

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Decision : 25.11.2021

Misc. Application No. 1148 of 2021
And
Appeal No. 692 of 2021

1. Mr. Pramod Jain
147-B, Jain Colony,
Delhi – 110 007
2. Mr. Rahul Malik
D-391, Defence Colony,
New Delhi – 110 024.
3. Mr. Rochak Midha
D-3, First Floor, Kailash Colony,
Greater Kailash,
New Delhi – 110 048. Appellants

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, Senior Advocate with Mr. Ravi Prakash and
Smt. Kalpana Desai, Advocates i/b Corporate Professionals
for the Appellant.

Mr. Vishal Kanade, Advocate with Mr. Abhiraj Arora,
Mr. Karthik Narayan and Mr. Harshvardhan Nankani,
Advocate i/b ELP for the Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Justice M.T. Joshi, Judicial Member

Per : Justice Tarun Agarwala, Presiding Officer (Oral)

1. There is a delay of 47 days in the filing of the appeal. For the reasons stated in the application, the delay is condoned. The application is allowed.

2. The present appeal has been filed against the order dated June 15, 2021 passed by the Adjudicating Officer ('AO' for short) of the Securities and Exchange Board of India ('SEBI' for short) imposing a penalty of Rs. 1 lakh each on the noticees / appellants for violation of Section 11C(2) and Section 11C(3) read with Section 11(2)(i) of the Securities and Exchange Board of India Act, 1992.

3. We have heard Shri P.N. Modi, the senior counsel for the appellant and Shri Vishal Kanade, the learned counsel for the respondent.

4. The facts leading to the filing of the present appeals is, that the complaints relating to malpractice with respect to the co-location facility being provided by the National Stock Exchange of India Limited ('NSE' for short) led to an investigation being conducted by SEBI. One trading member IKM Investors Private Limited was identified for comprehensive investigation including forensic audit for

primary and secondary server connects. The appellants are directors and chief operating officer in the Company.

5. SEBI issued summons dated May 9, 2019 to give access to computers, terminals, electronic records / IT Logs / communications / documents, etc. to the auditors and not to dispose of or delete or make modification, to any of the records, emails, communications etc. The statement of the appellants was also recorded on May 21, 2019. During the course of the recording of the statement it is alleged that the Investigating Authority requested the appellants to provide their mobile devices for imaging the data available on the device. The appellants contended that they offered their mobile devices for checking / examination by the investigating authority. The appellants, however, requested for not imaging their data on their mobile device on the ground that the mobile devices were purchased after the review period and that the data contained personal data which was not relevant for the investigation.

6. It transpires that in the investigation report it was indicated that a request was made to the appellants to provide the mobile device for the imaging data and the noticees had submitted that these devices were acquired post review period

and that the devices did not have the data corresponding to the review period. The investigation report observed that the appellants had concealed vital information and failed to cooperate with SEBI. Based on the investigation report, a show cause notice dated October 29, 2020 was issued to show cause as to why penalty for violating Section 11C(2) and 11C(3) read with Section 11(2)(i) of the SEBI Act should not be passed for non cooperating with the investigating authority and for not allowing data imaging of their mobile devices which has hampered the investigation.

7. The appellants filed the reply contending that whatever documents / information that was sought for in the summons dated May 9, 2019 the same was supplied and that the appellants had cooperated with the investigation. It was also stated that their statements were also recorded on May 21, 2019 and only during the course of the recording of their statement that a request was made for imaging the data of their mobile devices. It is the stand of the appellants that they had offered their mobile devices for checking to the Investigating Authority and requested that imaging data may not be taken as it contains personal data.

8. We find from the impugned order that the AO has noted that the summons which were issued did not ask for their mobile devices or for data imaging of their mobiles. The AO also admits that during the course of recording of their statement that 'a request' was made for imaging the data on their mobile device. The AO also finds that the appellants had actually offered their mobile devices for checking / examination by IA/Forensic Auditor and only requested not to image their personal mobile devices since the mobile devices were purchased by them after the review period and that imaging of their personal and private data in their mobile devices would lead to parting away with intimate details of their personal life.

9. In spite of giving the aforesaid finding the AO came to the conclusion that since the mobile set contains huge volume of data which cannot be examined just by handing over the instrument for a brief period without allowing the AO to image the data amounts to failure to provide information which is violative of Section 11C(2) and Section 11C(3) of the SEBI Act and therefore to that extent there was non-cooperation on the part of the noticees.

10. In this regard it would be appropriate to refer to the provisions, namely, Section 11(2)(i), Sections 11C(2), 11C(3) and 11C(6) which are extracted here under:-

“11(2)(i) calling for information from, undertaking inspection, conducting inquiries and audits of the stock exchanges, mutual funds, other persons associated with the securities market intermediaries and self-regulatory organizations in the securities market;

11C(2) Without prejudice to the provisions of sections 235 to 241 of the Companies Act, 1956 (1 of 1956), it shall be the duty of every manager, managing director, officer and other employee of the company and every intermediary referred to in section 12 or every person associated with the securities market to preserve and to produce to the Investigating Authority or any person authorised by it in this behalf, all the books, registers, other documents and record of, or relating to, the company or, as the case may be, of or relating to, the intermediary or such person, which are in their custody or power.

11C(3) The Investigating Authority may require any intermediary or any person associated with securities market in any manner to furnish such information to, or produce such books, or registers, or other documents, or record before him or any person authorised by it in this behalf as it may consider necessary if the furnishing of such information or the production of such books, or registers, or other documents, or record is relevant or necessary for the purposes of its investigation.

11C(6) If any person fails without reasonable cause or refuses-

(a) to produce to the Investigating Authority or any person authorised by it in this behalf any book, register, other document and

record which is his duty under sub-section (2) or sub-section (3) to produce; or

(b) to furnish any information which is his duty under sub-section (3) to furnish; or

(c) to appear before the Investigating Authority personally when required to do so under sub-section (5) or to answer any question which is put to him by the Investigating Authority in pursuance of that sub-section; or

(d) to sign the notes of any examination referred to in sub-section (7), he shall be punishable with imprisonment for a term which may extend to one year, or with fine, which may extend to one crore rupees, or with both, and also with a further fine which may extend to five lakh rupees for every day after the first during which the failure or refusal continues.”

11. A perusal of the aforesaid provisions indicates that if any person fails without reasonable cause or refuses to produce to the Investigating Authority any information or any book register or other document he shall be punishable with imprisonment or with fine or with both.

12. In the instant case, we find that a “request” was made by the Investigating Authority during the course of recording of the statement of the appellants for data imaging of their mobile devices. We find that the appellants did not refuse but only requested not to image the data in their personal mobile devices since the mobile devices were purchased by them after the review period and that the imaging of their personal

and private data would lead to parting away with intimate details of their personal life. We find that the appellants did not refuse to provide information but gave a reasonable cause which has been recorded in paragraph 10 of the impugned order but has not been dealt with by the AO.

13. We find that the appellants had cooperated throughout and thus we find that the request for not imaging the data in their personal mobile devices does not amount to non cooperation.

14. We also find that there is nothing on record to suggest that the oral request made by the Investigating Authority during the course of the recording of statement of the appellants were subsequently asked again. Prima facie, it appears that the request made by the appellants was duly accepted by the Investigating Authority otherwise the Investigating Authority could have issued another summons formally to image the data on their personal mobile devices.

15. In view of the aforesaid, we find that the impugned order cannot be sustained and is quashed. The appeal is allowed with no order as to costs.

16. The present matter was heard through video conference due to Covid-19 pandemic. At this stage it is not possible to sign a copy of this order nor a certified copy of this order could be issued by the registry. In these circumstances, this order will be digitally signed by the Private Secretary on behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Parties will act on production of a digitally signed copy sent by fax and/or email.

Justice Tarun Agarwala
Presiding Officer

Justice M.T. Joshi
Judicial Member

25.11.2021
msb