BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 65 of 2013

Date of decision: 03.07.2013

M/s. Gillette India Limited
P & G Plaza, Cardinal Gracias Road,
Chakala, Andheri (East),
Mumbai – 400 099. …… Appellant

Versus

1. Securities and Exchange Board of India
   SEBI Bhavan, Plot No. C-4A, G Block,
   Bandra Kurla Complex, Bandra (East),
   Mumbai - 400 051.

2. Procter & Gamble India Holdings B.V
   Watermanweg 100,
   3067 GG Rotterdam,
   Netherland.

3. Shri S K Poddar
   Hongkong House,
   31 Dalhousie Square(S),
   Kolkata 700 001. …… Respondents

Mr. Somasekhar Sundaresan, Advocate with Mr. Ravichandra S. Hegde, Mr. Abishek Venkatraman, Advocates for the Appellant.
Mr. J. J. Bhatt, Senior Advocate with Mr. Ajay Khaire, Advocate for Respondents.

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

Per : Jog Singh

The present appeal is filed by Gillette India Limited, hereinafter referred to as "Appellant", against order dated April 26, 2013 ("Impugned Order") passed by the Securities and Exchange Board of India, hereinafter referred to as "Respondent no. 1", rejecting the method proposed by the Appellant to attain the minimum public shareholding requirement of 25% in accordance with the Securities Contracts (Regulation) Rules, 1957 ("SCRR"). The appeal

has been filed under Section 15T of the Securities and Exchange Board of India Act, 1992 (“SEBI Act”).

2. Respondent number 2 is a promoter of the Appellant based out of India holding 75.9% of the voting rights in the Appellant company. Respondent number 3 is the Indian promoter group which is entitled to 12.9% of the voting rights.

3. Brief facts leading up to the dispute are that the Appellant is a public company with shares listed on the Bombay Stock Exchange Limited (“BSE”) and the National Stock Exchange of India Limited (“NSE”). The Appellant, jointly promoted by the Poddar Group (“Poddar Group”) and the Procter and Gamble Group (“P&G Group”) who are parties to a Shareholders’ Agreement dated July 10, 1996 (“SHA”), made an Application dated October 10, 2012 to Respondent No. 1 under paragraph 3 of Circular dated August 29, 2012 proposing a method to attain the mandatory requirement of minimum public shareholding of 25% in all listed companies, as the current public shareholding of the Appellant is 11.2%, which is significantly below the prescribed 25% limit.

4. As of today, the respective shareholdings of the Poddar Group and the P&G Group stand at 12.9% and 75.9%. The manner in which to achieve the required public shareholding as presented by the Appellant in the Application, in brief, is that the Poddar Group would first transfer 4% of its shares to the P&G Group, which being an inter-se transfer of shares held by the Poddar Group for around 16 years would be exempt from the obligation of making an open offer as per Regulation 10(1)(a)(ii) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (“SAST Regulations, 2011”), which reads as under :-

> "10.(1) The following acquisitions shall be exempt from the obligation to make an open offer under regulation 3 and regulation 4 subject to fulfillment of the conditions stipulated therefor,-
>
> (a) acquisition pursuant to inter se transfer of shares amongst qualifying persons, being,-
>
> (i) …….
>
> (ii) persons named as promoters in the shareholding pattern filed by the target company in terms of the listing agreement or these regulations for not less than three years prior to the proposed acquisition".

5. As a result of this transfer, the holding of the Poddar Group would go down to 8.9%. This would be followed by termination of the SHA and amendments to the Articles of Association of the company, as a result of which the Poddar Group would be classified as an ordinary public shareholder and would lose all its rights and control over the Appellant as promoter.

6. Respondent no. 1 first passed an order dated November 7, 2012 rejecting the Application of the Appellant against which the Appellant preferred appeal no. 26 of 2013 before this Tribunal. The appeal was filed on the ground that no cogent reasoning had been given in the order on the basis of which the Application had been rejected. This Tribunal indeed found that to be the case and, hence, remanded the matter back to Respondent no. 1 on February 22, 2013 ordering it to pass a speaking order on the request made by the Appellant. The present appeal has been filed against the Impugned Order passed by Respondent no. 1 in response to the Tribunal's order dated February 22, 2013.

7. The learned counsel for the Appellant, Shri Somasekhar submits that the Circular of August 2012 expressly provides that in order to achieve the minimum public holding, listed companies may approach SEBI to seek approval for any method that they wish to adopt with the aim of reaching the

25% threshold. Therefore, the Respondent No. 1 is precluded from saying that the method in question is not provided for in the Circular in question.

8. The Appellant submits that the classification of the Poddar Group as a public shareholder, as part of the proposed transaction, is not merely a change in nomenclature but a change in the status of the Poddar Group as is evidenced by the loss of all special and extraordinary rights and obligations regarding sale of shares held in the equity share capital of the Appellant. As submitted by the Appellant hereinabove such inter-se transfer of shares between the Poddar Group and P&G Group is exempt from any obligation of an open offer under Regulation 10(1)(a)(ii) of the SAST Regulations, 2011. It is also stated that nowhere in the SEBI Act, or under rules and regulations framed by the SEBI it is provided that once a shareholder is classified as a promoter, it must remain one for all times to come inspite of a factual change in its status.

9. The Appellant further submits that once the proposed transaction is complete the Poddar Group will hold 8.9% shares in the Appellant, which, as per the Appellant, is akin to the shareholding of an ordinary shareholder. The Appellant has provided a list of instances wherein even shareholders holding more than 10% voting rights in a company have been classified and treated as public shareholders. The Appellant also submits that the SCRR states that definitions contained therein are applicable “unless the context otherwise requires”, and that once the proposed transaction is completed the Poddar Group’s residual stake in the Appellant would reclassify it as a public shareholder leaving no room for confusing the definition of the ‘promoter holding’ with that of ‘public shareholding’. It is further stated that if the interpretation given to these two expressions by the Respondent No. 1 is accepted, it would lead to an absurd consequence of a promoter never being

able to shed its status as a promoter and take on that of an ordinary shareholder.

10. Finally, it is submitted by the Appellant that the proposed transaction is in accordance with the letter and the spirit of Rule 19A of the SCRA. In the last phase of the Appellant's proposed transaction, once the Poddar Group joins the ranks of a public shareholder, the Appellant will cause the P&G Group, who shall then be holding 79.9% of the issued share capital, to sell or otherwise dilute 4.9% of their shareholding in the Appellant company in the manner prescribed by the Respondent No.1 for achieving minimum public shareholding. In this context, it is stated that even after categorically making provisions for the dilution of 4.9%, the Respondent No. 1 has gone on to state that the proposed transaction "does not involve any offer and/or allotment of shares to the public shareholders" whereas, the proposed transaction contemplates an offer of 1,596,676 equity shares of the Appellant to the public shareholders albeit indirectly. It would meet the objective of increased public float and avoidance of concentration of stock in the hands of a few persons is, therefore, the contention of the Appellant.

11. We shall now deal with the submissions of the Respondent No. 1 in brief. The Respondent No.1 submits that the SCRR, as framed by the Central Government, provide for the compliance by companies listed on stock exchanges of certain conditions stipulated therein, one of which is the continuous requirement to ensure a minimum public shareholding of 25%. This criterion emanates from Rule 19A(1) of the SCRR which states as follow :-

> "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."

12. Further, clause 40A of the listing agreement entered into between a particular company and the concerned stock exchange vests a legal obligation in listed companies to compulsorily comply with initial as well as continuous listing requirements with respect to public shareholding as provided for in the SCRR.

13. Shri J. J. Bhatt, learned senior counsel for the Respondent No. 1 argued that after first introducing the requirement in 2001 in the form of clause 40A, a number of amendments were effected over the years to ensure that the condition stipulated is such that it noticeably embodies the need to maintain a healthy public float in the interest of the securities market. Rule 19A was thus introduced vide the Securities Contracts (Regulation) (Second Amendment) Rules, 2010 providing for the requirements regarding continuous listing for listed companies. The Respondent No. 1 submits that the case of the Appellant falls within the first proviso to Rule 19A(1), which requires every listed company to increase its public shareholding to minimum of 25% within a period of three years from June 4, 2010, i.e., the date on which the Securities Contract (Regulation) (Amendment) Rules, 2010 came into force.

14. It is also submitted by the Respondent No. 1 that the amendment of 2010 also introduced the definitions of public and public shareholding in the SCRR. These have been reproduced below for the sake of convenience :-

> "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."

15. The Respondent No. 1 further submits that it issued a Circular dated December 16, 2010 to amend Clause 40A of the Listing Agreement providing for certain methods to satisfy the condition of minimum public shareholding Next, the Respondent No. 1 gave another opportunity to listed companies to comply with the requirement of 25% minimum public shareholding in the form of Circulars dated February 8, 2012 and August 29, 2012 which listed other methods to achieve the mandatory threshold for all companies listed on recognized stock exchanges.

16. It may be noted that vide Circular dated August 29, 2012, the Respondent No. 1 offered to consider any method, other than the ones specifically provided for in various preceding circulars so that a company would come up with an acceptable way to fulfill the required criterion of minimum public shareholding without trying to circumvent the law in any way.

17. The Respondent No. 1 submits that the object of Rule 19A(1) of the SCRR is to compulsorily bring about increase in public shareholding of listed companies and the circulars issued by the Respondent No. 1 only supplement the rule, they should, thus, be read harmoniously with Rule19A(1). It is stated that the said rule grants the Respondent No. 1 the discretion to decide whether or not to accept the method put forth by any listed company as per circular dated August 29, 2012. The Respondent No. 1 submits that the proposal of the Appellant as stated in the application dated November 10, 2012 made to the Respondent No. 1 does not take into account the philosophy behind Rule 19A(1), viz., that of maintaining a strong participation of the general public as shareholders in listed companies, which is due to the fact that the Appellant's proposal does not, in simple terms, talk about offering shares to the public, rather it involves the reclassification of a promoter as a public shareholder by changing the nomenclature of the Poddar group from a promoter to a public shareholder. This is contrary to the spirit of Rule 19A(1). The Respondent No. 1 has repeatedly submitted that the proposed transaction, being the inter-se transfer of shares between shareholders of the Appellant company, does not lead to “broad basing/dispersing of ownership/shareholding of the company”. It is submitted that since there will not be any allotment of shares, which looked at objectively would be a rather simple way of respecting Rule 19A(1), the method of attaining minimum public shareholding being put forth by the Appellant, would not create the required “dispersed shareholding structure which is essential for the sustenance of a continuous market for listed securities to provide liquidity to the investors and to discover fair price.”

18. We have heard the learned counsel for both parties at length and gone through the appeal as well as all the documents annexed thereto.

19. Before dealing with the merits of the case, we find it necessary to first delve deep into the history of this requirement of minimum public shareholding to bring out the true import and object of the Rule. Now, companies in order to get their shares listed on a stock exchange must fulfill certain criteria prescribed in the SCRR. The SCRR requires listed companies comply with all conditions as mentioned in the listing agreement executed between the company and the stock exchange concerned. The first amendment to the SCRR was introduced on **June 4, 2010**, raising the minimum public shareholding requirement to 25% as a pre-requisite to getting listed with any recognized stock exchange. For companies which were already listed but did not meet the 25% criterion, it was ordained that they would gradually increase their public shareholding at the rate of 5% per annum. Further, it was provided that if any listed company had its public shareholding drop below the requirement of 25%, the company would be under an obligation to take it back up to 25% within a year of the shareholding dropping below 25%.

20. The SCRR was amended once again on **August 9, 2010**, altering Rule 19(2)(b) and inserting a new rule, viz., Rule 19(A). This amendment in effect provided that all listed companies would need to maintain a consistent public shareholding of 25% and those listed companies whose public shareholding was below the 25% benchmark were directed to satisfy the requirement within a period of three years from June 4, 2010, i.e., the day on which the SCRR was first amended with respect to the minimum public shareholding.

21. On December 16, 2010, SEBI issued a Circular amending Clause 40A of the Listing Agreement to provide for the manner which could be adopted by companies to increase their public shareholding to the mandatory requirement of 25%. The Circular provided for the following methods :-

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.

22. Following the said development, and Circular dated February 8, 2012 enabling listed companies to attain the minimum public shareholding of 25% through Institutional Placement Programme (IPP) was issued by SEBI. Finally, in August, SEBI issued a Circular prescribing more methods by which to achieve the seemingly elusive goal of making listed companies take their public shareholding up to 25%. The following additional methods were provided for :-

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.

23. As per the SEBI website, the Circular of August 29, 2012 under which the Appellant has made its application was result of a board meeting of SEBI held on August 16, 2012 in which it was decided that “in exceptional situations, where any company has a special difficulty in following the prescribed methods because of reasons peculiar to it”, the Chairman would be authorised “to approve a specific solution on a case to case basis to meet the larger objective of attaining minimum public shareholding and market integrity”.

24. As discussed above, the Appellant made an application proposing a method to achieve the requisite public shareholding in the company as per Circular dated August 29, 2012 which stated clearly that SEBI would have the

discretion to accept or reject any new proposal put forth by a listed company on a case to case basis. In our opinion, the Appellant seems to have overlooked, whether deliberately or inadvertently, the fact that the underlying philosophy behind the requirement of a minimum public holding of 25% is prevention of concentration of shares in the hands of a few market players by ensuring a sound and healthy public float to stave off any manipulation or perpetration of other unethical activities in the securities market which would unfortunately be the irrefragable consequence of the reins of the market being in the hands of a few.

25. It is pertinently noted that in the proposition put forth by the Appellant, the entire idea behind having a specific percentage of 25 involving a large number of the members of the public in the shareholding of listed companies, is eclipsed by the Appellants trying their best to part with as little of the promoters' shareholding as possible. Further, in relation to the rationale behind inclusion of Rule 19A in the SCRR, a Press Release dated June 4, 2010, issued by the Finance Ministry, following the introduction of Rule 19A, is relevant and reproduced hereinbelow :-

> "A dispersed shareholding structure is essential for the sustenance of a continuous market for listed securities to provide liquidity to the investors and to discover fair prices. Further, the larger the number of shareholders, the less is the scope for price manipulation."

26. It is, thus, noteworthy that the Appellant intends to achieve the minimum public shareholding requirement of 25% by first taking the shareholding of the P&G Group, which already stands at 75.9%, i.e., beyond the prescribed promoter shareholding, further up to 79.9% which would be the result of the Poddar Group transferring 4% of their shareholding to the P&G Group and would be ex-facie in breach of law. In effect, the Appellant intends

to first violate the law by raising the shareholding of the P&G Group substantially beyond the 75% benchmark and thereafter by relegating the Poddar Group to the ostensible stature of a public shareholder, and once the Appellant has intentionally broken the law, the P&G Group proposes to offer an insignificant 4.9 of their shares to the public. We fail to understand as to why the Appellant does not comply with the requirement of 25% of public shareholding by adopting a simple and straight forward approach and offering the shortfall in 25% public shareholding to the public through one of the methods elucidated by SEBI, as brought out in paras 22 and 23 above or which gets the approval of SEBI, instead of adopting a contentious and circuitous method which is against the spirit of law, as one proposed by them presently. Moreover, no hardship or problems have been brought forth during the course of proceedings before this Tribunal which seem insurmountable to such an extent as to lead the Appellant to come up with such a dubious manner of achieving the 25% requirement regarding public shareholding while ignoring all other perfectly executable methods suggested by SEBI in various circulars issued over the past few years. The SEBI cannot be made a party to such an unlawful scheme as the one proposed by the Appellant.

27. The Tribunal also notes the delay on part of the Appellant to come up with a proposal to achieve the minimum public shareholding. It is clear from the records that the first amendment to the SCRR was made on June 4, 2010 and that the Appellant waited for more than two years to draw up the scheme as presented in Application dated October 10, 2012. A feeble attempt at explaining the aforesaid delay was made by the Appellant at the hearing of this Appeal, the submission made was twofold :-

i) First, it was stated that a long period of 3 years had been granted by the Respondent to achieve the required minimum public shareholding, and the Appellant was well within its right to make the Application on October 10, 2012.

ii) Second, the Appellant submitted that SEBI itself delayed the process by coming out with Circulars every six months.

28. With respect to the first submission of the Appellant, it is our considered view that on the Respondent No. 1 first amending the SCRR by increasing the minimum public shareholding in listed companies to 25% on June 4, 2010, the Appellant should have behaved like a proactive and responsible entity by immediately putting its machinery into gear and doing everything possible to work in consonance with the law to protect the interests of the market. Similarly, regarding the submission about the supposed delay caused by SEBI's actions, we find that the Respondent No. 1 was not enjoined by law to issue one circular after another prescribing ways and means which could be resorted to by listed companies to comply with the amendments in the SCRR. The Respondent No. 1 did so with the laudable purpose of ensuring fairness in the market by providing listed companies with as many techniques as possible to honorably raise their public shareholding up to the requisite benchmark. When the Appellant itself waited till the fag end of the window period of 3 years provided to listed companies to ensure adherence with the Regulation in question, the Appellant is precluded from turning around and pointing fingers at SEBI for trying feverishly to facilitate listed companies in their endeavor to achieve the prescribed minimum public shareholding of 25%. SEBI was under no obligation to issue repeated circulars prescribing method after method which could be adopted to achieve the aforesaid goal, but it did so to help listed corporates embark upon the right path in order to ensure a larger public float in the Indian capital market.

29. For the reasons mentioned above, the impugned order is upheld and the appeal, being bereft of any merit, is hereby dismissed. Accordingly, interim

relief granted on May 30, 2013 also stands vacated. No costs.

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

03.07.2013
Prepared & Compared by
ptm