HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

S.B. Civil Writ Petition No. 12422/2019

Aksh Optifibre Ltd., Having Its Registered Office At F-1080, Riico Industrial Area, Phase-Iii, Bhiwadi-301 019, Rajasthan (India) Through Authorised Signatory.

----Petitioner

Versus

Securities And Exchange Board Of India, Ground Floor, Jeevan Nidhi-2, Lic Building, Ambedkar Circle, Bhawani Singh Road, Jaipur, Rajasthan-302005, Plot No. C4 A, G, Block, Bandra Kurla Complex, Bandra (East), Mumbai- 400 051

----Respondent

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सत्यमेव जयते

For Petitioner(s) : Mr. Rajendra Prasad, Senior Adv. with Mr. Sandeep Taneja, Adv. & Mr. Kartiky Sharma, Adv.

For Respondent(s) : Mr. Shyam Anil Mehta, Sr. Adv. with Mr. Punit Singhvi, Adv. & Mr. Akshay Singh, Adv.

HON'BLE MR. JUSTICE SANJEEV PRAKASH SHARMA

Judgment / Order

Reserved on 25/03/2021

Pronounced on 07/04/2021

1. Brief facts which require to be noticed are that the petitioner is a Company engaged in manufacturing of Optical Fibre, Optical Fibre Cables, Fibre Reinforce Product and providing services of e-Governance Solutions, Turnkey Solutions and Banking Correspondence. It has its registered office at Bhiwadi (Rajasthan).

2. It is stated that as manufacturing business of the petitioner-Company was not doing well, it intended to sell the manufacturing business and enter into purely service based

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business. The Board of Directors of the petitioner-company accordingly approved raising of funds upto USD 50 Million through issue of Global Depository Receipts (for short, 'GDRs') and Offering Circular was issued offering of 1,165,750 Global Depository Receipts representing 58,287,500 underlying Shares of Rs.5.00 each (offering at Rs.20.00 each) at an offer price of USD 21.45 per Global Depository Receipt).

3. It is further stated that based on the terms and conditions of end use of funds mentioned in the Offering Circular, the petitioner-Company transferred USD 24 Million to a wholly owned subsidiary of the petitioner-Company namely; AOL FZE based in Dubai, UAE. The remittance was made between 29/10/2010 to 17/03/2010. The AOL FZE transferred further USD 18 Million to Africa One Telecom, RAK FTZ, a Dubai based company between 03/11/2010 to 23/12/2010 for acquiring telecom licenses in Africa. The said transfer of amount was treated by the petitioner in its books of accounts as an investment. The project for obtaining telecom licenses was of a total value of USD 180 Million and the aforesaid amount was the 1st installment. Further fund raising was, therefore, approved by the Board of Directors of the petitioner-company with confirmation from the shareholders. Another issue was, therefore, opened of USD 100 Million GDRs in December, 2010 but the petitioner-company could not raise funds and therefore, the 2nd installment could not be paid which led to failure of contract and licenses could not be obtained and were sold to other parties. The advance money already paid got stuck and Africa One Telecom denied to refund the advance. It is stated

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that the petitioner-company is in the process of realizing the said amount.

4. It is further stated that SEBI on its part issued a show cause notice under Section 11B of the SEBI Act, 1992 as it found that the issue alleged to have subscribed by 8 subscribers was false while the entire subscription came from only one entity namely; Vintage. The Vintage on its part took loan of USD 25 Million from Euram Bank, Dubai where the petitioner had an account and had deposited the GDR subscription. Thus, the GDR subscription was actually made from the same loan taken from the same Bank and deposited in the same Bank. A tripartite agreement was also entered between Vintage, Euram Bank and the petitioner; and the GDR proceeds were pledged to secure the loan. The pledge agreement was also suppressed by the petitioner. The investigation also revealed that the Vintage repaid the loan installments on the same day or later money was transferred from petitioners' Euram Bank to its UAE subsidiary's Bank account during the period when the loan was repaid i.e. 29/10/2010 to 17/03/2011 and thus fraud was committed within the meaning of SEBI (Prohibition of Fraudulent and Unfair Trade Practices) Regulations, 2003 (for short, 'the Regulations of 2003').

5. The SEBI also issued another show cause notice on 08/06/2018 for imposing financial penalties on account of contravention of provisions of Section 12A(a),(b),(c) of the SEBI Act read with Regulations 3(a),(b),(c),(d) and 4(1), 2(f), (k), (r) of SEBI Regulations, 2003 as well as Section 21 of SCRA, 1956 read with Clause 36(7) of Listing Agreement.

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6. It is a case of the petitioner-company that although the allegations in the show-cause notices were false, however, the petitioner-Company decided to approach for settlement in terms of SEBI (Settlement of Administrative and Civil Proceedings) Regulations, 2014 and therefore, filed two applications relating to the aforesaid two show causes notices on 14/08/2018.

7. The petitioner-company further submits that during one of the hearings of the settlement applications on 20/12/2018, the respondents imposed a condition that the respective settlement applications of the petitioner-company would be considered only if the funds raised by the petitioner-company through issue of GDRs in September, 2010 and transferred as above, are brought into the petitioner-Company or otherwise into India failing which the settlement applications would not be considered.

8. Mr. Rajendra Prasad, learned Senior Counsel for the petitioner-company submitted that the aforesaid condition was an act of coercion. The said condition was clearly arbitrary, unreasonable and it was imposed for the petitioner-company to bring the said amount to India or into its own account of the petitioner-company as the petitioner-company had no business being conducted in India.

Learned Senior Counsel further submitted that faced with the said condition, the petitioner-company submitted representation requesting for not insisting on the said condition to the respondents but the same was not agreed upon and resultantly, the petitioner's and it's Directors were left with no option but to withdraw their settlement applications and accordingly the same was conveyed to the respondents vide

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letter dated 25/01/2019 that the said applications are being withdrawn under duress. The said withdrawal was accepted by the SEBI and the settlement applications were disposed of as withdrawn.

Learned Senior Counsel further submitted that thereafter, the proceedings on the show cause notices commenced on merits and vide order dated 28/06/2019, the allegations against the petitioner-company were confirmed and penalty was also imposed. The petitioner-company later on came to know that in similar matters of similar nature relating to identical allegations, two companies were allowed to enter into settlement and penalty was imposed on them and the matter was dropped vide orders dated 05/04/2019 and 16/05/2019 respectively.

Learned Senior Counsel brought attention of this Court to the aforesaid orders passed in the case of two companies namely; HFCL and KEI and submitted that upon realizing the aforesaid, the petitioner-company have approached this Court to submit that right of settlement of the petitioner-company has been taken away discriminately, unreasonably and arbitrarily by the respondents by laying down an irrelevant and impossible condition of bringing the amount in India. It is submitted that the action of the respondents amounts to coercion and any action under coercion cannot be said to be with free will. The withdrawal of settlement applications was under duress of an illegal condition. It is, therefore, prayed that such condition be declared illegal, arbitrary and the settlement applications be examined on merits without insisting on the condition of bringing the GDR proceeds to India. Learned Senior Counsel further submitted that similarly situated companies have been

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discriminated as while the other two companies were allowed to enter into settlement, the petitioner-company has been served with the penalty by orders passed by the SEBI on show cause notices. It is submitted that the SEBI had no authority in law to lay down such a condition as it goes beyond the provisions of the Settlement Regulations of 2018. The allegation against the petitioner is not of utilizing the GDR proceedings abroad in violation of any provision of SEBI laws or in violation of any provision of Foreign Exchange Management Act, 1999. Learned Senior Counsel submitted that withdrawal of the settlement applications ought not be treated as void ab-initio since the same was done under coercion and duress.

9. Per-contra, Mr. Shyam Anil Mehta, learned Senior Counsel appearing on behalf of SEBI, pointed out that there have been several scams between the period from 2009 to 2011 regarding the issue of so-called GDRs in foreign countries by Indian Companies. He submitted that the SEBI has come down heavily on such frauds and scams and in the process, show cause notices were issued to the petitioner too relating to the GDR issues whereby huge money in USD was collected and siphoned to other subsidiary companies of the petitioner-company. It is a fraud played on the investors and the SEBI has, therefore, rightly issued show cause notices to the petitioner.

With regard to the settlement applications, learned senior counsel submitted that there was no force, coercion or duress on the part of the respondents. The petitioner-company had applied under the Settlement Regulations and as per the procedure, the same was placed before the Internal Committee which laid down a condition for recalling of the GDR proceeds in

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the Company in India so that proper adjudication of settlement could be done. However, the petitioner-company did not challenge the said condition either in any Court of law or before any other higher forum and on the ground that such a condition was impossible to be complied with, on their own, took decision without any force, coercion or duress, to withdraw their settlement applications. Learned Senior Counsel further submitted that the said withdrawal applications were without any force and were made voluntarily and with free will. He has taken this Court to the language used by the Lawyers intimating the SEBI of their intention to withdraw their settlement applications. He submitted that as on today, there is no settlement application pending on record as the prayer for withdrawal of the settlement applications was decided in favour of the petitioner by the Board. The petitioner, therefore, cannot turn around now after having participated in the regular proceedings relating to the show cause notices and seek revival of their settlement applications.

Learned Senior Counsel has also taken this Court to Regulation 7 of the SEBI Settlement Regulations to submit that once the settlement application is withdrawn, ordinarily the same cannot be allowed to be made again before the authorities. However, if such an application is moved, the concerned High Powered Advisory Committee may recommend for allowing application for settlement subject to increase of at least 50% over the settlement amount determined in accordance with Schedule 2 of the SEBI Settlement Regulations. He, therefore, submitted that if the petitioner-company wants, they may move a second application for settlement which would

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be examined by the High Powered Advisory Committee which is headed by a retired Judge of the High Court and the matter would be examined by him to allow settlement or not subject to the conditions as mentioned in Regulation 7(2) of the SEBI Settlement Regulations. He submitted that a presumption cannot be drawn that the Committee would not allow the second application.

Learned Senior Counsel has also taken this Court to the prayer clause to submit that the prayer made in the writ petition gives an impression of pendency of the settlement application whereas no settlement application is pending on record for settlement either relating to the present or relating to allegation of fraud.

Learned Senior Counsel has relied on a judgment passed by the High Court of Judicature at Bombay in ***Shilpa Stock Broker Pvt. Ltd. & Anr. Vs. Securities and Exchange Board of Iindia: (Writ Petition No.2120/2011)*** decided on ***17/01/2012*** to submit that no right is available to a person who is found to have committed fraud for claiming settlement as a right. The judgment holds the settlement proceedings as guidelines. However, he fairly admits that the said guidelines, which have been examined in ***Shilpa Stock Broker Pvt. Ltd. & Anr. (supra)***, are now statutory regulations framed under the Act known as Settlement Regulations, 2018.

10. After considering the submissions, this Court finds that the petitioner had applied for settlement under the Settlement Regulations, 2014. The Internal Committee directed the petitioner to repatriate the money back in Company/India which was collected through GDRs. The amout is of USD 18 Million.

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The petitioner vide its letter dated 26/12/2018 answered stating as under:-

> *"4. Although the Company and other applicants are confident that they will be able to establish their bonafides and defend themselves against the allegations made in the Show Cause Notices dated June 8, 2018 and May 23, 2018, the Company and other applicants sought to settle the present proceedings only with the intention of avoiding unnecessary litigation and associated costs. However, since the transaction of acquisition of telecom licenses could not be completed and Afrika One Telecom has denied to refund the advance of USD 18 Mn., it is not possible to repatriate the money back in Company/India. However, the Company is still trying and discussing with Afrika One Telecom to realise a portion of advance money in the form of other assets and/or licenses/any other form.*
>
> *5. In the light of the above, the Applicants once again request that their application for settlement of the proceedings may be considered without insisting on immediate repatriation of the GDR proceeds to the Company or into India."*

11. On 25/01/2019, the petitioner conveyed through their Advocates as under:-

> *"Joby Mathew & Associates*
> *Advocates*
>
> *Date: 25/01/2019*
>
> *The Assistant General Manager*
> *Settlement Division*
> *Enforcement Department-2*
> *Securities and Exchange Board of India,*
> *SEBI Bhavan, C-4A, G Block,*
> *BandraKurla Complex,*
> *Bandra (E), Mumbai 400 051*
>
> *Sir,*

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Kind attention: Mr. Pradeep Kumar, Assistant General Manager.

Ref: Hearing before the Internal Committee in the Settlement Application in the matter of Aksh Optifibre Ltd.

*We address you on behalf of and at the instructions of Aksh Optifibre Ltd ("**Company**"); Dr. Kailash S Choudhari, Mr. P.F. Sundesha, Mr. B.R. Rakhecha, Mr. Narendra Kambhat and Mr. Arun Sood (collectively referred to as "**our Clients**").*

*a) It is submitted that our clients were afforded an opportunity of hearing before the Hon'ble Internal Committee ("**IC**") on December 20, 2018 and January 09, 2019 and the same was attended by us alongwith their Authorized Representative.*

b) In the course of the aforesaid hearing dated December 20, 2018, our clients were directed that their respective Settlement Applications would be considered only if the funds raised by the Company through the issue of Global Depository Receipts ("GDRs") in September 2010 and transferred to the wholly owned subsidiary of the Company, AOL, FZE, based in Dubai, UAE were brought into the Company or otherwise into India.

c) Our clients made a detailed representation vide letter dated December 26, 2018 that it was not possible to bring the GRD proceeds transferred to AOL, FZE into the Company/India, since the same had been used for a business purpose as per use of proceeds disclosed in the offer document. Thereafter, another hearing was granted before the IC wherein our clients repeated and reiterated that it was not possible at this point of time to bring the GDR proceeds transferred to AOL, FZE to the Company.

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However, it was informed to our clients that their Settlement Applications cannot beprocessed in such case as bringing back the GDR proceeds in Company is a pre-requisite for Settlement.

d) Hence, in view of above, our clients have decided to withdraw their Settlement Applications in the matter of Aksh Optifibre Ltd with regard to the Show Cause Notices dated June 08, 2018 and May 23, 2018 and accordingly we hereby inform you of the same.

Yours sincerely

Joby Mathew & Associates
Advocates"

12. A reading of the aforesaid letter reflects that the petitioner-Company has instructed to their counsels of their decision to withdraw their settlement applications unequivocally. There is no mention of any pressure, duress or coercion.

13. It is also noticed that after the aforesaid letter having been conveyed to the SEBI, the settlement applications were disposed of as withdrawn by the SEBI and conveyed to the petitioner vide e-mail dated 28/01/2019. A regular reply to the proceedings under Section 11B of the SEBI Act, 1992 was also filed and as informed, final order was passed and the petitioner-Company was restrained from accessing the securities market and the Directors were also restrained. By another order relating to the show cause notice, penalties proposed were also imposed.

14. This Court has been informed that the aforesaid orders have been challenged in appeal before the concerned appellate authority and as there is no interim order, security amount has been deposited subject to the appeal by the petitioner-company.

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15. Learned counsel for the petitioner has relied on the orders passed in the case of two companies namely; HFCL and KEI where settlement orders were passed on the settlement applications. The allegations against both the Companies were almost identical except to the extent that while in the case of the petitioner-company, the amount secured through GDRs was invested in Africa from where the petitioner-Company is unable to get the amount refunded, the aforesaid two companies HFCL and KEI had got the amount transferred to India itself in the Company after issuing of the GDRs.

16. Keeping in view the aforesaid, this Court finds that the petitioner-Company of its own will and as per the decision taken by it at the relevant time, withdrew its settlement applications without any demur. If the petitioner-Company had a grievance relating to the conditions laid down by the Internal Committee, it could have taken up the matter before appropriate forum challenging such conditions. Once the petitioner-Company has withdrawn its settlement applications and has also contested the show cause notices on merits, it cannot be allowed to turn around and pray that its original settlement applications should be revived and the matter should be settled. It is for the petitioner to have chosen its path. No duress or coercion is found in the facts of the case and the plea of revival of settlement applications on account of the same, is rejected.

17. The question now arises whether the petitioner can be allowed to move afresh applications for settlement.

18. Regulation 7 of the Settlement Regulations, 2018 reads as under:-

Withdrawal of application.

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"7.(1) An application may be withdrawn at any time prior to the communication of the decision of the Panel of Whole Time Members under regulation 15.
(2) An applicant who withdraws an application under sub-regulation (1) shall not be permitted to make another application in respect of the same default.

Provided that, as may be recommended by the High Powered Advisory Committee, such an application may be considered subject to an increase of at least fifty percent over the settlement amount determined in accordance with Schedule-II of these Regulations."

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19. In view of above, this Court holds that the petitioners are entitled to move application for settlement even at the appellate stage. However, for the said purpose, the petitioners would have to move appropriate application before the appellate forum. The said applications thereafter be rooted to the High Powered Advisory Committee which may examine the aspect keeping in view the fact that other similarly situated two companies (supra) have been allowed to get the matter settled and settlement orders have been passed in relation to the other similarly situated companies (supra).

20. The issue with regard to the condition as laid down by the Internal Committee can also be examined by the High Powered Advisory Committee and it may take its own decision in this regard. As on today, so far as this Court is concerned, it is of the confirmed opinion that such a precondition is not existing and the same only related to the earlier settlement applications.

21. In view of the above discussions and findings, this Court concludes that no relief can be granted to the petitioner for

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revival of the settlement applications and the petitioner has to move afresh application if so chooses in terms of Regulation 7 of the Settlement Regulations, 2018. If such afresh application for settlement is moved, it shall be placed before the High Powered Advisory Committee as provided under Regulation 7 of the Settlement Regulations, 2018 and a decision shall be taken at the earliest. However, taking into consideration that the orders have already been passed under Section 11B of the SEBI Act, 1992, there can be no precondition of depositing the amount of 50% over the settlement amount. The said condition would only operate after the settlement is arrived at and determined by the concerned Committee. Similarly, in relation to settlement of penalty also, the aforementioned observations will equally apply.

22. The writ petition is disposed of accordingly in the aforesaid terms. No order as to costs. All pending applications also stand disposed of.

(SANJEEV PRAKASH SHARMA),J

Raghu/

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