

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on: 19.3.2019
Date of Decision : 3.4.2019

Appeal No.275 of 2017

Debi Prasad Patra
CJ-332, Sector-II,
Salt Lake City, Kolkata – 700 091. Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot C4-A,
G Block, Bandra-Kurla Complex,
Bandra (E), Mumbai - 400 051. Respondent

Mr. Vinay Chauhan, Advocate with Mr. K.C. Jacob, Advocate
i/b. Corporate Law Chambers India for the Appellant.

Mr. J.P. Sen, Senior Advocate with Mr. Karan Bhosale, Mr.
Balagopal Menon and Mr. Pratik Ingle, Advocates i/b.
Singhania Legal Services for the Respondent.

With
Appeal No.289 of 2017

Tantra Narayan Thakur
B-1/46, (2nd Floor), Safdarjung Enclave,
New Delhi – 110 029. Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot C4-A,
G Block, Bandra-Kurla Complex,
Bandra (E), Mumbai - 400 051. Respondent

Mr. Vinay Chauhan, Advocate with Mr. K.C. Jacob, Advocate i/b. Corporate Law Chambers India for the Appellant.

Mr. Karan Bhosale, Mr. Balagopal Menon and Mr. Pratik Ingle, Advocates i/b. Singhania Legal Services for the Respondent.

**With
Appeal No.290 of 2017**

Nand Gopal Khaitan
1B, Old Post Office Street
Kolkata-700 001.

..... Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot C4-A,
G Block, Bandra-Kurla Complex,
Bandra (E), Mumbai - 400 051.

..... Respondent

Mr. P.N. Modi, Senior Advocate with Mr. Vinay Chauhan, Mr. Kunal Kataria and Mr. K.C. Jacob, Advocates i/b. Corporate Law Chambers India for the Appellant.

Mr. Karan Bhosale, Advocate with Mr. Balagopal Menon and Mr. Pratik Ingle, Advocates i/b. Singhania Legal Services for the Respondent.

**With
Appeal No.296 of 2017**

Amit Kiran Deb
DA-38, Sector-1, Salt Lake,
Bidhannagar (N), North 24
Parganas, Kolkata - 700064.

..... Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot C4-A,
G Block, Bandra-Kurla Complex,
Bandra (E), Mumbai - 400 051.

..... Respondent

Mr. Vinay Chauhan, Advocate with Mr. K.C. Jacob, Advocate
i/b. Corporate Law Chambers India for the Appellant.

Mr. Karan Bhosale, Advocate with Mr. Balagopal Menon and
Mr. Pratik Ingle, Advocates i/b. Singhania Legal Services for
the Respondent.

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

Per : Justice Tarun Agarwala

1. These group of appeals are against a common order and consequently the same are being decided together. For facility, the facts stated in Appeal No.290 of 2017 are being taken into consideration.
2. DPSC Ltd. (hereinafter referred to as 'DPSC') was incorporated as a Company on 2nd July, 1919 under the Indian Companies Act, 1913 and was primarily engaged in the business of generation, distribution and supply of electrical energy and matters incidental thereto. India Power Corporation Ltd. (hereinafter referred to as 'IPCL') is an unlisted Company

and is the sole promoter entity of DPSC holding 93% of the shareholding in DPSC.

3. The Securities Contracts (Regulation) Act, 1956 (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.

4. 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.

5. 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.”

6. Thus the provisions quoted 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 (SEBI).

7. In order to achieve the requirement as per the aforesaid provisions Securities and Exchange Board of India (hereinafter referred to as ‘SEBI’) issued various circulars dated 16th December, 2010, 8th February, 2012 and 29th August, 2012

prescribing various methods for complying with the Minimum Public Shareholding requirement (referred to hereinafter as 'MPS') such as issuance of shares to the public through prospectus, offer for sale of shares held by promoters to public through prospectus, sale of shares held by promoters through the secondary market, bonus shares to public shareholders, etc.

8. In the light of the aforesaid amendments in the SCRR, the Company was required to offload its shareholdings to the public, i.e., IPCL was required to reduce its shareholding from 93% to below 75%. In order to achieve this target and comply with the amended Rules, a Scheme of Arrangement and Amalgamation under Section 390, 391 and 394 of the Companies Act, 1956 was issued and filed for sanction before the Calcutta High Court. The Scheme of Arrangement and Amalgamation provided that:

“(a) the investment division of IPCL would be transferred to an Independent Trust with independent trustees (“Power Trust”);

(b) Inter alia 38,95,15,856 shares (40%) held by IPCL would be transferred to the Trust;

(c) After that, IPCL would be amalgamated into DPSC which would take over its business. IPCL would cease to exist and the balance shareholding of IPCL in DPSC would get cancelled;

(d) DPSC would issue 112,02,75,823 new shares to the shareholders of the IPCL, after which the holding of the said Trust would be only 24.69%;

(e) After the said amalgamation was complete, the said Trust would be holding 24.69%, which would be classified as a public shareholding.”

The said Scheme was considered and sanctioned by the Calcutta High Court by an order dated 17th April, 2013 passed in Company Petition No.206 of 2012.

9. It transpires that SEBI issued a letter dated 15th April, 2013 asking information from the Company pertaining to compliance with the MPS requirement by the Company in terms of Rule 19(2) (b) and Rule 19A of the SCRR Rules. In response to the said letter, the Company replied vide their letter dated 3rd May, 2013 intimating them that the Scheme of Arrangement and Amalgamation has been sanctioned by the Calcutta High Court by an order dated 17th April, 2013 and pursuant to the said

Scheme 38,95,15,856 shares held by the sole promoter of IPCL would be transferred to a Trust which will have public participation. It was also intimated that pursuant to the amalgamation of IPCL with DPSC, IPCL would cease to exist and the balance shareholding of IPCL and DPSC would get cancelled. Subsequently, another letter dated 3rd June, 2013 was issued intimating SEBI and the Stock Exchange that pursuant to the transfer of shares of the Trust in terms of the Scheme of Amalgamation, the promoters shareholding of DPSC stood reduced to 68.31% and thus the MPS requirement in terms of Rule 19 and Rule 19A of the SCRR Rules has been complied with.

10. In spite of the aforesaid information being supplied, it transpires that SEBI was under an impression that the Company had failed to achieve the MPS requirement and, consequently, passed an ex-parte interim order dated 4th June, 2013 against the Company and its Directors. The gist of the restraint order is:

- (a) Voting rights and corporate benefits of the promoters shares would stand frozen;
- (b) All promoters and directors were restrained from dealing in the shares of their respective companies;

(c) All promoters and directors were restrained from holding any new position as a director in any listed company.

11. The appellant upon coming to know of the ex-parte interim order immediately replied vide letter dated 5th June, 2013 and eventually a personal hearing was granted on 5th August, 2013 pursuant thereto SEBI decided that necessary clarification would be sought from the Calcutta High Court. Accordingly, SEBI filed an application before the Calcutta High Court on 12th December, 2013 contending that the shares held by the Trust cannot be construed as public shareholding and must be considered as promoter shareholding for the purpose of MPS requirement and accordingly sought modification of the order sanctioning the Scheme of Arrangement and Amalgamation. The Calcutta High Court disposed of the application of SEBI by an order dated 27th January, 2017 directing the Trust to sell 32,63,16,563 shares to the public by 30th April, 2017 in order to achieve the MPS requirement. For facility, the relevant portion of the order dated 27th January, 2017 passed by the Calcutta High Court is extracted hereunder:

“The trust will cite this order and make a public offer for sale of the said 32,63,16,563 shares. Advertisements in

such regard will be published in such newspapers as may be suggested by SEBI within a week of the form of the advertisement being forwarded to the office of SEBI in Kolkata. Such form of the advertisement should be forwarded to the relevant office within three weeks from date. The directions herein are in modification of the interim order of February 20, 2015 that restrains the amalgamated company from dealing with its shares.”

12. In compliance of the order of the Calcutta High Court, the Trust issued an advertisement on 6th April, 2017 for sale of 32,63,16,563 shares. Subsequently, the Trust issued another advertisement on 26th April, 2017 for sale of its shares. Through this advertisement only 7,73,051 shares were subscribed. Since the time period was elapsing as per the order of the Calcutta High Court and the shares were not being subscribed by the public the Trust moved an application before the Calcutta High Court for extension of time. The Calcutta High Court by an order dated 25th August, 2017 granted time till end of February, 2018 to sell its shares. Pursuant to the said direction the Trust issued an advertisement dated 21st December, 2017 and again on 30th January, 2018 and again on 15th February, 2018 for sale of its shares. It was submitted that some shares were subscribed by the public but the MPS requirement was not achieved as per Rule 19 and 19A of the SCRR Rules.

13. In the meanwhile, while the Trust was going ahead with the sale of its shares to the public SEBI confirmed the ex-parte interim order by the impugned order dated 25th July, 2017 holding that the appellant being a Director was responsible for ensuring compliance with the regulatory guidelines as per Rule 19 and 19A of the SCRR Rules. The Whole Time Member held:

“Under the facts and circumstances mentioned above, I am of the view that the Noticees, being the directors of the Company (DPSC) ought to have ensured that the functioning of the Company (DPSC) was in full compliance with the applicable laws including the provisions of Securities Contracts (Regulation) Rules, 1957.”

And further held:

“I note that the present promoter shareholding (including the shareholding of Power Trust) is 92.9%. This clearly indicates that DPSC has not complied with the MPS requirement as mandated by the provisions of SCRR and SCRA till date.

The failure on the part of DPSC and its directors including the Noticees herein to comply with the directions of the Hon’ble High Court cannot be condoned.”

14. The appellant being aggrieved by the order of the WTM dated 25th July, 2017 has filed the present appeal. We have heard Mr. P.N. Modi, Senior Advocate assisted by Mr. Vinay Chauhan, Mr. Kunal Kataria and Mr. K.C. Jacob, Advocates for

the appellant and Mr. J.P. Sen, Senior Advocate assisted by Mr. Karan Bhosale, Mr. Balagopal Menon and Mr. Pratik Ingle, Advocates for the respondent at length. Admittedly, after the amendment in SCRR Rules in 2010, promoters in a public listed Company cannot hold more than 75% shares of that Company. The requirement of law was for greater public participation in a listed Company and, therefore, atleast 25% of the shares in a listed Company was required to be held by the public. The amendment stipulated that those Companies with public shareholding of less than 25% was required to achieve the same within a period of 3 years from the date of commencement of the first amendment that is by 3rd June, 2013. In order to achieve this target, the Company came out with a Scheme of Arrangement and Amalgamation under Sections 390, 391 and 394 of the Companies Act, 1956 by which the MPS requirements would be achieved. The Scheme was initially sanctioned but was subsequently modified on the intervention of SEBI by the Calcutta High Court. It was found that the transfer of shares by IPCL to the Trust was not sufficient compliance of the MPS requirement under Rule 19 and 19A of the SCRR Rules. The Calcutta High Court accordingly directed that in

order to achieve the 25% minimum public shareholding in the amalgamated Company 32,63,16,563 shares were required to be sold by the Trust to the public through a public offer. We find from a perusal of the orders of the Calcutta High Court that a specific direction was issued to the Trust to divest its shares by making a public offer. No direction whatsoever was given to the Company or its Directors.

15. The contention of the respondent that if the MPS requirement was not achieved through this public offer pursuant to the direction of the Calcutta High Court it was still open to the Company and its Directors to ensure compliance of the requirement of law by adopting any of the methods as prescribed by SEBI vide its circulars cannot be accepted as it would run counter to the Scheme of Arrangement and Amalgamation as sanctioned by the Calcutta High Court. It would also violate the directions given by the Calcutta High Court.

16. We are, thus, of the opinion that the Whole Time Member has misinterpreted the orders of the Calcutta High Court and has committed an error in holding that the DPSC and its Directors had not complied with the MPS requirement and that there was

a failure on the part of DPSC and its Director to comply with the directions of the Calcutta High Court. The directions of the Calcutta High Court was only against the Trust and not against the Company and its Directors.

17. There is no doubt that the MPS requirement as per Rule 19 and 19A is required to be achieved and if the same cannot be achieved through the Scheme of Amalgamation as sanctioned by the Calcutta High Court, SEBI and/or the Company and its Directors are required to approach the Calcutta High Court for further directions and modification of the Scheme of Amalgamation. However, noncompliance of the MPS requirement cannot at this stage result in issuance of a restraint order. We are of the opinion that once SEBI approached the Calcutta High Court for modification of the Scheme of Amalgamation it was no longer available to SEBI to restrain the Directors for noncompliance of the MPS requirement. We are further of the view that since the Calcutta High Court had directed the Trust to divest its shares in order to achieve the MPS requirement under Rule 19 and 19A of the SCRR Rules it was no longer open to adopt any other method as per the circulars without taking leave from the Calcutta High Court.

18. In view of the aforesaid, the impugned ex-parte interim order dated 4th June, 2013 passed by the Whole Time Member and the confirmatory order dated July 25, 2017 cannot be sustained and are quashed. In the light of the aforesaid it is not necessary for this Tribunal to dwell into the contention as to whether the appellant being a Non Executive Director was otherwise responsible for the affairs of the Company or not. The appeals are allowed. In the circumstances of the case, there shall be no order as to costs.

Sd/-
Justice Tarun Agarwala
Presiding Officer

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

Sd/-
Justice M.T. Joshi
Judicial Member

3.4.2019

Prepared and compared by
RHN