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Decided on : 31.10.2017
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**IN THE COURT OF THE SPECIAL JUDGE UNDER THE SECURITIES
AND EXCHANGE BOARD OF INDIA ACT, 1992
SEBI SPECIAL CASE NO. 38 OF 2015**

Securities and Exchange Board of India

A Statutory body established under the
provisions of Securities and Exchange
Board of India Act, 1992, having its
Head Office at SEBI Bhavan,
Plot No.C-4/A, G Block, Bandra Kurla Complex,
Bandra (E), Mumbai 400 051 through its
Officer Ms. Anamika Ahir,
Officer Grade- A Legal

Complainant

Versus

Umesh Choukekar

Age : 42 years
residing at Sai Charan CHS, 4th Floor,
402, Telli Galli, N.C. Phadke Marg,
Andheri(E), Mumbai- 400 058

Accused

Appearance:

Ld.SPP Shri Basu for SEBI

Ld. Adv. Shri Deepak Sharma for accused.

**CORAM : HIS HONOUR SPECIAL JUDGE
SHRI M. G. DESHPANDE
SEBI SPECIAL COURT
(COURT ROOM NO. 22)**

DATE : October 31, 2017

JUDGMENT**(Dictated and pronounced in an Open Court)**

1. This is a complaint by Securities and Exchange Board of India (hereinafter referred to as “SEBI”) under Section 200 Cr.P.C. alleging that accused Umesh Choukekar violated Regulations 4(1) and 4(2) (a),(b), (e) and (g) of SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003. (Hereinafter referred to as “PFUTP Regulations, 2003”) read with Section 15HA of SEBI Act and thereby committed an offence punishable u/s. 24(2) of the Securities and Exchange Board of India Act, 1992 (for short “SEBI Act, 1992”), as he failed to pay the penalty Rs.5,00,000/-. Hence accused is facing the trial.

2. Charge was framed against accused vide Exh.12. Accused pleaded not guilty and claimed to be tried. His statement u/s. 313 Cr. P.C. was recorded at Exh.38. His defence is that he was not knowing anything about SEBI. He further stated that he does not know who opened the D'Mat account in his name and transacted the same. He has been cheated and falsely implicated in this case. In this background heard arguments of Ld.SPP Mr.Basu, Law Point for SEBI and Ld.Adv. Shri Deepak Sharma for accused. Following points arise for my determination. I am recording following findings thereon for the

reasons discussed below:-

<u>POINTS</u>	<u>FINDINGS</u>
1. Whether complainant SEBI proves that Adjudication Order dt.19.5.2010 was communicated and duly served/delivered to the accused but accused failed to pay the penalty Rs.5,00,000/- and thereby committed an offence u/s. 15HA punishable under Section 24(2) of the SEBI Act, 1992 ?	In the affirmative
2. What order ?	Accused is convicted as per final order.

REASONS

POINT NO.1:

FACTS AND THE BACKGROUND

3. Complainant SEBI being Market Regulator noticed violation of Regulations, 2003 and conducted investigation wherein the involvement of the accused was revealed in the scrip of Vijay Textiles Ltd. (For short "VTL") for the period from November 1,2004 to March 11, 2005. Accused was found involved in creating artificial volume in said scrip and distorted market equilibrium leading to wide fluctuation in the price of the scrip which did not have correlation with the performance of the company. Therefore, Adjudicating Officer conducted adjudication proceedings and Adjudication Order dt 19.5.2010 was passed against accused and penalty Rs.5 Lakhs was imposed on him. Despite communication of said order and reminders, accused failed to

pay the penalty. Hence, this prosecution.

DOCUMENTS RELIED ON BY SEBI

- Exh.29** Letter of Authority dt. September 7, 2017
- Exh.30** Copy of Delegation of Powers
- Exh.31** Original Adjudication Order dt. May 19, 2010
- Exh.32** Hand Delivery Acknowledgment
- Exh.33** Hand Delivery Acknowledgment
- Exh.34** Speed Post Acknowledgment Due
- Exh.35** Registered Post Acknowledgment Due

With this, SEBI examined only one witness Shri Nilesh Ghuge, Assistant Manager (C.W.1).

ARGUMENT OF LD.SPP MR BASU FOR SEBI

4. Learned SPP Shri Basu for the SEBI argued that accused was involved in creating artificial volume the scrip of VTL and this fact was revealed in the investigation. Despite many reminders by hand deliveries and RPAD, he failed to pay the penalty imposed by the Adjudicating Officer. Accused received the same at his address, but failed to pay the penalty, therefore, he may be convicted u/s. 24(2) of SEBI Act, 1992.

ARGUMENT OF LD. ADVOCATE SHRI DEEPAK SHARMA FOR ACCUSED

5. Ld Adv. Shri Deepak Sharma vehemently submitted that accused never received any correspondence and the copy of Adjudication Order. All the documentary evidence relied on by the SEBI is their own creature. Adjudication Order is the bare document and the contents

thereof are not proved. Even said order was not ever sent to the accused as alleged nor the accused received the same. Mere acknowledgments without any cogent evidence of sending the correspondence would not carry any presumption. Hence, mere production thereof would not tantamount the proof. Complainant failed to discharge the burden therefore, accused is not liable for any conviction. With this, he contended to acquit the accused.

6. I carefully examined the above arguments. Burden is on the SEBI to prove that there was an Adjudication Order. It was communicated to the accused as per Rule 7(a) of SEBI(Procedure for holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995. Accused has knowledge thereof.

7. This being complaint by Public Officer u/s. 200 Cr.P.C., Authority Letter (Exh.29) and the certified copy of Delegation of Powers (Exh.30) are qualified u/s.19 of SEBI Act which authorize Shri Nilesh Ghuge(C.W.1) to lead evidence. Admittedly, SEBI has not applied for the permission under Section 66 read with Section 65(a) of The Indian Evidence Act to lead secondary evidence in respect of their alleged letters and reminders dt. 19.5.2010, 21.10.2011, 10.1.2012, 26.7.2013 and 20.9.2013. Though hand delivery acknowledgments (Exh.32 and Exh.33) have no presumption of their deliveries, yet the Speed Post Acknowledgment (Exh.34) and Registered Post Acknowledgment Due(Exh.35) cannot be ignored. Speed Post Acknowledgment (Exh.34) and Registered Post Acknowledgment (Exh.35) have address of the accused as 'Shri Umesh Choukekar, Sai Charan CHS, 4th floor, 402, Telli Galli, N C Phadke Marg, Andheri (E), Mumbai- 400 058.' It is material to note that accused appeared in this case with the same

address. Accused has furnished Cash Bond on 5.4.2016 before my Learned Predecessor who released him on bail. He mentioned his same address therein. Exh.23 is an adjournment application filed by accused in person on 10.8.2017 wherein he mentioned his same address. Even same address is mentioned in his statement u/s. 313 Cr.P.C. All this clearly indicates that accused resides at the address where acknowledgments (Exhs.34 and 35) were signed by the recipients. Accused has not raised any dispute about his residential address. On the contrary, he admits the same.

8. Careful examination of acknowledgments (Exhs.34 and 35) clearly indicates that one Sau S.B.Choukekar the mother of accused, had received and signed the same on behalf of accused being recipient thereof. Accused has not raised any dispute that said Sau. S.B.Choukekar is not his mother or relative and SEBI fabricated the acknowledgments (Exhs.34 and 35). Except bare suggestions of denial about the delivery, accused could not point out that the address mentioned in both the acknowledgments is incorrect or said Sau. S.B.Choukekar is not his mother or related to him and authorized by him to accept the correspondence. Both the acknowledgments (Exhs.34 and 25) indicate outward numbers of SEBI regarding the letters containing the envelopes. Therefore, it is proved that SEBI has followed the common course of business in this particular case as required u/s.114(f) of The Indian Evidence Act. As noted above, except the general bare suggestions of denial, accused has nowhere assertively cross-examined Shri Nilesh Ghuge (C.W.1) on the point of delivery of any letters alongwith Exhs.34 and 35. Nor he raised any defence that he received only an empty envelope or an envelope with blank paper. Infact it is for the accused to justify that even if the acknowledgments

(Exhs.34 and 35) bear his correct residential address and postal stamps, he never received any correspondence nor his mother or family member ever signed the same. Therefore, I hold that accused miserably failed to justify the same and rebut the presumption u/s. 114(f) of The Indian Evidence Act read with Section 27 of General Clauses Act. Non production of the office copies of the alleged letters and reminders by SEBI would not affect the merit of their case.

9. Hand delivery acknowledgments (Exh.32 and 33) do not carry any presumption unless there is a satisfactory evidence of the delivery boy on the circumstances of the transaction while delivery of the correspondence. Even if the delivery of reminders by hand delivery is not proved yet, I hold that Acknowledgments (Exh.34 and 35) are sufficient to presume that copy of Adjudication Order was delivered to the accused at his correct address and the same was accepted by his family member mother Sau.S B. Choukekar. Hence, accused has knowledge of this fact.

10. There were following 3 options to the accused when Adjudication Order (Exh.31) was passed against him.

- (a) Deposit the penalty amount adjudicated against him within the prescribed period.
- (b) Prefer an appeal before the SAT challenging the legality and propriety of the adjudication Order as the SAT being exclusive forum for the same.
- (c) Even till date accused could have preferred the appeal before the SAT by applying for condonation of delay.

Admittedly, accused had not availed any one of the options nor

paid the penalty within the period directed by SEBI. Eversince he appeared in this case did not try to pay the penalty to the SEBI and continued the trial. Therefore, the case of SEBI squarely falls under Section 24(2) of SEBI Act, 1992. I therefore hold that SEBI has proved beyond the reasonable doubt that accused has failed to pay the penalty. Hence, Point No.1 is answered in the affirmative. Accused needs to be convicted. It is now 11.45 a.m. Accused needs to be heard on the question of sentence. Hence, I am taking pause. Accused is taken in judicial custody.

Time: 11.45 a.m.
Date : 31.10.2017

(M. G. Deshpande)
Special Judge,
SEBI Special Court,
City Civil & Sessions Court,
Gr. Bombay

Resumed at 1.30 p.m.

11. Now, it is 1.30 p.m. Accused and his Learned Advocate Shri Sagar Korgaonkar h/f. Advocate Deepak Sharma heard at length on the question of sentence. Accused submitted that he has absolutely no source of income. He is the only bread winner of his family. His parents are old and ailing. He has only a son aged 10 years who is taking education in 4th Std. His wife has no private job or service. If he is severely sentenced for imprisonment, his family would be orphan. He was working as Driver and presently jobless, therefore, depends upon the availability of work everyday. In this background, he prayed for taking lenient view.

12. I gave thoughtful consideration to whatever submitted by

accused, his background, capacity and source to earn, the dependents in his family. It has to be noted that except accused, there is no one else to look after his family. He has minor son aged 10 years and taking education in 4th Std. Though the provision u/s.24(2) of SEBI Act, 1992 prescribes punishment which may extend to 10 years, or with fine, which may extend to 25 crores Rupees or with both, the quantum of punishment should be based on the family background of the accused, source of his earning, dependents on him and his ability to pay the fine. Even Learned SEBI Prosecutors who are present Ms. Sabiha Ansari and Ms. Anubha Rastogi also admit the family background, capacity and source of earning of the accused and family dependent on him. Also it is an admitted fact that since the involvement of accused was revealed into 2010, thereafter till date accused never indulged in identical offence. At this juncture, accused submits that he is ready to pay some fine from his savings. He further specifically urging not to impose any sentence of imprisonment as his family would be shelterless. In this background, I am of the opinion that if he is sentenced to pay fine only same will maintain the balance. Therefore, the request of accused to take the lenient view is justified. Noting whatever submitted by the accused following order is passed:-

ORDER

1. Accused Umesh Choukekar is convicted as per Section 235(2) of the Code of Criminal Procedure, 1973 for alleged violation of Regulations 4(1) and 4(2) (a),(b),(e) and (g) of SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 read with Section 15HA of Securities and Exchange Board of India Act, punishable u/s. 24(2) of Securities and Exchange Board of India Act, 1992 and sentenced to pay fine Rs.4,00,000/- (Rupees Four Lakhs Only), out of which Rs.3,90,000/-(Rupees Three Lakhs

Ninety Thousand) be awarded to the complainant Securities and Exchange Board of India (SEBI) as the compensation. In default thereof accused shall undergo simple imprisonment for six months.

2. Accused shall surrender his bail.
3. Copy of the judgment is being given to the accused forthwith free of cost. Accused shall acknowledge the same.

(M. G. Deshpande)
Special Judge,
SEBI Special Court,
City Civil & Sessions Court,
Gr. Bombay

Date : 31.10.2017

Dictated on : 31.10.2017
Transcribed on : 31.10.2017
Draft submitted on : 31.10.2017
Final submitted on : 31.10.2017
Signed by HHJ on : 31.10.2017

Certified to be true and correct copy of the original signed order
31.10.2017

DATE AND TIME

B.S.Parab

Name of the Judge (With Court Room No.)

HHJ Shri M.G.Deshpande
C.R.No.22

Date of pronouncement of Judgment/Order

31.10.2017

Judgment/Order signed by P.O. on

31.10.2017

Judgment/Order uploaded on

31.10.2017

