HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

Writ Petition No.21471 of 2006

ORDER :

The petitioner by name Sri Krishna Naik, Managing Director of M/s. Golden Carpets Limited(for short, 'the GCL'), maintained the Writ Petition against the respondent-Securities and Exchange Board of India(for short, 'the SEBI'), represented by its Manager, with the prayer to issue writ order or direction in the nature of certiorari or any other appropriate writ or order or direction calling for the records in C.C.No.169 of 2005 on the file of the Special Judge for Economic Offences, Hyderabad and quash the same and also with another prayer in seeking writ of mandamus and other appropriate one declaring the action of the respondent supra in filing C.C.No.169 of 2005 against the petitioner as illegal and unjust with a consequential direction holding said proceedings won't lie u/sec.24(1) of the SEBI Act and to pass such other order or orders deems fit.

2. The supporting affidavit averments of the writ petitioner are that in GCL, a Public Limited Company (incorporated on 02.12.1993 and converted as Public Limited Company on 21.12.1994 having started commercial production during 98-99) by 2001 he invested a total sum of Rs.61 lakhs at regular intervals in view of the insistence of Industrial Development Bank of India (for short, 'the IDBI') for additional working capital, the IDBI directed him of the investment of Rs.61 lakhs should be converted into Equity Capital. By 09-09-1992 the SEBI [Substantial Acquisition of Shares and Takeovers-(for short, 'SAST')] Regulations, 1997 was amended and under Regulation No.3(1) © acquisition of shares by an acquiral in a Company on preferential basis was exempt from making a public announcement about acquisition of shares, that on 24-

12-2002 the petitioner's investment was converted as 6,10,000 shares representing 9.26% voting capital of 65,90,900 Equity Shares of the Company, that the Chairman, SEBI, issued a show cause notice stating that the petitioner had acquired the above referred shares without making a public announcement and prima facie violated the provisions of the SEBI Regulations 11(1) r/w Regulation 14(1) and thereby liable for penal action under the Regulations and the SEBI Act. It is averred that the petitioner has submitted a detailed explanation dt.21-02-2003 and 23-06-2003, the Chairman, SEBI, passed final order pursuant to show cause notice directing the petitioner to pay interest at 10%p.a. on the offer price to the shareholders from 01.05.2003 till the date of actual payment of consideration and besides that on 21.07.2003 one A.Sunil Kumar appointed as the Adjudicating Officer by the SEBI to enquire into and adjudge under Sec.15(h)(ii) of the SEBI Act on the alleged contraventions of Regulations 11(1) r/w Regulation 14(1) of SEBI (SAST)) Regulations, 1997 on the self-same allegations of the petitioner failed to make the public announcement on above referred acquisition of additional shares. *The Adjudicating Officer gave a show cause notice dated 31-07-2003 to the petitioner though there was no allotment of any shares in his favour and the same could be validly rescinded by the Board of Directors of the company without attracting the provisions of Reduction of Capital under the Companies Act, in its meeting held on 31-07-2003, the shares proposed to be allotted in his favour was rescinded ab initio and the petitioner handed over the relevant Share Certificates back to the Company duly endorsing that the Share certificates have been cancelled and the petitioner also submitted his explanation to the Adjudicating Officer on 12.08.2003*. It is averred that the Adjudicating Officer passed the final order on 29.02.2004 imposing a fine of Rs.5 lakhs on the petitioner as a penalty and directed that the said amount had to be paid by way of a Demand Draft drawn in favour of SEBI Penalties, remittable to Government of India, payable at Mumbai, that the petitioner made an Appeal bearing No.68/01 before the Securities Appellate Tribunal (for short, 'the SAT'), Mumbai. The SAT, by order dt.29.06.2004 disposed of the appeal and it is noticed that the preferential allotment of shares in his favour stood annulled by subsequent resolution of Board of Directors of the Company, though until 02.09.2002 such acquisition by way of Preferential allotment were entitled automatic exemption from the discipline of Regulations, that the IDBI imposed a condition while approving the restricting proposal for converting the 61 lakhs into Equity and that the alleged violation by the petitioner need to be viewed leniently and accordingly, the SAT, reduced the penalty amount from Rs. 5 lakhs to Rs. I lakh and after disposal of the appeal by the SAT, the SEBI filed C.C.No.169 of 2005 on 01.09.2006 before the Special Judge for Economic Offences, Hyderabad under Regulation 11(I) r/w Regulation 14 (I) of SEBI (SAST) Regulations, 1997 r/w Sec.24 of the SEBI Act.

3. Impugning said proceedings in C.C.No.169 of 2005, the petitioner submits that he did not violate any of the provisions of the SEBI Act or said Regulations and he paid penalty amount as imposed by the SAT of Rs.1 lakh and there is no subsisting direction against the petitioner to make any public announcement and there are no additional shares in his favour and the complaint filed by the SEBI won't lie and it tantemounts to double jeopardy for the self-same allegations without there being any contravention and thereby sought for quashing.

4. The complaint which is the subject matter of impugnment in the Writ Petition reads in nutshell that the accused is Director of GCL registered under the provisions of the Companies Act, where holding 30.82% of equity shares and on 24.12.2002, the petitioner/accused acquired 6,10,000 equity shares of GCI, at face value of Rs.10/-each through preferential allotment which resulting in increase of share holding of accused in GCL from 30.82% to 37.22% and as a result the equity share holding of the accused in GCL increased by 6.4% of total share holding which is more prescribed under the Regulation 11(1) of the SEBI(SAST) Regulations, 1997 and the accused taken place without making public announcement under Regulation 10 and 11 read with 14(1) of the SAST Regulation and because of its violation for no public announcement within 4 working days of entering into agreement for acquisition of such additional shares and voting rights or deciding to acquire such additional shares of voting rights as provided under Regulation 14(1) supra and as the accused acquired shares without complying with the requirement of Regulation 11 of SAST Regulation, *to the show cause notice issued on 31.01.2003, reply of accused issued on 02.12.2003 saying as if said allotment was exempted under Regulation 3(1) of SAST Regulations from making open public offer and the exemption relied on by the accused was in fact deleted/omitted by the SEBI(SAST) (second Amendment)Regulations 2002. Those were brought into force w.e.f. 09.09.2002 and the date of allotment was subsequent to that on 24.12.2002 to accused and he is required to make open offer under Regulation 11 r/w 14 pursuant to acquire shares in question (4 working days of entering into agreement for acquisition) under SEBI Act, opportunity of personal hearing of accused and after his submission, passed order on 23.06.2003 directing to make public offer in terms of*

SAST Regulation 11(1) of SAST Regulation 1997 within 45 days from date of order and said order of Chairman SEBI, on 23.06.2003 duly sent to accused by letter dt.24.06.2003 however the accused in spite of service of the order failed to comply Regulations and Directions of the Chairman supra and adjudication proceedings were initiated against the accused u/sec.15(h) of the SEBI Act and penalty of the 5 lakhs imposed by the Adjudicating Officer on 20.02.2004 and the SAT on 29.06.2004 upheld the adjudication order by reducing the quantum of penalty to 1 lakh from 5 lakhs and thereby sought to take cognizance of the offence punishable u/sec.24(1) of the SEBI Act against the accused and punish him according to law.

5. The counter affidavit of Sri DV Sekhar, Deputy Legal Advisor(Prosecutions), of SEBI with stay vacate petition in WVMP No.2379 of 2006 is with the averments that in the CC No.169 of 2005 filed u/sec.24(1) of SEBI Act, after complainant-S.V.Muralidhar Rao, General Manager, SEBI and another were examined and the case while coming for framing of charges, the petitioner filed this writ petition, with no bona-fides. _The Chairman of SEBI by order dt.23.06.2003 held that the acquisition of shares by the Writ Petitioner was illegal and directed the writ petitioner to make public announcement as required under Chapter III of SEBI (SAST) Regulations 1997 in terms of Regulation 11(1) taking the date 16.08.2002, the date of 1st Board Resolution for convening the general meeting to consider the preferential allotment of shares to the acquirer, as the reference date for calculation of offer price in terms of explanation (ii) to Regulation 20(11) of the Regulations, within 45 days from 23.06.2003 and para-9.2 of the order of the Chairman supra speaks that in terms of Sub-Regulation (12) of Regulation 22, the payment of consideration to the shareholders of the Target Company has to be paid_

within 30 days of closure of the offer and maximum time provided for completing offer formalities in respect of open offer, is 120days from the date of public announcement which ought to have been made by 31.12.2002 and entire process to be completed by 30.04.2003 and as no public announcement for acquisition made which adversely effected the interest of the shareholders of Target Company and it is equitable to direct the acquirer to pay 10% per annum interest on the offer price, the Court in so directing to pay to the shareholders for the loss of interest caused to the shareholders from 01.05.2003 till date of actual payment of consideration. It is further submitted that the order is final and the petitioner did not choose to file appeal before SAT and thereafter Adjudicating Officer, SEBI passed an order on 20.02.2004 under Rule 5(1) of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules,1995 and imposed a penalty of Rs.5 lakhs under Section 15(h)(ii) and SEBI and violation of 11 (1) read with 14(1) of the Regulations which when challenged in Appeal No.68 of 2004 before the SAT and the SAT by its order dated 29.06.2004 reduced the 5 lakhs to 1 lakh that became final and as the petitioner failed to make public offer after acquiring shares M/s GCL under Regulations 11(1) r/w 14(1) SEBI (SAST) Regulations which is punishable u/sec.24(1) of SEBI Act, and thereby filed complaint before the Sub Judge, Economic Offences that was taken cognizance having as C.C.No.169 of 2005 and the prosecution is valid and there are no grounds to quash.

6. Coming to the contention of the petitioner handed over back the relevant share certificates of the Company duly endorsing share certificates cancelled, the counter contest is that it will not absolve the petitioner from criminal liability and the fact that he paid the penalty as per modified orders of the SAT, it cannot exonerate him from criminal

liability and the contention that same is effected by double jeopardy is not tenable for both these are independent to each other and the order passed by SAT will not prevent his criminal prosecution and earlier the petitioner was not prosecuted u/sec.24(1) and the complaint is not the second one and thereby sought for dismissal of the writ petition for no grounds to quash the Calendar Case.

7. Heard both sides with respect to the rival contentions and perused the written submissions which are with reference to the contentions covered by the pleadings and other material supra and also perused the entire material on record.

8. The facts directly not much in dispute so also with reference to the respective pleadings and proceedings supra in deciding scope of the writ petition and as such no way requires repetition.

9. The point for consideration is whether the Calendar Case cognizance proceedings of the Special Judge, won't lie including on the ground of double jeopardy if any as contended by the Petitioner?

10. Now coming to decide the same, it is necessary to refer Section 24 of the SEBI Act and the Regulation Nos.11 r/w 14 of the SAST Regulations 1997 amended in 2002 and the consequences of the cancellation of the shares and surrendering back whether before or after the initiation of the prosecution.

11. Section 24, deals with offences reads that: (1) <u>Without prejudice to any award of penalty by the adjudicating officer under this Act</u>, <u>*if any person contravenes or attempts to contravene or abets the contravention of the provisions of this Act or of any rules or regulations made there under*</u>, he shall be punishable with imprisonment for a term

which may extend to ten years, or with fine, which may extend to twenty-five crore rupees or with both. (2) If any person fails to pay the penalty imposed by the adjudicating officer or fails to comply with any of his directions or orders, he shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to ten years or with fine, which may extend to twenty-five crore rupees or with both.

12. Regulation No.11 in relation to Consolidation of holdings and Regulation No.14 in relation to Timing of the public announcement of offer speak from their consolidated reading that no acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, [15 per cent or more but less than [fifty five per cent (55%)]] of the shares or more than 5% voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise; similarly fifty-five per cent (55%) or more but less than seventy-five per cent (75%) of the shares or voting rights in a target company similarly even desirous of consolidating his holdings while ensuring that the public share holding in the target company does not fall below the minimum level permitted by the listing agreement to do so …….*unless makes a public announcement to do so in accordance with the regulations, not later than four working days of entering into an agreement for acquisition of shares or voting rights or to acquire shares or voting rights exceeding the respected percentages supra.*

13. From the above, merely because IDBI directed on 13.11.2001 to convert the petitioner's investment supra into equity capital, he cannot abdicate the statutory provisions supra. The above Regulations

no way speak to get any exemption from penal consequences of such violation from any decision of Board of Directors of the Company by meeting to re-issue the forfeited equity shares of the petitioner in relation to said periodical shares much less on preferential basis with any increase and the non-involvement of change of management and control of the Company from 30.82 to 37.22% increase in the shareholding; unless shown not covered by said Regulations with penal consequences for cannot escape to question the prosecution. Coming to the claim of hit by double jeopardy from earlier payment of any penalty for such violation in a different proceeding referred supra before the Board modified in Appeal, referring to Section 15(I) and (U) of SEBI Act of adjudicating officer of the Board is deemed to be a Tribunal and same is a judicial proceeding therein within the meaning of deemed Court and other contention of lack of mensrea to visit the penal consequence u/sec.24 of the Act, to constitute an offence therefrom concerned:

14. The 5 Judge Bench expression of the Apex Court in Maqbool Hussain Vs. State of Bombay[1] where it came for consideration the scope of Autrefois convict referred in Article 20(2) of the Constitution of India vis-à-vis bar of second proceeding under section 403(old)=300(new) CrPC from original recourse under the Sea Customs Act, 1878 for levy of Sea Customs duties in relation to importation and exportation of goods with restrictions u/sec.18 and 19 with penalty and confiscation in relation to the offences and detention under Preventive Detention Act, 1950 with Punjab CD Rules, 1950 as per Section 4 of the Act, it was observed Sea Customs Authorities are not judicial tribunal for confiscation and penalty by increase in rate of duty and their so called adjudication is not a judgment or order of Court or of judicial tribunal to contend any double

[1] AIR 1953 SC 325

jeopardy to question the later prosecution under Section 23 of the Foreign Exchange Regulation Act. In latter 5 Judge Bench expression of the Apex Court in S.A.Venkatraman Vs. Union of India[2] with reference to similar contentions from the Public Servants Enquiries Act, Section 2 inquiry is neither prosecution nor punishment to question latter criminal proceedings before the Special Sessions Judge for the offence u/sec.161 to 165 IPC with Section 5(2) Prevention of Corruption Act, 1947 by relying on Maqbool Hussain supra. Coming to recent past expression of the 2 Judge Bench in State of Jharkhand Vs. Lalu Prasad Yadav[3] etc., where discussed the scope of law on the bar of second trial from the issue estoppel and double jeopardy from contention negated by High Court of earlier conviction in 6 other cases arising out of same fodder scam, it is observed that it relates to same offence bar but not trial of another offence for another conspiracy even some ingredients of two offences are common by holding there can be number of separate conspiracies in the general conspiracy. Thus, none of the judgments placed reliance shall come in aid to the contention of the petitioner to say the present prosecution is hit by Section 300 CrPC unless to hold earlier imposing of penalty is by judicial tribunal on same facts to the present prosecution before the Court. In this regard, coming to the reference of Section 15(I) and (U) of SEBI Act, in Section 15(I) it is no where referred that the Board has adjudicating authority is vested with the powers of the court or tribunal however the appellate tribunal as per Section 15(U) referred as a deemed civil court and a deemed court for purpose of contempt prosecution or perjury and not stated as criminal court or deemed criminal court much less the proceeding a deemed criminal prosecution, which is a pre-requisite to claim a bar u/sec.300

[2] (AIR) 1954 SC 375
[3] 2017 (8) SCC page 1

CrPC or even of Article 20(2) of the Constitution of India to question of the continuation of present criminal prosecution from earlier penalty imposed by the both reduced by the appellate tribunal.

15. Coming to the 3 Judge Bench expression of the Apex Court in Sri Gopal Jalan Vs. CSEA Limited[4] it deals with the difference between the allotment and re-issue of forfeited shares in saying re-issue of forfeited shares is not an allotment and no question of filing any return arises in such a case as in company law allotment means appropriation out of previously unappropriated capital of a Company of a certain number of shares to a person and till such allotment the shares do not exist as such and it is an allotment the shares comes into existence and once the forfeiture of the shares as valid as per Articles of Association of a Company, it can validly forfeit in terms of it for any reason and what the shares forfeited re-issued is not thereby allotment.

16. From the above, coming to the facts of the case on hand, the shares were allotted on 24.12.2002, which is as per Board Meeting dated 16.08.2002 to re-issue the forfeited equity shares to petitioner that were re-issued supra from the AGM of the Company held earlier on 30.09.2002 and undisputedly SEBI directed the company on 23.06.2003 pursuant to it by show cause notice dated 03.01.2003, to make public announcement within 45 days therefrom that was not complied with and for which under Rule 5 of SEBI Rules 1995 penalty imposed on 20.02.2004 that was in appeal reduced on 24.06.2004 that was paid. As order supra 23.06.2003 to make public announcement within 45 days therefrom was not complied, same is the subject matter of the criminal prosecution u/sec.24 of the SEBI Act. As referred supra it is on same facts practically

[4] AIR 1964 SC 250

and the punishment provided u/sec.24 of the Act, with effect from 29.10.2002 amendment by Act, 2002 is 10 years or with fine of 25 Crores or with both substituted for "upto one year or with fine or with both" leave about said allotment of equity shares endorsed as cancelled later and said cancellation was with no date. The petitioner in this regard contends said cancellation on 31-07-2003, with the say that the Adjudicating Officer gave a show cause notice dated 31-07-2003 to the petitioner, though there was no allotment of any shares in his favour and the same could be validly rescinded by the Board of Directors of the company without attracting the provisions of Reduction of Capital under the Companies Act, in its meeting held on 31-07-2003. His say thereby is that the shares proposed to be allotted in his favour was rescinded *ab initio* and he handed over the relevant Share Certificates back to the Company duly endorsing that the Share certificates have been cancelled and the petitioner also submitted his explanation to the Adjudicating Officer on 12.08.2003 to the above effect.

17. The private complaint filed by SEBI was on 22.07.2005 which is for the alleged offence committed from said non-compliance of public announcement within 45 days from 23.06.2003 subsequent to the amended Act came into force by the date of said offence as the law in force criteria, for nothing to show any bar of period of limitation to the complaint to launch the prosecution for said offence u/sec.24 supra. However, the fact remains what were the shares allotted were cancelled and the question of compliance with any public announcement pursuant to the order supra 23.06.2003 within 45 days therefrom does not arise for the reason that meantime said allotment of equity shares endorsed as cancelled from the Board meeting dated 31.07.2003 and he claims handed over the relevant Share Certificates back to the Company where

duly endorsed of the Share certificates have been cancelled and the petitioner also submitted his explanation to the Adjudicating Officer on 12.08.2003 to the above effect. Once such is the case, at least by said period given within 45 days to make public announcement, the share certificates once cancelled, from the moment cancelled it goes back to the date of allotment and question of compliance within the outer limit of 45 days does not arise from the cancellation with an expiry of the 45 days and once such is the case, irrespective of penalty what was imposed even later for the original default, now to the prosecution for non-compliance within the time stipulated does not arise from the cancellation within that period. In that view of the matter, the prosecution is not sustainable for not a case of cancellation after expiry of said 45 days and said non-compliance within the outer limit constituted the offence and not a case of any rejoinder given to reply dated 12.08.2003 mentioning already cancelled is not correct.

18. Having regard to the above and in the result, the Writ Petition is allowed and the proceedings in C.C.No.169 of 2005 on the file of the Special Judge for Economic Offences, Hyderabad pending against the petitioner are quashed and he is acquitted. His bail bonds shall stand cancelled. Consequently, miscellaneous petitions if any pending shall stand closed.

Dr. JUSTICE B. SIVA SANKARA RAO

Date:18.03.2019
b/o.vvr.