
(2023) 11 SEBI CK 0022

In the Securities Appellate Tribunal Mumbai

Case No : Appeal No. 845, 846 Of 2023

20 Microns Limited

APPELLANT

Vs

BSE Limited And Others

RESPONDENT

Date of Decision : 28-11-2023

Acts Referred:

Securities And Exchange Board Of India (Listing Obligations And Disclosure Requirements) Regulations, 2015 — Regulation 17(1A), 17(1C)
Companies Act, 2013 — Section 149, 152(2), 161(1)

Citation : (2023) 11 SEBI CK 0022

Hon'ble Judges : Tarun Agarwala, Presiding Officer; Meera Swarup, Technical Member

Bench : Division Bench

Advocate : Anand Kankani, Prakhar Godre, Muskan Mubarakali Kadiwar, Sagar Divekar, Abhimanyu Mhapankar, Ravishekhar Pandey, Nishit Dhruva, Shefali Shankar, Rasika Ghate, Harsh Sheth

Final Decision : Allowed

Judgement

Tarun Agarwala, Presiding Officer

1. Two appeals have been filed against the communication dated August 21, 2023 passed by BSE Limited ("BSE" for short) and National Stock Exchange of India Limited ("NSE" for short) wherein a fine was levied on account of non-compliance of Regulation 17(1A) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("LODR Regulations" for short) pursuant to the appointment of Mr. Swaminathan Sivaram as an additional director in the category of non-executive independent director by way of a board resolution.

2. The facts leading to the filing of the present appeal is, that the appellant Company is a public limited company and its shares are listed on the BSE and NSE. The composition of the board of directors of the Company was that it had chairman-cum-managing director, a managing director, a director and four independent directors. The composition of the board of directors was in

accordance with the LODR Regulations as it had consisted more than six directors and was in compliance with Regulation 17(1C) of the LODR Regulations. Under the LODR Regulations the Company was required to appoint three independent directors which was already existing and therefore the Company was in compliance with the LODR Regulations.

However, the second term of two independent directors was to expire on August 12, 2024.

3. Considering the good corporate governance practice that was being conducted by the Company the Nomination and Remuneration Committee of the Company made a recommendation to the board of directors for appointment of Mr. Swaminathan Sivaram as an additional director in the category of non-executive independent director subject to the approval of the members by way of special resolution in the 36th Annual General Meeting of the Company.

4. Based on the said recommendation the board of directors appointed Mr. Swaminathan Sivaram as an additional director in the category of non-executive independent director subject to the approval of members by way of special resolution in the 36th Annual General Meeting of the Company. It may be noted here that Mr. Swaminathan Sivaram had already attained the age of 75 years and therefore his appointment was subject to the approval of the members by way of special resolution.

5. The 36th Annual General Meeting of the Company was held on August 10, 2023 in which the resolution of the board of directors was approved by way of a special resolution by the members of the Company. By the impugned order dated August 21, 2023 the respondent BSE communicated to the appellant that they were not in compliance with Regulation 17(1A) of the LODR Regulations and accordingly imposed a fine of Rs. 1,08,560/-. Similar fine was also imposed by NSE.

6. We have heard Shri Anand Kankani, CS with Shri Prakhar Godre, CS and Ms. Muskan Mubarakali Kadiwar for the appellant, Shri Sagar Divekar with Shri Abhimanyu Mhapankar, the learned counsel for the BSE, Shri Ankit Lohia with Shri Shlok Bodar, the learned counsel for NSE and Shri Ravishekhar Pandey, Shri Nishit Dhruva, Ms. Shefali Shankar, Ms. Rasika Ghate and Shri Harsh Sheth, the learned counsel for the respondent no. 2 SEBI.

7. At the outset out we find that no reason whatsoever has been given in the impugned order as to why and how the Company has violated the provisions of Regulation 17(1A) of the LODR Regulations. The impugned order cannot be sustained on this short ground itself. The learned counsel for the respondents submitted that the fine was imposed on account of non-compliance of Regulation 17(1A) which provides that an additional director can only be appointed only after approval is given by the members of the Company through a special resolution and that an appointment cannot be made prior to taking the approval through a special resolution from the members of the Company.

8. Therefore, the core issue is, whether approval is required to be taken from the shareholders of the Company through a special resolution before a person who has attained the age of 75 years can be appointed.

9. Before we deal with the aspect it would be necessary to refer to a few provisions of Companies Act and LODR Regulations.

10. Section 149 of the Companies Act, 2013 provides that every Company shall have board of directors consisting of individuals as directors.

11. Section 152(2) of the Companies Act provides as under:-

"Save as otherwise expressly provided in this Act, every director shall be appointed by the company in general meeting".

The aforesaid provision indicates that directors can only be appointed by the Company in the Annual General Meeting.

12. Section 161(1) of the Companies Act provides as under:

"The articles of a company may confer on its Board of Directors the power to appoint any person, other than a person who fails to get appointed as a director in a general meeting, as an Additional Director at any time who shall hold office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier."

13. A perusal of the aforesaid provisions indicates that the board of directors can appoint any person as an additional director who shall hold office up to the date of the next Annual General Meeting.

14. A reading of Section 152(2) and 161(1) of the Companies Act makes it clear that a director can only be appointed by the shareholders of the Company in an Annual General Meeting. However, the board of directors can appoint any person as an additional director who will hold office up to the date of the next Annual General Meeting.

15. In the instant case, the board of directors appointed Mr. Swaminathan Sivaram as an additional director till the date of the next Annual General Meeting and subject to the approval given by the members of the Company through a special resolution.

16. Regulation 17(1A) and 17(1C) of the LODR Regulations are extracted here under :-

Regulation 17(1A)

"No listed entity shall appoint a person or continue the directorship of any person as a non-executive director who has attained the age of seventy-five years unless a special resolution is passed to that effect, in which case the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such a person."

Regulation 17(1C)

"The listed entity shall ensure that approval of shareholders for appointment or re-appointment of a person on the Board of Directors or as a manager is taken at the next general meeting or within a time period of three months from the date of appointment, whichever is earlier."

17. Regulation 17(1A) provides that no listed company shall appoint a person as a non-executive director who has attained the age of 75 years unless a special resolution is passed by the members of the Company. Regulation 17(1C) provides that the listed entity shall ensure that approval of shareholders for appointment of a person on the board of directors is taken at the next general meeting or within a period of 3 months from the date of appointment whichever is earlier.

18. Thus, from a conjoint reading of Section 149, 152(2), 161(1) of the Companies Act 2013 read with Regulation 17(1A) and 17(1C) of the LODR Regulations makes it apparently clear that the director is required to be appointed by the members of the Company. If a person is appointed as an additional director by the board of directors then his appointment is till the next annual general meeting. Regulation 17(1A) provides that if a person who has attained the age of 75 years then his appointment has to be made by a special resolution passed by the members and Regulation 17(1C) provides that appointment must be approved in the next general meeting or within three months from the date of the appointment whichever is earlier.

19. In the instant case, the appointment was made on May 16, 2023 by the board of directors which was approved in the next annual general meeting by the member of the Company through a special resolution and that this special resolution was passed on August 10, 2023 within three months from the date of appointment. Thus, from a conjoint reading of Regulation 17(1A) and 17(1C) of the LODR Regulations appointment of an additional director can be made by the board of directors which is required to be approved by the members of the Company through a special resolution and such approval is required to be made within three months.

20. In *Nectar Life Sciences Ltd. vs. SEBI & Ors.*, Appeal no. 185 of 2023 decided on April 27, 2023 this Tribunal considered the provisions of Regulations 17(1A) with other provisions and held that the word "unless" as depicted in Regulation 17(1A) does not mean "prior approval" nor the requirement of passing a special resolution was a qualificatory condition for appointment as a director.

21. In view of the aforesaid, the contention of the respondent that no person can be appointed as a non-executive independent director unless prior approval of the shareholders was made by a special resolution is erroneous.

22. Regulation 17(1A) and 17(1C) has to be read harmoniously with the provisions of Section 152(2) and 161(1) of the Companies Act which will make it

clear that a person above the age of 75 years can be appointed by the board of directors. Such appointment is required to be approved subsequently within the prescribed period by a special resolution in the next general meeting by the members of the Company which in the instant case was done within the prescribed period.

23. In view of the aforesaid, no penalty could have been imposed by the BSE and NSE for violation of Regulation 17(1A) of the LODR Regulations.

24. In view of the aforesaid, the impugned orders cannot be sustained and are quashed. The appeals are allowed with no order as to costs.