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Fresenius Kabi Oncology Ltd. v. SEBI (2013) and Delisting Regulations around the World

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ABSTRACT

The main purpose of listing of shares at stock exchanges is to provide for marketability to the shares of a company. In the case of Fresenius Kabi Oncology Ltd. v. SEBI (2013), allowed the company to delist its shares from the Indian stock market. SEBI challenged the order of the Tribunal allowing them to delist their shares in the Supreme Court. In this case, the due process of law and the required uniformity of law has been imposed. However, the Tribunal had allowed the SEBI to undergo investigation with regard to the investor complaints, it had allowed the company to delist its shares unconditionally. The delisting regulations are getting stringent over the years. From the onset of March, 2021, China renewed their Securities Law, due to which the two Chinese Exchanges have undergone strict restrictions in terms of financial standards. The shell companies have been targeted with this implementation.

I. INTRODUCTION

Law must operate uniformly – where delisting follows due process of law, SEBI cannot impose criteria different than that prescribed under the Delisting Regulations

The main purpose of listing of shares at stock exchanges is to provide for marketability to the shares of a company. When a public company chooses to go private, it must delist from the stock exchanges where it has been listed – which means that the shares of that company will stand unavailable for trading on the platform and the same shall be inaccessible for market activity in the stock exchange. A company chooses to list themselves to seize the advantages of listing, i.e., lower cost of capital, greater base in shareholders, liquidity in trading of shares, transparency etc. However, the companies, very often, need to deal with the benefits of listing that generally outweigh the listing costs and other disadvantages. The companies are also required to deal with the compliance requirements that usually overburden the companies and not expose them to punitive and disciplinary actions.

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Initially, there were 21 Regional Stock Exchanges ('RSE') in India, out of which 20 such RSEs have shut down over the years due course due to their lack of financial viability and feasibility. The one and only standing regional stock exchange during that time was the Calcutta Stock Exchange ('CSE'), which was also at its verge of getting shut. Even in times like this, various companies continue to be listed on CSE, however the economic viability of the same is still dubious. The Delisting Regulations enacted by SEBI make available to these companies for an easy opening of exit from the strict requisites by expressly reducing the time-period of the delisting procedure and reorganising the same.

With this Regulation, in cases of voluntary delisting, the relisting bar of 5 years in case of having been reduced to 3 years. The Regulation now allows the companies to relist in a moderately lesser period of time and promote for funds for the sake of their novel endeavour.

II. Facts of the Case

In the case of Fresenius Kabi Oncology Ltd. v. SEBI (2013), the capital market regulator, while putting an end to a long-standing dispute, allowed the Fresenius Kabi Oncology Ltd to delist its shares from the Indian stock market. While upholding that Section 11(2)[2][1] of the Securities and Exchange Board of India Act, 1992 casts a duty of protecting the investor's interests upon SEBI and grants it wide powers to that end. However, the Tribunal has held that wide powers granted to a public authority cannot be interpreted and unlikely to be construed as allowing it to amend the law on a case to case basis. The ratio decidendi of the case is that the law must operate uniformly to maintain its sanctity.

III. Order

While adjudicating, in its appellate jurisdiction, an appeal against one of its own orders, the SEBI held that when Regulation 17 (b) of the SEBI (Delisting of Equity Shares) Regulations, 2009[3][2] ("Delisting Regulations") categorically mentioned 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 - SEBI - specifying a different principle.

As per the case, the argument in summation was, where promoters of a company after procurement essential approval for compliance of minimum shareholding requirement under Regulation 19-A of the Securities Contract (Regulation) Rules, 1957 (as amended) by "Offer For Sale" decrease or reduce their shareholding from 90% to 81% and previously

[2] Powers and Functions of Board

[3] Regulation 17 (b) of the SEBI (Delisting of Equity Shares) Regulations, 2009 deals with Minimum number of equity shares to be acquired

accomplishing 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% (pre-OFS shareholding) instead of 81%.

Undeniably, the vital assumption for delisting had been taken after following due process of law. SEBI did not dispute the authenticity of the reasons on the basis of which delisting was sought. If delisting was in the ordinary course of the functional business, then, it was held, there was no reason for imposing conditions.

SEBI, in this case, has upheld that it appeared that disputed direction had been issued on the basis of certain complaints of alleged collusive buying by investors under the Offer For Sale with a view to benefit from the eventual buy back of shares during delisting. But such complaints, the judgement held, were yet to be investigated.

Therefore, in the abovementioned realities of the case, as a replacement for fulfilling minutest public shareholding requirement and obligation under SCRR, since delisting of shares under Delisting Regulations had been sought for valid and genuine reasons, therefore, in its opinion, SEBI while approving delisting was not acceptable or 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 determination of delisting. In the light of the above-mentioned discussion, SEBI permitted the 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 was, 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 urgency, SEBI was expected to act and take a decision expeditiously after investigating the grievances and complaints in question so that appellants are not put to unnecessary delay.

IV. SEBI CHALLENGED TRIBUNAL'S ORDER IN SUPREME COURT:

The SEBI moved the Supreme Court in order to appeal against the order of the Tribunal which allowed them to delist their shares. However, the company took a decision to stop trading its shares effective January 3rd on account of voluntary delisting regulations in accordance with NSE. Although the Tribunal had allowed the SEBI to undergo investigation with regard to the investor complaints, it had allowed the company to delist its shares unconditionally[4].

[4] Manisha Jha, "*SEBI moves apex court in Fresenius Kabi case*", The Hindu, March, 12th, 2018 Link

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V. Recent amendment to the regulation

Recently, in 2020, the Regulation was amended and a new Chapter was added where the Power to relax strict enforcement of the said regulation was structured. The said chapter places exemptions from enforcement of the law in special cases. In case of furthering innovation in technological aspects relating to testing new products, processes, services, business models, etc., in the live environment of regulatory sandboxes in the securities market, SEBI will provide an exemption for a period of not more than twelve months.

The meaning of regulatory sandbox has been explained as a live testing environment where new products, processes, services, business models, etc. can be deployed on a limited set of eligible customers for a specified period of time, for furthering innovation in the securities market.

Chinese Companies to get Delisted from American Depository Receipts

From the onset of March, 2021, China renewed their Securities Law, due to which the two Chinese Exchanges have undergone strict restrictions in terms of financial standards. The shell companies have been targeted with this implementation. According to popular opinion, there are the following main indicators which result in delisting of a company:

1. Negative net profit in a fiscal year
2. Negative net asset at the end of a fiscal year

Beijing has executed a policy of survival of the fittest on China's Stock exchanges, which are intending to erode the companies who are performing poorly, as well as the shell companies[5].

Around 250 Chinese companies, which were listed in American Depository Receipts ("ADRs") one of them being Alibaba, Yum China, are having a total market capital of around $2 Trillion. By the year 2024, these Chinese companies may start getting delisted from the United States Exchanges if the issues are not resolved by then[6].

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[5] Barry Van Wyk, "*China's stock exchanges are delisting a record-high number of companies",* SupChina, Dated June 14th, 2022 Link

[6] Vijay Yadav, "*The risk of delisting for the US listed Chinese ADRs",* Dated 16th June, 2022 Link