

**IN THE SECURITIES APPELLATE TRIBUNAL
MUMBAI**

Appeal No. 5 of 2007

Date of decision : 22.11.2007

Central Depository Services India Ltd.

..... Appellant

Versus

Securities and Exchange Board of India

..... Respondent

Mr. J.J. Bhatt Senior Advocate with Mr. V. Dhond Advocate for the Appellant.

Mr. Rafique Dada Senior Counsel with Dr. Poornima Advani and Ms. Sejal Shah
Advocates for the Respondent.

Coram : Justice N.K. Sodhi, Presiding Officer
Arun Bhargava, Member
Utpal Bhattacharya, Member

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

Same order as in Appeal no. 147 of 2006 decided on 22.11.2007.

Sd/-
Justice N.K. Sodhi
Presiding Officer

Sd/-
Arun Bhargava
Member

Sd/-
Utpal Bhattacharya
Member

22.11.2007

**IN THE SECURITIES APPELLATE TRIBUNAL
MUMBAI**

Appeal No. 147 of 2006

Date of decision : 22.11.2007

National Securities Depository Limited

..... Appellant

Versus

Securities and Exchange Board of India

..... Respondent

Mr. Janak Dwarkadas Senior Advocate with Mr. Somasekhar Sundaresan, Mr. Ankit Lohia and Mr. Zerick Dastur Advocates for the Appellant.

Mr. Rafique Dada Senior Counsel with Dr. Poornima Advani, Ms. Sejal Shah, Anant Upadhyay and Mr. Hitesh Mutha Advocates for the Respondent.

Coram : Justice N.K. Sodhi, Presiding Officer
Arun Bhargava, Member
Utpal Bhattacharya, Member

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

This order will dispose of a bunch of nine Appeals nos. 147 & 149 of 2006, 5 and 7 to 12 of 2007 all of which are directed against the common order dated November 21, 2006 passed by the whole time member of the Securities and Exchange Board of India (for short the Board) directing the appellants in these cases to jointly and severally disgorge an amount of Rs.115.82 crores in two sets within six months from the date of the order. Facts, in so far as they are necessary for the disposal of these appeals, are as under.

As a part of the on going surveillance activity by the Securities and Exchange Board of India (for short the Board) into various aspects of working of securities

investigations revealed that certain entities had cornered IPO shares reserved for retail applicants by making applications in retail category through the medium of fictitious/benami applicants with each application being for small values as to be eligible for allotment under the retail category. Subsequent to the receipt of IPO allotment, these fictitious/ benami allottees transferred the shares to their principals who in turn transferred those shares to the financiers who financed the whole game plan. The financiers then are alleged to have sold most of these shares on the first day of listing thereby realizing a windfall gain because of the difference in price between the IPO issue price and the price on the listing date. In view of the preliminary findings recorded in the investigations, the Board passed a comprehensive ex-parte ad-interim order dated April 27, 2006 and issued directions, among others, to various entities prohibiting them from dealing in the securities market till further orders. After the investigations were completed, the Board initiated various proceedings / actions against the concerned entities including the appellants in the form of enquiries, adjudication and prosecution under the Securities and Exchange Board of India Act, 1992. It is the admitted case of the Board that these proceedings are still in progress at various stages. While the guilt of the appellants and other entities has yet to be determined, the Board by its order dated November 21, 2006 directed the appellants herein and Karvy Stock Broking Limited (which is the appellant in Appeal no. 6 of 2007 which is being dealt with separately) to disgorge an amount of Rs.115.82 crores within a period of six months from the date of the order. The Board further directed that the amount shall be paid in equal amounts by the Depositories and the Participants in proportion to their actual involvement. Hence these appeals.

In para 7 of the impugned order it has been observed that “This order may be read as part of the SEBI interim order dated 27th April. 2006.” In para 45 of the

facilitated the same from enjoying the fruits of their ill gotten gains and in exercise of the powers delegated to me by the SEBI Board in terms of section 11 and 11B thereof and the provisions of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003, **pending adjudication i.e. inquiry into the subject transactions and passing of final order, I hereby issue the following directions, by way of an interim order as follows :"**

Directions were then issued to the appellants and others to disgorge a sum of Rs. 115.82 crores. Since the proceedings against the appellants were pending at various stages, the Board observed in para 47 as under :

"47. There will be no separate hearing granted to the parties, as the findings of this order will be co-terminus with the findings of the enquiry. A final order on the substantive area of wrong-doing will render a person liable under this order and conversely, any final order exonerating the person will free the person from any liability from this order."

We have heard the learned senior counsel for the parties who have taken us through the record. It is not in dispute that the proceedings against the appellants are still pending at different stages and the question whether they are guilty or not of the charges levelled against them has yet to be decided. Strangely enough, even before determining the guilt, if any, of the appellants, the Board has directed them to disgorge a sum of Rs.115.82 crores. In other words, the amount which the appellants have to disgorge has been determined in the impugned order though their guilt has yet to be established. It has also not been established whether they made any ill gotten gains. Having done this, the Board has observed that in case the appellants are found guilty of any wrong doing in the final order which has yet to be passed, they shall become liable to disgorge the amount without any further hearing being afforded to them and in case they are exonerated they shall be free from any liability under the impugned

They have not been issued any notice to show cause why they should not be called upon to disgorge the amount. This is clearly in violation of the principles of natural justice. We do not think that the Board could direct the appellants to disgorge the aforesaid amount without first determining their guilt and whether they had made any illegal gains. Again, it is not that every erring entity is held liable to disgorge the amount. Persons who have made illegal or unethical gains alone could be asked to disgorge their ill gotten profits. We are further of the view that all these issues should have been determined only after the passing of the final order holding the appellants guilty of the alleged wrong doings for which proceedings are still pending. In this view of the matter, we have no hesitation in setting aside the impugned order qua the appellants which we hereby do leaving it open to the Board to initiate, in accordance with law, disgorgement proceedings against such entities as may become liable to disgorge. The appeals are accordingly allowed with no order as to costs.

Sd/-
Justice N.K. Sodhi
Presiding Officer

Sd/-
Arun Bhargava
Member

Sd/-
Utpal Bhattacharya
Member

22.11.2007
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