BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on: 22.02.2022

Date of Decision : 25.02.2022

Appeal No. 585 of 2021

Himanshu Arora
A/63, Street No. 7,
Rajgarh Colony, Jheel,
Near Gandhi Nagar,
Delhi – 110 031. ….. 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. Amit Gupta, Advocate with Ms. Kapila Mahendroo, Advocate i/b AGKM Corpus Juris LLP for the Appellant.

Ms. Rajani Iyer, Senior Advocate with Ms. Nidhi Singh, Ms. Deepti Mohan, Ms. Binjal Samani, Ms. Aditi Palnitkar, Ms. Moksha Kothari, Advocates i/b Vidhii Partners for the Appellants.

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 2, 2021 passed by the Whole Time Member (‘WTM’ for short) of the Securities and Exchange Board of India (‘SEBI’ for short) whereby the appellant has been debarred from

accessing the securities market for a period of 3 years and has been imposed a penalty of Rs. 14 lakh under Section 15HA, 15HB of the SEBI Act, 1992 and under Section 19G of the Depositories Act, 1996.

2. The facts, in brief, leading to the filing of the present appeal is, Allied Financial Services Private Limited (‘AFSPL’ / ‘the Company’ for short) was a depository participant of National Securities Depository Limited (‘NSDL’ for short) under the Depositories Act. The appellant was one of the directors of this Company.

3. Certain complaints against the Company regarding fraudulent / unauthorized transfer of Mutual Fund units of Dalmia Cement East Limited (‘DCEL’ for short) and OCL India Limited (‘OCL’ for short) worth Rs. 344.07 was received by SEBI. Another complaint from Novjoy Emporium Private Limited (‘NEPL’ for short) was received regarding unauthorized transfer of its Mutual Fund units worth Rs. 21 crore by AFSPL. SEBI accordingly conducted an investigation for the period February 20, 2017 to February 8, 2019 and thereafter issued a show cause notice dated December 9, 2019 against the Company and its directors which included the appellant. The show cause notice basically

alleged that there had been fraudulent transfers from the demat accounts of the Company's clients, namely, DCEL, OCL and NEPL and Mutual Fund units has been transferred from their accounts by using Delivery Instruction Slips (DIS) which DCEL, OCL and NEPL claimed that they have neither signed nor authorized such transfers. The Economic Offences Wing (EOW) also issued a charge sheet in the matter.

4. The WTM after considering their material evidence on record and after considering their replies found that the Company had misled DCEL and OCL. The alerts was not sent to DCEL and OCL but to non-existent entities. The Mutual Fund units were transferred from the demat accounts of DCEL and OCL to the Company for using it as collateral for the transactions of DCEL and OCL. Further, the Company misrepresented regarding the status of the Mutual Fund units in the accounts of DCEL and OCL by giving false holding statements. The Company also misrepresented NEPL by giving them non-genuine holding statements. The WTM finally concluded that the Company's conduct amounted to unfair trade practices and violated Regulation 4(2)(p) of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices

relating to Securities Market) Regulations, 2003 ('PFUTP Regulations' for short).

5. The WTM, however, found that there was no material on record to show that the appellant had a direct role in the execution of fraudulent transfer of Mutual Fund units and only held that the appellant had neglected in its duties and responsibilities as a director and should have raised a red alert with regard to the transactions that was being done in the demat accounts of two of its Company's clients. The WTM also found that one of the directors Mr. Awanish Kumar Mishra, Managing Director was In-charge of the affairs of the Company and he was also aware of the execution of the fraudulent transfer of the Mutual Fund units of the clients of the Company. The WTM accordingly not only debarred the Company and its directors for specified periods but also imposed monetary penalties.

6. We have heard Shri Amit Gupta, the learned counsel for the appellant and Ms. Rajani Iyer, the learned senior counsel for the respondent.

7. The learned counsel for the appellant contended that he is not questioning the direction whereby the appellant has been restrained from accessing the securities market for a

period of 3 years nor is questioning the quantum of penalty computed under Section 15HB of the SEBI Act and 19G of the Depositories Act and has confined the present appeal only on the imposition and quantum of penalty under Section 15HA of the SEBI Act. The learned counsel contended that the penalty under Section 15HA can be imposed only if a person indulges in fraudulent and unfair trade practices where as, in the instant, case there is no finding against the appellant of having conducted fraudulent and unfair trade practices.

8. In this regard the violation has been found under Regulation 4(2)(p) of the PFUTP Regulations. For facility, Regulation 4(2)(p) is extracted here under:-

> *"4.* ***Prohibition of manipulative, fraudulent and unfair trade practices***
> *(1) ……*
> *(2) Dealing in securities shall be deemed to be a fraudulent or an unfair trade practice if it involves fraud and may include all or any of the following, namely:—*
> *(a) ……..*
> *(p) an intermediary predating or otherwise falsifying records such as contract notes."*

9. A perusal of the aforesaid provision indicates that dealing in securities would be deemed fraudulent or unfair trade practice if it involves fraud by an intermediary predating or otherwise falsifying record. Thus, under this provision by a deeming fiction a person is deemed to have indulged in

fraudulent or unfair trade practice provided the person is involved in fraud. Fraud has been defined under Regulation 2(c) of the PFUTP Regulations which is extracted here under:-

> *"2.(1) In these regulations, unless the context otherwise requires,—*
> *(a) …..*
> *(b) …….*
> *(c) "fraud" includes any act, expression, omission or concealment committed whether in a deceitful manner or not by a person or by any other person with his connivance or by his agent while dealing in securities in order to induce another person or his agent to deal in securities, whether or not there is any wrongful gain or avoidance of any loss, and shall also include—*
>
> *(1) a knowing misrepresentation of the truth or concealment of material fact in order that another person may act to his detriment;*
> *(2) a suggestion as to a fact which is not true by one who does not believe it to be true;*
> *(3) an active concealment of a fact by a person having knowledge or belief of the fact;*
> *(4) a promise made without any intention of performing it;*
> *(5) a representation made in a reckless and careless manner whether it be true or false;*
> *(6) any such act or omission as any other law specifically declares to be fraudulent,*
> *(7) deceptive behaviour by a person depriving another of informed consent or full participation,*
> *(8) a false statement made without reasonable ground for believing it to be true.*
> *(9) the act of an issuer of securities giving out misinformation that affects the market price of the security, resulting in investors being effectively misled even though they did not rely on the statement itself or anything derived from it other than the market price.*
>
> *And "fraudulent" shall be construed accordingly;*

Nothing contained in this clause shall apply to any general comments made in good faith in regard to—

(a) the economic policy of the government
(b) the economic situation of the country
(c) trends in the securities market;
(d) any other matter of a like nature

whether such comments are made in public or in private;"

10. In the instant case, we find that from the impugned order that a specific finding has been given while deciding issue no. 6 and 8 that the Company had indulged in fraudulent and unfair trade practice. The WTM has further dealt that a Company being a legal entity cannot run on its own and its affairs are managed by the board of directors. The WTM further considered the role of each of the directors and in paragraph 137 of the impugned order has given a specific finding that Mr. Awanish Kumar Mishra, Managing Director of the Company was In-charge of the affairs of the Company at the time when the violations had occurred. Further, Mr. Awanish Kumar Mishra was aware of the execution of the fraudulent transfer of Mutual Fund units from the accounts of DCEL, OCL and NEPL and further found him responsible for violation of Regulation 3(a), 4(1) and 4(2)(p) of the PFUTP Regulations.

11. Insofar as the appellant is concerned, the WTM in paragraph 134 found that there is no material on record to show that the appellant had any direct role in the execution of fraudulent transfers of Mutual Fund units from the accounts of DCEL, OCL and NEPL. The WTM further found that as a director and compliance officer the appellant has neglected his responsibility and duty to put in place the system that would have prevented the occurrence of such fraud. Similar finding has been given by the WTM in paragraph 135 and 138.

12. Therefore, we are of the opinion that no fraud has been played by the appellant in the fraudulent transfer of the Mutual Fund units from the demat accounts of the clients of the Company. Only a finding of negligence has been given against the appellant. Thus, we are satisfied that no case is made out against the appellant for violation of Regulation 4(2)(p) of the PFUTP Regulations. The appellant has not conducted any fraudulent or unfair trade practice and therefore cannot be penalized under Section 15HA of the SEBI Act. The provision of Section 15HA comes into picture when a person is found to have indulged in fraudulent and unfair trade practices.

13. In the light of the aforesaid, the appeal is partly allowed insofar as it relates to the appellant. The direction of debarment against the appellant is affirmed. Further, the penalty of Rs. 2 lakh under Section 15HB and Rs. 2 lakh under Section 19G of the Depositories Act is affirmed. The penalty of Rs. 10 lakh under Section 15HA is quashed. The appeal is partly allowed with no order as to costs.

14. 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

25.02.2022
msb

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