BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No.184 of 2011

Date of Decision: 4.10.2012

Dushyant N. Dalal
Ms. Puloma D. Dalal
120/123, Arun Chambers,
First Floor, Tardeo Road,
Mumbai – 400 034. …… Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No. C-4A, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai - 400 051. …… Respondent

Mr. P.N. Modi, Advocate with Mr. Vinay Chauhan, Mr. Ranjeet Bhonsale and Mr. Anant Upadhyay, Advocates for the Appellant.

Mr. Kumar Desai, Advocate with Mr. Mobin Shaikh, Advocates for the Respondent.

CORAM : P. K. Malhotra, Member & Presiding Officer (*Offg*.)
S.S.N. Moorthy, Member

Per : S.S.N. Moorthy

The adjudicating officer of the Securities and Exchange Board of India (for short the Board) imposed a penalty of ` 14 crores on the appellants, Dushyant Natwarlal Dalal and Puloma Dalal, on June 2, 2011. The above penalty was imposed under section 15HA of the Securities and Exchange Board of India Act, 1992 (the Act) for violating the provisions of section 12A (a), (b) and (c) of the Act read with 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 (referred to hereinafter as the FUPT Regulations). The cause of action for the impugned adjudication order arose out of the investigation conducted in the dealings in the shares of certain companies during their Initial Public Offerings (IPOs) covering the period 2003 to 2005. The investigations revealed that the appellants indulged in the unlawful act of cornering the shares of the company acting as financiers to the key operators in the IPOs of a few entities, and in the process, made unlawful gains at the cost of retail individual investors. The unlawful

gains were estimated to the tune of ` 4,94,19,379 and based on that the adjudicating officer imposed a penalty of ` 14 crores.

2. The appellants are chartered accountants by profession and are actively engaged in providing finances to various entities over a period of time. The appellants provided finance to market operators like Purshottam Budhwani (Budhwani), Sugandh Estates and Investments Pvt. Ltd. (Sugnadh) etc. The IPOs related to companies like ILFS Investments (ILFS), Infrastructure Development Finance Co. Ltd. (IDFCL), Sasken Communication Technologies Ltd. (Sasken), Gateway Distriparks Ltd. (Gateway), Provogue, MSP Steel, etc., to mention a few of them. According to the appellant, finances were provided to the key operators in the form of loan, pure and simple, and they had no control over the utilization of funds by the key operators. However, the analysis of the transactions and refund of money to the appellants revealed more than what was apparent and the Board conducted in depth investigation in the financial dealings of the appellant vis-à-vis the key operators. The appellants were served with a show cause notice on June 16, 2006 alleging violation of regulations 3 and 4 of the FUTP Regulations and directed to show cause why enquiry should not be conducted and penalty imposed under section 15HA of the Act if found guilty. A supplementary show cause notice was issued on 18.1.2011. Penalty as mentioned hereinabove was imposed on January 2, 2011.

3. We have heard Shri P.N. Modi, learned counsel for the appellants and Shri Kumar Desai, learned counsel for the respondent Board.

4. At the outset, it has to be mentioned that the arguments on both the sides were confined to the issue of non compliance with the principles of natural justice by the adjudicating officer while passing the impugned order. In the present appellate order we are confining ourselves to the above issue only and merits of the case are not considered.

5. The principal argument advanced by the appellant's learned counsel is that the respondent Board failed to appreciate that non disclosure of documents and refusal of cross examination of witnesses whose statements/submissions/correspondence are relied upon causes prejudice to the appellant and it is a clear denial of reasonable opportunity to submitting effective rebuttal of the allegations. According to the appellant, the Board ignored the settled legal position that an order exercising judicial or quasi judicial

functions passed in violation of the principles of natural justice cannot be sustained. The impugned order has been passed without providing the appellant opportunity for inspection of documents, cross examination of parties whose statements are relied upon and without providing effective opportunity to make submissions on the charges leveled.

6. The appellants' learned counsel submitted during the hearing of the appeal the history of the events which culminated in the levy of penalty. According to the appellant's learned counsel the impugned order has been passed on the basis of the material collected by the adjudicating officer and the evidence on record without providing the appellant necessary opportunity, as promised, to rebut the allegations. The supplementary show cause notice issued on 18.1.2011 expressly relied on the communication of Sugandh, Budhwani and Kakadia, but the request for cross examination of Sugandh, Budhwani and Kakadia was turned down. Opportunity of proper inspection of records was not provided to the appellants. In March 2011, the appellants had certain genuine difficulties which were duly communicated to the adjudicating officer and a reply was given to the appellants that a fresh date of hearing and time for inspection of documents would be provided. According to the appellant this was never granted by the adjudicating officer and the impugned order was passed taking into account the material already on record.

7. The appellant's learned counsel drew our attention to the provisions of section 15I and 15HA of the Act and submitted that the proceedings imposing penalty are independent quasi judicial proceedings which required proper application of mind by the adjudicating officer and the present order does not conform to the above legal requirements.

8. The learned counsel for the Board submitted that there was no infirmity on the part of the adjudicating officer with respect to compliance of the principles of natural justice and so the impugned order cannot be regarded as bad in law from that point of view. An affidavit in reply on behalf of the respondent has been filed justifying the stand taken by the adjudicating officer. According to the Board, the appellants had taken full, free and complete inspection of all documents referred to and relied upon by it and no prejudice is caused to the appellants by way of any failure on the part of the adjudicating officer. The appellant had been provided with information of various documents

considered in the supplementary show cause notice and inspection was also conducted by the appellant of the very same documents and no prejudice has been caused in this regard. In fact, the appellants had taken too many adjournments contributing to further delay in the proceedings. It is the case of the Board that investigation reports and all other documents referred to or relied upon in the adjudication proceedings were provided to the appellants. It is also submitted that statements of Budhwani, Sugandh and Kakadia as sought by the appellants were never recorded by the Board but reliance has been placed on the letters submitted by them. It is also argued that the submissions of Sugandh, Budhwani and Smt. Nimisha Kadakia were relied on only in the form of corroborative evidence for finance provided and refund received. It is also strenuously admitted that there is no need for cross examination of Budhwani and Kakadia since opportunity of cross examination is not an essential element of natural justice but is a part of only procedural justice and no prejudice has been caused to the appellants. With a reference to the order passed by the whole time member under section 11B issuing directions to the appellant and the order of disgorgement passed by the whole time member and the confirmation of the same in appeal it is submitted that the facts and evidences considered therein have been examined and found correct in those proceedings as well and so very same facts relevant to the impugned order automatically stand confirmed.

9. We have considered the rival submissions and have gone through the records of the case.

10. Let us first examine the grievance regarding non compliance with the principles of natural justice by the adjudicating officer. The order passed by the adjudicating officer, being quasi judicial in nature, has to necessarily observe the principles of natural justice with a view to providing the appellant with all the documents and evidences relied upon by him and for providing a reasonable opportunity to put up necessary defense against the allegations. In the present case, the appellant’s grievance concerns lack of opportunity to inspect relevant records, lack of opportunity to file a proper reply to the allegations, lack of satisfactory personal hearing and lack of opportunity to cross examine Budhwani and Kakadia. For a proper appreciation of the grievance of the appellant it is necessary to refer to the correspondence between the appellant and the adjudicating officer when the proceedings were on. The first show cause notice was

issued to the appellants on 16.6.2006. The appellants' correspondence with the respondent Board spanned over a considerable period of time from the issue of show cause notice. A supplementary show cause notice was issued on 18.1.2011. There were some deficiencies in the show cause notice issued on January 18, 2011 and so on January 25, 2011 the appellants corresponded with the Board for providing them with correct and complete documents in respect of the show cause notice. On February 14, 2011 the appellants sent a request to the Board to allow them to have personal inspection of the documents relied upon. A request was also made in the above letter for providing the appellant with an opportunity to cross examine Budhwani and Kakadia. The Board permitted inspection of relevant documents/materials to be held on March 14, 2011. Since the brother of one of the appellants who was dependent on her had to undergo an open heart surgery on March 14, 2011 a request was made for adjournment of the date of inspection. The Board rescheduled the inspection to March 24, 2011. On March 23, 2011 the appellants sent an email to the Board requesting another date since one of the appellants could not be present in Mumbai on the said date. It was the intention of the appellants to take a joint inspection of the documents under consideration. On March 23, 2011 at 2:51 p.m. the appellant sent an email to the Board stating that he was awaiting response to his emails rescheduling the date of inspection. Since no reply was forthcoming another email was sent to the Board at 5:03 p.m., again referring to the adjournment of the inspection and inability to talk over phone to the concerned officer Mr. Biyani. On March 24, 2011 another email was sent to the Board which reads as under:-

> "This is further to my telecon with Mr. Biyani this morning when, after understanding the facts, he assured me that he would revert back after talking with his colleagues.
>
> I now look forward to a fresh date for inspection with sufficient notice".

Subsequent to this there was no response from the Board. Admittedly, the appellant was not given inspection of documents as promised. No response regarding the request for cross examination was available.

11. The facts mentioned hereinabove are on record and are not disputed. From the request made by the appellants which is part of the records it is clear that the appellants wanted inspection of documents and cross examination of Budhwani and Kakadia. The

Board was inclined to grant necessary opportunity for inspection and a decision regarding cross examination of parties. The sequence of events narrated above shows that the appellants were keenly following up with the Board and all efforts were made to co-operate with the Board and request for adjournments was made only in exceptional contingencies. The emails sent by the appellants from time to time on March 23, 2011 evidence that the appellant keenly wanted rescheduling of the date of inspection and efforts were made time and again to contact the Board and obtain a convenient date. The email of March 24, 2011 shows that the appellants were under a bonafide impression that rescheduling of inspection would be done as promised by the officer of the Board.

12. It is necessary to see how the adjudication officer has reacted to the above request and proceeded with the finalization of the order on the basis of the available records and material as set out in the impugned order:

> "I have noted from the available records that since the initiation of proceedings the Noticees were provided atleast seven opportunities of personal hearings respectively on August 28, 2006, September 20, 2006, February 02, 2007, February 27, 2007, March 02, 2007, January 28, 2010 and February 23, 2011 and atleast five opportunities of inspection of documents of February 11, 2010, April 05, 2010, May 04, 2010, March 14, 2011, and March 24, 2011. I have also noted the lack of seriousness of the Noticees about the proceedings and fulfilling the requirements. Despite clearly advising them to furnish copy of their PAN cards in various comminuques (viz. letter dated January 17, 2008, July 17, 2009, February 08, 2011) they have not complied with the same and so far it has not been provided to the undersigned in the matter of instant adjudication proceedings.
>
> Going by the above stated facts, I am of firm opinion that the Noticees are making deliberate attempts to delay the proceedings. I am also of firm opinion that the relevant documents relied upon in support of the allegations against the Noticees have already been provided to them. I have further noted with concern that the show cause notice in this case alleges an unprecedented scale of fraud. Further, this IPO scam in which the Noticees are alleged to have played a key role, had a devastating impact on securities market and has caused loss of lakhs of investors. I am, therefore, of the view that it would cause prejudice to interests of the investors if the present proceedings are delayed any further. Therefore, in the facts and circumstances of the case, I proceed with the matter on the basis of the information/material and the submissions of the Noticees, which are available on record."

13. From the impugned order it is clear that a final conclusion was drawn on the basis of information/material and submissions of the appellants which are available on record. There is no mention about the specific request for rescheduling of inspection made by the appellants and the correspondence with the Board that it would revert to the appellants in reply to the request for adjournment. In view of the specific facts narrated above, it is

clear that the appellants were not provided with an opportunity for inspection of documents and consideration of the request for cross examination of parties. In the facts of the case we cannot agree with the submissions of the Board that the adjudicating officer has offered full, free and complete inspection of all documents referred to and relied upon by him. We cannot appreciate the stand of the Board that the appellants have failed and neglected to avail of opportunities and cannot now complain of breach of natural justice.

14. The learned counsel for the Board very strenuously argued that general cross examination is not part of natural justice but part of procedural justice. A reference was made to the judgment of High Court of Calcutta in Haripada Moitra vs President, Calcutta Improvement Tribunal, [AIR 1970 Cal.154]. However, on a perusal of the judgment it is seen that the present case cannot be held parallel to the facts available in that case. In the said judgment it is made clear that the petitioner refused to participate in the enquiry and the methods adopted by the petitioner clearly show that he was determined not to participate in the enquiry by the opposite party. However, in the present case there was no such non co-operation. On the other hand, the appellants had repeatedly informed the Board about their personal inconvenience and sought time very meticulously for investigation and cross examination of parties. Since every case is to be judged in the facts and circumstances of that case, we cannot hold the view that denial of inspection sought for by the appellant can be brushed aside on the ground of lack of prejudice or conclusion based on facts already considered in other orders relating to the appellants issued by the whole time member.

15. Another important objection raised by the appellant in the present appeal is that adjudication proceedings have been finalized without proper application of mind and without proper appreciation of the provisions of section 15I of the Act. According to the appellants' learned counsel, adjudication proceedings are separate and independent proceedings which require the delinquent to be provided with a reasonable opportunity of being heard for the purpose of imposing any penalty. It is submitted that the impugned order has been passed without observing the statutory requirement laid down in section 15I of the Act. On a consideration of the provisions of the Act and the observations in the adjudication order and the affidavit in reply filed by the Board, we are of the view

that the proceedings have not been treated as independent proceedings as envisaged. This aspect is significant in two respects, namely, application of mind of the adjudication officer and the compliance with the principles of natural justice. Even though the Board is empowered to conduct parallel proceedings in respect of a delinquent with regard to a single offence, the proceedings are separate and independent. It does not follow as a natural corollary that a delinquent can be punished in adjudication proceedings because certain directions have been issued against him under section 11 and 11B of the Act which have acquired finality. In this respect, it is necessary to refer to the relevant provisions of sections 15HA and 15I of the Act which are pertinent to the issue considered in the impugned order. For the sake of convenience, the above provisions of the Act are extracted below:-

> **"15HA.Penalty for fraudulent and unfair trade practices.-** If any person indulges in fraudulent and unfair trade practices relating to securities, he shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of such practices, whichever is higher
> ……
> ……
>
> **15I.Power to adjudicate.-** (1) For the purpose of adjudging under sections 15A, 15B, 15C, 15D, 15E, 15F, 15G, 15H, 15HA and 15HB ,the Board shall appoint any of its officers not below the rank of a Division Chief to be an adjudicating officer for holding an inquiry in the prescribed manner after giving any person concerned a reasonable opportunity of being heard for the purpose of imposing any penalty.
>
> (2) While holding an inquiry, the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in sub-section (1), he may impose such penalty as he thinks fit in accordance with the provisions of any of those sections."

Section 15HA deals with the penalty for fraudulent and unfair trade practices and this obviously takes us to regulations contained in FUTP Regulations. FUTP Regulations, the investigation procedure set out therein and the penal provisions contained in section 15HA and 15I are composite provisions which have to be implemented as laid down therein. In short, the adjudication proceedings for FUTP violation which is the subject matter of the present appeal are independent and so they should stand on their own factual and legal foundation.

16. In the affidavit in reply filed by the respondent Board heavy reliance is placed on the directions issued by the whole time member under section 11 and 11B of the Act and the disgorgement order passed against the appellant. It is submitted that the above two orders have attained finality in appellate proceedings and points of facts and law have become final and binding on the appellant and the Board. As a consequence, the materials and documents which formed the basis of the show cause notice in the present case are the same and the appellants had ample opportunity on the earlier occasion to take a full and complete inspection of the documents and verification of the facts contained therein. It is further submitted that the whole time member's order, having been confirmed by the Hon'ble Supreme Court and the facts as contained therein having been examined not only at the level of the Board but also at the level of the Tribunal and the Supreme Court the appellants cannot raise any grievance now. The tone and tenor of the submissions of the respondent Board is to the effect that all the statutory requirements have been complied with in the orders of the whole time member and the guilt of the appellants stands finally established.

17. The learned counsel for the Board made reference to a host of decisions holding the view that the order of the whole time member on identical wrong doing has attained finality. The following decisions of the Hon'ble Supreme Court are relied upon (1) Aligarh Muslim University and Ors. vs. Mansoor Ali Khan [(2000) 7 SCC 529] (2) Thakore Sobhag Singh vs. Thakur Jai Singh and Ors. [AIR 1968 SC 1328] (3) State of West Bengal vs. Hemant Kumar Bhattacharjee and Ors. [AIR 1966 SC 1061] and (4) Haryana Financial Corporation and Anr. Vs. Kailash Cahndra Ahuja [(2008) 9 SCC 31].

18. A perusal of the above mentioned orders reveals that they apply mainly to inter party disputes. The principles of res judicata are considered in detail in those orders. They relate mainly to cases where one consequence/claim flows from another suit/proceedings relating to the same case. In the present case, the legal position is different.

19. The Board has been authorized to conduct multiple proceedings in respect of a wrong doing in a parallel manner. But each proceeding is independent by itself and a competent authority has to come to a well reasoned out conclusion after proper application of mind to the facts and legal issues. It cannot be held that the consequences

in one of the proceedings can be automatically followed in other proceedings without observing the statutory requirements laid down in respect of the separate proceedings. In fact, the decision of the Hon'ble Supreme Court in Sri T. Ashok Pai vs. Commissioner of Income Tax, Bangalore [292 ITR 11], lays down the legal principle in a very clear manner. It has been held therein that penalty proceedings must be considered to be different from proceedings relating to quantum of income since the burden of proof in penalty proceedings is different.

> "18. The order imposing penalty is quasi-criminal in nature and, thus, burden lies on the department to establish that the assessee had concealed his income. Since burden of proof in penalty proceedings varies from that in the assessment proceeding, a finding in an assessment proceeding that a particular receipt is income cannot automatically be adopted, though a finding in the assessment proceeding constitute good evidence in the penalty proceeding. In the penalty proceedings, thus, the authorities must consider the matter afresh as the question has to be considered from a different angle."

20. This Tribunal, in the case of Dilip S. Pendse vs. Securities and Exchange Board of India, [Appeal no.90 of 2007 dated November 20, 2008] has considered the separate and independent character of adjudication proceedings and held that the finding in adjudication proceedings cannot be mixed up with the result of an enquiry under section 11 of the Act. "Every finding of the adjudicating officer must be passed on an independent appraisal of evidence on record and cannot be allowed to be influenced by extraneous factors. For the same reason, we do not appreciate the adjudicating officer's reference to the appellant being penalized for the same alleged mischief in an enquiry under section 11 of the Act……."

21. The above decision would show that the attempt of the learned counsel for the respondent Board that the adjudication order should be viewed in the backdrop of the orders of the whole time member which have attained a finality and so all statutory requirements should be considered to have been complied with cannot be accepted.

22. We have discussed at length the factual matrix of the case relating to denial of proper opportunity of inspection of records to the appellants in the previous paragraphs. The legal position set out in the previous paragraphs would also illustrate that independent evaluation of evidence by providing statutory opportunities to the appellants is lacking in the present case and this has affected application of mind of the adjudicating officer independently to the facts of the case.

In view of the discussion above, we set aside the impugned order, remand the case to the adjudicating officer for fresh consideration as per law the request the appellants to inspect records which are relevant and being relied upon and also to cross examine Budhwani and Kakadia. During the hearing of the appeal a reference has been made to a few documents annexed to the supplementary show cause notice which are said to be new. According to the appellant, it is necessary to inspect the new documents annexed to the supplementary show cause notice. The adjudicating officer may consider the relevance of these documents and if they are found to be relied upon this request may be considered as per law. The appellant is directed to fully co-operate with the Board and avail of the earliest opportunities for speedy finalization of the adjudication proceedings. The Board is directed to pass orders expeditiously since the appeal relates to an old matter. We may make it clear that we are not expressing any view on the merits of the case.

The appeal stands disposed of as above. No costs.

Sd/-
P.K. Malhotra
Member &
Presiding Officer (*Offg*.)

Sd/-
S.S.N. Moorthy
Member

4.10.2012
Prepared and compared by
RHN