

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 126 of 2010

Date of decision: 15.09.2010

Bharat Jayantilal Patel
3-3A, Churchgate House,
32-34, Veer Nariman Road,
Mumbai – 400 001.

..... Appellant

Versus

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

2. P. K. Bindlish
Designated Authority
SEBI Bhavan, Plot No.C-4A,
G Block, Bandra-Kurla Complex,
Mumbai – 400 051.

..... Respondents

Mr. N.H. Seervai, Senior Advocate with Mr. Chetan Kapadia,
Mr. Shaukat Merchant, Mr. Nikhil Dharod and Mr.Dhawal Kenia,
Advocates for the Appellant.

Mr. J. J.Bhatt, Senior Advocate with Ms. Daya Gupta and
Ms. Harshada Nagare, Advocates for the Respondents.

CORAM : Justice N.K. Sodhi, Presiding Officer
Samar Ray, Member
P.K. Malhotra, Member

Per : Justice N.K. Sodhi, Presiding Officer

What impels us to interfere in this case at the stage of the enquiry proceedings is the fact that the respondent, the Securities and Exchange Board of India(hereinafter referred to as the Board) does not seem to have taken note of the observations made by us in Dilip S. Pendse v. Securities and Exchange Board

of India, Appeal no. 90 of 2007 decided on November 20, 2008. In that case the statement of one Talaular was sought to be relied upon against the appellant therein to hold him guilty of insider trading and he was not allowed to cross examine Talaular. While allowing the appeal we made the following observations:

“We have been noticing the same kind of unwillingness on the part of the respondent Board in similar circumstances to permit cross examination of parties by the opposite side during enquiries conducted by it. We consider it necessary to remind the respondent Board once again that in a situation where one person’s statement is being relied upon as against the other, permitting cross examination of that person by the opposite side is the best way of arriving at the truth which is the only aim of an enquiry, whether the enquiry is by a whole time member or by an enquiry officer or by an adjudicating officer. We hope that this fundamental principle is not lost sight of by the respondent Board.”

This is yet another case where the appellant has approached us with a similar grievance.

2. The appellant before us is a member of the Bombay Stock Exchange, Mumbai carrying on his business as a share and stock broker and is registered with the Board under Section 12 of the Securities and Exchange Board of India Act, 1992 (for short the Act). The appellant states that in the ordinary course of his business, he has been selling and purchasing shares of Global Telesystems Limited on behalf of Niskalp Investments and Trading Company Private Limited and Tata Finance Limited (hereinafter called Niskalp and TFL respectively) on the verbal orders/instructions on telephone from A.L. Shilotri and D. S. Pendse who were the director and managing director of Niskalp and TFL respectively. The Board received a complaint dated October 18, 2002 from TFL alleging instances of irregular securities transactions in the nature of backdating and

fictitious contract notes/bills for sale and purchase of shares. It appears that the Board conducted investigations and thereafter issued a show cause notice dated October 23, 2009 to the appellant after a period of 7 years. The gravamen of the charge levelled against the appellant is that he executed fictitious and backdated transactions on behalf of Niskalp and TFL and thereby violated the provisions of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995 read with the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 and the code of conduct prescribed in clause A in Schedule II to the Securities and Exchange Board of India (Stock Brokers and Sub-Brokers) Regulations, 1992 . In support of this allegation, reliance is sought to be placed in paras 27 to 33 of the show cause notice on the statements of six individuals namely, P.R. Ramesh, Avadhoot L. Shiltori, Dilip Pendse, S. Sivaram, Subodh Shah and Jose Peter. The statements of these persons had been recorded during the course of investigations and copies of their statements have been forwarded to the appellant along with the show cause notice. The appellant has denied all the allegations made in the show cause notice and an enquiry officer has been appointed who is conducting the enquiry. Since reliance is being placed on the statements of the aforesaid individuals the veracity of which is being challenged by the appellant, he moved an application on May 31, 2010 with a request that without prejudice to his rights and contentions in the matter, he may be allowed to cross examine the aforesaid six individuals. This request of the appellant was merely noted and the enquiry officer fixed July 29, 2010 as the date of hearing in the enquiry. The appellant then moved another application dated July 15, 2010 pointing out to the enquiry officer that he would begin with the cross examination of the witnesses whose

statements had been recorded, referred to and relied upon in the show cause notice. He wanted these persons to be present on the date of hearing so that he could cross examine them. The enquiry officer informed the appellant by his letter dated July, 20, 2010 that the hearing would continue as scheduled on July 29, 2010 but “**no cross-examination of witnesses would be held**”. It was then that the appellant filed the present appeal impugning the decision of the enquiry officer not to allow cross examination.

3. At the outset, we may mention that we do not normally interfere at the stage of the enquiry proceedings primarily for the reason that any observation made by us for or against either party may prejudice the proceedings/parties. But in the instant case, we think it is necessary to intervene to avoid another round of litigation between the parties in the already more than 9 years old case. We are of the view that, in the circumstances of the present case, the appellant is entitled to cross examine the persons on whose statements strong reliance has been placed in the show cause notice to establish the charges levelled against him. If we do not step in at this stage, the enquiry officer shall proceed with the enquiry without allowing cross examination and, in case, the final order goes against the appellant, he would be in appeal before us making the same grievance and in that event we may have to set aside the order and remand the case back to the enquiry officer. We intend only to avoid such a situation.

4. We have heard the learned senior counsel on both sides and are of the view that the grievance of the appellant in this appeal in so far as he has been denied cross examination of the persons on whose statements reliance is sought to be placed is justified. The statements of the six persons mentioned in the earlier part of our order were recorded behind the back of the appellant during

the course of the investigations and it is the appellant's case that those statements are untrue. The only way the truth can come out is to allow cross examination of those who have deposed against him. In these circumstances, we see no reason why the appellant should not be allowed to cross examine those persons. The purpose of any enquiry is to find out the truth and where an assertion made by one is being contested by the other, there can be no better way of arriving at the truth than to allow the former to be cross examined. This will also enable the enquiry officer to watch their demeanour to arrive at the truth. In *Meenglas Tea Estate v. The Workmen*, AIR 1963 SC 1719 the learned Judges of the Supreme Court made the following observations which are extremely relevant for the present case:

"It is an elementary principle that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and this requirement must be substantially fulfilled before the result of the enquiry can be accepted. A departure from this requirement in effect throws the burden upon the person charged to repel the charge without first making it out against him."

In *Bareilly Electricity Supply Co. Ltd. vs. The Workmen* AIR 1972 SC 330, this is what the learned judges held:

"The application of the principle of natural justice does not imply that what is not evidence can be acted upon. On the other hand what it means is that no material can be relied upon to establish a contested fact which are not spoken to by persons who are competent to speak about them and are subjected to cross-examination by the party against whom they are sought to be used."

In *Kishinchand Chellaram v. Commissioner of Income-tax* AIR 1980 SC 2117, Hon'ble Mr. Justice P.N. Bhagwati (as his Lordship then was) speaking for the bench observed in paragraph 6 of the judgment as under:

“It will therefore be seen that, even if we assume that this letter was in fact addressed by the manager of the Punjab National Bank Limited to the Income-tax Officer, no reliance could be placed upon it, since it was not shown to the assessee until at the stage of preparation of the supplemental statement of the case and no opportunity to cross-examine the manager of the Bank could in the circumstances be sought or availed of by the assessee. It is true that the proceedings under the Income-tax Law are not governed by the strict rules of evidence and therefore it might be said that even without calling the Manager of the Bank in evidence to prove this letter, it could be taken into account as evidence. But before the Income-tax Authorities could rely upon it, they were bound to produce it before the assessee so that the assessee could controvert the statements contained in it by asking for an opportunity to cross examine the manager of the Bank with reference to the statements made by him.”

Again, a constitution bench of the Supreme Court in *A.K. Roy v. Union of India* AIR 1982 SC 710 noticed the following observations of the American Supreme Court in *Greene v. McElroy*, (1959) 3 L Ed 2d 1377:

“Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, ... but also in all types of cases where administrative actions were under scrutiny.”

and held as under:

“The principle that witnesses must be confronted and offered for cross-examination applies generally to proceedings in which witnesses are examined or documents are adduced in evidence in order to prove a point. Cross-examination then becomes a powerful weapon for showing the untruthfulness of that evidence.”

Similar view has been taken by the Supreme Court in *New India Assurance Co. Ltd. v. Nusli Neville Wadia & Anr.* AIR 2008 Supreme Court 876.

5. Before concluding on this aspect, we may mention that the enquiry officer has not only ignored the observations made by this Tribunal repeatedly and the settled law on the subject but also has ignored the guidelines issued by the Board itself for conducting cross examination of witnesses. These guidelines provide for cross examination of a witness on whose statement reliance is sought to be placed which happens to be the case before us.

6. We may now notice an objection raised by the learned senior counsel appearing for the Board. He contended that the present appeal was not maintainable and that the impugned communication dated July 22, 2010 was not “an order” within the meaning of Section 15T of the Act. We do not agree with him. The relevant part of Section 15T reads as under:

“15T. [(1) Save as provided in sub-section (2), any person aggrieved,-

(a) by an order of the Board made, on and after the commencement of the Securities Laws (Second Amendment) Act, 1999, under this Act, or the rules or regulations made thereunder; or

(b) by an order made by an adjudicating officer under this Act,

may prefer an appeal to a Securities Appellate Tribunal having jurisdiction in the matter.”

The words “an order” appearing in this provision are comprehensive enough to include every order or decision taken by the Board which adversely affects the

rights of the parties. Black's Law Dictionary (Sixth Edition) defines the word 'order' to mean "A mandate; command or direction authoritatively given; rule or regulation. Direction of a court or judge made or entered in writing, and not included in a judgment, which determines some point or directs some step in the proceedings." One of the issues that arose before the enquiry officer was whether the appellant was entitled to cross examine the persons whose statements are sought to be relied upon and the enquiry officer has decided that issue by denying the right to the appellant. So far as this issue is concerned, the order is final qua the enquiry and it affects the rights of the appellant. We are clearly of the view that it is an order within the meaning of Section 15T of the Act and that the present appeal is maintainable. The Division Bench judgment of the Bombay High Court in Harinarayan G. Bajaj v. Securities Appellate Tribunal and another, SEBI Appeal no. 6 of 2002 decided on October 31, 2002 does not, in our opinion, support the contention of the learned senior counsel for the Board. What has been held in that case is that purely procedural orders which do not affect the substantive rights of the parties are not appealable. We have already held that the impugned communication is not procedural in nature and it affects the substantive right of the appellant.

7. Before concluding, we are constrained to observe that the Board in the past has been allowing its proceedings to be vitiated in some cases by denying the right of cross examination to the delinquent against whom findings are recorded by placing reliance on the statements of witnesses recorded during the course of the investigations. We have time and again observed that when a fact is sought to be established on the basis of the statement of a person which is refuted by the delinquent, the latter has a right to cross examine the person

whose statement is sought to be relied upon. This is the bare minimum requirement of the principles of natural justice which needs to be complied with in all quasi judicial proceedings that are conducted by the Board. Our experience tells us that the Board does not adhere to this basic principle of natural justice and we are yet to come across a case where it has allowed cross examination to the delinquent in similar circumstances. We hope that while holding enquiries whether it be by the whole time member or by an enquiry officer or by the adjudicating officer, these elementary principles of natural justice leading to a fair trial shall be borne in mind.

In the result, the appeal is allowed and the decision of the enquiry officer declining the right of cross examination to the appellant set aside. He is directed to allow the Appellant to cross examine the six persons named in the earlier part of our order on whose statements reliance is being placed. There is no order as to costs.

Sd/-
Justice N. K. Sodhi
Presiding Officer

Sd/-
Samar Ray
Member

Sd/-
P.K. Malhotra
Member

15.9.2010
Prepared and compared by-ddg