

(2021) 05 SEBI CK 0069

In the Securities Appellate Tribunal Mumbai

Case No : Appeal No. 64, 184, 393, 394, 487, 488 Of 2020, 203 Of 2021, Miscellaneous Application No.67 Of 2020, 428 Of 2021 & Appeal No.64, 184, 393, 394, 487 488 Of 2020, 203 Of 2021, Miscellaneous Application No. 67 Of 2020, 428 Of 2021

Chromatic India Limited And Others

APPELLANT

Vs

Securities And Exchange Board Of India

RESPONDENT

Date of Decision : 12-05-2021

Acts Referred:

Securities Contracts (Regulation) (Procedure For Holding Inquiry And Imposing Penalties By Adjudicating Officer) Rules, 2005 — Rule 4
Securities And Exchange Board Of (Prohibition Of Fraudulent And Unfair Trade Practices Relating To Securities Market) Regulations, 2003 — Regulation 3, 4
Securities And Exchange Board Of India Act, 1992 — Section 11B, 12, 12A
Securities Contracts (Regulation) Act, 1956 — Section 21

Citation : (2021) 05 SEBI CK 0069

Hon'ble Judges : Tarun Agarwala, Presiding Officer; M. T. Joshi, J

Bench : Division Bench

Advocate : Manish Chhangani, Aishwarya Shubhangi, Shyam Mehta, Mihir Mody, Arnav Misra, Etc

Final Decision : Allowed

Judgement

Tarun Agarwala, Presiding Officer

1. For the reasons stated in the misc. applications, the delay in the filing of the appeals are condoned. The Misc. Application Nos. 67 of 2020 and 428

of 2021 are allowed.

2. Seven appeals have been filed against different orders. However, the issue is common and accordingly all the seven appeals are being decided

together. Appeal No. 393 of 2020, 394 of 2020 and Appeal No. 428 of 2021 and Appeal No. 203 of 2021 are against the orders passed by the

Adjudicating Officer (â??AOâ?? for convenience) of the Securities and Exchange Board of India (â??SEBIâ?? for convenience) dated March 31 2020

whereby a penalty has been imposed. Appeal No. 64 of 2020 and Appeal No. 184 of 2020 are against the order dated September 30, 2019 passed by

the Whole Time Member (â??WTMâ?? for convenience) of SEBI. Appeal No. 487 of 2020 has been filed by Vipin Sharma against the order of the

WTM dated September 25, 2020 and another Appeal has been filed by him being Appeal No. 488 of 2020 which is against the order of the AO dated

August 28, 2020 imposing a penalty.

3. The facts leading to the filing of the present appeals are, that investigation in the scrip of Chromatic India Limited was carried out to ascertain

whether the appropriate disclosures were made by the appellants with regard to the Global Depositories Receipts (â??GDRsâ?? for convenience)

issue made in October 2010 and whether the GDR issue was carried out in accordance with the procedures prescribed by law. Based on the

investigation a show cause notice dated June 28, 2017 was issued by the WTM under Section 11B of the SEBI Act, 1992 which after considering the

replies of the appellants an order dated September 30, 2019 was passed restraining the company Chromatic India Limited from accessing the

securities market for a period of 5 years. The directors were restrained from buying and selling for a limited period.

4. Another show cause notice was issued on March 28, 2018 under Rule 4 of the of Securities Contracts (Regulation) (Procedure for Holding Inquiry

and Imposing Penalties by Adjudicating Officer) Rules, 2005 to the appellants to show cause as to why a appropriate penalty should not be imposed

under the SEBI Act, 1992 and SEBI (Prohibition of Fraudulent and Unfair Trade Practice relating to Securities Market) Regulations, 2003

(â??PFUTP Regulationsâ?? for convenience). After considering the reply and the evidence that was brought on record the AO passed an order dated

March 31, 2020 against the appellant-company Chromatic India Limited and two directors Vinod Kumar Kaushik and Ajay Sethi imposing a penalty.

In the case of the appellant Chromatic India Limited a penalty of Rs. 10 crore was imposed under Section 12 of the SEBI Act read with regulations 3

and 4 of the PFUTP Regulations. Another sum of Rs. 20 lakhs was imposed upon the company under Section 21 of the Securities Contracts

(Regulation) Act, 1956 (â??SCRAâ? for convenience) read with Clauses 36 and 50 of the Listing Agreement. A sum of Rs. 5 crore was imposed

upon the director Vinod Kumar Kaushik under Section 12 of the SEBI Act read with regulations 3 and 4 of the PFUTP Regulations. In so far as Ajay

Sethi is concerned, a penalty of Rs. 20 lakhs was imposed.

5. In so far as another director Vipin Sharma is concerned the WTM had passed an order dated September 30, 2019 restraining him from accessing

the securities market for a period of 1 year. This order was challenged by the appellant in Appeal No. 58 of 2020 which was allowed by this Tribunal

by an order dated February 06, 2020 and the order of the WTM in so far as it related to Vipin Sharma was set aside with a direction to the WTM to

pass a fresh order after giving an opportunity of hearing. This Tribunal while allowing the appeal had found that an ex-parte order was passed against

him without serving a show cause notice. Pursuant to the order of the Tribunal, the WTM passed a fresh order dated September 25, 2020 cautioning

him to be careful and exercise due diligence in future. The AO also passed another order dated August 28, 2020 against Vipin Sharma imposing a

penalty of Rs. 3 lakhs.

6. The brief facts are, that a Resolution of the Board of Directors was passed on August 13, 2010 for opening a bank account for the purpose of the

GDR issue based on which in October 2011 GDR issue amounting to USD 35.78 million which is approximately 159 crores were subscribed.

According to the replies given by the appellants the GDR issues was in accordance with the prescribed procedure and proper disclosures were duly

made under the SEBI Act and the PFUTP Regulations. It was urged that the GDR was issued to expand the business and that the company would

get the benefit of flow of foreign capital and that the company will get the benefit of the global stock exchange. The WTM and the AO after perusing

the evidence give separate findings but came to a conclusion that Vintage FZE (â??Vintageâ?) was the only subscriber to the issue which misled the

investors. The authority found that the company misled the regulatory authorities in giving a list of subscribers which upon investigation was found to

be fictitious and non existent and that only Vintage was the sole subscriber. The authorities further found and held in the impugned orders that

pursuant to a Loan Agreement and Pledge Agreement Vintage took a loan on the

basis of which Vintage could subscribe to the entire GDR issue

which fact was concealed to the investors in India. The authorities also came to the conclusion that the Pledge Agreement was executed to secure the

obligations of Vintage in order to subscribe to the issue. It was found that the GDR proceeds were not available to the company Chromatic India

Limited but was utilized by Vintage and that the company was dependent on the repayment to be made by Vintage. It was found that the action of the

company in giving the loan to Vintage for the purpose of subscribing to the GDR issues was a fraud played by them to deceive the gullible investors. It

was further found that the amount refunded by Vintage was immediately transferred by the company to its subsidiary companies abroad as a result of

which no monies came into India. It was further found that the Pledge Agreement and the Loan Agreement was concealed by the company and no

disclosure was made under the Listing Agreement. Such fraudulent act committed by the company and its directors and giving misleading disclosure

was a fraudulent act. On these findings, the impugned orders were passed the WTM restraining the appellants from accessing the securities market

and the AO imposed the penalties.

7. We have heard Shri Manish Changani, the learned counsel for the appellants and Shri Shyam Mehta, the learned senior counsel for the respondent

in Appeal Nos. 393, 394 and 64 of 2020 and Mr. Shourya Tanay, the learned counsel for the appellant and Mr. Suraj Choudhary, the learned counsel

for the respondent in Appeal Nos. 203 of 2021 and 184 of 2020.

8. At the outset, the learned counsel submitted that the appellants except the appellant in Appeal No, 184 of 2020 are only confining their arguments

on the quantum of penalty imposed by the AO.

9. In view of the statement made by Shri Manish Changani, the learned counsel appearing for Chromatic India Limited the company and its directors

Vinod Kumar Kaushik the findings given by the WTM in its order dated September 30, 2019 and findings given by the AO in its order dated March

31, 2020 is hereby confirmed.

10. The learned counsel submitted that the penalty imposed is very high and excessive and does not commensurate with the offence. It was urged that

the principle of proportionality has been disregarded. In this regard, the learned counsel has placed a comparative chart indicating various orders that

has been passed by SEBI against various entities with regard to the GDR issue and submitted that a perusal of the subscription generated from the

GDR in many cases the penalty imposed upon the company and upon the directors was far less than what was imposed upon the appellants in the

instant case. It was contended that the managing directors in other companies were penalized Rs. 20 lakhs to Rs. 1 crore whereas in the instant case

the appellant Vinod Kumar Kaushik has been penalized Rs. 5 crore.

11. Having heard the learned counsel for the appellants, we find that under the penal provision a maximum penalty of Rs. 25 crores could be imposed.

In the instant case, the company has been penalized a sum of Rs. 10 crores. We find that the imposition of this amount is appropriate and is neither

arbitrary nor excessive. When we compare the penalty imposed upon the appellant-company with the comparative chart we find that all the

companies were imposed a sum of Rs. 10 crores. Thus, there is a uniformity in the imposition of penalty in so far as the company is concerned.

12. In so far as the appeal of Ajay Sethi is concerned, it was submitted that he was the Independent Director of the Company and although he had

attended the Board meeting of the company he was not involved in the day to day affairs of the company nor was he related to the promoters or the

directors of the company. It was urged, that he is not an officer in default and therefore he should not be penalized and that the restraint order should

also be set aside.

13. The WTM as well as the AO held that even though he was an Independent Director but since he a signatory to the Board Resolution dated

August 13, 2010 he was part of the fraud and therefore is liable. In addition to the aforesaid, the WTM and the AO also found that he was part of the

Audit Committee, the Investors/ Shareholders Committee and the Remuneration Committee. The WTM and the AO found that being part of the Audit

Committee, he had access to the financial status of the company and that he should have raised a red flag when the funds were not being utilized by

the company for any of the stated purposes of GDR issued and accordingly imposed a penalty of Rs. 20 lakhs.

14. Having heard the learned counsel for the parties, we are of the opinion that the Resolution dated August 13, 2010 by itself does not create any

suspicion nor creates any fraudulent act. Being a signatory to the said Resolution

by itself does not violate any provision of the SEBI Act or the PFUTP Regulations. However, being part of the Audit Committee he had access to the financial status of the company. It is deemed to be in his knowledge that the GDR proceeds of the company were lying in an account in European American Investment Bank (â??Euram Bankâ?) and the same was not being utilized for the business purposes of the company rather it was being utilized as collateral for the loan given to Vintage. Being part of the Audit Committee he should have raised a red flag by observing that the funds were not being utilized by the company for the purpose for which the GDR were issued. In this regard, this Tribunal in Mr. Kishore Hegde vs SEBI (Appeal No. 300 of 2019 decided on November 05, 2019) held:-

â??The contention of this appellant that he was not involved in the day to day running of the company cannot be accepted as he was found to be part of the resolution process of the company and his involvement in the issuance of the GDR proceeds. Apart from the above, we also find that the appellant was also the Chairman of the audit committee of the company. The WTM found that being the Chairman of the audit committee, he did not place any objection as to why the GDR proceeds did not reach the company and how the proceeds were utilized. We are thus, of the opinion that in the light of the findings given by the WTM, the appellant Kishore Hegde was part of the scheme through which issue of GDR by the company was effected through a fraudulent arrangement of loan agreement and pledge agreement. We are also of the opinion that the conduct of the appellant Kishore Hegde was inimical to the interest of the company, to the investors, as well as to the shareholders and, the action of the appellant Kishore Hegde was in violation of Section 12A of the SEBI Act read with Regulations 3 and 4 of the PFUTP Regulations.â??

15. In view of the aforesaid, the orders of the WTM and the AO does not suffer from any error of law.

16. In so far as the managing director / directors are concerned we find from the perusal of the comparative chart that some directors/ managing directors have been penalized a sum of Rs. 25 lakhs and in some cases Rs. 1 crore. It was contended by Shri Mehta, the learned senior counsel for the respondent that the amount imposed in those cases were on account of the peculiar facts in those cases. It was pointed out that in a majority of

those cases part of money had come back to India whereas in the instant case no amount had come back and the entire GDR subscription was

transferred to a subsidiary company outside India. Further false facts were placed before the regulatory authority misleading the regulators that the

allotments of GDRs were subscribed by a number of persons. Upon investigation it was found that those entities were non-existent and therefore false

disclosures were made. Further, the company violated the provisions of clause 36 and 50 of the Listing Agreement by not making disclosures and

making misleading disclosures. It was also stated that in the instant case the trading of the GDR scrips of the company was suspended. Considering

the aforesaid, which is distinct from the penalty imposed to other directors in other matters and no similarity having been pointed out by the appellant

we are of the opinion, that the penalty imposed by the AO under Section 12 of the SEBI Act read with 3 and 4 of the PFUTP Regulations and under

Section 21 of the SCRA read with Clauses 36 and 50 of the Listing Agreement needs no modification. We are further of the opinion, that when the

findings given by the WTM and the AO has not been pressed before us in such circumstances, the discretionary relief is not available to the appellants

namely the company and its whole time director Vinod Kumar Kaushik. The appeals of the company and Vinod Kumar Kaushik cannot be sustained.

17. In so far as the appeal of Vipin Sharma is concerned, we find that the WTM in its order dated September 25, 2020 found that he was appointed as

an additional director on 07.09.2009 and had resigned on 29.09.2010. The WTM held that he was part of the Resolution dated August 13, 2010 which

was the genesis of the ultimate fraud that was played by the company and its directors. The WTM took into consideration that even though the

appellant may have resigned soon thereafter on September 29, 2010 nonetheless, he was aware of the objectives behind the purpose of the Resolution

of the Board of Directors dated August 13, 2010. The WTM considering the fact that the appellant had already underwent a debarment of 5 months

pursuant to the earlier order dated September 30, 2019 did not find it fit to further pass an order of debarment and disposed of the appeal cautioning

the appellant to be careful and exercise due diligence in future.

18. The AO in its order dated August 28, 2020 penalized the appellant Vipin Sharma a sum of Rs. 3 lakhs only on the basis that he was present in the

meeting of the Board of Directors when the Resolution dated August 13, 2010 was passed for opening a bank account with Euram Bank.

19. The appellant has vehemently contended that he was not present in the meeting of Board of Directors when the Resolution dated August 13, 2010

was passed and that he was not involved in the day to day affairs as he was only an additional director. It was strongly contended, that no proof has

been filed by the respondent to show that he was present in the meeting of the Board of Directors dated August 13, 2010 and further submitted that

the signatures on the certified copy of the Resolution dated August 13, 2010 is the forged signature.

20. Without dwelling on the aforesaid aspect, we are of the opinion that in order to implicate a person, namely, a director of any fraudulent act it is

necessary for the authority to further find any evidence which would show that the said person or director was involved in the fraud with regard to the

GDR issue or that he was involved in the defalcation of the funds which was raised through GDR issue. In the instant case, we find that there is no

such evidence against the appellant Vipin Sharma other than the fact that he was part of the Resolution dated August 13, 2010 which has been

disputed by the appellant. We are of the opinion that the Resolution dated August 13, 2010 by itself does not create any suspicion nor create any

fraudulent act. The Resolution by itself does not violate any provision of the SEBI Act or PFUTP Regulations. In view of the aforesaid, the order of

the WTM giving a caution solely on the ground of being present when the Resolution dated August 13, 2010 was passed cannot be sustained. The

finding of the WTM that he was aware of the objectives behind the passing of the Resolution dated August 13, 2010 is based on surmises and

conjectures. The order of the AO imposing a penalty of Rs. 3 lakhs is also unwarranted in the facts of the present case. The orders of the WTM and

the AO in this regard cannot be sustained.

21. For the reasons stated aforesaid, Appeal Nos. 393 of 2020 Chromatic India Limited vs. SEBI, Appeal No. 394 of 2020 Vinod Kumar Kaushik vs.

SEBI, Appeal No, 184 of 2020 Ajay Sethi vs SEBI, Appeal No. 64 of 2020 Chromatic India Limited & Anr. vs. SEBI and Appeal No. 203 of 2021

Ajay Sethi vs SEBI are dismissed. The impugned orders in Appeal No. 487 of 2020 and 488 of 2020 Vipin Sharma vs. SEBI are quashed. The said

appeals are allowed In the circumstances of the case, parties shall bear their own costs.

22. The present matters were heard through video conference due to Covid-19 pandemic. At this stage it is not possible to sign a copy of this order

nor a certified copy of this order could be issued by the Registry. In these circumstances, 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. Parties will act on production of a digitally

signed copy sent by fax and/or email.