

M/S. DISCOVERY WEALTH MANAGEMENT SERVICES PVT. LTD. & ORS. A

v.

M/S. PADMINI ENGINEERING PVT. LTD. & ORS.

(Civil Appeal No. 5027 of 2008) B

DECEMBER 10, 2014

[DIPAK MISRA AND UDAY UMESH LALIT, JJ.]

Securities Contracts (Regulation) Rules, 1956: r.19(2)(b) – Securities and Exchange Board of India (Listing of Securities) Guidelines, 2003: clauses 8.1 to 8.5, 12.1 – Delisting of shares – BSE did not allow the delisting of shares of Hella Ltd. as level of public shareholding in Hella India did not go below 10% – Held: The offer of delisting would fail if the public shareholding does not fall below the minimum listing conditions or the listing agreement – In the instant case, as per the agreement between the company Hella India and BSE, the level of public shareholding fixed for continuous listing was 20% – On failure of “Hella India” to maintain the level of 20%, the condition for continuous listing would be violated and breached and Hella Ltd. would be eligible to get delisted. C D E

Dismissing the appeal, the Court

HELD: 1. On a perusal of the agreement between Hella Ltd. and the BSE, it is clear that the benchmark had been determined fixed at 20 per cent. It is not in dispute that the public shareholding has reduced to 18.63 per cent, which is less than 20 per cent. Clause 40A(i) provides that the listing company accepts the conditions to 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. It clearly conveys the meaning that if there is a benchmark F G H

- A in the agreement, the same has to be maintained. 2003 guidelines are applicable and prescribe the procedure for delisting of securities. As per the procedure prescribed, any promoter who desires delisting has to make an offer for purchase of shares in terms of clauses
- B 8.1 to 8.3. The said exercise has to be completed within a period specified in clauses 8.1 and 8.5. The whole process has to be monitored by the Stock Exchange and the Registrar and transfer agency has to ascertain the genuineness of the physical securities tendered, etc.
- C Clause 8.8 of 2003 guidelines stipulate that required level of public shareholding must fall below the level of continuous listing. Clause 12.1 of 2003 guidelines states that the offer of delisting would fail if the public shareholding does not fall below the minimum limit
- D specified by the listing conditions or the listing agreement. It is quite vivid that the 2003 guidelines do not prescribe or fix the required level of public shareholding of continuous listing though the said limit must be breached for an offer of delisting to succeed.
- E [Paras 8, 16, 17][275-G-H; 276-A-B, D-H]

3. Rule 19(2)(b) provided that at least 10% of each class or kind of securities must be offered to public for subscription through advertisement in newspaper during the time specified and the applications received
- F pursuant to such offer should be allotted as per the conditions postulated. The proviso engrafts states that in case the company does not fulfill the conditions, it shall offer at least 25% of each of the securities to the public for subscription through advertisement in
- G newspaper, etc. within the time stipulated. The opening words of sub-rule (2) of Rule 19 read “apart from complying with such other terms and conditions as may be laid down by a recognized stock exchange. These words have their own importance. It is clear that

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sub-rule (2) gives primacy to the terms and conditions as may be laid down by the recognized stock exchange in that regard. In the instant case, as per the agreement between the company "Hella India" and BSE, the level of public shareholding fixed for continuous listing was 20%. The said limit of 20%, is a higher limit. On failure of "Hella India" to maintain the level of 20%, the condition for continuous listing would be violated and breached. Public holding of 10% would not have satisfied the requirement of rule 19(2). Therefore, when harmoniously interpreted, the listing requirement i.e. the agreement with BSE with rule 19(2) along with 2003 Guidelines, it is apparent that the condition for continuous listing would not have been followed by "Hella India", if the public shareholding had fallen below 20%. Thus, it has to be held that offer of delisting would be successful and would not fail, if the public shareholding falls below 20%. The 10% limit would not apply in view of Rule 19(2) as the said Rule recognizes the terms and conditions laid down by recognized stock exchange and stipulates that the same must be satisfied for the company to claim continuous listing. [Para 18][277-A-H]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5027 of 2008.

From the Judgment and Order dated 27-05-2008 of the Securities Appellate Tribunal, Mumbai in Appeal No. 51 of 2006.

A.J. Bhambhani, Sr. Adv., Ms. Sumita Hazarika, Adv. for the Appellants.

Arvind Datar, Shyam Divan, Sr. Advs., Bhargava V. Desai, Vishal Chaudhary, Manpreet Lamba, N. Ganpathy (For M/s K.J. John & Co.), Advs. for the Respondents.

A The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The present appeal is directed against the judgment and order dated 27.05.2008 passed by the Securities Appellate Tribunal (for short "SAT") in Appeal No. 51 of 2006 whereby it has set aside the order passed by B the Bombay Stock Exchange (for short "BSE") declining to grant the benefit of delisting of respondent No. 4 herein, viz., M/s Hella India Lighting Ltd. (for short "Hella India").

2. The facts which are required to be stated are that Hella C India is a public limited company whose shares are listed on BSE as well as on Delhi Stock Exchange (for short "DSE") pursuant to the listing agreements between the company, on the one hand, and BSE and DSE, on the other. The agreements were executed on 17.10.1986. Reinhold Poersch D Gmbh, the promoter of Hella India, holds 51% of its share capital. In July, 2005, Hella India decided to have its shares delisted from both the Stock Exchanges in accordance with the provisions contained in the Securities and Exchange Board of India (Delisting of Securities) Guidelines, 2003 (for short E "the guidelines"). 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 first F respondent herein, which is an affiliated entity of the promoter of Hella India. The approval of the shareholders was obtained by a special resolution which was passed in the extraordinary general meeting of the shareholders of Hella India in September, 2005. The promoter of Hella India determined the floor price of Rs. 52.39 per share which was later turned out to be the exit price for delisting of securities in accordance G with the book building process prescribed by the guidelines. The public offer opened on 07.02.2006 and closed on 10.02.2006.

3. There is no cavil over the fact that 9,63,193 shares H including 16,000 shares in physical form were tendered at that

price. The total number of shares offered including those at higher prices were 9,71,754. Respondent No. 1- M/s. Padmini Engineering Pvt. Ltd., as the acquirer, accepted 9,63,193 shares at the price of Rs, 52.39 per share. The quantity of share accepted by the said respondent together with the holding of the promoters came to 81.37 per cent of the total equity share capital of Hella India, as a consequence of which, the level of public share holding in Hella India was brought down to 18.63 per cent, which was less than 20 per cent.

4. As the facts would further unfold, after accepting the shares at the price aforesaid, respondent No. 1 through the merchant banker, viz., UTI Securities approached the BSE by a letter dated 15.02.2006 for completing the settlement of transactions and permission was sought to release the advertisements regarding the final price as discovered by the reverse book building process. On receipt of the aforesaid request from respondent No. 1, BSE, declined to proceed with the merchant banker by a communication dated 15.02.2006, which reads as follows:-

“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.”

5. From the aforesaid, it is clear that BSE declined to proceed with the settlement as the holding of the acquirers together with the promoters did not exceed 90 per cent. In other words, BSE was of the view that the level of the public

A shareholding in Hella India had not gone below 10 per cent and, therefore, delisting could not be allowed.

6. Being grieved by the aforesaid communication, respondent No. 1 preferred the appeal before SAT. SAT referred to Section 30 of the Securities Contracts (Regulation) Act, 1956 (for short "SCRA"), Rule 19 (2) (b) of the Securities Contracts (Regulation) Act, 1956 (for short "Rules"), which was substituted with effect from 07.06.2001, and eventually came to hold as follows:

"...We have already noticed the provisions of Rule 19(2)(b). Companies which fulfil the conditions of clause (b) have to maintain at least 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 Rules 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 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 1(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

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exceed 90 per cent. We have, therefore, no hesitation in setting aside the impugned decision of BSE.” A

7. Aggrieved by the aforesaid adjudication and order, as has been indicated earlier, the present appeal has been preferred. It is also to be noted that the present appellants were not before the SAT. The present appeal was admitted after grant of permission to file the same. B

8. The singular question that we are required to address is whether the company, i.e., Hella India, was required to maintain 10 per cent benchmark for the public shareholding to remain as a listed company. During the pendency of this appeal, an agreement between respondent No. 4 herein, Hella India, and BSE has been brought on record. Be it clarified, Hella India was not a party before SAT. It was the 1st respondent who preferred the appeal before SAT. On a perusal of the agreement between respondent No. 4 and the BSE, it is graphically clear that the benchmark had been determined fixed at 20 per cent. It is not in dispute that the public shareholding has reduced to 18.63 per cent, which is less than 20 per cent. C
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9. It is submitted by Mr. A.J. Bhambhani, learned senior counsel appearing for the appellants, that even if the condition incorporated in the agreement is accepted, delisting could not have been allowed, regard being had to the Circular dated 02.05.2001 issued by the Securities and Exchange Board of India (for short “SEBI”), because the respondent No. 4 was required to maintain benchmark of 10 per cent and not 20 per cent. F

10. To appreciate the said submission of Mr. Bhambhani, scanning of certain facets of the guidelines are absolutely essential. Clause 40A of the said circular reads as follows: G

“40A – Conditions for continued listing

(i) The company agrees that in the event of the application for listing being granted by the H

A 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.

B (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.”

D 11. Learned counsel for the appellants has also drawn our attention to Rule 19(2)(b) of the Rules, which has been brought in by way of amendment. The said Rule deals with requirements with respect to the listing of securities on a recognised stock exchange. The relevant portion of Rule 19(2)(b) reads as under:

E “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”

F (a) *** ***”

G (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:

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- (a) minimum 20 lakh securities (excluding reservations, firm allotment and promoters' contribution) was offered to the public; A
- (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 B
- (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: C

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." D

12. At this stage, we may also refer to the 2003 Guidelines framed by SEBI. Clause 4 of the 2003 Guidelines provides that the guidelines shall be applicable to delisting of securities of companies. Clause 8 deals with exit price for voluntary delisting of securities. Keeping in view the immense emphasis being placed by both sides on various conditions of the said Clause, we think it appropriate to reproduce the same. It reads as under: E F

"8. EXIT PRICE FOR VOLUNTARY DELISTING OF SECURITIES

8.1 Any promoter of a company which desires to delist from the stock exchange shall determine an exit price for delisting of securities in accordance with the book building process described in Schedule II of these guidelines. G

- A 8.2 The offer price shall have a floor price, which will be the average of 26 weeks traded price quoted on the stock exchange where the shares of the company are most frequently traded preceding 26 week from the date of the public announcement and without any ceiling of maximum price.
- B
- C 8.3 In the case of infrequently traded securities the offer price shall be as per regulation 20(5) of the SEBI (Substantial Acquisition and Takeover) Regulations, and the infrequently traded securities shall be determined in the manner explained under regulation 20(5) of the SEBI (Substantial Acquisition and Takeover) Regulations.
- D 8.4 The stock exchange(s) shall provide the infrastructure facility for display of the price at the terminals of the trading members to enable the investors to access the price on the screen to bring transparency to the delisting process.
- E 8.5 In the event of securities being delisted, the acquirer shall allow a further period of six months for any of the remaining shareholders to tender securities at the same price;
- F 8.6 The stock exchanges shall monitor the possibility of price manipulation and keep under special watch the securities for which announcement for delisting has been made.
- G 8.7 To ascertain the genuineness of physical securities if tendered and to avoid the bad delivery, Registrar and Transfer Agent shall co-operate with the Clearing House / Clearing Corporation to determine the quality of the papers upfront.
- H 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." A

Thus, the aforesaid Clause basically stipulates as regards the exit price for delisting in accordance with the procedure and also enumerates the role of the stock exchange. B

13. At this juncture, it is apt to refer to Clause 12.1 which provides for minimum number of shares to be acquired. The said Clause reads as follows:

"12.1 Where the offer for delisting results in acceptance of a fewer number of shares than the total shares outstanding and as a consequence the public shareholding does not fall below the minimum limit specified by the listing conditions or the listing agreement, the offer shall be considered to have failed and no securities shall be acquired pursuant to such offer." C D

14. The submission of Mr. Bhambhani, as stated earlier, is that as per the new guidelines the benchmark has to be 10 per cent. For the aforesaid purpose, he has highlighted Clause 40A of the Circular, i.e., conditions for continued listing. E

15. Mr. Shyam Divan, learned senior counsel appearing for the respondent nos. 1 and 4 and Mr. Arvind Datar, learned senior counsel appearing for SEBI, would contend that Clause 40A has to be read in conjunction with the delisting guidelines. That apart, it is contended by them that Clause 40A(i) and Clause 40A(ii) govern two different situations, and hence, the order of delisting cannot be found fault with. F

16. To appreciate the rival submissions raised at the Bar, we have carefully scrutinised Clause 40A of the Circular. Be it stated, the clauses by virtue of the Circular have stood incorporated in the existing agreement. Clause 40A(i), as the language would suggest, provides that the listing company G

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A accepts the conditions to maintain a continuous basis the minimum level of non-promoter holding at the level of public shareholding as required at the time of listing. It clearly conveys the meaning that if there is a benchmark in the agreement, the same has to be maintained. Mr. Bhambhani would emphasise
B on Clause 40A(ii) to contend that the company has to maintain the benchmark at 10 per cent and it can only conceive of delisting if it goes below that. Mr. Datar, per contra, would submit that before the Circular was issued, certain listed companies had less than 10 per cent of non-promoter holding
C and, therefore, the Circular was issued that they should, within one year, bring it to 10 per cent. The aforesaid submission are to be appreciated in the context of the language employed in the Rule 19(1)(b), 2003 Guidelines and the agreement with the BSE.

D 17. As we find, 2003 guidelines are applicable and prescribe the procedure for delisting of securities. As per the procedure prescribed, any promoter who desires delisting has to make an offer for purchase of shares in terms of clauses
E 8.1 to 8.3. The said exercise has to be completed within a period specified in clauses 8.1 and 8.5. The whole process has to be monitored by the Stock Exchange and the Registrar and transfer agency has to ascertain the genuineness of the physical securities tendered, etc. Clause 8.8 has its own
F signification. Clause 8.8 of 2003 guidelines stipulate that required level of public shareholding must fall below the level of continuous listing. Clause 12.1 of 2003 guidelines, states that the offer of delisting would fail if the public shareholding does not fall below the minimum limit specified by the listing conditions or the listing agreement. It is quite vivid that the 2003
G guidelines do not prescribe or fix the required level of public shareholding of continuous listing though the said limit must be breached for an offer of delisting to succeed. It is condign to note that clause 12.1 refers to minimum limit specified by the listing condition or the listing agreement.

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18. As is evincible, Rule 19(2)(b) provides that at least 10% of each class or kind of securities must be offered to public for subscription through advertisement in newspaper during the time specified and the applications received pursuant to such offer should be allotted as per the conditions postulated. The proviso engrafts states that in case the company does not fulfil the conditions, it shall offer at least 25% of each of the securities to the public for subscription though advertisement in newspaper, etc. within the time stipulated. The opening words of sub-rule (2) of Rule 19 read "apart from complying with such other terms and conditions as may be laid down by a recognized stock exchange. an applicant company shall satisfy the stock exchange. These words have their own importance. It is clear that sub-rule (2) gives primacy to the terms and conditions as may be laid down by the recognized stock exchange and the company in question must satisfy the condition imposed by the stock exchange in that regard. As we find, in the instant case, as per the agreement between the company "Hella India" and BSE, the level of public shareholding fixed for continuous listing was 20%. The said limit of 20% is a higher limit. On failure of "Hella India" to maintain the level of 20%, the condition for continuous listing would be violated and breached. Public holding of 10% would not have satisfied the requirement of Rule 19(2). Therefore, when we harmoniously interpret the listing requirement i.e. the agreement with BSE with Rule 19(2) along with 2003 Guidelines, it is apparent and limpud that the condition for continuous listing would not have been followed by "Hella India", if the public shareholding had fallen below 20%. Thus, it has to be held that offer of delisting would be successful and would not fail, if the public shareholding falls below 20%. The 10% limit would not apply in view of Rule 19(2) as the said Rule recognizes the terms and conditions laid down by recognized stock exchange and stipulates that the same must be satisfied for the company to claim continuous listing.

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A 19. In view of the aforesaid analysis, we are disposed to think that the construction placed by the learned senior counsel for SEBI commends acceptance and we give the stamp of approval to the same.

B 20. Consequently, the appeal, being bereft of any merit, stands dismissed and the order of stay stands vacated. We may hasten to clarify that the order passed by the SAT has to be treated as valid from the date of its passing by the said authority and all concerned shall proceed, keeping the said fact in view, in accordance with law. There shall be no order as to costs.

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Devika Gujral

Appeal dismissed.