BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on: 20.04.2021

Date of Decision : 09.06.2021

Appeal No. 454 of 2020

CARE Ratings Limited
4th Floor, Godrej Coliseum,
Somaiya Hospital Road,
Off Eastern Express Highway,
Sion (E), Mumbai – 400 022. ….. 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. Somashekar Sunderasan, Advocate with Ms. Yugandhara Khanwilkar, Mr. Joby Mathew and Mr. Arihant Agarwal, Advocates i/b Joby Mathew & Associates for the Appellant.

Mr. Gaurav Joshi, Senior Advocate with Mr. Mihir Mody and Mr. Arnav Misra, Advocates i/b K. Ashar & Co. for the Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Justice M.T. Joshi, Judicial Member

Per : Justice Tarun Agarwala, Presiding Officer

1. The present appeal has been filed against the order dated

July 24, 2020 passed by the Adjudicating Officer (‘AO’ for

short) of the Securities and Exchange Board of India ('SEBI' for short) imposing a monetary penalty of Rs. 1 crore for violating Regulation 15(1) and Clauses 3 and 8 of the Code of Conduct for Credit Rating Agencies under the Securities and Exchange Board of India (Credit Rating Agencies) Regulations, 1999 ('CRA Regulations' for short) in the matter of credit ratings of Reliance Communication Limited ('RCom' for short).

2. The appellant is a Credit Rating Agency ('CRA' for short) and started its operation in 1993. The appellant offers a wide range of rating services in terms of CRA Regulations. The instant case relates to a credit rating of a security, namely, Non-Convertible Debenture ('NCD' for short) issued by RCom amounting to Rs. 2000 crore which had tenure of 7 years and was to mature in February 2019. As on the date of initiating proceedings, NCDs having a value of Rs. 750 crore was being rated by the appellant.

3. The ratings given by the appellant was as under:-

Sr. No.	Date	Rating Action
1.	09.02.2016	The rating given was 'A-'.
2.	29.09.2016	The rating given was 'Placed on Credit Watch'.

3.	22.05.2017	The rating was ‘Downgraded by 2 notches to BB and continued to be placed on Credit Watch.
4.	30.05.2017	The rating was Downgraded by 6 notches to D

4. RCom had defaulted in the repayment of the principal amount of Rs. 375 crore and interest of Rs. 9.7 crore on February 7, 2017 and March 7, 2017. Delayed payment was made on April 10, 2017. On the basis of the third quarterly financial results of financial years 2017 as well as the fourth quarterly results of the financial year 2017 the appellant had downgraded the ratings of NCDs of RCom from ‘A-’ to ‘BB’ and thereafter to ‘D’.

5. Considering the aforesaid sequence of events and other factors, SEBI sought comments from the appellant and after analyzing the comments and taking into other factors, a show cause notice dated September 7, 2018 was issued alleging violation by the appellant of Regulation 15(1) and Clauses (3) and (8) of Code of Conduct read with Regulation 13 of the CRA Regulations. The show cause noticed alleged that there was failure on the part of the appellant to monitor the ratings and factors affecting the credit worthiness of the Company in

a timely manner resulting in a significant delay in conducting the rating process and downgrading the ratings. It was alleged that the financial results of the third quarter of RCom which was disseminated on the website of the Stock Exchange on February 11, 2017 was not placed before the Rating Committee in a timely manner and that analysis was presented belatedly on May 18, 2017. It was also alleged that the international credit rating agencies such as Moody's Investors Service ('Moody's) downgraded the ratings of RCom on November 30, 2016 and January 26, 2017 and Fitch Ratings ('Fitch' for short) also downgraded it in December 2016 which was not taken into consideration by the appellant while monitoring the ratings of RCom. It was also alleged that even after significant deterioration in the financial results in the third quarter of the Company, the appellant did not proactively interact with the Company seeking information regarding its financial operational performance nor took steps to obtain a No Default Statement (NDS).

6. The stand of the appellant before the AO was that even though the profitability of RCom was affected in the third quarter and the said Company reported losses, nonetheless,

according to the appellant, performance of one quarter was not worth a revision in the ratings especially when it was completely due to external risk emanating from market penetrating pricing by a new entrant. It was also contended that RCom was expecting certain funds from the sale of its towers to Brookfield which funds would reduce the debt liability and therefore a conscious decision was taken to wait for another quarter with regard to the performance of RCom. It was also stated that RCom was an established promoter group which was a relevant factor and therefore the quarterly performance was discussed by the Rating Team and found that no further action was required. It was also contended that domestic and international skills of ratings are different and cannot be compared and therefore the ratings given by Moody's and Fitch was not taken into consideration. It was also contended that the appellant had regular interaction with the Company post third quarterly results. It was contended that the RCom intimated the appellant that they were regular in making payments for the debt liabilities and were managing the liquidity adequately and therefore, on this basis, no immediate action was taken after the declaration of the third quarterly financial results. It was also contended that the

appellant only became aware of the delay in the payment by RCom on May 27, 2017 when corporate announcement was made by RCom. The appellant promptly reviewed the ratings on May 30, 2017 and the ratings were downgraded by six notches to “Default”.

7. Additional submissions were made by the appellant before the AO, namely, that under CRA Regulations the ratings of the Company are required to be reviewed on a continuous basis and any significant development requires a review which the appellant reviewed from time to time. It was contended that the decision not to convene a Review Committee was a conscious and *bona fide* decision taken by the appellant. It was also contended that as per the Operational Manual of CRA read with Regulation 24 of the CRA Regulations, the appellant conducted internal reviews of the quarterly results of the Company. The quarterly results were reviewed within 90 days from the end of the each quarter. It was asserted that the appellant’s analyst coordinated with the Company for requisite information and if adequate information was not available then the appellant had a dialogue with the Company and sought clarification, if required. It was contended that based on the dialogue, the

quarterly review sheet was updated and if after the above procedure a detailed review was required then a review was undertaken by the Rating Team. It was asserted that this procedure was followed by the appellant. It was contended that the third quarterly results came into the public domain on February 11, 2017 and the fourth quarterly financial results was announced on May 27, 2017 and, within 90 days, the appellant undertook the review and downgraded the ratings. It was also asserted that vide email dated January 17, 2017 after the announcement of the third quarterly results, the appellant sought a No Default Statement (NDS) and break-up of the outstanding debt of the Company but the Company failed to give a reply. The appellant contended that thereafter they telephonically spoke to the officials of RCom who confirmed that debt payments were regular and therefore took a conscious decision not to change the ratings and wait for another quarter with regard to the performance of RCom. It was, thus, asserted that the appellant was continuously monitoring the situation and the rating process was followed diligently and therefore there was no violation of the CRA Regulations.

8. The AO after giving an opportunity to the appellant and after considering the written submissions and the documents available on the record held that the appellant had violated the provisions of the Regulations and accordingly imposed a penalty for lack of due diligence. The AO found that the role of a CRA in a rating exercise was not to express its opinion in standardised symbols on the basis of a material supplied by the Company but should have based its ratings on the basis of an independent investigation from other sources and on the basis of exercise of professional judgment. The AO further found that the ratings have to be monitored on a continuous basis as per the circular of SEBI dated June 30, 2017 and if there was any significant development in the performance of the Company then the same was required to be reviewed on an immediate basis which in the instant case was not done. The AO came to the conclusion that there was no promptitude on the part of the appellant and that they did not act with due diligence. The AO held that since there was a significant deterioration in the credit profits after the third quarterly financial year results no steps were taken by the Rating Committee to review the matter on an immediate basis. Further, the contention of the appellant that they discussed the

matter internally with the officials of the Company is not borne out from any evidence since no record was produced with regard to the discussions between the appellants and RCom with regard to the deterioration in the credit profile of the third quarterly financial results nor any record has been produced to show the analysis made by the Review Committee on the third quarterly financial results. The AO came to the conclusion that waiting for one more quarter before taking action was wholly belated and violative of Clauses 3 and 8 of the Code of Conduct. The AO further found that if NDS was not provided by the RCom, the same should have been dealt with in the manner prescribed in Operational Manual of CRA which again was not done. Further, international credit rating agencies had downgraded the NCDs of RCom which was not considered by the appellant. The AO came to the conclusion that the appellant failed to initiate review of its ratings after the third quarterly financial results in a timely manner and failed to take steps in accordance with Regulation 16 of the CRA Regulations.

9. We have heard Shri Somasekhar Sundaresan, the learned counsel for the appellant and Shri Gaurav Joshi, the learned senior counsel for the respondent at length.

10. Before us, the learned counsel for the appellant has raised the same submissions that was raised before the AO and further contended that under CRA Regulations the ratings given by the appellant is an expression of an opinion given in a standardised form. This opinion is based on an analysis of various factors and is also subjective apart from being scientific. It was contended that this expression of opinion given by the appellant cannot be substituted by SEBI through back door methods by initiating proceedings under Section 15-I of SEBI Act. It was contended that “ratings” is defined under Regulation 2(1)(q) as an expression of an opinion in standardised form and such expression of such opinion is part and parcel of freedom of speech subject to restriction provided under Article 19(1)(a) of the Constitution of India. It was, thus, contended that a rating agency has a freedom of expression subject to the law laid down under the CRA Regulations and the opinion of the appellant cannot be put to a test in proceedings under Regulation 15(1) of the CRA Regulations. At best, the appropriateness of the assigned ratings can be questioned under Regulation 29(3) and (4) read with Chapter V of the Securities and Exchange Board of India

(Intermediaries) Regulations, 2008 ('Intermediaries Regulations' for short).

11. The learned counsel contended that under the garb that there was lack of due diligence on the part of the appellant, the respondent was in fact considering only the appropriateness of the rating provided by the appellant which could not be assessed in proceedings initiated under Section 15I. It was also urged that there was no delay on the part of the appellant in downgrading the ratings and that the appellant acted promptly and downgraded the ratings within 90 days from the end of the third quarterly. Thus, there was no lack of due diligence.

12. On the other hand, the respondent contended that there was failure on the part of the appellant to act in accordance with the relevant Regulations, Code of Conduct and its own manual. It was contended that the decision of the appellant to downgrade the ratings of RCom was taken belatedly and should have been taken at an earlier point of time immediately after the declaration of the third quarterly financial results in February 2017 and should not have waited till the end of the quarter. It was contended that failure to act

on a timely basis includes continuous monitoring, periodic review which had not been done. Further, there was failure on the part of the appellant to follow its own guidelines with regard to review of the quarterly financial results. There was also failure on the part of the appellant to obtain the NDS and failure to disclose the non-cooperation of RCom. Thus, there was a complete failure on the part of the appellant to act with due diligence and therefore the appellant has been rightly penalized.

13. Having heard the learned counsel for the parties at some length and before proceeding; it would be appropriate to consider a few provisions of the CRA Regulations in order to find out exactly as to what is a role of the Credit Rating Agency.

Definitions

2.(1)(h) *"credit rating agency" means a body corporate which is engaged in, or proposes to be engaged in, the business of rating of securities offered by way of public or rights issue;*

2.(1)(q) *“rating” "rating" means an opinion regarding securities, expressed in the form of standard symbols or in any other standardised manner, assigned by a credit rating agency and used by the issuer of such securities, to*

comply with a requirement specified by these regulations;

2(1)(r) *"rating committee" means a committee constituted by a credit rating agency to assign rating to a security;*

Conditions of certificate

9(a) *the credit rating agency shall comply with the provisions of the Act, the regulations made there under and the guidelines, directives, circulars and instructions issued by the Board from time to time on the subject of credit rating.*

Code of conduct

13. *Every credit rating agency shall abide by the Code of Conduct contained in the Third Schedule.*

Agreement with the client

14. *Every credit rating agency shall enter into a written agreement with each client whose securities it proposes to rate, and every such agreement shall include the following provisions, namely:-*

(a) *…….*
(b) *…….*
(c) *the client shall agree to a periodic review of the rating by the credit rating agency during the tenure of the rated instrument;*

(d) *the client shall agree to co-operate with the credit rating agency in order to enable the latter to arrive at, and maintain, a true and accurate rating of the clients securities and shall in particular provide to the latter, true,*

adequate and timely information for the purpose.

Monitoring of ratings

15.(1) *Every credit rating agency shall, during the lifetime of securities rated by it continuously monitor the rating of such securities.*

(2) *Every credit rating agency shall disseminate information regarding newly assigned ratings, and changes in earlier rating promptly through press releases and websites, and, in the case of securities issued by listed companies, such information shall also be provided simultaneously to the concerned regional stock exchange and to all the stock exchanges where the said securities are listed.*

Procedure for review of rating

16.(1) *Every credit rating agency shall carry out periodic reviews of all published ratings during the lifetime of the securities.*

(2). *If the client does not co-operate with the credit rating agency so as to enable the credit rating agency to comply with its obligations under regulation 15 of this regulation, the credit rating agency shall carry out the review on the basis of the best available information.*

Provided t*hat if owing to such lack of co-operation, a rating has been based on the best available information, the credit rating agency shall disclose to the investors the fact that the rating is so based.*

(3) *A credit rating agency shall not withdraw a rating so long as the obligations under the security rated by it are outstanding, except where the company whose security is rated is wound up or merged or amalgamated with another company.*

Rating process

24.(1) *Every credit rating agency shall—*

(a) specify the rating process;

(b) file a copy of the same with the Board for record; and file with the Board any modifications or additions made therein from time to time.

(2) *Every credit rating agency shall, in all cases, follow a proper rating process.*

(3) *Every credit rating agency shall have professional rating committees, comprising members who are adequately qualified and knowledgeable to assign a rating.*

(4) *All rating decisions, including the decisions regarding changes in rating, shall be taken by the rating committee.*

(5) *Every credit rating agency shall be staffed by analysts qualified to carry out a rating assignment.*

(6) *Every credit rating agency shall inform the Board about new rating instruments or symbols introduced by it.*

(7) *Every credit rating agency, shall, while rating a security, exercise due diligence in order to ensure that the rating given by the credit rating agency is fair and appropriate.*

(8) *A credit rating agency shall not rate securities issued by it.*

(9) *Rating definition, as well as the structure for a particular rating product, shall not be changed by a credit rating agency, without prior information to the Board.*

(10) *A credit rating agency shall disclose to the concerned stock exchange through press release and websites for general investors, the rating assigned to the securities of a client, after periodic review, including changes in rating, if any*

Board's right to inspect

29(3) *The inspections ordered by the Board under sub-regulation (1) shall not ordinarily go into an examination of the appropriateness of the assigned ratings on the merits.*

(4) *Inspection to judge the appropriateness of the ratings may be ordered by the Board only in case of complaints which are serious in nature.*

Liability for action in case of default

34. *A credit rating agency which contravenes any of the provisions of the Act, Rules, or Regulations framed thereunder shall be liable for one or more actions specified therein including the action under Chapter V of the Securities and Exchange Board of India (Intermediaries) Regulations, 2008.*

THIRD SCHEDULE
SEBI (Credit Rating Agencies) Regulations, 1999
CODE OF CONDUCT

3. *A credit rating agency shall fulfill its obligations in a prompt, ethical and professional manner.*

4. *A credit rating agency shall at all times exercise due diligence, ensure proper care and exercise independent professional judgment in order to achieve and maintain objectivity and independence in the rating process.*

8. *A credit rating agency shall keep track of all important changes relating to the client*

> *companies and shall develop efficient and responsive systems to yield timely and accurate ratings. Further a credit rating agency shall also monitor closely all relevant factors that might affect the creditworthiness of the issuers.*
>
> ***9.*** *A credit rating agency shall disclose its rating methodology to clients, users and the public*

14. From the perusal of the aforesaid provisions it is clear that a CRA is a body corporate which is engaged in the business of ratings of securities offered by way of public or rights issue. The CRA is required to constitute a Rating Committee which ratings are given to securities issued by the issuer, namely, a person whose securities are proposed to be rated by a CRA. The ratings given by the Committee is an opinion expressed in the form of standardised symbols which are provided in the Schedule. Regulation 9 provides that the CRA shall comply with the provisions of the Act, Regulations and the guidelines, circulars and instructions issued by SEBI from time to time. Under Chapter III of the Regulations, General Obligations of CRA are provided which is required to be followed by a CRA. Regulation 13 provides that every CRA shall abide by the Code of Conduct which is contained in the Third Schedule. Regulation 14 provides that every CRA will enter into an agreement with its client whose

security it proposes to rate. Such agreement will contain that the client will agree to a periodic review of the ratings and that the client will cooperate with CRA to enable the agency to maintain a true and accurate ratings of the client securities. Regulation 15 makes it obligatory on a CRA to continuously monitor ratings of such security during the lifetime of the securities. Further, the CRA is required to disseminate information promptly through press release and website as well as to the Stock Exchange where the securities are to be listed.

15. The procedure for review of ratings is provided under Regulation 16 which makes it obligatory upon the CRA to carry out periodic reviews during the lifetime of the securities and, in the event, the client does not cooperate then it is obligatory for the CRA to carry out the review on the basis of the best available information or in the manner as specified by the Board from time to time. The rating process that is required to be done is provided under Regulation 24 which makes it mandatory for every CRA to specify the rating process and thereafter follow that process. The agency is required to have a professional rating committee comprising of members who are qualified and knowledgeable to assign a

rating. Further, changes in the rating is required to be taken up by the Rating Committee and that while rating a security a CRA is required to exercise due diligence in order to ensure that the ratings given by the CRA is fair and appropriate. Regulation 29 gives an unfettered right to the Board to carry out inspection of the books of account, records and documents of the agency and, if necessary, to investigate into the complaints received from the investors / clients or any other person with regard to the appropriateness of the assigned ratings given by the CRA. Regulation 34 provides that if a CRA contravenes any of the provisions of the Act, Rules or Regulations framed there under, the said agency would be liable for action under Chapter V of the Intermediaries Regulations.

16. In the light of the aforesaid provisions, it is clear that the object under SEBI Act read with CRA Regulations is to protect the interests of investors and to promote the development and to regulate the securities market. SEBI is empowered to take such measures as it thinks fit for carrying out those objectives and duties. The investors in the stock market deals on the basis of information provided by the

Company, the Stock Exchange and other intermediaries. The investors, at times, require crucial information with regard to the financials and the performance of the Company and therefore it has been considered essential by SEBI that for any debt instrument, the credit ratings assigned by the CRAs would be the best information that can be provided to the investors. Thus, it becomes vital for the CRA under the SEBI Act read with CRA Regulations to ensure that their conduct of business is in the right spirit and that the basic intention is to provide correct information to the public / investors for the investors protection and for orderly development of the securities market.

17. In view of the aforesaid, it is no doubt correct to state that the ratings given by a CRA is an opinion expressed in the form of standardised symbols. This opinion given is based not only on the information provided by the Company but is based on the scientific analysis done by the Rating Committee having regard to the financials, the performance of the Company and such other relevant factors necessary to give the debt instrument an appropriate rating. If a rating given is not appropriate then it provides wrong information to the investors which is not good for the orderly development of

the securities market. Thus, the obligation upon a CRA is not only confined to its personal opinion but the opinion has to be based on a scientific analysis of the financials and performance of the Company. Therefore, the responsibility of a CRA in the financial market is not only accountable but also answerable in a dynamic and constantly changing security market and the scope of credit rating cannot be truncated in a casual manner which may create a dent in the development of the corporate debt market and the investors protection.

18. Thus, the role and responsibility of a CRA cannot be confined to just provide credit rating of a debt instrument etc of a Company. There has to be a continuous monitoring of the rating and if there is any deviation appropriate steps are required to be taken promptly failing which there could be a lack of due diligence on the part of the CRA.

19. Further, from a perusal of the Regulations it becomes apparently clear that the credit rating provided by a CRA becomes one of the main criteria for an investor to make an investment. The standardised symbol assigned by CRA is of considerable significant to an investor. A good rating invites high value investors (both for domestic and foreign) and the

symbols given by a CRA serves as a benchmark. Thus, ratings cannot be a subjective opinion and cannot be based solely on the information provided by the client but has to be based on a scientific analysis based on independent professional judgment considering the financials and other performances of the Company, etc.

20. In view of the aforesaid, the contention of the appellant that the SEBI is substituting its opinion with the opinion of the appellant is patently misconceived. The entire exercise in the instant case is not to question the appropriateness of the rating given by the appellant but to find out as to whether a appropriate measures were taken timely by the appellant under the Regulations or not and therefore to see as to whether there was lack of due diligence or not. The appropriateness of the ratings has to be considered under Regulation 29(3)&(4) of the CRA Regulations read with the Intermediaries Regulations but, in the instant case, the exercise has been done to find out as to whether the appellant had exercised due diligence with promptitude while reviewing the ratings from time to time.

21. One glaring fact that we have noticed is that no meeting of the Rating Committee was held between September 2016 and May 22, 2017. No review was taken and, this glaring fact goes against the grain of the provisions of the CRA Regulations which requires timely review on a continuous basis of the ratings given by the Agency.

22. In the instant case, the third financial quarterly results of the RCom was disseminated on the website of SEBI on February 11, 2017. No decision was taken by the Review Committee to review its rating. An assertion has been made that a conscious decision was taken by the Rating Team to wait for another quarter before taking steps. Nothing has been indicated as to whether this Rating Team is equivalent to Rating Committee or is it other than the Rating Committee. The fact remains that the Review Committee did not meet immediately after the third quarterly financial results were disseminated on the website of the Stock Exchange on February 11, 2017 and was only taken up for consideration in the last week of May 2017. In our view, the Rating Committee did not act in a timely manner nor did they act on a continuous basis. There was laxity on their part which is clear and apparent. The record indicates that the analysis was

presented only on May 18, 2017 and the decision to downgrade was taken on May 30, 2017.

23. We also find that the appellant did not take into consideration the downgrading of the ratings made by Moody's on November 30, 2016 and January 26, 2017 nor took into consideration the Fitch ratings given on December 20, 2017 while monitoring the ratings of RCom. We are of the opinion that even after significant deterioration in the financial results in the third quarter of RCom the appellant did not proactively interact with the Company in seeking information regarding financial operational performance and timely servicing of its debt obligation nor took the NDS. If the Company was not cooperative then there was all the more reason for the appellant to disclose this fact on the website of the Stock Exchange regarding non-cooperation while reviewing its ratings.

24. We are of the view that the material on record coupled with the Code of Conduct provided under the Regulations and the Operation Manual makes it apparently clear that there was a failure on the part of the appellant to monitor the ratings and the factors affecting the credit worthiness of the Company in

a timely and continuous manner which resulted in a significant delay in reviewing the rating process and downgrading the ratings. Thus, we are of the opinion that there was lack of due diligence by the appellant while providing ratings given by it as provided under Regulation 24(7) of the CRA Regulations.

25. The AO has dwelt on the meaning of the words "due diligence" at length in its order and has cited some decisions which we are not reproducing here. It is suffice for us to state that there cannot be a straight jacket formula for determining due diligence. In **Consolidated Engg. Enterprises vs Irrigation Dept. (2008)7 SCC 169,** the Supreme Court held that " *Due Diligence cannot be measured by any absolute standards. Due Diligence is a measure of prudence or activity expected from and ordinarily exercised by a reasonable and prudent person under the particular circumstances*." Black's Law Dictionary 6th edition defines Due Diligence as *" such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case."* We can add that "due

diligence" means that it is an obligation to exercise reasonable care. In the instant case, reasonable care should have been exercised on a timely basis, with promptitude as well as on a continuous basis which apparently was not done. Thus, we are of the opinion that the appellant had violated the Regulation 15(1) and Regulation 13 of the CRA Regulations read with Clauses 3 and 8 of the Code of Conduct provided under Third Schedule of the CRA Regulations.

26. The AO has imposed a penalty of Rs. 1 crore for the aforesaid violations and while taking into consideration the factors mentioned in Section 15J of the SEBI Act and concluded that the factors under Section 15J are not exhaustive and that the loss suffered by investors cannot be computed and the gain made by the appellant is not known. Further, a specific finding has been given by the AO that no *mala fide* could be attributed to the appellant but concluded that failure to take timely action was a serious default due to the negligence of the appellant as it defeats the purpose of CRA Regulations. The AO further held that since an obligation was cast upon the appellant to review the credit ratings in a timely manner which having not been done, no

lenient view could be taken and therefore imposed a maximum penalty of Rs. 1 crore under 15 HB.

27. In our view the approach adopted by the AO is not correct nor is it in accordance with the provisions of 15J of the SEBI Act. For facility, Section 15HB and Section 15J of the SEBI Act are extracted here under:-

> *"15HB. Whoever fails to comply with any provision of this Act, the rules or the regulations made or directions issued by the Board thereunder for which no separate penalty has been provided, shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one crore rupees.*
>
> *15J. While adjudging quantum of penalty under section 15-I, the adjudicating officer shall have due regard to the following factors, namely :—*
>
> *(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;*
>
> *(b) the amount of loss caused to an investor or group of investors as a result of the default;*
>
> *(c) the repetitive nature of the default."*

28. Section 15J of the SEBI Act provides the factors which are to be taken into account by the AO while adjudging the quantum of penalty under Section 15-I of the SEBI Act. The

Supreme Court in ***Adjudicating Officer, SEBI vs Bhavesh Pabari (2019) SCC Online SC 294*** held that the factors contemplated under Section 15J are not exhaustive and there can be other factors as well. Thus, while considering Clause (a) and (b) of Section 15J the AO found no quantifiable gain or unfair advantage. In the instant case, we find that the AO has given a specific finding that there was no material available on record to quantify any gain or unfair advantage accrued to the appellant nor the extent of loss suffered by the investors could be computed. We find that the AO has failed to take into consideration Clause (c) of Section 15J of SEBI Act, namely, repetitive nature of the default. Admittedly, the appellant has been in the business since 1993 and as per the memo of appeal it is one of the largest credit rating agencies having a good reputation in the market which fact has not been disputed by the respondent. No evidence has come forward that the appellant was giving false rating in the past or had violated any provisions of the securities laws and its Regulations.

29. The mere fact that the client of the appellant is a corporate giant in the telecom industry does not mean that the maximum penalty has to be imposed on this ground. In our

view, this cannot be a factor for consideration of the quantum of the penalty. The charge is one of lack of due diligence and it is not a case where ratings were not downgraded. The ratings were downgraded by the appellants but not in a timely manner. There could be a case of carelessness or sluggishness or laxity in the manner in which the downgrading was done by the appellant but it is not a case of oversight.

30. We also find that for the same cause of action, proceedings were initiated against the issuer (RCom) which culminated in a settlement under the SEBI Act and a penalty of Rs. 60 lakh was paid by the issuer. On the hand, a maximum penalty has been imposed upon the appellant which in our opinion is excessive and arbitrary.

31. Considering the aforesaid that it was a case of lack of due diligence for not having acted in a timely manner we are of the opinion that the maximum penalty of Rs. 1 crore is highly excessive, harsh and arbitrary and does not commensurate with the violations. Section 15HB of SEBI Act provides that whoever fails to comply with any provisions of the Act or CRA Regulations for which no separate penalty has been provided shall be liable to a penalty which shall not

be less than Rs. 1 lakh and which may extend to Rs 1 crore. The use of the word ‘may’ is discretionary and not mandatory and therefore latitude is given to AO to fix a quantum of penalty depending on the violation made of any provisions of Act or CRA Regulations. Considering that it was the first violation and in our opinion the violation is not that serious warranting the maximum penalty we are of the opinion that in the given situation considering the facts and surrounding circumstances a penalty of Rs. 10 lacs is appropriate.

32. In view of the aforesaid, we affirm the order of the AO with regard to the violation committed by the appellant under the provisions of the SEBI Act and the CRA Regulations. However, the penalty is reduced from Rs. 1 crore to Rs. 10 lacs. The appeal is partly allowed. In the circumstances of the case, parties shall bear their own costs.

33. The present matter was heard through video conference due to Covid-19 pandemic. At this stage it is not possible to sign a copy of this order nor a certified copy of this order could be issued by the registry. In these circumstances, this order will be digitally signed by the Private Secretary on behalf of the bench and all concerned parties are directed to

act on the digitally signed copy of this order. Parties will act on production of a digitally signed copy sent by fax and/or email.

Justice Tarun Agarwala
Presiding Officer

Justice M.T. Joshi
Judicial Member

09.06.2021
msb

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