V. Manikandan vs Sebi on 6 September, 2023

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on: 06.06.2023

Date of Decision : 06.09.2023

Appeal No. 452 of 2022

V. Manikandan
No. 69, Kamala Nivas,
Jamia Nagar,
Kovaipudur,
Coimbatore - 641 042. ..... Appellant

Versus

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

Mr. Kunal Katariya, Advocate with Mr. Anil Shah and Ms. Shrishti Shashi, i/b Juris Matrix Partners LLP for the Appellant.

Mr. Sumit Rai, Advocate with Ms. Nidhi Singh, Ms. Deepti Mohan, Mr. Nishin Shrikhande and Ms. Hubab Sayeed, Advocates i/b Vidhii Partners for the Respondent.

AND

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Coimbatore - 641 042. ..... Appellant

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Advocates i/b Vidhii Partners for the Respondent.

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

Per : Justice Tarun Agarwala, Presiding Officer

1.

The appellant has filed Appeal no. 452 of 2022 against the order dated May 26, 2022 of the Adjudicating Officer ('AO' for short) of the Securities and Exchange Board of India ('SEBI' for short) imposing a penalty of Rs. 10,00,000/- under Section 15HA and 15A(a) of SEBI Act, 1992. The appellant has also filed Appeal no. 453 of 2022 challenging the order of the Whole Time Member ('WTM' for short) dated October 22, 2021 debarring the appellant from accessing the securities market for 2 years. Since the issue is common and arises from a common dispute, both the appeals are being decided together.

2. The facts leading to the filing of the present appeal is, that the Board of Directors of the Company known as Southern Ispat and Energy Ltd. (SIEL) passsed a resolution 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, the 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 4.037 million GDRs for USD 29.98 million in two tranches, one in 2010 and the second in 2011. The aforesaid GDRs 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 was issued to the Company and its Directors to show cause as to why penalty under Section 15A(a) and 15HA of SEBI Act should not be imposed.

6. The show cause notice alleged that pursuant to the resolution of the Board of Directors not only a

bank account was opened with EURAM Bank but the Managing Director executed a pledge agreement on behalf of the Company based on which a loan agreement 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 29.98 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 WTM and 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. 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 WTM and 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. The WTM by its order debarred various entities for specified periods and directed the Company to bring back the GDR proceeds. The AO, on the other hand, imposed penalties for the same violation.

9. We have heard Shri Kunal Katariya, the learned counsel with Shri Anil Shah and Ms. Shrishti Shashi, the learned counsel for the appellant and Shri Sumit Rai, the learned counsel Ms. Nidhi Singh, Ms. Deepti Mohan, Shri Nishin Shrikhande and Ms. Hubab Sayeed, the learned counsel for the respondent.

10. Having perused the record we find that this modus operandi in the instant appeals is the same as 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. The contention of the appellant is, that he was appointed as non-executive independent director on April 23, 2007 and had resigned on February 7, 2012. The appellant specifically contended that he was not involved in the day to day affairs of the Company and was also not aware that Vintage was the sole subscriber to the GDR or that there was a loan agreement or pledge agreement executed by the Company or the loan agreement executed between the bank and Vintage.

13. In this regard the WTM and the AO while admitting that the appellant was a non-executive independent director and had resigned on February 7, 2012 found that he was a member of audit committee and also became chairman of the audit committee at a later point of time which is depicted in the annual report of the Company 2010-11 and therefore it was his responsibility to monitor the end use of the funds and that he was required to ensure all the transfer of the GDR proceeds to the accounts of the Company in India. As per Section 177(4)(viii) of the Companies Act, 2013 the authority has also concluded that because that he had long association with the Company and therefore he was instrumental in the issuance of the GDR and therefore violated 12A of the SEBI Act.

14. The finding given by the WTM and the AO cannot be accepted. There is nothing on record to indicate that the matter relating to GDR issue was placed by the Company before the audit committee. In the absence of any evidence the finding that it was the responsibility to monitor the end use of the funds is patently erroneous. We are of the opinion that Section 177(4) of the Companies Act, 2013 cannot be applied in the instant case inasmuch as the said provision only came into existence when the Companies Act, 2013 was enacted. This provision was not in existence when the resolution was passed and GDR was issued in the year 2010-

11. The role of the audit committee under the Companies Act, 1956 was confined to matter that was placed by the Company before the audit committee. In the absence of any finding that the GDR issue was placed before the audit committee we are of the opinion that members of the audit committee cannot be held responsible for the alleged violation. Further, the finding that there was a long association with the Company is purely based on surmises and conjectures. We also are of the opinion that there is no finding that the appellant was involved in the day to day affairs of the Company merely attending board meetings cannot lead to a conclusion that the appellant was

involved in the day to day affairs of the Company.

15. In a large number of cases, namely, Appeal No. 389 of 2021, Prafull Anubhai Shah vs SEBI decided on June 28, 2021, Appeal No. 433 of 2021, Rajesh Shah vs SEBI decided on July 5, 2021, Appeal No. 58 of 2021, Jaiprakash Kabra vs SEBI decided on September 2, 2021 and Appeal No. 406 of 2020, Mr. Gurmeet Singh vs SEBI decided on September 20, 2021, we have held that independent directors cannot be penalized when they are not part of day-to-day affairs of the company.

16. In view of the aforesaid, the impugned orders passed by the WTM and AO cannot be sustained and are quashed insofar as it relates to the appellant. The appeals are allowed.

17. 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 06.09.2023MADHUKAR by MADHUKAR SHAMRAO msb BHALBAR BHALBAR Date: 2023.09.06 15:31:55 +05'30'