BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on : 19.08.2013

Date of Decision : 10.09.2013

Appeal No. 133 of 2013

Fresenius Kabi Oncology Limited
Echelon Institutional Area,
Plot No. 11, Sector 32,
Gurgaon- 122 001,
Haryana, India. …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. Janak Dwarkadas, Senior Advocate with Ms. Akila Agrawal and Mr. Anish Wadia, Advocates for the Appellant.

Mr. Shiraz Rustomjee, Senior Advocate with Mr. Mihir Mody and Mr. Pratham V. Masurekar Advocates for the Respondent.

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

Per : Jog Singh, Member

1. The present appeal has been filed against order dated July 22, 2013 ("Impugned Order") passed by the Respondent, SEBI against the Appellant, Fresenius Kabi Oncology Limited, directing the latter to consider its shareholding prior to the offer for sale ("OFS") launched by it on October 12, 2012, for the purposes of determining the application of Regulation 17 of the SEBI (Delisting of Equity Shares) Regulations, 2009 ("Delisting Regulations").

2. The Appellant is a public limited company incorporated under the Companies Act, 1956 in March 2003. It is engaged in the business of research, development, production and distribution of formulations used in oncology. Its business is spread over the country, as well as some parts of the world. Its shares are listed on the Bombay Stock Exchange Limited ("BSE") and the National Stock Exchange of India Limited ("NSE"). Fresenius Kabi (Singapore) Pte. Ltd. ("FKSL") is the Appellant's promoter company holding 81% of the total paid up share capital in the Appellant company.

3. Brief facts leading up to the instant appeal are that the public shareholding in the Appellant stood at 10% as opposed to the mandatory requirement of 25% which has been prescribed by the amended Securities Contracts (Regulation) Rules, 1957 ("SCRR"). In order to achieve this minimum public shareholding, FKSL's board of directors on May 30, 2012 decided to issue the OFS. This was done on October 12, 2012 after seeking and receiving the required approvals from the Foreign Investment Promotion Board ("FIPB"). Keeping in view the response to such offers launched earlier by companies such as ONGC and Wipro, the Appellant decided to launch the OFS in 2 tranches of 7.5% each. On October 12, 2012 when the OFS was issued, it was issued with an option to sell an extra 1.5% of the Appellant's shares if the OFS was received well in the capital market. As it turned out, the Appellant ended up divesting its shareholding by 9% and consequently, FKSL's shareholding in the Appellant was reduced to 81%.

4. Regrettably, in January 2013, the Food and Drugs Administration ("FDA") of the US, while conducting a routine inspection at the Kalyani plant belonging to the Appellant, found certain discrepancies in adherence to norms with respect to manufacturing, documentation practices and product testing. Following this development, the Appellant immediately stopped the functioning of the Kalyani plant. The plant has been inoperative since February, 2013. Relevant disclosures

regarding the aforesaid were made to the BSE and the NSE, as required by the Listing Agreement, on February 26, 2013.

5. Next, the Appellant decided to undertake voluntary delisting, and by letter dated April 16, 2013 FKSL proposed to launch a delisting offer to its public shareholders to acquire the entire public shareholding of the Appellant, i.e., 19% of the Appellant's capital, as per the Delisting Regulations. A resolution was passed at a meeting of the board of directors of the Appellant on April 17, 2013 resolving to seek the shareholders' approval regarding the proposed delisting through postal ballot. Following up on the aforesaid resolution, postal ballot notices were sent to the shareholders of the Appellant and advertisements were published in leading newspapers on April 24, 2013. The postal ballot resolution was successfully passed and its result declared on May 25, 2013. Also, the resolution was passed by the public shareholders by way of a two-thirds majority as required by Regulation 8(1) (b) of the Delisting Regulations.

6. The result of the postal ballot was sent to the Respondent vide letter dated May 25, 2013, and on the same day the information was communicated to the two stock exchanges concerned. Further, in-principle approvals sought from the BSE and the NSE, as mandated by Regulation 8(1) (c) of the Delisting Regulations, were received by the Appellant vide letters dated May 30, 2013 and June 3, 2013, respectively.

7. Order dated June 4, 2013 was passed by the Respondent forbidding FKSL and the Appellant from accessing the securities market in any way whatsoever, whether directly or indirectly except in order to comply with the mandatory minimum public shareholding requirement. The Appellant filed Appeal No. 117 of 2013 before the Tribunal against the said order, which was disposed of vide order dated June 24, 2013 by the Tribunal directing the Appellant to file a representation

stating all the relevant facts with respect to the delisting offer, and asking the Respondent to decide the matter within 4 weeks.

8. A representation dated June 26, 2013 was filed by Appellant before the Respondent, as directed by this Tribunal making the following requests :-

> *"(i) modify paragraph 17(b) of the SEBI Order so as to permit FKSL (as the promoter of the appellant) to buy the securities of the Appellant from its public shareholders as part of the Delisting Offer;*
>
> *(ii) grant exemption to the independent directors of the Appellant from the application of paragraphs 17(b) and 17(d) of the SEBI Order; and*
>
> *(iii) condone the delay of the Appellant in complying with the MPS norms and grant an extension of 3 months to the Appellant for complying with the MPS norms prescribed under SCRR in view of the Delisting Offer."*

9. A personal hearing was granted to the Appellant on July 5, 2013, after which the Appellant provided the Respondent, vide letter dated July 8, 2013, with copies of the following :-

> *"(a) Letter dated February 26, 2013 addressed to the Stock Exchanges informing, inter alia, that the Appellant had voluntarily put the production on hold at its Kalyani plant post the inspection by the US FDA; and (b) letter dated July 5, 2013 addressed to the Stock Exchanges informing that the Appellant has received a warning letter from the US FDA with respect to the Appellant's operations at the Kalyani plant."*

10. Finally, on July 22, 2013 the Impugned Order was passed by the Respondent, modifying the directions issued vide order dated June 4, 2013, in the following manner :-

> *"(i) The direction issued in paragraph 17(b) of the SEBI Order stands modified to the extent that it shall not hinder the already announced voluntary delisting offer/process initiated by the Appellant and the FKSL (the promoter of the Appellant) shall be permitted to buy the equity shares from the public shareholders as part of the Delisting Offer. The Appellant shall endeavor to complete the delisting process within a period of three months*

from the date of the Impugned Order and report its outcome on completion of the three months period.

(ii) In the proposed Delisting Offer of the Appellant, the pre-OFS shareholding of FKSL shall be applicable for the purposes of regulation 17 of Delisting Regulations.

(iii) The direction contained in paragraph 17(b) of the SEBI Order shall be re-imposed/revived immediately in case the delisting process of the Appellant is not successful within a period of three months from the date of the Impugned Order.

(iv) The directions contained in paragraphs 17(a),(c) and (d) of the SEBI Order shall continue till the time the Appellant is delisted from the stock exchanges or till the time the Appellant becomes compliant with the MPS norms."

11. We shall now deal with the Appellant's submissions in brief. The Appellant submits that the Impugned Order, having been passed while arbitrarily increasing the percentage of shareholding required for the successful completion of the delisting offer, is baseless considering the fact that none of the provisions under which it has been passed empower the Respondent to amend the Delisting Regulations. The provisions of the SEBI Act and the Securities Contracts (Regulation) Act, 1956 ("SCRA Act") vest in the Respondent wide powers to take measures in the interest of investors, however, these are strictly subject to the SEBI Act. The Delisting Regulations specify a certain threshold that ought to be taken into consideration while making a delisting offer as the shareholding of the promoters at the time of making the delisting offer, which in the present case is 81% as such, it is unlawful for the Respondent to prescribe a higher threshold of 90%, i.e., the shareholding of FKSL before making the OFS. The Impugned Order is, thus, ultra vires the SEBI Act and the Delisting Regulations.

12. It is the Appellant's contention that although the Respondent has the power to take measures under the SEBI Act and the SCRA, it can do so only after undertaking an inquiry into the matter concerned. In the present case no investigation has been conducted or show cause notice issued to the Appellant. The Impugned Order has been passed solely on the basis of 4 complaints received by the Respondent, copies

of which were sent to the Appellant. The Appellant has replied to all 4 complaints addressing the concerns of the complainants. The Respondent has not taken any action with respect to the complaints after receiving the Appellant's reply. The complaints in question, alleging that the Appellant may have acted in collusion with investors who bought the Appellant's shares pursuant to the OFS launched in October 2012 with the intention of eventually selling those shares off in the delisting offer, is based on nothing material. The Impugned Order is flawed in that even while it recognizes the genuine predicament that the Appellant is in, which led the Appellant to making the delisting offer, the Impugned Order imposes the ridiculous condition on FKSL of taking its shareholding up to 95% in keeping with Regulation 17 of the Delisting Regulation, when the actual position in law is that, based on the current shareholding of FKSL in the Appellant, i.e., 81%, FKSL should only be required to take it up to 90.5%.

13. We now come to the Respondent's case. The only ground on the basis of which the Respondent has directed the Appellant to comply with Regulation 17 of the Delisting Regulations while taking the pre-OFS shareholding of FKSL as the threshold is that, it received complaints accusing the Appellant of perhaps having acted in concert with investors purchasing shares amounting to 9% of the Appellants shareholding in response to the OFS. These investors might have bought the shares concerned with the aim of selling them off at artificial prices when the Appellant makes its delisting offer, to assist the Appellant in successfully completing its delisting offer.

14. The Respondent submits that since the company had failed to comply with the minimum public shareholding requirement, it should be forced to offer such compliance, in the absence of any other penalty being levied on it. As such, the Respondent, although allowing the Appellant to go ahead with its delisting process, deems it necessary to impose a condition regarding the compliance with Regulation

17 by directing the Appellant to take FKSL's pre-OFS shareholding into consideration while making the delisting offer.

15. We have heard both the parties at length and perused the appeal, along with documents attached thereto. On June 4, 2010 the SCRR was amended vide a notification by the Central Government adding a new rule, viz., Rule 19A, to the SCRR. It has provisions to the effect that a minimum of 25% public shareholding would compulsorily be maintained by all public listed companies. Those companies which had a public float of less than 25% were directed to increase it by 5% every year. Rule 19A was amended once again vide notification dated August 9, 2010 to provide that instead of increasing their public shareholding by 5% every year, public listed companies would be required to achieve the 25% benchmark within 3 years from the date of the first amendment, i.e., June 4, 2010.

16. The Listing Agreement was subsequently amended to mirror the changes made to the SCRR vide circular dated December 16, 2010 issued by SEBI. It was further amended vide circular dated February 8, 2012 providing for two new methods through which to attain the minimum public shareholding in question, viz., Institutional Placement Programme and OFS through the stock exchange.

17. For the sake of convenience, we deem it necessary to recapitulate a few undisputed facts in the matter. Once circular dated February 8, 2012 was issued, it took the Appellant less than 4 months to decide on issuing an OFS. It was prudently decided that the OFS would be completed in 2 tranches of 7.5% each, so as to give the Appellant the opportunity to gauge the investor response. The first leg of the OFS was undertaken and completed on October 12, 2012 as a result of which the stake of the Appellant was diluted to the extent of 9%.

18. Subsequently, owing to an unfortunate turn of events, the FDA pointed out certain irregularities in the functioning of the Appellant's Kalyani plant to the following extent :-

1) Irregularities in the manufacturing section;
2) Irregularities with respect to documentation practices and
3) Irregularities with respect to product testing.

This sad state of affairs led the Appellant to stop all production and other activities at the Kalyani plant immediately, and prompted it to make a delisting offer keeping in view the following factors :-

i) The Fresenius group has global reach. The Appellant being a company listed on the BSE and the NSE is obligated to inform the two stock exchanges of the FDA findings, which is likely to adversely affect not only the image of the Appellant, but also the interests of the entire group as a whole.

ii) The Appellant appreciates and acknowledges the fact that the issues pointed out by the FDA with respect to the non-conformities relating to Good Manufacturing Practices, i.e., GMPs, need to be dealt with at once and as such, the Appellant will have little time on its hands to try and maintain investor relations.

19. We find ourselves agreeing with the Appellant. After the delisting process is completed FKSL will be able to better influence the operations of the Appellant, thereby facilitating its business. The public shareholders would be in a position to exit the company at a good profit and once FKSL takes full control of the Appellant, the Fresenius group as a whole would be able to better manage the affairs of the Appellant in tune with its own functioning.

20. It is clear from the facts on record that the OFS was made with a bonafide intention to in effect comply with the mandatory requirement of a 25% public shareholding as provided by Rule 19A of the SCRR. It is the negative findings of the FDA which led the Appellant to make the delisting offer. It is a fact that all necessary in-principle approvals required for the purposes of the delisting had been received by the Appellant from the two stock exchanges. A company secretary issued a certificate of compliance with Regulation 8 (1) (b) of the Delisting Regulations in favour of the company which shows that the delisting process was being carried on in accordance with the applicable law concerned. Now, when the

delisting process was continuing smoothly, the Respondent suddenly decided to intervene and impose the needless condition on the Appellant that it ought to take its pre-OFS shareholding into consideration while complying with Regulation 17(b) of the Delisting Regulations. Regulation 17 is reproduced hereinbelow :-

> *"17. An offer made under chapter III shall be deemed to be successful if post offer, the shareholding of the promoter (alongwith the persons acting in concert) taken together with the shares accepted through eligible bids at the final price determined as per Schedule II, reaches the higher of – (a) ninety per cent of the total issued shares of that class excluding the shares which are held by a custodian and against which depository receipts have been issued overseas; or (b) the aggregate percentage of pre offer promoter shareholding (along with persons acting in concert with him) and fifty per cent of the offer size."*

Regulation 17(b) essentially, and rather unequivocally states that for an offer to be successful the post offer shareholding of the promoter group, in this case FKSL, should be the total of the pre-offer shareholding and 50% of the offer size. In the present case this would be the aggregate of the current shareholding which is 81% and 50% of the offer size, i.e., 9.5, which would mean that FKSL needs to have a 90.5% shareholding in the Appellant company to have successfully delisted.

21. It is evident from the way Regulation 17 (b) has been worded that the provisions of said regulation are not qualified by any other consideration whatsoever. SEBI has presumed to give a completely warped meaning to the words of Regulations 17 (b) supposedly in the light of its observation in the Impugned Order that, "the company having failed to comply with the MPS requirements as on the due date should ideally be required to comply with such requirements and also be visited with penalty". At this point we would like to make note of a particularly significant fact that the Appellant has given an undertaking to the effect that should the delisting offer be unsuccessful, FKSL shall ensure compliance with the requirement of 25% maintaining mandatory public float as soon as may be practicable. Moreover, the Respondent in the Impugned Order itself notes that the intention of the Appellant

was in fact to comply with Regulation 19A of the SCRR. The relevant statements from the Impugned Order are reproduced hereinabelow :-

> *"Though, the fact is that as on June 03, 2013, the Company was non-compliant with the MPS requirements, I wish to take note of the special facts and circumstances of this case discussed above including the OFS made in October 2012 which clearly shows the intention of the Company was to comply with the MPS requirement."*

22. Once the Respondent had established that the Appellant did in fact intend to conform to Regulation 19A of the SCRR, we are forced to question why then it decided to impose the ludicrous condition of taking the pre-OFS shareholding of FKSL, i.e. 90%, into consideration while moving forth with the delisting process. This the Respondent claims to have done relying on the 5 complaints received by it. In the absence of any basis for the allegations in the complaints, it would have to be held that complaints are based on conjectures and surmises. The complaints seemed to be basing this inference on a pointless and rather seemingly concocted story which gives it the appearance of wild conjecture that the investors who bought the 9% shareholding in the OFS might have acted in collusion with the Appellant so as to sell those shares off when the delisting offer is made and ensure the successful completion of the delisting process. As stated above, no documents have been brought on record to lend any credibility to these accusations. It is pertinently noted that on receiving a copy of the complaints, the Appellant offered its replies to the Respondent which seem to have been acceptable to the Respondent considering no action has admittedly been taken against the Appellant regarding any of the complaints. Therefore, the entire issue regarding these complaints does not assist the Respondent's case in any manner, particularly when no meaningful opportunity of being heard has been granted to the Appellants by the Respondent. We would hasten to add that we do not make any comment on the merit or demerit of the said complaints and it is purely for Respondent, if so advised, to proceed in the matter of those complaints as per law and take a decision thereon.

23. Finally, we would like to point out that delisting of a listed company is the company's prerogative, and as long as the process of delisting is carried out within the four corners of law, no authority can interfere with the same without a solid foundation.

24. The learned counsel for both the parties have cited a few case laws, some of which have been dealt with below:-

The learned senior counsel for the Appellant, Mr. Janak Dwarkadas has argued at length as to how a deeming fiction is to be looked at, particularly in the context of Regulation 17 of the SEBI (Delisting of Equity Shares) Regulations, 2009. He has vociferously relied upon the following judgments:-

i. State of Andhra Pradesh vs. Vallabhpuram Ravi (1984) 4 SCC 410;
ii. Dipak Chandra Ruhidas vs. Chandan Kumar Sarkar (2003) 7 SCC 66

In the case of Vallabhpuram, before the Hon'ble Supreme Court, the issue was regarding the interpretation of Section 10-A of the Andhra Borstal Schools Act, 1925. The precise issue was whether or not Vallabhpuram Ravi, who unfortunately got involved in an incident leading to his conviction under Section 302 of the IPC when he was still in his teens, was liable to be released from a Borstal School on attaining the age of 23 years. On the basis of his good conduct, he was granted the highest status of a Special Star Grade Inmate ("SSGI"). He was classified as such due to his industrious and good behavior under Section 19-C of the Borstal Act. He should have been released by the State of Andhra Pradesh on attaining the age of 23 years. This not having been done, Vallabhpuram sent a letter to the Hon'ble High Court of Andhra Pradesh for his release. It was treated as a Writ of Habeas Corpus and the Hon'ble High Court directed the State Government to release him. Being aggrieved by the High Court's order the State Government

approached the Hon'ble Supreme Court under Article 136 of the Constitution of India.

25. The Power of the State Government to transfer juvenile delinquents to Borstal School is to be seen in Section 10-A of the Borstal Act, which reads as under :-

> *"10-A Power to State Government to transfer offenders sentenced to transportation to Borstal Schools.- The State Government may, if satisfied that any offender who has been sentenced to transportation either before or after the passing of the Madras Borstal Schools (Amendment) Act, 1939, and who at the time of conviction was not less than 16 nor more than 21 years of age, might with advantage be detained in a Borstal School, direct that such offender shall be transferred to a Borstal School, there to serve the whole or any part of the unexpired residue of his sentence. The provisions of this Act shall apply to such offender as if he had been originally sentenced to detention in a Borstal School.*
>
> *An order may be made under this section notwithstanding that the sentence of transportation has been subsequently commuted into a sentence of imprisonment."*

25A. After considering the concept of Borstal Schools as a reformatory measure and analyzing the scheme of the Andhra Pradesh Borstal Schools Act, 1925, the Hon'ble Supreme Court categorically held that the second sentence in Section 10-A of the Borstal Act is a deeming provision. It provides that provisions of the Act shall apply to an adolescent offender as if he had been originally sentenced to detention in a Borstal School. In view of this deeming clause neither was it open to the State to detain a person in a Borstal School beyond the age of 23 years, nor would it be allowed to detain the person in prison otherwise, except on the ground of incorrigibility as provided in Section 14 of the Borstal Act. The Hon'ble Supreme Court pertinently observed as under :-

> *"9. It may also be noted that apart from the clause in Section 8 which prescribes that no person detained under it can be kept in a Borstal School after he attains 23 years of age, there are other provisions in the Act which are specially applicable to the inmates of a Borstal School. Section 21-A of the Act empowers the State Government to order at any time the discharge of an inmate of any Borstal School either absolutely or subject to such conditions, as it may think fit. The expression 'inmate' in Section 21-A should in the ordinary course include a person who is directed to be transferred to a Borstal School under Section 10-A of the Act. Section 19-C of the Act provides for classification of such inmates into various grades for purposes of discipline and control in a Borstal School. The provisions in Part III of the Act lay down the procedure for releasing the inmates of a Borstal School on licnece. Section 13-A of the Act authorises the transfer of an inmate of a Borstal School in the state of Andhra Pradesh to any Borstal School or other school of a like nature in any other part of India, with the consent of the Government of the other State concerned. Everyone of these provisions is applicable to a person transferred under Section 10-A."*

26. In the case of Dipakchandra Ruhidas (supra), the Hon'ble Supreme Court was called upon to interpret Section 116-A of the Representation of the People Act, 1951 which provides for an appeal to the Supreme Court on any question of law or fact from every order passed by a High Court ("the Tribunal") under Section 98 or 99 of the Act. The Supreme Court was in fact required to find the true import of the expression, "trial" with respect to election petitions. Section 86(1) of the Representation of the People Act, 1951 empowers a High Court to dismiss an election petition if the same does not conform to the requirements of Sections 81, 82 and 117. Whether such an order could be construed to have been passed at the trial was at the heart of the matter before the Hon'ble High Court. During the assembly elections in Assam held in May 2001, the respondent, namely Chandan Kumar Sarkar, filed his nomination from a reserved constituency as a reserved candidate. The appellant, Shri Dipak Chandra Ruhidas, took an objection before the Returning Officer that the defendant was not a member of any Scheduled Caste. However, the

said objection was overruled and the respondent having received a majority of valid votes was declared elected as a member of the Legislative Assembly. The appellant preferred an Election Petition before the Hon'ble High Court of Guwahati challenging the election of the respondent. The respondent, i.e., the returned candidate also filed a counter petition praying for the dismissal of the Election Petition, already filed by the appellant on the ground that the same contained vague allegations and lacked material particulars as required by the provisions of the Representation of the People Act, 1951. After considering the rival contentions, the Hon'ble High Court dismissed the Election Petition on the ground that it did not contain relevant and material facts / details as mandated by the Representation of the People Act, 1951.

Section 86(1) and explanation attached thereto are relevant and reproduced below :-

> *"86. Trial of election petitions.- (1) The High Court shall dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117.*
>
> *Explanation.- An order of the High Court dismissing an election petition under this sub-section shall be deemed to be an order made under clause (a) of Section 98."*

26A. On analyzing the scheme of the Representation of the People Act, 1951, and particularly explanation to 86(1), the Hon'ble Supreme Court held that the said explanation has been inserted for clarifying any vagueness which might otherwise occur in Section 86(1) of the Act. By reason of the said provision, thus, a legal fiction has been created in terms whereof an order passed under Section 86(1) would be an order under Clause (a) of Section 98. The legal fiction so created by reason of the said explanation must be given its full effect. Thus, the Hon'ble Supreme Court rejected the contention of the

appellant that the order of the High Court was not passed after a full-dressed trial by placing reliance on Bhavnagar University vs. Palitana Sugar Mill (P) Ltd. 2003 (2 SCC) 111, which in turn relied upon the same observation of Lord Asquith in the notable case of Eastend Dueellings Company Ltd. vs. Finsbury Borough Council reported in 1951(2) ALLER 578.

27. As argued by learned counsel for the Respondent, in Anand Rathi's case, the Hon'ble High Court of Bombay has dealt with the powers of SEBI to pass an ad-interim order (circular) suspending a broker pending further detailed enquiry if it is prima-facie found that such a drastic step would be in the larger interest of investors and for properly regulating the capital market under Sections 11 & 11B of the SEBI Act, 1992. The petitioner, Anand Rathi, a broker at the Bombay Stock Exchange ("BSE") and also the President of the Stock Exchange, was prima-facie found to have been involved in manipulation of the price of certain scrips on the basis of information illegally obtained from an officer of the BSE working in the surveillance department. On the very next day (i.e. March 2, 2001), the Sensex dropped by 176 points in a drastic and sudden manner. Anand Rathi had to resign from the post of President of the BSE on March 7, 2001. SEBI was galvanized and the learned Chairman passed an urgent order to meet the extraordinary situation on March 12, 2001 and exercising powers under Sections 11 & 11B of the Act passed an ad-interim ex parte order restraining Anand Rathi and his concerns from undertaking any fresh business as a broker. Further, Anand Rathi was debarred from acting as a Director of the governing Board of the BSE till further orders. In the circumstances, Anand Rathi with four private limited companies petitioned the Hon'ble High Court under Article 226 of the Constitution by way of a writ of certiorari to quash the impugned order dated March 12, 2001 passed by SEBI and later on confirmed by orders dated March 30, 2001 and April 13, 2001 after affording a hearing to the Petitioners.

27A. After analyzing various judgments and the scheme of the SEBI Act, 1992, the Hon'ble High Court of Bombay reiterated a settled legal position that "an express grant of statutory power carries with it, by necessary implication, the authority to use all reasonable means to make such grant effective." In this context, the Hon'ble High Court held that –

> *"In the light of the above decisions and also in the light of the fact that the SEBI as regulator of securities market is empowered to take all necessary measures to protect the interest of the investors and the capital, we have no hesitation in holding that the SEBI is fully competent and is empowered by sections 11 and 11B to pass interim order in aid of the final orders. In this connection, a reference may be made to the decision of the Court of Appeal for British Columbia in Exchange Bank and Trust v. British Columbia Securities Commission [2001] BCCA 389 wherein the following observations of Ontario Securities Commission were cited with approval:*
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> *"There are few areas in our public life that are as dynamic and as innovative as our capital markets. For the most part, that dynamism and innovation enure to the benefit of the economy at large and individual investors in particular. But that same dynamism and innovation can, and does, lead to abuse. A regulatory agency charged with oversight of the capital markets must have the capacity to move quickly to stop transactions which it considers to be injurious to the capital markets.*
>
> *Like a section 144(2) (now section 161(2) temporary cease trade or a section 73 (now section 89) halt order, a freeze order enables the Commission to respond immediately to information that, in its opinion, warrants regulatory intervention to prevent or minimize prejudice to the public interest. Often it is necessary to take these steps before any investigation is commenced or concluded. The ability of the Commission to act in this fashion is necessary to instill and maintain public confidence in the integrity of the capital markets."*
>
> *The SEBI is charged with duty to protect the public and the integrity of the capital markets and as a regulator, it is certainly empowered to order suspension as an interim measure pending investigation into serious allegations of*

> *manipulations and insider trading. We, therefore, overrule the submission that the SEBI had no power to pass the impugned order."*

It is indeed true that SEBI may pass an ex parte interim order in the interest of the capital market. But, as this Tribunal has reiterated time and again, such power ought to be used sparingly in extreme cases of violation and urgency. In any case, the power of SEBI to pass an ex parte interim order is not in question in the present appeal. The case of Anand Rathi, therefore, does not further the case of the Respondent in any way.

28. In the Chanchal Jain case, decided on July 24, 2009 in W.P.(C) 10390/2009, the Hon'ble High Court of Delhi dealt with the legality of circular dated June 30, 2009 issued by SEBI under which mutual funds were barred from charging entry load. The petitioners were distributors and were selling mutual funds to investors. They were getting a part of the "loading entry charges" upto 2 ½ % charged by mutual fund on any investment made by an investor as their commission.

29. The petitioners challenged the circular as ultra vires and illegal as SEBI lacked the power to issue the same under section 11(2)(b) of the SEBI Act, 1992. It was also contended by the petitioners that the circular infringed Articles 19(1)(g) and 21 of the Constitution of India.

30. Repelling the contentions of the petitioner, the Hon'ble Hon'ble High Court of Delhi held as under:-

> *"Section 11(1) of the Act is very widely worded and casts a duty on the Board to protect the interest of the investors; promote, develop and regulate the securities market by such measures as it deems fit. Sub-section 2 does not restrict or narrows down the wide scope of sub-section 1. Sub-section 2 is not exhaustive of the power and authority SEBI. Under sub-section 1 itself, SEBI has been authorized and empowered to regulate securities market, which will include power to regulate and control issue of new mutual funds by mutual fund managers and subscription to the said funds including application forms. Under sub-section 1, SEBI can regulate payment of commission or state that there shall not be any entry load. SEBI is controlling and regulating*

> *new issues by mutual fund managers. While doing so, they are entitled and empowered to issue circulars in respect of entry load in the new mutual fund. The contention of the learned counsel for the petitioner that under Section 11(2)(b) distributors of mutual funds cannot be regulated as they are not registered with SEBI, is misconceived. Under Section 11(2)(b), SEBI has the power to regulate and control the working of the intermediaries like the distributors. It is difficult to accept that under Section 11(2)(b) SEBI can regulate the working of stock brokers, sub-brokers, intermediaries only if they are registered and not unregistered intermediaries like distributors. The power conferred under Section 11(2)(b) upon SEBI relates to both registration as well as the regulation. It is not possible to accept the contention that without registration of distributors, SEBI cannot control or regulate their working."*

31. The judgment of the Hon'ble High Court rightly observes that Section 11(2) casts a duty of protecting the investor's interests upon SEBI while granting it wide powers. However, wide powers granted to a public authority cannot be construed as allowing it to amend the law on a case to case basis. The law must operate uniformly to maintain its sanctity. When Regulation 17(b) categorically mentions that the current shareholding of the promoter group ought to be taken into consideration while making a delisting offer, there can be no question of the Respondent specifying a different criterion. To the aforesaid extent we find the judgment delivered by the Hon'ble High Court of Delhi to be distinguishable in the facts and circumstances of the present case.

32. To sum up, dispute in this case is, where promoters of a company after obtaining necessary approval for compliance of minimum shareholding requirement under Regulation 19A of SCRR (as amended) by "Offer For Sale" reduce their shareholding from 90% to 81% and before achieving minimum shareholding requirement, for valid reasons, seek delisting of shares under Delisting Regulations, whether, SEBI while permitting delisting, is justified in directing that for purpose of delisting shares held by promoters, should be considered at 90% instead of 81%. Admittedly, necessary decision for delisting has been taken after following due process of law. SEBI does not dispute genuineness of the reasons on

the basis of which delisting is sought. If delisting is in the ordinary course of business, then there is no reason for imposing conditions. It appears that impugned direction has been issued on the basis of certain complaints which are yet to be investigated. Therefore, in the facts of the present case, instead of fulfilling minimum public shareholding requirement under SCRR, since delisting of shares under Delisting Regulations have been sought for valid and genuine reasons, in our opinion, SEBI while permitting delisting was not justified in directing that the promoters' shareholding prior to OFS, that is shareholding at 90% instead of 81%, should be taken into consideration for the purpose of delisting.

33. In the light of the aforesaid discussion, we allow the present appeal to the extent that the Appellants may go ahead with their delisting offer without the condition imposed by the Respondent regarding compliance with Regulation 17(b). The Respondent is, however, at liberty to investigate the 4-5 complaints made by investors against the Appellant and take necessary action as per law, if so advised. In such an eventuality, SEBI is expected to act and take a decision expeditiously after investigating the complaints in question so that appellants are not put to unnecessary delay. No costs.

Sd/-
Justice J. P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

Sd/-
A. S. Lamba
Member

10.09.2013
ptm/pk/msb