BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No. 42 of 2007

Date of decision : 22.07.2009

Bicharsil Traders Ltd. …. Appellant

Versus

Securities and Exchange Board of India …… Respondent

Mr. E P. Bharucha, Senior Advocate with Mr. Neville P. Lashkari and Mr.Joby Mathew, Advocates for Appellants.

Mr. Saleh Doctor, Senior Advocate with Mr. Anant Upadhyay and Mr. Tejas Joshi, Advocate for the Respondent.

Coram : Justice N.K. Sodhi, Presiding Officer
Samar Ray, Member

Per : Justice N.K. Sodhi, Presiding Officer

Same order as in Appeal no. 41 of 2007 decided on 22.7.2009.

Sd/-
Justice N.K. Sodhi
Presiding Officer

Sd/-
Samar Ray
Member

dd/- 220709

Prepared & compared by

BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No. 41 of 2007

Date of decision : 22.07.2009

1. Cheneena Impex Pvt. Ltd.
2. CEE-AN Impex Pvt. Ltd.
3. Smitasha Impex Pvt. Ltd.
4. Parekha Exim Pvt. Ltd. …. Appellants

Versus

Securities and Exchange Board of India …… Respondent

Mr. E P. Bharucha, Senior Advocate with Mr. Neville P. Lashkari and Mr.Joby Mathew, Advocates for Appellants.

Mr. Saleh Doctor, Senior Advocate with Mr. Anant Upadhyay and Mr. Tejas Joshi, Advocate for the Respondent.

Coram : Justice N.K. Sodhi, Presiding Officer
Samar Ray, Member

Per : Justice N.K. Sodhi, Presiding Officer

This order will dispose of two Appeals no. 41 and 42 of 2007 both of which are directed against the same order dated 19.1.2007 passed by the whole time member of the Securities and Exchange Board of India (for short the Board) by which the shares of Aastha Broadcasting Network Ltd. allotted to the appellants on preferential basis have been ordered to be frozen permanently. For the sake of convenience, the facts are being taken from Appeal no. 41 of 2007.

2. Aastha Broadcasting Network Limited (hereinafter called Aastha) is a public limited company incorporated under the provisions of the Companies Act, 1956 and its shares are listed on the Bombay Stock Exchange (BSE). In the extraordinary general meeting held on 16.5.2000, Aastha decided to make a preferential issue of 93 lac shares of the face value of Rs.10/- each. These were allotted on 14.8.2000 to the promoter group entities to the extent of 51 lac shares and 42 lac shares were allotted to others. The appellants in both the appeals are the allottees of preferential shares. On 16.8.2000

Aastha applied to BSE for the listing of the preferential shares and also gave intimation of the allotment. It appears that on queries made from Aastha, BSE was not satisfied that the former had received full preferential allotment consideration from the allottees. When the application for listing came up for consideration on October 10, 2002 before the listing committee of BSE, it decided to appoint a firm of chartered accountants to examine whether Aastha had genuinely received the subscription from the preferential allottees and whether the allotment was in accordance with the provisions of the various regulations governing preferential allotment. M/s. CM&RS Associates, a firm of chartered accountants was appointed for the purpose. The chartered accountant gave its reports dated January 30, 2003 and March 4, 2003. BSE sent its report to the Board which held its own investigations into the trading of the scrip of Aastha for possible violation of various securities laws. The Board was prima facie of the view that full consideration money in respect of the preferential shares had not been received by Aastha and that 1,19,373 unlisted shares had been off-loaded in the market. The Board also found that only a part of the preferential allotment funds were received by Aastha and those were rerouted for preferential allotment and the same funds were recirculated as the allotment consideration from the allottees adding no value to the capital base of Aastha. It appears that Aastha had given loans to different entities which money was received back in a circuitous manner as consideration for the allotment of preferential shares. Since the Board found that Aastha had not received full consideration money in respect of the preferential allotment and that it had off-loaded some of the unlisted shares in the market, it intervened to ensure that no further harm was caused to the investors or the market. By an ex-parte order dated 15.1.2004, the Board prohibited the preferential allottees and other entities to whom the shares had been transferred by the preferential allottees from buying, selling or dealing in the securities of Aastha till further orders. In addition, the shares of Aastha in the demat accounts of the allottees were ordered to be frozen till further orders. Post decisional hearing was given to all the entities including the appellants against whom the interim order was passed and by order dated 15.6.2004 the ex-parte interim order was confirmed. In the meantime, the Board concluded its investigations and based on the facts as found therein, it issued to

Aastha and 39 other entities including the appellants, a notice under sections 11 and 11B of the Securities and Exchange Board of India Act, 1992 (hereinafter called the Act) read with Regulations 11 and 13 of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003, alleging violation of various clauses of the Securities and Exchange Board of India (Disclosure and Investor Protection) Guidelines, 2000 and Regulations 5(1) and 6(a) of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995. It was alleged that Aastha had received only a part of the preferential allotment funds which were recirculated using layers of related entities to create an impression of subscription for the remaining amount and, in effect, a total of Rs.3.04 per share had been received as against the issue price of Rs.10/- per share. As already noticed, the appellants were among the allottees. Aastha and all other entities including the appellants denied the allegations of fraud made against them. After holding a detailed enquiry in which full opportunity of hearing was afforded to the appellants and other entities, the Board found that the charges levelled against them stood established and by order dated 6.9.2005 it prohibited Aastha and other entities including the appellants from buying, selling and dealing in securities and accessing the capital market till January 14, 2007. Further, the shares of Aastha held by the allottees in their demat accounts were ordered to remain frozen till 14.1.2007. In the last paragraph of this order, the Board observed as under:-

> "In the meanwhile, it will be open for SEBI to explore the possibility of taking up civil proceedings against the entities involved for appropriate remedies."

The Board then filed a civil suit in the High Court of Bombay on April 29, 2006 with a prayer to direct Aastha and other entities including the appellants to cancel the allotment of the preferential issue of 93 lacs shares allotted to the promoter group entities. Pending the hearing and final disposal of the suit, the Board made a prayer that Aastha and other entities including the appellants who were defendants in the suit be restrained by an injunction from dealing with, parting with possession, creating and/or transferring third party rights in respect of the preferential shares. By order dated January 12, 2007, a learned single Judge of the Bombay High Court declined to grant

any ad-interim relief to the Board. The order of the learned Single Judge was affirmed in appeal. The suit is still pending.

3. Feeling aggrieved by the aforesaid order dated 6.9.2005 passed by the Board, the appellants and all other entities filed Appeals before this Tribunal which came up for final hearing on February 6, 2006. The argument of the appellants in those Appeals was that even though Aastha did not receive the proceeds of the preferential allotment in the year 2000-01, it received the entire amount in the following year and, therefore, there was no fraud or manipulation resorted to either by Aastha or by any other entity. This argument was rejected by the Tribunal and this is what we held:

> "Having given our thoughtful consideration to the arguments advanced by the learned counsel on behalf of the appellant, we are unable to accept the same. The fact that there was manipulation in the circulation of money at the time of allotment is clear from the instances quoted in the impugned order which have not been disputed by the appellant. For instance, CMM Ltd. made a payment of Rs.25 lacs to the appellant company on 15.7.2000. It may be mentioned that the previous name of the appellant was CMM Ltd. which was subsequently changed and therefore this transfer by CMM Ltd. to the account of the appellant company was a transfer from one account to the other by the same entity. Having received the amount the appellant transferred the same to Sunrise Movies on the same day. Sunrise Movies transferred the same amount on 17.7.2000 to Cheneena Impex. Cheneena Impex then paid this amount (Rs.25 lacs) to the appellant on 18.7.2000 and shares worth this amount were allotted to it. These transactions and transfers were admitted by the learned senior counsel appearing for the appellant. These transactions clearly indicate that money which originated from the appellant company came back to it within a span of three days and in the process shares were allotted to Cheneena Impex. It is not necessary for us to find out whether Cheneena Impex was an entity of the appellant or not. There are several other similar instances which have not been disputed. In view of these specific instances referred to by the Board we have no hesitation to hold that the funds were rotated through intermediaries only as name lenders and that the company received only a meager sum of Rs.2.83 crores as against the issue size of Rs.9.3 crores. In this view of the matter, the board was right in holding that the appellant company played a fraud on the existing investors of the company who held 7 lac shares and that the investors in the market were led to believe that the preferential allotment was successful. This in turn would have increased the demand for the shares of the appellant company and would have resulted in defrauding the innocent investors had the Board not passed the interim order on 15.1.2004 prohibiting the appellant and its entities from buying, selling or dealing in scrips."

The Appeals were dismissed. None of the entities including the appellants took the matter in appeal to the Supreme Court and the order of the Tribunal dismissing the appeals has become final.

4. The present controversy starts now. By an ex-parte order dated 19.1.2007, the Board has ordered that the illegally allotted preferential shares to the appellants and others shall be frozen permanently. The Board also observed as under:

> "Further, the entities/persons mentioned above may file their objections, if any, to this order within 15 days from the date of this order and, if they so desire, avail themselves of an opportunity of personal hearing at the Securities and Exchange Board of India, Head Office, SEBI Bhawan, Bandra Kurla Complex, Mumbai 400 051 on a date and at a time to be fixed on a specific request, to be received in this behalf from the entities within 15 days from the date of this order.
>
> This order shall come into force with immediate effect."

The appellants did not file any objection to the ex-parte order and instead filed the present appeals against that order. It is in these circumstances that the appeals have come up for final hearing before us.

5. We have heard the learned senior counsel on both sides. There is no gainsaying the fact that by its earlier order dated 6.9.2005, the Board found that the preferential allotment made by Aastha to different entities including the appellants was illegal and was a result of fraud and manipulation. The appeals filed against this order were dismissed and the findings have become final. The question that now arises for consideration is whether the illegally allotted shares without receipt of allotment money should be allowed to be traded in the market. Shri E.P. Bharucha, learned senior counsel appearing for the appellants did not dispute that the shares allotted to his clients were illegal and that the findings recorded by the Board in the earlier order dated 6.9.2005 and upheld by this Tribunal on 6.2.2006 have become final. He, however, strenuously contended that for the illegality committed by the appellants and Aastha, they had been adequately punished by the order of 6.9.2005 by which they were debarred from accessing the capital market till January 14, 2007 and the shares in dispute were also frozen till that period and having undergone that punishment, the

Board was neither justified nor did it have any jurisdiction to pass the impugned order freezing the disputed shares permanently. The argument looks attractive at first sight but when examined in the light of the facts established, we find no merit in it. Aastha and the entities including the appellants which were allotted the shares had committed grave irregularities in the matter of allotment of preferential shares and played a fraud on the existing investors of Aastha. We have observed in our order dated 6.2.2006 that money which originated from Aastha came back to it within a span of three days and in the process shares were allotted to the appellants and other entities. We also held that funds were rotated through intermediaries only as name lenders and that Aastha received only a meager sum of Rs.2.83 crores as against the issue size of Rs.9.3 crores. Payments made by Aastha to its group entities passed through various entities to finally reach the subscriber bank account and in turn to Aastha in the form of application money for the preferential allotment as made by Aastha. These are grave irregularities and amount to fraud and the appellants had to be punished for all this. No doubt, they have undergone the punishment but the question is the shares which were allotted to them and other entities continue to remain tainted. It has been established on the record that the shares were allotted without receipt of full consideration/allotment money and the only way in which these shares can be prevented from being traded in the market is to freeze them. If this is not done, the appellants who got the shares fraudulently will go to the market and reduce the value of the existing shareholders. It will also shake the investor confidence. How can we allow this to happen. The impugned order freezing the disputed shares permanently is meant to prevent the market from being contaminated. We are, therefore, satisfied that the order is in the larger interest of the investors and the securities market and by no means can it be said to be without jurisdiction. It furthers the objects of the Act. The Act was promulgated to instill confidence in the minds of the investors and protect the securities market. Sections 11 and 11B of the Act when read together give ample power to the Board to protect the interest of investors by taking such measures as it may think fit and by issuing such directions as it may deem necessary. By freezing the tainted shares the Board has taken steps to protect the investors and the securities market. But for the freezing of

preferential shares issued by Aastha, there was every likelihood of those shares being off-loaded into the market further contaminating it. As noticed earlier, 1,19,373 unlisted shares had already been off-loaded in the market. Punishment awarded to the appellants earlier or their having undergone the same, did not remove the taint from the shares and they pose a continuing threat to the market and, therefore, these could not be allowed to be traded. In this view of the matter, we have no hesitation in upholding the impugned order.

6. Assuming that the impugned order is illegal (though we have held otherwise), we are not inclined to set aside the same in the exercise of our powers under Rule 21 of the Securities Appellate Tribunal (Procedure) Rules 2000 which reads as under:

> "Rule 21 – The Appellate Tribunal may make, such orders or give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice."

We are clearly of the view that the impugned order is in the interest of investors and the securities market and the only way to secure the ends of justice is to freeze the tainted shares.

7. Before concluding, we may mention that during the course of the hearing of this Appeal, the learned senior counsel appearing for the appellants strenuously contended that even though allotment was made on August 14, 2000, the allotment money was received in the subsequent financial year 2001-02. This fact was seriously disputed by the learned senior counsel appearing for the respondent Board. Since this issue had been examined by BSE at the time of granting in-principle approval for the listing of the disputed shares, we directed the said exchange to submit a report to us whether the funds (allotment money) had been received in the year 2001-02. This direction was given to weigh the equities in the case. An affidavit was filed on behalf of BSE along with the reports of the independent chartered accountant appointed by it and we perused those reports. The reports were not clear whether the funds had actually been received in the subsequent year or not and both sides continued to adopt their respective stands. The appellants contended that the funds had been received whereas the respondent Board stated that they had not been received even in the subsequent years. To put the

matter beyond any doubt, we appointed, with the consent of the parties, M/s. Price Waterhouse as an independent chartered account to examine the records and books of accounts of the concerned entities and report whether the funds had been received on or before March 31, 2002. The Price Waterhouse sought time on a few occasions which delayed the disposal of the Appeal and ultimately submitted its detailed report on June 27, 2008. We have perused that report carefully and find that it is as vague as it could be and does not specifically respond to the query posed in our order dated 14.3.2008. The report shows that there was circuitous movement of funds for allotment of preferential shares but the Price Waterhouse has obscured all their observations with severe scope limitations and it is not possible to accept the report because it cannot be relied upon for drawing any meaningful conclusion about receipt and utilization of the funds. We then decided to proceed with the matter and dispose of the same on the basis of the record before us.

For the reasons recorded above, there is no merit in the Appeals and they stand dismissed with no order as to costs.

Sd/-
Justice N.K. Sodhi
Presiding Officer

Sd/-
Samar Ray
Member

dd/- 220709

Prepared & compared by