

(1998) 09 GUJ CK 0038
In the Gujarat High Court

Case No : Letters Patent Appeal No. 981 of 1998 in SCA No. 2560 of 1998

Jaltarang Motels Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 18-09-1998

Acts Referred:

Constitution of India, 1950 — Article 226
Securities and Exchange Board of India (Appeal to the Central Government) Rules,
1993 — Rule 12, 14, 15, 15(2), 5(1)

Citation : (1999) 95 CompCas 339

Hon'ble Judges : C.K.Thakker, J;A.M. Kapadia, J

Bench : Division Bench

Judgement

C.K. Thakker, J.—This appeal is filed by the appellant against the judgment and order dated July 30, 1998, passed by the learned single judge in Special Civil Application No. 2560 of 1998 (See [1999] 95 Comp Cas 339).

2. The appellant was the original petitioner. By filing Special Civil Application No. 2560 of 1998, the petitioner invoked the jurisdiction of this court under article 226 of the Constitution of India praying therein to issue a writ of mandamus or a writ of certiorari or any other appropriate writ, order or direction quashing and setting aside orders passed by the Union of India (respondent No. 1 herein), dated August 22, 1997, and March 17, 1997. A prayer was also made to quash and set aside the order passed by the Securities and Exchange Board of India ("the SEBI" for short) dated December 19, 1996, as also orders passed by the Appellate Authority under the Securities Contracts (Regulation) Act, 1956 ("the Act" for short) dated December 24, 1996, and September 30, 1997. Interim relief was also prayed for against execution and implementation of the order passed by respondent No. 1, Union of India, and by the Securities and Exchange Board of India.

3. The case of the petitioner was that it was a company incorporated in 1994 under the Companies Act, 1956. The Registrar of Companies issued

commencement certificate of business in favour of the petitioner-company on August 30, 1994. The petitioner-company floated a public issue of 36 lakhs equity shares of Rs. 10 each. The issue was opened for subscription on December 21, 1995. It was over subscribed by nearly twelve times. The Securities and Exchange Board of India received a complaint in regard to this public issue. Certain allegations were made regarding irregularity on the basis of which inquiry was ordered by the Securities and Exchange Board of India and a report was submitted. From the report it was established that two persons, namely, Mr. Atul Shah, managing director of the petitioner-company and one Mr. Shantilal Gandhi, were involved in gray market operations. It was also alleged that there was an agreement between Mr. Atul Shah and Mr. Shantilal Gandhi, which guaranteed payment of Rs. 21 lakhs by the former to the latter "for grey market operations" to illegally boost the price of shares. In view of the above allegations and report, a notice was issued by the Securities and Exchange Board of India on April 16, 1996. On May 17, 1996, another notice was issued by the Securities and Exchange Board of India, in which it was stated that in terms of the chairman's order dated April 16, 1996, an investigation was conducted into the affairs relating to dealings in shares in respect of the public issue of the petitioner-company. The investigation report dated April 26, 1996, was also sent along with the said communication. In the light of the investigation report, the petitioner was asked to show cause why the public issue should not be refunded. The petitioner was asked to submit his reply so as to reach the Securities and Exchange Board of India within ten days from the date of receipt of the said letter.

4. The petitioner submitted its detailed reply on June 24, 1996, inter alia, controverting the allegations levelled against it. A prayer was made that the proposed action was de hors the powers and authority of the Securities and Exchange Board of India and no direction could be issued against the petitioner. The proceedings were, therefore, liable to be dropped and the show-cause notice deserved to be withdrawn.

5. On December 19, 1996, the Securities and Exchange Board of India passed an order which was one of the orders impugned in the petition. In the said order, the Securities and Exchange Board of India considered allegations levelled against the petitioner in respect of payment of Rs. 21 lakhs by Mr. Atul Shah to Mr. Shantilal Gandhi, as also other circumstances. Considering all materials, the Securities and Exchange Board of India observed;

"1. An understanding was arrived at between Shri Atul Shah and Shri Shantilal D. Gandhi to market the issue and for which purposes fees of Rs. 21 lakhs have been received by Shri Shantilal Gandhi from Shri Atul Shah. However, Shri Atul Shah had denied that the monies were paid for grey market operations.

2. It may be mentioned that when the issuer of securities appoints a merchant banker or a broker for the purpose of marketing the issue, the issuer company pays marketing expenses to the merchant banker or commission to the broker

depending on the applications procured by the broker. It may be mentioned that Shri Shantilal D. Gandhi is not a broker or a sub-broker but a cloth merchant and, therefore, I find it difficult to believe that for an issue of Rs. 3.6 crores a sum of Rs. 21 lakhs could be paid to a person who is not a Securities and Exchange Board of India registered intermediary nor a registered expert only for the purpose of marketing the issue.

3. Shri Atul Shah had stated that the agreement which refers to various transactions is forged. I find it difficult to believe that Rs. 21 lakhs must have been paid without any supporting documents.

4. The payment of cheques, the meetings with Shri Gandhi, Shri Gandhi's easy access to the office of Shri Atul Shah, and the fact that Shri Atul Shah while addressing a conference of brokers had Shri Shantilal Gandhi sitting on the same dais shows special closeness between them.

5. There is enough evidence of transactions in the scrips of Jaltarang Motels Ltd., even prior to the listing of the shares of Jaltarang.

6. Shri Atul Shah had confirmed that he was aware of the trading of the scrips of Jaltarang in the grey market. However, he was not aware of the number of shares and the buyer and seller trading therein.

7. Shri Atul Shah also admitted that the monies collected against the public issue of Jaltarang had been released even prior to the approval of listing of shares."

6. It was further stated :

"All the above factors and the investigation report leave me with no hesitation in concluding that the transactions had been entered into in order to create a false market in order to induce the people to subscribe to the public issue of Jaltarang.

In view of the above, I, under the provisions of the Securities and Exchange Board of India Act, 1992, and the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Markets) Regulations, 1995, order that Shri Atul Shah be directed to refund the subscriptions received from the public issue of Jaltarang Motels. A copy of this order to be forwarded to the lead merchant banker in order to ensure that the said order of refund is complied with."

7. It is an admitted fact that the order passed by the Securities and Exchange Board of India is appealable under the Securities and Exchange Board of India (Appeal to Central Government) Rules, 1993 ("the Rules" for short). Rule 12 enables an aggrieved party to prefer an appeal to the Central Government. Rule 5(1) states that "every appeal shall be accompanied by a fee of rupees five hundred only". Rule 14 enjoins the Central Government to communicate, before considering the appeal, to the appellant or the Board or both the date and place of the hearing of the appeal. Rule 15 provides for hearing of the appeal. The said rule is relevant and may be quoted in extenso :

"15. Hearing of appeal. - (1) On the day fixed or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal. The Central Government shall, then, if necessary, hear the Board or its authorised representative against the appeal, and in such case the appellant shall be entitled to reply.

(2) In case the appellant does not appear in person or through an authorised representative when the appeal is called for hearing, the Central Government may dispose of the appeal on merits :

Provided that where an appeal has been disposed of as provided above and the appellant appears afterwards and satisfies the Central Government that there was sufficient cause for his non-appearance, when the appeal was called for hearing, the Central Government shall make an order setting aside the ex parte order and restore the appeal."

8. It was the case of the petitioner that an appeal was filed within the stipulated period. Initially, hearing was fixed on May 19, 1997, which was adjourned at the request of learned counsel for the petitioner, to June 30, 1997. On June 26, 1997, the petitioner applied to the Appellate Authority seeking adjournment on the ground that the advocate for the petitioner had returned only a few days earlier from abroad. A request was therefore, made to keep the hearing on any date after July 10, 1997. It was the case of the petitioner that no reply was given to the communication dated June 26, 1997, to the petitioner and on July 1, 1997, the appeal was heard ex parte by the Appellate Authority. Even thereafter, the petitioner was not informed. According to the petitioner, on August 5, 1997, again it addressed a letter to the Appellate Authority, annexure "M" to the petition, wherein a request was made for fixing another date of hearing of the appeal. It was also stated that earlier time was sought by an application dated June 26, 1997, but till that date, i.e., August 5, 1997, the petitioner had not heard anything from the Appellate Authority in the matter. Therefore, once again a request was made to fix the date of hearing of the appeal.

9. According to Mr. Atul Shah, when he personally inquired in the office of the Appellate Authority on August 29, 1997, he was given to understand that the hearing was already over in July and some order was passed but as it was not signed, the same could not be despatched. It is on record that the order was passed by the Appellate Authority on August 22, 1997. Which was forwarded with letter dated September 9, 1997 (annexure "A" to the petition). The said order was also challenged by petitioner in the petition. So far as that order is concerned, it is undisputed that it was passed ex parte, but dealing with the grounds mentioned in the memorandum of appeal and considering the material which was with the Appellate Authority, the Appellate Authority stated as under :

"We have carefully gone through the material placed before us by the appellant and the Securities and Exchange Board of India, the order of chairman, Securities and Exchange Board of India, and the report of the investigation

officer. The fact that :

(a) There were withdrawals to the extent of 50 per cent. of the total subscription to the scrip of the appellant and the appellant accepted the withdrawal only from friends, relatives and associates.

(b) Shri Atul Shah gave an amount of Rs. 21 lakhs to Shri Shantilal D. Gandhi, a cloth merchant (and not a broker or a sub-broker) to market the issue of the appellant.

(c) Shri Atul Shah has confirmed that he was aware of the trading of scrips of the appellant in the grey market.

(d) Eighteen undated cheques handed over by Shri Atul Shah to Shri Gandhi were produced before the Securities and Exchange Board of India, leave little scope for us to disagree with the findings of the Securities and Exchange Board of India that Shri Atul Shah was aware of the unofficial trading of the scrips of the appellant and that the appellant are responsible for indulging in unfair trade practices in contravention of the directions of the various guidelines issued in this regard from time to time. We are, therefore, in agreement with the findings of the Securities and Exchange Board of India and the appeal is accordingly dismissed."

10. After the order was received by the petitioner, he preferred an application for review on September 30, 1997 (annexure "N" to the petition). The Appellate Authority rejected the application and passed the following order on March 17, 1998 :

"Sub. :- Review application of Jaltarang Hotels Ltd., to the Central Government u/s 20 of the Securities and Exchange Board of India Act, 1992.

Sir,

Please refer to your revision application dated 30-9-1997, against the order of the Appellate Authority dated 22-8-1997.

The matter has been examined. Since there is no provision of revision either under the Securities and Exchange Board of India Act 1992, or Securities and Exchange Board of India (Appeal to Central Government) Rules 1993, and, moreover, there are no grounds for reviewing Appellate Authority's order dated 22-8-97, the revision appeal has been disposed of by the Appellate Authority."

11. Before the learned single judge, a serious grievance was made that the Securities and Exchange Board of India had committed an error of law in passing the order against the petitioner which was contrary to the facts and documentary evidence. It was also contended that though the appeal was filed in accordance with law and the Appellate Authority was bound to decide it on the merits, without affording opportunity of hearing and without complying with the principles of natural justice, the appeal was dismissed ex parte. By doing so, an error of law was committed even by the Appellate Authority which deserved

interference by this court. It was urged that the appeal was fixed for hearing on June 30, 1997. Since it was not possible for the petitioner to proceed with hearing of appeal on that day, an application was made, well in advance, on June 26, 1997, requesting the Appellate Authority to adjourn the hearing. The Appellate Authority did not inform the petitioner that the appeal will not be adjourned and hearing will take place on the scheduled day. The petitioner in these circumstances was under the impression that the appeal would be adjourned and would not be decided in his absence. The petitioner was not made aware of the fact that on July 1, 1997, the appeal would be heard on the merits in his absence. Even after conclusion of hearing, the petitioner was not intimated of that fact. It was only in the end of August, 1997, when Mr. Atul Shah went to the office of the Appellate Authority that he was informed that hearing was over and the order was passed. Even at that time, he was informed that the order was not signed. The order was signed only on August 22, 1997, and was communicated to the petitioner in September, 1997.

12. Regarding review, a grievance was made before the learned single judge that the Appellate Authority has committed an error of law in coming to the conclusion that the review application was not maintainable relying upon rule 15 of the Rules. It was contended that it was obligatory on the Appellate Authority to review its earlier judgment under the proviso to rule 15(2) in the light of the fact that an application was made in advance which could be said to be sufficient ground to afford an opportunity of hearing to the petitioner.

13. The learned single judge, after hearing the parties, held that it would be appropriate on the part of the Appellate Authority to afford an opportunity of hearing to the petitioner. At the same time, however, considering the facts and circumstances of the case, while setting aside the order passed by the Appellate Authority as also on the review application and by extending an opportunity to the petitioner to prosecute his appeal, certain conditions were imposed by the learned single judge. In paras. 8 and 9, the learned single judge observed (page 343 of 95 Comp Cas) :

"In the circumstances stated above, the proper course will be that the petitioner can be given an opportunity to be heard once again in both the appeals, but that will be on stringent terms. In fact, the petitioner ought to refund the entire amount, and restore the status quo ante. Mr. Shelat states that they should at least deposit Rs. 50,00,000 since admittedly they have diverted Rs. 67,60,000 to their sister concern and Mr. Atul Shah should give a personal undertaking to refund the remaining amount, if required. In the meanwhile the petitioner should create a charge in favour of the Securities and Exchange Board of India on the properties purchased. The suggestion of Mr. Shelat deserves acceptance in the interest of justice. In the circumstances, the two appeals shall stand revived, if :

(a) The petitioner deposits an amount of Rs. 50,00,000 with the Securities and Exchange Board of India and Mr. Atul Shah gives a personal undertaking to this court that he will pay the remaining amount if the decisions in the appeals go

against him. Mr. Jhaveri states that the petitioner has only Rs. 6 lakhs available in the bank and only that much deposit be directed. It is not possible to accept this suggestion that if he deposits these Rs. 6 lakhs with the Securities and Exchange Board of India, the same will be adjusted towards the deposit of Rs. 50 lakhs. In the mean-while he shall not withdraw any amount from these Rs. 6 lakhs.

(b) The petitioner will create a charge on the properties purchased out of these funds mentioned in his affidavit, filed in this court affirmed on July 29, 1998.

The petitioner is given the time of four weeks to take the necessary steps within which period the execution of the impugned order will remain stayed. During this period, however, the petitioner and Mr. Atul Shah will not deal with, part with, alienate or encumber any of these properties mentioned in the affidavit. Mr. Atul Shah will also instruct the jaltarang Club to stop its activities forthwith inasmuch as they are obviously run out of the diverted fund of Rs. 67,60,000, that will enable him to raise the deposit of Rs. 50,00,000 as well. Mr. Jhaveri states that it is a separate entity but no further particulars about it are being given. He accepted that the directors are the same persons. No prejudice will be caused if the activities of the club are not run for a period of four weeks."

14. So far as setting aside the orders passed by the Appellate Authority on appeal and on review are concerned, Mr. Jhaveri, learned counsel for the appellant submitted that the appellant has no objection. In fact, the said orders are in favour of the appellant and, obviously, he has no grievance. His objection, however, is that while quashing those orders and remanding the matter to the Appellate Authority, the learned single judge ought not to have imposed conditions which were imposed on the petitioner/appellant. His main grievance was in respect of the condition regarding deposit of Rs. 50 lakhs with the Securities and Exchange Board of India by Mr. Atul Shah and also the personal undertaking to be given by him. According to Mr. Jhaveri, his client is in a position to deposit only Rs. 6 lakhs which was in the bank and was available. Even at the time of hearing of this appeal, he stated that the appellant can pay the said amount of Rs. 6 lakhs. But he is unable to pay an amount of Rs. 50 lakhs as directed by the learned single judge.

15. Regarding condition No. 2, as to creation of a charge on properties, he stated that the appellant has no objection if the said condition remains as it is. He also stated that the property of the appellant-company is worth more than Rs. 3.6 crores. In these circumstances, even if condition (A) as imposed by the learned single judge is totally ignored and not insisted upon, there is sufficient protection to persons who might have paid the amount in view of the properties of the company on which charge is ordered to be created.

16. The question for our consideration is whether the learned single judge has committed an error in exercising discretion in imposing the two conditions referred to hereinabove ?

17. Mr. Shelat appearing for the Securities Exchange and Board of India submitted that normally when a discretion is exercised by the court, it may not be interfered with by an appellate court by substituting the discretion of the appellate court in place of the discretion of the trial court. Moreover, in the facts and circumstances of the case, the order passed by the learned single judge and the conditions imposed by him cannot be said to be illegal, improper or arbitrary. Relying on various provisions of the Companies Act, he submitted that when an amount was received by the company before complying with the provisions of the Companies Act and before necessary permission was granted by the authorities, the appellant was holding the amount in trust. It was, therefore, not open to the appellant either to appropriate or to spend or to divert or in any other manner deal with the said amount. He was virtually a banker to the issue. When the learned single judge recorded a finding that the appellant has diverted an amount of Rs. 67,60,000 to its sister concern, i.e., "Jaitarang Club", the order to deposit an amount of Rs. 50 lakhs with the Securities and Exchange Board of India cannot be said to be illegal or improper. According to Mr. Shelat, the amount which has to be recovered from the petitioner is about Rs. 3.6 crores. Considering the fact, Rs. 50 lakhs would come to approximately 15 to 20 per cent. If the learned single judge, after considering the totality of circumstances, directed the petitioner appellant to deposit an amount of 15 to 20 per cent. by giving an opportunity of hearing by the Appellate Authority, on the merits, by no stretch of imagination, can the order be said to be illegal which requires interference in exercise of appellate jurisdiction by this court.

18. Mr. Jhaveri contended that initially the Appellate Authority committed an illegality by not extending an opportunity of hearing and by rejecting the review application without taking into account the provisions of rule 15 of the Rules, particularly the proviso to sub-rule (2) to rule 15. He also stated that since it is impossible for the appellant to deposit the amount of Rs. 50 lakhs, though it can be said that the petition was allowed by the learned single judge extending him opportunity of hearing, in reality, the petition could be said to have been dismissed as the condition which is imposed cannot be satisfied or fulfilled, which would result in depriving the appellant of the right of appeal.

19. Mr. Shelat on this aspect, submitted that a person who could not have diverted the funds in accordance with law, diverted them illegally. Such person cannot contend that though he was required to keep the amount in tact since he had already diverted the funds, it was not possible for him to get back the said amount and hence without insisting for refund of amount or deposit as directed by the learned single judge, he should be heard on the merits. This is virtually paying premium to a party who has committed wrong. A court of law would not allow a party to take undue advantage of his own wrong. When the learned single judge has not granted a relief in favour of the petitioner and has imposed conditions, it cannot be said that such a direction could not have been issued.

20. In the facts and circumstances of the case, we are of the opinion that it

cannot be said that by imposing a condition of deposit Rs. 50 lakhs, as a condition precedent for revival of the appeal and setting aside the order passed by the Appellate Authority, any illegality can be said to have been committed by the learned single judge. To recall, an amount of Rs. 67,60,000 was paid by the appellant to its sister concern "Jaltarang Club". It is, no doubt, contended by Mr. Jhaveri that the learned single judge was not right in observing that the fund was "diverted". According to him, it was done with a view to get a right of way which was absolutely necessary for the said club and to spend the amount. It was, thus, an investment which was a need and necessity and it could not be said that the action was taken with a view to deprive any person who would otherwise be entitled to get back the amount.

21. In our opinion, however, the question was not whether such expenses were necessary. The question was that when the provisions of the Companies Act were not duly complied with and necessary sanction/permission was not granted by the authorities, it was not open to the appellant to deal with the amount received by him for any purpose. If during that period, he dealt with the amount, an appropriate condition could be imposed on him. Moreover, the said amount of Rs. 67,60,000 was paid by the appellant to its sister concern. Taking into account that a statement was made by Mr. Shelat on behalf of the Securities and Exchange Board of India before the learned single judge that it would be appropriate if the learned single judge passed an order directing the petitioner to deposit at least an amount of Rs. 50 lakhs from the amount of Rs. 67,60,000, in our opinion, the learned counsel was fair and the order was just and equitable. If on the basis of that fact and the statement the learned single judge passed an order directing the petitioner to deposit an amount of Rs. 50 lakhs, such direction cannot be said to be arbitrary or unreasonable.

22. It is true that even in exercise of discretionary powers an appellate court, in an appropriate case can interfere, if the exercise of discretion is illegal, arbitrary or unreasonable. In the instant case, however, in our opinion, it cannot be said that exercise of discretion by the learned single judge was contrary to law or otherwise arbitrary.

23. Sub-rule (1) of rule 5 states that every appeal shall be accompanied by a fee of rupees five hundred only. Mr. Jhaveri, therefore, submitted that if an appeal can be filed on payment of fees of Rs. 500, no condition could be imposed on the appellant to deposit an amount of Rs. 50 lakhs. In our view, the contention is not well founded. Rule 5 speaks of payment of fees on memorandum of appeal. It has nothing to do with the amount of deposit which the learned single judge directed. When the appellant had received an amount of about Rs. 3.6 crores and according to the learned single judge he "diverted" Rs. 67,60,000 to its sister concern and in the light of that fact, a condition was imposed to deposit an amount of Rs. 50 lakhs, such a direction, in our considered opinion, could have been issued in exercise of powers under article 226 of the Constitution. Such power has nothing to do with the provisions of sub-rule (1) of rule 5. That

contention, therefore, cannot carry the case of the appellant further.

24. Both the sides relied on certain passages from Judicial Review of Administrative Action by de Smith (5th edition). In our opinion, the law relating to exercise of discretion is well settled. Exercise of discretion ultimately depends upon the facts and circumstances of each case. As in the instant case, the discretion exercised by the learned single judge could not be said to be contrary to law, we have not interfered with the same.

25. Mr. Jhaveri stated that the learned single judge has erroneously observed that an amount of Rs. 67,60,000 was diverted by the appellant after the order was passed by the Securities and Exchange Board of India. That order was passed on December 19, 1996, whereas the amount was diverted prior to that date. In our opinion, it is not relevant. We are of the view that the said amount could not have been diverted or paid to anyone else, even if the contention of learned counsel Mr. Jhaveri is accepted, the appellant cannot take advantage of that situation. As it was not open to the appellant to utilise any fund till all the requirements have been complied with, by spending or diverting the amount, he had committed an illegality. If an order to deposit Rs. 50 lakhs was passed by the learned single judge, it needs no interference.

26. For the above reasons, we are of the view that no ground has been made out to interfere with the order passed by the learned single judge. The appeal deserves to be dismissed and is accordingly dismissed. Notice is discharged. In the facts and circumstances of the case, there shall be no order as to costs.

27. Mr. Jhaveri prayed that the time to deposit the amount of Rs. 50 lakhs as directed by the learned single judge may be extended. In the facts and circumstances of the case, time to deposit the amount is extended for six weeks from today. It is, however, clarified that the appeal will be heard by the Appellate Authority on the merits only after the payment of Rs. 50 lakhs is made. It is also ordered that if during the extended period the amount is not paid, the order passed by the learned single judge as well as by us will not operate.