
(2022) 02 SEBI CK 0120

In the Securities Appellate Tribunal Mumbai

Case No : Miscellaneous Application No. 420 Of 2021, Appeal No. 343, 344, 345, 346, 347, 348, 349, 350, 351, 352 Of 2021

Surendra Kumar Gupta And Others

APPELLANT

Vs

Securities And Exchange Board Of India

RESPONDENT

Date of Decision : 07-02-2022

Acts Referred:

Securities And Exchange Board Of India (Prohibition Of Fraudulent And Unfair Trade Practices Relating To Securities Market) Regulations, 2003 — Regulation 3, 4
Securities And Exchange Board Of India Act, 1992 — Section 11B

Citation : (2022) 02 SEBI CK 0120

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

Bench : Division Bench

Advocate : Prakash Shah, Kushal Shah, Kevic Setalvad, Nidhi Singh, Binjal Samani, Aditi Palnitkar, Moksha Kothari, Pesi Modi, Kunal Katariya, Vikas Bengan, Etc.

Final Decision : Allowed/Disposed Of

Judgement

Tarun Agarwala, Presiding Officer

1. This group of appeals have been filed against the common order dated 26th February, 2021 passed by the Whole Time Member ('WTM' for short) wherein the appellants have been restrained from accessing the securities market for three months. The appellants are noticee nos. 1, 2, 3, 4, 5, 8, 9, 18, 20 and 82 out of 109 noticees. For facility, the facts stated in the appeal of Raj Kumar Agarwal is taken into consideration.

2. A reference was made by the Income Tax Department informing Securities and Exchange Board of India (hereinafter referred to as 'SEBI') that certain entities could be manipulating the price of Nikki Global Finance Ltd. based on which investigation was conducted for a possible violation of Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (hereinafter referred to as 'PFTUP

Regulations') for the period from 1st July, 2009 to 30th May, 2014. The investigation was carried out against 301 entities and, based on the investigation, a show cause notice dated 25th July, 2017 was issued to 109 entities.

3. The show cause notice alleged that the price of the scrip rose from Rs.11.60/- to Rs.980/- and eventually closed at Rs.115/-. The Company's financials were low as it had negligible profit in the financial years 2010-11, 2011-12, 2012-13, 2013-14, 2014-15 and in the financial year 2015-16 it showed a loss. The show cause notice divided the entire period into four patches, namely, patch 1 from 1st July, 2009 to 28th February, 2012. Patch 2 was from 29th February, 2012 to 30th March, 2012. Patch 3 was from 2nd April, 2012 to 4th December, 2013 and patch 4 was from 5th December, 2013 to 30th May, 2014. The present controversy against the appellants falls in patch 1. In patch 1, the allegation is, that the price rose from Rs.11.60/- to Rs.375/- and eventually settled at Rs.375.75/-. Ten entities contributed Rs.1,738.35 i.e. 26.47% to the market positive Last Traded Price (LTP). Out of these entities six of them are the appellants. It was also alleged that 75 noticees have traded as buyers and 109 entities have traded amongst themselves contributing 11.48% positive LTP. However, 59 entities aided by selling shares and thereby increased the price and manipulated the price of the scrip. Further, 16 entities were charged for manipulation of the price of the scrip in patch 1.

4. The upshot of the show cause notice is, that there were 301 connected entities who traded in the scrip of the Company. 90 out of 301 traded as buyers and contributed Rs.2773.17 i.e. 42.23% of positive LTP and 75 out of these 90 entities are the noticees before the WTM.

5. The WTM found that the contribution of Rs.754.23/- which works out to 11.48% positive LTP by 109 noticees was insignificant and, therefore, cannot contribute to the manipulation of the price of the scrip of the Company and, therefore, exonerated them. The WTM further found that the trades by 90 connected entities resulted in a contribution of Rs.2773.17/- i.e.42.23% during patch 1 which contribution is a significant contribution.

6. The WTM, however, found that many of these entities' individual contribution was negligible and out of 75 noticees 65 noticees positive contribution was less than one percent and, therefore, exonerated these 65 persons.

7. The WTM, however held that the appellants' positive contribution was above one percent and, therefore, will come within the rigors of the directions under Section 11B of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as the 'SEBI Act').

8. The WTM found that 55 of these noticees have contributed Rs.1165.92/- which were negligible in comparison to the net LTP contribution of Rs.766.48/-of the ten appellants and, therefore, the WTM, also exonerated these 46 noticees.

9. In so far as M/s. Kanudia Capital and Management Services Private Limited is concerned, the investigation revealed that it had generated a huge positive LTP of Rs.2532.15/- but no show cause notice was issued. In this regard, the WTM held that the investigation report had found that the said entity had no connection with the Company, its directors and promoters whereas the appellants were found to be connected with the Company and its directors and promoters.

10. We have heard Mr. Prakash Shah, Advocate assisted by Mr. Kushal Shah, CA for the appellant in appeal no.343 of 2021, Mr. Pesi Modi, Senior Advocate assisted by Mr. Kunal Katariya, Advocate for the appellant in appeal no.344 of 2021, Mr. Vikas Bengani, Advocate for the appellants in appeal nos.345, 347, 349, 350, 351 and 352 of 2021 and Dr. S. K. Jain, Practicing Company Secretary for the appellants in appeal nos.346 and 348 of 2021 and Mr. Kevic Setalvad, Senior Counsel assisted by Ms. Nidhi Singh, Ms. Binjal Samani, Ms. Aditi Palnitkar and Ms. Moksha Kothari, Advocates for the respondents.

11. The basic charge in the show cause notice against the 109 noticees are as follows:

(1) 90 entities contributed Rs.2773.17/- or 42.23% of market positive LTP during patch 1.

(2) 109 entities traded amongst themselves and contributed Rs.754.23 or 11.48% positive LTP increasing the price of the scrip and thereby manipulated the price of the scrip of the Company.

12. The contention of the appellant before us is, that whereas certain noticees have been exonerated inspite of contributing positive LPT but the WTM exonerated them on the ground that their positive contribution was less than one percent.

13. On the other hand, the appellants have been found guilty because their positive contribution was above one percent. This criteria is not based on any intelligible differentia and is wholly arbitrary. It was further contended that the finding that the appellants are connected with the Company, its promoters and directors is patently erroneous. This finding is based on surmises and conjectures and is not based on any evidence. Further, the only evidence found was connection with some of the noticees who have been exonerated by the WTM and, therefore, the link is broken and the charge of contributing to the LTP or manipulating the price of the scrip thus does not arise. It was asserted that the charge of price manipulation against 109 entities was dropped. There is no finding of price manipulation against the appellants and, therefore, the impugned order cannot be sustained. Further, many of the appellants were buyers and in the absence of counter party no penalty could be awarded.

14. On the other hand, the stand of the respondent is, that there was a significant positive contribution to LTP by the appellant which could not be

ignored and 6 of the appellants were amongst top 10 contributors. The WTM has exercised his discretion in fixing a benchmark and exonerated those entities which has less than one percent LTP. It was also contended that the connection was established and the case of the entity M/s. Kanudia Capital and Management Services Private Limited was distinguishable and no advantage could be taken by the appellants.

15. Having heard the learned counsel for the parties at some length, we are of the opinion that the impugned order cannot be sustained for the following reasons:-

(1) The major allegation in the show cause notice is, that 109 entities traded amongst themselves and contributed 11.48% of positive LTP thereby increasing the price from Rs.11.60/- to Rs.337.75/-per share. These 109 entities have been exonerated on the ground that their contribution was insignificant.

(2) The contribution of 11.48% of 109 entities have been calculated which is an incorrect method of calculation in as much as out of 109 entities only 90 were noticees and, therefore, contribution of 90 noticees alone could be taken into consideration. 90 entities who were not notices, their contribution could not be taken into consideration while arriving at trading contribution of 11.48%.

(3) The trades of 90 entities contributed 42.23% positive LTP which according to the WTM was a significant contribution. This calculation of 42.23% is incorrect and has been wrongly calculated since out of 90 connected entities only 75 were noticees and, therefore, the contribution of 75 noticees alone could be taken into consideration for calculating positive contribution.

(4) Further, out of 75 noticees, 65 noticees have been exonerated by the WTM on the ground that their individual positive LTP was less than one percent and, therefore, no direction could be issued under section 11B. The benchmark of one percent fixed by the WTM, in our opinion, is not based on any intelligible criteria nor is based on any circular or regulations framed by SEBI in this behalf to show as to how much percentage of positive LTP would be treated as violative of Regulations 3 and 4 of the PFTUP Regulations or would be treated as unfair trade practice. Classification is based on intelligible differentia. The differentia bears a reasonable nexus with the object sought to be achieved. In the instant case, we find that classification is not based on any intelligible criteria nor has any nexus with the objective of the Regulations. In the absence of any criteria laid down by SEBI the fixation of one percent by the WTM without any reasonable basis is arbitrary.

(5) The WTM cannot blow hot and cold and take positive LTP as a group on one hand and consider individual positive contribution of each noticee individually and exonerate them having found that their contribution was less than one percent.

(6) In the case of Kanudia Capital and Management Services Private Limited the investigation report indicates that there was a positive LTP 2532.15% which is

very large and significant but no show cause notice was issued to this entity. The WTM came to the conclusion that since the said entity was not connected to the Company, its directors or promoters no show cause notice was required to be issued and, on the other hand, the appellants are connected with the Company, its directors or promoters and therefore action was initiated. This finding given in paragraph 11(j) of the impugned order is patently perverse and is not based on any evidence. For facility, the said finding is quoted hereunder:

"I note that while 10 Noticees have been found to be connected to the Company, its directors or promoters etc., no such connection is alleged to have been found in the investigation report or show cause notice with respect to M/s. Kanudia Capital and Management Services Private Limited".

(7) The connection of the appellants have been given by the WTM in Table 5 of the impugned order which indicates that the appellants were connected in one way or the other with the other noticees, namely, by way of off market transfer or having a common address, etc. The details have been given in Table 5 of the impugned order and is not being extracted hereunder. It is sufficient to say that the connection of the appellant is only with the other noticees. No connection whatsoever has been shown in Table 5 or any other way in the impugned order to show that these appellants were connected with the Company, its directors and promoters. Therefore, the finding given in paragraph 11(j) of the impugned order that the appellants are connected with the Company, its directors and promoters is per se incorrect.

(8) The connection of the appellants shown in Table 5 of the impugned order is with the other noticees and is not helpful to the case of the respondent. The connected noticees have been exonerated in the impugned order. For example, the appellant Mr. Raj Kumar has been shown to be connected to noticee no.36 who have been exonerated. Similar is the case of other noticees.

(9) In *Manish Suresh Joshi vs. SEBI*, appeal no.2 of 2020 decided on 13th January, 2020 this Tribunal held:

"6. The decision of the AO in Ganatra case has not been disputed by the respondent. However, an attempt was made to justify the case on the ground that the volume of trade made by Ganatra was miniscule compared to the volume of trade made by the appellant. Be that as it may. We are of the view that in view of exoneration of Ganatra of the charge of violation of PFUTP Regulations, the connection with the PPG Entities gets broken. Once the link in the chain is broken, there was no other connection between the appellant with that of the PPG Entities. The only link through which the appellant was found guilty was that the appellant was connected with Ganatra who, in turn, was connected with the 28 entities of PP Group. Once the Ganatra link is broken, there was no evidence to show that the appellant was in any way connected directly or indirectly with the PPG Entities.

7. In the light of the aforesaid, the charge of connivance of the appellant with the

counter party, namely, PPG Entities cannot be proved. The principles involved in the Ajmera case cannot be made applicable to the facts and circumstances of the present case. Consequently, the impugned order cannot be sustained and is quashed. The appeal is allowed.”

The said decision is applicable in the instant case. Once a link is broken and there is no other connection the appellants cannot be penalised on the basis of this alleged connection.

(10) There is no finding of price manipulation or fraud or violation of Regulations 3 and 4 of the PFUTP Regulations against the appellants. The only finding is positive LTP which calculation shown is incorrect. From the Table in the impugned order, in the case of Mr. Raj Kumar, the percentage of positive LTP is 1.25% which is taken into consideration and the trades which was less than one percent, namely, 0.52% was exonerated by the WTM in the impugned order. Thus, the net positive LTP in the case of appellant Raj Kumar would be 1.25% minus 0.52% which comes to 0.73% and which would be less than one percent the benchmark fixed by the WTM and, therefore, on this ground also the appellants cannot be penalised.

(11) Most of the appellants were buyers. There is no finding as to whether they had placed there buy orders above LTP or whether they have placed their buy order before the sell orders. In the absence of this evidence and in the absence of a counter party it is difficult to prove positive LTP against the appellants.

16. In view of the aforesaid, the directions given by the WTM under section 11B of the SEBI is arbitrary and cannot be sustained. The impugned order is quashed. The appeals are allowed. Misc. application no.420 of 2021 is also disposed of accordingly. In the circumstances of case parties shall bear their own costs.

17. 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.