

**BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI**

**Order Reserved On: 18.10.2013
Date of Decision : 31.10.2013**

Appeal No. 138 of 2013

M/s. N R Mercantiles Private Ltd.
7C, Kiran Shankar Roy Road,
Hastings Chambers, 2nd Floor,
Kolkata- 700 001

...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

AND

Appeal No. 141 of 2013

M/s. Imtihan Commercial Private Ltd.
7C, Kiran Shankar Roy Road,
Hastings Chambers, 2nd Floor,
Kolkata- 700 001

...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. Vinay Chouhan, Advocate with Mr. Prashant Ingle, Mr. K. C. Jacob, Advocates for Appellants.

Mr. Shiraz Rustomjee, Senior Advocate with Mr. Mihir Mody, Mr. Pratham V. Masurekar, Advocates for Respondent.

CORAM: Justice J.P. Devadhar, Presiding Officer
Jog Singh, Member
A.S. Lamba, Member

Per : Justice J.P. Devadhar

1. Whether Adjudicating Officer of Securities and Exchange Board of India ('SEBI' for short) was justified in imposing penalty of ₹ 40 lacs and ₹ 13.50 lacs respectively on each of appellants herein on ground that appellants have violated section 12A(d) and section 12A(e) of the Securities and Exchange Board of India Act, 1992('SEBI Act' for short) and regulation 3(i) of the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 ('PIT Regulations for short) is the question raised in these two appeals.

2. Since facts in both appeals are common, both these appeals are heard together by consent of both parties.

3. SEBI conducted an investigation into affairs relating to buying, selling and dealing in shares of Ramsarup Industries Limited ('RIL' for short) during the period from July 01, 2010 to August 31, 2010.

4. During investigation period it is noticed that RIL had come out with two corporate announcements one on July 28, 2010 and another on August 13, 2010. On July 28, 2010, RIL had informed National Stock Exchange (NSE) that a meeting of Board of Directors of RIL would be held on August 13, 2010 inter alia to consider and take on record the following:-

- a) Un-audited Financial results for the 1st quarter ended on June 30, 2010.
- b) Raising long term resources by:

- i) Issue of equities/warrants Securities Convertible in Equity Shares/ADRs/GDRs/FCCBs.
- ii) Issue of Equity Shares/ Securities Convertible into Equity Shares to eligible qualified Institutional buyers.

5. On August 13, 2010 RIL informed NSE that the Board of Directors of the Company at its meeting held on August 13, 2010, inter alia has approved the following:

- a) Issuance of FCCB and/ or other convertible instruments to the extent of US \$ 250 million/ ₹ 1150 crores.
- b) Issuance of 35, 00,000 fully convertible into 1(one) equity share of face value of ₹ 10/- each on a preferential basis to the constituents of promoter/ promoter group and to non-promoters/strategic investors representing not more than 10% of the Equity Share Capital of the Company at a price not more than 10% of the Equity Share Capital of the Company at a price to be determined as per relevant provisions of SEBI (ICDR) Regulations, 2009 as amended.

6. It is not in dispute that declaration of financial results for quarter ended June 2010 to be made on August 13, 2010 being a price sensitive information, RIL by its notice dated August 06, 2010 informed stock

exchanges that trading window of RIL will remain closed from August 07, 2010 upto 24 hours after the Board meeting on August 13, 2010. As per clause 3.2.1 read with clause 3.2.3 of Code of Conduct under Schedule I of regulation 12(i) of PIT Regulations, every Company is required to close its trading window during the time information referred to in para 3.2.3 is unpublished.

7. Investigation carried out by SEBI revealed that RIL as well as both appellants herein were Companies controlled by Ashish Jhunjunwala. In case of N. R. Mercantiles Pvt. Ltd., (appellant in Appeal No. 138 of 2013) Ashish Jhunjunwala and his wife held 68.52% shares of the Company and balance 31.48% shares were held by Rav Dravya Pvt. Ltd. Ashish Jhunjunwala and Naveen Gupta were the only two Directors in N. R. Mercantiles Pvt. Ltd. In case of Imtihan Commercial (P) Ltd. (appellant in Appeal No. 141 of 2013) 100% shares of the Company were held by Mr. Ashish Jhunjunwala and his wife. Investigation further revealed that Mr. Ashish Jhunjunwala was also Chairman and Managing Director of RIL and Mr. Naveen Gupta was Whole Time Director & CEO of RIL.

8. It is not in dispute that N. R. Mercantiles Pvt. Ltd (appellant in Appeal No. 138 of 2013) had sold 1650 shares of RIL on May 11, 2010, 77500 shares on July 30, 2010 and 75000 shares on August 12, 2010, out of which sale of 75000 shares of RIL on August 12, 2013 fell within the period during which trading window of RIL was closed. Similarly, Imtihan Commercial (P) Ltd. (appellant in Appeal No. 141 of 2013) sold

25000 shares of RIL on August 12, 2013, which was also within the period during which trading window of RIL was closed. Evidence on record shows that on behalf of appellants orders for sale of shares of RIL were placed by Ashish Jhunjunwala.

9. According to SEBI, Ashish Jhunjunwala was privy to financial results of RIL for quarter ending on June 30, 2010 and therefore, sale of shares of RIL by Ashish Jhunjunwala on behalf of appellants during the period when trading window of RIL was closed constituted violation of SEBI Act and PIT Regulation. On issuance of show cause notice, appellant contested it by denying allegations made in show cause notice. Rejecting that contention impugned orders have been passed against appellants. Challenging those orders both dated May 31, 2013 these two appeals are filed.

10. Findings in the impugned order that Ashish Jhunjunwala was privy to price sensitive information of RIL, prior to his selling 75000 shares and 25000 shares of RIL on August 12, 2013, has not been contested before us by counsel for appellants. What is argued before us by counsel for appellants can be summarized thus:-

- a) Sales effected by appellants were not clandestine sales but sales effected through stock exchanges with a view to comply with the public shareholding norm as provided in clause 40A of the listing agreement.
- b) Sales were effected (when trading window was closed and prior thereto) with a view to facilitate

urgent repayment of debt payable by RIL to various lending entities. Requisite evidence to show that sale proceeds on sale of shares of RIL were in fact transferred to the bank account of RIL was produced before Adjudicating Officer, however, same have not been considered in proper perspective.

- c) Relying on decisions of this Tribunal in case of Rajiv B. Gandhi & Ors Vs. SEBI (Appeal No. 50 of 2007 decided on 09.05.2008) and decision in case of Dilip S. Pendse Vs. SEBI (Appeal No. 80 of 2009 decided on 19.11.2009) it is contended that since sales were effected to meet an emergency situation like paying of urgent debts of RIL, appellants could not be held guilty of violating PIT Regulations.
- d) In any event penalty imposed upon appellants it excessive and disproportionate to the alleged offence committed by appellants.

11. We see no merit in above contentions.

12. As rightly contended by counsel for SEBI, facts on record clearly show that both appellant Companies were controlled by Ashish Jhunjhunwala & Ashish Jhunjhunwala as Chairman and Managing Director of RIL was privy to price sensitive information of RIL when he sold RIL shares held by appellants during the period when trading window of RIL was closed.

13. Since counsel for appellant did not press argument relating to the question as to whether Ashish Jhunjhunwala was privy to price sensitive information of RIL at the time of selling RIL shares by appellants, only question that remains to be considered is, whether RIL shares were sold by appellants in extra ordinary circumstances and if not, whether penalty imposed is excessive?

14. Argument of appellant that RIL shares have been sold to comply with the public shareholding norm as provided in clause 40A of the Listing Agreement has been rightly rejected by Adjudicating Officer on ground that Listing Agreement nowhere provides for compliance of the provisions contained therein even while in possession of unreported price sensitive information. No material is brought on record to show that unless shares of RIL were sold during the period when trading window was closed, appellants would have been guilty of violating Listing Agreement. Therefore, decision of Adjudicating Officer that sale of RIL shares by appellants during the period when trading window of RIL was closed constituted violation of PIT Regulations cannot be faulted.

15. Similarly, argument of appellants that RIL shares were sold to repay debts urgently repayable by RIL to various lending entities do not merit acceptance, because, firstly, there is no material on record to suggest that debts of RIL had to be discharged during the period when trading window of RIL was closed. Secondly, there is no material on

record to suggest that RIL has in fact discharged its debt immediately after receiving funds from appellants.

16. Reliance placed by counsel for appellants on two decisions of this Tribunal, do not support case of appellants. In case of Rajiv B. Gandhi (supra), this Tribunal while upholding penalty imposed for violating regulation 3(i) of PIT Regulations as it then stood held that if the motive of trade during the period when trading window was closed was to meet emergency situation, then, person executing such trade would not be guilty of the charge of insider trading. As rightly held by Adjudicating Officer, regulation 3(i) of PIT Regulations has been amended in 2002 by deleting words “on the basis of” and substituting words “when in possession of”. As a result of above amendment trading in securities even “when in possession” of any unpublished price sensitive information constitutes violation of PIT Regulations. Hence decision of this Tribunal in case of Rajiv B. Gandhi (supra) based on provisions of PIT Regulations as in force prior to 2002 would not be relevant to fact of present case.

17. Similarly, decision of this Tribunal in case of Dilip S. Pendse (supra) is also distinguishable on facts. In that case, appellant therein had sold shares when he was not in possession of unpublished price sensitive information but sale proceeds of shares sold were received after appellant therein became privy to price sensitive information. In appeals before us, it is not disputed shares of RIL were sold after Ashish Jhunjhunwala acquired knowledge about unpublished price sensitive

information. Therefore, decision of this Tribunal in case of Dilip S. Pendse (supra) is distinguishable on facts.

18. Alternative argument of appellants that penalty imposed upon them is exorbitant is also without any merit. Under Section 15G of SEBI Act 1992, penalty for insider trading is `25 crore or three times the amount of profits made out of insider trading whichever is higher. Finding of fact recorded by Adjudicating Officer in these appeals is that potential loss avoided by each appellant by insider trading is `13, 17,750/- and ` 4, 37, 500/-respectively. Hence penalty imposed at three times the potential loss avoided being lowest penalty, we see no reason to interfere with the penalty imposed upon appellants.

19. For all aforesaid reasons, we find no merit in these appeals and accordingly both appeals are dismissed with no order as to costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

Sd/-
A S Lamba
Member

31.10.2013
Prepared & Compared By: Pk