(2021) 07 SEBI CK 0096

In the Securities Appellate Tribunal Mumbai

Case No : Appeal No. 436 Of 2020

Pankaj J. Shah (HUF) And Others APPELLANT

Vs

Securities And Exchange Board Of India RESPONDENT

Date of Decision : 19-07-2021

Acts Referred:

Securities And Exchange Board Of India (Prohibition Of Fraudulent And Unfair Trade Practices Relating To Securities Market) Regulations, 2003 — Regulation 2(i)(a), 2(ze), 3, 3(a), 4
Securities And Exchange Board Of India Act, 1992 — Section 12A, 15J
Securities Contracts (Regulation) Act, 1956 — Section 2(i), 2(i)(a), 2(1)(a), 13, 16, 18

Citation : (2021) 07 SEBI CK 0096

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

Bench : Division Bench

Advocate : Kunal Katariya, Sahebrao Wamanrao, Kumar Desai, Manish Chhangani, Anubhav Ghosh, Ravishekhar Pandey

Final Decision : Partly Allowed

Judgement

Tarun Agarwala, Presiding Officer

1. The present appeal has been filed against the order of the Adjudicating Officer (â??AOâ?? for short) imposing a penalty of Rs.35 lakhs on noticee

no.1, 3 to 24, 26 to 29, 31 to 34 and 37 to be paid jointly and severally for violation of the provisions of Section 12A of the Securities and Exchange

Board of India Act, 1992 (hereinafter referred to as the â??SEBI Actâ??) and 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 the â??PFUTP

Regulationsâ??). In addition to the aforesaid, the noticee nos.1 to 35 were also directed to pay a penalty of Rs.25,000 each for violating the provisions of Section 2(i)(a) read with Sections 13, 16 and 18 of the Securities Contracts (Regulation) Act, 1956 (hereinafter referred to as the

â??SCRA, 1956â??). Further, noticee no.36 was directed to pay a penalty of Rs.2,50,000 for violating the provisions of Section 2(1)(a) read with

Sections 13, 16 and 18 of the SCRA, 1956.

2. All the said noticees have filed the present appeal collectively. It transpires that a suspicious transaction report from the Financial Intelligence Unit,

Government of India was received by Securities and Exchange Board of India (hereinafter referred to as the â??SEBIâ??) indicating that Ms. Swara

P. Shah received 19,431 shares of L & T Finance Holdings Ltd. through off-market transactions from 55 entities who in turn had received shares in

allotment during the Initial Public Offering (hereinafter referred to as â??IPOâ??). This led to an investigation, based on which, a show cause notice

dated 30th December, 2019 was issued to 37 noticees.

3. The show cause notice alleged that certain entities had applied in various IPOs for allotment of shares and, for this purpose, loans were provided by

Pankaj J. Shah, HUF noticee no.1, through its Karta, noticee no.2, on the basis of which allotment applications were made. After allotment, the shares

were sold by the allottees and the sale proceeds were transferred to noticee no.1. In this manner, Pankaj Shah, noticee no.2 and Karta of Pankaj Shah

HUF and father of Ms. Swara P. Shah, noticee no.36 appeared to have cornered the shares which were meant for retail individual investor category

in IPOs. Such cornering of shares was in violation of Section 12(A) of the SEBI Act read with Regulations 3 and 4 of the PFTUP Regulations.

4. It was also alleged that noticee nos.1 to 35 had transferred shares of L & T Finance Holdings Ltd. to noticee no.36 in off-market transactions. But

noticee nos.1 to 35 did not receive any payment within the specified period for â??spot delivery contractsâ? under Section 2(i)(a) and, therefore, the

same was violative of the said provisions read with Sections 13, 16 and 18 of the SCRA Act.

5. The reply of noticee nos.1 and 2 was that noticee no.1 is an HUF of which noticee no.2 is the Karta. In addition noticee no.2 was also the

proprietor of the Phoolghar Bal Vikas Kendra and the trustee of Phoolgarh Primary School and was involved in the management of the school. The

said noticee no.2 had lent money to its friends, employees and family members, namely, the said noticees. Such loans so given were not based on any

written document but interest was charged on the loan. It was contended that the loans given to noticee nos.3 to 37 was utilized for participating in the

IPO and that the loans were repaid alongwith interest by cheque or by cash. It was specifically contended that noticee no.2 never received the shares

from noticee nos.3 to 37.

6. It was also alleged that there has been an inordinate delay in the issuance of the show cause notice. It was contended that the transaction occurred

in May to December, 2011 and that the show cause notice was issued after eight years on 30th December, 2019. Such inordinate delay has caused

prejudice as relevant documents are now not available. It was also contended that there was no bar in giving loans. It was urged that no fraud or

manipulation of the market has been made out nor the appellants have violated the SEBI Act or the SCRA Act. The replies of the other noticees were

also on similar lines barring minor changes.

7. The Adjudicating Officer after considering the material evidence on record held that there is no timeline prescribed under the Act for initiation of

proceedings and, therefore, there is no delay. Further, the case laws cited by the appellants were all distinguishable. The Adjudicating Officer further

found that all the noticees were connected with each other on the basis of KYC documents, bank transactions, demat account, address, mobile

numbers etc. The Adjudicating Officer further found that the scheme adopted by noticee nos.1 and 2 led to the cornering of the shares which was not

permitted under the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 (hereinafter referred to

as â??ICDR Regulations, 2009â??) and was violative of the SEBI Act, SCRA Act and the PFUTP Regulations. The Adjudicating Officer came to

the conclusion that the entire proceeds of the sale of the shares were transferred to noticee no.1 and that the loan alongwith interest was not

bifurcated and that nothing was shown as to how the interest was calculated by noticee nos.1 and 2. The WTM also came to a finding that noticee

nos.3 to 37 acted as a conduit of noticee no.1 with the sole aim to circumvent the maximum limit of applying in retail quota of the IPOs which at the

relevant time was Rs.2 lakhs per application. The Adjudicating Officer, thus, concluded that fraud was played and market was manipulated for unlawful gains. The Adjudicating Officer further found that noticee no.36 had received shares of L & T Finance Holdings Ltd. from other noticees but

consideration was not paid within the stipulated period and, therefore, the provisions of Section 2(i)(a) read with Sections 13, 16 and 18 of SCRA Act

was violated.

8. We have heard Mr. Kunal Katariya, Advocate assisted by Mr. Sahebrao Wamanrao Buktare, Advocates for the appellants and Mr. Kumar Desai,

Advocate assisted by Mr. Manish Chhangani, Mr. Anubhav Ghosh and Mr. Ravishekhar Pandey, Advocates for the Respondent.

9. It was urged that there was an inordinate delay in the initiation of the proceedings and, consequently, on this ground the proceedings should be

quashed. It was contended that the transactions was executed in the year 2011 and that the show cause notice was issued on 30th December, 2019

and, therefore, there is an inordinate delay. On this aspect we find that SEBI had approved initiation of the proceedings in 2016 and thereafter took

two years to appoint an Adjudicating Officer on 21st June, 2018. The record was given to the Adjudicating Officer on 18th November, 2019 and,

thereafter the show casue notice was issued on 30th December, 2019. This sequence of events indicate the casual, non serious and lackadaisical

manner in the initiation of the proceedings. Thus, there has been a delay in the initiation of the proceedings which has caused prejudice to the

appellants in the sense that relevant documents are now not available or traceable. However, proceedings in the instant case on the ground of

inordinate delay cannot be quashed but the factum of delay would be considered as a mitigating circumstance for the imposition of penalty, if any, if

we find the appellants to be guilty of violation of the Act and its Regulations.

10. A half hearted plea was raised that the appellants are not connected with each other. We find from the record that the appellants are connected

on the basis of KYC documents, bank transactions, demat accounts etc. Further, we find that the mobile number of noticee no.2 was given for the

remaining noticees for vested purposes. Further, the bank account of noticee nos.3 to 37 was being operated by an employee of noticee no.2 and,

therefore, noticee no.2 had full control of the bank account of the appellants. In addition to the aforesaid, majority of the noticee nos.3 to 37 are

employees of noticee no.2 and the remaining are the relatives or coparceners in noticee no.1 HUF.

11. The contention that no fraudulent scheme was ever devised by the appellant is patently erroneous. From the pattern of the scheme made by

noticee nos.1 and 2, it is clear that loans were advanced to its employees who were under the control of noticee nos.1 and 2. Such loan given was

utilized for the purpose of making an application for allotment of shares in IPO. Upon allotment, the shares were sold and the proceeds were credited

in the allotees bank account which was controlled by noticee no.2 and subsequently, the entire proceeds was transferred to noticee no.1. This was in

violation of the ICDR Regulations, 2009. In this regard, Regulation 2(ze) defines retail individual investor as â??means an investor who applies or bids

for specified securities for a value of not more than two lakh rupeesâ?. From the aforesaid, it is clear that a maximum amount of Rs.2 lakhs worth of

shares could be applied by one applicant for one allotment and that the applicant cannot make multiple applications. Noticee no.1/noticee no.2 could

have made only one application under the retail individual category but he gave loans to many entities, most of them were employees of noticee nos.1

and 2. Upon the allotment of the shares, the same were sold and the proceeds were transferred to noticee no.1. This, in our opinion, amounts to

cornering of shares which was fraudulent and manipulative and, consequently, violative of Regulations 3 and 4 of the PFTUP Regulations.

12. In the instant case, the intention of noticee nos.1 and 2 was very clear, namely, to defeat the mechanism of one individual applying for allotment of

shares. Such scheme so devised was fraudulent as defined under the PFTUP Regulations which states that fraud includes any act, expressions,

omissions or concealment committed whether in a deceitful manner or not by a person or any other person with his connivance or by his agent while

dealing in securities in order to induce another person or his agent to deal in securities, whether or not there is any wrongful gain or avoidance of any

loss. In our opinion, the concealment of fraud was present and that noticee no.1 had devised a scheme for making applications for allotment of shares

in connivance with noticee nos.3 to 37 to deal in securities.

13. It was urged that the shares allotted in the three IPOs was 0.37%, 0.02% and 0.08% of the total offer size and, therefore, it was too miniscule to

have any impact on the market nor would such allotment of shares would amount to cornering of the shares. The submission though attractive has no legs to stand. It is not a question of quantification of the total number of shares allotted qua the total offer size of the IPO. What is essential is, that by this scheme, the noticee no.1 and 2 have employed a devise for making several applications for allotment of shares in the retail individual investor category which was not permissible and, therefore, such scheme was manipulative and fraudulent with the sole intention to make unlawful gains.

14. The contention that since the loan was repaid alongwith interest there is no illegality is wholly erroneous. Nothing has been brought on record by noticee nos.1 and 2 to show how interest was charged. In our opinion, the contention that loan was given and interest was charged is patently an afterthought and is not based on any evidence.

15. It was also urged that there was failure of natural justice as relevant documents were not provided to the appellant. In our view, details on this aspect have not been brought on record. The submission made was vague and, consequently, we do not find any substantial reason to hold that there was denial of natural justice. This contention raised is erroneous.

16. Admittedly, noticee no.36 had taken shares of L & T Finance Holdings Ltd. from noticee nos.3 to 35 but no consideration was paid within the stipulated period. The Adjudicating Officer found that there was violation of spot delivery contracts as defined under Section 2(i) of the SCRA Act. In our opinion, the findings given by the Adjudicating Officer on this aspect needs no interference. Considering the aforesaid we find that the noticee nos.1 and 2 and 36 have violated the provisions of the Act and the Regulations with impunity. The Adjudicating Officer himself states that noticee no.3 to 35 were conduits of noitcee no.2. In addition to this finding we are of the opinion that noticee no.2 was managing the school. Majority of the noticee nos.3 to 35 were its employees who were getting meagre salary ranging from Rs.4000/ to Rs.9000/ per month. We are of the opinion that these employees had no choice in the matter and were acting under compulsion. If they had not consented, then there was a risk of an action being taken by way of termination of their employment. We, thus, can safely presume that these employees were aiding noticee nos.1 and 2 under compulsion and that the sword of Damocles was hanging on their heads. Considering the aforesaid, even though these employees and others have violated the

provision of the Act and the Regulations, we are of the opinion that the penalty imposed by the Adjudicating Officer under each head is excessive as

well as arbitrary in as much as, it has not taken into consideration the factors mentioned in Section 15J coupled with the fact that the mitigating

circumstances of inordinate delay is also a factor for consideration of imposition of penalty.

17. In view of the aforesaid, the penalty imposed upon noticee nos.3 to 24, 26 to 29, 31 to 34 and 37 is reduced to Rs.15,000 each to be paid for

violating the provisions of Section 12A and Regulations 3(a) of the PFUTP Regulations and 2(i)(a) read with Sections 13, 16 and 18 of the SCRA Act.

Noticee no.1 is liable to pay a sum of Rs.20 lakhs for violation of Section 12A and Regulations 3(a) of the PFUTP Regulations and 2(i)(a) read with

Sections 13, 16 and 18 of the SCRA Act. Further, the direction to pay a penalty of Rs.2,50,000 by noticee no.36 for violation of 2(i)(a) read with

Sections 13, 16 and 18 of the SCRA Act does not suffer from any error of law.

18. In view of the aforesaid, while upholding the findings given by the Adjudicating Officer on the violation of the provisions of the Act and the

Regulations, the penalty is reduced in the manner stated aforesaid. The appeal is, thus, partly allowed with not order as to costs.

19. The present matter was 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.

