

THE HON'BLE THE CHIEF JUSTICE ALOK ARADHE
AND
THE HON'BLE SHRI JUSTICE ANIL KUMAR JUKANTI

WRIT APPEAL No.218 of 2024

ORDER: *(Per the Hon'ble the Chief Justice Alok Aradhe)*

Mr. Gandra Mohan Rao, learned Senior Counsel representing Mr. K.Siddharth Rao, learned counsel for the appellants.

Mr. Vedula Srinivas, learned Senior Counsel representing Mr. C.V.Narasimham, learned counsel for the respondents No.1 and 2.

2. This intra court appeal is filed against the order dated 19.09.2023 passed in W.P.No.34761 of 2021. The appellants and the respondents No.3 to 6 had filed a writ petition, in which the action of the Securities Exchange Board of India (hereinafter referred to as "SEBI") in issuing the impugned certificate under Section 28A of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "the SEBI Act"), read with

Section 222 of the Income Tax Act, 1961, directing the appellants to pay a sum of Rs.69,33,92,781/- along with interest was challenged. The said writ petition has been dismissed.

3. Facts giving rise to filing of this appeal briefly stated are that the SEBI conducted an investigation into the trading in the scrip of ICSEA (India) Limited for the period from 01.02.2009 to 28.02.2010. Thereafter, the adjudication under Section 15-I of the SEBI Act was conducted and an order dated 15.10.2015 was passed imposing the penalty of an amount of Rs.40,00,00,000/- under Sections 15-G and 15-HA of the SEBI Act against the appellants and certain others and they were directed to pay the aforesaid amount jointly and severally. The aforesaid order dated 15.10.2015 attained finality, as the same was upheld by the Supreme Court by an order dated 21.10.2019 passed in Civil Appeal No.7981 of 2019.

4. In order to recover the amount due under the order dated 15.10.2015, the Recovery Officer and Deputy General Manager, SEBI, issued the impugned certificate

dated 23.11.2021 by which the appellants and others were directed to pay the sum of Rs.69,33,92,781/- along with further interest, all costs, charges and expenses within a period of fifteen days from the date of receipt of the said notice. The aforesaid notice was challenged by the appellants and the respondents No.3 to 6 in the writ petition, *inter alia*, on the ground that the same cannot be enforced as the proceedings under the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as “IBC”) and the provisions of the Provincial Insolvency Act, 1920 (hereinafter referred to as “the 1920 Act”), initiated against the appellants are pending and the orders of interim moratorium have been passed.

5. The learned Single Judge, by an order dated 19.09.2023, *inter alia*, held that the provisions of IBC have an overriding effect over the provisions of the SEBI Act. It was further held that no interim moratorium orders have been passed in favour of the appellants and the proceedings initiated by the appellant No.2 and respondents No.3 to 5 are still pending. It was further held

that only in respect of the appellant No.1, the interim moratorium order has been passed under Section 96 of IBC. It was held that the penalty imposed and sought to be recovered from the appellants by issuing the impugned certificate fall within the meaning of 'fine', which is excluded under clause (a) of sub-section (15) of Section 79 of IBC and therefore, the interim moratorium order issued in favour of the appellant No.1 has no application to the penalty sought to be recovered under the impugned certificate. The learned Single Judge accordingly dismissed the writ petition. In the aforesaid factual background, this intra court appeal has been filed.

6. Learned Senior Counsel for the appellants submitted that the learned Single Judge has wrongly equated the penalty under Section 15-I of SEBI Act synonymous with fine provided under Section 79(15)(a) of IBC. It is further submitted that the Legislature has provided for distinction between the penalty and fine and in the instant case, the penalty was imposed on the appellants. It is further pointed out that the penalty is levied by the Adjudicating

Officer under Section 13(1) of IBC and under Section 11C(6) and Section 11B(2) of the SEBI Act for violation of the provisions of Chapter VIA of the SEBI Act. It is also contended that the Adjudicating Officer while acting under Section 15-I of the SEBI Act neither is a Court nor is a Tribunal as provided under Section 79(15)(a) of IBC. Lastly, it is contended that the interim moratorium commences from the date of filing of application under Sections 94 and 95 of IBC and the SEBI Act does not specify the National Company Law Tribunal, as required, to pass any specific formal order declaring the moratorium. In support of his submissions, learned Senior Counsel for the appellants has referred to the definition of 'penalty' in P.Ramanatha Aiyar's Advanced Law Lexicon 5th Edition and has placed reliance on the decisions of the Supreme Court in **Indo-China Steam Navigation Company Limited v. Jasjit Singh, Additional Collector of Customs, Calcutta¹, Director of Enforcement v. M.C.T.M. Corporation Private Limited², Pratibha**

¹ 1964 SCC OnLine SC 42 : AIR 1964 SC 1140

² (1996) 2 SCC 471

Processors v. Union of India³, State of U.P v. Sukhpal Singh Bal⁴ and Union of India v. R.Gandhi, President, Madras Bar Association⁵.

7. On the other hand, learned Senior Counsel for the respondents No.1 and 2 has submitted that there is no moratorium in favour of the appellants and therefore, the respondents No.1 and 2 are well within their rights to issue the impugned certificate and recover the amount due from the appellants. It is further submitted that in the facts of the case, the issue whether the impugned levy is a penalty or a fine need not be examined and the aforesaid question be kept open to be adjudicated in an appropriate proceeding.

8. We have considered the rival submissions and perused the record.

9. Chapter III of IBC deals with insolvency resolution process. Section 95 of IBC provides that an application

³ (1996) 11 SCC 101

⁴ (2005) 7 SCC 615

⁵ (2010) 11 SCC 1

may be made by the creditor to initiate insolvency resolution process. Sections 96 and 101 deal with interim moratorium and are extracted below for the facility of reference:

96. Interim-moratorium.—(1) When an application is filed under Section 94 or Section 95—

(a) an interim-moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application; and

(b) during the interim-moratorium period—

(i) any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed; and

(ii) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt.

(2) Where the application has been made in relation to a firm, the interim-moratorium under sub-section (1) shall operate against all the partners of the firm as on the date of the application.

(3) The provisions of sub-section (1) shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

101. Moratorium. - (1) When the application is admitted under section 100, a moratorium shall commence in relation to all the debts and shall cease to have effect at the end of the period of one hundred and

eighty days beginning with the date of admission of the application or on the date the Adjudicating Authority passes an order on the repayment plan under section 114, whichever is earlier.

(2) During the moratorium period—

- (a) any pending legal action or proceeding in respect of any debt shall be deemed to have been stayed;
- (b) the creditors shall not initiate any legal action or legal proceedings in respect of any debt; and
- (c) the debtor shall not transfer, alienate, encumber or dispose of any of his assets or his legal rights or beneficial interest therein;

(3) Where an order admitting the application under section 96 has been made in relation to a firm, the moratorium under sub-section (1) shall operate against all the partners of the firm.

(4) The provisions of this section shall not apply to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

Thus from conjoint reading of the aforesaid provisions, it is evident that once an application is admitted under Section 100, a moratorium shall commence in relation to all the debts and shall cease to have effect at the end of the period of 180 days beginning with the date of admission of the application or on the date

the adjudicating authority passes an order on the repayment plan under Section 114, whichever is earlier.

10. In the instant case, so far as appellant No.1 is concerned, the period of moratorium commenced on 04.02.2022 which cease to operate on expiry of 180 days i.e., 04.08.2022. Similarly, in respect of appellant No.2, the period of moratorium commenced on 13.12.2022 and the same expired on efflux of 180 days on 13.06.2023. The writ petition was heard by the learned Single Judge on 19.09.2023. Thus, it is evident that no moratorium was in force in favour of the appellants. Therefore, respondents No.1 and 2 were justified in issuing the impugned certificate under Section 28A of the SEBI Act. It is pertinent to note that the provisions of Chapter IV of IBC, namely Sections 121 to 124 do not apply to the facts of the case as the application under Section 122 was not filed when the Certificate under Section 28A of the SEBI Act was issued. The issue whether the impugned levy is a fine or a penalty is also not required to be decided in the facts and

circumstances of the case and we keep the same open to be adjudicated in an appropriate proceeding.

11. For the aforementioned reasons, we do not find any grounds to differ with the view taken by the learned Single Judge.

12. In the result, the appeal fails and is hereby dismissed.

Miscellaneous applications pending, if any, shall stand closed. However, there shall be no order as to costs.

ALOK ARADHE, CJ

ANIL KUMAR JUKANTI, J

22.03.2024

vs