BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 64 of 2012

Date of Decision : 03.10.2012

Mr. Manoj Gaur
A-9/27, Vasant Vihar,
New Delhi – 110 057. …Appellant

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. Janak Dwarkadas, Senior Advocate with Mr. P.N. Modi and Mr. Anant Upadhyay, Advocates for the Appellant.

Mr. Darius Khambatta, Advocate General with Mr. Aditya Mehta and Mr. Mobin Shaikh, Advocates for the Respondent.

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

Per : P.K. Malhotra

This order will dispose of three Appeals no. 59, 60 and 64 of 2012 which arise out of a common order dated January 5, 2012 passed by the adjudicating officer of the Securities and Exchange Board of India (the Board) holding the appellants guilty of violating Regulation 3 and 4 of the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 (for short the Regulations) and imposing a penalty of ₹ 10 lakhs each under section 15G of the Securities and Exchange Board of India Act, 1992 (the Act).

2. The appellant in Appeal no. 64 of 2012, Mr. Manoj Gaur, is the Executive Chairman of the Jaiprakash Associates Ltd. (the company). Appellant in Appeal no. 59 of 2012 Mrs. Urvashi Gaur is wife of Mr. Manoj Gaur and appellant in Appeal no. 60 of 2012 Mr. Sameer Gaur is the brother of Mr. Manoj Gaur. By virtue of their

being wife and brother respectively of Mr. Manoj Gaur they are persons deemed to be connected to the appellant in terms of regulation 2(h) of the Regulations.

3. The Board carried out investigations into the trading in the scrip of the company during the period September 29, 2008 to October 27, 2008 and came to a prima-facie conclusion that Mr. Manoj Gaur, Executive Chairman of the company was in possession of Unpublished Price Sensitive Information (UPSI) relating to financial results of the company for the quarter ending September 30, 2008 which was passed on by him to Mrs. Urvashi Gaur and Mr. Sameer Gaur and both of them traded on the basis of UPSI, thereby violating the provisions of the Regulations. The case of the Board is that the company received the trial balances for the quarter ending September 30, 2008 from various units in the first week of October 2008. Thereafter, the company made announcement on October 11, 2008 through the stock exchange that in the board meeting scheduled to be held on October 21, 2008, the matter with regard to unaudited financial results for the quarter ending September 30, 2008, interim dividend for the year 2008-09 and rights issue will be considered. Accordingly, as required under the code of conduct of the company prescribed in terms of the Regulations, the company had closed its trading window from October 11, 2008.

4. The investigations carried out by the Board revealed that Mrs. Urvashi Gaur bought 1000 shares of the company on October 14, 2008 and Mr. Sameer Gaur bought a total of 7400 shares on October 13, 14 and 16, 2008. The allegation is that both these entities, being deemed to be connected persons to Mr. Manoj Gaur within the meaning of regulation 2(h) of the Regulations, traded in the shares of the company on the basis of UPSI that was passed on by Mr. Manoj Gaur to these connected persons before the actual declaration of the financial results in the board meeting held on October 21, 2008.

5. Show cause notices dated March 22, 2011 were issued to all the three appellants asking them to show cause why enquiry should not be held against them

and penalty imposed under the Act for violating the provisions of the Regulations as specified in the show cause notice. A personal hearing was also granted to the appellant. Thereafter, the impugned order dated January 5, 2012 was passed and a penalty of ₹ 10 lakhs was imposed on Mr. Manoj Gaur for violating regulation 3(ii) of the Regulations and penalty of ₹ 10 lakhs each was imposed on Urvashi Gaur and Sameer Gaur for violating regulations 3(i) and 4 of the Regulations. Hence this appeal.

6. We have heard Mr. Janak Dwarkadas, Senior Advocate and Mr. P.N. Modi, learned advocate for the appellant and Mr. Darius Khambatta, Advocate General and Mr. Mihir Mody, advocate on behalf of the respondent Board. Mr. Janak Dwarkadas, learned senior counsel for the appellant in Appeal no. 64 of 2012, submitted that the show cause notice and the impugned order expressly refer to and rely upon the investigation report but the Board has failed to furnish a copy of the same to the appellant inspite of the fact that the appellant made a request to that effect in its reply to the Board. According to learned senior counsel, this is in gross violation of principles of natural justice and vitiates the order. Learned senior counsel further submitted that the entire foundation of the case, as set out in the show cause notice, is that consolidated trial balances of the financial results of the company for the quarter ending September 2008 were available on October 12, 2008 which were approved by the Board on October 21, 2008. Therefore, the period from October 12, 2008 to October 21, 2008 was considered to be the period when UPSI was in existence. According to learned senior counsel, the appellant has comprehensively replied to it contending that the quarterly results were not known till October 17, 2008 when the consolidated and finalized results were placed before the audit committee. According to him, without dealing with this submission of the appellant, the adjudicating officer has drawn a presumption that since the trading window was closed by the company on October 11, 2008, it proves that UPSI was in existence from that date. It was submitted by the learned senior counsel that it is not open to the respondent Board to abandon the entire foundation of the charge in the show cause notice and make out a totally new case for the first time in the impugned order. According to learned senior

counsel, the order is liable to be set aside on this ground alone. It was further submitted by him that the findings arrived at by the adjudicating officer in the impugned order are totally misconceived and untenable. The charge in the show cause notice and in the order is of violating Regulation 3 of the Regulations which bars insider from trading while in possession of UPSI or communicating it to a third party and bars any such third party also from trading while in possession of such UPSI. The impugned order proceeds on the assumption that the closure of trading window, as prescribed under the code of conduct framed under the Regulations, by itself proves the existence of UPSI. According to learned senior counsel, this proposition is legally untenable. According to him, the prohibition contained in regulation 3 of the Regulations is an absolute prohibition and applies to every category of investor regardless of its position qua the company whereas the code of conduct provides for an additional restriction / prohibition which applies only to the categories specified in the code of conduct and prohibits them from trading during the period of closure of the trading window. According to learned senior counsel, closure of the trading window does not presuppose the automatic existence of UPSI. It was further contended by him that the burden to prove the date of existence of UPSI lies upon the Board which cannot be presumed by the mere fact of closure of trading window by the company, as has been concluded by the adjudicating officer in the impugned order. It was further submitted by him that the adjudicating officer has failed to give his finding as to the date on which UPSI came into existence and has drawn conclusion that the company closed its trading window from October 11, 2008 and that itself indicates that there was UPSI in existence on that day. Learned senior counsel vehemently argued that neither the regulations nor the code of conduct presupposes nor provides that the closure of trading window by the company shall be deemed to mean that the UPSI has come into existence. Learned senior counsel also referred to the affidavit-in-reply filed by the respondent Board and stated that it is for the first time that the respondent Board has sought to rely on the letter dated October 14, 2008 from the company to the ICICI Bank (principal lender of the company) seeking no objection for a dividend upto 15 per cent to allege that the financial results were known to the appellant even as on October 14, 2008. According to learned

senior counsel, it makes it clear that the Board's case is built on "shifting sands". It can never be assumed that the routine letter dated October 14, 2008 sent to the Bank was based on the knowledge of the final results for the quarter ending September, 2008 despite the fact that other evidence to the contrary was made available to the Board. According to learned senior counsel, the Board has totally ignored the evidence on record that quarterly financial results were available only on October 17, 2008 as is evident from the letter dated February 15, 2010 and May 31, 2010, the affidavit of the Director Finance and the letter of the auditors. Assuming that the trial balances were available on October 11, 2008, the same, in any case, cannot become UPSI because trial balances are to be consolidated in the finance departments of the company and it is only when final accounts are prepared and approved by the audit committee that the financial results can be considered to be UPSI.

7. Mr. Darius Khambatta, learned Advocate General, appearing for the respondent Board, supported the order passed by the adjudicating officer stating that appellant is the Executive Chairman of the company. In the letter dated February 15, 2010, issued by the Senior Vice President - Corporate Affairs and Company Secretary of the company and addressed to the investigation department of the Board, the company itself has stated that the issue with regard to the interim dividend was discussed on October 11, 2008 while considering items to be included in the agenda for proposed board meeting for considering the quarterly results. In the said letter, it is stated that trial balances for the quarter ending September 30, 2008 started reaching from various units in the corporate office in the first week of October 2008 till October 10, 2008 and thereafter the work of consolidation of the trial balances was taken in hand. The said letter further states that the unpublished financial results of the company as a whole for the quarter ending September 30, 2008 were made available by the company on October 11, 2008. The appellant, being the Executive Chairman of the company, was aware of the performance of the company for the quarter ending September, 2008 on October 11, 2008 itself. The company had informed the stock exchanges on October 11, 2008 that its next board meeting was scheduled to be held on October 21, 2008 to consider the quarterly financial results,

interim dividend and rights issue. Therefore, the company also closed its trading window on October 11, 2008 in accordance with clause 13 of the company's code of conduct for prevention of insider trading, framed by the company in pursuance of regulation 12 of the Regulations. On October 14, 2008, the appellant wrote letter to its lending bank seeking its approval for interim dividend upto 15 per cent considering the performance of the company. Therefore, the appellant was aware of the financial performance of the company on October 11, 2008 and, it cannot be said that at the time of writing letter to the lender bank or at the time of sending notice to the stock exchanges for holding the next board meeting, the appellant was not in possession of the UPSI. Mrs. Urvashi Gaur and Mr. Sameer Gaur bought shares of the company on October 13, 14 and 16, 2008 when the trading window of the company was closed and Mr. Manoj Gaur was in possession of UPSI and hence the provisions of the Regulations were violated. It was further argued by learned senior counsel for the Board that merely because the financial results were crystalized on October 17, 2008 for placing it before audit committee it does not mean that the appellant could not have ascertained the performance of the company from the information available in the trial balances of the company which were available to him on October 11, 2008. He further submitted that regulation 3 of the Regulations prohibit an insider from dealing in securities of a company when in possession of any unpublished price sensitive information or to communicate any unpublished price sensitive information to any person. Pursuant to regulation 12 of the insider trading Regulations, all listed companies are required to frame a code of conduct as near to the model code of conduct as possible without diluting the provisions of model code of conduct prescribed under the Regulations. The company had framed a code of conduct prescribing closure of the trading window and such closing of the trading window is for the purpose of restraining misuse of UPSI. The closing of trading window strongly suggests existence of UPSI. Therefore, there is nothing wrong in the conclusion arrived at by the adjudicating officer that since the company itself had closed the trading window on October 11, 2008, it indicates the existence of UPSI. Learned senior counsel for the respondent Board further submitted that un-collated trial balances of the various units received in the headquarters of the company could

very well constitute price sensitive information and there is no requirement that the trial balances must be crystalized/collated into periodical financial results before it can constitute price sensitive information. It was further submitted that availability of trial balances from different units of a company is information that is sufficiently collated for an Executive Chairman of the company to determine whether performance of the company is good and, therefore, constitutes price sensitive information.

8. On the issue of alleged violation of the principles of natural justice in not making copy of the investigation report available, learned senior counsel for the Board relied on regulation 9(1) of the Regulations which requires only the finding of the investigation report to be communicated to a person suspected of insider trading. In paragraph 3 of the show cause notice issued to the appellant, the findings of the investigation report were made available to the appellant and, therefore, there is no legal obligation on the Board to furnish the entire investigation report to the appellant. It was further submitted that the adjudicating officer has not relied upon any material that was contained in the investigation report except the material which is expressly set out in the show cause notice. With regard to the allegation that in the show cause notice, information about the financial results of the company was UPSI with effect from October 12, 2008 but in the impugned order the date has been shifted to October 11, 2008, it was submitted by the learned senior counsel for the Board that reference to the existence of UPSI from October 12, 2008 in the show cause notice was a summary of the findings of the investigation report whereas existence of UPSI with effect from October 11, 2008 is the finding arrived at by the adjudicating officer on the basis of closure of trading window by the company. It was, therefore, submitted that the order passed by the adjudicating officer does not call for any interference.

9. Before dealing with the rival submissions let us have a look at the relevant provisions of the regulations.

> “ **Definitions.**
> 2**.** In these regulations, unless the context otherwise requires :—
> (a) ……………
> (b) …………….

(c) "connected person" means any person who—

(i) is a director, as defined in clause (13) of section 2 of the Companies Act, 1956 (1 of 1956), of a company, or is deemed to be a director of that company by virtue of sub-clause (10) of section 307 of that Act; or

(ii) occupies the position as an officer or an employee of the company or holds a position involving a professional or business relationship between himself and the company whether temporary or permanent and who may reasonably be expected to have an access to unpublished price sensitive information in relation to that company:

(d) ………..

(e) "insider" means any person who,

(i) is or was connected with the company or is deemed to have been connected with the company and is reasonably expected to have access to unpublished price sensitive information in respect of securities of a company, or

(ii) has received or has had access to such unpublished price sensitive information;

(f) ……….

(g) ……….

(h) "person is deemed to be a connected person", if such person—

(i) is a company under the same management or group, or any subsidiary company thereof within the meaning of sub-section (1B) of section 370, or sub-section (11) of section 372, of the Companies Act, 1956 (1 of 1956) or sub-clause (g) of section 2 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969) as the case may be;

(ii) is an intermediary as specified in section 12 of the Act, Investment company, Trustee Company, Asset Management Company or an employee or director thereof or an official of a stock exchange or of clearing house or corporation;

(iii) is a merchant banker, share transfer agent, registrar to an issue, debenture trustee, broker, portfolio manager, Investment Advisor, sub-broker, Investment Company or an employee thereof, or is member of the Board of Trustees of a mutual fund or a member of the Board of Directors of the Asset Management Company of a mutual fund or is an employee thereof who have a fiduciary relationship with the company;

(iv) is a Member of the Board of Directors, or an employee, of a public financial institution as defined in section 4A of the Companies Act, 1956;

(v) is an official or an employee of a Self-regulatory Organisation recognised or authorised by the Board of a regulatory body;

(vi) is a relative of any of the aforementioned persons;

(vii) is a banker of the company;

(viii) relatives of the connected person; or

(ix) is a concern, firm, trust, Hindu undivided family, company or association of persons wherein any of the connected persons mentioned in sub-clause (i) of clause (c), of this regulation or any of the persons mentioned in sub-clause (vi), (vii) or (viii) of this clause have more than 10 per cent of the holding or interest;

(ha) "price sensitive information" means any information which relates directly or indirectly to a company and which if published is likely to materially affect the price of securities of company.

Explanation.—The following shall be deemed to be price sensitive information :—

(i) periodical financial results of the company;

(ii) intended declaration of dividends (both interim and final);
(iii) issue of securities or buy-back of securities;
(iv) any major expansion plans or execution of new projects.
(v) amalgamation, mergers or takeovers;
(vi) disposal of the whole or substantial part of the undertaking; and
(vii) significant changes in policies, plans or operations of the company;

(k) "unpublished" means information which is not published by the company or its agents and is not specific in nature.
Explanation.—Speculative reports in print or electronic media shall not be considered as published information.

Prohibition on dealing, communicating or counselling on matters relating to insider trading.

3**.** No insider shall—

(i) either on his own behalf or on behalf of any other person, deal in securities of a company listed on any stock exchange when in possession of any unpublished price sensitive information; or

(ii) communicate or counsel or procure directly or indirectly any unpublished price sensitive information to any person who while in possession of such unpublished price sensitive information shall not deal in securities :
Provided that nothing contained above shall be applicable to any communication required in the ordinary course of business or profession or employment or under any law.

3A. No company shall deal in the securities of another company or associate of that other company while in possession of any unpublished price sensitive information.
3B. ……………………………….

Violation of provisions relating to insider trading.

4. Any insider who deals in securities in contravention of the provisions of regulation 3 or 3A shall be guilty of insider trading.

5 to 8 ………………………………….

Communications of findings, etc.

9. (1) The Board shall, after consideration of the investigation report communicate the findings to the person suspected to be involved in insider trading or violation of these regulations.
(2) The person to whom such findings has been communicated shall reply to the same within 21 days;
(3) On receipt of such a reply or explanation, if any, from such person, the Board may take such measures as it deems fit to protect the interests of the investors and in the interests of the securities market and for the due compliance of the provisions of the Act, the regulations made thereunder including the issue of directions under regulation 11.
10 to 11 …………………………………..

Code of internal procedures and conduct for listed companies and other entities.

12. (1) All listed companies and organisations associated with securities markets including :

(*a*) the intermediaries as mentioned in section 12 of the Act, asset management company and trustees of mutual funds ;
(*b*) the self-regulatory organisations recognised or authorised by the Board;
(*c*) the recognised stock exchanges and clearing house or corporations;
(*d*) the public financial institutions as defined in section 4A of the Companies Act, 1956; and
(e) the professional firms such as auditors, accountancy firms, law firms, analysts, consultants, etc., assisting or advising listed companies,

shall frame a code of internal procedures and conduct as near thereto the Model Code specified in Schedule I of these Regulations without diluting it in any manner and ensure compliance of the same.

(2) The entities mentioned in sub-regulation (1), shall abide by the code of Corporate Disclosure Practices as specified in Schedule II of these Regulations.

(3) All entities mentioned in sub-regulation (1), shall adopt appropriate mechanisms and procedures to enforce the codes specified under sub-regulations (1) and (2).

(4) Action taken by the entities mentioned in sub-regulation (1) against any person for violation of the code under sub-regulation (3) shall not preclude the Board from initiating proceedings for violation of these Regulations.

10. Para 3.2 of the Model code of conduct as prescribed in Schedule I to the regulations is also relevant for our purpose and the same is reproduced hereunder for ease of reference:-

"3.2 **Trading window**

3.2.1 The company shall specify a trading period, to be called "Trading Window", for trading in the company's securities. The trading window shall be closed during the time the information referred to in para 3.2.3 is un-published.

3.2.2 When the trading window is closed, the employees / directors shall not trade in the company's securities in such period.

3.2.3 The trading window shall be, *inter alia*, closed at the time:-

(a) Declaration of financial results (quarterly, half-yearly and annually).
(b) Declaration of dividends (interim and final).
(c) Issue of securities by way of public/ rights/bonus etc.
(d) Any major expansion plans or execution of new projects.
(e) Amalgamation, mergers, takeovers and buy-back.
(f) Disposal of whole or substantially whole of the undertaking.
(g) Any changes in policies, plans or operations of the company.

3.2.3A The time for commencement of closing of trading window shall be decided by the company.

3.2.4 The trading window shall be opened 24 hours after the information referred to in para 3.2.3 is made public.

3.2.5 All directors/ officers/designated employees of the company shall conduct all their dealings in the securities of the Company only in a valid trading window and shall not deal in any transaction involving the purchase or sale of the company's securities during the periods when trading window is closed, as referred to in para 3.2.3 or

during any other period as may be specified by the Company from time to time.
3.2.6 In case of ESOPs, exercise of option may be allowed in the period when the trading window is closed. However, sale of shares allotted on exercise of ESOPs shall not be allowed when trading window is closed."

11. In compliance with the requirement of regulation 12(1) the company has also framed a code of conduct of internal procedures, relevant provisions of which are as under:-

"**CODE OF CONDUCT** :

1 & 2 …………….

3. The Code of Conduct shall, be applicable to :
   a. All the Directors on the Board of Directors of the Company;
   b. * All management staff of the Grade – Vice President and above of all the Departments;
   c. * All employees of the Finance Department of the Company;
   d. All employees of Accounts and Secretarial Departments of the Grade N6 and above.
   e. All connected persons and persons deemed to be connected as defined in the Regulations."

"UNPUBLISHED PRICE SENSITIVE INFORMATION:

8. **'Unpublished Price Sensitive Information'** means any information which is material and unpublished i.e. generally not known or published by the Company for general information but, which if published or known, is likely to materially affect the price of securities of the Company in the stock market. This will include, but shall not be limited to, financial results, intended declaration of dividends, issue of securities, any major expansion plans or execution of new projects, amalgamation, mergers and take-overs, disposal of the whole or substantially the whole of the undertaking, such other information as may affect the earnings of the Company, any changes in policies, plans or operations of the Company, etc."

"PRESERVATION OF UNPUBLISHED PRICE SENSITIVE INFORMATION :

9. The Directors and Designated Employees shall maintain confidentiality of all **'Unpublished Price Sensitive Information'**. The Directors and Designated Employees shall not pass on such information to any person directly or indirectly by way of making a recommendation for the purchase or sale of securities of the Company based on the same."

"**PREVENTION OF MISUSE OF UNPUBLISHED PRICE SENSITIVE INFORMATION:**

13. All Directors and Designated Employees shall be subject to certain trading restrictions as enumerated below;

a. The Company has designated a **'Trading Window' period** being **<u>the period during which transactions in the shares of the Company can be effected</u>** by Directors and Designated Employees_(hereinafter referred to as **'Trading Window'**) for trading in the Company's securities;

b. The **TRADING WINDOW** shall remain **closed** from the date of notice given to Stock Exchanges for convening the meeting of the Board of Directors of the Company to consider:

   i. Declaration of Financial results (quarterly, half-yearly and annual);
   ii. Declaration of dividends (interim and final);
   iii. Issue of securities by way of public/ rights/bonus etc. ;
   iv. Any major expansion plans or execution of new projects ;
   v. Amalgamation, mergers, takeovers and buy-back ;
   vi. Disposal of whole or substantially whole of the undertaking ; and
   vii. Any changes in policies, plans or operations of the Company.

c. The Directors/Designated Employees shall not trade in the Company's securities during the period when the **TRADING WINDOW** is closed and will have to forego the opportunity to trade in the Company's securities during such period.

d. The **TRADING WINDOW** shall be **opened 24 hours** after the information referred to in Clause (b) is made public.

e. All Directors and Designated Employees shall conduct all their dealings in the securities of the Company only in a valid **TRADING WINDOW** and shall, not deal in any transaction involving the purchase or sale of the Company's securities during the periods when Trading Window is closed or during any other period as may be specified by the Company from time to time."

12. Referring to the order of this Tribunal in the case of Dilip S. Pendse vs. Securities and Exchange Board of India [Appeal no. 80 of 2009 decided on November 19, 2009] it has been rightly pointed out by learned senior counsel for the appellant that the charge of insider trading is one of the most serious charges in relation to the securities market and having regard to the gravity of this wrong doing higher must be the preponderance of probabilities in establishing the same. This is what the Tribunal has observed in the said order.

> "The charge of insider trading is one of the most serious charges in relation to the securities market and having regard to the gravity of this wrong doing, higher must be the preponderance of probabilities in establishing the same. In Mousam Singha Roy v. State of West Bengal

(2003) 12 SCC 377, the learned judges of the Supreme Court in the context of the administration of criminal justice observed that, "It is also a settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof, since a higher degree of assurance is required to convict the accused." This principle applies to civil cases as well where the charge is to be established not beyond reasonable doubt but on the preponderance of probabilities. The measure of proof in civil or criminal cases is not an absolute standard and within each standard there are degrees of probability. In Hornal v. Neuberger Products Ltd. (1956) 3 All E.R.970 Hodson, L.J. observed as under:

> "Just as in civil cases the balance of probability may be more readily tilted in one case than in another, so in criminal cases proof beyond reasonable doubt may more readily be attained in some cases than in others."

We are also tempted to refer to what Denning, L.J. observed in Bater v. Bater (1950) 2 All E.R. 458 wherein he was resolving the difference of opinion between two Lord Justices regarding the standard of proof required in a matrimonial case. This is what he said:

> "It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion."

13. Again in the case of Shri E. Sudhir Reddy vs. Securities and Exchange Board of India [Appeal no. 138 of 2011 decided on December 16, 2011] this is what we have observed with reference to the regulations dealing with insider trading.

> "A shareholder becomes an owner of the company to the extent of the value of shares held by him. He is therefore, entitled to his share in the profits earned by the company. Therefore, performance of a company is of primary importance to the investors as well as to the general public who might be interested in investing in the company. The shareholders and general public get information about the company either through the annual report or during the annual general meeting. However, persons in the company or otherwise concerned with the affairs of the company are in possession of such information before it is actually made public. The directors of the company or for that matter even professionals like Chartered Accountants and Advocates advising the company on its business related activities are privy to the performance of the company

> and come in possession of information which is not in public domain. Knowledge of such unpublished price sensitive information in the hands of persons connected to the company puts them in an advantageous position over the ordinary shareholders and the general public. Such information can be used to make gains by buying shares anticipating rise in the price of the scrip or it can also be used to protect themselves against losses by selling the shares before the price falls. Such trading by the insider is not based on level playing field and is detrimental to the interest of the ordinary shareholders of the company and general public. It is with a view to curb such practices that section 12A of the Sebi Act makes provisions for prohibiting insider trading and the Board also framed the Insider Trading Regulations to curb such practice."

Regulation 3 of the Regulations prohibits an insider from dealing in securities of a company when in possession of unpublished price sensitive information or to communicate unpublished price sensitive information to any person. Regulation 2(ha) of the Regulations defines price sensitive information as any information which relates directly or indirectly to a company and which, if published, is likely to materially affect the price of securities of the company. The explanation to the said definition clause deems certain information to be price sensitive and this includes periodical financial results of a company. In accordance with the code of conduct prescribed by the company the directors and employees of the company are required to keep price sensitive information confidential and not to pass on such information to any person. Para 8 of the code of conduct gives definition of UPSI and it specifically says that it will include, but shall not be limited to, financial results, **intended declaration of dividends**, issue of securities……etc. With a view to prevent misuse of UPSI, the code of conduct also prescribes closing of the trading window and it inter alia provides that the trading window shall remain closed from the date of notice given to stock exchanges for convening the meeting of the board of directors of the company to consider declaration of financial results, dividends, rights issue……etc. and shall be opened 24 hours after the information is made public.

14. There is no denying the fact that Mr. Manoj Gaur being the Executive Chairman of the company is an insider and Mrs. Urvashi Gaur and Mr. Sameer Gaur being the wife and brother respectively of Mr. Manoj Gaur are deemed to be connected persons and hence they also fall within the definition of 'insider' for the purposes of the said Regulations. The closure of the trading window is surely a

restriction on the freedom of the director / employees of the company to trade in the shares of the company but such a restriction is a reasonable restriction to restrain these persons from taking advantage of the UPSI which may be in their possession and which is not known to the public shareholders. A bare perusal of Schedule I in the model code of conduct, prescribed under the Regulations and code of conduct as prescribed by the company, will make it clear that the closure of the trading window is not only confined to the period during the existence of UPSI but it can also be closed on other occasions. However, if we read these provisions with the definition of price sensitive information as given in regulation 2(ha) of the Regulations, it will make it abundantly clear that as and when periodical financial results of the company are under consideration, the information relating to periodical financial results of the company is invariably price sensitive and trading window will be closed till such information is made public. When the Board sought information from the company with regard to the financial results for the quarter ending September 30, 2008 the company was evasive in its reply and, therefore, Board had no option but to arrive at its own conclusion with regard to date of existence of UPSI on the basis of material made available by the company. It was for the company to inform the Board about the date from which, according to the company, the UPSI came into existence. If the company fails to provide the desired information or furnish information, which according to Board is not correct, the Board may draw its own conclusion on the basis of material available on record. Admittedly, the company in its letter dated February 15, 2010 had informed the Board that the trial balances from various units started reaching the accounts department at corporate office in the first week of October 2008 till October 10, 2008 and thereafter the company made an announcement on October 11, 2008 with regard to the board meeting to be held on October 21, 2008. It is in the later communications that the company changed its stand with regard to availability of UPSI on the ground that the consolidated and finalized quarterly results were placed before the committee and were available on October 17, 2008. The definition of price sensitive information under regulation 2(ha) of the Regulations is very wide and includes any information with regard to periodical financial results of the company. Admittedly, when the trial balances for the quarter

ending September 30, 2008 were available with the headquarters of the company by October 10, 2008, we see no reason to disagree with the conclusion arrived at by the adjudicating officer that UPSI came into existence on October 11, 2008. The adjudicating officer has based his decision on the observation that as company closed its trading window from October 11, 2008, the UPSI existed on that day. We are of the view that even going by the facts of the case and the information made available by the company during the course of investigations, the company has admitted that the trial balances for the quarter ending September 2008 were available with the appellant on October 11, 2008. We are also of the view that such trial balances fall within the definition of any information relating to financial results of the company which is known only to a few persons in the company and which are not in public domain. Since the findings arrived at by the adjudicating officer can be supported on the basis of material made available by the company during the investigation and relied upon by the Board, we have no hesitation in upholding his findings dehors the observation that the information was UPSI solely on the basis that the company itself had closed the trading window from October 11, 2008.

15. It was strenuously argued by the learned senior counsel for the appellant that the corporate announcement dated October 11, 2008 made to the stock exchange regarding three issues viz. financial results for the quarter , dividends and rights issue were in public domain and could not be considered as UPSI. We are unable to accept this argument. As stated above, the definition of price sensitive information as provided in regulation 2(ha) of the Regulations is wide enough to include information relating to periodical financial results. What has been disclosed to the stock exchange is that these issues will be considered in the board meeting to be held on October 21, 2008. What has not been disclosed are the financial results or the amount of dividend or details of the rights issue. If we accept this argument of the learned senior counsel for the appellant that the moment a notice is sent to the stock exchange with regard to consideration of certain issues without details thereof, the same cannot be considered to be UPSI, it will be narrowing down the scope of the regulations defeating the very purpose of framing the regulations to prohibit insider trading while in possession of

UPSI. When the company receives trial balances which are to be collated and ultimately examined by the internal committees, only those persons who are dealing with the issue are privy to such information and such information cannot be said to be in public domain. In the facts and circumstances of this case, the availability of the trial balances from the various units in the corporate office, which were discussed with the Executive Chairman of the company, leads us to the only conclusion that on the basis of trial balances, the UPSI was in existence on October 11, 2008 and Mr. Manoj Gaur being the Executive Chairman of the company was in possession of the same. The question that arises for further consideration is whether he had passed on this information to Mrs. Urvashi Gaur, his wife, and Mr. Sameer Gaur, his brother, who are appellants in the other two appeals and whether the trading done by them on October 13,14 and 16, 2008 is based on the UPSI.

16. We had an occasion to deal with a similar situation in the case of Mrs. Chandrakala vs. The Adjudicating Officer, Securities and Exchange Board of India [Appeal no 209 of 2011 decided on January 31, 2012] where we have observed that prohibition contained in regulation 3 of the Regulations apply only when an insider trades or deals in securities on the basis of any unpublished price sensitive information and not otherwise. It means that the trades executed should be motivated by the information in the possession of the insider. If an insider trades or deals in securities of a listed company, it may be presumed that he has traded on the basis of unpublished price sensitive information unless contrary to the same is established. The burden of proving a situation contrary to the presumption mentioned above lies on the insider. If an insider shows that he did not trade on the basis of unpublished price sensitive information and that he traded on some other basis, he cannot be said to have violated the provisions of regulation 3 of the Regulations.

17. We have looked into the trading pattern of Mrs. Urvashi Gaur and Mr. Sameer Gaur. We find that both of them are regularly trading not only in the scrip of the company but in the scrip of other companies as well. Even the trading pattern in respect of trading in the shares of the company shows that only 1000 shares were

purchased by Mrs. Urvashi Gaur on October 17, 2008 when she was already holding of 38,985 shares on that date and even thereafter she had been purchasing the shares of the company regularly. As on March 23, 2012, she was holding 59,045 shares of the company. She is the wife of Mr. Manoj Gaur, the Executive Chairman of the company. If Mr. Manoj Gaur had passed on UPSI to Mrs. Urvashi Gaur and she traded on the basis of that UPSI she would not have traded in 1000 shares only. We cannot lose sight of the fact that the company is a widely held listed company with a paid up capital divided into 212,64,33,182 equity shares out of which promoter group holds 44.44 per cent. It is a large infrastructure company engaged in highways, cement, power and education sector and the Executive Chairman of such company would not like to risk the reputation of himself and the company for 1000 shares. Similarly, Mr. Sameer Gaur is also a regular trader of shares of the company. Before trading on October 13,14 and 16, 2008 he was holding 1,10,250 shares of the company. The first sale of 1400 shares was made by him only on May 8, 2009. Till date, he is holding 62,882 shares. Looking at the trading pattern, the number of shares purchased and going by their status, it seems highly improbable that trading was done by them on the basis of UPSI. On the other hand, it is more probable that they traded in the normal course of business. If the intention of Mrs. Urvashi Gaur and Mr. Sameer Gaur had been to capitalize on the UPSI allegedly communicated by Mr. Manoj Gaur, the quantum of purchase would not have been so small. Both the appellants are financially independent and trade independently which is clear from their trading pattern that they have been buying the shares in similar quantities in the immediate past as well as on later dates.

18. Looking at the totality of the facts and circumstances of the case, it is highly improbable that trading done by Mrs. Urvashi Gaur or Mr. Sameer Gaur on October 13, 14 and 16, 2008 was based on UPSI or that they received any UPSI from Mr. Manoj Gaur. In the appeal, a ground had been taken on behalf of Mrs. Urvashi Gaur and Mr. Sameer Gaur that with respect to the trading during the ‘window closing period’, the Model code of conduct of the company was not applicable to them as they do not fall in the category of director or designated employee and,

therefore, there cannot be a prohibition or embargo on them to trade during the window closing period of the company. It is interesting to note that in para 3 of the code of conduct, prescribed by the company, it is stated that the code shall be applicable to all connected persons and persons deemed to be connected as prescribed in the Regulations. If we strictly apply the code of conduct as prescribed by the company, Mrs. Urvashi Gaur and Mr. Sameer Gaur are covered by the same and could not have traded when the trading window was closed. However, we note that there is no such charge against them and, therefore, we are leaving the matter at that. The finding of the adjudicating officer to the effect that Mr. Manoj Gaur was in possession of UPSI on October 11, 2008 can be upheld on the basis of information provided by the company itself that the trial balances for the quarter ending October 30, 2008 were available on that day. However, the adjudicating officer has failed to bring on record any evidence, direct or circumstantial, to show that Mr. Manoj Gaur passed on the UPSI to Mrs. Urvashi Gaur and Mr. Sameer Gaur and thus violated regulation 3(ii) of the Regulations. The trading pattern of Mrs. Urvashi Gaur and Mr. Sameer Gaur also belies the findings that the trading in the scrip of the company done by Mrs. Urvashi Gaur on October 14, 2008 or by Mr. Sameer Gaur on October 13, 14 and 16, 2008 was based on UPSI.

19. It may be noted that the trading has not been done by Mr. Manoj Gaur who is not supposed to trade during the closure of trading window. The trading is done by his wife and brother. No doubt, being deemed to be connected persons to Mr. Manoj Gaur, they were insiders. But no evidence has been brought on record, direct or circumstantial, to show that they were in possession of UPSI about the financial results of the company for the quarter ending September 30, 2008. As we have observed earlier, having regard to the gravity of charge of insider trading, higher degree of preponderance of probabilities is needed to bring home the charge. The adjudicating officer has not brought any material on record to show that they were in possession of UPSI.

20. We may now take note of some other arguments which were advanced on behalf of the appellants. It was alleged that the principles of natural justice were violated on the ground that copy of investigation report was not provided to the appellants which has resulted in denial of fair hearing to them. It was also alleged that entirely a new case has been made out by the adjudicating officer while holding that the UPSI existed from October 11, 2008 whereas in the show cause notice, it was alleged that the information about the financial results etc. of the company was UPSI with effect from October 12, 2008. We are inclined to agree with the submissions made by learned Advocate General on behalf of the Board that there is no violation of the principles of natural justice on any of these counts. Regulation 9(i) of the Regulations specifically provides that only the findings of the investigation report are to be communicated to a person suspected of insider trading. Such findings were furnished to the appellants. The investigation report is not the evidence on which reliance was placed by the adjudicating officer. Since the adjudicating officer has complied with the statutory requirements, there is no legal obligation on the Board to furnish the entire investigation report to the appellants. Learned counsel for the parties have relied on certain case law relating to principles of natural justice. We do not consider it necessary to refer to all those details in view of the fact that regulation 9 of the Regulations makes it obligatory to communicate the findings in the investigation report and not the whole report. It is nobody's case that such findings were not made available. If the procedure laid down in the regulations has been followed by the adjudicating officer, the grievance of violation of principles of natural justice is without any foundation. We are also inclined to agree with the learned Advocate General that reference to the existence of UPSI from October 12, 2008 in the show cause notice was only a summary of the findings of the investigation report whereas existence of UPSI with effect from October 11, 2008 is the finding arrived at by the adjudicating officer on the basis of material available on record. Therefore, in our opinion, there was no breach of principles of natural justice and no new case has been made out by the adjudicating officer.

21. To summarise, we are of the considered view that the trial balances for the quarter ending September 2008, which were available with the company by October 11, 2008, was price sensitive information within the meaning of regulation 2(ha) of the Regulations and was unpublished till the collated and finalised accounts were placed before the Board on October 21, 2008. Mr. Manoj Gaur became privy to it when trial balances were considered on October 11, 2008 and therefore, he was in possession of UPSI on that date. However, the Board has not brought any evidence on record, direct or circumstantial, to show that he had passed on this information to either Mrs. Urvashi Gaur or Mr. Sameer Gaur or that the trading done by Mrs. Urvashi Gaur on October 13, 2008 or Mr. Sameer Gaur on October 13, 14 and 16, 2008 was based on UPSI.

We, therefore, set aside the impugned order and allow all the three appeals with no order as to costs.

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

Sd/-
S.S.N. Moorthy
Member

03.10.2012
Prepared and compared by:
msb