

IN THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 404 of 2004

Date of decision : 15.11.2007

1. Alliance Capital Mutual Fund,
2. Alliance Capital Asset Management (India) Private
Limited,
3. Alliance Capital Management L.P. Appellants

Versus

Securities and Exchange Board of India Respondent

Mr. Janak Dwarkadas Senior Advocate with Mr. Ankit A. Lohia, Ms. Darshika Kothari and Mr. Ravi Hegde Advocates for the Appellants.
Mr. Kumar Desai Advocate with Ms. Daya Gupta and Chloris John Advocates for the Respondent.

Coram : Justice N.K. Sodhi, Presiding Officer
Arun Bhargava, Member
Utpal Bhattacharya, Member

Per : Justice N.K. Sodhi, Presiding Officer

Alliance Capital Mutual Fund (for short the Fund) is a mutual fund registered with the Securities and Exchange Board of India (for short the Board) under the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996 (for short MF Regulations). The asset manager of the Fund is Alliance Capital Asset Management (India) Pvt. Ltd. Mumbai (for short ACAML). ACAML is a subsidiary of Alliance Capital (Mauritius)(P) Ltd. (for short the Mauritius Company). Mauritius Company is a subsidiary of Alliance Capital Management Corporation of Delaware USA (for short ACMD). ACMD is the sponsor of the Fund and the former is a subsidiary of Alliance Capital Management L.P. U.S.A. (for short ACM). ACM is a foreign institutional investor registered as such with the Board and it makes investments in Indian securities on behalf of its sub-accounts which are also registered with the Board. The sub-accounts are international entities and are institutional investors and they have made investments in several Indian securities.

ACAML was incorporated in the year 1994 and the Fund launched the first of its 13 schemes in 1995. As the asset manager, ACAML exclusively managed all the schemes of the Fund. During the initial years of its operations from 1995 to 1998, one Shri Samir Arora (for short Arora) was employed by ACAML as its Chief Investment Officer and was based in Mumbai. As Chief Investment Officer, Arora was rendering investment management services in respect of the Fund's equity schemes and the equity portion of its balanced schemes. In August 1998 Arora was relocated to Singapore and became an employee of a subsidiary of ACM there from where he resigned in August 2003. ACM claims that as per its global practice, its employees are employed by the relevant subsidiary in the country in which they are located. It is further claimed that they continue to act as officers/directors of its subsidiaries around the world for which they have been allocated responsibilities. In view of the aforesaid, Arora was not on the rolls of ACAML w.e.f. 1998 but continued to act as its Chief Investment Officer till August 2003.

Some time in January 2003 news item appeared in the print and electronic media stating that ACM had decided to sell its stake in its Indian subsidiary ACAML. This led to the fall in the assets managed by ACAML and the Fund was facing redemption pressure. The prices of certain scrips in which the Fund had invested also fell substantially. The sale did not go through and ACM announced that it would retain the ownership of the Fund. As a result of this announcement the prices of the securities bounced back. In this back ground, the Board ordered investigations into the affairs of the management and conduct of the Fund. Investigations revealed that Arora was managing the funds of ACAML, the Fund and also those of different sub-accounts. It was further revealed that Arora managed the funds in a non-transparent manner. The investigations also revealed that the Fund had invested substantially in Digital Globalsoft Ltd (DGL), Balaji Telefilms Ltd (BTL), Mastek Ltd. (Mastek), Hinduja TMT Ltd. (HTMT) and United Phosphorous Ltd. (UPL). These companies, according to the investigations, were mid-cap companies having high promoter holding and low floating stock. From the trading

pattern it was inferred that Arora had utilised his substantial holdings in these low floating stock mid-cap companies to indulge in manipulative trades giving unfair advantage to ACM and its sub-accounts at the cost of the investors of the Fund. The investigating officer also came to the conclusion that Arora had indulged in insider trading when he sold the entire holding in DGL in four consecutive trading days starting from May 8, 2003. On the basis of the findings recorded in the investigation report, Arora was served with a show cause notice dated 20.2.2004 detailing specific charges. Since the charges levelled against the appellants herein are based on the acts and omissions of Arora, it is necessary to summarise here the charges levelled against him. Those charges were as under :

(i) Arora was guilty of professional misconduct inviting action under sections 11(4) and 11B of the Securities and Exchange Board of India Act, 1992 (hereinafter called the Act).

(ii) Arora was guilty of violating the provisions of Regulations 4(a), 4(b), 4(c), 4(d) and 5 of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 1995 (for short FUTP Regulations).

(iii) Arora was guilty of violating the provisions of Regulation 3 of the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 (for short Insider Trading Regulations).

We are not concerned in this appeal with charge (i) levelled against Arora. The gravamen of charge (ii) against him was that being entrusted with equity funds of ACM, its sub-accounts and those of the Fund, he compromised the interests of Indian unit holders for benefiting the parent company ACM. This, according to the Board, he did by (a) first, depressing the value of stocks of some specified companies namely BTL, HTMT, Mastek and UPL by massive selling of the holdings of the Fund in these companies and (b) subsequently purchasing the same at depressed prices on behalf of the sub-accounts through ACM thereby benefiting these international entities at the cost of the Fund, thus, harming the interests of Indian unit holders. In regard to charge (iii), it was found that Arora made a statement in an interview which was published in Business Standard on May 5, 2003 praising the stock of DGL in view of its impending merger with HP ISO- a division

of Hewlett Packard and later he disposed of the entire DGL holding of the Fund during the period May 8 to May 12, 2003. This, according to the Board, he did because he was in possession of unpublished price sensitive information which later had an adverse impact on the price of the scrip and it fell. This information, according to the allegation, made him an ‘insider’. The Board held an inquiry against Arora under section 11-B of the Act and found that all the aforesaid charges stood established against him. Accordingly, by order dated 31.3.2004 Arora was prohibited from buying, selling or dealing in securities in any manner, directly or indirectly, for a period of five years.

At this stage, it would be relevant to refer to the findings recorded by the investigating officer against the appellants which were communicated to them and they read as under :

“4.0. Violations of ACMF and ACAML :

4.1. Liability for Employee’s Acts :

According to regulations 25(3) of SEBI (Mutual Funds) Regulations, 1996, the Asset Management Company shall be responsible for the acts of commission or omission by its employees or the persons whose services have been procured by the Asset Management Company. Hence, ACMF is responsible for the above acts of omission and commission by Shri Samir Arora who was functioning as their Fund Manager and Chief Investment Officer.”

Since the investigations found that the appellants herein were acting in concert and that they were responsible for the acts of commission and omission of Arora, who at the relevant time was the Chief Investment Officer of ACAML (Appellant no.2), the Board initiated adjudication proceedings against them. The adjudicating officer issued notices dated May 11, 2004 calling upon the appellants to show cause why an inquiry be not held against them under Rule 3 of the Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995. The notices stated that the appellants had made themselves liable for penalties under sections 15-G and 15-HA of the Act. Section 15-G of the Act provides for a monetary penalty for insider trading which Arora was found to have indulged in by the Board by its order dated March 31, 2004 referred to

hereinabove. By the same order, Arora had also been found to have violated Regulations 4(a) to 4(d) and 5 of the FUTP Regulations for which a monetary penalty is provided under section 15-HA of the Act. In reply to the show cause notices the appellants filed their detailed replies controverting the findings recorded by the investigating officer, a copy of which had been enclosed with the notices. It was categorically denied by the appellants that Arora had indulged in manipulative transactions in various scrips referred to earlier or that he benefited the appellants or the sub-accounts of ACM at the cost of Indian unit holders of the Fund. They also denied that Arora had indulged in insider trading or that he was in possession of any unpublished price sensitive information when he took the decision to sell the DGL holding of the Fund from May 8 to May 12, 2003. On a consideration of the replies filed by the appellants and on the basis of the material on the record and after affording an opportunity of personal hearing to the appellants, the adjudicating officer came to the conclusion that Arora had violated Regulations 4(a) to 4(d) and 5 of FUTP Regulations as he was entrusted with the equity funds of ACM, its sub-accounts and also those of the Fund and he compromised the interests of the Indian unit holders for benefiting the parent company ACM. According to the adjudicating officer, Arora did this by first depressing the value of stocks of the aforesaid companies by large scale selling of the holdings of Fund and subsequently purchasing those stocks at depressed prices on behalf of ACM and its sub-accounts thereby harming the interests of the Indian unit holders. He also found that Arora was in possession of unpublished price sensitive information when he sold the DGL shares held by the Fund from May 8 to May 12, 2003 and being an insider he violated Regulation 3 of the Insider Trading Regulations. After recording these findings, the adjudicating officer as per his own understanding of the provisions of section 15-J of the Act calculated the amount of penalty payable by Appellants nos. 2 and 3 and quantified the same at Rs.15 crores. Even though the Fund was found vicariously liable for the acts and omissions of Arora, the adjudicating officer did not issue any direction to it to pay the penalty as that, according to him, would be

detrimental to the interests of its unit holders. By his order dated 18.8.2004 ACM and ACAML were held liable to pay jointly and severally the aforesaid amount of penalty. It is against this order that the present appeal has been filed under section 15-T of the Act.

It is pertinent to mention that feeling aggrieved by the order dated March 31, 2004 Arora filed Appeal no. 83 of 2004 before this Tribunal which was allowed on October 15, 2004 reversing the findings on all the three charges levelled against him. For the detailed reasons given in its order the Tribunal held that the charge of professional misconduct as framed against Arora was not made out against him. The charge that Arora had violated Regulations 4(a) to 4(d) and 5 of the FUTP Regulations also failed in its entirety. The charge of insider trading also met with the same fate. This is how the Tribunal summed-up its conclusions in regard to charges (ii) and (iii) levelled against Arora while allowing his appeal:

“68.(I) To sum up therefore we conclude as follows :

(i)

(ii) The second charge pertains to violation of Regulations 4 and 5 of SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 1995. These regulations forbid a person from entering into transactions in securities with the intention of artificially affecting the prices of securities or indulging in acts calculated to create a false or misleading appearance of trading or any non-genuine transactions not intended to effect transfer of beneficial ownership. The evidence cited in support of the charge does not even attempt to bring out any of these ingredients. In respect of the transactions cited in support of this charge there is nothing artificial or non-genuine or intended or calculated to create a false or misleading appearance of trading and there was transfer of beneficial ownership in respect of every single transaction. Similarly, in respect of the appellant's statement alleged to be in violation of Regulation 5, there is nothing that can be treated as misleading in any material particular. Since Regulation 5 forbids only statements misleading in any material particular, there is therefore no substance in this charge.

(iii) In respect of the third charge of insider trading we have come to the conclusion that even the price sensitive information which the appellant is alleged to have some how accessed did not turn out to be correct information because the merger was not announced on May 12, 2003. Information which finally turns out to be false or at least uncertain cannot even be labelled as information. The sale of securities prior to the board meeting therefore, can only be considered as based on his analysis and assessment of the information available in the public domain. Besides there is not even an attempt by SEBI to show how the information generated by Shri Bansi Mehta personally and signed, sealed and delivered by him to Shri Soonawala and opened only in the board meeting

on May 12, 2003 could have reached the appellant, particularly when SEBI has nowhere doubted the credentials of S/Shri Bansi Mehta and Soonawala. We have also found that there were assessments by independent analysts on May 8, 2003 recommending downgrading and sale of the DGL scrip. We have also noticed that several other funds had also sold the same scrip in the same month in substantial numbers as also the fact that the appellant himself had also disposed of his entire holding in some other renowned companies, some of them in the same month as per his assessment of the conditions prevailing in the market. The list of such companies includes names as famous as Infosys, Satyam, MTNL and Century Textiles, Liquidation of the entire stock in DGL there does not by itself, make a case of insider trading. There has to be independent evidence in support of this charge. There is none of that in the impugned order. We therefore hold this charge as not proved.”

We have heard Shri. Janak Dwarkadas learned senior counsel for the appellants and Shri. Kumar Desai learned counsel for the respondent. The argument of Shri. Dwarkadas senior Advocate is that the appellants herein have been made liable vicariously for the acts and omissions of Arora and in the appeal filed by Arora this Tribunal has already held that the charges levelled against him have not been proved. He contends that if Arora is not liable for any act of commission or omission, the question of the appellants being vicariously liable for those acts does not arise. According to the learned senior counsel, the present appeal deserves to succeed on this short ground. He also strenuously urged that we being a coordinate Bench of the same Tribunal should not take on facts a contra view from the earlier judgment in Arora’s case. We find merit in the contentions advanced on behalf of the appellants. From the findings recorded by the investigating officer which have been reproduced in the earlier part of the order, it is clear that the appellants are being made liable for the various acts of omission and commission of Arora. Reference therein has been made to Regulation 25(3) of the MF Regulations which provides that the asset management company shall be responsible for the acts of omission and commission by its employees or the persons whose services have been procured by the asset management company. It is not in dispute that at the relevant time Arora was acting as the Chief Investment Officer of ACAML. If the appellants as the masters of Arora are to be held vicariously liable for his acts, it has first to be established that the servant (Arora) was liable. In cases where a master is sought to

be made vicariously liable for the acts of his servants, the first question that needs to be answered is whether the servant is liable. If not, the master can never be held liable. In other words, the master's liability can arise only when the servant is liable. In the case before us Arora has already been absolved of the charges levelled against him and has been honourably exonerated. In this view of the matter, the appellants as the employers of Arora cannot be held vicariously liable. The appeal must, therefore, succeed on this ground. We are also in agreement with the learned senior counsel for the appellants that judicial discipline requires that we as a coordinate Bench of the same Tribunal should not take a contra view on the same set of facts. In *Sub-Inspector Rooplal & Anr. vs. Lt. Governor & ors.* (2000) 1 SCC 644 the learned judges of the Apex court had this to say :

“At the outset, we must express our serious dissatisfaction in regard to the manner in which a Coordinate Bench of the Tribunal has overruled, in effect, an earlier judgment of another Coordinate Bench of the same Tribunal. This is opposed to all principles of judicial discipline. If at all, the subsequent Bench of the Tribunal was of the opinion that the earlier view taken by the Coordinate Bench of the same Tribunal was incorrect, it ought to have referred the matter to a larger Bench so that the difference of opinion between the two Coordinate Benches on the same point could have been avoided. It is not as if the latter Bench was unaware of the judgment of the earlier Bench but knowingly it proceeded to disagree with the said judgment against all known rules of precedents. Precedents which enunciate rules of law form the foundation of administration of justice under our system. This is a fundamental principles which every presiding officer of a judicial forum ought to know, for consistency in interpretation of law alone can lead to public confidence in our judicial system. This Court has laid down time and again that precedent law must be followed by all concerned; deviation from the same should be only on a procedure known to law.”

In view of the binding observations made in *Sub-Inspector Rooplal's* case (supra) we cannot but hold that none of the charges levelled against Arora are established. We have carefully gone through the earlier judgment in Arora's case and for the detailed reasons recorded therein we are inclined to take the same view. Shri. Kumar Desai learned counsel for the Board, however, submits that some of the issues raised in this appeal could be said to be covered by the earlier decision in Arora's case but those

not covered will have to be decided on merits. We asked the learned counsel to point out those issues which did not arise in Arora's case. He stated that the charge against the appellants is that Arora utilised his substantial holdings in the low floating stock mid-cap companies to indulge in manipulative trades to benefit the sub-accounts at the cost of the Indian unit holders but this was not the charge against Arora. We cannot agree with the learned counsel for the respondent. The charges levelled against Arora have been referred to in the earlier part of the order and it is clear that this charge was also levelled against him the finding on which was reversed by this Tribunal. Having gone through the facts of the present case and the impugned order and the order passed in Arora's case, we have no doubt that the issues involved in the two cases were the same and that the appellants have been found guilty only on account of their vicarious liability.

For the view that we have taken, it is not necessary for us to decide whether the penalty was properly quantified.

In the result, the appeal is allowed and the impugned order set aside. There is no order as to costs.

Sd-
Justice N.K. Sodhi
Presiding Officer

Sd/-
Arun Bhargava
Member

Sd/-
Utpal Bhattacharya
Member

15.11.2007
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