BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

**Order Reserved On: 17.10.2022**
**Date of Decision : 01.11.2022**

**Appeal No. 283 of 2022**

V. Shankar
C/o. Mahish Ghia & Associates,
Company Secretaries,
4 Chandan Niwas (Old),
Sir M V Road, Andheri (East),
Mumbai- 400 069 …Appellant

Versus

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

Mr. Somsekhar Sundaresan, Advocate with Mr. Joby Mathew, Mr. Abhishek Venkatraman, Ms. Tanya Gupta, Ms. Nitiksha Parmar and Mr. Krishnakant Deshmukh, Advocates i/b Joby Mathew and Associates for the Appellant.

Mr. Suraj Choudhary, Advocate with Mr. Abhiraj Arora and Mr. Shourya Tanay, Advocates i/b ELP for the Respondent.

CORAM: Justice Tarun Agarwala, Presiding Officer
Ms. Meera Swarup, Technical Member

Per: Justice Tarun Agarwala, Presiding Officer

1. The present appeal has been filed against the order dated March 22, 2022 passed by the Adjudicating Officer ("AO" for convenience) of the Securities and Exchange Board of India

("SEBI" for convenience) imposing a penalty of Rs. 10 lakhs upon the appellant under Section 15HA of the SEBI Act for violation of Section 68 and 77A of the Companies Act, 1956.

2. The facts leading to the filing of the present appeal is, that SEBI conducted an investigation in the scrip of Deccan Chronicle Holdings Ltd., ("DCHL" for convenience) in order to ascertain whether the promoters of the company and its directors had made any fraudulent pledging of the shares of the company and whether the adequate disclosures had been made in accordance with the provisions of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("SAST Regulations" for convenience) during the period October 2011 to December 2012. The investigation revealed several irregularities committed by the company which led to the issuance of the show cause notice. The show cause notice alleged that the company had understated outstanding loans and interest in finance charges etc. in the annual report for financial year 2008-2009, 2009-2010 and 2010-2011 and that the company had carried out buyback of the shares without having adequate free reserves which misled the investors. Further allegations were that the company failed to disclose to the stock exchanges material price sensitive information on the date of

entering into an agreement with Deccan Chronicle Marketers ("DCM") and gave misleading financial information and overstated profits in their annual reports. Charge was also failure to appoint Company Secretary and failure to disclose related party transactions and understatement of outstanding loans and interest and finance charges etc.

3. In so far as the charge against the appellant is concerned, the specific charge is that the company understated outstanding loans and interest and finance charges in the annual report for the year 2008-2009, 2009-2010 and 2010-2011 and being a signatory to the public announcement made by the company on May 06, 2011 for buyback of its equity shares without having adequate free reserves have misled investors/ shareholders, and consequently violated Section 68 and 77A of the Companies Act.

4. The AO, after considering the material evidence on record, came to the conclusion that the company/ promoters and directors knowingly and consciously contributed in dissemination of wrong, factually incorrect, understated and distorted information relating to the annual financial statements of the company to the public in their annual reports. The AO

further found that the company carried out buyback of its equity shares which were more than 25% of the total paid up capital limit during the financial year 2011-2012 without having adequate free reserves and consequently misled the investors / shareholders about the perceived valuation and strong financials and free reserves of the company and thereby violated Section 77A of the Companies Act. The AO found that the company had artificially inflated profits to the shareholders when there was actually a loss.

5. The AO therefore concluded that the company and its directors and promoters had violated Section 68 and 77A of the Companies Act read with Regulations 3 and 4 of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 ("PFUTP Regulations" for convenience) and Section 12A of the SEBI Act.

6. With regard to the appellant, the AO found that the appellant was acting as the Company Secretary when the buyback offer was made by the company. The AO further found that the appellant had ascribed his signatures on the public announcement for buyback in his capacity as a Company Secretary. The AO held that the appellant should have

exercised utmost due diligence and checked the veracity of the buyback offer document and its legal compliances before authenticating such a document and signing the aforesaid documents which apparently violated the provisions of the Companies Act. The AO held that since the appellant was responsible as the Company Secretary of the company for signing the public announcement made by the company on May 06, 2011 for buyback of its equity shares the appellant is equally liable for violation of Section 68 and 77A of the Companies Act read with Regulations 3 and 4 of the PFUTP Regulations and Section 12A of the SEBI Act along with the company and its directors.

7. We have heard Shri Somsekhar Sundaresan, the learned counsel for the appellant and Shri Suraj Choudhary, the learned counsel for the respondent.

8. Before we proceed, it would be appropriate to refer to the provisions of Section 68 and 77A of the Companies Act, which are extracted hereunder:-

> *"Penalty for fraudulently inducing persons to invest money.*

***68.*** *Any person who, either by knowingly or recklessly making any statement, promise or forecast which is false, deceptive or misleading, or by any dishonest concealment of material facts, induces or attempts to induce another person to enter into, or to offer to enter into-*

*(a) any agreement for, or with a view to, acquiring, disposing of, subscribing for, or underwriting shares or debentures; or*

*(b) any agreement the purpose or pretended purpose of which is to secure a profit to any of the parties from the yield of shares or debentures, or by reference to fluctuations in the value of shares or debentures;*

*shall be punishable with imprisonment for a term which may extend to five years, or with fine which may extend to one lakh rupees, or with both.*

***"Power of company to purchase its own securities***

*77A. (1) Notwithstanding anything contained in this Act, but subject to the provisions of sub-section (2) of this section and section 77B, a company may purchase its own shares or other specified securities (hereinafter referred to as "buy-back")out of-*

*(i) its free reserves; or*
*(ii) the securities premium account; or*
*(iii) the proceeds of any shares or other specified securities.*

***Provided*** *that no buy-back of any kind of shares or other specified securities shall be made out of the proceeds of an earlier issue of the same kind of shares or same kind of other specified securities.*

*(2) No company shall purchase its own shares or other specified securities under sub-section (1), unless-*

*(a) the buy-back is authorised by its articles;*

*(b) a special resolution has been passed in general meeting of the company authorising the buy-back:*

***Provided*** *that nothing contained in this clause shall apply in any case where-*

*(A) the buy-back is or less than ten per cent, of the total paid-up equity capital and free reserves of the company; and*
*(B) such buy-back has been authorised by the Board by means of a resolution passed at its meeting:*

***Provided further*** *that no offer of buy-back shall be made within a period of three hundred and sixty-five days recokned from the date of the preceding offer of buy-back, if any.*

*Explanation.-For the purposes of this clause, the expression "offer of buy-back" means the offer of such buy-back made in pursuance of the resolution of the Board referred to in the first proviso;]*

*(c) the buy-back is or less than twenty-five per cent of the total paid-up capital and free reserves of the company:*

***Provided*** *that the buy-back of equity shares in any financial year shall not exceed twenty-five per cent of its total paid-up equity capital in that financial year;*

*(d) the ratio of the debt owed by the company is not more than twice the capital and its free reserves after such buy-back:*

***Provided*** *that the Central Government may prescribe a higher ratio of the debt than that specified under this clause for a class or classes of companies.*

*Explanation.-For the purposes of this clause, the expression "debt" includes all amounts of unsecured and secured debts;*

*(e) all the shares or other specified securities for buy-back are fully paid-up;*

*(f) the buy-back of the shares or other specified securities listed on any recognised stock exchange is in accordance with the regulations made by the Securities and Exchange Board of India in this behalf;*

*(g) the buy-back in respect of shares or other specified securities other than those specified in clause (f) is in accordance with the guidelines as may be prescribed.*

*(3) The notice of the meeting at which special resolution is proposed to be passed shall be accompanied by an explanatory statement stating-*

*(a) a full and complete disclosure of all material facts;-.*

*(b) the necessity for the buy-back;*

*(c) the class of security intended to be purchased under the buy-back;*

*(d) the amount to be invested under the buy-back; and*

*(e) the time limit for completion of buy-back.*

*(4) Every buy-back shall be completed within twelve months from the date of passing the special resolution [or a resolution passed by the Board] under clause (b) of sub-section (2).*

*(5) The buy-back under sub-section (1) may be-*

*(a) from the existing security holders on a proportionate basis; or*

*(b) from the open market; or*

*(c) from odd lots, that is to say, where the lot of securities of a public company, whose shares are listed on a recognised stock exchange, is smaller than such marketable lot, as may be specified by the stock exchange; or*

*(d) by purchasing the securities issued to employees of the company pursuant to a scheme of stock option or sweat equity.*

*(6) Where a company has passed a special resolution under clause (b) of sub-section (2) [or the Board has passed a resolution under the first proviso to clause (b) of that sub-section] to buy-back its own shares or other securities under this section, it shall, before making such buy-back, file with the Registrar and the Securities and Exchange Board of India a declaration of solvency in the form as may be prescribed and verified by an affidavit to the effect that the Board has made a full inquiry into the affairs of the company as a result of which they have formed an opinion that it is capable of meeting its liabilities and will not be rendered insolvent within a period of one year of the date of declaration adopted by the Board, and signed by at least two directors of the company, one of whom shall be the managing director, if any:*

***Provided*** *that no declaration of solvency shall be filed with the Securities and Exchange Board of India by a company whose shares are not listed on any recognised stock exchange.*

*(7) Where a company buy-back its own securities, it*

*shall extinguish and physically destroy the securities so bought-back within seven days of the last date of completion of buy-back.*

*(8) Where a company completes a buy-back of its shares or other specified securities under this section, it shall not make further issue of the same kind of shares (including allotment of further shares under clause (a) of sub-section (1) of section 81) or other specified securities within a period of [six] months except by way of bonus issue or in the discharge of subsisting obligations such as conversion of warrants, stock option schemes, sweat equity or conversion of preference shares or debentures into equity shares.*

*(9) Where a company buy-back its securities under this section, it shall maintain a register of the securities so bought, the consideration paid for the securities bought-back, the date of cancellation of securities, the date of extinguishing and physically destroying of securities and such other particulars as may be prescribed.*

*(10) A company shall, after the completion of the buy-back under this section, file with the Registrar and the Securities and Exchange Board of India, a return containing such particulars relating to the buy-back within thirty days of such completion, as may be prescribed:*

***Provided** that no return shall be filed with the Securities and Exchange Board of India by a company whose shares are not listed on any recognised stock exchange.*

*(11) If a company makes default in complying with the provisions of this section or any rules made thereunder, or any regulations made under clause (f) of sub-section (2), the company or any officer of the company who is in default shall be punishable*

*with imprisonment for a term which may extend to two years, or with fine which may extend to fifty thousand rupees, or with both.*

*Explanation.-For the purposes of this section,-*

*(a) "specified securities" includes employees' stock option or other securities as may be notified by the Central Government from time to time;*

*(b) "free reserves" shall have the meaning assigned to it in clause (b) of Explanation to section 372A."*

9. Section 68 provides that where any person knowingly or recklessly makes a statement which is false, deceptive or misleading he would be punishable with imprisonment for a term which may extend to five years or with fine or both. Section 77A provides that a company may purchase its own shares provided the buyback is authorised by its articles and that a special resolution is passed in a general meeting of the company authorising the buyback. Clause 6 provides, that where the company has passed a special resolution or where the Board has passed a resolution to buyback its shares it shall, before making such buyback, file it with the Registrar and SEBI a declaration of solvency in the forms as may be prescribed and verified by an affidavit. Clause 11 provides that if a company makes default in complying with the provision of Section 77 or any rules made under the company or any officer of the

company who is in default shall be punishable with imprisonment or fine or both.

10. The question which arises for consideration is, whether the appellant who was the Company Secretary had induced others knowingly or recklessly by signing the public announcement or had committed a default under Section 77A and therefore was liable for the penalty imposed by the AO.

11. In this regard, Section 215 of the Companies Act provides as under:-

> *"**215**. Authentication of balance sheet and profit and loss account.*
>
> *(1) Save as provided by sub- section (2), every balance sheet and every profit and loss account of a company shall be signed on behalf of the Board of directors-*
>
> *(i) in the case of a banking company, by the persons specified in clause (a) or clause (b), as the case may be, of sub-section (2) of section 29 of the Banking Companies Act, 1949 (10 of 1949);*
>
> *(ii) in the case of any other company, by its, manager or secretary, if any, and by not less than two directors of the company one of whom shall be a managing director where there is one.*
>
> *(2) In the case of a company not being a banking company, when only one of its directors is for the time being in India, the balance sheet and the*

> *profit and loss account shall be signed by such director; but in such a case there shall be attached to the balance sheet and the profit and loss account a statement signed by him explaining the reason for non-compliance with the provisions of subsection (1).*
>
> *(3) The balance sheet and the profit and loss account shall be approved by the Board of directors before they are signed on behalf of the Board in accordance with the provisions of this section and before they are submitted to the auditors for their report thereon.*

12. Clause 1 provides that every balance sheet has to be signed on behalf of the Board of Directors by a Manager or Secretary and not less than two directors of the company, one of whom shall be the Managing Director. Clause 3 of Section 215 provides, that the balance sheet and profit and loss account shall be approved by the Board of Directors before they are signed on behalf of the Board.

13. Thus, a perusal of Section 215 clearly indicates that there is a fiduciary responsibility upon the Board of Directors of the Company to verify the contents of the balance sheet before approving it. Once the balance sheet and the profit and loss is approved by the Board of Directors then the ministerial task falls upon the secretary and two of the directors to sign the balance sheet under Clause (1) of Section 215.

14. The finding given by the AO that one of the duties and responsibilities entrusted upon the appellant as a Company Secretary is that he should have exercised utmost due diligence and should have checked the veracity of the buyback offer document before authenticating such document. In our opinion, this finding is totally perverse. Once the offer document and the balance sheet is approved by the Board of Directors the Company Secretary, as part of his duty and responsibility, is only to authenticate the contents indicated in the balance sheet or in the offer document and is not required to go into the veracity of the buyback offer document and its legal compliances before authenticating such document. Such duty is not part of the responsibility of the appellant as a Company Secretary.

15. We are further of the opinion, that the company is run and managed by its Board of Directors. The AO has found that the Board of Directors were involved in the understatement of the financial in the annual report and in the offer document relating to buyback. It is these Board of Directors who had violated Section 68 knowingly and recklessly inducing investors by inflating the profits of the company. The appellant as a Company Secretary had no role to play except comply with the

resolution made by the Board of Directors. The appellant was nowhere responsible for the false or misleading open offer made by the company and therefore cannot be made guilty of Section 68 of the Companies Act.

16. For the same reason, the company has made a default in complying with the provisions of Section 77 and therefore it is the Board of Directors who are responsible for the default. Merely because the appellant as a Company Secretary is also an officer in default under Section 5 of the Companies Act does not automatically make him an officer in default for non-compliance of the provisions of Section 77A of the Companies Act. A specific finding has to be given that the Company Secretary was himself responsible for compliances under Section 77A, which is missing coupled with the fact that a clear finding has been given that the directors were solely responsible for the understatement made in the balance sheet and the misleading statements made in the open offer.

17. There is another aspect Regulation 19 of the SEBI (Buy-back of Securities) Regulations, 1998 provides various obligations which is required to be carried out by the company. Regulation 19(3) provides as under:-

> ***"19(3)*** *The company shall nominate a compliance officer and investors service centre for compliance with the buy-back regulations and to redress the grievances of the investors."*

18. The aforesaid provision indicates that the company will nominate a Compliance Officer to redress the grievances of the investors. The appellant being a Company Secretary was also a Compliance Officer and thus the role of the Compliance Officer was only limited to redress the grievance to the investors.

19. In view of the aforesaid, the impugned order cannot be sustained and is quashed in so far as the appellant is concerned. The appeal is allowed.

20. This order will be digitally signed by the Private Secretary on behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Certified copy of this order is also available from the Registry on payment of usual charges.

Justice Tarun Agarwala
Presiding Officer

Ms. Meera Swarup
Technical Member

**01.11.2022**
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