BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 85 of 2012

Date of Decision: 28.06.2013

1. S. R. B. Ramesh Chandra
   Plot No. 949, Road No. 47 Jubilee Hills,
   Hyderabad- 500 033.

2. S. R. B. Ramesh Chandra (HUF)
   Plot No. 949, Road No. 47 Jubilee Hills,
   Hyderabad- 500 033.

3. Mr. S. Chandra Mohan
   Plot No. A-58, Road No. 13, Film Nagar,
   Jubilee Hills,
   Hyderabad- 500 033

4. S. Chandra Mohan (HUF)
   Plot No. A-58, Road No. 13, Film Nagar,
   Jubilee Hills,
   Hyderabad- 500 033

5. Ms. S, Laxmi Mohan
   Plot No. A-58, Road No. 13, Film Nagar,
   Jubilee Hills,
   Hyderabad- 500 033

6. Mr. S. Karthik Sarat Chandra
   Plot No. A-58, Road No. 13, Film Nagar,
   Jubilee Hills,
   Hyderabad- 500 033

7. Ms. Deepthi Sunethri
   Plot No. A-58, Road No. 13, Film Nagar,
   Jubilee Hills,
   Hyderabad- 500 033

8. Ms. Vimala Kumari
   Plot No. 949, Road No. 47 Jubilee Hills,
   Hyderabad- 500 033.

9. Mr. S. Chatur Swaroop Chandra
   Plot No. 949, Road No. 47 Jubilee Hills,
   Hyderabad- 500 033.

10. Ms. S. Dharani
Plot No. 949, Road No. 47 Jubilee Hills,
Hyderabad- 500 033.

11. Mr. S. Kishore Chandra
Shri Ram Nivas,
H. No. 29-28-1/35,
Ground Floor, Kovilmoodivari Street,
Sitarampuram,
Vijayawada- 520 004.

12. S. Kishore Chandra (HUF)
Shri Ram Nivas,
H. No. 29-28-1/35,
Ground Floor, Kovilmoodivari Street,
Sitarampuram,
Vijayawada- 520 004.

13. Ms. S. Sasi Rekha
Shri Ram Nivas,
H. No. 29-28-1/35,
Ground Floor, Kovilmoodivari Street, …Appellants
Sitarampuram,
Vijayawada- 520 004.

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. Janak Dwarkadas, Senior Advocate with Mr. Vinay Chauhan, Mr. Prashant Ingle and Mr. K.C. Jacob, Advocates for Appellants.

Mr. Shiraz Rustomjee, Senior Advocate with Mr. Ajay Khaire, Advocate for the Respondent.

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

Per : Jog Singh

1. The present appeal is filed by 13 entities (“Appellants”) against order dated July 19, 2011, (“Impugned Order”) passed by the Securities

and Exchange Board of India ("Respondent") directing the Appellants to disinvest 41,96,760 shares of Bheema Cements Limited ("the Company") within a period of two months from the date of the Impugned Order for the violation of Regulation 11(2) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 ("Takeover Regulations") while acquiring the abovementioned shares.

2. The Company was originally incorporated in the name of M/s. Coromandel Cements Limited in 1978, and had its name changed subsequently to Bheema Cements Limited on September 29, 2008. It constructs, runs, operates, acquires factories for the manufacture of cement and other allied products. The Appellants are promoters of the Company which is listed on the BSE. It has 2,78,37,969 shares, out of which 63.26% are held by the Appellants and the remaining 36.74% are held by the public. Out of the 63.26% of the equity share capital held by the Appellants, 45.17% have been pledged with banks. In 2005 the Company approached banks for term loans of approximately Rs. 20 Crore, against which a margin of around Rs. 6 Crore was demanded by the banks. The Appellants, therefore, agreed to infuse Rs. 3 Crore into the Company by way of preferential allotment of shares. As a result of this, the shareholding of the Appellants in the Company would go up from 63.26% to 69.11% leading to the triggering of Regulation 11(1) of the Takeover Regulations. The Appellants, in order to circumvent this situation, made an application dated January 22, 2005 under Regulation 4(2) of the said Regulations to the Respondent asking to be exempted

from the obligation of making an open offer under Regulation 11(1). The Respondent graciously granted the exemption sought by the Appellants for the acquisition of 30,00,000 equity shares at Rs. 10 each exercising it powers under Section 19 of the SEBI Act, read with Regulation 4(6) of the Takeover Code of 1997. Following the aforesaid exemption, the Company held an EGM on December 13, 2005 wherein the shareholders granted their approval to the preferential allotment of 30,00,000 shares along with the allotment of 41,96,790 warrants in favour of the Appellants. If may be noted that the allotment of 41,96,790 warrants was beyond the exemption granted by the Respondent, which was only for acquisition of 30,00,000 equity shares.

3. After securing the shareholders' approval, the Company sought and received in-principal approval from the BSE vide letter dated January 12, 2007 for issue and allotment of 30,00,000 equity shares and 41,96,790 warrants. The Company finally allotted the said shares and warrants to the Appellants on July 6, 2007. The warrants had to be converted into shares within 18 months from the date of allotment as per law and if not converted were to lapse automatically. The 30,00,000 shares got listed on the BSE on December 7, 2007. This allotment took the shareholding of Appellants in the Company to 69.11%. The allotment of these shares and warrants led to the infusion of Rs. 3,41,96,790 into the Company. Now, the warrants were converted into equity shares on December 15, 2008 by the Appellants who paid an amount of Rs, 3,77,71,110 to the Company as the balance amount payable for subscription of warrants before conversion. This took the shareholding of the Appellants from 69.11% to

74.01%. The Appellants did not make any public announcement as required under Regulations 11(2) and 14(2) of the Takeover Code of 1997. This precisely appears to be the dispute in the instant appeal.

4. Further, the Respondent had written a letter to the Company on June 26, 2007 stating that the exemption granted was only with respect to the 30,00,000 shares and not for allotment of 41,96,790 warrants. After the conversion of warrants into equity shares, the Appellants vide letter dated September 10, 2010 applied to the Respondent for post-facto exemption from making a public offer under the Takeover Code of 1997 with respect to the warrants converted into shares on December 15, 2008. This application was rejected by the Respondent vide letter dated October 27, 2010 seeking an explanation from the Appellants as to why Regulations 11(2) and 14 of the Takeover Code had not been complied with. In the meanwhile, in July 2010 the Appellants pledged 8,09,450 shares to raise Inter Corporate Deposits ("ICDs") to deal with certain financial difficulties which had arisen. The Appellants defaulted on the repayment of these ICDs, and part of the shares pledged to raise the ICDs were sold by them, bringing their shareholding down to 71.93%. Subsequently, the Corporate Debt Restructuring unit sent the approved proposal regarding the restructuring of the Company's debts to the banks concerned and the Appellants. It listed various steps to be taken by the Company in order to deal with its predicament.

5. Finally, the Respondent issued a Show Cause Notice ("SCN") dated March 28, 2011 to the Appellants alleging the violation of

Regulation 11(2) read with Regulation 14(2) of the Takeover Code of 1997. Appellants filed a reply vide letter dated May 3, 2011 expressing their belief that they were eligible for the exemptions granted under Regulation 3(1) read with Regulation 4 of the Takeover Code of 1997. Following this the Appellants appeared for a personal hearing on May 18, 2011. The Appellants then sold 14,37,352 of their shares for the purposes of a project that they had undertaken, which took their shareholding to 66.5%. In accordance with the CDR package, the Appellants pledged 1,27,01,781 shares with the banks concerned on June 29, 2011. The Impugned Order was finally passed July 19, 2011 asking the Appellants to disinvest 41,96,790 of their shares within the next two months. The Respondent acceded to the Appellants' request regarding prolonging of the time given for compliance with the Impugned Order by granting extension of time till March 31, 2012.

6. The Appellants' case is that the Respondent has not appreciated the pains and risks taken by the Appellants to infuse capital into the Company so that it may bounce back into shape and that the amount of Rs. 4,19,67,900 paid by the Appellants in order to subscribe to the warrants has been utilized for the betterment of the Company and its shareholders. The Appellants also submit that they have always been in control of the Company and the conversion of the warrants into equity shares does not change the position in any way. Further, the Appellants have not been the beneficiaries of any undue advantage, nor have the public shareholders suffered in any way owing to the actions of the Appellants.

7. The Appellants submit that the shares of the Company not being very liquid, the market will not be able to absorb 41,96,790 shares. Also, the price of the shares will fall drastically which would lead to undermining of the value of the shares held by the public and the banks. There have been no complaints by public investors with respect to the transactions undertaken by the Appellants. It is also submitted that adjudication proceedings have already commenced with respect to the same alleged violation in question. The Respondent having granted post-facto exemption in the cases of Jaiswal Neco Limited and Seahorse Hospitals Ltd., it is stated that the Respondent cannot have different yardsticks with respect to different entities. The Appellants submit that the Respondent failed to understand the gravity of the Appellants situation when it was forced to take the decision to convert the 41,96,760 warrants into shares, in a duly convened EGM with the shareholders' approval and the Appellants were constrained to take such a decision not for any hidden agenda which would lead to any sort of undue benefit to the Appellants, but in the interest of the Company.

8. We now deal with the submissions of the Respondent. The Respondent submits that a letter dated June 26, 2007 was sent to the Appellants stating categorically that the exemption granted vide SEBI's Order dated September 23, 2005 was only with respect to the 30,00,000 shares and not the 41,96,790 warrants sought to be exempted. It was also stated in the letter that the exemption granted should not be construed in such a way so as to include the warrants and their conversion into shares

at a future date. It is the Respondent's submission that prior to the conversion of the warrants in question, no application was made as required by Regulation 4(2) of the Takeover Code of 1997. When, as a result of the conversion, the shareholding of the Appellants went from 69.11% to 74.01%, no public announcement was made in respect of the said increase. It is submitted that despite being warned against the allotment of 41,96,790 warrants vide letter dated February 21, 2007, the acquirers went ahead with the allotment followed by their subsequent conversion into shares. The Respondent submits with respect to the matters of Jaiswal Neco Limited and Seahorse Hospitals Limited that the facts of the instant case are different from those of the two cases mentioned above. It is also submitted that as per Regulation 4 of the Takeover Code of 1997 an exemption can be granted only in case of a proposed acquisition and that post-facto exemption is not contemplated under the said regulation. The Respondent further submits that the Appellants deliberately violated Regulation 11(2) of the Takeover Code, and that such conscious violation of the law cannot be overlooked by the Respondent.

9. Both the learned counsel for the parties have been heard at length and the pleadings in the appeal and the documents annexed therewith have been perused.

10. On a minute analysis of the submissions of both the parties concerned, the following facts stand undisputed:

i) That the Company was in fact a sick unit going into major losses and it required positive steps to be taken urgently if it were to have any chance of revival;

ii) That the Appellants applied for and received exemption from the obligation of making a public offer under Regulation 11(1) of the Takeover Code of 1997 with respect to 30,00,000 shares;

iii) That the exemption granted by the Respondent was only with respect to the 30,00,000 shares and did not extend to the 41,96,790 warrants;

iv) That the Appellants' infusion of capital into the Company through the allotment of preferential shares was done in order to bring the Company out of its unfortunate predicament;

v) That the Respondent had warned the Appellants vide letter dated June 26, 2007 that the exemption granted to the Appellants was only with respect to the 30,00,000 shares, and not for the warrants in question.

vi) That, the Appellants acted in violation of Regulation 11(2) of the Takeover Code of 1997, when they subscribed to 41,96,790 warrants and subsequently converted then into shares on December 15, 2008.

vii) That the Appellants have been in control of the Company all along and the impugned conversion of the warrants into equity shares does not refashion the dynamics with respect to the functioning of the Company.

11. However, we also note that prior to the infusion of capital into the Company in 2005 by the Appellants, the Company was in an appalling condition. Immediately after the boost in capital owing to the equity shares bought by the Appellants and warrants subscribed to, the value of

the shares held by investors at large increased substantially. It is evident from the records that sales skyrocketed from Rs. 31.34 Crores in March 2006 to 93.98 Crores on March 31, 2009 which admittedly is an increase of 200%. The profitability during the above said period witnessed an increase of approximately 1600%. Further, it is pertinently noted that prior to the coming into play of the scheme which turned the shape of the Company around in its entirety for the better, the shares of the Company were quite thinly traded in view of the non-performance of the Company's scrip and there was no other adequately viable route which could have been adopted to meet the Company's desperate need for funds. And once the much needed capital was infused into the Company, we note that the production of the Ordinary Portland Cement rose from 1,35,445 M.Ts on March 31, 2005 to 2,56,479 M.Ts as on March 31, 2009, i.e., there was a visible increase of 89.36%. The increase in fixed assets investments was as much as 248%, which went up from Rs. 52.81 Crore in September 2007 to Rs. 183.77 Crore in March 2009. Further, the Company declared a respectable dividend of 10% in 2008 and 12% in 2009 for two years, keeping in view the fact that the number of shareholders as of December 31, 2009 was a mere 1209 shareholders. Even the loans taken from various banks saw an increase of 1551% owing to the Appellants consistent approach to bring the Company out of sickness. Further, we note that the Appellants at all times kept the stock exchanges in the loop by informing them of the proposed conversion of the 41,96,790 warrants into equity shares from time to time and receiving

the in-principle permission from the BSE in 2007 itself for the aforesaid conversion of warrants into shares.

12. The Appellants seem to have been under the genuine belief that since post-facto exemption had been granted to two companies, being Jaiswal Neco Limited and Seahorse Hospitals Limited, in the past by the Respondent, that even in the case of the Appellants the Respondent would take a liberal view and ratify the impugned conversion of warrants into equity shares without making the mandatory public offer. In this connection, the Tribunal notes that when the Appellants got the shareholders' approval in the EGM held on December 13, 2005 the Appellants had also included in the agenda, and subsequently gotten approved, the allotment of 41,96,790 warrants followed by their conversion into equity shares. Also, the BSE had granted in-principle approval to the listing of the 30,00,000 shares in question, as well as the warrants convertible into shares at a future date. Therefore, the conditions which were fulfilled by the Appellants with respect to the 30,00,000 shares were also fulfilled with respect to the 41,96,790 warrants in question.

13. We are of the considered view, that ordering the Appellants to divest 41,96,790 equity shares would not be in anyone's interest and that no benefit would accrue to other investors in the scrip of the Company, its employees or its promoters by such divestment. On the contrary, this proposed action of divestment might sent the Company back into sickness after all the attempts made by the Appellants to bring it out of

dire straits gradually over a significantly long period of time. In order to abruptly divest the 41,96,790 equity shares the Appellants will have to sell off their own shares out of which, the records show, 45.17% are pledged with banks as security for all the loans taken by the Appellants for the betterment of the Company. Sale of huge number of shares, as required under orders of the Respondent, will bring down the share price, leading to under evaluation of security, in the form of shares, with banks/financial institutions for loan; this in turn shall lead to demand for higher security by financial institutions/ loanee and thereby triggering a chain reaction, leading to financial difficulties, making/continuing operation difficult/ impossible. Thus, company may fall back into sickness again.

14. Next, we have been informed that parallel adjudication proceedings under the SEBI Act, 1992 pertaining to the said violation have commenced. We make it clear that in case the Appellants are found guilty of violation of the regulation in question, SEBI shall be at liberty to impose suitable monetary penalty on the Appellants as per law. The alleged violation would, thus, not go unpunished.

15. Therefore, in the facts and circumstances of the case, we find it fit to remand the case back to SEBI for reconsideration given the fact that post-facto exemption is not an unprecedented action on part of the Respondent. Ordered accordingly. Before parting, we would like to make a note of our appreciation for SEBI’s objectivity while looking at the Appellant Company’s situation prior to the allotment of the shares and warrants in question, as it was in 2005, and granting exemption with

respect to the allotment 30,00,000 shares specially considering the drastic improvement in the Appellant's functioning post said allotment. It is our hope that this objectivity and fairness will be maintained by the Respondent as it reconsiders the instant matter so as to ensure that the Appellant does not plunge into distress once again.

16. " In the light of above observations, the Respondent shall complete the process of reconsideration within three months from the date of receipt of a copy of this order after affording a reasonable opportunity of hearing to the Appellants. With the above said directions, the appeal stands disposed of without making any observation on the merit of adjudication proceedings going on against the Appellants.

The Appeal, thus, stands disposed of with the above said directions and liberty. No costs.

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

28.06.2013
Prepared & Compared By: Pk