

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on: 11.12.2019

Date of Decision : 29.01.2020

Misc. Application No. 3 of 2019

And

Misc. Application No. 532 of 2019

And

Appeal No. 407 of 2018

A.T. Rajan
301 Daisy,
Omaxe Green Valley,
Sector 42,
Faridabad – 121 010.

...Appellant

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. Ashim Sood, Advocate with Ms. Shreya Suri, Mr. Rhythm Buaria and Mr. Saurabh Bachhawat, Advocates i/b Indus Law for the Appellant.

Mr. Gaurav Joshi, Senior Advocate with Mr. Vivek Shah, Advocate i/b ELP for the Respondent.

WITH

Misc. Application No. 579 of 2019

And

Appeal No. 427 of 2018

T. Takano
28-186, Tsutsujigaoka, Aoba-ku,
Yokohama-city, Kanagawa-pref.,
227-0055, Japan

...Appellant

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. Ashim Sood, Advocate with Ms. Shreya Suri, Mr. Rhythm Buaria and Mr. Saurabh Bachhawat, Advocates i/b Indus Law for the Appellant.

Mr. Gaurav Joshi, Senior Advocate with Mr. Vivek Shah, Advocate i/b ELP for the Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Dr. C.K.G. Nair, Member
Justice M.T. Joshi, Judicial Member

Per : Dr. C.K.G. Nair, Member

1. These two appeals have been filed to challenge the confirmatory order dated August 16, 2018 passed by the Whole Time Member ('WTM' for short) of Securities and Exchange Board of India ('SEBI' for short). By the said order directions contained in the interim order dated February 12, 2018, along with the corrigendum dated March 6, 2018, were confirmed. By the interim order appellants, among others, have been restrained from accessing the securities market or dealing with the securities market directly or indirectly and BSE Limited ('BSE' for short) was directed to appoint an independent auditor / audit firm for conducting a detailed forensic audit of the books of account of Ricoh India Limited ('Rico' for short) from the financial year 2012-13 till March 6, 2018. The said forensic audit had to be completed and the report submitted to SEBI through BSE within

six months from March 6, 2018 i.e. latest by early September 2018. Since both these appeals are filed challenging the same impugned order, by consent of the parties, both the appeals are heard together and decided by this common decision by taking Appeal No. 407 of 2018 as the lead matter.

2. Following certain observations by the statutory auditor of Ricoh M/s. BSR & Co. LLP while conducting review of the financial statements of quarter ending June 30, 2015 and half year ending September 30, 2015 Ricoh ordered a preliminary investigation through PricewaterhouseCoopers Private Limited, India ('PwC' for short). Based on the findings in the preliminary investigation report Ricoh sent a letter to SEBI dated April 20, 2016 stating that the financial statements of the Company for the quarters ending June 30, 2015 and September 30, 2015 did not reflect the true and fair view of the state of affairs of the Company and therefore requested SEBI to conduct an investigation into possible violations of SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 ("PFUTP Regulations" for short). It was also stated that Ricoh was also doing further investigation to ascertain the extent of deviations from the true state of affairs and the reasons for the same. Subsequently, Ricoh disclosed a loss of Rs. 1118 crore in its

financial statements for the year ending March 2016 in its annual report. Copy of the final report / forensic review by PwC was also submitted to SEBI by Ricoh vide letter dated November 29, 2016.

3. Based on the aforesaid information, SEBI initiated an investigation in the matter, particularly to examine the role of the Key Managerial Person (KMP) responsible for such misstatements in the books of account of Ricoh. SEBI also summoned to Mr. Manoj Kumar, Mr. Arvind Singhal and Mr. Anil Saini three senior officials of Ricoh to appear before the investigating authority for recording their statements. Mr. Manoj Kumar and Mr. Arvind Singhal, in addition, also gave their written submissions. Thereafter, SEBI sought further details from Ricoh which was also provided by the Company. Thereafter based on its own investigation and findings it was noted by SEBI that the financial misstatements commenced from the financial year 2012-13 onwards and Ricoh suffered considerable amount of loss on account of transfers to third parties, write-offs or non-recovery of debts, non-existence of inventory etc. It was further noted that share price of Ricoh had gone up considerably on account of the misstatements in the accounts and consequent painting of a rosy picture regarding its profitability. Share price rose from Rs. 33/- on April 2, 2012 to Rs. 1030/- on August 4, 2015 which, however,

declined to Rs. 413/- on April 1, 2016 and further to Rs. 193/- on December 12, 2016. Similarly, from a net loss of Rs. 1.32 crore in 2012-13 the loss increased to Rs. 1118 crore in 2015-16.

4. Appellant in Appeal No. 407 of 2018 was a long serving official of Ricoh and was Senior Vice President and Chief Strategy Officer during 2014-15 and 2015-16. Subsequently on April 13, 2016 he was appointed as MD and CEO. Appellant in Appeal No. 427 of 2018 was the MD and CEO of Ricoh during 2012-13 to 2014-15.

5. Learned Counsel Shri Ashim Sood representing the appellants submits that the impugned order has been passed in absolute disregard of the settled principles of natural justice and fair hearing. Though written submissions of the appellants were taken on record by the WTM of SEBI those submissions have not been considered while confirming the interim order. Moreover, both the appellants were not given another opportunity for personal hearing though the appellants repeatedly sought the same while filing their supplementary submissions.

6. Further, it was contended by the learned Counsel for the appellants that SEBI relied only on the findings in the preliminary report / forensic audit by PwC but the same report did not find any

evidence against the appellants nor their names were included in any wrongdoing. Therefore, while relying on the said PwC report, instead of sticking to the finding in the report that three employees of Ricoh and an outside entity was involved in the malafide activities of financial wrongdoing, the names of the appellants have been arbitrarily added in the Show Cause Notice and thereafter an *ex parte* interim order was passed against them without any basis. However, the appellants fully cooperated with the enquiry of WTM of SEBI and provided detailed replies to the WTM. Instead of considering those replies the impugned order just records the same and proceeded to confirm the directions contained in the interim order without having any regard to the consequences of the restraint order on the appellants.

7. It was specifically pointed out by the learned Counsel for the appellant that vide letters dated March 6, 2018, June 6, 2018 and June 28, 2018 and during personal hearing on June 11, 2018 that there was no mention whatsoever regarding any alleged role and involvement of the appellant in any fraudulent transaction in the interim order. It was also submitted that the appellant was not dealing with any of the financial matters of Ricoh; he was made MD only on April 13, 2016 and he was never Head of SCM and was only Senior Vice President, Corporate Strategy Office etc.

However, these submissions are not considered and without considering the submissions the interim directions were confirmed vide the impugned order. Similarly, Mr. T. Takano also vide his letters dated June 6, 2018 and June 28, 2018 and personal hearing on June 11, 2018 also submitted that there was no evidence relating to his wrongdoings and only because he was the MD and CEO in previous years his name has been included in the list of those who are responsible for the alleged wrongdoings. Therefore, a vicarious liability has been cast upon this appellant without any evidence / finding about his role in the wrongdoings only because he was MD and CEO of Ricoh and such liability has been imposed without considering the submissions made by the appellant.

8. The learned Counsel for the appellants while substantiating the stand also read out paragraph 28 of the impugned order which reads as follows:-

“I note that the facts of the case clearly Point towards large-scale irregularities in the business transactions of the company and manipulations in its books of accounts amounting to fraud. However, the actual extent and time span of such irregularities and manipulations and the exact roles of the Noticees in such alleged fraud are still not fully ascertained. In the absence of any crystallised findings with regard to the individual roles of the Noticees, it would be premature to give credence to the submissions of the individual Noticees.”

Similarly, he also emphasized paragraph 29 of the said order which reads as follows:-

“I note that the independent auditor / audit firm, appointed by the BSE for conducting a detailed forensic audit of the books of accounts of Ricoh for the financial year 2012-13 onwards, as per the directions in the Interim Order, is yet to submit its report to SEBI through BSE and a clear picture regarding the financial affairs of the company and the role of various Noticees in the alleged fraud is yet to emerge pending such investigation. Therefore, it would be prudent to keep all questions related to the role of the Noticees in the alleged fraudulent and manipulative activities open so that the investigations pending in the matter may not be prejudiced in any manner by this order. Consequently, I find it appropriate not to vacate the directions issued against the Noticees vide the Interim Order at this stage, in the interest of the investors and the integrity of the securities market.”

9. Therefore, the learned Counsel for the appellants contended that there is no evidence relating to any malafide activities or any collusion or abetment from the side of the appellants. The forensic report as ordered by SEBI had to be made available through BSE latest by the first week of September 2018. Even after one year SEBI has not brought out the said report or passed any final order in the matter. Therefore, appellants are undergoing restraint since March 6, 2018 for no fault of theirs and since there is no evidence relating to any wrongdoing from the part of the appellants, just based on suspicion and on the presumption that evidence may be

forthcoming in the forensic report etc. the impugned order cannot be sustained.

10. In order to press his contentions the learned Counsel for the appellants relied on ***Union of India (UOI) vs Chaturbhai M. Patel & Co. (MANU/SC/0046/1975)*** and submitted that in the absence of proving a case of fraud against the appellants the impugned order cannot survive. Further, by relying on ***Maharashtra State Board of Secondary and Higher Secondary Education vs K.S. Gandhi and Others (1991) 2 SCC 716*** it was canvassed that “*If there are no positive proved facts, oral, documentary or circumstantial from which the inferences can be made the method of inference fails and what is left is mere speculation or conjecture*” the alleged prima facie violations cannot be sustained without evidence. Further relying on ***63 Moons Technologies Ltd. vs Union of India 2019 SCC OnLine SC 624*** it was submitted that only subsequent materials i.e., materials in the form of facts that have taken place after the order in question is passed, that can be looked at or relied on subsequent to passing of the impugned order and therefore the forensic audit report which is now available and sought to be used as evidence to sustain the impugned order at this stage is legally untenable. Learned Counsel for the appellant also relied on ***State***

of Goa and Another vs Colfax Laboratories Ltd. and Another (2004) 9 SCC 83, Fedco (P) Ltd. Another vs S.N. Bilgrami Others (1960) 2 SCR 408 : AIR 1960 SC 415 and The Siemens Engineering Co. of India Ltd. vs. The Union of India and Another (1976) 2 SCC 981 to support his contentions.

11. Learned Senior Counsel Shri Gaurav Joshi appearing on behalf of SEBI, on the other hand, contended that the impugned order is not just based on the report / forensic review of PwC; in addition SEBI also conducted an investigation and sought details from the Company etc. The impugned order contains clear cut evidence relating to large scale diversion and misstatements of funds of Ricoh to the tune of Rs. 1118 crore. By giving a rosy picture and thereby appellants misleading the public has resulted in considerable loss to the investors and therefore passing the impugned order was very much in public interest since it was relating to the interest of a listed Company, its investors and the stakeholders at large.

12. The learned Senior Counsel for respondent SEBI further contended that for unknown reasons the PwC report was restricted to chose a six months period of June and September quarters of 2015 only when it was already on record that misstatements of accounts started from financial year 2012-13 onwards. Hence, the

attempt of the management of Ricoh, which included the appellants and other noticees, was just to cover up the entire issue and hence the limited brief of enquiring into six months financial statements given to the PwC but even this report of PwC dated November 17, 2016 points out serious anomalies in the financial statements of Ricoh as given in paragraphs 4 and 5 at page 3 of the impugned order. Similarly, its dealing through entities such as FDSL and Redhex belonging to relatives of the noticees, transfer of funds and transactions of circular nature through those entities are all part of the finding of the SEBI's investigation as detailed at pages 5, 6 and 7 of the impugned order. The relationship between persons involved in the suspect transactions are also detailed in the PwC report as shown at page 8 of the impugned order. SEBI's own investigation by which Rs. 683 crore losses came into picture and how the share prices and profitability of the Company got affected in the process are all on record.

13. It was also contended by learned Senior Counsel for SEBI that KMPs such as MD & CEO cannot take shelter under ignorance of the wrongdoings in the Company and place such wrongdoings only at the doorsteps of their junior officers. In the instant case the amount of misstatements is more than Rs. 1100 crore and no MD who has been at the helm for years can pretend

ignorance of the same and get away with it. As regards Mr. A.T. Rajan irrespective of whether he was Head of SCM (in fact the order at page 12 states the designation correctly based on his own statement), in any case he was a senior officer of Ricoh as Senior Vice President and Chief Strategy Officer who was senior enough to be made the MD and CEO on April 13, 2016. Even if he was not in-charge of the finance division findings regarding misstatements of accounts relating to inventories squarely come within the Supply Chain Management unit which was his responsibility and given such a finding his involvement is not a matter of just conjecture and suspicion.

14. The learned Senior Counsel for the respondent SEBI also guided us through various transactions of Ricoh with FDSL and Redhex and other companies involved and the role of the KMPs of Ricoh and other third parties who have been found to have violated Section 12A(a), 12A(b) and 12A(c) of SEBI Act, 1992 read with regulations 3(b), 3(c), 3(d), 4(1), 4(2)(e), 4(2)(k) and 4(2)(r) of PFUTP Regulations. The learned Senior Counsel further submitted that more evidence is now available through the forensic audit got done by BSE, report of which is now available, which SEBI wanted to place on record. It was also submitted that vide affidavit dated September 17, 2019 the concluding

paragraphs of the said forensic report was placed on record which contains the appellants' role. Therefore, while the investigation is continuing, it is also in the fitness of things that some more time be granted to SEBI to pass a final order taking into account the evidence contained in the forensic report and other evidence collected in the interim and thereby issuing a comprehensive show cause notice. On instructions, the learned Senior Counsel further submitted that such a show cause notice will be issued within one week and subject to the appellants cooperation a final order can be passed within a very short time as may be allowed by this Tribunal.

15. The learned Senior Counsel, relying on *Chairman, All India Railway Recruitment Board and Another vs K. Shyam Kumar and Others (2010) 6 SCC 614* submitted that additional grounds can be looked into to examine the validity of an order in public interest. SEBI has passed the impugned order under Section 11 and 11B in public interest. Similarly, relying on *K.K. Ahuja vs V.K. Vora and Ors. MANU/SC/1111/2009* it was contended that the role of MD or Joint MD and their accountability are well established in law and hence application of Section 27 of the SEBI Act to contend that Mr. Takano is squarely covered in the matter.

16. Having heard the detailed submissions made by the learned counsel for the parties and having perused the documents placed before us we are of the view that interim directions passed on February 12, 2018 has been in operation for about 21 months now. Even after the confirmatory order dated August 16, 2018 more than 16 months have passed. The forensic report was to be available latest by first week of September 2018 pending which hearing of these appeals had been postponed periodically. We further note that while hearing on a Misc. Application filed by Mr. Arvind Singhal, one of the noticees in this proceedings against whom also directions have been passed by the said orders, we had directed SEBI to make the forensic report known by the last week of August 2019.

17. Be that as it may. The more proximate issue before us is to decide whether the impugned order can be sustained on its own merits. Here we find paragraph 28 and 29 of the impugned order (quoted at paragraph 5 and 6 of this order) bring out only a suspicion about the role of the appellants. Moreover, we note that though the submissions of the appellants have been noted in detail in the impugned order they have not been dealt with appropriately. Concluding part of paragraph 28 of the impugned order states as below:-

“In the absence of any crystallised findings with regard to the individual roles of the Noticees, it would be premature to give credence to the submissions of the individual Noticees.”

Similarly, paragraph 29 of the impugned order further states that:-

“a clear picture regarding the financial affairs of the company and the role of various Noticees in the alleged fraud is yet to emerge pending such investigation.”

18. Therefore, the question before us is how long the appellants would be kept out of the market through directions contained in an interim order and confirmatory order which are based on only a prima facie suspicion and vicarious liability attributable to a MD / CEO. This question becomes more relevant particularly in the facts of the case where we are told that the Company Ricoh itself is under liquidation and the appellants are not in-charge of the said Company and therefore not in a position to influence the decisions of the Company. Moreover, we also note that the submissions made by the appellants have not been dealt with in the impugned order in any meaningful manner thereby effectively confirming the interim directions without taking into account the submissions and the documents made available by the appellants. Given these factors we find it difficult to sustain the impugned order qua the appellants.

19. In the result, both the appeals succeed and the impugned order is quashed qua the appellants. However, SEBI is at liberty to issue a fresh show cause notice and proceed in the matter in case evidence against the appellants are available through the forensic audit report or through SEBI's own investigation. No orders on costs.

20. Misc. Application Nos. 3 of 2019 and Misc. Application No. 532 of 2019 in Appeal No. 407 of 2018 and Misc. Application No. 579 of 2019 in Appeal No. 427 of 2018 seeking interim relief have become infructuous and are disposed of as such.

Sd/-
Justice Tarun Agarwala
Presiding Officer

Sd/-
Dr. C.K.G. Nair
Member

Sd/-
Justice M.T. Joshi
Judicial Member

29.01.2020

Prepared and compared by:msb