N. NARAYANAN

v.

ADJUDICATING OFFICER, SEBI

(Civil Appeal Nos. 4112-4113 of 2013)

APRIL 26, 2013

[K.S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]

Securities and Exchange Board of India Act, 1992 - s.12A & s.15HA r/w s.15J - Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practice Relating to Securities Market) Regulations, 2003 - Regulation 3(b), 3(c), 3(d), 4(1), 4(2)(a), 4(2)(e), 4(2)(f), 4(2)(k), 4(2)(r) - Securities Market - Market abuse - Allegations of, against the appellant, who was promoter as well as whole time Director of the company in question - Held: Disclosure and transparency are the two pillars on which market integrity rests - Disclosure of information about companies whose securities are traded on a public market is crucial for accurate pricing of the companies' securities and also for efficient operation of the market - On facts, investors' confidence was eroded and the market was abused for personal gains and attainments - Directors of the company in question failed in their duty to exercise due care and diligence and allowed the company to fabricate figures and making false disclosures - The Directors "created artificiality" and manipulated financial results of the company resulting in price rise of the scrip of the company and then pledged their shares at artificially inflated prices to raise substantial funds from financial institutions - Clear violation of s.12A of the SEBI Act r/w Regulations 3 and 4 of the 2003 Regulations which essentially intends to preserve 'market integrity' and to prevent 'market abuse' - Conduct of appellant-Director and other Directors was fraudulent and the practices they adopted, relating to securities, were unfair, which attracted the penalty provisions contained in s.15 HA

A *r/w s.15J of the SEBI Act - SEBI rightly restrained the appellant-Director for two years from buying, selling or dealing with any securities, in any manner, or accessing the securities market, directly or indirectly and from being Director of any listed company - Adjudicating officer rightly imposed penalty* B *of Rs.50 lakhs u/s.15HA of the SEBI Act - Maxims - acta exteriora indicant interiora secreta" (meaning external actions reveals inner secrets).*

Company Law - Listed companies - Corporate Governance and Directors -Obligations of the Directors - C *Held: Obligations of the Directors in listed companies are particularly onerous - Over-riding obligation of the Directors to approve the accounts only if they are satisfied that they give true and fair view of the profits or loss for the relevant period and the correct financial position of the company.*

D

Company Law - Disclosure and Transparency - Requirement of - Held: The Companies Act casts an obligation on the company registered under the Companies Act to keep the Books of accounts to achieve transparency - E *Disclosure of information about the company is crucial for the accurate pricing of the company's securities and for market integrity - Records maintained by the company should show and explain the company's transactions, it should disclose with reasonable accuracy the financial position, at any time -* F *Accounts to give a true and fair view.*

Shares & Securities - Market abuse - What is - Effect of 'market abuse' - Discussed.

Shares and Securities - Securities market - SEBI, the G *market regulator - Duty of the SEBI to protect investors-individual and collective, against opportunistic behavior of Directors and Insiders of the listed companies so as to safeguard market's integrity - Duty of Print and Electronic Media.*

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The appellant was the promoter as well as a whole time Director of a company registered under the Companies Act, 1956. The company had nine Directors, including the appellant and was involved in the business of Exhibition (Theatre), Film and Television, Content Production, Distribution, Hospitality, Food & Beverage, Animation and Gaming and Cine Advertising etc. The shares of the company were listed on Bombay Stock Exchange Ltd. (BSE) and National Stock Exchange (NSE) at the relevant time.

The investigation department of SEBI noticed that the company had committed serious irregularities in its books of accounts and showed inflated profits and revenues in the financial statements and lured the general public to invest in the shares of the company based on such false financial statements and thereby violated the provisions of Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practice Relating to Securities Market) Regulations, 2003. Show cause Notice was issued to the appellant and to the other Directors stating that they had violated Section 12A of the Securities and Exchange Board of India Act, 1992 and Regulation 3(b), 3(c), 3(d), 4(1), 4(2)(a), 4(2)(e), 4(2)(f), 4(2)(k), 4(2)(r) of 2003 Regulations. Further, a notice under Rule 4(1) of the SEBI (Procedure for Holding Inquiry and imposing penalties by Adjudicating Officer) Rules, 1995 was issued to the Directors to show cause why penalty be not imposed under Section 15HA of the SEBI Act for the alleged contravention of the provisions of the Act.

The appellant stated, though a whole time Director of the company, he was only handling Human Resource Department of the company and was fully engrossed in the recruitment of personnel, training and team buildup. Further, it was also stated that he had only relied upon the auditor's statements in financial matters and hence

A was not personally liable for the violation of the provisions of SEBI Act and 2003 Regulations.

The Whole Time Member (WTM) of SEBI, however, held that the Directors were guilty for violation of Section 12A of the SEBI Act, 1992 and Regulation 3(b), 3(c), 3(d), 4(1), 4(2)(a), 4(2)(e), 4(2)(f), 4(2)(k), 4(2)(r) of the 2003 Regulations. Order was passed restraining the appellant for a period of two years from buying, selling or dealing in securities in any manner whatsoever or accessing the securities market directly or indirectly and from being Director of any listed company; and further, monetary penalty to the tune of 50 lacs was imposed on the appellant under Section 15HA of SEBI Act. The order was affirmed by the Securities Appellate Tribunal, the legality of which was the subject matter of this appeal under Section 15Z of the SEBI Act.

Dismissing the appeals, the Court

HELD: 1. Investors' confidence in the capital market can be sustained largely by ensuring investors' protection. Disclosure and transparency are the two pillars on which market integrity rests. Facts of the case disclose how the investors' confidence has been eroded and how the market has been abused for personal gains and attainments. "Market abuse" has now become a common practice in the India' security market and, if not properly curbed, the same would result in defeating the very object and purpose of the Securities and Exchange Board of India Act, 1992 which is intended to protect the interests of investors in securities and to promote the development of securities market. Disclosure of information about companies whose securities are traded on a public market is crucial for the accurate pricing of the companies' securities and also for the efficient operation of the market. In the instant case, the Directors of the company had clearly violated provisions of Section

12A of the SEBI Act read with Regulations 3 and 4 of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practice Relating to Securities Market) Regulations, 2003. The SEBI rightly restrained the appellant for a period of two years from the date of that order from buying, selling or dealing with any securities, in any manner, or accessing the securities market, directly or indirectly and from being Director of any listed company and the adjudicating officer has rightly imposed a penalty of Rs.50 lakhs under Section 15HA of SEBI Act. [Paras 1, 10, 28, 42] [400-A-B; 403-C-D; 413-C-D; 418-F-G]

Palmer's Company Law, 25th Edition (2010), Volume 2 and Gower & Davies - Principles of Modern Company Law, **9th Edition (2012) - referred to.**

Corporate Governance and Directors

2. The SEBI Act read with Regulations of the Companies Act would indicate that the obligations of the Directors in listed companies are particularly onerous especially when the Board of Directors makes itself accountable for the performance of the company to share holders and also for the production of its accounts and financial statements especially when the company is a listed company. [Para 29] [413-E-F]

3. Responsibility is cast on the Directors to prepare the annual records and reports and those accounts should reflect 'a true and fair view'. The over-riding obligation of the Directors is to approve the accounts only if they are satisfied that they give true and fair view of the profits or loss for the relevant period and the correct financial position of the company. The Directors are expected to exercise their power on behalf of the company with utmost care, skill and diligence. [Paras 32, 33] [414-C-D]

A *Official Liquidator v. P.A. Tendolkar* **(1973) 1 SCC 602: 1973 (3) SCR 364 - relied on.**

4. The facts in this case clearly reveal that the Directors of the company in question had failed in their duty to exercise due care and diligence and allowed the company to fabricate the figures and making false disclosures. Facts indicate that they have overlooked the numerous red flags in the revenues, profits, receivables, deposits etc. which should not have escaped the attention of a prudent person. The facts clearly indicated that the company had made false corporate announcement stating that it had entered into agreements with 802 theatres and that false corporate announcement gave false figures relating to advance, security deposit and income pertaining to the theatres which were not inexistence. The deposits shown turned out to be not genuine but mere book entries to hide receivables in the balance sheet. [Paras 31, 34] [413-H; 414-A-B, F-G]

Securities Market - Market abuse

5. Market abuse refers to the use of manipulative and deceptive devices, giving out incorrect or misleading information, so as to encourage investors to jump into conclusions, on wrong premises, which is known to be wrong to the abusers. 'Market abuse' impairs economic growth and erodes investor's confidence. The object of the SEBI Act is to protect the interest of investors in securities and to promote the development and to regulate the securities market, so as to promote orderly, healthy growth of securities market and to promote investors protection. Section 12A of the SEBI Act read with Regulations 3 and 4 of the Regulations 2003 essentially intended to preserve 'market integrity' and to prevent 'Market abuse'. The statutory provisions deal with the situations where a person, who deals in securities,

takes advantage of the impact of an action, may be manipulative, on the anticipated impact on the market resulting in the "creation of artificiality'. The same can be achieved by inflating the company's revenue, profits, security deposits and receivables, resulting in price rice of scrip of the company. Investors are then lured to make their "investment decisions" on those manipulated inflated results, using the above devices which will amount to market abuse. [Para 35] [415-E-G]

6. On facts, it is clearly found that the Directors of the company have "created artificiality" by projecting inflated figures of the company's revenue, profits, security deposits and receivables and that the manipulation in the financial results of the company resulted in price rise of the scrip of the company and the promoters of the company then pledged their shares to raise substantial funds from financial institutions. The conduct of the appellant and others was, therefore, fraudulent and the practices they had adopted, relating to securities, were unfair, which attracted the penalty provisions contained in Section 15 HA read with 15J of the SEBI Act. [Para 36] [415-H; 416-A-B]

Disclosure and Transparency:

7. The Companies Act casts an obligation on the company registered under the Companies Act to keep the Books of accounts to achieve transparency. Disclosure of information about the company is crucial for the accurate pricing of the company's securities and for market integrity. Records maintained by the company should show and explain the company's transactions, it should disclose with reasonable accuracy the financial position, at any time, and to enable the Directors to ensure that the balance-sheet and profit and loss accounts will comply with the statutory expectations that accounts give a true and fair view. [Para 38] [416-F-H; 417-A-B]

A **8. In the instant case, the Directors and the Chief Financial Officers of the company had caused to publish forged and misleading results of the company, various quarterly financial results and the annual results for the year 2007-08, were reported to the stock-exchanges** B **containing inflated figures of the company's revenue, profits, security deposits and receivables and those financial statements which were relied upon by investors in making investment decisions, which did not reflect a true and fair view of the state of affairs of the company.** C **The appellant, admittedly, was a whole time Director of the company, as regards the preparation of the annual accounts, the balance-sheet and financial statement and laying of the same before the company at the Annual General Meeting and filing the same before the Registrar** D **of the Companies as well as before SEBI, the Directors of the company have greater responsibility, especially when the company is a registered company. Directors of the companies, especially of the listed companies, have access to inside knowledge, such as, financial position** E **of the company, dividend rates, annual accounts etc. So far as this case is concerned, the subsequent conduct of pledging their shares at artificially inflated prices, based on inflated financial results and raising loan on them would indicate that they had deliberately and with full knowledge committed the illegality and hence the** F **principle of "acta exteriora indicant interiora secreta" (meaning external actions reveals inner secrets) applies with all force. [Paras 39, 40, 41] [417-F-G; 418-A-E]**

Sahara India Real Estate Corporation Limited and G *Others v. Securities and Exchange Board of India and Another* **(2013) 1 SCC 1 - relied on.**

A word of caution:

9.1. SEBI, the market regulator, has to deal sternly H **with companies and their Directors indulging in**

manipulative and deceptive devices, insider trading etc. or else they will be failing in their duty to promote orderly and healthy growth of the Securities market. Economic offence is a serious crime which, if not properly dealt with, as it should be, will affect not only country's economic growth, but also slow the inflow of foreign investment by genuine investors and also casts a slur on India's securities market. Fraud, deceit, artificiality, SEBI should ensure, have no place in the securities market of this country and 'market security' is our motto. SEBI has a duty to protect investors, individual and collective, against opportunistic behavior of Directors and Insiders of the listed companies so as to safeguard market's integrity. Print and Electronic Media have also a solemn duty not to mislead the public, who are present and prospective investors, in their forecast on the securities market. A media projection on company's position in the security market with a view to derive a benefit from a position in the securities would amount to market abuse, creating artificiality. [Paras 43, 44] [419-A-F]

Case Law Reference:

(2013) 1 SCC 1	**relied on**	**Para 25**
1973 (3) SCR 364	**relied on**	**Para 33**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4112-4113 of 2013.

From the Judgment and Order dated 05.10.2012 of the Securities Appellate Tribunal at Mumbai in Appeal Nos. 28 & 29.

Sibo Sankar Mishra, M.K. Pandey for the Appellant.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. India's capital market in

A the recent times has witnessed tremendous growth, characterized particularly by increasing participation of public. Investors' confidence in the capital market can be sustained largely by ensuring investors' protection. Disclosure and transparency are the two pillars on which market integrity rests. B Facts of the case disclose how the investors' confidence has been eroded and how the market has been abused for personal gains and attainments.

2. The Appellate Jurisdiction of this Court guaranteed under Section 15Z of the Securities and Exchange Board of C India Act, 1992 (for short 'SEBI Act') has been invoked challenging a joint order dated 5.10.2012 passed in Appeal Nos. 28 and 29 of 2012 passed by Securities Appellate Tribunal, Mumbai (for short 'Tribunal') upholding the order passed by SEBI dated April 18, 2011 restraining the appellant D for a period of two years from buying, selling or dealing in securities and the order passed by the adjudication officer dated July 28, 2011 imposing a monetary penalty of 50 lacs under Section 15HA of SEBI Act.

E 3. The appellant was the promoter as well as a whole time Director of M/s Pyramid Saimira Theatre Limited (PSTL), a company registered under the Companies Act, 1956. The shares of PSTL were listed on Bombay Stock Exchange Ltd. (BSE) and National Stock Exchange (NSE) at the relevant time. F The company was involved in the business of Exhibition (Theatre), Film and Television, Content Production, Distribution, Hospitality, Food & Beverage, Animation and Gaming and Cine Advertising etc. The company had nine Directors, including the appellant herein. The investigation department of SEBI noticed that the company had committed serious G irregularities in its books of accounts and showed inflated profits and revenues in the financial statements and lured the general public to invest in the shares of the company based on such false financial statements thereby violated the provisions of Securities and Exchange Board of India

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(Prohibition of Fraudulent and Unfair Trade Practice Relating to Securities Market) Regulations, 2003 (for short 'Regulations 2003'). Consequently, a notice was issued to the appellant and to the other Directors stating that they had violated Section 12A of SEBI Act and Regulation 3(b), 3(c), 3(d), 4(1), 4(2)(a), 4(2)(e), 4(2)(f), 4(2)(k), 4(2)(r) of Regulations 2003 and were directed to show cause why appropriate directions as deemed fit and proper under Sections 11, 11B and 11(4) of the SEBI Act read with Regulation 11 of Regulations 2003 be not issued against them.

4. The appellant replied to the show cause notice vide letter dated February 3, 2010 stating that there were no irregularities and the company's Managing Director and the Principal Officer would send a detailed reply in that regard. Later,a notice dated April 8, 2010 under Rule 4(1) of the SEBI (Procedure for Holding Inquiry and imposing penalties by Adjudicating Officer) Rules, 1995 was issued to the Directors to show cause why penalty be not imposed under Section 15HA of the SEBI Act for the alleged contravention of the provision of the Act.

5. The appellant submitted a detailed reply stating that it was the Managing Director and Principal Officer of the company who was in charge of day-to-day affairs of the company including the operations, finance and accounts, secretarial and compliance, legal services and technical services. Appellant, it was stated, though was a whole time Director of the company was only handling Human Resource Department of the company and was fully engrossed in the recruitment of personnel, training and team buildup. Further, it was also stated that he had only relied upon the auditor's statements in financial matters and hence was not personally liable for the violation of the provisions of SEBI Act and Regulations 2003. Personal hearing was accorded to the appellant on 30.8.2010. Written Submissions dated 15.9.2010 filed by the appellant was also considered by SEBI. The Board

A noticed following specific violations:-

(a) manipulated accounts by fictitious entries;

(b) made false disclosures to the stock exchange;

B (c) did not co-operate with the investigations, and

(d) did not maintain certain books of accounts.

6. On facts, the officer found that all the above-mentioned violations had been established. Consequently, the Whole Time C Member (WTM) of SEBI, in exercise of powers conferred under Section 19 of the SEBI, held that the Directors were found guilty for the violation of Section 12A of SEBI Act, 1992 and Regulation 3(b), 3(c), 3(d), 4(1), 4(2)(a), 4(2)(e), 4(2)(f), 4(2)(k), 4(2)(r) of the Regulations 2003. WTM of SEBI then, in exercise D of the powers conferred on him under Section 19 read with Sections 11, 11B and 11(4) of the SEBI Act and Regulation 11 of Regulations 2003, passed an order restraining the appellant and other Directors for a period of two years and three years respectively from buying, selling or dealing in securities in any manner whatsoever or accessing the securities market E directly or indirectly and from being Director of any listed company.

7. The Adjudicating Officer also held that the appellant and others have violated the provisions of Section 12A of SEBI Act F and Regulation 3(b), 3(c), 3(d), 4(1), 4(2)(a), 4(2)(e), 4(2)(f), 4(2)(k), 4(2)(r) of Regulations 2003 and took the view that the appellant and other Directors are liable for monetary penalty under Section 15HA of SEBI Act whereby a penalty of 50 lacs was imposed on the appellant.

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8. The above order, as already indicated, was affirmed in an appeal by the Tribunal, the legality of which is the subject matter of this appeal.

9. We may before examining various legal issues that H arise for consideration in this appeal wish to indicate that the

investigation had revealed that the financial results contained in the quarterly report filed with the stock exchanges contained inflated figures of the company's revenue profits, security deposits and receivables. Further, the manipulation in the financial results of the company resulted in price rise of the scrip of the company and the promoters pledged their shares to raise substantial funds from financial institutions.

10. We would like to demonstrate on the facts of this case as well as law on the point that "market abuse" has now become a common practice in the India' security market and, if not properly curbed, the same would result in defeating the very object and purpose of SEBI Act which is intended to protect the interests of investors in securities and to promote the development of securities market. Capital market, as already stated, has witnessed tremendous growth in recent times, characterized particularly by the increasing participation of the public. Investor's confidence in capital market can be sustained largely by ensuring investors' protection.

11. Before examining the law on the point, we would like to demonstrate how the company and its Directors had inflated figures of the company's revenue profits, security deposits and receivables which were relied upon by investors for making investment decisions. Facts would also indicate that the Directors had pledged their shares and artificially inflated prices of the scrip based on inflated financial results which enabled them to raise higher quantum of funds that would not have been possible otherwise.

12. The quarterly unaudited financial results of the company for the quarter ended 31st March 2007 to the quarter ended 31st March 2009 shows the following details:

H G F E D C B A

Particulars	For the quarter ended (in Rs. Lakh)								
	March 31, 2007	June 30, 2007	Sept. 30, 2007	Dec. 31, 2007	March 31, 2008	June 30, 2008	Sept. 30, 2008	Dec. 31, 2008	March 31, 2009
Net Sales	6756.89	12271.43	14418.79	23141.87	24556.12	2501.87	25225.72	13794.81	8069.04
Other Income	23.24	13.68	231.75	152.90	144.05	12.94		2.08	
Total Income	6780.13	12285.11	14650.54	23294.77	24700.17	25027.81	25225.72	13796.89	8069.04
Total Expenditure	6122.60	9936.44	12513.42	19718.54	22366.93	22886.72	23478.48	12997.58	6859.02
Net profit / loss	583.47	1600.77	1511.31	2986.50	-311.22	1349.72	870.42	-7474.35	-8527.25
Equity	2827.64	2827.65	2827.65	2827.65	2827.65	2827.65	2827.65	2827.65	2827.65
Face value of shares (in Rs.)	10	10	10	10	10	10	10	10	10

13. The above facts and figures would indicate that the net sales for the quarter ended June 30, 2007 doubled as compared to the previous quarter. In the subsequent quarters, till the quarter ended September 30, 2008, that upward trend had continued and in the quarter ended December 31, 2008, there was a sudden fall in the net sales figures (the net sales figures for the quarter ended December 31, 2008 were down by around 45% as compared to the previous quarter).

14. The company also showed a loss of Rs.74.74 crore in the said quarter. For the quarter ended March 31, 2009, the company again showed a loss of Rs. 85.37 crore. The net profit figures also surged in sync with the total income upto the quarter ended June 30, 2008 except for the quarter ended March 31, 2008.

15. SEBI, it was pointed out, had verified books of accounts of the company for the financial year 2007-2008 to ascertain whether proper books of accounts and supporting documents were maintained by the company in respect of the theatre income, theatre receivables and theatre security deposits and whether the financial disclosures made by the company to the stock exchanges as per listing agreement reflected true and fair view of the state of affairs of the company.

16. SEBI's investigation revealed that for the financial year 2007-08, total revenue of Rs. 749.30 crore included an income of Rs. 549.58 crore from theatres which is stated as follows:

(In Rs. Crore)

Region	From PSTL Theatres	From Non-PSTL Theatre	Total Revenue from Theatres
Tamil Nadu	303.46	41.51	344.97
Andhra Pradesh	74.66	62.04	136.70
Karnataka	45.86	7.60	53.45
Kerala	12.95		12.95
Others	0.28	1.23	1.52
Total	437.21	112.18	549.58

17. On theatre income of Rs. 303.46 crore from Tamil Nadu region included consolidated credit entries of Rs.244 crore with corresponding consolidated debits 'Theatre Collections Receivable Account'. The account did not show any income from April 2008 onwards. The journal vouchers in respect of those entries did not carry any such narration such as daily collection report number, name of theatre etc. The receivables were adjusted against cost of content, transferred to advance/security deposit account or remained unrealized. As on March 31, 2008, the total receivables of the company from Tamil Nadu region were Rs. 38.58 crore. Out of that, Rs.2.19 crore was outstanding against 162 theatres and the balance Rs. 36.39 crore outstanding in one account only which did not contain the theatre wise break up. Further it was also noticed that the entire amount of Rs.75 crore from own theatres in Andhra Pradesh was accounted by single journal voucher which did not have any other supporting documents in support of those consolidated entries or journal vouchers, despite assurance to provide the same. Those facts lead the SEBI to conclude that those revenues disclosed inflated figures in its annual report for 2007-08 and thereby misled the investors.

18. The company disclosed no stock exchanges on January 30, 2009 that it had entered into agreement with 802 theatres as on June 30, 2008. Out of 802 agreements, the company could show only 257 original agreements to SEBI officials which lead SEBI to conclude that the balance 545 agreements never existed. The fictitious revenues had converted to 'theatre collection receivables' which in turn had been converted to 'security deposits'. It was noticed security deposits were not genuine but were created to hide receivables in the balance sheet since outstanding receivables for a period of six months had to be compulsorily disclosed in its annual report. The SEBI therefore concluded the company had made a false corporate announcement to the effect that it had entered into agreement with 802 theatres thereby misled the investing public.

19. The appellant's main defence was that, though he was

the Whole Time Director as well as Promoter of the company, yet was not involved in the day-to-day management of the company and that he was looking after the Human Resource Department of the company. Further, it was also stated that the financial statements, accounts etc. were prepared and duly audited by the statutory auditors, verified by the audit committees and reviewed by the managing Director and that, in the company, the role of each Director was confined to his field of operation and there was no justification for holding a Director to be in over-all charge and control of the affairs of the company. Further, it was also pointed out that the auditors were well versed in accounts and finance, therefore, there was no reason for the Directors who have no expertise or knowledge of the intricacies of the accounts and finance to suspect them or sit in judgment over their decisions. In such circumstances, it was contended, that there is no justification in debarring them from buying, selling or dealing in securities or accessing securities market or to impose penalty since there is no *mens rea* on the part of the appellant in intentionally stating any untrue statement or preparing false records and that he has no role as such in preparing the accounts and finance of the company.

20. The facts and figures as such are not in dispute and the defence taken is that the statements were duly audited by statutory auditors and, consequently, it could not be held that the appellant had violated the provision of SEBI Act or the provisions of Regulations 2003.

21. Let us now examine the scope of the various provisions stated to have been violated by the appellant and its consequences. Section 12A falls in Chapter VA of the SEBI Act which reads as follows:

"PROHIBITION OF MANIPULATIVE AND DECEPTIVE DEVICES, INSIDER TRADING AND SUBSTANTIAL ACQUISITON OF SECURITIES OR CONTROL

Prohibition of manipulative and deceptive devices, insider

A trading and substantial acquisition of securities or control.

12A. No person shall directly or indirectly –

(a) use or employ, in connection with the issue, purchase or sale of any securities

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listed or proposed to be listed on a recognised stock exchange, any manipulative or

deceptive device or contrivance in contravention of the provisions of this Act or the rules or the regulations made

C thereunder;

(b) employ any device, scheme or artifice to defraud in connection with issue or dealing in securities which are listed or proposed to be listed on a recognised stock

D exchange;

(c) engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person, in connection with the issue, dealing in securities which are listed or proposed to be listed on a recognised

E stock exchange, in contravention of the provisions of this Act or the rules or the regulations made thereunder;

(d) engage in insider trading;

(e) deal in securities while in possession of material or

F non-public information or communicate such material or non-public information to any other person, in a manner which is in contravention of the provisions of this Act or the rules or the regulations made thereunder;

G (f) acquire control of any company or securities more than the percentage of equity share capital of a company whose securities are listed or proposed to be listed on a recognised stock exchange in contravention of the regulations made under this Act."

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22. Section 12A has to be read along with various provisions of Regulations 2003. Chapter II of Regulations 2003 deals with prohibition of fraudulent and unfair trade practices relating to the securities market and Chapter III deals with investigation. SEBI has also noticed the violation of Regulations 3 and 4 of 2003 Regulations, which read as follows:

"PROHIBITION OF FRAUDULENT AND UNFAIR TRADE PRACTICES RELATING TO THE SECURITEIS MARKET:

3. *Prohibition of certain dealings in securities*

No person shall directly or indirectly.

(a) buy, sell or otherwise deal in securities in a fraudulent manner;

(b) use or employ, in connection with issue, purchase or sale of any security listed or proposed to be listed in a recognized stock exchange, any manipulative or deceptive devise or contrivance in contravention of the provisions of the Act or the rules or the regulations made there under;

(c) employ any device, scheme or artifice to defraud in connection with dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange;

(d) engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person in connection with any dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange in contravention of the provisions of the Act or the rules and the regulations made there under:

4. *Prohibition of manipulative, raudulent and unfair trade practices*

A (1) Without prejudice to the provisions of regulation 3, no person shall indulge in a fraudulent or an unfair trade practice in securities.

(2) Dealing in securities shall be deemed to be a fraudulent or an unfair trade practice if it involves fraud and may include all or any of the following namely:-

B

(a) indulging in an act which creates false or misleading appearance of trading in the securities market;

C

(b) .....

(d).....

(e) any act or omission amounting to manipulation of the price of a security;

D

(f) publishing or causing to publish or reporting or causing to report by a person dealing in securities any information which is not true or which he does not believe to be true prior to or in the course of dealing in securities.

E

(g) .....

(h) .....

F

(i) .....

(j) .....

(k) an advertisement that is misleading or that contains information in a distorted manner and which may influence the decision of the investors;

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(l) .....

(p) .....

H (q) .....

(r) planting false or misleading news which may induce sale or purchase of securities." A

23. The object and purpose of the above-mentioned statutory provisions are to curb "market manipulation". *Palmer's Company Law,* 25th Edition (2010), Volume 2 at page 11097 states: "Market manipulation is normally regarded as the "unwarranted" interference in the operation of ordinary market forces of supply and demand and thus undermines the "integrity" and efficiency of the market." See also *Gower & Davies – Principles of Modern Company Law*, 9th Edition (2012) at page 1160. B C

24. Reference may also be made to the penalty provisions which is contained in Chapter VI A of the SEBI Act of which we are mainly concerned with Section 15HA which deals with penalty for fraudulent and unfair trade practices and Section 15J which deals with the factors to be taken into account by the adjudicating officer while adjudging the quantum of penalty. Those provisions are given below for easy reference: D

"**15HA**. Penalty for fraudulent and unfair trade practices.- If any person indulges in fraudulent and unfair trade practices relating to securities, he shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of such practices, whichever is higher." E F

"**15J.** Factors to be taken into account by the adjudicating officer.-While adjudging quantum of penalty under section 15 I, the adjudicating officer shall have due regard to the following factors, namely:

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default; G

(b) the amount of loss caused to an investor or group of investors as a result of the default; H

A (c) the repetitive nature of the default."

25. In *Sahara India Real Estate Corporation Limited and Others v. Securities and Exchange Board of India and Another* (2013) 1 SCC 1, this Court has noticed that though the Indian Companies Act, 1956 was modeled on English B Companies Act, 1948, no efforts have been made to incorporate universally accepted principles and concepts into our company law. Of late, however, some efforts have been made by carrying out few amendments to the Companies Act, 1956, so also in the SEBI Act, 1992 and Rules and Regulations C framed therein to keep pace with the English Companies Act and related legislations. When we interpret the provisions of the SEBI Act and the Regulations relating to a company registered under the Companies Act, the provisions of the Companies Act have also to be borne in mind. For instance, in SEBI Act, there D is no provision for keeping proper books of accounts by a registered company.

26. Section 209 of the Companies Act says that every company shall keep at the registered office proper books of E accounts. Books of accounts should be so kept as to give true and fair view of the state of the company's affairs and explain transactions. Of course, the auditors of the company must examine whether the company has maintained proper cost accounting records as required by the rules. Companies whose F securities are traded on a public market, it is trite law that the disclosure of information about the company is crucial for the correct and accurate pricing of the company's securities and for the official operation of the market. Section 210 of the Companies Act states that at every annual general meeting of the company, the Board of Directors is required to lay before G it a balance-sheet as at the end of and a profit and loss account for the financial year.

27. Clause 41 of Listing Agreement between the SEBI and the concerned companies requires the companies to furnish to H stock exchange and to publish unaudited financial result on a

quarterly basis in the prescribed format. Section 55A of the Companies Act deals with the powers of SEBI which says some of the provisions referred to therein, so far as they relate to issue and transfer of securities and non-payment of dividends in the case of listed companies be administered by SEBI. Further, it is also indicated that how the books of accounts have to be kept by the company, so also with regard to audit of account etc. finds a place in the Companies Act, so also the qualification and disqualification of the Managing Directors.

28. We notice in this case that the Directors of the company had clearly violated provisions of Section 12A of SEBI Act read with Regulations 3 and 4 of 2003 Regulations. Companies whose securities are traded on a public market, disclosure of information about the company is crucial for the accurate pricing of the companies' securities and also for the efficient operation of the market.

Corporate Governance and Directors

29. SEBI Act read with Regulations of the Companies Act would indicate that the obligations of the Directors in listed companies are particularly onerous especially when the Board of Directors makes itself accountable for the performance of the company to share holders and also for the production of its accounts and financial statements especially when the company is a listed company.

30. The Directors of the company or the person in charge directly or indirectly use or employ, in connection with the issue, purchase or sale of any securities listed in stock exchange, any manipulative or deceptive device or contrivance in contravention of SEBI Act or the Regulations made thereunder have necessarily to be dealt with in accordance with the provisions of the Act and the Regulations which is absolutely necessary for the investor's protection and to avoid market abuse.

31. The facts clearly indicated that the company had made

A false corporate announcement stating that it had entered into agreements with 802 theatres and that false corporate announcement gave false figures relating to advance, security deposit and income pertaining to the theatres which were not inexistence. The deposits shown were turned out to be not B genuine but mere book entries to hide receivables in the balance sheet.

32. Responsibility is cast on the Directors to prepare the annual records and reports and those accounts should reflect 'a true and fair view'. The over-riding obligation of the Directors C is to approve the accounts only if they are satisfied that they give true and fair view of the profits or loss for the relevant period and the correct financial position of the company.

33. Company though a legal entity cannot act by itself, it D can act only through its Directors. They are expected to exercise their power on behalf of the company with utmost care, skill and diligence. This Court while describing what is the duty of a Director of a company held in *Official Liquidator v. P.A. Tendolkar* (1973) 1 SCC 602 that a Director may be shown to E be placed and to have been so closely and so long associated personally with the management of the company that he will be deemed to be not merely cognizant of but liable for fraud in the conduct of business of the company even though no specific act of dishonesty is provide against him personally. He cannot shut his eyes to what must be obvious to everyone who F examines the affairs of the company even superficially.

34. The facts in this case clearly reveal that the Directors of the company in question had failed in their duty to exercise due care and diligence and allowed the company to fabricate G the figures and making false disclosures. Facts indicate that they have overlooked the numerous red flags in the revenues, profits, receivables, deposits etc. which should not have escaped the attention of a prudent person. For instance, profit as on quarter ending June 2007 was three times more than the H preceding quarter, it doubled in the quarter ending December

2007 over the preceding quarter. Further, there was disproportionate increase in the security deposits i.e. Rs. 36.05 crore in September 2007 to Rs. 270.38 crore in December 2007 as compared to increase in the number of theatres during the same period. They have participated in the board meetings and were privy to those commissions and omissions.

Securities Market – Market abuse

35. Prevention of market abuse and preservation of market integrity is the hallmark of Securities Law. Section 12A read with Regulations 3 and 4 of the Regulations 2003 essentially intended to preserve 'market integrity' and to prevent 'Market abuse'. The object of the SEBI Act is to protect the interest of investors in securities and to promote the development and to regulate the securities market, so as to promote orderly, healthy growth of securities market and to promote investors protection. Securities market is based on free and open access to information, the integrity of the market is predicated on the quality and the manner on which it is made available to market. 'Market abuse' impairs economic growth and erodes investor's confidence. Market abuse refers to the use of manipulative and deceptive devices, giving out incorrect or misleading information, so as to encourage investors to jump into conclusions, on wrong premises, which is known to be wrong to the abusers. The statutory provisions mentioned earlier deal with the situations where a person, who deals in securities, takes advantage of the impact of an action, may be manipulative, on the anticipated impact on the market resulting in the "creation of artificiality'. The same can be achieved by inflating the company's revenue, profits, security deposits and receivables, resulting in price rice of scrip of the company. Investors are then lured to make their "investment decisions" on those manipulated inflated results, using the above devices which will amount to market abuse.

36. We have, on facts, clearly found that the Directors of the company have "created artificiality" by projecting inflated

A figures of the company's revenue, profits, security deposits and receivables and that the manipulation in the financial results of the company resulted in price rise of the scrip of the company and the promoters of the company then pledged their shares to raise substantial funds from financial institutions. The conduct
B of the appellant and others was, therefore, fraudulent and the practices they had adopted, relating to securities, were unfair, which attracted the penalty provisions contained in Section 15 HA read with 15J of the SEBI Act.

C **Disclosure and Transparency:**

37. Gower and Davies on Principles of Modern Company Law, 9th Edition (2012) at page 751, reiterated their views on the scope and rationale of annual reporting required under the Companies Acts, as follows:

D "On the basis that "forewarned is forearmed" the fundamental principle underlying the Companies Act has been that of disclosure. If the public and the members were enabled to find out all relevant information about the company, this, thought the founding fathers of our company law, would be a
E sure shield. The shield may not have proved quite so strong as they had expected and in more recent times, it has been supported by offensive weapons."

38. The Companies Act casts an obligation on the
F company registered under the Companies Act to keep the Books of accounts to achieve transparency. Previously, it was thought that the production of the annual accounts and it preparation is that of the Accounting Professional engaged by the company where two groups who were vitally interested were the shareholders and the creditors. But the scenario has
G drastically changed, especially with regard to the company whose securities are traded in public market. Disclosure of information about the company is, therefore, crucial for the accurate pricing of the company's securities and for market integrity. Records maintained by the company should show and
H explain the company's transactions, it should disclose with

reasonable accuracy the financial position, at any time, and to enable the Directors to ensure that the balance-sheet and profit and loss accounts will comply with the statutory expectations that accounts give a true and fair view. Companies (Amendment) Act, 2000 has added clause (a)(iii) under which SEBI has also been given the power of inspection of listed companies or companies intending to get listed through such officers, as may be authorized by it.

39. So far as the company in question is concerned, books of accounts were maintained in the Tally accounting software and for the financial year 2007-08 separate books of accounts were maintained for each region/unit. Books of accounts were reportedly maintained by the regions in their respective regional office and at the end of the year for the preparation of annual financial statement and for auditing purpose, those books of accounts were brought to the companies registered office. The auditors had informed that those books were audited at the registered office of the company. As already indicated, after the declaration of financial results on January 31, 2008, containing inflated profits, revenues for the quarter ended on 31.12.2007, the Managing Directors of the company, his wife and the appellant had together pledged 72,75,455 shares of the company with various banks and financial institutions and raised 97.30 crores as loans. We have noticed that the Directors and the Chief Financial Officers of the company had caused to publish forged and misleading results of the company, various quarterly financial results and the annual results for the year 2007-08, were reported to the stock-exchanges containing inflated figures of the company's revenue, profits, security deposits and receivables and those financial statements which were relied upon by investors in making investment decisions, which did not reflect a true and fair view of the state of affairs of the company.

40. The appellant has taken the stand, as already stated, that even though he was a whole time Director he was not conversant with the accounts and finance and was only dealing

A with the human resource management of the company, hence, he had no fraudulent intention to deceive the investors. We find it difficult to accept the contention. The appellant, admittedly, was a whole time Director of the company, as regards the preparation of the annual accounts, the balance-sheet and
B financial statement and laying of the same before the company at the Annual General Meeting and filing the same before the Registrar of the Companies as well as before SEBI, the Directors of the company have greater responsibility, especially when the company is a registered company. Directors of the
C companies, especially of the listed companies, have access to inside knowledge, such as, financial position of the company, dividend rates, annual accounts etc. Directors are expected to exercise the powers for the purposes for which they are conferred. Sometimes they may misuse their powers for their
D personal gain and makes false representations to the public for unlawful gain.

41. We have indicated, so far as this case is concerned, the subsequent conduct of pledging their shares at artificially inflated prices, based on inflated financial results and raising
E loan on them would indicate that they had deliberately and with full knowledge committed the illegality and hence the principle of *"acta exteriora indicant interiora secreta"* (meaning external actions reveals inner secrets) applies with all force, a principle which this Court applied in *Sahara's* case.

F 42. Above being the factual and legal position, we are of the view that the SEBI has rightly restrained the appellant for a period of two years from the date of that order from buying, selling or dealing with any securities, in any manner, or accessing the securities market, directly or indirectly and from
G being Director of any listed company and that the adjudicating officer has rightly imposed a penalty of Rs.50 lakhs under Section 15HA of SEBI Act. The appeals are, therefore, dismissed. However, there will be no order as to costs.

H

A word of caution:

43. SEBI, the market regulator, has to deal sternly with companies and their Directors indulging in manipulative and deceptive devices, insider trading etc. or else they will be failing in their duty to promote orderly and healthy growth of the Securities market. Economic offence, people of this country should know, is a serious crime which, if not properly dealt with, as it should be, will affect not only country's economic growth, but also slow the inflow of foreign investment by genuine investors and also casts a slur on India's securities market. Message should go that our country will not tolerate "market abuse" and that we are governed by the "Rule of Law". Fraud, deceit, artificiality, SEBI should ensure, have no place in the securities market of this country and 'market security' is our motto. People with power and money and in management of the companies, unfortunately often command more respect in our society than the subscribers and investors in their companies. Companies are thriving with investors' contributions but they are a divided lot. SEBI has, therefore, a duty to protect investors, individual and collective, against opportunistic behavior of Directors and Insiders of the listed companies so as to safeguard market's integrity.

44. Print and Electronic Media have also a solemn duty not to mislead the public, who are present and prospective investors, in their forecast on the securities market. Of course, genuine and honest opinion on market position of a company has to be welcomed. But a media projection on company's position in the security market with a view to derive a benefit from a position in the securities would amount to market abuse, creating artificiality. SEBI has the duty and obligation to protect ordinary genuine investors and the SEBI is empowered to do so under the SEBI Act so as to make security market a secure and safe place to carry on the business in securities.

B.B.B. Appeals dismissed.