BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 51 of 2006

Date of decision : 27.5.2008

Padmini Engineering Private Limited …… Appellant

Versus

1. The Bombay Stock Exchange Limited

2. Securities and Exchange Board of India …… Respondents

Mr. F. Divitre Senior Advocate with Mr. Mihir Rale Advocate for the Appellant.

Mr. P. N.Modi Advocate for Respondent No.1.

Dr. Poornima Advani Advocate for Respondent No.2.

Coram : Justice N.K. Sodhi, Presiding Officer

Utpal Bhattacharya, Member

Per : Justice N.K. Sodhi, Presiding Officer

Is Hella India Lighting Limited (for short Hella India) entitled to get its securities delisted from the Bombay Stock Exchange Limited (hereinafter referred to as BSE) is the short question that arises for our consideration in this appeal filed under section 23L(1) of the Securities Contracts (Regulation) Act, 1956 (for short SCRA). The appellant is feeling

aggrieved by the decision of BSE communicated through its letter dated 15.2.2006 addressed to UTI Securities Ltd. declining to delist the securities of Hella India. The undisputed facts giving rise to this appeal lie in a narrow compass and these may first be noticed.

2. Hella India, formerly known as JMA Industries Limited, is a public limited company whose shares are listed on BSE as well as the Delhi Stock Exchange (for short DSE) pursuant to the listing agreements executed between Hella India on the one hand and BSE and DSE on the other, both dated October 17, 1986. Reinhold Poersch GmbH, the promoter of Hella India, holds 51% of its equity share capital. In July 2005 the promoter of Hella India decided to have its securities delisted from both the exchanges in accordance with the provisions of the Securities and Exchange Board of India (Delisting of Securities) Guidelines 2003 (hereinafter referred to as the guidelines). Accordingly, in January 2006 a voluntary offer was made to the public shareholders to acquire their shares as per the guidelines. The offer was made by a public announcement through Padmini Engineering Private Limited – the appellant herein which is an affiliate entity of the promoter and Hella India. Since the guidelines require that the promoter or the acquirer desirous of delisting securities of a company should obtain the prior approval of the shareholders of the company by a special resolution, the same was obtained in the extraordinary general meeting of the shareholders of Hella India held in September 2005. UTI Securities had been appointed the merchant banker for the purpose. The promoter of Hella India determined the floor price of Rs.52.39 per share which later turned out to be the exit price for delisting of securities in accordance with the book building process prescribed by the guidelines. The public offer opened on 7.2.2006 and closed on 10.2.2006. It is not in dispute that 9,63,193 shares including 16000 shares in physical form were tendered at that price. The total number of shares offered including those at higher prices was 9,71,754. The appellant, as the acquirer, accepted 9,63,193 shares at the price of Rs.52.39 per share. The quantity of shares accepted by the appellant together with the holding of the promoters comes to 81.37 per cent of the total equity share capital of Hella India. In other words, after the public offer, the level of public shareholding in Hella India would be brought down to 18.63 per cent which is less than 20% but not less than 10%. After accepting the shares at the price aforesaid, the appellant through the merchant banker approached BSE as per letter dated February 15, 2006 for completing the settlement of transactions. It also enquired from BSE to let it know the formalities, if any, to be completed in this regard. The appellant also informed BSE that it was planning to release the advertisements in the newspapers regarding the final price as discovered by the reverse book building process. On receipt of this letter, BSE declined to proceed with the settlement of funds and securities and informed the merchant banker by its letter of the same date (February 15, 2006) as under:

> "You are requested to note that the threshold limit for delisting on the Exchange would be triggered only if the acquirers holding together with promoters holding exceed 90%.
>
> It is observed from the electronic book, which was kept open for the period from February 7, 2006 to February 10, 2006, that the quantity offered therein by the demat shareholders together with the promoters existing holding would not exceed 90%. Hence, the Exchange would not proceed with the settlement of funds and securities."

It is clear from the communication sent by BSE that it was not proceeding with the settlement because the holding of

the acquirers together with promoters did not exceed 90%. In other words, BSE wanted the level of the public shareholding in Hella India to come down below 10% before delisting could be allowed. It is against this communication that the present appeal has been filed.

3. Before we deal with the question posed in the opening part of our order, it is necessary to refer to Rule 19(2) of the Securities Contracts (Regulation) Rules, 1957 (hereinafter called the Rules) and the guidelines.

4. Listing means admission of securities to dealings on a recognised stock exchange and the securities may be, among others, of any public limited company. For general public investors, listing of shares is important as it is only by such listing that the shares held by them become relatively liquid and tradable. Unlisted shares are not easily tradable since there is no ready market for them. Before the securities of a company could be listed on a stock exchange, it has to comply with the listing requirements of that exchange. Listing requirements are the set of conditions imposed by a given stock exchange upon companies that want to be listed on that exchange and they are contained in the listing agreement executed between the exchange and the company. Section 21 of SCRA mandates that a listed company shall comply with the conditions of the listing agreement with the stock exchange. The listing agreements normally provide, as a condition precedent, the minimum level of public shareholding which the companies must maintain so that they could remain listed on a continued basis. It would follow that if the level of the public shareholding was ever to fall below the minimum prescribed in the listing agreement, the company would become liable to be delisted. Rule 19 of the Rules lays down the requirements which a public company desirous of getting its securities listed on a recognised stock exchange has to comply with. The Rules have been framed by the Central Government in exercise of the powers conferred by Section 30 of SCRA for the purpose of carrying into effect the objects of that Act. It is the requirement of Section 30(3) of SCRA that every rule made under this Act has to be placed before each House of Parliament. Rule 19(2)(b) which was substituted with effect from 7.6.2001 and concerns us, reads as under:

> "19(1)……
> (2) Apart from complying with such other terms and conditions as may be laid down by a recognised stock exchange, an applicant company shall satisfy the stock exchange that:
>
> (a) …….
>
> (b) At least 10 per cent of each class or kind of securities issued by a company was offered to the public for subscription through advertisement in newspapers for a period not less than two days and that applications received in pursuance of such offer were allotted subject to the following conditions:
>
> (a) minimum 20 lakh securities (excluding reservations, firm allotment and promoters' contribution) was offered to the public;
> (b) the size of the offer to the public, i.e., the offer price multiplied by the number of securities offered to the public was minimum Rs.100 crores; and
> (c) the issue was made only through book building method with allocation of 60 per cent of the issue size to the qualified institutional buyers as specified by the Securities and Exchange Board of India:
>
> **Provided that if a company does not fulfil the conditions, it shall offer at least 25 per cent of each class or kind of securities to the public for subscription through advertisement in newspapers for a period not less than two days and that**

applications received in pursuance of such offer were allotted:

Provided further……."

A reading of the aforesaid provisions makes it clear that a company which fulfils the conditions prescribed in clause (b) of sub-rule (2) must offer atleast 10 per cent of its securities to the public for subscription through advertisement. The proviso reproduced above deals with companies which do not fulfil the conditions in clause (b) and lays down that such companies shall offer atleast 25 per cent of their securities to the public and on receipt of applications in pursuance to the offer must make the allotment. The use of the word 'shall' makes the provisions mandatory. In other words, these are the mandatory requirements for public companies to get their securities listed on a continual basis. Every listing agreement has to be in consonance with this Rule.

5. Securities of a company can also be delisted. Delisting of securities means permanent removal of securities of a listed company from the stock exchange. The consequence of delisting is that the shares of the company would no longer be traded on that stock exchange. Delisting may be voluntary or compulsory. Compulsory delisting is usually resorted to by a stock exchange as a penal measure where the company does not comply with any of the listing requirements on a continual basis. In voluntary delisting, the company decides on its own to permanently remove its securities from the stock exchange. Delisting of securities is governed by the guidelines issued by the Securities and Exchange Board of India (for short the Board) in exercise of its powers under section 11(1) of the Securities and Exchange Board of India Act, 1992. These guidelines apply to both compulsory and voluntary delisting when the level of the public shareholding falls below the minimum limit specified in the listing conditions or listing agreement. The guidelines then prescribe the procedure to be followed in the case of voluntary delisting. After the promoter of the company has determined the floor price of the share, he has to provide an exit offer to the public shareholders by making a public announcement and offer to purchase their shares at the exit price determined by the book building process. The guidelines further provide that if the quantity of shares offered at the exit price accepted by the acquirer does not result in the public shareholding falling below the required level of public holding for continuous listing, the company shall remain listed. To put it differently, if the number of shares offered by the public shareholders does not reduce the public shareholding below the level prescribed in the listing agreement, the company shall not be delisted. Clause 8(8) of the guidelines which is relevant for our purpose reads as under :-

> "8(8) If the quantity eligible for acquiring securities at the final price offered does not result in public shareholding falling below required level of public holding for continuous listing, the company shall remain listed."

Clause 12(1) of the guidelines is also significant in this regard. It provides that where the number of shares accepted is not enough to bring down the public shareholding below the minimum limit specified by the listing agreement, the offer shall be considered to have failed. If as a result of the public offer the level of the public shareholding in a company falls below the minimum level prescribed by the listing agreement for continuous listing, the acquirer through its merchant banker shall approach the stock exchange for settlement of funds and securities. This, in a nutshell, is the scheme of the guidelines for voluntary delisting. It is not necessary to refer to the procedure for compulsory delisting as we are not concerned with the same in this appeal.

6. Now let us examine as to what is the position in the present case. As already noticed, the shares of Hella India are listed both on BSE and DSE and that it had entered into separate listing agreements with both the exchanges. Sub clause (A) of clause 40 of the agreement with DSE provides that the public shareholding in the company shall, in no case, be allowed to fall below 20 per cent of its total voting capital. In other words, DSE requires Hella India to maintain at all times, public shareholding atleast upto 20 per cent of its equity capital. It could be more. This clause with its proviso which is relevant reads as under:

> "(A) No individual/individuals, group, constituent of a group or body corporate shall jointly or severally, whether in his of its own or in the name of any other person.
>
> (a) acquire or agree to acquire any shares in a company whose shares are listed on a recognised Stock Exchange, if the total nominal value of such shares intended to be acquired exceeds or would exceed, together with the total nominal value of the shares already held by such holder/holders in that company in the aggregate, 25 per cent of the voting capital of such company or
>
> (b) secure the effective control of management of a company, by acquiring or agreeing to acquire, irrespective of the percentage of the voting capital, the shares of the Directors or other members, who by virtue of their shareholdings together with the shareholdings of their relatives, nominees, family interest, and group effectively control or manager the company.
>
> Unless the individual/individuals, group, constituent of a group or body corporate, as the case may be, before acquisition of such shares makes an offer to the remaining members of the company to acquire their shares at a price not lower than the price at which the shares of the company referred to in sub-clauses (a) and (b) above are being acquired/agreed to be acquired and on such terms and conditions as may be approved by the regional stock exchange where the registered office of the company is situate.
>
> **Provided that the offer to the remaining shareholders shall not under any circumstances result in the public shareholding being reduced to less than 20 per cent of the voting capital of the company**."

There is no corresponding provision in the listing agreement between Hella India and BSE. In other words, the agreement does not prescribe the minimum level of public shareholding which Hella India is required to maintain for continued listing. In the absence of such a provision we are clearly of the view that the mandatory provisions of Rule 19(2)(b) of the Rules will get attracted and those will have to be read into the listing agreement. It would follow that with effect from 7.6.2001 when clause (b) was substituted in its present form in Rule 19(2), Hella India was required to maintain a minimum level of public shareholding as prescribed therein. We have already noticed the provisions of Rule 19(2)(b). Companies which fulfil the conditions of clause (b) have to maintain atleast 10 per cent of public shareholding out of their total voting capital and others who do not fulfil those conditions have to maintain a minimum of 25 per cent. It is common ground between the parties that Hella India does not fulfil the conditions laid down in clause (b) of Rule 19(2) of the Rules. It has, therefore, to maintain a minimum level of 25 per cent of public holding for continuous listing. This condition which forms part of the listing agreement when read with clauses (4), 8(8) and 12 of the guidelines

would make it clear that if the public shareholding of Hella India was ever to fall below 25 per cent, it would become eligible to get delisted. As already noticed earlier, acceptance by the acquirer of the shares offered by the public would bring the public shareholding of Hella India down to 18.63 per cent of its total equity share capital. This level of public shareholding entitles Hella India to get its securities delisted on BSE in terms of Rule 19(2) of the Rules read with the guidelines. In this view of the matter, BSE was not justified in holding that the limit for delisting would get triggered only when the public holding would fall below 10 per cent or, to put it the other way, the acquirers' holding together with promoters' holding exceed 90 per cent. We have, therefore, no hesitation in setting aside the impugned decision of BSE.

7. It is not the case of BSE nor was it even suggested on its behalf that in the absence of a provision in the listing agreement prescribing a minimum level of public shareholding to be maintained for continued listing, the shares of Hella India could never be delisted. What is contended by Shri P. N. Modi, learned counsel for BSE is that the public offer was made by the appellant in February 2006 when clause 40A of the listing agreement as introduced in pursuance to the Board's directive dated May 2, 2001 was in place and clause (ii) thereof required that if the non promoter holding of an existing listed company (which Hella India is) as on April 1, 2001 was less than the limit of public shareholding required to be maintained at the time of initial listing, the company shall raise the non promoter holding to at least 10%. The argument is that this sub-clause of the listing agreement clearly indicates that every listed company like Hella India ought to maintain a level of public shareholding above 10% for continued listing and in case it fell below that figure it would become liable for delisting. Since this argument is based on clause 40A of the listing agreement as it stood at the relevant time, it is necessary to reproduce the relevant portion thereof at this stage.

"40.A – Conditions for continued listing

(i) The company agrees that in the event of the application for listing being granted by the Exchange, the company shall maintain on a continuous basis, the minimum level of non-promoter holding at the level of public shareholding as required at the time of listing.

(ii) Where the non-promoter holding of an existing listed company as on April 01, 2001 is less than the limit of public shareholding as required at the time of initial listing, the company shall within one year raise the level of non-promoter holding to at least 10%. In case the company fails to do so, it shall buy-back the public shareholding in the manner provided in the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997.

(iii) ……

(iv) ……

(v) ……."

Having given our thoughtful consideration to this argument, we are unable to accept the same for two reasons. One, sub-clause (i) would apply in cases where the minimum level of public shareholding was fixed at the time of listing. Admittedly, in the case before us, no such limit was fixed in the agreement executed between Hella India and BSE in the year 1986. For this reason sub-clause (i) of clause 40A of the listing agreement is not applicable and does not advance the argument of the learned counsel for BSE. Secondly, the inference that is sought to be drawn from sub-clause (ii) is not warranted from the plain language of the sub-clause. This sub-clause means that no existing listed company as on April 01, 2001 could allow its public shareholding to fall below 10%. If, however, the listing agreement of an existing company required it to maintain a limit higher than 10% then that company had to maintain that higher limit of public shareholding. We cannot read sub-clause (ii) of clause 40A of the listing agreement to mean that every existing listed company was required to maintain the level of public shareholding at 10% only. If that were so, it would run counter to Rule 19(2) of the Rules. Before we conclude on this issue, it is necessary to mention that the language of clause 40A of the listing agreement as introduced by the Board as per its circular dated May 2, 2001 was not happily worded. May be it could be read the way Mr. Modi wanted us to read but such a reading would result in the violation of Rule 19(2)(b) of the Rules. We have, therefore, avoided such an interpretation. It appears that the Board itself became aware of this incongruity and has substituted clause 40A with a new one with effect from May 1, 2006. The new clause is strictly in conformity with Rule 19(2)(b) of the Rules. It is now made clear that every public company desirous of listing its securities on a recognised stock exchange has to maintain public shareholding of atleast 25 per cent of the total number of issued shares if it does not fulfil the conditions enumerated in clause (b) of Rule 19(2) of the Rules. This provision now applies uniformly to all public companies across the board. In this view of the matter, we have no hesitation in rejecting the contention raised on behalf of BSE.

8. The next argument of Shri Modi is that since the securities of Hella India were sought to be delisted from BSE, the latter could impose any additional condition to be complied with. Reliance in this regard was placed on clause 6(1)(d) of the guidelines. There is no merit in this contention either. Clause 6(1)(d) of the guidelines provides that any promoter or acquirer desirous of delisting securities of the company under the provisions of the guidelines shall “comply with such other additional conditions as may be specified by the concerned stock exchanges from where the securities are to be delisted”. It follows that the additional condition which a promoter or an acquirer is required to comply with must be “specified” by the exchange. The requirement that Hella India should have maintained at least 10% of public shareholding was never specified at any point of time prior to sending the impugned communication dated 15.2.2006. The word “specified’ would mean that the conditions to be complied with should be set down in black and white and the company informed before the non-compliance of those conditions is made a ground for not allowing delisting. There is nothing on the record to show that the condition referred to in the impugned communication was ever set down prior thereto or Hella India was ever informed about the same. BSE cannot lay down additional conditions in the impugned communication for the first time and simultaneously reject the claim for delisting. This is impermissible. Moreover, the additional condition(s) which could be specified could not go counter to the provisions of Rule 19(2) of the Rules which, we have already held, was a part of the listing agreement with effect from 7.6.2001 and has an overriding effect.

9. No other point was raised.

In the result, the appeal is allowed, the decision of BSE not to allow delisting of Hella India as conveyed in the impugned communication set aside and a direction issued to BSE to allow delisting of the securities of Hella India. The parties shall bear their own costs.

Sd/- Justice N.K. Sodhi

Presiding Officer

Sd/-

Utpal Bhattacharya Member

27.5.2008

ddg/-