BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

Appeal No. 207 of 2010

Date of decision : 18.11.2011

Gujarat NRE Mineral Resources Ltd
(on behalf of Marley Foods Pvt. Ltd. since
Merged with our company), a company duly
Incorporated under the provisions of the
Companies Act, 1956 and having its
Registered office at 22, Camac Street,
Block C, 5th floor,
Kolkata – 700 016. …… Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No.C-4A, 'G' Block,
Bandra Kurla Complex, Bandra (East), …… Respondent
Mumbai.

Mr. Janak Dwarkadas, Senior Advocate with Mr. Zal Andhyarujina,
Mr. Kunal Dwarkadas, Advocates for the Appellant.

Mr. D. J. Khambatta, Additional Solicitor General with Mr. Shiraz Rustomjee, Senior Counsel, Mr. Aditya Mehta, Mr. Kersi Dastoor, Advocates for the Respondent.

Coram : Justice N.K. Sodhi, Presiding Officer
P. K. Malhotra, Member
S.S.N. Moorthy, Member

Per : Justice N.K. Sodhi, Presiding Officer

Whether the decision taken by a listed investment company to dispose of a part of its investment is "price sensitive information" requiring mandatory disclosure to the stock exchange(s) under clause 2.1 of the Code of Corporate Disclosure Practices as specified in Schedule II to the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 (hereinafter called the regulations) is the sole question that arises for our consideration in these four Appeals no. 207 to 210 of 2010.

All these appeals are directed against a common order dated October 29, 2010 passed by the adjudicating officer imposing monetary penalties on the appellants for violating regulations 3 and 4 of the regulations and clause 2.1 in Schedule II to the regulations and are being disposed of by this order. Since the main arguments were addressed in Appeal no. 207 of 2010, the facts are being noticed from this appeal.

2. FCGL Industries Ltd. is a public limited company whose shares are listed on Bombay Stock Exchange Ltd., Mumbai (for short BSE) and Calcutta Stock Exchange, Kolkata. It shall be referred to hereinafter as FCGL. It is a core investment company having more than ninety per cent of its assets as investment in associated or group companies. As on June 30, 2005, it was holding 1,67,09,824 shares of Gujarat NRE Coke Ltd. (for short the Coke company) constituting 17.716 per cent of its total paid-up equity capital. The board of directors of FCGL in their meeting held on July 4, 2005 decided to acquire coal mining leases in Australia through a special purpose vehicle which was registered as a company in Australia under the name and style of "Gujarat NRE FCGL Pty Ltd." It was a joint venture of FCGL and the Coke company. The cost of acquisition and development of the mines was around 80 million Australian Dollars. FCGL needed substantial funds for the new acquisition and its board of directors discussed various options to raise funds for the purpose and finally decided to dispose of a part of its investment in the Coke company in order to arrange the requisite funds. It was decided to sell the shares of Coke company at suitable time(s) and the funds so raised could be parked in short term avenues, if so required. It would be relevant to refer to the decision taken by FCGL in this regard. The relevant extract from the minutes of the meeting of the board of directors of FCGL held on July 4, 2005 is reproduced hereunder for facility of reference:

> "ACQUISITION OF COLLIERY BY M/S. GUJARAT NRE FCGL PTY LTD. & SOURCING OF FUNDS
>
> Mr. A K Jagatramka informed that the Company's Australian Joint Venture M/s. Gujarat NRE FCGL Pty Ltd., has entered into an agreement to acquire the coal mining leases comprising the whole of old Avondale colliery and part of Huntley Colliery in the Southern Coalfields of New South Wales, Australia.

The mining leases being transferred comprise of –

- Approximately 5,500 ha within the Illawara Coal Measures of the Sydney basin.

- Wangawilli and Tongarra seams both of which have been mined previously in the adjoining leases, producing high fluidity low phos good quality hard coking coal.

- Indicated recoverable reserves totaling approximately 96 million tones.

The work has commenced on preparation of the development application so that it can proceed to mining in the shortest possible time frame. The acquisition and development of the mine will cost about 80 million Australian Dollars.

He also informed that the Company needs to take steps to arrange funds to finance the aforesaid mine and considering that substantial funds could be arranged from sale of investment made in shares of Gujarat NRE Coke Ltd, it is proposed that the said investment may be disposed.

Board discussed the matter including other options to raise funds in this regard and it was decided to dispose of the investment in Gujarat NRE Coke Limited at suitable time(s) in order to arrange the requisite funds well in advance and the funds so raised may be parked in short term avenues, if so required."

The aforesaid board meeting was attended, among others, by Shri G. L. Jagatramka and Shri A. K. Jagatramka who are the chairman and director respectively of FCGL. Soon after the board meeting was over, FCGL made on the same day a corporate announcement to BSE informing the latter about the agreement to acquire the coal mining leases in Australia. BSE had also been informed that the cost of acquisition and development of the mines would be around 80 million Australian Dollars. It is common case of the parties that in pursuance to the board decision, FCGL sold 84,79,709 shares of the Coke company between July 18, 2005 and September 29, 2005 for the purpose of raising funds for acquiring coal mining leases in Australia. The corporate announcement did not mention about the decision of FCGL to dispose of its investment in the Coke company to raise funds for the acquisition. This non-disclosure has been taken by the Securities and Exchange Board of India (for short Sebi) as a serious violation of the regulations and also of clause 2.1 of the Code of Corporate Disclosure Practices specified in Schedule II to the regulations. At this stage it would be relevant to

reproduce the press lease issued by the Coke company on behalf of FCGL being its group company.

" GUJARAT NRE COKE ACQUIRES 2nd COKING COAL MINE IN AUSTRALIA

Gujarat NRE Coke Limited ("GNCL") is pleased to announce that their Australian joint venture company, Gujarat NRE FCGL Pty Ltd., has entered into an agreement to acquire the coal mining leases comprising the whole of old Avondale colliery and part of Huntley Colliery in the Southern Coalfields of New South Wales, Australia. FCGL Industries Ltd. is also having substantial stake in the Australian joint venture.

The acquisition subject to ministerial approval also proposes to re-name the colliery, NRE No 2 Colliery.

The mining leases being transferred comprise of –

- approximately 5,500 ha within the Illawara Coal Measures of the Sydney basin;
- Wangawilli and Tongarra seams both of which have been mined previously in the adjoining leases, producing high fluidity low phos good quality hard coking coal;
- indicated recoverable reserves totaling approximately 96 million tones
- In December, 2004, Gujarat NRE Coke completed the acquisition of the NRE No.1 Colliery which is located in close proximity to the proposed NRE No.2 colliery.

The Vice Chairman & Managing Director of Gujarat NRE Coke, Mr Arun Jagatramka said "this strategic investment further strengthens the position of our company in the Southern Coalfields of New South Wales. The Southern Coalfields is renowned for producing high quality hard coking coal and the investment makes sense given its vicinity to our NRE No.1 Colliery and the potential benefits of ownership in two nearby collieries."

The Company has commenced work on preparation of the development application so that it can proceed to mining in the shortest possible timeframe. The acquisition and development of the mine will cost about 80 million AUD.

Gujarat NRE Coke was advised by Ernst & Young Mergers & Acquisitions Division as lead corporate finance advisors and Corrs Chambers Westgarth as legal advisors."

3. Sebi carried out investigations in the scrip of FCGL during the period from September 5, 2005 to September 24, 2005 and found that Matangi Traders and Investors Limited and Marley Foods Private Limited (hereinafter referred to as Matangi and Marley, respectively) had bought the shares of FCGL during the investigation period on

the basis of unpublished price sensitive information. Sebi further found that Shri G. L. Jagatramka and Shri A. K. Jagatramka who attended the board meeting of FCGL on July 4, 2005 were also the directors of Matangi and Marley which were persons acting in concert with the promoters and directors of FCGL. Investigations further revealed that Marley had purchased 3,00,000 shares of FCGL and Matangi purchased 50,000 shares of FCGL during the quarter ending September, 2005. This, according to Sebi, was in violation of regulations 3 and 4 of the regulations and clause 2.1 of the Code of Corporate Disclosure Practices for prevention of insider trading as prescribed by the regulations. Sebi decided to initiate adjudication proceedings against Matangi, Marley, G. L. Jagatramka and A. K. Jagatramka alleging that Matangi and Marley had violated regulations 3 and 4 of the regulations and the two Jagatramkas had violated clause 2.1 of Schedule II to the regulations in addition to violating regulations 3 and 4. Separate, though identical, show cause notices all dated July 1, 2009 were issued to these four persons calling upon them to show cause why monetary penalty be not imposed on them under sections 15G and 15HB of the Securities and Exchange Board of India Act, 1992 (hereinafter called the Act). Separate replies were filed by all the four noticees denying the allegations. They were also afforded a personal hearing and on a consideration of the material collected during the course of the investigations and the enquiry and also taking note of the replies filed by the noticees, the adjudicating officer by a common order dated October 29, 2010 found them guilty of the charges levelled against them and imposed a penalty of Rs.1 crore and Rs.20 lacs on Marley and Matangi respectively and a sum of Rs.40 lacs on each of the two Jagatramkas. Hence these appeals. It may be mentioned that Marley has since merged with Gujarat NRE Mineral Resources Ltd. which is the appellant in Appeal no. 207 of 2010.

4. We have heard the learned senior counsel on both sides and are of the view that the appeals deserve to succeed. As already noticed in the opening part of the order, the question before us is whether the information regarding the decision of FCGL to dispose of its investment in the Coke company was price sensitive. The answer to this question depends upon the interpretation of the term “price sensitive information” as

given in the regulations. We may now refer to the relevant provisions of the regulations which have a bearing on the allegations made against the appellants. “Price sensitive information” has been defined in regulation 2(ha) and the words ‘insider’ and ‘unpublished’ in clauses (e) and (k) of regulation 2. Regulations 3 and 4 prohibit insider trading and all these provisions are reproduced hereunder for facility of reference:

> “2. In these regulations, unless the context otherwise requires:-
>
> (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 who 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;
>
> (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; and
> (vii) significant changes in policies, plans or operations of the company;
> (i) …….
> (j) ……
> (k) “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;
> (l) ……..
>
> 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 any unpublished price sensitive information; or
>
> (ii) communicate 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 under any law.
>
> 4. Any insider who deals in securities in contravention of the provisions of regulation 3 shall be guilty of insider trading."

Regulation 3, among others, prohibits an insider either on his own behalf or on behalf of any other person from dealing in securities of a company listed on any stock exchange when he is in possession of any unpublished price sensitive information and any person who deals in securities in contravention of regulation 3 is said to be guilty of insider trading. In the case before us, it is not in dispute that FCGL in its board meeting had decided to sell a part of its investment in the Coke company and actually sold 84,79,709 shares of the Coke company to raise funds for the aforesaid acquisition. It is also the admitted case of the parties that both Shri G. L. Jagatramka and Shri A. K. Jagatramka attended the board meeting. These two directors of FCGL are also the directors of Matangi and Marley who traded in the scrip of FCGL during the quarter ending September, 2005. The fact that FCGL had decided to dispose of its investment in the Coke company had not been intimated to BSE and therefore this information remained unpublished and the two Jagatramkas being common directors made Matangi and Marley insiders which traded in the scrip of FCGL. In other words, Matangi and Marley when in possession of unpublished information traded in the scrip. Regulation 3 of the regulations would stand violated only if the unpublished information was price sensitive in nature. A reading of the definition of "price sensitive information" as reproduced above would make it clear that the information which relates to a company and which when published is likely to materially affect the price of its securities would be price sensitive. FCGL is an investment company whose business is only to make investments in the securities of other companies. It earns income by buying and selling securities held by it as investments. This being the normal activity of an investment company, every decision by it to buy or sell its investments would have no effect, much less material, on the price of its own securities. If that were so then no investment company would be able to function because every time it would buy or sell securities held as investments, it would have to make disclosures to the stock exchange(s) where its

securities are listed. Such decisions of an investment company, in our opinion, do not affect the price of its securities. The explanation to the definition has seven clauses and information in regard to all those matters is treated as price sensitive. The adjudicating officer has placed strong reliance on clause (vi) thereof which deals with "disposal of the whole or substantial part of the undertaking". These words would mean when a company decides to dispose of the whole or substantial part of its business activity or project in which it is engaged. The word 'undertaking' cannot possibly mean investments held by an investment company which are its stock-in-trade. To illustrate, if a manufacturing company were to dispose of the whole or a substantial part of its manufacturing unit, it would be an event which would materially affect the price of its securities and according to the explanation it would be price sensitive requiring the company to make the necessary disclosures at the earliest. On the other hand, if a manufacturing company were to sell its products or buy raw materials, it would be a part of its normal business activity which would not be price sensitive and not required to be disclosed. In our opinion, the adjudicating officer has completely misdirected himself in placing reliance on clause (vi) of the explanation to hold that the decision of FCGL to dispose of a part of its investment in the Coke company was price sensitive in nature. We have, therefore, no hesitation in holding that the decision taken by FCGL in the board meeting on July 4, 2005 regarding the disposal of its investment in the Coke company to raise funds for acquiring coal mines in Australia was not price sensitive information within the meaning of the regulations. We are in agreement with the learned senior counsel for the appellants that the non-disclosure in the press release was only in regard to the source of funds through which FCGL was to acquire the coal mines and the decision meant only switching of investments which is a part of normal business activity of an investment company. Interestingly, the adjudicating officer in para 34 of the impugned order has himself observed that the method of funding a project is not per se price sensitive information but nevertheless goes on to hold that since the price of the scrip of FCGL had gone up, the decision of FCGL to dispose of the investment in the Coke company was price sensitive. The adjudicating officer has missed the real point. The price of the scrip of FCGL had gone up not because it

decided to dispose of its investment in the Coke company but because of the fact that it acquired coal mines in Australia which information was price sensitive and had been disclosed to the market. We cannot, therefore, uphold the findings of the adjudicating officer.

In the result, the appeals are allowed and the impugned order set aside leaving the parties to bear their own costs.

Sd/-
Justice N. K. Sodhi
Presiding Officer

Sd/-
P. K. Malhotra
Member

Sd/-
S.S.N. Moorthy
Member

18.11.2011
Prepared & compared by-ddg/-