BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No. 102 of 2008

Date of decision : 26.9.2008

Sasken Communication Technologies Limited …… Appellant

Versus

1. Securities and Exchange Board of India
2. JM Financial Consultants Private Limited …… Respondents

Mr. Janak Dwarkadas Senior Advocate with Mr. Shyam Mehta and Ms. Ayesha Nair Advocates for the Appellant.
Mr. Ravi Kadam Advocate General with Dr. Poornima Advani and Ms. Sejal Shah Advocates for Respondent No.1.
Mr. Somashekhar Sundaresan Advocate for Respondent No.2.

Coram : Justice N.K. Sodhi, Presiding Officer
Arun Bhargava, Member
Utpal Bhattacharya, Member

Per : Justice N.K. Sodhi, Presiding Officer

Sasken Communication Technologies Limited is the appellant before us. It is a public limited company incorporated under the provisions of the Companies Act, 1956 (for short the Act) and its shares are listed on the Bombay Stock Exchange (BSE) and the National Stock Exchange of India Limited (NSE). It shall be referred to hereinafter as the company. The Board of Directors of the company in its meeting held on April 18, 2008 decided to purchase the equity shares of the company upto Rs.40 crores at a price not exceeding Rs.260 per equity share. This buy-back of shares by the company had to be in accordance with the provisions of section 77A of the Act and the Securities and Exchange Board of India (Buy-Back of Securities) Regulations, 1998 (for short the regulations). The Directors also resolved in their meeting that the buy-back would be completed within a period of 12 months from the date of their resolution in one or more tranches from time to time and the same shall be out of the free reserves of the company. They also decided that the buy-back shall be by the methodology of open market purchases through the stock exchanges as prescribed by the Act and the regulations. Two other resolutions passed by the directors which are relevant for our purpose read as under:

> **"RESOLVED FURTHER THAT** the Board in its absolute discretion may decide to close the buy-back of shares at such earlier date as may be determined by the Board, even if the maximum limit of buy-back has or has not been reached, by giving an appropriate notice for such earlier date.
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> **RESOLVED FURTHER THAT** within the limits of 10% of the total paid-up capital and the free reserves (as of March 31, 2008) of the Company i.e. to the extent or less than Rs. 4,000.00 Lakhs and the maximum price stipulated as aforesaid, Mr. Rajiv Mody, Chairman & Managing Director, Mr. G. Venkatesh, Whole-time Director and Ms. Neeta Revankar, Chief Financial Officer of the company be and are hereby, severally authorized to determine number of equity shares to be bought back, amount to be utilized towards the buy-back, the price range for transactions in the Buy-back, the source, the mechanism and the time frame thereof and completion of the modalities for the closure of the Buy-back."

Soon after the aforesaid board meeting, the company prepared a public notice-cum-public announcement for the attention of its shareholders/ beneficial owners of equity shares. The proposed time table for the buy-back as mentioned therein was as under :

"Board Meeting approving Buy-back	April 18, 2008
Date of opening of the Buy-back	May 5, 2008
Acceptance of Shares	Within 15 days of the relevant payout dates of the Stock Exchanges.
Extinguishment of Shares	Within 7 days of acceptance as above.
Last Date for the Buy-back	April 17, 2009 (i.e. 12 months from the date of the resolution passed by the Board of Directors of the Company at its meeting held on April 18, 2008). The Board in its absolute discretion may decide to close the buy-back of shares at such date as may be determined by the Board irrespective of whether the maximum limit of buy-back has or has not been reached, by giving an appropriate notice for such date and completing all formalities in this regard as per relevant laws and regulations.

Clause 13.7 of the public announcement is also relevant and the same is reproduced hereunder for facility of reference :-

> "It may be noted that all the equity shares bought back by the Company may not be at a uniform price. Further, the Company is under no obligation to place a "buy" order on a daily basis, nor is the Company under any obligation to place an order on both the odd lots as well as the normal trading segment of the Stock Exchanges, as applicable."

The public notice-cum-public announcement was published on 19.4.2008 in two national dailies offering to buy-back equity shares for an aggregate amount of Rs.40 crores at a maximum price of Rs.260 per share through the open market using the electronic trading systems of BSE and NSE. A copy of this public announcement was sent to the Securities and Exchange Board of India (hereinafter called Sebi) for its comments. On receipt of the relevant documents for buy-back, Sebi offered its comments and informed the company that its Board of Directors could not have the discretion to close the buy-back of shares at any time they wanted and required the company to delete the words "the Board in its absolute discretion……as per relevant laws and regulations" as appearing in the proposed time table (reproduced hereinabove) contained in the public notice-cum-public announcement. Sebi also required the company to delete the words "no obligation on the company to place a buy order on daily basis" as contained in clause 13.7 of the public notice. It appears that the company represented to Sebi in this regard and the latter as per its communication dated May 29, 2008 advised the company to place buy orders at least once in a week. Other baffling directions that were issued to the company were to place its buy orders **"at or above market price" and "to start the buy-back immediately."** Again, by its letter dated July 25, 2008 Sebi informed the company that the "buy-back offer can be closed at any time within the validity period of the resolution provided the amount offered to be utilised for buy-back i.e. Rs.4000 lacs has been fully exhausted or the disclosed percentage of equity shares have been bought-back." Thereafter, Sebi addressed another communication dated August 18, 2008 to the company requiring it to start the buy-back immediately but not later than seven days from the date of the letter. It is against all these communications/ advice /directions requiring the company to amend its public notice-cum- public announcement that the present appeal has been filed.

2. We have heard Shri. Janak Dwarkadas senior Advocate on behalf of the appellant, the learned Advocate General on behalf of Sebi and Mr. Somasekhar Advocate on behalf of Respondent no. 2- the merchant banker. At the outset, we may refer to one minor issue that had arisen between the parties and now stands settled. As already observed, the company had to buy-back its securities up to the maximum amount of Rs. 40 crores

through open market purchases through the stock exchanges in the prescribed manner. Sebi advised the company to place its buy orders in the market on a daily basis and when the company represented, Sebi allowed it to place orders on a weekly basis. It is not necessary for us to examine whether Sebi could issue such an advice in view of the provisions of the Act and the regulations because the parties have now agreed that the company shall place its buy orders on a fortnightly basis. This puts an end to this dispute.

3. Now we come to the core issue between the parties which is whether the offer size of Rs.40 crores is the maximum amount for which the company shall buy shares as contended by it or is it the minimum as contended by Sebi. By its letters dated April 29, 2008 and July 25, 2008 (Exhibits G and M on the record) Sebi had advised the company to delete some of the words referred to hereinabove from the proposed time table contained in the public notice-cum-public announcement and specifically informed the company that the buy-back offer could not be closed at the discretion of its board of directors till such time it exhausts the limit of Rs. 40 crores as offered to the public shareholders or till the disclosed percentage of equity shares had been bought-back. We do not think that on the facts and circumstances of this case Sebi had any authority to issue such a direction. We have already referred to the public announcement a copy of which was placed before us during the course of hearing. This public announcement refers to the details of the resolutions passed by the board of directors of the company in its meeting held on April 18, 2008. The first resolution states that the company shall purchase its equity shares up to Rs. 40 crores at a price not exceeding Rs.260 per equity share. Again, in clause 1.6 of the public notice-cum-public announcement, the company had made it known to its public shareholders that the maximum amount which it was investing in the buy-back shall be Rs. 40 crores. This fact is further clear from clauses 5 (reproduced in the board resolutions of the company), 7,10(2),12 and 13.9 of the public announcement. It is through this public notice that the company made a representation to its shareholders and when we read this document as a whole including the aforesaid clauses, there is no doubt in our mind that the shareholders had been clearly and unambiguously told that the company would buy-back its shares of the face value of Rs. 10 each up to the maximum limit of Rs. 40 crores at a price not exceeding Rs. 260 per

equity share and that all the shares shall be bought-back from the open market through the stock exchanges. This representation makes it clear that the company would buy-back its shares to the extent of or less than Rs. 40 crores as has been mentioned in so many words in one of the resolutions passed by the board of directors in its aforesaid meeting which has been reproduced in the public announcement. It is, thus, apparent that the company could in its discretion close the buy-back offer after buying shares for an amount less than Rs. 40 crores. The amount of Rs. 40 crores which has been described as the offer size in the public announcement was the maximum limit up to which the shares could be purchased by the company as resolved by its board of directors and it is not the minimum amount as Sebi has taken it to be. The company could purchase for a lesser amount. Sebi has treated this figure of Rs. 40 crores as the minimum amount which, according to it, the company had necessarily to spend as per the public announcement. Sebi is not right in treating this as the minimum amount as that is contrary to the representation made to the public shareholders. In this view of the matter, Sebi was not justified in advising the company to exhaust the limit of Rs. 40 crores before it could close its buy-back offer. The learned Advocate General referred to clauses 1.1 and 1.2 of the public notice-cum- public announcement and strenuously contended that Rs. 40 crores being the offer size is the minimum amount for which the company ought to purchase its shares before it could exercise its option to close the offer. He also contended that the company through the public announcement has made a representation to its public shareholders that it would purchase its shares for Rs. 40 crores and having represented, it cannot be allowed to go back on that representation as that would, according to him, adversely affect the interests of the public shareholders. Having given our thoughtful consideration to the submissions made by the learned Advocate General, we regret our inability to accept the same. Since the argument is based on clauses 1.1 and 1.2 of the public announcement, the same are reproduced hereunder for facility of reference:

> "1.1.Sasken Communication Technologies Limited (the "Company" or "Sasken") hereby announces the Buy-back of its fully paid-up equity shares of the face value Rs. 10 each ("Equity Shares") form the existing owners of Equity Shares (the "Buy-back") form the open market using the electronic trading facilities of the Bombay Stock Exchange Limited ("BSE") and the National Stock Exchange

> of India Limited ("NSE") in accordance with the provisions of Sections 77A, 77AA and 77B of the Companies Act, 1956 (the "Act") and the Securities and Exchange Board of India (Buy-back of Securities) Regulations, 1998 (the "Buy-Back Regulations") at a price not exceeding Rs. 260.00 per Equity Share ("Maximum Offer Price") payable in cash, for an aggregate amount not exceeding Rs. 4,000.00 lakhs ("Offer Size"). The Offer Size represents 9.45% of the aggregate of the Company's total paid-up equity capital and free reserves as on March 31, 2008 (the date of the latest standalone audited accounts).
>
> 1.2 The number of equity shares bought back would depend upon the average price paid for the equity shares bought back and the aggregate consideration paid for such equity shares bought back, subject to the maximum limit of 10% of the total paid up shares capital and free reserves of the Company, in accordance with the resolution passed by the Board of Directors of the Company on April 18, 2008. This is subject to a further limit of 25% of the total paid-up equity shares capital of the Company in a financial year as stipulated in the Act. As an illustration, at the proposed maximum offer price of Rs. 260.00 per Equity Share and for an aggregate consideration amount of Rs. 4,000.00 lakhs, the number of equity shares that can bought back would be 1,538,461 Equity Shares, amounting to approximately 5.39% of the paid up equity capital of the Company as on March 31, 2008. Should the average purchase price be lower than Rs. 260.00 per Equity Share, the number of equity shares bought back would be greater, assuming the payment of an aggregate consideration amount of Rs. 4,000.00 lakhs."

The plain language of clause 1.1 does not support the contention advanced by the learned Advocate General. The words **"for an aggregate amount not exceeding Rs.4,000 lakhs (Offer Size)"** leave no room for doubt that Rs.40 crores was the maximum amount for which the company could buy-back its shares and the company could buy-back shares for a lesser amount. Even though this clause by itself is clear, it has to be read in conjunction with the other clauses. Public notice-cum-public announcement is a commercial document issued by the company for the attention of its shareholders offering to buy-back equity shares and all its clauses have to be read together and understood in a manner in which a reasonable prudent investor of the company would read and understand. The various clauses of the public announcement to which reference has been made hereinabove do not suggest that the company was bound to buy-back shares upto Rs.40 crores.

4. Where Sebi seems to have missed the point is that while offering its comments on the public notice-cum-public announcement, it failed to point out to the company that it should have prescribed a minimum number of shares that it proposed to buy-back which

is the requirement of clause 9 of Schedule II read with regulations 15 and 8(1) of the regulations which provides as under :-

> "The public announcement shall, inter alia, contain the following:
> 1 to 7 ……...
> …….…….....
> 8. The maximum amount to be invested under the buy-back.
> 9.The minimum and the maximum number of securities that the company proposes to buy-back, ……
> ……..……
> ……..…….
> 24.……..……."

Had Sebi advised the company to prescribe the minimum number of shares to be bought back, the problem with which we are now faced would not have arisen. Instead of doing that, it wants us to read the public notice to mean that the offer size of Rs.40 crores is the minimum which the company has prescribed which is contrary to the plain language of the public announcement. If the offer size of Rs.40 crores is taken as the minimum then the question arises – what is the maximum? If we take the amount of Rs.40 crores as the minimum as Sebi wants us to do, then the distinction between the maximum and the minimum gets obliterated which is not the scheme of things. Schedule II to the Regulations clearly mandates that the maximum amount to be invested under the buy-back and the minimum as well as the maximum number of shares the company proposes to buy-back must be specified in the public announcement. Since the minimum number of shares to be purchased by the company has not been mentioned in the public announcement, the learned senior counsel for the appellant placed before us a proposal that the company shall amend the public announcement so as to incorporate therein a clause to the effect that a minimum number of 4 lac shares shall be purchased before the company decides to exercise its option to close the offer at its discretion. When this case came up for hearing on 5.9.2008, we directed Sebi through its counsel to give us its response to the proposal. From the stand taken by the learned Advocate General and the tenor of his arguments, it appears that Sebi is not willing to accept the proposal. We cannot understand why. The proposal is fair and reasonable having regard to the size of the buy-back and the maximum price of the share that is offered. We, therefore, direct the appellant to modify its public announcement by incorporating the minimum number of 4

lac equity shares which it shall buy-back before it exercises its discretion to close the offer. The needful shall be done at the earliest but not later than two weeks from the date of this order.

5. To be fair to the learned Advocate General, we may take note of an objection that he raised to the aforesaid proposed direction during the course of the hearing. He stated that the public announcement had already been issued and the buy-back of shares by the company had commenced and any change or alteration in the public announcement at this stage may adversely affect the interests of the public shareholders. On repeated queries made by us, Sebi could not clarify as to how it would be detrimental to the interests of the public shareholders. We do not think that the interests of the public shareholders would get affected at all because the buy-back by the company is from the open market through stock exchange mechanism at the prevailing price.

6. After the conclusion of the arguments, Sebi has filed its written submissions. It has furnished two reasons why the directions issued by it should be upheld as otherwise, according to it, the interest of the public shareholders would suffer. The two reasons given are reproduced hereunder:

> "(i) Appellants have made a clear representation to the public that their offer size is Rs.4,000.00 lakhs. Backtracking on this promise will amount to a fraud on the existing shareholders who would have decided to hold on to their shares in the hope of getting a higher E.P.S. as a result of extinguishment of share capital to the extent of Rs.4,000.00 lakhs. It is submitted that a decision of the existing shareholder to hold on to his shares cannot be termed as speculation because the representation made by the Appellants is that they ***will*** buy-back shares to the tune of the maximum amount subject to the buy-back being possible. Hence, if buy-back is possible, an existing shareholder is justified in believing that the share capital of the stated amount will be extinguished. Similarly, the avowed objective of the buy-back is enhancement of shareholders value and going back on the offer made by the appellants is contrary to this objective. Thus, SEBI has rightly advised the Appellant to withdraw the objectionable clauses.
>
> (ii) Appellants' misrepresentation that it will buy-back shares as long as the share price is less than Rs.260/- is likely to harm prospective shareholders who may purchase the company's shares to sell them at a higher value. It is submitted that this cannot be termed as speculation because the investors are justified in believing that the Appellants will buy-back as long as the share price remains below Rs.260/- and the Appellant's intention is to extinguish the share capital of Rs.4,000.00 lakhs/-. Similarly, backtracking on the representation is also a fraud on the

> prospective shareholders who may buy shares in the hope of being shareholders of a company with a smaller capital base."

As regards (i), we have already held that the representation made to the public shareholders was that the amount of Rs.40 crores was the maximum for which the shares would be bought back and, therefore, this clause proceeds on a wrong hypothesis and cannot be accepted. The reason given in (ii) is un-understandable. How could the interest of prospective shareholders be considered in a buy-back where the company decides to buy-back shares from its existing shareholders? Be that as it may, the explanation furnished in (ii) above proceeds on the assumption that the share price is likely to go up to Rs.260/-. There is no basis whatsoever for such an assumption. We cannot, therefore, accept this reason as well.

7. Before concluding, we may refer to the other directions that were issued to the company as per communication dated May 29, 2008. As already observed, the company was directed to place its buy orders at or above the market price and was further directed to start with the buy-back immediately. As regards the first direction, we do not think that Sebi could direct the company to place the buy orders above the market price. As a matter of fact, it is no part of Sebi's duty to advise a purchaser regarding the price at which he needs to put in his buy orders. The company has already informed Sebi that the buy-back will be from the open market through stock exchange mechanism. This obviously means that the shares shall be purchased at the prevailing price as determined by the system subject to the maximum price of Rs.260/-. This being the position, there was hardly a need to tell the company to place its buy orders at the market price. This apart, the other direction issued to the company is equally un-understable. The company has been directed to start with the buy- back immediately. Such a direction could not be issued. Section 77A(4) mandates that every buy-back shall be completed within 12 months from the date of the passing of the resolution by the board of directors. Such a resolution was passed by the board of directors of the company which has been notified to the public shareholders through the public announcement. When the law allows the company to complete the buy-back within 12 months, it has the option to start with the same at any time which it thinks is appropriate for the buy-back within the said

period. It cannot be compelled to complete the buy-back soon after the passing of the resolution as has been directed by Sebi. There is nothing in the regulations either to suggest that the buy-back should be completed at the earliest. In these circumstances, we cannot appreciate such a direction.

In the result, the appeal is allowed in the above terms leaving the parties to bear their own costs.

Sd/-
Justice N.K. Sodhi
Presiding Officer

Sd/-
Arun Bhargava
Member

Sd/-
Utpal Bhattacharya
Member

26.9.2008
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