

**BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI**

Appeal No.167 of 2012

Date of Decision: 17.12.2012

1. Mr. Sujit Karkera
2. Mrs. Shilpa Kotak
603, Krishna, Bharda Wadi Road,
Amboli, Andheri (West), Mumbai – 400 058.

3. Mr. Purushottam Karkera
C/804, Nandan, S.V. Road,
Andheri (West), Mumbai – 400 058.

..... Appellants

Versus

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

..... Respondent

Mr. Prakash Shah, Advocate for the Appellants.

Mr. Shiraz Rustomjee, Senior Advocate with Mr. Mihir Mody and Mr. Dinesh Mishra,
Advocates for the Respondent.

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

Per : S.S.N. Moorthy

The appellants are traders in securities. The present appeal is directed against an order passed by the adjudicating officer of the Securities and Exchange Board of India (for short the Board) by which a penalty of ` 60,73,316/-, ` 54,19,212/- and ` 4,66,108/- respectively has been imposed on the appellants. The above penalties were imposed under section 15HA of the Securities and Exchange Board of India Act, 1992 (the Act) in relation to the violation of 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 (FUTP Regulations).

2. The Board investigated the trading activity of the appellants. It was observed that the group, while trading through B P Equities Pvt. Ltd., was trading ahead of the trades

of Citigroup Global Markets Mauritius Pvt. Ltd. (CGMMPL) for the period October 01, 2008 to December 31, 2008 and the trades were put in with prior knowledge of the trades of CGMMPL. The impugned trades related to the orders of CGMMPL in the scrip of Aurobindo Pharma Ltd., ICICI Bank Ltd. and State Bank of India. The prior knowledge in the trading of the above scrips was obtained from Mr. Suresh Menon, a trader of CGMMPL. Call records of the Mr. Sujit Karkera, the first appellant and Mr. Suresh Menon were examined and it was noticed that during the material period the transactions in the scrips were discussed in clear terms between the two. The transcripts of the telephonic conversation revealed flow of information of the scrip, order quantity, order timing and price of the scrip which were passed on to the appellants by Mr. Suresh Menon while in possession of the orders of CGMMPL. It was therefore alleged that the appellants had prior information of the order details of CGMMPL and had sold shares prior to the selling of the shares of CGMMPL. It was also noticed that after purchasing the shares at a low price when CGMMPL was selling the shares they sold the shares subsequently earning profits. A charge of violation of regulations 3 and 4 of the FUTP Regulations was leveled against the appellants.

3. We have heard Shri Prakash Shah, learned counsel for the appellants and Shri Shiraz Rustomjee, learned senior counsel for the respondent Board.

4. It was contended by the appellants' learned counsel that the transactions impugned in the order of the adjudicating officer took place in the ordinary course of business through the stock exchange mechanism and there was no connivance with CGMMPL and there was no knowledge about the counter party and time of execution. According to him, the transactions were at the market rate and they were not dictated by any prior information from Mr. Suresh Menon as alleged. It was submitted by him that there was no "front running" in the transaction in the alleged scrips and the adjudicating officer wrongly held the appellants as violating regulations 3 and 4 of the FUTP Regulations. He also made a reference to the order of this Tribunal in Appeal no.216 of 2011 dated 09.11.2012 [Shri Dipak Patel vs. The Adjudicating Officer, Securities and Exchange Board of India].

4. The learned senior counsel appearing for the Board reiterated all the arguments which were advanced in support of the order in the case of Shri Dipak Patel mentioned

supra. He also mentioned that the transcripts of the telephonic conversation in the present case clearly establish prior information regarding the order, time and quantity of the scrips transacted and this has to be regarded as a serious wrong doing in the market. According to him, regulation 3 of the FUTP Regulations is wide enough to cover the wrong doing indulged in by the appellants and a reference to regulation 4(2)(q) of the FUTP Regulations is uncalled for.

5. We have considered the rival submissions. We cannot agree with the submissions of the appellant's learned counsel that the impugned transactions were in the nature of ordinary market operations. The facts on record establish that there was constant flow of information to the appellants from Mr. Suresh Menon and the telephonic conversation related specifically to the order, place, time and quantity of the scrips transacted. On a consideration of the facts on record and the material relied on by the adjudicating officer we have no hesitation in holding that the alleged transactions of the appellant are in the nature of "front running". The transactions entered into by the appellants in this case are identical to the transactions which were entered into and dealt with us in the case of Dipak Patel supra. The additional supporting evidence available in this case is the telephonic conversation of the appellant with Mr. Suresh Menon. Therefore, the argument of learned counsel for the appellants that the trades were executed in the normal course of business cannot be accepted. However, in the case of Dipak Patel referring to the regulation 4(2)(q) of the FUTP Regulations we have taken a view that the said regulations bar "front running" only by intermediaries and not by traders. We have drawn this conclusion because of the specific departure made by the regulator while framing the regulations of 2003 and repealing the regulations of 1995. This is what we have observed in the case of Dipak Patel.

"13. We are inclined to agree with learned counsel for the appellants that the 1995 Regulations prohibited front running by any person dealing in the securities market and a departure has been made in the Regulations of 2003 whereby front running has been prohibited only by intermediaries. The cases cited by the learned senior counsel for the Board and referred to above also relate to front running by intermediaries and not by other traders in the market. In the absence of any specific provision in the Act, rules or regulations prohibiting front running by a person other than an intermediary, we are of the view that the appellants cannot be held guilty of the charges levelled against them. There is no denying the fact that when the appellants placed their order, these were screen based and at the prevalent market price. Admittedly Passport was the major counter party for trading in the market and was placing huge orders and hence possibility of order of traders

placing orders for smaller quantities matching with orders of Passport cannot be ruled out. Therefore, it cannot be said that they have manipulated the market. The alleged fraud on the part of Dipak may be a fraud against its employer for which the employer has taken necessary action. In the absence of any specific provision in law, it cannot be said that a fraud has been played on the market or market has been manipulated by the appellants when all transactions were screen based at the prevalent market price.”

6. The appellants before us are traders and not intermediaries. So, following our decision in the case of Shri Dipak Patel supra, we hold that the appellant cannot be held guilty of violating the provisions of regulations 3 and 4 of the FUTP Regulations. We have taken note of the submissions of the learned senior counsel for the Board that the provisions of regulation 3 are wide in their sweep and application. However, the fact remains that regulation 4(2)(q) of the FUTP Regulations has made a specific provision in respect of manipulative, fraudulent and unfair trade practices indulged in by an intermediary. The legal position as regards the provisions of section 4(2)(q) has been dealt with at length in the order of this Tribunal in the case of Shri Dipak Patel mentioned above. When a specific provision is available in respect of violation of the regulations it is necessary to apply the specific regulation. In the present case, the general provisions contained in regulation 3 of the FUTP Regulations cannot be applied to the facts of the case since it is squarely covered by specific provision contained in regulation 4(2)(q) of the FUTP Regulations. There is no specific provision in the Act, rules or regulations prohibiting front running by a person other than an intermediary. Since the appellants are not intermediaries they cannot be held to have violated the provisions of regulations 3 and 4 by indulging in front running.

In view of the discussion above, we set aside the impugned order of the adjudicating officer and allow the appeal with no order as to costs.

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

Sd/-
S.S.N. Moorthy
Member

17.12.2012

Prepared and compared by
RHN