

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: July 26, 2019
Judgment delivered on: August 22, 2019

+ W.P.(C) 7768/2019, CM No. 32308/2019

NIMISH H. SHAH AND ANR.

..... Petitioners

Through: Mr. Abhinav Vasisht, Sr. Adv. with
Mr. Bhavin Gada, Mr. Manendra
Singh, Ms. Mehak Gupta, Ms. Arpan
Behl, Mr. Rohan Roy, Ms. Priya Singh
and Ms. Akshita Sachdeva, Advs.

versus

SECURITIES AND EXCHANGE BOARD OF INDIA
AND ANR.

..... Respondents

Through: Mr. Neeraj Malhotra, Sr. Adv. with
Ms. Sandhya and Ms. Cassandra
Zosangliani, Advs. for R1/SEBI
Mr. Sandeep Sethi, Sr. Adv. with
Mr. Jayant Mehta, Mr. V.P. Singh, Mr.
Abhijnan Jha, Mr. Abhishek Singh and
Ms. Drishti Harpalani, Advs. for R2

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. The present petition has been filed by the petitioners with the following prayers:

“In view of the facts and circumstances stated hereinabove, it is therefore prayed this Hon’ble Court may graciously be pleased to:

1. *issue Writ of Mandamus and / or Certiorari or any other appropriate Writ for quashing and / or setting aside the Impugned SEBI Clarification issued by the Respondent No.1;*
2. *Pass order declaring the Postal ballot Notice and PA of the respondent NO.2 as illegal and void;*
3. *Pass an order directing the respondent No.1 to initiate investigation into the breach of the MPS Norms by the respondent No.2 before any action may be taken by the respondent No.2 under the Exit Circular;*
4. *to direct the respondent No.1 to follow the mandate of the Section 11 of the Section 11 of the Securities and Exchange Board of India Act, 1992 and the circulars issued by respondent No.1 itself, and take appropriate actions accordingly;*
5. *pass any such other order or orders as this Hon'ble Court may deem and appropriate, in the interest of justice, in favour of the petitioners."*

2. In substance the grievance of the petitioners is that the respondent No.2 Bharat Nidhi Limited ('BNL' in short) is proceeding to undertake buyback of shares at a grossly understated valuation in breach of the minimum public share holding requirement as specified in Rule 19(2) and Rule 19 (A) of the Securities Contracts (Regulations) Rule 1957 as well as various circulars issued by SEBI in respect of listed companies to be in compliance with the MPS norms and have reflected

promoters and promoter group as part of the public shareholding to deny all the public shareholders a true and fair value of their rights. It is also the grievance of the petitioners that the process of buyback is being undertaken when investigation in respect of the promoters of respondent No.2 is pending. The challenge is also to the circular dated July 25, 2017 issuance of which resulted in amending and diluting laws, which is against the interest of investors in securities and development of securities market.

3. Some of the facts necessary for a decision in the writ petition are, the petitioner No.1 is a citizen of India, holding 1170 shares of respondent No.2 in dematerialized account with Stock Holding Corporation of India ('SHCIL' in short). The petitioner No.2 is a HUF holding 900 shares of the respondent No.2. The BNL has its registered office in Delhi and was public company listed on the Delhi Stock Exchange (DSE) and holds 24.40% shares of Bennett Coleman and Company Ltd. (BCCL) with other group companies of BNL which makes it the largest shareholder of the leading media house of the nation, the Times Group. BCCL in turn owns brand capital which own shares of 500 plus companies via barter of advertising eg. Times Internet Ltd, 74% of Radio Mirchi and private and quoted portfolio exceeding ₹15,000/- crores at cost and far higher at market value. It is the case of the petitioners that the core media decision of BCCL is highly profitable. BNL also hold 24.40% shareholding of Bennett Property Holdings Company Ltd. (BPHCL) and through BPHCL it owns several land parcel, buildings and flats and properties in prime location in most key cities and states in India acquired at very low cost whose market value would be in excess of thousands of crores. It is stated that BNL hold

12.41 lakh shares of Times Internet Ltd.

4. Further to the de-recognition of the DSE even though the BNL being as Exclusively Listed Company (ELC) on DSE, was moved to the dissemination board (DB) of the BSE Ltd. as per the then existing SEBI circular. However, BNL got itself listed on the Calcutta Stock Exchange (CSE). It is the case of the petitioners that BNL did this under the garb of the circulars and clarification issued by the respondent No.1, SEBI. In any case further to special purpose inspection conducted by SEBI in October 2017, the BNL is currently placed on the DB of the National Stock Exchange of India Ltd. (NSE)

5. A reference is made in the petitioners about various circulars issued by SEBI in respect to exit option to de-recognized stock exchanges; process of exit for exclusively listed companies on regional stock exchanges. These circulars being dated December 29, 2008; May 20, 2012; May 22, 2014; April 17, 2015; October 10, 2016. In the October 10, 2016 circular SEBI provided clarification on raising of further capital and the process of exit of ELCs from the DB. It is the case of the petitioners that the circular provided that all ELCs shall be required to ensure compliance with the procedure for exit and the oversee and monitoring of such exit mechanism shall be carried out by the designated stock exchange, which is the National Stock Exchanges hosting the ELC on its DB. It is also the case of the petitioners that the 2016 SEBI circular further provides the following:

(i) the ELCs on the DB which are yet to indicate their intention to comply with listing or to provide exit shall submit their plan of action of Designated Exchanges latest within three months from the date

of the said circular to the satisfaction of the Designated Exchanges, failing which the Designated Exchange shall recommend the penal action as specified under Para 6 of the circular;
(ii) the Designated Exchanges shall review the plan of action and ensure completion of the process within 6 months.”

6. According to the petitioners SEBI circular also provided the following penal actions for failure to comply the provisions therein:

“(i) the company, its directors, its promoters and the companies which are promoted by any of them shall not directly or indirectly associate with the securities market or seek listing for any equity shares for a period of ten years from the exit from the DB;

(ii) freezing of shares of the promoters/directors;

(iii) list of the directors, promoters etc. of all non-compliant companies as available from the details of the company with nationwide stock exchanges shall be disseminated on SEBI website and shall also be shared with other respective agencies;

(iv) attachment of bank accounts/other assets of promoters/directors of the companies so as to compensate the investors.”

7. Thereafter the SEBI (Respondent No.1) vide its circular dated January 05, 2017 extended the timeline for submission of plan of actions

by ELCs till March 31, 2017 which date was further extended to June 30, 2017. Further, on July 07, 2017 vide press release the SEBI further extended the timeline for submission of plan of actions by ELCs to September 20, 2017. It is averred that the SEBI under the impugned clarification dated July 27, 2017 provided the following clarifications:

“(i) the ELC's request to allow issue of bonus shares so as to raise capital may be considered subject to compliance with condition as mentioned in Companies Act, 2013 by the ELCs;

(ii) the ELC's request to allow buyback of shares by the company so as to provide exit to the public shareholders may be considered;

(iii) investors who are willing to be include in the category of promoters may be allowed. In this regard the Designated Exchanges may obtain an undertaking from the investors who wish to be classified as promoters and the exit obligation of the promoter may be reduced accordingly;

(iv) investors who are willing to remain as shareholders of the company and do not want an exit may be allowed. In this regard, the Designated Exchanges may obtain an undertaking from the investors who do not want exit and the exit obligation of the promoters will be reduced accordingly;

(v) the ELCs which have requested further time to comply with the minimum public shareholding

(MPS) requirement and have made representation to list, may not be considered;

(vi) the cases of ELCs which have submitted High Court Order related to scheme of arrangement or were under the process of scheme of arrangement on or before October 10, 2016 may be kept on hold till such process is completed.”

8. As stated above, the BNL was transferred to DB of the National Stock Exchange. On March 20, 2019 a clarification was issued with respect to transfer of companies from CSE to DB of NSE in the following manner:

“(i) The Circulars / guidelines issued by SEBI from time to time for ELCs shall be applicable to companies transferred from CSE to the DB of NSE;

(ii) Such Companies may be granted three months' time from the date of transfer to DB to submit the plan of action to NSE in terms of SEBI Circular dated October 10, 2016; and

(iii) Once the company is transferred to DB of NSE, such company ceases to be listed on CSE. Hence, such company shall have the same listing status as applicable for other exclusively listed companies and all the necessary approvals to such companies shall be granted by NSE.”

9. On June 13, 2019 BNL issued a postal ballot notice for seeking shareholders consent by way of special resolution to the following effect:

“(i) buyback up to only 21,791 (out of 29,19,722

outstanding equity shares of BNL) fully paid-up equity shares of Rs. 10/- each of BNL aggregating up to 0.746% of the paid up equity shares capital of BNL at a price of Rs. 11,229/- (Rupees Eleven Thousand Two Hundred and Twenty Nine only) per equity share payable in cash for an aggregate amount of up to Rs.24,46,91,139/- (Rupees Twenty Four Crores Forty Six Lacs Ninety One Thousand One Hundred and Thirty Nine Only); and

(ii) acquiring equity shares of Ashoka Marketing Limited (hereinafter referred to as "AML") from the other outstanding shareholders of AML at an exit price i.e. Rs. 9,47,225/- per shares by making investment not exceeding of Rs. 150 Crores. It is pertinent to note that AML is a related party to BNL as per the report of board of directors of BNL for the year ending March 31, 2018."

It is averred that the postal ballot states that the date of receipt of duly completed postal ballot forms or e-voting would be July 21, 2019 which would be the date of passing of the special resolution.

10. It is averred that on June 15, 2019 BNL issue a public announcement of its intention to buyback of upto 21,791 fully paid up equity shares of BNL aggregating up to 0.746% of the paid up equity shared capital of BNL out of 29,19,722 outstanding equity shares of BNL, for a price of ₹11,229/- per equity share. The public notice

mentions that such buyback is as per the SEBI circulars referred above. The said PA also required the shareholders who wish to continue as shareholders of BNL to submit an undertaking in this regard in terms of the impugned SEBI clarification on a non judicial stamp paper.

SUBMISSIONS:

11. It is the submission of Mr. Abhinav Vasisht, learned Senior Counsel appearing for the petitioners that the impugned SEBI clarification is non-est in law for the following reasons:

- (i) Under the said Exit Circulars, all the public shareholders were required to be given a complete exit and not a partial exit. The aforementioned has been contemplated and demonstrated in Clause (vii) of Annexure A of the 2016 SEBI Circular, reproduced hereinbelow:

*“The exit offer shall remain open for a period of maximum five working days during which the public shareholders shall tender their shares. The promoter shall open an escrow account in favour of independent valuer / designated stock exchange and deposit therein the total estimated amount of consideration on the basis of exit price and **number of outstanding public shareholders.** The escrow account shall consist of either cash deposited with a scheduled commercial bank or a bank guarantee, or a combination of both.*

The account in the escrow account shall not be released to the promoter unless all the payments made in respect of shares tendered for the aforesaid period of one year.”

(Emphasis supplied)

(ii) Under the said impugned SEBI clarification, the number of shares that can be bought back by a company are governed by the provisions of Section 68 of the Companies Act, 2013 (hereinafter referred to as “**Companies Act**”), which provides that a buy back offer can be made maximum for 10% or 25% of the paid up share capital and free reserves, thus, the spirit of the Exit Circulars so as to provide complete exit to all the public shareholders cannot be achieved;

(iii) Even if the intent and spirit of the Exit Circulars is proposed to be followed by the SEBI impugned clarification, the same would not be permitted under the provisions of the Companies Act;

(iv) The Exit Circular had provided time bound process for completion of exit to be provided to all the public shareholders, however, the SEBI impugned clarification, if allowed to be acted upon, does not give timelines and the road map for exit to the public shareholders. If the provisions of Companies Act are to be followed, then another buy back offer cannot be made for a year after completion of one buy back, thus, leaving in lurch the timelines for a public

shareholders to seek exit from the company;

(v) SEBI has the obligation under Section 11 of the SEBI Act, 1992, to ensure protection of interest of investors in securities and to promote the development of, and to regulate the securities market. While issuing the Exit Circulars, SEBI has in fact, relied upon this section for issuing these circulars, however, the interest of investors who are public shareholders will not be protected if the SEBI impugned clarification is allowed to be given effect to, as it grossly violates the intent and spirit of the SEBI Act and the Exit Circulars.

12. According to him, the respondent No.1 is also responsible to ensure compliance with the minimum public shareholding requirement as specified in Rule 19 (2) and Rule 19A of the Securities Contracts (Regulations) Rules, 1957 as well as various circulars / regulation issued by SEBI. The respondent No.2, that is Bharat Nidhi Limited, is in breach of the MPS Norms and has fraudulently reflected promoters and promoters group as part of the public shareholders to deny all the public shareholders a true and fair value of their rights, and shield the promoters and promoter group from penal consequences under the applicable laws. In this regards they have placed on record the charts prepared to show cross-shareholding historic cross-directorship and key managerial personnel, sharing of registered offices with each other complex and

convoluted web of holding through which the Jain Family controls the respondent No.2.

13. According to him, the respondent No.1 has failed to initiate any action to identify the promoters and promoter group of the respondent No.2 even after various complaints have been filed in this regard and also despite directions of the Court in W.P. (C) 9846/2017 dated December 06, 2018. In the instance case, if the true disclosures would have been made regarding the promoters and promoter group, then such persons were obligated to give a full and fair exit to the public shareholders of the respondent No.2, under the Exit Circulars. He highlighted the relevant portion of the 2016 SEBI Circular, reproduced as below, which provided for penalties for failure to give exit by the promoters as per the provisions mentioned therein:

“6. Action against companies remaining on the DB

a. Any promoter or director whose company is on the DB and has failed to demonstrate adequacy of efforts for providing exit to their shareholders in conformity with the exit mechanism as provided in this circular shall be liable for the following actions:

- The company, its directors, its promoters and the companies which are promoted by any of them shall not directly or indirectly associate with the securities market or seek listing for any equity*

shares for a period of ten years from the exit from the DB.

- *Freezing of shares of the promoters / directors.*
- *Last of the directors, promoters etc. of all non-compliant companies as available from the details of the company with nationwide stock exchanges shall be disseminated on SEBI website and shall also be shared with other respective agencies.*
- *Attachment of Bank accounts/other assets of promoters/directors of the companies so as to compensate the investors.”*

14. He stated that the respondent No.1's inaction against the respondent No.2 and its promoters / promoter group has provided a safe haven to the promoters / promoter group of the respondent No.2 so as to escape their liabilities as per the aforementioned paragraph 6 of the 2016 SEBI circular. According to him, the persons failing to comply with the 2016 SEBI Circular can be punished with freezing of their shares. Therefore, in the instant case, if the promoters were disclosed by the Respondent No.2 or identified by the Respondent No.1, then their failure to provide exit to the public shareholders would have resulted in freezing of their shares, as an immediate result of which, such promoter shareholders could not have been allowed to vote on the proposal buy back resolution by the Respondent no.2.

15. He submitted that pending the investigation by the Respondent No.1 to identify the promoters / promoter group of the Respondent No.2 which would result in freezing of shares and voting rights. As such, the postal ballot dated June 13, 2019 for the proposed buy back wherein the promoter / promoter group have an ability to vote, pending the investigation by the Respondent No.1, would be bad in law.

16. He also stated paragraph 16.5.3 (f) of the Secretarial Standard on General Meetings issued by the Institute of Company Secretaries of India, which are binding on all companies as per the provisions of Section 118 (10) of the Companies Act, reproduced below:

“16.5.3 A postal ballot from shall be considered invalid if:

.....

(f) Any competent authority has given directions in writing to the company to freeze the Voting Rights of the Member;”

He stated that in the instant case, the Respondent No.1 is the competent authority to pass such orders, and if such orders are / were passed, then the promoters of Respondent No.2 will not be allowed to vote on the proposed postal ballot resolution for buy back. As such, the Postal Ballot Notice for the proposed buy back wherein the promoter / promoter group have an ability to vote, pending the investigation by the Respondent No1., would be bad in law.

17. He also submitted that the true value of the Respondent No.2 has not been taken into consideration in the Postal Ballot Notice and public announcement issued by the Respondent no.2 dated June 15, 2019 and the price offered is not the fair value, and amongst other factors, market value of investments made by the Respondent No.2 in the listed and unlisted investments have not been considered. The valuation report dated June 6, 2019 issued by Corporate Professionals Capital Private Limited does not reveal the fair value of the shares of the Respondent No.2 and in place admits lack of information and documents. The Valuation Report in spite of observing that the Respondent No.2 holds investments in certain operating companies as well as certain non-operating companies besides holding investments in mutual funds, quoted shares, corporate deposits, has failed to demonstrate the fair value of the shares of the Respondent No.2. Even though the Respondent No.2 is the major shareholder of Bennett Coleman and Company Limited and Bennett Property Holdings Company Limited (hereinafter referred to as “BPHCL”) the Valuation Report states that the Respondent No.2, does not have access to detailed information about BCCL and BPHCL.

18. He stated that the counsels for the Respondent No.1 have submitted that an investigation into the breach of MPS Norms against the Respondent No.2 is ongoing and pending such investigation by the

Respondent No.1, the proposed buy back if allowed would cause irreparable damage and loss to the public shareholders like the petitioners, for the following reasons:

(i) If the buy-back is allowed to be acted upon, then the Respondent No.2 may very well take a stand that since it has complied with the Impugned SEBI Clarification it should be allowed to come out of the dissemination board (hereinafter referred to as “DB”) of the National Stock Exchange of India Limited (hereinafter referred to as “NSE”). As a result of the Respondent No.2 coming out of the DB of NSE, the Respondent No.2 will no longer be within the jurisdiction of the Respondent No.1, and the rights of the public shareholders to seek full and fair exit shall be frustrated;

(ii) If the buy-back is allowed to be acted upon, and if subsequently the Respondent No.1 determines that the Respondent No.2 has failed to disclose its promoters / promoter group and has violated the MPS Norms, the public shareholders who have tendered their shares in the buy back offer will be left with no remedy, as their shares would have been extinguished as a result of the buy back. He seeks, the prayer as made in the writ petition with costs.

19. Mr. Sandeep Sethi, learned Senior Counsel appearing for the respondent No.2 submitted at the outset that the writ is not maintainable

against a private person, being a company performing no statutory functions. In this regard he has pointed out that prayer No.2 at page 113 of the writ petition is directed against the respondent No.2 which is a private person, being a company incorporated under the Companies Act. Further no such prayer is maintainable as is established law in view of judgments in *Praga Tools v. C.A. Immanuel*, (1969) 1 SCC 585 at para(s) 6 and 9, *Binny Ltd. v. Sadasivan*, (2005) 6 SCC 657 at para(s) 9-11, 29; *Federal Bank v. Sagar Thomas*, (2003) 10 SCC 733 at para(s) 18, 27, 31 and 32.

20. It was his submission that there cannot be an injunction on the holding of a meeting of the general body of shareholders in view of judgments in *LIC v. Escorts*, (1986) 1 SCC 264 at para(s) 95, 100; *Anil Kumar Boddar v. Reliance Industries Ltd.*, (2016) SCC Online Del 1855 at para(s) 5 to 7; *Ganesh Chakkarwar v. VRG Healthare*, dated September 26, 2018 in W.P. (C) 6154/2018. Consequently, prayer 2 at page 113 of the writ petition cannot be granted.

21. He also stated that the petitioners holds miniscule shareholding (0.0007%) in respondent No.2 and cannot stall the entire process which is for the benefit of all shareholders. He submitted that the process of buyback is approved under law by the shareholders of respondent No.2. Shareholders holding miniscule shareholding (0.0007%) ought not to be

allowed to keep the process on hold. This would be in the teeth of the principle of corporate democracy. In this regard, he relied upon the judgment in *LIC v. Escorts, (1986) 1 SCC 264* at para(s) 95 and 100.

22. He stated that there is no cause of action. The petitioners have not made any complaint with SEBI in relation to the grievances raised in the writ petition, inasmuch as it is an established principle of law that there cannot be any relief for mandamus if no demand has been made, as held in *Rajasthan State Industrial Development v. Subhash Sindhi, (2013) 5 SCC 427* at para 24 and *Saraswati Industrial Syndicate v. Union of India, (1974) 2 SCC 630* at paras 24 and 25. In the absence of any such complaint, no cause of action is made out for approaching this High Court.

23. It is also submitted that the respondent No.2 has followed due procedure in giving exit in the form of a buy-back, inasmuch as once respondent No.2 was transferred to the Dissemination Board, it had an option between (a) raising capital for listing on NSE / BSE or (b) providing an exit to shareholders. Accordingly, it has proposed to provide exit to shareholders. There is no requirement in law that a company must have a promoter. Being a promoter-less company, it could only offer a buy-back of its shares as set out in the SEBI letter dated July 25, 2017. He stated that the SEBI circular dated July 25, 2017

has been upheld by the Securities Appellate Tribunal in a detailed judgment in *Mahendra Girdharilal v. Securities Appellate Tribunal*, dated February 28, 2019, in M.A. No.91/2019 in C.A. No. 73/2019. The SAT is an expert tribunal and its ruling on exit through the Dissemination Board by way of a buyback and in terms of the SEBI circular ought to be given due consideration. In this regard reliance is placed on the judgments of the Supreme Court in *Clariant International v. SEBI*, (2004) 8 SCC 524 at paras 71 and 77 to 81; *Reliance Silicon (I) Pvt. Ltd. v. Collector, Central Excise*, (1997) 1 SCC 215 at para 2. In light of the above, the petitioners' grievances do not survive. He also stated nowhere in the Jaspreet Aulakh matter or any other order of the High Court or by SEBI / NSE / BSE, has a promoter-less company been disallowed to exit through the Dissemination Board. In fact, the order passed in the Jaspreet Aulakh matter reaffirms that a promoter-less company can exit through the Dissemination Board process.

24. According to Mr. Sethi, the petitioners seek to reopen issues concluded in the order dated December 06, 2018 passed in Jaspreet Aulakh matter inasmuch as the respondent No.2's listing in the stock exchanges and subsequent transfer to the Dissemination Board of NSE was the subject matter of the Jaspreet Aulakh matter and the High Court had relied on the fact that respondent No.2 had been transferred to the

Dissemination Board and had accordingly decided that nothing survived in the petition. In light of the above, there cannot be any argument that the respondent No.2 should be listed back on a nationwide stock exchange. By corollary, respondent No.2 must be allowed to exit through the Dissemination Board and the only possible mechanism of exit for a promoter-less company is buyback of shares. He also stated that this Court has previously held that the process before the Dissemination Board cannot be stalled inasmuch as in the order passed on December 21, 2018 in *Manish Mittal and Ors. v. SEBI and Ors.* this Court has categorically held that the process of exit before the Dissemination Board cannot be stalled. The petitioners seek to raise the same issues raised earlier in the Manish Mittal matter and conclusively held against the shareholders in that case.

25. Mr. Sethi stated that buyback is an offer to a shareholder without any attendant obligation on any shareholder to sell shares. In other words, a shareholder is also free to reject the buyback offer and continue to be a shareholder. According to Mr. Sethi, there is no link between a buyback exercise under the Companies Act and an investigation by SEBI into possible promoters of a Company, inasmuch as any company existing through the Dissemination Board has a choice in terms of giving an exit to its public shareholders; (a) either to buy back the shares

through promoters; or (b) buyback the shares through the Company itself. In other words, the SEBI circular offers an additional option to companies, whether they have promoters or not, to exit through the Dissemination Board by way of a buyback exercise. Further, regardless of the mechanism chosen by the Company, there is still a buyback of shares. Consequently, the value at which the shares are bought back remains the same. In the circumstances, whether a company has promoters or not has no bearing at all on the buyback exercise being conducted. Consequently, the buy back exercise ought not to be interfered with.

26. He also stated that the buyback is in accordance with Companies Act inasmuch as:

- a. The buyback size is the maximum that Respondent No.2 could offer in terms of Section 68 (2) (C), Companies Act, 2013.
- b. Under Section 68 (2)(c), Companies Act, 2013, a Company can only buy back 25% of the Company's fully paid up equity share capital and free reserves. As per the last unaudited standalone financial statements for the year March 2019, the aggregate paid up share capital and free reserves of the Company amounted to ₹97,87,99,681 (₹ 97.87 Crores).

c. Consequently, Respondent No.2 could only offer a buyback amounting to a maximum of (25% of ₹97.87 Crores), i.e., 24.46 Crores. This is what Respondent No.2 has offered. With each share being valued at ₹11,229, the total number of shares that could be offered is 21,791 equity shares (0.746% of total fully paid up equity shares of the company).

27. That apart it is his submission that in any event any grievance by a shareholder may only be made in terms of the Companies Act, inasmuch as any grievance by a shareholder of violations of provisions of Companies Act may only be made before the National Company Law Tribunal. Such a shareholder may make an application alleging oppression / mismanagement under Sections 241/242 of the Companies Act, 2013. Further, in terms of Section 430 of the Companies Act, 2013, the National Company Law Tribunal has exclusive jurisdiction in all matters pertaining to the Companies Act. Thus, in terms of the above, it is not appropriate for the petitioner to approach the writ court with such grievances.

28. He stated the valuation conducted is in accordance with law. In this regard, he stated that the following:

a. In terms of the Circular dated October 10, 2016, the appointment

of an 'independent valuer' is to be done from the panel of expert valuers of the designated stock exchange.

b. In accordance with the above, a SEBI Registered Category I Merchant Banker, empanelled with NSE, was appointed.

c. SEBI Circular dated October 10, 2016 does not specify any methodology to be adopted for arriving at the "fair valuation" of the shares of the Company. The valuation methodology is in accordance with internationally accepted valuation standards and customary valuation practices in India.

d. He also stated that it is an established principle of law that the valuation should be left to the wisdom of valuers (*GL Sultaniav. SEBI (2007) 5 SCC 133, Paras 33 and 37: Hindustan Unilever Employees Union v. Hindustan Unilever Ltd. 91995) Supp. (1) SCC 499.*

29. With regard to Mr. Vashisht's plea that in a buyback process by the Company, the shares are extinguished, it was submitted by the learned counsel for the respondent No.2 that this is irrelevant. Buyback is a process allowed by law. In other words, there is no illegality in a share buyback process. Besides, it is immaterial to the selling shareholder as to what happens to the shares after they have been bought back by the Company or the promoter as the case may be. Similarly, with regard to the plea that the SEBI's circular over-reaches Section 68

of the Companies Act, 2013, it was submitted by Mr. Sethi that there is no such ground taken in the writ petition. The Companies Act allows buyback as a legitimate and legal corporate action. The SEBI letter allows buyback as a legitimate and legal mechanism of exit of a company on the Dissemination Board of a nationwide stock exchange. There is no contradiction between two and the Companies Act and SEBI circular are absolutely in conformity with each other.

30. With regard to the petitioners' plea that the offer is only 0.734%, it was stated that the petitioner deliberately glosses over Paragraphs 3 and 6 of the Explanatory Statement accompanying the Postal Ballot Notice. In terms of the Companies Act, 2013, a Company can only buy back 25% of the Company's fully paid up equity share capital and free reserves at any given time. This is what Respondent No.2 has done.

31. With regard to the plea that the SEBI clarification puts the Petitioner's interest in jeopardy, it was stated that this is a bald plea and there is no legal basis for it. There is no compulsion to sell shares as set out by the petitioner.

32. With regard to the plea by relying on the Corporation Secretarial Standards, it was the submission of the learned counsel for the respondent No.2 that such reliance is wholly misplaced as the said document has no relevance to the present lis. The clause only applies to

the voting members whose membership has been frozen. This means that as on the date of postal ballot, there should be a freezing order. There is none in the present case. The Petitioner relies on his own allegations as gospel of truth to seek an injunction on the postal ballot. This argument is manifestly contrary to the principle of Corporate democracy laid down in *LIC v. Escorts, (1986) 1 SCC 264*, Paras 95 and 100.

33. Insofar as the counsel for the SEBI is concerned, his only submission was that the investigation into be breach of MPS norms against respondent No.2 BNL is going on.

CONCLUSION:-

34. Having heard the learned counsel for the parties, the first and foremost question that needs to be decided is whether the Circular dated July 25, 2017 issued by the SEBI is non-est in law. Vide the said circular SEBI permitted a Company to buy-back the shares so as to provide an exit to the public shareholders. At the outset, it must be stated that the circular has been challenged after two years of its coming into existence. Within these two years, it has been made operational / implemented. One such case i.e. noted during the course of arguments is that of *T. Stanes and Company Limited* as during the course of arguments reliance was placed by Mr. Sethi on the Judgment of Securities Appellate Tribunal, Mumbai, in Appeal No. 73/2019 wherein

the challenge was with regard to an order passed by NSE removing the Company from Dissemination Board after it bought back the shares, which action was upheld by SAT by relying upon the Circular dated July 25, 2017. So, it is quite late in the day for the petitioners to challenge the circular on the ground that the company cannot be allowed to buy back shares. Even otherwise, the impugned circular has to be read in conjunction with Section 68 of the Companies Act as it stipulates buy-back of shares in a particular manner. Any reading of the circulars in the manner stated by the petitioners shall be in violation of the Companies Act creating an anomalous situation whereby the buy-back of shares while the Company is on the Dissemination Board shall be contrary to the Companies Act which allows buy-back as a legitimate and legal corporate action. Having said that, this court proceeds to deal with the submissions of the counsel for the parties on the premise that the company can buy back shares.

35. The submissions of Mr. Vashisht in support of his challenge to the circular are the following:

- (i) Under the exit circulars all the public shareholders are required to be given complete exit and not a partial exit and in this regard he had relied upon Clause (7) of Annexure-A of the 2016 SEBI Circular.

- (ii) As noted from the impugned circular of July 25, 2017, the number of shares that can be bought back by a Company are governed by the provisions of Section 68 of the Companies Act, which provides that a buy back offer can be made maximum for 10% or 25% of paid up share capital and free reserves and thus the spirit of the existing circulars so as to give complete exit to all the public shareholders, cannot be achieved.
- (iii) The impugned circular does not give timelines and road map for exit to the public shareholders unlike exit circulars which provides time bound process for completion of exit to all shareholders.
- (iv) The impugned circular does not protect the interest of the investors who are public shareholders.

36. The pleas of Mr. Vashisht as noted above are not appealing. The exit circulars nowhere expressly state that all the public shareholders need to be given complete exit. The reliance was placed on the words “*number of outstanding public shareholders*” in clause (VII) of Annexure A of 2016 circular. The words have to be read in the context when exit offer is given an escrow account shall be opened in favour of the valuer / designated stock exchange wherein, deposit of the amount on the basis of exit price and number of outstanding public shareholders shall be made. This is keeping in view, all the public shareholders shall be given option to sell their share but it is not necessary all the public shareholders shall opt to sell their shares. It was rightly pointed out by Mr. Sethi that shareholder is also free to reject the buy-back offer and continues to be a shareholder. So, it follows the circulars do not contemplate the exit of all public shareholders. This I also say, in view

of the stipulation in the impugned SEBI Circular “*investors who are willing to remain shareholders of a company and do not want to exit, should be allowed*”. I do not find any illegality in such a stipulation as it is not necessary for a shareholder to seek his exit.

37. The plea of Mr. Vashisht that the impugned circular does not give timelines and road map is concerned, the same is also without merit, inasmuch as the clarification dated March 20, 2019 issued by SEBI with respect to transfer of companies from CSE to DB of NSE clearly stipulates:

- (i) The circulars / guidelines issued by SEBI from time to time for ELCs shall be applicable to companies transferred from CSE to DB of NSE like the respondent no.2 Company herein.
- (ii) All such companies have been granted three months’ time from the date of transfer to DB to submit a plan of action to NSE in terms of SEBI’s circular dated October 10, 2016. That apart, Annexure “A” of circular dated October 16, 2016 also states that the exit offer shall remain open for a period of minimum five working days. It is also stated that the payment for consideration shall be made within fifteen days from the date of completion of offer.

38. The plea of Mr. Vashisht that the impugned circular does not protect the interest of the investors is concerned, as stated above there is no compulsion for the investors to sell or not to sell his share. So, it cannot be said that the petitioners’ interest has been put in jeopardy.

39. The plea of Mr. Vashisht that respondent no.1 SEBI failed to initiate any action to identify the promoters and promoter group of BNL that would have obligated such persons to give full and fair exit to the public shareholders of the BNL under the circulars also does not impress me for the reason, in terms of the judgment of this Court in *Jaspreet Aulakh (supra)*, as vide Para 20, it is clear that the identity of the promoters of BNL was required to be examined by SEBI subject to the complaint made by the petitioners therein. Assuming the petitioner or any person, (other than petitioners) had made a complaint to SEBI, they have not cared to approach this court, with their grievance. Surely, the petitioners have not made any complaint and they cannot agitate this issue.

40. In any case the issue of identifying the promoters has no effect on a company giving an exit to its public shareholders, as the option to buy back the shares of the public shareholders is available through a promoter or through the company itself. It is the case of the respondent no.2 BNL that it has no promoters and it has decided to buy-back the shares itself. Assuming promoter / promoter groups are identified, then also the discretion / right of the company to buy-back shares cannot be interdicted / curtailed as is clear from the impugned circular which provides for such an option to a Company. This conclusion also answer the plea of Mr. Vashisht that failure on the part of the promoters to give full and fair exit to public shareholders shall entail penalties as being without merit inasmuch as, when there is no obligation, there is no question of penalties.

41. It must be stated here that circular of 2016 stipulates action against a company, its director on their failure to provide exit to the shareholders, which includes the action stated therein. It is not the case of the petitioner that respondent no.2 company has failed to provide exit to its shareholders. So, it follows, the postal ballot dated July 13, 2019 is in that direction, which cannot be faulted.

42. One of the pleas of Mr. Vashisht was that the price offered for share is not the fair value, and amongst other factors, market value of investments made by the respondent No.2 have not been considered and even the valuation report dated June 6, 2019 issued by Corporate Professionals Capital Private Limited does not reveal the fair value of the shares of the Respondent No.2 and in fact admits lack of information and documents, is concerned, if the petitioners are not satisfied with the valuation, they are within their right not to accept the offer of buy-back at that rate. I note, respondent no.2 has justified share value by stating that under Section 68 (2)(c) of the Companies Act, 2013, a company can buy-back 25% of the Company's full paid up equity share capital and free reserves and as per the last unaudited stand alone financial statements for the year ending March, 2019, the aggregate paid up share capital and free reserves of the company amounted to ₹97,87,99,681/- and 25% of the amount would be ₹24.46 Crores and with each share valued at ₹11,229/-, the total number of shares that would be offered is 21,791/- equity shares. If that be so, there is some justification of the respondent no.2 to value the share @ ₹11,229/-. In any case, this court does not have necessary wherewithal to determine the share value and surely the determination shall be beyond the scope of judicial review.

43. Having come to the aforesaid conclusion, I agree with the submission made by Mr. Sethi that Prayer (2) of the writ petition challenging the Postal Ballot and Notice and PA of the respondent no.2, shall not be maintainable as their issuance is purely an action of the company incorporated under the Companies Act. It is not the case of the petitioners that the same have been issued contrary to the circulars issued by SEBI or provisions of the Companies Act. That apart through this writ petition, the petitioners who are two shareholders holding a miniscule number of shares cannot interdict the process of buy back. In fact, the viability of buy-back needs to be decided through the special resolution, passed at the general meeting of the company through the postal ballot, wherein it is clearly mentioned that a shareholder can vote for or against the resolution. The buy-back of the shares necessarily has to be pursuant to the resolution having been accepted by the shareholders. Mr. Sethi is also justified in saying that there is no cause of action for the petitioners to approach this court inasmuch as the petitioners have not even cared to take up this issue with SEBI before approaching this court. Having said that, this court is of the view that the impugned circular dated July 25, 2017 is in accordance with the law and the prayer made at serial no.2 of the writ petition cannot be granted as being not maintainable. In so far as the prayer no.3 is concerned, there is no dispute that the SEBI is investigating the issue of breach of MPS norms by respondent no.4, which has no connection with the issue of buy back of shares by the Company.

44. I do not find any merit in the petition. The same is dismissed.

CM No. 32308/2019

Dismissed as infructuous.

V. KAMESWAR RAO, J

AUGUST 22, 2019/aky

