REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No.563 of 2020

SECURITIES AND EXCHANGE BOARD OF INDIA ...APPELLANT(S)

VERSUS

ABHIJIT RAJAN ...RESPONDENT(S)

J U D G M E N T

V. Ramasubramanian

1. The Securities and Exchange Board of India has come up with the above appeal, challenging an Order of the Securities Appellate Tribunal, by which the Order of its Whole Time Member (for short "*WTM*") directing the respondent to disgorge the amount of unlawful gains made by him, was set aside.

2. We have heard Mr. Arvind P. Datar, learned senior counsel for the appellant and Mr. Somasekhar Sundaresan, learned counsel appearing

for the respondent.

3. The background facts leading to the above appeal are as follows:

(i) The respondent *herein* was the Chairman and Managing Director of a company by name Gammon Infrastructure Projects Limited (hereinafter referred to as *"GIPL"*) till September 20, 2013. Thereafter, he ceased to be the Chairman Managing Director, but continued to be a Director of the Company.

(ii) In the year 2012 GIPL was awarded a contract by National Highways Authority of India. The total cost of the project was Rs.1648 crores. For the execution of the project, GIPL set up a special purpose vehicle called Vijayawada Gundugolanu Road Project Private Limited ("VGRPPL").

(iii) Similarly, another company by name Simplex Infrastructure Limited (SIL) was awarded a contract by NHAI in Jharkhand and West Bengal and the total cost of the project was Rs.940 crores. For the execution of the project, SIL set up a special purpose vehicle called Maa Durga Expressways Private Limited (MDEPL).

(iv) GIPL entered into two shareholders agreements with SIL. Under these agreements, GIPL was to invest in MDEPL and SIL was to invest in VGRPPL for their

respective projects. The mutual investments were to be tuned in such a manner that GIPL and SIL would hold 49% equity interest in each other's projects.

(v) However, on 9.08.2013 the Board of Directors of GIPL passed a resolution authorizing the termination of both shareholders agreements.

(vi) On 22.8.2013, the respondent sold about 144 lakhs shares (approx.) held by him in GIPL, for an aggregate value of approximately Rs.10.28 crores.

(vii) On 30.08.2013 GIPL made a disclosure to the National Stock exchange of India and BSE regarding the termination of two shareholders agreements.

(viii) On 20.09.2013 the respondent resigned from the post of Chairman and Managing Director of GIPL.

(ix) Pursuant to an input received from the National Stock Exchange, about the aforesaid transaction and the possibility of the trading having taken place on the basis of unpublished price sensitive information, SEBI conducted a preliminary enquiry. After completion of the preliminary enquiry, SEBI passed an ex-parte interim order on 17.07.2014 holding *prima facie* that the respondent violated the provisions of Section 12A(d) and (e) of The Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "*SEBI Act,*

1992") and consequently restraining the respondent from buying, selling or dealing in securities and accessing the security markets directly or indirectly. This ex-parte interim order was also confirmed by a confirmatory order dated 23.03.2015, passed after providing an opportunity of hearing to the respondent. The appeal filed by the respondent against the said confirmatory order was dismissed as withdrawn on 4.02.2016.

(x) In the interregnum, SEBI completed the investigation and issued certain directions on 21.03.2016, followed by a show cause notice dated 29.03.2016. The show cause notice was addressed not only to the respondent *herein*, but also to another Company by name Consolidated Infrastructure Company Private Limited and two of its Directors. The noticees filed their replies and after giving an opportunity of hearing to the noticees, the WTM passed an Order dated 13.07.2016. By the said order the WTM held the respondent *herein* guilty of insider trading and hence liable to disgorge the amount of unlawful gains made by him to the tune of Rs.1.09 crores. The show cause notices issued to the others, *namely*, Consolidated Infrastructure Company Private Limited and its Directors were closed without

any directions, on the ground that no case was made out against them.

(xi) Challenging the said order of the WTM, the respondent filed a statutory appeal before the Securities Appellate Tribunal. The appeal was allowed by the Tribunal by an Order dated 08.11.2019 and it is against the said order that SEBI has come up with the above appeal.

4. The reasons for the Securities Appellate Tribunal allowing the appeal of the respondent are three-fold, *namely*, ***(i)*** that the information regarding the termination of the two shareholders agreements, was not actually a price sensitive information, since the investment of GIPL in Simplex Project, to the tune of Rs. 4.9 crores constituted only 0.05% of GIPL's order book value at the end of August, 2013 and only 0.7% of its turnover for the financial year; ***(ii)*** that in any case the respondent was in dire need to sell the shares at that time for the purpose of CDR (Corporate Debt Restructuring) package and hence he cannot be said to have indulged in trading on the basis of information within his knowledge; and ***(iii)*** that there was no reason why SEBI did not take into account the last trade price of 03.09.2013, but chose the price as on

04.09.2013.

5. Assailing the order of the Securities Appellate Tribunal, it is argued by Mr. Arvind P. Datar, learned senior counsel for the appellant:-

(a) that proportionality is a dangerous and subjective ground in matters involving insider trading, especially since one-third of the total number of directors of a listed company are independent directors and even transactions involving thousands of crores might be a minor proportion to the turnover, if the company is very large in size;

(b) that Regulations 3 and 4 contain an absolute prohibition against insider trading and such a statutory prohibition cannot be diluted by arguing that the total value of the contracts terminated by the company was just a minor percentage of the order book value and the total turnover of the company;

(c) that in any case the total value of the contracts terminated on both sides was nearly Rs.2600 crores (Rs.1648 crores + 940 crores) and hence the information relating to the termination of the contracts was definitely likely to materially affect the price of the securities of the company under Regulation 2(ha);

(d) That Explanation (vi) under Section 2(ha) which speaks

about *"significant changes in policies, plans or operations of the company"* cannot limit the scope of the main part of the definition and in this case as a matter of fact the price of the share dropped in just one day and the respondent avoided a loss of Rs.85 lakhs;

(e) that the *de minimis* syndicate has no application to insider trading, as it introduces an element of subjectivity;

(f) that *bona fide* intentions or grounds of necessity, such as those pleaded in this case, cannot frustrate the object of strict ban on insider trading, especially when the expression *"lawful excuse"* as used in about 88 Central Statutes to justify non-compliance, is conspicuously absent in the Statute on hand;

(g) that in any case, SEBI took note of the situation in which the respondent was placed, warranting the necessity to sell the shares and hence confined the final order only to disgorgement, which is merely in the nature of restitutionary relief;

(h) that the intimation regarding the termination of the contracts was given to the Bombay Stock Exchange at 1.05 p.m. and to NSE at 2.40 p.m. on 03.09.2013 and the trading concluded at 3:30 p.m. and hence the adoption of the closing price on 03.09.2013 would not

correctly determine either the gains made or the losses averted; and

(i) that therefore, the question of SEBI taking the closing price as on 03.09.2013 did not arise.

6. Responding to the above submissions made on behalf of the appellant, Mr. Somasekhar Sundaresan, learned counsel for the respondent raised the following contentions:-

(a) that the primary object of Insider Trading Regulations anywhere in the world is to prohibit an insider from taking advantage of asymmetrical access to unpublished price sensitive information over others who do not have such access;

(b) that the question whether an information is price sensitive or not, would depend upon its potency to materially impact, upon publication, the price of the securities;

(c) that therefore by its very nature, it is barely a question of fact or at the most, a mixed question of fact and law which will not fall within the scope of Section 15Z of SEBI Act, 1992 warranting interference by this Court;

(d) that one of the key factors which the Courts take into account while interpreting the circumstances revolving

around transactions such as the one in question, is the purpose for which the transaction was effected;

(e) that apart from looking into the purpose of the transaction, Courts have also taken into account other circumstances such as the scale of the transaction, pattern of trading and honesty in responses during the proceedings as is evident from the decisions in ***(i) Chintalapati Raju*** *vs.* ***SEBI;***[1] ***(ii) Rajiv Gandhi*** *vs.* ***SEBI;***[2] ***(iii) Miller*** *vs.* ***Pezzani***[3]**;** and ***(iv) SEBI*** *vs.* ***Kanaiyalal Baldevbhai Patel***[4]**;**

(f) that in the case on hand, the information in question, *namely,* the termination of the Agreements actually resulted in GIPL gaining total control of a larger project worth Rs.1648 crores and that in other words what was lost by the termination was far lesser than what was gained and hence the information relating to the termination of the Agreements was actually a favourable and not adverse information;

(g) that as seen from SEBI's own computation, the value of the contract terminated was just 3.1% to 4.1% and hence it cannot be reasonably expected to have a

1 (2018) 7 SCC 443
2 (Appeal No.50/2007 decided by the Ld. SAT on 09.05.2008) – (Civil Appeal 5302 of 2008 against this order was dismissed)
3 (A decision of the US Court of Appeals)-the US Supreme Court refused to entertain a challenge to it
4 (2017) 15 SCC 1

material impact on the market price of the shares of GIPL;

(h) that GIPL's investments in the project of SIL represented 0.05% of GIPL's order book and 0.7% of its turnover;

(i) that a project with a small percentage of the order book and a miniscule percentage of the turnover cannot *ipso facto* become material for information about it to become UPSI;

(j) that on facts, the shares sold by the respondent on 22.08.2013 constituted 0.99% of the share capital of GIPL;

(k) that what was sold by the respondent was 70% of his total shareholding in GIPL and the sale was not an isolated one but coupled with the sale of multiple other assets to raise money to fund promoters' contribution to the CDR package of Gammon India Limited, the listed parent company of GIPL;

(l) that the failure of the respondent to meet the obligation towards CDR package would have led to GIL filing for bankruptcy;

(m) that every penny of the sale proceeds of the shares, was transferred by the respondent towards the implementation of CDR package and hence it is a

misconception to think that he made unlawful gains that ought to be disgorged;

(n) that SEBI itself has accepted the fact that the sale proceeds were used for funding the CDR package;

(o) that SEBI itself exonerated the co-noticee, *namely,* Consolidated Infrastructure Company Private Limited, on the ground that its sale of shares was on account of a pressing need to meet a margin shortfall to its stock broker;

(p) that SEBI thus applied two different yardsticks, one in respect of the respondent and another in respect of the co-noticee in the very same proceeding, which necessitated interference by the Tribunal; *and*

(q) that therefore the present appeal does not raise a substantial question of law and that in any case the order of the Appellate Tribunal does not call for any interference.

7. From the rival contentions, we think that the questions arising for our determination can be formulated as follows:

(i) whether the information regarding the decision of the Board of Directors of GIPL to terminate the aforesaid two contracts can be characterized as "*price sensitive information*"

within the meaning of Section 2(ha) of the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations 1992, (*hereinafter referred to as the 'Regulations'*);

(ii) whether the sale by the respondent of the equity shares held by him in GIPL, under peculiar and compelling circumstances in which he was placed, would fall within the mischief of '*insider trading*' in terms of Regulation 3(i) read with Regulation 4 of the Regulations;

(iii) whether SEBI should have taken into account the last trade price of the day on which information was disclosed instead of the trade price of the next day;

Question Nos.1 & 2

8. Before we proceed to analyze the points, we must note that this is an appeal under Section 15Z of SEBI Act, 1992 and we are concerned in such appeals with "*any question of law arising out of the order of the Tribunal*". The focus of Section 15Z is on '*any question of law*' and not '*any substantial question of law*'. Keeping this in mind, we shall now proceed further.

9. The SEBI Act, 1992 is intended, as seen from its preamble, "*to provide for the establishment of a Board to protect the interests of*

investors in securities and to promote the development of and to regulate the securities market". As a matter of fact, the Securities and Exchange Board of India was established even before the Act was enacted. Since the Board was already in place, the Parliament enacted the Act with a view among other things, to vest SEBI with statutory powers.

10. In exercise of the powers conferred by Section 30 of the Act, the Board issued a set of Regulations known as "*Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992*", with the previous approval of the Central Government. Regulation 2(ha) of these Regulations defines the expression "*price sensitive information*" as follows:-

> "2(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;

(vii) and significant changes in policies, plans or operations of the company."

11. Regulation 2 (k) defines the expression "unpublished" as follows:

> "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."

12. Regulation 3 imposes a prohibition on dealing, communicating or counseling on matters relating to insider trading. It reads as follows:-

> "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."

13. Regulation 4 declares the circumstances under which a person shall be held guilty of insider trading. It reads as follows:-

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

14. Interestingly, the Regulations do not define the words, "*insider trading*". But Regulation 4 declares a person guilty of insider trading if, ***(i)*** he happens to be an insider; and ***(ii)*** if he deals in securities in contravention of Regulation 3.

15. The word "*insider*" is defined in Regulation 2(e) as follows:-

> "(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.

16. The words "*dealing in securities*" is defined in Regulation 2(d) as follows:-

> "(d) "dealing in securities" means an act of subscribing, buying, selling or agreeing to subscribe, buy, sell or deal in any securities by any person either as principal or agent."

17. We may note at this stage that the Regulations underwent sweeping changes through SEBI (Insider Trading) (Amendment) Regulations 2002, w.e.f. 20.02.2002. Prior to the amendment made in

the year 2002, the words, "*unpublished price sensitive information*" were defined through a single definition clause, namely Regulation 2(k) as follows:-

> "2(k) Unpublished price sensitive information means any information which related to the following matters or is of concern, directly or indirectly, to a company, and is not generally known or published by such company for general information, but which if published or known, is likely to materially affect the price of securities of that company in the market –
>
> (i) financial results (both half-yearly and annual) of the company;
> (ii) intended declaration of dividend (both interim/final);
> (iii) issue of shares by way of public rights, bonus etc.;
> (iv) any major expansion plans or execution of new projects;
> (v) amalgamations, mergers and takeovers;
> (vi) disposal of the whole or substantially the whole of the undertaking;
> (vii) such other information as may affect the earnings of the company."

18. But under the Amendment Regulations, 2002, the word, "*unpublished*" alone is defined in Regulation 2(k) and the rest of the words "*price sensitive information*" is defined in Regulation 2(ha).

19. The important modifications brought forth under the Amendment Regulations of 2002 to the definition of what is unpublished price sensitive information are two-fold namely, ***(i)*** that the definition of words

unpublished is expanded; and ***(ii)*** that even significant changes in policies, plans and operations of the company are brought within the definition of the expression "*price sensitive information*", through a deeming provision in the Explanation under Regulation 2(ha).

20. Therefore in view of the Regulations discussed above, a person can be held guilty of violating Regulation 3, only if the following conditions are satisfied:-

> ***(i)*** He must be an insider within the meaning of the word "*insider*", under Regulation 2(e), by virtue of his past or present connection or deemed connection with the company and he is also reasonably expected either to have had access to UPSI or has received such information;
>
> ***(ii)*** The information that such a person received or has had access or reasonably expected to have had access should be unpublished, in the sense that it was not published by the company or its agent or though published, it was not specific in nature;
>
> ***(iii)*** Such unpublished information should fall within the definition of the expression "*price sensitive information*" within the meaning of Section 2(ha) of the Regulations; and
>
> ***(iv)*** He must have indulged in trading, either by dealing in

securities of the company or in communicating or counseling or procuring directly or indirectly any such information to any person.

21. In other words, to find out if a person is guilty of violation of Regulation 3, the Court should address itself to the following questions namely, ***(i)*** is he an insider?; ***(ii)*** did he possess or have access to any information relating to the company?; ***(iii)*** whether such information was price sensitive?; ***(iv)*** whether the information was unpublished?; and ***(v)*** whether he dealt in securities by subscribing, buying, selling or agreeing to do any of these things in any securities?

22. Before we proceed to find an answer to the above questions in the context of the present appeal we must take note of one important fact namely, that the price sensitivity of an information has a correlation directly to the materiality of the impact that it can have on the price of the securities of the company. An information may materially affect the price of the security of a company either positively or negatively. The impact may be beneficial or adverse. The information should have the potential either to catapult the price of the securities of the company to

a higher level or to make it plunge. The effect can be bullish or bearish. But the effect should be material and not completely insignificant.

23. Keeping the above parameters in mind if we come to the facts of the case on hand, it will be clear, ***(i)*** that the respondent was certainly an insider, as he was a Chairman and Managing Director of GIPL till 20.09.2013 and was a party to the resolution of the Board of Directors passed on 09.08.2013 authorising the termination of the shareholders' Agreements; ***(ii)*** that the information relating to the termination of both the shareholders' Agreements that the respondent had, would certainly fall under the category of "*significant changes in policies, plans or operations of the Company*" under Regulation 2(ha)(vii); ***(iii)*** that the respondent dealt in securities by selling 144 lakhs of shares on 22.08.2013, which was a month before his resignation as Chairman and Managing Director; and ***(iv)*** that the termination of the shareholders' Agreements on 09.08.2013 was disclosed to the NSE and BSE on 30.08.2013, after the sale of the shares, which made the information relating to the termination of the Agreements unpublished as on the

date of the sale.

24. Therefore, it may appear at first blush, that the respondent, who was an insider and who possessed information which was both unpublished and price sensitive, was guilty of the charge of insider trading as he undoubtedly dealt in securities.

25. But the catch lies in understanding the true scope of Explanation (vii) under Regulation 2(ha). As we have seen earlier, the main part of Regulation 2(ha) defines "*price sensitive information*" to mean any information, which relates directly or indirectly to a company and which if published is likely to materially affect the price of securities of a company. The Explanation under Regulation 2(ha) creates a deeming fiction and it makes 7 items of information listed thereunder as price sensitive information.

26. It may be interesting to note that out of the 7 items of information listed under the Explanation, all the others except Item No.(vii) are likely to have an impact directly upon the financial strength of the company. Item No.(vii) stands apart, in that it is very broad and general in nature.

While nothing more is required to show that the information listed in Items (i) to (vi) of the Explanation under Regulation 2(ha) is likely to materially affect the price of securities of a company, the same is not the case insofar as the information in Item No.(vii) is concerned. In other words, the likelihood of the price of the securities getting materially affected, is inherent in Items (i) to (vi) namely,

> "(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;"

But such is not the case with the information in Item No.(vii).

27. Therefore, while dealing with a case falling under Explanation (vii) of Regulation 2(ha), one may have to see whether there was any likelihood of the said information materially affecting the price of the securities of the company. Additionally, the activity in which the insider was involved also determines his culpability for violation of Regulation 3. For instance, the sale by a person in possession of price sensitive information, at a time when the price is likely to take a plunge, will

certainly be an attempt at taking advantage of or encashing the information. Similarly the purchase by a person in possession of UPSI at a time when the price of the security is about to skyrocket, will certainly be an attempt to take advantage.

28. But the above logic cannot be applied to cases which fall on the opposite side of the spectrum. For instance, the sale by a person at a time when the price of the securities is likely to shoot up on account of price sensitive information coming into the public domain or the purchase by a person at a time when the price of the shares is likely to go downward due to price sensitive information getting published, cannot come under the category of insider trading. While it is true that the actual gaining of profit or sufferance of loss in the transaction, may not provide an escape route for an insider against the charge of violation of Regulation 3, one cannot ignore normal human conduct. If a person enters into a transaction which is surely likely to result in loss, he cannot be accused of insider trading. In other words, the actual gain or loss is immaterial, but the motive for making a gain is essential.

29. The words, "*likely to materially affect the price*" appearing in the main part of Regulation 2(ha) gain significance for the simple reason that profit motive, if not actual profit should be the motivating factor for a person to indulge in insider trading. This is why the information in Item No.(vii) of the Explanation under Regulation 2(ha) may have to be examined with reference to the words "*likely to materially affect the price*". Keeping this in mind let us now come back to the facts of the case.

30. GIPL was awarded a contract for the execution of a project, whose total cost was admittedly Rs. 1648 crores. SIL was awarded a contract for a project whose cost was Rs. 940 crores. Both GIPL and SIL created Special Purpose Vehicles and then they entered into two shareholders Agreements. Under these Agreements, GIPL and SIL will have to make investments in the Special Purpose Vehicles created by each other, in such a manner that each of them will hold 49% equity interest in the other's project.

31. It means that GIPL could have acquired 49% equity interest in the project worth Rs. 940 crores and SIL would have acquired 49% equity interest in a project worth Rs. 1648 crore.

32. In arithmetical terms, the acquisition by GIPL, of an equity interest in SIL's project was worth Rs. 460 crores approximately. Similarly, the acquisition by SIL, of the equity interest in GIPL's project was worth Rs. 807.52 crores. Therefore, the cancellation of the shareholders Agreements resulted in GIPL gaining very hugely in terms of order book value. In such circumstances an ordinary man of prudence would expect an increase in the value of the shares of GIPL and would wait for the market trend to show itself up, if he actually desired to indulge in insider trading. But the respondent did not wait for the information about the market trend, after the information became public. The reason given by him, which is also accepted by the WTM and the Tribunal is that he had to dispose of his shares as well as certain other properties for the purpose of honouring a CDR package. It is on record that if the CDR package had not gone

through successfully, the parent company of GIPL namely, Gammon India Ltd., could have gone for bankruptcy.

33. Therefore, the Tribunal was right in thinking that the respondent had no motive or intention to make undeserved gains by encashing on the unpublished price sensitive information that he possessed.

34. As a matter of fact, the Tribunal found that the closing price of shares rose, after the disclosure of the information. This shows that the unpublished price sensitive information was such that it was likely to be more beneficial to the shareholders, after the disclosure was made. Any person desirous of indulging in insider trading, would have waited till the information went public, to sell his holdings. The respondent did not do this, obviously on account of a pressing necessity.

35. We agree with the contention of Shri Arvind P. Datar, learned senior counsel for the appellant, that the allegation of insider trading cannot be measured in terms of the value of the contracts terminated and the percentage of shares sold and that the theory of

proportionality cannot be applied in such cases. The magnitude of what an insider did, in relation to the size of the company, may not have a bearing upon the question whether someone indulged in insider trading or not. But what is sought to be encashed by the insider should be an information which if published is likely to materially affect the price of the securities of the company.

36. The contention of Shri Arvind P. Datar, learned senior counsel, that the total value of the contracts terminated on both sides was nearly Rs.2600/- crores (Rs.1648 crores + Rs.940 crores) and that therefore the information relating to the termination of the contracts was surely likely to materially affect the price of the securities of the company, is unsustainable for the simple reason that the net effect of the termination of both the contracts, for GIPL was a positive advantage of about Rs.800 crores. We have already provided in paragraph 32 above, the simple arithmetics of the whole transaction, which put GIPL in a more advantageous position after the termination of the contract.

37. It is true that the *de minimis* Rule has no application to insider trading, as it introduces an element of subjectivity. This is why we have not gone on the basis that GIPL's investments in the project of SIL represented 0.05% of GIPL's order book value and 0.7% of its turnover. We have gone on the basis that the termination of both the contracts put GIPL in a more advantageous position, in which one would have expected the price of the securities to soar. The normal human conduct would be to wait for this event to happen. This event could have happened only after the publication of the information in question. The fact that the respondent did not wait to take advantage of the situation, convinces us that his intention was not to indulge in insider trading.

38. Shri Arvind P. Datar, learned senior counsel is right in pointing out that in as many as 88 Central Statutes, the expression "*lawful excuse*" is used as a justification for non-compliance. But the same is not used in SEBI Act, 1992 or the Regulations issued thereunder. Therefore, we have not tested the conduct of the respondent solely on the argument of necessity. But we have taken note of the admitted

position that the respondent had to save the parent company going bankrupt, by selling his stock, at a time when he had every reason to wait for the information regarding the termination of the contracts to go public. This is not a case where the respondent has come up with an excuse to justify his action that was intended to give him a financial advantage. This is a case where a man of ordinary prudence would have expected the price of the shares to go up, after the information became public, due to the impact that the information was likely to have on the turnover/net worth of the company.

39. The contention of the appellant that SEBI took note of the situation in which the respondent was placed and the dire need that he had to sell the shares and that therefore SEBI confined the final order only to disgorgement, is neither here nor there. This argument is actually an argument of convenience. It so happened in this case that according to SEBI the closing price of the stock on 03.09.2013 showed favourable position for the respondent and SEBI was able to calculate as though the respondent made a profit. But if a company is likely to gain strength by making a significant change in its policy, the price of its

securities is likely to shoot up. Despite such a natural phenomena, if a person sells his stocks without waiting for the market trend to show up, it can only be taken as a sale, devoid of any desire to make unlawful gains, even if it cannot be termed as a distress sale.

40. In ***SEBI*** vs. ***Kishore R. Ajmera***[5], this Court was concerned with the question as to what is the degree of proof required to hold a broker liable for fraudulent/manipulative practices under SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 as well as the Conduct Regulations of 1992. After taking note of the fact that SEBI Act and the Regulations framed thereunder are intended to protect the interest of investors and that the provisions of the Act and the Regulations have to be understood and interpreted in that light, this Court held in Para 26 as follows:-

> "It is the judicial duty to take note of the immediate and proximate facts and circumstances surrounding the events on which the charges/allegations are founded and to reach what would appear to the Court to be a reasonable conclusion therefrom. The test would always be that what inferential process that a reasonable/prudent man would adopt to arrive at a conclusion."

5 (2016) 6 SCC 368

41. While dealing with yet another case arising out of allegations of violation of SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003, this Court held in ***Kanaiyalal Baldevbhai Patel*** (Supra) (para-58) that the volume, the nature of the trading and the timing of the transactions may have to be taken into account to find out whether there was an attempt at encashing the benefit of the information that the insider was in possession. It is no doubt true that the Court clarified in paragraph 62 of its decision in ***Kanaiyalal Baldevbhai Patel*** (supra) that *mens rea* is not an indispensable requirement to attract the rigor of FUTP Regulations, 2003. This Court held that the correct test is one of preponderance of probabilities.

42. But an attempt by the insider to encash the benefit of the information is not exactly the same as *mens rea*. Therefore, the Court can always test whether the act of the insider in dealing with the securities, was an attempt to take advantage of or encash the benefit of the information in his possession. This is the test we have applied to the case on hand.

43. In ***Chintalapati Srinivasa Raju*** (supra), this Court approved the minority judgment of the Securities Appellate Tribunal (in para 20), which took note of the compelling circumstances under which the individual was selling shares. The fact that this has been taken note of by WTM as a mitigating factor, while passing a mere restitutionary order, does not take away the validity of the defence taken by the respondent.

44. Therefore, we are of the view on Question No.1 that the information regarding the termination of the two contracts can be characterised as price sensitive information, in that it was likely to place the existing shareholders in an advantageous position, once the information came into the public domain. In such circumstances, our answer to Question No.2 would be that the sale by the respondent, of the shares held by him in GIPL would not fall within the mischief of insider trading, as it was somewhat similar to a distress sale, made before the information could have a positive impact on the price of the shares.

45. In view of our answers to Question Nos. 1 and 2, we are of the view that there is no necessity to go into Question No.3. Our answers to Question Nos. 1 and 2 are sufficient to hold that the impugned order of the Tribunal does not call for any interference. Therefore, the appeal is dismissed. There will be no order as to costs.

.....J.
(Indira Banerjee)

.....J
(V. Ramasubramanian)

NEW DELHI
SEPTEMBER 19, 2022