(2022) 03 SEBI CK 0101

In the Securities Appellate Tribunal Mumbai

Case No : Miscellaneous Application No. 1211 Of 2021, Appeal No.669 Of 2021

Rana Kapoor APPELLANT

Vs

Securities And Exchange Board Of India RESPONDENT

Date of Decision : 25-03-2022

Acts Referred:

Citation : (2022) 03 SEBI CK 0101

Hon'ble Judges : Tarun Agarwala, Presiding Officer;M. T. Joshi, J

Bench : Division Bench

Advocate : Somasekhar Sundaresan, Abishek Venkataraman, Rushin Kapadia, Pradeep Sancheti, Mihir Mody, Arnav Misra, Mayur Jaisingh

Final Decision : Allowed/Disposed Of

Judgement

Tarun Agarwala, Presiding Officer

1. The present appeal has been filed against the order dated October 4, 2021 passed by the Adjudicating Officer ('AO' for short) wherein the application of the appellant to cross-examine certain individuals whose statements were recorded and mentioned in the show cause notice was rejected.

2. The facts leading to the filing of the present appeal is, that the appellant was the Managing Director (MD) and Chief Executive Officer (CEO) of Yes Bank Limited ('YBL' for short) between 2004 and January 31, 2019. In proceedings totally unconnected with show cause notice, the appellant was arrested by the Enforcement Directorate on March 8, 2020 and is currently in judicial custody.

3. A show cause notice dated October 28, 2020 was issued against YBL and certain individuals including the appellant alleging that senior officials of Private Wealth Management Team in YBL misrepresented and mis-sold the AT-1 bonds of YBL to investors. The show cause notice alleged that the appellant was responsible for the actions of the officials of YBL in his capacity as MD & CEO of YBL while overseeing the entire activities. For facility, paragraph 19 and 20 of the show cause notice is extracted here under:-

"19. In view of the above, it is alleged that Noticee 2 was actively pushing its team for the down sell of YBL AT1 Bonds in the secondary market and was giving direct instructions to them to go for granular distribution. The same led the senior officials of the PWM Team of YBL viz. Noticee 3, Noticee 4 and Noticee 5 to recklessly sell the bonds to the individual investors without doing adequate due diligence.

20. It is further alleged that the senior officials of PWM Team viz. Noticee 3, Noticee 4 and Noticee 5on behalf of YBL were involved in the misrepresentation, manipulation and mis-selling the AT1 bonds of YBL to the individual investors. It is further alleged that Noticee 2 was also responsible for the said actions of the aforesaid senior officials of the PWM Team as he was overseeing the entire activities, taking regular updates from the team and giving them further instructions to expedite / increase the sales."

4. The appellant applied for inspection of documents and cross-examination of witnesses on June 22, 2021. The said application was rejected by an order of July 6, 2021 and again on July 14, 2021, against which the appellant filed Appeal no. 525 of 2021. This appeal was disposed of by an order of this Tribunal dated August 6, 2021 with the following directions:-

"6. In view of the aforesaid, we direct the appellant to file a reply of the show cause notice on or before August 20, 2021. Thereafter it would be open to the appellant to move a fresh application for cross-examination of the witness/ witnesses. If such an application is filed indicating reasons for cross-examination, the same shall be considered by the Adjudicating Officer and appropriate orders will be passed by giving reasons without being influenced by the earlier order passed by him on July 06, 2021."

5. Based on the aforesaid directions a detailed application dated August 25, 2021 was filed praying for cross-examination of certain witnesses. The appellant submitted that the charge in the show cause notice was entirely based on the statements / submissions made by certain individuals and the e-mails given by these individuals. It was contended that the statements of these individuals formed the sole basis of the charge against the appellant. The appellant contended that the statements of the witnesses is the only foundation of the show cause notice and that the appellant will only be able to defend himself appropriately in the proceedings if he is allowed to cross-examine the persons who have made the statements and that it was contended that the cross-examination of these witnesses will bring out the credibility or lack of their credibility and the denial of cross-examination would take away the appellant's right to defend himself.

6. The AO after considering the matter passed the impugned order on October 4, 2021 rejecting the application for cross-examination of the witnesses holding that the statements of witnesses is a statement of fact which is not used for crystallization / framing of the charge. The AO contended that the statement of

the witnesses was factual in nature and the e-mails issued are documents which are part of the record for which no cross-examination was required. Further, the charges levelled in the show cause notice was based on independent evidence and was not based on the statements of the witnesses.

7. We have heard Shri Somasekhar Sundaresan, the learned counsel for the appellant and Shri Pradeep Sancheti, the learned senior counsel for the respondent.

8. It was urged that the statements of witnesses is closely entangled and is intricately woven with the statement of fact which cannot be disentangled and consequently the statement of fact is required to be verified as to whether it is correct or not for which purpose it is essential to cross-examine the witnesses in order to verify the veracity and credibility of the statement. It was also urged that the statement of witnesses forms the sole basis / foundation of the charge-sheet and therefore it is essential for the appellant to cross-examine the witnesses. In support of his submissions, the learned counsel for the appellant placed reliance upon a decision of the Supreme Court in (2016) 15 SCC 785, Andaman Timbers Industries vs Commissioner of Central Excise, Kolkata-II and decision of this Tribunal in Bharat Jayantilal Patel vs Securities and Exchange Board of India, Appeal No. 126 of 2010 decided on September 15, 2010 as well as a recent decision of the Supreme Court in the case of T. Takano vs Securities and Exchange Board of India dated February 18, 2022 in Civil Appeal Nos. 487-488 of 2022.

9. On the other hand, the learned counsel for the respondent Shri Pradeep Sancheti at the outset contended that it is not necessary for this Tribunal to delve on the reasoning given by the AO as to whether the statement of the witnesses being a statement of fact was not required to be cross-examined for the purpose of verification and credibility of that statement made by that witness. It was contended that the respondent will not rely on the statement of the witnesses and the appeal may accordingly be disposed of this basis.

10. In view of the statement given by the learned senior counsel it becomes essential for the AO to reconsider the matter de novo because in our opinion a finding has been given that the statement of witnesses being a statement of fact is not required to be cross-examined which prima facie in our opinion appears to be incorrect. Further, if the statement of the witnesses is not being considered by the respondent while adjudicating the matter the respondent is further required to consider whether the e-mails issued by these witnesses are required to be cross-examined or not on those e-mails. The AO is further required to consider whether the e-mails of these witnesses can be considered without considering the statement of the witnesses and if the e-mails of these witnesses are being considered as a statement of fact then whether the appellant is entitled to cross-examine the said witnesses on those e-mails.

11. In view of the aforesaid, without going into the legalities and the findings

given by the AO in the impugned order we set aside the impugned order and remit the matter to the AO to re-decide the application of the appellant for cross-examination of the witnesses in the light of the statement made by the senior counsel for the respondent, namely, that the statement of the witnesses will not be relied upon by the respondent in the adjudication proceedings. While deciding the application the AO will take into consideration the decisions that may be placed by the appellant including the recent decision of the Supreme Court in the case of T. Takano. The AO will pass a fresh order in accordance with law after giving an opportunity of hearing within three months. The appeal is allowed. In the circumstances of the case, parties shall bear their own costs. The miscellaneous application is also disposed of.

12. 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.