

SECURITIES AND EXCHANGE BOARD OF INDIA

v.

M/S. OPEE STOCK-LINK LTD. & ANR.

(Civil Appeal No. 2252 of 2010)

JULY 11, 2016

[ANIL R. DAVE AND R. BANUMATHI, JJ.]

Securities Contracts (Regulation) Act, 1956 – ss. 13, 2(i) – Securities and Exchange Board of India Act, 1992 – s. 12A(a), (b), (c) – Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Markets) Regulations, 2003 – Initial public offerings (IPO) – Shares offered to public at large by two companies – Shares over subscribed – Shares meant for Retail Individual Investors cornered through hundreds of benami/fictitious demat account holders through off market transactions – Violation of s. 12A(a), (b), (c) of the SEBI Act and Regs 3 and 4(1) of the 2003 Regulations – On appeal, held: It is clear from the transactions that demat account holders were not genuine, they were benami/fictitious and shares were purchased on behalf of someone, who had financed these demat account holders, at a price less than the market price of the shares – Demat account holders used addresses of others and signed in a fishy manner in their demat accounts – Entire chain of the transactions of shares was against the interest of small investors – Transfer of shares did not comply with the requirements of the provision of either s. 13 or s. 2(i) of SCRA – Thus, Whole Time Member as well as Adjudicating Officer rightly held the off market trading indulged into by respondents to be per se illegal, not fair and in violation of the Act as well as Regulations.

Securities Contracts (Regulation) Act, 1956 – Nature of – Held: Is a special law to regulate the sale and purchase of shares and securities – Thus, prevails over the provisions of the Contract Act, 1872 and Sale of Goods Act, 1930, insofar as the matters specifically dealt with by the 1956 Act.

Allowing the appeals, the Court

HELD: 1.1 From all the transactions, which are in the nature

A of a scam, it is clear that the demat account holders were not
genuine and either they were benami or fictitious and the shares
were purchased on behalf of someone, who had financed these
demat account holders and a show was made as if the shares
were finally sold to the concerned respondents. The entire chain
B of the transactions of shares and doubtful nature of the demat
holders, establishes the fact that all these transactions were
nothing but a scam. If the respondents had acted as brokers,
they ought to have been registered brokers, but they were not.
By having the said device, the respondents had done something
which was against the interest of small investors because from
C their quota the shares were allotted to the demat account holders
who were not genuine. [Para 11] [179-C-E]

1.2 As a result, the respondents got undue benefit. They
got the shares transferred from the so called demat holders at a
price which was less than the market price of the shares. Normally
D such things never happen in a well regulated stock exchange.
The share prices are known to all persons interested in buying
or selling shares and in such circumstances, it cannot be believed
that 553 persons would sell their shares at a time to one particular
person at a price which is much below the prevailing market price
E of the shares. Many of these demat account holders had used
addresses of others and had signed in a fishy manner in their
demat accounts. In fact, the so-called sale of shares was bogus as
there was someone who had financed all the demat holders, who
had given back the shares to the respondents to whom they had
lent their names for getting the shares. The Whole Time Member
F of the SEBI rightly held that the dealings of the respondents were
not fair and were in violation of the Act as well as the Regulations.
[Paras 12, 13] [179-E-H; 180-A]

1.3 Upon perusal of the impugned order passed by the SAT,
it is found that SAT did not arrived at any specific conclusion to
G the effect that the findings recorded by the Whole Time Member
as well as the Adjudicating Officer of the SEBI were incorrect or
perverse. The appeals before the SAT were in nature of First
Appeal and therefore, it was open to the SAT to re-appreciate
the evidence after looking at the facts of the case.[Para 14] [180-
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1.4 If one looks at the purpose with which the Act has been enacted, one can see that its object is to regulate the securities market and check unfair trade practices. Its object is also to promote fairness and efficiency in all dealings relating to the capital market so that confidence of the persons having dealings with shares etc. is enhanced. One of the most important objects is to protect the interest of the investors. The entire case was decided by the Whole Time Member of the SEBI after keeping in mind the said object with which the Act has been enacted. The Whole Time Member as well as the Adjudicating Officer of the SEBI were justified in imposing penalty upon the respondents for the reasons recorded by them. [Paras 15, 16] [180-D-E]

1.5 There is no substance in the submissions made on behalf of the respondents to the effect that the price of the shares of Jet Airways India Ltd. paid by the respondents to the demat account holders was reasonable. Even according to the submission made by the counsel, value of the said shares, during the said period varied from Rs.1172/- to Rs.1339/- and in such circumstances, nobody would believe that all the demat account holders would sell their shares at the same rate, viz. Rs.1170/- per share to the respondents. These transactions are, therefore, definitely of fishy nature. [Para 17] [180-F-G]

1.6 The submission to the effect that no Retail Individual Investor had made any complaint to the SEBI is not at all relevant because the SEBI need not act only on the basis of a complaint received. If from its independent sources, the SEBI, after due enquiry comes to know about some illegality or irregularity, the SEBI has to act in the manner as it acted in the instant case. The fact, however, remains that because of the undue advantage which the respondents got, some small investors or RII must have not got the shares, which they ought to have been allotted. [Para 18] [180-H; 181-A]

1.7 The submission that a common address given by several demat account holders would not show any irregularity, cannot be accepted because normally a person would give his own address when he is opening his demat account. Rarely, a person would give someone else's address if he is not having any permanent address or is likely to shift his residence. In the instant

A case, not one or a few, but several demat holders had given one particular address and it is also pertinent to note that upon initiation of an inquiry at the instance of the SEBI, most of the demat accounts had been closed by the demat account holders. [Para 19] [181-B-C]

B 1.8 Looking at the fact that number of persons, having common address of their demat accounts, selling their shares at the same price to a particular person before listing of shares of a company with a stock exchange is not a normal thing. In the facts and circumstances of the case, the submission that the shares could have been sold before they were listed with a stock exchange and such a sale cannot be illegal, cannot be accepted. [Para 20] [181-D-E]

C 1.9 The Securities Contracts (Regulation) Act, 1956 (SCRA) is a special law to regulate the sale and purchase of shares and securities and hence it prevails over the provisions of the Contract Act, 1872 and Sale of Goods Act, 1930, insofar as the matters which are specifically dealt with by the SCRA. The contracts for sale and purchase of securities, as envisaged under the SCRA, can be entered into only in a prescribed manner in a notified area and that can only be effected through registered members of a recognised stock exchange (i.e. stock brokers) and the only exception to this is a Spot Delivery Contract. It is clear from the definition of 'Spot Delivery Contract' u/s. 2(1) (b) of the SCRA that to enter into such a contract, the seller has to effect actual delivery of securities and the buyer has to pay the price therefor either on the same day or on the next day and further, the said transfer should be coupled with transfer of the Securities from one Beneficial Owner (BO) to another. Considering the facts and circumstances of the instant case, the transfer of shares did not comply with the requirements of the provision of either Section 13 or Section 2(i) of the SCRA. Therefore, the off market trading indulged into by the respondents was rightly held to be per se illegal by the Whole Time Member. [Paras 21, 22] [181-F-H; 182-C-D, F]

E 1.10 The submission made to the effect that the Tribunal is a final fact finding authority cannot be disputed. According to the counsel, the facts found by the SAT should not be disbelieved by H

this Court. However, for coming to a definite conclusion contrary to the findings arrived at by the lower authority, the appellate authority, in the instant case, the SAT, ought to have recorded specific reasons for arriving at a different conclusion, but no sound reason is found for coming to a different conclusion in the impugned order. On the other hand, there is detailed discussion for coming to a particular conclusion in the order, which was passed by the Whole Time Member of the SEBI and therefore, there is no reason for the SAT to disturb the said finding without mentioning any strong and justifiable reason for coming to a different conclusion. [Para 23] [182-G-H; 183-A]

1.11 For the said reasons and in view of the submissions made by the counsel appearing for the appellant for sustaining the orders passed by the Whole Time Member as well as the Adjudicating Officer of the SEBI, the impugned order passed by the SAT are quashed and set aside. [Para 24] [183-B]

Bhagwati Developers Pvt. Ltd. v. Peerless General Finance and Investment Company Ltd. & Anr. 2013 (7) SCR 547 : (2013) 9 SCC 584 – referred to.

Case Law Reference

2013 (7) SCR 547 referred to Para 22

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2252 of 2016.

From the Judgment and Order dated 30.12.2009 of the Securities Appellate Tribunal, Mumbai (“SAT”) in Appeal No. 20 of 2009

WITH

C. A. Nos. 2285, 2286, 2294 and 2303 of 2010.

C. U. Singh, Sr. Adv., Pratap Venugopal, Ms. Supriya Jain, Gaurav Nair, Ms. Niharika (For M/s. K. J. John & Co.), Advs. for the Appellant.

R. P. Bhatt, Sr. Adv., E. C. Agrawala, Mahesh Agarwal, Ankur Saigal, Sanjay Mehta, Jitin Mehra, Vikrant Pachnanda, Neelkanth Rajiv Mehta, Advs. for the Respondents.

The Judgment of the Court was delivered by

ANIL R. DAVE, J. 1. All these appeals have been filed under the provisions of Section 15-Z of the Securities and Exchange Board of

A India Act, 1992 (hereinafter referred to as ‘the Act’) challenging the
impugned order dated 30th December, 2009, passed by The Securities
Appellate Tribunal, Mumbai (hereinafter referred as “SAT”) in Appeal
Nos. 16 to 20 of 2009, whereby the SAT has allowed the appeals filed
by the respondents herein and set aside the orders dated 31st December,
B 2008 passed by the Whole Time Member and the Adjudicating Officer,
SEBI.

2. These are the cases which reflect the manner of getting
excessive number of shares in an irregular manner, which would
adversely affect Retail Individual Investors, who are the persons with
relatively less means and who desire to invest their hard earned money
C into shares of companies, whereby they also make an effort to participate
in the progress of our economy. So as to see that the Stock Exchanges
of the country and the persons connected therewith do not indulge
themselves into illegalities or irregularities, the Act has been enacted
and the functionaries under the Act have to see that no financial scams
D take place in the matters relating to issue or transfer of shares,
management of Stock Exchange etc. One of the important duties of the
functionaries under the Act is to see that when there is an Initial Public
Offerings (IPO), the shares are offered to public at large in a particular
manner so that even small investors {who have been referred to
E hereinafter as ‘Retail Individual Investors’ (RII)}, also get fairly good
chance to purchase shares of newly floated companies or shares of
existing companies, as and when they are offered to the public at large.

3. As we are concerned with issue of shares in the nature of IPO
(there is initial offering made by Jet Airways Limited and Infrastructure
Development Finance Company Limited), without referring to much
F details about the transactions of sale or purchase of each company, we
have referred to the nature of the transactions in general terms. When
shares of the aforesaid companies were offered to the public at large,
the issue of shares in relation to both the companies had been over
subscribed.

G 4. Somehow it was brought to the notice of the Security and
Exchange Board of India (SEBI) that several serious irregularities/
illegalities had been committed by some persons so as to corner shares
of the said companies by adopting certain unscrupulous, immoral and
improper methods not known to the law, which had not only affected the
H RII but had also an effect on the share market because such dealings

by certain greedy persons would adversely affect the faith of a common man in the functioning of the share market. The basic purpose with which the Act was enacted was to see that the share market functions properly and effectively so that ultimately it may not adversely affect the economy of our country. A

5. Investigations was made by the officials of the SEBI and in pursuance of the said investigation it was revealed that in the matter of the IPO of the aforesaid two companies, shares which were meant for RIIs had been cornered through hundreds of benami/fictitious demat account holders, which was in violation of the provisions of Section 12A (a), (b), (c) of the SEBI Act, 1992. Moreover it was also found that the said transactions were in violation of Regulations 3 and 4(1) of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Markets) Regulations, 2003 (hereinafter referred to as 'the Regulations'). B C

6. As modus operandi was quite similar in applications for shares made in respect of both the companies and parties concerned are common, we have referred to the issue of Jet Airways India Limited. It was found by the SEBI that respondent in Appeal No.20 of 2009 before the SAT had received 12,053 shares out of which 3272 shares were transferred before the day of listing of shares of the company with the stock exchange, 3598 shares on the day of listing and 5183 shares after the day of listing. The said shares were purchased through off market transactions from 553 demat account holders, who had been allotted shares of the said company. The shares of the company were listed on 14th March, 2005. D E

7. The said 553 demat account holders sold the shares to the said respondent at the rate of Rs.1170/- per share, though the market value of the said shares was much more than Rs.1170/- per share. The said shares were thereafter sold by the said respondent at a higher price. Upon investigation, it was also found that most of those 553 demat account holders were not genuine persons though there is no specific finding to that effect but there is a specific finding by the Whole Time Member of the SEBI that:- F G

“(e).There is no material on record that the 553 demat account holders were benami or fictitious. Investigation has not been able to substantiate this. There are name lenders, as alleged in the SCN. The conduct of these account holders substantiates this. H

A All the 553 accounts behaved exactly in the same manner in terms of price and timing, that too, in off market, which is not transparent. However, the allegation that these were benami or fictitious does not make any material difference to the main charge that the noticees used 553 demat accounts to corner shares in the retail segment of the Jet IPO.”

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8. The finding by the Whole Time Member of the SEBI is clear to the effect that the said respondent had not acted as a share broker. It is an admitted fact that the said respondent purchased the shares at the rate of Rs.1170/- per share though the market value of the said shares at the time when they were purchased was much more and the shares were sold at an average market value of Rs.1296.12 paise. Had the respondent been a share broker, he would have charged brokerage from the demat account holders but the facts found by the authorities making the investigation are absolutely different. All the demat holders were paid some amount by the concerned respondents and the shares had been sold at a much higher price thereafter. In normal circumstances, no share holder would sell his shares through a broker or otherwise at a price below the market value. In the instant case all the 553 demat account holders have received the same price viz. Rs.1170/- per share and that too some of the demat holders sold the shares either on the date of listing of shares of the company with the BSE and NSE or even prior thereto, when the market price of the shares was also not known or determined. In normal circumstances, no man with normal prudence would ever enter into such type of transaction but in this case all the 553 demat account holders did it !

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9. Upon knowing the nature of the transactions, the Whole Time Member of the SEBI was convinced that all the transactions pertaining to opening of the demat accounts, applications made by the applicants holding the demat accounts, sale by those account holders to the respondents and sale by the respondents to other buyers of the shares were of fishy nature. There is a specific finding by the Whole Time Member of the SEBI, who has thoroughly examined the facts of the case and has come to the conclusion, like a trial court, to the effect that the demat accounts were signed by some persons with different spellings of their names and in different manners. We also agree with the findings that normally a person would have his same signature everywhere and even if at different places he has signed differently, he would never use

different spellings of his name or would sign in a different manner with
a different spelling of his name. A

10. It is also a fact that most of the demat account holders were
not having their trading accounts and many of them were having a
common address. Normally, a demat account holder, if a genuine one,
would use his own correct address while opening and operating his demat
account. Number of demat account were having same address and that
too, care of someone else and this makes genuineness of the account
holders and the transactions doubtful. B

11. From all the transactions, which are in the nature of a scam,
it is clear that the demat account holders were not genuine and either
they were benami or fictitious and the shares were purchased on behalf
of someone, who had financed these demat account holders and a show
was made as if the shares were finally sold to the concerned respondents.
The entire chain of the transactions of shares and doubtful nature of the
demat holders, establishes the fact that all these transactions were nothing
but a scam. If the respondents had acted as brokers, they ought to have
been registered brokers, but they were not. By having the aforesaid
device, the respondents had done something which was against the
interest of small investors because from their quota the shares were
allotted to the demat account holders who were not genuine. C
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12. As a result of the aforesaid transactions, the respondents
got undue benefit. They got the shares transferred from the so called
demat holders at a price which was less than the market price of the
shares. Normally such things never happen in a well regulated stock
exchange. The share prices are known to all persons interested in buying
or selling shares and in such circumstances, it cannot be believed that
553 persons would sell their shares at a time to one particular person at
a price which is much below the prevailing market price of the shares.
We, once again, note the fact that many of these demat account holders
had used addresses of others and had signed in a fishy manner in their
demat accounts. In fact, the so-called sale of shares was bogus as there
was someone who had financed all the demat holders, who had given
back the shares to the respondents to whom they had lent their names
for getting the shares. E
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13. The Whole Time Member of the SEBI has very meticulously
examined the aforesaid facts and in our opinion he has rightly come to
the conclusion that the dealings of the respondents were not fair and
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A were in violation of the Act as well as the Regulations.

B 14. Upon perusal of the impugned order passed by the SAT, we do not find any specific conclusion arrived at by the SAT to the effect that the findings recorded by the Whole Time Member as well as the Adjudicating Officer of the SEBI were incorrect. The appeals before the SAT were in nature of First Appeal and therefore, it was open to the SAT to re-appreciate the evidence after looking at the facts of the case but upon perusal of the impugned order, we do not find any such finding to the effect that the findings arrived at by the Whole Time Member as well as the Adjudicating Officer of the SEBI were incorrect or perverse for a particular reason.

C 15. If one looks at the purpose with which the Act has been enacted, one can see that its object is to regulate the securities market and check unfair trade practices. Its object is also to promote fairness and efficiency in all dealings relating to the capital market so that confidence of the persons having dealings with shares etc. is enhanced. One of the most important objects is to protect the interest of the investors. In our opinion, the entire case was decided by the Whole Time Member of the SEBI after keeping in mind the aforesaid object with which the Act has been enacted.

D 16. Upon hearing the learned counsel appearing for both the sides, we are of the view that the Whole Time Member as well as the Adjudicating Officer of the SEBI were justified in imposing penalty upon the respondents for the reasons recorded by them.

E 17. We do not find any substance in the submissions made on behalf of the respondents to the effect that the price of the shares of Jet Airways India Ltd. paid by the respondents to the demat account holders was reasonable. Even according to the submission made by the learned counsel, value of the said shares, during the said period varied from Rs.1172/- to Rs.1339/- and in such circumstances, nobody would believe that all the demat account holders would sell their shares at the same rate, viz. Rs.1170/- per share to the respondents. These transactions are, therefore, definitely of fishy nature.

F 18. The submission to the effect that no Retail Individual Investor had made any complaint to the SEBI is not at all relevant because the SEBI need not act only on the basis of a complaint received. If from its independent sources, the SEBI, after due enquiry comes to know about
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some illegality or irregularity, the SEBI has to act in the manner as it acted in the instant case. The fact, however, remains that because of the undue advantage which the respondents got, some small investors or RII must have not got the shares, which they ought to have been allotted. A

19. The learned counsel for the respondents also made a submission that a common address given by several demat account holders would not show any irregularity. We do not agree with the said submission, because normally a person would give his own address when he is opening his demat account. Rarely, a person would give someone else's address if he is not having any permanent address or is likely to shift his residence. In the instant case, not one or a few, but several demat holders had given one particular address and it is also pertinent to note that upon initiation of an inquiry at the instance of the SEBI, most of the demat accounts had been closed by the demat account holders. B
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20. The submission was also to the effect that the shares could have been sold before they were listed with a stock exchange and such a sale cannot be said to be an illegality. Looking at the fact that number of persons, having common address of their demat accounts, selling their shares at the same price to a particular person before listing of shares of a company with a stock exchange is not a normal thing. In the facts and circumstances of the case, we do not accept the said submission made by the learned counsel appearing for the respondents. D
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21. We also note that the Securities Contracts (Regulation) Act, 1956 (SCRA) has been enacted to prevent undesirable transactions in securities by regulating the business of dealing therein, by providing for certain other matters connected therewith like regulating functioning of recognised stock exchanges and working of the members of such stock exchanges. The SCRA is a special law to regulate the sale and purchase of shares and securities and hence it prevails over the provisions of the Indian Contract Act, 1872 and Sale of Goods Act, 1930, insofar as the matters which are specifically dealt with by the SCRA. The contracts for sale and purchase of securities, as envisaged under the SCRA, can be entered into only in a prescribed manner in a notified area and that can only be effected through registered members of a recognised stock exchange (i.e. stock brokers) and the only exception to this is a Spot Delivery Contract. F
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22. 'Spot Delivery Contract' is defined in Section 2(i) of the SCRA as a contract, which – H

- A “(a) provides for actual delivery of securities and the payment of a price thereof either on the date of the contract or on the next day, excluding the time involved in dispatch of shares and remittance of money where parties do not reside in the same town/locality;
- B (b) transfer of securities by depository from the account of one beneficial owner (demat account) to the account of other beneficial owner (demat account) were securities involved are in demat form.”

C Section 2(i)(b) of the SCRA was introduced in the statute book with effect from September 20, 1995. It is clear from the aforesaid definition of ‘Spot Delivery Contract’ that to enter into such a contract, the seller has to effect actual delivery of securities and the buyer has to pay the price therefor either on the same day or on the next day and further, the said transfer should be coupled with transfer of the Securities from one Beneficial Owner (BO) to another. Considering the scope of Spot Delivery Contract as defined in Section 2(i) of the SCRA in *Bhagwati Developers Pvt. Ltd. v. Peerless General Finance and Investment Company Ltd. & Anr. (2013) 9 SCC 584*, this Court has held as under:-

D “..... a contract providing for actual delivery of securities and the payment of price thereof either on the same day as the date of contract or on the next day means a spot delivery contract.”

E Considering the facts and circumstances of the present case, the transfer of shares did not comply with the requirements of the provision of either Section 13 or Section 2(i) of the SCRA. Therefore, the off market trading indulged into by the Respondents was rightly held to be

F *per se* illegal by the Whole Time Member.

G 23. The submission made to the effect that the Tribunal is a final fact finding authority cannot be disputed. According to the learned counsel, the facts found by the SAT should not be disbelieved by this Court. However, for coming to a definite conclusion contrary to the findings arrived at by the lower authority, the appellate authority, in the instant case, the SAT, ought to have recorded specific reasons for arriving at a different conclusion, but we do not find any sound reason for coming to a different conclusion in the impugned order. On the other hand, we find detailed discussion for coming to a particular conclusion in the order,

H which was passed by the Whole Time Member of the SEBI and therefore,

we do not see any reason for the SAT to disturb the said finding without A
mentioning any strong and justifiable reason for coming to a different
conclusion.

24. For the aforesaid reasons and in view of the submissions B
made by the learned counsel appearing for the appellant for sustaining
the orders passed by the Whole Time Member as well as the Adjudicating
Officer of the SEBI, we quash and set aside the impugned order passed
by the SAT.

25. The appeals filed by the SEBI are allowed with no order as to C
costs and the orders passed by the SAT are quashed so as to give effect
to the orders passed by the Whole Time Member as well as the
Adjudicating Officer, SEBI. The said orders shall be acted upon within
two months from today.

Nidhi Jain

Appeals allowed.