BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No. 80 of 2009

Date of decision: 19.11.2009

Dilip S. Pendse
602, Royal Grace,
L.T. Colony, Road No.2,
Dadar (East),
Mumbai – 400 014. …… Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No. C4-A, "G" Block,
Bandra Kurla Complex, Bandra (East),
Mumbai. …… Respondent

Mr. V. M. Singh Advocate for the Appellant.

Mr. Kumar Desai Advocate with Ms. Daya Gupta Advocate for the Respondent.

CORAM : Justice N.K. Sodhi, Presiding Officer
Samar Ray, Member

Per : Justice N.K. Sodhi, Presiding Officer

Whether the appellants are guilty of insider trading is the short question that arises for our consideration in this bunch of six Appeals no.78 to 80 and 89 to 91 of 2009. The whole time member of the Securities and Exchange Board of India has found them guilty in the first set of three appeals and by his order dated March 31, 2009 restrained them from accessing the securities market for a period of five years from the date of the order. In the other set of appeals, the adjudicating officer has also found them guilty of the same charge and by his order dated April 16, 2009 imposed the maximum monetary penalty of Rs.5 lacs on each of them under Section 15 G of the Securities and Exchange Board of India Act, 1992. All the appeals involve common questions of law and fact and were heard together. Since arguments were addressed in Appeal no.80 of 2009, the facts are being taken from this case. Counsel for the parties are agreed that the decision in this case shall govern the other appeals as well.

2. The Securities and Exchange Board of India (hereinafter called the Board) received a complaint dated December 3, 2001 from M/s. Tata Finance Limited (for short TFL) alleging various irregularities committed by the appellant who, at the relevant time, was its managing director. The primary grievance of the complainant was that at the instance of the appellant, his friends, relatives and associates sold 2,90,000 shares of TFL on the basis of unpublished price sensitive information in his possession during March, 2001. The shares were said to have been sold through two brokers namely, M/s. Jhunjhunwala Stock Brokers Private Limited and Malini Sanghvi Securities Private Limited. In these appeals, we are only concerned with Malini Sanghvi Securities Private Limited which will be referred to hereinafter as the Broker. The Board carried out investigations to find out, inter alia, the alleged insider trading committed by the appellant and others. The investigations revealed that the appellant was the managing director of TFL and a director of Nishkalp Investment and Trading Company Limited (for short Nishkalp) which is a 100% subsidiary of TFL. It also transpired that Nishkalp was an investment company and that it had constituted an Investment Committee of which the appellant was a member and hence aware of the poor estimated financial results of Nishkalp and TFL for the quarter ending March, 2001. Investigations further revealed that the financial results of TFL were discussed by its Finance Department with the appellant in the **second/third week of March, 2001**. This apart, the appellant was aware of the estimated loss/erosion in the value of investment portfolio of Nishkalp as a copy of the Net Asset Value of its portfolio was prepared and given to him on a daily basis. The investigations also revealed that the information relating to the erosion of finance of TFL and Nishkalp was not in public domain and the information in respect of the provisional losses to the tune of Rs.79.37 crores suffered by Nishkalp as on March 31, 2001, was disclosed to the shareholders only on April 30, 2001. The Board prima facie found that the appellant knew that the news about losses suffered by TFL and Nishkalp on becoming public would have an adverse impact on the price of the shares of TFL which is a listed company. According to the Board, the appellant advised his associates and relatives to sell the shares of TFL on the basis of this unpublished price

sensitive information. Accordingly, the following friends, relatives and associates of the appellant sold the shares of TFL as under:

Seller	No. of shares	Stock broker
Mrs. Anuradha S. Pendse	10,000	Malini Sanghvi Securities Private Limited
Nalini Properties Private Limited	30,000	Malini Sanghvi Securities Private Limited
Dr. Anjali Beke	20,000	Malini Sanghvi Securities Private Limited
Anjudi Property & Investment Private Limited	80,000	Malini Sanghvi Securities Private Limited
Anjudi Property & Investment Private Limited	1,50,000	Jhunjhunwala Stock Brokers Private Limited

In these appeals, we are only concerned with Mrs. Anuradha S. Pendse and Nalini Properties Private Limited as they alone, alongwith the appellant, are in appeal before us. It is common case of the parties that Mrs. Anuradha S. Pendse is the wife of the appellant and Nalini Properties Private Limited (for short Nalini) is a company promoted by her and Mr. Sudhakar Pendse, the father of the appellant and they are the only directors in this company.

3. The fact that the appellant was the managing director of TFL at the relevant time and that his wife Mrs. Anuradha S. Pendse and Nalini traded in the scrip of TFL is not in dispute before us. It is also not in issue that the appellant was in possession of unpublished price sensitive information **in the second/third week of March, 2001** pertaining to the estimated losses suffered by Nishkalp and TFL and that Mrs. Anuradha S. Pendse and Nalini are persons deemed to be connected with TFL and, therefore, 'insiders' within the meaning of the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 (hereinafter called the regulations). What is really in dispute is whether Mrs. Pendse and Nalini traded in the scrip of TFL when the appellant was in possession of the unpublished price sensitive information. The case of the appellant is that Mrs. Pendse and Nalini sold 10,000 and 30,000 shares of TFL respectively in September, 2000 when the appellant was not in possession of the aforesaid unpublished price sensitive information whereas the case of the respondent Board as found by the whole time member and the adjudicating officer in the impugned

orders is that they actually sold the shares between March, 28 to March 31, 2001 when the appellant was admittedly in possession of the aforesaid information. There is no denying the fact that in September 2000,neither the appellant nor his wife and not even Nalini was an 'insider' within the meaning of the regulations and, therefore, none of them was debarred from trading in the scrip of TFL. However, in the end of March 2001, all the three had become 'insiders' by virtue of the fact of the appellant possessing the aforesaid unpublished price sensitive information by then.

4. From the rival stands of the parties, what we need to decide is whether the sale transactions took place in September, 2000 or in the end of March, 2001. Learned counsel for the parties are agreed that if the transactions took place in September, 2000, the appellant is not guilty of insider trading but if we come to the conclusion that the sales took place in the end of March, 2001 as found by the Board, the appellant must fail.

5. We shall now examine as to when the transactions actually took place. The case of the appellant is that Mrs. Anuradha S. Pendse and Nalini sold 10,000 and 30,000 shares of TFL respectively through the Broker on September 11, 2000 on a principal to principal basis at the rate of Rs.90 per share. In other words, the shares were sold to the Broker in its proprietary account. According to the appellant, the Broker then sold the shares to a third party viz., India Emerging Companies Investments Limited (IECIL) by executing a back to back transaction. We are not concerned with this end of the transaction. What is relevant for our purposes is whether Mrs. Pendse and Nalini sold the shares to the Broker in September, 2000. In support of this plea, the appellant has produced two contract notes both dated 11.9.2000 in Form B issued by the Broker to Mrs. Anuradha Pendse and Nalini. As per the regulations framed by the Board, every transaction of sale and purchase of securities when executed through a broker is required to be reported to the respective stock exchange(s) and every broker is required to furnish to the client without delay a contract note for all transactions in the form specified by the stock exchange. The Bombay Stock Exchange on which Exchange the transactions in question are said to have been executed, has prescribed two Forms, A & B in which the

stock brokers are required to issue the contract notes. The contract note is issued in Form A when the transaction is executed between the two clients through their respective broker(s) but when the sale/purchase is made to/from a broker in his proprietary account (on his own account), the cover note is required to be issued in Form B. The appellant contends that since Mrs. Anuradha S. Pendse and Nalini sold the shares to the Broker in its proprietary account, the contract notes were issued by the latter in Form B. Apart from the fact that these contract notes indicate that the transactions were executed by Mrs. Pendse and Nalini on September 11, 2000, there is also on record material to show that these transactions had been reported by the Broker to the Bombay Stock Exchange. By its letter dated September 16, 2000, the Broker sent five contract notes dated September 11, 2000, including the two issued to Mrs. Anuradha S. Pendse and Nalini. A photocopy of this letter is on the record before us and it bears the stamp of the Stock Exchange, Mumbai showing acknowledgement of the receipt of this letter. It has been initialed by the official who received the same in the office of the Exchange and the acknowledgement bears the date 19.9.2000. We also have on record, letter dated November 26, 2002 from the Stock Exchange, Mumbai addressed to IECIL to whom the Broker had sold the shares in a back to back transaction, acknowledging the receipt of letter dated September 16, 2000 from the Broker by which it had reported the aforesaid transactions to the Exchange. A perusal of this letter leaves no room for doubt that the broker had reported the transactions to the Bombay Stock Exchange as per its letter dated September 16, 2000 which had been received by the Stock Exchange, Mumbai on 19.9.2000. According to the regulations, the transactions were required to be reported by the Broker either on the same day or on the following day. The reporting was made only on 19.9.2000 when the letter dated September 16, 2000, was received by the Stock Exchange, Mumbai. There was, thus, a delay of 8 days in reporting the transactions. The Stock Exchange, Mumbai initiated disciplinary action against the Broker for not reporting the transactions within the time prescribed by the regulations. The matter was placed before the Disciplinary Action Committee of the Exchange in its meeting held on March 12, 2003 which was chaired by a former judge of the Bombay High Court. The

said committee considered the matter and asked the Broker to provide complete details of the transactions. It noted that there was delay in reporting the transactions to the Exchange and that there was delay in the settlement of the trades as well. Settlement refers to the process whereby payment is made by all who have made purchases and shares are delivered by all who have made sales. The committee decided to warn the Broker to be more careful in future and directed it to submit a written undertaking to the Exchange that in future it would strictly follow the Rules, Bye-laws and Regulations of the Exchange. It would be relevant to reproduce the decision taken by the said committee in the case of the Broker. It reads as under:

> "(ii) **Malini Sanghvi Securities Pvt. Ltd. (Clg. No.412)**
> Ms. Malini Sanghvi, Designated Director and Shri Ajit Sanghvi, Director, appeared before the Committee. They stated that the transactions were not spot delivery transactions, but these were off market hand delivery transactions. They confirmed that though late, the transactions were reported to the Exchange. They also stated that they had issued contract notes in the prescribed Form B and had obtained the written consent from their clients i.e. the buyer as well as the sellers. They accepted the delay in delivery and payment to the clients.
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> **DECISION**:
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> The Committee noted that
> (a) There was delay in reporting transactions to the Exchange and
> (b) There was delay in settlement of the trades.
>
> It was noted that written consent of the clients was obtained as required under Bye-law 15 of the Exchange and the transactions were reported to the Exchange, though late.
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> In view thereof, the Committee decided to warn the member to be more careful in future and also decided that the member should submit a written undertaking to the Exchange confirming that in future it will strictly follow all the Rules, Bye-laws and Regulations of the Exchange."

6. There is further material on the record which lends credibility to the plea raised by the appellant that the trades were actually executed in September, 2000. Shri Kumar Desai, learned counsel appearing for the respondent Board produced before us a copy of the letter dated January 21, 2002 addressed by Mrs. Anuradha Pendse to the Chief General Manager of the Board by which she placed on the record of the Board, a copy of the Party Ledger pertaining to her running account with the Broker for the period from 1/4/2000 to 31/3/2001. A perusal of this ledger account clearly indicates that on

September 16, 2000 a credit was given to her for an amount of Rs.9 lacs by the Broker in relation to bill no. 201003 GB01. A copy of this bill was then produced by the learned counsel for the appellant which could not be disputed by the Board. This bill was raised by the Broker on 16.9.2000 after the shares had been sold by Mrs. Pendse and the same has been noticed by the whole time member in the impugned order while referring to the letter of Mrs. Pendse. When we examine this bill and bill no. GB01/201006 which was raised in favour of Nalini, they clearly indicate that Mrs. Anuradha Pendse and Nalini had sold 10,000 and 30,000 shares of TFL respectively through the Broker thereby earning a credit of Rs.9 lacs and Rs.27 lacs respectively in their ledger accounts. The bills further demonstrate that the amounts were due to the sellers. The Party Ledger of Mrs. Pendse further indicates that it was on 30th March, 2001 that a cheque for Rs.9 lacs was actually received by her and the same was credited by making a debit entry in the Party Ledger account, which cheque was subsequently encashed in April, 2001. The running ledger account of Mrs. Anuradha Pendse maintained by the Broker in its books also substantiates the plea that the trades took place in September, 2000 when, after the contract was concluded, she was given a credit entry and the amount became due to her though it was actually received by her in March, 2001. According to the Indian Accounting Standards prescribed by the Institute of Chartered Accounts of India which is the account setting body laying down the accounting standards for the companies in India under the Companies Act, 1956, “Revenues and costs are accrued, that is, recognized as they are earned or incurred (and not as money is received or paid) and recorded in the financial statements of the periods to which they relate.” (Accounting Standard (AS)1 on Disclosure of Accounting Policies Clause 10.c). It is, thus, clear that there is a clear distinction between the revenue earned and revenue received and the moment a contract is complete, the right to receive the revenue thereunder accrues though it may be received subsequently. When we look at the aforesaid bill(s) and the contract notes read with the Party Ledger maintained by the Broker in the name of Mrs. Anuradha Pendse, it is more than clear that the sale transactions by Mrs. Anuradha Pendse and Nalini were clinched in September, 2000 though the amount thereunder was received by her on March, 30, 2001.

In the letter of January 21, 2002 Mrs. Anuradha Pendse has also admitted that the delivery of the shares was given on March 28, 2001 subsequent to the transactions. It may be mentioned that the shares sold by Mrs. Anuradha Pendse and Nalini were in dematerialized form and their demat accounts were debited on the basis of the transfer instruction forms on March 28, 2001. This fact is also clear from the demat account of Mrs. Anuradha Pendse maintained by the National Securities Depository Limited, a copy of which was produced before us by the learned counsel for the Board.

7. It appears that the transactions executed by the Broker on behalf of Mrs. Pendse, Nalini and other associates of the appellant as referred to in the chart in para 2 above, were also under the scrutiny of the Economic Offences Wing of the Criminal Investigation Department of Mumbai Police. In response to a letter received from the police making enquiries about the transactions, the Bombay Stock Exchange by its letter dated May 3, 2003, a copy of which is on the record, informed the senior inspector of police that all these transactions had been placed before the Disciplinary Action Committee of the Exchange in its meeting held on March 12, 2003 and that the said committee after noticing the delay in reporting the transactions and also the delay in the settlement of the trades, had warned the Broker to be careful in future. The Bombay Stock Exchange quoted the decision of the Disciplinary Action Committee which has already been reproduced in para 4 above. This letter from the Bombay Stock Exchange further strengthens the case of the appellant that the said transactions were executed in September, 2000 and that there was delay in their reporting as well as in their settlement. Had the transactions taken place in March 2001, there was no question of any delay either in their reporting or in their settlement. Unfortunately, the whole time member has not taken note in the impugned order of this letter from the Bombay Stock Exchange.

8. From the documents referred to hereinabove which are on the record of the Board except the two bills to which we shall refer later, it is clear that the shares of TFL were sold by Mrs. Anuradha Pendse and Nalini on September 11, 2000 through the Broker which issued the contract notes on the same day and reported the trades to the Stock Exchange, Mumbai only on 19.9.2000. The documents produced by the appellant make

it further clear that even though the deal for the sale of the shares was struck in September, 2000 and credit given for the amount that became due to Mrs. Pendse in the Party Ledger account maintained by the Broker, actual delivery of the shares was given on March 28, 2001 when the demat accounts of Mrs. Anuradha Pendse and Nalini were debited and the payment was actually received on March 30, 2001 at the time of the settlement of the account at the end of the accounting year 2000-01. It is further clear that the trades though executed in September, 2000 were not settled within the time prescribed by the Bye-laws of Bombay Stock Exchange Limited. It is common case of the parties that the trades executed by Mrs. Anuradha Pendse and Nalini were off market hand delivery transactions which according to Bye-law 48(ii) of the Bye-laws had to be settled not later than fourteen days following the date of the contract. Admittedly, there was a long delay in settling the trades and since it was the responsibility of the Broker to settle the trades, the Stock Exchange, Mumbai, through its Disciplinary Action Committee took action against it for the delay and issued the warning as noticed earlier. It is pertinent to mention that during the course of the investigations, the Broker was sent for and its representative appeared on January 24, 2002 and it was pointed out to him that the trades of TFL shares in September, 2000 were not in accordance with the Securities Contracts (Regulation) Act, 1956 and he was asked to explain as to when the deliveries were given and payments made. This is what he stated:

> "The transactions took place in September 2000. The contracts were issued in September 2000. The transaction was hand delivery contract. We received the deliveries of the shares in March 2001 which were given to the purchasers. The payments for these transactions were received from the purchasers in March 2001 and same were paid to the sellers in march 2001. We were following up for the deliveries and before the year end reconciliation, we noticed that the above deliveries were pending. In an earlier transaction of 13,30,000 shares of TFL sold by Sheba Properties to IECIL, we did not receive the deliveries. Deliveries were given by Sheba Properties to IECIL directly. For the September transactions also, we acted in good faith waiting for deliveries and payments. We are not aware of any violation of SC (R) Act and deny any violation. Going by the trust and faith in this clients, above precedent of Sheba, we acted in good faith. We have no abnormal gain from the above transactions. Our income was Rs.1/- per share, within the permissible limits of brokerage."

From the answer given by the Broker, it appears that delays in the settlement of the trades were not unusual and the proviso to Bye-law 48(ii) of the Bye-laws does give power to the governing board of the Exchange to extend the time for delivery and payment from time to time by a further period of 14 days each, so that the overall period does not exceed 90 days from the date of the contract. As mentioned by the Broker, there was a similar delay in another case as well and it appears to us that such delays are not a rare phenomena. Since such delays are not very uncommon, the Disciplinary Action Committee of the Exchange also did not take a serious view of the lapse and only issued a warning to the Broker to be careful in future. Shri Kumar Desai, learned counsel for the Board very strenuously argued that what kind of a sale did Mrs. Pendse or Nalini execute in September 2000 when the payment was received and delivery of shares given only in March 2001. He may be right. The transaction may be illegal or it may be contrary to the Bye-laws of the Exchange and whatever other action the Board or the Exchange may take against the Broker, the material on the record cannot lead us to conclude that no transaction took place in September 2000 or that the appellant is guilty of insider trading.

9. The entire material produced by the appellant in support of his case has been discarded by the whole time member and he has given reasons for doing so. We shall now examine each of those reasons and see whether they are tenable to establish the preponderance of probabilities against the appellant. As already noticed, the case of the appellant is that Mrs. Pendse and Nalini sold the shares on September 11, 2000 and that these transactions were reported by the Broker to the stock exchange as per its letter of September 16, 2000 which was received by the Bombay Stock Exchange on September 19, 2000. This letter of the Broker by which it reported the transactions to the Exchange has not been accepted and the whole time member has given two reasons for the same in para 14 of the impugned order. The first ground for rejection is that even though it bears the stamp of the Exchange acknowledging receipt of the letter, the date and time has not been recorded in the place provided for the same in the acknowledgement receipt and that the date “11.9.2000” is handwritten outside the seal. We have perused the photocopy of this letter which is on the record and can only observe

that this ground, to say the least, is most flimsy. The letter bears the initials of the official who received it in the office of the Exchange and he put the date with his hand outside the seal. There is nothing unusual about it which should raise any doubt regarding the existence of the letter. The second reason mentioned is that all the contract notes issued by the Broker to Mrs. Pendse, Nalini and other associates of the appellant bear consecutive serial numbers and this, too, has raised a doubt in the mind of the whole time member. We wonder how the validity of the document could be doubted on this ground. Since the Broker issued the contract notes on the same day, there is nothing unusual if they are in consecutive serial numbers. This is rather in order. To be fair to Shri Kumar Desai learned counsel for the Board, he did not even make an attempt to justify any of these two reasons. Since the reasons mentioned by the whole time member are so unconvincing, we have no hesitation in rejecting the same and we cannot agree with him that there is any basis for doubting the existence of the letter dated September 16, 2000 written by the Broker to the Exchange which the latter itself admits having received it and the admission is in its communication dated November 26, 2002 addressed to IECIL as referred to in para 4 above.

10. The contract notes relied upon by the appellant dated September 11, 2000 have also been doubted. One of the reasons given by the whole time member is that the sub-serial numbers on some of them have been handwritten. We have perused the photocopy of the contract notes which are on the record and cannot accept the version of the whole time member. The contract notes are in Form B which have been generated from the computer. A part of the number was dim and the same has been made legible with a ball pen. Nothing much can be read into this and we must acknowledge that even Mr. Kumar Desai, learned counsel for the Board could not raise any objection in this regard. However, what was seriously debated before us and as found by the whole time member in para 15 of the impugned order is that the two contract notes dated September 11, 2000 contradict the stand of the appellant and “are not relevant but are extraneous to the issue in question.” The case of the appellant is that Mrs. Pendse and Nalini had sold the shares on September 11, 2000 to the Broker and the latter sold the same to IECIL on a back to

back basis on the same day. The whole time member has referred to the contract notes and finds that in the ones issued to Mrs. Pendse and Nalini, it is stated "Securities SOLD TO you for" and in the one issued to IECIL it was mentioned "Securities BOUGHT FROM you for'. On the basis of these captions, the whole time member jumps to the conclusion that these contract notes refer to some transactions by which Mrs. Pendse and Nalini had purchased the shares and that these contract notes belie the stand of the appellant that they had sold the shares of TFL in September, 2000. On this basis the whole time member holds that they are not relevant to the issue. He further holds that the appellant has failed to substantiate his plea that the shares were actually sold by Mrs. Pendse in September, 2000 as claimed. We are really surprised at these findings recorded by the whole time member. To say the least, there is total non-application of mind to the facts of the case and he has not even cared to look at the material on the record. The investigations carried out by the Board had indicated that at the behest of the appellant, Mrs. Pendse, Nalini and other associates had sold 2,90,000 shares of TFL and this has been the case of the Board throughout. As a matter of fact, the complaint received by the Board on the basis of which the investigations were started, itself states that Mrs. Pendse and Nalini had sold the shares when the appellant was in possession of the unpublished price sensitive information. On the basis of the findings of the investigations, the appellant was issued a show cause notice dated April 7, 2003 and it is relevant to refer to para 2.1 of the said show cause notice which reads as under:

> "Investigation revealed that 2,90,000 shares of TFL were sold by Mrs. Anuradha Pendse, your wife, Dr. Anjali Beke, your acquaintance and associate and Director of Anjudi Property & Investments Pvt. Ltd. And Nalini Properties Pvt. Ltd. (hereinafter collectively referred to as "Associates"). It was seen that Mrs. Pendse sold 10,000 shares through MSSPL; Nalini Properties Pvt. Ltd., sold 30,000 shares through broker MSSPL, Dr. Anjali Beke sold 20000 shares through MSSPL, Anjudi Properties and Investments Ltd. Sold 80,000 shares through MSSPL and 1.5 lakh shares through JSBPL. It was seen during the course of investigations that, these entities had sold in total 2,90,000 shares of TFL in off-market deals to brokers JSBPL and MSSPL. It was observed that brokers, JSBPL and MSSPL had issued Contract notes in Form B on September 11 and 13, 2000 to the sellers, the Associates. Further, it was seen that these brokers in turn sold these

> shares to IECIL and Sarjan Securities Pvt. Ltd. (hereinafter referred to as SSPL). For this transaction also the brokers i.e. MSSPL and JSBPL had issued Contract notes in Form B on September 11 and 13, 2000 to the buyers IECIL and SSPL."

When the show cause notice was issued, the Board was in possession of the contract notes dated September 11, 2000 on which the appellant is relying. As is clear from the aforesaid para, the case in the show cause notice is that the associates of the appellant including Mrs. Pendse and Nalini had sold the shares. The contract notes of September 11, 2000 have also been referred to. It is a different matter that the show cause notice subsequently alleges that these contract notes were ante-dated to show that the sale took place in September 2000 when, according to the Board, the shares were sold between March 28 and March 30, 2001 but nowhere does the show cause notice allege that Mrs. Pendse and Nalini had ever purchased the shares. If that had been the case, it would not support the charge of insider trading, having regard to the nature of the unpublished price sensitive information available with the appellant. As a matter of fact, the Board proceeded throughout on the basis that Mrs. Pendse and Nalini had sold the shares and the only dispute between them was whether the sale took place in September, 2000 or in March, 2001. It is for the first time in the impugned order that a finding has been recorded that the contract notes pertain to the purchase of TFL shares by Mrs. Pendse and Nalini. At no stage prior to the passing of the impugned order was the appellant or Mrs. Pendse or even Nalini ever confronted with the fact that they had purchased the shares or that the contract notes pertained to their purchases. It is true that the contract notes were produced by the appellant and he did so in support of the plea that Mrs. Pendse and Nalini had sold the shares. During the course of the investigations, the representative of the Broker was summoned to appear on 24.1.2002 and again on 10.8.2002 and it was never put to him that the contract notes issued by it pertain to the purchases made by Mrs. Pendse and Nalini. On the other hand, all the questions put to the Broker clearly indicate that the case of Board all through has been that Mrs. Pendse and Nalini sold the shares to the Broker who, in turn, sold the same to IECIL. For

instance, question 6 put to the Broker on 24.1.2002 and questions 13 and 21 asked on 10.8.2002 read as under:

> "Q.6 It is gathered that in September 2000 IECIL purchased shares of Tata Finance Ltd. And orders were given by you on behalf of IECIL. Please give details of chronology of events. It is also noticed that this was an off market deal which was not in accordance with provisions of Securities Contract (Regulations) Act. Please clarify.
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> Q.13 Who gave order on behalf of IECIL for purchase of shares of TFL shown to have been purchased in September 2000 and how the shares were purchased?
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> Q.21 Who gave instruction to IECIL from Tata group for purchase of these shares of TFL ostensibly purchased in Sept.2000. Who was the recipient of the instructions?"

The answers given to these questions are not relevant for our purpose but the tenor of the questions clearly indicate that the Board was proceeding on the assumption that IECIL had purchased the shares of TFL from the Broker. We wonder how the whole time member could ignore all this and just on the basis of the two captions in the contract notes which were neither put to the appellant or his associates and not even to the Broker conclude that IECIL had sold the shares and Mrs. Pendse and Nalini had bought the shares and thereby holding the contract notes to be irrelevant. What happened is that the sale transactions by Mrs. Pendse and the purchase made by IECIL were back to back transactions executed by the Broker and it issued the contract notes simultaneously and the two captions inadvertently got reversed on the basis of which the whole time member has recorded his findings without appreciating that the finding now recorded in the impugned order was never the case of the Board. Had any questions been asked to the appellant or even to the Broker, the matter would have been clarified. Since the findings have been recorded for the first time in the impugned order, the appellant has had no opportunity to explain the discrepancy, if any. Further, there is on record the letter dated January 21, 2002 addressed by Mrs. Anuradha Pendse to the Chief General Manager of the Board pointing out that she had entered into only one off market deal in September 2000 through the Broker and sold 10,000 shares of TFL. She also pointed out that she did not execute any other transaction in TFL shares during the period from April

1, 2000 to April 30, 2001. This part of her statement has never been doubted by the Board and nor is there any material on the record to show that she executed any other trade except the one evidenced by the contract note. We have also noticed earlier that the sales made by Mrs. Pendse and Nalini through the Broker on September 11, 2000 had been reported by the Broker to the Bombay Stock Exchange. If the whole time member had any doubt about the transactions at any stage of the proceedings, he could have easily gathered further information from the Exchange which is not only as intermediary of the securities market but also under the regulatory control of the Board. It would have been in the fitness of things, if the Board had at some stage of the proceedings verified the details of the transactions executed by Mrs. Pendse and Nalini in September, 2000 from the Bombay Stock Exchange and that could have clinched the issue. If nothing else, the Board could have verified from that Exchange whether the Broker had reported the transactions to it in September 2000 for which we find there is ample material on record to show that it did. In this view of the matter, we cannot uphold the findings of the whole time member recorded in para 15 of the impugned order.

11. This brings us to the two bills dated 16.9.2000 issued by the Broker in the name of Mrs. Anuradha Pendse and Nalini. Detailed reference to these bills has already been made hereinabove. Learned counsel for the respondent objected to the bills being produced for the first time before us. We do not find any merit in this objection. Reference to one of these bills has already been made in para 17 of the impugned order while referring to the Party Ledger account of Mrs. Pendse in the books of the Broker. The whole time member has not disputed the bill and if he had had any doubts, he could have asked the appellant or Mrs. Pendse to produce the bills. A copy of the ledger account of Mrs Pendse is also on the record and the details of the bills tally with the details given therein. The bill numbers tally, the settlement period referred to in the bills also tallies with the period mentioned in the contract notes. Shri Kumar Desai, learned counsel for the Board strenuously argued that the bill number in the ledger account is prefixed by the letter ‘Z’ whereas this letter does not appear in the copy of the bill now produced. On this basis, he doubts the authenticity of the bill. We are unable to agree

with him. The whole time member has not expressed any doubts with regard to the bill while making reference to it in paragraph 16 nor has he rejected the same on this ground. Be that as it may, Shri Desai is missing the real point. The ledger account of Mrs. Pendse was a printout from the computer of the Broker who was maintaining it and that computer had its own code in the ledger account of Mrs. Pendse and the letter 'Z' is prefixed with all the bill entries in the ledger account including the ones which are not even in dispute. We have no reason to suspect the correctness of the bill. These bills clearly support what is stated in the contract notes and the ledger account. When all these three documents are read together, the transaction of sale of TFL shares in September, 2000 is complete and this wholly substantiates the case of the appellant.

12. We have already noticed that the appellant had placed strong reliance before the Board on the proceedings recorded by the Disciplinary Action Committee of the Bombay Stock Exchange chaired by a former Judge of the Bombay High Court. The proceedings to which detailed reference has already been made, clearly establish the fact that the transactions executed by Mrs. Pendse and Nalini in September, 2000 had been reported though there was a delay of eight days in reporting. These proceedings also indicate that there was a delay in the settlement of the trades. Having regard to these delays, the Disciplinary Action Committee decided to warn the Broker. The minutes of the Disciplinary Action Committee have been brushed aside by the whole time member merely by observing that the transactions in question were executed in the year 2000-01 whereas the minutes of the Disciplinary Action Committee were recorded on March 12, 2003. This had to be so and this is no ground to discard the minutes. We cannot uphold the findings recorded by the whole time member in this regard.

13. The charge of insider trading is one of the most serious charges in relation to the securities market and having regard to the gravity of this wrong doing, higher must be the preponderance of probabilities in establishing the same. In Mousam Singha Roy v. State of West Bengal (2003) 12 SCC 377, the learned judges of the Supreme Court in the context of the administration of criminal justice observed that, "It is also a settled

principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof, since a higher degree of assurance is required to convict the accused." This principle applies to civil cases as well where the charge is to be established not beyond reasonable doubt but on the preponderance of probabilities. The measure of proof in civil or criminal cases is not an absolute standard and within each standard there are degrees of probability. In Hornal v. Neuberger Products Ltd. (1956) 3 All E.R.970 Hodson, L.J. observed as under:

> "Just as in civil cases the balance of probability may be more readily tilted in one case than in another, so in criminal cases proof beyond reasonable doubt may more readily be attained in some cases than in others."

We are also tempted to refer to what Denning, L.J. observed in Bater v. Bater (1950) 2 All E.R. 458 wherein he was resolving the difference of opinion between two Lord Justices regarding the standard of proof required in a matrimonial case. This is what he said:

> "It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion."

In the light of the aforesaid principles on degree of proof, we have carefully gone through the impugned order and the material on the record and find that the whole time member has miserably failed to establish the charge of insider trading against the appellant with the required degree of probability necessary to establish such a serious charge. The only ground on which the whole time member holds that the sale transactions of Mrs. Pendse and Nalini were executed in the end of March 2001 is that the delivery of shares was

given by the sellers on March 28, 2001 and payment for the shares was received on March 30, 2001. The whole time member has noticed the long delay in settling the trade for which the contract was completed in September, 2000 and has concluded that the sale of the shares took place in March, 2001. We have already dealt with this aspect of the matter earlier in our order and we cannot agree with the findings recorded in this regard. As already observed, the trades may have been contrary to the Bye-laws of the Exchange but it cannot be said that the contract was not completed in September, 2000. If the sale did not take place in September, 2000 then what was the Broker reporting to the stock exchange as per its letter dated September 16, 2000. We have already noticed that the Bombay Stock Exchange had acknowledged the receipt of this letter from the Broker in its letter of November 26, 2002. In this view of the matter, the charge must fail. Accordingly, we answer the question posed in the opening part of our order in the negative and hold that the appellants are not guilty of insider trading.

In the result, the appeals are allowed and the impugned orders set aside, leaving the parties to bear their own costs.

Sd/-
Justice N. K. Sodhi
Presiding Officer

Sd/-
Samar Ray
Member

19.11.2009
ddg/-

Prepared and compared by – Devendra