IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1019 OF 2008

Mr. Dattaraj V. Salgaocar … Petitioner.

V/s.

State of Maharashtra & Anr. … Respondents.

WITH
CRIMINAL WRIT PETITION NO. 1362 OF 2008

Smartlink Network Systems Limited & Ors. … Petitioners.

V/s.

State of Maharashtra & Anr. … Respondents.

Mr. Amit Desai, Senior Counsel a/with Gopal Shenoy, Aditya Mehta and Ms. Karina Kriplani, Advocates i/by Amarchand & Mangaldas & Suresh A. Shroff & Co. for the Petitioners in both the petitions.
Mrs. A. A. Mane, APP for the State.
Mr. B.G. Bidanchandran, Advocate for Respondent No.2.

CORAM : M.L.TAHALIYANI,J.
DATE : 03rd MARCH, 2015

P.C. :

1 These writ petitions impugn the order passed by the learned additional Metropolitan Magistrate, 47th Court, Esplanade, Mumbai in criminal case no. 30/SS/06 and the

order passed by the learned Sessions Judge in criminal revision application no. 937 of 2007.

2 The petitioners in both the petitions are accused in criminal case no. 30/SS/2006 and they are facing trial for the offence punishable under section 77A (11) of the Companies Act, 1956. The learned senior counsel Mr. Amit Desai on behalf of the petitioners has submitted that the proceedings were initiated against the petitioners for the same issue by the Securities and Exchange Board of India (SEBI) and that the Board found the petitioners guilty. However, the Securities Appellate Tribunal, Mumbai exonerated the petitioners. The copies of both the orders are placed before me for my perusal. It is submitted by the learned senior counsel that exoneration of the petitioners by the Appellate Tribunal and particularly in view of the fact that the said order has not been challenged by the respondent/complainant, the petitioners are entitled to be exonerated from the criminal prosecution also. Mr. Desai has further submitted that the offence under section 77A(11) of the Act is not complete unless offer (announcement) is made by the company. My attention was invited to the fact that there was a resolution of the company which authorized the Board to buy-back the shares. However, there was no offer and therefore, the ingredients of the offence under section 77A(11) were not complete. It is submitted that the Petitioners have not violated any of the provision of section 77A of the

Companies Act. This view is taken by the Appellate Tribunal also. The Appellate Tribunal in its judgment at paras 6 and 7 has stated as under :

> “6. We have heard Shri Amit Desai learned senior counsel on behalf of the appellant and Shri Shiraz Rustomjee Advocate on behalf of the Board. The first question that needs to be answered is whether the appellant company was under any obligation to go ahead with the buy-back after its shareholders had passed a special resolution in the EGM authorizing it to buy-back its fully paid up equity shares. On a reading of the provisions of section 77(A) of the Act and the relevant provisions of the buy-back regulations to which detailed reference has been made in the earlier part of our order we are of the considered view that a company is under no obligation to buy-back its securities even if its shareholders have passed a special resolution authorizing it to buy-back on the terms and conditions mentioned in the resolution. Section 77(A) of the Act is only an enabling provision and all that it mandates is that no company shall buy-back its own securities unless it is authorized by its articles and also by its shareholders. But even where the shareholders pass a special resolution, it does not become obligatory for the company to buy-back the shares. The passing of a special resolution by the shareholders is the first step by which they authorize the company and the second step would be the decision of the company to buy-back by making an offer to its shareholders. The buy-back regulations prescribe the manner in which such an offer could be made. Since the shareholders of the appellant company had authorized it to buy-

back the shares from the open market through the stock exchange, Regulation 15 of the buy-back regulations read with Regulation 8 required it to make a public announcement if it wanted to buy-back and the public announcement would then have been the offer which the company would have made to its shareholders. As it took no decision to buy-back, it did not come out with a public announcement and consequently no offer to buy-back was made to the shareholders.

7. At this stage it would be relevant to refer to clause (d) of Regulation 19(1) of the buy-back regulations which reads as under : –

> "19. Obligations of the Company--(1) The company shall ensure that :-
> (a) to (c) **
> (d) the company shall not withdraw the offer to buy-back after the draft letter of offer is filed with the Board of public announcement of the offer to buy-back is made;"

This provision is a clear indication that once the company has made an offer either by issuing a letter of offer or by public announcement to its shareholders to buy-back, it cannot withdraw the same. It follows that it is only when the second step of making an offer to the shareholders has been taken that the company is obliged to go through with the buy-back. In the case before us the company had not come out with a public announcement and, therefore, it was open to it not to go through with the buy-back."

3 To counter this argument, the learned counsel for the Respondent - SEBI has submitted that the judgment of the Securities Appellate Tribunal is based on the regulations which are secondary legislations and cannot overrule the provisions of the Companies Act. In this regard, one may take note of the provisions of section 77A(2) of the Companies Act. It will be apt to reproduce section 77A (1) & (2).

> "77A. Power to company to purchase its own securities,--
>
> (1) Notwithstanding anything contained in this Act, but subject to the provisions of sub-section (2) of this section and section 77B, a company may purchase its own shares or other specified securities (hereinafter referred to as "buy-back") out of –
>
> (i) its free reserves; or
> (ii) the securities premium account; or
> (iii) the proceeds of any shares or other specified securities;
>
> **Provided** that no buy-back of any kind of shares or other specified securities shall be made out of the proceeds of an earlier issue of the same kind of shares or same kind of other specified securities.
>
> (2) No company shall purchase its own shares or other specified securities under sub-section (1), unless –-
>
> (a) the buy-back is authorised by its articles;
> (b) a special resolution has been passed in general meeting of the company authorising the buy-back;

[**Provided** that nothing contained in this clause shall apply in any case where -

(A) the buy-back is or less than ten per cent, of the total paid-up equity capital and free reserves of the company; and

(B) such buy-back has been authorised by the Board by means of a resolution passed at its meeting;

Provided further that no offer of buy-back shall be made within a period of three hundred and sixty-five days reckoned from the date of the preceding offer of buy-back, if any,

Explanation. – For the purposes of this clause, the expression "offer of buy-back" means the offer of such buy-back made in pursuance of the resolution of the Board referred to in the first proviso;]

…. …..
…. …..

One may also take note of the provisions of section 77A (2)(f) & (g) which read as under :

(f) the buy-back of the shares or other specified securities listed on any recognized stock exchange is in accordance with the regulations made by the Securities and Exchange Board of India in this behalf;

(g) the buy-back in respect of shares or other specified securities other than those specified in clause (f) is in accordance with the guidelines as may be prescribed."

4 As such considering these provisions of the Act and the regulation, it was necessary for the respondent to demonstrate that there was an offer or public announcement of buy-back of equity shares. Unless that is there the offence would not be complete. As already stated, there was no public announcement. Similar view has been taken by the Tribunal also. For these reasons, in my considered opinion, the prosecutions against the petitioners cannot be continued as the same amounts to abuse of process of court.

5 Hence, I pass the following order :

i. Both the writ petitions are allowed.

ii. The proceedings pending against the petitioners in the court of Metropolitan Magistrate, 47th Court, Esplanade, Mumbai vide criminal case no. 30/SS/06 are hereby quashed.

At this stage, I am told that these cases are transferred to the Special Judge at Sessions Court, Mumbai. It is, therefore, directed that this order should be applicable to new number given to the case no. 30/SS/2006.

(JUDGE)

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