

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on:29.8.2019
Date of Decision: 8.11.2019

Appeal No.232 of 2016

Abhijit Rajan
Rituraj, 2, Ruia Park,
1, Military Road, Juhu,
Mumbai

..... Appellant

Versus

Securities & Exchange Board of India
SEBI Bhavan, C-4A, Bandra Kurla
Complex, Bandra (E), Mumbai 400051. Respondent

Mr. Somasekhar Sundaresan, Advocate with Mr. Abishek Venkataraman, Mr. Pulkit Sukhramani and Ms. Stuti Shah, Advocates i/b. J. Sagar Associates for the Appellants.

Mr. Pradeep Sancheti, Senior Advocate with Mr. Abhiraj Arora and Mr. Vivek Shah, Advocates i/b. ELP for the Respondent.

CORAM: Justice Tarun Agarwala, Presiding Officer
Justice M.T. Joshi, Judicial Member

Per : Justice M.T. Joshi

1. Appellant Abhijit Rajan, the then Chairman and Managing Director of Gammon Infrastructure Projects Limited (hereinafter referred to as 'GIPL') sold 1,43,81,246

shares of GIPL on 22nd August, 2013 through the platform of BSE Limited (BSE) and National Stock Exchange of India Ltd. (NSE) for Rs.8.28 crores. NSE has given an input of this information to respondent Securities and Exchange Board of India (hereinafter referred to as 'SEBI') considering the possibility of trading on the basis on unpublished price sensitive information. SEBI conducted investigation in the same and found that on the date of sale of the shares by the appellant he had unpublished information with him of cancellation of two shareholders agreement of GIPL with one Simplex Infrastructure Limited (hereinafter referred to as 'Simplex'). The announcement of the cancellation was made by GIPL with the stock exchanges on 3rd September, 2013. It disclosed the said information on BSE website at 1.05 p.m. and NSE website at 2.40 p.m. After investigation and after hearing the appellant he was held guilty for insider trading and vide the impugned order was directed to disgorge an amount of Rs.1.09 crores already deposited by the appellant in an escrow account as per the earlier direction under the provisions of Section 19 read with Section 11 and 11B of the Securities and Exchange Board of India Act, 1992 (referred

to hereinafter as 'SEBI Act') read with Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 (referred to hereinafter as 'PIT Regulations'). Hence the present appeal.

2. GIPL, during the relevant period was an infrastructural project development company. Appellant was the Chairman and Managing Director of GIPL till September 2, 2013. Thereafter he continued to be on the Board of GIPL. GIPL was awarded a road project by National Highways Authority of India ("NHAI") in Andhra Pradesh. Total cost of the same was Rs.1648 crores. GIPL has set up a special purpose vehicle ("SPV") called Vijayawada Gundugolanu Road Project Private Limited. Similarly, another Company-Simplex was awarded a road project by NHAI in Jharkhand and West Bengal. The cost of the same was Rs.940 crores. Simplex had also a special purpose vehicle called Maa Durga Expressways Private Limited ("MDEPL") to undertake its work.

Both these entities had earlier on 26th April, 2012 entered into two shareholders agreement under which they agreed to invest to the extent of 49% equity investment in the

projects allotted to each other. After some days talks for termination of these agreements started between these two entities. Specifically on 9th August, 2013, the Board of Directors of GIPL passed a resolution authorizing the termination of the agreement. On 22nd August, 2013, the appellant sold the shares as detailed earlier. Thereafter, on 30th August, 2013 both the entities signed the termination of agreement. On 3rd September, 2013, GIPL made disclosure of the termination to the Stock Exchanges as detailed supra. SEBI therefore prima facie concluded that the termination of the agreement was an Unpublished Price Sensitive Information (UPSI). It came into existence during July, 2013 and remained unpublished till September, 2013. However, within this period the appellant had sold the shares of GIPL to avoid the probable loss as according to SEBI the information would have an adverse impact on the share price of GIPL. The calculation of probable loss is detailed by respondent SEBI on the ground that on the date of selling of the shares by the appellant the weighted average price of the shares was Rs.7.14. However, weighted average price on September 4, 2013 i.e. one day after the disclosure was

Rs.6.56 and, thus, the calculation of avoidance of probable loss came to Rs.83,32,934.50.

It was found that one Consolidated Infrastructure Company Private Limited (hereinafter referred to as "CICPL") also sold 28,56,618 shares of GIPL. During the same period i.e. July and August, 2013 CICPL had acquired several properties from Abhijit Rajan for a consideration of Rs.5.15 cores. It was therefore alleged that CICPL and the promoters had information about the termination of agreement from appellant Abhijit Rajan and, therefore, the enquiry was conducted against them also. Ultimately however SEBI found that no case is made out against CICPL or its promoters. Therefore, the proceedings came to be dropped against them but order came to be passed against the appellant as detailed supra.

3. The appellant before SEBI as well as before us explained as under:-

4. That the information in question was not material to impact the price of the securities of GIPL. It was for the respondent SEBI to establish the materiality of the same for the above context. As the appellant had sold the shares the

SEBI should be able to show that the information would have an adverse impact on the price of the security upon publication of the same and the same was the motive for selling the shares while holding the information. The respondent has simply assumed that termination of the agreement involved significant change in the policies, plans or operation of the Company and, therefore, it would be UPSI. Infact realignment of the projects were done in ordinary course of business. The termination of the agreement had two consequences (i) GIPL acquired exclusive control on the larger part of the contract worth Rs.1640 crore and (ii) exited from relatively small project of Rs.940 crores in which GIPL had invested only 4.9 crores representing less than 0.05% of GIPL's order book value at end of August, 2013 and only around 0.7% of the turnover of the financial year ending March31, 2013. This cannot be termed as material exposure. GIPL itself did not regard the information as price sensitive and, therefore, trading window was not closed. Green signal was sought from the Compliance Officer before the sale of the shares and the same was

granted. The Simplex even did not disclose the termination of the agreement to the stock exchange.

Appellant further explained that though the termination agreement was disclosed to stock exchanges on 3rd September, 2013 in the noon as detailed supra, the respondent SEBI for its own calculation purpose took into consideration the weighted average closing price as on September 4th, 2013 as Rs.6.56. In fact the weighted average closing price of the shares as on 3rd September, 2013 ought to have been taken into consideration. Infact on that day i.e. on September 3, 2013 immediately after disclosure of termination of agreement the price movement in the GIPL showed a small increase of 0.10 paise and on September 4, 2013 it decreased of Rs.0.30 paise. Thus, the disclosure of the information had no adverse effect on the price of the shares as infact there was a small increase of Rs.0.10 paise which would scuttle the inference of SEBI that in order to avoid the loss due to adverse information the shares were sold by the appellant.

5. The appellant further pleaded that during the relevant period GIPL was under financial stress and was facing the

prospect of liquidation under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act). Under the circumstances, a corporate debt restructuring agreement was entered into between the GIL subsidiary of GIPL and the lenders. In the master restructuring agreement the promoters contribution was necessary and, therefore, the appellant sold the shares and the amount was deposited in the account of CDR scheme. This infusion of the funds from the appellant was going on since June, 2013 and the details of the same are given as under:-

Name of Entity	Date of Amount Infusion	Amount (` in Crores)
Abhijit Rajan	24.06.2013	5.00
Pacific Energy Pvt. Ltd.	28.06.2013	6.00
Abhijit Rajan	13.07.2013	5.00
Abhijit Rajan	02.08.2013	5.00
Abhijit Rajan	10.08.2013	7.00
Abhijit Rajan	14.08.2013	0.50
Abhijit Rajan	31.08.2013	10.00
Abhijit Rajan	17.09.2013	8.00
Total		46.50

6. Not only this during the relevant period besides selling the shares the appellant had raised Rs.5.15 crores from CICPL on 20th August, 2018, by selling his own properties to CICPL in the following manner”-

Nature of Property	Value (` in Crores)	Date of Payment	Date of Agreement
Agricultural Land-Village Kale, District-Pune	0.90	28.08.2013	28.08.2013
Agricultural Land-Village Kolgaon, District-Raigad	1.10	28.08.2013	28.08.2013
Agricultural Land-Village Kolgaon, District-Raigad	2.40	28.08.2013	28.08.2013
Flat at Four Bungalows, Andheri Mumbai	0.75	28.08.2013	28.08.2013
Total	5.15		

7. The respondent SEBI however did not accept any of the defense and the impugned order came to be passed.

8. Before embarking upon the rival submission it is necessary to advert to the relevant provisions.

“PIT Regulations, 1992

Regulation 2(c)(ii)

(c) “Connected person” means any person who—

...

(ii) occupies the position as an officer or an employee of the company or holds a position involving a professional or business relationship between himself and the company whether temporary or permanent and who may reasonably be expected to have an access to unpublished price sensitive information in relation to that company:

Explanation:— For the purpose of clause (c), the words “connected person” shall mean any person who is a connected person six months prior to an act of insider trading;

Regulation 3(i)

Prohibition on dealing, communicating or counselling on matters relating to insider trading.

3. No insider shall—

(i) either on his own behalf or on behalf of any other person, deal in securities of a company listed on any stock exchange when in possession of any unpublished price sensitive information;

(ii) communicate or counsel or procure directly or indirectly any unpublished price sensitive information to any person who while in possession of such unpublished price sensitive information shall not deal in securities:

3A. No company shall deal in the securities of another company or associate of that other company while in possession of any unpublished price sensitive information.

Violation of provisions relating to insider trading.

4. Any insider who deals in securities in contravention of the provisions of regulation 3 or 3A shall be guilty of insider trading

SEBI ACTSection 12A(d) & (e)

12A. No person shall directly or indirectly—

(d) engage in insider trading;

(e) deal in securities while in possession of material or non-public information or communicate such material or non-public information to any other person, in a manner which is in contravention of the provisions of

this Act or the rules or the regulations made thereunder;

9. *“Price sensitive information” has been defined in regulation 2(ha) and ‘unpublished’ in clauses (e) and (k) of regulation 2 of Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992. The said provisions are reproduced hereunder for facility of reference:*

“2. In these regulations, unless the context otherwise requires:-

(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;*
- (v) disposal of the whole or substantial part of the undertaking; and*
- (vi) significant changes in policies, plans or operations of the company;*
- (i)*
- (j)*
- (k) “unpublished” means information which is not published by the company or its agents and is not specific in nature. Explanation.- Speculative reports in*

print or electronic media shall not be considered as published information;

(l)”

10. Heard Mr. Somasekhar Sundaresan, Advocate assisted by Mr. Abishek Venkataraman, Mr. Pulkit Sukhramani and Ms. Struti Rajan, Advocates for the Appellant and Mr. Pradeep Sancheti, Senior Advocate assisted by Mr. Abhiraj Arora and Mr. Vivek Shah, Advocates for the Respondent.

11. Mr. Somasekhar Sundaresan, learned counsel for the appellant submits that considering the miniscule proportion of the effect of termination of the agreement on the total turnover of GIPL and even the fact that the Simplex had not published the information at any point of time the respondent SEBI ought to have concluded that the information was not that much material which would affect the price of GIPL. The information, in fact had not adversely affected the price of the share on the date of disclosure of the information. He further submits that an insider can be held guilty for insider trading only when he trades, on the basis of the information as provided by the provisions of Section 12A(d) and (c) of the SEBI Act as reproduced supra. It was further submitted that the Adjudicating Officer for the reasons best known to

him neglected the weighted average price of the shares as on the date of the disclosure of the information and considered the price as on 4th September, 2013 and, thus, calculated the probable loss at Rs.33 lakh and odd. He further submitted that the explanation given by the appellant would show that due to the dire need of infusion of funds under the master restructuring agreement, the appellant was constrained to sell the shares. These submissions, according to him are, supported by the fact and figures as detailed supra. Therefore, Mr. Somashekhar argued, as the appellant had not traded on the basis of the information the Adjudicating Officer ought to have absolved the appellant.

In support of the above submissions Mr. Somasekhar relied on the ratio of

1. This Tribunal's order dated 9.5.2008 in Appeal no.50 of 2007 in Rajiv B. Gandhi & Ors. vs. Securities and Exchange Board of India.
2. This Tribunal's order dated 18.11.2011 in Appeal No.207 of 2010 in Gujarat NRE Mineral Resources Ltd. vs. SEBI.

3. This Tribunal's order dated 31.1.2012 in Appeal No.209 of 2011 in Mrs. Chandrakala vs. The Adjudicating Officer, SEBI.

In all these cases, on facts this Tribunal had held that the appellants therein were able to show that they did not trade on the basis of the information.

The learned counsel also placed reliance on the following decisions:

- a) Supreme Court of United States order dated March 7, 1998 Basic Incorporated vs. Max L. Levinson (1988) SCC Online US 45.
- b) United States Court of Appeals for the Ninth Circuit order in the case of Miller v. Pezzani (1994) U.S. App. LEXIS 25471.

In these cases, on facts it was held that the information was not significant/material.

12. On the other hand, Mr. Pradeep Sancheti, learned senior counsel submitted that it is an admitted fact that the appellant was an insider being the Chairman and Managing Director of GIPL when its board had passed a resolution authorizing termination of the agreement. Holding the said information

with himself, the appellant had sold the shares and thereafter the information was disclosed to the stock exchanges. He drew attention of the Tribunal to the assessment made by the Adjudicating Officer on the impact of termination of agreement in the order book value of GIPL at 3.1% as detailed in para 5.12 of the impugned order. He submits that whether the price of shares actually decreased upon disclosure is not material. The determination of price by a market at a given day depends on number of facts, information, the trend in the segment etc. In the circumstances, supporting the reasons forwarded by the Adjudicating Officer he wanted that appeal be dismissed.

13. Upon hearing both the sides in our opinion the appeal deserves to be allowed for the following reasons:-

Reasons

1. In our view the information itself was not a price sensitive information. The record would show that GIPL had invested only Rs.4.9 crores in the Simplex project in the said financial year. It represented only 0.05% of the GIPL's order book value at the end of August, 013 and only 0.7% of its turnover for the said

financial year. Further due to the termination of the agreement a large project worth Rs.1648 returned back to GIPL while the smaller project of Rs.940 crore remained with Simplex. In a way it could have been a positive information to the shareholders. The Adjudicating Officer however has calculated the change in the order book value without assessing whether the change was positive or negative. Considering the minor proportion of the transaction to the turnover of GIPL, in our view the information cannot be termed as price sensitive information. The Simplex had not even disclosed the said information to the stock exchanges.

2. Further, even if it is assumed that the information was is a price sensitive information, still the appellant cannot be blamed of insider trading for the reasons that he did not trade “on the basis of the information”. The appellant was able to show his dire need to infuse fund in the entity under the master restructuring agreement to implement a CDR package as detailed supra. He was even required to sell his agricultural land and flat

details of which are already given hereinabove. In these circumstances he sold the shares. In the case of Rajiv B. Gandhi on fact this Tribunal held that the appellants therein were able to rebut the presumption that they traded on the basis of UPSI as they had a necessity to sell the shares. Similar is the case of Gujarat NRE Mineral Resources Ltd. and Mrs. Chandrakala decided by this Tribunal.

3. The appellant had contended that respondent SEBI had deliberately taken the closing price of September, 2013 when the price were around 30% lower than the closing price as on September 3, 2013. By adding this extra day SEBI had widened the gap between the selling price and the price found on 4th September, 2013. In fact the share closing price rose on September 3, 2013 i.e. on the date of disclosure of the information. However, according to the appellant, respondent SEBI only inorder to show that the appellant had avoided the probable loss calculated the figures based on the last traded price of September 4, 2013.

4. It is already recorded that the information was disclosed to the BSE and NSE on September 3, 2012 at 1.05 p.m. and 2.40 p.m. respectively i.e. much before the closure of the market. There is no reason forwarded in the impugned order as to why the last traded price of September 3, 2013 is not taken into consideration by respondent SEBI. For all these reasons in our view the order cannot be sustained.

5. The appeal is hereby allowed. The impugned order is hereby set aside. SEBI shall take steps for refund of the amount already deposited by the appellant.

Sd/-
Justice Tarun Agarwala
Presiding Officer

Sd/-
Justice M.T. Joshi
Judicial Member

8.11.2019

Prepared and compared by
RHN