

SECURITIES AND EXCHANGE BOARD OF INDIA, MUMBAI

ORDER

UNDER SECTION 15-I (3) OF THE SECURITIES AND EXCHANGE BOARD OF INDIA, 1992

IN RESPECT OF:

	ENTITY	PAN
1.	Nikhlesh Kumar	AFHPN8413N
2.	Nikita Forex Private Limited	AADCN8028M
3.	Kunal Yadav	AJDPY2050J
4.	Nature Infosoft Private Limited	AACCN6386M
5.	Saurabh Gupta	AJCPG9938Q
6.	Topline Fabrics Private Limited (now known as M.A. Market Services Private Limited)	AAACO7265J
7.	Tushar Commodities Private Limited	AACCT2372F

(Aforesaid entities are referred to in this order individually by their respective names or Noticee numbers and collectively as “the Noticees”.)

IN THE MATTER OF KALPA COMMERCIAL LIMITED.

BACKGROUND:

1. Securities and Exchange Board of India (“SEBI”) received complaints from certain intermediaries alleging that some unknown entities were misguiding investors by sending Short Message Services (“SMSes”), using their names as IDs, and promising guaranteed returns on investments made in the scrip of Kalpa Commercial Limited (“Kalpa/Company”). SEBI, thereafter, conducted a preliminary examination into the trading in the scrip of KCL for the period October 10, 2017 to October 18, 2017.
2. Pursuant to the findings of the preliminary examination, SEBI passed an interim order dated April 27, 2018, against 28 entities *inter-alia* prohibiting them from accessing the

securities market. Thereafter, vide confirmatory order dated September 26, 2019, the directions were confirmed against 19 entities.

3. Subsequently, SEBI conducted an investigation in the scrip of KCL to ascertain any possible violation of the provisions of the Securities and Exchange Board of India Act, 1992 (“SEBI Act”) and the SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 (“PFUTP Regulations”).
4. Based on the findings of the investigation, SEBI initiated adjudication proceedings against 14 entities and an Adjudicating Officer (“AO”) was appointed vide Order dated March 10, 2021. The A.O issued a common Show Cause Notice (“SCN”) dated July 19, 2021, to the 12 entities calling upon them to show cause as to why an inquiry should not be conducted against them and penalty imposed for the alleged violation of the following provisions of the securities laws:-
 - a) Section 15HA of the SEBI Act for the alleged violations of section 12A (a) (b) and (c) of the SEBI Act and Regulations 3 (a), (b), (c) and (d) and 4(1) and 4(2) (a), (f), (k) and (r) of the PFUTP Regulations;
 - b) Section 23H of SCRA for the alleged violation of section 16 of SCRA read with SEBI Notification G.S.R 219(E) dated October 3, 2013, section 13 and section 18 of SCRA, read with section 2(i) of SCRA;
 - c) Section 15A (a) of the SEBI Act for the alleged violations of section 11C (3) of the SEBI Act.
5. Thereafter, the AO vide Order dated November 24, 2021 (“A.O Order”) held that charges as alleged against all 12 entities stands established based on the material on record, and imposed varying penalties on the 12 entities under section 15A(a) and 15HA of the SEBI Act, and section 23H of the SCRA.

6. It was, however, noted that in respect of 7 of the 12 entities, who form the Noticees in the present proceedings before me, the A.O had imposed a penalty of only Rs. 4,00,000 under section 15HA of the SEBI Act whereas the mandatory minimum penalty prescribed under the said section was Rs. 5,00,000.
7. In view of the same, the present SCN dated March 07, 2022, was issued under section 15-I(3), calling upon the Noticees to show cause on the limited issue of why an appropriate penalty as provided under section 15 HA should not be imposed on them.
8. I note from the records that the SCN was served on all the Noticees: it was delivered to Notice No. 5 and No. 6 through Speed Post; it was served on Noticees No. 2 to 4 and Noticee 7 by way of affixture at the last known address of the said Noticees available with SEBI; and by way of digitally signed email to Noticees no. 1, 2 and 4 to 7. I, however, note that even though the SCN was duly served on all the Noticees, replies were only received from Noticee No. 5 and 6.
9. The Noticees were granted an opportunity of personal hearing on July 19, 2022, which was later adjourned to July 25, 2022, due to certain administrative exigencies. On July 25, 2022, only Noticee No. 6 entered appearance and was represented by Mr. Sandeep Agarwal, Advocate. Noticee No. 6, subsequently, filed written submission dated July 29, 2022, recording the submissions made during the oral hearing. The summary of the arguments made by the Noticees No. 5 and 6 is given below:-

Noticee No. 5

- (i) The Noticee reiterated the submissions made earlier vide letter dated March 19, 2019.

- (ii) No specific submissions were made in respect of the SCN dated March 07, 2022, seeking to enhance the quantum of penalty imposed under section 15 HA of the SEBI Act.

Noticee No. 6

- (i) It was submitted on behalf of the Noticee that there was nothing on record to establish that the order of the AO was prejudicial to the interest of the securities market which is an essential ingredient for exercising powers under section 15-I(3).
- (ii) Without prejudice to the above contention, it was submitted that the A.O is a quasi-judicial authority and in case SEBI felt aggrieved by the A.O order, then it ought to have filed an appeal under section 15T of the SEBI Act.
- (iii) It was also submitted that it is settled law that each and every type of mistake or error committed by the A.O is not amenable to review under section 15-I(3) and only errors in the nature of violation of principles of natural justice or those tainted by non-application of mind can be relooked at under the section.
- (iv) Reliance was placed on the judgement of the Hon'ble Supreme Court in the matter of SEBI v. Bhavesh Pabari¹ wherein it was held that the A.O has the discretion to impose a lesser penalty than the mandatory penalty prescribed under the Act.
- (v) Noticee submitted that the SCN ignores the fact that the A.O has in its order categorically discussed the reasons for imposing the penalty and now it would not be open for SEBI to reopen the matter.
- (vi) It was also submitted that the Noticee has already filed an appeal against the A.O order and therefore SEBI should not interfere in the matter until the appeal is

¹ Civil Appeal No. 11311 of 2013

disposed of by SAT. In support, Noticee relied on the order passed by the Aurangabad Bench of the Hon'ble Bombay High Court in the matter of Kishore v. Preeti² wherein it was held that in circumstances where the superior court is seized of the matter, the subordinate court should lay their hands off till the proceeding pending before the superior court is decided.

CONSIDERATION

10. After carefully considering the SCN, the replies received in the matter and the submissions made on behalf of Noticee No. 6 during the personal hearing, I note that the only issue that arises for consideration is whether the Order dated November 24, 2021, passed by the A.O, is erroneous to the extent that it imposed a penalty, under section 15 HA of the SEBI Act, 1992, which is lesser than the minimum penalty provided under the section.

11. It would, therefore, be appropriate at this juncture to reproduce the provisions of the section 15HA of the SEBI Act which reads as under,-

“Penalty for fraudulent and unfair trade practices.

15HA. If any person indulges in fraudulent and unfair trade practices relating to securities, he shall be liable to a penalty which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of such practices, whichever is higher.”(emphasis supplied)

12. The minimum penalty under section 15 HA, as it stands now, was inserted vide the Securities Laws (Amendment) Act, 2014. Similar amendments were also made to other penalty provisions under Chapter VI A of the SEBI Act vide the said amendment. I note that the Hon'ble Supreme Court in the matter of the Bhavesh Pabari v. SEBI (Supra) had an opportunity to look at the effect of the said amendments made to penalty provisions under Chapter VI A. The Hon'ble Court in this respect had observed that:-

² (W.P (C) No. 7502 of 2006)

“We would prefer read and interpret Section 15-A(a) as it was between 25th October, 2002 and 7th September, 2014 in line with the Amendment Act 27 of 2014 as giving discretion to the Adjudicating Officer to impose minimum penalty of Rs.1 lakh subject to maximum penalty of Rs.1 crore, keeping in view the period of default as well as aggravating and mitigating circumstances including those specified in Section 15-J of the SEBI Act.” (emphasis supplied)

13. It can, therefore, be noted that the Hon’ble Supreme Court has observed that discretion vested on the A.O in imposing a penalty under Chapter VI A will be circumscribed by the minimum and maximum range provided under the respective sections. Consequently, any order passed by an A.O imposing a penalty lower than the minimum provided under the respective section would be erroneous to that extent.
14. Noticee No. 6 has primarily contended that every error committed by an A.O is not amenable to exercise of the powers under section 15-I(3) and only those orders which are erroneous to the extent that they are not in the interests of the investors in the securities market may be interfered with. It was also canvassed on behalf of the said Noticee that the Hon’ble Supreme Court in the matter of Bhavesh Pabari (Supra) recognised the discretion vested on the AO’s to impose penalties lower than the mandatory penalty prescribed under the respective sections under Chapter VI A of the SEBI Act.
15. It is noted that the Noticee is not disputing that the AO imposed a penalty which was lower than the mandatory minimum under section 15HA. What is being challenged is:- SEBI’s power to “review” such an order under section 15-I(3); whether even post the amendments made vide the Securities Laws (Amendment Act) 2014 and judgment of the Apex Court in the matter of Bhavesh Pabari (Supra), AOs retain the discretion to impose a penalty lower than the mandatory minimum; and whether the power under section 15-I(3) can be invoked during the pendency of an appeal preferred before the Hon’ble Securities Appellate Tribunal against the ‘impugned order’.

16. I propose to consider the second and third issues first. The question of AO's discretion to impose a penalty lower than the mandatory minimum penalty, I note, has been squarely answered by the Hon'ble Supreme Court in the matter of the Bhavesh Pabari (Supra). The Court had observed in this matter that discretion vested on the AO will be subject to the minimum and maximum penalties under the respective sections. The findings of the Hon'ble Court which is sought to be relied upon by Noticee No.6 – that AOs have discretion in imposing a penalty lower than the mandatory penalty – were made in the context of the provision as it existed from 2002 till its amendment in 2014 vide the Securities Laws (Amendment) Act, 2014. In view of the same, I am of the considered view that post the enactment of the Securities Laws (Amendment) Act, 2014, the AOs do not enjoy discretion to impose penalties lower than the mandatory minimum prescribed under the respective penalty provisions under Chapter VI A of the SEBI Act.

17. The third contention raised on behalf of the Noticee – that it would not be appropriate for SEBI to invoke powers under section 15-I(3) during the pendency of an appeal against the impugned order pending before the Hon'ble Tribunal – is covered under the second proviso to section 15-I(3) which reads as under:

*“Provided further that nothing contained in this sub-section shall be applicable after an expiry of a period of three months from the date of the order passed by the adjudicating officer or **disposal of the appeal under section 15T, whichever is earlier.**” (emphasis supplied)*

18. It is clear from the perusal of the proviso that powers under the section can be invoked during the pendency of an appeal and it is only on the disposal of the appeal by the Hon'ble Tribunal that the bar under the proviso kicks in. For the same reason, the order in the matter of Kishore v. Preeti (Supra), relied upon by the Noticee in support of this contention, has no application in the present matter.

19. The final issue that is required to be considered is whether “errors” in the nature contained in the impugned order are amenable to the exercise of powers under section 15-I(3). Before considering this issue, it would be appropriate to refer to the text of section 15-I(3) which reads as under:-

“Power to adjudicate.

*(3) The Board may call for and examine the record of any proceedings under this section and if it considers that the **order passed by the adjudicating officer is erroneous to the extent it is not in the interests of the securities market,** it may, after making or causing to be made such inquiry as it deems necessary, pass an order enhancing the quantum of penalty, if the circumstances of the case so justify.”*

20. I note that section 15-I(3) empowers SEBI to examine an AO order and, if it is of the view that the Order is erroneous to the extent it is not in the interest of the securities market, pass an order enhancing the penalty imposed by the A.O. The question that therefore needs to be looked at is whether an order imposing a penalty lower than the mandatory minimum penalty is an error which is amenable to exercise of powers under section 15-I(3).

21. As stated above, the mandatory minimum penalties were introduced in chapter VIA of the SEBI Act vide the Securities Laws (Amendment) Act, 2014. The statement of objects and reasons of the said amending act provides that the amendments to penalty provisions of chapter VIA were carried out “to clarify that adjudicating officers have discretion while imposing monetary penalties and to **incorporate minimum penalties that have to be imposed for violations**”

22. I note that the legislative intent was to provide that while A.Os would have discretion while arriving at the quantum of penalty to be imposed, the same would be circumscribed by the floor and cap provided under the respective sections. Further, as stated above, the Hon’ble

Supreme Court had also made similar observations in the matter of Bhavesh Pabari (Supra). Also, the SEBI Act, including the penalty provisions under Chapter VI A, have been enacted in furtherance of the object of Act, as contained in its preamble, which includes the protection of the interest of investors in the securities market. In view of the same, any order which is not in compliance with mandatory provisions of the Act would not be in consonance with investor protection mandate.

23. Given the above, considering that the penalty imposed is contrary to the express provisions of securities laws, I am of the view that the imposition of a penalty lower than the mandatory minimum under section 15HA, in the impugned order, is erroneous and not in the interest of the securities market, and therefore amenable to exercise of powers under section 15-I(3).

DIRECTIONS.

24. In view of the foregoing, I, in exercise of the powers conferred upon me in terms of section 15-I(3) read with of section 19 of the SEBI Act, 1992, hereby enhance the penalty imposed the under section 15HA of the SEBI Act on the Noticees vide the AO Order dated November 24, 2021, from Rs. Four lakh to Rs. Five lakh. The enhanced penalty amount of Rs. One lakh shall be paid by the Noticees within a period of forty-five (45) days from the date of coming into force of this direction.
25. The Noticees shall remit/ pay the aforesaid amount of penalty either by way of Demand Draft in favour of “SEBI - Penalties Remittable to Government of India”, payable at Mumbai, or through online payment facility available on the website of SEBI, i.e. www.sebi.gov.in on the following path, by clicking on the payment link: ENFORCEMENT - > Orders - > Orders of Chairman/ Members - > PAY NOW. In case of any difficulties in online payment of penalties, the said Noticees may contact

support at portalhelp@sebi.gov.in . The demand draft or the details/ confirmation of e - payment should be sent to "The Division Chief, IVD - ID 1, Securities and Exchange Board of India, SEBI Bhavan II, Plot no. C - 7, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai - 400 051" and also to e - mail id: - tad@sebi.gov.in in the format as given in table below:

1. CASE NAME:	
2. NAME OF THE PAYEE:	
3. DATE OF PAYMENT:	
4. AMOUNT PAID:	
5. TRANSACTION No:	
6. PAYMENT IS MADE FOR: (PENALTY/DISGORGEMENT)	

26. This Order shall come into force with immediate effect.

Date: September 09, 2022
Place: Mumbai

ASHWANI BHATIA
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA