BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Date of Hearing: 14.08.2013
Date of Decision: 27.08.2013

Appeal No. 184 of 2012

Ashesh Agarwal
98, Ratanlal Nagar,
Kanpur – 208022. …… Appellant

Versus

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

AND

Appeal No. 185 of 2012

Sanjeev Agarwal
W-33, MIG Juhi,
Kanpur 208 023. …… Appellant

Versus

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

AND

Appeal No. 202 of 2012

Big Broker House Stock Ltd.
G-12, Anand Niketan,
New Delhi- 110 021 (OLD ADDRESS) …… Appellant

Versus

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

Mr. Deepak Dhane, Advocate for the Appellants in Appeal nos. 184 and 185 of 2012.
Mr. Prashant Ingle, Advocate for the Appellant in Appeal no. 202 of 2012.

Mr. Shiraz Rustomjee, Senior Advocate with Mr. Mihir Mody, Mr. Pratham V. Masurekar, Advocates for the Respondent in all the Appeals.

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

Per : Justice J. P. Devadhar

1. In these three appeals filed under section 15T of the Securities and Exchange Board of India Act, 1992 ('SEBI Act' for short) appellants seek to challenge three orders passed by the Adjudicating Officer of the Securities and Exchange Board of India (hereinafter referred to as the "Respondent") all dated 31st July, 2012. By the said orders all dated 31st July, 2012, penalty amounting to ` 7 lac, ` 7 lac and ` 8 lac has been imposed upon the respective appellants for the offences committed by them under section 15HA of the SEBI Act and Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 ('PFUTP Regulations' for short). Since facts in all these appeals arise from common investigation, all these three appeals are heard together and disposed of by this common judgment.

2. During the period 27th March, 2009 to 12th August, 2009 (hereinafter referred to as the 'investigation period') the Respondent noticed that there was sharp rise in price and trading volumes of scrip of Rich Capital and Financial Services Ltd. ('RCFL' for short). Investigation conducted by the Respondent revealed that during the investigation period scrip of RCFL was interalia traded at Bombay Stock Exchange (BSE) for 138 days and that the price of the scrip at BSE opened at ` 8.90 on 27th March, 2009 and moved to a high of ` 80.15 on 12th

August, 2009 and closed at ` 73.90 on 12th August, 2009 with average volume of 5,258 shares per day.

3. On completion of investigation show cause notices were issued to the appellants, calling upon them to show cause, as to why enquiry should not be held against appellants in terms of Rule 4 of the Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by the Adjudicating Officer) Rules, 1995 and penalty should not be imposed under section15HA of SEBI Act for the alleged contravention of the provisions of SEBI Act and PFUTP Regulations. In the show cause notices it was alleged that appellants contributed to new price high, entered into trades at higher price than last traded price of the scrip and also executed reversal/circular trades thereby creating artificial volumes in the scrip of RCFL and manipulated the price of that scrip which led to manipulative, fraudulent and unfair trade in the scrip during the investigation period. In support of the above allegation relevant materials gathered during the course of investigation were also annexed to the show cause notices.

4. On receipt of show cause notices, appellants inter alia sought from the Respondent entire copy of the investigation report together with annexures, if any. Respondents in turn informed the appellants that relevant portions of the investigation report has already been furnished to the appellants along with show cause notices and it was open to the appellants to take inspection of the said documents. Appellants however, without filing affidavit-in-reply to the show cause notices, insisted on receiving full enquiry report and sought adjournments from time to time, as and when personal hearing was offered by the Respondent. Ultimately, on 15th February, 2012 appellants were heard and the appellants were directed to file replies to the show cause notices by 10th April, 2012. Accordingly, the appellants filed their replies to the show cause notices within the stipulated time.

5. Thereafter Respondent furnished copies of order logs relating to the trades during the investigation period and called upon appellants to offer their comments on the said order logs. In reply, appellants questioned the propriety of furnishing order logs after granting personal hearing and after replies to the show cause notices were filed by the appellants. Appellants further submitted that neither documents annexed to the show cause notices nor order logs furnished belatedly contain any evidence to establish the charges leveled against appellants and hence the impugned orders are liable to be quashed and set aside.

6. Rejecting the contentions of the appellants, Adjudicating Officer, by the impugned orders all dated 31st July, 2012 imposed penalty upon each of the appellants under section 15HA of the SEBI Act.

7. Mr. Deepak Dhane, learned counsel appearing on behalf of appellants in Appeal nos.184 and 185 of 2012 and Mr. Prashant Ingle, learned counsel appearing on behalf of appellant in Appeal no.202 of 2012 submitted as follows:

a) Findings recorded in the impugned orders are based on incomplete materials furnished to the appellants and failure on part of the Respondents to furnish entire copy of the investigation report inspite of repeated requests has vitiated the impugned orders. Passing of impugned orders without furnishing the basis on which SEBI Board ordered investigation, failure to furnish complete investigation report and furnishing incomplete order logs after granting personal hearing to the appellants, are in violation of the principles of natural justice and hence the impugned orders are liable to be quashed and set aside.

b) Findings recorded in the impugned orders to the effect that the appellants were connected with each other and connected with the entities named therein, who traded in the shares of RCFL in connivance with each other are based on erroneous presumption and without any evidence on record. Fact that there

are common Directors, common address etc between appellants, RCFL and the companies/individuals who have traded in the shares of RCFL during the investigation period cannot be a ground to hold that they are connected to each other as it is possible for two companies who are distinct legal entities to have common Directors and common address. Therefore, without any further evidence on record, inference drawn that the appellants were closely connected with RCFL, is wholly unjustified.

c) Without considering the plea of appellants in their affidavit-in-reply, it is held in the impugned orders that the appellants have contributed to new price high and entered into trades at a higher price than the last traded price in the scrip in question. As per the impugned orders the price of the scrip during the investigation period increased by ` 71.25 out of which contribution of the appellant in Appeal no.184 of 2012 towards the price rise is only to the extent of ` 1.95 which is only 2.73 percent of total price rise and, therefore it cannot be said that appellant in Appeal no.184 of 2012 played any role in respect of the new price high. Similarly, trades effected by other two appellants were very small compared to the total number of shares traded during the investigation period. Moreover, all trades of appellants were within the circuit limit prescribed by BSE and same were executed at market rate. Trading in the scrip in question by appellants was merely in execution of jobbing transactions and the appellants had no intension to raise price of the scrip but were only interested to earn profit by trading in scrip which any investor normally wants to do in day trade. Hence the allegation that the appellants contributed to new price high is baseless.

d) Fact that most of buy orders matched with sell orders of the alleged connected entities could not be a ground to infer that appellants in connivance with connected parties were creating new high price, because trading system of the

Stock Exchange mechanism provides complete anonymity and does not allow any party to the transaction or even his broker to know as to who the counter party or counter broker is. Therefore, there being no interaction between the parties to the transaction it could not be held that appellants were guilty of new price high.

e) Fact that most of orders placed by the appellants in respect of shares of RCFL matched with the entities set out in the show cause notices could not be a ground to hold that appellants and the said entities were related/ connected entities and were acting in tandem with each other, because, matching of trades was purely a matter of coincidence. In any event trades in the scrip in question effected by appellants were negligible compared to the total volume of transactions during the investigation period and therefore, the impugned decisions based on mere conjectures cannot be sustained.

f) Impugned orders purport to hold that appellants have effected circular/reversal trades which is contrary to facts on record. Appellants are jobbers and are day traders, wherein, they buy and sell shares on same day on several occasions in order to earn profit and in such a case there may be transactions with same party, who is also a jobber. Therefore, merely because some transactions were with the same jobber, it could not be inferred that there were circular/reversal trades. Consequently, findings recorded in the impugned orders that the Appellants have created artificial volumes in the scrip, thereby created artificial demand in the scrip and thus created false or misleading appearance of huge trading in the securities market relating to shares of RCFL is totally erroneous and wholly unjustified.

g) In the affidavit-in-reply to the show cause notices appellants had placed on record, trades in the scrip in question that the appellants had with other parties to demonstrate that all trades in question were carried out in the ordinary

course of business as a simple investor/jobber. Adjudicating Officer failed to consider above material on record which has led to miscarriage of justice.

8. Mr. Shiraz Rustomjee, learned senior counsel appearing on behalf of respondent, on the other hand submitted that in the present case, evidence gathered during the course of investigation conclusively establishes the charges levelled against the appellants. He submitted that grievance of the appellants that failure to furnish entire investigation report is violative of principles of natural justice is, without any merit, because, relevant portions of investigation report on the basis of which show cause notices were issued to the appellants, have in fact been furnished to the appellants. Relying upon a decision of the Apex Court in the case of Chandrama Tiwari vs. Union of India reported in AIR 1988 SC 117, counsel for the respondent submitted that non supply of copy of documents having no bearing on the charges or which are not relied upon in the impugned orders does not amount to violation of principles of natural justice. Counsel for the respondent took us through the impugned orders and submitted that there is no infirmity whatsoever in the impugned orders and hence the appeals are liable to be dismissed.

9. We have carefully considered rival submissions.

10. First question to be considered herein is, in the absence of any rule, whether, it was mandatory for the respondent to furnish entire copy of the investigation report to the appellants, and whether failure to furnish entire copy of the investigation report constitutes violation of principles of natural justice? It is well established in law, that enquiry report should be furnished to the delinquent officer even where rules are silent and denial of the report of the enquiry officer amounts to denial of reasonable opportunity and hence constitutes breach of principles of natural justice [State of Uttar Pradesh v/s. Harendra Arora (2001) 6 SCC 392]. It is equally well established that non supply of copy of documents

having no bearing on charges framed in the show cause notice or non supply of documents tendered during inquiry but not relied upon by Inquiry Officer in support of charges, does not amount to violation of principles of natural justice [Chandrama Tiwari vs. Union of India (AIR 1988 S.C.117).]

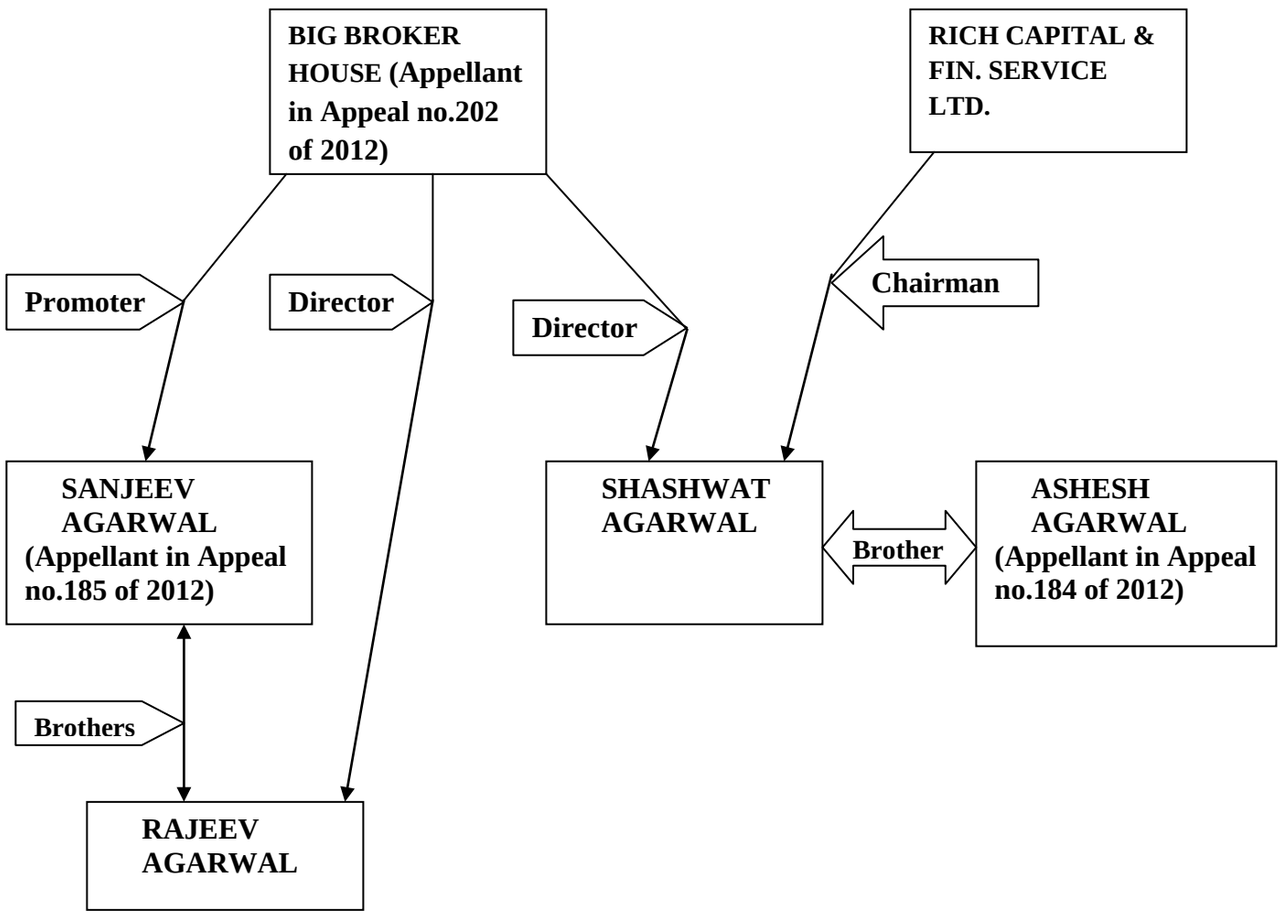
11. In the cases before us, although appellants have repeatedly demanded complete copy of the investigation report, they have not demonstrated as to how failure to furnish complete copy of the investigation report has caused prejudice to them. It is neither the case of appellants that documents relied upon in the show cause notice have not been furnished to them, nor it is the case of appellants that any particular document in possession of respondent which has bearing on the issues involved has been denied to the appellants, as a result of which prejudice has been caused to appellants. Therefore, unless there are compelling reasons, it would be just and proper that in every case the respondent furnishes entire copy of the investigation report to the charged person. In the present case, instead of furnishing entire copy of the investigation report, documents relied upon in the show cause notices have been furnished to the appellants. It is not the case of appellants that selective findings recorded in the investigation report are only furnished and findings which are in favour of the appellants have not been furnished and thereby prejudice is caused to the appellants. Similarly, contention that incomplete trade/order logs have been furnished to the appellants after granting personal hearing does not enhance the case of the appellants, because admittedly, appellants were called upon to furnish comments in respect thereof and appellants while offering their comments have neither demanded entire copy of the trade/order logs nor sought personal hearing in respect thereof. Even before us, counsel for the appellants could not demonstrate as to how prejudice is caused to the appellants by not furnishing entire copy of investigation report and trade/order logs. Therefore, in the fact of present case, in the absence of any

prejudice caused to the appellants by non supply of full investigation report or trade/order logs, it cannot be said principles of natural justice have been violated.

12. Question then to be considered in all these appeals is, whether there is any merit in the findings recorded in the impugned orders that appellants and RCFL were connected with each other.

13. Relationship between the parties as recorded in the impugned orders can be effectively demonstrated from the following chart:-

(1) **RELATION / CONNECTION**



14. From the above chart it is seen that Mr. Shashwat Agarwal is Chairman of RCFL and is also a Director in Big Broker House Stock Ltd. (Appellant in Appeal no.202 of 2012) with Sanjeev Agarwal (Appellant in Appeal no.185 of 2012) as a promoter of Big Broker House Stock Ltd. Ashesh Agarwal (Appellant

in Appeal no.184 of 2012) is brother of Shashwat Agarwal. Thus Shashwat Agarwal, Chairman of RCFL is connected with Ashesh Agarwal (Appellant in Appeal no.184 of 2012) as brother and is connected with Sanjeev Agarwal (Appellant in Appeal no.185 of 2012) and Big Broker House Stock Ltd. (Appellant in Appeal no.202 of 2012) as Director. From the above facts it is evidently clear that appellants were closely connected with RCFL.

15. It was contended on behalf of appellants that without disclosing evidence on record, conclusion drawn against appellants regarding relationship between parties is totally erroneous. We see no merit in the above contentions, because, conclusion regarding relationship between the parties is drawn on the basis of KYC documents as more particularly set out in para 16 of the impugned order. Appellants are neither disputing the relationship between the parties set out in the impugned order, nor they are disputing the contents of the KYC documents. Their only grievance is KYC documents have not been furnished to them. It is relevant to note that no such request for furnishing copies of the KYC documents were made by appellants in their affidavit-in-reply to the show cause notices. No such request was made even during personal hearing. Therefore, in the absence of denial, findings regarding relationship of appellants with RCFL recorded in the impugned orders cannot be faulted.

16. Argument that appellants have not played any role in new price high/LTP variation is without any merit. Out of the price rise of ` 71.25 noticed during the investigation period, Ashesh Agarwal, Sanjeev Agarwal and Big Broker House Stock Ltd. (appellants herein) have contributed new price high of ` 1.95, ` 9.40 and ` 20.20 respectively. These facts are not in dispute. Similarly out of 584 instances of LTP variation, appellants executed trades at prices higher than LTP in 248 instances, thereby contributing a cumulative price rise of ` 139.97 or 44.60 percent (Page 44 of Appeal no.184 of 2012) out of which, Ashesh Agarwal

contributed 43 instances with a price rise of ` 15.20, Sanjeev Agarwal contributed 61 instances with a price rise of ` 33.72 and Big Broker House Stock Ltd. contributed 139 instances with a price rise of ` 89.30. These facts are also not in dispute. Thus, facts revealed during the course of investigation clearly show that appellants as a group have contributed to a new price high/LTP variation and hence action taken against appellants in the impugned order cannot be faulted. Argument that no action ought to have been taken against Ashesh Agarwal as the new price high, if any, contributed by him is negligible (` 1.95) is without any merit as he was a part of group which indulged in price manipulation in the scrip of RCFL.

17. Similarly, in paras 30 and 31 of the impugned order (at pages 48 and 52) in Appeal no.184 of 2012 the adjudicating authority by facts and figures has clearly demonstrated that the appellants had indulged in circular and reversal trades. Contention of the appellant that the trades in question were carried out in the ordinary course of business as jobber has been rightly rejected by the adjudicating authority by recording a finding that circular/reversal trades continued for 35 days from 28/5/2009 to 12/8/2009 out of 86 trading days during the investigation period and the circular/reversal trades effected by appellants constituted 25.72 percent (82142 shares) whereas total shares of RCFL traded during the said period of 35 days was 3,19,302 shares. It is further recorded by the Adjudicating Officer that in all the above transactions there was a time difference of few seconds and the price at which the buy orders and sell orders were placed, were matching in almost all cases with same counterparties. In these circumstances conclusion regarding circular/reversal trades carried out by appellants cannot be faulted.

18. Counsel for appellants sought to rely certain observations made in the Adjudication order dated 21/10/2011 passed in the case of M/s. Saroj & Co., a

sub-broker who had traded in the shares of RCFL on behalf of Ashesh Agarwal during the investigation period. We have not permitted the counsel for appellants to rely on the said order, because, firstly, the said adjudication order dated 21/10/2011 has been admittedly set aside by this Tribunal on 18/5/2012 and secondly, observations made while giving benefit of doubt to a sub-broker regarding his complicity with the appellants, would not have any bearing to the case of appellants, where the facts and figures on record demonstrate that appellants had indulged in price manipulation of shares of RCFL during the investigation period.

19. Counsel for appellants have not canvassed any arguments regarding the quantum of penalty levied against appellants in the impugned orders.

20. For all the aforesaid reasons, we see no merit in all these appeals and the same are hereby dismissed with no order as to costs.

Sd/-
Justice J. P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

Sd/-
A. S. Lamba
Member

27.08.2013
RHN/PTM