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Insider Trading: A Comparative Appraisal of Regulatory Norms and Legal Mechanisms in India vis-à-vis the United Kingdom under the Realm of Securities Legislation

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ABSTRACT

The trading of securities stands as one of the most prominent global investment activities, where the public engages with shares of companies listed on stock exchanges, contributing investment funds to facilitate operational endeavors. However, certain company officers, such as Key Managerial Personnel (KMPs) and Directors, engage in the illicit practice of insider trading by utilizing confidential non-public information to trade securities, potentially impacting share prices. To address such occurrences, robust securities legislations have been implemented. This research paper delves into the jurisdictions of India and the United Kingdom to assess the efficacy of existing laws in mitigating insider trading offenses. Specifically, the paper focuses on recent landmark judgments, such as SEBI v. Abhijit Rajan in India and FCA v. Martyn Dodgson in the UK. It critically examines the nature of criminal and civil sanctions applicable to insider trading offenses, questioning the presence of corporate criminal liability for corporations in both jurisdictions, as punitive measures predominantly target individuals. Furthermore, the paper analyzes the regulatory capabilities of SEBI and FCA as overseers of the securities market in resolving associated issues. Extensive deliberations concerning essential amendments required in the securities legislation regime are also presented. Moreover, the discussion extends to corporate governance practices within companies in both jurisdictions to combat insider trading effectively.

Keywords: *Insider, Securities, Companies, Intention, Investigation.*

I. INTRODUCTION

As companies grow globally, global markets have seen increase in number of investment and trading activities. General public/Investors make investments into companies that they trust and companies thrive on such investments. Stock Exchange is where actual trading of securities happen and where brokers and middlemen play a role in facilitating transfer of securities in an

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 [ISSN 2581-5369]

easier manner. The most common kind of securities is 'Shares'. The buying and selling of shares have a significant impact on the stock market as it impacts the prices of the shares of a company. Stock prices of a company in the market is reflective of the company's financial capability and worth.

Insider Trading is financial corporate fraud that creates a huge impact on stock market. Insider Trading refers to the practice where a person who is in possession of a secret material data which is not known to the rest of the public and by using that information, the person tries to trade in the securities market and thereby gaining profit or avoiding any loss for himself before the secret information is made public causing a change in the stock price of the shares.

If a listed company PQR Ltd. is about to publish their financial statements in the next month, and directors and key managers of the company have the price sensitive information that their company has suffered huge losses in this financial year and have increased debts. These directors and key managers divulge this information to their families and close relatives and friends who have invested in the company to sell their shares as it is more probable that the shares prices of the company will fall drastically. These top managers and directors and their families and close relatives will be fraudulently gaining by avoiding the risk of share prices falling. This kind of trading of securities is deemed to be 'Insider Trading'. Here, both officers of the company and their relatives will be liable for the corporate fraud or offence of insider trading.

Engaging in such insider trading practices places other shareholders and the general public at an unjust disadvantage, eroding their confidence in the integrity of the stock market system. It creates a perception that only a select few individuals can trade shares with minimal risk, while the remaining investors are left to face the inherent risks associated with investing in shares.

The author has conducted a comprehensive examination of the implications stemming from insider trading offenses, along with an analysis of how the legal frameworks within the jurisdictions of India and England have addressed said offenses. The paper elucidates the primary areas of concern surrounding the norms governing insider trading in both legal systems.

The paper endeavours to determine the jurisdiction that exhibits a more advantageous stance concerning the legal mechanisms pertaining to insider trading and identifies critical issues that necessitate resolution to effectively mitigate such offences.

The author has undertaken a comprehensive literature review concerning the existing insider trading mechanisms within both countries.:

1. Rachana Panguluru. Vamsi Krishna Bodapati. Insider Trading-Comparative Study with

 [ISSN 2581-5369]

UK and India[2]- In this research, the author scrutinizes the impetus driving insider trading while conducting a comparative analysis of the laws between the United Kingdom and India. The examination of this offense is primarily achieved through an exploration of relevant case laws. Additionally, the author provides insightful recommendations aimed at enhancing SEBI's efficacy in handling such cases.

2. Ipsita Das, Pradip Kumar Sarkar. Investor Protection in India and UK- Comparative Study[3]- In this research paper, the author delves into a comprehensive analysis of the investor protection landscape in the United Kingdom and India. The investigation encompasses an exploration of the historical development of regulatory measures in both jurisdictions, assessing the effectiveness of the present regulatory authorities in safeguarding investors against financial offenses, notably insider trading. Furthermore, the paper outlines strategies to enhance investor awareness and education in this domain.

3. Sakshi Rewaria. An Analysis of Insider Trading in India[4]- In this research paper, the author thoroughly examines the merits and demerits associated with insider trading. The investigation encompasses an in-depth exploration of the evolutionary trajectory of this concept, the legal framework governing insider trading in India, and the measures implemented to effectively curb such practices.

4. Bornali Roy. Insider Trading Laws in India Vis-à-vis the US and UK[5]- In this article, the author presents an exhaustive compendium of laws enacted by the Securities and Exchange Commission (SEC) in the USA, the Securities and Exchange Board of India (SEBI) in India, and the Financial Conduct Authority (FCA) in the UK, all aimed at combatting insider trading offenses. The author also meticulously identifies shortcomings within the provisions of each country's legal framework and proposes potential enhancements to strengthen these laws.

5. Abhirami B, Arya Kuttan. Insider Trading Laws in India- Pertinence and Problems[6]- Through this research, the author scrutinizes the role of SEBI in mitigating illicit insider trading activities in India and identifies existing deficiencies within the legal framework. By drawing parallels with other jurisdictions, the study seeks solutions to address these

[2] Rachana Panguluru. Vamsi Krishna Bodapati. Insider Trading-Comparative Study with UK and India MANUPATRA (JUNE 25th, 2020)
[3] Ipsita Das, Pradip Kumar Sarkar. Investor Protection in India and UK- Comparative Study. JPPW 6(6) 4220-4231 (2022)
[4] Sakshi Rewaria. An Analysis of Insider Trading in India. IJRPR 2(7) 815-821 (2021)
[5] Bornali Roy. Insider Trading Laws in India Vis-à-vis the US and UK. Mondaq. (APR 12th, 2018)
[6] Abhirami B, Arya Kuttan. Insider Trading Laws in India- Pertinence and Problems. IJLDAI 4(5) 443-463 (2018)

 [ISSN 2581-5369]

shortcomings effectively. Additionally, the author offers pertinent recommendations for the further development and enhancement of the insider trading laws in India.

II. INDIA'S INSIDER TRADING REGULATIONS: A LEGAL ASSESSMENT OF STATUTORY PROVISIONS

In India, the Securities and Exchange Board of India (SEBI) assumes the responsibility of regulating securities transactions. The word 'insider' is defined under the SEBI's 2015 Regulation[7] as a connected person or an individual who have the possession or access to the UPSI[8]. This rule's explanation states that the onus of proving an individual/connected person having access to UPSI is on the authority that is charging for insider trading.

Connected person involves any individual who has been connected with the company indirectly or directly in a fiduciary, contractual or employee relationship or connected with the company as director, officer, employee, any holder of professional relationship with the company for a short term or long term[9].

UPSI is defined as any information about the company or company's securities which are invited for subscription to the public which is not normally available to the investors or general public and if such information comes to the knowledge of the public, it can affect the securities' prices in the stock market.[10].

Insider is not allowed to communicate, provide or allow access to any UPSI in relation to anything about the listed securities of the company or anything which is proposed to be listed, to any person including other insiders except where such information has to communicated for legitimate reasons, for performing their duties or for fulfilment of legal obligations[11].

SEBI Act lists out the penalty for committing insider trading which is a penalty not less than 10 lakhs but extending till 25 crores or three times the amount of profits made by insider trading whichever is higher[12]. Also, in case any award passed by the Board or any provisions are contravened, liability shall be imposed which will be 10 years imprisonment or fine upto 25 crores or both[13]. The Act also provides for powers of investigation of insider trading cases[14].

[7] SEBI (Prohibition of Insider Trading) Regulations, 2015 (India)
[8] UPSI stands for Unpublished Price Sensitive Information
[9] SEBI (Prohibition of Insider Trading) Regulations, 2015. Rule 2(d) (India)
[10] SEBI (Prohibition of Insider Trading) Regulations, 2015. Rule 2(n) (India)
[11] SEBI (Prohibition of Insider Trading) Regulations, 2015. Rule 3 (India)
[12] SEBI ACT, 1992, §.15G, No. 15, Acts of Parliament, 1992 (India).
[13] SEBI ACT, 1992, §.24, No. 15, Acts of Parliament, 1992 (India).
[14] SEBI ACT, 1992, §.11, No. 15, Acts of Parliament, 1992 (India).

 [ISSN 2581-5369]

Case of SEBI v. Abhijit Rajan[15]*:*

Facts: In 2013, Abhijit Rajan was previously Chairman and MD of GIPL[16], had sold the shares of GIPL of Rs. 10 crores. He had sold the shares during when GIPL had terminated SHAs with SIL and GIPL had disclosed this information to the public. After SEBI had made inquiries, it was held that he had been engaging in insider trading and was asked to discharge the profits he had made. The order of SEBI was dismissed by SAT[17] on the fact that the information regarding termination of SHAs is not a UPSI as GIPL's investment in SIL was only 0.05% and on the fact that GIPL had the urgency to sell the shares to ensure parent company of GIPL was not bankrupted. SEBI had challenged the order of SAT to the Supreme Court.

Issues: The first issue was whether SHAs which was terminated comes under UPSI. The second issue was whether selling of GIPL shares by Abhijit Rajan does constitute insider trading.

Judgement: The Supreme Court even though GIPL investment constituted 0.05%, termination of SHAs proved to be an advantage for GIPL and GIPL could expected the increase of the share prices in the market. Thereby, SC held that termination of SHAs is a UPSI. With respect to whether Abhijit Rajan had committed insider trading or not, SC had used the rarely used test with respect to this offence, which is whether the he wanted to take advantage of the UPSI and had a profit motive for selling the shares. SC held that even though the company was in advantage due to termination of the contracts, Rajan had sold the shares instead for buying more shares of GIPL and such selling of shares was to prevent bankruptcy of GIPL. Thereby, SC ruled that it will not be included under the ambit of insider trading.

This judgement by the Supreme Court has brought into limelight the requirement of the test of intention of the insider which is used to find out whether a person is guilty or not. But in the previous judgements of the Supreme Court[18], the Court ruled that insider trading is a civil wrong and does not involve mens rea for imposing penalty and has held that it is not a necessary ingredient of the offence. This shows that SC and SAT both have been contradictory with their previous judgements.

III. INSIDER TRADING REGULATIONS IN THE UK: EXPLORING THE LEGAL LANDSCAPE

Financial Services and Markets Act 2000 Market Abuse Regulation 2016 (FSMA 2000 MAR

[15] SEBI v. Abhijit Rajan CA No. 563 of 2020
[16] GIPL refers to Gammond Infrastructure Project Limited
[17] SAT refers to Securities Appellate Tribunal
[18] Hindustan Lever Ltd. v. SEBI 1 (1998) 18 SCL 311 MOF; DSQ Holdings Ltd v. SEBI 2005 60 SCL 156 SAT

 [ISSN 2581-5369]

2016) which was adopted in 2016. FCA is an authority governed under MAR which ensures regulation of financial markets and tries to safeguard investor's interest in UK.

Inside Information according to MAR, refers to any precise information which is not disclosed to the public, about any financial instrument and if it is disclosed to the public, it could create a significant impact on the price of such financial instruments[19]. MAR defines insider dealing as when a person is in possession of any inside information and make use of it from himself or any other third person in direct or indirect manner in relation to financial instruments that information pertains to[20].

MAR stops individuals from getting involved or try to involve in the offence of insider trading, or recommend anyone to commit offence of insider trading or making any disclosure of inside information in unlawful manner[21]. In case, this provision is breached, then FCA has the authority to impose a penalty on such offender as much it is appropriate and also can instead of penalty, publish a statement to the public censuring the person[22]. FCA has also been given further freedom to issue temporary or permanent prohibition to the person from holding any office or capacity that includes taking responsibility managerial decisions; or a temporary prohibition from acquiring or selling off any financial instruments.

CJA 1993 deals with the criminal aspect of Insider Trading. CJA states a person can be made liable for insider trading if such person uses any information that can affect the price of the securities or has made any person indulge in insider trading with inside information or makes any disclosure of insider information in an unlawful manner[23]. CJA lays down defences for the party who has been accused of insider trading. First defence is the person did not expect that trading the securities would have resulted in a profit from sensitive information. Second defence is that the person had believed in a reasonable manner that the information is already disclosed to the public. Third defence is the person would dealt with the securities even if he did not have the inside information. The same three defences are used for encouraging another person to commit insider trading. Defences to show that a person has not made a wrongful disclosure is that no knowledge that the person who received the information was about to trade the securities or did not expect to get a profit from such information[24]. Penalties under CJA is summary

[19] Market Abuse Regulation EU No. 596/2014. Article 7
[20] Market Abuse Regulation EU No. 596/2014. Article 8
[21] Market Abuse Regulation EU No. 596/2014. Article 14
[22] Criminal Justice Act, 1993. C. 36 of 1993. Section 123(2) (Eng.)
[23] Criminal Justice Act, 1993. C. 36 of 1993 Section 52 (Eng.)
[24] Criminal Justice Act, 1993. C. 36 of 1993 Section 53 (Eng.)

 [ISSN 2581-5369]

conviction for upto 6 months or fine or both; or fine or imprisonment for 10 years or both[25].

Case of FCA v. Dodgson, Hind:

Martyn Dodgson who was the MD of Deutsche Bank and Andrew Hind often made agreements to deal with securities on the basis of inside information. Dodgson used all the information from the investment banks that he was a part of and gave out those information to Hind who posed as a middle man and Hind used these inside information for dealing with securities with gaining a profit for him and Dodgson. These events happened over for a period of 4 years from 2006-2010. Both these persons set up different mechanisms to prevent any kind of detection. They used unregistered phones, cash transactions, encoded ways of recording etc. They had gained about 7.4 million pounds of profits over this many years of insider trading.

The FCA initiated Operation Tabernula to investigate and uncover the specifics of insider trading. The FCA employed trading analysis, financial data, communication information, forensic data, and documentary evidence, while also utilizing surveillance techniques and materials obtained through search warrants.

FCA found that Dodgson and Hind committed insider trading and they were sentenced to 4.5 years and 3.5 years of imprisonment respectively under Section 52(1) of CJA 1993 by the Southwark Crown Court[26].

IV. INDIA AND THE UK: A COMPARATIVE ANALYSIS OF INSIDER TRADING POLICIES

Both the UK and India have criminal and civil sanctions in place for insider trading, but the UK treats them as separate categories, while India does not make such a distinction. As seen in *Abhijit Rajan* and other supreme court judgements, there is no clarity whether SEBI deals insider trading as a civil wrong or criminal activity. It becomes important so as to ascertain the criteria of *mens rea*. UK lists down defences for the accused to prove that the person did not have any intention to do so. Whereas India neglects the aspect of intention in its legal regime for insider trading.

In UK, it is observed that for majority of the cases, imprisonment does not exceed more than 5 years as opposed to the statutory prescription of 10 years. In *Dodgson* case, even though about 7.5 million pounds of profit were gained by the insiders, they were only imposed upto 4.5 and 3.5 years of imprisonment. UK mentions the element of 'gain' for prosecution under insider

[25] Criminal Justice Act, 1993. C. 36 of 1993 Section 61 (Eng.)

[26] FCA. Insider dealers sentenced in Operation Tabernula trial (2021). Available at: https://www.fca.org.uk/news/press-releases/insider-dealers-sentenced-operation-tabernula-trial (Accessed: February 18, 2023).

trading but Indian jurisdiction does not explicitly mention the same. UK has a wide range of penalties with regard to inside trading and it depends upon the severity of the case in hand. In India, only basic sanctions like fines are laid out irrespective of the severity of the case.

In *Martyn Dodgson* case, FCA had scope for conducting extensive investigation, surveillance methods. FCA is authorized to acquire communications, record covert actions, get encryption details, usage of informants, access to intercept communications[27]. SEBI lacks these investigation methods and permissions to find out guilty persons. The high level of burden of proof is upon the SEBI to prove the offence which cannot be done until and unless better surveillance and investigation powers are given. It can be seen that SEBI has failed to prove cases due to circumstantial evidences. It is to be noted that both UK and Indian law do not have phone tapping powers.

One crucial concern revolves around Corporate Criminal Liability, where both India and the UK lack provisions for imposing civil sanctions on corporations. In the aforementioned cases, we observed that managers and directors of the company possessed privileged access to highly confidential information, which they exploited for securities trading purposes. This highlights the absence of robust mechanisms within the corporate environment to control the unauthorized disclosure of such privileged information to select individuals. It is imperative to hold corporations accountable for fostering an environment where directors and key personnel can evade legal consequences for unlawful disclosures. By doing so, it will act as a deterrent against insider trading offenses, compelling corporations to implement stringent measures to prevent such illicit disclosures.

In 2020, India introduced a uniform database system mandating the inclusion of PAN (Permanent Account Number) of board of directors of listed companies who have access to privileged information. To safeguard the sensitivity of this matter, SEBI (Securities and Exchange Board of India) has prohibited the outsourcing of database maintenance. Additionally, SEBI has implemented various restrictions on the trading window[28]. These recent amendments hold great potential in curbing insider trading. However, their effectiveness hinges on how companies manage and maintain these databases, as well as SEBI's ability to investigate and substantiate insider trading cases against company officers.

In contrast to India, the United Kingdom implements a financial services compensation scheme that safeguards investors and customers, ensuring their protection and providing compensation

[27] Lexis Nexis. FCA Investigations and Enforcement Overview. (Accessed: February 18, 2023).
[28] Tanya Nayyar, Anushka Shah. Recent Amendments to the Insider Trading Regime. Cyril Amarchand Blogs (AUG 3rd, 2020)

 [ISSN 2581-5369]

in cases of financial fraud committed by companies.

Both jurisdictions encounter the challenge of protracted investigation and prosecution proceedings concerning insider trading, wherein directors and officers of a company evade or elude punishment, leaving investors to endure financial losses and a decline in market confidence. The *Martyn Dodgson* case investigation spanned approximately five years, demonstrating the extensive duration required for the detection of insider trading cases, despite employing enhanced surveillance and investigation mechanisms, which surpass those employed in India.

Corporate governance encompasses a set of regulations, protocols, and methodologies that a company employs to ensure transparency, disclosure, accountability, and safeguarding of the interests of its stakeholders. In 2018, T.K. Vishwanathan Committee recommended every listed company to list out code of conduct for dealing with insider trading. The committee gave out a model code of conduct for every company to reference and come up with their own code. The committee also recommended stronger and better system of reporting such crimes from within the company by giving immunity to those violators who report the offence to SEBI. The Committee mentioned that the such power to grant immunity has not yet being granted to whistle-blowers[29]. So, SEBI had brought out certain whistleblowing mechanisms that give rewards to the whistle-blowers, regarding confidentiality and safeguards etc[30].

Corporate Governance in UK also prescribes for all individuals of a listed company who have managerial positions to adhere to the Code before trading in securities of the company. UK code gives out ways to interpret whether an information is an insider information or not; directors to keep up with many requirements for trading in securities[31]; recommends keeping record of disclosures made to the public[32]. In *Abhijit Rajan* Case, it can be observed that courts had different interpretations whether termination of SHA is a UPSI or not. Indian Corporate Governance can also offer diverse methodologies for interpreting the classification of information as insider information, thereby facilitating more efficient investigation and prosecution processes.

While both jurisdictions have made commendable and substantial efforts in the development of

[29] SEBI. Report of Committee on Fair Market Conduct. (AUG 3rd, 2018) (Accessed: February 18, 2023).
[30] Radhika Iyer, Meher Mehta. Analyzing SEBI's Paper on Rewarding Whistleblowers. Mondaq. (SEPT 20th, 2019)
[31] Nick Gibbon, Clive Garston, Bridget Salaman. Corporate Governance and director's duties in UK: Overview. Thomson Reuters Practical Law (DEC 1st, 2019)
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 [ISSN 2581-5369]

insider trading laws, it is imperative to address certain deficiencies in order to enhance the efficacy of the legal system.

V. CONCLUSION

FINDINGS: Through this research, it becomes evident that both the Indian and UK jurisdictions face certain challenges that necessitate resolution in order to effectively combat insider trading offenses committed by company officers and affiliated individuals. In this regard, the UK exhibits a superior position compared to India.

CONCLUSION: SEBI Regulations of 2015 governs insider trading in India. Financial Services and Market Act and Market Abuse Regulation and Criminal Justice Act deals with insider trading in UK. In *Abhijit Rajan* and *Martyn Dodgson*, it is evident of certain deficiency in legal mechanisms of both countries which has to be addressed as there is increase in stock market transactions. UK deals criminal and civil aspect of the offence separately but India does not have a clear stance. This initiates problem that whether the intention of the accused has to be taken into consideration or not. The requirement of better investigation and surveillance mechanisms have posed a problem as it is needed for faster solving of insider trading cases. Both the countries do not have any provision that imposes civil penalty for corporations for insider trading offences. Corporate Governance Committees in India and UK have recommended for phone tapping mechanisms to detect the offence, ways to interpret what information can be considered as an inside information, improving the whistleblowing system. It cannot be denied that both India and UK have brought many important changes to improve the legal mechanisms of insider trading.

SUGGESTIONS: India should strive to incorporate provisions that offer adequate defences for accused individuals within its securities legislation to ensure the dismissal of frivolous cases, akin to the approach adopted in UK law. SEBI should adopt a comprehensive approach in classifying insider trading offenses as both criminal and civil in nature. Diverging from the FCA's approach, SEBI lacks extensive investigative and surveillance powers, and the burden of proving beyond reasonable doubt falls on SEBI, necessitating improvement and augmentation. In both jurisdictions, the introduction of phone tapping capabilities, subject to adherence to privacy norms, would serve as a valuable tool in gathering additional evidence when required. Furthermore, SEBI should devise measures, such as a financial compensation scheme akin to that of the UK, to provide redress to private individuals adversely affected by insider trading incidents.

Both the United Kingdom and India should implement corporate criminal liability provisions

 [ISSN 2581-5369]

targeting the misuse of inside information by directors, key managers, and officers of the company to serve as a powerful deterrent. Elevating awareness among investors and companies concerning this offense and strategies to mitigate its occurrence in the future is imperative. SEBI must clearly outline provisions for reducing penalties applicable to violators who act as whistleblowers to incentivize reporting of insider trading incidents. In contrast, the UK should impose more stringent punishments, as stated in the statute, for significant and huge insider trading cases like the *Dodgson case*, in order to effectively suppress the offense. FCA's authority to publicly disclose insider trading occurrences serves as a commendable approach to inform investors of their rights and impede unlawful gains by company officers. India can consider adopting a similar mechanism to enhance transparency and investor awareness.

India has huge number of companies and it becomes difficult for SEBI to track down each and every company and their securities to check for insider trading, SEBI must be granted further resources for effective functioning. Both India and UK must bring out a system where the cases are investigated and prosecuted in a time-bound manner to maximise investor protection.

Such changes can help India and UK to become very proficient in tracking down insider trading that puts other investors and shareholders at a vulnerable position.

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 [ISSN 2581-5369]

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