BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 151 of 2008

Date of decision: 07.08.2009

S Kumars Nationwide Ltd. ….Appellant

Versus

The Bombay Stock Exchange Ltd. ..… Respondent No. 1
Securities and Exchange Board of India ...….Respondent No. 2

Mr. Janak Dwarakadas, Senior Advocate with Ms. Ankita Singhania, Advocate for the Appellant.

Ms. Bharati Mahant, Advocate with Ms. Harshada Nagare, Advocate for Respondent no. 1.

Ms. Chloris John, Advocate for Respondent no. 2.

CORAM : Justice N.K. Sodhi, Presiding Officer
Samar Ray, Member

Per : Justice N.K. Sodhi, Presiding Officer (Oral)

The appellant is a public limited company incorporated under the provisions of the Companies Act, 1956. It is engaged in the business of buying, selling, manufacturing, marketing all kinds of textile fabrics and textile products. The shares of the appellant are listed on the Bombay Stock Exchange Ltd., Mumbai (for short 'BSE') and National Stock Exchange of India Ltd. During the course of its business, the appellant had raised loans to the tune of approximately Rs. 850 crores from various Banks / financial institutions. Since the appellant was unable to repay the loans, one of the lenders filed an application with the Corporate Debt Restructuring Cell (for short CDR) as per the framework specified by the Reserve Bank of India for restructuring the

debts of the appellant. CDR approved the proposed restructuring package submitted by one of the lending Banks. This package provided that the promoters of the appellant should pledge their entire equity shares held by them in the appellant with the lending Banks and that they should bring in Rs. 230 crores. In compliance with the conditions of the CDR package, the promoters pledged the equity shares held by them with the Banks. Further, S. Kumar Enterprises (Synfabs) Ltd., one of the promoters of the appellant, subscribed to the shares of the appellant valuing Rs. 15 crores by way of preferential issue in order to comply with the conditions pertaining to promoters bringing in Rs. 230 crores. These shares on preferential basis were allotted after obtaining the sanction of the shareholders in a meeting held in accordance with the provisions of section 81(1A) of the Companies Act, 1956. Similarly, some other promoters were allotted shares on preferential basis for an amount of Rs. 5 crores to comply with the aforesaid conditions stipulated in the CDR package. These shares were also allotted after complying with the provisions of section 81 (1A) of the aforesaid Act. Some of the shares allotted by the appellant were in physical form while others were in dematerialised form and it is not in dispute that most of the shares held by the promoters of the company were in physical form and as per the conditions of the CDR package, the shares held by the promoters had been pledged with the Banks / financial institutions.

Having decided to allot shares to some of the promoters of the appellant on preferential basis, the latter filed applications with BSE on January 28, 2005 and July 2, 2005 seeking its in-principle approval for the issue, allotment and listing of those shares. After protracted correspondence between the parties, the request of the appellant has been declined and the decision of the BSE was communicated to the appellant as per letter dated December 1, 2008. It is against this communication / decision that the present appeal has been filed under section 22A of the Securities Contracts (Regulation) Act, 1956. It is pertinent to mention here that 63,76,195 equity shares were allotted to S. Kumar Enterprises (Synfabs) Ltd. valuing Rs. 15 crores and another 16,66,665 equity shares were allotted to some other promoters on preferential basis. It is in regard to

these shares that BSE has declined to grant in-principle approval for listing. The reason for declining the request of the appellant is that the two issues did not comply with the provisions of Chapter XIII of the Securities and Exchange Board of India (Disclosure and Investor Protection) Guidelines, 2000 (hereinafter referred to as the guidelines). This is what the BSE has said in the impugned communication:

> "After considering all the facts of the matter and the submissions made by the company, the Committee unanimously decided that the Exchange cannot grant in-principle approval to the preferential issues viz. i) 63,76,195 Equity Shares of Rs. 10/- each to be issued at a premium of Rs. 13.525 per share and to be allotted to Promoters group and ii) 16,66,665 Equity Shares of Rs. 10/- each to be issued at a premium of Rs. 20/- per share to be allotted to Promoters group on preferential basis as the two issues were non-compliant with the provisions of Chapter XIII – Guidelines for Preferential Issues of SEBI (Disclosure and Investor Protection) Guidelines, 2000 :
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> a) 63,76,195 equity shares to promoters group :
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> i) The company had obtained the shareholders approval for the proposed preferential issue at the meeting held on March 29, 2005. However, the company made its application seeking in-principle approval of the Exchange for issue and allotment of the securities, on May 31, 2005 i.e., after a period of nearly two months from the date of the AGM, thereby making it impossible for the company to comply with the requirement under clause 13.4.1 of DIP Guidelines of making the allotment within 15 days of the passing of the resolution by the shareholders in the general meeting.
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> ii) Out of the prior holding of the allottees, 39,51,500 shares were held in physical form at the time of the AGM. The said shares were dematerialized in tranches in July and September, 2007 i.e., after a period of nearly two and half years after the date of the AGM. Clause 13.3.1(f) of DIP Guidelines stipulates that no listed company shall make a preferential issue to any person unless the entire shareholding of such person in the company is held in dematerialized form. Hence, the preferential issue to the proposed allottees, is non-compliant with 13.3.1(f) of DIP Guidelines.
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> iii) As per the requirements of clause 13.3.1(g) of DIP Guidelines, inter alia, the entire preferential allotment shareholding of the allottee shall be under lock-in from the relevant date. The company has not furnished any documentary proof confirming the compliance with the requirement of the said clause of DIP Guidelines.
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> b) 16,66,665 equity shares to promoters :
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> i) The company had obtained the shareholders approval for the proposed preferential issue at the meeting held on July 21, 2005. Though the company had sought details of the formalities to be

completed for the in-principle approval for the aforesaid preferential issue, the company made its application seeking in-principle approval of the Exchange for issue and allotment of the securities, only in June 2008 i.e., after a period of nearly three years from the date of the AGM, thereby making it impossible for the company to comply with the requirement under Clause 13.4.1 of DIP Guidelines of making the allotment within 15 days of the passing of the resolution by the shareholders in the general meeting.

ii) Out of the prior holding of the allottees 1,32,900 shares were held in physical form at the time of the AGM. The said shares were dematerialized in tranches in June 2007 i.e., after a period of nearly two years after the date of the AGM. Clause 13.3.1(f) of DIP Guidelines stipulates that no listed company shall make a preferential issue to any person unless the entire shareholding of such person in the company is held in dematerialized form. Hence, the preferential issue to the proposed allottees, is non-compliant with Clause 13.3.1(f) of DIP Guidelines.

iii) As per the requirements of clause 13.3.1(g) of DIP Guidelines, inter alia, the entire pre preferential allotment shareholding of the allottee shall be under lock-in from the relevant date. The company has not furnished any documentary proof confirming the compliances with the requirement of the said clause of DIP Guidelines."

From a bare perusal of the aforesaid communication, it is clear that BSE has declined to grant in-principle approval to the two preferential issues for identical reasons which are mentioned in clauses (a) and (b).

We have heard the learned senior counsel for the appellant and Ms. Bharti Mahant, Advocate on behalf of BSE and are of the view that none of the reasons given by BSE can be sustained. The first reason given in clause (a)(i) of the impugned communication which is identical to the reason contained in clause (b)(i) is that the issue and allotment of securities by the appellant was in violation of clause 13.4.1 of the guidelines in as much as the allotment was not made within 15 days of the passing of the resolution by the shareholders of the appellant company in their general meeting. It is true that clause 13.4.1 requires the allotment to be made within 15 days of the passing of the resolution by the shareholders under section 81 (1A) of the Companies Act but this clause of the guidelines is not applicable to cases where preferential allotment is made in pursuance to a CDR package. Clause 13.4.2A of the guidelines clearly stipulates that nothing contained in clause 13.4.1 shall apply to the allotment of

shares on preferential basis pursuant to a sanction of Corporate Debt Restructuring as per the framework specified by the Reserve Bank of India. It is common ground between the parties that the two preferential issues in which shares were allotted to the promoters of the appellant were in pursuance to the CDR package sanctioned by the CDR cell of the Reserve Bank of India. In this view of the matter, we cannot uphold the reason given in clauses (a)(i) and (b)(i) of the impugned communication.

Coming now to the second ground on which the in-principle approval sought by the appellant has been declined. The promoters held 39,51,500 shares in physical form prior to the preferential allotment made in their favour. Since these shares were in the physical form and clause 13.3.1(f) of the guidelines requires that no listed company shall make a preferential issue of equity shares at a later date to any person unless the entire shareholding of such person in the company is in dematerialized form, the preferential issue is not in compliance with the guidelines. The shares held by the promoters of the appellant were admittedly in physical form and as per the conditions laid down in the CDR package, those shares had been pledged with the lending Banks and they were in their possession. There is ample material on the record to show that the appellant company pursued the matter with the lending Banks and called upon them to handover the physical shares to enable it (the appellant company) to get them dematerialized. Despite several letters written in this regard, the shares were not returned as they formed part of the security for the loans advanced by the Banks. As the lending Banks did not part with the security held by them, (the shares in the physical form) the appellant company was unable to get those shares dematerialized. We could have blamed the appellant company for not taking proper steps in this regard if the shares were in its possession. As already observed, the shares in the physical form were in the possession of third parties who did not want to part with their security and, therefore, the appellant company was unable to comply with the provisions of clause 13.3.1(f) of the guidelines. There is a technical violation of clause 13.3.1(f) of the guidelines but for no fault of the appellant. All these observations of ours apply mutatis mutandis to clause (b)(ii) of the impugned communication as well. It is in these

circumstances that clause 17.2A.1 of the guidelines comes into play which enables the Securities and Exchange Board of India (for short the Board) which is the market regulator to grant exemption from the obligation of any particular provision(s) of the guidelines if there is a technical violation or violation that was caused or may be caused due to factors beyond the control of the listing company. The said clause of the guidelines reads as under –

> "17.2A.1 The Board may grant exemption from the application of any particular provision(s) of these Guidelines:
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> (a) on an application made by any listed company or intermediary connected with the issue;
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> (b) of a technical violation or a possible technical violation; or
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> (c) on being satisfied that the violation was caused or may be caused due to factors beyond the control of the applicant."

We are satisfied that the technical default on the part of the appellant company was for reasons beyond its control. We could have remitted the case back to the Board to consider the request of the appellant but, in the circumstances, we do not think it necessary to adopt that course and in the background of the aforesaid factual situation, we can issue the same direction and exercise the same powers which the Board could.

This brings us to the third ground on which the in-principle approval has been declined by the BSE. It is stated that the appellant has not furnished any documentary proof confirming that the shares allotted to the promoters under CDR package were under lock-in for a period of one year from the date of allotment which is the requirement of sub clause (g) of clause 13.3.1 of the guidelines. When the shares allotted in physical form are to remain under lock-in for a certain period, they have to carry a stamp that they are not transferable for the said period. According to the BSE, the appellant did not furnish any proof of the fact that the shares carried such a stamp indicating that they were under lock-in for a period of six months. The shares held by the promoters were pledged with different lending Banks some of which returned the shares to enable the appellant to get them dematerialized and put them under lock-in for

the requisite period while others did not. As already noticed, if some of the lending Banks did not part with their security thereby disabling the appellant from getting them dematerialized and putting them under lock-in for a period of six months, the appellant cannot be blamed for the same. Here again the violation is only technical with no consequences because the shares were lying pledged with the Banks. Clause 17.2A.1 of the guidelines needs to be invoked in the circumstances.

Therefore, exercising powers under clause 17.2A.1 of the guidelines, we grant exemption to the appellant from the provisions of clause 13.3.1(f) and (g) of the guidelines and direct BSE to grant in-principle approval as sought by the appellant. The BSE shall, thereafter, consider the request of the appellant for listing of the shares in accordance with law. Accordingly, the appeal stands allowed with no order as to costs.

Sd/-
Justice N.K. Sodhi
Presiding Officer

Sd/-
Samar Ray
Member

07.08.2009
Prepared and compared by :
msb