
(2023) 07 SEBI CK 0073

In the Securities Appellate Tribunal Mumbai

Case No : Miscellaneous Application No. 922, 1401 Of 2022, 65 Of 2023, Appeal No. 44, 552 Of 2022, 125, 290 Of 2023

Scan Infrastructure Ltd And Others

APPELLANT

Vs

Securities And Exchange Board Of India

RESPONDENT

Date of Decision : 28-07-2023

Acts Referred:

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 (Prohibition Of Insider Trading) Regulations, 1992 — Regulation 13(4A), 13(5)
Securities And Exchange Board Of India Act, 1992 — Section 11B, 12A, 15HA
Securities Contracts (Regulation) Act, 1956 — Section 21, 23H
Companies Act, 2013 — Section 77(2)

Citation : (2023) 07 SEBI CK 0073

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

Bench : Division Bench

Advocate : Pandit Kasar, Suraj Chaudhary, Nidhi Singh, Deepti Mohan, Nishin Shrikhande, Hubab Sayyed, Harish Ballani, Nidhi Faganiya, Komal Shah, Vidhii Partners, Vinay Chauhan, Afreen Thanevala, Himanshu Agarwal, Prakash Shah

Final Decision : Disposed Of

Judgement

Tarun Agarwala, Presiding Officer

1. Four out of twenty three noticees have filed separate appeals against a common order dated April 13, 2022 passed by the Adjudicating Office ("AO" for convenience) of the Securities and Exchange Board of India ("SEBI" for convenience) imposing penalty for violation of the SEBI (Prohibition of Insider Trading) Regulations, 1992 ("PIT Regulations" for convenience) and Section 12A of the SEBI Act, 1992 read with Regulations 3 & 4 of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 ("PFUTP Regulations" for convenience). Since the issue is common, all the appeals are being decided together.

2. The fact leading to the filing of the present appeal is, that noticee no. 1 who is the appellant in Appeal No. 552 of 2022 is the Company, namely, Unisys Softwares and Holding Industries Limited which issued a notice dated December 29, 2010 regarding issuance of convertible warrant on preferential basis wherein 25% of the conversion price was to be paid before the allotment i.e. March 28, 2011 and balance 75% of the amount was to be paid during March 2011.

3. Noticees no. 2-8 are the preferential allottees who have paid 25% of the amount prior to the allotment on February 11, 2011 and the balance 75% of the amount was paid during March 2011. Noticees no. 9 to 13 are the conduits and, through these entities, the money was paid to the allottees and these entities were funded by noticee no. 1, namely, the Company.

4. Noticee no. 1 i.e. Unisys Softwares and Holding Industries Limited is the Company filed Appeal No. 552 of 2022, Notice no. 10 Vibhuti Multi Trade Pvt. Ltd. filed Appeal No. 125 of 2023, Noticee no. 11 Allbright Electricals Pvt. Ltd. filed Appeal No. 290 of 2023 and Noticee no. 14 Scan Infrastructure Limited filed Appeal No. 739 of 2022 and they are the conduits for the transfer of the monies to the allottees.

5. SEBI conducted an investigation into the affairs of the Company with regard to the disclosure requirements under the PIT Regulations and funding by the Company to the preferential allottees in the preferential allotment made by it on March 28, 2011. The show cause notice alleged that the promoters of the Company acquired the shares of the Company on October 01, 2011 which resulted in the change of their shareholding on account of transfer of the shares exceeding Rs. 5 lakhs in value or 25,000 shares or 1% of the total shareholding or voting rights and, therefore, the promoters of the Company were obligated to make disclosures to the Company as well as to the Stock Exchange under Regulation 13(4A) read with 13(5) of the PIT Regulations which they failed to make. It was also alleged that the shareholding pattern submitted by the Company to the Stock Exchange during the quarter ending on December 2011 the shareholding pattern of some of the entities was incorrect as it was found that these entities were not holding any shares on December 31, 2011 as it had transferred the shares on or before December 31, 2011. It was thus alleged that the Company had violated Section 21 of the Securities Contracts (Regulation) Act, 1956 ("SCRA" for convenience) read with Clause 35 of the Listing Agreement for filing wrong quarterly shareholding pattern disclosures to the Stock Exchange.

6. The show cause notice also alleged that the Company had funded the allotment of its shares to the preferential allottees. In this regard, the show cause notice alleged that with regard to the payment of 25% of the preferential amount Noticees no. 2-8 have transferred Rs. 7.50 Crores to Unisys Softwares and Holding Industries Limited i.e. the Company on February 11, 2011. These Noticees No. 2-8, i.e. preferential allottees had received Rs. 7.50 Crores from Noticee no. 11 i.e. Allbright Electricals Private Limited on February 10, 2011 which after receiving paid to Unisys Softwares and Holding Industries Limited. It

was also alleged that Allbright Electricals Private Limited Noticee no. 11 had received Rs. 3 Crores and Rs. 5 Crores on February 10, 2011 from Noticee no. 9 Gulistan Vanijya Private Limited and Vibhuti Multi Trade Private Limited, Noticee no. 10, and upon receiving the same, on the same day transferred the amount to Noticees no. 2 to 8. On February 12, 2011 the Company transferred Rs. 2.75 crores to Allbright Electricals Private Limited. It was alleged on analyzing the bank statement it was observed that on February 10, 2011 the Company had a balance in its account to the tune of Rs. 1,58,150.84/- and on February 11, 2011 transferred Rs. 2,50,00,000/- to Noticee no. 12 and Rs. 2,75,00,000/- to Noticee no. 11. Thus transferring Rs. 5.25 crores to entities from which Noticees no. 2-8 had received funds for preferential allotment on the same day.

7. Similarly the balance 75% of the total amount of the preferential allotment was made in the similar modus operandi, details of which has been given in paragraph 2(x) of the impugned order.

8. In view of the aforesaid, it was alleged that the Company had given financial assistance to the preferential allottees i.e Noticees no. 2-8 to enable them to subscribe and buy the shares of the Company on a preferential basis on March 28, 2011 thereby limiting genuine capital infusion to that extent. It was alleged that Noticees No. 9 to 23 were acting as conduits and facilitated the Company and gave financial assistance in connection with the subscription made by the preferential allottees.

9. The noticees denied the charge leveled against them. The Company contended that money given to Grafton Merchant Private Limited, Noticee no. 12 and Allbright Electricals Pvt. Ltd. Noticee no. 11 were given in the course of business and had nothing to do with the preferential allotment of the shares given to noticees no. 2-8. It was contended that the Company was having regular financial dealings with Grafton Merchant Private Limited and Allbright Electricals Pvt. Ltd. and the money paid to them was not paid towards the amount advanced by them to the preferential allottees. It was also contended that there was no violation under the PIT Regulations regarding non-disclosure of the shareholding pattern of the promoters. It was also contended that the monies given to Allbright Electricals Pvt. Ltd. was with regard to purchase of shares of certain companies for which relevant vouchers was given by the said entities.

10. The contention made by Noticees no. 10, 11 and 14 was that the transactions with Allbright Electricals Pvt. Ltd. and Grafton Merchant Private Limited was not a singular transaction and that in the past there were many other transactions regarding sale and purchase of shares. The amount paid to Noticees no. 2-8 had nothing to do with the allotment of shares and there can be no connection of the amount received from the Company.

11. The AO after considering the material evidence on record found that the Company had devised a scheme which resulted in funding the preferential allottees and thus there was no genuine capital infusion of the funds in the

Company. The AO further found that Noticees No. 9-23 were acting as conduits and had facilitated the Company in giving financial assistance in connection with the subscription made by the preferential allottees, namely, noticees 2-8. The AO accordingly found that the action of the Company and the other noticees were fraudulent and violated Section 12A of the SEBI Act read with Regulations 3 and 4 of the PFUTP Regulations. The AO accordingly imposed a penalty of Rs. 4 lakhs upon the Company noticee no. 1 under Section 23H of the SCRA for violating the PIT Regulations for non-disclosure of the shareholding pattern of the promoters of the Company. In addition to the aforesaid, the AO imposed a sum of Rs. 46 lakhs upon noticees no. 1-23 under Section 15HA to be paid jointly and severally by these noticees for violating Section 12A of the SEBI Act read with Regulations 3 and 4 of the PFUTP Regulations.

12. The learned counsel for the appellant-company further conceded that the Company did not make the necessary disclosures under the PIT Regulations with regard to the shareholding pattern of its promoters and therefore to that extent the impugned order does not suffer from any effort of law.

13. We have heard Shri Pandit Kasar, the learned counsel, Shri Vinay Chauhan, the learned counsel, Shri Himanshu Agarwal, the learned counsel and Shri Prakash Shah, the learned counsel for the appellants and Shri Suraj Chaudhary, the learned counsel for the respondent.

14. The contention of the learned counsel for the Company is, that they have not devised any fraudulent scheme with regard to allotment of the preferential shares. It was contended that the finding of the AO that the Company had in fact funded the preferential allottees is based on surmises and conjectures. The payment made by the Company to Grafton Merchant Private Limited and to Allbright Electricals Pvt. Ltd. was in the usual course of business and that some amount was paid to Allbright Electricals Pvt. Ltd. for purchase of shares of other Company to which the said entity has acknowledged. It was urged, that the Company had no knowledge that the funds were utilized by Allbright Electricals Pvt. Ltd. for funding the preferential allottees. It was thus contended that the finding that there was a fraudulent intent on the part of the Company in devising such a scheme was wholly erroneous. It was urged, that the Company has not violated Section 77(2) of the Companies Act by giving financial assistance for purchase of its own shares which was allotted validly to noticees no. 2-8 on preferential basis. The appellants also denied that noticees no. 8-23 acted as conduits and facilitated the Company in giving financial assistance for routing of funds in connection with the subscription made by the preferential allottees.

15. In so far as the appellants who are noticees no. 10, 11 and 14 it was urged that they would be happy if the order of penalty is modified and instead of directions to pay the amount of Rs. 46 lakhs jointly and severally the appellants may be permitted to pay the amount proportionately. It was urged, that the appellants are not connected with the other noticees and the mere fact that the appellant may have been connected with the Company does not mean that they

are connected with the other noticees and therefore the finding that the penalty should be paid jointly and severally was wholly erroneous.

16. Having heard the learned counsel for the appellant-Company, we find that the AO has dealt in length with regard to the round tripping of the funds and has given a categorical finding that the Company had in fact funded the subscription amount of the allotment of preferential shares to noticees no. 2- 8. The findings have been given in paragraph 24 and 25 of the impugned order and we do not find any reason to differ from the conclusions arrived at. We are not satisfied with the contention that the Company was not aware of the funds transferred by Grafton Merchant Pvt. Ltd. and Allbright Electricals Pvt. Ltd. to other entities which eventually found its way to the preferential allottees. The very fact that the funds have moved from Grafton Merchant Pvt. Ltd. and Allbright Electricals Pvt. Ltd. to certain entities and to the allottees and from the allottees to the Company and from the Company to Grafton Merchant Pvt. Ltd. and Allbright Electricals Pvt. Ltd. within 48 hours leads to an irresistible conclusion that the fund transfer was only for the purpose of subscription of the preferential allotment by these preferential allottees. The pictorial no. 1 and 2 as displayed in the impugned order gives a clear picture of the modus operandi of the transfer of funds between the conduit entities to the preferential allottees and from the preferential allottees to the Company and from the Company to the conduits. Such round tripping of the funds was clearly fraudulent which shows no intention of genuine capital infusion of funds.

17. We are satisfied and we are of the confirmed opinion that the money received by the allottees was the funds which was funded by the Company through the conduits. Such round tripping of the funds was totally fraudulent.

18. In Farooq Kasam Hawa & Ors. vs. SEBI in Appeal No. 448 of 2020 and other companion appeals decided on June 10, 2022 the facts in that appeal was:-

"14. On 28th November, 2013, noticee no.12 Mihir Consulting and Trading Company received Rs.1 crore from noticee no.13 AA Plus Commodity Broking P. Ltd. Noticee no.12 also received Rs.5 lakhs from Mainak Comtrade Pvt. Ltd., noticee no.15. Upon receiving the aforesaid amount noticee no.12 transferred Rs.15 lakhs each to 7 preferential allottees i.e. noticee no.5 to 11. Upon receiving the said amount noticee no.5 to 11 transferred the funds to the Company towards application money for preferential allotment on 29th November, 2013. On 30th November, 2013, the Company issued Rs.64,25,000 shares of Rs.10 each under preferential allotment to 49 entities including noticee nos.5 to 11. The shares of the Company was listed on BSE in the category of Trade to Trade group with effect from 12th June, 2014. Prior to that it was listed on Ahmedabad Stock Exchange. It appears that an orchestrated scheme was planned and executed by the Company and its Directors with the help of connected entities and certain individuals forming part of the Dhyana group. In Patch 1, certain noticees were involved in pumping up the share price of the Company to an artificial level by trading amongst themselves. In Patch 2, these

noticees acted as counter party buyers and provided an exit to the preferential allottees and, in this process, increased the price of the scrip and also created further artificial volume.”

19. This Tribunal after considering the evidence held:

“18. We further find that Mihir Consulting and Trading Company acted as a conduit through which funds were transferred by the Company connected entities to 7 preferential allottees. The contention of these 7 preferential allottees that they had taken loan in the normal course of business as well as the contention of Mihir Consulting and Trading Company and Mainak Comtrade Pvt. Ltd that the loan was given by them in the normal course of business cannot be believed. No supporting documents have been filed either by the noticee nos.5 to 11 or by Mihir Consulting and Trading Company and Mainak Comtrade Pvt. Ltd to show that any loan agreement was executed nor anything has come on record to indicate that the period of loan, the nature of loan, the interest rate etc. Further, Mihir Consulting and Trading Company Mainak Comtrade Pvt. Ltd are not registered NBFCs. In the absence of any documentary evidence such as loan agreement, income tax returns etc., we are unable to accept that a bonafide loan transaction was given by these entities. Further, we find it strange that 7 preferential allottees entered into a loan transaction for the same amount on the same date without any documentation. Further, given the fact that these noticees had insufficient funds in their accounts, an irresistible inference can be drawn that the funds were transferred through noticee nos.5 to 11 with the sole purpose to finance the subscription to the preferential allotment under a fraudulent scheme. We are of the opinion that the allotment to these 7 preferential allottees were fraudulent. We also find that out of these 7 preferential allottees, only noticee nos.7, 9 and 11 have filed appeals before this Tribunal.”

20. Similarly, in Shri Bakul Ramniklal Parekh & Ors. vs. SEBI in Appeal No. 527 of 2019 decided on April 17, 2021 this Tribunal held:-

“7. Having heard the learned counsel for the parties and having perused the records we find that the Company had transferred its funds to the preferential allottees to enable them to subscribe to the Company’s shares. This fact has not been disputed and, the only contention raised was that it was an advance. Some of the appellants contended that it was a loan and according to appellant no. 7 it was an advance towards professional fees to be adjusted in future. We are of the opinion that when a Company raises its capital, issuance of shares is considered as capital infusion and an ordinary investors perceives it as a capital infusion which is essential for strengthening the Company’s financial fundamentals. When a preferential allotment is made by a listed Company it gives an impression that genuine capital infusion is being brought into the Company. When the Company uses its own funds and distributes it to the allottees for the purpose of subscribing to the shares, it deceives the genuine investors and in fact falsely leads them to invest in the shares of the Company. Thus, we are of the opinion

that the Company along with the management and allottees receiving such funds from the Company were perpetuating a fraud on the ordinary investing public who were deceived to invest in the securities of the Company.”

21. The aforesaid decision is squarely applicable. We are of the opinion, that when the Company uses its own funds and distribute it to the allottees for the purpose of subscription to the shares it deceives the genuine investors and falsely leads the investors to invest in the shares of the Company. Such scheme in our opinion perpetuates a fraud on the ordinary investors and gives a false impression that there was an infusion of funds through preferential allotment. We are further of the opinion, that this kind of fraudulent act which is an unfair device was meant to deceive the investors and such act is clearly prohibited under Section 12A of the SEBI Act read with Regulations 3 and 4 of the PFUTP Regulations. In view of the aforesaid, the contention raised by the learned counsel for the Company does not hold any merit.

22. In M/s. Agarwal Holdings vs. SEBI Appeal No. 702 of 2021 decided on June 18, 2022, this Tribunal passed the following order on the issue of jointly and severally liability. Paragraph No. 4 of the said judgment is as under :-

“4. It was urged that the direction of the AO to pay the penalty amount jointly and severally was wholly erroneous, since the appellant alongwith other noticees did not act in concert. In this regard, we find that the only connection shown of the appellant with other noticees has been indicated in paragraph no. 21 of the impugned order wherein the appellant has been shown to be connected with noticee no. 4, Invorex Vincom Pvt. Ltd. through offmarket transfer. There is nothing to indicate the appellant’s connection with other noticees. Since eight noticees have been found to have violated provisions of the Section 12A read with Regulations 3 and 4 of the PFUTP Regulations and in the absence of any finding as to why all the noticees should be liable to pay jointly and severally, we are of the opinion that the direction of the AO to pay the penalty amount jointly and severally is harsh and arbitrary and without any reasons.”

23. In SRSR Holdings Pvt. Ltd. vs. SEBI Appeal No. 01, 2019 decided on 02.02.2023 this Tribunal held:

“91. We find that the direction to disgorge an amount jointly and severally has been used loosely without understanding the true import of the meaning of “joint and several” liability. All persons who aid or direct or join in the committal of a wrongful act, are joint tort-feasors. To constitute a joint liability, the act complained of must be joint and not separate. Where two or more persons combine together to commit an act, it is a joint action which amounts to a tort. The liability of joint tort-feasors i.e. the liability that an individual or business either shares with other tort-feasor or bears individually without the others. Thus, joint tort-feasors are jointly and severally liable for the whole damage resulting from the tort. In assessing damages against joint tort-feasors or several tort-feasors causing same or indivisible damage, one set of damages will be

fixed, and joint tort-feasors may be assessed according to the aggregate amount of the injury resulting from the common act or acts. The reason being is that where the cause of action is one and indivisible then all persons become liable jointly and severally.

92. The mere coincidence of a number of persons doing a series of acts will not make them joint tort-feasors. It must be shown that they acted concurrently or jointly with a common intention.

93. Thus, the damage caused by several tort-feasors may be the same or indivisible or it may be distinct referable to each tort-feasor. In case where the damage caused by the each of the several tortfeasors is distinct, then each of them is liable only for the damage attributable to his own act.

94. From the aforesaid, it is clear that where persons joined together to do a wrongful act, they are joint tort-feasors. That is to say, that when persons are acting in concert and by their wrongful acts caused damage, they are joint tort-feasors. If the damage caused by persons acting in concert jointly is the same and it is indivisible, then the damage is joint and several. But where persons are not acting in concert and the damage caused by each of the several tort-feasors is distinct, then each of them are liable only for the damage attributable to their own act. Further, if the damage caused by the persons acting in concert is divisible even then, in that case, each one of them is liable for the damage attributable to them and the damage is to be computed against their name individually. In such cases, damages cannot be paid jointly and severally.

96. In the instant case, apart from B. Ramalinga Raju and B. Rama Raju, others did not act concurrently or jointly but sold the shares at different moment of time. All the appellants made a series of acts at different point of time and therefore their acts will not make them liable jointly and severally. Further, the WTM has calculated the unlawful gains against each of the appellants. Once the amount is calculated, then each of them is only liable to pay the unlawful gains attributable to his own act. The unlawful gains cannot be clubbed together nor can any direction be issued to disgorge the amount jointly and severally. Thus, the direction of the WTM to disgorge the amount jointly and severally cannot be sustained."

24. This Tribunal in the case of Mahavirsingh N. Chauhan (supra) has held as under :-

"20. In the end, the contention that the liability to disgorge the amount cannot be made joint and several under Regulation 11B of the SEBI Act has same force. In this regard, the explanation to Section 11B is extracted hereunder :-

"Explanation. - For the removal of doubts, it is hereby declared that the power to issue directions under this section shall include and always be deemed to have been included the power to direct any person, who made profit or averted loss by indulging in any transaction or activity in contravention of the provisions of this

Act or regulations made thereunder, to disgorge an amount equivalent to the wrongful gain made or loss averted by such contravention.”

21. From the aforesaid, it is clear that a person can be directed to disgorge amount equivalent to the wrongful gain made by him. By such contravention, the liability to disgorge the amount is individual and not collective. Thus, we are of the opinion that the direction of the WTM directing the appellants to pay the amount jointly or severally is against the provisions of Section 11B and to that extent, it cannot be sustained. The order of the WTM is consequently, modified to the extent that the liability of the appellants in question except Rajesh Ranka to disgorge the amount is to the extent of the profit earned by them as calculated by the WTM under Table 9. In the event of failure by these appellants to pay the amount, it would be open to SEBI to recover the amounts in the order of hierarchy stipulated in paragraph 145(e) of the impugned order. We are of the view that in view of the role played by Rajesh Ranka, the disgorgement is jointly and severally for which we do not find any fault with the order of the WTM.”

25. Further, in the case of Navin Kumar Tayal & Ors. vs. SEBI (supra), this Tribunal has held as under :-

“49. The contention that an order of disgorgement cannot be fastened upon the appellants jointly and severally cannot be accepted. Reliance in the case of Mahavir Chauhan vs. SEBI Appeal No. 393 of 2018 decided on October 18, 2019 is distinguishable. The findings of this Tribunal in the case of Mahavir Chauhan (supra) was based on the fact that the WTM had in that case separately quantified the profit made by each of the noticees and consequently, in that context this Tribunal held that there cannot be the order for joint and several liability.”

26. Considering the aforesaid, we find that there is no inter se connection of noticees no. 10, 11 and 14 with the other noticees except that these noticees are connected to the Company noticee no. 1. In our view, the directions to pay the penalty amount jointly and severally was not proper and is arbitrary. The appellants have been found to be part of the scheme planned by the Company and have been involved in transferring the funds to the preferential allottees for subscription of the preferential allotment of the shares. The AO has imposed a penalty of Rs. 46 lakhs upon 23 noticees to be paid joint and severally which works out to Rs. 2 lakhs per noticee. However, considering the peculiar facts and circumstances of the present case, which shall not be treated as a precedent in other cases, we are of the opinion, that the penalty of Rs. 4 lakhs would be just and proper for each of the appellants i.e. noticees no. 10, 11 and 14.

27. In view of the aforesaid, Appeal No. 552 of 2022 Unisys Softwares and Holding Industries Ltd. is dismissed. Appeal No. 125 of 2023 Vibhuti Multi Trade Private Limited, Appeal No. 290 of 2023 Allbright Electricals Pvt. Ltd. and Appeal No. 739 of 2022 Scan Infrastructure Ltd. are partly allowed. Each of the appellants are required to pay a sum of Rs. 4 lakhs towards penalty within 4

weeks from today. Any amount paid pursuant to any direction of this Tribunal would be adjusted. In the circumstances of the case, parties shall bear their own costs. The misc. applications are disposed off accordingly.

28. 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.