BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 133 of 2006

Date of decision : 7.1.2009

M/s. R.C. Gupta & Co. Pvt. Ltd. …… Appellant

Versus

The Adjudicating & Enquiry Officer,
Securities and Exchange Board of India …… Respondent

Mr. Shyam Mehta Advocate with Mr. Ajay Fernandes Advocate and Akshaya Purohit Advocate for the Appellant.
Mr. Kumar Desai Advocate with Ms. Daya Gupta Advocate and Ms. Chloris John Advocate for the Respondent.

Coram : Justice N.K. Sodhi, Presiding Officer
Utpal Bhattacharya, Member

Per : Justice N.K. Sodhi, Presiding Officer

Same order as in Appeal no. 106 of 2006 decided on 7.1.2009.

Sd/-
Justice N.K. Sodhi
Presiding Officer

Sd/-
Utpal Bhattacharya
Member

7.1.2009
bk/-

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 106 of 2006

Date of decision : 7.1.2009

DKG Buildcon Private Limited …… Appellant

Versus

The Adjudicating & Enquiry Officer,
Securities and Exchange Board of India …… Respondent

Mr. Pradeep Sancheti Advocate for the Appellant.
Mr. Kumar Desai Advocate with Ms. Daya Gupta Advocate and Ms. Chloris John Advocate for the Respondent.

Coram : Justice N.K. Sodhi, Presiding Officer
Utpal Bhattacharya, Member

Per : Justice N.K. Sodhi, Presiding Officer

This order will dispose of two Appeals no. 106 and 133 of 2006 as they involve common questions of law and fact even though they were heard separately. These appeals are directed against the orders dated 28th November, 2003 and 31st December, 2003 respectively passed by the adjudicating officer imposing a monetary penalty of Rs.1 crore on each of the appellants under section 15A(a) of the Securities and Exchange Board of India Act, 1992 (for short the Act) for not complying with the summons issued to the appellants for the production of documents and furnishing information during the course of the investigations carried out by the Securities and Exchange Board of India (for short the Board). There was considerable delay in the filing of these appeals which was not condoned and they were dismissed as barred by time. The appellants went up in appeal to the Supreme Court and by order dated August 4, 2008 their appeals were disposed of with a direction that if they deposit a sum of Rs.1.25 lacs each, the delay in the filing of the appeals before this tribunal would stand condoned and the Tribunal in that event was directed to hear and dispose of the appeals on merits. The appellants have deposited the requisite amount as a result whereof the appeals were taken up for final hearing on merits.

On noticing unusual price movement in the shares of M/s. Shonkh Technologies International Ltd. (STIL), the Board conducted investigations into the buying, selling and dealings in the shares of this company under the provisions of the Act read with the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Markets) Regulations, 1995 (for short the Regulations). Investigations revealed that one Shreejee Yatayat India Limited (Yatayat), a company listed on the Bombay Stock Exchange (BSE), acquired the entire undertaking of M/s. Shonk Technologies Ltd. and that in turn Yatayat allotted its shares to the shareholders of Shonk Technologies Ltd. The appellant in Appeal no. 106 of 2006 was allotted 10 lac shares of Yatayat whereas the appellant in the other Appeal (no.133 of 2006) had been allotted 1,43,000 shares. Having taken over the business activities of Shonk Technologies Ltd., Yatayat changed its name to STIL with effect from July 27, 2000. Investigations further revealed that the appellants herein had transferred the shares of STIL to a company under the name and style of Sai Mangal Investrade Pvt. Ltd. (Sai Mangal). Similarly, entities like Classic Credit Limited, Goldfish Computers Ltd. and Luminant Investment Private Ltd. had also received shares of STIL from various entities who had been allotted shares by Yatayat. It is pertinent to mention here that Sai Mangal and the other entities referred to above which received the shares of STIL were all controlled and managed by one Ketan Parekh who had rigged the securities market in a big way in the year 2000 and 2001 and by order dated 12.12.2003 passed by the Board, the said Ketan Parekh and the companies controlled by him had been prohibited from buying, selling or dealing in securities in any manner directly or indirectly for a period of fourteen years. That order was upheld by this Tribunal on 14.7.2006 and the appeal filed in the Supreme Court was dismissed.

In view of the aforesaid investigations, the Board initiated proceedings against several entities including the appellants herein under sections 11 and 11B of the Act read with the provisions of Regulation 11 for violating Regulation 4 of the Regulations which were subsequently replaced by the Regulations of 2003. By a separate order dated October 16, 2007, the Board found that large quantities of shares of STIL were made available to entities associated with Ketan Parekh during the period

between October, 2000 and April, 2001 and that facilitated them to create artificial volumes in the said scrip in the securities market. The Board also found that the entities associated with Ketan Parekh had sold large number of shares of STIL in the securities market in a circular/synchronized manner with a view to create artificial market in the said shares. It came to the conclusion that the appellants and other entities had facilitated Ketan Parekh and his companies in manipulating the securities market and thereby violated Regulation 4 of the Regulations and restrained them from accessing the securities market for a period of five years and also prohibited them from buying, selling or dealing in securities either directly or indirectly for the same period. This is what the Board said :

> "The facts and circumstances of the case indicate that the said entities (other than the KP entities) facilitated the KP entities to manipulate the securities market by their direct/indirect transfer of shares of STIL to KP entities."

The plea that the appellants and other entities who had transferred the shares of STIL in favour of the companies controlled by Ketan Parekh were not aware of his intentions while dealing with him and his companies was rejected and the Board found as under :

> "Thus, it is found that all the above entities who were linked to each other are seen to have acted in a concerted manner to create an artificial increase in the share price of STIL. The whole picture on the canvass contains tell-tale strands of how each one of the entities at various sequences in the chain has catalysed the routing of shares, in a web of make believe transfers meant to mislead the trading in the shares of STIL.
>
> The case history establishes all the ingredients of how a series of unauthorised activities starting from the allotment of shares of STIL to various people including PTL and KP entities till the culmination of alluring and entrapping of the genuine investors by the entities associated with Shri Ketan Parekh through a web of transfers could virtually wreck the integrity of the securities market, under-mine the system and provide for a fertile ground to wangle unfair gains."

The appellants have not filed any appeal against this order which has become final qua them. It is in the background of this order and the findings recorded therein that the disputes arising in the present appeals have to be examined.

Section 11C(3) of the Act gives power to the investigating authority to call upon any intermediary or any person associated with the securities market to furnish such information or produce such documents and records as it may consider necessary if the

furnishing of such information or the production of such documents and records is relevant or necessary for the purposes of its investigation. Section 15A provides for penalty for failure to furnish information or produce documents and records. It is alleged that while the investigations were going on, the appellants and other entities involved in the manipulation tried to block the investigations by not responding to the summons issued to them.

Appeal No. 106 of 2006

Summons dated 27.8.2001 were issued to the appellant for the production of documents and submission of information as per the annexure attached thereto. The appellant claims that this summons was not received by it and, therefore, it could not respond. Be that as it may, a letter dated 10.6.2002 was sent to the appellant along with a copy of the summons and it was called upon to furnish the information and produce the documents referred to therein. Admittedly, the appellant did not respond to this letter despite having received the same. Again, summons dated 18.6.2002 was issued to the company and it was advised to furnish the information and produce the documents as referred to in the letter dated 10.6.2002. There was no response from the side of the appellant. The investigating authority then issued summons dated 4th March, 2003 to the appellant requiring it to attend the proceedings on March 20, 2003 making it clear that the person who had to appear on its behalf should be able to answer all questions in relation to the investigations and the appellant had further been directed to produce on that date all the documents as per the annexure to the summons. The appellant addressed a letter dated March 20, 2003 to the investigating authority informing the latter that its director Mr. Navneet Kumar was on tour and would return only by 30th March, 2003 whereafter he will be able to appear before the investigating authority. The investigating authority then issued another summons on 24th March, 2003 requiring the appellant to appear and produce documents and furnish information on April 1, 2003. The details of the documents to be produced and the information to be furnished were mentioned in the annexure thereto. The appellant did not respond to these summons and it was open to the Board to initiate proceedings against the appellant for non-compliance of the summons. However, it chose to issue another summons on April 1,

2003 for the same purpose requiring the appellant to appear on April 8, 2003 and furnish the information and produce documents, the details of which were mentioned in the annexure attached thereto. This time again, the appellant did not respond and failed to appear before the investigating authority and neither produced the documents nor furnished the information sought from it. The information that was sought from the appellant was as under :-

"**Annexure**

1. The list of the directorships of other companies held by the directors of M/s DKG Buildcon Private Limited.

2. The details of holdings in the scrip of M/s Shreejee Yatayat Limited as on March 31, 2000.

3. The details of the acquisition of the shares of M/s Shonkh Technologies Limited. The details shall contain.

   - The date of the acquisition
   - The quantity and rate of the acquisition
   - The name and address of the trading member through whom the acquisition was made
   - In case the acquisition was made off-market, the name and address of the transferors.

4. The details of the acquisition of the shares of M/s Shonkh Technologies International Limited. The details shall contain.

   - The date of the acquisition
   - The quantity and rate of the acquisition
   - The name and address of the trading member through whom the acquisition was made
   - In case the acquisition was made off-market, the name and address of the transferors.

5. The details of the trading in the scrip of M/s Shonkh Technologies International Limited during the period from August 1, 2000 to June 30, 2001. The details shall include.

   a. The date of the transaction.
   b. The name and address of the trading member through whom the transaction is entered into.
   c. In case of off-market transaction, please provide the name and address of the counterparty.
   d. The quantity, rate and value of the transaction.

6. The details of the shares given in fiduciary capacity or pledged with any entity. The details shall contain.

   - The name and address of the party to whom shares were given on fiduciary capacity or with whom shares were pledged.
   - The quantity of the shares given in fiduciary capacity or pledged."

Apart from the fact that the statement of the representative of the appellant could not be recorded, it also failed to furnish the information as per the aforesaid annexure. It seems that the appellant was bent upon not appearing before the investigating officer and was also determined not to furnish the information and produce the documents sought from it. The Board initiated adjudication proceedings for not complying with the summons. The adjudicating officer found that the appellant had willfully failed to respond to the summons and imposed a monetary penalty of Rs.1 crore under section 15A (a) of the Act.

Appeal no. 133 of 2006

In this case the appellant had been issued three summons. The first summons was issued on July 26, 2001 and a letter dated July 2, 2001 was attached thereto giving the details of the information sought. The appellant furnished the information on 29.7.2001. Thereafter, during the course of the investigations the appellant was again summoned on 18th June, 2002 to supply by June 21, 2002 the information mentioned in the letter dated June 10, 2002 which was attached to the summons. The appellant did not respond despite having received the summons. It may be mentioned that some of the information that was sought from the appellant was the same that was sought through the earlier summons dated 26th July, 2001. However, some additional information was also sought. Since the appellant failed to respond to these summons, it was open to the board to initiate proceedings against it for non-compliance. However, it chose to issue another summons on April 9, 2003 requiring the appellant to appear on April 12, 2003 making it clear that the person who had to appear on its behalf should be such who could answer all questions in relation to the investigations. The appellant was further directed to produce all the documents and furnish information, the details of which were mentioned in the annexure to the summons. Vital information was sought from the appellant pertaining to the investigations but the appellant failed to respond to these summons as well. The information sought from the appellant was as follows :-

" **Annexure**

1. The details of holdings in the scrip of M/s Shreejee Yatayat Limited as on March 31, 2000

2. The details of the acquisition of the shares of M/s. Shonkh

Technologies Limited. The details shall contain

- The date of the acquisition
- The quantity and rate of the acquisition
- The name and address of the trading member through whom the acquisition was made
- In case the acquisition was made off – market, the name and address of the transferors.

3. The details of the acquisition of the shares of M/s Shonkh Technologies International Limited. The details shall contain

- The date of the acquisition
- The quantity and rate of the acquisition
- The name and address of the trading member through whom the acquisition was made.
- In case the acquisition was made off-market, the name and address of the transferors.

4. The details of the trading in the scrip of M/ Shonkh Technologies International Limited during the period from August 1, 2000 to June 30, 2001. The details shall include

- The date of the transaction.
- The name and address of the trading member through whom the transaction is entered into.
- In case of off-market transaction, please provide the name and address of the counterparty.
- The quantity, rate and value of the transaction."

As the appellant failed to comply with the summons dated April 9, 2003, the Board initiated adjudication proceedings against it. The adjudicating officer issued a show cause notice dated September 15, 2003 pointing out some of the information sought earlier through the summons which the appellant had failed to furnish. The appellant was informed that it had become liable for the imposition of penalty under section 15A(a) of the Act. The appellant filed its reply dated 18.12.2003 and furnished the information on the points referred to in the show cause notice. On a consideration of the material available on the record the adjudicating officer found that the appellant did not comply with the summons and imposed a monetary penalty of Rs.1 crore.

We have heard the learned counsel for the parties and are of the view that both the appeals deserve to be dismissed. The fact that the appellants did not comply with the summons dated 1.4.2003 and 9.4.2003 respectively is not in dispute. Vital information was sought from them and they were required to furnish that information and produce documents which were not only relevant but also necessary for the purpose of the investigations that were being carried out by the Board. The appellants had been

allotted shares of Shonkh Technologies Limited which was an unlisted company and these came to them from Ankur Cultivators Limited a promoter of that company. These were allotted to the appellants at the rate of Rs.10 per share whereas others were allotted shares at a much higher price. In this background, the investigating authority sought the following information from the appellants which was never furnished :

> "1) Manner in which the acquisition of shares of unlisted company STIL was funded, with details such as the terms and conditions of the funding name and address of the person providing the funds, the acquisition amount involved, cheques no./draft no. given, name of the drawing bank, account form which the instrument was issued and the relevant bank statement for the funding.
>
> 2) Whether the aforesaid acquisition was pursuant to any agreement or arrangement or understanding with any person. If yes, provide the details on the agreement/ arrangement/ understanding whether oral or otherwise terms and conditions thereof, copy of the agreement/ arrangement/ understanding, reason of such transaction and other details such as the name and address of person who approached the company for such transactions, names and address of the person negotiating the same on the company's behalf as well on behalf of the other side.
>
> 3) Whether the shares have been sold or given to some other person as pledge / security with the details such as the date, sale price, name and address of ultimate buyer, broker if shares were sold. If given, the names and addresses of persons to whom it was given along with the terms and conditions thereof and agreement/ arrangement /understanding, if any, for the same. The company was also asked to state the use of the funds so obtained, the names and addresses the persons to whom they have been given copy of the bank statement narration, copy of agreement/ arrangement, if any, for the use of funds.
>
> 4) The relationship of the company with Shonk Technologies Ltd., its promoters, Ankur Cultivators Ltd., Iris Infrastructurals Ltd., Advance Hovercrafts and Composites India Ltd., Zodiac.com Ltd., Mikona Impex Ltd.
>
> 5) Circumstances leading to the delivery of 3,00,000 shares of STIL to Classic Credit Ltd. on 3.11.2000 and the details thereof including the nature of relationship with Classic Credit Ltd. etc.
>
> 6) Circumstances leading to the sale of 2,00,000 shares to Goldfish Computers at a price of Rs.160/- and the details thereof.
>
> 7) Details regarding demating of 2,00,000shares of STIL on 20.11.2000 in favour of Goldfish Computers Ltd. and matters incidental to the said transaction."

Non-furnishing of this information cannot be viewed lightly because, as subsequently found by the Board, the appellants were aiding and abetting Ketan Parekh and his companies which were found to have rigged the securities market in the years 2000 and

2001 by executing circular and artificial trades thereby raising the price of the scrip artificially. The appellants have been found to have supplied Ketan Parekh and his companies with the shares of STIL which they subsequently traded in the market. It has also been found that they were acting in concert with those entities. As the appellants had aided and abetted Ketan Parekh and his companies in rigging the price of the shares of STIL, they were deliberately trying to withhold the information that was being sought from them lest it incriminates them. Regulation 9 of the Regulations casts a duty on every person to produce before the investigating officer such information and documents as he may require for the purposes of investigations. By not responding to the summons, the representative(s) of the appellant did not appear before the investigating officer as a result whereof their statements could not be recorded. This, obviously, hampered the investigations. In the result, the inescapable conclusion is that the appellants were adamant in not furnishing the information sought from them though vital to the investigations and that they stonewalled the investigations as commented by the adjudicating officer. It is of utmost importance that every person from whom information is sought should fully co-operate with the investigating officer and promptly produce all documents, records, information as may be necessary for the investigations. If persons are allowed to flout the summons issued to them during the course of the investigations, the Board as the watchdog of the securities market will not be able to perform its duties in protecting the interests of the investors and safeguarding the integrity of the securities market.

The primary contention of both counsel appearing for the appellants is that non-compliance with summons issued by the investigating officer does not constitute a continuing wrong and, therefore, the only offence committed was in the year 2001 in the case of DKG Buildcon Private Limited (for short DKG which is appellant in Appeal no.106 of 2006) and in June 2002 in the case of R.C. Gupta & Co. Private Limited (for short R.C. Gupta- appellant in the other appeal) when they did not comply with the summons. The argument is that at the relevant time the maximum penalty that could be levied could not exceed one lac and fifty thousand rupees for such a failure. Even if we

agree with the learned counsel that non-compliance with the summons is not a continuing wrong (though this question in the present case does not arise), we are unable to agree with them that the penalty could not exceed Rs.1.5 lacs. Section 15A(a) of the Act finds mention in Chapter VIA of the Act which was introduced in January 1995. The provision as it originally stood provided for "a penalty not exceeding Rs.1,50,000 for each such failure." This provision was amended by the amending Act of 2002 which was meant to make the penalty more deterrent. This provision was amended with effect from 29.10.2002 to provide for "a penalty of one lac rupees for each day during which such failure continues or one crore rupees, whichever is less." DKG violated the summons for the first time in August 2001 and it was open to the Board to proceed against it for that non-compliance. Again, DKG violated the summons in June 2002 and the Board could have proceeded against it for that non-compliance as well. Had the Board proceeded against DKG for those non-compliances which constituted two separate wrongs, the penalty leviable would have been under the unamended provisions. We are also of the view that the Board not having proceeded against DKG for those non-compliances and having chosen to issue fresh summons in April 2003, it (Board) condoned the earlier lapses and gave DKG another opportunity to furnish the information and appear in person to make a statement. Had DKG complied with this summons, it would not have been open to the Board to proceed against it (DKG) for the earlier non-compliances. Non-compliance of the summons issued on 1.4.2003 was a fresh offence committed by DKG for which the Board has now proceeded which proceedings have culminated in the passing of the impugned order. Since this wrong was committed in April 2003 by which time the amended provisions were in place, penalty had to be levied in accordance with those provisions. No fault can, thus, be found with the action of the adjudicating officer in levying the penalty under the amended provisions. Same is the situation in the case of R.C. Gupta. In this view of the matter, we have no hesitation in rejecting the arguments of the learned counsel for the appellants.

It was then argued on behalf of DKG that section 15A(a) of the Act does not apply as the Act, Rules or Regulations made thereunder do not per se require the

production of documents or furnishing of information and that it was only a direction of the Board contained in the summons that the appellant was required to comply with. The argument indeed is that non-compliance with the directions of the Board would not attract section 15A(a) and that the penalty could be levied under the residuary provision contained in section 15HB. The argument is being noticed only to be rejected. Section 11C of the Act was introduced with effect from 29.10.2002 and sub-section (3) thereof provides that the investigating authority may require any person associated with the securities market "to furnish such information, or produce such books, or registers, or other documents, or record before him…". The power to require a person to furnish any information or record or documents includes the power to require such person to make a statement and give clarifications with regard to the information and documents produced by him. In the absence of such a power the purpose of the legislature in introducing section 11C would be frustrated and the Board will not be able to investigate properly the market irregularities and offences. In order to advance the object of Parliament the language used in sub-section (3) of section 11C has to be given a wider meaning. We are, therefore, of the considered opinion that section 11C (3) gives the power to the investigating authority to call upon any person to make a statement while furnishing any information, document or record.

Mr. Pradeep Sancheti learned counsel for DKG then argued that the impugned order dated 28th November, 2003 records findings which are beyond the show cause notice. We are unable to appreciate this argument. When the show cause notice was issued to the appellant on September 11, 2003, it failed to file any reply thereto. This apart, we have perused the show cause notice and find that it is clearly alleged therein that the appellant had failed to comply with a number of summons issued to it. When we read the impugned order, categoric findings have been recorded that the appellant failed to respond to the summons. As a matter of fact the adjudicating officer has referred in detail to the vital information which was sought from the appellant which it failed to furnish thereby hampering the investigations. The impugned order in no way

goes beyond the show cause notice. The argument is without any merit and the same stands rejected.

Lastly, the learned counsel for both the appellants urged that the penalty imposed is highly excessive and that the same needs to be reduced considerably. We have given our thoughtful consideration to this submission and are unable to accept the same. As already noticed, the appellants want the penalty to be reduced primarily on the ground that it could be levied only under the unamended provisions of section 15A(a) of the Act. We have already rejected that contention of the learned counsel. It was also urged that since the appellants had furnished a substantial part of the information sought from them to the investigating officer, the penalty should be reduced. Here again, we are unable to agree with them in the facts and circumstances of these cases. We have noticed above that by not responding to the summons issued in April 2003, the representatives of the appellants did not appear before the investigating officer and their statements could not be recorded. Further, the most vital part of the information that was being sought from the appellants was withheld by them knowingly. Reference in this regard has already been made in the earlier part of our order. We have also noticed that the appellants were aiding and abetting Ketan Parekh and his companies in manipulating the price of the scrip of STIL and it is for this reason that they were trying to stonewall the investigations. Ketan Parekh had misused the market mechanism to manipulate the price of the scrip of STIL along with other scrips. This being the position, we are not inclined to reduce the quantum of penalty levied on the appellants lest a wrong signal is transmitted to the market that by avoiding furnishing of inconvenient information delinquent entities could get away with meagre penalties.

Before concluding, we may notice the order of this Tribunal dated 14.3.2006 passed in the case of Iris Infrastructurals Private Limited (Appeal no. 2 of 2006). In that case a penalty of Rs.1 crore had been levied on the appellant therein under section 15A(a) of the Act for not complying with the summons issued in July 2001 and June 2002. It was held in that case that the offence was committed prior to 29.10.2002 and that penalty could be imposed only under the unamended provisions and the same was

reduced to Rs.1 lac on that score. In the cases before us the summons which were not complied with had been issued in April 2003 and, therefore, the penalty was levied in accordance with the amended provisions of Section 15A(a) of the Act at the enhanced rate. That order of the Tribunal does not advance the case the appellants.

For the reasons recorded above, the appeals fail and they stand dismissed with no order as to costs.

Sd/-
Justice N.K. Sodhi
Presiding Officer

Sd/-
Utpal Bhattacharya
Member

7.1.2009
bk/-