

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on: 12.07.2019

Date of Decision : 09.09.2019

Appeal No. 295 of 2017

Shri Umesh Khariwala
5/18, Jai Lalaram CHS Ltd.,
Kharkar Lane,
Thane – 400 601.

.... 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. L.S. Shetty, Advocate with Mr. U.R. Naik and Ms. Sanika Lalit, Advocates i/b L.S. Shetty & Associates for the Appellant.

Mr. Gaurav Joshi, Senior Advocate with Mr. Anubhav Ghosh and Ms. Rashi Dalmia, Advocates i/b The Law Point for the Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Dr. C.K.G. Nair, Member
Justice M.T. Joshi, Judicial Member

Per : Dr. C.K.G. Nair, Member

1. This appeal has been filed to challenge the order of the Adjudicating Officer ('AO' for short) of the Securities and Exchange Board of India ('SEBI' for short) dated August 21,

2017. By the said order a penalty of Rs. 50 lakh has been imposed on the appellant under Section 15HA of the SEBI Act, 1992 for violations of Regulations 3(b), 3(c), 4(1) and 4(2) (r) of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices) Regulations, 2003 ('PFUTP Regulation' for short)

2. Facts relevant to the matter are the following: SEBI conducted an investigation into trading in the scrip of M/s. Adam Comsof Limited ('ACL' for short) during the period October 29, 2003 to October 31, 2004. The said investigation revealed that ACL made a number of corporate announcements during October 29, 2003 to February 6, 2004 relating to preferential allotment, issuance of redeemable preferential shares, interim dividend, stock split and bonus shares etc. Further, after the consequential price rise in the scrip from Rs. 6.00 to Rs. 22.00 during subsequent period i.e. February 9, 2004 to August 10, 2004 a group of entities by the name Rajkumar Basantani Group ('RKB Group' for short) off-loaded shares of ACL in the market resulting in drastic decline of price from Rs. 22.00 to Rs. 2.60.

3. Various announcements made by the Company as indicated in the impugned order are the following:-

Sl. No.	Date	News Subject	News
1.	19.09.2003	Consideration of issuance of secured bonds	A meeting of the Board of directors of AC will be held on September 26, 2003 to consider mobilizing funds by issuing secured bonds in the markets.
2.	22.12.2003	Board of Directors of ACL to consider issue of equity shares on preferential basis.	ACL has informed BSE that a meeting of the Board of Directors of the Company will be held on December 22, 2003 to transact the following business: (i) To consider the issue of Equity shares through Preferential Allotment. (ii) To consider the issue of Redeemable Preferential Shares. (iii) To call the ensuing Annual General Meeting on Shorter Notice.
3.	31.12.2003	Board of Directors of ACL approves Preferential Issue	ACL has informed BSE that the Board of Directors at their meeting held on December 22, 2003 has decided to issue 45,00,000 equity shares of Rs.10/- each at a premium of Rs.2/- per share through preferential allotment to promoters and body corporate and to issue 50,00,000 10% Redeemable/Convertible preferential shares @ Rs.10/- each.
4.	21.01.2004	Board of Directors of ACL to declare dividend	ACL has informed BSE that a meeting of the BoD of the Company will be held on January 30, 2004, to recommend 10% interim dividend on equity shares, and to split the face value of

			shares from Rs. 10/- per share to Rs. 5/- per share.
5.	30.01.2004	ACL declares dividend	ACL has informed BSE that the meeting held on January 30, 2004, the Board has declared 10% Interim Dividend on equity shares and also decided to spilt the face value of the equity share from Rs 10/- per share to Rs 5/- per share subject to the approval of the members in the general meeting.
6.	01.04.2004	Board of Directors of ACL to consider the issue of Bonus Shares.	ACL has informed BSE that a meeting of the BoD of the Company will be held on April 9, 2004, to consider the issue of Bonus Shares.
7.	19.08.2004	Board of Directors of ACL to consider Bonus issue	ACL has informed BSE that a meeting of the Board of Directors of the Company will be held on August 23, 2004 to discuss and recommend the issue of Bonus Shares.

4. It is found that many of the announcements were neither implemented nor even board meeting dated April 9, 2004 and August 23, 2004 took place.

5. The appellant was an Additional Director of ACL during the period October 8, 2003 to June 2, 2004 when many of the corporate announcements were made by the ACL. In addition, on April 5, 2004, 1,46,439 shares were transferred to the account of the appellant held jointly with his wife from an

account jointly held by the appellant and one Mr. Anil Tambe, Director of Collar Biotech Limited. Further, on the same day the appellant received 1,49,000 shares in off-market transaction from related / connected entities without any consideration. Further, on April 12, 2004, 1,58,354 shares were transferred from an account jointly held by the appellant and Mr. Jayendra Thakkar, Director of Kolar Biotech Ltd. to the appellant's account jointly held with his wife. Also, on the same day i.e. on April 12, 2004 the appellant received 1,58,000 shares in off market transactions from related entities without any consideration. During April 5, 2004 – April 28, 2004 the appellant sold 1,88,273 shares through the trading account maintained with Sharekhan Ltd. in the name of M/s. Pragati Investments (Proprietor – Pratima Khariwala, wife of the appellant) for a total consideration of Rs. 13,97,299/-. Also, during April 29, 2004 – May 12, 2004 the appellant sold 1,17,686 shares in the market for a total consideration of Rs. 2,80,478/- through the joint account held in the name of the appellant and his wife with HDFC Ltd. On June 2, 2004 the appellant resigned from the post of Additional Director of ACL. The resignation letter was sent to the Thane office of the company instead of its registered

office with shows that the appellant was aware of the fact that the registered office was closed/non-functional.

6. On February 25, 2010 SEBI passed an order against the appellant for violation of PFUTP Regulation and thereby imposed a penalty of Rs. 20 lakh. This tribunal set aside the said order dated February 25, 2010 on August 20, 2015 and remanded the matter back to the AO. On October 14, 2016 SEBI issued a show cause notice and on June 29, 2017 an opportunity of personal hearing was given to the appellant.

7. Thereafter, SEBI furnished details of the transactions of the appellant in the shares of ACL. On July 31, 2017 another opportunity of personal hearing was given to the appellant.

8. On August 21, 2017 the AO passed the impugned order imposing a penalty of Rs. 50 lakh under section 15HA of SEBI Act, 1992 for violation of various provisions of PFUTP Regulations.

9. Learned counsel for the appellant Shri L.S. Shetty contended that only because the appellant was an Additional Director of ACL for a short time of 8 months from October 8, 2003 to June 2, 2004 the appellant has been held responsible for the misdoings of ACL. The appellant was a medical

doctor and was an employee of M/s Soundcraft Industries Ltd. which is under the same management of ACL. Since the Chairman and Managing Director of ACL, Soundcraft and Kolar Biotech Ltd., three sister concerns resigned and left India in April 2004 the appellant also resigned from the company in June 2004. The adjudication order dated February 25, 2010 was passed as an *ex-parte* order in respect of the appellant. Since all the directors of ACL had left in 2004 form 32 was not filed with the RoC regarding his resignation. However, in 2005 itself the appellant informed BSE, NSE and SEBI that he had never attended any board meeting of ACL. In response to the show cause notice dated October 14, 2016 the appellant had informed the AO that he is a practicing medico and he joined as an Additional Director of ACL only for looking after the technical aspects of the company and denied having participated in any board meeting of ACL. Through additional submissions the appellant reiterated these facts to the AO. When the appellant was informed of his signatures in the financial results for the quarter ending December 31, 2003 and in the corporate governance report for the year appellant noticed that the signature was forged and informed the same to the AO on August 14, 2017.

10. In short the learned counsel for the appellant submitted that the appellant was only an Additional Director of ACL and did not have any role in its day-to-day management nor attended any of the board meetings. His signature was forged on the financial results and corporate governance report of ACL. Being not part of any board meeting the appellant was not aware of any of the corporate announcements made by ACL nor any of the alleged wrong doings of ACL. Just because he was an additional director for a short period of eight months he cannot be held vicariously liable for the offences, if any, made by the company or its other directors. Further, the appellant also took the stand that the Adjudicating Officer should have proceeded on the basis of the original show cause notice issued in 2009 and should not have issued another show cause notice in October 2016. This was against what was ordered by this tribunal while remanding the matter back to the AO vide its order dated August 20, 2015.

11. As regards the transactions in the shares of ACL, the learned counsel for the appellant contended that most of these transactions were done by M/s Pragati investments, a proprietary concern of the appellant's wife and not by the

appellant and the first holder of those shares was his wife. Therefore in computation of the penalty only the shares where the appellant was the 1st holder should have been included. If the same is done the proceeds come to only Rs. 2,80,478/-. Therefore, even if penalties are imposed on the appellant it should have been on the basis of this amount only and not on the basis of the total sales proceeds calculated at Rs. 1,677,777/-. In short, it was contended that he had no role in the corporate announcements made by ACL and his transactions in the shares of ACL is limited and was done in the ordinary course of business, having no role in either the corporate announcements nor in the price rise of the shares of ACL and therefore he violated no provisions of the PFUTP Regulations. In order to press his contentions, the learned counsel for the appellant also relied on the order of the Delhi High Court in the matter of *Rashima Verma vs Securities and Exchange Board of India (2009) 157 DLT 417* and stated that a person sought to be arraigned as an accused has to have some connection with the day to day management of the Company or in relation to the offences committed by the Company.

12. We have also heard the learned senior counsel for the respondent SEBI, Shri Gaurav Joshi. It was urged by him that misleading corporate announcements by ACL is a matter of record. It is also an admitted fact that the appellant was a director of ACL during October 2003 to June 2004 irrespective of whether he was an additional director, which is only a designation before getting confirmed by the shareholders. Through these various misleading corporate announcements the price of the scrip of ACL was increased from Rs. 6/- to Rs. 22/- during the relevant time during which the appellant had offloaded a large quantity of shares and afterwards the price fell sharply to Rs. 2.60 on August 10, 2004. Despite being a director in the board of ACL, apart from claiming that he did not participate in the meetings etc, the appellant did not produce any evidence and therefore just relying on ignorance or negligence does not absolve the appellant from his duties and liabilities of a Director. In any case the Compliance Report on Corporate Governance and the quarterly audit reports clearly show that the appellant had attended the board meetings during that quarter. The signatures therein tally with the signatures of the appellant in his PAN card. Further, all the companies-ACL, Kolar Biotech Ltd. and Soundcraft Industries Ltd. belong to the Rajkumar

Basantani group and the appellant was an employee of one of them and was a Director of another and hence cannot pretend complete ignorance of the on goings in ACL.

13. The learned senior counsel further submitted that assuming that the appellant was not aware of the corporate announcements etc. it is inexplicable how he had received a large number of shares of ACL off market and why he has bought and sold a huge quantity of shares during the relevant time. These trades are not disputed nor the gain of about Rs. 17 lakh. The appellant held 18 demat accounts either individually or jointly with others as provided by the depositories. At the same time the appellant describes himself as a small-time investor. His claim of being a sub- broker in order to save brokerage is also not substantiated with any evidence. In the face of the evidence of large-scale dealings in the scrip of ACL during the relevant time of misleading corporate announcements and soon thereafter a director of the company cannot feign ignorance and take shelter. The preponderance of probability alone would make him liable. In the instant matter further no explanation has been given by the appellant either before SEBI or before this Tribunal regarding his transactions in the scrip of ACL; how he got

large number of shares off market and at what price etc. is still unknown to us. Relying on the judgment of the Hon'ble Supreme Court of India in the matter of *N. Narayanan vs Adjudicating Officer, SEBI, MANU/SC/0426/2013*, the learned senior counsel for SEBI emphasized the responsibility of the Directors.

14. We find no merit in the contentions made by the appellant. The contention that no fresh show cause notice could be issued by the AO is without any merit since this Tribunal had remanded the matter on the ground of its ex-parte nature and asking the AO to pass a fresh order in accordance with law. It did not prevent the AO from issuing a fresh show cause notice or a supplementary show cause notice as deemed appropriate. We also find no merit in the submission that the appellant as a director was fully oblivious to the ongoing in the company in which he was a director/additional director for 8 months. His submission that the signatures were forged in the documents submitted by the company has no merit and we would treat it as an afterthought in the face of the fact that the company was facing several disputes and litigations and all the Directors had left the

Company with the Chairman and Managing Director even leaving the country.

15. It is to be noted that large quantity of shares were transferred to the demat account of the appellant jointly held with his wife by other directors of Kolar Biotech Ltd. and the appellant was having joint account with directors of Kolar Biotech Ltd. In addition the appellant received 1,58,000 shares off market without any consideration for which no explanation has been given.

16. Examination of the demat account statements of the appellant, as submitted by depositories reveal the following. The appellant had 18 demat accounts held either singly or jointly with others; many of which are presently closed. During the relevant period the appellant had substantial transactions in the scrips of Adam Comsof Ltd., Kolar Biotech Ltd., and Soundcraft Industries Ltd. Seven of these accounts show transactions in the scrip of Adam Comsof Ltd. including off-market transfers. Two of the accounts were jointly held with Mr. Anil Tambe and Mr. Jayendra Thakkar, respectively, who were directors of Kolar Biotech Ltd. The Joint account with Anil Tambe, having DP ID- IN301854 Client ID- 10038476 received off market credit of 1,66,439

shares out of which 1,46,439 shares were transferred to the account of the appellant held jointly with his wife Ms. Pratima Khariwala on 05.04. 2004. The joint account with another director Mr. Jayendra Thakkar, having DP IDIN301854 and Client ID- 10038468 received off-market credit of 1,58,354 shares which was in turn transferred on 12.04.2004 to the joint account of the appellant held with his wife Ms. Pratima Khariwala.

17. The complete unwillingness to give any explanation relating to large scale transactions in the shares of ACL, including off market transactions, with parties in the RKB Group at the relevant time itself speaks volumes of the collusion of the appellant with the company ACL and its group entities. Neither the explanation of being a small investor nor a sub- broker without any documentation nor that the first holder of most of the shares was his wife do not absolve the appellant from these dealings particularly when the appellant was an additional director of ACL. Therefore even assuming that he was not party to the corporate announcements made by ACL he was conscious of the price rise in the script of the company and offloaded huge amount of shares of ACL in the market and made a substantial profit

of almost Rs. 17 lakh. Therefore the finding that he has violated provisions of the PFUTP Regulations cannot be faulted. Given these facts we find no merit in the appellant's reliance on the order of Rashima Verma (supra), which is distinguishable on facts.

18. The penalty imposable under Section 15HA of SEBI Act at the relevant time was that of twenty-five crore rupees or three times the amount of profits made out of such practices, whichever is higher. Given the undisputed facts about the various transactions in the shares of ACL by the appellant when he was an Additional Director of ACL and other facts as detailed herein make the appeal fail. The penalty of Rs. 50 lakh imposed in the given facts of the case is fair and just.

19. Accordingly, appeal is dismissed with no order as to costs.

Sd/-
Justice Tarun Agarwala
Presiding Officer

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

Sd/-
Justice M.T. Joshi
Judicial Member

09.09.2019

Prepared and compared by:msb