BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Hearing : 31.10.2023
Date of Decision : 08.11.2023

Misc. Application No. 436 of 2023
And
Appeal No. 328 of 2023

1. Metex Marketing Pvt. Ltd.
   357, Kothari Mansion,
   SVP Road, Mumbai – 400 004.

2. Apurva Shah
   4A, Sambhav Tirth,
   2A, Bhulabhai Desai Road,
   Hajiali, Mumbai – 400 026.

3. Ashni Shah
   4A, Sambhav Tirth,
   2A, Bhulabhai Desai Road,
   Hajiali, Mumbai – 400 026.

4. Bhavna Shah
   4A, Sambhav Tirth,
   2A, Bhulabhai Desai Road,
   Hajiali, Mumbai – 400 026.

5. Manish L. Shah
   4A, Sambhav Tirth,
   2A, Bhulabhai Desai Road,
   Hajiali, Mumbai – 400 026.

6. Manish Shah HUF
   4A, Sambhav Tirth,
   2A, Bhulabhai Desai Road,
   Hajiali, Mumbai – 400 026.

7. Chanchal Jain
   1/B, Nagindas Building,
   Prathna Samaj, Mumbai – 400 004.

8. Rashi Jain
   601/602, Padmavati Heights,
   P. B. Marg, Tardeo,
   Mumbai – 400 007. ….. Appellants

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. Somasekhar Sundaresan, Advocate with Mr. Kunal Katariya, Ms. Ashmita Goradia, Advocates i/b Mr. Aagam Doshi, Advocate for the Appellants.

Mr. Vishal Kanade, Advocate with Mr. Aditya Sarangarajan, Ms. Veena Hari, Advocates i/b Mansukhlal Hiralal & Co. for the Respondent.

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

Per : Justice Tarun Agarwala, Presiding Officer

1. The appellants have challenged the order dated December 20, 2022 passed by the Adjudicating officer (hereinafter referred to as 'AO') of Securities and Exchange Board of India (hereinafter referred to as 'SEBI') imposing a penalty of Rs. 5 lakh under Section 15HB of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as 'SEBI Act') for non-compliance of SEBI order dated March 9, 2016 and further imposed a penalty of Rs. 13,10,00,000/- under Section 15H(ii) of the SEBI Act for violation of Regulations 10 and 14 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as 'SAST Regulations').

2. The facts leading to the filing of the present appeal is, that the appellants were the promoter group of the target company known as Koffee Break Pictures Ltd. and were holding 28,90,810 shares constituting 4.51% of the total shareholding of the company as on June 30, 2009. Certain warrants which were earlier allotted to the appellants were converted into equity shares between June 30, 2009 to December 31, 2009, as a result of which the shareholding of the promoter group increased from 4.51% to 25.20% as on December 31,

2009. As a result of the conversion of the warrants into shares, the collective shareholding of the promoter group increased from 12.77% to 25.20% which was beyond the threshold limit of 15% as specified under Regulation 10 of the SAST Regulations. Since the conversion of warrants into equity shares triggered the provisions of Regulation 10, the appellants were required to make a public announcement in accordance with the provisions of Regulation 10 read with Regulation 14(1) of the SAST Regulations within four working days. No such public announcement was made and consequently, the appellants violated Regulation 10 read with Regulation 14 of the SAST Regulations.

3. SEBI, accordingly, issued a show cause notice dated September 26, 2014 under Section 11 and 11B of the SEBI Act to show cause as to why appropriate directions under Section 11 and 11B of the SEBI Act read with Regulations 44 and 45 of the SAST Regulations should not be issued for violating Regulation 10 read with Regulation 14(1) of the SAST Regulations. Vide order dated March 9, 2016, the Whole Time Member (hereinafter referred to as 'WTM') directed the appellants to make a public announcement

jointly and severally and acquire the shares of the target company in accordance with the provisions of the SAST Regulations.

4. The appellants filed an appeal before this Tribunal which was dismissed by an order dated June 4, 2019. An appeal before the Hon'ble Supreme Court was also dismissed on September 6, 2019. Since the order of the WTM dated March 9, 2016, as affirmed by this Tribunal, was not complied and no open offer was made, the AO initiated proceedings by issuance of a show cause notice on April 1, 2022 to show cause why penalty should not be imposed under Section 15H(ii) and 15HB of the SEBI Act. The AO after considering the material evidence on record rejected the contention of the appellants and imposed a penalty. The AO did not agree with the submission of the appellants that they were under financial constraints and that they were not in a position to comply with the order of the WTM.

5. We have heard Mr. Somasekhar Sundaresan, the learned counsel with Mr. Kunal Katariya, Ms. Ashmita Goradia, the learned counsel for the appellants and Mr. Vishal Kanade, the learned counsel with Mr. Aditya Sarangarajan, Ms. Veena Hari, the learned counsel for the respondent.

6. Having heard the learned counsel for the parties, we find that the controversy involved in the present appeal is squarely covered by a decision of this Tribunal in ***G. R. K. Reddy and Ors. vs. SEBI in Appeal No. 584 of 2020 and other companion appeals decided on October 17, 2023.*** This Tribunal considered the law declared by the Hon'ble Supreme Court in ***SEBI vs. Sunil Krishna Khaitan and Ors. [(2022) SCC Online SC 862]*** and held as under :-

> *"26. In the matter of* ***Sunil K. Khaitan (supra),*** *warrants were issued which triggered the requirements of compliance of Regulations 10 and 11 of the SAST Regulations since the said provisions were violated. SEBI issued a show cause notice to show cause as to why suitable direction under Section 11 and 11B of the SEBI Act read with Regulations 44 and 45 of the SAST Regulations should not be issued. The WTM after considering the matter issued an order directing the company and its directors to make combined public announcement to acquire shares in compliance of the Regulations 10 and 11. The order was challenged in appeal before the appellate Tribunal wherein the Tribunal held that Regulation 10 was not violated but Regulation 11(1) was violated. This Tribunal held that since there was a delay of 5 years in the issuance of the show cause notice, the direction to make an open offer was not justified and, consequently, imposed a penalty of Rs. 25 lakh."*
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> *"27. The Hon'ble Supreme Court considered the matter and held that the use of the word "may" in Regulation 44 reflects that SEBI has been conferred a*

discretion and that the word "may" is not "shall" and, therefore, it is not mandatory that in every case of violation and breach of Regulations 10, 11 and 12 of the SAST Regulations, a direction under Regulation 44 should be issued. In an appropriate case, appropriate orders for direction under Regulation 44 and / or penalty under Chapter VI-A could be imposed in as much as Regulation 44 only provides a discretionary power and is not mandatory in nature. The Hon'ble Supreme Court further held that other directions under Regulation 44 are required to be considered after taking into consideration the relevant factors including the interest of the securities market and protection of the investors. The Hon'ble Supreme Court held as under :-

> *"72. The use of the word 'may' in Regulation 44 and the wording of Sections 11(1), 11B and 11(2)(h) reflect that the Board has been conferred a discretion, which in turn also means and should be interpreted as imposing a duty, an aspect which we will elucidate in the subsequent paragraphs. Use of the word 'may' over the years is normally construed as permissive and not imperative. The words 'may' or 'shall' by their very etymological foundation denote discretion and mandatory nature of an act respectively. This Court has, therefore, held that the courts should not readily interpret the word 'may' as 'shall' unless such interpretation is necessary to avoid absurdity, inconvenient consequences or as mandated by the intent of the legislature which is gathered from the other parts of the statute."*

> *"73. Use of the word 'may' and not 'shall' in Regulation 44 is significant. It is not mandatory that in case of every violation and breach of Regulations 10, 11 and 12, direction under Regulation 44 shall be issued. The*

interpretation gets fortified in view of the words and object of the Regulation 44 which empowers the Board to issue directions as it deems fit. Section 11(1), while broadly defining the functions of the Board, states that it is the duty of the Board to protect interest of investors in securities and to promote the development of, and regulate the securities market by such measures as it thinks fit. Section 11B, which deals with the power of the Board to give directions, states that the Board, after making or causing an inquiry, may issue directions if it is satisfied that it is necessary in the interest of the investors, or orderly development of the securities market; to prevent the affairs of any intermediary or other persons referred to in Section 12 from conducting affairs in a manner detrimental to the interest of the investors or to secure proper management of such intermediary or persons. Section 11(2)(h) provides that the Board is entitled to take measures for regulating substantial acquisition of shares and takeover of companies. Regulation 44 states that the Board while issuing directions, has to keep in mind the interest of the securities market and its role as a protector of interest of investors. We will read the word 'or' between the expression 'in the interest of securities market or protection of investors' as 'and'. The Board, therefore, when it decides to exercise its power under Regulation 44 and issues directions under the said Regulation has to keep the two facets in mind, namely, (i) interest of the securities market; and (ii) protection of interest of the investors. The exercise of discretion of the Board, in fact, would not be restricted to the two facets mentioned above as the power and functions of the Board are far broader as they include promotion, development and regulation of securities market as a whole and regulating

substantial acquisition of shares and takeover of companies."

"74. Discretion is an effective and an important tool which the legislature confers and vests with the executive for effective and good governance, administration, and in the present case - regulation, of the securities market which has complex commercial and economic facets. Therefore, the law provides an option to the Board and the authorities to adopt one or the other alternatives. However, this does not mean that the Board or the authorities enjoy unfettered and unchecked discretionary jurisdiction to act according to private or personal opinion in a vague and fanciful manner. Discretion, when of wide amplitude, and when it can have civil and penal consequences, must be exercised in a legal and regular manner. Exercise of discretion is always governed by rules, which means that the exercise of discretion should be fair and reasonable as the legislature while conferring discretion never intends that the authorities would not act whimsically, arbitrarily, but on the precept that they shall act only when it appears to be necessary in public interest. Legal exercise of discretion is one, where the authority examines and ascertains the facts, is aware of the law, and then decides objectively and rationally what serves the interest better. This is true even when the statutes are silent and only the power is conferred to act in one way or the other. Reasonableness as a standard is tested by reference to the community standards at the time of exercise of discretion. This means that discretion should be exercised within the limit to which an honest man competent to discharge his office ought to confine himself. It will be also true to state that

the greater the harm or penal consequences, greater is the duty and obligation of the public authority to ensure that discretion is used as an effective tool in regulation or administration but does not cause confusion, chaos and instability."

"75. In the context of Regulations 44 and 45, it implies that the Board has the power to make a choice between different courses of action or inaction. This choice is not unfettered but is always held subject to implied limitations inherent in every statute, limitations set by the common law and the constitutional mandate of rule of law. The underlying rationale of giving discretion is to ensure that the Board exercises the discretion in consonance with legitimate values of public law, which include need to maintain legal certainty and consistency which are at the heart of the principle of rule of law. These have to be balanced with other equally legitimate public law value, which is the object and purpose of the enactment. The need for the said flexibility is given and is necessary to meet unusual and practical situations and to do justice in a particular case. The remedial order passed by the Board as the regulator must also meet the said parameters in addition to meeting the requirements of the enactment."

"76. Clearly, therefore, Regulation 44 differs from Section 15-H, which is somewhat a strict liability provision that applies if a person fails to comply with the clauses (i) to (iv). It may be, however, noted that Section 15-H prescribes the lower as well as the higher monetary penalty limits. These stipulations have undergone modifications and changes from time to time. As per the amendments made by Act No. 59 of

2002, with retrospective effect from 29 October 2002, the penalty which can be imposed is not to be less than Rs. 10,00,000/- but may extend up to Rs. 25,00,00,000/- or three times the amount of profits made out of such failure, whichever is higher. The phase 'profits made out of such failure' in Section 15-H indicates that while imposing quantum of penalty the authority should consider the profit made by the acquirer on account of failure to comply with the requirements mentioned in clauses (i) to (iv) of Section 15-H."

"78. In this context, reliance placed by the Board on the judgments which relate to and arise from the orders passed by the adjudicating officer under Chapter VI-A of the Act are of no relevance, as Regulation 44 is a discretionary power and not mandatory in nature. Not only this, the directions under Regulation 44 are required to be issued considering relevant factors, including, interest of the securities market and protection of the investors in mind. Regulation 44 is not a strict liablity provision."

"82. We entirely agree with the reasoning given by the Appellate Tribunal for setting aside the directions given in the penultimate paragraph of the orders passed by the Whole Time Member. As noticed above, the violation alleged in Appeal No. 23 of 2013 in the case of Sunil Krishna Khaitan relates to the years 2006-2007. The order issuing the directions was passed on 31 December 2012, nearly eight years after the alleged violation."

"83. The direction given by the Board vide letter dated 17 December 2012 in the case of Madhuri S. Pitti in the form of direction to modify the draft letter of offer submitted to the Board for approval on 19 September 2011 pursuant to the public announcement made by PLL on 9 September 2011, it must be stated, is rather odd and defies objectivity and logic. The Appellate Tribunal is right in noticing that there was lack of clarity on the part of the Board as to the provision under which the power has been exercised, as the Board's power under Regulation 18 of the Takeover Regulations 1997 is to specify changes, if any, in the letter of offer, without there being any obligation on the part of the Board to do so, and thereupon the merchant banker and the 'acquirer' are required to carry out such changes before the letter of offer is despatched to the shareholders. As per sub-regulation (2), the letter of offer is to be despatched to the shareholder not earlier than 21 days from the date of submission of the letter of offer to the Board in terms of sub-regulation (1). In this case, directions of the Board for amendment of the letter of offer was issued after a lapse of more than one year as the draft letter of offer was submitted on 19 September 2011 and the directions were issued vide letter dated 17 December 2012. Further, these directions were for the reason that the acquirer had failed to comply with Regulation 10 of the Takeover Regulations 1997 in the remote past, that is, in the year 2006 and 2007. Clearly, this is whimsical and arbitrary exercise of discretion by the Board which would have led to chaos and confusion."

"28. The Hon'ble Supreme Court in paragraph nos. 82 of the ***Sunil Khaitan's matter (supra),*** *agreed with the reasoning of this Tribunal for setting aside the*

> *direction of the WTM for making an open offer and accepted that the order of the WTM issuing directions after 8 years of the alleged violation was not proper. In paragraph nos. 83 of the* ***Sunil Khaitan's judgment (supra),*** *the Hon'ble Supreme Court further held that in the matter of* ***Madhuri S. Pitti,*** *the direction to modify the draft letter of offer after a lapse of more than one year were whimsical and arbitrary exercise of the discretion by the Board."*

7. The aforesaid principle is squarely applicable in the instant case. The Hon'ble Supreme Court in ***Sunil Krishna Khaitan (supra)*** clearly held that the word 'may' as depicted in Regulation 44 of the SAST Regulations confers a discretion and that it is not mandatory that in every case of violation and breach of Regulation 10 of the SAST Regulations that a direction to make an open offer is to be issued. In appropriate cases appropriate orders for direction under Regulation 44 and / or penalty under Chapter VI could be imposed.

8. In ***Clariant International Ltd. & Anr. vs. SEBI [(2014) 8 SCC 524],*** the Hon'ble Supreme Court clarified that the direction to make an open offer should not be resorted to where the public shareholding of the target company has been altered since the time of requirements of making an open offer. In the instant case, the shareholding of the appellants has been reduced from 54.40% to

12.57% and this factor being a relevant factor ought to have been considered.

9. In ***G. R. K. Reddy (supra),*** the AO had imposed a penalty of Rs. 74.75 crore under Section 15H(ii) of the SEBI Act. This Tribunal considered the matter and held as under :-

> *"41. A perusal of the provisions of Section 15H clearly indicates that for failure to make a public announcement to acquire shares at a minimum price under Section 15H(ii), a penalty of not less than Rs. 10 lakh which can extend up to Rs. 25 crore or three times of the amount of profits made out of such failure could be imposed. There are two factors involved, namely, the penalty could range from Rs. 10 lakh to Rs. 25 crore or three times of amount of profits. In the instant case, profit has not been calculated by the AO. The AO has considered the costs of acquisition to be around Rs. 67 crore and after adding interest had imposed a penalty of Rs. 74.75 crore. In our opinion, the AO has exceeded the powers that can be exercised under Section 15H(ii). The maximum penalty is Rs. 25 crore or three times of the amount of profits. In the absence of calculation of the profits the imposition of penalty is wholly arbitrary."*

10. The said decision is squarely applicable as in the instant case, we find from a perusal of paragraph nos. 41 of the impugned order that a penalty of Rs. 13.10 crore has been imposed on the basis of the cost of acquisition that could have been involved if the

appellants had made an open doffer. In our opinion, Section 15H(ii) of the SEBI Act clearly envisages that penalty cannot be less than Rs. 10 lakh and which may exceed to Rs. 25 crore or three times of the amount of profits whichever is higher. The cost of acquisition is not profit as depicted under Regulation 15H(ii) of the SEBI Act. Consequently, the imposition of penalty under Section 15H(ii) of the SEBI Act is wholly erroneous, excessive and does not commensurate with the violation of Regulation 10 of the SAST Regulations.

11. Further, in our opinion, penalty under Section 15HB of the SEBI Act cannot be issued for the enforcement of an order of the WTM passed under Section 11 and 11B of the SEBI Act read with Regulations 44 and 45 of the SAST Regulations.

12. According to the respondent, for non-compliance of the directions of the WTM, a penalty under Section 15HB could be issued. It was urged, that under Section 15HB whoever fails to comply with the directions issued by the Board for which no separate penalty has been provided, shall be liable to pay a penalty.

13. Directions issued under Section 11B are under Chapter-II of the SEBI Act, which gives powers to the Board to issue such

directions as are necessary to protect the interest of the investors in securities and to promote the development of, and to regulate the securities market by such measures as it thinks fit. Such directions issued under 11B are in the nature of orders which are passed after due enquiry.

14. Black's Law Dictionary Seventh Edition defines 'direction' to mean an order. The word 'order' has also been defined in the same Black's Law Dictionary Seventh Edition as a command, direction or instruction, a written direction or command delivered by a court or judge. Thus, direction and order are synonymous terms and are interchangeable.

15. In ***Rajinder Nath vs. Commissioner Of Income Tax [(1979) 4 SCC 282],*** the Supreme Court held that a direction is an order issued by the authority or Court which is empowered to give while deciding the case before it.

16. Section 15HB is under Chapter-VIA of the SEBI Act, which provides for penalties and adjudication. A perusal of Chapter-VIA would indicate that penalties have been provided for specific violations, for example, under Section 15A, a penalty is provided for

failure to furnish information, return, etc. Under Section 15B penalty is provided for failure by any person to enter into agreement with clients. Penalty is provided under Section 15C for failure to redress investors' grievances and so forth. Section 15HB is a residuary clause meaning thereby that where specific penalties have not been provided elsewhere under Chapter-VI, then a penalty could be awarded under Section 15HB for failure to comply with any provisions of the Act, Rules, Regulations or directions issued by the Board.

17. The word 'directions' issued by the Board under Section 15HB is different and distinct from the directions issued under Section 11B after due enquiry and adjudication. There are many directions issued under the Regulations and the Circulars requiring a person to do an act in a certain manner. For example, a person is required to comply with a certain provision within a stipulated period. Failure to comply with such directions issued by the Board under the Act, Regulations, Rules or Circulars if not complied with may invite penalty. If penalty is not specified under Chapter-VIA from Section 15-A to Section 15-HAA for failure to comply with

such type of directions then penalty can be imposed after adjudication under the residuary clause Section 15HB.

18. In our opinion, Section 15HB cannot be invoked for noncompliance of any directions issued under Section 11B after enquiry and adjudication.

19. We are further of the opinion that Section 11B(2) was amended w.e.f. March 8, 2019 which gave powers to the Board (in the instance case to the WTM) to levy penalty under Section 15HB. This power was not utilized and, therefore, AO could not exercise such power under Section 15HB.

20. We are also of the opinion that the penalty imposed by the AO is excessive and arbitrary. The AO has not considered the hardship and the situation prevailing at the time of the passing of the impugned order.

21. In similar circumstances, for failure to make an open offer the respondent has imposed much lower penalties for violation under Section 15H(ii) of the SEBI Act which is apparent from the table below :-

Sr. No.	Parties	Date of order	Violation	Amount of Penalty (Rs.)
1.	Sunil Krishna Khaitan	June 19, 2013	Regulation 11(1) of the Takeover Regulations, 1997	25 Lakhs
2.	Shri Fateh Lal Shah & Ors.	May 23, 2018	Regulations 3(1) and 4 of the Takeover Regulations, 2011	6 Lakhs
3.	ISG Traders Ltd.	March 8, 2017	Regulations 3(1), 3(3) and 13(1) of the Takeover Regulations, 2011	10 Lakhs
4.	R V Lifestyle Ltd. & Ors. vs. SEBI	May 15, 2019	Regulation 11(1) of Takeover Regulations, 1997	30 Lakhs
5.	Pradeep B. Ranka & Ors.	March 23, 2018	Regulation 11(2) read with 14(1) of the Takeover Regulations, 1997	10 Lakhs
6.	Vaman Madhav Apte & Ors.	October 31, 2014	Regulation 11(2) of the Takeover Regulations, 1997	10 Lakhs
7.	Intercon Finance Pvt. Ltd. & Ors.	December 24, 2019	Regulation 11(2) of the Takeover Regulations, 1997	5 Lakhs
8.	Assam Timber Products Pvt. Ltd. & Ors.	August 22, 2017	Regulation 11(2) of the Takeover Regulations, 1997	11 Lakhs
9.	Kaminiben Atulbhai Patni & Ors.	January 30, 2022	Regulations 3(1) and 4 of the Takeover Regulations, 1997	10 Lakhs
10.	Mooldhan Advisory Systems Pvt. Ltd. & Ors.	December 12, 2017	Regulations 10 and 14 of the Takeover Regulations, 1997	25 Lakhs
11.	Ushdev Trade Ltd. vs. SEBI	September 14, 2010	Regulations 10 and 14 of the Takeover Regulations, 1997	5 Lakhs
12.	TGV Projects & Investments Ltd. & Ors.	April 20, 2009	Regulation 11(2) of the Takeover Regulations, 1997	5 Lakhs
13.	Capetown Trading Company Pvt. Ltd. vs. SEBI	June 28, 2019	Regulation 12 of the Takeover Regulations, 1997	20 Lakhs
14.	Jayanti Lal Bhandari & Ors.	October 3, 2017	Regulation 12 of the Takeover Regulations, 1997	5 Lakhs
15.	Vashi Construction Pvt. Ltd. & Ors.	January 19, 2012	Regulation 10 of the Takeover Regulations, 1997	20 Lakhs
16.	Baader Bank Aktiengesellschaft vs. SEBI	October 10, 2019	Regulation 10 of the Takeover Regulations, 1997	25 Lakhs
17.	G. P. Shah Investment Pvt. Ltd. & Ors. vs. SEBI	March 16, 2020	Regulations 3(2) of the Takeover Regulations, 2011	5 Crores
18.	Hemant Kothari vs. SEBI	September 12, 2014	Regulation 10 of the Takeover Regulations, 1997	40 Lakhs
19.	Kunal Pradeep Savla vs. SEBI	April 13, 2019	Regulation 11(2) of the Takeover Regulations, 1997	7 Lakhs
20.	Mega Resources Ltd. vs. SEBI	September 7, 2017	Regulation 11(2) of the Takeover Regulations, 1997	50 Lakhs
21.	Shilpa Mahavir Deshlahra vs. SEBI	September 15, 2020	Regulations 3(2) of the Takeover Regulations, 2011	5 Crores
22.	Unijules Life Sciences Ltd. vs. SEBI	November 1, 2012	Regulations 10, 11 and 14 of the Takeovers	50 Lakhs

			Regulations, 1997	
23.	Dr. V. K. Sukumaran vs. SEBI	August 24, 2021	Regulations 3(2) of the Takeover Regulations, 2011	10 Lakhs

22. From the aforesaid table, in the matter of ***Sunil Krishna Khaitan (supra),*** the direction to make an open offer was set aside by the Tribunal and a monetary penalty of Rs. 25 lakh was imposed which was upheld by the Hon'ble Supreme Court. Similarly, in the ***Vaman Madhav Apte & Ors. vs. SEBI,*** the imposition of Rs. 10 lakh on account of failure to make an open offer was upheld by this Tribunal as well as by the Hon'ble Supreme Court by its order dated May 3, 2019. Similarly, in the matter of ***Mooldhan Advisory Systems Pvt. Ltd. & Ors.,*** the direction of penalty of Rs. 25 lakh passed was upheld by this Tribunal. We also find that direction to make an open offer was issued in the case of ***Parsoli Corporation*** and against its promoters Zafar Sareshwala and Uvesh Sareshwala. These entities lost at every round all the way to the Hon'ble Supreme Court with concurrent judicial finding in SEBI's favour. On account of non-compliance of the open offer SEBI closed the matter with imposition of monetary penalty of Rs. 25 lakh.

23. We also find that the company had a negative networth and the appellants were financially incapable to make an open offer having no income from the last five years. It has come on record that the appellants sold the entire shareholding in the company in order to repay debts of bank and financial institutions. The appellants also sold the personal property to settle the bank loans taken by the company. This fact was highlighted by the appellants before the AO which has not been disputed, but the same has been rejected on the ground that the financial networth as in the year 2009 was not disclosed. We are of the opinion that such approach was incorrect and unwarranted and that the financial constraints is a relevant factor which is required to be considered as a mitigating circumstance under Regulation 44 of the SAST Regulations read with Section 15J of the SEBI Act. We also find the contention that the appellants were financially incapable of making an open offer was rejected on the ground that the appellants were staying in upscale areas of Mumbai. In our opinion, such grounds cannot be considered as it is based on personal knowledge of the AO and is not based on any assertion made in the show cause notice. Even otherwise, it is common knowledge that people staying in upscale areas are also having meager income and are staying in rented properties.

24. In view of the aforesaid, the impugned order passed by the AO imposing a penalty cannot be sustained and is quashed. The appeal is allowed. Further, we are of the opinion that no useful purpose will be served in remitting the matter back for reconsideration on the quantum of penalty as the alleged transactions are of the year 2009. We are of the opinion that much water has flown and a quietus should be reached. The minimum penalty specified under Section 15H(ii) is Rs. 10 lakh to a maximum of Rs. 25 crore. Considering the penalties imposed by SEBI as given in the aforesaid table which is not disputed, this Tribunal apart from exercising the powers of the Board can also exercise the powers to make such orders and give such direction as may be necessary or expedient to secure the ends of justice as specified under Rule 21 of the Securities Appellate Tribunal Procedure Rules, 2000. These powers had been conferred upon the Tribunal with a view to do complete justice between the parties which is equitable in nature to be exercised to ensure justice between the parties or to prevent miscarriage of justice.

25. Considering the fact that the dispute is from the year 2009 onwards and the matter has lingered for more than 15 years, we are

of the opinion that a quietus must be reached and the matter is finally laid to rest. Considering these facts and the penalties imposed by SEBI as given in the aforesaid table and considering the size of the open offer that was required to be made, we are of the opinion that substantial justice would be done if a penalty of Rs. 30 Lakh is imposed upon the appellants to be paid jointly and severally within eight weeks from today. We direct accordingly. In the circumstances of the case, parties shall bear their own costs.

Justice Tarun Agarwala
Presiding Officer

Ms. Meera Swarup
Technical Member

08.11.2023
PTM

PRAMILA TANAJI MISAL

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