Laxminarayan S/O. Jainarayan Rathi vs Sebi on 4 September, 2023

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on: 11.07.2023

Date of Decision : 04.09.2023

Appeal No. 545 of 2022

Laxminarayan S/o. Jainarayan Rathi
Flat No. 202, B-Wing,
Vrindavan Garden,
Near Lokmat office, Akola,
Maharashtra. ..... Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No. C-4A, G-Block,
Bandra-Kurla Complex, Bandra (East),
Mumbai - 400 051. ... Respondent

Mr. Hitesh Biherani, Advocate for the Appellant.

Mr. Shyam Mehta, Senior Advocate with Mr. Mihir Mody,
Mr. Arnav Misra, Advocates i/b. K Ashar & Co. for the
Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Ms. Meera Swarup, Technical Member

Per : Justice Tarun Agarwala, Presiding Officer

1.

The present appeal has been filed against the order dated May 26, 2020 passed by the Adjudicating Officer ('AO' for short) of the Securities and Exchange Board of India ('SEBI' for short) imposing a penalty of Rs. 1,10,00,000/- upon the appellant under Section 15HA and 15A(a) of the SEBI Act, 1992.

2. The facts leading to the filing of the present appeal is, that the Board of Directors of the Company known as Asahi Infrastructure & Projects Ltd. passed a resolution on January 31, 2008 for opening

a bank account with European American Investment Bank AG (hereinafter referred to as 'EURAM Bank') for depositing the GDR proceeds.

3. The resolution approved by the Board of Directors resolved that a bank account would be opened with EURAM Bank for the purpose of receiving the subscription money in respect of GDR issue. Further, appellant Managing Director of the Company was authorised to sign and execute an agreement as may be required by the Bank and take such steps from time to time on behalf of the Company. The resolution further resolved to use the funds deposited in the aforesaid Bank account as security in connection with the loan, if any as well as to enter into any escrow account or similar arrangement if and when so required.

4. Based on the aforesaid resolution, the Company issued 29,91,000 GDRs for USD 5.98 million dated April 29, 2009. The aforesaid GDR was subscribed by one entity, namely, Vintage FZE (hereinafter referred to as 'Vintage') and a corporate announcement was made by the Company that the entire issue was subscribed.

5. Securities and Exchange Board of India (hereinafter referred to as 'SEBI') conducted an investigation pertaining to the issue of GDR by the Company. Based on the investigation, a show cause notice dated March 28, 2019 was issued to the Company and its Directors to show cause as to why penalty under Section 15A(a) and 15HA of SEBI Act and Section 23E of SCRA should not be imposed.

6. The show cause notice alleged that pursuant to the resolution dated January 31, 2008 not only a bank account was opened with EURAM Bank but the Managing Director executed a pledge agreement dated March 1, 2011 on behalf of the Company based on which a loan agreement dated April 21, 2009 was executed between Vintage and EURAM Bank in which the proceeds of the GDR was to be kept as security with EURAM Bank. The show cause notice further alleged that the pledge agreement and the loan agreement was not disclosed to the stock exchange and, consequently, the investors and shareholders were kept in the dark. The show cause notice further alleged that based on the pledge agreement and the loan agreement EURAM Bank advanced USD 5.8 million to Vintage which amount was utilised by Vintage to subscribe to the entire issue. The GDR proceeds were pledged as security till such time the loan was repaid by Vintage. It was also alleged that the fact that Vintage was the sole subscriber was not intimated to the stock exchange and to the Indian investors. Thereafter, GDR was cancelled and converted into shares and sold to the Indian investors with the help of certain Foreign Institutional Investors (FIIs) registered with SEBI. Further, by not discharging the loan agreement and pledge agreement the investors were mislead.

7. The AO after considering the evidence on record found that the entire scheme of using the GDR proceeds to fund a subscriber to the GDR issue was a fraudulent scheme and violative of Section 12A of the SEBI Act and Regulations 3 and 4 of the PFUTP Regulations. The AO found that the GDR was subscribed by one entity, namely, Vintage and not by two entities as disclosed by the Company. The AO further found that on account of the pledge created by the Company with EURAM Bank the funds were not made available at the Company's disposal and the same became available in tranches as and when the loan amount was repaid by Vintage. Further, the loan agreement was not disclosed

to the stock exchange and to the Indian investors. Further, the disclosure made by the Company to the stock exchange that the GDR issue was fully subscribed was misleading as the investors were not informed that the GDR was subscribed by only one entity and, therefore, the scheme hatched by the Company and its Directors was violative of Section 12A of the SEBI Act and Regulations 3 and 4 of the PFUTP Regulations.

8. The AO found that the non-disclosure of the loan agreement and the pledge agreement was violative of Clause 36 of the Listing Agreement as well as Section 21 of the SCRA Act read with Clause 32 and 50 of the Listing Agreement.

9. We have heard Shri Hitesh Biherani, the learned counsel for the appellant and Shri Shyam Mehta, the learned senior counsel with Shri Mihir Mody, Shri Arnav Misra, the learned counsel for the respondent.

10. Having heard the learned counsel for the parties we find that this modus operandi in the instant appeals is the same and has been dealt with by this Tribunal in a large number of matters relating to the GDR issue wherein the Tribunal has held that non-disclosure of the loan agreement and the pledge agreement was totally fraudulent and violative of the Listing Agreement. This Tribunal also held that the Company and its MDs were aware of the execution of the pledge agreement as well as loan agreement and it was no longer open to them to deny the existence of the said agreements. This Tribunal also held that the Company and its Directors misled SEBI into believing that there were more subscribers to the issue and not one subscriber.

11. We also held that Company and its MDs were aware of the pledge agreement, non-disclosure of the pledge agreement and loan agreement invited penalty. Further, the corporate announcement did not disclose the fact that the subsisting pledge agreement facilitated the subscribers to subscribe to the GDR issue. The corporate announcement was misleading and presented a distorted version to the investors and created a false version inducing the investors to deal in securities. The aforesaid findings have been given in a large number of matters decided by this Tribunal especially in Appeal no. 381 of 2019, Sibly Industries Ltd. vs SEBI and other companion appeals decided on July 14, 2022, Appeal no. 438 of 2020, Aksh Optifibre Ltd. vs SEBI and other companion appeals decided on June 27, 2022 and Appeal no. 28 of 2022, Praveen Kumar Hastimal Shah vs SEBI and other companion appeals decided on July 6, 2022.

12. In the light of the aforesaid decisions the only ground urged before this Tribunal was that the penalty imposed was high and excessive and did not commensurate with the alleged violation.

13. In this regard we have also held in a large number of cases that the penalty imposed upon the Managing Director and other Directors was excessive and accordingly reduced the quantum of penalty.

14. In Excel Corp Care Limited vs Competition Commission of India & Anr, (2017) 8 SCC 47, the Supreme Court held:

> "92. Even the doctrine of "proportionality" would suggest that the court should lean in favour of "relevant turnover". No doubt the objective contained in the Act, viz., to discourage and stop anti-competitive practices has to be achieved and those who are perpetrators of such practices need to be indicted and suitably punished. It is for this reason that the Act contains penal provisions for penalising such offenders. At the same time, the penalty cannot be disproportionate and it should not lead to shocking results. That is the implication of the doctrine of proportionality which is based on equity and rationality. It is, in fact, a constitutionally protected right which can be traced to Article 14 as well as Article 21 of the Constitution. The doctrine of proportionality is aimed at bringing out "proportional result or proportionality stricto sensu". It is a result oriented test as it examines the result of the law in fact the proportionality achieves balancing between two competing interests: harm caused to the society by the infringer which gives justification for penalising the infringer on the one hand and the right of the infringer in not suffering the punishment which may be disproportionate to the seriousness of the Act."

15. Similar view was expressed by the Delhi High court in Rajkumar Dyeing and Printing Works Pvt. Ltd. In Rajendra Yadav, the Supreme Court held that the doctrine of equality applies to all those who are found guilty. The Supreme Court held:

> "9. The doctrine of equality applies to all who are equally placed; even among persons who are found guilty. The persons who have been found guilty can also claim equality of treatment, if they can establish discrimination while imposing punishment when all of them are involved in the same incident. Parity among co-delinquents has also to be maintained when punishment is being imposed. Punishment should not be disproportionate while comparing the involvement of co-delinquents who are parties to the same transaction or incident. The disciplinary authority cannot impose punishment which is disproportionate, i.e., lesser punishment for serious offences and stringent punishment for lesser offences."

16. Undoubtedly, the doctrine of proportionality is now well established in our jurisprudence and is a recognised facet of Article 14 of the Constitution of India. In Andhra Pradesh Dairy Development Corporation Federation vs. B. Narasimha Reddy and Others (2011) 9 SCC 286, the Supreme Court held:

> "29. It is a settled legal proposition that Article 14 of the Constitution strikes at arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. This doctrine of arbitrariness is not restricted only to executive actions, but also applies to legislature. Thus, a party has to satisfy that the action was reasonable, not done in unreasonable manner or capriciously or at pleasure without adequate determining principle, rational, and has been done according to reason or judgment, and certainly does not depend on the will alone. However, the action of legislature, violative of Article 14 of the Constitution, should ordinarily be manifestly arbitrary. There must be a case of substantive unreasonableness in the statute itself for

declaring the act ultra vires of Article 14 of the Constitution. (Vide: Ajay Hasia etc. v. Khalid Mujib Sehravardi, Reliance Airport Developers (P) Ltd. v. Airports Authority of India, Bidhannagar (Salt Lake) Welfare Assn. v. Central Valuation Board, Grand Kakatiya Sheraton Hotel and Towers Employees and Workers Union v. Srinivasa Resorts Limited, and State of T.N. v. K. Shyam Sunder.)"

17. In matters relating to punitive measures the emphasis has shifted from the wednesbury principle of unreasonable to one of proportionality. A disproportionate punitive measure which does not commensurate with the offence would be violative of Article 14 of the Constitution of India. We are of the opinion that in the rapid growth of administrative law it has become the need and necessity to control possible abuse of discriminatory power by administrative authorities. In this regard, certain principles have been evolved by Courts, namely, that if an action is taken by an authority which is contrary to law or which is improper or where the action taken is unreasonable then the Court of law is duty bound to interfere with such action and one such mode of exercising power is to exercise the doctrine of proportionality. Where the punitive measure is harsh or disproportionate to the offence which shocks the conscience it is within the discretion of the Court to exercise the doctrine of proportionality and reduce the quantum of punishment to ensure that some rationality is brought to make unequals equal.

18. In this regard, the appellants have produced various orders passed by SEBI against various companies and its Directors wherein different penalties have been imposed for similar/identical offence. In the instant case, the AO has penalised the appellant Company of Rs. 10.10 crore and the Managing Director of Rs. 1.10 crore. In similar matters lesser penalty has been awarded. For facility, a comparative table is given hereunder:

Penalty Orders Sr. Name of the Date of GDR Subscriber Combined Date No. GDR issuer Issue size Penalty of the company (million Order $)

1. ABL June 2008 6.68 Clifford Rs.50,00,000/- 23rd Biotechnologies Capital (Rupees Fifty April Ltd. Partners Lakhs)

2. Syncom September 20.74 Vintage Rs.25,00,000/- 30th Healthcare Ltd. 2010 (Rupees Twenty August Five Lakhs) 2019

3. Visu April 9.66 Seazun Rs.1,25,00,000/- 18th International 2006 (Rupees 1 Crore March Ltd. Twenty-Five 2021 Lakhs)

4. GV Films Ltd. April 40 Whiteview Rs.25,00,000/- 29th 2007 (Rupees January Twenty-Five 2020 Lakhs)

5. Aksh Opti- Sept 2010 25 Vintage Rs.10,15,00,000/- 28th Fibre Ltd. (Rupees Rupees February Ten Crore 2020 Fifteen Lakhs)

6. Rana Sugars May, 18.00 Rs.10,00,000 29th 2006 (Rupees Ten Lakhs) February

7. Sybly Industries June 9, 6.99 Vintage Rs.10,30,00,000/- March Ltd. 2008 (Rupees Rupees 2019 Ten Crore Thirty Lakhs)

8. Winsome Yarns March 29, 13.24 Vintage Rs.11,00,00,000 28th Ltd. 2011 (Rupees Eleven Crores) March

19. A perusal of the aforesaid table indicates that G.V. Films Ltd. had raised 40 million USD and the Company was only awarded a penalty of Rs. 25,00,000/-. Another Company Syncom Healthcare Ltd., raised 20.74 million USD and was awarded a penalty of Rs.25 lakhs whereas in the case of the appellant Company who raised 6.99 million USD has been awarded Rs.10,30,00,000/-. In Sybly Industries Ltd. v. SEBI, appeal no.381 of 219 and other connected appeals decided on 14th July, 2022 penalties ranging from Rs.10 lakhs to Rs.10.30 crores were imposed which were reduced to Rs.25 lakhs on the Company and Rs.10 lakhs on the Managing Director. Thus, in our opinion, the penalty imposed is excessive and disproportionate to the violation and is also discriminatory.

20. In Jindal Cotex Limited & Ors. vs. SEBI, Appeal no. 76 of 2023 decided on February 23, 2023 this Tribunal by its decision a penalty of Rs. 20 lakh was imposed upon the Managing Director which was reduced to Rs. 10 lakh.

21. In M/s. Texmo Pipes and Products Ltd., Appeal no. 608 of 2022 decided on September 30, 2022 a penalty of Rs. 20 lakh imposed upon the Managing Director which was affirmed by this Tribunal.

22. Considering the aforesaid, we find that the penalty of Rs. 1,10,00,000/- upon the appellant is excessive and we accordingly reduced it to Rs. 20 lakh since in similar circumstances penalty upon Managing Director was appropriately reduced.

23. For the reasons stated aforesaid, the violation committed by the appellant is affirmed. The penalty is, however, reduced from Rs. 1,10,00,000/- to Rs. 20 lakh. The appeal is partly allowed.

24. This order will be digitally signed by the Private Secretary on behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Certified copy of this order is also available from the Registry on payment of usual charges.

Justice Tarun Agarwala Presiding Officer Ms. Meera Swarup Technical Member 04.09.2023 MADHUKAR Digitally signed by MADHUKAR SHAMRAO SHAMRAO BHALBAR msb BHALBAR Date: 2023.09.05 10:21:47 +05'30'