

# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi Disciplinary  
Peer Reviewed Edition :

[www.ijlra.com](http://www.ijlra.com)

## **DISCLAIMER**

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

IJLRA

## **EDITORIAL TEAM**

### **EDITORS**

#### **Dr. Samrat Datta**

*Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board*



#### **Dr. Namita Jain**



*Head & Associate Professor*

*School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.*

*Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019*

## Mrs.S.Kalpna

Assistant professor of Law

*Mrs.S.Kalpna, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.*



## Avinash Kumar



*Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.*

## **ABOUT US**

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS  
ISSN

2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

# **CRITICAL ANALYSIS ON THE GAP IN SEBI DISGORGEMENT ORDERS: SAFEGUARDING THE INTERESTS OF AFFECTED INVESTORS AND SHAREHOLDERS**

AUTHORED BY- AYUSH PATIDAR

## **ABSTARCT**

Disgorgement is a kind of equitable monetary compensation intended to stop wrongdoers from unfairly benefiting financially from their illicit activities. Since 2003, the Securities and Exchange Board of India has been issuing disgorgement orders, prompted by the practice in the United States of America. As a result, the SEBI Investor Protection and Education Fund is credited with the illicit funds that the SEBI was able to collect through disgorgement orders.

The preservation of investor interests and the advancement of investor education in compliance with the relevant legislation are the two main goals of the funds held in the SEBI Investor preservation and Education Fund, as explained in this article. According to the author, the Indian Contract Act of 1872's fundamental principles against undue enrichment are being broken by the SEBI through this kind of retention.

Therefore, this article argues that in order to better fulfil the SEBI's mandate, a specific clause stating that the disgorged funds credited to the fund should be used to compensate injured investors upon identification should be added to the SEBI (Investor Protection and Education Fund) Regulations, 2009.

## **INTRODUCTION**

Disgorgement serves as a deterrent. It is equivalent to taking away any financial gain that comes from breaking the law. The goal is to deprive the perpetrator of their actual profits. Disgorgement is a pecuniary penalty imposed and enforced by the State, for a crime or offences against its laws, according to the Supreme Court of the United States of America (hereinafter referred to as the "USA") in the well-known case of *Huntington v. Attrill*. It is imposed as a result of violating

public laws<sup>1</sup>, i.e., a violation committed against the State rather than an enraged individual. If those who violate securities legislation were exempt from having to disgorge their illicit profits<sup>2</sup>, the deterrent effect of enforcement action by the securities regulatory agencies would be severely undercut. Moreover, American courts have determined that disgorgement is frequently not compensatory.

The Securities Exchange Commission (henceforth referred to as the "SEC") was not expressly granted disgorgement powers under the Securities Exchange Act of 1934 (henceforth referred to as the "SEC Act"). Prior to the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, the SEC lacked explicit jurisdiction to amass and disburse money to investors who had been duped through legal or administrative channels.

Disgorgement was acknowledged as a remedy for the first time by an appeal court with the decision in *SEC v. Texas Gulf Sulphur Co.*<sup>3</sup> The disgorgement clause originated with the passage of the Sarbanes-Oxley Act of 2002, sometimes known as the "SOX Act."<sup>4</sup> The Act was passed in the wake of the Enron scandal and specifically gave the SEC permission to gather money under Section 308 to reimburse injured investors for their losses. Similar to the SEC Act, the Securities and Exchange Board of India Act of 1992 (hereinafter "SEBI Act") granted broad authority for "any equitable relief that may be appropriate or necessary for investors"<sup>5</sup> and similarly lacked any specific provisions regarding the regulator's disgorgement powers.

Nonetheless, the SEBI Act<sup>6</sup> did not explicitly grant authority to impose punitive or preventive measures. Supported by the SOX Act's implementation, which established disgorgement as a fair remedy, the Securities and Exchange Board of India (SEBI)<sup>7</sup> likewise started imposing disgorgement orders in 2003. But this quickly turned into a divisive matter in Indian courts. In the matter of *Rakesh Agrawal v. SEBI*<sup>8</sup>, the Securities Appellate Tribunal (henceforth referred to as "SAT") overturned the directives of the SEBI on November 3, 2003. According to the SAT's

<sup>1</sup> *Huntington v. Attrill*, 1892 SCC OnLine US SC 245 : 36 L Ed 1123 : 146 US 657 (1892), 667.

<sup>2</sup> *Kokesh v. Securities and Exchange Commission*, 2017 SCC OnLine US SC 58 : 581 US \_\_\_\_ (2017).

<sup>3</sup> *SEC v. Texas Gulf Sulphur Co.*, 401 F 2d 833 (1968).

<sup>4</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

<sup>5</sup> Barbara Black, Should the SEC Be a Collection Agency for Defrauded Investors? 63 THE BUSINESS LAWYER, 317-346 (Feb., 2008). Barbara Black, Should the SEC Be a Collection Agency for Defrauded Investors? 63 THE BUSINESS LAWYER, 317-346 (Feb., 2008).

<sup>6</sup> The Securities and Exchange Board of India Act, 1992, No. 15, Acts of Parliament, 1992

<sup>7</sup> *Rakesh Agrawal v. SEBI*, 2003 SCC OnLine SAT 38 : (2004) 49 SCL 351.

<sup>8</sup> *Id.* at ¶77 (Quoting *Securities and Exchange Commission v. Maurice Rind*, 991 F 2d 1486 (9th Cir 1993)); see *Videocon International Ltd. v. SEBI*, (2015) 4 SCC 33.

ruling, courts alone have the authority to use equitable powers; quasi-judicial entities or tribunals are not permitted to do so.<sup>9</sup>

Disgorgement of any purported gains cannot be ordered by SEBI. Disgorgement of purported gains is always intended as a preventative action rather than as payment. Any financial burden that the legislature wishes to place on the people must be specifically mentioned in the relevant Act or Regulation. The Supreme Court noted in *Ritesh Agarwal v. SEBI*<sup>10</sup> that "Section 11B is more action oriented, in a sense, it is a functional tool in the hands of the Board." Directions of disgorgement are therefore penal in nature and cannot be passed pursuant to Section 11 B of the said Act, under which only remedial directions may be passed.

In actuality, Section 11B is one of the executive tools at the respondent's (SEBI) disposal to uphold its primary responsibility of safeguarding investors. Interestingly, in the case of IPO irregularities - dealings by Ms. Roopalben N. Panchal, the SEBI held that "disgorgement is not a penalty, but a monetary equitable remedy"<sup>11</sup> while citing the decisions of the SAT in a number of cases. The section identifies the persons to whom and the purposes for which directions can be issued. Due to uncertainty surrounding the equitable powers of the SEBI, the Securities Laws (Amendment) Act 3 of 2014 inserted an "explanation" to Section 11B in the SEBI Act in accordance with international precedents of legislative empowerment to the regulator for issuing disgorgement orders.<sup>12</sup>

This was in response to the SAT's decision in *Dushyant N. Dalal v. SEBI*<sup>13</sup>, which noted that "there need be no specific provision in the [SEBI] Act in this regard and this power to order disgorgement is inherent in the Board."<sup>14</sup> The power to issue directions under Section 11B was made clearer. It states<sup>15</sup> that the power to direct someone who engaged in any activity or transaction that violated the terms of this Act or its regulations and made profit or avoided loss must disgorge an amount equal to the wrongful gain they made or the loss they avoided. This power was put into effect on July 18, 2013.

---

<sup>9</sup> SAT followed the earlier cases of *SEC v. Maurice Rind*, 991 F 2d 1486 (9th Cir 1993); *SEC v. Manor Nursing Centers Inc.*, 458 F 2d 1082 (2nd Cir 1972); *Sterlite Industries (India) Ltd. v. SEBI*, 2001 SCC OnLine SAT 28; *BPL Ltd. v. SEBI*, 2001 SCC OnLine SAT 40; *Videocon International Ltd. v. SEBI*, Id.

<sup>10</sup> *Ritesh Agarwal v. SEBI*, (2008) 8 SCC 205, at ¶27.

<sup>11</sup> *Roopalben N. Panchal, In re*, 2011 SCC OnLine SEBI 33, at ¶9d.

<sup>12</sup> *Dushyant N. Dalal v. SEBI*, (2017) 9 SCC 660.

<sup>13</sup> *Roopalben N. Panchal, In re*, supra note 11.

<sup>14</sup> The Securities and Exchange Board of India (Amendment) Act, 2014, No. 27, Acts of Parliament, 2014.

<sup>15</sup> Id.

Therefore, the modification would not violate the fundamental rights violations and the cardinal principles crystallized against ex facto law. Disgorgement of unjustly obtained advantages is a fair remedy, not a punishment. This article examines the background that led to the evolution of the disgorgement of ill-gotten gains in the Indian securities market. The SAT recently upheld the jurisprudence on disgorgement in *Ram Kishori Gupta v. SEBI* (commonly known as the *Vital Communications case*)<sup>16</sup>, holding that "disgorgement without restitution does not serve any purpose."<sup>17</sup>

The author aims to evaluate the effectiveness of the disgorgement orders issued by the SEBI by looking at a number of decisions. The purpose is to investigate whether the SEBI is protecting investors as required by law by limiting its authority to issuing disgorgement orders. Given that the regulator has just gathered substantial sums, this is really important. The author tries to highlight the provisions of the SOX Act and the corresponding practices followed by the SEC in the USA to protect the interests of the harmed investors in light of the SAT's ruling that "disgorgement without restitution" does not serve the purpose of investor protection in the securities market.

It is arguable that very little money is spent in India on investor education, and the interest earned on the money left in the Investor Protection and Education Fund is starting to provide income for the SEBI. Given this, the author contends that the SEBI has engaged in "undue enrichment" through the current procedure of collecting and holding onto the disgorged funds of unjust gain. Therefore, it is against the fundamental values outlined in the Indian Contract Act of 1872.

This article argues that equity requires the disgorged funds to be reimbursed to investors or restored to them in order to make up for the money they lost as a result of the unscrupulous actions of a small number of market players. This money cannot be held by the SEBI, especially if it is not being used. This article aims to offer a compensation method for investors who have been harmed in the domestic securities market, based on the SEC's Rules of Practice and Rules on Fair Fund and Disgorgement Plans.

In order to achieve the goal of safeguarding investors, the author suggests modifying the SEBI Act. The journey of the enforcement regime under the SEBI Act is described in Part I of this article. In Part II, the jurisprudence that has been created is discussed from several angles

---

<sup>16</sup> *Ram Kishori Gupta v. SEBI*, 2019 SCC OnLine SAT 149.

<sup>17</sup> *Id.* at ¶6.

regarding the SEBI's disgorgement powers. Part III identifies the gap in the investor protection procedure that the SEBI implements after issuing disgorgement orders. There will also be supporting evidence presented to support this main point. This article attempts to suggest the addition of a suitable clause to the SEBI Act, taking a cue from Section 308 of the SOX Act (Fair Funds for Investors). A comparable process involving court intervention is also present in the Indian Companies Act, 2013.

## **THE ENFORCEMENT REGIME IN THE SEBI ACT**

A jurisdiction's legal and regulatory environment, eco-political framework, case merits, type of conduct to be discouraged, and, most importantly, the social, cultural, and economic milieu all have a significant impact on the enforcement ecosystem.<sup>18</sup> The Supreme Court in *N. Narayanan v. SEBI*<sup>19</sup> highlighted the importance of the SEBI's deterrent measures against those who commit economic offences in India.<sup>20</sup>

The message should be that we live by the "Rule of Law" and that "market abuse" will not be tolerated in our nation. "Market security" is our credo, and SEBI should guarantee that there is no room for fraud, dishonesty, or artificiality in the nation's securities market.

The enforcement metrics and penalty-setting framework in India have evolved gradually and have been impacted by numerous externalities. There has been a learning curve for Indian securities rules. The legislators who drafted the SEBI Act lacked market experience and a forward-thinking outlook. The Act did not include provisions for the application of sanctions because it was unable to completely appreciate the designs and colours of market infractions. "In the light of experience gained with the working of the SEBI Act, 1992, it was considered desirable to expand the jurisdiction of SEBI, enhance its autonomy and empower it to take a variety of punitive actions in case of violations of the Act,"<sup>21</sup> writes Sahoo in the article titled "Historical Perspective of Securities Law." India was admitted as a member of the International Organization of Securities Commissions (hereinafter "IOSCO").

Since Principle 9 of the 30 Principles of Securities Regulations at the time called for a strict

---

<sup>18</sup> THE BOARD OF THE INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, PRINCIPLES FOR FINANCIAL BENCHMARKS (2013).

<sup>19</sup> *N. Narayanan v. SEBI*, (2013) 12 SCC 152.

<sup>20</sup> *Id.* at ¶170.

<sup>21</sup> M.S. Sahoo, *Historical Perspective of Securities Laws*. CHARTERED SEC'Y (2000).

enforcement mechanism within its membership, the SEBI's ability to carry out the Principles effectively was essential.<sup>22</sup> Penalties and Adjudication, or Chapter VI-A<sup>23</sup>, was therefore added to the SEBI Act through the Securities Laws (Amendment) Act of 1995. The Amendment Act gave the SEBI enforcement authority the much-needed teeth of monetary penalties as a substitute instrument to address capital market abuse and misuse.

Once more, a regulatory gap was created by inexperience and regulatory hurry. The SEBI Act's Section 14(1)(aa) stated that "all sums realized by way of Penalties under this Act shall be credited to Securities and Exchange Board of India General Fund,"<sup>24</sup> however in other significant jurisdictions, the penalty payments were credited to the government treasury. This anomaly was fixed by the SEBI (Amendment) Act, 2002.<sup>25</sup>

The penalties are placed in the Consolidated Fund of India as a result of the amendment. It seemed that regulators in India, including the SEBI (as defined by this article), had not complied with the modification. The SEBI and other regulators were accused by the Comptroller and Auditor General of India of "contravention of constitutional provision" for the fiscal year (hereinafter "FY") that ended in March 2010 of keeping their excess funds, which totaled more than INR2, 142 crores from fees and penalties, outside of government accounts.<sup>26</sup> Coincidentally, the SEBI's Annual Accounts for the months of March 2016 and March 2017 indicated that fines were being paid into the Consolidated Fund of India.

Even while "gain-based" remedies<sup>27</sup> are covered by the Indian Contract Act of 1872, their broader application is relatively new in the regulatory enforcement ecology of the Indian securities industry (applied only in the IPO scandal). The goal of this remedy is to make up for the plaintiff's loss, meaning that the investor(s) will receive compensation to the degree that it is possible to replace the money they lost. The two main categories of gain-based remedies are disgorgement and restitution (a and b, respectively). The law of gains-based recovery is the law of restitution, which is an equitable remedy. It offers the restoration of something wrongfully taken from

---

<sup>22</sup> INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION (2003).

<sup>23</sup> The Securities and Exchange Board of India (Amendment) Act, 1995, No. 5, Acts of Parliament, 1995.

<sup>24</sup> §14(1)(aa), SEBI Act, 1992.

<sup>25</sup> The Securities and Exchange Board of India (Amendment) Act, 2002, No. 59, Acts of Parliament, 2002

<sup>26</sup> ET Bureau, CAG pulls up 5 watchdogs for keeping fee out of govt accounts, THE ECONOMIC TIMES (Mar. 19, 2011, 12:49 AM).

<sup>27</sup> Indian Contract Act, 1872, No. 9, Acts of Parliament, 1872.

someone else. It's not recompense. Nonetheless, the cash or property that the defendant has unlawfully obtained must be traceable, meaning that they can be connected to specific funds or assets. Restitution in this situation takes the shape of an equitable lien or a constructive trust.<sup>28</sup>

## **THE SCOPE AND OBJECTIVES OF THE SEBI'S DISGORGEMENT POWERS:**

In *Karvy Stock Broking Ltd. v. SEBI*<sup>29</sup>, the Supreme Appellate Tribunal (SAT) expounded on the purpose and meaning of the agency's disgorgement powers<sup>30</sup>, stating that the remedy's goal is to stop an offender from unfairly benefiting from their illegal actions. It is not intended to be a form of punishment nor to address the losses incurred by those who were harmed by the illegal activity. If someone violates securities rules or regulations, disgorgement of ill-gotten earnings may be required, but not all violators will face this penalty. Only those wrongdoers who have benefited financially from their illegal conduct or acts may be requested to do so. It would follow that the disgorgement sum should not exceed the overall profits realized as a result of the unlawful action since the main goal of imposing disgorgement is to ensure that the wrongdoers do not profit from their wrongdoing. The onus of proving that the amount sought to be disgorged fairly approximates the amount of unjust enrichment in a disgorgement action rests with the Board.

The SAT quashed the SEBI's orders in the aforementioned case, noting that "the impugned order was passed without affording an opportunity of hearing to the appellant and other entities which have been ordered to disgorge a sum of Rs. 115.82 crores."<sup>31</sup> The SAT upheld that natural justice principles shall prevail even while the SEBI issues disgorgement orders. The Board should have at the very least demanded that the appellant provide justification for why it shouldn't be forced to return the money that was decided in the contested decision. The natural justice principles have been blatantly broken by not doing so. Therefore, the contested order ought to be overturned only on this basis.

The SAT clarified the goals and authority of the SEBI's enforcement in *Karvy Stock Broking Ltd. v. SEBI*.<sup>32</sup> The essential center and essence of the Act is found in Section 11. This clause was

---

<sup>28</sup> ANNA PAYNE & MONIQUE LEAHY, *RESTITUTION AND IMPLIED CONTRACTS*, 66AM. JUR.2D §6 (Thomson Reuters, 2001).

<sup>29</sup> *Karvy Stock Broking Ltd. v. SEBI*, 2008 SCC OnLine SAT 74, at ¶5.

<sup>30</sup> §15J, inserted by the 1995 amendment.

<sup>31</sup> *Karvy Stock Broking Ltd. v. SEBI*, supra note 32, at ¶7.

<sup>32</sup> *Karvy Stock Broking Ltd. v. SEBI*, 2007 SCC OnLine SAT 2, at ¶18.

created in 1992, but it has since undergone numerous amendments, and it is now significantly different from what it was then. The authority's purview has been significantly expanded. The legislative intent is demonstrated by the addition of Subsection (4) to Section 11 and by the inclusion of several other provisions, such as Section 11B. These provisions are designed to give the Board the power it needs to carry out its stated goals and successfully exercise its authority. The SEBI has been directing the disgorgement of funds in various matters on the pretext that "the interest of the market and of investors requires that such entities are not allowed to participate in the market and unjustly enrich themselves at the expense of investors." It is evident that a common thread runs through the various provisions of the Act, and that is to empower the Board to take preventive as well as punitive measures so as to protect the investor and to promote the securities market.<sup>33</sup> The market's orderly development and integrity are threatened by such major irregularities, which necessitate regulatory involvement to safeguard investors' interests.

The ruling in *Sumeet Industries v. SEBI* established that the calculation of illicit gains must adhere to specific criteria. If this is not the case, it will be reversed, and the SEBI might be asked to recalculate the amount of illegal earnings that the appellants must disgorge.<sup>34</sup>

Furthermore, in the *Palred Technologies* case, the regulatory body stated that "the stock exchange, as a first level regulator, has a fiduciary duty to the entire ecosystem" and that "the securities lying in the demat account of these persons shall be frozen to the extent of the remaining value"<sup>35</sup> if the impounded funds subject to disgorgement "are found to be insufficient to meet the figure of unlawful gains."<sup>36</sup>

Furthermore, it said that "an order for disgorgement of a portion of the profits derived from the TBT [Tick by Tick]<sup>37</sup> data dissemination activity during the relevant period, for being transferred to the Investor Protection and Education Fund, created by SEBI under section 11 of the SEBI Act, would be an appropriate direction, commensurate with the violations."<sup>38</sup>

As a temporary measure, the SEBI may also impound the unlawful gains in case there is a possibility of diversion of such monies. Market participants' confidence in the trading system is based on the assumption that the rules of trading are completely uniform and transparent. "It is

<sup>33</sup> IPO Irregularities-Dealings by Mr. Deepak Kumar Shantilal Jain in *The Initial Public Offering of Infrastructure Development Finance Co. Ltd.*, In re, 2008 SCC OnLine SEBI 176, at ¶13.

<sup>34</sup> *Sumeet Industries Ltd. v. SEBI*, 2016 SCC OnLine SAT 289.

<sup>35</sup> *Palem Srikanth Reddy*, In re, 2016 SCC OnLine SEBI 42, at ¶12.

<sup>36</sup> *National Stock Exchange of India Ltd.*, In re, 2019 SCC OnLine SEBI 120, at ¶8.3.3.9.

<sup>37</sup> *OPG Securities (P) Ltd.*, In re, 2019 SCC OnLine SEBI 116.

<sup>38</sup> In *National Stock Exchange of India Ltd.*, In re, supra note 38, at ¶10.2.

possible that the notices may divert the unlawful gains (subject to the adjudication of the allegation on the merits in the final order), which may result in defeating the effective implementation of the direction of disgorgement, if any, to be passed after adjudication on merits," the SEBI directed in the ICICI Bank Ltd., In re, matter.<sup>39</sup>

Further, interest on the disgorged funds may be granted from the date the cause of action began until the date the procedures to collect such interest in equity were started.<sup>40</sup> This is subject to the regulator's non-interference at this time. It is also possible to award interest that will be paid until the actual payment date. These instructions must be precise, though. Nevertheless, no further interest is due if the SEBI order does not state "along with further interest till actual payment is made."<sup>41</sup>

In the April 30, 2013, ruling in Ramkishori Gupta v. SEBI<sup>42</sup>, SAT, it was decided that the SEBI was not authorized to reimburse the complainants for their losses. It added, "For the simple reason that SEBI lacks the infrastructure and experience for this purpose, this issue needs to be looked into by a civil court of competent jurisdiction in a trial and not by SEBI under the SEBI Act. There is no legal requirement for SEBI to take such action in the event that an investor loses money while trading shares or other securities."

It is important to note that the SEBI Act does not, in its whole, provide for such authority. As previously mentioned, the SAT directed SEBI to "look into the part of the complaint of the Appellants which relates to the alleged misleading and fraudulent advertisements issued by Vital Communications Limited, along with the investigation, understandably, being carried on in respect of VCL or separately, as it may be advised and considered fit and proper in the circumstances of this case as per law."

It is sometimes difficult to precisely quantify the damages because of the complex nature of transactions and the fact that the investigation report does not dwell on the extent of the specific gains made by the clients or the brokers.<sup>43</sup> Under Section 28A of the SEBI Act<sup>44</sup>, the SEBI is entitled to start the recovery process if the unlawful gains and directed interest are not paid within the allotted time.

---

<sup>39</sup> In ICICI Bank Ltd., In re, 2016 SCC OnLine SEBI 19, at ¶24.

<sup>40</sup> Trojan and Co. v. N.N. Nagappa Chettiar, AIR 1953 SC 235 : 1953 SCR 789.

<sup>41</sup> Dushyant N. Dalal v. SEBI, supra note 12.

<sup>42</sup> Ramkishori Gupta v. SEBI, 2013 SCC OnLine SAT 17 : [2013] SAT 52.

<sup>43</sup> In re Jay Bharat Fabrics Mills Ltd., SEBI Order No.AS/AO-03/2014 (2014), [https://www.sebi.gov.in/sebi\\_data/attachdocs/1393913697715.pdf](https://www.sebi.gov.in/sebi_data/attachdocs/1393913697715.pdf) (last visited May 18, 2020).

<sup>44</sup> Sumeet Industries Ltd., In re, 2014 SCC OnLine SEBI 278.

## THE SEBI'S MISSING PIECE IN ITS DISGORGEMENT ORDERS:

In the securities market, investor safety is essential. By their actions, wrongdoers expropriate money, especially earnings that were obtained unfairly. The financial markets' ability to function is threatened by such behaviour. Disgorgement of funds is in the greater public interest and has been upheld by the US Supreme Court.<sup>45</sup> As a result, there needs to be a deterrent enforcement ecosystem in the securities market that "holds individuals and entities accountable and deters misconduct, promote public confidence in financial services, creates an environment in which fair and efficient markets can thrive (sic)." <sup>46</sup>

In the securities market, **the SEBI has been granted "public interest"** jurisdiction. In *Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi*<sup>47</sup>, the Supreme Court of India provided an explanation of the phrase, ruling that "the expression 'public interest' has to be understood in its true connotation so as to give complete meaning to the relevant provisions of the Act." The goal of the SEBI Act is to safeguard the interests of securities investors and to encourage the orderly, healthy growth of the securities market through regulation and increased investor confidence.<sup>48</sup>

It is flexible, takes its colour from the statute in which it appears, and changes with time and the needs of society. It is a well-established canon of statutory construction that the Court must assist Parliament in achieving its goal of offering a remedy for the wrong that the law is intended to prevent. Consequently, the Court ought to favour a construction that promotes this goal over one that looks for a way around it.<sup>49</sup> Using the justification of the aforementioned court rulings, it can be claimed that the SEBI's crediting of the fines to the Consolidated Fund of India represents the SEBI Act's legislative mandate that these funds are public funds that the government may use for such purposes.<sup>50</sup>

Continuing this line of reasoning with regard to the disgorged funds, it is contended that since the funds are to be credited to the Investor Protection and Education Fund, the legislation's fundamental intention is unequivocally to protect and educate investors in the securities market,

---

<sup>45</sup> *Kokesh v. SEC*, supra note 2.

<sup>46</sup> *OSCO*, supra note 22

<sup>47</sup> *Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi*, (2012) 13 SCC 61, at ¶22.

<sup>48</sup> *N. Narayanan v. Adjudicating Officer*, supra note 19.

<sup>49</sup> *R.K. Agarwal v. SEBI*, 2001 SCC OnLine SAT 15 : 2001 SAT 15.

and that is the only use for this particular fund. It will be shown, therefore, **that the SEBI is not protecting investors with the money; rather, it is utilizing it for investor education.** The lone exception to this rule were the IPO scams. **As a result, there is an administrative and regulatory gap caused by the way things are now working.**

## CONCLUSION

This article starts out by outlining how legislation has evolved to give market regulators the authority to require the disgorgement of money obtained illegally from different market players. Disgorgement is a more recent invention used as a deterrent in the securities market. The Securities and Exchange Commission lacked explicit jurisdiction to issue disgorgement orders prior to the Securities Enforcement Remedies and Penny Stock Reforms Act 1991. The SEC has express jurisdiction to order the disgorgement of money obtained through fraudulent means thanks to the SOX Act, which was passed in the wake of the Enron scandal. For investors, it is placed in the Fair Funds. The SEBI Act, which was similar to the SEC Act and was passed in 1992, likewise prohibited the SEBI from issuing orders for disgorgement. Nonetheless, the SEBI began granting disgorgement orders in 2003 using its equitable powers. This was overturned by a SAT decision that held that the Act or Regulation must specifically grant the authority to impose disgorgement orders. Finally, **SEBI received the much-needed empowerment under the Securities Laws (Amendment) Act, 2014.** The Investor Protection and Education Fund is to be credited with the funds received in accordance with the aforementioned orders. The arguments in this article are further strengthened by the jurisprudence that has emerged on the SEBI's authority to make orders for the disgorgement of ill-gotten money by various courts and quasi-judicial authorities in India, which are covered in Part II.

The author concludes by arguing that since disgorgement must be followed by restitution, special provisions should be included in the SEBI (Investor Protection and Education Fund) Regulations, 2009, stating that the funds credited to the fund after disgorgement should be used to compensate the affected investors after identification. The author has also suggested a method to make up for the investors who have been wronged, based on the best worldwide practice that the SEC has accepted. Without a doubt, this will raise investor morale, especially among individual investors who are staying out of the market for various reasons. The regulatory environment, rather than the courts, is more important to the expansion of the Indian financial market.