BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Order Reserved On: 10.10.2014
Date of Decision : 30.10.2014

Appeal No. 183 of 2013

Golden Tobacco Ltd.
Darjipura,
Post- Amaliyara,
Vadodara,
Gujrat-390 022 …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. Iqbal Chagla, Senior Advocate with Mr. Atul Singh, Advocate for the Appellant.

Mr. Kevic Setalvad, Senior Advocate with Mr. Mihir Mody, Ms. Sneha Prabhu and Mr. Rushin Kapadia, Advocates for the Respondent.

WITH

Appeal No. 181 of 2013

GHCL Limited
GHCL House, Opp. Punjabi Hall,
Near Navarangpura Bus Stand,
Navrangpura,
Ahmedabad- 380 009 …Appellant

Versus

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

Mr. P. N. Modi, Senior Advocate with Mr. Neville Lashkari and Mr. Atul Singh, Advocates for the Appellant.

Mr. Kevic Setalvad, Senior Advocate with Mr. Mihir Mody, Ms. Sneha Prabhu and Mr. Rushin Kapadia, Advocates for the Respondent.

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

Per: Justice J.P. Devadhar

1. Appellants in these two appeals are aggrieved by orders passed by the Adjudication Officer ("AO" for short) of Securities and Exchange Board of India ("SEBI" for short) on July 31, 2013 and August 6, 2013 respectively. By the said orders penalty is imposed upon appellants under Section 23E of the Securities Contracts (Regulation) Act, 1956 ("SCRA" for short) and Section 15HA of the Securities and Exchange Board of India Act, 1992 ("SEBI Act, 1992" for short) for allegedly violating clause 35 of the Listing Agreement and Regulations 3(d) and 4(2)(f) of Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 ("PFUTP Regulations" for short) respectively. Since common question of law is involved in these two appeals, both these appeals are heard together and disposed of by this common decision.

2. Common question of law raised in these two appeals is:-

> "Whether a listed Company under the format annexed to clause 35 of the Listing Agreement is required to disclose to the Stock Exchange, details of 'otherwise encumbered' shares of that listed Company held by the promoter/ promoter group, even though there is no obligation cast upon the promoter/ promoter group to make such disclosures to the listed Company?

3. For convenience, facts in Appeal No. 183 of 2013 are set out herein. Counsel for parties state that the decision in Appeal No. 183 of 2013 would equally apply to Appeal No. 181 of 2013.

4. Facts relevant for Appeal No. 183 of 2013 are as follows:-

a) Appellant is a listed Company duly incorporated under Companies Act, 1956.

b) By a show cause notice issued on November 30, 2010, SEBI called upon the appellant to show cause as to why an inquiry should not be held and why penalty, if any, should not be imposed on the appellant under Section 23E of SCRA and Section 15HA of SEBI Act, as the appellant failed to disclose to the Stock Exchange under clause 35 of the amended Listing Agreement that by an arbitration order dated July 23, 2009, nine promoter entities of appellant have been restrained from selling, transferring or creating third party interest in any manner in the shares of appellant Company held by the said promoters as more particularly set out therein. According to SEBI aforesaid restraint order passed in respect of 32,93,000 shares of appellant held by nine promoters (18% of the entire equity capital)

constituted encumbrance on the shares, which the appellant ought to have disclosed to the Stock Exchange under clause 35 of the Listing Agreement.

c) It was further stated in the show cause notice that failure to disclose aforesaid encumbrance created on shares by the restraint order passed by the arbitrator amounts to committing fraud and causing to publish information which is not true under regulation 3(d) and 4(2)(f) of PFUTP Regulations and accordingly the appellant was called upon to show cause as to why appellant should not be held liable for penal action.

d) In the reply to the show cause notice, appellant contended that the obligation to make disclosure arises under clause 35 of the Listing Agreement only when the shares are pledged by promoter or promoter group. Even SEBI circular dated February 3, 2009 required the Stock Exchanges to amend clause 35 of the Listing Agreement to include details of shares pledged by the promoters and promoter group as per the format enclosed therein. As the circular refer to disclosing details of shares

pledged by promoters/ promoter group, the expression ‘shares pledged or otherwise encumbered’ in the format appended to the circular dated February 3, 2009 must be restricted to encumbrance arising as a result of pledge created in consonance with the provisions of regulation 58 of SEBI (Depositories and Participants) Regulations.

e) In the written submissions filed before SEBI, appellant relied on Adjudication Order passed in the case of Dewan Housing Finance Corporation Ltd. dated September 28, 2011 wherein it is held that the words ‘shares pledged or otherwise encumbered’ in the format appended to clause 35 of the Listing Agreement covers only pledge of shares.

f) Rejecting the above contention of the appellant, the Adjudication Officer of SEBI by the impugned order dated July 31, 2013 held that the appellant has violated clause 35 of the Listing Agreement and regulation 3(d) and 4(2)(f) of PFUTP Regulations and accordingly imposed penalty of ₹40 lac under Section 23 E of SCRA for violating clause 35 of the Listing Agreement and ₹ 60 lac under Section 15HA

of SEBI Act 1992 for violating regulation 3(d)and 4(2)(f) of PFUTP Regulations. Challenging the aforesaid order present appeal is filed.

5. Mr. Chagla learned Senior Advocate appearing on behalf of the appellant in Appeal No. 183 of 2013 and Mr, Modi, learned Senior Advocate appearing on behalf of appellant in Appeal No. 181 of 2013 have advanced following arguments:-

a) Prior to February 3, 2009, listed Companies were not required to give details of the pledged shares in their quarterly reports filed in compliance with clause 35 of the Listing Agreement. By two circulars both dated February 3, 2009 SEBI called upon the Stock Exchanges to bring to the notice of the Companies regarding the disclosures to be made under regulation 8A(1),8A(2),8A(3) & 8A(4) introduced to the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (“Takeover Regulations, 1997” for short) with effect from 28.01.2009 as per the format annexed thereto and further advised all the Stock exchanges to amend clause 35 of the Listing Agreement interalia

relating to disclosure of shareholding pattern of promoters and promoter groups as per the format annexed to the said circular. Since both the circulars refer to disclosure of details of the pledge it is contended that the format appended to the circular dated February 3, 2009 should relate to the details relating to the pledge only. In other words, it is submitted that since the circular refers to disclosing details relating to the pledge, the word 'shares pledged or otherwise encumbered' in the format annexed to the circular must also be construed to mean obligation to disclose details relating to pledge only.

b) There is nothing on record to suggest that clause 35 of the Listing Agreement has in fact been amended by the Stock Exchanges in compliance with SEBI circular dated February 3, 2009. Fact that the Stock Exchanges had displayed on their website the circular of SEBI dated February 3, 2009 does not amount to the Stock Exchanges amending clause 35 of the Listing Agreement and therefore appellant cannot be penalized on ground that the amended clause 35 of the Listing Agreement

has been violated. Moreover, the said SEBI circular merely advised the Stock Exchanges to amend clause 35 of the Listing Agreement and in the absence of any proof that the Stock Exchanges have in fact amended clause 35 of the Listing Agreement, SEBI is not justified in holding that the appellant is guilty of violating amended clause 35 of the Listing Agreement.

c) Admittedly, Adjudicating Officer of SEBI in the case of Dewan Housing Finance Corporation Ltd. (Supra) has held that the words 'shares pledged or otherwise encumbered' in the format appended to clause 35 of the Listing Agreement refers only to pledge of shares. Above order passed by the Adjudicating Officer of SEBI was brought to the notice of the Adjudicating Officer in the present case. In the impugned order, the Adjudication Officer, even after recording that the appellant has relied on the Adjudication order in case of Dewan Housing Finance Corporation Ltd. (Supra), has not given any reason as to why he is taking a view contrary to the view already taken by another Adjudicating

Officer in the case of Dewan Housing Finance Corporation Ltd. (Supra).

In these circumstances, counsel for respective appellants submitted that the orders impugned in each of the appeals be quashed and set aside.

6. Mr. Setalvad, learned Senior Advocate appearing on behalf of SEBI, on the other hand submitted as follows:-

a) Amendment to clause 35 of the Listing Agreement as suggested by SEBI as per SEBI circular dated February 3, 2009, have been given effect to by the Stock Exchanges and in fact by its circular dated February 24, 2009, Bombay Stock Exchange ('BSE' for short) has intimated to all the listed Companies regarding the obligation arising from the amendment to clause 35 of the Listing Agreement. Similar circular is issued by National Stock Exchange ('NSE' for short) on February 6, 2009. Hence, there is no merit in the contention of the appellants that clause 35 of the Listing Agreement has not in fact been amended by the Stock Exchanges.

b) SEBI in its circular dated February 3, 2009 has specifically recorded that the format for reporting the shareholding pattern is required

to be changed and that the details of shares pledged by promoters and promoter entities shall have to be reported as per the amended format appended to the said circular. Thus, the SEBI circular dated February 3, 2009, requires every listed Company to disclose the shareholding pattern of the promoter/promoter group as per the format which includes obligation to make disclosure not only of shares pledged but also shares which are otherwise encumbered by the promoters or promoter group. Since the format annexed to the SEBI circular dated February 3, 2009 duly published by the Stock Exchanges forms part of the circular and the said format specifically requires the listed Companies to disclose details of ‘shares pledged or otherwise encumbered’ by promoter/promoter group, appellants are not justified in contending that there is any conflict between the circular and the format annexed thereto and appellants are not justified in contending that they are required to make disclosures only if the shares were pledged by the promoter/ promoter group. In this connection reliance is placed on the

decision of the Apex Court in case of Aphali Pharmaceuticals Ltd. vs State of Maharashtra (AIR 1989 SC 2227) B. Permanand vs Mohan Koikal [(2011) 4SCC 266]

c) Expression ‘shares pledged or otherwise encumbered’ in the prescribed format not only require the listed Company to disclose shares which are pledged but also by promoter/ promoter group disclose shares which are otherwise encumbered in any manner whatsoever. Since the restraint order passed by the learned arbitrator amounts to encumbering the shares of the appellant company held by promoter/ promoter group, the appellants were obliged to disclose the same in their quarterly reporting as contemplated under the amended clause 35 of the Listing Agreement. Since appellants failed to discharge that obligation, appellants cannot escape penal liability.

d) Relying on the decisions of the Apex Court in the case of State of Himachal Pradesh vs Tarsem Singh & Ors. (AIR 2001 SC 3431), Omprakash Verma vs State of Andhra Pradesh [(2010) 13 SCC 158] it is submitted by the counsel for respondent that the expression

‘otherwise encumbered’ is a very wide expression and would include within its sweep all kinds of encumbrances including the encumbrance created on account of the restrain order passed by the arbitrator in the pending arbitration proceedings between the promoters and some third party.

e) Failure or omission on part of appellants to disclose that about 80% of the shares held by the promoter/promoter group on account of the restraint order passed in the arbitration proceedings constitutes concealment and fraud on investors as per regulation 3(d) of PFUTP Regulations. Similarly, providing incorrect number of encumbered shares to the Stock Exchange would mean ‘causing to publish information which is not true’, thereby violating regulation 4(2)(f) of PFUTP Regulations. Hence, imposition of penalty on appellants for violating clause 35 of the Listing Agreement as well as PFUTP Regulations is justified.

Accordingly, counsel for the respondent submitted that there being no merit in the contentions raised by the appellants, the appeals be dismissed with costs.

7. We have carefully considered rival submissions.

8. First question to be considered herein is, whether the Stock exchanges have in fact amended clause 35 of the Listing Agreement as suggested by SEBI in its circular dated February 3, 2009. From the letter addressed by NSE to SEBI on January 24, 2014 (page 57 of affidavit in reply) it appears that NSE had amended clause 35 of the Listing Agreement as per SEBI circular dated February 3, 2009 and amended Equity Listing Agreement was duly published by NSE on its website on February 6, 2009. Similarly, from the e-mail sent by BSE to SEBI on January 13, 2014 it is seen that the authorized officer of BSE had amended the Listing Agreement and issued a circular on February 24, 2009 informing all the listed Companies that the Listing Agreement has been amended. By the said BSE circular dated February 24, 2009, public was informed that clause 35 of the Listing Agreement has been amended by SEBI vide circular dated February 3, 2009. That statement is not a correct statement, because by circular dated February 3, 2009 SEBI has not amended clause 35 of the Listing Agreement and SEBI advised all the Stock Exchanges to appropriately amend interalia clause 35 of the Equity Listing Agreement in line with the text of the amendments specified in annexure to the said circular dated February 3, 2009. Whether BSE has actually amended clause 35 of the Listing Agreement as suggested by SEBI in its circular dated February 3, 2009 by following the norms that are required to be followed for amending the Listing Agreement, is a question that may be gone into in an appropriate case. However, for the purpose of present appeals, in view of the statement

made by SEBI that the Stock Exchanges have in fact amended clause 35 of the Listing Agreement we proceed on the basis that the amendments have been carried out in accordance with law.

9. Question then to be considered is, whether appellant was obliged to disclose to the Stock Exchange under clause 35 of the Listing Agreement (as amended) that the shares of the appellant Company held by the promoter/promoter group stood encumbered, because, in an arbitration proceeding the arbitrator on July 23, 2009 had restrained the promoter/promoter group from selling, transferring or creating third party interest in the shares of the Company held by the said promoter/ promoter group. In other words, the question is, whether the expression 'shares pledged or otherwise encumbered' in the format appended to amended clause 35 of Listing Agreement makes it mandatory for a listed Company to disclose to the Stock Exchange that the shares of the appellant company stand encumbered since the arbitrator in an arbitration proceedings has restrained the promoter/promoter group from selling, transferring or creating third party interest in the shares of the appellant Company held by the said promoter/ promoter group.

10. From the press release issued by SEBI on January 21, 2009 (Page 193 of the Paper Book) it is seen that the necessity to make it mandatory on part of promoters to disclose to the Stock Exchanges details of pledge of shares held by them in listed Companies promoted by them arose on account of the scam that was unearthed in case of Satyam Computer Services Ltd. In the said press release SEBI has further stated that

disclosures shall have to be made as and when the shares are pledged as also by way of periodic disclosures and that necessary steps to amend the relevant regulation and the Listing Agreement are being taken. As per the press release, details of pledge of shares and release/sale of 'pledged shares' were to be furnished by the promoters to the Company and the Company was in turn to inform the same to the public through the Stock Exchanges.

11. Immediately after taking the above policy decision, SEBI introduced regulation 8A to SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 ("Takeover Regulations, 1997" for short) with effect from 28.01.2009. As per regulation 8A(1)&8A(2) it is mandatory for a promoter or every person forming part of the promoter group to disclose to the Company details of shares of that Company held by them that are pledged. Similarly, under regulation 8A(3) a promoter or every person forming part of the promoter group is required to disclose to the Company details of invocation of pledge of shares of that Company which are pledged by the promoter/promoter group. Regulation 8A(4) requires every listed Company to disclose the above information received from the promoter/promoter group to the Stock Exchanges within such time as stipulated therein.

12. Thereafter, SEBI, issued two circulars both dated February 3, 2009 which were forwarded by SEBI to the Stock Exchanges. By the first circular, Stock Exchanges were informed about the introduction of regulation 8A to Takeover Regulations, 1997 and Stock Exchanges were

advised to bring the same to the notice of the listed Companies. Along with the said circular reporting format to be filed by the promoter/ promoter group to the listed Company were annexed. Similarly, by the second circular, the Stock Exchanges were advised to amend clause 35 of the Listing Agreement in terms of the format annexed to the said circular.

13. It is relevant to note that as per the press release as also the format annexed to the first circular dated February 3, 2009, the promoter/promoter group are required to disclose to the listed Company under regulation 8A of Takeover Regulations, 1997 only the details relating to shares that are pledged/revoked/invoked. It is only in the format under clause 35 of the Listing Agreement appended to the second circular, a listed Company is required to disclose to Stock Exchanges details such as 'shares pledged or otherwise encumbered' by the promoter/ promoter group. Thus, as per the respective formats annexed to the two SEBI circulars both dated February 3, 2009, promoter/promoter group, on the one hand, are required to furnish to the listed Company details of shares of the listed Company held by the promoter/ promoter group which are pledged/revoked/invoked, and on the other hand, as per the format under clause 35 of the Listing Agreement the listed Company is required to disclose to the Stock Exchange not only details of the shares that are pledged by the promoter/ promoter group but also disclose details of the shares that are otherwise encumbered by the promoter/promoter group.

14. According to SEBI, since the word ‘otherwise encumbered’ is used in the format appended to clause 35 of the Listing Agreement, every listed Company is obliged to disclose not only shares pledged by promoter/promoter group, but also shares which are otherwise encumbered by the promoter/ promoter group. It is surprising that the format annexed to clause 35 of the Listing Agreement casts an obligation on the listed Companies to disclose to the Stock Exchanges details of the shares that are otherwise encumbered by the promoter/promoter group, without making corresponding obligation on the promoter/ promoter group to make such disclosures to the listed Company. As noted earlier, as per the press release issued by SEBI on January 21, 2009, and as per regulation 8A of Takeover Regulations, 1997, what is to be disclosed by the listed Companies to the Stock Exchanges is the information received by the listed Company from the promoter/promoter group. As per regulation 8A(1)/8A(2) what is to be disclosed by the promoter/promoter group to the listed Company is only details of shares that are pledged/revoked/invoked and there is no obligation cast upon promoter/ promoter group to disclose shares that are otherwise encumbered. It is not even the case of SEBI that under regulation 8A or under any other provision, the promoter/promoter group are required to furnish to the listed Company details of shares that are otherwise encumbered. If promoter/promoter group are not obliged to give to the listed Company details of shares that are otherwise encumbered under any provision framed by SEBI, then, making it mandatory for the listed Companies to disclose to the Stock Exchanges

details of shares that are ‘other encumbered’ by the promoter/promoter group would be wholly unjustified and contrary to the policy decision taken by SEBI which was made public by press release dated January 21, 2009. Neither clause 35 of the Listing Agreement nor any other clause in the Listing Agreement requires the promoter/promoter group to disclose to the Company the shares that are ‘otherwise encumbered’. Thus, the format annexed to clause 35 of the Listing Agreement goes beyond the scope of clause 35 of the Listing Agreement and contrary to the policy decision of SEBI, mandates the listed Company to disclose to the Stock Exchanges details of shares ‘otherwise encumbered’ by the promoter/promoter group, without making the promoter/ promoter group liable to make such disclosure to the listed Company.

15. By directing listed Companies to disclose to the Stock Exchanges details of shares that are otherwise encumbered by the promoter/ promoter group, without making it obligatory on part of promoter/promoter group to disclose such details to the listed Companies, SEBI has created an anomalous situation, because, promoter/ promoter group who have details of shares that are ‘otherwise encumbered’ are not obliged to disclose the same to the listed Company, whereas, listed Companies to whom such details are not furnished by the promoter/ promoter group are made to disclose such details to the Stock Exchanges. Apparently in view of the above anomaly in the format prescribed by SEBI, the Adjudicating Officer in the case of Dewan Housing Finance Corporation Ltd. (Supra) has held that the words ‘shares pledged or otherwise encumbered’ used in the format appended

to clause 35 of the Listing Agreement covers only pledge of shares. Admittedly, the above order was brought to the notice of the Adjudicating Officer in the present case, and in fact in the impugned order it is recorded that the appellants have relied upon the order in case of Dewan Housing Finance Corporation Ltd. (Supra). However, the Adjudicating Officer, in the present case, has neither found fault with the order passed in case of Dewan Housing Finance Corporation Ltd. (Supra) nor assigned any reason for taking a view contrary to the view taken therein. Such an attitude on part of the Adjudicating Officer of SEBI deserves to be condemned. View taken by one Adjudicating Officer of SEBI cannot be disregarded by another Adjudication order without assigning any reasons. It is high time that SEBI takes remedial measures and ensure that its Adjudicating Officers respect orders passed by each other. We make it clear, that respecting each others order does not mean that even an erroneously order, passed by the Adjudicating Officer must be followed blindly. In such a case, contrary view could be taken by recording reasons for taking such contrary view.

16. In the present case, the Adjudicating Officer, without assigning any reason has taken a view contrary to the view taken in case of Dewan Housing Finance Corporation Ltd. (Supra). No doubt, that the expression ‘shares pledged or otherwise encumbered’ in the format appended to clause 35 of the Listing Agreement, would ordinarily cover not only shares encumbered by creation of pledge, but also cover shares which are encumbered otherwise than by creation of pledge. Details of shares that are pledged or otherwise encumbered by the

promoter/promoter group could be furnished by the listed Company to the Stock Exchange only if such details are made available to the listed Companies by the respective promoter/promoter group. Since the promoter/promoter group are obliged to disclose to the listed Companies only shares that are pledged/revoked/invoked, it is totally improper on part of SEBI to cast an obligation on the listed Companies to disclose to the Stock Exchanges details of shares which are encumbered otherwise than by way of pledge, even though such details are not made available to the listed Companies by the promoter/promoter group.

17. Reliance was placed by the counsel for SEBI on various decisions of the Apex Court in support of his contention that the words 'otherwise encumbered' have to be construed widely. In all those cases, the Apex Court was called upon to consider scope of the expression 'free from all encumbrances' whereas, in the present case, we are concerned with the obligation cast upon a listed Company to disclose to the Stock Exchange details of shares that are 'otherwise encumbered' by the promoter/promoter group, even though the promoter/ promoter group are not obliged to disclose such details to the listed Company. Hence, the decisions relied upon by the counsel for SEBI do not enhance the case put forth by SEBI in these appeals.

18. To sum up, impugned decisions of the Adjudicating Officer of SEBI in holding that in view of the words 'shares pledged or otherwise encumbered' in the format annexed to clause 35 of the Listing Agreement (as amended), appellants were obliged to disclose to the

Stock Exchanges details of shares which are otherwise encumbered by the promoter/promoter group and since the appellants have failed to make such disclosures, appellants have violated clause 35 of the Listing Agreement as well as PFUTP Regulations is unjustified, because, firstly, neither any regulation framed by SEBI nor clause 35 of the Listing Agreement cast an obligation on the promoter/promoter group to make such disclosures to the listed Company, and in the absence of such disclosure made by promoter/ promoter group, SEBI is not justified in directing the listed Company to disclose to the Stock Exchanges details of shares which are 'otherwise encumbered' by the promoter/ promoter group. Secondly, as per the press release issued by SEBI on January 21, 2009, clause 35 of the Listing Agreement was to be amended so that details of pledged shares and release/sale of shares are first made by promoter/promoter group to the listed Company and in turn, the listed Company would disclose the same to the public through the Stock Exchanges. Since the promoter/ promoter group are not obliged to disclose to the listed Company details of shares that are otherwise encumbered by them, SEBI is not justified in directing the listed Company to disclose to the Stock Exchange details of 'otherwise encumbered' shares which are not furnished to it by the promoter/promoter group. Thirdly, when an Adjudicating Officer of SEBI has already construed the words 'shares pledged or otherwise encumbered' and held that the said words would cover particulars relating to pledged shares only, the Adjudicating Officer in the present case is not justified in taking a contrary view that too without assigning

any reasons. Such a conduct on part of the Adjudicating Officer is highly objectionable. We hope that the officers of SEBI shall henceforth ensure that no orders are passed by them which are mutually contradictory to each other.

19. For the reasons stated hereinabove, we set aside penalty of ₹1crore and ₹1.25 crore imposed on each appellant by SEBI on ground that the appellants have failed to disclose to the Stock Exchanges, fact that the shares of the appellant Company held by the respective promoter/promoter group have been encumbered pursuant to an order passed by the arbitrator in the arbitration proceedings between the promoter/promoter group and some third party.

20. Both appeals are allowed in aforesaid terms with no order as to costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

Sd/-
A S Lamba
Member

30.10.2014
Prepared & Compared By: PK