
(2020) 09 SEBI CK 0079

In the Securities Appellate Tribunal Mumbai

Case No : Miscellaneous Application No. 278 Of 2020, Appeal No. 269 Of 2020

Affluence Fincon Services Pvt. Ltd. And Others

APPELLANT

Vs

Securities And Exchange Board Of India

RESPONDENT

Date of Decision : 07-09-2020

Acts Referred:

Code Of Civil Procedure, 1908 — Order 38 Rule 5, Order 38 Rule 6, Order 38 Rule 7, Order 38 Rule 8, Order 38 Rule 9, Order 38 Rule 10, Order 38 Rule 11, Order 38 Rule 12, Order 38 Rule 13
Securities And Exchange Board Of India Act, 1992 — Section 11, 11(2), 11A, 11B, 11B(2), 11(4)(d), 15G

Citation : (2020) 09 SEBI CK 0079

Hon'ble Judges : Tarun Agarwala, Presiding Officer; M. T. Joshi, J

Bench : Division Bench

Advocate : Pesi Modi, Ravi Vijay Ramaiya, Kunal Katariya, Dahebrao Buktare, Rafique A. Dada, Anubhav Ghosh, Ravishekhar Pandey

Final Decision : Disposed Of

Judgement

Tarun Agarwala, Presiding Officer

1. The Appellants have filed the present appeal against an ex-parte interim order dated 24th August, 2020 passed by the Whole Time Member

directing the Appellant to deposit a sum of Rs.2,60,93,085.85 in an escrow account in a Nationalised Bank towards illegal gains made by them by using

unpublished price sensitive information. The Whole Time Member further directed the Banks to freeze all debits to the extent of the above amount till

such time the escrow account is opened and the amount is transferred. The Whole Time Member also directed the depositories to suspend all debits

and, therefore, restrained the Appellants from disposing or alienating any assets or properties till such time the amount is credited in the escrow

account. The Whole Time Member also directed the appellants to provide details of all the bank accounts, demat account, holdings in shares and

securities and details of companies in which the Appellants have a substantial or controlling interest.

2. By the impugned order, the Appellants were further directed to show cause as to why the illegal gains should not be disgorged and an order under

Section 11B(2), 11A and 15G of the Securities and Exchange Board of India Act, 1992 read with Securities and Exchange Board of India (Prohibition

of Insider Trading) Regulations, 2015 (hereinafter referred to as "PIT Regulations") should not be passed.

3. The aforesaid ex-parte directions have been passed for violation of the PIT Regulations, 2015 on the ground that the Appellants had executed

trades in violation of the PIT Regulations and that the Appellants had participated in the preferential allotment of shares in Infibeam Avenues Ltd. (

hereinafter referred to as "the Company") and was in possession of a price sensitive Information namely, the news relating to the stock split of

the shares of the Company. The Whole Time Member further found the Appellants to be connected persons with the promoters of Infibeam

Company.

4. We have heard Mr. Pesi Modi, Senior Advocate assisted by Mr. Ravi Vijay Ramaiya, Chartered Accountant, Mr. Kunal Katariya and Mr.

Dahebrao Buktare, Advocates for the Appellants and Mr. Rafique A. Dada, Senior Advocate assisted by Mr. Anubhav Ghosh and Mr. Ravishekhar

Pandey, Advocates for the Respondent.

5. The contention of the learned Senior Counsel for the Appellant is that there was no urgency in passing an ex-parte order with regard to the trades

done by the Appellants between 3rd April, 2017 to 22nd June, 2017. Further, the summons were served upon the Appellants in February, 2019 based

on which the Appellants appeared and filed their response within 7 days. Thereafter, the second summons was sent after 9 months on 27th

November, 2019 pursuant to which the Appellants filed their replies and provided the necessary information and documents on 4th December, 2019.

The Respondent thereafter waited for another 4 months and directed the Appellants to appear in person in March, 2020 when the Appellants again

appeared on 11th March, 2020 and provided the documents asked by the

Respondent. It was contended that even after the filing of the documents in March, 2020, it took the Respondent another 4 months to pass the impugned order. The time lag shows that there was no urgency on the part of the Respondent and, consequently, the ex-parte interim order is wholly illegal and violative of the principles of natural justice.

6. The learned counsel urged that had an opportunity of hearing been provided the relevant facts would have been intimated which could have been considered by the Respondent. It was contended that the Appellants are not an insider nor were privy to any price sensitive information and, therefore, there was no emergent need or measure to be adopted by the Respondent to impound the monies at this stage when the same could be done after adjudication and after providing an opportunity of hearing.

7. On the other hand, the learned Senior Counsel for the Respondent contended that the impugned order is just and proper in the circumstances of the case in order to protect the securities market and the investors. It was urged that on account of a prima facie finding it was essential to impound the illegal gains in order to protect the securities market and to ensure that the investors are not put to any loss. It was contended that if a reply is filed the matter would be decided within a short period. The learned senior counsel contended that there is no laches in issuing the impugned order and the same was passed at the earliest opportune moment. It was urged that pursuant to a report of NSE dated 22.5.18, the Adjudicating Officer was appointed on 31.01.19 and the order was passed in August 2020. It was also urged that the decision of this Tribunal in the matter of Dr. Malhoutra is not applicable and that the principles of O38 R5 to 13 of CPC are not applicable and that the respondent has the powers to pass an impounding order under Sec. 11(4)(d) of the SEBI Act.

8. Having heard the learned counsel for the parties at some length, we are of the opinion that the controversy involved in the present case is squarely covered by a decision of this Tribunal in Appeal no.80 of 2019 North End Foods Marketing Pvt. Ltd. vs. SEBI decided on 1st March, 2019 and in Appeal no.145 of 2020 Dr. Udayant Malhoutra vs. SEBI decided on 27th June, 2020.

9. In North End Foods Marketing Pvt. Ltd. (supra) this Tribunal held as under:-

â??13. Having heard the learned senior counsel at length, we find that it is no

more res integra that SEBI has power to pass ex-parte interim orders, pending investigation, which power flows from Section 11 and 11B of the SEBI Act. A plain reading of Section 11 and 11B shows that SEBI has to protect the interests of the investors in securities and to regulate the securities market by such measures as it thinks fit and such measures may be for any or all of the matters provided in sub-section 2 of Section 11 of the Act. SEBI has power to pass interim orders and such interim orders can also be passed exparte. Interim orders are passed in order to prevent further possible mischief of tampering with the securities market. If during a preliminary enquiry, it is found prima-facie, that the person is indulging in manipulation of the securities market, it would be obligatory for SEBI to pass an interim order or for that matter an ex- parte interim order in order to safeguard the interests of the investors and to maintain the integrity of the market. Normally, while passing an interim order, the principles of natural justice has to be adhered to, namely, that an opportunity of hearing is required to be given. Procedural fairness embodying natural justice is to be applied whenever action is taken affecting the rights of the parties. At times, an opportunity of hearing may not be pre-decisional and may necessarily have to be post-decisional especially where the act to be prevented is imminent or where action to be taken brooks no delay. Thus, predecisional hearing is not always necessary when exparte ad-interim orders are made pending investigation or enquiry unless provided by the statute. In such cases, rules of natural justice would be satisfied, if the affected party is given a postdecisional hearing.

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

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

the regulatory agency must move quickly in order to curb further mischief and to take action immediately in order to instill and restore confidence in the capital market.â??

10. In *Dr. Udayant Malhoutra* (supra) this Tribunal held:

â??9â?|â?|â?|.In our opinion, the reasoning given by the WTM justifying its action to pass an ex parte interim order is patently erroneous and cannot

be sustained. On one hand, we find that only a show cause notice has been issued and the matter has not been adjudicated on merits but the appellant,

on the other hand, has been directed to deposit the possible disgorgement amount in advance. We are of the opinion that no amount towards

disgorgement can be directed to be deposited in advance unless it is adjudicated and quantified unless there is some evidence to show and justify the

action taken. An order of the like nature can only be passed during the pendency of the proceedings and such orders cannot be passed at the time of

initiation of the proceedings. Further, no order of the like nature can be passed without recording its satisfaction and cannot be based on the basis of

possibility.â??

10. In this regard, we may refer to the provisions of Order 38 Rule 5 to 13 of the Code of Civil Procedure, 1908 which lays down the parameters for

attachment before judgment. The said principles are fully applicable in the instant case. The object of attachment before judgment is to prevent any

attempt on the part of the appellant to defeat the realization of the final order on disgorgement that may be passed against the appellant. But this

principle applies only when it is found that the appellant is about to dispose of the property in question. Further, this principle can only be applied when

there is evidence to show that the appellant has acted, or is about to act with the intent to obstruct or delay the adjudication of the proceedings that

may be passed against him. We are of the opinion that there is no finding that the appellant will remove the property or will dispose of all the property

or that he would obstruct the proceedings or that he would delay the proceedings pursuant to the show cause notice. In the absence of any such

finding, the ex-parte interim order cannot be sustained especially when the trades were of 2016 and from 2016 till the date of the impugned order there

is no evidence to show that the appellant was trying to divert the alleged notional gain/loss.

11. As held in North End Foods Marketing Pvt. Ltd. (supra) there is no real urgency in the matter to pass an ex-parte interim order especially during the pandemic period. There is no doubt that SEBI has the power to pass an interim order and that in extreme urgent cases SEBI can pass an ex-parte interim order but such powers can only be exercised sparingly and only in extreme urgent matters. In the instant case, we do not find any case of extreme urgency which warranted the respondent to pass an ex-parte interim order only on arriving at the prima-facie case that the appellant was an insider as defined in the PIT Regulations without considering the balance of convenience or irreparable injury.â??

11. In the instant case, we do not find that the matter is one of extreme urgency which requires passing of an ex-parte interim order. We find that the trades were done in the year 2017. Nothing has come on record as to when the Respondent became aware of these transactions. However, we find that the proceedings were initiated in February, 2019 which continued till 11th March, 2020 and, thereafter, it took the Respondents another 4 months to pass the impugned order. This by itself indicates that there was no extreme urgency in passing the impugned order. We, therefore, are of the opinion that merely by arriving at a prima facie case that the Appellants were an insider as defined under the PIT Regulations, 2015 cannot be made the sole basis for passing the impugned order without considering the balance of convenience or irreparable injury. We further find that the only reason given for passing the interim order has been provided in para 34 of the impugned order namely that the illegal gains should be impounded otherwise it would result in irreparable injury to the interest of the securities market and investors. In our view, illegal gains are yet to be adjudicated and, therefore, in the absence of adjudication it will not be proper to impound the so called illegal gains especially when there is no assertion that the Appellants are disposing of the property in question or they are obstructing or delaying the proceedings.

13. In the light of the aforesaid, the impugned order in so far as it relates to the Appellants cannot be sustained and is quashed at the admission stage itself without calling for a reply except the show cause notice. The Appeal is allowed and the Misc. Application No.278 of 2020 and 269 of 2020 are accordingly disposed of. We further direct the Appellants to file a reply to the show cause notice on or before 7th October, 2020. The Respondent will

thereafter decide the matter finally after giving an opportunity of hearing to the Appellants either through physical hearing or through video conference

within 6 months thereafter. During the interim period, in order to safe guard the interest of the investors in the securities market and also to protect the

integrity of the securities market, we direct the Appellants to provide a fixed deposit of Rs2,60,93,085.85 in the name of SEBI for a period of one year,

within two weeks from today. This fixed deposit receipt will be kept in the safe custody with the respondent and will not be encashed till three months

after the passing of the final order by the respondent. The respondent will supply the documents specified in the impugned order within four days from

today. In the circumstances of the case, parties shall bear their own costs.

14. 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.