BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved:19.7.2021
Date of Decision:09.8.2021

Misc. Application No.772 of 2021
And
Misc. Application No.815 of 2021
And
Appeal No.423 of 2021

PNB Housing Finance Ltd.
9th Floor, Antriksh Bhawan,
22 KG Marg, New Delhi-110001. ...Appellant

Versus

Securities and Exchange Board of India
Plot No.C4/A, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai – 400 051, India. …Respondent

Mr. Janak Dwarkadas, Senior Advocate with Mr. Pesi Modi, Senior Advocate, Mr. Rohan Rajdayksha, Mr. Neville Lashkari, Ms. Pallavi Shroff, Mr. Prashant Gupta, Mr. Anuj Berry, Ms. Manjari Tyagi, Ms. Deepika Goyal Mr. PSS Bhargava and Mr. Aryan Agarwal, Advocates i/b. Shardul Amarchand Mangaldas & Co. for the Appellant.

Mr. Fredun De Vitre, Senior Advocate with Mr. Mustafa Doctor, Senior Advocate, Mr. Mihir Mody, Mr. Arnav Misra and Mr. Mayur Jaisingh, Advocates i/b. K. Ashar & Co. for the Respondent.

CORAM: Justice Tarun Agarwala, Presiding Officer
Justice M.T. Joshi, Judicial Member

Per: Justice Tarun Agarwala, Presiding Officer

1. The impugned order/communication dated 18th June, 2021 issued by the General Manger of Securities and Exchange Board of India (for short 'SEBI') is under challenge in this appeal. By this impugned communication, respondent has restrained the appellant from holding the Extra Ordinary General Meeting ('EGM' for short) with regard to agenda no.1 circulated vide notice dated 31st May, 2021.

2. The facts leading to the filing of the present appeal is, that the appellant is a registered housing finance Company. In November, 2016 the appellant became a public listed Company and its shares was listed on the Stock Exchange. The appellants were seeking to raise its capital in the past two years but such efforts could not materialise. In February, 2021 Punjab National Bank, which is the largest shareholder, holding 33% of

the shareholding of the appellant's Company, intimated the appellant that it cannot provide funding as regulatory approval from Reserve Bank of India was not obtained.

3. On the other hand, some of the existing shareholders alongwith others jointly offered to pump in funds by way of preferential allotment of shares. These entities are:

i Pluto Investment S.a.r.l (Carlyle Group)

ii Salisbury Investments P. Ltd.

iii Alpha Investments Pte Ltd.

iv General Altantic Singapore Fund Fii Pte Ltd.

4. Based on the offer given by the aforesaid entities the Board of Directors of the appellant Company passed a resolution dated 31st May, 2021 approving the raising of capital through preferential allotment of shares to the proposed allotees at a price of Rs.390/ per share. The resolution resolved to convene an Extra Ordinary General Meeting for approval of the

resolution of the board by the shareholders. Accordingly, a notice was issued to all shareholders intimating that an Extra Ordinary General Meeting would be convened on 22nd June, 2021 to consider various items and item no. 1 related to the issue of allotment of shares by way of preferential allotment on private placement basis for cash consideration.

5. The aforesaid resolution of the Board of Directors and the subsequent issue of the notices to the shareholders were intimated to the Stock Exchanges, pursuant to which, the Stock Exchanges from 11th to 15th June, 2021 sought various information/responses from the Company which was duly supplied. Based on the responses, the Stock Exchanges submitted a joint report to SEBI. SEBI vide letter dated 17th June, 2021 asked the appellants to submit a parawise comments to the joint report dated 16th June, 2021 submitted by the Stock Exchanges especially on the issue whether all applicable methods of valuation were considered by

the Board of Director while ascertaining the share price. The appellants gave parawise reply on 18th June, 2021 and, thereafter, on the same date, i.e. 18th June, 2021, the impugned communication was issued. By this communication it was held that agenda no.1 being ultra vires of Article of Association shall not be acted upon until the appellant obtained a report from the registered valuer in terms of article 19(2) of the Articles of Association. It was stated that the resolution is ultra vires since valuation by the registered valuer had not been factored while determining the price of the preferential issue and that the Articles of Association as it stands as on date requires the Board of Directors to consider the valuation report of a registered valuer. It was also indicated that the report submitted by the BR Maheshwari & Co. LLP ('BRM' for short), statutory auditor, was merely a certificate of calculation of the price of the proposed issuance of shares and the same

was not in accordance with the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements, Regulations, 2018) (hereinafter referred to as 'ICDR Regulations') and that the valuation report given by BRM was also not permissible in view of Section 144 of the Companies Act, 2013. It was asserted that the valuation under the Articles of Association determines the value which is different from the floor price determined under the ICDR Regulation which only determines the minimum floor price. It was also indicated that there was no repugnancy between the Articles of Association vis-a-vis the Companies Act and the ICDR Regulations.

6. We have heard Mr. Janak Dwarkadas, Senior Advocate assisted by Mr. Pesi Modi, Senior Advocate, Mr. Rohan Rajdayksha, Mr. Neville Lashkari, Ms. Pallavi Shroff, Mr. Prashant Gupta, Mr. Anuj Berry, Ms. Manjari Tyagi, Ms. Deepika Goyal, Mr. PSS Bhargava and Mr. Aryan Agarwal, Advocates for the

Appellant and Mr. Fredun De Vitre, Senior Advocate assisted by Mr. Mustafa Doctor, Senior Advocate, Mr. Mihir Mody, Mr. Arnav Misra and Mr. Mayur Jaisingh, Advocates for the Respondent.

7. The contention of the appellant is, that the respondent had no jurisdiction to pass such an order and that the limited jurisdiction which the respondent had was only to examine the pricing of the preferential issue in compliance with the price discovery mechanism as provided under Regulation 164 of the ICDR Regulations. The impugned communication was violative of the principles of natural justice and that an opportunity of hearing ought to have been provided before taking such a decision. It was also urged that SEBI is acting discriminately with the appellant in as much as it has selectively singled out the appellant contrary to market precedents and whereas various Companies which had identical Article in the Articles of Association with regard to

valuation of shares from a registered valuer were allowed to go ahead with the pricing mechanism under Regulation 164 of the ICDR Regulations and that those Company were not required to obtain the valuation report from a registered valuer. On the other hand, the appellant is being discriminated. It was also urged that in view of the provisions of Section 62(1)(c) of the Companies Act read with the second proviso to Rule 13(1) of the Companies (Share Capital And Debenture) Rules, 2014 (hereinafter referred to as the Rules of 2014), a listed Company was not required to obtain a valuation report from a registered valuer and that the pricing of the shares was required to be done as per the price discovery mechanism provided under Regulation 164 of the ICDR Regulations. In the alternative, it was urged that Article 19(2) of the Articles of Association was repugnant to Section 62(1)(c) of the Companies Act and also repugnant to Regulation 164 of the ICDR Regulations. It was also urged that in any case, the

appellant had obtained a valuation report from a registered valuer which factor has been incorrectly considered by the respondent. It was also contended that the respondents are now justifying their action on the basis of new pleas being raised in their replies which is not permissible.

8. On the other hand, the respondent contended that SEBI has the jurisdiction to issue directions in the interest of the investors and shareholders. It was contended that the preferential issue would result in change in the control of the appellant Company and that the shareholding of the largest preferential shareholder, namely, PNB would get reduced from 32.64% to 20.28% and that the shareholding of the preferential allottees would increase to 68%. Such change in the shareholding would trigger an open offer as mandated under the SAST Regulations, 2011. It was contended that the floor price fixed under Regulation 164 of the ICDR was Rs.384.60 which is

far less than the book value at Rs.540/ per share and, therefore, the price determined at Rs.384.60 was unfair even though the price fixed by the Company was Rs.390/ per share and the price offered by the acquirer under Regulation 8 was Rs.403.22 per share. It was contended that Regulation 164 does not prescribe that the price to be determined for the preferential issue shall be the floor price. It only provides that such price shall not be less than the prescribed floor price and that it was open to the Company to determine the price of the preferential issue which was higher than the minimum and to do so on the basis of any other method that results in such a higher price. It was, thus, urged that there was no repugnancy in Article 19(2) of the Articles of Association with Regulation 62(1)(c) of the Companies Act or Regulation 164 of the ICDR Regulations. It was, thus, contended that there is no bar for a price to be determined by the registered

valuer so long as the price does not go below the floor price determined under Regulation 164.

9. The short question that arises in the present controversy is, whether the appellant is required to get its shares valued from a registered valuer as required under Article 19(2) of the Articles of Association or whether the appellant is required to get the pricing calculated in accordance with the pricing mechanism provided under Regulation 164 of the ICDR.

10. Before we dwell into this aspect it would be appropriate to cull out the appropriate provisions, namely, Article 19(2) of the Articles of Association, Section 6 of the Companies Act, Section 24 of the Companies Act, Section 62(1)(c) of the Companies Act, Rule 3 & 13 of the Debenture Rules, 2014 and Regulation 164 of the ICDR.

> ***"Article 19(2) of the Articles of Association***
>
> *Notwithstanding anything contained in sub-clause (1) hereof, the further shares aforesaid may be offered to any persons (whether or not those persons include the persons referred to*

in clause (a) of sub-clause (1) hereof) if authorized by special resolution either for cash or for consideration other than cash, if the price of such shares is determined by the valuation of a registered valuer."

*"**Section 6 of the Companies Act, 2013***

6. Act to override memorandum, articles, etc.-

Save as otherwise expressly provided in this Act—

(a) the provisions of this Act shall have effect notwithstanding anything to the contrary contained in the memorandum or articles of a company, or in any agreement executed by it, or in any resolution passed by the company in general meeting or by its Board of Directors, whether the same be registered, executed or passed, as the case may be, before or after the commencement of this Act; and

(b) any provision contained in the memorandum, articles, agreement or resolution shall, to the extent to which it is repugnant to the provisions of this Act, become or be void, as the case may be."

"Section 24 of the Companies Act, 2013

24. Power of Securities and Exchange Board to regulate issue and transfer of securities, etc.—

(1) The provisions contained in this Chapter, Chapter IV and in Section 127 shall,—

(a) insofar as they relate to—

(i) issue and transfer of securities; and

(ii) non-payment of dividend,

by listed companies or those companies which intend to get their securities listed on any recognised stock exchange in India, except as provided under this Act, be administered by the Securities and Exchange Board by making regulations in this behalf;

(b) in any other case, be administered by the Central Government.

Explanation.—For the removal of doubts, it is hereby declared that all powers relating to all other matters relating to prospectus, return of allotment, redemption of preference shares and any other matter specifically provided in this Act, shall be exercised by the Central Government, the Tribunal or the Registrar, as the case may be.

(2) The Securities and Exchange Board shall, in respect of matters specified in subsection (1) and the matters delegated to it under proviso to sub-section (1) of Section 458, exercise the powers conferred upon it under sub-sections (1), (2A), (3) and (4) of Section 11, Sections 11A, 11B and 11D of the Securities and Exchange Board of India Act, 1992."

"Section 62(1)(c) of the Companies Act, 2013:

(1) Where at any time, a company having a share capital proposes to increase its

subscribed capital by the issue of further shares, such shares shall be offered –

.....

(c) to any persons, if it is authorised by a special resolution, whether or not those persons includes the person referred to in clause (a) or (b), either for cash or for a consideration other than cash, if the price of such shares is determined by the valuation report of a registered valuer, subject to the compliance with the applicable provisions of Chapter III and any other conditions as may be prescribed."

"Rule 3 of the Companies (Share Capital and Debentures) Rules, 2014 (SCD Rules):

3. The provisions of these rules shall apply to—

a all unlisted public companies;

b all private companies; and

(c) listed companies so far as they do not contradict or conflict with any other regulation framed in this regard by the Securities and Exchange Board of India."

"Rule 13 of the Companies (Share Capital and Debentures) Rules, 2014 (SCD Rules):

13. Issue of shares on preferential basis:

(1) For the purposes of clause (c) of sub section (1) of section 62, if authorised by a

special resolution passed in a general meeting share may be issued by any company in any manner whatsoever including by way of the preferential offer, to any persons whether or not those persons include the persons referred to in clause (a) or clause (b) of sub-section (1) of section 62 and such issue on preferential basis should also comply with conditions laid down in section 42 of the Act.

Provided that in case of any preferential offer made by a company to one or more existing members only, the provisions of sub-rule (1) and proviso to sub-rule (3) of rule 14 of Companies (Prospectus and Allotment of Securities) Rules, 2014 shall not apply.

Provided further that the price of shares to be issued on a preferential basis by a listed company shall not be required to be determined by valuation report of a registered valuer.

Explanation.- For the purposes of this rule, (i) the expression 'Preferential Offer' means an issue of shares or other securities, by a company to any select persons or group of persons on a preferential basis and does not include shares or other securities offered through a public issue, rights issue, employee stock option scheme, employee stock purchase scheme or an issue of sweat equity shares or bonus shares or depository receipts issued in a country outside India or foreign securities;

(ii) the expression, "shares or other securities" means equity shares, fully convertible debentures, partly convertible debentures or any other securities, which would be

convertible into or exchanged with equity shares at a later date.

13(2) Where the preferential offer of shares or other securities is made by a company whose share or other securities are listed on a recognized stock exchange, such preferential offer shall be made in accordance with the provisions of the Act and regulations made by the Securities and Exchange Board and if they are not listed the preferential offer shall be made in accordance with the provisions of the Act and rules made hereunder and subject to compliance with the following requirements, namely:-

(a) the issue is authorized by its articles of association;

(b) the issue has been authorized by a special resolution of the members;

(c) the securities allotted by way of preferential offer shall be made fully paid up at the time of their allotment.

(d) The company shall make the following disclosures in the explanatory statement to be annexed to the notice of the general meeting pursuant to section 102 of the Act:

(i) the objects of the issue;

(ii) the total number of shares or other securities to be issued;

(iii) the price or price band at/within which the allotment is proposed;

(iv) basis on which the price has been arrived at along with report of the registered valuer;

(v) relevant date with reference to which the price has been arrived at;

(vi) the class or classes of persons to whom the allotment is proposed to be made;

(vii) intention of promoters, directors or key managerial personnel to subscribe to the offer;

(viii) the proposed time within which the allotment shall be completed;

(ix) the names of the proposed allottees and the percentage of post preferential offer capital that may be held by them;

(x) the change in control, if any, in the company that would occur consequent to the preferential offer;

(xi) the number of persons to whom allotment on preferential basis have already been made during the year, in terms of number of securities as well as price;

(xii) the justification for the allotment proposed to be made for consideration other than cash together with valuation report of the registered valuer.

(xiii) ……..”

“<u>Regulation 164 of the ICDR.</u>

164(1): If the equity shares of issuer have been listed on a recognised stock exchange for a period of twenty six weeks or more as on the relevant date, the price of the equity shares to be allotted pursuant to the preferential issue shall be not less than higher of the following:

"a. the average of the weekly high and low of the volume weighted average price of the related equity shares quoted on the recognised stock exchange during the twenty six weeks preceding the relevant date; or

b. the average of the weekly high and low of the volume weighted average prices of the related equity shares quoted on a recognised stock exchange during the two weeks preceding the relevant date."

11. Sub-section (1) of Section 24 of the Companies Act, 2013 provides that all the provisions in Chapter III (Prospectus and Allotment of Securities), Chapter IV and Section 127 of the Act in so far as they relate to issue or transfer of securities and non-payment of dividend by listed companies and companies that intend to get their securities listed would be administered by SEBI. In the instant case, the provisions of Chapter III insofar as it relates to issuance of securities would be administered by SEBI by making appropriate Regulations. Pursuant to Section 24 of the Companies Act, virtually all the provision of Chapter III that are connected with

securities of listed Companies stand covered by SEBI so long as there is a connection with issue and transfer of securities, etc. The provision, in fact, enhances the powers of SEBI in relation to listed Companies in as much as everything related to raising capital out of issuance of securities and transfer of securities is now explicitly in SEBI's domain. Sub-section (2) of Section 24 of the Companies Act also empowers SEBI to adopt and utilise its inherent powers under sub-section 1, 2(a), 3 and 4 of Section 11 of the SEBI Act, Section 11A, Section 11B and Section 11D of the SEBI Act. Such powers under the SEBI Act may be used by SEBI in discharge of its powers and duties under the Companies Act, insofar it relates to issue and transfer of securities etc. as set out in sub-section (1) of Section 24 of the Companies Act. The said provision makes it apparently clear that SEBI can exercise its powers under SEBI Act for the purpose of

administration and enforcement of the provisions of the Companies Act.

12. Section 6 of the Companies Act provides that the provisions of the Companies Act shall have effect notwithstanding anything to the contrary contained in the Memorandum and Articles of Association of the Company or where there is a provision in the Memorandum or Articles of Association which is repugnant to the provisions of the Companies Act, in which case, the Companies Act will prevail in the face of competition between the two. Thus, there can be no provision in the Memorandum or Articles of Association which could grant any authority to the Company which is contrary to the provisions of the Act. Therefore, any clause in the Articles of Association which is repugnant to the Companies Act would be void and the Companies Act shall prevail as held in ***Madanlal Fakirchand Dudhediya vs. Shree Changdeo Sugar Mills Ltd. (1962) 32 Company Cases***

604 (SC). Thus, the statute is to be considered as paramount and no action of the Company based on the provisions contained in the Articles of Association which runs contrary to the Act can and shall not sanctify such action.

13. In this light, we have to see whether Article 19(2) of the Articles of Association is repugnant to the provisions of the Companies Act or not. In this regard, Article 19(2) of the Articles of Association of the appellant Company provides that further issuance of shares may be offered to any person by a special resolution if the price of the shares are determined by the valuation of a registered valuer. This provision is absolutely clear, namely, that the price of the shares of the Company are required to be determined by the valuation of a registered valuer. Only then the shares can be offered to any person.

14. Section 62 of the Companies Act relates to further issuance of share capital by issuance of further

shares. Section 62(1)(c) is the relevant provision for this case which provides that such shares shall be offered to any persons if it is authorised by a special resolution either for cash or for consideration other than cash if the price of such shares is determined by the valuation report of a registered valuer subject to the compliance with the applicable provisions of Chapter III of the Companies Act and any other conditions as may be prescribed.

15. Thus, under Section 62(1)(c) the price of the share is required to be determined by the valuation report of a registered valuer. To this extent there is no conflict with Article 19(2) of the Articles of Association and, consequently, there is no repugnancy. However, the determination of the price of the shares by the valuation report of a registered valuer is subject to compliance with the applicable provisions of Chapter III which in the instant case is Section 24 of the Companies Act and which requires that SEBI will

administer this provision in accordance with the SEBI Act and the Regulations framed therein. In this regard, the Regulations framed is the ICDR and the pricing mechanism has been prescribed under Regulation 164.

16. Section 62(1)(c) further provides that the determination of the price of the shares by the valuation report of the registered valuer would also be subject to any other conditions as may be prescribed. In this regard, the Rules which has been framed are called the Companies (Share Capital and Debentures) Rules, 2014. Rule 3 provides that the Rules of 2014 will apply to all unlisted public companies, all unlisted companies and listed companies so far as they do not contradict or conflict with any other Regulations framed in this regard by SEBI, that is to say, that if the Rules of 2014 are contradictory or is in conflict with any provisions of the Regulations framed by SEBI in that case the Rules of 2014 will not apply to such listed companies with regard to the issuance of the shares or

securities. Rule 3(c) of the Rules of 2014 makes it very clear that the Regulations framed by SEBI will be given primacy if any provision of the Rules of 2014 are in conflict with the Regulations framed by SEBI.

17. The second proviso to Rule 13(1) makes it explicitly clear that the price of the shares to be issued on a preferential basis by a listed Company shall not be required to be determined by the valuation report of a registered valuer. Further, Rule 13(2) of the Rules of 2014 further amplifies that where a preferential offer of shares or other securities is made by a Company whose shares or other securities are listed on a recognised Stock Exchange, such preferential offer shall be made in accordance with the provisions of the Act and Regulations made by SEBI and if the shares are not listed then preferential offer shall be made in accordance with the other requirements as stipulated in clause (2) and, one of them is, the valuation report of

the shares being determined by the registered valuer under Rule 13(2)(d)(xii).

18. Thus, a combined reading of Section 62(1)(c) read with Rule 13 of the Rules of 2014 makes it clear and explicit, namely, that such shares shall be offered by a Company where the price of such shares is determined by the valuation report of a registered valuer. However, in the case of a listed Company whose shares or other securities are listed on a recognised Stock Exchange, the Company is not required to determine the shares through a registered valuer in view of the second proviso to Rule 13(1) read with Rule 13(2) and that the price is required to be determined in accordance with the Regulations framed by SEBI which in the instant case is Regulation 164 of the ICDR.

19. Rule 3 of the Rules of 2014 states that the provisions of the Regulations framed by SEBI would prevail in the event there is any contradiction or

conflict with the Rules of 2014. SEBI in their reply before us has categorically stated that there is no conflict of ICDR Regulations and especially Regulation 164 with any other provisions of the Companies Act or the Rules framed there under. We also find from a reading of the ICDR Regulations and especially Regulation 164 that there is no contradiction or conflict with Regulation 62(1)(c) of the Companies Act or with Regulation 164 of the ICDR Regulations.

20. This brings us to Regulation 164 of the ICDR Regulations. The condition of the pricing of shares on the basis of valuation report of a registered valuer as per Section 62(1)(c) of the Companies Act has been dispensed with under Rule 13 of the Rules of 2014 in so far as a listed company is concerned. The ICDR Regulations is a complete code by itself framed by SEBI for pricing of the shares for preferential allotments. SEBI has framed Regulations for allowing preferential allotments which requires passing of a

special resolution, disclosures to be sent to the shareholders and a pricing formula depending on stock market quotations of the Company. The pricing mechanism has been stipulated as per Regulation 164 of the ICDR which, in our opinion, is a complete code by itself and no external aid is required. Regulation 164 provides the pricing of the frequently traded shares of the listed Companies on a recognised Stock Exchange. Where shares are listed for more than a period of 26 weeks then the pricing mechanism has to be determined in accordance with the Regulation 164(1). If the shares are listed for a period of less than 26 weeks, then the pricing mechanism is required to be determined under Regulation 164(2) of the ICDR Regulations. Sub-clause (5) of Regulation 164 defines "frequently traded shares" which means the shares of the issuer, in which the traded turnover on any recognised Stock Exchange during the twelve calendar months preceding the relevant dates is at least ten

percent of the total number of shares of such class of shares of the issuer. The proviso clarifies that where the share capital of a particular class of the shares of the issue is not identical throughout such period the weighted average number of shares shall represent the total number of shares. The explanation provides that for the purpose of this Regulation the words "stock exchange" means any of the recognised Stock Exchanges in which the equity shares of the issuer are listed in which the highest trading volume in respect of equity shares of the issuer has been recorded during the preceding 26 weeks prior to the relevant date. The relevant date has been defined under Regulation 161 which means that in a case of preferential issue of equity shares, the date 30 days prior to the date on which the meeting of the shareholders is held to consider the proposed preferential issue.

21. In this light, the words stipulated under Regulation 164(1) "shall not be less than higher" has to be

considered, namely, that if the shares are listed for 26 weeks or more as on the relevant date, the price of the equity shares to be allotted pursuant to the preferential share shall not less than higher of the following, namely,

(a) the average of the weekly high and low of the volume weighted average price of the related equity shares quoted on the recognised stock exchange during the 26 weeks preceding relevant date; or

(b) the average of the weekly higher and low of the volume weighted average price of the related equity shares quoted on a recognised stock exchange during the two weeks preceding the relevant date.

The mechanism of pricing the shares under Regulation 164(1) has to be read alongwith sub clause (5) of Regulation 164 and only then the

meaning of the words “shall not be less than higher” would be clear.

22. From the aforesaid, it is clear that the mechanism of pricing the valuation of the shares where the shares are listed on a Stock Exchange for more than 12 calendar months preceding the relevant date the price shall not be less than the higher of the following, namely, the average of weekly high and low of the equity shares during the 26 weeks preceding the relevant date or during the two weeks preceding the relevant date. There is nothing under the ICDR Regulations and especially under Regulation 164 which specifies that the words “shall not be less than” to mean not less than the price determined by the registered valuer. Such words cannot be added in the Regulation which is a complete code by itself.

23. In our view, the contention of the respondent that the words “shall not be less than” as depicted in Regulation 164 means not less than the value of the

shares determined by the registered valuer under Article 19(2) of the Articles of Association is patently erroneous and cannot be accepted. In this regard, we had specifically raised a query, namely, that if a listed Company does not have a stipulation of valuing its shares through a registered valuer as per Article 19(2) of the Articles of Association then what pricing mechanism would such listed Company follow. To this query, the learned senior counsel Mr. De Vitre clearly stated that if there is no provision in the Articles of Association requiring valuation of shares by the registered valuer, in that case pricing mechanism under Regulation 164 will have to be followed. In view of this statement, we are of the opinion that there cannot be two kinds of mechanism or two sets of procedure for valuation of the price of the shares in a case of a listed Company which has a provision under its Articles of Association for valuation of the shares through a registered valuer and in the case of another

listed Company which has no such stipulation under its Articles of Association. Having two different procedure, in our opinion, would run counter to the provisions of Section 62(1)(c) of the Companies Act read with Rule 13 of the Rules of 2014 read with Section 6 and 24 of the Companies Act.

24. We are of the considered opinion that in a case of a listed Company like that of the present appellant the stipulation contained in Article 19(2) of the Articles of Association requiring valuation of the shares through a registered valuer is dispensed with in view of Rule 13 of the Rules of 2014. Further, in view of Section 24 of the Companies Act read with Rule 3(c) and 13(2) of the Rules of 2014, the pricing of the shares of a listed Company is required to be determined in accordance with the Regulations framed by SEBI, namely, Regulation 164 of the ICDR Regulations. Further, in our view there is no repugnancy of any provision of the

Companies Act, Rules of 2014 with the SEBI Act and Regulation 164 of the ICDR Regulations.

25. The impugned communication/order of the General Manager dated 18th June, 2021 holding that agenda no.1 being ultra vires the Articles of Association shall not be acted upon until the appellant obtains a report from a registered valuer in terms of Article 19(2) of the Articles of Association is patently illegal and cannot be sustained. In the first instance, ultra vires means beyond the legal power or authority of a person performing an action. An act which requires a legal authority but is done without it. The impugned order holds that agenda no.1 was ultra vires, that is to say, that the Company did not have the legal authority to place agenda no.1 for consideration before the shareholders of the Company in the Extra Ordinary General Meeting. Such unilateral decision taken by the authority is patently erroneous and smacks of arbitrariness quite apart from the fact that the same was

also violative of the principles of natural justice. The respondent has adjudged an issue finally without puting the appellant to notice on this aspect. Adjudicating an issue without giving notice or an opportunity of hearing is otherwise violative of the principles of natural justice in gross violation of Article 14 of the Constitution of India. Thus, the stand of the respondent that agenda no.1 was ultra vires Article 19(2) of the Articles of Association is not only perverse but wholly incorrect and cannot be sustained.

26. We are further of the opinion that a matter has been adjudicated finally without issuing a notice and without giving an opportunity of hearing. The impugned communication is thus violative of the principles of natural justice as embodied in Article 14 of the Constitution of India. The mere fact that certain correspondence was sought for is good enough for making an internal assessment but not good enough for adjudication of an issue. Any order which has civil

implications must stand the test of fairness and principles of natural justice which in the instant case was totally lacking.

27. We are also of the opinion that the respondent had no jurisdiction to issue such a direction at that stage before any decision could be taken in the Extra Ordinary General Meeting by the shareholders. Only a resolution of the Board of Directors had been passed which was required to be approved by a special resolution in an Extra Ordinary General Meeting of the shareholders of the Company. The right of the shareholders to accept or reject an agenda is supreme and paramount which cannot be whittled by any executive action of the respondent. If agenda no.1 was accepted by the majority of the shareholders as per the provisions of the Companies Act and if that resolution was in violation of the ICDR Regulations it would have been open for SEBI to step in at that stage and question that resolution, but it was not open to the

respondent to pre-empt the shareholders from passing the resolution. In this regard, in ***Praful Patel vs. SEBI (1999) 19 SCL (Bom.)*** a matter before the Bombay High Court was under Regulation 23 of the SEBI (SAST) Regulations, 1997 read with Section 81A of the Companies Act, 1956 which is akin to Section 62(1)(c) of the Companies Act, 2013. In the said case the petitioners made a public announcement that they would acquire the respondent company's shares by public offer. It was held by the Bombay High Court that an interim order restraining the target Company from passing any resolution for issuing further ordinary or preference shares could not be passed. The Bombay High Court held that if the resolution was in violation of the SAST Regulations then it could be challenged afterwards. The said decision is squarely applicable in the instant case.

28. In view of the aforesaid, the impugned communication dated 18th June, 2021 issued by

General Manager of SEBI cannot be sustained and is quashed. The appeal is allowed. We direct the appellant to declare the results of the Extra Ordinary General Meeting which was held on 22nd June, 2021. Misc. Application nos.772 and 815 of 2021 are also accordingly disposed of. In the circumstances of the case, parties shall bear their own costs.

Justice Tarun Agarwala
Presiding Officer

09.8.2021
RHN

29. I have had the honour to peruse the draft of the judgment prepared by the Hon'ble Presiding Officer. Unfortunately, however I am not able to agree with the reasoning recorded and the conclusion drawn by the Hon'ble Presiding Officer (in short the Hon'ble PO). Therefore, I proceed to pass my separate judgement as under.

30. The Hon'ble Presiding Officer had very succinctly framed the core issue that has arisen in the present controversy. It is - whether the appellant is required to obtain valuation of it's shares from a registered valuer as prescribed by Article 19(2) of the Articles of Association of the appellant Company or whether the calculation of price has to be made as per the mechanism provided under the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements, Regulations, 2018) (hereinafter referred to as 'ICDR Regulations').

31. It cannot be gainsaid that as provided by Section 6 of the Companies Act, 2013, the provisions of the Companies Act would override any provisions contained in the Memorandum of Association or Articles of Association of a Company or any agreement executed by it. Rule 13 of the Companies (Share Capital and Debentures) Rules, 2014, provides that in case of allotment of shares on preferential basis

by a listed Company the price of the shares is not required to be determined by a valuation report of a registered valuer. Regulation 164 of the ICDR Regulations provides that in such scenario the price of the equity shares to be allotted on preferential basis shall not be less than the higher of the two weighted average prices quoted on the recognised stock exchange as per sub-regulation (a) and (b) whichever is applicable.

32. All these provisions are already quoted in detail by the Hon'ble Presiding Officer.

33. It is an admitted fact that Article 19 of the Article of Association of the appellant was incorporated in the year 2016 i.e. when the shares of the appellant Company were to be listed with the exchanges. Prior to it when the appellant Company was not listed the said provision was not there.

34. The valuation of the shares of the appellant Company from the view point of the respondent SEBI

is a concern of the general investors of the Company as admittedly the volume of the preferential shares to be allotted as proposed by the Board of Directors of the appellant Company would change the control of the Company from the hands of present controlling group consisting of Punjab National Bank, to the group to whom the preferential shares would be allotted. This would trigger the provisions of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations (for short SAST Regulations). In the circumstances, ultimately the new group will have to make an open offer to the general investors giving them an opportunity to exit at a price. This price of the shares to be offered would be admittedly impacted by the price of the preferential shares now proposed to be allotted to the group.

35. In the corporate world, while Memorandum of Association is recognised as the constitution of a Company, it's Articles of Association provide the

mechanism for implementation of the constitution along with defining the internal relationship between the shareholders *interse* and between the Company etc. The Article of Association in a way is a contract between the shareholder and the Company (Refer **Naresh Chandra Sanyal vs. Calcutta Stock Exchange Trader Association (1971) AIR 422 Supreme Court.**)

36. Once it is found that Articles of Association forms a contract between the shareholders and the Company/association it would follow that the contract will have to be performed by the parties thereto unless the contract - agreement is void being unlawful or not enforceable by law as provided by the Indian Contract Act or Section 6 of the Companies Act 2013.

37. Section 6 of the Companies Act provides that the provisions of the Companies Act, 2013 shall override any provisions contrary to it contained in the Memorandum or Articles of Association of the

Company. Thus, if there is any repugnancy between a provision of Article of Association and a provision of the Companies Act or any rules or regulations framed by SEBI (ICDR in the present case) then the said provisions in Articles of Association shall not have any effect.

38. To answer the issue as to whether the provisions of Article 19(2) of the Articles of Association freshly incorporated by the Company at the time of it's listing of the share on the stock exchange platforms is repugnant or not to the pricing mechanism provided under Regulation 164 of ICDR, it would be necessary to have a look at the terminology used in the Regulation 164 of ICDR and Rule 13 of the Companies (Share Capital and Debentures) Rules, 2014.

Regulation 13 of the of the Companies (Share Capital and Debentures) Rules, 2014, declares "price of the preferential shares shall not be required to be

determined" by a valuation report of a registered valuer. It does not prohibit determination of the price by a registered valuer.

Regulations 164 of ICDR inter alia provides that in case "the price of the equity shares to be allotted pursuant to the preferential issue shall not be less than higher of the following: ……"

Thus the Regulation 164 ICDR prescribes that the price shall not be less than the method prescribed there under. It does not naturally prohibit higher price if agreed between the Company and the proposed acquirer, as it would be in the interest of the Company. In fact in the present case, the price of the share proposed is Rs. 400/- per share as against the price of Rs. 384.60 per share arrived at by applying the provisions of the Regulation a64 of ICDR as detailed in Paragraph 6.6 and 6.9 of the appeal memo wherin the facts are detailed by the appellant.

39. The conjoint reading of all these provisions would show that there is no requirement of valuation of the price of the shares by a registered valuer as declared by of the Companies (Share Capital and Debentures) Rules, 2014, and as provided by Regulation 164(1) of the ICDR Regulations, the price of the shares is required to be not less than the higher of as arrived as per the methods.

40. On the other hand Article 19 affirmatively prescribes that preferential shares can be allotted as per other terms and conditions if authorised by special resolution and if the price of such shares is determined by a registered valuer.

41. To put the legal issue in the form of riddle in logic, it would be thus :-

Mr. Rule says I do not need any registered valuer's report for arriving at a figure. Ms. Article 19 says that I would accept the figure which would come from a registered valuer. Mr. Regulation says I am not

interested in your methodology (registered valuer or not) of arriving at a figure. Use any methodology, find any figure. I would simply tally that figure to my own figure. If it is equivalent or more than my figure I am fine with it.

In such situation what should M/s Directors on the board propose to the shareholders in the extra ordinary general meeting?

The directors would appoint a registered valuer as Ms. Article 19 wants. Mr. Rule would ignore it. Mr. Regulation would jump into the fray. It would ignore method and would have a look at the figure arrived at by the valuer. It would tally it's own figure with the figure arrived at by the registered valuer and accept/refuse it depending on whether it is equivalent or higher/lesser than his figure.

42. Thus in my view there is no repugnancy or a contradiction between all these provisions. The contract is entered into by the Company with it's

shareholders that in case of preferential allotment of shares, the price of such shares would be determined according to the valuation of a registered valuer. Rule 13 of SCD Rules declares that the same is not necessary and Regulation 164 of ICDR provides that the price of such shares shall not be less than the higher of the price as per the mechanism provided by it.

43. Further, Regulation 164 of the ICDR provides for a floor price i.e. minimum price of the equity shares to be allotted preferentially by prescribing that the price shall not be “less than” arrived at under the Regulation. Appellant also in it’s memorandum of appeal at pragraph no.6.5 accepts that the price arrived at by it is a floor price of which disclosure was made vide the extraordinary general meeting.

44. A provision can be said to be repugnant with other provision if both the provisions are irreconcilable and cannot stand together. I do not find any

repugnancy between Article 19 of the Articles of Association and the pricing method provided by Regulation 164 of the ICDR. Article 19 is an agreement between the shareholders and the Company that in the cases where allotment of preferential shares is being made the price of the shares shall be determined by a registered valuer. Regulation 164 of ICDR simply provides for a floor price i.e. a price that shall not be less than the price arrived at by the mechanism provided by it. Both the provisions can stand together.

45. Mr. Janak Dwarkadas, learned senior counsel for the appellant submitted that in a way SEBI is inventing two different pricing method; one as provided by its own Regulation 164 of ICDR for one set of companies and the other under Articles of Association. However, if the Articles of Association additionally provides for additional method of valuation of the shares then in those cases, in my view there can be two methods of

valuation of the shares and the higher of the valuation would be the valuation of the shares for the purpose of preferential allotment of the shares which ultimately would be the price for an open offer under the SAST Regulations to the general shareholders giving them an opportunity to exit.

46. Mr. De Vitre, the learned senior counsel for the respondent relied on the ratio of ***Amruta Kaur Puri vs. Kapurthala Flour Oil and General Mills Company Pvt Ltd. and Others (1982) SCC Online ERH 518.***

47. In that case, the Articles of Association of the Company in question provided that the quorum for the meeting of the Board of Directors shall be of four directors of the total 9 directors of the company. Section 287 of the Companies Act, 1956 provided that the quorum for a meeting of the Board of Directors of a Company shall be one third of the total strength. It was, therefore, argued that Article 98 which provided for quorum of four Directors was ultra vires of the

provisions of the Section. In the situation the Punjab High Court vide paragraph no.23 held that the provision of the Companies Act does not forbid the Company to fix a higher number of Directors to form a quorum. It merely provides the minimum number of Directors for the purpose of quorum. Since the Articles of Association has provided for a quorum of Directors on the higher side, the High Court held that there would not be any repugnancy between the two provisions and the provisions in Articles of Association would stand.

48. Mr. Janak Dwarkadas, learned senior counsel for the appellant had submitted that the impugned order is manifestly arbitrary, perverse and in violation of the principles of natural justice as no opportunity of hearing was provided.

49. To buttress his submissions in compilation of the judgments, the appellant has relied on the following authorities:

1. ***Uma Nath Pandey v. State of Uttar Pradesh AIR 2009SC 2375***
2. ***Biecco Lawrie Limited v. State of West Bengal (2009)10 SCC 32***
3. ***Kaushik Roy v. Securities and Exchange Board of India, 2019 SCC OnLine SAT 357***
4. ***Canara Bank & Ors v. Debasis Das & Ors, (2003) 4SCC 557***
5. ***Tarlochan Dev Sharma v. State of Punjab & Ors, (2001) 6 SCC 260***

50. It cannot be disputed that an order which has a civil implication must stand the test of fairness and principles of natural justice. In the present case the order is culmination of correspondence between the appellant Company on one hand and firstly Exchanges and thereafter SEBI – the regulator on the other hand, on the basis of admitted facts regarding valuation of the shares. In order to buttress it's other ground that SEBI cannot substitute its views as against the view

expressed by an expert valuer, the appellant has relied on the case of ***G.L. Sultaniav. SEBI AIR 2007 SC 2172***. In that case, the valuation of shares of a Company whose shares were infrequently traded was in dispute. In that case, the investor came with a grievance that the price of the shares was not rightly valued by the registered valuer appointed by the Company. As per the provisions of the SAST Regulations, 1997, the SEBI without hearing the Company had appointed another independent valuer. In those circumstances, while making an observation that the SEBI is not an expert in the field and, therefore, it has rightly appointed another independent valuer, as regards the violation of the principles of natural justice, the Hon'ble Supreme Court held that SEBI being a regulator in it's regulatory jurisdiction can take such decisions and the same cannot be faulted that it has not passed a reasoned order. In that case without hearing the parties SEBI had appointed

another valuer without any reasoned order, finding the dispute about the valuation arrived at by the valuer appointed by the company. (refer paragraph nos.45 and 48 of the judgement).

51. In the present case, what we find from the impugned order is that the appellant Company had made a corporate announcement about proposed preferential allotment of shares, on the platform of BSE and NSE. Both of them had called for information from the appellant and thereafter a joint report was submitted by the exchanges to SEBI. SEBI also called for information from the appellant and finding that the appellant Company has admittedly not adopted the procedure as prescribed by it's Article 19(2) of the Articles of Association passed the impugned order, without hearing the appellant. The time line of the entire episode would show that in view of the impeding Extra Ordinary General Meeting of the Company, the impugned decision was taken by

respondent SEBI. The procedure adopted by SEBI therefore cannot be faulted with.

52. An issue was raised during the arguments as to whether SEBI has jurisdiction to issue the impugned direction of not acting on the relevant agenda until the appellant Company undertakes the valuation of the shares as per Article 19 (2), before the shareholders could take any decision for approval of the Board resolution.

In my view SEBI has jurisdiction to take such step. There is no bar in SEBI Act to pass such orders, though extraordinary in nature. SEBI is mandated to take such decisions as it may find necessary to protect the interest of the investors. The decisions are subject to the scrutiny in appeal by this tribunal and thereafter by the Hon'ble Supreme Court.

The Hon'ble P O has observed that that the right of the shareholders to accept or reject an agenda is supreme and paramount which cannot be whittled by

any executive action. The Hon'ble P.O. relied on the decision of the Bombay High Court in the case of ***Praful Patel vs. SEBI (1999) 19 SCL (Bom.),*** wherein the prayer of the petitioner therein to restrain the target Company from passing any resolution was refused at the interim stage. The facts of the case would show that the petitioner therein was intending to take over the Company by making open offer, as against the respondent rival group who had control of the Company and had moved for allotment of preferential to another respondent. SEBI had agreed to decide the issue within a time frame and in such scenario relying on the provisions of Section 81 of the Companies Act as applicable therein, the Bombay High Court refused to grant interim relief to the petitioner of restraining the company from passing a resolution. Liberty was granted to the petitioner, that the resolution passed if any may be challenged by an appropriate proceedings. Neither the issue of jurisdiction of SEBI in issuing

such directions was involved, nor any findings on merit in this regard were recorded by the Bombay High Court.

53. In the present case in order to safeguard the interest of the investors, the impugned order was passed by SEBI on the line of the provisions made in Article 19(2) by the Appellant Company and it's shareholders, at the time the Company was to be listed on the Stock Exchanges. Therefore, in my view the same cannot be called as illegal or unjustified.

54. In the result appeal is hereby dismissed without any orders as to costs. Misc. Application nos.772 and 815 of 2021 are also accordingly disposed.

Justice M.T. Joshi
Judicial Member

09.8.2021
RHN

55. In view of the difference of the opinion between the Members of the Bench we direct the interim order

dated 21st June, 2021 to continue till further orders. The registry is further directed to place the papers of the appeal before the Presiding Officer on the administrative side for appropriate orders.

56. The present matter was heard through video conference due to Covid-19 pandemic. 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 Private Secretary 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

Justice M.T. Joshi
Judicial Member

09.8.2021
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