LITIGATING INSIDER TRADING: DECODING EVIDENCES IN CASES UNDER SEBI (PROHIBITION OF INSIDER TRADING) REGULATIONS, 2015

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Insider trading is a grave crime since it endangers investor interests and trust in the securities market. On the other hand, the charge is serious, especially where criminal liability is involved, and therefore those accused of insider trading need adequate protection from wrongful conviction. This makes it imperative for there to be adequate and compelling evidence to substantiate a charge of insider trading. The charge of insider trading is constituted of several elements, each of which require evidence to establish or disprove. This paper examines the evidences submitted by both, the prosecution and the defence in proving or disproving each prong of the charge of insider trading, and incidentally touch upon some key discussions and debates. First, it examines the evidences taken into account by adjudicating and appellate authorities while determining if the information in question is unpublished price sensitive information. Next, it explores the evidences that attest to or refute the status of a person as an insider with possession of unpublished price sensitive information. Lastly, it decodes the evidences that rebut the presumption that an insider trading with possession of unpublished price sensitive information traded on the basis of such information.

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I. INTRODUCTION

Insider trading is the trading of securities by insiders gaining undue benefit from asymmetric access to unpublished price sensitive information (‘UPSI’). It is a grave offence – being detrimental to the integrity of the market and contrary to the interests of investors. The Securities and Exchange Board of India (‘SEBI’) has been tasked with protecting investors interests, and trust in the securities market. Fraudulent and deceptive practices like insider trading undermine this trust, since “the typical investor would desert the market, retarding or destroying important functions of the stock market such as capital formation”, if persons in possession of insider information have an unchecked and consistent advantage over them. Further, the disparity between persons with and without access to price sensitive information causes loss of confidence by investors in markets, leading to a concurrent decline in trading. SEBI has also supported this rationale.

Insider trading laws and regulations in India are under constant amendment and overhaul; for instance, the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 (‘SEBI PITR 1992’ or ‘1992 Regulations’) were amended in 2002, and repealed in 2015 by the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015 (‘SEBI PITR 2015’ or ‘2015 Regulations’). Since then, these regulations have been amended six times between 2018 and 2020. This is because of a two-fold reason. Firstly, insider trading is a difficult charge to establish. The report of the High-Level Committee to Review the SEBI (Prohibition of Insider Trading) Regulations, 1992, under the Chairmanship of former Chief Justice N. K. Sodhi stated, “insider trading is difficult to prove and the initial burden to bring home a charge could be heavy”. Secondly, it is extremely crucial to convict insiders who engage in this practice in order to maintain the integrity of the market. The aforementioned report underscores the importance of proving the charge of insider trading in order to “send a proper

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1. JULIETTE OVERLAND, CORPORATE LIABILITY FOR INSIDER TRADING 1 (2019).
2. See The Securities and Exchange Board of India (Prohibition of Insider Trading) (Amendment) Regulations, 2020(which prescribe remittance of penalty to the Investor Protection and Education Fund for contravention of the code of conduct).
10. The Securities and Exchange Board of India (Prohibition of Insider Trading) (Amendment) Regulations, 2020(is the most recent amendment to the regulations).
signal to the market about the seriousness of the issue”. Therefore, the importance of amending and updating insider trading regulations to establish a robust mechanism for convicting wrongdoers cannot be understated. However, insider trading being a grave charge with serious consequences such as a fine of ten lakhs to twenty-five crore rupees or three times the amount of profits made, it is equally important to adequately defend those accused of the offence.

In consideration of the above, it is imperative to understand exactly how the charge of insider trading is litigated, and what kinds of evidence are taken into deliberation while examining a case of insider trading. Insider trading laws use broad terminology such as ‘unpublished price sensitive information’, and ‘connected person’, (which includes a person who has a connection with the company that is expected to put him in possession of unpublished price sensitive information) that make up elements of the aforementioned crime. Therefore, the burden lies on SEBI and the legal counsel of the noticee to provide concrete evidence to establish or disprove these charges. For instance, SEBI would have to furnish evidence to prove that the information in question was indeed price sensitive. Conversely, the noticee would have to submit evidence to rebut the presumption that he traded to gain undue advantage of the UPSI in his possession. In this paper, I decode the different categories of evidence relied upon by legal counsels that correspond to different elements of the charge of insider trading. In this vein, each part examines an extensively argued element of the charge of insider trading. Therefore, this paper explores how authorities strike a balance between achieving a robust insider trading mechanism while also providing an adequate defence to those accused of such a grave charge.

In Part I, I examine the evidence and parameters considered by adjudicating authorities and courts while deliberating whether the information under consideration is UPSI. The parameters include firstly, the total income, market capitalisation, and financials of the company. Secondly, the information’s effect on the functioning, operation, and reputation of the company and its promoters. Thirdly, the actual price fluctuations caused by the publication of the information. In Part II, I examine the evidences taken into account to determine whether a noticee is an insider or has possession of UPSI, including circumstantial evidence, the role and position of a person within the company, and their trading patterns. In Part III, I decode the evidences presented to refute the presumption that an insider in possession of UPSI traded on the basis of this information to gain unfair advantage. In the conclusion, I demonstrate that authorities rely on a myriad of different evidences to establish a strong probability of the commission of insider trading.

II. DETERMINING IF INFORMATION IS UPSI

SEBI PITR, 2015 prohibits an insider to communicate, provide, or allow access to UPSI, or for any person to procure the same from an insider. Most often the first issue in

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12 Id., 2.
13 Securities Exchange Board of India Act, 1992, §15G.
14 The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, Regulation 2(1)(n).
15 Id., Regulation 2(1)(d).
16 Id., Regulation 3.
consideration in cases of insider trading is whether the information in question is UPSI.\footnote{See, e.g., Securities and Exchange Board of India, In Re: Insider Trading in the Scrip of Multi Commodity Exchange of India Limited, WTM/MPB/EFD/116/2018, ¶13 (August 29, 2018).} Regulation 2(1)(n) of the SEBI PITR 2015 defines UPSI as follows:

“(n) “unpublished price sensitive information” 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; and
(vi) material events in accordance with the listing agreement”.

Therefore, not only must the information be unpublished, it should also be likely to have a material impact on the price of the securities.\footnote{Chandravijay Shah, \textit{Importunate Need to Check Insider Trading}, 19 Chartered Secretary 641 (1989).} The vagueness in the term ‘likely’,\footnote{The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, Regulation 2(1)(n).} leaves significant discretion with the Adjudicating Officer and appellate courts. Whether the information was published is not often heavily litigated but may have some room for discussion.\footnote{Rajat Sethi & Sarangan Rajeshkumar, \textit{The Conundrum Of “Unpublished Information” Under The Insider Trading Regulations}, MONDAQ, March 16, 2021, available at https://mondaq.com/article/the-conundrum-of-unpublished-information-under-the-insider-trading-regulations-115618860.} Authorities have been strict in holding that media reports of speculative nature are not to be considered as having ‘published’ UPSI,\footnote{Securities and Exchange Board of India, In Re: Poonam Haresh Jashnani, Adjudication Order No. Order/PM/NK/2020-21/8082, ¶27 (June 30, 2020).} because they are not specific in nature and therefore cannot qualify as information available in the public domain. When a reader could not have deduced the implications of the information in a media report depending on their exposure to the subject matter covered in it, due to the lack of precise facts or specificity of information, the report is said to be speculative.\footnote{Id.} Therefore, it would not count as a publication of UPSI since it does not disseminate precise or specific information into the public domain, based on which an interested investor can make investment decisions. By contrast, news reports by financial newspapers like Economic Times, containing specific, precise, and comprehensive facts of the UPSI can be considered as evidence of publication of UPSI.\footnote{Securities and Exchange Board of India, In Re: Trading in the scrip of 63 Moons Technologies Limited, Order No. WTM/MPB/EFD/ 129/2018 (January 31, 2018).} In Re: Trading in the scrip of 63 Moons Technologies Limited, SEBI held that the newspaper article in question was not speculative because it contained precise facts with respect to the show cause notice (which was the UPSI).\footnote{Id.} It mentioned the specific details in the
show cause notice about the allegations against the accused as well as its potential consequences. The article mentioned that if the accused failed to satisfactorily reply to the show cause notice, its exemptions would be withdrawn, which could lead to loss of reputation and payment default. Being so detailed, the article was not speculative.25

On the other hand, whether the information was price sensitive is more excessively argued out in front of authorities.26 It is not adequate for the information to simply fall within the scope of the categories listed in Regulation 2(1)(n) since the word ‘ordinarily including’ implies that those categories of information usually, but not necessarily, are UPSI. The word ‘ordinarily’ suggests that these categories are not mandatorily or by default designated as UPSI, but rather generally have a propensity to fall under the umbrella of the term due to the nature of the information. Therefore, the criteria that the information is likely to affect price must still be evidenced even in cases of information falling within one of the categories mentioned in Regulation 2(1)(n).27 In re Emami Limited and Ors. (‘Emami Limited’),28 the Adjudicating Officer accepted the contention that merely because an event was listed under Regulation 2(1)(n) does not mean such information is UPSI by default. The materiality of its potential price impact must also be demonstrated. In this regard, courts look at the following evidence to establish whether information could have a material price impact, and therefore be UPSI.

A. TOTAL INCOME, MARKET CAPITALISATION, AND IMPACT ON FINANCIALS

In a case involving mergers or acquisitions or entering into contracts for business activities,29 the value of the deal relative to the total income of the company, its market capitalisation, and its possible impact on the company’s financials,30 are all important factors to ascertain the likely price impact of the information pertaining to the deal. This is because such information can significantly influence investor conduct, which triggers a cascading material impact on price.31

Information about the business activities of a company can signal to investors the future performance of the company or the confidence and capabilities of the directors of the company. In turn, it could drive up the price of the securities of the company due to anticipation of future favourable returns and good performance. On the flip side, if the business activities or plans for mergers or amalgamations are inconsequential to the overall performance of the company, information pertaining to it may not have a material impact on price since investor conduct would remain unchanged.

In Emami Limited, the Adjudicating Officer considered that the Kesh King Acquisition by Emami had a value of Rs. 1681 crores, and while this was only six percent of

25 Id.
26 Sethi & Rajeshkumar, supra note 20.
28 Id., ¶34.
29 See Securities Appellate Tribunal (Mumbai Bench), J.C. Mansukhani v. Securities and Exchange Board of India (July 26, 2016).
30 Id.
Emami’s market capitalisation, the total income of Emami in the March, 2015 quarter was only Rs. 524 crores.\(^{32}\) Further, ‘acquisitions’ are listed as ordinarily qualifying to be UPSI under regulation 4(1) of the PIT Regulations, 2015. Lastly, the publishing of the UPSI had caused a significant price movement on stock exchanges. All these factors combined led the Adjudicating Officer to hold that the Kesh King acquisition would have a substantial impact on Emami’s financials, and could therefore be considered price sensitive.\(^{33}\)

Therefore, it is the substantial nature of the transaction that signals its likely impact on price. There is a difference between substantial business activities and normal business activities. In Re: Jubilant Life Sciences Limited (‘Jubilant Life’),\(^{34}\) the Adjudicating Officer rejected the submission of the noticee that since the business being sold constituted only 0.37% of the consolidated fixed assets of the noticee, the information regarding the sale was not UPSI.\(^{35}\) Instead it was held that since the entire business of a subsidiary was being sold, and not only some portion or division of the business, the information regarding the sale was price sensitive.\(^{36}\) In other cases, certain business activities were seen as normal activity of the company that would not cause a significant impact on the price of its securities.\(^{37}\) For instance, in Gujarat NRE Mineral Resources Ltd. v. SEBI, it was held that information about an investment company acquiring coal mining leases by selling a part of its investments was not price sensitive, since earning income by buying and selling securities was the normal activity of an investment company.\(^{38}\) Not every such transaction would have a material impact on the price of its securities. Similarly, if a manufacturing company bought raw materials or sold its products, this information would be normal business activity and not price sensitive.\(^{39}\) Therefore, information only qualifies as UPSI when the monetary value of the transaction crosses a certain threshold,\(^{40}\) i.e., when it is substantial enough (unlike normal business activities) to impact the price of securities. For instance, in J.C. Mansukhani v. SEBI,\(^{41}\) it was held that while not every contract for supply of goods manufactured by a company would be price sensitive, however, in this case the two contracts entered into by the company constituted sixty five percent of the total orders received by the company in that year. Therefore, the monetary quantum of the contracts was substantial enough that its disclosure could cause a material impact on the price of the company’s securities.

To conclude, when the value, monetary or otherwise, of a transaction or deal is substantial relative to the total income of a company, or the total orders received by the company, or other similar factors, it has the potential to materially affect investor conduct and behaviour.

\(^{33}\) Id.
\(^{35}\) Id., ¶80.
\(^{36}\) Id.
\(^{37}\) Securities Appellate Tribunal (Mumbai Bench), Gujarat NRE Mineral Resources Ltd. v. Securities and Exchange Board of India (November 18, 2011).
\(^{38}\) Id., ¶4.
\(^{39}\) Id.
\(^{40}\) Securities Appellate Tribunal (Mumbai Bench), Mr. Anil Harish v. Securities and Exchange Board of India (June 22, 2012).
\(^{41}\) Securities Appellate Tribunal (Mumbai Bench), J.C. Mansukhani v. Securities and Exchange Board of India (July 26, 2016).
Therefore, it is classified as price sensitive. On the other hand, when the transaction or deal is of a routine nature and is a normal business activity of a company, it cannot be said to be price sensitive as it would not materially affect investor behaviour.

B. EFFECT ON FUNCTIONING, OPERATION, AND REPUTATION OF COMPANIES AND PROMOTERS

If the information could have a significant impact on the functioning or operation of a company, then it can be said to have a material impact on the price of the securities of that company. This is because the functioning of a company significantly impacts its profitability and the interests of its shareholders. Therefore, impediments to the functioning of a company could have a negative impact on its share prices and vice versa. Further, the information with respect to one company can also be considered as UPSI of its associate companies where they share the same holding company and management, or holding or group companies. When such information could cause loss of reputation and credibility of promoters involved, it can be considered to be UPSI.

The aforementioned observation was also recognised in, In Re: Insider Trading in the Scrip of Multi Commodity Exchange of India Limited (‘Multi Commodity Exchange’). In this case, National Spot Exchange Limited was given an exemption from operation of the Forward Contracts (Regulation) Act, 1952 (‘FCRA’) on its platform. However, a show cause notice was issued pointing to certain discrepancies which could result in withdrawal of the exemption of non-applicability of the FCRA to one day forward contracts. Since a majority of the contracts traded on National Spot Exchange Limited were of such nature, the withdrawal of the exemption would affect its functioning and operation. Therefore, the information contained in the show cause notice was held to be UPSI. Further, the information could have an adverse impact on the price of the securities of the associate company of National Spot Exchange Limited, Multi Commodity Exchange of India Limited, which was owned by the same holding company as National Spot Exchange Limited. This is because the definition of price sensitive information includes information which indirectly affects the price of the securities of a company.

The same principle was also upheld in Jubilant Life, where the holding company

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44 (“It is noted that FTIL was the holding company of NSEL holding 99.99% shares therein. Any adverse impact on the business and operations of NSEL was likely to have a contagion, cascading and materially adverse impact directly or indirectly on the holding company - FTIL. In my view, the possibility of serious challenges to be faced by NSEL which is almost wholly owned by FTIL had the potential to materially affect the price of the securities of FTIL when disclosed to public. Further, the same would have also led to a loss of reputation and credibility of the promoters and management of FTIL. In view of the above, considering the nature, extent and timing of the information relating to issuance of SCN by DCA to NSEL and its possible implications, I find that the said information was a price sensitive information in respect of FTIL.”)
46 Id., ¶19.
was obligated to disclose price sensitive information under Clause 36 of the Listing Agreement.\textsuperscript{47} Here, there were warning letters stating a violation of certain regulations. This could lead to the US Food and Drug Administration withholding approval of pending drug applications, or refusing admission of articles into the US. This information could have an adverse cascading effect on the business operation and profitability of the holding company.\textsuperscript{48} It could also lead to loss of reputation of the holding company and its promoters. Therefore, it could be said to be price sensitive information since “company reputations are real, present and often very substantial assets”,\textsuperscript{49} and damage to a company’s reputation can reduce its value. Further, information about the imposition of duties on the company by a government agency could also have a direct impact on the pricing of the product exported, and by extension the profitability of the company. Such information was held to be UPSI.

Therefore, any evidence proving that the information in deliberation could affect the functioning, operation, and reputation of a company, such as sanction or withdrawal of exemptions, would successfully qualify the information to be UPSI.

\textbf{C. PRICE MOVEMENT OF SECURITIES ON STOCK EXCHANGES CAUSED BY PUBLISHING UPSI}

In cases where the UPSI is subsequently published,\textsuperscript{50} or where news reports have been broadcasted about the information, authorities analyse price fluctuations immediately before and after the publication of information to determine whether it was price sensitive.\textsuperscript{51} For instance, in cases of mergers, authorities study changes in the price of securities the day before and after disclosure of proposal of the merger.\textsuperscript{52} There need not be absolute certainty or finality to the information.\textsuperscript{53} In Re: Haresh Parmanand Jashnani (‘Haresh Parmanand’),\textsuperscript{54} the acquisition of additional twenty six percent of the voting share capital under open offer, that would make the acquirer a majority stakeholder in the target company, was considered to be UPSI. This is because on the date of the public announcement, the scrip reached a high of Rs. 2940.55 from Rs. 2557 previously, and the number of trades executed rose by 205.54\%.\textsuperscript{55} Therefore, the information of the acquisition had a material price impact on the securities.

\textsuperscript{48}\textit{Id.}, ¶31.
\textsuperscript{50}See \textit{e.g.}, Securities Appellate Tribunal (Mumbai Bench), J.C. Mansukhani v. Securities and Exchange Board of India (July 26, 2016).
\textsuperscript{52}Securities and Exchange Board of India, In Re: Rohit Premkumar Gupta and Ors., Adjudication Order No. Order/AA/AR/2020-21/7796-7802, ¶16 (May 29, 2020).
\textsuperscript{55}\textit{Id.}, ¶22.
In Emami Limited, in order to ascertain the materiality of the information’s potential price impact, the Adjudicating Officer analysed the price movement of the concerned securities on Bombay Stock Exchange (based on its preliminary report). The Adjudicating Officer observed price movement as a result of the media flash on ET Now at 13:50 titled “Emami is in advanced talks to buy Kesh King brand from Himachal Pradesh SBS Biotech. Deal to be valued around Rs. 1800 crores”.

The Adjudicating Officer noted that the price of the scrip opened at Rs. 931 on May 4, 2015, and closed at Rs. 1063 on June 2, 2015. Further, on May 14, 2015, Emami had made a disclosure to stock exchanges about the proposed acquisition of shares under regulation 10(5) of SAST Regulations, 2011. On the next day, the price of the scrip rose from Rs. 936.65 to Rs. 1049 and closed at Rs. 1020. Both of these price movements suggested that the information pertaining to the Kesh King Acquisition indeed had a material effect on price, and would therefore be price sensitive information. Similarly, in Jubilant Life, the price fluctuation in the shares of the holding company upon disclosure of warning letters to stock exchanges was evidence that the information was price sensitive.

Therefore, price fluctuations of the concerned securities on stock exchanges immediately upon publication of the information in consideration, whether it be about acquisitions or sanctions by regulatory authorities, is one of the surest ways to demonstrate that the information is UPSI.

This part demonstrates examples of information that is designated as UPSI. It includes information impacting the financials of a company, information about its functioning and operation, and information causing price movement on stock exchanges. Other miscellaneous examples of UPSI include ‘sale of shares in high volume by a promoter’, because this causes loss of investor confidence in the company, and therefore could drive down the price of its securities.

III. DETERMINING IF THE NOTICEE WAS AN INSIDER IN POSSESSION OF/ WITH ACCESS TO UPSI

The second issue that authorities consider is whether the concerned noticees an insider. Insiders can be connected persons, including the family of the insider, from whom UPSI was obtained. The definition of the term ‘insider’ in Regulation 2(e)(i) of the SEBI PITR

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57 Id., ¶37.
58 Id.
59 Id.
63 The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, Regulation 2(1)(n).
64 The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, Regulation 2(1)(f).
1992 is as follows:\(^{65}\)

“(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 is reasonably expected to have access to unpublished price sensitive information in respect of securities of company, or

ii) has received or has had access to such unpublished price sensitive information”

The term ‘insider’ is defined under Regulation 2(1)(g) of the SEBI PITR 2015 as follows:\(^{66}\)

“(g) “insider” means any person who is:

i) a connected person; or

ii) in possession of or having access to unpublished price sensitive information;”

The 2015 Regulations do not have retrospective application,\(^{67}\) and are only applicable from May 15, 2015, onwards.\(^{68}\) For a cause of action arising prior to this date, the 1992 Regulations apply.\(^{69}\) The reason for the change in the legislation was to urgently strengthen the legal framework of insider trading. The key difference between the 1992 Regulations and the 2015 Regulations is that in Regulation 2(e)(i) of the 1992 Regulations, an insider is defined as someone who is a connected person ‘and’ is reasonably expected to have access to unpublished price sensitive information in respect of securities of a company. Contrariwise, as per Regulation 2(1)(g) of the 2015 Regulations, an insider is defined to be a connected person or a person in possession of or having access to unpublished price sensitive information. The 2015 Regulations use the disjunctive phrase ‘or’ while the 1992 Regulations use the conjunctive word ‘and’.\(^{70}\) This means that under the 1992 Regulations, both the limbs of the definition have to be satisfied in order for one to be considered an insider. Comparatively, under the 2015 Regulations, only one of the limbs has to be satisfied. For litigating a case where the 1992 Regulations apply, the definition of ‘insider’ is narrower compared to the wide net that the 2015 Regulations cast. A notable example of the wide ambit of the 2015 Regulations is where persons acquainted with one another through social media such as Facebook, and having interaction through likes on social media, were held to be connected persons and therefore insiders.\(^{71}\) Regulation 2(1)(d)(i) stipulated that a person can be an insider by way of their association in any capacity or frequent communication with officers of a company. Such association or communication, according to SEBI, includes communication in a social capacity such as through likes on the social media.\(^{72}\) The difference between the two regulations is relevant since it affects who can qualify as an insider.

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\(^{65}\) The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992, Regulation 2(e)(i).

\(^{66}\) The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, Regulation 2(1)(g).


\(^{68}\) Id., Regulation. 12.

\(^{69}\) Chintalapati Srinivasa Raju & Ors v. Securities and Exchange Board of India, AIR 2018 SC 2411, ¶10.


\(^{71}\) Id.
The following are the evidences authorities consider while determining if a person is an insider and/or has possession of UPSI.

A. CIRCUMSTANTIAL EVIDENCE SHOWING POSSESSION OR LACK OF POSSESSION OF UPSI

In some cases, there may be direct evidence of the possession of UPSI by the noticee. In cases of mergers and acquisitions, the possession of UPSI can be established if the companies involved themselves disclose to SEBI the list of employees who were privy to UPSI, or if statements of senior employees attest to the fact that the noticee worked with them on the transaction.\textsuperscript{73} When there is direct evidence, the veracity of circumstantial evidence is greatly diminished. However, often times there is a dearth of direct evidence showing that a person had possession of UPSI.\textsuperscript{74} Further, what constitutes as direct evidence in the context of possession of UPSI is selective. For instance, in \textit{V.K. Kaul v. The Adjudicating Officer, Securities and Exchange Board of India} (\textit{V.K. Kaul}),\textsuperscript{75} the affidavits of insiders from whom the noticee was alleged to have obtained UPSI were not considered direct evidence. While the insiders in their affidavits stated that they did not provide UPSI to the noticee, they also cautioned that since the matter had occurred three years prior, they may not be able to recollect the minute details of the same and whether the noticee was contacted or not.\textsuperscript{76} Therefore, the Securities Appellate Tribunal permitted circumstantial evidence to be taken into consideration.\textsuperscript{77}

The dearth of direct evidence is especially acute when the person is a relative of the insider and evidence of communication of UPSI needs to be found. In these cases, courts have often accepted circumstantial evidence to establish or disprove that a person had possession of UPSI. For instance in, \textit{In re Shreejesh Harindranath and Ors} (\textit{Shreejesh Harindranath}),\textsuperscript{78} in order to establish that the brother of the insider was an immediate relative as per the definition in Regulation 2(1)(f) of the SEBI PITR 2015, it had to be proved that he consulted the insider in taking decisions to trade in securities.\textsuperscript{79} While the Adjudicating Officer did not find any direct evidence of communication of UPSI, it was noted that the brother had bought shares of the company on the same days as the insider,\textsuperscript{80} which could not have been a coincidence since he had not held any shares of the company before then. This indicated to the Adjudicating Officer that he was acting on the advice of the insider. The Adjudicating Officer did not accept the submission that the shares were bought in response to a favourable news report stating that the industry was performing well, as the report was two months old by the time the shares were bought.\textsuperscript{81} Therefore,

\textsuperscript{73}Securities and Exchange Board of India, In Re: Utsav Pathak, Adjudication Order No. AO/SBM/EAD-1/12/2019 (August 30, 2019).
\textsuperscript{74}Rajat Sethi et al., \textit{Insider Trading: Circumstantial Evidence is Evidence Enough?}, Vol.32, NLSI Rev., 206 (2020).
\textsuperscript{75}Securities Appellate Tribunal (Mumbai Bench), V.K. Kaul v. The Adjudicating Officer, Securities and Exchange Board of India (October 8, 2012).
\textsuperscript{76}Id., ¶12.
\textsuperscript{77}Id., ¶14.
\textsuperscript{78}Securities and Exchange Board of India, In Re: Shreejesh Harindranath and Ors., Adjudication Order No. EAD-7/BD /NR/2020-21/7794-95, ¶16 (May 29, 2020).
\textsuperscript{79}The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, Regulation 2(1)(f).
\textsuperscript{80}Securities and Exchange Board of India, In Re: Shreejesh Harindranath and Ors., Adjudication Order No. EAD-7/BD /NR/2020-21/7794-95, ¶32 (May 29, 2020).
\textsuperscript{81}Id., ¶34.
it was considered unreasonable to contend that the investment decision was based on the news report. Comparatively, the time of purchase of the shares was much closer to the date on which the financial results of the company, i.e., the UPSI, came into existence. This is further corroborated by the fact that the noticee sold the shares on the very next day after the UPSI was published.

Circumstantial evidence must typically sketch a viable scenario which points to the insider’s guilt, and insufficient evidence from which reasonable inferences cannot be made would fail to land up in a conviction. For instance, in the Supreme Court decision of Chintalapati Srinivasa Raju v. Securities and Exchange Board of India (‘Chintalapati Srinivasa’), the appellant was an executive director of Satyam Computer Services Limited (‘SCSL’) from 1993 to 2000, a non-executive director from 2000 to 2003, and was a relative of Ramalinga Raju. The appellant was confined to operating a joint venture company of SCSL, namely, Satyam Enterprise Solutions Private Limited (‘SES’) in which he owned twenty percent shareholding. In 1999, SES and SCSL merged and the appellant received 8,00,000 equity shares in SCSL. Fabrication of financial statements of SCSL i.e., the UPSI, came into existence on March, 31 2001 when the appellant was a non-executive director. The appellant sold his shares from February 22, 2001 to December, 2008. Subsequently, it was alleged that the appellant, being an insider, took unfair advantage of the UPSI in his possession, the knowledge that the books of account of SCSL were fabricated, to sell his shares at an inflated value. The appellant had no role in the fraud itself. This case was decided on the 1992 Regulations which adopted a narrowed definition of ‘insider’ as explained above.

The Court relied on circumstantial evidence to establish that the appellant could not reasonably be expected to have UPSI. The UPSI in question in this case was the fabrication of financial statements, and there was evidence to suggest that this fabrication was concealed from the Board of Directors which the Appellant was a part of. The Court relied on the fact that the appellant had not been held to have violated the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to the Securities Market) Regulations, 2003 due to lack of evidence. Therefore, the court held that due to lack of foundational facts, reasonable inferences pointing to the appellant possessing knowledge of UPSI could not be drawn.

Another alternative is to scrutinise the activities of the noticee with respect to the event considered as the UPSI. There is a difference in trading in securities due to possession of UPSI, and trading in securities based on predictions and presumptions of a company’s future business activities. For instance, in transactions such as mergers or acquisitions, a host of different parties are involved in the transaction cycle, from managers in the acquirer or target companies, to legal advisors from law firms, and other market participants. Through examining their involvement in the transaction cycle, which could include the emails they exchanged with other parties involved

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82 Chintalapati Srinivasa Raju &Ors v. Securities and Exchange Board of India, AIR 2018 SC 2411.
83 Id., ¶3.
84 Id., ¶39.
85 Id., ¶12.
86 Id.
87 Id., ¶21.
or letters and affidavits by the acquirer or target companies and their officials evidencing the involvement of the noticee in the transaction, courts can conclude a reasonable likelihood of the noticee being in possession of the UPSI. 89

For instance, in Haresh Parmanand, 90 the UPSI came into existence when the acquirers sent preliminary instructions to Platinum Partners regarding an open offer for the acquisition of the target company. Mr. Nishat Gupte, the Global Business Development Manager of the acquirer was alleged to be privy to the information till the date of its public announcement. 91 To establish that Mr. Nishat was in possession of UPSI, the Adjudicating Officer relied on emails exchanged between him and other officers involved in managing the open offer. 92 The email dated July 31, 2013, revealed that Mr. Nishat advised the manager to the offer to update him on share price movements every week. 93 Emails also revealed that Mr. Nishat was setting the agenda for meetings to consider the various options, such as preferential allotment or creeping acquisitions, that the acquirers could adopt. Other emails, minutes of board meetings, and letters by the acquirer company disclosed that Mr. Nishat was involved in discussions with external advisors. 94 These discussions were for considering potential alternatives for the consolidation of share capital in the target company. This demonstrated to the Adjudicating Officer that Mr. Nishat was part of the core team handling the acquisition from the beginning of the transaction cycle. Therefore, it was highly likely he had access to the UPSI before its public announcement.

These cases are testament to the fact that insider trading charges are difficult to establish due to lack of evidence. Unless there is direct evidence proving that a person had possession of UPSI, which is rare, courts rely on circumstantial evidence, 95 to adjudge whether a person could be reasonably expected to be in possession of UPSI. 96 As demonstrated above, this can be done by scrutinising the timing of the trading of securities relative to the timing of publication of UPSI, past investment trends of the noticee, adjoining factors like publication of news reports, and findings of other judicial decisions made on the same set of facts. However, there has been debate about the reliability of circumstantial evidence in establishing a charge as serious as insider trading – with notable critique stating that SEBI failed “to strike the right balance regarding the standard of proof required for establishing such offence”. 97 This has been argued because in cases like V.K. Kaul, the Securities Appellate Tribunal relied wholly on circumstantial evidence to hold the noticee guilty of insider trading, while placing the burden of providing direct evidence on the noticee to prove his innocence. Further, courts have relied on trading patterns to

91 Id., ¶1.
92 Id., ¶45.
93 Id., ¶41.
94 Id., ¶42.
95 N. K. SODHI COMMITTEE, supra note 11.
97 SETHI, supra note 75.
establish guilt, although they did not necessarily prove that the insider had communicated UPSI, since the tippers were “engaged in financial journalism/services and could have received the information from public sources”. SEBI has also gone as far as to hold certain individuals as connected persons merely because they were connected on social media. Therefore, it has been argued that there is an overreliance on circumstantial evidence in insider trading cases.

B. ROLE AND POSITION OF THE NOTICEE WITHIN THE COMPANY CONCERNED

When a person occupies a certain high-level position in a company, there is a reasonable likelihood that such a person had access to UPSI. In the aforementioned case of Haresh Parmanand, Mr. Nishat was the Global Business Development Manager (M&A) of the person acting in concert with the acquirer company. The Adjudicating Officer stated that when an acquisition is by agreement with the promoters/ shareholders of the target company, connected persons of both the target company and the acquirer company could have possession of UPSI. Alternatively, in hostile takeovers persons connected to the acquirer company or the persons acting in concert would be privy to UPSI. Therefore, Mr. Nishat as the Global Business Development Manager (M&A) of the person acting in concert, by virtue of his business connection to the person acting in concert and his position within the company could reasonably be expected to be privy to the UPSI of the acquisition.

Alternatively, the role and position of a noticee could prove the opposite. Where the position of the noticee within a company is such that he could be barred or prevented from access to certain information only a few officials are privy to, his position could be evidence of the fact that he did not have access to UPSI. For instance, in Chintalapati Srinivasa, where the narrow definition of ‘insider’ under the 1992 Regulations was in operation, the court stipulated that the appellant was not a promoter, and therefore could not be roped in on the allegation that as a promoter he would have known of the fraudulent activities of the company and act on such knowledge to sell off his shareholding. The court relied on annual reports where the appellant signed his name as a director and not a promoter, and the fact that the lock-in period for trading shares during the merger of SES into SCSL which was applicable to promoters was not enforced against the appellant. Further, the appellant was no longer an executive director when the UPSI actually came into existence in 2001. The appellant was only a non-executive director. Since a non-executive director is not involved in the day-to-day affairs of the company it is less likely he would have access to UPSI. The appellant in this case had only attended six out of ten board meetings, and was not involved in the formulation of business or diversification plans. Given that

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98 Securities and Exchange Board of India, In the matter of Insider trading in the scrip of CRISIL Limited, Adjudication Order No. AO/SBM/EAD-1/12/2019 (August 30, 2019).
99 Id., ¶209.
102 Id.
103 Chintalapati Srinivasa Raju &Ors v. Securities and Exchange Board of India, AIR 2018 SC 2411.
104 Id., ¶3.
105 Id., ¶13.
106 Id., ¶16.
the appellant’s role and position in the company was such that he could not have been privy to the fraudulent activities that had been designated as UPSI in this case, he could not be said to have reasonably been in possession of UPSI.

On the flip side, if the insider was present during a board meeting where UPSI was discussed, then he is said to have possession of the UPSI. In Jubilant Life, the minutes of the board meeting revealed that the noticees in question had attended a board meeting whose agenda included the sale of the entire business of a subsidiary. Since the board meeting took place on February 6, 2014, and the UPSI remained unpublished till March 3, 2014, the trade executed by the noticees on February 28, 2014, was done when they had possession of UPSI and therefore they were insiders.

In cases regarding financial results, included in the definition of UPSI under Regulation 2(1)(n)(i) of the SEBI (PIT) Regulations, 2015, the members of the Finance and Accounts Departments are generally assumed to be in possession of UPSI since they are tasked with preparing the draft financial results. In Shreejesh Harindranath, the noticee who was the general manager of financial planning analysis and treasury was concluded to be an insider with respect to the financial results of the company.

Therefore, the role and position of a person could indicate their proximity to UPSI, and the likelihood that they were privy to it. Members of finance or accounts departments, directors attending board meetings amongst others are likely to be privy to UPSI.

C. ANALYSIS OF TRADING PATTERN

Courts often scrutinise the trading patterns of noticees to ascertain whether they traded in securities with the possession of UPSI. The trading patterns of such noticees provide foundational facts from which reasonable inferences can be drawn. One way of doing so is comparing the trading patterns of the noticee to the other insiders and other outsiders to find similarities.

In Chintalapati Srinivasa, the Court found that the appellant accused of trading securities in possession of UPSI had still retained a substantial shareholding while the promoters with UPSI had already disposed it two years prior. When the appellant did finally sell of a substantial portion of his shareholding, all other outsider shareholders were doing the same in reaction to the news reporting that SCSL’s merger with Maytas Infra Limited and Maytas

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108 Id., ¶93.
111 Chintalapati Srinivasa Raju &Ors v. Securities and Exchange Board of India, AIR 2018 SC 2411.
112 Id., ¶14.
Properties was cancelled.\footnote{id, ¶14} Prior to this, the appellant had only sold shareholding as and when there was a genuine business requirement to fund a venture capital investment business,\footnote{id, ¶13} and the sale proceeds were actually used for this purpose. This was unlike the other insiders with UPSI who sold their shares in one go.\footnote{id}

In Mrs. Chandrakala v. Securities and Exchange Board of India (‘Chandrakala’),\footnote{Securities Appellate Tribunal (Mumbai Bench), Mrs. Chandrakala v. Securities and Exchange Board of India (January 31, 2011).} the trading patterns of the appellant revealed that she both bought and sold shares during the period that the price sensitive information was unpublished. It was held that a person acting on UPSI would only buy shares and not sell them, since the UPSI revealed positive information about issue of dividend and bonus shares.\footnote{id, ¶7} Further, person in possession of UPSI would likely only buy shares before the price sensitive information was published and then immediately offload the shares upon publication.\footnote{id} However, the appellant in this case bought and sold shares both prior to and after the publication of the price sensitive information.\footnote{id} Therefore, the appellant was not held to have committed insider trading.

\textbf{D. PREPONDERANCE OF PROBABILITIES}

In the absence of adequate evidence, a case of insider trading cannot be made out.\footnote{ECONOMIC TIMES (Reena Zachariah), \textit{SEBI finds it difficult to crack down on insider trading}, October 21, 2009, available at https://economictimes.indiatimes.com/sebi-finds-it-difficult-to-crack-down-on-insider-trading/articleshow/5143683.cms?from=mdr (Last Visited on September 15, 2021).} Since insider trading is a grave charge, there must be a high preponderance of probabilities to establish a violation of insider trading regulations.\footnote{id} This was held by the Securities Appellate Tribunal in the case of \textit{Dilip S. Pendse v. Securities and Exchange Board of India}.\footnote{Securities Appellate Tribunal (Mumbai Bench), Dilip S. Pendse v. Securities and Exchange Board of India (November 19, 2009).} The Securities Appellate Tribunal cited the case of \textit{Mousam Singha Roy v. State of West Bengal},\footnote{Mousam Singha Roy v. State of West Bengal,2003(12) SCC 377.} which held that the more serious an offence is, the higher is the degree of proof required to secure a conviction. In Emami Limited, the adjudicating officer noted that insider trading is a serious charge and there was a higher degree of proof required for the preponderance of probability. Keeping this in mind, the Adjudicating Officer gave the noticees a benefit of the doubt even though they were held to be insiders because the noticees were able to submit evidence to prove that the transfer was an \textit{inter se} transfer between promoters. Such a transaction has been classified as proof of innocence under Regulation 4(1). The evidence included proof of disclosures under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, and pre-clearance orders by Emami submitted to the noticees. These evidences pointed to the likelihood that the transaction was a
conscious and informed trade decision which was pre-arranged. Further, there was “no material available on record to show that the UPSI was in access”,\textsuperscript{124} by the noticees which could point to the likelihood that they acted on asymmetric access to UPSI. Therefore, the preponderance of probabilities was in favour of the innocence of the noticees.

Therefore, authorities err on the side of caution while weighing the probabilities, especially where there is a dearth of facts.

IV. DEMONSTRATING THAT THE INSIDER DID NOT TRADE ON THE BASIS OF UPSI

To rebut the presumption of insider trading, it must be proved that the noticee did not trade in order to gain an unfair advantage due to possession of UPSI, essentially benefiting from the information asymmetry unfairly.\textsuperscript{125} In Chandrakala, the Securities Appellate tribunal held:\textsuperscript{126}

“The trades executed should be motivated by the information in the possession of the insider. […] If an insider shows that he / she did not trade on the basis of unpublished price sensitive information and that he / she traded on some other basis, he / she cannot be said to have violated the provisions of regulation 3 of the regulations”.

According to the Securities Appellate Tribunal in Rajiv B. Gandhi and Ors. v. SEBI,\textsuperscript{127} when an insider trades in the securities of a listed company, there operates a presumption that he traded on the basis of UPSI. The burden of proof is on the insider to rebut this presumption,\textsuperscript{128} and to demonstrate that the insider traded not on the basis of UPSI but for some other reason.\textsuperscript{129} Therefore, it falls upon the legal counsel of an insider to gather evidence suggesting that the insider traded in the securities of a listed company not on the basis of UPSI.\textsuperscript{130}

The SEBI Act, 1992 states the following:\textsuperscript{131}


\textsuperscript{126}Securities Appellate Tribunal (Mumbai Bench), Mrs. Chandrakala v. Securities and Exchange Board of India, ¶7(January 31, 2011).

\textsuperscript{127}Securities Appellate Tribunal (Mumbai Bench), Rajiv B. Gandhi v. Securities and Exchange Board of India (May 9, 2008).

\textsuperscript{128}Securities Appellate Tribunal (Mumbai Bench), Manoj Gaur v. Securities and Exchange Board of India (October 3, 2012).

\textsuperscript{129}The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, Regulation 4(1): (“When a person who has traded in securities has been in possession of unpublished price sensitive information, his trades would be presumed to have been motivated by the knowledge and awareness of such information in his possession […] it would be open to the insider to prove his innocence by demonstrating the circumstances mentioned in the proviso, failing which he would have violated the prohibition.”)

\textsuperscript{130}Securities Appellate Tribunal (Mumbai Bench), Rajiv B. Gandhi v. Securities and Exchange Board of India(May 9, 2008).

\textsuperscript{131}Securities Exchange Board of India Act, 1992, §12A.
“12A. No person shall directly or indirectly—

(d) engage in insider trading;

(e) deal in securities while in possession of material or non-public information or communicate such material or non-public information to any other person, in a manner which is in contravention of the provisions of this Act or the rules or the regulations made thereunder;

15G. If any insider who, — (i) either on his own behalf or on behalf of any other person, deals in securities of a body corporate listed on any stock exchange on the basis of any unpublished price-sensitive information; […] shall be liable to a penalty which shall not be less than ten lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of insider trading, whichever is higher”.

Further, Regulation 4 of the SEBI PITR 2015 states:132

“4. (1) 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”

Therefore, to refute the presumption of guilt, the following evidences are looked into.

A. THE EXISTENCE OF THE UPSI WAS AN EVENT SUBSEQUENT TO DISCLOSURE OF INTENTION TO TRADE BY INSIDER

When it is evidenced that an insider had the intention to trade the securities before the UPSI even came into existence, it is a logical impossibility that the insider decided to trade on the basis of the UPSI. If the disclosures made by the insider citing intention to trade the said securities pre-dates the existence of the UPSI, the insider cannot have traded on the basis of the UPSI. In Multi Commodity Exchange, the insider was a non-executive director of a company having UPSI.133 He had disclosed in the prospectus of the company’s IPO that he would sell his shares within three months of the IPO.134 The prospectus was dated February 28, 2012. The UPSI was in the form of a show cause notice, and this show cause notice was only issued on April 27, 2012, subsequent to the disclosure made in the prospectus.135 Therefore, it was held that the presumption against the insider stood rebutted.

B. CONDUCT OF THE INSIDER AND CIRCUMSTANTIAL EVIDENCE

In the past, courts have been scrutinising to adduce the reason an insider traded in securities when in possession of UPSI. When insiders buy shares during the UPSI period and sell shares immediately after the publication of UPSI that is positive information, and this is a strong preponderance of probability that they traded on the basis of UPSI to make a profit.136 For instance,
in Jubilant Life, the Court rejected the submission that the insider sold shares to fund the renovation of his house since his conduct of selling shares the very next day after obtaining UPSI suggested that the insider was trying to avoid losses after being intimated of negative news. Similarly, the court observed the conduct of the person in possession of UPSI in, In re Rohit Premkumar Gupta and Ors, the noticee was not an active investor in the equity market. Suddenly during the nine days whilst in possession of UPSI, he repurchased shares more than Rs. 1 crore in value. This indicated that he purchased such shares only when the company was on the verge of finalising a merger in order to make a profit from UPSI.

V. CONCLUSION

In this paper, I have examined in detail the evidences looked into by adjudicating and appellate authorities to satisfy or dismiss a charge of insider trading. While considering whether a given piece of information is UPSI, authorities consider information about buying/selling of a business to be UPSI if the value of that deal was substantial relative to the income of a company. They did not always hold the opposite to be true. Where the deal was a small percentage of the market capitalisation or fixed assets of a company this did not always imply that it was not UPSI due to the discretion granted by the term ‘likely’. This could indicate that authorities generally err on the side of caution while discounting a piece of information as not being UPSI, but more readily assume the opposite. Next, information about sanctions, withdrawal of exemptions, or other interference from regulatory bodies in the business of a company could have an adverse impact on the functioning and operation of these companies, which in turn could affect the profitability of the company itself and its holding company. This could lead to an adverse or material impact on the price of its securities. Therefore, such information is UPSI. Lastly, in what may be considered the surest way of evidencing that certain information is UPSI, the price fluctuations of the securities on stock exchanges immediately after the publication of the information indicates that such information is UPSI.

Next, while determining if an individual is an insider or has possession of UPSI, authorities tend to rely on circumstantial evidence due to the dearth of direct evidence in these matters. Circumstantial evidence includes instances where a relative’s trading pattern closely mirrors that of an insider, attendance in board meetings, and findings of other courts on adjacent charges related to the same set of facts. Authorities also examine the involvement of the noticee in the activity (such as mergers) giving rise to the UPSI, where emails and statements of others involved in the transaction can reveal if the noticee participated in meetings and discussions, coordinated with other stakeholders, or was a part of the team designated to handle the transaction. Further, authorities also consider whether the role or senior position of the noticee could have made him privy to sensitive information, or alternatively barred his access to that information. Those employed in the finance or accounting departments of organisations tend to have information about the financial results of the company. Evidences that could indicate one’s position in the company, with respect to greyer areas like the designation of Promoter, include

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139 Id., ¶23.
signatures on annual reports applicability of lock-in periods for trading in securities. Lastly, authorities analyse trading patterns of the noticees. When a person’s trading patterns are similar to those of other outsiders who are reacting to news reports generally available, the suspicion that they acted in possession of UPSI is diminished. The same applies when a person does not trade similar to what would be expected of an insider with UPSI as a person with positive information about the company would not sell his stake before the publication of the information and a person with negative information would not retain his stake. Ultimately, the preponderance of probabilities decides what is more likely.

While refuting the presumption that an insider traded on the basis of UPSI to gain undue advantage, authorities look at the broader facts and circumstances - for example, where an insider disclosed the intention to trade before the UPSI even came into existence, the insider could not have traded on the basis of UPSI. Alternatively, when the insider buys shares during the UPSI period and sells them immediately after the publication of UPSI which was positive information, there is a strong probability that this was done to make a profit off the knowledge of the UPSI.

To conclude, authorities are generally thorough in examining cases of insider trading. While it is a serious and grave charge, authorities largely tend to rely on a combination of different evidences that suggest the strong probability of the elements of the charge being fulfilled or not, rather than requiring irrefutable evidence of the same. Authorities rely on evidences and facts such as emails, trading patterns, statements and affidavits etc. from which an overall scenario and inferences can be extrapolated. Therefore, in order to strike a balance between implementing a robust mechanism to inhibit insider trading, and preventing overzealous convictions due to the gravity of the charge, authorities conduct careful deliberations and weigh numerous evidences to reach a decision.