

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 77 of 2012

Date of decision: 18.05.2012

SRM Energy Limited
601, Pressman House,
70A, Nehru Road, C.T.S. No.
76 & 87, Vile Parle (East),
Mumbai – 400 099.

.....Appellant

Versus

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

2. Arihant Capital Markets Ltd.
3rd Floor, Krishna Bhavan,
67, Nehru Road, Vile Parle (East),
Mumbai – 400 057.

..... Respondents

Mr. Janak Dwarkadas, Senior Advocate with Mr. Vinay Chauhan, Mr. Anant Upadhyay, Advocates for the Appellant.

Mr. Kumar Desai, Advocate with Mr. Ajay Khaire, Advocate for Respondent No. 1.
None for Respondent No. 2.

CORAM : P. K. Malhotra, Member & Presiding Officer (*Offg.*)
S. S. N. Moorthy, Member

Per : P. K. Malhotra

The appellant is aggrieved by the letter dated February 7, 2012 issued by the Securities and Exchange Board of India (for short the Board) to its merchant banker stating that the appellant is not eligible to proceed with its rights issue till the prohibitory order under Section 11 and 11B of the Securities and Exchange Board of India Act, 1992 (the Act) against Cals Refineries Ltd., one of its (appellant's) promoter group entities, is in force.

2. Facts of the case, in brief, are that the appellant is a public limited company incorporated under the Companies Act, 1956. It is listed on the Bombay Stock Exchange Limited (BSE). With a view to mobilize funds for the power project and pursuant to the resolution passed by it under Section 81(1A) of the Companies Act, 1956 the appellant decided to issue shares on rights basis to its existing shareholders. Accordingly, on August 17, 2010, it filed a draft letter of offer through its merchant bankers (respondent no. 2) for 5,88,90,000 equity shares of ` 10/- each at par aggregating to ` 58.89 crores to its existing shareholders on rights basis in the ratio of 65 equity shares for every 10 fully paid up equity shares held by them. In the draft letter of offer, the appellant had disclosed that Cals Refineries Ltd., a public limited company, is also one of the promoter group entities listed on BSE and having a public shareholding of 83.91 per cent. There has been protracted correspondence between the Board and the appellant relating to the proposed rights issue. While the request for the proposed rights issue was still under consideration, the Board passed an ad interim ex-parte order dated September 21, 2011 prohibiting a few entities, including Cals Refineries Ltd., from issuing equity shares or any other instrument convertible into equity shares or alter their capital structure, in any manner, till further directions in this regard. This order was issued by the Board on being alerted by its surveillance system of the large scale market transactions indicating that some foreign institutional investors were converting the global depository receipts underlying the shares of certain companies, including Cals Refineries Ltd., into equity shares to sell in the Indian market and most of the cancellations happened within a short period of time of the issue. This ex-parte interim order was confirmed by the whole time member of the Board by its order dated December 30, 2011. As the request of the appellant for the proposed rights issue was still under consideration and the Board had issued the aforesaid prohibitory orders against Cals Refineries Ltd., one of the promoter entities of the appellant, the appellant vide its letter dated January 23, 2012 sought guidance from the Board regarding applicability of regulation 4(2)(a) and (b) of the Securities and Exchange Board of India (Issue of

Capital and Disclosure Requirements) Regulations, 2009 (for short the regulations) to the appellant. Regulation 4(2)(a) and (b) of the said regulations *interalia* provide that no issuer shall make a public or rights issue of specified securities if the issuer, any of its promoters, promoter group or directors or persons in control of the issuer are debarred from accessing the capital market or, if any of the promoters, directors or persons in control of the issuer was or also is a promoter, director or person in control of any other company which is debarred from accessing the capital market under any order or directions made by the Board. It is in response to this letter that the Board informed the appellant by the impugned order *interalia* observing that the Cals Refineries Ltd. has been directed not to issue equity shares or any other instrument convertible into equity shares or alter their capital structure, in any manner, till further directions. By the said letter, the Board also disposed of appellant's request for rights issue observing that it does not satisfy the eligibility criteria, as provided in regulation 4(2)(a) and (b) of the regulations and hence is not eligible to proceed with the rights issue till directions against Cals Refineries Ltd. are in force.

3. Mr. Janak Dwarkadas, learned senior counsel for the appellant, referring to the provisions of the aforesaid regulation, submitted that this regulation covers only those cases where the persons/entities falling under the relevant category have been debarred from accessing the capital market. According to the learned senior counsel, Cals Refineries Ltd. has not been debarred from accessing the capital market. The only direction that has been issued against Cals Refineries Ltd. is "not to issue equity shares or any other instrument convertible into equity shares or alter capital structure in any manner till further directions". In spite of the interim order, Cals Refineries Ltd. can still do fund raising from the public by issuing non-convertible instruments. It was further submitted by him that the nature of embargo imposed on Cals Refineries Ltd., pending completion of investigations, is very narrow and limited as distinguished from complete embargo on accessing the capital market as contemplated in the regulation. It was further submitted by him that the rights issue

of the appellant cannot be stifled based on interim order passed solely on the basis of *prima facie* findings. The appellant's rights issue has been jeopardized because of the time insensitivity exhibited by the Board in processing the offer documents promptly or within a reasonable time. It was further submitted by him that the successful completion of rights issue will benefit the public shareholders since with infusion of the funds, the power project implementation will progress which would result in exponential growth in the valuation of the appellant company. It is, therefore, prayed by the appellant that the direction contained in the impugned letter may be set aside and the Board may be directed to clear the letter of offer.

4. Mr. Kumar Desai, learned counsel appearing for the Board, raised a preliminary issue regarding maintainability of the appeal itself stating that the impugned letter dated February 7, 2012 is not an 'appealable order' within the meaning of Section 15T of the Act. According to him, it was only a reply to the query raised by the appellant in its letter dated January 23, 2012 and not an order passed by the Board. On merits, it was submitted by him that the term 'debarred from accessing the capital market' used in regulation 4(2)(a) and (b) of the regulations is wide enough to take within its fold the restriction placed on Cals Refineries Ltd. prohibiting it from 'issuing equity shares or any other instrument convertible into equity shares or alter their capital structure in any manner'. The terminology used in regulation 4 of the regulations cover all types of debarments, whether partial or full. In any case, Cals Refineries Ltd., the promoter group company, has been directed not to issue equity shares or any other instrument convertible into equity shares till further directions and, therefore, the appellant also cannot proceed with the rights issue.

5. Before we deal with the issue raised by the parties, it is necessary to have a look at the relevant provision of regulation 4 of the regulations which read as under:-

“4. (1) Any issuer offering specified securities through a public issue or rights issue shall satisfy conditions of this Chapter at the time of filing draft offer document with the Board (unless stated otherwise in

this Chapter) and at the time of registering or filing the final offer document with the Registrar of Companies or designated stock exchange, as the case may be.

(2) No issuer shall make a public issue or rights issue of specified securities:

- (a) if the issuer, any of its promoters, promoter group or directors or persons in control of the issuer are debarred from accessing the capital market by the Board;
- (b) if any of the promoters, directors or persons in control of the issuer was or also is a promoter, director or person in control of any other company which is debarred from accessing the capital market under any order or directions made by the Board;”

Regulation 4 appears under Chapter II of the regulations providing common conditions for public issues and rights issues. It prescribes general conditions meaning thereby that unless the requirements laid down in these general conditions are satisfied, the Board will not proceed with granting its clearance for the issue of capital. These conditions must be satisfied not only at the time of filing of draft offer document with the Board but also at the time of registering or filing the final offer document with the Registrar of companies or designated stock exchange, as the case may be. Admittedly, in the case in hand, when the draft offer document was filed with the Board, it issued its letter of observations to the appellant on February 8, 2011. The appellant was aggrieved by some of the observations made thereunder and filed an appeal before this Tribunal (Appeal No. 34 of 2011). By an order dated June 6, 2011, the Appeal was allowed and the direction, objected to by the appellant, was set aside. It is only thereafter that the appellant, vide its letter dated June 17, 2011, filed final letter of offer with the Board through its merchant banker on which the Board was yet to convey its decision. In the interregnum, the Board had also passed interim order against various entities, including Cals Refineries Ltd., not to issue equity shares or any other instrument convertible into equity shares or alter capital structure in any manner till further directions in this regard. Regulation 4(2) prohibits an issuer from making a public issue or rights issue of specified securities if the issuer or any of the promoters, promoter group or directors or persons in control of the issuer are debarred from accessing the capital market by the Board or any of the promoters, directors or persons in control of the issuer is also a promoter, director

or person in control of any other company which is debarred from accessing the capital market under any order or direction made by the Board. It is not in dispute that the order passed by the Board against Cals Refineries Ltd. is an order or direction made by the Board within the meaning of the aforesaid regulation. It is also not in dispute that Cals Refineries Ltd. is a company falling within the category of promoter group as envisaged by regulation 4. The bone of contention in this case is confined to the issue whether the restraint order against Cals Refineries Ltd. prohibiting it from 'issuing equity shares or other instrument convertible into equity shares or altering its capital structure in any manner' falls within the ambit of words 'debarred from accessing the capital market' appearing in regulation 4 of the regulations.

6. We have considered the rival submissions and also examined the material placed on record. In so far as preliminary objection raised by the Board with regard to maintainability of the appeal is concerned, we do not find any merit in the same. In a recent order passed by us in the case of H. B. Stockholding Ltd. (Appeal No. 86 of 2011 decided on 25.4.2012), interpreting the provisions of Section 15T of the Act, we have observed as under:-

“An order is primarily a decision which has the effect of a command, whether called by such name or not and is distinguishable from an advise or request by the nature of the consequence that may flow from the non implementation of the same. Therefore, the words “an order” used in the aforesaid provision are comprehensive enough to include every order or decision taken by the Board **which adversely affect the rights of the parties** (*emphasis supplied*). We have also looked at the orders/decisions cited by learned counsel on both sides. In brief, the ratio on the issue under consideration in all these orders/decisions is that orders which are merely procedural cannot be appealed against and it is only those orders or decisions taken by the Board which adversely affect the rights of the parties will fall within the purview of an appealable order under Section 15T of the Act. To ascertain whether a communication or decision amounts to an order within the meaning of the above noted provision, its substance and not its form has to be seen. If a particular direction, request or observation is binding and has penal consequence for its violation, the same will have to be treated as an order within the meaning of the above noted provision. It is immaterial whether the communication through which the decision is conveyed is in the form of a letter or order or a note.”

In the case in hand, admittedly, the letter of offer filed by the appellant was still under consideration with the Board. The appellant, vide its letter dated January 23, 2012, also sought an advice of the Board with regard to the applicability of regulation 4(2) of the regulations in view of the order passed against Cals Refineries Ltd., one of its promoter entities. While furnishing its advice, the Board, by the impugned order, also conveyed its decision on the pending letter of offer to the appellant and observed that the appellant is not eligible to proceed with the rights issue till direction issued against Cals Refineries Ltd. is in force. The decision taken by the Board surely affects the rights of the appellant and hence an appealable order within the meaning of section 15T of the Act.

7. On the issue whether the prohibition imposed by the Board on Cals Refineries Ltd. on issuing equity shares or other instrument convertible into equity shares or altering its capital structure in any manner falls within the scope of debarment from accessing the capital market as mentioned in regulation 4(2) of the regulations, we are inclined to agree with learned counsel for the Board that the restraint imposed on Cals Refineries Ltd. is covered by the provisions of regulation 4(2) of the regulations. Learned counsel for the Board has rightly relied upon the principles of interpretation as discussed by the Hon'ble Supreme Court in the case of **District Mining Officer vs. Tata Iron And Steel Co. [2001 7 SCC 5]** wherein the Hon'ble Supreme Court has observed that "a statute has to be construed according to the intent of them that make it and the duty of the court is to act upon the true intention of the legislature. If a statutory provision is open to more than one interpretation, the court has to choose that interpretation which represents the true intention of the legislature". The Court has further observed as under:-

"The process of construction combines both literal and purposive approaches. In other words, the legislative intention i.e. the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed."

The following further observations made by the Hon'ble Supreme Court in the same judgment are also relevant and are reproduced for ease of reference :-

“The most fair and rational method for interpreting a statute is by exploring the intention of the legislature through the most natural and probable signs which are either the words, the context, the subject-matter, the effects and consequences, or the spirit and reason of the law. In the court of law what the legislature intended to be done or not to be done can only be legitimately ascertained from that what it has chosen to enact, either in express words or by reasonable and necessary implication. But the whole of what is enacted “by necessary implication” can hardly be determined without keeping in mind the purpose or object of the statute. A bare mechanical interpretation of the words and application of legislative intent devoid of concept or purpose will reduce most of the remedial and beneficent legislation to futility.”

Regulation 6 of the regulations prohibits any issuer to make a public issue or rights issue where the aggregate value of specified securities offered is fifty lakh rupees or more unless a draft offer document has been filed with the Board through the lead merchant banker. The Board is empowered to specify changes or issue observations, if any, on the draft document. This regulation further mandates that if the Board specifies changes or issue observations on the draft offer document, the issuer and lead merchant banker shall carry out such changes in the offer document and comply with the observations issued by the Board before registering the document with the Registrar of Companies etc. It will, thus, be seen that complying with the directions issued by the Board is mandatory for the issuer and the merchant banker. This requirement also indicates the purpose of filing the draft document with the Board before it is registered with the Registrar of Companies or filed with the designated stock exchange. The Board, as a market regulator and as protector of interest of investors in securities, is mandated to see that proper disclosures are made in the draft document to enable investors to take an informed decision before investing their money. Examining the issue in the light of the above principles, we are of the view that the words ‘debarred from accessing the capital market’ in regulation 4(2) of the regulations will take within its fold, the words ‘restraint on issue of equity shares or any other instrument convertible into equity shares or altering the capital structure in any manner’. Looking at the aim and objective of the regulations and the

general conditions, the word ‘debarred’ used in regulation 4(2) cannot be given a restricted meaning of complete prohibition only. Such prohibition can be partial, interim, ad-interim or in any other form during the time when request for public issue or rights issue is under consideration either with the Board or filing of the document with the Registrar of Companies. Admittedly, the Board had offered its observations on the draft offer document submitted by the appellant to which the appellant had responded after an order passed by this Tribunal and the appellant has yet to register and file the offer document with the Registrar of Companies. Since the draft offer document has not been finalised, the general conditions as laid down in regulation 4 will be applicable and the Board is justified in denying its clearance to the offer document on non fulfilment of these conditions. We are, therefore, not inclined to interfere in the matter at this stage.

In view of the above, the appeal stands dismissed with no order as to costs.

Sd/-
P. K. Malhotra
Member &
Presiding Officer (*Offg.*)

Sd/-
S. S. N. Moorthy
Member

18.05.2012
Prepared & Compared by
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