(2022) 03 SEBI CK 0118

In the Securities Appellate Tribunal Mumbai

Case No : Miscellaneous Application No. 944 Of 2021, Appeal No.624 Of 2021

Century Enka Limited APPELLANT

Vs

Securities And Exchange Board Of India And Others RESPONDENT

Date of Decision : 25-03-2022

Acts Referred:

Securities And Exchange Board Of India (Listing Obligation And Disclosure Requirement) Regulations, 2015 — Regulation 17, 17(1), 25(6), 98
Securities And Exchange Board Of India Act, 1992 — Section 11A, 11A(2)
Securities Contract (Regulations) Act, 1956 — Section 9, 21

Citation : (2022) 03 SEBI CK 0118

Hon'ble Judges : Tarun Agarwala, Presiding Officer;M. T. Joshi, J;Meera Swarup, Member

Bench : Full Bench

Advocate : Yugandhara Khanwilkar, Sanjay Sangani, Usha Peri, Chirag Shah, Rishab Jain, Pradeep Sancheti, Rashid Boatwalla, Dhruv Jadhav, Sagar Divekar, Abhimanyu Mhapankar, Pranati Dabholkar

Final Decision : Allowed

Judgement

Tarun Agarwala, Presiding Officer

1. The present appeal has been filed against the orders dated February 3, 2020 issued by National Stock Exchange of India Ltd. (hereinafter referred to as ‘NSE’) and BSE Ltd. (hereinafter referred to as ‘BSE’), July 2, 2020 issued by NSE and BSE, January 15, 2021 issued by BSE, May 4, 2021 issued by NSE and June 30, 2021 issued by Securities and Exchange Board of India (hereinafter referred to as ‘SEBI’).

2. The facts leading to the filing of the present appeal is, that Mr. B. K. Birla was a non-independent non-executive director in the appellant company and died on July 3, 2019 thereby causing a vacancy in the board of directors. This vacancy was required to be filled up and eventually an independent director was appointed on February 5, 2020.

3. Regulation 17(1) of the Securities and Exchange Board of India (Listing Obligation and Disclosure Requirement) Regulations, 2015 (hereinafter referred to as 'LODR Regulations') provides as under :-

"17. (1) The composition of board of directors of the listed entity shall be as follows:

(a) board of directors shall have an optimum combination of executive and non-executive directors with at least one woman director and not less than fifty percent of the board of directors shall comprise of non-executive directors;

Provided that the Board of directors of the top 500 listed entities shall have at least one independent woman director by April 1, 2019 and the Board of directors of the top 1000 listed entities shall have at least one independent woman director by April 1, 2020;

Explanation: The top 500 and 1000 entities shall be determined on the basis of market capitalisation, as at the end of the immediate previous financial year.

(b) where the chairperson of the board of directors is a non-executive director, at least one-third of the board of directors shall comprise of independent directors and where the listed entity does not have a regular non-executive chairperson, at least half of the board of directors shall comprise of independent directors:

Provided that where the regular non-executive chairperson is a promoter of the listed entity or is related to any promoter or person occupying management positions at the level of board of director or at one level below the board of directors, at least half of the board of directors of the listed entity shall consist of independent directors.

Explanation. - For the purpose of this clause, the expression "related to any promoter" shall have the following meaning:

(i) if the promoter is a listed entity, its directors other than the independent directors, its employees or its nominees shall be deemed to be related to it;

(ii) if the promoter is an unlisted entity, its directors, its employees or its nominees shall be deemed to be related to it.

(c) the board of directors of the top 1000 listed entities (with effect from April 1, 2019) and the top 2000 listed entities (with effect from April 1, 2020) shall comprise of not less than six directors.

Explanation: The top 1000 and 2000 entities shall be determined on the basis of market capitalisation as at the end of the immediate previous financial year.

(d) where the listed company has outstanding SR equity shares, atleast half of the board of directors shall comprise of independent directors.

(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.

(1B) With effect from April 1, 2022, the top 500 listed entities shall ensure that the Chairperson of the board of such listed entity shall –

(a) be a non-executive director;

(b) not be related to the Managing Director or the Chief Executive Officer as per the definition of the term "relative" defined under the Companies Act, 2013:

Provided that this sub-regulation shall not be applicable to the listed entities which do not have any identifiable promoters as per the shareholding pattern filed with stock exchanges.

Explanation – The top 500 entities shall be determined on the basis of market capitalisation, as at the end of the immediate previous financial year."

4. A perusal of the aforesaid provisions indicated that the board of directors shall comprise of not less than 6 directors.

5. Admittedly, after July 3, 2019 on account of demise of Mr. B. K. Birla, the composition of the board of directors reduced from 6 to

5 directors. The vacancy so caused was eventually filled up on February 5, 2020.

6. For the aforesaid period from July 4, 2019 to February 5, 2020 on account of non-compliance of the Regulation 17(1) of the LODR Regulations, BSE and NSE has imposed a fine for the quarter ended December 31, 2019 and again for the quarter ended March 31, 2020 under circular dated May 3, 2018 issued by SEBI. The relevant extract of Annexure I to the circular dated May 3, 2018, namely, item no. 4 is extracted hereunder :-

Sl No.

Regulation

Fine payable and / or other action to be taken for noncompliance in respect of listed entity

4

Regulation 17(1)

Non-compliance with the requirements pertaining to the composition of the Board including failure to appoint woman director

Rs. 5,000/- per day

7. A perusal of the aforesaid provision indicates that for non-compliance of the Regulation 17(1) of the LODR Regulations, a fine of Rs. 5,000/- per day can be imposed. The appellant being aggrieved filed an application before SEBI for

waiver of the fine which was rejected by SEBI by an order dated June 30, 2021.

8. The stock exchanges in their orders have levied a fine holding that the exchange has decided to provide a period of three months or time till the next board meeting whichever is later to enable the companies to fill the vacancy in consonance with the provisions of Regulation 25(6) of the LODR Regulations and since the appellant failed to fill the vacancy within three months, the penalty has been imposed from October 3, 2019 under Regulation 17 of the LODR Regulations. The same view was taken by SEBI in its order of June 30, 2021.

9. Having heard the learned counsel for the parties, we are of the opinion that the approach adopted by the respondent is totally illegal and against the provisions of law. The provisions under the LODR Regulations are required to be complied by the companies including the appellant. Non-compliance of various provisions may entail imposition of fine as per the circular dated May 3, 2018. This circular has been issued in exercise of the powers under Section 11A(2) of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as 'SEBI Act') read with Sections 9 and 21 of Securities Contract (Regulations) Act, 1956 (hereinafter referred to as 'SCR Act') and read with Regulation 98 of the LODR Regulations. This circular has the force of law. Under Annexure I to the circular a fine of Rs. 5,000/- per day can be imposed for non-compliance of Regulation 17(1) of the LODR Regulations. Regulation 17(1) states that the board of directors shall comprise of not less than 6 directors. If there are less than 6 directors, the said regulation is violated and fine can be imposed but the question is that there is no time line provided under Regulation 17(1) to fill the vacancy caused by the reason of death, resignation, etc. If no time line is provided, the question of imposition of fine at the rate of Rs. 5,000/- per day does not arise.

10. In this regard, Regulation 25(6) of the LODR Regulations provides certain obligations with respect to independent directors, namely, that where an independent director who resigns or is removed from the board of directors, the said independent director would be replaced by a new independent director at the earliest but not later than the immediate next meeting of the board of directors or three months from the date of such vacancy whichever is later. Such provision is missing under Regulation 17(1). Consequently, in our opinion, so long as the period of filing the vacancy in the board of directors under Regulation 17(1) is not framed, no fine could be imposed.

11. Further, we are of the opinion that the exchange cannot on its own take a decision for imposition of fine. Fine can only be imposed by statutes or by circular which has the force of law. In the instant case, nothing has been brought on record to show that the stock exchange has the power to frame such laws nor anything has been brought on record to indicate that SEBI has framed such laws under Section 11A of the SEBI Act read with Sections 9 and 21 of the SCR Act and read with Regulation 98 of the LODR Regulations.

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

13. This order will be digitally signed by the Private Secretary on behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Certified copy of this order is also available from the Registry on payment of usual charges.