

Securities Appellate Tribunal

S. Ramesh, S. Padmalata And Asis ... vs Securities And Exchange Board Of ... on 22 June, 2004

Equivalent citations: 2005 59 SCL 521 SAT

Bench: K Rajaratnam, N Lakhanpal

ORDER Kumar Rajaratnam, J. (Presiding Officer)

1. Appeal is taken up with consent of both parties.

2. These two appeals, appeal no. 165/03 and appeal 163/03 are taken up together and a common order is passed since it arises out of a common order. In appeal 165/03, the appellant is Asis Bhaumik, executive director of Sahney Paris Rhone Ltd. (hereinafter referred to as SPRL). The allegation against him was that he had purchased 1300 shares of SPRL on behalf of his son Rana Bhaumik and Raja Bhaumik. The shares were purchased at Rs. 75 per share in the month of August 1997 and they were tendered in the open offer in November 1997 and Bhaumik family received a price of Rs. 117.40 per share. It was further alleged that the public did not have access to information about the offer price of Rs. 117.40 being offered by RIH Co. to SPRL. The public came to know of the offer only on 11.11.1997. It was further alleged that the Bhaumik family had purchased 2600 shares on the basis of the unpublished price sensitive information which was not known to the general public but was known to Asis Bhaumik because he was in employment with SPRL. Before we deal with the legal aspect of the matter, it would be necessary to understand the nature of the transaction and the profit that enured to the Bhaumik family, according to the adjudicating officer appointed by SEBI, and reads as follows.

	Date of Purchase	No. of Shares Purchased	Rate (Rs.)	Value of the Shares purchased (Rs.)	No. of shares offered in the Open offer at Rs. 117.40	Profit (Rs. in lacs)
Rana Bhaumik	7.8.1997 to 14.8.1997	1300	79.00	1,02,700/-	1300	0.50
Raja Bhaumik	7.8.1997 to 14.8.1997	1300	79.00	1,02,700/-	1300	0.50

3. By this it was alleged that the Bhaumik family had made unjust gain of Rs. 1 lakh. The adjudicating officer found Bhaumik guilty of the misconduct of inside trading and imposed a penalty of Rs. 2 lakhs.

4. In appeal 163/03, the appellant is Ramesh and his wife Padmalata. Shri Ramesh was the Company Secretary of SPRL and he purchased on behalf of his wife Padmalata 1400 shares of SPRL at the rate of Rs. 79/- and sold at the rate of Rs. 117.40 on an open offer and made a profit of Rs.

50,000/-.

5. It is not in dispute that both Bhaumik and Ramesh were insiders. Bhaumik was the executive director and Ramesh was the Company Secretary of SPRL. The respondent Board's reasoning cannot be faulted and in its succinct order on the issue of insider trader the respondent stated as follows.

"The issue relates to the alleged insider trading by Shri S. Ramesh and Shri Ashish Bhaumik who was the Company Secretary and Executive Director of SPRL when the shares of SPRL were acquired by them through their close relatives in August 1997. It is alleged that the said acquisition at a price of Rs. 79/- was made on the basis of unpublished price sensitive information regarding the open offer price of Rs. 117.40 made by the acquirer on 11.11.1997 and that the shares so acquired were tendered in the open offer and received a price of Rs. 117.40 per share and thereby deriving an unjust enrichment at the expense of other shareholders who were unaware of the price at which the acquirer would acquire the shares in the public announcement.

There was a press report in the Economic Times dated March 11, 1996 regarding the offer of Delco Remy America (DRA) to acquire 37% equity stake in SPRL and to enter into technical collaboration agreement with the company. Approvals from FIPB and SIA vide letters dated September 6, 1996 and July 17, 1997 for 37% equity participation in the company by the Delco Group were received.

Delco Remy America Inc. (DRA) a wholly owned subsidiary of Delco Remy International, USA, (DRI) had entered into a license Agreement dated July 24, 1997 with SPRL pursuant to which DRA had granted SPRL the exclusive right to use DRA technology and technical know-how to manufacture, market, sell and distribute specified DRA products in India. DRA had also entered into a Distribution Agreement dated July 24, 1997 with SPRL appointing SPRL as the exclusive distributor for DRA, in India. DRA and DRI had also entered into a Trademark Sublicense Agreement dated July 24, 1997 with SPRL, granting SPRL a limited, exclusive, nontransferable and non-assignable right to use specified DRA and DRI trademarks in connection with the manufacture and sale of DRA products pursuant to the License Agreement.

Remy India Holdings, Inc. (RIH) is a company incorporated on June 11, 1997 under the laws of the State of Delaware, USA. RIH is a wholly owned subsidiary of Remy International, Inc. which in turn is a wholly owned subsidiary of DRI. RIH entered into a share purchase agreement dated Nov. 11, 1997 with Shri Bhupendra Singh Sahney, Smt. Brijween Kaur Sahney, Smt. Jasmine Sahney Pillai, Smt. Anjana Sahney Thakker, Ms. Ambita Kaur Sahney, Ms. Deepika Kaur Sahney and Bhupinder Investment Co. Pvt. Ltd., for purchase of 1163650 shares of the company representing 37% of the paid up capital of the company at a price of Rs. 117.40 per share. Application was made to SEBI vide letter dated March 26, 1996 for exemption under Regulation 4 of SEBI (Substantial Acquisition of shares and Takeovers) Regulations. SEBI considered the company's application and refused to grant exemption and the company was advised by SEBI vide letter dated December 24, 1996 to ensure compliance with the provisions of the Regulations for the proposed acquisitions of shares by Delco Remy, America. The refusal of SEBI to grant exemption to the acquirer from the open offer was communicated to the applicant and not generally known to the public at large.

On November 11, 1997 RIH made a public announcement about the open offer to acquire an aggregate of 629000 fully paid up equity shares of Rs. 10/- each of SPRL at an offer of Rs. 117.40 per share."

6. Shri Ramesh and Asis Bhaumik being company secretary and executive director of SPRL respectively at the relevant time are undoubtedly connected persons in terms of Regulation 2C of SEBI "Insider Trading" Regulation, 1992. They are also insider in terms of Regulation 2E of SEBI Insider Trading Regulation, 1992.

7. By the purchase of these shares both Mr. Ramesh and through him his wife and Mr. Bhaumik and through him his family members had unfairly gained enrichment by buying the shares in and around August 1997 at Rs. 79 and later tendering the shares in the open offer announced by RIH on behalf of Delco Remi Ltd. in November 1997 at as Rs. 117.40 per share and they made unlawful gain. The relevant provisions have been extracted in the impugned order and we feel it appropriate to reiterate the relevant provisions.

"The prohibition on Insider Trading is contained in SEBI (Insider Trading) Regulations, 1992 Regulation 3(i) of the said Regulations reads as under:-

No insider shall

(i) either on his own behalf or on behalf of any other person, deal in securities of a company listed on any stock exchange on the basis of any unpublished price sensitive information.

Thus the sub-regulation prohibits,

(a) an insider

(b) from dealing in securities of a listed company

(c) on the basis of unpublished price sensitive information Further, the term "insider" used in Regulation 3(i) has been defined in Regulation 2(e) as under: -

"Insider" means any person who is or was connected with the company or is deemed to have been connected with the company and who is reasonably expected to have access by virtue of such connection to unpublished price sensitive information in respect of securities of the company or who has received or has had access to such unpublished price sensitive information.

11. On an analysis of the above definition it can be concluded that the term "insider" has the following three essential ingredients:

(a) insider is a person; and

(b) who is connected or deemed to have been connected with the company; and

(c) who is reasonably expected to have access by virtue of such connection, to unpublished price sensitive information or who has received or has had access to unpublished price sensitive information.

12. Regulation 2(c) defines "connected person". It reads as under:

"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 and who may reasonably be expected to have an access to unpublished price sensitive information in relation to that company.

3. prohibition on dealing communication or counseling on matters relating to insider trading. No insider shall -

(i) either on his own behalf or on behalf of any other person deal in securities of a company listed on any stock exchange on the basis of an unpublished price sensitive information.

(ii) Communicate any unpublished price sensitive information to any person, with or without his request for such information, except as required in the ordinary course of business or under any law, or

(iii) Counsel or procure any other person to deal in securities of any company on the basis of unpublished price sensitive information."

8. Regulation 2K reads as follows:

"Unpublished Price sensitive information" means any information which relates to the following matters or is of concern directly or indirectly to a company and is not generally known or published by such company for general information but which if published or known is likely to materially affect the price of securities of that company in the markets : -

(i) financial results (both half yearly and annual of the company

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

(iii) issue of shares by way of public right bonus etc.

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

(v) amalgamation, mergers and takeovers

(vi) disposal of whole or substantially the whole of the undertaking

(vii) such other information as may affect the earnings of the company

(viii) any changes in policies, plans or operations of the company Price agreed to be paid by the acquirer to the shareholders of the target company for substantial acquisition of shares and takeovers is undoubtedly "price sensitive information".

9. Any violation of the provision relating to inside trading will make a person guilty of being an inside trader. It was submitted rather feebly by the counsel for the appellants that the wife of Ramesh or the family members of that Bhaumik are not insiders. Mr. Kumar Desai submitted that any person who receives sensitive information not available to the public will come within the bouquet of an insider trader. Mr. Desai took us through Section 15G of SEBI Act which reads as follows.

"Section 15G of SEBI Act, 1992 provides that penalty for insider trading and reads as under "If any insider who, -

(i) either on his own behalf or on behalf of any other person, deals in securities of a body corporate listed on any stock exchange on the basis of any unpublished price sensitive information; or

(ii) communicates any unpublished price sensitive information of any person, with or without his request for such information except as required in the ordinary course of business or under law; or

(iii) counsels or procures for any other person deals in any securities of any body corporate on the basis of unpublished price sensitive information."

shall be liable to a penalty not exceeding twenty-five crore rupees or three times the amount of profits made out of insider trading, whichever is higher."

10. Mr. Desai, learned counsel for the respondent relied on American judgment in SEC v. Texas Gulf Sulphur Company (401 F 2d at 848) The court held that one need not be strictly termed as an insider but must possess inside information and if so must either disclose it or abstain from trading. The Court further pronounced that "anyone in possession of material inside information must either disclose it to the investing public or, if he is disabled from disclosing it in order to protect a corporate confidentiality, or if he chooses not to do so, must, abstain from trading in or recommending the securities concerned while such inside information remains undisclosed." In Shapiro v. Merrill Lynch (495 5 F 2d.235), the US Court has enforced the "disclose or abstain" theory by stating that this "is to protect the investing public in securities to secure fair dealing in the securities market by promoting full disclosure of insider information so that an informed judgment can be made by all the investors."

11. We have carefully considered the matter. As far as Mr. Bhaumik is concerned his submission has been one of regret and apology. In fact it is common ground that as soon as he came to know of the alleged violations he approached SEBI and offered to pay back the profit which he earned by the sale of the shares. It is also submitted that he is an elderly person and has college going children. As far as Mr. Ramesh is concerned, Ramesh himself appeared and submitted that he was in dire financial difficulty and is without proper employment. He also submitted that he was willing to pay back the profit. It is also submitted that Bhaumik and Ramesh are also facing criminal proceedings on the very same allegations and the ordeal is still continuing and for the same allegations both the appellants are before the criminal court.

12. It is not clear as to why criminal proceedings have been commenced inspite of the fact that both Bhaumik and Ramesh admitted that they have made a mistake and are willing to pay back the ill-gotten gain. However, these are not within the domain of this Tribunal and it is for SEBI to catch hold of the bigger violators some of whom act to the detriment of economy of this country.

13. Section 15J requires an adjudicating officer to take into account with due regard to the following factors

- a) the amount of disproportionate gain
- b) the amount of loss caused to the investor]
- c) repetitive nature of the default.

We have applied these principles as enunciated in Section 15J.

14. Taking into account the sad financial situation of both the parties and their admission, it would be appropriate to consider reducing the penalty.

15. The unjust enrichment of the Bhaumik family was Rs. 1 lakh. The adjudicating authority has imposed a penalty of Rs. 2 lakhs. We feel it appropriate to reduce the penalty to Rs. 1.25 lakhs. With respect to Ramesh and wife Padmalata the unjust enrichment was approx. Rs. 50,000/-. We feel it appropriate taking into account the dire financial situation of Ramesh and family and to reduce it to Rs. 60,000/-. Accordingly, the penalty on Bhaumik is reduced from Rs. 2 lakhs to Rs. 1.25 lakhs and on Ramesh is reduced Rs. 1,08,000/- to Rs. 60,000/-. With the above modification, the appeals are disposed of. Any amount deposited in excess of the amount stipulated by us by virtue of the interim order shall be refunded by the respondent within 4 weeks from the date of the date. The appeal is disposed of accordingly. No order as to costs. Time granted for compliance of this order if the amount is not already paid shall be four weeks.