BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Hearing : 08.04.2021
Date of Decision : 02.08.2021

Appeal No. 8 of 2018

1. Navin Kumar Tayal
   131-A, 13th Floor, NCPA Apartment,
   Nariman Point, Mumbai – 400021.

2. Sanjay Kumar Tayal
3. Jyotika Sanjay Tayal
   23-B, 2nd Floor, NCPA Apartment,
   Nariman Point, Mumbai – 400021.

….. 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. Gaurav Joshi, Senior Advocate with Ms. Rishika Harish, Mr. Aditya Bhansali, Ms. Rakshita Poddar, Mr. Suyash Bhandari, Advocates and Ms. Nirali Mehta Practicing Company Secretary for the Appellants.

Mr. Mustafa Doctor, Senior Advocate with Mr. Abhiraj Arora, Ms. Rashi Dalmia, Advocates i/b ELP for the Respondent.

With
Appeal No. 9 of 2018

Kulwinder Kumar Nayyar
Flat No. 101-A, Shirin Co-op Housing
Society Ltd., Plot No. 15, Sector - 29,
Vashi, Navi Mumbai – 400 073. ….. Appellant

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. Saurabh Bachhawat, Advocate with Mr. Priyanshu Mishra, Advocate for the Appellant.

Mr. Mustafa Doctor, Senior Advocate with Mr. Abhiraj Arora, Ms. Rashi Dalmia, Advocates i/b ELP for the Respondent.

With
Appeal No. 10 of 2018

1. Advik Textiles & Realpro Pvt. Ltd.
   1st Floor, Hrishna House, Raghuvanshi Mill
   Compound, S. B. Road,
   Lower Patel (West), Mumbai – 400 013.

2. Azam Mohmmed Ahsan Shaikh
   Flat No. 101-A, Shirin Co-op Housing
   Society Ltd., Plot No. 15, Sector 29, Vashi,
   Navi Mumbai - 400703. ….. 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. Pulkit Sharma, Advocate with Mr. Priyanshu Mishra, Advocate for the Appellants.

Mr. Mustafa Doctor, Senior Advocate with Mr. Abhiraj Arora, Ms. Rashi Dalmia, Advocates i/b ELP for the Respondent.

With
Appeal No. 11 of 2018

Rohitkumar Premkumar Gupta
Raghuvanshi Mansion, Raghuvanshi Mills
Compound, Senapati Bapat Marg,
Lower Parel (W), Mumbai – 400013. ….. Appellant

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. Pradeep Sancheti, Senior Advocate with Mr. Sukrut Mahtre, Advocate for the Appellant.

Mr. Mustafa Doctor, Senior Advocate with Mr. Abhiraj Arora, Ms. Rashi Dalmia, Advocates i/b ELP for the Respondent.

With
Appeal No. 250 of 2020

1. Navin Kumar Tayal
   131-A, 13th Floor, NCPA Apartment,
   Nariman Point, Mumbai – 400021.

2. Jyotika Tayal
   23-B, 2nd Floor, NCPA Apartment,
   Nariman Point, Mumbai – 400021. ….. 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. Gaurav Joshi, Senior Advocate with Ms. Rishika Harish, Mr. Aditya Bhansali, Ms. Rakshita Poddar, Mr. Suyash Bhandari, Advocates and Ms. Nirali Mehta Practising Company Secretary for the Appellants.

Mr. Mustafa Doctor, Senior Advocate with Mr. Abhiraj Arora, Ms. Rashi Dalmia, Advocates i/b ELP for the Respondent.

With
Appeal No. 261 of 2020

1. Advik Textiles & Realpro Pvt. Ltd.
   1st Floor, Hrishna House,
   Raghuvanshi Mill Compound,
   S. B. Road, Lower Patel (West),
   Mumbai – 400 013.

2. Azam Mohmmed Ahsan Shaikh
   Flat No. 101-A, Shirin Co-op.

Housing Society Ltd., Plot No. 15,
Sector 29, Vashi,
Navi Mumbai - 400703 ….. 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. Pulkit Sharma, Advocate with Mr. Priyanshu Mishra, Advocate for the Appellants.

Mr. Mustafa Doctor, Senior Advocate with Mr. Abhiraj Arora, Ms. Rashi Dalmia, Advocates i/b ELP for the Respondent.

With
Appeal No. 262 of 2020

Kulwinder Nayyar
Flat No. 101-A, Shirin Co-op Housing
Society Ltd., Plot No. 15, Sector - 29,
Vashi, Navi Mumbai – 400 073. .. Appellant

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. Saurabh Bachhawat, Advocate with Mr. Priyanshu Mishra, Advocate for the Appellant.

Mr. Mustafa Doctor, Senior Advocate with Mr. Abhiraj Arora, Ms. Rashi Dalmia, Advocates i/b ELP for the Respondent.

With
Appeal No. 263 of 2020

Rohitkumar Premkumar Gupta
Raghuvanshi Mansion, Raghuvanshi Mills
Compound, Senapati Bapat Marg,
Lower Parel (W), Mumbai – 400013. ..Appellant

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. Pradeep Sancheti, Senior Advocate with Mr. Sukrut Mhatre, Advocate for the Appellant.

Mr. Mustafa Doctor, Senior Advocate with Mr. Abhiraj Arora, Ms. Rashi Dalmia, Advocates i/b ELP for the Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Justice M. T. Joshi, Judicial Member

Per : Justice Tarun Agarwala, Presiding Officer

1. There are two sets of appeals. First set are appeals Nos. 11 of 2018, 8 of 2018, 9 of 2018 and 10 of 2018 which is against the order dated November 22, 2017 passed by the Whole Time Member (hereinafter referred to as 'WTM') of Securities and Exchange Board

of India (hereinafter referred to as 'SEBI') by which the appellants were restrained from buying, selling or dealing in the securities market for a period of five years. Further, the appellants in these appeals were directed to disgorge an amount of Rs. 95,77,614/- alongwith interest at the rate of 12% p. a. with effect from May 27, 2010 onwards to be paid jointly and severally. The second set of appeals are appeal Nos. 250 of 2020, 261 of 2020, 262 of 2020 and 263 of 2020 which is against the order dated May 29, 2020 passed by the Adjudicating Officer (hereinafter referred to as 'AO') imposing a penalty of Rs. 3 crore to be paid by the appellants jointly and severally. Since the facts and issues involved are common, all the appeals are being taken up together. For facility, the facts as enumerated in the appeal No. 11 of 2018 Rohitkumar Gupta vs. SEBI (hereinafter referred to as 'Rohit Gupta') is being taken into consideration.

2. SEBI conducted an investigation in the scrip of Bank of Rajasthan for the period of May 7, 2010 to May 18, 2010 with regard to insider trading under Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 (hereinafter referred to as 'PIT Regulations'). This period relates to the discussions held between the dominant shareholders of Bank of

Rajasthan (hereinafter referred to as 'BoR') and ICICI Bank Ltd. (hereinafter referred to as 'ICICI') with regard to the merger of the two banks. Information of such merger was a price sensitive information as per the Regulation 2ha(v) of the PIT Regulations. The investigations further revealed that merger talks were going on between the two banks since February 2010 but the discussion broke down on May 6, 2010 and was again revived on May 7, 2010 which ultimately led to the execution of a binding agreement dated May 18, 2010 between the parties.

3. Based on the investigation, an impounding order dated January 5, 2016 was issued by the WTM directing the appellants not to divert any unlawful gains arising out of the trades executed in violation of PIT Regulations. One of the noticees / appellants, namely, noticee No. 5 Advik Textiles and Realpro Pvt. Ltd. (hereinafter referred to as 'Advik Texiles') filed an appeal before this Tribunal which was disposed of by an order dated October 11, 2017 directing SEBI to pass a final order within six weeks.

4. In view of the above, a show cause notice dated October 18, 2017 was issued to all the appellants. The show cause notice alleged that Pravin Tayal and Sanjay Tayal were the dominant shareholders in BoR and were associated from the very beginning in the

discussions on the merger of the BoR with ICICI. The discussions were being held from February 2010 and were again resumed with effect from May 7, 2010. The respondent have taken the Unpublished Price Sensitive Information (UPSI) period from May 7, 2010 to May 18, 2010 till 05:12:24 p.m. It was alleged that on May 18, 2010 at 4:30 a.m. in the morning and after several rounds of discussions from May 7, 2010 onwards, a Binding Implementation Agreement dated May 18, 2010 was entered between Pravin Tayal and Sanjay Tayal with ICICI to procure cooperation and support of shareholders in order to give effect to the proposed merger in terms of Section 44A of the Banking Regulation Act, 1949. The BoR informed the Stock Exchange on May 18, 2010 at 17:12:24 hours to the effect that the Board of Directors were to convene urgently on the same date for considering the proposed merger.

5. It was alleged that the appellant Rohit Gupta purchased 1,40,000 shares of BoR on 17th and 18th May 2010 for Rs. 1,28,77,324.83 and sold the shares on 25th, 26th and 27th of May 2010 and earned a profit of Rs. 95,77,614/-. It was alleged that the appellant Rohit Gupta had insider information and was in possession of UPSI in connivance with Sanjay Tayal, noticee No. 2 (now

deceased), Navin Tayal and Jyotika Tayal, noticee nos. 3 and 4 respectively.

6. The show cause notice further alleged that the appellant Rohit Gupta was funded by Advik Textiles and its directors Kulwinder Nayyar and Azam Shaikh, noticee Nos. 5 and 6 respectively. The show cause notice, thus, alleged that all the noticees, namely, noticee Nos. 1 to 7 had violated Section 12A(d) and (e) of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as 'SEBI Act') as they were engaged in insider trading and were dealing in securities while in possession of material price sensitive information. It was alleged that Advik Textiles had violated Regulation 3A read with Regulation 4 of the PIT Regulations, 1992 read with Regulation 12 of the PIT Regulations, 2015 and that all the noticee Nos. 1 to 7 had committed a fraud and, therefore, violated Regulations 3 and 4 of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relation to Securities Market) Regulations, 2003 (hereinafter referred to as 'PFUTP Regulations').

7. The stand of Rohit Gupta before the WTM was that he has wrongly been charged for violating Section 12A of the SEBI Act or for the PIT Regulations. The said appellant vehemently denied that he was in possession of UPSI when he had traded in the scrip of

BoR. It was contended that the news of merger was already in the public domain from May 6, 2010 and thus, the question of there being an UPSI did not arise. It was further contended that 104 entities had traded almost 10,000 shares on May 18, 2010 and whereas no investigation has been done against them, the appellant has wrongly been investigated. The appellant contended that he has not committed any fraud nor had violated Regulations 3 and 4 of the PFUTP Regulations. The appellant contended that he was not an insider nor a connected person nor a person deemed to be connected and was not related to the Company. On the other hand, he was an active investor trading in mutual funds and was a man of means and had a balance of a few crores in his bank accounts.

8. Before the WTM, the statement of Rohit Gupta was recorded wherein he admitted that Rs. 116.44 lac were transferred through RTGS to his bank account on May 18, 2010 and May 19, 2010 by Advik Textiles. It was alleged that this amount was transferred pursuant to any agreement for sale dated May 1, 2010 entered between the appellant Rohit Gupta with Advik Textiles for sale of four shops by the appellant Rohit Gupta to Advik Textiles for a total consideration of Rs. 1,74,64,860/-. Further, 2/3rd of the amount totaling Rs.116.44 lac was paid up front. It was also stated that this

agreement for sale was terminated on June 3, 2010 and the amount was refunded on June 17, 2010. Rohit Gupta admitted that the agreement was not a registered agreement nor there were any witnesses to the agreement.

9. Noticee Nos. 2, 3 and 4, namely, Sanjay Tayal, Navin Tayal and Jyotika Tayal (hereinafter referred to as 'Tayal family') have filed a common reply. During the pendency of the appeal, Sanjay Tayal died. They contended that they were not the directors of Advik Textiles and, therefore, Advik Textiles cannot be deemed to be a connected person under Regulation 2(h)(ix) of the PIT Regulations. Further, Sanjay Tayal nor Navin Tayal were shareholders in this Company though it has come on record that Navin Tayal was a director from June 2, 2008 till March 2, 2010 and, therefore, continued to remain an authorized signatory of the bank accounts of the Advik Textiles. The Tayal family contended that they were not in possession of any UPSI and, in any case, the information was available in the public domain and, therefore, the question of existence of a price sensitive information did not arise.

10. The noticee Nos. 5, 6 and 7, namely, Advik Textiles and its two directors submitted that it was a business deal for purchase of four shops and they had paid Rs. 116.44 lac as an advance towards

2/3rd of the sale consideration. It was also contended that subsequently, the agreement was terminated on June 3, 2010 and the money was refunded on June 17, 2010. It was contended that the directors of Advik Textiles were not privy to any UPSI.

11. The WTM after considering the material evidence on record and after hearing the parties held that the information regarding merger of BoR with ICICI between May 7, 2010 to May 18, 2010 was an UPSI. The WTM found that the contention of the noticees that the information relating to merger was no longer an UPSI as it was published in the newspaper on 6th and 7th May 2010 and was, thus, in the public domain was not accepted nor could be taken into consideration in as much as such publication in the newspaper does not come within the parameters of unpublished information as defined under Regulation 2(k) of the PIT Regulations which explicitly states that reports printed in the print media is not a published information.

12. The WTM further found that Rohit Gupta to be connected person and that he was an insider in possession of price sensitive information. The WTM concluded on the basis of proximity with the Tayal family, namely, family connection and connection with Advik Textiles that Rohit Gupta was an insider and in possession of UPSI.

The WTM on the basis of substantial evidence found that the appellant Rohit Gupta was not an active investor nor dealt with in any scrip except the scrip in question of BoR and a few mutual funds and that he had not traded thereafter and had never traded in the scrip of BoR since 2005-06 and, therefore, concluded that on a preponderance of probability, that the appellant Rohit Gupta was an insider having unpublished price information. The WTM further found that Rohit Gupta's sister, noticee No. 4, whose husband was Sanjay Tayal and was actively involved in the merger discussions and based on this proximity, an irresistible inference was drawn by the WTM that both Jyotika and Rohit Gupta had knowledge about the merger and possessed UPSI. The WTM also found that Rohit Gupta had very cordial relationship with his sister and that the appellant Rohit Gupta was closely connected with the Tayal family. Further, purchasing shares on 17th and 18th May 2010 was unusual when Rohit Gupta was not a regular trader / investor.

13. The WTM further found that Advik Textiles was wholly owned by the Tayal family from September 29, 2008 to March 2, 2010. Navin Tayal and Jyotika Tayal held 100% shares of Advik and thereafter they resigned and Kulwinder Nayyar and Azam Shaikh, noticee Nos. 6 and 7 became directors with 50%

shareholders each from March 2, 2010 to September 10, 2010 and thereafter Navin Tayal and Jyotika Tayal again became directors holding 100% shares of Advik Textiles from September 5, 2012. On the basis of this shareholding pattern, the WTM found that even though Navin Tayal and Jyotika Tayal had relinquished the directorship during the UPSI period in question, nonetheless, they still controlled the Company as Navin Tayal continued to remain as the authorized signatory of the Company.

14. Further, the WTM found that the address of Advik Texiles was as under :-

> C/o. Elemento Lifestyle Pvt. Ltd.
> Raghuvanshi Mansion,
> 11, Senapati Bapat Marg,
> Lower Parel, Mumbai 400 013.

15. This is the same address as of BoR. Further, it was found that the appellant Rohit Gupta, was the Managing Director in Elemento Lifestyle Pvt. Ltd. since 2005. Thus, there is a direct connection of the appellant Rohit Gupta with Advik Textiles and with the Tayal family and, therefore, the WTM came to a conclusion that the Advik Textiles was connected to Tayal as well as to Rohit Gupta. The WTM further came to the conclusion that the agreement for sale dated May 1, 2010 executed between Rohit Gupta and Advik

Textiles was only a sham transaction to cover up the scheme of insider trading and to fund Rohit Gupta for the purpose of purchasing the scrips of BoR. The WTM came to the conclusion that this agreement for sale was neither registered nor were there any witnesses in this agreement for sale, and therefore it was only a piece of paper which had no evidentiary value.

16. The WTM further found that the directors Kulwinder Nayyar and Azam Shaikh, noticee Nos. 6 and 7 were closely associated with the Tayal family and were directors in more than 14 companies which was floated and managed by the Tayal family.

17. Based on the aforesaid findings, the WTM came to the conclusion that the appellants had violated Section 12A(d) and (e) of the SEBI Act read with Regulations 3 and 4 of the PIT Regulations. The WTM further found that the charge of fraud under Regulations 3 and 4 were not proved and, therefore, the order of disgorgement and debarment was passed.

18. We have heard Mr. Gaurav Joshi, the learned senior counsel, Mr. Saurabh Bachhawat, Mr. Pulkit Sharma, the learned counsel and Mr. Pradeep Sancheti, the learned senior counsel for the appellants and Mr. Mustafa Doctor, the learned senior counsel alongwith

Mr. Abhiraj Arora, Ms. Rashi Dalmia, the learned counsel for the respondent through video conference.

19. The contention of the appellant Rohit Gupta is that in the first instance, there was no UPSI, the said information was in the public domain from May 6, 2010 onwards. It was contended that in the absence of UPSI, the charge of insider trading cannot be levelled against him. In the alternative, it was urged that assuming there existed an UPSI, there was no evidence to show that UPSI was transferred to the appellant Rohit Gupta. It was contended that the appellant had no role to play in the negotiation with regard to the merger of the two banks. Only the dominant shareholders Sanjay Tayal and Pravin Tayal were involved in the negotiation, even though Sanjay Tayal is his brother-in-law, nonetheless, there is no evidence to show that the appellant was privy to the negotiation and / or the UPSI. In the absence of any plausible evidence, it was contended that the findings of the WTM were being based on surmises and conjectures cannot be accepted.

20. It was also urged by the appellant Rohit Gupta that the WTM has miserably failed to establish the charge of trading against the appellant and has been found guilty only on the basis of preponderance of probability. In this regard, the learned counsel for

the appellant had relied upon a decision of this Tribunal in ***Dilip S. Pendse vs. SEBI Appeal No. 80 of 2009 decided on November 19, 2009***, wherein this Tribunal has held as under :-

> *"13. The charge of insider trading is one of the most serious charges in relation to the securities market and having regard to the gravity of this wrong doing, higher must be the preponderance of probabilities in establishing the same. In Mousam Singha Roy v. State of West Bengal (2003) 12 SCC 377, the learned judges of the Supreme Court in the context of the administration of criminal justice observed that, "It is also a settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof, since a higher degree of assurance is required to convict the accused." This principle applies to civil cases as well where the charge is to be established not beyond reasonable doubt but on the preponderance of probabilities. The measure of proof in civil or criminal cases is not an absolute standard and within each standard there are degrees of probability. In Hornal v. Neuberger Products Ltd. (1956) 3 All E.R.970 Hodson, L.J. observed as under :*
>
> > *"Just as in civil cases the balance of probability may be more readily tilted in one case than in another, so in criminal cases proof beyond reasonable doubt may more readily be attained in some cases than in others."*
>
> *We are also tempted to refer to what Denning, L.J. observed in Bater v. Bater (1950) 2 All E.R. 458 wherein he was resolving the difference of opinion between two Lord Justices regarding the standard of proof required in a matrimonial case. This is what he said :*

> *"It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion."*

In the light of the aforesaid principles on degree of proof, we have carefully gone through the impugned order and the material on the record and find that the whole time member has miserably failed to establish the charge of insider trading against the appellant with the required degree of probability necessary to establish such a serious charge. The only ground on which the whole time member holds that the sale transactions of Mrs. Pendse and Nalini were executed in the end of March 2001 is that the delivery of shares was given by the sellers on March 28, 2001 and payment for the shares was received on March 30, 2001. The whole time member has noticed the long delay in settling the trade for which the contract was completed in September, 2000 and has concluded that the sale of the shares took place in March, 2001. We have already dealt with this aspect of the matter earlier in our order and we cannot agree

with the findings recorded in this regard. As already observed, the trades may have been contrary to the Bye-laws of the Exchange but it cannot be said that the contract was not completed in September, 2000. If the sale did not take place in September, 2000 then what was the Broker reporting to the stock exchange as per its letter dated September 16, 2000. We have already noticed that the Bombay Stock Exchange had acknowledged the receipt of this letter from the Broker in its letter of November 26, 2002. In this view of the matter, the charge must fail. Accordingly, we answer the question posted in the opening part of our order in the negative and hold that the appellants are not guilty of insider trading."

21. It was urged by Rohit Gupta that he was not privy to the transfer of funds by Advik Textiles to the appellant as he did not authorize the said transfer. It was contended that the appellant was a man of means and had a credit balance of Rs. 116.43 lacs in his account between May 5, 2010 to May 10, 2010 which would show that there was no need for any transfer of funds by Advik Textiles for the purpose of buying the shares of BoR. It was contended that it was a pure and simple business deal between the appellant Rohit Gupta with Advik Textiles for sale of four shops for a total consideration of Rs. 1.74 crore out of which 2/3rd was paid amounting to Rs. 116 lac as an advance payment. It was urged that such transfer of money during the same time could not be related to some deep rooted plan or conspiracy for buying the shares. It was contended that since the deal did not fructify, the agreement was

terminated and the advance money was refunded. Subsequently, at a later point of time, a suit was filed by the appellant Rohit Gupta against Advik Textiles with regard to the payment of interest which was disposed of in terms of a consent compromise.

22. The appellant Rohit Gupta further urged that the calculation of disgorgement is totally erroneous. According to the appellant the price has to be calculated on the basis of the price of the share when UPSI was made public and not on the basis of calculation of the price when the shares were sold. In support of his submission, the learned counsel placed reliance on a decision of this Tribunal in ***Karvy Stock Broking Ltd. vs. SEBI Appeal No. 6 of 2007 decided on May 2, 2008,*** wherein this Tribunal explained the meaning of the word disgorgement. For facility, the relevant portion is extracted hereunder ;-

> *"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 illgotten 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 act(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."*

23. In addition to the aforesaid, reliance was placed on another decision in ***S.E.C. v. Patel 61 F.3d 137 (2d Cir. 1995) decided on July 24, 1995***, wherein it was held *"where stock is purchased on the basis of inside information, the proper measure of damages is the difference between the price paid for the share at the time of purchase and the price of the shares shortly after disclosure of the inside information".*

24. On the aforesaid basis of the two decisions, it was urged that the calculation made by the WTM on the basis of the difference between the price of the shares purchased and the price of share sold was arbitrary and requires reconsideration.

25. It was also contended that the interest charged at the rate of 12% p. a. from the date of the alleged transactions i.e. May 18, 2010 was wholly arbitrary and excessive. It was urged that interest should be charged from the date on which the cause of action arose i.e. when the amount of disgorgement was calculated which was only finalized when the impugned order was passed on November 22, 2017. It was thus, contended that interest prior to from the date of the impugned order cannot be calculated. In support of his submission reliance was made on a decision of the Hon'ble Supreme Court in ***Dushyant Dalal & Anr. vs. SEBI [(2017) 9 SCC 660],*** where the Hon'ble Supreme Court held as under :-

> *"32. We agree with the aforesaid statement of the law. It is clear, therefore, that the Interest Act of 1978 would enable Tribunals such as SAT to award interest from the date on which the cause of action arose till the date commencement of proceedings for recovery of such interest in equity. The present is a case where interest would be payable in equity for the reason that all penalties collected by SEBI would be credited to the Consolidated Fund under Section 15-JA of the SEBI Act. There is no greater equity than such money being used for public purposes. Deprivation of the use of such money would, therefore, sound in equity. This being the case, it is clear that, despite the fact that Section 28-A belongs to the realm of procedural law and would ordinarily be retrospective, when it seeks to levy interest, which belongs to the realm of substantive law, the Tribunal is correct in stating that such interest would be chargeable under Section 28-A read with Section 220(2) of the Income Tax Act only prospectively. However, since it has not taken into account the Interest Act, 1978 at all,*

we set aside the Tribunal's findings that no interest could be charged from the date on which penalty became due. Civil Appeals Nos. 10410-12 of 2017 are allowed insofar as the penalty cases are concerned."

"36. All the aforesaid orders show that the said Whole-Time Member was fully cognizant of his power to grant future interest which he did in all the aforesaid cases. In fact, in the last-mentioned case, whose facts are very similar to the facts of the present case, the order was passed "without prejudice to SEBI's right to enforce disgorgement along with further interest till actual payment is made". The words "along with further interest till actual payment is made" are conspicuous by their absence in the order dated 21-7-2009. In the circumstances, we are of the view that Shri Subramonium Prasad is correct in his submission. If there is default in payment of Rs. 6 crores within the stipulated time, no future interest is payable inasmuch as a much severer penalty of being debarred from the market for 7 years was instead imposed."

26. Reliance was also made on a decision of this Tribunal ***Shailesh S. Jhaveri vs. SEBI Appeal No. 79 of 2012 decided on October 4, 2012***.

27. It was urged that the rate of interest at the rate of 12% p.a. was wholly excessive and was not in consonance with the interest rate prevailing at the time of either when the impugned order was passed or at the time when the alleged transactions took place. In the end, it was urged that there has been an undue delay of seven years in the issuance of the notice. It was contended that the proceedings

initiated were wholly belated. The alleged transaction is of the year 2010 whereas the show cause notice was issued after seven years on October 18, 2017. No reason has been given as to why the proceedings could not be initiated earlier and, therefore, on the ground of an inordinate delay the proceedings should be quashed. In support of his submission, the learned counsel has placed reliance in ***Ashok Shivlal Rupani & Anr. Appeal No. 417 of 2018 decided on August 22, 2019 alongwith connected appeal and ICICI Bank Ltd. vs. SEBI Appeal No. 583 of 2019 decided on July 8, 2020 and Ashlesh Gunvantbhai Shah Appeal No. 169 of 2019 alongwith connected appeals decided on January 31, 2020.***

28. On the other hand, the respondent have contended that the order of the WTM debarring the appellants and directing disgorgement as well as the order of the AO directing payment of penalty to be paid jointly and severally does not suffer from any error of law. It was contended that the foundational facts are not only based on circumstantial evidence and preponderance of probability which is also based on direct evidence. It was contended that the inference drawn by the authorities in the impugned order is reasonable which can be legitimately arrived at on a consideration to the totality of the material evidence before it. It was contended that based on the foundational facts, it was clearly established that Rohit

Gupta had access to UPSI and traded on the basis of price sensitive information. It was, thus, contended that the findings that Rohit Gupta traded on the basis of UPSI does not suffer from any manifest error of law. It was contended that disgorgement is an equitable remedy and that the amount to be disgorged is left to the discretion of the authority which has rightly been exercised. The method adopted was fair and reasonable which requires no interference. It was further contended that there was no undue delay in the issuance of the show cause notice and that the show cause notice was issued immediately after the investigation was completed. It was also contended that the other appellants were equally guilty of the illegal trades as they were not only connected with each other but also connived with one another and, consequently, a common penalty was imposed.

29. From the above sequence of events, the admitted facts, as culled out is, that Rohit Gupta is the brother of Jyotika Tayal. Jyotika Tayal is the wife of Sanjay Tayal (deceased). Sanjay Tayal was one of the persons involved in the merger discussions. Sanjay Tayal was also a signatory to the binding agreement. Sanjay Tayal had inside information. Rohit Gupta purchased shares on 17th & 18th May 2010 and sold on 25th and 27th May 2010 and made a profit of Rs. 95,77,614/- on 18th and 19th May 2010. Rohit Gupta received

Rs. 116.44 lac from Advik Textiles. This amount was utilized to purchase the shares. The proceeds of the sale made by Rohit Gupta was deposited in his account on June 2, 2010 and on the very next day i.e. June 3, 2010, the sale agreement between Rohit Gupta and Advik Textiles was terminated and the alleged amount of advance given to Rohit Gupta pursuant to this agreement was refunded on June 17, 2010. Further, at the time when the trades were executed by Rohit Gupta on 17th and 18th May 2010, he had a balance of Rs. 1,32,747.78 in his bank account which was insufficient to pay the purchase price of the shares which he had executed on 17th and 18th May 2010. Advik Textiles was closely connected with the Tayal Group. Further, Rohit Gupta was not a regular trader in the securities market.

29. In order to fulfill the mandate to protect the interest of the investors in the securities market, SEBI is empowered to lift the corporate veil and find out the truth whenever the interest of the investors are likely to be affected otherwise SEBI would be a mute spectator to the corporate misdeeds which may affect the interest of the investors. In this regard, the Hon'ble Supreme Court in ***N. Narayan vs. SEBI [(2013) 12 SCC 152]*** held as under :

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

"42. SEBI, the market regulator, has to deal sternly with companies and their Directors indulging in manipulative and deceptive devices, insider trading, etc. or else they will be failing in their duty to promote orderly and healthy growth of the securities market. Economic offence, people of this country should know, is a serious crime which, if not properly dealt with, as it should be, will affect not only the country's economic growth, but also slow the inflow of foreign investment by genuine investors and also cast a slur on India's securities market. Message should go that our country will not tolerate "market abuse" and that we are governed by the

"rule of law". Fraud, deceit, artificially, SEBI should ensure, have no place in the securities market of this country and "market security" is our motto. People with power and money and in management of the companies, unfortunately often command more respect in our society than the subscribers and investors in their companies are thriving with investors' contributions but they are a divided lot. SEBI has, therefore, a duty to protect investors, individual and collective, against opportunistic behavior of Directors and insiders of the listed companies so as to safeguard market's integrity."

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

30. In the light of the aforesaid, the contentions raised by the appellants are dealt with hereunder.

31. The shares in question were purchased on 17th and 18th May 2010 and were sold on 25th and 27th May 2010. Investigation was carried out from 2013 to 2015 in which 104 persons were examined and summons were issued to 87 persons. Based on the investigation, a report was submitted on December 12, 2015 based on which an impounding order was passed immediately thereafter on January 5,

2016 wherein a slew of directions were passed against the appellants. One of the entities, namely, Advik Textiles filed an appeal before this Tribunal which was disposed of by an order dated October 11, 2017 directing SEBI to pass a final order within six months. Based on the directions by this Tribunal, a show cause notice was issued on October 18, 2017 and the impugned order was passed on November 22, 2017.

32. Considering the aforesaid sequence of events, we find that the contention of the appellants that there was an inordinate delay in the initiation of the proceedings is erroneous. The allegation that the inordinate delay has not been explained and the manner in which the proceedings have been initiated shows lack of attitude in carrying out their duties cannot be accepted. The contention that the delay has had a dematerializing effect upon the appellants as the sword of damocles was hanging on their heads since long is patently erroneous. In our opinion, the proceedings were initiated the moment it came to the notice of SEBI and, in the peculiar facts of this case, a show cause notice was issued immediately after the investigation report was submitted. We are of the opinion that in the peculiar facts of the present case, when summons were issued to 104 persons and 87 of the were examined, there is no inordinate delay on

the part of the respondent in the issuance of the show cause notice. The decision cited by the appellants which has been stated in the preceding paragraphs are distinguishable and are not applicable in the instant case. We are further of the opinion that no prejudice has been caused to the appellants since nothing has been shown nor urged in the arguments. The restraint order was passed on December 12, 2015 which was not challenged by the most of the appellants. Therefore, in our opinion, there is no inordinate delay in the initiation of the proceedings. The contention raised on this aspect is accordingly rejected.

33. Before we deal on the question whether Rohit Gupta was an insider or not, it would be appropriate to peruse a few provisions of the relevant Regulations, namely, the PIT Regulations as hereunder :

> *"2(c). "connected person" means any person who—*
>
> *(i) is a director, as defined in clause (13) of section 2 of the Companies Act, 1956 (1 of 1956), of a company, or is deemed to be a director of that company by virtue of sub-clause (10) of section 307 of that Act or*
> *(ii) occupies the position as an officer or an employee of the company or holds a position involving a professional or business relationship between himself and the company [whether temporary or permanent] and who may reasonably be expected to have an access to unpublished price sensitive information in relation to that company:*

[Explanation :—For the purpose of clause (c), the words "connected person" shall [mean] any person who is a connected person six months prior to an act of insider trading;]

"2(e). "insider" means any person who,

(i) is or was connected with the company or is deemed to have been connected with the company and is reasonably expected to have access 10[***] to unpublished price sensitive information in respect of securities of 11[a] company, or
(ii) has received or has had access to such unpublished price sensitive information."

"2(h). "person is deemed to be a connected person", if such person—

(i) is a company under the same management or group, or any subsidiary company thereof within the meaning of sub-section (1B) of section 370, or sub-section (11) of section 372, of the Companies Act, 1956 (1 of 1956) or sub-clause (g) of section 2 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) as the case may be; or

(ii) is an intermediary as specified in section 12 of the Act, Investment company, Trustee Company, Asset Management Company or an employee or director thereof or an official of a stock exchange or of clearing house or corporation;
(iii) is a merchant banker, share transfer agent, registrar to an issue, debenture trustee, broker, portfolio manager, Investment Advisor, sub-broker, Investment Company or an employee thereof, or is member of the Board of Trustees of a mutual fund or a member of the Board of Directors of the Asset Management Company of a mutual fund or is an employee thereof who have a fiduciary relationship with the company;

(iv) is a Member of the Board of Directors or an employee of a public financial institution as defined in section 4A of the Companies Act, 1956; or

(v) is an official or an employee of a Self-regulatory Organisation recognised or authorised by the Board of a regulatory body; or (vi) is a relative of any of the aforementioned persons; (vii) is a banker of the company.

(viii) relatives of the connected person; or

(ix) is a concern, firm, trust, Hindu undivided family, company or association of persons wherein any of the connected persons mentioned in sub-clause (i) of clause (c), of this regulation or any of the persons mentioned in sub-clause (vi), (vii) or (viii) of this clause have more than 10 per cent of the holding or interest"

"2(ha). "price sensitive information" means any information which relates directly or indirectly to a company and which if published is likely to materially affect the price of securities of company.

Explanation.—The following shall be deemed to be price sensitive information :—

(i) periodical financial results of the company;

(ii) intended declaration of dividends (both interim and final);

(iii) issue of securities or buy-back of securities;

(iv) any major expansion plans or execution of new projects.

(v) amalgamation, mergers or takeovers;

(vi) disposal of the whole or substantial part of the undertaking;

(vii) and significant changes in policies, plans or operations of the company."

"2(i) "relative" means a person, as defined in section 6 of the Companies Act, 1956 (1 of 1956)"

> *"2(k) "unpublished" means information which is not published by the company or its agents and is not specific in nature.*
>
> *Explanation.—Speculative reports in print or electronic media shall not be considered as published information."*

34. The aforesaid provisions have been explained in various decisions. For facility, the relevant paragraphs of various decisions are extracted hereunder.

35. In ***SEBI vs. Kishore R. Ajmera [(2016) 6 SCC 368]***, the Hon'ble Supreme Court has held as under :-

> *" 26. It has been vehemently argued before us that on a screen based trading the identity of the 2nd party be it the client or the broker is not known to the first party/client or broker. According to us, knowledge of who the 2nd party/ client or the broker is, is not relevant at all. While the screen based trading system keeps the identity of the parties anonymous it will be too naive to rest the final conclusions on said basis which overlooks a meeting of minds elsewhere. Direct proof of such meeting of minds elsewhere would rarely be forthcoming. The test, in our considered view, is one of preponderance of probabilities so far as adjudication of civil liability arising out of violation of the Act or the provisions of the Regulations framed thereunder is concerned. Prosecution under Section 24 of the Act for violation of the provisions of any of the Regulations, of course, has to be on the basis of proof beyond reasonable doubt.*
>
> *The conclusion has to be gathered from various circumstances like that volume of the trade effected; the period of persistence in trading in the particular scrip; the particulars of the buy and sell orders, namely, the*

volume thereof; the proximity of time between the two and such other relevant factors. The fact that the broker himself has initiated the sale of a particular quantity of the scrip on any particular day and at the end of the day approximately equal number of the same scrip has come back to him; that trading has gone on without settlement of accounts i.e. without any payment and the volume of trading in the illiquid scrips, all, should raise a serious doubt in a reasonable man as to whether the trades are genuine. The failure of the brokers/sub-brokers to alert themselves to this minimum requirement and their persistence in trading in the particular scrip either over a long period of time or in respect of huge volumes thereof, in our considered view, would not only disclose negligence and lack of due care and caution but would also demonstrate a deliberate intention to indulge in trading beyond the forbidden limits thereby attracting the provisions of the FUTP Regulations. The difference between violation of the Code of Conduct Regulations and the FUTP Regulations would depend on the extent of the persistence on the part of the broker in indulging with transactions of the kind that has occurred in the present cases. Upto an extent such conduct on the part of the brokers/sub-brokers can be attributed to negligence occasioned by lack of due care and caution. Beyond the same, persistent trading would show a deliberate intention to play the market. The dividing line has to be drawn on the basis of the volume of the transactions and the period of time that the same were indulged in. In the present cases it is clear from all these surrounding facts and circumstances that there has been transgressions by the respondents beyond the permissible dividing line between negligence and deliberate intention."

"30. We disagree with the above contention. The stage at which the monetary penalty was imposed on the two other brokers indulging in circular trading is prior to any determination of liability of the said two brokers who did not contest the charges. In the case of M/s Monarch Networth Capital Limited the stage has advanced far beyond the above and had culminated in operative findings against the said subbroker. The

imposition of monetary penalty in the case of M/s. Ess Ess Intermediaries Pvt. Ltd., M/s. Rajesh N. Jhaveri and M/s. Rajendra Jayantilal Shah [second category] for violation of the FUTP Regulations cannot be a basis for alteration of the punishment of suspension imposed on M/s. Monarch Networth Capital Limited to one of monetary penalty. In this regard, provisions of Section 15J of the SEBI Act has to be kept in mind and if the primary authority had thought it proper to impose different penalties in different cases involving different set of facts, we do not see how and why interference should be made in present appeals."

36. In ***SEBI vs. Kanaiyalal Baldevbhai Patel [(2017) 15 SCC 1],*** the Hon'ble Supreme Court has held as under :-

"22. A word on interpretation would be appropriate before I take up legal aspects of this case. Mr. K. T. S Tulsi, learned Senior Counsel, states that penal laws have to be strictly construed. He places reliance on Govind Impex (P) Ltd. v. CIT, Krishi Utpadan Mandi Samiti v. Pilibhit Pantnagar Beej Ltd. Although strict construction is well-established principle when interpreting a penal provision, but such interpretation should not result in incongruence when compared with the purpose of the Regulation. In SEBI v. Kishore R. Ajmera, this Court observed that : (SCC p. 383, para 25)

"25. The SEBI Act and the Regulations framed thereunder are intended to protect the interests of investors in the securities market which has seen substantial growth in tune with the parallel developments in the economy. Investors' confidence in the capital/securities market is a reflection of the effectiveness of the regulatory mechanism in force. All such measures are intended to pre-empt manipulative trading and check all kinds of impermissible conduct in order to boost the investors' confidence in the capital market. The primary purpose of the statutory

enactments 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. The provisions of the SEBI Act and the Regulations will, therefore, have to be understood and interpreted in the above light."

"43. On the issue of General Duty between all participants (Tippees), the Court stated that :

"Formulation of a general duty between all participants in market transactions for forego actions based on material, non-public information, so as to give rise to liability under Section 10(b) of the Securities Exchange Act for failure to disclose, would depart radically from established doctrine that a duty arises from a specific relationship between two parties and should not be undertaken absent some explicit evidence of congressional intent. Securities Exchange Act of 1934, Section 10(b) as amended 15 U.S.C.A. Section 7j(b)."

"58. Adverting to the facts of the present case if the information with regard to acquisition of shares by M/s Passport India was parted with by Dipak Patel to Kanaiyalal Baldevbhai Patel and Anandkumar Baldevbhai Patel and the latter had transacted in huge volume of shares of the particular company/scrip mentioned by Dipak Patel as little while before the bulk order was placed by M/s Passport India and the said persons had sold the same a short while later at an increased price, such increase being a natural consequence of a huge investment made in the particular scrip by M/s Passport India, surely, it can be held that by the conduct of Dipak Patel, Kanaiyalal Baldevbhai Patel and Anandkumar Baldevbhai Patel were induced to deal in securities. A natural and logical inference that would follow is that the aforesaid two latter persons would not have entered into the transactions in question, had it not been for the information parted with by Dipak Patel. The track record of earlier trading of the two persons concerned

does not indicate trading in such huge volumes in their normal course of business. Such an interference would be a permissible mode of arriving at a conclusion with regard to the liability, as held by this Court in SEBI v. Kishore R. Ajmera referred to by my learned Brother Ramana, J. The volume; the nature of the trading and the timing of the transactions in question can leave no manner of doubt that Kanaiyalal Baldevbhai Patel and Anandkumar Baldevbhai Patel had acted in connivance with Dipak Patel to encash the benefit of the information parted with by Dipak Patel to them and, therefore, they are parties to the "fraud" committed by Dipak Patel having aided and abetted the same."

"62. To attract the rigour of Regulations 3 and 4 of the 2003 Regulations, mens rea is not an indispensable requirement and the correct test is one of preponderance of probabilities. Merely because the operation of the aforesaid two provisions of the 2003 Regulations invite penal consequences on the defaulters, proof beyond reasonable doubt as held by this Court in SEBI v. Kishore R. Ajmera is not an indispensable requirement. The inferential conclusion from the proved and admitted facts, so long the same are reasonable and can be legitimately arrived at on a consideration of the totality of the materials, would be permissible and legally justified. Having regard to the facts of the present cases i.e. the volume of shares sold and purchased; the proximity of time between the transactions of sale and purchase and the repeated nature of transactions on different dates, in my considered view, would irresistibly lead to an inference that the conduct of the respondents in Appeals Nos. 2595, 2596 and 2666 of 2013 and the appellants in Appeals Nos. 5829 and 11195-96 of 2014 were in breach of the code of business integrity in the securities market. The consequences for such breach including penal consequences under the provisions of Section 15-HA of the SEBI Act must visit the defaulters concerned for which reason the orders passed by the Appellate Tribunal impugned in Civil Appeals Nos. 2595, 2596 and 2666 of 2013 are set aside and the findings

recorded and the penalty imposed by the adjudicating officer are restored.

37. In ***SEBI vs. Rakhi Trading Pvt. Ltd. [(2018) 13 SCC 753],*** the Hon'ble Supreme Court has held as under :-

"38. We are fortified in our conclusion by the judgment of this Court in SEBI v. Kishore R. Ajmera, though it is a case pertaining to brokers, wherein it has been held at para 25 : (SCC p. 383)

"25. The SEBI Act and the Regulations framed thereunder are intended to protect the interests of investors in the Securities Market which has seen substantial growth in tune with the parallel developments in the economy. Investors' confidence in the capital /securities market is a reflection of the effectiveness of the regulatory mechanism in force. All such measures are intended to pre-empt manipulative trading and check all kinds of impermissible conduct in order to boost the investors' confidence in the capital market. The primary purpose of the statutory enactments 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. The provisions of the SEBI Act and the Regulations will, therefore, have to be understood and interpreted in the above light."

In this case, it was also held that in the absence of direct proof of meeting of minds elsewhere in synchronized transactions, the test should be one of preponderance of probabilities as far as adjudication of civil liability arising out of the violation of the Act or the provision of the Regulations is concerned. To quote : (SCC p. 385, para 31)

"31. The conclusion has to be gathered from various circumstances like that volume of the trade effected; the period of persistence in trading in the particular scrip; the particulars of the buy and sell

orders, namely, the volume thereof; the proximity of time between the two and such other relevant factors."

We do not think that those illustrations are exhaustive. There can be several such situations, some of which we have discussed hereinabove."

"65. Insofar as synchronized trade involving same set of brokers and meeting of minds, in SEBI v. Kishore R. Ajmera, this Court held as under: (SCC pp. 384-85, paras 29-31)

"29. This will take us to the second and third category of cases i.e. Ess Ess Intermediaries (P) Ltd., Rajesh N. Jhaveri and Rajendra Jayantilal Shah (second category) and Monarch Networth Capital Ltd. (earlier known as Networth Stock Broking Ltd.) (third category). In these cases the volume of trading in the illiquid scrips in question was huge, the extent being set out hereinabove. Coupled with the aforesaid fact, what has been alleged and reasonably established, is that buy and sell orders in respect of the transactions were made within a span of 0 to 60 seconds. While the said fact by itself i.e. proximity of time between the buy and sell orders may not be conclusive in an isolated case such an event in a situation where there is a huge volume of trading can reasonably point to some kind of a fraudulent/manipulative exercise with prior meeting of minds. Such meeting of minds so as to attract the liability of the broker/sub-broker may be between the broker/sub-broker and the client or it could be between the two brokers /sub-brokers engaged in the buy and sell transactions. When over a period of time such transactions had been made between the same set of brokers or a group of brokers a conclusion can be reasonably reached that there is a concerted effort on the part of the brokers concerned to indulge in synchronized trades the consequence of which is large volumes of fictitious trading resulting in the unnatural rise in hiking the price/value of the scrip(s). It must be specifically taken note of herein that the trades in question were not "negotiated trades" executed in accordance with the terms of the Board's circulars issued from time to time.

A negotiated trade, it is clarified, invokes consensual bargaining involving synchronising of buy and sell orders which will result in matching thereof but only as per permissible parameters which are programmed accordingly.

30. It has been vehemently argued before us that on a screen-based trading the identity of the second party be it the client or the broker is not known to the first party/client or broker. According to us, knowledge of who the second party/client or the broker is, is not relevant at all. While the screen-based trading system keeps the identity of the parties anonymous it will be too naïve to rest the final conclusions on said basis which overlooks a meeting of minds elsewhere. Direct proof of such meeting of minds elsewhere would rarely be forthcoming. The test, in our considered view, is one of preponderance of probabilities so far as adjudication of civil liability arising out of violation of the Act or the provisions of the Regulations framed thereunder is concerned. Prosecution under Section 24 of the Act for violation of the provisions of any of the Regulations, of course, has to be on the basis of proof beyond reasonable doubt.

31. The conclusion has to be gathered from various circumstances like that value of the trade effected; the period of persistence in trading in the particular scrip; the particulars of the buy and sell orders, namely, the volume thereof; the proximity of time between the two and such other relevant factors. The fact that the broker himself has initiated the sale of a particular quantity of the scrip on any particular day and at the end of the day approximately equal number of the same scrip has come back to him; that trading has gone on without settlement of accounts i.e. without any payment and the volume of trading in the illiquid scrips, all, should raise a serious doubt in a reasonable man as to whether the trades are genuine. The failure of the broker/sub-brokers to alert themselves to this minimum requirement and their persistence in trading in the particular scrip either over a long period of time or in respect of huge volumes thereof, in our considered view, would not only disclose

negligence and lack of due care and caution but would also demonstrate a deliberate intention to indulge in trading beyond the forbidden limits thereby attracting the provisions of the FUTP Regulations."

(emphasis supplied)

"66. In Nirmal Bang Securities (P) Ltd. v. SEBI, SAT applied the test of price, quantity and time to hold that synchronised trading in that case was violative of norms of trading in securities and held as under : (SCC OnLine SAT para 280)

"280. BEB has been charged for synchronized deals with First Global. I have examined the data provided by the parties on this issue. I find many transactions between BEB and FGSB. There are many instances of such transaction. I find the scrip, quantity and price of these orders had been synchronised by the counter-party brokers. Such transactions undoubtedly create an artificial market to mislead the genuine investors. Synchronised trading is violative of all prudential and transparent norms of trading in securities. Synchronised trading on a large scale, can create false volumes. The argument that the parties had no means of knowing whether any entity controlled by the client is simultaneously entering any contra order elsewhere for the reason that in the online trading system, confidentially of counter parties is ensured, is untenable. It was submitted by the appellants that it was not possible for the broker to know who the counter-party broker is and that trades were not synchronised but it was only a coincidence in some cases. Theoretically this is OK. But when parties decide to synchronise the transaction the story is different. There are many transactions giving an impression that these were all synchronised, otherwise there was no possibility of such perfect matching of quantity, price, etc. As the respondent rightly stated it is too much of a coincidence over too long a period in too many transactions when both parties to the transaction had entered buy and sell orders for the same quantity of shares almost simultaneously. The data furnished in the show cause

notice certainly goes to prove the synchronised nature of the transaction which is in violation of Regulation 4 of the FUTP Regulations. The facts on record categorically establish that BEB had indulged in synchronised trading in violation of Regulation 47of the FUTP Regulations. In a synchronised trading intention is implicit."

"67. In the quasi-judicial proceeding before SEBI, the standard of proof is preponderance of probability. In a case of similar synchronized trading involving same set of brokers emphasising that the standard of proof is "preponderance of probability" in paras 26 and 27, in Kishore R. Ajmera case, this Court held as under : (SCC p. 383)

"26. It is a fundamental principle of law that proof of an allegation levelled against a person may be in the form of direct substantive evidence or, as in many cases, such proof may have to be inferred by a logical process of reasoning from the totality of the attending facts and circumstances surrounding the allegations/charges made and levelled. While direct evidence is a more certain basis to come to a conclusion, yet, in the absence thereof the courts cannot be helpless. It is the judicial duty to take note of the immediate and proximate facts and circumstances surrounding the events on which the charges/allegations are founded and to reach what would appear to the court to be a reasonable conclusion therefrom. The test would always be that what inferential process that a reasonable/prudent man would adopt to arrive at a conclusion."

(emphasis supplied)

"68. There was no possibility of such perfect matching of quantity timing, prices, etc. between the same parties unless there was prior meeting of minds or a specific understanding/arrangement between the parties. After referring to Ketan Parekh and Nirmal Bang cases, in Accord Capital Markets Ltd., In re, SEBI held as under : (Accord Capital Case, SCC OnLine SEBI para 4)

"4.12. I note that most of the synchronised trades executed by the Broker were perfectly matched with the counter-party orders even with respect of the price to the extent of two decimal points. The proximity in placing the orders at the same price and for the same quantity almost at the same time (in majority of the cases) resulted in the matching of the aforesaid transactions, with all the ingredients i.e. quantity, price and the time, required to conclude the trades. The time difference (between the buy and sell orders) of majority of the synchronised trades was very less with the price and quantity matching. The said synchronisation cannot take place in the absence of any specific understanding/arrangement between the clients at the first instance, especially when the shares of the company were highly liquid at the time of the trades.

4.24. The proof of manipulation in the circumstances always depends on inferences drawn from a mass of factual details. Findings must be gathered from patterns of trading data and the nature of the transactions, etc. Several circumstances of a determinative character coupled with the inference arising from the conduct of the parties in a major market manipulation could reasonably lead to conclusion that the Broker was responsible in the manipulation. The evidence direct or circumstantial, should be sufficient to raise a presumption in its favour with regard to the existence of a fact sought to be proved. As pointed out by Best in "Law of Evidence", the presumption of innocence is no doubt presumptio juris; but everyday practice shows that it may be successfully encountered by the presumption of guilt arising from circumstances, though it may be a presumption of fact. Since it is exceedingly difficult to prove facts which are especially within the knowledge of the parties concerned, the legal proof in such circumstances partakes the character of a prudent man's estimate as to the probabilities of the case. Hon'ble Securities Appellate Tribunal (SAT) has observed in the matter of Ketan Parekh v SEBI : (SCC OnLine SAT para 20)

'20. ..Whether a transaction has been executed with the intention to manipulate the market or defeat its mechanism will depend upon the intention of the parties which could be inferred from the attending circumstances because direct evidence in such cases may not be available….'

4.25. Presumption plays a critical role in coming to a finding as to the involvement or otherwise of a market participant in any manipulation. For instance, while trading, a lip service can be paid to a screen based trading system while agreement is reached beforehand between brokers to effect the transaction. Anonymity can be a cloak to cover anastomosis of interest. Therefore, the hackneyed plea based on intentions in the market place cannot pass muster in all circumstances, more so when such intentions are in the special/peculiar knowledge of the parties to the transactions. Also any suggestion attributing innocence to the parties involved in such transactions would give rise to an untenable situation where certain other third person/entities alone would be responsible for the manipulation and none else."

"69. Applying the test laid down in Kishore R. Ajmera case to the present case, I find that by cumulative analysis of the reversal transactions between the respondent and Kasam Holding, quantity, time and significant variation of prices, without major variation in the underlying price of the securities clearly indicate that the respondent's trades are not genuine and had only misleading appearance of trading in the securities market, without intending to transfer beneficial ownership.

38. In ***Chintalapati Srinivasa Raju vs. SEBI [(2018) 7 SCC 443],*** the Hon'ble Supreme Court has held as under :-

"30. We have already demonstrated that the minority judgment is much more detailed and correct than the

majority judgment of the Appellate Tribunal. We accept Shri Singh's submission that in cases like the present, a reasonable expectation to be in the know of things can only be based on reasonable inferences drawn from foundational facts This Court in SEBI v. Kishore R. Ajmera, stated : (SCC p. 383, para 26)

"26. It is a fundamental principle of law that proof of an allegation levelled against a person may be in the form of direct substantive evidence or, as in many cases, such proof may have to be inferred by a logical process of reasoning from the totality of the attending facts and circumstances surrounding the allegations/charges made and levelled. While direct evidence is a more certain basis to come to a conclusion, yet, in the absence thereof the Courts cannot be helpless. It is the judicial duty to take note of the immediate and proximate facts and circumstances surrounding the events on which the charges/allegations are founded and to reach what would appear to the Court to be a reasonable conclusion therefrom. The test would always be that what inferential process that a reasonable/prudent man would adopt to arrive at a conclusion."

39. In ***Utsav Pathak vs. SEBI Appeal No. 430 of 2019 decided on June 12, 2020***, the Tribunal has held as under :-

"19. The contention of the learned counsel for the appellant that the inference of providing sensitive information by the appellant to the Tippees was not inferred from any foundational facts is patently erroneous. In this regard, we may note that it is a fundamental principle of law that proving of an allegation levelled against a person can be derived either from direct substantive evidence or can be inferred by a logical process of reasoning from the totality of attending facts and circumstances surrounding the allegations made and levelled. The Supreme Court in SEBI vs. Kishore Ajmera (2016) 6 SCC 368 held that in the absence of direct evidence, the court cannot become helpless and that the court can take notice of immediate

and proximate facts and circumstances surrounding the events and reach to a reasonable conclusion. The Supreme Court held that the test would always be as to what inferential process that a reasonable/prudent man would adopt to arrive at a conclusion.

20. In this regard, the decision in Raj Ratnam's case is relevant wherein the relevance of circumstantial evidence relating to an insider has been culled out as under:-

> *"...Moreover, several other Courts of Appeals have sustained insider trading convictions based on circumstantial evidence in considering such factors as "(1) access to information; (2) relationship between the tipper and the tippee; (3) timing of contact between the tipper and the tippee; (4) timing of the trades; (5) pattern of the trades; and (6) attempts to conceal either the trades or the relationship between the tipper and the tippee." United States v. Larrabee, 240 F.3d 18, 21-22 (1st Cir. 2001)..."*

21. Taking a cue from the decision in Ajmera's case and Raj Ratnam's case, we find the foundational facts as under:-

A. The appellant was a connected person and was an insider as per the PIT Regulations and was privy to the price sensitive information and was directly involved with the activities pertaining to the open offer.

B. The appellant had close relationship with the Tippees.

C. During the investigation, the appellant made attempts to conceal his relationship with the Tippees, as well as tried to dilute his role in the open offer process.

D. The trading pattern of the Tippees makes it apparently clear that the Tippees had prior information with regard to the open offer. To elaborate, we find that the Tippee-1 i.e.,

the sister of the appellant purchased 4000 shares of CRISIL on 31/5/2013 and sold it on the day when the open offer announcement was made on 3/6/2013. Similarly, Tippee-2 purchased 15000 shares on 14/5/2013, 20/5/2013, 21/5/2013 and 24/5/2013 and sold it on 4/6/2013.

E. The Tippees only traded in the shares of CRISIL and did not trade in any other shares.

F. Tippee 2 had borrowed large amount [Rs. 1 cr] and sold off existing holdings etc to finance the buy orders of CRISIL shares thereby effectively putting all her eggs in one basket which is a highly abnormal investment behavior.

G. Purchase of large chunks of shares and selling it immediately after announcement of the open offer without any plausible cause is suspicious.

H. The Tippees were also charged for insider trading and violation of the PIT Regulations. The Tippees filed a Settlement Application which was allowed on payment of an amount.

22. From the aforesaid foundational facts, the circumstantial evidence or on a preponderance of probability by a logical process of reasoning from the totality of the attending facts and circumstances as stated aforesaid, an irresistible inference can be drawn that the appellant had passed on the price sensitive information regarding the open offer to the Tippees. Such inference taken from the immediate and proximate facts and circumstances surrounding the events is reasonable and logical which any prudent man would arrive at such a conclusion. The Supreme Court in Kanhaiyalal Patel (supra) held that an inferential conclusion from proved and admitted facts would be permissible and legally justified so long as the same is reasonable.

> *23. In the light of the aforesaid, the decisions cited by the learned counsel for the appellant on the issue that a person cannot be held guilty only on the strength of proximity of relationship with the Tippee are distinguishable on facts and are not applicable in the instant case. We find from the record that there is ample evidence to draw a reasonable inference that the appellant had passed on the price sensitive information to the Tippees and, consequently, we are of the opinion that the order of the AO does not suffer from an error of law."*

40. The contention that there was no distinctive material to show that the appellant Rohit Gupta was privy to UPSI and, therefore, not an insider cannot be accepted. In the instant case, on the basis of the foundational facts, it can be reasonably inferred and established on a preponderance of probability that the appellant Rohit Gupta had access to UPSI and traded on the basis of price sensitive information. This is borne out from the fact that Rohit Gupta, Sanjay Tayal (deceased) and Jyotika Tayal are close relatives. Jyotika Tayal is the sister of Rohit Gupta and was the wife of Sanjay Tayal who was involved in the merger discussions. Sanjay Tayal admittedly had inside information. By a deeming fiction of law, his wife also had inside information. Rohit Gupta being the brother-in-law of Sanjay Tayal and having close cordial relationship, an irresistible inference can be drawn that he had access to this price sensitive information. Further, Rohit Gupta was not a regular trader and all of sudden he

makes trades on 17th and 18th May 2010 during the time when the binding agreement was executed is not a coincidence but raises a red flag and indicates that the trades were executed based on UPSI. Rohit Gupta did not have enough funds to purchase the shares and accordingly, an amount was transferred from Advik Textiles which is a company which was closely connected with the Tayal Group. The payment to the broker was made on May 20, 2010 after the amount was received by Rohit Gupta from Advik Textiles.

41. The expression "reasonably accepted" means material to show that such person could reasonably be accepted to have access to UPSI. The proximate facts and circumstances surrounding the events clearly indicates that Rohit Gupta had access to UPSI.

42. The contention that there was no UPSI as the same information was in the public domain from May 6, 2010 onwards cannot be accepted. It was contended that there were newspaper reports with regard to merger discussions between Tayal's and ICICI Bank and, therefore, the information being in the public domain could no longer be considered as an UPSI. In this regard, Regulations 2(k) of the PIT Regulations clearly indicates that news report cannot be treated as a published information. Thus, reliance on newspaper reports cannot be taken to mean that the UPSI was

now in the public domain. Even otherwise, the appellant Rohit Gupta has relied upon the newspaper report dated May 6, 2010 which suggests that differences had arisen between parties as a result of the proposed merger which was unlikely to take place. Therefore, this news report of May 6, 2010 cannot be considered as the news of the merger taking place. Further, reliance on a newspaper report dated May 18, 2010 in the Live Mint was erroneous in as much as the said news report was published on 11 P. M. on May 18, 2010 after more than 12 hours of the trades made by Rohit Gupta. Thus, the trades made by Rohit Gupta on 17th and 18th May 2010 cannot be based on the news report either of May 5, 2010 or of May 18, 2010.

43. The contention that the appellant was a man of substantive means and did not require funds from Advik Textiles to trade is patently erroneous. At the time when the trades were executed on 17th and 18th May 2010, the appellant Rohit Gupta only had Rs. 1,32,747.78 and, therefore, could not pay for the purchase of the shares. Rohit Gupta received Rs. 116.44 lac from Advik Textiles through RTGS transfer on 18th and 19th May 2010, based on which the broker was paid on May 20, 2010. The explanation given by Rohit Gupta that the funds transfer from Advik Textiles was on the basis of an agreement dated May 1, 2010 between him and Advik

Textiles for sale of four shops is an eye wash. Such agreement cannot be taken as an evidentiary value in as much as it was not an agreement either registered nor it was on a stamp paper nor there were any witness to the said agreement. Under Sec. 17 of the Registration Act 1908, an agreement to transfer any immovable property is required to be compulsory registered which in the instant case is lacking. The document is not on a stamp paper and there are no attesting witnesses. Thus the document has no evidentiary value. Further, if an agreement was executed on May 1, 2010, no explanation has been given as to why the advance money was given only on 18th and 19th May 2010. Further, the evidence clearly indicates that Navin Tayal and Jyotika Tayal were 100% owners of Advik Textiles and that the address of Advik Textiles is C/o. Elemento Lifestyle Ltd., Raghuvansh Mansion, 11, Senapati Bapat Marg, Lower Parel, Mumbai 400 013. The evidence that has come on record is that Rohit Kumar was the Managing Director in this company Elemento Lifestyle Ltd. Thus, there was a direct link between Rohit Gupta and Advik Textiles. Further, said address is also the corporate address of the BOR and, therefore, Advik Textiles, Rohit Gupta and Tayal's had a common link. Thus, the contention that Rohit Gupta was not privy to transfer of funds by Advik Textiles to trade as he did not authorize the company is clearly an

afterthought and is an irrelevant consideration. The sequence of events clearly indicates that the appellant could not have purchased the shares but by the transfer of funds by Advik Textiles.

44. On disgorgement, the contention is that the price has to be calculated on the basis of the price of the share when UPSI was made public and not on the basis of the calculation of the price when the shares were sold. In this regard, reliance has been made by the appellants in the case of ***Karvy Stock Broking Ltd. vs. SEBI Appeal No. 6 of 2007 decided on May 2, 2008,*** wherein the principle of disgorgement was propounded in paragraph 5 which is extracted hereunder :-

> *"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 illgotten 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 act(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."*

45. Reliance was also made on the decision in ***S. C. E. vs. Patel 61 F.3d 137 (2d Cir 1995) dated July 24, 1995***, which is a decision by the United States of Appeal Second circuit wherein it was held, *"where stock is purchased on the basis of inside information the proper measure of damages is the difference between the price paid for shares at the time of purchase and the price of the share shortly after disclosure of the inside information."* It was, thus, urged that calculation on the basis of difference between the price of shares purchased and price of shares sold was arbitrary and should be set aside.

46. The submission though attractive cannot be accepted in the present set of circumstances. Disgorgement is an equitable remedy where shares are purchased and sold, then the difference between the price sold and the price purchased gives unlawful gains which is the appropriate method when the sale price and the purchase price are known. The method asked by the appellants will only apply in a

situation when there is no sale price. Thus, the decisions cited by the appellants are not applicable in the instant case. In fact, the decision in ***S C. E. vs. Patel (supra)*** cited by the appellants also indicates that the method adopted is only applicable when the sale price is not capable of being computed with exactitude. Thus, we do not find any error in the method of computation / calculation of the unlawful gains made by the WTM. The decisions cited by the appellants in the case of ***Himani Patel vs. SEBI in appeal No. 154 of 2008 dated September 7, 2009 and Dushyant Dalal vs. SEBI in appeal No. 182 of 2009 decided on November 12, 2010*** are distinguishable.

47. It was urged that the rate of interest awarded is excessive and arbitrary and further the interest could only be levied from the date of the order and not from the date of cause of action. This contention cannot be accepted. The appellants made unlawful gains in 2010 and have earned interest on it, and therefore, the authority was justified in imposing interest on the disgorged amount from the date of the cause of action and not from the date of the order. Further, nothing has been brought of record to indicate that in 2010, the rate of interest was lower than what has been levied in the impugned order. Consequently, in the absence of any documentary evidence, no latitude can be given to the appellants on this aspect.

48. It was contended that Navin Tayal and Jyotika Tayal had no role in the merger discussions and, therefore, cannot be held to have inside information merely because Navin Tayal was the brother of Sanjay Tayal or Jyotika Tayal was the wife of Sanjay Tayal. It was contended that there was no evidence to show that the appellants circulated an UPSI to Rohit Gupta nor were these appellants had any role in the transfer of funds by Advik Textiles as they were not directors of the company at that moment of time. It was urged that Navin Tayal and Jyotika Tayal were not shareholders of Advik Textiles nor were directors during the period in consideration and there was nothing to show that they had inside information or were privy to the UPSI. Consequently, they cannot be called a tipper as they were never provided any information to Rohit Gupta. The contention of the appellants Navin Tayal and Jyotika Tayal cannot be accepted. The fact that the Navin Tayal was the brother of Sanjay Tayal and Jyotika Tayal was the wife of the Sanjay Tayal leads to an irresistible inference that they had inside information and, in any case, were deemed to be connected persons having inside information. The sequence of events clearly indicates that these appellants conspired to make unlawful gain. The fact that Sanjay Tayal, Rohit Gupta and Advik Textiles were closely connected

cannot be disputed. This is direct evidence and on this foundational fact, an irresistible inference can be drawn on the preponderance of probability that there was a conspiracy which led to the purchase of shares by Rohit Gupta on the basis of UPSI. The funds were provided by Advik Textiles which was the company wholly owned by Navin Tayal and Jyotika Tayal till March 03, 2010, after which they resigned and the shareholding were transferred to Kulwinder Nayyar and Azam Shaikh who became the directors for a short period. After the event, Navin Tayal and Jyotika Tayal again became directors of Advik holding together 100% of the shareholding. Admittedly, negotiation had started in February 2010 and at that time Navin Tayal and Jyotika Tayal were the directors in Advik. When the deal has started materializing this conspiracy was evolved and Navin Tayal and Jyotika Tayal resigned as directors and making their henchmen as the directors. After this event Navin Tayal and Jyotika Tayal again became directors holding 50% each of the total shareholding in Advik Textiles. These facts leads to an irresistible inference that based on the conspiracy, money was transferred from Advik Textiles to Rohit Gupta for purchase of the shares. There is an another aspect even after they had resigned as directors from March 10, 2010, Navin Tayal remained a signatory to the bank accounts of the Advik Textiles and, therefore, had a control over the funds of the

company. Thus, it cannot be doubted that Navin Tayal and Jyotika Tayal conspired to make an illegal gain through Rohit Gupta. The findings given by the WTM cannot be faulted.

49. The contention that an order of disgorgement cannot be fastened upon the appellants jointly and severally cannot be accepted. Reliance in the case of ***Mahavir Chauhan vs. SEBI Appeal No. 393 of 2018 decided on October 18, 2019*** is distinguishable. The findings of this Tribunal in the case of ***Mahavir Chauhan (supra)*** was based on the fact that the WTM had in that case separately quantified the profit made by each of the noticees and consequently, in that context this Tribunal held that there cannot be the order for joint and several liability. On the other hand, in the case of ***Dhaval Mehta vs. SEBI Appeal No. 155 of 2008 decided on September 8, 2005***, this Tribunal has held as under :-

> *"This brings us to the directions issued in the impugned order requiring the appellant to disgorge a sum of Rs.72 lacs. The whole time member has found that the appellant and the finance company have jointly made unlawful gains by cornering shares meant for the retail investors. Since the appellant and the finance company were hand in glove and no record was produced to show the actual amount of unlawful gains received by the appellant, the whole time member worked out the illegal gains as the difference between the issue price and the price at which the shares were sold in the market after they were listed. On this basis, which appears to be fair and reasonable in the*

circumstances of the case, the amount of illegal gains made by the two work out to Rs. 1,43,67,775/-from all the applicants in the IPO's of Suzlon and IDFC. In the absence of any material as to how the illegal gains were distributed between the appellant and the finance company, the whole time member, in our view rightly proceeded on the basis that they shared the amount equally. It is on this basis that the appellant was required to disgorge a sum of Rs. 72lacs. Disgorgement is a monetary equitable remedy to prevent a wrong doer from unjustly enriching himself as a result of his illegal conduct. Disgorgement of illegal gains are ordered against those who violate the securities laws and make unlawful gains. The amount should not exceed the total profits realized as a result of the unlawful activity and the amount ordered to be disgorged should approximately be equal to the amount of unjust enrichment. In the instant case, the whole time member has worked out the amount from the prices that were available and we find no ground to interfere with the order in this regard."(emphasis supplied)"

50. Further, in ***SEC vs. David E. Whittmore and Peter S. Cahill [659 F.3d 1 (D.C. Cir. 2011)]***, it was held :-

"As part of a civil enforcement action brought by the Securities and Exchange Commission, the district court entered a disgorgement order against Peter S. Cahill imposing joint and several liability for the full proceeds of his sales of stock in a small, thinly traded corporation not listed on a major stock exchange. Cahill challenges the order principally on the grounds that the district court's disgorgement calculation was clearly erroneous in failing to account for a pre fraud value of 32 cents per share; the disgorgement order was impermissibly punitive because it imposed liability for funds he had transferred to co-defendants; and the district court also abused its discretion in fashioning

an equitable remedy by imposing joint and several liability when there was no close relationship between the defendants and apportionment was warranted." "Cahill, in turn, argued that, assuming the truth of Lowry's declaration about the closing price of the stock prior to the fraud, the district court should assume a pre-fraud value of 32 cents in calculating the amount of profits causally connected to the fraud. Joint and several liability was inappropriate, he added, because it was clear to whom the proceeds went after the sale of shares and because there was no evidence of a close relationship or collaboration beyond the one transaction between Cahill and the Whittemore defendants, id. at 30, 32–33. Whittemore, on the other hand, argued that the record contained no evidence that he ever received the proceeds from the IOLTA account into which Cahill had placed the money. The Commission responded that it did not know what had happened to the money after Cahill transferred it: "[W]e don't know what happened to the money after that. We don't know how much of it made a round trip back into Mr. Cahill's pocket." Id. at 48. The district court ordered Cahill to disgorge the gross proceeds of his sales of Triton stock and imposed joint and several liability with the Whittemore defendants." "Accordingly, we affirm the order of disgorgement."

51. In addition to the aforesaid, the Hon'ble Supreme Court in the case of ***Chintalapati Srinivasa Raju vs. SEBI [(2018) 7 SCC 443]*** has held :-

"17. An instructive judgment of Lord Halsbury is contained in ***Dovey and the Metropolitan Bank v. John Cory*** *[1901] AC 477. The Lord Chancellor put it thus:*

"The charge of neglect appears to rest on the assertion that Mr. Cory, like the other directors, did not attend to any details of business not brought before them by the

general manager or the chairman, and the argument raises a serious question as to the responsibility of all persons holding positions like that of directors, how far they are called upon to distrust and be on their guard against the possibility of fraud being committed by their subordinates of every degree. It is obvious if there is such a duty it must render anything like an intelligent devolution of labour impossible. Was Mr. Cory to turn himself into an auditor, a managing director, a chairman, and find out whether auditors, managing directors, and chairmen were all alike deceiving him? That the letters of the auditors were kept from him is clear. That he was assured that provision had been made for bad debts, and that he believed such assurances, is involved in the admission that he was guilty of no moral fraud; so that it comes to this, that he ought to have discovered a network of conspiracy and fraud by which he was surrounded, and found out that his own brother and the managing director (who have since been made criminally responsible for frauds connected with their respective offices) were inducing him to make representations as to the prospects of the concern and the dividends properly payable which have turned out to be improper and false. I cannot think that it can be expected of a director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditors himself. The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management. If Mr. Cory was deceived by his own officers - and the theory of his being free from moral fraud assumes under the circumstances that he was - there appears to

me to be no case against him at all. The provision made for bad debts, it is well said, was inadequate; but those who assured him that it was adequate were the very persons who were to attend to that part of the business; and so of the rest. If the state and condition of the bank were what was represented, then no one will say that the sum paid in dividends was excessive.

(at pages 485-86)

Per Lord Davey, it was held:

"In this state of the evidence, my Lords, I ask whether the course of business at the board meetings, as described by the respondent, was a reasonable course to be pursued by the respondent and other directors, or whether the knowledge which might have been derived from a careful and comparative examination of the weekly states and quarterly returns from the different branches of the bank ought to be imputed to the respondent, or (alternatively) whether he was guilty of such neglect of his duty as a director as would render him liable to damages. I do not think that it is made out that either of the two latter questions should be answered in the affirmative. I think the respondent was bound to give his attention to and exercise his judgment as a man of business on the matters which were brought before the board at the meetings which he attended, and it is not proved that he did not do so. But I think he was entitled to rely upon the judgment, information, and advice of the chairman and general manager, as to whose integrity, skill, and competence he had no reason for suspicion. I agree with what was said by Sir George Jessel in Hallmark's Case, and by Chitty J. in In re Denham & Co., that directors are not bound to examine entries in the company's books. It was the

> *duty of the general manager and (possibly) of the chairman to go carefully through the returns from the branches, and to bring before the board any matter requiring their consideration; but the respondent was not, in my opinion, guilty of negligence in not examining them for himself, notwithstanding that they were laid on the table of the board for reference. The case is no doubt one of some difficulty, but the appellant has not made out to my satisfaction that the respondent wilfully (as that term is explained in the cases I have referred to) misappropriated the company's funds in payment of dividends."*
>
> *(at pages 492-493)*

> *"18. It is also important to note that the appellant attended only six out of ten board meetings of SCSL for the period that he was a non-executive director. The appellant was not involved in any business development, diversification plans and advise on new ventures of SCSL post 1999. It was also held by the minority judgment that the findings of the Whole Time Member and the majority went clearly beyond the show cause notice, which, when read with Annexure 15 thereof, makes it clear that the appellant is only sought to be roped in as a promoter. Once it is found that he is not a promoter, then the basis of the show cause notice goes as also the basis of the impugned judgment."*

52. Advik Textiles, Azam Shaikh and Kulvinder contended that they had only advanced money pursuant to an agreement of sale and had no UPSI nor traded and, therefore, the charge of insider trading cannot be levelled on them. It was urged that they were not involved in the trades executed by Rohit Gupta and that merely because Azam

and Kulvinder were the directors, the charge of insider trading cannot be levelled. Further, the charge of violation of Regulations 3 and 4 of the PFUTP Regulations cannot be levelled as they have not traded in any securities. The contentions raised cannot be accepted. The charge is one of conspiracy in the commissioning of the offence of insider trading. Admittedly, Kulwinder and Azam were the directors of Advik Textiles at the time when the funds were transferred for the purpose of purchase of the shares in question. The connection between Rohit Gupta and Tayal's has been established in paragraph 33 of the impugned order which indicates that Kulwinder Nayyar and Azam Shaikh were closely associated with the Tayal's and they were directors in 14 companies possessed by the Tayal group. These appellants have contravened Section 12A(d) of the SEBI Act and, therefore, the order of the WTM cannot be faulted.

53. In so far as the appeals against the order of the AO is concerned, we find that the show cause notice dated July 31, 2018 was served on all the noticees, in spite of which they failed to appear and did not file their responses. Accordingly, by the impugned order dated May 29, 2020, the AO imposed a penalty of Rs. 3 Crore to be paid by all the noticees jointly and severally.

54. The contention of the appellants is that adequate opportunity was not provided and that they had asked for time to inspect the documents and to adjourn the date of hearing in spite of which their application remained unattended and the AO proceeded arbitrarily and had passed an ex-parte order against them. It was urged that the impugned order is violative of the principles of natural justice.

55. It was urged that the notice dated December 27, 2019 intimating the appellants that the inspection of the documents can be made on January 30, 2020 was only received by the appellants on January 28, 2020 and, therefore, it was not possible to inspect the documents on such short notice and consequently vide letter dated February 11, 2020 a request was made to the AO to grant further opportunity to inspect the documents and reschedule the hearing which was fixed for February 17, 2020.

56. The aforesaid contentions have been denied by the respondent.

57. Considering the matter and upon a perusal of the record, we find that pursuant to the show cause notice dated July 31, 2018 which was duly served on all the notices, the appellants were required to appear on September 3, 2019 and file a reply which they failed to do so. By a letter dated December 9, 2018 some of the noticees,

namely, Navin Tayal and Jyotika Tayal intimated that their authorized signatory would appear on their behalf but failed to appear on next date i.e. September 3, 2019. On September 3, 2019, the AO fixed the hearing date for September 17, 2019. All the noticees requested for an adjournment on September 17, 2019 and prayed that they may be provided an opportunity to inspect the documents. The AO, in the interest of justice, adjourned the matter for November 18, 2019. Prior to that date, noticee No. 1 on November 4, 2019 and on November 5, 2019, the appellants Navin Tayal, Jyotika Tayal and Azam Shaikh, on November 14, 2019 Advik and on November 15, 2019 Kulwinder Nayyar vide the letters requested the AO for inspection of documents. The matter was accordingly adjourned on November 18, 2019 and vide notice dated December 27, 2019, all the noticees were given an opportunity to inspect the documents on January 30, 2020. By the said notice, all the noticees were intimated that the hearing would be fixed on February 17, 2020. The record indicates that no one appeared to inspect the documents on January 30, 2020 in spite of the receipt of the notice nor appeared on the date fixed for hearing i.e. February 17, 2020 and accordingly the AO proceeded ex-parte and passed the impugned order.

58. The contention that the notice dated December 12, 2019 was received by the appellants on January 28, 2020 was vehemently denied by the respondent. The respondent contended that the said notice was received by the appellants on January 17, 2020 and proof of delivery of service has been annexed to the reply. It was contended that the letter of the appellants dated February 11, 2020 seeking further time to inspect the documents and for adjournment and for reschedulement of the hearing was never received and the appellants were put to strict proof. In rejoinder, the appellants admitted that the notice dated December 27, 2019 was received on January 17, 2020 but was not placed before the appellants and, therefore, could not appear for inspection of documents. It was also stated that on account of personal exigency, the appellants could not attend the date fixed for hearing. No proof have been filed by the appellants with regard to the service of letter dated February 11, 2020.

59. In view of the aforesaid narration of the facts, it is apparently clear that the appellants were duly served with the notice. Adequate opportunity was provided to inspect the documents and appear on the date fixed for hearing. The appellants chose not to inspect the documents nor appeared personally nor appeared through their

authorized representative on the date fixed for hearing. Consequently, we are of the opinion that the principles of natural justice was fully complied with. The appellants deliberately chose not to participate in the proceedings and, therefore, we do not find any fault in the proceedings adopted by the AO. The order of the AO does not suffer from any error of law.

60. In view of the aforesaid, all the appeals filed against the order of the WTM and against the order of the AO are dismissed with no order as to costs.

61. 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 Private Secretary 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.

Justice Tarun Agarwala
Presiding Officer

Justice M. T. Joshi
Judicial Member

02.08.2021
PTM

RAJALAKSHMI H NAIR
Digitally signed by RAJALAKSHMI H NAIR
Date: 2021.08.02 14:18:10 +05'30'