SUPREME COURT OF INDIA

SEBI

Vs.

Roofit Industries Ltd

C.A.No.1364-1365 of 2005

(Vikramajit Sen and Shiva Kirti Singh, JJ.)

26.11.2015

JUDGMENT

Vikramajit Sen, J.

1 These Appeals lay siege to the decision of the Securities Appellate Tribunal (SAT) which modified the order of the Adjudicating Officer under

> "SEBI, reducing the penalty payable by the Respondent, Roofit Industries Ltd., under Section 15A of the Securities And Exchange Board of India Act, 1992 (SEBI Act) from Rs. 1 crore to Rs. 60,000. In the connected matters, the penalty imposed by the Appellant SEBI was reduced from Rs. 75,00,000 to Rs. 15,000 in five cases and Rs. 60,000 in one case. What formulae, if any, has been followed in these reductions is not forthcoming, making the exercise pregnant to the possibility of arbitrariness if not inconsistency or caprice."

2. The Appellant, having noticed allegations of share-price rigging by the Respondent, initiated an investigation into the shareholder pattern of the Respondent and price manipulation thereof. During the investigation, the Appellant issued Summons on 23.7.2002 to the Respondent requiring it to procure and produce certain documents and also for submitting additional information. The Respondent sought time till 20.8.2002 to provide the documents and information sought by the Appellant, and thereafter sought further time till 31.8.2002 and then 30.9.2002. After a reminder dated 5.9.2002, since the Summons were still not complied with and the information required was not provided by the Respondent, an Adjudicating Officer was appointed on 23.6.2003 under Section 15I of the SEBI Act to conduct an enquiry. By Show- Cause Notice dated 1.9.2003 for non-compliance of Summons dated 23.7.2002, the Adjudicating Officer granted the Respondent two opportunities of personal hearing on 25.2.2004 and 8.3.2004. The Respondent did not appear before the Adjudicating Officer despite these opportunities. The Adjudicating Officer therefore held, on 29.3.2004, that there was no material to suggest that the Respondent had complied with the Summons or had given the information sought for by SEBI despite extensions of time. In

terms of Section 15A(a) of the SEBI Act, a penalty of Rs. 1 crore was imposed on the Respondent. In the connected appeals, a penalty of Rs. 75 lakhs was imposed on each of the various Respondent companies. Aggrieved, the Respondent moved an Appeal before the SAT.

3. The SAT, on 9.8.2004, came to the conclusion that there was no dispute that the Respondent was liable to answer the summons and produce whatever information was available with it. It noted that the penalty under Section 15A had been enhanced in 2002 to Rs. 1 lakh for each day of failure to furnish the required document, return or report, or Rs. 1 crore, whichever is less. It noted the submission of the Respondent that it had suffered deep financial setbacks and was on the verge of bankruptcy, and therefore most of its staff had left the service of the Company. The SAT held that given that the business of the Respondent had come to a dormancy, there would be no point in imposing high penalties which would remain paper orders, and never be implemented. It considered impecuniosity an additional factor to those listed under Section 15J in adjudicating the quantum of penalty, and found it fit to reduce the penalty to Rs. 60,000. The quantum of penalty in the connected appeals was also reduced for the same reasons, from Rs. 75 lakh to Rs. 15,000 in five cases and Rs. 60,000 in one case. The Appellant's application for review was dismissed on 8.11.2004. The Appellant has now filed the present Appeal, contending that the SAT erred in reducing the penalty imposed by the Adjudicating Officer on wholly extraneous grounds including the inability of the Respondent to pay the penalty, a contingency which is not mentioned or featured in Section 15J of the SEBI Act.

4. We find merit in the contentions of Learned Senior Counsel for the Appellant that the penalty imposed by the Adjudicating Officer should not have been reduced on wholly extraneous grounds not mentioned in Section 15J of the SEBI Act. Section 15J reads thus:
15J. While adjudging quantum of penalty under Section 15-I, the adjudicating officer shall have due regard to the following factors, namely:-

> "(a) The amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;
>
> (b) The amount of loss caused to an investor or group of investors as a result of the default;
>
> (c) The repetitive nature of the default. The use of the word "namely" indicates that these factors alone are to be considered by the Adjudicating Officer. Black's Law Dictionary defines "namely" as "by name or particular mention. The term indicates what is to be included by name. By contrast, including implies a partial list and indicates something that is not listed." In this context, we find no reason to read "namely" as "including", as Learned Senior Counsel for the Respondent would have us do. It would be apposite for us to begin our analysis of the penalty to be imposed by laying out Section 15A(a) as it stood subsequent to the 2002 amendment, for the facility of reference:

15A. If any person, who is required under this Act or any rules or regulations made thereunder,-

(a) to furnish any document, return or report to the Board, fails to furnish the same, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less; In the connected appeals before us, the Appellant has imposed a penalty of Rs. 75 lakhs despite the failure having continued for substantially more than 75 days. Learned Senior Counsel for the Appellant has contended that the Appellant has discretion to impose a penalty below the number of days of default regardless of the words "whichever is less". He has argued that there would be no purpose to Section 15J if the Adjudicating Officer's discretion to fix the quantum of penalty did not exist, and that such an interpretation would render certain Sections of the SEBI Act as expropriatory legislation due to the crippling penalties they would impose. We do not agree with these submissions. The clear intention of the amendment is to impose harsher penalties for certain offences, and we find no reason to water them down. The wording of the statute clarifies that the penalty to be imposed in case the offence continued for over one hundred days is restricted to Rs. 1 crore. No scope has been given for discretion. Prior to the amendment, the Section provided for a penalty "not exceeding one lakh fifty thousand rupees for each such failure", thus giving the Appellant the discretion to decide the appropriate amount of penalty. In this context, the change to language which does not repose any discretion is even more significant, as it indicates a legislative intent to recall and remove the previously provided discretion. Additionally, Section 15J existed prior to the amendment and was relevant at that time for adjudging quantum of penalty. Once this discretionary power of the adjudicating officer was withdrawn, the scope of Section 15J was drastically reduced, and it became relevant only to the Sections where the Adjudicating Officer retained his prior discretion, such as in Section 15F(a) and Section 15HB. This ought to have been reflected in the language of Section 15I, but was clearly overlooked. Section 15J has become relevant once again, subsequent to the Securities Laws (Amendment) Act, 2014, which changed Section 15A(a), with effect from 8.9.2014, to read as follows:

15A. Penalty for failure to furnish information, return, etc. - If any person, who is required under this Act or any rules or regulations made thereunder,-

"(a) to furnish any document, return or report to the Board, fails to furnish the same, he shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees; The purpose of amendment was clearly to re-introduce the discretion of the Adjudicating Officer which was taken away by the SEBI (Amendment) Act, 2002. Had the failure of the Respondent taken place between 29.10.2002 and 8.9.2014, the penalty ought to have been Rs. 1 crore, without the possibility of any discretion for reduction."

6. However, before imposing such a penalty, we must consider the date on which the amendment came into effect, i.e. 29.10.2002. Since the Appellant's Summons to furnish the required documents was prior to this date and the Respondent failed to do so till well after it, the question before us is when the failure or default took place. While this question does not appear to have been raised before the SAT, it is a question of law and can therefore be raised at any point. As was held by this Court in Chitturi Subbanna vs Kudapa Subbanna (1965) 2 SCR 661, a pure question of law, which is not dependent on the determination of any question of fact, may be raised for the first time at the appellate or even the final stage, even though no reference to it had been made in the Courts below.

7. As previously discussed, the initial Summons to the Respondent was dated 23.7.2002. From this date onwards, there was an obligation on the Respondent to produce the documents and information sought by the Appellant, but it failed to do so, even until the imposition of a penalty by the Adjudicating Officer on 29.3.2004. Instead, the Respondent sought extensions of time vide three letters. After the third letter, the Appellant sent a reminder letter dated 5.9.2002, which is reproduced below:

> "URGENT
> IES/ID9/SP/17502/02 September 5, 2002
> SUJIT PRASAD DY. GENERAL MANAGER INVESTIGATIONS, ENFORCEMENT AND SURVEILLANCE DEPARTMENT
> email : sujitp@sebi.gov.in tel.no.:282981
> M/s. Roofit Industries Ltd.
> 501, Sangli Bank Bldg.
> 296, Perin Nariman Street,
> Fort,
> Mumbai - 400001.
> Dear Sirs,
> Please refer to our summons dated July 23, 2002 advising you to submit certain information specified at Annexure 'A' to the said summons, by August 01, 2002. In response, you had vide your letter dated July 26, 2002 requested for extension of time till August 20, 2002 for submission of the aforesaid information. Further, vide you letter dated August 12, 2002 you had again requested for the extension of time till August 31, 2002 and now, vide your letter dated August 28, 2002 you have once again requested for extension of time till September 30, 2002 to furnish the information. From the foregoing, it appears that you do not have any desire to submit the information, as sought by us, and/or do not wish to co¬operate in the ongoing investigation in the scrip of M/s. Roofit Industries Ltd. However, before initiating action in terms of prosecution under Section 24 of the SEBI Act, 1992 and/or levying penalty under Section 15A of the SEBI Act, 1992, you are once again advised to submit the information sought vide our above mentioned summons by September 16, 2002 failing which appropriate action(s) as mentioned above would be initiated and no further communication would be entertained from your end. It is thus abundantly

clear from a perusal of the letter that the Appellant had declined the request for a further extension of time beyond 16.9.2002. The Respondent had failed to furnish the information by that date, resulting in the penalty under Section 15A becoming applicable. It would thus be palpable that the penalty prior to the amendment to Section 15A would be applicable, i.e. Rs. 1.5 lakhs. "

8. Learned Senior Counsel for the Appellant, however, has argued that this is a continuing default, as it did not end till well after the amendment, with the result that penalties both prior to and post the amendment would apply. He has relied on the decision of the Three-Judge bench in *Maya Rani Punj vs Commissioner of Income Tax, Delhi*[1] wherein it was held that where "a duty continues from day to day, the non-performance of that duty from day to day is a continuing wrong. Having perused Maya Rani Punj, we find that the facts therein were significantly different from those before us. In that case, the Income Tax Act, 1961 applied instead of the Income Tax Act, 1922 because the former statute stated that it would apply if the Assessment was made subsequent to 1.4.1962. On an analysis of the language in the 1961 Act, it is clear that the Legislature intended for non-compliance with the obligation of making a Return to be considered an infraction as long as the default continued. The facts before us are significantly different. The amendment to Section 15A did not indicate that the amended Section would apply to penalties imposed after 29.10.2002. The amendment was merely made with effect from that date, indicating that the change would be applicable for failures occurring after that date. The date on which the failure occurred was thus relevant for deciding the applicable law, not the date on which the penalty was imposed. The relevant version of the Act for us to consider would therefore be that before 29.10.2002, the language of which did not indicate a legislative intent to consider the default a continuing one.

9. We find that the situation before us is more akin in its factual matrix to that in *State of Bihar v. Deokaran Nenshi*[2] which distinguished between continuing offences and offences committed once and for all.

> "5. A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and recurs there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all." In that case, Regulation 3 read with Section 66 of the Mines Act made the failure to file an Annual Return by the appropriate date an offence. It was held that since the failure was to file the Returns by the stipulated date,

the infringement occurred on that date and became complete on that date. Significantly, this case was discussed in Maya Rani Punj but was not overruled."

10 On the facts at hand, as in Deokaran Nenshi, the default was clearly complete on the failure to submit the requisite information by the date set by the Appellant, i.e. 16.9.2002. Had the Respondent furnished the information sought by the Appellant by that date, undoubtedly there would have been no culpability against it. Thus the penalty first became applicable under the pre-amendment Section, which imposed "a penalty not exceeding one lakh fifty thousand rupees for each such failure". The intention of the Section as it then stood was clearly not to consider it a continuing default. Such an intention can be read into the provision as it currently stands, as it imposes a penalty for each day for which the breach continues, but this was not the case prior to 29.10.2002. Facially, this was the reason and necessity for the amendment.

11. As the failure herein was complete on 16.9.2002, the penalty to be imposed on the Respondent in C.A. No. 1364-65 of 2015 and on each of the Respondents in the connected Appeals is Rs. 1.5 lakhs. The impugned judgment of the SAT is set aside and the Appeals are allowed in these terms. The interim stay order dated 18.2.2005 is vacated. No orders as to costs.

Cases Referred

[1]*(1986) 1 SCC 445*
[2]*(1972) 2 SCC 890*