BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Hearing : 28.1.2022
Date of Decision: 27.6.2022

Appeal No.534 of 2019

1. Mr. P.F. Sundesha
   221/222 Creative Industrial Estate,
   72, N.M. Joshi Road, Lower Parel,
   Mumbai – 400013

2. Mr. B. R. Rakhecha
   D 16B, 2nd Floor Hauz Khas,
   Delhi – 110016.

3. Mr. Narendra Kumbhat
   58, Kamdhenue Apartments,
   Sector-9, Rohini, Delhi -110085.

4. Mr. Arun Sood
   7/17, Roop Nagar,
   Delhi-110007. ...Appellants

Versus

Securities and Exchange Board of India
SEBI Bhavan, C-4A, G Block,
Bandra Kurla Complex,
Bandra (E), Mumbai 400 051. …Respondent

Mr. Sumit Garg, Advocate with Kamal Budhiraja, Advocate i/b. DMD Associates for the Appellants.

Mr. Shyam Mehta, Senior Advocate with Mr. Mihir Mody, Mr. Arnav Misra and Mr. Mayur Jaisingh, Advocates i/b. K. Ashar & Co. for the Respondent.

With
Appeal No.535 of 2019

Aksh Optifibre Ltd. ...Appellant
F-1080, RIICO Industrial Area,
Phase-III, Bhiwadi-301 019,
Rajasthan

Versus

Securities and Exchange Board of India …Respondent
SEBI Bhavan, C-4A, G Block,
Bandra Kurla Complex,
Bandra (E), Mumbai 400 051.

Mr. Rohan Kadam, Advocate with Mr. Sumit Garg and Mr. Kamal Budhiraja, Advocates i/b. DMD Associates for the Appellant.

Mr. Shyam Mehta, Senior Advocate with Mr. Mihir Mody, Mr. Arnav Misra and Mr. Mayur Jaisingh, Advocates i/b. K. Ashar & Co. for the Respondent.

With
Appeal No.536 of 2019

Dr. Kailash S. Choudhari ...Appellant
C-65, First Floor, Anand Niketan,
Delhi – 110021.

Versus

Securities and Exchange Board of India …Respondent
SEBI Bhavan, C-4A, G Block,
Bandra Kurla Complex,
Bandra (E), Mumbai 400 051.

Mr. Rahul Agarwal, Advocate with Mr. Sumit Garg, Mr. Kamal Budhiraja, Advocates i/b. DMD Associates for the Appellant.

Mr. Shyam Mehta, Senior Advocate with Mr. Mihir Mody, Mr. Arnav Misra and Mr. Mayur Jaisingh, Advocates i/b. K. Ashar & Co. for the Respondent.

With
Appeal No.438 of 2020

Aksh Optifibre Ltd.
F-1080, RIICO Industrial Area,
Phase-III, Bhiwadi-301 019,
Rajasthan. ...Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, C-4A, G Block,
Bandra Kurla Complex,
Bandra (E), Mumbai 400 051. …Respondent

Mr. Rohan Kadam, Advocate with Mr. Sumit Garg and Mr. Kamal Budhiraja, Advocates i/b. DMD Associates for the Appellant.

Mr. Shyam Mehta, Senior Advocate with Mr. Mihir Mody, Mr. Arnav Misra and Mr. Mayur Jaisingh, Advocates i/b. K. Ashar & Co. for the Respondent.

With
Appeal No.439 of 2020

Dr. Kailash S. Choudhari
C-65, First Floor, Anand Niketan,
Delhi – 110021. ...Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, C-4A, G Block,
Bandra Kurla Complex,
Bandra (E), Mumbai 400 051. …Respondent

Mr. Rahul Agarwal, Advocate with Mr. Sumit Garg, Mr. Kamal Budhiraja, Advocates i/b. DMD Associates for the Appellant.

Mr. Shyam Mehta, Senior Advocate with Mr. Mihir Mody, Mr. Arnav Misra and Mr. Mayur Jaisingh, Advocates i/b. K. Ashar & Co. for the Respondent.

With
Appeal No.440 of 2020

1. Mr. P.F. Sundesha
   221/222 Creative Industrial Estate,
   72, N.M. Joshi Road, Lower Parel,
   Mumbai – 400013.

2. Mr. B. R. Rakhecha
   D 16B, 2nd Floor Hauz Khas,
   Delhi – 110016.

3. Mr. Arun Sood
   7/17, Roop Nagar,
   Delhi-110007. ...Appellants

Versus

Securities and Exchange Board of India
SEBI Bhavan, C-4A, G Block,
Bandra Kurla Complex,
Bandra (E), Mumbai 400 051. …Respondent

Mr. Sumit Garg, Advocate with Mr. Kamal Budhiraja, Advocate i/b. DMD Associates for the Appellants.

Mr. Shyam Mehta, Senior Advocate with Mr. Mihir Mody, Mr. Arnav Misra and Mr. Mayur Jaisingh, 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 Company and its Directors have filed various appeals against two orders dated 28th June, 2019 passed by the Whole Time Member ('WTM' for short) and order dated 28th February, 2020 passed by the Adjudicating Officer ('AO' for short) in the matter relating to issuance of Global Depositories Receipts ('GDRs' for short). Since the issue is common, all the appeals are being decided together. The WTM by the impugned order has restrained the Company Aksh Opticfibre Ltd. and its Managing Director Dr. Kailash S. Choudhary from accessing the securities market for a period of five years. The other Directors have been restrained for a period of six months. The AO by the impugned order has imposed a sum of Rs.10,15,00,000/- upon the Company, Rs.20,00,000/- upon the Managing Director Dr. K. Choudhari and Rs.10,00,000/- lakhs each on the remaining appellants who were the Directors.

2. The facts leading to the filing of the present appeal is, that the matter arises in respect of the issuance of GDRs by the Company Aksh Optifibre Ltd., whereby a fraudulent scheme was devised by the Company and its Directors. In this regard, the Board of Directors of the Company passed a resolution dated 17th May, 2010 authorising European American Investment Bank AG (hereinafter referred to as 'EURAM Bank') located outside India to receive the subscription money in respect of the GDR issued by the Company. The resolution further resolved that the Managing Director, Dr. Kailash Choudhari, Chief Financial Officer and Company Secretary were authorised to sign, execute any application, agreement, documents as required by the EURAM Bank for the aforesaid purpose. The Board of Directors also resolved that the Bank was further authorised to use the funds so deposited in the Bank account of the Company as security in connection with loans, if any.

3. Based on the aforesaid resolution, a bank account of the Company was opened in EURAM Bank. Further, a loan agreement dated 16th August, 2010 was entered into between EURAM Bank and Vintage FZE (hereinafter referred to as 'Vintage') for subscribing to 1.17 million GDRs of the Company. On the same date i.e. 16th August, 2010 a pledge agreement was also executed between EURAM Bank and the appellant Company inter alia pledging the proceeds from the GDR issue as a collateral for the loan taken by Vintage.

4. Based on the aforesaid agreements, Vintage was the only entity which subscribed the entire 1.17 million GDRs of the Company by obtaining a loan from EURAM Bank. Pursuant to the loan agreement dated 16th August, 2010 the loan amount was secured by the pledge agreement dated 16th August, 2010 executed by the Company.

5. On 1st September, 2010, 11,65,750 GDRs representing 5,82,87,500 equity shares of Rs.5 each at

USD 21.45 per GDR was allotted to Vintage. Vintage purportedly repaid the loan amount in several tranches to EURAM Bank between the period from 29th October, 2010 to 17th March, 2011. Pursuant to the repayment of the loan EURAM Bank issued a letter dated 21st March, 2011 to Vintage confirming the repayment of the loan taken by Vintage. A copy of this letter was also given to the appellant.

6. Securities and Exchange Board of India (hereinafter referred to as 'SEBI") conducted an investigation in the issuance of the GDR and found that Vintage was the sole subscriber to the GDR and that the Company did not disclose this fact with clarity that only one entity had subscribed to the entire GDR and, therefore, misled the investors. Further, the loan agreement and the pledge agreements were not disclosed to the stock exchange or to the shareholders of the Company.

7. Accordingly, a show cause notice dated 23rd March, 2018 was issued to show cause as to why action should not be taken for the alleged violation of the provisions

of Section 12A(a), (b), (c) of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as the 'SEBI Act') read with Regulations 3 and 4 of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (hereinafter referred to as 'PFUTP Regulations"). The show cause notice alleged that the Company had issued the GDRs amounting to USD 25 million which was subscribed only by Vintage and that Vintage has paid the subscription amount by obtaining the loan from EURAM Bank. The Company had also executed a pledge agreement by which the GDR proceeds were pledged for the loan taken by Vintage. It was also alleged that the Managing Director, Dr. Kailash Choudhari had executed the pledge agreement and that the pledge agreement was also an integral part of the loan agreement. The show cause notice further alleged that the Company reported to the stock exchange on 2nd September, 2010 that the Company had successfully

closed its GDR issue of USD 25 million. Such information was misleading and distorted as it did not contain the fact that the entire GDR issue was subscribed by one entity through a loan taken by that entity on the basis of pledging the proceeds by the Company and, thus, misled the investors by indicating that the GDRs were successfully subscribed. It was also alleged that the Company furnished wrong information to SEBI by providing false list of GDR subscribers whereas only one entity had subscribed to the GDR issue. The show cause notice alleged that the announcement misled the Indian retail investors and induced investors to deal in the shares of the Company in the Indian capital market and, therefore, the scheme of issuance of GDR was fraudulent violating Section 12A(a), (b), (c) of the SEBI Act read with Regulations 3 and 4 of the PFUTP Regulations.

8. The appellants submitted their replies contending that the documents annexed to the show cause notice were mere photocopies and were not duly

authenticated as being photocopies of the original and, therefore, such documents cannot be considered as evidence until and unless these documents are authenticated. Further, the originals of the loan agreement, escrow agreement and pledge agreement were not provided for inspection and, therefore, it was violative of the principles of natural justice. Further, the show cause notice did not disclose the precise action that was proposed to be taken against the Company and other noticees. It was further submitted that the Company did not give any false information regarding subscribers to the GDR issue and contended that the list of subscribers that was received from the Company by the Lead Manager was provided to SEBI during investigation and that there was no reason to suspect that the list of subscribers provided by the Lead Manager was incorrect. The Company and its Managing Director denied the execution of the pledge agreement contending that no such resolution was passed by the Board of Directors nor the Company

gave any consent to authorise any person to create any pledge on the deposits made in the bank account in favour of EURAM Bank. The Managing Director also contended that he did not execute any pledge agreement. The Company further contended that it was not aware of any restriction being placed by EURAM Bank on the use of the funds credited in its account and contended that as and when they instructed to transfer funds to its subsidiary Company in Dubai the same was executed by the Bank. It was further contended by some of the Directors that being independent Directors they were not involved in the day to day management of the affairs of the Company. It was also contended that there is an inordinate delay in the initiation of the proceedings. The GDR issue took place in the year 2010 whereas the show cause notice was issued in the year 2018 after eight years and, on this ground, the proceedings should be dropped.

9. All the grounds taken by the appellants were considered by the WTM and AO. The contention so raised were rejected by the respondent holding that the Company had misled the investors in believing that the GDR issue was successful whereas there was only one subscriber, namely, Vintage. The respondent held that the arrangement made through a pledge and loan agreement for the purpose of issuance of GDR was fraudulent. The acts of the Company resulted in a fraud being committed on the investors of the securities market and created a false impression about the Company which was in violation of Section 12A read with Regulations 3 and 4 of the PFTUP Regulations. The respondent further found that the Company and its Board of Directors having participated in the scheme through which issue of GDR was effected through a fraudulent arrangement were guilty of the fraud and, accordingly, appropriate orders were passed by the WTM and AO respectively.

10. We have heard Mr. Ravi Kadam, Senior Advocate alongwith Mr. Sumit Garg, Advocate assisted by Mr. Kamal Budhiraja, Advocate for the appellants in appeal no.534 of 2019, Mr. Rohan Kadam, Advocate assisted by Mr. Sumit Garg and Mr. Kamal Budhiraja, Advocates for the appellants in appeal nos.535 of 2019 and 438 of 2020, Mr. Rahul Agarwal, Advocate assisted by Mr. Sumit Garg and Mr. Kamal Budhiraja, Advocates for the appellants in appeal no.536 of 2019 and 439 of 2020 and Mr. Shyam Mehta, Senior Advocate with Mr. Mihir Mody, Mr. Arnav Misra and Mr. Mayur Jaisingh, Advocates for the respondent.

11. Before us, the following contentions was raised by the appellants, namely,

i. Pledge agreement was never executed by the Company or by the Managing Director Dr. Kailash S. Choudhari.

ii. Burden was upon SEBI to produce the original and prove the documents.

iii. Show cause notice relies upon photocopies of loan agreement, pledge agreement etc., which are inadmissible in evidence since the same has not been authenticated nor proved especially when originals are available.

iv. Secondary evidence under Section 65 and 66 of the Evidence Act was not followed.

v. Loan agreement has two dates, namely, 16th August, 2010 and 26th August, 2010 which casts doubt on the authenticity of the documents and, therefore, it was essential for SEBI to produce the original.

vi. The Company did not mislead the investors as no false statement was made with regard to the subscription of the GDR nor any false information was given to SEBI with regard to the number of entities subscribing to the issue.

12. The first and foremost issue is, that the Company and its Managing Director have specifically denied the execution of the pledge agreement and, thus,

contended that when the document is disputed the burden was upon SEBI to prove the said document which in the instant case has not been done in accordance with the provisions of the Evidence Act. This contention is patently erroneous. We have perused the reply given by the appellants before the authorities and have perused the other documents on record and we find that the appellants have only made a bald denial about the execution of the pledge agreement. An attempt has been made by the appellants to camouflage their misdeeds and create a smokescreen and divert the attention of the regulator by making a bald denial about the execution of the pledge agreement. We find that a mere denial is not sufficient to place the burden upon the regulator. The onus only shifts when the allegation is supported by either attendant circumstances or convincing evidence. In the instant case, we find that no steps had been taken by the Company or by the Managing Director to lodge a complaint/FIR. No steps were taken by the Company

and the Managing Director with EURAM Bank as to how the pledge agreement was executed and how the loan agreement was executed in which the GDR proceeds kept in the Company's account was being used for the loan taken by Vintage. We also find that no steps whatsoever has been taken especially by the Managing Director denying the signatures on the pledge agreement nor any steps were taken to produce an expert witness to opine that the signatures on the pledge agreement is not that of the Managing Director. In the absence of the aforesaid steps not been taken by the Company and its Managing Director, we are of the opinion that the allegations made by the Company, its Directors and the Managing Director that the pledge agreement was not executed cannot be accepted.

13. Our view is further fortified by a letter dated 21st March, 2011 issued by EURAM Bank to Vintage wherein EURAM Bank confirmed the repayment of the loan taken by Vintage. This letter was addressed by EURAM Bank to Vintage and a carbon copy was

marked to the appellant Company. There is no denial of this letter by the appellants. Thus, the letter indicates that the appellants were aware of a loan taken by Vintage. Pursuant to the loan agreement and the pledge agreement, the proceeds of the GDR was used as a loan which Vintage has repaid over a period of time the details of which has been given in the impugned order. This letter amply proves that the appellants were aware of the execution of the loan and pledge agreement.

14. In addition to the aforesaid, the WTM as well as AO have compared the signature of the Managing Director, Dr. Kailash Choudhari which were appended in the pledge agreement and in the escrow agreement as well as in the authorisation letter authorising M/s. Joby Mathew and Associates to appear before SEBI. The WTM has given a categorical finding that the signature of the Managing Director on all these documents appear to be the same and no distinction can be made out. This finding has not been questioned before us.

Thus, the contention that the Company and its Managing Directors did not execute the pledge agreement, being a bald denial cannot be accepted.

15. A perusal of the pledge agreement and loan agreement clearly indicates that the appellants were aware and had copies of the agreements. Thus, it is no longer open to the appellants to contend that photocopies of these documents cannot be relied upon. We are of the opinion that the originals were either with the appellant Company or with the Bank and, therefore, it was not necessary for production of the originals. In any case, we find that SEBI had obtained copies of the loan agreement, pledge agreement, escrow agreement, bank statements from the overseas market regulator in exercise of the powers exercised by SEBI under Section 11(2)(ib) of the SEBI Act. The documents have come from a known source and, therefore, in the given circumstances did not require any authentication.

16. Reliance by the appellants' of the decision of ***Bareilly Electricity Supply Co. Ltd. vs. The Workmen and others 1971 (2) SCC 617*** wherein the Supreme Court held that the Tribunal was not justified in law in relying upon the copies when originals were in existence and could be proved through deposing relevant witnesses is erroneous. In the light of this decision, it was contended that the respondent has proceeded to rely upon photocopy of the pledge agreement when it was disputed and was thus wholly in violation of the principles of natural justice is also erroneous. The contention that the pledge agreement could not be relied upon without first proving the documents is also patently erroneous.

17. In this regard, the facts in Bareilly Electricity Supply Co. Ltd., is, that a dispute was raised for adjudication before the Industrial Tribunal as to whether bonus was required to be paid to the workers or not. The Company produced several documents before the Tribunal to support their stand that no bonus

was required to be paid. These documents were disputed by the respondent/workers. It was observed that mere filing of the documents does not amount to proof of them and unless they are either admitted by the respondent or proved they do not become evidence in the case. In the light of the aforesaid observations the Company's stand before the Supreme Court was that the Evidence Act was not strictly applicable and the requirement of proving the document could be dispensed with. The Supreme Court held that mere production of documents did not amount to proof of it or the truth of the entries therein. Where entries are challenged, the appellant was required to prove each such entries by producing a book and speaking from the entries made therein. If a document is produced to establish some fact, then the writer must be produced or his affidavit must be filed in accordance with the principles of natural justice under Order 19 of Civil Procedure Code as well as the Evidence Act. It is in this light that the Supreme Court held that the Tribunal

cannot rely upon copies of the documents when the original are in existence and are not produced or proved by one of the methods either by affidavit or by witness who have executed them. Thus, reliance by the appellants on this decision of the Supreme Court ***Bareilly Electricity Supply Co. Ltd. (supra)*** is totally misplaced and is not applicable in the given circumstances.

18. Similarly, the decision of the Bombay High Court in ***Pradyuman Kumar Sharma vs. Jaysagar M. Sacheti and Others 2013 (5) Mh. L. J. 86*** is not applicable nor helpful to the appellant's case. In this decision, the arbitrator did not refer the dispute to an expert witness to examine the disputed signature. The Bombay High Court held that the arbitrator rightly did not refer the document to an expert witness as the same was disputed and not proved. It is in this scenario, the Bombay High Court held that a disputed document that was not proved could not be relied upon.

19. In the instant case, the copies of the loan agreement, pledge agreement was obtained from an authenticated source and, therefore the existence of the original document cannot be disputed and, in any case, the appellants especially the Company and Managing Director had copies of these documents if not the original and, therefore, it does not lie in their mouth to contend that the copies annexed to the show cause notice cannot be relied upon. In any case, we are of the opinion that if copies of the documents and/or its contents thereof are relied by SEBI and the same is disputed by the appellants regarding its existence or its contents then the onus is upon the appellants who disputes it to prove that the document is forged or its contents are manipulated and its signatures are not of their Directors. The onus is upon the appellants and not upon SEBI.

20. The appellants contended that they were not aware of the pledge agreement and, therefore, the question of disclosing it to the stock exchange did not arise. Since

we have already held that the appellants were aware of the pledge agreement non-disclosure of the pledge agreement invited penalty which the AO has rightly penalised the appellants.

21. We also find that the corporate announcement made by the Company on 2nd September, 2010 to the effect that the Company had successfully closed the GDR issue, did not present the correct picture. The corporate announcement did not disclose the fact that there was a subsisting pledge agreement which facilitated the subscribers to subscribe to the GDR issue nor the fact was disclosed that the GDR issue was allotted to a single entity. This corporate announcement by the Company was clearly misleading and presented a distorted version to the investors and created a false impression inducing the investors to deal in securities. We also find that the Company furnished wrong information to SEBI regarding the subscribers to the issue. The list provided by the Company indicated that a number of subscribers had

subscribed to the GDR issue which upon investigation was found to be false and that only one entity had subscribed to the GDR issue. The contention that the Company had only forwarded the letter that was given by the Merchant Banker cannot be accepted. The responsibility at the end of the day is of the Company and, in our opinion, filing false information was solely the responsibility of the Company and cannot be diverted to the Merchant Banker.

22. It was urged that original copies should have been produced and EURAM Bank could have been directed to produce it which in the instant case was not done. The WTM in this regard held that since EURAM Bank was not subject to the process of the court such direction could not be issued to produce the documents. In this regard, we are of the opinion that the respondent under Section 11(1)(ib) of the SEBI Act but also under Section 15I(2) has powers to enforce the attendance of any person to give evidence or produce any document. In any case, we take judicial

notice of the fact that a large number of appeals have been filed by EURAM Bank before this Tribunal against directions/penalties imposed by SEBI upon them and, therefore, it does not lie in the mouth of SEBI to say that EURAM Bank is outside their process. However, production of the original documents was not required in view of what we have held earlier in the preceding paragraphs.

23. A feeble attempt was made contending that there were two dates on the loan agreement, namely, 16th August, 2010 and 26th August, 2010 and, therefore, doubted the authenticity of the said document. In the first blush the argument appeared to be attractive but upon a closer scrutiny of the document we find that the loan agreement was sent by EURAM Bank to Vintage on 16th August, 2010. This offer of a loan agreement was accepted by Vintage when they placed their signature on 26th August, 2010. Thus, we do not find any discrepancy doubting the authenticity of the loan agreement.

24. It was last urged that the directions issued by the WTM and the penalty imposed by the AO is excessive and arbitrary as well as discriminatory. It was urged that the directions and the penalty should, in any case, be reduced as it does not commensurate with the alleged violation. It is also urged that there has been an inordinate delay in passing the order and, therefore, this delay should also be considered as a mitigating factor while imposing penalty. It was urged that other companies who had raised more GDRs in numbers and value were given lesser punishment and, therefore, the appellant has been discriminated on that score. It was lastly urged that no reason or justification has been given for quantifying the penalty.

25. In support of this submission, the learned counsel has placed reliance on the decision of the Supreme Court in ***Excel Corp Care Ltd. vs. Competition Commission of India Ltd. 2017 (8) SCC 47*** and the decision of the Delhi High Court in ***Rajkumar Dyeing and Printing Works Pvt. Ltd. vs. Competition***

Commission of India 2014 SCC OnLine Delhi 6450 on the issue of the doctrine of proportionality and ***Rajendra Yadav vs. State of Madhya Pradesh and Others 2013 (3) SCC 73.***

26. In Excel Corp. (supra) the Supreme Court held

> *"92. Even the doctrine of 'proportionality' would suggest that the court should lean in favour of 'relevant turnover'. No doubt the objective contained in the Act, viz., to discourage and stop anti-competitive practices has to be achieved and those who are perpetrators of such practices need to be indicted and suitably punished. It is for this reason that the Act contains penal provisions for penalising such offenders. At the same time, the penalty cannot be disproportionate and it should not lead to shocking results. That is the implication of the doctrine of proportionality which is based on equity and rationality. It is, in fact, a constitutionally protected right which can be traced to Article 14 as well as Article 21 of the Constitution. The doctrine of proportionality is aimed at bringing out 'proportional result or proportionality stricto sensu'. It is a result oriented test as it examines the result of the law in fact the proportionality achieves balancing between two competing interests: harm caused to the society by the infringer which gives justification for penalising the infringer on the one hand and the right of the infringer in not suffering the punishment which may be disproportionate to the seriousness of the Act."*

27. Similar view was expressed by the Delhi High court in Rajkumar Dyeing and Printing Works Pvt. Ltd. In Rajendra Yadav, the Supreme Court held that the doctrine of equality applies to all those who are found guilty. The Supreme Court held:

> *"9. The doctrine of equality applies to all who are equally placed; even among persons who are found guilty. The persons who have been found guilty can also claim equality of treatment, if they can establish discrimination while imposing punishment when all of them are involved in the same incident. Parity among co-delinquents has also to be maintained when punishment is being imposed. Punishment should not be disproportionate while comparing the involvement of co-delinquents who are parties to the same transaction or incident. The disciplinary authority cannot impose punishment which is disproportionate, i.e., lesser punishment for serious offences and stringent punishment for lesser offences."*

28. Undoubtedly, the doctrine of proportionality is now well established in our jurisprudence and is a recognised facet of Article 14 of the Constitution of India. In ***Andhra Pradesh Dairy Development Corporation Federation vs. B. Narasimha Reddy and Others (2011) 9 SCC 286,*** the Supreme Court held:

> *"29. It is a settled legal proposition that Article 14 of the Constitution strikes at arbitrariness because an action that is arbitrary, must necessarily involve negation of equality. This doctrine of arbitrariness is not restricted only to executive actions, but also applies to legislature. Thus, a party has to satisfy that the action was reasonable, not done in unreasonable manner or capriciously or at pleasure without adequate determining principle, rational, and has been done according to reason or judgment, and certainly does not depend on the will alone. However, the action of legislature, violative of Article 14 of the Constitution, should ordinarily be manifestly arbitrary. There must be a case of substantive unreasonableness in the statute itself for declaring the act ultra vires of Article 14 of the Constitution. (Vide: Ajay Hasia etc. v. Khalid Mujib Sehravardi, Reliance Airport Developers (P) Ltd. v. Airports Authority of India, Bidhannagar (Salt Lake) Welfare Assn. v. Central Valuation Board, Grand Kakatiya Sheraton Hotel and Towers Employees and Workers Union v. Srinivasa Resorts Limited, and State of T.N. v. K. Shyam Sunder.)"*

29. In matters relating to punitive measures the emphasis has shifted from the wednesbury principle of unreasonable to one of proportionality. A disproportionate punitive measure which does not commensurate with the offence would be violative of Article 14 of the Constitution of India. We are of the

opinion that in the rapid growth of administrative law it has become the need and necessity to control possible abuse of discriminatory power by administrative authorities. In this regard, certain principles have been evolved by Courts, namely, that if an action is taken by an authority which is contrary to law or which is improper or where the action taken is unreasonable then the Court of law is duty bound to interfere with such action and one such mode of exercising power is to exercise the doctrine of proportionality. Where the punitive measure is harsh or disproportionate to the offence which shocks the conscience it is within the discretion of the Court to exercise the doctrine of proportionality and reduce the quantum of punishment to ensure that some rationality is brought to make unequals equal.

30. In this regard, the appellants have produced various orders passed by SEBI against various companies and its Directors wherein different period of debarment

have been given for similar/identical offence. For facility, a comparative table is given below:

Debarment Order						
Sr. No.	**Name of the GDR issuer company**	**Period of GDR issue**	**Total Amount raised by GDR issue (USD) million**	**Subscriber**	**Period of Debarment**	**Date of Order**
1.	Morepan Laboratories Ltd.	March-03	15.25 million	Solsec and Severon	1 year of debarment	24th September, 2019
2.	Vikas Metal & Power Ltd.	April-11	11.99	Vintage FZE	3 years of debarment	29th September, 2019
3.	Aqua Logistics Ltd.	Feb-11	62.38	Vintage FZE	3 years of debarment	22nd July, 2021
4.	Zenith Birla (India) Ltd.	May-10	22.99	Vintage FZE	3 years of debarment	30th March, 2021
5.	Aksh Opti-Fibre Ltd.	Sept 10	25	Vintage FZE	5 years of debarment	26th June, 2019

31. A perusal of the aforesaid table indicates that in the case of Aqua Logistics Ltd., the said Company had raised 62.38 million USD and the Company was debarred from accessing the securities market for a period of three years. Similarly, in the case of Zenith Birla (India) Ltd. the total amount raised through GDRs was 22.99 million USD and the Company was debarred for a period of three years. Whereas in the instant case, the appellant Company had raised 25 million USD but has been debarred for five years.

Consequently, in our opinion, the debarment period against the appellants is excessive and discriminatory and not in consonance with the directions given in similar matters.

32. Similarly, the AO penalised the appellant Company of Rs.10,15,00,000/-, the Managing Director Rs.20,00,000/- and other Directors Rs.10,00,000/-. In similar matters lesser penalty has been awarded. For facility, a comparative table is given hereunder:

Penalty Orders						
Sr. No.	**Name of the GDR issuer company**	**Date of Issue**	**GDR size (million $)**	**Subscriber**	**Combined Penalty**	**Date of the Order**
1.	ABL Biotechnologies Ltd.	June 2008	6.68	Clifford Capital Partners	Rs.50,00,000/- (Rupees Fifty Lakhs)	23rd April, 2018
2.	Syncom Healthcare Ltd.	September 2010	20.74	Vintage	Rs.25,00,000/- (Rupees Twenty Five Lakhs)	30th August, 2019
3.	Visu International Ltd.	April 2006	9.66	Seazun	Rs.1,25,00,000/- (Rupees 1 Crore Twenty-Five Lakhs)	18th March, 2021
4.	GV Films Ltd.	April 2007	40	Whiteview	Rs.25,00,000/- (Rupees Twenty-Five Lakhs)	29th January, 2020
5.	Aksh Opti-Fibre Ltd.	Sept 2010	25	Vintage	Rs.10,15,00,000/- (Rupees Rupees Ten Crore Fifteen Lakhs)	28th February, 2020

33. A perusal of the aforesaid table indicates that G.V. Films Ltd. had raised 40 million USD and the

Company was only awarded a penalty of Rs.25,00,000/-. Another Company Syncom Healthcare Ltd., raised 20.74 million USD and was awarded a penalty of Rs.25 lakhs whereas in the case of the appellant who raised 25 million USD has been awarded Rs.10,15,00,000/-. This, in our opinion, is again excessive and disproportionate to the violations and is also discriminatory.

34. We find that such excessive penalty imposed upon the Company does not make any sense. In the instant case, there are 70,000 public shareholders. Penalising the Company with such heavy penalty is infact penalising the shareholders which is not justifiable especially for a running company. Further, the money raised through GDRs has been received by the Company and has not been misappropriated. The same has been utilitised for the purpose for which the GDR was issued, namely, for the Company's subsidiary which fact has not been disputed. Thus, it is not a case of defalcation of the funds.

35. Considering the aforesaid, we are of the opinion that even though the appellants had misled the investors into believing that the GDR was successful whereas there was only one subscriber. Further, the loan agreement, pledge agreement was not disclosed to the shareholders and to the stock exchange. Such scheme was totally fraudulent. If the Company had not given security for the loan taken by Vintage then Vintage could not have subscribed to the GDRs and, consequently, the GDR issue would have failed. Thus, by entering into the pledge agreement for facilitating subscription of its GDRs, we are of the view that the appellant had played a fraud on the securities market and misled the investors by creating a false impression and, thus, violated Section 12A of the SEBI Act and Regulations 3 and 4 of the PFUTP Regulations.

36. However, the directions so issued under Section 11 and 11B of the SEBI Act and the penalty so imposed under Section 15HA are disproportionate and does not

commensurate with the violation in view of the directions given in similar matters by the respondent.

37. A penalty of Rs.10,00,000/- has been imposed on the Directors only on the strength that they were signatories to the board resolution. In ***Mr. Gurmeet Singh vs. SEBI, appeal no.406 of 2020 and other connected appeals decided on 20th September, 2021***, this Tribunal has held that merely being a signatory to a resolution does not mean that these Directors were part of the fraudulent scheme that the respondent was required to show some other evidence to show that these Directors were also part of the fraudulent scheme. Thus the imposition of penalty is excessive.

38. Consequently, while affirming the order of the WTM and AO of the aforesaid violations committed by the appellants we reduce the debarment period of the Company and the Managing Director from five years to three years. The other Directors have already undergone the debarment period and, therefore, no further order is required to be passed. In so far as the

penalty imposed by the AO is concerned, the penalty against the Company is reduced to Rs.25 lakhs. The penalty against the Managing Director is affirmed. The penalty imposed against the remaining Directors is reduced from Rs.10,00,000/- to Rs.2,00,000/-. The appeals are partly allowed. In the circumstances of the case, parties shall bear their own costs.

39. 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. Certified copy of this order is also available from the Registry on payment of usual charges.

Justice Tarun Agarwala
Presiding Officer

Justice M.T. Joshi
Judicial Member

27.6.2022
RHN

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