BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No. 78 of 2011

Date of decision: 9.11.2011

M/s Kalpena Plastiks Limited
3, Saheed Nityananda Saha Sarani,
Kolkata – 700 001. … Appellant

Versus

The Bombay Stock Exchange Limited
Phiroze Jeejeebhoy Towers,
Dalal Street, Fort,
Mumbai – 400 001. … Respondent

Mr. Somasekhar Sundaresan, Advocate with Mr. Ravichandra S. Hegde, Mr. Paras Parekh, Ms. Delna Aga, Advocates for the Appellant.

Mr. P. N. Modi, Advocate with Mr. Faraz Alam Sagar, Advocate for the Respondent.

CORAM : Justice N. K. Sodhi, Presiding Officer
P. K. Malhotra, Member
S. S. N. Moorthy, Member

Per : P. K. Malhotra, Member

The appellant before us is a company registered under the Companies Act, 1956 and its shares are listed on the Bombay Stock Exchange Limited (BSE), Calcutta Stock Exchange and Delhi Stock Exchange since 1992. The appellant company was incorporated in the year 1989 in the name of Sarla Gems Limited and its name was changed to Kalpena Plastiks Limited in the year 2009. It was initially engaged in the business of marketing and exporting of gems and jewellery which was reportedly diversified into activities relating to export, buying and selling of synthetics, resins, rubbers and plastics.

2. With a view to raise its resources, the appellant decided to issue 32,60,035 equity shares of ` 10/- each for cash at par, on preferential basis to the promoters of the company i.e. 12,60,035 equity shares to M/s. Tara Holdings Private Limited and 20,00,000 equity shares to Kalpena Industries Limited. A resolution was passed to this effect in the extra ordinary general meeting of the shareholders

held on September 5, 2009 and it was also intimated to all the three stock exchanges vide letter of the same date. The allotment of the shares on preferential basis also triggered the open offer under Regulations 10 and 12 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (for short the takeover code). The allottees made a public announcement under the takeover code and also submitted the draft letter of offer to the Securities and Exchange Board of India (for short the Board) on August 25, 2009. The open offer was closed on December 14, 2009. Simultaneously, the appellant also filed an application with BSE on August 27, 2009 for 'in-principle' approval as per clause 24(a) of the listing agreement for listing of shares. The said clause reads as under:-

> "24.(a) The company agrees to obtain 'in-principle' approval for listing from the exchanges having nationwide trading terminals where it is listed, before issuing further shares or securities. Where the company is not listed on any exchange having nationwide trading terminals, it agrees to obtain such 'in-principle' approval from all the exchanges in which it is listed before issuing further shares or securities. The company agrees to make an application to the Exchange for the listing of any new issue of shares or securities and of the provisional documents relating thereto."

It is the case of the appellant that it kept on pursuing the matter with BSE for the said approval but there was no response. The appellant was in dire need to infuse funds which were delayed and the proposed allottees were reluctant to block their funds any further. Therefore, the appellant, vide its letter dated December 28, 2009, intimated the BSE that the appellant would proceed with the preferential allotment of shares under the presumption that the BSE has no objection for the said issuance of shares on preferential allotment basis. As there was no response from the BSE, the appellant allotted 32,60,035 equity shares on preferential basis to the promoters on January 6, 2010. Thereafter, vide its letter dated January 19, 2010, the appellant requested BSE for listing of the said shares on the stock exchange. It is at this stage that, for the first time, BSE responded to the appellant, vide its e-mail dated January 27, 2010, calling for some further information and asking for an undertaking from the company that it will recompute the issue price of shares on completion of six months of scrip being listed on the exchange and accordingly collect the difference, if any, from the

allottees. The BSE also objected to the appellant going ahead with the allotment of shares without obtaining prior in-principle approval which amounts to violation of clause 24(a) of the listing agreement. The appellant responded to the said e-mail *inter-alia* stating that as there was no response from BSE for four months, the company was in dire need of money and the promoters were not willing to block their money for indefinite period, the company went ahead with the allotment of preferential shares under intimation to BSE presuming that clause 24(a) of the listing agreement has been complied with. As regards undertaking from the company for recomputing the issue price of shares on completion of six months of scrip being listed on the exchange, the appellant, vide its letter dated January 30, 2010, submitted as under:-

> "4. As regards undertaking from the company for re-computing the issue price of shares on completion of 6 months of scrip being listed on the exchange, we have to state as under:-
> That the provisions stated in Regulation 76(2) and 76(3) of the SEBI (ICDR) Regulations, 2009 are not applicable to our Company.
>
> The provisions of Regulations 76(2) and 76(3) are reproduced herein as follows:-
>
> 76(2): If the equity shares of the issuer have been listed on a recognized stock exchange for a period of less than six months as on the relevant date, the equity shares shall be allotted at a price not less than the higher of the following:
>
> (a) the price at which equity shares were issued by the issuer in its initial public offer or the value per share arrived at in a scheme of arrangement under sections 391 to 394 of the Companies Act, 1956, pursuant to which the equity shares of the issuer were listed, as the case may be; or
> (b) the average of the weekly high and low of the closing prices of the related equity shares quoted on the recognised stock exchange during the period shares have been listed preceding the relevant date; or
> (c) the average of the weekly high and low of the closing prices of the related equity shares quoted on a recognised stock exchange during the two weeks preceding the relevant date.
>
> 76(3): Where the price of the equity shares is determined in terms of sub-regulation (2), such price shall be recomputed by the issuer on completion of six months from the date of listing on a recognised stock exchange with reference to the average of the weekly high and low of the closing prices of the related equity shares quoted on the recognised stock exchange during these six months and if such recomputed price is higher than the price paid on allotment, the difference shall be paid by the allottees to the issuer.

> We would like to draw your attention to the first line of the Regulation 76(2) which states very clearly that the provisions of this Regulation apply to only those Companies which are listed for less than 6 months. Our Company has been listed with your exchange since 1992.
>
> The shares of our Company were suspended for trading purpose only for certain period due to some procedural non compliances of Listing Agreement. However, this situation can not be construed as the Company's shares are not having been listed. In fact, the suspension of trading was revoked by your exchange vide your letter dated 16th October, 2009.
>
> The above facts were also stated to your officials during the meeting on 12th November, 2009 in presence of Mr. Gopal Kirishna Iyer, General Manager, Corporate Services.
>
> Since there is no confusion to the fact that the shares of the Company is listed since 1992 (which is certainly for a period of more than 6 months), the requirement of collecting differential amount and putting the shares under lock-in till the time such amount is paid by the allottees, is not applicable in our case."

There was further exchange of correspondence between the parties and ultimately the BSE, vide its letter dated November 10, 2010, finally conveyed its decision to the appellant, *inter-alia*, stating that Regulation 76(1) of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 (for short the Regulations) which deal with the pricing of the equity shares makes a reference to the closing price of the equity shares quoted on the recognised stock exchange. Since the scrip of the company was under suspension during the entire period, no trading price data was available. Further chapter VII of the Regulations does not specify any method of computation to deal with the cases where the scrip of a company is suspended during the relevant pricing period. The BSE, thereafter, referred to the minutes of the joint meeting of the Board, BSE and NSE, held on May 8, 2008 where it was decided that for companies whose shares have been suspended from trading in the past and subsequently revoked and in case of companies with less than six months of trading history subsequent to revocation of suspension of trading, the pricing may be taken as higher of the following:-

> "(a) As per clause 20(5) of SAST guidelines, or
>
> (b) Average pricing of the available period (> than two weeks)
>
> (c) Average price of at least two weeks, subject to recomputation of the price at the end of six months, as provided in clause

> 13.1.1.2 of erstwhile SEBI (DIP) guidelines. As per this decision of the meeting, the companies may be asked to give an undertaking to recompute the price and pay the difference amount, if any, if recomputed price is higher."

Based on this decision, the BSE asked the appellant to furnish an undertaking for re-computation of the price of preferential shares at the end of six months of listing. Being aggrieved by the said direction of BSE, the appellant has preferred this appeal for setting aside the said decision.

3. We have heard learned counsel for the parties who have taken us through the records. During the course of hearing, though learned counsel on both sides made submissions on issues like the appellant going ahead with allotment of preferential shares without first obtaining in-principle approval under clause 24(a) of the listing agreement, we are of the considered view that it is not necessary for us to go into these issues for deciding the appeal. It is common case of the parties that scrip of the company, though listed on the stock exchanges since 1992, its trading remained suspended till October 9, 2009 and no pricing data of the scrip was available. The pricing of the equity shares of the company cannot be worked out as per formula as prescribed under Regulation 76(1) of the Regulations due to non availability of pricing data. Therefore, BSE, relying on the minutes of the meeting held on May 8, 2008 between the Board, BSE and NSE and based on the decision taken in that meeting, asked the company to give an undertaking to recompute the price of preferential equity shares at the end of six months of listing. The decision on the basis of which undertaking was asked from the appellant reads as under:-

"SEBI-BSE/NSE MEETING ON PRIMARY MARKET/LISTING RELATED ISSUES

Item	**Contents**	**Discussions and decision taken in the Meeting held on May 8, 2008**
	List of members present in the meeting is given in Annexure I.	
10	Pricing in case of preferential issue cases and QIP	(i) <u>Companies whose shares have been suspended from trading in the past and subsequently revoked</u> In case of companies, with less than 6 months of trading history subsequent to revocation of suspension of trading, it was decided that the pricing may be higher of

		the following: a. As per Clause 20(5) of SAST Guidelines or b. Average pricing for the available period (> than 2 weeks) c. Average price for at least 2 weeks Subject to re-computation of the price at the end of 6 months, as provided in clause 13.1.1.2 of DIP. If recomputed price is higher than the balance amount to be brought in by the acquirer otherwise the lock-in on shares so allotted to allottee shall continue.

Securities and Exchange Board of India, Mumbai – Private Circulation Only"

The short question that has to be decided by us is whether BSE was right in asking the appellant to furnish an undertaking for revising price of preferential shares after six months on the basis of the aforesaid minutes. We are of the considered view that, in the facts and circumstances of the case, the answer to the issue has to be in the negative. Admittedly, the decision was taken in the meeting held by the Board but no action has been taken in furtherance of this decision either by issuing the rules, order or circular making such decision known to the public. The minutes are specifically marked as for "private circulation only". There is no doubt that the Board is empowered to take any decision to protect the interest of the investors in securities and to promote the development of securities market. However, such decision has to be made known to the public through some communication. A decision taken in the closed doors of the Board room which has not been made known to the investors, intermediaries or other players of the market cannot place any obligation on the market players. Such decision, to be binding, must be made known to the public in the form of rules, regulations, orders or circulars. The decision relied upon by BSE in issuing the impugned letter was taken way back on May 8, 2008. The appellant approached BSE for in-principle approval on August 27, 2009 and it did not respond to appellants repeated requests till January 27, 2010. Even thereafter, it took BSE ten months to convey its decision, that too, based on the minutes of meeting held on May 8, 2008 which were not made public. Since the Board had not issued any order/circular making its decision public, it was not competent for BSE to base its decision on such minutes. Further, the allotment of the shares under preferential

allotment triggered the open offer under Regulations 10 and 12 of the takeover code and the allottees submitted the draft letter of offer with the Board on August 25, 2009. The Board gave its observations on the letter of offer and did not raise any issue on the price as offered by the proposed allottees. In the absence of any provision for computation of price of preferential shares in respect of scrip which is listed on the stock exchange but whose trading is suspended and the price, as offered by the proposed allottees, having been accepted by the Board in the draft offer letter, we are of the considered view that the BSE erred in asking the appellants to furnish an undertaking to revise the price of preferential shares, if necessary, after six months of its listing on the stock exchange on the basis of minutes of the meeting held on May 8, 2008 which were not made public.

In the result, the appeal is allowed and the impugned order is set aside. The respondent is directed to list the subject shares on its exchange. There is no order as to costs.

Sd/-
Justice N. K. Sodhi
Presiding Officer

Sd/-
P. K. Malhotra
Member

Sd/-
S. S. N. Moorthy
Member

9.11.2011
Prepared & Compared by
ptm