BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Order Reserved: 24.9.2013
Date of Decision: 9.10.2013

Appeal No.60 of 2013

Earnest Healthcare Limited ["the Company"]
105, Earnest House, 194, NCPA Marg,
Nariman Point, Mumbai – 400 021. …… Appellant

Versus

Securities and Exchange Board of India
SEBI Bhawan, Plot No. C-4A, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai - 400 051. …… Respondent

Mr. Ashok Mehta, Authorised Representative for the Appellant.

Mr. Prateek Seksaria, Advocate with Mr. Pratham V. Masurekar, Advocate for the Respondent.

CORAM : Justice J. P. Devadhar, Presiding Officer
Jog Singh, Member
A. S. Lamba, Member

Per : A.S. Lamba

1. The present appeal is filed by Appellant against SEBI order no.EAD-2/AO/99/2012 dated November 12, 2012 for violation of section 15C of SEBI Act for failure to redress investors grievances.

2. Securities and Exchange Board of India (hereinafter referred to as "SEBI") vide order dated October 10, 2003 passed 11B directions against Earnest Healthcare Limited (hereinafter referred to as "appellant") for non redressal of investor grievances and debarred it from accessing capital markets for a period of five years, which period ended in 2008. Again SEBI once again vide letter dated April 07, 2011 asked appellant to redress 51 investor grievances pending against it

within 15 days from date of receipt of letter and submit status report. As per SEBI appellant failed to redress investor complaints/ grievances within specified time and failed to submit Action Taken Report (ATR) in proforma prescribed by SEBI.

3. Thereafter SEBI vide letter dated October 11, 2011 appellant was advised to submit ATR as per proforma detailed in circular dated November 25, 2009 with respect to 51 pending complaints since appellant was required, as per SEBI, to submit two subsequent reminders sent to complainants with gap of one month between dispatches but appellant resubmitted the same ATR as previously filed with SEBI and SEBI was of the view that appellant had not resolved the complaints.

4. SEBI, therefore, initiated adjudication proceedings and appointed Shri P K Bindlish as the Adjudicating Officer (AO) vide Order dated September 23, 2011 under Section 15-I of the SEBI Act read with Rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as the 'Adjudication Rules') to inquire into and adjudge the alleged violations under Section 15C of the SEBI Act, 1992 committed by appellant. Consequent to transfer of Shri Bindlish, Shri Satya Ranjan Prasad was appointed as Adjudicating Officer thereafter SEBI vide order dated May 22, 2012 appointed Shri P.K. Kuriachan as the AO.

5. Notice was issued to appellant on May 30, 2012 (hereinafter called "SCN") in terms of Rule 4 of Adjudication Rules requiring appellant to show cause as to why an inquiry should not be held against it for the alleged violations.

6. SCN was sent to appellant but appellant neither replied to SCN. In the interest of natural justice and in order to conduct an inquiry as per Rule 4 (3) of the Adjudication Rules, Adjudicating Officer granted opportunity of personal hearing to appellant on September 18, 2012, vide letter dated September 04, 2012, but

appellant neither attended hearing on scheduled date nor sent any reply, in this regard.

7. Since appellant did not put up any defence or challenged SCN, it was assumed by Learned Adjudicating Officer that charges levelled in SCN have been accepted by appellant and accordance with principle laid by this Tribunal in matter of **Classic Credit Ltd. v. SEBI [2007] 76 SCL 51 (SAT - MUM.) wherein it was inter-alia held that**

> "…The appellants did not file any reply to second show-cause notice. This being so, it has to be presumed that the charges alleged against them in the show-cause notice were admitted by them".

Consideration of Issues, Evidence and Findings of Adjudicating Officer

8. After careful perusal of charges leveled against appellant mentioned in SCN and documents as available on record, issues for consideration in present case as per Learned Adjudicating Officer are:

(a) Whether the appellant has violated the provisions of Sections 15C of the SEBI Act?

(b) If yes, what should be the quantum of penalty?

(c) Does the violation, if any, on the part of the appellant attract any penalty under Section 15C of the SEBI Act?

9. Section 15(C) of SEBI Act

> "**15C.Penalty for failure to redress investors' grievances:** If any listed company or any person who is registered as an intermediary, after having been called upon by the Board in writing, to redress the grievances of investors, fails to redress such grievances within the time specified by the Board, such company or intermediary shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less."

10. As per Learned Adjudicating Officer Annexure II to SCN that SEBI vide letter dated April 07, 2011 had advised appellant to redress 51 investor grievances within 15 days of receipt of said letter and submit ATR, and appellant vide letter dated May 07, 2011 asked copies of complaints. Copies of seven complaints were

handed over to representative of appellant on June 09, 2011, and for the rest of complaints appellant was asked to seek confirmation.

11. Appellant vide its letter dated July 09, 2011 submitted the ATR, but as per Learned Adjudicating Officer ATR was incomplete. Therefore SEBI vide letter dated October 11, 2011 asked appellant to submit proof of two subsequent reminders sent to complainants with gap of one month between dispatches. Appellant vide letter dated October 18, 2011 submitted ATR but it was not as per proforma prescribed by SEBI and necessary documents required to treat complaints as redressal, were not submitted.

12. Therefore appellant neither redressed investor complaints/grievances within time limit of 15 days specified by SEBI in its letter dated April 07, 2011 nor submitted report as per the proforma specified by SEBI as per circular dated November 25, 2009.

13. In view of aforesaid observations, Adjudicating Officer, found that appellant had failed to redress investor grievances and submit ATR as per proforma specified by SEBI, thereby violated Section 15C of SEBI Act warranting imposition of monetary penalty.

14. While imposing monetary penalty it was obligatory for Learned Adjudicating Officer to consider factors stipulated in Section 15J of the SEBI Act which reads as under:

> **15J - Factors to be taken into account by the adjudicating officer**
>
> While adjudging quantum of penalty under section 15-I, adjudicating officer shall have due regard to 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.

15. Adjudicating Officer observed that from material available on record it was difficult to quantify any gain or unfair advantage accrued to appellant or extent of

loss suffered by investors as result of default of appellant and default of appellant was repetitive, in nature, and did not even respond to charges against it.

16. In view of the above, after considering all facts and circumstances of case and exercising powers conferred upon Learned Adjudicating Officer under Section 15-I (2) of SEBI Act read with Rule 5 of the Adjudication Rules, Adjudicating Officer imposed a penalty of Rs.10,00,000/- (Rupees Ten Lakhs Only) on appellant under Section 15C of the SEBI Act, which in his view was commensurate with default committed by the appellant.

Analysis of facts of case and findings of Adjudicating Officer

17. Most important aspect of the matter has not been adequately considered by Adjudicating Officer is that appellant had been asked to deal/redress the complaints in 2003, and on, finding that appellant had not addressed investor's grievances; was barred from accessing securities market for five years. In 2011, when debarment period of appellant from accessing securities market ended in 2008, appellant was again asked to redress pending 51 investors complaints/grievances and again has been found to be non-responsive in redressing grievances of investors and appellant has been imposed penalty of Rs.10 lac, in present matter under appeal.

18. It may be noted that 51 complaints are from period 1995 to 2010 and 34 of these complaints are for period 1995 to 2003, thus only 17 complaints are for period after 2003 upto 2010. As stated in para above, 34 complaints pertain to period before 2003 and appellant was debarred from accessing capital market in 2003 for non-redressal of these complaints and thus out of 51 complaints, presently pending for redressal with appellant, 34 complaints out of these 51 are for period prior to 2003 and appellant has already undergone punishment, but these 34 complaints are still pending.

19. It may be mentioned that appellant is a sick company since March 2002 and was delisted by Bombay Stock Exchange in July, 2004 and is before BIFR for being defunct and for Industrial and Financial Reconstruction since 2002, the appellant is maintaining small support staff at Head Office in Mumbai, which is looking after every activity of the company.

20. SEBI, in their Register of Investor's Grievances, relating to appellant company has 51 complainants pending for appellant to redress, but where are these complaints in physical terms, is not known to anyone. When appellant were asked to redress these 51 complaints, and when appellant asked for copies of same, SEBI could make only 7 of these available, and for 44 complaints, appellant was asked to seek confirmation. Thus, what happened to these 44 complaints is not known to anyone.

21. Appellant, when asked to redress 51 complaints, got 7 copies of complaints and sought confirmation from rest 44, which can be seen from ATR submitted by appellant to respondent. In 7 cases where complaints were available replies were sent and for rest 44 complainants, complainants were asked to make available the complaints. All these 51 letters were despatched by speed post and despatch proof has been made available by appellant to respondent.

22. Now take the case of some of complainants, whose complaint is available, e.g. Shri P. Vasu at serial no.06. The appellant has informed Shri Vasu that share certificate for transfer in his name has not been made available to appellant. Now when SEBI writes to Shri Vasu, he replies that his complaint still remains unresolved. No one is, in fact, trying to find out where the problem lies and what should be done to resolve it, but everyone concerned is writing in some set format and respondent blaming appellant for not resolving the complaint and appellant also not applying itself, as to what is to be done to resolve the matter, but is

sending some communication, in order to satisfy respondent that they have taken action.

23. The same is found to be the case in other cases, where complaint is available, to more or less to some extent. Respondent seems to have evolved some grievance redressal system, which it applies, mindlessly, in a routine manner and are concerned with formalities, which are stated in grievances redressal system, without bothering whether sending communication, reminders (two at gap of one month between dispatch) will resolve the matter or not, but wants that be done, since, as per Learned Adjudicating Officer, the same requires to be carried out, as per SEBI grievances redressal system, irrespective of its purposefulness.

24. Now coming to the fact that for 34 grievances out of 51; appellant has undergone punishment/penalty, and whether for same being pending even now, respondents are authorised/competent to penalise appellant once again. This further supports, what has been stated above that respondent/appellant are pursuing Grievance Redressal System of SEBI, unmindful of whether the same is leading to redressal of grievances or not. This Tribunal is of the opinion that observance of procedures/prescriptions is necessary but all concerned should see that application of these lead to redressal of grievances since mindless pursuits of procedures is not leading to anywhere. In other words what is being done is not purposeful, for resolution of matters and no amount of punishment/procedures, if grievances are unattended, serve any purpose.

25. Now coming to main allegation of Adjudicating Officer in penalizing appellants of Rs.10 lac for violation of section 15(C) of SEBI Act; for not sending two reminders, at a gap of one month between dispatch. It is seen from Annexure C to SEBI Circular OI AE/Cir-1/2009 dated November 25, 2009 that “where the complaint is pending for redressal as additional documents/information has been sought from the complainant then, the ATR should contain details mentioned in

Table III and IIB. There is no table IIB in this Annexure C, but from table III it can be seen that two subsequent reminders are required to be sent with a gap of one month between despatches; which the Learned Adjudicating Officer is also insisting for each of the addressee of grievances. However, it is to be noted that this is required when documents/information has been sought from complainant. However, as far this Tribunal has been able to understand the facts of the case, 7 complainants, whose complaint was made available to appellant, have been informed of status of case and for rest 44, complainants have been asked to send a copy of complaint. In none of these cases, no information/document have been sought from all 51 complainants, which may require sending of two reminders, with gap of one month between dispatches. It may be mentioned that some of these 51complaints at least 2 of 3 are repeated and actual number of complainants is little less than 51.

26. Coming to purpose of requirement of two reminders at gap of one month between dispatch, the same is not understood/appreciated by this Tribunal. When a letter has been sent by a confirmatory system of despatch i.e. speed post in instant case, the purpose of two reminders, at gap of one month between dispatch, seems unnecessary and unwarranted and has been prescribed without relevance, purpose or requirement and is redundant since once proper communication has been sent and acknowledgement of same is available, the same is sufficient as proof or receipt by complainant. In all matters of communications by post, procedures have been devised to ensure that communication is properly addressed, adequately stamped and put in post box or delivered to post office. In instant case, most reliable and quick mode of postal communication has been adopted and in opinion of this Tribunal, the same is adequate, sufficient and serves the purpose.

27. In the circumstances SEBI is requested to review its investors grievances system, including ATR and communicational requirements and come out with a

new system or modify the existing system, which is cost effective, saves unnecessary labour and also addresses investor's grievances effectively in a meaningful manner, within fixed time framework. The appellant is accordingly directed to deal effectively with all pending grievances of investors, with due application of mind, and inform all investors, whose complaints are available and who send their complaints now, of the position/status of complaints and what has been done or is contemplated to be done in future; in three months from date of this order with intimation to SEBI.

28. In view of above and keeping the relief(s) sought by appellant, it is ordered that order of SEBI imposing monetary penalty of Rs.10,00,000/- on appellant is set aside and the appeal is allowed. No order as to costs.

Sd/-
Justice J. P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

Sd/-
A S Lamba
Member

9.10.2013
RHN