(2023) 12 SEBI CK 0037

Securities Appellate Tribunal Mumbai

Case No: Appeal No. 126, 478 Of 2022

M/s. Ethan Constructions Pvt. Ltd		APPELLANT
	Vs	
Securities And Exchange Board Of India		RESPONDENT

Date of Decision: Dec. 14, 2023

Acts Referred:

- Securities And Exchange Board Of India (Prohibition Of Fraudulent And Unfair Trade Practices Relating To Securities Market) Regulations, 2003 - Regulation 3(a), 3(b), 3(c), 4(1), 4(2)(a), 4(2)(e)
- Securities And Exchange Board Of India Act, 1992 - Section 11(1), 11(4), 11B

Hon'ble Judges: Tarun Agarwala, Presiding Officer; Meera Swarup, Technical Member

Bench: Division Bench

Advocate: Rinku Valanju, Aditya Shah, Vyom Shah, Nidhi Singh, Deepti Mohan Hubab Sayeed, Niket Dalal, Purvi Jain, Vidhii Partners

Final Decision: Allowed

Judgement

Meera Swarup, Technical Member

1. Two appeals have been filed by M/s. Ethan Constructions Pvt. Ltd. (Appellant). Appeal no. 126 of 2022 has been filed by the Appellant impugning the order dated August 27, 2021 passed by the Whole Time Member ("WTM" for short) of the Securities and Exchange Board of India ("SEBI") for violation of provisions of Regulations 3(a) and (c) and Regulations 4(1), 4(2)(a) and 4(2)(e) of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices) Regulations, 2003 ("PFUTP Regulations" for short) restraining the Appellant from accessing the securities market and prohibiting them from buying, selling or otherwise dealing in securities or being associated with the securities market for a period of three months from the date of the impugned order. Appeal no. 478 of 2022 has been filed challenging the order dated May 24, 2022 passed by the Adjudicating Officer ("AO" for short) of SEBI for violations of provisions of Regulations 3(a), 3(b), 3(c) and 3(c) and Regulations 4(1), 4(2)(a) and 4(2)(e) of the PFUTP Regulations and thereby imposing a penalty of Rs. 5 lakh on the Appellant.

2. As the subject matter of both the appeals is the same, both the appeals are taken up together. For the sake of facility, the facts of case in Appeal no. 478 of 2022 are being relied upon.

3. Based on information received from Income Tax authorities, SEBI started an investigation into the trading activities in the scrip of Allied Computers International (Asia) Ltd. (ACIL) for the period from November 23, 2007 to September 22, 2012. The period was divided into six patches. No adverse inference was drawn for patches I to

IV. For Patches V and VI, the investigation revealed that 49 entities who were connected on the basis of analysis of KYC details, off-market transfers, MCA documents and Bank Account Statement etc. contributed to significant price rise (Patch V) and price fall (Patch VI). The trades of these entities were analyzed in detail. During Patch V, top ten entities had contributed 51.61% to market Last Traded Price (LTP) and there were 5 entities connected to one another amongst these. In Patch VI, the scrip price had decreased by 80.21% and top ten entities had contributed to 25.75% to market LTP with six entities connected to one another.

4. Based on the investigation, it was alleged that the connected entities, which also included the Appellant, indulged in trades which resulted in manipulation of price of the scrip. Accordingly, Show Cause Notice (SCN) dated November 8, 2017 was issued to 37 entities out of 49 connected entities who had traded amongst themselves during Patch – V and VI. It was alleged that connected entities, including the Appellant, indulged in trades which resulted in manipulation of the scrip. The Appellant contributed to price rise of Rs. 0.43 as a buyer and Rs. 0.64 as a seller, a total of positive LTP contribution of Rs. 1.07. By trading in the scrip, the Appellant violated the provisions of Regulations 3(a), (b), (c) and (d) and 4(1), 4(2)(a) and (e) of the PFUTP Regulations.

5. Based on identical facts another SCN was issued by the WTM in August 2017 to 37 entities calling upon to show cause as to why directions under Section 11(1), 11(4) and 11B of the SEBI Act should not be issued against them for aforesaid alleged violation under PFUTP Regulations.

6. The Appellant preferred an appeal before this Tribunal (Appeal no. 72 of 2022) claiming that the adjudication order dated November 24, 2021 was passed by the AO “ex parte” as the SCN and the hearing notices were not served. This Tribunal vide its order dated February 17, 2022 allowed the appeal and remitted the matter back to the AO to decide the matter afresh after duly serving the SCN to the Appellant. Impugned order was accordingly passed by the AO on May 24, 2022.

7. We have heard Ms. Rinku Valanju, the learned counsel with Shri Aditya Shah, the learned counsel for the appellant and Shri Vyom Shah, the learned counsel with Ms. Nidhi Singh, Ms. Deepti Mohan, Ms. Hubab Sayeed, Shri Niket Dalal and Ms. Purvi Jain, the learned counsel for the respondent.

8. The primary contentions raised by the Appellant are as following-

(a) There was a delay of five and a half year in issuing of SCN. The investigation was conducted for the period November 2007 to September 2012. SCN was issued on November 8, 2017.

(b) Parallel proceedings under Section 11, 11B were also initiated along with adjudication proceedings for the same cause of action.

(c) 49 connected group entities were identified, however, SCN was issued to only 37 connected entities. The connections were established on the basis of analysis of KYC / UCC details from BSE and MCA database, Bank Statements, off-market data obtained from depositories etc.

(d) Appellant”s connection was established with two entities – (i) M/s. Whitetext Infrastructure Pvt. Ltd. and (ii) M/s. Yadon Constructions Pvt. Ltd. However, these two entities were not Noticees in the SCN.

(e) In WTM”s order dated August 27, 2021, Appellant”s connection was sought to be established with one Shri Nagmaheshwar Balraj Yellamelli, however, AO has sought to

establish connection with M/s. Whitetext Infrastructure Pvt. Ltd.

(f) 34 Noticees were exonerated on the grounds that their individual contribution to LTP was less than 1%.

9. As far as the issue of delay in issuance of SCN is concerned, we note that the AO has not dealt with the issue and WTM has dealt with the issue in a cursory manner. WTM has stated that the investigation in the matter was intricate and time consuming and involved multitude of entities. We find that the investigation started after receipt of a reference from Income Tax authorities in February 2015 for the trades carried on during the period November 23, 2007 to September 22, 2012. SCNs were issued in August 2017 and November 2017 by WTM and AO respectively and orders passed in August 2021 (WTM Order) and November 2021 (AO Order). It took 4 years to conclude the proceedings after issue of SCN which in our view was not justified. We are also of the opinion that enquiry into the trades executed in 2007 after 8 years should not have been conducted, investigating old and stale disputes should be discouraged.

10. As to the issue of parallel proceedings raised by the Appellant, this Tribunal has time and again upheld that the proceedings under Section 11B and adjudication proceedings can go on simultaneously. As recent as the judgment delivered in Appeal no. 87 of 2021 on November 4, 2023 in the matter of Reliance Industries Limited we have held –

"In our opinion there is no legal bar of initiation of adjudication proceedings during pendency of Section 11B proceedings. In our opinion, adjudication proceedings and Section 11B proceedings can be held in parallel. "

11. In both the impugned orders the Respondent found that there were 49 connected entities including the Appellant who had traded amongst themselves during Patch V and VI. However, SCN was issued to only 37 entities. Connections were established with two entities on the basis of one off-market transaction and one common director but these two entities were not issued with the SCN. In our view, one off-market transaction and one common director with the Appellant cannot be a good enough ground to establish that the Appellant was connected with other entities in the group. Further, we note that the AO and the WTM have tried to establish connection with different entities for the one off-market trade alleged to have been carried out on March 2, 2012. Further, both of these entities are not noticees in the present proceedings.

12. We note that 34 noticees were exonerated on the grounds that their individual contribution to LTP was less than 1%. This Tribunal in Surendra Kumar Gupta vs SEBI, Appeal No. 343 of 2021 decided on February 7, 2022 and other connected appeals held that the contribution of 1% fixed by WTM was not based on any intelligible criteria and was arbitrary. This Tribunal also held that when positive LTP as a group is being considered then individual positive contribution cannot be considered. For facility paragraph 15(4), (5) and 16 are extracted hereunder:-

"15(4) Further, out of 75 noticees, 65 noticees have been exonerated by the WTM on the ground that their individual positive LTP was less than one percent and, therefore, no direction could be issued under section 11B. The benchmark of one percent fixed by the WTM, in our opinion, is not based on any intelligible criteria nor is based on any circular or regulations framed by SEBI in this behalf to show as to how much percentage of positive LTP would be treated as violative of Regulations 3 and 4 of the PFTUP Regulations or would be treated as unfair trade practice. Classification is based on intelligible differentia. The differentia bears a reasonable nexus with the object sought to be achieved. In the instant case, we

find that classification is not based on any intelligible criteria nor has any nexus with the objective of the Regulations. In the absence of any criteria laid down by SEBI the fixation of one percent by the WTM without any reasonable basis is arbitrary.

(5) The WTM cannot blow hot and cold and take positive LTP as a group on one hand and consider individual positive contribution of each noticee individually and exonerate them having found that their contribution was less than one percent.

16. In view of the aforesaid, the directions given by the WTM under section 11B of the SEBI is arbitrary and cannot be sustained. The impugned order is quashed. The appeals are allowed. Misc. application no.420 of 2021 is also disposed of accordingly. In the circumstances of case parties shall bear their own costs. "

13. We note that the AO passed the impugned order after the above order dated February 7, 2022. In this case too, 34 noticees have been exonerated in an arbitrary manner and their individual positive contribution has been considered. Thus, there is a huge contradiction in the treatment meted out to these noticees and the Appellant.

14. There is no charge of artificial volume creation, synchronized trades or reversal of trades. The charge is only of contribution of 1.07% to market positive LTP without indicating as to how the Appellant or the connected entities derived any benefit or stood to gain. In paragraph 45 of the impugned order the AO notes as following-

"The material available on record has not quantified the amount of disproportionate gain or unfair advantage made by the Noticee and the loss suffered by the investors as a result of the Noticee's default. There is also no material made available on record to assess the amount of loss caused to investors or the amount of disproportionate gain or unfair advantage made by the Noticee as a result of default. "

15. In view of the aforesaid, we are of the view that the charges cannot be sustained. The connection drawn between the group entities by the Respondent is at best sketchy. There is a categorically finding that there has been no assessment of the loss caused to the investors or the amount of disproportionate gain or unfair advantage made by the Appellant. There has been a considerable delay in finalizing both the proceedings against the Appellant. Based on these grounds, we are inclined to give the benefit of doubt to the Appellant.

16. Accordingly, the Appeal No. 478 of 2022 is allowed. Appeal No. 126 of 2022 has become infructuous as the Appellant has already served the period of restraint.