

Securities Appellate Tribunal

DSQ Holdings Limited vs Securities And Exchange Board Of ... on 15 October, 2004

Equivalent citations: 2005 60 SCL 156 SAT

Bench: N Lakhanpal, B Samal

JUDGMENT B. Samal, Member

1. The appeal is directed against the order dated 27/02/2003 passed by the respondent. The order is made under Section 11 of the SEBI Act, 1992. By the said order the appellant M/s. DSQ Holdings Limited (DSQH) have been debarred from dealing in Securities Market in any manner whatsoever for a period of five years with immediate effect. After detailed investigation, a show cause notice was issued to DSQH for alleged Insider Trading under Regulation 9 of SEBI (Prohibition of Insider Trading) Regulations, 1992 communicating the findings of investigations vide respondent's letter No. IES/SBM/30541/2001 of June, 13, 2001. The findings were communicated to DSQH in terms of Regulation 9(1) of SEBI (Insider Trading) Regulations, 1992. An opportunity of personal hearing was also given to DSQH. In response to the above mentioned notice DSQH submitted their reply vide letter dated August 17, 2001.

2. The appellant had requested for an interim order. Taking into consideration all the relevant aspects, the Tribunal felt that the appellant has not made out a case for an interim order staying the operation of the impugned order. In the given set of circumstances there was no justification to pass an interim order staying the operation of the impugned order at that stage of the proceedings. Accordingly, vide its order dated May 12, 2003, the Tribunal rejected the appellant's prayer for interim order.

3. The matter was called for hearing on 10/06/2004. On that day neither the party nor his representative was present when the case was called. As a last chance, at the request of the respondent, the matter was adjourned to 27/07/2004. Even on that date there was no representation from the representative or the appellant in person. Finally it was adjourned to 19/08/2004 and it was specifically mentioned that if there is no representation on that day, the matters will be taken up for disposal on merits. Accordingly, fresh notice was issued.

4. On 19/08/2004, however, neither the appellant nor its representative was present. We find that ample opportunity has been given to the appellant to present his case before this Tribunal. However, no response is received from him. We have therefore, no alternative, but to proceed in the matter ex-parte with the consent of the learned Senior Counsel Shri Kumar Desai on behalf of the respondent.

5. The impugned order is stated to have been issued on the basis of the findings of an investigation carried out by the respondent under the provisions of the Securities and Exchange Board of India (Insider Trading) Regulations, 1992. The charge against the appellant is that it indulged in insider trading in the shares of another company via, DSQ Biotech Ltd., (DSQB). The transactions mainly relate to the period from 01/08/1994 to 30/09/1994. The respondent has held that the appellant is an insider and it had purchased shares on the basis of the unpublished price sensitive information. In that context the respondent found the appellant guilty of violating regulation 3(i) of the Insider

Regulations.

6. In accordance with the said Regulation "no insider" shall either on his own behalf or on behalf of any other person shall deal in securities of a company listed on any Stock Exchange on the basis of any unpublished price sensitive information. "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 access to such unpublished price sensitive information. Who is "deemed to be a connected person" has been defined in Regulation 2(h). The expression "unpublished price sensitive information" has been defined in Regulation 2(k). Regulation 11 empowers the respondent to issue appropriate direction for the purpose as stated there under

7. The short point involved in this appeal is whether the appellant has indulged in Insider Trading in the shares of another company viz. DSQ Biotech Ltd. (DSQB). The appellant in his memo of appeal has submitted that "it was not privy to any unpublished price sensitive information on the basis of which it had acquired shares. The impugned order states that the 'right issue' being made by the company is the unpublished price sensitive information on the basis of which the appellant had acquired shares. The impugned order, states that the purchases were effected during the period 01/08/1994 to 30/09/1994. In fact, the authority to make right issue of shares was obtained by the Board of DSQB only in the AGM of DSQB held on 30/09/1994. The impugned order states that the information on the rights issue of DSQB became public only on 30/09/1994 when the AGM was held. In fact, the notice of the AGM containing the business to be transacted in the AGM was dispatched to the shareholding on 25/08/1994. On dispatch of the notice, the shareholding of the company are deemed to be in knowledge of the proposed business in the AGM, which includes the resolution for issue of further equity shares of the company. The impugned order states that the right issue was first discussed in 41st Board Meeting of the Company held on 30/07/1994. The extract of the resolution from the minutes of the Board Meeting in respect of the right issue is as under:

a) PREFERENTIAL OFFER TO FOREIGN INSTITUTIONAL INVESTORS/FURTHER ISSUE:

The Managing Director informed the Board that it is proposed to offer at the appropriate time the Company's shares to investors including Foreign Institutional Investors as per the guideline in force at the time of offer. In this connection he requested the approval of the Board to include the following item in the Notice of the seventh Annual General Meeting. This additional capital would be utilized to part finance the proposed expansion/diversification programme which at present estimated at about Rs. 40 crores.

"RESOLVED THAT, in accordance with the provisions of Section 81 and other applicable provisions, if any of the Companies Act, 1956 and the enabling provisions in the Articles of Association of the Company and subject to the approval with conditions/modifications of Government of India (GOI). Securities and Exchange Board of India (SEBI) and Reserve Bank of India (RBI) and such other approvals as may be necessary and which may be agreed to by the Board of Directors of the

Company, (hereinafter referred to as "the Board") consent of the Company be and it is hereby accorded to the Board to issue/offer Equity Shares / Convertible Debentures (partly or fully) for an aggregate value upto Rs. 25 crores with or without warrants to the Members, Employees, Non-Resident Indians, Overseas Corporate Bodies, International Institutions, Foreign Institutional Investors, Foreign Financial Institutions, Companies other entities and to such persons by Public Issue, Rights Issue, Private Placement or Preferential allotment or by any one or more of the above methods, whether shareholders of the Company or not, and at such time as the Board may think fit, on such terms and conditions including the face value, amount of premium, number of tranches, manner of calls etc. with authority to retain such oversubscription amount as may be permitted".

"RESOLVED THAT such of these Equity Shares / Convertible Debentures (Partly or Fully) are not subscribed may be disposed of by the Board in its absolute discretion in such manner as they may deem fit".

"FURTHER RESOLVED THAT for the purpose of giving effect to the above resolution, the Board be and they are hereby authorized to do all such acts, deeds, matters and things as they may, in their absolute discretion, deem necessary or desirable and to settle any question, difficulty or doubt that may be arise in regard to the offer, issue, allotment and utilization of the issue proceeds of the Equity Shares / Convertible Debentures (partly of Fully) to the Company's projects / other corporate needs as they may deem fit".

The Board considered and approved the above resolution for inclusion at the Notice of the Seventh Annual General Body Meeting."

According to appellant, it is evident from the minutes that the Board of Directors of the company had passed the resolution to make a right issue subject to approval of the members in the general meeting, and that the board had also resolved to appropriately keep the stock exchanges informed. To keep the stock exchanges informed is a legal requirement under the listing agreement. Consistent with the decision of the Board meeting, the company had also informed the stock exchange about the proceedings in the Board meeting relating to right issue. However, because of the passage of time the company is unable to furnish any acknowledgement for the same. In any event, under law, the minutes of the board meeting are the conclusive proof for the proceedings in the meeting.

1. Further as stated in the memo of appeal the information that the Board of Directors in their proposed meeting on 30/07/1994 was to consider the right issue was also communicated to the Stock Exchange as per the requirements of the Listing Agreement. The purpose of sending information to the Stock Exchange is to proper disseminate the information among the public. Therefore, concerned public were aware of the company's proposal to make a right issue from 30/07/1994 itself. Hence on the days the shares were acquired by the appellant, there was no unpublished price sensitive information available to the appellant. Further acquisition of shares by the appellant during the period 01/08/1994 to 30/09/1994 is not violation of any law or regulation.

2. Further, the appellant in his memo of appeal has also stated that unpublished price sensitive information means any information relating to a Company that is not generally known or published.

There was no unpublished price sensitive information available to the appellant that was not generally known to others. The particulars of the right issue were made known to the investors and shareholders through the declarations under the listing agreement and the issue of the notice of the Annual General Meeting. Therefore, the ingredients necessary to sustain a charge of violation of SEBI (Insider Trading) Regulations are not existence in this case. Finally, the investigations and proceedings on the alleged violation had been initiated after the lapse of more than six years and the impugned order had been made after a lapse of 8 years from the alleged date of violation and the passage of time has rendered the ascertainment and examining the standard of evidence are bad in law.

3. The learned Senior Counsel Shri Kumar Desai on behalf of respondent submitted that a detailed investigation in the scrip of DSQ Biotech (DSQB) was conducted by SEBI for two periods i.e., June, 1994 to December, 1994 (period prior to the Rights Issue) and June, 1995 to March, 1996 (after the Rights Issue). DSQB (earlier Usta Te Biotech Ltd.) was originally promoted by M/s. KND Engineering & Technologies Ltd., jointly with Tamil Nadu Industrial Development Corporation. The erstwhile management in DSQB entered into an agreement in April, 1994 with Square 'D' group promoted by Shri Dinesh Dalmia. Through the agreement the appellant purchased 44, 98, 995 shares of DSQB at the rate of Rs. 15.94 per share from the erstwhile promoters. Thereafter the DSQ group made an open offer as per clause 40A and 40B of the Listing Agreement to acquire a further 17,66,400 shares (20% of the paid up capital of the Company) during the last quarter of 1994. The scrip of DSQB prior to takeover of the company by the DSQ group in April, 1994 was not actively traded on the exchanges with the price hovering in the region between Rs. 12 to Rs. 18.00 during most part of 1993 and also during the first half of 1994. The scrip witnessed considerable movement both in terms of price and volume immediately after the DSQ group took over the company.

4. Soon thereafter, the new management announced a right issue in the ratio of one share for every two shares held. The rights issue of DSQB was made for 44,16,000 equity shares of Rs.10.00 each for cash at a premium of Rs. 35 per share. The said rights issue of DSQB opened for subscription on 03/07/1995 and closed on 02/08/1995.

5. There was a steep jump in the scrip of DSQB both in terms of price and volume with effect from June, 1994 and it sustained till December, 1994 (the scrip rose from Rs. 20/- to around Rs. 91/92). Subsequently, the Rights issue of the Company opened for subscription on 03/07/1995 and closed on 02/08/1995. Immediately after the closure of the Rights issue the scrip of DSQB once again witnessed movement both in terms of price and volume and this movement sustained till the first quarter of 1996 (the scrip rose from Rs. 40-44 to around Rs. 112). After April, 1996, the scrip of DSQB was not traded actively. During the whole of the calendar year 1997 only 14 trades in the scrip took place for 1600 shares. During the year 1998, the price of scrip of DSQB also touched a low of Rs. 8.00.

6. Learned Counsel Shri Desai also stated that the information regarding the aforesaid Rights issue of DSQB became public knowledge only on 30/09/1994 (i.e., in the 7th AGM of the shareholders held on 30/09/1994). This has been confirmed in the sworn statement by Shri K. Gopalakrishnan, the Managing Director of DSQB given to the investigating team. However, the matters regarding the

Rights issue of DSQB was first discussed in the 41st Board Directors Meeting of DSQB held on 30/07/1994. Thereafter, the period between 01/08/1994 to 30/09/1994 is the period when the information on the Rights issue was "unpublished and price sensitive". Investigations brought out that during the period June, 1994 to December, 1994 and also after the closure of the Rights issue (i.e. from July/August, 1995 up to March / April, 1996) large quantities of shares of DSQB were purchased from the market through group companies of DSQB management. This shows that the shares so purchased was due to the prior knowledge of the rights issue as discussed in the 41st Board Meeting of DSQB on 30/07/1994.

7. It was also submitted by the learned Counsel for Respondent that the general fundamentals of DSQB was also not very good for genuine investors to indulge in delivery based purchases in the scrip on such a large quantity during the above period. Substantial quantities of shares of the Company were purchased by the appellant, one of the promoter group company with the knowledge of the impending Rights issue of DSQB. The shares purchased by the Appellant prior to the aforementioned Rights issue also entitled them for rights in the Right issue.

8. Shri Kumar Desai submitted that the investigating team of SEBI requested DSQB for actual proof of dispatch of AGM notices and the same were not submitted by them due to absence of proper records.

9. With regard to the appellant's submission that the enquiry was initiated by the respondent after a long gap of alleged violation, the learned Counsel for respondent submitted that Section 11 of SEBI Act, 1992 does not prescribe any time period. The investigation had to cover several entities, their brokers and connected persons. A case of insider trading had to be meticulously investigated.

10. Learned Counsel for Respondent also submitted that it was not correct that the appellant was not privy to any unpublished price sensitive information on the basis of which they had acquired shares. The information regarding rights issue is price sensitive and it is beyond doubt that it was unpublished at the time the appellant traded in scrip.

11. Regarding the fact of keeping the stock exchange informed regarding issuance of rights issue, the respondent stated that the extract of the resolution from the minutes of the Board Meeting does not anywhere mentions that the company had resolved to appropriately keep the stock exchange informed. DSQB also failed to submit the actual proof of dispatch of the AGM notices and only submitted a copy of Form 23 filed with ROC, Chennai which indicated the dispatch of the notices as August 25, 1994.

12. The Rights issue of DSQB became public knowledge on 30/09/1994 (i.e. in the 7th Annual General Meeting of the shareholding held on 30/09/1994). But the matter regarding the Rights issue of DSQB was first discussed in the 41st Board of Directors meeting of DSQB held on 30/07/2004. The Respondent submitted that the period between 01/08/1994 to 30/09/1994 was the period under the price information on the Rights issue was "unpublished and price sensitive"

13. Regulation 2K(iii) of the SEBI (Insider Trading) Regulations, 1992 considers the information regarding issue of shares by way of public rights, bonus, etc. as unpublished price sensitive information. In the instant case, the appellant was clearly in an advantageous position ahead of other investors with the unpublished price sensitive information relating to the rights issue. Further the Managing Director of DSQB, Shri K. Gopalakrishnan was also a Director on the Board of the appellant at the time of Rights issue.

14. Under Regulation 2(e) of the said Regulation "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. Further, under Regulation 2(h) of the said Regulation "a person is deemed to be a connected person" if such person 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".

15. The appellant being the promoter group company of DSQB is a "connected person" under the Regulation 2(c) of the said Regulations. Both the appellant and DSQB have a common parentage and both the companies were promoted by the same person i.e. Shri Dinesh Dalmia. Being the group company of DSQB and common directors, the appellant is therefore an "Insider" within the meaning of Regulation 2(e) of the Regulations. The impugned order also records (para 6.4.26) that maximum number of shares were purchased by DSQH during August/September 1994 while the notice for the AGM was supposedly dispatched only on August 25, 1994. The impugned order also states that these notices were not actually dispatched but only scanty records were created about the dispatch. The impugned order also states that these shares were pledged with banks as collateral security for receiving loans. Thus the appellant's argument about absence of any profit motive also does not stand scrutiny. Also where it is clearly established that there was trading by an insider on the basis of price sensitive information which has been proved conclusively by the respondent.

16. Taking into consideration all the aspects, we find no merit in this appeal which fails, and is hereby dismissed.

17. No order as to costs.