

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORIGINAL SIDE**

WRIT PETITION (L) NO. 3441 OF 2020

JK Paper Limited, a company
within the meaning of the Companies
Act, 2013 having its registered office at
P.O. Central Pulp Mills Fort Songarh,
District Tapi, Gujrat- 394660.

... Petitioner.

v/s.

Securities and Exchange Board of India,
an authority established under the Securities
and Exchange Board of India having its
office at Plot No.C4-A, "G" Block, Bandra
Kurla Complex, Bandra East,
Mumbai-400 051.

... Respondent.

Mr. Janak Dwarkadas, Senior Advocate with Mr.Ameya Gokhale
and Ms.Radhika Indapurkar i/b. Shardul Amarchand Mangaldas
& Co. for the Petitioner.

Mr. Rafique Dada, Senior Advocate with Mr.Omprakash Jha and
Ms. Shivani Kumbhojkar i/b. The Law Point for the Respondent.

**CORAM : NITIN JAMDAR AND
MILIND JADHAV, JJ.**

**DATE : 6 October 2020.
(Through Video Conferencing)**

JUDGMENT : (Per Nitin Jamdar, J.)

Rule. Rule made returnable forthwith. Heard finally by
consent of parties.

2. The Petitioner, JK Paper Limited, requested the Respondent- Securities and Exchange Board of India for a personal hearing regarding exemption application filed by it under a regulation governing employee stock options. The Board of SEBI refused the request for personal hearing and permitted additional written submissions. Petitioner has filed this petition to direct the Board to grant a personal hearing.

3. The question therefore is: whether the Board is obliged to grant a personal hearing to the petitioner while considering an exemption application under the *Securities and Exchange Board of India (Share Based Employee Benefits) Regulations, 2014*. The answer is-No. The facts and the reasons for this conclusion are as follows.

4. The Petitioner- JK Paper Limited is a public limited company. The Petitioner manufactures and supplies paper and board. The Respondent, Securities and Exchange Board of India, SEBI, is established under the Securities and Exchange Board of India Act, 1992.

5. SEBI, in the year 1999, had framed "*Securities and Exchange Board of India (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999*" which provided for the stock-based incentive schemes to employees. On 28 October 2014, SEBI notified *Securities and Exchange Board of India (Share Based Employee Benefits) Regulations, 2014*, ("*Regulations of*

2014"). SEBI has framed the Regulations of 2014 in the exercise of the power conferred by sections 11, 11A and 30 of the Act of 1992 read with section 62 of the *Companies Act of 2013* and rule 12 of *Companies (Share Capital and Debentures) Rules, 2014*. The Regulations govern the following schemes: (a) employee stock option schemes; (b) employee stock purchase schemes; (c) stock appreciation rights schemes; (d) general employee benefits schemes; and (e) retirement benefit schemes consequent upon which the existing guidelines have been repealed. The Regulations shall apply to those companies whose shares are listed on any recognised stock exchange in India, and which fulfils the following: (i) has a scheme for the direct or indirect benefit of employees; (ii) involves dealing in or subscribing to or purchasing securities of the company, directly or indirectly; and which has a scheme set up by the company or any other company in its group; the scheme is funded or guaranteed by the company or any other company in its group; the scheme is controlled or managed by the company or any other company in its group. The Regulations of 2014 lay down various regulatory measures regarding such a scheme. The object of the Regulations of 2014 is to check and prevent manipulation of share prices in the larger interest of the investors.

6. The Petitioner, in January 2004, formed an employee welfare trust named JK Paper Welfare Trust. Around ninety seven percent of its assets are shares of the Petitioner and around 4.73% of its share capital. The Trust administers Continuity Facility Assistance

Scheme; Medical Assistance Scheme; Education Scholarship Scheme; and Prize Scheme for Sports.

7. On 7 May 2018, the Petitioner sought clarification regarding the Regulations of 2014. By letter dated 29 June 2018, SEBI provided guidance to the Petitioner. SEBI informed that the Regulations of 2014 apply to the Petitioner.

8. On 24 October 2019, the Petitioner applied seeking relaxation from the applicability of Regulations under the Regulation 29 of the Regulations of 2014, the SEBI is empowered to grant relaxation for the strict compliance of the Regulations.. Relying upon Regulation 29, the Petitioner sought exemption from the strict compliance of Regulations 1(3), 1(4), 3(1), 26(2) and 31(2)(b)(i) and (ii). Reasons for exemption were in the application.

9. By communication dated 3 February 2020, the SEBI rejected the Petitioner's request for exemption. The communication did not spell out any reasons for rejection. The Petitioner filed an appeal before the Securities Appellate Tribunal under the Act of 1992 and the Securities Appellate Tribunal (Procedure) Rules, 2000. The Appellate Tribunal allowed the appeal on 11 August 2020. The Appellate Tribunal held that the SEBI had to give reasons in the order rejecting the exemption application. The Tribunal directed the SEBI to pass a reasoned order within the set time limit.

10. The SEBI, by an email communication dated 26 August 2020, sought certain information from the Petitioner. The Petitioner responded on 2 September 2020 and submitted information. The Petitioner sought a personal hearing before any decision is taken on the exemption application. By communication dated 7 September 2020, the SEBI informed the Petitioner to make submissions in writing by 12 September 2020. The Petitioner again, by an email dated 11 September 2020, requested an opportunity to make submissions in person. The SEBI replied on 14 September 2020 stating that according to it, all the relevant submissions have been brought on record and there is no such requirement for a personal hearing. However, the Petitioner was given liberty to file additional information through written submissions, if necessary.

11. Since the request for a personal hearing was refused, the Petitioner has approached this Court with a prayer that SEBI be directed to give an opportunity of hearing to the Petitioner in respect its exemption application. The SEBI has filed its reply and has opposed the petition.

12. We have heard Mr. Janak Dwarkadas, learned Senior Advocate for the Petitioner and Mr. Rafique Dada, learned Senior Advocate for the Respondent- SEBI.

13. The Petitioner has founded its prayer on three grounds. First, the proceedings are quasi-judicial, and therefore a personal hearing is necessary. The language of Regulation 29 provides for a

personal hearing. Last, whatever may be the nature of the power, considering the consequences, a personal hearing should be given. Besides the legal position, the Petitioner requests that in the facts of the case, it would serve the ends of justice, if a personal hearing is given.

14. The Petitioners have not challenged the applicability of the Regulations of 2014 in this petition, and we proceed on the basis that the Petitioner is governed under the said regulations.

15. Relying upon Regulation 29, the Petitioner sought exemption from the strict compliance of Regulations 1(3), 1(4), 3(1), 26(2) and 31(2)(b)(i) and (ii). It will be useful to reproduce these Regulations. Regulations 1(3) and 1(4) make the Regulations of 2014 applicable to certain schemes and entities. The relevant provisions read thus:

1. Short title, commencement and application.

(1) (2.)

.....

(3) *The provisions of these regulations shall apply to following, -(i) employee stock option schemes; (ii) employee stock purchase schemes; (iii) stock appreciation rights schemes; (iv) general employee benefits schemes; and (v) retirement benefit schemes.*

(4) *The provisions of these regulations shall apply to any company whose shares are listed on a recognised stock exchange in India, and has a scheme:*

- (i) *for direct or indirect benefit of employees; and*
- (ii) *involving dealing in or subscribing to or purchasing securities of the company, directly or indirectly; and*
- (iii) *satisfying, directly or indirectly, any one of the*

following conditions:

- a. the scheme is set up by the company or any other company in its group;*
- b. the scheme is funded or guaranteed by the company or any other company in its group;*
- c. the scheme is controlled or managed by the company or any other company in its group.*

Regulation 3 specifies the manner of implementation of the schemes. The regulation reads thus:

3. Implementation of schemes through trust. (1) *A company may implement schemes either directly or by setting up an irrevocable trust(s):*

Provided that if the scheme is to be implemented through a trust the same has to be decided upfront at the time of taking approval of the shareholders for setting up the schemes:

Provided further that if the scheme involves secondary acquisition or gift or both, then it is mandatory for the company to implement such scheme(s) through a trust(s).

(2) and (3)

Regulation 26 mandates certain conditions regarding the position of shares of the company. The relevant part is reproduced as under:

26. Administration and implementation.

(1)

(2) *At no point in time, the shares of the company or shares of its listed holding company shall exceed ten per cent of the book value or market value or fair value of the total assets of the scheme, whichever is lower, as appearing in its latest balance sheet for the purposes of GEBS.*

Regulation 31 specifies certain compliances. Relevant portion reads thus:

31. Repeals and savings.

- (1)
 (2) *Notwithstanding such repeal, -*
 (a)
 (b) *all listed companies having existing schemes to which these regulations apply are required to comply with these regulations in their entirety within one year of the same coming into effect, subject to these exceptions:*
- (i) *trusts holding shares, for the purposes of implementing employee benefits schemes of the company, beyond the permissible limits as provided under these regulations, shall have a period of five years to bring down its holding in shares to such limits;*
- (ii) *trusts holding shares, for the purposes of implementing GEBS or RBS, which exceed ten per cent. of the total value of the total assets of the trust(s) as provided under these regulations, shall have a period of five years to bring down its holding in shares to such limits;*



LEGAL MEDIA GROUP

BY THE PEOPLE. FOR THE PEOPLE. OF THE PEOPLE

The Petitioner has sought exemption from these provisions invoking the power under Regulation 29. Regulation 29 reads thus:

“29. Power to relax strict enforcement of the regulations.

- (1) *The Board may suo motu or on an application made by a company, for reasons recorded in writing, grant relaxation from strict compliance with any of these regulations subject to such conditions as the Board deems fit to impose in the interests of investors in securities and the securities market.*
- (2) *A company making an application under sub-regulation (1), shall pay a non-refundable fee of rupees one lakh by way of direct credit in the bank account through NEFT/RTGS/IMPS or any other mode allowed by RBI or by*

way of a banker's cheque or demand draft payable at Mumbai in favour of the Board."

This regulation is followed by Regulation 30 which empowers the SEBI to issue directions and order to take necessary measures for contravention of the regulations in exercise of its powers under the Act of 1992, the Securities Contracts (Regulation) Act, 1956 and the Companies Act, 2013.

16. The Petitioner's first contention is that the Appellate Tribunal in its order dated 11 August 2020 has held that the power under Regulation 29 is a quasi-judicial power and since it is a finding rendered in the litigation between the parties the same is binding on SEBI. The SEBI has argued that there is no such finding.

17. When SEBI had rejected the application of the Petitioner for exemption/relaxation on 3 February 2020, the Petitioner filed an appeal before the Securities Appellate Tribunal. The Petitioner contended that the communication was non-speaking. The stand taken by SEBI was that it is only when an exemption is granted that the reasons need to be given. There is no obligation to provide any reasons when the exemption application is rejected. The Tribunal noted the phrase "*for reasons to be recorded*" and observed that this requirement would apply in both contingencies, i.e. for rejection of the application and for grant of the same. After interpreting the language of Regulation 29(1) in this manner, the Appellate Tribunal also made a general comment on the evolution of law regarding the

right to information. In paragraph-11 of the order, the Appellate Tribunal observed thus:

“11. We would also like to reiterate at this stage that implementation of the Right to Information Act, 2005 and the various judgments emanating on/from the same have emphasised the need for greater transparency as well as for providing reasons, at least in brief, in even in ordinary administrative communications issued by various authorities. Therefore, application of such transparency requirements on the part of quasi-judicial authorities has to be of a much higher order.”

Petitioner's sole emphasis is on the last line of this paragraph. No other observation is shown to us. Except for a general reference to the quasi-judicial authorities in this sentence, there is no finding by the Appellate Tribunal much less any specific finding interpreting Regulation 29. Therefore, the contention of the Petitioner that because of the finding of the Appellate Tribunal that exercise of power under Regulation 29 being quasi-judicial, personal hearing has to be provided cannot be accepted. We do not need to comment on the interpretation of Regulation 29 by the Appellate Tribunal regarding providing of reasons while not granting the exemption, as the said issue is not debated before us in this petition.

18. The petitioner's second contention is that irrespective of the finding of the Tribunal, this court should hold that the power under Regulation 29 is quasi-judicial power and therefore, a personal hearing is mandated. SEBI contends that Regulation 29 is not a quasi judicial power.

19. The power to grant relaxation under Regulation 29 is a discretion to be exercised by the SEBI, and the conditions to be imposed are in the interest of the investors. Besides contending that serious consequences would flow from not granting exemption nothing else is pointed out to us as to how the exercise of this power can be called as quasi-judicial power to import duty of personal hearing.

20. We find no merit in the consequence-based argument that is that since serious consequences would flow from the rejection of the exemption under Regulation 29, a personal hearing must be mandated. No such absolute proposition, without reference to the scheme and purpose of the statutory instrument in question, can be accepted. Having governed by the Regulations, if any entity is in breach thereof, the consequences would follow as provided in Regulation 30, unless the entity is exempted. Liability thus originates from the breach of the Regulations 2014. Refusal to grant an exception under Regulation 29 is not the origin of liability. Grant of exemption is a matter of exception from the general rule contained under the Regulations. The contention of the Petitioner that right of personal hearing must follow because the power under Regulation 29 is a quasi-judicial power, cannot be accepted.

21. The next limb argument of the Petitioner is that looking at the consequences that would follow, whatever may be the

nature of Regulation 29, in requirement of fairness, transparency and principles of natural justice, personal hearing be read into these provisions. Reliance is placed on the decisions of the Supreme Court in the cases of *Swadeshi Cotton Mills v. Union of India*¹, *The Siemens Engineering & Manufacturing Co. of India Ltd. v. The Union of India*² and *Sabara India (Firm), Lucknow v.*

*Commissioner of Income Tax, Central-I*³. SEBI, on the other hand, has relied on the following decisions to contend that the principles of natural justice are flexible and the scheme of the Regulations of 2014 is just and fair to the applicants: *Gorkha Security Services v. Government (NCT of Delhi)*⁴ and *State Bank of India v. M/s. Jab Developers Pvt. Ltd.*⁵.

22. The Petitioner relied upon the Supreme Court judgment in the case of *Sabara India* and more particularly paragraph-20 thereof. In this decision, the Supreme Court has observed that requirement of giving reasonable opportunity of being heard is generally read into the provisions of a statute, particularly when the order has adverse civil consequences and this principle will hold good irrespective of whether the power conferred on the statutory body or the tribunal is administrative or quasi-judicial. In this case, the Supreme Court framed a question as to whether any pre-decisional hearing is required before any direction is issued under section 142(2-A) of the Income Tax Act, 1961 regarding special audit of the

1 (1981) 1 SCC 664

2 (1976) 2 SCC 981

3 (2008) 4 SCC 151

4 (2014) 9 SCC 105

5 Civil Appeal No.4776/2019 decided on 8 May 2019.

accounts of the assessee. It is, in this context, the Bench of three learned Judges observed that pre-decisional hearing should be read into the provision. In the case of *The Siemens Engineering & Manufacturing Co. of India Ltd.*, the Supreme Court was considering a question as to what was the correct amount of import duty chargeable on pot motors when imported separately from rayon spinning machines. Having answered this question, the Supreme Court disapproved the hurried manner the Collector in that case had disposed of the proceedings which were quasi-judicial proceedings and stressed on the need to give reasons. The Supreme Court also observed that administrative authorities and Tribunal exercising quasi-judicial functions should observe the principle of *audi alteram partem*. Relying on these decision, the Petitioner further submits that it cannot be the contention that hearing need not be given as it will be a useless formality.

23. However, in the case of *Sabara India*, the Supreme Court has further observed that reading of requirement of personal hearing in a statute when there are consequences cannot be applied as a rule. The Supreme Court has observed that no general rule of universal application can be laid down to the applicability of principle *audi alteram partem* in addition to the provision. The Supreme Court has clarified this position in the judgment in the case of *Gorkha Security Services v. Government (NCT of Delhi)*⁶, wherein the appellant before the Supreme Court had questioned the form and content of show cause notice to be issued to blacklist the petitioner.

⁶ (2014) 9 SCC 105

One question framed by the Supreme Court was the necessity to serve show cause notice as requisite of principles of natural justice. The Supreme Court observed that once a show cause notice is given and an opportunity is accorded to give a reply, it is not necessary to give personal hearing. The case of *State Bank of India v. M/s.Jah Developers Pvt. Ltd.*⁷, came up before the Supreme Court in respect of the declaration of a borrower as a willful defaulter under the circulars issued by the Reserve Bank of India. The question was whether an advocate ought to be allowed to represent the borrower before the Committee taking a decision. The issue was answered in negative. The Supreme Court, in *State Bank of India*, reiterated the principle that natural justice is a flexible tool used in order to arrive at a just result and such result can be achieved without a personal hearing, on written representations given by the parties. The Petitioner seeks to distinguish these two judgments on the ground that these judgments pertain to show cause notice for which nature of the proceeding is different and in the present case, according to the Petitioner, non-grant of exemption would straightway result in serious consequences. This cannot be the sole ground for distinguishing the dicta laid down. In the case of *State Bank of India*, the Supreme Court has emphasized that what is required is a 'just result'. Therefore, the purpose, ambit and the measures under the statutory instrument have to be seen.

24. The Regulations of 2014 are a code in itself. They regulate employee stock option schemes in the larger interest of the investors.

⁷ Civil Appeal No.4776/2019 decided on 8 May 2019.

They incorporate conditions, regulate the activity and provide for consequences. The reason for exemption can be elaborated in the application. If additional material is required, it can be submitted. Based on this material, SEBI will take a decision whether to grant exemption or refuse it. The conditions to be imposed are in the interest of the investors. Thus, it is for the SEBI to deliberate upon the extent and ambit of the conditions. This process can be easily achieved by the Petitioner by submitting submissions in writing. If SEBI finds that exemption need not be granted, it will give reasons for the same which can be tested in appeal. If the conditions are arbitrarily imposed or that the exercise is perverse, the validity can be challenged. The Petitioner's argument proceeds on the footing that the principles of natural justice in all circumstances include personal hearing which is not a correct position of law. The Petitioner also erroneously proceeds on the basis that the need and extent of imposition of conditions can be a matter of debate for which personal hearing is required. As stated earlier, the power in question is a discretionary power and the use of this discretion can be challenged in appeal within the well settled parameters. Full transparency is maintained by permitting written submissions providing reasons and the right to appeal .

25. It is a settled position that the requirement of compliance with the principle of natural justice can vary in different situations and conditions. Even where situations where principles of natural justice require an opportunity of hearing, it does not in all

circumstances mean a personal hearing. SEBI has placed two Regulations before us and has pointed out two of the provisions. First is Regulation 5 of the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011. It incorporates a condition of giving a reasonable opportunity. Second is Regulation 25A(4) of the SEBI (Delisting of Equity Shares) Regulation, 2009. It provides for a “reasonable opportunity of being heard” to the applicant before deciding exemption application. Therefore whenever it is found necessary to provide for an opportunity, SEBI has expressly incorporated it in such provisions. No such stipulation is found in the Regulation at hand.

26. The apprehension expressed by the SEBI that by reading duty to give personal hearing in this Regulation would have adverse ramifications on its working cannot be said to be unwarranted. The SEBI has framed several regulations on various aspects of the securities market. A large number of applications are filed before it. It will hamper the functioning of the SEBI if the exercise of its every power is preceded by mandatory personal hearing, whether the regulation provides for it or not.

27. We conclude, therefore that there is no duty on the Board while considering an exemption application under Regulation 29 of *the Securities and Exchange Board of India (Share Based Employee Benefits) Regulations, 2014*, to give a personal hearing to the applicant.

28. Petitioner lastly contends that in the facts of this case, it will be in the interest of justice to give a personal hearing to the Petitioner. The argument of the Petitioner that since SEBI has formed an opinion and the rigid application of the Regulations, it is necessary to give an opportunity of personal hearing. As rightly pointed out by SEBI, there is no such formation of opinion. There were no reasons given in the earlier order. The Petitioner has submitted the relevant material. Petitioner has also been given an opportunity to submit additional written submissions. Once there is no requirement of a personal hearing under Regulation 29, we do not find that there is a special case made out by the Petitioner or any extraordinary circumstances exist to give special direction for the Petitioner.

29. Writ Petition is dismissed. Rule is discharged. No order as to costs.

30. We extend the period for submitting of the additional material/submissions by fifteen days from the date this order is uploaded on the server.

31. This judgment/order will be digitally signed by the Personal Assistant/ Private Secretary of this Court. All concerned to act on production by fax or email of a digitally signed copy of this order.

(MILIND JADHAV, J)

(NITIN JAMDAR, J)