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Shruti Vohra Vs. Securities and Exchange Board of India Prohibition or Promotion of Insider Trading

ANMOL KAUR NAYAR[1]

ABSTRACT

Insider trading is a practice which involves trading in securities of a company by any person who is or can be reasonably be believed to have unpublished price sensitive information (hereinafter referred to as "UPSI"). UPSI is unpublished information related to a company which, if it were to become public, would have the likelihood of affecting the price of securities of that company. This practice if illegal under Securities and Exchange Board of India Act, 1992[2] (hereinafter referred to as the SEBI Act). The SEBI Act along with the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015 (hereinafter referred to as "PIT regulations") regulate the various aspects of this practice.

The objective of PIT regulations is to protect the innocent investors who maybe at a less advantageous position compared to those persons who have access to information which, if known to the public, would affect the prices of securities. In order to determine the liability of a person under this practice, many questions need to be answered such as, whether he or she is an insider? whether the information in question is UPSI? And so on. The regulations have been drafted with explanatory notes at every stage in order to make the interpretation of each of these terms clear. However, in the case of Shruti Vohra Vs. SEBI[3], a crucial question arose before the Securities Appellate Tribunal viz Whether forwarding of financial results of a company immediately after they have been prepared and before they have been formally released by the company, amounts to sharing UPSI? While the tribunal answered this question in negative, this case comment is an attempt to highlight a few aspects that it had failed to appreciate.

I. BRIEF FACTS

The series of events which led to the present appeal started in November 2017. A catena of newspaper articles indicated that the quarterly financial results of around twelve companies

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[2] Securities and Exchange Board of India, 1992, S.12A.
[3] Shruti Vohra Vs. SEBI Appeal No. 308 of 2020.

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were circulated in some WhatsApp groups before its results were released to the public by official channel of the companies. As a result of this, the Securities and Exchange Board of India (hereinafter referred to "SEBI") started an investigation of these WhatsApp groups. The order in this case was related to appeals filed in respect of cases involving six companies out of the twelve. These companies were Bajaj Auto Ltd., Bata India Ltd., Ambuja Cements Ltd., Asian Paints Ltd., Wipro Ltd. and Mindtree Ltd. During the investigation, it was discovered that the financial results of these companies were finalized around 15 days prior to respective disclosure of the same on the platform of the stock exchange. However, within one or two days after the final results were prepared, messages reflecting the results were circulating in the WhatsApp groups of appellants. It is interesting to note that the information which was being circulated in the groups was very close in facts to the information which was released later on. During the investigation, SEBI could not find the relationship between the appellants and the companies the information of which was released in the WhatsApp groups of the appellants. The Adjudicating Officer (hereinafter referred to as "AO") hence concluded that the Appellants were guilty of insider trading since the messages were nothing but circulation of UPSI in violation of SEBI Act and the PIT regulations.

The Appellants filed an appeal against the order of SEBI before the Securities Appellate Tribunal (hereinafter referred to as the tribunal). The main issue raised in the appeal was "whether a 'forwarded as received' WhatsApp message regarding the financial information of a company, shortly after the in-house finalization of the financial results, and shortly before the release of official results by the company could be considered as release of UPSI?

II. ARGUMENTS IN FAVOUR OF SEBI

1. Chronological proximity between circulation of WhatsApp messages containing financial results and the release of financial results.
2. Close resemblance between the figures contained in WhatsApp messages and actual financial results officially declared.
3. Appellants acting as employees in the securities market were under no legal obligation to send any such messages to any of the clients.
4. Some of the entities to whom the massages were forwarded were not even clients.

III. GROUNDS OF DEFENCE RAISED BY APPELLANTS

1. The messages did not originate from appellants and they had forwarded the messages received from some other sources which were untraceable at the time of investigation

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partially due to lapse of time and partially due to end-to-end encryption policy of WhatsApp.

2. The practice of sharing unsubstantiated market related information, commonly known as "Heard on Street (hereinafter referred to as HOS)" is usual amongst traders, market analyst, institutional investors etc.
3. There were many other companies, regarding which similar information was shared by the appellants on the WhatsApp group but the information circulated on the group was significantly different from the financial results declared by the company subsequently. Many news agencies like CNBC, Reuters share the HOS information through newspaper articles.
4. Even Bloomberg had published an estimate in respect of Wipro and the same estimate turned out to be exactly the same as that declared by the company in official results.

IV. DECISION BY THE TRIBUNAL

After analysing the relevant provisions of PIT Regulations, the tribunal allowed the appeal and reversed the order of SEBI on following grounds:

1. The investigating officer could not identify the source of information. No instance of release of information from financial, legal or the audit team of the respective companies could be proved.
2. Out of hundreds of WhatsApp messages retrieved from the phones of appellants about many companies, only data related to six companies matched with that released by the companies through official channel.
3. The definitions of the "unpublished price sensitive information" and "insider" as given in the PIT regulations shows that a generally available information is not an unpublished price sensitive information.
4. The tribunal relied upon its opinion in the case of Samir Arora Vs. SEBI[4] that establishment of a link between the potential source of the unpublished price sensitive information and the person allegedly in possession of such information is necessary to hold the possessor of such information guilty of Insider Trading.
5. SEBI failed to prove that the impugned messages were unpublished price sensitive information within the knowledge of appellants and they had passed that information to other persons with that knowledge.

[4] Samir Arora Vs. SEBI (2004) SCC Online SAT 90.

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V. ANALYSIS

The analysis of the judgment has been done through following points:

1. **Identifying what is "unpublished price sensitive information (hereinafter referred to as UPSI)**

Regulation 2(n) defines the UPSI as "any information, relating to a company or its securities, directly or indirectly, that is not generally available which upon becoming generally available, is likely to materially affect the price of the securities and shall, ordinarily including but not restricted to, information relating to the following: –

(i) Financial results
(ii) Dividends
(iii) Change in capital structure
(iv) Mergers, de-mergers, acquisitions, delistings, disposals and expansion of business and such other transactions
(v) Changes in key managerial personnel.

A reading of the definition of UPSI highlights following essentials:

1. Any information related directly or indirectly to a company or its securities
2. Such information is not generally available
3. If such information becomes public, it has the likelihood of materially affecting the price of securities of the company

It must be noted that the information circulated by the appellants in their Watsapp groups meets all the essentials laid down in the definition as discussed above. The tribunal has held the information to not be UPSI because of two reasons discussed below:

a. The information could possibly be in the public domain prior to appellants sharing it and therefore it was covered by the definition of "generally available information". The term "generally available information" is defined under Regulation 2(e) as "information that is accessible to the public on a non-discriminatory basis"

Analysis

Here, the definition of "generally available information" lays emphasis on the element of availability of information to the public on a non-discriminatory basis. This means that only such information, which is on a channel accessible by all the members of public equally, falls under this definition. However, in the present case, the appellants could not put on record anything to show that the information forwarded by them was from any source existing already

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in public domain. Their pleading in relation to this issue was simply that the information MIGHT have originated from the brokerage houses, or from the estimates found on the platform of Bloomberg. An aspect of this issue is the element of non-discrimination. In the absence of any substantive evidence about whether the information was published on public platform prior to it being shared by the appellants, the information forwarded by the appellant put the recipient at an advantage over the general public since the access of general public to this information remained an unsettled fact. This fact, in itself, takes the information out of the purview "generally available information" simply because viz-a-viz the appellants, there is no evidence that they received this information from a public platform, and with respect to the recipients, they have an undue advantage by receiving that information.

Another aspect that the tribunal failed to take into consideration is manner in which the information is presented. For instance, in one of the appeals in his matter, the WhatsApp message was "Wipro revenue 13700 PBIT 2323 PBT 2758" where PBIT meant Profit Before Interest and Tax and PBT meant Profit Before Tax. The tribunal did not appreciate that for a person of ordinary prudence, it is easier to simply share the weblink of an information on WhatsApp that actually type the figures and abbreviations. Hence, even on a preponderance of probabilities, it was not prudent for the appellants to share the information in the form in which it was actually shared. Thus, the tribunal proceeded on a mere possibility of existence of information in public domain to label it as generally available information.

b. The appellants did not have the knowledge that the impugned information was UPSI The tribunal states that[5] "the information can be branded as an unpublished price sensitive information only when the person getting the information had a knowledge that it was unpublished price sensitive information."

Analysis:

A reading of the definition of UPSI above shows that "knowledge of the possessor" is not an essential of the UPSI. This is not a mere accident, but a well thought off decision by the drafting authorities. The legislative intent behind not including "knowledge" as an essential in the definition of UPSI is in consonance with the larger objective of investor protection. A UPSI shared by someone irrespective of whether they did it with or without knowledge is going to harm the investors. In the present case, the impugned information was squarely covered by the essentials of definition given in PIT regulations. The tribunal was not authorised to read into the definition an additional essential. By considering "knowledge" as an essential, the tribunal

[5] Para 16, Shruti Vohra Vs. SEBI Appeal No. 308 of 2020.

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has transgressed from its judicial functions into the legislative function.

2. Relevance of the source of UPSI

In the order under consideration, the tribunal has relied heavily on the fact that the source of UPSI could not be identified by the investigating authority. Hence, the appellants could not be held liable for committing insider trading. For the purpose of analysis, relevant provisions are produced below:

"Insider", as defined under regulation 2(g) means any person who is

i) a connected person or

ii) Is in possession of or having access to unpublished price sensitive information;

The Note given in continuation of this definition states that "Since "generally available information" is defined, it is intended that anyone in possession of or having access to unpublished price sensitive information should be considered an "insider" regardless of how one came in possession of or had access to such information. Various circumstances are provided for such a person to demonstrate that he has not indulged in insider trading. Therefore, this definition is intended to bring within its reach any person who is in receipt of or has access to unpublished price sensitive information. The onus of showing that a certain person was in possession of or had access to unpublished price sensitive information at the time of trading would, therefore, be on the person leveling the charge after which the person who has traded when in possession of or having access to unpublished price sensitive information may demonstrate that he was not in such possession or that he has not traded or he could not access or that his trading when in possession of such information was squarely covered by the exonerating circumstances.

A conjoint reading of the two provisions above shows that appellants were very well within the definition of an insider since they were in possession of the UPSI. The note at the end of the definition categorically states that a person in possession of UPSI will be considered to be an insider irrespective of how he or she acquired that information. The note goes further in explained the legislative intent of bringing every person in possession of UPSI within the scope of the term "insider". On the contrary, the tribunal has relied upon its judgment in Samir Arora holding that establishment of a nexus between the source of information and the person possessing UPSI is a sine qua non for fixing the liability of such person under insider trading provisions. The rule laid down by the tribunal is opposite to that laid down in the regulations in clear terms.

Further, Regulation 3 (1) of SEBI (PIT) Regulations, 2015 states that "no insider shall

communicate, provide, or allow access to any unpublished price sensitive information, relating to a company or securities listed or proposed to be listed, to any person including other insiders except where such communication is in furtherance of legitimate purposes, performance of duties or discharge of legal obligations."

Thus, the only exception to insider trading as per regulation 3 is where the UPSI has been shared in performance of duties or discharge of a legal obligation. However, by creating a necessary requirement of establishing the link between the source of information and the possessor thereof, the tribunal has developed a second exception, thereby again assuming legislative function.

VI. CONCLUSION

The interpretation of PIT regulations as given by tribunal is the opposite of that intended by legislature. indicates that it failed to appreciate the purpose of the PIT regulations, which can be inferred from the clearly worded explanatory notes accompanying the provisions throughout the Regulations. In addition, by reading additional conditions for holding appellants liable for committing insider trading, the tribunal ended up assuming law making function. This order of tribunal has opened room for people to get undue advantage over other investors by simply sharing UPSI by erasing the source thereof and thus escape the clutches of law which, as already discussed above, clearly holds that source of information is not crucial to determine whether someone has indulged in insider trading.

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