(2021) 06 SEBI CK 0180

In the Securities Appellate Tribunal Mumbai

Case No : Appeal No. 580 Of 2019

Nirmal N. Kotecha APPELLANT

Vs

Securities And Exchange Board Of India RESPONDENT

Date of Decision : 08-06-2021

Acts Referred:

Securities And Exchange Board Of India (Prohibition Of Fraudulent And Unfair Trade Practices Relating To Securities Market) Regulations, 2003 — Regulation 3, 4, 4(2)(d)
Securities And Exchange Board Of. India (Substantial Acquisition Of Shares And Takeovers) Regulations, 1997 — Regulation 7(1)
Securities And Exchange Board Of India (Prohibition Of Insider Trading) Regulations, 1992 — Regulation 13(1)
Securities And Exchange Board Of India Act, 1992 — Section 11, 11B, 11C, 15A, 15B, 15C, 15D, 15E, 15F, 15G, 15H, 15HA, 15HB, 15I, 15I(3), 15T
Code Of Civil Procedure, 1908 — Section 11

Citation : (2021) 06 SEBI CK 0180

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

Bench : Division Bench

Advocate : Gaurav Joshi, Rishika Harish, Aditya Bhansali, Nirali Mehta, Mustafa Doctor, Abhiraj Arora, Rashi Dalmia, Karthik Narayan

Final Decision : Allowed

Judgement

Tarun Agarwala, Presiding Officer

1. The present appeal has been filed against the order dated September 18, 2019 passed by the Whole Time Member (â??WTMâ? for convenience)

of the Securities and Exchange Board of India (â??SEBIâ? for convenience) holding the appellant guilty of violating Regulation 3 and 4 of the SEBI

(Prohibition of Fraudulent and Unfair Trade Practice relating to Securities Market) Regulations, 2003 (â??PFUTP Regulationsâ? for short) as well as

Regulation 7(1) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (â??SAST Regulationsâ? for convenience) and

Regulation 13 (1) of SEBI (Prohibition of Insider Trading) Regulations, 1992 (â?? PITâ? for convenience) in the scrip of Usher Agro Limited

(â??UAL or Companyâ? for convenience). The WTM accordingly debarred the appellant from buying, selling or otherwise dealing in the securities

market directly or indirectly for a period of two years.

2. SEBI witnessed a significant rise in the price of the scrip of the Company and accordingly conducted an investigation for the period August 20,

2008 to December 31, 2008 to examine possible violation of the SEBI Act and its Regulations.

3. Based on the investigation, a show cause notice dated May 18, 2015 was issued against the appellant and 12 other entities alleging that the appellant

along with other Group-1 entities had indulged in trading amongst themselves by way of executing self-trades resulting in no change in the beneficial

ownership and thereby created artificial volume in the scrip of the company which was violative of regulations 3 and 4 of the PFUTP Regulations.

4. It was alleged in the show cause notice that the group purchased 81,13,427 shares accounting for 15.20% of the market volume and sold 80,73,869

shares accounting for 15.13% of the market volume. In so far as the appellant is concerned, he traded on two days i.e. on October 10, 2008 and

December 15, 2008 totaling 85,886 shares which comes to .016% of the total traded quantity which was 5,33,62,546 shares. The show cause notice

further alleged that as a result of the trading made by the appellant it increased his shareholding from 4.70% to 5.19% which triggered compliance of

the SAST Regulations and PIT Regulations. Since necessary disclosures were not made the appellant violated Regulation 7(1) of the SAST

Regulations read with Regulation 13(1) of the PIT Regulations. The WTM after considering the replies and after considering the material evidence on

record came to the conclusion that the self-trades carried out by the appellant was a fraud and amounted to a market manipulation violative of

regulations 3 and 4 of the PFUTP Regulations and further held that the appellant had violated disclosure obligations under the SAST Regulations and

PIT Regulations. The WTM did not believe the contention of the appellant that the broker Indiabulls was charging a higher rate of interest while

another broker JM Financial was offering a lower interest rate and therefore in order to set off the credit and debit balances and reduce the payable interest component for the funds utilized from the funding account, the appellant sold the shares from his Indiabulls account and bought the same

through the JM Financial account. The WTM found that the self-trades were made within a span of four minutes prior to the close of the trading

hours of the day and, therefore, the self-trades were not an inadvertent error but were strategically done to manipulate the market. In this regard, the

WTM also placed reliance on a Policy of SEBI dated May 16, 2017 wherein it had been stated that the intention is sine qua non for establishing

manipulation in case of self-trades and that accidental/ unintentional self-trades are not covered under the Regulations. The WTM accordingly

debarred the appellant from buying, selling or otherwise dealing in the securities market directly or indirectly for a period of two years.

5. We have heard Shri Gaurav Joshi, the learned senior counsel assisted by Ms. Rishika Harish, Shri. Aditya Bhansali, advocates and Ms. Nirali

Mehta, PCS for the appellant and Shri Mustafa Doctor, the learned senior counsel assisted by Shri Abhiraj Arora, Ms. Rashi Dalmia and Shri Karthik

Narayan, advocates for the respondent.

6. It was urged by the learned senior counsel for the appellant that as per the Policy of SEBI dated May 16, 2017 mere occurrence of self-trades

should not be considered per se illegal in the absence of any other additional evidence to prove manipulation or intent to defraud which in the instant

case was missing and therefore the appellant could not be held guilty under Regulation 4(2)(d) of the PFUTP Regulations. It was also urged that

against the same issue, i.e., on the same trades, separate proceedings were initiated by the Adjudicating Officer (â??AOâ? for convenience) under

Section 15I, and pursuant to the show cause notice dated April 06, 2015, the AO after considering the Policy dated May 16, 2017 and the evidence on

the record, came to the conclusion that there was no manipulative intent on the part of the appellant and exonerated the appellant and quashed the

proceedings. It was urged that the said order has become final and therefore it was binding on SEBI and was no longer open for SEBI to take a

different stand on the same issue which has now been conclusively decided inter se between the same parties. In support of this contention the

appellant has relied on the decision of the Supreme Court of India in Hope Plantations Ltd. vs. Taluk Land Board Peermade & Anr. (1999) 5 SCC

590 which according to the appellants squarely covers the issue.

7. On the other hand, the learned senior counsel for the respondent contended that the Policy of SEBI dated May 16, 2017 was apparent and that the intention behind the same was to exonerate accidental/ unintentional self-trades. In the instant case, the trading pattern of the appellant was clear, namely, that his intention was to transfer the shares from one account to another account and, for this purpose, the appellant used the Stock Exchange platform which was not permissible. It was contended that once this intention was established the question of exonerating the appellant for self-trades thus did not arise nor did the Policy allowed such intentional trading to be exonerated. It was contended that these self-trades were not an inadvertent error. In this regard, the learned counsel has placed reliance on a decision of this Tribunal in Crosseas Capital Services Pvt. Ltd. vs. SEBI (Appeal No. 330 of 2017 decided on 26.02.2019) wherein this Policy was considered and this Tribunal held that it was essential to find out the intention for manipulation. Reliance was also placed on another decision of this Tribunal in Nirmal N. Kotecha vs. SEBI (Appeal No. 261 of 2018 decided on March 02, 2020) between the appellant and the respondent wherein this Tribunal had the occasion to deal with a similar explanation offered by the appellant with regard to shifting of his position from one broker to another broker which explanation was repelled by this Tribunal. The respondent further contended that the proceedings initiated by the WTM under Section 11B is independent and distinct from adjudicating proceedings which is initiated under Section 15I of the SEBI Act. It was contended that the conclusions arrived at by the AO are not binding upon the WTM. It was also contended that the findings given by the AO based on the Policy was incorrect and that the reasoning given by the WTM is correct.

8. Having heard the learned senior counsel for the parties, we are of the opinion that it is not necessary to go into the question as to whether the self-trades executed by the appellant is miniscule compared with the total trading volume of the scrips or that the self-trades were unintentional or inadvertent nor it is necessary for us to go into the question as to whether the Policy dated May 16, 2017 is applicable in favour of the appellant or not in as much as we are of the opinion that the controversy can be decided on the following issue.

9. No doubt, the provisions of Sections 11B and 15I are different and distinct. The powers exercised by the Board under Chapter IV under Sections

11 and 11B are powers prescribed under the Act. The directions issued under Section 11B after due investigation under Section 11C are remedial in

nature. On the other hand, under Section 15I under Chapter VI-A, a mechanism has been provided to an AO to impose penalties for various violations

if committed under the Act or Regulations framed therein.

10. Directions under Section 11B of the Act can be issued if the Board is satisfied that it is necessary in the interest of the investors or orderly

development of the securities market or where the affairs are being conducted in a manner which is detrimental to the interests of the investors or the

securities market. Such directions so issued are remedial in nature. On the other hand, Section 15I of the Act gives power to the AO to penalize a

person under Sections 15A, 15B, 15C, 15D, 15E, 15F, 15G, 15H, 15HA and 15HB of the Act in the event the person contravenes the provisions of the

Act and the Regulations framed therein.

11. There is no doubt that under the Act separate proceedings can be initiated, one under Section 11, 11B and the other under Section 15I of the Act.

In the instant case, the AO on the same facts and on the same trades considered the same issue and after considering the Policy dated May 16, 2017

held that the volume of transaction done by the appellant was miniscule as compared to the total trading and therefore there cannot be any

manipulative intent. Further, the self-trades does not create any misleading appearance of trading in the securities market nor was there any fraudulent

intention behind the execution of self-trades and consequently there was no violation of Regulations 3 and 4 of the PFUTP Regulations.

12. The question which arises for consideration is, that once an AO after making an inquiry and after adjudicating the matter quashes the proceedings,

is it open to SEBI to adjudicate the same issue on the same facts under Section 11-B and contend that the order of the AO order was erroneous and

therefore not binding on the WTM who is exercising the powers of the Board as a delegatee.

13. In our opinion, once an issue, on the same facts and between the same parties has been determined, it gives rise to an issue estoppel. It operates

not only in the same proceedings but also in subsequent proceedings.

14. In Hope Plantations Ltd. (Supra) the Supreme Court held that principles of estoppel and res judicata are based on public policy and justice and that

the doctrine of res judicata is often treated as a branch of law of estoppel. The Supreme Court held:-

â??Rule of res judicata prevents the parties to a judicial determination from litigating the same question over again even though the

determination may even be demonstratedly wrong. When the proceedings have attained finality, parties are bound by the judgment and are

estopped from questioning it. They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for

decision in the earlier litigation. These two aspects are â??cause of action estoppelâ? and â??issue estoppelâ?. These two terms are of

common law origin. Again once an issue has been finally determined, parties cannot subsequently in the same suit advance arguments or

adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is to approach the higher forum if

available. The determination of the issue between the parties gives rise to, as noted above, an issue estoppel. It operates in any subsequent

proceedings in the same suit in which the issue had been determined. It also operates in subsequent suits between the same parties in which

the same issue arises. Section 11 of the Code of Civil Procedure contains provisions of res judicata but these are not exhaustive of the

general doctrine of res judicata. Legal principles of estoppel and res judicata are equally applicable in proceedings before administrative

authorities as they are based on public policy and justice.â??

15. In Gopal Prasad Sinha vs. State of Bihar (1970) 2 SCC 905, the Supreme Court held that the basic principle underlying the rule of issue estoppel is

that the same issue of fact and law must have been determined in the previous litigation.

16. Thus, an estoppel which has come to be known as â??issue estoppelâ? may arise where a plea of res judicata could not be established because

the cause of action was not the same. In order to apply the doctrine of res judicata it is an essential requirement that the actual issues in the two

proceedings are identical.

17. In this regard the question which arises further is, whether it was the same

issue of fact which was determined in the earlier case, namely, the

proceedings before the AO, and our answer is, yes. This finding is based on a perusal of the order of the AO in which the same transactions was

considered on the same facts as well as the Policy of SEBI. Further, the violation of the provision of the Act was also the same and the same law was

also taken into taken consideration by the AO. Further, the same facts and law considered by the AO is not disputed by the respondent.

18. In the light of the aforesaid, when the earlier proceedings is identical on facts and law with the present proceedings and the subject matter/ issue

involved is the same, in such a case, we are of the opinion that the bar is absolute in relation to all points decided. The principle of issue estoppel is

fully applicable in the instant case.

19. There is yet another aspect and, in this regard, the provisions of Section 15I is extracted hereunder:-

â??15-I. Power to adjudicate.

(1) For the purpose of adjudging under sections 15A, 15B, 15C, 15D, 15E, 15F, 15G, 15H, 15HA and 15HB, the Board shall appoint any

officer not below the rank of a Division Chief to be an adjudicating officer for holding an inquiry in the prescribed manner after giving

any person concerned a reasonable opportunity of being heard for the purpose of imposing any penalty.

(2) While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted

with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer,

may be useful for or relevant to the subject matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply

with the provisions of any of the sections specified in sub-section (1), he may impose such penalty as he thinks fit in accordance with the

provisions of any of those sections.

(3) The Board may call for and examine the record of any proceedings under this section and if it considers that the order passed by the

adjudicating officer is erroneous to the extent it is not in the interests of the securities market, it may, after making or causing to be made

such inquiry as it deems necessary, pass an order enhancing the quantum of penalty, if the circumstances of the case so justify:

Provided that no such order shall be passed unless the person concerned has been given an opportunity of being heard in the matter:

Provided further that nothing contained in this sub-section shall be applicable after an expiry of a period of three months from the date of

the order passed by the adjudicating officer or disposal of the appeal under section 15T, whichever is earlier.â??

20. A perusal of sub-clause (3) of Section 15-I gives powers to the Board to call for and re-examine the record of the proceedings before the AO and,

if the Board considers that the order is erroneous and is not in the interest of the securities market it may pass further order after making an inquiry.

Thus if the Board was satisfied that the order of the AO was not in the interests of the investors or orderly development of the securities market or

was detrimental to the interests of the investors of securities market, the order of the AO could have been revised but having not done so, the said

order becomes binding upon SEBI and it was no longer open for the respondent to take a different view in proceedings under Section 11-B of the Act.

We are of the opinion, that a consistent view is required to be taken by SEBI for the purpose of orderly development of the securities market and

therefore the quasi judicial bodies are required to maintain a discipline and ensure that divergent opinions on the same issue are not taken.. If the order

of the AO was incorrect it could have been reviewed under sub-clause (3) of Section 15-I or could have been challenged in a higher forum if

permissible in law but it was not open to another authority of SEBI to take a different view on the same issue based on the same facts and law and

between the same parties.

21. We are further of the opinion, that powers under Section 11B of the SEBI Act ought not to have been exercised in the instant case which related

to execution of self-trades and which was alleged to be violative of regulations 3 and 4 of the PFUTP Regulations and non-disclosure of the creeping

acquisition of shares under regulation 7(1) of the SAST Regulations read with Regulation 13(1) of the PIT Regulations and the same could have been

easily dealt with in proceedings under Section 15-I

22. For the reasons stated aforesaid, the impugned order cannot be sustained and is quashed. The appeal is allowed. Even though the appellant has

admittedly violated the provisions of Regulation 7(1) of the SAST Regulations read with Regulation 13(1) of the PIT Regulations for not making

disclosures, appropriate penalty could have been imposed but since the appellant has already underwent debarment for more than a year, we are of

the opinion that no further penalties could be imposed for the said violation. In the circumstances of the case, parties shall bear their own costs.

23. 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.