

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Hearing : 20.12.2019

Date of Decision : 02.03.2020

Appeal No. 261 of 2018

Nirmal N. Kotecha
601, Sukh Castle,
Bhandarkar Road,
Matunga,
Mumbai - 400 019.

..... 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. Gaurav Joshi, Senior Advocate with Ms. Raksita Poddar,
Mr. Aditya Bhansali, Mr. Jitendra Sharda, Mr. Shikhar Sthapak,
Advocates and Ms. Nirali Mehta, Practicing Company Secretary i/b
Mindspright Legal for the Appellant.

Mr. Rafique Dada, Senior Advocate with Mr. Abhiraj Arora,
Mr. Vivek Shah, Ms. Misbah Dada, Advocates i/b ELP for the
Respondent.

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

Per : Justice M. T. Joshi, Judicial Member

1. A newspaper report based on a forged letter purported to have been issued by respondent Securities and Exchange Board of India (hereinafter referred to as 'SEBI') directing the promoter Mr. P. S. Saminathan of Pyramid Saimira Theatre Ltd. (hereinafter referred to as 'PSTL') on December 21 and December 22, 2008 to make an open offer to acquire shares of the PTSL, had caused respondent SEBI to make investigation in the matter and to file a First Information Report with the police.

2. The investigation by SEBI led to the present appellant Mr. Nirmal Kotecha, as one of the conspirators in the episode, amongst others, like one Mr. Rakesh Sharma said to be originator of the news and also the acquaintance of the present appellant.

3. The investigation of respondent SEBI revealed that the present appellant was concerned with the circulation of the forged letter, as well, sold large number of shares within a short span of opening of the trades on the stock exchanges on December 22, 2008 - Monday till PSTL revealed by 10:30 a.m. to the stock exchanges about the

non-existence of such a letter. It also revealed that the present appellant who was the biggest investor in PSTL had also in the immediate past, resorted to artificial inflation of the trading volumes and the stock price of the PSTL through various synchronized trades, reversal trades, self trades, etc. through front entities. In the circumstances, it is alleged that, the appellant had violated Section 12A (a), (b) and (c) of the Securities and Exchange Board of India Act, 1992, (hereinafter referred to as 'SEBI Act') and Regulations 3(a), (b), (c), (d), 4(1), 4(2)(a), (b), (d), (e), (f), (g), (k) & (r) of 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').

4. A show cause notice was issued to the appellant. The appellant denied the allegations. He denied any connection either with Mr. Rakesh Sharma or any of the front entities detailed in the show cause notice. SEBI, however, found that the present appellant had indulged in unfair trade practices. Therefore, he was restrained from accessing the securities market, in any manner, for a period of 14 years vide the interim order. The said period was reduced to the period already undergone by him as 9 years had passed from the date of the passing of the interim order till the passing of the impugned order dated

March 22, 2018. Additionally, the appellant was also directed to disgorge an amount of Rs. 32,50,882/- with interest, etc. Hence the present appeal.

5. We have heard Mr. Gaurav Joshi, the learned senior counsel with Ms. Raksita Poddar, Mr. Aditya Bhansali, Mr. Jitendra Sharda, Mr. Shikhar Sthapak, the learned counsel and Ms. Nirali Mehta, Practicing Company Secretary for the appellant and Mr. Rafique Dada, the learned senior counsel with Mr. Abhiraj Arora, Mr. Vivek Shah, Ms. Misbah Dada, the learned counsel for the respondent.

6. Number of submissions were made from both the sides relating to the material on record to buttress the respective cases of the appellant and the respondent on the issue of probabilities and the connection of the appellant with front entities, more particularly with one Mr. Amol Kokane who had traded with different entities. Mr. Gaurav Joshi, the learned senior counsel for the appellant submitted that so far as the criminal case is concerned no chargesheet is filed against the present appellant and in fact the investigating officer had given a clean chit to the appellant in this regard. He further relied upon the judgments of the Hon'ble Supreme Court of India in the cases of *Union of India vs. M/s Chaturbhai M. Patel & Co. [(1976)*

1 SCC 747], Parsoli Corporation Ltd. & Ors. vs. Securities and Exchange Board of India [(2011) SCC Online SAT 106] and submitted that in the case of fraud merely a suspicion cannot take place of proof and higher degree of preponderance of probabilities are required. In our view, however, an inference of an investigating officer during investigation is not required to be considered in the present proceedings.

7. The material revealed that Mr. Rakesh Sharma who was an executive from one Adfcators PR Pvt. Ltd. has caused to circulate the report of the letter. A reply of the appellant would reveal that he was acquainted with Mr. Rakesh Sharma. It was alleged that the said Mr. Rakesh Sharma in connivance with the appellant and one Mr. Rajesh Unnikrishnan, a reporter with the Economic Times and Dharmesh Shah, a childhood friend of the appellant had caused the fake news to be circulated on the basis of the forged SEBI letter.

8. Though the statements of Mr. Rakesh Sharma recorded by SEBI during the investigation were not relied, during the proceedings by SEBI as Mr. Rakesh Sharma was not offered for any cross-examination, the learned Whole Time Member (hereinafter referred to as 'WTM') found that atleast a piece of statement of Mr. Rakesh

Sharma that the conspiracy was hatched on December 20, 2008 in the afternoon in Pritam Hotel at Dadar (East), Mumbai is corroborated by the tower location of the mobile numbers of the appellant, Mr. Rakesh Sharma and Rajesh Unnikrishnan at the relevant time i.e. at about 12 noon in contradistinction to the statement of the appellant that he was far away from this location, at Ghatkopar. Various other probabilities were taken into consideration by the WTM while concluding that the appellant was one of the conspirators. We find that there is a direct proof in this regard which requires to be considered prominently.

9. One Ms. Mittal Acharya, during the relevant period, was working as an Account Assistant with M/s. Kotecha Capital Services Pvt. Ltd., a family concern of the appellant. Her first statement was recorded by respondent SEBI on January 7, 2010. The statement revealed that Ms. Mittal Acharya used to directly report to the appellant. An envelope in which the alleged forged letter was sent to Mr. P. S. Saminathan was shown to Ms. Mittal Acharya by the respondent SEBI. She said that the address of Mr. P. S. Saminathan written on the envelope was written by her. During her statement dated January 9, 2010, she added that the said address was written by her on the direction of the appellant Nirmal Kotecha. On the fateful

day, the appellant called her in his cabin and told that for some urgent work she should write the address on the envelop as dictated by him. She explained that she did not know regarding the content in the envelope.

10. Ms. Mittal Acharya was sufficiently cross-examined from the side of the respondent on January 10, 2017. Her memory was tested to find as to how she could recollect the minor incident of writing an address on the envelope. She explained that since the concern run by the appellant was a small business and since immediately after the incident, SEBI officers started visiting the office as well as her house relating to the investigation and since she was concerned with all these episodes she recollected the event. Except this statement, there is nothing in the cross-examination which would discredit her earlier statement as stated (supra). There is no suggestion in the cross-examination of Ms. Mittal Acharya to show that the address over the disputed envelope is not in her handwriting. This would definitely go to show that on the instruction of the appellant his assistant Ms. Mittal Acharya had addressed the forged letter to Mr. P. S. Saminathan.

11. The trading pattern of the appellant of December 22, 2008 would show that on the opening of the market he sold 6,54,101 shares before 10:30 a.m. on the Bombay Stock Exchange (BSE) platform i.e. before Mr. P. S. Saminathan explained to the stock exchanges that he is not in receipt of any such letter. The WTM by adding selling of shares by the appellant on NSE, calculated unlawful gains of Rs. 38,74,981/- in the following manner :-

Total no. shares Sold as on December 22, 2008 before 10:30 am (A)	654101
Average price of the shares (in Rs.) - (B)	80.39
Close Price of the shares as on December 19, 2008 (in Rs.) - (C)	75.42
Price before 10:30 am on December 22 - Close price on December 19 (D = B - C)	4.97
If Ill-gotten profit that is purported to have been made is *	
D*A 654101 x 5.761	32,50,882

“Thus, the Noticee had made a unlawful gain of Rs. 38,74, 981/-.”

Therefore, the disgorgement to that extent was directed.

12. Shri Gaurav Joshi, the learned senior counsel for the appellant submitted that the trading pattern would show that since June 2008 the appellant was selling the shares of PSTL as he wanted to disinvest from the same and, therefore, the sale of the particular day only should not have been taken into consideration by WTM.

13. However, while deciding the next of the issue of synchronized trades, self trades, etc. of that period also we are coming to the conclusion that the appellant either himself or through his front entities had indulged in market manipulation and, therefore, sale of earlier period would not be an excuse.

14. Coming to the issue as to whether the appellant either himself or through his front entities had indulged in fraudulent activities as detailed (supra), the following facts are required to be taken into consideration.

15. One Mr. Sandeep Gavhane (since deceased) was working as an accountant with the appellant. Said Mr. Sandeep Gavhane was brother-in-law of Mr. Amol Kokane. The appellant was using a mobile connection of Mr. Amol Kokane bearing No. 9819988816. The appellant explained that in order to have his personal transaction different from the business transactions, he used to use this mobile

number for personal purposes. SEBI during the investigation, however, found that the monthly bill of the said mobile number used to be upto Rs. 40,000/-. Besides, admittedly, the said mobile was also used for business purposes. This, Mr. Amol Kokane - a student, was allegedly used as a front entity by the appellant by opening the trading account with M/s. India Capital Markets Pvt. Ltd. (ICMPL), on the very day the appellant had opened the account of the said entity. The transactions of crore of rupees were made in the account of Mr. Amol Kokane with various entities as detailed in the impugned order. Besides, in the month of September, October 2008, a huge amount was transferred in the account of Mr. Amol Kokane as detailed in paragraph No. 4.4 of the impugned order. Through this Mr. Amol Kokane's account, following trades in PSTL shares were made from June 1, 2008 to December 19, 2008.

	BSE	NSE	GROSS ACROSS BOTH EXCHANGES
BUY QTY BY AK	4,59,084	93,909	5,52,993
SELL QTY BY AK	4,21,974	1,31,019	55,29,93
NET ATY BY AK	37110	-37110	0
GROSS QTY BY AK	8,81,058	2,24,928	11,05,986
% contribution of each exchange	79.66%	20.34%	100%

16. It can be thus, gathered that 5,52,993 shares were bought through this account and exact number of shares of PSTL were sold. In the details of the said trading pattern, respondent SEBI alleged that these trades were in the nature of circular and reversal trades with one Ms. Priyanka Darshan Desai, Inventure Growth & Securities Ltd., Ankit Girishkumar Vasani, DKG Securities Pvt. Ltd.

17. The appellant's case is that he had nothing to do with Mr. Amol Kokane or his trading pattern. He merely used the mobile connection of Mr. Amol Kokane. Mr. Darshan Desai, the proprietor of ICMPL has also stated that Mr. Sandeep Gavhane was the real client behind the account of Mr. Amol Kokane. Therefore, the appellant defended that he is not in any way concerned with the account of Mr. Amol Kokane and with other so called entities though he had some minor connection with them as brought out during the course of the investigation.

18. Besides all the probabilities, as appreciated by the WTM in the impugned order, we have the statements of Mr. Amol Kokane on record. On February 27, 2009, he made a statement to the investigation officer of SEBI that the account was being operated by

his brother-in-law Mr. Sandeep Gavhane for his boss Mr. Nirmal Kotecha. He used to merely put signatures on the documents as per their directions. Even the mobile number was obtained by them. He never used the said mobile. He additionally stated that Mr. Sandeep Gavhane (who had died by that time) used to get salary of Rs. 12,000 per month from the appellant, out of which an amount of Rs. 4,000/- was being spent by the said Mr. Sandeep Gavhane for paying rent for his accommodation. He further stated that upon death of Mr. Sandeep Gavhane in an accident, he had requested the appellant to provide some compensation upon which the appellant shown readiness to pay Rs. 4,000/- immediately. Upon further persuasion, the appellant became ready to pay a compensation of Rs. 2 lacs to the sister of Mr. Amol Kokane i.e. wife of deceased Sandeep Kokane. During his next statement dated June 25, 2009, he resiled from his earlier statement naming the appellant in the transaction and stated that he has signed various documents as per the directions of his deceased brother-in-law and nothing more.

19. Mr. Amol Kokane was cross-examined by the respondent on October 10, 2013. During this cross-examination, he stated that in fact deceased Sandeep Gavhane had caused the said account to be opened in which the transactions of crore of rupees were done as

detailed (supra). As already pointed out, Mr. Amol Kokane had already resiled from the statement implicating the appellant in the transaction during his second statement recorded by SEBI. During this cross-examination however, it was not challenged that deceased Sandeep Gavhane (since deceased) was getting a salary of Rs. 12,000/- per month from the appellant out of which a major expenses i.e. rent of Rs. 4,000/- per month.

20. Thus, the fact that the mobile number of Mr. Amol Kokane was being used by the appellant, the fact that the said Mr. Amol Kokane's brother-in-law Mr. Sandeep Gavhane was working with the appellant, said Mr. Sandeep Gavhane did not have any wherewithal for transacting into the shares of the PSTL worth crore of rupees would clearly show that the account of Mr. Amol Kokane was used as front by the appellant for carrying transactions in the shares of the PSTL. Though the appellant relied on the statement of Mr. Darshan Desai, the trading member that he (Mr. Darshan Desai) transacted in the account of Mr. Amol Kokane on the instruction of Mr. Sandeep Gavhane, it is noteworthy that the trading in the account continued even after the death of Mr. Sandeep Gavhane. The defense of the appellant as supported by his share broker in this regard cannot be accepted for the reasons detailed (supra).

21. The details of the synchronized and reversal trades with various entities are detailed by the WTM from paragraph No. 4.26 (7) to (27) of the impugned order. These details would show that from the account of Mr. Amol Kokane synchronized trades were made in PSTL continuously within a short period ranging from minutes to a day, with various entities and between themselves as detailed in the impugned order. The connection of all these entities in one or the other way with the appellants is also brought out in detail. For example, the appellant had advanced interest free loan of Rs. 25 lacs to the wife of one of the director of Inventure Growth and Securities Ltd. This company had thereafter indulged in circular and reversal trading of PSTL shares. Similarly, the appellant was in touch with Radha Krishna Garg, almost on a day to day basis, as revealed from call data record of their mobile numbers. This Mr. Garg was an employee of one DKG Securities Pvt. Ltd. - an entity involved in circular and reversal trades of PSTL shares.

22. Besides the trades through Mr. Amol Kokane's account, the appellant has also entered into self trades on October 24, 2008 and October 27, 2008 of 1,25,568 and 1,92,985 shares of PSTL respectively. This was the respective contribution of 47.75% and

66.25% to the market quantity. The appellant explained that as he wanted to shift his position from one broker to another, the same resulted into inadvertent self trades. The learned WTM however, rightly observed that transfer of position from one broker to another could have been done more easily by giving suitable direction to the depository without misusing the stock exchange mechanism, thereby creating a false impression of transfer of beneficial ownership and increasing the volume in the trades. The explanation provided by the appellant is not plausible.

23. Besides this, there were admittedly, cross trading of substantive shares of PSTL, between the appellant and Mr. P. S. Saminathan, without any fund transfer. The appellant gave an explanation that it was not sale and purchase of the shares but was in the nature of a loan transaction as detailed in his statement. However, this transaction also gave a misleading impression of trading in the market. The exact statement dated January 29, 2009 of the appellant would amplify the fact which is as under :-

“Q. 6. How many shares of PSTL did you sell to Shri P. S. Saminathan ?

A. 6. I sold 13.70 lakh shares to Shri P. S. Saminathan in June 2008. The sale was made through the common

broker Keynote Capitals Ltd. I also sold around 3 lakh shares of Shri P. S. Saminathan on November 19, 2008 through the broker JM Financial.

Q. 7. Did you receive the consideration for the aforesaid sell transactions ?

A. 7. I had sold the shares to Shri P. S. Saminathan and as per the agreement with him, I had transferred the sale proceeds back to him. I instructed my broker Keynote Capital, vide my letter dated June 26, 2008, to transfer the credit in my account of Rs. 34 crores received towards the sell of the shares, to the account of Shri P. S. Saminathan. As per the agreement, Shri P. S. Saminathan had to pay that money to me within six months. I am submitting the said loan agreement and the letter to the broker Keynote Capitals Ltd. for your consideration. Shri Saminathan has not made any payment to me for the same till date though the last date for the said payment was December 31, 2008, as per the agreement. I have sent a legal notice to Shri P. S. Saminathan and also initiated arbitration proceedings against him.

I have received the payment for the sale of shares to Shri P. S. Saminathan done through J. M. Financial in November 2008.

Q. 8. Please comment on the disclosure made by Shri P. S. Saminathan under regulation 3(3) of SEBI (SAST) Regulations, 1997 to buy shares from you at a price of Rs. 200 on November 28, 2008. Whether you felt the announcement was genuine as the market price prevailing at that point of time was less than 100 and Shri P. S. Saminathan had agrees to pay Rs. 200 to you when he had not paid any money for his earlier acquisition from you.

A. 8. I was happy to see the announcement made by Shri P. S. Saminathan at huge premium to the market price. The same he had offered me orally.”

24. Considering all the material on record, therefore, the impugned order of the WTM cannot be faulted with. In the result, the following order :-

ORDER

25. The appeal is hereby dismissed without any order as to costs.

Sd/-
Justice Tarun Agarwala
Presiding Officer

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

Sd/-
Justice M. T. Joshi
Judicial Member

02.03.2020
Prepared & Compared by
PTM