



Securities and Exchange Commission of Pakistan

BEFORE APPELLATE BENCH NO. IV

In the matter of

Appeal No. 37 of 2015

Shifa International Hospitals Limited

...Appellant

Versus

The Commissioner Company Law Division,
Securities and Exchange Commission of Pakistan

...Respondent

Date of Hearing

14/10/15

Present:

For the Appellant:

- (i) Mr. Javed Panni, Chief Executive, MJ Panni Associates
- (ii) Mr. Muhammad Naeem, Company Secretary, Shifa International Hospitals Ltd
- (iii) Mr. Wazir Muhammad, General Manager Finance, Shifa International Hospitals Ltd

For the Respondent:

- (i) Mr. Ali Azeem Ikram, Executive Director (CSD)
- (ii) Mr. Shahzad Afzal Khan, Joint Director (CSD)

ORDER

1. This order is in appeal No.37 of 2015 filed under section 33 of the Securities and Exchange Commission of Pakistan Act, 1997 against the order dated 19/08/15 (Impugned Order) passed by the Respondent.

Appellate Bench No. IV

Appeal No. 37 of 2015



Securities and Exchange Commission of Pakistan

2. Brief facts of the case are that an Extra Ordinary General Meeting (EOGM) of Shifa International Hospitals Limited (Appellant) was held on 25/06/15 to seek approval of shareholders for issuance of 4,024,100 new ordinary shares, other than by way of right issue, to certain private investors. The Appellant applied for approval of further issue of shares other than by way of right issues under Section 86 of the Companies Ordinance 1984 (Ordinance), however approval was denied by the Respondent. It was communicated to the Appellant that share price of the Appellant as on 18/08/15 was Rs.285.05 per share while the Appellant intends to issue shares at a much lower price i.e. Rs.240 per share, which appears to be an attractive price for existing shareholders. Therefore, all the shareholders should be given equal right to participate in the proposed further issue of capital.
3. In view of the above, the Respondent being dissatisfied with the reasons given by the Appellant to issue further shares as otherwise than right and to safeguard the preemptive right of existing shareholders, advised the Appellant to comply with the provisions of Section 86 of the Ordinance in respect of further issue of capital by offering the shares to the existing members in proportion to the existing shares held by them.
4. The Appellant has preferred the instant appeal against the Impugned Order on the following grounds:
 - a) The Impugned Order fails to appreciate that the Appellant has right to issue shares other than right issue under the first proviso to section 86(1) of the Ordinance and subsequent approval of the Commission is primarily to ensure that the Special Resolution has been passed by the shareholders. The circumstances of the Appellant were special and it was not possible to raise the capital by way of rights issue, and to cater to the the special circumstances this right was provided to the Appellant under the first proviso to section 86(1) of the Ordinance.
 - b) The conditions prescribed under Rule 5(iv)(a) and (b) of the Companies (Issue of Capital) Rules, 1996 (Capital Issue Rules) require:

Appellate Bench No. IV

Appeal No. 37 of 2015

Page 2 of 7



Securities and Exchange Commission of Pakistan

- i. An undertaking from at least 40% of the existing shareholders to subscribe their portion of the right issue; and
- ii. Underwriting of the remaining rights issue by two financial institutions.

The Board of Directors (BoD) of the Appellant was of the view that to get commitment from 40% shareholders was not possible as this is also evident from the fact that the shareholders unanimously approved the special resolution in the Extra Ordinary General Meeting (EOGM). There was not a single dissent from any shareholder. Further, even after publication of the EOGM Notice as well as subsequent passage of Special Resolution, not a single shareholder has complained on the proposed issue of shares. The BoD was of the view that compliance with the underwriting requirement was also not possible. The Appellant had explored other alternatives including debt raising but as per the Prudential Regulations of the State Bank of Pakistan, a debt to equity ratio of 80:20 needs to be maintained which was not possible for the Appellant to do so, especially in light of the new project it had intended to undertake for its growth.

- c) The abovementioned special circumstances under which the mobilization of Capital was adopted was to enable the Company to expand and provide state of the art health facilities to the people which would in turn create more value of the shares to the benefit of the shareholders. Further, a special resolution was passed unanimously by the shareholders in the EOGM where the matter was considered and justified in detail to the satisfaction of the shareholders. The shareholders have waived their pre-emption rights and this waiver right cannot be questioned by the Commission. The impugned Order, therefore, in an unreasonable exercise of discretion by the Respondent which is not granted by the law.

5. The Respondent rebutted the arguments as follows:

- a) The Impugned Order was passed by the Respondent on the basis of available information. Moreover, in the best interest of minority shareholders, it was

Appellate Bench No. IV

Appeal No. 37 of 2015

Page 3 of 7



Securities and Exchange Commission of Pakistan

considered appropriate to provide equal opportunity of the offer to all the existing shareholders. One of the basis for declining the application was higher trading price than the price approved in EOGM. The price on 18/08/15 was Rs.285.05 per share, a day before refusal of the request. The price subsequent to EOGM goes up to Rs.294.05 on 20/08/15. Price as at 05/10/15 was Rs.274.53. One of the proposed investors is M/s Service Fabrics Limited which intends to invest in 500,000 number of shares, representing 12.43% shares out of the total issue 4,024,100 shares with regard thereto, is not financially sound. Further, Drekkar Kingsway (which intends to invest in 520,000 shares, representing 12.92% out of the total issue 4,024,100 shares) is also in a revival phase.

- b) The Appellant's contention that it would not be possible to get atleast 40% undertaking from shareholders in order to comply with the Companies (Issue of Capital) Rules, 1996 for issuing shares at premium over and above free reserve is incorrect. As per pattern of shareholding 36% shares are held by directors and associated companies alone and it is unlikely that such a lucrative offer would not be availed by the minority shareholders. The trading in the shares of the Company at a price of Rs.270 per share depicts the assumption of the directors is not cogent. Furthermore, considering the financial health and size of the issue, underwriting cost with a range between 0.5% and 1% of the issue to be underwritten would not be significant for the Company. The Company was required to justify the issue of further shares otherwise than right which it failed to justify. Moreover, as per updated prudential regulations for corporate/commercial banking of the State Bank of Pakistan, there is no such requirement of debt to equity ratio as mentioned in the Appeal.
- c) The fundamental importance and duty of the Commission is the protection of minority shareholder rights. The Commission is not a bystander obliged to grant approval to all the requests approved by special resolution. The Commission can review the issue of further shares even if the issue is approved by special resolution, in a situation where the majority shareholders of the Company had voted in a manner

Appellate Bench No. IV

Appeal No. 37 of 2015

Page 4 of 7



Securities and Exchange Commission of Pakistan

coercive or oppressive to the minority or where the majority shareholders had not voted in the interest of shareholders as a class. The resolution was merely passed by 46.6% shareholders therein prima facie included 36% shares which are alone held by directors/associated companies. Reliance is placed on the judgment of the Lahore High Court in the matter of *Kohinoor Raiwind Mills Limited v. Kohinoor Gujar Khan* cited at 2002 CLD 1314, wherein, it was held that, “section 284 of the Ordinance which required the sanction of the Court to any scheme of arrangement is meant for the protection of the rights of powerless small minorities who can be outvoted at general meeting and cannot, therefore, adequately safeguard their interests on the strength of their voting rights alone.” In the above cited judgment, the Court could decline approval despite approval of the majority shareholders as specified in section 284 of the Ordinance. The same premise holds in respect of approval granted under section 86 of the Ordinance.

6. We have heard the parties. Section 86(1) of the Ordinance is reproduced for ease of reference:

86. Further issue of capital - (1) *Where the directors decide to increase the capital of the company by the issue of further shares, such shares shall be offered to the members in proportion to the existing shares held by each member, irrespective of class, and such offer shall be made by notice specifying the number of shares to which the member is entitled and limiting a time, within which the offer, if not accepted, will be deemed to be declined:*

[Provided that the Federal Government may, on an application made by any public company on the basis of special resolution passed by it, allow such company to raise its further capital without issue of right shares:

[Provided further that a public company may reserve a certain percentage of further issue of its employees under “Employees Stock Option Scheme” to be approved by the Commission in accordance with the rules made under this Ordinance

Emphasis Added

7. The Appellant has argued that circumstances of the Appellant were such that it was not possible to raise the capital by way of rights issue, and to cater to the special circumstances, the Appellant has been granted power under the first proviso to

Appellate Bench No. IV

Appeal No. 37 of 2015

Page 5 of 7



Securities and Exchange Commission of Pakistan

section 86(1) of the Ordinance to raise further share capital other than right provided this proposal is approved through a special resolution. Once the resolution is passed, the Respondent does not have the power to disapprove the proposal.

8. The Respondent has rebutted the Appellant's arguments by stating that Appellant cannot proceed with issue of further share capital other than right without approval of Respondent. The basis for declining the application was higher trading price than the price approved in EOGM at which further issue was proposed to be made. The price on 18/08/15 was Rs.285.05 per share, a day before refusal of the request and the Appellant intended to issue shares at a much lower price i.e. Rs.240 per share. Furthermore, it is highly unlikely that such a lucrative offer would not be availed by the minority shareholders.
9. In accordance with Section 86, Appellant cannot proceed with issue of further share capital other than right without approval of Respondent. We therefore concur with the Respondent that the issue of further share capital once was approved by a special resolution cannot be made unless the same is approved by the Respondent. The proviso to section 86(1) of the Companies Ordinance states that, "*on an application made by any public company on the basis of special resolution passed by it, allow such company to raise its further capital without issue of right shares*". Therefore, the Commission has to "allow" the company to raise its further capital without issue of right shares and the Appellant's argument that since this was approved by a special resolution, the waiver of pre-emption rights of the shareholders cannot be questioned by the Commission holds no merit.
10. It is also very important that the resolution was merely passed by 46.6% shareholders which prima facie included 36% shares which are alone held by directors/associated companies. So the special resolution does not have support from the minority share holders.

Appellate Bench No. IV

Appeal No. 37 of 2015

Page 6 of 7



Securities and Exchange Commission of Pakistan

11. Further, in relation to compliance with the Capital Issue Rules, the Appellant could apply to the Commission for relaxation from compliance of any requirement under Section 10 of the Capital Issue Rules which the Commission could have granted if it was satisfied that it was not practicable to comply with any requirement of the Capital Issue Rules. The Appellant has not been able to give reference of any prudential regulations of the State Bank of Pakistan which are applicable to the Appellant as a non-banking financial institution, whereby, debt to equity ratio of 80:20 had to be maintained.
12. In view of above, the Appellant has not been able to satisfactorily convince the Bench why the shares were not offered as right to existing shareholders who have the first right to participate in the benefits accruing from increase in the share value. We do not agree with the Appellant that there were special circumstances under which the shares could only be offered to invited private investors.
13. In view of the foregoing, we see no reason to interfere with the Impugned Order. The Impugned Order is upheld with no order as to costs.

(Fida Hussain Samoo)
Commissioner (Insurance)

(Zafar Abdullah)
Commissioner (SCD)

Announced on: 02 NOV 2015