BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No. 31 of 2011

Date of decision: 8.9.2011

M/s Nirvana Holdings Private Limited
Plot No.36-3-541/C, 4th Floor,
Irrum Manzil Colony, Panjagutta,
Hyderabad – 500 082. ……Appellant

Versus

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

Mr. Janak Dwarkadas, Senior Advocate with Mr. Vinay Chauhan, Advocate for the Appellant.
Dr. Poornima Advani, Advocate with Ms. Amrita Joshi, Advocate for the Respondent.

CORAM : Justice N. K. Sodhi, Presiding Officer
P. K. Malhotra, Member
S. S. N. Moorthy, Member

Per : Justice N. K. Sodhi, Presiding Officer

Whether Nirvana Holdings Pvt. Ltd., the appellant herein violated Regulation 11(1) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as the takeover code) when it acquired 6.17 per cent of the equity capital of Heritage Foods (India) Limited (hereinafter called the target company) and did not make a public announcement to acquire further shares in accordance with the takeover code. Facts giving rise to this appeal lie in a narrow compass and these may first be noticed.

2. The appellant is a private limited company incorporated under the provisions of the Companies Act, 1956 having only two promoters/directors/shareholders namely, Mr. Nara Lokesh and Ms. Nara Bhuvaneshwari who shall collectively be referred to hereinafter as the Naras. There is no other shareholder in this company and the Naras have 50 per cent

shareholding each. This is an investment company whose main object is to invest in shares/debentures of other companies. The two Naras in their individual capacity are also promoters of the target company and they together hold 33.38 per cent of the voting rights/share capital in the target company. The remaining 15 promoters of the target company as shown in the statement filed with the stock exchanges hold 12.32 per cent of the voting rights in that company. Thus, the total holding of the promoter group in the target company comes to 45.70 per cent including that of the two Naras. The appellant company acquired 9,161 shares of the target company on November 13, 2008 and another 7,02,260 shares on November 17, 2008 which together constitute 6.17 per cent of the total equity capital of the target company. Since the two Naras in their individual capacity are promoters of the target company and they are also promoters of the appellant company holding 100 per cent of its share capital, the appellant company automatically becomes a part of the promoter group of the target company as per Explanation I to the definition of 'promoter' contained in Regulation 2(h) of the takeover code, the relevant part of which reads as under:

> "Promoter means –
> (a) any person who is in control of the target company;
> (b) any person named as promoter in any offer document of the target company or any shareholding pattern filed by the target company with the stock exchanges pursuant to the Listing Agreement, whichever is later;
> **and includes any person belonging to the promoter group as mentioned in Explanation I**:
> Provided that ……
> **Explanation I : For the purpose of this clause, "promoter group" shall include:**
> (a) in case promoter is a body corporate –
> (i) to (iii) ……..
>
> **(b) In case the promoter is an individual –**
> (i) …….
> (ii) **any company in which 10 per cent or more of the share capital is held by the promoter or an immediate relative of the promoter or a firm or HUF in which the promoter or any one or more of his immediate relative is a member;**
> (iii) and (iv) ……"

Regulation 11(1) of the takeover code provides that no acquirer who, together with persons acting in concert with him, has acquired 15 per cent or more but less than 55 per cent 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 per cent of the voting rights with post acquisition shareholding or voting rights not exceeding 55 per cent in any financial year on March 31, unless such acquirer makes a public announcement to acquire further shares in accordance with the takeover code. As noticed above, the appellant company acquired shares/voting rights in the target company which entitled it to exercise more than 5 per cent (6.17 per cent) of the voting rights therein thereby increasing the collective shareholding of the two Naras and the appellant in the target company from 33.38 per cent to 39.55 per cent triggering Regulation 11(1) of the takeover code. Since the appellant did not come out with a public announcement to acquire further shares of the takeover code, the Securities and Exchange Board of India (for short the Board) issued a notice dated November 25, 2009 calling upon the appellant to show cause why appropriate directions be not issued to it under Regulation 44 of the takeover code for violating Regulation 11(1). The appellant filed its detailed reply dated December 30 2009 stating that it had not violated the provisions of Regulation 11(1) when it acquired 6.17 per cent equity shares of the target company without making a public announcement. It also disputed that the collective shareholding of the promoters of the target company increased from 45.7 per cent to 51.87 per cent in the financial year 2008-09 as alleged. The case of the appellant is that the Board erroneously clubbed its shareholding of 6.17 per cent with the shareholding of the 'promoter group'. In para 10 of its reply this is what the appellant pleaded:-

> "It appears that simply because our promoters/directors are also the promoters of Target Company and are holding around 33.38% shares in the Target Company, it has been concluded that our promoters/directors are acting in concert with the other persons in the "promoter group" of the Target company and further that the "promoters group" of the Target Company (including our promoters) were acting in concert with us when we acquired 6.17 % shares of the Target Company through the stock exchange in November 2008. Same is legally untenable. There is no justification for equating us with the "promoter group" of the Target company and treating us as their part. **We reiterate that, at the relevant time, when we acquired the shares of the Target Company, we were not acting in concert with either Mrs Nara Bhuvaneshwari & Mr N. Lokesh or the entities/persons constituting the "promoter group" of the Target Company. Our acquisitions of shares of the Target Company were**

> **independent of acquisitions/holdings of "promoter group" of the Target Company.** Therefore, our shareholding of 6.17% cannot be added to the "promoter groups" shareholding of 45.7% in order to allege that promoter's shareholding increased from 45.7% to 51.87% in the financial year 2008-2009."
>
> (emphasis supplied)

The appellant was called for a personal hearing before the whole time member on May 25, 2010 and instead of appearing on that date, it filed a supplementary reply/submissions stating as under:-

> "Without prejudice to the aforesaid, we submit that **if you are not satisfied with our submissions, that at the relevant time we were not acting in concert with others as alleged and feel that we have violated the provisions of Regulation 11(1), then we submit that we are open to disinvesting the shareholding of 1.17% which is allegedly in excess of 5% permissible creeping acquisition limit available to us for the Financial year 2008-09. The proposed disinvestment by us of the 1.17% shares would be in consonance with the provisions of Regulation 44 of Takeover Regulations, under which, as stated in the Notice, you propose to issue directions against us for the alleged violation of Regulations 11(1) of Takeover Regulations.**"
>
> (emphasis supplied)

The appellant also pleaded that the violation by acquiring 1.17 per cent equity shares in excess of the permissible limit of five per cent was too insignificant and miniscule and that by this acquisition it did not acquire control over the target company since the two Naras were already in control. The appellant further pleaded that the violation was technical, procedural and a venial breach which did not cause any adverse consequences. It claims that it did not make any disproportionate gain nor did the acquisition cause any loss to anyone including the public shareholders of the target company.

3. On a consideration of the material on the record including the replies filed by the appellant and taking note of the facts which are not in dispute, the whole time member by his order dated November 9, 2010 held that the appellant had violated Regulation 11(1) of the takeover code when it acquired 6.17 per cent shares of the target company without making a public announcement. He directed the appellant to disinvest within a period of two months from the date of the order 1,34,905 shares constituting 1.17 per cent of the equity capital of the target company which was in excess of the 5 per cent limit. The appellant was further

directed to transfer the profits, if any, arising out of such disinvestment to the Investor Protection Fund(s) of the concerned stock exchanges. It is against this order that the present appeal has been filed.

4. We have heard the learned senior counsel for the appellant and Dr. Mrs. Poornima Advani Advocate on behalf of the Board who have taken us through the record and the impugned order. The whole time member has clubbed the acquisition of the appellant company (6.17 per cent) with the holding of the promoter group which was 45.70 per cent including that of the two Naras. It is on this basis that he concluded that Regulation 11(1) of the takeover code got triggered because the appellant crossed the permissible creeping acquisition limit of 5 per cent in a financial year and not having come out with a public announcement, it violated the said provision. We have on record the statement showing the shareholding of persons belonging to the promoter group of the target company. A copy of this statement was furnished to the appellant alongwith the show cause notice. A perusal of this statement shows that there were in fact 17 promoters including the two Naras and not 18 because the name of Ms. Nara Bhuvaneshwari appears twice in the list. It is common ground between the parties that the total shareholding of these promoters (as shown in the statement) is 45.70 per cent out of which the two Naras hold 33.38 per cent and all the others hold 12.32 per cent. The statement showing the shareholding pattern of the promoter group of the target company as on September 30, 2008 was furnished by this company to the stock exchange(s) where its shares are listed. This statement erroneously omits the name of the appellant company. We have already noticed the definition of promoter on the basis of which the appellant automatically became a part of the promoter group by virtue of the shareholding of the two Naras in the target company. The definition makes it clear that if a promoter of a target company who is an individual holds 10 per cent or more shares in any other company, then that company also becomes a part of the promoter group of the target company. In the present case each of the two Naras hold 50 per cent shares in the appellant company. The appellant company is, therefore, a part of the promoter group of the target company even without holding a single share. It is,

thus, clear that the two Naras and the appellant are promoters of the target company. The learned senior counsel very strenuously challenged the findings recorded by the whole time member and contended that he grossly erred in clubbing the acquisition of the appellant with that of the promoter group of the target company. The argument is that the appellant was not a 'person acting in concert' with any promoter of the target company. He pointed out that there was no such allegation in the show cause notice nor is there any material on the record to show that there was a meeting of the minds between the appellant on the one hand and any of the promoters on the other. We have given our thoughtful consideration to the argument of the learned senior counsel and are unable to accept the same. It is true that 'person acting in concert' comprises two or more persons who share a common objective or purpose of substantial acquisition of shares or voting rights in a company. In other words, there has to be a meeting of their minds when the acquisition takes place and it is only then that it could be said that they acted in concert. In the present case it cannot even be suggested that the appellant while acquiring 6.17 per cent shares of the target company did not act in concert with the two Naras who, as already observed, are promoters of the target company in their individual capacity and also hold 100 per cent shares of the appellant company. The two Naras control the appellant company and they are also its directing mind. No investment decision on behalf of the appellant company could be taken without their authority, knowledge, consent and approval. The appellant being a body corporate is distinct from the two Naras. In this view of the matter, it is obvious that when the appellant company which is a body corporate acquired shares of the target company, it acted in concert with the two Naras in their individual capacity who are also the promoters of the target company. The shares acquired by the appellant company and the holding of the two Naras has to be clubbed for the purposes of Regulation 11(1) of the takeover code as they were acting in concert. When we do this, it becomes clear that the appellant crossed the permissible creeping acquisition limit of 5 per cent thereby triggering Regulation 11(1) of the takeover code and not having made a public announcement, violated the said provision. The learned senior counsel for the

appellant is right only to the extent that the appellant company did not act in concert with any promoter of the target company other than the Naras and that is of no consequence. Even if the shareholding of the other promoters is excluded, the shareholding of the Naras and the appellant together is enough to trigger Regulation 11(1). In this view of the matter, no fault can be found with the conclusion arrived at by the whole time member that Regulation 11(1) got triggered and the appellant by not making a public announcement violated the said provision. The question posed in the opening part of the order is answered in the affirmative.

5. Having upheld the finding that the appellant violated Regulation 11(1) of the takeover code by not making a public announcement, the question that next arises is what direction should be issued to it. The whole time member has directed the appellant to disinvest 1,34,905 shares constituting 1.17 per cent of the equity capital of the target company which was in excess of the permissible limit of 5 per cent and transfer the profits, if any, to the Investor Protection Fund(s) of the concerned stock exchanges. He appears to have blindly accepted the plea of the appellant in this regard that was made in the supplementary reply dated May 25, 2010 as noticed above. Since the plea of the appellant is covered by the provisions of Regulation 44(a) of the takeover code, the whole time member has without recording any reasons directed the appellant to disinvest the shares in excess of the permissible limit. It must be remembered that whenever an acquirer violates Regulation 10, 11 or 12 of the takeover code by not making a public announcement, he should be directed to comply with the provision by making a public offer. The words “unless such acquirer makes a public announcement” appearing in Regulations 10 and 11(1) make these provisions mandatory and a public announcement has to be made. Similar words appear in Regulation 12 as well. These provisions make the acquisition conditional upon a public announcement being made. The primary object of the takeover code is to provide an exit route to the public shareholders when there is substantial acquisition of shares or a take over. This right to exit is an invaluable right and the shareholders cannot be deprived of this right lightly. It is only when larger

interest of investor protection or that of the securities market demands that this right could be taken away. Therefore, as a normal rule, a direction to make a public announcement to acquire shares of the target company should issue to an acquirer who fails to do that. The Board need not give reasons as to why such a direction is being issued because that is the mandate of Regulations 10, 11 and 12. However, if the issuance of such a direction is not in the interest of the securities market or for the protection of interest of investors, the Board may deviate from the normal rule and issue any other direction as envisaged in Regulation 44 of the takeover code. In that event, the Board should record reasons for deviation. In the case before us no reasons have been recorded for deviating from the normal rule and we find no ground for deviation. In these circumstances, we modify the direction issued by the whole time member and direct the appellant to make a public announcement to acquire the shares of the target company in accordance with the provisions of the takeover code. For this limited purpose, the appellant shall now approach the Board within one week to comply with the procedural requirements in this regard.

In the result, the appeal is dismissed and the direction issued by the whole time member modified as stated above. There is no order as to costs.

Sd/-
Justice N. K. Sodhi
Presiding Officer

Sd/-
P. K. Malhotra
Member

Sd/-
S. S. N. Moorthy
Member

After we pronounced the order in Court, the learned counsel for the appellant has made an oral prayer that the operation of the direction issued by us

be stayed for a period of four weeks to enable the appellant to file an appeal in the Supreme Court. The prayer appears to be reasonable. We, therefore, direct that the operation of our order shall remain stayed for a period of four weeks from today.

Sd/-
Justice N. K. Sodhi
Presiding Officer

Sd/-
P. K. Malhotra
Member

Sd/-
S. S. N. Moorthy
Member

8.9.2011
Prepared & Compared by
ptm/ddg