HIGH COURT, BOMBAY

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 7 OF 2001
IN
SEBI APPEAL NO.24 OF 2000

The Securities & Exchange Board)
Of India, having their Office at)
Mittal Court, "B" Wing, Nariman)
Point, Mumbai – 400 021)…. Appellants

Versus

Cabot International Capital)
Corporation, a company)
Incorporated under the provisions)
Of the law in the United States)
And having its Registered Office)
At Suit 1300, Two Seaport Lane,)
Boston MA-02210-2019, USA.)…….Respondents

Mr. R.A. Dada, Senior Counsel, with Mr. Kumar Desai
c/o Maneksha & Sethna for the appellants.

Mr. Aspi Chinoy, Senior Counsel, with Suneep Sen i/b
Little & Co. for the Respondents.

CORAM: R.M. LODHA & ANOOP V. MOHTA, JJ.

DATED : MARCH 3, 2004

JUDGEMENT : (Per Anoop V. Mohta, J.)

1. Enlarged and projected issue is, whether mens rea is sine qua non, for imposing penalty for breach of the provisions of the SEBI Act and the Regulations framed thereunder, apart from the discretion, exercisable by the adjudicating authority.

2. **INTRODUCTION :** This appeal is under Section 152 of the Securities & Exchange Board of India Act, 1992 (for short, "SEBI Act") filed by the Securities & Exchange Board of India (for short "SEBI") against the order dated 20th January, 2001, of the Securities Appellate Tribunal (for short "SAT") in Appeal NO.24 of 2000, under Section 15T of the SEBI Act, whereby, order dated 31st August, 2002 passed by the Adjudicating Officer under Section 15J of the SEBI Act was set aside.

3. FACTS: The appeallants, SEBI, are statutory body constituted under the provisions of the SEBI Act. It can sue and be sued b that name. Being a person aggrieved and affected by the impugned order, has preferred this Appeal.

4. The respondents – Cabot International Capital Corporation (for short referred as "CICC") have its office at Suite 1360, Two Seaport Lane, Boston MA-02201-2019. Cabot India Limited (for short "CIL") is a company incorporated under the Companies Act 1956. CIL was listed in Bombay Stock Exchange on 16th December, 1996. CICC, the foreign collaboration of the CIL, held 51% of paid up capital of the CIL. After the Board Meeting of the CIL dated 24th December, 1996, the Board of Directors approved the recommendations for the Preferential Issue to the members and shareholders of the CIL and accordingly, Extraordinary General meeting was convened and conducted on January 23, 1997, which was duly notified to the Bombay Stock Exchange on January 2, 1997.

5. By Certificate dated 14th January, 1997, M/s. S.R. Batliboi & Associates, Chartered Accountants, being the statutory Auditors of the CIL, addressed a certificate to the SEBI and the Reserve Bank of India (for short "RBI") and it was confirmed that the Preferential Issue could be made by the CIL at a price, less than Rs.121/- per share. This was done in accordance with the provisions of the SEBI Guidelines for Preferential Allotment dated 4th August, 1994 and the RBI Guidelines determining issuing price of preferential shares, dated 3rd June, 1994, regarding approval for raising foreign equity in existing Companies. From 4th November, 1994, SEBI (Substantial Acquisition of Shares & Takeovers) Regulations 1994 (for short "SEBI Takeover Regulations, 1994") were in force till 22nd February 1997.

6. CICC, on 21st January 1997, communicated to the CIL, its decision to subscribe to the preferential issue, subject to approval of the Foreign Investment Promotion Board, the RBI, the SEBI and all other relevant agencies of the Government of India. On 23rd Januray, 1997, Extra-General meeting was held and therein, CIL's Members and share holders approved the preferential issue to the CICC, of 16,00,200 equity shares, under the provisions of Section 81(1A) of the Companies Act, and all other applicable provisions. The respondents – Company, on February 5, 1997, filed Form 23 with the Registrar of Companies, Maharashtra, with other details. CICC, on 18th February, 1997, received an approval from the Foreign Investment Promotion Board, permitting the CICC to increase its equity holding in the CIL from 51% to 74%. The SEBI (Substantial Acquisition Of Shares & Takeovers) Regulations 1997 (for short SEBI Takeover Regulations, 1997) are in force from February 22, 1997. CIL, made an application to the RBI for issuing shares to the CICC and for permission under Section 1991)(d) of the Foreign Exchange Regulation Act 1973. On 28th February, 1997, sent copies of the Minutes of the Annual General Meeting to the Bombay Stock Exchange. The RBI, by its letter dated 1st February 1997, granted an approval to the CIL to make the preferential issue to the CICC. On March 3, 1997, the CICC remitted US $ 7,712,346.42 in favour of the CIL, being the amount payable towards the subscription money for the preferential issue. CIL, thereafter, convened a Meeting of its Board of Directors, on 4th March, 1997 and resolved to allot 16,05,020, new equity shares of Rs.10/- each, subject to final approval from the RBI, which was also received by them on 11th April, 1997. CIL, on 16th April 1997, filed a Return of Allotment pursuant to Section 75(1) of the Companies Act with the Registrar of Companies, Maharashtra, in respect of the above referred issues and allotment of new equity shares. On 16th May, 1997, on application, Bombay Stock Exchange, informed the listing of the aforesaid shares and that the shares were not transferable upto 10th April, 2002. CICC, therefore, pursuant to the aforesaid preferential allotment, held 60% of the issued capital of the CIL. On 2nd June, 1997, the respondents ought to have filed a Report with the SEBI under Regulation 3(4), 3(5) of SEBI Takeover Regulations 1997, within 21 days of the said allotment. On 28th October, 1998, the SEBI Takeover Regulations 1997 were amended.

7. DSP Merill Lynch Limited, on 10th November, 1998, on behalf of the CICC, made an application to the SEBI in respect of acquisition of further 14% of the shares and sought an exemption under Regulation 3 of the SEBI Takeover Regulations 1997.

8. Sometime in November, 1998, appellants raised query and pointed out that the SEBI Takeover Regulations 1997, were applicable and the respondents were under an obligation to file a Report under Regulation 3(4) of the SEBI Takeover Regulations 1997. The respondents (CICC), by its letter dated 3rd December, 1998, replied that basic formalities had been complied with, before the SEBI Takeover Regulations 1997 came into force. Respondents (CICC), also expressed that they understood that it was not necessary to submit a Report and, therefore, its non compliances with those requirements were unintentional. The respondents, however, submitted the requisite Report by its letter, dated 3rd December, 1998. The appellants had accepted the said Report which was filed admittedly, beyond 529 days. The Report ought to have been filed on 22nd June, 1997. The appellants, on 7th December, 1998, by a reasoned order, granted exemption to the (CICC) respondents form making a public offer for a minimum of 20% of the CIL and granted the permission to make a public offer for the acquisition of 14% of the shares in the CIL, as per the then applicable SEBI Takeover Regulations, 1997. The actual allotment of acquisition took place on 4th March, 1997, after 20.2.1997 i.e. effective date of the SEBI Takeover Regulations, 1997.

9. The Adjudicating officer had been appointed by the appellants by the orders dated 30th September, 1999 and 10th December, 1999, to conduct an inquiry into the matter, pursuant to Section 15I read with the SEBI (Procedure for Holding Enquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995. The appellants, pursuant to Section 15(A) 15H of the SEBI Act, read with regulation 3(4), 11 of the SEBI Takeover Regulations 1997, issued show cause notice to conduct an inquiry into the alleged contraventions by the respondents, in the matter of acquisition of said Preferential Shares in the year 1997. The said show cause notice dated 8th February, 2000 was duly received and replied by the respondents, and submissions were sent by letter dated 7th March, 2000 and 8th August, 2000. The matter was heard by the Adjudicating Officer on 15th April, 2000, 19th April, 2000 and 2nd May, 2000 and after hearing both the parties, considering the material and evidence on the record

including then existing provisions, levied a restricted, lumpsum penalty of Rs.1,50,000/- on the respondents. No penalty was levied on the respondents for the breath of Section 15H (ii) of the SEBI Act.

10. The respondents, therefore, being aggrieved and affected by the said order of the Adjudicating Officer dated 31st August, 2000, imposing monetary penalty, preferred an Appeal No.24 of 2000, under Section 15T of the SEBI Act, before the SEBI Appellate Tribunal (SAT), Mumbai, on 22nd October, 2000. This Appeal was duly contested by the appellants through its Adjudicating officer. The basic grounds raised in the appeal by the respondents were that, there was no deliberate or dishonest conduct or any conscious disregard to the SEBI Takeover Regulations of 1994/1997. It was only a technical or venial flaw from a bonafide belief that the respondents were not liable to act in the manner prescribed under the provisions of SEBI Takeover Regulations 1997. That alleged breach was without "mens rea" and no advantage of any kind accrued to the respondents or any loss of the investors. There was no occurrence of default or repetition of the alleged violation by the respondents. They had complied with other laws and regulations. Therefore, no case of penalty was made out and the learned Adjudicating Officer failed to exercise discretion judiciously. The appellants, resisted the above grounds by its Affidavit dated 14th November, 2000.

11. The SAT, after hearing both the parties, by its order dated 25th January, 2001, allowed the appeal of the respondents and held that the order imposing penalty on the respondents was unsustainable and same was set aside.

12. The appellants – SEBI, therefore, preferred the present Appeal No.7 of 2001, under Section 15Z of the SEBI Act, on 23rd March, 2001. The present Appeal was admitted and, therefore, heard finally. As important common issues were involved, other Senior Counsel and Advocates have also made their respective valuable legal submissions. Those submissions and authorities are infact guiding factors for this decision.

13. We have already, in Appeal No.2 of 2001, arising out of SEBI Appeal No.17 of 2000 (Securities & Exchange Board of India vs Sangeeta Valia) considered some provisions, by

the Judgement dated 5th December, 2003. This and other appeals are identically placed on law. However, aforesaid, enlarged and projected issue vehemently raised on behalf of the contesting respondents in this appeal.

14. The relevant paragraphs of the judgement in Appeal No.2 of 2001 are necessary, to cut short the basic issue and discussion on SEBI Act and the Regulations and as referred by the counsel for the parties also. Those are :

> "10. The developing securities market, in the international scenario, including the growth of the capital market, necessitated the comprehensive legislation for setting up the Statutory Body to promote orderly and healthy growth of the securities market. The Securities & Exchange Board of India Ordinance 1992 was, therefore, promulgated on 13.1.1992 and ultimately the SEBI Act has been enacted and notified on 14.4.1992. The statement of objects and reasons appended to the bill, as relevant, is reproduced as under :
> "The capital market has witnessed tremendous growth, in recent times, characterized particularly by the increasing participation of the public Investors confidence in the capital market can be sustained largely by ensuring investors protection. With this and in view, Government decided to vest SEBI immediately with statutory powers required to deal effectively with all matters relating to capital market."
>
> 12. The other essential provisions as provided in Chapter VI A of the SEBI Act, titled as "Penalties and Adjudication". Section 15A, 15J (prior to amendement dt.29.10.2002) as referred by both the parties, are reproduced as under :
>
> 15A **Penalty for failure to furnish information, return, etc** – If any person, who is required under this Act or any rules or regulations made thereunder :-
> 15(a) to furnish any document, return or report to the Board, fails to furnish the same, he shall be liable to "a penalty not exceeding one lakh and fifty thousand rupees for each such failure.
> (b) to file any return or furnish any information, books or other documents within the time specified therefore in the regulations, fails to file return or furnish the same

within the time specified therefore in the regulation, he shall be liable to "a penalty not exceeding five thousand rupees for every day during which such failure continues."

(c) to maintain books of account or records, fails domination the same he shall be liable to "a penalty not exceeding ten thousand rupees for every day during which the failure continues."

15J. **Factors to be taken into account by the Adjudicating Officer:** While adjudging the quantum of penalty under Section 15-I, the adjudicating officer shall have due regard to the following factors namely:-

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default,

(b) the amount of loss caused to an investor or group of investors as a result of the default.

13. It is very clear that above functions are provided to protect the interest of the investors in securities and to promote the development of, and to regulate the securities market, by appropriate and suitable rules, regulations, directions an orders. Those statutory functions and duties are in the interest of the public at large and to achieve the purpose and object of the Act, including of investors and the capital market. These powers and authorities which are provided to such regulatory agency, is to prevent or minimize various frauds, scams, apart from regulations of securities market. This is also essential to gain the public confidence and regulating economy of the developing countries like India. The SEBI therefore, in order to protect the public and capital market, as regulator, has issued and published various guidelines, regulations, rules, notifications, circulars etc. under the power conferred by Section 30 of the SEBI Act. The reference may be made to the concerned regulations for the purpose of the issues raised in the present Appeals. These are, Securities and Exchange Board of India (Substantial acquisition of shares and takeovers) regulations, 1997.

17. The provisions of penalty in failure to furnish any documents, return or report or any information or books, within the specified period as per the regulations as contemplated under section 15A (a), 9b), (c) and are in the form of mandatory

provisions. These compliances therefore, in our opinion, are essential to serve the purpose and object of the Act, as referred above. The provisions of penalty for non-compliance of the said mandate of the Act is definitely with an object to have an effective deterrent to ensure better compliances of the provisions of such laws, which is in the interest of public at large, investors and essential to regulate and control such markets, through the regulatory authority, like SEBI.

22. At the outset, there cannot be any debate so far, as the legal principles, reflected, from the authorities cited by the learned Counsel for the Respondent. However, it is now settled and reiterated by the Hon'ble Supreme Court, time and again that, "status as is well-known must be read in the text and context thereof, "the construction of a statute will depend on the purport and object for which the same had been used. The purpose and object of the Act must be given its full effect and the entire statute must be read as a whole; "Contextual reading is a well-known proposition of interpretation of statute. The clauses of a statute should be construed with reference to the context vis-à-vis the other provisions so as to make a consistent enactment of the whole statute relating to the subject matter"; "A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word"; "No part of a statute and no word of a statute can be construed in isolation"

29. It is clear from the provisions referred above, that it is an obligation and duty of the acquirer to provide and furnish detail information with documents through the format of report as prescribed. This format further makes it clear that general information about the acquisition of shares must be submitted to the Board by acquirer with details of "promoter" and "target Company" etc. The format is always for the convenience of acquirer such other person, so that maximum detail information can be submitted and or called by the appropriate authorities. It is clear that the purpose of collection of this information is to take appropriate recommendations or decisions on such acquisition. Therefore, scheme of the

regulation in such cases would be defeated, if such acquirer after acquisition allow to take it's own time to file such details to the Board.

33. Mention of wrong provision of law shall not render the exercise of power by the authority bad in law, if the source of power can be traced in some other provision. The present is a case where the authority has exercised the power under section 15A(b) and that cannot be faulted for the reasons we have indicated above."

15. SUBMISSIONS : The learned senior counsel for the appellants, Mr. RA. Dada with Mr. Kumar Desai made focused and contributory submissions with a platnora of Judgements.

(A). The appellants counsel submitted that the SEBI Takeover Regulations 1997, apply to the preferential allotments in question. Both the SEBI Takeover Regulations 1994 and 1997 govern takeover and substantial acquisition of shares. The acquirer availing of the exemption under Regulation No.3(1) (c) was also required to comply with the provisions of the Regulation 3(4) and 3(5). Therefore, filing of a Report with requisite details with the SEBI within 21 days of the said acquisition was a must. This procedure of filing of Report would assist the SEBI in its regulatory functions and it was not merely a procedural lapse or technical breach. The respondents even though exempted from making an offer under Regulation 3(1)(c), were required to comply with the SEBI Takeover Regulations, 1997 i.e. Regulation 3(4) and 3(5). For want of details through Report, the SEBI was unaware of the said preferential allotment made in the year 1997 by the respondents.

(B) There was admittedly delay of 529 days in filing the said Report with details. As appellants had acquired preferential allotment on or about 2nd June, 1997, the Report ought to have been filed on or about 22nd June, 1997. The Report was filed on 3rd December 1998.

(C) The respondents were, therefore, liable for penalty as provided in Section 15A(b) of the SEBI Act; in view of the admitted delay and default.

(D). The Adjudicating Officer, under Section 15-I read with 15J of the SEBI Act, was bound to adjudicate on the said breach's and on quantum of penalty, in question.

(E). The SEBI Act and the Regulations in question are not penal statutes, but are regulatory and remedial in nature. Proceedings under Chapter VI-A relating to levy of penalties are adjudicatory in nature and are not criminal proceedings. The Adjudicating Officer performs quasi judicial functions and does not act as a Court, but acts for the purpose of determining the liability for the breach of civil obligations imposed by the SEBI Act and the Regulations.

(F). The Adjudicating Officer, after taking into consideration all facts and circumstances and the provisions of Section 15J, had imposed a nominal penalty of Rs.1,50,000/- only. Therefore, discretion exercised by the Adjudicating Officer ought not to have been interfered with. The Adjudicating Officer had not imposed any penalty under Section 15H (ii) of the SEBI Act as no offence under that Section was made out.

(G). The penalties prescribed under the SEBI Act are the liabilities for breach of civil obligation in complying with civil obligations imposed by the SEBI Act and Regulations and, therefore, penalty imposed cannot be equated to a fine imposed in criminal proceedings. The SEBI Act and Regulations have been set up to promote, develop and regulate the securities market and to protect the interest of investors. Breach of any provisions in question does not require mens rea.

(H). When penalty is to be imposed under the SEBI Act for breach of a civil obligation by adjudicatory proceedings, which is civil in nature, that does not attract the rule that mens rea is an essential before a penalty could be imposed.

16. The learned senior counsel Mr. Aspi Chinoy appearing on behalf of the respondents supported the impugned order and resisted the appeal and submissions made by the appellant's counsel. Referring to Section 15I and 15J of the SEBI Act, read with the judicial opinions of the Hon'ble Supreme Courts made their propositions as under. Those darted contributions and propositions are based on extract of Apex Court's decisions, as useful and relevant, reproduced as under :

A. It is well settled that :

(a) liability to pay a "penalty does not arise merely upon proof of default / failure.

(b) An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi criminal proceeding and penalty will not ordinarily be imposed unless the party obliged act deliberately in defiance of law, or was guilty of contumacious conduct or dishonest, or acted in conscious disregard of its obligations.

(c) The authority will be justified in refusing to impose a penalty when there is a technical or penial breach of the provisions or where the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed by the Statute.

(d) The word penalty is a word of wide significance. Sometimes it means recovery of an amount as penal measure even in a civil proceeding. An exaction which is not of a compensatory character is also termed as a penalty even though it is not being recovered pursuant to an order finding the person concerned guity of a crime.

(e) A penalty imposed by the sales tax authorities is only a civil liability though penal in character.

(f) A provision for levy of penalty for failure to comply with a statutory / civil obligation is penal in the sense that its consequences are intended to be an effective deterrent.

(g) Once default is established deliberation may be inferred if there is no reasonable explanation forthcoming from the assessee.

B. It has been contended therefore, that settled principle of mens rea is a must before proposing a penalty in question. This general principle of mens rea is a must before proposing a penalty in question. This general principle is not altered or affected by the decision in "Director of Enforcement vs MCTM": AIR 1996 SC 1100.

C. In the case of "State of Maharashtra vs. Hans Meyer George": AIR 1965 SC 722(3 Judges) the Supreme Court had earlier held that offences under FERA were absolute offences and not conditioned by guilty intent or mens rea.

D. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be Judicially exercised and on a consideration of all the relevant circumstances / the entirety of circumstances.

17. Senior Counsel Mr. Janak Dwarkadas for the respondents in other appeal supported the arguments of Senior Counsel Mr. Aspi Chinoy and in addition to that, he referred to the Judgement of this Court in Appeal No.2 of 2001, dated 5h December, 2003 9supra), AIR 1966 S.C., 13 (Nathulal Vs. State of M.P.) (3 Judges) and 1984 (2) All. E.R., 603 (Gannon (hongkon) & Ors. Vs. Attorney General of Hongkong (Privy Council) J. He further submitted that non-compliance of the order of the Adjudicating Officer results in to offence under Section 24 of the SEBI Act. Therefore, existence of mens rea is necessary.

18. CONSIDERATION : We have scanned the authorities cited by the counsel for the parties and observed as under :

AUTHORITIES OF RESPONDENTS : (1)AIR 1965, S.C., 722 (State of Maharashtra vs. Mayer Hans George) This was a case of smuggling; and on the issue that "mens rea", was an essential ingredient for offence under Section 23 (1A) read with Section 8(i) of the Foreign Exchange Regulation Act, 1947. This Judgement has been heavily relief for their proposition that mens rea is an essential ingredient for such penalty in question. We have noted following paragraph from the Judgement.

> "There is a presumption that mens rea is an essential ingredient of a statutory offence; but this may be rebutted by express words of a Statute creating the offence or by necessary implications. But, the one fact that the object of a statute is to promote welfare activities or to eradicate grave social evils is in itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of the offence. The nature of mens rea that will be implied in a statute creating an offence depends upon the object of the Act and the provisions thereof.

Whether the enforcement of the law and the attainment of its purpose could not be rendered futile in the event of such an ingredient being considered necessary."

Reference : Para 34 Pg. 738."

19. This was a case of an offence and related conviction under the old Foreign Exchange Regulation Act. We are not dealing with a case of an offence or criminal punishment or obligation under the SEBI Act and respective regulations. Strikingly, this judgement again is a guiding factor to decide the matter of the penalty, in case of civil obligations under the relevant statute. This Judgement guides further that the object and purpose of the Act and its effectiveness, including related provisions should be the criteria to arrive at proper and effective conclusion in cases of doubt, as raised or alleged. We have already noted the object and purpose of the SEBI Act including its Scheme and Policy in our Judgment in Appeal NO.2 of 2001 (Supra). This Judgment was considered in AIR 1966, S.C. 43 (Nathulal vs. State of Madhya Pradesh) (Supra).

(ii) 1970 (i) SCR, 753 (Hindustan Steel Limited vs. State of Orissa.). This authority was referred in support of the submission that

"An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to exercised judiciously and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed by the Statute."

20. This was a case under the Sales Tax Act 1947 and penalty provision was in addition to the failure to register itself as a dealer. The observations of the Supreme Court that penalty for failure to carry out a statutory obligation would not be, ordinarily, imposed unless the delinquent party acted deliberately or was guilty of contumacious conduct or dishonest or in conscious disregard of its obligation is based on the proceeding being quasi criminal proceeding. Obviously the said observations shall not be applicable as it is, if the imposition of the penalty is for the breach of civil obligation. Moreover, the Supreme Court has held that imposition of the penalty is a matter of discretion of the authority to be exercised judiciously and on a consideration of all the relevant facts.

(iii) AIR 1970 S.C. 1982 (The Commissioner of Income Tax, West Bengal Vs. Anwar Ali): This is a case under Section 28 (1) 9c) of the Income Tax Act, dealing with concealment of particulars of income, deliberate furnishing inaccurate particulars and penal nature of proceedings.

(iv) (1972) 83 ITR, 369, (Commissioner of Income Tax Vs. Knoday Eswarsa & Sons) : This was also a case under the old Indian Income-tax Act 1922 Section 28(1) (c) and turns on the language of Section 28(1) (c).

(v) AIR 1974, S.C., 859 (Collector of Customs Vs. D. Bhoormull) : This was a case of possession of smuggled goods and related burden of proof in view of the specific provisions of Section 167 and 178A of the Sea Customs Act, under which the alleged action was in the nature of criminal offence. Therefore, it was held that the authorities should be guided by the basic cannon of criminal jurisprudence and natural justice. Admittedly, we are not dealing with any criminal offence under the SEBI Act and Regulations.

(vi) AIR 1980 S.C., 1146 (M/s. Anantharam Veerasinghaiah & Co. Vs. Commissioner of Income-tax, Andhra Pradesh) : This was also a case under the Income-tax Act, Section 271 91) (c). This Judgment again reconfirms that where an order of imposing a penalty is result of quasi-criminal proceedings, the burden lies on the authorities to prove that offender or assessee has consciously concealed or has guilty mind.

(vii) AIR 1980 S.C., 346 (The Cement Marketing Company of India Vs. The assistant Commissioner of Sales Tax, Indore & Ors.1). This was a case of Madhya Pradesh General Sales Tax Act, Central Sales Tax Act and filing of incorrect return and not accompanied by guilty mine.

(viii) Air 1988, S.C., 1860 (D.B.) (Commissioner of Sales Tax Vs. M/s. Moolchand Shah) : This was a case under the Uttar Pradesh Sales Tax Act. The imposition of a penalty under the said Act was held to be quasi-criminal processing and , therefore, it was observed that unless strictly proved, the assessee was not liable for the same.

(ix) 1983(3) S.C.C., 529 (Shiv Dutt Rai Fateh Chand & Ors. Vs. Union of India & anr.) : This was a case of the penalty under the Central Sales Tax Act 1973. This Judgment elaborates the meaning and purpose of the words "offence" and "penalty". After considering all earlier leading cases on these related principle of "offence" and "penalty", the Hon'ble Supreme Court, in paragraphs 25 and 31, observed as under :

> 25. ……The expression "offence" is not defined in the Constitution. Article 367 of the Constitution says that unless the context otherwise provides for words which are not defined in the constitution, the meaning assigned in the General Clauses Act, 1897 may be given. Section 3 (38) of the General Clauses Act defines "offence" as any act or omission made punishable by any law for the time being in force. The marginal note of our Article 20 is protection in respect of conviction for offences. The presence of the words "conviction" and "offence", in the marginal note 'convicted of an offence, the act charged as an offence and 'commission of offence' in clause (1) of Article 20, 'prosecuted and punished' in clause (2) of Article 20 related to the constitutional protection given to persons who are charged with a crime before a criminal court (see H.M. Seervai: Constitutional Law of India (3rd Edn.), Vol. I, p.759). The word 'penalty' is a word of wide significance. Sometimes, it means recovery of an amount as a penal measure even in a civil proceeding. An exaction which is not of compensatory character is also termed as a penalty even though it is not

being recovered pursuant to an order finding the person concerned guilty of crime. In Article 20(1) the expression 'penalty' is used in the narrow sense as meaning a payment which has to be made or a deprivation of liberty which has to be suffered as a consequence of a finding that the person accused of a crime is guilty of the charge. (Emphasis added).

31. After giving an anxious consideration to the points urged before us, we feel that the word 'penalty' used in Article 20(1) cannot be construed as including a 'penalty' levied under the sales tax laws by the departmental authorities for violation of statutory provisions. A penalty imposed by the Sales Tax authorities is only a civil liability, though penal in character. It may be relevant to notice that sub-section (2A) of Section 9 of the Act specifically refers to certain acts and omissions which are offences for which a criminal prosecution would lie and the provisions relating to offences have not been given retrospective effect by Section 9 of the Amending Act. The argument based on Article 20(1) of the Constitution is, therefore, rejected." (Emphasis added).

21. The judicial pronouncements clearly distinguish the criminal proceedings, as well as, civil proceedings, which can be initiated under the same act. It further emphasizes that a penalty imposed by the Sales Tax authorities is only a civil liability, though penal in nature. The word 'penalty' is a word of wide significance and sometimes it means recovery of an amount as a penal measure even in a civil proceeding. This Judgment, on the contrary, presupposes and recognizes, two distinct liabilities, civil, as well as, criminal, and are invokable under the same statute.

(x) 1990 (47)ELT, 161 (SC) (D.B.) (Akbar Badruddin vs. Collector of Customs): The concerned provisions were under the Customs Act, 1962. By referring to Hindustan Steel (supra) and other cases, on merit, the imposition of penalty was held to be unwarranted and unjustifiable, as goods, itself, were not within the ambit of Import-Export Policy and / or the Customs Act and as they had acted bonafidely. Therefore, held that the quantum of penalty and fine in lieu of confiscation was extremely harsh, excessive and unr4easonable, as found by the Appellate Tribunal.

(xi) 20 (1) S.C.C., 278 (Consolidated Coffee Limited Vs. Agricultural Income Tax Officer): This judgment elaborates the meaning of the words "interest" and "penalty" in reference to the Agricultural Income Tax.

22. Mr. Dwarkadas relied on AIR 1966, S.C., 43 (Nathulal vs State of Madhya Pradesh). This was a case of offence under Essential Commodities Act 1955 r/w Section 40 of the Indian Penal Code. This was again a case of criminal offence. The principle noted above and referred in AIR 1965, S.C.722 (State of Maharashtra vs. Mayer Hans George) (supra) has been followed. The paragraph referred vehemently in support of his submissions is reproduced as under:

> Having regard to the object of the Act, namely, to control in general public interest, among others, trade in certain commodities, it cannot be said that the object of the Act would be defeated if mens ea is read as an ingredient of the offence. The provisions of the Act do not lead to any such exclusion. Indeed, it could not have been the intention of the Legislature to impose heavy penalties like imprisonment for a period upto 3 years and to impose heavy fines on an innocent person who carries on business on an honest belief that he is doing the business in terms of the law. Having regard to the scope of the Act, it would be legitimate to hold that a person commits an offence under S.7 of the Act if he intentionally contravenes any order made under S.3 of the Act. So construed the object of the Act will be best served and innocent persons will also be protected from harassment."

23. **AUTHORITIES OF APPELLANTS :** The learned counsel for the appellants, on the other hand, heavily relied on the judgment of the Supreme Court; in AIR 1989, S.C. 1670 (M/s. Gujarat Travancore Agency; Cochin vs Commissioner of Income-tax, Kerala). This judgment deals with Section 271 (1) (a) of the Income Tax Act. The Apex Court, while dealing with the issue about imposition of penalty for late filing of Return held that proof of mens rea is not necessary for the same. The Supreme Court observed as under :

"4. …… There can be no dispute that having regard to the provisions of S.276C, which speaks of willful failure on the part of "the defaulter and taking into consideration the nature of the penalty, which is punitive, no sentence can be imposed under the provision unless the element of mens rea is established. In most cases of criminal liability, the intention of the Legislature is that the penalty should serve as a deterrent. The creation of an offence by Statute proceeds of the assumption that society suffers injury by the act or omission of the defaulter and that a deterrent must be imposed to discourage the repetition of the offence. In the case of a proceeding under S.271(1)(a), however, it seems that the intention of the legislature is to emphasise the fact of loss of Revenue and to provide a remedy for such loss, although no doubt an element of coercion is present in the penalty. In this connection, the terms in which the penalty fails to be measured is significant. Unless there is something in the language of the statute indicating the need to establish the element of mens rea it is generally sufficient to provide that a default in complying with the statute has occurred. In our opinion, there is nothing in S.271 9e) (a) which requires that mens rea must be proved before penalty can be levied under that provision.

5. Accordingly, we hold that the element of mens rea was not required to be proved in the proceedings taken by the Income-tax officer under S.271 (1) (a) of the Income-tax Act against the assessee for the assessment years 1965-66 and 1966-67."

24. AIR 1992 S.C., 1762 (Additional Commissioner of Income-tax Vs. I.M. Patel) : This judgment is again in reference to Section 271 (1) (a) of the Income-tax Act and concluded as under in paragraph 11:

"11. In view of this, it is no longer open to argument whether any mens rea is required to be established under Section 271 (1) (a). As a matter of fact, in the subsequent decision of this Court in (1992) 193 ITR, 713: (1991 AIR SCW 585), Commr. Of Income-tax vs. Kalyan Das Rastogi, squarely applied this ratio. In the result, the reference is answered in favour of the Revenue. The appeals will stand allowed setting aside the judgments of the High Court and the Tribunal. The order

of assessment as passed by the Assessing Authority and as confirmed by the Assistant Appellate Commissioner in relation to penalty is hereby confirmed. There shall be no order as to costs."

25. In AIR 1996, S.C. 1100 (Director of Enforcement Vs. M/s. MCT M. Corporation Pvt. Ltd. & Ors. J, the Apex Court was seized of the penalty proceedings under Section 23(1) (a) FERA, 1947. The Apex Court, after taking into consideration AIR 1953 S.C. 325, (Maqbool Hussain vs. State of Bombay) observed as under :

"7. "Mens rea" is a state of mind. Under the criminal law, mens rea is considered as the "guilty intention" and unless it is found that the "accussed" had the guilty intention to commit the "crime" he cannot be held "guilty" of committing the crime. An 'offence' under Criminal Procedure Code and the General Clauses Act, 1897 is defined as any act or omission "made punishable by any law for the time being in force." The proceedings u/s. 23(1) 9a) FERA, 1947 are "adjudicatory" in nature and character and are not criminal proceedings. The officers of the Enforcement Directorate and other administrative authorities are expressly empowered by the Act to 'adjudicate' only. Indeed they have to act "judicially" and follow the rules of natural justice to the extent applicable but, they are not "Judges' of the "Criminal Courts" trying an 'accused' for commission of an offence, as understood in the general context. They perform quasi-judicial functions and do not act as "Courts" but only as 'administrators' and 'adjudicators'. In the proceedings before them, they do not try "an accused" for commission of "any crime" (not merely an offence) but determine the liability of the contravenor for the breach of his "obligations" imposed under the Act. They imposed 'penalty' for the breach of the 'civil obligations' laid down under the Act and not impose any "sentence" for the commission of an offence. The expression 'penalty' is a word of wide significance. Sometime, it means recovery of an amount as a penal measure even in civil proceedings. An exaction which is not compensatory in character is also termed as a 'penalty'. When penalty is imposed by an adjudicating officer, it is done so in 'adjudicatory proceedings' and not by way of fine as a result of "prosecution" of an "accused" for commission of an "offence" in a criminal Court. Therefore, merely because 'penalty'

clause exists in Section 23(1) (a), the nature of the proceedings under that Section is not changed from 'adjudicatory' to 'criminal' prosecution. An order made by an adjudicating authority under the Act is not that of conviction but of determination of the breach of the civil obligation by the offencer. (Emphasis added).

"8. It is true the breach of a "civil obligation" which attracts "penalty" under Section 23(1) (a) FERA, 1947 and a finding that the delinquent has contravened the provisions of Section 10 FERA 1947 would immediately attract the levy of 'penalty' under Section 23, irrespective of the fact whether the contravention was made by the defaulter with any "guilty intention" or not. Therefore, unlike in a criminal case, where it is essential for the "prosecution" to establish that the "accused" had the necessary guilty intention or in other words the requisite "mens-rea" to commit the alleged offence with which he is charged before recording his conviction, the obligation on the part of the Directorate of Enforcement, in cases of contravention of the provisions of Section 10 of FERA, would be discharged where it is shown that the "blameworthy conduct" of the delinquent had been established by willful contravention by him of the provisions of Section 10 FERA, 1947. It is the delinquency of he defaulter itself which established his "blameworthy" conduct, attracting the provisions of Section 23(1) (a) of FERA, 1947 without any further proof of the existence of "mens rea". Even after an adjudication by the authorities and levy of penalty under Section 23(1)(a) of FERA, 1947, the defaulter can still be tried and punished for the commission of an offence under the penal law, where the act of the defaulter also amounts to an offence the penal law and the bar under Article 20(2) of the Constitution of India in such a case would not be attracted. The failure to pay the penalty by itself attracts 'prosecution' under Section 23F and on conviction by the 'court' for the said offence imprisonment may follow. (Emphasis added).

9. ……..

10. ……..

11. The Constitution Bench; then laid down that though the administrative authorities functioning under the Sea Customs Act had the jurisdiction to confiscate gold, illegally brought into the country and levy penalty on the defaulter, noe the less the authorities were not trying a criminal case but deciding only the effect of a breach of the obligations by the defaulter under the Act. On a parity of reasoning, what holds true for the adjudicatory machinery under the Sea Customs Act holds equally true for the administrative or adjudicatory machinery, designed to adjudge the breach of a civil statutory obligation and provide penalty for the said breach under the FERA, 1947, whether the breach was occasioned by any guilt intention or not is irrelevant. (Emphasis added).

12. In "Corpus Juris Secundum" volume 85, at page 580, paragraph 1023, it is stated thus:

"A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature and is far different from the penalty for a crime or a fine of forfeiture provided as punishment for the violation of criminal laws."

13. We are in agreement with the aforesaid view and in our opinion, what applies to "tax delinquency" equally holds goods for the "blameworthy" conduct for contravention of the provisions of FERA, 1947. We, therefore, hold that mens-rea as is understood in criminal law is not an essential ingredient for holding a delinquent liable to pay penalty under Section 23(1) of FERA 1947 for contravention of the provisions of Section 10 of FERA 1947 and that penalty is attracted under Section 23(1) 9a) as soon as contravention of the statutory obligation contemplated by Section 10 (1) (a) is established. The High Court apparently fell in error in treating the "blameworthy conduct" under the Act as equivalent to the commission of a "criminal offence" overlooking the position that the "blameworthy conduct" in the adjudicatory proceedings is established by proof only of the breach of a Civil obligation under the Act, for which the defaulter is obliged to make amends by payment of the penalty imposed under Section 23(1) (a) of the Act irrespective of the fact whether he committed the breach with or without any guilty intention. Our

answer to the first question, formulated by us above is, therefore, in the negative." (Emphasis added.)

26. AIR 1977, S.C. 2279 (R.S. Joshi Vs. Ajit Mills) : A Constitution Bench of 7 Judges, while dealing with the constitutionality of certain provisions of the Bombay sales Tax Act, observed thus:

> "19. ……. Even here we may reject the notion that a penalty or a punishment cannot be cast in the form of an absolute or no-fault liability but must be preceded by mens rea. The classical view that 'no mens rea, no crime' has long ago been eroded and several laws in India and abroad, especially regarding economic crimes and departmental penalties, have created severe punishments even where the offences have been defined to exclude mens rea. Therefore, the contention that Section 37(1) fastens a heavy liability regardless of fault has no force in depriving the forfeiture of the character of penalty."

27. AIR 1598, S.C., 2526 (Union of India & Anr. Vs. M/s. Mustafa & Najibai Trading Company & Ors.) : This was a case under Section 30 & 111 of the Customs Act 1962 whereby, imposition of the penalty by the fact finding authority was upheld as the discretion was used within the framework of the law. Reference was made to Collector of Customs vs. D. Bhoormull (supra) as relied by the Counsel for the Respondents in this case. It was observed that in the matter of confiscation of goods under Section 111(d) of the Act, intention had, no bearing. Requirement was that the goods had been imported or attempted to be imported or brought within the Indian Customs waters contrary to the prohibiton imposed by or under the Act or any other law for the time being in force. Mens rea was not essential for invoking the power of confiscation of the goods under Section 111 of the Act.

28. thus, the following extracted <u>principles are summarized.</u>

A). Mens rea is an essential or sine qua non for criminal offence.

B). Strait jacket formula of mens rea cannot be blantly followed in each and every case. Scheme of particular statute may be diluted in a given case.

C). If, from the scheme, object and words used in the statute, it appears that the proceedings for imposition of the penalty are adjudicatory in nature, in contra-distinction to criminal or quasi criminal proceedings, the determination is of the breach of the civil obligation by the offender. The word "penalty" by itself will not be determinative to conclude the nature of proceedings being criminal or quasi criminal. The relevant considerations being the nature of the functions being discharged by the authority and the determination of the liability of the contravenor and the delinquency.

D). Mens rea is not essential element for imposing penalty for breach of civil obligations or liabilities.

E). There can be two distinct liabilities, civil and criminal, under same act.

F). Even the administrative authority empowered by the Act to 'adjudicate' have to act judicially and follow the principles of natural justice, to the extent applicable.

G). Though looking to the provisions of the statute, the delinquency of the defaulter may itself expose him to the penalty provision yet despite, that in the statute minimum penalty is prescribed, the authority may refuse to impose penalty for justifiable reasons like the default occurred due to bonafide belief that he was not liable to act in the manner prescribed by the statute or there was too technical or venial breach etc.

29. Chapter VI-A of the SEBI Act deals with the penalties and the adjudication. Section 15-I of the SEBI Act envisage appointment of Adjudicatory Officer for holding an inquiry in the prescribed manner, after giving reasonable opportunity of being heard for the purpose of imposing any penalty. This Section read with concerned Rules provide power to Adjudicating Officer to summon and enforce the attendance of any person to give evidence or to produce relevant or useful document for an inquiry and, provides a sequence of the procedure to conduct the inquiry before imposing any penalty. Furthermore, it is also

provided in Section 15-J to consider various factors while adjudging the question of penalty under Section 15-I, after taking into account, the amount of disproportionate gain or unfair advantage, whenever quantifiable, loss caused to an investor or group of investors, the repetitive nature of default. These twin Sections basically deal with the procedure of monetary penalty under the Act. All these Sections 15A, 15B, 15C, 15D, 15E, 15F, 15G, 15H, 15HA & 15HB, provide monetary penalties for respective breaches or non compliances of provisions of the SEBI Act and the Regulations. Default or failure, as contemplated under the Act includes : (15A) failure to furnish information, return, (15B) failure to enter into agreement with clients, (15C) failure to redress investors' grievances, (15D) default in case of mutual funds, (15E) failure to observe rules and regulations by an asset management company, (15F) default in case of stock brokers, (15G) for insider trading, (15H) non disclosure of acquisition of shares and takeovers, (15HA) fraudulent and unfair trade practices, (15HB), penalty if not separately provided.

30. Therefore, for respective default or failure, penalty is provided under the Act. The scheme of the SEBI Act of imposing monetary penalty is very clear. This Chapter nowhere deals with criminal offence. These defaults or failures are nothing, but failure or default of statutory civil obligations provided under the Act and the Regulations made thereunder. It is pertinent to note that Section 24 of SEBI Act deals with the criminal offences under the Act and its punishment.

31. The adjudication for imposing penalty by Adjudicating Officer, after due inquiry, is neither a criminal nor a quasi criminal proceeding. The penalty leviable under this Chapter or under these Sections, is penalty in cases of default or failure of statutory obligation or in other words breach of civil obligation. The provisions and scheme of penalty under SEBI Act and the Regulations, there is no element of any criminal offence or punishment as contemplated under criminal proceedings. Therefore, there is no question of proof of any mens rea by the Appellants and it is not essential element for imposing penalty under SEBI Act and the Regulations.

The penalty imposable under the SEBI Act and the Regulations under Sections 15I and 15J, is deterrent in nature to see that the parties or person concerned complies with the

Regulations strictly. The imposition of the penalty under SEBI Act and Regulations is civil in nature and cannot be equated with penal in character as referred and submitted by the respondents and / or observed by the Appellate Authority. It is also clear that the word "penalty" has different colour and shades and facets and that has to be interpreted and imposed on the basis of particular act and policies or scheme. It is also clear that there can be two distinct liabilities under the same act i.e. civil and / or criminal. The Authorities or Regulatory Authority have ample power to initiate, both proceedings, if case is made out, within the framework of the SEBI Act or the Regulations.

32. The SEBI Act and the Regulations, are intended to regulate the Security Market and the related aspects, the imposition of penalty, in the given facts and circumstances of the case, cannot be tested on the ground of "no mens rea, no penalty". For breaches of provisions of SEBI Act and Regulations, according to us, which are civil in nature, mens rea is not essential. On particular facts and circumstances of the case, proper exercise of judicial discretion is a must, but not on a foundation that mens rea is an essential to impose penalty in each and every breach of provisions of the SEBI Act.

33. Now, the question, of the penalty, by the Adjudicating Authority, in the facts and circumstances of the case, was warranted or not. We find that the allotment in question was undoubtedly covered under the exemption provided in Regulation 3(1). There could not have been insistence by the Appellants –SEBI to comply with the requirements of Regulation 3(4). It is also clear that when an acquisition is covered under Regulation 3 the acquirer is required to report to the Board under the Sub-Regulation 3(4) within the specified time, as referred above. In view of this undisputed position, merely because there was no Report filed, that itself cannot be read as serious defect or non compliances of the said provisions. The Appellate Authority, after considering the material on record, including the events, referred in the pleadings, found that the respondents-Company had no intention to suppress any material information from the appellants or the share holders. The Company had informed the Stock Exchange, Registrar of Companies and complied with all other provisions of other laws, well in time. It cannot be overlooked that information about the preferential allotment was well within the knowledge of the appellants, as reflected form the letter dated 2nd January, 1997. The appellants were aware of the preferential allotment in

question and in fact prevented the Respondent-Company from monitoring and pursuing further course of action. It is also clear from the record that S.R. Batliboi & Associates, Chartered Accountants, being statutory Auditors of the Company, had written on 14th January, 1997, to the respondents, the Reserve Bank of India and reported the Company's decision to make preferential allotment. It appears that there was no intention of the respondents to avoid filing of such a Report with the appellants, as the respondents had in fact complied with and notified the relevant details to all other concerned Authorities, like Registrar of Companies, Reserve Bank of India and Stock Exchange in respect of the preferential allotment and the relevant details. Therefore, SAT, cannot be said to have erred in the factual background of the case that the respondents never intended or consciously or deliberately avoided to comply with the obligations under the SEBI Act and the Regulations and the non filing of the Report in question was a technical and a minor defect or breach based on bonafide belief that respondents were not liable or required to submit the said Report in view of the admitted exemption available under the SEBI Act and the Regulations. In the facts and circumstances of the present case the reversal of the order of the Adjudicatory Authority, by the SAT cannot be faulted.

However, we are not in agreement with the Appellate Authority in respect of the reasoning given in regard to the necessity of mens rea being essential for imposing the penalty. According to us, mens rea is not essential for imposing civil penalties under the SEBI Act and Regulations.

49. **RESULT :** We, therefore, dispose of the Appeal by the following order :

(a) The reasoning of the SAT that mens rea or guilty mind of the contravenor is required to be alleged and proved by the appellants-SEBI for imposing of the penalty for breaches and default of the provisions of the SEBI Act and its Regulations, is set aside.

(b) The order passed by the SAT dated 25th January, 2001, in SEBI Appeal No.24 of 2000 to the extent, it reversed and set aside the penalty imposed by the Adjudicating authority upon the respondents, is maintained.

(c) There shall be no order as to costs.

Parties may be provided ordinary copy of the order duly authenticated by Court Associate on payment or usual charges.

(R.M. LODHA, J.)

(ANOOP V. MOHTA, J.)