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BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

**Order Reserved on: 25.06.2019**

**Date of Decision : 02.08.2019**

**Appeal No. 281 of 2017**

1. P.G. Electroplast Ltd.
   P-4/2, 4/3, 4/4, 4/5, 4/6, Site B,
   UPSIDC Industrial Area,
   Surajpur, Greater Noida,
   Uttar Pradesh – 201 306.

2. Promod Gupta
   P-4/2, 4/3, 4/4, 4/5, 4/6, Site B,
   UPSIDC Industrial Area,
   Surajpur, Greater Noida,
   Uttar Pradesh – 201 306.

3. Anurag Gupta
   P-4/2, 4/3, 4/4, 4/5, 4/6, Site B,
   UPSIDC Industrial Area,
   Surajpur, Greater Noida,
   Uttar Pradesh – 201 306.

4. Vishal Gupta
   P-4/2, 4/3, 4/4, 4/5, 4/6, Site B,
   UPSIDC Industrial Area,
   Surajpur, Greater Noida,
   Uttar Pradesh – 201 306.

5. Vikas Gupta
   P-4/2, 4/3, 4/4, 4/5, 4/6, Site B,
   UPSIDC Industrial Area,
   Surajpur, Greater Noida,
   Uttar Pradesh – 201 306. ….. Appellants

Versus

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

Mr. Shyam Mehta, Senior Advocate with Ms. Rishika Harish and Ms. Akshaya Bhansali, Advocates i/b Mindspright Legal for Appellants.

Mr. Mustafa Doctor, Senior Advocate with Mr. Mihir Mody and Mr. Sushant Yadav, Advocates i/b K. Ashar & Co. for the Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Dr. C.K.G. Nair, Member
Justice M.T. Joshi, Judicial Member

Per : Justice Tarun Agarwala, Presiding Officer

1. P.G. Electroplast Ltd. ('PGEL' for short) had come out with Initial Public Offering (IPO) in August, 2011 for issue of 57,45,000 equity shares of face value of Rs. 10/- each. When the shares was listed on the BSE Limited ('BSE' for short) and National Stock Exchange of India Limited ('NSE' for short) platform in September, 2011, Securities and Exchange Board of India ('SEBI' for short) noticed fluctuation in the price of the scrips of the Company following the day of listing and consequently initiated an investigation into the said scrip.

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Based on the preliminary findings an ad-interim ex-parte order was passed on December 28, 2011 which was confirmed on October 31, 2012. Subsequently, a Show Cause Notice (SCN) was issued on January 16, 2013 alleging non-disclosure of certain information such as amount raised through Inter Corporate Deposits (ICDs), board resolution dated August 17, 2011, purchase orders for plant and machinery, names of certain suppliers etc. Diversion of IPO proceeds and diversion of funds through purchase orders was also alleged. The Whole Time Member ('WTM' for short) after giving an opportunity of hearing and after considering their replies passed an order dated March 11, 2014 prohibiting the appellants from raising any capital from the securities market and further restrained them from dealing in the securities market in any manner for a period of ten years. The appellants were also directed to recover all the monies which were not recovered by the appellants and submit a report to SEBI. The appellants were also directed that the monies so recovered should be deposited in the escrow account. The appellant being aggrieved filed an appeal before this Tribunal.

2. The charges levelled against the appellants, for the sake of convenience, can be clubbed into two heads, namely:-

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(a) Non-disclosure of certain material information in the offer documents and;

(b) Diversion of IPO proceeds and other funds to entities which purchased the appellants' shares to ensure full subscription to the IPO of the appellants.

3. The Tribunal by its order dated August 30, 2016 allowed the appeal in part holding that the appellants were guilty of inadequate disclosure of certain material information in the offer documents. The Tribunal further found that the appellants were not guilty of the provisions of SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to the Securities Market) Regulations, 2003 ('PFUTP Regulations' for short). The Tribunal held:-

> *"To sum up, the Appellant has partially failed to ensure proper disclosure of material information which was required for the investors in order to enable them to take an informed decision to invest or not to invest in the IPO in question. However, there are certain facts which remain undisputed. One, that there is no connivance or connection for that matter which has been established between the Appellant itself and entities further down in the line of transfer which eventually purchased the Appellant's shares and dealt in its scrip once it was listed on the stock exchange. There is no*

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*commonality of directors, or registered addresses or any other incidents which can lead to such an inference that the Appellant was involved in the transfer of funds to certain such entities which, inter-alia, bought the Appellant's share in the IPO. Further, invoices and other documents have been produced by the Appellant for the purchase of raw materials and equipments required to run the business, and their validity is not in question. It is pertinently noted that most of the money which the Respondent alleges to have been transferred has been returned to the Appellant. The Respondent has fairly submitted that the Auditor appointed by SEBI itself has in its report dated January 25, 2016 noted that an amount of ₹ 80 crore has been successfully recalled by the Appellant and the Respondent has scrutinized the utilization thereof. It is also a fact that the Appellant has already recalled moneys recoverable owing to ICDs, cancelled contracts pertaining to land purchase, except an amount of ₹ 3.77 crore as explicated hereinabove with respect to which the Appellant has initiated the winding up of the company called Supreme. It shows the respect for and earnest desire of the Appellant to abide by SEBI's regulatory directions.*

*Further, it remains undisputed that ICDs which were given out of the IPO Proceeds to the tune of ₹ 32 crore given as ICDs to Saptrishi, Raw Gold and Wattkins. Today, however, this amount of ₹ 32 crore has been received by the Appellant, albeit with certain amount of delay. It is also to be noted that minutes of the annual general meeting held on September 12, 2012, attached as Exhibit F2 of the Appeal clarify that unequivocal permission was granted to the Board of the Appellant, as per Section 61 of the Companies Act, 1956, to alter the utilization of the IPO Proceeds and to use the proceeds as the directors deemed fit. Therefore, looking into the totality of the facts and circumstances of the case in hand, the Respondent should not have imposed the punishments of debarment from the market for a*

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*long period of one decade. Given that, some of the Respondent's allegations levelled in the Impugned Order, and particularly dealt with in this order in paragraphs no. 40, 45, and 50 cannot be sustained in law or on fact as elucidated, this Tribunal is of the opinion that in order to meet the ends of justice the period of debarment from the securities market of ten years imposed upon the Appellant should be reduced to seven years as the Appellant has already suffered by remaining out of the market for a period of more than four and half years by now. Ordered accordingly. As far as the money lying in the escrow account is concerned, the Appellant shall be at liberty to use for the objects of the IPO as per law."*

4. The Tribunal found that it was not a case of non-disclosure of material information but was a case of inadequate disclosure at the relevant place in the Red Herring Prospectus (RHP). The Tribunal further found that there was no connivance or connection between the appellants and other entities with regard to the purchase of appellant's share nor there was any commonality of the Directors with other entities which could lead to an inference that the appellant was involved in the transfer of funds to certain entities which bought the appellant's share in the IPO. The Tribunal further found that most of the money which had been transferred was returned to the appellant and that the auditor appointed by SEBI had certified that an amount of Rs. 80 crore has been successfully recalled by the appellants and further had

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cancelled the contracts pertaining to land purchase. In fact, the Tribunal found that the appellants had shown an earnest desire to abide by SEBI's regulatory directions. The Tribunal considering the aforesaid factors and considering the fact that the appellants had already undergone debarment for several years pursuant to the order of SEBI reduced the debarment from ten years to seven years.

5. While the proceedings were going before the WTM, the Adjudicating Officer ('AO' for short) also initiated proceedings under the SEBI Act, 1992. The AO considering the show cause notice and the order of the Tribunal found that the following issues arose for consideration, namely:-

(a) Non-disclosure of certain material information in the offer documents

(b) Diversion of IPO proceeds and other funds to entities which purchased the shares of the company to ensure full subscription to the IPO.

6. The AO considered the findings of the Tribunal and found the appellants guilty of the following:-

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(a) Non-disclosure of ICD agreements which were in the form of bridge loan in the prospectus.

(b) Non-disclosure of its Board Resolution dated August 17, 2011 to invest the IPO proceeds in ICDs of other companies and

(c) Disclosure of agreements for purchase of land executed with other entities.

7. The AO on the aforesaid basis passed the impugned order holding that the appellants had violated the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 ('ICDR Regulations' for short) and Section 11C(2) and (3) the SEBI Act, 1992 and consequently imposed a penalty of Rupees One Crore each on the appellants under Section 15HB of the SEBI Act, 1992. The appellants being aggrieved by the said order has filed the present appeal.

8. We have heard Shri Shyam Mehta, the learned senior counsel alongwith Ms. Rishika Harish, the learned counsel for the appellants and Shri Mustafa Doctor, the learned senior

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counsel alongwith Shri Mihir Mody, the learned counsel for the respondent.

9. With regard to the findings arrived at by the AO we are of the opinion that the Tribunal's earlier order on the very same issues need to be looked into.

10. On the issue of non-disclosure of ICD agreements which were in the form of bridge loan in the prospectus the Tribunal found that, the bridge loan could not be shown in the draft RHP, in as much as, the bridge loan was executed after the filing of the RHP and that the Board of Directors in its resolution on August 17, 2011 had communicated to its Merchant Banker the information relating to the bridge loan. The Tribunal found that when the board resolution was intimated to the Merchant Banker it was then the duty of the Merchant Banker to incorporate the factum of bridge loan in the prospectus. The Tribunal further found that the Merchant Banker appeared to be in a great hurry to file the RHP on the same date on account of which the information relating to bridge loan was not mentioned in the RHP or the prospectus. Thus, even though the non-disclosure was vital, the Tribunal in clear terms indicated that once Board's resolution was sent to the Merchant Banker it became the onerous duty of the

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Merchant Banker to incorporate the factum of the bridge loan in the prospectus. Thus, in our view the non-disclosure is only technical. The Tribunal in its earlier order on this issue held:-

> *"The first instance of non-disclosure relates to ICDs taken by the Appellant in the nature of bridge loans. A bridge loan in financial parlance is nothing but a short-term loan availed of by companies to meet their immediate fiscal requirements, this is precisely what an inter-corporate deposit represents. Clause 2(VII)(G) of Part A mandates the disclosure of bridge loans or any other financial arrangement which the concerned company intends to repay out of the proceeds of the issue. As per the facts of the case, the Appellant executed ICD agreements with seven entities, namely Jainex, Prraneta, Agarwal Holdings Ltd., JRI Industries and Infrastructure Ltd., Vineet Capital Services Pvt. Ltd., Jay Polychem (India) Pvt. Ltd., and Urmi Computers Pvt. Ltd. It is pertinent to note that all these seven agreements, vide which the Appellant received an aggregate of 26 around ₹52 crore, were executed after the filing of the RHP, but before the filing of the Prospectus i.e., between August 17, 2011 and August 31, 2011. A perusal of the Impugned Order dated March 11, 2014 clearly points out that the Appellant could not have disclosed this information in the Draft RHP, which was filed on September 23, 2010 or even in the RHP which was filed, after incorporating SEBI's suggestions and on being approved by the Company's Board of Directors on August 17, 2011. This Board Resolution was communicated by the Appellant to its Merchant Banker on August 17, 2011 itself whose duty it was to incorporate this factum of bridge loan in the Prospectus. The Merchant Banker seems to have a great hurry to file the RHP on the same date due to which the bridge loan aspect did not find a mention either in the RHP or the Prospectus."*

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11. On the issue of non-disclosure of the Board's resolution dated August 17, 2011 to invest the IPO proceeds in ICDs of other companies, the Tribunal in its earlier order found that the appellant had disclosed in the prospectus that the Company intends to invest the IPO proceeds in interest bearing liquidity instruments, and thus the Tribunal held that the appellant satisfied the disclosure requirements as per the ICDR Regulations. The Tribunal was, however, of the view that the appellant should have disclosed in categorical terms that the IPO proceeds were to be invested in ICDs. The Tribunal found that the expression "ICD" was absent in the prospectus though the appellant had fairly disclosed the relevant information in the prospectus. In our view it is not a case of non-disclosure and non indication of the expression "ICD" in the prospectus is only technical. In this regard the finding of the Tribunal in its earlier order is extracted hereunder:-

> *"The second allegation of non-disclosure in the RHP and Prospectus relates to the non-disclosure of the Company's Board Resolution dated August 17, 2011 to invest the IPO Proceeds in ICDs of other companies. In pursuance thereof, three ICD agreements were entered into between the Appellant and the concerned parties for amounts of ₹15 crore, ₹7 crore and ₹10 crore. Although*

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> *by disclosing in the Prospectus that the Appellant intends to invest the IPO Proceeds in interest bearing liquid instruments, the Appellant satisfied the disclosure requirements as per the ICDR Regulations, the Appellant did not in categorical terms disclose that it wished to invest the IPO Proceeds in ICDs. We note that even though the Prospectus did state that the Appellant would be investing the IPO proceeds in high-quality interest bearing liquid instruments, the expression 'ICD' is absent from the disclosure. The Appellant should, therefore, have fairly disclosed the abovesaid relevant information, if not material, regarding ICDs in the RHP and Prospectus filed with the Respondent."*

12. Lastly, on the third issue, namely, disclosure of agreements for purchase of land executed with other entities, in this regard, the Tribunal in its earlier order found that agreements for purchase of land were executed with several entities aggregating Rs. 80 crore between the date of filing of the RHP and date of filing of the prospectus. This detail was mentioned in the prospectus but not at the appropriate place. Thus, again we are of the opinion that it is not a case of non-disclosure but a case of improper disclosure at the wrong place in the prospectus. In this regard, the finding of the Tribunal in its earlier order is extracted hereunder:-

> *"Finally, the Appellant has been held guilty by the Respondent for allegedly not disclosing agreements and MOUs entered into for the purchase of land. Agreements for the purchase of land were executed with Saptrishi, Safeco,*

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*Realnet and Eastern Resorts, aggregating to an amount of ` 80 crore between the date of filing of the RHP and the date of filing the Prospectus. Out of the ₹ 80 crore (approximate value), around ₹ 37 crore was paid in advance to the aforementioned entities in pursuance of the said land deals, however, the details regarding the same were not mentioned at the appropriate place in the Prospectus. The Appellant, however, stated that it had "not entered into any commitment for any strategic initiatives…" which as per the Respondent is a misstatement. The Appellant's defense that the aforesaid agreements did not need to be disclosed since they fell under the "General Corporate Purpose" head cannot be accepted because the money allocated towards general corporate purposes was only ₹21.4 crore as opposed to the ₹80 crore which was sought to be spent on the land purchase agreements. In this regard, therefore, the Impugned Order does not carry any legal infirmity."*

13. After considering the aforesaid findings given by the Tribunal, the AO held that the allegations regarding non-disclosure of ICD agreements which were in the form of bridge loan, non-disclosure of its Board resolution dated August 17, 2011 to invest the IPO proceeds in ICDs of other companies and, non-disclosure of agreements for purchase of land executed with other entities were upheld by the Tribunal and therefore imposed the maximum penalty of Rs. 1 crore each on the appellant. In our opinion, the AO has completely misinterpreted the order of this Tribunal. The penalty imposed is also grossly disproportionate to the alleged misconduct.

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14. At this stage and, for the sake of repetition, the charge against the appellant was non-disclosure of material information in the offer document and diversion of IPO proceeds. The second charge, namely, diversion of IPO proceeds was far more serious than the charge of non-disclosure. The Tribunal while considering the aforesaid two charges found that the appellant had partially failed to ensure proper disclosure of material information in the prospectus. It was not a case of complete non-disclosure of material information and, as we have found that the partial non-disclosure, was at best, a technical violation. In one instance, the information was given to the Merchant Banker who failed to disclose it in the RHP and, in the two other instances, the disclosure was made in the prospectus but not at the relevant place. Thus, it cannot be said that there was complete non-disclosure of material information in the prospectus.

15. Insofar as the second charge of diversion of IPO proceeds is concerned the Tribunal in its earlier order held that the charge of violating PFUTP Regulations was not established by any cogent reasoning or convincing evidence. The Tribunal also found that the purchase of land by the

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appellant was genuine and not illegal or fabricated and consequently came to a conclusion:-

> *"An analysis of the abovesaid documents reveals that the Appellant's dealings with Saptrishi, as far as the agreement for the purchase of land is concerned, are genuine and not illegal or fabricated......There has to be sufficient material to bring home such a severe charge against the Appellant. The charge relating to violation of PFUTP Regulations is a serious charge and hence a higher degree of proof is required to sustain it. In the instant case, such a charge has not been established against the Appellant by adducing cogent reasoning and convincing evidence."*

16. Since the appellant had already undergone a considerable period of debarment pursuant to the order of SEBI, the Tribunal reduced the debarment from ten years to seven years for the partial disclosure of information in the prospectus. In the ultimate analysis, the order of debarment was for violation of partial disclosure in the prospectus and not for violation of PFUTP Regulations. The AO while imposing the penalty has not factored this debarment while fixing the quantum of penalty. Further, in our opinion, the factors contemplated under Section 15J was also not considered by the AO in the right perspective.

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17. Under Section 15HB a maximum penalty of Rs. 1 crore can be imposed. For facility, the said provision is extracted hereunder:-

> ***"15HB. Penalty for contravention where no separate penalty has been provided.-*** *Whoever fails to comply with any provision of this Act, the rules or the regulations made or directions issued by the Board thereunder for which no separate penalty has been provided, shall be liable to a penalty which may extend to one crore rupees."*

18. Penalty can be imposed for failure to carry out a statutory obligation under the SEBI's Act. Factors contemplated under Section 15J are required to be taken into consideration before imposing a penalty. If it is found that a party has not acted deliberately, then the authority has a discretion, to be exercised judicially, whether in a given case, after taking into consideration of all the relevant circumstances, as to whether a penalty should be imposed or not. Even if a minimum penalty is prescribed, the authority, after considering the circumstances of the case and other factors enumerated in Section 15J would be justified in refusing to impose penalty when there is a technical or venial breach of the provisions of the Act. The above was precisely held by the Supreme Court in ***M/s. Hindustan Steel Ltd. vs. State of Orissa, 1969(2) SCC 627***.

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19. In ***Adjudicating Officer, Securities and Exchange Board of India vs. Bhavesh Pabari, (2019) 5 SCC 90***, the Supreme Court held that the provisions of Clauses (a), (b) and (c) of Section 15-J are illustrative in nature and have to be taken into account whenever such circumstances exist. The Supreme Court further held that factors other than those enumerated in Clauses (a), (b) and (c) of Section 15-J can also be considered by the Adjudicating Officer.

20. Further, we are also of the opinion that the direction of the AO to penalize all the directors is wholly unwarranted. Merely because the appellants are directors does not make them liable. The AO must give a specific finding that all the appellants as Directors were responsible for the alleged violation and were in charge of the affairs of the Company. In the instant case, there is no shred of evidence to show that the alleged act was committed by any of the Directors from which a reasonable inference could be drawn that the said Directors could also be vicariously liable. Vicarious liability can be inferred against a Company and its Directors only if the requisite assertions / allegations are averred in the Show Cause Notice so as to make the Company and its Directors

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vicariously liable for the violation of the provisions of the Act and its Regulations. The assertions / allegations should also include that the Director / Directors were in charge of and responsible for the business of the Company and by virtue of their position they are liable for penalty. In the instant case, no such allegations has been made in the SCN.

21. In our view this is a fit case where no penalty could be imposed and the question of imposing the maximum penalty in the given facts and circumstance does not arise. The AO has clearly exceeded its power in imposing the maximum penalty. The AO has misinterpreted the order of Securities Appellate Tribunal (SAT).

22. Considering the aforesaid, we are of the opinion that the maximum penalty of Rs. 1 crore each imposed upon the appellants is grossly disproportionate to the violation. In our view the order of debarment which was reduced by this Tribunal from ten years to seven years was more than sufficient penalty to cover the technical violation for imposition of penalty for violating the provision of Section 11C of the SEBI Act, 1992 and the ICDR Regulations.

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23. In the light of the aforesaid, the appeal is allowed. The imposition of penalty of Rs. 1 crore each on the appellants is set aside. In the circumstances of the case, there shall be no order on costs.

Sd/-
Justice Tarun Agarwala
Presiding Officer

Sd/-
Dr. C.K.G. Nair
Member

Sd/-
Justice M.T. Joshi
Judicial Member

02.08.2019
Prepared and compared by:msb