

(2023) 09 SEBI CK 0024

In the Securities Appellate Tribunal Mumbai

Case No : Appeal No. 23 Of 2019

M/s Apollo Tyres Ltd

APPELLANT

Vs

Securities And Exchange Board Of India

RESPONDENT

Date of Decision : 27-09-2023

Acts Referred:

Securities And Exchange Board Of India (Buy Back Of Securities) Regulations, 1998 — Regulation 4(1), 5(A), 19(7)
Companies Act, 1956 — Section 77, 77A, 77A(9), 77A(10)
Special Courts Act, 1979 — Section — Section 9A(3), 13

Citation : (2023) 09 SEBI CK 0024

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

Bench : Division Bench

Advocate : Pesi Modi, Manu Nair, Neville Lashkari, Neelabh Shreesh, Zal Andhyarujina, Maithali Parikh, Abhiraj Arora, Deepanshu Agarwal, Shourya Tanay, Ashwin Mehta

Final Decision : Allowed

Judgement

Tarun Agarwala, Presiding Officer

1. The present appeal has been filed against the order dated November 23, 2018 passed by the Adjudicating Officer ("AO" for convenience) of the Securities and Exchange Board of India ("SEBI" for convenience) imposing a penalty of Rs 65 lakhs for violation of Regulation 4(1), 5(A) and 19(7) of the SEBI (Buy Back of Securities) Regulations, 1998.

2. The facts leading to the filing of the present appeal is, that in aftermath of the Harshad Mehta scam, a Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 (hereinafter referred to as the "Special Court Act") was enacted which came into force on June 06, 1992. The Special Court provided for establishment of a Special Court for speedy trial of offences relating to transactions in securities and disposal off property attached there under. The

Special Court Act is a special statute and is a complete Code in itself. The purpose and object for which it was enacted was not only to punish the persons who were involved in the act of criminal misconduct by defrauding the banks and financial institutions but also to see that the properties, movable and immovable or both, belonging to persons notified by the custodian were appropriated and disposed of for discharge of liabilities to the banks and financial institutions, etc.

3. Harshad Mehta was one of the persons notified by the custodian and his entire holdings came to be attached under the Special Court Act. The issue in question relates to the purchase of more than 90 lakhs shares in the appellant company by Late Harshad Mehta and their family members. These shares were required to be dealt with by the custodian under the Special Court Act. The Supreme Court by orders dated March 11, 1996 and May 13, 1998 directed the custodian to draft a scheme for sale of attached shares, pursuant to which a scheme was presented and the Supreme Court directed the Special Court to consider the said scheme and modify it if it was required. Based on the said direction the Special Court on August 17, 2000 approved the scheme. It categorized the attached shares into (i) routine shares; (ii) bulk shares and (iii) controlling block of shares. The shares of Apollo fell within the 'controlling block' category since it was more than 5% of the paid up capital.

4. The Supreme Court by an order of August 23, 2001 directed the Special Court for sale of the controlling block of shares. The Supreme Court directed the Special Court that it may resort to any sale method in order to get the best price and that the Special Court should give an opportunity to the Company to buy-back the shares by complying with the provisions of Section 77A of the Companies Act, 1956.

5. In compliance of the Supreme Court directions, the custodian drafted the terms and conditions of sale of 54,88,850 shares of the appellant. A public notice dated April 01, 2003 was issued inviting bids and indicating that the sale of the shares has to be in accordance with the provisions of Section 77A of the Companies Act. The Special Court considered the two bids received in which one offered Rs. 80 per share and the other offered Rs. 40 per share. The Special Court accordingly negotiated the matter with the appellant and the appellant agreed to purchase the shares @ Rs. 85 per share, based on which, the Special Court by an order of May 02, 2003 approved the modalities and buy back of 54,88,850 shares of the appellant company.

6. The sale made by the Special Court to the appellant was challenged by Ashwin Mehta before the Supreme Court of India on various grounds and, one such ground was that the buy-back effected by the appellant was in compete violation of Section 77A of the Companies Act as well as the Buy-Back Regulations. The Supreme Court while entertaining the appeal was informed that out of the buy-back of 54,88,850 shares, 36,90,000 shares were already extinguished and, to that extent, the share capital of the company has been reduced. The Supreme Court while admitting the appeal on May 29, 2003 recorded that only 4.95% of

the shares purchased by the appellant are in existence and accordingly directed the appellant not to further alienate those shares.

7. The said appeal of Ashwin Mehta was partly allowed by the Supreme Court by judgement dated 08.11.2011 holding that the Special Court violated the principles of natural justice. However, the Supreme Court did not vitiate the decision of the Special Court dated April 30, 2003 and May 02, 2003 in view of the fact that out of 54,88,850 shares 36,90,000 had already been extinguished and therefore the entire 54,88,850 shares cannot be rescinded as it would be impracticable and fraught with grave difficulties. The Supreme Court accordingly directed that the relief in the present appeal was confined to 4.95% of the shares which the Special Court was required to take necessary steps to recover the same from the appellant and put them to sale afresh in terms of the norms approved earlier by the Supreme Court.

8. After the passing of the order by the Supreme Court Ashwin Mehta filed a complaint dated 21.12.2011 before SEBI alleging that the Supreme Court has held that the sale of the appellant shares was not found to be in order and contended that since the sale of the shares of 36,90,000 were in violation of Section 77A of the Companies Act and Buy-Back Regulations and since a fraud had been made by the appellant Company the said Buy-Back is liable to be annulled and rescinded and the shares purchase by the appellant are liable to be restored to Ashwin Mehta and Others.

9. Based on the complaint SEBI investigated the matter and a show cause notice dated 24.01.2014 was issued alleging contravention of the Buy-Back Regulations. The AO after considering the matter passed an order on July 09, 2014 imposing a penalty of Rs. 1 crore for violation of the Regulation 5A of the SEBI Buy-Back Regulations. Against the said order an Appeal No. 322 of 2014 was filed which was allowed by this Tribunal by its order dated December 30, 2016 and the matter was remitted to the AO for reconsideration. This Tribunal held that it is not clear as to how the appellants have violated Regulation 5(A) and 19(7) of the SEBI Buy Back of Securities) Regulations, 1998 nor any justification has been given as to why a maximum penalty has been imposed. This Tribunal accordingly quashed the order of the AO and directed the AO to pass a fresh order on merits in accordance with law.

10. Pursuant to the directions, the AO reconsidered the matter and the impugned order has been passed holding that the buy-back of shares was in violation of the Buy-Back Regulations and accordingly imposed a penalty of Rs. 65 lakhs.

11. We have heard Shri Pesi Modi, the learned senior counsel for the appellant and Shri Zal Andhyarujina, the learned senior counsel for the respondent and Shri Ashwin Mehta, appeared for the Intervener.

12. Mr. Ashwin Mehta has also filed an intervention application seeking impleadment and/ or seeking permission to intervene in the matter. Mr. Ashwin Mehta contended that he is an interested party and the impugned order was

passed based on his complaint and, therefore, he must be heard. In this regard, this Tribunal permitted Mr. Ashwin Mehta that he would be heard as an intervener.

13. We have accordingly heard and have perused his intervention application. The broad contention of the intervener is that 36 lakhs shares were purchased under the buy-back scheme from the Special Court in violation of Section 77A of the Companies Act and Buy-Back Regulations. It was contended that the Supreme Court has found that the sale made by the Special Court was not in order and was in violation of the principles of natural justice the sale of these 36 lakhs shares should be annulled and should be restored to the intervener. It was also held that the order passed by the AO imposing a penalty does not suffer from any error of law to the extent of the imposition of the penalty awarded by the AO against the appellant.

14. The contention of the appellant is, that there is an inordinate delay. It was contended that the buy-back took place in open court proceeding before the Special Court in the year 2003. The appellant vide letter dated May 09, 2003 had intimated SEBI that the provisions of Section 77A of the Companies Act and the Buy-Back Regulations did not apply to the facts of the case. Further, a public notice was issued by the appellant on May 13, 2003 recording the buy-back of the shares from the Special Court based on which, SEBI raised queries vide letter dated June 16, 2003 to which the appellant replied vide letter dated July 18, 2003 intimating the process with regard to the buy-back of the shares. In addition to the aforesaid, it was urged that a letter dated May 09, 2003 was issued to the Registrar of Companies which was copied to SEBI intimating that the provision of Section 77A of the Companies Act did not apply to the purchases of shares in question. The Board Resolution of May 09, 2003 by which it approved the purchase through the buy-back scheme was also intimated to the Stock Exchange. Further on May 12, 2003 the appellant wrote to the depositories for extinguishment of 36,90,000 shares bought back by the appellant. Further, the return under Form 4C pursuant to Section 77A(10) of the Companies Act, 1956 was filed by the Company before the Registrar of Companies on May 12, 2003 containing particulars of the buy-back and on May 15, 2003 Central Depository Services (India) Limited ("CDSL"), namely, the depository confirmed the reduction in the share capital of the Company by the extinguishment of 36,90,000 shares bought back and, on the same day, the appellant updated its 'Registers of Securities Bought Back' as required under Section 77A(9) of the Companies Act and the same was informed to the Stock Exchange. The extinguishment of 36,90,000 shares were also intimated to SEBI letter dated May 21, 2003.

15. It was thus urged, that information regarding buy-back of shares was intimated to SEBI and was also in the public domain since 2003 but the show cause notice was issued on 24.01.2014 after 11 years. It was urged, that a specific objection was raised before the AO and that the AO has brushed aside the said contention on the sole ground that since no period of limitation has been

prescribed, the proceedings cannot be quashed on the ground of delay in the initiation of proceedings.

16. It was also urged that the Special Court Act overrides the SEBI Act and the Buy-Back Regulations in view of the Section 9A (3) read with Section 13 of the Special Court Act which gives exclusive jurisdiction to the Special Court relating to any transactions in securities. It was also urged that the Buy-Back Regulations do not apply to a Court given scheme for disposal of securities of notified persons in view of the fact that the attached securities had to be sold in such a manner that the objectives of the Special Court Act was achieved. It was also urged, that in view of the decision of the Supreme Court dated November 08, 2011 validating the purchase of 36,90,000 shares the Supreme Court deemed to have rejected the contention of Mr. Ashwin Mehta that the buyback of 36,90,000 shares was in violation of Section 77 of the Companies Act and the Buyback Regulations.

17. Having heard the learned counsel for the parties and the intervener, we find that the contention of the intervener that 36,90,000 shares that were bought by the appellant under the buy-back scheme being violative of Section 77A of the Companies Act and the SEBI Buy-Back Regulations was required to be annulled and returned to the appellant. Such contention cannot be accepted and is untenable for the following reasons:-

18. The purchase of 54,88,850 shares sold by the Special Court to the appellant was challenged by Mr. Ashwin Mehta before the Supreme Court. The Supreme Court by its judgement of November 08, 2011 upheld the sale of shares to the extent of 36.90 lakh shares and set aside the sale for the remaining 4.95% of the shares. As a result of affirming the sale of 36.90 lakh shares, the question of the said sale being violative of Section 77A of the Companies Act or of the Buy-Back Regulations was deemed to have been rejected by the Supreme Court.

19. Once the sale of 36.90 lakh shares was upheld by the Supreme Court, the question of SEBI looking into the possible violation of the Buy-Back Regulations or of the Section 77 of the Companies Act does not arise nor penalty could be imposed. We are of the view, that once the sale of 36.90 lakhs have been affirmed by the Supreme Court the alleged violation is deemed to have been waived and it was no longer open for the intervener to allege violation nor was it open to SEBI to impose a penalty for the alleged violation.

20. We are also of the view, that there has been an inordinate delay in the initiation of the proceedings. The Special Court had sold the shares by its order of April 30, 2003 and May 02, 2003. SEBI was in the knowledge of the sale through various letters issued by the appellant and through public notice. The buy-back of the shares was in the public domain. SEBI did not stir in the matter inspite of raising the queries from the Company. It is only after 11 years that pursuant to a complaint raised by the intervener that the show cause notice was issued on 24.01.2014.

21. In our view, there is an inordinate delay in the initiation of the proceedings. The AO in the impugned order has committed a manifest error in holding that since no period of limitation is prescribed under the Act the adjudication proceedings cannot be quashed on the ground of delay.

22. In Mr. Rakesh Kathotia vs. SEBI in Appeal No. 7 of 2016 decided by this Tribunal on 27th May, 2019 this Tribunal held:-

"23. It is no doubt true that no period of limitation is prescribed in the Act or the Regulations for issuance of a show cause notice or for completion of the adjudication proceedings. The Supreme Court in Government of India vs. Citedal Fine Pharmaceuticals, Madras and Others, [AIR (1989) SC 1771] held that in the absence of any period of limitation, the authority is required to exercise its powers within a reasonable period. What would be the reasonable period would depend on the facts of each case and that no hard and fast rule can be laid down in this regard as the determination of this question would depend on the facts of each case. This proposition of law has been consistently reiterated by the Supreme Court in Bhavnagar University v. Palitana Sugar Mill (2004) Vol.12 SCC 670, State of Punjab vs. Bhatinda District Coop. Milk P. Union Ltd (2007) Vol.11 SCC 363 and Joint Collector Ranga Reddy Dist. & Anr. vs. D. Narsing Rao & Ors. (2015) Vol. 3 SCC 695. The Supreme Court recently in the case of Adjudicating Officer, SEBI vs. Bhavesh Pabari (2019) SCC Online SC 294 held:

"There are judgments which hold that when the period of limitation is not prescribed, such power must be exercised within a reasonable time. What would be reasonable time, would depend upon the facts and circumstances of the case, nature of the default/statute, prejudice caused, whether the third-party rights had been created etc."

23. Similar view was held in Ashok Shivilal Rupani & Anr. vs. SEBI, Appeal No. 417 of 2018 along with other connected appeals decided on 22nd August, 2019. Against the order of this Tribunal in the matter of Ashok Shivilal Rupani, SEBI filed Civil Appeal No. 8444-8445 of 2019 before the Supreme Court of India which was dismissed and the order of this Tribunal affirmed by the Supreme Court.

24. Similar view was again reiterated in the matter of Ashlesh Gunvantbhai Shah vs. SEBI, Appeal No. 169 of 2019 and other connected appeals decided on 31st January, 2020 (2020 SCC OnLine SAT 30) where on account of inordinate delay in the initiation of the proceedings by issuance of the show cause notice, the penalty order was quashed.

25. Similar view was again reiterated in the matter of D. Sundarajan vs. SEBI and other connected appeals, Appeal no.119 of 2022 decided on 18th May, 2023 and Jolly Plastic Industries Ltd. & Ors. vs. SEBI, Appeal No. 752 of 2022 decided on 19.05.2023 and the appeals were allowed.

26. In view of the aforesaid, we are of the opinion that on both counts, the

impugned order cannot be sustained and is quashed. The appeal is allowed with no order as to costs. We have been informed that the penalty amount has been deposited by the appellant under protest. Since we have quashed the order, the respondent is directed to refund the amount within 4 weeks from today.

27. In view of the aforesaid, it is not necessary to dwell into the other grounds raised by the appellant.