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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPLICATION NO.1298 OF 2019
WITH
CRIMINAL APPLICATION NO.1498 OF 2019**

Madhusudan Khemka,

Age 56 years, Occupation: Service,
Residing at Y-202, Anna Nagar West,
Chennai – 600 040

... Applicant

V/s.

1. The State of Maharashtra

**2. Securities and Exchange
Board of India,**

Mittal Court, “B” Wing, 1st Floor,
Nariman Point, Mumbai 400 021

... Respondents

Mr. Hiten S. Venegaonkar with Mr. Ninad More, Mr. Joby Mathew, Ms. Nitiksha Parmar, Mr. Ramesh Gogawat, and Mr. Mahnish Malpani i/by Joby Mathew & Associates for the applicant.

Mr. A.R. Patil, APP for respondent No.1/State.

Mr Pradeep Sancheti, Senior Advocate, with Mr Darshit Jain and Mr Omprakash Jha i/by The Law Point for respondent No.2.

CORAM : AMIT BORKAR, J.

RESERVED ON : APRIL 26, 2023

PRONOUNCED ON : MAY 4, 2023

JUDGMENT:

1. These Criminal Applications under Section 482 of the Criminal Procedure Code, 1973 (hereafter "the Code", for short) call into question the legality, propriety and correctness of the order dated 26 August 2019 passed by the learned SEBI Special Judge, City Civil & Sessions Court, Greater Bombay on an application below Exhibit 46 in SEBI Special Case No.183 of 2014 whereby the prayer of the applicant to discharge him from the prosecution came to be rejected. A prayer is also made for quashing the complaint, including an order of issuance of process and framing of charges against the applicant.

2. Background facts necessary for the determination of these applications can be stated as under:

The accused offered the public to acquire 20% of the capital of M/s. Damania Airways Limited in terms of Clause 40 B of the listing agreement of the Stock Exchange, Mumbai and provisions of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 (hereafter "1994 Regulations", for short). The offer was opened on 1 February 1996 and closed on 29 February 1996.

Regulation 20(1) of the 1994 Regulations imposes a general obligation on the acquirers to publicly announce to acquire shares only when acquirers have every reason to believe they can implement the offer.

3. On 9 April 1996, a letter was dispatched to the complainant by M/s.LKP Merchant Financing Limited, the Managers to the

offer, stating *inter alia* that the despatches are being carried out by registered post from the office of Registrar at Ahmedabad. Further, vide letter dated 29 April 1996, the Managers of the issue informed the complainant that out of 19,358 applicants, cheques to 10,193 applicants had been despatched. They indicated that the acquirers were aware of this delay in completing the despatch, which violated Regulation 20. Hence, they sought an explanation from the acquirers in this regard. On 22 May 1996, Managers stated that acquirers had indicated there would be further delay in despatching the cheques and requested the complainant to grant 45 days to complete the despatch.

4. On 24 May 1996, the complainant issued a letter to the acquirers stating that non-despatch of consideration amounts to a violation of Regulation 20, asking them to explain why action should not be initiated against them for the said violation.

5. The acquirers had sent a letter to the complainant dated 10 July 1996, stating *inter alia* that consideration had been despatched to more than 60% of the applicants. They stated that they could not raise funds against the security due to the liquidity crunch in the market, and hence they could not complete the payments in time.

6. Consequently, the complainant issued a Show Cause Notice to the acquirers dated 2 August 1996. The acquirers replied to this show cause notice vide letter dated 17 August 1996, stating *inter alia* that the liquidity crunch in the market caused the delay and that they had already despatched more than 70% of the

consideration.

7. In Vide letter dated 11 December 1996, the acquirers assured the complainant that a sum of Rs.2.5 crore would be paid on an installment basis per month, beginning in January 1997, along with an interest amount at the rate of 15% as compensation for the delay in despatching the consideration to the applicants. In February 1997, the acquirers personally met the officers of the complainant and accepted that they were unable to discharge their obligation. However, the complainant has received several letters from aggrieved investors indicating that the consideration has not been dispatched to them.

8. The complainant, therefore, filed a complaint against accused Nos.1 to 5 as per Section 24 of the Securities and Exchange Board of India Act, 1992 (hereafter “said Act”, for short).

9. Pending the complaint, accused No.3 filed an application for discharge, contending *inter alia* that accused No.3 resigned from the company on 7 June 1997 and, therefore, accused No.3 deserves to be discharged.

10. The complainant resisted the discharge application by filing a reply.

11. Learned Special SEBI Judge, after appraisal of the contentions in the applicant, reply thereto and material on record as well as submissions canvassed across the bar, was persuaded to reject the application. Learned SEBI Special Judge was of the view that accused No.3 was unable to substantiate his contention of

resignation by producing credible material on record and, therefore, there were sufficient grounds to proceed against the applicant.

12. Being aggrieved, the applicant has invoked the jurisdiction of this Court under Section 482 of the Code.

13. I have heard Mr. Venegaonkar, learned Advocate for the petitioner and Mr. Sancheti, learned Senior Advocate and Mr. Subramaniam, learned Senior Advocate for respondent No.2.

14. Mr. Venegaonkar, a learned Advocate for the applicant, canvassed two-fold submissions. Firstly, the initiation of prosecution under Section 24 of the said Act was vitiated in the absence of holding of investigation under Chapter 5 of the 1994 Regulations. Therefore, according to him, holding of investigation under the said Chapter is *sine qua non* before launching prosecution under Section 24 of the Act. In support of his submission, he relied on the judgment of the Apex Court in **Reliance Industries Ltd. v. Securities and Exchange Board of India & Ors.** reported in (2022) 10 SCC 181, unreported judgment of the Division Bench of this Court in Criminal Writ Petition No.4144 of 2019 decided on 21 April 2020 and judgment of Single Judge of the Delhi High Court in **SRG Infotech Ltd. & Ors. v. Securities and Exchange Board of India** reported in 2014 SCC OnLine Del 1684.

15. Per contra, Mr Sancheti and Mr Subramaniam learned Senior Advocates countered the submission of Mr Venegaonkar. Laying emphasis on the material on record, especially letters dated 9 April

1996, 25 April 1996, 10 July 1996 and 17 August 1996, it is submitted that the acquirers, i.e. Khemka brothers, have accepted that they have not been able to pay the shareholders who have accepted the offers and cited liquidity crunch in the market as the reason for their failure. They submitted that failure on the part of acquirers to meet the obligation amounts to a breach of Regulations 20 and 22 of the 1994 Regulations. Section 24(1) of the Act makes it clear that any breach of the Act, Rules and Regulations would invite prosecution.

16. Prima facie, there is no serious dispute about non-payment as required under Regulations 20 and 22, and therefore, there is no need to investigate Chapter 5 of the 1994 Regulations. According to them, there is overwhelming material to lend support to the averments in the complaint.

17. In order to appreciate the submissions keeping in view the broad parameters on which the prayer for discharge is required to be adjudicated, it is necessary to note relevant provisions of the Act and Regulations, which are as under.

18. Section 24 (which was in existence on the date of offence) reads thus:

“Offences.

24. (1) Without prejudice to any award of a penalty by the adjudicating officer under this Act, if any person contravenes or attempts to contravene or abets the contravention of the provisions of this Act or any rules or regulations made thereunder, he shall be punishable with imprisonment for a term which may extend to one year, or

with fine, 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 three years or with fine which shall not be less than two thousand rupees but which may extend to ten thousand rupees or with both.”

19. Regulations 20, 22, 30, 33 and 39 of the 1994 Regulations reads thus:

“General Obligations

20. (1) The announcement of public offer to acquire shares shall be made only when the acquirer has every reason to believe that he shall be able to implement the offer.

(2) Within fourteen days of the public announcement of offer, the acquirer must also submit a letter of offer to the Board of Directors of the company, whose shares are being acquired.

(3) The acquirer shall state the period for which the offer to acquire shares from the other shareholders shall remain open:

Provided that every such offer shall be kept open for a period of not less than four weeks from the date of the offer.

(4) The directors of the company of which the shares are being acquired shall not sell or enter into an agreement for sale of assets not being sale or disposal of assets, in the ordinary course of business, of the company or its subsidiaries or issue any authorised but unissued securities carrying voting rights during the period, when the offer is open for acceptance unless the approval of the general body of shareholders is obtained.

(5) Every document issued to shareholders or any advertisement published in connection with the offer must state that the directors in case the acquirer, is a company,

accept the responsibility for the information contained in the document or advertisement:

Provided that if any of the directors desire to exempt himself from the responsibility of the information in such document or, as the case may be, the advertisement the document or, advertisement as the case may be, shall contain a statement to that effect together with reasons thereof.

(6) The company whose shares are being acquired shall furnish to the acquirer, within seven days of the request of the acquirer, a list of names of shareholders and of those persons whose applications for transfer of registration is considered valid and accepted by the company.

(7) The company, whose shares are being acquired, shall also inform the persons whose application for transfer are considered valid within sixty days and also inform about such transfers to the transferor and transferee, so that they have an opportunity to accept the offer.

(8) The letter of offer shall be sent to all the shareholders so as to reach them within ten days from the record date.

(9) Any acquirer who has made any acquisition of shares either by negotiation or through open market purchases shall not make any further public announcement for acquisition of shares in the succeeding six months.

Completion of the Offer

22. The acquirer shall within a period of four weeks from the date of the closure of the offer complete all procedures relating to the offer including payment of consideration to the shareholders who have accepted the offer.

Persons acquiring shares to make public announcement in certain cases

30.1(1) Where an offer is made to the shareholders other than the persons in-charge of the management of the affairs of the financially weak company, the person acquiring shares shall make a public announcement of his intention for acquisition of shares.

(2) Such public announcement shall contain relevant

details about the offer including the information about identity and background of the person acquiring shares, offer price, the plan for revival of the unit and the period for which the offer shall be kept open.

(3) The terms of offer shall be forwarded to each of the shareholders in the financially weak company indicating therein a specific mention of the record date and also the acquisition date of the offer.

(4) Notwithstanding anything contained in the foregoing regulations, the financially weak company or, as the case may be, the lead institution shall ensure that at no point of time shareholding held by the public is reduced to less than twenty per cent of the paid-up share capital of such company.

(5) While accepting the offer from the other shareholders, the person acquiring shares shall offer to acquire from the individual shareholder his entire holdings if such holding is upto hundred shares of the face value of rupees ten each or ten shares of the face value of rupees hundred each.”

Board’s right to investigate

33. (1) Where it appears to the Board so to do, it may appoint one or more persons as investigating authority to investigate and undertake inspection of the books of accounts, other records and documents of any person who may have acquired or sold securities to any person for any of the purposes specified in sub-regulation (2).

(2) The purposes referred to in sub-regulation (1) may be as follows —

- (a) to investigate into the complaints received from investors, intermediaries or any other person on any matter having a bearing on the allegations of substantial acquisition of shares and take-overs; and
- (b) to investigate *suo-moto* upon its own knowledge or information, in the interest of securities business or investors interests, for any breach of the regulations.

Directions by the Board

39. On receipt of the report under Regulation 36, the Board may without prejudice to its right to initiate criminal prosecution under Section 24 of the Act give such directions as it deems fit for all or any of the purposes, namely.

- (a) directing the person concerned not to further deal in any securities;
- (b) prohibiting the person concerned from disposing of any of the securities acquired in violation of these regulations;
- (c) directing the person concerned to sell the shares acquired in violation of the provisions of these regulations;
- (d) taking action against the person concerned who is an intermediary holding a certification of registration under Section 12 of the Act.”

20. On the aforesaid touchstone, I find it rather difficult to accede to the submissions on behalf of the applicant that in the absence of investigation under Chapter 5 of the 1994 Regulations, no prosecution under Section 24 of the Act could have been initiated. Prima facie, the material on record indicates that the Khemka brothers issued a letter of offer to the shareholders of M/s. Skyline NEPC Limited (formerly known as M/s. Damania Airways Limited) for acquiring up to 64,66,800 fully paid equity shares of Rs.10/- each at Rs. 35.25 per share. Khemka brothers intended to acquire 20% of the voting capital of the target company, i.e. M/s. Skyline NEPC Limited. On 1 February 1996, the offer was opened and closed on 29 February 1996. Khemka brothers had appointed M/s. LKP Merchant Financing Limited as their Manager for managing the offer. Prima facie, the letter of offer at Exhibit-2 of the complaint, in Clause XIII of Method of

Settlement, they have stated that all procedures to the offer, including payment of consideration to the shareholders who have accepted the offer, would be completed within four weeks from the date of closure of the offer. The offer closed on 29 February 1996; Khemkas should have made the payments to the shareholders on or before 28 March 1996. the complainant has produced on record letters from the Manager of the Offer and Khemka Brothers dated 9 April 1996, 25 April 1996, 10 July 1996 and 17 August 1996 wherein it is unambiguously admitting that the acquirers, i.e. Khemka Brothers have not been able to pay the shareholders who have accepted the offer and cited liquidity crunch in the market as the reason for their failure. As has been explained above, the Regulation requires that the payout to the shareholders who have accepted the offer is to be made within four weeks from the closure of the offer. Prima facie failure on the part of the acquirer to meet the obligation amounts to a breach of Regulations 20 and 22. Section 24(1) of the SEBI Act makes it clear that any SEBI Act, Rules and Regulations breach would invite prosecution.

21. In the face of aforesaid material, at this juncture, in my opinion, there was sufficient material available with the complainant, which prima facie indicates a violation of Regulations 20 and 22. Regulation 33 confers discretion on the Board having regard to the facts and circumstances of the case to investigate into the books of account or other records. Based on the report of such investigation under Regulation 36, the Board has the power to issue directions as contemplated under Regulation 39. Regulation 39 expressly saves the power of the Board to initiate criminal

prosecution under Section 24 of the Act.

22. The conjoint reading of Regulation 33, along with Regulation 39, confers discretion on the Board to initiate an investigation if such investigation appears to be necessary to the Board. In the facts of the case, in my opinion, there was sufficient material to demonstrate that there was sufficient material based on correspondence between the Managers of the accused and the complainant wherein the accused admitted that they have not been able to pay the shareholders who had accepted the offer. Furthermore, the accused cited the liquidity crunch in the market as the reason for their failure. Therefore, in the facts of the case, it is not necessary for the Board to lodge an investigation as per Chapter V into the violation of Regulations 20 and 22.

23. The judgment relied on behalf of the applicant in the case of **Reliance Industries Ltd.** (supra) holds that initiation of criminal action in commercial transactions should take place with a lot of circumspection, and the Regulator must be cautious in initiating such action and carefully weigh each factor. In the facts of said case, there was a divergence of advice before initiating prosecution, and the material on record was insufficient to initiate prosecution against the accused. However, in the facts of the present case, the accused persons have admitted on their own that there was a failure to pay the shareholders who had accepted the offer. Therefore, the judgment is of no help to the applicant.

24. In the absence of incontrovertible documents such as Form 32 under the Companies Act, 1932 or other material to show the

applicant's resignation, the SEBI Special Judge has rightly held that the applicant has failed to make out a case for discharge. Hence, there is no merit in the criminal applications. No case is made out for quashing the complaint or charges.

25. Both criminal applications are dismissed. No costs.

26. By way of abundant caution, it is clarified that the observations are confined to the consideration of the prayer for discharge, and the Trial Court shall decide the Special case on its own merits and in accordance with the law without being influenced by any of the observations made herein above.

(AMIT BORKAR, J.)

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