

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Hearing : 05.07.2022

Date of Decision : 16.11.2022

Appeal No. 203 of 2019

Shiv Kumar Agarwal
B-21, Akash Tower,
Opp. Premchand Nagar,
Judges Bungalow Road,
Bodakdev, Ahmedabad – 380 054.

... Appellant

Versus

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

... Respondent

Mr. Vinay Chauhan, Advocate with Mr. K. C. Jacob, Advocate i/b
Corporate Law Chambers India for the Appellant.

Mr. Pradeep Sancheti, Senior Advocate with Mr. Abhiraj Arora, Mr.
Shourya Tanay, Advocates i/b ELP for the Respondent.

With
Appeal No. 255 of 2019

Madhudevi Agarwal
B-21, Akash Tower,
Opp. Premchand Nagar,
Judges Bungalow Road,
Bodakdev, Ahmedabad – 380054.

... Appellant

Versus

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

...Respondent

Mr. Vinay Chauhan, Advocate with Mr. K. C. Jacob, Advocate i/b
Corporate Law Chambers India for the Appellant.

Mr. Pradeep Sancheti, Senior Advocate with Mr. Abhiraj Arora, Mr.
Shourya Tanay, Advocates i/b ELP for the Respondent.

**With
Appeal No. 350 of 2019**

1. Pawankumar Agarwal
2. Rosydevi Agarwal
3. Roselabs Ltd.
(Formerly known as Singhal
Overseas Ltd.)

F-22, Akash Tower,
Opp. Premchand Nagar,
Bodakdev, Ahmedabad – 380054.

..... 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

Ms. Rajvi Patel, Advocate for the Appellants.

Mr. Pradeep Sancheti, Senior Advocate with Mr. Abhiraj Arora, Mr. Shourya Tanay, Advocates i/b ELP for the Respondent.

**With
Appeal No. 462 of 2019**

Sanjay Thakkar
66, Yogiraj, M. B. Patel Farm House Road,
Vatva Road, Jasodanagar,
Ahmedabad – 382445. 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. Kunal Katariya, Advocate with Mr. Jash Joshi, Advocate for the Appellant.

Mr. Pradeep Sancheti, Senior Advocate with Mr. Abhiraj Arora, Mr. Shourya Tanay, Advocates i/b ELP for the Respondent.

**With
Appeal No. 101 of 2020**

Roselabs Finance Ltd.
Lodha Excelus, N. M. Joshi Marg,
Mahalaxmi, Mumbai - 400 011. 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. Zal Andhyarujina, Senior Advocate with Ms. Shruti Sardessai,
Mr. Mehul Jain, Mr. Aniruddha Banerji, Advocates i/b Bharucha &
Partners for the Appellant.

Mr. Pradeep Sancheti, Senior Advocate with Mr. Abhiraj Arora, Mr.
Shourya Tanay, Advocates i/b ELP for the Respondent.

With
Misc. Application No. 609 of 2021
And
Appeal No. 447 of 2021

Basant Malpani
503, Madhav Villa, Madhe Singh Circle,
Bani Park, Jaipur – 02016, Rajasthan.

.... 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. P. R. Ramesh, Advocate with Ms. Mona Vora, AOR for the
Appellant.

Mr. Pradeep Sancheti, Senior Advocate with Mr. Abhiraj Arora, Mr.
Shourya Tanay, Advocates i/b ELP for the Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Justice M. T. Joshi, Judicial Member
Ms. Meera Swarup, Technical Member

Per : Justice M. T. Joshi, Judicial Member

1. Present appeals are preferred aggrieved by the separate orders of the learned Adjudicating Officer (hereinafter referred to as 'AO') of the respondent Securities and Exchange Board of India (hereinafter referred to as 'SEBI') imposing penalty on different dates, in the same issue concerning trading in the shares of Gujarat Arth Ltd. (hereinafter referred to as 'GAL or the company'). Those are therefore are being decided by the present common order.

2. The AO passed order imposing penalty for violation of the provisions of Regulations 3(a), (b), (c), (d), 4(1) and 4(2)(a), (d), (e), (f), (k) and (r) 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'), Regulation 10 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as 'SAST Regulations') as well as Regulation 7(1), (1A) read with Regulation 7(2) of the SAST Regulations and Regulation 13(1), (3), (4) read with 13(5) of the Securities and Exchange Board of India

(Prohibition of Insider Trading) Regulations, 1992 (hereinafter referred to as 'PIT Regulations').

3. The appellant Shiv Kumar Agarwal, appellant Madhudevi Agarwal, appellant Pawankumar Agarwal, Rosydevi Agarwal and Roselabs Ltd. were the common noticees in one proceeding. Vide order dated January 28, 2019, monetary penalty was imposed upon these appellants directing to pay different amounts of penalties for different violations. Aggrieved by the said order, appeal nos. 203 of 2019, 255 of 2019 and 350 of 2019 are filed.

4. Appeal No. 462 of 2019 is filed by the appellant Sanjay Thakkar, aggrieved by the order dated April 26, 2019 wherein he is penalized under the similar regulations. Appeal No. 101 of 2020 is filed by the appellant Roselabs Finance Ltd., aggrieved by the order dated December 23, 2019. The company is penalized for Rs. 2,53,72,500/- for the same violation. Similarly, Basant Malpani in Appeal No. 447 of 2021 is penalized for Rs. 1,30,00,000/- vide order dated March 24, 2021.

5. The allegation is that appellant Shiv Kumar Agarwal, Madhudevi Agarwal, Pawankumar Agarwal, Rosydevi and Roselabs

Ltd. (formerly known as Singhal Overseas Ltd.) being a directors / promoters of the company or persons acting in concert had off-market transactions / transfer of shares to one Right Finstock Pvt. Ltd., Cavalier Securities Ltd. (hereinafter referred to as ‘Cavalier’) and appellant Basant Malpani. Out of them Right Finstock had in off-market transactions, transferred shares to appellant Sanjay Thakkar. Roselabs Finance Ltd. and Roselabs Ltd. were disclosed as persons acting in concert as regards the company. It is alleged that all of them acting in concert with each other and had violated the provisions of the Regulations as detailed (supra).

6. Before we proceed, it would be appropriate to refer to the relevant provision of the regulations which are extracted hereunder :-

PFUTP Regulations

Reg. 3. Prohibition of certain dealings in securities

“No person shall directly or indirectly—

(a) buy, sell or otherwise deal in securities in a fraudulent manner;

(b) use or employ, in connection with issue, purchase or sale of any security listed or proposed to be listed

in a recognized stock exchange, any manipulative or deceptive device or contrivance in contravention of the provisions of the Act or the rules or the regulations made thereunder;

(c) employ any device, scheme or artifice to defraud in connection with dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange;

(d) engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person in connection with any dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange in contravention of the provisions of the Act or the rules and the regulations made thereunder.”

Reg. 4 – Prohibition of manipulative, fraudulent and unfair trade practices

“(1) Without prejudice to the provisions of regulation 3, no person shall indulge in a fraudulent or an unfair trade practice in securities.

(2) Dealing in securities shall be deemed to be a fraudulent or an unfair trade practice if it involves fraud and may include all or any of the following, namely :—

(a) indulging in an act which creates false or misleading appearance of trading in the securities market;

(d) paying, offering or agreeing to pay or offer, directly or indirectly, to any person any money or money’s worth for inducing such person for dealing in any security with the object of

inflating, depressing, maintaining or causing fluctuation in the price of such security;

(e) any act or omission amounting to manipulation of the price of a security;

(f) publishing or causing to publish or reporting or causing to report by a person dealing in securities any information which is not true or which he does not believe to be true prior to or in the course of dealing in securities;

(k) an advertisement that is misleading or that contains information in a distorted manner and which may influence the decision of the investors;

(r) planting false or misleading news which may induce sale or purchase of securities.”

SAST Regulations

Reg. 10 - Acquisition of fifteen per cent or more of the shares or voting rights of any company.

“No acquirer shall acquire shares or voting rights which (taken together with shares or voting rights, if any, held by him or by persons acting in concert with him), entitle such acquirer to exercise [fifteen] per cent or more of the voting rights in a company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the Regulations.”

Reg. 7(1) – Acquisition of 5 per cent and more shares or voting rights of a company

“7(1). Any acquirer, who acquires shares or voting rights which (taken together with shares or voting rights, if any, held by him) would entitle him to more than five per cent or ten per cent or fourteen percent. or fifty four per cent. or seventy four per cent shares or voting rights in a company, in any manner whatsoever, shall disclose at every stage the aggregate of his shareholding or voting rights in that company to the company and to the stock exchanges where shares of the target company are listed.”

“7(1A). Any acquirer who has acquired shares or voting rights of a company under sub-regulation (1) of regulation 11, shall disclose purchase or sale aggregating two percent. or more of the share capital of the target company to the target company, and the stock exchanges where shares of the target company are listed within two days of such purchase or sale along with the aggregate shareholding after such acquisition or sale.”

“7(2.) The disclosures mentioned in sub-regulations (1) and (1A)] shall be made within two days of, –

- (a) the receipt of intimation of allotment of shares; or*
- (b) the acquisition of shares or voting rights, as the case may be.”*

Insider Trading Regulations

“13(1). Any person who holds more than 5% shares or voting rights in any listed company shall disclose to the company in Form A, the number of shares or voting rights held by such person, on becoming such holder, within 2 working days of :—

(a) the receipt of intimation of allotment of shares; or

(b) the acquisition of shares or voting rights, as the case may be.”

“13(3). Any person who holds more than 5% shares for voting rights in any listed company shall disclose to the company in Form C the number of shares or voting rights held and change in shareholding or voting rights, even if such change results in shareholding falling below 5%, if there has been change in such holdings from the last disclosure made under sub-regulation (1) or under this sub-regulation; and such change exceeds 2% of total shareholding or voting rights in the company.”

“13(4). Any person who is a director or officer of a listed company, shall disclose to the company and the stock exchange where the securities are listed in Form D, the total number of shares or voting rights held and change in shareholding or voting rights, if there has been a change in such holdings of such person and his dependents (as defined by the company) from the last disclosure made under sub-regulation (2) or under this sub-regulation, and the change exceeds Rs. 5 lakh in value or 25,000 shares or 1% of total shareholding or voting rights, whichever is lower.”

“13(5). The disclosure mentioned in sub-regulations (3) and (4) shall be made within 51[two] working days of :

(a) the receipts of intimation of allotment of shares, or

(b) the acquisition or sale of shares or voting rights, as the case may be.”

7. The appellants had denied any of such violations. However, the impugned orders came to be passed. Hence the present appeals.

8. We have heard Mr. Vinay Chauhan, Mr. K. C. Jacob, Ms. Rajvi Patel, Mr. Kunal Katariya, Mr. Jash Joshi, the learned counsel and Mr. Zal Andhyarujina, the learned senior counsel with Ms. Shruti Sardesai, Mr. Mehul Jain, Mr. Aniruddha Banerji, Mr. P. R. Ramesh, the learned counsel with Ms. Mona Vora, AOR for the appellants and Mr. Pradeep Sancheti, the learned senior counsel with Mr. Abhiraj Arora, Mr. Shourya Tanay, the learned counsel for the respondent.

9. Since different roles are assigned to the different group of appellants, it would be worthwhile to decide the present appeals in the similar fashion as decided by the learned AO.

Appeal Nos. 203, 255 and 305 of 2019

10. The common charge against the present appellants is that they being director / promoter / person acting in concert had issued misleading corporate announcement on November 1, 2003, December 22, 2003 and January 16, 2004 regarding the acquisition

of business of one Poonam Industries and preferential / right issue which did not materialize at all. These announcements lured investors to create artificial volume and price rise. During the said period, these appellants transferred shares before the misleading announcements were made to various entities who thereafter sold those shares through market and off-market transfers. While disposing the shares in the above fashion, they had violated the provisions of SAST Regulations and PIT Regulations as the transfer of the shareholding was not disclosed as required by SAST and PIT Regulations. These transfers were more than 15% shares and, therefore, the disclosure was required to be made.

11. As regards the liquidity of the shares of the company, the order records that from August 1, 2003 to October 6, 2003 the scrip of the company traded on only three days with one trade on each day for a price of Rs. 8.05. However, from October 2003 i.e. when first of the announcement was made the trading activity started and major volume was observed on January 16, 2004 which was 8,04,675 shares. The price also rose and ultimately the price and volume started declining and the scrip closed to Rs. 4.63 in February 2004 which thereafter slid at Rs. 1.25 on December 20, 2004.

SEBI alleges that announcements were misleading as though on November 1, 2003, the company announced that it had acquired the business of Poonam Industries Ltd. alongwith their registered trademark Poonam Sarees, the company has terminated its arrangement with Poonam Industries for using this brand name, as company had withheld the royalty amount. Further, the company explained to SEBI during investigation that there was no preferential allotment to increase the authorised share capital, though on December 22, 2003 the said announcement was made by the company. During this period also the price of the scrip rose as detailed in paragraph no. 16 of the impugned order.

12. The order further records that the present appellants had totally transferred 11,82,880 shares of the company to various entities including the Cavalier and Basant Malpani. The details of the same are given in the impugned order. Thereafter, on October 21, 2003, these appellants received back 5,75,600 shares from the entities other than the above two entities. But again, these appellants transferred those 5,75,600 shares on October 23, 2003 to Cavalier. Out of these securities, 2,97,200 shares were transferred

to Basant Malpani. The details of the transfer, re-acquisition and again transfer are given in paragraph no. 22 of the impugned order.

13. Appellant Shiv Kumar Agarwal represented all these appellants and all the appellants filed similar replies before SEBI. Appellant Shiv Kumar Agarwal claimed that he ceased to be member of board of director of the company as on October 9, 2003 and, therefore, had no concern with any of the impugned announcements. The other appellants submitted that they sold their shareholding in October 2003 and, therefore, were not concerned with any of the activities thereafter. According to them, initially Cavalier had made a mistake in transfer of some of the shares to some of the entities as mentioned in the table below paragraph no. 22 of the impugned order. Therefore, these shares were re-transferred to the respective appellants and then were transferred to the real buyer of the same as detailed in the table.

14. The learned counsel for the appellants vehemently submitted that while appellant Shiv Kumar Agarwal ceased to have any concern with the company with effect from October 9, 2003, the transfer / re-transfer of the shares was the result of the mistake committed by the Cavalier and, therefore, they denied any role in

any subsequent announcements or increase in the rise in the trading volume/price of the shares.

The learned counsel for the appellants submitted that Shiv Kumar Agarwal himself, his wife Madhudevi and his brother Pawankumar Agarwal and Pawankumar's wife Rosydevi and group companies were the part of the promoter group of the company. This group was holding around 48.58% share capital of the company. The appellant Shiv Kumar Agarwal was holding around 4.04% shares till September 2003. He was the managing director of the company and appellant Madhudevi was one of the directors. All of them have decided to exit from the company as the business of the company was not doing well. They sold their shareholding to Cavalier a registered sub-broker with SEBI which was interested in buying the entire stake. Thus, between December 25, 2002 to October 9, 2003, appellant Shiv Kumar Agarwal and Madhudevi Agarwal submitted their resignation letters with the company after the said exit. The buyer thereafter had appointed its own directors on the board of the company. Post-exit of the promoter group, the appellants had no role to play in the affairs of the company. Cavalier had committed some mistake in further transfer of the

shares to the various entities and therefore the shares were again re-transferred to the appellants. The respective appellants thereafter transferred the shares to the correct buyers as detailed in the order.

15. Upon hearing the appellants, we do not find any force in the above submissions. Though appellant Shiv Kumar Agarwal claims that he resigned from the company on October 9, 2003, the MCA records shows that he was director till January 11, 2004. Not only this, but also the annual report of the year 2003-2004 of the company confirmed that he was managing director of the company till January 14, 2004. The learned AO has pointed that in the said annual report, the resignation of the other two directors, namely, Madhudevi Agarwal and Muralidhar Minda is specifically noted alongwith the appointment of four new directors. The composition of board as detailed in the annual report would show that the appellant Shiv Kumar Agarwal became an independent executive director. In view of the same, the case of the appellants that they had no concern with the misleading announcements does not hold any water.

16. There is nothing on record to show that transfer and re-transfer of the shares was done due to any mistake by Cavalier and, therefore, this submission cannot be accepted.

17. The volatility in the price and volume of the shares on the stock exchange platform coupled with the financial of the company as noted in the order and as submitted by the appellants themselves that the company was not doing well if juxtaposed with the misleading announcements would show that all these misleading announcements were made with the purpose of increase in the trading volume and price.

18. In the circumstances, the violation of Regulations 3 and 4 of the PFUTP Regulations, SAST Regulations and PIT Regulations as detailed in the impugned order are affirmed.

19. The appellants have relied in the judgment of *Suhas Bhand vs. State of Maharashtra & Anr. [(2009) SCC OnLine Bom 1245]*, wherein in the fact of that case the Hon'ble Bombay High Court had decided the question of law relating to the resignation of a director of a company. In the present case, on facts, it is crystal clear that the appellant Shiv Kumar Agarwal did not resign from the board of

directors on the date as claimed by him as the annual report clearly belies his statement. He also relied on the judgment of *Shamlal Madanlal Khetan vs. SEBI [(2021) SCC OnLine SAT 756]*, wherein this Tribunal was considering the onus to prove the date of ceasing of a director of the company upon his resignation. In that case, the learned WTM of SEBI solely relied on the record of the Ministry of Corporate Affairs by disbelieving the evidence provided by the appellants. In the fact of the present case, however, the onus is discharged by SEBI on facts.

20. The appellants generally pleaded that there was inordinate delay in initiation of the proceedings against them. The record shows that within a period of less than six years from the date of the transactions, proceedings were initiated. Further, no definite prejudice is shown by any of the appellants which according to them might have caused due to the delay in initiation of the proceedings. In the circumstances, the ratio in the cases of *Adjudicating Officer, SEBI vs. Bhavesh Pabari [(2019) 5 SCC 90]*, *MBL & Company Ltd. vs. SEBI (Appeal No. 494 of 2020) decided on May 13, 2022*, *Pooja Vinay Jain vs. SEBI [SAT order dated March 17, 2020]*, *N. Narayanan vs. Adjudicating Officer, SEBI [(2013) 12 SCC 152]* all

of which are decided in the facts of the respective cases would not be applicable in the present case.

21. In the circumstances, Appeal Nos. 203, 255 and 350 of 2019 will have to be dismissed.

Appeal No. 462 of 2019

22. Appellant Sanjay Thakkar, in the present appeal is additionally alleged to have violated the provisions of Section 15A(a) and (b) of the SEBI Act for non-compliance of the summons issued to him during the investigation, besides the violations under the SAST Regulations, PFUTP Regulations and PIT Regulations.

23. Admittedly, he received 3,50,000 shares of the company in off-market transactions from Right Finstock Pvt. Ltd. on January 16, 2004 which is as referred in the above order regarding the appellant Shiv Kumar Agarwal and Ors. Around the same time, the corporate announcements alleged to be misleading were made by the company and the present appellants sold 2,05,000 shares within two days and rest of the shares were sold through market and off-market transfers. The appellant submitted before SEBI that he was an ordinary lay

investor cum trader with a poor financial in stock market. Due to his innocence, unintentionally the lapse, if any, has occurred. He was not connected with the company and its promoters or any of person acting in concert. His trading through the platform of the stock exchanges was in January while the corporate announcements were made in November and December.

24. The learned AO took into consideration the copy of the income tax return of the appellant for the relevant year. Further, it was found that the bank statement by the appellant did not indicate any transaction towards purchase / sale of the shares of the company. It was also pointed out that majority of the shares were sold by him in the market within a day and the balance shares were transferred back to Right Finstock Pvt. Ltd.

25. Upon hearing both the sides, in our view, finding of the learned AO needs no interference. The appellant submitted that he is a lay investor with a poor financials but his income tax returns however shows otherwise. As action of re-transfer of portion of the shares to Right Finstock Pvt. Ltd. and off-loading remaining shares in the market, while his bank statement does not evidence of transaction of purchase and sale of shares by the company off-

market would certainly show that he had entered into non-genuine trades in violation of the PFUTP Regulations.

26. As regards the SAST Regulations, admittedly, the appellant had acquired more than 10% of the share capital of the company and no disclosure regarding the same was made. Therefore, he was in violation of Regulation 7 of the SAST Regulations and Regulation 13 of the PIT Regulations.

27. As regards the non-compliance with the summons issued by the respondent SEBI during investigation dated May 6, 2008 and August 12, 2008, though there is some evidence that the appellant sent one individual to attend SEBI, the information sought was not completely provided. The appellant went on seeking for some additional time to submit the information sought. Though he acknowledges both the summons, subsequently, he has submitted that he did not remember if he received any summons. Therefore, AO has rightly imposed penalty under Section 15A(a) of the SEBI Act on this count. However, no reasons are recorded as to why maximum penalty of Rs. 1 crore is imposed. In the facts of the case, in our view, a penalty of Rs. 5 lac would be just and sufficient.

28. The appellant has taken the plea in delay in launching of the proceeding, it is to be noted that the transaction of acquisition and disposal of the shares are of the year 2004. Show cause notice was issued to him on March 18, 2010. Thus, there is no inordinate delay in issuing the show cause notice. Further, the fact that he did not cooperate with the investigation as detailed (supra) is the additional reason for some delay. Considering all these facts on record, we do not find any reason recorded by the learned AO. The appeal therefore is liable to be dismissed without any order as to costs.

Appeal No. 101 of 2020

29. The present appellant during the relevant period was the promoter of the company. In fact, the appeal memo records that the appellant was promoted by appellant Pawankumar Agarwal, Rosydevi Agarwal, Singal Overseas Ltd., Sadiram Industries Pvt. Ltd. and appellant Shiv Kumar Agarwal and Madhudevi Agarwal alongwith others were holding 61.78% of the equity share capital of the present appellant. Annexure IV to the show cause notice issued to the appellant would show that alongwith other promoters and the persons acting in concert, the present appellant had transferred

256,695 shares to one Kaushtubh Credit and Holdings Pvt. Ltd. on October 10, 2003. Those were received back by the appellant on October 20, 2003. Thereafter again the appellant transferred those shares to Cavalier on October 23, 2003. Respondent SEBI charged the appellant for violation of PFUTP and SAST Regulations being the person acting in concert with other promoters as detailed (supra). According to SEBI, the off-market transfer, re-transfer and again transfer of the shares coupled with the misleading announcements and spurt in the trading in the shares was an act in violation of PFUTP Regulations for which the present appellant is also responsible. Further for non-disclosure of transfer, the violation of relevant provisions of the SAST Regulations has also occurred. In the circumstances, show cause notice was issued to the present appellant on December 15, 2009.

30. The present appellant contended that though it was promoted by the concerned appellants as recorded above, in the year 2008 one Poonam Fast Foods Pvt. Ltd. acquired majority of the equity shares of the appellant from the erstwhile management by way of open offer under the relevant regulations of the SAST Regulations, 1997. Copy of the open offer is filed on record. Not

only this, subsequently, in June 2013 Arihant Premises Pvt. Ltd. i.e. the present promoters of the appellant acquired 74.25% of the shareholding of the appellant company again in terms of SAST Regulations and the copy of the second open offer is also filed on the record. While this second open offer was made on May 6, 2013, the show cause notice was already issued but the information of this show cause notice dated December 15, 2009 was not available in the public domain. The earlier promoter i.e. Poonam Fast Foods Pvt. Ltd. did not inform the present management of the appellant about the show cause notice or the pending proceedings. Thereafter, after the gap of six years respondent SEBI issued another show cause notice dated December 15, 2009 and, at that time, the appellant came to know of the proceedings. Thereupon, they started making enquiry about the transactions by issuing letters to the concerned stockbrokers. These stockbrokers however did not give any information to the present management. Reply from the appellant in show cause notice however was sought. Ultimately, on February 28, 2018 Pravin Ratilal Share and Stockbrokers Ltd. sent a letter to the appellant stating that the documents requested by the appellant belonged to Cavalier i.e. the sub-broker and, therefore, the appellant should obtain information from it. Ultimately, the appellant filed

reply to the show cause notice on June 15, 2018 highlighting the above facts. It submitted that the erstwhile management of the appellant company had entered into the transaction to transfer its entire shareholding in the company to Cavalier through off-market transfers. The equity shares were initially transferred to the demat account maintained with Khandwala Integrated Financial Services Pvt. Ltd. in three tranches as per the instructions received from Cavalier. However, the appellant was informed by the Cavalier that the shares of the company were erroneously transferred to the wrong account. Thereafter, on October 20, 2003, the shares were transferred back to the appellant's demat account and were successfully transferred to the correct demat account of the Cavalier on October 23, 2003. Thus, there is no acquisition of fresh or additional shares. There is no material to know that the appellant was involved in any fraudulent activity in violation of the PFUTP Regulations. There are only transactions of transfer of the shares as detailed above. However, grave and serious violation of fraud are made against the appellant which required to indicate the particular fraud and manipulation purported and hence it wanted exoneration.

31. The learned AO however concluded that the appellant was admittedly person acting in concert, who transferred the shares through off-market transactions as detailed above alongwith Shiv Kumar Agarwal and other persons acting in concert. Further, misleading announcement as detailed (supra) were made as regards the company. Though the appellant Shiv Kumar Agarwal made a statement that he had resigned from the company long before the announcement was made, material as detailed while discussing the appeal of Shiv Kumar Agarwal and Ors. would show that he continued to be independent executive director of the company and, therefore, the appellant was also guilty of the violation of the regulations.

32. As regards the change in control of the appellant on two occasions after the alleged violations, the learned AO observed that the appellant is a juristic entity. Any change in the control of the appellant would not affect the liability which has occurred due to an act of the company i.e. the appellant. In the circumstances, noting that it is difficult to quantify the exact disproportionate gains or unfair advantage enjoyed by the appellant or the consequent losses

suffered by the investors, a composite penalty of Rs. 2,53,72,500/- was imposed upon the appellant.

33. Learned counsel for the appellant submitted that there is no specific charge in the show cause notice against the appellant though allegations of the violation of the PFUTP Regulations are made. Further, though the appellant was a promoter group entity, it was not a person acting in concert as under the SAST Regulations, 1997, the promoters were not “deemed to be person acting in concert” which provision came in existence by subsequent Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (hereinafter referred to as ‘SAST Regulations, 2011’). It was submitted that there was a delay of six years from the issue of show cause notice till the decision by the AO. The show cause notice was issued after a lapse of five years without any reason. Due to the delay appellant was unable to make any effective representation as the control of the appellant changed twice and despite it’s best efforts the present management was unable to get the information required to answer the show cause notice. Even otherwise, the only allegations against the appellant is of transfer and re-transfer of shares as detailed (supra) which *ipso facto* cannot

establish that the appellant was involved in any fraudulent activity in violation of PFUTP Regulations. It is also submitted that no explanation for imposing huge penalty of Rs. 2,53,72,500/- is given in the impugned order and, therefore, he wanted that the appeal be allowed.

34. The submission that the AO has used the subsequently amended provisions of SAST Regulations, 2011 for branding the present appellant as person acting in concert is wrong. The provisions of SAST Regulations, 2011, in this regard, shows that the promoter is deemed to be a person acting in concert. In the essence, even when no material is found to show that a person is acting in concert with the acquirers/transferrors of the shares but if he is a promoter then by applying the deeming provisions he would be termed as person acting in concert. Here, in the present case, the facts on record as detailed by the appellant himself and as found from the record would show that all the promoters in unison transferred the shares to Cavalier and others as detailed (supra). Their contention is that all of them had decided together to exit from the company. In the circumstances, nothing more is required to show that the present appellant is a person acting in concert with

other promoters of the company. Therefore, there is no need to find as to whether they were deemed person acting in concert. Therefore, the arguments of the appellant in this regard will have to be rejected.

35. Further, when the appellant's submission and the facts on record show that the appellant has transferred the shares as detailed in the order, clearly there was violation of SAST Regulations, 1997. As regards the violation of PFUTP Regulations, the facts would show that while the promoters transferred the shares and got re-transferred from Cavalier, etc., in the same period the company when one of the promoter, namely, Shiv Kumar Agarwal was the independent executive director made misleading announcements as detailed (supra). Thereupon, the trading on the platform of the exchanges started with much vigour. Thus, the appellant in concert with other promoters was instrumental in causing the same. The appellant's participation in the same, thus, is amply clear.

36. Thus, finding that the present appellant has committed the violation of the relevant regulations of the SAST Regulations and PFUTP Regulations, so far as the quantum of penalty is concerned,

is the same however the same cannot be sustained for the following reasons :-

The present appellant had change of the management upon change of control twice after the disputed transactions of the year 2008. One Poonam Fast Foods Pvt. Ltd. earlier acquired the appellant and thereafter the present appellant through Arihant Premises Pvt. Ltd. came in the control of the appellant. The violations of SAST Regulations as well as of PFUTP Regulations were committed by the person acting in concert i.e. appellant Shiv Kumar Agarwal and others who were also the then promoter of the present appellant. Though, the learned AO is legally correct in making a statement that the appellant is a juristic person and, therefore, it cannot be escape the liability, still the fact would show that imposing a huge penalty of Rs. 2,53,72,500/- (though reasons not detailed, may be this exact figure was arrived at upon computation of the shares transferred by the appellant), is not justifiable. Therefore, taking into consideration, the above facts that the violation was not committed by the present promoter group, in our view, the penalty imposed is excessive one. In the circumstances, the case will have to be remanded back to the learned

AO to appreciate the facts stated above and compute the penalty accordingly.

37. The appellant has submitted that due to the delay and due to the fact of change of control, they could not effectively reply to the show cause notice as they did not get the information as detailed (supra). In our view, the only fact that is relevant is the transfer and re-transfer of shares by this appellant in the month of October 2003. No more information was required and, therefore, no prejudice is caused to the appellant so far as that aspect is concerned.

Appeal No. 447 of 2021

38. The present appellant had received 2,97,200 shares from Singhal Overseas Ltd., another promoter of the company on October 11, 2003. From October 14, 2003, the present appellant started trading in the shares on the platform of the exchanges by buying as well as selling the shares of the company. He has totally bought and sold 9,01,738 shares (11.10%) and 7,69,471 shares (9.48%) during the period when the misleading announcements as detailed (supra) were made.

The appellant made contradictory statements in his reply before the learned AO. He submitted that he was on a friendly term with Cavalier management which requested him to assist in trading in the shares of the company as they had no facility to trade at BSE. The appellant had a demat account. Cavalier transferred 2,97,200 shares of the company to him in off-market transactions. As per the direction of the personnel of Cavalier he transacted in the shares. He submitted that during the same period, he availed the loan of Rs. 3 lac from Cavalier and repaid Rs. 6,81,198/- on October 5, 2005. Rs. 3,81,198/- was towards consideration of sale of 2,97,200 shares of the company while Rs. 3 lacs towards the loan amount.

39. Thus, while he claims, only as friend he transacted in the shares of the company as per the direction that has been given by the Cavalier, in the next breath he said that he purchased those shares at purchase price of Rs. 3,81,198/- from Cavalier.

40. The appellant has contributed to 11.10% of the volume on the buy side and 9.48% on the sell side when misleading announcements were made by the company. The appellant had earlier never traded in the scrip of the company. All these facts

would clearly show that the appellant is also involved in the violation of the PFUTP Regulations.

41. The percentage of the share in which he transacted was also in violation of the SAST Regulations. He would therefore be liable to pay the penalty of Rs. 20 lacs under Section 15HA of the SEBI Act as detailed in the impugned order by the AO.

The learned AO has also imposed a penalty of Rs. 10 lacs under Section 15A(b) of the SEBI Act for non-disclosure of the acquisition of these shares and takeovers. Considering the facts and circumstances as detailed supra, we find that the learned AO in his discretion has imposed a penalty which needs no interference.

42. The appellant was also charged for non-submission of information sought for by SEBI through summons and remainders were issued to him during the investigation. The appellant has accepted the lapse in the proceedings. He submitted that due to his health problem was unable to attend those summons which are giving information. He further clarified that the information and document relating to investigation against the noticees were already available with SEBI. The learned AO took a note of the decisions of

this Tribunal in *M/s. Asian Films Production and Distribution Ltd. vs. SEBI Appeal No. 203 of 2010 decided on January 19, 2011 and Rich Capital & Financial Services Limited & Anr. vs. SEBI Appeal No. 51 of 2013 decided on October 22, 2013*. AO observed that it was a serious obstruction in the investigation and the appellant despite providing several opportunities have not appeared before SEBI. Therefore, maximum penalty of Rs. 1 crore as provided under Section 15A(a) of the SEBI Act was imposed upon the appellant. We find that whatever information was sought by the investigating authority i.e. regarding the transaction carried by the appellant was available with SEBI. The appellant has not denied that he has not produced the information and stated that due to his health problem he was unable to attend the hearing.

43. Considering all these facts and circumstances on record, the penalty imposed by the AO is harsh. In our view, Rs. 5 lacs on this count in the facts and circumstances would meet the end of justice.

44. In the result, the following order :-

ORDER

45. The Appeal Nos. 203 of 2019, 255 of 2019 and 350 of 2019 are dismissed without any order as to costs.

46. Appeal No. 462 of 2019 is hereby partly allowed only to the extent of penalty imposed under Section 15A(a) of the SEBI Act. The penalty of Rs. 1 crore imposed by the learned AO on this count is reduced to the penalty of Rs. 5 lacs.

47. Appeal No. 101 of 2020 is hereby allowed. The direction of the learned AO to pay a composite penalty of Rs. 2,53,72,500/- is hereby set aside. Instead the case is remanded back. The learned AO is directed to recalculate the penalty in view of the findings recorded in paragraph no. 36 above, upon hearing the appellant afresh on the limited aspect of the quantum of the penalty. The appellant is directed to appear before the learned AO on 22nd December 2022 for the purposes of the hearing.

48. Appeal No. 447 of 2021 is party allowed to the extent of imposition of penalty under Section 15A(a) of the SEBI Act. The penalty of Rs. 1 crore imposed on this count by the learned AO is

hereby set aside. Instead the appellant is directed to pay a penalty of Rs. 5 lacs on this count.

49. Rest of the orders of the learned AO are hereby confirmed.

50. 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

Ms. Meera Swarup
Technical Member

16.11.2022
PTM