BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Hearing : 12.04.2016
Date of Decision : 13.05.2016

Misc. Application No. 117 of 2015
And
Misc. Application No. 118 of 2015
And
Misc. Application No. 130 of 2015
And
Misc. Application No. 163 of 2015
And
Misc. Application No. 165 of 2015
And
Appeal No. 222 of 2015

Almondz Global Securities Ltd.
2nd Floor, 3 Scindia House,
Janpath, New Delhi – 110 001. ….. Appellant

Versus

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

Mr. P. N. Modi, Senior Advocate with Mr. Joby Mathew, Mr. Deepak Dhane, Mr. N. P. Lashkari, Mr. Ramesh Gogawat, Advocates for the Appellant.

Mr. J. P. Sen, Senior Advocate with Mr. Mihir Mody, Mr. Saurabh Bachhawat, Mr. Harekrishna Ashar, Advocates i/b K. Ashar& Co. for the Respondent.

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

Per : Jog Singh

Misc. Application No. 163 of 2015 in Appeal No. 222 of 2015 :

There is a delay of 25 days in filing this appeal. For the reasons stated in the miscellaneous application, delay is condoned. Miscellaneous Application No. 163 of 2015 is disposed of accordingly.

Appeal No. 222 of 2015 :-

1. The present Appeal has been filed against Order dated January 20, 2015 ("Impugned Order") passed by the Respondent – SEBI, declaring that Almondz Global Securities Limited ("Appellant") is not a "Fit and Proper Person" as defined under Schedule II of the SEBI (Intermediaries) Regulations, 2008 ("Intermediaries Regulation") and hence rejecting the Appellant's application for renewal of registration as Merchant Banker ("MB").

2. Further, The Appellant has filed three Miscellaneous Applications all in which the Applicant had acted as a BRLM. These are as follows:

- MA No. 130 of 2015 in Appeal No. 275 of 2014 for staying the operation of Impugned Order dated March 21, 2014 passed by SEBI against the Appellant under Sections 11(1), 11(14) and 11(b) of the SEBI Act, in the matter of the IPO of PG Electroplast Limited;
- MA No. 117 of 2015 in Appeal No. 129 of 2014 for staying the operation of Impugned Order dated March 3, 2014 passed by SEBI against the Appellant under Sections 11(1), 11(14) and 11(b) of the SEBI Act, in the matter of the IPO of Bharati Global Infomedia Limited; and
- MA No. 118 of 2015 in Appeal No. 187 of 2014 for staying the operation of Impugned Order dated April 11, 2014 passed by SEBI against the Appellant under Section 12(3) of the SEBI Act read with

Regulation 28(2) of SEBI (Intermediaries) Regulations, 2008 in the matter of the IPO of Bharati Global Infomedia Limited.

3. These three MAs, emanating from the two impugned orders dated March 3, 2014 and March 21, 2014, pertaining to similar sets of facts are being heard and decided with Appeal No. 222 of 2015, with the consent of all parties concerned. Both these impugned orders are the subject matter of Appeal Nos. 129 of 2014 and 275 of 2014 respectively, which have also been heard and are being decided today itself.

4. The facts of the matter at hand are such that the Appellant is a public limited company registered as a Category I Merchant Banker with SEBI. The Appellant was appointed as Book Running Lead Manager ("BRLM") for IPOs in relation to two companies – PG Electroplast Limited ("PGEL") and Bhartiya Global Infomedia Limited ("BGIL").

5. The Impugned Order was passed on the basis of the impugned orders dated March 3, 2014, March 21, 2014 and April 11, 2014 owing to negligence committed during the process of the IPO in respect of two Issuer Companies.

6. In particular, with respect to the IPO of PGEL, SEBI made the following allegations :

- Failure to ensure disclosure of material facts in the RHP and Prospectus viz., funds raised by the Issuer Company through Inter Corporate Deposits which were in the nature of a bridge-loan; decision by the Board of Directors of the Issuer Company to invest in ICDs of other companies; purchase orders placed by the Issuer Company for plant and

machinery; names of certain companies in the list of suppliers of plastic granules; agreements and Memorandum of Understandings entered into by the Issuer Company with certain entities for purchase of land; and

- Failure to prevent misrepresentation in respect of amount of term-loan availed by the Issuer Company.

7. With respect to the IPO of BGIL the two primary allegations against the Appellants were as follows:

- Incorrect / inadequate disclosures in the RHP and Prospectus regarding related party transactions, ostensibly being a transaction for the purchase of land between Gadeo Electronics, a partnership comprised of Richa Mittal and R K Mittal, the sister-in-law and father respectively of Sanjeev Mittal, Director of BGIL;
- Non-disclosure of two ICD loans aggregating to ₹ 15 crore.

8. As a result of these alleged infractions, the Respondent concluded that in both these cases the Appellant had failed to exercise due and reasonable care while conducting its due diligence operations at various stages on the two IPOs, which resulted in inaccurate / inadequate disclosures in the RHP/Prospectus. Order dated March 3, 2014 passed in the matter of BGIL barred the Appellant from indulging in the securities market in any manner for a period of five years from the date of the order.

9. Further, order dated March 21, 2014 prohibited the Appellant from taking up any new assignment or involvement in a new issue of capital, including IPO, follow-on issue, etc. in the securities market for a period of five years. Further, Order dated April 11, 2014 was passed by SEBI

suspending the certificate of registration of the Appellant as MB for a period of six months from March 3, 2014.

10. SEBI issued a show cause notice ("SCN") dated June 16, 2014 to the Appellant on the ground that the Appellant did not satisfy the criteria for "Fit and Proper Person" as understood under Regulation 8 read with Regulations 6A and 8A(5) of the SEBI (Merchant Bankers) Regulations, 1992 and Schedule II of the Intermediaries Regulations, 2008. The Appellant responded to this SCN on July 18, 2014. SEBI, in turn, issued another SCN on January 7, 2015, based on an extreme allegation that the Appellant did not comply with the criteria for "Fit and Proper Person" required for continuing as a registered stock broker/depositary participant. Finally, the Impugned Order declaring the Appellant to be unfit to indulge in the securities market came to be passed on January 20, 2015.

11. We shall now deal with the crux of the Appellant's submissions before us. The Appellant submits that the Impugned Order is arbitrary, illegal, perverse and contrary to material on record. The orders on the basis of which the Show Cause Notice and later the Impugned Order have been passed are pending before this Tribunal for consideration and cannot be said to have been finalized. The restraint orders, around which the SCN and the Impugned Order are centered for SEBI to come to the inference that the Appellant is not a Fit and Proper Person as per Schedule II of the Intermediary Regulations, are not adequate for leveling and proving such a grave allegation against the Appellant.

12. Per Contra, the Respondent submits that Schedule II of the Intermediaries Regulations puts forth the absence of restraint orders as a criterion to be satisfied for the purposes of determining whether or not a

person is fit and proper. It is also put forth that the Appellant has had three restraint orders passed against it, viz., orders dated March 3, 2014, March 21, 2014 and April 11, 2014. At the time of the passing of the Impugned Order, the order dated March 21, 2014 was in force. The Respondent therefore submits that an ongoing order is not only relevant in terms of the MB Regulations but in fact decisive in order to conclude that an entity is not fit and proper. The Respondent, thus, ostensibly did not have a choice but to reject the Appellant's application for renewal of its MB registration especially since a restraint order was ongoing at the time the application was made.

13. The Respondent has relied on judgment dated June 26, 2014 passed by this Tribunal in FTIL vs. SEBI in which it was held that SEBI could rely on an order under challenge before this Tribunal for the purposes of determining whether or not a person is a fit and proper person. Therefore, the mere pendency of challenges to the restraint orders passed against the Appellant cannot preclude the Respondent from relying on them in order to conclude that the Appellant is not a fit and proper person in accordance with the MB Regulations read with Schedule II of the Intermediaries Regulations.

14. Coming to the MAs mentioned above, it has been submitted by the Appellants in the aforementioned MAs that SEBI is constantly ignoring the fact that the above-mentioned three impugned orders have been challenged before this Tribunal and are pending merely because no order has been passed by the Tribunal staying the operation of the three impugned orders.

15. It is submitted that SEBI cannot assume that the Appeals filed by the Appellants will be dismissed and the three impugned orders in the

respective Appeals would attain finality. Additionally, the impugned orders cannot be the basis for an allegation that the Appellant is not a "Fit and Proper Person" under the Intermediaries Regulations, especially in light of the possibility that they may be quashed by this Tribunal.

16. It is further submitted that the Appellant's business as an MB has been practically shut down by SEBI on the basis of the three impugned orders and now SEBI is proceeding a step further to ensure that the remaining business of the Appellant as a Stock Broker and as a Depositary Participant also crumbles to the ground. The Appellant submits that its employees are dependent on the Appellant for their livelihood and its clients would be adversely affected by the proposed action of SEBI and, therefore, if no stay was granted, the Appellant would suffer grave and irreparable harm over and above the penalty which has already been imposed upon it without any justification.

17. Per Contra, with respect to the MAs the Respondent submits that with respect to the SCN sought to be challenged by the Appellant, this Tribunal vide order dated April 17, 2015 has already recorded a statement on behalf of SEBI that they would not act upon the said SCN during the pendency of the Appeals. Further, the Appellant has not challenged the SCN itself in any appeal and therefore, the reliefs sought in the MAs are not in aid of any final reliefs in the Appeals challenging the orders passed against the Appellant with respect to the IPOs of the two Issuer Companies. Since no order has been passed with respect to the SCN in question, the MAs are premature in nature. Further, an SCN should not be interfered with unless there are extraordinary circumstances which justify such

interference, and in this case there are no such extraordinary circumstances which call for any intervention.

18. Moreover, it is submitted that the SCN calls upon the Appellants to explain why registration as a stock broker or a depositary participant should not be denied to it considering both the Depositaries Regulations as well as the Stock Broker Regulations require the applicant to be a fit and proper person in terms of Schedule II of the Intermediaries Regulations. And since the Intermediaries Regulations require the absence of a conviction or restraint order to be considered fit and proper, SCN is justifiable and ought not to be interfered with at this stage.

19, We have heard the counsel for both parties and closely perused the Appeal, along with other documents placed before us.

20. Before we analyse with the facts of the case, it is pertinent to analyze the relevant regulations. These Regulations have been reproduced hereinafter:

"Regulation 6 of the MB Regulations"

> *"The Board shall take into account for considering the grant of a certificate, all matters which are relevant to the activities relating to merchant banker and in particular the applicant complies with the following requirements, namely :—*
>
> *…(gg) the applicant is a fit and proper person."*

"Regulation 6A of the MB Regulations"

> *"Criteria for fit and proper person.*
>
> *6A.For the purpose of determining whether an applicant or the merchant banker is a fit and proper person the Board may take into account the criteria specified in Schedule II of the Securities and Exchange Board of India (Intermediaries) Regulations, 2008."*

"Schedule II of the Intermediaries Regulation"

"Criteria for determining a 'fit and proper person'

For the purpose of determining as to whether an applicant or the intermediary is a 'fit and proper person' the Board may take account of any consideration as it deems fit, including but not limited to the following criteria in relation to the applicant or the intermediary, the principal officer and the key management persons by whatever name called –

(a) integrity, reputation and character;

(b) absence of convictions and restraint orders;

(c) competence including financial solvency and networth."

21. On a bare perusal of the provisions cited above, it is borne out that an MB has to fulfill the criteria for a Fit and Proper Person as provided under Schedule II of the Intermediaries Regulations. Six criteria have been specifically laid down by the Intermediaries Regulations as those which ought to be satisfied before an entity can be designated as a Merchant Banker.

22. In order to understand the true import of the concept of Fit and Proper Person, we need to look at it from a historical perspective and also analyse the context in which it has come to be used against the Appellant.

23. It is pertinent to note that regulations dedicated to the criteria for fit and proper person, namely, SEBI (Criteria for Fit and Proper Person) Regulations, 2004 ("Regulations of 2004") were first crafted by the Respondent to clearly delineate the criteria to be satisfied for a person to be considered fit and proper. It seems that this was the first instance wherein the concept of Fit and Proper Person was introduced in the legal scheme of the structure of the securities market. Regulation 3 of the erstwhile

regulations laid down the criteria. Further, these were repealed by SEBI through the Intermediaries Regulation w.e.f. May 26, 2008. Regulation 3 of the erstwhile Regulations of 2004 has been reproduced hereinafter:

> ***3. Criteria for determining a 'fit and proper person'***
>
> *(1) For the purpose of determining as to whether an applicant or the intermediary seeking registration under any one or more of the relevant regulations is a 'fit and proper person', the Board may take account of any consideration as it deems fit, including but not limited to the following criteria –*
>
> *(a) financial integrity;*
>
> *(b) absence of convictions or civil liabilities;*
>
> *(c) competence;*
>
> *(d) good reputation and character;*
>
> *(e) efficiency and honesty; and*
>
> *(f) absence of any disqualification to act as an intermediary as stipulated in these regulations.*
>
> *(2) A person shall not be considered as a" fit and proper person" for the purpose of grant or renewal of certificate to act as an intermediary or to continue to act as an intermediary under any one or more of the relevant regulations, if he incurs any of the following disqualifications –*
>
> *(a) the applicant or the intermediary, as the case may be or its whole time director or managing partner has been convicted by a Court for any offence involving moral turpitude, economic offence, securities laws or fraud;*
>
> *(b) an order for winding up has been passed against the applicant or the intermediary;*
>
> *(c) the applicant or the intermediary, or its whole time director, or managing partner has been declared insolvent and has not been discharged;*
>
> *(d) an order, other than an order of suspension of certificate of registration as an intermediary, restraining, prohibiting or debarring the applicant or the intermediary, or its whole time director or managing partner from dealing in securities in the*

capital market or from accessing the capital market has been passed by the Board or any other regulatory authority and a period of three years from the date of the expiry of the period specified in the order has not elapsed;

(e) an order canceling the certificate of registration of the applicant or the intermediary has been passed by the Board on the ground of its indulging in insider trading, fraudulent and unfair trade practices or market manipulation and a period of three years from the date of the order has not elapsed;

(f) an order withdrawing or refusing to grant any license / approval to the applicant or the intermediary, or its whole time director or managing partner which has a bearing on the capital market, has been passed by the Board or any other regulatory authority and a period of three years from the date of the order has not elapsed;

***Provided** that the Board may for reasons to be recorded in writing, allow the applicant or the intermediary, to seek registration before the lapse of three years as specified in clauses (d), (e) and (f).*

(g)the applicant or the intermediary, is financially not sound;

(h)any other reason, to be recorded in writing by the Board, which in the opinion of the Board, renders such applicant or the intermediary, or its whole time director or managing partner unfit to operate in the capital market.

24. On an analysis of Regulation 3, it emerges that Regulation 3(1) had provided for 6 criteria to be kept in mind while considering whether a person related to the securities market is a fit and proper person. These criteria were financial integrity, absence of convictions or civil liabilities, competence, good reputation and character, efficiency and honesty, and the absence of any disqualification to act as an intermediary. As mentioned above, these criteria have now been incorporated in the Intermediaries Regulations. The Regulations of 2004, however, additionally, also prescribed certain mandatory disqualifications which would render an

entity unfit for the purpose of grant or renewal of a certificate to act as an intermediary or to continue to act as an intermediary.

25. It is pertinent to note that Regulation 3(2)(d), however, particularly excluded certain orders from the ambit of the Regulations of 2004 with the result that the orders mentioned in the same would not incur the disqualification of being declared unfit. These excluded orders were as follows:

- Suspension of the certificate of registration as an intermediary; or
- Restraining the applicant or the intermediary from dealing in the securities market or accessing the securities market; or
- Prohibiting the applicant or the intermediary from dealing in the securities market or accessing the securities market; or
- Debarring the applicant or the intermediary from dealing in the securities market or accessing the securities market.

26. The case of the Appellant would have been squarely covered within the four corners of the very first excluded order being the suspension of the certificate of registration as an intermediary, and by virtue of this exclusion, the appellant could not have been declared unfit thus, if the Regulations of 2004 had been in force when the order against the Appellant had been passed, the Appellant would've been excluded from being considered as unfit in accordance with Regulation 3(2)(d).

27. Therefore, the intention of the law-maker with respect to the criteria for fit and proper persons can be traced back to the Regulations of 2004 wherein certain orders, with respect to entities whose wrongdoings or lapses in judgment were condonable, were deliberately kept out of the

purview of the said regulations. From an analysis of the scheme of the Regulations of 2004 it is borne out that the underlying philosophy of the regulations was to ensure that trespasses of a serious nature would not go unpunished and that undesirable elements would be kept out of the securities market. This is evident from the wrongdoings that were considered to be mandatory disqualifications under the Regulations of 2004. On an examination of the eight events which necessarily disqualified a person from being a fit and proper person, we note that these were instances of moral turpitude, securities law fraud, insolvency, indulgence in unfair trade practices, insider trading etc. In other words, offences which were considered to be particularly serious and injurious to the growth of a healthy capital market and hence undeserving of any opportunity of redemption to be given to the committer of these grave infringements. Furthermore, while listing down these mandatory disqualifications, the suspension of the intermediary's registration certificate was particularly excluded from the purview of the Regulations of 2004 because it was rightly recognized by SEBI that such trivial wrongdoings did not warrant such a heavy penalty as being declared unfit under the Intermediaries Regulations.

28. We now turn our attention to the Intermediaries Regulations, Schedule II of which currently incorporates the criteria for a fit and proper person. At first glance, it emerges that the words used in the Schedule are *"the Board may"* which have the effect of leaving the criteria to be employed by SEBI at its discretion. The disqualifications have been deleted in their entirety. Schedule II only retains the six criteria, among others, to be kept in mind while determining the criterion of fit and proper. These criteria are not exhaustive in nature and SEBI is free to have resort to other

criteria it might deem fit depending on the facts and circumstances of a given case. The way the criteria have been listed in Schedule II of the Intermediaries Regulations, it is evident that in fact these criteria were all considered to be equally important. The Regulations are silent regarding the process to be followed when five out of six criteria are duly met by the intermediary, as in this case. The Appellant's conduct, as is clear from the facts of the matter at hand, has not been fraudulent or dishonest or unfair in any manner. In the last 10 ten years of the functioning of the Appellant, it has come out with around 120 public offerings without any complaint from any investor or SEBI for that matter. Its conduct so far has been exemplary, barring the IPOs of the two Issuer Companies alone wherein the MB failed to examine the bank statements of the two entities and fell prey to their clandestine scheme of working. It is, in fact, correct to say that the first five criteria provided under Schedule II of the ICDR viz .*financial integrity; absence of convictions or civil liabilities; competence; good reputation and character; efficiency and honesty* have been consistently fulfilled by the Appellant in all other cases. Although, we have quashed the remainder of the punishment imposed vide Impugned Orders dated March 3, 2014 and March 21, 2014 in Appeal Nos. 275 of 2014 and 129 of 2014 respectively, by partially upholding the aforesaid orders, we are not inclined to uphold the decision impugned in the present appeals, because, the orders dated March 3, 2014 and March 21, 2014 were passed on the footing that after undergoing the penalty imposed therein the appellant would be entitled to carry on business as usual. In our orders passed in Appeal Nos. 275 and 129 of 2014, the punishment imposed vide Impugned Orders dated March 21, 2014 and March 3, 2014 we have held that the penalty imposed is

excessive and the penalty already undergone is far in excess and disproportionate to the violation committed by the appellant.

29. We, therefore, find in the facts of present case that, the fact that the restraint order passed against the appellant has been upheld cannot be a ground to hold that the appellant is not a fit and proper person to seek renewal of registration as a Merchant Banker. It is not the case of SEBI that in every case where a restraint order is passed against any person, that person must be held to be not a fit and proper person. In fact counsel for the appellant brought to our notice following decisions of SEBI wherein, inspite of the restraint order passed against a person, that person has not been held to be not a fit and proper person. The said decisions are as follows :-

A. In the case of Enam Securities Pvt. Ltd. by order dated 31st December 2010, SEBI found the MB guilty of non-disclosure of complete information in the offer documents inasmuchas the MB failed to make disclosure of various entities as promoters by exercising reasonable due diligence. Similarly, the MB failed to perform his duties in the matter of post-issue aspects as lead manager. Enam Securities was, therefore, found guilty of having violated Regulation 13 of SEBI (Merchant Bankers) Regulations, 1992 and clauses 5.1, 5.1.1, 5.1.2, 5.3.3, 7.3, 7.4.1, 7.7.7, 11.2(xxiii), 11.3.6(ii), 16.2.2.2 of erstwhile SEBI (DIP) Guidelines, 2000 issued under SEBI Act, 1992. Neither any prohibition was imposed on Enam for mis-handling the IPOs by failing to conduct proper due diligence nor was it declared unfit and improper person for continuance as permanent MB and only monetary penalty of ₹ 25 lac was imposed on MB.

AA. Enam Securities, however, appeal said against order of SEBI for imposing monetary penalty of ₹ 25 lac the Tribunal did not find the appellant guilty of violating regulatory framework as alleged by SEBI and allowed the appeal preferred by Enam Securities by setting aside the impugned order dated 31st December 2010 passed by SEBI.

B. In the case of J M Financial Consultants Pvt. Ltd. SEBI by its order dated 25th August 2009 accused the MB of violating various regulatory norms observed during the inspection conducted by SEBI. Violation of Regulation 13 of SEBI (Merchant Bankers) Regulations, 1992 and various clauses of SEBI (Disclosure and Investor Protection) Guidelines, 2000 were alleged to have been committed by the J. M. Financial Consultants Pvt. Ltd. by the inspection team for the period April 2003 to August 2005. SEBI did not proceed in this matter anymore and settled the same on J. M. Financial Consultants Pvt. Ltd. remitting a sum of ₹ 4 lac in favour of SEBI by way of consent mechanism. The adjudication proceedings initiated against J. P. Financial Consultants Pvt. Ltd. (formerly known as JM Morgan Stanley Pvt. Ltd.) were accordingly disposed off.

C. In the case of Edelweiss Capital Ltd., the MB was charged of failure to exercise due diligence by not adopting independent professional judgments in verifying the records / visiting the places of issuer company, not providing the correct information and / or misleading information in the offer document, failed to supervise the activities of Syndicate Member Registrars, etc. by

order dated 11th May 2011. The MB was accused of committing Clause 4, 6 , 7 of Code of Conduct as stipulated in Regulation 13 of MB Regulations; SEBI Circular dated 27th April, 2008; Clauses 5.1.1, 5.1.2, 5.4.3.1, 7.3.1, 7.4.1, 7.7.7 and 16.2.2.2 of erstwhile DIP Regulations and Regulation 18(2) of SAST Regulations. This matter was also resolved by SEBI preferring settlement of ₹ 15 lac inspite of any other harsh / harsher action against the Eddelweiss. The proposal of Eddelweiss was settled by way of consent accepted by SEBI. In fact it is pertinent to note that the present appellant, namely, Almondz has also preferred an application for consent mechanism which was declared by SEBI for unknown reasons.

D. In the case of Kotak Mahindra Capital Co. Ltd., SEBI by its order dated 27th August, 2009 held that the MB had failed to exercise due diligence while handling various IPOs and lapses found by SEBI in their inspection. The MB was accused of violating provisions of Regulation 13 read with Schedule III of SEBI (Merchant Bankers) Regulations, 1992 and Clauses 5.1, 5.3.3.1, 6.9.2.1, 11.3.6, 7.3, 7.4.1, 7.7.7, 16.2.2.2 of erstwhile (DIP) Guidelines, 2000. The proposal of Kotak Mahindra Capital Co. Ltd. was settled by way of consent order and SEBI had accepted ₹ 5.50 lac as penalty.

E. In the matter of DSP Merrill Lynch Limited, various lapses had been noted by SEBI while conducting their inspection. SEBI had accused the MB in question of not exercising due diligence with respect to disclosures in the offer documents in relation to allocation of shares to Qualified Institutional Buyers, and

failing to act professionally and diligently as post-issue lead manager. No prohibition was imposed on the MB, on the contrary vide consent order dated January 12, 2010 the matter was settled on payment of ₹ 30.50 lakh as penalty by the MB.

F. In the matter of Keynote Corporate Services Ltd., the Adjudicating Officer imposed a mere penalty of ₹ 10 lakh vide order dated January 31, 2012, even in view violation of SEBI (DIP) Guidelines, 2000 read with Regulation 111 of the ICDR Regulations. The MB was accused of failing to note the suspicious routing of funds by Edsery Softsystems Ltd. and undertaking ICD transactions.

FF. Once again in case of Keynote Corporate Services Ltd., it was accused of violating several clauses of the DIP Guidelines along with the Code of Conduct as enshrined under Regulation 13 of the MB Regulations. Allegations leveled against the MB this time around were the lace of due diligence pertaining to adequate disclosures, failure to act professionally and further, failure in the commission of duties as post-issue lead manager. The matter was settled vide consent order dated April 9, 2009 on payment of a penalty of ₹ 1 lakh by the MB.

G. In PNB Investment Services Limited, the MB had failed to disclose ICD transactions in the offer documents alongwith making certain incorrect disclosures. Several regulations of the ICDR Regulations were alleged to be violated. While the DA recommended the suspension of the certificate of registration of the MB for 6 months, the WTM ultimately exonerated the MB vide order dated August 5, 2014.

30. As noted above, the punishment imposed by SEBI in similar cases range from just a warning or token punishment for a day to the imposition of a fine of ₹ 1 crore. Further, in cases where there are repeated offences, registration has been denied. However, in the facts of the present case, since the fault of the Appellant is limited in as much as the Appellant has relied upon the Statutory Auditor's reports and the statements issued by the two Issuer Companies, instead of looking into the banks statement, by no stretch of imagination can it be said that the Appellant is not a fit and proper person for carrying on business as a Merchant Banker.

31. To sum up, the appellant has been subjected to numerous proceedings, under various Regulations and consequent different punishments for the same charge of lack of due diligence in respect of the two IPOs pertaining to the two issuer companies almost during the same period. These punishments are :-

- 5 years in case of the IPOs of PGEL under the ICDR Regulations read with the MB Regulations by order dated March 21, 2014.
- 5 years in case of the IPOs of BGIL under the ICDR Regulations read with the MB Regulations by order dated March 3, 2014.
- 2 years under the Intermediaries Regulations by order dated March 20, 2015.
- Suspension of the registration as MB for a period of 6 months by order dated April 11, 2014.

- Rejection of request for continuance as MB under the Intermediaries Regulations vide order dated January 20, 2015 on the basis of it allegedly not being fit and proper.
- SCN dated January 7, 2015 seeking cancellation of the appellant's registration even from the Membership of the Stock Exchanges and as Depository Participant.

32. No rationale is brought on record by the respondent to justify the multiple punishments sought to be imposed on the appellant almost on similar sets of facts in preparing and presenting the offer document to the concerned authorities in respect of the two IPOs pertaining to the two companies in question. Although the respondent is empowered to take action under different provisions of law / regulations against any particular entity but such actions in imposing multiple punishments must be supported by reasons to be recorded by the respondent before embarking upon such a path, especially when the cause of action remains the same. No cogent or convincing reasons are forthcoming from the pleadings and documents brought on record by the respondent. Similarly, the object sought to be achieved by such a plurality of actions remains totally obscure. In addition, as earlier noted, there is no consistency in imposing different punishments on the same entity in an indiscriminate manner for the same violation. Therefore, we are of the considered view that the present Impugned Order cannot be sustained in law.

33. We shall now deal with cases cited by SEBI in support of its submission that the Appellant is not a fit and proper person. **Aryaman Financial Services Ltd**., holding a category 1 MB registration, applied for registration as debenture trustee as per Regulation 3 of the SEBI

(Debenture Trustees) Regulations, 1993. Vide order dated September 20, 2002, the WTM, while citing several instances wherein Aryaman had failed to exercise due diligence while managing issues and also submitted incorrect information in the declaration furnished to SEBI along with offer documents of the issuing companies such as Rich Paints Ltd., Tabassum International Ltd., Shine Computech Ltd., Gurukul Technologies Ltd., to name a few issuing companies, held that Aryaman had an unsatisfactory track record as MB in exercising proper due diligence. Therefore, Aryaman's application was rejected. This case is therefore different from the Appellant's, since Aryaman **had acted unsatisfactorily as an MB on a number of occasions and had failed to meet the criterion of being a fit and proper person** repeatedly.

34. We now come to the case of **Parsoli Corporation Limited**, a stock broker with NSE and BSE, and also a depositary participant of CDSL. Parsoli was found to have fraudulently transferred and dematerialized **fake shares** in favour of its promoter/front entities. Several orders were passed against Parsoli and its directors. It is pertinent to note that 80,800 fake share certificates were issued by Parsoli, signatures of genuine investors were forged on transfer documents, fraudulent transfer and dematerialization of those fake share certificates was approved in favour of 22 promoter / front entities, resulting in blatant violation of Regulations 3 and 4 of the PFUTP Regulations. Therefore, order dated July 27, 2010 restrained Parsoli from accessing the securities market in any manner for a period of seven years. A monetary penalty of ₹ 4.05 crore was further imposed upon Parsoli. Consequently, its application to be registered as an MB was rejected by SEBI, and rightly so. Moreover, in 2013, Parsoli was declared to have not fulfilled the criterion of fit and proper and was not fit

to act as a market intermediary as per the Intermediary Regulations. This case was one of flagrant violations wherein regulations were flouted with impunity. This case cannot be compared to an oversight of the Appellant of not analysing the bank statements of the two Issuer Companies. These two cases stand on two very different footings.

35. We now deal with the only instance brought on record wherein an erstwhile MB has been declared to not have satisfied the criterion of fit and proper person. **Altius Finserv Private Limited** was appointed as an MB by SEBI on June 10, 2010. Mr. Pawan Bansal, the Managing Director of Altius was also its KMP. The CBI filed an FIR against Mr. Basal on August 1, 2014 and subsequently arrested him regarding the sanction of External Commercial Borrowings by Syndicate Bank for Prakash Industries, in relation to which Mr. Bansal was a named intermediary. The CBI levelled accusations against the employees of Syndicate Bank which had allegedly sanctioned the ECBs with a few procedural irregularities. Mr. Bansal was released from judicial custody on October 1, 2014 on bail. Vide order dated March 17, 2016, SEBI held that Mr. Bansal had failed to fulfill the criterion of fit and proper person as per the MB Regulations read with the Intermediaries Regulations. It is pertinently noted that before he was declared to be unfit, Mr. Bansal had already surrendered his MB registration certificate to SEBI vide letter dated October 14, 2014, almost a year and a half before he was declared unfit. Further, no allegation as contained in the FIR has been proved against Mr. Bansal as yet. Be that as it may, this case cannot be compared with that of the Appellant since there is no allegation of any criminal activity associated with the Appellant.

36. In the case of **Sahara Asset Management Company Pvt. Ltd.** (Sahara AMC), the company was granted Portfolio Manager registration which was valid till October 15, 2012. On consideration of their application for renewal of the registration, SEBI informed Sahara AMC that it was not a fit and proper person as per the Portfolio Managers Regulations read with the Intermediary Regulations and hence was not eligible for renewal. This conclusion was arrived at by SEBI owing to the egregious conduct of Mr. Subroto Roy Sahara who is even today under judicial custody due to wrongdoings committed through his companies, namely, Sahara Commodity Services Corporation Limited and Sahara Housing Investment Corporation Limited. Two criminal complaints were also filed by SEBI against the companies and their directors / promoters. These companies were directed by SEBI to refund the money collected from subscribers of Optionally Fully Convertible Debentures with interest at 15% p.a. from the date of receipt of money till the date of repayment. Further, Mr. Subroto Roy Sahara was restrained from associating himself with any listed public company and any public company intending to raise money from the public till the time of such repayment. The Sahara Group was forbidden from alienating any property; and all its bank accounts, including those of its promoters / directors were frozen. In this case as well, the conduct attributed to Mr. Subroto Roy cannot be equated with that of the Appellants at any level, doing so would be a monumental folly.

37. Grishma Securities Pvt. Ltd. (Grishma) was a stockbroker registered with SEBI. In 2011, Grishma facilitated one of its clients in indulging into trades worth ₹ 60 crore on the first day of the opening of the IPO of Tijaria Polypipes. However, no margin was collected for such trading, which exposed the entire market to risk. Vide order dated July 31, 2013, Grishma

was restrained from dealing in the securities market in any manner for a period of five years. This Tribunal, while elucidating upon the prodigious oversight on the part of Grishma, upheld SEBI's order and concurred with SEBI's finding that Grishma had violated the SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003. As a result when Grishma applied for registration as a Depositary Participant, its application was rejected by SEBI.

38. At this stage, we must analyse the concept of discretion conferred upon the Respondent. It goes without saying that wider the discretion, the greater the responsibility to act judiciously. By and enlarge, there is no consistency in the orders passed by SEBI where restraint orders have been passed against entities who are found to have violated Regulations framed by SEBI. This is plainly an unjust and unfair approach whereby rules of law to be applied depend upon the person who is being charged of a certain wrong. Such an approach indubitably leads to the miscarriage of justice. It is not inapposite to say that there is always a certain level of duty attached to administrative discretion viz. the duty to act in a fair and reasonable manner. In fact, such a duty is not nebulous in nature at all, but on the other hand quite distinct and demands to be adhered to and taken seriously. When discretion is granted to a governmental authority, it is vested alongside a monumental obligation to be responsible and true to the spirit of the statute or legal provision the authority strives to implement. In this case, SEBI is trying to ensure the implementation of Schedule II of the Intermediaries Regulation which spells out the criteria to be satisfied before a person can be deemed to be a fit and proper person. As stated above, to say that a person does not fulfill these criteria, SEBI must be absolutely certain that by not doing so, irreparable harm would be caused to the

securities market for the simple reason that this punishment of being declared unfit is the ultimate punishment that can be imposed upon an intermediary. Therefore, this weapon in SEBI's arsenal must be wielded sparingly only in cases of repeated offences committed with impunity by intermediaries.

39. In such a situation we need to look at the true rationale behind the imposition of punishments on companies. In our considered opinion, SEBI's aim in imposing punishments upon companies should be to make companies law-compliant so as to ensure that the interests of the securities market are secured. SEBI should not view punishments from a perspective of thinning the herd, rather it should help in fostering a healthy environment where intermediaries act cautiously and responsibly under the overall supervision of the market regulator. The punishment should not only be reasonable but must fit the violation or breach of law for which the entity is sought to be penalized. It is true that neither can a straitjacket formula be prescribed nor can a general pattern of reasonableness be laid down to be invariably applied in all cases. A certain degree of subjectivity is involved in the process of imposition of punishments on different persons depending upon the facts and circumstances of a case. At the same time, in its will to punish a person for a violation, an authority cannot lose sight of the principle of proportionality. In the famous case of **E.P. Royappa vs. Tamil Nadu quoted in [1974 (4) SCC 3],** it has been observed by the Hon'ble Supreme Court that in case an authority acts in an arbitrary manner, Article 14 of the Constitution of India would be attracted even in the matter of imposition of excessive punishment in departmental proceedings. In E.P. Royappa, the Hon'ble Supreme Court equated the doctrine of proportionality with the Wednesbury principle of

reasonableness. Similarly, in the case of **Teri Oat Estates (P. Ltd.) reported in [2004 (2) SCC 130],** Hon'ble Supreme Court has particularly observed in paragraph no. 49 as under:

> "49. Ever since 1952, the principle of proportionality has been applied vigorously to legislative and administrative action in India. While dealing with the validity of legislation infringing fundamental freedoms enumerated in Article 19(1) of the Constitution of India, this Court had occasion to consider whether the restrictions imposed by legislation were disproportionate to the situation and were not the least restrictive of the choices. In cases where such legislation is made and the restrictions are reasonable; yet, if the statute concerned permitted administrative authorities to exercise power or discretion while imposing restrictions in individual situations, question frequently arises whether a wrong choice is made by the administrator for imposing the restriction or whether the administrator has not properly balanced the fundamental right and the need for the restriction or whether he has imposed the least of the restrictions or the reasonable quantum of restrictions etc. In such cases, the administrative action in our country has to be tested on the principle of proportionality, just as it is done in the case of main legislation. This, in fact, is being done by the courts. Administrative action in India affecting the fundamental freedom has always been tested on the anvil of the proportionality in the last 50 years even though it has not been expressly stated that the principle that is applied is the proportionality principle."

40. Furthermore, the Hon'ble Supreme Court elaborated upon the exact import of the doctrine of proportionality by holding in paragraph 46 as follows:

> "46. By proportionality, it is meant that the question whether while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the legislature and the administrative authority. "maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of person keeping in mind the purpose which they were intended to serve."

41. Therefore, it is indeed saddening to note that there is no consistency in the orders passed by SEBI in terms of the punishment imposed upon Merchant Bankers for their misconduct. The punishments range from just a warning or token punishment for a day to the imposition of a fine of ₹ 1 crore. Further, in cases where there are repeated offences, registration has been denied. However, in the facts of the present case, since the fault of the Appellant is limited in as much as the Appellant has relied upon the Statutory Auditor's reports and the statements issued by the two Issuer Companies, instead of looking into the banks statement, by no stretch of the imagination can it be said that the Appellant is not a fit and proper person for carrying on business as a Merchant Banker.

42. The Impugned Order in Appeal No. 222 of 2015 is quashed and set aside. The Appeal, thus, stands allowed. Accordingly, MA No. 117/2015 in Appeal No. 129/2014 to stay Impugned Order dated March 3, 2014; MA No. 118/2015 in Appeal No. 187/2014 to stay Impugned Order dated April 11, 2014; and MA No. 130/2015 in Appeal No. 275/2015 to stay the Impugned Order dated March 21, 2014 stand disposed of in terms of this Order. Further, MA No. 163/2015 in Appeal No. 222/2015 for condonation of delay and finally, MA No. 165/2015 in Appeal No. 300/2014 to amend the Appeal are disposed of accordingly. No order as to costs.

Sd/-
Justice J. P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

13.05.2016
Prepared & Compared
PTM