BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal no. 47 of 2008

Date of decision : 9.5.2008

SVPCL Ltd. …… Appellant

Versus

1. The Bombay Stock Exchange Ltd.
2. UTI Securities Ltd.
3. Securities and Exchange Board of India …… Respondents

Mr. S. H. Doctor Senior Advocate with Mr.Vinay Chouhan Advocate for the Appellant.
Mr. Pesi Modi Advocate with Ms. Bhavini Menon Advocate and Mr. Mayank Mehta Advocate for Respondent No.1.
Mr. Janak Dwarkadas Senior Advocate with Mr. Sagar Divekar Advocate for Respondent no.2.
Dr. Poornima Advani Advocate with Mr. Haihangrang E.H. Newme Advocate for Respondent No.3.

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

Per : Justice N.K. Sodhi, Presiding Officer

Challenge in this appeal is to the communication dated January 21, 2008 sent by the Bombay Stock Exchange (for short BSE) to the appellant informing the latter that "your application for listing of your company's equity shares on this Exchange stands rejected." The primary ground on which the request for listing has been turned down is that UTI Securities Limited-the lead manager responsible for post issue compliances had expressed its inability to certify that section 73 of the Companies Act, 1956 (for short the Act) had been complied with. It is not necessary for us to state the facts in detail nor is it necessary to examine the merits of the impugned order as we are of the view that the appellant cannot be given any relief on account of its failure to file an appeal before this Tribunal against the deemed refusal of its

application for listing by the National Stock Exchange of India Limited (hereinafter referred to as NSE).

Since the claim of the appellant has been rejected in view of section 73 of the Act, it is necessary to straightaway refer to the relevant provisions of that section which read as under:

> "**S.73. Allotment of shares and debentures to be dealt in on stock exchange**- [(1) Every company intending to offer shares or debentures to the public for subscription by the issue of a prospectus shall, before such issue, make an application to one or more recognized stock exchanges for permission for the shares or debentures intending to be so offered to be dealt with in the stock exchange or each such stock exchange.]
>
> [(1A)] Where a prospectus, whether issued generally or not, states that an [application under sub-section (1) has been] made for permission for the shares or debentures offered thereby to be dealt in one or more recognized stock exchanges, such prospectus shall state the name of the stock exchange or, as the case may be, each such stock exchange, and any allotment made on an application in pursuance of such prospectus shall, whenever made, be void [*****] if the permission has not been granted by the stock exchange or each such stock exchange, as the case may be, before the expiry of ten weeks from the date of the closing of the subscription lists:
>
> Provided that where an appeal against the decision of any recognized stock exchange refusing permission for the shares or debentures to be dealt in on that stock exchange has been preferred under section 22 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), such allotment shall not be void until the dismissal of the appeal.]
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> ……...
> ……...
>
> [(5) For the purposes of this section, it shall be deemed that permission has not been granted if the application for permission, where made, has not been disposed of within the time specified in sub-section (1).]
> ……..
> …….."

Section 73 of the Act requires that every company intending to offer shares to the public for subscription by the issue of a prospectus should make an application to one or more recognized stock exchanges seeking their permission for listing the shares on the stock exchange or each such stock exchange. This application must be made before the issue of the prospectus. Sub-section (1A) of section 73 of the Act

provides that the company in the prospectus for a public issue of shares shall not only state that an application for permission for listing the shares has been made to one or more recognized stock exchanges but it shall also state the name of the stock exchange or, as the case may be, each such stock exchange. It is also the mandate of this sub-section that if permission for listing is not granted by the stock exchange or each such stock exchange, as the case may be, before the expiry of ten weeks from the date of the closing of the subscription lists, then any allotment made in pursuance to the prospectus shall be void. The only contingency in which such allotment could then be saved from being void is referred to in the proviso to section 73(1A) and that is, when an appeal is filed before this Tribunal under section 22A of the Securities Contracts (Regulation) Act, 1956 (for short SCRA) against the decision of any recognized stock exchange refusing permission for listing the shares. Where such an appeal is filed the allotment shall not be void until the dismissal of the appeal. In other words, the allotment will then be subject to the decision of the appeal. Section 73(5) postulates that an application for permission shall be deemed to have been rejected if it is not disposed of within ten weeks from the date of the closing of the subscription lists which is the time specified in sub-section (1A). This deeming provision is clear and unambiguous and there are no ifs and buts nor does it admit of any exception. From a reading of the provisions of section 73 of the Act as reproduced above and from the language in which they are couched, it becomes abundantly clear that they are mandatory. Validity of the allotment of shares made in pursuance to the prospectus has been made dependent upon permission for listing being granted by the stock exchange(s) concerned within ten weeks from the date of the closing of the subscription lists. This period of ten weeks is sacrosanct and cannot be extended for any reason whatsoever nor can any period be excluded therefrom. It would follow that each and every stock exchange named in the prospectus on which the scrip of the company is intended to be listed must grant the permission within ten weeks and if any one of those exchanges, for whatever reason, refuses the permission within that time or if there is a deemed refusal under section

73(5), the entire allotment shall become void. The public issue will, however, be saved or the allotment shall not be void only if the issuer company were to file an appeal against the refusal or deemed refusal of the stock exchange. The view that we have taken in regard to the provisions of section 73 of the Act finds support from the decision of the Supreme Court in **Raymond Synthetics Ltd. and others v. Union of India and others AIR 1992 S.C. 847**. While referring to the provisions of section 73(1A), their Lordships observed as under:

> "This provision makes it necessary for the company to state in its prospectus the name of each of the recognized stock exchanges whose permission for listing has been sought by the company. Any allotment of shares will become void if permission is not granted by the stock exchange or each such stock exchange, as the case may be, before the expiry of 10 weeks from the date of the closing of the subscription lists. The validity of the allotment is thus made dependent on securing the requisite permission of each stock exchange whose permission has been sought. The liability to repay the application money arises only upon refusal of the stock exchange to grant the permission sought by the company before the expiry of 10 weeks from the date of closing of the subscription lists. This is clear from sub-section (1A) read with sub-section (5). There is a deemed refusal if permission is not granted by the stock exchange before the expiry of 10 weeks from the date of closing of the subscription lists, and upon the expiry of that date, any allotment of shares made by the company becomes void."

Again in para 26 of the judgment the learned Judges had this to say -

> "Sub-section (1A) postulates that any allotment made becomes void at the end of 10 weeks from the date of the closing of the subscription lists if by that time the requisite permission of the stock exchange has not been obtained. But this consequence is postponed till the dismissal of any appeal preferred under Section 22 of the Securities Contracts (Regulation) Act, 1956 (see the proviso to sub-section (1A) of Section 73 of the Act). Nevertheless, the permission, if not obtained within 10 weeks, is deemed not to have been granted."

We may now notice the undisputed facts insofar as they are necessary for the disposal of this appeal. The appellant before us is a company incorporated under the Act with its registered office at Hyderabad and its main business is manufacturing paper products. It came out with an initial public offer (public issue) of 76,66,668 equity shares of face value of Rs.10/- each for cash at a price of Rs.45/-. In this

public issue, BOB Capital Markets Limited (BOB) was the book running lead manager and UTI Securities Limited (UTI) was the lead manager responsible for post issue compliances. Aarthi Consultants Pvt. Ltd. was the Registrar to the issue. The issue opened on 22.10.2007 and closed on 26.10.2007 and it is common ground between the parties that ten weeks period commencing from 27.10.2007 came to an end on 4.1.2008. It is also not in dispute that the appellant company in its prospectus had named BSE and NSE as the two stock exchanges where it proposed to list its scrip. As per the requirements of section 73(1) of the Act, it applied to both these exchanges seeking their permission for the listing of its shares. BSE by its letter dated May 18, 2007 permitted the company to use the name of the exchange in its offer document and granted its "in-principle approval of the company's listing application seeking permission for its equity shares to be dealt in on the Exchange subject to the company completing post issue requirements and complying with the necessary statutory, legal and listing formalities and fulfilling the requirements of Sec.73 of the Companies Act, 1956." Similarly, NSE by its letter dated June 18, 2007 permitted the appellant company to use its name in the offer document in respect of the proposed public issue and communicated to the company its decision in the following words:

> "You have been permitted to use the name of the National Stock Exchange in the Offer Document in respect of the proposed public issue of equity shares provided the Company prints the Disclaimer Clause as given below in the Offer Document after the SEBI disclaimer clause. The in-principle approval is subject to adequate disclosures to be made in the Offer Document with respect to the above mentioned points.
> ……..…
> ……..…
>
> It is to be distinctly understood that the aforesaid permission given by NSE should not in any way be deemed or construed that the offer document has been cleared or approved by NSE; nor does it in any manner warrant, certify or endorse the correctness or completeness of any of the contents of this offer document; nor does it warrant that this Issuer's securities will be listed or will continue to be listed on the Exchange; nor does it take any responsibility for the financial or other soundness of this Issuer, its promoters, its management or any scheme or project of this Issuer."

Admittedly, BSE has rejected the listing application of the appellant company by the impugned communication and NSE has not passed any order on the listing application till date. In other words, the application for permission filed with the NSE is deemed to have been rejected in terms of section 73(5). This being the position, the question that needs to be answered is does the public issue survive in the absence of any appeal filed by the appellant against the deemed refusal of its application by the NSE. In our opinion the answer to this question has to be in the negative. As already observed, the appellant had mentioned the names of NSE and BSE in its prospectus when it offered shares to the public for subscription. It was, therefore, necessary that both these exchanges should have granted permission for the listing of the shares within ten weeks from the closing of the subscription lists which period admittedly expired on 4.1.2008. BSE by the impugned communication has rejected the listing application of the appellant against which the present appeal has been filed. In view of the proviso to sub-section (1A) of section 73 of the Act, the issue/allotment qua the BSE has not become void due to the pendency of the present appeal. The application filed with NSE is deemed to have been rejected which rejection could be appealed against under section 22A of SCRA as has been done in the case of BSE but no appeal having been filed, the deemed rejection by NSE has become final. Had an appeal been filed against the deemed refusal by NSE, the issue/allotment under the prospectus would then have been saved in terms of the proviso to sub-section (1A) of section 73 of the Act and would have become subject to the decision in the appeal. In the absence of an appeal, the public issue qua the NSE has become void. Since the requirement of the law is that both the exchanges mentioned in the prospectus should have granted the permission within the ten weeks period which ended on 4.1.2008 and NSE having rejected the application for listing by a deemed order which has become final, the public issue/allotment as a whole must necessarily fail. Even if we were to set aside the order of BSE and grant permission on its behalf, our order will be of no consequence in the light of the

deemed rejection by NSE and the public issue will still not be revived. This is the mandate of section 73(1A).

In **M/s. Rishyashringa Jewellery Ltd. and another v. The Stock Exchange Bombay and others, AIR 1996 S.C. 480**, the question arose whether it was necessary to obtain permission from 'each' stock exchange mentioned in the prospectus and what is the effect if any of those exchanges refuses permission. Their Lordships answered the question in the following words:

> "Thus, where the prospectus held out that enlistment of shares would be in more than one stock exchanges the consequence envisaged in sub-section (1A) of Section 73 ensues to render void the entire allotment of shares unless the permission is granted by each and everyone or all of the stock exchanges named in the prospectus for enlisting the shares. This is the plain meaning of sub-section (1A) of Section 73. In short, unless permission granted by each or everyone of all the stock exchanges named in the prospectus for listing of shares to which application is made by the company, the consequence is to render the entire allotment void. **In other words, if the permission has not been granted by any one of the several stock exchanges named in the prospectus for listing of shares the consequence by virtue of sub-section (1A) of Section 73 is to render the entire allotment void and the grant of permission by one of them is inconsequential.** This construction also promotes the object of insertion of sub-section (1A) in Section 73 by amendment of the law made to overcome the effect of the decision of this Court in Allied International Products Ltd. (AIR 1971 SC 251)." (Emphasis supplied).

The aforesaid observations apply with full vigour to the facts of the present case and since NSE has by a deemed order rejected the application for listing filed by the appellant, the entire public issue must fail.

Mr. S. H. Doctor the learned senior counsel for the appellant brought to our notice a complaint from one Srinivas Pandit, on the receipt of which the Securities and Exchange Board of India (for short the Board) by its letter dated December 17, 2007 when the ten weeks period postulated by section 73(1A) was yet to run out, advised BOB, one of the lead managers to the issue "not to proceed further towards listing of shares till the complaint is addressed satisfactorily." It was also pointed out that the restraint order was lifted by the Board as per its letter dated January 4, 2008

which was sent to both the lead managers BOB and UTI through fax at 8.25 p.m. on that date after office hours by which time the ten weeks period had come to an end. It is in this background that Mr. Doctor argues that because of the restraint order issued by the Board, NSE could not grant the requisite permission within the stipulated period of ten weeks. It is contended that as a result of the restraint order, it had become impossible for NSE to grant the permission within the specified time and in view of this impossibility the doctrine of **lex non cogit ad impossibilia** would be attracted and the impossibility is a valid excuse for non compliance with the provisions of section 73(1A). The argument, indeed, is that because of the restraint order which brought about the impossibility, the allotment has not become void and that the public issue would still be alive. Reliance was placed on the judgments of the Supreme Court in State of Rajasthan v. Shamsher Singh 1985 (Supp) SCC 416 and Industrial Finance Corporation of India Limited v. Cannanore Spinning and Weaving Mills Ltd. and others (2002) 5 SCC 54. We have given our thoughtful consideration to the argument of the learned senior counsel for the appellant and express our inability to accept the same. We have already noticed the provisions of section 73 of the Act and held that the time period of ten weeks prescribed by sub-section (1A) is mandatory and if permission is not granted by any one of the two exchanges within this period, the allotment shall be void. Even if we agree with the learned senior counsel that the restraint order issued by the Board on 17.12.2007 had made it impossible for NSE to grant permission within the requisite period of ten weeks, the allotment/public issue nevertheless became void on the expiration of ten weeks and nothing could save it except an appeal to this Tribunal. Even an impossibility, as pleaded by the learned senior counsel, will not by itself save the allotment. In that event also, the issuer company should have filed an appeal under section 22A of the SCRA against the refusal or deemed refusal of the exchange and could have taken the ground of impossibility before the Tribunal upon which the latter could have passed appropriate orders. The allotment would then have been subject to the order of the Tribunal in appeal and this is the only way in which the

public issue/allotment could have been saved. Grant of permission by NSE within the requisite period might have become impossible but the filing of an appeal against its deemed refusal had not. Since the proviso to section 73(1A) itself has provided a way out, we are of the considered opinion that the doctrine of impossibility of performance (lex non cogit ad impossibilia) is not attracted. There is no quarrel with the proposition of law laid down in the judgments relied upon by the learned senior counsel for the appellant but they do not apply to the facts of this case.

For the view that we have taken, it is not necessary to examine the other contentions raised by the learned senior counsel for the appellant. It is also not necessary to examine the validity of the impugned communication because the appeal must fail as the deemed rejection by the NSE has become final and the public issue cannot survive in the absence of a permission from it.

In the result, the appeal fails and the same is dismissed leaving the parties to bear their own costs.

Sd/-
Justice N.K. Sodhi
Presiding Officer

Sd/-
Arun Bhargava
Member

Sd/-
Utpal Bhattacharya
Member

9.5.2008
ddg/-