

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 54 of 2011

Date of Decision : 21.07.2011

Kemefs Specialities Pvt. Ltd.
310, "E" Wing,
Crystal Plaza, 3rd Floor,
New Link Road, Andheri (W),
Mumbai – 400 053.

...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. Zal Andhyarujina, Advocate with Mr. Deepak Dhane, Advocate for the Appellant.

Mr. Kumar Desai, Advocate with Mr. Kersi Dastoor and Mr. Mohin Shaikh, Advocates for the Respondent.

CORAM : Justice N.K. Sodhi, Presiding Officer
P.K. Malhotra, Member
S.S.N. Moorthy, Member

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

Whether the appellant is guilty of insider trading is the primary question that arises for our consideration in this appeal filed under section 15T of the Securities and Exchange Board of India Act, 1992 (hereinafter called the Act). The adjudicating officer has found the appellant guilty of the charge on two counts – (i) when it purchased on April 6 and April 11, 2005, 5791 shares of Helios and Matheson Information Technology Ltd. (for short the company) and (ii) again when it sold 7000 shares of the company on January 3, 2006. He has held that when the appellant bought and sold the shares, it was in possession of unpublished price sensitive information and thereby violated Regulation 3 of the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 (for short the Regulations). The appellant was also charged with misrepresenting facts in its reply

during the course of investigations and thereby making itself liable for penalty under Section 15A(a) of the Act and the adjudicating officer has found that this charge also stands established. Since the appellant, according to the adjudicating officer, indulged in insider trading on two occasions as aforesaid, the conduct of the former has been held to be repetitive and having regard to the provisions of Section 15J of the Act, the latter by his order dated January 31, 2011 imposed a penalty of ₹ 15 lacs on this count. A penalty of ₹ 10 lacs has been levied under Section 15A(a) of the Act. It is against this order that the present appeal has been filed.

2. The appellant is a private limited company whose managing director is one Rajeev Sawhney. He along with his wife and daughter are the shareholders and they are also the directors of this company. It is not in dispute that Rajeev Sawhney is also a substantial shareholder and promoter of vMoksha group of companies which consists of vMoksha Technologies Ltd. Mauritius, vMoksha Technologies Private Ltd. India, vMoksha Inc. USA and vMoksha Technologies Pte. Ltd. Singapore. Rajeev Sawhney was keen to exit from the vMoksha group and wanted to sell his stake therein. On July 12, 2004, he engaged the services of Pricewaterhouse Coopers Pvt. Ltd. to sell his stake on a best effort basis and find a buyer. It is common case of the parties that Pricewaterhouse Coopers introduced the appellant to the company and they started negotiations in regard to the sale of Rajeev Sawhney's stake in the vMoksha group and also for acquiring three of its entities by the company. During the course of the negotiations, the company and the vMoksha group and their respective shareholders signed a Term Sheet on April 8, 2005 laying down the modalities for the acquisition by the company of the three entities of vMoksha group and the stake of Rajeev Sawhney including the fixed consideration and additional value to promoters. Subsequently, on May 11, 2005 the parties executed, among others, a share purchase agreement firmly laying down the terms and conditions on which the company was to acquire the three entities of vMoksha group. While negotiations were going on for the acquisition of three entities of vMoksha group and the stake of Rajeev Sawhney, the appellant purchased on April 6, 2005 and April 11, 2005 5791 shares of the company

for which Rajeev Sawhney placed the orders with the broker. The contract notes had been furnished to Rajeev Sawhney in the name of the appellant company. As already noticed above, the question for our consideration is whether the appellant purchased these shares when it was in possession of unpublished price sensitive information. We are of the view that the appellant was in possession of such information as a result whereof it indulged in insider trading and violated Regulation 3 of the regulations. The appellant no doubt is a private limited company but it is being controlled and managed by Rajeev Sawhney. He was the one who was negotiating with the company for the sale of his stake and also for the acquisition of three entities of vMoksha group by the company. The information that the company was in serious negotiations with Rajeev Sawhney and vMoksha group of companies for the aforesaid acquisition was not in public domain and was only in the knowledge of Rajeev Sawhney. While in possession of this information he purchased the shares in the name of the appellant of which he was the managing director and a person managing and controlling its affairs. We are of the view that the information regarding the negotiations between the company and the vMoksha group of companies was price sensitive as it was likely to affect the price of the scrip of the company when published as it was listed on different stock exchanges. Price sensitive information as defined in the Regulations 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 that company. According to Clause (ha) of Regulation 2 of the Regulations, information regarding amalgamations, mergers or takeovers is deemed to be price sensitive information. As already noticed, the negotiations between the parties were in regard to the acquisition by the company of three entities of the vMoksha group of companies and the stake of Rajeev Sawhney therein. The learned counsel for the appellant strenuously argued that the information regarding the negotiations was not price sensitive information as the negotiations were only at the primary stage and it could not be said with any certainty whether the company would be able to takeover the three entities of vMoksha group of companies. We are unable to agree with him. The negotiations had been going on since January, 2005 when Pricewaterhouse Coopers had introduced

Rajeev Sawhney to the company for the aforesaid acquisition. Rajeev Sawhney on the one hand was negotiating with the company whose shares were listed on different stock exchanges and on the other hand he, as a managing director of the appellant, purchased shares in the name of the appellant. The fact that Rajeev Sawhney was 'insider' within the meaning of the Regulations is not seriously disputed before us. Rather, the appellant has admitted in the memorandum of appeal that he was an insider as defined in Regulation 2(e) of the Regulations. Information regarding acquisition by the company being price sensitive and Rajeev Sawhney being an insider, he could not trade in the shares in view of the prohibition contained in Regulation 3 of the Regulations. This Regulation prohibits an insider from dealing in securities of a company listed on any stock exchange when he is in possession of any unpublished price sensitive information. Rajeev Sawhney purchased the shares at a time when the negotiations were at an advanced stage and even the Term Sheet (memorandum of understanding) had been executed between the parties. We are unable to agree with the learned counsel for the appellant that the negotiations were only at a preliminary stage and Rajeev Sawhney could not have known whether the deal would go through. We are satisfied that he purchased the shares when in possession of the unpublished price sensitive information and thereby violated Regulation 3. In this view of the matter, no fault can be found with the finding recorded by the adjudicating officer in this regard.

3. There is yet another charge of insider trading. Before we discuss this charge, it is necessary to mention that the deal regarding acquisition of three entities of vMoksha group of companies by the company did not go through despite their having executed the Term Sheet (memorandum of understanding) and the share purchase agreement on May 11, 2005 along with other connected agreements / documents. It is not necessary for us to go into the question as to who is to blame for the deal not going through. What is material for us is that just as the information regarding acquisition of the entities by the company was price sensitive in nature, the information regarding the deal falling through was equally price sensitive. The

appellant through Rajeev Sawhney had sold 7000 shares of the company on January 3, 2006 and the adjudicating officer has found that the appellant was in possession of unpublished price sensitive information on that day regarding the deal not going through and having executed the sale transactions while in possession of that information, the appellant was guilty of insider trading. We are unable to agree with the adjudicating officer in this regard. It is true that the deal regarding acquisition by the company had fallen through but the question is when did this happen. Obviously, if the deal had fallen through prior to January 3, 2006, it would be reasonable to assume that the appellant was in possession of the unpublished price sensitive information. If, on the other hand, the deal fell through long after January 3, 2006 and negotiations were continuing between the parties even after the date of sale, then it would be difficult to hold that the appellant executed the sale transactions while in possession of that information. We have on record an e-mail message dated January 31, 2006 from Murali, the managing director of the company addressed to, inter alia, Rajeev Sawhney and vMoksha group of companies which reads as under:

“Dear sirs,
ref: meetings at Bangalore on the 15th Nov ‘05 and at Mumbai on the 22nd Nov ‘ 05.
We hope the closing of the transaction can be done now with your guidance.
With best regards
Murali”

The aforesaid e-mail had an attachment with it which is a letter dated January 30, 2006 which is more explicit on the subject and the same reads as under:

“30th Jan’06
Dear Sirs,

Sub: 1. Share Purchase Agreement dated 11th May 2005
2. Subscription Agreement dated 11th May 2005
3. Escrow Agreement dated 11th May 2005
4. Our letters dated 3rd September’05 and 28th September’05

This is in continuation of our earlier letters pursuant to the agreements referred to above. We had confirmed that we have complied with the terms and conditions of the said agreements. We understand that the issues between the original promoters have been reconciled.

We hereby call upon you to complete the entire transaction by each of you fulfilling your respective obligations under those

agreements to complete all the transactions contemplated under these agreements.

We hope you will now proceed with the steps required for completion of the conditions precedent and advise us to arrange for allotment of the preference shares. As soon as we hear from you we will take steps for allotment of the shares.

In case you have any difficulty with regard to completion of the CPs, kindly let us know in what way we can be of any assistance for closing the transaction smoothly at an early date.

Yours sincerely,

For Helios & Matheson Information Technology Limited

G.K. Muralikrishna
Managing Director”

This letter was also addressed, among others, to Rajeev Sawhney and vMoksha group of companies. A reading of the e-mail message and the letter quoted above makes it abundantly clear that the deal had not fallen through till January 31, 2006 and the company was wanting the sellers to complete the entire transactions by fulfilling their respective obligations under the share purchase agreement and other related agreements executed between them. It is, thus, clear that till January 31, 2006 none of the parties had any knowledge about the deal falling through which happened sometime after January 31, 2006. This being so, we wonder how Rajeev Sawhney acting on behalf of the appellant could be in possession of the price sensitive information regarding the deal not going through on January 3, 2006 when the shares are said to have been sold by the appellant. Since the deal fell through long after January 3, 2006, the appellant cannot, in the circumstances of this case, be held to be guilty of insider trading as Rajeev Sawhney could not be in possession of that information when the sale transactions were executed.

4. This brings us to the second charge levelled against the appellant. It is alleged that during the course of the investigations, the appellant was asked to furnish the details of the buy and sell orders in the scrip of the company and that it filed a reply stating that all the transactions in the scrip had been executed not on the basis of any price sensitive information but independently on the advice given by JM Morgan Stanley Financial Services Private Limited (JMM) which was its financial advisor.

On receipt of this reply, the Board verified the fact from JMM and this is what JMM informed the Board as per its letter of May 30, 2007.

“1. As regards registration/documents with M/s KEMEFS Specialties Pvt. Ltd., please note that neither are they registered nor do we have any agreement signed with them other than as a client for their secondary market trades. However, Mr. Rajeev Sawhney, apart from being our client for secondary market trades is also registered with us as one of our Portfolio Management clients. A photocopy of the agreement executed by us with him together with necessary supporting document(s) is annexed hereto and marked as Annexure “A”.

Since the appellant was not registered with JMM as a portfolio management client, the Board alleged that the reply furnished was a misrepresentation and accordingly, it was charged with violating Section 15A(a) of the Act. This Section reads as under:

“15A. If any person, who is required under this Act or any rules or regulations made thereunder,-

(a) to furnish any document, return or report to the Board, fails to furnish the same, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less;”

We are inclined to agree with the learned counsel for the respondent that if the information furnished is incorrect or misleading, the aforesaid provisions would come into play and it could be said that the delinquent had failed to furnish the required information. However, in the facts and circumstances of this case, we are inclined to hold that the reply that was given by the appellant to the investigating officer stating that it had traded on the advice of JMM was not misleading or incorrect. From the letter of JMM, the relevant part of which has been reproduced hereinabove, it is clear that Rajeev Sawhney had been registered with JMM as one of their portfolio management clients and Rajeev Sawhney is no different from the appellant company. As already noticed above, Rajeev Sawhney is not only the managing director but also the heart and soul of the appellant and it is he who had been buying and selling shares on its behalf. Since a serious charge of misrepresentation has been levelled against the appellant which is a private limited company, it becomes necessary to lift the corporate veil and see who is controlling it. When we do that it is clear that it is Rajeev Sawhney who is lurking behind the veil. We are, therefore, of the view that

when the appellant stated that it was receiving advice from JMM, it obviously meant that the advice was being taken by Rajeev Sawhney on its behalf. The letter of May 30, 2007 also makes it clear that Rajeev Sawhney was being advised by JMM being one of its portfolio management client. In this view of the matter, we don't think that the reply furnished by the appellant was misleading. We cannot, therefore, hold the appellant guilty of violating Section 15A(a) of the Act. The charge in this regard must fail.

5. We have upheld the finding of guilt in regard to insider trading when the appellant purchased 5791 shares of the company on April 6, 2005 and again on April 11, 2005. The charge of insider trading in regard to the sale transactions has not been established. The adjudicating officer has levied a penalty of ₹ 15 lacs holding the appellant guilty on both the counts. Since we have reversed the finding on one of the counts, we are inclined to agree with the learned counsel for the appellant that the amount of penalty deserves to be reduced. We, accordingly, reduce the same to ₹ 7.5 lacs in regard to the charge of insider trading. The other charge of furnishing misleading information has not been established against the appellant and no penalty in this regard is called for.

In the result, the appeal is partly allowed as aforesaid and the penalty levied on the appellant reduced to ₹ 7.5 lacs in all. There is no order as to costs.

Sd/-
Justice N.K. Sodhi
Presiding Officer

Sd/-
P.K. Malhotra
Member

Sd/-
S.S.N. Moorthy
Member

21.07.2011

Prepared and compared by:
msb