2022 LiveLaw (SC) 659

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
N.V. RAMANA; CJI., J.K. MAHESHWARI; J., HIMA KOHLI; J.
AUGUST 05, 2022
CRIMINAL APPEAL No. 1167 of 2022 [@ SPECIAL LEAVE PETITION (CRL) NO. 3417/2022]
RELIANCE INDUSTRIES LIMITED *versus* **SECURITIES AND EXCHANGE BOARD OF INDIA & ORS.**

Summary: Supreme Court directs Securities and Exchange Board of India (SEBI) to disclose to Reliance Industries Ltd the documents relied on by the SEBI to filed a criminal complaint against RIL over alleged irregularities in a share transaction in 1994.

Regulators should avoid frivolous criminal actions against large corporations - Initiation of criminal action in commercial transactions, should take place with a lot of circumspection and the Courts ought to act as gate keepers for the same. Initiating frivolous criminal actions against large corporations, would give rise to adverse economic consequences for the country in the long run. Therefore, the Regulator must be cautious in initiating such an action and carefully weigh each factor. *(Para 29)*

Regulators should act fairly - SEBI is a regulator and has a duty to act fairly, while conducting proceedings or initiating any action against the parties. Being a quasi-judicial body, the constitutional mandate of SEBI is to act fairly, in accordance with the rules prescribed by law. The role of a Regulator is to deal with complaints and parties in a fair manner, and not to circumvent the rule of law for getting successful convictions. There is a substantive duty on the Regulators to show fairness, in the form of public co-operation and deference. *(Para 42)*

Principles of natural justice - The duty to act fairly by SEBI, is inextricably tied with the principles of natural justice, wherein a party cannot be condemned without having been given an adequate opportunity to defend itself. *(Para 43)*

Fair Trial - The approach of SEBI, in failing to disclose the documents also raises concerns of transparency and fair trial. Opaqueness only propagates prejudice and partiality. Opaqueness is antithetical to transparency. It is of utmost importance that in a country grounded in the Rule of Law, institutions ought to adopt procedures that further the democratic principles of transparency and accountability. Principles of fairness and transparency of adjudicatory proceedings are the cornerstone of the principles of open justice. *(Para 46)*

Indian Evidence Act, 1872; Section 129 - Privilege over legal advise - Legal privilege not applicable to legal opinion used by SEBI to initiate prosecution, as such opinion is part of investigation. *(Para 53-55)*

Code of Criminal Procedure, 1973; Section 207 - Sec 207 of CrPC cannot be read as a provision etched in stone to cause serious violation of the rights of the accused as well as to the principles of natural justice - Can't always insist that documents can be shared only after court takes cognizance of the complaint. *Follows dicta in SP Velumani versus Arappoor Iyakam 2022 LiveLaw (SC) 507 (Para 56)*

For Petitioner(s) Mr. Harish N. Salve, Sr. Adv. Mr. K.V. Vishwanathan, Sr. Adv. Mr. Amit Desai,Sr. Adv. Mr. K. R. Sasiprabhu, AOR Mr. Rohan Shah, Adv. Mr. Raghav Shankar, Adv. Mr. Amey Nabar,

Adv. Mr. Gopalakrihna Shenoy, Adv. Ms. Drishti R., Adv. Mr. Vishnu Sharma, Adv. Mr. Venkataraman, Adv. Mr. Tushar Bhardwaj, Adv.

For Respondent(s) Mr. Arvind Datar, Sr. Adv. Mr. Dhaval Mehrotra, Adv. Mr. Suraj Chaudhary, Adv For M/s.K Ashar & Co., AOR

J U D G M E N T

N.V. RAMANA , CJI

1. Leave granted.

2. This appeal is filed against the impugned order dated 28.03.2022, passed by the High Court of Judicature at Bombay in Criminal Interim Application No. 1945 of 2021 in Criminal Revision Application No. 209 of 2020.

3. Brief facts necessary for disposal of this appeal are that a complaint was filed on 21.01.2002 by one Shri S. Gurumurthy, with the Securities and Exchange Board of India [for short 'the SEBI'] against Reliance Industries Ltd. [for short 'RIL'], its associate companies and its directors, alleging that they fraudulently allotted 12 crore equity shares of RIL to entities purportedly connected with the promoters of RIL, which were funded by RIL and other group companies in 1994. It was alleged that the company and its directors were in violation of Section 77 of the Companies Act, 1956. Based on the aforesaid complaint, the SEBI appointed an investigating officer to inquire into the aforesaid complaint. Accordingly, a report was submitted by the said investigating officer on 04.02.2005.

4. It may be necessary to note that SEBI chose not to take any action with respect to the aforesaid letter. The appellant alleged that a note was prepared by the Legal Affairs Department of the SEBI on 17.05.2006, wherein it was noted that the report had not brought out any specific violation of any legal provision by RIL. However, the note was said to have observed that there was requirement of an opinion by an external expert *inter alia* on the possibility of initiating appropriate criminal proceedings against RIL. In this context, a retired Judge of this Court, Justice (Retd.) B.N. Srikrishna was approached by SEBI for the same. The learned retired Judge is stated to have given his first opinion to SEBI, which was divulged by SEBI in parts, to the appellant herein.

5. On 16.04.2010, SEBI sent a letter to RIL alleging that RIL had funded purchase of its own shares by 38 related entities and thereby violated Section 77 (2) of the Companies Act, 1956 and consequently, violated Regulations 3, 5 and 6 of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995. RIL, in reply, addressed numerous letters to SEBI requesting for copies of the documents and submitting *inter alia* that the issue concerning violation of Section 77 of the Companies Act, 1956 was examined by the Ministry of Corporate Affairs which had concluded that the transaction was compliant with the applicable law.

6. In any case, the Adjudicating Officer of SEBI issued a show cause notice to the promoters of RIL under Rule 4 of the Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 alleging violation of Regulation 11(1) of the SEBI Takeover Regulations (as it then stood).

7. It is borne out from the records that an Office Memorandum dated 18.7.2011 was issued by the Ministry of Corporate Affairs wherein it was noted that provisions under Section 77 of the Companies Act, 1956 was not attracted.

8. When the matter stood thus, on 29.09.2011, RIL filed a settlement application before SEBI, without prejudice to its rights, in order to put a quietus to the aforesaid issue which had taken place many years ago.

9. In any case, SEBI issued a letter dated 23.04.2014, answering the request of documents sought by the appellant herein in the following manner:

"With regard to the documents/information sought in paragraphs 5(a) to (d) of the said letter, SEBI's response is as under:

1. Request 5(a): The copy of the opinion received by SEBI on June 11, 2009 from a retired judge of the Hon'ble Supreme Court of India cannot be provided since it is privileged and confidential in nature.

2. Request 5(b): a copy of the case for opinion provided by SEBI to the Hon'ble retired judge for seeking the opinion is enclosed.

3. Request 5(c): A copy of the communication from Ministry of Corporate Affairs dated February 7, 2012 and dated September 1, 2011 forwarding letter dated July 18, 2011 is enclosed.

4. Request 5(d): A copy of the relevant opinion / views dated April 6, 2006, June 11, 2009 and August 25, 2010 of the legal department of SEBI are enclosed."

10. It is a matter of record that in the year 2017-18, the SEBI decided to re-examine the issue and accordingly sought advice of Justice (Retd.) B.N. Srikrishna for the second time. Justice (Retd.) B.N. Srikrishna addressed a letter dated 26.07.2017 to the SEBI in the following manner:

"Considering the importance of the matter I am of the view that some very senior person should be consulted in this matter.

I would suggest SEBI to approach Mr. Y.H. Malegam, Chartered Accountant, who may be consulted in this matter. He is a person of high standing and great repute. In my opinion, he would be the most appropriate person to advise us as to whether the monies transferred to RUPL and RPTL were towards project advances and other charges or were merely round tripping.

You may depute one senior person to meet him and discuss with him the facts. It would enable him to take a view in the matter and make a report to you. After the report of Mr. Malegam is received, you may further discuss the matter with me."

11. It is stated by the appellant that Mr. Y.H. Malegam, Chartered Accountant examined the records of RIL and various other companies and submitted his report to SEBI.

12. Based on the report of Mr. Y.H. Malegam, an opinion was sought from the learned retired Judge for the second time.

13. On 21.01.2019, the appellant addressed a letter to SEBI seeking further material in connection with the pending settlement application in the following manner:

"Accordingly, we request SEBI to provide us inspection and copies of the following in connection with the subject settlement:

(a) All further material collected by SEBI;

(b) Further internal reports and noting;

(c) Reports from external experts, including report from Shri Y.H. Malegam, which was confirmed by the Committee as having been received;

(d) Any further case for opinion and opinion obtained by SEBI."

14. In reply, SEBI rejected the request for disclosure of the documents in the following manner:

"With regard to your request for the said report, it may be noted that no such report or other material as asked is asked *(sic)* is made part of the pending settlement proceedings. Further, your attention is drawn to Regulation 13(2)(a) of the SEBI (Settlement Proceedings) Regulations, 2018, which reads as under:

"(a) Call for relevant information, documents etc., pertaining to the alleged default(s) in possession of the applicant or obtainable by the applicant;

Explanation – Nothing in these regulations shall confer a right upon the applicant to seek information from the Board or require the Board to seek information from any other person for the purpose of relying upon it in the settlement proceedings or request the Board to permit it to present information not already disposed in the applicant, [Illegible] the applicant our *(sic)* aware of at the time of making the application or which information upon diligent enquiry being made could bare became known to the applicant." In view of the same, I am directed to inform you that the request for the said report and other material has not been acceded to."

15. Aggrieved by the aforesaid communication of the SEBI, the appellant challenged the same before the High Court of Bombay in Writ Petition (Lodg.) No. 300 of 2019. The High Court, vide order dated 04.02.2019, dismissed the aforesaid petition. It may not be out of context to note that SEBI also rejected the supplementary application filed by the appellant herein.

16. On 16.07.2020, SEBI filed a complaint in the Court of SEBI Special Judge, Mumbai praying therein as under:

"(a) That this Hon'ble Court may be pleased to issue the process against the accused for the continuing offences punishable under Section 24(1) r/w Section 27 of the SEBI Act, 1992 as amended in 2002, for having violated Regulations 3,5 and 6 of the SEBI (PFUTP) Regulations 1995, Regulation 11 of the SEBI (SAST) Regulations, 1997 and be further pleased to deal with the accused in accordance with the law.

(b) That this Hon'ble Court may be pleased to issue the process against the accused for offences punishable under Sections 77(2) and 77A r/w Section 55A of the Companies Act, 1956."

17. On 30.09.2020, the SEBI Special Court dismissed the complaint filed by SEBI as being barred by limitation.

18. The aforesaid order has been challenged by SEBI in Criminal Revision Application No. 209 of 2020 before the High Court of Bombay. In the aforesaid proceedings, the appellant filed an application being IA No. 1945 of 2021, seeking the following documents:

(i) Report of Sh. Y.H. Malegam, Chartered Accountant.

(ii) Brief for opinion / Case for opinion prepared by SEBI for obtaining further written opinion of Hon'ble Mr. Justice (Retd.) B.N. Srikrishna.

(iii) Revised written opinion issued by Hon'ble Mr. Justice (Retd.) B.N. Srikrishna.

19. The High Court after extensively hearing the arguments on the aforesaid application passed the impugned order on 28.03.2022 in the following manner:

"5. At this stage, the prayer sought for in the Interim Application cannot be considered without hearing the main Revision Application. It is pertinent to note that the respondent No.1 – SEBI i.e. original applicant in the Revision Application has filed the aforesaid Revision Application seeking quashing and setting aside of the impugned order dated 30th September, 2020, passed by the learned SEBI Special Judge, City Civil and Sessions Court, Greater Bombay, in SEBI Misc. Application No. 686 of 2020, by which the learned Judge dismissed the Miscellaneous Application No. 686 of 2020 (complaint) only on the ground, that it was barred by limitation. Therefore, the question that arises in the Revision Application is whether the complaint filed by SEBI was barred by limitation or not.

6. In view of what is stated hereinabove, the Interim Application will have to be heard alongwith the main Revision Application, on the next date. It is made clear that all contentions of the parties in the aforesaid Interim Application are kept open, including the question of maintainability."

20. Aggrieved by the aforesaid order, the appellant-RIL has filed the present appeal.

21. Mr. Harish Salve, learned Senior counsel appearing on behalf of the appellant contends:

i. That the challenge to the maintainability of the present appeal is misconceived. He stated that the interim application filed for seeking documents was argued at length before the High Court, which was ultimately not considered.

ii. That the SEBI, being a regulator, has a duty to disclose documents pursuant to Article 21. This constitutional mandate has been accepted by this Court and has been applied to SEBI in ***T. Takano v. Securities and Exchange Board of India,* 2022 SCC Online SC 210**

iii. SEBI cannot claim litigation privilege as the proceedings are not adversarial in nature.

iv. That the selective disclosure of excerpts of the opinion by Justice (Retd.) B.N. Srikrishna, amounted to cherry picking by SEBI which cannot be allowed. The accused is entitled to the complete document to ensure a fair trial.

v. That the action of SEBI of disclosing excerpts of the report clearly amounts to waiver of litigation privilege claimed by SEBI.

22. Mr. Arvind Datar, learned Senior Counsel appearing on behalf of the respondents contends:

i. That the present appeal is not maintainable as there is no criminal complaint pending as on this date. The appellant cannot seek documents in a criminal revision against dismissal of the complaint on the ground of limitation.

ii. The issue before the High Court was limited to the issue of limitation and the attempt of the accused to expand the proceedings to seek documents cannot be entertained.

iii. That the impugned order was a mere adjournment order which has not affected any rights of the accused. Therefore, the appeal is not maintainable against such an adjournment order.

iv. The law laid down in ***T. Takano v. Securities and Exchange Board of India***, 2022 SCC Online SC 210, is not applicable to the present case as it was rendered in the context of investigation under different Regulations.

v. The documents are being sought at a pre-mature stage. If cognizance is taken by the trial Court, the accused would be entitled for the documents in terms of Section 207 of CrPC. Any attempt to seek documents beyond the scope of Section 207 CrPC cannot be accepted.

vi. The opinion of the Retd. Judge and the report of the Chartered Accountant are clearly covered as part of litigation privilege in terms of the Indian Evidence Act. Such opinions cannot be a matter of production by a party.

23. Having heard the parties at length and perusing the records, the following questions arise for consideration:

i. Whether this appeal is maintainable?
ii. Whether SEBI is required to disclose documents in the present set of proceedings?

ISSUE I

24. At the outset, Mr. Datar, learned Senior Counsel appearing on behalf of the respondents has challenged the maintainability of the present appeal on two grounds namely: (1) that the impugned order is a mere adjournment order against which this Court should not exercise its discretionary jurisdiction; (2) that no criminal complaint exists, to seek document disclosure as the trial Court had already dismissed SEBI's complaint on the ground of delay. On the contrary, Mr. Harish Salve, learned Senior Counsel appearing on behalf of the appellant has portrayed that the High Court was not justified in adjourning a case after hearing the parties on more than two occasions on the application.

25. The present dispute pertains to certain facts which took place in 1992-1994, when the initial complaint was instituted before SEBI in the year 2002, which is alleged to be closed by the note of the Legal Affairs Department of SEBI dated 17.05.2006. Further, the letter of the Ministry of Corporate Affairs dated 07.02.2012 also clarifies *inter-alia,* that no violation of Section 77 of the Companies Act, 1956 was made out, in the following manner:

4. It has further been reported by the ROC that there was no violation of Section 81(1A) of the Companies Act, 1956 in respect of preferential allotment of shares. Also, there was no specific guidelines for valuation or determination of premium in respect of issue of convertible debentures at the relevant time. The determination of premium was within the authority of the company subject to compliance with Section 81(1A) which appears to have been done.

5.MCA had conducted inspection of books of accounts of M/s. Reliance Industries Ltd. in 2002 and for the various violations reported in the inspection report, necessary penal action was initiated as stated in para 2 and 3 above.

6. The inspection report of 2002 also revealed as follows:-

i.) Provision of Section 77 of the Act were not attracted in respect of funds invested by the company in Somnath Syndicate, a partnership firm in which company is a partner; ii.) No funds was given by RIL to 34 entities to which NCDs were allotted;

iii.) Ambanis were neither directors norshareholders of the entities to whom shares were allotted;

iv.) Ambanis were not allotted any sharespursuant to PPD-IV issue.

7. **In view of above, no action is required to be taken on the part of Ministry of Corporate Affairs**.

(**Emphasis supplied**)

In this context, the re-examination of the complaint by SEBI ought to happen only after providing adequate opportunity to the accused to fully defend his case.

26. There is no doubt that the Special Court of SEBI in M.A. No. 686 of 2020 has dismissed the complaint of SEBI on the ground of limitation. Against such an order, SEBI has filed a Criminal Revision being Criminal Revision Application No. 209 of 2020 before the High Court which is pending. On perusal of this Criminal Revision Petition it is clear that SEBI has made the following prayer:

(a) This Hon'ble Court be pleased to quash and setaside the impugned order dated 30th September, 2020 and **direct the Ld. Special Court Judge to issue process against the Accused**.

(emphasis supplied)

Interestingly, SEBI has not restricted the revision petition to the grounds of condonation of delay or inapplicability of limitation as the offences alleged, are continuing in nature; rather SEBI has pleaded the case on merits. This is apparent from the following grounds advanced by SEBI on merits:

F. The Ld. Judge erred to appreciate that the allotment including the allotment of bonus shares, was fraudulent since it was issued without any authority, and in violation of securities laws, including the Companies Act. When the actual issue and allotment of NCDs with detachable warrants and subsequent conversion of warrants into equity shares itself was undertaken without any authority of the AGM, and the earmarking of 'bonus' issue of shares for the benefit of a debenture-holder i.e. a non-share-holder was done and the total private placement of 12 crore shares was carried out without any authority either of the shares holders or in law resulting in cementing of 'control' and exercise thereof there was a clear breach of the fiduciary duty of the accused directors of the issuer company.

G. The Ld. Judge erred in failing to appreciate thatthe fraud was consummate and involved a complex subterfuge, spread over a long period of time. The accused Directors sat in sub-committees that negotiated and earmarked without any share holder authority, the NCDs with warrants convertible of shares with a sizeable free allotment of bonus shares to allottees of the NCDs which were essentially paper companies and related companies of the accused and later on joined them as person acting in concert (PACs) when the warrants attached to the NCDs were converted into shares in 2000. When the directors negotiated the placement of NCDs with warrants with the Unit Trust of India (UTI) whose allotment is made as per Resolution 13 as disclosed on the stock exchange, no such 'free' bonus was given to UTI. However, all this was not considered by the Ld. Judge who erred in failing to appreciate that the directors also granted a conversion price to the accused allottees which was much less than the conversion price given to UTI.

…

…

P. The Ld. Judge erred in failing to appreciate the ratio laid down by the Hon'ble Supreme Court in the matter of Fiona Shrikhande Versus State of Maharashtra and another, (2013) 14 Supreme Court Cases 44 wherein, the Hon'ble Supreme Court has held that at the complaint stage, the Magistrate is merely concerned with the allegations made out in the complaint and has only to prima facie satisfy whether there are sufficient grounds to proceed against the accused. In the facts of the present case there were more than sufficient grounds for the Ld. Judge to prima-facie be satisfied of the offence and issue process in the matter.

…

…

W. The Ld. Judge failed to note that it was vitally necessary to take cognizance of the offences in the interest of justice under Section 473, keeping in mind the devious method of involving 38 companies and routing of funds in a preplanned and preordained sequence of transactions. If no cognizance is taken of such egregious offences, it would seriously harm the interest of the investors in the securities market. It is in the interests of justice that large conglomerates having lakhs of shareholders are not permitted to flagrantly violate the law and seek to escape prosecution.

27. Coming to the point of delay, *inter alia* the contention of SEBI is that the Court should have considered Section 473 of CrPC to condone delay having considered the facts and circumstances in proper perspective. At this juncture, it is relevant to quote Section 473 of CrPC which reads as under:

"473. Extension of period of limitation in certain cases. - Notwithstanding anything contained in the foregoing provisions of this Chapter, any Court may take cognizance of an offence after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice."

The aforesaid provision is categorical in stating that any limitation prescribed under Section 468 of CrPC can be overlooked if sufficient cause is made out in the facts and circumstances of the individual case in the interest of justice. The said provision, while trying to balance public interest in initiating criminal prosecutions, has been restricted to peculiarities of individual case while clothing the Court with discretionary power. Such a discretion vested in the Court ought to be a principled exercise, wherein the facts and circumstances portrayed justify such an exercise. The intention of the aforesaid provision is to make the inquiry a question of fact and not of untrammelled discretion as to whether in a particular case, the Court should condone the delay.

28. It is in this context that the High Court is bound to consider the facts of the present case concerning the modus of initiation of the case and other factors, before considering the aspect of condonation of delay in terms of Section 473 of CrPC. The approach of the High Court of adjourning adjudication of the interim application seeking disclosure of documents cannot be appreciated. Ideally, the High Court ought to have considered the interim application before dealing with the limitation aspect.

29. Initiation of criminal action in commercial transactions, should take place with a lot of circumspection and the Courts ought to act as gate keepers for the same. Initiating frivolous criminal actions against large corporations, would give rise to adverse economic consequences for the country in the long run. Therefore, the Regulator must be cautious in initiating such an action and carefully weigh each factor.

30. In ordinary course, this Court would have remanded the matter for adjudication by the High Court on the interim application moved by the appellant seeking such disclosure. However, arguments have been extensively advanced before this Court touching upon important aspects of criminal jurisprudence which require consideration. Moreover, the facts stated above, clearly indicate that the acts which are sought to be prosecuted go back to the year 1992-1994, and over three decades have passed without there being any end to the litigation. In this regard, the Court intends to examine this important issue and pass appropriate orders to ensure that the adjudication is not delayed unnecessarily, *ad infinitum.*

ISSUE II

31. This brings us to the issue as to whether the interim application seeking documents, filed by the appellant herein deserves to be allowed in the instant case. The respondents have raised objections for such disclosure on two counts:

i. That such a request was already rejected by the High Court in an earlier writ petition filed by the appellant herein, when the settlement proceedings were on going;
ii. That the respondents claim legal privilege, as against both the opinions of Justice (Retd.) B. N. Srikrishna and the Report of the Chartered Accountant, viz. Sh. Y.H. Malegam.

32. Coming to the first objection, there is no gainsaying the fact that the respondent (regulator) had issued a letter dated 16.04.2010, conveying the findings of the investigation. In furtherance thereto, the appellant had sought to settle the issue considering the fact that substantial time had already elapsed.

33. During the settlement proceedings, SEBI had appointed Sh. Y. H. Malegam, Chartered Accountant on the advice of Justice (Retd.) B. N. Srikrishna. Accordingly, the Chartered Accountant is supposed to have submitted a Report to SEBI. During the settlement proceedings, the appellant submitted an application dated 21.01.2019, wherein it sought the aforesaid documents. In response SEBI, *vide* letter dated 28.01.2019, rejected the request by relying on the provisions of Section 13(2) of the Securities and Exchange Board of India (Settlement Proceedings) Regulations, 2018 [hereinafter 'Settlement Regulations'].

34. The aforesaid letter dated 28.01.2019, was impugned by the appellant before the High Court of Judicature at Bombay in W.P. (Lodg.) No. 300 of 2019. The High Court, by final Order dated 04.02.2019, while dismissing the aforesaid writ petition held as under:

"10. The internal Committee of the SEBI is seized of the matter. During the proceedings, an application came to be filed by the petitioner seeking copies of certain documents including copy of the report submitted by Mr. Malegam. The provisions of Regulation 13(2)(a) are clear. **These regulations do not confer any right on the Petitioner to ask for a copy of the said report. In that view of the matter, the issue of principles of fairness does not arise at this stage, considering the purpose of the proceedings before the internal Committee and powers of the High Power Committee and the Regulations framed in this regard**. There is no right conferred under the Regulations on the Petitioner to ask for such a copy. In the facts, we are not convinced to exercise our writ jurisdiction.

As and when the adjudicatory proceedings takes place, the Petitioner may ask for copies of such documents in accordance with the procedure established to conduct the proceedings."

(**emphasis supplied**)

We may only note that the High Court was dealing with specific requests that were made during the Settlement proceedings under Regulation 13(2) of the Settlement Regulations. From a reading of the Explanation appended to Regulation 13(2)(a) of the Settlement Regulations, it is clear that the intention of Settlement proceedings is to facilitate the Regulator to consider the feasibility of settlement in certain cases, without allowing a roving and fishing expedition. However, the findings of the High Court in the aforesaid case are of no avail to the SEBI, as we are at a stage when SEBI has invoked the provisions under the criminal law to prosecute the appellant herein.

35. At this juncture, SEBI relies on Regulation 29 of Securities and Exchange Board of India (Settlement Proceedings) Regulations 2018, which notes as under :

CONFIDENTIALITY OF INFORMATION .

29. (1) All information submitted and discussions held in pursuance of the settlement proceedings under these regulations shall be deemed to have been received or made in a fiduciary capacity and the same may not be released to the public, if the same prejudices the Board and/or the applicant. 2) Where an application is rejected or withdrawn, the applicant and the Board shall not rely upon or introduce as evidence before any court or Tribunal, any proposals made or information submitted or representation made by the applicant under these regulations:

Provided that this sub-regulation shall not apply where the settlement order is revoked or withdrawn under these regulations.

Explanation. – When any fact is discovered in consequence of information received from a person in pursuance of an application, so much of such information, whether it amounts to an admission or not, as relates distinctly to the fact thereby discovered, may be proved.

Reliance on the above provision is misconceived, as both the clauses must be interpreted to deter usage of the applicant's proposals/representations and allied information before Courts/Tribunals, in the event the settlement fails. It does not deal with the disclosure obligations cast on SEBI. In any case, the purpose of settlement is to ensure that parties come to an understanding having assessed their relative merits. It is expected that parties in such proceedings are transparent, more so for Regulators like SEBI, who are expected to share all the documents, which are necessary for understanding the issue.

36. It is a matter of record that subsequently, the settlement proceedings were terminated by SEBI and thereafter SEBI has decided to initiate a criminal complaint against the appellant herein.

37. In this context, the objection of SEBI that the issue of disclosure of documents is *res judicata* as the same was disallowed by the High Court in the earlier round of litigation, cannot be sustained in the eyes of law.

38. This brings us to the right of the accused-appellant to seek document disclosure in the present case. In this case, the appellant has been pursuing SEBI for these documents as they believe that an attempt is being made by SEBI to suppress the Opinions and Reports as they are adverse to the cause of SEBI.

39. A cursory glance at the background of the matter would reveal that initially, a complaint was submitted to SEBI on 21.01.2002, wherein the appellant and its directors were purportedly involved in irregularities in allotment of NonConvertible Debentures in the year 1994. Accordingly, an Investigation Report was submitted by the Investigating Authority on 04.02.2005. SEBI in its counter-affidavit has admitted that the aforesaid Report was inconclusive and recommended further enquiry in this regard.

40. In pursuance thereof, SEBI approached Justice (Retd.) B. N. Srikrishna in the year 2009. He is supposed to have given his first Opinion, which formed the basis of initiating action against the appellant herein. It is SEBI's case that during the Settlement proceedings, the appellant had disclosed numerous documents, which mandated SEBI to re-examine its stand. Accordingly, the matter was referred to Justice (Retd.) B. N. Srikrishna for a second time.

41. Thereafter, Justice (Retd.) B. N. Srikrishna wrote back to SEBI asking them to consult Sh. Y. H. Malegam, a renowned Chartered Accountant to determine the culpability of the appellant and various directors. It is reported that this exercise had culminated in the Second opinion of Justice (Retd.) B. N. Srikrishna.

42. SEBI is a regulator and has a duty to act fairly, while conducting proceedings or initiating any action against the parties. Being a quasi-judicial body, the constitutional mandate of SEBI is to act fairly, in accordance with the rules prescribed by law. The role of a Regulator is to deal with complaints and parties in a fair manner, and not to circumvent the rule of law for getting successful convictions. There is a substantive duty on the Regulators to show fairness, in the form of public co-operation and deference.

43. The duty to act fairly by SEBI, is inextricably tied with the principles of natural justice, wherein a party cannot be condemned without having been given an adequate opportunity to defend itself. In ***State Bank of Patiala v. SK Sharma***, (1996) 3 SCC 364, this Court while dealing with document disclosure and natural justice held as under:

"28. The decisions cited above make one thing clear, viz., principles of natural justice cannot be reduced to any hard and fast formulae. As said in *Russell* v. *Duke of Norfolk* [(1949) 1 All ER 109 : 65 TLR 225] way back in 1949, these principles cannot be put in a strait-jacket. Their applicability depends upon the context and the facts and circumstances of each case. (See *Mohinder Singh Gill* v. *Chief Election Commr.* [(1978) 1 SCC 405 : (1978) 2 SCR 272]) The objective is to ensure a fair hearing, a fair deal, to the person whose rights are going to be affected. (See *A.K. Roy* v. *Union of India* [(1982) 1 SCC 271 : 1982 SCC (Cri) 152] and *Swadeshi Cotton Mills* v. *Union of India*[(1981) 1 SCC 664] .) As pointed out by this Court in *A.K. Kraipak* v. *Union of India* [(1969) 2 SCC 262] , the dividing line between quasi-judicial function and administrative function (affecting the rights of a party) has become quite thin and almost indistinguishable — a fact also emphasised by House of Lords in *Council of Civil Service Unions* v. *Minister for the Civil Service* [(1984) 3 All ER 935 : (1984) 3 WLR 1174 : 1985 AC 374, HL] where the principles of natural justice and a fair hearing were treated as synonymous. …"

44. At this juncture, the appellant has pressed into service the ratio laid down by this Court in ***Takano case*** (supra), to seek document disclosure. On the other hand, the respondents have tried to distinguish the present case by stating that the present case is not one of disclosure which is being sought during investigation by SEBI under the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003. Although we agree with the respondents that the ***Takano Case*** (supra) was rendered under the aforesaid Regulations, however, we are of the opinion that the reasoning of this Court alludes to a general obligation of disclosure on the part of SEBI. This Court has held in the ***Takano Case*** (supra) that three fundamental purposes of disclosure of information are (i) reliability, i.e., the Court will be able to perform its function accurately only if both parties have access to information and possess opportunity to address arguments and counter arguments; (ii) fair trial, i.e., this will enable the parties to effectively participate in the proceedings; and (iii) transparency and accountability, i.e., the investigative agencies are held accountable through transparency and not opaqueness. Keeping a party abreast of the information that influenced the decision promotes transparency of the judicial process which was discussed in the aforesaid case in the following manner:

"**24.** While the respondents have submitted that only materials that have been *relied* on by the Board need to be disclosed, the appellant has contended that all *relevant* materials need to be disclosed. While trying to answer this issue, we are faced with a multitude of other equally important issues. These issues, all paramount in shaping the jurisprudence surrounding the principles of access to justice and transparency, range from identifying the purpose and extent of disclosure required, to balancing the conflicting claims of access to justice and grounds of public interest such as privacy, confidentiality and market interest. An identification of the *purpose* of disclosure would lead us closer to identifying the extent of required disclosure. There are three key purposes that disclosure of information serves:

(i) Reliability: The possession of information by both the parties can aid the courts in determining the truth of the contentions. The role of the court is not restricted to interpreting the provisions of law but also determining the veracity and truth of the allegations made before it. The court would be able to perform this function accurately only if both parties have access to information and possess the opportunity to address arguments and counterarguments related to the information;

(ii) Fair Trial: Since a verdict of the Court has far reaching repercussions on the life and liberty of an individual, it is only fair that there is a legitimate expectation that the parties are provided all the aid in order for them to effectively participate in the proceedings;

(iii) Transparency and accountability: The investigative agencies and the judicial institution are held accountable through transparency and not opaqueness of proceedings. Opaqueness furthers

a culture of prejudice, bias, and impunity - principles that are antithetical to transparency. It is of utmost importance that in a country grounded in the Rule of Law, the institutions adopt those procedures that further the democratic principles of transparency and accountability. The principles of fairness and transparency of adjudicatory proceedings are the cornerstones of the principle of open justice. This is the reason why an adjudicatory authority is required to record its reasons for every judgement or order it passes. However, the duty to be transparent in the adjudicatory process does not begin and end at providing a reasoned order. Keeping a party bereft of the information that influenced the decision of an authority undertaking an adjudicatory function also undermines the transparency of the judicial process. It denies the concerned party and the public at large the ability to effectively scrutinise the decisions of the authority since it creates an information asymmetry.

25. The purpose of disclosure of information is not merely individualistic, that is to prevent errors in the verdict but is also towards fulfilling the larger institutional purpose of fair trial and transparency. Since the purpose of disclosure of information targets both the *outcome* (reliability) and the *process* (fair trial and transparency), it would be insufficient if only the material relied on is disclosed. Such a rule of disclosure only holds nexus to the outcome and not the process. Therefore, as a default rule, all relevant material must be disclosed."

45. There is no doubt that the set of facts portrayed herein are unique. The impugned action of the appellant hails back to the year 1994, and almost three decades have gone by without there being any light at the end of the tunnel. The investigation report by SEBI in 2005 was inconclusive about the alleged offence. There is even a communique by the Minister of Corporate Affairs, Union of India recommending closure of the case as they found nothing to further the prosecution under Section 77 of the Companies Act, 1956. In this light, SEBI's action to initiate a criminal complaint without providing the appellant an adequate opportunity to defend itself by releasing necessary Reports and other documents, cannot be appreciated by this Court as it is in gross violation of the appellant's right to natural justice. Recently, in ***S. P. Velumani v. Arappor Iyakkam***, 2022 SCC Online SC 663, while dealing with the necessity of document disclosure in cases where prosecuting authorities blow hot and cold, this Court has held as under:

"22…The principles of natural justice demanded that the appellant be afforded an opportunity to defend his case based on the material that had exonerated him initially, which was originally accepted by the State."

46. The approach of SEBI, in failing to disclose the documents also raises concerns of transparency and fair trial. Opaqueness only propagates prejudice and partiality. Opaqueness is antithetical to transparency. It is of utmost importance that in a country grounded in the Rule of Law, institutions ought to adopt procedures that further the democratic principles of transparency and accountability. Principles of fairness and transparency of adjudicatory proceedings are the cornerstone of the principles of open justice.

47. Even for adjudication of condonation of delay under Section 473, CrPC, the modus of initiation of criminal complaint and the conclusions reached therein are relevant in the facts and circumstance of the case.

48. Viewed from a different angle, the respondents have vehemently relied on litigation privilege under Section 129 of the Evidence Act, 1872 to claim exemption from document disclosure. Section 129 of the Evidence Act reads as under:

129. Confidential communications with legal advisers.—No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to

disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

49. The rationale of such a provision has been well known to common law since ages. Sir George Mackenzie's *Observations upon the 18th Act of the 23rd Parliament of King James the Sixth against Dispositions made in Defraud of Creditors etc* (1675), in *Sir George Mackenzie's Works* Vol 2 (1755), p1 are significant. He said this, at p 44:

"An Advocate is by the Nature of his employment tied to the same Faithfulness that any Depositor is: For his Client has depositate in his Breast his greatest Secrets; and it is the Interest of the Common-wealth, to have that Freedom allowed and secured without which Men cannot manage their Affairs and private Business: And who would use that Freedom if they might be ensnared by it? This were to beget a Diffidence betwixt such who should, of all others, have the greatest mutual Confidence with one another; and this will make Men so jealous of their Advocates that they will lose their private Business, or succumb in their just Defence, rather than Hazard the opening of their Secrets to those who can give them no Advice when the case is Half concealed, or may be forced to discover them when revealed."

In England, the Legal professional privilege is often classified under two sub-headings: legal advice privilege and litigation privilege. Legal advice privilege comprises of communications between a client and his legal adviser, and is available when proceedings are in existence or contemplated. Litigation privilege on the other hand, covers a wider class of communications, such as those between the legal adviser and potential witnesses.

50. Coming to legal advice privilege in England, the House of Lords through Justice Carswell in ***Three Rivers District Council and others (Respondents) v. Governor and Company of the Bank of England (Appellants)*****,** [2004] UKHL 48, has summarized the law as under:

“The conclusion to be drawn from the trilogy of 19th century cases to which I have referred and the qualifications expressed in the modern case-law is that communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied:

(a) litigation must be in progress or incontemplation;

(b) the communications must have been madefor the sole or dominant purpose of

conducting that litigation;

(c) the litigation must be adversarial, notinvestigative or inquisitorial.”

51. The distinction in application of this privilege *qua* adversarial and investigative litigation/inquisitorial litigation is reasoned by English Courts in ***In Re K (Infants),*** [1965] AC 201 as under:

“Where the judge is not sitting purely, or even primarily, as an arbiter but is charged with the paramount duty of protecting the interests of one outside the conflict, a rule that is designed for just arbitrament cannot in all circumstances prevail.”

52. Further, ***In Re E (S.A.) (a Minor) (Wardship: Court’s Duty)***, [1984] 1 WLR 156, while pointing out that a court in wardship proceedings was not exercising an adversarial jurisdiction and that:

“Its duty is not limited to the dispute between the parties: on the contrary, its duty is to act in the way best suited in its judgment to serve the true interest and welfare of the ward. In exercising wardship jurisdiction, the Court is a true family court. Its paramount concern is the welfare of the ward. It will,

therefore, sometimes be the duty of the court to look beyond the submissions of the parties in the endeavor to do what it judges to be necessary"

53. Indian position seems to be different from England. Section 126 to 129 of the Evidence Act do not draw any distinction between adversarial and investigative litigation as such, and privilege is applicable all through. This aspect is crucial, as it touches on the foundations of the legal profession at large in India. This Court does not want to express any opinion in this regard as the case at hand is different and such an issue does not arise, for the following reasons:

i. The investigation report was inconclusive, as admitted by SEBI itself.

ii. Instead of SEBI referring the issue to an expert, it could have undertaken the exercise of further investigation by itself, which was not done.

iii. SEBI ultimately took further steps, only because of the first opinion of Justice (retd.) B. N. Srikrishna.

iv. The first opinion of Justice (retd.) B. N. Srikrishna is a part and parcel of the investigation and documents connected therewith.

v. Moreover, certain documents have already been disclosed to the appellant herein.

54. The simple test in this case is whether SEBI has launched the prosecution on the basis of the investigation report alone. The answer seems to be 'No' by SEBI's own admission in its reply where it states that the investigation report was inconclusive and hence further scrutiny of the transactions by experts was called for. That being the case, further Reports and opinions obtained, from whomsoever it may be, are only an extension of the investigation to help SEBI as a Regulator to ascertain the facts and reach conclusions for prosecution or otherwise.

55. For the above reasons, we do not agree with the contention of the learned Senior Counsel for SEBI that the first opinion of Justice (Retd.) B. N. Srikrishna is covered by 'legal privilege' under Section 129 of the Evidence Act. Same is the case with the second opinion of Justice (Retd.) B. N. Srikrishna and the Report of Sh. Y. H. Malegam, which are nothing but a continuation of the fact-finding exercise undertaken by SEBI to determine culpability.

56. Moreover, learned Senior counsel, Mr. Arvind Datar, appearing for SEBI has pointed out that the present set of proceedings have emanated before Criminal Court, wherein the procedures must be strictly in accordance with the provisions of CrPC. He states that the stage of document production under the CrPC is provided under Section 207 and 208, which takes place after cognizance is taken by the Magistrate. This Court, in ***S. P. Velumani*** (supra), while rejecting a similar contention, held as under:

"26. We may note that the contention of the State may be appropriate under normal circumstances wherein the accused is entitled to all the documents relied upon by the prosecution after the Magistrate takes cognizance in terms of Section 207 of CrPC. However, this case is easily distinguishable on its facts. Initiation of the FIR in the present case stems from the writ proceedings before the High Court, wherein the State has opted to re-examine the issue in contradiction of their own affidavit and the preliminary report submitted earlier before the High Court stating that commission of cognizable offence had not been made out. It is in this background we hold that the mandate of Section 207 of CrPC cannot be read as a provision etched in stone to cause serious violation of the rights of the appellantaccused as well as to the principles of natural justice."

Observing the facts and circumstances of this case, which have been adumbrated above, we are of the firm opinion that the defence taken by SEBI that they need not disclose any documents at this stage as such a request is pre-mature in terms of the CrPC, cannot be sustained.

57. Before we part with the present appeal, another disconcerting aspect of this case that comes to the fore is SEBI's attempt to cherry-pick the documents it proposes to disclose. There is a dispute about the fact that certain excerpts of the opinion of Justice (Retd.) B. N. Srikrishna, were disclosed to the appellant herein. It is the allegation of the appellant that while the parts which were disclosed, vaguely point to the culpability of the appellant, SEBI is refusing to divulge the information which exonerate it. Such cherry-picking by SEBI only derogates the commitment to a fair trial. In ***Nea Karteria Maritime Co Ltd v. Atlantic and Great Lakes Steamship Corporation***, [1981] Com LR 138 at 139, Mustill J. held as under:

'I believe that the principle underlying the rule of practice exemplified in *Burnell v British Transport Commission* [1956] 1 QB 187 is that where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood.'

The aforesaid principle is often referred to as the 'Cherrypicking' principle.

58. In the case at hand, SEBI could not have claimed privilege over certain parts of the documents and at the same time, agreeing to disclose some part. Such selective disclosure cannot be countenanced in law as it clearly amounts to cherry-picking.

59. In view of the aforesaid discussion, we allow the present appeal and direct the respondents to furnish a copy of the following documents to the appellant forthwith:-

(i) First opinion of Justice (Retired) B.N. Srikrishna

(ii) Report of Y.H. Malegam

(iii) Second opinion of Justice (Retired) B.N. Srikrishna

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