

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Decision : 17.04.2018

Appeal No. 116 of 2018

Penta Gold Limited
30, 1st Floor, Champa Gully,
Zaveri Bazar,
Mumbai – 400 002. Maharashtra ...Appellant

Versus

National Stock Exchange of India Limited
Exchange Plaza, Plot No. C/1, G Block,
Bandra Kurla Complex,
Bandra (East),
Mumbai – 400 051. ...Respondent

Mr. P.N. Modi, Senior Advocate with Mr. Neville Lashkari, Ms. Purti Minawala, Ms. Poornima Balasubramaniam and Mr. Kunal Mehta, Advocates i/b Crawford Bayley and Co. for the Appellant.

Mr. Rashid Boatwalla, Advocate with Mr. Rahul Jain, Advocate i/b MKA & Co. for the Respondent.

Mr. Vishal Kanade, Advocate with Mr. Mihir Mody and Mr. Nishant Upadhyay, Advocates i/b K Ashar & Co. for SEBI on notice.

CORAM : Justice J.P. Devadhar, Presiding Officer
Dr. C.K.G. Nair, Member

Per : Justice J.P. Devadhar (Oral)

1. Where a public issue is undersubscribed, whether, the underwriters to the public issue are entitled to discharge their obligation contained in regulation 106P of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 ('ICDR Regulations' for short) by procuring applications from third parties is the basic question raised in this appeal.

2. In the present case, Inventure Merchant Banker Services Private Limited ('Merchant Banker' for short) was appointed to act as its lead Merchant Banker to the public issue of the appellant company. Under the public offer, 36 Lakh equity shares of the company having face value of Rs. 10 each at a price of Rs. 37 per share aggregating to Rs. 1332.00 Lakh were offered to the public in terms of Chapter XB of ICDR Regulations. On September 26, 2017 an Underwriting Agreement was executed between the appellant company, the merchant banker and GCM Securities Ltd. (underwriter and market maker) wherein the merchant banker had underwritten 15% of the issue size and GCM Securities Ltd. had underwritten 85% of the issue size.

3. The public issue of the appellant company opened for subscription on March 23, 2018 and closed on March 27, 2018 wherein the issue was subscribed only to the extent of 55.42%. With a view to determine the underwriters obligation in relation to unsubscribed shares and to determine the basis for allotment of shares, a meeting was held on April 5, 2018 between the company, merchant banker and Karvy Computershare Pvt. Ltd. (Registrar to the Issue). In the minutes of the meeting dated April 5, 2018 it was recorded that unsubscribed portion comes to 16,14,000 shares and that the underwriters had subscribed to those 16,14,000 shares by procuring applications from 8 investors named therein.

4. On furnishing a copy of the minutes of the meeting dated April 5, 2018, Mr. Lokesh Bhandari, Manager of National Stock Exchange of India Limited ('NSE' for short) sought explanation from the appellant as to why the undersubscribed portion of the issue has been subscribed by 8 investors and not by the underwriters themselves. The appellant explained that as per

the Model Underwriting Agreement prescribed by SEBI it was open to the underwriters to procure subscription from the investors. In support of the above contention reliance was placed on the decision of BSE in case of Powerhouse Fitness and Realty Ltd. wherein BSE had allowed such procurement of subscription by the investors.

5. Rejecting the contention of the appellant, the Manager of NSE by the impugned communication dated April 6, 2018 informed the appellant that the Exchange has not approved the basis of allotment because undersubscribed shares have been subscribed by 8 investors and not by the underwriters themselves as set out in the offer document. Challenging the said communication, present appeal is filed.

6. Before considering the rival contentions, it would be appropriate to quote Regulation 106P of the ICDR Regulations which reads thus:-

Underwriting by merchant bankers and underwriters.

“[106P]. (1) The issue made under this Chapter shall be hundred per cent. underwritten.

Explanation- The underwriting under this regulation shall be for the entire hundred percent of the offer through offer document and shall not be restricted upto the minimum subscription level.

(2) The merchant banker/s shall underwrite at least fifteen per cent of the issue size on his/ their own account/s.

(3) The issuer in consultation with merchant banker may appoint underwriters in accordance with Securities and Exchange Board of India (Underwriters) Regulations, 1993 and the merchant banker may enter into an agreement with nominated investor indicating therein the number of specified securities which they agree to subscribe at issue price in case of under-subscription.

(4) If other underwriters fail to fulfill their underwriting obligations or other nominated investors fail to subscribe to unsubscribed portion, the merchant banker shall fulfill the underwriting obligations.

(5) The underwriters other than the merchant banker and the nominated investors, who have entered into an agreement for subscribing to the issue in case of under-subscription, shall not subscribe to the issue made under this Chapter in any manner except for fulfilling their obligations under their respective agreements with the merchant banker in this regard.

(6) All the underwriting and subscription arrangements made by the merchant banker shall be disclosed in the offer document.

(7) The merchant banker shall file an undertaking to the Board that the issue has been hundred per cent. underwritten along with the list of underwriters and nominated investors indicating the extent of underwriting or subscription commitment made by them, one day before the opening of issue.”

7. In the present case, the underwriting agreement executed on September 26, 2017 in accordance with the model underwriting agreement prescribed by SEBI specifically records that the underwriters agree to underwrite and/or procure subscription for the issue of shares in case the issue is undersubscribed. Admittedly the said underwriting agreement was vetted by NSE before the public issue was opened.

8. Thus on one hand, regulation 106P(2) of ICDR Regulations require the merchant banker to underwrite at least 15% of the issue size on his own account and further regulation 106P(4) provides that if the other underwriters or the nominated investors fail to fulfill their obligation then the merchant banker shall fulfill their underwriting obligations. On the other hand, the model underwriting agreement prescribed by SEBI in the year 1993 which continues to be in force till date permits the underwriters to procure applications from the investors to subscribe to the unsubscribed shares if the issue is undersubscribed. The model underwriting agreement prescribed by SEBI further provides that in the event of failure by the underwriters to subscribe to the shares, the issuer company shall be free to

make arrangement with one or more persons to subscribe to such shares without prejudice to the rights of the issuer company to take such measures and proceedings as may be available to it against the underwriters including the right to claim damage for any loss suffered by the company by reason of failure on part of the underwriters to subscribe to the shares.

9. In the present case the underwriting agreement executed by and between the appellant and the underwriters was in accordance with the model underwriting agreement prescribed by SEBI and the said underwriting agreement was admittedly vetted by NSE. Having vetted the underwriting agreement executed by the appellant company and the underwriters which is in consonance with the model underwriting agreement prescribed by SEBI, NSE is not justified in rejecting the basis of allotment submitted by the appellant on ground that the underwriters have failed to subscribe to the unsubscribed shares as contemplated under regulation 106P of the ICDR Regulations.

10. In these circumstances, in the interest of investors and securities market, we dispose of the appeal by passing the following order:-

- (a) The impugned communication of NSE dated April 6, 2018 is quashed and set aside;
- (b) Appellant is at liberty to ascertain from the underwriters within 3 days from today as to whether they are ready and willing to discharge their obligation set out in regulation 106P of the ICDR Regulations and intimate the same to the NSE immediately thereafter.

- (c) If the underwriters express their inability to discharge their obligation under the ICDR Regulations, then the appellant company be permitted to take into consideration the shares subscribed by the 8 investors and proceed to complete the public issue process.
- (d) If the underwriters agree to discharge their obligation set out in the ICDR Regulations, then, in the peculiar facts of present case, no action need be taken against the underwriters.

11. Before concluding we deem it proper to bring to the notice of SEBI that there is no clarity between the ICDR Regulations and the model underwriting agreement prescribed by SEBI in the year 1993 (which is still in operation) in relation to the obligations to be discharged by the underwriters. Therefore, it would be just and proper that SEBI addresses itself on the above issue expeditiously and ensure that there is clarity in relation to the obligations to be discharged by the underwriters.

12. Appeal is disposed of in the above terms with no order as to costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

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

17.04.2018

Prepared and compared by:msb