BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No. 123 of 2006

Date of decision : 29.5.2008

Holcim (India) Private Limited …… Appellant

Versus

The Adjudicating Officer,
Securities and Exchange Board of India …… Respondent

Mr. I. M. Chagla Senior Advocate and Mr. Janak Dwarkadas Senior Advocate with Mr. Ashwath Rau and Mr. Indranil Deshmukh Advocates for the Appellant.

Mr. J.J. Bhatt Senior Advocate with Mr. D. P. Desai, Mr. Ravi Hegde and Ms. Dhwani Mehta Advocates for the Respondent.

Coram : Justice N.K. Sodhi, Presiding Officer
Arun Bhargava, Member
Utpal Bhattacharya, Member

Per : Justice N.K. Sodhi, Presiding Officer

Holcim (India) Private Limited, a company registered under the Companies Act, 1956 with its registered office in New Delhi is the appellant before us. It, along with its holding company Holderind Investments Limited, a company registered under the laws of Mauritius, with its registered office at Port Louis, Mauritius, entered into share purchase agreement and share subscription agreement with Gujarat Ambuja Cements Limited (for short GACL) and Ambuja Cements (India) Limited (for short ACIL) on the basis of which they acquired a consolidated shareholding of 67 per cent of the equity shares of ACIL. The remaining 33 per cent of the equity share capital of ACIL was held by GACL. The primary purpose of this investment by the appellant was to acquire shares and control in Associated Cement Companies Limited (for short ACC). At the time when the aforesaid agreements were executed, ACIL which is an unlisted company, already held 13.82 per cent of the equity share capital of ACC. The appellant acting in concert with GACL and ACIL acquired further shares of ACC as a

result whereof the total shareholding of ACIL in ACC rose to 34.71 per cent. This acquisition was made through the public offer process prescribed by the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter called the takeover code). At the time of the aforesaid acquisition by the appellant and others, ACC was holding 76.01 per cent of the equity share capital of Everest Industries Limited (for short EIL) and therefore they, acting in concert with each other, indirectly acquired control of EIL. ACC and EIL are both listed companies whose shares are listed, among others, on the Bombay Stock Exchange Limited and the National Stock Exchange Limited (hereinafter referred to as BSE and NSE respectively). On the basis of the aforesaid facts which are not in dispute, it is alleged that when the appellant indirectly acquired the shares of EIL on April 26, 2005, it did not make a public announcement to acquire further shares of EIL in terms of Regulation 11(2A) read with Regulation 14(4) of the takeover code. In view of this alleged violation of the takeover code, adjudication proceedings were initiated against the appellant under chapter VIA of the Securities and Exchange Board of India Act, 1992 (for short the Act). A notice dated April 13, 2006 was issued to the appellant to show cause why penalty be not levied under section 15H(ii) of the Act for violating Regulation 11(2A) of the takeover code. It is alleged in the show cause notice that the appellant acquired shares and control of ACC through the open offer procedure and in turn indirectly acquired the shares of EIL to the extent of 76.01 per cent of its equity capital and since it failed to make a public announcement to acquire further shares of EIL, it violated Regulation 11(2A) of the takeover code. The appellant filed its detailed reply to the show cause notice controverting the allegations though the facts were not disputed. The stand taken by the appellant is that it was under no obligation to make an open offer to the public shareholders of EIL in terms of Regulation 11(2A) read with Regulation 14(4) of the takeover code for the detailed reasons mentioned in the reply. On a consideration of the aforesaid facts which have been admitted before us and the reply filed by the appellant and having regard to the contentions raised on its behalf, the adjudicating officer came to the conclusion that Regulation 11(2A) of the takeover code

got triggered when the appellant acting in concert with others had indirectly acquired 76.01 per cent shares of EIL and was obliged to give delisting offer in respect of acquisition of EIL. He recorded his findings in paragraph 24 of the impugned order in the following words:

> "Given the plain reading of SAST regulations 10, 11, 12 along with the exemptions available in Reg. 3, in tandem with SC ruling in Technip case, it is clear that the contention of Holcim that it was not required to make an open offer to the shareholder of EIL u/r 10 and 12 of SAST is absolutely untenable. Acquisition of shares and control over ACC by Holcim and PACs triggered SAST regulations, thus obligating them to make open offer to the shareholders of EIL. In terms of the provisions of Regulation 21(1) of SAST, the public offer made by the acquirer to the shareholders of the target company (EL) shall be for a minimum 20% of the voting capital of the company. Had Holcim complied with the provisions of SAST Regulations and given an open offer, the result of the same would have increased their holding in EIL to 76.01%+21%, i.e. 96.01%, which in any case was a fit case for delisting. This is so because even if we take 10% as the minimum continuous listing requirement, the 3.99% public shareholding is far less than that. In this regard, I would like to refer to the provisions of Rule 19(2) (b) of Securities Contracts (Regulation) Rules, 1957, which inter alia mandates that 10% of securities issued by a company were to be offered to the public. Therefore it can be concluded here that resultantly, and as a consequence of an indirect acquisition of EIL by Holcim, and crossing the 'delisting threshold', the ultimate requirement and obligation of Holcim was to make delisting offer in respect of acquisition of EIL under the delisting guidelines read with Regulation11(2A) of SAST Regulations. In view of the above, the response to the questions framed in paragraph 21 of this order is that the provisions of Regulation 11(2A) of SAST are triggered and accordingly it was obligatory on the part of Holcim to comply with Regulation 11(2A) of SAST, i.e. to give delisting offer in respect of acquisition of EIL."

Accordingly, by his order dated August 25, 2006 the adjudicating officer found the appellant guilty of violating Regulation 11(2A) of the takeover code and imposed on it a penalty of Rs.25 crores. It is against this order that the present appeal has been filed.

2. We have heard the learned senior counsel on both sides. The primary question that arises for our consideration is whether the appellant has violated Regulation 11(2A) of the takeover code. In order to answer this question, it is necessary to refer to the

allegations made in the show cause notice. The adjudicating officer has stated the undisputed facts in paragraphs 2 and 3 of the notice which we have referred to hereinabove and then makes allegations in paragraphs 4, 5 and 6 thereof which read as under:

> "4. ACC in turn held 76.01% of the equity of Everest Industries Ltd. (EIL), a company whose shares are listed on the BSE and NSE. Since you acquired shares and control of ACC through the aforesaid open offer, which in turn held 76.01% of EIL's equity, you have indirectly acquired shares of EIL, for which you were required to make a public announcement to acquire further shares of EIL, in terms of Regulation 11(2A) of SEBI (SAST) Regulations, 1997. The aforesaid public announcement was required to be made within three months of acquisition of shares or control of ACC (i.e. three months from April 26, 2005) as per Regulation 14(4) of the said Regulations.
>
> 5. It is alleged that you have not made the necessary public announcement as required under Regulation 11(2A) of SEBI (SAST) Regulations, 1997 read with 14(4) of the said regulation which makes you liable for penalty under Section 15H(ii) of SEBI Act, 1992, which reads as under:-
>
> Penalty for non-disclosure of acquisition of shares and take-overs
>
> 15H. 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.
>
> He shall be liable to a penalty [twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher]
>
> 6. You are therefore, advised to show cause as to why an inquiry should not be held against you in terms of Rule 4(3) of the captioned Rules and penalty be not imposed on you under the cited provisions."

What is said in the show cause notice is that when the appellant indirectly acquired 76.01 per cent of EIL's equity, it should have made a public offer within three months of the acquisition to acquire further shares of EIL and not having done so, it violated Regulation 11(2A) of the takeover code. It is, thus, clear that what is being alleged is

only the violation of Regulation 11(2A). Now let us see what Regulation 11(2A) has to say. It reads as under:

> "11.Consoldiation of holdings.
>
> (1)……
>
> (2)……..……
> (2A) Unless otherwise provided in these regulations, an acquirer, who seeks to acquire any shares or voting rights whereby the public shareholding in the target company may be reduced to a level below the limit specified in the Listing Agreement with the stock exchange for the purpose of listing on continuous basis, may acquire such shares or voting rights, only in accordance with the guidelines or regulations regarding delisting of securities specified by the Board:
>
> Provided that, the provisions of this sub-regulation shall not apply in case of acquisition by virtue of global arrangement which may result in indirect acquisition of shares or voting rights or control of the target company."
>
> (3)……"

It is relevant to mention here that every listed company has to enter into a listing agreement with recognised stock exchange(s) where it wants its securities to be listed and such agreement(s) provide for a minimum limit of public shareholding which that company has to maintain to enable it to remain listed on a continued basis. If ever, the public shareholding in that company were to fall below that limit, the company would become liable to be delisted. It is common ground between the parties that in the case of EIL, the listing agreement provides that the company shall keep a minimum public holding of 20 per cent to keep its shares listed on the stock exchange. When we read the provisions of Regulation 11(2A) of the takeover code in the light of the minimum level of public holding to be maintained, it becomes clear that when an acquirer seeks to acquire shares in a company as a result whereof the public shareholding in that company gets reduced to a level below the limit specified in the listing agreement with the stock exchange for the purpose of continuous listing, he has to acquire shares in that company only in accordance with the guidelines pertaining to delisting of securities issued by the Securities and Exchange Board of India (for short the Board). In other

words, Regulation 11(2A) gets triggered only where the acquisition results in the lowering of the public shareholding below the limit prescribed in the listing agreement. Has this happened in the case before us? Going by the facts as stated in the show cause notice and reproduced in the earlier part of our order, the answer to the question has to be in the negative. The appellant acting in concert with GACL and ACIL had acquired 34.71 per cent of the equity capital of ACC. With this acquisition, they also indirectly acquired 76.01 per cent of the equity capital in EIL. With this indirect acquisition the level of the public shareholding in EIL which at all times was required to be maintained atleast upto 20 per cent for the purpose of continuous listing has not fallen below that limit. To put it differently, even with indirect acquisition of 76.01 per cent shares of EIL, the public shareholding in that company continues to be more than 20 per cent – the limit prescribed in the listing agreement for continuous listing. Since the level of the public shareholding has not fallen below the minimum level, Regulation 11(2A) of the takeover code is not attracted. When Regulation 11(2A) does not apply, the question of its violation cannot arise. The show cause notice alleging its violation and the impugned order holding that the said Regulation stood violated deserve to be set aside on this ground alone.

3. When faced with this situation, Shri J. J. Bhatt learned senior counsel appearing for the Board took a different stance and contended that Regulation 10 of the takeover code had in fact been violated because the appellant did not come out with a public offer to acquire further shares of EIL. He urged that the violation of Regulation 10 should be read into the show cause notice and when so read it becomes clear that the adjudicating officer was justified in levying the impugned penalty. He also urged that the appellant had understood the show cause notice to mean that it had violated Regulation 10 and, therefore, no prejudice shall be caused to it. Reference in this regard was made to the memorandum of appeal and also to the reply filed to the show cause notice before the adjudicating officer. We are not impressed with this argument. Violation of Regulation 10 of the takeover code has not been alleged in the show cause

notice and the appellant had not been put on notice for such a violation. Violation of Regulation 10 and the violation of Regulation 11(2A) are two distinct violations for which separate penalties could be levied and, therefore, at the appellate stage we cannot amend the charge and read the violation of Regulation 10 in the show cause notice in the absence of any such allegation. Be that as it may, the adjudicating officer has levied penalty on the appellant for violating Regulation 11(2A) of the takeover code and not for violating Regulation 10. A similar plea was allowed to be raised for the first time by the Customs, Excise and Gold (Control) Appellate Tribunal and a provision different from the one mentioned in the show cause notice was invoked to sustain the impugned order. This action of the Tribunal was not approved by the learned judges of the Supreme Court in SACI Allied Products Ltd., U.P. v. Commissioner of Central Excise (2005) 7 SCC 159 and this is what they said:

> "This finding of the Appellate Tribunal is based on first proviso to Section 4(1)(a) of the Act. While the show-cause notice and the order of the Collector proceeded on the basis of the invocation of third proviso to Section 4(1)(a) of the Act, the Appellate tribunal for the first time in the impugned order has sustained the proceedings on the basis of first proviso to Section 4(1)(a) of the Act. It was argued that the first proviso to Section 4(1)(a) of the Act was never invoked by the Department either in the show-cause notice or in the impugned order and it was for the first time that the Appellate Tribunal in the impugned order has sought to sustain the impugned order by invoking the first proviso to Section 4(1)(a) of the Act. It is thus seen that the Tribunal has gone totally beyond the show-cause notice and the order of the Collector, which is impermissible. The Appellate Tribunal cannot sustain the case of the Revenue against the appellants on a ground not raised by the Revenue either in the show-cause notice or in the order."

We are satisfied that on the basis of the facts as mentioned in the show cause notice, the violation of Regulation 11(2A) is not made out. We are also of the view that the show cause notice is vague and bereft of the details which are necessary to allege the violation of Regulation 11(2A) of the takeover code. Such details could not be furnished because the public shareholding in EIL had not fallen below 20 per cent.

4. We may now deal with the reasoning of the adjudicating officer as contained in para 24 of the impugned order which has been reproduced in the earlier part of our order holding that Regulation 11(2A) of the takeover code stood violated. His logic is that Regulation 10 of the takeover code stood violated and had the appellant not violated that Regulation, it would have had to come out with a public announcement to acquire atleast another 20 per cent equity shares of EIL (which is the requirement of Regulation 21(1) of the takeover code) and in that event the public shareholding of EIL would have fallen below 20 per cent which is the minimum threshold limit prescribed in the listing agreement and, therefore, Regulation 11(2A) was violated. We cannot agree with this reasoning, which can only be described as perverse. How could the adjudicating officer proceed on the basis that Regulation 10 stood violated when no charge to that effect was laid in the show cause notice. Be that as it may, the fact remains that the appellant did not come out with any public announcement to acquire further shares of EIL and the question of its public shareholding falling below 20 per cent did not arise. It seems to us that in order to establish the charge made in the show cause notice, the adjudicating officer has moulded his logic and brought in the idea of Regulation 10 having been violated thereby leading to the violation of Regulation 11(2A).

5. Learned senior counsel for the appellant strongly relied upon the judgment of the Supreme Court in Technip SA Vs. SMS Holding (P) Ltd. & Ors. (2005) 5 SCC 465 to contend that while indirectly acquiring 76.01% of the equity capital of EIL, the appellant was not required to make a public announcement to acquire further shares of EIL under Regulation 10 of the takeover code because the assets of EIL constituted only 3 per cent of the total assets of ACC and its total gross revenue was only 5 per cent of the gross revenue of ACC. The fact that the total assets of EIL constituted only 3 per cent of the total assets of ACC and that its gross revenue was 5 per cent of the gross revenue of ACC was not disputed though the learned senior counsel for the respondent also relied upon the same judgment to contend that the public offer should have been

made. The arguments of both sides proceeded on the assumption that Regulation 10 got triggered but this is not the subject matter of the show cause notice. Shri I.M. Chagla learned senior counsel also seriously contended that the appellant never had the intention of acquiring EIL and it had explicitly disclosed its intention in the public announcement. This appears to be so and the record bears it out. However, in view of our finding that on the basis of the facts as alleged in the show cause notice, the violation of Regulation 11(2A) of the takeover code is not made out, it is not necessary to decide these issues in this case.

In the result, the appeal is allowed and the impugned order dated August 25, 2006 set aside, leaving the parties to bear their own costs.

Sd/-
Justice N.K. Sodhi
Presiding Officer

Sd/-
Arun Bhargava
Member

Sd/-
Utpal Bhattacharya
Member

29.5.2008
ddg/-