prejudice to its powers under Chapter VIA and section 24 of the Act, the Board may, in the interest of investors in securities and the securities market, issue such directions as it deems fit under section 11 or section 11B or section 11D of the Act, including,

(a) directing divestment of shares acquired in violation of these regulations, whether through public auction or in the open market, or through an offer for sale under the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, and directing the appointment of a merchant banker for such divestiture;
(b) directing transfer of the shares, or any proceeds of a directed sale of shares acquired in violation of these regulations to the Investor Protection and

> Education Fund established under the Securities and change Board of India (Investor Protection and Education Fund) Regulations, 2009;……"

14. As regard the decision in Nirvana, relied in the impugned order, it is to be noted that 1.17 percent of the shares in excess of prescribed limit of the target company were acquired by the promoters from other shareholder as against the Regulation 11(1) of the Takeover Regulations. In those circumstances, it was observed by this Tribunal that when substantive shares are acquired in violation of the Takeover Regulations normal rule would be to direct the acquirer to make public announcement.

15. Besides, in the matter of acquisition of shares of Kaycee Industries Limited in WTM/RKA/CFD-DCR/01/2015 dated January 5, 2015, finding that there was acquisition of only 0.23 percent between the promoters of the target company the WTM directed for disinvestment of those shares through sale in small lot and transfer the entire proceeds of the sale of such shares to the Investor Protection and Education Fund.

16. In the present case, we have found that the acquisition is of miniscule proportion above the permitted limit, that too between the promoters. In the case of Nirma (supra) the Hon'ble Supreme Court in para 17 observed that in the given set of circumstances of that case the withdrawal of the open offer to

acquire 20 percent of shared of the Company was neither in the interest of the investor nor in the development of the securities market. Thus, the case of Nirma was decided in its own circumstances.

17. In the case of Kishore Ajmera (supra), the Hon'ble Supreme Court found that the manipulative and fraudulent market practices are required to be curbed by brining a comparative legislative to bring about some clarity and certainty which cannot be disputed.

Considering all the aspects of the case that violation of the Takeover Regulation is only to the extent of 0.04 percent and that too due to transfer of shares between the promoters via open market, in our view the direction of the WTM to make public announcement to acquire shares would be disproportionate. In the circumstance, the directions as provided by Rule 32(1)(b) of the Takeover Regulations as cited supra would meet the ends of justice. The appellant can be directed to transfer 0.04 percent shares i.e. 2000 shares through open market and to direct to deposit an amount of Rs.3,60,300/- (2000 shares x Rs.180.15 : purchase price) in the Investor Protection and Education Fund would meet the ends of justice. Hence the following order:

Order

1. The appeal is hereby partly allowed. The order of the WTM directing the appellant to make public announcement to acquire shares of the target company and to pay interest at the rate of 10 percent as detailed in the order is hereby set aside.

2. Instead it is hereby directed that the appellant shall transfer 2000 shares in open market within a period of 4 weeks and shall deposit an amount of Rs.3,60,300 in the Investor Protection and Education Fund established by SEBI within a period of six weeks from the date of this order.

3. In default, the amount shall carry interest at the rate of 12 percent p.a. from the date of this order till the date of deposit.

Sd/-
Justice Tarun Agarwala
Presiding Officer

Sd/-
Dr. C. K. G. Nair
Member

Sd/-
Justice M.T. Joshi
Judicial Member

1.5.2019
Prepared and compared by
RHN