BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No. 110 of 2007

Date of decision : 16.6.2008

Bonanza Biotech Ltd. …… Appellant

Versus

Securities and Exchange Board of India …… Respondent

Mr. Gaurav Joshi Advocate for the Appellant.

Dr. Mrs. Poornima Advani, Ms. Pranita Mhatre and Ms. Sujata Patil, Advocates for the Respondent.

Coram : Justice N.K. Sodhi, Presiding Officer
Arun Bhargava, Member
Utpal Bhattacharya, Member

Per : Justice N.K. Sodhi, Presiding Officer (Oral)

This order will dispose of two Appeals no. 110 and 138 of 2007 in which common questions of law and fact arise. These appeals are directed against the same order dated March 6, 2007 issuing directions to the appellants under sections 11 and 11B of the Securities and Exchange Board of India Act, 1992 (hereinafter called the Act).

2. The Securities and Exchange Board of India (for short the Board) carried out investigations into the dealings in the shares of Design Auto Systems Limited (for short DASL) for the period between August 2001 and January 2002. Investigations revealed that DASL had made a preferential allotment of ten crore shares in favour of Bonanza Biotech Limited – the appellant herein. It is not in dispute that DASL and the appellant were both listed companies and their shares were listed on different stock exchanges including the Bombay Stock Exchange (BSE). It is alleged that after making the aforesaid allotment DASL approached the Madhya Pradesh Stock Exchange (MPSC) and obtained the listing permission. However, DASL was not given the trading permission. The case of the respondent Board is that after the aforesaid allotment was

made the shares were dematerialized and were credited to the demat account of the appellant with Central Depository Services (India) Limited (CDSL). Even though there was no permission to trade these shares, the appellant company offloaded six crore unlisted shares from its account to different entities as referred to in the impugned order. It is further alleged that the appellants had sold these shares to different parties whereas the case of the appellant is that these shares had been offered by way of security to secure a loan obtained by the appellant. For the view that we are taking, it is not necessary to decide this dispute between the parties. The unlisted shares were traded on BSE and before the transactions could be completed, the exchange (BSE) intervened and suspended trading in the scrip of DASL which was otherwise listed on that exchange. It is common ground between the parties that as a result of the intervention of BSE, 9,01,78,926 shares out of the ten crore unlisted shares were frozen and the remaining 98,21,074 shares were sold to the lay investors in the market. In this background, the Board initiated proceedings against the appellant and DASL and their directors and they were issued notices to show cause why appropriate directions be not issued to them under section 11B of the Act including directions to restrain them from accessing the capital market for a suitable period. The appellant company did not respond to the show cause notice despite service and was proceeded ex-parte. It is relevant to mention at this stage that even during the course of the investigations the appellant company and its directors/officers did not cooperate with the Board and they were proceeded against under section 15A of the Act and monetary penalty to the tune of Rs.One crore was levied on the appellant and its directors. That order of penalty was upheld by this Tribunal in Appeal no. 61 of 2006 decided on 23rd August 2006.

3. On a consideration of the material collected during the course of the investigations and the statements recorded of different persons who were summoned to appear, the Board by its order dated March 6, 2007 came to the conclusion that the charges levelled against the appellant company and its directors stood established and that they offloaded more than 98 lac unlisted shares in the market as a result whereof

the lay investors were duped. Accordingly, directions have been issued to the appellant and its directors not to access the capital market for a period of seven years from the date of the order and with a view to give an exit opportunity to the entrapped public shareholders of DASL, the appellant company has been directed to offer to purchase an equivalent amount of 98,21,074 shares of DASL from the public shareholders by making an offer in the manner prescribed in the impugned order. It is against this order that the present appeals have been filed. Appeal no.110 of 2007 has been filed by Bonanza Biotech Ltd. and the other one by its directors.

4. We have heard the learned counsels for the parties who have taken us through the impugned order. It was strenuously argued by Shri Gaurav Joshi, learned counsel for the appellant that his clients had not been served with the show cause notice in the present proceedings and, therefore, the Board was not justified in proceeding ex-parte and that the impugned order deserves to be set aside on this short ground. The learned counsel appearing for the Board has placed before us the original record which we have perused. The show cause notice was sent to MPSC with a direction to serve the same on the appellant company and its directors. The same was received by one Mr. B.L. Joshi on behalf of the appellant company and its directors and he gave an acknowledgement to MPSC, which was subsequently sent to the Board. We have on record a letter dated July 21, 2005 from the appellant company informing MPSC that Mr. B.L. Joshi had been authorized on its behalf to collect the show cause notice, which he did on the same day. In view of this documentary evidence on the record we cannot accept the mere ipse dixit of the appellants that they had not been served in the proceedings. We have, therefore, no hesitation to reject this contention.

5. The next argument of Mr. Gaurav Joshi, Advocate on behalf of the appellants is that they were not afforded any opportunity to cross-examine the persons on whose statements the Board has relied and, therefore, the principles of natural justice stood violated. This argument will not detain us for long. Admittedly, statements of several persons were recorded during the course of the investigations and the appellants had

also been summoned to appear. They did not appear for which they had been proceeded against section 15A of the Act as already noticed above. Had they appeared they would have been confronted with those statements and it was at that point of time that they could ask for their cross-examination. Not having responded to the summons and not having cooperated with the Board during the course of the investigations, it is not open to the appellants to allege that they were denied the opportunity to cross-examine those whose statements have been relied upon. In any case copies of all the statements were sent to the appellants along with show cause notice and even at that stage they chose not to appear and allowed ex-parte proceedings to be conducted against them. They cannot now be heard to say that they were denied the opportunity to cross-examine the witnesses.

6. Having failed to satisfy us on the aforesaid submissions, the learned counsel for the appellants contended that the appellant company had no occasion to know that the shares allotted to it which had been dematerialized by CDSL had not been listed and, therefore, they could not be blamed for offloading 98 lac shares which were sold in the market. It is inconceivable that ten crores shares of DASL having been allotted to the appellant company, the latter was unaware that they were not listed. The impugned order has pointed out the nexus between DASL and the appellant company and their directors in issuing preferential shares on swap basis and the manner in which these were offloaded in the market entrapping the lay investors. We are in agreement with the findings recorded in the impugned order in this regard and cannot therefore accept this contention of the appellants.

7. It was also urged on behalf of the appellants that the Board had no power under the Act to issue directions to the appellants to purchase 98,21,074 shares of DASL from the entrapped shareholders by making an offer to them in the manner stated in the impugned order. The appellants are forgetting that directions have been issued to them under section 11B of the Act which gives ample powers to the Board to issue appropriate directions which, according to it, are necessary in the interest of investors

and also in the interest of the securities market. It is true that every direction issued under section 11B of the Act has to be tested on this touch stone and when we look at the directions issued in the instant case we find that the directions issued are fair and equitable and this is the only way in which the entrapped public shareholders can be provided with some relief. The appellants acting in concert with DASL and its directors had played a big fraud on the lay investors and the securities market and in the process duped a large number of public investors. Public investors have to be protected and the most reasonable way is to give them an opportunity to exit if they so choose. This is what the impugned order purports to do. We cannot, therefore, find any fault with the directions issued in the impugned order.

Appeal no. 138 of 2007

8. The additional argument that was urged on behalf of the appellants in this appeal who are the directors of Bonanza Biotech Limited is that the appellants, no doubt, were directors at the relevant time but they were not in charge of and responsible to the company for the conduct of its business and, therefore, no action could be taken against them. Support in this regard was taken from the provisions of section 27 of the Act which deals with offences committed by companies. The question whether the appellants as directors were in charge of and responsible to the company for the conduct of its business is a question of fact which ought to have been pleaded before the Board and established by producing the relevant material in the form of board resolutions showing that persons other than the appellants were in the control of the company. The appellants did not appear before the Board nor did they produce any material before it. We cannot permit the appellant to raise such a plea for the first time before us. Be that as it may, the appellants have not produced copies of any resolution passed by the board of directors of Bonanza Biotech Ltd. to show that persons other than the appellants were in charge of the company and were conducting its business. We specifically put it to the learned counsel for the appellant whether there was any resolution passed by the company authorizing directors other than the appellants to carry on its business and he

frankly submitted that there was nothing on record to that effect. In the absence of any such material, we cannot but proceed on the assumption that the company must have taken decisions through resolutions as that is the only manner in which companies can act. Admittedly, the appellants were the directors and as such were parties to all such decisions taken by the company. This contention, too, raised on behalf of the appellants is without any merit and the same is rejected.

9. In the result, both the appeals fail and they stand dismissed. No costs.

Sd/-
Justice N.K. Sodhi
Presiding Officer

Sd/-
Arun Bhargava
Member

Sd/-
Utpal Bhattacharya
Member

16.6.2008
ddg/-