BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of hearing : 30/08/2013
Date of decision: 14/11/2013

Review Application No.5 of 2012
In
Appeal No. 79 of 2012

Shailesh S. Jhaveri
A-2, Manibhadra Flats,
New Girdhar Park Society,
Ambawadi,
Ahmedabad – 380 015. … Review Applicant
(Original Appellant)

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No. C4-A, G-Block,
Bandra Kurla Complex,
Mumbai – 400 051. … Respondent

AND

Review Application No.6 of 2012
In
Appeal No.80 of 2012

Mrs. Harsha M. Shah
A-2, Manibhadra Flats,
New Girdhar Park Society,
Ambawadi,
Ahmedabad – 380 015. … Review Applicant
(Original Appellant)

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No. C4-A, G-Block,
Bandra Kurla Complex,
Mumbai – 400 051. … Respondent

Mr. P.N.Modi, Senior Advocate with Mr. Deepak R. Shah, Advocate for Appellants.

Mr. Kumar Desai, Advocate with Mr. Mihir Mody and Mr. Akhilesh Singh, Advocates for Respondents.

CORAM: Justice J.P. Devadhar
Jog Singh, Member
A.S.Lamba, Member

Per : Jog Singh

1. Original appellants have filed these two Review Applications against common Order of this Tribunal, dated October 4, 2012, whereby Appeal No.79 of 2012 and Appeal No.80 of 2012 filed by appellants against common disgorgement order passed by Whole Time Member of Securities and Exchange Board of India ('SEBI' for short) which were partly allowed by upholding disgorgement order of SEBI dated January 25, 2012, however, restricting interest on disgorgement amount @ 12% p.a. after expiry of 45 days from the date of disgorgement order.

2. Dispute in the above said two Appeals was whether the learned Whole Time Member (WTM) of the Respondent was justified in directing appellants to disgorge unlawful gain of Rs.60,72,000/- each along with interest amounting to Rs.75,31,111/- from January, 2000 to May, 2010. While disposing of those two appeals by order dated October 4, 2012, this Tribunal held as under:-

> "9. Coming to the next argument at (iv) above that even on merits the appellants have a strong case and the matter needs to be looked into on merits also, we are of the view that in disgorgement proceedings, which is an extraordinary power available to the regulator, it is not competent on the part of the regulator to reexamine the matter on merits which has already been settled by passing directions under Sections 11 and 11B of the Act. We may take note of the fact that the earlier orders passed by the Board under Section 11B of the Act debarring the appellants from dealing in the securities market for two years has acquired finality as the appeal

filed against the said order before this Tribunal was withdrawn by the appellants on June 2, 2008. The disgorgement proceedings cannot be treated as separate and independent proceedings as is the case with the adjudication proceedings under Chapter VIA or prosecution under Section 23 of the Act. Disgorgement is in fact a continuation of the earlier proceedings under which a person has been held guilty of violating the regulatory framework and had benefitted illegally and the Board decides to disgorge the delinquent of the unlawful gains. We are, therefore, of the considered view that the matter cannot be reexamined on merits in disgorgement proceedings. What can be disputed in disgorgement proceedings is the amount of illegal gains if the appellant feels that the amount worked out by the Board is not correct. **In the case of present appellants, we notice that the whole time member of the Board has arrived at a positive finding that the appellants had got the preferential allotment of shares without any consideration. It is appellants' own case that sale consideration received by them was ₹ 60,72,000/- each. Therefore, we cannot find any fault with the findings of the whole time member that amount of unlawful gain in case of each appellant is ₹ 60,72,000/-.**

10. The last argument of learned counsel for the appellants was that charging of interest with effect from January, 2000 is arbitrary and bad in law. We find merit in the argument of learned counsel for the appellants that when the disgorgement proceedings itself were initiated by the issue of a show-cause notice on February 29, 2008, the interest could not be charged from January, 2000. The amount of disgorgement got crystallized only on passing of the order on January 25, 2012. By the said order the Board has permitted the appellants to pay the total amount within 45 days from the date of the order. It was not an amount which was due or payable to the Government or to the Board. It is only after the Board concluded that the appellants have illegally enriched themselves and the amount of illegal gains got crystalized and disgorgement order is passed, it can be said that the amount has become payable. The Board granted 45 days time to the appellants to pay this amount. If any interest is to be charged, it can be charged only from the date of expiry of 45 days of the passing of the impugned order.

11. For the reasons stated above, we find no merit in the appeal. However, on the issue of interest, we are inclined to modify the order to the extent that the interest shall be payable @ 12% per annum on expiry of 45 days from the date of the impugned order.

The appeal is partly allowed as above with no order as to costs."

3. Learned counsel appearing on behalf of Review Applicants submitted as follows:-

a) In the impugned order dated October 4, 2012 this Tribunal has considered only five grounds raised in the appeal and has failed to consider various other grounds raised in the appeals.

b) Even five grounds considered by this Tribunal is erroneous and contrary to facts and evidence on record.

c) Appellants had filed appeal against debarment order which was allowed to be withdrawn by this Tribunal on June 2, 2008 by preserving rights of appellants to raise all contentions in the disgorgement proceedings. In spite of above, in the impugned order dated October 4, 2012, this Tribunal, while disposing of appeal filed by appellants against disgorgement order has declined to consider merits of the case, which is totally illegal and contrary to law.

(d) SEBI in its order dated 13th November, 2007, passed under Section 11B of Securities and Exchange Board of India Act, 1992, has specifically recorded that the net profit which the appellants derived out of the transactions in question was Rs.69,393/- only. In spite of above finding of fact, SEBI could not have held in the disgorgement proceedings that appellants have unlawfully gained Rs.60,72,000/- and this Tribunal could not have affirmed that order of SEBI which is contrary to facts on record.

(e) Since SEBI has not taken any action in respect of eight other similarly situated allottees against whom identical charges have been levelled, SEBI ought not to have passed any order against appellants and therefore, decision of SEBI to pass order against appellants being arbitrary, discriminatory and

unreasonable, this Tribunal ought to have set aside the disgorgement order passed by SEBI.

4. On the other hand, Respondent submits that the grounds raised by Review Applicant are in effect grounds of Appeal. Therefore, if the Appellant is aggrieved by order dated 4th October, 2012 passed by this Tribunal, Review Applicants may have recourse to such proceedings as envisaged under Section 15(Z) of Securities and Exchange Board of India Act, 1992, if so advised. Respondent has vehemently disputed the grounds and propositions advanced on behalf of Review Applicants in Review Application. Respondent has also specifically submitted that the disgorgement proceedings against eight other connected persons in the matter of Ojas Technochem Products Ltd. (OTPL) have since been initiated by show cause notices dated January 25, 2012 and the same are pending. Names of eight such persons are; (i) Nrupesh C. Shah, (ii) Falguni N. Shah, (iii) Pratima G. Jhaveri, (iv) Ankit G. Jhaveri, (v) Annal A. Jhaveri, (vi) Sheetal A. Jhaveri, (vii) Yogesh K. Bhavnagari, and (viii) Saumil A. Bhavnagari. Thus, Respondent submits that the Review Applicants have not at all been discriminated in any manner whatsoever in passing disgorgement order in question.

5. We have heard both learned counsel for the parties at length and have perused Review Applications as well as Written Submissions filed by both parties. A perusal of order dated October 4, 2012 passed by this Tribunal in Appeals Nos. 79 of 80 of 2012, which is sought to be reviewed in present proceedings before us, points out that all points urged by

Appellants in two Appeals, and now in Review Applications, have been duly considered by this Tribunal in paragraphs 4, 6, 7, 8, 9 and 10 of judgment of this Tribunal, dated October 4, 2012. Therefore, in our considered opinion what learned Senior Advocate Shri P.N. Modi has strenuously attempted to argue before us, is not a review but in garb of review rehearing of Appeal. This is not permissible in law. The order under review is a well considered and reasoned order on question of disgorgement amount of Rs.60,72,000/-. This Tribunal has rejected case of each of Appellants in two Appeals, but at same time allowed their prayer partly by modifying Respondent's original Order dated January 25, 2012 in respect of period of interest. Respondent has directed Appellants to pay interest from January 2000 till date of order whereas order of this Tribunal under review has modified it to extent that interest now payable by each of the Appellants @ 12% per annum is from expiry of 45 days from impugned order dated January 25, 2012. The order of this Tribunal under review, therefore, does not call for any recall, particularly, in review proceedings and Review Applicants cannot be virtually allowed to seek rehearing of entire matter afresh, which is not possible in Review Applications.

6. In this context, it is pertinently noted that Hon'ble Apex Court in case of **Subhash v. State of Maharashtra and Anr., AIR 2002 SC 2537** emphasized that Court should not be misguided and should not lightly entertain review application unless there are circumstances falling within the prescribed limits that Courts and Tribunals should not proceed to re-examine the matter as if it was an original appeal before it, for reason that

it cannot be scope of a review. Above view has also been reiterated by Hon'ble Apex Court in the case of **Rajendra Kumar v. Rambhal [AIR 2003 SC 2095]** holding that the limitations on exercise of the power of review are well settled. The first and foremost requirement of entertaining a review petition is that the order, review of which is sought, suffers from any error apparent on the face of the record and permitting the order to stand will lead to failure of justice. In the absence of any such error, finality attached to the judgment/order cannot be disturbed. Again in the case of M/s. Jain Studios Ltd. v. Shin Satellite Public Co. Ltd. [AIR 2006 SC 2686] it has been held by the Hon'ble Apex Court that **the power of review cannot be confused with appellate power which enables a superior court to correct all errors committed by a subordinate Court.** It is not rehearing of an original matter. A review of old and overruled argument is not enough to reopen concluded adjudications. The power of review can be exercised with extreme care, caution and circumspection only in exceptional case.

7. Taking support of aforesaid decisions of Hon'ble Apex Court, we have no hesitation in holding that in garb of review, a party cannot be permitted to reopen the case and gain a full-fledged inning for making submissions, nor review lies merely on the ground that may be possible for the Court to take a view contrary to what had been taken earlier. If a case has been decided after full consideration of arguments made by a counsel, he cannot be permitted, even in garb of doing justice or substantial justice, to engage the Court again to decide the controversy already decided. If a party is aggrieved by a judgment, it must approach

higher Court but entertaining a review to reconsider the case by this Tribunal would amount to exceeding its limited jurisdiction conferred for the purpose of review. This Tribunal, therefore, cannot revisit reasoning which led the Tribunal to order dated October 4, 2012 which is sought to be reviewed.

8. Argument of applicants that this Tribunal instead of considering all contentions raised and argued, has considered only five contentions of appellants, does not merit consideration in these Review Applications, because, in order dated October 4, 2012, each argument canvassed by appellants before the Tribunal have been specifically set out. Dispute as to whether other than five grounds were raised/argued and whether this Tribunal failed to consider those grounds, is a question which cannot be considered by this Tribunal in exercise of review jurisdiction, as it involves determination of contentious issues which is beyond the scope of review jurisdiction. Similarly, argument that five grounds of appellants considered in impugned order are also contrary to facts on record cannot be a ground for exercising review jurisdiction, because, assuming that in the impugned order facts have been erroneously construed, then the remedy is to challenge the said order by filing appeal and not by way of Review Application.

9. Contentions of applicants that when this Tribunal while permitting appellants to withdraw appeal against debarment order had preserved right of appellants to raise all contentions in the disgorgement proceedings, this Tribunal while disposing of appeals against

disgorgement order could not have declined to consider merits of the case, is also unacceptable because, correctness of order passed by this Tribunal cannot be considered by this Tribunal in exercise of its review jurisdiction. For same reason, argument of appellants regarding quantum of disgorgement amount is also unacceptable, because in the impugned order, while recording contention of appellants that they have earned only Rs.69,393/- each on sale of shares, this Tribunal has held that sale consideration of Rs.60,72,000/- admittedly received by appellants would be disgorgement amount payable by appellants. Correctness of this finding cannot be gone into in exercise of review jurisdiction.

10. Argument of appellants, that eight other similarly situated persons have been let off by SEBI has been denied by SEBI and it is stated that proceedings have already been initiated against those eight persons.

11. When factual scenario is examined in the background of legal principles set out above, the inevitable conclusion is that these Review Applications sans any merit and are liable to be rejected. Hence Review Applications are hereby rejected with no order as to costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

Sd/-
A.S. Lamba
Member

14/11/2013
Prepared & compared by-ddg