BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Hearing : 23.02.2023
Date of Decision : 09.11.2023

Appeal No. 282 of 2022

Deccan Chronicle Holdings Ltd.
36, Sarojini Devi Road,
Secunderabad – 500 003. ….. 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. Kunal Katariya, Advocate with Mr. Sahebrao Wamanrao Buktare, Ms. Ashmita Goradia, Advocates, Mr. Lovkesh Batra, Authorized Representative and Mr. Ravi Vijay Ramaiya, CA i/b Shah & Ramaiya, Chartered Accountants for the Appellant.

Mr. Abhiraj Arora, Advocate with Mr. Deepanshu Agarwal, Ms. Misbah Dada, Mr. Shourya Tanay, Advocates i/b ELP for the Respondent.

With
Appeal No. 395 of 2022

1. T. Venkattram Reddy
   Plot No. 54, House No. 8-2-703/A-6-C,
   Road No. 12, Banjara Hills,
   Hyderabad – 500 034.

2. T. Vinayak Ravi Reddy
   Plot No. 53, House No. 8-2-703/A-6-C,
   Road No. 12, Banjara Hills,
   Hyderabad – 500 034. ….. Appellants

Versus

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

Mr. Vikram Nankani, Senior Advocate with Mr. KRCV Seshachalam, Ms. Sabeena Mahadik, Mr. Mehul Talera, Mr. Mangesh Avhale, Advocates i/b. Visesha Law Services for the Appellants.

Mr. Abhiraj Arora, Advocate with Mr. Deepanshu Agarwal, Ms. Misbah Dada, Mr. Shourya Tanay, Advocates i/b ELP for the Respondent.

With
Appeal No. 421 of 2022

P. K. Iyer
No. 2, LIC Colony,
Dr. Radhakrishnan Nagar,
Thiruvanmiyur, Chennai – 600041. ….. Appellant

Versus

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

Ms. Shreya Parikh, Advocate i/b Eshwars, Advocates for the Appellant.

Mr. Abhiraj Arora, Advocate with Mr. Deepanshu Agarwal, Ms. Misbah Dada, Mr. Shourya Tanay, Advocates i/b ELP for the Respondent.

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

Per : Justice Tarun Agarwala, Presiding Officer

1. Three appeals have been filed by the four noticees against a common order dated March 22, 2022 passed by the Adjudicating Officer (hereinafter referred to as 'AO') of Securities and Exchange Board of India (hereinafter referred to as 'SEBI') imposing penalties for violation of various provisions of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as 'SEBI Act') and its Regulations. A penalty of Rs. 4 crore has been imposed upon

Deccan Chronicle Holdings Ltd. (hereinafter referred to as 'DCHL') noticee nos. 1 and noticee nos. 2, 3 and 4 have been imposed a penalty of Rs. 1.30 crore each.

2. The facts leading to the filing of the present appeals is, that noticee nos. 1 is a company in the business of printing and publishing newspapers, namely, Deccan Chronicle, Asian Edge, Financial Chronicle, and Andhra Bhoomi. Noticee Nos. 2, 3 and 4 are directors / promoters of the company. The respondent conducted investigation into the affairs of the company to ascertain whether the promoters of the company had made any fraudulent pledging of shares and made adequate disclosures in accordance with Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (hereinafter referred to as 'SAST Regulations') during the period October 2011 to December 2012. An investigation was also carried out to ascertain as to whether there was any understatement of the liabilities by the company in the books of accounts for the financial year 2008-09 to 2011-12 in violation of the PFUTP Regulations.

3. The show cause notice dated May 6, 2016 was issued alleging violations of various securities laws. Some of the key allegations made in the show cause notice were as follows :-

a. DCHL had understated its outstanding loans to the tune of

(i) Rs. 1,339.17 crore for the year 2008-09,

(ii) for financial year 2009-10 Rs. 2,982.07 crore and

(iii) for financial year 2010-11 Rs. 3,347.41 crore.

b. DCHL had not booked the interest liability (incurred and paid it) in its profit and loss account for the aforesaid three years.

c. Deccan Chronicle Marketers (hereinafter referred to as 'DCM'), (owned and controlled by the promoters of DCHL), had dues payable to DCHL to the tune of Rs. 4,084.21 crore. DCHL falsely claimed to have acquired the brands "Deccan Chronicle" and "Andhra Bhoomi" which were already owned by DCHL.

d. The appellants had failed to make disclosures with respect to their encumbered shares with ICICI Bank Ltd. (through Non-Disposable Undertakings), with IDFC Ltd. (through pledge), with Religare Securities Ltd. (through irrevocable power of attorney), with Future Capital Holdings Ltd. (hereinafter referred to as 'FCHL') (through NDU) and also failed to make disclosures about the invocation of encumbrance of shares done by ICICI Bank Ltd., IDFC Ltd. and Religare Securities Ltd.

e. The company has carried out the buyback of shares beyond the prescribed limit and also did not make any disclosure about change in its shareholding consequent to the buyback. The appellants were signatories to public announcement made by the company on May 6, 2011 to buy back of its securities without having adequate free reserves.

4. Based on the aforesaid violations, a show cause notice alleged that the appellants violated the following provisions of the securities laws, namely :-

(i). Section 12(a), (b) and (c) of the SEBI Act, 1992;

(ii). Regulation 3(a), (b), (c), (d), 4(1), 4(2)(f), (k) and (r) of the PFUTP Regulations, 2003;

(iii). Regulation 31(1) and 31(2) read with Regulation 31(3) of the SAST Regulations, 2011;

(iv). Regulation 13(4) and Regulation 13(4A) read with Regulation 13(5) of the PIT Regulations, 1992;

(v). Section 21 read with Section 24(1) of Securities Contract (Regulation) Act, 1956.

5. The appellants filed their replies and denied the alleged violations. The AO after considering the material evidence on record found that the charges levelled against the appellants stood proved. The AO found that the outstanding loans and interest in the annual reports for the financial years 2008-09 to 2011-12 was understated and that without having adequate free reserves, an announcement

was made for buy back of its equity shares. The AO also found that the appellants misled the uninformed investors who might have been influenced or induced by the investment decisions taken by the appellants especially when the scrip price was declining since May 2010 and that the appellants failed to make disclosures with respect to encumbered shares with various lenders and also failed to make disclosures for invocation of the pledge of shares. The AO also found that the company failed to make necessary compliances of the listing agreement. Accordingly, penalties were imposed upon the appellants and other noticees.

6. We have heard Mr. Vikram Nankani, the learned senior counsel with Mr. KRCV Seshachalam, Mr. Kunal Katariya, Mr. Sahebrao Wamanrao Buktare, Ms. Ashmita Goradia, Ms. Sabeena Mahadik, Mr. Mehul Talera, Mr. Mangesh Avhale, Ms. Shreya Parikh, the learned counsel and Mr. Lovkesh Batra, Authorized Representative and Mr. Ravi Vijay Ramaiya, CA for the appellants and Mr. Abhiraj Arora, the learned counsel with Mr. Deepanshu Agarwal, Ms. Misbah Dada, Mr. Shourya Tanay, the learned counsel for the respondent.

7. The undisputed facts as culled out from the impugned order are as follows :-

1. That DCHL had taken loans from different banks and had outstanding loans during the FY 2008-09 to 2011-12.

2. That DCHL was paying interest on the loans that it had taken from various banks and financial institutions.

3. That DCHL had purportedly transferred certain amounts of loans to DCM only for a day i.e. 31st March of each of the three years.

4. That on each occasion the loan was brought back to books of DCHL on 1st April next financial year.

5. That there was no corresponding entry in the books of DCM (even for one day i.e. 31st March of each year) and there was no Tripartite Agreement.

8. The details of year wise loans taken by DCHL, loans transferred to DCM (i.e. only for a day on 31st March each F.Y.) and the amount shown in balance sheet was as under :-

Sr. No.	FY	**Total outstanding loans (in Rs. Crore)**	Loans transferred to DCM A/C (in Rs. Crore)	**Loans disclosed in balance sheet (in Rs. Crore)**
1	2008-09	**1347.67**	828.23	**519.44**
2	2009-10	**2780.34**	2128	**652.34**
3	2010-11	**3678.50**	2895.90	**782.60**

9. Thus, DCHL has wrongfully understated its outstanding loans on by transferring them to DCM. The disclosures regarding understatement of loans were as under :-

a. FY 2008-09 = Rs. 519.44 Crs. (instead of Rs. 1347.67 Crs.)

b. FY 2009-10 = Rs. 652.35 Crs. (instead of Rs. 2780.34 Crs.)

c. FY 2010-11 = Rs. 782 Crs. (instead of 3678.50 Crs.)

10. The company had reported a net profit of Rs. 260.92 crore and Rs. 162.59 crore for FY 09-10 and FY 10-11 respectively. However, if understatement of interest expenses and financial charges is taken into consideration and the profit and loss account is recast accordingly it will be seen that the company actually had

suffered an operating loss of Rs. 44.76 crore in FY 09-10 and a loss of Rs. 131.03 crore in FY 10-11.

11. The company, namely, DCHL submitted that an application for resolution filed against the DCHL was accepted by National Company Law Tribunal, Hyderabad (hereinafter referred to as 'NCLT') and Moratorium Order under Section 14 of the Insolvency and Bankruptcy Code (hereinafter referred to as 'IBC') came into existence / operation with effect from July 19, 2017. The show cause notice was issued subsequent to the Moratorium Order on August 3, 2017. Further, the resolution plan as applied by the company was approved by the NCLT by an order dated June 3, 2019. This order of approval was set aside by National Company Law Appellate Tribunal (hereinafter referred to as 'NCLAT') on January 21, 2022. Further, the Hon'ble Supreme Court set aside the order of the NCLAT dated January 21, 2022 and remitted the matter again to NCLAT for a fresh decision by an order dated May 10, 2022. NCLAT vide order dated September 2, 2022 approved the resolution plan.

12. The learned counsel for the company submitted that the show cause notice issued was wholly erroneous and without any authority

of law especially when the Moratorium Order under Section 14 of the IBC had crept in. Further, once a resolution plan has been approved, it was not open to the AO to pass an order imposing a penalty upon the company. In support of his submission, the learned counsel placed reliance upon a decision of this Tribunal in ***Dewan Housing Finance Corporation Ltd. & Anr. vs. SEBI in Appeal No. 206 of 2020 decided on October 9, 2020.*** It was contended that the finding of the AO that since the order of the NCLAT approving, the resolution plan was set aside and the appeal of SEBI against the order of the Tribunal in ***Dewan Housing Finance Corporation Ltd. & Anr. (supra)*** is pending before the Hon'ble Supreme Court, therefore, the AO has the authority to pass the impugned order.

13. On the other hand, the respondent has relied upon the judgment of the Hon'ble Supreme Court in the case of ***Sundaresh Bhatt, Liquidator of ABG Shipyard vs. Central Board of Indirect Taxes and Customs Civil Appeal No. 7667 of 2021 decided on August 26, 2022*** and contended that the respondent has a right to crystalize its claim so that the same can be filed before the resolution professional or the liquidator.

14. Having heard the learned counsel for the parties on this issue, in our opinion, the entire proceedings initiated by the AO pursuant to the show cause notice dated August 5, 2019 was wholly illegal and in violation of various provisions of the IBC especially Sections 14 and 31.

15. In our opinion, the controversy involved in the present appeal is squarely covered by a decision of the Hon'ble Supreme Court in ***Committee of Creditors of Essar Steel India Ltd. vs. Satish Kumar Gupta [(2020) 8 SCC 531]*** wherein the Hon'ble Supreme Court held :-

> *"107. For the same reason, the impugned NCLAT judgment in holding that claims that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority / Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60(6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution*

applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, NCLAT judgment must also be set aside on this count."

16. The aforesaid decision was considered by this Tribunal in ***Monnet Ispat and Energy Ltd. vs. SEBI Appeal No. 238 of 2020 decided on October 29, 2020.***

17. This Tribunal considered the provisions of Section 31 of the IBC which reads as under :-

"9. In this regard Section 31(1) of the IBC reads as follows :-

*"**31. Approval of resolution plan.** – (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in subsection (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan:*

PROVIDED that the Adjudicating Authority shall, before passing the order for approval of resolution plan under this sub-

> *section, satisfy that the resolution plan has provisions for its effective implementation."*
>
> *"10. On a perusal of Section 31(1) of the IBC, it is apparently clear that the resolution plan is binding not only on all creditors but also on central government, state government or local authority to whom statutory dues are owed. The immunities applicable to the appellant will be in accordance with the approved resolution plan."*

18. This Tribunal relying upon the decision of the Hon'ble Supreme Court in ***Essar Steel India Ltd. (supra)*** held :-

> *"18. In the light of the aforesaid, we are of the opinion that once a resolution plan has been approved it becomes binding on all creditors including the government and local authorities including the respondent under Section 31(1) of the IBC. It is no longer open to the respondent to issue a show cause notice or adjudicate and pass an order of penalty upon the appellant. Consequently, the impugned order cannot be sustained and is quashed. The appeal is accordingly allowed with no order as to costs."*

19. This Tribunal held that once a resolution plan has been approved, it becomes binding on creditors including government and local authorities including respondent SEBI under Section 31(1) of the IBC and, therefore, it was no longer open to the respondent to adjudicate or pass an order of penalty upon the appellant.

20. The aforesaid decision of this Tribunal in ***Monnet Ispat and Energy Ltd. (supra***) was subsequently followed in ***Alok Industries Ltd. vs. SEBI Appeal No. 300 of 2020 decided on December 1, 2020, Raj Oil Mills Ltd. vs. SEBI Appeal No. 54 of 2019 decided on February 15, 2021, Arcelor Mittal Nippon Steel India Ltd. vs. SEBI Appeal No. 338 of 2022 decided on July 1, 2022.***

21. Section 32A came into effect from December 28, 2019 which is extracted hereunder :-

Section 32A. Liability for prior offences, etc.

"(1) Notwithstanding anything to the contrary contained in this Code or any other law for the time being in force, the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not —

(a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(b) a person with regard to whom the relevant investigating authority has, on the basis of

material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court:

Provided that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having been fulfilled:

Provided further that every person who was a "designated partner" as defined in clause (j) of section 2 of the Limited Liability Partnership Act, 2008, or an "officer who is in default", as defined in clause (60) of section 2 of the Companies Act, 2013, or was in any manner incharge of, or responsible to the corporate debtor for the conduct of its business or associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of such offence as per the report submitted or complaint filed by the investigating authority, shall continue to be liable to be prosecuted and punished for such an offence committed by the corporate debtor notwithstanding that the corporate debtor's liability has ceased under this sub-section."

"(2) No action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the

provisions of Chapter III of Part II of this Code to a person, who was not —

(i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

Explanation. — For the purposes of this sub-section, it is hereby clarified that,—

(i) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;

(ii) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable."

"(3) Subject to the provisions contained in sub-sections (1) and (2), and notwithstanding the immunity given in this section, the corporate debtor and any person who may be required to provide assistance under such law

> *as may be applicable to such corporate debtor or person, shall extend all assistance and co-operation to any authority investigating an offence committed prior to the commencement of the corporate insolvency resolution process."*

22. A perusal of the aforesaid indicates that IBC expressly mandates that the liability of a corporate debtor for any offence committed prior to the commencement of the Corporate Insolvency Resolution Process (hereinafter referred to as 'CIRP') shall cease and cannot be prosecuted after the resolution plan is approved, if the plan results in the change in the management and control of the corporate debtor. In the instant case, we find that there has been a change in the management and control of the corporate debtor and, consequently, the penalty could not be imposed.

23. The contention of the respondent is that SEBI was entitled to issue a show cause notice and was entitled to crystalize the claim and file the same before the resolution professional or the Liquidator even after the passing of an order of moratorium under Section 14 or a resolution plan being crystalized under Section 31 is patently erroneous. Relying on the decision of the Hon'ble Supreme Court in the matter of ***Sundaresh Bhatt, Liquidator of ABG Shipyard (supra)***

is patently erroneous. In our opinion, the said decision is clearly distinguishable since in that case an order was passed to liquidate the corporate debtor and the Liquidator was inviting claims from the creditors, at which stage, Section 31 and 31A of the IBC did not apply. Further, the issue in that case was whether the customs department could claim the customs duty by releasing the goods of corporate debtor or whether they were required to stand in line with other creditors by filing their claims for customs duty. The Hon'ble Supreme Court held that the customs department in such liquidation proceedings could crystalize its claim and then stand in the line of other creditors for distribution. In the instant case, the resolution plan was approved by the committee of creditors and NCLT approved the same which has attained finality and consequently, Section 31 and 32A are clearly applicable. Once the resolution plan has been approved, no order can be passed by the respondent against the appellant by virtue of the "clean slate principle" as laid down by the Hon'ble Supreme Court in the ***Essar Steel India Ltd (supra).***

24. In view of the aforesaid, we are of the opinion that the AO has no power to issue the show cause notice or adjudicate the contravention under the SEBI laws after the moratorium order was

issued and the resolution plan was filed and approved by the Tribunal.

25. The above view was also taken by this Tribunal in ***Bhushan Power & Steel Ltd. vs. SEBI Appeal No. 534 of 2022 decided on June 28, 2023*** which is squarely applicable in the instant case.

26. In view of the aforesaid, the impugned order in so far as it relates to the company cannot be sustained.

27. The appellants in Appeal No. 395 of 2022, T. Venkattram Reddy noticee nos. 2 is the chairman of the company and Shri T. Vinayak Ravi Reddy is the vice chairman of the company and is noticee nos. 3. The appellants contended that there was an inordinate delay and laches on the part of SEBI in initiating the proceedings against the appellants. It was contended that the transactions were of the year 2008-09 whereas the show cause notice was issued after 8 years on August 3, 2017. Further, a reply was filed on September 12, 2017. But no hearing took place till November 2020 nor any reason has been recorded as to why the matter could not proceed in these three years. It was, thus, urged that there was an inordinate delay in the issuance of the show cause notice as well as in the disposal of the

proceedings and, therefore, on this short ground, the order should be set aside. It was also urged that the charge of fraud has been proved on the basis of preponderance of probability and adverse inferences without adducing any proof of material to establish the charge has been drawn. The respondent has not considered the principles as laid down by this Tribunal in ***Sterlite Industries Ltd. vs. SEBI [(2001) 34 SCL 485 (SAT)], Videocon International vs. SEBI [(2002) 4 CLJ 402 (SAT) and M/s. Vintel Securities Pvt. Ltd. vs. AO Appeal No. 219 of 2009.***

28. It was urged that the appellants cannot be held liable for the alleged violations committed by the company and that only 'officers in default' can be held liable and penalized. It was urged that the appellants cannot be termed as 'officer in default' under the Companies Act, 1956 (hereinafter referred to as 'Companies Act') and there is nothing to show that the appellants were in over all control of the day-to-day business of the company. Reliance was placed on the following decisions :-

a) ***Nanjundiah (H.) vs. Govindan, Registrar of Companies [(1986) 59 Comp. Cas 356 (Bom);***

b) Pritha Bag vs. Securities and Exchange Board of India (Appeal No. 291 of 2017 decided on February 14, 2019).

29. It was contended that the financials of the company was prepared by the financial team which was latter approved by the board of directors and, therefore, the liability cannot be fixed upon the appellants for the misstatement in the financials. It was urged that no benefit accrued upon the appellants for understatement of the liabilities and that the AO has itself given a finding that no tangible gain was accrued or realized in the hands of the promoters or directors and, therefore, the penalty imposed was disproportionate. It was urged that provisions of the Section 12A of the SEBI Act read with Regulations 3 and 4 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') were not attracted and, therefore, no penalty could be issued. It was also urged that there is no finding of the connivance with the other noticees and, thus, again the provisions of Regulations 3 and 4 of the PFUTP Regulations were not attracted. It was, thus, urged that the finding that the appellants had knowingly and consciously committed fraud is patently erroneous and based on

surmises and conjectures. It was also urged that the finding regarding the pledge of shares was based on a misconceived understanding of the facts. It was also urged that the penalty of Rs. 1.30 crore each were disproportionate and was arbitrary.

30. On the issue of understating the lenders in the financial statement, it was urged that :-

1. The PFUTP Regulations must be strictly construed, as they are penal in nature.

2. The alleged understating of loans overlooks accounting treatment. The burden lies on SEBI to show that the writing off of loans on 31st March of the financial year and reinstatement of thereof on 1st April of the next financial year, coupled with not debiting the interest and financing charges to the profit and loss account, is in contravention of particular accounting standards. No such accounting standards have been shown to have been violated.

3. The allegation made by SEBI that DCHL has not disclosed certain loans and further allegation that these loans were netted off against certain receivables in the balance sheets

is grossly incorrect and submitted that this allegation was made without actually understanding the accounting procedure and accounting entries made in the books of accounts of DCHL. The DCHL has never netted off or setoff any loans and receivables in the balance sheet. The company had certain advertisement receivables or debtors from DCM and all these receivables (debtors) were accounted to DCM account on the last date of the financial year. In other words, DCM account was debited with amounts receivable from DCM which were grouped under different accounts. The company had taken certain short term loans from banks and financial institutions in lieu of receivables from DCM. To differentiate, loans taken by the company for its purpose and loans taken in lieu of receivables from DCM, the DCHL had accounted all these loans taken on behalf of DCM from various banks and financial institutions to DCM account on the last date of the financial year i.e. DCM account was credited with total loans balance amount taken on its behalf. In a nutshell, debtors or receivables were debited to DCM accounts in the books of accounts and also loans or liabilities raised in

respect of DCM were credited to DCM account in the books of accounts. As the receivables from DCM account and liabilities to DCM account are same amounts and both receivables and loans were accounted to same account D. C. Marketeers, when trial balances were extracted from the books of accounts, these liabilities and receivable were not appeared in the trial balances for the financial years 2008-09, 2009-10 and 2010-11. It is known fact that trial balances are base documents for preparation of financial statements. Hence, it is submitted that there was no understatement of liabilities and no net-off or setoff of loans in the financial statements.

4. It was also contended that there is no violation of the relevant provisions of the Companies Act, 1956 for the three financial years 2008-09 to 2010-11. The Supreme Court held that it was not permissible to read a prohibition when there does not exist any such bar in law. In support of his submission, the learned counsel placed reliance on :-

(i) DLF Qutab Enclave Complex vs. State of Haryana (2003) 5 SCC 622

(ii) Ashwini Kumar Upadhyay vs. Union of India (2019) 11 SCC 683

5. It was urged that AS 32 deals with netting off in Clause 42. It is, therefore, submitted that Accounting Standards do permit netting off. There is no basis whatsoever for jumping to the conclusion that such an accounting treatment is *per se* fraudulent or hit by the PFUTP Regulations. Fraud cannot be inferred. An action which is permissible or not expressly barred by law, cannot *ipso facto*, be covered by PFUTP as amounting to fraud or deceit or manipulative device or contrivance.

31. In this regard, we find that :-

i. Admittedly, no agreement, tripartite or otherwise has been executed by DCHL or DCM wherein the liability of the aforesaid loans could have been assigned to a third party.

ii. Admittedly, as per the books of the Banks / Financial Institutions, the loans were availed by DCHL. No dispute has been raised against the fact that the liability of repayment of the aforesaid lay with DCHL alone and no other party.

iii. The Appellants have however presented a case / story based on some private arrangement between DCHL and DCM, pursuant to which it is claimed that in the DCM would take over the liability of loans taken by DCHL, in case of failure of payment obligations by DCM for sale of advertisement space.

iv. This arrangement admittedly was never disclosed to the shareholders of DCHL.

v. In any case, this arrangement, however, cannot, and did not, lead to discharge of DCHL's liability to Banks/Financial Institutions as regards loans taken by DCHL. This is admitted by the Appellant in as much as they admit that they reinstated such liability in the books of DCHL on April 1 i.e., in the beginning of the next FY.

vi. There is no reflection of this liability in the books of DCM.

vii. Admittedly, there is no NOC / approval from the banks to transfer the liability from DCHL to DCM. This position holds good even when a private agreement is in place.

32. We also find that the same set of persons / promoters were controlling DCM and DCHL. Further, these transactions and agreements between DCHL and DCM were never disclosed as related party transaction in the financial statement of the company nor the said agreements between the company and DCM was disclosed in the register maintained under Section 101 of the Companies Act. Thus, the company had been misled and given false statement to the Registrar of the Companies year after year and had been concealing the related party transaction of its financials for the several years. The said transaction was wholly violative of the securities law.

33. On the issue of buy-back of shares, the appellants urged as follows :-

1. This charge is based on deduction of interest and finance charges from the total of paid-up capital and reserves and surplus. The basis for deducting this amount from the sum total of paid-up capital and reserve is not disclosed. Under what provisions of law or account or accounting standard is such a deduction made, as is evident from the table at page no. 107. If such a deduction is not made, the buy-back is within the permissible limit of 25% under Section 77A(2) of the erstwhile Companies Act, 1956.

2. In any event, violation of Section 77A cannot be liable for punishment under the SEBI Act.

3. Apart from the aforesaid, the erstwhile Companies Act, 1956 stands repealed, and under Section 465(2)(a) of the Companies Act, 2013, only pending proceedings are saved. Admittedly, the present show cause notice of the alleged violation was issued after the repeal of the Companies Act, 1956. Hence, the proceedings are not maintainable.

4. In any view of the matter, the appellants cannot be held liable for penalty since the buy-back was managed by experts such as merchant bankers, chartered accountants and basis their advice, the company undertook the buy-back after approval of the board of directors. Hence, the appellants cannot be individually liable for the alleged violation of the buy-back.

34. In this regard, we find that the buy-back announcement was made by the company on May 6, 2011. As per the accounts, maximum available limit available for buy-back of shares is of Rs. 116.02 crore whereas the announcement for an amount aggregating up to Rs. 270 crore from the open market at the price not exceeding Rs. 180/- per share was made. Thus, the company had carried out buy-back of shares which were more than 25% of its total paid up capital during the financial year 2011-12. We, therefore, hold that without having adequate free reserves, the company carried out buy back of its shares which misled the uninformed investors and shareholders about the perceived valuation and adequate free reserves of the company and which may have influenced the decision of the investors especially when the price of shares was declining

since May 2010. We, therefore, find that the company had manipulated its financials and that the announcement over the buy-back of its securities was made in the absence of adequate reserves and that the company carried out the buy back of shares beyond the prescribed limit.

35. The contention of the appellants that SEBI had no jurisdiction to penalize the appellants under Section 77A of the Companies Act relating to buy back especially after repeal of the Companies Act and, consequently, no action can be taken under Section 465 of the Companies Act is wholly erroneous. The contention that since the Companies Act stood repealed only pending proceedings are saved and since the show cause notice was issued much after the repeal of the Companies Act, therefore, no penalty can be imposed for violation of Section 77A of the Companies Act is misplaced. In our opinion, the submission so raised is totally misconceived. Proceedings have been initiated with regard to buy back of securities under the Securities and Exchange Board of India (Buy Back of Securities) Regulations, 1998 (hereinafter referred to as 'Buy Back Regulations') which was repealed in 2018 and replaced by Securities and Exchange Board of India (Buy Back of Securities)

Regulations, 2018. Thus, the contention raised by the learned counsel for the appellants is patently erroneous. The contention that the respondent had no jurisdiction regarding the alleged wrongful buy back beyond 25% is patently erroneous in as much as it is governed by the Buy Back Regulations. We are further of the opinion that the wrongful buy back by the company as the result of the manipulation in the books of accounts of the listed company which resulted in misleading and mis-investing the investors at large and the securities market was in contravention not only of the provisions of the Companies Act but also the provisions of the SEBI Act and PFUTP Regulations.

36. On the issue of brand ownership, the appellants contended that :-

1. It is alleged that (DCHL) was the owner of the brand name, and falsely claimed the partnership firm to be the owner thereof to show the arrangement for advertisement space to write off and understate loans.

2. The company came into existence on December 16, 2002. No doubt, the company took over the business

of printing and publishing of newspapers of the partnership firm w.e.f. 01.01.2003 as a going concern, vide agreement dated December 27, 2002, but the brand names were prior thereto transferred by the partnership firm to DCMPL vide agreement dated December 16, 2002. DCMPL was thereafter admitted to the partnership of Deccan Chronicle vide Deed of Addendum dated April 1, 2004 and the firm was renamed as Deccan Chronicle Marketeers (DCM).

3. It was submitted that at the relevant time, when the company entered into an agreement dated April 2, 2008 with the DCM, it was a partnership firm which was the owner of the brand name and not the company.

4. The extracts reproduced in paragraphs 100 to 104 of the impugned order nowhere shows that the company DCHL claimed ownership of the brand names. The undisputed fact is that the company was / is the publisher of the two newspapers 'Deccan Chronicle' and 'Andhra Bhoomi'. Use of words in that context like "Our brands" or "developing the 'Deccan

Chronicle' brand" cannot by any stretch be construed to mean claim of ownership.

37. The contention of the appellants cannot be accepted. In this regard, we find that :-

1. DCM owed a sum of Rs. 4,084.81 crore to DCHL on account of non-payment of advertisement charges, interest and financial charges and above stated amount remained outstanding dues for years. No steps were taken by the company to recover the said amount; hence liability had been accruing in the books of DCHL with each passing day.

2. In order to settle the said dues, a settlement agreement was entered into between DCM and DCHL on September 28, 2012 wherein DCM agreed to transfer, assign, sell all its rights, title, interest, etc. in the brands "Deccan Chronicle" and "Andhra Boomi" to DCHL for a consideration of Rs. 2,905.32 crore and the said dues were settled in terms of the settlement agreement

dated September 28, 2012 executed between DCM and DCHL.

3. However, it was observed from the disclosures / statements relating to brands and trademarks made in the prospectus dated December 6, 2004 issued by DCHL and the annual report of DCHL for FY 2005-06 that the brands “Deccan Chronicle” and “Andhra Bhoomi” have already been disclosed to be owned by DCHL and have been duly recognized in its books of accounts as assets of DCHL.

4. DCM, owned and controlled by the promoters of DCHL, had dues payable to DCHL to the tune of Rs. 4,084.21 crore. DCHL falsely claimed to have acquired the brands “Deccan Chronicle” and “Andhra Bhoomi” which were already owned by DCHL. Thus, under the guise of acquisition of brands, the promoters of DCHL had in their books of accounts, flatulently transferred the liability of DCM to DCHL against the interest of other shareholders of DCHL to the extent of Rs. 2905.32 crore.

38. With regard to non-disclosure undertakings, the appellants contended that :-

1. Prior to July 29, 2019, Regulation 28(3) of the SAST Regulations, 2011 did not cover a NDU. This was added for the first time by an amendment effective July 29, 2019. Prior thereto Regulation 28(3) provided that the term "encumbrance" shall include pledge, lien or any such transaction, by whatever name called. This amendment was made to plug the lacuna which SEBI acknowledged in various circulars which spoke about promoters executing NDUs.

2. It is settled law that the use of the word "include" does not always mean that the definition is not exhaustive. This is more so since the Depositories Act, 1998 which deals with securities of listed entity covered only pledges. Hence, Regulation 31 read with Regulation 28(3), as it stood at the relevant time did not include NDUs.

3. In any case, if more than two views on interpretation of Regulation 28(3) prior to July 29, 2019 are possible, the benefit of doubt must go to the appellants.

4. It is equally well settled that circulars cannot override regulations and cannot impose conditions which do not exist in law. Hence, circulars referred to in paragraph 80 of the impugned order cannot be the basis for imposing penalty.

39. The aforesaid submission cannot be accepted as we find that :-

i. The factual background, including the details of 'encumbrance' of shares are set out in para nos. 71 to 78 of the Impugned Order.

ii. The legal contentions raised by the appellants have been duly dealt with in para nos. 83 to 90 of the impugned order. In particular, we find that the execution / signing of NDU is not in dispute. The fact that some of the banks have invoked pledge and sold the shares is also a matter of

record and moreover as per SEBI's Circular dated 23rd September, 2011, the listed companies were mandated that the promoters disclose encumbrance created on their shareholding. The prescribed format itself refers to definition of encumbrance under the SAST Regulations, 2011, which in turn defines the same under Regulation 28(3) to mean by way of pledge, lien, etc. and, therefore, there could be no doubt that NDU in fact created a lien on the shares, in as much as, the Owner is contractually bound not to deal with the shares.

iii. Further, on a bare perusal of the said NDUs, it is clear that the essence and spirit of all these agreements have essentially been to create a pledge / encumbrance in favour the respective financial institutions. As regards, the contention of the appellants that NDU was required to be disclosed only pursuant to the SEBI circular dated August 05, 2015, we find that the Regulation 31(1) of the SEBI (SAST) Regulations, 2011, *inter alia*, prescribes that the promoter of every target company shall disclose the details of shares in such target company encumbered by him.

Thus, the contention raised by the appellants cannot be accepted.

iv. In this regard, the respondent places reliance on the order of this Hon'ble Tribunal in the matter of ***Yes Capital (India) Pvt. Ltd. vs SEBI (Appeal No. 2018 of 2020),*** wherein it was held as follows –

> *"... having taken into consideration the definition of encumbrance as found in the SAST Regulations, 2011 i.e. before amendment we find that the definition is inclusive one if the construction of the definition is taken into consideration. It begins with "encumbrance shall include" and thereafter two kinds of encumbrances like pledge, lien are listed and again general words "or any such transactions by whatever names called" are used to define the term encumbrance. Therefore, the rule of ejusdem generis which is applied when particular genus precedes the general words, would not be applicable in the present case." "After taking into consideration the object of the SEBI Act and the subordinate legislations thereunder that the interest of the investing public should be protected, investors should be informed about the fundamentals of the Company so that they would be able to take an informed decision, in our view a liberal construction of the definition of encumbrance is required to be made in view of the ratio of SEBI vs. Ajay Agarwal cited supra."*

A copy of the judgment in Yes Capital is hereby annexed as "Annexure D".

40. We find that the appellants noticee nos. 2, 3 and 4 were also promoters of the company and had signed various types of agreement with certain financial institutions, encumbrancing their shareholdings, namely, with ICICI Bank, IDFC Ltd., Religare Securities Ltd. and FCHF. The agreements signed with ICICI Bank and FCHF were in the nature of Non-Disposable Undertakings (NDU). Agreement of IDFC Ltd. was by way of a pledge agreement and agreement with Religare Securities Ltd. by way of irrevocable power of attorney. Such agreement was mandatorily required to be disclosed regarding encumbrance created on their shares to the stock exchange which was not done. NDUs are typically undertakings given by a shareholder not to transfer or otherwise eliminate the securities and are in the nature of negative lien given in favour of another party, usually a lender. When a restriction is created on the rights of the holder of securities through an agreement and operates as an encumbrance on the securities, then the same is required to be disclosed to the stock exchange under the SAST Regulations. The AO from paragraph no. 83 to 90 of the impugned order has dealt in

detail on the contents of the agreements and has come to conclusion that these agreements create an encumbrance on the rights of the holder of securities. The AO came to the conclusion that this encumbrance was not disclosed and failed to comply with the Regulations 31 of the SAST Regulations. We find that the aforesaid finding does not suffer from any error of law and we hold that noticee nos. 2, 3 and 4 have failed to make disclosure under Regulation 31 of the SAST Regulations.

41. Considering the aforesaid, the submission raised by the appellants noticee nos. 2, 3 and 4 on the aforesaid issues is bereft of any merit. The allegation that the charge of fraud has not been proved and is based on preponderance of probability is patently erroneous. The AO has considered the material and has rightly come to the conclusion that fraud was played by the appellants in presenting false financials to the detriment of the investors and the shareholders of the company. The appellants, being the chairman and vice-chairman were involved in the day-to-day affairs of the company and were responsible for its management. The AO has rightly came to the conclusion that the noticee nos. 2, 3 and 4 are responsible for the fraud played in the financials of the company and

rightly penalized them. The ingredients of the Section 12A of the SEBI Act and the provisions of the SAST Regulations, etc. were clearly applicable.

42. The appellant noticee nos. 4 in Appeal No. 421 of 2022 did not argue anything on the merits and the findings given in the impugned order, but contended that the impugned order was passed in breach of the principles of the natural justice and that no reasonable opportunity of being heard was given to the said appellants. In this regard, we find that ample opportunity was given and pursuant to the show cause notice. Reply was filed and the appellant was also heard before the impugned order was passed. Thus, the contention that the principles of the natural justice was violated is erroneous.

43. It was also contended that the AO has selectively reproduced the appellant's reply in the impugned order and deliberately omitted certain responses. Such tactics adopted in selectively reproduced response of the appellant was a breach of the principles of the natural justice. In our opinion, the submission so raised is without any merit. No incidence has been pointed out as to which part of the response was not considered by the AO in the impugned order.

44. A common submission was made by all the appellants regarding the inordinate delay in the commencement of the investigation and in passing of the impugned order. It was alleged that there was an inordinate delay of 9 years from the date of the alleged commencement of the fraud to the date of issuance of the show cause notice and that there has been a delay of 14 years from the date of the alleged commencement of the fraud to the date of the impugned order. In support of their submission, the learned counsel has placed reliance upon the decisions of this Tribunal ***Ashok Shivlal Rupani vs. SEBI [2019 SCC Online SAT 169], Sanjay Jethalal Soni vs. SEBI (2019 SCC Online SAT 247) and Shriram Insight Share Brokers Ltd. vs. SEBI Appeal No. 559 of 2020 decided on January 4, 2022.***

45. It was urged that delay in initiating proceedings as well as adjudication has caused prejudice in as much as questions in relation to write off of loans, netting of liability, buy back limits, compliances with listing agreements, disclosures of NDUs are all matters handled by experts such as chartered accountants, auditors, merchant bankers, company secretaries and basis advise of such experts the company and its board of directors act. The benefit of these experts who

contemporaneously handled matters and the record of the company including audit committee and management committee minutes are not available to the appellants. Besides, the appellants are no longer in the management upon commencement of CIRP on July 5, 2017, whereafter the show cause notice was issued on August 3, 2017. Hence, apart from the fact that delay per se is prejudicial, the appellants have suffered actual prejudice.

46. The AO held that there is no period of limitation prescribed under the SEBI Act or the Regulations for the issuance of the show cause notice or for completion of the adjudication proceedings and, consequently, came to the conclusion that the proceedings cannot be quashed on the ground that the same has been initiated at a late stage or could not be concluded within a reasonable period unless the delay creates prejudice to the noticees. The AO came to the conclusion that no prejudice was caused and, therefore, held that there was no delay in the issuance of the show cause notice or in the disposal.

47. In our view, we find that in spite of a catena of decisions of this Tribunal which has been affirmed by the Hon'ble Supreme Court that proceedings cannot be initiated after an inordinate delay, the AO and the regulator consistently takes a stand that there is no period of

limitation and, therefore, they can initiate the proceedings on their whims and fancies. Such approach without considering the decisions of this Tribunal in ***Ashok Shivlal Rupani and Sanjay Jethalal Soni (supra),*** creates a trend by the respondent of deliberately ignoring these decisions. Such approach adopted by the AO, in our opinion, is a misuse of the process of court.

48. In ***Government of India vs. Citedal Fine Pharmaceuticals, Madras and Others, [AIR (1989) SC 1771],*** the Hon'ble Supreme Court held that in absence of any period of limitation, the authority is required to exercise its powers within a reasonable period. What would be the reasonable period would depend on the facts and circumstances of each case. The proposition of law was reiterated as recent as in ***SEBI vs. Bhavesh Pabari [(2019) SCC Online SC 294].***

49. In the instant case, we find that the alleged transactions were of the year 2008-09. The show cause notice was issued after 8 years on August 3, 2017. No plausible explanation has been given as to why the show cause notice could not be issued earlier. We are also not satisfied with the reasoning given by the AO in the impugned order. We further find that the reply was given by the appellants on September 12, 2017 within a month from the date of issuance of the

show cause notice. But the first hearing only took place after more than three years in November 2020. Nothing has been indicated as to why the hearing could not take place prior to November 2020 or immediately after the filing of the reply by the appellants.

50. The finding that since there is no period to conclude the proceedings, there is no delay is patently erroneous. Such approach is totally unreasonable. The Hon'ble Supreme Court has time and again has held that proceedings must be conducted in a timely manner and it is not open to the AO to hold that he will conduct the proceedings on his own whims and fancies. Delay in the issuance of the show cause notice and in the disposal of the proceedings by itself causes prejudice to the noticees.

51. Considering the aforesaid and in the peculiar facts and circumstance of the case, we are of the opinion that there is a delay in the issuance of the show cause notice and in the disposal of the proceedings. But considering the peculiar facts, we are not inclined to vitiate the proceedings on the ground of inordinate delay. But the delay would be considered as a mitigating factor while considering the quantum of penalty under Section 15J of the SEBI Act.

52. The AO has given a finding that the disproportionate gain, if any, cannot be quantified nor does he find any unfair advantages made by the appellants since there is nothing to indicate any loss suffered by any investors on account of default made by the appellants. Considering the aforesaid, we are of the opinion that the penalty imposed upon the appellants is disproportionate. The imposition of penalty of Rs. 1.30 crore imposed upon each of the appellants is not supported by any material nor any reasoning has been given nor there is any finding with regard to the repetitive nature of default. Considering the fact that on a similar charge, the WTM has also debarred the appellants from accessing the securities market for a period of two years, we are of the opinion that the penalty imposed is harsh and disproportionate to the alleged violation.

53. In view of the aforesaid, the impugned order in so far as it relates to the company in Appeal No. 282 of 2022 cannot be sustained and is quashed. The appeal is allowed. The violations committed by noticee nos. 2, 3 and 4 in Appeal Nos. 395 of 2022 and 421 of 2022 are affirmed. However, the penalty is reduced from Rs. 1.30 crores to Rs. 65 lakh each to be paid by the appellants

within four weeks from today. The Appeal Nos. 395 of 2022 and 421 of 2022 are partly allowed. In the circumstances of the case, parties shall bear their own costs.

Justice Tarun Agarwala
Presiding Officer

Ms. Meera Swarup
Technical Member

09.11.2023
PTM