BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Hearing : 23.07.2019
Date of Decision : 04.09.2019

Appeal No. 148 of 2017

1. Khoday India Ltd.
   'Brewery House', 7th Mile,
   Kanakapura Road,
   Bangalore - 560 062.

2. Srihari K L (HUF)
   No:9, Seshadri Road,
   Bangalore - 560 009.

3. Ramachandra K L (HUF)
   No:9, Seshadri Road,
   Bangalore - 560 009.

4. Padmanabhasa K L A (HUF)
   No:9, Seshadri Road,
   Bangalore - 560 009.

5. Swamy K L (HUF)
   No:9, Seshadri Road,
   Bangalore - 560 009.

6. Srihari K. L.
   No:9, Seshadri Road,
   Bangalore - 560 009.

7. Ramachandra K L
   No:9, Seshadri Road,
   Bangalore - 560 009.

8. Padmanabhasa K L A
   No:9, Seshadri Road,

Bangalore - 560 009.

9. Swamy K L
No:9, Seshadri Road,
Bangalore - 560 009.

10. Ghanashyam K P
No:9, Seshadri Road,
Bangalore - 560 009.

11. Giridhar K S
No:9, Seshadri Road,
Bangalore - 560 009.

12. Lalitha Swamy Khoday
No:9, Seshadri Road,
Bangalore - 560 009.

13. Srihari K L (Ptnr K Lakshmansa & Co)
No:9, Seshadri Road,
Bangalore - 560 009.

14. Srihari K L (Trustee L K Trust)
No:9, Seshadri Road,
Bangalore - 560 009.

15. Nithyananda K R
No:9, Seshadri Road,
Bangalore - 560 009.

16. Dayananda K R
No:9, Seshadri Road,
Bangalore - 560 009.

17. Srinivas K H
No:9, Seshadri Road,
Bangalore - 560 009.

18. Radheshyam K H
No:9, Seshadri Road,
Bangalore - 560 009.

19. Rajalakshmi Srihari Khoday

No:9, Seshadri Road,
Bangalore - 560 009.

20. Gurunath K H
No:9, Seshadri Road,
Bangalore - 560 009.

21. Gulab Padmanabhasa Khoday
No:9, Seshadri Road,
Bangalore - 560 009.

22. Srihari K L (Trustee L K & Sons)
No:9, Seshadri Road,
Bangalore - 560 009.

23. Gayathri Holdings Pvt. Ltd.
'Brewery House', 7th Mile,
Kanakapura Road,
Bangalore - 560 062.

24. Srihari K L - Partner - M/s. Khoday
R C A Industries
No:9, Seshadri Road,
Bangalore - 560 009.

25. Vyjayanti Tradings Pvt. Ltd.
'Brewery House', 7th Mile,
Kanakapura Road,
Bangalore - 560 062.

26. Macdonald Tradings Pvt. Ltd.
'Brewery House', 7th Mile,
Kanakapura Road,
Bangalore - 560 062.

27. Panchaganga Tradings Pvt. Ltd.
'Brewery House', 7th Mile,
Kanakapura Road,
Bangalore - 560 062.

28. Honeywell Business Pvt. Ltd.
'Brewery House', 7th Mile,
Kanakapura Road,
Bangalore - 560 062.

29. Sri Gurunath Tradings Pvt. Ltd.
'Brewery House', 7th Mile,
Kanakapura Road,
Bangalore - 560 062.

30. Pancha Kalyanni Tradings Pvt. Ltd.
'Brewery House', 7th Mile,
Kanakapura Road,
Bangalore - 560 062.

31. Peter Scot Tradings Pvt. Ltd.
'Brewery House', 7th Mile,
Kanakapura Road,
Bangalore - 560 062.

32. Khodays Breweries Ltd.
'Brewery House', 7th Mile,
Kanakapura Road,
Bangalore - 560 062.

33. Elkay Tradings Corporation Pvt. Ltd.
No:9, Seshadri Road,
Bangalore - 560 009.

34. The Distillers Company Pvt. Ltd.
'Brewery House', 7th Mile,
Kanakapura Road,
Bangalore - 560 062.

35. Hercules Construction Co. Pvt. Ltd.
Sri Lakshmi Venkateshwara
Complex, P. B. No. 9940, No:11,
Race Course Road,
Bangalore - 560 009.

36. K. L. Ramachandra - Chairman
'Brewery House', 7th Mile,
Kanakapura Road,
Bangalore - 560 062.

37. K. L. A. Padmanabhasa - Joint
Managing Director
'Brewery House', 7th Mile,

Kanakapura Road,
Bangalore - 560 062.

38. K. L. Swamy - Executive Promoter Director
'Brewery House', 7th Mile,
Kanakapura Road,
Bangalore - 560 062.

39. K. R. Nithyanand - Promoter Director
'Brewery House', 7th Mile,
Kanakapura Road,
Bangalore - 560 062.

40. K. H. Gurunath - Promoter Director
'Brewery House', 7th Mile,
Kanakapura Road,
Bangalore - 560 062.

41. K. S. Giridhar - Promoter Director
'Brewery House', 7th Mile,
Kanakapura Road,
Bangalore - 560 062.

42. Maj. Gen (Retd.) M. K. Paul - Independent Director
'Brewery House', 7th Mile,
Kanakapura Road,
Bangalore - 560 062.

43. Sudhakar Shetty - Independent Director
'Brewery House', 7th Mile,
Kanakapura Road,
Bangalore - 560 062.

44. B. K. Ratnakar Rao - Independent Director
'Brewery House', 7th Mile,
Kanakapura Road,
Bangalore - 560 062.

45. P. R. Ananda Murthy - Independent Director

'Brewery House', 7th Mile,
Kanakapura Road,
Bangalore - 560 062.

46. D. V. Sathyanarayana - Independent Director
'Brewery House', 7th Mile,
Kanakapura Road,
Bangalore - 560 062.

47. D. Prabhakara Rao - Independent Director
'Brewery House', 7th Mile,
Kanakapura Road,
Bangalore - 560 062.

48. Pamela Sunawala - Independent Director
'Brewery House', 7th Mile,
Kanakapura Road,
Bangalore - 560 062.

49. K. A. Sheriff
Independent Director
'Brewery House', 7th Mile,
Kanakapura Road,
Bangalore - 560 062. …… Appellants

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. Mustafa Doctor, Senior Advocate with Mr. Ravichandra Hegde, Mr. Robin Shah, Advocates and Mr. R. Venkat Subramanyan, CS & CFO i/b Parinam Law Associates for the Appellants.

Mr. Kumar Desai, Advocate with Mr. Chirag Bhavsar, Advocate i/b MDP & Partners for Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Dr. C. K. G. Nair, Member
Justice M. T. Joshi, Judicial Member

Per : Justice Tarun Agarwala, Presiding Officer

1. The appellant No. 1 is a public limited company whose shares were listed on the Bombay, Madras and Bangalore stock exchanges. Due to continuous losses, the company did not pay dividend to its shareholders after the year 2006-2007. At the present moment, the shares of the company are listed on the Bombay Stock Exchange (hereinafter referred to as, 'BSE') as the Madras and Bangalore stock exchanges have been derecognized.

2. The Securities Contracts (Regulation) Act, 1956 (hereinafter referred to as, 'SCRA') was enacted to prevent undesirable transactions in securities by regulating the business of dealings therein, and by providing for certain other matters connected therewith. Further, for carrying out the mandate of the SCRA, the Securities Contracts (Regulation) Rules, 1957 (hereinafter referred to as 'SCRR') were framed by the Central Government. Section 21 of the SCRA mandates the compliance, by all listed companies, of the conditions of the listing agreement with the stock exchange. The

SCRR, *inter-alia*, prescribes the requirements which are required to be satisfied by the companies for the purpose of getting their securities listed on any stock exchange in India.

3. The SCRR was amended vide notification of the Securities Contracts (Regulation) (Amendment) Rules, 2010 ('First amendment') by the Central Government dated June 04, 2010 and amended again vide Securities Contracts (Regulation) (Second Amendment) Rules, 2010 ('Second amendment') in terms whereof Rule 19(2)(b) was amended and a new rule namely, Rule 19(A) was inserted.

4. The amended Rule 19(2)(b) and newly introduced Rule 19(A) of SCRR reads as under :-

> *"(19)(1) A public company as defined under the Companies Act, 1956 desirous of getting its securities listed on a recognized stock exchange, shall apply for the purpose to the stock exchange and forward along with its application the following documents and particulars :*
>
> *……*
>
> *19(2) Apart from complying with such other terms and conditions as may be laid down by a recognized stock exchange, an applicant company shall satisfy the stock exchange that :*
>
> *(a) ……..*
>
> *(b)(i) At least twenty five per cent of each class or kind of equity shares or debentures convertible into equity*

shares issued by the company was offered and allotted to public in terms of an offer document; or

(ii) At least ten per cent of each class or kind of equity shares or debentures convertible into equity shares issued by the company was offered and allotted to public in terms of an offer document if the post issue capital of the company calculated at offer price is more than four thousand crore rupees:

Provided that the requirement of post issue capital being more than four thousand crore rupees shall not apply to a company whose draft offer document is pending with the Securities and Exchange Board of India on or before the commencement of the Securities Contracts (Regulation) (Amendment) Rules, 2010, if it satisfies the conditions prescribed in clause (b) of sub-rule 2 of rule 19 of the Securities Contracts (Regulation) Rules, 1956 as existed prior to the date of such commencement:

Provided further that the company, referred to in sub clause (ii), shall increase its public shareholding to at least twenty five per cent, within a period of three years from the date of listing of the securities, in the manner specified by the Securities and Exchange Board of India.

Continuous Listing Requirement.

19A. (1) Every listed company other than public sector company shall maintain public shareholding of at least twenty five per cent. :

Provided that any listed company which has public shareholding below twenty five per cent, on the commencement of the Securities Contracts (Regulation) (Amendment) Rules, 2010, shall increase its public shareholding to at least twenty five per cent, within a period of three years from the date of such commencement, in the manner specified by the Securities and Exchange Board of India.

Explanation: For the purposes of this sub-rule, a company whose securities has been listed pursuant to an offer and allotment made to public in terms of sub-clause

(ii) of clause (b) of sub-rule (2) of rule 19, shall maintain minimum twenty five per cent, public shareholding from the date on which the public shareholding in the company reaches the level of twenty five percent in terms of said sub-clause.

(2) Where the public shareholding in a listed company falls below twenty five per cent. At any time, such company shall bring the public shareholding to twenty five per cent within a maximum period of twelve months from the date of such fall in the manner specified by the Securities and Exchange Board of India.

(3) Notwithstanding anything contained in this rule, every listed public sector company shall maintain public shareholding of at least ten per cent. :

Provided that a listed public sector company-

(a) which has public shareholding below ten per cent, on the date of commencement of the Securities Contracts (Regulation) (Second Amendment) Rules, 2010 shall increase its public shareholding to at least ten per cent, in the manner specified by the Securities and Exchange Board of India, within a period of three years from the date of such commencement;

(b) whose public shareholding reduces below ten per cent, after the date of commencement of the Securities Contracts (Regulation) (Second Amendment) Rules, 2010 shall increase its public shareholding to at least ten per cent, in the manner specified by the Securities and Exchange Board of India, within a period of twelve months from the date of such reduction."

5. Thus, the provisions quoted above and especially Rule 19(2)(b) and 19A(1) of the SCRR above require all listed companies to achieve and maintain the minimum public shareholding of 25% of each class or kind of equity shares or debentures convertible into

equity shares issued by such companies. Those companies with public shareholding of less than 25% are required to achieve the same, within a period of three years from the date of commencement of the first amendment i.e. by June 03, 2013 in the manner specified by the Securities and Exchange Board of India (hereinafter referred to as, 'SEBI').

6. In order to achieve the aforesaid requirements, in the light of the aforesaid amendment made in the SCRR, the company was required to offload its shareholding to below 75%.

7. With a view to facilitate listed companies to comply with the Minimum Public Shareholding (MPS) requirement within the time specified in Rule 19A of the SCRR, SEBI issued circulars dated December 16, 2010, February 8, 2012 and August 29, 2012 providing the method by which public shareholding may be raised to the prescribed minimum level. Further, paragraph 3 of the circular dated August 29, 2012 provided as under :-

> *"3. Listed entities desirous of achieving the minimum public shareholding requirement through other means may approach SEBI with appropriate details. Further, listed entities desirous of seeking any relaxation from the available methods may approach SEBI with appropriate details. Such requests would be considered by SEBI based on merit. SEBI would endevour to communicate its decision within 30 days from the date of receipt of such requests."*

8. In this regard, the appellant company had also entered into a listing agreement with BSE. Clause 24(f) which is relevant to the present controversy is extracted hereunder :-

> *"24(f). The company agrees that it shall file any scheme / petition proposed to be filed before any Court or Tribunal under sections 391, 394 and 101 of the Companies Act, 1956, with the stock exchange, for approval, at least a month before it is presented to the Court or Tribunal."*

9. In this regard, Rule 19(7) of the SCRR provides as under :-

> *"19(7). The Securities and Exchange Board of India may, at its own discretion or on the recommendation of a recognized stock exchange, waive or relax the strict enforcement of any or all of the requirements with respect to listing prescribed by these rules."*

10. Pursuant to the aforesaid provision, SEBI issued a circular dated September 3, 2009 wherein certain requirements were prescribed for seeking exemption under Rule 19(7) of SCRR from the strict enforcement of Rule 19(2)(b) by listed companies, namely, the requirement to increase the public shareholding to atleast 25%. SEBI considering Clause 24(f) of the listing agreement observed that in terms of circular dated September 3, 2009 and pursuant to the scheme

of construction of amalgamation being sanctioned by High Court under Sections 391, 394 and 101 of the Companies Act, the listed companies desirous of getting their equity shares listed after merger/de-merger/amalgamation, etc. were required to seek an exemption from SEBI from the requirements of Rule 19(2)(b) of SCRR under Rule 19(7) of the SCRR. It was also observed that SEBI was granting exemption to such listed companies from time to time on a case to case basis. SEBI accordingly issued another circular dated February 4, 2013 revising the requirements for the stock exchanges and listed companies.

11. Under circular dated February 4, 2013 certain obligations were imposed upon the listed companies, namely, that the listed companies would file a draft scheme with the stock exchange in terms of Clause 24(f) of the listing agreement and would submit the documents mentioned in Paragraph 2 of Part A of Annexure I to the circular dated February 4, 2013. The listing company would also obtain a valuation report from an independent chartered accountant. The listed company was also required to include the observation letter of the stock exchange in the notice that was sent to the shareholders seeking approval of the scheme and was also required to bring to the notice of the High Court at the time of seeking approval of the scheme. On the other hand, the obligation of the stock exchange was

to process the draft scheme and forward their objection / no-objection to SEBI within a stipulated period. Further, the obligation of SEBI was to provide its comments of the draft scheme to the stock exchange.

12. Part B of the Annexure I to the circular of SEBI dated February 4, 2013 further required certain obligations to be carried out by the company as well as by the stock exchange upon the sanctioning of the scheme by the High Court. The said circular was clarified / modified by SEBI by circular dated May 21, 2013.

13. In terms of the circular dated February 4, 2013 and, in order to achieve the MPS under Rule 19(2)(b) and 19A of the SCRR, the appellant submitted a draft scheme under Section 100 of the Companies Act to BSE. It was asserted that since the shareholders were not receiving any dividend since 2006-2007, the Board of Directors of the company decided to reduce the share capital of the company from Rs. 37,59,12,370/- divided by 3,75,91,237 equity shares of Rs. 10/- each to Rs. 33,66,01,950/- divided by 3,36,60,195/- equity shares of Rs. 10/- each by returning the capital in respect of 39,31,042 equity shares held by the public.

14. BSE by a letter dated July 19, 2013 forwarded the scheme to SEBI with a note that they are unable to grant no-objection to the

proposed scheme of arrangement. BSE in its objection noted that the chartered accountant found that the fair value of the equity shares had been derived at Rs. 31.39 per share and that the merchant banker had found that the valuation of the share appeared to be fair and reasonable. The stock exchange also noted that the company had submitted the auditor certificate as required under Clause 24(l) of the listing agreement and also noted that under Clause 24(g) of the listing agreement the scheme did not violate any provisions of the SEBI Act or Regulations or of the Companies Act. The stock exchange further noted that the company would forward to its shareholders the fairness opinion obtained from the independent merchant banker on valuation of the assets / shares done by the valuer for the company and further confirmed that the compliance report and the observation letter issued by the stock exchange would also be included in the notice sent to the shareholders seeking approval of the draft scheme of the company. BSE inspite of noting that the scheme submitted by the appellant company was in terms of the requirements mentioned in the circulars dated February 4, 2013 and May 21, 2013 refused to grant no-objection on the ground that the draft scheme of the company appeared to be in contravention of the provisions of the Delisting Regulations and that Regulation 3(2) of the Securities and Exchange

Board of India (Buy Back of Securities) Regulations, 1998 prohibits the company from buy back of shares.

15. Based on the comments given by BSE, SEBI vide its letter dated August 30, 2013 approved the comments of BSE and opined that the no-objection certificate should not be granted to the company and that the company should be intimated to include the observation of the stock exchange while filing an application to the High Court.

16. Notwithstanding the aforesaid, the proposed scheme was laid before the general body of the company. In the Annual General Meeting (AGM) of the Company dated December 30, 2013, the scheme was approved under Section 100 of the Companies Act. The operative portion of the minutes of the AGM is extracted hereunder :

> *"The Chairman then declared that both the special resolutions as stated at item nos: 7 & 8 of the Notice under special business, had been passed by a majority of votes cast by the shareholders other than Promoters and Promoter Group i.e. public shareholders in accordance with the procedure mentioned in SEBI Circular CIR/CFD/DIL/5 dated 04th February 2013 (as amended by the subsequent SEBI Circular dated 21st May 2013) and also by more than 3/4ths combined majority of votes cast by shareholders belonging to both Public and Promoters category as required under Section 100 of the Companies Act, 1956."*

17. Thereafter, the resolution of the general body of the company was filed for confirmation before the Hon'ble Karnataka High Court. The Hon'ble Karnataka High Court by an order dated August 7, 2014 allowed the application and reduced the capital as resolved in the 47th Annual General Meeting of the company held on December 30, 2013. Pursuant to the order of the Hon'ble Karnataka High Court, the Registrar of Companies issued the certificate dated September 12, 2014 confirming reduction of capital.

18. Inspite of the process of reducing the shareholdings had started, SEBI issued an interim order dated June 4, 2013 against the company for failing to comply with the minimum public shareholding requirements. The directions so issued are extracted hereunder :-

> *"Vide an Order dated June 4, 2013("Interim Order"), SEBI issued the following directions inter alia against Khoday, an entity which failed to comply with the requirement of minimum public shareholding requirement by June 3, 2013,-*
>
> *17. "Hence, in exercise of the powers conferred upon me by virtue of Section 19 and under Sections 11(1), 11(2)(j), 11(4) and 11B of the Securities and Exchange Board of India Act, 1992 ("SEBI Act") read with Section 12A of Securities Contracts (Regulation) Act, 1956 ("SCRA"), pending passing of the final order in these case, I hereby:*

a. *Direct freezing of voting rights and corporate benefits like dividend, rights, bonus shares, split, etc. with respect to the excess of proportionate promoter / promoter group shareholding in the above mentioned non – compliant companies, till such time these companies comply with minimum public shareholding requirement.*

   i. *For the purpose of above direction, proportionate promoter/promoter group shareholding shall be computed on the basis of the public shareholding in the company; e.g. if public shareholding in a company after the deadline is less than 25%, say 10%, in such case, the proportionate promoter shareholding would be 30% (i.e. three times the existing public shareholding). Thus the excess promoter/promoter group holding i.e. 60%, shall be frozen till the minimum public shareholding requirement is complied with.*

   ii. *In case of more than one entity in the promoter/promoter group in a company, the excess promoter holding for the purpose of taking action shall be computed on a proportionate basis. For illustrating the example above, if there are three promoters; A, B and C with shareholdings of 45%, 35% and 10% respectively; the excess*

promoter holding of 60% shall be allocated as follows:

1. A: (60% multiplied by [45%/45%+35%+10%]) = 30.00%
2. B: (60% multiplied by [35%/45%+35%+10%]) = 23.33%
3.C: (60% multiplied by [10%/45%+35%+10%]) = 06.67%
Total = 60.00%

b. Prohibit the promoter/promoter group and directors of these non – compliant companies from buying, selling or otherwise dealing in securities of their respective companies, either directly or indirectly, in any manner whatsoever, except for the purpose of complying with minimum public shareholding requirement till such time these companies comply with the minimum public shareholding requirement.

c. Restrain the shareholders forming part of the promoter/promoter group in the non – complaint companies from holding any new position as a director in any listed company, till such time these companies comply with the minimum public shareholding requirement.

d. Restrain the directors of non – compliant companies from holding any new position as a director in any listed company, till such time these companies comply with the minimum public shareholding requirement."

19. The interim order was subsequently, confirmed on July 24, 2014. The appellants being aggrieved by the interim order as confirmed on July 24, 2014 filed an appeal before this Tribunal. This

Tribunal after taking into consideration the order of the Hon'ble Karnataka High Court dated August 7, 2014 passed an order dated July 7, 2016 permitting the appellants to withdraw the appeal with liberty to make a representation before SEBI bringing to the knowledge the order passed by the Hon'ble Karnataka High Court which was apparently passed after the confirmatory order. Accordingly, the appeal was withdrawn.

20. In the light of the aforesaid, a representation dated July 26, 2016 was filed before SEBI bringing to the knowledge the order of the Hon'ble Karnataka High Court dated August 7, 2014 by which their scheme for reduction of share capital under Section 100 of the Companies Act was allowed and the appellants were permitted to reduce the share capital of the company to the extent of the public shareholding. In the light of the order of the Hon'ble Karnataka High Court, the appellant prayed that the interim order and the confirmatory order should be recalled / modified.

21. It transpires that SEBI upon coming to know of the order of the Hon'ble Karnataka High Court filed an intervention application before the Hon'ble Karnataka High Court praying that they should be impleaded as the respondent. The Learned Single Judge of the Hon'ble Karnataka High Court by an order dated September 21,

2015 rejected the application of SEBI for impleadment holding that the order of the Hon'ble Karnataka High Court dated August 7, 2014 allowing the reduction of the share capital under Section 100 of the Companies Act was independent and would not affect the proceedings under the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as, 'SEBI Act') or the SCRA and the Rules and that non-compliance of the SCRR would be considered by SEBI on its own merits. The learned Single Judge held :-

> *"14. In the instant case, the SEBI is alleging non compliance of SCRR for which proceedings in exercise of the power under Section 19 and Section 11(1),2(j),(4) and 11B of SEBI Act read with Section 12A of Securities Contracts (Regulation) Act, 1956 ('SCR Act' for short) has already been initiated. If in that light the said conclusion in MCX Stock Exchange case is kept in view, there can be no doubt that the proceedings are independent of each other. If that be the position, irrespective of the sanction being granted by the Company Judge to the reduction of share capital, the non compliance of any other regulations over which the SEBI has the jurisdiction would be dealt with by the SEBI as a regulatory authority and the consequence thereof will visit the listed Company. Since the two proceedings are held to be different and distinct, the order dated 07.08.2014 in Co.P.No.132/2014 will only have the effect of providing the approval as contemplated under Sections 100 to 104 of the Companies Act to the extent the procedure contemplated therein has been adhered to, but it cannot be held as a shield by the Company to protect itself in the proceedings already initiated or to justify the non-compliance with the requirement of any other regulations, if it is still required to be complied."*

22. The learned Single Judge further held :-

> *"..... Hence all that is required to be clarified herein is, since the said proceedings is a continuation of a different and distinct proceedings than the proceedings for reduction of share capital, all contentions of the parties therein would be considered in the appeal, independent of the order dated 07.08.2014. When such right is available to SEBI irrespective of the subsistence of the order dated 07.08.2014 passed in Co.P.No.132/2014, the consequences thereof would follow. Hence the question of allowing SEBI to implead themselves would be wholly unnecessary."*

23. The Hon'ble Karnataka High Court in the operative portion of the order held :-

ORDER

> *"(i) The C.A. Nos. 1415/2014, 1416/2014 and 313/2015 are accordingly rejected.*
>
> *(ii) The C.A.Nos. 1648/2014 and 1778/2014 are disposed of as unnecessary.*
>
> *(iii) It is however clarified that the order dated 07.08.2014 in Co.P.No.132/2014 shall remain independent and shall not effect the proceedings under SEBI Act and SCR Act initiated by SEBI for non-compliance of SCRR, which would be considered on its own merits and all contentions are left open in the appeal pending before the Securities Appellate Tribunal.*
>
> *(iv) Parties to bear their own costs."*

24. Thereafter, the representation of the appellants was rejected by the Whole Time Member (hereinafter referred to as, 'WTM') by the impugned order dated May 8, 2017 and the interim order dated June 4, 2013 read with the confirmatory order dated July 24, 2014 was again confirmed. The appellants, being aggrieved by the said order, have filed the present appeal.

25. The WTM held that irrespective of the scheme for reduction of the share capital being granted by the Hon'ble Karnataka High Court the appellants were required to comply with the provisions of the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009 (hereinafter referred to as, 'Delisting Regulations'). Since the same has not been done, the interim order and the confirmatory order would continue to operate. The WTM further held that the scheme of arrangement involved reduction in share capital was rejected by SEBI by an order dated April 1, 2013 since there was no provision for granting exemption under the Delisting Regulations. Consequently, the company was required to comply with the minimum public shareholding requirement as contemplated under Rule 19 and 19(A) of the SCRR. It was also observed that the scheme of arrangement approved by the Hon'ble Karnataka High Court under Section 100 of the Companies Act proposed to pay the public shareholders the price of Rs. 75/- per

share whereas under the Delisting Regulations the price would be much more than what was being offered under the scheme of arrangement and therefore, the scheme was not in the interest of the investors.

26. We have heard Shri Mustafa Doctor, the learned senior counsel with Shri Ravichandra Hegde and Shri Robin Shah, the learned counsel for the appellants and Shri Kumar Desai, the learned counsel with Mr. Chirag Bhavsar, the learned counsel for the respondent.

27. In our view, the WTM has completely ignored the circulars dated February 4, 2013 and May 21, 2013 which provided a method for complying with the MPS requirements under Rule 19 and 19A of the SCRR. One such method which was permitted by SEBI was to reduce the share capital of the company under Section 100 of the Companies Act. We find that neither SEBI nor BSE while refusing to grant the no-objection certificate considered the requirements of SEBI circulars dated February 4, 2013 and May 21, 2013 and only considering the provision of the Delisting Regulations which is wholly irrelevant. Further, there is no finding by BSE while refusing to grant no-objection to the effect that the scheme was not in accordance with the requirements contemplated under the circulars

dated February 4, 2013 and May 21, 2013. The finding of the WTM that the price per share indicated in the scheme of arrangement was not in accordance with the Delisting Regulations is per se erroneous and misconceived in as much as the method was already prescribed under the circulars dated February 4, 2013 and May 21, 2013,

28. In our view, the approach adopted by the WTM is patently erroneous and cannot be sustained. The WTM has not considered the import of the provisions of the Sections 77 and 100 of the Companies Act and has only considered the impact of the Delisting Regulations under the SEBI laws. In order to proceed further, it would be appropriate to refer to the provisions of the Sections 77 and 100 of the Companies Act and Regulation 4 of the Delisting Regulations. For facility, the Sections 77 and 100 of the Companies Act and Regulation 4 of the Delisting Regulations are extracted hereunder :-

Sections 77 and 100 of the Companies Act -

*"**S. 77. Restrictions on purchase by company or loans by company for purchase, of its own or its holding company's shares.-***

(1) No company limited by shares, and no company limited by guarantee and having a share capital, shall have power to buy its own shares, unless the consequent reduction of capital is effected and sanctioned in pursuance of sections 100 to 104 or of section 402.

(2) No public company, and no private company which is a subsidiary of a public company, shall give, whether

directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or in its holding company:

Provided that nothing in this sub- section shall be taken to prohibit-

(a) the lending of money by a banking company in the ordinary course of its business; or

(b) the provision by a company, in accordance with any scheme for the time being in force, of money for the purchase of, or subscription for, fully paid shares in the company or its holding company, being a purchase or subscription by trustees of or for shares to be held by or for the benefit of employees of the company, including any director holding a salaried office or employment in the company; or

(c) the making by a company of loans, within the limit laid down in sub- section (3), to persons (other than directors, or managers) bona fide in the employment of the company with a view to enabling those persons to purchase or subscribe for fully paid shares in the company or its holding company to be held by themselves by way of beneficial ownership.

(3) No loan made to any person in pursuance of clause (c) of the foregoing proviso shall exceed in amount his salary or wages at that time for a period of six months.

(4) If a company acts in contravention of sub- sections (1) to (3), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to [ten thousand rupees].

(5) Nothing in this section shall affect the right of a company to redeem any shares issued under section 80 or

under any corresponding provision in any previous companies law.

*"**S. 100. Special resolution for reduction of share capital, -** (1) Subject to confirmation by the (Tribunal), a company limited by shares or a company limited by guarantee and having a share capital, may, if so authorized by its articles, by special resolution, reduce its share capital in any way; and in particular and without prejudice to the generality of the foregoing power, may -*

(a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up;

(b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost, or is unrepresented by available assets; or

(c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company;

and may, if and so far as is necessary, alter its, memorandum by reducing the amount of its share capital and of its shares accordingly.

(2) A special resolution under this section is in this Act referred to as "a resolution for reducing share capital".

Regulation 4 of the Delisting Regulations :

"4. (1) No company shall apply for and no recognised stock exchange shall permit delisting of equity shares of a company,-

(a) pursuant to a buyback of equity shares by the company; or

(b) pursuant to a preferential allotment made by the company; or

(c) unless a period of three years has elapsed since the listing of that class of equity shares on any recognised stock exchange; or

(d) if any instruments issued by the company, which are convertible into the same class of equity shares that are sought to be delisted, are outstanding.

[(1A) No promoter or promoter group shall propose delisting of equity shares of a company, if any entity belonging to the promoter or promoter group has sold equity shares of the company during a period of six months prior to the date of the board meeting in which the delisting proposal was approved in terms of sub-regulation (1B) of regulation 8.]

(2) For the removal of doubts, it is clarified that no company shall apply for and no recognised stock exchange shall permit delisting of convertible securities.

(3) Nothing contained in clauses (c) and (d) of sub-regulation (1) shall apply to a delisting of equity shares falling under clause (a) of regulation 6.

(4) No promoter shall directly or indirectly employ the funds of the company to finance an exit opportunity provided under Chapter IV or an acquisition of shares made pursuant to sub-regulation (3) of regulation 23.

(5) No [acquirer or promoter or promoter group or their related entities] shall –

(a) employ any device, scheme or artifice to defraud any shareholder or other person; or

(b) engage in any transaction or practice that operates as a fraud or deceit upon any shareholder or other person; or

> *(c) engage in any act or practice that is fraudulent, deceptive or manipulative –*
>
> *in connection with any delisting sough or permitted or exit opportunity given or other acquisition of shares made under these regulations."*

29. Under Section 77 of the Companies Act, a limited company is prohibited from buying its own shares. The main reason for this prohibition is that such purchase may either amount to trafficking in its own shares thereby enabling the company in an unhealthy manner, to influence the market price of its shares by reducing the stock or it would operate as a reduction of capital to the prejudice of its creditors. This general prohibition has however, being diluted by the insertion of Section 77A, 77AA and 77B of the Companies Amendment Act, 1999 which provides for buy back of its own securities by a company subject to the conditions specified therein.

30. In addition to the aforesaid buy back of the equity shares which are listed on any recognized stock exchange, the company shall, additionally, comply with the provisions of the Delisting Regulations issued by SEBI. Elaborate procedure has been prescribed for buy back of its equity shares by a listed company from existing shareholders. However, such buy back of shares is not applicable where there is a reduction of the share capital under

Section 100 of the Companies Act. Section 77 of the Companies Act clearly indicates that no company shall have the power to buy its own shares unless the consequent reduction of the capital is effected and sanctioned in pursuance of Sections 100 to104 of the Companies Act.

31. The process of reduction of share capital under Section 100 of the Companies Act has been summed up by the Hon'ble Supreme Court in **Pujab Distilleries India Ltd. vs. CIT, [(1965) 35 Com Cases 541, 544]** as under :-

> *"First, there will be a resolution by the general body of a company for reduction of capital by distribution of the accumulated profits amongst the shareholders. Secondly, the company will file an application in the court for an order confirming the reduction of capital. Thirdly, after it is confirmed, it will be registered by the Registrar of Companies. Fourthly, after the registration the company will issue notices to the shareholders inviting applications for refund of the share capital and fifthly, on receiving the applications, the company will distribute the said profits."*

32. The Act does not prescribe the manner in which the reduction of capital is to be effected. Nor is there any limitation of the power of the court to confirm the reduction except that it must first be satisfied that all the creditors entitled to object to the reduction have either consented or been paid or secured.

33. Subject to the confirmation of the Court which is required for safeguarding the interests of creditors and minority shareholders and seeing that it is fair and reasonable, the question of reducing the capital is a domestic affair to be decided by the majority, and the Act leaves the Company to decide for itself the extent, mode, etc., of the reduction and the application of the moneys released thereby as held in **Hindustan Commercial Bank Ltd. vs. Hindustan General Electric Corporation, (1960) 30 Com Cases 367 : AIR 1960 Cal 637 and In re, Panruti Industrial Company (private) Ltd., AIR 1960 Mad 537.**

34. We also find that in its consideration of the fairness of a proposed reduction of capital of a Company, the Court's jurisdiction is not confined to matters relating to the reduction alone. All circumstances relating to the adjustment of the interests of the different classes of shareholders, but not mere possibilities that may ultimately affect them, may properly be taken into account.

35. In the light of the aforesaid, the Hon'ble Karnataka High Court categorically held that the proceedings under Section 100 of the Companies Act were different and distinct from the delisting proceedings under the Delisting Regulations.

36. Thus, in our view, as a result of the reduction in the share capital of the company, and as a necessary consequence thereof, the shareholders were required to "surrender their shares". The phrase "surrender of shares" means the surrender to the company on the part of the registered holder of the shares already issued. Where shares are surrendered to the company under Section 100 of the Companies Act, it amounts to a reduction of the share capital. In our opinion, it is not a case of "buy back of shares" as prohibited under Section 77 of the Companies Act. In our view, the surrender of shares under Section 100 of the Companies Act is an exception to the Rules as provided under Section 77 of the Companies Act.

37. Much stress was laid by the respondent with regard to Regulation 4 of the Delisting Regulations which provided that no company shall apply for delisting of equity shares of the company pursuant to buy back of equity shares by the company. In our opinion, Regulation 4(1)(a) of the Delisting Regulations is not applicable in the case of reduction of the share capital under Section 100 of the Companies Act in view of the fact that it is not a case of buy back of shares by the company pursuant to the scheme sanctioned by the Hon'ble Karnataka High Court but is a case of surrender of the shares by the shareholders.

38. In this regard, Section 55A of the Companies Act which has been inserted by the Companies Amendment Act, 2000 is extracted hereunder :-

> *"**S. 55A. POWERS OF SECURITIES AND EXCHANGE BOARD OF INDIA**.- The provisions contained in sections 55 to 58, 59 to 84, 108, 109, 110, 112, 113, 116, 117, 118, 119, 120, 121, 122, 206, 206A and 207, so far as they relate to issue and transfer of securities and non-payment of dividend shall, -*
>
> *(a) in case of listed public companies ;*
>
> *(b) in case of those public companies which intend to get their securities listed on any recognized stock exchange in India,*
>
> *be administered by the Securities and Exchange Board of India ; and*
>
> *(c) in any other case, be administered by the Central Government.*
>
> *Explanation. - For removal of doubts, it is hereby declared that all powers relating to all other matters including the matters relating to prospectus, statement in lieu of prospectus, return of allotment, issue of shares and redemption of irredeemable preference shares shall be exercised by the Central Government, [Tribunal] or the Registrar of Companies, as the case may be]"*

39. The aforesaid provision indicates that SEBI has the power to deal with the provisions of Sections 77, 77A, 77AA and 77B of the Companies Amendment Act, 1999 and does not have any power to

question the reduction of the share capital under Sections 100 to 104 of the Companies Act.

40. The respondent has unnecessarily mixed up the provisions of the Delisting Regulations with that of the MPS requirements. SEBI vide its letter dated April 1, 2013 in connection with the proposed scheme of reduction of the appellant company had observed that 'reduction of share capital' and 'delisting of shares' are distinct processes and separate procedure have been prescribed under law in respect thereof. SEBI further observed that it is not required under law to apply the provision of the Delisting Regulations to a scheme of reduction of share capital under Section 100/101 of the Companies Act. In the light of the specific observation of SEBI vide its letter dated April 1, 2013 in relation to the proposed scheme of reduction of the paid-up capital of the appellant company, it was not open to the WTM to state that the interim order could not be vacated or rescinded on account of non-compliance of the Delisting Regulations.

41. In view of the aforesaid, it is apparently clear that the reduction of the share capital sanctioned under Section 100 of the Companies Act does not, in any manner, breach the provisions of the Regulation 4 of the Delisting Regulations.

42. As a result of the sanctioned scheme under Section 100 and upon implementation of the reduction of the share capital, the appellants and the respondent are required to comply with Part B of Annexure I to the circular dated February 4, 2013. If the same is not adhered to, it would be open to the respondent to initiate proceedings again, but at this stage, the interim order and the confirmatory order cannot be allowed to continue. Accordingly, the interim order dated June 4, 2013 and the confirmatory order dated July 24, 2014 are quashed. The appeal is allowed. In the circumstances of the case, parties shall bear their own costs.

Sd/-
Justice Tarun Agarwala
Presiding Officer

Sd/-
Dr. C. K. G. Nair
Member

Sd/-
Justice M. T. Joshi
Judicial Member

04.09.2019
Prepared & Compared by
PTM