

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 136 of 2012

Date of decision: 12.09.2012

Mercury Fund Management Co. Ltd.
C/o. Newman Business Centre,
3, Old Court House Street,
Kolkata – 700 009. ...Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No. C-4A, G-Block,
Bandra Kurla Complex,
Mumbai – 400 051. ... Respondent

Mr. Vinay Chauhan, Advocate with Mr. Deepak Dhane, Advocate for the Appellant.
Mr. Prateek Seksaria, Advocate with Ms. Harshada Nagare, Advocate for the Respondent.

CORAM : P. K. Malhotra, Member & Presiding Officer (*Offg.*)
S. S. N. Moorthy, Member

Per : P. K. Malhotra

The appellant before us is a company registered under the Companies Act, 1956 and is engaged in investing in shares of listed and unlisted companies and in miscellaneous financial activities. The company is aggrieved by the order passed by the adjudicating officer of the Securities and Exchange Board of India (the Board) on October 21, 2011 whereby it has been found guilty of violating certain provisions of the regulations issued by the Board and a penalty of ₹ 27 lac has been imposed as under:

Sr. No.	Provision of Act/Regulation violated	Section of SEBI Act under which penalty imposed	Amt. of Penalty
1.	Regulation 10 of the Takeover Code.	Sections 15H(ii)	₹ 10,00,000
2.	Section 11C(2) & 11C(3) of the SEBI Act.	Section 15A(a)	₹ 2,00,000
3.	Regulation 7(1) of Takeover Code and Regulations 13(1) and 13(3) of Insider Trading Regulations.	Section 15A(b) read with Section 15H(i)	₹ 5,00,000
4.	Section 12A(a), (b) & (c) of the SEBI Act read with Regulation 3 of FUTP Regulations.	Section 15HA of SEBI Act	₹ 10,00,000
		Total Penalty	₹ 27,00,000

2. The facts of the case, in brief, are that the Board carried out investigation in the dealings of shares of M/s. Gennex Laboratories Ltd. (the company) to ascertain whether any provision of the Securities and Exchange Board of India Act, 1992 (the Act) or the rules and the regulations made thereunder were violated. It noticed that during the period April 2007 to December 2007, shareholding of promoters group changed from 53.62 per cent to 24.72 per cent of the paid up capital resulting in change of shareholding to the extent of 28.90 per cent. It happened because all the promoters except Vinod Baid, L. Lalitha, L. Vithal Rao and Prudential Investments Ltd. had sold or transferred their shares. The appellant before us is one of the major promoter entities who sold its shares. The appellant also received 2,95,300 shares in off market from Prudential Stock and Securities, out of which it sold 34,700 shares in the market during November 12-29, 2007 and balance 2,60,600 shares were transferred to another entity. The appellant also received 9,60,000 shares in off market on July 4, 2007 from Mr. Vinod Baid, chairman of the company. The appellant was, therefore, required to make disclosures under regulation 7(1) of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (for short the takeover code) as well as regulation 13(1) read with regulation 13(5) of Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 (for short the insider trading regulations). The appellant made only one disclosure under the takeover code to the stock exchange but no disclosures were made under the insider trading regulations. It was further noticed by the Board that during the quarter ending March, 2007, the appellant was holding 16,36,036 (16.12%) equity capital which was reduced to 1,19,086 (1.17%) for the quarter ending June, 2007. This change in the shareholding was required to be disclosed to the stock exchanges under regulation 13(3) read with regulation 13(5) of the insider trading regulations, but no such disclosure was made. For the lapses committed by the appellant in reporting these transactions to the stock exchanges, a show cause notice dated May 23, 2011 was issued to the appellant asking it to show cause as to why penalty as provided under the Act should not be imposed upon it. After affording an opportunity of hearing to the appellant, the

adjudicating officer found the appellant guilty of the aforesaid violations and imposed a total penalty of ₹ 27 lac as stated above. Hence, this appeal.

3. We have heard learned counsel for the parties who have taken us through the record. Mr. Vinay Chauhan, learned counsel for the appellant, has not seriously disputed that the disclosures/intimations required to be made under the takeover code and the inside trading regulations were not made. He has also not disputed that the appellant failed to comply with the summons which resulted in violation of the provisions of section 11C of the Act. No material has been placed on record by the appellant either in response to the show cause notice or before the adjudicating authority or before this Tribunal, that it has complied with the statutory requirements under the takeover code or insider trading regulations while acquiring or disposing of the shares beyond the threshold limit. Similarly, no evidence has been placed on record with regard to compliance with the summonses issued under Section 11C of the Act. Therefore, no fault can be found with regard to the findings arrived at by the adjudicating officer with regard to violations noted in the table at sr.nos. 1, 2 and 3 above.

4. The only grievance made by learned counsel for the appellant is with regard to the findings of the adjudicating officer in para 31 of the impugned order. The adjudicating officer has come to a finding that the company had planted false positive announcement to facilitate the off loading of the shares by its promoter Vinod Baid through the appellant, and the appellant has facilitated Vinod Baid in off loading the shares of the company in the market. According to the adjudicating officer, this act of the company, Vinod Baid and the appellant, is an artifice/device to defraud the investors in the market by presenting the company as a lucrative investing option. Therefore, the appellant acted as a facilitator and together with Vinod Baid and company played a fraud upon innocent investors and thereby violated the provisions of section 12 of the Act read with regulation 3 of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 (FUTP regulations). The grievance of the appellant is that a penalty of ₹ 10 lac has

been imposed on the appellant for the aforesaid violation whereas no action has so far been taken against the company or Vinod Baid, whom the appellant is said to have helped in their alleged fraudulent activities.

5. We directed the respondent Board to file an affidavit stating as to what action has been taken against the company and its promoter/director Vinod Baid in respect of the aforesaid violations. The Board has filed an affidavit dated August 28, 2012 stating that the Board has already passed order against the company and Vinod Baid for non-compliance of summons issued by the Board and a penalty of ₹ 10 lac and ₹ 3 lac respectively has been imposed upon them. It is further stated that the show cause notices dated May 9, 2012 have been issued to these entities under section 11 and 11B of the Act read with regulation 11 of the FUTP regulations to which these entities have filed their replies and the proceedings are still continuing. On a query raised by the bench as to whether any action is being taken against the company and Vinod Baid under chapter VIA of the Act as was done in the case of appellant, learned counsel for the Board responded that instead of adjudication proceedings under chapter VIA, the Board has decided to proceed against the company and Vinod Baid under section 11 and 11B of the Act.

6. After hearing learned counsel for the parties and perusing the record, we find it anomalous to note that the appellant who is alleged to have facilitated the company and its director Vinod Baid in offloading their shares in the market has been punished but action is yet to be taken against the company and its director Vinod Baid who are the main culprits and alleged to have violated section 12 of the Act and regulation 3 of the FUTP regulations. The appropriate course for the Board would have been to initiate proceedings simultaneously against all the entities, which has not been done in this case. It may be possible that in the proceedings which have been initiated against the company and its director Vinod Baid under section 11 and 11B of the Act, the Board may come to a conclusion that it does not call for any penalty or these entities may be let off with a lower punishment like warning, but the appellant who is alleged to have

facilitated them has already been imposed a penalty of ₹ 10 lac in the adjudication proceedings initiated against it.

7. In the fact and circumstances of this case, we are of the considered view that the Board may, at the first instance, complete the proceedings against the company and its director Vinod Baid for the alleged violations of FUTP regulations and only then take a decision relating to acts of commission or omission on the part of the appellant.

8. We, therefore, set aside the penalty of ₹ 10 lac imposed on the appellant under section 15HA of the Act for alleged violation of sections 12A(a), (b) and (c) of the Act read with regulation 3 of the FUTP regulations with liberty to the Board to initiate fresh proceedings against the appellant, if considered necessary, in case the company and Vinod Baid are ultimately found guilty of violating the aforesaid provisions of the Act and the FUTP regulations.

The appeal is partly allowed as above with no order as to costs.

Sd/-
P. K. Malhotra
Member &
Presiding Officer (*Offg.*)

Sd/-
S.S.N. Moorthy
Member

12/9/0212
Prepared & compared by ddg