BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Decision: 12.04.2023

Misc. Application No. 124 of 2023
And
Misc. Application No. 358 of 2023
And
Appeal No. 286 of 2023

S.K. Chowdhary
Resident of 7, Paschim Marg,
Vasant Marg,
New Delhi – 110 057. …..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

Ms. Nandini Sen, Authorised Representative for the Appellant.

Mr. Suraj Chaudhary, Advocate with Mr. Manish Chhangani, Ms. Samreen Fatima and Mr. Sumit Yadav, Advocates i/b The Law Point for the Respondent.

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

Per : Justice Tarun Agarwala, Presiding Officer (Oral)

1. There is a delay in the filing of the appeal. For the reasons stated in the application, the delay is condoned.

The Misc. Application no. 124 of 2023 is allowed. The Misc. Application no. 358 of 2023 for exemption is allowed.

2. The present appeal has been filed against the order dated December 5, 2022 passed by the Whole Time Member ('WTM' for short) of the Securities and Exchange Board of India ('SEBI' for short) restraining the appellant from accessing the securities market for a period of six months from the date of the impugned order or till the direction to bring back Rs. 29.42 crore of the IPO proceeds.

3. The facts leading to the filing of the present appeal is, the appellant was appointed as an independent director in the Company in the year 2006 and resigned in the year 2009. According to him he was only an honorary director and never attended a single meeting of the board of directors nor ever signed any document for the Company.

4. Three show cause notices dated March 26, 2014, March 26, 2014 and July 12, 2018 were issued by the Adjudicating Officer ('AO' for short). The broad charges in the said show cause notices were – (a) misstatement in the Red Herring Prospectus (RHP) by Austral Coke, (b) misstatement regarding utilization of IPO proceeds and

siphoning of the IPO proceeds and (c) manipulation of books of accounts and execution of fictitious trades

5. The show cause was issued to the Company and its directors in the backdrop that in August 2008 the Company came out with an Initial Public Offer (IPO) and that SEBI received complaints intimating that books of accounts of the Company have been manipulated and several misstatements in the prospectus of the Company had been made with the intent to mislead the investors. The misstatements were relating to Company's coke production in the association of promoters with another Company. The show cause notice alleged that the Company made misstatements in the RHP regarding production capacity and that purchase and sale figures showed in the books of accounts were inflated by passing fictitious purchase / sales entries which were paper entries. It was, therefore, alleged that the Company and its directors have violated Section 12A and Regulation 3 and 4 of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 ('PFUTP Regulations' for short) read with Clause 6.2 of the SEBI (Disclosure and Investor Protection) Guidelines, 2000 ('DIP Guidelines' for short) and Regulation 57(1) of the SEBI

(Issue of Capital and Disclosure Requirements) Regulations, 2009 ('ICDR Regulations' for short).

6. The appellant was Noticee no. 17 in the proceedings before the AO. The AO after considering the material evidence on record and after considering the replies passed an order dated July 29, 2022 exonerating the appellant from the charges levelled in the show cause notice holding that the appellant was not involved in the day to day functioning and the material on record does not bring out his role in the aforesaid violations. The AO accordingly exonerated the appellant of the violations alleged in the show cause notice. For facility, the relevant portion of the order of the AO in paragraph 333 is extracted below:-

> *"333. Noticees 17, 18 and 19 were independent non-executive directors as per the RHP and not in charge of day to day functioning. Material on record does not bring out their role in the aforesaid violations. Hence, the aforesaid violations are not established against them."*

7. For the same violation parallel proceedings were initiated by the WTM by issuance of two show cause notices dated June 9, 2015. The WTM for the same violation and on the same issue found the appellant to be guilty and

consequently by the impugned order dated December 5, 2022 restrained the appellant from accessing the securities market for a period of six months or till the date of bringing back an amount of Rs. 29.42 crore of the IPO proceeds.

8. We have heard Ms. Nandini Sen, Authorised Representative for the Appellant and Shri Suraj Chaudhary, the learned counsel with Shri Manish Chhangani, Ms. Samreen Fatima and Shri Sumit Yadav, the learned counsel for the respondent.

9. Under section 11 of the SEBI Act the powers to issue directions by the Board can be exercised under 11 and 11B and that power to levy penalty can also be exercised by the Board under Chapter VI-A of the Act from section 15A to 15HB. The power to issue a direction on behalf of the Board is exercised by the WTM and penalty orders are exercised on behalf of the Board by the AO. There is no doubt that under the Act, separate proceedings can be initiated, one under Section 11, 11B and on the other hand under Section 15-I of the Act.

10. Directions under Section 11B of the Act can be issued if the Board is satisfied that it is necessary in the interest of the

investors or orderly development of the securities market or where the affairs are being conducted in a manner which is detrimental to the interests of the investors or the securities market. Such directions so issued are remedial in nature. On the other hand, Section 15I of the Act gives power to the AO to penalize a person under Sections 15A, 15B, 15C, 15D, 15E, 15F, 15G, 15H, 15HA and 15HB of the Act in the event the person contravenes the provisions of the Act and the Regulations framed therein.

11. In the instant case, the AO has exercised its powers by deciding a case on an issue holding that the appellant is not guilty of any violation under Section 12A of SEBI Act and Regulation 3 and 4 of the PFUTP Regulations and the ICDR Regulations. On the other hand, the WTM without considering the order of the AO has found the appellant to be guilty of the same charge and has consequently issued directions under Section 11 and 11B of the Act.

12. Thus, there are two orders passed by two authorities of the Board on the same issue which are contradictory to each other.

13. The question which arises for consideration is, that once an AO after making an inquiry and after adjudicating the matter quashes the proceedings, is it open to an another authority of SEBI to adjudicate the same issue on the same facts under Section 11 and 11B of the SEBI Act and pass contradictory order.

14. In our opinion, once an issue, on the same facts and between the same parties has been determined, it gives rise to an issue estoppel. It operates not only in the same proceedings but also in subsequent proceedings.

15. In ***Nirmal N. Kotecha vs SEBI in Appeal no. 580 of 2019 decided on June 8, 2021*** a similar issue came up for consideration, namely, that once an AO after making an enquiry quashes the proceedings, was it open to SEBI to adjudicate the same issue on the same facts under section 11 and 11B of the SEBI Act and take a different view. This Tribunal held that once an issue on the same facts and between the same parties has been determined, it gives rise to an issue estoppel. This Tribunal held:-

> *"14. In* ***Hope Plantations Ltd. (Supra)*** *the Supreme Court held that principles of estoppel and res judicata are based on public policy and justice and*

that the doctrine of res judicata is often treated as a branch of law of estoppel. The Supreme Court held:-

> *"Rule of res judicata prevents the parties to a judicial determination from litigating the same question over again even though the determination may even be demonstratedly wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it. They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation. These two aspects are "cause of action estoppel" and "issue estoppel". These two terms are of common law origin. Again once an issue has been finally determined, parties cannot subsequently in the same suit advance arguments or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is to approach the higher forum if available. The determination of the issue between the parties gives rise to, as noted above, an issue estoppel. It operates in any subsequent proceedings in the same suit in which the issue had been determined. It also operates in subsequent suits between the same parties in which the same issue arises. Section 11 of the Code of Civil Procedure contains provisions of res judicata but these are not exhaustive of the general doctrine of res judicata. Legal principles of estoppel and res judicata are equally applicable in proceedings before administrative authorities as they are based on public policy and justice."*

15. In ***Gopal Prasad Sinha vs. State of Bihar (1970) 2 SCC 905****, the Supreme Court held that the basic principle underlying the rule of issue estoppel is that the same issue of fact and law must have been determined in the previous litigation.*

16. Thus, an estoppel which has come to be known as "issue estoppel" may arise where a plea of res judicata could not be established because the cause of action was not the same. In order to apply the doctrine of res judicata it is an essential requirement

that the actual issues in the two proceedings are identical.

17. In this regard the question which arises further is, whether it was the same issue of fact which was determined in the earlier case, namely, the proceedings before the AO, and our answer is, yes. This finding is based on a perusal of the order of the AO in which the same transactions was considered on the same facts as well as the Policy of SEBI. Further, the violation of the provision of the Act was also the same and the same law was also taken into taken consideration by the AO. Further, the same facts and law considered by the AO is not disputed by the respondent.

18. In the light of the aforesaid, when the earlier proceedings is identical on facts and law with the present proceedings and the subject matter/ issue involved is the same, in such a case, we are of the opinion that the bar is absolute in relation to all points decided. The principle of issue estoppel is fully applicable in the instant case."

16. In our opinion the authorities of the Board while passing quasi-judicial orders are required to take a consistent view in a matter. If the AO after applying its mind and after considering the material evidence on record passes an order exonerating the appellant, then the order of AO which is an order of the regulator SEBI is binding upon the WTM and it is not open for the WTM to take a different view.

17. In this regard section 15-I(3) of the SEBI Act is extracted below:-

> *"**15-I. Power to adjudicate**. — (1) ……..*
> *(2) ……..*
> *(3) The Board may call for and examine the record of any proceedings under this section and if it considers that the order passed by the adjudicating officer is erroneous to the extent it is not in the interests of the securities market, it may, after making or causing to be made such inquiry as it deems necessary, pass an order enhancing the quantum of penalty, if the circumstances of the case so justify:*
>
> *Provided that no such order shall be passed unless the person concerned has been given an opportunity of being heard in the matter;*
>
> *Provided further that nothing contained in this sub-section shall be applicable after an expiry of a period of three months from the date of the order passed by the adjudicating officer of disposal of the appeal under section 15-T, whichever is earlier."*

18. The aforesaid provision gives power to the Board i.e. SEBI to call for and re-examine the record of any proceedings and if it finds that the order passed by the AO is erroneous and not in the interest of the securities market then after making such inquiry can pass an order enhancing the quantum of penalty. The said provision clearly gives power to Board to revise the order of the AO if it is not in the interest of the securities market.

19. If the order of the AO is not revised under section 15-I(3) then the order of the AO becomes final insofar as the SEBI is concerned. The order of the AO is, thus, binding not only on the appellant but also on the regulator i.e. SEBI. Once the order is binding on SEBI it is no longer open to another authority of SEBI i.e. WTM to pass a different order which is contradictory to the order of the AO.

20. In our opinion, the authorities of the AO are required to take a consistent stand on an issue insofar as the appellant is concerned. We are of the opinion that the consistent view is required to be taken by the authorities for the purpose of orderly development of the securities market and therefore quasi-judicial authorities are required to maintain a discipline and ensure that divergent opinions on the same issue are not taken. The principles of judicial discipline require the regulator to take a consistent view in a matter against a noticee.

21. In view of the aforesaid, the impugned order of the WTM insofar as it relates to the appellant cannot be sustained and is quashed. The appeal is allowed.

22. 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

12.04.2023
msb

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