BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on : 18.06.2020

Date of Decision : 08.07.2020

Appeal No. 583 of 2019

ICICI Bank Limited
ICICI Bank Towers,
Bandra Kurla Complex,
Mumbai – 400 051. …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. Darius Khambata, Senior Advocate with Mr. Sandeep Parekh and Mr. Tushar Hathiramani, Advocates i/b Finsec Law Advisors for the Appellant.

Mr. Mustafa Doctor, Senior Advocate with Mr. Abhiraj Arora and Mr. Vivek Shah, 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: Dr. C.K.G. Nair, Member

1. This appeal has been preferred aggrieved by the order of the Adjudicating Officer ('AO' for short) of Securities and Exchange Board of India ('SEBI' for short) dated September 12, 2019. By the said order a penalty of Rs. 5 lakh each has been imposed on the appellant for violation of Clause 36 of the Equity Listing Agreement ('Listing Agreement' for short) read with Section 21 of the Securities Contracts (Regulation) Act, 1956 ('SCRA' for short) and Regulation 12(2) of the SEBI (Prohibition of Insider Trading) Regulations, 1992 ('PIT Regulations, 1992' for short).

2. The question raised in this appeal is, whether the information relating to signing of a Binding Implementation Agreement ('Binding Agreement' for short) by an Authorized Executive Director of the appellant with the dominant Shareholders of the Bank of Rajasthan was liable to be disclosed on an immediate basis under Clause 36 of the

Listing Agreement and Regulation 12(2) of the PIT Regulations, 1992.

3. The facts relating to the matter are the following: -

(i) On May 18, 2010 at 4.30 AM a Binding Agreement was signed by the Executive Director of the appellant with the dominant shareholders of Bank of Rajasthan who held 28.61% of the equity shares of Bank of Rajasthan proposing an amalgamation of the appellant bank and the Bank of Rajasthan.

(ii) Same day, at 5.12 p.m. and at 5.25 pm the Bank of Rajasthan informed the National Stock Exchange (NSE) and Bombay Stock Exchange (BSE) respectively that a meeting of its Board of Directors is being convened immediately to discuss the proposal relating to amalgamation of the Bank of Rajasthan with the ICICI Bank

(appellant). It also stated that the Board of Directors of the ICICI Bank also was scheduled to meet the same day to discuss this issue.

(iii) At 5.57 p.m. the Power of Attorney from the dominant Shareholders was received by the legal advisors to the parties. The Board of Directors of the appellant met at 6.00 p.m. and concluded its meeting around 7.30 p.m. Disclosures relating to the merger / amalgamation were made to NSE at 8.10 p.m. and to the BSE at 8.18 p.m. respectively.

4. We have heard the learned Senior Counsel for the parties at length through video conference on account of the ongoing Covid-19 pandemic.

5. Shri Darius Khambata, learned Senior Counsel for the appellant made valiant efforts in demolishing the findings in the impugned order on several grounds: for going beyond the

show cause notice; for misinterpreting the provisions of price sensitive information (PSI) in the PIT Regulations; for misreading the performance capability of the Binding Agreement; for its failure to understand the provisions of the Indian Contract Act, 1872 (‘Contract Act’ for short); for its language and tenor and the over reach in treating a premature information as liable to be disclosed. The learned Senior Counsel also emphasized the inordinate delay of 8 years in issuing the Show Cause Notice and 9 years in passing the impugned order. It was also contended that the affidavit-in-reply filed by SEBI goes beyond the impugned order.

6. It was strongly contended that the Binding Agreement was entered into between the appellant and the dominant Shareholders of Bank of Rajasthan, not with the Bank of Rajasthan itself. As such, it was not an agreement signed between the amalgamating parties and hence premature to be disclosed. Further, it was strongly contended that the agreement in itself had two conditions precedent clearly

given at Clause 5 of the agreement which states that (i) power of attorney from the dominant Shareholders has to be given to the custody of the legal advisors of the respective parties and (ii) the Board of Directors of both the banks have to approve the proposal including the draft scheme of amalgamation annexed to the Binding Agreement. In the absence of fulfilling both these conditions, it was contended, the Binding Agreement is nothing but a bundle of papers. Therefore, at best, when the power of attorney was deposited with the legal advisors to the parties (which was at 5.57 p.m.) one could say that the Binding Agreement had reached some stage of being capable of performance (in terms of its contracting nature) but it would achieve certainty only when the Board of Directors of both the banks approved it and in the case of the appellant it was approved only when the board concluded its meeting at 7.30 p.m. Therefore, there has been no delay in disclosing the proposed amalgamation to the Stock

Exchanges concerned at 8:10 p.m. and 8:18 p.m. on the same day after the binding conditions have been fulfilled.

7. The learned Senior Counsel relying on a number of judgments stated that contingent agreements are not certain agreements because for those agreements to attain certainty the conditions precedents have to be first fulfilled. Therefore, contingent contracts cannot be treated as certainties. He also emphasized the meaning of 'condition precedent' as defined in the Black's Law Dictionary as "*An act or event, other than a lapse of time that must exist or occur before a duty to perform something promised arises. If the condition does not occur and is not excused, the promised performance need to be rendered. The most common condition contemplated by this phrase is the immediate or unconditional duty of performance by a promisor."* Similarly, the appellant placing Sections 31 to 33 of the Contract Act, reproduced below, emphasized the enforceability of a contract subject to happening of the stated event(s).

> "*31. 'Contingent Contract' defined – A 'contingent contract' is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.*
>
> *32. Enforcement of contracts contingent on an event happening – Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void.*
>
> *33. Enforcement of contracts contingent on an event not happening – Contingent contracts to do or not to do anything if an uncertain future event does not happen, and be enforced when the happening of that event becomes impossible, and not before.*"

He also relied on the decision of the Supreme Court in ***Delhi Airtech Services P Ltd v State of UP (2011) 9 SCC 354***, wherein the Hon'ble Supreme Court held that unless a condition precedent has been performed, the rights under the contract / agreement in which they are contained would not arise. The relevant para of the said Judgement is reproduced below:

> *"70. The expression condition precedent has been defined in Words and Phrases (permanent edition, Vol. 8. St. Paul, Minn, West Publishing Co., 1951, p 629) as those which 'must be punctually performed before the estate can vest'."*

Further, judgment of the Bombay High Court in **Jethalal C Thakkar v RN Kapur ILR 1955 Bom 1083; AIR 1956 Bom 74** wherein it was held that an agreement provides that the obligations contained therein would arise on the occurrence of a contingency, the agreement would not constitute a contract unless and until the contingency occurs (pg. 1086, 1087) was also emphasized to drive the point home.

> *"Fulfilment of Clause 2.2(ii) is a condition precedent to enforceability of the Agreement."*

8. It was also strongly argued that the Binding Agreement was not a contract between the Bank of Rajasthan and ICICI Bank but between only the dominant Shareholders of the Bank of Rajasthan and ICICI Bank, while the amalgamation

had to be between the Bank of Rajasthan and the ICICI Bank. Therefore, the Binding Agreement was not between the relevant parties and hence had not attained the stature of material information liable to be disclosed with immediate effect. In this regard reliance was placed on the Guidelines of the Reserve Bank of India dated May 11, 2005 which, inter alia, stated as follows:-

> *"2….Boards of the banks have to play a crucial role in the process. It may be ensured that the decision of merger should be approved by two third majority of the total Board members and not those present alone."*

9. Therefore, as per the RBI Guidelines it was contended that the banks could not have considered the Binding Agreement as a concluded contract unless board approvals had been obtained and, therefore, when the boards of both the banks were not privy to the Binding Agreement it was not liable to be disclosed, particularly, when the Binding Agreement also contained confidentiality provisions to that effect. The appellant further relied on the decision of the

Supreme Court in ***M. V. Shankar Bhat & Anr v Claude Pinto since (Deceased) by LRs & Ors – (2003) 4 SCC 86*** wherein it was held that "31. *When an agreement is entered into subject to ratification by others, a concluded contract is not arrived at. Whenever ratification by some other persons, who are not parties to the agreement is required, such a clause must be held to be a condition precedent for coming into force of a concluded contract.*"

10. It was also vehemently argued that signing of the Binding Agreement did not constitute Price Sensitive Information as defined under Regulation 2(ha) of PIT Regulations, 1992. In this regard, it was contended that only when an amalgamation is certain it becomes a Price Sensitive Information not when some parties have entered into an agreement for amalgamation which is condition precedent. Therefore, the amalgamation became a Price Sensitive Information only when the board approval for the same was obtained. Every information relating to a possible

amalgamation is not Price Sensitive Information liable to be disclosed. The Impugned Order held it to be a PSI based on analysis of the price of the shares of Bank of Rajasthan, not that of the appellant, that too based on post disclosure. There has been no analysis of the price sensitiveness of the Binding Agreement *per se*. Reliance was placed on the Order of this Tribunal in ***Jubilant Stock Exchanges Holding Pvt Ltd & Ors v SEBI – Appeal No. 174 of 2018*** which held that the a Memorandum of Understanding entered into for the sale of a hospital did not constitute price sensitive information on its mere execution as it was not a transfer or sale and was merely an offer which was not enforceable as it was subject to completion of due diligence and the determination of actual consideration.

11. It was further submitted that SEBI's reliance on the judgment of this Tribunal in ***J C Mansukhani v SEBI (Appeal No. 192 / 2014), New Delhi Television Ltd v SEBI – 2019 SCC Online SAT 140*** and the reference to Tata

Chemicals Ltd. acquiring 100% stake of British Gas Ltd which disclosed the same at the time of an agreement are not relevant to the matter as the underlying facts in those matters and in the matter under challenge are distinguishable.

12. The learned Senior Counsel for the appellant also relied on the Guidelines dated September 30, 2014 issued by the Bombay Stock Exchange relating to disclosures by listed companies highlighting the need for avoiding premature disclosures and disclosing only at the right time and argued that in the case of amalgamation, merger, etc. only after the board approval the company should make the relevant disclosure.

13. In short, the learned Senior Counsel for the appellant contended that the Binding Agreement signed in the early hours of May 18, 2010 was not an agreement between the relevant parties, it was only an understanding to bind the dominant promoters to take the next steps towards a possible

amalgamation; not a Binding Agreement till the conditions precedent i.e. obtaining power of attorney and board approvals, are met; both the RBI Guidelines and BSE Guidelines on amalgamations require disclosures only after board approval; it was not an agreement between the relevant parties as only the dominant Shareholders of the Bank of Rajasthan was a party not the Bank of Rajasthan itself; it was not a PSI and it was treated as a PSI based on the post disclosure price movement of the shares of only Bank of Rajasthan; the relevant disclosure was made immediately after the board approvals and therefore there was no delay in disclosing the relevant information both under the Listing Agreement and PIT Regulations, 1992 and if the Binding Agreement itself was disclosed the appellant would have been charged with premature disclosure thereby impacting the securities of the companies.

14. The learned Senior Counsel also submitted that the impugned order and the submissions of SEBI, particularly,

the affidavit-in-reply goes beyond the show cause notice and the impugned order respectively, the former in terms of treating the Binding Agreement as a *certainty* and the latter as a *near certainty* and in bringing in new facts and both in misinterpreting the provisions of law. In order to take home this argument the learned Senior Counsel relied on ***Nasir Ahmad vs Asst. Custodian General (1980) 3 SCC 1 (Para 3)***, wherein the Supreme Court held that an enquiry which travels beyond the bounds of a Show Cause Notice is impermissible and also in ***Canara Bank & Ors vs Debasis Basu (2003) 4 SCC 557, (Para 15)*** it was held that the Show Cause Notice must be precise and should apprise a party determinatively of the cause he has to meet. Therefore, it was contended that the impugned Order deserves to be quashed forthwith.

15. As an alternative, the learned Senior Counsel for the appellant submitted that even if it is held that there is a technical violation as the disclosure could have been made a

little earlier at around 5.57 p.m. when the Power of Attorney was received, but by then trading hours was over, and hence a minor technical delay is not open to the respondent to impose a penalty after 9 years of the alleged violation and that too when the show cause notice was issued after 8 years. The respondent SEBI was fully aware of all the developments at the relevant time itself and even the investigation report which recommended the same course of action was submitted in August 2012. In support of this contention the learned Senior Counsel placed reliance on a decision of this Tribunal in the matter of ***Ashok Shivlal Rupani v SEBI (Appeal No. 417 of 2018).***

16. The learned Senior Counsel Shri Mustafa Doctor representing respondent SEBI, on the other hand, vehemently argued that what is relevant is whether the Binding Agreement signed between the Executive Director and Chief Financial Officer (CFO) of the appellant and the Dominant Shareholders of the Bank of Rajasthan in itself was a material

event and hence a Price Sensitive Information and therefore was liable to be disclosed with immediate effect. He reiterated the reasonings in the impugned order and stated that from the agreement itself it is clear that the proposed amalgamation was enabling synergy between the two entities and hence material and as such price sensitive. Further, actual trading data itself shows that the announcement which was made subsequently did impact the volume of trading and prices of both the scrips. Therefore, it was contended that the argument of the appellant that the Binding Agreement was subject to conditions and therefore was liable to be disclosed only after the conditions have been fulfilled has no merit. The learned Senior Counsel also submitted that the circular of the BSE relied on by the appellant came more than four years later to the event and in any case such circulars/guidelines cannot overrule provisions in an Act and the Regulations.

17. Before we proceed, the relevant provisions of SCRA, Listing Agreement, PIT Regulations, 1992 and Annexure to

the PIT Regulations, 1992 are reproduced for convenience below:-

> *" **SCRA***
>
> *S.21**.** Where securities are listed on the application of any person in any recognized stock exchange, such person shall comply with the conditions of the listing agreement with that stock exchange.*
>
> ***Listing Agreement***
>
> *Cl. 36. Apart from complying with all specific requirements as above, the Company will keep the Exchange informed of events such as strikes, lockouts, closure on account of power cuts, etc. both at the time of occurrence of the event and subsequently after the cessation of the event in order to enable the shareholders and the public to appraise the position of the Company and to avoid the establishment of a false market in its securities. In addition, the Company will furnish to the Exchange on request such information concerning the Company as the Exchange may reasonably require. The Company will also immediately inform the Exchange of all the events, which will have bearing on the performance/operations of the company as well as price sensitive information. The material events may be events such as:*

(7) Any other information having bearing on the operation/performance of the company as well as price sensitive information, which includes but not restricted to; i) Issue of any class of securities.

ii) Acquisition, merger, de-merger, amalgamation, restructuring, scheme of arrangement, spin off or selling divisions of the company, etc.

iii) Change in market lot of the company's shares, sub-division of equity shares of company.

iv) Voluntary delisting by the company from the stock exchange(s).

v) Forfeiture of shares.

vi) Any action, which will result in alteration in, the terms regarding redemption/cancellation/retirement in whole or in part of any securities issued by the company.

vii) Information regarding opening, closing of status of ADR, GDR, or any other class of securities to be issued abroad.

viii) Cancellation of dividend/rights/bonus, etc.

The above information should be made public immediately.

PIT Regulations, 1992

*R. 2 (ha) "**price sensitive information**" means any information which relates directly or indirectly to a company and which if published is likely to materially affect the price of securities of company.*

Explanation.—The following shall be deemed to be price sensitive information:—

(i) periodical financial results of the company; (ii) intended declaration of dividends (both interim and final); (iii) issue of securities or buy-back of securities; (iv) any major expansion plans or execution of new projects. (v) amalgamation, mergers, or takeovers; (vi) disposal of the whole or substantial part of the undertaking; (vii) and significant changes in policies, plans or operations of the company;

Code of internal procedures and conduct for listed companies and other entities.

R. 12(2). The entities mentioned in sub-regulation (1), shall abide by the code of Corporate Disclosure Practices as specified in Schedule II of these Regulations.

SCEHDULE II - CODE OF CORPORATE DISCLOSURE PRACTICES FOR PREVENTION OF INSIDER TRADING

2.0 Prompt disclosure of price sensitive information

2.1 Price sensitive information shall be given by listed companies to stock exchanges and

disseminated on a continuous and immediate basis."

18. A reading of the aforesaid legal provisions makes it eminently clear that disclosures have to meet all of those stated provisions. Clause 36 is sweeping in nature as it mandates all disclosures to enable the shareholders and the public to appraise the position of the Company and to avoid the establishment of a false market in its securities. It also mandates that the Company will also immediately inform the Exchange of all the events, which will have bearing on the performance/operations of the company as well as price sensitive information. Sub clause 7 further mandates disclosure of any other information having bearing on the operation/performance of the company as well as price sensitive information, which includes but not restricted to the specified events. Under 7(ii) comes merger, amalgamation etc. Price sensitive information as defined under PIT Regulation 2 (ha) "means any information which relates

directly or indirectly to a company and which if published is likely to materially affect the price of securities of company".

19. Given the above provisions of law, having heard the learned counsel for both the parties and having perused the various documents relating to the appeal we do not find merit in the submissions of the appellant. We note that the Binding Agreement was signed by a Board Authorized Executive Director of the appellant bank and two representatives of the dominant Shareholders. One of the signatories (Sanjay Kumar Tayal) from the dominant Shareholders' side was also a Director of Bank of Rajasthan at the relevant time. Therefore, the contention that it was just a preliminary agreement having no materiality and certainty does not have any meaning. More importantly it was not a draft Binding Agreement taken before the Board of the appellant as a draft proposal, like any normal agenda, but a signed Binding Agreement by the two parties. As noted in the impugned order the Binding Agreement itself contained provisions

relating to the swap ratio and the outer time limit (of two and five days) in completing the steps/formalities concerned. It is also on record that the agreement signed in the early hours of May 18, 2010 at 4.30 a.m. got culminated in the decisions of both the Boards of Directors by the same evening. The Bank of Rajasthan disclosed the fact relating to their Board of Directors meeting to the Stock Exchange at 5.12 p.m. and the Board of Directors of ICICI Bank met at around 6.00 p.m. (presumably the notice relating to this board meeting was already disclosed to the Stock Exchanges).

20. The contention that the Binding Agreement was premature for disclosure as it was only a contingent contract and not a certainty does not have any merit as the disclosure regulations and the provisions of the Contract Act stand on different footing. While certainty is paramount for a contract, materiality of an event is what is tested in disclosure; if the event does not fructify disclose that as well with reasons explained. Be that as it may. For the sake of argument let us

probe this proposition further. Is the Binding Agreement a completely uncertain document about its outcome? What are the proposed conditions to be met? (1) production of Power of Attorney by the same Dominant Shareholders who have already signed the agreement at 4.30 a.m. and (2) approval of the respective Boards of both the banks, the appellant as well as Bank of Rajasthan. The signatory of the appellant was a board authorized Executive Director. Shri. Sanjay Kumar Tayal, one of the two signatories on the other side, was also a Director on the Board of Bank of Rajasthan at the relevant time. Two of them signed on behalf of all the dominant shareholders. In the light of this it would be irrational to assume that the Binding Agreement did not have any certainty or did not have a reasonable certainty of performance.

21. Further, a look at the run up to signing the Binding Agreement as given in the Investigation Report would indicate that it was a story of amalgamation foretold. Starting

in February 2010 ICICI Bank Officials at various senior management levels and the dominant shareholders had multiple meetings. On 6th May the dominant shareholders informed their lack of interest to go ahead. However, a meeting was held on 7th May, the very next day, to consider a way forward, which within 10 days thereafter resulted in the Binding Agreement, which also contained all the necessary steps to be taken by the parties, and included the share swap ratio. A two days / five days time frame was given to the Transferor Bank and the Transferee Bank to complete the procedures. Meeting was held between 11.30 p.m. on 17th night which concluded around 4.30 a.m. on 18th early hours. At 4.30 p.m. Sanjay Tayal sent a communication requesting to arrange a meeting of the Board of Directors of Bank of Rajasthan, which informed the exchanges at 5.12 and 5.25 p.m. and arranged the said meeting starting 5.30 p.m. Power of Attorneys were received by the legal advisers before 5.57 p.m., whereupon the Binding Agreement was executed and

executed copies were given to parties. Appellant Bank started board meeting at 6.00 p.m. Both the bank boards approved the proposal by 7.30 p.m. Facts relating to this timelines would undoubtedly indicate a well planned and well executed plan suiting professional companies leaving no element of practical uncertainty regarding the Binding Agreement, though legally many a hornets' nest can be raised about its binding, contractual nature, which is though not the basis of disclosure law.

22. The Binding Agreement was a material event regarding the performance of the appellant is not a disputed fact as revealed in the disclosure actually made by the Appellant. That disclosure, inter alia, states as follows:

> *"The proposed amalgamation would substantially enhance ICICI Bank's branch network, already the largest among Indian private sector banks, and especially strengthen its presence in northern and western India. It would combine Bank of Rajasthan's branch franchise with ICICI Bank's strong capital base. The valuation implied by the share exchange ratio as mentioned above is in line*

with the market capitalization per branch of old private sector banks in India. It also compares favorably with relevant precedent transactions."

23. The disclosure further stated the following:

"There can be no assurance that terms of the scheme will not have an adverse impact on ICICI Bank. The proposed amalgamation and any future acquisitions or mergers may involve number of risks, including deterioration of asset quality, diversion of our management's attention required to integrate the acquired business and failure to retain key acquired personnel; and clients, leverage synergies or rationalize operations, or develop the skills required for new businesses and markets, or unknown and known liabilities, some or all of which could have an adverse impact on our business."

24. This statement clearly demonstrates that the appellant was aware of the potential risk and hence the impact the proposed amalgamation could have on its share prices clearly making it price sensitive information. Therefore, the disclosures by the appellant regarding the potential synergy and performance of the amalgamation and its risk factors would make it both material and price sensitive information.

Therefore, the finding to this effect in the impugned order cannot be faulted, irrespective of whether post-facto share prices were in fact affected or not, and whether such an analysis has been done or not. What is relevant for disclosure is the materiality and the *ex-ante* possibility of impacting prices of the securities, which may not come true *ex-post* due to several other factors affecting the company concerned or/and the securities market in general.

25. A clear reading of the disclosure provisions both under Clause 36 read with Section 21of SCRA and under the PIT Regulations, 1992 would necessitate disclosure of the Binding Agreement since what is liable to be disclosed is material and price sensitive information relating to the performance of a company on a continuous basis. Therefore, what is held in the impugned order that the said Binding Agreement fulfills both these criteria and therefore should have been disclosed with whatever conditions attached to the Binding Agreement has no deficiency.

26. It is the contention of the appellant that even after the board approval two more crucial steps had to be completed for the amalgamation to become effective. These steps were (1) the shareholders approval of both the entities and (2) the approval of the RBI to the proposed amalgamation under Section 44 of the Banking Regulations Act. In fact, if it is the argument of the appellant that the Binding Agreement signed by the dominant Shareholders, one of whom was also a Director of Bank of Rajasthan, on one hand and an authorized Executive Director on the other was an uncertain event then we are of the considered view that shareholders approval (when the public shareholding in both the entities was of a high order) is a much more uncertain event. Equally uncertain is the approval of the banking regulator RBI to the proposed amalgamation. Therefore, conditions precedent stipulating certain steps which are at least partly within the control of the signatories to the Binding Agreement cannot be more uncertain than the steps which are completely outside the

control of the signatories. Accepting the argument of the learned Senior Counsel for the appellant would therefore mean that disclosure relating to an amalgamation has to be made only when the final approval (RBI approval) is available would make the disclosure regulations regarding securities markets meaningless. The reason why disclosure regulations are more onerous and continuous in nature in a disclosure-based regime is because of this market dynamics which factors in every single bit of information which is material to the security of an entity continuously on real time basis.

27. By the same reasoning the interpretation given by the circular of the BSE dated September 30, 2014 relied on by the appellant also does not come to the aid of the appellant even ignoring the fact that this circular was not available on the date of the event. What the circular states is as follows:-

The BSE Circular of 2014

"*9. Disclosures relating to Any other information having bearing on the operation/performance of the Listed Entity as well as price sensitive information, which includes but not restricted to;*

I. ……..

II. ***Acquisition, merger, de-merger, amalgamation, restructuring, scheme of arrangement, spin off or selling divisions of the Listed Entity, delisting, redemption/ cancellation/retirement of any securities issued by the Listed Entity****.*

This should be informed at time of Board approval or any committee authorized by the Board.

Acquisition / agreement to acquire:

a) Name of the target entity

b) Whether the promoter/ promoter group/ group companies have any interest in the entity being acquired? If yes, nature of interest and details thereof;

c) Whether the acquisition would fall within related party transactions? If yes, whether the same is done at, arm's length;

d) Industry to which the entity being acquired belongs;

As reproduced, the above circular states that information relating to amalgamation etc has to be informed at the time of board approval or any committee authorized by the board. The format also states “acquisition / agreement to acquire” which clearly envisages situations of a Committee approval and agreement to acquire also to be disclosed. Further, in the absence of clarity, what is presumed by the BSE circular is a standard approach to such proposals i.e. draft proposal placing before a Committee or the Board of Directors of a company and which is approved by the Board of Directors or by a Committee authorized by the Board. In the instant case, it is an Executive Director of the appellant who is authorized by the Board to sign such agreement(s) the signatory to the Binding Agreement. As such, it could be treated as a committee authorized by the Board, as a committee can be comprising one member also. In any case, the BSE circular does not take into account specific situations like a Binding Agreement signed by the dominant Shareholders and a Board

authorized entity etc. before being submitted as a draft agenda before the Board of Directors for approval. Therefore, even a principle-based interpretation of the BSE Circular cannot be applied to the given facts of the case apart from the fact that the said circular was issued more than four years subsequent to the concerned events.

28. In view of the above reasons we do not agree with the contentions of the learned Senior Counsel for the appellant that the Binding Agreement was premature to be disclosed; was liable to be disclosed only after the conditions precedent were met and that the RBI and BSE Guidelines/circular mandate disclosure only after Board approval in every given facts of the matter. Moreover, though we agree with the principles underlying contingent contracts and the principles laid down in various judgments cited on the issue we are of the considered view that such interpretations cannot be extended *ipso facto* to the provisions of disclosure laws/regulations when the said regulations mandate

disclosure of every material and price sensitive information relating to the performance or operation of a listed company on an on-going, continuous basis. If such disclosures had to await finality/complete certainty of material corporate decisions not only disclosure laws become redundant but consequently even core PIT Regulations to help prevent insider trading, a major bane of securities market, will also become a casualty. The purpose and spirit of disclosure in a disclosure-based regulatory regime is simple and clear; disclose all material and price sensitive events/information and disclose even when one is in doubt. It does not have to be tested with finer legal examination, hairsplitting arguments or semantics. Here, it is an admitted fact that the appellant itself had a view that the event was disclosable; hence consulted their legal advisers though at 12.31 p.m. they advised against disclosing for whatever reasons. In our reasoned view, given the facts of this matter, the signed Binding Agreement in question was price sensitive and admittedly material to the

performance of the appellant and needed to be disclosed on an immediate basis which was not done.

29. Similarly, we do not agree with the submissions made by the learned Senior Counsel for the appellant on the usage of some adjectives or qualifiers (amalgamation vs information relating to amalgamation; certainty vs near certainty) or in providing publicly known facts (trading volumes and prices of the appellant before the Tribunal) in bringing out the deficiencies in the show cause notice vis-à-vis in the impugned order vis-à-vis the affidavit-in-reply. Providing information available in the public domain to the Courts does not suffer from any infirmities. We are of the considered opinion that other deficiencies, though avoidable, do not tarnish the findings in the impugned Order as language of communication, even in judicial proceedings, have not achieved perfection of mathematical/algebraic formulae. Hence, such technical deficiency, though should be avoided, cannot be used to undermine the facts of the case and in

interpreting regulatory provisions. On the basis of interpretation given in the impugned order itself the finding that signing of the Binding Agreement was a material and price sensitive information and hence there was a delay of a trading day in making the disclosure to the Stock Exchanges cannot be faulted. It was a PSI is also clear from the fact that the investigation revealed insider trading by entities connected with the dominant Shareholders in the shares of Bank of Rajasthan on the day of the Binding Agreement. Submission that insider trading did not happen in the shares of the Appellant does not dilute the issue since it is the same Binding Agreement which triggered the alleged violation of insider trading. Therefore, the appeal fails on merit.

30. However, we agree with the contentions of the learned Senior Counsel for the appellant on the inordinate delay in issuing the show cause notice and in passing the impugned order by respondent SEBI. The disclosure violations had been noticed by SEBI soon thereafter and a preliminary

investigation was carried out and a report was available in the month of August 2012. However, even the show cause notice was issued almost six years thereafter in June 26, 2018. In the interim proceedings against the other entities relating to alleged insider trading had been completed. Despite that the respondent SEBI could not issue the show cause notice to the appellant herein and proceed with the matter within a reasonable period of time. The submissions that final investigation report was approved only in 2015 (3 years delay even thereafter), no prejudice has been caused to the appellant etc cannot be accepted since a company, that too a banking company, being a dynamic entity grows organically and inorganically and learns by doing. Given that a violation committed at an early stage of an organizational life cycle, and which was known to the Regulator, cannot be invoked to punish it several years down the line when the organization has reached a different stature and position. That would cause prejudice to the appellant unlike as argued by the

respondent SEBI. Moreover, corrective actions relating to market violations have to be taken by the regulator as early as possible, at least soon after it becomes known to the regulator, for appropriately punishing the guilty not only for the sake of modifying the behavior of the violator but also for sending strong messages to the market participants in general. After all the charge against the appellant is one trading day's delay in disclosure, but the delay on the part of SEBI to show cause is 2955 days from the date of the event and about 2130 days from the date of the preliminary investigation report, which is too wide a gap to be ignored. Several years' delay in show-causing and concluding proceedings in such known incidence of violation / alleged violations is a failure in effectively performing the behavior modification function of a market regulator. The orders relied on by SEBI on the ground of delay are distinguishable from the facts of this matter. Therefore, we are of the considered view that issuance of a penalty order against the appellant in

September, 2019 for certain disclosure violations in mid-May 2010 by issuing a show cause notice on June 26, 2018 has caused prejudice to the appellant and the order suffers from laches, as held in this Tribunal's Order in the matter of ***Ashok Rupani (supra)***.

31. In the instant case we, however, find that the appellant did not take the plea of laches before the AO. This plea was, however, taken before the Tribunal in the memo of appeal. It is well settled that in the absence of pleadings, evidence if any, cannot be considered. Parties cannot be permitted to travel beyond its pleadings. The object and purpose of pleadings is to enable the adversary party to know the case it has to meet.

32. The pleadings, however, should receive a liberal construction. No pedantic approach should be adopted to defeat justice on hair-splitting technicalities as held by the Supreme Court in ***Ram Sarup Gupta (deceased) by LRs vs Bishun Narain Inter College AIR 1987 SC 1242***. Thus,

sometimes pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law, in which case, it is the duty of the Court to ascertain the substance of the pleadings in order to determine the question.

33. Thus, if a case is not specifically pleaded, the same can still be considered by the Court only where the pleadings in substance though not in specific terms contain the necessary averment to make out a particular case. Further, if the issue raised is a question of law and goes to the root of the problem then it can be raised at any stage.

34. Laches is a mixed question of fact and law. The facts in the instant case indicate delay in issuing the show cause notice. However, the plea of laches though not raised before the AO was specifically raised in the appeal before this Tribunal. We however, find that undue delay in initiating the proceedings by the respondent by itself causes prejudice and

would ultimately attach a stigma pursuant to any adverse order that may be passed.

35. Thus, in the instant case, though there are laches, that by itself in the peculiar circumstances of the case, will not vitiate the proceedings but definitely the penalty amount of Rs. 10 lakh imposed on the appellant cannot be sustained and deserves to be substituted by a lesser penalty.

36. In the result, while upholding the impugned order on merits, we modify the penalty imposed on the appellant to only a warning which will meet the ends of justice in the given facts and circumstances of the matter. Appeal is thereby partly allowed. No orders on costs.

37. 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 Presiding Officer 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.

TARUN AGARWAL

Digitally signed by TARUN AGARWAL
DN: c=IN, st=Uttar Pradesh, 2.5.4.20=a0e08b2d80e9d23c2c2aa3e16780d684adad6bc9e810de2d7b0c28efd35557c9, postalCode=211001, street=B/A,NYAYA MARG ALLAHABAD, serialNumber=095f8b286bb0b1cd07ff676611f4f5e7999727d404aa38ca422f9d3529bdb8a3, o=Personal, cn=TARUN AGARWAL
Date: 2020.07.08 11:22:39 +05'30'

Sd/-
Justice Tarun Agarwala
Presiding Officer

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

Sd/-
Justice M.T. Joshi
Judicial Member

08.07.2020
msb