BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No. 201 of 2009

Date of decision: 2.12.2009

Shri Shadilal Chopra
Aashiana, Opp. Deonar Bus Depot,
Deonar, Mumbai. ……Appellant

Versus

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

Mr. Prakash Shah, Advocate for the Appellant.

Dr. Poornima Advani, Advocate with Ms. Harshada Nagare, Advocate for the Respondent.

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

Per : Justice N. K. Sodhi, Presiding Officer (Oral)

This order will dispose of two connected Appeals no. 136 and 201 of 2009 both of which have been filed by Shadilal Chopra who has been found guilty of unfair trade practices. Common questions of law and fact arise in these appeals. Appeal no. 201 of 2009 is directed against the order dated August 10, 2009 passed by the whole time member of the Securities and Exchange Board of India (for short the Board) debarring the appellant from accessing the securities market directly or indirectly for a period of 45 days and also directing him to disgorge an amount of Rs.66,20,209/- which is the unlawful gain made by him. He has also been directed to pay another sum of Rs.23,83,275/- being the interest for three years at the rate of 12% per annum. The other appeal is directed against the order dated June 10, 2009 passed by the adjudicating officer holding the appellant guilty of the same charges and imposing a monetary penalty of Rs.70 lakhs on him. Facts giving rise to these appeals clearly bring out the fraud that the appellant played in cornering the shares in the Initial Public Offering (IPO).

Atlanta Limited (Atlanta) came out with an IPO in September 2006 and offered 43 lakhs shares to different categories of investors including 2 lakhs shares to its employees. The issue opened on September 1, 2006 and closed on September 7, 2006 and the shares were listed on the National Stock Exchange of India Limited (NSE) and Bombay Stock Exchange Limited (BSE) on September 25, 2006. The Board noticed certain irregularities in trading in the scrip of Atlanta and pending investigations, it passed an ad-interim ex-parte order on February 22, 2007 directing several persons including the appellant herein not to buy, sell or deal in the securities of Atlanta till further directions. The investigations, among other things, revealed that the appellant had cornered large number of shares reserved for the employees of the issuer company by financing their applications and on allotment getting the shares transferred in his demat accounts which he then sold thereby making a windfall gain. Accordingly, proceedings were initiated under Section 11B of the Securities and Exchange Board of India Act, 1992 (hereinafter called the Act) and also under Chapter VIA thereof for the imposition of monetary penalty. It was alleged in the show cause notice dated March 9, 2009 that the appellant was a director of Shrikant Studio Pvt. Ltd. which is a part of the promoter group of Atlanta and that he provided funds to as many as 11 employees of the issuer company who made applications and received shares which on allotment were transferred by them to his demat account. It was further alleged that in this manner the appellant received 57,172 shares which were meant for the employees of Atlanta and after getting them transferred in his demat account he sold them in the market for a sum of Rs.1,51,96,009/-. The show cause notice further stated that the shares were allotted to the employees at the rate of Rs.150/- per share. The appellant was alleged to have violated Regulations 3(c) and 4(1) of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities market) Regulations, 2003 (for short the Regulations). The appellant filed a detailed reply to the show cause notice in which he did not dispute the fact that he had financed the applications of 11 employees whose names were mentioned in the show cause notice. He referred to the terms orally agreed between him and the employees on which the finance was given and stated as under:-

"Broadly the terms agreed upon were / are as under:

→ The Application in employee reservation portion shall be made in the employees name as statutorily required.
→ Employees will transfer shares to my demat account on allotment
→ After listing of Atlanta shares, I shall sell the shares within a period three months at my discretion
→ Employee will be entitled to 25 % of the profit after deduction of interest cost @ 9% per annum for the actual number of days of investment. However in case of loss, I shall not be entitled to any interest."

His case in the reply was that the terms on which the applications of the employees had been financed by him were within the four corners of law and a legitimate act on his part which did not violate any provision of law or the regulations. On a consideration of the reply and the material collected during the course of the enquiry, the whole time member found that the appellant was guilty of violating Regulations 3(c) and 4(1) of the Regulations and debarred him from accessing the securities market as aforesaid. Since he had made a windfall gain on the sale of the shares, he was also directed to disgorge the unlawful gains made by him. The adjudicating officer has also recorded similar findings and imposed a monetary penalty of Rs.70 lakhs under Section 15HA of the Act. Hence these appeals.

We have heard the learned counsel for the parties. The fact that the appellant is a director of a group company of Atlanta is not in dispute. It is also not in issue that he financed the applications of 11 employees for the allotment of shares from the quota reserved for them. It is common case of the parties that 11 employees were allotted 57,172 shares with the finances provided by the appellant and that they transferred these shares to the demat account of the appellant between September 26, 2006 and October 4, 2006. The chart showing the names of the employees, the date and amount of finance given and the date on which the employees received the shares which chart is referred to in the impugned order is reproduced hereunder for facility of reference:-

Table A: Summary of Transactions by the Noticee

Name of employee	Finance to Employees		Shares Received from Employees			Refund from Employees	
	Date	Amount (Rs.)	Date	No. of shares	Value (Rs.)	Date	Amount (Rs.)
1	2	3 = 6+8	4	5	6	7	8
B.S. Korigeri	1/9/2006	10,50,000	26/9/2006	5,929	8,89,350	11/10/2006	1,60,650

R. K. Khatri	1/9/2006	9,00,000	26/9/2006	5,147	7,72,050	11/10/2006	1,27,950
Sachin Jain	1/9/2006	9,00,000	26/9/2006	5,136	7,70,400	11/10/2006	1,29,600
Uttam Krishna Sawant	1/9/2006	9,00,000	26/9/2006	5,195	7,79,250	11/10/2006	1,20,750
Minal L. Kaku	1/9/2006	9,00,000	26/9/2006	5,225	7,83,750	11/10/2006	1,16,250
S. C. Desai	1/9/2006	9,00,000	27/9/2006	5,008	7,51,200	11/10/2006	1,48,800
Bharati Shetty	1/9/2006	9,00,000	26/9/2006	5,189	7,78,350	11/10/2006	1,21,650
Brinda Vishal Shah	1/9/2006	9,00,000	26/9/2006	5,229	7,84,350	11/10/2006	1,15,650
Ida W. Pinto	1/9/2006	9,00,000	26/9/2006	5,160	7,74,000	11/10/2006	1,26,000
Lilly Omen Jecob	1/9/2006	9,00,000	26/9/2006	5,160	7,74,000	11/10/2006	1,26,000
Ulhash Bhole	1/9/2006	9,00,000	4/10/2006	4,794	7,19,100	11/10/2006	1,80,900
Total		**1,00,50,000**		**57,172**	**85,75,800**		**14,74,200**

It is the appellants own case that he sold the shares between October 6, 2006 and October 17, 2006 for a sum of Rs.1,51,96,078.21. The only argument that has been advanced before us is that the appellant has done no wrong in giving finance to the employees for the purchase of shares from the quota meant for them and that the subsequent transfer of shares in his demat account was also as per the procedure prescribed by law and further sale by him was through the exchange mechanism. It is argued that the appellant did not violate any provision of the Regulations and that the impugned orders in both the appeals are not warranted. We are unable to agree with the learned counsel for the appellant. It is common ground between the parties that two lakhs shares had been reserved in the IPO by Atlanta for its employees and we are of the view that the appellant cornered the shares using the employees as conduits. If the appellant had applied for the shares in his own name as a retail investor which he claims to be, he could not have applied for an amount exceeding Rs.1 lakh and in that event he would have been allotted only 54 shares as per the pro- rata allotment made by Atlanta to the retail investors. As against 54 shares, he managed to corner 57,172 shares through the employees. It is by now well settled that a person cannot do indirectly what he is not permitted to do directly. Instead of making an application in his own name which he could not as he is not an employee of the issuer company, he thought of a deceitful device to file applications in the name of 11 employees and wholly financed those applications and immediately on the allotment of shares he got them transferred in his demat account and subsequently sold them in the market thereby making a windfall gain. It is also an admitted fact that the employees quota in the IPO was over subscribed by 1.14 times and had the appellant not cornered the shares, the same would have been allotted to the genuine employees of Atlanta. This

conduct of the appellant clearly amounts to fraud as defined in the Regulations and in addition deprived the employees of their due shares. Even if the employees quota had been under subscribed (which did not happen in the instant case), the unsubscribed portion would have then been added back to the net issue to be available to the genuine investors in accordance with law. The fact that the 11 employees were completely under the control of the appellant is borne out from the fact that immediately on the allotment of the shares at the rate of Rs.150/- per share they transferred the shares to his demat account and did not sell them in the market where the price was much higher. The shares were listed on the stock exchanges on September 25, 2006 and the shares opened at the price of Rs.170/- per share and closed on the first day at Rs.192.30. Subsequently the price of the share further went up but the employees chose to transfer the shares to the appellant at the issue price. Further, there was no documentation between the appellant and the employees and the oral terms to which the appellant has referred to also lead us to conclude that this is not a case where the employees had taken a loan to apply for the shares. If that had been the case, they would have sold the shares in the market at a higher price and returned the money to the appellant. This also leads us to the inference that it was the appellant who applied for the shares in the names of the employees. We are, therefore, satisfied that the appellant by his deceitful conduct had employed a device to defraud the genuine employees of their due share and committed an unfair trade practice while dealing in the shares of Atlanta. The impugned order rightly holds him guilty of violating Regulations 3(c) and 4(1) of the Regulations. It is again admitted between the parties that the issue price of the shares was Rs.150/- and the appellant sold them at a much higher price on different dates at an average price of Rs.265.80. The whole time member has calculated the unlawful gain made by the appellant in this regard and has rightly directed him to disgorge a sum of Rs.90,03,484/- including interest at the rate of 12% per annum for three years. Disgorgement is the forced giving up of profits obtained by illegal or unethical acts. It is a repayment of ill-gotten gains that is imposed on wrong doers. It is a monetary equitable remedy that is designed to prevent a wrong doer from unjustly enriching himself as a result of his

illegal conduct. It is not a punishment. In this view of the matter, no fault can be found with the impugned order passed by the whole time member.

This brings us to the order passed by the adjudicating officer. He has imposed a monetary penalty of Rs.70 lakhs on the appellant for his fraudulent conduct in cornering 57,172 shares which were meant for the employees of Atlanta. He has taken into account the provisions of Section 15J and accordingly worked out the penalty. What is contended by the learned counsel for the appellant is that the adjudicating officer should have taken into consideration only the closing price of the scrip on the day of listing and not the actual price at which the appellant sold the shares in the market. We cannot accept such an argument. Admittedly, the appellant sold the shares at a much higher price than the closing price on the first day of listing. As already observed, the scrip opened at Rs.170/- on 25.9.2006 and closed at Rs. 192.30 and the appellant on his own showing sold the shares at an average price of Rs.265.80 per share. He wants the closing price on the first day of listing to be taken into consideration for assessing the quantum of penalty in terms of Section 15J of the Act. This cannot be done. The price at which the shares were actually sold is the one which should be taken into consideration for the purposes of assessing the quantum of penalty. No fault can, thus, be found with the order of the adjudicating officer. Having regard to the fraudulent conduct of the appellant, we are of the view that this is not a fit case in which the quantum of penalty should be reduced.

In the result, both the appeals fail and they stand dismissed with no order as to costs.

Sd/-
Justice N. K. Sodhi
Presiding Officer

Sd/-
Samar Ray
Member

2.12.2009
ptm

Prepared & Compared by
ptm