

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on: 21.12.2020

Date of Decision: 07.1.2021

Appeal No.27 of 2020

Soumen Chatterjee

Aged 34, son of Sushanta Chatterjee

Ex-employee Director-Research,

Guinness Securities Limited.

3B, Arindam Apartment,

Garia Station Road,

Kolkata – 700084.

... Appellant

Versus

Securities and Exchange Board of India

SEBI Bhavan, Plot No.C4-A,

G Block, Bandra Kurla Complex,

Bandra (East), Mumbai – 400051.

... Respondent

Ms. Anjali Agarwal, Advocate for the Appellant.

Mr. Chauduri Suraj, Advocate with Mr. Aubhav Ghosh
and Mr. Ravishekhar Pandey, 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

1. The present appeal has been filed against the confirmatory order dated 31st July, 2019 passed by the Whole Time Member ('WTM' for short) under section 19 of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as 'SEBI Act') read with section 11(1), 11(4) and 11D of the SEBI Act confirming the ex-parte ad-interim order dated 19th December, 2018 against the appellant and 28 other entities. By the said order the appellant has been restrained from accessing the securities market and further prohibited from buying, selling or otherwise dealing in securities either directly or indirectly or being associated with the securities market in any manner whatsoever till further directions. The appellant has also been restrained from undertaking any activities in the securities market either directly or indirectly and has further been restrained from disposing of or alienating any assets, whether movable or immovable including money lying in the bank accounts except with the prior permission of Securities and Exchange Board of India (hereinafter referred to as

‘SEBI’). By the said impugned orders the depositories have also been directed to ensure that no debits are made in the demat accounts held jointly or severally by the appellant and the banks have also been directed to ensure that no debits are made in the bank accounts except for the purpose of payment of money to the client/investors under the written confirmation of the concerned stock exchange.

2. The above ex-parte ad-interim order dated 19th December, 2018 as confirmed by the confirmatory order dated 31st July, 2019 was passed in the matter of Guinness Securities Limited (hereinafter referred to as ‘GSL’) which is a stock broking Company and is a member of the National Stock Exchange of India Ltd., BSE Ltd., Metropolitan Stock Exchange of India Ltd. and is also a depository participant of Central Depository Services Ltd. and National Securities Depository Ltd.
3. SEBI examined the irregularities in the conduct of the affairs of GSL which was brought to its notice by

NSE through its report dated 21st November, 2018.

Following irregularities was noted namely:-

- (i) Misappropriation of client securities by GSL and its associates;
 - (ii) Lack of solvency of GSL;
 - (iii) Falsification of books;
 - (iv) Non-settlement of funds and securities;
 - (v) Funding to clients having debit balances by providing further exposure;
 - (vi) Non-redressal of investor complaints;
 - (vii) Non furnishing of information to SEBI.
4. Based on the aforesaid irregularities an ex-parte ad-interim order was passed which was consequently confirmed.
5. The appellant was appointed initially as a Research Analyst in the stock broking company and, thereafter, was appointed as a Director-Research employee with effect from 29th December, 2015. It is alleged that the appellant submitted his resignation 27th October, 2018. In the appointment letter the appellant's role was limited to that of a Research Analyst and was required to provide sound research work and a specific duty was

defined, namely, that he would be responsible for efficient, satisfactory and economical operation in the area of research and its related activities. According to the appellant, he had no knowledge of the day to day trading or any activity relating to the same of the Company. The appellant had set out in detail his area of work as a Director-Research and contended that he only attended three board meetings and all documents that were produced during the board meeting did not show any irregularity. It was contended that the appellant had no access to the financial irregularities committed by the Company nor had any role to play in such activities. Under the terms of his employment the appellant's employment was confined only to the research department though he was designated as a Director but in fact he was an employee and was getting a salary. It was contended that the appellant was not involved in the day to day affairs of the Company nor had any knowledge of the violation and irregularities committed by the Company and that he had been restrained only on the basis of presumption

and only on the ground that he was designated as a Director.

6. In the ex-parte ad-interim order dated 19th December, 2018 no role or complicity of the appellant was brought on record while conducting the investigation into the affairs of GSL nor was there any adverse material against the appellant. The appellant was however restrained on the basis that the Company cannot act by itself and only acts through its directors. The directors are expected to exercise their power on behalf of the Company with utmost care, skill and diligence. The board of directors are responsible for the conduct of business of the Company and are liable for any non-compliance of law and such liability can be fastened upon individual director and, on this basis that the appellant was a Director, was accordingly restrained under the ex-parte ad-interim order.

7. The appellant filed his objections and prayed for vacation of the interim order contending that he was not in control of the day to day running nor had any knowledge of the irregularities alleged to have been

committed by the Company. It was contended that he was only an employee and the irregularities committed by the Company cannot be fastened upon him. The WTM while considering his objections found that the appellant was an employee of GSL but was promoted as an Executive Director and was handling an important department of GSL and, therefore, was deemed to be aware of the day to day functioning of the Company. The WTM also found that the appellant had attended three board meetings and, therefore, the appellant cannot rely upon statutory compliance certificate or internal audit report and, therefore, confirmed the interim order against the appellant.

8. We have heard Ms. Anjali Agarwal, Advocate for the Appellant and Mr. Chauduri Suraj, Advocate assisted by Mr. Aubhav Ghosh and Mr. Ravishekhar Pandey, Advocates for the Respondent.
9. Having heard the counsel for the parties we are of the opinion that the continuation of the interim order against the appellant is not justifiable at this stage. An interim order which was passed on 19th December,

2018 and confirmed on 31st July, 2019 cannot be allowed to continue till further orders. The appellant has already been restrained for more than two years from accessing the securities market. The appellant is out of employment and cannot get another employment on account of the restraint order. He has also been restrained from alienating his assets and his demat accounts, bank accounts have been frozen. Such harsh orders without any specific finding against the appellant cannot be allowed to continue. Till date no show cause notice has been issued pursuant to the submission of the forensic report. It was contended by the learned counsel for the respondent that a show cause notice will be issued very shortly by the end of January, 2021. Be that as it may. In our opinion, the restraint order cannot be allowed to continue any further. The appellant has already been restrained for the past two years and we see no justifiable reason to allow this restraint order to continue also for the following reasons.

10. We find from a perusal of the ex-parte ad-interim order dated 19th December, 2018 that six clients of GSL emerged as a top six sellers during the period 1st January, 2008 to 31st August, 2018 which led to the misappropriation of clients securities by GSL to the tune of Rs.233.75 crores. The interim report states that these six client sold securities without corresponding purchases and GSL had delivered the securities of other clients for sale made by these six clients resulting in the alleged misappropriation. Apart from the other irregularities this was by and large the main irregularity against the Company and, consequently, against the appellant.

11. The six clients as per the ex-parte ad-interim order and the alleged misappropriation is of different period which is culled out from the order itself namely:-

(a) SKB Securities Ltd. - January, 2008 to 31st August, 2018.

(b) Param Commodities Pvt. Ltd. - July, 2009 to June, 2012.

(c) Paramarth Agro Marketing Pvt. Ltd. - June, 2009 to October, 2013.

(d) Apurva Commodity Pvt. Ltd. - January, 2008 to May, 2012.

(e) Awadhoot Marketing Pvt. Ltd. - April, 2014 to May, 2015.

(f) Superfast Tours and Travels Pvt. Ltd. - June, 2012 to August, 2018.

12. The aforesaid six clients of GSL as per the ex-parte ad-interim order misappropriated 233.75 crores during the aforesaid period. Admittedly, the appellant was appointed as a Director on 29th December, 2015. Majority of the misappropriation is prior to the appellant's appointment except in the case of SKB Securities Ltd. and Superfast Tours and Travels Pvt. Ltd.. Nothing has been brought on record to indicate as to how much security was misappropriated by the aforesaid two entities from the time the appellant became a Director. In the absence of any specific finding in this regard, we are of the opinion that on mere ipse dixit the restraint order cannot be allowed to continue any further on the ground that the appellant was an Executive Director and is presumed to be in knowledge of the affairs of the Company. The WTM

has lost sight of the fact that the appellant was the employee and was promoted as an employee Director because the law required the Company to do so.

13. We find that the WTM has discharged certain directors of GSL on the ground that they are independent Director and/or Non-Executive Directors and, therefore they may not be aware of the day to day functioning and wrong doings of GSL in connection with the misappropriation of client's securities, falsification of accounts, non-settlement of funds and securities etc. The WTM was of the opinion that these directors were either Independent Directors or Non-Executive Directors and may not be involved in the day to day functioning of GSL and that these Directors were justified in relying upon the statutory compliance certificate and internal audit report in the board meeting which never pointed out any non-compliance by GSL and on the contrary the statutory compliance certificate affirmatively mentioned compliance of the law by GSL. The WTM while discharging these directors held as under:-

“I have considered the replies of Noticee nos. 4, 5, 6, 7, 8, 9, 10, 13, 14 and 15. One of the main contention raised by these Noticees except Noticee no. 4, 8, 9 and 10, is that they were either independent directors and/non-executive directors, and as such they were not involved in the day to day functioning of GSL. It has also been contended that they relied on the statutory compliance certificate and internal audit report which never pointed out towards any non-compliance by GSL and on the contrary these statutory compliance certificates affirmatively mentioned regarding GSL’s compliance with all laws. On perusal of the statutory compliance certificates furnished by the Noticees, I observe that the statement of statutory compliances contains the details of applicable statutes and nature of compliances and signature of the nodal officer certifying compliances with the applicable statutes. As regards the compliances with respect to securities laws, I observe that the company secretary of GSL has certified that provisions of all the regulations applicable have been complied with. The company secretary of GSL has also certified that there have been no non-compliance/ violations of any regulations. Further, the Internal Audit report furnished by the Noticees also states that no material fraud/ non-compliance/ violation by GSL is observed during the course of the audit. These certificates/ reports submitted to the board of directors coupled with the fact that these Noticees were either independent and/ or non-executive directors of GSL, prima facie shows that they might not be aware of the day to day functioning and wrongdoings of GSL in connection with misappropriation of client securities, falsification of books of accounts, non-settlement of funds/ securities of clients etc. I also note that forensic audit by NSE and BSE is presently underway which will bring out the role played by these Noticees and if found liable these Noticees shall always be

proceeded against in accordance with law. However, at this stage, I find no reason to continue the directions issued vide interim order dated December 19, 2018.”

14. However, the same stand was taken by the appellant that nothing was brought to his notice during the board's meeting which he attended. The appellant also relied upon the statutory compliance certificate and the internal audit report which did not point out any irregularity or non-compliance by GSL but the WTM for reasons best known to him applied a different standard/yardstick contending that since the appellant was an Executive Director he is deemed to be in the knowledge of the day to day affairs of the Company. In our opinion, this presumption is totally erroneous, misconceived and cannot be sustained. There is no magic in the words “Executive Director”. Section 27 of the SEBI Act clearly indicates that every person who was responsible for the conduct of the business of the Company would be deemed guilty of the offence and would be liable to be proceeded against but such person would not be punished if he

proves that the offence was committed without his knowledge or that he has exercised due diligence to prevent the commission of the offence. In the instant case, the appellant has relied upon the compliance certificate and internal audit report contending that nothing was brought to his notice with regard to the irregularities alleged to have been committed by the Company. There is no evidence which has come in the investigation report that the appellant was involved in the day to day affairs of the Company especially when there was a Managing Director existing in the Company.

15. Merely because the appellant has attended three board meetings does not make the appellant deemed to have knowledge of the affairs and mismanagement of the Company. By this yardstick the WTM should have also restrained the independent and Non-Executive Directors in as much as these Directors have also attended the same board meeting of the Company. Not only this, we find that one of the Independent Directors had chaired the meeting of the board of directors as

Chairman but for whatever reasons the WTM has removed the restraint order may be because he was a retired IAS Officer. In our opinion, if an independent or non-executive Director chairs the meeting of the board of directors he becomes far more responsible than any other Director attending the meeting of the board of directors.

16. Thus, for the aforesaid reasons, since the stand of the appellant was the same as that of the independent and non-executive director, there is no reason to distinguish the case of the appellant with that of the other independent/non-executive directors. If anything against the appellant is found in the forensic report which shows his involvement in the financial irregularities it will always be open to the respondent to proceed against him by issuance of a show cause notice but at this stage, in the absence of any explicit involvement of the appellant in the financial irregularities alleged to have been committed by the Company, the restraint order cannot be allowed to continue any further. We are of the opinion that in the

absence of any evidence showing the linkage of the appellant in the financial irregularities of GSL, the appellant cannot be held liable for the alleged activities undertaken by GSL.

17. For the reasons stated aforesaid, the impugned ex-parte interim order dated 19th December, 2018 as confirmed by the order dated 31st July, 2019 cannot be sustained and allowed to continue in so far as it relates to the appellant. The impugned order is accordingly quashed in so far as it relates to the appellant. The appeal is allowed. In the circumstances of the case, parties shall bear their own costs.

18. The present matter was heard through video conference due to Covid-19 pandemic. At this stage it is not possible to sign a copy of this order nor a certified copy of this order could be issued by the registry. In these circumstances, this order will be digitally signed by the Private Secretary on behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Parties will

act on production of a digitally signed copy sent by fax
and/or email.

Justice Tarun Agarwala
Presiding Officer

Dr. C. K. G. Nair
Member

Justice M.T. Joshi
Judicial Member

07.1.2021
RHN