BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Hearing : 27.4.2022
Date of Decision: 14.7.2022

Appeal No.381 of 2019

Sybly Industries Ltd.
Pawan Puri, Muradnagar,
Ghaziabad - 201206. ...Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No.C-4A, G Block,
Bandra Kurla Complex, Bandra (E),
Mumbai 400 051. …Respondent

Mr. Nihar Mody, Advocate with Mr. Prakash Shah, Advocate i/b. Prakash Shah & Associates for the Appellant.

Mr. Shyam Mehta, Senior Advocate with Mr. Nishit Dhruva, Mr. Yash Garach and Ms. Meghna Ashwin i/b. MDP & Partners for the Respondent.

With
Appeal No.382 of 2019

Mr. Umesh Kumar Mittal
Laxmi Niwas,
Opp. Modi Degree College,
Modinagar – 201204. ...Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No.C-4A, G Block,
Bandra Kurla Complex, Bandra (E),
Mumbai 400 051. …Respondent

Mr. Prakash Shah, Advocate with Mr. Meit Shah, Advocate i/b. Prakash Shah & Associates for the Appellant.

Mr. Shyam Mehta, Senior Advocate with Mr. Nishit Dhruva, Mr. Yash Garach and Ms. Meghna Ashwin i/b. MDP & Partners for the Respondent.

With
Appeal No.384 of 2019

Mr. Mahendra Kumar Gupta
A-1, Devpriya, Shambhu Nagar,
Baghpat Road, Meerut - 250002. ...Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No.C-4A, G Block,
Bandra Kurla Complex, Bandra (E),
Mumbai 400 051. …Respondent

Mr. Prakash Shah, Advocate with Mr. Meit Shah, Advocate i/b. Prakash Shah & Associates for the Appellant.

Mr. Shyam Mehta, Senior Advocate with Mr. Nishit Dhruva, Mr. Yash Garach and Ms. Meghna Ashwin i/b. MDP & Partners for the Respondent.

With
Appeal No.385 of 2019

Mahesh Chand Mittal
Laxmi Niwas,
Opp. Modi Degree College,
Modinagar – 201204. ...Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No.C-4A, G Block,
Bandra Kurla Complex, Bandra (E),
Mumbai 400 051. …Respondent

Mr. Prakash Shah, Advocate with Mr. Meit Shah, Advocate i/b. Prakash Shah & Associates for the Appellant.

Mr. Shyam Mehta, Senior Advocate with Mr. Nishit Dhruva, Mr. Yash Garach and Ms. Meghna Ashwin i/b. MDP & Partners for the Respondent.

With
Appeal No.386 of 2019

Mr. Subodh Kumar Goel
C-2, Devine Park View Apartment,
Abhay Khand – 3,
Indirapuram – 201012. ...Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No.C-4A, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai 400 051. …Respondent

Mr. Prakash Shah, Advocate with Mr. Meit Shah, Advocate i/b. Prakash Shah & Associates for the Appellant.

Mr. Shyam Mehta, Senior Advocate with Mr. Nishit Dhruva, Mr. Yash Garach and Ms. Meghna Ashwin i/b. MDP & Partners for the Respondent.

With
Misc. Application No.947 of 2021
And
Appeal No.387 of 2019

1. Mr. Mahendra Kumar Gupta
   A-1, Devpriya, Shambhu Nagar,
   Baghpat Road, Meerut - 250002.

2. Mr. Subodh Kumar Goel
   C-2, Devine Park View Apartment,
   Abhay Khand – 3,
   Indirapuram – 201012. ...Appellants

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No.C-4A, G Block,

Bandra Kurla Complex, Bandra (E),
Mumbai 400 051. …Respondent

Mr. Prakash Shah, Advocate with Mr. Meit Shah, Advocate i/b. Prakash Shah & Associates for the Appellant.

Mr. Shyam Mehta, Senior Advocate with Mr. Nishit Dhruva, Mr. Yash Garach and Ms. Meghna Ashwin i/b. MDP & Partners for the Respondent.

With
Appeal No.389 of 2019

Sybly Industries Ltd.
Pawan Puri, Muradnagar,
Ghaziabad - 201206. ...Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No.C-4A, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai 400 051. …Respondent

Mr. Prakash Shah, Advocate with Mr. Meit Shah, Advocate i/b. Prakash Shah & Associates for the Appellant.

Mr. Shyam Mehta, Senior Advocate with Mr. Nishit Dhruva, Mr. Yash Garach and Ms. Meghna Ashwin i/b. MDP & Partners for the Respondent.

With
Appeal No.390 of 2019

1. Mahesh Chand Mittal
   Laxmi Niwas,
   Opp. Modi Degree College,
   Modinagar – 201204.

2. Mr. Umesh Kumar Mittal
   Laxmi Niwas,
   Opp. Modi Degree College,
   Modinagar – 201204. ...Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, C-4A, G Block,
Bandra Kurla Complex,
Bandra (E), Mumbai 400 051. …Respondent

Mr. Prakash Shah, Advocate with Mr. Meit Shah, Advocate i/b. Prakash Shah & Associates for the Appellant.

Mr. Shyam Mehta, Senior Advocate with Mr. Nishit Dhruva, Mr. Yash Garach and Ms. Meghna Ashwin i/b. MDP & Partners for the Respondent.

CORAM: Justice Tarun Agarwala, Presiding Officer
Ms. Meera Swarup, Technical Member

Per: Justice Tarun Agarwala, Presiding Officer

1. Eight appeals have been filed against separate orders passed by the Whole Time Member ('WTM' for short) and Adjudicating Officer ('AO' for short), namely, appeal no.387 of 2019 filed by Mr. Mahendra Kumar Gupta and Mr. Subodh Kumar Goel, appeal no.389 of 2019 filed by the Company Sybly Industries Ltd. and appeal no.390 of 2019 filed by Mr. Mahesh Chand Mittal and Mr. Umesh Kumar Mittal against a common order dated 16th January, 2018 wherein the

appellant Company and its Directors have been restrained from accessing the securities market for a period of five years.

2. Appeal no.381 of 2019 has been filed by Sybly Industries Ltd. against the order of the AO dated 15th March, 2019. Appeal no.382 of 2019 has been filed by Mr. Umesh Kumar Mittal against the order of the AO dated 26th March, 2019, appeal no.384 of 2019 has been filed by Mr. Mahendra Kumar Gupta against the order of the AO dated 27th March, 2019. Appeal no.385 of 2019 has been filed by Mr. Mahesh Chand Mittal against the order of the AO dated 25th March, 2019 and appeal no.386 of 2019 has been filed by Mr. Subodh Kumar Goel against the order dated 27th March, 2019 wherein the AO has imposed penalties ranging from Rs.10 lakhs to Rs.10.30 crores.

3. Since the facts and the issues are common in all the appeals, the same are being decided together. For facility, the facts stated in appeal no.381 of 2019 is being taken into consideration.

4. The facts leading to the filing of the present appeal is, that the Board of Directors of the Company known as Sybly Industries Ltd. passed a resolution dated 31st March, 2008. The said resolution is extracted hereunder:

> *"RESOLVED THAT a bank account be opened with EURAM Bank ("the Bank") or any branch of Euram Bank, including the Offshore Branch, outside India for the purpose of receiving subscription money in respect of the Global Depository Receipt issue of the Company.*
>
> *RESOLVED FURTHER THAT Shri Mahesh Chand Mittal, Managing Director and Shri Umesh Kumar Mittal, Director of the Company, be and are hereby severally authorized to sign, execute, any application, agreement, escrow agreement, document, undertaking, confirmation, declaration and other paper(s) from time to time, as may be required by the Bank and to carry and affix, Common Seal of the Company thereon, if and when so required.*
>
> ...
>
> *RESOLVED FURTHER THAT the Bank be and is hereby authorized to use the funds so deposited in the aforesaid bank account as security in connection with loans if any as well as to enter into any Escrow Agreement or similar arrangements if and when so required.*"

5. The resolution approved by the Board of Directors resolved that a bank account would be opened with European American Investment Bank AG (hereinafter referred to as 'EURAM Bank') for the purpose of receiving the subscription money in respect of GDR issue. Further, Mr. Mahesh Chand, Managing Director and Mr. Umesh Kumar Mittal, Director of the Company were authorised to sign and execute 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 deposited in the aforesaid Bank account as security in connection with the loan, if any as well as to enter into any escrow account or similar arrangement if and when so required.

6. Based on the aforesaid resolution, the Company issued 1.5 million GDRs for USD 6.99 million equivalent to Rs.3,02,05,000 equity shares of Rs.1 each dated 9th June, 2008. The aforesaid GDR was subscribed by one entity, namely, Vintage FZE

(hereinafter referred to as 'Vintage') and a corporate announcement was made by the Company that the entire issue was subscribed.

7. 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 2nd July, 2018 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 Securities and Exchange Board of India Act, 1992 (hereinafter referred to as '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 'SCRA Act') read with Clauses 32, 36(7) and 50 of the Listing Agreement.

8. The show cause notice alleged that pursuant to the resolution dated 31st March, 2008 not only a bank account was opened with EURAM Bank but the Managing Director executed a pledge agreement dated 30th May, 2008 on behalf of the Company based on which a loan agreement dated 30th May, 2008 was executed between Vintage and EURAM Bank in which the proceeds of the GDR was to be kept as security with EURAM Bank. The show cause notice further alleged that the pledge agreement and the loan agreement was not disclosed to the stock exchange platform and, consequently, the investors and shareholders were kept in the dark. The show cause notice further alleged that based on the pledge agreement and the loan agreement EURAM Bank advanced USD 6.99 million to Vintage which amount was utilised by Vintage to subscribe to the entire issue. The GDR proceeds were pledged as security till such

time the loan was repaid by Vintage. It was also alleged that the fact that Vintage 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 Regulations.

9. The WTM and the AO 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 authorities found that the GDR was subscribed by one entity, namely, Vintage and not by three entities as disclosed by the Company vide its letter dated 22nd December, 2016. The authority further found that on account of the pledge created by the Company with EURAM Bank 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 Vintage. 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.

10. The authority found that the non-disclosure of the loan agreement and the pledge 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 since the Company has not complied with the accounting standards and since the balance lying in the EURAM Bank was not free cash. The authorities, however, found that Vintage repaid the loan amount over a period of time in instalments and that based on a Chartered

Accountant's certificate the entire GDR proceeds alongwith interest accrued thereon amounting to USD 7.48 million was transferred to the subsidiary of the appellant Company.

11. We have heard Mr. Nihar Mody, Advocate assisted by Mr. Prakash Shah and Mr. Meit Shah, Advocates for the appellant and Mr. Shyam Mehta, Senior Advocate assisted by Mr. Nishit Dhruva, Mr. Yash Garach and Ms. Meghna Ashwin, Advocates for the respondent.

12. The contention of the appellant is, that they had no knowledge of the pledge agreement or the loan agreement and that they came to know for the first time when SEBI informed the appellant about it. It was alleged that during the process of issuance of GDR the appellant had signed numerous documents as advised by the Lead Manager and it was also possible that the pledge agreement was also unknowingly signed by the Managing Director/Director of the Company. It was contended that the appellants have appointed a Lead

Manager and had signed the documents as per the advice of the Lead Manager. It was contended that when the appellant came to know about the fraud played upon them by the Lead Manager they chose not to take action by filing a complaint or FIR since the Company had received the money and the same was utilised in accordance with the object of the GDR. It was urged that the GDR proceeds were utilised in accordance with the objects of the GDR issue and that there was no diversion of money nor has the appellant indulged in any wrong dealings in securities. Further, there was no complaint from any investor with regard to the issuance of the GDR nor has the appellant made any disproportionate gain nor caused any loss to the shareholders or to the investors. It was, thus, urged that the appellant, being a small Company, has not played any fraud upon the market and the violation, if any, is only confined to the non-disclosure under the Listing Agreement for which purpose the direction of debarment by the WTM and the penalty awarded by

the AO is wholly excessive, harsh and disproportionate to the alleged violations.

13. On the other hand, the respondent supported the impugned order and contended that the modus operandi is the same as has been dealt with by this Tribunal in a large number of matters relating to the GDR issue wherein this Tribunal has held that the non-disclosure of the loan agreement and the pledge agreement was totally fraudulent and violative of the Listing Agreement. In our opinion, the contention of the appellant cannot be accepted. The signature of the Managing Director/Director on the pledge agreement has not been disputed before us and it cannot be believed that such signatures on such important documents were signed without their knowledge or in ignorance or in good faith at the instance of the Lead Manager. Further, when they came to know of the fraud, no steps were taken to lodge a complaint or an FIR. Not only this, we find that based on the pledge agreement, the GDR proceeds

were blocked for a certain period of time and it was not possible for the Company and its Directors to contend that they were not aware that the GDR proceeds had been frozen on account of the pledge agreement. Thus, in view of the aforesaid we are of the firm view that the appellants were aware of the execution of the pledge agreement and had signed with open eyes and had knowledge. The appellants consequently cannot deny the existence of the loan agreement executed between Vintage and EURAM Bank.

14. The appellants also misled SEBI into believing that there were three subscribers to the issue. Investigation found that there was only one subscriber. Explanation given by the Company and its Directors that the Lead Manager had supplied the information which were forwarded to SEBI in good faith cannot be believed. At the end of the day, the responsibility lies with the Company to forward such information which are true and the blame cannot be passed to another entity.

15. Since we have already held that the appellants were aware of the pledge agreement, non-disclosure of the pledge agreement invited penalty. Further, the corporate announcement did not disclose the fact that the subsisting pledge agreement facilitated one subscriber to subscribe to the GDR issue. The corporate announcement was misleading and presented a distorted version to the investors and created a false version inducing the investors to deal in securities.

16. There is no doubt that USD 7.48 million which included interest was eventually transferred to a subsidiary of the Company in accordance with the objects of the GDR issue. This fact has not been denied. Thus, there has been no diversion of money and there was no wrongful dealing in securities. Further, we do not find any complaint given by any shareholder or investors in this regard. The AO has himself given a finding that no disproportionate gain could be found out against the Company and its

Directors nor any loss was caused to the shareholders or investors.

17. We are accordingly of the opinion that in view of the fact that the appellant is a small listed Company the directions issued by the WTM and the penalty imposed by the AO is excessive and arbitrary as well as discriminatory.

18. In Excel Corp. (supra) the Supreme Court held:

> *"92. Even the doctrine of 'proportionality' would suggest that the court should lean in favour of 'relevant turnover'. No doubt the objective contained in the Act, viz., to discourage and stop anti-competitive practices has to be achieved and those who are perpetrators of such practices need to be indicted and suitably punished. It is for this reason that the Act contains penal provisions for penalising such offenders. At the same time, the penalty cannot be disproportionate and it should not lead to shocking results. That is the implication of the doctrine of proportionality which is based on equity and rationality. It is, in fact, a constitutionally protected right which can be traced to Article 14 as well as Article 21 of the Constitution. The doctrine of proportionality is aimed at bringing out 'proportional result or proportionality stricto sensu'. It is a result oriented test as it examines the result of the law in fact the proportionality achieves balancing between two competing interests: harm caused to the society by the infringer which gives justification for penalising the infringer on the one*

hand and the right of the infringer in not suffering the punishment which may be disproportionate to the seriousness of the Act."

19. Similar view was expressed by the Delhi High court in Rajkumar Dyeing and Printing Works Pvt. Ltd. In Rajendra Yadav, the Supreme Court held that the doctrine of equality applies to all those who are found guilty. The Supreme Court held:

"9. The doctrine of equality applies to all who are equally placed; even among persons who are found guilty. The persons who have been found guilty can also claim equality of treatment, if they can establish discrimination while imposing punishment when all of them are involved in the same incident. Parity among co-delinquents has also to be maintained when punishment is being imposed. Punishment should not be disproportionate while comparing the involvement of co-delinquents who are parties to the same transaction or incident. The disciplinary authority cannot impose punishment which is disproportionate, i.e., lesser punishment for serious offences and stringent punishment for lesser offences."

20. Undoubtedly, the doctrine of proportionality is now well established in our jurisprudence and is a recognised facet of Article 14 of the Constitution of India. In ***Andhra Pradesh Dairy Development***

Corporation Federation vs. B. Narasimha Reddy and Others (2011) 9 SCC 286, the Supreme Court held:

> *"29. It is a settled legal proposition that Article 14 of the Constitution strikes at arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. This doctrine of arbitrariness is not restricted only to executive actions, but also applies to legislature. Thus, a party has to satisfy that the action was reasonable, not done in unreasonable manner or capriciously or at pleasure without adequate determining principle, rational, and has been done according to reason or judgment, and certainly does not depend on the will alone. However, the action of legislature, violative of Article 14 of the Constitution, should ordinarily be manifestly arbitrary. There must be a case of substantive unreasonableness in the statute itself for declaring the act ultra vires of Article 14 of the Constitution. (Vide: Ajay Hasia etc. v. Khalid Mujib Sehravardi, Reliance Airport Developers (P) Ltd. v. Airports Authority of India, Bidhannagar (Salt Lake) Welfare Assn. v. Central Valuation Board, Grand Kakatiya Sheraton Hotel and Towers Employees and Workers Union v. Srinivasa Resorts Limited, and State of T.N. v. K. Shyam Sunder.)"*

21. In matters relating to punitive measures the emphasis has shifted from the wednesbury principle of unreasonable to one of proportionality. A disproportionate punitive measure which does not

commensurate with the offence would be violative of Article 14 of the Constitution of India. We are of the opinion that in the rapid growth of administrative law it has become the need and necessity to control possible abuse of discriminatory power by administrative authorities. In this regard, certain principles have been evolved by Courts, namely, that if an action is taken by an authority which is contrary to law or which is improper or where the action taken is unreasonable then the Court of law is duty bound to interfere with such action and one such mode of exercising power is to exercise the doctrine of proportionality. Where the punitive measure is harsh or disproportionate to the offence which shocks the conscience it is within the discretion of the Court to exercise the doctrine of proportionality and reduce the quantum of punishment to ensure that some rationality is brought to make unequals equal.

22. In this regard, the appellants have produced various orders passed by SEBI against various

companies and its Directors wherein different period of debarment have been given for similar/identical offence. For facility, a comparative table is given below:

Debarment Order						
Sr. No.	**Name of the GDR issuer company**	**Period of GDR issue**	**Total Amount raised by GDR issue (USD) million**	**Subscriber**	**Period of Debarment**	**Date of Order**
1.	Morepan Laboratories Ltd.	March-03	15.25 million	Solsec and Severon	1 year	24th September, 2019
2.	Vikas Metal & Power Ltd.	April-11	11.99	Vintage FZE	3 years	29th September, 2019
3.	Aqua Logistics Ltd.	Feb-11	62.38	Vintage FZE	3 years	22nd July, 2021
4.	Zenith Birla (India) Ltd.	May-10	22.99	Vintage FZE	3 years	30th March, 2021
5.	Aksh Opti-Fibre Ltd.	Sept 10	25	Vintage FZE	5 years	26th June, 2019
6.	Sybly Industries Ltd.	June 9, 2008	6.99	Vintage FZE	5 years	16th January, 2018

23. A perusal of the aforesaid table indicates that in the case of Aqua Logistics Ltd., the said Company had raised 62.38 million USD and the Company was debarred from accessing the securities market for a period of three years. Similarly, in the case of Zenith Birla (India) Ltd. the total amount raised through GDRs was 22.99 million USD and the Company was

debarred for a period of three years whereas in the instant case, the appellant Company had raised 6.9 million USD but has been debarred for five years.

24. In similar circumstances, in ***Aksh Optifibre Ltd. in Appeal No.535 of 2019 and other connected appeals decided on 27th June, 2022*** this Tribunal reduced the debarment from 5 years to three years.

25. Consequently, in our opinion, the debarment period against the appellants is excessive and discriminatory and not in consonance with the penalty awarded in similar matters.

26. Similarly, the AO penalised the appellant Company of Rs.10,30,00,000/-, the Managing Director Rs.20,00,000/- and other Directors Rs.10,00,000/-. In similar matters lesser penalty has been awarded. For facility, a comparative table is given hereunder:

Penalty Orders						
Sr. No.	**Name of the GDR issuer company**	**Date of Issue**	**GDR size (million $)**	**Subscriber**	**Combined Penalty**	**Date of the Order**
1.	ABL Biotechnologies Ltd.	June 2008	6.68	Clifford Capital Partners	Rs.50,00,000/- (Rupees Fifty Lakhs)	23rd April, 2018
2.	Syncom Healthcare Ltd.	September 2010	20.74	Vintage	Rs.25,00,000/- (Rupees Twenty	30th August,

					Five Lakhs)	2019
3.	Visu International Ltd.	April 2006	9.66	Seazun	Rs.1,25,00,000/- (Rupees 1 Crore Twenty-Five Lakhs)	18th March, 2021
4.	GV Films Ltd.	April 2007	40	Whiteview	Rs.25,00,000/- (Rupees Twenty-Five Lakhs)	29th January, 2020
5.	Aksh Opti-Fibre Ltd.	Sept 2010	25	Vintage	Rs.10,15,00,000/- (Rupees Rupees Ten Crore Fifteen Lakhs)	28th February, 2020
6.	Rana Sugars	May, 2006	18.00		Rs.10,00,000 (Rupees Ten Lakhs)	28th February, 2018
7.	Sybly Industries Ltd.	June 9, 2008	6.99	Vintage	Rs.10,30,00,000/- (Rupees Rupees Ten Crore Thirty Lakhs)	March, 2019

27. A perusal of the aforesaid table indicates that G.V. Films Ltd. had raised 40 million USD and the Company was only awarded a penalty of Rs.25,00,000/-. Another Company Syncom Healthcare Ltd., raised 20.74 million USD and was awarded a penalty of Rs.25 lakhs whereas in the case of the appellant Company who raised 6.99 million USD has been awarded Rs.10,30,00,000/-. In ***Aksh Optifibre Ltd. in Appeal No.535 of 2019 and other connected appeals,*** a penalty of Rs.10.15 crores was imposed. This Tribunal by our order dated 27th June, 2022 reduced the penalty to Rs.25 lakhs. Thus, in our

opinion, the penalty imposed is excessive and disproportionate to the violation and is also discriminatory.

28. We find that such excessive penalty imposed upon the Company does not make any sense. In the instant case, there are 7,300 public shareholders and 180 workmen. Penalising the Company with such heavy penalty is infact penalising the shareholders which is not justifiable especially for a running company. Further, the money raised through GDRs has been received by the Company and has not been misappropriated. The same has been utilitised for the purpose for which the GDR was issued, namely, for the Company's subsidiary which fact has not been disputed. Thus, it is not a case of defalcation of the funds.

29. Thus, the directions so issued under Section 11 and 11B of the SEBI Act and the penalty so imposed under Section 15HA are disproportionate and does not commensurate with the violation in view of the

directions and penalty that has been imposed in similar matters by the respondent.

30. A penalty of Rs.10,00,000/- has been imposed on the Independent Directors only on the strength that they were signatories to the board resolution. On the same basis, they have been debarred for five years. In ***Mr. Gurmeet Singh vs. SEBI, appeal no.406 of 2020 and other connected appeals decided on 20th September, 2021***, this Tribunal has held that merely being a signatory to a resolution does not mean that these Directors were part of the fraudulent scheme and that the respondent was required to show some other evidence to show that these Directors were also part of the fraudulent scheme. A specific assertion was made that they were not involved in the day to day affairs of the Company and that they had nothing to do with the proceeds of the GDR. This fact has not been denied by the respondent. The imposition of penalty is wholly arbitrary.

31. In Mr. ***S.N. Sharma vs. SEBI, appeal no.472 of 2020 decided on 7th September, 2021*** this Tribunal has held that merely because Non-Independent Executive Directors were part of the resolution cannot be penalized as they were not involved in the day to day affairs of the Company.

32. Similar view was held by this Tribunal in the case of ***Govind Das Pasari vs. SEBI, Appeal No. 201 of 2019 decided on April 30, 2021; Prafull Anubhai Shah vs. SEBI, Appeal No.389 of 2021 decided on June 28, 2021***; ***Jaiprakash Kabra, Appeal no.58 of 2021 decided on September 2, 2021, Gurmeet Singh, Appeal No.406 of 2020 and other connected appeals decided on September 20, 2021 and Rajesh Shah, Appeal no.433 of 2021 decided on July 5, 2021***. In addition to the aforesaid, this Tribunal in ***Chromatic India Ltd., Appeal No.393 of 2020 and other connected appeals decided on May 12, 2021*** held that being part of the resolution by itself cannot make the

incumbent liable and something further related to fraud committed by the incumbent is required to be shown. This Tribunal held:

> *"Without dwelling on the aforesaid aspect, we are of the opinion that in order to implicate a person, namely, a director of any fraudulent act it is necessary for the authority to further find any evidence which would show that the said person or director was involved in the fraud with regard to the GDR issue or that he was involved in the defalcation of the funds which was raised through GDR issue. In the instant case, we find that there is no such evidence against the appellant Vipin Sharma other than the fact that he was part of the Resolution dated August 13, 2010 which has been disputed by the appellant. We are of the opinion that the Resolution dated August 13, 2010 by itself does not create any suspicion nor create any fraudulent act. The Resolution by itself does not violate any provision of the SEBI Act or PFUTP Regulations."*

33. An application has been filed by the respondent to bring on record additional documents. It was urged that these documents are relevant for the purpose of justifying the action taken against the Non-Executive Independent Director. In this regard a similar application was filed by the respondent ***in appeal no.406 of 2020 Mr. Gurmeet Singh and other***

connected appeals. This Tribunal rejected the application seeking permission to bring on record the additional documents. This Tribunal held:

> *"11. In our view, the application of the respondent seeking permission to bring on record the additional documents cannot be allowed as it does not come within the parameters of the grounds given in Order 41 Rule 27 of the Code of Civil Procedure. Nothing has been stated as to why these documents which are in the public domain could not be considered by the authorities while considering the matter. Nothing has been brought on record to indicate as to why such documents which was within their knowledge could not be brought on record. In any case, reliance upon these documents are misplaced. Merely because Mr. I.S. Sukhija was the Chairman of the Audit Committee does not mean that he was party to the fraudulent scheme, if any. The observations made by the authorities in the impugned orders that he should have raised questions as to why the GDR proceeds was not brought into the Company's account or why the loan was given to the Vintage from the GDR proceeds are not matters which comes under the purview of the audit committee. In any case, we find that there was no need to raise such questions as the loan in one case was paid immediately and in the other case was paid within a couple of months. Further, the evidence which has come on record indicates that the GDR proceeds were utilized for the purpose for which the resolution for issuance of the GDR was passed. Thus, the finding of the authorities that a fraud has committed by the Company is patently erroneous. When the proceeds have come into the*

Company and have been utilized for the purpose of setting up a subsidiary in UAE the funds have been utilized for the purpose for which the GDR was issued. Thus, in our view merely because the appellant Mr. I.S. Sukhija was part of the resolution which approved the issuance of the GDR and opening of a bank account with Euram Bank does not lead to a conclusion that the appellant was part of the scheme of the alleged fraud which in any case was not in existence. Thus, imposition of penalty by the AO and debarment by the WTM was wholly erroneous on this appellant."

34. The same principle is applicable in the instant case and the application is rejected. We are of the opinion that since the loan has been repaid and the GDR proceeds have been utilized in accordance with the objects of the GDR the finding that a fraud was committed by the Company is patently erroneous. We are of the opinion that when the proceeds have come into the Company and have been utilized by the subsidiary and have been ulitized for the purpose of which the GDR was issued the debarment of the Non-Executive Director, namely, Mr. Subodh Kumar Goel and Mr. Mahendra

Kumar Gupta for five years and penalty of Rs.10 lakhs only on the basis that they were signatories to the resolution of the Board of Directors dated 31st March, 2008 appears to be excessive as well as unjustified. Other than this there is no evidence that they were part and parcel in the issuance of the GDR. A categorical statement has been made by these Directors that they were not involved in the day to day affairs of the Company. In the absence of any finding, merely because they were signatories to the resolution these Non-Executive Directors cannot be held to be part of the fraudulent scheme. The imposition of penalty and the debarment cannot be sustained.

35. A penalty of Rs.20 lakhs has been imposed upon the Directors of the Company. We find that in similar circumstances in the case of Visu International Ltd. a penalty of Rs.10 lakhs was imposed upon the Directors and in Govind Das Pasari a penalty of Rs.15 lakhs was imposed. Considering the aforesaid, we are of the

opinion that the penalty of Rs.20 lakhs is excessive. Considering the fact that they have already undergone debarment for more than three years we think it fit and proper if the penalty is reduced to Rs.10 lakhs each to be paid by the Directors.

36. Consequently, while affirming the order of the WTM and AO of the aforesaid violations committed by the Company we reduce the debarment period of the Company and the Managing Director, Director and Independent Director from five years to the period undergone. In so far as the penalty imposed by the AO is concerned, the penalty against the Company is reduced to Rs.25 lakhs. The penalty against the Managing Director and Director is reduced to Rs.10 lakhs. The penalty imposed against the Independent Director is quashed. The appeals are partly allowed. Misc. application no.947 of 2021 is also disposed of accordingly. In the circumstances of the case, parties shall bear their own costs.

37. 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.

Justice Tarun Agarwala
Presiding Officer

Ms. Meera Swarup
Technical Member

14.7.2022
RHN