(2021) 09 SEBI CK 0169

In the Securities Appellate Tribunal Mumbai

Case No : Appeal No. 119, 120, 121, 122, 123, 124, Of 2020

?Shripal Shares And Securities Limited And Others APPELLANT

Vs

Securities And Exchange Board Of India RESPONDENT

Date of Decision : 27-09-2021

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 Act, 1992 — Section 15HA

Citation : (2021) 09 SEBI CK 0169

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

Bench : Division Bench

Advocate : Rishika Harish, Aditya Bhansali, Suyash Bhandari, Amisha Lolusare, Nirali Sunil Mehta, Mustafa Doctor, Ravishekhar Pandey, Pulkit Sharma

Judgement

Tarun Agarwala, Presiding Officer

1. This group of appeals, the appellants have challenged a common order dated December 30, 2019 passed by the Adjudicating Officer ("AO" for convenience) of the Securities and Exchange Board of India ("SEBI" for convenience) imposing a penalty under Section 15HA of the SEBI Act. The facts leading to the filing of the present appeal is, that between April 2007 to August 2008 there was a price movement and trading pattern in the scrip of Sunteck Reality Limited which showed that the price moved from Rs. 494.05 in April 2007 to Rs. 1957.10 in November 2007 and eventually coming down to Rs. 1427.25 in August 2008. This led to an investigation wherein it was found that the noticees/ appellants were indulging in circular trades, namely, that they were buying and selling among themselves. The modus operandi was that the appellants used to transfer shares off-market to a large number of entities who in turn sold the shares in the market and these shares were again bought back by the appellants and again transferred off-market. As a result of this modus operandi it was found that the appellants were contributing to the market volume of 78 to 85% of the scrip which was illiquid.

2. Accordingly, a show cause notice dated September 18, 2009 was issued in which it was alleged that there were circular trades amongst the appellants who were transferring shares through off-market to a large number of entities and who in turn were selling the shares in the market so as to give an impression of widespread trading in the scrip. It was also alleged that the appellants were guilty of creating misleading appearance of trading in the securities market and were inflating the price of the scrip. It was also alleged that the appellants were connected with each other by way of fund transfers, off-market transfer of shares, phone calls, text messages etc. and that through this modus operandi all the appellants made unjust enrichment and consequently violated Regulations 3 and 4 of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 ("PFUTP Regulations" for convenience).

3. The appellants filed their replies in the year 2010 and further sought inspection of certain documents which were granted. The AO after giving an opportunity of hearing passed the impugned order on December 24, 2019 holding that the appellants have fraudulently executed the trades and indulged in unfair trade practice and accordingly imposed penalties under Section 15HA of two times the unlawful gains made by them.

4. The AO in the impugned order found that the contribution of the appellants to the market volume was very high namely 78.09% in February 2007, 80.37% in April 2007, 79.84% in May 2007, 77.8% in July 2007. The AO further found that on account of the trading pattern of the appellants, the price of the scrip was impacted. The AO held that the appellants placed orders above the Last Traded Price (LTP) and the orders matched from amongst the connected entities. The AO further found that when the price showed a rising trend, other innocent investors started investing in the scrip and then they suffered losses when the appellants exited from the scrip.

5. The AO further found that all the appellants were connected with each other in one way or the other. The AO after analyzing the off-market transfers of the shares of the company found that the appellants were connected through off-market transfers of shares which has been explicitly depicted in paragraph 34 of the impugned order. Further connection was found through phone call records which has been specifically stated in paragraphs 37 and 38 of the impugned order. A further finding has been given that the appellants did not give any explanation in their replies to the show cause notice on this aspect. In paragraph 39 of the impugned order the AO found further connection inter-se between the appellants through fund transfers which fact has also not been disputed by the appellants which details have been given in paragraph 40 of the impugned order. Thus, the AO came to the conclusion that all the appellants were in touch with each other as per the call data records and fund transfers amongst themselves. The AO on the basis of the transactions came to a conclusion that the trading pattern clearly showed that the appellants were trading amongst themselves which were circular in nature and the trading pattern was fraudulent and

amounted to an unfair trade practice and consequently violative of Regulations 3 and 4 of the PFUTP Regulations. The AO after calculating the unlawful gains found that penalty under Section 15HA could be imposed and accordingly imposed a penalty of twice the unlawful gains made by the appellants.

6. We have heard Ms. Rishika Harish and Mr. Pulkit Sharma, the learned counsel for the appellants and Mr. Mustafa Doctor, the learned senior counsel for the respondent.

7. Before us, the learned counsel submitted that there has been an inordinate delay in the disposal of the adjudication proceedings. It was contended that whereas trades were executed in the year 2007-2008, the show cause notice was issued on September 18, 2009 and the impugned order was passed on December 30, 2019 after more than 10 years for which there was no justification for this inordinate delay. It was contended that the appellants had given their replies in the year 2010 but no effort was made by the respondent to fix an early date for hearing. It was thus contended that on this ground itself the proceeding should be quashed.

8. On this issue, we find that the AO has passed the buck upon the appellants contending that they took one year to file their replies and thereafter took time to inspect the records which they did not avail. In our opinion, there was no delaying tactics on the part of the appellants in these proceedings. No justification has been given by the respondent as to why the matter could not be decided after the reply was filed in 2010 and why no proceedings took place between 2010 to 2014. From a perusal of the impugned order, it is apparently clear that the AO has proceeded in a lackadaisical manner in conducting the proceedings. The delay has occured from the side of the respondent and not from the side of the appellants. However, on account of this delay in the disposal of the proceedings, we are of the opinion that the show cause notice and the adjudication proceedings or the impugned order cannot be quashed. However the delay caused can be a mitigating factor in the computation of the penalty.

9. It was urged that the entire trade logs was not provided and therefore one could not file an efficacious reply or contest the matter effectively as to whether all the trades that were executed by the appellants were circular trades in violation of regulations 3 and 4 of the PFUTP Regulations. We find that in this regard, the AO has specifically stated in paragraph 15 that inspection of the trade logs was duly provided to all the appellants but for reasons best known to them they failed to avail this opportunity to inspect the trade logs. Thus, it is no longer open for the appellants to allege violation of the principles of natural justice on account of non-supply of the trade logs. The contention raised is erroneous and cannot be accepted.

10. It was urged that the show cause notice clearly indicated that apart from the appellants there were many other entities to whom the shares were transferred off-market and who thereafter sold it on the stock exchange platform. It was

contended that no adjudication proceedings have been initiated against such entities nor are parties to these proceedings. It was thus urged, that if certain entities to whom the shares were transferred were not found to be circular trades then no charge of circular trades could be levelled upon the appellants. In this regard, we are of the opinion, that even if the appellants had transferred certain shares off-market to certain entities and who are not part of the adjudication proceedings, the same will not make any difference in so far as the circular trades executed by the appellants amongst themselves. The volume of trades, the placing of orders above the LTP and trading between themselves have not been denied by them. Thus, merely because some shares were transferred off-market to certain entities against whom no proceedings have been initiated will not vitiate the trades executed by the appellants amongst themselves. The contention raised in this regard is patently misconceived and cannot be accepted.

11. The AO has calculated the unlawful gains/profits on the basis of First-In-First-Out method (FIFO) on the ground that some the appellants' shares remained unsold during the investigation period and, therefore, the appropriate method was the FIFO method for calculating profits which was also in consonance with the provisions of Sec. 45(2) of the Income Tax Act. In this regard, the appellants contended that the normal rule which SEBI follows is the average cost method and there was no exceptional reason for the respondents to make a departure in the instant case. In this regard, we find and it is an admitted fact that unlawful gains are generally calculated on the basis of average cost method. Nothing has been indicated as to why this method was not the appropriate method. If a special method is used for calculation of profits then specific reasons are required to be given whenever a departure is made which in the instant case is lacking. Nothing has been indicated as to why the average cost method is not the appropriate method for calculating profit in the instant case.

12. We also find from paragraph 85 of the impugned order that all the transfers of the scrip made by the appellants as indicated in column-C has been taken into consideration while calculating the total sales made by the appellants. In this regard, the contention raised by the appellants is, that all the sales of the scrip made by the appellants were not tainted sales in as much as many of the transfers made off-market to other entities were found to be legitimate since no notice or proceedings were initiated against those entities. It was contended that if the appellants by transferring shares off-market to those entities had committed a violation then that should have come out in the impugned order which in the instant case was not done nor any steps were taken to include those entities for violation of circular trades. It was thus contended that the shares sold off-market etc. to those entities to whom notices have not been issued should not be taken into consideration while calculating the total sales of the scrip made by the appellants. In this regard, we find some justification in as much as the learned senior counsel for the respondent could not point out that the total sales made by the appellant as depicted in column-C in paragraph 85 of the impugned order are only those sales made inter-se between the appellants/ noticees in the

adjudication proceedings. Consequently, the calculation of the unlawful gains in our opinion requires reconsideration.

13. For the reasons stated aforesaid, we affirm the findings of the AO with regard to fraudulent and unfair trade practice committed by the appellants vis-à-vis violation of the Regulation 3 and 4 of the PFUTP Regulations. The calculation of unlawful gains made by the respondent requires reconsideration and to that extent the order is set aside. All the appeals are partly allowed in so far as it relates to the appellants. The matters are remitted to the AO only for the limited purpose of recalculation of the unlawful gains. The AO will calculate the unlawful gains only with regard to the tainted shares sold by the appellants inter-se between the appellants/ noticees. The AO will also take into consideration the time factor as a mitigating factor for considering the quantum of penalty. The AO will also reconsider as to which method of calculation is appropriate, whether FIFO method or average cost method and would supply its reasons. The AO will pass a fresh order after giving an opportunity of hearing to the appellants within four months from today. In the circumstances of the case, parties shall bear their own costs.

14. 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.