

**BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI**

Appeal No. 96 of 2007

Date of decision: 8.7.2008

Siddhartha Agarwal

.....Appellant

Versus

Adjudicating Officer,
Securities and Exchange Board of India

..... Respondent

Mr. Pesi Modi Advocate with Mr. Vinay Chauhan Advocate for the Appellant.
Dr. Poornima Advani Advocate with Ms. Sejal Shah Advocate for the Respondent.

CORAM : Justice N.K. Sodhi, Presiding Officer
Arun Bhargava, Member
Utpal Bhattacharya, Member

Per : Justice N.K. Sodhi, Presiding Officer (Oral)

The appellant before us was a promoter director of Bhoruka Financial Services Ltd., (BFSL) a company registered under the Companies Act, 1956 with its registered office in Bangalore. This company was not carrying on any activity and its only asset was a big chunk of land in the city of Bangalore measuring 15 acres. The appellant and other promoters of the company wanted to sell the land and M/s DLF Commercial Developers (DLF) a Delhi based company was agreeable to purchase the same. Since the sale of land would have attracted capital gains tax for the seller and stamp duty for the buyer, they both decided to carry out the transaction as a sale of the entire shareholding of the promoters of BFSL to DLF. The shares of BFSL were listed only on the Bangalore Stock Exchange. It is the case of the appellant that he alongwith Shri Chandrashekhar, Legal Advisor of BFSL personally approached Shri Ananda Kumar, Director of the Bangalore Stock Exchange on 18 January, 2005 for trading the shares of BFSL through the Exchange. According to the appellant, Shri Ananda Kumar informed him and the legal advisor that trading was not permitted on the Bangalore Stock Exchange and it was not possible to trade the shares on that exchange. The buyer and the seller then approached the Magadh Stock Exchange and executed the trades through that exchange.

It appears that trading on the Magadh Stock Exchange had been stopped/suspended and when these trades were executed in August 2005, the Securities and Exchange Board of India (for short the Board) carried out investigations as to how and why the trading took place. During the course of those investigations the appellant was called to appear before the investigating officer and was pointedly asked as to why they traded the shares at Magadh when those were listed on the Bangalore Stock Exchange and this is what he said in reply:

“Myself and Shri Chandrashekhar, Legal Advisor of BFSL personally approached Shri Anand Kumar, Director, BgSE on 18th January, 2005 for trading in the shares of BFSL. Shri Anand Kumar informed us that trading is not permitted at BgSE.”

In response to a question as to whether the appellant asked Shri Ananda Kumar as to why trading was not permitted on the Bangalore Stock Exchange, his reply was as under:

“Yes. I asked Shri Anand Kumar, why trading is not permitted at BgSE. However, I was informed that Indo-next platform is going to be launched soon and therefore trading is not possible at BgSE. However, since it was a meeting in person there is no documentary evidence to show the same. **The Annual Reports of BgSE for the years ending 31.03.2004 and 31.03.2005 also shows in the Directors’ Report that there was no trading activity during the above years.”**

Prior to the recording of the aforesaid statement of the appellant, it appears that the Chief General Manager of the Board enquired on phone from Shri Ananda Kumar the Executive Director of Bangalore Stock Exchange as to why he (Ananda Kumar) did not allow the trading of the scrip of BFSL on the Exchange at Bangalore. In response to the telephonic query Shri Ananda Kumar addressed a letter dated December 12, 2005 to the Chief General Manager of the Board and this is what he said in the letter:

“Further, we would also inform you that, prior to the date of suspension, the trading in the securities of the company was open at BgSE and further the trading in the securities of the company at BgSE were never suspended. Further we wish to inform you that the Trading Platform of Bangalore Stock Exchange Ltd., is kept open for trading by the members of the Exchange and the same has never been suspended or closed. We would like to state that neither the Bhoruka Financial Services Ltd., nor their representative

have approached the Exchange for trading at any point of time.”

It will be seen that the stands taken by the appellant and Mr. Ananda Kumar the Executive Director of the Exchange at Bangalore were diametrically opposite. The appellant states that he approached Ananda Kumar on January 18, 2005 and was told that trading on the Bangalore Stock Exchange was not possible whereas Ananda Kumar denies that the appellant ever met him.

On receipt of the aforesaid letter from Shri Ananda Kumar, the Board prima facie was of the view that the appellant had made a wrong statement before the investigating officer and was trying to mislead him. Adjudication proceedings were initiated against the appellant for having violated section 15A(a) read with section 15-HB of the Securities and Exchange Board of India Act, 1992 (for short the Act). The adjudicating officer served a notice dated November 16, 2006 calling upon the appellant to show cause why suitable penalty be not imposed on him for misrepresenting before the investigating officer. The show cause notice refers to the stand taken by the appellant and also the reply furnished by Ananda Kumar to the Board denying the meeting with the appellant. On a consideration of the statement made by the appellant and the reply received from Shri Ananda Kumar, the adjudicating officer believed what was stated by Ananda Kumar in his letter of December 12, 2005 and disregarded the statement made by the appellant on oath before the investigating officer. After disbelieving the appellant, the adjudicating officer found that the former had violated the provisions of section 15A(a) of the Act and levied a monetary penalty of Rs. 25 lacs as per order dated February 26, 2007. It is against this order that the present appeal has been filed. Section 15A(a) of the Act provides that if any person who is required under the Act to furnish any document, return or report, fails to furnish the same, he shall be liable to a penalty of one lac rupees for each day during which such failure continues or Rs. 1 crore, whichever is less. Making a false statement would amount to failure to furnish the information sought and would attract section 15A(a).

We have heard the learned counsel for the parties and are of the view that the impugned order deserves to be set aside. The short question that had arisen before the adjudicating officer was as to which of the two versions which were diametrically opposite to each other was correct. In other words, he was called upon to decide whether the appellant was telling the truth when he stated on oath that he alongwith the legal advisor of BFSL had met Shri Ananda Kumar on January 18, 2005 with a request to allow the trading in the scrip of BFSL so that the shares could be transferred in the name of DLF and that he was told that trading on that exchange was not possible. Since Ananda Kumar had taken an opposite stand and had denied having met the appellant and, if the matter had rested at that, we would have remanded the case back to the adjudicating officer to decide afresh after allowing the appellant to cross examine Ananda Kumar. However, in the circumstances of this case, it is not necessary to adopt that course because there is enough material on the record to show that what Ananda Kumar had stated in his letter of December 12, 2005 was not true. We have on record two annual reports of the Bangalore Stock Exchange copies of which had been furnished by the appellant to the investigating officer at the time when his statement was recorded on June 7, 2006. Copies of these annual reports were also enclosed with the reply furnished by the appellant before the adjudicating officer. These annual reports pertain to the years 2003-04 and 2004-05. These have been signed by Ananda Kumar as a trustee and also as the Executive Director of the Bangalore Stock Exchange. In the annual report for the year 2003-04 this is what is stated regarding its business operations:

“During the year, your exchange had no trading activity, as a result of which there has been no turnover. Despite this, the Exchange has been able to show cash surplus.”

Again para 5 of this report which deals with ‘Future Outlook’ states thus:

FUTURE OUTLOOK

BSE – Indonext proposal: BSE and Federation of Indian Stock Exchanges, of which your exchange is also a member, have jointly submitted a proposal on setting up of an alternative trading platform for small and medium enterprises. This platform would be made available to all the listed companies of all the Regional Stock Exchanges. With the implementation of this proposal, trading on your exchange will re-commence.”

Similar statements have been made in the annual report for the year 2004-05. Paras 2.1 and 5 of this report also need to be referred to as they clinch the issue that has arisen for our consideration. These paras read as under:

“Business operations

2.1 Turnover

Your Exchange had no trading activity during the year.”

5. “IndoNext

On 7th of January 2005, the Hon’ble Finance Minister of Government of India, inaugurated IndoNext, the alternative platform for small and medium enterprises with a paid-up capital between Rs. 3 Crore and Rs. 20 Crore, which are currently listed on Regional Stock Exchanges and similar sized companies listed on BSE. Indonext has been jointly promoted by BSE, and the Federation of Indian Stock Exchanges, of which your exchange is a member. Activities of Market surveillance and Clearing and Settlement of trades in IndoNext are being carried out by BSE, while the Regional Stock Exchanges are monitoring the companies for compliance to the listing norms.”

The learned counsel for the appellant has placed before us the annual report of the Bangalore Stock Exchange for the year 2005-06 as well and that report also contains identical statements. From a reading of the aforesaid paras of the annual reports referred to hereinabove it is, abundantly, clear that there was no trading on the Bangalore Stock Exchange from the year 2003-04 till the end of March 2006 and, as already noticed above, these reports had been signed by Ananda Kumar. When we compare what is stated in the letter of December 12, 2005 with the statements made in the annual reports, it becomes abundantly clear that Ananda Kumar is the one who had misled the Board by making a false statement in the letter to the effect ‘..... that the Trading Platform of Bangalore Stock Exchange Ltd., is kept open for trading by the members of the Exchange and the same has never been suspended or closed.....’ We have seen from the annual reports that not even a single share of any company was traded during the 3 years from 2003-04 to 31.3.06 and this could happen only if the exchange was closed or trading thereon was suspended. It is inconceivable that the platform of the exchange was open for trading and not a single share was traded. It is thus clear that the documentary evidence on the record falsifies the statement of Mr. Ananda Kumar in his letter. This being so, the adjudicating officer was not justified in relying upon his statement

contained in the letter. As a matter of fact, he was in error in relying upon that letter. The statements contained in the annual reports support the plea taken by the appellant that there was no trading on the Bangalore Stock Exchange and that it was not possible to transfer the shares through that exchange in favour of DLF. It is unfortunate that the adjudicating officer did not bother to look at the material on the record. Only if he had looked at the annual reports, copies of which had been furnished to him by the appellant as well, he could have known that there was in fact no trading on the Bangalore Stock Exchange and that the appellant was right in this regard. There is no reference to the annual reports in the impugned order. He preferred to rely upon the false statement made by Ananda Kumar in the aforesaid letter as against the statement of the appellant made on oath which was subsequently reiterated in the form of an affidavit that was filed before the adjudicating officer. He has given no reasons for this. All that he has said is that the appellant has failed to furnish any documentary proof of his personal meeting with Ananda Kumar. The adjudicating officer should have weighed both the versions in the light of the annual reports and could have called Ananda Kumar for cross examination. When we examine the two opposite versions in the light of the annual reports we find that it was Ananda Kumar who misled the Board and not the appellant and that the charge against the latter is not established.

In the result, the appeal is allowed and the impugned order set aside with no order as to costs.

Sd/-
Justice N.K.Sodhi.
Presiding Officer

Sd/-
Arun Bhargava
Member

Sd/-
Utpal Bhattacharya
Member

08.07.2008
pmb

