BEFORE THE SECURITIES APPELLATE TRIBUNAL

MUMBAI

Appeal No.95 of 2007

Date of decision: 17.03.2008

M/s. CSL Securities Pvt. Ltd. ….. Appellant

Versus

Securities and Exchange Board of India ….. Respondent

Mr. Somasekhar Sundaresan Advocate with Mr. Zerick Dastur Advocate for the Appellant.
Dr. Poornima Advani Advocate with Mr. Haihangrang E.H. Newme Advocate for the Respondent.

Coram: Justice N.K. Sodhi, Presiding Officer
Arun Bhargava, Member
Utpal Bhattacharya, Member

Per: Justice N.K. Sodhi, Presiding Officer (Oral)

This appeal is directed against the order dated February 27, 2007 passed by the deputy legal advisor as the authorized representative of the Securities and Exchange Board of India (for short the Board) denying the appellant the benefit of the fee which Deepak Chowdhary had paid as a registered stock broker before his proprietary concern was corporatized under the name and style of M/s. CSL Securities Pvt. Ltd.- the appellant herein. Facts giving rise to this appeal are not in dispute and these may first be noticed.

One Deepak Chowdhary (Chowdhary) a member of the Delhi Stock Exchange (DSE) was registered as a stock broker with the Board on December 1, 1992. He formed a company on November 24, 1997 which is the appellant herein and the main object of this corporate entity was to takeover the running business of the proprietorship concern which was earlier working under the name and style of Deepak Chowdhary & Co. Chowdhary became the managing director of the company and held 54.35% of its equity share capital. It is not in dispute that on being corporatized, the membership card of DSE of Chowdhary was transferred in the name of the appellant

company which, on the basis of that card, got registered as a stock broker with the Board on December 31, 1997.

The Securities and Exchange Board of India (Stock Brokers and Sub-brokers) Rules, 1992 (for short the rules) require that no stock broker shall buy, sell or deal in securities unless he holds a certificate granted by the Board under the regulations. Rule 4 of the rules lays down the conditions for the grant of certificate to a stock broker and one of the conditions is that he must hold the membership of any stock exchange. The other condition upon which a certificate could be granted to a stock broker is that he shall pay the amount of fees for registration in the manner provided in the regulations. The Board has framed the Securities and Exchange Board of India (Stock Brokers and Sub-brokers) Regulations, 1992 (hereinafter referred to as the regulations) providing for their registration and for payment of fees. Regulation 10 of the regulations requires that every applicant eligible for grant of a certificate of registration shall pay such fees and in such manner as is specified in Schedule III. When we look at Schedule III it provides for the payment of fee by a stock broker on the basis of his annual turnover and after the expiry of five financial years from the date of his initial registration, he is required to pay a sum of Rs.5,000/- for every block of five financial years commencing from the sixth financial year after the date of grant of initial registration to keep his registration in force. There was no provision in the regulations for the grant of exemption to any stock broker from payment of fees. The policy of the Board has been to encourage corporatization of brokers. It found that most of the brokers operating in the securities market were either individuals or partnership firms and as such there was no transparency in their working. In order to have more transparency in their working, they were encouraged to corporatize themselves so that they become limited companies under the Companies Act, 1956. With a view to encourage those who corporatized themselves, the Board introduced paragraph 4 in Schedule III and it would be relevant to refer to the same at this stage. It reads as under:

> "4.Where a corporate entity has been formed by converting the individual or partnership membership card of the exchange, such corporate entity shall be exempted from payment of fee for the period for which the erstwhile individual or partnership member, as the case may be, has already paid the fees subject to the condition that the erstwhile individual or partner shall be the whole-time director of the corporate member so converted and such director will continue to hold a minimum of 40 per cent shares of the paid-up equity capital of the corporate entity for a period of at least three years from the date of such conversion.
> *Explanation:* It is clarified that the conversion of individual or partnership membership card of the exchange into corporate entity shall be deemed to be in continuation of the old entity and no fee shall be collected again from the converted corporate entity for the period for which the erstwhile entity has paid the fee as per the regulations."

A reading of the aforesaid provision makes it abundantly clear that an individual or a partnership firm which converts his/its membership card into a corporate membership card of any exchange, then such corporate entity shall be exempted from payment of fee for the period for which the erstwhile individual or partnership, as the case may be, had already paid the fees subject, of course, that the other conditions enumerated in paragraph 4 are satisfied. Those conditions are that the erstwhile member or partner of the firm shall become the whole time director of the corporate entity so converted and such director shall continue to hold a minimum of 40% shares of the paid up equity capital of the corporate entity for at least a period of three years from the date of such conversion. Paragraph 4 was inserted in the regulations only with effect from 21.1.1998 though the regulations came into force much prior thereto. With effect from 20.2.2002 the explanation was added to paragraph 4 clarifying that where an individual membership card or a partnership firm has converted its card into a corporate card then the corporate entity shall be deemed to be in continuation of the old entity and no fee shall be collected again from the converted corporate entity for the period for which the erstwhile entity had paid the fee as per the regulations. As already observed, this paragraph and the explanation were added by the Board to encourage individuals and partnership firms to become corporate entities.

Now reverting to the facts of the present case, we find that Chowdhary got his individual card converted into a corporate card and the corporate entity was registered

as a stock broker on December 31, 1997. Chowdhary became the managing director of the new corporate entity holding more than 40% of its paid up equity capital. As chance would have it, he expired on July 24, 1999 as a result whereof he could not continue as managing director of the new corporate entity for a period of three years as required by paragraph 4. The short question that arises for our consideration is whether the appellant which is the new corporate entity entitled to the benefit of paragraph 4, that is, whether the company would get the benefit of the fee which Chowdhary had paid prior to corporatization. It is clear that because of the death of Chowdhary he could not continue to remain the managing director of the corporate entity and, therefore, the condition of paragraph 4 that he ought to have been there for at least a period of three years to avail the benefit is not complied with. The claim of the appellant for the benefit of the fee paid by Chowdhary prior to corporatization has been declined by the Board on the ground that the mandatory condition of paragraph 4 requiring Chowdhary to be a whole time director for at least a period of 3 years has not been complied with. We do not think that the Board was justified in rejecting the claim of the appellant on this ground. Death of Chowdhary was an act of God which occurred on July 24, 1999 and because of this, the condition contained in paragraph 4 could not be complied with. It is trite law that when the fulfillment of a condition prescribed by law, though mandatory, becomes impossible to be complied with because of an act of God or otherwise, law will excuse the fulfillment of that condition. Law can never insist upon the performance of an act which has otherwise become impossible of performance. For this view of ours, we take support from the observations of the Apex Court in Industrial Finance Corporation of India Ltd. & Ors. Vs. Cannanore Spinning & Weaving Mills Ltd. & Ors., AIR 2002 SC 1841 wherein the learned judges of the Apex Court observed as under:

> “28. …There can be no doubt that a man may by an absolute contract bind himself to perform which subsequently however becomes impossible, or to pay damages for the non-performance and this interpretation is to be placed upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promissor.

> 29. But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened. It is on this principle that the act of God is in some cases said to excuse the breach of a contract.
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> 30. The Latin Maxim referred to in the English judgment "lex non cogit ad impossibilia" also expressed as "impotentia excusat legem" in common English acceptation means, the law does not compel a man to do that which he cannot possibly perform. There ought always thus to be an invincible disability to perform the obligation and the same is akin to the Roman Maxim "nemo tenetur ad impossibilia. In Broom's Legal Maxims the state of the situation has been described as below:-
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> "It is, then, a general rule which admits of ample practical illustration, that impotentia excusat legem; where the law creates a duty or charge; and the party is disabled to perform it without any default in him, and has no remedy over, there the law will in general excuse him (t): and though impossibility of performance is in general no excuse for not performing an obligation which a party has expressly undertaken by contract, yet when the obligation is one implied by law, impossibility of performance is a good excuse. ..."

The same view was earlier expressed by the Apex Court in Raj Kumar Dey & Ors., Vs. Tarapada Dey & Ors., AIR 1987 SC 2195 and this is what was stated in para 7 thereof:

> "7. In this case indisputably during the period from 26th of July, 1978 to 20th December, 1982 there was subsisting injunction preventing the arbitrators from taking any steps. Furthermore, as noted before the award was in the custody of the court, that is to say, 28th of January, 1978 till the return of the award to the arbitrators or the parties could not have presented the award for its registration during that time. The award as we have noted before was made on 28th of November, 1977 and before the expiry of the four months from 28th November, 1977, the award was filed in the court pursuant to the order of the court. It was argued that the order made by the court directing the arbitrators to keep the award in the custody of the court was wrong and without jurisdiction, but no arbitrator could be compelled to disobey the order of the court and if in compliance or obedience with court of doubtful jurisdiction, he could not take back the award from the custody of the court to take any further steps for its registration then it cannot be said that he has failed to get the award registered as the law required. The aforesaid two legal maxims – the law does not compel a man to do that which he cannot possibly perform and an act of the Court shall prejudice no man would apply with full vigour in the facts of this case and ….."

The case on all fours is the Division Bench judgment of the Gujarat High Court in Rolcon Engineering Co. Ltd. Vs. State of Gujarat & Ors., Special Civil Application

no.2033 of 2004 decided on 2.3.2006 wherein the benefit of the sales tax incentive scheme was subject to the condition that the beneficiaries continued to generate electricity for a continuous period of six years so as to avail the benefit of tax exemption. The petitioner therein having availed of the benefit could not continue to generate electricity owing to a natural calamity namely, a cyclone which was an act of God and it completely destroyed its windmills and this is what the learned judges observed in their order granting the benefit of exemption to the petitioner who defaulted by reason of an act of God.

> "32. Looking to the language employed in Clause 7(f) of the scheme, it is clear that so as to retain the benefit already granted, an industrial undertaking should keep the wind farm running satisfactorily at least for 6 years from the date of commissioning the same. The language used in the said clause cannot be interpreted to read that even if due to factors beyond control of the industrial undertaking, if the wind farm cannot be kept in a running condition, there would be breach of the said condition. The condition incorporated in the said clause deals with a voluntary action on the part of the industrial undertaking. The said clause can be invoked for withdrawal of the benefits if it is found that either deliberately or due to gross negligence on the part of the industrial undertaking, the wind farm was not kept in running condition. So, in our opinion, if the act of discontinuing generation of electricity is deliberate or voluntary, then only the concerned industrial undertaking should be deprived of the benefit availed under the scheme.
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> 33. In the instant case, it is not even the case of the respondent government authorities that the petitioner had done something deliberately or on account of its carelessness, generation of electricity could not go on uninterruptedly or the wind farm did not run satisfactorily for a period of 6 years from the date on which its operation had commenced. It cannot be disputed that it was only on account of an act of God, vis majore, that the petitioner industrial undertaking could not keep the wind farm running after 9.6.1998.
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> 35. It is a settled legal position that a person cannot be constrained to do something which is impossible. There is a well known legal maxim Lex non cogit ad impossibilia, which means that law cannot compel a man to do what he cannot possibly do.
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> 39. So far as the case on hand is concerned, impossibility was on account of vis-majore, an Act of God. It is not even the case of the respondent authorities that the condition incorporated in Clause 7(f) of the scheme was violated by the petitioner deliberately. It cannot be disputed that the cyclone was an Act of God, which completely destroyed two wind-mills set up by the petitioner, which made it impossible for it to fulfill one of the conditions incorporated in the scheme. As stated hereinabove, till the cyclone had hit the coastal area of Saurashtra, the petitioner had continuously operated both the wind-mills and had supplied electricity scrupulously to GEDA. Not a

> single default had been committed by the petitioner and only on account of vis-majore, it became impossible for the petitioner to generate and supply electricity as per the aforestated condition. It is also pertinent to note that one of the wind-mills, which had been duly insured, had been commissioned immediately upon getting insurance claim and this fact reveals that the petitioner had no dishonest intention to commit breach of any of the conditions on which the benefit had been availed by it under the scheme. We, therefore, hold that the petitioner cannot be deprived of the benefit, which had been given to it under the scheme only because it could not fulfill the condition due to an Act of God or because of impossibility on its part to perform the same."

In the case in hand, the benefit of fee exemption has been denied to the appellant only because Chowdhary did not comply with the condition of para 4 in Schedule III to the regulations. Chowdhary could not comply with the condition because of his death and had he not died the conditions would have been complied with and it is not in dispute that till his death those conditions had been complied. In these circumstances, the legal maxim that the law does not compel a man to do that which he cannot possibly perform would apply with full force to the facts of this case. In this view of the matter, we are of the opinion that the appellant was entitled to the benefit of paragraph 4 not withstanding that Chowdhary could not complete his term as managing director of the company for three years.

The respondent Board has, however, relied upon its circular dated September 30, 2002 to deny the benefit of para 4 to the appellant. We do not think that this circular helps the respondent Board. This circular, among others, deals with fee continuity benefit where the erstwhile individual/partner dies prior to completion of three year period from conversion of membership. The circular clarifies (though we do not think that it is a clarification) that all converted corporate entities which were otherwise eligible for fee continuity benefit under para 4 would continue to enjoy the benefit hereunder even in case of death of the erstwhile individual/partner within a period of three years from the date of conversion provided that the following two conditions are satisfied (a) the erstwhile individual/partner was satisfying the conditions till his/her death and (b) the legal heirs of such whole time director satisfy the conditions of para 4 till the completion of the remaining period. This circular will

not apply to the facts of the present case as it was issued long after the period of three years were over not only from the date of corporatization of the erstwhile individual but even from the date of the death of Chowdhary. The right to claim the benefit under para 4 had accrued to the appellant when Chowdhary expired on July 24, 1999 and the accrued right could not be taken away by the circular. This apart, the circular has imposed a new condition when it requires the legal heirs of the deceased director to comply with the conditions of para 4 for the remaining period. No such condition is found in para 4 of Schedule III to the Regulations. This new condition again could not operate retrospectively.

For the reasons recorded above, we allow the appeal, set aside the impugned order and hold that the appellant is entitled to the benefit of para 4 in Schedule III to the regulations. There is no order as to costs.

Justice N.K. Sodhi
Presiding Officer

Arun Bhargava
Member

Utpal Bhattacharya
Member

17.03.2008
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