BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

DATE: 04.06.2019

Misc. Application No. 148 of 2019
And
Appeal No. 89 of 2019

Sanjay Gupta
House No. 445, Sant Nagar,
Civil Lines, Ludhiana – 141001.
Punjab, India. …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

Dr. S. P. Sharma, Advocate for the Appellant.

Mr. Kevic Setalvad, Senior Advocate with Mr. Anubhav Ghosh, Ms. Rashi Dalmia and Mr. Abhishek Mishra, Advocates i/b The Law Point for the Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Dr. C. K. G. Nair, Member
Justice M. T. Joshi, Judicial Member

Per : Justice Tarun Agarwala, Presiding Officer (Oral)

1. The present appeal has been filed against the confirmatory order dated October 30, 2018 passed by the Whole Time Member (hereinafter referred to as, 'WTM') confirming the ex-parte ad-interim order dated November 1, 2017. The facts leading to the filing of the present appeal is, that the appellant was one of the

promoters and shareholders of a Company called M/s. Supreme Tex Mart Ltd. (hereinafter referred to as, 'STML'). The shares of STML are listed on Bombay Stock Exchange Ltd. (BSE) and National Stock Exchange of India Ltd. (NSE). SEBI conducted a preliminary examination in the scrips of STML for the period July 1, 2016 to March 31, 2017 in relation to bulk Short Messages Services (SMSs) which recommended trading in the scrips of the Company.

2. On the basis of the investigation and material available with SEBI, the WTM found it fit to pass an ex-parte interim order dated November 1, 2017 in order to safeguard the interest of the investors and to protect the integrity of the securities market. The ex-parte ad-interim order against the appellant was as under :-

> *"(a) Prohibited from buying, selling or dealing in securities, directly or indirectly, in any manner whatsoever, till further directions;*
>
> *(b) Directed to cease and desist from disseminating messages or news in any form related to the securities market, directly or indirectly, by any means whatsoever."*

3. The *prima-facie* basis for passing the ex-parte ad-interim order by the WTM was that prior to sending of SMSs, there was a fund

transfer of Rs. 50 lacs from the joint account of the STML to Mr. Lahoti. Mr. Lahoti in collusion with Mr. Mohsin channelized the funds to RouteSMS on behalf of Future Fintrade. It was observed that Future Fintrade entered into an agreement with RouteSMS for the purpose of sending bulk SMSs. Payments to RouteSMS were made by Mr. Mohsin who received funds either from the joint account of STML or through Mr. Lahoti. It was also observed that the bank statement of STML maintained with UCO Bank revealed that STML was the primary account holder, Mr. Ram Lal Gupta was Joint holder No. 1, appellant was Joint holder No. 2 and Mr. Ajay Gupta was Joint holder No. 3. It was also observed that there appeared to be a nexus amongst the entities and the modus operandi was that the account of STML was used to fund the sending of bulk SMSs which was sent through Idea Cellular, Goldleaf International Pvt. Ltd., etc. recommending to buy scrips of STML. It was further observed that during the period when SMSs were being sent, the price of the scrips increased and, during this period, the appellant off-loaded its shares at a higher price.

4. The WTM further observed that the appellant alongwith other entities in collusion made misrepresentations through the SMSs and by their action and omission had solicited, enticed and induced investors to deal in securities in the scrips of STML and, thus, played a fraud as defined in Regulation 2(1)(c) of the Securities and

Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (hereinafter referred to as, 'PFUTP Regulations'). It was also observed that the price manipulation done through fraudulent and deceitful manner also attracted the prohibition under Section 12A(a), (b) and (c) of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as, 'SEBI Act') as well as Regulations 3(a), (b), (c) and (d) read with Regulations 4(1), 4(2)(f) and (r) of the PFUTP Regulations. Based on the aforesaid *prima-facie* findings, the ex-parte ad-interim order was passed pending detailed investigation in the matter.

5. Subsequently, the appellant appeared and filed his replies dated November 3, 2017, November 28, 2017 and December 23, 2017, contending that he was never a joint holder of the Bank account of STML. He further submitted that the appellant had resigned as a director of STML on April 19, 2013 which was duly accepted by STML as well as from the Goldleaf International Pvt. Ltd. Form 32 was duly filed by the Company before the Registrar of Companies (ROC). It was also contended that due to differences the appellant disinherited his son Gautam Gupta (the director of STML and a noticee) and re-wrote his WILL dated February 9, 2016. It was also contended that Gautam Gupta, his son, filed a police compliant against the appellant on May 13, 2016 and that STML also filed a

defamation Suit against him on March 22, 2016. It was also contended that the appellant had filed a petition before NCLT Chandigarh against STML and its directors Ajay Gupta (Brother) and Gautam Gupta (Son) for mismanagement of STML under the Companies Act, 2013. It was also stated by the appellant that he was never a joint account holder with STML in the bank account maintained with UCO Bank. It was contended that as per the banking practice there cannot be a joint account with the Company and that the appellant was only an authorized signatory to the bank account of STML as a director but after his resignation in 2013 his authorization to use the account came to an end. It was categorically stated that he never operated the account of STML after he resigned as a director. In this regard, the appellant produced certificates from the UCO Bank indicating that the bank account of STML was not a joint account and that the appellant had never signed any cheque after his resignation on April 19, 2013. The appellant further submitted that he had no nexus with the promoters and the directors of STML nor had any connection with the sending of the SMSs at any point of time in the year 2016 as he had ceased to be a director since April 2013. In view of the serious differences with the present management, it was contended that question of conspiring with other entities in order to benefit from the price manipulation did not arise as the appellant was never a party to the price manipulation through

the scheme of SMSs. The appellant however admitted that he had sold a part of his shareholding in the ordinary course of his business and subsequently, in July 2017, he purchased substantial shares from the market on the stock exchange platform again in the ordinary course of business in order to retain a minimum 10% of the total shareholding of STML for the purpose of wrestling control of STML in future and in order to save STML from mismanagement by the present directors.

6. Inspite of the overwhelming evidence being filed by the appellant, the WTM passed a confirmatory order on the strength of the bank statement provided by UCO bank which indicated that the STML bank account was a joint account in which the appellant was a joint holder. The WTM further observed that there was a *prima-facie* fund trail from this joint account to the issuance of the SMSs which lead to manipulation of the price in the scrips of STML.

7. We have heard Dr. S. P. Sharma, the learned counsel for the appellant and Mr. Kevic Setalvad, the learned senior counsel alongwith Mr. Anubhav Ghosh and Ms. Rashi Dalmia, the learned counsel for the respondent. We find that we are unable to accept the manner and approach of the WTM in deciding the matter in such a casual manner without considering the evidence on record.

8. There is no doubt that there is a *prima-facie* finding of distribution of funds from the account of STML to various entities for the purpose of sending SMSs recommending to buy the scrips of STML. There is further a *prima-facie* finding that the bulk SMSs led to manipulation in the scrips of STML which action was fraudulent under the provisions of the PFUTP Regulations.

9. However, the appellant has been linked to these fraudulent transactions on account of being allegedly a joint holder in the STML's bank account. This is based on a bank statement obtained by the respondent from UCO Bank for the period from January 1, 2016 to June 1, 2016. The WTM on the basis of this bank statement had issued an ex-parte interim order. No finding has been given by the WTM on the letter dated January 2, 2018 issued by the UCO Bank stating that the account of STML was not a joint account and that the appellant had resigned as a director in 2013 and since then had not issued any cheque on behalf of STML. The WTM for reason best known has not considered the certificate issued by the bank and chose to ignore this vital piece of evidence.

10. Under the Banking Regulation Act, 1949, for opening an account of a Company, amongst other documents, a resolution from the Board of Directors and power of attorney granted to its managers, officers or employees to transact on behalf of the Company is

required to be filed. A Company is a legal entity and can only act through its Board of Directors or through one or more juridical persons. In the instant case, no such steps have been taken by the WTM to find out who are the authorized signatories who can transact on behalf of STML. No steps have been taken by the WTM to find out as to whether a joint account with a Company can be opened in a Bank or not. No steps were taken by the WTM to check the Bank account opening form or the resolution of the Board of Directors to satisfy itself as to what kind of an account was opened by STML. In the instant case, *prima-facie*, we find that the bank statement is as a result of a system flaw of the Bank's computer program. Normally, the bank prepares its own software. Various categories are shown viz, Primary holders, first joint account holder and so on. In the instant case, there may not have been a column for an "authorized signatory" and accordingly, the name of the appellant was shown as a joint holder. Such facts should have been ascertained by the WTM instead of mechanically treating a bank statement as the gospel truth.

11. The WTM has also not considered the fact that the appellant had resigned in the year 2013 which resignation was accepted by the Company and forwarded to the ROC in Form 32. There is not even a discussion in the impugned order with regard to the resignation of the appellant from the Company. There is no discussion or finding that

the appellant was still a director of the Company or was responsible of the affairs of the Company in some manner or the other.

12. Further, the appellant has clearly brought out the acrimonious litigation between the appellant and other directors of STML, namely, disinheriting his son, lodging of FIR by his son against him, defamation suit filed by STML against him, etc. Nothing has been discussed by the WTM with regard to the effect of this litigation.

13. In order to attribute fraudulent malpractices to the appellant, it was essential to atleast give a *prima-facie* finding that there was a causal link between the appellant and other entities including STML which indulged in the manipulation of the price of the scrips of STML through bulk SMSs. We find, that in the instant case, when the appellant has come forward with a specific case that he had resigned in 2013 and was not part of the management of STML during the time when bulk SMSs were sent supported by two letters of the Bank, coupled with the fact that there was a litigation going on between the appellant and his son and brother who were directors of the Company, it was the bounden duty of the WTM to deal with this aspect and atleast give a *prima-facie* finding on the basis of an in depth analysis of the evidence that there was a causal linkage of the appellant with the manipulative increase in the price of the shares of the company through bulk SMSs. The WTM has conveniently

overlooked these evidences which on the face of it is glaring and could not be overlooked in a casual manner.

14. The fact that the appellant sold a substantial portion of his holdings during the increase of the price of the scrip cannot by itself lead to a conclusion of the appellant indulged in any manipulative or fraudulent practice which would come under PFUTP Regulations unless there was further evidence to show that the appellant was acting in concert as a homogenous group with other entities. No such observation or *prima-facie* evidence has been given by the WTM.

15. We are, consequently, of the opinion that the impugned order in so far as it relates to the appellant cannot be sustained.

16. SEBI has power to pass interim orders and such interim orders can also be passed ex-parte. Interim orders are passed in order to prevent further possible mischief of tampering with the securities market. If during investigation, it is found *prima-facie,* that the person is indulging in manipulation of the securities market, it would be obligatory for SEBI to pass an interim order or for that matter an ex-parte interim order in order to safeguard the interests of the investors and to maintain the integrity of the market. Normally, while passing an interim order, the principles of natural justice has to be adhered to, namely, that an opportunity of hearing is required to

be given. Procedural fairness embodying natural justice is to be applied whenever action is taken affecting the rights of the parties. At times, an opportunity of hearing may not be pre-decisional and may necessarily have to be post-decisional especially where the act to be prevented is imminent or where action to be taken brooks no delay. Thus, pre-decisional hearing is not always necessary when ex-parte ad-interim orders are made pending investigation or enquiry unless provided by the statute. In such cases, rules of natural justice would be satisfied, if the affected party is given a post-decisional hearing.

17. However, it does not mean that in every case, an ex-parte interim order should be passed on the pretext that it was imminent to pass such interim order in order to protect the interest of the investor or the securities market. An interim order, however, temporary it may be, restraining an entity/person from pursuing his profession/trade may have substantial and serious consequences which cannot be compensated in terms of money.

18. Thus, ex-parte interim order may be made when there is an urgency. As held in **Liberty Oil Mills & Ors. vs. Union of India & Ors. [AIR (1984) SC 1271] decided on May 1, 1984**, the urgency must be infused by a host of circumstances, viz. large scale misuse and attempts to monopolise or corner the market. In the said

decision, the Supreme Court further held that the regulatory agency must move quickly in order to curb further mischief and to take action immediately in order to instill and restore confidence in the capital market.

19. However, when an ex-parte interim order is passed and a party approaches the authority for vacation of the ex-parte order, the authority is required to act prudently especially when the party approaches the authority immediately for its vacation which in the instant case was done within three days from the passing of the ex-parte order. The appellant filed its reply as early as on November 3, 2017. However, the ex-parte interim order continued till the confirmatory order was passed on October 30, 2018. In our opinion, apart from the delay in disposal of the matter, the ex-parte order was confirmed mechanically without any application of mind and without considering the relevant documents. In our opinion, there was no shred of evidence to come to a *prima-facie* conclusion that the appellant was indulging in unfair trade practices with a manipulative intent to manipulate the price.

20. The appellant has stated on affidavit before SEBI on December 23, 2017 that he has no other source of income except trading in shares and that as a result of the ex-pate order, his broker prematurely closed his trading positions which the appellant had

taken in F&O segment resulting in a loss of Rs. 50 lacs. This aspect has not been considered by the WTM. We are further of the opinion that whenever an ex-parte order is granted, an endevour should also be made to dispose of the matter as expeditiously as possible no sooner when the party appears. In the instant case, the ex-parte order was passed on November 1, 2017 and the appellant filed his replies on November 3, 2017, November 28, 2017 and December 23, 2017. It took the WTM almost a year to dispose of the application. We find that at this late stage there was no real urgency to continue with the restraint order. Passing a confirmatory order virtually puts a stoppage on the appellant's right to trade which in the instant case is based on non-consideration of evidence and, in our opinion, is harsh and unwarranted. In our opinion, for the aforesaid reasons, the appellant is, thus entitled to get costs from the respondent.

21. For the reasons stated aforesaid, the ex-parte ad-interim order as confirmed by the confirmatory order cannot be sustained and are quashed in so far as it relates to the appellant. It would be open to SEBI to pass a fresh order in accordance with the principles of natural justice if and when fresh evidence comes before it. In the circumstances of the case, the appellant is entitled to get costs and is computed at Rs. 50,000/- (Rupees Fifty Thousand Only) which shall be paid by the respondent to the appellant within four weeks from

today. Proof of compliance will be intimated to the Registrar of this Tribunal.

22. After the aforesaid order was pronounced the learned senior counsel Shri Setalvad made an appeal for waiver of the costs contending that such imposition of costs would send a ripple down the throat of the respondent. Be that as it may. We find that in the given circumstances of the case, cost is justified. The oral request of the learned senior counsel for the respondent is rejected.

Sd/-
Justice Tarun Agarwala
Presiding Officer

Sd/-
Dr. C. K. G. Nair
Member

Sd/-
Justice M. T. Joshi
Judicial Member

04.06.2019
Prepared & Compared by
PTM