* **THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 14.01.2013

\+ WP(C) 1261/2002

THE SECURITIES & EXCHANGE BOARD
OF INDIA .....PETITIONER

Vs

A.P.L. INDUSTRIES LTD. & ORS. .....RESPONDENTS

ADVOCATES WHO APPEARED IN THIS CASE:
For the Petitioner: Ms. Maninder Acharya, Advocate
For the Respondents: None

CORAM :-
HON'BLE MR JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

1. This writ petition has been filed to assail the order of the Securities Appellate Tribunal (in short SAT) dated 18.10.2010.

2. It may be pertinent to note that by the said order, SAT has reversed the order dated 22.05.1998 passed by the Chairman, Security and Exchange Board of India (in short SEBI).

3. The challenge arises in the background of the following facts, most of which are not in dispute :-

3.1 Respondent no.1/company had floated a prospectus for a public issue of 30 Lakhs equity shares of a face value of Rs.10/- each, for cash at par

aggregating to a total sum of Rs.3 Crores. The public issue opened on 26.02.1996. The closing date for the issue was 08.03.1996.

3.2 Against the aforementioned public issue, respondent no.1/company received 51,37,100 applications by the date of closure i.e., 08.03.1996.

3.3 Evidently, there were certain withdrawals as well as rejection of the share applications filed with the Registrar to the Share Issue (in short the Registrar). Undisputedly 23,13,800 share applications were withdrawn, while 3,25,700 share applications were rejected on one ground or the other by the Registrar. Two important facts emerged by virtue of the aforesaid events.

3.4 First, that on the date of closure i.e., 08.03.1996, the public issue of respondent no.1/company was over-subscribed by almost 1.71 times. However, if the rejected share applications were taken into account which, as indicated above, numbered 3,25,700, on the date of closure i.e., 08.03.1996 the public issue was over-subscribed by 1.60 times as against 1.71 times, if all application forms were taken into account.

3.5 Second, if, however, the share applications in respect of which request for withdrawal had been received from the applicants were taken into account the subscription to the public issue of respondent no.1 fell to 94% of the total public issue. Similarly, if both the rejected share applications and the request for withdrawal of share applications was taken into account, the subscription to the public issue fell to 83% of the total public issue made by respondent no.1/company .

4. It is in the background of these undisputed facts that the issue which arises for consideration is whether the SEBI was right in directing refund of

the entire share application amount since, according to SEBI, respondent no.1/company had not been able to achieve the minimum subscription as provided in its prospectus.

4.1 It may be relevant, therefore to, extract the minimum subscription clause as contained in the prospectus :-

> "..MINIMUM SUBSCRIPTION
>
> IF THE COMPANY DOES NOT RECEIVE THE MINIMUM SUBSCRIPTION AMOUNT OF 100% OF THE ISSUE AS APPLICATION MONEY TILL THE CLOSURE OF THE ISSUE, THE COMPANY SHALL FORTHWITH REFUND THE ENTIRE SUBSCRIPTIOON AMOUNT REEIVED. IF THERE IS A DELAY IN REFUND OF THE AMOUNT COLLECTED, THE COMPANY AND THE DIRECTORS OF THE COMPANY SHALL BE JOINTLY AND SEVERELY LIABLE TO REPAY THE AMOUNT BY WAY OF REFUND WITH INTERST AT TEH RATE OF 15% PER ANNUM FOR THE DELAYED PERIOD BEYOND 78 DAYS FROM THE OPENING OF THE ISSUE..."

4.2 As would be evident respondent no.1/company was thus required to achieve a minimum subscription of 100% of the issue as the application money till the closure of the issue, failing which it was required to refund the entire subscription amount received from the applicants for allotment of shares.

4.3 Continuing with the narrative, the request for withdrawal of share application had been received by the Registrar between 08.03.1996 to 14.05.1996. Since the subscription had dropped to 83% of the total share issue, the lead Manager to the public issue, issued a certificate stating therein, inter alia, that respondent no.1/company had failed to achieve

minimum subscription. It may be pertinent to note that the lead Manager to the Share issue was one, Allianz Capital and Management Services Limited.

4.4 Based on the aforesaid events, SEBI shot of a communication dated 07.06.1996, whereby it advised respondent no.1/company to immediately refund the share application money to the concerned applicants, and file a status report with it, latest by 12.06.2012. Respondent no.1/company was also put to notice that if it failed to do the needful, SEBI would be constrained to take action against it, in accordance with the provisions of the Securities & Exchange Board of India Act, 1992 and the Companies Act, 1956 (in short the Companies Act). It may also be pertinent to note that in this very communication of 07.06.1996, there was a discussion as to the applicability of the provisions of Section 72(5) of the Companies Act. SEBI seems to have indicated in the said communication that, the applicant(s) who were desirous of being allotted shares, could withdraw their application after the expiry of the 5th day from the opening of the subscription list. A reference was also given to a previous precedent wherein SEBI had come to the same conclusion. A copy of the said appellate decision, in the case of Vishwalaxmi Petro Products Limited, was also, evidently furnished to respondent no.1/company .

4.4 It appears that being aggrieved, respondent no.1/company filed an appeal with SAT which, by an order dated 20.11.1996, rejected the appeal on the ground that the order impugned was not appealable as it was not an order passed under the provisions of the SEBI Act. Respondent no.1/company was thus permitted to approach the Chairman of the SEBI for redressal of its grievance.

4.5 Accordingly, respondent no.1/company approached the Chairman of the SEBI who by an order dated 22.05.1998 directed respondent no.1/company to refund the monies received from the applicants against the public issue.

4.6 It is this order which was assailed by respondent no.1/company before SAT. As indicated above, SAT by virtue of the impugned order dated 18.10.2000 reversed the order of the Chairman of SEBI dated 22.05.1998. It may only be recorded as a matter of fact that prior to approaching SAT respondent no.1/company had approached the High Court of Punjab and Haryana which in effect directed it to SAT, vide its order dated 14.10.1999 passed in CWP 10811/1998.

4.7 This resulted in SEBI being aggrieved by the order of SAT and hence chose to take recourse to a writ petition. For this purpose, a writ petition was filed in the Bombay High Court, wherein respondent no.1/company raised a preliminary objection with regard to the territorial jurisdiction, whereupon SEBI withdrew its writ petition, with liberty to approach the appropriate court. This order was passed on 09.01.2002.

4.8 Importantly, in the interregnum, the Bombay High Court had passed an order on 11.05.2001, whereby the bankers to the issue were restrained from making over moneys to respondent no.1/company.

5. It is in this background that the captioned writ petition has been filed in this court, by SEBI. The captioned writ petition was moved on 20.02.2002, when this court while issuing notice issued a similar ad interim direction, which was passed by the Bombay High Court, in effect, restraining the bankers to the issue from releasing payment to respondent no.1/company.

6. Pleadings in the writ petition are complete. There is no appearance on behalf of respondent no.1/company today in court. However, in pursuance to the directions issued by this court, written synopsis have been filed on behalf of the parties including respondent no.1/company.

6.1 The sum and substance of the respondent no.1/company's defence is as follows :-

(i). the prospectus constitutes an offer for subscription of shares and once an application is made the contract is complete and hence, it cannot be revoked by seeking withdrawal of the share application money. In other words, what is contended is that even after the 5th day of the opening of the subscription list, there can be no unilateral withdrawal of the share application money;

(ii). the withdrawal of the share application money can only be accepted by the company i.e., in this case respondent no.1/company and not by the Registrar. It is evidently the stand of respondent no.1/company that on the date of closure the public issue was over-subscribed by 1.71 times which was well over the minimum subscription of 100% as per the requirement stipulated in respondent no.1/company's prospectus and therefore, the condition prescribed therein was met. The provisions of Rule 2(3) of the SEBI, Registrar to an issue and Share Transfer Agents Rules 1993 are sought to be invoked to establish that it was never within the remit of the Registrar to permit withdrawal of the share applications. It is sought to be submitted that power, if any, to permit withdrawal of the share application vested with the Board of Directors of respondent no.1/company, and that, the Registrar in that regard had no power to return the share application money to the subscribers.

7. On the other hand, learned counsel for the petitioner, Ms. Acharya has submitted that it is well settled that the prospectus is an invitation to offer and that an applicant desirous of applying for shares, if any, of a listed company or otherwise can withdraw his offer prior to its acceptance. Ms. Acharya submits that the offer of an applicant culminates into a contract only upon allotment of the shares. In this case, according to Ms. Acharya withdrawal of the share application(s) took place before the allotment and therefore, as a matter of fact, in effect, the Registrar was only carrying out what is a ministerial act. Reliance was placed by her on the judgment of the Bombay High Court in the case of Vishwalakshmi Petro Products Ltd. vs Securities Exchange Board of India in WP(C) No. 728/1996 in the High Court of Judicature at Bombay.

7.1. In the alternative, Ms. Acharya argues that the Registrar is empowered to receive and permit withdrawal of the share applications. In this regard, Ms. Acharya places reliance on Rule 2(3)(i) and (iii)(b) of SEBI.

7.2 Furthermore, Ms. Acharya thus submits that, in terms of Section 69 of the Companies Act, the company which is respondent no.1 was prohibited from making an allotment if, it did not receive subscription equivalent to the minimum amount prescribed in the prospectus.

7.3. Mrs. Acharya also places reliance on Sub-Section (5) of Section 72 of the Companies Act, to contend that the prohibition on an applicant to withdraw his share application extends to the 5th day from the date of opening of the subscription list, and therefore, upon expiry of the said period, an applicant can make a request for withdrawal, in respect of which, neither the Registrar nor the company can have any say.

8. Having heard learned counsel for the petitioner and on perusal of pleadings, record and the written submissions filed on behalf of respondent no.1/company, what emerges is as follows :-

(i). That, on the date of closure of the share issue i.e., 08.03.1996, the public issue of respondent no.1/company was over-subscribed. The over subscription was to the extent of 1.17 times;

(ii). There were both rejections and withdrawals;

(iii). If, rejections are taken into account, the over-subscription dropped to 1.60 times of the total public issue;

(iv). If, however, the withdrawals were also taken into account, the subscription to the share issue dropped to a figure below the minimum subscription, which was equivalent to, in percentage terms 83% of the total issue.

9. The question, therefore, arises as to whether the date of closure is to be taken into account for determining whether or not the petitioner company achieved the minimum subscription. Undoubtedly, what can be said in favour of respondent no.1/company that the clause pertaining to minimum subscription, as appearing in the prospectus, did indicate that respondent no.1/company was required to refund subscription amount received if it did not receive 100% of the total issue amount till the date of closure of the issue. However, this contractual clause has to be understood in the context of the transaction at hand. The transaction at hand concerns an application for shares which is made by an entity including an individual to a company, pursuant to a prospectus being issued, in this case by respondent no.1/company.

9.1. If that be so a share application is like any other offer which would require acceptance of the offer made. The acceptance of an offer of this nature can only be brought about, inter alia by allotment of shares made in favour of the applicant by some overt method. Like in any other transaction between two individuals before an offer is accepted, the offerer is entitled to revoke the offer. This is precisely what happened in the present case. The minimum subscription clause is inserted in a prospectus to protect the interest of the investors, which is why Section 69 of the Companies Act provides that if minimum subscription is not achieved, a company issuing the prospectus cannot proceed to allotment of shares. The purpose being that it would be pointless to have investors provide capital to the recipient company unless the minimum amount is received by such a company for the purpose stated in the prospectus. The argument advanced on behalf of respondent no.1/company that on receipt of the share application form, a concluded contract came into existence, is a submission which is completely misconceived because if it was so the concerned company would have to, as of necessity, allot to the applicant, without fail, the exact number of shares for which a request is lodged. As is well known, on very many occasions the opposite happens. This is legitimate since in law, a share application is only an offer.

9.2 Therefore, in my opinion, the minimum subscription clause appearing in the prospectus would have to yield to the right of an applicant to withdraw his offer before its acceptance. I may note here the argument of Ms. Acharya, learned counsel for the petitioner, made on the same lines, that the prospectus issued by a company was an invitation to offer and if the application for shares is made, pursuant to issuance of a prospectus, it was only an offer which could be withdrawn at any stage before its acceptance.

I am in agreement with this submission of the learned counsel for the petitioner. [***See AIR 1933 Madras 320, Official Liquidator of Bellary Electric Supply Co. Ltd. Vs. Kanniram Rawoothmal*** and ***A. Sirkar vs Parjoar Hosiery Mills Ltd. 1933 (3) Comp.Cas 454***]

9.3 Therefore, in my opinion, minimum subscription would have to be calculated after taking into account the requests made for withdrawal of share application.

9.4 There is another reason for coming to the same conclusion. Undoubtedly, in this case like in other public issues, there are rejections by a Registrar based on various technical grounds. If as per the clause of minimum subscription, the minimum subscription had to be calculated as on the date of closure, it would be well-nigh impossible to carry out that exercise as more often than not the rejections are made even after the date of closure.

9.5 Therefore, if the minimum subscription amount is not reached, which is the case in the present petition, then surely no allotment can be made. There can be no dispute about this position in view of the provisions of Section 69 of the Companies Act. The minimum subscription, therefore, would have to be calculated by taking into account the factum of number of withdrawal request rejections made qua share application received. Since the contract between the applicant and the company is concluded only on the allotment of shares the withdrawal request can be made by an applicant well before the said date. There is no dispute vis-a-vis the fact that withdrawal requests were made.

10. The other aspect of the matter which has come to fore is, does the request for withdrawal get triggered automatically or does it require

acceptance. The stand of the respondent no.1/company which has been accepted by SAT is that the withdrawal can only take place if its is accepted by the company and since in the present case, the withdrawal request was accepted by the Registrar the order of the Chairman SEBI had to be reversed. As rightly argued by Ms. Acharya, the fallacy in this conclusion is that it is premised on the reasoning that a request for withdrawal of a share application requires acceptance. Once a request is triggered for withdrawal of a share application, in law, it requires no acceptance. The only bar which is statutorily introduced, is one, provided under section 72(5) of the Companies Act. The bar is also put in place for a limited period of time i.e., till the closing of the 5th day of the opening of the subscription list. It is no one's case before the authorities below that withdrawal applications were not received after the expiry of the eclipse period, as provided in section 72(5) of the Companies Act.

11. Having regard to the aforesaid, I am of the view that the order of the SAT deserves to be set aside. It is ordered accordingly. In that view of the matter, the order of the Chairman SEBI dated 22.05.1998 would have to be sustained and the directions contained therein for refund of the money to the share applicants would have to be implemented. It is ordered accordingly. The SEBI shall ensure that refund is made to the share applicants, as expeditiously as possible, in accordance with law. Any interest earned on the interregnum amongst the applicants in accordance with law. Deficiency, if any, shall be recovered from respondent no.1/company, once again, by taking recourse to the relevant provisions of law.

12. Before I conclude, I may also notice that there is something to be said vis-a-vis the power of the Registrar to permit withdrawal of a share

application and consequent refund. A reference in this regard may be made to Rule 2(e)(i)(iii)(b) of the SEBI Rules. It is quite clear if the Registrar has the power to finalise the list, implicit in that power is the power to order refund qua request for withdrawal of share application. Accordingly the order dated 20.02.2002 which was made absolute on 22.08.2005 is vacated.

13. The writ petition is, accordingly, disposed of.

RAJIV SHAKDHER, J

JANUARY 14, 2013
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