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(2023) 02 SEBI CK 0019

In the Securities Appellate Tribunal Mumbai

Case No : Miscellaneous Application No. 674, 731, 768 Of 2021, Appeal No. 461, 462, 463 Of 2021, 956, 957, 958 Of 2022

Soma Textiles and Industries Ltd And Others APPELLANT

Vs

Securities And Exchange Board Of India RESPONDENT

Date of Decision : 22-02-2023

Acts Referred:

Securities Contracts (Regulation) Rules, 1957 — Rule 19, 19A, 21
Securities And Exchange Board Of India (Prohibition Of Fraudulent And Unfair Trade Practices Relating To Securities Market) Regulations, 2003 — Regulation 3, 3(a), 3(b), 3(c), 3(d), 4, 4(1), 4(2)(f), 4(2)(k), 4(2)(r)
Securities And Exchange Board Of India Act, 1992 — Section 11, 11B, 12A, 12A(a), 12A(b), 12A(c)
Securities Contracts (Regulations) Act, 1956 — Section 21, 23A(a), 23E

Citation : (2023) 02 SEBI CK 0019

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

Bench : Division Bench

Advocate : Vinay Chauhan, Rasika Ghate, Shyam Mehta, Mihir Mody, Arnav Misra, Mayur Jaisingh, K Ashar, Kunal Katariya, Aditya Thanvi, Rasika Ghate, Sumit Rai

Final Decision : Allowed/Dismissed

Judgement

Tarun Agarwala, Presiding Officer

1. Three appeals have been filed against the order dated February 8, 2021 passed by the Whole Time Member (‘WTM’ for short) of the Securities and Exchange Board of India (‘SEBI’ for short) debarring the Company, its director and its authorized representative from accessing the securities market for a specified period. Three appeals have also been filed against the order dated August 30, 2022 passed by the Adjudicating Officer (‘AO’ for short) wherein penalties have been imposed upon the Company, its director and its authorized representative.

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2. The facts leading to the filing of the present appeal is, that the Board of Directors of the Company known as Soma Textiles and Industries Limited passed a resolution on July 27, 2006 for opening a bank account with Banco Effisa (hereinafter referred to as 'Banco') for depositing the GDR proceeds. By the said resolution, Mr. Sunil Patel was authorized to sign and execute an agreement as may be required by the bank and take such steps from time to time on behalf of the Company. The resolution further resolved to use the funds so deposited in the aforesaid bank account as security in connection with loan, if any, as well as to enter into any escrow agreement or similar arrangements if and when so required.

3. Based on the aforesaid resolution, the Company issued 1.85 million GDRs for USD 17.2975 million dated October 20, 2006. The aforesaid GDR was subscribed by one entity, namely, Whiteview Trading Corporation (hereinafter referred to as 'Whiteview') and a corporate announcement was made by the Company that the entire issue was subscribed.

4. Securities and Exchange Board of India (hereinafter referred to as 'SEBI') conducted an investigation pertaining to the issue of GDR by the Company. Based on the investigation, a show cause notice dated July 21, 2017 was issued to the Company and its Directors to show cause as to why suitable directions under Section 11 and 11B should not be issued for violation of Section 12A(a), (b), (c) of the SEBI Act read with Regulation 3(a), (b), (c), (d) and 4(1), 4(2)(f), (k), (r) 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'), Section 21 of the Securities Contracts (Regulations) Act, 1956 (hereinafter referred to as the 'SCR Act') read with Clauses 32, 36(7) and 50 of the Listing Agreement and Section 23E of the SCR Act.

5. The show cause notice alleged that pursuant to the resolution dated July 22, 2006 not only a bank account was opened with Banco but a account charge agreement dated October 18, 2006 was executed on behalf of the Company based on which a loan agreement dated October 18, 2006 was executed between Whiteview and Banco in which the proceeds of the GDR was to be kept as security with Banco. The show cause notice further alleged that the account charge agreement and the loan agreement was not disclosed to the stock exchange and, consequently, the investors and shareholders were kept in the dark. The show cause notice further alleged that based on the account charge agreement and the loan agreement Banco advanced USD 17.2975 million to Whiteview which amount was utilised by Whiteview to subscribe to the entire issue. The GDR proceeds were pledged as security till such time the loan was repaid by Whiteview. It was also alleged that the fact that Whiteview was the sole subscriber was not intimated to the stock exchange and to the Indian investors and, accordingly, the Company and its Directors were charged with violation of Section 12A of the SEBI Act and Regulations 3 and 4 of the PFUTP

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Regulations.

6. The WTM after considering the evidence on record found that the entire scheme of using the GDR proceeds to fund a subscriber to the GDR issue was a fraudulent scheme and violative of Section 12A of the SEBI Act and Regulations 3 and 4 of the PFUTP Regulations. The WTM found that the GDR was subscribed by one entity, namely, Whiteview. The WTM further found that on account of the account charge agreement created by the Company with Banco the funds were not made available at the Company's disposal and the same became available in tranches as and when the loan amount was repaid by Whiteview. Further, the loan agreement was not disclosed to the stock exchange and to the Indian investors. Further, the disclosure made by the Company to the stock exchange that the GDR issue was fully subscribed was misleading as the investors were not informed that the GDR was subscribed by only one entity and, therefore, the scheme hatched by the Company and its Directors was violative of Section 12A of the SEBI Act and Regulations 3 and 4 of the PFUTP Regulations.

7. The WTM found that the non-disclosure of the loan agreement and the account charge agreement was violative of Clause 36 of the Listing Agreement as well as Section 21 of the SCRA Act read with Clause 32 and 50 of the Listing Agreement The WTM also found that Whiteview defaulted in the repayment of the loan amount of USD 16.67 million

8. Similar finding has also been given by the AO based on which penalties have been imposed upon the Company, its director and its authorized representative.

9. We have heard Shri Vinay Chauhan, Mr. Kunal Katariya Ms. Rasika Ghate with Shri Aditya Thanvi, the learned counsel in respective appeals and Mr. Shyam Mehta, the learned senior counsel and Mr. Sumit Rai with Mr. Mihir Mody, Mr. Arnav Misra and Mr. Mayur Jaisingh, the learned counsel for the respondent in respective appeals.

10. The modus operandi adopted by the Company in the issuance of the GDR is identical and was considered by the Tribunal in several appeals. This Tribunal found that the modus operandi was the same and that investors were misled into believing that the GDR was subscribed by many investors whereas the fact remained that the GDR was subscribed by one entity who received the loan from a bank for the purpose of subscribing to the issue. Further, the bank had given a collateral securities by the Company in the form of a pledge agreement / account charge agreement securing GDR proceeds as collateral security for the loan given to that entity. This Tribunal has found such scheme to be fraudulent.

11. Similar is a finding in the instant case and therefore it is not necessary for us to deal in detail with regard to the findings given by the WTM and the AO in this regard.

12. The only ground urged by the learned counsel for the appellants is, that in a large number of appeals this Tribunal has reduced the penalty imposed by the AO

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and the period of debarment passed by the WTM considering the gravity of the offence. In support their submission the learned counsel placed reliance upon the decisions of this Tribunal in Gurmeet Singh vs SEBI (Appeal No. 406 of 2020 decided on September 20, 2021), Prafull Anubhai Shah vs SEBI (Appeal No. 389 of 2021 decided on June 28, 2021), Adesh Jain vs SEBI (Appeal No. 217 of 2020 decided on November 19, 2020) and Yogendra Premkrishna Trivedi vs SEBI (Appeal No. 417 of 2020 decided on November 23, 2020).

13. There is no doubt that this Tribunal found that penalties imposed upon the appellants were disproportionate to the violation committed by them and had accordingly reduced the penalty as well the period of debarment while affirming the violation.

14. In the instant case, we find that Whiteview had defaulted in the repayment of the loan to the extent of USD 15.67 million out of USD 17.295 million. Whiteview in paragraph 63 of the impugned order has found that the Company received back the amount of USD 15.67 million along with interest of USD 442.704 million from Whiteview in various tranches. The WTM further found that the amount received back by the Company was eventually transferred to its subsidiaries which has not only received the proceeds of the GDR but has also been utilized for the purpose for which the GDR was issued in the first place. Considering the aforesaid that at the end of the day there is no diversion of money except for the fact that a default was committed by the Whiteview and the amount was eventually received by the Company belatedly, the AO has also given a finding that no disproportionate gain was attributed to the appellant. Further, the AO has also given a finding that no loss was caused to the shareholders or investors. Considering the aforesaid and on the principles of doctrine of proportionality we are of the opinion that the debarment period imposed upon the Company is excessive.

15. In the instant case, we find that the WTM has debarred the Company for a period of 3 years while affirming the violation committed by the Company we are of the opinion that the debarment is reduced to the period undergone.

16. Insofar as the debarment of S.K. Somany, A.K. Somany and P. Bandyopadhyay is concerned, we find that they were Chairman, Managing Director and Executive Director respectively were involved in the issuance of the GDR and were also looking after the day-to-day affairs of the Company. Thus, in our opinion, the debarment of 2 years is justified in the given circumstances. The penalty of Rs. 5 lakh imposed by AO in the circumstances is also just and proper.

17. Insofar as the appellant Sunil Patel is concerned, he was only an authorized representative of the Company and is not a director nor was he involved in the day-to-day affairs of the Company nor was part of the GDR issue. The appellant Sunil Patel was only authorized to sign the documents with Banco on the basis of a resolution passed by the Board of Directors. Thus, he had no other role to play nor was involved in the issuance of the GDR or with the day-to-day affairs of the

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Company. Consequently, merely by signing a document was insufficient to hold the said appellant guilty of fraudulent activities under Regulation 3 and 4 of the PFUTP Regulations or under Section 12A of the SEBI Act. In our opinion, the debarment of 2 years by the WTM and penalty of Rs. 5 lakh by the AO is unwarranted and cannot be sustained.

18. 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.

19. 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."

20. Consequently, while affirming the violation committed by the Company, Soma Textiles and Industries Limited in Appeal Nos. 461 of 2021 and 956 of 2022, we reduce the debarment period of the Company from 3 years to the period undergone. The penalty of Rs. 20 lakh imposed against the Company, Soma Textiles and Industries Limited, is affirmed and the penalty of Rs. 5 lakh

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under Section 23E of the SCRA is set aside. The appeals of S.K. Somany and A.K. Somany are dismissed. Insofar as Appeals No. 462 of 2021 and 958 of 2022 of P Bandyopadhyay is concerned, the appeals lack merit and is dismissed. Appeals No. 463 of 2021 and 957 of 2022 of Sunil Patel are allowed. The impugned order insofar as it relates to the said appellant is quashed. In the circumstances of the case, parties shall bear their own costs. Miscellaneous applications are disposed of.

21. 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.

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