BEFORE THE RECOVERY OFFICER
SECURITIES AND EXCHANGE BOARD OF INDIA
MUMBAI
Recovery Certificate Nos. 1327 of 2017
ORDER

Under Section 28A of the Securities and Exchange Board of India Act, 1992 read with Section 222(1) of the Income Tax Act, 1961 and Rule 16, 48 & 51 of Second Schedule to Income Tax Act, 1961

In respect of –

1. Mr. Vinit Kumar PAN AACPV9310Q (Defaulter)

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1. A penalty of Rs.25,00,000 was levied on Mr. Vinit Kumar (The Defaulter), Director of Temptation Foods Limited & Venture Business Advisors Pvt. Limited by the Adjudicating Officer ("AO") of SEBI, vide order no. BM/AO-05/2013 dated January 31, 2013for violation of Regulations 3(a), 4(1), 4(2) (a) (f) (g) & (r) of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to the Securities Markets) Regulations, 2003 ("**PFUTP Regulations**") in the matter of the Kohinoor Foods Limited ("**KFL**")..
2. The AO order was challenged by the defaulter vide Appeal no 429 of 2014 before the Hon'ble Securities Appellate Tribunal ("**SAT**" / "**Tribunal**"). However, the said appeal was later withdrawn by the defaulter and an Order in this regard was passed by the Hon'ble Tribunal vide its order dated July 8, 2016.
3. As the Defaulter failed to pay the penalty, recovery proceeding was initiated vide recovery certificate number 1327 of 2017 on December 21, 2017 ("**Recovery Certificate**") for the recovery of the penalty amount along with further interest and cost. Subsequently, the Bank Accounts, Demat Accounts & Mutual Fund Folios of the defaulter were attached.
4. The defaulter challenged the recovery proceedings vide Appeal no 50 of 2018 before the Hon'ble Securities Appellate Tribunal ("**SAT**" / "**Tribunal**"). The Hon'ble Tribunal vide its order dated July 26, 2018 ("**SAT Order**") ordered as below

"Appellant is aggrieved by the attachment proceedings initiated by the Recovery Officer ("RO" for short) of Securities and Exchange Board of India ("SEBI" for short) on 21st December, 2017 in implementation of the order passed by the Adjudicating Officer of SEBI on 31st January, 2013. It is contended on behalf of the appellant that since the appellant is declared to be an insolvent pursuant to the order passed by the High Court on 3rd October, 2006, no recovery proceedings could be initiated by the RO against the appellant. Since this argument was not brought to the notice of the RO, appellant is permitted to make a representation in that behalf to the RO within one week from today. If the appellant makes such a representation, then, the RO shall consider the representation and pass appropriate order thereon as expeditiously as possible. It is made clear that the attachment levied by the RO shall continue to remain in force in the meantime."

5. The defaulter vide his letter dated June 28, 2018 made his submissions and also requested to provide an opportunity of personal hearing before the recovery officer.
6. The Defaulter through his authorized representative had appeared before the Recovery Officer on August 01, 2018 . and submitted that they will file a note on submission within a week, summarizing the oral submission made before the Recovery Officer which they later submitted on August 03, 2018.
7. The Defaulter in his submission dated June 28, 2018 and August 03, 2018 and during the personal hearing has, *inter alia*, submitted the following:
    a. The defaulter has been adjudged insolvent by the Hon'ble Bombay High Court by an order dated October 03, 2006. He has not been discharged in relation to the Insolvency Order and the same continues against the defaulter.
    b. The provisions of Section 46(3) of the Presidency- towns Insolvency Act, 1909 ("**PTI Act**") provides that such debts and liabilities that a party, who has been declared insolvent, that he is subject before the date of his being adjudged an insolvent are provable under the PTI Act. Referring the ruling of the Hon'ble Bombay High Court in the case of Union of India and Anr. Vs. Shantilal Jewellers and Ors., the defaulter claimed that the penalties imposed by an authority after the date of insolvency are not provable as per Section 46(3) of the PTI Act and the adjudication proceedings and indeed the present proceedings are therefore not maintainable.
    c. If the adjudication proceedings against the Noticee were 'debt provable in insolvency', the same would not be maintainable by the provisions of Section

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17 of the PTI Act. Section 17 of the PTI Act requires that the leave of the Court be taken prior to the initiation of any proceeding against a person adjudged insolvent. Admittedly no such leave has been taken as the proceedings (as indeed the investigation in the matter) commenced after the Insolvency Order. The proceedings initiated by the Ld. Adjudicating officer were therefor vitiated and the present proceedings arising therefrom are also vitiated because of the operation of Section 17 of the PTI Act.

d. In situations where adjudication proceedings against companies facing liquidation under Section 446 of the Companies Act, 1956 were initiated without the leave of the court, various adjudicating officers have taken a view that such proceedings are not maintainable. In the present case, the same recourse needs to be adopted as the requirement of Section 17 of the PTI Act also contains an identical requirement.

e. Only in case where the recovery is pursuant to non-compliance with directions of the SEBI under Section 11B of the Securities and Exchange Board of India Act, 1992("**SEBI Act**") does the provision of Section 28 A of the SEB Act allow supersession of application of other laws. Indeed, recovery pursuant to adjudication proceedings is not a situation where such overriding is allowed by Law. Therefore, the provisions of Section 46(3() and 17 of the PTI Act will bar adjudication proceedings and consequently the present proceedings.

8. The Defaulter in his submission dated June 28, 2018 and August 03, 2018 has, *inter alia*, requested the following:
   a. The present adjudication and recovery proceedings be dropped on account of the order passed by the adjudicating officer being not maintainable pursuant to provisions of Section 46(3) and 17 of the PTI Act.
   b. The bank account, demat account and mutual fund portfolios of the Noticees be released.

CONSIDERATION OF SUBMISSIONS

9. I have carefully perused the submissions of the Defaulter and the documents available on record. The Recovery Certificate seeks to recover the penalty of Rs.25,00,000 imposed by the Adjudicating Officer of SEBI vide the AO Order for violations of the SEBI Act read with provisions of the PFUTP Regulations as stated hereinbefore.

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10. The defaulter in his submission has extensively referred to the provisions of The Presidency- Towns Insolvency Act, 1909 (PTI Act) to argue that the present recovery proceeding is vitiated and bad in law as he had already been adjudged as insolvent. The defaulter has also submitted that SEBI has not taken leave of court in relation to the adjudicating proceedings and the Attachment Notices as required under section 17 of PTI Act, 1909, which renders entire proceedings invalid. It is now relevant to quote section 17 of the PTI Act, 1909:

   a. *"On the making of an order of adjudication, the property of the insolvent wherever situate shall vest in the official assignee and shall become divisible among his creditors, and thereafter, except as directed by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt or shall commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose:"*

It is clear from the above that section 17 of the PTI Act pertains to a bar on only creditors to whom the insolvent is indebted to in respect of any debt provable in insolvency, from having any remedy against the property of the insolvent or from commencing any suit or other legal proceeding save with the leave of the court. However, the recovery proceeding in question was initiated to recover the penalty imposed by the AO of SEBI, which is not a debt provable under the PTI Act.

In this regard, , the decision of the Hon'ble Madras High Court in T.Y.V. Dhinakaran Vs. Dy. Director, Enforcement Directorate (MANU/TN/2007/2002) is relevant to quote:

"The order which is imposing "penalty" for contravention of a penal statute cannot amount to a debt within the meaning of the P.T.I.Act, nor the applicant be characterised as a debtor within the meaning of the said Act.

As per the above mentioned decision, the penalty imposed by SEBI is penal in nature and does not amount to debt under PTI Act. Therefore, SEBI was not required to take leave of court.

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11. With reference to submission made at para 7(d), it is noted that the order of the Adjudicating Officer referred by the defaulter pertains to companies under liquidation under the provisions of the Companies Act, 1956 ("**Companies Act**") and not to proceedings under the PTI Act. It is pertinent to note that the provision, on the basis of which adjudication proceedings against the company therein was dropped was different from Section 17 of the PTI Act. In the aforesaid order, the Adjudicating Officer of SEBI interpreted Section 446 of the Companies Act, and held that the adjudication proceedings could not be continued in light thereof. The relevant portion of which stated that –

> *"446. Suits stayed on winding up order.*
> *(1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced. or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the Court and subject to such terms as the Court may impose."*

Thus, it is imperative to note, that Section 446 (1) states that no suit or other legal proceeding shall be commenced or if pending at the date of the winding up order, be proceeded with against the company against whom such winding up order has been passed save with the leave of the court.

However, the purport and import of Section 17 (1) of the PTI Act does not operate in the same realm. The said provision pertains to a bar on only creditors to whom the insolvent is indebted to in respect of any debt provable in insolvency, from having any remedy against the property of the insolvent or from commencing any suit or other legal proceeding save with the leave of the court. Thus the restriction against initiation or continuance of suit or legal proceedings as imposed u/s 446 of Companies Act is broader, compared to the limited restriction u/s 17 of PTI Act which applies only to creditors of the insolvent in respect of debts provable under the said Act.

As it has been established in point no.10 above that a 'debt' under the PTI Act does not include penalty levied by a statutory authority, the SEBI cannot be said to be a creditor of the Appellant. Thus, there exists no bar on SEBI from initiating recovery proceedings for the recovery of penalty amount payable by the Defaulter by virtue of Section 17 as is being contended by the Defaulter. The defaulter has also specifically contended that the penalty imposed by the AO is not covered under definition of debts provable under PTI Act. It is

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observed that a consequence of the said argument is that the restrictions imposed u/s 17 of PTI Act also would not apply in case of such penalties imposed by AO.

Notwithstanding the above, the Hon'ble Supreme Court in in *Damji Valji Shah v. LIC of India* (AIR 1966 SC 135) held that leave of the winding up court is not required to be obtained for initiating or continuing a proceedings in respect of which the Company Court has no jurisdiction. The said judgment has been followed in a catena of cases. The jurisdiction of civil courts is ousted by section 15Y of SEBI Act in respect of matters under adjudication under Chapter VIA. Accordingly, the jurisdiction of High Court while dealing with winding up of companies under the Companies Act, is ousted by sections 15Y of SEBI Act. In view of the above said ratio laid down by the Hon'ble Supreme Court, leave of the winding up court before which the liquidation proceedings are pending need not be obtained by SEBI for initiating or continuing adjudication proceedings under SEBI Act.

12. In view of the above observations, I find that the order passed by the Adjudicating Officer and the proceedings u/s 28A for recovering the penalty are valid and do not suffer any infirmity.

13. In respect to the submission made by the defaulter as reproduced in para 7(b) and the case laws referred, it is noted that the said submission and case laws are not relevant to the facts of the present case as they had primarily initiated from the recovery of debt or tax claims and not from the case of the recovery of penalty as imposed by the quasi judicial authority like AO of SEBI. The judgment in Union of India and Anr. vs. Shantilal Jewelers and Ors. is distinguished since in that case, the Tax Recovery Officer made a claim before the Official Assignee under PTI Act, whereas in the present case SEBI has not made any claim before any authority under PTI Act. Instead, SEBI is enforcing the order passed by the Adjudicating under the relevant provisions of SEBI Act. Therefore section 46 of the PTI Act has no bearing over the penalty imposed by the AO of SEBI or on the recovery proceedings u/s 28A of SEBI Act.

Order

14. Under the above circumstances, to protect the claim of SEBI it is necessary to pass the following orders and accordingly, in the exercise of powers under section 28Aof SEBI Act

SECURITIES AND EXCHANGE BOARD OF INDIA * RECOVERY DIVISION * read with section 222 of the Income tax Act and Rules of the second schedule to Income tax Act, I hereby order the following:

(i) The recovery proceeding initiated against the defaulter Shri Vinit Kumar shall continue to remain in force;

(ii) The bank account, demat account and Mutulal fund portfolios of the defaulter shall continue to be attached.

Copy of this order may be served on the Defaulter and The Official Assignee.

Atanu Pan
Dy. General Manager & Recovery Officer

Mumbai
October 08, 2018

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ATANU PAN / अतनु पान
Dy. General Manager & Recovery Officer
उप महाप्रबंधक एवं वसूली अधिकारी
Securities and Exchange Board of India
भारतीय प्रतिभूती एवं विनिमय बोर्ड
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