

**BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI**

Date of order reserved: 09/06/2016

Date of decision: 29/6/2016

Appeal No.372 of 2014

1. Tijaria Polypipes Limited
112 (First Floor), Krishna Square,
Subhash Nagar Shopping Centre,
Subhash Nagar, Jaipur,
Rajasthan – 302 016.
2. Alok Jain Tijaria
Tijaria Kunz, F-32 Ghiya Marg,
Bani Park, Jaipur – 16.
3. Vikas Jain Tijaria
Tijaria Kunz, F-32 Ghiya Marg,
Bani Park, Jaipur – 16.
4. Pravin Jain Tijaria
Tijaria Kunz, F-32 Ghiya Marg,
Bani Park, Jaipur – 16.
5. Vineet Jain Tijaria
Tijaria Kunz, F-32 Ghiya Marg,
Bani Park, Jaipur – 16.

... Appellants

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No.C4-A, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai – 400 051.

... Respondent

Mr. Zal Andhyarujina a/w Mr. Anant Upadhyay and Mr. Neerav Merchant,
Advocates for Appellants.

Mr. Shiraz Rustomjee, Senior Advocate a/w Mr. Saurabh Bachhawat,
Advocate i/b K. Ashar & Co. for the Appellant.

CORAM : Justice J.P. Devadhar, Presiding Officer
Dr. C.K.G. Nair, Member

Per : Dr. C.K.G. Nair

1. The Appellants are aggrieved by the impugned order of the Whole Time Member ('WTM' for short) of Securities and Exchange Board of India ('SEBI' for short) dated 20th June, 2014 whereby they have been restrained from dealing in securities market in any manner for a period of 7 years for various violations under the Securities and Exchange Board of India Act ('SEBI Act' for short), SEBI (Prevention of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 ('PFUTP Regulations' for short) and SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009.

2. The facts of the case are as follows:-

3. Appellant No.1-Tijaria Polypipes Limited ('TPL' for short) is a company listed on the National Stock Exchange (NSE) and Bombay Stock Exchange Ltd. (BSE). Appellant Nos. 2 to 5 are the promoters of TPL.

4. TPL came out with an Initial Public Issue offering one crore equity shares of Rs.10 face value issued at Rs.60 (with Rs.50 as premium) during 27-29 September, 2011. The shares were listed on 14th October, 2011. On the day of listing, shares were sold at prices as high as Rs.63 in the early trading hours and as low as Rs.19.50 in later hours which shows extreme volatility. Because of this volatility in the prices on the first day of listing itself, SEBI on the basis of preliminary investigation, issued an ad-interim ex-parte order on 28th December, 2011. This order was passed against several entities including the Appellants. In the said order, it was held that provisions of the SEBI Act, PFUTP Regulations and ICDR Regulations have been violated. Accordingly, Appellants were prohibited from raising any further capital in the securities market in any manner whatsoever till further orders; prohibited from buying,

selling or dealing in securities market in any manner whatsoever till further directions. TPL was also directed to call back an amount of Rs.20.40 crores from the entities to which IPO proceeds had been allegedly diverted and to explain the reasons for such diversions and deposit the amount in interest bearing escrow account till further orders. TPL was further directed to call back Rs.25 crores transferred from the IPO proceeds to their Cash Credit Account and also all other amounts transferred/paid out of the IPO proceeds to the promoters/directors or relatives of promoters or directors, etc. TPL was also further directed to deposit all amounts forming part of the IPO proceeds lying across all its bank/deposit accounts or any investments in interest bearing Escrow Account with a Scheduled Commercial Bank till further orders.

5. After providing opportunity for personal hearing, inspection of documents, etc. on 13th June 2013, SEBI issued the Confirmatory Order which reiterated the charges against the Appellants as stated in the ad-interim ex-parte order.

6. The Appellants approached this Tribunal challenging the Confirmatory Order passed by SEBI stating that it suffers from serious infirmities on account of several reasons. However, this Tribunal noticing that show-cause notice had already been issued to the Appellants, without getting into the merit of the matter, vide its order dated 5th March, 2014 directed the Appellants to file reply to the notice and directed SEBI to dispose of the matter within a period of three months from the date of receiving reply to the show-cause notice.

7. After due process, the final order (Impugned Order) was passed by WTM of SEBI on June 20, 2014 whereby the following charges have been levelled against the Appellants:-

- i. Diversion of IPO proceeds through repayment of ICDs, which were subsequently used to partially fund certain entities, individuals who traded in the scrip of TPL;
- ii. Failed to make disclosures of material facts in the Prospectus such as –
 - a. Non-disclosure of the Board Resolution dated September 10, 2011, to raise funds through ICDs.
 - b. Non-disclosure of funds raised through ICDs in accordance with the Board Resolution dated September 10, 2011, which were in the nature of a bridge loan.
 - c. Non-disclosure of funds raised by TPL through ICDs taken prior to the Board Resolution dated September 10, 2011.
- iii. Made wrong disclosure/misstatement in the Prospectus regarding procurement of plant and machinery (imported and indigenous) and suppliers.
- iv. Made misstatements in the Prospectus by overstating expenditure.

8. It is on record that the board resolution dated 10th September, 2011 had authorized Mr. Vineet Jain Tijaria, Director of TPL to raise funds through issue of ICDs to the tune of Rs.12.5 crore from 5 specified entities. It is also a matter of record that Mr. Vineet Jain Tijaria had raised funds to the tune of Rs.15.25 crore from 6 entities whereby he exceeded the mandate given by the board of directors. Subsequently, on September 12, 2011 the Company issued its prospectus, but did not disclose the Board decision to raise funds through ICDs.

9. Learned Counsel for the Appellant argued extensively before this Tribunal that the information relating to the ICDs was not material to the IPO. In any case the money was used for the purpose of financing investments, purchase of raw material and for working capital requirements

and hence in the nature of its ordinary business that posed no material risk to the investors. Hence there was no requirement of disclosing the same in the prospectus. It was further argued by the Counsel for the Appellant that the total project cost was Rs.108.52 crore out of which IPO was proposing to raise only Rs.60 Crore, the remaining amount being mobilized by the promoters from other sources. The funds mobilized through the ICDs were used for the normal business of the Company. All these reasons are favourable to the Company and investors rather than posing risks to them and their non-disclosure did not adversely affect the Company and hence the requirement of disclosure was not there. It was also argued by the learned Counsel for the Appellant that the board resolution was only in the form of an authorization and not a final decision and hence identifying the sources from which the funds could be obtained and signing of agreements etc. with them would take time. Hence, it was premature to disclose the information. Counsel for the Appellant further argued that the earlier loans taken by the TPL on May 23, 2011 and June 9, 2011 were not material because it was also used for the purpose of working capital and raw material and hence in the nature of conducting ordinary business of the Company was not posing any material risk. Hence, no disclosure was necessary.

10. Learned Sr. Counsel for the Respondent argued that Rs.15.25 Crore mobilized through the ICDs constituted more than 25% of the IPO funds; the IPO fund proceeds was used to payout the ICDs and hence these are substantively material information which should have been disclosed mandatorily in the prospectus as per the ICDR Regulations. He further argued that even if the gap of two days (between IPO closure and issue of Prospectus) was insufficient to publish this information in the prospectus this

information could have been separately published immediately after the board resolution through the website of the Company, media, etc. Counsel for the Respondent refuted the argument made by the Appellant that the board resolution was only an authorization and agreement was signed many days later by stating that the board resolution clearly indicates the name of the entities and the amount to be borrowed from each one of them. Further, money started getting credited into the account of the Appellant from 10th September, 2011 onwards i.e. from the date of the board resolution itself, as evidenced in the rejoinder submitted by the Appellant before this Tribunal. Learned Counsel for the Respondent juxtaposed the requirements of disclosures with Regulations 57 and 60(4)(a) of ICDR Regulations and insisted that even a prima facie reading of these regulatory provisions would entail disclosure of such information either in the prospectus or separately immediately after the board resolution. It was also noted that the agreements were signed with all the 6 entities on or before 23rd September, 2011 outer boundary of which is only 13 days from the date of board resolution and as such a substantial degree of understanding would have already been reached with these entities by the date of the board resolution itself whereby the board resolution could identify the entities from whom specific amounts could be borrowed through ICDs. Counsel for the Respondent further argued that since IPO proceeds were used to refund these ICDs, funds raised through the ICDs were in the nature of bridge loans and hence as per ICDR provisions all bridge loans also must be disclosed. This fact should have been disclosed through the prospectus or immediately after the board meeting on September 10, 2011. Counsel for the Respondent argued that prima facie reading of the ICDR Regulations necessitates disclosures of funds raised prior

to the Board meeting for providing full and balanced financial position of the Company to enable investors to take informed decisions.

11. We agree with the arguments made by the learned Counsel for the Respondent on the importance and requirements of disclosure of the ICDs in the Prospectus or through the media, website, etc. as specified in the relevant regulations. Information relating to an amount to the tune of 25% of the IPO proceeds is not just a material one, it is substantively material for the market to correctly evaluate the advantage and risks of an IPO. Hence, the contention of the Appellants that since money was used for normal business and the information did not pose any risk to the investors do not have any merit and is therefore rejected. Since IPO proceeds were used to refund the ICDs, the argument by the Counsel for the Respondent that they are in the form of a bridge loan also cannot be faulted. So is the requirement of disclosing information relating to past ICDs which should all have been disclosed given the statutory requirement of a disclosure based regime in the securities market. As such all charges in the impugned order relating to information disclosure or limited disclosure are borne out of facts and cannot be faulted.

12. It is further held in the impugned order that through wrong/misleading disclosure relating to ordering of plant and machinery, IPO proceeds have been diverted. Counsel for the Appellant argued in detail that orders for plant and machinery were not only made but plant and machinery was subsequently received and installed in the premises of the Appellant. They were in fact supplied by the same suppliers who were though not manufactures of the plant and machinery but only suppliers. While SEBI's inspection document showed that these were small-time

vendors who were not traced in the given addresses, they had changed the addresses which were informed to SEBI. Plant and machinery was installed which was also informed to SEBI along with copy of the chartered engineer certificate. However, SEBI did not take cognizance of that and decided to stick to their arguments based on only the inspection report.

13. Counsel for the Respondent argued that the names disclosed in the DRHP and in the prospectus and inspection report received from SEBI officials were different that despite concerted efforts they could not meet with the suppliers on their given addresses. Rather efforts were made by some of them in misguiding the investigating officers of SEBI. Therefore, the entire episode relating to the veracity of the suppliers of the plant and machinery appears to be fabricated and therefore the charge that IPO proceeds was diverted by using bogus orders is justified.

14. The charge that the Appellant did not call back Rs.20.40 crore for complying with the interim order was refuted by the Counsel for the Appellant stating that ICDs were genuine and had to be refunded and refund of a genuine payment received by the Appellant cannot be called back. Similarly the direction to call back advance paid for orders of plant and machinery also cannot be done because that is genuinely required by the Company. In fact the Counsel for the Appellant pointed out that they did ask the suppliers to return the advance to which the suppliers responded that the orders have been placed with the manufacturers who are in the process of fabricating the plant and machinery and as such the advance cannot be refunded at that stage. Counsel for the Respondent argued that since IPO proceeds were used to refund the ICDs which were not disclosed in the

prospectus and hence it needed to be called back irrespective of whether it was genuine or not. Similarly since as per the SEBI's inspection report no plant and machinery was installed by 31/3/2002, which is not in dispute, the advance paid to the supplier of plant and machinery was based on bogus orders used to divert IPO proceeds and must be called back.

15. Counsel for the Respondent further argued that all charges have to be looked into in an interconnected manner though they are separately framed because the overarching theme or the modus operandi of the Appellant is to make a prima facie sustainable framework in the form of borrowing through ICDs, placing orders for plant and machinery, etc. through connected entities and thereby using this framework to divert IPO proceeds. The fact that several disclosures are not made are also a part of this scheme so that a healthy financial position about the company is shown which would make IPO successful. Many of the suppliers are interconnected and not bona fide. Chartered Engineer Certificate relating to installation of machinery was not relied on because the inspection report of the SEBI team was sufficient to conclude that the plant and machinery was not installed up to 31/3/2012. Part of the IPO proceeds was in fact used for diversion. Accordingly, Rs.9.14 crore out of Rs.15.38 crore of the diverted amount was utilized for trading in the IPO of the Appellant-company.

16. There is no dispute that ICDs were used to borrow funds and the payment was received by the Company and as such, Counsel for the Respondent was asked by the Tribunal whether it is appropriate to call back the money genuinely paid to certain entities? It may be possible to state that the Appellant should make good of the money refunded to certain entities

because it was not disclosed and IPO proceeds were used to refund the same but it is sustainable that money genuinely paid to certain entities as refund can be called back from those entities. Findings recorded in para 22.1 of the impugned order that the appellant failed to call back Rs. 20.40 crore from the entities to whom the IPO proceeds were found to have been diverted on the ground that the ICD documents and the purchase orders produced by the appellant were prima facie found to be fabricated cannot be sustained. It is not in dispute that the appellant has actually received Rs. 15.25 crore through ICDs. Once receipt of Rs. 15.25 crore through ICDs is accepted, then repayment of Rs. 15.38 crore (inclusive of interest) from the IPO proceeds towards repayment of ICD amount cannot be faulted. In such a case, the WTM of SEBI could not have directed the appellant to call back the amount of Rs. 15.38 crore paid towards repayment of ICD amount.

17. Assuming that the amounts received under the ICDs were not utilized by the appellant for the IPO project, then also the WTM of SEBI could not have asked the appellant to call back the amount paid to the persons towards repayment of ICD amount, especially when receipt of the amounts under the ICDs is not in dispute. Assuming that the amounts received under the ICDs were used for a purpose other than the IPO project, then the appellant could be held guilty of utilizing the IPO proceeds for purposes other than the IPO project, but that could not be a ground to direct the appellant to call back the amounts from the persons to whom payments were made towards repayment of ICD amount.

18. Similarly, payment of Rs. 5 crore made from IPO proceeds to four suppliers could not be directed to be called back, because, the said payments

were made for supply of plant and machinery and according to the appellant the plant and machinery have been received from the said suppliers. It is apparent that the WTM of SEBI has failed to consider the argument of the appellant that the plant and machinery from the suppliers have been in fact received by the appellant (though belatedly) and in support of that contention the appellant had relied upon the certificate issued by a Chartered Engineer. It is true that the visit reports of SEBI casts serious doubts as to the existence of the above suppliers. However, when the appellant had submitted that there was change in the address of the said suppliers and that the said suppliers had belatedly supplied the plant and machinery which are installed and available for inspection as per the Chartered Engineer's certificate, without verifying the aforesaid facts the WTM of SEBI, solely based on visit reports of SEBI could not arrive at a conclusion that the plant and machinery have not been received from the said suppliers and accordingly direct the appellant to call back the amount paid to the said four suppliers. Fact that the said suppliers were first time suppliers and that the advance payments were made prior to the purchase orders cannot be a ground to disbelieve the case of the appellant supported by a Chartered Engineer's certificate that the plant and machinery have been in fact received from the said suppliers and installed in the factory of the appellant. In the facts of present case, failure on part of SEBI in considering the arguments of the appellant regarding the actual receipt of plant and machinery from the suppliers in question as well as the certificate issued by Chartered Engineer has led to miscarriage of justice.

19. The impugned order, based on the various charges, has imposed the following punishments on the Appellants:-

- (a) The Appellants have been prohibited from raising any further capital and from buying, selling or dealing in securities market in any manner whatsoever for a period of 7 years.
- (b) Appellant No.1 – TPL has been further directed to call back Rs.20.40 crore from the entities to whom the IPO proceeds were found to have been diverted.

20. Given that, some of the charges levelled in the impugned order cannot be sustained as explained in detail, this Tribunal considers that the period of debarment of the Appellants for 7 years from the securities market cannot be justified. Accordingly, their debarment from the securities market for a period of 7 years is reduced to 5 years. As regards calling back money from the entities to whom the IPO proceeds have been used to refund ICDs cannot be sustained as it is found that these entities did in fact make the payments to TPL and refund of the money to those companies cannot be called back.

21. The Impugned Order is, therefore, modified to the specified extent and appeal is disposed of with no order as to costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

Sd/-
Dr. C.K.G. Nair
Member

29/6/2016

Prepared & compared by-ddg