Kaashyap Technologies Ltd. & Ors. vs Sebi on 4 September, 2023

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Hearing : 15.06.2023
Date of Decision : 04.09.2023

Appeal No. 804 of 2022

1.

Kaashyap Technologies Ltd.

33/8, II Floor, B. R. Complex, C. P. Ramaswamy Road, Alwarpet, Chennai - 600018.

2. Shri A. Venkatramani A5, Madrasapattinam No. 95, Karpagam Avenue, 4th Street, Sai Nagar, R. A. Puram, Chennai - 600028.

3. Shri A. Ganesan Flat No. 27, 3rd Floor, Prayad Apartments, New No. 15, Old No. 8, First Main Road, Adyar, Chennai - 600020.

4. Shri R. Dakshinamurthy 18-A, Kannappa Nagar, Extn., Thiruvanmiyur A Chennai 600041.

5. Shri A Sivakumaran Plot 13, Venkateswara Garden, Kottivakkam, Chennai - 600041.

6. Shri R. Gopalan 476, BEML Layout, 1st Floor, 8th Main, Basaveswar Nagar, 3rd Stage, 4th Block, Bangalore. ..... Appellants Versus Securities & Exchange Board of India SEBI Bhavan, Plot No. C-4A, G Block, Bandra Kurla Complex, Bandra (East), Mumbai - 400 051. ... Respondent Ms. Arunagiri Velu, Advocate with Mr. Jitendra Sharda, Advocate for the Appellants.

Mr. Sumit Rai, Advocate with Mr. Mihir Mody, Mr. Arnav Misra, Advocates i/b. K Ashar & Co. for the Respondent. CORAM : Justice Tarun Agarwala, Presiding Officer Ms. Meera Swarup, Technical Member Per : Justice Tarun Agarwala, Presiding Officer

1. The present appeal has been filed against the order dated July 29, 2022 passed by the Adjudicating Officer (hereinafter referred to as 'AO') of Securities and Exchange Board of India (hereinafter referred to as 'SEBI') imposing penalties for violation of Section 12A of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as 'SEBI Act') and Regulations 3 and 4 of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (hereinafter referred to as 'PFUTP Regulations') as well as under Section 21 of the Securities Contracts (Regulation) Act, 1956

(hereinafter referred to as 'SCRA') read with Clauses 36 and 50 of the Listing Agreement. A sum of Rs. 25 lakh has been imposed upon the company Kaashyap Technologies Ltd. noticee nos.

1. A sum of Rs. 20 lakh has been imposed upon noticee nos. 2. A sum of Rs. 10 lakh each has been imposed upon noticee nos. 3, 4, 5 and 6.

2. The facts leading to the filing of the present appeal is, that the Board of Directors of the company known as Kaashyap Technologies Ltd. passed a resolution on October 4, 2007 for opening a bank account with Banco Efisa, S. F. E., S. A. (hereinafter referred to as 'Banco') for depositing the GDR proceeds.

3. The resolution approved by the Board of Directors resolved that a bank account would be opened with Banco for the purpose of receiving the subscription money in respect of GDR issue. Further, Mr. A. Venkatramani, CMD, was authorised to sign and execute an agreement as may be required by the Bank and take such steps from time to time on behalf of the company. The resolution further resolved to use the funds deposited in the aforesaid Bank account as security in connection with the loan, if any as well as to enter into any escrow account or similar arrangement if and when so required.

4. Based on the aforesaid resolution, the company issued 4,92,500 GDRs for USD 16.50 million dated December 27, 2007. The aforesaid GDR was subscribed by one entity, namely, Clifford Capital Partners A. G. S. A. (hereinafter referred to as 'Clifford') and a corporate announcement was made by the company that the entire issue was subscribed.

5. SEBI conducted an investigation pertaining to the issue of GDR by the company. Based on the investigation, a show cause notice dated June 29, 2018 was issued to the company, its Directors and Company Secretary to show cause as to why suitable directions under Section 11 and 11B should not be issued for violation of Section 12A(a), (b), (c) of the SEBI Act read with Regulation 3(a),

(b), (c), (d) and 4(1), 4(2)(f), (k), (r) of the PFUTP Regulations, Section 21 of the SCRA read with Clauses 32, 36(7) and 50 of the Listing Agreement and Section 23E of the SCRA.

6. The show cause notice alleged that pursuant to the resolution dated October 4, 2007 not only a bank account was opened with Banco but the Managing Director executed a pledge agreement / Account Charge Agreement dated October 23, 2007 on behalf of the company. A loan agreement dated October 19, 2007 was executed between Banco and Clifford in which the proceeds of the GDR was to be kept as security with Banco. The show cause notice further alleged that the pledge agreement and the loan agreement was not disclosed to the stock exchange and, consequently, the investors and shareholders were kept in the dark. The show cause notice further alleged that based on the pledge agreement and the loan agreement Banco advanced USD 16.50 million to Clifford which amount was utilised by Clifford to subscribe to the entire issue. The GDR proceeds were pledged as security till such time the loan was repaid by Clifford. It was also alleged that the fact that Clifford was the sole subscriber was not intimated to the stock exchange and to the Indian investors. Further, Clifford did not repay the loan and defaulted, as a result, the bank adjusted USD 10.39

million from the GDR proceeds and, accordingly, the company and its Directors were charged with violation of Section 12A of the SEBI Act and Regulations 3 and 4 of the PFUTP Regulations.

7. The AO after considering the evidence on record found that the entire scheme of using the GDR proceeds to fund a subscriber to the GDR issue was a fraudulent scheme and violative of Section 12A of the SEBI Act and Regulations 3 and 4 of the PFUTP Regulations. The AO found that the GDR was subscribed by one entity, namely, Clifford and not by four entities as disclosed by the company vide its letter dated June 18, 2015. The AO further found that on account of the pledge created by the company with Banco the funds were not made available at the company's disposal and the same became available in tranches as and when the loan amount was repaid by Clifford. Further, the loan agreement was not disclosed to the stock exchange and to the Indian investors. Further, the disclosure made by the company to the stock exchange that the GDR issue was fully subscribed was misleading as the investors were not informed that the GDR was subscribed by only one entity and, therefore, the scheme hatched by the Company and its Directors was violative of Section 12A of the SEBI Act and Regulations 3 and 4 of the PFUTP Regulations.

8. The AO found that the non-disclosure of the loan agreement and the pledge agreement was violative of Clause 36 of the Listing Agreement as well as Section 21 of the SCRA Act read with Clause 32 and 50 of the Listing Agreement. The AO, however, found that Clifford repaid the loan amount over a period of time in installments except the defaulted amount.

9. We have heard Ms. Arunagiri Velu, the learned counsel and Mr. Jitendra Sharda, the learned counsel for the appellants and Mr. Sumit Rai, the learned counsel with Mr. Mihir Mody, Mr. Arnav Mishra, the learned counsel for the respondent.

10. The appellants contended that they acted on the advice of the lead manager Bremer Bugmann Seiler Capital Partners Ltd. and that the appellants are a victim of exploitation by Clifford. The appellants denied that they have committed fraud or violated any provision of law and contended that the appellants have been subjected to the fraudulent advice given by the lead manager. The appellants contended that they were not in any manner connected with Clifford. Further, they had no knowledge about Clifford being the sole subscriber to the GDR issue until the receipt of the show cause notice. The appellants further denied that they had violated any clause of the Listing Agreement and contended that all information was duly disclosed to the stock exchange as and when a material event had occurred. The appellants further denied signing the pledge agreement and contended that it had never authorised Banco to create a pledge and only came to know when the show cause notice was issued. It was urged that the GDR proceeds were utilised in accordance with the objects of the GDR and there was no diversion of money nor has the appellant indulged in any wrong doing. Further, there was no complaint with regard any unlawful or disproportionate gain or any loss caused to the shareholders or to the investors. It was urged that the appellant, being a small Company, has not played any fraud upon the market and violation, if any, is confined to non-disclosure under the Listing agreement for which purpose the penalty awarded was wholly excessive, harsh and disproportionate.

11. It was also urged that the appellant nos. 3, 4, 5 and 6 are independent directors and were not involved in the day-to-day affairs of the company and, therefore, the penalty imposed upon them was wholly inappropriate. In support of their submission, the learned counsel placed reliance upon decisions of this Tribunal in Sayanti Sen vs. SEBI Appeal No. 163 of 2018 decided on August 9, 2019 and Prafull Anubhai Shah vs. SEBI Appeal No. 389 of 2021 decided on June 28, 2021. It was also urged in the alternative that the penalty imposed upon the appellants is excessive and disproportionate and should be appropriately reduced.

12. On the other hand, the respondent supported the impugned order and contended that the modus operandi is the same as has been dealt with by this Tribunal in a large number of matters relating to the GDR issue wherein this Tribunal has held that the nondisclosure of the loan agreement and the pledge agreement was totally fraudulent and violative of the Listing Agreement.

13. Having heard the learned counsel for the parties, we find that this modus operandi in the instant appeals is the same and has been dealt with by this Tribunal in a large number of matters relating to the GDR issue wherein the Tribunal has held that non-disclosure of the loan agreement and the pledge agreement was totally fraudulent and violative of the Listing Agreement. This Tribunal also held that the company and its MDs were aware of the execution of the pledge agreement as well as loan agreement and it was no longer open to them to deny the existence of the said agreements. This Tribunal also held that the company and its Directors misled SEBI into believing that there were more subscribers to the issue and not one subscriber.

14. We also held that company and its MDs were aware of the pledge agreement, non-disclosure of the pledge agreement and loan agreement invited penalty. Further, the corporate announcement did not disclose the fact that the subsisting pledge agreement facilitated the subscribers to subscribe to the GDR issue. The corporate announcement was misleading and presented a distorted version to the investors and created a false version inducing the investors to deal in securities. The aforesaid findings have been given in a large number of matters decided by this Tribunal especially in Appeal No. 381 of 2019, Sibly Industries Ltd. vs. SEBI and other companion appeals decided on July 14, 2022, Appeal No. 438 of 2020, Aksh Optifibre Ltd. vs. SEBI and other companion appeals decided on June 27, 2022 and Appeal No. 28 of 2022, Praveen Kumar Hastimal Shah vs. SEBI and other companion appeals decided on July 6, 2022.

15. Consequently, in the light of the aforesaid decisions the findings against the appellants in the instant appeals does not require any interference nor we require to give elaborate reasons. The findings of the AO are upheld.

16. On the issue of quantum of penalty and on the issue of proportionality, we find that in Excel Corp Care Limited vs. Competition Commission of India & Anr. [(2017) 8 SCC 47], the Supreme Court held :-

> "92. Even the doctrine of "proportionality" would suggest that the court should lean in favour of "relevant turnover". No doubt the objective contained in the Act, viz., to discourage and stop anti-competitive practices has to be achieved and those who are

> perpetrators of such practices need to be indicted and suitably punished. It is for this reason that the Act contains penal provisions for penalising such offenders. At the same time, the penalty cannot be disproportionate and it should not lead to shocking results. That is the implication of the doctrine of proportionality which is based on equity and rationality. It is, in fact, a constitutionally protected right which can be traced to Article 14 as well as Article 21 of the Constitution. The doctrine of proportionality is aimed at bringing out "proportional result or proportionality stricto sensu". It is a result oriented test as it examines the result of the law in fact the proportionality achieves balancing between two competing interests: harm caused to the society by the infringer which gives justification for penalising the infringer on the one hand and the right of the infringer in not suffering the punishment which may be disproportionate to the seriousness of the Act."

17. Similar view was expressed by the Delhi High court in Rajkumar Dyeing and Printing Works Pvt. Ltd. In Rajendra Yadav, the Supreme Court held that the doctrine of equality applies to all those who are found guilty. The Supreme Court held :-

> "9. The doctrine of equality applies to all who are equally placed; even among persons who are found guilty. The persons who have been found guilty can also claim equality of treatment, if they can establish discrimination while imposing punishment when all of them are involved in the same incident. Parity among co-delinquents has also to be maintained when punishment is being imposed. Punishment should not be disproportionate while comparing the involvement of co-delinquents who are parties to the same transaction or incident. The disciplinary authority cannot impose punishment which is disproportionate, i.e., lesser punishment for serious offences and stringent punishment for lesser offences."

18. Undoubtedly, the doctrine of proportionality is now well established in our jurisprudence and is a recognised facet of Article 14 of the Constitution of India. In Andhra Pradesh Dairy Development Corporation Federation vs. B. Narasimha Reddy and Others [(2011) 9 SCC 286], the Supreme Court held :-

> "29. It is a settled legal proposition that Article 14 of the Constitution strikes at arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. This doctrine of arbitrariness is not restricted only to executive actions, but also applies to legislature. Thus, a party has to satisfy that the action was reasonable, not done in unreasonable manner or capriciously or at pleasure without adequate determining principle, rational, and has been done according to reason or judgment, and certainly does not depend on the will alone. However, the action of legislature, violative of Article 14 of the Constitution, should ordinarily be manifestly arbitrary. There must be a case of substantive unreasonableness in the statute itself for declaring the act ultra vires of Article 14 of the Constitution. (Vide: Ajay Hasia etc. v. Khalid Mujib Sehravardi, Reliance Airport Developers (P) Ltd. v. Airports Authority of India, Bidhannagar (Salt Lake) Welfare Assn. v. Central Valuation Board, Grand

Kakatiya Sheraton Hotel and Towers Employees and Workers Union v. Srinivasa Resorts Limited, and State of T.N. v. K. Shyam Sunder.)"

19. In matters relating to punitive measures the emphasis has shifted from the wednesbury principle of unreasonable to one of proportionality. A disproportionate punitive measure which does not commensurate with the offence would be violative of Article 14 of the Constitution of India. We are of the opinion that in the rapid growth of administrative law it has become the need and necessity to control possible abuse of discriminatory power by administrative authorities. In this regard, certain principles have been evolved by Courts, namely, that if an action is taken by an authority which is contrary to law or which is improper or where the action taken is unreasonable then the Court of law is duty bound to interfere with such action and one such mode of exercising power is to exercise the doctrine of proportionality. Where the punitive measure is harsh or disproportionate to the offence which shocks the conscience it is within the discretion of the Court to exercise the doctrine of proportionality and reduce the quantum of punishment to ensure that some rationality is brought to make unequals equal.

20. In this regard, we find that SEBI has passed various orders against company and its directors imposing different penalties for identical / similar offences. In a large number of penalties ranging from Rs. 25 lakh to Rs. 1.25 crore have been imposed upon the companies which we have appropriately reduced to Rs. 25 lakh. Similarly, for managing director considering the factor in each of the case the penalties have been reduced to Rs. 10 lakh and Rs. 20 lakh. Similarly, in many cases the penalty ranging from Rs. 5 lakh and Rs. 10 lakh have been imposed upon the directors. In a large number of cases, we have exonerated independent directors.

21. In the light of the aforesaid, without going into the specific details, in the instant case, we find that penalty imposed against the company is appropriate as in many other cases we have been reduced the penalty against the company to Rs. 25 lakh. Thus, the penalty imposed by the AO against the company noticee nos. 1 needs no interference. Similarly, we find that the penalty of Rs. 25 lakh imposed upon the noticee nos. 2 who is the CMD is also appropriate and commensurate with the alleged violation as he was the signatory to the account charge agreement / pledge agreement. In so far as noticee nos. 3, 4, 5 and 6 are concerned, we find that noticee nos. 3 was non-executive director and noticee nos. 4, 5 and 6 were independent directors. There is no evidence to show that all these noticees apart from being signatory to the resolution of the board of directors were not involved in the day-to-day affairs of the company nor were they aware or monitor the issuance of the GDR issue.

22. In a large number of cases, namely, Appeal No. 389 of 2021, Prafull Anubhai Shah vs SEBI decided on June 28, 2021, Appeal No. 433 of 2021, Rajesh Shah vs SEBI decided on July 5, 2021, Appeal No. 58 of 2021, Jaiprakash Kabra vs SEBI decided on September 2, 2021 and Appeal No. 406 of 2020, Mr. Gurmeet Singh vs SEBI decided on September 20, 2021, we have held that independent directors cannot be penalized when they are not part of day-to-day affairs of the company.

23. Consequently, the penalty imposed upon notice nos. 3 to 6 to the tune of Rs. 10 lakh each are set aside.

24. For the reasons stated aforesaid, the appeal of the company and its managing director noticee nos. 1 and 2 are dismissed. Appeal of noticee nos. 3 to 6 is allowed. In the circumstances of the case, there shall be no order as to costs.

25. This order will be digitally signed by the Private Secretary on behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Certified copy of this order is also available from the Registry on payment of usual charges.

Justice Tarun Agarwala Presiding Officer Ms. Meera Swarup Technical Member 04.09.2023 PRAMILA Digitally by PRAMILA signed PTM TANAJI TANAJI MISAL Date: 2023.09.05 MISAL 10:20:58 +05'30'