

SECURITIES AND EXCHANGE BOARD OF INDIA

CORAM: Dr. T. C. NAIR, WHOLE TIME MEMBER

IN THE MATTER M/s. MUNGA HOLDINGS LTD

M/s. BINANI CEMENT LTD

WTM/TCN/ /IVD/06/

DATE OF HEARING: 4th May 2006

APPEARANCES:

FOR NOTICEES:

Shri Sunderrajan, Executive Director, M/s. Binani Cement Ltd

Ms. Zia Mody, Advocate

FOR SEBI:

Shri Sanjeev Dutt, Chief General Manager

Shri V R Prasad Deputy Legal Advisor

ORDER

(UNDER SECTION 11 (4) OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992)

Background

1. The Delhi Stock Exchange (hereinafter referred to as "DSE") had examined the trading pattern of the scrip of M/s. Munga Holdings Ltd. (hereinafter referred to as "the Company") for the period 1st January 2001 to 31st August 2001 (hereinafter referred to as "period under consideration") and submitted a report to the Securities and Exchange Board of India (hereinafter referred to as "SEBI"). As per the investigation report of DSE, during the period under consideration, the price of the scrip had increased from Rs. 3.50 on 1st January 2001 to Rs. 43 on 31st August 2001, resulting in a rise of 1130%, only in 52 trading days, however there was no adequate volume to support the rise of the price in the scrip of the Company. The following observations were also made by DSE with respect to the Company:
 - (i) it has not submitted the distribution schedule on quarterly basis which is a violation of clause 35 of the Listing agreement
 - (ii) it has not submitted the Annual Report with complete schedule to DSE for the year 1998-99 and 2000-01 which is a violation of clause 31 (a) of the Listing agreement
 - (iii) it has not submitted the copy of all notices for AGM and EGM in advance and also the proceedings of General Meeting. This is in violation of clause 31 (C) and 31 (D) of the Listing agreement
 - (iv) it has not submitted to DSE the results indicating total turnover / sale, gross profit, net profit / loss, provision for tax and depreciation etc. which is a violation of clause (20) of the Listing agreement
 - (v) it has not closed transfer books once in a year at the time of AGM to have the record date for the purpose of bonus shares, right issue and dividend etc. which is a violation of clause (16) of the Listing agreement
 - (vi) it has not submitted to DSE the audited results for the year ending 31st March 2001
 - (vii) it failed to file disclosures under the regulation 8 (3) of Securities and Exchange Board of India (Substantial acquisition of shares and take over) Regulations, 1997 as on 31st March 2001
 - (viii) it had made preferential allotment of 20 Lacs shares in March 1996 to five group companies. At the same time, the same five group companies allotted 55.36 Lacs shares to the Company, at the same price and premium. The details of the said preferential allotments are as under:
 - (a) it had allotted 5 lacs shares with the premium of Rs. 90/- per share to M/s. Divya Mercantile Ltd. and on the same day M/s. Divya Mercantile Ltd. allotted 5 Lacs of its shares of Rs. 10/- with the premium of Rs. 90 per share to the Company

- (b) it had allotted 6 Lacs shares of Rs 10/- with the premium of Rs.90 per share to M/s. Shukhlamber Exports Ltd. which in turn on the same day allotted 9 Lacs share of Rs. 10/- with the premium of Rs.90 per share to the Company
- (c) it had allotted 3 Lacs shares to M/s. Shambu Mercantile Ltd. with the premium of Rs.90 per share and on the same day M/s. Shambu Mercantile Ltd. allotted 20 lacs shares of Rs. 10/- with the premium of Rs.90/- per share to the Company
- (d) The company allotted 3 Lacs shares of Rs. 10/- with the premium of Rs.90/- per share to Welcon Traders Exports Ltd. and on the same day Welcon Traders Exports Ltd allotted 20 Lacs shares of Rs. 10/- with the premium of Rs.90/- per share to the Company
- (e) The company allotted 3 Lacs shares of Rs. 10/- with the premium of Rs.90/- per share to Zircon Traders Ltd. and on the same day Zircon Traders Ltd allotted 1.36 Lacs shares of Rs. 10/- with the premium of Rs.90/- per share to the Company
- (ix) The company allotted 2.99 Lacs shares to three merged entities - Plaza Fiscal Services Ltd., Amarjyoti Fiscal Services Ltd. & Muller Fiscal Services Ltd. in January 1991, which are not listed with the Exchange due to non-submission of documents required by the exchange vide its their letters dated 28/09/1993 and 24/11/1993
- (x) It has been stated by DSE that the Company merged with M/s. Binani Cement Ltd. (hereinafter referred to as "Binani") on 9th October 2000 on the approval of the Calcutta High Court vide its order no. 644 dated 17.01.2001. As per the scheme of amalgamation, M/s. Binani shall allot 9 shares for every one share of M/s. Munga to the shareholders of M/s. Munga. It has been observed by DSE that consequent to the merger, the shareholders of M/s. Munga (who will get 9 shares of Binani Cements Limited against 1 share held) are going to be benefited immensely and therefore, it seems that the trading in the scrip was structured by entities, which are associates of M/s. Munga, with the purpose to take benefit once the shares of M/s. Binani (presently unlisted company) are Listed with the exchange and / or subsequently when M/s. Binani raises fresh capital either from the public or from institutions.

2. DSE in its investigation report had stated that while processing Listing application of the company, details of bank statement along with a certificate from the Chartered Accountants confirming the receipt of money pursuant to which such allotment has been made were sought from the Company. Despite repeated reminders made by DSE, the Company has failed to furnish the desired documents. It has further been stated by DSE that M/s. Munga has failed to furnish information / documents sought by the exchange for Listing of shares allotted on preferential basis. As such these shares have not been listed by DSE.
3. In view of the above, SEBI vide an order dated 08.08.02, directed an investigation into the trading in the scrip of the Company for possible violations, if any, of the Securities and Exchange Board of India (Stock Brokers and Sub-brokers) Rules, 1992, Securities and Exchange Board of India (Stock Brokers and Sub-brokers) Regulations, 1992 and Securities and Exchange Board of India (Prohibition of Fraudulent Unfair Trade Practices Relating to Securities Market) Regulations, 1995.
4. Investigation revealed that M/s. EXV Finvest Ltd. and M/s. Ananya Traders Ltd. were two entities who majorly traded in the scrip of the Company. It was found that these two entities were related to the Company. It was found that M/s. Ananya Traders Ltd. and M/s. EXV Finvest Ltd. both had the same address as the company i.e. 9, Ezra Street, Kolkata. Further, Shri. S. Dutta Roy, a director of the Company was found to be also a Director of M/s. Ananya Traders Ltd. The relation of M/s. EXV Finvest Ltd. with the Company was that the Company had a holding 8.89% of M/s. EXV Finvest Ltd.
5. From the trade record it was observed that between the period 28.05.01 and 06.08.01 only 11 trades were executed in the scrip of the Company, all of which were executed by and between M/s. Ananya Traders Ltd. and M/s. EXV Finvest Ltd. constituting 100% trading in the scrip of the company. During this period the price of the scrip of the company rose from Rs.33.25 to Rs.42. It was alleged that the said trading was done by related entities of the Company to influence price as well as volume of the scrip of the company.

Show cause notices and replies

6. In view of the above, a notice dated 24.04.03 was issued to the Company under section 11 (4) of the SEBI Act, 1992, asking it to show cause why appropriate orders including restraining the Company from accessing the securities market and prohibiting the Company from buying, selling or dealing in securities for a period of five years. The Company vide letter dated 25.06.03 informed SEBI that all its assets and properties had been transferred and vested in Binani Cements Ltd. (hereinafter referred to as "BHL") pursuant to an order of merger dated 11th December 2000 passed by the Hon'ble High Court at Calcutta upon which the Company had no practical existence and that it became liable to be dissolved without being wound up. Even so, the Company had during its existence complied with all the requirements of the Listing Agreement religiously and had submitted the relevant documents and returns on a timely basis. It was also submitted that all the books, records and documents having been taken over by BCL had constrained the Company in furnishing a detailed reply to the show cause notice issued by SEBI.

7. One of the submissions made by the Company before SEBI was that post merger the company had become non-existent for all practical purposes. It was noticed from clause 2 of Part II of the scheme of amalgamation, approved by an order No. 644 dated 17.01.01 passed by the Hon'ble High Court of Calcutta, if any suit appeal or any other proceedings of whatsoever nature by or against the Company be pending, the same shall not abate, be discontinued or be in anyway prejudicially affected by reason of the transfer of the undertaking of the Company or anything contained in this scheme, but the proceedings may be continued, prosecuted and enforced by or against BCL in the same manner and to the same interest as it would be or might have been continued, prosecuted and enforced by or against the company as if this scheme had not been made. In view of the said clause in the scheme of amalgamation, a notice dated 16.08.04 was issued to BCL, under Section 11 (4) of the SEBI Act, 1992, asking it to show cause as to why appropriate orders including orders for restraining BCL from accessing the securities market and prohibiting it from buying, selling or dealing in securities for a period of five years.
8. BCL submitted its replies vide letters dated 27.08.04 and 21.03.06. Subsequently, vide a letter dated 12.04.06, BCL was afforded a personal hearing before me on 04.05.06. BCL appeared through its representatives and reiterated the written submissions made earlier. On 08.05.06, a letter was received from BCL enclosing therewith copies of documents (acknowledgement of the Registrar of Companies, West Bengal acknowledging delivery of a certified copy of the Amalgamation Order, Receipt of the official liquidator filed with the Hon'ble Calcutta High Court in respect of the Company, application by the Company of dissolution without winding up of the transferor company) directed to be submitted by me at the time of the hearing.
9. BCL has made the following submissions through their letters and when it appeared before me:
 - a. The date of merger of MHL with BCL was 01.04.00. On approval of the merger by the High Court, MHL became a defunct company and no balanced sheet, annual report, etc. needed to be prepared and filed with the Stock Exchange.
 - b. There could not have been any structured trading in the scrip of MHL to take benefit once the shares of BCL are listed since the institutional approval for their merger was received only in April 2003, more than two years later. The shares to the shareholder were allotted on 03.07.03 and the actual effect of the merger was given in the books of BCL in September 2003 nearly after three years and therefore, the allegation is baseless. Even had there been any transactions in the scrip of MHL, BCL was not in the know of these transactions and neither BCL nor Binani Industries Ltd., the holding company of BCL was involved in these transactions.
 - c. MHL, a listed company was merged with effect from 01.04.00 with BCL and the effect of this merger was given in the books of accounts in September 2003, with the approval of the Board of Directors. Till then BCL was not having any control over the affairs of MHL or its associate companies and therefore, no explanation could be offered pertaining to the transactions by these entities.
 - d. The Official Liquidator appointed by the Hon'ble High Court of Calcutta has in his report concluded that the affairs of MHL were not conducted in a manner prejudicial to the interest of the members or to the public interest.
 - e. The swap ratio for the merger between MHL and BCL was concluded in September 2000, whereas the alleged transactions considered structured have been entered into during the period May 2001 to August 2001. Therefore, it would be wrong to conclude that the transactions specified to be structured were entered into with a view to influence the swap ratio for the merger.
 - f. Neither BCL, its promoters nor any of its associate entities have ever traded in the scrip of MHL. Also, BCL and its Directors do not have any relation whatsoever with the perpetrators of the transactions in the scrip of MHL as alleged by the investigation.
 - g. Section 11 of the SEBI Act, 1992 is to be invoked only in emergent situations to control the market and not to be availed of to punish for alleged violations as held by SAT in Sterlite Industries Ltd., Videocon International Ltd. and BPL Ltd. Also, SAT has held in UBS Securities Asia Ltd. Vs SEBI that an order under Section 11 (4) read with Section 11B of the SEBI Act, 1992 is normally only to be in emergent situation and should be remedial and not penal. It has been submitted that the show cause issued in 2004 for transactions entered into during the year 2001 can be nothing but pertaining to an emergent situation and would fairly and squarely be covered by judgments of SAT as detailed above.
 - h. It is also submitted that Section 11(4) of SEBI Act is sought to be invoked by the show cause notice by the alleged trades conducted during the investigation period in 2001. Section 11 (4) of the SEBI Act was brought into effect from 29.10.02. It is therefore, submitted that Section 11 (4) cannot be applied retrospectively in the absence of specific mention to that effect in the statute. The Hon'ble Supreme Court in the matter of Govind Das and Ors. Vs The Income Tax Officer & Anr. (1976) 103 ITR 123 has held that "it is a well settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure.....if the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only..".

10. In order to verify the claims made by BCL vide its replies before SEBI, DSE was requested to verify the status of compliance of the listing requirements by MHL. DSE had replied vide its letters dated 20.09.06 and 13.10.06. DSE had clarified that MHL had been de-listed from the exchange on 23.10.03 and furnished a list of non compliances of clauses 16, 20, 31(a) (c) & (d), 35, 41, 47 (a) & (c) and 49. This was a reiteration of the failures observed by DSE in the earlier report submitted to SEBI.

Consideration of the issues

11. I have carefully considered the investigation report, show cause notices issued to BCL and the replies and submissions, oral and written, given to the show cause notice.
12. The primary question that arises for consideration is whether BCL is in anyway responsible or can be held liable for the actions or transactions in the scrip of MHL entered into during the period January 2001 to August 2001, when the merger had been approved by the High Court of Calcutta but the same was not given effect to, as stated by BCL, in view of pending institutional approvals and such other formalities. The High Court while approving the Scheme of amalgamation has prescribed as follows:

"Part II

1. with effect from the appointed date, the undertaking of MHL shall without further act or deed be transferred to and vest in and be deemed to be transferred to and vested in BCL pursuant to Section 394 (2) of the Companies Act, 1956."
- "2. if any suit, appeal or any other proceedings of whatsoever nature (hereinafter called "the proceedings") by or against MHL be pending, the same shall not abate, be discontinued or in anyway prejudicially affected by reason of the transfer of the undertaking of MHL or anything contained in the scheme but the proceedings may be continued, prosecuted and enforced by or against BCL in the same manner and to the same extent as it would be or might have been continued, prosecuted and enforced by or against MHL if this scheme had not been made."

"Part III

2. until the scheme is sanctioned and transfer effected as aforesaid, MHL shall carry on its business in the usual course which shall be deemed to be carrying on the said business for and on behalf of and in trust for BCL with effect from the appointed date".
13. The aforesaid references in the scheme of amalgamation especially clause 2 of Part III make it amply clear that the business of MHL continued subsequent to approval of the scheme of amalgamation is for and on behalf of BCL. BCL is entitled for any profits that may arise out of these businesses and will have to bear the losses that may arise therefrom. In effect it is the trustees of BCL who are carrying on the business for BCL and the principal for these transactions or but none other than BCL itself. Therefore, in my opinion BCL cannot alienate itself from these transactions, citing lack of knowledge and it would be just to hold BCL responsible for the repercussions arising out of these transactions.
14. In its submissions before SEBI, MHL has specified that it has not been able to provide a detailed reply to the allegations made out in the show cause notice since the records of MHL were under the control of BCL and MHL no more had access to the same. Also, BCL took the same defense in not submitting a complete reply to the allegations made out in the show cause notice issued to it. It is not understandable as to how both the entities cannot be in possession of the documents and records at a given point of time and can pinpoint towards the other entity in this regard. As observed earlier from the scheme of amalgamation, any business conducted on or after 01.04.00 by MHL would be for the benefit of BCL and the undertaking in toto had been transferred to BCL by virtue of the scheme. Therefore, it becomes the bounden responsibility of BCL to maintain the requisite books, accounts and records. The claim by BCL of non -availability of records for not submitting appropriate reply before SEBI cannot be accepted and any violation in this regard will have to be attributed to BCL and none other.
15. The next issue that crops up is whether there has been any manipulation in the scrip of MHL and whether the same has benefited the members of MHL or BCL, or is likely to benefit the allottees when BCL comes up with a public issue post merger.
16. It has been noted from the scheme of amalgamation that the swap ratio for the scheme has been concluded at nine shares of BCL for every one share of MHL. As per the investigation, during the period January 2001 to August 2001, the price in the scrip of MHL had increased from Rs.3.50 to Rs.43.00 resulting in a rise of 1130% in only 52 trading days, without adequate volumes. In this regard, DSE had observed that, the increase in price might have been brought out with a view to benefit the shareholders of MHL once BCL comes up with a public issue or when BCL's shares are listed in Stock Exchanges. The findings of investigations by SEBI has brought out that the price increase was a result of transactions entered into by entities associated with the erstwhile management of MHL, but did not attribute to any malafide to those transactions. Therefore, I find it would be right to conclude, based on the records made available to me that there is no concrete evidence to establish manipulation in the scrip of MHL resulting in the price rise as detailed above.

17. I have also noticed that MHL has not complied with various prescriptions of the listing agreement with DSE. But, the submissions made by BCL have controverted every claim made by the investigation in this regard. As regards the details to be submitted post 01.04.00, it is a known fact that MHL and BCL had applied to the Hon'ble High Court of Calcutta for approval of their scheme of amalgamation. Also, in December 2000 the High Court had approved the scheme of amalgamation with 01.04.00 as the appointed date for the merger. But the scheme has actually been given effect to in the books of accounts after approval from the Directors of BCL only in September 2003, since the non-availability of institutional approvals till April 2003 had delayed the process. As observed earlier, the conduct of business in the interregnum was for and on behalf of and interest for BCL as per the scheme of amalgamation. Also, the business of MHL had been continued and had not been wound up till September 2003, as per the information available to me. Taking the above facts into account, it can be understood that the requirements relating to listing and other relevant requirements that need to be adhered to by a listed company had to be complied with by BCL. Therefore, the non-compliance with the listing requirements will fall within the responsibility of BCL and it shall be held liable for the same.
18. I have also noticed from the investigations that BCL has failed to file the requisite disclosures to DSE under Regulation 8 (3) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 on prescribed dates. MHL had been merged with BCL and the appointed date for the said merger was 01.04.00 as per the order of the High Court of Calcutta. By virtue of the merger, the undertaking of MHL had been wholly and completely vested in BCL with effect from the appointed date. As observed by me in the previous paragraph relating to non-compliance of the listing requirements of DSE, the responsibility in respect of compliance under Regulation 8 (3) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 would also have to be affixed upon BCL. In view of the same, I find that BCL had violated the provisions of Regulation 8 (3) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997.
19. I have noticed from the investigations and the submissions made by BCL as detailed above that there has been violation of the provisions of Regulation 8 (3) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 and the prescriptions under the listing agreement entered into by MHL with DSE prior to the merger. These violations would warrant action against BCL under the provisions of Section 11 (4) of SEBI Act, 1992, since BCL is the entity that can be held liable for any acts of omissions and commissions of MHL with effect from 01.04.00, as directed by the Hon'ble High Court of Calcutta while approving the scheme of amalgamation in December 2000. I have noticed that one of the submissions made by BCL before me is that the provisions of Section 11 (4) were brought into the SEBI Act, 1992 with effect from 29.10.02 whereas, the alleged violations had occurred during the period January to August 2001, rendering the said provision inapplicable to the said violations if any. I am of the view that the orders passed under Section 11 (4) cannot only be restricted to emergent circumstances but can also be invoked in situations which warrant action post facto. Any action which SEBI would be required to take now though post facto would still ensure appropriate remedy of the violations committed by BCL as observed above. The next submission in this regard is that provisions of Section 11 (4) cannot be applied with retrospective effect when there is no such express mention in the statute. I feel that the provisions of Section 11 (4) inserted into SEBI Act, 1992 with effect from 29.10.02 is only an explanation or elucidation of the powers vested in SEBI under Section 11 of SEBI Act. Consequently, the power to take action under Section 11 (4) was already vested with SEBI under Section 11 of the SEBI Act. As a result, the action taken pursuant to the Show Cause Notice issued under Section 11 (4) would be valid.
20. In the light of the above findings, it is clear that BCL is liable for action under the present proceedings for said violations. In the facts and circumstances of the case and considering the nature of violations, it would be appropriate to direct BCL to be careful in ensuring timely compliance of the listing requirements and other ancillary filing requirements.

Order

21. Therefore, I, in exercise of powers conferred upon me under Section 19 of Securities and Exchange Board of India Act, 1992, read with Section 11 (4) of the Securities and Exchange Board of India Act, 1992, hereby direct M/s. Binani Cements Limited to be careful in ensuring timely compliance of the listing requirements and other ancillary filing requirements as envisaged under law in force. Any violation as aforesaid in future will be viewed very seriously.

Place: Mumbai
Date: 2nd November, 2006

T C Nair
Whole-Time Member
Securities and Exchange Board of India