

**IN THE SECURITIES APPELLATE TRIBUNAL
MUMBAI**

Appeal No. 156 of 2006

Date of Decision 11.9.2007

Top Telemedia Ltd.
Formerly known as Top Cassettes Ltd. ***Appellant***

Versus

Securities and Exchange Board of India **Respondent**

Present : Mr. Pesi Modi, Advocate with Mr. Deepak Shah, Advocate
for the appellant
Dr. Poornima Advani, 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)

By the impugned order passed by the adjudicating officer the maximum penalty of Rs. 1 crore has been levied on the appellant under section 15A(a) of the Securities and Exchange Board of India Act, 1992 (for short the Act) for not complying with the summons issued to it during the course of the investigations ordered by the Securities and Exchange Board of India (hereinafter called the Board). We are extremely unhappy with the manner in which the matter has been dealt with and are satisfied that the investigating officer, the Board and even the adjudicating officer did not apply their mind and acted arbitrarily through out. Facts giving rise to this appeal may now be noticed.

2. The Board ordered investigations into certain irregularities allegedly committed by Prakash Fotran Softech Ltd. (for short the company) which had allegedly rigged the price of its scrip during the period from October 1999 to

December 1999. During the course of the investigations, the investigating officer issued summons dated 10.9.2004 to the appellant for appearance on 17.9.2004 calling upon it to furnish the information as referred to in Annexure 1 to the summons. The appellant claims that it did not receive these summons and the respondent has no proof whether these were ever served on the appellant. Thereafter, a letter dated 17.9.2004 was issued to the appellant and a copy of the summons dated 10.9.2004 along with the annexure was enclosed. Admittedly, this letter was received by the appellant. Annexure 1 containing the items on which the information was sought from the appellant reads as under:

“Annexure 1

The following information for the period October 1, 1999 to December 31, 1999 is to be furnished before the investigating authority at the time of your personal appearance.

1. Shareholding pattern of the company Top Cassettes Ltd. and Associate Companies
2. Details of the Promoters and their shareholdings in Top Cassettes Ltd.
3. The documents pertaining to the company/or its directors relationship with Prakash Fotran Softech Ltd., its group companies and directors.
4. The details of the dealing of the directors of your company/associate companies on the scrip of Prakash Fotran Softech during July 1999 to December 1999.”

It is pertinent to mention here that the summons had been issued to Top Cassettes Ltd. which was the previous name of the appellant. On receipt of the aforesaid letter along with the summons containing annexure 1, the appellant addressed a communication dated 22.9.2004 to the Board seeking some

reasonable time of 20-30 days to collect and produce the information and the following request was made in that letter:

“In this connection, we would like to know that as the desired information/documents/details required by your good office is around 5 years old, therefore it will take some reasonable time of 20-30 days to collect the same and produce before your good office.

In the Circumstances mentioned above, kindly give us time of 20-30 days enable us to submit the desired information as per Annexure of your summons.”

This letter was admittedly received by the Board on 23.9.2004. The request of the appellant seems to have been rejected by the investigating officer and a letter dated 24.9.2004 was addressed to it requiring it to appear on 27.9.2004 alongwith the necessary documents and the same reads as under:-

“With reference to your reply to summons vide Letter No. nil dated 22/09/2004, please note that two summons are already been issued and the first summon has not been complied with.

In this connection we would like to inform you that you are required to appear in person before the Investigating Authority along with the necessary documents as directed in the summons at the latest by September 27, 2004. No further time will be given to you in this regard.”

This letter was sent to the appellant at its Mumbai address on 24.9.2004 itself. It was sent by hand and the same was received back with the report “office is closed from last two years said building security, Sd/- Madhukar – 24.9.2004 – 5 p.m.” The letter was placed before the investigation department and it was ordered that it be resent to the appellant at its Ahmedabad address by registered post. The letter was then sent to the Ahmedabad address by registered post

acknowledgment due and the A.D. form was prepared on 26.9.2004. It bears a postal stamp of post office Nariman Point, Mumbai dated 28.9.2004 from where the letter was despatched. It also bears the postal stamp of post office Ellis Bridge, Ahmedabad dated 30.9.2004. It is thus clear that the letter was received at Ahmedabad on 30.9.2004 whereas the appellant was required to appear in person along with the requisite information on 27.9.2004. Since the appellant did not appear on 27.9.2004, the investigating officer proceeded to submit his investigation report to the Board. The investigation report is said to have been placed before an internal committee of Divisional Chiefs on 11.10.2004. In the meantime the appellant submitted its detailed reply dated 21.10.2004 furnishing the required information to the investigating officer. The appellant had given parawise reply to the various items of information sought from it. Having furnished the detailed information this is what it had to say in paragraph 3 of the reply.

“In view of furnishing of the information as above, as required by you in the Summons, we are of the considered opinion that our physical presence in the matter is not required and be dispensed with. Accordingly, we treat this reply as compliance of Summons dated 10th September 2004. Delay, if any, in filing this reply as compliance of Summons may please be condoned.”

This reply was received by the Board on 2.12.2004.

Thereafter, the Board initiated adjudication proceedings on 17.1.2005 against the appellant for not complying with the summons issued by the investigating officer on 24.9.2004 for appearance upto 27.9.2004. Admittedly, the adjudicating officer was appointed only on 7.7.2005. He issued a notice to the appellant on 22.11.2005 under Rule 4(1) of the Securities and Exchange Board of India (Procedure for Holding Enquiry and Imposing Penalties by

Adjudicating Officer) Rules, 1995 (for short the Rules). This notice was sent by registered post at the Ahmedabad address and was returned undelivered with the remarks “left”. Another show cause notice was issued on 24.2.2006 at the Pune address and that too, could not be served on the appellant. The investigation department then pasted a copy of the show cause notice on 25.4.2006 at the office premises of the appellant at Ahmedabad. It appears that this pasted notice came to the notice of the appellant and it sent a letter dated 7.6.2006 through a messenger to the adjudicating officer with a request to supply a complete copy of the show cause notice dated 25.4.2006 along with its annexure so that it could file its reply. The fact that this letter was sent through messenger who met the adjudicating officer is not disputed. We have perused this letter and find that a request had been made therein to furnish a copy of the notice as per the bearer whose name had been mentioned in the letter. The adjudicating officer did not accede to this request and ordered that a copy of the show cause notice dated 25.4.2006 be sent to the appellant by registered post (AD) at the address mentioned in letterhead. The address on the letter head of the company was that of its Ahmedabad office. This notice again came back undelivered with the remarks “left”. Thereafter, the adjudicating officer fixed the date for the enquiry and after examining the material on the record came to the conclusion that the appellant had failed to comply with the summons issued to it during the course of the investigations and was liable to be penalised under section 15A(a) of the Act. While considering the quantum of penalty the adjudicating officer observed in paragraph 15 of the impugned order as under:-

“.....I am fully satisfied that this case deserves severe penalty since it is a matter of fraud involving crores of rupees. Keeping in view the facts and circumstances of the case and non-cooperation by TCL during investigations and also during the proceedings before me, I am of the view that it is a fit case for

imposition of maximum penalty as prescribed under Section 15A(a) of SEBI Act. Since more than 700 days have elapsed since September 27, 2004, when TCL was required to comply with summons, and it has not done so, penalty at the maximum of Rs.1 lakh per day would work out to Rs. 700 lakhs. Since maximum permissible penalty under Section 15A(a) is Rs. 100 lakhs, I restrict myself to the said amount, considering all the fact and circumstances of this case.”

By the impugned order dated 30.8.2006 he levied the maximum penalty of Rs. 1 crore on the appellant. It is against this order that the present appeal has been filed under section 15T of the Act.

3. We have heard the learned counsel for the parties at length. As already observed, the charge levelled against the appellant is that it failed to furnish the requisite information sought from it during the course of the investigations. The investigating authority has power under Section 11C(3) of the Act to require any intermediary or any person associated with the securities market to furnish such information or produce such books, or registers or other documents or record before him as he may consider necessary. Section 15A (a) of the Act provides that if any person who is required under the Act or any rules or regulations made thereunder to furnish any document, return or report to the Board 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 one crore rupees whichever is less. Did the appellant fail to comply with the summons issued to it during the course of the investigations and whether it failed to furnish the information sought from it through the summons is the short question that arises for our consideration.

4. Let us first examine how the investigating officer conducted the proceedings. Admittedly, he issued a summons to the appellant on 10.9.2004

along with Annexure 1 which has been reproduced in the earlier part of the order. It is not in dispute that this summons did not reach the appellant. The investigating officer then issued a letter on 17.9.2004 calling upon the appellant to appear on 24.9.2004. Along with this letter of the investigating officer a copy of the earlier summons dated 10.9.2004 along with the Annexure had been sent. It is common case of the parties that on receipt of the letter dated 17.9.2004 the appellant addressed a communication dated 22.9.2004 seeking a reasonable time of 20-30 days to collect the information. The request was made because the information sought was about 5 years old and the appellant wanted some reasonable time to collect the same. The request was obviously reasonable but the investigating officer was most unreasonable, to say the least, in declining the same. There was no pressing hurry for him to proceed with the investigations and it was only the first request that the appellant had made. We cannot lose sight of the fact that the alleged rigging in the scrip of the company that was being investigated is said to have taken place in the year 1999 and the investigations were ordered only in the year 2004 and the least that the investigating officer should have done was to have given time to the appellant to furnish the requisite information. Instead of granting time, the investigating officer issued the letter dated 24.9.2004 requiring the appellant to appear in person latest by 27.9.04 alongwith the necessary information/records. Here again the investigating officer was most unreasonable in allowing only 3 days time to the appellant. He had already been informed that the records sought from the appellant were 5 years old and it required 20-30 days time to produce the same. He did not even bother to verify whether this letter had reached the appellant within time. Only if he had examined the record before him he would have realised that the appellant had not been served for 27.9.2004 and that the letter was despatched from Mumbai only on 28.9.04 which reached Ahmedabad on 30.9.04. How could the investigating officer expect the appellant to appear

before him on 27.9.04. It is, thus, clear that the appellant was not afforded any opportunity by the investigating officer to comply with the summons. Since the appellant did not appear on 27.9.04, the investigating officer submitted his report observing that the appellant had failed to produce the requisite information. By not granting time to the appellant initially which he should have and without noticing the fact that the appellant had not been served for 27.9.2004, we are of the view that the investigating officer acted most arbitrarily and denied an opportunity to the appellant to comply with the summons. The appellant has been imposed the maximum penalty of Rs.1 crore for not complying with these summons. The impugned order is, therefore, per se illegal.

5. The Board was equally arbitrary in initiating the adjudication proceedings. Rule 3 of the Rules which is an enabling provision provides that **whenever the Board is of the opinion** that there are grounds for adjudging under any of the provisions in Chapter VI A of the Act it may appoint an adjudicating officer for holding an enquiry for the said purpose. The words which have been highlighted by us are of importance and the Board as a statutory regulator is not expected to initiate adjudication proceedings as a matter of course merely on the recommendation of the investigating officer. It has to form an opinion that it is necessary to initiate such proceedings. Such an opinion has to be formed only after applying its mind and examining objectively the complete record including the investigation report and the reply, if any, filed by the delinquent entity. We may hasten to add that while forming its opinion, the Board is not expected to record findings on the guilt or otherwise of the delinquent which is the duty of the adjudicating officer. Once the proceedings are initiated, the adjudicating officer shall, in the first instance, issue a notice to the delinquent requiring him to show cause why an enquiry

should not be held against him. Every such notice shall indicate the nature of offence alleged to have been committed by the delinquent. On receipt of the notice the delinquent will have right to file his reply and state therein all that he wants to say as to why an enquiry against him should not be held. The adjudicating officer will consider the reply, if any, filed by the delinquent and come to a conclusion whether the latter has been able to show sufficient cause or not. If the person proceeded against is able to show sufficient cause for not proceeding against him, the adjudicating officer shall drop the proceedings and pass an order and communicate the same to the delinquent. Since he is concluding the proceedings, he, shall record the reasons as well. If, after considering the cause, if any, shown by such person, the adjudicating officer forms an opinion that the former has not shown sufficient cause, he shall ordinarily record such opinion without recording reasons and continue with the enquiry. He shall issue notice fixing a date for the appearance of that person either personally or through his lawyer or other authorised representative. He shall then explain to the person proceeded against or his representative the offence alleged to have been committed by such person indicating the provisions of the Act, rules or regulations in respect of which contravention is alleged to have taken place. He shall then give an opportunity to such person to produce his evidence as he may consider relevant to the enquiry, and if necessary, the hearing could be adjourned to a future date for taking evidence. If any person fails, neglects or refuses to appear as required by Rule 4(3) before the adjudicating officer, the latter may proceed with the enquiry in the absence of such a person after recording reasons for doing so. If upon consideration of the evidence produced before the adjudicating officer, he is satisfied that the person has become liable to penalty, he shall by order in writing impose such penalty as he thinks fit in accordance with Chapter VIA of the Act after taking

into consideration the factors enumerated in section 15J of the Act. It goes without saying that he shall record his reasons for the same.

6. We shall now examine how the Board initiated the adjudication proceedings in the instant case and whether the adjudicating officer acted fairly in conducting those proceedings. On receipt of the report from the investigating officer the same was placed before a committee of Divisional Chiefs on 11.10.2004. It is obvious that the report must have been received by the Board after 27.9.2004 and before it was placed before the said committee. The report was considered by the aforesaid committee and an office note was prepared by the investigation department in which it was pointed out that the appellant had replied to the second summons seeking an extension of time by 3-4 weeks. It was also noticed that the summons sent to the appellant at its given address had come back undelivered with a report that the office was lying closed. Presumably the note refers to the letter dated 24.9.2004 which had been initially sent to the Bombay address of the appellant and which came back undelivered on the same day. From this it is sought to be inferred in the office note that the appellant was deliberately trying to delay the investigations and in doing so it was liable to be proceeded against under Section 15A of the Act. Action referred to in Annexure 1 attached to the note had been proposed against a number of entities including the appellant. Against the appellant it was proposed that adjudication proceedings be initiated. The executive director then puts up this note to the whole time member for approval of the actions as per Annexure 1 thereof. The whole time member has put his initials on 17.1.2005 in token of having approved the proposed action. It was thereafter that the adjudicating officer was appointed on 7.7.2005. We have gone through the office note which is in the form of Executive Summary. It is unsigned. It does not mention that the request by the appellant for granting 3-4 weeks time to comply with the summons had been turned down by the investigating officer.

It also does not notice that the investigating officer on receipt of a request for grant of time from the appellant had granted another three days time to produce the relevant record. The fact that the appellant had not been served for 27.9.2004 before the investigating officer had also not been noticed in the office note. The reply that was field by the appellant on 21.10.2004 and which had been received by the Board on 2.12.2004 had also not been referred to in the note. It is, thus, clear that these material facts were never brought to the notice of the whole time member when he approved the initiation of adjudication proceedings against the appellant. As already observed, these are material facts and if the attention of the whole time member had been drawn to the reply furnished by the appellant on 21.10.2004, it is possible that he may not have agreed with the office proposal to initiate adjudication proceedings because, according to the appellant, it had furnished complete information in its letter dated 21.10.2004. Again, if it had been pointed out that the appellant had not been served for 27.9.2004 before the investigating officer, there is no reason why the whole time member would have initiated the proceedings. Since these material facts were never put up before the whole time member when he approved the initiation of adjudication proceedings, we are satisfied that there was total non-application of mind on the part of the Board in initiating the proceedings and that the opinion formed by it in terms of Rule 3 of the Rules had not been properly formed. As already observed, the Board is required to consider the entire material on the record objectively and then apply its mind to the facts of the case before forming its opinion whether to initiate adjudication proceedings. In this view of the matter, we have no hesitation in holding that the initiation of adjudication proceedings was improper and the same stands vitiated.

7. Even though the adjudication proceedings were initiated by the Board on 17.1.2005, the adjudicating officer came to be appointed only on 7.7.2005 and

the first show cause notice that he issued was on 22.11.2005. It is not in dispute that this notice came back undelivered as office of the company was lying closed. Another show cause notice was issued on 24.2.2006 at the Pune address of the appellant and that too was received back undelivered. The adjudicating officer then ordered the pasting of another show cause notice at the office premises of the appellant at Ahmedabad. This notice was dated 25.4.2006 and a report from the Ahmedabad Stock Exchange that it had been pasted was received by the adjudicating officer on 29.5.2006. It is the case of the appellant that this pasted notice was found in torn pieces by Mr. Wagela, a director of the company on 5.6.2006. The appellant then addressed a letter dated 7.6.2006 to the Board and the same was sent by hand through one Mr. Ashwin Kunder with a request that a complete copy of the notice dated 25.4.2006 be sent through the bearer. This request was not acceded to and the adjudicating officer directed another notice dated 14.6.2006 to be sent to the appellant by registered post on the address mentioned on the letter head. Since the appellant company was lying closed the notice came back undelivered. Another notice is then pasted on the office premises of the appellant on 11.7.2006 which, according to the appellant, was not found. It was thereafter that the adjudicating officer proceeded in the absence of the appellant and by the impugned order imposed the maximum penalty of Rs. 1 crore on the appellant for not producing the requisite information before the investigating officer. From the sequence of facts narrated hereinabove, it is clear that most of the notices sent by registered post or pasted at the office premises of the appellant did not reach the appellant. It is true that the notice dated 11.7.2006, as found by the adjudicating officer, was pasted at the office premises of the appellant and it should have made arrangement to put in appearance before the adjudicating officer though it claims that that notice was not found. Be that as it may, we see no reason why a copy of the notice was not handed over to Ashwin Kunder, the representative

of the appellant when he appeared in the office of the Board on 8.6.2006 along with the letter dated 7.6.2006. If the copy of the notice had been handed over to the bearer of the letter the “cat and mouse game” to which reference has been made in paragraph 3 of the impugned order would have come to an end. The adjudicating officer instead chose to send a copy of the notice by registered post which came back undelivered with the remark “left”. Even if we assume that the appellant had been served on 11.7.2006, the adjudicating officer was not justified on the facts of the present case to record a finding that the appellant had failed to respond to the summons before the investigating officer. He too does not seem to have applied his mind to the facts of the case nor did he look into the records carefully. Had he done so, he would have realized that the letter dated 24.9.2004 had not been served on the appellant before 30.9.2004 and, therefore, it was justified in not appearing before the investigating officer on 27.9.2004. It is for this alleged default that the penalty has been levied.

8. We find from the impugned order that the adjudicating officer has commented on the merits of the information furnished by the appellant as per its letter dated 21.10.2004. He has observed that the information on the shareholding pattern of the company and its associates had been furnished for a period different from the one for which the investigating officer had sought that information. This fact was seriously disputed on behalf of the appellant. It has also been observed in the impugned order that the appellant had concealed some relevant facts from the investigating officer which fact was again very seriously disputed by the appellant. Similarly, the observations made by the adjudicating officer in paras 9 and 10 of the impugned order were seriously disputed by Shri P.N. Modi Advocate and it was contended that the adjudicating officer has recorded incorrect findings. It is not necessary for us to record a finding as to whether the appellant had furnished the correct and

complete information to the investigating officer because admittedly, at no stage prior to the passing of the impugned order was the appellant ever informed that the reply furnished by it as per its letter dated 21.10.2004 was incomplete, inadequate or false. It was, therefore, inappropriate on the part of the adjudicating officer to comment on the reply without the appellant having been informed in that regard earlier.

9. It is really surprising that the adjudicating officer without applying his mind to the facts of the case has observed in para 15 of the impugned order that this was a fit case where the maximum penalty of Rs.1 crore should be levied. This, in fact, is a case where the appellant has committed no default and the question of levying any penalty does not arise. The Board had ordered investigations into the alleged irregularities committed by the company which is said to have rigged the price of its scrip and it appears that the investigations revealed that the promoters of the company acting in concert with some others had committed a big fraud. The adjudicating officer seems to have been influenced by this factor and has completely lost sight of the fact that the present proceedings had been initiated for the alleged non-furnishing of information by the appellant before the investigating officer in response to the summons dated 24.9.2004 requiring it to furnish the information by 27.9.2004. As already observed, the adjudicating officer also did not examine the record and went on to make observations which were unwarranted. It is, thus, clear that neither the investigating officer nor the Board and not even the adjudicating officer looked into the record to see that the appellant had not been served for 27.9.2004 on which date it did not furnish the information for which the monetary penalty has been imposed.

10. Before concluding, we cannot resist mentioning that the adjudicating officer has used somewhat intemperate language while recording his findings in the impugned order. It would have been better if he had used proper language as befits a quasi judicial authority. We leave the matter at that in the hope that more appropriate language shall be used in future.

11. For the reasons recorded above, we are of the considered opinion that the impugned order imposing the penalty of Rs. 1 crore cannot be upheld. The appeal is, accordingly, allowed and the impugned order set aside. The appellant will have its costs which are assessed at Rs. 1 lac.

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

**Sd/
Arun Bhargava
Member**

**Sd/-
Utpal Bhattacharya
Member**

11.9.2007
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