BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Decision:12.5.2023

Appeal No.442 of 2023

1. Ferryden International Ltd.
   Ground Floor, Coastal Building,
   Wickhams Cay II,
   PO Box 3169 Tortola,
   British Virgin Islands,
   VG-1110.

2. Mr. Ashok Bhandari
   Abhipusha Bungalows,
   Thaltej Shilaj Road,
   Jayendra Park CHS,
   Ahmedabad-380059,
   Gujarat, India. ...Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No.C4-A,
G Block, Bandra Kurla Complex,
Mumbai – 400 021, India. …Respondent

Mr. Somasekhar Sundaresan, Advocate with Mr. Robin Shah and Mr. Abishek Venkataraman, Advocates i/b. Bodhi Legal for Appellants.

Mr. Gaurav Joshi, Senior Advocate with Mr. Ravishekhar Pandey, Ms. Shefali Shankar and Ms. Rasika Ghate, Advocates i/b. MDP & Partners for the Respondent.

CORAM: Justice Tarun Agarwala, Presiding Officer
Ms. Meera Swarup, Technical Member

Per: Justice Tarun Agarwala, Presiding Officer (Oral)

1. The appellants have filed the present appeal questioning the veracity of the order dated 16th March, 2023 passed by the Chief General Manager of Securities and Exchange Board of India (hereinafter referred to as 'CGM') directing the appellants to make an open offer within 15 days and pay interest at the rate of 10% p.a. with effect from 12th March, 2007 on the consideration amount to the shareholders who accepted the open offer.

2. In addition to the aforesaid, a penalty of Rs.10,00,000 has been imposed on the appellants to be paid, jointly and severally, and have also been

restrained from accessing the securities market till compliance of the open offer is made.

3. The facts leading to the filing of the present appeal is, that an investigation in the scrip of Electrotherm (India) Ltd. was conducted for possible violation of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as 'SAST Regulations) during the period 2005 to 31st March, 2007. The investigation revealed that two Singapore based companies known as 'Castleshine Pte Ltd.' and 'Leadheaven Pte Ltd.' cumulatively held 18% in the target Company. These two companies were allotted 10,00,000 warrants on 9th September, 2005 which were converted into 10,00,000 equity shares on 27th February, 2007. As a result of the conversion of warrants into equity shares Castleshine Pte Ltd., held 10.95% and Leadheaven Pte Ltd., held 10.95% of the

shareholding of the target Company as on 31st March, 2007.

4. Appellant no.1, Ferryden International Ltd. is a Company incorporated in British Virgin Islands and is owned 100% by Mr. Ashok Bhandari, Appellant No.2.

5. On 12th March, 2007, the appellants acquired Castleshine Pte Ltd. and Leadheaven Pte Ltd., as a result of which the appellants, i.e. noticee nos.1 and 2 acquired more than 15% of the equity shares of the target Company and, consequently, triggered compliance for making a public announcement by way of an open offer to acquire the shares of the target Company in accordance with Regulation 10 of the SAST Regulations, 1997.

6. Admittedly, the appellants failed to make a public announcement. Complaints in this regard were made in January, February, May and July, 2019. It has also come on record that the appellants made the necessary

disclosures to the stock exchange in 2019. Based on the complaint, an investigation was made which led to the issuance of the show cause notice dated 13th December, 2021 calling upon the appellants to show cause as to why appropriate directions including penalty should not be imposed under Section 11 and 11B of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as 'SEBI Act) read with Regulation 44 of the SAST Regulations. The CGM after considering the material evidence on record held that there was no undue delay in the initiation of the proceedings and having found that the appellants had not made an open offer held that Regulation 10 of the SAST Regulations was triggered in March, 2007. The CGM while exercising its discretion directed that under Regulation 44 the appellant should make an open offer and pay interest at the rate of 10% from 12th March, 2007 to the date of payment of consideration to

the shareholders of the target Company whose shares are accepted in the open offer.

7. We have heard Mr. Somasekhar Sundaresan, Advocate assisted by Mr. Robin Shah and Mr. Abishek Venkataraman, Advocates for the appellants and Mr. Gaurav Joshi, Senior Advocate assisted by Mr. Ravishekhar Pandey, Ms. Shefali Shankar and Ms. Rasika Ghate, Advocates for the respondent.

8. Since there are no disputed facts, the appeal is being decided at the admission stage itself without calling for a reply. Admittedly, the acquisition was made on 12th March, 2007. Since the acquisition was more than 15% it triggered the compliance of Regulation 10 by way of making a public announcement for an open offer. Admittedly, this was not done.

9. We find that a plea of delay in the initiation of proceedings was taken. It was urged that there was undue delay in the initiation of proceedings as the

acquisition was made in the year 2007 and that the show cause notice was issued after 14 years on 13th December, 2021.

10. Upon perusal of the records, we are satisfied that there is no undue delay in the initiation of the proceedings in as much as the acquisition was not made public by the appellants and that it came to the knowledge of the authorities only in 2019 pursuant to which an investigation was initiated and show cause notice was issued on 2021. Thus, there is no undue delay in the initiation of the proceedings.

11. The CGM has directed the appellants to make an open offer considering Regulation 44 of the SAST Regulations and relying upon a decision of this Tribunal in ***Nirvana Holdings P. Ltd. vs. SEBI, Appeal No.31 of 2011 decided on 8th September, 2011,*** wherein this Tribunal held that whenever an acquirer violates Regulations 10, 11 and 12 of the SAST

Regulations by not making a public announcement then the acquirer should be directed to comply with the provisions by making a public announcement. Based on this order, the CGM has directed the appellants to make an open offer under Regulation 44.

12. If there is a violation of Regulation 10, then a direction can be issued under Regulation 44 of the SAST Regulations and penalty can also be imposed under Regulation 35 and Section 15H of the SEBI Act. For facility, the said provisions are extracted hereunder:

Regulation 44

—Directions by the Board.

44. Without prejudice to its right to initiate action under Chapter VIA and section 24 of the Act, the Board may, in the interest of securities market or for protection of interest of investors, issue such directions as it deems fit including:-

(a) directing appointment of a merchant banker for the purpose of causing disinvestment of shares acquired in breach

of regulation 10, 11 or 12 either through public auction or market mechanism, in its entirety or in small lots or through offer for sale;

(b) directing transfer of any proceeds or securities to the Investors Protection Fund of a recognised stock exchange;

(c) directing the target company or depository to cancel the shares where an acquisition of shares pursuant to an allotment is in breach of regulation 10, 11 or 12;

(d) directing the target company or the depository not to give effect to transfer or further freeze the transfer of any such shares and not to permit the acquirer or any nominee or any proxy of the acquirer to exercise any voting or other rights attached to such shares acquired in violation of regulation 10, 11 or 12;

(e) debarring any person concerned from accessing the capital market or dealing in securities for such period as may be determined by the Board;

(f) directing the person concerned to make public offer to the shareholders of the target company to acquire such number of shares at such offer price as determined by the Board;

(g) directing disinvestment of such shares as are in excess of the percentage of the shareholding or voting rights specified for disclosure requirement under regulation 6, 7 or 8;

(h) directing the person concerned not to dispose of assets of the target company contrary to the undertaking given in the letter of offer;

(i) directing the person concerned, who has failed to make a public offer or delayed the making of a public offer in terms of these regulations, to pay to the shareholders, whose shares have been accepted in the public offer made after the delay, the consideration amount along with interest at the rate not less than the applicable rate of interest payable by banks on fixed deposits.‖

Regulation 45

Penalties for non-compliance.

45. (1) Any person violating any provisions of the regulations shall be liable for action in terms of the regulations and the Act.

(2) If the acquirer or any person acting in concert with him, fails to carry out the obligations under the regulations, the entire or a part of the sum in the escrow account shall be liable to be forfeited and the acquirer or such a person shall also be liable for action in terms of the regulations and the Act.

(3) The board of directors of the target company failing to carry out the obligations under the

regulations shall be liable for action in terms of the regulations and the Act.

(4) The Board may, for failure to carry out the requirements of the regulations by an intermediary, initiate action for suspension or cancellation of registration of an intermediary holding a certificate of registration under section 12 of the Act:

Provided that no such certificate of registration shall be suspended or cancelled unless the procedure specified in the regulations applicable to such intermediary is complied with.

(5) For any mis-statement to the shareholders or for concealment of material information required to be disclosed to the shareholders, the acquirers or the directors where the acquirer is a body corporate, the directors of the target company, the merchant banker to the public offer and the merchant banker engaged by the target company for independent advice would be liable for action in terms of the regulations and the Act.

(6) The penalties referred to in sub-regulations (1) to (5) may include:-

(a) criminal prosecution under section 24 of the Act;

(b) monetary penalties under section 15H of the Act;

(c) directions under the provisions of section 11B of the Act;

(d)directions under section 11(4) of the Act;

(e) cease and desist order in proceedings under section 11D of the Act;

(f) adjudication proceedings under section 15HB of the Act.‖

Section 15H of the SEBI Act

—15H. Penalty for non-disclosure of acquisition of shares and take-overs.-

If any person, who is required under this Act or any rules or regulations made thereunder, fails to—

(i).....

(ii) make a public announcement to acquire shares at a minimum price,

(iii).....
he shall be liable to a penalty which shall not be less than ten lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher.‖

13. The aforesaid provisions have been interpreted by the Supreme Court in ***Sunil Krishna Khaitan v. SEBI (2023) 2 SCC 643*** *as under:*

> *—79. Regulation 44 states that the Board, without prejudice to their rights to initiate action under Chapter VI-A56 and Section 2457 of the Act, may in the interest of the securities market or for protection of the interests of the investors, issue such directions as it may deem fit. Thereafter, it specifies certain directions in clauses (a) to (i), using the word ‗including', which implies that the directions issued by the Board can include the directions given in clauses (a) to (i), albeit the Board may issue directions even beyond what is stated in clauses (a) to (i). Thus, the Board's power to give directions is wide. This is also clear from the relevant provisions of the Act, namely, Section 11 and 11B and Sections 1(2)(h), which read:*
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> ***—11. Functions of Board****. – (1) Subject to the provisions of this Act, it shall be the duty of the Board to protect the interest of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit.*
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> ***11-B. Power to issue directions****. – Save as otherwise provided in section 11, if after making or causing to be made an enquiry, the Board is satisfied that it is necessary –*

(i) in the interest of investors, or orderly development of securities market; or

(ii) to prevent the affairs of any intermediary or other persons referred to in section 12 being conducted in a manner detrimental to the interest of investors of securities market; or

(iii) to secure the proper management of any such intermediary or person,

it may issue such directions –

(a) to any person or class of persons referred to in section 12, or associated with the securities market; or

(b) to any company in respect of matter specified in section 11-A, As may be appropriate in the interests of investors in securities and the securities market.‖

11(2) Without prejudice to the generality of the foregoing provisions, the measures referred to therein may provide for:

(h) Regulating substantial acquisition of shares and take- over of companies;"

80. The use of the word _may' in Regulation 44 and the wording of Section 11(1), 11B and 11(2)(h) reflect that the Board has been conferred a discretion, which in turn also means and should be interpreted as imposing a duty, an aspect which we will elucidate in the

subsequent paragraphs. Use of the word _may' over the years is normally construed as permissive and not imperative. The words _may' or _shall' by their very etymological foundation denote discretion and mandatory nature of an act respectively. This Court has, therefore, held that the courts should not readily interpret the word _may' as _shall' unless such interpretation is necessary to avoid absurdity, inconvenient consequences or as mandated by the intent of the legislature which is gathered from the other parts of the statute.

81. Use of the word _may' and not _shall' in Regulation 44 is significant. It is not mandatory that in case of every violation and breach of Regulations 10, 11 and 12, direction under Regulation 44 shall be issued. The interpretation gets fortified in view of the words and object of the Regulation 44 which empowers the Board to issue directions as it deems fit. Section 11(1), while broadly defining the functions of the Board, states that it is the duty of the Board to protect interest of investors in securities and to promote the development of, and regulate the securities market by such measures as it thinks fit. Section 11B, which deals with the power of the Board to give directions, states that the Board, after making or causing an inquiry, may issue directions if it is satisfied that it is necessary in the interest of the investors, or orderly development of the securities market; to prevent the affairs of any intermediary or other persons referred to in Section 12 from conducting affairs in a manner detrimental to the interest of the

investors or to secure proper management of such intermediary or persons. Section 11(2)(h) provides that the Board is entitled to take measures for regulating substantial acquisition of shares and takeover of companies. Regulation 44 states that the Board while issuing directions, has to keep in mind the interest of the securities market and its role as a protector of interest of investors. We will read the word _or' between the expression _in the interest of securities market or protection of investors' as _and'. The Board, therefore, when it decides to exercise its power under Regulation 44 and issues directions under the said Regulation has to keep the two facets in mind, namely, (i) interest of the securities market; and (ii) protection of interest of the investors. The exercise of discretion of the Board, in fact, would not be restricted to the two facets mentioned above as the power and functions of the Board are far broader as they include promotion, development and regulation of securities market as a whole and regulating substantial acquisition of shares and takeover of companies.

82. Discretion is an effective and an important tool which the legislature confers and vests with the executive for effective and good governance, administration, and in the present case – regulation, of the securities market which has complex commercial and economic facets. Therefore, the law provides an option to the Board and the authorities to adopt one or the other alternatives. However, this does not mean that the Board or the authorities enjoy unfettered and unchecked discretionary jurisdiction to act

according to private or personal opinion in a vague and fanciful manner. Discretion, when of wide amplitude, and when it can have civil and penal consequences, must be exercised in a legal and regular manner. Exercise of discretion is always governed by rules, which means that the exercise of discretion should be fair and reasonable as the legislature while conferring discretion never intends that the authorities would not act whimsically, arbitrarily, but on the precept that they shall act only when it appears to be necessary in public interest. Legal exercise of discretion is one, where the authority examines and ascertains the facts, is aware of the law, and then decides objectively and rationally what serves the interest better. This is true even when the statutes are silent and only the power is conferred to act in one way or the other. Reasonableness as a standard is tested by reference to the community standards at the time of exercise of discretion. This means that discretion should be exercised within the limit to which an honest man competent to discharge his office ought to confine himself. It will be also true to state that the greater the harm or penal consequences, greater is the duty and obligation of the public authority to ensure that discretion is used as an effective tool in regulation or administration but does not cause confusion, chaos and instability.

83. In the context of Regulations 44 and 45, it implies that the Board has the power to make a choice between different courses of action or inaction. This choice is not unfettered but is always held subject to implied limitations

inherent in every statute, limitations set by the common law and the constitutional mandate of rule of law. The underlying rationale of giving discretion is to ensure that the Board exercises the discretion in consonance with legitimate values of public law, which include need to maintain legal certainty and consistency which are at the heart of the principle of rule of law. These have to be balanced with other equally legitimate public law value, which is the object and purpose of the enactment. The need for the said flexibility is given and is necessary to meet unusual and practical situations and to do justice in a particular case. The remedial order passed by the Board as the regulator must also meet the said parameters in addition to meeting the requirements of the enactment.

84. Clearly, therefore, Regulation 44 differs from Section 15-H, which is somewhat a strict liability provision that applies if a person fails to comply with the clauses (i) to (iv). It may be, however, noted that Section 15-H prescribes the lower as well as the higher monetary penalty limits. These stipulations have undergone modifications and changes from time to time. As per the amendments made by Act No. 59 of 2002, with retrospective effect from 29th October 2002, the penalty which can be imposed is not to be less than Rs.10,00,000/- but may extend up to Rs.25,00,00,000/- or three times the amount of profits made out of such failure, whichever is higher. The phase _profits made out of such failure' in Section 15-H indicates that while imposing quantum of penalty the authority should consider the profit made by the acquirer on

account of failure to comply with the requirements mentioned in clauses (i) to (iv) of Section 15-H.

85. Reference in this regard is also to be made to Section 15-I, which has been quoted above. It states that the person concerned has to be given a reasonable opportunity of being heard for the purpose of imposing any penalty. The adjudicating officer has the power to summon and enforce attendance of any person acquainted with the facts and circumstances of the case to give evidence or produce documents which, in the opinion of the adjudicating officer, would be useful or relevant to the subject matter of enquiry. Lastly, the adjudicating authority should be satisfied that the person has failed to comply with the provisions of the section specified in sub-section (1).

86. In this context, reliance placed by the Board on the judgments which relate to and arise from the orders passed by the adjudicating officer under Chapter VI-A of the Act are of no relevance, as Regulation 44 is a discretionary power and not mandatory in nature. Not only this, the directions under Regulation 44 are required to be considering relevant factors, including, interest of the securities market and protection of the investors in mind. Regulation 44 is not a strict liability provision.

87. The above position in law gets fortified from Regulation 45 which stipulates that any person violating a provision of the regulations shall be liable in terms of the Regulation, that is, the

Takeover Regulations 1997 and the Act. Sub-regulation (6) to Regulation 45, with reference to the penalties, states that it would include monetary penalties under Section 15-H of the Act. It may also include directions under the provisions of Section 11B and 11(4) of the Act. Further, there is power to issue cease and desist order in proceedings under Section 11D of the Act. Criminal prosecution under Section 24 of the Act can also be initiated. Lastly, adjudicating proceedings under Section 15-H of the Act can be held. Therefore, the authorities have a right to take recourse to multiple proceedings which have been loosely classified and referred to as ‗penalties' in Regulation 45(6). Nowhere, however, Regulation 45 stipulates that in case of violation of Regulations 10, 11 or 12 of the Takeover Regulations 1997, the Board must initiate action and issue directions in terms of Regulation 44. The Board, in appropriate case, may take action under Regulation 44 and issue directions, but when it issues such directions, it must keep in mind the interest of securities market and to the protect the interests of the investors. Existence and conferment of power, and reasonable and legitimate exercise of the power in accordance with law are two different facets.‖

14. The Hon'ble Supreme Court after analysing the provisions of the SAST Regulations and especially Regulation 44 came to the conclusion that the direction

of the WTM to make an open offer was not correct and was rightly set aside by the Tribunal in view of the delay in relation to the acquisition.

15. In our view the decision of the Supreme Court in Sunil Khaitan (supra) is squarely applicable in the instant case. Admittedly, the acquisition was made in the year 2007. At that time, there were 3,618 shareholders who could have availed the opportunity to exit from the target Company. As on date there are only 400 shareholders and, therefore, the direction to make an open offer will not provide equality of treatment to all stakeholders who held shares on the trigger date.

16. In view of the long lapse of time from the date of acquisition till the date of the impugned order the discretion exercised by the CGM in directing the appellants to make an open offer was not a proper exercise of discretion. The discretion is an effective

and important tool for effective and good governance administration but in the present context such exercise of discretion was not appropriate given the fact that Regulation 44 provides other options which could have been exercised. In our opinion, the exercise of discretion in the instant case was not fair and reasonable.

17. Considering the aforesaid, the order of the CGM directing the appellants to make an open offer and pay interest cannot be sustained. Consequently, the direction restraining the appellants from accessing the securities market also cannot be sustained.

18. For the reasons stated aforesaid, the impugned order dated 16th March, 2023 passed by the CGM of SEBI cannot be sustained and is quashed. The appeal is allowed.

19. The matter is remitted to the CGM to pass an appropriate order afresh after considering other

provisions of Regulation 44 of the SAST Regulations, 1997 within three months from today.

20. This order will be digitally signed by the Private Secretary on behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Certified copy of this order is also available from the Registry on payment of usual charges.

Justice Tarun Agarwala
Presiding Officer

Ms. Meera Swarup
Technical Member

12.5.2023
RHN

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