BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Hearing : 17.03.2023
Date of Decision : 27.03.2023

Misc. Application No. 375 of 2023
And
Misc. Application No. 376 of 2023
And
Appeal No. 284 of 2023

1. Arshad Hussain Warsi
Casa Zen 10, Shantiniketan CHSL,
Air India Colony, Yari Road,
Versova, Andheri West,
Mumbai – 400 061.

2. Maria Goretti Warsi
Casa Zen 10, Shantiniketan CHSL,
Air India Colony, Yari Road,
Versova, Andheri West,
Mumbai – 400 061.

3. Iqbal Hussain Warsi
2506 Mayfair, The View,
Godrej Hiranandani Link Road,
Vikhroli West, Mumbai – 400 079. ….. Appellants

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 Agrawal, Advocate with Mr. Sumit Agrawal, Mr. Rushin Kapadia, Mr. Pratham Darad, Ms. Radhika Yadav, Mr. Tarun Toprani, Advocates i/b Regstreet Law Advisors for the Appellants.

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

With
Misc. Application No. 377 of 2023
And
Appeal No. 285 of 2023

Aahuti Rasik Mistry
A Wing, 1903, Oberoi Springs,
Off New Link Road, Citi Mall,
Andheri West, Mumbai – 400 053. ….. 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. Sumit Agrawal, Advocate with Mr. Amit Agrawal. Mr. Rushin Kapadia, Ms. Krithika Kataria, Mr. Atharv Kotwal, Advocates i/b Regstreet Law Advisors for the Appellant.

Mr. Sumit Rai, Advocate with Mr. Mihir Mody, Mr. Arnav Misra, Mr. Mayur Jaisingh, Advocates i/b. K Ashar & Co. for the Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Ms. Meera Swarup, Technical Member

Per : Justice Tarun Agarwala, Presiding Officer

1. The Whole Time Member (hereinafter referred to as WTM') of Securities and Exchange Board of India (hereinafter referred to as 'SEBI') has passed an ex-parte ad-interim order dated March 2, 2023 against 31 noticees issuing a slew of directions, namely, directing the noticees to deposit the unlawful gains in an escrow account in a nationalized bank towards illegal gains made by them and further directing the bank to freeze all debits till such time an escrow account is opened and the amount is transferred. The WTM also directed the depositories to suspend all debits and restrained the noticees from disposing or alienating any assets or property. The WTM also directed the noticees to provide full inventory of all the assets or investments held in their name, jointly and severally, whether movable or immovable including details of all bank accounts, demat accounts, mutual fund investments, etc.

2. Four noticees out of 31 noticees have filed two appeals questioning the validity and legality of the ex-parte ad-interim order. Appeal No. 284 of 2023 has been filed by Arshad H. Warsi, Maria

Goretti Warsi and Iqbal Hussain Warsi who have arrayed as noticees nos. 28, 29 and 30 in the impugned order. Appeal No. 285 of 2023 has been filed by Aahuti Rasik Mistry who has been arrayed as noticee nos. 27 in the impugned order.

3. The ex-parte ad-interim order has been issued under Section 11(1), 11(4) and 11B of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as 'SEBI Act') for, *prima-facie*, finding a violation of Section 12A of the SEBI Act read with Regulations 3 and 4 of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trading Practices relating to Securities Market) Regulations, 2003 (hereinafter referred to as 'PFUTP Regulations').

4. We have heard Mr. Amit Agrawal, the learned counsel with Mr. Sumit Agrawal, Mr. Pratham Darad, Ms. Radhika Yadav, Mr. Tarun Toprani, Mr. Rushin Kapadia, Ms. Krithika Kataria, Mr. Atharv Kotwal, the learned counsel for the appellants and Mr. Gaurav Joshi, the learned senior counsel with Mr. Sumit Rai, Mr. Feroze Patel, Mr. Mihir Mody, Mr. Arnav Misra, Mr. Mayur Jaisingh, the learned counsel for the respondent.

5. The contention of the learned counsel for the appellants was that there was no urgency in passing an ex-parte ad-interim order with regard to the trades done by the appellants. It was alleged that the appellants were not part of the orchestrated scheme and did not induce any unsuspecting investors to trade in the shares of the scrip in question nor featured in the alleged videos which were uploaded on the YouTube channels nor participated, in any manner, in the alleged scheme. It was urged that the principles as contemplated under Order 38 Rule 5 of the Code of Civil Procedure is applicable in the instant case in as much as, in the absence of any cogent evidence, the impounding order was passed on imaginary reasons. In support of his submissions, the learned counsel has placed reliance on the decisions of this Tribunal in ***Affluence Fincon Services Pvt. Ltd. & Ors. vs. SEBI Appeal No. 269 of 2020 decided on September 7, 2020, Dr. Udayant Malhoutra vs. SEBI Appeal No. 45 of 2020 decided on June 2, 2020, Cameo Corporate Services Limited vs. SEBI Appeal No. 566 of 2019 decided on November 26, 2019, North End Foods Marketing Pvt. Ltd. & Anr. vs. SEBI Appeal No. 80 of 2019 decided on March 12, 2019*** and a decision of the Hon'ble Supreme Court in ***Radha Krishan Industries vs. State of Himachal Pradesh & Ors. [(2021) 6 SCC 771].***

6. On the other hand, the learned senior counsel for the respondent contended that the impugned order was just and proper, in the circumstances of the case in order to protect the securities market and the investors. It was urged that it was a classic case of pump and dump scheme whereby through an orchestrated scheme, the noticees in the impugned order including the appellants through a coordinated involvement have made illegal gains by way of alleged fraudulent and manipulative scheme which was violative of Section 12A of the SEBI Act read with Regulations 3 and 4 of the PFUTP Regulations. It was urged that the appellants in the instant case were volume creators who have induced unsuspecting investors to deal in the scrip.

7. The facts leading to the filing of the present appeals is, that the appellant nos. 1 in Appeal No. 284 of 2023 is an actor in Bollywood and works in the entertainment industry. Appellant Nos. 2 is his wife who is an author and a chef and appellant nos. 3 is a brother of the appellant nos. 1 and is also the employee manager of the appellant nos. 1 and manages the business, accounts, taxes and properties of the appellant nos. 1. The appellant Aahuti R. Mistry in Appeal No. 285 of 2023 is a talent manager of the appellant Arshad Warsi. The appellants contended that Arshad Warsi was working on

a movie assignment given by noticee nos. 1 Manish Mishra and while working in that film, the appellants were induced and persuaded by noticee no. 1 to trade in the shares of the scrip of Sadhna Broadcast Ltd. (hereinafter referred to as 'Sadhna').

8. The appellant nos. 1, 2 and 3 in appeal No. 284 of 2023 accordingly invested a sum of Rs. 1,17,99,684/- for shares purchased in an around July 13, 2022 and the shares were purchased from Jatin Manubhai Shah, Daivik Jatin Shah, Heli Jatin Shah and Angad Ishwarlal Rathod who are also noticees in the impugned order and are also depicted as volume creators. The appellants sold most of the shares on August 3, 2022 and August 5, 2022 for a total consideration of Rs. 1,94,34,412/- and thereby made a profit of Rs. 76,34,728/-. Similarly, Aahuti R. Mistry brought 10 lacs shares and sold the same during patch 1 which is from April 27, 2022 to July 14, 2022.

9. It transpires that some complaints were received by SEBI regarding price manipulation and offloading of shares by certain entities in the scrip of Sadhna. It was alleged that misleading YouTube videos with false contents were being uploaded to lure unsuspecting investors to trade in the scrip of Sadhna. Based on these complaints, SEBI conducted a preliminary examination to look

into a possible violation of various provisions of the SEBI Act and its Regulations and found that in patch 1 which is from April 27, 2022 to July 14, 2022, there was a spurt in the price and volume of the scrip in question. The examination further revealed that in patch 2, i.e. from July 15, 2022 to September 30, 2022, false and misleading videos about the company were uploaded on two YouTube channels, namely, 'The Advisor' and 'Moneywise'. These YouTube channels were created by noticee no. 1 and false and misleading news recommending that investors should buy the scrip of Sadhna. The examination further revealed that YouTube video was uploaded on July 15, 2022 which led to an increase in the price and trading volume on the basis of the videos being streamed on the YouTube channels which had lakhs of subscribers. During this period, certain promoters, shareholders, key managerial personnel of the company and non-promoters, shareholders off-loaded a significant portion of their shareholding at inflated prices and booked profit.

10. In the impugned order, noticee nos. 28, 29 and 30 have been classified as volume creators and profit makers and noticee nos. 27 has been classified as a volume creator.

11. Based on the above, the WTM, *prima-facie*, came to the conclusion and held in paragraph nos. 6.9 of the impugned order that

various noticees collectively helped to create trading volumes and interest in the scrip and spread false and misleading YouTube videos and, therefore, induced unsuspecting investors to buy the scrip of Sadhna at elevated prices, thereby, *prima-facie*, violating the provisions of the PFUTP Regulations.

12. In paragraph no. 19 of the impugned order, the WTM, *prima-facie,* concluded that the noticees including the appellants were involved in a scheme / device to manipulate the volume of Sadhna through the trades of some of the noticees and through buy recommendations made through YouTube videos which, *prima-facie*, induced small investors to deal in Sadhna. In paragraph no. 28, the WTM, *prima-facie,* found that the modus operandi indicates that the noticees were engaged in the coordinated scheme to induce unsuspecting investors to acquire securities in the scrip in question to buy at inflated price thereby making illegal gains at the cost of new investors and accordingly, *prima-facie,* found violation of Section 12A of the SEBI Act and Regulations 3 and 4 of the PFUTP Regulations.

13. The WTM in paragraph no. 32 held that all the noticees are individually liable to disgorge the illegal gains individually made by them as depicted in table no. 16 but simultaneously held that noticees

nos. 1, 4, 5, 6, 7, 10, 11, 23 and 31 are jointly and severally liable for all of the illegal gains cumulatively made by all the noticees as tabulated in table no. 16 which works out to Rs. 41.85 crore.

14. The WTM further found that some of the noticees named in paragraph no. 30 of the impugned order were engaged in the similar modus operandi with regard to another scrip. It may be noted here that the appellants were not involved in the other scrip in question. Considering the aforesaid, the WTM came to the conclusion in paragraph no. 37 of the impugned order that the noticees may divert the alleged unlawful gains before the investigation is concluded and directions for disgorgement, if any, are passed and, therefore, by the impugned order issued a slew of directions including impounding of the alleged unlawful gains, freezing of their bank accounts and further restraining them from accessing the securities market.

15. From perusal of the impugned order, the appellants are connected to each other. The appellant Arshad Warsi admits that he is connected to noticee no. 1 in connection with another professional assignment with regard to the movie of noticee no. 1. The impugned order however connects the appellant Arshad Warsi with noticee no. 1 through call data records and as per table no. 5 there are only two calls between noticee no. 1 and the appellant Arshad Warsi had

between June 18, 2022 to September 30, 2022. Apart from the aforesaid, there is no connection of the appellants with the other noticees named in the impugned order except the appellants.

16. On the other hand, we find that :-

(i). The appellants are not involved in the increase in the price of the scrip in patch 1, i.e., between April and July 2022 nor are involved in the increase in the price of the scrip in patch 2 from July to September 2022.

(ii). The appellants were not involved in the making / distribution or uploading of the videos on the YouTube channels nor do the appellants feature in such videos.

(iii). There is no finding that the appellants are connected to the company, its shareholders or key managerial personnel.

(iv). The appellants are not connected with other volume creators or net sellers other than noticee no. 1 who is connected only to the appellants, namely, Arshad Warsi and his talent manager Aahuti R. Mistry.

(v). There is nothing to indicate that the appellants by their conduct had created any interest on any investor to trade in the scrip of Sadhna.

(vi). The appellants have not spread any false and misleading information regarding the scrip in question.

(vii). There is no evidence to indicate that the appellants had induced unsuspecting investors to buy the scrip in question.

17. The only allegation against the appellants are that they are volume creators and are connected to noticee no. 1. In this regard, we find that the appellants had purchased the shares in July from another volume creator and had sold it to another volume creator as is clear from paragraph nos. 16.7 and 17.11 of the impugned order. Thus, the appellants by selling the shares have made profit was not at the expense of any unsuspecting gullible investor.

18. A person dabbles in the stock exchange to make profits and there is no harm if a person buys and sells the shares to make profits.

In the instant case, the facts that the appellant bought the shares on one occasion and then sold it does not make the appellants a volume creator and, in any case, nothing has been shown to indicate any violation of the securities laws by dubbing the appellants as volume creators.

19. In the light of the aforesaid, we are of the considered view that the WTM has passed the order in haste and without considering the essential facts. In so far as the appellants are concerned, there is no iota of evidence against the appellants to show that they were engaged in a coordinated scheme to induce unsuspecting investors to acquire securities in the scrip in question. There is no evidence to show that the trades made by the appellants led to the increase in the price of the scrip. There is no evidence to show that the sale of the shares by the appellants was made to gullible unsuspecting investors. There is no evidence to show that the appellants were involved in the making, distribution, promotion and uploading of the videos on YouTube channels.

20. Thus, merely by a reason of a professional connection between noticee no. 1 and the appellant Arshad Warsi, at best may give rise to a suspicion against the appellants but it cannot lead to any conclusion that the appellants were engaged in a coordinated

scheme to induce unsuspected investors to acquire securities in the company in question.

21. In addition to the above, we find that the WTM in table no. 16 of the impugned order has directed to disgorge the amount individually as well as jointly and severally. The name of the appellant Aahuti R. Mistry, noticee no. 27 is not included in table no. 16 and has not been directed to disgorge any amount. The said appellant has only being named as a volume creator who had purchased the shares and sold the same in patch 1 prior to the uploading of the videos on the YouTube channels. We however find that in spite of the fact that no direction has been issued to disgorge any amount from noticee nos. 27, yet her bank account has been frozen and has also been restrained from buying or selling or accessing the securities market. Further, direction has been issued not to alienate the assets or provide full inventory of the assets. In our opinion, such directions are totally harsh and unwarranted in the case of the noticee no. 27.

22. In view of the aforesaid, the direction issued by the WTM against the appellants in appeal no. 284 of 2023 is also harsh and unwarranted and cannot be sustained.

23. In ***North End Foods Marketing Pvt. Ltd. & Anr. vs. SEBI (supra),*** this Tribunal held as under :-

> *"13. Having heard the learned senior counsel at length, we find that it is no more res integra that SEBI has power to pass ex-parte interim orders, pending investigation, which power flows from Section 11 and 11B of the SEBI Act. A plain reading of Section 11 and 11B shows that SEBI has to protect the interests of the investors in securities and to regulate the securities market by such measures as it thinks fit and such measures may be for any or all of the matters provided in sub-section 2 of Section 11 of the Act. SEBI has power to pass interim orders and such interim orders can also be passed exparte. Interim orders are passed in order to prevent further possible mischief of tampering with the securities market. If during a preliminary enquiry, it is found prima-facie, that the person is indulging in manipulation of the securities market, it would be obligatory for SEBI to pass an interim order or for that matter an ex-parte interim order in order to safeguard the interests of the investors and to maintain the integrity of the market. Normally, while passing an interim order, the principles of natural justice has to be adhered to, namely, that an opportunity of hearing is required to be given. Procedural fairness embodying natural justice is to be applied whenever action is taken affecting the rights of the parties. At times, an opportunity of hearing may not be pre-decisional and may necessarily have to be post-decisional especially where the act to be prevented is imminent or where action to be taken brooks no delay. Thus, pre-decisional hearing is not always necessary when ex-parte ad-interim orders are made pending investigation or enquiry unless provided by the statute. In such cases, rules of natural justice would be satisfied, if the affected party is given a post-decisional hearing."*

"14. However, it does not mean that in every case, an ex-parte interim order should be passed on the pretext that it was imminent to pass such interim order in order to protect the interest of the investor or the securities market. An interim order, however, temporary it may be, restraining an entity/person from pursuing his profession/trade may have substantial and serious consequences which cannot be compensated in terms of money."

"15. Thus, ex-parte interim order may be made when there is an urgency. As held in Liberty Oil Mills & Ors. vs. Union of India & Ors. [AIR (1984) SC 1271] decided on May 1, 1984, the urgency must be infused by a host of circumstances, viz. large scale misuse and attempts to monopolise or corner the market. In the said decision, the Supreme Court further held that the regulatory agency must move quickly in order to curb further mischief and to take action immediately in order to instill and restore confidence in the capital market."

24. In ***Dr. Udyant Malhotra vs SEBI (supra),*** this Tribunal held as under :-

"9. ……. In our opinion, the reasoning given by the WTM justifying its action to pass an exparte interim order is patently erroneous and cannot be sustained. On one hand, we find that only a show cause notice has been issued and the matter has not been adjudicated on merits but the appellant, on the other hand, has been directed to deposit the possible disgorgement amount in advance. We are of the opinion that no amount towards disgorgement can be directed to be deposited in advance unless it is adjudicated and quantified unless there is some evidence to show and justify the action taken. An order of the like nature can only be passed during the pendency of the proceedings and such orders cannot be passed at the time of initiation of the

proceedings. Further, no order of the like nature can be passed without recording its satisfaction and cannot be based on the basis of possibility."

"10. In this regard, we may refer to the provisions of Order 38 Rule 5 to 13 of the Code of Civil Procedure, 1908 which lays down the parameters for attachment before judgment. The said principles are fully applicable in the instant case. The object of attachment before judgment is to prevent any attempt on the part of the appellant to defeat the realization of the final order on disgorgement that may be passed against the appellant. But this principle applies only when it is found that the appellant is about to dispose of the property in question. Further, this principle can only be applied when there is evidence to show that the appellant has acted, or is about to act with the intent to obstruct or delay the adjudication of the proceedings that may be passed against him. We are of the opinion that there is no finding that the appellant will remove the property or will dispose of all the property or that he would obstruct the proceedings or that he would delay the proceedings pursuant to the show cause notice. In the absence of any such finding, the ex-parte interim order cannot be sustained especially when the trades were of 2016 and from 2016 till the date of the impugned order there is no evidence to show that the appellant was trying to divert the alleged notional gain/loss."

25. Similar view was taken by this Tribunal in ***Affluence Fincon Services Pvt. Ltd. & Ors. vs. SEBI (supra) and Cameo Corporate Services Limited vs. SEBI (supra).***

26. In ***Radha Krishan Industries (supra),*** the Hon'ble Supreme Court held as under :-

"The High Court noted that a provisional attachment on the basis of a subjective satisfaction, absent any cogent or credible material, constitutes malice in law."

27. While considering the decision of the Gujarat High Court in ***Valerius Industries vs. Union of India (SCC OnLine Guj Para 53],*** The Hon'ble Supreme Court quoted with approval as under :-

"(2). The power conferred upon the authority under Section 83 of the Act for provisional attachment could be termed as a very drastic and far-reaching power. Such power should be used sparingly and only on substantive weighty grounds and reasons."

"(3). The power of provisional attachment under Section 83 of the Act should be exercised by the authority only if there is a reasonable apprehension that the assesse may default the ultimate collection of the demand that is likely to be raised on completion of the assessment. It should, therefore, be exercised with extreme care and caution."

"(6). The attachment of bank account and trading assets should be resorted to only as a last resort or measure. The provisional attachment under Section 83 of the Act should not be equated with the attachment in the course of the recovery proceedings."

28. The Hon'ble Supreme Court further held :-

"49. Now in this backdrop, it becomes necessary to emphasize that before the Commissioner can levy a

provisional attachment, there must be a formation of "the opinion" and that it is necessary "so to do" for the purpose of protecting the interest of the government revenue. The power to levy a provisional attachment is draconian in nature. By the exercise of the power, a property belonging to the taxable person may be attached, including a bank account. The attachment is provisional and the statute has contemplated an attachment during the pendency of the proceedings under the stipulated statutory provisions noticed earlier. An attachment which is contemplated in Section 83 is, in other words, at a stage which is anterior to the finalization of an assessment or the raising of a demand. Conscious as the legislature was of the draconian nature of the power and the serious consequences which emanate from the attachment of any property including a bank account of the taxable person, it conditioned the exercise of the power by employing specific statutory language which conditions the exercise of the power. The language of the statute indicates first, the necessity of the formation of opinion by the Commissioner; second, the formation of opinion before ordering a provisional attachment; third the existence of opinion that it is necessary so to do for the purpose of protecting the interest of the government revenue; fourth, the issuance of an order in writing for the attachment of any property of the taxable person; and fifth, the observance by the Commissioner of the provisions contained in the rules in regard to the manner of attachment. Each of these components of the statute are integral to a valid exercise of power. In other words, when the exercise of the power is challenged, the validity of its exercise will depend on a strict and punctilious observance of the statutory preconditions by the Commissioner. While conditioning the exercise of the power on the formation of an opinion by the Commissioner that "for the purpose of protecting the interest of the government revenue, it is necessary so to do", it is evident that the statute has not left the formation of opinion to an unguided subjective discretion of the Commissioner. The formation of the opinion must bear a proximate and live nexus to the purpose of protecting the interest of the government revenue."

"50. By utilizing the expression "it is necessary so to do" the legislature has evinced an intent that an attachment is authorized not merely because it is expedient to do so (or profitable or practicable for the revenue to do so) but because it is necessary to do so in order to protect interest of the government revenue. Necessity postulates that the interest of the revenue can be protected only by a provisional attachment without which the interest of the revenue would stand defeated. Necessity in other words postulates a more stringent requirement than a mere expediency. A provisional attachment under Section 83 is contemplated during the pendency of certain proceedings, meaning thereby that a final demand or liability is yet to be crystallized. An anticipatory attachment of this nature must strictly conform to the requirements, both substantive and procedural, embodied in the statute and the rules. The exercise of unguided discretion cannot be permissible because it will leave citizens and their legitimate business activities to the peril of arbitrary power. Each of these ingredients must be strictly applied before a provisional attachment on the property of an assesses can be levied. The Commissioner must be alive to the fact that such provisions are not intended to authorize Commissioners to make preemptive strikes on the property of the assessee, merely because property is available for being attached. There must be a valid formation of the opinion that a provisional attachment is necessary for the purpose of protecting the interest of the government revenue."

"51. These expressions in regard to both the purpose and necessity of provisional attachment implicate the doctrine of proportionality. Proportionality mandates the existence of a proximate or live link between the need for the attachment and the purpose which it is intended to secure. It also postulates the maintenance of a proportion between the nature and extent of the attachment and the purpose which is sought to be served by ordering it. Moreover, the words embodied in sub-

Section (1) of Section 83, as interpreted above, would leave no manner of doubt that while ordering a provisional attachment the Commissioner must in the formation of the opinion act on the basis of tangible material on the basis of which the formation of opinion is based in regard to the existence of the statutory requirement. While dealing with a similar provision contained in Section 45 of the Gujarat Value Added Tax Act 2003 , one of us (Hon'ble Mr Justice M R Shah) speaking for a Division Bench of the Gujarat High Court in Vishwanath Realtor v State of Gujarat observed:

> *"26. Section 45 of the VAT Act confers powers upon the Commissioner to pass the order of provisional attachment of any property belonging to the dealer during the pendency of any proceedings of assessment or reassessment of turnover escaping assessment. However, the order of provisional attachment can be passed by the Commissioner when the Commissioner is of the opinion that for the purpose of protecting the interest of the Government Revenue, it is necessary so to do. Therefore, before passing the order of provisional attachment, there must be an opinion formed by the Commissioner that for the purpose of protecting the interest of the Government Revenue during the pendency of any proceedings of assessment or reassessment, it is necessary to attach provisionally any property belonging to the dealer. However, such satisfaction must be on some tangible material on objective facts with the Commissioner. In a given case, on the basis of the past conduct of the dealer and on the basis of some reliable information that the dealer is likely to defeat the claim of the Revenue in case any order is passed against the dealer under the VAT Act and/or the dealer is likely to sale his properties and/or sale and/or dispose of the properties and in*

> *case after the conclusion of the assessment/reassessment proceedings, if there is any tax liability, the Revenue may not be in a position to recover the amount thereafter, in such a case only, however, on formation of subjective satisfaction/opinion, the Commissioner may exercise the powers under Section 45 of the VAT Act." (emphasis supplied)*

29. From the aforesaid, it is clear that ad-interim orders can be passed in case of urgency or where it is found that the noticee is about to dispose of the property. In the absence of any finding that the appellants will defalcate the unlawful gains, the impounding order constitutes malice in law. Further, the power must be exercised with extreme care and caution and should be resorted to only as a last resort or measure. Merely by stating that the appellants may divert the unlawful gains is not based on any cogent evidence rather on surmises and conjectures and formation of unguided subjected satisfaction which is not permissible.

30. On the other hand, the respondent has relied upon a decision of the Hon'ble Supreme Court in ***Essar House Pvt. Ltd. vs. Arcellor Mittal Nippon Steel India Ltd. [SLP (C) No. 3187 of 2021 decided on September 14, 2022],*** wherein the Hon'ble Supreme Court held that even on a strong possibility of diminution of assets would suffice

to attach the property. This decision, in our opinion, is not helpful to the respondent and, in fact, helps the appellants. In this case, the bank guarantee given by the respondent was not being refunded and accordingly, the Hon'ble High Court directed Essar House Pvt. Ltd. to deposit Rs. 47.41 crore which order was challenged before the Hon'ble Supreme Court. The Hon'ble Supreme Court while dismissing the appeal found that the Hon'ble High Court had considered that the appellant was heavily indebted and did not have the assets other than the assets disclosed in the affidavit in reply and, therefore, in that light, the Hon'ble Supreme Court came to the conclusion that even if that they are exist the strong possibility by diminution of assets which was sufficient for the High Court to pass an order to protect the interest of the respondent. The Hon'ble Supreme Court, therefore, found that the attachment of the order was justified. In the instant case, there is no such evidence.

31. We however find that there is an admission of the appellant Arshad Warsi that he is connected with noticee no. 1 who is alleged to have been the main player in the promoting the videos and thereby misleading the investors. Investigations are still going on and the possibility of the appellants being involved in the manipulative scheme cannot be ruled out. However, at this stage, the impugned

order is bereft of any evidence against the appellants requiring passing of such strong and harsh order. However, balance of convenience is required to be considered at this stage.

32. Considering the aforesaid :-

a. Directions contained in the impugned order against the appellants in appeal no. 284 of 2023 are set aside with the following directions :-

(i). The appellants are restrained from trading in the scrip of Sadhna during the pendency of the investigation.

(ii). The appellants shall deposit 50% of the alleged unlawful gains in an escrow account with a scheduled commercial bank within 15 days from today. For the balance amount, the appellants shall give an undertaking within the same period of 15 days that they will deposit the balance amount within 30 days from the date of final order, if any, passed by the WTM.

(iii). This escrow account shall be kept in an interest bearing escrow account and a lien will be created in favour of SEBI.

(iv). Directions (i), (ii) and (iii) would continue to operate during the investigation.

(v). The appeal is partly allowed.

b. In Appeal No. 285 of 2023, the impugned order in so far as it relates to the said appellant is quashed. The appeal is allowed. We however restrain the appellant from dealing in the scrip of Sadhna during the pendency of the investigations.

c. We also direct SEBI to complete the investigation within six months and initiate appropriate proceedings, if any, against the appellants. If the investigations remain incomplete and no proceedings are initiated, it will be open to the appellants to apply for modification of our order.

d. Any observation, findings given in this order is only tentative in nature and will not affect the investigation. Further, neither party will rely upon any observation / finding in any proceedings before any authority.

e. In the circumstances of the case, parties shall bear their own costs.

33. 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

Ms. Meera Swarup
Technical Member

27.03.2023
PTM

PRAMILA TANAJI MISAL

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