

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on: 23.08.2019

Date of Decision : 09.09.2019

Appeal No. 360 of 2017

Madhusudan Securities Limited
37, National Storage Building,
Plot No. 42 B, Nr. Johnson &
Johnson Bldg., SB Road,
Mahim (West),
Mumbai – 400 060.

..... Appellant

Versus

BSE Limited
14th Floor, P J Towers,
Dalal Street, Fort,
Mumbai – 400 001.

.... Respondent

Mr. Shyam Mehta, Senior Advocate with Mr. Joby Mathew
and Mr. Mit Shroff, Advocate i/b Joby Mathew & Associates
for the Appellant.

Mr. P.N. Modi, Senior Advocate with Vivek Shah, Advocate
i/b ELP for the Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Dr. C.K.G. Nair, Member

Per : Justice Tarun Agarwala, Presiding Officer

1. We have heard Shri Shyam Mehta, the learned senior
counsel along with Shri Joby Mathew for the appellant. The

appellant is a Company registered under the Companies Act, 1956 and is a listed Company. The appellant is engaged in the business of investments. On February 4, 2011 the appellant entered into a Business Transfer Agreement ('BTA' for short) with one Primus Retail Private Limited ('Primus' for short) wherein Primus agreed to transfer their business undertaking including the assets and liabilities as well as the trademarks and licenses to the appellant for a total consideration of Rs. 100 crore. Based on the aforesaid agreement certain payments were made by the appellant and further on May 16, 2011, 61,42,857 equity shares of Rs. 10 each at a premium of Rs. 60 per share was allotted in favour of Primus for consideration other than cash.

2. It is alleged that Primus failed to perform its obligation under the BTA and in the meanwhile one of the creditors of the Primus filed a Company Petition before the High Court of Karnataka, based on which the Karnataka High Court passed an order of winding up of the said Company on October 8, 2012 and appointed an Official Liquidator.

3. Since the obligations under the BTA could not be fulfilled by Primus the appellant vide their letter dated

November 2, 2012 intimated Primus that the BTA had been rendered void and thereafter the appellant passed a resolution by the Board of Directors on October 17, 2014 forfeiting the said shares allotted to Primus and further directed to reissue them to other parties in due course subject to statutory approvals and compliances.

4. Based on the aforesaid resolution the appellant filed an application dated February 5, 2015 before the BSE Limited ('BSE' for short) for recognizing the forfeiture of the shares by the appellant Company pursuant to the resolution of the Board of Directors. By an application dated July 3, 2015 the appellant again made a request to the BSE for recognizing the forfeiture of the shares allotted to Primus and prayed that approval may be granted for delisting the forfeited shares.

5. By e-mail dated November 10, 2015 BSE informed that there is no request received from the Official Liquidator with regard to the cancellation of shares and that it is not known whether the Official Liquidator was aware of the forfeiture of the shares and the subsequent application made by the appellant to BSE. BSE further informed that the delisting cannot be done through forfeiture of the shares and can only

be done in accordance with the Companies Act by a scheme of arrangement etc.

6. Subsequently, by the impugned order dated July 21, 2017 the application of the appellant for forfeiture of 61,42,847 equity shares held by Primus was rejected. BSE found that the forfeiture of the shares was not in accordance with the Articles of Association of the Company. Further there was no provision in the BTA for forfeiture of shares allotted to Primus on account of non performance of the obligation by Primus. By the impugned order, BSE advised the appellant to adopt the scheme for reduction of the share capital for delisting of the shares.

7. The appellant Company being aggrieved by the said decision of the BSE has filed the present appeal.

8. The Articles of Association of the appellant Company provides for forfeiture of the shares subject to certain compliances. For facility, Clause 53 and 59 of the Articles of Association of the Company are extracted below:-

“53. If by the terms of issue of any share or otherwise any amount is payable at any fixed time or by installments at fixed times. Whether on account of the nominal amount

of the share or by way of premium every such amount or installment shall be payable as if it were a call duly made by Directors and payable on the date on which by the terms of issue such sum becomes payable and of which due notice has been given. In case of non-payment of such sum, all the relevant provisions herein contained as to payment of interest and expenses, forfeiture or otherwise shall apply as if such sum had become payable by virtue of a call duly made and verified.

59. *If calls or installment not paid notices may be given:*

If a member fails to pay and call, or installment of a call, on or before the date appointed for payment of the same, the Directors may at any time thereafter during such time as the call or installment remains unpaid, serve a notice on such member requiring him to pay the same together with any interest that may be accrued and all expenses that may have been incurred by Company by reason of such non-payment.”

9. In this regard we may refer to Clause 29, 30 and 31 of Schedule I of Table A of the Companies Act which relates to forfeiture of shares. For facility, the said provisions are extracted here under:-

“Forfeiture of shares

29. If a member fails to pay any call, or instalment of a call, on the day appointed for payment thereof, the Board may, at any time thereafter during such time as any part of the call or instalment remains unpaid, serve a notice on him requiring payment of so much of the call or

instalment as is unpaid, together with any interest which may have accrued.

30. *The notice aforesaid shall –*

(a) *name a further day (not being earlier than the expiry of fourteen days from the date of service of the notice) on or before which the payment required by the notice is to be made; and*

(b) *state that, in the event of non-payment on or before the day so named, the shares in respect of which the call was made will be liable to be forfeited.*

31. *If the requirements of any such notice as aforesaid are not complied with, any share in respect of which the notice has been given may, at any time thereafter, before the payment required by the notice has been made, be forfeited by a resolution of the Board to that effect.”*

10. From the aforesaid, it is apparently clear that a notice is required to be given to the shareholder giving him an opportunity for payment of the call money. Thus, before any forfeiture can be made an appropriate service of notice is a condition precedent to be fulfilled. Therefore, if there is any, irregularity either in the contents of the notice or in the service of notice as required under Clause (30) the same would be fatal to the validity to the forfeiture. The Supreme Court in *Public Passenger Service Ltd. vs. M.A. Khadar (1967) 36 Comp Cas 1* held that a defective notice of

forfeiture of shares renders the subsequent forfeiture invalid. Similar view was reiterated by the Andhra Pradesh High Court in *Bhagwandas Garg vs. Canara Bank Ltd. (1981) 51 Comp Cas 38*. In *Kanduri Lakshmiah Chetty vs The Adoni Electric Supply Co., Ltd. AIR 1944 Mad 322* wherein it was held that if there is a slight irregularity it would be fatal to the forfeiture.

11. Thus, BSE had rightly held that the forfeiture of shares made by the appellant Company was not in accordance with the provisions of the Articles of Association of the Company. Nothing has been indicated by the learned counsel as to how the finding of the BSE is incorrect. We find that under Clause 29 and 30 of Schedule I of Table A of the Companies Act read with Clause 53 and 59 of the Articles of Association the forfeiture of shares can only happen when a member fails to pay sum / calls. Further, due notice has to be given to the member before any forfeiture could be done by the Company. In the instant case, there is nothing to indicate that due notice was given to Primus or to the Official Liquidator before the resolution was passed by the Board of Directors of the appellant Company.

12. Thus, if the forfeiture is not validly made, the same would become invalid. In the instant case, we do not find anything to indicate that condition relating to forfeiture was duly complied with by the appellant. We are further of the opinion that once shares are allotted and registered in the name of Primus the appellant Company has no power to forfeit the shares on the ground of failure of consideration and the remedy available is only to obtain appropriate relief by a suit as held in *Kotah Transport Ltd., Kotah vs. State of Rajasthan AIR 1966 Raj 136*.

13. We further find that the BTA also does not provide any provision for forfeiture of shares allotted to Primus on account of non-performance of the obligation by Primus.

14. In the light of the aforesaid, the contention of the appellant that since much water has flown and no objection has been raised by Primus with regard to forfeiture of shares the appellant may be permitted to file a fresh application for delisting of the shares cannot be accepted as the same is misconceived in as much as it is not known whether the appellant Company or the Official Liquidator are aware of

such alleged forfeiture made by the appellant Company. In any case, we are of the opinion that the decision of the appellant to forfeit the shares allotted to Primus was wholly vitiated and was not in accordance with the Articles of Association and Clause 29, 30 and 31 of Schedule I of Table A of the Companies Act. Even otherwise, once the shares are allotted the shares cannot be forfeited by a resolution made by the appellant Company.

15. Consequently, for the reasons stated aforesaid we do not find any error in the order passed by the BSE. The appeal fails and is dismissed. In the circumstances, there shall be no order on costs.

Sd/-
Justice Tarun Agarwala
Presiding Officer

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

09.09.2019
Prepared & Compared by
MSB/PTM