BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No.79 of 2012

Date of decision: 04.10.2012

Shailesh S. Jhaveri
A-2, Manibhadra Flats,
New Girdhar Park Society,
Ambawadi,
Ahmedabad – 380 015. …Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No. C4-A, G-Block,
Bandra Kurla Complex,
Mumbai – 400 051. … Respondent

Mr. Deepak R. Shah, Advocate for the Appellant.

Mr. Kumar Desai, Advocate with Mr. Mobin Shaikh, Advocate for the Respondent.

CORAM : P. K. Malhotra, Member & Presiding Officer (*Offg.*)
S. S. N. Moorthy, Member

Per : P. K. Malhotra

This order will dispose of two Appeals, no. 79 and 80 of 2012, which arise out of a common order dated January 25, 2012 passed by the whole time member of the Securities and Exchange Board of India (for short the Board) directing the appellants to disgorge unlawful gain of ₹ 60,72,000 each and also pay ₹ 75,31,111 each being simple interest @ 12% per annum on the aforesaid unlawful gain for the period January, 2000 to May, 2010.

2. The allegation against the appellants is that they got preferential allotment of 6,00,000 shares each of OjasTechnochem Products Limited (the company) without actual infusion of funds by them as consideration. The appellants sold these shares subsequently at an average price of ₹ 10.12 per share making illegal profit of ₹ 60,72,000 each. This, according to the Board, was violative of the provisions of Regulation 4(b) and 4(d) of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 1995 (for short the FUTP Regulations). Therefore, after holding an enquiry in accordance with the laid down procedure, the whole time member of the Board held both the appellants guilty of the aforesaid violations and by his order dated November 13, 2007, issued direction under Section 11B of Securities and Exchange Board of India Act, 1992 restraining the appellants from accessing the securities market and prohibiting them from buying, selling or dealing in securities either directly or indirectly for a period of two years. On completion of these proceedings, the Board issued a fresh show-cause notice on February 29, 2008 initiating disgorgement proceedings against the appellants under Sections 11 and 11B of the Act. By the said show-cause notice, the appellants were given an opportunity to respond to the allegations contained in the show-cause notice. The appellants filed their reply. Personal hearing was also granted. After considering the reply and the submissions made at the time of personal hearing, the whole time member passed the order as aforesaid. Hence this appeal.

3. We have heard Mr. Deepak R. Shah, Advocate for appellants and Mr. Kumar Desai, Advocate for the respondent-Board. Before we proceed to deal with their contentions, it is necessary to make note of the fact that the appellants have also filed a writ petition in the High Court of Gujarat at Ahmedabad against non-supply of certain documents sought by the appellants from the Board under the Right to Information Act. The said writ petition is said to be pending. As noted by the whole time member of the Board in the impugned order, the Hon’ble High Court, by its order dated March 23, 2010, has directed that if any order is passed by the Board, the same will

not be implemented on condition that the Petitioner will furnish the bank guarantee in pursuance of the order of the Board. Before hearing the matter, it was put to the learned counsel for the parties as to whether there will be any handicap to decide this appeal due to the pendency of the writ petition before the Hon'ble High Court of Gujarat. The counsel for the parties answered in the negative. Therefore, we are proceeding to deal with the contentions of the parties as raised in the appeal before us.

4. During the course of argument, learned counsel for the appellants has raised following issues before us:

(i) In the order passed under Section 11B of the Act, the appellants have already been restrained from accessing the securities market for a period of two years. Now for the same violation, the Board is issuing another direction in the form of disgorgement. This amounts to double jeopardy within the meaning of Article 20 of the Constitution of India.

(ii) Directions under Section 11B of the Act can be issued only to a person referred to in Section 12 or to the persons associated with the securities market. Section 12 makes reference to the stock-broker, sub-broker, share transfer agents, banker to an issue, registrar to an issue, merchant banker, and other intermediaries who may be associated with the securities market. Such persons require a certificate of registration to be obtained from the Board before dealing in securities. According to the learned counsel for the appellants, the words "associated with securities market" should also have a rational connection with the above referred persons and, therefore, it will not include an individual who is merely an investor. The appellants in the present case are only investors in the securities and do not belong to the class of persons referred to in Section 12 of the Act. Therefore, directions, as enunciated under Section 11B of the Act cannot be issued to them.

(iii) The shares of the company were allotted on January 13, 2000 whereas the show-cause notice for disgorgement was issued only on

February 29, 2008. Thus, there is a delay of 8 years which, by any standard, cannot be considered reasonable. Therefore, the action is barred by limitation. Alternatively, the order needs to be quashed on the ground of inordinate delay alone.

(iv) It was further argued by the learned counsel for the appellants that even on merits, the appellants have a strong case. The appellants have borrowed money for investment in the shares from M/s. Rajesh Jhaveri and the amount was utilized for the purpose of subscribing to the shares of the company. The appellants had subscribed to the shares through cheques by withdrawing the credit balance and finance from M/s. Rajesh Jhaveri and the cheques were debited from the bank account of the appellants and got credited to the bank account of the company. The transaction was thus complete and it is incorrect to say that the allotment of shares to the appellants was without consideration. It was further contended by leaned counsel for the parties that the appellants have earned only ₹ 69,393 each on sale of the shares and, therefore, the order directing disgorgement of Rs.60,72,000 each is bad in law.

(v) It was further argued that the show-cause notice for disgorgement itself was issued on February 29, 2008 and the impugned order was passed only on January 25, 2012. Therefore, charging of interest from January, 2000 is arbitrary and bad in law.

5. Let us now deal with each of the arguments of the learned counsel for the appellants based on the submissions made before us and the material placed on record.

6. On issue no.(i), we are clearly of the view that the principle of double jeopardy is not applicable to the facts of the present case. Article 20(2) of the Constitution of provides that no person shall be prosecuted and punished for the same offence more than once. These are not criminal proceedings. This is a civil action for violation of the regulatory framework relating to the securities market and there is no legal bar in

initiating action for violating different provisions of the Act. The Act itself permits adjudication proceedings under Chapter VIA of the Act, issue of directions under Sections 11 and 11B of the Act and prosecution under Section 23 of the Act for violating provisions of the Act or the rules made thereunder. In any case, disgorgement is not a penal action. A person who has unjustly enriched himself by his unlawful conduct is required to disgorge the illegal gains made by him. This Tribunal had an occasion to deal with the concept of disgorgement in Karvy Stock Broking Ltd. v. Securities and Exchange Board of India (Appeal no. 6 of 2007 decided on May 2, 2008) wherein the Tribunal observed as under:

> "(5) Before we deal with the contentions of the parties, it is necessary to understand what disgorgement is. It is a common term in developed markets across the world though it is new to the securities market in India. Black's Law Dictionary defines disgorgement as "The act of giving up something (such as profits illegally obtained) on demand or by legal compulsion." In commercial terms, 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 wrongdoers by the courts. Disgorgement is a monetary equitable remedy that is designed to prevent a wrongdoer from unjustly enriching himself as a result of his illegal conduct. It is not a punishment nor is it concerned with the damages sustained by the victims of the unlawful conduct. Disgorgement of ill-gotten gains may be ordered against one who has violated the securities laws/regulations but it is not every violator who could be asked to disgorge. Only such wrongdoers who have made gains as a result of their illegal act(s) could be asked to do so. Since the chief purpose of ordering disgorgement is to make sure that the wrongdoers do not profit from their wrongdoing, it would follow that the disgorgement amount should not exceed the total profits realized as the result of the unlawful activity. In a disgorgement action, the burden of showing that the amount sought to be disgorged reasonably approximates the amount of unjust enrichment is on the Board."

A similar view was taken by this Tribunal in the case of Dhaval Mehta vs. Securities and Exchange Board of India (Appeal no. 155 of 2008 decided on September 8, 2009). It was further observed in the case of Dushyant N. Dalal vs. Securities and Exchange Board of India (Appeal no. 182 of 2009 decided on November 12, 2009) that disgorgement is not a punishment but only a monetary equitable remedy meant to prevent a wrongdoer from unjustly enriching himself as a result of his illegal conduct and, therefore, we are of the view that there need not be specific provision in the Act in this regard and this power to order disgorgement inheres in the Board. It will thus be seen that the order for disgorgement can be passed by the Board only after a delinquent has been found guilty of violating the provisions of the Act, rules or regulations and

has made gains which are considered to be illegal. Such disgorgement proceedings can be initiated simultaneously with the proceedings to establish the guilt of the delinquent or on conclusion of such proceedings. The principle of double jeopardy is not applicable to such cases. We are, therefore, unable to accept this argument of the learned counsel for the appellant.

7. On issue no.(ii) that the appellants are only investors and, therefore, they do not fall within the category of an intermediary as defined in Section 12 of the Act or within the category of a "person associated with the securities market", we are of the view that this issue is no more res integra. The High Court of Gujarat in the case of Karnavati Fincap Ltd. vs. Securities and Exchange Board of India [1996] 87 CompCas 186 (Guj), had an occasion to deal with this issue and this is what the High Court has held:

> "The words "other persons associated with the securities market" have not been defined in the Act. The question then arises whether "persons associated with the securities market" takes its colour from persons enumerated in clause (ba)? If one has to go by the literal meaning, the interpretation which restricts the meaning of "persons associated with the securities market" to the persons enumerated in clause (ba) is not acceptable. In ordinary meaning, the persons associated with the securities market would include all and sundry who have something to do with the securities market. It is to be noted that the securities market in the sense is not confirmed to stock exchanges only. The words "persons associated with the securities market" are of much wider import than intermediaries. "Persons associated with" denotes a person having connection or having intercourse with the other, in the present case that "other" with whom a person is to have connection or intercourse in the securities market". The term "securities market" has not been defined under the statute. But taking the meaning of "securities" as defined in the Securities (Contracts) Regulation Act, 1956, because that is the definition of "securities" adopted under the SEBI Act, and the ordinary meaning of the word "market", it will mean a place or institution where the business of selling or buying of securities is carried on. Selling, buying or dealing with securities is the essential ingredient of a market. Though "securities market" has not been defined, the definition of "stock exchange" under section 2(i) of the Securities Contracts (Regulation) Act means any body of individuals whether corporate or not, constituted for the purpose of assisting, regulating or controlling the business of buying, selling or dealing in securities. "Securities" has been defined under section 2(h) to include shares, scrips, stocks, debentures, debenture stock or other marketable securities of like nature in or of any incorporated company or other body corporate, etc., etc. What in noticeable is it refers to "marketability" of it. A stock exchange is more than a mere selling, buying or dealing place for securities, but adorns the role of an assisting agency in smooth conduct of securities business by suitable regulating or controlling authority. None the less a market cannot be conceived of without a seller or buyer who are the primary persons for whose purpose the market exists. All activities of business of selling and buying are

> related to the seller or the buyer. It is inconceivable to think that a buyer or seller of a scrip is not a person associated with the securities market, where or through which he transacts his business, whether as trader or as investor, of selling or buying the required scrip"

In view of clear finding of the Hon'ble High Court, this argument of learned counsel for the appellants also fails and is rejected.

8. With regard to issue no. (iii) relating to inordinate delay in initiating and completing the disgorgement proceedings, we are of the view that in the facts and circumstances of the present case, the appeal cannot be allowed on this ground also. It needs to be appreciated that the first order under Sections 11 and 11B of the Act debarring the appellants from dealing in the securities itself was passed on November 13, 2007. The question of disgorgement can arise only when the Board comes to a definite conclusion that there was violation of the regulatory framework and the delinquent has illegally enriched himself. In support of his argument, learned counsel for appellants has relied on some of the orders passed by this Tribunal as well as decision of other Courts as listed below:

1. M. Srinivasa Rao v/s ACIT (167 Taxmann 53) (Madras HC)
2. CIT v/s NHK Japan Broadcasting Corporation (172 Taxmann 230) (Delhi HC)
3. Govt. of India v/s Citadel Fine Pharmaceutical (184 ITR 467) (SC)
4. Mahindra and Mahindra Ltd. v/s DCIT (303 SOT 374) (ITAT Mumbai Spl. Bench)
5. Ms. Aditi Dalal v/s SEBI (Appeal No.143 of 2011 before the SAT)
6. Amrit Foods v/s CCE 2005 (190 ELT 433 SC)
7. Hindustan Polymers Co. Ltd. v/s CCE 1999 (106 ELT 12 SC)
8. Savaka Business Machines Ltd. v/s SEBI (Appeal No. 76 of 2005 before the SAT)
9. Gold Multifab Limited v/s SEBI (Appeal No. 115 of 2002 before the SAT)

We have perused the judgments/orders cited by learned counsel for the appellants and we feel that all these orders were passed in the peculiar facts and circumstances of the

relevant case. In so far as the decisions under the tax matters are concerned, these were rendered keeping in view the statutory time limit prescribed in relation to related matters like assessment proceedings or penalty proceedings. While dealing with the issue of delay in conducting the proceedings by the Board in matters relating to market manipulation, we have observed in the case of Subhkam Securities Private Limited vs. Securities and Exchange Board of India (Appeal no. 73 of 2012 decided on 25.7.2012) that expeditious disposal of such proceedings by the Board alone will ensure that the Board is carrying out its duties effectively to protect the interests of investors in securities and to promote the development of and regulating the securities market as mandated by Section 11(1) of the Act. We have also observed that inordinate delay in conducting enquiries and in punishing the delinquent not only permits market manipulator to operate in the market, it also has demoralizing effect on the market players who are ultimately not found guilty but damocles' sword of enquiry keeps hanging on them for years together from the date of starting of investigations by the Board to the date of completion of enquiry proceedings. However, we are also conscious of the fact that in the absence of any statutory requirement, no hard and fast rule can be laid down as to how much delay is justified in conducting an enquiry. It will depend on the facts and circumstances of each case. In the case in hand, the disgorgement order could not have been passed before arriving at a conclusion whether the appellants have violated the regulatory framework of the securities market and whether they have earned any illegal profits out of transactions conducted by them. It is only when Board comes to a definite conclusion on this issue that disgorgement proceedings can be initiated. Although there may be little delay in passing the final order by the whole time member after completing the hearing, such delay is not fatal keeping in view the seriousness of the charge of market manipulation against the appellants. We are, therefore, of the considered view that the appellants cannot succeed on this ground also.

9. Coming to the next argument at (iv) above that even on merits the appellants have a strong case and the matter needs to be looked into on merits also, we are of the

view that in disgorgement proceedings, which is an extraordinary power available to the regulator, it is not competent on the part of the regulator to reexamine the matter on merits which has already been settled by passing directions under Sections 11 and 11B of the Act. We may take note of the fact that the earlier orders passed by the Board under Section 11B of the Act debarring the appellants from dealing in the securities market for two years has acquired finality as the appeal filed against the said order before this Tribunal was withdrawn by the appellants on June 2, 2008. The disgorgement proceedings cannot be treated as separate and independent proceedings as is the case with the adjudication proceedings under Chapter VIA or prosecution under Section 23 of the Act. Disgorgement is in fact a continuation of the earlier proceedings under which a person has been held guilty of violating the regulatory framework and had benefitted illegally and the Board decides to disgorge the delinquent of the unlawful gains. We are, therefore, of the considered view that the matter cannot be reexamined on merits in disgorgement proceedings. What can be disputed in disgorgement proceedings is the amount of illegal gains if the appellant feels that the amount worked out by the Board is not correct. In the case of present appellants, we notice that the whole time member of the Board has arrived at a positive finding that the appellants had got the preferential allotment of shares without any consideration. It is appellants' own case that sale consideration received by them was ₹ 60,72,000/- each. Therefore, we cannot find any fault with the findings of the whole time member that amount of unlawful gain in case of each appellant is ₹ 60,72,000/-.

10. The last argument of learned counsel for the appellants was that charging of interest with effect from January, 2000 is arbitrary and bad in law. We find merit in the argument of learned counsel for the appellants that when the disgorgement proceedings itself were initiated by the issue of a show-cause notice on February 29, 2008, the interest could not be charged from January, 2000. The amount of disgorgement got crystallized only on passing of the order on January 25, 2012. By the said order the Board has permitted the appellants to pay the total amount within 45 days from the date of the order. It was not an amount which was due or payable to the

Government or to the Board. It is only after the Board concluded that the appellants have illegally enriched themselves and the amount of illegal gains got crystalized and disgorgement order is passed, it can be said that the amount has become payable. The Board granted 45 days time to the appellants to pay this amount. If any interest is to be charged, it can be charged only from the date of expiry of 45 days of the passing of the impugned order.

11. For the reasons stated above, we find no merit in the appeal. However, on the issue of interest, we are inclined to modify the order to the extent that the interest shall be payable @ 12% per annum on expiry of 45 days from the date of the impugned order.

The appeal is partly allowed as above with no order as to costs.

Sd/-
P. K. Malhotra
Member &
Presiding Officer (*Offg.*)

Sd/-
S.S.N. Moorthy
Member

4-10-2012
Prepared & compared by-ddg