BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 176 of 2007

Date of decision: 20.08.2008

Eider e-Commerce Ltd. …Appellant

Vs

Securities and Exchange Board of India Respondent

None for the Appellant

Dr. Poornima Advani, Advocate with Ms. Sejal Shah, Advocate for the Respondent

Mr. P.N Modi, Advocate, Amicus Curiae

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

Per: Utpal Bhattacharya, Member

The short but interesting question that arises in this appeal is whether an acquirer who already holds more than seventy five per cent (75%) of the shares in a company, acquires further shares in that company is required to make a public announcement to acquire further shares in accordance with the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulation 1997 (for short the Takeover Code). Another question that arises is whether the appellant who is alleged to have financed further purchase of shares in that company is an acquirer at all within the meaning of the Takeover Code.

2. Challenge in this appeal is to the order of the adjudicating officer, Securities and Exchange Board of India (the Board for short) dated July 11, 2005 by which a consolidated penalty of Rs. 5 lacs has been imposed on the appellant and nine other

entities jointly and severally under section 15H(ii) of the Securities and Exchange Board of India Act, 1992 for the violation of Regulation 11(2) of the Takeover Code.

3. On 29.3.2004, a show cause notice was issued to the appellant by the adjudicating officer for alleged violation of Regulation 11(2) of the Takeover Code. In so far as the appellant is concerned, the show cause notice alleged that it had funded the purchase of shares of Eider Infotech Limited (EIL for short) by Saran Investments which was acting in concert with the promoters of EIL who already held more than 75 per cent of its shares and thereby violated Regulation 11(2) of the Takeover Code since the purchase had been made without making any public announcement.

4. The appellant in its reply dated 28.6.2004 to the show cause notice stated that Skytel Communication Limited and Mata Naina Devi Spinning Mills Ltd. (both of whom had been served with the same show cause notice) could not be considered to be the associates of the promoters of EIL just because they had the same address as the appellant. According to the appellant, if the shareholdings of these two entities are excluded, the total shareholding of the promoters of EIL and their associates would work out to only 73.24 per cent of EIL's paid up equity capital as on 31.10.1999. Since this was less than 75 per cent, there was no violation of Regulation 11(2) of the Takeover Code when Parshad and Co. and Saran Investments acquired further shares of EIL in February and March 2000.

5. Despite being served, the appellant did not put in appearance before us when the matter came up for hearing on 14.12.2007 and 1.2.2008. The learned counsel for the Board was heard by us on 14.2.2008 ex parte. The appellant has in its reply to the show cause notice as well as other communications, disputed the facts mentioned in the show cause notice. As already observed, the question which arises in this appeal is whether an acquirer who already holds more than 75 per cent of the shares in a company is required to make a public announcement in accordance with the Takeover Code if he wants to acquire further shares. Unfortunately, we did not have any assistance from the appellant in resolving this question as it had not appeared before us at any stage and

since this matter is likely to have repercussions in other cases as well, it was decided to seek the assistance of an amicus curiae. Mr. P. N. Modi, Advocate was requested to assist us in this matter. We have heard Dr. Poornima Advani, learned counsel for the Board and Mr. P.N. Modi amicus curiae at length.

6. Regulation 11 of the Takeover Code, as it stood in February and March 2000, is reproduced below for facility of reference.

> **"11.Consolidation of holdings**
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> (1) No acquirer who together with persons acting in concert with him has acquired, in accordance with the provisions of law, 15% or more but less than 75% of the shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise more than 5% of the voting rights, in any period of 12 months, unless such acquirer makes a public announcement to acquire shares in accordance with the Regulations.
> (2) No acquirer who, together with persons acting in concert with him has acquired, in accordance with the provisions of law, 75% of the shares or voting rights in a company, shall acquire either by himself or through persons acting in concert with him any additional shares or voting rights, unless such acquirer makes a public announcement to acquire shares in accordance with the regulations."

In the case before us the promoters of EIL and the persons acting in concert together had, according to the Board, more than 75 per cent of shareholding in EIL at the time when still further shares were acquired by Parshad and Co. and Saran Investments in February and March 2000. The learned counsel for the Board argued that in terms of Regulation 11(2) of the Takeover Code as it then was, if any acquirer together with any person acting in concert had 75 per cent of the shares in a company, it would be required to make a public announcement before acquiring any further shares. According to her, the same requirement of making a public announcement would hold good even if the prior shareholding by the acquirer together with any person acting in concert was even more than 75 per cent. Mr. P.N.Modi the learned amicus curiae advocated a different view. He pointed out that Regulation 11(1) of the Takeover Code dealt with creeping acquisition of shares and in that Regulation, the condition precedent to the

public announcement was that the acquirer together with persons acting in concert with him already held 15 per cent or more but less than 75 per cent of the shares in a company. In contrast, in Regulation 11(2) of the Takeover Code, the condition precedent was holding of only 75 per cent of the shares and not "75 per cent or more".

7. On a consideration of the language and scheme of Regulation 11, we are of the view that if the shareholding of an acquirer together with that of persons acting in concert with him is 15 per cent or more but less than 75 per cent, he can keep on making creeping acquisitions not exceeding 5 per cent in any period of 12 months without being called upon to make a public announcement. This is what Regulation 11(1) says. It would follow that if such an acquirer were to acquire more than 5 per cent shares during the period of 12 months he will have to make a public announcement. We can envisage a situation where such an acquirer acquires further shares and reaches the limit of 75 per cent. He may also in the process breach that limit. If further acquisition enables him to reach the limit of 75 per cent without exceeding the same, he would be covered by Regulation 11(1) and if he has acquired upto 5 per cent of the shares to reach that limit, he need not make a public announcement even though he reaches the limit of 75 per cent. If he were then to acquire even one share more, Regulation 11(2) will get attracted and he will have to make a public announcement. If, however, with further acquisition such an acquirer were to breach the limit of 75 per cent, he will be covered by Regulation 11(2) and will be required to make a public announcement even though his additional acquisition may be less than 5 per cent. Once an acquirer together with persons acting in concert with him holds more than 75 per cent shares in a company and were to acquire additional shares, there is no requirement in the Takeover Code that he has to make any public announcement. Regulation 11 is not attracted in such a situation. To illustrate, if an acquirer has already acquired say, 71 per cent of the equity shares of a company, then according to Regulation 11(1), he is entitled to acquire another 5 per cent in a period of 12 months without making a public announcement. But actually he is not permitted to do so in view of the provisions of Regulation 11(2) . If his intention is to acquire

anything beyond 4 per cent, he has to reach the level of 75 per cent on the way and he would have to make a public announcement in accordance with Regulation 11(2) before exceeding the benchmark of 75 per cent. It is to be noted here that Regulation 21(1) of the Takeover Code (as it stood at the relevant time) lays down that when the acquisition takes shareholding of the acquirers beyond 75 per cent, the public offer " shall be for such percentage of the voting capital of the company as may be decided by the acquirer". Therefore, after crossing 75 per cent, the acquirer can stop at any level that he decides and once he has crossed 75 per cent, there is no requirement in the Takeover Code that he has to make any public announcement before acquiring any further shares. This is the scheme of Regulation 11. When we look at the facts of the case in hand, the promoters of EIL and their associated entities held 84.5 per cent of the equity capital of EIL when the appellant is alleged to have funded the purchase of shares of EIL by Saran Investments alongwith Eider Financial Services Ltd. Assuming that the appellant was an acquirer and acted in concert with the purchasers and the promoters of EIL, he was not required to make a public announcement because Regulation 11 was not attracted. In this view of the matter, the first question posed in the opening part of our order is answered in the negative.

8. In view of our answer to the first question, it is not necessary to deal with the second.

In the result, the appeal is allowed and the impugned order set aside qua the appellant. No order as to costs.

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Sd/-
Justice N.K. Sodhi
Presiding Officer

Sd/-
Arun Bhargava
Member

Sd/-
Utpal Bhattacharya
Member

20.8.2008
sl/-