

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Hearing : 09.10.2019

Date of Decision : 18.10.2019

Appeal No. 393 of 2018

Mahavirsingh N. Chauhan
311/6, New Premnagar Line-8,
B/h Omkar Factory, Naroda,
Ahmedabad : 382 345.

..... Appellant

Versus

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

... Respondent

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

Mr. Kumar Desai, Advocate with Mr. Chirag Bhavsar, Advocate i/b
MDP & Partners for the Respondent.

With

Appeal No. 394 of 2018

Dharmendra R. Shah HUF
Public Park,
B/h. Old State Bank of India,
Himmatnagar - 383001.

..... Appellant

Versus

Securities & Exchange Board of India
SEBI Bhavan, Plot No. C-4A, G Block,
Bandra Kurla Complex, Bandra (East),

Mumbai - 400 051.

... Respondent

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

Mr. Kumar Desai, Advocate with Mr. Chirag Bhavsar, Advocate i/b
MDP & Partners for the Respondent.

**With
Appeal No. 408 of 2018**

Rajesh Ranka
G-13, Orchid Garden,
Girdharnagar, Shahibaug,
Ahmedabad, Gujrat.

..... Appellant

Versus

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

... Respondent

Mr. Pulkit Sharma, Advocate i/b Mr. Manoj Jain, CA for the
Appellant.

Mr. Kumar Desai, Advocate with Mr. Chirag Bhavsar, Advocate i/b
MDP & Partners for the Respondent.

**With
Appeal No. 71 of 2019**

1. Minaben Prafulbhai Shah
10, Saritkunj Society,
Bahai Center, Shahpur,
Ahmedabad - 380001.

2. Alkaben Kirtibhai Shah
G-206, Vraj Bhumi Flat
Opp G. E. B. Office,
Dehgam Road Narod,
Naroba I E Ahmedabad City,
Ahmebabad - 382330.
3. Pruthvi Himanshu Shah
10, Saritkunj Society,
Bahai Center, Shahpur,
Ahmedabad - 380001.
4. Himadri Kamleshbhai Shah
2299-1, Moti Pole,
Dariaypur - 2, Kadiyanaka,
Ahmedabad - 380001.
5. Himanshu Prafulchnadra Shah
10, Saritkunj Society,
Bahai Center, Shahpur,
Ahmedabad - 380001.
6. Kaliyaben Himanshu Shah
10, Saritkunj Society,
Bahai Center, Shahpur,
Ahmedabad - 380001.
7. Vinit Kamleshkumar Shah
2299-1, Moti Pole,
Dariaypur - 2, Kadiyanaka,
Ahmedabad - 380001.
8. Karan Kirtibhai Shah
G-206, Vraj Bhumi Flat
Opp G. E. B. Office,
Dehgam Road Narod,
Naroba I E Ahmedabad City,
Ahmebabad - 382330.
9. Keval Kirtikumar Shah
G-206, Vraj Bhumi Flat
Opp G. E. B. Office,
Dehgam Road Narod,
Naroba I E Ahmedabad City,
Ahmebabad - 382330.

10. Kirtikumar Rashiklal Shah
 G-206, Vraj Bhumi Flat
 Opp G. E. B. Office,
 Dehgam Road Narod,
 Naroba I E Ahmedabad City,
 Ahmebabad - 382330.

..... 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. Saurabh Bachhawat, Advocate i/b Mr. Lalit Joshi, Advocate for
 the Appellants.

Mr. Kumar Desai, Advocate with Mr. Chirag Bhavsar, Advocate i/b
 MDP & Partners for the Respondent.

**With
 Appeal No. 256 of 2019**

1. Meenaben Natubhai Thakkar
 297, Tanki Varo Khancho Chh Bhag,
 Bareja Deskroj, Ahmedabad,
 Gujarat - 382425.
2. Mitesh Kanaiyalal Thakkar
 36, Patel Vas, Mahijada,
 Ahmedabad - 382425.
3. Mukeshbhai Shantilal Thakkar
 44, Tulsi Villa, Matar,
 Kheda, Gujarat - 387530.
4. Natubhai Shantilal Thakkar
 297, Tanki Varo Khancho Chh Bhag,
 Bareja Deskroj, Ahmedabad,

Gujarat - 382425.

5. Navinchandra Kanubhai Thakkar
36, Patel Vas, Mahijada,
Ahmedabad - 382425.

6. Suresh Nenmalji Malvi
D114, Rushabdevnagar,
Adinathnagar, Odhav,
Ahmedabad City, Ahmedabad,
Odhav Industrial Estate,
Gujarat - 382415.

7. Vaishali Natavarbhai Thakkar
B-501, Shubhlaxmi Apartment,
Old Ahmedabad Road,
Bajera Deskroj,
Ahmedabad, Gujarat - 382425.

8. Kanubhai Narandas Thakkar
36, Patel Vas, Mahijada,
Ahmedabad - 382425.

..... Appellants

Versus

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

... Respondent

Mr. Vikas Bengani, Advocate for the Appellants.

Mr. Kumar Desai, Advocate with Mr. Chirag Bhavsar, Advocate i/b
MDP & Partners for the Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Dr. C. K. G. Nair, Member
Justice M. T. Joshi, Judicial Member

Per : Justice Tarun Agarwala, Presiding Officer

1. Five appeals have been filed against a common order passed by the Whole Time Member (hereinafter referred to as, 'WTM') of Securities & Exchange Board of India (hereinafter referred to as, 'SEBI'). These appeals have been clubbed together and are being decided together. Before we consider the submissions raised by each of the appellants, it would be essential to give a brief background of the facts leading to the filing of the present appeals.

2. SMS Techsoft (India) Ltd. (hereinafter referred to as, 'the company') allotted 3 crores shares through preferential allotment to 31 entities on March 13, 2012. After stock split in the ratio 1:10 in November 2012, these 3 crores shares became 30 crores shares. The allotment of shares had a lock in period of one year and thus, the allottees could not sell the shares during the lock in period. Around the time when the lock in period was coming to an end, Short Text Messages (SMS) were sent to various investors on their mobiles recommending purchase of the scrip of the company which was a listed company on the BSE Ltd. (BSE) and Coimbatore Stock Exchange Ltd. SEBI noticing the recommendations through these SMS undertook an enquiry in the matter relating to buying and selling of shares of the company and, upon an analysis of the trading activity in the scrip of the company, it found that 37 entities were

acting together as a group and had adopted a fraudulent device and artifice to defraud the genuine shareholders of the company by falsely portraying fraudulent transactions as genuine preferential allotment of shares and offloading the shares allotted pursuant to the preferential allotment thereby earning illegal profits.

3. As a result of the aforesaid enquiry, SEBI issued an ad-interim ex-parte order dated November 5, 2013 against 37 entities restraining them from accessing the securities market and further prohibiting them from buying, selling or dealing in the securities market either directly or indirectly and further directed them to keep in an escrow account an amount of Rs. 6 crore which they had earned illegally from sale of the shares allotted in preferential allotment by the company. The company was also restrained from raising any additional capital through the securities market either directly or indirectly. The said ad-interim ex-parte order was subsequently confirmed on May 7, 2015.

4. Subsequently thereto, after investigation a common show cause notice dated November 15, 2016 was issued to 36 entities to show cause as to why suitable actions/directions in terms of Sections 11(4) and 11B of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as, 'SEBI Act') should not be issued including disgorgement of ill-gotten gains should not be initiated

against these entities for the violation of provisions of Section 12A of the SEBI Act read with Regulations 3 and 4 of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 (hereinafter referred to as, 'PFUTP Regulations').

5. It was alleged in the show cause notice that the preferential allotment of 3 crores shares was made without consideration and after the expiry of the lock in period the preferential allottees have offloaded the shares between March 13, 2013 to November 5, 2013 and have made profits by this sale. It was alleged that majority of the entities shared a common mobile number and common e-mail which belonged to Shri Rajesh Mangilal Ranka and, therefore, these entities were connected with each other through a common e-mail, mobile number and address. It was also alleged that there was a movement of funds from the bank account of one of the entities to other entities. It was also alleged that the majority of the entities have authorized Rajesh Ranka to receive the bank statement on their behalf. It was also alleged that the price of the scrip moved from 0.60 paisa after the lock in period to 0.71 paisa and after offloading the shares, the price of the scrip gradually declined to 0.45 paisa in August 2013 and then declined to 0.09 paisa on November 5, 2013. It was also alleged that most of the entities also traded in the shares of the scrip after the

lock in period, namely, that they were buying and selling the shares of the scrip on the platform of the stock exchange. It was, thus, contended that the noticees while acting together as a group adopted a fraudulent device and artifice to defraud the genuine shareholders of the company by portraying fraudulent transactions as genuine preferential allotment and offloaded shares allotted in the fraudulent allotment in the market thereby earning illegal profits in violation of Section 12A of the SEBI Act read with Regulations 3 and 4 of the PFUTP Regulations.

6. Pursuant to the show cause notice, the appellants in question submitted their replies. The WTM after considering the evidence and the replies filed by the appellants, passed an order debarring the appellants from accessing the securities market directly or indirectly for a period of 10 years from the date of completion of disgorgement. The appellants were further restrained from dealing in the securities market, in any manner, for a period of 10 years and were made jointly and severally liable to disgorge an amount of Rs. 6,78,85,716/- alongwith simple interest calculated at the rate of 12% p.a. with effect from November 5, 2013 till the date of payment. The WTM further directed that in the event there was a failure to pay the amount by the appellants and the other noticees jointly and severally SEBI would consider the recovery of amounts either from

Jagadish Vital, thereafter from the legal representatives of Late Maheshchandra Shah and thereafter from Rajesh Ranka, or thereafter from Manjulaben Shah and thereafter from other preferential allottees and lastly from SMS Techsoft i.e. the company in the aforesaid order of hierarchy.

7. Some of the appellants being aggrieved by the said order have filed the present appeals.

8. We have heard Shri Deepak Shah, Shri Pulkit Sharma, Shri Saurabh Bachhawat and Shri Vikas Bengani, the learned counsel for the appellants and Shri Kumar Desai alongwith Shri Chirag Bhavsar, the learned counsel for the respondent.

9. The learned counsel for the appellant in Appeal No. 393 of 2018 submitted that the said appellant was only a driver of Mahesh Shah who was the manager in the company and was the kingpin in the entire nefarious activity of allotment of preferential shares etc. It was submitted that the appellant had no knowledge of his bank account, demat account and that everything was being managed by Mahesh Shah who died subsequently. It was further contended that the company has agreed to pay the disgorgement amount and, therefore, no liability should be fastened upon the appellant. In the alternative, it was contended that liability to pay the disgorgement amount should

not be made joint and several and that the appellant should only be held to be liable to disgorge the amount to the extent of the profit made as per Section 11B of the SEBI Act.

10. In Appeal No. 394 of 2018, it was contended that the shares were never sold and, therefore, no profit was made, consequently, there cannot be any disgorgement. It was contended that disgorgement on the basis of notional profit cannot be made in support of his submission. The learned counsel placed reliance upon the decision of Hon'ble Supreme Court in **Chainrup Sampatram vs. Commissioner of Income-tax [(1953) 24 ITR 481(SC)]**.

11. The learned counsel in Appeal No. 408 of 2018 contended that the appellant Rajesh Ranka was only an employee in the company and was not a preferential allottee nor had sold or made profit by selling the shares nor acted together in concert with any other entity nor adopted fraudulent devices in the fraud and, therefore, could neither be debarred nor can be held liable for disgorgement of the unlawful gain or profit. In support of his submission, the learned counsel placed reliance upon the decisions of this Tribunal in **Shailesh S. Jhaveri vs. SEBI (Appeal No. 79 of 2012 decided on October 4, 2012)** and **Karvy Stock Broking Ltd. vs. SEBI (Appeal No. 6 of 2007 decided May 2, 2008)**.

12. In Appeal No. 71 of 2019, it was contended by the appellants that they had never opened the bank account or the demat account and that the fraud was played upon them by Rajesh Ranka or Mahesh Shah. In this regard, the appellant filed an FIR. The appellant, thus, contended that no order could have been passed against them as they were themselves a victim of fraud.

13. In Appeal No. 256 of 2019, the appellants contended that their bank accounts, demat accounts, trading accounts were forged and that they are not signatories to these accounts. It was contended that since the appellants have not earned any profits from the alleged shares, no disgorgement order could have been issued against them.

14. On the other hand, the learned counsel for the respondent contended that the order of WTM does not suffer from any error of law and is liable to be affirmed. It was contended that a fraudulent scheme was adopted and all the appellants were linked with each other in one way or the other and benefited from such fraudulent activities. It was contended that an effort was made to divert the attention on Mahesh Shah who apparently died soon thereafter. It was further contended that the disgorgement has been calculated on each of the appellants based on the profits made by them. Such amount was liable to be paid by them jointly and severally.

15. Having heard the learned counsel for the parties at some length, we find that the contention of some of the appellants that they were only employees in the company and had no knowledge of the fraudulent activities is patently baseless and cannot be accepted. Each of the appellants were aware of the activities being done through their accounts and, therefore, it is inconceivable to believe that they were not aware of their bank accounts, trading accounts or the demat accounts being utilized by Shri Rajesh Ranka. The contention that they were not signatories to these accounts is a mere afterthought as, except one, others have not filed an FIR to this effect. However, there is nothing to show that this appellant (in Appeal No. 71 of 2019) pursued the matter in any manner. Further, we find that the appellants were beneficiaries to the profits which came into these accounts.

16. All the appellants were acting in concert as majority of the appellants had a common e-mail and address of Rajesh Ranka who is alleged to be an employee in the company and to whom a power of attorney was also given to the bank to send all e-mails and statements of accounts. This fact has not been denied by any of the appellants.

17. The contention that the appellant Rajesh Ranka cannot be held guilty either for debarment or for disgorgement as he was neither a preferential allottee nor profited by the sale of these shares is patently

erroneous. Rajesh Ranka has been found to be acting in concert with the appellant and other entities in adopting fraudulent devices and was operating all the accounts of the appellants through the power of attorney given to him. In certain instances, there has been evidence of transfer of funds from one account to the other account. The WTM has further found that he had access to the e-mail account of all the appellants and was also the authorized signatory of the bank account of all the other appellants. Not only that, the bank statement of the appellants was being sent to him. Therefore, he was part of the fraud and even though he may not be an allottee himself but was involved in the manipulation or fraud in concert with others.

18. The contention made by the appellants that they have not made profits nor sold the shares, and therefore, cannot be made liable for disgorgement either individually or jointly is patently misconceived. Table 9 of the impugned order clearly shows that the profit earned by each and every person has been calculated. Based on this, the total amount has been calculated which the WTM has directed the appellants to disgorge the amount jointly or severally. The contention that since the profit has not been computed, the amount cannot be disgorged under Section 11B is patently erroneous. A feeble attempt was made by one of the appellants that the expenses incurred by the appellants in the transactions should be deducted

from the profits or wrongful gains made by them. Such submission cannot be considered in the absence of any amount being brought on record to show the actual expenses incurred by the appellants. The contention raised is misconceived and an afterthought. The contention by some of the appellants that they were not signatories to the bank accounts, trading accounts or the demat accounts and that a fraud was played upon them and, therefore, they should not be made liable for disgorgement is patently erroneous. We find that the appellants in Appeal No. 256 of 2019 had received compensation of Rs. 15,000/- per month for renting their demat accounts. We are of the opinion that by renting their demat account, trading account etc., the appellants were concealing the identity of the fraudster and, thus, were acting not only in concert but in connivance with the said fraudster. The appellants cannot, thus, escape from the liability of debarment and the wrongful gains made by them.

19. The contention that the company had admitted before the WTM that the wrongful gain made by Mahesh Shah would be disgorged by the company and therefore, contended that no disgorgement should be made from the appellant is patently erroneous. In our opinion, such admission made by the company is only illusory. The record shows that the company is not a financially sound company and, thus, the offer to pay back the disgorged amount

is not only illusory but a device for the other appellants to go scot-free. In our opinion, the appellants cannot escape from their liability for the contravention done by them in their individual capacity.

20. In the end, the contention that the liability to disgorge the amount cannot be made joint and several under Regulation 11B of the SEBI Act has same force. In this regard, the explanation to Section 11B is extracted hereunder :-

“Explanation. - For the removal of doubts, it is hereby declared that the power to issue directions under this section shall include and always be deemed to have been included the power to direct any person, who made profit or averted loss by indulging in any transaction or activity in contravention of the provisions of this Act or regulations made thereunder, to disgorge an amount equivalent to the wrongful gain made or loss averted by such contravention.”

21. From the aforesaid, it is clear that a person can be directed to disgorge amount equivalent to the wrongful gain made by him. By such contravention, the liability to disgorge the amount is individual and not collective. Thus, we are of the opinion that the direction of the WTM directing the appellants to pay the amount jointly or severally is against the provisions of Section 11B and to that extent, it cannot be sustained. The order of the WTM is consequently, modified to the extent that the liability of the appellants in question except Rajesh Ranka to disgorge the amount is

to the extent of the profit earned by them as calculated by the WTM under Table 9. In the event of failure by these appellants to pay the amount, it would be open to SEBI to recover the amounts in the order of hierarchy stipulated in paragraph 145(e) of the impugned order. We are of the view that in view of the role played by Rajesh Ranka, the disgorgement is jointly and severally for which we do not find any fault with the order of the WTM.

22. In the light of the aforesaid, we do not find any merit in the appeals and order of the WTM is affirmed except to the extent stated aforesaid. The appeals are accordingly disposed of with no order as to costs.

Sd/-
Justice Tarun Agarwala
Presiding Officer

Sd/-
Dr. C. K. G. Nair
Member

Sd/-
Justice M. T. Joshi
Judicial Member

18.10.2019
Prepared & Compared by
PTM