

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 35 of 2013

Date of decision: 27.08.2013

SPS Share Brokers Private Limited
66, Tamrind Lane,
4/5 Haji Kasam Building,
First Floor, Fort,
Mumbai – 400 001.

...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. Gaurav Joshi, Advocate with Ms. Neeta Jain and Mr. Manish Chhangani,
Advocates for the Appellant.

Dr. Mrs. Poornima Advani, Advocate with Mr. Ajay Khaire and Ms. Virakthi
Hegde, Advocates for the Respondent.

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

Per : Jog Singh

1. By way of present appeal the appellant is challenging the impugned order dated December 19, 2012 passed by the respondent imposing a penalty of Rs. 2,50,000/- on the appellant under the provisions of Section 15A(b) of the SEBI Act, 1992 read with Regulation 7 of the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997 ('SAST Regulations, 1997').

2. Briefly stated the facts of the case are that the appellant, namely, SPS Share Brokers Pvt. Ltd. is a company incorporated under the Companies Act, 1956 having its registered office in Mumbai. The appellant is a registered stock broker with membership of Bombay Stock Exchange Ltd. (BSE) and National Stock Exchange of India Ltd. (NSE).

3 A Show Cause Notice (SCN) dated February 27, 2007 came to be issued to the appellant by the respondent pursuant to certain investigations undertaken into the trading in the scrip of Prudential Pharmaceuticals Limited ('PPL'). It is alleged in the SCN that the appellant failed to comply with the provisions of Regulation 7 of the SAST Regulations, 1997 pursuant to acquisition of 8.75 lakh shares of PPL amounting to 16.98% of the total paid-up capital of PPL.

4. The appellant vide its reply dated March 19, 2007, inter alia, stated that it had purchased only 6 lakh shares of PPL through two separate transactions; viz., 2,50,000 shares on April 9, 2001, followed by 3,50,000 shares on May 8, 2001. The rest of the trading in the scrip of PPL was undertaken by the appellant on behalf of its client and, therefore, the same cannot be clubbed with its own personal trade in the same scrip for the purposes of determining the acquisition limit prescribed by the SAST Regulations, 1997. The appellant specifically submitted that all the necessary disclosures in relation to the said acquisition of 6 lakh shares were made as per the requirement laid down in Regulation 7 of the SAST Regulations, 1997 to the company i.e. PPL and also to the Ahmedabad Stock Exchange Ltd. ('ASE'). The appellant duly annexed proof of dispatch of the said disclosure Under Certificate of Posting (UCP) along with said letter. The said documents have also been produced before us

for our perusal by way of a separate Misc. Application no. 83 of 2013 and the same have been duly noted by this Tribunal.

5. The appellant also submits that Regulation 7 of the SAST Regulations, 1997 was amended on September 9, 2002 making it incumbent upon any acquirer of shares of a listed company to make disclosure of such acquisition at various stages to the company as well as the concerned stock exchanges. The earlier requirement under Regulation 7 of SAST Regulations, 1997 was restricted only to providing information to the company. The case of the appellant is that not only did it duly inform the company, but by way of abundant precaution it also informed the ASE of the acquisition in question.

6. The respondent did not find this reply convincing and as such instituted and commenced adjudication proceedings against the appellant as per the procedure enshrined in the SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995. After conducting and finalizing the proceedings in question, the learned Adjudicating Officer ('AO') by way of impugned order dated December 19, 2012 came to the conclusion that the appellant was guilty of violating Regulation 7 of the SAST Regulations, 1997 and imposed a penalty of Rs. 2,50,000/- for the said violation.

7. Before looking into the merit of the matter, we feel it appropriate to resolve the issue as to whether the acquisition of shares of PPL by the appellant on April 9, 2001 and May 8, 2001 would attract the provisions of the unamended Regulation 7 of the SAST Regulations, 1997 or the amended provisions brought into force w.e.f. September 9, 2002. For the sake of

convenience the unamended and amended provisions of Regulation 7 of the SAST Regulations, 1997 are hereby reproduced:-

Unamended Regulation 7 of the SAST Regulations, 1997

“Substituted by the SEBI (Substantial Acquisition of Shares and Takeovers) (Second Amendment) Regulations, 2002, w.e.f. 9-9-2002 for the following:

(1) Any acquirer, who acquires shares or voting rights which (taken together with shares or voting rights, if any, held by him) would entitle him to more than five percent shares or voting rights in a company, in any manner whatsoever, shall disclose the aggregate of his shareholding or voting rights in that company, to the company.

“Substituted by the SEBI (Substantial Acquisition of Shares and Takeovers) (Second Amendment) Regulations, 2002, w.e.f. 9-9-2002 for the following:

(1A) Any acquirer who has acquired shares or voting rights of a company, under sub-regulation (1) of regulation 11, shall make disclosures of such acquisition as well as the aggregate of his pre and post acquisition of shareholding and voting rights to the company when such acquisition aggregates to 5% and 10% of the voting rights.

Inserted by the SEBI (Substantial Acquisition of Shares and Takeovers) (Third Amendment) Regulations, 2001, w.e.f. 24-10-2001.

Amended Regulation 7 of the SAST Regulations, 1997

“Acquisition of 5 per cent and more shares or voting rights of a company.

7. (1) Any acquirer, who acquires shares or voting rights which (taken together with shares or voting rights, if any, held by him) would entitle him to more than five per cent or ten per cent or fourteen per cent shares or voting rights in a company, in any manner whatsoever, shall disclose at every stage the aggregate of his shareholding or voting rights in that company to the company and to the stock exchanges where shares of the target company are listed.

(1A) Any acquirer who has acquired shares or voting rights of a company under sub-regulation (1) of regulation 11, shall disclose purchase or sale aggregating two per cent or more of the share capital of the target company to the target company, and the stock exchanges where shares of the target company are listed within two days of such purchase or sale along with the aggregate shareholding after such acquisition or sale.”

A perusal of the above said Regulations clearly reveals that the case of the appellant, as far as substantive provisions are concerned, would be governed by the unamended provisions of SAST Regulations, 1997 which were in vogue on the relevant dates i.e. April 9, 2001 and May 8, 2001 when the appellant admittedly acquired 2,50,000 shares and 3,50,000 shares, respectively of PPL. Undoubtedly, the amended Regulations which brought into existence the requirement of intimating to the stock exchange regarding the acquisition was also introduced in addition to the earlier requisite of making such disclosure to the concerned company whose shares were sought to be acquired by a person. It is, therefore, clear that the appellant cannot be held guilty of violating a substantive provision which came into force on September 9, 2002 for an alleged violation which took place on April 9, 2001 and May 8, 2001. No retrospective effect is given to the amended Regulation 7 of the SAST Regulations, 1997. In fact it appears that the passing of the impugned order relying on a provision clearly inserted post the happening of the alleged violation exhibits a sort of pre-conceived inclination on the respondent's part to impose a penalty on the appellant without really considering whether or not such an act of the respondent might be sustained in law. Therefore, this issue has to be decided in favour of the appellant and against the respondent.

8. We would, however, clarify and rather reiterate the settled position that the amended Regulations dated September 9, 2002 would be retrospectively applicable in procedural matters. Further, although Regulation 7 of the SAST Regulations, 1997 is procedural in nature and does not seek to create a substantive right, it is crucial for SEBI to keep a track of all acquisitions of shares or voting rights beyond a prescribed limit in case of all the listed companies through various stock exchanges. As such, its violation has to be

viewed seriously because such information / disclosure may form the very basis of an investigation conducted by SEBI in a given case. In the case in hand, however, the requirement of reporting to stock exchanges has been introduced in the amended Regulation 7 of the SAST Regulations, 2002 with a view to enable SEBI to act promptly and intervene in case of any alleged violation of SAST Regulations by any person and nobody can dispute the notion that prompt action by SEBI in such cases is of utmost value to protect the interests of investors and to regulate the capital market. Keeping this factor duly in mind, the SAST Regulations, 2002 make it necessary to inform the company and the concerned stock exchanges of such acquisition and disclosure at every stage within 4 days of the event occurring, by the person concerned.

9. We have heard Mr. Gaurav Joshi, learned counsel for the appellant and Dr. Mrs. Poornima Advani, learned counsel for the respondent at length and have also minutely gone through the pleadings, impugned order and certain judgments pointed out by both the parties at the hearing. It is an admitted position that the appellant purchased 2,50,000 shares of PPL on April 9, 2001. The requirement of making disclosure under Regulation 7 of SAST Regulations, 1997 was not attracted at that time because the said acquisition was within the prescribed threshold limit of 5%. However, on May 8, 2001 when the appellant acquired another 3,50,000 shares of the same company i.e., PPL, the statutory requirement to make disclosure to the company got triggered as per the provisions of Regulation 7 of the SAST Regulations, 1997 since the appellant's acquisition touched 11.6% of the paid-up capital of the Company i.e., PPL.

10. A perusal of the records makes it abundantly clear that the appellant has duly informed the company as well as the ASE of this acquisition of 6 lakh shares which amounted to about 11.6% of the total paid-up capital of PPL. In this connection, letter dated May 8, 2001 addressed to ASE has been brought on record by way of Exhibit – ‘B’ annexed with the Misc. Application no. 83 of 2013. Similarly, the UCP receipt dated May 8, 2001 is also annexed by the appellant on page 9 of the said Misc. Application. These documents were also produced before the learned AO by the appellant during the adjudication proceedings but the same have been ignored and not taken into consideration while passing the impugned order against the appellant. Similarly, we note from the records that neither the company nor the stock exchange has disputed the receipt of such disclosure through postal services. Moreover, as discussed earlier it is evident that the mandatory requirement of disclosing relevant information at every single stage of the acquisition after the 5% benchmark is crossed, viz., ten percent or fourteen percent or fifty four or seventy four percent, was introduced only w.e.f. September 9, 2002. The respondent seems to have disregarded this fact while holding the appellant guilty of a provision of law not even in existence when the acquisitions in question took place.

11. In this connection, it may be pertinently noted that a broker is rightfully entitled to trade on his client’s behalf as well as on behalf of himself. The point to be borne in mind is that there is a marked distinction between the trades executed by a broker for his own purposes, and those executed by him on behalf of his clients, albeit in the scrip of the same Company. Therefore, for the purposes of acquisition under Regulation 7 or any other similar provision in other regulations, the two aforementioned transactions have to be treated

separately unless it is proved that the client and the broker acted in league with each other, and the client funded the broker's own transactions as well.

12. It is worthwhile to note that reliance placed by the learned AO in the case of Mega Resources Ltd. vs. SEBI decided by this Tribunal on March 19, 2002, Appeal no. 49 of 2001 is totally misplaced in as much as SEBI in that case had contested the authenticity of the claim of posting the letter and genuineness of the certificate of posting produced by the appellant therein. In that context by relying upon the judgment of the Hon'ble Supreme Court reported in (1994) 1 SCC 682 in the matter of Gadakh Yashwantrao vs. E.V. alias Balasaheb Vakil, this Tribunal came to the conclusion that the UCP mode of making a communication was not very reliable in the facts and circumstances of that case. In the present case, neither the authenticity nor the genuineness of the certificate of posting has been doubted by the respondent. Therefore, the decision in the case of Mega Resources Ltd. (supra) is totally distinguishable and doesn't advance the case of the respondent as argued by Dr. Mrs. Advani, learned counsel for the respondent.

In this view of the matter, the appeal deserves to be allowed.
Ordered accordingly. No costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

Sd/-
A.S. Lamba
Member

27.08.2013

Prepared and compared by:
msb