

SECURITIES AND EXCHANGE BOARD OF INDIA

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v.

UDAYANT MALHOUTRA

(Civil Appeal Nos. 2981-2982 of 2020)

NOVEMBER 18, 2020

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**[DR. DHANANJAYA Y CHANDRACHUD,
INDU MALHOTRA AND INDIRA BANERJEE, JJ.]**

Securities and Exchange Board of India Act 1992 – s.19 r/w. ss.11(1), 11(4)(d), 11(4A), 11(5) and 11B – SEBI (Prohibition of Insider Trading) Regulations 2015 – regn.10 – It was alleged that respondent-CEO and Managing Director of the company had sold 51,000 shares of the company on 24.10.2016 having inside knowledge of price sensitive information, namely, the unaudited financial results of the quarter ending on 30.09.2016 – Later, the price of the scrips of the company sustained a drastic reduction – The allegation against the respondent was that being in possession of price sensitive information, he had sold the shares and had, thus, made a notional gain or averted a notional loss – The matter became subject of investigation in 2017 and the respondent was called for information on 28.11.2019 – The Whole Time Member passed an ex-parte order on 15.06.2020 – However, the Tribunal held that it does not find any case of extreme urgency which warranted to pass an ex-parte interim order only on arriving at the prima-facie case that the respondent was an insider as defined in the Regulations, 2015 without considering the balance of convenience or irreparable injury – Held: On the facts, the Tribunal was correct in coming to the conclusion that since the investigation was pending since 2017 and information had been supplied on 28.11.2019, there was no urgency for passing an ex-parte interim order of the nature that was issued by the Whole Time Member – It was, in this background, that the Tribunal, while affirming the power of SEBI to pass an ex parte interim order in appropriate cases, observed that this should be exercised “only in extreme urgent matters” – Thus, there is no reason to take a view at variance with the conclusion of the Tribunal on the facts of the case – However, the interpretation which has been placed by the Tribunal on the powers of SEBI shall not be

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A *cited as a precedent in any other case – Accordingly, appeals are disposed of.*

North End Foods Marketing Pvt Ltd v Securities and Exchange Board of India (Appeal 80 of 2019 decided on 12.03.2019 by Securities Appellate Tribunal) – referred to.

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CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2981-82 of 2020

From the Judgment and Order dated 27.06.2020 of the Securities Appellate Tribunal, Mumbai in Appeal No. 145 of 2020

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Tushar Mehta, SG, Mahfooz A Nazki, Avinash Tripathi, Advs. for the Appellant.

Amit Sibal, Sr. Adv., Sonal Jain, Ishkaran Singh, Advs. for the Respondent.

The following Judgment of the Court was delivered:

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JUDGMENT

1. These statutory appeals have been instituted by the Securities and Exchange Board of India¹ under Section 15Z of the Securities and Exchange Board of India Act 1992². The appeals arise out of the orders passed by the Securities Appellate Tribunal³ on 27 June 2020 and 23 July 2020. The Tribunal set aside an interim order dated 15 June 2020 passed by the Whole Time Member of SEBI under Section 19 read with Sections 11(1), 11(4)(d), 11(4A), 11(5) and 11B of the SEBI Act read with Regulation 10 of the SEBI (Prohibition of Insider Trading) Regulations 2015.

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2. By the interim order, the Whole Time Member quantified an amount of Rs 3,83,16,230.73, being the notional loss sought to be avoided on account of trades carried out by the respondent in the scrips of Dynamatic Technologies Ltd over unpublished price sensitive information. The respondent was directed by the Whole Time Member to credit the amount into an Escrow Account.

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3. For the purpose of the present appeals, the facts lie in a narrow compass. The respondent is the Chief Executive Officer and Managing

¹ “SEBI”

² “SEBI Act”

³ “Tribunal”

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Director of the Company in question. It was alleged that he had sold 51,000 shares of the Company on 24 October 2016 having inside knowledge of price sensitive information, namely, the unaudited financial results of the quarter ending on 30 September 2016. It was alleged that the financial results were approved by the Board of Directors on 11 November 2016, upon which the price of the scrips of the Company sustained a drastic reduction. The allegation against the respondent was that being in possession of price sensitive information and being a connected person, he had sold the shares and had, thus, made a notional gain or averted a notional loss. The sales made by the respondent were the subject matter of an investigation in 2017. It appears from the record that the investigating team called for information from the respondent on 28 November 2019. The Whole Time Member passed an ex parte order on 15 June 2020.

4. Before the Tribunal, it was urged by the respondent that there was no urgency in passing an ex-parte order against the respondent, regarding a trade done about three years ago and that the ex-parte action of the appellant in requiring a deposit during the pandemic is arbitrary. Opposing this, the appellant alleged that the reason for passing an ex-parte order was that there was a possibility of a diversion of the notional gain made by the respondent. In arriving at its conclusion in the impugned order, the Tribunal placed reliance on its earlier decision in **North End Foods Marketing Pvt Ltd v Securities and Exchange Board of India**⁴. In paragraph 11 of the decision, the Tribunal held as follows:

“11. As held in North End Foods Marketing Pvt. Ltd. (supra) there is no real urgency in the matter to pass an ex-parte interim order especially during the pandemic period. There is no doubt that SEBI has the power to pass an interim order and that in extreme urgent cases SEBI can pass an ex-parte interim order but such powers can only be exercised sparingly and only in extreme urgent matters. In the instant case, we do not find any case of extreme urgency which warranted the respondent to pass an ex-parte interim order only on arriving at the prima-facie case that the appellant was an insider as defined in the SEBI (Prohibition of Insider Trading) Regulations, 2015 (‘PIT Regulations’ for short) without considering the balance of convenience or irreparable injury.”

⁴ Appeal 80 of 2019 decided on 12 March 2019

A 5. On the facts before it, the Tribunal, in our view, was correct in coming to the conclusion that since the investigation was pending since 2017 and information had been supplied on 28 November 2019, there was no urgency for passing an ex-parte interim order of the nature that was issued by the Whole Time Member. It was, in this background, that the Tribunal, while affirming the power of SEBI to pass an ex parte interim order in appropriate cases, observed that this should be exercised “only in extreme urgent matters”.

B 6. On the facts, as they have emerged before this Court, we do not find any reason to take a view at variance with the conclusion of the Tribunal on the facts of the case. By way of abundant caution, we clarify that we are affirming the view on the facts which have emerged from the record before the Tribunal.

C 7. Mr Tushar Mehta, learned Solicitor General, however, submitted that the reason why SEBI has been constrained to file the appeals is because of certain observations contained in the impugned order, on question of law bearing on the statutory powers of SEBI. In particular, the attention of the Court was drawn to the following paragraph:

D “9. ... We are of the opinion that no amount towards disgorgement can be directed to be deposited in advance unless it is adjudicated and quantified unless there is some evidence to show and justify the action taken. An order of the like nature can only be passed during the pendency of the proceedings and such orders cannot be passed at the time of initiation of the proceedings.”

E 8. Section 11(4) of the SEBI Act confers power on SEBI in the following terms:

F “11. Functions of Board:

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G (4) Without prejudice to the provisions contained in sub-sections (1), (2), (2A) and (3) and section 11B, the Board may, by an order, for reasons to be recorded in writing, in the interests of investors or securities market, take any of the following measures, either pending investigation or inquiry or on completion of such investigation or inquiry, namely:—

H (a) ***

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(b) ***

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(c) ***

(d) impound and retain the proceeds or securities in respect of any transaction which is under investigation;”

9. Since we have come to the conclusion that the Tribunal was on the facts of the case correct in setting aside the ex-parte order of the Whole Time Member on the ground that no urgency has been made out to sustain such an order, it is necessary for this Court to clarify that the interpretation which has been placed by the Tribunal on the powers of SEBI, particularly in paragraph 9 of the impugned order, which has been extracted above, shall not be cited as a precedent in any other case. The order passed by the SEBI must necessarily be in accord with Section 11(4) of the SEBI Act.

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10. With the above clarification, we affirm the view of the Tribunal on the facts as they have emerged. The appeals are accordingly disposed of.

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Ankit Gyan

Appeals disposed of.

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