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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION(L)NO.1784 OF 2015
IN
SUIT (L)NO.685 OF 2015

Multi Commodity Exchange of India Ltd.
a company incorporated under the
Companies Act, 1956 and having its
registered office at Exchange Square,
Suren Road, Andheri (East), Mumbai-400 093. ...Applicant

In the matter between

Multi Commodity Exchange of India Ltd.
a company incorporated under the
Companies Act, 1956 and having its
registered office at Exchange Square,
Suren Road, Andheri (East), Mumbai-400 093. ...Plaintiff

V/s.

Metropolitan Stock Exchange of India Ltd.
(previously known as MCX-SX) a
company incorporated under the
Companies Act, 1956 and having its
registered office at 4th floor, Vibgyor
Tower, C62 BKC, Bandra (E), Mumbai-400 098. ...Defendant

…

Mr. Virag V. Tulzapurkar a/w Mr. Sameer Pandit, Bindi Dave, Ms. Ankita Godbole i/b. M/s. Wadia Gandhy & Co. for the Plaintiff.

Mr. J. P. Sen, Senior Advocate , a/w Mr. Advait M. Sethna i/b. M/s. Khare Legal Chambers for the Defendant.

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CORAM : A. K. MENON, J.

RESERVED ON : 8th OCTOBER, 2015

PRONOUNCED ON: 13TH OCTOBER, 2015

J U D G M E N T

1] By this notice of motion the Plaintiff attempts to secure a sum of Rs.41,59,17,672/- lying deposited with the defendant for securing value of warrants of the same number issued by the defendant convertible into shares at the Plaintiff option but subject to pre-conditions. Mr. Tulzapurkar the learned senior counsel appearing for the plaintiff has upon instructions restricted the reliefs sought in the present notice of motion to an order seeking in terms of prayer clause B(1) which reads as follows:-

> *"B(1) that pending hearing and final disposal of the instant Notice of Motion and the captioned Suit, this Court be pleased to direct the defendant to deposit a sum of Rs.41,59,17,672/- being the remaining portion of the deposit placed by the plaintiff with the defendant with this Court."*

Meanwhile, the defendant has voluntarily deposited a sum of Rs.20 crores with the Prothonotary and Senior Master in September, 2015 which amount is presently invested by the Prothonotary and Senior Master. The offer for deposit is recorded in the Order dated 3rd August, 2015 passed in the above notice of motion. Today the notice of motion is taken up for final hearing and disposal. Before entering upon the controversy between the parties it is appropriate that a few facts are narrated.

2] The plaintiff is a National Commodity Exchange duly recognized by the Central Government in consultation with the Forward Markets Commission under the Forward Contracts (Regulation) Act, 1952. The defendant is a Stock Exchange duly recognized under the provisions of the Securities Contracts (Regulation) Act, 1956 "***the SCRA***" which was incorporated on 14th August, 2008. The plaintiff was one of the initial promoters of the defendant having invested a sum of Rs.64,43,00,000/- in the defendant. In return the plaintiff was allotted an equal number of shares which amounted to 37.03% of the defendant's total paid up capital.

3] Upon recognition of the defendant as a Stock Exchange under section 4 of the SCRA, the defendant became liable to comply with certain regulations known as "Securities Contact (Regulations) (Manner of Increasing and Maintaining Public Shareholding in Recognized Stock Exchange) Regulations, 2006 hereinafter referred to as ***MIMPS***. Compliance with MIMPS was to be achieved within one year from the date of recognition. In the instant case time for compliance was extended upto 15th September, 2010. Regulation 8 of MIMPS did not permit a person to hold shares in excess of 5% of the total equity share capital of the defendant. No share holder could hold in excess of 5% since it was it was in the defendant's interests to ensure that it continued to be recognised as a stock exchange under section 4 of the SCRA. The defendant in its effort to ensure compliance with the MIMPS and secure permission to introduce new products, proposed a scheme of arrangement cum reduction of share capital (the Scheme). The plaintiff consented to the scheme which came to be sanctioned by this Court on 12th March, 2010. According to the scheme, Rs.61,71,35,000/- shares held by the plaintiff in the defendant were cancelled and the defendant's capital stood reduced by the said sum which amount also reflected the face value of the cancelled shares each share being valued at Re.1/-. Upon cancellation, the defendant became liable to pay the plaintiff Rs.61,71,35,000/- however, it is the plaintiff's case that on account of the defendant's inability to pay the said amount, it was treated as a non-refundable deposit with the defendant which was secured by issuing 61,71,35,000 warrants on Re.1/- each.

4] The warrants were freely transferable and entitled the holder to subscribe to an equal number of equity shares by converting the warrants into equity shares. Thus, in fact, the plaintiff as the holder of warrants could have transferred the warrants and have recovered, the amount equivalent to the deposit or more, or less, as consideration for transfer of the warrants any number of third party purchasers provided that no single transferee could hold more than 5% of the shares of the Defendant upon conversion of the warrants. Effectively, the transferee of warrants would be step into shoes of the plaintiff qua the number of warrants purchased. The warrants were subjected to certain terms and conditions. The most relevant terms and condition of the warrants are conditions no.(g) (h) and (i) which reads as follows:-

> *"(g) The warrant holder can exercise, in one or more installments, its option to subscribe to the fully paid up Equity Shares in the Company at any time after six months from the date of the allotment, which is March 22, 2010. Upon the exercise of the option, the proportionate non refundable interest free deposit will be adjusted against the money payable in respect of the Equity Shares so issued. Hence, no further amount will be payable by the Warrant holder for issue and allotment of the fully paid up Equity Shares against the exercise of the Warrants.*
>
> *(h) Exercise of Warrants shall be subject to all applicable*

laws and shall specifically be in accordance with Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations, 2012 and/or any other law for the time being in force relating to shareholding restrictions in stock exchanges.

(i) The Equity Shares arising out of the exercise of the Warrants will rank pari passu with the then existing equity shares in all respects."

5] The terms and conditions of the warrants were self-explanatory. The scheme, upon its sanction by this Court, was fully effective and the plaintiff continued to hold the warrants and retained the option to subscribe to shares of the defendant should the authorized capital of the defendant be increased resulting in the plaintiff's holding being reduced to less than 5%. Upon such conversion the plaintiff could subscribe to further shares by seeking conversion of the warrants so as to any manner such that they remain with the over all limit of 5%.

6] On 19th June, 2012 the Securities and Exchanges Board of India(SEBI) replaced the MIMPS Regulations with the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations 2012 (***SECCR***). The SECCR mandated, vide Regulations 16 and 17, that in addition to shares other instruments such as the warrants which would entitle the holder to conversion into shares were also to be taken into consideration to determine the share holding of a person. Accordingly, as far as the plaintiff was concerned, the SECCR required the plaintiff to divest the difference of the additional shares that it held since the warrants were capable of converted into shares and would therefore the defendant would violate Section 4 of the SECCR i.e. before 19th June, 2015 the plaintiff would be require to dispose of all the warrants if the defendant was to continue to be recognized as a stock exchange.

7] It is the plaintiff's case that continued holding of the warrants by the plaintiff would not in itself be illegal or unlawful but it would result in the defendants losing its recognition as a stock exchange under SCRA. In the course of the business, the plaintiff was required to provide the assurances to SEBI that it would comply with the SECCR during the prescribed time period. At the defendant's request, the plaintiff provided an undertaking to SEBI that it would ensure the reduction of its combined holding with one M/s. Financial Technologies (India) Ltd. The plaintiff contended that the undertaking was provided only to assist the defendant in securing permission to trade in additional products. On 10th July, 2012 SEBI granted the defendant permission to deal in the interest rate derivative markets, equity, futures and options in equity and wholesale debt segments. Thus, the defendant continued to be recognized under the SCRA but under a continuing obligation, as required by SEBI, to ensure that its promoter share holders (which includes the plaintiff and the said FTIL) would reduce their share holding of under 5%). As per the said letter, SEBI directed the share holder promoters including plaintiff to reduce their entitlement or rights over equity arising from such warrants by 19th June, 2015. It is the plaintiff's case that the management of the defendant took no steps to reduce the percentage holding of the plaintiff for almost two years after coming into force of the SECCR.

8] As and by was background, the plaintiff and defendant were both almost entirely controlled by M/s. Financial Technologies (India) Ltd. (***FTIL***)and in June-July 2013 a major scam involving amounts in excess of Rs.5600 crore was unearthed at National Stock Exchange Limited and which was another company promoted and managed by the FTIL group. During the investigation into this scam, the Forward Markets Commission declared FTIL and its share holders as not “fit and proper” to be share holders of the plaintiff or any other Commodity exchange. FTIL was also declared ineligible to be represented on the Board of the Directors of the plaintiff. Accordingly a new management was put in place. The plaintiff' could not reduce their holders before the prescribed date as a result the defendant cancelled the warrant unilaterally and without the plaintiff's consent hence the present controversy arise. According to Mr.Tulzapurkar since January 2014 the plaintiff has made efforts to dispose of the warrants so as to assist the defendant in complying with the regulations and an advertisement inviting offer was published on dated 20th February, 2014. Pursuant to the advertisement, the plaintiff also engaged the services of a merchant banker by name M/s. Dolat Merchant Banking and Financial Services Pvt.Ltd. and made vigorous efforts to dispose of the warrants. The warrants were of a face value of Re.1/- each. While the plaintiff was awaiting further developments in dispose of the warrants. The plaintiff thought it fit to seek extension of the deadline specified by SEBI from 19 June, 2015 however SEBI declined and from March onwards plaintiff intensified their efforts to dispose of the warrants. On 25th May, 2015 the plaintiff received offers for purchase of warrants at Rs.1.50 per warrant and while they were in the process of finalizing the terms of sale thought the aforesaid merchant bankers, on 4th June, 2015 the defendant rights issued for allotment of the equity shares to its existing share holders at the price of Re.1/- per share. According to the plaintiff this frustrated their proposed disinvestment and derailed all their efforts to reduce their shares below the threshold limit. Although the plaintiff had attributed motives to the defendant on timing of the rights issue. This aspect has not come true as a deliberate attempt of any kind. According to the plaintiff time and price of the rights issued reveals that it was a deliberate attempt to dispose of the warrants. On or about 19th June, 2015 the plaintiff called upon the defendant to return the deposits against the warrants. The defendant did not respond. In any event, the plaintiff continued to make efforts to sell the warrants and the defendant meanwhile continued their business as a stock exchange. Mr.Tulzapurkar submitted that unknown to the Plaintiff, the defendant clandestinely on 27th June, 2015 resolved to extinguish the warrants held by the plaintiff and decided to transfer of the value of the deposit mainly Rs.41,59,17,672/- to the capital reserves of the defendant. This action according to the plaintiff was unlawful.

9] The plaintiff filed above suit and sought an exparte injunction on 9th July, 2015 which came to be granted restraining the defendant from cancelling and/or extinguishing the warrants or dealing with the remaining amount of deposit. The said order which came to be passed at 11.30 a.m was immediately communicated to the defendant. The defendant promptly responded contending that the warrants had already been extinguished pursuant to the resolution dated 27th June, 2015. At the hearing held on 10th July, 2015 it was admitted by the counsel on behalf of the defendant that the resolution was never communicated to plaintiff till 9th July, 2015 i.e. till after the plaintiff communicated the order passed by this Court on 9th July, 2015. It is not even the defendant's case that it made an effort to communicate this decision any time before 9th July, 2015 although such a drastic measure had been resorted to 27th June, 2015. Mr. Tulzapurkar has since clarified in answer to a query from Court, that the plaintiff was completely unaware of the fact that that the resolution had been passed. It must be stated that on 10th July, 2015 the defendant made a statement that they will not act in furtherance of the decision taken on 27th June, 2015 till further orders and no steps will be taken to implement the decision. At a further ad-interim hearing that took place on 3rd August, 2015 the defendant agreed to deposit a sum of Rs.20 crores in the Prothonotary and Senior Master without prejudice to rights and contentions of the defendant. This amount since has been invested.

10] Mr. Tulzapurkar contended that the amount lying with the defendant was initially by way of contribution against which shares were issued. Thereafter it continued as a deposit pursuant to the scheme. He submitted that the character of the money lying with the defendant was in the nature of a deposit which by its very nature represented monies paid over to the plaintiff upon the shares being surrendered as per the scheme. The only difference being that the plaintiff agreed to retain the funds with the defendant in exchange for the warrants. The warrants if exercised would entitle the plaintiff to shares of the defendant company without any further payment, since the price of the shares which would be issued at face value of Re.1/- would be appropriated from the deposit lying with the defendant. It was submitted that the defendant has also at all material times considered the same as a deposit and could not by any means legitimately appropriate the amount towards capital reserves. The money admittedly belongs to the plaintiff and there is no provision in law or in contract whereby the defendant could appropriate the money towards its own capital reserves.

11] Mr. Tulzapurkar then submitted that in any event the fact remains that FTIL being considered as not “fit and proper” to hold shares were permitted to sell the divest itself of the warrants had initially met with the same fate as that of the plaintiff inasmuch as in or around 2014 the defendant sought to contend that the warrants issued to FTIL would stand extinguished and that the amount of deposit lying to the credit of FTIL would stand appropriated. However, later the defendant itself reversed its decision on the basis of legal opinion,reversed the extinguishment, restored the warrants and permitted FTIL to transfer the warrants which FTIL did on or about 27th November, 2014 decided to extinguish warrants held by FTIL permitted to 15 third parties to hold the warrants.

12] As far as the plaintiff is concerned, in the same report it is recorded that after having considered the facts and circumstances and taking into consideration all stake holders, the board felt that there was "no other choice" but to extinguish the warrants held by MCX "in excess of share holding limits as prescribed in SECCR". The board's decision was apparently influenced by legal opinion and thereafter the board decided to treat 41,59,17,672 warrants of MCX as extinguished and "of no effect whatsoever" on account of the plaintiff's continuance to hold the same after the time limits specified lapsed.

13] Mr. Tulzapurkar further submitted that there were various media reports which indicated that the CEO of the defendant intended to resign on account of differences of opinion in the style of functioning of the defendant. Mr. Tulzapurkar further submitted that it is come to light that the defendant, in order to continue with its business as a stock exchange is required to maintain its net worth at about Rs.100 crores as it is a mandatory requirement for all the stock exchanges of the country. Relying on the news report, it is suggested that the defendant had Rs.75 crores to rights issue and that the net worth over Rs.22 crores. He therefore submitted that there is no justification whatsoever in seeking to appropriate the deposit amount in this clandestine fashion. Mr. Tulzapurkar further submitted that securities and Exchange Board of India had informed the defendant that the request to continue to hold warrants in excess of the ceiling limit beyond 19th June, 2015 cannot be acceded to since Regulation 16(2) of the SECCR did not permit extension of time beyond three years and therefore, the request for extension of time could not be acceded to. He has submitted that the request of extension was made by the defendant and this is an indication that that respondent had requested for extension of time for holding the warrants beyond 19th June, 2015, inter alia, by letters dated 14th January, 2015, 20th January, 2015, 17th April, 2015 and 30th April, 2015 and that in response to this request for extension of time the SEBI had vide their letter declined to grant extension in view of the fact that SECCR did not permit extension of time beyond three years to reduce the excess holdings held in the form of warrants. By the said letter SEBI advised the defendant to comply with the SECCR and divest the excess holdings. The copies of letter dated 14th January, 2015, 20th January, 2015, 17th April, 2015 and 30th April, 2015 were produced in Court on each of these letters I find requests from the Chairman of the defendant to the Chairman of the SEBI to permit the Commodity Exchange to hold upto 15% paid up capital of the Stock exchange and that it will also enable the plaintiff to comply with the requirements of the Regulations.

14] Thus, according to Mr. Tulzapurkar, all these letters clearly establish that it was in the interests of the defendant that the holding had to be brought down and the plaintiff was not in any manner affected by inability to bring down the share holding in defendant. Mr. Tulzapurkar in support of his contention relied upon the letter dated 25th November, 2014 issued by FTIL to the Bombay Stock Exchange and National Stock Exchange of India recording that they have entered into share and warrant purchase agreements with various parties. Mr.Tulzapurkar also relied upon a certificate dated 11th June, 2015 issued by T.R. Chadha & Co. Chartered Accountant Company certifying that the defendants net worth of Rs.114.36 crores as on 31st March, 2015. As far as pleadings are concerned Mr.Tulzapurkar referred to the notification dated 20th June, 2015 whereby Security Contracts (Regulation) (Stock Exchange and Clearing Corporation) Regulations, 2012 (SECCR) was notified in the official gazette and he invited my attention to Chapter II and the obligation to seek recognition which inter alia required that no person shall conduct organise or assist in organising any stock exchange or clearing Corporation unless he has obtained recognition from the board in accordance with the Act, Rules and Regulations of SECCR. Under clause 4 of the Regulations it was provided that an application for recognition as against Stock Exchange could be submitted to the board (SEBI) only subject to compliance of the provisions of the Act in consideration of the grant of recognition clause (vii) provided that the applicant seeking registration as SECCR shall comply with the conditions listed in clause (vii). Clause (vii) inter alia provides that the applicant must satisfy requirements relating to ownership and governance structure as specified in SECCR. Under chapter III of SECCR net worth requirements were prescribed and Regulation 14(1) provides that every recognised stock exchange shall have minimum net worth of one hundred crore rupees at all times.

15] Mr.Tulzapurkar then made reference to Chapter IV which deals with ownership of SECCR and submitted that general condition 16(1) and 17 were material. In particular he pointed out that under Regulation 16(2) share holding referred to in Chapter includes any instrument owned or controlled, directly or indirectly that provides that entitlement to rights over equity in any future date. This, he submitted included warrants and as such under regulation 16(2) the time limit for reducing the excess limit of share holding as contemplated in the regulation would extend upto three years from the date of commencement of SECCR. It will be useful to reproduce general condition 16 :

> *General Conditions :*
>
> *16 (1) Save as otherwise provided in these regulations, the share holding or voting rights of any person in a recognised stock exchange or a recognised clearing corporation shall not exceed the limits specified in this chapter at any point of time.*
>
> *(2) The shareholding as specified in this chapter shall include any instrument owned or controlled, directly, or indirectly, that provides for entitlement to equity or rights over equity at any future date.*
>
> *Provided that any equity or rights over equity, arising from such instruments in excess of limit of shareholding specified in this chapter on the date of commencement of these regulations, shall be reduced to the specified limit within a period as may be decided by the Board, which may extend upto three years from the date of such commencement."*

16] Mr.Tulzapurkar then submitted that under regulation 17(1) at least 51% of paid up equity share capital of a recognised stock exchange should be held by the public,as a result the defendant was duty bound to the broad base the share holding in order to ensure that 51% is held by the public. This would have entailed increase in the authorised capital which would also have resulted in facilitating a higher share holding by the plaintiff. He then referred to regulation 49 of SECCR which provides for direction to be issued by SEBI which inter alia provided that SEBI could suo motu or on receipt of any information, in the interest of the public, issue such directions including directions to a person holding equity shares in a recognised stock exchange in contravention of SECCR to divest holding in such a manner as may be specified. He then made reference to the letter dated 10th July, 2012 issued by SEBI to the Managing Director of the defendants which granted permission to the defendants to deal with interest rate derivatives, equity, future and options on equity and wholesale debt segment and submitted that SEBI had vide said letter granted permission to deal with in the aforesaid security only on the strength of the defendants submissions that the share holding of the plaintiff and FTIL in the equity to the defendants shall be brought within 5% limit as contemplated under SECCR within 18 months from the date of the letter and that plaintiff and FTIL shall reduce their entitlement to equity or rights over equity in excess of share holding limit specified in SECCR within three years from the date of notification of SECCR. The defendant was bound to provide on quarterly basis the status report of disentitlement. It is also specified that combined voting rights of the plaintiff and FTIL in the defendants shall not exceed 5%. Mr.Tulzapurkar therefore submitted that burden to ensure reduction below limit is that of the Defendant.

17] The plaintiff has also relied upon the extract of resolution said to have been passed by the plaintiff's the oversight committee but the document does not disclose which resolution this has been extracted from and nor does it indicate the date of resolution. Howsoever, what is to be noted is that at the said meeting reference was made by the plaintiff company to he replacement of MIMPS regulations by SECCR and the fact that the plaintiff also took shares to reduce the combine equity and other instrument by June 2015 and recorded the fact that warrants held by the plaintiff have to be disposed of or else the warrants will stand extinguished.

18] This appears to indicate the plaintiff's knowledge, at the material time, that the plaintiff was aware that the warrants could be extinguished but that is not the defendant's case before me. The extract also records meeting of the aforesaid committee held on 14.2.2015 where at interest shown by IL&FSS, SMC and Dolat Merchant bankers who were assigned a time frame for disposal of warrants. It is contended that IL&FS offered Rs. 2.50 per warrant. The others have not made any commitment. Based on this in March 2015 the Plaintiff sold 30,539,982 warrants to IL&FS out of which same were converted to equity shares. The resolution records that despite best efforts the plaintiff was successful in disposal of a small number of the warrants held and that they continued to make efforts and divest excess holdings. In this manner Mr.Tulzapurkar submitted that continuous efforts led to Merchant banker procuring an offer in a sum of Rs.1.50 but before this transaction could fructify the defendants had declared a rights issue whereby they offered to issue shares at face value of Rs.1.00 and thereby obstructed the proposal disinvestment by the Plaintiff.

19] Mr.Tulzapurkar then referred to the letter of offer made by the defendants on 29th May, 2015 and submitted that the letter of offer was made pursuant to a resolution passed on the same date. He referred to the authority of the Board of Directors pursuant to section 62(1)(a) of the Companies Act, 2013 whereby the Board of Directors of the Company vide resolution date 29th May, 2015 has authorised issue of shares on the rights basis of the existing share holders. He submitted that this is indication of malafides and deliberate attempt to sabotage the petitioner's attempt of disinvestment. He submitted that the Plaintiff cannot be faulted and all efforts were made by the Plaintiff to divest the plaintiff's shares. He further submitted that on 19th June, 2015 the Plaintiff addressed a letter to the defendants and put on record various efforts made by them of disinvestment and objected to the rights issues at a price lower than the price of the proposed sale of the warrants by the Plaintiff. The Plaintiff also called upon the defendants not to convert interest free deposit as reserved and thereby increase their net worth. Mr.Tulzapurkar submitted that there is no reply to the said letter. He also referred to an interview given by the Managing Director to the defendants to the HINDU wherein reference was made to cancellation of the warrant issued to FTIL and reversal of the decision and by re-issue of warrants to FTIL by stating that being an unlisted company and as the Companies Act does not have provisions for cancellation of the warrant, they were advised to revisit the issue of extinguishment of warrants and accordingly the warrants were reinstated. He submitted that this clearly indicated a deliberate act to sabotage the warrants held by the Plaintiff and restricted the relief sought to by him at prayer clause (b-1) of the Notice of Motion.

20] Mr.Tulzapurkar also relied upon statement of financial reserves dated 31.3.2015 published by the defendants in which under the heading of statement of assets and liabilities under the heading of equities and liabilities Non Refundable Interest Free Deposits against warrants were shown as outstanding. Thus, he submitted that it included warrants held by the Plaintiff and the nature of deposit was indicated. According to him, therefore, clear indication of the nature of character of lying deposit.

21] In support of his contention, Mr. Tulzapurkar relied upon the judgment of the House of Lords in the case of ***Fibrosa Spolka Akcyjna V/s. Fairbairn Lawson Combe Bar-Bour Limited, (1943) A.C. 32*** [1] and submitted, in that case the claim in the suit was for damages for breach of contract, for specific performance or alternatively, return of the some of the money with interest. The facts in that case reveal that under a written contract an English company agreed to sell and appellants agreed to purchase machinery for sum of £4800 a sum of £ 1000 had been paid out of £1600 which were due and payable. However war broke out between Germany and Poland and thereafter Great Britain declared war on Germany in the result contract of performance as it was frustrated by

1 (1943) A.C. 32

German occupation of a part of Poland. The Plaintiff sought the refund of some of £ 1000. The House of Lords held that the price which was paid in advance was refundable and there was no valid reason why the right to recover prepaid money should not equally arise on frustration arising from supervening circumstances as it it arises on frustration of a contract from destruction of a particular subject matter. Relying on the aforesaid observations Mr. Tulzapurkar submitted that the present case is one where supervening circumstances had prevented the plaintiff from reducing its holding of the warrants. Such circumstances included the imposition of the SECCR and also the fact that the defendant came out with the rights issue just about the time when the Plaintiff had negotiated and were finalizing the transfer of warrants and a price of 1.50 in supervening circumstances. According to Mr. Tulzapurkar the defendant prevented the conclusion of the process of reduction of share holding.

22] Mr. Tulzapurkar then relied upon the judgment in the case of ***Kuju Collieries Ltd. V/s. Jharkhand Mines Ltd. and others (1974) 2 SCC 532***[2]***.*** He also relied upon the provisions of Section 65 of the Contract Act and submitted that when an agreement is discovered to be void or when a contract becomes void, any person in such agreement or

2 (1974) 2 SCC 532

contract is bound to restore or make compensation for it to the person from whom he received it. He submitted that and as observed by the Hon'ble Supreme Court that the section made a distinction between an agreement and a contract. The distinction between two was an agreement which was enforceable by law is a contract and an agreement which is not enforceable by law can be said to be void. The Hon'ble Supreme Court observed that it may be that one of the parties to the agreement may not have been aware that the agreement was not enforceable in law and they might have come to know later of such un-enforceability and this is a case where the agreement between the parties had become void on a later date due to subsequent happening namely the imposition of the SECCR. He submitted that this is a case where both parties believed that an agreement was valid and lawful, however, subsequent events rendered it unenforceable and accordingly the amount lying as deposit with the defendant was liable to be returned.

23] Mr Tulzapurkar then relied upon the judgment of the Hon'ble Supreme Court in ***Tarsem Singh V/s. Sukhminder Singh (1998) 2 BLJR 819***[3] and submitted that in which judgment the Hon'ble Supreme Court observed that the section 65 is based on an equitable doctrine and

3 (1998) 2 BLJR 819

provides that if any party received any benefit under void agreement or contract the person who is received advantage under the agreement has to restore such advantage or pay compensation for it to the person from whom that advantage or benefit was received. He also relied on the aforesaid judgment of ***B.O.I. Finance Ltd. V/s. Custodian and others (1997) 10 SCC 488***[4]. He relied upon paragraph 30, 33 and 34 of the said judgment and submitted that in that case certain notifications were issued under the Securities Contracts (Regulations) Act, 1957 prohibiting of contracts for sale or purchase of Securities other than spot delivery contract or contract for cash or hand delivery and held that ready-forward transactions were severable into two parts the ready leg and the forwards leg. As far as the ready leg was concerned, the transaction was not illegal or unlawful but the forward leg was illegal and was hit by the notification on question. It was found that the circulars which have been issued were not made public and were confidential documents and required the banking companies to transact their businesses in a particular manner. The circular did not mention the consequence of the directions contained therein not being followed by the banking companies namely that the transaction would be recorded as void. The Supreme Court observed that the instructions which were issued by the said circulars were meant to be

4 (1997) 10 SCC 488

complied with by the banking companies only and did not purport to nor could be binding on the third parties. Relying upon the aforesaid observations, Mr. Tulzapurkar submitted that it applied with full force to the facts at hand and therefore according to him the plaintiff cannot be faulted for being unable to dispose of the warrants within the time specified.

24] Mr. Sen learned Senior Advocate representing the defendant at the outset made a submission, which if established, would negate the entire case of the plaintiff. He submitted that as far as the value representing the face value of the warrants was concerned, it was always agreed that the amount that was brought in by the plaintiff company could not be taken away. According to Mr. Sen underlying agreement between the parties was that under no circumstances would the Petitioner be entitled to withdraw the value of the warrants and it was always to be treated as part of the Plaintiff's capital contribution. He reiterated that right from inception when the Plaintiff invested in the defendants' company this was clearly understood. He relied upon contents of the affidavit dated 20th July, 2015 filed by Mr. Nazeeb Salim on behalf of the defendants. He submitted that since inception the Plaintiff and said FTIL holds shares as par in excess of 5% and that the Plaintiff and

FTIL has parameters of the defendants took steps to sale part of their share holding to comply with MIMPS regulations and accordingly the scheme was proposed under section 100 to 104 and 391 to 393 of the Companies Act. The scheme envisaged reduction of the equity share capital of the defendants by deduction and cancellation of excess equity shares and adjustment of consideration for reduction by allotment of the equal number of warrants to the share holders without any cash outflow. He, therefore, submitted that under the scheme itself it was clearly understood that there would be no cash outflow and that monies would lie invested. He submitted that the scheme has been brought to the knowledge of SEBI and this Court has also sanctioned scheme with effect from 19th March, 2010.

25] Mr.Sen submitted that the SECCR does not disclose any consequences of action that would be taken by Stock Exchange for violation to comply with regulation. He further submitted that extinguishment of the warrants by the defendants was insisted upon by virtue of an obligation of the defendants to ensure that share holders are complying with laws. Mr.Sen submitted that in addition to the regulation the defendants were also obligated to ensure compliance based on the directions issued by SEBI vide its order dated 10th July, 2012 wherein SEBI granted permission to the defendants to deal in interest rate, direct equity, futures and option in equity and the wholesale debt segment and while complying to the order of SEBI, the Plaintiff and FTIL had undertaken reduction to the combined holding and instrument construing the reduction and equity to the required minimum within three years from 20th June, 2012. Mr.Sen stressed on the fact that extinguishment of the warrants upon the Plaintiff was a measure that was adopted by the defendants in order to comply with SECCR and directions of the SEBI and the defendants were answerable to the SEBI and renewal of the recognition is depending upon the plaintiff's compliance with statutory requirements. According to Mr.Sen action taken by the defendants in this regard cannot be termed as illegal or arbitrary as same was done only to ensure that the law was upheld at all costs.

26] Mr.Sen submitted that the defendants had no choice but to extinguish the warrants specially in view of the fact that period of three years had expired on 19th June, 2015 and the warrants held by the Plaintiff were illegal and therefore the right to hold and convert these warrants to equity shares also became inoperative by law. The defendants, according to Mr.Sen, has accordingly complied with the SEBI requirements by ensuring that the warrants were canceled thereby reducing the holdings of Plaintiff. He also submitted that there was no law setting out manner in which said compliance had to be achieved and therefore the defendants had no option but to extinguish the warrants. The principal contention of Mr.Sen was thus reiterated that there could be no outflow of funds under any circumstances.

27] Mr. Sen submitted that this is not a case of frustration as contended by Mr. Tulzapurkar. The plaint proceeds on the basis that regardless of the 2012 Regulations the plaintiff can hold the warrants. He further submitted that there was no averment in the plaint that supports the frustration theory. Even the alternative prayer is not supported by the pleadings. According to Mr. Sen there was no challenge to the scheme which came to be approved by this Court. The scheme being valid, there is no question of the plaintiff seeking to resile from its commitment to the scheme and therefore to retain the value of the shares as non-refundable deposit. According to Mr. Sen the judgments relied upon by Mr. Tulzapurkar did not assist the plaintiff's case in any manner and the facts of the present case reveal that the parties arrived at a bargain whereby the plaintiff and FTIL agreed to promote the defendant company. The MIMPS (Regulations) were the imposed and the scheme having been approved, warrants were issued.

28] Mr.Sen invited my attention to the terms and conditions under which the warrants were issued are in particular clause (h) which provides that the exercise of warrants shall be subject to all applicable laws and shall specifically in accordance with the Securities Contracts (Stock Exchanges and Clearing Corporations) Regulations, 2012 or any other law for the time being in force relating to schedule under description in the stock exchanges. The learned Senior counsel therefore submitted that once having agreed to these terms and conditions they formed a integral part of the warrant certificate and therefore there was no occasion to resile from the same. The SECCR clearly provided that the holding should be brought even the 5% limit and the plaintiff was bound to follow the same. He reiterated his submission that prayer clause B(1) in the notice of motion in which terms the plaintiff seeks relief is beyond the scope of the plaint and no relief can be granted in those terms. As far as prayer B(3) he submitted that it is a final relief which can be granted only in the suit and therefore cannot be granted as an alternative prayer at the interim stage. Mr. Sen further submitted that the prayer B(3) is inconsistent with Regulation 16 and 17 and the SEBI had refused to extend time. He submitted that no Appeal was filed by the plaintiff against the decision of the SEBI refusing to extend time. He submitted that an alternative remedy by way of an appeal to the Securities Appellate Tribunal could have been availed of but for reasons best known to the plaintiff no such Appeal was filed. The plaint as now filed, seeks to set at nought the decision of the SEBI and if prayer B(3) is granted it will run contrary to the plaintiff's case.

29] Apropos the deposit is made by the plaintiff in this Court, Mr. Sen submitted that deposit was entirely voluntary and strictly without prejudice to the contentions that the amounts claimed in the plaint are not payable. According to Mr. Sen therefore the various reasons given by the Plaintiff for not exiting in time are unsustainable. Mr. Sen further submitted that the plaintiff's contentions that it made best efforts to sell the warrants yet could not, is incorrect. According to the learned counsel between 25th November, 2013 and 1st April, 2014 the defendant had written several letters addressed to the Plaintiff whereby the Plaintiff was asked to reduce the share holding in the defendant to even 5% as required by the SECCR. All these letters are appearing at exhibit-F Collectively to the affidavit in reply to the notice of motion. These letters seen to be written on 25th November, 2013, 6th December, 2013, 27th December, 2013, 18th August, 2014, 26th June, 2014, 7th January, 2014, 24th January, 2014, 18th February, 2014 and 1st April, 2014 and he submitted that vide all these reminders the plaintiff was informed that they will be required to reduce their share holding, however, they failed to do so.

30] On the other hand, M/s. Financial Technologies India Ltd. had complied with the Regulations and had reduced their stock. He submitted that the Plaintiff had not even replied to these numerous letters addressed to them. Mr. Sen then submitted that upon expiry of the period of three years from the date of the notification of the SECCR, the warrants held by the plaintiff were rendered illegal and the Plaintiff had no right to hold the warrants nor they took convert the warrants into equity shares after 19th June, 2015. He submitted that the defendant was liable to submit quarterly reports to SEBI on the disinvestment by the concerned stock holders and there was no constructive action taken by the plaintiff to that effect. He submitted that the defendant was required to show compliance with the SECCR to the SEBI by ensuring that the plaintiff had complied and that there was no statutory provisions in the matter of effecting such a compliance and, therefore, the defendants had no option but to extinguish the warrants. According to Mr. Sen the plaintiff's attempt is to recover the value of these warrants which were clearly not payable since the plaintiff was not entitled to a refund under the Scheme and this is proof that the amount was to remain in the company at all times. Mr. Sen further submitted that the defendant had no intention to misappropriate the funds and that even as per Rule 19 the plaintiff informed the defendant that the Plaintiff had sold some warrants and that it wished to exercise its action attached to some of the warrants sold and increasing of share holding of the 5% of the capital post sale and post conversion of the warrants and submitted that about 73,30,000/- warrants were not cancelled and were not among the extinguished warrants.

31] Mr. Sen then contended that the plaintiff is seeking to take advantage of their own wrong inasmuch as they had acknowledged that they were liable to divest themselves of the warrants failing which the same would stand extinguished as admitted by the plaintiff in the extract of the resolution annexed to the plaint as Exhibit-O. Despite this knowledge, the Plaintiff was dragging its feet and failed to dispose of the warrants. According to Mr. Sen the defendant had been continuously following up with the plaintiff to ensure compliance with the SECCR, however, the plaintiff had failed to take steps and accordingly the defendant proceeded to pass the Resolution on 27th June, 2015. Mr. Sen therefore submitted that there is no occasion for the plaintiff to complain about the cancellation of extinguishment of warrant or seeking compensation/repayment of the amount of the deposit. Mr.Sen further submitted that even otherwise the Plaintiff cannot seek repayment of the deposit since the reliefs in the Notice of Motion do not form part of the reliefs in the suit.

32] Mr.Sen further submitted that there are no averments in support of the reliefs sought in the amended notice of motion and that there is no proof that the defendant would be unable to pay the amount in the event of the plaintiff succeeding in the suit. He submitted that the order sought in the notice of motion is akin to one in an application under Order 38 Rule 5 and the plaintiff had not made out any case to support this application. In support of his submissions Mr. Sen relied upon the decision of the Supreme Court in Cotton Corporation of India Ltd. Vs. United Industrial Bank Ltd. and Others AIR 1983 SC 1272 and submitted that the relief ought were granted of will fall foul of the judgment. He submitted relying upon the observations of the Supreme Court in paragraph 10 of the judgment that the Court can grant interim relief only in aid of and as ancillary to the main relief which may be available to the Plaintiff on final determination of his rights in the proceedings. Mr. Sen then relied upon the decision of the Calcutta High Court in the case of ***Premraj Mundra Vs. Md. Maneck Gazi & Ors. AIR***

(38) 1951 Calcutta 156[5] and submitted that the Calcutta High Court after considering various decisions of other Courts had set out certain guiding principles for relief under Order 38 Rule 5. In effect he submitted that an order under Order 38 Rule 5 can be issued only in the circumstances stated in the application and that if circumstances did exist, the same were required to be proved to the satisfaction of the Court and that a Court would not be justified in ordering the attachment or for providing security merely because no harm would be done by such an order. The judgment further holds that the affidavits in support of the application must not be vague and must be properly verified. The source of information must be disclosed and that a mere allegation that the defendant was selling of and his property was not sufficient. Relying upon these guidelines, Mr. Sen submitted that none of these requirements were met by the Plaintiff and no such order could be passed as prayed for.

33] Mr. Sen then relied upon the decision of ***Raman Tech. & Process Engg. Co. and Anr. Vs. Solanki Traders (2008) 2 SCC 302***[6] and relied upon paragraphs 4, 6 and 7 of the judgment once again to buttress his case that order 38 Rule 5 was to prevent the defendants from

5 AIR (38) 1951 Calcutta 156
6 (2008) 2 SCC 302

defeating the realisation under the decree that may ultimately be passed and that power under Order 38 Rule 5 is a drastic and extra ordinary power. It should not be exercised mechanically or merely for the asking. He submitted that merely because the plaintiff has filed the present suit is not a ground for seeking relief and the relief that the plaintiff has sought is in fact by way of application under order 38 Rule 5 but without conforming to the requirements of these potent provision.

34] Lastly, Mr.Sen relied upon ***Rajasthan State Industrial Development and Investment Corporation and Anr. Vs. Diamond & Gem Development Corporation Ltd. & Anr. (2013) 5 SCC 470***[7] and submitted that interpreting of the terms of contract the Supreme Court had held that a party cannot claim anything more than what is covered under the contract. The contract being a creature of an agreement between the parties has to be interpreted by giving literal meaning unless, there is ambiguity. He submitted that it is not permissible for the court to make a new contract for the parties. Mr. Sen contended that the Plaintiff had failed to make out any case within four corners of the contract provisions and submitted that the Notice of Motion is liable to be dismissed and the amount deposited by the defendant in the Court is

7 (2013) 5 SCC 470

liable to be repaid to them.

35] While dealing with the arguments on behalf of the defendant Mr. Tulzapurkar submitted that the defendant's arguments were incorrect inasmuch as its contention that the basic understanding between parties is that there would be no out cash flow was misconceived. He submitted that the contract clearly emphasizes and recognizes the fact that the amount in question is belonging to the plaintiff but the same would be treated as a deposit. He further submitted that while agreeing to the scheme the plaintiff had anticipated that further issue of shares by the defendant would have entitled the plaintiff to seek issuance of shares in view of the warrant being convertible and it is an anticipation of such an opportunity that the plaintiff agreed that the amount representing the value of the reduced share holding would be treated as a non-refundable deposit. He submitted that the plaintiff had fully co-operated with the defendant in supporting the sanctioning of the Scheme by this Court. He submitted that the benefit of the deposit is for the Plaintiff or for the benefit of the plaintiff's nominees or transferee of the warrant since the Plaintiff had option of recovering the amount representing the deposit i.e. the value of the shares that stood reduced, by transferring the warrants at that value. In any event, it is submitted that the benefit of the deposit cannot be that of the company and the dishonest intention of the defendant is exemplified by the fact that the deposit was sought to be transferred to the capital reserves. He submitted that defendant had no right to transfer this capital reserves. Mr. Tulzapurkar further submitted that for the aforesaid reasons the defendant's contention that the principal arrangement between the parties was that there would be no cash outflow cannot be sustained.

36] As far as the defendant's contention that there is no provision in law for cancelling the warrants, he submitted that the contract had no date, the same was open ended and there was no Regulations which entitled the defendant to retain the money belonging to the plaintiff. He submitted that the defendant is expecting a Court to read Regulation 16 and 17 in isolation which he submitted cannot be done. He then referred to provisions of clause 3, 4 and 7. He reiterated his contentions as to the purpose for which the SECCR were formulated and submitted that Regulations were intended to regulate "recognition, ownership and governance in stock exchanges and clearing corporations". He submitted that the Regulations were essentially made for the purposes of defendant and the regulation, ownership of the defendant and governance of the exchange, he further reiterated his contention qua chapter II Regulation

3, 4 and 7 and chapter III Regulation 14, chapter IV Regulation 16 and 17 and submitted that when these Regulations are made harmoniously the defendant's case is found to be unsustainable inasmuch as the purposes of Regulations 16 and 17 are for the defendant to meet the requirements of law and not for the plaintiff's benefit. He submitted that consequences of non compliance of Regulation 16 and 17, the defendant company have to face the action by the SEBI under Regulation 49 whereby the SEBI could debar the defendant from accessing the securities market or dealing in securities as will be determined by the Board. The SEBI had in the instant case not acted pursuant to the Regulation 49. The defendant had benefited from such extinguishment of the warrants. He submitted that the defendant took no positive steps to provide an alternative to extinguish the warrants. It did not offer to seek modification of the scheme. He therefore submitted that the plaintiff is entitled to the reliefs prayed for in the plaint.

37] In response to the contention of Mr. Sen there is no averment in support of the prayers that were being sought. Mr. Tulzapurkar submitted that the contentions of the defendant were not correct inasmuch as the present notice of motion is not an application under Order 38 rule 5 wherein the plaintiff was seeking attachment of property belonging to the defendant or any third party but the plaintiff' was merely seeking money. In support of his contentions he referred to the averments in the further affidavit in support of the notice of motion filed by Dr. Raghavendra Prasad on 10th July, 2015 and submitted that in paragraph 11 & 12 the necessary averments have been incorporated to support the prayer in the motion, inter alia, that the defendant's conduct was clandestine, calculated with a design to mislead the plaintiff and subvert the legal process by purportedly reserving to extinguish the warrants that in the light of legal opinion obtained in the case of FITL the warrants once extinguished were restored and there was no reason why in the case of the plaintiff the warrants have to stand extinguished despite having legal opinion that such extinguishment may have been frowned upon. He further submitted in paragraph 12 the deponent had stated that defendant's financial position has deteriorated significantly over the past one year. It has lost a significant chunk of its market share and its revenues had shrunk and that the rights issue had remained under-subscribed by Rs.43 crore. This was the justifiable apprehension that Mr. Tulzapurkar offered in support of the prayer for grant of relief.

38] Mr. Tulzapurkar submitted that the transaction could be derived from the fact that defendant wanted to be a stock exchange and that the defendant prevailed upon the plaintiff to consent to the scheme. He submitted that there is no restriction in company law to continuing the deposit retaining its character as a deposit and the defendant had no right to change the character of the deposit and assuming that the defendant was required to cancel the warrants and the money could not be retained by the defendant. Apropos the various letters relied upon by Mr. Sen to buttress his argument that the defendant constantly reminded the plaintiff to divest its holdings. Mr. Tulzapurkar submitted that substantially all the letters sought divestment of the combined holding of a FTIL and the plaintiff. On the other hand, he invited my attention to Exhibit B to the affidavit in rejoinder which is a letter dated 12^{th} December, 2014 wherein the defendant informed the plaintiff that FTIL had hold its entire equity share holding and a substantial chunk to third parties and as a result, SEBI is aware of the condition relating to disinvestment of joint equity holding with FTIL to 5% stands complied with. That in exercise of warrants by the third parties the paid up capital stood enhanced consequent upon which the share holding percentage of the plaintiff had been reduced from 4.86% to 2.88% and as per the said holding Plaintiff could exercise its rights under 2,10,46,514 warrants and convert them to shares so as to maintain the 5% equity holding. This clearly indicated that as to December 2014 there was no need for the Plaintiff to convert its entire equity to warrants and that the so called constant reminders to divest, copies of which were annexed to the affidavit in reply stood fully explained by virtue of this single letter, in this manner Mr. Tulzapurkar submitted that there is every reason to grant the relief in favour of the plaintiff. He submitted that prayer clause B(3) was doubt on the basis that the warrants could be reinstated and as such the prayer B(1) that is now being pressed proceeds on the basis that cancellation of the warrants was incorrect. He also referred to the contents of paragraph 9 of the plaint and contended that the warrants held from July 2010 and the money is continued to remain with the company and it is his case that plaintiff is entitled to recover the sum of Rs.41,59,17,672/- being the face value of the warrants along with interest thereon at 18% p.a. from 10th July, 2010 till date of payment and that the said sum represents the amount of the deposit held by the defendant to the plaintiff's credit and it is payable by the defendant to the plaintiff.

39] Mr. Sen in a brief sur-rejoinder submitted that it is not for the defendants alone to meet demands of SECCR but each share holder/stake holder must meet the requirements. While he has admitted that multiple letters written from November 2014 did deal with combined obligation of FTIL and the Plaintiff herein, the letter at page

93 dated 12th December, 2014 relied upon by the Plaintiff merely reiterated that the fact that the exit by FTIL left a equity gap which could be filled. According to Mr. Sen this letter is not capable of being interpreted in favour of the Plaintiff to be read as regularisation for the condition for disinvestment which for all times continued to operate and it is the plaintiff's obligation to divest itself of the warrants. Mr. Sen denied that the monies deposit of which was now being sought belong to the Plaintiff.

Conclusions:

40] I have heard counsel at length and having considered the facts with their assistance I am of view that the Plaintiff is entitled to relief. The plaintiff has contended that the money representing the value of warrants was a deposit lying with the defendants company against warrants of Re.1 each which would continue to lie with the defendant company till they were converted to shares. The plaintiff disavowed responsibility to divest itself of the warrants and contended it was the responsibility of the defendant to do so. It was submitted that the plaintiff made all efforts to dispose of its warrants but the plaintiff's attempts were frustrated by the defendant's rights issue. The plaintiffs contended that the money representing value of the warrants belong to the Plaintiff and could not be transferred to the capital reserves since it was a deposit and not a capital contribution. It was also contended that akin to a case under Section 65 of the Indian Contract Act the contract between the parties had become void by the supervening circumstances in the form of the SECCR and hence the monies were repayable to the Plaintiff.

41] On the other hand Mr.Sen has submitted that fundamental agreement between the parties was that the monies once invested shall at all times be retained by the company since it was not a refundable deposit. Secondly, the Plaintiff had sufficient time to divest themselves of warrants but have failed to do so despite having sufficient opportunities and therefore, they lost their right to claim the monies. Thirdly, the application is in the nature seeking attachment before the money/furnishing of security and such an order could not be passed for want of pleadings in this behalf. It was also contended that the defendant had no option but to extinguish the warrants, alluding to such being the requirement of law.

42] I am not convinced that the plaintiff was not obliged to divest itself of the warrants. The reference to the possible extinguishment of the warrant in extract of the resolution annexed to the plaint at Exhibit "O" is an indication that the plaintiff anticipated a possibility that the warrants may be extinguished. Of course, such a possibility could have become a reality in the light of treatment the FTIL holding received when the defendant had initially contended that the warrants would stand extinguish and thereafter has reversed the decision. The plaintiff made efforts to reduce their holdings and this is borne out by the attempts made by the Plaintiff to divest themselves of the warrants inter alia by engaging merchant bankers and transferring some of the warrants to IL&FS and finalising sale of further warrants at the price of Re.1. In my view the contention of the plaintiff that defendant deliberately sabotaged the plaintiff's attempt to sell the warrants at Rs.1.50 with a rights issue around the same time is prima facie, not borne out by the material on record today.

43] The submission on behalf of the plaintiff that the obligation to review scheme holding of warrants was that of the defendant alone ignores the fact that the plaintiff also had an obligation to reduce warrants which cannot be wished away. It is also evident from the facts that the Plaintiff are aware that the warrants would have to be transferred before the specified date. The recording in the extract of the board resolution at Exhibit 'O' to effect that the warrants could stand extinguished reveals that the Plaintiff expected that the defendants may extinguish the warrants like they did in the case of FTIL. However, this does not mean that the extinguishment of the warrants would entail appropriation of the deposit. It would retain its character as a deposit. Since it was non refundable, it would remain as such but the fact that the Defendant has resolved to transfer it to the capital reserves indicates that even according to the defendant the deposit did retain its character as a non-refundable deposit. If the defendant could unilaterally appropriate the plaintiff's contribution there must be a quid pro quo. There is nothing on record to indicate that the plaintiff had always agreed to retain the monies in the defendant company by way of capital. If that were so the Scheme would have provided for the same in as many words. Such a provision is conspicuously absent. Furthermore, the defendants made no offer to modify the scheme. If the scheme had provided that in the event of warrants being ineffective by any reason including operation of the statutory provisions, the amount of deposit would be transferred to the capital reserves of the defendants, there would be no contest. However, having said this, I find in favour of the plaintiff as far as the nature of deposit is concerned. The scheme clearly provides that in section 4 that paid up equity capital of the Plaintiff will be reduced and cancelled to the extent of Rs.61,71,35,000/- . The amount of Re.1/- paid on each share against liability of the plaintiff to pay the equivalent amount towards non refundable interest free deposit to be maintained against the warrants to be issued is detailed in Schedule IV, clause 4. Under Schedule IV, clause 5.1(a) the defendant became liable to pay to the Plaintiff Rs.61,71,35,000/- towards value of equity shares proposed to be reduced and cancelled. This amount was to be adjusted against the liability of the plaintiff to pay an equivalent amount towards non refundable deposit.

44] Mr. Sen had interpreted clause 5.2 to submit that on a net basis there would not be cash outflow. This clause 5.2 appears to be basis of that submission. Schedule IV, Clause 6 provided for issuance of warrants and clause 6.2 specifies that interest shall be adjusted against paid up capital on account of shares held by them and cancelled pursuant to the scheme. The terms and conditions of the warrants were specified in clause 6.3. However, nothing in these terms provide that the warrants could be extinguished or that deposit could be appropriated toward capital reserves or in any other manner. The amount at all material times, continued to be a deposit which may not have been refundable on demand but certainly it was not amount which could be appropriated in the manner sought to be done. I am of the view that Mr. Sen's reliance on the alleged underlying agreement or basic understanding between the parties that money could never be withdrawn is certainly not borne out by the documents or correspondence inter-partes or the Scheme where it may have found a place. There is no evidence to support the interpretation that on a net basis there can be no outflow from the defendant company even if the warrants were extinguished or invalidated. Thus the defendant's contention that the warrants could be extinguished and that amount could be appropriated in the manner sought to be done does not find any basis or support in the documents, correspondence or the Scheme.

45] Admittedly, the warrants were issued as per the Scheme and monies were held as deposit by virtue of the Scheme. Merely because the introduction of SECCR would result in reduction of the amount of the potential share holding through the instrument of warrants does not mean that the plaintiff would be deprived of their deposit. No doubt the Plaintiff would be deprived of their rights to trade the warrants for shares or trade the warrants for consideration as FTIL and the plaintiff did in a limited way. They would thus be deprived of the right to transfer the warrants possibly at a profit, but for the defendants to contend that the money could be appropriated leaving the plaintiff without any option is unsustainable.

46] Mr. Sen's argument that the primary intention of and between the parties was that monies brought in by the plaintiff would always remain with the defendant company sounded attractive, plausible and it may have been true but the defendants were unable to cite any provision within which such an agreement or understanding would operate. Worse still, neither the agreement between parties nor the Scheme capture such an intention. It is not possible to enforce such a understanding in law since the defendant has not been able to point out legal provision to enforce such an understanding. Moreover, even the affidavit in reply filed or the document filed by the defendant does not support such an interpretation.

47] In the pleadings the defendant has adopted contrary stands, at one point of time they contended that extinguishment took place by operation of law. In another it is stated that law being silent on the issue, the defendant had no choice but to extinguish the warrants. It will be useful to consider some of the averments in the affidavit in reply. In paragraph 15 of the reply the deponent has contended as follows:-

*"15. ....I submit that t**here was no need or***

> ***requirement to intimate the Plaintiff prior to finalizing the Board Minutes in light of the fact that the warrants stood illegal as on 19th June, 2015*** *and also that the Plaintiff was well aware of this fact.......” (Emphasis supplied).*

Yet again the paragraph B(v) the defendant has contended as follows:-

> *“v) In the present situation, the Defendant had to show compliance to SEBI by ensuring that the Plaintiff has complied.* ***As the law was silent*** *on the manner of effectuating such compliance, t****he Defendant had no option but to extinguish the warrants****.” (Emphasis supplied)*

However, in paragraph 21, the same deponent had stated as follows:-

> *“21. ….. As per the SECC Regulations, the right to hold the warrants to equity expired on 19th June, 2015. Due to this, there would be no corresponding value or right to the said warrants.* ***The decision of extinguishment only replicated the actual effect of operation of law.****”*
> *(Emphasis supplied)*

48] From the aforesaid averments the defendant has clearly adopted conflicting versions while all along seeking in to justify its actions. The Plaintiff may not have had any objection to the extinguishment of the warrants per se provided amount of deposit is paid over to them. The Plaintiff could have objected to such course of action being adopted by the defendants but along with extinguishment of the warrants the defendants could not have transferred the same to capital reserves. In my view the defendants have failed to establish a case that it had a right to appropriate the deposit. Likewise they have failed to establish that the Plaintiff could not object to transfer of deposit to the capital account. The conduct of the defendant is suspect. It attempted extinguishment of FTIL warrants and thereafter, allegedly on basis of legal advice, reversed the decision and permitted FTIL to exit which FTIL managed to do. However, merely because in the present case the plaintiff has not managed to sell all the warrants does not entail the plaintiff being deprived of the deposit.

49] I have observed that in the affidavit in reply to the notice of motion the defendant has contended that there was no need or requirement to intimate the plaintiff prior to finalizing the board minutes in the light of a fact that the warrants stood illegal as of 19th June, 2015 and that it is the plaintiff who had to take timely action to make share holding legal or seek permission from the SEBI to continue to hold its rights under the warrants and converted into equity. The defendant has contended that it had neither the powers to validate the excess share holding nor extend time granted for reduction. However, in the same affidavit, the deponent states as follows:-

> *"18. …….. I submit that the Plaintiff had not shown any inclination to divest its shareholding. T**he Defendant could not intimate the Plaintiff of the events that transpired during the Board Meeting dated 27th June, 2015, prior to finalizing the Minutes of the Meeting.** However, to the surprise of the Defendant, the Plaintiff forwarded Order dated July 9, 2015, which was passed ex parte and without the knowledge of the Defendant. In such a situation, it was deemed necessary and urgent to intimate to the Plaintiff that the decision in respect of the extinguishment of warrants had already been taken……."(Emphasis supplied)*

50] In this context it will be useful to refer to General condition 16 (2):

> *General Conditions :*
>
> *16 (1) ……..*
>
> *(2) The shareholding as specified in this chapter shall include any instrument owned or controlled, directly, or indirectly, that provides for entitlement to equity or rights over equity at any future date.*
>
> *Provided that any equity or rights over equity, arising from such instruments in excess of limit of shareholding*

specified in this chapter on the date of commencement of these regulations, shall be reduced to the specified limit within a period as may be decided by the Board, which may extend upto three years from the date of such commencement."

Clause 16(2) deals with shareholding which includes any instrument owned or controlled, **directly, or indirectly,** that provides for entitlement to equity or rights over equity at any future date. Thus it is not the warrants held by the plaintiff alone that could be subjected to extinguishment and deposit approriation. In a hypothetical situation if some part of the warrants were to be indirectly held by a Special Purpose Vehicle, even such holding would fall foul of the SECCR. In such a case the defendant's contentions as to the right to appropriation by virtue of the "no outflow" argument cannot be substantiated. Hence the appropriation could certainly not have occasioned unilaterally upon extinguishment. The Plaintiff's contention that under regulation 17(1) at least 51% of paid up equity share capital of a recognised stock exchange should be held by the public,as a result the defendant was duty bound to the broad base the share holding in order to ensure that 51% is held by the public also has considerable merit.

51] Mr. Sen's contention that the Notice of Motion seeks an attachment before judgement and that too in the absence of the requisite pleadings has no merit since Mr. Tulzapurkar has pointed out the relevant averments which in my view justify the application. The Motion is not an application for attachment before judgement for the simple reason that the Plaintiff seeks to secure it own money characterised as a deposit in the hands of the Defendant. The case law cited Mr.Sen apropos the reliefs sought not having a basis in the plaint in pleadings, want of pleadings contemplated for seeking relied under Order 38 in my view will not help him in the fact situation at hand. I am therefore of the view that the plaintiff's have demonstrated that plaint and motion are not wanting in averments which support the prayer being sought. On the other hand the decisions in **Tarsem Singh** and **BOI Finance (**Supra) support the case of the Plaintiff.

52] Absent a provision to deal with the consequences of extinguishment or invalidity of warrants one must examine how the amount would be dealt with and to my mind it will not be possible to accept the defendant's contention that the amount is required to be transferred to the capital reserves or otherwise appropriated by the defendant company. The money admittedly belongs to the plaintiff and there is no provision in law or in contract whereby the defendant could appropriate the money towards its own capital reserves. In view of the defendant's attempt to contend otherwise, this aspect will have to be gone into only at the trial of suit and in the meanwhile it is not desirable that the amount lies with the defendant company, in any manner, whether as by way of non refundable deposit or otherwise. The amount is not an interest bearing deposit and the defendant has not established that it is entitled in contract or law to retain the amount.

53] There is no justification in allowing the company to hold the same and the Plaintiff's that request for deposit of monies in this Court in my view must be accepted. If the amount is deposited in court,it will be invested and earn interest. Although the funds may not remain idle if retained by the defendant, the chances of its depletion cannot be ruled out. The balance of convenience rests in favour of the plaintiff. The plaintiff's are therefore entitled to the reliefs prayed in the notice of motion.

54] Accordingly, I pass the following order:-

i) Notice of Motion is made absolute in terms of prayer clause (B-1).

ii) In view of the fact that the defendant has already deposited a sum of Rs.20 crores pursuant to the statement made by them and as recorded in the order dated 3rd August, 2015, the defendant will now deposit a sum of Rs.21,59,17,672/- to the credit of the suit account, within a period of eight weeks from today.

iii) Upon such deposit being made, the amount so deposited will be invested by the Prothonotary and Senior Master in a fixed deposit in any nationalised bank, initially for a period of one year renewable from time to time pending hearing and final disposal of the suit.

iv) The earlier deposit of Rs.20 crores which is already invested shall continue to be so invested initially for a period of one year renewable from time to time pending hearing and final disposal of the suit.

v) In the meantime the undertaking recorded in the order dated 10th July, 2015 shall continue to operate.

vi) There will be no orders as to costs.

(A. K. MENON, J.)

wadhwa