BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Order Reserved On: 06.12.2017
Date of Decision : 05.01.2018

Appeal No. 140 of 2015

Devang D. Master
16-A, Tower "C",
Viceroy Park,
Thakur Village,
W.E. Highway,
Kandivali (E),
Mumbai- 400 101 …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 i/b Mr. Jayesh Ahire for the Appellant.

Mr. Mustafa Doctor, Senior Advocate with Mr. Mihir Mody and Mr. Nishant Upadhyay, Advocates i/b K. Ashar & Co. for the Respondent.

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

Per: Justice J.P. Devadhar

1. Appellant is aggrieved by the order passed by the Adjudicating Officer ("AO" for short) of Securities and Exchange Board of India ("SEBI" for short) on December 24, 2014. By the said order aggregate penalty of ₹ 1 crore [₹ 20 lac under Section 15HA, ₹ 75 lac under Section 15H(ii) and ₹ 5 lac under Section 15A(b) of the Securities and Exchange Board of India Act, 1992 ("SEBI Act, 1992" for short)] is imposed on the

appellant for violating the provisions contained in the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 ("PFUTP Regulations" for short), SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 ("SAST Regulations, 1997") and the Securities and Exchange Board of India (Prevention of Insider Trading) Regulations, 1992 ("PIT Regulations, 1992" for short).

2. Penalty imposable under Section 15HA is up to ₹ 25 crore. Similarly penalty imposable under Section 15H is up to ₹ 25 crore and penalty imposable under Section 15A is up to ₹ 1 crore. Thus, as against the penalty of ₹ 51 crore imposable under Section 15HA, 15H & 15A(b) of SEBI Act, 1992 for the violations allegedly committed by the appellant, the AO of SEBI after considering all mitigating factors has imposed aggregate penalty of ₹ 1 crore. Appellant, however, submits that in the facts of present case, penalty ought not to have been imposed on the appellant and alternatively submits that the penalty imposed is exorbitant and disproportionate to the violations allegedly committed by the appellant.

3. Facts relevant for deciding the issues raised in this appeal are as follows:-

a) Appellant who was the promoter and director of Empower Industries India Ltd. ("EIIL" for convenience) held 3,90,050 shares of EIIL out of

5,00,000 shares issued by EIIL. Thus, the appellant held nearly 80% of the total shareholding of EIIL.

b) In the month of October 2004, the appellant admittedly handed over 1,25,000 shares of EIIL in physical form along with 5 unsigned blank transfer deeds (share transfer forms) to Mr. Shambhu Agrawal (finance broker) who was to arrange personal loan of ₹ 1 crore to the appellant. However, without arranging the loan, Mr. Shambhu Agrawal on 01.11.2004 transferred the aforesaid 1,25,000 shares in the name of his 5 family members. Appellant claims that the said shares were transferred without the consent of the appellant and by forging the signature of the appellant on the share transfer forms. Admittedly, till date neither the appellant has received any consideration from Mr. Shambhu Agrawal in respect of the aforesaid 1,25,000 shares nor the appellant has filed any complaint or initiated any proceedings against Mr. Shambhu Agrawal to get back the said shares.

c) On 27.01.2005 the appellant transferred 2,500 shares of EIIL from his demat account to the pool account of Ruchiraj Shares and Stock Brokers Pvt. Ltd. and the appellant claims that the said 2,500 shares were later

on utilized to meet certain settlement obligation of Shambhu Agrawal.

d) On 31.01.2005 appellant rematerialized 2,40,500 shares of EIIL and handed over 2,13,000 rematerialized shares (out of 2,40,500 rematerialized shares) to Mr. Shambhu Agrawal along with unsigned share transfer forms so that on Mr. Shambhu Agrawal arranging a loan of ₹ 1 crore to the appellant all the shares handed over to Mr. Shambhu Agrawal could be offered as collateral security for the loan.

e) On 10.02.2005 Mr. Shambhu Agrawal gave to the appellant ₹ 2,59,000 by cheque and ₹ 2,41,000 by cash as token advance.

f) On 25.02.2005 Mr. Shambhu Agrawal transferred 2,13,000 shares received from the appellant to 22 entities. Appellant claims that the aforesaid transfers were effected without the consent and knowledge of the appellant by forging the signature of the appellant on the share transfer forms.

g) On 02.03.2005 the Board of Directors ("BOD") of EIIL made a corporate announcement that in the Board Meeting scheduled to be held on 08.03.2005 the Board would consider the pricing of the issue and

also consider the options and ways for expansion plans, acquisition and any other related matter for growth of the company and also consider increase in the authorised capital and issue of rights/ preferential shares.

h) After the above corporate announcement, market price of EIIL shares increased from the closing price of ₹ 100.12 on 01.03.2005 to ₹ 101.90 on the next trading day and the volume of trading increased from average daily trading volume of 3685 shares to average daily trading volume of 22606 shares during the investigation period (16.12.2005 to 11.03.2005).

i) On 11.03.2005 Bombay Stock Exchange Ltd. ("BSE") received a letter dated 08.03.2005 from EIIL wherein it was stated that the Board meeting scheduled on 08.03.2005 has been cancelled/ postponed as the directors of the company had gone out of station and that any further notice in that regard would be given to the stock exchange in due course.

j) As Mr. Shambhu Agrawal could not arrange loan of ₹ 1 crore, appellant on 25.03.2005 returned the advance amount of ₹ 5 lac to Mr. Shambhu Agrawal in cash and on 31.03.2005 Mr. Shambhu Agrawal returned 2,15,500 shares (1,82,150 in physical form +

33,350 in demat account) to the appellant. At that time, appellant claims that he realised for the first time that 2,15,500 shares (2,13,000+2500) returned by Mr. Shambhu Agrawal were not the original shares given by the appellant to Mr. Shambhu Agrawal but the shares belonging to 5 different parties. However, appellant claims that since equal quantity of shares were returned, the appellant did not take any action against Mr. Shambhu Agrawal.

k) SEBI after conducting an enquiry in respect of the aforesaid transactions, passed an order on 31.01.2013 which was set aside by this Tribunal on 23.04.2014 and remanded for fresh decision, inter alia, by recording as follows:-

> *"During the course of hearing, it was felt that in the facts and circumstance of the case, a comparison of the Appellants signature would be required to ascertain authenticity of his alleged signature on the transfer deeds. This factual analysis may also require additional evidence. It would be, therefore, appropriate to remand this matter to the learned adjudicating officer for fresh hearing and adjudication."*

l) Thereafter, the AO heard appellant again and passed the impugned order on 24.12.2014 without recording

any additional evidence. Appellant has filed the present appeal to challenge the order dated 24.12.2014.

4. Mr. Modi, learned Senior Advocate appearing on behalf of appellant submitted as flows:-

a) Entire charge and findings recorded against the appellant and appellant's purported involvement in the alleged conspiracy are solely based on the allegation that the appellant had transferred 1,25,000 shares and 2,13,000 shares of EIIL to the Agrawal family. Case of the appellant at all times had been that he had never signed any of the purported transfer deeds and therefore the transfers effected on the basis of forged and fabricated documents cannot be the basis for holding the appellant guilty of violating the regulations framed by SEBI.

b) To prove his case, the appellant had obtained a signature comparison report from a forensic expert and on perusal of the said report this Tribunal on 23.04.2014 had set aside the order passed by the AO on 31.01.2013 and directed the AO to pass fresh order on merits after recording additional evidence, if deemed necessary, to ascertain the authenticity of the signature on the transfer deeds. However, the AO has passed the impugned order without recording any

additional evidence and without recording any finding that the signatures on the two sets of the transfer deeds are genuine or legitimate signatures of the appellant. It is submitted that even to the naked eye it is evident that the signatures on the two sets of transfer deeds are different. In these circumstances, it is submitted that the impugned order passed by the AO by ignoring the expert report is liable to be quashed and set aside.

c) The AO by relying on a decision of the Apex Court in the case of Shashi Kumar v/s Subodh Kumar reported in AIR 1964 SC 529 has erroneously held that the expert evidence cannot be relied upon without any other corroborative evidence. In that case, witness to the will in dispute, had deposed before the Court which was contrary to the expert evidence. In that context the Apex court held that when substantive evidence of the attesting witness to the will was available, the opinion of a handwriting expert cannot override the substantive evidence. In a subsequent case reported in AIR 1980 SC 531 (Murarilal v/s State of Madhya Pradesh) the Apex Court had held that it would be unjustifiable to reject the opinion of an expert on the sole ground that it was not corroborated. Thus, the impugned decision which is based on

misinterpretation of the Apex Court decision deserves to be quashed and set aside.

d) In para 43 & 48 of the impugned order the AO has recorded that in the absence of any objection raised by the RTA, it must be presumed that the shares were transferred after following the due procedure and accordingly the AO has rejected the plea of the appellant that the transfer deeds were forged and fabricated. It is submitted that without calling for the documentary evidence to show that due procedure was actually followed by the RTA, the AO is not justified in rejecting the plea of the appellant merely on the basis of conjectures and surmises.

e) In the investigation report it is recorded that the Agrawal family had stated that they had acquired shares through two sub-brokers and in support of that contention bills from the two sub-brokers were produced. Since the two sub-brokers had denied to have issued any such bills it is evident that the Agrawal family had forged/fabricated the purported bills of two sub-brokers. In such a case, instead of SEBI filing FIR/ Police Complaint, against Agrawal, it is erroneously held in the impugned order that the appellant had failed to produce any corroborative evidence such as FIR/ Police Complaint in support of

the plea that the signatures on the share transfer forms were forged.

f) In para 47 of the impugned order it is erroneously held that all transfer deeds were checked and signature was tallied by the company official and the company's seal was also affixed on all the transfer deeds thereby confirming the authenticity/ genuineness of the transfer. It is submitted that the above finding is recorded without raising any such ground in the show cause notice and without giving any opportunity to the appellant to rebut such ground. Moreover, the aforesaid finding is totally false, because, no company official had signed on any of the transfer deeds and the company's seal was not affixed on any of the transfer deeds and there is only a rubber stamp on the transfer deeds which obviously has been placed by the RTA only and not by any company official.

g) Finding recorded in para 40 and 41 of the impugned order that the appellant had given the shares as collateral/ security for the loan is totally incorrect, because, the appellant had simply handed over shares in physical form along with unsigned transfer forms so as to obtain loan of ₹ 1 crore. It is only when the loan was advanced the appellant would have signed

the blank transfer deeds and at that point of time collateral/ security would have been created. Therefore, the AO is not justified in holding that the appellant had given the shares as collateral/ security for the loan without receiving any loan.

h) As per the direction given by this Tribunal in the earlier round of litigation on 23.04.2014, it was incumbent upon the AO to adjudicate upon the issue of legitimacy/ forgery of the appellant's signatures on the transfer deeds, inter alia, by calling upon the RTA to explain as to how RTA permitted transfer of shares despite variation in the signatures on the transfer deeds. Since the AO has failed to comply with the directions given by this Tribunal, the impugned order is liable to be quashed and set aside.

i) As the shares belonging to the appellant were transferred on the basis of forged/ fabricated transfer deeds, it cannot be said that the appellant knowingly transferred shares to any of the parties and consequently the appellant cannot be held guilty of violating the SAST Regulations or the PIT Regulations. Therefore, any manipulation in the price or volume of the shares or any circular movement of the shares by any third parties cannot be attributed to the appellant. Hence, the finding recorded by the AO

that the appellant has violated the PFUTP Regulations cannot be sustained.

j) Although 1,25,000 shares, and 2,13,000 shares were handed over by the appellant to Mr. Shambhu Agrawal, the finance broker, for arranging loan of ₹1 crore, the appellant had received only ₹ 5 lac as token advance from Mr. Shambhu Agrawal. As the loan transaction did not materialize, the appellant had returned ₹ 5 lac to Mr. Shambhu Agrawal and thereupon, Mr. Shambhu Agrawal on 31.03.2005 returned 2,15,500 shares being 2,13,000 shares handed over by the appellant to Mr. Shambhu Agrawal and 2500 shares which were transferred by the appellant to the pool account of Ruchiraj- who was the broker. Although on 31.03.2005 the shares returned by Mr. Shambhu Agrawal were not the same shares which the appellant had given to Mr. Shambhu Agrawal, in view of the fact that equal quantity of shares were returned, the appellant did not take any action against Mr. Shambhu Agrawal for illegally transferring the shares handed over by the appellant to Mr. Shambhu Agrawal. Fact that the appellant has not initiated any action against Mr. Shambhu Agrawal for forging and fabricating the signature of the appellant on the transfer deeds, cannot be a ground to

hold that the appellant has sold the shares in violation of the regulations framed by SEBI.

k) Shares belonging to the appellant which were transferred by Mr. Shambhu Agrawal under the forged transfer deeds were not used for any of the impugned trades. In fact, the investigation report (see page 166 of the Memorandum of Appeal) records that there were no debit and credit entries in the demat statement of the Agrawal family during the investigation period. As the shares of the appellant were transferred by forging and fabricating the signature of the appellant on the transfer deeds without the consent and knowledge of the appellant and the said shares have not been utilized for manipulating the price or volume in the scrip of EIIL, the AO is not justified in holding that the appellant has transferred the shares of EIIL in violation of the regulations framed by SEBI.

l) Fact that the appellant after the investigation period had sold 26000 shares at the rate of ₹ 120 - ₹ 127 per share in June 2005 could not be a ground to hold that the appellant had taken advantage of the alleged manipulation in the price of the scrip. In the impugned order it is recorded that the price and volume manipulation took place during the

investigation period from 16.02.2005 to 11.03.2005 and by 11.04.2005 the prices had come down to ₹ 97.80. The subsequent increase in price in June 2005 to ₹ 120 - ₹ 127 is not alleged to be a consequence of any alleged manipulation. Therefore, appellant could not be said to have taken advantage of the alleged price/ volume manipulation by selling the shares of EIIL.

m) As regards the alleged misleading corporate announcements made by EIIL, it is submitted that the appellant was not the person who communicated either of the corporate announcements to the stock exchange. There were five directors in EIIL at the relevant time yet the appellant alone is held liable for the misleading corporate announcement which is wholly unjustified.

n) The corporate announcement made on 02.03.2005 was legitimate and genuine and there is nothing on record to suggest that the same was bogus or fabricated. Merely, because, the company could not ultimately come out with any rights or preferential issue could not be a ground to hold that the corporate announcements made were false and intended to lure the investors. The corporate announcement made on 02.03.2005 did not state that EIIL had decided to

come out with the rights or preferential issue of shares. What was announced was that a Board Meeting has been scheduled on 08.03.2005 to consider as to whether to come out with any such rights/ preferential issue and the pricing thereon. Clearly, there was no representation made to the investors that the company had decided to issue rights/ preferential shares as wrongly interpreted in the impugned order.

o) The Board Meeting scheduled to be held on 08.03.2005 was cancelled and accordingly intimated to the stock exchange. Merely, because, the word "postponed" was also used in the said letter, the AO is not justified in holding that the meeting scheduled to be held on 08.03.2005 was postponed but never held thereafter.

p) Without prejudice to the aforesaid submissions it is submitted that the penalties imposed against the appellant are exorbitant and disproportionate. If transfer of shares triggered disclosure obligations on part of appellant, then the very same transfers would also trigger disclosure obligations on part of Mr. Shambhu Agrawal and his family. However, no action is taken against the Agrawal family under the

SAST Regulations or the PIT Regulations for not discharging the disclosure obligations. In fact by an order dated 10.12.2012 consolidated of ₹ 10 lac has been imposed on five Agrawal family members for the alleged violation of PFUTP Regulations. Similarly, other parties who were allegedly involved in the price and volume manipulation have only been levied penalties in the range of ₹ 1 lac to 5 lac. In these circumstances, it is submitted that the impugned order which seeks to levy penalty of ₹ 1 crore is exorbitant and disproportionate. Accordingly, it is submitted that the impugned order be quashed and set aside and alternatively it is submitted that the penalty be reduced to the extent as this Tribunal deems fit and proper.

5. We see no merit in the above arguments.

6. Basic argument of the appellant is that the impugned order is passed by disregarding the direction given by this Tribunal on 23.04.2014 in Appeal No. 61 of 2013. It is contended that as per the direction given by this Tribunal on 23.04.2014, the AO could pass the impugned order only after recording additional evidence in relation to the plea of the appellant that the shares have been transferred by forging the signature of the appellant on the transfer deeds. Since, the impugned order is passed without recording any additional evidence it is submitted that the impugned order is liable to be quashed and set aside.

7. Perusal of the order of this Tribunal dated 23.04.2014 clearly shows that there was no direction given to the AO to pass fresh order only after recording additional evidence. The said order merely records that since the appellant claims that the shares belonging to the appellant have been transferred by forging the signature of the appellant on the share transfer forms and in support of the above contention the appellant relied on a report of Forensic Expert which became available after the original order was passed by the AO on 31.01.2013, this Tribunal set aside the order dated 31.01.2013 and remanded the matter by directing the AO to pass fresh order, inter alia by recording additional evidence, if found necessary, on the issue relating to forgery in the light of the report of the Forensic Expert produced by the appellant. Thus, the AO had the discretion either to record additional evidence or not to record additional evidence in relation to the plea of forgery raised by the appellant. Therefore, argument of the appellant that the impugned order is passed by disregarding the direction given in the order dated 23.04.2014 cannot be accepted.

8. In the impugned order the AO has held that the signature comparison report/ handwriting comparison report cannot be considered in the absence of any other corroborative evidence to substantiate the plea of the appellant that his signatures on the transfer deeds were forged. Assuming that the AO was not justified in seeking corroborative evidence for considering the report of Forensic Expert, the question to be considered herein is, whether the AO could hold the appellant guilty of violating the SEBI Act and the regulations framed thereunder, without

considering the plea of the appellant that the shares were transferred by forging his signature. In other words, assuming that the shares of EIIL held by the appellant were transferred by forging the signature of the appellant on share transfer forms, whether, in the facts of present case the appellant could be said to have violated the SEBI Act and the regulations framed thereunder.

9. Appellant claims that EIIL shares belonging to the appellant have been transferred by forging the signature of the appellant came to his knowledge on 31.03.2005 when Shambhu Agrawal instead of returning the very same EIIL shares given by the appellant, returned EIIL shares that were in the name of third parties. Appellant further submits that he did not take any action against Shambhu Agrawal for forging the signature of the appellant, because, equal quantity of shares were returned by Shambhu Agrawal.

10. There is no merit in the above argument, because, appellant had handed over in all 3,38,000 shares of EIIL which were all in the name of the appellant (1,25,000 shares in October 2004 and 2,13,000 shares on 31,01,2005) to Shambhu Agrawal whereas, on 31.03.2005 Shambhu Agrawal had returned to the appellant only 2,15,500 shares of EIIL which were all in the name of third parties. To a specific query raised by this Tribunal regarding the balance shares, counsel for the appellant fairly stated that appellant has no explanation to offer. Thus, it is evident that the appellant handed over in all 3,38,000 shares whereas, Shambhu Agrawal returned only 2,15,500 shares that were in the name of third parties. Therefore, argument of the appellant that he did not take action

against Shambhu Agrawal for forgery on account of receiving equal quantity of shares handed over to Shambhu Agrawal is contrary to facts on record and hence unsustainable.

11. It is interesting to note that out of 2,15,500 shares returned by Shambhu Agrawal, 1,82,150 shares were in physical form and 33,350 shares were transferred directly to the demat account of the appellant. It is not in dispute that immediately after 31.03.2005 appellant got the 1,82,150 shares in physical forms transferred to his own name. Assuming that on 31.03.2005 the appellant for the first time came to know that shares of EIIL handed over to Shambhu Agrawal have been fraudulently transferred by Shambhu Agrawal, very fact that the appellant instead of taking action against Shambhu Agrawal for transferring the shares allegedly by committing forgery chose to get the 1,82,150 shares in physical form transferred from the name of third parties to the name of the appellant clearly shows that either Shambhu Agrawal had transferred the shares with the consent of the appellant or that the appellant had acquiesced to the transfer of shares being effected by Shambhu Agrawal. Thus, assuming that the shares of EIIL belonging to the appellant were transferred by forging the signature of the appellant, that fact has no bearing in the present case, because, penalty is imposed on the appellant for acquiring shares of EIIL from third parties without complying with the provisions contained in the regulations framed under the SEBI Act and not on account of transferring the shares of EIIL belonging to the appellant.

12. Moreover, once it is admitted by the appellant that on 31.03.2005 he became aware about the transfer of shares belonging to the appellant it obviously means that on 31.03.2005 the appellant knew that on account of such transfer of shares, his shareholding in EIIL stood reduced from 80% to less than 10%. Therefore, when appellant took steps for transferring 1,82,150 shares in the name of third parties to the name of the appellant, it was within the knowledge of the appellant that such transfer would result in increasing the shareholding of the appellant in EIIL in excess of 15% and in such a case various obligations under the Takeover Regulations would get triggered. Appellant who was the promoter-director of EIIL cannot feign ignorance of the obligation to comply with the regulations framed under the SEBI Act when shares are acquired by him from third parties in excess of the limits prescribed under the regulations.

13. Thus, the facts on record reveal that the appellant holding about 80% shares of EIIL resorted to rematerializing the shares of EIIL and then handed over 3,38,000 shares to Shambhu Agrawal in November 2004 and January 2005 for allegedly arranging loan of ₹ 1 crore. Shambhu Agrawal transferred the said shares to his own name and to the name of his family members and others. Thereafter, the said shares were traded on market. Finally on 31.03.2005, Shambhu Agrawal without arranging loan of ₹ 1 crore returned only 2,15,500 shares out of 3,38,000 shares. Admittedly, 2,15,500 shares returned by Shambhu Agrawal were in the name of third parties. Assuming that on 31.03.2005 appellant came to know that 3,38,000 shares of EIIL handed over by the appellant

to Shambhu Agrawal were transferred by forging the signature of the appellant after 31.03.2005 appellant could not have acquired shares of EIIL in excess of the limits prescribed, without following the obligations prescribed under the regulations framed by SEBI.

14. With this background, we may now consider the arguments advanced on behalf of the appellant in relation to the charges held proved against the appellant in the impugned order.

15. First charge held against the appellant in the impugned order is that the appellant as a promoter- director of EIIL was instrumental in issuing misleading corporate announcement on 02.03.2005 and therefore guilty of violating the PFUTP Regulations. The corporate announcement made by EIIL on 02.03.2005 was that in the meeting Scheduled to be held on 08.03.2005 the Board would inter-alia consider options and plans for expansion/ growth of the company and also consider increase in authorized capital and issue of rights/ preferential shares. However, no such meeting was held on 08.03.2005 and by a letter dated 08.03.2005 (received by the BSE on 11.03.2005) the stock exchange was informed that the Board meeting Scheduled on 08.03.2005 has been cancelled/ postponed as the directors of the company had gone out of station and that any further notice in that regard would be given to the stock exchange in due course.

16. It is not in dispute that immediately after the above corporate announcement made at 11.02 AM and 4.44 PM on 02.03.3005, the price

of the EIIL scrip increased from the closing price of ₹ 100.15 on 01.03.2005 to ₹ 101.90 on 02.03.2005 and the volume increased from daily trading volume of 3685 shares to average daily trading volume of 22606 shares during the investigation period. Thus, it is apparent that the above corporate announcement was a price sensitive information and in fact the said corporate announcement had immediate impact on the price and volume of EIIL scrip.

17. By letter dated 08.03.2005 the stock exchange was informed that the Board meeting Scheduled on 08.03.2005 has been cancelled/ postponed as the directors of the company had gone out of station. From that letter it cannot be inferred that on 08.03.2005 the company had decided to drop consideration of the corporate announcement made on 02.03.2005. Very fact that the letter dated 08.03.2005 records that any further notice in relation to the agenda for the meeting scheduled on 08.03.2005 would be given to the stock exchange in due course, clearly shows that the corporate announcement made on 02.03.2005 was to be considered by the Board in any of the subsequent meetings. Admittedly, in none of the subsequent Board meetings the corporate announcement made on 02.03.2005 was considered. Therefore, the argument of the appellant by letter dated 08.03.2005 EIIL had informed the stock exchange that the corporate announcement made on 02.03.2005 has been cancelled, cannot be accepted. Consequently, the decision of the AO that misleading corporate announcement was made on 02.03.2005 cannot be faulted.

18. Argument of the appellant that he had not made the corporate announcement on 02.03.2005 and when were several directors in EIIL, the AO could not hold appellant alone guilty of making misleading corporate announcement is without any merit as can be seen from the following:-

a) Appellant was the promoter-director of EIIL holding 3,90,050 shares out of 5,00,000 shares issued by EIIL. Prior to the corporate announcement dated 02.03.2005 the appellant in October 2004 had handed over 1,25,000 shares of EIIL in physical form along with unsigned blank share transfer forms to Shambhu Agrawal a finance broker. Thereafter, on 27.01.2005, appellant transferred 2500 shares of EIIL from his demat account to the pool account of Ruchiraj Shares and Stock Brokers Pvt. Ltd. On 31.01.2005 appellant rematerialized 2,40,500 shares of EIIL and handed over 2,13,000 rematerialized shares to Shambhu Agrawal along with unsigned share transfer forms. On a query raised by this Tribunal, counsel for the appellant admitted that all the aforesaid 3,40,500 shares of EIIL (1,25,000+2500+2,13,000) were handed over/ transferred by the appellant to Shambhu Agrawal/ Ruchiraj Shares & Stock Brokers Pvt. Ltd. so that on Shambhu Agrawal arranging loan of ₹ 1 crore, the said shares could be offered as collateral security.

b) Instead of arranging loan of ₹ 1 crore, Shambhu Agrawal on 01.11.2004 transferred 1,25,000 shares received from the appellant to his own name and to the name of his other family members. Similarly, on 25.02.2005 Shambhu Agrawal transferred 2,13,000 shares received from the appellant to the name of 22 entities.

c) Finding of fact recorded in para 33 and 34 of the impugned order is that the Agrawal family during the period from 02.03.2005 to 11.03.2005 sold 1,07,000 shares of EIIL which was 49% of the total market volume during the investigation period.

d) In para 37 of the impugned order the AO has recorded a finding that out of the 22 entities to whom the shares of EIIL belonging to the appellant were transferred by Shambhu Agrawal, some of the entities sold 63,300 shares of EIIL during the investigation period, wherein majority of the counter parties to the trades were entities belonging to the group.

e) Above facts on record reveal that prior to the corporate announcement dated 02.03.2005, appellant holding nearly 80% shares of EIIL rematerialized the shares and handed over 3,38,000 shares in physical form to Shambhu Agrawal allegedly for availing loan

of ₹ 1 crore. Instead of arranging loan of ₹ 1 crore, Shambhu Agrawal allegedly gave token amount of ₹ 5 lac (₹ 2,59,000 by cheque and ₹ 2,41,000 in cash) which was allegedly returned by the appellant in cash to Shambhu Agrawal on 31.03.2005 and thereupon on 31.03.2005 Shambhu Agrawal returned 2,15,500 shares of EIIL which were in the name of the third parties.

f) Thus, prior to the corporate announcement, appellant indulged in rematerializing the shares of EIIL and handed over 3,38,000 rematerialized shares to Shambhu Agrawal, who transferred the said shares to his family members and others who traded the said shares on the stock exchange during the investigation period when the corporate announcement was made and thereafter on 31.03.2005, Shambhu Agrawal returned 2,15,500 shares which were in the name of third parties who had traded in the shares of EIIL during the investigation period.

g) Although appellant claims that Shambhu Agrawal transferred the shares of EIIL belonging to the appellant by forging the signature of the appellant, very fact that the appellant has not initiated any proceedings against Shambhu Agrawal for allegedly

committing forgery and the fact that the appellant even after receiving back only 2,15,500 shares out of the total 3,38,000 shares handed over to Shambhu Agrawal has not chosen to take any steps for receiving the balance shares clearly shows that there were deep rooted conspiracy between the appellant and Shambhu Agrawal in utilizing the shares of EIIL belonging to the appellant for trading on market during the period when misleading corporate announcement was made.

19. Aforesaid facts on record establish beyond any shadow of doubt that the appellant was instrumental in issuing misleading corporate announcement on 02.03.2005. Thus, on one hand appellant was instrumental in issuing corporate announcement by EIIL on 02.03.2005 which was admittedly not considered by the Board of EIIL at any time thereafter and on the other hand appellant in connivance with Shambhu Agrawal manipulated a device for trading in the shares of EIIL belonging to the appellant during the period of corporate announcement which resulted in increase in the price and volume of the EIIL scrip. Thus, it is apparent that corporate announcement was nothing but a device adopted to lure the investors to trade in the shares of EIIL. Since the corporate announcement was not even considered by the Board it is abundantly clear that the said corporate announcement was not made with bonafide intentions.

20. In these circumstances, finding recorded by the AO that the appellant was instrumental in issuing misleading corporate

announcement on 02.03.2005 in gross violation of the PFUTP Regulations cannot be faulted. Penalty imposable for such fraudulent and unfair trade practices under Section 15HA of SEBI Act is up to ₹ 25 crore. In the present case, the AO after considering all mitigating factors has imposed penalty of ₹ 20 lac under Section 15HA which cannot be said to be excessive or unreasonable.

21. Second charge held against the appellant is that the appellant has failed to comply with the public announcement/ open offer obligation contained in regulation 10 & 11(1) of the Takeover Regulations, 1997.

22. As noted earlier, appellant as a promoter-director of EIIL was holding 3,90,050 shares of EIIL which constituted nearly 80% of the entire shareholding. Admittedly, appellant resorted to rematerializing the shares of EIIL and in October 2004 handed over 1,25,000 shares and on 31.01.2005 handed over 2,13,000 in physical form to Shambhu Agrawal which were transferred by Shambhu Agrawal to his own name, to the name of his family members and other entities. Although, the appellant claims that the aforesaid shares were transferred by Shambhu Agrawal without the consent and knowledge of the appellant and by forging the signature of the appellant, it is admitted by the appellant that on 31.03.2005 he came to know about the above transfer of shares.

23. Thus, admittedly on 31.03.2005 appellant was aware that shares of EIIL held by him have been transferred. Consequently, on 31.03.2005 was aware that on account of such transfer of shares effected by Shambhu Agrawal, shareholding of the appellant in EIIL stood reduced

from 80% to 9.91%. Therefore, on 31.03.2005 when Shambhu Agrawal returned 2,15,500 shares of EIIL in the name of third parties, appellant knew that transferring those shares to the name of the appellant would result in increasing the shareholding of the appellant in EIIL from 9.91% to 43.10% (see para 58 of the impugned order). Regulation 10 & 11(1) of the Takeover Regulations mandatorily requires a person acquiring 15% or more shares to make public announcement/ open offer. Admittedly, 2,15,500 shares of EIIL have been transferred to the name of the appellant without following the procedure prescribed under the Takeover Regulations. It is important to note that out of 2,15,500 shares returned by Shambhu Agrawal 1,82,150 shares were in physical form and it is the appellant who took steps to transfer the said 1,82,150 shares in the name of third parties to the name of the appellant. Thus, it is apparent that acquiring shares of EIIL in excess of the limits prescribed, without making public announcement/ open offer was in gross violation of regulation 10 & 11(1) of the Takeover Regulations.

24. Penalty imposable under Section 15H(ii) of SEBI Act for failure to comply with regulation 10 & 11(1) of the Takeover Regulations is up to ₹ 25 crore. However, in the facts of present case, the AO after taking into consideration all mitigating factors has imposed penalty of ₹ 75 lac as against the penalty of ₹ 25 crore imposable under Section 15H(ii) of SEBI Act which cannot be said to be excessive or unreasonable.

25. Third charge held against the appellant is that the appellant has violated regulation 7(1A) read with regulation 7(2) of the Takeover

Regulations and regulation 13(4) read with regulation 13(5) of the PIT Regulations.

26. In para 60 and 61 of the impugned order, the AO has set out the obligation of the appellant to make disclosures under the aforesaid regulations when the shareholding of the appellant in EIIL stood reduced from 53.01 to 9.91% and thereafter increased from 9.91% to 43.01% on 31.03.2005. Assuming that on 31.03.2005 appellant came to know about the transfer of shares belonging to the appellant, after 31.03.2005 appellant ought to have made disclosures which the appellant failed to do. Similarly, when shares of EIIL in the name of third parties were transferred to the name of the appellant disclosures ought to have been made, but the appellant failed to make disclosures. Thus, in the facts of present case, decision of the AO that the appellant has violated the disclosure obligations contained in the Takeover Regulations and PIT Regulations cannot be faulted.

27. Penalty imposable under Section 15A (b) of SEBI Act for failing to comply with the disclosure obligations under the aforesaid regulations is up to ₹ 1 crore. However, the AO after considering all mitigating factors has imposed penalty of ₹ 5 lac which cannot be said to be excessive or unreasonable.

28. Strong reliance was placed on the statement contained in the SEBI investigation report (at page 166 of the Appeal Paper Book) to the effect that there were no debit and credit entries in the demat statement of the Agrawal family during the investigation period. We see no merit in the

above contention, because, admittedly appellant had handed over shares of EIIL in physical form to Shambhu Agrawal. In such a case question of making any debit or credit entry in the demat account does not arise at all. Moreover, once it is established that the appellant had adopted a modus operandi for trading in the shares of EIIL belonging to the appellant in violation of the regulations framed by SEBI, then irrespective of the fact that the appellant had received any consideration or not, the appellant is bound and liable to face the consequences for violating SEBI Act and the regulations framed thereunder. Fact that lesser penalty has been imposed on the Agrawal group cannot be a ground to take lenient view towards the appellant, because, the appellant was the chief architect of manipulating a device for committing fraud on the investors in the securities market.

29. Thus, in the fact of present case, appellant who was instrumental in manipulating a device to defraud the investors in the securities market could have been made liable to pay aggregate penalty up to ₹ 51 crores [(up to ₹ 25 crore under Section 15HA, up to ₹ 25 crore under Section 15H(ii) and up to ₹ 1 crore under Section 15A(b)] under the SEBI Act. However, after considering all mitigating factors the AO has imposed aggregate penalty of only ₹ 1 crore on the appellant promoter-director of the company who was the chief architect in manipulating a device which is prohibited under the securities laws. Hence, in the facts of present case, aggregate penalty or ₹ 1 crore imposed on the appellant cannot be said to be exorbitant or unreasonable.

30. 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/-
Dr. C.K.G. Nair
Member

05.01.2018
Prepared & Compared By: PK