

BEFORE THE SECURITIES APPELLATE TRIBUNAL  
MUMBAI

**Date of Decision: 04.05.2018**

**Appeal No. 78 of 2018**

Umashankar Agarwal  
B/205, B Wing,  
2<sup>nd</sup> Floor, Rajniketan,  
Opp. Patkar College,  
S.V. Road,  
Goregaon (West)  
Mumbai- 400 062

...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. Saurabh Bachhawat, Advocate i/b Mr. Manoj Jain, Chartered Accountant for the Appellant.

Mr. Vishal Kanade, Advocate with Mr. Shantanu Mitra and Mr. Anubhav Ghosh, Advocates i/b Desai & Diwanji for the Respondent.

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

Per: Justice J.P. Devadhar (Oral)

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 19.01.2018. By the said order penalty of ₹ 16 lac is imposed on the appellant under Section 15HA of the Securities and Exchange Board of India, Act, 1992 for aiding and abetting Mr. Bimlesh Kumar Mishra (Mr. Mishra) in off-loading the fraudulently dematted

excess shares of Somani Cement Company Limited. ("SCCL" for convenience) to the innocent investors in the securities market.

2. SEBI conducted investigation in the scrip of SCCL a public listed company for the period from 02.07.2004 to 01.04.2005. Investigation carried out by SEBI revealed that during the investigation period SCCL made several corporate announcements which appeared to be false and misleading. It was also noticed that during the investigation period SCCL had issued 44,73,450 shares in excess of its paid up capital and out of said excess shares, 37,58,450 shares were dematted by SCCL during the period from February 2005 till the end of the investigation period and the said excess shares dematted by Mr. Mishra were sold in the market to gullible and innocent investors through various entities including the appellant.

3. It is not in dispute that appellant was one of the persons who had acquired shares of SCCL from Mr. Mishra in off market and sold them on-market by receiving an amount of 25 paise per share. Very fact that the appellant agreed to acquire shares of SCCL in off-market from Mr. Mishra and sell the said shares on market by receiving 25 paise per share clearly shows that it was not a transaction carried out in the ordinary course of business.

4. By an order dated 23.12.2010 SEBI had held that the appellant through the aforesaid transactions aided and abetted Mr. Mishra in fraudulently off-loading the excess dematted shares of SCCL and accordingly imposed penalty of ₹ 1 lac on the appellant on the ground

that the appellant had violated the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (“PFUTP” Regulations” for convenience). On appeal this Tribunal set aside the said ex-parte order and directed SEBI to pass fresh order on merits after hearing the appellant.

5. Accordingly, the appellant was heard and by the impugned order it is held that the appellant has violated the PFUTP Regulations and penalty of ₹ 16 lac has been imposed on the appellant.

6. Grievance of the appellant is that firstly, just because the ex-parte order initially passed by imposing penalty of ₹ 1 lac has been set aside by this Tribunal and remanded for fresh decision, SEBI is not justified in enhancing the penalty up to ₹ 16 lac. Secondly, having not taken any action against the depositories who were equally responsible for issuing the excess dematted shares and having not initiated any penalty proceedings against Mr. Mishra who was the main culprit in the present case, SEBI is not justified in imposing penalty of ₹ 16 lac on the appellant.

7. It is further submitted on behalf of the appellant that in all 17 entities including the appellant had received shares of SCCL in off-market from Mr. Mishra and sold them on-market and out of 17 entities penalty has been imposed on 12 entities in the range of ₹ 1 lac to ₹ 2 lac for the similar violations and three persons have been exonerated by

wrongly recording that they had not received shares of SCCL in off-market from Mr. Mishra. In these circumstances, it is submitted, that imposing penalty of ₹ 16 lac on the appellant is unjustified.

8. We find merit in the aforesaid contentions as in our opinion, in the present case, SEBI has unduly favoured the violator who are found to have committed serious fraud on the securities market.

9. It is a matter of record that the total paid up capital of SCCL in terms of number of shares as on 05.03.2005 was 71,68,900 shares, whereas, the total number of shares issued by SCCL as on 05.03.2008 stood at 1,16,42,350 shares. Thus, SCCL had issued 44,73,450 shares in excess of its paid up capital. Out of 44,73,450 excess shares, 37,58,450 shares were dematted by SCCL during the investigation period. It is also recorded in the impugned order that Mr. Mishra, Charman and Director of SCCL had dematted 29,24,500 shares after 23.02.2005 and sold the same on-market to the innocent investors through various entities including the appellant who received shares from Mr. Mishra in off-market transactions. It is also recorded that Mr. Mishra had transferred 41,31,000 shares of SCCL in the off-market to a number of entities who sold those shares in the market and created artificial volume in the scrip of SCCL.

10. Issuing shares in excess of authorised share capital and further dematting those unauthorized excess shares and allowing those shares to be sold on-market to innocent investors is a serious fraud on the

securities market. In such a case, SEBI is unjustified in not initiating any action against the depositories.

11. It is not in dispute that in the present case, the main architect in committing serious fraud on the securities market was Mr. Mishra, Chairman and Director of SCCL. In fact Mr. Mishra, vide letter dated 27.04.2007 had admitted that the shares in excess were intentionally sold by him in order to meet the liability of SCCL towards unsecured creditors. In such a case, merely debarring Mr. Mishra from accessing the securities market for 10 years and not even initiating penalty proceedings against Mr. Mishra who had collected crores of rupees by selling the unauthorized excess shares is wholly unjustified.

12. Apart from the above, when 17 entities including the appellant were found to have aided and abetted Mr. Mishra in off-loading the fraudulently dematted excess shares of SCCL to innocent investors in gross violation of PFUTP Regulations, imposing penalty ranging from ₹ 1 lac to ₹ 2 lac on most of the entities as against the imposable penalty of ₹ 25 crore under Section 15HA of SEBI Act clearly shows that SEBI has shown undue leniency by imposing nominal penalty on the violators.

13. In any event, having imposed penalty of ₹ 1 lac in the ex-parte order passed against the appellant, without assigning any reasons SEBI is not justified in treating the appellant differently from other similarly situated violators and imposing higher penalty of ₹ 16 lac on the appellant.

14. It is further shocking to note that in respect of some of the entities involved in the present case (eg. In the case of Narendra M. Patel and Umesh H. Patel) the adjudication proceedings have been dropped by recording a specific finding that they had not received shares of SCCL in off-market from Mr. Mishra. In fact, the investigation report specifically records that those two persons (like the appellant) had also received shares of SCCL in off-market from Mr. Mishra. Thus, it is apparent that some of the violators have been let off by recording a finding contrary to the facts on record. It is difficult to believe that dropping of the adjudication proceedings in case of some of the violators by recording findings which are contrary to the facts on record was an inadvertent error.

15. In these circumstances, the appellant is justified in contending that he is being victimized for approaching this Tribunal and that there is no reason to treat the appellant differently from other similarly situated violators. In our opinion, the course adopted by SEBI in the present case is detrimental to the interests of the securities market.

16. Accordingly, for all the aforesaid reasons, we set aside the impugned order passed against the appellant and restore the matter for fresh decision on merits. We sincerely hope that SEBI would take appropriate remedial measures in the matter and ensure that its credibility as an efficient market regulator is not eroded.

17. Since the matter is being remanded on account of the abnormalities noticed in the order of SEBI, we would have imposed heavy costs on SEBI in the present case. However, looking to the fact that the appellant who was a Director of Agrawal Shares Finance Pvt. Ltd. has prima facie, indulged in aiding and abetting Mr. Mishra in off-loading fraudulently dematted excess shares of SCCL and has indulged in making misleading statements in his letter dated 04.05.2017 and in the statement recorded on 27.11.2006, we refrain from imposing costs. Apart from the above, it is difficult to believe that the appellant, a Director of a company. could not understand the motive behind Mr. Mishra transferring shares of SCCL in off-market to the appellant and giving to the appellant 25 paise per share for selling the said shares in the market.

18. In the result, impugned order is set aside and restored for fresh decision, with no order as to costs. Registry is directed to forward a copy of this order to the Chairman, SEBI for information and necessary action.

Sd/-  
Justice J.P. Devadhar  
Presiding Officer

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