BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on: 18.05.2023

Date of Decision : 13.09.2023

Appeal No. 348 of 2022

1. Winsome Textile Industries Ltd.
   Corporate Office: SCO 191-192,
   Sector 34A, Chandigarh – 160 022
   Punjab.

2. Ashish Bagrodia
   H No. 351, Sector 9-D,
   Chandigarh – 160 009
   Punjab. ….. 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

Shri P. N. Modi, Senior Advocate with Mr. Kunal Katariya and Mr. Prakash Shah, Advocates i/b Prakash Shah & Associates for the Appellants.

Mr. Shyam Mehta, Senior Advocate with Ms. Nidhi Singh, Ms. Deepti Mohan, Ms. Hubab Sayed and Mr. Raghav Taneja, Advocates i/b Vidhii Partners for the Respondent.

WITH
Appeal No. 251 of 2022

Aspire Emerging Fund
C/o Aurisse International Limited,
Citadelle Mall, Sir Virgil Naz Street,
Port-Louis,
Maurititus. ….. 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. Somasekhar Sundaresan, Advocate with Mr. Kunal Kataria, Ms. Ashmita Goradia and Ms. Vidhi Mehta, Advocates i/b Aagam Doshi for the Appellant.

Mr. Sumit Rai, Advocate with Ms. Nidhi Singh, Ms. Deepti Mohan, Ms. Hubab Sayed and Mr. Raghav Taneja, Advocates i/b Vidhii Partners for the Respondent.

WITH

Appeal No. 342 of 2022

Davos International Fund
Rockmills Financials Ltd.
3 River Court, St. Denis Street,
Port Louis, Mauritius. ….. 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. Dikshat Mehra, Advocate and Ms. Anjali Dhoot, Advocate i/b Rajani Associates for the Appellant.

Mr. Sumit Rai, Advocate with Ms. Nidhi Singh, Ms. Deepti Mohan, Ms. Hubab Sayed and Mr. Raghav Taneja, Advocates i/b Vidhii Partners for the Respondent.

WITH
Appeal No. 343 of 2022

Leman Diversified Fund
Rockmills Financials Ltd.
3 River Court, St. Denis Street,
Port Louis, Mauritius. ….. 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. Abishek Venkataraman, Advocate with Mr. Dikshat Mehra, and Ms. Anjali Dhoot, Advocates i/b Rajani Associates for the Appellant.

Mr. Shyam Mehta, Senior Advocate with Ms. Nidhi Singh, Ms. Deepti Mohan, Ms. Hubab Sayed and Mr. Raghav Taneja, Advocates i/b Vidhii Partners for the Respondent.

AND
Appeal No. 345 of 2022

Sparrow Asia Diversified Opportunities Fund
Rockmills Financials Ltd.
3 River Court, St. Denis Street,
Port Louis, Mauritius. ….. 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. Gaurav Joshi, Senior Advocate with Mr. Dikshat Mehra and Ms. Anjali Dhoot, Advocate i/b Rajani Associates for the Appellant.

Mr. Sumit Rai, Advocate with Ms. Nidhi Singh, Ms. Deepti Mohan, Ms. Hubab Sayed and Mr. Raghav Taneja, Advocates i/b Vidhii Partners for the Respondent.

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

Per : Justice Tarun Agarwala, Presiding Officer

1. Five appeals have been filed by six noticees against the order dated December 15, 2021 passed by the Whole Time Member ('WTM' for short) of the Securities and Exchange Board of India ('SEBI' for short). The noticee no. 1, Winsome Textile Industries Limited ('Winsome' for short) was restrained from accessing the securities market for a period of 3 years and were further directed to bring back the outstanding GDR proceeds, namely, USD 9.018 million. The noticee no. 1 was further penalized a sum of Rs. 4.40 crore for violation of Section 12A of the SEBI Act, 1992 and Regulation 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'). In addition to the aforesaid, noticee nos. 4, 14, 15 and 17 were debarred from

accessing the securities market for a period one year and noticee no. 4 was further directed to disgorge a sum of Rs. 1,11,52,500/- along with noticee nos. 2 and 3 jointly and severally. Further, noticee no. 2 was debarred for two years and a penalty of Rs. 44 lakh was imposed.

2. The facts leading to the filing of the present appeal is, that the Board of Directors of the Company known as Winsome Textile Industries Ltd. passed a resolution on September 16, 2010 for opening a bank account with European American Investment Bank AG (hereinafter referred to as 'EURAM Bank') for depositing the GDR proceeds.

3. The resolution approved by the Board of Directors resolved that a bank account would be opened with European American Investment Bank AG (hereinafter referred to as 'EURAM Bank') for the purpose of receiving the subscription money in respect of GDR issue. Further, amongst, other, noticee no. 6 Managing Director, Shri Ashish Bagrodia was authorised to sign and execute an agreement as may be required by the Bank and take such steps from time to time on behalf of the Company. The resolution further resolved to use

the funds deposited in the aforesaid Bank account as security in connection with the loan, if any as well as to enter into any escrow account or similar arrangement if and when so required.

4. Based on the aforesaid resolution, the Company issued 1.2 million GDRs for USD 9.99 million on March 31, 2011. The aforesaid GDR was subscribed by one entity, namely, Vintage FZE (hereinafter referred to as 'Vintage') and a corporate announcement was made by the Company that the entire issue was subscribed. In this regard, Pan Asia Advisors Limited ('Pan Asia' for short), notice no. 11 was the Lead Manager which was totally controlled by noticee no. 2, Arun Panchariya.

5. Securities and Exchange Board of India (hereinafter referred to as 'SEBI') conducted an investigation pertaining to the issue of GDR by the Company. Based on the investigation, a show cause notice dated July 4, 2019 and supplementary show cause notice dated July 10, 2020 was issued to the Company, its Directors and other entities to show cause as to why suitable directions under Section 11 and 11B should not be issued for violation of Section 12A(a), (b), (c) of the SEBI Act read with Regulation 3(a), (b), (c), (d) and

4(1), 4(2)(f), (k), (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'), Section 21 of the Securities Contracts (Regulations) Act, 1956 (hereinafter referred to as the 'SCR Act') read with Clauses 32, 36(7) and 50 of the Listing Agreement and Section 23E of the SCR Act.

6. The show cause notice alleged that pursuant to the resolution dated September 16, 2010 not only a bank account was opened with EURAM Bank but the Managing Director executed a pledge agreement dated March 23, 2011 on behalf of the Company with EURAM Bank in which the proceeds of the GDR was to be kept as security with EURAM Bank. Further, a loan agreement was executed between Vintage and EURAM Bank, by which the Bank agreed to give a loan to Vintage for the purpose of subscribing to the GDR. The show cause notice further alleged that the pledge agreement and the loan agreement was not disclosed to the stock exchange and, consequently, the investors and shareholders were kept in the dark. The show cause notice further alleged that based on the pledge agreement and the loan agreement EURAM Bank advanced USD 9.9 million to Vintage which amount was

utilised by Vintage to subscribe to the entire issue. The GDR proceeds were pledged as security till such time the loan was repaid by Vintage. It was also alleged that the fact that Vintage was the sole subscriber was not intimated to the stock exchange and to the Indian investors. Further, Vintage did not repay the loan and defaulted, as a result, the Bank adjusted USD 9.018 million from the GDR proceeds and, accordingly, the Company and its Directors were charged with violation of Section 12A of the SEBI Act and Regulations 3 and 4 of the PFUTP Regulations.

7. The show cause notice further alleged that noticee no. 11, Pan Asia was the Lead Manager to the GDR issue and that this entity was wholly controlled by Arun Panchariya, noticee no. 2. It was further alleged that noticee no. 2 in connivance with notice no. 1 and its directors along with the connected entities, namely, noticee nos. 4 and 12 to 17 received 64,50,000 shares on conversion of GDR and that noticee no. 4 Aspire Emerging Fund sold converted shares worth Rs. 1.11 crore through noticee no. 12 who was also connected to Arun Panchariya. The show cause notice alleged that Arun Panchariya in connivance with the Company Winsome

devised and structured a fraudulent scheme through its connected entities as named above which was fraudulent.

8. The WTM after considering the evidence on record found that the entire scheme of using the GDR proceeds to fund a subscriber to the GDR issue was a fraudulent scheme and violative of Section 12A of the SEBI Act and Regulations 3 and 4 of the PFUTP Regulations. The WTM found that the GDR was subscribed by one entity, namely, Vintage and not by five entities as disclosed by the Company. The WTM further found that on account of the pledge created by the Company with EURAM Bank the funds were not made available at the Company's disposal and the same became available in tranches as and when the loan amount was repaid by Vintage. Further, the loan agreement was not disclosed to the stock exchange and to the Indian investors. Further, the disclosure made by the Company to the stock exchange that the GDR issue was fully subscribed was misleading as the investors were not informed that the GDR was subscribed by only one entity and, therefore, the scheme hatched by the Company and its Directors was violative of Section 12A of the SEBI Act and Regulations 3 and 4 of the PFUTP Regulations.

9. The WTM found that the non-disclosure of the loan agreement and the pledge agreement was violative of Clause 36 of the Listing Agreement as well as Section 21 of the SCRA Act read with Clause 32 and 50 of the Listing Agreement.

10. The WTM further held that the outstanding GDR proceeds were not received by Winsome and the bank accounts statements shown by the Company indicated that certain remittances were received in USD but held that it was not possible to find out as to whether it was part of the GDR receipts and therefore held that the adjustments of USD 9.018 million by EURAM Bank was never received by the Company. The WTM came to the conclusion that the scheme of issue of GDR of Winsome constituted fraud and that noticee no. 2 i.e. Arun Panchariya connived with Winsome to structure the fraudulent scheme of GDR and that the Company did not receive the consideration for its GDR issue to the tune of USD 9.018 million and therefore the Company and its directors along with noticee no. 2 had violated Section 12 A of the SEBI Act and Regulation 3 and 4 of the PFUTP Regulations.

11. In so far as the noticee nos. 4 and 12 to 17 are concerned the WTM after considering the evidence came to the conclusion that these noticees are connected to noticee no. 2 Arun Panchariya and that these noticees received the GDR in question and converted them into shares. The WTM further found that only noticee no. 4 sold some of the shares and other noticees had not sold the shares. The WTM on the basis of the connection of these noticees with Arun Panchariya held that the GDR were received by them without consideration and therefore connected as party to the fraudulent scheme and violated Section 12A of the SEBI Act and Regulation 3 and 4 of the PFUTP Regulations.

12. We have heard Shri P. N. Modi, Shri Gaurav Joshi, the learned senior counsel, Shri Somasekhar Sundaresan, Shri Dikshat Mehra, Shri Abishek Venkataraman, Shri Kunal Katariya, Shri Prakash Shah, Ms. Ashmita Goradia, Ms. Vidhi Mehta and Ms. Anjali Dhoot, the learned counsel for the appellant in respective appeals and Shri Shyam Mehta, the learned senior counsel, Shri Sumit Rai, Ms. Nidhi Singh, Ms. Deepti Mohan, Ms. Hubab Sayed and Shri Raghav Taneja, the learned counsel for the respondent.

13. According to the learned senior counsel for the respondent fraud in the present case has been committed upon the investors in two stages. In the first stage Arun Panchariya noticee no. 2 who is the Managing Director of Pan Asia, noticee no. 11 in connivance with noticee no. 1 Winsome and its directors subscribed to the GDRs through Vintage which was wholly owned by Arun Panchariya. Thus the investors in India was falsely made to believe that the issue was subscribed by foreign investors when in fact the issue was subscribed by one entity through Arun Panchariya. The second stage of the fraud is that the GDR was acquired by Vintage were then transferred to the Arun Panchariya's connected sub-accounts namely noticee no. 4 and 12 to 17 who converted the GDR into shares and one such entity namely noticee no. 4 sold part of the shares to the Indian investors. These entities acted as party to the fraudulent scheme and violated Section 12A of the SEBI Act and Regulation 3 and 4 of the PFUTP Regulations. Considering the aforesaid this Tribunal has to see whether noticees 4, 14, 15 and 17 who are appellants before us were part of the fraudulent scheme committed by Aurn Panchariya noticee no. 2 in connivance with noticee no. 1 and its directors and

whether these noticees were aware of these fraudulent scheme.

14. Before dealing with this aspect of the matter we shall deal with the first part of the fraud namely alleged fraud committed by Winsome and its directors in connivance with Arun Panchariya noticee no. 2.

15. In this regard the respondent supported the impugned order and contended that the modus operandi is the same as has been dealt with by this Tribunal in a large number of matters relating to the GDR issue wherein this Tribunal has held that the nondisclosure of the loan agreement and the pledge agreement was totally fraudulent and violative of the Listing Agreement.

16. Having heard the learned counsel for the parties we find that the *modus operandi* in the instant appeals is the same and has been dealt with by this Tribunal in a large number of matters relating to the GDR issue wherein the Tribunal has held that non-disclosure of the loan agreement and the pledge agreement was totally fraudulent and violative of the Listing Agreement. This Tribunal also held that the Company and its MDs were aware of the execution of the pledge agreement as

well as loan agreement and it was no longer open to them to deny the existence of the said agreements. This Tribunal also held that the Company and its Directors misled SEBI into believing that there were more subscribers to the issue and not one subscriber.

17. We also held that Company and its MDs were aware of the pledge agreement, non-disclosure of the pledge agreement and loan agreement invited penalty. Further, the corporate announcement did not disclose the fact that the subsisting pledge agreement facilitated the subscribers to subscribe to the GDR issue. The corporate announcement was misleading and presented a distorted version to the investors and created a false version inducing the investors to deal in securities. The aforesaid findings have been given in a large number of matters decided by this Tribunal especially in ***Appeal no. 381 of 2019, Sibly Industries Ltd. vs SEBI and other companion appeals decided on July 14, 2022, Appeal no. 438 of 2020, Aksh Optifibre Ltd. vs SEBI and other companion appeals decided on June 27, 2022 and Appeal no. 28 of 2022, Praveen Kumar Hastimal Shah vs SEBI and other companion appeals decided on July 6, 2022***.

18. Consequently, in the light of the aforesaid decisions the findings against the Company, Winsome and noticee no. 6 does not require any interference nor we require to give elaborate reasons. The findings of the WTM are upheld.

19. The learned senior counsel for the appellant contended that finding of the WTM that the Company did not receive the balance amount of USD 9.018 million is patently erroneous and against the material evidence. The learned senior counsel submitted that evidence was filed showing the balance amount received by the Company in USD which has been depicted by the WTM in paragraph 35 of the impugned order wherein it was also stated that the remittances has been duly certified by the statutory auditors and was also reflected in the annual report for the year 2013-14. The said annual report also indicated that the GDR proceeds have been utilized for the purpose the issue was made. The learned senior counsel contended in spite of the assertions of the appellant being depicted in paragraph 35 of the impugned order the WTM disbelieved the contention on the ground that the narration of the remittances does not indicate the sender or the account from which has been remitted making it impossible to state as to whether the said amount was received as part of the GDR

proceeds. In our opinion this finding of the WTM is patently perverse and based on surmises and conjectures.

20. We have perused the record. The evidences in the form of the bank statements has been filed showing receipts of certain remittances in USD. The statutory auditor of the Company has also issued a certificate dated October 23, 2020 certifying:-

> "*that the funds raised against GDRs issued by the Company in FY 2010-11 amounting to USD 99,97,500 has been received in the Company's bank account(s) in India in subsequent year i.e. till FY 2013-14*".

21. In addition to the aforesaid, the Company also filed a certificate from a Chartered Accountant who was empanelled with SEBI who also certified as under :-

> *"Based on our examination of the FIRC's and bank statements for the period 27th Feb, 2012 to 21st March, 2014, and according to the information and explanation given to us, we certify that the GDR proceeds specified in the Statement have been received by the Company in its Canara bank Account (Account No. 1625201002905 & 162526100044)."*

22. The Annual Report for the above year 2013-14 was also filed. Paragraph 27.3 of the explanatory notes to the Annual Report is extracted here under:-

> *"27.3 During the year 2010-11, the Company had issued and allotted 12,90,000 nos. GDR's entitling 6,45,00,000 (now 64,50,000 equity shares of Rs. 10/- each) nos. equity shares of Re. 1/- each at a price of Rs. 6.94/- per share (including premium of Rs. 5.94/-, now premium is Rs. 59.40/- on Rs. 10/- per share). As on 31.03.2013, balance Rs. 4,160.43 lacs which was invested outside India (including balance in bank Rs. 13,35 lacs).*
>
> *During the year the Company have received in India balance amounting to Rs. 4626.54 lacs (including exchange gain of Rs. 479.47 lacs) and the same have been utilized for the purpose the issue was made."*

23. The above clearly indicates that the Company had received the balance amount towards GDR proceeds and the same has been utilized for the purpose the issue was made.

24. In the light of the aforesaid evidence which has not been disputed and disbelieved, we find it difficult to accept the finding given by the WTM in paragraph 36 to the effect that the narration of the remittances does not indicate the sender or the account from which has been remitted when two Chartered Accountants are certifying that the GDR funds has been received in USD and which is also reflected in the annual reports coupled with the fact that the GDR proceeds have now been utilized for the object of the issue. We are of the opinion that the finding of the WTM in this regard cannot

be sustained. The direction of the WTM directing the Company to bring back the outstanding amount of the GDR proceeds is patently erroneous and cannot be sustained.

25. The learned senior counsel urged that for the violation committed by the Company for the non-disclosure of the loan agreement etc. penalty of Rs. 4.40 crore and debarment of three years was excessive and in the given circumstances the penalty should be proportionately reduced.

26. In this regard, in ***Excel Corp Care Limited vs Competition Commission of India & Anr, (2017) 8 SCC 47***, 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 penalties have been imposed for similar/identical offence. In the instant case, the WTM has penalised the appellant Company of Rs.4.40 crore. 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
6.	Rana Sugars	May, 2006	18.00		Rs.10,00,000 (Rupees Ten Lakhs)	29th February 2018
7.	Sybly Industries Ltd.	June 9, 2008	6.99	Vintage	Rs.10,30,00,000/- (Rupees Rupees Ten Crore Thirty Lakhs)	March 2019
8.	Winsome Yarns Ltd.	March 29, 2011	13.24	Vintage	Rs.11,00,00,000 (Rupees Eleven Crores)	28th March 2021

31. 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 Company who raised 6.99 million USD has been awarded Rs.10,30,00,000/-. In ***Sybly Industries Ltd. v. SEBI, appeal no.381 of 219 and other connected appeals decided on 14th July, 2022*** penalties ranging from Rs.10 lakhs to

Rs.10.30 crores were imposed which were reduced to Rs.25 lakhs on the Company and Rs. 10 lakh on the Managing Director. Thus, in our opinion, the penalty imposed is excessive and disproportionate to the violation and is also discriminatory.

32. We find that such excessive penalty imposed upon the Company does not make any sense. In the instant case, there are public shareholders and workers. The Company is a running concern. Penalising the Company with such heavy penalty is in fact 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 which fact has not been disputed. Thus, it is not a case of defalcation of the funds.

33. The penalty imposed upon noticee no. 6 is also harsh and excessive. However, being signatory to the agreements, noticee no. 6 was involved in the scheme, appropriate penalty has to be levied.

34. With regard to the second leg of the fraud the show cause notice alleges that notice nos. 4, 14, 15 and 17, namely, appellants along with three other noticee nos. 12, 13 and 16 were connected with Arun Panchariya and had received 64,50,00,000 shares on conversions of GDR. Most of the shares were retained by these noticees except noticee no. 4 who sold some of the shares worth Rs. 1.11 crore through noticee no. 12 who was also connected with Arun Panchariya. The show cause notice alleged that the scheme of issuance of GDR involving subscription of the GDR issue by obtaining finance from EURAM Bank, by pledging the GDR proceeds, non-repayment of complete loan by Vintage and monetizing the GDR through sale by underlying shares of the Indian Stock Exchanges by converting GDR was fraudulent. The show cause notice also alleged that Arun Panchariya in connivance with the Company i.e. Winsome devised and structure the fraudulent scheme through connected entities, namely, noticee nos. 4 and 12 to 17 and violated Section 12A and Regulation 3 and 4 of the PFUTP Regulations.

35. Since the role of all these noticees is the same the facts as depicted in the appeal of Aspire Emerging Fund, Appeal no. 251 of 2022 is being taken for consideration.

36. Aspire Emerging Fund is a private company incorporated in Mauritius with limited liability under the laws of Mauritius on February 9, 2021 having its registered office at Suite 1909, 19th Floor, Citadelle Mall, Dr. Eugene Laurent Street, Port-Louis, Mauritius.

37. Aspire Emerging Fund holds a Category 1 Global business license issued the Financial Commission of Mauritius ('FSC') in Mauritius as an expert fund licensed by the FSC pursuant to the Financial Service Act 2007 ('FSA 2007'), the Securities Act, 2005 and the Securities (Collective Investment Scheme and Closed end Fund) Regulations, 2008.

38. Aspire Emerging Fund was registered as a sub-account with Golden Cliff from June 14, 2013 to February 28, 2017. Aspire Emerging Fund is also registered as Foreign Portfolio Investor ('FPI') with SEBI under the erstwhile SEBI (Foreign Portfolio Investors) Regulations, 2014 from February 28, 2017.

39. Aspire Emerging Fund received GDRs of Winsome from Ambrus Value Fund Limited ('Ambrus' for short) in 2013 i.e. over two years after the GDR issue. The

consideration for the same was in the form of subscription, i.e. issuance of 2006461 Class AEF-1 non-voting redeemable participating shares for consideration of USD 2006461.21 to Ambrus.

40. Aspire Emerging Fund converted 4,58,718 GDRs to 22,93,590 shares of Winsome. Out of the total converted GDRs, Aspire Emerging Fund sold 3,15,000 shares and received a total sale consideration of Rs. 1.12 crores. Aspire Emerging Fund continues to hold 19,78,590 equity shares of Winsome.

41. The aforesaid facts were categorically stated by the said noticee before the WTM in its reply. The said noticee had specifically contended that they had no dealings with Arun Panchariya or with any other connected entities. The appellant had no connection with Winsome or its Directors and were not aware of any scheme being orchestrated by Winsome in connivance with Arun Panchariya and / or Vintage. It was categorically stated that the appellant was not aware of the loan agreement or of pledge agreement.

42. The WTM held that noticee no. 4 was connected with Arun Panchariya. The WTM found that one of the directors

Aslam Kanowah was also a director in noticee no. 16, namely, Highblue Sky Emerging Market Fund (HBSF) and that the owner of HBSF, namely Anant Kailash Chandra Sharma was a director in Sai Sant Advisory (I) P. Ltd. in which Arun Panchariya was also a director and, on this basis, the WTM concluded that noticee no. 4 was connected to Arun Panchariya and acted as a party to the fraudulent scheme. The WTM further came to the conclusion that noticee no. 4 acted as a conduit to Arun Panchariya by receiving GDRs of Winsome without consideration.

43. Similar finding has also been given against the remaining noticees, namely, noticee nos. 14, 15 and 17 which has been depicted in paragraph 73 of the impugned order. The connection is similarly drawn on the basis of the connection depicted in paragraph 52 of the impugned order.

44. At the outset, we are of the opinion that the second stage of fraud as alleged in the impugned order and in the show cause notice is different and distinct from the first stage of the alleged fraud. We are of the opinion that the entities involved in the second stage of the alleged fraud have nothing to do with the alleged fraud involved in the first stage as there is no

material to suggest any connection of noticee nos. 4, 14, 15 and 17 with noticee no. 1 and its directors and noticee no. 3. The first stage of the fraud is with regard to the issuance of the GDR issue in connivance with the Company Winsome and its directors with Arun Panchariya and Vintage. The second stage of the alleged fraud is the conversion of GDR into shares by noticee nos. 4, 14, 15 and 17 and selling it in the Indian market. We find that noticee nos. 4, 14, 15 and 17 has no connection with the Company Winsome or its directors. Further, the alleged connection with Arun Panchariya is too remote and there is no evidence to suggest that Vintage passed on the GDR or sold the GDR to noticee nos. 4, 14, 15 and 17. Thus, first stage of the alleged fraud are distinct and different and the entities involved in the alleged second stage are not involved in the first stage. A specific assertion was made that they are not aware of the loan agreement or the pledge agreement and WTM has not dealt into these issues and therefore we are of the opinion that these entities involved in the second stage was not privy to the fraud played in the first stage by the Company and its directors along with Arun Panchariya and Vintage. There is no direct involvement of noticee nos. 4, 14, 15 and 17.

45. In our opinion the finding given by the WTM is perverse and without any consideration of the material facts which were before it. The findings that the GDR was received by these noticees without consideration is based on no evidence and is purely based on surmises and conjectures. A specific contention was raised by noticee no. 4 that it had received GDR from one entity, namely, Ambrus Value Fund (paragraph 67 of the impugned order) and that noticee no. 4 had issued participating shares and therefore noticee no. 4 had received the GDR for valuable consideration. There is no allegation nor any finding that Ambrus is connected in any manner to Arun Panchariya or to Vintage. Further a specific assertion was made by the noticee no. 4 that it had received the GDR for valuable consideration which is also depicted in paragraph 67 of the impugned order but a finding has been given by the WTM in paragraph 17 that it had received GDRs without consideration which in our opinion is patently perverse. Once the GDR has been received for valuable consideration we are of the opinion that the finding given by the WTM that noticee no. 4 had received the GDR without consideration is not based on any evidence. Consequently, we hold that finding that the GDRs were received by the appellants without any consideration is based on no evidence.

46. We also find that the finding that these noticees were connected to Arun Panchariya is patently erroneous and too remote. By this connection it cannot be presumed even on the basis of probability that these noticees were party to the fraudulent scheme connived by Arun Panchariya with the Company and its directors. Thus, the finding that these noticees acted as a conduit by receiving GDRs of the Company is patently erroneous.

47. There is no finding that the proceeds of the shares sold by noticee no. 4 was eventually received by Arun Panchariya or by Vintage. In the absene of such finding we are of the opinion that the shares were validly sold by noticee no. 4 on the Stock Exchange for consideration which cannot be treated as tainted or violative of Regulation 3 and 4 of the PFUTP Regulations.

48. There is no finding that these noticees had knowledge of the fraudulent issue of GDR or the fact that Vintage had acquired the same for free. There is no finding that these noticees have acquired the GDRs from Arun Panchariya or Vintage and only a presumption has been drawn that these

noticees have received the GDRs from Arun Panchariya. On the other hand, these noticees have annexed documents showing the subscription of the participating shares of the appellants which clearly shows that these noticees did not acquire the GDR from Vintage or from any entity that was owned and controlled by Arun Panchariya. Thus, we are of the opinion that the appellants cannot be held to have knowledge of the fraud connived by Arun Panchariya with Winsome.

49. We also find that the controversy with regard to these noticees is squarely covered by a decision of this Tribunal in the case of ***KII Limited vs SEBI, Appeal no. 317 of 2017 decided on June 8, 2018***. In KII, the facts described reveals that KII had borrowed money from Panchariya and then purchased the GDR with the said monies. Upon cancelling the GDR it converted them to shares and sold them in the Indian market and thereafter KII transferred the funds to Mr. Panchariya. This Tribunal concluded that Mr. Panchariya had committed a fraud in the first part, i.e. subscription of the GDR by Vintage by using the proceeds of the GDR as security to get a loan to subscribe to the GDRs. The entities who were dealing with the GDRs in the ordinary course of

their business did not know about the fraud perpetrated, and even if there existed a commercial relationship between Mr. Panchariya and such funds, the same could not be extended to state that the said entity were party to the said fraud.

50. In view of the aforesaid, we are of the opinion that no case is made out against noticee nos. 4, 14, 15 and 17. The direction of debarment against these noticees cannot be sustained. The direction against noticee no. 4 to disgorge an amount of Rs. 1,11,52,500/- is patently erroneous and cannot be sustained.

51. For the reasons stated aforesaid, while affirming the order of the WTM for the violations committed by the Company we reduce the penalty against the Company to Rs.25 lakhs. The debarment of three years is reduced to the period undergone. Similarly, the penalty imposed upon noticee no. 6 is excessive and harsh. While affirming the order of the WTM, we reduce the debarment of two years to the period undergone. The penalty of Rs. 44 lakh is reduced to Rs. 20 lakh. Appeal no. 348 of 2022 is partly allowed.

52. Appeal no. 251 of 2022 (Aspire Emerging Fund), Appeal no. 342 of 2022 (Davos International Fund), Appeal

no. 343 of 2022 (Leman Diversified Fund) and Appeal no. 345 of 2022 (Sparrow Asia Diversified Opportunities Fund) the impugned order insofar as it relates to these appellants cannot be sustained and are quashed. The appeals are allowed.

Justice Tarun Agarwala
Presiding Officer

Ms. Meera Swarup
Technical Member

13.09.2023
msb

MADHUKAR SHAMRAO BHALBAR
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