

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved On: 20.09.2013

Date of Decision: 10.10.2013

Appeal No. 111 of 2013

Dhaval Mehta
5/A, Vaishnav Society,
Ramnagar, Sabarmati,
Ahmedabad- 380 005

...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. P. N. Modi, Senior Advocate with Mr. Neville Lashkari, Advocate
for the Appellant.

Mr. Shiraz Rustomjee, Senior Advocate with Mr. Mihir Mody and
Mr. Pratham V. Masurekar Advocates for the Respondent.

CORAM : Justice J.P. Devadhar, Presiding Officer
Jog Singh, Member

Per : Justice J.P. Devadhar

1. This appeal is filed to challenge order dated 6th March, 2013 passed by adjudicating officer of the Securities and Exchange Board of India ('SEBI' for short). By the said order penalty of ₹ 1 crore has been imposed upon appellant under Section 15HB of the Securities and Exchange Board of India Act, 1992 ('SEBI Act' for short) on the ground that appellant failed to comply with the directions contained in the order of SEBI dated 31st October, 2008. By order dated 31st October, 2008 appellant was to disgorge unlawful gain of ₹ 72 lakhs with interest

thereon at the rate of 10% from the date of listing (12th August, 2005) of the IPO of IDFC Limited till actual disgorgement.

2. Facts relevant to the case of appellant who is an individual investor and has been a trader in the securities market since 2005 is as follows:-

3. On noticing certain irregularities in the dealing of shares offered through Initial Public Offerings (IPO's) of Suzlon Energy Ltd. ('Suzlon' for short) and IDFC Ltd. ('IDFC' for short) during the period 2003-2005, SEBI passed ad-interim ex-parte order on 27th April, 2006 against several parties including the appellant herein. By that ad-interim ex-parte order appellant was restrained from buying, selling or dealing in the securities market directly or indirectly until further orders. The said ad-interim ex- parte order dated 27th April, 2006 was confirmed on 27th November, 2007.

4. Thereafter, show cause notice was issued on June 4, 2008 calling upon appellant to show cause as to why suitable directions should not be issued against him. As the appellant failed to submit reply and failed to avail opportunity of hearing, Whole Time Member of SEBI passed an order on 31st October, 2008 ('Disgorgement Order' for short) directing the appellant to disgorge ₹ 72 lakhs with interest thereon at the rate of 10% from the date of listing till actual disgorgement. On the same date i.e., on 31st October, 2008 itself, adjudicating officer had passed an order ('adjudication order' for short) imposing penalty of ₹ 1 crore on appellant under Section 15HA of SEBI Act for violating provisions of Section 12A of the SEBI Act and Regulation 3 and 4 of Securities and

Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 ('FUTP' for short).

5. Challenging both the above orders, appellant filed two appeals being Appeal No. 155 of 2008 and Appeal No. 25 of 2009 before this Tribunal. Appeal No. 155 of 2008 filed against the disgorgement order dated 31st October, 2008 was dismissed by this Tribunal on 8th September, 2009. Appeal No. 25 of 2009 filed against the adjudication order also dated 31st October, 2008 was dismissed by this Tribunal on 15th September, 2009 for the reasons recorded in the aforesaid order dated 08th September 2009.

6. Challenging aforesaid orders of this Tribunal, appellant filed two Civil Appeals before the Apex Court, viz, Civil Appeal No. 7697 of 2009 against order of this Tribunal dated 8th September, 2009 (arising from disgorgement proceedings) and Civil Appeal No. 7861 of 2009 to challenge order of this Tribunal dated 15th September, 2009 (arising from adjudication proceedings).

7. Apex Court passed a common order in both the Civil Appeals on 15th February 2010 & relevant portion of that order reads thus:-

“Issue notice, limited to the question whether Securities and exchange Board of India ['SEBI' for short] has the authority to impose penalty under Section 15(i) of the Securities and Exchange Board of India Act, 1992 ['Act', for short], returnable after ten weeks. This question arises in the context of the claim of the appellant that he is not a broker in the stock market and that there is no provision in the Act to impose penalty on “any person other than a stock broker”. ***As far as penalty is concerned, SEBI is***

restrained from recovering the amount of Rupees one crore, subject to the appellant depositing the said amount in the Registry of this Court within ten weeks from today.”(Emphasis supplied)

8. In accordance with aforesaid order, appellant deposited a sum of ₹ 1 crore on 10th September 2010 (belatedly) but deposit was made in Appeal No. 7697 of 2009 arising from disgorgement proceedings as is evident from the receipt issued by the Supreme Court Registry.

9. Subsequently, appellant moved Interlocutory Application No. 7 of 2011 in Appeal No. 7697 of 2009 (Disgorgement proceedings) with a prayer that the appellant be allowed to withdraw the appeal and amount of ₹ 1crore deposited, with accrued interest, be refunded to appellant for being paid to respondent. Appellant had also filed Interlocutory Application No. 4 of 2011 in Civil Appeal No. 7861 of 2009 with a prayer for withdrawal of Civil Appeal No. 7861 of 2009.

10. Apex Court, thereupon disposed of both appeals on 21st September, 2012 by passing order as follows:

“Learned counsel appearing on behalf of the appellant submits that the amount which is to be paid to the Securities and exchange Board of India, has been deposited by the appellant. We direct that the amount deposited by the appellant be released to the Securities and Exchange Board of India. In view of the above, learned counsel prays for withdrawal of these appeals. These appeals are accordingly dismissed as withdrawn.”

11. In the meantime, by a show cause notice dated 16th December, 2009, appellant was called upon to show cause as to why penalty should not be imposed upon appellant under Section 15HB of SEBI Act for failing to disgorge the amount as directed in the disgorgement order

dated 31st October, 2008. In spite of service of repeated notices for personal hearing, appellant failed and neglected to appear and therefore by impugned order dated 6th March, 2013 penalty of ₹ 1 crore was levied under Section 15HB of SEBI Act, 1992 on account of failure to disgorge ₹ 72 lakhs with 10 % interest within the time stipulated in the order dated 31st October, 2008. Challenging the aforesaid order dated 6th March, 2013, present appeal is filed.

12. Mr. P. N. Modi, learned senior Advocate appearing on behalf of appellant submitted that by common order dated 15th February, 2010 passed in both Civil Appeal Nos. 7697 and 7861 of 2009 Apex Court directed appellant to deposit ₹ 1 crore and accordingly deposit of ₹ 1 crore made by appellant and later on received by respondent must be held to be in full and final settlement of claims which were subject matter of both appeals. Consequently penalty imposed by impugned order dated 6th March 2013 on the footing that claims arising from disgorgement order which were subject matter of Civil Appeal No. 7697 of 2009 have not been complied with cannot be accepted.

13. Counsel for appellant further submitted that deposit of ₹ 1 crore was in fact made by appellant in Civil Appeal No. 7697 of 2009 in disgorgement proceedings as is evident from the receipt issued by Supreme Court Registry. In Interlocutory Application No. 7 of 2011 filed in Appeal No. 7697 of 2009, the appellant while seeking permission to withdraw Appeal no. 7697 of 2009 (filed in disgorgement proceedings) had sought withdrawal of ₹ 1 crore deposited thereunder for being paid to respondent, obviously in discharge of disgorgement

liability. In fact, Advocate for respondent in his letter dated 4th January, 2013 addressed to the Supreme Court Registry seeking withdrawal of the amount deposited by appellant had acknowledged that the deposit was made in Civil Appeal No. 7697 of 2009 relating to disgorgement proceedings. Even the Apex Court on 21st September, 2012 while permitting appellant to withdraw both Civil Appeals, permitted respondent to withdraw ₹ 1 crore deposited in Civil Appeal No. 7697 of 2009 arising from disgorgement proceedings and in fact appellant has withdrawn the amount of ₹ 1 crore deposited in that appeal, which obviously means that the amount of ₹ 1 crore has been paid towards disgorgement liability and hence SEBI was not justified in passing the impugned order on the footing the disgorgement liability has not been discharged.

14. Even on merits, it is contended by Mr. Modi, that disgorgement order dated 31st October, 2008 itself sets out consequences for non compliance of that order and therefore SEBI by invoking Section 15HB of SEBI Act 1992 could not have imposed penalty for the alleged non-compliance of disgorgement order. Submission is that, once disgorgement order itself provides that if the disgorgement amount of ₹ 72 lakhs with interest at the rate of 10% is not paid within the stipulated time, appellant shall be restrained from buying, selling or dealing in securities market for an additional period of 5 years without prejudice to SEBI's right to enforce disgorgement, then, assuming that appellant has not deposited disgorgement amount of ₹ 72 lakhs with interest at the rate of 10% within the stipulated time, it is not open to

SEBI to invoke jurisdiction under Section 15 HB of SEBI Act and pass impugned order imposing penalty of ₹ 1 crore as it amounts to double jeopardy which is not permissible in law.

15. We see no merit in the above contentions. As rightly contended by advocate for respondent, Apex Court order dated 15th February, 2010 specifically records that in view of restraining SEBI from recovering penalty of ₹ 1 crore, appellant is directed to deposit ₹ 1 crore towards penalty imposed upon appellant by adjudication order dated 31st October, 2008. Therefore, fact that common order in Civil Appeal No. 7697 of 2009 (relating to disgorgement proceedings) and Civil Appeal No. 7861 of 2009 (relating to penalty imposed under adjudication order) was passed by Apex Court on 15th February, 2010, it cannot be inferred that ₹ 1 crore was directed to be deposited in discharge of claims under both appeals, because, firstly, order dated 15th Feb, 2010 was interim order passed during the pendency of Civil Appeals and not a final order and secondly, deposit of ₹ 1 crore was ordered in view of Apex Court restraining SEBI from recovering penalty of ₹ 1 crore imposed under adjudication order dated 31st October, 2008. Therefore, argument of appellant that ₹ 1 crore was deposited in full and final settlement of liability under disgorgement order as well as adjudication order both dated 31st October, 2008 cannot be accepted.

16. Fact that ₹ 1 crore was deposited by appellant in Civil Appeal No. 7697 of 2009 arising from disgorgement proceedings, fact that Supreme Court Registry accepted and issued receipt to the effect that deposit of ₹ 1 crore has been made in Civil Appeal No. 7697 of 2009 relating

disgorgement proceedings and the fact that even advocate for SEBI initially sought withdrawal of ₹ 1 crore from Civil Appeal No. 7697 of 2009 by treating that amount as being deposited in disgorgement proceedings cannot be a ground to hold that the said amount was deposited towards appellant's liability under the disgorgement order, because, Apex Court in its order dated 15th February, 2010 had specifically directed that deposit of ₹ 1 crore has been ordered in lieu of restraining SEBI from recovering penalty of ₹ 1 crore imposed under adjudication order dated 31st October, 2008. Therefore, when Apex Court had directed appellant to deposit ₹ 1 crore towards penalty, appellant was not justified in depositing ₹ 1 crore in Civil Appeal No. 7697 of 2009 relating to disgorgement liability. Similarly, fact that Supreme Court Registry has wrongly accepted the deposit in appeal relating to disgorgement proceedings and advocate for SEBI had not raised any objection in respect thereof, it cannot be inferred that the deposit of ₹ 1 crore was made in discharge of disgorgement liability. Further, fact that Supreme Court Registry paid ₹ 1 crore deposited by appellant with interest to SEBI from Civil Appeal No. 7697 of 2009; it cannot be inferred that deposit was made and later on paid to the respondent in discharge of disgorgement liability, especially when the Apex Court on 15th February 2010, had specifically directed that ₹ 1 crore be deposited towards penalty in lieu of restraining SEBI from recovering penalty of ₹ 1 crore during the pendency of the Civil Appeal. Above order passed by Apex Court on 15th February, 2010 has not been modified by Apex Court on 21st September, 2012, while permitting

SEBI to withdraw amount of ₹ 1 crore deposited by appellant.

17. While Apex Court was passing order on 21st September, 2012, appellant could have requested the Apex Court to direct SEBI to adjust amount of ₹ 1 crore in discharge of disgorgement liability instead of adjusting it towards penalty. It appears that no such requests was made and in any event order passed by Apex Court on 21st September, 2012 does not record any such request. In these circumstances, since deposit of ₹ 1 crore as per order of Apex Court dated 15th February, 2010 was towards penalty, SEBI was justified in adjusting amount of ₹ 1 crore towards payment of penalty imposed under adjudication order dated 31st October, 2008. In these circumstances decision of SEBI that liability under the disgorgement order dated 31st October, 2008 has not been discharged by the appellant and consequently imposing penalty under Section 15 HB of SEBI Act cannot be faulted.

17. Argument that disgorgement order itself records consequences for non-compliance of disgorgement order dated 31st October, 2012 and therefore SEBI could not have passed the impugned order for non-compliance of disgorgement order dated 31st October, 2008 is also without any merit, because, order dated 31st October, 2008 has been passed under Section 11, 11(4) and 11B of SEBI Act, 1992 and not under Section 15HB of SEBI Act, 1992. Section 15HB of SEBI Act empowers SEBI to impose penalty, where separate penalty has not been provided when a person fails to comply with any provision of SEBI Act, 1992, the rules or regulations made or directions issued by SEBI under SEBI Act, 1992. It is not in dispute that for non-compliance of

disgorgement order, apart from Section 15HB, there is no other provision under SEBI Act for imposition of penalty. Therefore, additional debarment contained in the order dated 31st October, 2008 for non-compliance of that order cannot be considered as imposition of monetary penalty imposable under Section 15 HB of SEBI Act.

19. Counsel for appellant lastly contended that this appeal may be treated as mercy petition and direction may be issued to the respondent to adjust amount of ₹ 1 crore towards liability under disgorgement order instead of adjusting the same towards penalty imposed under adjudication order. Since Apex Court had specifically directed appellant to deposit ₹ 1 crore towards penalty, and accordingly SEBI on withdrawal of that amount had adjusted the same towards penalty, it would not be proper on our part to direct SEBI to adjust amount of ₹ 1 crore towards the disgorgement liability under disgorgement order as it would amount to modifying the order passed by Apex Court. Accordingly, request for adjustment of the amount towards disgorgement liability cannot be accepted.

20. For all the aforesaid reasons we see no merit in the appeal and the same is hereby dismissed with no order as to costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

10.10.2013

Prepared & Compared By: Pk