A SECURITIES AND EXCHANGE BOARD OF INDIA

v.

M/S. AKSHYA INFRASTRUCTURE PVT. LTD.

B (Civil Appeal No. 6041 of 2013)

APRIL 25, 2014

[SURINDER SINGH NIJJAR AND A. K. SIKRI, JJ.]

C *SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 – Regn. 27 and 11 – Whether an open offer voluntarily made through a Public Announcement for purchase of shares of the target company can be permitted to be withdrawn at a time when the voluntary* D *open offer has become uneconomical to be performed – Held: Plain reading of Regn. 27(1) makes it clear that no public offer whether it is voluntary or triggered by Regn.11 can be withdrawn, unless it satisfies the circumstances set out in Regn.27(1)(b), (c) and (d) – Under Regn. 27(1)(b)(c)* E *and (d), a Public Offer, once made, can only be permitted to be withdrawn in circumstances which make it virtually impossible to perform the Public Offer – Ejusdem generis principle is fully applicable for the interpretation of Regn. 27(1)(b)(c) and (d) as there is a common genus of* F *impossibility – This impossibility would not include a contingency where voluntary open offer once made can be permitted to be withdrawn on the ground that it has now become economically unviable – Accepting such a submission, would give a field day to unscrupulous elements* G *in the securities market to make Public Announcement for acquiring shares in the Target Company, knowing perfectly well that they can pull out when the prices of the shares have been inflated, due to the public offer – Such speculative*

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practices are sought to be prevented by Regn. 27(1)(b)(c) and (d), that is precisely the reason why Regn. 27(1)(a) was deleted.

Allowing the appeal, the Court

HELD:1. The plain reading of Regulation 27(1) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 makes it clear that no public offer whether it is voluntary or triggered by Regulation 11 can be withdrawn, unless it satisfies the circumstances set out in Regulation 27(1)(b), (c) and (d). There can be no distinction between a *triggered* public offer and a *voluntary* public offer. Both have to be considered on an equal footing. [Para 28][420-F-H; 421-A]

2. Under Regulation 27(1)(b)(c) and (d), a *Public Offer*, once made, can only be permitted to be withdrawn in circumstances which make it virtually impossible to perform the Public Offer. In fact, the very purpose for deleting Regulation 27(1)(a) was to remove any misapprehension that an offer once made can be withdrawn if it becomes economically not viable. [Para 31][422-E-F]

3. The *ejusdem generis* principle is fully applicable for the interpretation of Regulation 27(1)(b)(c) and (d) as there is a common *genus* of *impossibility*. This *impossibility* envisioned under the aforesaid regulation would not include a contingency where *voluntary open offer* once made can be permitted to be withdrawn on the ground that it has now become economically unviable. Accepting such a submission, would give *a field day* to unscrupulous elements in the securities market to make Public Announcement for acquiring

shares in the *Target Company*, knowing perfectly well that they can pull out when the prices of the shares have been inflated, due to the public offer. Such speculative practices are sought to be prevented by Regulation 27(1)(b)(c) and (d), that is precisely the reason why Regulation 27(1)(a) was deleted. [Para 36][424-G-H; 425-A-B]

Nirma Industries Ltd. & Anr. v. Securities and Exchange Board of India **(2013) 8 SCC 20 : 2013 (3) SCR 662 – affirmed.**

Clariant International Ltd. & Anr. v. Securities & Exchange Board of India **(2004) 8 SCC 524 : 2004 (3) Suppl. SCR 843 and** *Natwar Singh v. Director of Enforcement & Anr.* **(2010) 13 SCC 255 : 2010 (13) SCR 99 – referred to.**

Case Law Reference:

2013 (3) SCR 662	**affirmed**	**Para 12**
2004 (3) Suppl. SCR 843	**referred to**	**Para 16**
2010 (13) SCR 99	**referred to**	**Para 33**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 6041 of 2013.

From the judgment and order dated 19.06.2013 of the Securities Appellate Tribunal, Mumbai ("SAT") in Appeal No. 3 of 2013.

C. U. Singh, Sr. Adv., Pratap Venugopal, Ms. Surekha Raman (for M/s K. J. John & Co.), Advs. for the appellant.

R. F. Nariman, Sr. Adv., Mayank Mishra, Ms. Ashlesha Srivastasva, Dheeraj Nair, Advs. for the respondent.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. This appeal under Section 15Z of the Securities and Exchange Board of India Act, 1992 (the 'SEBI Act') is directed against the judgment and final order of the Securities Appellate Tribunal, Mumbai (SAT) dated 19th June, 2013 rendered in Appeal No.3 of 2013, by which the appeal filed by M/s. Akshya Infrastructure Private Limited – the respondent herein against the directions issued by SEBI on 30th November, 2012 has been allowed.

2. The fundamental issue which arises in this appeal is whether an open offer voluntarily made through a Public Announcement for purchase of shares of the target company can be permitted to be withdrawn at a time when the voluntary open offer has become uneconomical to be performed.

3. In this case, the respondent herein, M/s Akshya Infrastructure Pvt. Ltd., is a part of the Promoter Group of MARG Limited ('the Target Company'). For the years 2006-07, 2007-08 and 2010-11, the gross acquisition by the Promoter Group of shares in the Target Company was as under :

"Financial Year	Percentage	Date triggered on
2006-07	14.34%	30.03.2007
2007-08	5.64%	12.10.2007
2010-11	7.11%	19.02.2011"

As a consequence of the foregoing acquisitions, the acquirers breached the 5% creeping acquisition limit and were required to comply with the provisions of Regulation 11 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as the "Takeover Regulations").

4. On 20th October, 2011, the respondent made a *voluntary open offer* through a Public Announcement in major National Newspapers, under Regulation 11 of the Takeover Regulations wherein the public shareholders of the Target Company were given an opportunity to exit at an offer price of Rs.91/- per equity share. This price represents a premium of 10.3% over the average market closing price for the two weeks preceding the Public Announcement. The tendering period was scheduled to commence on 1st December, 2011 and conclude on 20th December, 2011. The consideration for the tendered shares was to be paid on or before 4th January, 2012. As on the date of the open offer, the list of Promoters/Promoter Group Entities was as under:-

Sl. No.	Name
1.	Mr. G.RK. Reddy
2.	Mr. G. Raghava Reddy
3.	Ms. V.P. Rajini Reddy
4.	Mr. G. Madhusudan Reddy
5.	GRK Reddy & Cons (HUF)
6.	M/s. Global Infoserve Ltd.
7.	M/s. Marg Capital Markets Limited
8.	M/s. Exemplarr Worldwide Limited
9.	M/s. Marg Projects and Infrastructure Limited (formerly Marg Holdings and Financial Services Limited)
10.	M/s. Akshya Infrastructure Private Limited

5. However, due to certain events, which have been highlighted by both the parties, the respondent by letter dated 29th March, 2012 through M/s. Motilal Oswal Investment Advisors (P) Ltd., the Managers to the Issue (hereinafter referred to as the "Merchant Banker"), addressed to SEBI, sought to contend that the open offer in question had become outdated, thereby outliving its necessity and, therefore, the same ought to be permitted to be withdrawn. It was also contended that the amount of Rs.17.46 crores deposited by the respondent in an escrow account towards the open offer ought to be allowed to be withdrawn. The letter emphasizes that the public announcement was in nature of a *voluntary open offer* under Regulation 11 of the Takeover Regulations for consolidation of shareholding of the Promoter Group in the Target Company. The offer price of Rs.91/- per equity share of the Target Company was aimed at presenting a commercially reasonable opportunity to the public shareholders to exit and at the same time it was meant to consolidate the shareholding of the promoter in the Target Company. It was further stated that due to the unjustified delay by SEBI in taking a decision as to whether to approve the draft letter of offer has rendered the entire open offer exercise academic and meaningless. It was claimed that the transaction envisaged by the respondent is no longer justifiable on any ground, including the grounds of economic rationale and commercial reasonableness. The respondent sought the withdrawal of open offer made under the public announcement in terms of Regulation 27 of the Takeover Regulations. The exact prayer made by the respondent was as follows:-

> "Consequently, we hereby seek withdrawal of the open offer made under the public announcement in terms of Regulation 27 of the Takeover Regulations (the benefit of which continue to accrue to us in terms of Regulation 35(2) of the SEBI (Substantial Acquisition of Shares and

A Takeovers) Regulations, 2011 "New Takeover Regulations"). Regulation 23(1)(d) of the New Takeover Regulations equally empowers withdrawal of an open offer."

B 6. The appellant by letter dated 30th November, 2012 conveyed its comments in terms of the proviso to Regulation 16(4) of the Takeover Regulations on the draft letter of offer. Certain information was sought in the aforesaid letter. No reference was made in this letter with regard to the request C made by the respondent for permission to withdraw the open offer. Rather it was stated as under :

"Please note that failure to carry out the suggested changes in the letter of offer as well as violation of D provisions of the Regulations will attract appropriate action. Please also ensure and confirm that apart from above, no other changes are carried out in the letter of offer submitted to us."

The aforesaid comments of SEBI were challenged by E the respondent before SAT in Appeal No.3 of 2013.

7. The respondent claimed that the impugned directions, ostensibly in the form of comments and observations on the draft letter of offer, reject the plea of the petitioner that the delay F caused by SEBI in clearance of the draft letter of offer, now renders the open offer unviable and academic. Further, the impugned directions purport to bind the appellant and thereby constitute an order by which the respondent was aggrieved; and necessitated the appeal before the SAT.

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8. In the appeal before SAT, the respondent claimed that the directions contained in the impugned letter of SEBI dated 30th November, 2012, incorrectly allege that prima facie requirement to make an open offer was triggered by the

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promoters and the promoter group entities of the Target Company (Promoter Group) under Regulation 11(1) of the Takeover Regulations on three past occasions, viz. March 30, 2007, October 12, 2007 and February 19, 2011 (Alleged Triggers). It was further claimed that the directions to revise the offer price, on account of the requirement to make open offers pursuant to the alleged triggers was illegal and without jurisdiction. It was also claimed that the directions contained in the impugned letter has caused severe civil consequences to the respondent. It was also claimed that the submissions on the issues presented by the respondent before the appellant have neither been considered nor appreciated.

9. The appeal was contested by the appellant by filing a detailed affidavit on 12th April, 2013. As noticed above, the aforesaid appeal has been allowed by SAT in terms of prayer clause (a), (b) and (c) of Para 7 of the appeal filed by the respondent, which are as under:-

"(a) That this Hon'ble Tribunal be pleased to set aside the Impugned Direction;

(b) That this Hon'ble Tribunal be pleased to order and direct the respondent to allow the appellant to withdraw the open offer without any adverse orders or directions against the appellants or the Promoter Group;

(c) That this Hon'ble Tribunal be pleased to order and direct the respondent to allow the appellant to withdraw the amount of Rs.17.46 crores deposited in escrow in lieu of the Open Offer."

10. It was, however, made clear that SAT has not made any observation on the merits of the issue regarding the three alleged triggers and the contentions of the parties in this regard were kept open. Aggrieved by the aforesaid impugned judgment, SEBI has filed the present Civil Appeal.

A 11. We have heard the learned counsel for the parties at length.

12. Mr. C.U. Singh, learned senior counsel appearing for the appellant, has submitted that the issues raised by the B appellant herein are squarely covered against the respondent by an earlier judgment of this Court in **Nirma Industries Ltd. & Anr.** Vs. **Securities and Exchange Board of India**[1].

13. At this stage, Mr. R.F. Nariman, learned senior counsel C appearing for the respondent, has raised certain preliminary objections with regard to the maintainability of the appeal. He submits that the directions issued by the SEBI are based on a misconception of the law applicable to the peculiar facts of this case. He submits that *firstly*: this is a case where the D respondent had made *voluntary open offer*. It was not a case of an open offer made because of a *triggered mechanism* under the Takeover Regulations; *secondly*: since the open offer was a pure and simple *voluntary offer*, no prejudice has been caused to any shareholder; *thirdly*: the present case does not E fall within the ambit of Regulation 27 of Takeover Regulations. According to Mr. Nariman, Regulation 27 ought to be read in a manner that it would only govern *mandatory open offers* and not *voluntary open offers; fourthly*: SEBI has without any justification intermingled acquisition of shares by the F respondent on the three earlier occasions in 2006-07, 2008-09 and 2009-10; *fifthly*: SEBI unjustifiably and arbitrarily took 13 months to offer comment(s) on the draft letter of offer. Even then the clarification sought by the appellant pertained to the past alleged triggers which had no connection with the G *voluntary open offer*. It is submitted that even if the case of the respondent falls within the ambit of Regulation 27, the withdrawal is permissible in such circumstances which in the opinion of SEBI (the Board) merit withdrawal; *sixthly*: the

H [1] (2013) 8 SCC 20

judgment in **Nirma Industries (supra)** is distinguishable; A
lastly: the judgment in **Nirma Industries (supra)** is incorrect and needs reconsideration.

14. Mr. C.U. Singh, learned senior counsel appearing for the appellant, has submitted that the correspondence B exchanged between the parties would show that the delay in consideration of the letter of offer was caused by the respondent by not giving the necessary information. He relies on the voluminous correspondence between the parties in support of his submission which, if necessary, shall be C considered later. His second submission is that the request for withdrawal of open offer is to be considered strictly under the provision of Regulation 27 of the Takeover Regulations.

15. The respondent had made a Public Announcement D on 20th October, 2011 which clearly informed the public shareholders of the Target Company that they were being given an opportunity to exit at an offer price of Rs.91/- per equity share, which represented a premium of 10.3% over the average market closing price for the two weeks preceding the E Public Announcement. This Public Announcement and the Public Offer was sought to be withdrawn on 29th March, 2012. He points out that in the aforesaid letter; the request for withdrawal is specifically made under Regulation 27 of the Takeover Regulations. Therefore, Mr. Nariman cannot be F permitted to, now, submit that Regulation 27 is not applicable to the open offer in the present case.

16. Mr. C.U. Singh then submits that the respondents have consciously proceeded with an open offer and they have G rightly not been permitted to withdraw the same by the appellant. The next submission of Mr. C.U. Singh is that Regulation 27 deals with only withdrawal of 'Public Offer' and not withdrawal of 'Public Announcement'. In any event,

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A according to learned senior counsel, submission with regard to withdrawal of Public Announcement has been made, only, at the time of arguments before this Court. It was neither pleaded nor raised before the SEBI/SAT, nor even in the counter affidavit before this Court. He next submitted that under the B provisions of Regulation 27, public offer is a rule and *withdrawal* is an exception. Relying on the interpretation of Regulation 27 in **Nirma Industries Ltd.(supra)**, he submits that an offer can be permitted to be withdrawn only if it becomes virtually impermissible to carry out. Permitting public offers once made C to be *withdrawn* on the ground that it has become uneconomical would compromise the integrity of the Securities Market. This would be contrary to the scheme of the Takeover Code. Mr. C.U. Singh then submits that there is no distinction under D Regulation 27 between the *voluntary open offer* and *mandatory open offer* which is the result of a *triggered acquisition*. Relying on Regulations 11 to 14 of the Takeover Regulations, he submits that all the different types of open offers are set out therein. Each one of the open offers has the E same effect on shareholders and the market. Therefore, the provisions contained in Regulation 27 have to be strictly adhered to in considering the request for withdrawal of the open offer. It is further submitted that the appellant had fixed the offer price under the relevant regulations and in accordance F with the law laid down by this Court in **Clariant International Ltd. & Anr.** Vs. **Securities & Exchange Board of India**[2].

17. According to Mr. C.U. Singh, in normal circumstances, withdrawal can only be made under Regulation 27(1)(b), (c) G and (d). He submits that in the letter dated 29th March, 2012, the respondent claims that the offer has become "outdated due to the sheer efflux of time". The second reason given is the delay in clearance of open offer from SEBI. The letter also indicates that the respondent does not agree with the views of

H [2] (2004) 8 SCC 524

the SEBI on the fact situation. Another reason given is that "even if the SEBI were to approve the draft letter of offer today, the open offer exercise would be entirely academic and meaningless." Another reason given is that "the transaction then envisaged by us is no longer justifiable on any ground including grounds of economic rationale and commercial reasonableness." All these factors, according to Mr. C.U. Singh, will not be covered by any of the clauses in Regulation 27(1)(b)(c)(d). He then submitted that even if there is a delay by SEBI, the ordinary investor in shares of the Target Company should not be made to suffer. According to Mr. C.U. Singh, the controversy raised in the appeal is squarely covered against the respondent by judgment of this Court in **Nirma Industries Ltd. (supra)**.

18. Mr. Nariman has rebutted the aforesaid submissions of Mr. C.U. Singh. He submits that the single most important distinction between **Nirma** and this case is that it pertains to a *voluntary public offer*. This Court had no occasion to deal with a *voluntary public offer* in **Nirma Industries Ltd. (supra)**. In reply to the other submissions made by Mr. C.U. Singh, Mr. Nariman has also relied on some correspondence. He has also relied upon a table to substantiate the submission that the law laid down in **Nirma Industries** would not be applicable in the facts and circumstances of this case. Dealing with the issue of delay, it is submitted by Mr. Nariman that there was an unjustifiable and inexplicable delay by SEBI in issuing its comments on the draft letter of offer. In support of this submission, he has relied on some correspondence.

19. He relies on letter dated October 20, 2011, whereby the respondent made a *voluntary open offer* by Public Announcement under Regulation 11 of the Takeover Regulations. He points out that Clause 11.4 of the Public Announcement clearly states that voluntary open offer can be

A *withdrawn* by the respondent at any time. He then points out that on 25th October, 2011, SEBI called upon the respondent to provide information on the changes in shareholding and capital build up of the Target Company, along with compliance of the SEBI Regulations. He submits that although the B information sought pertains to the earlier acquisition it was duly provided on November 4, 2011 and November 8, 2011. Mr. Nariman submits that under Regulation 18(1) of the Takeover Regulations, the draft letter of offer is required to be filed with SEBI well within 14 days from the date of the Public C Announcement. Once the letter of offer is filed, SEBI was required to dispatch the same to the shareholders immediately after 21 days. During 21 days, SEBI is permitted to stipulate the changes required to be made in the letter of offer which the Merchant Banker and the Acquirer shall incorporate in the D letter of offer, before it is dispatched to the shareholders. In case, SEBI receives a complaint or it initiates an enquiry or investigation in respect of public offer, it can call for a revised letter of offer. In this case, he submits that the draft letter of E offer was given on October 28, 2011 well within 14 days period stipulated under Regulation 18(1). But SEBI did not issue its comments on the draft letter of offer within 21 days, as required. Not only there was a non-compliance of Regulation 18(1) but there was no occasion to invoke proviso to Regulation 18(2). F SEBI did not inform or advise the respondent to revise the draft letter of offer on account of any inadequacy in the disclosure made by the respondent in the draft letter of offer in respect of the voluntary offer. All the queries were related to the past *alleged triggers*. These *alleged triggers* were wholly G unrelated to the voluntary open offer for which the draft letter of offer was filed with the appellant. He then pointed out that by letter dated 17th November, 2011, the appellant again sought the same clarification on the alleged triggers, as stated in its letter dated November 11, 2011. He submitted that the

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Merchant Banker and the respondent provided all explanation regarding these acquisitions on November 28, 2011. The letter dated November 24, 2011 of the respondent was forwarded to the appellant by the Merchant Banker on November 28, 2011. This letter gave date wise explanation on all the issues raised as to why no open offer was made pertaining to the alleged triggers, as there was no violation of Regulation 11(1) and 11(2) of the Takeover Regulations. This explanation was reiterated on December 14, 2011 by the respondent/Promoters but there was no response from the appellant to any of the aforesaid letters. This led the respondent to a reasonable belief that the explanation had been accepted. Subsequently, there was a telephonic request by the appellant to provide the same information on the *alleged triggers* in various formats. The respondent duly re-arranged the same information in the desired format and provided the same to the appellant on January 13, 2012, January 16, 2012 and February 3, 2012. Inspite of all this, still there were no comments from the SEBI. Mr. Nariman emphasized that the unjustifiable, inexplicable and inordinate, delay on the part of the appellant in issuing comments on the draft letter of offer created a situation wherein it was *impossible* for the respondent to implement the *voluntary open offer*. By that time, the underlying decision to consolidate shareholding had become *infructuous* by sheer efflux of time. It was under these circumstances that the respondent intimated its decision to withdraw its *voluntary open offer* and sought withdrawal of the same in terms of the Regulation 27 of the Takeover Regulations.

20. It was pointed out by Mr. Nariman that the respondent specifically and expressly sought opportunity of a personal hearing on the aforesaid request for withdrawal, the appellant did not revert on the request. The respondent once again furnished the same information on the alleged triggers in different formats as required by the appellant through

communications dated April 12, 2012; April 20, 2012; May 10, 2012; May 21, 2012; June 6, 2012 and July 5, 2012. After a period of more than 13 months, from the date of filing of the draft letter of offer and after more than 8 months from the date of request for withdrawal, the appellant issued the impugned letter dated November 30, 2012. Mr. Nariman points out that the directions issued in the impugned letter are wholly unjustified. He points out to the following two directions :-

(a) Go ahead with the voluntary open offer on account of some alleged triggers (for creeping acquisitions under Regulation 11 of the Takeover Code, 1997) in the past i.e. 2006-07; 2007-08 and 2010-11.

(b) make an open offer with upward revision in price per share. The share prices offered by the respondent in 2009 were RS.91.00 per equity share and as on date the prices is RS.315.90 per equity share.

21. Mr. Nariman submitted that SAT without going into the merits and demerits of the alleged earlier acquisitions, has left it open for SEBI to take appropriate action in accordance with law with regard to the aforesaid three acquisitions. Therefore, clearly the aforesaid three acquisitions have no connection whatsoever with the *voluntary offer* under consideration in these proceedings.

22. The next submission of Mr. Nariman is the foundation of all his other submissions. According to Mr. Nariman, there is a fundamental difference between a *mandatory public offer* and a *voluntary open offer*. It cannot be placed on the same pedestal. According to learned senior counsel, in a mandatory public offer there exists an underlying transaction which *triggers* the Takeover Code under which the shareholders obtain a right to exit from the company. However, in a *voluntary open offer*, no such right accrues to the shareholders to exit the company,

since the offer is not the result of a *triggered acquisition*. In the present case, the action of SEBI, according to Mr. Nariman, is contrary to Regulation 18. The letter of offer was not dispatched to the shareholders as per Regulation 18(1). Regulation 15(4) deems that the offer is made on the date on which the Public Announcement has appeared in any newspaper. But according to Mr. Nariman, this deeming fiction is for the purpose of price fixation for the offer. It has nothing to do with Regulation 18 which is to dispatch the actual offer to the shareholders. Therefore, according to Mr. Nariman, reliance placed by Mr. C.U. Singh on the expression "offer once made" in Regulation 27 is misconceived. This expression has to be understood in terms of Regulation 18. Since Regulation 18 had not been complied with and there was no dispatch of the letter of offer to the shareholders, there was no question of any prejudice being caused to the interest of the shareholders. Mr. Nariman then submits that because of the inaction on the part of SEBI, the respondent would be squarely covered under Regulation 27(1)(b). The approval of the letter of offer by the appellant is statutory in nature. Since it had not been granted within the stipulated period of time, the respondent was entitled to assume that it had been refused. According to Mr. Nariman, it has been erroneously submitted by Mr. C.U. Singh that the claim of the respondent is not covered under Regulation 27(1)(b). Mr. Nariman then submits that the judgment in **Nirma Industries** is not applicable in the facts and circumstances of this case. Finally, he has submitted that the judgment in **Nirma Industries (supra)** requires reconsideration. In support of this submission, he submits that Regulation 27 has to be interpreted by keeping in mind the earlier Regulation 27(1)(a). In **Nirma Industries**, this Court has held that Regulation 27 (b), (c) and (d) are all in the nature of impossibility. Mr. Nariman made a mention about Regulation 27(1)(a) which was omitted by the SEBI (Substantial Acquisition of Shares and Takeovers)

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A (Second Amendment) Regulations, 2002 with effect from September 9, 2002. Prior to deletion, it read as under :

> "-(a) the withdrawal is consequent upon any competitive bid,"

B Based on this, he submits that economic viability of public offer was the genus of Regulation 27. The facts of this case would clearly place the request of the respondent for withdrawal of the *public offer* in the realm of impossibility. Mr. Nariman has submitted that for the interpretation of Regulation 27, the C *ejusdem generis* principle would not apply as there is no common *genus* between Clauses 27(1)(b)(c) and (d).

23. Mr. C.U. Singh in rejoinder has submitted that in view of the law laid down in **Nirma Industries**, the public offer made D by the respondent cannot be permitted to be withdrawn. Earlier incidence of the *alleged triggers* can be relied upon. According to him, the price has to be fixed on the basis of the public announcement/offer. He submits that Regulation 18(1) talks of 14 days of the Public Announcement. Furthermore, public offer E cannot be said to be made only on dispatch of the letter of offer to the individual shareholders. The impact on the securities market would follow the public announcement. He reiterates that even the withdrawal letter seeks permission to withdraw the Public Offer under Regulation 27. Finally, he F submits that the interpretation of Regulation 27 rendered in **Nirma Industries Ltd. (supra)** is correct. It fully applies to the facts of the present case. It is neither distinguishable nor does it require reconsideration.

G 24. We have considered the submission made by the learned counsel for the parties.

25. Factually, it cannot be denied that in the years 2006-07, 2007-08 and 2010-11, the respondent had acquired shares H in excess of 5% which breached the 5% creeping acquisition

limit. In our opinion, the respondent was required to comply with Regulation 11 and make a Public Announcement to acquire shares in accordance with law. The respondent admittedly not having complied with Regulation 11, in our opinion, the appellant was perfectly justified in taking the non-compliance into consideration whilst considering the feasibility of the public offer made on 20th October, 2011.

26. With regard to delay, we do not find much substance in the submission of Mr. C.U. Singh. Mr. Singh has sought to explain the delay on the ground that information sought by the appellant was not given by the respondent. In our opinion, this was no ground for the appellant to delay the issuance of comments on the letter of offer, especially not for a period of 13 months. In the event the information was not forthcoming, the appellant had the power to refuse the approval of the public offer. It is true that under Regulation 18(2), SEBI was required to dispatch the necessary letters to the shareholders within a reasonable period. It is a matter of record that the comments were not offered for 13 months. Such kind of delay is wholly inexcusable and needs to be avoided. It can lead to avoidable controversy with regard to whether such belated action is bona fide exercise of statutory power by SEBI. By adopting such a lackadaisical, if not callous attitude, the very object for which the regulations have been framed is diluted, if not frustrated. It must be remembered that SEBI is the *watchdog* of the Securities Market. It is the guardian of the interest of the shareholders. It is the protective shield against unscrupulous practices in the Securities Market. Therefore, SEBI like any other body, which is established as a *watchdog*, ought not to act in a lackadaisical manner in the performance of its duties. The time frame stipulated by the Act and the Takeover Regulations for performing certain functions is required to be maintained to establish the transparency in the functioning of SEBI.

A 27. Having said this, we are afraid such delay is of no assistance to the respondent. It will not result in nullifying the action taken by SEBI, even though belated. Ultimately, SEBI is charged with the duty of ensuring that every public offer made is bona fide for the benefit of the shareholders as well as B acquirers. In the present case, SEBI has found that permitting the respondent to withdraw the public offer would be detrimental to the overall interest of the shareholders. The only reason put forward by the respondent for withdrawal of the offer is that it is no longer economically viable to continue with the C offer. Mr. Nariman has referred to a tabular statement and data to show that there is no substantial variation in the share prices that ensued making of the public offer. Having seen the table, we find substance in the submission of Mr. Nariman that there is hardly any variation in the shares of the Target Company D from 20th October, 2011 till 30th November, 2011. The variation seems to have been between Rs. 78.10 (on 24.11.2011) and Rs. 87.60 (on 20.10.2011). Such a variation cannot be said to be the result of the public offer. But this will not detract from the well known phenomena that Public Announcement of the public E offering affects the securities market and the shares of the Target Company. The impact is immediate.

28. We are unable to agree with the submission of Mr. Nariman that Regulation 27 would not be applicable to a F *voluntary public offer*. A perusal of Regulation 27(1) makes it patently clear that Regulation 27(1) reads "no public offer, once made, shall not be withdrawn except under the following circumstances." Accepting Mr. Nariman's submission would be to reconstruct the aforesaid provision. This Court, or any G other court, whilst construing the statutory provision cannot reconstruct the same. The plain reading of the aforesaid regulation makes it clear that *no public offer* whether it is voluntary or triggered by Regulation 11 can be withdrawn, H unless it satisfies the circumstances set out in Regulation

27(1)(b), (c) and (d). There can be no distinction between a *triggered* public offer and a *voluntary* public offer. Both have to be considered on an equal footing. We find substance in the submission made by Mr. C.U. Singh that Regulation 18(2) has no relevance to the case projected by the respondents having singularly failed to give the necessary information to SEBI with regard to the earlier three acquisitions.

29. We also do not agree with Mr. Nariman that Regulation 27 has to be read in the context of the Regulation as it existed when it was first enacted. As noticed earlier, Regulation 27(1)(a) before its deletion on September 9, 2002 permitted the public offer to be withdrawn, consequent upon any competitive bid. We see no reason to differ from the view taken in **Nirma Industries Ltd. (supra)** wherein we have observed as follows:

> "62. A bare perusal of the aforesaid Regulations shows that Regulation 27(1) states the general rule in negative terms. It provides that no public offer, once made, shall be withdrawn. Since clause (*a*) has been omitted, we are required to interpret only the scope and ambit of clauses (*b*), (*c*) and (*d*). The three sub-clauses are exceptions to the general rule and, therefore, have to be construed very strictly. The exceptions cannot be construed in such a manner that would destroy the general rule that no public offer shall be permitted to be withdrawn after the public announcement has been made. Clause (*b*) would permit a public offer to be withdrawn in case of legal impossibility when the statutory approval required has been refused. Clause (*c*) again provides for impossibility when the sole acquirer, being a natural person, has died. Clause (*b*) deals with a legal impossibility whereas clause (*c*) deals with a natural disaster. Clearly clauses (*b*) and (*c*) are within the same

A genus of impossibility. Clause (*d*) also being an exception to the general rule would have to be naturally construed in terms of clauses (*b*) and (*c*). Mr Divan has placed a great deal of emphasis on the expression "such circumstances" and "in the opinion" to indicate that the B Board would have a wide discretion to permit withdrawal of an offer even though it is not impossible to perform. We are unable to accept such an interpretation."

30. The submission with regard to the non-applicability C of *ejusdem generis* for interpretation of the Takeover Regulations has been considered and rejected in **Nirma Industries Ltd. (supra)** (Paragraphs 63 to 71).

31. We are also not impressed by the submission of D Mr. Nariman that it has now become economically impossible to give effect to the public offer. This very submission has been rejected in **Nirma Industries Ltd. (supra)**. We reiterate our opinion in **Nirma Industries Ltd. (supra)** that under Clause 27(1)(b)(c) and (d), a *Public Offer*, once made, can E only be permitted to be withdrawn in circumstances which make it virtually impossible to perform the Public Offer. In fact, the very purpose for deleting Regulation 27(1)(a) was to remove any misapprehension that an offer once made can be withdrawn if it becomes economically not viable. We are of F the considered opinion that the distinction sought to be made by Mr. Nariman between a *voluntary public offer* and a *triggered public offer* is wholly misconceived. Accepting such a submission would defeat the very purpose for which the Takeover Code has been enacted.

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32. We also do not find any merit in the submission of Mr. Nariman that the delay of 13 months by SEBI in issuing the impugned directions would permit the respondent to withdraw the Public Offer under Regulation 27(1)(b). The consideration H by SEBI is as to whether a Public Offer is in conformity with

the provisions of the SEBI Act and the Takeover Regulations. Delay in performance of its duties by SEBI can not be equated to refusal of the statutory approval requires from other independent bodies, such as under the RBI, Taxation Laws and other regulatory statutes including Foreign Exchange Regulations. Delay by SEBI in taking a final decision in making its comments on the letter of offer would not fall under Regulation 27(1)(b).

33. This now brings us to the submission of Mr. Nariman that there was a breach of Rules of Natural Justice. It is matter of record that the respondent had asked for an opportunity of hearing but none was granted. But the question that arises is as to whether this is sufficient to nullify the decision of SEBI. In our opinion, the respondent has failed to place on the record either before SAT or before this Court the prejudice that has been caused by not observing Rules of Natural Justice. It is by now settled proposition of law that mere breach of Rules of Natural Justice is not sufficient. Such breach of Rules of Natural Justice must also entail avoidable prejudice to the respondent. This reasoning of ours is supported by a number of cases. We may, however, refer to the law laid down in **Natwar Singh** Vs. **Director of Enforcement & Anr.,**[3] wherein it was held that "there must also have been caused some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice."

34. All the information sought by SEBI related to the three earlier acquisitions when the creeping limit for acquisition has been breached for triggering the mandatory Takeover Regulations. In appeal, SAT has left the question with regard to the earlier three acquisitions open and to be decided in accordance with law. Therefore, clearly no prejudice has been caused to the respondent.

[3] (2010) 13 SCC 255

35. Finally, we are unable to accept the submission of Mr. Nariman that the ratio of law as declared in **Nirma Industries Ltd.** (supra) would not be applicable to the facts and circumstances of this case. As pointed out earlier, we do not accept the distinction sought to be made by Mr. Nariman with regard to *voluntary open offer* and *mandatory open offer* which is the result of a triggered acquisition. The consequences of both kinds of offers to acquire shares in the *Target Company*, at a particular price, are the same. As soon as the offer price is made public, the securities market would take the same into account in all transactions. Therefore, the withdrawal of the open offer will have to be considered by the Board in terms of Regulation 27(1)(b)(c) and (d). Further, the deletion of Regulation 27(1)(a) does not, in any manner, advance the case of the respondent. It rather reinforces the conclusion that an open offer once made can only be withdrawn in circumstances stipulated under Regulation 27(1)(b)(c) and (d). We also do not agree with Mr. Nariman that *voluntary open offer* made by the respondent ought to be permitted to be withdrawn under Regulation 27(1)(b) for the reasons already stated. We have already come to the conclusion that the delay in offering comments by the Board on the letter containing voluntary open offer, though undesirable, is not fatal to the decision ultimately taken by the Board. We, therefore, reiterate our conclusion in **Nirma Industries** (supra).

36. We also do not find substance in the submission of Mr. Nariman that the judgment in **Nirma Industries** (supra) needs reconsideration. In our opinion, the *ejusdem generis* principle is fully applicable for the interpretation of Regulation 27(1)(b)(c) and (d) as there is a common *genus* of *impossibility*. This *impossibility* envisioned under the aforesaid regulation would not include a contingency where *voluntary open offer* once made can be permitted to be withdrawn on the ground that it has now become economically

unviable. Accepting such a submission, would give *a field day* to unscrupulous elements in the securities market to make Public Announcement for acquiring shares in the *Target Company*, knowing perfectly well that they can pull out when the prices of the shares have been inflated, due to the public offer. Such speculative practices are sought to be prevented by Regulation 27(1)(b)(c) and (d), that is precisely the reason why Regulation 27(1)(a) was deleted. Merely because there has not been any substantial change in the price of shares in this particular case, would not, in any manner, invalidate the conclusion reached in **Nirma Industries** (supra).

37. Last but not least, we are not able to approve the approach adopted by SAT in adopting the Issue of Capital and Disclosure Requirements Regulations, 2009 (ICDR) Regulation for interpreting the provisions contained in Regulation 27 of the Takeover Regulations. The regulations in Takeover Code have to be interpreted by correlating these regulations to the provisions of the SEBI Act.

38. In view of the above, the appeal is allowed. The impugned order passed by the SAT dated 19th June, 2013 in Appeal No.3 of 2013 is set aside and the directions issued by the appellant in the letter dated 30th November, 2012 are restored.

Bibhuti Bhushan Bose Appeal allowed.