

BEFORE THE SECURITIES APPELLATE TRIBUNAL  
MUMBAI

**Order Reserved on: 06.03.2020**

**Date of Decision : 12.11.2020**

**Appeal No. 553 of 2019**

JCT Limited  
Village Chohal,  
District Hoshiarpur,  
Punjab – 146 024.

...Appellant

Versus

1. BSE Limited  
14<sup>th</sup> Floor,  
P J Towers,  
Dalal Street, Fort,  
Mumbai – 400 001.

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

...Respondents

Mr. Janak Dwarkadas, Senior Advocate with Mr. Joby Mathew and Mr. Nikhil Shah, Advocates i/b Joby Mathew & Associates for the Appellant.

Mr. P.N. Modi, Senior Advocate with Mr. Anubhav Ghosh and Ms. Rashi Dalmia, Advocates i/b The Law Point for Respondent No. 1.

Mr. Shyam Mehta, Senior Advocate with Mr. Abhiraj Arora and Mr. Vivek Shah, Advocates i/b ELP for Respondent No. 2.

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

Per : Dr. C.K.G. Nair, Member

1. This appeal has been preferred aggrieved by the communication of Respondent No. 1, BSE Limited ('BSE' for short) dated August 16, 2019 as well as other related communications, including from the Securities and Exchange Board of India ('SEBI' for short), respondent No:2, on the matter whereby the proposal to issue 3,64,72,067 equity shares to a lender on preferential basis was rejected / closed.

2. The relevant facts relating to the matter are the following:-

The appellant is a Company incorporated under the Companies Act, 1956 and listed with BSE since 1986. It availed several credit facilities from a consortium of banks. In addition, it issued Foreign Currency Convertible Bonds ('FCCBs' for short) which were due for redemption on April 6, 2011. The FCCBs could not be redeemed due to the unsound financial condition of the appellant and the bond holders initiated winding up proceedings against the appellant in the Punjab and Haryana High Court. Even a settlement agreement dated June 1, 2015 arrived at in terms of the direction of the said High Court also could not be honored since the appellant defaulted in paying the installments. Therefore, the appellant approached an Asset Reconstruction

Company ('ARC' for short), namely, Phoenix ARC Private Limited ('Phoenix' for short) who agreed to a one time settlement of the obligations of the FCCBs for a total consideration of Rs. 100 crore as well as agreed for a need based working capital loan to the appellant up to Rs. 20 crore. Therefore, the said agreement was for a total loan of Rs. 120 crore with tenor/maturity of 5 years to be repaid with an interest @ 19% per annum. It is the contention of the appellant that given that the interest rate of 19% was on a very high side the appellant and Phoenix agreed to revise this particular item in terms of 16% per annum interest payable on a monthly basis and 3% to be paid upfront at the time of assigning / first draw down of the loan. Further, it was also agreed between appellant and Phoenix that equity shares would be allotted to Phoenix in lieu of this 3% interest component. On September 21, 2018 the Phoenix conveyed its final sanction of the loan in terms of the above terms. Thereafter, the Board of Directors of the appellant, on December 31, 2018 approved issue of fresh equity shares of the value in lieu of the 3% interest which comes to Rs. 9.16 crore on discounted value basis and therefore 3,64,72,067 equity shares at a face value of Rs. 2.50 had to be issued. On February 14, 2019 in an extraordinary general body meeting, a special resolution was passed empowering the Board of Directors to issue the said

shares. On January 30, 2019 the appellant submitted an application to BSE for in-principle approval of the said issue and allotment. Various clarifications were sought by BSE which were replied to. On July 15, 2019 the appellant submitted a representation to SEBI, Respondent No. 2, seeking in-principle approval for the said issue and allotment. On August 9, 2019 a personal hearing was held before SEBI in which officials from BSE were also present. In this meeting SEBI endorsed the view taken by the officials of BSE and informed the appellant that approval cannot be granted to the proposed issue and allotment in terms of Regulation 169(1) of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 ('ICDR Regulations, 2018' for short). On August 16, 2019 the appellant received an e-mail communication from BSE stating the following:-

*“Kindly note that as per the earlier intimation to you to provide the required documents / clarifications, we have not yet received the required documents / clarifications from your end, Hence. your Case No. 90239 is treated as “CLOSED”. In case, the application need to be processed, kindly make fresh application through the “Listing Centre” along with the applicable fees and required documents”.*

3. Aggrieved by the said decision of Respondent No. 1 and 2 that the proposed issue and allotment of equity shares to Phoenix was not approved and hence the matter was treated as “CLOSED”, this appeal has been filed.

4. Learned Senior Counsel Shri Janak Dwarkadas appearing for the appellant vehemently contended that the issue and allotment of shares come under the Companies Act and not under the SEBI Act, 1992; ICDR Regulations, 2018 is issued under Section 30 of the SEBI Act, which gives power to make Regulation to SEBI is a subordinate legislation and subordinate legislation should be in consonance with the parent legislation which in the instance case is the Companies Act. Since Section 32 of the SEBI Act states that *“the provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.”* Accordingly, since “securities” are defined under the Securities Contracts (Regulation) Act, 1956 (‘SCRA’ for short), Section 2A of the said Act takes us to Section 62 of Companies Act, 2013 which is regarding further issue of share capital including preferential allotment and sub section 62(1)(c) deals with issue for “consideration of cash or other than cash”.

5. In short, it is the contention of the learned Senior Counsel that the proposed issue and allotment of equity shares on a preferential basis to the ARC Phoenix is fully in compliance with the provisions of the Companies Act as well as the ICDR Regulations, 2018 since it has followed the legal trajectory of board resolution and a special resolution passed in an

extraordinary general body meeting and such a special resolution was passed because of the preemptive rights of the existing shareholders in preferential allotment and in the instant case allotment is to “others” i.e. other than existing shareholders. Therefore, the appellant Company is entitled to make such an issue under Section 62 of the Companies Act, 2013.

6. The learned Senior Counsel further contended that the proposed issue and allotment is for “consideration other than cash basis” because the 3% interest component over a period of 5 years was converted into a net present value (NPV) basis thereby converting a Rs. 21.55 crore potential liability into a Rs. 9.16 crore liability by using an appropriate discounting.

7. The learned Senior Counsel also relied on the commentaries of Ramaiah’s on the Companies (Second Amendment) Act, 2002 on payment in “Cash” or in “kind” and sought to emphasize the Department’s Clarification – I & II which are as follows:-

*“Department’s Clarification.- I, If consideration for allotment of shares is actual cash, then only the allotment would be for cash. “Cash” is actual money or instruments e.g. cheques which are generally used and accepted as money. If consideration for allotment is not flow of cash but some other mode of payment e.g. cancellation of a genuine debt or outstanding bills, for goods sold and delivered, marketable securities, time deposits in banks, then allotment*

*cannot be treated as for cash (Department's Letter No. 8/4/69-CL-V, dated 18-11-1969).*

*Clarifications-II. Further, clarification given by the Department of Company Affairs is as follows:-*

*"I am directed to refer to this Department's Circular Letter No. 8/4/69, dated 18-11-1969 and to say that the views conveyed therein have since been re-examined. The Department is now of the view that the allotment of shares by a company to a person in lieu of a genuine debt due to him is in perfect compliance of the provisions of section 75(1). In this connection it is clarified that the act of handing over cash to the allottee of shares by a company in payment of the debt and the allottee in turn returning the same cash as payment for the shares allotted to him is not necessary for treating the shares as having been allotted for cash. What is required is to ensure that the genuine debt payable by a company is liquidated to the extent of the value of the shares. [Circular 8/32(75) 77-CL-V, dated 13<sup>th</sup> March, 1978]."*

8. The learned Senior Counsel further submitted that the proposed issue and allotment of shares to Phoenix is on non-cash consideration basis is also emphasized by the fact that the same has been classified as part of the expense account as per Rule 13(2)(j)(ii) of the Companies (Share Capital and Debentures) Rules, 2014. The learned Senior Counsel further admits that while making application to BSE an inadvertent error was made in the application which stated that "other than cash consideration" was not applicable. However, it was submitted that an inadvertent error made by an official of a Company should not come in the

way of correct interpretation of the provisions of law when it is called upon to do so.

9. The learned Senior Counsel Shri P.N. Modi appearing on behalf of Respondent No. 1, BSE submitted that the application for listing the proposed issue and allotment did not say other than cash, but said N A (not applicable); therefore the appellant was fully aware that proposed issue and allotment was for cash and at this later state they cannot change the stand. In any case, the learned Senior Counsel, emphasized that a reading of the provisions of law makes it clear that the proposal to issue and allot shares in lieu of 3% reduction in interest is for cash, since the interest obligation otherwise would have been a cash liability.

10. The learned Senior Counsel Shri Shyam Mehta appearing on behalf of the Respondent No. 2, SEBI submitted that Section 24 of the Companies Act, 2013, and Section 11(a), Section 30(1), Section 30(2) etc. of SEBI Act give ample powers to SEBI to regulate listed Companies or Companies intending to be listed. It was further submitted that there is a discrepancy between the sanction letter at page 34 and the minutes of the board of directors held on December 31, 2018; while the former shows no reference to NPV the latter refers to NPV. In any case, it was contended by the learned Senior Counsel that the entire agreement is as if the

ARC is paying price of the shares every month hence it is in cash; not other than cash. However, if the ARC had deducted Rs. 9.06 crore from the loan of Rs. 120 crore sanctioned instead of adjusting against the future interest payment it would have been on cash basis. In short, the arguments of the learned Senior Counsel for the respondents was that the application did not specify that the issue was on non-cash basis and since the adjustments is with respect to a liability in terms of interest equivalent of 3% it is on cash basis.

11. Since entire dispute is relating to interpretation of Regulation 169(1) of ICDR Regulations, 2018, for convenience of reference we reproduce the section which reads:-

*“169. (1) Full consideration of specified securities other than warrants shall be paid by the allottees at the time of allotment of such specified securities except in case of shares issued for consideration other than cash.*

*Provided that in case of a preferential issue of specified securities pursuant to any resolution of stressed assets under a framework specified by the Reserve Bank of India or a resolution plan approved by the National Company Law Tribunal under the Insolvency and Bankruptcy Code 2016, the consideration may be in terms of such scheme.”*

12. The expression “Cash” is further amplified in Ramaiah’s compilation in terms of Department’s Clarification-I which thus reads- *“Cash” is actual money or instruments e.g. cheques which*

*are generally used and accepted as money.” It also states that “cancellation of a genuine debt or outstanding bills, for goods sold and delivered, marketable securities, time deposits in banks, then allotment cannot be treated as for cash”. Clarification-II further amplifies this provisions by stating that “The Department is now of the view that the allotment of shares by a company to a person in lieu of a genuine debt due to him is in perfect compliance of the provisions of section 75(1)”. In terms of this interpretation we are of the considerate view that if as part of an agreement of liquidating a future obligation / liability if an issue and allotment is made it shall be treated as for “other than cash consideration”. The submission of the respondent here that it has to be an existing debt obligation is a very tight and narrow interpretation, particularly, in the context of a beneficial economic legislation where some degree of freedom of doing business is to be granted while interpreting provisions of such law in the absence any allegation of violations, manipulations or other offences.*

13. Here is a case of a Company on the brink of liquidation trying to pay up its past obligations to the financial institutions by availing a term-loan from an ARC who for its own business considerations are ready to give such a term-loan though at an

exorbitant rate of interest @ 19%. Given that 19% is too high, which might again make the appellant company non-viable, it has entered into an agreement with an ARC for a reduction in the interest liability in terms of giving some shares of the same company, which the ARC is willing to accept and for which a NPV calculation was also agreed to. By this NPV method a potential liability of Rs. 21.55 crore has been converted into Rs. 9.16 crore and hence the adjustments were made and the agreement was accepted. There are lots of genuine business decisions in terms of this agreement. Even if it is possible to read such an interest adjustment for shares as for cash consideration it is also possible to read the same futuristic NPV based considerations as not for cash. In such a context of 'right versus right' and that too in the case of business decisions we need to read it with a positive spirit for enabling business and genuine business decisions.

14. Further, the basic principle of the construction of a statute is that when the words of a statute are clear, plain or unambiguous, the courts are bound to give effect to the meaning irrespective of the consequences. When the language is plain and unambiguous and admits of only one meaning, then no question of construction of a statute arises for the Act speaks for itself. If the words used

are capable of one construction then it is not open to the courts to adopt any other hypothetical construction. The salient principle is, that the court must avoid addition of words and resort to only in exceptional circumstances to achieve the purpose of the Act/provision or to give a purposeful meaning to the provision.

15. In the instant case, the proposal to issue and allot shares in lieu of 3% reduction in interest is clearly "other than cash". These words are clear, plain and unambiguous and needs no further interpretation and therefore use of any additional words to give a purposeful meaning to the provision is not required especially when clarification 1&2, as quoted above, have been made.

16. Therefore, in the facts and circumstances of the matter, we are of the considered view that the impugned issue and allotment of equity shares is for "other than cash", and no violation has been attributed in the entire matter.

17. In view of the aforesaid reasons, impugned Order is quashed and appeal is allowed with no orders on costs.

18. This Order has been pronounced through video conference due to Covid-19 pandemic, since the matter had been reserved only a few days prior to the lockdown. At this stage it is not possible to sign a copy of this order nor a certified copy of this order could be issued by the registry. In these circumstances, this order will be digitally signed by the Presiding Officer on behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Parties will act on production of a digitally signed copy sent by fax and/or email.

Justice Tarun Agarwala  
Presiding Officer

Dr. C.K.G. Nair  
Member

Justice M.T. Joshi  
Judicial Member

12.11.2020  
msb