(2022) 04 SEBI CK 0021

In the Securities Appellate Tribunal Mumbai

Case No : Appeal No. 59 Of 2020, 473 Of 2021

Pia Johnson APPELLANT

Vs

Securities And Exchange Board Of India RESPONDENT

Date of Decision : 08-04-2022

Acts Referred:

Securities And Exchange Board Of India (Prohibition Of Insider Trading) Regulations, 2015 — Regulation 2(1)(d), 2(1)(g), 3, 3(3), 4(1), 5
Companies Act, 2013 — Section 186

Citation : (2022) 04 SEBI CK 0021

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

Bench : Division Bench

Advocate : Somasekhar Sundaresan, Paras Parekh, Samyak Pati, Shyam Mehta, Abhiraj Arora, Harshvardhan Nankani, Shourya Tanay, Anshu Mehta, Misbah Dada

Final Decision : Allowed

Judgement

Tarun Agarwala, Presiding Officer

1. One appeal has been filed against the order dated February 5, 2020 passed by the Whole Time Member ("WTM" for short) of the Securities and Exchange Board of India ("SEBI" for short) whereby the appellants have been restrained from accessing the securities market for a period of one year and has further been restrained from buying, selling or dealing in the securities of Indiabulls Ventures Ltd. ("IVL" for short) for a period of three years and further the appellants have been directed to disgorge an amount of Rs. 87,21,918.55. Another appeal has also been filed against the order of the Adjudicating Officer ("AO" for short) dated May 21, 2021 imposing a penalty of Rs. 25 lakh each on the appellants for the same violation. Since the issues involved are common, both the appeals are being decided together.

2. The facts leading to the filing of the present appeals are, that IVL is a listed Company and holds 100% shareholding in Indiabulls Distribution Services Ltd. ("IDSL" for short). IDSL holds 100% shareholding in India Land and Properties

Limited ("ILPL" for short). Thus, ILPL is indirectly owned by IVL.

3. Indiabulls Real Estate Limited ("IREL" for short) is a listed Company and it has a subsidiary Company known as Indiabulls Infrastructure Limited ("IIL" for short).

4. On November 19, 2014 IDSL acquired ILPL for Rs. 600 crores and this fact was disseminated on the Stock Exchange platform. On May 4, 2016 the Board of Directors of IDSL resolved to sell the entire investment in ILPL for not less than the acquisition cost. Based on the aforesaid resolution, the Board of Directors of IVL also resolved on June 15, 2016 approving the sale of ILPL subject to the approval of its shareholders. On July 20, 2016 the shareholders of IVL approved the sale of investment by IDSL in the share of ILPL. On July 27, 2016 the Board of Directors of IVL appointed a managing committee to authorize IDSL to sell its stake in ILPL which shall be more than the amount invested by IDSL. The appellant Pia Johnson was a member of this managing committee with effect from September 28, 2016. Even though a managing committee was formed no meeting took place for consideration of the sale of ILPL.

5. On January 24, 2017 a meeting was held between Mr. Divyesh Shah, Chief Executive Officer of IVL and Director in ILPL with Mr. Gurbans Singh who was the Chief Executive Officer of IREL and Director of IIL wherein a request was made by Mr. Divyesh Shah for a loan for ILPL from IIL. The loan could not have been granted by IIL without approval from its Board of Directors and shareholders. Accordingly, on January 25, 2017 a notice was circulated by IIL for convening a meeting of Board of Directors on February 3, 2017 on which date the Board of Directors of IIL resolved to convene an Extraordinary General Meeting ("EGM" for short) on March 1, 2017. The EGM of the shareholders of IIL was held wherein it was resolved to invest surplus funds of its Company by way of loan and further resolved to give complete authorization to the Board of Directors in terms of Section 186 of the Companies Act, 2013, namely, that the Board of Directors were given the authority to purchase a Company / entity which shall not be more than Rs. 600 crores.

6. In furtherance of the discussion that was last held on January 24, 2017 between Mr. Divyesh Shah and Mr. Gurbans Singh further discussions were held with regard to the loan on March 7, 2017 as now Mr. Gurbans Singh had the authority to give a loan pursuant to the resolution of the EGM dated March 1, 2017. The loan proposal was discussed and in this meeting it was agreed in principle that IIL will purchase the shareholding of ILPL instead of giving a loan. Between March 7, 2017 to March 14, 2017 discussions and finalization of the terms and conditions with regard to the sale of ILPL to IIL was already held which ultimately led to the execution of a definite agreement dated March 14, 2017 between IDSL, ILPL and IIL for sale of ILPL to IIL for Rs. 685 crores. This development was intimated to the Stock Exchange.

7. The appellant Pia Johnson was a non-executive director of IVL from March 10, 2015 to August 28, 2017. During this period the appellant purchased the shares

of the Company IVL as under:-

Period

Trade date

Buy Quantity

Pre-UPSI Period (April 01, 2015 to

January 23, 2017)

20-06-2016

135000

21-06-2016

170000

05-07-2016

0

Total

305000

During UPSI Period (January 24,

2017 to March 14,

2017)

16-02-2017

275000

17-02-2017

80000

22-02-2017

150000

Total

505000

-

0

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8. Pia Johnson”s husband Mehul Johnson also purchased shares of IVL as under:-

Period

Trade date

Buy Quantity

Pre-UPSI Period (April 01, 2015 to

January 23, 2017)

20-06-2016

45000

Total

45000

During UPSI Period (January 24,

2017 to March 14,

2017)

14-02-2017

166000

16-02-2017

122970

09-03-2017

50000

Total

338970

-

0

9. SEBI conducted an investigation into suspected insider trading activities of certain entities in the scrip of IVL for the period January 1, 2017 to November 3, 2017 to ascertain whether or not suspected entities had traded in the aforesaid scrip on the basis of unpublished price sensitive information ("UPSI" for short) in contravention to the provisions of SEBI Act, 1992 and SEBI (Prohibition of Insider Trading) Regulations, 2015 ("PIT Regulations" for short). Based on the investigation an ad-interim ex parte impounding order cum show cause notice dated May 24, 2019 was passed prima facie finding that the appellants had UPSI and had traded in the scrip of IVL during the UPSI period in contravention to Regulation 4(1) of the PIT Regulations. By this ex parte ad interim order, the WTM impounded the alleged unlawful gains of Rs. 87,21,918.55 along with interest and directed the appellants to credit the said amount in an escrow account and create a lien in favour of SEBI. By the said order the appellants were

directed to show cause as to why the order of disgorgement could not be passed on account of insider trading and further restrain the appellants from accessing the securities market and prohibiting them from buying, selling or otherwise dealing in securities for an appropriate period.

10. Based on the show cause notice, replies were filed and after giving an opportunity of hearing, final order dated February 5, 2020 was passed directing the appellants to disgorge an amount of Rs. 87,21,918.55 and further restrained the appellants from accessing the securities market for a specified period etc. The WTM came to the conclusion that the appellant Pia Johnson was an insider as per Regulation 2(1)(g) of the PIT Regulation, 2015 and that her husband Mehul Johnson was a "connected person" under Regulation 2(1)(d). The WTM further found that the two appellants had traded in the securities of the Company in violation of Regulation 4(1) of the PIT Regulations holding that the three ingredients in Regulation 4(1) were present in the trades executed by the appellants. The WTM found that there was a UPSI when the appellants had traded during February and March 2017 based on the fact that IVL had decided to sell ILPL held by IDSL for consideration more than the amount invested by IDSL, and that, on January 24, 2017, two CEOs of IVL and IRPL held discussions with regard to loan to ILPL by IIL. The WTM further came to a conclusion that the proposal to grant a loan which originated on January 24, 2017 eventually culminated into a sale by ILPL for Rs. 684 crores on March 14, 2017 which information was made public on March 15, 2017 and thus the UPSI regarding sale of ILPL came into existence on January 24, 2017. The WTM further came to a conclusion that the UPSI period was between January 24, 2017 to March 14, 2017 which information was not published.

11. The WTM further came to a conclusion that the information regarding sale of ILPL by IDSL for more than Rs. 600 crores was already in the public domain since July 15, 2016 was irrelevant as it was only an information and was not crystallized in concrete UPSI since there was no identified purchaser nor the number of shares to be sold was ascertained nor the consideration amount was finalized nor the agreed time between the buyer and seller was finalized. The resolution of the EGM dated July 15, 2016 was a general resolution which was not crystallized and was not acted upon and thus can be said to have lapsed. The WTM went on to hold that only in principle approval was accorded by IVL in the EGM resolution on July 15 2016 which entered into an execution stage on January 24, 2017.

12. We have heard Shri Somasekhar Sundaresan, the learned counsel for the appellant and Shri Shyam Mehta, the learned senior counsel for the respondent.

13. The contention of the learned counsel for the appellants is, that the appellants were not privy to any inside information and were therefore not in possession of UPSI. Further, the finding that the UPSI started from January 24, 2017 is patently erroneous and against the material evidence on record.

14. In the instant case, the appellants have fairly conceded that Appellant no. 1is an insider as per Regulation 2(1)(g) of the PIT Regulations, 2015 and that Appellant no. 2 is a connected person under Regulation 2(1)(d). Therefore, it is not necessary for this Tribunal to go into this question as to whether the appellants are an insider or a connected person. The only question which needs to be answered is, whether the appellants had traded while in possession of UPSI. In this regard Regulation 4(1) of the PIT Regulations, 2015 is extracted here under:-

"4. (1) No insider shall trade in securities that are listed or proposed to be listed on a stock exchange when in possession of unpublished price sensitive information.

[Explanation. – When a person who has traded in securities has been in possession of unpublished price sensitive information, his trades would be presumed to have been motivated by the knowledge and awareness of such information in his possession;]

Provided that the insider may prove his innocence by demonstrating the circumstances including the following : –

(i) the transaction is an off-market inter-se transfer between [insiders] who were in possession of the same unpublished price sensitive information without being in breach of regulation 3 and both parties had made a conscious and informed trade decision:

[Provided that such unpublished price sensitive information was not obtained under sub-regulation (3) of the regulation 3 of these regulations:]

[Provided further that such off-market trades shall be reported by the insiders to the company within two working days. Every company shall notify the particulars of such trades to the stock exchange on which the securities are listed within two trading days from receipt of the disclosure or from becoming aware of such information;]

(ii) the transaction was carried out through the block deal window mechanism between persons who were in possession of the unpublished price sensitive information without being in breach of regulation 3 and both parties had made a conscious and informed trade decision:

Provided that such unpublished price sensitive information was not obtained by either person under sub-regulation (3) of regulation 3 of these regulations.

(iii) the transaction in question was carried out pursuant to a statutory or regulatory obligation to carry out a bona fide transaction.

(iv) the transaction in question was undertaken pursuant to the exercise of stock options in respect of which the exercise price was pre-determined in compliance with applicable regulations.]

(v) in the case of non-individual insiders :-

(a) the individuals who were in possession of such unpublished price sensitive information were different from the individuals taking trading decisions and such decision-making individuals were not in possession of such unpublished price sensitive information when they took the decision of trade; and

(b) appropriate and adequate arrangements were in place to ensure that these regulations are not violated and no unpublished price sensitive information was communicated by the individuals possessing the information to the individuals taking trading decisions and there is no evidence of such arrangements having been breached;

(vi) the trades were pursuant to a trading plan set up in accordance with regulation 5.

NOTE: When a person who has traded in securities has been in possession of unpublished price sensitive information, his trades would be presumed to have been motivated by the knowledge and awareness of such information in his possession. The reasons for which he trades or the purposes to which he applies the proceeds of the transactions are not intended to be relevant for determining whether a person has violated the regulation. He traded when in possession of unpublished price sensitive information is what would need to be demonstrated at the outset to bring a charge. Once this is established, it would be open to the insider to prove his innocence by demonstrating the circumstances mentioned in the proviso, failing which he would have violated the prohibition.

(2) In the case of connected persons the onus of establishing, that they were not in possession of unpublished price sensitive information, shall be on such connected persons and in other cases, the onus would be on the Board.

(3) The Board may specify such standards and requirements, from time to time, as it may deem necessary for the purpose of these regulations."

15. The appellants have been charged with trading while in possession of UPSI. Regulation 4(1) of the PIT Regulation deals with trading while in possession of UPSI for insider trading. This Regulation 4(1) has three ingredients which is essential to attract the prohibition contained in Regulation 4(1), namely, (a) insider, (b) possession of UPSI by the insider and (c) trading in the securities by the insider. In the instant case, the appellants admit that they are insider and have also admit that they have traded during the alleged UPSI period. However, the appellants disputes the UPSI period and being in possession of UPSI.

16. The WTM in the impugned order finds that the information regarding investment by IIL in ILPL was a UPSI pertaining to the sale of shares of ILPL which came into existence on January 24, 2017 and became generally available on March 15, 2017. In our opinion this finding that the sale of the shares of ILPL started on January 24, 2017 is wholly illegal and is against the material evidence on record and such finding cannot be sustained for the following reasons:-

(a) On January 24, 2017 there was no discussion of sale of ILPL between the Chief Executive Officer of IVL Mr. Divyesh Shah and Mr. Gurbans Singh, CEO of IREL nor there is anything on record to suggest that any offer for purchase of ILP was made. The record indicates that the discussion was with regard to a loan requested by ILPL from IIL;

(b) Pursuant to the discussion on January 24, 2017 a notice by IIL was issued for convening a meeting of the Board of Directors of IIL for the purpose of investing surplus funds of Company by way of loan. The Board of Directors on February 3, 2017 resolved to convene EGM on March 1, 2017 for investing surplus funds by way of loan. Thus, till Febuary 3, 2017 there was no indication from IIL that they were interested in purchasing ILPL.

(c) The shareholders of IIL in its EGM held on March 1, 2017 resolved to invest surplus funds upto Rs. 600 crores by way of loan and further authorized the Board of Directors in terms of Section 186 of the Companies Act, 2013 to invest upto Rs. 600 crores by way of purchase of a Company. Thus, at best it can be said that the intention to purchase an entity by investing its surplus funds came into existence on behalf of IIL for the first time on March 1, 2017.

(d) The meeting held on March 7, 2017 between the two CEOs of IVL and IREL was in relation to the loan proposal given earlier on January 24, 2017 from IIL for ILPL. During discussion it has come on record that Mr. Gurbans Singh came to know for the first time that IDSL is interested in divesting its shares in ILPL. This fact has been recorded in the statement given by Mr. Gurbans Singh during the investigation period.

(e) Discussions relating to purchase of ILPL by IIL was held between March 7, 2017 to March 14, 2017 and a definitive agreement dated March 14, 2017 was executed for sale of ILPL to IIL for Rs. 685 crores.

(f) In view of the aforesaid, it is clear that the UPSI regarding purchase of an entity by IIL came into existence for the first time on March 1, 2017 when a resolution was passed by the shareholders of the Company in its EGM. Prior to 1st March there was no inkling or indication by IIL making an offer to purchase ILPL. The discussion that was held on January 24, 2017 was only confined to a loan to be taken for ILPL from IIL.

(g) We are of the opinion that a loan is distinct from a sale and the two cannot be intermingled for the purpose of giving a finding that a loan culminated into a sale.

17. There is no doubt that information of sale of ILPL was in the public domain since July 15, 2016 but this information which came into the public domain was not treated to be an UPSI by the WTM on the ground that the resolution passed by IVL on July 15, 2017 was only a raw information and there was no crystallized offer through an identified purchaser or ascertained consideration amount for the purpose of crystallizing the UPSI. If the information of sale of ILPL by IVL on July

15, 2016 was not a UPSI and was in the public domain then the purchase of shares by the appellants between July 15, 2016 to March 1, 2017 could not be made the basis of UPSI. We, thus, conclude that since there was no UPSI during this period the trades executed by the appellants were not violative of Regulation 4(1).

18. The EGM of IIL was held on March 1, 2017 on which date it authorized the Board of Directors to give a loan upto Rs. 600 crores or could acquire upto Rs. 600 crores. Thus, this information of acquisition, if any, came into existence on March 1, 2017. Thus, UPSI period can start from March 1, 2017 onwards till March 14, 2017.

19. The appellants alleged that they were never in possession of UPSI. In this regard the resolution of IVL on July 15, 2016 to sell ILPL can be the starting point of UPSI. The WTM has however disregarded this date as not a UPSI. We also find that this information came in the public domain and therefore the decision to sell ILPL was not a price sensitive information nor was it an UPSI.

20. The WTM has strongly relied on the fact that the appellant Pia Johnson was a member of the managing committee appointed by the Board of Directors of IVL who were authorized to authorize IDSL to sale its stake in ILPL. Based on this fact, the WTM concluded that the appellant Pia Johnson had inside information and was in possession of UPSI. This fact that the appellant was a member of the managing committee can create a suspicion that the appellant could be in possession of UPSI but in our opinion the appellants were successful in proving that they had no UPSI. It has come on record that no meeting of this managing committee was ever held and therefore there was no occasion to discuss the sale of ILPL. Further, we find that there is no finding that the resolution of IIL on March 1, 2017 or notice dated January 25, 2017 or resolution of Board of Directors of IREL on February 3, 2017 was known to the appellants. The appellants had nothing to do with IREL or IIL and therefore there can be no presumption that the appellants had information that IIL was in the process of purchasing ILPL.

21. We also find that during the investigation the statement of the two CEOs of IVL and IREL were recorded and both the CEOs clearly stated that the information regarding sale of ILPL was not made known to others and that the appellants had no knowledge of the deal. These statements has not been considered by the WTM coupled with the fact that Mr. Gurbans Singh in his statement categorically made statement that he only came to know only in March 2017 that ILPL was up for sale. Thus the trades made by Mehul Johnson in March 2017 cannot be said to be made when in possession of UPSI.

22. In view of the aforesaid, we are satisfied that the appellants were not in possession of UPSI when they purchased the shares of IVL during the alleged UPSI period as per the show cause notice. In our view, the appellants have successfully discharged the burden under the proviso to Regulation 4 of the PIT

Regulation. Considering the aforesaid, the impugned order cannot be sustained and are quashed. The appeals are allowed with no order as to costs.

23. 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. Certified copy of this order is also available from the Registry on payment of usual charges.