

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date : 26.02.2019

Appeal No. 330 of 2017

Crosseas Capital Services Pvt. Ltd.
1303, 13th Floor, Lodha Supremus,
Dr. E. Moses Road, Worli Naka,
Worli, Mumbai - 400 018.

.....Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No. C-4A, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai - 400 051.

..... Respondent

Mr. Pesi Modi, Senior Advocate with Mr. Sumit Agrawal,
Ms. Kalpana Desai, Ms. Prachi Jain, Advocates i/b Regstreet Law
Advisors for the Appellant.

Mr. Mustafa Doctor, Senior Advocate with Ms. Vidhi Jhavar,
Advocate i/b The Law Point for the Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Dr. C. K. G. Nair, Member

Per : Justice Tarun Agarwala, Presiding Officer (Oral)

1. The appellant is a private limited company and is a stockbroker registered with Securities and Exchange Board of India (hereinafter referred to as, "SEBI") and is also a member of BSE Ltd. (hereinafter referred to as, "BSE") as well as National Stock Exchange of India

Ltd. (hereinafter referred to as, "NSE"). On March 11, 2011, i.e. on the day of listing of the scrip of Sudar Industries Ltd. (hereinafter referred to as, "SIL") on the stock exchanges, the price of the scrip opened at Rs. 74.00 on BSE and Rs. 80.05 on NSE. On that day, the price of the scrips rose by almost 47% reaching Rs. 117.70 on BSE and Rs. 117.35 on NSE. A total of 3,43,12,272 shares of SIL was traded on BSE and 4,04,07,612 shares were traded on NSE. This 47% increase in the price of the scrips led to an investigation being conducted by SEBI on the price movement of the scrip of SIL and for possible violations of securities laws.

2. Based on this investigation, a show cause notice dated May 12, 2015 was served to show as to why an inquiry should not be held and penalty be not imposed for violation of Regulations 3 and 4 of Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (hereinafter referred to as, "PFUTP Regulations"). The appellant was given an opportunity of hearing, and after considering the matter, a final order was passed by the Adjudicating Officer (hereinafter referred to as, "AO") imposing a penalty of Rs. 1.10 crore under Sections 15HA and 15HB of the Securities and Exchange Board of India Act, 1992, (hereinafter referred to as,

“SEBI Act”) for violation of PFUTP Regulations and Code of Conduct for stockbrokers.

3. The AO found that the appellant on March 11, 2011 while carrying out algo trading in the scrip of SIL had conducted large self-trades with an intent to create misleading appearance of trading without intention to change the ownership of such securities. The AO held that such manipulative act and failure to comply with the Code of Conduct had violated Regulation 3(a) and (d) and Regulation 4(1) and 4(2)(a) and (g) of PFUTP Regulations as well as Clause A(3), (4) and (5) of the Code of Conduct under Schedule II read with Regulation 7 of the Securities and Exchange Board of India (Stock Brokers and Sub Brokers) Regulations, 1992 (hereinafter referred to as, “Stockbroker Regulations”).

4. The AO found that the total market volume constituted by the appellant in the SIL scrip by way of self-trades was around 4% in both the stock exchanges. The AO took this total market volume of 4% into consideration to be substantial creating misleading appearance of trading with the intention of misleading the market. The AO gave this finding of 4% of the total market volume as substantial on the basis of the decision of Securities Appellate Tribunal in Smt. Krupa Sanjay Soni vs. SEBI, in Appeal No. 32 of 2013 decided on January 24, 2014 wherein it was held that 3% of the

total market volume of self-trades were considered as substantial creating misleading appearance of trading. Thus, taking 3% as the yardstick, the AO found that in the instant case, the total market volume of self-trades being around 4% was substantial which had a manipulative intent. The AO further found that the frequency, timing, number of self-trades or the substantial volume of the self-trades including the proprietary trading constituted manipulative intention of the appellant which indicated positive movement in the scrips and practically influencing the investors on the outcome of first day trading in the scrips after it was listed. Such large volume created an impression that the scrip was doing well in terms of volume and / or price thereby influenced the investors to deal in the scrip.

5. The appellant being aggrieved by the imposition of penalty has filed the present appeal on various grounds. We have heard Shri Pesi Modi, the learned senior counsel for the appellant and Shri Mustafa Doctor, the learned senior counsel for the respondent. Mr. Modi, the learned counsel basically placed his arguments on two counts, namely, that the impugned order was based on erroneous facts and that there was a violation of the principles of natural justice as adequate opportunity was not given to inspect the documents.

6. The learned counsel contended that the finding given by AO that the appellant had self-traded around 4% of the total market volume in the SIL scrips was factually incorrect. It was urged that the total percentage of self-trades was only 1.95% of the total market.

7. It was also urged by the learned counsel for the appellant that the AO as well as the Whole Time Member (hereinafter referred to as, 'WTM') pursuant to the policy in respect of self-trades and pursuant to the decision of this Tribunal in Smt. Krupa Sanjay Soni's case had adopted a yardstick that self-trades of around 3% or more would be treated as substantial creating misleading appearance of trading. It was contended by the learned counsel for the appellant that the AO as well as the WTM were passing several orders holding that the volume of self-trading being less than 3% was a negligible percentage and that it was difficult to arrive at a conclusion that these self-trades were executed with an intention to create misleading appearance of trading in the securities market and thus, difficult to hold them liable for any failure of Code of Conduct of Stockbrokers Regulations. Such orders were passed by the AO in the case of the appellant itself being Adjudication Order No. RA/JP/172-181/2017 dated September 29, 2017 and another order in the case of the appellant in RA/JP/166-171/2017 dated September 29, 2017 and

again in the case of the appellant passed by the WTM dated December 28, 2018.

8. The learned counsel for the respondent fairly conceded that the percentage arrived at by the AO of self-trading of 4% was incorrect and that the correct calculation comes to around 1.95%. It was, however, submitted that such mathematical error would not in any manner affect the merits of the case and the imposition of penalty in as much as the AO has considered other aspects and found that the execution of self-trades by the appellant was manipulative creating a misleading appearance in the securities market and that such manipulative intention was based on the modus operandi, namely, frequency, timing, volume / percentage of self-trades as well as proprietary trading. It was, thus, submitted that the AO after taking into consideration the modus operandi and the entire circumstances came to the conclusion that the appellant had violated Regulations 3 and 4 of the PFUTP Regulations and Clause A of the Code of Conduct under Schedule II of the Stockbrokers Regulations. It was, thus, urged that the impugned order does not suffer from any error of law and, that the appeal was required to be dismissed.

9. Having heard the learned counsel for the parties at some length, we find that in order to understand the alleged violations, it is essential to know as to what exactly is a self-trade. In case of self-

trades, both the buyer and the seller are the same entity and, therefore, execution of self-trade does not result in change of beneficial ownership. Nonetheless, it may create a false or misleading appearance of trading in the securities market and may entice other investors to trade in that particular scrip or entities may enter into such trades with the intention of manipulating the price or volume of the scrip. As such, the execution of self-trades falls within the purview of Regulation 4(2)(a) and (g) of PFUTP Regulations, 2003. However, orders placed through algo trading software using different terminals through the same broker, may get matched accidentally without any manipulative intention. As such, mere occurrence of self-trades may be accidental but still would attract the provisions of Regulation 4(a) and (g) of the PFUTP Regulations, 2003 if any additional material, evidence or circumstances are available to indicate manipulation of the price or volume of the scrip or creation of false or misleading appearance of trading in securities market resulting from such self-trades.

10. In the case of **Ketan Parekh vs. SEBI in Appeal No. 2 of 2004 decided on July 14, 2006**, this Tribunal held as under :-

“Whether a transaction has been executed with the intention to manipulate the market or defeat its mechanism will depend upon the intention of the parties which could be inferred from the attending circumstances because direct evidence in such cases may not be available. The nature of the transaction executed, the frequency with which such transactions are undertaken, the value

of the transactions, whether they involve circular trading and whether there is real change of beneficial ownership, the conditions then prevailing in the market are some of the factors which go to show the intention of the parties. This list of factors, in the very nature of things, cannot be exhaustive. Any one factor may or may not be decisive and it is from the cumulative effect of these that an inference will have to be drawn.”

11. Various decisions have also been passed by the Tribunal on the issue of self-trades wherein this Tribunal has taken a consistent view that a few instances of self-trades in themselves would not amount to an objectionable trade if there was no manipulative intent.

12. In the light of the various decisions taken by this Tribunal, SEBI reviewed its stand and came out with the circular dated May 16, 2017 dealing in self-trades. For facility, the said circular is extracted hereunder :-

EFD/DRA-3/ON/332/2017

***Securities and Exchange Board of India
Enforcement Department -1 (DRA-3)***

“Sub.: Approved policy to deal with ongoing cases involving allegation of self-trade.

1. *IVD vide their ON dated January 25, 2017 had advised EFD to take a view on the ongoing cases alleging self-trades. Accordingly, EFD drafted a policy to deal with the issue of self-trades in the ongoing matters. The said policy has been approved by WTM(GM) on May 15, 2017.*
2. *While considering the policy view on the issue of self-trades, the specific legal provisions applicable to self-trades i.e. 4(2)(a), (b) and (g) of PFUTP Regulations, 2003 were examined and based on the examination done by EFD, it is observed that intention is a sine quo non for establishing manipulation in case of self-trades and accidental/unintentional self-trades are not covered under the said regulations. Accordingly, mere occurrence of self-*

trades should not be considered as per se illegal in the absence of any other additional evidence to prove manipulation or intent to defraud as is done in cases of synchronised trades. Therefore, in all matters of Self Trade, an assessment has to be made regarding whether the said trade was intentional or unintentional on the basis of supporting evidence and the manipulation caused by indulging in self-trades should be clearly brought out.

3. *Accordingly, the approved policy to deal with ongoing cases involving allegation of self-trade is as under :*
 - a. *The quasi-judicial authority may assess on the basis of SCN/ investigation report whether any manipulation is arising out of self-trade or any intention to enter into self-trade is evident from the material on record. If the manipulation or intent can be established the same may be proceeded with as approved. However, if no intention or manipulation is evident from the case and the only charge is mere occurrence of self-trades, then the entity may be exonerated by the quasi-judicial authority. Further, while assessing the manipulative intent, the volume transacted may also be considered in addition to the other factors.*
 - b. *Further, the entities who have been charged for self-trades have an option to apply for settlement proceedings and the cases where there is mere occurrence of self-trades without any other evidence to indicate manipulation may be settled at the minimum amount prescribed as Schedule II, Chapter I, pt. 2 of the Settlement Regulations. In order to remove difficulties arising from various clauses of Settlement Regulations such as Reg. 5(1)(c) exemption is granted from the restriction placed under Regulation 5(1)(c) so that cases arising in multiple scrips due to self-trades by the same entity can be settled. The settlement orders arising out of self-trade matters would not considered in the number of orders under Reg. 5(1)(c). The individual cases would accordingly be taken through HPAC and panel of members as per the Settlement Regulations.*
4. *The said policy may be circulated to all the departments for necessary action.”*

13. The circular indicates that in order to find someone guilty of self-trades under the PFUTP Regulations, 2003, it is essential to find out the intention or manipulation. The circular indicated that accidental / unintentional self-trades were not covered under the regulations and mere occurrence of self-trades would not be considered per se illegal in the absence of any other additional evidence to prove manipulation or intention to defraud. The circular, thus, provided that in all matters of self-trades, an assessment has to be made as to whether the said trade was intentional or unintentional on the basis of supporting evidence. One such supporting evidence as per the circular to indicate the manipulative intent is, the volume transacted.

14. In the light of the aforesaid circular, we find that the impugned order basically revolves around the total market self-trades executed by the appellant. This self-trades being around 4% of the total market weighed heavily in the mind of the AO while passing the impugned order and imposing the penalty against the appellant. We also find that the AO has considered the modus operandi as supportive evidence to find out the manipulative intent of the appellant but basically relied upon the high volume of self-trades in arriving at a conclusion that there was a manipulative intention to mislead the market and the investors. In our view, the other factors

relating to manipulative intent, namely, frequency, timing, number of self-trades have not been dealt with in the correct perspective.

15. In the instant case, the AO has given a finding that the appellant has indulged in self-trades which is around 4% of the total market trading which was substantial and created a misleading appearance of trading. Based on this substantial volume of trading, further finding has been given that the trading was manipulative. This substantial trading of 4% is apparently incorrect and has wrongly been calculated by the AO. In this regard, we find that the volume of self-trades made by the appellant in both the stock exchanges are as under :-

S. No.	Details	Volume of Self Trades (A)	Total Market Volume (B)
1.	BSE	8,31,677 ¹	3,43,12,272 ³
2.	NSE	6,28,461 ²	4,04,07,612 ⁴
3.	Total (1+2)	14,60,138	7,47,19884

The total percentage of self-trades to the total market would be the total quantity of self-trades divided by the total market volume i.e. $14,60,138/7,47,19,884*100 = 1.95\%$ of self-trades to the total market volume.

16. As per the actual calculation the total market self-trades comes to 1.95%. This fact has been fairly conceded by the learned senior counsel for the respondent. Whether 1.95% is substantial or not has to be reconsidered by the AO in the light of the circular of 2017 in order to find out whether the self-trades were accidental or unintentional and, therefore, not covered by the PFUTP Regulations, 2003 or the self-trades were manipulative or intentional to defraud the market on the basis of additional evidence which could be physical or circumstantial to show the intention or manipulation.

17. We are also of the opinion that the adoption of the yardstick of around 3% of the total market self-trades as substantial creating misleading appearance of trading, after taking into consideration the judgment of SAT in Smt. Krupa Soni's case is totally misplaced. We find that the decision in Smt. Krupa Soni case does not indicate that a total market self-trades of less than 3% would be considered as negligible. Thus, in our view, the AO is required to reconsider and arrive at a finding as to what percentage of the total market self-trades would be considered as negligible or minuscule to come under the category of accidental or unintentional self-trades.

18. Admittedly, the appellant was trading through algorithmic software which was dully approved by BSE and NSE. In this regard, the Bombay High Court in the case of **National Stock Exchange of**

India Ltd. vs. Moneywise Media Pvt. Ltd. [(2015) SCC Online Bom. 4790; (2016) 1 Bom CR 112], has considered what is the algo trading, holding :-

“Algo trades are the product of very high end mathematical modelling. These are models devised specifically to anticipate the most microscopic changes in markets and to respond to those changes in a matter of seconds. This is done not through any human intervention, an aspect that is totally eliminated, but in a wholly automated fashion by computer-generated or triggered transactions. In high value transactions the number of such transactions that can be put through is very considerable indeed. A most rudimentary example might be this: an ‘algo’ is designed to detect the most minute changes in stock prices and to respond accordingly. In anticipation of a rise in a particular stock’s value, say, with no manual intervention but by a computer program responding to the data input, a series of purchases are triggered made at a lower value so that when the markets later reach the higher level, a considerable profit is then, equally automatically, generated and booked. The same can also operate in reverse to minimise a potential loss. Of course, these are utterly basic examples. I imagine the actual models are far more sophisticated and complicated, for use in complex scenarios for highly evolved financial and security transactions. The point is, however, that these trades are automatic and computer-generated, and they happen at very high speed and in high volumes.”

19. Admittedly, the software is designed to anticipate microscopic changes in the market and to respond to those changes in the matter of seconds. Orders of sale and purchase are done automatically through this software and not through any human intervention. The algo softwares are designed to detect the most minute changes in stock prices and to respond accordingly and, therefore, it is quite possible that when certain orders are automatically generated without any human intervention for purchase of shares on a minute change in the stock prices, simultaneously in a fraction of seconds a similar

order of the same quantity could be booked for sale. Consequently, such purchase and sale could happen automatically which may result in self-trades. Whether such self-trades generated automatically could lead to violation of PFUTP Regulations is a point which is required to be considered by the AO especially in the light of the policy declared by SEBI in its circular of 2017, namely, the intention/the manipulative intention. Further, whether such intention or manipulative intention generated automatically through algo trading can be fastened upon the appellant when there is no human intervention is also required to be given some consideration. The fact remains that if the appellant was executing an order through algo trading, he should have placed some mechanism in the algo software in order to ensure that such trades do not result in self-trades. All these aspects are required to be considered which we find the same to be lacking in the instant case.

20. Since, admittedly, the volume of the transaction in self-trades have been incorrectly calculated, the impugned order cannot be sustained and the matter is required to be remitted again to the AO to re-decide the matter. At this stage, it needs to be said that the contention of the appellant that appropriate opportunity of hearing was not given and the principles of natural justice were violated is not correct. We find from a perusal of the record that ample

opportunity was given which the appellant availed. However, since the matter is remitted again to the AO to pass an order afresh, it would be open to the appellant to move a fresh application for inspection of the documents. If such an application is filed, the AO will pass appropriate orders and deal with such application in accordance with law.

21. For the reasons stated aforesaid, the impugned order cannot be sustained and is quashed. The appeal is allowed. The matter is remitted to the AO of SEBI to decide the matter afresh in the light of the observations made above after hearing the parties within four months from the date of receipt of the certified copy of the order. In the circumstances of the case, parties will bear their own costs.

Sd/-
Justice Tarun Agarwala
Presiding Officer

Sd/-
Dr. C. K. G. Nair
Member

26.02.2019
Prepared & Compared by
PTM