BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of decision : 15/01/2015

Appeal No.53 of 2013

Purshottam Budhwani
B-2, Himalaya Society,
Milind Nagar, Asalfa,
Ghatkopar (W), Mumbai – 400 084. … Appellant

Versus

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

Mr. Sunit Shah, Advocate and Mr. H.D. Dave, Advocate for the Appellant

Mr. Shiraz Rustomjee, Senior Advocate with Mr. Rushin Kapadia, Advocate i/b K.Ashar & Co. for the Respondent.

CORAM : Justice J.P. Devadhar, Presiding Officer
A. S. Lamba, Member

Per : A.S. Lamba

1. This appeal has been preferred by Purshottam Budhwani (Appellant) Vs. Adjudication Officer, SEBI (Respondent) in the matter of alleged violation of Regulations 3(a), (b), (c) and (d) and 4(1) of SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (PFUTP Regulations) and Section 12A(a), (b) and (c) of Securities and Exchange Board of India Act, 1992 (SEBI Act) and imposition of penalty of Rs.1,50,00,000/- under Section 15HA of SEBI Act.

2. Facts of the case in brief are that, Appellant was "Key Operator" or "master account holder" and had opened a large number of demat accounts and bank accounts,

which were in the names of non-existent persons or were benami and he acquired shares of various companies in IPOs of 13 companies during 2005, by making applications in benami names with each of the application being of such a value so as to make it eligible for allotment under the retail category. Subsequent to the allotment of shares in IPOs, shares from demat account of such benami/afferent allottees were transferred in the demat account of key operator/master account holder, before listing of such shares on stock exchanges. Key operators then transferred the shares through off-market deals to certain entity referred to as "financier". In some cases key operator retained a portion of shares for himself and thereby earned gains illegally. The entire scheme was designed to corner shares from the quota reserved for retail investors in the IPOs of 13 companies and to make profit by selling the shares.

3. Show cause notice (SCN) no.A&E/BS/68771/2006 dated June 7, 2006 was issued a second time vide letter no.A&E/BS/84867/2007 dated January 22, 2007 through RPAD, for a reply within 15 days from receipt of notice or otherwise it was to be presumed that Appellant has no reply to submit.

4. In the SCN, it is only stated that you cornered/acquired shares in various IPOs of 21 companies during 2003-05, by making applications in category reserved for retail investors, through the medium of thousands of fictitious/benami applicants and you had opened various demat accounts in fictitious and benami names and made large number of applications in IPOs in category of retail investors in fictitious and benami names. On allotment of shares in the category of retail investors in the IPOs, you had transferred the said shares to your account.

5. Allegations against Appellant are;

(i) Said practice was adopted to corner the quota for retail investors in the IPOs of the companies.

(ii) You had received IPO shares from many dematerialized account holders during the said period.

(iii) Subsequently, the said shares in your demat accounts, were transferred to many entities who appear to be financiers in the whole process.

6. It is to be noted that in the SCN or allegations specified in SCN; there is no mention of profits/gains whether legal/illegal, being made from all what the Appellant had done or in the allegations in SCN. Names of companies, whose shares were acquired/cornered by Appellant in their IPOs, are named and there are 21 in all and period of IPOs is from December, 2003 to August, 2005.

7. Thereafter, it is alleged in SCN that Appellant has allegedly violated Section 12 A of SEBI Act and Regulations 3, 4 and 6 of PFUTP Regulations, read with Regulations 3 & 4 of PFUTP Regulations.

8. To this, SCN dated June 7, 2006, Appellant sent his reply dated March 15, 2007 and main submission is, that SCN does not contain reference to Section 15HA of SEBI Act and hence SCN is void *ab-initio*, illegal and without jurisdiction.

9. After Appellant's above submission vide letter dated March 15, 2007, Respondent sent a letter no. A&E/DRK/MD/ /2011 dated December 15, 2011, with subject "Supplementary material in the Adjudication proceedings in the matter of IPO irregularities", whereas the subject of earlier letter dated June 7, 2006 was – "Adjudication Proceedings – Notice under Rule 4 of SEBI (Procedure for holding inquiry and imposing penalties by Adjudicating Officer) Rules, 1995". It may be pointed out that there exists a blank between MD and 2011 in reference no. of letter dated December 15, 2011. How and why this exists, Respondent may have some information, but perhaps it points to direction that same was issued mindlessly or in haste.

10. This letter dated December, 15, 2011 narrates "Dealings of Appellant", main points of which are:

- As alleged in investigation report that Appellant is the main key operator, cornered shares in various IPOs, main financier was Dushyant, as per scheme Dushyant provided finance and Appellant made applications from demat accounts under his control, refund money either rotated to other IPOs or refunded to financier along with shares cornered.
- Appellant mainly used name lenders (benami) for purpose of opening bank account and thereafter used these bank accounts for purpose of opening demat accounts.
- Alleged on basis of IR that all bank accounts, mentioned in page 5-10 of IR, were under control of Appellant, by virtue of following:
  - Appellant was primary holder and also authorized signatory for operating of bank accounts.
  - Bank accounts were used for purpose of opening demat accounts and for receiving refund orders in various IPOs.
  - These accounts shared common addresses with that of Appellant.
  - Charges in respect of above mentioned accounts were made through bank account of Appellant.
- Modus operandi of opening demat accounts is explained.
- Bank no.0601000207455 of Appellant 'Where he is primary holder" with HDFC Bank, used for opening demat account no.1301440000338097, had 10 second holders.
- This account with HDFC Bank, is used to open 140 demat accounts – with combination of names.

Instances of identical signatures of different BOs of HDFC Bank

- In some instances, signature of different demat account opened with HDFC appeared to be identical.

Dealings of Appellant with Dushyant in IPOs of Gateway, Provogue, MSP Steel, Nectar Lifesciences, IDFC, Suzlon

- Appellant applied for 1500 applicants, paid Rs.48,000 for each applicant for 200 shares, total funds required for 1500 applications was Rs.7,20,00,000 in IPO of Nectar and this amount was received by Appellant from Dushyant, Appellant received 25 shares per application and refund of Rs.42,000 against each application i.e. total of Rs.6,30,00,000, which amount was credited in Appellant's account.
- In some other case exact amount for a given number of applications was received, applications made and refund was received, since shares allotted was less than and refund was credited to Appellant's bank account and this refund was either used to finance further applications in other IPOs or returned to Dushyant.

Detailed analysis in the IPO of IDFC

- Appellant financed 3200 applications, but received only 1,44,000 shares in his demat accounts which should be 8,67,160 shares since firm allotment @ 266 shares per application was made. Remaining shares 7,23,160 were transferred directly to Chavvda family or Nimesh Kadakia.

Dealings with Dushyant Dalal

- Here in para 17 and 18 of letter dated December 15, 2007 lots of transaction of share, such as number, stock broking co., amounts received and transferred, cheque nos., name of recipients of funds, etc. etc., but name of scrip is not mentioned. Allegation, based on IR, explained.

Dealings with Nimisha Kadakia

- Dealing of some shares is started, but name of scrip not mentioned.

Dealing with Chhadva family (presumably same as Chhavvda family referred in para supra)

- Here, at least name of scrip is mentioned as IDFC. In the table at page 11 of this letter, under the heading "Market/Off market" (Col.5), it is stated "market" and subsequently stated "sold by Budhwani," "sold by Budhwani", "with Budhwani", "sold by Nimisha". It is understood that all these sales were market sales, two sold by Budhwani, one sold by Nimisha and what is meant by with Budhwani, is not clear but presumably means retained by Budhwani and not sold, but then what is sale price in col.7 for "with Budhwani" is not clear. This entire table is mired in mystery.

Ill-gotten gains – sale of shares

- Table at page 12 of letter dated December 15, 2011 shows profit made by Budhwani for his dealings in various IPOs of 13 companies.

11. Thereafter in Table at page 13 of letter dated December 15, 2011, shares of IPOs retained in demat account of Appellant is given, along with notional profit from same.

12. And after enumeration of violation of various Sections of SEBI Act and Regulations of PFUTP Regulations, Appellant is called upon to show cause as to why an inquiry should not be held against him and why penalty, if any, should not be imposed under Section 15HA of SEBI Act.

13. Once again, a time limit of 15 days is indicated to Appellant to reply. However, it appears from case record that no reply to letter of SEBI dated December 15, 2007 was received by SEBI.

14. Thereafter Ld. A.O. SEBI passed Adjudicating Order in the matter, dated December 28, 2012. Main features of this order are; submissions of Appellant in response to SCN dated June 7, 2006; allegations as per SCN and supplementary material dated December 15, 2006 and considerations of evidence and findings. As a matter of fact paragraphs 13 to 31 of Impugned Order are the same as para 3 to 22 of letter dated December15, 2011 regarding "Supplementary material in Adjudication Proceedings" and need not be repeated. However, it may be pointed out that name CHAVVDA has now been corrected in all places in impugned order, which is spelled as CHHADVA.

15. Before submissions of Appellant are considered, it may be stated that submissions of Appellant dated 15-3-2007, were in response to show cause notice dated 7-6-2006 and this SCN, as stated earlier stated very little and provided no details of transactions/dealings/events, etc. and based on these perfunctory details in SCN, Appellant replied on 15-3-2007. Without considering the submissions of Appellant dated 15-3-2007, in response to SCN dated June 7, 2006; Ld. A.O. issued another letter titled as "Supplementary Material" dated December 15, 2011, giving details of allegations, transactions, etc. and asked Appellant to show cause why inquiry not held and penalty imposed. As a matter of fact, dated December 15, 2011 was meant for supplementary material and ended asking to show cause, etc. in the name of supplementary material, some "relevant" extracts of Investigation Report were annexed. It is also seen that SCN dated 7-6-2006 also enclosed alongwith letter dated December 15, 2011. Summary of findings of preliminary scrutiny in the case of IDFC, Annexed at A. How relevant extracts of Investigation Report (as provided with letter dated 15-12-2011) are different from summary of finding of preliminary scrutiny enclosed with to SCN sated June 7, 2006 is not clear since these relevant extracts of IR, are not provided in MOA.

16. Respondent, as evident from SCN dated 7-6-2006, had issued the SCN in haste, which is based on "Findings of Preliminary Scrutiny of IDFC" and contained no details of transactions/dealings/events and thereafter when more details of happenings of IPO dealing became clear from Investigation Report, another letter titled "Supplementary material" was issued on 15-12-2011, but in the meanwhile Appellant had furnished his reply to SCN, vide letter dated 15-3-2007.

17. Respondent thus in garb of issuing "Supplementary material" dated 15-12-2011, issued a detailed SCN, which is evident since after narrating events, violations, allegations; Appellant was asked to show cause why inquiry should not be held and penalty imposed for alleged violation. Ld. Senior Counsel, appearing for Respondent, was asked why letter dated 15-12-2011 was issued, to which he reiterated the stand of Respondent that same was for furnishing supplementary material.

18. This act of Respondent and misstatement of Ld. Senior Counsel of Respondent is not acceptable to the tribunal. Respondent should act in a transparent manner and accept its wrong action of issuing the SCN dated 7.6.2006 in haste and try to take remedial actions by withdrawing earlier SCN and thereby issuing a fresh SCN or issue a supplementary SCN, based on discovery of new facts in IR, but this action of issuing supplementary SCN is garb of supplementary material, is not acceptable.

19. The action of Ld. A.O. to repeat in impugned order, what is stated in supplementary material letter and almost 19 paras of total of 42 paras of Impugned Order are lifted from letter dated 15-12-2011, is also not acceptable to this Tribunal. Since Impugned Order is, according to Ld.A.O. is based on facts and circumstances of the case and material made available on record and what is stated in supplementary material letter should not be part of record, since it is not SCN, and hence not part of record, but entire impugned order is based on supplementary material letter.

20. There are still more inconsistencies in working out of shares available to Appellant, sold by Appellant, returned by Appellant and thus profit made by Appellant, relating to IDFC issue. From paras 22 to 30 of impugned order, it is seen that Appellant was provided finance for 3260 applications of IDFC issues and number of shares available to him were 8,67,160. However, from table of ill-gotten gains – sale of shares, it is seen that Appellant had 9,99,975 shares of IDFC, available to him. As a matter of fact, in a related case (Appeal no.91 of 2013), it is seen that number of IDFC shares available to Appellant were 15,65,824 . Similarly against Gateway, no. of shares available with Appellant is 51,480, whereas from related case, the same is 90,270. In Provogue, shares available is 8680, but from related case same is 9460. MSP Steel shares available is 30,000, whereas from related case same is 51,000. Nectar's number of shares is 13,500, but same were 26,850 from related case. Similarly there are major differences in availability of shares as shown in impugned order and as in related case; for Suzlon, Sasken, SPL, Shoppers Stop, IL&FS and Yes Bank. Similarly, ill-gotten profits also differ in two related cases.

21. In facts and circumstances of the case, in view of SCN having very frugal details, all details contained in supplementary material letter, reply of Appellant based on SCN and not on supplementary material letters, supplementary material letter asking for show cause and hence SCN issued in garb of supplementary material letter, supplementary material letter having no legal sanction, but impugned order based substantially on supplementary material letter, non-application of mind by Ld. A.O. in entire proceedings, discrepancies in number of shares of various scrips available to Appellant compared to number shown in related case and so on and so forth, Tribunal sets aside the impugned order and quashes the same, but, in view of the fact that Appellant did indulge in violations of securities laws, as admitted by him, and played a key role in opening bank accounts, opening demat accounts, making thousand of

benami applications in 13 IPOs and cornering lakhs of shares in violation of securities laws and made huge ill-gotten gains, he cannot be allowed to go scot-free, in view of technicalities and non-application of mind by Ld.A.O., the case is remanded back to Respondent for issuing a fresh SCN, incorporating all details of wrong doing and making allegations based on firm figures of shares obtained by Appellant, shares sold and shares retained by Appellant and that allegation should be based on violation of SEBI Act and Regulations made thereunder.

Sd/-
Justice J.P. Devadhar
Presiding Officer

Sd/-
A.S. Lamba
Member

15/01/2015
Prepared & Compared by
Ddg/PTM