

**BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI**

Appeal No.96 of 2007

Date of decision : 26.11.2008

Siddhartha Agarwal

.....Appellant

Versus

Adjudicating Officer
Securities and Exchange Board of India

.....Respondent

Mr. Pesi Modi Advocate with Mr. Vinay Chauhan Advocate for the Appellant.

Dr. Poornima Advani Advocate with Mr. Santosh Parad Advocate for the Respondent.
Mr. Mihir Kamdar Advocate for Mr. Ananda Kumar Executive Director, Bangalore
Stock Exchange Ltd.

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

Per : Justice N.K. Sodhi, Presiding Officer

This appeal had come up for hearing before this Tribunal on 8.7.2008 and after hearing the counsel for the parties we allowed the same and the impugned order passed by the adjudicating officer levying a penalty of Rs.25 lacs on the appellant had been set aside. While setting aside the impugned order, we commented on the conduct of Shri Ananda Kumar, Executive Director, Bangalore Stock Exchange Ltd. though he was not a party before us. The Securities and Exchange Board of India (for short “the Board”) filed Review Petition no.5 of 2008 seeking review of our order on the ground that the conclusions drawn by us from the record were wrong. This is hardly a ground to review our order. However, when the review application came up for hearing on 14.10.2008, Shri Ananda Kumar on his own was present in court alongwith his counsel. He made a grievance that he had not been heard and that in his absence we had commented upon his conduct. It was primarily on the oral application of Shri Ananda Kumar that we recalled our order dated 8.7.2008 and restored the appeal

to its original number and permitted him to be heard at the time of hearing. He was given liberty to file an affidavit, if he so wanted, and the main appeal was set down for hearing on 20.11.2008. On this date, Shri Ananda Kumar through his counsel wanted to file an affidavit in court without furnishing an advance copy to the counsel opposite. This is not the procedure for filing affidavits and since this would have necessitated an avoidable adjournment, we did not permit him to file the affidavit and proceeded to hear the counsel for the parties including the counsel for Shri Ananda Kumar.

2. The appellant before us was a promoter director of Bhoruka Financial Services Ltd., (BFSL) a company registered under the Companies Act, 1956 with its registered office in Bangalore. This company was not carrying on any activity and its only asset was a big chunk of land in the city of Bangalore measuring 15 acres. The appellant and other promoters of the company wanted to sell the land and M/s DLF Commercial Developers (DLF), a Delhi based company was agreeable to purchase the same. Since the sale of land would have attracted capital gains tax for the seller and stamp duty for the buyer, they both decided to carry out the transaction as a sale of the entire shareholding of the promoters of BFSL to DLF. The shares of BFSL were listed only on the Bangalore Stock Exchange. It is the case of the appellant that he alongwith Shri Chandrashekhar, Legal Advisor of BFSL personally approached Shri Ananda Kumar, Director of the Bangalore Stock Exchange on 18th January, 2005 for trading the shares of BFSL through the exchange. According to the appellant, Shri Ananda Kumar informed him and the legal advisor that trading was not permitted on the Bangalore Stock Exchange and it was not possible to trade the shares on that exchange. The buyer and the seller then approached the Magadh Stock Exchange and executed the trades through that exchange. It appears that trading on the Magadh Stock Exchange had been stopped/suspended and when these trades were executed in August 2005, the Securities and Exchange Board of India (for short the Board) carried out investigations as to how and why the trading took place. During the course of those investigations

the appellant was called to appear before the investigating officer and was pointedly asked as to why they traded the shares at Magadh when those were listed on the Bangalore Stock Exchange and this is what he said in reply:

“Myself and Shri Chandrashekhar, Legal Advisor of BFSL personally approached Shri Anand Kumar, Director, BgSE on 18th January, 2005 for trading in the shares of BFSL, Shri Anand Kumar informed us that trading is not permitted at BgSE.”

In response to a question as to whether he asked Shri Ananda Kumar as to why trading was not permitted on the Bangalore Stock Exchange his reply was as under:-

“Yes. I asked Shri Anand Kumar, why trading is not permitted at BgSE. However, I was informed that Indo-next platform is going to be launched soon and therefore trading is not possible at BgSE. However, since it was a meeting in person there is no documentary evidence to show the same.

The Annual Reports of BgSE for the years ending 31.03.2004 and 31.03.2005 also shows in the Directors’ Report that there was no trading activity during the above years.”

3. Prior to the recording of the aforesaid statement of the appellant, the Chief General Manager of the Board enquired on phone from Shri Ananda Kumar as to why he did not allow the trading of the scrip of BFSL on the exchange at Bangalore. In response to the telephonic query, Shri Ananda Kumar addressed a letter dated December 12, 2005 to the Chief General Manager the relevant part of which is reproduced here under for facility of reference:-

“Sub: Information in regard to M/s. Bhoruka Financial Services Ltd.,

This has reference to the discussion the undersigned had with you today in the above regard.

.....
.....

Further, we would also inform you that, prior to the date of suspension, the trading in the securities of the company was open at BgSE and further the trading in the securities of the company at BgSE were never suspended. Further we wish to inform you that the Trading Platform of Bangalore Stock Exchange Ltd., is kept open for trading by the members of the Exchange and the same has never been suspended or closed. We would like to state that neither the Bhoruka Financial Services Ltd., nor their representative have approached the Exchange for trading at any point of time.”

4. On receipt of the aforesaid letter, the Board was of the view that the appellant made a wrong statement before the investigating officer and was trying to mislead him. Adjudication proceedings were initiated against him for having violated section 15 A(a) read with section 15 HB of the Securities and Exchange Board of India Act, 1992 (for short the Act). The adjudicating officer served a notice dated November 16, 2006 calling upon the appellant to show cause why suitable penalty be not imposed on him for misrepresenting before the investigating officer. The show cause notice refers to the stand taken by the appellant and also to the reply furnished by Shri Ananda Kumar to the Board denying his meeting with the appellant. On a consideration of the statement made by the appellant and the reply received from Shri Ananda Kumar, the adjudicating officer believed what was stated by Ananda Kumar in his letter of December 12, 2005 and disregarded the statement on oath made by the appellant before the investigating officer. After disbelieving the appellant, the adjudicating officer found that the former had violated the provisions of section 15A(a) of the Act and levied monetary penalty of Rs.25 lacs as per his order dated February 26, 2007. It is against this order that the present appeal has been filed.

5. Section 15A(a) of the Act provides that if any person who is required under the Act to furnish any documents, returns or reports fails to furnish the same, he shall be liable to a penalty of one lac rupees for each day during which such failure continues or one crore rupees whichever is less. Making a false statement would amount to failure to furnish the information sought and would attract section 15A(a) of the Act.

6. We have heard the learned counsel for the parties including the counsel for Shri Ananda Kumar and are of the view that the impugned order deserves to be set aside. The gravamen of the charge levelled against the appellant in the show cause notice is that he made a false statement before the investigating officer and tried to mislead him. As already noticed, the adjudicating officer had two versions before him which were diametrically opposite to each other and he was to decide which of the two

was correct. The appellant had appeared during the course of the investigations and had made his statement on oath. Not only this, he had also filed before the adjudicating officer an affidavit dated 15.12.2006 duly notarized in which he reiterated the stand taken by him when he appeared on June 7, 2006 before the investigating officer. We have already noticed that the appellant had stated on oath that he alongwith the legal advisor of BFSL had met Shri Ananda Kumar on January 18, 2005 with a request to allow the trading in the scrip of BFSL so that the shares could be transferred in the name of DLF and that he was told that trading on that exchange was not possible. Shri Ananda Kumar had taken an opposite stand and had denied having met the appellant and if the matter had rested at that we would have remanded the case back to the adjudicating officer to decide afresh after allowing the appellant to cross examine Shri Ananda Kumar. We are not adopting this course because, in our opinion, there is enough material on the record to show that what Shri Ananda Kumar had stated in his letter dated December 12, 2005 was not true. It may be mentioned that he had said that trading in the securities was open at Bangalore Stock Exchange and that trading had never been suspended. He further stated that trading platform of the exchange is kept open for trading by the members of the exchange and the same had never been suspended or closed. Bangalore Stock Exchange is a limited company and we have on record two of its annual reports copies of which had been furnished by the appellant to the investigating officer at the time when his statement was recorded on June 7, 2006. Copies of these annual reports were also enclosed with the reply furnished by the appellant before the adjudicating officer. These annual reports pertain to the year 2003-04 and 2004-05. These have been signed by Shri Ananda Kumar as a trustee and also as the Executive Director of the Bangalore Stock Exchange. In the annual report for the year 2003-04 this is what is stated regarding its business operations:-

“During the year, your exchange had no trading activity, as a result of which there has been no turnover. Despite this, the Exchange has been able to show cash surplus.

Para 5 of this report which deals with 'Future Outlook' states thus:-

"FUTURE OUTLOOK

BSE – Indonext proposal: BSE and Federation of Indian Stock Exchanges, of which your exchange is also a member, have jointly submitted a proposal on setting up of an alternative trading platform for small and medium enterprises. This platform would be made available to all the listed companies of all the Regional Stock Exchanges. **With the implementation of this proposal, trading on your exchange will re-commence."**

7. Similar statements have been made in the annual report for the year 2004-05.

Para 2.1 and 5 of this report need to be referred to and they read as under:-

"Business operations

2.1 Turnover

Your Exchange had no trading activity during the year."

5. "IndoNext

On 7th of January 2005, the Hon'ble Finance Minister of Government of India, inaugurated IndoNext, the alternative platform for small and medium enterprises with a paid-up capital between Rs.3 Crores and Rs.20 Crore, which are currently listed on Regional Stock Exchanges and similar sized companies listed on BSE. Indonext has been jointly promoted by BSE, and the Federation of Indian Stock Exchanges, of which your exchange is a member. Activities of Market surveillance and Clearing and Settlement of trades in IndoNext are being carried out by BSE, while the Regional Stock Exchanges are monitoring the companies for compliance to the listing norms."

8. A copy of the annual report for the year 2005-2006 was furnished during the course of the hearing on 8.7.2008 and that report also contains identical statements and in our opinion clinch the issue. The relevant part of para 5 of the report is reproduced hereunder for facility of reference:-

"5. Future Out look

Your exchange has been exploring various avenues to revive trading. Tie ups with other leading exchanges, entering into strategic partnership for capital and technology infusion for commencing trading and a host of other options are under the consideration of your Directors. They are confident that some headway would be made soon."

From a reading of the aforesaid paras of the annual reports, it is abundantly clear that there was no trading on the Bangalore Stock Exchange from the year 2004-05 till the

end of March, 2006. During the year 2003-04 trading was miniscule. In January, 2005 when the appellant is said to have approached Shri Ananda Kumar for trading the shares of BFSL on the Bangalore Stock Exchange, admittedly there was no trading going on. As is clear from the annual reports, the exchange has been exploring various avenues to revive the trading and the shareholders had been informed that the exchange was trying to tie up with other exchanges for capital and technology infusion for commencing trading. The shareholders had also been informed that a host of other options were under consideration of the Board of Directors and that they were confident that some headway will be made. It is, thus, clear that till the end of March, 2006 the exchange could not make any headway in reviving the trading for which efforts were being made. The learned counsel for Shri Ananda Kumar strenuously urged that there was no order suspending trading on the Bangalore Stock Exchange and since the platform of the exchange was open, the trading thereon was possible. He also submitted that what Shri Ananda Kumar had stated in his letter of December 12, 2005 was not untrue. We cannot accept these contentions. May be, there was no order suspending the trading on the exchange and, therefore, theoretically speaking, the trading could be possible but the question is, was it feasible to carry out a large trade worth around Rs.90 crores when the system had been out of use for a long time and, as borne out by the annual reports of the exchange, it needed capital and technology infusion to commence the trading. Our answer to this question is in the negative. We say so, because when the Board enquired from Shri Ananda Kumar as to why trading was not permitted/possible, he took a stand that was different from the one which the Bangalore Stock Exchange had projected to its shareholders. He told the Board that trading was possible and that it had never been suspended and that the appellant and his legal advisor never met him. On the other hand, in the annual reports, the exchange informs the shareholders that it had been exploring various avenues to revive the trading and that it was trying to tie up with other exchanges for capital and technology infusion for commencing trading. It follows that till such time

capital and technology are not infused, trading could not re-start. The directors were exploring a host of other options as well and that they were confident that some headway would be made. It is common ground between the parties that trading on the Bangalore Stock Exchange has not commenced till date. The statement to the shareholders clearly depicts a different stand from one taken by Ananda Kumar before the Board. It appears to us that the stand taken by Shri Ananda Kumar before the Board in his letter of 12th December, 2005 was born out of his apprehension that the Board may not proceed against the stock exchange for not having its systems in place for trading. One cannot lose sight of the fact that a stock exchange is also a market intermediary subject to the regulatory control of the Board. In this view of the matter, we have no hesitation to hold that the statement of Shri Ananda Kumar in his letter of December 12, 2005 was not factually correct and it was he who misled the Board. The statements contained in the annual reports support the plea taken by the appellant that there was no trading on the Bangalore Stock Exchange and that it was not possible to transfer the shares through that exchange in favour of DLF. It is unfortunate that the adjudicating officer did not bother to look at the annual reports copies of which had been furnished to him by the appellant as well. Only, if he had looked at the annual reports, he would have known that there was infact no trading on the Bangalore Stock Exchange and that the appellant was right in this regard. He preferred to rely upon the factually incorrect statement made by Shri Ananda Kumar in the aforesaid letter as against the statement of the appellant made on oath which was subsequently reiterated in an affidavit that was filed before him. When we examine the two opposite versions in the light of the annual reports, we find that the charge against the appellant is not established.

9. Before concluding, we may notice another plea strenuously urged by Dr. Mrs. Poornima Advani learned counsel for the Board. She contended that the version of the appellant that he alongwith the legal advisor of BFSL had gone to the Executive Director to enquire about trading was not credible as there was no occasion

for any trader to visit the Executive Director for that purpose. Instead of meeting the Executive Director, the appellant and the legal advisor should have approached a broker member of the exchange and should have started trading. We are unable to agree with her. There is no gainsaying the fact that in January, 2005 when the appellant is said to have met the Executive Director, there had been no trading on the Bangalore Stock Exchange for more than two years. In such a situation if a party wants to trade shares worth 90 crores, it is natural that he would check up with the Executive Director as to whether trading was possible. To put it differently, it would be a folly for any trader to straightaway put in such a large trade on an exchange where there has been no trading for two years and more.

For the reasons recorded above, the appeal is allowed and the impugned order set aside with no order as to costs.

Sd/-
Justice N.K. Sodhi
Presiding Officer

Sd/-
Utpal Bhattacharya
Member

26.11.2008
RHN