

In Re: Elegant Marbles and Granite

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Court : SEBI Securities and Exchange Board of India or Securities Appellate Tribunal SAT

Decided On : Dec-28-2004

Reported in : (2005)3CompLJ378SAT

Judge : A Singh, A Officer

Appellant : In Re: Elegant Marbles and Granite

Judgement :

1. The undersigned was appointed as the adjudicating officer by the Securities and Exchange Board of India (hereinafter referred to as Board) vide an order dated 30 June 2004 to inquire into and adjudge under Section 15A(b) of SEBI Act, 1992, for alleged non-compliance of clause 51 of the Listing Agreement by Elegant Marbles and Granite Industries Ltd. (hereinafter referred to as 'the company'/'EMGIL.') read with regulation 17(3) [erstwhile regulation 18(3)] of SEBI (Central Listing Authority) Regulations, 2003 (hereinafter referred to as 'CLA Regulations').
2. SEBI, vide Circular No. SMD/Policy/Cir-13/02 dated 20 June 2002 had directed stock exchanges to include clause 51 in the Listing Agreement requiring the companies specified from time to time to upload various financial statements/ documents on the EDIFAR web site, www.sebi.edifar.nic.in set up by SEBI in association with National Informatics Centre (NIC).
3. It has been stated that EMGIL was required to upload the required financial documents / statements with effect from quarter ending 30 March 2003 as

stipulated vide SEBI Circular No. SMD/Policy/Cir-10/2003, dated 17 March 2003.

4. It has been further stated that it was observed that the company had failed to register with the website for uploading the financial statements/documents and also failed to upload the following documents: (i) annual report inclusive of the balance sheet, profit and loss statement, director's report and auditor's report for the financial year 2002-03, (v) quarterly financial statements for the quarter ending 31 March 2003; and (vi) statement of actions taken against the company by any regulatory agency during the period upto 31 March 2003.

5. After being appointed as the Adjudicating Officer, a notice in accordance with rule 4 of the SEBI (Procedure for Holding Enquiry and Imposing Penalty by Adjudicating Officer) Rules 1995 was served on EMGIL vide letter No. Adj./AS/2004/21143 dated 9 September 2004 to show cause, within 15 days as to why an enquiry should not be initiated against it to adjudicate upon the alleged violations under Section 15A(b) of the SEBI Act? The said notice provided the details of the violations alleged to have been committed by the company.

6. The company, vide its letter dated 23 September 2004 submitted its reply to the show cause notice. The company was extended an opportunity of personal hearing on 3 November 2004 vide letter No. Adj./AS/2004/21621 dated 26 October 2004, which was not availed.

7. Subsequently, EMGIL submitted its detailed reply vide its letter dated 8 November 2004 and stated that its written submissions be taken as its full submissions and that they waive any further opportunity for personal hearing.

7.1 Before I proceed to deal with the case, it would be pertinent to make a reference to the relevant provisions of the said Act and CLA Regulations as alleged to have been contravened by EMGIL.

8.1 Regulation 17(3) of SEBI (Central Listing Authority) Regulations, 2003, states as under- "If a company or other body corporate, mutual fund or collective investment scheme fails to comply with these regulations, the listing conditions or the listing agreement or neglects to furnish any information or documents, which

are required to be furnished to the Board, to the Authority or to an exchange as per these regulations, the listing conditions or the listing agreement, it shall be liable to penalty as specified in Section ISA or Section 15HB of the Act, to be imposed in accordance with the procedure prescribed under Chapter VI A of the Act." "If any person, who is required under this Act or any rules or regulations made thereunder, to file any return or furnish any information, books or other documents within the time specified therefor in the regulations, fails to file return or furnish the same within the time specified therefor in the regulations, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less." 9.1 In its reply dated 23 September 2004, the company mainly stated the following- 9.2 It had received a circular from the stock exchange in September 2002 informing them about the EDIFAR scheme but that their company name was not mentioned in the list of companies to whom it would be applicable. It was further stated in the said circular that the stock exchange would intimate them when EDIFAR was made applicable to the company. Since then, no communication was received by the company from Jaipur stock exchange regarding their filing under the EDIFAR scheme.

9.1.3 They had been regular in submitting all the required information in physical format to the stock exchange on time as per mandatory requirements.

9.2 Immediately on receipt of SEBI letter, they had applied for EDIFAR registration on 23 September 2004.

9.2. In its detailed reply 8 November 2004, the company has mainly contended the following: 9.2.1 It had consistently complied with all the requirements of law including the SEBI Act, Regulation and Rules and the Listing Agreement.

9.2.2 There were some teething problems in implementation of the sophisticated and advanced EDIFAR system, especially, during the initial phase for a company like theirs having an office in the interiors.

9.2.3 The requirements had been complied with as soon as the company became aware of the same and it had no intention of delaying or not filing the information.

9.2.4 The period for complying with the said circular of SEBI was quite short, i.e., 17 March 2003 when the circular has been issued to 31 March 2003 when it was to come into force.

9.2.5 The information that had to be filed under EDIFAR was already public. In paper form, all the information had been sent to every shareholder and every stock exchange where the company was listed. The required information had also been issued in the form of press advertisements and thus the said information was already in the public domain. Further, no person had complained of lack of receipt of information and no loss whatsoever had been caused to any person.

9.2.6 There was considerable uncertainty as to how the whole concept of EDIFAR will operate, what will be steps, to whom will it apply, etc. As all information was already made public, the alleged breach, if any, was merely technical and out of a genuine and bona fide belief that there was yet no requirement in law to be complied with.

9.2.7 They had been charged for violation of regulation 17(3) of CLA Regulations which shall not be applicable to them. The CLA Regulations have come into force in August 2003 whereas the said contravention of non-compliance with clause 51 of the listing agreement pertains to the period ended 31 March 2003. The said regulations cannot apply to contraventions that have taken place prior to the date they have come into force as the said regulations are not retrospective in nature.

9.2.8 Even otherwise, CLA Regulations do not apply to the company as the said regulations provide for a different procedure for a company to be listed on the stock exchange, i.e. through the Central Listing Authority. Since EMG1L was listed in 1994, the regulations are not applicable to them and CLA Regulations are applicable only to companies listed in accordance with them.

9.2.9 Penalty cannot be levied under Section s 15A/15HB of the SHBI Act, 1992, as the said Section s apply only if a person fails to comply with the requirements under the Act or the rules and regulations made thereunder. The requirement of filing under EDIFAR is under the said circular of SEBI and the listing agreement, and that there are no rules, regulations that require the information to be filed.

Penalty cannot be levied for non-compliance with a circular/ guideline. The company has also furnished an extract on the judgment of SAT in the matter of Toubro Infotech & Industries Ltd., In re (2005) 3 Comp LJ 305 (SAT), wherein SAT has held that circulars and guidelines cannot be compared with and put at par with regulations and rules under SEBI Act and that violation of circulars/guidelines cannot result in any penal action.

9.2.10 Factors for levy of penalty under Section 15J are not even remotely attracted. The company has cited the SAT order in the matter of Industrial and Prudential Investment Co. Ltd., In re dated 18 May 2004 (2005) 3 Comp LJ 305 (SAT) wherein SAT has observed that there was no unfair advantage or disproportionate gain, nor were there any previous such violations by the entity. SAT has further observed in the case that taking into account that the misconduct was of a technical nature and the disclosure was made voluntarily by the appellant, it would be appropriate in the facts and circumstances of this case to take a lenient view with regard to the penalty.

9.2.11 EMGIL has also cited the decision of the Bombay High Court in the case of Cabot [SEBI v. Cabot International Capital Corporation (2004) 2 Comp LJ 363 (Bom) and the remarks made by the court in the said decision holding that since the information in the case was already with the exchanges, hence, the company had no intention to suppress any material information, the question of levy of penalty does not arise.

9.2.12 The company has thus through the above points requested for dropping of penal proceedings.

10.1 I find that the company's reply dated 23 September 2004 seeks to give an impression that the company became aware of its obligation to comply with the HD1FAR system only on receipt of the show cause dated 9 September 2004 issued by the undersigned. The company's claim does not appear to be correct as the notice issued by the undersigned refers to (a) previous show cause notice No. SMD/Policy/ EDI-FAR/12963/2003 dated 4 July 2003 issued by SEBI to the company on the same subject, (b) SEBI circular No. SMD/Policy/Cir-10/2003 dated 17 March 2003 which required the company to upload documents on

EDIFAR web site. The company has not made any reference to these previous communications in its replies.

10.2 I find that the claim of the company that CLA Regulations do not apply to it does not hold as the said regulations were first notified on 13 February 2003 whereas the circular issued by SEBI under which EMGII. was required to file under EDIFAR was issued in March 2003.

Subsequently, when the regulations were amended in August 2003, clause 18(3) of the erstwhile regulations was to be read as clause 17(3) of the newly notified CLA Regulations. However, since the amended regulations included the savings clause, all violations under the earlier regulations were to be treated as violations of the amended regulations.

10.3 Further, clause 17(3) of the CLA Regulations mandates every company listed on a stock exchange (irrespective of the procedure followed for listing) to continue to comply with the listing agreement.

Thus the claim that the said regulations do not apply to the company since it was not listed as per the procedure listed in the CLA regulations cannot be maintained.

10.4 It is observed from the EDIFAR site that as on the date of this order, the web site does not show the company's balance sheet for the year 2002-03 and corporate governance report for the March 2004 quarter and quarterly financial statements for the March 2003 and March 2004 quarters. Thus the claim of the company that it has updated all information on the EDIFAR site as on date apparently does not hold. It has also been gathered from the Corporate Finance Department of SEBI that the company started uploading on EDIFAR web site only from 2 October 2004.

10.5 EMGIL has claimed that it has submitted all required information in paper form to each and every stock exchange and shareholder. It has also stated that it has published its results in the newspapers.

However, the company has not furnished any document in support of its claim. Even if it is assumed that the company has been complying with all disclosure

requirements through physical filings, the significance of electronic filing through the EDIFAR system cannot be belived. The EDIFAR system was set up over and above the requirement of physical filing, for dissemination of information to various classes of market participants like investors, regulatory organisation, research institutions, etc., in a standard format which would be useful to the companies and the stock exchanges. I find that the company in its reply has tried to justify its non-compliance of filing under EDIFAR by overstating the aspect of physical filing. Physical filings in paper form and filings under EDIFAR are mutually exclusive and one cannot substitute for the other.

10.6 With respect to the various judgments and orders cited by the company, I find that unlike the case of Toitbro Infotech and Industries Ltd., in the present matter, the company has not complied with the listing agreement thus violating regulation 17(3) of CLA Regulations.

The adjudication proceedings have been initiated against the company for violation of the regulations and not that of SEBI circular.

Further, the decision of the Bombay High Court in the Cabot matter relates to disclosure regarding the preferential allotment to SEBI whereas, in the present case, I find that the company did not meet its obligation to disclose certain information to investors through EDIFAR web site. In the matter of Industrial and Prudential Investment Co.

Ltd. (2005) 3 Comp LJ 329 (SAT), SAT took a lenient view considering the fact that the disclosure was made voluntarily by the appellant in the matter. However, in the instant case, I find that the company was rather lax in meeting its obligation and started complying only after the start of adjudication proceedings.

10.7 In terms of the provisions of Section 15J of SEBI Act, 1992, the amount of gain to the company as a result of non-filing under EDIFAR qualified. The amount of loss caused to investors due to non-filing under EDIFAR is also difficult to quantify. Incidentally, it has been observed that there is no substantial interest in the shares of the company as the daily average volume on BSE has been around 1,500 shares since March 2003.

10.7.1 Thus, while the company's failure to meet its obligation to upload information under EDIFAR System is established leading to non-compliance of clause 51 of the Listing Agreement read with regulation 17(3) [erstwhile regulation 18(3)] of CLA Regulations, it is noted that (a) filing under EDIFAR is only one of the modes of making the information public and available to the investors; (b) the company has claimed to have met its disclosure requirements with competent authorities through physical filings, which has not been contested; (c) no complaints have been produced in regard to disclosures made through physical filings or EDIFAR system and (d) from the EDIFAR web site, it appears that the company has started complying with the uploading requirements under EDIFAR. Therefore, a lenient view can be taken against the company for its non-compliance. Accordingly, I find this a fit case for imposing only a token penalty.

11.1 Keeping in view the provisions of the SEBI Act, 1992, factors as listed in Section 15 J of the said Act, the above facts and circumstances of the case, findings as recorded above and Rule 5(2) of the SEBI (Procedure for Holding Inquiry and Imposing Penalty by Adjudicating Officer) Rules, 1995, I am satisfied that a penalty of Rs. 10,000 (Rupees ten thousand only) is appropriate in the case.

11.2 I hereby impose a penalty of Rs. 10,000 on Elegant Marbles and Granite Industries Ltd. It shall pay this penalty by way of demand draft/pay order in favour of 'SEBI-Penalties Remittable to the Government of India' payable at Mumbai within 45 days of receipt of this order. The said demand draft shall be sent to Ms. Neelam Bhardwaj, Deputy General Manager, Division of Issues and Listing, Corporate Finance Department, Securities and Exchange Board of India, Mittal Court, B-Wing, 224, Nariman Point, Mumbai-400 021.

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