BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No.30 of 2013

Date of decision: 23.07.2013

1. Ramswarup Sarda

2. Ramswarup Sarda HUF

14 North Ambazari Road,
Daga Layout, Nagpur,
Maharashtra – 440 010.

…Appellants

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No. C-4A, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai - 400 051. …Respondent

Mr. N.P. Lashkari, Advocate with Mr. Manish Chhangani, Advocate for Appellants.

Dr. Mrs. Poornima Advani, Advocate with Mr. Ajay Khaire and Ms. Virakthi Hegde, Advocates for the Respondent.

CORAM : Justice J.P. Devadhar, Presiding Officer
Jog Singh, Member
A. S. Lamba, Member

Per : Jog Singh

1. In the present Appeal, Appellant No. 1, namely, Ramswarup Sarda, is an individual investor in the securities market. He is also the Karta of his Hindu Undivided Family which is Appellant No.2. He is contesting an order dated May 11, 2012 passed by the Securities and Exchange Board of India ("SEBI") restraining him, along with some others, from accessing the securities market and prohibiting him from buying, selling or otherwise

dealing in securities, directly or indirectly, for a period of two years under Sections 19, 11(4) & 11B of the Securities and Exchange Board of India Act, 1992 read with Regulations 3(a), 3(b), 3(c), 3(d) and 4(1) and 4(2)(a), (b) and (g) of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 ("FUTP Regulations").

2. Appellant No. 1 submits that he has an impeccable track record in terms of compliance with various laws related to securities and he is a routine and genuine investor in securities. He has no link with the promoters or any of the parties mentioned in the impugned order. His case is that he purchased 50,000 (Fifty Thousand) shares of Alka Securities Ltd. ("the Company") in an auction held by the Dena Bank as a long term investment and has never dealt with or transferred or disposed of those shares till date.

3. It appears from the pleadings that the Respondent observed a spurt in the volumes of the scrip of the Company during November, 2008 to March, 2009. Investigation was, accordingly, conducted and it was prima-facie observed that the closing price of the scrip had been Rs.32.45 in September, 2008 to begin with and it reached a high of Rs.35.05 in the same month with some fluctuations thereafter. It reached to Rs.32 in May, 2009. The Respondent, therefore, passed an ex parte order on July 28, 2009 prohibiting the Appellant, along with many others, from buying, selling or dealing in the securities of the Company till further orders. The basic presumption on which the interim order came to be passed seems to be that the promoters of the Company along with some other persons indulged in manipulative trades with the idea of creating artificial volumes so as to give a wrong impression about the liquidity of the scrip. On October 30, 2009 the said interim order came to

be confirmed by the Respondent and a Show Cause Notice (SCN) dated December 27, 2010 was issued to several entities, including the Appellants, calling upon them to furnish their reply in the matter of alleged circular trades which had created artificial volumes enhancing image of the scrip in the public eye. After considering the explanations/replies offered by various parties including the Appellant, the final impugned order came to be passed on May 11, 2012 restraining the Appellants and a few others from dealing in securities for two years. The learned counsel for the Appellant, Mr. Lashkari, has submitted that the Appellant is an innocent and bonafide investor. He purchased the shares in question from Dena Bank and directly made the payment to the same bank. The shares of the Company were pledged with the bank and therefore the ownership had remained with the promoter Ms.Dimple M. Kothari. It is further forcefully argued that the Appellant had no intention of trading in the scrip as it was a long term investment. From November ,2008 till July 28, 2009, when the interim order was passed by the Respondent, the Appellant had almost ten months' time to trade in the shares in question. He did not do so because of the simple reason that he was not at all connected with any of the entities/persons mentioned in the impugned order by the Respondent, as well as with the promoters. The learned counsel for the Appellant has relied upon a judgment of this Tribunal dated July 16, 2012 passed in Appeal No. 131 of 2012 in the case of Piyush P. Avlani v. SEBI.

4. Per contra, the case of the Respondent, as submitted by Mrs. Poornima Advani, learned counsel for the Respondent, is that although the Appellant has purchased the shares from Dena Bank, it has received the same from one of the promoters of the Company. It is submitted that the 1st level entities were the channels used to off-load shares of the Company to 2nd level entities and

additional entities through off-market as well as on-market transfers. Following this, shares were sold by the 2nd level entities to the 1st level entities through the market mechanism. It is pointed out by the Respondent that a total of 6,84,76,922 shares have been traded in the scrip of the Company in different tranches during the entire period of the investigation carried on by SEBI among entities at various levels and the promoters. It is further argued that payments made to Dena Bank, although made through cheques and demand drafts, the cheques were transferred from the account of the promoters and not Dena Bank, which leads to the conclusion that the Appellants did not purchase the shares in question from Dena Bank. In response to the contention of the Appellants that the shares were bought by them as a long term investment evidenced by the fact that they have not been sold to any entity, the Respondent states that, "the entire scheme of manipulation came to a standstill by the interim order in this matter, because of which several entities may not have been able to transfer the shares received by them to manipulate the scrip."

5. We have heard both the learned counsel for the parties at length and perused the pleadings and written submissions/affidavit submitted by the parties before us. In the impugned order, the Appellant is held guilty of violating Regulations 3(a), 3(b), 3(c), 3(d) and 4(1) and 4(2)(a), (b) and (g) of the FUTP Regulations. For ease of reference, the above regulations are extracted below:-

"3. Prohibition of certain dealings in securities

No person shall directly or indirectly-

(a) buy, sell or otherwise deal in securities in a fraudulent manner;

(b) use or employ, in connection with issue, purchase or sale of any security listed or proposed to be listed in a recognized stock exchange, any manipulative or deceptive

device or contrivance in contravention of the provisions of the Act or the rules or the regulations made there under;

(c) employ any device, scheme or artifice to defraud in connection with dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange;

(d) engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person in connection with any dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange in contravention of the provisions of the Act or the rules and the regulations made there under.

4. Prohibition of manipulative, fraudulent and unfair trade practices

(1) Without prejudice to the provisions of regulation 3, no person shall indulge in a fraudulent or an unfair trade practice in securities.

(2) Dealing in securities shall be deemed to be a fraudulent or an unfair trade practice if it involves fraud and may include all or any of the following, namely:-

(a) indulging in an act which creates false or misleading appearance of trading in the securities market;

(b) dealing in a security not intended to effect transfer of beneficial ownership but intended to operate only as a device to inflate, depress or cause fluctuations in the price of such security for wrongful gain or avoidance of loss;

(c) advancing or agreeing to advance any money to any person thereby inducing any other person to offer to buy any security in any issue only with the intention of securing the minimum subscription to such issue;

(d) paying, offering or agreeing to pay or offer, directly or indirectly, to any person any money or money's worth for inducing such person for dealing in any security with the object of inflating, depressing, maintaining or causing fluctuation in the price of such security;

(e) any act or omission amounting to manipulation of the price of a security;

(f) ……..

(g) entering into a transaction in securities without intention of performing it or without intention of change of ownership of such security;

(h) to (r) ……..”

On an analysis of the provisions reproduced above, we are of the opinion that in order for there to be an offence committed under the said regulations, a few points need to be borne in mind. Firstly, the transaction in question should amount to a fraudulent activity. Dealing in the scrip of a particular company ought to reek of manipulation. Any “device, scheme or artifice”, as mentioned in Regulation 3(c) ought to have been employed with the intention to defraud. The impugned transaction, in a given case, should necessarily have created a “false or misleading appearance of trading in the securities market.” Without proof of such consequence of the transition in question, a violation under the above-said provisions cannot be spelt out. Further, as provided by Regulation 4(2)(b), dealing in the securities market shall be considered fraudulent if as a result of a transfer of shares, beneficial ownership in them does not get transferred but the transfer is intended to cause inflation, depression or fluctuations in the price of a scrip so as to ensure gain or avoid loss. For a transaction to have the above-said effect, there needs to be a nexus between various parties intending to collude and bring about the desired results. As Regulation 4(2)(g) spells out a transaction shall be construed as being fraudulent if it is entered into without the intention of performance of such transaction.

6. It is evident from a perusal of the impugned order and connected material brought on record through pleadings that Dena Bank started the process of auction for debt recovery in respect of the shares pledged with it by the Company (i.e. ASL). The Appellant made a bid to the bank and purchased 50,000 shares by making payment to Dena Bank directly. However, the shares were transferred to the Appellant’s account from the account of one of the

promoters namely, Ms. Alka Pande. In our considered opinion, the mere fact of transfer of the shares in question from the account of one of the promoters to the Appellant's account would not, ipso facto, make the whole transaction illegal and violative of the FUTP Regulations in question. It is a matter of record that the Appellant has not transferred the said shares to the second level entities or to anybody else. This evidences that the Appellants intended to treat the shares purchased by them in the auction from the Dena Bank as a long term investment. Moreover, there is no specific finding regarding the Appellant's nexus with any of the promoters or any other entity in the whole matter, let alone collusion with other entities with the specific intention to deceive. Without the Appellant having transferred such shares to second level entities or to any other person, he cannot be held guilty of circular trading or creating false volumes in the scrip. There is nothing on record to clearly suggest that the Appellant was part of any alleged scheme of manipulation in the matter of circular trading or the creation of false volumes in the market. No proof of collusion of the Appellant with other entities, whatsoever, is forthcoming from the impugned order and nothing of the sort was brought to our notice even during the hearing of the matter. The SCN dated December 27, 2010 issued by the Respondent under Regulation 3(a), 3(b), 3(c), 3(d) and 4(1) and 4(2)(a), (b) and (g) of the FUTP Regulations, clearly focuses on trading in the market and alleged manipulation of volumes in the scrip. None of the allegations stand proved against the Appellant on the basis of the documents and records brought before us through pleadings. Therefore, the imposition of the ban of two years on the Appellant to enter the securities market by the impugned order is harsh and liable to be set aside by this Tribunal qua the Appellant. Ordered accordingly.

5. Lastly, we may refer to the judgment of Piyush P. Avlani, referred to by the learned counsel for the Appellant. The Tribunal has categorically held that the Appellant therein was not a party to any trade and the share of the same ASL Company, involved in the present matter, came to be transferred to his account by way of a pledge. The Tribunal, therefore, quashed the impugned order as far as the Appellant namely, Piyush P. Avlani, was concerned. Paragraphs 16 to 18 of the said order are relevant and are hereby reproduced below:-

> "16. We have already observed above that the appellant retained the shares with him and in the absence of any transfer of shares we cannot attribute any manipulative intent. The observation of the whole time member in the impugned order with regard to this aspect of the case is worthy of reference.
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> > "Further, certain noticees have argued that their holding in ASL shares remains virtually intact, and this indicates that the shares were not transferred but rather pledged to these entities. It is pertinent to note that the entire scheme of manipulation came to a standstill by the interim order in this matter, because of which several entities may not have been able to transfer the shares received by them to manipulate the scrip. Hence, this argument holds no merit."
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> It is to be noted that there was an interval between the receipt of shares by the appellant and the passing of the interim order by the whole time member. During the interval the shares were commanding good price in the market. Even then, the appellant did not part with the shares. So the consistent stand taken by the appellant regarding retention of the shares by way of security stands vindicated. The observation of the whole time member quoted above does not point to any specific instance of manipulation by the appellant.
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> 17. We do not find it necessary to go into the case laws referred to by the parties since the facts of the case stand on their own right and the case laws cited by the parties may not in any way add to the strength of the case.

> 18. The conduct of the appellant established that he was not connected with the entities involved in the transactions and he has no role in the transfer of shares which is the foundation of the alleged manipulative transactions by the various entities in the case. In the absence of transfer of shares which were retained by the appellant no manipulative intent can be attributed to him. No connection or link with the entities involved in the impugned transactions has also been established. The appellant's basic activity of business is trading in the securities market. Debarment for a period two years is a very harsh punishment for a person of his kind. In the present case, no wrong doing attracting the provisions of FUTP Regulations has been established in the impugned order."

Therefore, we find that the Appellant's case is squarely covered by the above judgment of this Tribunal in Avlani's case, and hence the appeal is liable to succeed on this ground as well.

6. On the other hand, a judgment of this Tribunal dated June 28, 2013 passed in Appeal No. 229 of 2012 in the case of Kamlesh Baheti, HUF vs. SEBI relied upon by the learned counsel for the Respondent is clearly distinguishable. In the case of Kamlesh Baheti, HUF, the Appellant therein had admittedly received 20,000 shares in his demat account on January 19, 2009 from the account of one of the promoters namely, Ms. Dimple M. Kothari without any consideration whatsoever. The Tribunal also saw an established nexus between the Appellant and the promoter group as evident from the records. As such, the Tribunal rightly dismissed the said appeal preferred by Kamlesh Baheti, HUF. In the case in hand, however, the Appellant has purchased the shares from Dena Bank and made the payment directly to the said bank. Therefore, the facts are clearly distinguishable. Moreover, in the case of Kamlesh Baheti, HUF the Appellant sold 19,000 shares to JMDE Packaging and Realties Ltd. and 1,000 shares to Alpha Graphic India who

were found to be conduits and involved in the whole scheme of manipulation. The said two purchasers had not even bothered to file their reply before the Respondent-SEBI during the proceedings/enquiry before the learned Whole Time Member. Thus, this case of Kamlesh Baheti, HUF does not help the Respondent in any manner.

The appeal is, therefore, allowed and the impugned order is quashed and set aside.

Sd/-
Justice J.P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

Sd/-
A. S. Lamba
Member

23.07.2013
msb/ddg
prepared & compared by -ddg