BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Decision : 07.09.2022

Misc. Application No. 935 of 2022
And
Appeal No. 539 of 2022

1. SecureKloud Technologies Limited
   No. 37 & 38, ASV Ramana Towers,
   5th Floor, Venkat Narayan Road,
   T. Nagar,
   Chennai – 600 017.

2. Mr. Suresh Venkatachari
   24GA, 1st Street,
   Cenotaph Road,
   Teynampet,
   Chennai – 600 018. …..Appellants

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. Somasekhar Sundaresan, Advocate with Ms. Shruti Rajan, Mr. Anubhav Ghosh, Mr. Vivek Shah, Mr. Harishankar Raghunath and Ms. Shubhi Maheshwari, Advocates i/b Trilegal for the Appellant.

Mr. Pradeep Sancheti, Senior Advocate with Mr. Mihir Mody, Mr. Arnav Misra and Mr. Mayur Jaisingh, Advocates i/b. K Ashar & Co. for the Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Justice M.T. Joshi, Judicial Member
Ms. Meera Swarup, Technical Member

Per : Justice Tarun Agarwala, Presiding Officer (Oral)

1. The present appeal has been filed by the Company SecureCloud Technologies Limited, Noticee no. 1 and Mr. Suresh Venkatachari, Noticee no. 2 who is the Chief Executive Officer of the Company against the *ex parte ad interim* order cum show cause notice dated August 4, 2022 wherein the Whole Time Member ('WTM' for short) of the Securities and Exchange Board of India ('SEBI' for short) has issued the following directions:-

> *"(a) The Noticee nos. 1 to 4 are restrained from buying, selling or dealing in securities, either directly or indirectly, in any manner whatsoever until further orders. If the said Noticees have any open position in any exchange traded derivative contracts, as on the date of the order, they can close out / square off such open positions within 3 months from the date of order or at the expiry of such contracts, whichever is earlier. The said Noticees are permitted to settle the pay-in and pay-out obligations in respect of transactions, if any, which have taken place before the close of trading on the date of this order.*
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> *(b) Noticee nos. 2 to 4 are hereby restrained from associating themselves with any intermediary registered with SEBI, acting as Directors / Key Managerial Personnel of any listed public company (including Noticee No. 1) and acting as Directors /Key Managerial Personnel / promoters of any public company which intends to raise money from the public, till further order."*

2. The facts leading to the filing of the present appeal is, that based on certain complaints and resignation of the Company's statutory auditor Deloitte Haskins and Sells ('Deloitte' for short) an investigation was conducted in the affairs of the Company for the financial year 2017-18 to 2020-21. The focus of the investigation was broadly to investigate the alleged misstatement in the books of account of the Company and to ascertain violation of the securities laws.

3. It transpires that Deloitte before submitting its report under Section 143(12) of the Companies Act, 2013 had informed certain observations to the audit committee of the Company and sought its response. The audit committee appointed M/s PKF Sridhar & Santhanam ('PKF' for short) as a forensic auditor on July 24, 2019. Deloitte sought report of the forensic auditor and the Company informed that the report was under progress. Since the report was not filed the Company alleges that they had disengaged PKF as forensic auditor and appointed KPSN & Associates LLP ('KPSN' for short) as the forensic auditor.

4. In the meanwhile, since the forensic report of PKF was not submitted Deloitte submitted a fraud report to the

Ministry of Corporate Affairs indicating various irregularities and inconsistencies in the bank statements etc and subsequently thereafter Deloitte resigned as the statutory auditor of the Company with effect from November 15, 2019.

5. From February 12, 2019 onwards through various letters/emails SEBI advised the Company to share the Deloitte report and provide its findings and. The Company informed SEBI vide letter dated July 13, 2020 that they had disengaged PKF as their forensic auditor and had appointed KPSN which report was given and was forwarded to SEBI. In this report, KPSN disagreed with the majority of the observations made by Deloitte.

6. SEBI considered the matter and after 9 months appointed M/s Grant Thornton Bharat LLP (‘GT’ for short) as the forensic auditor to undertake forensic audit of the books of accounts of the Company for the financial year 2017-18, 2018-19 and 2019-20 ending December 2020. The scope of work of such forensic audit was to conduct a detailed review with regard to manipulation of the books of accounts, misrepresentation including of financials, business operations, wrongful diversion, siphoning of the funds etc.

7. The GT submitted its forensic report to SEBI on June 14, 2022 alleging that there were suspicious transactions with its customers and vendors for the financial year 2018-19 and that the Company failed to provide information and failed to cooperate with the forensic auditor. The report alleged that the Company was booking fictitious revenue and receivables for providing services to three entities which were the subsidiaries of the Company. It was also alleged that various invoices / agreements were forged for the purpose of overstating the revenues and receivables, expenditure and payables and fixed assets. It was also alleged that there was round tripping of funds namely that the payments made by three entities which are alleged to be subsidiaries of the Company were in fact being funded by the Company.

8. Based on the report of the forensic auditor the WTM in the impugned *ex parte ad interim* order found that there was a delay by the Company in providing requisite information to the forensic auditor. There was non-cooperation by the Company and its directors and employees and that false submissions were made to the forensic auditor. The impugned order further *prima facie* found that the Company had booked fictitious revenue in the name of its customers and that the

Company tried to mislead the forensic auditor by creating e-mail Ids with fake domain names etc. The WTM further concluded that the Company deliberately hid the draft report given by PKF and submitted the report given by KPSN which was not an independent report but was influenced by appellant no. 2.

9. Considering the aforesaid, the WTM *prima facie* came to the conclusion that a *prima facie* case against the appellants has been made out for conceiving and implementing a fraudulent scheme / artifice through financial statements and that there is a *bonafide* apprehension and genuine possibility that there could be attempts to thwart the regulatory action or erase the traces of such *malafide* scheme. The WTM accordingly passed the *ex parte ad interim* order cum show cause notice.

10. We have heard Shri Somasekhar Sundaresan, the learned counsel assisted by Ms. Shruti Rajan, Shri Anubhav Ghosh, Shri Vivek Shah, Shri Harishankar Raghunath and Ms. Shubhi Maheshwari, the learned counsel for the appellant and Shri Pradeep Sancheti, the learned senior counsel assisted by Shri Mihir Mody, Shri Arnav Misra and Shri Mayur Jaisingh, the learned counsel for the respondent.

11. The basic contention of the appellant is, that there was no urgency for the respondent to pass such a drastic order restraining the appellant from associating with the securities market. It was contended that certain warrants had been issued to appellant no. 2 and the last date for conversion of the warrants was till September 15, 2022. It was urged that if interim orders are not passed the appellant will lose the right to convert these warrants into shares which will entail a colossal loss in terms of money.

12. It was also urged that restraining the appellant no. 2 from acting as a director / key managerial personnel of the Company was wholly harsh in as much as restraining the appellant no. 2 will make the Company headless.

13. On the other hand, the learned senior counsel for the respondent vehemently urged and contended that the financial irregularity of a great nature was conducted by the appellant Company for the financial year 2015-16 to 2018-19. It was contended that the irregularity found by the forensic auditor is grave and that there is a possibility that the appellants may erase the traces of the *malafide* scheme and thereby thwart the regulatory action. It was urged that considering the gravity of

the violation the *ex parte ad interim* order was just and proper and required no interference.

14. Having heard the learned counsel for the parties, as per the submission of the learned senior counsel for the respondent and as per the Note – II provided by the respondent and, upon a perusal of the facts as disclosed in the impugned order we find that the Company's revenue rose from Rs. 271.93 crore in financial year 2015-16 to Rs. 850.39 crore in financial year 2018-19. The respondent admits that Company stopped booking fictitious revenue from the financial year 2019-20 onwards. Thus, the alleged misstatements of the books of accounts of Company are prior to the financial year 2019-20.

15. In ***North End Foods Marketing Pvt. Ltd. & Anr. vs Securities and Exchange Board of India in Appeal no. 80 of 2019 decided on March 12, 2019*** the alleged trades were between December 2017 to August 2018. The *ex parte interim* order was passed on February 28, 2019. This Tribunal found that there was no urgency in passing an *ad interim* order at this belated stage. This Tribunal held:-

> *"13. Having heard the learned senior counsel at length, we find that it is no more res integra that SEBI has power to pass ex-parte interim orders,*

pending investigation, which power flows from Section 11 and 11B of the SEBI Act. A plain reading of Section 11 and 11B shows that SEBI has to protect the interests of the investors in securities and to regulate the securities market by such measures as it thinks fit and such measures may be for any or all of the matters provided in sub-section 2 of Section 11 of the Act. SEBI has power to pass interim orders and such interim orders can also be passed exparte. Interim orders are passed in order to prevent further possible mischief of tampering with the securities market. If during a preliminary enquiry, it is found prima-facie, that the person is indulging in manipulation of the securities market, it would be obligatory for SEBI to pass an interim order or for that matter an ex- parte interim order in order to safeguard the interests of the investors and to maintain the integrity of the market. Normally, while passing an interim order, the principles of natural justice has to be adhered to, namely, that an opportunity of hearing is required to be given. Procedural fairness embodying natural justice is to be applied whenever action is taken affecting the rights of the parties. At times, an opportunity of hearing may not be pre-decisional and may necessarily have to be post-decisional especially where the act to be prevented is imminent or where action to be taken brooks no delay. Thus, pre-decisional hearing is not always necessary when ex-parte ad-interim orders are made pending investigation or enquiry unless provided by the statute. In such cases, rules of natural justice would be satisfied, if the affected party is given a post-decisional hearing.

14. However, it does not mean that in every case, an ex-parte interim order should be passed on the pretext that it was imminent to pass such interim order in order to protect the interest of the investor or the securities market. An interim order, however, temporary it may be, restraining an entity/person from pursuing his profession/trade may have substantial and serious consequences which cannot be compensated in terms of money.

15. Thus, ex-parte interim order may be made when there is an urgency. As held in ***Liberty Oil Mills & Ors. vs. Union of India & Ors. [AIR (1984) SC 1271] decided on May 1, 1984****, the urgency must be infused by a host of circumstances, viz. large scale misuse and attempts to monopolise or corner the market. In the said decision, the Supreme Court further held that the regulatory agency must move quickly in order to curb further mischief and to take action immediately in order to instill and restore confidence in the capital market.*

16. In the light of the above, we find that on the basis of the enquiry, the rationale for taking urgent preventive actions is based on the fact that appellant, NEFM had accumulated/cornered stocks of Mentha Oil through entities in Group A and Group B by misusing the exchange platform. Such large accumulation of Mentha Oil was with the intention of acquiring a dominant position in the market in order to manipulate the future price of Mentha Oil during the lean season on the strength of the physical stock of Mentha Oil it held on the exchange platform.

17. In our opinion, the impugned order is harsh and unwarranted. We are of the opinion that there was no real urgency at this late stage in passing an ex-parte restraint order which virtually amounts to passing a final order. The period of trades is 2017-2018. At the time when the impugned order was passed the future contracts had been executed. The lean season was over. There is nothing on record to indicate that the sales made by the appellants was on a higher side indicating manipulation in the price nor there is any prima-facie, finding that by accumulating large stocks of Mentha Oil, the appellant had dominated the market without making any comparison with the total volume of trades in the physical market. In our opinion, the basis of urgency was purely on account of presumption and was not based on any piece of evidence. There should be some shred of evidence to come to a prima-facie conclusion that the appellants are indulging in unfair trade practices in cornering the market with a

manipulative intent to manipulate the price. Passing a restraint order which virtually puts a stoppage on the appellants right to trade based on a needle of suspicion, in our opinion, is harsh and unwarranted.

18. In the absence of in depth analysis based on evidence, we are of the opinion that in the facts and circumstances of the present case, it was not such an urgent case where the WTM should have exercised its powers. In our opinion, the respondent is empowered to pass an ex-parte interim order only in extreme urgent cases and that such power should be exercised sparingly. In the instant case, we do not find that any extreme urgent situation existed which warranted the respondent to pass an ex-parte interim order. We are, thus, of the opinion that the impugned order is not sustainable in the eyes of law as it has been passed in gross violation of the principles of natural justice as embodied in Article 14 of the Constitution of India. Accordingly, the appellants are entitled to the reliefs claimed."

This order attained finality as no appeal was filed by the SEBI.

16. In ***Dr. Udayant Malhoutra vs Securities and Exchange Board of India in Appeal no. 145 of 2020 decided on June 27, 2020*** the said appellant sold shares on October 24, 2016 on the basis of inside knowledge of the price sensitive information, based on which an *ex parte* order dated June 15, 2020 was passed directing the said appellant to deposit the alleged unlawful gain. This Tribunal relying upon the decision in ***North End Foods Marketing Pvt. Ltd.*** quashed the ad interim order and allowed the appeal holding that there

was no urgency. This order was challenged by SEBI before the Supreme Court in ***Civil Appeal Nos. 2981-2982 of 2020*** wherein the order of this Tribunal was affirmed. The Supreme Court held that the Tribunal was correct in coming to the conclusion that there was no urgency in passing an *ex parte interim* order. The Supreme Court held:-

> *"5. On the facts before it, the Tribunal, in our view, was correct in coming to the conclusion that since the investigation was pending since 2017 and information had been supplied on 28 November 2019, there was no urgency for passing an ex-parte interim order of the nature that was issued by the Whole Time Member. It was, in this background, that the Tribunal, while affirming the power of SEBI to pass an ex parte interim order in appropriate cases, observed that this should be exercised "only in extreme urgent matters".*
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> *6. On the facts, as they have emerged before this Court, we do not find any reason to take a view at variance with the conclusion of the Tribunal on the facts of the case. By way of abundant caution, we clarify that we are affirming the view on the facts which have emerged from the record before the Tribunal."*

17. Similar view was again held by this Tribunal in ***Cameo Corporate Services Limited vs Securities and Exchange Board of India in Appeal no. 566 of 2019 decided on November 26, 2019***.

18. In view of the aforesaid, we are of the view that the alleged financial irregularities in the books of account is related to the period prior to financial year 2018-19. Admittedly, there is no irregularity in the books of account relating to the alleged fraudulent scheme through financial statement from the financial year 2019-20 onwards till date.

19. Considering the aforesaid and in the light of the principles depicted in the aforesaid judgments of this Tribunal which has been affirmed by the Supreme Court we are of the view that direction (a) and (b) given in paragraph 27 of the impugned order is harsh and inappropriate in the present facts and circumstances of the case. Admittedly, certain warrants of appellant no. 2 is to be converted into shares before September 15, 2022. We are of the opinion that the appellant no. 2 should be allowed to convert the warrants into shares. Further, the investigation has been completed and a show cause notice has been issued. The appellant is required to file a reply and the matter will be decided thereafter. All the evidence has already been collected by SEBI and therefore the contention that there could a possibility to erase the traces of the alleged *malafide* scheme appears to be farfetched.

20. In the light of the aforesaid, we dispose of the appeal modifying the directions of the WTM as contained in paragraph 27 (a) and (b) as under:-

(a) We direct the respondents to provide inspection of the documents within a week from today after giving due notice and thereafter the appellants will file their reply to the show cause notice within three weeks thereafter.

(b) The respondent will fix a date for hearing within two weeks thereafter and will pass an appropriate order within two months from the date of conclusion of the hearing insofar as the appellants are concerned.

(c) Direction 27(a) is modified to the extent that appellant no. 2 who is Noticee no. 2 is allowed to enter the securities market for the limited purpose of converting the warrants into shares subject to the condition that the shares will not be sold by him during the pendency of the proceedings before the WTM.

(d) Direction 27(b) is modified to the extent that appellant no. 2 would be allowed to continue as the Chief Executive Officer of the Company to enable him to contest the matter before the WTM but will not take any major policy decision without the approval of the Board of Directors.

21. Any observations made in our order touching the merits would not be utilised to its advantage by the parties. In the circumstances of the case, parties shall bear their own costs. Miscellaneous application is disposed of.

22. This order will be digitally signed by the Private Secretary on behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Certified copy of this order is also available from the Registry on payment of usual charges.

Justice Tarun Agarwala
Presiding Officer

Justice M.T. Joshi
Judicial Member

Ms. Meera Swarup
Technical Member

07.09.2022
msb

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