
(2004) 03 BOM CK 0032

In the Bombay High Court

Case No : Appeal No. 5 of 2001 in SEBI Appeal No. 27 of 2000

Securities and Exchange Board of India

APPELLANT

Vs

SKDC Consultants Ltd.

RESPONDENT

Date of Decision : 12-03-2004

Acts Referred:

Securities and Exchange Board of India (Registrar to an Issue and Share Transfer Agents) Rules, 1993 — Rule 4(1)

Securities and Exchange Board of India Act, 1992 — Section 15B, 15J, 15Z

Citation : (2004) 2 CompLJ 387

Hon'ble Judges : R.M. Lodha, J;Anoop V. Mohta, J

Bench : Division Bench

Advocate : R.A. Dada, Kumar Desai, of Maneksah and Sethna, for the Appellant; J.B. Lentin and Sonali Gaurav, of M.S. Bodhanwala, for the Respondent

Final Decision : Dismissed

Judgement

R.M. Lodha, J.—S.K.D.C. Consultants Limited - the respondents herein and to be "referred as the company hereinafter was incorporated on 18 February, 1998. On 25 February, 1998, the company is said to have entered into the memorandum of understanding with the proprietrix of M/s. Sree Krishna Data Centre for its takeover as a going concern from 1 April, 1998, or the date from which the permission of the Securities and Exchange Board of India (SEBI) was received. SEBI's case is that on 21/22 December, 1998, M/s Sree Krishna Data Centre contravened the provisions of Rule 4(1)(b) of the SEBI (Registrar to an Issue and Share Transfer Agents) Rules, 1993 (for short, "the rules of 1993") by acting as a registrar to an issue on behalf of corporate bodies without entering into a valid agreement and also acted as share transfer agents on behalf of few corporate bodies prior to entering into valid agreements with the said corporate bodies. The proceedings were initiated against the company by issuance of show cause notice dated 9 May, 2000, for contravention of Rule 4(1)(b) of the rules of 1993 u/s 15B of the Securities and Exchange Board of India Act, 1992 (for short, "SEBI Act, 1992"). The company responded to the said notice and set up the case, inter

alia, that the company took over the business of M/s. Sree Krishna Data Centre as a going concern with effect from 1 April, 1998, and until 31 March, 1998, Sree Krishna Data Centre was a proprietrix concern. The adjudicating officer by his order dated 31 August, 2000, imposed penalty of Rs. 25,000 on the company. Dissatisfied with the said order, the company went in appeal before the Securities Appellate Tribunal. The Tribunal allowed the appeal and set aside the order of adjudicating officer vide its order dated 28 February, 2001. It is this order which is under challenge in this appeal u/s 15Z of SEBI Act, 1992, at the instance of SEBI.

2. From the available facts, it is clear that the company came into existence on its incorporation on 18 February, 1998, and with effect from 1 April, 1998, it took over the business of M/s. Sree Krishna Data Centre. The violations as alleged by the SEBI relating to public issue of shares took place somewhere in the month of November/ December, 1995. The activities of share transfer agent allegedly in violation of the statutory provisions were also carried out indisputably prior to 2 February, 1998. It would be, thus, seen that the illegal activities of share transfer agent and the alleged violation relating to public issue of shares took place much before the company came into existence. In this fact situation, the finding of the Tribunal that the company cannot be held liable cannot be faulted. The Tribunal in the impugned order held thus:

"In this context, it is to be noted that the appellant is a distinct legal personality from SKDC. The fact that the appellant had taken over the business of the said SKDC or that Mrs. Padma Sreedharan, the sole proprietor of the said SKDC, is one of the 7 subscribers to the memorandum of association and that she is one of the first directors out of the 4 directors of the appellant is not sufficient to hold that the said SKDC and the appellant are one and the same entity for all purposes. It may not be forgotten that the appellant is a public limited company and not even a private company owned by the said Mrs. Padma Sreedharan. The agreement between the appellant and SKDC provides only for transferring the ongoing business with all the assets and liabilities of SKDC to the appellant."

3. The aforesaid observation of the Tribunal cannot be said to suffer from any illegality and based on that if the Tribunal has set aside the order of penalty passed by the adjudicating officer the order of Tribunal cannot be faulted.

4. However, we find that in the impugned order the Tribunal held that an order imposing penalty for violation of non-compliance of Rule 4(1)(b) is quasi-criminal proceedings u/s 15B of SEBI Act, 1992, cannot be sustained in the light of the judgment in Appeal No. 7/2001 in SEBI Appeal No. 24/2000 decided on 3 March, 2004 [see Securities and Exchange Board of India Vs. Cabot International Capital Corporation, . In Cabot International Capital Corporation, we held thus (para 29 to 32 at pages 383-384 of Comp LJ) :

" 29. Chapter VIA of the SEBI Act deals with the penalties and the adjudication. Section 15I of the SEBI Act envisage, appointment of Adjudicating Officer for

holding an inquiry in the prescribed manner, after giving reasonable opportunity of being heard for the purpose of imposing any penalty. This section read with concerned rules provides power to Adjudicating Officer to summon and enforce the attendance of any person to give evidence or to produce relevant or useful document for an inquiry and provides a sequence of the procedure to conduct the inquiry before imposing any penalty. Furthermore, it is also provided in Section 15J to consider various factors while adjudging the question of penalty u/s 15I, after taking into account the amount of disproportionate gain or unfair advantage, whenever quantifiable, loss caused to an investor or group of investors, the repetitive nature of default. These twin sections basically deal with the procedure of monetary penalty under the Act. All these Sections 15A, 15B, 15C, 15D, 15E, 15F, 15G, 15H, 15HA and 15HB, provide monetary penalties for respective breaches or non-compliances of provisions of the SEBI Act and the regulations. Default or failure, as contemplated under the Act includes: (15A) failure to furnish information, return, (15B) failure to enter into agreement with clients, (15C) failure to redress investors' grievances, (15D) default in case of mutual funds, (15E) failure to observe rules and regulations by an asset management company, (15F) default in case of stock brokers, (15G) for insider trading, (15H) non disclosure of acquisition of shares and takeovers, (15HA) fraudulent and unfair trade practices, (15HB), penalty if not separately provided.

30. Therefore, for respective default or failure, penalty is provided under the Act. The scheme of the SEBI Act of imposing monetary penalty is very clear. This Chapter nowhere deals with criminal offence. These defaults or failures are nothing but failure or default of statutory civil obligations provided under the Act and the regulations made thereunder. It is pertinent to note that Section 24 of SEBI Act deals with the criminal offences under the Act and its punishment.

31. The adjudication for imposing penalty by Adjudicating Officer, after due inquiry, is neither a criminal nor a quasi criminal proceeding. The penalty leviable under this Chapter or under these sections, is penalty in cases of default or failure of statutory obligation or in other words breach of civil obligation. The provisions and scheme of penalty under SEBI Act and the regulations, there is no element of any criminal offence or punishment as contemplated under criminal proceedings. Therefore, there is no question of proof of any mens rea by the appellants and it is not an essential element for imposing penalty under SEBI Act and the regulations. The penalty imposable under the SEBI Act and the regulations under Sections 15I and 15J is deterrent in nature to see that the parties or person concerned complies with the regulations strictly. The imposition of the penalty under SEBI Act and regulations is civil in nature and cannot be equated with penal in character as referred to and submitted by the respondents and/or observed by the Appellate Authority. It is also clear that the word "penalty" has different colours and shades and facets and that has to be interpreted and imposed on the basis of particular Act and policies or scheme. It is also clear that there can be two distinct liabilities under the same Act, i.e., civil and/ or criminal. The authorities or regulatory authority have ample power to

initiate both proceedings, if case is made out, within the framework of the SEBI Act or the regulations.

32. The SEBI Act and the regulations are intended to regulate the security market and the related aspects, the imposition of penalty, in the given facts and circumstances of the case, cannot be tested on the ground of "no mens rea, no penalty". For breaches of provisions of SEBI Act and regulations, according to us, which are civil in nature, mens rea is not essential. On particular facts and circumstances of the case, proper exercise of judicial discretion is a must, but not on a foundation that mens rea is an essential [ingredient?] to impose penalty in each and every breach of provisions of the SEBI Act"

5. Though we maintain the order passed by the Securities Appellate Tribunal setting aside the penalty, the observation made by the Tribunal that the said proceedings are quasi criminal proceedings are not maintained in the light of our judgment in Securities and Exchange Board of India Vs. Cabot International Capital Corporation, .

6. With the agreeable clarification, we dismiss the appeal. No costs.

7. The parties may be provided ordinary copy of this order duly authenticated by court associate on payment of usual copying charges.