

INSIDER TRADING IS LEGAL IN INDIA? A CRITICAL STUDY

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Law and morality have an intertwined relationship and certainly a rather tricky one. The foundation of law essentially rests upon the Ethics and values laid down as per societal standards and cultural norms which define what is acceptable and what is not. With time, as the societies progress into a more civilized and systematic scheme of things, the nature of crimes being committed also changes. The driving force behind criminalizing them however, still remains to be ethics and morality. The debate around insider trading has been a similar one. While the ones committing it have been defending it as just a perk of being in a particular kind of profession, the ones at the opposite end have been relentlessly questioning its ethical foundations and impact on the market. It has been argued that the extent of the unfairness is virtually criminal, and hence calls for a similar legal consequence. The latter view has successfully found its place as insider trading has been regarded as an illegal activity almost worldwide starting with the USA in 1934.¹ However, like any other law this too has exceptions and in effect gives certain legal kinds of trading by insiders. This paper seeks to explore the meaning, origin and kinds of insider trading under the India law and undertake a critical analysis of the same.

Keywords- Insider, Unpublished Price Sensitive Information, Connected Person, Capital Market, securities, Trading, Ethics, Code of Conduct, Trading Plan.

Introduction

The onset of the concept of Capital markets² and trading in securities can be traced back to the 1600s in Amsterdam, where the Dutch East India Company was the world's first company to trade publicly wherein it issued stocks to raise capital. This over several decades, gradually developed into

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1 USA was the first country to formally enact a legislation to regulate insider trading through the Securities and Exchange Act, 1934.

2 The Capital Market is a market for financial investments that are direct or indirect claims to capital. It is wider than the Securities Market and embraces all forms of lending and borrowing, whether or not evidenced by the creation of a negotiable financial instrument. The 'Securities Market' is a sub-set of the capital market.

a more complex system that constitutes the present securities market.³ Stock exchanges, intermediaries, and companies are the key players. So, it was only obvious that when the boom of the stock market arrived, the people involved in it on a daily basis had the opportunity to exploit the benefits the most. With scarcely available information and expertise, not only was this new marketplace that was giving unprecedented returns and wealth, inaccessible to the common people but was also largely unregulated for the longest period of time. It almost became like a place of fascination- which was fortified by a wall of secrecy and deprivation of knowledge to the general public. While those *inside* the fort were drenched in wealth, those *outside* were mere spectators- left to figure out their way into this fort which seemed to have at best, only a few peep-holes.

The result was that the key players in the market were the “Kings” who continuously indulged in manipulating the market- which is otherwise based on an idea of *Laissez Faire*⁴ - to suit to their own whims and fancies. It was never mentioned if these practices were “unfair”, and were rather looked upon as ‘perks and benefits’ of being in the securities trading business. There was thus a creation of two classes (privileged knowledge being the divisive factor)-i.e. - the “insiders” and the “outsiders”. It was only after the great crash of the American stock market in 1929, that attention was directed towards unfair trade practices being carried out by Directors, promoters and key managerial personnel – the most prominent being insider trading. Since it was the influential “Haves” who were the target here, they opposed this notion of such practices being unfair and justified them as being perks of the job. It was famously described by the Sunday Times (1973, UK) as “*the crime of being something in the city*”.

Historical Background

The battle of making insider trading an illegal activity was a long one, especially around the debates about its ethicality. It was in 1934 that the first attempt was ever made to declare insider trading as an offence in law by the government of the United States. This trend soon spread over other nations, though reluctantly. In 1940s India first time encountered with insider trading. The Thomas Committee Report in 1948 under the chairmanship of P.J. Thomas, cited instances of directors, agents, officers, auditors possessing strategic information regarding economic conditions

3 Inyoung Hwang, *A Brief History of the Stock Market*, available at:<https://www.sofi.com/learn/content/history-of-the-stock-market/> (Last visited on 10 May 2022).

4 *A philosophy or practice characterized by a usually deliberate abstention from direction or interference especially with individual freedom of choice and action* [available at: <https://www.merriam-webster.com/dictionary/laissez-faire;> (Last visited on 10 May 2022)]

of the company regarding the size of the dividends to be declared, or of the issue of bonus shares or the awaiting conclusion of a favorable contract prior to public disclosure.⁵

In 1952, Bhabha committee also recommended to put obligation on the directors to disclose their sale/purchase of shares in a separate register to be maintained by the company. After observing the recommendations made by the committee, Sections 307 and 308 were incorporated in the Companies Act of 1956. Where Section 307 provided for maintenance of a register by the companies to record the directors' shareholdings in the company and Section 308 prescribed the duty of the directors and persons deemed to be the directors to make disclosure of their shareholdings in the company, subsequently Manager of the company were also included in such section to make the requisite disclosure as per Companies Amendment Act, 1960.

In 1978, the *Sacher Committee* also pointed out in its report that more stringent laws shall be made to gain information about the transactions where one party gained undue advantage of the transaction who could possibly be in possession of price sensitive information.

The *Patel Committee* in 1986, headed by G. S. Patel gave a suitable definition of 'Insider Trading' in their Report providing that management of the company who are dealing in shares of such company on basis of 'undisclosed price sensitive information' not available to others. It was also recommended to *amend* the Securities Contract (Regulation) Act ("SCRA"), 1956 in order to allow the exchanges to make stringent policies to curb insider trading.

Further in 1989 *Abid Hussain Committee* recommended to cover the offence of Insider Trading under civil and criminal laws and also suggested for stricter regulation by SEBI to restrain the unfair practice of Insider Trading.

Eventually, in the view of requirement to establish proper and stringent laws to deal with the offenders of unfair practice in financial market in 1992 a statutory body⁶ was put in place called the 'Securities and Exchange Board of India', which under its statutory powers⁷ formed

5 Thomas, P.J., *Report on the Regulation of the Stock Exchanges in India. Securities and Exchange Board of India, (1948), Para 63. Page 68, available at: <http://www.mca.gov.in/MinistryV2/library.html> (Last visited on 10 May 2022).*

6 *The Securities and Exchange Board of India Act, 1992, No. 15.*

7 *Ibid* Section 30.

guidelines on prohibition of insider trading in the same year.⁸ This underwent significant changes under the 2002 Amendment,⁹ and were ultimately replaced and repealed by the Regulations of 2015¹⁰ - which too have been subject to amendments from time to time.¹¹ However, complexities around implementations of these are still immense, which SEBI in its Annual Report of 2020-21¹² plans to overcome through effective leverage of technological advancements and policy decisions.¹³

Definitions and Meaning

The term 'Insider Trading' is almost self-explanatory. In general parlance, trading by insiders means the act of buying and selling of securities by any employee, director or key managerial personnel of a company or any other person, using some 'confidential information' which is only in their possession, to the disadvantage of the other investors, (albeit the uninformed general public). This confidential information is a material piece of information that has the power of influencing the market price of the securities of that company.

On the basis of the above the following elements can be highlighted:

- i. Access to confidential information that has power to impact the price of the securities.
- ii. Use of such information to trade in securities by persons who have access to such information.
- iii. Non-communication of this private information to other investors (general public) who are not in possession of it.
- iv. Non access of any confidential information to these other investors.
- v. Undue enrichment of the former at the cost of the latter's interest.
- vi. Unequal distribution of crucial information which is instrumental in making informed decisions about strategic trading of securities.
- vii. Unfair advantage to one group over the other.
- viii. Loss of faith of the other group in the stock market due to their unfair losses.

8 *Securities and Exchange Board of India (Insider Trading) Regulations, 1992*

9 *Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2002*

10 *Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015*

11 2018, 2019, 2020, 2021.

12 *SEBI Annual Report 2020-2021.*

13 *Roopanshi Sachar & Dr. M. Afzal Wani, Regulation of Insider Trading In India: Dissecting The Difficulties And Solutions Ahead JCIL Vol. 2 Issue 11.*

The above-said definition is a loose explanation of what constitutes *insider trading*. While the term “insider trading” has not per se been defined under the law, however, the 2015 Regulations put an explicit bar on:

- i. Communication and procurement of unpublished price sensitive information by and from insiders;¹⁴ and
- ii. Trading in securities listed or proposed to be listed by insiders while in possession of unpublished price sensitive information.¹⁵

In order to give a clear idea of what the above constitutes- the regulations have defined the technical jargons such as- ‘insider’, ‘connected person’, ‘trading’, ‘unpublished price sensitive information’ and also explaining what kind of activities are included within the realm of insider trading.¹⁶ It is only when one reads the concerned regulations prohibiting certain acts, in conjunction with these regulations, that they can achieve clarity of the ambit of the crime.

Thus, before going over to look at the formal Regulations, it is pertinent to reproduce these definitions beforehand:

- i. An “insider”¹⁷ means any person who is:
 - a. A connected person; or
 - b. A person in possession of unpublished price sensitive information
- ii. The 2015 Regulation gives a wide meaning to the term “connected person”¹⁸. The intention is to include any person who is likely to have access to or possession of unpublished price sensitive information by virtue of their connection with the company. This connection could be direct (such as being associated in professional capacity of employee, consultant, advisor, director, etc.) or indirect (such as immediate family members or other relations of the aforementioned persons).

The definition is divided into two clauses; the first part states:

“(i) any person who is or has during the six months prior to the concerned act been associated with a company, directly or indirectly, in any capacity including by reason of frequent communication with its officers or by being in any contractual, fiduciary or employment relationship or by being a director, officer or an employee of the company or holds any position

14 *Infra* note 11 at Regulation 3.

15 *Infra* note 11 at Regulation 4.

16 *Infra* note 11 at Chapter 3.

17 *Infra* note 11 at Regulation 2(1)(g).

18 *Infra* note 11 at Regulation 2(1)(d).

including a professional or business relationship between himself and the company whether temporary or permanent, that allows such person, directly or indirectly, access to unpublished price sensitive information or is reasonably expected to allow such access.”

The scope of this clause is quite wide and covers almost every scenario in which a person could either be said to be connected with a company or might be reasonably expected to have access to undisclosed information (UPSI). It is however a point of criticism that the time period of “six months” is arbitrary and has no reasonable basis.¹⁹

The second clause is a deeming provision wherein certain category or classes or persons are presumed to be connected persons under law. This legal fiction is however a rebuttable presumption. It reads as follows:

“... (ii) Without prejudice to the generality of the foregoing, the persons falling within the following categories shall be deemed to be connected persons unless the contrary is established -

- (a) an immediate relative²⁰ of connected persons specified in clause (i); or
- (b) a holding company or associate company or subsidiary company; or
- (c) an intermediary as specified in section 12 of the Act or an employee or director thereof; or
- (d) an investment company, trustee company, asset management company or an employee or director thereof; or
- (e) an official of a stock exchange or of clearing house or corporation; or
- (f) a member of board of trustees of a mutual fund or a member of the board of directors of the asset management company of a mutual fund or is an employee thereof; or
- (g) a member of the board of directors or an employee, of a public financial institution as defined in section 2 (72) of the Companies Act, 2013; or
- (h) an official or an employee of a self-regulatory organization recognised or authorized by the Board; or
- (i) a banker of the company; or

19 *Infra* note 14.

20 *Infra* note 11 at Regulation 2(1)(f), “immediate relative” means “...a spouse of a person, and includes parent, sibling, and child of such person or of the spouse, any of whom is either dependent financially on such person, or consults such person in taking decisions relating to trading in securities”;

(j) a concern, firm, trust, Hindu undivided family, company or association of persons wherein a director of a company or his immediate relative or banker of the company, has more than ten per cent. of the holding or interest;”

iii. "Unpublished price sensitive information"²¹ (UPSI) means-

“...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”

iv. “Trading in Securities”²² means and includes:

“...Subscribing, buying, selling, dealing or agreeing to subscribe, buy, sell or deal in any security of the Company and “trade” shall be construed accordingly”

Rationale behind illegality of insider trading

The Securities and Exchange Board Act, 1992 (hereinafter referred to as the “1992 Act”) prohibits insider trading under Section 12A clause (d) and (e) and penalises the same under Section 15G with a penalty of minimum 10 lacs to maximum 25 crores or three times the profit made by such insider trading- whichever is higher. It also casts a duty upon SEBI²³ to ensure prohibition of insider trading under Section 11(2)(g) of the 1992 Act. It is quite apparent that the Indian law discourages insider trading and treats it as an illegal activity through imposition of serious penalties.

But what is the reason behind it? The first and foremost argument in favour of criminalising insider trading is the ethical questionability of it. The foundational premise of insider trading is an unfair advantage of one over another vis-à-vis some consequent benefit of the former, at the cost of the latter, by virtue of that unfair advantage.²⁴ This disrupts the level playing field²⁵ that is essential element of a healthy competitive market

21 *Infra note 11 at Regulation 2(1)(n).*

22 *Infra note 11 at Regulation 2(1)(l).*

23 *The Securities and Exchange Board of India.*

24 *Abhirami B. and Arya Kuttan, Insider Trading Laws In India - Pertinence And Problems, 4 IJLDAI 5, 443, 443-4639 (Sep 2018).*

25 *Ayan Roy, Insider Trading in India (June 4, 2010) available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1620386 (Last visited on 3 April, 2022).*

space. Another point of contention is that insider trading is a threat to a free economy (*laissez faire*). This is because it is often used as a tool to manipulate market forces which are otherwise supposed to act independently on the basis of demand and supply factors without intervention from the state or undue influence of powerful market participants.²⁶ This infects the entire system with a biased tilt, favouring the manipulator- either to make illegitimate gains or evade legitimate losses. The third argument is a consequence of the above actions-i.e. loss of faith of outsider investors in the market and thereby a disinterest in investing in the same. This is a major hit to the existence of the market as without investors there would be no marketplace to begin with. Studies have even shown that insider trading has deep causal connections with market crashes.²⁷

Legal forms of insider trading

Contrary to popular belief, insider trading can also be legal in certain circumstances. Although often referred to with a negative and criminal connotation, it also has a legal form, that is devised to allow “insider” corporate participants to indulge in their personal and official trading activities, without compromising the ethical and moral standards of operations. The reason behind this, as stated by the Securities Appellate Tribunal (SAT), is that the insider trading jurisprudence is not founded on the concept of ‘disclose or abstain’, i.e., that an insider in possession of UPSI cannot trade in a company’s stocks until he reveals the UPSI.²⁸ The SEBI Regulations of 2015 carve out a few exceptions to the general prohibition on trading by insiders which gives us the legal form of insider trading. These exceptions are by way of systematic and time bound disclosures that are to be mandatorily made beforehand. These are discussed as below:

Regulation 3 aims to protect ‘unpublished price sensitive information’ in connection to any company or securities (whether listed or proposed to be listed). It prohibits both the communication and procurement of it, to or by any person (including other insiders) except for three purposes namely:²⁹

- i. In furtherance of legitimate purposes; or
- ii. Performance of duties; or

26 Baishali Das, *Insider Trading Law in India LATEST LAWS (2018)*, available at: <https://www.latestlaws.com/wp-content/uploads/2018/09/Insider-Trading-Law-in-India-By-Baishali-Das.pdf> (Last visited on 10 April, 2022).

27 M. Anil Kumar, *An Empirical Analysis of Legal Insider Trading in India (July, 2018)*,

28 *Rakesh Aggarwal vs SEBI Before SAT 2004*, SCL 351.

29 *Infra note 11 at Regulation 3(1)*.

iii. Discharge of legal obligations

The regulation further explains that “*legitimate purposes*”³⁰ would include sharing of information in the ordinary course of business with auditors, legal advisors, customers, collaborators, etc.³¹ In addition to this the Board of Directors of a listed company have to formulate a policy as part of “*Code of Fair Disclosures and Conduct*”, as to what would constitute “*legitimate purpose*” for their company under Regulation 8.³² Any person who receives unpublished price sensitive information under these exceptions shall also be deemed to be an insider.³³

There is another exception regarding sharing of UPSI in circumstances that entail an obligation to make an open offer under the takeover regulations where the Board of Directors of the listed company is of the opinion that doing so is in the best interest of the company. In case of transactions that do not require such an obligation but the Board of Directors still think that such a communication would be in the best interest of the company, the regulations allow for the sharing of the UPSI, provided that that such information is made generally available at least two trading days prior to the proposed transaction and covers all material details.³⁴

The marginal note of Regulation 4 reads “*Trading when in possession of unpublished price sensitive information*”. Since any person who is in possession of UPSI is an insider, this provision points towards “insider trading”. It states that- “*no insider shall trade in securities that are listed or proposed to be listed on a stock exchange when in possession of unpublished price sensitive information.*”³⁵ An interesting point to note here is that the explanation to this clause clarifies that when any person in possession of UPSI trades in securities, it would be presumed that his trade was influenced by his

30 “*Legitimate Purpose*” shall include “*..sharing of unpublished price sensitive information in ordinary course of business by an Insider with partners, collaborators/lenders, customers, suppliers, merchant bankers, legal advisors, auditors, insolvency professionals or other advisors or consultants provided that such sharing has not been carried out to evade or circumvent the prohibitions of these regulations.*”

31 *Infra* note 11 at Clause 2 of Regulation 3.

32 *Infra* note 11 at Clause 2A of Regulation 3.

33 *Infra* note 11 at Clause 2B of Regulation 3.

34 *Infra* note 11 at Clause 3 of Regulation 3.

35 *Infra* note 11 at Clause 1 of Regulation 4.

knowledge of that UPSI. Thus, existence of mens rea stands presumed. It is however a rebuttable presumption, as the subsequent clauses list the following defences for such insider:³⁶

- i. It was an off- market transaction between two insiders having possession of the same UPSI and both parties made an informed decision. The UPSI should not have been obtained in violation of regulation 3 but at the same time should also not fall under clause (3) of the same regulation. Such a trade has to be reported to the company within two working days, which shall further notify the same to the stock exchange within two trading days from the receipt of such information.
- ii. That the transaction was through a “block deal window mechanism” between two persons in possession of the same UPSI and both the parties made an informed decision. The UPSI should not have been obtained in violation of regulation 3 but at the same time should also not fall under clause (3) of the same regulation.
- iii. The transaction had been carried out under a regulatory or statutory obligation to carry out a bona fide transaction.
- iv. The transaction was carried out by the person pursuant to the exercise of stock options.
- v. For non- individual insiders:
 - a. The individuals who were in possession of the UPSI were different from the persons taking the trading decisions and the latter were not in possession of the UPSI at the time of decision making; and
 - b. Appropriate and adequate arrangements were put in place to make sure that:
 - These regulations are not violated.
 - No UPSI was communicated by the insider individuals to the trade related decision- making individuals.
 - There is no evidence of the breach of the above-said arrangements.
- vi. The trades were in consonance with the Trading Plans set up as per Regulation 5.

³⁶ *Infra note 11 at Proviso to Clause 1 of Regulation 4.*

In case of connected persons, the regulations presume that they were in possession of UPSI and the onus of proving the contrary is on them. However, in other cases, there is no such presumption and the burden of proving that the person in question had certain UPSI is on the Board of Directors.³⁷

The last ground of defence stated above mentions about a “Trading plan”. A trading plan is a pre-decided strategy to execute certain trades in future. This concept has been brought into picture to enable lawful trading in securities people who might be perpetually in possession of UPSI. The rationale behind disclosure of a pre- decided plan is to give credibility to their actions which are now in consonance with something already decided in the past, even before the UPSI came into their possession, and hence cannot be said to be influenced by the UPSI obtained afterwards. The irrevocable nature of the plan coupled with the mandate of its public disclosure after due approval from concerned authorities, virtually leaves no room for any deviance from it, and creates accountability towards the general public as well.³⁸

The idea behind such a provision is do refrain from imposing a blanket ban on insiders from indulging into an kind of personal trade as well. This is because the offence of insider trading has been brought into light to maintain parity of knowledge and opportunity between investors of all kind; banning a certain group merely because they possess privileged information would amount to an extreme step and be unfair. What can be done is to develop a mechanism to keep a check on people who possess such information and regulate their trading behaviour so as to ensure lawful and healthy market exchanges for all. A balance has to be created between the interests of both “insiders” and “outsiders”, where no one’s interest is forwarded at the cost of another’s. The execution of a trading plan aims to achieve something on those lines.

An insider is entitled to formulate a trading plan and submit it to a compliance officer for approval and public disclosure. Thereafter, trades may be carried out in their behalf according to such plan.³⁹ The following things have to be kept in mind that a trading plan shall:⁴⁰

37 *Infra note 11 at Clause (2) of Regulation 4.*

38 *Bali, Reema. Insider Trading In India - Rules Till Now, International Journal of Research -GRANTHAALAYAH. 8. (2020) 49-53. available at:10.29121/granthaalayah.v8.i9.2020.1072. (Last visited on 10 April 2022).*

39 *Infra note 11 at Clause 1 of Regulation 5.*

40 *Infra note 11 at Clause 2 of Regulation 5.*

- (i) Not entail commencement of trading on behalf of the insider earlier than six months from the public disclosure of the plan;
- (ii) not entail trading for the period between the twentieth trading day prior to the last day of any financial period for which results are required to be announced by the issuer of the securities and the second trading day after the disclosure of such financial results;
- (iii) entail trading for a period of not less than twelve months;
- (iv) not entail overlap of any period for which another trading plan is already in existence;
- (v) set out either the value of trades to be effected or the number of securities to be traded along with the nature of the trade and the intervals at, or dates on which such trades shall be effected; and
- (vi) not entail trading in securities for market abuse.

After a trading plan has been presented to the compliance officer, it shall be assessed for any potential violations of the regulations, and thereafter approve and monitor the implementation of the plan. Also, upon approval, the compliance officer shall intimate the trading plan to the stock exchanges on which the securities are listed.⁴¹ A trading plan once approved shall be irrevocable and no deviation from it shall be allowed whatsoever. However, in case the UPSI, which was in possession of the insider at the time of formulating the plan, has still not become public at the time of commencement of implementation of the plan, then such an implementation shall be postponed till the needful disclosure is made.⁴²

Case Studies

Hindustan Lever limited (HLL) v. SEBI

The case of *Hindustan Lever limited (HLL) v. SEBI*, was one of the earliest cases of insider trading brought before SEBI. In this case the transaction under scrutiny was the purchase of 8 lakh shares of Brooke Bond Lipton India Limited (BBLIL) by Hindustan Lever limited (HLL) from Unit Trust of India (UTI) on March 25, 1996. This purchase attracted suspicion as it was just two weeks before the merger of these two companies. Upon investigation by SEBI it was found that these two companies were subsidiaries of the same parent company in London. Thus, it could be reasonably presumed that the Directors already knew about the said merger and were “insiders” as per the 1992 Regulations. The matter went into appeal before SAT which though concurred with SEBI that the information regarding the merge was

41 *Infra note 11 at Clause 5 of Regulation 5.*

42 *Infra note 11 at Clause 4 of Regulation 5.*

price sensitive, but did not agree that it was “unpublished”. After this case SEBI made an amendment to the 1992 regulations and added and defined the word ‘unpublished’. This was the origin for the definition of the term ‘Unpublished Price Sensitive Information’ in India.

Dilip Pendse vs. SEBI⁴³

In this case Dilip Pendse was the managing director of Tata finance Ltd. Nish Kalpa, which was a wholly owned subsidiary of Tata finance Ltd. (also a listed company) had incurred a huge loss of 80 crores which would definitely affect the profits of Tata finance Ltd. Before this information could be disclosed to the general public on 30th April, 2001, Dilip Pendse gave this information to his wife who sold almost 3 lakh shares of Tata finance Ltd. which were in her name as well as in the name of companies controlled by her kith and kins. SEBI found Dilip Pendse guilty of insider trading, due to which he was removed as the Chief of TATA Finance Ltd. and had to face imprisonment of two years as well. This decision was however reversed by the Securities Appellate Tribunal due to lack of proper evidences against Mr. Pendse.

Rakesh Agarwal vs SEBI⁴⁴

This case was prominent with respect to the principle of mens rea vis-à-vis insider trading. The facts of the case were that ABS Industries Ltd. had entered into an acquisition deal with Bayer AG, a German company, which had agreed to purchase 51% shares of the former company. Mr. Rakesh Agarwal was the Managing Director (and negotiator) of ABS Industries Ltd. had sold a significant portion of his shares in this co. which he owned through his brother-in-law Mr. I.P. Kedia. SEBI took cognizance of this transaction and held Mr. Aggarwal liable for insider trading, citing the reasons that mens rea was not relevant to be guilty of the said offence and any kind of trade in securities while in possession of UPSI is enough for establishing culpability. However, this order of SEBI was reversed by SAT in appeal, stating that mens rea, though not expressly stated to be an element in the Regulations, is an essential point of consideration, as without that, the entire purpose and policy behind such regulations will be defeated and that a literal interpretation would be contrary to the intended spirit of the regulations. As per SAT, since Mr. Rakesh Aggarwal had been acting in the best interest of the company at the time of entering into the trade, there was absence of a mala fide intention to make wrongful profits, and therefore, did not attract liability.

43 *Dilip Pendse vs SEBI in SAT. Appeal No.62 of 2017.*

44 *Before SAT 2004, SCL 351.*

Infosys employee's insider trading Case⁴⁵

During an investigation around July 2020 by SEBI, there were few entities (Capital One, Tesora Capital etc.) that were found to be involved in trading in the scrips of Infosys (“INFY”), while in the possession of the UPSI. The scrip was in the Future and Option segment and is a part of SENSEX and NIFTY. SEBI in its order has impounded the illegal gains as mentioned above and further restricted the entities from accessing the securities market till further orders. The matter is pending before SEBI.

Conclusion

The legislative attempt of the Securities and Exchange Board of India has been commendable in terms of striking a good balance of interests amongst various kinds of investors. The intervention of the judiciary from time to time has helped refine and improve upon these laws. To answer the question that whether insider trading is legal in India- the answer would be a ‘no’. The nature of laws has made it amply clear. The legal aspect of insider trading is only the one where the law has tried to eliminate the scope of unfair advantage in form of public disclosures at every step. The transparency seeks to uphold the spirit of healthy market practices and a fair play for all.

⁴⁵ *Before SAT 2020, SCL 1001.*