

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Hearing : 27.01.2020

Date of Decision : 17.03.2020

Appeal No. 184 of 2018

1. Susheel Somani
403, Olympus,
Altamount Road,
Mumbai - 400026.
2. Rajendra Somani
Shreeniketan, 86-A,
N. S. Road,
Mumbai - 400002.
3. Mridula Somani
Shreeniketan, 86-A,
N. S. Road,
Mumbai - 400002.
4. Vandana Somani
Shreeniketan, 86-A,
N. S. Road,
Mumbai - 400002.
5. Surendra Somani
Shreeniketan, 86-A,
N. S. Road,
Mumbai - 400002.
6. Adarsh Somani
Shreeniketan, 86-A,
N. S. Road,
Mumbai - 400002.
7. Suhrid Somani
403, Olympus,

Altamount Road,
Mumbai - 400026.

8. Jaya Somani
403, Olympus,
Altamount Road,
Mumbai - 400026.

9. Hridai Somani
403, Olympus,
Altamount Road,
Mumbai - 400026.

10. Koprani Lab Pvt. Ltd.
Parijat House, 1076,
Dr. E. Moses Road,
Worli, Mumbai - 400018.

11. SV Trading & Agencies Ltd.
Parijat House, 1076,
Dr. E. Moses Road,
Worli, Mumbai - 400018.

..... Appellants

Versus

Securities & Exchange Board of India
SEBI Bhavan, Plot No. C-4A, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai - 400 051.

... Respondent

Ms. Rishika Harish, Advocate with Ms. Rakshita Poddar, Mr. Aditya Bhansali, Advocates i/b Mindspright Legal for the Appellants.

Mr. Kumar Desai, Advocate with Mr. Kaushal Parsekar, Ms. Tanvi Rana, Advocates i/b Legasis Partners for the Respondent.

CORAM : Dr. C. K. G. Nair, Member
Justice M. T. Joshi, Judicial Member

Per : Justice M. T. Joshi, Judicial Member

1. Aggrieved by the order of the Adjudicating Officer (hereinafter referred to as 'AO') of the respondent Securities & Exchange Board of India (hereinafter referred to as 'SEBI') dated December 27, 2017 imposing a penalty of Rs. 15 lacs for violation of provisions of Regulation 3(2) read with Regulation 13(1) of the Securities & Exchange Board of India (Substantial Acquisition of Shares & Takeovers) Regulations, 2011 (hereinafter referred to as 'SAST Regulations, 2011'), the present appeal is preferred.

2. The record would show that during the quarter ending June 30, 2012, appellant No. 1 Susheel Somani had acquired 31,680 shares of Svaraj Trading and Agencies Ltd. (hereinafter referred to as 'the company') by way of inter se transfer between the promoters i.e. from two other promoters, namely, Shree Satyanarayan Properties Pvt. Ltd. and Kramer Pharmaceuticals Pvt. Ltd. He also was a promoter of the company during the relevant period. This acquisition of shares had increased the shareholding of the appellant No. 1 Susheel Somani from 0.35% to 31.68%. Since the shares were acquired without making any public announcement as stipulated under Regulation 3(1) read with Regulation 13(1) of the SAST Regulations, 2011, it was alleged by the respondent SEBI that the

Appellant No. 1 has violated the provisions of Regulation 3(1) read with Regulation 13(1) of the SAST Regulations, 2011.

3. It was also alleged that such acquisition of the shares by appellant No. 1 Susheel Somani led to the increase in the collective shareholding of all the appellants - the promoters, from 29.42% to 61.10% which was more than threshold limit of 5%. Therefore, all the appellants were required to make public announcement as stipulated under Regulation 3(2) read with Regulation 13(1) of the SAST Regulations, 2011. However, as no public announcement was made, it was alleged that all the present appellants have also additionally violated the provisions of Regulation 3(2) read with Regulation 13(1) of the SAST Regulations, 2011.

4. So far as the violation alleged to have been committed by the appellant No. 1 Susheel Somani is concerned, a penalty of Rs. 15 lacs was imposed upon him. He challenged the said order before this Tribunal vide Appeal No 273 of 2014. However, subsequently he withdrew the appeal with permission to pay the penalty. The same was granted.

5. So far as the second violation as detailed in paragraph No. 3 above is concerned, it is now the bone of the contention between the parties. By the very common order the then AO of the respondent SEBI also imposed a penalty of Rs. 15 lacs for violation of Regulation 3(2) read with Regulation 13(1) of the SAST Regulations, 2011. The appellants had filed Appeal No. 274 of 2014 challenging the said order. Vide order dated March 1, 2016, this Tribunal remanded the matter back to the AO for passing fresh order on merit.

6. After remand, the appellants contended before the AO that there was no violation of Regulation 3(2) read with Regulation 13(1) of the SAST Regulations, 2011. They also pleaded that since the transfer was inter se between the promoters, the same was exempted from making a public announcement as provided by Regulation 10 of the SAST Regulations. They contended that two of the entities who had transferred the shares to the appellant No. 1 Susheel Somani continued to be promoter and, therefore, it was an inter se transfer.

7. The AO rejected both the contentions of the appellants. It was held by him that two entities who had transferred the shares to Susheel Somani cannot be held as 'persons acting in concert' within the meaning of the SAST Regulations as the intention of the seller

and the buyer would be different. As regard the exemption, the AO found that while Regulation 10 of the SAST Regulations provides for making disclosures to the stock exchanges and to the company within a period of two working days. In the present case, the appellants made the disclosures on 7th day. Therefore, according to the AO the exemption would not be applicable. Hence the penalty came to be imposed.

8. We have heard Ms. Rishika Harish, the learned counsel with Ms. Rakshita Poddar, Mr. Aditya Bhansali, the learned counsel for the Appellants and Mr. Kumar Desai, the learned counsel with Mr. Kaushal Parsekar, Ms. Tanvi Rana, the learned counsel for the Respondent.

9. Regulation 3(2) and Regulation 13(1) of the SAST Regulations 2011 are as under :-

“3(2). No acquirer, who together with persons acting in concert with him, has acquired and holds in accordance with these regulations shares or voting rights in a target company entitling them to exercise twenty-five per cent or more of the voting rights in the target company but less than the maximum permissible non-public shareholding, shall acquire within any financial year additional shares or voting rights in such target company entitling them to exercise more than five per cent of the voting rights, unless the acquirer makes a public announcement of an open offer for acquiring shares of

such target company in accordance with these regulations:

Provided that such acquirer shall not be entitled to acquire or enter into any agreement to acquire shares or voting rights exceeding such number of shares as would take the aggregate shareholding pursuant to the acquisition above the maximum permissible non-public shareholding.

Provided further that, acquisition pursuant to a resolution plan approved under section 31 of the Insolvency and Bankruptcy Code, 2016 (No. 31 of 2016) shall be exempt from the obligation under the proviso to the sub-regulation (2) of regulation 3.

Explanation.—For purposes of determining the quantum of acquisition of additional voting rights under this sub-regulation,—

(i) *gross acquisitions alone shall be taken into account regardless of any intermittent fall in shareholding or voting rights whether owing to disposal of shares held or dilution of voting rights owing to fresh issue of shares by the target company.*

(ii) *in the case of acquisition of shares by way of issue of new shares by the target company or where the target company has made an issue of new shares in any given financial year, the difference between the pre-allotment and the post-allotment percentage voting rights shall be regarded as the quantum of additional acquisition.”*

“13. (1) The public announcement referred to in regulation 3 and regulation 4 shall be made in accordance with regulation 14 and regulation 15, on the date of agreeing to acquire shares or voting rights in, or control over the target company.”

10. We find the definition of the term ‘person acting in concert’ in SAST Regulations, 2011, which reads as under :-

“2(q). — *“persons acting in concert” means,—*

- (1) *persons who, with a common objective or purpose of acquisition of shares or voting rights in, or exercising control over a target company, pursuant to an agreement or understanding, formal or informal, directly or indirectly co-operate for acquisition of shares or voting rights in, or exercise of control over the target company.*
- (2) *Without prejudice to the generality of the foregoing, the persons falling within the following categories shall be deemed to be persons acting in concert with other persons within the same category, unless the contrary is established,—*
 - (i) *a company, its holding company, subsidiary company and any company under the same management or control;*
 - (ii) *a company, its directors, and any person entrusted with the management of the company;*
 - (iii) *directors of companies referred to in item (i) and (ii) of this sub-clause and associates of such directors;*
 - (iv) *promoters and members of the promoter group;*
 - (v) *immediate relatives;*

- (vi) *a mutual fund, its sponsor, trustees, trustee company, and asset management company;*
- (vii) *a collective investment scheme and its collective investment management company, trustees and trustee company;*
- (viii) *a venture capital fund and its sponsor, trustees, trustee company and asset management company;*
- [(viiia) an alternative investment fund and its sponsor, trustees, trustee company and manager;]*
- (ix) 5 [***]
- (x) *a merchant banker and its client, who is an acquirer;*
- (xi) *a portfolio manager and its client, who is an acquirer;*
- (xii) *banks, financial advisors and stock brokers of the acquirer, or of any company which is a holding company or subsidiary of the acquirer, and where the acquirer is an individual, of the immediate relative of such individual:*

Provided that this sub-clause shall not apply to a bank whose sole role is that of providing normal commercial banking services or activities in relation to an open offer under these regulations;

- (xiii) *an investment company or fund and any person who has an interest in such investment company or fund as a shareholder or unitholder having not less than 10 per cent of the paid-up*

capital of the investment company or unit capital of the fund, and any other investment company or fund in which such person or his associate holds not less than 10 per cent of the paid-up capital of that investment company or unit capital of that fund:

Provided that nothing contained in this sub-clause shall apply to holding of units of mutual funds registered with the Board;

Explanation.—For the purposes of this clause - “associate” of a person means,—

- (a) any immediate relative of such person;*
- (b) trusts of which such person or his immediate relative is a trustee;*
- (c) partnership firm in which such person or his immediate relative is a partner; and*
- (d) members of Hindu undivided families of which such person is a coparcener;”*

11. A reading of the definition itself would show that there should be common objective of purchase of shares or voting rights amongst the members to make them persons acting in concert. In the present case, while two promoters had an objective to dispose of their shares, the appellant No. 1 Susheel Somani had an objective to acquire the shares. This itself would show that there was no common cause between the appellant No. 1 Susheel Somani and the two transferors. Therefore, though the promoter group holdings in the company

remained constant, the same would be irrelevant as observed by the AO. The order to that extent cannot be faulted with.

12. The question however remains as to whether the appellants were exempted from making a public announcement. In this regard, it would be relevant to advert to the provisions of Regulation 10 and Regulation 29 of the SAST Regulations, 2011 which reads as under :-

“10. (1) The following acquisitions shall be exempt from the obligation to make an open offer under regulation 3 and regulation 4 subject to fulfillment of the conditions stipulated therefor,—

(a) acquisition pursuant to inter se transfer of shares amongst qualifying persons, being,—

(i) immediate relatives;

(ii) persons named as promoters in the shareholding pattern filed by the target company in terms of the listing agreement or these regulations for not less than three years prior to the proposed acquisition;

(iii) a company, its subsidiaries, its holding company, other subsidiaries of such holding company, persons holding not less than fifty per cent of the equity shares of such company, other companies in which such persons hold not less than fifty per cent of the equity shares, and their subsidiaries subject to control over such qualifying

persons being exclusively held by the same persons;

- (iv) persons acting in concert for not less than three years prior to the proposed acquisition, and disclosed as such pursuant to filings under the listing agreement;*
- (v) shareholders of a target company who have been persons acting in concert for a period of not less than three years prior to the proposed acquisition and are disclosed as such pursuant to filings under the listing agreement, and any company in which the entire equity share capital is owned by such shareholders in the same proportion as their holdings in the target company without any differential entitlement to exercise voting rights in such company:*

Provided that for purposes of availing of the exemption under this clause,—

- (i) If the shares of the target company are frequently traded, the acquisition price per share shall not be higher by more than twenty-five per cent of the volume-weighted average market price for a period of sixty trading days preceding the date of issuance of notice for the proposed inter se transfer under sub-regulation (5), as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period, and if the shares of the target company are infrequently traded, the acquisition price shall not be higher by more than twenty-*

five percent of the price determined in terms of clause (e) of sub-regulation (2) of regulation 8; and

- (ii) the transferor and the transferee shall have complied with applicable disclosure requirements set out in Chapter V.”*

The provisions of Regulation 29 in Chapter V are as under :-

“29.(1) Any acquirer who acquires shares or voting rights in a target company which taken together with shares or voting rights, if any, held by him and by persons acting in concert with him in such target company, aggregating to five per cent or more of the shares of such target company, shall disclose their aggregate shareholding and voting rights in such target company in such form as may be specified.

(2) Any person, who together with persons acting in concert with him, holds shares or voting rights entitling them to five per cent or more of the shares or voting rights in a target company, shall disclose the number of shares or voting rights held and change in shareholding or voting rights, even if such change results in shareholding falling below five per cent, if there has been change in such holdings from the last disclosure made under sub-regulation (1) or under this sub-regulation; and such change exceeds two per cent of total shareholding or voting rights in the target company, in such form as may be specified.

(3) The disclosures required under sub-regulation (1) and sub-regulation (2) shall be made within two working days of the receipt of intimation of allotment of shares, or the acquisition of shares or voting rights in the target company to,—

- (a) every stock exchange where the shares of the target company are listed; and*

(b) the target company at its registered office.

(4) For the purposes of this regulation, shares taken by way of encumbrance shall be treated as an acquisition, shares given upon release of encumbrance shall be treated as a disposal, and disclosures shall be made by such person accordingly in such form as may be specified:

***Provided** that such requirement shall not apply to a scheduled commercial bank or public financial institution as pledgee in connection with a pledge of shares for securing indebtedness in the ordinary course of business.”*

13. It is an admitted fact that the appellants have made requisite disclosures on 7th day as against the provisions of Regulation 29(3) that the disclosures are required to be made within two working days. Thus, technically the appellants were not exempted from making public announcement and, thus, are in violation of the relevant regulations. The AO has observed that as the condition of making disclosures within two working days is not fulfilled, the act was not fit for grant of exemption. In the circumstances, the penalty was imposed.

14. While determining the quantum of penalty, the AO has taken into consideration the provisions of Section 15J of the Securities and Exchange Board of India Act, 1992 which reads as under :-

“15J. While adjudging quantum of penalty under section 15-I, the adjudicating officer shall have due regard to the following factors, namely :-

(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 investors or group of investors as a result of the default;

(c) the repetitive nature of the default.”

15. The AO took into consideration the mitigating factors that the interest of the shareholders of the target company is not jeopardized and the penalty of Rs. 15 lacs was imposed.

16. In our view, the AO has not considered the fact that the appellants made the disclosures though belatedly after five days as required by Regulation 29 of the SAST Regulations. Thus, it was a technical breach and, therefore, in our view instead of imposing a penalty of Rs. 15 lacs, a penalty of Rs. 5 lacs would have been just and sufficient. In the result, the following order.

ORDER

1. The appeal is partly allowed.
2. The order of the AO to the extent of quantum of penalty is hereby set aside.
3. It is hereby directed that the appellants shall pay the penalty of Rs. 5 lacs in terms of the directions of the impugned order.

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

Sd/-
Justice M. T. Joshi
Judicial Member

17.03.2020
Prepared & Compared by
PTM