BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved On: 28.09.2020
Date of Decision : 01.10.2020

Appeal No. 297 of 2020

1. Rajeev Vasant Sheth
   3 Villa Ramona, 37A Nepean Sea Road,
   Mumbai- 400 036

2. Aarti Sheth
   Aventa, 5th Floor,
   16a Altamount Road,
   Mumbai-400 036

3. Divya Sheth
   1803C Raheja Vivarea
   Arthur Road, Jacob Circle,
   Mumbai-400 011 …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. Somasekhar Sundaresan, Advocate with Mr. Ankit Lohia and Ms. Ryna Karani, Advocates i/b M/s. ALMT Legal for Appellants.

Mr. Rafique A. Dada, Senior Advocate with Mr. Anubhav Ghosh and Mr. Ravishekhar Pandey, Advocates i/b The Law Pont for the Respondent.

CORAM: Dr. C.K.G. Nair, Member
Justice M. T. Joshi, Judicial Member

Per: Dr. C.K.G. Nair

1. This appeal has been filed aggrieved by the *ex-parte* order passed by the Whole Time Member ("WTM" for short) of the Securities and Exchange Board of India ("SEBI" for short) dated September 04, 2020. By the said order the following directions have been passed: -

> *"46. In view of the foregoing, I, in exercise of the powers conferred upon me in terms of Section 19 read with Section 11(1), 11(4)(d) and 11B(1) of the SEBI Act read with Regulation 10 of the PIT Regulations, hereby issue the following directions:*
>
> *47. I, hereby, impound from the below mentioned persons the alleged unlawful notional loss avoided, on account of trades carried out during the UPSI Period, as mentioned against their respective names in below table:*

Table-11		
Name	***PAN Number***	***Unlawful loss avoided (in Rs.)***
Rajeev Vasant Sheth	*AAFPS7760Q*	*1,26,59,481.50*
Aarti Sheth	*AAGPS3762H*	*2,09,930.40*
Divya Sheth	*AAHPS8431L*	*9,62,060.70*

> *48. The persons mentioned in Table-11 above are also directed that above mentioned individual amount of unlawful loss avoided is to be credited to an interest bearing Escrow Account ["Escrow Account in Compliance with SEBI Order dated September 04, 2020 – A/c (in the name of the respective person)"] created specifically for the purpose in a Nationalized Bank. The Escrow Account(s) shall create a lien in*

favour of SEBI and the monies kept therein shall not be released without permission from SEBI.

49. Banks are directed that no debits shall be made, without permission of SEBI, in respect of the bank accounts held jointly or severally by the persons mentioned under Table-11, except for the purposes of transfer of funds to the Escrow Account. Further, the Depositories are also directed that no debit shall be made, without permission of SEBI, in respect of the demat accounts held by the aforesaid persons. However, credits, if any, into the accounts maybe allowed. Banks and the Depositories are directed to ensure that all the aforesaid directions are strictly enforced. Further, debits may also be allowed for amounts available in the account in excess of the amount to be impounded. Banks are allowed to debit the accounts for the purpose of complying with this Order.

50. The persons mentioned under Table-11 are directed not to dispose of or alienate any of their assets/properties/securities, till such time the individual amount of unlawful loss avoided is credited to an Escrow Account except with the prior permission of SEBI. Further, on production of proof by the persons mentioned under Table-11 that the individual amount of unlawful loss avoided has been deposited in the Escrow Account, SEBI shall communicate to the Banks and Depositories to defreeze their respective accounts.

> *51. The persons mentioned under Table-11 are further directed to provide a full inventory of all their assets whether movable or immovable, or any interest or investment or charge in any of such assets, including property, details of all their bank accounts, demat accounts, holdings of shares/securities if held in physical form and mutual fund investments and details of companies in which they hold substantial or controlling interest immediately but not later than 7 working days of this Order."*

2. Appellant no. 1 was the Chairman and Managing Director of Tara Jewels Limited ("TJL" for short), in addition to being a promoter and appellant no. 2 and 3 are his daughters who were also promoters of the TJL.

3. The main charge against the appellants is that during October 01, 2017 to December 31, 2017 (investigation period) the appellants entered into suspected insider trading being privy to unpublished price sensitive information ("UPSI" for short) of declining profits of TJL and disposed of their promoter shareholding (fully by appellants 2 and 3 and partly by appellant 1) and thereby avoided losses. Further, they have also violated Code of Conduct applicable to 'insiders' by not taking pre-clearances from the concerned authority of the company for trading in the shares of the company during the UPSI period.

4. We have heard Shri Somasekhar Sundaresan, learned counsel assisted by Shri Ankit Lohia and Ms. Ryna Karani, advocates for the appellants and Shri Rafique Dada, learned senior counsel assisted by Shri Anubhav Ghosh and Shri Ravishekhar Pandey, advocates for the respondent through video conference.

5. It is the contention of the learned counsel Shri Somasekhar Sundaresan, appearing on behalf of the appellants that the impugned order has been passed in haste and that too without show-causing the appellants and thereby not providing them an opportunity of presenting the full facts. If such an opportunity had been given, the appellants would have been able to demonstrate that there was no UPSI in question; profits of the company declining since 2016 was a public information; appellants sold the shares in order to infuse funds to the company as a final effort in reviving its falling fortunes due to adverse market conditions; full information relating to the sale proceeds from shares and transfer of funds to the accounts of the company soon thereafter etc. are matters of record; in fact more funds have been transferred to the company than the sale proceeds and, therefore, there has been no diversion of funds in any manner whatsoever and, therefore, the appellants were

trying to help the company to remain within business. It was submitted that since the revival efforts did not succeed, later on, the company has gone under liquidation. Therefore, the learned counsel contended that the investigation started in April 2018 and proceeded till end of 2019 during which a number of correspondences /replies etc. have been exchanged. Since there was nothing to hide, all the information, including that the appellants had made mandatory disclosures under relevant regulations such as SEBI (Prohibition of Insider Trading) Regulations ("PIT Regulations")/ SEBI (Substantial Acquisition of Shares and Takeover) Regulations ("SAST Regulations"), and even the fact that no pre-clearances had been taken as the appellants genuinely considered no UPSI existed, were all disclosed. Since the appellants have been cooperating fully with SEBI there was no need for passing an *ex-parte* order without enabling the appellants to get the benefit of a show cause in order to enable them to submit detailed replies with evidence thereon. Accordingly, an *ex-parte* order in the given facts and circumstances, was absolutely unnecessary as the appellants would have demonstrated that they sold part/full of their promoter shareholding for infusing funds into the company and there was genuine reasons for the actions of the appellants as held by this Tribunal in the matter of ***Abhijit Rajan vs. SEBI (Appeal No. 232 of 2016 decided on 08.11. 2019).***

6. It was further contended by the learned counsel for the appellants that a similar impounding direction was passed in the matter of ***Dr. Udayant Malhoutra vs. SEBI (Appeal No. 145 of 2020 decided on 27.06.2020)*** which was quashed and set aside by this Tribunal. Though, SEBI has challenged the said order before the Apex Court no stay has been granted and, therefore, as on date the ruling of this Tribunal is the law. Therefore, given that the aforesaid orders of this Tribunal are in place it was incumbent on SEBI not to pass an *ex-parte* impounding order in the present matter.

7. The learned senior counsel Shri Dada, representing SEBI, however, submitted that the impugned order has been passed with adequate reasons. It is on the record that company has gone into liquidation and the endeavor of the appellants was to become unsecured creditors by lending funds to the company as under liquidation promoter shareholders come last in the order of waterfall. There is sufficient evidence to show that the appellants' gained from using the advance information relating to adverse profitability of the company and, therefore, trading while in possession of UPSI. Moreover, the appellants have violated code of conduct for insider since it is an admitted fact that they did not pre-clear the trades. There is investigation by

multiple agencies in the matter. Therefore, given the fact that the Company has gone under liquidation and there are only a few shares left with appellant no. 1 it was imperative for SEBI to secure the amount of loss averted by the appellants by trading as insiders while in possession of UPSI. Therefore, the learned counsel submitted that if the appellants cooperate and provide all the relevant information a final order will be passed at the earliest possible time and this Tribunal may not interfere with the impugned order. In any case, it was urged that the interest of the investors need to be protected.

8. Having heard the learned counsel for the parties at reasonable length, we proceed to dispose of the appeal at the stage of admission itself without calling for reply/rejoinder etc. as this matter is squarely covered by our orders in ***Abhijit Rajan (supra)*** and ***Dr. Udayant Malhoutra (supra.*** The relevant paragraph in our Order of ***Abhijit Rajan (supra)*** is reproduced below:-

> "*13(2) Further, even if it is assumed that the information was is a price sensitive information, still the appellant cannot be blamed of insider trading for the reasons that he did not trade "on the basis of the information". The appellant was able to show his dire need to infuse fund in the entity under the master*

restructuring agreement to implement a CDR package as detailed supra. He was even required to sell his agricultural land and flat details of which are already given hereinabove. In these circumstances he sold the shares. In the case of Rajiv B. Gandhi on fact this Tribunal held that the appellants therein were able to rebut the presumption that they traded on the basis of UPSI as they had a necessity to sell the shares. Similar is the case of Gujarat NRE Mineral Resources Ltd. and Mrs. Chandrakala decided by this Tribunal."

In the present appeal before us, however, since all the facts are yet to be analysed by the respondent SEBI upon hearing the appellant, we do not propose to make any comment on the merit of the case at this stage.

9. The relevant paragraphs in the Order of ***Dr. Udayant Malhoutra (supra)*** are reproduced below: -

"9. We find that the only reason directing the appellant to deposit the alleged notional gain / loss in an Escrow Account is based on the finding given in paragraph 22 of the impugned order, namely, that "it is possible that the entity may divert the notional gain" and that if an interim order is not passed it would defeat the effective implementation of the disgorgement, if any, to be passed on merits after adjudication. In our opinion, the reasoning given by the WTM justifying its action to pass an ex-parte interim order is patently erroneous and cannot be sustained. On one hand, we find that only a show cause notice has been issued and the matter has not

been adjudicated on merits but the appellant, on the other hand, has been directed to deposit the possible disgorgement amount in advance. We are of the opinion that no amount towards disgorgement can be directed to be deposited in advance unless it is adjudicated and quantified unless there is some evidence to show and justify the action taken. An order of the like nature can only be passed during the pendency of the proceedings and such orders cannot be passed at the time of initiation of the proceedings. Further, no order of the like nature can be passed without recording its satisfaction and cannot be based on the basis of possibility.

10. In this regard, we may refer to the provisions of Order 38 Rule 5 to 13 of the Code of Civil Procedure, 1908 which lays down the parameters for attachment before judgment. The said principles are fully applicable in the instant case. The object of attachment before judgment is to prevent any attempt on the part of the appellant to defeat the realization of the final order on disgorgement that may be passed against the appellant. But this principle applies only when it is found that the appellant is about to dispose of the property in question. Further, this principle can only be applied when there is evidence to show that the appellant has acted, or is about to act with the intent to obstruct or delay the adjudication of the proceedings that may be passed against him. We are of the opinion that there is no finding that the appellant will remove the property or will dispose of

all the property or that he would obstruct the proceedings or that he would delay the proceedings pursuant to the show cause notice. In the absence of any such finding, the ex-parte interim order cannot be sustained especially when the trades were of 2016 and from 2016 till the date of the impugned order there is no evidence to show that the appellant was trying to divert the alleged notional gain/loss.

11. As held in ***North End Foods Marketing Pvt. Ltd. (supra)*** *there is no real urgency in the matter to pass an ex-parte interim order especially during the pandemic period. There is no doubt that SEBI has the power to pass an interim order and that in extreme urgent cases SEBI can pass an ex-parte interim order but such powers can only be exercised sparingly and only in extreme urgent matters. In the instant case, we do not find any case of extreme urgency which warranted the respondent to pass an ex-parte interim order only on arriving at the prima-facie case that the appellant was an insider as defined in the SEBI (Prohibition of Insider Trading) Regulations, 2015 ("PIT Regulations" for short) without considering the balance of convenience or irreparable injury.*

12. In the light of the aforesaid, the impugned order cannot be sustained and the same is quashed at the admission stage itself without calling for a counter affidavit except the show cause notice. The appeal is allowed. The Misc. Application No. 154 of 2020 and Misc. Application No. 155 of 2020 are accordingly

disposed off. We further direct that the appellant to file a reply to the show cause notice within four weeks from today. The respondent will decide the matter finally after giving an opportunity of hearing to the appellant either through physical hearing or through video conference within six months thereafter. During the interim period, in order to safeguard the interests of the respondent and more particularly the interest of the investors in the securities market and also to protect the integrity of the securities market, we direct the appellant to give an undertaking to the respondent within four weeks from today that he will not alienate 50% of his total shareholdings of the company DTL held as on date, as stated by the learned counsel for the appellant. In the circumstances of the case parties shall bear their own costs."

10. Accordingly, we quash and set aside the impugned Order, except as a Show Cause Notice (SCN), upon deposit of the amounts as specified below. Appellants are directed to file a reply to the SCN within four weeks from today. The respondent will decide the matter finally after giving an opportunity of hearing to the appellant either through physical hearing or through video conference within six months thereafter. In the interim, in order to safeguard the interests of the investors in the securities market and also to protect the integrity of the securities market, we further direct the appellants to deposit the

specified amounts, as given in Table 11 of the impugned Order and as reproduced in para 1 of this Order, in an interest bearing Escrow account with SEBI within four weeks from today. No orders on costs.

11. The present matter was heard through video conference due to Covid-19 pandemic. At this stage it is not possible to sign a copy of this order nor a certified copy of this order could be issued by the Registry. In these circumstances, this order will be digitally signed by the Presiding Officer on behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Parties will act on production of a digitally signed copy sent by fax and/or email.

TARUN AGARWAL

Digitally signed by TARUN AGARWAL
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Dr. C.K.G. Nair
Member

Justice M. T. Joshi
Judicial Member

01.10.2020
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