INSIDER TRADING LAWS IN INDIA - PERTINENCE AND PROBLEMS

Written By ***Abhirami B[1] and Arya Kuttan[2]***

ABSTRACT

"Integrity is the essence of everything successful." This has been rightly quoted by Mr. Buckminster Fuller. Ethical trading is the point at which the Company's, the Investor's and the General Public's interests are coincided and are thought about without risking any of their interest during the course of its trade. Insider Trading is purchasing, offering or managing a security while rupturing the organization strategies or controls, in this manner breaking the trust and certainty of an organization while having Unpublished Price Sensitive Information (UPSI) about the securities. Insider trading can be legal or illegal. Legal Insider trading is the point at which the insiders of the organization exchange shares yet in the meantime report the exchange to the Securities and Exchange Board of India. Whereas, Unlawful insider trading is the point at which the insiders need to profit by the organization data at the cost of the organization. Illegal insider trading is prima facie against the concept of ethical trading. This paper recognizes various hiatus that the present regulations pertaining to insider trading has, consequential to the increase in the occurrence of number of cases recently. Such lacunaes are recognized and correlated to the effective methods deployed in other countries. This paper alsosuggests certain recommendations enriching the statutes governing Insider trading in India.

INTRODUCTION

Insider trading was a problem of the past and unfortunately is still a problem in the present. The practice of Insider trading is prevalent in all parts of the world be it the United Kingdom, Australia, United States of America or India. The United States of America was the first among other countries to make a bold move by bringing about an enactment to regulate the menace of

[1] 3rd year BBA LLB (Hons.), Student, School of Law, Christ (Deemed to be University), Bengaluru.
[2] 3rd year BBA LLB (Hons.), Student, School of Law, Christ (Deemed to be University), Bengaluru.

Insider trading[3]and the other countries followed afterwards. Preetinder Singh Bharara, a former U.S Attorney ,who won one of the biggest insiders trading case in the United States against Steve Cohen's SAC Capital Advisors, which is also known as the SAC Capital Advisors case has rightly said that "*Insider trading tells everybody at precisely the wrong time that everything is rigged, and only people who have a billion dollars and have access to and are best friends with people who are on boards of directors of major companies - they're the only ones who can make a true buck*". Here Mr. Preet Bhararahas brought up in an exceptionally suitable manner, everything that is wrong with insider trading. The capital market and small shareholders are usually among the most affected due to the illegal practice of insider trading. Moreover it is pertinent to note with the group of people who advocate for the prohibition of insider trading there are likewise another set of people who object to the prohibition of insider trading. Those who advocate for prohibition of Insider trading state that it shatters the confidence of the investors [4] and damages the individuals who exchange with, or on the opposite side of the market from, the insider. Opponents of insider exchanging likewise make two related, however to some degree totally unrelated, contentions: first, that insider exchanging defers the arrival of data both to people in general and inside the company, therefore hurting both market and corporate efficiency, and second, alternately, that it hurts organizations by bringing about the untimely discharge, through spillage, of their private data.[5]The last contention and the reasonable argument in any scenario or in any event, is that insider trading simply isn't reasonable.[6]

INSIDER TRADING

Insider trading, the utilization of advantaged data for trading offers and securities for the reasons for gain (or to evade a misfortune) to the detriment of the clueless overall population, is ethically and legitimately inexcusable. The term is so normal place that it is relatively clear

[3]Montagano, Christopher P, *"The Global Crackdown on Insider Trading: A Silver Lining to the "Great Recession"*.Indiana Journal of Global Legal Studies 19, no. 2 (2012): 575-98.
[4]Brudney, Insiders, "*Outsiders, and Informational Advantages Under the Federal Securities Law"*, 93 HARV. L. REV. 322, 353-56 (1979).
[5]Haft, "*The Effect of Insider Trading Rules on the Internal Efficiency of the Large Corporation"*, 80 MICH. L. REV. 1051 (1982).
[6] Barbara Ann Banof, "*The Regulation of Insider Trading in the United States, United Kingdom, and Japan*", Michigan Journal of International Law, Vol 9 no.1 (1988).

as crystal.[7]. In like manner speech, insider trading alludes to trading securities based on data that has not been made open[8] . The focal element of direct which could be portrayed as insider trading, past the conspicuous necessity of procurement or offer of security, is the ownership by the merchant of the data that is in some sense material to the estimation of the securities exchanged, and isn't, data as of now freely known, or all the more particularly known to other individuals in the market[9] .Insider trading can likewise be portrayed as buy and offer of securities of enterprise by individual with access to private data about organization that can tangibly influence the estimation of securities and which isn't known by the investors or the overall population.[10]

The SEBI Act, 1992 does not define exactly the meaning of Insider Trading rather it defines the terms 'Insider',' Connected Person 'and 'Price Sensitive Information'.

INSIDER

"Insider" means any person who is a connected person; or in possession of or having access to unpublished price sensitive information;[11]

CONNECTED PERSON

"connected person" means 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 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. Without prejudice to the generality of the foregoing, the persons falling within the categories shall be deemed to be connected persons unless the contrary is established.[12]

[7] M.L. Gopichandra, "*Insider Trading Insights*" in JayshreeBose (ed.) Insider Trading: Perspective and Cases 3 (2007).
[8] Dr. Jinesh Panchali and M. Ravindran, "*Insider Trading Issues*" 1 Knowledge for Markets 48 (2011).
[9] M.P. Dooley, "*Enforcement of Insider Trading Restriction*" 66 Virginia Law Review 1(1980).
[10] Lubinisha Saha, "*Insider Trading: SEBI Regulation*", 50 Corporate Law Adviser 76 (2002).
[11]SEBI(Prohibition of Insider Trading) Regulation, 2015, Reg. 2 (1) (g).
[12] SEBI (Prohibition of Insider Trading) Regulation, 2015, Reg. 2 (1) (d)

UNPUBLISHED PRICE SENSITIVE INFORMATION

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 financial results; dividends,change in capital structure,mergers, de-mergers, acquisitions etc..[13]

THE HISTORY OF INSIDER TRADING

As mentioned earlier Unites States has been the one of the first nation to deliver most grounded laws to regulate and prevent insider trading, this was because of the market crash fueled prolonged absence of confidence of the investors in the capital market which was followed by the great depression in the United States . The whole scenario in turn led to the enactment of the Securities Act, 1933 which also dealt with provisions which would prevent fraud in the sale of securities and this was further complimented with the subsequent enactment of the Securities Exchange Act, 1934. The Securities Exchange Act, 1934 imposesadministrative control upon the national securities trades, upon the practices utilized in exchanging securities recorded and enrolled on them, and upon brokers and dealers.[14]This is intended to ensure the investors' interest by keeping up reasonable and open markets for the purchasing and offering of securities and by counteracting misuse of the facilities given by the exchange.[15]Under the insider trading doctrine, the U.S. courts and the Securities and Exchange Commission (SEC) have held that exchanging based on inside data, under certain conditions, is a "fraud" infringing upon the general antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934 (the 1934

[13] SEBI (Prohibition of Insider Trading) Regulation, 2015, Reg. 2 (1) (l)
[14]Cook, Donald C., and Myer Feldman, "*Insider Trading under the Securities Exchange Act*." HARV. L. REV 66, no. 3 (1953).
[15]*Ibid.*

Act)[16] and Rule l0b 5 there under.[17]Therefore Securities Exchange Act is the first legislation that regulated and prevented insider trading.

In the case of *Dirks vs SEC*[18], the concept of constructive insiders evolved as it meant to disclose vital information to prevent fraud as opposed for personal gain. These Constructive insiders can be anyone who receives or have access to vital or unpublished sensitive information while they are rendering there services to the company.

The U.S. courts have given the essential jurisprudence with insider trading which in turn will help the Security Exchange Commission, which can be categorized as follows:

1. *The Classical or Disclose or Abstain hypothesis:* Under the classical theory, a corporate insider, (for example, an officer or director) breaches Section 10(b) and Rule 10b-5 by exchanging the corporation's securities based on material non-public data about the company.Such a great corporate insider, who owes trustee obligations to the corporation,its investors and shareholders, has an obligation either to avoid exchanging or reveal such data before exchanging.[19]
2. *The Misappropriation theory:*[20]A second theory of insider trading risk (the "misappropriation" hypothesis) was supported by the Supreme Court in *United States v. O'Hagan*.[21] In O'Hagan, a lawyer traded in a potential takeover target. He got to

[16]Section 10(b) of the 1934 Act, 15 U.S.C. § 78j (1976), provides in pertinent part that:
It will be unlawful for any individual, straightforwardly or by implication, the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange - (b) To utilize or employ, regarding the purchase or sale of any security enrolled on a national securities trade or any security not all that enlisted, or any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.
Rule l0b-5, 17 C.F.R. § 240.10b-5 (1984), promulgated by the SEC pursuant to Section 10(b), provides:
It will be unlawful for any individual, straightforwardly or by implication, by the utilization of any methods or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To put forth any false expression of a material truth or to overlook to express a material certainty important to put forth the expressions made, in the light of the conditions under which they were made, not misdirecting, or (c) To take part in any demonstration, practice, or course of business which works or would work as a misrepresentation or double dealing upon any individual, regarding the buy or offer of any security.
[17] Richard M. Phillips., and Robert J. Zutz," *The Insider Trading Doctrine: A Need for Legislative Repair*", Hofstra Law Review, Vol 13 no. 1.
[18]*Dirks v. SEC* ,463 U.S. 646 (1983)
[19] Howard J. Kaplan ,Joseph A. Matteo ,Alan Pfeffer and Arkin Kaplan Rice, LLP, " *The Law of Insider Trading*", ABA Section of Litigation 2012 Section Annual Conference April 18-20, 2012: The Lessons of the Raj Rajaratnam Trial: Be Careful Who's Listening.
[20]*Ibid.*
[21]*United States v. O'Hagan*, 521 U.S. 642 (1997).

know about the potential takeover from private data acquired by his law office, who in turn was representing the company in the same tender. Since he was not an officer of the objective organization, and had no connection to it, the classical theory of insider exchanging did not make a difference. The Court held that he was all things considered to be committed the fraud of insider trading , giving an explanation that the lawyer indeed owed a guardian obligation to his law office, what's more, by utilizing his law office's private data to trade, he "misused" such data. The Court in this manner held that a corporate "outsider" damages Section 10(b) and Rule 10b-5 "when he abuses secret data for securities trading purposes, in rupture of a guardian obligation owed to the source of the data," instead of to the people with whom he trades.[22] The "misappropriation theory premises risk on a trustee turned-broker's deception of those who entrusted him with access to confidential information."[23] The misappropriation theory is "'intended to protect the integrity of the securities markets against violations by ' outsiders' to an organization who have access to secret data that will influence the company's security cost when uncovered, yet who owe no guardian or other obligation to that enterprise's shareholders.'"[24]

Moreover in 2006, Stop Trading on Congressional Knowledge or STOCK bill was introduced in the U.S senate which was finally passed in 2012. This bill have provisions which prohibit any member of the Congress and their aides from making any kind of insider trading by the any kind of data they acquire from Capitol Hill and also have disclosure norms for public officials to disclose their financial transactions[25].

In 2016 in *Salman v. Joined States*,[26],case which included a Citibank representative, Maher Kara, who wrongfully revealed material nonpublic data to his sibling, Michael Kara, perceiving that Michael proposed to exchange without anyone else advantage. Michael along these lines imparted the data to his companion, Bassam Salman, a companion and brother by marriage of Maher Kara.[27] Salman exchanged on the data, taking consideration to disguise his bad behavior

[22]*Ibid.*
[23]*Ibid*
[24]*United States v.O'Hagan*, 521 U.S. 642 (1997). at 653
[25] Brody Mullins and Andrew Ackerman, *" Senate Passes Insider-Trading Ban"*, The Wall Street Journal(Feb 3, 2012)
[26]*Salman v. Joined States* 137 S. Ct. 420 (2016).
[27] Miriam H. Baer," *Insider Trading's Legality Problem*", 127 Yale L.J. F. 129 (2017-2018)

by running the exchanges through a financier account in another person's name. Salman's case empowered the Supreme Court to elucidate insider exchanging law's application to "remote tippees," those merchants who in a roundabout way get data from corporate insiders yet generally play no coordinate part in the insider's infringement of guardian obligation.[28]

EVOLUTION OF INSIDER TRADING IN INDIA

The recorded scenery of Insider Trading in India relates back to the 1940's with the arrangement of government boards of trustees, for example, the Thomas Committee of 1948.Thereafter, arrangements identifying with Insider Trading were joined in the Companies Act, 1956 under Sections 307 and 308, which required shareholding revelations by the supervisors and executives of an organization. In 1979 the Sachar board perceived the requirement for alteration of the Companies Act, 1956 as representatives having organization's data can abuse them and control the stock costs. Taken after by it in 1986, the Sachar Committee prescribed alteration in the Securities contracts (Regulations) Act, 1956 to influence trades to decrease insider trading. In 1989, Abid Hussain Committee endorsed that the Insider trading Activities be punished by normal and criminal strategies and similarly suggested that SEBI characterize the bearings and speaking to codes to neutralize out of line dealings. In 1992, India has precluded the deceitful routine with regards to Insider Trading through "Security and Exchange Board of India (Insider Trading) Regulations Act, 1992[29]. Here, a man indicted Insider Trading is culpable under Section 24 and Section 15G of the SEBI Act, 1992 involving 4 Chapters and 3 Schedules including the 15 Regulations. Part I managed meanings of wordings utilized in the Regulations like associated people, esteemed individual, insider, value touchy data, and so on. Part II given to denial on managing, imparting or directing by insider as characterized in the Regulation[30]. Chapter III narrated the investigative power of SEBI under the Regulation and enumerated the prohibitory orders or directions that it can issue against the guilty and in the interest of capital market regulation[31].Part IV dealt the code of inside procedures and conduct to be trailed by recorded organizations and different elements, exposure prerequisites to be followed by company executives, officers and substantial shareholders and the appeal

[28] *United States v. Newman*, 773 F.3d 438, 448 (2d Cit. 2014)
[29] Published in the Gazette of India, Extraordinary in Part III, Section 4 on 19th November, 1992

[30] Id., Reg. 3 to 4.
[31] Id., Reg. 4A to 11A.

provision which a wronged may get a kick out of the chance to take after against the order of SEBI[32] . At that point 2002, the Regulations were definitely corrected and renamed as "SEBI (Prohibition of Insider Trading) Regulations, 1992. In November, 2014, India's market capitalization crossed USD 1.6 trillion, making it world's ninth biggest economy by advertise capitalization[33].The need of patching up the law on insider trading could be ascribed to the way that in excess of twenty three years had gone since SEBI issued the Regulation which was turning lacking in the light that since the year 1992, the recorded organizations, the share trading system and the economy all in all had persevered changes. These progressions featured the lacunae in the Regulation of 1992 which harmfully affected the privileges of investors, corporate administration standards and in this way harmed the general trust in Indian monetary markets. Therefore SEBI thought it was needful that another legitimate administration be acquainted with connect the escape clauses to the lawful structure and to guarantee this, an orderly survey of the current law was called for. SEBI thought it was needful that another lawful administration be acquainted with connect the provisos to the lawful structure and to guarantee this, a methodical survey of the current law was called for. SEBI, in this manner, constituted the 18 part High Level Sodhi Committee[34]under the Chairmanship of Justice N. K. Sodhi, previous Chief Justice of the High Courts of Kerala and Karnataka and Former Presiding Officer of Securities Appellate Tribunal to attempt a far reaching audit of the current Regulations and adjust the law on insider trading. The Report of the Sodhi Committee was talked about and endorsed by the SEBI in its gathering hung on nineteenth November, 2014 and shaped the reason for presentation of the SEBI (Prohibition of Insider Trading) Regulations, 2015[35]which supplanted the before Regulations. The Press Release that went with the 2015 Regulations expressed that the essential goal for the presentation of the Regulations has been to fortify the lawful and requirement structure, adjust Indian administration to worldwide practices, furnish lucidity as for the definitions and ideas, and encourage authentic business exchanges[36].The Regulation of 2015 involves 5 Chapters, 2 Schedules and 12 Regulations. Part I manages the definitions. Part II manages the Restriction on

[32] Id., Reg. 12 to 15
[33] Samie Modak, "*India's market capitalization cross 100 trillion*" Business Standard, Nov. 28, 2014
[34] Government of India: High Level Committee to Review the SEBI (Prohibition of Insider Trading) Regulations, 1992 (Ministry of Corporate Affairs, 2013).
[35] SEBI vide its Notification No. LAD-NRO/GN/2014-2015/21/85 dated 15th January, 2015 in the Gazette of India, Extra Ordinary Part III, Section 4 published by Authority, New Delhi.
[36] Press Release No. 130 of 2014 dated 19th November, 2014.

Communications and Trading by Insiders. Part III discusses the revelations to be made by the organizations while trading its securities by insiders. Section IV recommends a Code of Fair Disclosure and Conduct. Part V contains different arrangements.

DETERMINING THE LACUNAES IN THE PRESENT REGULATION ON INSIDER TRADING

Insider Trading is one of the serious problem which India needs to tackle with. There were scenarios in which it was difficult to detect the fraud and prosecute the accused.

INEFFECTIVE INVESTIGATIVE MECHANISM:

YEAR	INVESTIGATION TAKEN UP	INVESTIGATION COMPLETED
2010-11	28	15
2011-12	24	21
2012-13	11	14
2013-14	13	13
2014-15	10	15

As of late, another scandal to the spotlight is, Reuters revealed that WhatsApp group chat had been utilized to flow (shockingly precise) unpublished Price Sensitive Information(UPSI) identifying with the quarterly numbers of no less than 12 organizations, only a couple of days before people in general declarations of the numbers. These breaks related to the financials of huge organizations –, for example, Dr. Reddy's Laboratories Ltd., a pharma organization with an extensive market top. SEBI is presently exploring the issue, yet this has prompted reestablished feedback about the controller's laxity in researching and indicting insider trading matters in the last more than two decades. Purportedly, SEBI has utilized its pursuit and seizure tasks (which it only here and there does) at around 34 areas in its endeavors to explore the WhatsApp spill.

So where does the problem arises leading to such practices in the country?

REASONS FOR INEFFECTIVE INVESTIGATIVE MECHANISM:

1. INADEQUATE STAFFS:

Based on the Annual Report (CY 2016) of the US Securities and Exchange Commission (SEC), the SEC has almost one employee for each listed company. However, based on SEBI's Annual Report (FY 2017), it appears that SEBI has one employee for six listed companies. In key divisions such as Corporate Finance, which is inter alia responsible for ascertaining the quality of financial statements of listed entities, SEC has more than 15 times as many employees as SEBI (477 versus 31)[37].Due to such a reason it becomes difficult in identifying Insider Trading Practice. There is a high chance for connected persons of a company to involve themselves in such malpractices. When there are adequate staffs of at least one staff monitoring one listed company then there might be a strict vigilance in the functioning of the company. Another problem in Indian insider trading prosecutions has been lack of resources and manpower equipped. As compared to SEBI, SEC of United States is a much powerful body which has fully equipped itself with human resources as well as a strong infrastructure to detect and curb insider trading. The SEC employees staff of 3958 persons[38] while SEBI employs a mere 643 persons in toto as its employees all over the country at its various offices.[39]

2. REQUIREMENT FOR SKILLED AND EXPERTISED MANPOWER:

Fruitful authorization activities by SEBI can have the twin impact of punishing the blameworthy, from one perspective, and making a critical obstruction impact then again. Be that as it may, for such hindrance impacts to be felt in India, SEBI must prepare itself so it can dexterously accumulate prove with the goal of "examine to contest." SEBI needs to make bunches including data scientists, accountants, lawful instructors had some aptitude in corporate law, programming architects and academicians. The people require significance of learning inside their specific areas as also have wide ability across finished reasonable domains. Additionally, SEBI ought to create its market learning through predictable overview of measurable studying and reports of middle person guides.[40]

[37] Report of the Committee on Corporate Governance,2017(Kotak Committee Report)
[38] U.S. Congressional Budget Justification for Financial Year 2013 – 2014.
[39] Online available at: http://www.sebi.gov.in/acts/EmployeeDetails.html.
[40] Report of the Committee on Corporate Governance | October 2017

3. POWER TO TAP PHONE CALLS:

Demonstrating instances of insider trading is a test as the charges are construct as a rule in light of incidental confirmation. Much of the time, phone records and transcripts are the main proof accessible to demonstrate a nexus between those enjoying such illicit movement[41] . SEBI does not have in its grasp a pivotal intensity of examination i.e. tapping of telephone calls. Not long after the Raj Rajaratnam-Rajat Gupta insider trading case[42] ended up open, SEBI had moved toward the legislature for forces to tap telephone calls for suspected insider trading and different securities fakes[43]. Anyway SEBI does not have the ability to tap telephones as that was denied by the administration on grounds of it being at risk to abuse[44] . UK Sinha, SEBI Chairman stated, "The SEBI does not have the ability to tap telephones. It can ask for call information records in suspicious cases. In India just a couple of financial organizations like the Central Board of Direct Taxes have the ability to tap telephones[45].” Such a power can prove to be the most decisive piece of evidence in investigation to prove a case against the guilty. An example of such power being used successfully is in USA, where insider trading by Rajat Gupta was proved by relying exclusively on 18,000 wiretapped recorded telephone conversations and e-mails on which he had leaked out price sensitive information of the company to Mr. Raj Rajratanam.

4. LIMITED SCOPE WITH REGARDS TO INDIVIDUALS CARRYING OUT INVESTIGATION:

In India, under Section 11B (3) of the SEBI Act, 1992, engaging SEBI to complete examination, the exploring specialist may require just an ‘intermediary or anyperson associated with securities market in any manner’ to outfit data to, or create books, or enlists, or different archives, or record before him or any individual approved by it for this sake. This is a remarkable inverse to the situation in UK where under Section 177 (1) of the Financial Services

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[41] Reena Zachariah, “*SEBI set to overhaul Insider Trading rules; to form a committee led by former SAT chief*” The Economic Times, Feb. 25, 2013.

[42] *Securities and Exchange Commission v. Rajat K. Gupta and Raj Rajaratnam, Civil Action No. 11-CV-7566 (SDNY) (JSR)*

[43] “Insider trading is Rampant on Dalal Street” The Economic Times, June 18, 2012.

[44] Santosh Nair, “*Insider Trading: SEBI must knock few heads to drive message*”, online available at http://www.moneycontrol.com/news/market-edge/insider-trading-sebi-must-knock-few-heads-to-drive-message_ 1233505.html

[45] “*Stricter Disclosure Norms soon for Research Analysts*” The Indian Express, July 18, 2015.

Act, 1986, the Secretary of State is engaged to designate at least one capable investigators to do examinations andthe assessor so designated is qualified for require 'any individual' whom they consider to be ready to give data concerning any such repudiation, to create record, to go to before them and generally give all help with association with the examination. This suggests the investigatory intensity of SEBI is constrained in its ambit to just people as said in the Section 11B (3) of the Act and hence SEBI may be disabled in circumstances where the individual whose help is required does not fall inside the ambit of the people specified in the sub area.

5. LACK OF APPLICATION OUTSIDE THE TERRITORY OF INDIA:

Because of globalization of world economies, the world has risen as a worldwide town and the offense of insider trading has additionally begun crossing the national outskirts. The Indian law in such manner is in reverse as it needs application outside the region of India i.e. additional regional application. The fundamental targets of extraterritorial uses of national laws have been protection of domestic markets and rights of resident investors from conduct of foreign participants[46].Under the Indian law, there is no arrangement to force punishment or even follow examination on the outside national who has conferred the offense of insider trading. There is no specify in the Regulation about the authorization of criminal endorse against executive of remote organization recorded in residential trade which has enjoyed insider trading as SEBI Act will not be relevant to domain outside India and it will be an additional regional use of this Act[47]. Numerous nations like USA have laws that have additional regional tasks. In addition, because of globalization of the securities exchange, there might be situations where an examination started in India may have some bit of confirmations outside it domain. The Indian law does not get the job done in looking for transnational help and help with such respect. For investigatory help Indian controllers have some two-sided assertions, including Mutual Legal Assistance Treaty (with 39 nations out of 196 nations) and Memorandum of Understanding (with 22 nations out of 196 nations).[48] In any case, these two-sided assertions are not developed with various states as lion's offer states stay uncovered. Along these lines various outside

[46] George C. Nnona, "International Insider Trading: Reassessing the Propriety and Feasibility of the U.S. Regulatory Approach" 27 North Carolina Journal of International Law and Commercial Regulation 196 (2001).
[47] Amit Kumar Pathak, "How to Tackle Insider Trading in India: An analysis of current law and regulation through judicial decision" online available at http://corporatelawreporter.com/2012/03/28/tackle-insider-trading-indiaanalysis-current-laws-regulations-judicial-decissions/.
[48] List of MOUs available at http://www.sebi.gov.in/cms/sebi_data/internationalAffr/IA_Bil MoU.html

specialists diminishing to take part with the Indian Regulator.SEBI as it doesn't have domain in their locale, nor share any course of action to share information in the events of any cash related offense.

6. LACK OF ANTICIPATORY ACTION:

Under the SEBI Act, SEBI has a privilege to dispatch an examination just when any mediator or any individual related with the securities advertise has disregarded any of the arrangements of this Act or the Rules or the Regulations made or headings issued by the Board.[49]Regardless, there might rise a condition where SEBI turns out to be more familiar with around a couple of predicted occasion of insider trading through a witness and may attempt to maintain a strategic distance from it. At any rate under India law, hopeful movement with a view to thwart insider trading isn't obliged and only an enquiry into the consequence of a spillage of unpublished esteem sensitive information is acceptable.

7. LACK OF REASONABLE TIME FRAME:

The Regulation does not set out some sensible time length to close the examination of insider trading cases. Any peculiar deferral in the complete of examination may result in loss of key evidentiary material and gives the neckline committers chance to affect the examination. Also they do not have an appropriate strategy to do the examination procedure.

So all these previously mentioned lacunae infers that the Investigative Mechanism overall in the SEBI (Prohibition of Insider Trading) Regulations, 2015 expects changes to be acquired.

The ineffective mechanism of Investigation was also identified in the case of *Dilip Pense v. SEBI(2001)* [50]. Nishkalpa was an auxiliary of TATA Finance Ltd. (TFL) which was a recorded association. Dilip Pendse was the Managing Director of TFL. On Walk 31, 2001, Nishkalpa had obtained a tremendous loss of Rs. 79.37 crore and this will without a doubt affect the advantages of TFL. This was in a general sense the unpublished cost tricky information of which Pendse thought about. This information was revealed to general society just on April 30, 2001. Along these lines any trade by an insider between the periods March 31, 2001 to April 30, 2001 will without a doubt fall inside the degree of insider trading. Dilip Pendse passed this

[49] Securities and Exchange Board of India Act, 1992, s. 11 C.
[50] Vyas Amit K. (2006), "Insider Trading : Review of Some Important Cases", Chartered Secretary, ICSI, August 2006, pp-1133-1138

information to his significant other who sold 2, 90,000 offers of TEL held in her own name and furthermore for associations controlled free from any other person and her father in-law. This information was uncovered to the all inclusive community multi month later. SEBI made an examination against Dilip Pendse. In the wake of completing examination, SEBI contemplated that Pendse used unpublished esteem sensitive information and he kept up a vital separation from disaster. He was found subject and repelled. Discipline of Rs. 5, 00, 000 was constrained on each one of Dilip Pendse, his significant other and Nalini Properties confined. This was perhaps the clearest case of insider trading which was successfully dealt with by SEBI and went up against no difficulties in repelling the miscreants.

This case confirms the manner in which that SEBI does not have a cautious investigative component and a vigilant approach because of which blameworthy gatherings can escape from the hold of law. In the greater part of the cases, SEBI neglect to allude to exhibit similarly, affirm its circumstance under the watchful look of the Court. Not in any way like the change of probabilities that is required in showing a typical commitment, a case including criminal hazard requires the charges to be shown past sensible inquiries. Consequently, there should string revealed examination and all stipulations if any should be suitably associated with.

OTHER LACUNAES:

Out of the considerable number of issues that the controller of the securities showcases in India needs to handle with, the direction of insider managing has turned out to be the most troublesome. Experience of such control, which has pulled in the unflattering name of 'the unwinnable war', prompts reevaluation of the issue[51]India is one of numerous nations that once in a while uphold the insider trading laws that exist on the law books[52]. It involves genuine worry that the SEBI has done next to no separated from starting tests, that as well, all the time, simply after the issues are raised by the media[53].

The case of *Hindusthan Unilever Limited v. SEBI (1998)*[54]also enabled in identifying various lacunaes in the Regulation.

[51] A.M. Louis, "*The Unwinnable War on Insider Trading*" Fortune 72 (1981)
[52] Mark Miller, "*The Insider: Parasite or Legitimate Profit-Maker*?", online available at ccs.in/internship_papers/2002/29.pdf.
[53] Naresh Kumar, "*How Effective Are the Insider Trading Regulations*" 75 Corporate Law Adviser 35 (2006).
[54] 18 SCC 311 MOF

Facts

Hindustan Lever Limited (HLL) and Brooke Bond Lipton India Limited (BBLIL) were auxiliaries of a typical parent organization called Unilever Inc in UK and were under a similar administration. HLL bought 8 lakh offers of BBLIL from UTI on the 25th March 1996 at the rate of Rs.350.35 per share. A merger declaration was made 25 days after the buy exchange had occurred. HLL reported its merger with BBLIL and advised the same to the stock trades. BBLIL's offer value shot up by Rs. 50 for every offer after the merger.SEBI was advised about the spillage of the merger data and insider trading by the market and in addition the media. Along these lines, SEBI had started examinations concerning the issue and found that HLL as an Insider had obtained the securities of BBLIL from UTI based on the Unpublished Price Sensitive Information (UPSI) about the looming merger, in this manner abusing the arrangements of the Insider Trading Regulations and the SEBI Act. Subsequently, UTI caused losses.SEBI in exercise of its forces under Section 11 B of the SEBI Act read with Regulation 11 of the Insider TradingRegulations had coordinated the HLL to remunerate UTI to the degree the UTI had endured misfortunes. SEBI evaluated the misfortunes caused to UTI to the tune of Rs. 3.04 crores. The reason for this computation was the contrast between the market cost of the offers of BBLIL at which the offers were sold by UTI to HLL before the declaration of merger and after the declaration barring premiums. UTI and HLL recorded separate interests against the

SEBI’s request before the investigative expert.

Question of Law:

The understanding of the expression "Insider" under Regulation 2 (e) of the Insider Trading Regulations was one of the key issues under thought, before the investigative specialist for this situation. In such manner, the re-appraising expert saw that the meaning of Insider ought to have three fixings:

1. The individual ought to be a characteristic individual or lawful substance.

2. The individual ought to be an associated individual or a considered to be associated individual.

Securing of UPSI ought to be by ethicalness of the association.

The SEBI had likewise translated in its request, the third prerequisite of procurement of UPSI by the Insider by prudence of the association with the organization by conceiving two elective circumstances:

1. Where the Insider is sensibly anticipated that would approach UPSI by goodness of association with the organization.

2. Where the Insider has really gotten or approached such.

SEBI had reasoned that if an associated individual really gains or gets such data freely, despite his situation in the organization, such individual will fall inside the meaning of "Insider" andin this way SEBI saw HLL as an Insider. This was kept up by the Appellate Authority.

Judgment

In any case, the Appellate Authority overruled the SEBI's ask for on the going with grounds:

1. The news about the merger was not an UPSI as it was overall known and perceived by the market.

2. The information relating to a merger couldn't have enormous impact on the cost at which the trade was done up.

3. SEBI's decision to give pay to UTI experienced procedural blemishes.

4. SEBI's going to HLL to compensate UTI needs

5. SEBI's setting out toward arraignment under Section 24 of the SEBI Act, was unpleasant in law as the demand did not express the reasons behind arraignment and moreover SEBI did not express the clarifications behind prosecution and besides SEBI did not gather specific powers for intercession under Section 15 G of the SEBI Act.

All these signify the different lacunae exhibit in the direction that prompts increment in the event of such practices. Aside from the insufficient Investigative instrument there are different perspectives that SEBI needs to toss consideration on.

1. <u>OVERBURDENING COMPLIANCE OFFICER:</u>

The most striking highlights of the Regulation of 2015 has been the expansion of the part and duty of the Compliance officer in an inconceivably broad way. They are required to report exchanges executed by all classes of connected persons, in expansion to their own particular representatives. The term 'employee' gets every one of the representatives of an organization under the ambit of the disclosure provisions. This expands the extent of obligations of the consistence officer as far as possible as number of workers in any extensive organization might be commonly more than the quantity of high positioning authorities. The obligation regarding observing and announcing behavior of connected persons appears to broad in that capacity 'associated people may incorporate organization's investors, money related and lawful counsels, close relatives and numerous others. On account of the expansive extent of the meaning of connected person in the Regulation, it is a monotonous errand for the consistence officer to do as such. An extensive outsider network has been incorporated as ' connected person' furthermore, it is a test for recorded organizations to get divulgence consistence from them44. A single element conveying such oppressive obligation builds odds of default in their obligation.

2. CONSENT MECHANISM

SEBI had endorsed assent instrument for settlement of cases identifying with insider trading without precedent for round no. EFD/ED/Cir-1/2007dated 20 April, 2007[55] to cut down on cost, authorization and endeavors to make up implementation move. The sum to be paid in settlement through assent orders is simply a fine which is little ascontrasted with the sum under dispute[56]. Settlement of insider trading cases through assent arrange drives a feeling that insider trading does not include much high dangers of money related misfortune and detainment in an uncommon likelihood. This may wind up bringing down the dread as a top priority of the potential insider dealers and therefore turn vain and infact grievous in it effect. It is likewise that such goals confines

[55] Online available at http://www.sebi.gov.in/cms/sebi_data/attachdocs/1291879532674.pdf, stating: "*All appropriate administrative or civil actions e.g. proceedings under Sections 11, 11B, 11D, 12(3) and 15I of SEBI Act and other civil matters pending before SAT / courts may be settled between SEBI and a person (party) who may prima facie be found to have violated the securities laws or against whom administrative or civil action has been commenced for such violation*."

[56] Astha Singh and Roshni Chadda, "*Internet Law – Insider trading prohibition law in India*", online available at https://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2527.

the advancement of law regarding the matter and does not reveal insight into the procedure by which the initial inquiry order was instituted. [57]

3. SELF EVALUATION PROCESS:

SEBI has never been known about doing a self-evaluation of its own procedures/ examination attempted in different insider trading cases that neglected to be demonstrated. SEC of USA has been doing self-examinations to discover what turned out badly in their examination by over and over endeavor examination of their procedures. For instance report titled "Examination of disappointment of SEC to reveal Bernard Madoff's Ponzi scheme"[58] takes an inside and out hope to discover the flaws that SEC experienced because of which Madoff was capable
to escape arraignment for quite a while. The absence of origination of execution examination for SEBI prompts similar insufficiencies discovering route in the examination over and over.

4. SEBI Regulation or some other law has not acquainted any strategy with support private individuals to share data that prompts the presentation of insider trading act being embraced. India does not have an uncommon arrangement in its law that gives abundance to those privies to data identifying with insider trading granting them for correspondence of such data.

5. MENSREA:

The Regulation of 2015 has even complemented the prior equivocalness with regards to the necessity of foundation of mens rea in insider trading offense instead of settling it. Stipulation to Regulation 4(1) of Regulation of 2015 states that 'gave that the insider may demonstrate his honesty by exhibiting the conditions including the following: taken after by an arrangement of comprehensive or represented guards which are accessible. Along these lines other than the particular cut outs as said in the stipulation which are illustrative in nature, the Regulation likewise allows the demonstrating of guiltlessness. The utilization of term 'guiltlessness' infers nonappearance of mens rea aim to confer the offense. Be that

[57] Satvik Varma, "Insider Trading is a criminal offence" The Economic Times, Dec. 11, 2011.
[58] Online available at https://www.sec.gov/news/studies/2009/oig-509.pdf

as it may, the note annexed to the Regulation states: 'explanations behind which he exchanges or the reason for which he applies the returns are not proposed to be applicable for deciding if the individual has abused the control'. Thus, they reject that mens rea barrier by saying that the reasons are not important. This is evidently an exceptional illustration where the Note what's more, the Regulation repudiate and confuse the vagueness with respect to necessity of mens rea much more.

RECOMMENDATIONS:

The enactment of Prohibition of Insider Trading Regulations, 2015 under the Chairmanship of N.K. Sodhi has brought about changes in the Insider Trading laws in India to coordinate with the international standards on laws identifying with the same. But it still suffers from certain drawbacks.

The following proposals would help in overcoming the lacunae that the insider trading laws in India suffer from-

A) One of the main drawbacks of the regulations is the lack of a proper investigative mechanism due to which a lot of cases dealing with insider trading are not adjudicated properly. For example in the case of *Hindustan Lever Limited vs SEBI*[59]and*Dilip Pendse vs SEBI*[60] one could very well understand that because of the lack of a proper investigative mechanism and corroboration of evidences a lot of offenders escape from the law or are given meager punishments. This in turn again promotes the illegal practice of insider trading as they now can take the aid of these loopholes.Therefore investigative mechanism that are employed in the Insider trading cases can be improved by –

i. Increasing the number of employees or regulator appointed by SEBI to monitor the working of listed companies to an extent that there is adequate staff to monitor each company individually in contrast to the present scenario where one person is

[59]*Hindustan Lever Limited vs SEBI* 18 SCC 311 MOF
[60]*Dilip Pendse vs SEBI* MANU/SB/0159/2009

looking into the dealings of 6 listed companies. That is one employee or regulator for one company.[61]

ii. A lot of insider trading cases were able to be traced in other countries because the officials there were able to tap phone calls of suspected individuals. For Example in the case of *Securities Exchange Commission vsRajat Gupta and Raj Rajaratnam*[62]the entire situation came into the light as a result of the telephone calls tapped by the SEC, which thus was utilized as proof against the Rajat Gupta. Therefore it would make the job of SEBI a whole lot easier on the off chance that they are likewise engaged with a similar right that is tapping of calls of the suspected individuals to keep a check on their suspicious activities. It is not necessarily the case that this privilege of tapping telephone calls ought to be offered discretionarily to SEBI; it ought to with legitimate rules as under which conditions such power can be utilized.

iii. The Section 11B(3) of the SEBI Act,1992 which empowers the SEBI to carry out investigation clearly limits its powers as it mentions particular members from whom the assistance for the case can be taken . Thus the ambit of this section could be made much wider so that SEBI is able to conduct a smooth investigation without any hindrance.

iv. Foreign international who are indulged in insider trading activities cannot be punished as there is no mention in the Regulation about the same. Therefore it is advisable to include provisions for penalizing even the foreign companies listed in the Indian stock markets if found indulging in such prohibited activities.

v. There should be a set time frame set for every insider trading case so that the case doesn't prolong to longer period than necessary which at times results in watering down the seriousness of the case.

[61]*Ibid.* note 39
[62]*Ibid.* note 42

CONCLUSION:

To conclude India is doing a fairly good job by introducing legislation to prevent the menace of insider trading. The Prohibition of Insider Trading Regulations, 2015 indeed is an appreciated legislation but it fails to cover loopholes present in the previous regulations Moreover even the current regulation does not suffice to the need. One of the main drawbacks is that despite of having these regulations SEBI still faces problem while investigating cases related to insider trading due to lack of certain powers. The paper has to point out certain lacunae that regulation suffers from and also provided with weight age suggestions. The truth being complete eradication of insider trading might not be possible but we can always try the best eradicate this menace of insider trading which in turn will make the growth of economy meaningful.