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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
J.B. PARDIWALA; J., K. V. VISWANATHAN; J.
CIVIL APPEAL NOS. 5209-5211 of 2022; 17 March, 2026
Securities and Exchange Board of India *versus* Terrascope Ventures Limited Etc.

Securities Law – SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 (PFUTP) – Regulations 3 and 4 – Fraudulent Diversion of Funds – Ratification by Shareholders – Legality of Post-Facto Approval - Core Issue: Whether a company that raises funds through preferential allotment for specific disclosed objects can, after immediately diverting those funds for unauthorized purposes, legitimize the illegality through a subsequent shareholders' resolution – Supreme Court noted the following – i. PFUTP and Fraud: The definition of "fraud" under PFUTP Regulations is expansive and does not require a strict "deceit" element as per common law - Diversion of funds raised for a specific object to an undisclosed purpose constitutes a breach of Regulation 3 and Regulations 4(2)(f), (k), and (r); ii. Irregularity vs. Illegality: Supreme Court distinguished between an "irregularity," which can be regularized, and an "illegality," which cannot - An act that is "*ultra vires*" or violates statutory regulations impacting public interest and multiple stakeholders cannot be ratified even if all shareholders agree; iii. Public Interest Dimensions: SEBI Regulations have public law dimensions designed to protect the integrity of the market - A private resolution by shareholders cannot wipe off a crystallized liability or waive rights involving public policy; iv. Parallel Proceedings: Held, that the Whole Time Member (WTM) and the Adjudicating Officer (AO) operate in separate fields the former for protective measures/disgorgement and the latter for imposing penalties and both proceedings are maintainable on the same set of facts. *[Relied on SEBI v. Kanaiyalal Baldevbhai Patel (2017) 15 SCC 1; Shri Lachoo Mal v. Shri Radhey Shyam (1971) 1 SCC 619; Government of Andhra Pradesh v. K. Brahmanandam (2008) 5 SCC 241; SEBI v. Kishore R. Ajmera (2016) 6 SCC 368; Paras 41-66]*

For Appellant(s): Mr. Navin Pawha, Sr. Adv. M/S Ads Legal, AOR Mr. Dhaval Mehrotra, Adv. Ms. Aditi Desai, Adv.

For Respondent(s): Mr. Mahfooz Ahsan Nazki, Amicus Curiae Mr. Vivek Rajan D.b, Adv. Mr. Hemant Gupta, Adv

J U D G M E N T

K. V. Viswanathan, J.

1. The present appeals, under Section 15Z of the Securities and Exchange Board of India Act, 1992 (for short the “SEBI Act”), call in question the correctness of the order dated 02.06.2022 passed by the Securities Appellate Tribunal (for short the “SAT”), Mumbai in Appeal Nos. 116 of 2021, 114 of 2021 and 115 of 2021. The SAT set aside the orders of the Adjudicating Officer dated 29.04.2020. The Adjudicating Officer had imposed monetary penalties on the respondentcompany as well as on the respondent individuals who were the Managing Director (Mr. Manoharlal Saraf) and Director (Mrs. Geeta Manoharlal Saraf) respectively, for violations of the provisions of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 (for short the “PFUTP Regulations”), and the Securities Contracts (Regulation) Act, 1956.

2. Though the respondents were duly served, they did not put in appearance. This Court, by order dated 22.08.2025, appointed Mr. Mahfooz A. Nazki, learned counsel, as *amicus curiae* to assist the Court.

BRIEF FACTS: -

3. On 03.09.2012, the respondent No.1-company, then known as Moryo Industries Limited, issued notice for an Extraordinary General Meeting (EoGM) and presented to its shareholders and the public, the purpose and object of allotment of equity shares on preferential basis to nonpromoters. The number of proposed allottees was 49 and the total number of equity shares to be allotted was up to 74,50,000. In the explanatory statement appended pursuant to Section 173(2) of the Companies Act, 1956, dealing with the objects of the issue, it was set out as under: -

"The object of the issue is to fulfill the additional fund requirements for capital expenditure including acquisition of companies/business, funding long-term working capital requirements, marketing, setting up of offices abroad and for other approved corporate purposes."

The disclosure was additionally as per Regulation 73(1) of the SEBI (ICDR) Regulations, 2009.

4. On 01.10.2012, a Special Resolution was passed and between 16.10.2012 and 08.11.2012 preferential allotment was made to 42 entities and a total sum of Rs. 15,87,50,000/- was raised.

5. The appellant-SEBI contends that from 17.10.2012 itself, instead of using the proceeds for approved objects, funds were diverted to purchase shares of other companies and grant loans/advances. SEBI contends that this is an indication that from the very inception, there was no intention on the part of the respondent-company to use the proceeds of the preferential issue for the purpose for which it was made. According to SEBI, these transactions happened between 17.10.2012 and 09.11.2012.

AD-INTERIM ORDER OF WTM: -

6. On 04.12.2014, the Whole Time Member (WTM) SEBI passed *ad interim* orders restraining the company promoters, directors including the individual respondents herein, the preferential allottees and, certain group companies of the first respondent from buying, selling or dealing in the securities markets, either directly or indirectly, in any manner, till further directions. We are only concerned with the respondents herein. These orders were made by virtue of powers conferred under Section 19 read with Section 11(1), 11(4)(b) and 11B of the SEBI Act. In the said order, after setting out certain background facts and the movement of the share price in the market of the first respondent-company and the diversion of purpose, pursuant to the preferential allotment, it was recorded in para 26 as under: -

"In the facts and circumstances of this case, I am of the view that preferential allotment was used as a tool for implementation of the dubious plan, device and artifice of *Moryo Group* and allottees. One could argue that in the order to make LTCG, the preferential allottees in question could have bought in secondary market and waited for a year before selling the shares. In the instant case, probably the preferential allotment route was preferred over secondary market route because the share capital of Moryo prior to preferential allotment was very small, i.e., 1,900,190 shares (Face Value: ₹10), to accommodate the required fictitious LTCG of ₹141 crore approximately. As such the capital expansion through preferential allotment and stock split provided much bigger source to the persons involved in terms of volume and price manipulation to facilitate the whole operation."

7. Dealing with the entities in which investments were made and to which loans and advances were given pursuant to the preferential allotment of shares, the relevant portion of the WTM order is set out hereunder: -

"13. During preliminary inquiry Moryo submitted that it had invested 66% of proceeds of preferential allotment in shares of listed as well as unlisted companies and rest of the money was given as loans and advances to certain entities as given in the following table:-

Table : V

	Investments	
	Shares	**Values**
1.	Banas Finance Ltd.	2,80,34,913
2.	Confidence Trading Co. Ltd.	26,37,751
3.	Esaar (India) Ltd	72,39,206
4.	Out of City Travel Solutions Ltd.	1,71,83,697
5.	Shreenath Commercial and Finance Ltd.	4,77,66,900
6.	Kayaguru Capital Market Pvt. Ltd	2,00,000
7.	Daga Strips Pvt. Ltd	2,75,000
	Total	**10,33,37,467**
	Loans & Advances	
1.	Rupak Developers Pvt. Ltd	25,34,000
2.	Sanjay V Parmar	25,00,000
3.	Fragrant Multitrading Pvt. Ltd	26,85,000
4.	Rockon Capital Market Pvt. Ltd	2,56,62,000
5.	Kayaguru Capital Market Pvt. Ltd	1,18,00,000
6.	Insight Multitrading Pvt. Ltd	27,50,000
7.	Yashasvi Developers Pvt. Ltd	25,00,000
	Total	**5,04,31,000**

14. From the copy of the special resolution passed under Section 81(1A) of the Companies Act, 1956 as available on BSE website it is noted that Moryo had disclosed to its shareholders and public that the purpose of aforesaid fund raising through preferential allotment was to meet requirements for –

a) capital expenditure including acquisition of company/business

b) funding long term working capital requirements

c) marketing

d) setting up of offices abroad and

e) for other approved corporate purposes.

15. The aforesaid utilisation of proceeds of preferential allotment does not appear to be for any of the aforesaid purposes as Moryo did not use them for either capital expenditure or acquisition of company/business or towards working capital or setting up office abroad or for marketing. Further in the common business parlance general corporate purposes provide the framework for ongoing decisions and activities of the business. In this case, as discussed above, Moryo did not have any business operations during relevant period.

16. On examination it was observed that most of the companies mentioned at Table V had a common promoter, i.e., Mr. Giriraj Kishore Agarwal (GKA). Companies mentioned at Sr. no. 1 to 6 in the above Table in which Moryo invested and entities mentioned at Sr. no. 1 to 6 to whom loans and advances were given, are connected to Mr. Giriraj Kishore Agarwal. It was submitted by Moryo during the preliminary inquiry that all its aforesaid loans and advances granted, were without any loan agreement. Such informal financing arrangement without any documentation clearly indicates that these entities were known or connected to Moryo."

8. It transpires from the record that even before the adinterim order of WTM but after having diverted the proceeds of the preferential allotment to purchase shares and advance loans, the respondent No.1-Company carried out the amendments to the objects clause of the Memorandum of Association on 12.03.2014. By this, they sought to include financing, investment and share trading in the objects.

9. The WTM, by order of 22.08.2016, confirmed his adinterim order of 04.12.2014.

PURPORTED RATIFICATION RESOLUTION DATED 29.09.2017:-

10. When the matter stood thus and pursuant to the interim order, it transpires that on 29.09.2017, a resolution was passed by the first respondent-company purportedly ratifying the diversion of funds. The resolution is in the following terms: -

"**RATIFICATION BY SHAREHOLDERS FOR ALTERATION / VARIATION OF UTILIZATION OF PROCEEDS OF PREFERENTIAL ALLOTMENT OF 63,50,000 EQUITY SHARES**

"RESOLVED THAT pursuant to the provisions of Section 27 and other applicable provisions, if any, of The Companies Act, 2013 and pursuant to the Companies (Prospectus and Allotment of Securities) Rules, 2014 and all the applicable laws and regulations for the time being in force, in respect of Preferential Allotment of 63,50,000 Equity Shares of Face Value of Rs.10/- each issued at a premium of Rs.15/- per share allotted by the Board of Directors at their meeting held on 09/11/2012, the ratification and approval of the Shareholders be and is hereby accorded to all acts, deeds and things done by the Company in entering into and giving effect to the utilization of proceeds as received in the said Preferential issue which is in variation to the objects as stated out in the Notice of Extra Ordinary General meeting held on 01/10/2012".

11. On 29.05.2015, the respondent-Company wrote a letter to the WTM denying any diversion of the proceeds of preferential allotment to purposes other than stated in the objects of the EoGM.

12. It further transpires from the record that on 05.12.2017, that WTM issued a show cause for violations of the PFUTP Regulations. The show cause notice called upon the respondents herein to show cause as to why suitable directions under Section 11B, 11(4) and 11(1) of the SEBI Act be not passed against them for violation of the aforementioned violations. It further transpires that the WTM on 19.03.2019, after rejecting the reply of the respondents dated 05.01.2019 held that there was violation of the PFUTP Regulations. The WTM found the Company had utilized the proceeds for the objects not disclosed in the notice of EGoM however, since by the said date, the respondents herein had already undergone restriction from accessing the security market for a period of more than four years and three months, in view of the adinterim order of 04.12.2014, no further penalty was imposed.

SHOW CAUSE NOTICE BY ADJUDICATING OFFICER (AO):-

13. On 27.04.2018, the Adjudicating Officer (AO) of the appellant issued a show cause notice to the respondents calling upon the noticees to show cause as to why an enquiry should not be held for violations under Regulations 3(a), 3(b), 3(c), 3(d), 4(1), 4(2)(f), 4(2)(k) and 4(2)(r) of the PFUTP Regulations. It was specifically alleged that the proceeds

of the preferential allotment were immediately transferred to various entities inasmuch as while the proceeds were credited in the account of the Company during 16.10.2012 and 08.11.2012. The same were transferred to various entities during October 16, 2012 to November, 09, 2012. The relevant para in the show cause notice is extracted hereunder:-

"It was further observed that proceeds of preferential allotment were immediately transferred to various entities as mentioned in the table 2. As an instance while the proceeds of preferential allotment started getting credited on Oct 16, 2012, a part of the same was transferred to one Mr. Raj Agarwal on the next day itself, i.e. on Oct 17, 2012. While the proceeds of the preferential allotment were credited in the said bank accounts of Moryo during Oct 16, 2012 to Nov 09, 2012. Thus, the proceeds of preferential allotment were never retained in the company for executing its objects as envisaged in the special resolution passed under section 81(1A) of the Companies Act, 1956. Further, it was also observed that prior to receipt of the proceeds of the preferential allotment, the funds available in the aforesaid bank accounts of the company would not have been sufficient enough for transfers to various entities."

14. To the show cause notice of 27.04.2018 issued by the Adjudicating Officer though the same was delivered there was no response from the noticees initially. Letter of 04.04.2019 was issued informing of the personal hearing which was fixed on 24.04.2019. Thereafter, a fresh notice was issued for personal hearing on 24.07.2019. Both the notices were returned as unclaimed. By way of affixture of notice on the last known address on 15.07.2019, service was effected.

REPLY TO SHOW CAUSE NOTICE BY RESPONDENTS: -

15. By a letter of 22.07.2019, noticee No.1 submitted a reply stating that under the MOA advancing money to companies was permitted; that due to prevailing market conditions the proceeds of the preferential issue could not be utilized as per the objects of the issue. Therefore, considering the object to be incidental or ancillary to the attainment of the main object of the company a part of the proceeds were invested in shares and lend to entities. They also submitted that in the year 2014 they altered the object clause to financial activities through a special resolution. They averred that a part of the preferential issue, proceeds which were invested in shares and lent to other entities were received back and utilized as per the modified objects clause of the noticee company. They also submitted the shareholders have ratified and approved the aforesaid utilization of the proceeds of the preferential issue by passing a Special Resolution in the AGM. They submitted that the acts were bona fide and cannot be considered as detrimental to the interest of the participants in the securities market.

ORDER OF AO DATED 29.04.2020: -

16. On 29.04.2020, the Adjudicating Officer passed three orders against respondent Nos.1 to 3 finding that they have violated Regulations 3(a), 3(b), 3(c), 3(d), 4(1), 4(2)(f), 4(2)(k), and 4(2)(r) of the PFUTP. It was also found that the respondent No.1-company has violated Section 21 of the SCRA read with Clause 43 of the Listing Agreement. The AO ordered that in exercise of his powers under Section 15(I)(2) of the SEBI Act read with Rule 5 of the Adjudication Rules and Section 23(I)(2) of the SC (R) Act, 1956 read with Rule 5 of the Adjudication Rules, a monetary penalty of Rs.70,00,000/- under Section 15HA of the SEBI Act, 1992 for violation of PFUTP Regulations and Rs. 30,00,000/- under Section 23E of the SC (R) Act for violation of Section 21 of the said Act and Clause 43 of the Listing Agreement be imposed. This penalty was on the Company. Insofar as the individual Directors were concerned, for violation of PFUTP Regulations, the penalty of Rs.25,00,000/- each was imposed.

17. The Adjudicating Officer found that the Noticees had not utilized the proceeds of the preferential issue as mentioned in the notice of the EoGM. Moreover, the AO found that the Noticees accepted the position that they have utilized the proceeds for purchasing shares of other companies and extending loans and advances to other companies and entities. It was found that the proceeds were not utilized as per the objects of the issue. The AO rejected the explanation of the Noticees that the proceeds could not be utilized due to prevailing market conditions by finding that the Noticees had not elaborated as to what the market condition was and the difficulties in meeting the objects of the issue and the compelling reason to extend loans and advances.

18. The AO distinguished between objects of the preferential allotment as stated in the notice for EoGM and the objects of the company as stated in the Memorandum of Association. Hence, the AO rejected the argument that utilizing the proceeds of the preferential issue purportedly for one of the objects incidental/ancillary to the attainment of the main object of the company was to be considered as utilizing the proceeds towards meeting the objects of the issue, as devoid of merit. A further finding was recorded that Clause III(B)(11) of the MoA did not contain as its ancillary/incidental object, the grant of loans and advances, and only permitted giving guarantees or acting as security. The AO noticed the postfacto amendment to the MoA on 12.03.2014 and held that being a post-facto amendment it would not remedy the illegality of a prior act.

19. Dealing with the Special Resolution dated 29.09.2017, which according to the Noticees ratified and approved all acts, deeds and things with regard to utilization of the proceeds from the preferential issue, the AO rejected the said contention, holding that past alleged acts/deeds cannot be legitimized by subsequent ratification.

20. Thereafter, the AO held that the Noticees had made investments in shares and given loans and advances which were not disclosed as objects of the preferential issue. The AO held that the objects of the issue as presented to the shareholders/public in the notice dated 03.09.2012 was untrue and misleading.

21. By way of two separate orders passed on the same day, the AO found R2 and R3 liable for the violations committed by R1 since a company cannot act on its own. The AO held that R1's fraudulent acts could not have been committed except with the knowledge of Respondents Geeta Manoharlal Saraf and Manoharlal Saraf, who were directors of the company and signatories to the financial statements declared by the Company in its Annual Report for 2012-13 and 2013-14. It was noted that Manoharlal Saraf was the MD, and his wife Geeta Manoharlal Saraf was the Chairman of the Audit Committee of the Company for the FY 2012-13 and 2013-14 and that she had attended all the meetings of the Audit Committee held during FY 2012-13 and 2013-14.

APPEAL TO SAT: -

22. The respondents carried the matter in appeal to the SAT. By a short order, the SAT, after noticing the ratification in the resolution on 29.09.2017, allowed the appeal of the Noticees by recording the following finding: -

"12. Once the utilization of the proceeds have been ratified by the shareholders of the Company, the acts and deeds done by the Company becomes valid and authorized and therefore there was no variation of the utilization of the proceeds. The show cause notice alleging variation in the utilization of the proceeds is, thus, erroneous.

13. For the same reason, since the utilization of the proceeds have been ratified, there was no variance in the utilization of the proceeds and consequently there was no violation of Clause 43 of the Listing Agreement."

Aggrieved, the appellant is in appeal before us.

CONTENTIONS OF THE APPELLANT: -

23. Mr. Naveen Pahwa, learned Senior Advocate for the appellant contends that the misutilization of funds is in violation of the PFUTP Regulations, 2003 and Section 21 of SCRA and Clause 43 of the Listing Agreement. Learned Senior Counsel submits that the objects stated in the notice of EoGM pursuant to the resolution passed by the company on 01.10.2012, were the following: -

"a. Capital expenditure including acquisition of companies/business;

b. Funding long term working capital requirements;

c. Marketing:

d. Setting up of offices abroad; and

e. For other approved corporate purposes."

Whereas between 16.10.2012 and 08.11.2012 they were diverted for different purposes namely for grant of loans and investments in shares.

24. Learned Senior Counsel submits that the ratification of 29.09.2017 is of no avail as Section 27 of the Companies Act has no application. According to the learned Senior Counsel, Section 27 of the Companies Act applies only to variation in terms of contract or objects in prospectus. According to the learned Senior Counsel, there is no provision under the Companies Act to ratify post facto diversion of funds raised through issue of any securities. Learned Senior Counsel submits that as per Section 42(3) of the Companies Act a Company making private placement shall issue private placement offer and application in such form and manner as may be prescribed. Learned Senior Counsel submits that as per Rule 14(3) of the Companies (Prospectus and Allotment of Securities) Rules, 2014, the prescribed form is PAS-4. Under this form, the object of preferential issue is required to be disclosed to existing shareholders and a special resolution is required to be passed for making such allotment. Further, as per Regulation 73(1)(a) of the SEBI ICDR Regulations, the object of preferential issue ought to be disclosed in the explanatory statement to the notice for the general meeting proposed for passing the Special Resolution. Learned Senior Counsel submits that guardrails have been placed to ensure that due process has been followed and the interest of the investors are protected. According to the learned Senior Counsel, neither SEBI ICDR Regulations nor the Companies (Prospectus and Allotment of Securities) Rules 2014 provide for varying the purpose or object of preferential allotment.

25. Learned Senior Counsel submits that the timing of diversion immediately after the receipt, establishes fraud and violation of Regulations 3 and 4 of the PFUTP Regulations. Learned Senior Counsel submits that illegal and *void ab initio* acts cannot be ratified. Utilizing funds for purpose different from the purpose stated in the invitation to subscribe is a fraudulent activity under the PFUTP Regulations.

26. Learned Senior Counsel submits that both Section 11 proceedings by the WTM and the proceedings by the AO under 15(I) are maintainable. According to learned Senior Counsel, the proceedings under Section 11 by the WTM are for the interest of investors and to maintain integrity of the securities market, while under Section 15(I) the power is to impose penalty for violation of SEBI regulations. Learned Senior Counsel contended that the impugned order is wholly untenable and prayed for setting aside the same and restoration of the order of the Adjudicatory Authority. Detailed written submissions also have been filed by the appellants.

CONTENTIONS OF THE AMICUS CURIAE: -

27. Mr. Mahfooz A. Nazki, the learned Amicus did not dispute that the proceeds received as consideration for the preferential issue have not been utilized for the purposes stated in the notice. The contention of the learned Amicus is that though Section 27 on its terms and applied only to a prospectus, since Section 62(1)(c) of Companies Act which deals with allotments such as private placement makes compliance with provisions of Chapter III, the principles analogous to Section 27 would be applicable to the present situation when read with Section 62(1)(c). Learned Amicus submits that there is no requirement of prior approval.

28. Learned Amicus contends that shareholders are entitled to grant a retrospective approval or make a ratification. Learned Amicus submits that it cannot be contended that the company could not have authority to vary the objects under any circumstances. Learned Amicus Curiae contends that a company cannot be rendered helpless or paralyzed merely because no specific mechanism for variation of objects of a preferential issue is provided in the statute. Learned Amicus submits that so long as the variation does not contravene any law or the company's constitutional documents, the Company must be treated as having the implied power to make such variation and according to the learned Amicus such power is being reasonable and incidental to achievement of its objects.

29. Learned Amicus contends that under Clause 3 (A)(12) of the Memorandum of Association, investment in shares is set out as one of the objects of the Company. Though the Memorandum of Association did not provide for lending as one of the purposes, according to learned Amicus there was no clause prohibiting the same. Learned Amicus submits that on 12.03.2014 the MOA came to be amended providing for lending as one of the objects of the company. Learned Amicus submits that there is no express provision forbidding a company from ratifying any impugned action. Hence, learned Amicus submits that on facts the ratification is valid, especially since: -

(A) The breach was in relation to the interest of the shareholders

(B) No complaints were received from anyone including the group of shareholders who have subscribed to the preferential issue.

(C) that complaint was not per se ultra vires the Memorandum of Association of the respondent.

(D) that in reply to Show Cause Notice, the noticees have specifically stated that the information regarding preferential issue was shared with the shareholders in the Balance Sheet of the Company as well as on the exchange and company website on regular basis.

30. Learned Amicus contends that merely mentioning the wrong provision of Section 27 is not fatal for ratification. Learned Amicus questioned the imposition of heavy penalties contending that the AO has not considered the contention of the noticees that all loans advanced have been received back by the Company and that the investments made by the respondents had yielded positive results.

31. Learned Amicus Curiae contends that the proceedings before the AO and the WTM were founded on the very same set of facts and allegations. Once the WTM had adjudicated the matter and returned findings it was impermissible for the AO to simultaneously adjudicate on the same cause, as such parallel exercise of jurisdiction leads to contradictory and inconsistent findings undermining certainty and regulatory

discipline. So contending, learned Amicus submitted that the impugned order did not call for any interference.

QUESTION FOR CONSIDERATION: -

32. In the above background, the question that arises for consideration is: Whether the SAT was justified in reversing the order of the Adjudicating Officer, and exonerating the respondents for alleged violations of PFUTP Regulations and the SCRA?

ANALYSIS AND REASONING: -

33. The original object for the preferential issue as disclosed was that the funds raised would be utilized for (a) capital expenditure including acquisition of companies/business, (b) funding long-term working capital requirements (c) marketing (d) setting up of offices abroad and (e) for other approved corporate purposes. These objects are statutorily required to be disclosed under Regulation 73 of the SEBI (ICDR) Regulations, 2009.

34. It is undisputed that the funds raised by the preferential issue were utilized for investment in shares and giving loans and advances which were admittedly not the objects set out in the disclosure made prior to the raising of funds. The only defence raised is that by a resolution of 29.09.2017, the shareholders have ratified the alteration/variation in the utilization of proceeds of preferential allotment. It is also submitted that post the issue and the raising of funds, on 12.03.2014 the Memorandum of Association of the Company was altered to include carrying on business as a finance company and advance money to any person, firm or body corporate. The argument of ratification is what has found favour with the SAT.

RELEVANT STATUTORY PROVISIONS :-

35. The SEBI Act, 1992 has amongst its objects promotion of orderly and healthy growth of securities market and for investors' protection. The Board itself has been established to protect the interests of the investors in securities and to promote the development of and to regulate, the securities market and for matters connected therewith or incidental thereto. To achieve this object several regulations have been issued by SEBI and we are in the present case concerned with one of them namely the PFUTP Regulations. The relevant provisions of PFUTP Regulations with which we are concerned are as follows.

"2(1)(c). "fraud" includes any act, expression, omission or concealment committed whether in a deceitful manner or not by a person or by any other person with his connivance or by his agent while dealing in securities in order to induce another person or his agent to deal in securities, whether or not there is any wrongful gain or avoidance of any loss, and shall also include—

xxx xxx

(3) an active concealment of a fact by a person having knowledge or belief of the fact;

(4) **a promise made without any intention of performing it**;

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 device 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 manipulation, fraudulent and unfair trade practices

(2) Dealing in securities shall be deemed to be a manipulative fraudulent or an unfair trade practice if it involves any of the following:—

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(f) knowingly publishing or causing to publish or reporting or causing to report by a person dealing in securities any information relating to securities, including financial results, financial statements, mergers and acquisitions, regulatory approvals, which is not true or which he does not believe to be true prior to or in the course of dealing in securities;

xxx xxx

(k) disseminating information or advice through any media, whether physical or digital, which the disseminator knows to be false or misleading in a reckless or careless manner and which is designed to, or likely to influence the decision of investors dealing in securities;

xxx xxx

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

(Emphasis Supplied)

OBJECTS OF THE SEBI ACT AND REGULATIONS: -

36. It is now very well settled that the SEBI Act and the Regulations are intended to pre-empt manipulative trading and check all kinds of impermissible conduct resorted by parties, so that the innocent investor is not misled. The primary purpose of such statutory provisions is to provide an environment conducive to increased participation and investment in the securities market, which is vital to the growth and development of the economy.

37. Further, the object is to prevent exploitation of the public through misrepresentation and to ensure that adequate and true information before the investor is placed. This Court has also held that while interpreting these regulations which are intended to protect the investor the Court must weigh against an interpretation which will protect unjust claims over just, fraud over legality and expediency over principle. Further, this Court has emphasized that any practice which does not conform to the fair and transparent principles of trades in the stock market would be captured under the rubric of unfair trade practices in the securities market. This Court has held that protection of investors should necessarily include prevention of misuse of the market. (See ***SEBI*** v. ***Kishore R. Ajmera,***[1], ***SEBI*** v. ***Kanaiyalal Baldevbhai Patel***[2], and ***SEBI*** v. ***Rakhi Trading (P) Ltd.***[3]

[1] (2016) 6 SCC 368
[2] (2017) 15 SCC 1
[3] (2018) 13 SCC 753

APPLICATION OF LAW TO THE FACTS :-

38. Applying these principles to the facts, we find that the proceeds for preferential allotment, as alleged in the Show Cause Notice were immediately transferred to various entities by way of loans inasmuch as while the proceeds started getting credited in the account of the company from 16.10.2012 till 08.11.2012, the transfers occurred from October 16, 2012 to November 9, 2012. Further, the Adjudicating Officer found that though the noticees sought to justify their stand by contending that proceeds could not be utilized due to prevailing market conditions, the noticees have not elaborated as to what the market conditions were and as to what the difficulties were in meeting the objects of the issue and the compelling reasons to extend loans and advances. The Adjudicating Officer also correctly distinguished between the objects of the preferential allotment as stated in the notice for EoGM and the objects as stated in the Memorandum of Association. Hence, what is crucial is what was stated as objects in the notice of EoGM.

39. For the purpose of PFUTP and the SCRA, breach of Regulation 3 and 4 would be attracted if any person sells or otherwise deals in the security in a fraudulent manner. It would further be attracted if any person uses or employs in connection with issue of any security, any manipulative or deceptive device in contravention of provisions of the Act; knowingly publishes or causes to publish any information which is not true or which he does not believe to be true prior to or in the course of dealing with securities; disseminates information which he knows to be false or misleading and which is designed to influence the decision of the investor dealing in securities and knowingly plants false or misleading news which may induce sale or purchase of securities.

EXPANDED MEANING OF THE CONCEPT OF FRAUD :-

40. It may also be noticed that fraud has been defined to mean any act expression or concealment committed whether in a deceitful manner or not in order to induce any person to deal in securities and whether or not there is any wrongful gain or avoidance of wrongful loss. Fraud would also include an active concealment of a fact by a person having knowledge or belief of the fact and making of a promise without any intention of performing it.

41. Under the PFUTP Regulations, fraud is broadly defined and is not confined to the meaning as normally understood. As would be clear from the definition, there could be fraud under the PFUTP Regulations even without deceit. This view is reinforced by the judgment of this Court in ***Kanaiyalal Baldevbhai Patel (supra)***.

"28. There is no dispute as to the fact that fraud is jurisprudentially very difficult to define or clothe it with particular ingredients. A generalised meaning may be difficult to be attributed, as human ingenuity would invent ways to bypass such behaviour. It is to be noted that fraud is extensively used in various regulatory framework which mandates me to take notice of the conceptual and definitional problem it brings along. Fraud is among the most serious, costly, stigmatising and punitive forms of liability imposed in modern corporations and financial markets. **Usually, the antifraud provisions of the security laws are not coextensive with common law doctrines of fraud as common law fraud doctrines are too restrictive to deal with the complexities involved in the security market, which is also portrayed by the changes brought in through the 2003 Regulations to the 1995 Regulations.**

29. On a comparative analysis of the definition of "fraud" as existing in the 1995 Regulations and the subsequent amendments in the 2003 Regulations, it can be seen that the original definition of "fraud" under the FUTP Regulations, 1995 adopts the definition of "fraud" from the Contract Act, 1872 whereas the subsequent definition in the 2003 Regulations is a variation of the same and does not adopt the strict definition of "fraud"

as present under the Contract Act. It includes many situations which may not be a "fraud" under the Contract Act or the 1995 Regulations, but nevertheless amounts to a "fraud" under the 2003 Regulations.

54. The definition of "fraud", which is an inclusive definition and, therefore, has to be understood to be broad and expansive, contemplates even an action or omission, as may be committed, even without any deceit if such act or omission has the effect of inducing another person to deal in securities. Certainly, the definition expands beyond what can be normally understood to be a "fraudulent act" or a conduct amounting to "fraud". The emphasis is on the act of inducement and the scrutiny must, therefore, be on the meaning that must be attributed to the word "induce"

42. Further, in ***Kanaiyalal Baldevbhai Patel (supra)*** this Court clearly laid down a touch stone namely that a Court must weigh against any interpretation which would protect unjust claims over just, fraud over legality and expediency over principle and once this Rule is established, individual cases should not pose any problem.

43. Applying this principle, we have no semblance of doubt in our mind that the diversion of the funds raised for an object not set out in the notice of EoGM was clearly in breach of Regulation 3 as well as Regulations 4(2)(f), 4(2)(k) and 4(2)(r) of the PFUTP Regulations. Further, the very purpose of notice of EoGM and the notice informing the objects of preferential issue is also traceable to Regulation 73 of the ICDR Regulations, 2009 which mandate that the objects for the preferential issue have to be set out.

44. The reason is not far to seek. When a company offers private placement or goes public, the legal regime mandates fair disclosure and transparency. The investors and all other stakeholders concerned with the securities market irrespective of whether they ultimately subscribe to the shares or not, adjust their affairs based on the disclosure made.

45. For example, based on the objects set out an investor holding the shares of a company may decide to retain the shares and not trade at that moment. It may also happen that an investor who carefully observes the market may on reading the objects and finding them to be genuine may decide to purchase shares of the company which are otherwise traded in the market. Yet another investor keenly observing the market may feel that the object set out for a particular preferential issue may be ultimately detrimental to the company and decide to off load his shares in the market. All this is set out only to show that disclosure of the objects as mandated in Regulation 73 of the ICDR Regulations and as mandated by the fairness and transparency required of companies by the various regulations of SEBI have salutary purposes, which ought not to be casually compromised with.

46. The importance of the objects stated in the explanatory statement is also highlighted in Clause 43 of the Listing Agreement of the stock exchange which mandates the furnishing on quarterly basis indicating variations between projected utilization of funds and/or projected profitability statement made in the letter of offer or objects stated in the explanatory statement and the actual utilization of funds and or actual profitability. Clause 43 is extracted hereinbelow.

"Equity Listing Agreement - BSE

43. a) The Company agrees that it will furnish on a quarterly basis a statement to the Exchange indicating the variations between projected utilisation of funds and/or projected profitability statement made by it in its prospectus or letter of offer or object/s stated in the explanatory statement to the notice for the general meeting for considering preferential issue of securities, and the actual utilisation of funds and/or actual profitability.

b) The statement referred to in clause (1) shall be given for each of the years for which projections are provided in the prospectus/letter of offer/object/s stated in the explanatory statement to the notice for considering preferential issue of securities and shall be published in newspapers simultaneously with the unaudited/audited financial results as required under clause 41.

c) If there are material variations between the projections and the actual utilisation/profitability, the company shall furnish an explanation therefore in the advertisement and shall also provide the same in the Directors' Report.

d) The statement referred to in clause (a) shall also be given for warrants issued along with public or rights issue of specified securities."

47. Section 21 of the Securities Contracts (Regulation) Act, 1956 and 23E of SCRA read as under.

"21. Conditions for listing. -

Where securities are listed on the application of any person in any recognised stock exchange, such person shall comply with the conditions of the listing agreement with that stock exchange.

23E. Penalty for failure to comply with listing conditions or delisting conditions or grounds. -

If a company or any person managing collective investment scheme or mutual fund, fails to comply with the listing conditions or delisting conditions or grounds or commits a breach thereof, it or he shall be liable to a penalty not exceeding twenty-five crore rupees."

48. Further, the importance of the objects and the need for compliance is further highlighted by the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015. Though the LODR Regulations are of 2015, it has only been set out here to highlight how Regulation 32(1) and 32(5) create a reporting obligation of deviations in the use of the proceeds from the stated objects. This does not mean that this is a sanction for deviation but this mandates the reporting of deviation, to enable stock exchange to be posted of the said facts. Regulation 32 and 35 are extracted hereinbelow: -

"32. Statement of deviation(s) or variation(s).

(1) The listed entity shall submit to the stock exchange the following statement(s) on a quarterly basis for public issue, rights issue, preferential issue etc.,-

(a) indicating deviations, if any, in the use of proceeds from the objects stated in the offer document or explanatory statement to the notice for the general meeting, as applicable; (b)indicating category wise variation (capital expenditure, sales and marketing, working capital etc.) between projected utilisation of funds made by it in its offer document or explanatory statement to the notice for the general meeting, as applicable and the actual utilisation of funds.

(2) The statement(s) specified in sub-regulation (1), shall be continued to be given till such time the issue proceeds have been fully utilised or the purpose for which these proceeds were raised has been achieved.

(3) The statement(s) specified in sub-regulation (1), shall be placed before the audit committee for review and after such review, shall be submitted to the stock exchange(s).

(4) The listed entity shall furnish an explanation for the variation specified in sub-regulation (1), in the directors' report in the annual report.

(5) The listed entity shall prepare an annual statement of funds utilized for purposes other than those stated in the offer document/prospectus/notice, certified by the statutory auditors of the listed entity, and place it before the audit committee till such time the full money raised through the issue has been fully utilized.

(6) Where the listed entity has appointed a monitoring agency to monitor utilisation of proceeds of a public issue or rights issue or preferential issue or qualified institutions placement, the listed entity shall submit to the stock exchange(s) any comments or report received from the monitoring agency within fortyfive days from the end of each quarter.

(7) Where the listed entity has appointed a monitoring agency to monitor the utilisation of proceeds of a public issue or rights issue or preferential issue or qualified institutions placement, the monitoring report of such agency shall be placed before the audit committee on a quarterly basis, promptly upon its receipt.

Explanation,— For the purpose of sub-regulations(6) and (7), "monitoring agency" shall mean the monitoring agency as specified in the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018.

(7A) Where an entity has raised funds through preferential allotment or qualified institutions placement, the listed entity shall disclose every year, the utilization of such funds during that year in its Annual Report until such funds are fully utilized.

(8) For the purpose of this regulation, any reference to "quarterly/quarter" in case of listed entity which have listed their specified securities on SME Exchange shall respectively be read as "half yearly/half year.

Annual Information Memorandum.

35. The listed entity shall submit to the stock exchange(s) an Annual Information Memorandum in the manner specified by the Board from time to time."

49. A conspectus of the reading of the SEBI Act, PFUTP Regulations, the SCRA Act, ICDR Regulation and the Listing Agreement all point in one direction to the fact that objects set out in the explanatory note for the issuance of securities including preferential allotment of shares are of utmost significance and have a large say in influencing and impacting the conduct of the stakeholders concerned with the securities market. It is not to be taken casually since the consequences to public interest could be grave.

INTENTION TO DISREGARD OBJECTS FROM INCEPTION: -

50. There is another significant aspect in the present case. The EoGM was on 03.09.2012 for the stated objects therein and the funds started coming in from 16.10.2012. From the very next day, the funds were diverted towards advances to companies and for investment in shares. The ratification came after the WTM had passed an ex-parte order on 04.12.2014 only on 29.09.2017, at a point when the entire funds already stood diverted. The explanation tendered that the market conditions prevailing prevented them from utilizing was rightly not accepted. It is very clear from the facts that the respondents had from the very inception had no intention to use the funds for the stated objects and their only object was to somehow raise the funds and divert it for the purpose they ultimately did.

51. In ***Kishore R. Ajmera (supra),*** this Court held that proof of violation of Regulations may have to be inferred by a logical process of reasoning from the totality of attending facts and circumstances. In this case, though there is admission that there is diversion of purpose, the claim that it was due to market conditions is false, is established from the speed with which the amounts were diverted. The reliance on newspaper articles about GDP rate hitting a new low is to say the least not convincing at all and is too general.

COULD ILLEGALITY BE RATIFIED? :-

52. It is in this background that we need to test the summary finding of the SAT that since the shareholders have ratified the Acts and Deeds done by the company, they

become valid and authorized and as such there was no variation in the utilization of the proceeds.

53. Mr. Mahfooz A. Nazki, the learned Amicus placed reliance on Section 27 of the Companies Act read with Section 62 (1)(c) of the said Act. Learned Amicus contends that though Section 27 may not apply proprio vigore, by virtue of Section 62(1)(c) the principles analogous to Section 27 may be applied. Section 27 reads as under : -

"27. Variation in terms of contract or objects in prospectus.—(1) A company shall not, at any time, vary the terms of a contract referred to in the prospectus or objects for which the prospectus was issued, except subject to the approval of, or except subject to an authority given by the company in general meeting by way of special resolution:

Provided that the details, as may be prescribed, of the notice in respect of such resolution to shareholders, shall also be published in the newspapers (one in English and one in vernacular language) in the city where the registered office of the company is situated indicating clearly the justification for such variation:

Provided further that such company shall not use any amount raised by it through prospectus for buying, trading or otherwise dealing in equity shares of any other listed company.

(2) The dissenting shareholders being those shareholders who have not agreed to the proposal to vary the terms of contracts or objects referred to in the prospectus, shall be given an exit offer by promoters or controlling shareholders at such exit price, and in such manner and conditions as may be specified by the Securities and Exchange Board by making regulations in this behalf.

54. A careful perusal of Section 27 indicates that it applies to variation of objects in a prospectus. Section 2(70) of the Companies Act, 2013 defines "prospectus" as under: -

"2(70) "prospectus" means any document described or issued as a prospectus and includes a red herring prospectus referred to in section 32 or shelf prospectus referred to in section 31 or any notice, circular, advertisement or other document inviting offers from the public for the subscription or purchase of any securities of a body corporate;"

55. On its very terms, Section 27 has no application. The present issue of equity shares by way of preferential allotment to designated individuals is through private placement and under Section 42(8) no company offering securities on private placement shall release any public advertisement or utilize any media, marketing, disbursement channels or agents to inform public at large about such an offer. The reliance on Section 62(1)(c) is also misplaced. The reliance placed by the learned Amicus is the amendment made in 2018. Section 62(1)(c) in the unamended and amended form (with effect from 09.02.2018) respectively, read as under: -

"62. Further issue of share capital.—(1) Where at any time, a company having a share capital proposes to increase its subscribed capital by the issue of further shares, such shares shall be offered—

(c) to any persons if it is authorized by a special resolution, whether or not those persons include the persons referred to in clause (a) or clause (b), either for cash or for a consideration other than cash, if the price of such shares is determined by the valuation report of a registered valuer subject to such conditions as may be prescribed.

AMENDED FORM

62. Further issue of share capital.—(1) Where at any time, a company having a share capital proposes to increase its subscribed capital by the issue of further shares, such shares shall be offered—

(c) to any persons, if it is authorised by a special resolution, whether or not those persons include the persons referred to in clause (a) or clause (b), either for cash or for a consideration other than

cash, if the price of such shares is determined by the valuation report 2 [of a registered valuer, subject to the compliance with the applicable provisions of Chapter III and any other conditions as may be prescribed."

56. Even if one is to take the amended form of Section 62(1)(c) all that Section talks of is the applicable provisions of Chapter III which would mean the conditions stipulated in Section 42. Reverting back to Section 27, which deals with varying the terms of the prospectus, it will be seen that even there it is subjected to several conditions; firstly, it is subject to the Companies (Prospectus and Allotment of Securities) Rules, 2014. Rule 7 of the said rules read as under: -

"7. Variation in terms of contracts referred to in the prospectus or objects for which prospectus was issued.—

(1) where the company has raised money from public through prospectus and has any unutilized amount out of the money so raised, it shall not vary the terms of contracts referred to in the prospectus or objects for which the prospectus was issued except by passing a special resolution through postal ballot and the notice of the proposed special resolution shall contain the following particulars, namely: —

(a) the original purpose or object of the Issue;

(b) the total money raised;

(c) the money utilised for the objects of the company stated in the prospectus;

(d) the extent of achievement of proposed objects(that is fifty percent, sixty percent, etc);

(e) the unutilised amount out of the money so raised through prospectus,

(f) the particulars of the proposed variation in the terms of contracts referred to in the prospectus or objects for which prospectus was issued;

(g) the reason and justification for seeking variation; (h) the proposed time limit within which the proposed varied objects would be achieved;

(i) the clause-wise details as specified in sub-rule (3) of rule 3 as was required with respect to the originally proposed objects of the issue;

(j) the risk factors pertaining to the new objects; and

(k) the other relevant information which is necessary for the members to take an informed decision on the proposed resolution.

(2) The advertisement of the notice for getting the resolution passed for varying the terms of any contract referred to in the prospectus or altering the objects for which the prospectus was issued, shall be in **Form PAS1** and such advertisement shall be published simultaneously with dispatch of Postal Ballot Notices to Shareholders.

(3) The notice shall also be placed on the website of the company, if any."

Secondly, Rule 7(e) requires stipulation of the unutilized amount; and thirdly, even under Section 27 the amount ought not be used for buying, trading or otherwise dealing in equity shares of other listed company.

57. In the present case, the entire amount raised was utilized for a different object than the one set out in the EoGM notice and ratification was sought after committing the illegality. In view of the above, the reliance on Section 27 read with Section 62(1)(c) is completely misplaced.

58. There is another important aspect. SEBI's Regulations including the PFUTP is to protect the rights of several stakeholders and as such has public law dimensions. The

Regulations are framed keeping in mind the rights and interests of multiple stakeholders involved in the securities market.

59. By a private resolution, a liability which is crystalized cannot be wiped off by contending that the shareholders have condoned the action. When rights of multiple stakeholders are involved and certain Regulations proscribe a particular course of action any breach of the Regulation has to face its consequences. They are not in the realm of private rights which can be waived off as ratified. Dealing with the difference between private rights and public rights and as to how matter involving rights of the public cannot be waived, this Court in ***Shri Lachoo Mal*** v. ***Shri Radhey Shyam***[4], held as under: -

"**6.** The general principle is that every one has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy. Thus the maxim which sanctions the non-observance of the statutory provision is cuilibet licet renuntiare juri pro se introducto. (See Maxwell on Interpretation of Statutes, Eleventh Edn., pp. 375 and 376). If there is any express prohibition against contracting out of a statute in it then no question can arise of any one entering into a contract which is so prohibited but where there is no such prohibition it will have to be seen whether an Act is intended to have a more extensive operation as a matter of public policy. In Halsbury's Laws of England, Vol. 8, Third Edn., it is stated in para 248 at p. 143:

"As a general rule, any person can enter into a binding contract to waive the benefits conferred upon him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that such an agreement is in the circumstances of the particular case contrary to public policy. Statutory conditions may, however, be imposed in such terms that they cannot be waived by agreement, and, in certain circumstances, the legislature has expressly provided that any such agreement shall be void."

60. What was said in the context of waiver will equally apply for ratifications since ratification of an illegality cannot be done. In ***Government of Andhra Pradesh and Others*** vs. ***K. Brahmanandam and Others,***[5] in the context of service jurisprudence, this Court held as under: -

"16. Appointments made in violation of the mandatory provisions of a statute would be illegal and, thus, void. **Illegality cannot be ratified**. Illegality cannot be regularised, only an irregularity can be."

[Emphasis supplied]

61. In ***Pramod Kumar*** vs. ***U.P. Secondary Education Services Commission and Others,***[6] this Court observed as under: -

"18. If the essential educational qualification for recruitment to a post is not satisfied, ordinarily the same cannot be condoned. Such an act cannot be ratified. An appointment which is contrary to the statute/statutory rules would be void in law. **An illegality cannot be regularised,** particularly, when the statute in no unmistakable term says so. Only an irregularity can be. [See *Secy., State of Karnataka* v. *Umadevi (3)* [(2006) 4 SCC 1], *National Fertilizers Ltd.* v. *Somvir Singh* [(2006) 5 SCC 493] and *Post Master General, Kolkata* v. *Tutu Das (Dutta)* [(2007) 5 SCC 317]"

[Emphasis supplied]

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[4] (1971) 1 SCC 619
[5] (2008) 5 SCC 241
[6] (2008) 7 SCC 153

62. Following the judgment in ***re: Birkbeck Permanent Benefit Building Society***,[7] this Court in ***Dr. A. Lakshmanaswami Mudaliar and Others*** vs. ***Life Insurance Corporation of India and Another,***[8] observed that where a company does an act which is ultra vires, no legal relationship or effect ensues therefrom. Such an act is absolutely void and cannot be ratified even if all the shareholders agree.

63. Though said in the context of resolution of the shareholders being ultra vires the Memorandum of Association of the Trust in the said case, what is important is the holding that if something is "ultra vires" it cannot be ratified.

64. The meaning of ultra vires, according to Advanced Law Lexicon P. Ramanatha Aiyar 3rd Edition 2005 "*ultra vires (beyond their power) said of a company or corporation etc. when exceeding the authority imparted to it by law*".

65. In the present case, what is argued by the learned amicus is that notwithstanding the diversion of the funds raised through the preferential allotment, the purpose for which they were diverted, namely, advancement of loans and investment in shares is relatable to the Memorandum of Association as it originally stood and, in any event, was covered by the amendment to the Memorandum of Association made on 12.03.2014. We are not able to countenance the submission What is crucial for our purpose is that the object set out in the explanatory note appended to the notice of EoGM prior to the issuance of preferential shares. The funds were not utilized for those disclosed objects. To make the matters worse for the respondents here the diversions were made soon after the amounts were raised between 16.10.2012 and 08.11.2012. The diversion was contrary to the object set out to the explanatory note and was before any amendment was carried out to the Memorandum of Association and the purported resolution of ratification dated 29.09.2017. More importantly, the diversion was contrary to the PFUTP Regulations of SEBI, the SEBI Act and the disclosure norms under Section 173(2) of the Companies Act read with Regulation 73(1) of the SEBI ICDR Regulations, 2009. Being a plainly illegal act impacting a vast array of stakeholders other than the shareholders of the company, the question of ratification cannot arise at all.

66. The matter cannot be viewed from the prism of the shareholders alone. When matter involves public interest it cannot be deemed as private waivable right. What applied to waiver will also apply to ratification. No condonation or ratification on aspects opposed to public policy can be made, as it will seriously jeopardize public interest.

VALIDITY OF SEPARATE PROCEEDINGS BY WTM AND ADJUDICATING OFFICER:-

67. That brings us to the final question that learned Amicus Curiae raised. Learned Amicus Curiae contend that the adjudicating order which culminated in the order of 29.04.2020, was found on the very same facts and allegations on which the WTM had on 19.03.2019 adjudicated after passing the ex-parte order on 04.12.2014. According to the learned Amicus Curiae, the AO was estopped from initiating proceedings on the same set of facts which the WTM had adjudicated. Reliance is placed on ***Securities and Exchange Board of India*** Vs. ***Ram Kishori Gupta & Anr.***[9], judgment of SAT in ***Nirmal N. Kotecha*** v. ***SEBI***[10].

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[7] (1912) 2 Ch. D. 183
[8] 1962 SCC OnLine SC 9
[9] Civil Appeal no. 7941 of 2019
[10] 2021 SCC OnLine SAT 1613

68. Considering the timelines involved in this case, we find that this submission is also misplaced. The EoGM resolution is dated 01.10.2012 and the funds were raised between 16.10.2012 and 08.11.2012. The funds were utilized for the purpose other than the one set out in the explanatory memorandum between 16.10.2012 and 09.11.2012.

69. Thereafter on 04.12.2014, the Whole Time Member exercising powers under Section 11(4) and 11(B) of the SEBI Act as it then stood, passed an ex-parte order against respondents, restraining them from buying, selling, and dealing with securities market either directly or indirectly in any manner till further directions. This was done to protect the interest of the investors.

70. Section 11(1), 11(4)(b) and 11(B) of the SEBI Act, at that point of 04.12.2014, stood as under :-

"**11. Functions of Board**.- (1) Subject to the provisions of this Act, it shall be the duty of the Board to protect the interests of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit.

11 (4) Without prejudice to the provisions contained in sub-sections (1), (2), (2A) and (3) and section 11B, the Board may, by an order, for reasons to be recorded in writing, in the interests of investors or securities market, take any of the following measures, either pending investigation or inquiry or on completion of such investigation or inquiry, namely:—

(b) restrain persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities;

11B. **Power to issue directions.-** (1) Save as otherwise provided in section 11, if after making or causing to be made an enquiry, the Board is satisfied that it is necessary,—

(i) in the interest of investors, or orderly development of securities market; or

(ii) to prevent the affairs of any intermediary or other persons referred to in section 12 being conducted in a manner detrimental to the interest of investors or securities market; or

(iii) to secure the proper management of any such intermediary or person, it may issue such directions,—

(a) to any person or class of persons referred to in section 12, or associated with the securities market; or

(b) to any company in respect of matters specified in section 11A, as may be appropriate in the interests of investors in securities and the securities market.

Explanation.—For the removal of doubts, it is hereby declared that the power to issue directions under this section shall include and always be deemed to have been included the power to direct any person, who made profit or averted loss by indulging in any transaction or activity in contravention of the provisions of this Act or regulations made thereunder, to disgorge an amount equivalent to the wrongful gain made or loss averted by such contravention."

71. The ex-parte order was confirmed on 22.08.2016. Thereafter, the appellant conducted a detailed investigation and a Show Cause Notice was issued to the respondents on 05.12.2017 calling upon them for alleged violation under PFUTP Regulations and to show cause why suitable direction under Section 11(B), 11(4) and 11(1) cannot be passed. An order was made after adjudication on 19 March 2019 and insofar as the present respondents were concerned, since by then these respondents had already undergone a prohibition from accessing the securities market directly or indirectly for a period of more than four years, the said period was held as sufficient.

72. Under Section 11(B), 11(4) and 11(1) of the SEBI Act, as it then stood, the WTM could only impose punishment of restraining access from the securities market and

disgorgement of any profit made or loss averted. In the present case, for a transaction of this nature, only restraining from accessing markets could have been imposed by the WTM at that point and that was duly imposed.

73. The power to impose penalty under Section 15HA was to be exercised by the Adjudicating Officer under 15(I)(1). Post the interim order by the WTM and based on the investigation for the purpose of imposition of penalty the Adjudicating Officer issued a Show Cause Notice on 27.04.2018 and it is out of this Show Cause Notice that the present proceedings arise. Section 15HA was amended in 2014 to read as under: -

"Penalty for fraudulent and unfair trade practices.

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

74. It is only in 2018 under the Finance Act of 2018 with effect from 08.03.2019 power was vested in the Whole Time Member to levy penalty under Section 15HA under Section 11B. However, since in the present case inquiry having begun on 27.04.2018 by the AO, the WTM steered clear of the penalty inquiry since the AO was looking into matter. Today, post the amendment the WTM could impose the penalty. However, we are dealing with situation before the amendment in the Finance Act 2018 and particularly a case where AO had exercised jurisdiction.

75. It will be very unfortunate if the only punishment a person who has committed fraud under PFUTP Regulation is an order restraining access from market and disgorgement of profit or the loss averted. There would be no deterrence. When the matter was clear during the inquiry that there was a clear case for penalty, the AO stepped in and exercised jurisdiction and passed an order for penalty. We find nothing wrong in the course of action adopted in the impugned order. It is only that two authorities vested with different powers operating in separate fields have exercised jurisdiction during the period in question.

76. The judgment in ***Nirmal N. Kotecha (supra)*** has no application. There the adjudicating officer had exonerated the party and thereafter the WTM stepped in. That is not the scenario again. ***Nirmal N. Kotecha (supra)*** is pending in appeal before this Court and we are not to be taken to have commented one way or the other on the issues involved in the said appeal.

77. ***Ram Kishori Gupta (supra)*** is also distinguishable. There this Court categorically held that when an earlier order dated 31.07.2014 of the WTM on the same cause of action and on the very same show cause notices remained intact and attained finality, the later order of 29.08.2018 could not have been passed supplementing the earlier order with additional directions. It was held that the power to order disgorgement was very much within the ambit and scope of SEBI even on 31.07.2014 but the WTM chose not to resort to it. It was in that context that this Court held that the order of 31.07.2014 having attained finality and given full effect, passing of a fresh order once again on the very same cause of action trampled upon and reversed the finality that had already attached to the earlier order. That is not the situation in the present case.

78. We also do not find the penalty imposed to be disproportionate.

79. For the above reasons, the impugned order passed by the SAT in Appeal Nos. 116 of 2021, 114 of 2021 and 115 of 2021 cannot be sustained. Accordingly, we set aside the

same. The Appeals are allowed. The order of the Adjudicating Officer dated 29.04.2020 is restored.

80. We place on record our appreciation for Mr. Mahfooz A. Nazki, the learned Amicus, who very ably presented the case on behalf of the respondents.