**(2020) 05 SEBI CK 0001**

**In the Securities Appellate Tribunal Mumbai**

**Case No :** Miscellaneous Application No. 136, 137 Of 2020, Appeal (L) No.169 Of 2020

Amalendu Mukherjee APPELLANT

Vs

Securities And Exchange Board Of India RESPONDENT

**Date of Decision :** 27-05-2020

**Acts Referred:**

Securities And Exchange Board Of India (Prohibition Of Insider Trading) Regulations, 1992 — Regulation 2(ha)
Securities And Exchange Board Of India (Prohibition Of Insider Trading) Regulations, 2015 — Regulation 2(1)(g)
Insolvency And Bankruptcy Code, 2016 — Section 7
Companies Act, 2013 — Section 2(54), 2(60)

**Citation :** (2020) 05 SEBI CK 0001

**Hon'ble Judges :** Tarun Agarwala, Presiding Officer;Dr. C. K. G. Nair, Member;M. T. Joshi, J

**Bench :** Full Bench

**Advocate :** Dinesh Kumar Sabharwal, Gaurav Joshi, Abhiraj Arora, Vivek Shah, Pradeep Kumar

**Final Decision :** Disposed Of

# Judgement

Tarun Agarwala, Presiding Officer

1. Considering the facts and circumstances pointed out in the application, the Urgency Application No.136 of 2020 is allowed and disposed off.

2. The present appeal has been filed against an impounding order of the Whole Time Member (â??WTMâ?? for short) of Securities and Exchange

Board of India (â??SEBIâ?? for short) dated 17/03/2020 directing the appellant and a public company, namely, Fourth Dimension Solutions Limited

(FDSL) to deposit a sum of Rs.2,30,34,010/- in an escrow account. Pursuant to the said order, the bank accounts and the demat accounts of the appellant was seized on the next day.

3. The facts leading to the filing of the present appeal is, that FDSL was incorporated as a public company in which the appellant has disclosed in his appeal that he was a director, but at the present moment, is a suspended director.

4. It is alleged that SEBI conducted an investigation in the scrip of Ricoh India Limited (â??Ricohâ?? for short) to ascertain whether or not suspected entities had traded in the scrip of Ricoh during the period 14/08/2014 to 17/11/2015. In September 2015, the statutory auditors of Ricoh found certain transactions between Ricoh and its vendors to be suspicious and, accordingly appointed PwC to submit a forensic audit report. In the meanwhile, Ricoh-company made a corporate announcement on 22/4/2016 intimating the public that the financial statements of Ricoh were not fair or true. PwC submitted a forensic audit report on 17/11/2016 and found, amongst other things, that FDSL had traded in the shares of Ricoh and liquidated its shares on 20/11/2015 when the statutory auditors found the transactions by the company through its vendors to be suspicious.

5. Accordingly, SBEI issued an ex-parte order on February 12, 2018 restraining the appellant from accessing the securities market. This order was confirmed on 16/8/2018. Subsequently another forensic audit report was submitted by Pipara & Co. on 25/10/2019 indicating the involvement of the appellant in the fictitious transactions being conducted by Ricoh with its vendors and also with regard to the sale and purchase of shares of Ricoh by the appellant and his company. Accordingly, an ex-parte impounding order dated 17/3/2020 was passed against the FDSL and the appellant directing them to deposit a sum of Rs.2,30,34,010/- in an escrow account pending final orders. By the same order, the WTM directed the appellant to show-cause as to why an order of disgorgement should not be passed.

6. It transpires that WTM subsequent to issuing the impugned order came to know that the company FDSL was under insolvency under the Insolvency and Bankruptcy Code and that an Interim Resolution Professional was already appointed by National Company Law Tribunal under Section 7 of the Insolvency and Bankruptcy Code, 2016 on 25/7/2019. Accordingly, an addendum order was issued by the WTM on 30/3/2020 keeping its order in abeyance against the company during the moratorium period.

7. The appellant being aggrieved by the impugned order dated 17/3/2020 has

 

filed the present appeal.

8. We have heard Mr. Dinesh Kumar Sabharwal, learned Counsel for the appellant and Mr. Gaurav Joshi, Sr. Advocate assisted by Mr. Vivek Shah

and Abhiraj Arora Advocates for the respondent.

9. The learned Counsel for the appellant submitted that the impugned order is an ex-parte order which has been passed in violation of the principles of

natural justice. It was stated that based on the aforesaid order, the demat account and all the bank accounts of the appellant have been seized and

which is in gross violation of the principles of natural justice. It was urged that the appellant is not an insider in terms of 2(1)(g) of the SEBI

(Prohibition of Insider Trading) Regulations, 2015 nor was he a privy to any unpublished price sensitive information (UPSI) as defined under regulation

2(ha) of the SEBI (Prohibition of Insider Trading) Regulations, 1992. It was also urged that the impugned order is not based on any evidence and is

only based on suspicion and, on such suspicion, such kind of impugned order could not be passed. It was also urged that trading of the shares of

Ricoh-company was being done by FDSL through itâ??s demat account and the appellant was only authorized by the Board of Directors to trade in

the shares of Ricoh. It was contended that the gains, if any, in the trading of the shares of Ricoh was made by FDSL and there is no evidence to show

that the appellant was a beneficiary and, therefore, the order of impounding is illegal. It was also contended that earlier to the forensic report of Pipara

& Co., there was another forensic report by C.S. Nanda & Co. which report has not been considered for reasons best known to the respondent. It

was thus contended that freezing of the bank accounts and demat account of the appellant was wholly unjustified especially during the pandemic

period and therefore prayed that an interim order should be passed directing the respondent to defreeze the bank accounts of the appellant. In support

of his submissions, the learned Counsel for the appellant placed reliance on a decision in Hindustan Lever Ltd vs Sebi, (1998)18 SCL 311 (AA),

Rakesh Agarwal vs Sebi in Appeal No.33 of 2001 and Samir C Arora vs Sebi in Appeal No.83 of 2004 to buttress his submission that no ex-parte

order should be passed based on suspicion.

10. On the other hand, Shri Gaurav Joshi, learned Senior Counsel for SEBI contended that the impugned order is also a show-cause notice and, till

 

date, the appellant has not filed any reply to the show cause notice. It was also contended that the ex-parte interim order dated 12/2/2018 was

challenged before SAT and the appeal was dismissed. The confirmatory order was never challenged. The learned Senior Counsel contended that the

forensic report of Pipara & Co. has not been filed and if an opportunity is given to the respondent, such report will be filed which will show that the

appellant was the lynchpin and had his hands in every transaction/deal in Ricoh and that he was aware of the false financial statements which were

being portrayed by the said company through its audited balance sheet. It was also stated that the appellant had knowledge of the financial statements

of Ricoh and traded in those shares when the price of the same was rising and offloaded its shares when the appellant realized that the statutory

auditors of Ricoh-company were finding certain transactions with its vendors to be suspicious. It was contended that the appellant was an

â??â??insiderâ?? and had unpublished price sensitive information which he utilized for ulterior purposes and unlawful gains. It was also contended

that no case was made out for grant of an interim order and that the appellant should file a reply to the show-cause notice which will be decided by

the WTM in accordance with law after giving an opportunity of hearing.

11. In rejoinder, Shri Sabharwal, learned Counsel for the appellant submitted that no fraud has been committed by the appellant and that Economic

Offences Wing (EOW) also submitted a report indicating lack of evidence of fraud against the appellant. The learned Counsel urged that it was a fit

case for grant of an interim order.

12. Having heard the learned counsel for the parties at some length through video conferencing, we found upon a query raised by us that the appellant

was a major promoter in the public company FDSL to the extent of 54% of the total shareholding. The learned counsel for the appellant further

informed that the appellant was also the Managing Director before he was suspended. In our opinion, these are crucial facts which were not disclosed

by the appellant in his appeal for reasons best known to the appellant.

13. In the light of the fact that the appellant was the Managing Director in FDSL and had 54% shares coupled with the prima facie finding that the

appellant was involved in the transactions of Ricoh and was servicing the insiders of Ricoh (which fact has not been disputed in the memo of appeal) and had inside information of the transactions and wrong financial statements being projected by Ricoh coupled futher with the fact that the forensic

report of Pipara & Co. having not been filed, we are of the opinion that at this stage no case is made out for grant of an interim relief. Being a

Managing Director, the appellant is entrusted with substantial powers of management of the affairs of the company and therefore responsible for its

act as provided under Sec.2(54) &2(60) of the Companies Act 2013. The fact as to whether the appellant was an insider or was in possession of

UPSI are questions of fact which should be raised by the appellant before the WTM. At this stage it is not appropriate for this Tribunal to decide such

questions in the absence of the forensic report and other relevant documents.

14. We also find that by the impugned order the appellant had been directed to show cause and till date no reply has been filed. We are of the opinion

that the WTM is empowered under the SEBI Act and the Regulations to pass an ex-parte order in order to protect the interests of securities market

and the investors. If such impounding order is not passed, it may result in defeating the ultimate direction of disgorgement if any, as there would be

chances of such monies being dissipated by the appellant. However, we are of the opinion that such order cannot be allowed to continue for an

indefinite period and the matter has to be concluded at the earliest.

14. We accordingly direct the appellant to file a reply to the impugned order-cum-show cause notice dated 17/3/2020 on or before 15/6/2020. If such a

reply is filed, the WTM will decide the matter finally within three weeks thereafter after giving an opportunity of hearing to the appellant either through

physical hearing or through video conferencing as per the prevailing situation due to the pandemic. It is made clear that any observation made by are

only tentative in nature and cannot be utilized by any party.

15. In view of the aforesaid, we are not inclined to grant any interim order at this stage and the stay application is accordingly disposed of. Let the

appeal be listed for admission on 0707/2020 by which time the defects in the appeal should be removed and the court fees should be paid.

16. 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.