BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Date of Decision: 05.11.2014

Appeal No. 92 of 2014

Nitta Gelatin India Limited
Post Box 4262, 54/1446 SBT Avenue,
Panampilly Nagar,
Cochin 682 036
Kerala …Appellant

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. Amit Vyas, Advocate for the Appellant.

Mr. Kumar Desai, Advocate with Mr. Rushin Kapadia, Advocate for the Respondent.

CORAM: Justice J.P. Devadhar, Presiding Officer
Jog Singh, Member
A.S. Lamba, Member

Per: Jog Singh (Oral)

1. The issue involved in the present case is whether the respondent is justified in not favorably considering the request of the appellant-company for grant of extension of time for the allotment of bonus shares to one of the promoters of the appellant-company under regulations 109 read with regulation 95 of the Securities and Exchange Board of India

(Issue of Capital and Disclosure Requirements) Regulations, 2009, hereinafter referred to as ICDR Regulations.

2. Facts relevant for the present adjudication are that the appellant-company, namely Nita Gelatin Inc., Japan ("**NGI**" for short) decided to increase the public shareholding to the required 25% level of its total equity share capital. As on March 31, 2013 the collective shareholding of the promoters was 80.51% whereas it should not have been more than 75% as per law. Out of 80.51%, NGI was holding 46.43% and the only other promoter, namely Kerala State Industrial Development Corporation ("**KSIDC**" for short) was holding 34.07%. It was, therefore, decided by the Board of Directors, of the appellant-company in their meeting dated May 3, 2013 to dilute the shareholding of promoters by offering an Employee Stock Purchase Scheme of 1 lac equity shares of Rs. 10 each to the permanent employees of the appellant-company. Secondly, by declaring bonus issue of 5,79,160 equity shares of Rs. 10 each in the ratio of 1:3 i.e., 1 share for every 3 shares held by the shareholders of the company **other than the promoters**. This meeting was attended by the directors representing both the promoters who supported the above said resolution for dilution of the promoters' shareholding.

3. Accordingly, **Stock Option Plan 2013-I** was submitted to SEBI for its approval which was granted by SEBI subject to certain conditions. In the mean time, an Extraordinary General Meeting ("**EGM**" for short), was held by the company on May 29, 2013 in which the Stock Option

Plan 2013-I was accepted. It is pertinent to note that both the promoters gave up their respective entitlement to receive bonus shares. KSIDC was a part of this decision in the EGM when notice was given regarding the record date of the allotment the bonus shares which was 20th June, 2013.

4. However, KSIDC held a meeting of its board of directors on 30th June, 2013 and decided not to forego its entitlement of bonus issue of shares and it intended to subscribe to the same and intimation was sent to the appellant-company by KSIDC in this regard on 17th June, 2013. The appellant-company intimated this aspect to the Bombay Stock Exchange. In the circumstances, the appellant-company sought extension of time from the respondent to complete the allotment of bonus shares to the public shareholders beyond the period of two months by letter dated 24th June, 2013. Thereafter, notice and explanatory statement was dispatched in regard to the EGM to be held on 30th July, 2013 regarding the resolutions to be considered in the EGM. Two proposals were considered and passed by the Board of Directors in their meeting on 05th July, 2013; first, issue of bonus shares in the ratio 1:3 to the Promoters also in partial modification of the earlier resolution and second; Issue of 6,96,667 equity shares under an **Stock Option Plan 2013-II** subject to the approval of the respondent at an issue price of Rs. 25 per share. Accordingly, the meeting to be held on 30th July, 2013 was adjourned to 24th August, 2013.

5. In the meanwhile, noting the urgency for the allotment of 5,79,160 bonus shares to the public shareholders only, the appellant-company

completed the allotment of said bonus shares to the public shareholders of the appellant- company by the record date i.e., 20th June, 2013. Thus, by 3rd August, 2013 the appellant-company became compliant with the MPS regulations. Despite this the appellant-company made an application to the BSE on 19th August 2013 seeking in-principle approval under clause 24(a) of the Listing Agreement.

6. The controversy, thus, started on 24th August, 2013 when the appellant-company in the EGM resolved to issue **additional bonus shares** in the ratio of 1:3 to the Promoters also ("Stock Option Plan 2013-II). On 27th August, 2013 BSE sent an Email to the appellant-company to seek condonation from the SEBI as the bonus issue to the Promoters was beyond the period of 2 months from the date of the Board Meeting held on 3rd May, 2013. Appellant-company, therefore, by its letter dated 31st August, 2013 requested SEBI for condonation of delay under Regulation 109 of ICDR Regulations with respect to allotment of shares in the bonus issue to the Promoters beyond the period of 2 months. This request has been turned down by SEBI by its letter dated 14th February, 2014 mainly on the ground that this would affect the interest of investors and also those who would have traded in the shares of the appellant-company based on the resolution of the EGM dated 29th May, 2013. This is how the present appeal has been preferred by the appellant-company before this Tribunal seeking quashing of the impugned communication dated 14th February, 2014 issued by SEBI.

7. Learned counsel Shri Amit Vyas, appearing on behalf of appellant has strenuously argued that the impugned order fails to appreciate that the shareholders are not affected in any manner by the proposed issuance of bonus shares to the Promoters. On the contrary, the shareholders will benefit from the marginal enhanced participation of the Promoters.

8. It is further submitted that the appellant company has not violated any of the provisions of the Companies Act, 1956 or the SEBI Act, 1992. The respondent's action in not allowing the appellant-company to choose the method by which it would adhere to the MPS Regulations in accordance with the permission of the public shareholders of the appellant-company is totally unjustified. The appellant-company also submits that at no point of time has it sought to undermine the regulatory authority of the respondent and/or the Stock Exchanges. It is also argued by learned counsel for the appellant-company that the respondent has failed to furnish clear, exact and specific reasons for not acceding to the request made by the appellant-company to relax the strict compliance of Regulation 109 of the ICDR Regulations in regard to the delay in issue of shares pursuant to a bonus issue under the purview of Regulation 95 of the ICDR Regulations despite the public shareholders of the appellant-company approving such an issue. The impugned order is without material findings and is arbitrary.

9. Learned counsel, Shri Kumar Desai, contended on behalf of the respondent that the impugned communication is a well considered and

reasoned order and hence not liable to be interferred by this Tribunal in appeal. It is submitted by the respondent that the impugned order dated 14th February 2014 clearly mentions the following grounds:-

a) *The said allotment of bonus shares to promoters is s modification to the earlier resolution passed in the extra-ordinary general meeting (EGM) held on May 29, 2013 wherein it was decided to allot bonus shares only to public shareholders.*

b) *The said resolution had an implication on the price movement of the shares of the company and trades have been executed on the stock exchanges based on the disclosures already made by the company.*

c) *Accordingly, if we accede to your request as stated in your aforesaid letters, the interest of the investors, including those who had traded in the shares of the company based on the resolution passed in the EGM held on 29th May, 2013 would be adversely affected.*

10. We have heard both the learned counsel for the parties at length and have minutely perused the pleadings before us. It is a matter of record that the appellant vide its letter dated 31st August, 2013 sought the relaxation from the respondent under Regulation 109 of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 ("ICDR Regulations") with respect to Regulation 95 i.e. extension of time for the allotment of bonus shares to one of the promoters too even after achieving the target of 25% of Minimum Public Shareholding (**MPS**).

11. We have also gone through various relevant legal provisions including clause 40A(ii)(f) of the Listing Agreement as well as Regulations 95(2) and 109 of ICDR Regulations, 2009, and Rule 19A of the SCRR, 1957 etc. It is, undoubtedly, clear that the condition precedent for the purpose of compliance of MPS requirement by issue of bonus shares is that the promoters are to forgo their entitlement to equity shares, whether present or future, which may arise from such issue. Thus, the Prompters have to give-up their entitlement under the bonus issue in order to achieve the threshold of 25% towards MPS as enshrined by law. In fact, the appellant-company had already become MPS compliant before it asked for additional time for the sake of a promoter. It is also to be noted that the general investors did trade in the shares of the appellant-company based on the said resolution passed by the general body of shareholders by which the promoters gave up their entitlement to receive bonus shares. Once the announcement of the bonus issue is made, including the one at which the Promoters had unequivocally agreed to forgo their entitlement for bonus shares, the same cannot be retracted as in law and on fact.

12. Chronology of events in the present case clearly indicates that the Board of Directors of the appellant-company vide their resolution dated 3rd May, 2013 for complying with the Minimum Public Shareholding Requirements resolved the issue of 1,00,000 equity shares of Rs. 10 each under Employee Stock Purchases Scheme-I (‘ESPS-I’ for short) to the employees of the Company and additionally issue of 5,79,160 equity

shares of Rs. 10 each in the ratio of 1:3 to the existing shareholders with the condition that the Promotes would forgo their right to such shares, whether present or further, arising of the said issue. It is pertinent to note that the above issue of bonus shares as per ESPS-I was approved with the consent of the Directors representing all the Promoters, including the Directors representing KSIDC, one of the two Promoters, holding 34.07% of the total paid up equity capital of the appellant.

13. The appellant-company vide its letter dated 4th May, 2014 sought approval from the respondent with regard to the above ESPS scheme for complying with the MPS requirements as the same was not one of the pre-approved means provided by respondent in its various directions/circulars and now incorporated in 40A of the Listing Agreement for increasing Public Share Holding of the company to the minimum requirement of 25% of the share capital of the company.

14. The shareholders vide their resolution dated 29th May, 2013 provided their approval to the said ESPS scheme and to the bonus issue only to public shareholders. The Board of Directors of KSIDC, the Promoter of equity of the appellant-company vide its letter dated 15th June, 2013 informed the appellant-company of its decision that KSIDC is not in a position to forgo its right of entitlement of the bonus issue and had decided to subscribe to the bonus shares as per its rights. It is worthwhile to note that KSIDC has gone back after having agreed to forgo its rights with respect to the bonus issue after providing its approval to forgo its rights in the first place and after the resolution of

the Board of Directors and shareholders of the appellant-company was passed and also after the respondent approved the ESPS-I for enabling the appellant to comply with MPS requirement.

15. Appellant-company in the meantime vide its letter dated 31st July, 2013 sought extension of time from the respondent beyond the time limit of two months which was granted to the appellant-company vide the respondent's letter dated 5th August, 2013 to complete the allotment of bonus shares to public shareholders. The Board passed the resolution dated 5th July, 2013 for issue of bonus shares in the ratio of 1:3 to the shareholders as well as the promoters (in partial medication of the earlier resolution). Issue of 6,96,667 equity shares under ESPS-II at an issue price of Rs. 25 per shares.

16. It is, therefore, obvious that neither any plausible reason for the KSIDC's inability for not forgoing their right to the bonus issue nor any benefit that the public shareholders might receive from the said partial modification of the resolution dated 29th May, 2013 is forthcoming from the pleadings. Therefore, SEBI has rightly rejected the request of the appellant-company in this regard. It is true that the respondent's action must reflect fair play in action. Probity and the best interests of the company as contemplated by the Companies Act, 1956 must be kept in mind by SEBI while exercising power of supervision over the concerned companies conferred upon it by Sections 59 to 84 of the Companies Act, 1956 read with various relevant provisions of the ICDR Regulations as well as Securities Contracts (Regulation) Rules, 1957 (SCRR). But in

the case in hand, we have no hesitation, to hold that SEBI has exercised these powers in an objective and fair manner and to achieve the objective underlying the above said provision of law.

17. It is the admitted position that the statutory requirement of attaining and maintaining the Minimum Public Shareholding (MPS) emanates from Section 19A(a) of the SCRR which reads as under:

> "19A(1) Every listed company (other than public sector company) shall maintain public shareholding of at least twenty five per cent:
>
> Provided that any listed company which has public shareholding below twenty five per cent on the commencement of the Securities Contracts (Regulation) (Amendment) Rules, 2010, shall increase its public shareholding to at least twenty five per cent within a period of three years from the date of such commencement, in the manner specified by the Securities and Exchange Board of India.
>
> Explanation.- For the purposes of this sub-rule, a company whose securities has been listed pursuant to an offer and allotment made to public in terms of sub-clause (ii) of clause (b) of sub-rule (2) of rule 19, shall maintain minimum twenty five per cent public shareholding from the date on which the public shareholding in the company reaches the level of twenty five per cent in terms of said sub-clause."

18. The above said provision was inserted by way of two amendments effected on 04.06.2010 and 09.08.2010 in the SCRR. After these amendments all the listed companies are required to maintain a consistent public shareholding of 25%. The companies, whose public shareholding was below 25% benchmark, as on 09.08.2010, were directed to satisfy the requirement within a period of three years from 04.06.2010 when the SCRR was first amended to prescribe a minimum

threshold of 25% as a pre-requisite for a company to get listed its shares with any recognized stock exchange. SEBI in furtherance of the above amendments of SCRR issued a Circular dated 16.12.2010 amending Clause 40A of the Listing Agreement and prescribed the manner which could be adopted by companies to increase their shareholding to the minimum of 25%. The Circular dated 16.12.2010 read with another Circular dated 08.02.2010, inter alia, mainly prescribe following methods for the attainment of 25% public shareholding:

Circular dated 16.12. 2010

i) Issuance of shares to the public through prospectus;
ii) Offer for sale of shares held by promoters to public through prospectus;
iii) Sale of shares held by promoters through the secondary market i.e. OFS through Stock Exchange.

Circular dated 08.02.2012

i) Rights Issues to public shareholders, with promoters/promoter group shareholders foregoing their rights entitlement;
ii) Bonus Issues to public shareholders, with promoters/promoter group shareholders foregoing their bonus entitlement;
iii) Any other method as may be approved by SEBI, on a case to case basis.

19. At this stage it is relevant to note that the amendments of SCRR effected on 04.0.2010 also introduced the definitions of public and public shareholding in the said Rules which are as under:-

"2(d) "public" means persons other than –

(i) the promoter and promoter group;
(ii) subsidiaries and associates of the company.

Explanation.- For the purpose of this clause the words "promoter" and "promoter group" shall have the same meaning as assigned to them under the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009."

> "2(e) "public shareholding" means equity shares of the company held by public and shall exclude shares which are held by custodian against depository receipts issued overseas."

Thus, the scheme of law, which emerges from the abovesaid SCRRs, ICDR Regulations and various SEBI Circulars, is meant for increasing and maintaining "public shareholding" and not the "promoters' shareholding".

20. Furthermore, we may also look at the regulation 109 of the ICDR Regulations which reads as under:

> *"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."*

21. The appellant's case does not fall under any of the above mentioned three categories. Neither is the grant of extension of time in the interest of the public investors nor it is for the development of the securities market. In fact, if the request of the appellant is acceded to, it would set a wrong precedent and the sanctity of the Rule 19A of SCRR, SEBI circulars and the amended clause 40A of the Listing Agreement would be undermined. It would be in the fitness of things not to permit anyone to circumvent any provision that enables the companies to meet the MPS requirement. Granting of the extension of the time as prayed for by appellant-company for the purpose of extending the benefit of bonus issue to one of the promoters would amount to permitting it to

circumvent these provisions of law. Certainty in the corporate affairs is of utmost importance for a healthy growth of capital market by percolating and disseminating true disclosures and correct information to the investors.

22. In the facts and circumstances of the present case, the appeal is, therefore, found to be bereft of any merit and the same is hereby dismissed with no order as to costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

Sd/-
A S Lamba
Member

05.11.2014
Prepared and compared by:
PK/msb