IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

Criminal Application No. 1263 / 2019

Vasant Jagjivandas Kotak and Ors. .. **Applicants**

Versus.

Securities and Exchange
Board of India and Ors. .. **Respondents**

****

Mr. Premlal Krishnan a/w Sameer Reshamwala a/w Mr. Prestos Dias i/by Pan India Legal Services, Advocate for the Applicants.

Ms. Anubha Rastogi a/w Kumar SEBI Officer for SEBI Respondent No.1.

Mr. Chintan Shah h/f Sandesh Patil, Advocate for Respondent CBI.

Smt. Sharmila Kaushik, APP for State.

****

CORAM : SANDEEP K. SHINDE J.

DATE : 06th SEPTEMBER,2021.

Oral Judgment : -

1. Rule.

2. Rule made returnable forthwith. Heard, finally with the consent of the parties.

3. Although, this application under Section 482 of the Code of Criminal Procedure, 1973 seeks to quash proceedings in SEBI Special Case No. 51/2014, essentially it challenges the order dated 28th August, 2019 in the said SEBI case, whereby, application under Section 24A of Securities and Exchange Board of India Act, seeking compounding of offence was rejected by the SEBI Special Court.

4. Facts Essential for decision of this application, are as follows;

. Applicant Nos. 1 to 4 were Directors of a Company named Avani Plantation Ltd., incorporated on 14th January, 1997. Applicant No.4 resigned from the Board in the year 1999. Applicant Nos. 5 to 7 were nominal share holders of Avani Plantation Ltd. (Company for short). Respondent No.1 is Securities and Exchange Board of India; Respondent No.2 is

Union of India and Respondent No.3 is State of Maharashtra.

5. The first Respondent filed Criminal Complaint No.47/S/2004 against the Applicants before the Additional Chief Metropolitan Magistrate, Mumbai, for alleged violation provisions of Sections 11(B), 12(1B) of SEBI Act, 1992 and Regulation 71 read with Regulations 9, 73 and 74 of SEBI (Collective Investment Schemes) Regulation 1999, which is punishable under Section 24(1) of Securities and Exchange Board of India Act, 1992.

6. Complainant case in brief is that, to protect the interest of investors and to regulate the securities market through appropriate measures a person, who immediately prior to the commencement of the said Regulation of 1999 (Regulation for short), operating a Collective Investment Scheme was required to make an application to SEBI for grant of

registration within a period of two months from the date of notification. As per Regulation 73, Collective Investment Schemes that failed to make an application for registration with SEBI was required to wind-up its scheme(s) and repay its investors in the manner specified therein. Regulation 74 states that an existing Collective Investment Scheme, which is not desirous of obtaining provisional registration from SEBI was required to formulate the scheme of repayment and make the repayment to the existing investors in the manner specified under Regulation 73.

7. The said Company applied for provisional registration and it was granted on 1st April, 2001, on the condition more particularly, stated in Regulation 71. For non-compliance of regulation, the SEBI vide show cause notice dated 7th January, 2003 called upon the said Company, as to why the provisional registration granted to them should not

be revoked, Company was heard. Whereafter, the SEBI advised the Company to comply with Regulation by 25th April, 2003 or wind-up the existing scheme and make payments to the investors. Thereafter on 27th November, 2003, SEBI directed the said Company to refund the monies collected under the scheme within one month from the date of order, failing which, action would follow. The Company allegedly failed to comply with the directions contained in the order dated 27th November, 2003 and therefore the SEBI initiated prosecution under Section 24 of SEBI Act.

8. Complaint was filed on 15th April, 2014. Cognizance under Section 26 was taken on 14th September, 2006. It was numbered as Special Case No. 51/2014. Pending case, vide application below Exhibit 11, Applicants moved an application under Section 24-A of the SEBI for seeking composition of the offence and submitted that the accused/Company has wound up and refunded the entire amount

collected under scheme to all their share holders/ creditors.

9. The application was opposed by the SEBI contending that composition application moved by the accused/Company was placed before the High-powered Advisory Committee (HPAC), which recommended that the matter may not be compounded and the said recommendation was approved by the Panel of Whole Time Members of SEBI. On these grounds, the SEBI sought rejection of the application, seeking composition of offences.

10. The learned SEBI Special Judge vide order dated 28th August, 2019 declined to compound the offence, on the ground that since the SEBI has decided not to compound the offence against the accused/Company, therefore, without the consent of SEBI it is not possible to compound the offence.

11. Aggrieved by order dated 28th August, 2019, Applicants have approached this Court in its inherent jurisdiction under Section 482 of the Code of Criminal Procedure, 1973 and would contend that although, all investors have been repaid, as is evident from winding up report dated 22nd February, 2019 (in terms of Regulation 73 and 74 of SEBI) Collective Investment Schemes Regulation 1999, and orders passed in Company petition, the learned Special Judge ignored the relevant material. Submission is that the learned Judge failed to appreciate import of provisions of Section 24-A of the SEBI Act, in as much, while declining to compound the offence, he has simply relied on the recommendation of HPAC and the approval granted by Panel of Whole Time Members of SEBI and thereby failed to exercise jurisdiction vested in the Special Court under Section 24-A of SEBI Act. Learned Counsel would submit that once the proceedings are instituted before the Court, which

is seized of it, the Court has exclusive jurisdiction to compound the offence. It is therefore argued that the learned Court, ought to have independently decided, whether material on record, would justify, compounding the offence. Thus, submitted the opinion/ recommendation of HPAC and approval has no binding force and thus, it is a case of non-exercise of jurisdiction and therefore the impugned order refusing to compound the offence, be quash and set aside.

12. To appreciate the arguments of learned Counsel for the Applicants, I deemed it proper to reproduce the reasoning articulated by the Special Judge, while declining to compound the offenses.

"6. I have duly considered above submissions of both the sides, so also, I have gone carefully through the case record. There is no dispute that once a criminal complaint is filed it can only be compounded in accordance with law. It appears that the complaint was filed on 7/5/2004 and the present

application (Exhibit 11) is filed for compounding on 7/12/2015. It appears that an opportunity was given by the SEBI to the accused before taking the action, for settlement. But, that offer was not accepted by the accused and compelled to the SEBI for filing the present complaint.

7. There is no dispute that SEBI as a Regulator has an enabling power to settle a dispute during the pendency of the proceedings either before the Securities Appellate Tribunal or before a Court, but SEBI cannot be compelled to settle a dispute on any particular amount as the Court has no discretionary power in this regard.

8. In this matter, since the SEBI has decided not to compound the offence against the accused/company, therefore, without the consent of SEBI it is not possible to compound the offence."

(emphasis supplied)

13. From the observations made in Paragraph No.8 (reproduced), it is obvious, the learned Judge has largely relied on the judgment of this Court in the

Case of **N H Securities Limited Vs. Securities and Exchange Board of India**; 2018 SCC OnLine Bom 4040; wherein it was held that consent of SEBI was necessary before an application of compounding under Section 24-A. A Special Leave Petition challenging this judgment was disposed of by the two Judge Bench of the Hon'ble Apex Court through an order dated 17th September, 2019, wherein SEBI agreed to compounding of the offence subject to penalty which may be imposed under Section 24(2) of the SEBI Act. However the question, whether the consent of SEBI was necessary for compounding the offence under Section 24-A was not gone into.

14. Learned Counsel for the Applicant submitted that the Hon'ble Apex Court in the case of **Prakash Gupta Vs. Securities and Exchange Board of India**; ((Criminal Appeal No. 569/2021) has gone into this issue in Paragraphs 80 onwards and concluded in Paragraph No. 92 of the said judgment by drawing

guidelines for compounding under Section 24A. It is submitted that the Hon'ble Apex Court has held, although the powers of compounding offences to SAT or to the Court, as the case may be, before which the proceedings are pending, the view of SEBI as an expert regulator must necessarily borne in mind by the SAT and the Court, and would be entitled to a degree of deference. Learned Counsel would largely rely on the observations Paragraph No.90 of the judgment to contend that before taking a decision on whether to compound an offence punishable under Section 24(1), the Court must obtain the views of SEBI for furnishing guidance to its ultimate decision. The Paragraph No.90 reads as under;

"While the statue has entrusted the powers of compounding offences to SAT or to the Court, as the case may be, before which the proceedings are pending, the view of SEBI as an expert regulator must necessarily be borne in mind by the SAT and the Court, and would be entitled to a degree of deference. While SEBI does not have a veto, having regard to the language of Section 24A, its views must be elicited. The view of SEBI, an envisaged in

the FAQs accompanying SEBI's circular dated 20 April 2007, must undoubtedly be sought by the SAT or the Court, to decide on whether an offence should be compounded. For SEBI can provide an expert view on the nature and gravity of the offence and its implication upon the protection of investors and the stability of the securities' market. These considerations and others which SEBI may place before the SAT or the Court, would be of relevance in determining as to whether an application for compounding should be allowed. We, therefore, hold that before taking a decision on whether to compound an offence punishable under Section 24(1), the SAT or the Court must obtain the views of SEBI for furnishing guidance to its ultimate decision. These views, unless manifestly arbitrary or mala fide, must be accorded a high degree of deference. The Court must be wary of substituting its own wisdom on the gravity of the offence or the impact on the markets, while discarding the expert opinion of the SEBI."

15. Learned Counsel has invited my attention to guidelines drawn in the judgment in case of Prakash Gupta (supra). These guidelines are;

"92. Section 24A only provides the SAT or the Court before which proceedings are pending with the power to compound the offences, without providing any

guideline as to when should this take place. Hence, we deem it necessary to elucidate upon some guidelines which SAT or such Courts must take into account while adjudicating an application under Section 24A:

(i) They should consider the factors enumerated in SEBI's circular dated 20 April 2007 and the accompanying FAQs, while deciding whether to allow an application for a consent order or an application for compounding. These factors, which are non-exhaustive, are:

"Following factors, which are only indicative, may be taken into consideration for the purpose of passing Consent Orders and also in the context of compounding of offences under the respective statute:

1. Whether violation is intentional.
2. Party's conduct in the investigation and disclosure of full facts.
3. Gravity of charge i.e. charge like fraud, market manipulation or insider trading.
4. History of non-compliance. Good track record of the violator i.e. it had not been found guilty of similar or serious violations in the past.
5. Whether there were circumstances beyond the control of the party.
6. Violation is technical and/or minor in nature and whether violation warrants penalty.
7. Consideration of the amount of investors' harm or party's gain.
8. Processes which have been introduced since the violation to minimize future violations/lapses.
9. Compliance schedule proposed by the party.
10. Economic benefits accruing to a party from

delayed or avoided compliance.
11. Conditions where necessary to deter future non-compliance by the same or another party.
12. Satisfaction of claim of investors regarding payment of money due to them or delivery of securities to them.
13. Compliance of the civil enforcement action by the accused.
14. Party has undergone any other regulatory enforcement action for the same violation.
15. Any other factors necessary in the facts and circumstances of the case."

(ii) According to the circular dated 20 April 2007 and the accompanying FAQs, an accused while filing their application for compounding has to also submit a copy to SEBI, so it can be placed before the HPAC. The recommendation of the HPAC is then filed before the SAT or the Court, as the case may be. As such, the SAT or the Court must give due deference to such opinion. As mentioned above, the opinion of HPAC and SEBI indicates their position on the effect of non-prosecution on maintainability of market structures. Hence, the SAT or the Court must have cogent reasons to differ from the opinion provided and should only do so when it believes the reasons provided by SEBI/HPAC are mala fide or manifestly arbitrary;

(iii) The SAT or Court should ensure that the proceedings under Section 24A do not mirror a proceeding for quashing the criminal complaint under Section 482 of the Cr.P.C., thereby providing the accused a second bite at the cherry. The principle

behind compounding, as noted before in this judgment, is that the aggrieved party has been restituted by the accused and it consents to end the dispute. Since the aggrieved party is not present before the SAT or the Court and most of the offences are of a public character, it should be circumspect in its role. In the generally of instances, it should rely on the SEBI's opinion as to whether such restitution has taken place; and

(iv) Finally, the SAT or the Court should consider whether the offence committed by the party submitting the application under Section 24A is private in nature, or it is of a public character, the non-prosecution of which will affect others at large. As such, the latter should not be compounded, even if restitution has taken place."

. In light of these observations of the Hon'ble Apex Court, Counsel would submit that, in affidavit-in-reply, SEBI, would largely rely on the judgment of the Bombay High Court in the case of N H Securities Limited (supra), however, the HPAC's decision on the application, was not placed before the Special Judge.

16. Indisputably, the learned Judge neither referred

to wind up repayment report dated 22nd February, 2019, nor the orders passed by this Court in Company Petition; nor SEBIs' circular dated 20th April, 2007, nor the Court obtained the views of SEBI before denying to compound the offence.

17. In consideration of the facts aforestated and for the reasons, the order dated 28th August, 2019 below Exhibit – 11 in SEBI Special Case No. 51/2014 passed by learned SEBI Special Judge is quash and set aside.

18. As a consequence, learned Judge shall decide the application below Exhibit-11, in accordance with guidelines of the Hon'ble Apex Court set out in the case of Prakash Gupta (supra).

19. Application is allowed and disposed of.

(SANDEEP K. SHINDE, J.)