

**BEFORE THE SECURITIES APPELLATE TRIBUNAL  
MUMBAI**

**Appeal No. 32 of 2008**

**Date of decision: 20.6.2008**

Temptation Foods Limited

..... Appellant

Versus

Bombay Stock Exchange Limited  
Securities and Exchange Board of India

..... Respondents

Mr. Subhash Jha Advocate with Mr. Prashant Aher and Ms. Laxmi Menon Advocates for the Appellant.

Mr. P.N. Modi Advocate with Mr. Sagar Divekar Advocate for Respondent No.1.

Dr. Poornima Advani Advocate with Mr. Haihangrang E.H. Newme Advocate for Respondent No.2.

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.32 and 33 of 2008 in which identical questions of law and fact arise. Since arguments were addressed in Appeal no.32 of 2008 we are making reference to the facts of this case. It is not even necessary to refer to the detailed facts because we are upholding the preliminary objection raised by the learned counsel appearing for the Bombay Stock Exchange (BSE) which is Respondent no.1 in both the appeals.

Challenge in the appeal is to the communication dated October 18, 2007 sent by BSE to the appellant informing the latter that its application under clause 24(a) of the listing agreement for prior in-principle approval for the issue of 2,90,000 equity shares of Rs.10/- each at par to the promoters and business associates on a preferential basis stands rejected. The ground on which the in-principle approval has been declined is that the appellant company failed to comply with clause 13.4.1 of the Securities and Exchange Board of India (Disclosure and Investor Protection) Guidelines, 2000 (for short the guidelines). The learned counsel for BSE at the outset contended that in view

of the subsequent developments, the present appeal has become infructuous. Facts in so far as they are necessary for the disposal of the appeal may now be stated. An Extraordinary General Meeting (EGM) of the appellant company was held on June 26, 2006 in which a resolution, among others, was passed for making a preferential allotment of 3,30,000 equity shares of Rs.10/- each at par to the directors and business associates of the company. Having armed itself with this resolution and before making the allotment, the appellant company filed an application with BSE for seeking in-principle approval for the allotment. This was necessary in view of clause 24(a) of the listing agreement between the appellant and BSE. Since the appellant did not make the allotment within 15 days from the passing of the resolution by the shareholders in the EGM, the in-principle approval was declined and it is that decision of BSE which is now under challenge. In the meantime company sent a notice dated 29.11.2007 to its shareholders for holding an EGM on 26.12.2007. This notice contained an Explanatory Statement and this is what the shareholders had been informed:

“A proposal to issue 3,10,000 Equity Shares to the Directors and Business Associates at par value of Rs.10/- had been approved earlier by the members at an Extraordinary General Meeting of the Company on 26<sup>th</sup> June, 2006 and application for listing under Clause 24(a) of the Listing Agreement with the Bombay Stock Exchange was submitted albeit after the statutory period of 15 days as provided by Clause 13.4.1 of SEBI (DIP) Guidelines, 2000. As a result, the BSE, vide its letter dated 18<sup>th</sup> October, 2007 rejected the same. The Resolution for 3,10,000 Fully Convertible Warrants, is, therefore, being put to shareholders for consideration and is at a price as per pricing formula specified by SEBI in this behalf.

By a subsequent corrigendum the company clarified that the figure 3,10,000 wherever appearing would mean 3,30,000.” From the aforesaid disclosure made by the company to its shareholders it is evident that in lieu of 3,30,000 equity shares which were to be allotted to the directors and the business associates as approved in the EGM held on June 26, 2006, the company was now proposing to issue 3,30,000 fully convertible warrants because its application seeking in-principle approval under clause 24(a) of the listing agreement had been declined by BSE and, therefore, the fresh proposal was being put up to the shareholders for their consideration. In the EGM held on 26.12.2007

one of the shareholders—Mr. Dindayal Khandelwal referred to the Explanatory Statement annexed to the notice and made an enquiry from the Chairman of the meeting as to whether the convertible warrants were being issued in lieu of the earlier 3,30,000 equity shares which were sought to be allotted in pursuance to the EGM held on June 26, 2006 or were the warrants in addition to those shares. The Chairman informed that the issue of warrants under the resolution was in addition to the issue of the equity shares to the shareholders which had been approved earlier and not in lieu thereof. This query and the explanation furnished by the Chairman of the meeting finds mention in the minutes of the EGM as recorded by the company. When we read the minutes of the EGM held on 26.12.2007 alongwith the Explanatory Statement annexed to the notice convening that meeting, we find that the two are contradictory. The Explanatory Statement recites that the warrants were being issued in lieu of the equity shares approved in the earlier EGM whereas the minutes record that those were being issued in addition to those shares. The matter does not end here. The Board of Directors of the company then prepared their report on 5.4.2008 and in that report they again inform the shareholders that the convertible warrants proposed to be allotted to the directors and business associates are in lieu of the equity shares earlier approved by the shareholders in the EGM held on June 26, 2006. It will be seen that this statement in the Directors' Report is in consonance with what the shareholders had been informed in the Explanatory Statement to the notice convening the EGM held on 26.12.2007. The directors in their report have clarified that the offer of 3,10,000 equity shares on preferential basis in the earlier year had lapsed due to the non-grant of in-principle approval by BSE. From what has been stated above it is clear that the company and its directors make one disclosure in the Explanatory Statement and in the Directors' Report whereas in the minutes of the EGM they record that the warrants were in addition to the equity shares approved in the earlier year. One wonders as to which of the two statements is correct. However, there can be no doubt that the shareholders had been informed that the warrants were in lieu of the equity shares approved in the earlier EGM. We say so because it is the Explanatory Statement and the Directors' Report

which were sent to the shareholders. The minutes of the EGM which record the contrary version are only with the company. On the conclusion of the EGM in December, 2007 in which the resolution for the allotment of convertible warrants had been approved, the company again applied to BSE seeking an in-principle approval under clause 24(a) of the listing agreement and this application is presently pending. In view of the aforesaid events which took place subsequent to the impugned communication, we are satisfied that the company has misled its shareholders and having done so we are not inclined to entertain the appeal. The appellant who approaches this Tribunal must come with clean hands. The appellant is a market player and cannot be allowed to mislead its investors. It is not in the interest of the securities market. This apart, the directors in their report have already informed the shareholders that the proposed offer of allotment made in pursuance to the approval granted in the EGM held on 26.6.2006 has lapsed. The directors themselves having said that the previous approval has lapsed and, therefore, the learned counsel appearing for BSE is right in pointing out that the present appeal has become infructuous. It has become infructuous because the approval granted by the shareholders in the EGM held on 26.12.2007 for the allotment of convertible warrants is in lieu of the equity shares proposed to be allotted to the directors and the business associates earlier. The proposed allotment of convertible warrants is not in addition to that allotment and for this allotment the appellant has filed a fresh application seeking approval under clause 24(a) of the listing agreement which is pending.

In Appeal no. 33 of 2008 the preferential allotment was sought to be made of convertible warrants in favour of two parties namely Venture Business Advisors Pvt. Ltd. and NRI Tax Services.com Pvt. Ltd. Here again, the appellant company obtained the approval from its shareholders in the EGM held on 17.9.2007 and thereafter applied for in-principle approval to BSE which has been declined by the impugned communication dated 15.11.2007. After the refusal by BSE the company once again placed the same matter before the shareholders in the EGM held on 26.12.2007 though for slightly higher number of warrants. Here also the warrants now proposed to be

issued are in lieu of the warrants which had earlier been approved by the shareholders in the EGM held on 17.9.2007. Although the directors here do not say that the earlier proposal has lapsed but it obviously has because the company has again approached BSE for approval to the proposed allotment of convertible warrants to the aforesaid preferential allottees. The Explanatory Statement to the notice convening the subsequent EGM makes it abundantly clear that the proposal that was being placed before the shareholders was in lieu of the earlier approval granted. This being so we are of the opinion that this appeal has also become infructuous because for the subsequent proposed allotment, the application for approval is pending with BSE.

It goes with out saying that the pending applications with BSE shall be disposed of in accordance with law.

For the reasons recorded above, both the appeals are dismissed as infructuous.  
No costs.

Sd/-  
Justice N.K. Sodhi  
Presiding Officer

Sd/-  
Arun Bhargava  
Member

Sd/-  
Utpal Bhattacharya  
Member

20.6.2008  
pw