

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 203 of 2012

Date of decision: 28.06.2013

1. Bombay Rayon Fashions Limited,
D-1st Floor, Oberoi Garden Estate,
Chandivali Farms Road,
Chandivali,
Andheri East,
Mumbai-400 072
2. B R Machine Tools Private Limited
'E' Wing, 2nd Floor,
Kendriya Sadan,
Koramangala, Bengaluru,
Karnataka-560 034

....Appellants

Versus

Securities and Exchange Board of India,
SEBI Bhavan, Plot No. C-4A, G-Block,
Bandra-Kurla Complex, Bandra (East),
Mumbai – 400 051.

....Respondent

Mr. R. S. Loona, Advocate with Mr. Ankur Loona, Mr. Abhishek Borgikar, Advocates for Appellants.

Mr. Kumar Desai, Advocate with Mr. Mihir Mody, Mr. Akhilesh Singh, Advocates for the Respondent.

CORAM : Jog Singh, Member & Presiding Officer (*Offg.*)
A S Lamba, Member

Per: Jog Singh

The appeal has been preferred by two persons. The Appellant No. 1, namely, Bombay Rayon Fashions Ltd., is a company incorporated under the Companies Act, 1956 with its registered office in Mumbai. Its shares are listed on the Bombay Stock Exchange Limited (BSE) and National Stock Exchange of India Limited (NSE). It is a vertically integrated textile

company, mainly engaged in the manufacture of a wide range of fabrics and garments.

2. Appellant No. 2, namely, B.R. Machine Tools Private Ltd., is one of the Promoter Group Companies of Appellant No. 1. Mr. Janardhan Agarwal, Mr. Aman Agarwal and Mr. Prashant Agarwal, along with their relatives and companies owned by them, are the promoters of Appellant No. 1. The Promoter Group held 34.15% of the issued and paid-up equity share capital of Appellant No. 1 before the occurrence of the dispute explained below. Both the Appellants are aggrieved by the impugned letter dated August 10, 2012 issued by the Respondent, SEBI, rejecting the request of the Appellants for relaxation under the Regulation 109(c) of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009, hereinafter referred to as “ICDR Regulations of 2009”.

3. The brief facts leading up to the present dispute are that, under the ICDR Regulations of 2009, Appellant No. 1 made preferential issues of 10 million optionally convertible warrants at the conversion exercise price of Rs.263/- per warrant including premium to B R Machine Tools Pvt. Ltd. Similar allotment of 10 million warrants was made by Appellant No. 1 in favour of Reynold Shirting Ltd., which is also a Promoter Group Company, on September 13, 2009 at the conversion exercise price of Rs.193/- per warrant including premium. Pursuant to the above said allotment of 20 million warrants, 12.5 million warrants were converted into equity shares within the creeping acquisition limit as prescribed by the Securities and Exchange Board of India (Substantial Acquisition of

Shares and Takeovers) Regulations, 1997, hereinafter referred to as “SAST Regulations, 1997”. Thus, 7.5 million warrants remained to be converted into equity shares and the prescribed limitation of 18 months for conversion of such warrants into shares was to expire on April 3, 2012.

4. In the meanwhile, certain developments took place which led to the reconstitution of the Promoters’ Group and consequently, the Promoter Group’s holding in Appellant No. 1 stood at 93.15% of the total capital. In fact, AAA United Brevy, hereinafter referred to as “AAA”, a body corporate incorporated in the Netherlands is also a major shareholder of Appellant No.1 and stated to be holding 37.89% of the total capital. In April, 2009 AAA first acquired 18 million equity shares constituting 20.67% of the then total paid-up capital in Appellant No. 1 through preferential allotment of equity shares. As per the SAST Regulations, 1997, open offer to public shareholders of Appellant No. 1 was duly made by AAA (Open Offer-1). It was followed by subscription by AAA in two rounds of GDRs (non-voting) issued by Appellant No.1 in November 2009 and October 2010, respectively. This led to an aggregate of 33 million GDRs to be converted into an equivalent number of equity shares of Appellant No. 1. However, till this point of time, AAA remained a public shareholder only.

5. Further, in April 2011, AAA along with Ashwell Holding Company Limited, (“Ashwell”) which is also a Promoter Group entity, gave another mandatory open offer as required by Regulations 11(1) and 12 of SAST Regulations, 1997 to the public shareholders of the issuer company (Open

Offer-2). This was done by AAA with an intention to convert the aforesaid 33 million outstanding GDRs into equity shares. However, it would have given AAA voting rights in excess of the permissible creeping acquisition limit of 5% laid down under the SAST Regulations, 1997. In addition to this, AAA also appears to have intended to be recognized as a person acting in concert (PAC) with the Promoter Group of Appellant No.1. Therefore, as per the mutual understanding between AAA and Ashwell, as duly disclosed in the letter of offer, all the equity shares tendered in Open Offer-2 were acquired by Ashwell. Accordingly, Ashwell acquired 28.42 million equity shares tendered by the public shareholders of Appellant No. 1 in response to Open Offer-2. In tune with the disclosure made in the letter of offer, thus, AAA came to be recognized as a part of the Promoter Group of Appellant No. 1 and the reconstituted Promoter Group shareholding reached a level of 93.15% of the total capital. Such an increase in number of shares appears to be on account of conversion of the entire 33 million GDRs.

6. In the above situation, Appellant No. 2 did not convert the balance 7.5 million outstanding warrants on account of proviso to sub-regulation (2) of Regulation 3 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, hereinafter referred to as “SAST Regulations, 2011”. The said Regulation provides that no further acquisition of shares by any acquirer is permissible if such acquisition results in bringing the aggregate shareholding of the acquirer (including PACs) above the maximum permissible non public shareholding which is 75%. According to the

Appellants, Appellant No. 2 was, therefore, restrained from exercising its conversion option in respect of 7.5 million outstanding warrants and this peculiar situation which had arisen entirely due to coming into force of SAST Regulations, 2011 w.e.f. October 23, 2011. As such, the Appellants approached the Respondent under Regulation 109(c) of the ICDR Regulations, 2009 for grant of relaxation from the strict enforcement of Regulations 75 and 77 of the ICDR Regulations, 2009 by letter dated March 14, 2012.

7. Regulation 3(2) of SAST Regulations, 2011 as well as Regulations 75, 77(4) and 109(c) of ICDR Regulations, 2009 are relevant and reproduced hereinbelow for the sake of convenience,

“(2) No acquirer, who together with persons acting in concert with him, has acquired and holds in accordance with these regulations shares or voting rights in a target company entitling them to exercise twenty-five per cent or more of the voting rights in the target company but less than the maximum permissible non-public shareholding, shall acquire within any financial year additional shares or voting rights in such target company entitling them to exercise more than five per cent of the voting rights, unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations:

Provided that such acquirer shall not be entitled to acquire or enter into any agreement to acquire shares or voting rights exceeding such number of shares as would take the aggregate shareholding pursuant to the acquisition above the maximum permissible non-public shareholding.

Explanation.— For purposes of determining the quantum of acquisition of additional voting rights under this sub-regulation,—

(i) gross acquisitions alone shall be taken into account regardless of any intermittent fall in shareholding or voting rights whether owing to disposal of shares held or dilution of voting rights owing to fresh issue of shares by the target company.

(ii) in the case of acquisition of shares by way of issue of new shares by the target company or where the target company has made an issue of new shares in any given financial year, the difference between the pre-allotment and the post-allotment percentage voting rights shall be regarded as the quantum of additional acquisition.”

“Tenure of convertible securities.

75. The tenure of the convertible securities of the issuer shall not exceed eighteen months from the date of their allotment.

Payment of consideration.

77. (1) Full consideration of specified securities other than warrants issued under this Chapter shall be paid by the allottees at the time of allotment of such specified securities:

Provided that in case of a preferential issue of specified securities pursuant to a scheme of corporate debt restructuring as per the corporate debt restructuring framework specified by the Reserve Bank of India, the allottee may pay the consideration in terms of such scheme.

(2) An amount equivalent to at least twenty five per cent of the consideration determined in terms of regulation 76 shall be paid against each warrant on the date of allotment of warrants.

(3) The balance seventy five per cent. of the consideration shall be paid at the time of allotment of equity shares pursuant to exercise of option against each such warrant by the warrant holder.

(4) In case the warrant holder does not exercise the option to take equity shares against any of the warrants held by him, the consideration paid in respect of such warrant in terms of sub-regulation shall be forfeited by the issuer.

Power to relax strict enforcement of the regulations.

109. The Board may, in the interest of investors or for the development of the securities market, relax the strict enforcement of any requirement of these regulations, if the Board is satisfied that:

- (a) the requirement is procedural in nature; or
- (b) any disclosure requirement is not relevant for a particular class of industry or issuer; or
- (c) the non-compliance was caused due to factors beyond the control of the issuer.”

8. In letter dated March 14, 2012 the Appellants mainly requested the Respondent to relax the strict enforcement of requirements under Regulation 77 of the ICDR Regulations, 2009 as further acquisition of shares had become impossible due to factors beyond the control of the acquirer/issuer company in the light of the coming into force of SAST Regulations, 2011. A further request was made to permit the issuer company not to forfeit 25% of the upfront payment made while issuing the warrants in question and to refund the same to the acquirer. Also, since the 18 months' time-limit for exercising the conversion option was expiring on April 4, 2012 it was requested that the same may be extended for a period of one month from the disposal of the said application dated March 14, 2012.

9. By letter dated April 17, 2012, the Respondent rejected the request for relaxation from the strict enforcement of Regulation 77(4) of the ICDR Regulations, 2009. The said letter was challenged by the Appellants before this Tribunal by way of Appeal No. 139 of 2012 and the same was disposed of by order dated July 5, 2012 setting aside the impugned order dated April 17, 2012 and remanding the matter back to the Respondent while directing it to pass a speaking order as to the request made by the Appellants.

10. Accordingly, the Respondent has once again reconsidered the whole matter and the request of the Appellants and has passed the impugned order dated August 10, 2012 rejecting the same by way of an exhaustive and reasoned order.

11. The same has been challenged by the Appellants mainly on the grounds that the current shareholding of the re-constituted Promoter Group already stands at 93.15%. It will further increase to 93.51% if the balance outstanding 7.5 million warrants held by the Promoter Group were directed to be converted into equity shares. Such an acquisition is not permissible under the proviso to sub-regulation (2) of Regulation 3 of the SAST Regulations, 2011. In fact, no acquirer is legally entitled to acquire shares/voting rights exceeding 75% of the issuer company's shareholding. This is in view of the fact that the Securities Contracts (Regulations) Rules, 1957 provides that 25% of the shareholding in every listed company has to be kept mandatorily for public shareholders. The Appellants, therefore, submit that the proposed acquisition of shares pursuant to conversion of warrants will amount to violation of the above stated Regulation. This situation, according to the Appellants, has arisen purely due to coming into force of the SAST Regulations, 2011 on October 23, 2011 (the same were Gazetted on September 23, 2011). Therefore, the Appellants contend that if the Respondent does not intervene in the matter, it would result in forfeiture of 25% of the consideration paid for the said warrants in terms of Regulation 77(2) of the ICDR Regulations, i.e., upfront payment to the tune of Rs. 49.31 crore and so on.

12. The Respondent on the other hand has contended that the appeal has been preferred jointly by the issuer company (Appellant No. 1) and the Appellant No. 2 (the acquirer) even though under the provisions of Regulation 109(c) of the ICDR Regulation, 2009, such an application can

be moved only by the warrant holder, i.e., Appellant No. 2 in the instant case, and Appellant No. 1 which is the company has no role to play in the exercise of conversion of warrants by Appellant No. 2 against the payment of the balance price. In case Appellant No. 2 decides or chooses not to, or fails to exercise the option to convert warrants into shares by making payment of the balance price within the exercise period of 18 months, the warrants would lapse automatically. In such an event the money paid by Appellant No. 2 against allotment of warrants in question would stand forfeited under the provisions of Regulation 77(4) of the ICDR Regulations, 2009. In fact, it is the contention of the Respondent that Appellant No. 1 is required in its own interest and the interest of public shareholders to retain the amount paid as forfeit, consequent to allotment of the warrants in question.

13. We have heard both the learned counsel for the parties at length and have perused the appeal along with the documents brought on record. Chapter VII of the ICDR Regulations, 2009 deals with the subject of 'Preferential Issue' and Regulations 70 to 74 provide for the various conditions, including the methodology resorted to, for the purpose of allotment of 'Preferential Issue'. Regulation 75 deals with the "Tenure of Convertible Securities" and provides that it shall not exceed 18 months from the date of their allotment. Similarly, Regulation 77 provides for the payment of consideration and its forfeiture. Sub-regulation (4) of Regulation 77 specifically provides that in case the warrant holder does not exercise the option to take equity shares against warrants held by him, the consideration paid in respect of such warrants under sub-regulation (2)

of Regulation 77 shall stand forfeited. Undoubtedly, this provision is mandatory and the actual events in the present case duly demonstrate that Appellant No. 2 had more than adequate number of opportunities to convert the warrants in question into shares. In this regard it is pertinent to deal with Regulation 109(c) of the IDCR Regulations, 2009 under which the exemption is being vociferously claimed by the Appellants. It is evident from the facts of the case that the non-compliance would in no way be caused owing to any factors ostensibly beyond the Appellants' control. We reproduce para 2(v) of the impugned order hereinbelow:

*“v. Relaxation under Regulation 109 of the ICDR Regulations may be granted by the Board, if the matter is in the interest of investors or for the development of the securities market. If the consideration paid to you by the warrant holder under Regulation 77 (2) is **refunded** to such warrant, holder it shall be **against the interest of the minority investors** of the company. Also, such a **relaxation shall be detrimental** for the **development of securities** market as it shall set a **wrong precedent** to give a relaxation where **none of the clauses of Regulation 109** is applicable.”*

14. It is seen from the pleadings that the Promoter Group in Appellant No. 1 increased their shareholding in a systematic manner from 31.54% to 93.15% during December 2009 to December 2011. The process of conversion of warrants into equity shares went on till September 30, 2011 when Appellant No. 2 converted atleast 2.5 million warrants into shares. It is pertinent to note here that the new SAST Regulations, 2011 had already been published in the official Gazzette on September 23, 2011 and as such the Appellant No. 2 was fully aware of the implication of the said Regulations which were to come into force on October 23, 2011 i.e. after 30 days of their being Gazzetted. In fact, the threshold limit of 25%

regarding minimum public holding prescribed by Rule 19(A) of SCRR, 1957 appears to have been breached at that time itself by increasing the shareholding of the promoters along with the person acting in concert with them beyond 75% i.e. up to 93.15%.

15. Indeed Appellant No. 2 should have atleast approached the Respondent for any relaxation or exemption from the applicability of Regulation 3(2) of the SAST Regulation, 2011 immediately after the same were Gazetted on September 23, 2011 or after October 23, 2011 when they were brought into force and a further window of one month, was provided by the Respondent for considering and clearing such issues as remained unconverted. But no such application was preferred by Appellant No. 2 at that time. It is also relevant to note that Regulation 35 (2)(b) of the SAST Regulations, 2011 saves any right, privilege, obligation or liability acquired, accrued or incurred under SAST Regulations, 1997. But Appellant No. 2 faltered in not making any application to the Respondent seeking clarification or exemption till March 14, 2011 when a joint application was moved in collaboration with Appellant No. 2, knowing well that the 18 months period provided by the Regulation for conversion of warrants in question was on the verge of expiry.

16. It is our considered opinion that Appellant No. 2 has totally failed to satisfy the Respondent regarding any factor beyond the control of the issuer which would have prevented him from converting the warrants in question into shares. The Respondent, therefore, rightly did not exercise its jurisdiction to permit any relaxation in the matter.

17. At this stage it may be pertinently noted that relaxation is a valuable tool in the hands of the Respondent and discretion in this regard has to be exercised with caution to do complete justice in a case of hardship. It will undoubtedly depend on the peculiar facts and circumstances of a given case. In the present case the impugned order has been issued with the approval of the Chairman, SEBI, in accordance with the SEBI (Delegation of Powers) Order, 2010. The decision has been communicated by the officer who has signed the impugned order. Therefore, there we find no legal infirmity in passing the said order. Moreover, the impugned order dated August 10, 2012 is in the nature of a reply to the application for exemption sought by the Appellants under Regulation 109 (c) of the ICDR Regulations and as such there is no question of violation of the principles of natural justice by the Respondent in passing the same. It is a well considered and reasoned decision and hence an opportunity of hearing would have been superfluous in the facts and circumstances of the case. This contention of the Appellants also is, therefore, repelled.

The appeal, thus, stands dismissed with no order as to costs.

Sd/-
Jog Singh
Member &
Presiding Officer (*Offg.*)

Sd/-
A.S. Lamba
Member

28.06.2013

Prepared & Compared By: Pk