BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No. 29 of 2011

Date of decision: 03.04.2012

1. Jayesh P. Khandwala HUF
   Proprietor : Zealous Trading Company,
   1, Alap Bungalows, Part-I,
   Near Mayurpankh Society, Satellite,
   Ahmedabad – 380 015.

2. Jayesh P. Khandwala
   1, Alap Bungalows, Part-I,
   Near Mayurpankh Society, Satellite,
   Ahmedabad – 380 015. … Appellants

Versus

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

Mr. Janak Dwarkadas, Senior Advocate with Mr. Somasekhar Sundaresan, Mr. Paras Parekh and Ms. Delna Aga, Advocates for Appellants.

Mr. Kumar Desai, Advocate with Ms. Pratiksha Mody and Mr. Mobin Shaikh, Advocates for the Respondent.

Coram : P. K. Malhotra, Member
S.S.N. Moorthy, Member

Per : P. K. Malhotra, Member

This appeal is directed against the order dated October 26, 2010 passed by the whole time member of the Securities and Exchange Board of India (for short the Board) under Section 11 and 11B of Securities and Exchange Board of India Act, 1992 (for short the Act) prohibiting the appellants from buying, selling or dealing in the securities market in any manner for a period of three months from the date of the order and further directing appellant no.1 to disgorge unlawful gains of ₹ 4,04,20,658/- along with interest of ₹ 1,21,26,197/-. In the event of non-payment of the said amount within the stipulated period, the appellants are restrained for a further period of seven years from

accessing the securities market and buying, selling or dealing in securities in any manner.

2. This case arises out of the initial public offering (IPO) scam that was unearthed by the Board in the year 2005-06. Before we deal with the facts of the present case, let us briefly state how this scam/fraud was perpetrated. On receipt of information regarding alleged abuse and misuse of the IPO allotment process, the Board initiated a probe. During preliminary analysis of buying, selling and dealing in the shares allotted through IPOs of as many as 21 companies in the years 2003, 2004 and 2005, it transpired that certain entities opened many demat accounts in fictitious/benami names and these entities cornered/acquired shares of those companies allotted in the IPOs by making large number of applications of small value so as to make them eligible for allotment under the retail category. The strategy adopted was that subsequent to the receipt of the IPO allotment, these fictitious/benami allottees transferred the shares to their principals called the 'key operators' who controlled their accounts and who, in turn, transferred most of the shares to the 'financiers' who had originally made available funds for executing the game plan. In view of the then booming market, the financiers then sold most of these shares on the first day of listing or soon thereafter thereby making windfall gains of the price difference between the issue price and the listing/sale price.

3. The appellants herein are said to be financiers. Appellant no.1 is a Hindu undivided Family (HUF) of appellant No.2 who is proprietor of M/s. Zealous Trading Company. The Board issued a show cause notice dated April 8, 2009 alleging that the appellants had acquired/cornered shares in the IPOs of IDFC Limited (IDFC), Sasken Communication Technologies Limited (Sasken) and Suzlon Energy Ltd. (Suzlon) by making available finance to key operators and received corresponding shares and refunds. Thereafter, a number of shares had been transferred to various entities like Sheelu Lalwani and Jitendra Lalwani at issue price when the market price of the shares was much higher. It is further alleged that the appellants routed the transaction through

the account of one Bhanuprasad Trivedi and ultimately received the ill-gotten gains into their account. It is further alleged that the appellant managed to receive shares in the three IPOs noted above which were meant for retail investors. It is alleged that the appellants had prior understanding with key operators and employed fraudulent, deceptive and manipulative practices in cornering the shares meant for retail investors thereby violating Section 12A of the Act and regulations 3 and 4(1) of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (for short the Regulations). The appellants are also said to have made unlawful gain of ₹ 4,04,20,658 and they were called upon to show cause why action be not taken against them for the aforesaid violation and why they should not be asked to disgorge the amount of illegal gains made by them.

4. The appellants were granted personal hearing and they also filed detailed reply dated July 24, 2009 denying the allegations. It was submitted by the appellant that they had lent funds to Sugandh, Roopalben, Biren Kantilal Shah and Ketan Shah and Company as a part of their routine business activity. They are engaged in the business of extending finance and also trading in shares, securities and commodities. Their lending as well as borrowing activities for the year 2003-04, 2004-05 and 2005-06 are said to be in the range of 345 crores, 650 crores and 720 crores respectively. It was further submitted by them that in the previous years, when there were no allegations of any funding by the appellants, regular business transactions were undertaken with various parties including those named above. According to the appellants, they had long standing and continuous relationship with the above named entities for the purpose of advancing of the funds as per the extant practice in the market. The appellants were not aware about the end use of the funds extended by them to their clients. The shares and the amount received by them were only by way of repayment of loans. The appellants admitted that they accepted a part of their loan repayment by transfer of shares but

denied they were involved in any attempt to corner the shares meant for retail investors or that they were privy to or involved in any scam as alleged by the Board.

5. On consideration of the material available on record, reply furnished by the appellant and after affording them a personal hearing, the whole time member of the Board, by the impugned order, did not accept plea of the appellants that they had lent money to the above-named entities in the normal course of financing or that they were not involved in cornering the shares in different IPOs that were meant for retail investors. The whole time member came to the conclusion that the appellants had manipulated the IPOs allotment process by providing finance to the entities named above who, with that money, made applications in large number through fictitious/benami accounts to corner the shares meant for retail investors. He, therefore, came to the conclusion that the appellants had violated Section 12A of the Act and regulations 3 and 4(1) of the Regulations. He also found that the appellants had made unlawful gains of ₹ 4,04,20,658 to the detriment of the retail investors. A summary of the transactions made by the appellants resulting in the said unlawful gain of ₹4,04,20,658 is given in Table A' at page 3 of the impugned order, which is reproduced hereunder for ease of reference.

Table A : Summary of Transactions

IPO	KO	Amount (Rs.) provided to KOs	Issue Details					No. of Application made	Receipt of Shares and Refunds by Jayesh			Disposal of Shares received			Unlawful Gains (Rs.)
			Issue Price Rs.)	Retail Application Size		Retail Allotment Size			Receipt of Shares		Refund Amount (Rs.)	Transferred to/through	No. of shares transferred	Commission/ Sale proceeds	
				No. of Shares	Amount (Rs.)	No. of Shares	Amount (Rs.)		No. of Shares	Value at issue price (Rs.)					
1	2	3=(6*9)= (11+12)	4	5	6=(4*5)	7	8=(4*7)	9=(3/6)	10	11=(4*10)	12	13	14	15	16
IDFC	SEIPL	7,14,00,000	34	1,400	47,600	266	9,044	1,500	3,98,734	1,35,56,956	5,78,43,044	Jitendra	9,49,620	3,23,32,600	11,61,675
	Biren	4,80,65,000			47,600			1,010	2,05,086	69,72,924	4,03,75,000			+11,61,875	
	Roopal	12,75,95,000			23,800			5,360*	3,45,800	1,17,57,200	7,01,22,800				
	Roopal(Bhanu)								11,00,000	3,74,00,000		Bhanu	11,00,000	7,28,75,000	3,54,75,000
Sasken	SEIPL	3,50,00,000	260	350	91,000	25	6,500	385	6,375	16,57,500	--	Bhanu	14,275	70,45,343	33,33,783
	Roopal	9,10,00,000			91,000			1,000	6,500	16,90,000	8,93,10,000				
	Biren	--			--			--	1,400	3,64,000	--				
Suzlon	Roopal	4,89,60,000	510	96	48,960	16	8,160	1,000	16,000	81,60,000	4,07,00,000	Sheelu	28,800	1,46,88,000	4,50,000
	Biren	4,15,00,000						800	12,800	65,28,000	3,49,72,000			+4,50,000	
Total															4,04,20,658

*Rs.12,75,95,000 provided by Jayesh to Roopal was used for meeting 50% margin requirement @ Rs.23,800 for 5,360 applications while the balance came from Bharat Overseas Bank.

6. In view of these findings, the appellants have been prohibited from buying, selling or dealing in securities or from accessing the securities market in any manner for a period of three months from the date of the order in addition to the period during which they remained out of the market pursuant to the interim order passed by the Board. The appellant no.1 has also been directed to disgorge the unlawful gain of ₹4,04,20,658 made by it along with interest of ₹ 1,21,26,197/- and in the event of non-payment of the aforesaid amount, the appellants are restrained from accessing the securities market for a further period of seven years without prejudice to Board's right to enforce disgorgement. It is against this order of the whole time member that the present appeal has been filed.

7. We have heard Mr. Janak Dwarkadas, Senior Advocate and Somasekhar Sundaresan, Advocate for the appellants and Mr. Kumar Desai, Advocate for the respondent-Board who have taken us through the records of the case. Learned counsel for the appellants seriously disputed the findings arrived at by the whole time member in the impugned order alleging that the order has been passed without application of mind to the facts rendered by the appellants and also in violation of the principles of natural justice. It was further submitted that the impugned order has not dealt with the defence rendered by the appellants. The submissions made by the appellants in the replies as set out at pages 387, 404, 421, 440 and 469 of the appeal paperbook have not been considered or dealt with in the impugned order. The order, therefore, cannot be said to be a reasoned one. It was further argued by the learned senior counsel for the appellants that while arriving at its conclusion, the whole time member has relied on certain observations made by this Tribunal in Appeal no. 197 of 2009 filed by Bhanuprasad Trivedi (BT for short) who is said to be a front entity of the appellants. It was submitted by him that the appellants had no opportunity to present their case in the appeal filed by BT and any observations made in the case of BT cannot be relied upon in arriving at conclusions against the appellants. The figures given in the table extracted

above were also seriously disputed by the learned counsel for the appellants stating that the impugned order has proceeded on the basis that there need be no certainty in demonstrating that the amount sought to be disgorged is indeed illegitimate gain. Mr. Somasekhar Sundaresan, learned counsel for the appellants, further argued that the whole time member has totally ignored the submissions of the appellants that it is engaged in the business of extending finances and also is trading in shares, securities and commodities. The details of financing activities of the appellants for the years 2003-04, 2004-05 and 2005-06 have been ignored and entries from the books of accounts and bank statements have been used in a selective manner in arriving at the conclusions. It was further submitted that the appellants had, in the course of business, advanced a loan of ₹ 345.57 crores and procured loans of ₹ 345.67 crores in the year 2003-04, ₹ 654.79 crores and ₹ 660.03 crores in the year 2004-05 and ₹ 724.14 crores and ₹ 716.19 crores in the year 2005-06 respectively while transacting with various parties. It was submitted that the appellants had long standing and continuous relationship with the clients for the purpose of advancing the funds and the transactions were carried on the basis of mutual trust and confidence. The fact that there were no formal documents entered into between the appellants and its clients for the funding does not in any manner indicate that the making of applications by the clients in various IPOs were on account of the appellants. The appellants had never faced any bad debts in the entire history of its operations and therefore no requirement was felt by the appellants to seek any formalization of the terms between the parties or for any securities of the funds advanced. According to the appellant, the system was indeed followed by various parties in the market at the relevant time. The appellants explained their dealings with the clients and contended that they were not a financier to the transactions as defined by the Board in its order dated April 27, 2006. The appellants claimed that they were not aware of any irregularities on the part of the clients and the impugned order has misconstrued the legitimate transaction between the appellants and their clients. If there was any wrongdoing on the part of its clients, the appellants cannot be held responsible for the same. It was further submitted that the impugned

order seeks to disgorge the amounts that have already been disgorged from other persons who are alleged to be co-conspirators thereby ceasing to be disgorgement and instead unjust enrichment of the respondent-board. Learned counsel for the appellants took us through the relevant documents in respect of the financial transactions relating to IDFC, Sasken and Suzlon IPOs and pointed out inconsistencies which, according to the counsel, go to the root of the matter stating that the very foundation of the impugned order i.e. table summarizing alleged illegitimate transactions is erroneous and serious doubt raised about the veracity of the information contained therein. A note of submissions has been filed by the learned counsel for the appellants as an 'aide memoire' and as a supplement to the proceedings to navigate the issues that fall for determination of the controversy involved in the case which has been taken on record.

8. Mr. Kumar Desai, learned counsel for the respondent-Board strongly supported the findings arrived at in the impugned order stating that the appellants have not disputed the receipt of the shares as listed in the table nor the manner in which the same were transferred or sold nor the amount received on such transfers or sale as all these amounts are reflected in the appellants' bank accounts and demat accounts. In para 5.6 of the memorandum of appeal, the appellants had in fact admitted not only that the appellants had advanced monies to the key operators but also that the said amounts were utilized by the key operators for making applications in various IPOs. He took us through each of the transactions as stated in the table submitted with documents on record and stated that the appellants were the ultimate beneficiary of the amounts shown in the table which have been correctly and accurately concluded and are recoverable from the appellants. With regard to the argument that the impugned order is not a reasoned order or that the arguments advanced on behalf of the appellants have not been considered, it was submitted that it was not necessary for the respondent-board to give its decision on each and every submission made before it. The two replies furnished by the appellants running into 65 pages and 141 pages respectively and written submissions of 95 pages were duly considered and reasons recorded for the decision arrived at by the Board. The important points raised by the appellants, both preliminary

as well as on merits, have been set out in the impugned order and separately dealt with. Therefore, no prejudice is caused to the appellants. Learned counsel for the respondent Board has also filed a brief of his arguments in the form of written submissions which has been taken on record.

9. We have considered the rival submissions and also perused documents available on record. With regard to the preliminary issue raised on behalf of the appellants that the order passed by the Board is not a reasoned one and the arguments advanced by/on behalf of the appellants have not been considered, we are inclined to agree with the learned counsel for the Board that while passing the order, the Board is required to give reasons for its decision but this does not mean that the reasons should be as elaborate as a decision of a Court of Law. It is sufficient if, after considering the submissions made by the parties, the Board gives a decision on the issues under its consideration supported by the reasons for arriving at such a decision. The order must reflect that the submissions made before the Board were duly considered for arriving at a decision and the decision is supported with reasons. However, it is also important that if a point has been raised which may impact the decision taken by the authority, such point should also be dealt with while arriving at the decision. We will come to this aspect a little later when we deal with the specific submissions which according to the appellants have not been dealt with by the whole time member.

10. We cannot lose sight of the fact that this case cannot be viewed in isolation. It has to be seen in the light of the material collected and investigations carried out by the Board in respect of the IPO scam during the year 2003 to 2005. For the purposes of this scam, the Board, vide its ad-interim ex parte order dated April 27, 2006, defined the term ‘financier’ as under:-

> “Financier” is a person who either on his own or alongwith others provided the finance for IPO subscription and are the ultimate beneficiaries in the scheme of cornering retail allotment and forking out a big gain on sale immediately after listing.”

During the course of investigation the Board could trace the finances to the accounts of the appellants. In respect of the financing transactions of IDFC and Sasken IPO, it found that finances were provided by the appellants to the key operators through BT and accordingly show cause notices were issued to him also. This Tribunal had an occasion to deal with the case of BT also where allegation was that BT had cornered shares in the IPOs of IDFC and Sasken while acting in concert with Roopalben Panchal (key operator) and Jayesh Khandwala, appellant in this appeal, (Jayesh) with whom he had prior understanding. It was alleged that BT facilitated the appellant to make ill-gotten gains by routing the funds and shares received from key operator through his accounts. The allegation in the case of BT was that Jayesh transferred ₹ 3.7 crores to BT on 13.8.2005 and BT used this money to purchase 11 lac shares of IDFC from Roopalben on the same day at the issue price of ₹ 34 per share. Roopalben, on receipt of the money from BT in her bank account on 13.8.2005, transferred the amount to the bank account of Jayesh on the same day. It was further alleged in the show cause notice issued to BT that 11 lac shares of IDFC purchased by him from Roopalben were sold in the market on August 16, 2005 through the broker for ₹ 7,28,75,000/- @ ₹ 66.25 per share. The entire sale proceeds received by BT in his bank account on August 17, 2005 were transferred to the bank account of Jayesh on the same day. It was therefore concluded that Jayesh was the ultimate beneficiary of the sale proceeds and that BT acted as his front entity. Another charge in that show cause notice was that Jayesh received 14,275 shares of Sasken from three key operators including Roopalben which was transferred to BT on September 9, 2005 and September 14, 2005 and then said to have been sold by BT in the market through the broker. BT is then said to have transferred the sale proceeds from his account to Jayesh through a cheque. The appeal (No. 197 of 2009) filed by BT against the order of the Board was dismissed by this Tribunal by order dated July 5, 2010. The relevant portion of the order reads as under:-

> "9. We have heard the learned counsel on both sides and it is their common case that the appellant had dealt in the shares of IDFC and Sasken which, among others, were involved in the IPO scam. We shall first deal with the shares of IDFC. It is not in dispute that the IPO of IDFC

opened on July 15, 2005 and closed on July 22, 2005 and that the allotment of shares was made on August 5, 2005 at the rate of Rs.34 per share. Parties are also agreed that the shares of this IPO were listed on the stock exchanges on August 12, 2005 and that the closing price of the scrip on the first day of listing was Rs.69.55. The charge against the appellant is that he cornered shares in this IPO while acting in concert with Roopalben and Khandwala with whom he had a prior understanding and that he facilitated Khandwala to make ill-gotten gains by routing the funds and the shares through his accounts. The case of the appellant, on the other hand, is that after the allotment was made on August 5, 2005 he learnt that large number of shares were available with Roopalben for off-market sale prior to the listing and that he contacted her. It is also his case that on August 10, 2005 (two days prior to the date of listing) he entered into an oral agreement with her for the purchase of 11 lac shares from her at the rate of Rs.35.50 per share. Since he did not have the funds to purchase, he claims to have borrowed Rs.3,74,00,000 from Khandwala on August 13, 2005 and paid the same to Roopalben on the same day i.e. August 13, 2005 on which date she transferred the shares to his demat account. According to the appellant, he purchased the shares from Roopalben in spot transaction(s) off-market before listing after she had them in her demat account and since this was then permissible, he (the appellant) did no wrong in purchasing the shares. It is also his case that he sold the entire lot of 11 lac shares on market on August 16, 2005 through the broker at the rate of Rs.66.25 per share and made a huge profit and transferred the entire sale proceeds to Khandwala in the running loan account.

10. Having carefully examined the case as set up by the appellant and also by the Board and from the record that we have before us, it is more than clear that the appellant was hand-in-glove with both Roopalben and Khandwala with whom he had a prior understanding and he facilitated Khandwala to make ill-gotten gains and that he allowed the funds and shares to be routed through his accounts as alleged and as found by the whole time member in the impugned order. The story as set up by the appellant is difficult to believe in the face of the material that is on the record. If the appellant purchased 11 lac shares from Roopalben at the rate of Rs.35.50 per share, as claimed by him, then he should have paid her Rs.3,90,50,000. Admittedly, he did not pay this amount to her on August 13, 2005 on which date the shares were transferred to his demat account. He paid only a sum of Rs.3,74,00,000 as is clear from his bank account and this is the same amount which he received from Khandwala on the same day. This amount which the appellant received from Khandwala and paid to Roopalben clearly shows that she transferred the shares at the issue price of Rs.34 per share and not at the rate of Rs.35.50 as claimed by the appellant. To overcome this difficulty of difference in the two amounts, the appellant has introduced the fiction of deferred payment of Rs.16,50,000 at a distant date of more than nine months. This amount of Rs.16,50,000/- if paid by the appellant to

Roopalben in June, 2007 cannot be towards the purchase of these shares but could well be for some other purpose. The appellant says he had no connection with Roopalben. If that were so, why should she transfer 11 lacs shares to him without receiving the full amount. Again, the shares were transferred and payment made on August 13, 2005 on which date they were already listed (they were listed on August 12, 2005) and the closing price of the scrip on the first day of listing was Rs.69.55. When the shares could be sold in the market for Rs.69.55 per share or around that price, why should Roopalben transfer such a large chunk of shares to the appellant only at the rate of Rs.35.50 per share and that too on deferred payment. Let us not forget that Roopalben has been identified as one of the key operators and a prominent player in the IPO scam who abused the system and cornered very large number of shares in different IPOs only to make money which she had to pass on to the financiers. She had not gone to the market for charity. Further, in his replies filed to the various show cause notices issued to him, the appellant has categorically stated that he purchased the 11 lac shares from Roopalben in an off-market transaction in a spot deal. The appellant claims to be a seasoned market player and if his claim is right, he would have known that in a spot delivery contract the payment of price for the purchase has to be made on the date of the contract or on the next day and if it is not so made the transaction becomes illegal. This is the requirement of Section 2(i) of the Securities Contracts (Regulation) Act, 1956. Surely, we do not expect a seasoned market player dealing in lacs of shares to execute such an illegal transaction. As a matter of fact, he did not execute any illegal transaction. He purchased the shares in a spot transaction(s) and made the payment of Rs.3,74,00,000 to Roopalben at the issue price of Rs.34 per share on the same day which money had come from Khandwala. There is yet another reason why we cannot accept the ipse dixit of the appellant that he entered into an oral agreement for the purchase of shares on August 10, 2005. In one of his replies filed on December 16, 2006 to the show cause notice dated June 15, 2006 he himself admitted that the shares had been purchased by him on August 13, 2005. The relevant part of his reply has been reproduced in para 3 above. Again, in his letter of July 3, 2007 addressed to the adjudicating officer while submitting documents after the personal hearing, the appellant clearly stated that the 11 lac shares of IDFC had been purchased on SPOT as per purchase voucher no. 35 dated August 13, 2005. How can we now believe that he had entered into a verbal agreement to purchase the shares on August 10, 2005. This is clearly an afterthought. Moreover, the appellant did not have money to purchase the shares. The amount of Rs.3,74,00,000 (representing the issue price of 11 lac shares) came to his account from Khandwala only on August 13, 2005 and he paid that amount to Roopalben on that day when the shares were transferred to his demat account. This clearly indicates that the transaction took place on August 13, 2005 and we cannot believe that there was any verbal agreement on August 10, 2005 as claimed

by the appellant. Interestingly, Roopalben transferred Rs.3,74,00,000 to Khandwala on August 13, 2005 itself and this is clear from her bank account. Obviously, the appellant pleads ignorance about this transfer as he claims he has no links with Roopalben. But the fact of the matter is that Khandwala transferred Rs.3.74 crores to the appellant which money was given to Roopalben for the purchase of 11 lac shares at the issue price and Roopalben transferred the same amount back to Khandwala and all this happened on August 13,2005. In other words, the amount which came from Khandwala went back to him in his account on the same day through the appellant and Roopalben and the circle was complete. What more proof is required to establish the obvious link between the three of them. These facts clearly go to establish that they were acting in concert with each other. Again, the story that the appellant took loan from Khandwala for the purchase of shares cannot be believed in the circumstances of the present case. Except for the ipse dixit of the appellant, there is not even an iota of material to show that any loan transaction took place. There is nothing on the record to show that Khandwla was a money lender but assuming that to be so, it is impossible to believe that such huge sums of money could have been lent without any documentation or security. Since the appellant has set up the case that he borrowed money from Khandwala, it was for him to establish the fact by producing cogent material on the record. In the absence of any such material, we cannot but hold that the story of borrowing money is incredible and cannot be relied upon. Another interesting feature of the case may be noticed at this stage. It is the appellant's own case that having procured the shares from Roopalben at the rate of Rs.34 per share as found by us or, at the most, at the rate of Rs.35.50 per share as claimed by him, he sold them in the market on August 16, 2005 at the rate of Rs.66.25 per share for a total amount of Rs.7,28,75,000. This sale was on market through the broker and a contract note was executed a copy of which is on the record. He received this amount in his bank account on the following day i.e., August 17, 2005. According to the T+2 system of settlement of trades that is prevalent in the market, the payout date was August 18, 2005. Surprisingly, he received the amount one day prior to the payout date and more interestingly, he transferred the entire sale proceeds to Khandwala on the same day without deduction of any brokerage, securities turnover tax, service tax, etc. On a query made by us, the learned counsel for the appellant informed us that Khandwala's brother is a director in the broker company (Khandwala Integrated Financial Services Pvt. Ltd.). All this leads us only to one conclusion that the appellant, Roopalben and Khandwala were acting in concert with each other in the IPO scam while dealing in the shares of IDFC and that the appellant did not make any purchases in the secondary market in the ordinary course of trading as was now sought to be argued before us. From what we have observed above, it is clear that Khandwala was providing the finances which were being routed through the accounts of the appellant and his demat account

had also been used for parking and selling the shares. The shares cornered in the IPO could have been sold directly by Roopalben or Khandwala in the market without involving the appellant but apparently he was brought in only to complicate the web of entities involved in the IPO scam and obfuscate the issue with a view to avoid detection.

11. This brings us to the IPO shares of Sasken. Here again we have no doubt that the appellant played foul in selling the shares received from Khandwala which clearly shows that he was mixed up with him. It is not in dispute that after receiving the shares of Sasken from three key operators including Roopalben, Khandwala transferred on September 9, 2005 and September 14, 2005, 13,550 and 725 shares respectively aggregating to 14,275 shares to the appellant. It is the appellant's case that he purchased these shares from Khandwala at the rate of Rs.300.40 per share for a total consideration of Rs.42,88,210. The demat account of the appellant shows that he received these shares from Khandwala but there is not an iota of evidence on the record to show that the appellant ever purchased these shares. He has not produced bank account or any other supporting document to show that consideration was paid for these shares. His ipse dixit cannot be accepted. The onus was on him to establish that he purchased the shares. In the absence of any evidence we cannot but hold that these shares were transferred without consideration. Again, the appellant sold these shares through the broker on September 9, 2005 at the rate of Rs.493.54 per share for a gross amount of Rs.70,45,343.75 even though by that date he had received only 13,550 shares. This by itself is not an illegality because short sales are permissible. However, the interesting part of the story is that the broker transferred on September 14, 2005 the gross amount of Rs.70,45,343.75 to the account of the appellant without deducting brokerage, turnover tax and other transaction charges and the appellant on receipt of the amount immediately on the same day transferred the gross amount of sale proceeds to Khandwala. A copy of the bank account of the appellant is on the record. We cannot believe the version of the appellant that the amount had been transferred towards the repayment of the loan because the accounts have not been produced. We are satisfied that in the absence of any other cogent explanation, the appellant is resorting to the same loan theory which has no basis. The transfer of Sasken shares to the appellant and the subsequent sale by him and remitting the amount to Khandwala is enough proof of the fact that he was a front entity of Khandwala for selling the cornered shares for making illegal gains.

12. In view of our findings recorded above, we have no hesitation to hold that the appellant did not deal with the shares of IDFC and Sasken in the ordinary course of business in the secondary market but was acting in concert with Roopalben and Khandwala in the IPO scam. We are in agreement with the whole time member that the appellant indulged in unfair trade practices in the securities market and facilitated Khandwala to make ill-gotten gains and

> thereby violated Section 12A of the Act and Regulations 3 and 4 of the Regulations."

It was strenuously argued by learned counsel for the appellants that the above order of this Tribunal has no consequences because any observation made by the Tribunal in any earlier case could only be in aid of the decision in that case and cannot be regarded as having created a binding precedent. In BT's case, the appellants were not a party and had no occasion to defend themselves. Therefore, any observations about the appellants in that order may at best be regarded as obiter, or an observation in aid of the larger order based on facts that then seemed apparent and by no stretch of imagination can such observation be regarded as a legal pre-emption or prohibition of the dispensation of justice in subsequent proceedings against third parties who were not party to the earlier proceedings. The reliance placed by the whole time member in para 10.4 and 10.5 of the impugned order vitiates the order as the appellants had no opportunity to present their case before the Tribunal when the appeal of BT was heard.

11. Learned counsel for the Board submitted that even if the said observations in paragraphs 10.4 and 10.5 are not taken into consideration, the order passed by the Board against the appellants would still stand as the alleged observations were merely corroborative and the facts have been independently established against the appellants as set out in paragraphs 18, 19, 20 and 30 of the show cause notice and in table 'A' read with paragraphs 10.3 and 10.5 of the impugned order. It was further alleged that the facts on the basis of which the Board had made the allegations and arrived at findings against BT and the appellants are the same. The charge against the appellants is that they had received shares in three IPOs meant for retail investors and had made ill-gotten gains. No doubt, the appellants are financiers and have been providing finance to various entities but that by itself is not enough to show that the appellants had not provided finance for the transactions in question. The conduct of the appellants show that they had acted in concert with key operator and BT and had provided finance in respect of the transactions listed in the table reproduced above. Therefore, no fault can be found with the order of disgorgement.

12. On the issue of disgorgement, the counsel on both sides were in agreement that the disgorgement is the forced giving up of profits obtained by illegal or unethical acts. It is the repayment of ill-gotten gains that is imposed on wrongdoer by the Courts. This Tribunal in the case of Karvy Stock Broking Ltd. vs. Securities and Exchange Board of India (Appeal No. 6 of 2007 decided on May 2, 2008) had summarized the position in this regard as under:

> "5. Before we deal with the contentions of the parties, it is necessary to understand what disgorgement is. It is a common term in developed markets across the world though it is new to the securities market in India. Black's Law Dictionary defines disgorgement as "The act of giving up something (such as profits illegally obtained) on demand or by legal compulsion." In commercial terms, disgorgement is the forced giving up of profits obtained by illegal or unethical acts. It is a repayment of ill-gotten gains that is imposed on wrongdoers by the courts. Disgorgement is a monetary equitable remedy that is designed to prevent a wrongdoer from unjustly enriching himself as a result of his illegal conduct. It is not a punishment nor is it concerned with the damages sustained by the victims of the unlawful conduct. Disgorgement of ill-gotten gains may be ordered against one who has violated the securities laws/regulations but it is not every violator who could be asked to disgorge. Only such wrongdoers who have made gains as a result of their illegal acts(s) could be asked to do so. Since the chief purpose of ordering disgorgement is to make sure that the wrongdoers do not profit from their wrongdoing, it would follow that the disgorgement amount should not exceed the total profits realized as the result of the unlawful activity. In a disgorgement action, the burden of showing that the amount sought to be disgorged reasonably approximates the amount of unjust enrichment is on the Board."

13. We have examined the facts of the present case and considered the arguments of learned counsel on both sides in the background of the position as stated above and are of the view that there are certain glaring inconsistencies in the order and some important submissions made by the appellant have not been taken note of by the whole time member while passing the order and these go to the root of the matter. Some such discrepancies are:-

(i) As will be seen from table as reproduced above, it is stated that the appellants had provided a sum of ₹ 12,75,95,000 to Roopalben Panchal, the key operator, for making applications in the IPO of IDFC.

A copy of the order dated January 31, 2012 passed by the Board in the case of Roopalben Panchal (key operator) has been placed on record by learned counsel for the appellants and according to table on page 23 of that order, it is stated that the appellant provided an amount of ₹ 7,87,50,000 to Roopalben Panchal for the said purpose. In response to this, learned counsel for the Board stated that it is a mistake in the order and the Board would take necessary steps in due course to correct the said error. It needs to be appreciated that the order against the appellant was passed as early as on October 26, 2010 and the order against Roopalben Panchal was passed on January 31, 2012. As stated above, disgorgement is a monetary equitable remedy that is designed to prevent a wrongdoer from unjustly enriching himself as a result of illegal conduct. Therefore, there has to be a certainty with regard to the amount of finance provided and the amount of illegal gains resulting therefrom. We are inclined to agree with the learned counsel of the appellants that such a wide disparity in quantum cannot be irrelevant for the purpose of alleging financing of transaction by the appellants to the key operator, more so, when the amount of disgorgement is being worked out on the basis of providing finance of ₹ 12,75,95,000.

(ii) It was stated by the appellant that B.T. had shown the profits made by him from sale of 11 lac shares of IDFC in his income-tax return and has paid capital gains tax payable in respect thereof. This plea was also taken by the appellants in their reply at page 469 of the appeal paperbook. The whole time member, while passing the impugned order, has not dealt with this issue at all. This is an important issue which may have a bearing on the final decision that may be arrived at. Under similar circumstances, in another order in the case of Jayantilal Jitmal vs. SEBI (Appeal No. 5 of 2010 decided on 9.9.2010) referred to during the course of hearing, the appellant was held to be a

beneficial owner of the shares because he had reflected the total amount received in his books of account and paid tax thereon. If B.T. has shown the sale price of 11 lac shares in his books of account and paid income tax on the profits made on such sale of shares, how can the appellants be held to be the beneficial owners of these shares. Why can't their plea that they were only financiers of BT and not of the key operator be accepted is not clear to us. The whole time member has not recorded any findings to the effect that the appellants were aware about the IPO scam or the deal between the key operator and B.T. for financing of the IPO transactions. In the absence of any such findings, we fail to understand how financier of a financier can be held guilty when it is on record that the appellants are providing finance to BT and other entities not only in this transaction but in a lot of other transactions running to hundred crores. It is not denied that the appellants are in the business of financing and had been providing finance as noted in the earlier part of this order. The finance in this case was also provided only on August 13, 2005 whereas IPO of IDFC opened on July 15, 2005, closed on July 22, 2005 and allotment of shares was made on August 5, 2005. It is the Board's own case that the appellants provided finance to BT only on August 13, 2005. In that case, it requires examination as to how such a transaction can be treated as one for financing the IPO of IDFC.

(iii) It was argued by the learned counsel for the Board that even if the observations made in paras 10.4 and 10.5 supporting the findings in the appellants' case on the basis of observations made by this Tribunal in the case of BT are ignored, the order can stand on its own. However, we are of the view that if the order is read as a whole, it gives an impression that while arriving at its conclusion, the observations made by this Tribunal in BT's case heavily weighed with the whole time

member. We are inclined to agree with the learned counsel for the appellants that any observation made by this Tribunal in the case of BT against the appellants, needs to be re-examined in the light of additional material that has been placed on record by the appellants in their case.

(iv) There is nothing in the impugned order to show that the appellants provided finance to Biren for the Sasken IPO and yet 1400 shares of Sasken acquired from Biren have been taken into account while arriving at the amount of disgorgement. If no finance was provided by the appellants to Biren for the Sasken IPO and in the absence of any allegation against Biren for manipulating the Sasken IPO, how can the sale proceeds of 1400 shares be treated as illegitimate gain of the appellants for the purpose of disgorgement.

The above are only illustrations of discrepancies that have been pointed out by the appellants during the course of hearing. These illustrations go to the root of the matter and decision thereon may have impact on the final view on the issue of financing of IPO transactions and disgorgement. The whole time member has not dealt with these issues in the impugned order. In the written submissions, the appellants have pointed out certain other inconsistencies which were also pointed out in reply to the show cause notice but have not been dealt with by the whole time member. As stated earlier, in the case of disgorgement, only ill-gotten gains can be ordered to be disgorged and the disgorgement amount should not exceed the total profits realized as a result of unlawful activity. We are, therefore, of the considered view that the matter needs to be reconsidered in the light of the inconsistencies noted above as well as those pointed out by the appellants in response to the replies filed to the show cause notice and personal hearing.

In view of the foregoing discussions, we cannot but set aside the impugned order which we hereby do and remand the matter to the Board for holding fresh proceedings against the appellants after giving them an opportunity of hearing. It is made clear that we have not expressed any view on any of the issues raised in the appeal which shall remain open. Since the transactions relate to the year 2004 and 2005, we direct the Board to conclude the proceedings expeditiously. No costs.

Sd/-
P. K. Malhotra
Member

Sd/-
S.S.N. Moorthy
Member

03.04.2012
Prepared & compared by-ddg