

**BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI**

Appeal No.173 of 2013

Order reserved on : 15/9/2014

Date of decision : 30/09/2014

1. M/s. Ram Kaashyap Investment Limited
(Now known as M/s. Gemmia Oiltech (India) Limited)
Represented by its Director
Mr. S. Krishnakumar
 2. A. Venkatramani
Both having office at
B.R. Complex, II floor,
33/8, C.P. Ramaswamy Road, Alwarpet,
Chennai 600 018
- ... Appellants

Versus

Securities & Exchange Board of India
Southern Regional Office,
Overseas Towers, 7th floor,
756-L, Anna Salai,
Chennai – 600 002.

... Respondent

Mr. K. Ravi, Advocate with Mr. R. Murugan and Mr. A.H. Nagi, Advocates
for Appellants.

Mr. Shiraz Rustomjee, Senior Advocate with Mr. Mihir Mody, Advocate for
the Respondent.

CORAM : Justice J.P. Devadhar, Presiding Officer
Jog Singh, Member
A. S. Lamba, Member

Per : Justice J.P. Devadhar

1. Appellants are aggrieved by impugned order passed by Whole Time
Member of Securities and Exchange Board of India (SEBI) on 31st December,
2012 whereby the appellants are restrained from accessing the securities

market and further prohibited from buying, selling or otherwise dealing in securities, directly or indirectly, for a period of two years from the date of the said order.

2. It is not in dispute that before filing the preset Appeal, appellants had filed a writ petition before the Madras High Court and pursuant to an order passed in the aforesaid writ petition, implementation of the impugned order was stayed and that interim order has continued till date.

3. Relevant facts are that in the year 2010, appellant No.1 whose shares are listed on the Bombay Stock Exchange (BSE) and Madras Stock Exchange, offered to its shareholders 3,51,60,000 equity shares of Rs.10 each for cash at par aggregating to Rs.35.16 crore on rights basis. The rights issue opened on November 18, 2010 and closed on December 16, 2010. Vivro Financial Services Pvt. Ltd. ("Vivro" for short) a SEBI registered merchant banker was the lead manager to the rights issue and Knack Corporate Services Pvt. Ltd. ("Knack" for short), a SEBI registered Registrar to Issue and Share Transfer Agent, was the Registrar to the rights issue ("RTI" for short).

4. During the course of routine inspection of Knack carried out by SEBI, it was noticed that there were several complaints from the investors regarding non receipt of "Composite Application Forms" ("CAFs" for short) for subscribing to the rights issue of the company. Apart from above, several other discrepancies were also noticed during the course of said routine inspection.

5. In view of the discrepancies noticed, show-cause notices were issued to both the appellants alleging that they have violated various provisions of law as are listed in the following table:

Sl. No.	Name of the entity	Allegation	Violation
1.	Appellant No.1- Company	i) Failed to dispatch CAFs through registered post or speed post to all the eligible shareholders at least three days before the opening of the issue.	Regulation 54(1) of the ICDR Regulations
		ii) CAFs were not dispatched at all through any mode. The document submitted towards proof of dispatch was forged.	Regulations 3(c), 3(d), 4(2)(f) and 4(2)(k) of the PFTUP Regulations.
		iii) Made false and misleading advertisements with respect to the dispatch of CAFs to its shareholders, intending to deceive the investors and the regulatory authorities.	Regulations 3(c), 3(d), 4(2)(f) and 4(2)(k) of the PFTUP Regulations.
		iv) Concealed the fact that the refund of the application money was done on the instructions of SEBI and made a false disclosure to the stock exchange that the refund was made voluntarily.	Regulations 3(c), 3(d), 4(2)(f) and 4(2)(k) of the PFTUP Regulations.
		v) Did not publish advertisements in the newspapers informing the investors about the material developments that happened in its rights issue.	Regulation 60(4) of the ICDR Regulations
		vi) Did not enter into a valid agreement with Knack before engaging it as its Registrar to the Issue in the rights issue.	Regulation 5(5) of the ICDR Regulations
		vii) Failed to hand over records of signatures, etc, to Knack	Regulation 53A of the DP Regulations read with SEBI Circular D&CC/FITTC/CIR-15/2002 dated December 27, 2002.
2.	Appellant No.2 – Mr. A. Venkataramani (Promoter)	i) Mr. A. Venkataramani neglected his responsibility as the promoter of the Company in ensuring that CAFs were	Regulation 54(1) of the ICDR Regulations

		properly dispatched to the shareholders within the prescribed timeframe laid down in the regulations.	
		ii) Mr. A. Venkataramani was in the knowledge of the developments leading to the Company making misleading and false advertisements and the production of the forged/fake postal register falsely suggesting the dispatch of CAFs.	Regulations 3(c), 3(d), 4(2)(f) and 4(2)(k) of the PFTUP Regulations.
		iii) Failed in his obligation to inform the investors about the factual position leading to the refund of the issue proceeds.	Regulation 60(4) of the ICDR Regulations
		iv) Mr. A. Venkataramani, being the main promoter of the Company, was responsible for making proper disclosures by the Company.	Regulations 3(c), 3(d), 4(2)(f) and 4(2)(k) of the PFTUP Regulations.

6. Appellants filed replies to the show-cause notices denying the allegations made against them in the show-cause notices. Personal hearing was also afforded to the appellants. After considering the reply as also arguments advanced at the personal hearing, Whole Time Member of SEBI has passed the impugned order on 31st December, 2012. Challenging the aforesaid order dated 31st December, 2012, initially a writ petition was filed and thereafter pursuant to the order passed by the Madras High Court, appellants have filed the present appeal. As noted earlier, implementation of the impugned order has remained stayed all these years in view of the interim order passed by the Madras High Court.

Submissions relating to charges levelled against appellant No.1:

7. As regards charges (i) and (ii) levelled and upheld against appellant No.1, Mr. K. Ravi, learned counsel appearing on behalf of appellant No.1, submitted that as per Regulation 54(1) of Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 ("ICDR Regulations" for short), CAFs are required to be dispatched by registered post or speed post at least three days before the date of opening of the rights issue. In the present case, Knack (RTI) has admitted that CAFs were neither sent by registered post nor by speed post but were sent under certificate of posting which is not in compliance with Regulation 54(1) of the ICDR Regulations.

8. Counsel for appellants further submitted that once it is accepted that CAFs were not sent by registered post or by speed post, SEBI ought to have stopped further enquiry and asked appellant No.1 company to drop the issue at once. In fact, by a letter dated 5/1/2011 SEBI directed Vivro (merchant banker) to instruct appellant No.1 to refund entire subscription proceeds. Vivro, in turn, addressed a letter to that effect to appellant No.1. Accordingly, appellant No.1 refunded the entire subscription amount on 8th January, 2011. Thus, the defect being fully cured and no loss caused to any of the investors, SEBI is not justified in restraining appellant No.1 from entering the securities market for two years. By invoking provisions contained in Section 11(1), 11(4) & 11(B) of Securities and Exchange Board of India, Act, 1992 impugned order is passed against appellant No.1 as a punitive measure which is beyond the scope of aforesaid provisions. Moreover, neither in the show-cause notice nor in the impugned order it is stated that the restraint order was required to

be made with a view to protect either the interests of investors or the securities market. In any event, for violations of ICDR Regulations committed by Knack (RTI), appellant No.1 could not be penalized. Accordingly, it is submitted that charges (i) and (ii) framed and held against appellant No.1 cannot be sustained.

9. In respect of charge no.(iii), learned counsel for appellant No.1 submitted that Vivro as merchant banker to the rights issue had issued advertisement on behalf of appellant No.1 and before releasing the public advertisement to be published on 15th November, 2010, Vivro had sent draft advertisement for approval by email to appellant No.1 on 20/8/2010 and another draft advertisement by email on 12/11/2010 at 3.12 p.m. In both drafts Vivro had left out certain particulars to be filled in later, one such particular being the date and mode of dispatching the CAFs. In the advertisement issued on 15/11/2010 it was wrongly stated that the CAFs were dispatched “through Registered Post/Speed Post by November 13, 2010”. By a corrigendum issued on December 6, 2010, the error in the advertisement was rectified. Since the lapse, if any, in issuing advertisement with incorrect statement is by Vivro, SEBI is not justified in penalizing appellant No.1 especially when SEBI has absolved Vivro from charge No.(iii).

10. With reference to charge No.(iv), it is contended by counsel for appellant No.1 that neither SEBI had addressed any letter directing appellant No.1 to refund subscription proceeds nor there was any instruction issued to appellant No.1 to make a public statement that appellant No.1 was refunding the subscription amount on instructions from SEBI. Therefore, voluntary corporate announcement made by appellant No.1 could not be said to have

been made fraudulently so as to attract regulation 2(c) of PFTUP Regulations and consequently penalizing appellant No.1 on ground that PFUTP Regulations have been violated, is wholly unjustified.

11. With reference to charge no.(v), learned counsel for appellant No.1 submitted that issuing advertisement in the newspapers under regulation 60(4) of ICDR Regulations would arise only when there are material developments to the rights issue. In the present case, since the rights issue was called off as per the instructions of SEBI, it could not be said that there was any material development which would trigger regulation 60(4) of ICDR Regulations and hence penalizing appellants on ground that they have violated regulation 60(4) of ICDR Regulations is unjustified.

12. With reference to charge no.(vi), it is submitted that before appointing Knack as RTI to the rights issue, appellant No.1 had entered into an MoU with Knack. Merely because the said MoU was not stamped, it could not be said that there is no agreement and accordingly it could not be said that Regulation 5(5) of ICDR Regulations is violated.

13. With reference to charge no.(vii), learned counsel for appellant No.1 submitted that in the absence of any specific charge as to which record mentioned in the regulation/circular dated December 27, 2002, have not been maintained and furnished to Knack, SEBI is not justified in holding that appellant No.1 has violated any regulation or violated circular dated December 27, 2002.

Submissions relating to charges levelled against appellant No.2 :-

14. With reference to four charges levelled against appellant No.2, counsel for appellants submitted that appellant No.2 was only a promoter and not a director of appellant No.1 company and thus, appellant No.2 was not in charge of the day to day affairs of the company. In the absence of any statutory responsibility cast upon a promoter under the SEBI Act or rules/regulations framed thereunder, in the present case, appellant No.2 could not be said to have violated any regulation framed by SEBI and therefore, SEBI is not justified in passing restraint order against appellant No.2.

15. Learned counsel for appellants further submitted that failure on part of SEBI to give an opportunity to the appellants to cross-examine Vivro and Knack by making them as parties to the proceedings amounts to violating the principles of natural justice. He submits that during the course of hearing, appellants were told that they would be given an opportunity to cross-examine Vivro and Knack, however, without giving any such opportunity impugned order has been passed in gross violation of the principles of natural justice and hence impugned order is liable to be quashed and set aside.

16. Counsel for appellants further submitted that in para 24 of the impugned order, it is stated that no material is brought on record to establish the allegation that the appellants have colluded with Knack in forging the proof of dispatching the CAFs. However, in para 32 of the impugned order it is stated that there is strong preponderance of probability that a plan, scheme

and device was orchestrated between appellant No.1, appellant No.2 and Knack to deliberately deprive the eligible public shareholders to subscribe to the rights issue and to enable appellant No.2 to increase and consolidate his shareholding in the company, by subscribing to shares beyond his entitlement under the guise of subscribing to unsubscribed portion of rights issue at low cost and without attracting the obligation to make an open offer under the Takeover Regulations, 1997. Similarly in para 35 of the impugned order, it is recorded that since conduct of Vivro is not part of the proceedings, conduct of Vivro is not examined in the impugned order. Charge No.(iii) against appellant No.1 in fact deals with the misleading advertisement issued by Vivro. Having not taken any action against Vivro, SEBI is not justified in penalizing the appellants. In any event, in view of above mutually contradictory and inconsistent stand taken by SEBI in the impugned order, counsel for appellants submitted that impugned order deserves to be quashed and set aside. Relying on a decision of the Apex Court in the case of Ram Singh Vs. Col. Ram Singh reported in AIR 1986 S.C. 3 and a decision of this Tribunal in case of BPL Ltd. vs. SEBI reported in (2002) 38 SCL 310, counsel for appellants submitted that statutory authorities like SEBI cannot arrive at findings on serious charges like forgery, corrupt practice or fraud on the basis of preponderance of probabilities and wherever the charge entails serious consequences, the charge must be proved beyond doubt and the standard of proof in such case would be the standard of proof required in a criminal trial.

17. Reliance is also placed by counsel for appellants on the following decisions in support of his contention that SEBI has no jurisdiction to pass a punitive order under Section 11 or Section 11(4) or Section 11B of SEBI Act:

- a) Sterlite Industries (India) Ltd. vs. SEBI [(2001) 34 SCL 485]
- b) Ritesh Agarwal & anr. Vs. SEBI [(2008) 8 SCC 205]
- c) Videocon Intl. Ltd. vs. SEBI [(2002) 38 SCL 422]

Submissions on behalf of Respondents

18. Mr. Rustomjee, learned counsel appearing on behalf of respondent while supporting the order impugned in the appeal submitted that once primary responsibility of appellant No.1 for not sending CAFs to eligible shareholders in the manner specified under the ICDR Regulations is accepted, appellant No.1 cannot escape from the clutches of Section 11(1), 11(4) & 11B of SEBI Act which inter alia empowers SEBI to restrain the violators from entering the securities market. Counsel for SEBI further submitted that independent proceedings have been taken against Vivro and Knack and by an order dated 8th November, 2012, WTM of SEBI has suspended the certificate of registration granted to Knack for three months and by an order dated December 20, 2013 WTM of SEBI while holding Vivro guilty of violating ICDR Regulations, has warned Vivro to be more careful in the future. It is further contended by counsel for SEBI that in the year 2009 the managing director of Knack was employed with Kaashyap Technologies (a group company) wherein appellant No.2 is chairman and managing director and the premises from which Knack operates belong to appellant No.2. In these circumstances, counsel for SEBI submitted that the restraint order passed against appellants under Section 11, 11(4) and 11B of SEBI Act

cannot be said to be without jurisdiction. In support of above contention, reliance is placed by counsel for SEBI on a decision of this Tribunal in case of Libord Finance Ltd. vs. SEBI (Appeal No.38 of 2008 decided on 31.3.2008).

Findings

19. We have carefully considered rival submissions.

20. On perusal of the impugned order, it is seen that there were several complaints from the investors regarding non receipt of CAFs in relation to rights issue from the appellant No.1 company. As per regulation 54(1) of ICDR Regulations, it was mandatory for the issuer-appellant No.1 company to dispatch the abridged letter of offer along with CAFs through registered post or speed post to all the existing shareholders at least three days before the date of opening of the rights issue. Admittedly, CAFs were neither dispatched through registered post nor by speed post. Being issuer to the rights issue, appellant No.1 cannot escape responsibility by alleging that Knack appointed as RTI by appellant No.1 has violated the ICDR Regulations. It is not in dispute that under Section 11(4) of SEBI Act, SEBI is empowered to restrain a person violating SEBI Act and the Regulations made thereunder, from entering the securities market for such period as it deems fit. In the facts of present case, it is not in dispute that in relation to the rights issue floated by appellant No.1, ICDR Regulations have been violated. Therefore, no fault can be found with the decision of SEBI in restraining appellant No.1 from entering the securities market for two years.

21. Argument that once the appellant No.1 at the instance of SEBI has refunded the entire subscription amount to the investors for not dispatching CAFs through registered post/speed post, SEBI ought to have dropped the

proceedings and ought not to have further investigated the matter is without any merit, because, Knack, appointed as RTI by appellant No.1 had represented to SEBI that CAFs were sent through certificate of posting and to find genuineness of that representation, it was necessary for SEBI to carry further investigation. In fact, on further probe, it is found that the representation made by Knack was a false representation based on got up document created by Knack and accordingly by an order dated November 8, 2012 the certificate of registration granted to Knack has been suspended for a period of three months. Since appellant No.1 had floated the rights issue, it was the primary responsibility of appellant No.1, to ensure that CAFs are dispatched in the manner specified under regulation 54(1) of ICDR Regulations. Since appellant No.1 failed to discharge that responsibility, appellant No.1 cannot escape liability by alleging that the violations are committed by RTI appointed by appellant No.1.

22. As regards charge No. (iii) is concerned, although the advertisement was issued by Vivro in the name of appellant No.1, admittedly draft advertisement was duly approved by appellant No.1. If draft advertisement sent to the appellant No.1 for approval did not contain particulars relating to CAFs, then, appellant No.1 ought not to have approved the draft. Having approved the draft advertisement on the basis of representation made by Knack, appellant No.1 cannot now turn around and say that appellant No.1 cannot be held liable for the false statement made in the advertisement, because, the advertisement was released by Vivro. Very fact that appellant No.1 claims to have approved draft advertisement based on the confirmation given by Knack that CAFs have been dispatched by registered post/speed

post and the said false statement was to the benefit of appellant No.2 who as a promoter to the rights issue could subscribe to the unsubscribed shares, SEBI was justified in drawing an inference that not sending CAFs but issuing a false advertisement was a game plan of appellant No.2 to strengthen his shareholding in appellant No.1 company. From the order passed by SEBI against Vivro on December 20, 2013, it is seen that though the advertisement of appellant No.1 was issued by Vivro, Vivro had relied upon the confirmation given by appellant No.1 as well as Knack that CAFs were dispatched through registered post/speed post. Fact that Vivro has been let off with a warning would not absolve appellant No.1 from the consequences of issuing false advertisement, because, admittedly the advertisement was issued in the name of appellant No.1 and draft of that advertisement was approved by appellant No.1.

23. Other charges levelled against appellant No.1 are no doubt trivial charges. The corporate announcement made by appellant No.1 though voluntary announcement, if it was stated therein that the amounts were refunded at the instance of SEBI, it would have been far more accurate statement. Similarly, aborted rights issue ought to have been considered as material development and advertisement to that effect ought to have been issued in the newspapers for the benefit of investors. Entering into an MoU instead of entering into an agreement in the prescribed format before appointing Knack an RTI could not be said to be in compliance with regulation 5(5) of ICDR Regulations. In para 43 of the impugned order, it is recorded that appellant No.1 has not produced any proof to show that it had handed over the signature records to Knack. Irrespective of the fact that these

charges are all trivial charges, in the facts of present case, since the CAFs were not dispatched inspite of specific provision under ICDR Regulations and advertisement issued by appellant No.1 did contain false statement, no fault can be found with the decision of SEBI in restraining the appellant No.1 from accessing the securities market for a period of two years.

24. Arguments that no opportunity was given to appellants to cross examine Vivro, Knack as also the postal authorities is without any merit, because, firstly, there is no request on record made by appellants in writing to that effect. Secondly, claim of appellants that during the course of hearing they were told that opportunity to cross examine aforesaid persons would be given is also not supported by documents on record. Thirdly, once the appellants admit that CAFs were not dispatched by registered post/speed post/under postal certificate and that the advertisement issued in the name of appellant No.1 contained false statement in relation to dispatching CAFs, then, cross examining Vivro or Knack or the postal authorities to ascertain as to whether CAFs were dispatched at all would be wholly irrelevant. Moreover, Knack (RTI) has been found guilty of manipulating records on the basis of confirmation received from postal authorities and Knack has accepted the decision of SEBI. If Knack has accepted the decision of SEBI, then there is no reason as to why appellants want to cross examine Knack and postal authorities, especially when appellants contend that they are not parties to the wrongful acts committed by Knack. Therefore, argument that the impugned order has been passed in violation of the principles of natural justice cannot be accepted.

25. Arguments advanced on behalf of appellant No.2 are equally without any merit, because, as per the letter of offer, appellant No.2 who is the promoter of appellant No.1 was to play a major role by subscribing to the unsubscribed share under the rights issue. In para 30 of the impugned order, it is recorded that managing director of Knack was employed with Kaashyap Technologies in the year 2009 and at that time appellant No.2 was the chairman and managing director of Kaashyap Technologies. Moreover, it is seen that the premises from which Knack operates belong to appellant No.2. These findings recorded in the impugned order are not disputed. In view of the close proximity of Knack with appellant No.2 and failure of Knack in not dispatching CAFs was to the benefit of appellant No.2 in subscribing to the unsubscribed shares under the rights issue, adverse inference drawn by SBEI that the appellant No.2 was the mastermind for floating the rights issue with a view to consolidate his shareholding in appellant No.1 company by resorting to dubious methods in connivance with Knack cannot be said to be without any substance. Further in the impugned order it is recorded that out of 4 cheques given by appellant No.2 aggregating to Rs.28.25 crore for subscribing to the unsubscribed shares under the rights issue, three cheques worth Rs.23.75 crore had bounced. Thus, it is clear that knowing fully well that funds are insufficient, appellant No.2 had issued cheques for Rs.28.25 crore only to ensure that on the basis of cheques issued by appellant No.2, appellant No.1 announces that the rights issue has been fully subscribed. In these circumstances, restraint order passed against appellant No.2 cannot be faulted.

26. Argument that there are several inconsistencies and mutually contradictory statements in the impugned order is also without any merit. What is stated in para 24 and 32 of the impugned order is that although there is no direct evidence to establish that appellants and Knack have connived, from the material on record it can be inferred that the conduct of appellant No.1 in not dispatching CAFs but still issuing an advertisement that CAFs have been dispatched by registered post/speed post was with a view to facilitate appellant No.2 who is the promoter of appellant No.1 to subscribe to the unsubscribed shares under the rights issue even when adequate funds were not there, was nothing but a device adopted by appellant No.2 with a view to strengthen his shareholding in the appellant No.1 company, without complying with open offer obligation under the Takeover Regulations, 1997. Various decisions relied upon by the counsel for appellants have no bearing on the facts of present case, because, in none of these cases, applicability of Section 11(4) of SEBI Act have been considered. Facts in the present case reveal that appellant No.1 failed to comply with ICDR Regulations by not dispatching CAFs and further, appellant No.1 got advertisement issued in its name that CAFs have been dispatched by registered post/speed post, thereby giving an impression that provisions of ICDR Regulations have been complied with. These acts of appellant No.1 were obviously intended to benefit appellant No.2 – promoter of appellant No.1, because, appellant No.2 was entitled to subscribe to the unsubscribed shares under the rights issue, without resorting to open offer procedure prescribed under the Takeover Regulations.

27. Argument of appellants that by impugned order punitive action is taken against appellants, even though Section 11, 11(4) or Section 11B of SEBI Act do not empower SEBI to take any punitive action is also without any merit, because, restraining persons found violating the regulations framed by SEBI from entering the securities market is one of the powers vested in SEBI under Section 11(4) of SEBI Act inserted with retrospective effect from 29/10/2002. Therefore, without going into the question as to whether under Section 11(1), 11(4) and 11B of SEBI Act, punitive action can be taken or not, in the facts of present case, we find that restraint order passed against appellants is within four corners of SEBI Act.

28. For all aforesaid reasons, we see no merit in the appeal and the same is hereby dismissed with no order as to costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

Sd/-
A.S. Lamba
Member

30/9/2014
Prepared & compared by-ddg