IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 21ST DAY OF SEPTEMBER 2015

BEFORE

THE HON'BLE MR. JUSTICE A S BOPANNA

C.A.NO.1415/2014 A/W C.A.NO.313/2015,
C.A.No.1648/2014 & C.A.No.1778/2014 AND
C.A.NO.1416/2014
IN
COMPANY PETITION NO.132/2014

BETWEEN:

SECURITIES AND EXCHANGE BOARD OF INDIA
CONSTITUTED UNDER THE SECURITIES
AND EXCHANGE BOARD OF INDIA ACT, 1992,
HAVING ITS LOCAL OFFICE AT 2ND FLOOR
JEEVAN MANDAL BUILDING NO.4
RESIDENCY ROAD, BENGALURU-560025
REP.HEREIN BY ITS ASSISTANT
GENERAL MANAGER
MR. N S SHESHASHAYEE

... APPLICANT IN
C.A.Nos.1415/2014, 1416/2014,
1648/2014 & 1778/2014

SECURITIES AND EXCHANGE BOARD OF INDIA
CONSTITUTED UNDER THE SECURITIES
AND EXCHANGE BOARD OF INDIA ACT, 1992,
HAVING ITS OFFICE AT SOUTHERN
REGIONAL OFFICE 7TH FLOOR,
OVERSEAS TOWERS REP. HEREIN BY
ITS ASSISTANT GENERAL MANAGER
MR. DEEPU ANANDAN

... APPLICANT IN
C.A.No.313/2015

(BY SRI S VIJAYSHANKAR, SR.ADV. A/W
SRI T SURYANARAYANA FOR
M/S. KING & PARTRIDGE)

AND:

KHODAY INDIA LIMITED
BREWERY HOUSE 7TH MILE
KANAKAPURA ROAD
BANGALORE-560 062
REP. HEREIN BY ITS EXECUTIVE
DIRECTOR MR. K L SWAMY

... RESPONDENT (COMMON)

(BY SRI ADITYA SONDHI, SR.ADV. A/W
SRI KARAN JOSEPH, ADV.)

C.A.NO.1415/2014 IS FILED UNDER RULE 9 OF THE COMPANIES [COURT] RULES, 1959, PRAYING TO IMPLEAD SEBI AS A RESPONDENT IN CO.P.NO.132/2014 AND ALSO TO DISMISS CO.P.NO.132/2014 AS THE RESPONDENT COMPANY IS NOT IN COMPLIANCE WITH THE SEBI [DELISTING OF EQUITY SHARES] REGULATIONS, 2009.

C.A.NO.313/2015 IS FILED UNDER RULE 6 & 9 OF THE COMPANY [COURT] RULES, 1959, PRAYING TO CONDONE THE DELAY IN FILING CA 1415/14 FOR IMPLEADING ITSELF AS PARTY TO THE COMPANY PETITION.

C.A.NO.1416/2014 IS FILED UNDER RULE 9 OF THE COMPANIES [COURT] RULES, 1959, PRAYING TO RECALL ITS ORDER DATED 07.08.2014 PASSED IN COMPANY PETITION NO.132/2014 AND PERMIT SEBI TO BE HEARD IN THE MATTER.

C.A.NO.1648/2014 IS FILED UNDER RULE 9 OF THE COMPANIES [COURT] RULES, 1959, PRAYING TO LIST THE ABOVE MATTER FOR HEARING ON AN EARLY DATE AND DISPOSE OF THE SAME.

C.A.NO.1778/2014 IS FILED UNDER RULE 9 OF THE COMPANIES [COURT] RULES, 1959, PRAYING TO STAY THE PROCEEDINGS PURSUANT TO THE ORDER DATED 07.08.2014 IN COMPANY PETITION NO.132 OF 2014 PENDING THE OUTCOME OF THE PRESENT PROCEEDINGS.

THESE APPLICATIONS HAVING BEEN RESERVED FOR ORDERS, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

O R D E R

The parties would be referred to by their names for the purpose of clarity since their array is different and the applicant in the instant applications is not a party in the disposed of company petition.

2. M/s. Khoday India Ltd have filed the Co.P.No.132/2014 under Section 101 to 104 of the Companies Act seeking confirmation of the reduction of share capital. This Court after securing publication of the filing of the petition and inviting objections had considered the petition. It was allowed by the order dated 07.08.2014. Subsequent thereto, the instant applications are filed by the Securities and Exchange Board of India ('SEBI' for short) seeking that they be impleaded as respondents to the petition filed under Sections 101 to 104 and on condoning the delay, recall the order dated 07.08.2014. This Court while taking note of the said applications though had kept the applications pending to be taken up for further consideration, by the order dated 08.01.2015, on taking

note of the contention put forth by SEBI had ordered that the final order dated 07.08.2014 be kept in abeyance.

3. In that view, M/s. Khoday India Ltd being aggrieved by the said order dated 08.01.2015 had filed an appeal in O.S.A No.7/2015. The Hon'ble Division Bench on taking note of the contention that the order dated 08.01.2015 was passed without taking a decision on the impleading application of SEBI, has set aside the order dated 08.01.2015 and remitted the matter to the Company Judge for considering the application of SEBI seeking impleadment in the proceedings and thereafter to consider the application for recalling the order dated 07.08.2014. It is in that background the above noticed applications have arisen for consideration at this point.

4. Heard Sri S.Vijayashankar, learned senior counsel appearing on behalf of the counsel for SEBI and Sri Aditya Sondhi, learned senior counsel appearing on behalf of the counsel for M/s. Khoday India Ltd and perused the relevant papers.

5. Though, to an extent the learned senior counsel have referred to the merit of the contention relating the requirement of the minimum public shareholding in a listed company and in that light, whether the order permitting reduction of share capital can be made or not, the said contention is taken note only to determine as to whether in that circumstance SEBI should be considered as a necessary party to the instant proceedings under Sections 101 to 104 of the Companies Act. This is more so in a circumstance that the Company Judge based on the applications filed by SEBI, had by the order dated 08.01.2015 kept the order dated 07.08.2014 allowing Co.P.No.132/2014 in abeyance till the Securities Appellate Tribunal decides the appeal on its own merits, but, the Hon'ble Division Bench of this Court by the order dated 12.03.2015 has set aside the said order dated 08.01.2015 only due to the fact that the said order is passed before considering the application seeking impleadment.

6. Therefore, the issue that is to be determined herein at the outset is the right or otherwise, to be impleaded. If the conclusion in that regard is to dismiss the impleading application, no further questions will arise for consideration. On the other hand if the impleadment is permitted, the option will be either to recall the order dated 07.08.2014 allowing Co.P.No.132/2014 or to keep it in abeyance as had been done, by the earlier order and thereafter reconsider the rival contentions in the petition under Sections 101 to 104 of the Companies Act.

7. In Co.P.No.132/2014 while seeking reduction of share capital, the company has resolved to do so by paying up the public shareholders. SEBI contends that as per Rule 19(2)(b)(i) and 19-A of the Securities Contracts (Regulation) Rules,1957 ('SCRR' for short), the requirement is that a listed company should offer and allot to public at least 25% of each class or kind of equity shares or debentures and maintain the same. The provision having come into effect on 04.06.2010, a

period of three years has been provided to the listed companies which did not meet the requirement to increase and comply. M/s. Khoday India Ltd. and several other companies did not satisfy the requirement and as such SEBI by the order dated 04.06.2013 froze the voting rights and corporate benefits, which has been confirmed by the order dated 25.07.2014. M/s. Khoday India Ltd., have no doubt filed an appeal to the Securities Appellate Tribunal and the same is pending.

8. The learned senior counsel for SEBI in that light would refer to the object of the SEBI Act and the duty cast on SEBI to regulate all matters relating to securities. The decisions in the case of ***Swedish Match AB and another -Vs- SEBI and another [(2004) 11 SCC 641]*** wherein the Act and Regulations were referred in detail and the role of SEBI which is an expert body was emphasised and in the case of ***SEBI -vs- Ajay Agarwal [(2010)3 SCC 765]*** wherein also the legislative intent of the Act was taken note and it was held that the primary function of the Board is to regulate the

business in terms of the power vested are cited. In that view to contend that SEBI must be permitted to be impleaded has relied on the decisions in the case of ***U.P.Awas Evam Vikas Parishad -vs- Gyan Devi (Dead) by LRs and Others [(1995)2 SCC 326]*** wherein it was held that there is a world of difference between locus and right of impleadment, the former is permissive and the latter is mandatory; and in the case of ***Vidur Impex and Traders Private Ltd., and others -vs- Tosh Apartments Private Ltd., and others [(2012)8 SCC 384]*** wherein it is held that the Court can, at any stage of the proceedings, either on an application or otherwise direct impleadment of any person or party whose presence is necessary before the Court for effective and complete adjudication of the issues though he may not be a person in favour of or against whom a decree is to be made.

9. The learned senior counsel for M/s. Khoday India Ltd., would on the other hand contend that SEBI has no locus to come on record in a petition filed under

Sections 100 to 104 of the Companies Act. It is pointed out that even prior to this Court passing the order on 07.08.2014 allowing Co.P.No.132/2014, the SEBI was aware of the proceedings and in fact, by their letter dated 10.04.2013 had informed M/s. Khoday India Ltd., that the "Reduction of share capital" and "delisting of shares" are distinct processes and separate procedure has been prescribed under law. Reliance is placed on the decision of the Hon'ble Division Bench of the Bombay High Court in the case of ***SEBI -vs- Sterlite Industries (India) Ltd. (2003 Vol.113 Comp. cases 273)*** wherein while considering the objection of SEBI in relation to buy back of the shares in an amalgamation proceedings, it was held that they cannot seek to object to the same. The decisions in the case of In ***Re: Ucal Fuel Systems Ltd., and another (1992 (73) Comp.Cases 63- Mad)*** and in the case of ***Innovatherm GmbH -vs- Sesa Goa Ltd. (2013 (3) BomCR 720)*** are relied on to contend to the effect that the unconcerned interveners in proceedings under Sections 391 to 394 and 100 of Companies Act cannot be permitted.

10. In the background of the contentions raised, the fact that SEBI is a regulatory authority under the SEBI Act and in that light, it is required to secure compliance of all the regulations by the listed companies cannot be in dispute. The decisions relied on by the learned senior counsel for the SEBI in the cases of ***Ajay Agarwal*** and ***Swedish Match AB*** cited supra would leave no doubt whatsoever in that regard. Even if that be the position, keeping in view the nature of the proceedings in which they seek to implead themselves and put forth the contentions of non compliance of Regulation 19(2)(b) and 19-A of SCRR,1957, whether it is justified or not is the issue. If they were on record, whether this issue could have been addressed in a petition under Sections 100 to 104 of the Companies Act is what would be relevant to be decided to consider as to whether the application for impleadment as a party respondent or as an intervener would be justified at this stage?

11. In order to consider this aspect, the decision of the Division Bench of Bombay High Court, in the case of ***Sterlite Industries*** (supra) will be relevant. It is no doubt true that the said judgment was carried in appeal by SEBI before the Hon'ble Supreme Court in C.A.No. 5438/2002 and by the order dated 22.02.2006, though the appeals were disposed of without interfering with the order, the contentions were left open for SEBI to urge the same in an appropriate case. In that circumstance, insofar as this Court is concerned, the decision of a Division Bench being in force, though of another High Court, it is to be followed.

12. In that backdrop, a perusal of the contention of SEBI which was considered in the said ***Sterlite Industries*** case was that as a result of the scheme offered to the public, there is likelihood of reduction in the public shareholding to less than 25 per cent amounting to violation of the regulations of the SEBI. Despite such contention, it was held that merely because the SEBI has been empowered to administer

the provisions of Sections 77 and 77A, it does not give the SEBI any locus in a petition under Sections 391 or 394. Hence it is held that SEBI has no right of notice nor does it have any right to appear in the proceedings under Sections 391 and 394A of the Act. While arriving at such conclusion the other decisions relating to the Court's powers under Sections 100 to 104 and Section 391 was also kept in view by the Division Bench.

13. In that backdrop, the decision of another Division Bench of the Bombay High Court in the case of ***MCX Stock Exchange Ltd. -vs- SEBI and others (2012(2) Comp L.J. 473-Bom)*** relied on by the learned senior counsel for SEBI, based on which the petition for reduction of share capital is sought to be opposed is also to be noticed. The relevant conclusion in the judgment on which reliance is placed reads as hereunder;

> *"(v) The sanctioning of the scheme of capital reduction by the Company Judge under sections 391 to 393 read with sections 100 to 103 of the Companies Act,1956, does not preclude SEBI as*

a statutory regulator from determining as to whether the provisions of the MIMPS regulations have been complied with. SEBI is independently entitled to ensure compliance with the MIMPS regulations which have been made a condition for the grant of recognition. The statutory functions conferred upon SEBI under the SCRA and cognate legislation are not diluted;"

14. In the instant case, the SEBI is alleging non compliance of SCRR for which proceedings in exercise of the power under Section 19 and Section 11(1),2(j),(4) and 11B of SEBI Act read with Section 12A of Securities Contracts (Regulation) Act,1956 ('SCR Act' for short) has already been initiated. If in that light the said conclusion in MCX Stock Exchange case is kept in view, there can be no doubt that the proceedings are independent of each other. If that be the position, irrespective of the sanction being granted by the Company Judge to the reduction of share capital, the non compliance of any other regulations over which the SEBI has the jurisdiction would be dealt with by the SEBI as a regulatory authority and the consequence

thereof will visit the listed Company. Since the two proceedings are held to be different and distinct, the order dated 07.08.2014 in Co.P.No.132/2014 will only have the effect of providing the approval as contemplated under Sections 100 to 104 of the Companies Act to the extent the procedure contemplated therein has been adhered to, but it cannot be held as a shield by the Company to protect itself in the proceedings already initiated or to justify the non-compliance with the requirement of any other regulations, if it is still required to be complied.

15. Therefore, in the instant facts, when in a circumstance the proceedings under the SEBI Act read with SCR Act for not achieving the minimum public share holding requirement, action is initiated and an order dated 04.06.2013 is made and a confirmatory order dated 25.07.2014 is passed, the reduction permitted if given effect also, the non achievement of the public share holding will continue and consequences if any will follow. Hence it would not preclude SEBI from

proceeding further regarding which, as indicated, an order is already made by SEBI. M/s.Khoday India Ltd., are stated to have filed an appeal before the Securities Appellate Tribunal. Hence all that is required to be clarified herein is, since the said proceedings is a continuation of a different and distinct proceedings than the proceedings for reduction of share capital, all contentions of the parties therein would be considered in the appeal, independent of the order dated 07.08.2014. When such right is available to SEBI irrespective of the subsistence of the order dated 07.08.2014 passed in Co.P.No.132/2014, the consequences thereof would follow. Hence, the question of allowing SEBI to implead themselves would be wholly unnecessary, as even thereafter the result could be no different. If that be the position, the decisions in the case of ***U.P.Awas Evam Vikas Parishad***(supra) and in the case of ***Vidur Impex and Traders Private Ltd. and others*** (supra) are not of assistance in the present facts.

16. In the result, the following;

ORDER

(i) The C.A. Nos.1415/2014, 1416/2014 and 313/2015 are accordingly rejected.

(ii) The C.A.Nos.1648/2014 and 1778/2014 are disposed of as unnecessary.

(iii) It is however clarified that the order dated 07.08.2014 in Co.P.No.132/2014 shall remain independent and shall not effect the proceedings under SEBI Act and SCR Act initiated by SEBI for non-compliance of SCRR, which would be considered on its own merits and all contentions are left open in the appeal pending before the Securities Appellate Tribunal.

(iv) Parties to bear their own costs.

Sd/-
JUDGE

akc/bms