

(2023) 02 SEBI CK 0023

In the Securities Appellate Tribunal Mumbai

Case No : Appeal No. 76 Of 2023

Jindal Cotex Limited And Others

APPELLANT

Vs

Securities And Exchange Board Of India

RESPONDENT

Date of Decision : 23-02-2023

Acts Referred:

Constitution Of India, 1950 — Article 14, 21
Securities Contracts (Regulation) Rules, 1957 — Rule 19, 19A
Securities And Exchange Board Of India (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 12A, 12A(a), 12A(b), 12A(c)
Securities Contracts (Regulation) Act, 1956 — Section 21, 23A(a), 23E

Citation : (2023) 02 SEBI CK 0023

Hon'ble Judges : Tarun Agarwala Presiding Officer; Meera Swarup Technical Member

Bench : Division Bench

Advocate : P.N. Modi, Kalpana Desai, Ravi Prakash, Sumit Rai, Bhushan Shah, Aditya Sarangarajan, Mansukhlal Hiralal

Final Decision : Partly Allowed

Judgement

Tarun Agarwala, Presiding Officer

1. The present appeal has been filed by M/s. Jindal Cotex Limited ('the Company' for short) and three directors against the order dated January 23, 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. 10.30 crore against the Company, Rs. 20 lakh on the Managing Director and Rs. 10 lakh each on the Chairman and Director of the Company for violation of Section 12A of the SEBI Act, 1992 read with Regulation 3 and 4 of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 ('PFUTP Regulations' for short) and Section 21 of the Securities Contracts (Regulation) Act, 1956 ('SCRA' for short) read with Clause 36 of the Listing Agreement.

2. The facts leading to the filing of the present appeal is, that the matter is in respect of the issuance of GDRs by the Company whereby a fraudulent scheme was devised by the Company and its Directors. In this regard, the Board of Directors of the Company passed a resolution dated April 26, 2010 authorising European American Investment Bank AG (hereinafter referred to as 'EURAM Bank') located outside India to receive the subscription money in respect of the GDR issued by the Company. The resolution further resolved that Mr. Sandeep Jindal, Managing Director and Mr. Rajinder Jindal, Director were authorised to sign, execute any application, agreement, documents as required by the EURAM Bank for the aforesaid purpose. The Board of Directors also resolved that the Bank was further authorised to use the funds so deposited in the Bank account of the Company as security in connection with loans, if any.

3. Based on the aforesaid resolution, a bank account of the Company was opened in EURAM Bank. Further, a loan agreement dated June 11, 2010 was entered into between EURAM Bank and Vintage FZE (hereinafter referred to as 'Vintage') for subscribing to 5 million GDRs of the Company. On the same date i.e. June 11, 2010 a pledge agreement was also executed between EURAM Bank and the appellant Company inter alia pledging the proceeds from the GDR issue as a collateral for the loan taken by Vintage.

4. Based on the aforesaid agreements, Vintage was the only entity which subscribed the entire 5 million GDRs of the Company by obtaining a loan from EURAM Bank. Pursuant to the loan agreement dated June 11, 2010 the loan amount was secured by the pledge agreement dated June 11, 2010 executed by the Company.

5. On June 30, 2010, 5 million GDRs for USD 38.75 million was allotted to Vintage. Vintage purportedly repaid the entire loan amount in several tranches to EURAM Bank and thereafter the amount was utilized by the Company for the purposes for which the GDR was issued.

6. Securities and Exchange Board of India (hereinafter referred to as 'SEBI') conducted an investigation in the issuance of the GDR and found that Vintage was the sole subscriber to the GDR and that the Company did not disclose this fact with clarity that only one entity had subscribed to the entire GDR and, therefore, misled the investors. Further, the loan agreement and the pledge agreements were not disclosed to the stock exchange or to the shareholders of the Company.

7. Accordingly, a show cause notice dated June 29, 2018 was issued to show cause as to why action should not be taken for the alleged violation of the provisions of Section 12A(a), (b), (c) of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as the 'SEBI Act') read with Regulations 3 and 4 of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (hereinafter referred to as 'PFUTP Regulations'). The show cause notice alleged

that the Company had issued the GDRs amounting to USD 38.75 million which was subscribed only by Vintage and that Vintage has paid the subscription amount by obtaining the loan from EURAM Bank. The Company had also executed a pledge agreement by which the GDR proceeds were pledged for the loan taken by Vintage. It was also alleged that the Director had executed the pledge agreement and that the pledge agreement was also an integral part of the loan agreement. The show cause notice further alleged that the Company reported to the stock exchange that the Company had successfully closed its GDR issue of USD 38.75 million. Such information was misleading and distorted as it did not contain the fact that the entire GDR issue was subscribed by one entity through a loan taken by that entity on the basis of pledging the proceeds by the Company and, thus, misled the investors by indicating that the GDRs were successfully subscribed. It was also alleged that the Company furnished wrong information to SEBI by providing false list of GDR subscribers whereas only one entity had subscribed to the GDR issue. The show cause notice alleged that the announcement misled the Indian retail investors and induced investors to deal in the shares of the Company in the Indian capital market and, therefore, the scheme of issuance of GDR was fraudulent violating Section 12A(a), (b), (c) of the SEBI Act read with Regulations 3 and 4 of the PFUTP Regulations.

8. All the grounds taken by the appellants were considered by the AO. The contention so raised were rejected by the respondent holding that the Company had misled the investors in believing that the GDR issue was successful whereas there was only one subscriber, namely, Vintage. The respondent held that the arrangement made through a pledge and loan agreement for the purpose of issuance of GDR was fraudulent. The acts of the Company resulted in a fraud being committed on the investors of the securities market and created a false impression about the Company which was in violation of Section 12A read with Regulations 3 and 4 of the PFTUP Regulations. The respondent further found that the Company and its Board of Directors having participated in the scheme through which issue of GDR was effected through a fraudulent arrangement were guilty of the fraud and, accordingly, appropriate orders were passed by the WTM and AO respectively.

9. We have heard Shri P.N. Modi, the learned senior counsel assisted by Ms. Kalpana Desai, the learned counsel for the appellant and Shri Sumit Rai, the learned counsel assisted by Shri Bhushan Shah, the learned counsel for the respondent.

10. The proceeds of the GDR issue were received by the Company belatedly and was utilized for the purpose for which the GDR was issued. There is no diversion of funds and no wrongful dealings in securities other than the fact that amount was received belatedly. The AO has himself given a finding that no disproportionate gain is attributed to the appellants nor any finding that any loss was caused to the shareholders or investors.

11. Considering the above, the only ground urged by the learned counsel for the

appellants was that the penalty imposed by the AO was harsh and excessive.

12. 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."

13. 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."

14. 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*.)”

15. 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.

16. 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.10.30 crore and the Managing Director of Rs. 20 lakh and other directors of Rs. 10 lakh. In similar matters lesser penalty has been awarded. For facility, a comparative table is given here under:

Penalty Orders

Sr.

No.

Name of the GDR issuer company

Date of Issue

GDR

size (million

\$)

Subscriber

Combined Penalty

Date

of the Order

1.

ABL

Biotechnologies Ltd.

June 2008

6.68

Clifford Capital Partners

Rs.50,00,000/-

(Rupees Fifty Lakhs)

23rd

April 2018

2.

Syncom Healthcare Ltd.

September 2010

20.74

Vintage

Rs.25,00,000/-

(Rupees Twenty Five Lakhs)

30th

August 2019

3.

Visu International Ltd.

April 2006

9.66

Seazun

Rs.1,25,00,000/-

(Rupees 1 Crore Twenty-Five

18th

March 2021

Lakhs)

4.

GV Films Ltd.

April 2007

40

Whiteview

Rs.25,00,000/-

(Rupees

Twenty-Five Lakhs)

29th January 2020

5.

Aksh Opti- Fibre Ltd.

Sept 2010

25

Vintage

Rs.10,15,00,000/-

(Rupees Rupees

Ten Crore Fifteen Lakhs)

28th February 2020

6.

Rana Sugars

May, 2006

18.00

Rs.10,00,000

(Rupees Ten Lakhs)

29th

February 2018

7.

Sybly Industries Ltd.

June 9,

2008

6.99

Vintage

Rs.10,30,00,000/-

(Rupees Rupees Ten Crore Thirty Lakhs)

March 2019

8.

Winsome Yarns Ltd.

March 29,

2011

13.24

Vintage

Rs.11,00,00,000

(Rupees Eleven Crores)

28th

March 2021

17. 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.

18. We find that such excessive penalty imposed upon the Company does not make any sense. In the instant case, there are public shareholders and workers. The Company is a running concern. Penalising the Company with such heavy penalty is in fact penalising the shareholders which is not justifiable especially for a running company. Further, the money raised through GDRs has been received by the Company and has not been misappropriated. The same has been utilised for the purpose for which the GDR was issued which fact has not been disputed.

Thus, it is not a case of defalcation of the funds.

19. A penalty has also been imposed upon the Company for violation of Section 23E of the SCRA Act for non-disclosure under the Listing Agreement. The imposition of penalty under Section 23E is wholly erroneous in as much as Section 23E is not applicable.

20. In *Suzlon Energy Ltd. v. SEBI*, appeal no.201 of 2018 decided on 3rd May, 2021, this Tribunal held:

"17. The AO held that since Clause 36 of the Listing Agreement was violated, in addition to the penalty imposed under Section 23A(a), the provisions of Section 23E of the SCRA is also invoked. In our view, the imposition of penalty under Section 23E is patently erroneous. The AO has committed a manifest error in invoking Section 23E of the SCRA.

18. Section 23E has nothing to do with the violation of the provisions of the Listing Agreement especially Clause 36. Section 23E provides that where a Company fails to comply with the listing conditions or delisting conditions or grounds or commits a breach thereof then penalty would be a minimum of Rs. 5 lakh upto maximum of Rs. 25 crore. The words "fails to comply with the listing conditions" cannot mean failure to comply with the conditions in the Listing Agreement. One of the requirements in the Listing Agreement which is required to be complied with is Clause 36 whereas Section 23E refers to the conditions which are imposed upon a Company when it is applying for its shares to be listed on the stock exchange platform. Section 23E has to be read along with Rule 19 of the Securities Contracts (Regulation) Rules, 1957 (?SCRR? for short). Rule 19 of the SCRR provides certain requirements with respect to a listing of securities on a recognized stock exchange. Rule 19A provides that a Company has to continuously maintain listing requirements. Rule 21 provides conditions for delisting of securities. Failure to comply with the listing conditions which are stated in Rule 19 would entail a penalty as provided under Section 23E. Thus, in our view violation of Clause 36 of the Listing Agreement will attract Section 23A(a) of the SCRA and will not attract Section 23E. The AO has made an error.

19. In view of the aforesaid, the penalty of Rs. 1 crore under Section 23E is patently erroneous and cannot be imposed and the order to that extent cannot be sustained."

21. For the same reason imposition of penalty upon the Managing Director is excessive. In large number of cases we have reduced the penalty to Rs. 10 lakh. The penalty imposed upon the Chairman and another Director, Appellant nos. 3 and 4 is neither arbitrary nor excessive and the penalty is affirmed.

22. In view of the aforesaid, while affirming the order of the AO for the violations committed by the Company we reduce the penalty against the Company, Jindal Cotex Limited to Rs. 25 lakh. The penalty against the appellant no. 2, Mr. Sandeep Jindal is reduced to Rs. 10 lakh and the penalty against the appellant

nos. 3 and 4, Mr. Rajinder Jindal and Mr. Yash Paul Jindal is affirmed. The appeal is partly allowed. In the circumstances of the case, parties shall bear their own costs.

23. 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.