

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Hearing : 05.03.2020

Date of Decision : 12.11.2020

Misc. Application No. 18 of 2020
And
Appeal No. 137 of 2020

Mrs. Manisha B. Kadhi
B-1001, Kalpavruksh Garden,
Mahavir Nagar, Kandivali (West),
Mumbai - 400 067.

..... Appellant

Versus

1. Securities and Exchange Board of India
SEBI Bhavan, Plot No. C-4A, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai - 400 051.
2. BSE Ltd.
Floor 25, P. J. Towers,
Dalal Street, Mumbai - 400 001.
3. Subway Finance & Investment
Eastern Court, B 101, 1st Floor,
Junction of Tejpal & Parleshwar Road,
Vile Parle, Mumbai - 400 057.
4. Central Depository Services (India) Ltd.
Marathon Futurex, A- Wing, 25th Floor,
N M Joshi Marg, Lower Parel,
Mumbai - 400013.

... Respondents

With
Misc. Application No. 16 of 2020
And
Appeal No. 135 of 2020

Mr. Bhupendra Kadhi
 B-1001, Kalpavruksh Garden,
 Mahavir Nagar, Kandivali (West),
 Mumbai - 400 067.

..... Appellant

Versus

1. Securities and Exchange Board of India
 SEBI Bhavan, Plot No. C-4A, G Block,
 Bandra Kurla Complex, Bandra (East),
 Mumbai - 400 051.
2. BSE Ltd.
 Floor 25, P. J. Towers,
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4. Central Depository Services (India) Ltd.
 Marathon Futurex, A- Wing, 25th Floor,
 N M Joshi Marg, Lower Parel,
 Mumbai - 400013.

... Respondents

With
Misc. Application No. 17 of 2020
And
Appeal No. 136 of 2020

Harhit Kadhi
 Heer Kadhi
 B-1001, Kalpavruksh Garden,

Mahavir Nagar, Kandivali (West),
Mumbai - 400 067.

.....Appellants

Versus

1. Securities and Exchange Board of India
SEBI Bhavan, Plot No. C-4A, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai - 400 051.

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4. Central Depository Services (India) Ltd.
Marathon Futurex, A- Wing, 25th Floor,
N M Joshi Marg, Lower Parel,
Mumbai - 400013.

...Respondents

Mr. Chanchal Choudhary, Advocate for the Appellants.

Mr. Kevic Setalvad, Senior Advocate with Mr. Abhiraj Arora,
Mr. Vivek Shah, Ms. Misbah Dada, Advocates i/b ELP for the
Respondent Nos. 1.

Mr. Sagar Divekar, Advocate with Mr. Abhimanyu Mhapankar,
Advocate for the Respondent Nos. 2.

None for the Respondent Nos. 3.

Mr. Areez Gazdar, Advocate i/b Veritas Legal for the Respondent
Nos. 4.

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

Per : Justice Tarun Agarwala, Presiding Officer

1. Three appeals have been filed by husband, wife and their children. The relief claimed is the same and, therefore, all the three appeals are being decided together.

2. There is a delay in the filing of the appeals. The ground urged is, that the appellants demat accounts have been frozen by Central Depository Services (India) Ltd. Respondent No. 4 on the instructions given by BSE Ltd. (hereinafter referred to as 'BSE') for non-compliance of Regulation 33 of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (hereinafter referred to as 'LODR Regulations') by the company known as Subway Finance and Investment. It was contended that the appellants were informed by the Director of the company that the compliance of Regulation 33 of the LODR Regulations has been made and freezing of the demat account would be lifted inspite of which the same has not been defrozeed. In this regard, the appellants have made a written request to the stock

exchange which have fallen on deaf ears and consequently, the present appeals have been filed for setting aside the freezing of the demat accounts. For the reasons stated in their application and on the facts stated aforesaid, we are of the opinion that sufficient cause has been shown. Consequently, the delay is condoned and the application is allowed.

3. The appellants have prayed for the quashing of the circulars dated November 30, 2015 and October 20, 2016 issued by Securities and Exchange Board of India (hereinafter referred to as 'SEBI') and have also prayed that the demat accounts may be defreezed.

4. The facts leading to the filing of the present appeals is, that the appellant Bhupendra Kadhi in Appeal No. 135 of 2020 is a promoter of Subway Finance and Investment which is a listed company and has a stake to the extent of 2% of the shareholding in the said company. The appellant Manisha Kadhi in Appeal No. 137 of 2020 is the wife of Bhupendra Kadhi and is also a promoter in the said company having 2% shareholding. Both the husband and the wife contend that they are only promoters to the extent of 2% each and are not involved in the day to day functioning of the company nor are they involved in the decision making process.

5. The appellants Harshit Kadhi and Heer Kadhi in Appeal No. 136 of 2020 are son and daughter of the appellant Bhupendra Kadhi. These appellants contend that they are not the promoters in the company Subway Finance and Investment nor are they involved in the decision making process or day to day functioning in the working of the said company. These two appellants hold a demat account alongwith their father.

6. It transpires that the company did not comply with the requisite disclosure under Regulation 33 of the LODR Regulations. Regulation 33 of the LODR Regulations requires that audit reports of the company are required to be uploaded on the platform of the stock exchange on a quarterly basis after being approved by the Board of Directors of the company.

7. It transpires that the company failed to submit the quarterly results of their audit reports for two consecutive quarters i.e. September 2018 and December 2018. It further transpires that BSE in terms of SEBI circular dated May 3, 2018 issued notices dated November 30, 2018, March 5, 2019, March 12, 2019 and March 22, 2019 requiring the company to comply with Regulation 33 of the

LODR Regulations and pay the fine as per the circular failing which steps would be taken for suspension of the shares of the company and other action that is available to the stock exchange. In spite of these notices, the company failed to comply with Regulation 33 of the LODR Regulations, as a result BSE vide letter dated April 16, 2019 directed suspension of trading of the shares in the company with effect from May 8, 2019 for non-compliance of Regulation 33 of the LODR Regulations for two consecutive quarters i.e. September 2018 and December 2018. BSE further directed freezing of the entire shareholding of the promoter and promoter group of the company as well as all other securities held by the promoter and promoter group in the demat account of the promoter and promoter group with effect from April 16, 2019.

8. The appellants contend that they approached the company and the director informed them that necessary compliance would be made and their accounts would be defreezed. It was urged that necessary compliance by the company was made on April 30, 2019 inspite of which their accounts have not been defreezed. Letters in this regard were written by the appellants to the stock exchange which fell on deaf ears and the accordingly, the present appeals have been filed.

9. The Tribunal while entertaining the appeal had directed the parties by its order dated January 20, 2020 to come prepared with all the material on the subject in issue, based on which a compilation of documents, affidavit and written submissions have been filed by SEBI as well as by BSE.

10. We have heard Mr. Chanchal Choudhary, the learned counsel for the appellants and Mr. Kevic Setalvad, the learned senior counsel with Mr. Abhiraj Arora, Mr. Vivek Shah, Ms. Misbah Dada Mr. Sagar Divekar, Mr. Abhimanyu Mhapankar Mr. Areez Gazdar, the learned counsel for the respondents and with the consent of the parties the appeals are being disposed of at the admission stage itself.

11. The learned counsel for the appellants contended that the circulars dated November 30, 2015 and October 20, 2016 which have been issued in terms of Regulations 97 and 98 of the LODR Regulations is arbitrary as it overrides the provisions of the Regulations and, therefore, the said circulars are arbitrary and are required to be quashed. It was contended that the appellants are only promoters in the company having a small stake of 2% each and are not responsible for the management of the day to day affairs of the company. It was contended that if the company has failed to comply

with any provisions of the LODR Regulations, then the company and its Board of Directors should be penalized rather than penalizing the promoters and the promoter group of the company. It was, thus, contended that the circular is arbitrary and is liable to be quashed. It was also contended that the reasons for freezing their demat accounts was non-furnishing of the audit results of the two consecutive quarters i.e. September 2018 and December 2018 of the company. It was contended that the company had subsequently complied and deposited the fees on April 30, 2019 and thus, there was no reason for not defreezing their demat accounts. It was urged that the action of the respondent in not defreezing the demat accounts was wholly arbitrary and illegal.

12. The respondent SEBI contended that the circulars so issued by them which is under challenge in the present appeals have already been superseded by the circular dated May 3, 2018 and, therefore, the question of judging the veracity and legality of the said circulars at this stage does not arise especially when the circular dated May 3, 2018 is not under challenge. It was further contended that the validity of the circulars cannot be questioned in an appeal before the Tribunal nor does the Tribunal has the jurisdiction to test the validity of the circular and that the legality and validity of the circular could

only be challenged in a writ jurisdiction under Article 226 of the Constitution of India before an appropriate High Court.

13. It was also contended by the learned senior counsel that a promoter plays a vital role in raising capital for a company and, therefore, the role of promoter is subject to greater scrutiny irrespective of shareholding and its position in the management. It was submitted that the circulars issued are in conformity with Regulation 98 of the LODR Regulations which provides for freezing of promoter / promoter group holding of designated securities as may be applicable. It was also contended that freezing of the promoter holding is a temporary measure intended to nudge the companies to ensure compliance of the disclosure requirements. It was further contended that freezing the demat account of the directors would adversely impact various categories of the directors such as independent director, nominee director, etc. considering that the tenure of the director is only for a fixed term unlike the promoters.

14. On the issue of freezing the accounts of the children of the promoters, it was urged that the promoter group includes “child” under Regulation 2(1)(pp) of Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018. It

was contended that the two children Harshit and Heer in Appeal No. 136 of 2020 would be presumed to act together with their parents while acting as a promoter group in a listed company and therefore, based on the PAN number of the appellant Bhupendra Kadhi their accounts were also frozen validly.

15. Having heard the learned counsel for the parties at some length, we are of the opinion that in view of the decision of the Hon'ble Supreme Court in *National Securities Depository Ltd. vs. Securities and Exchange Board of India [(2017) 5 SCC 517]*, it is no longer open for this Tribunal to question the veracity and / or legality of a circular issued by SEBI. The validity and legality of such a circular could only be challenged by a party in a writ jurisdiction under Article 226 of the Constitution of India. Thus, the prayer of the appellants for quashing of the circular dated November 30, 2015 and October 20, 2016 which in any case is superseded by the circular dated May 3, 2018 does not arise.

16. In so far as the contention of the appellants Bhupendra Kadhi and his wife Manisha Kadhi that they are promoters to the extent of 2% of the entire holding of the company and are not involved in the day to day management and, therefore, their accounts should not

have been frozen is erroneous and cannot be accepted. We are of the opinion that a promoter plays a vital role in the raising of the capital for a company and, therefore, the role of a promoter is subject to greater scrutiny irrespective of his shareholding and his position in the management of the company. It is immaterial that the appellants are not actively involved in the management of the company. Regulation 98 of the LODR Regulations read with the circular dated May 3, 2018 allows the stock exchange to freeze the demat accounts of the promoters and promoter group for non-compliance of the LODR Regulations.

17. On the question whether SEBI could direct the depository to freeze the joint demat account where one of the account holder is not a promoter of the company, we are unable to deal with this issue on account of lack of material and arguments raised before us. We however find that the demat accounts of the appellants were frozen because the company failed to comply with Regulation 33 of the LODR Regulations for two consecutive quarters i.e. September 2018 and December 2018. The said accounts were frozen with effect from April 16, 2019. The Tribunal has been informed that the company complied with the Regulation 33 of the LODR Regulations on April 30, 2019. Thus, in our opinion, there was no reason for the

respondents to continue with the freezing of the demat accounts of the appellants. In this regard, the learned counsel for the respondent BSE submitted that the company has defaulted under other provisions of the LODR Regulations and consequently, till such time compliances of the other provisions of the Regulations is not made by the company, the freezing of the demat accounts of the appellants would continue. In our opinion, action of BSE in continuing with the freezing of the demat accounts of the appellants for other violation of the LODR Regulations committed by the company which happened thereafter is arbitrary and cannot be accepted. Once an order of freezing has been passed by an order dated April 16, 2019 on the basis of non-compliance of Regulation 33 of the LODR Regulations which stood subsequently complied by the company on April 30, 2019, the freezing of the demat accounts should have come to an end there and then. If the company thereafter has violated any other provisions of the LODR Regulations, it would be open to BSE to issue notice to the company requiring them to comply with the provisions and if they failed to comply within the stipulated period, it would be open to BSE to proceed against the company, Directors, promoters in accordance with law, but the freezing of the demat accounts cannot continue when the initial violation of the provision stood complied with and came to an end.

18. In the light of the aforesaid, all the appeals are allowed. The freezing of the demat accounts of the appellants pursuant to the order of BSE dated April 16, 2019 is set aside. It would however be open to BSE to proceed afresh against the company, its directors, promoters and promoter group in accordance with the LODR Regulations and circular dated May 3, 2018, if the company has violated any other provisions of the LODR Regulations. In the circumstances of the case, parties shall bear their own costs.

Justice Tarun Agarwala
Presiding Officer

Dr. C. K. G. Nair
Member

Justice M. T. Joshi
Judicial Member

12.11.2020
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