BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

APPEAL NO. 34/2000

In the matter of:

Canbank Investment Management Services Ltd.
(AMCompany of Canbank Mutual Fund) Appellant

vs.

Shri P. Sri Sai Ram,
Adjudicating Officer Respondent

APPEARANCE

Mr. Anand Desai
Advocate
I/b, Shah Desai Doijode & Phatarphekar

Ms. Raksha Kothari
Advocate

Mr. S. L. Manjrekar
Company Secretary

Mr. K. Raveendra
Divisional Manager (Legal)
Canbank Investment Management Services for Appellant

Mr. S. V. Krishna Mohan
Division of Chief, SEBI

Mr. P. K. Nagpal
Division Chief & General Manger, SEBI for Respondent

(Appeal arising out of the order dated 10.11.2000 made by the Adjudicating Officer, Securities and Exchange Board of India)

ORDER

M/s Canbank Investment Management Services Ltd., the Appellant herein, is the asset Management Company of the Canbank Mutual Fund. The said Mutual Fund launched a close ended tax saving scheme known as "Canpep 93" in 1993 and converted it into an open ended scheme, by 15.5.1999. Conversion of the scheme necessitated issuance of uptdated offer document an abridged offer document containing key information. In that context Securities and Exchange Board of India (SEBI) vide its letter dated 1st April 1999 advised the Appellant, to ensure that the offer document and the memorandum containing key information i.e. the abridged offer document, contained all the prescribed information. In compliance thereto, printed copies of the offer document and the abridged offer document cum application form (AOD) containing the particulars as prescribed by SEBI in its circular dated 31.3.1998 were filed with SEBI. But subsequently SEBI can to know that the copy of the AOD submitted to it and the one in circulation different in material aspects, as the latter did not contain certain key information with respect to the associate transactions, investors rights services and grievances and more importantly penalties, pending litigations and criminal cases etc. against the fund and others concerned. Having come

to know of the omission on the part of the Appellant, SEBI decided to appoint an Adjudicating Officer for holding an inquiry and impose penalty if so warranted. Adjudicating Officer was appointed on 13.01.2000.

The Adjudicating Officer concluded the inquiry, holding the Appellant guilty of violating the provisions of regulation 29(2) and 29(4) of the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996 (the Regulations) and vide order dated 10.11.2000 imposed a sum of Rs.3 lakhs as penalty. The said order is under challenge in the present appeal.

Shri Anand Desai, learned Counsel appearing for the Appellant submitted that the Adjudicating Officer has gone beyond his authority and conducted the inquiry and adjudication, ignoring the mandate of the competent authority. He pointed out that it is clear from the order of adjudication dated 13.01.2000 made by Chairman, SEBI that the Adjudicating Officer was ordered to adjudge the matter with reference to the alleged violation of Section 15D (of the Securities and Exchange Board of India Act, 1992 (the Act). But the Adjudicating Officer in his wisdom, ignoring the said mandate, viewed that the appropriate provisions for passing adjudication order is Section 15E and Section 15D and proceeded accordingly. He has adjudged the failure under section 15E and decided the penalty with reference to the same. Shri Desai submitted that the Act does not empower the Adjudicating Officer to go beyond the adjudication order and assume authority. Authority is conferred on him by SEBI in terms of Section 152. Learned Counsel submitted that since the impugned order is made without authority the same is void.

Shri Desai stated that the Appellant had submitted an offer document and AOD to SEBI. SEBI returned the same with certain suggestions. Both these documents, incorporating the particulars as suggested by SEBI, were printed and issued. However, when the stock of AOD was exhausted, it was printed again and while doing so certain particulars were unknowingly and unintentionally left out. But on SEBI pointing out the omission, immediately new set of AOD was printed and circulated to all concerned, and the defective AOD was withdrawn from circulation and also those who had invested in the scheme based on the defective AOD were given option to exit from the scheme. Learned Counsel submitted that in response to the defective AOD circulated the Appellant had received only 51 applications for allotment of 21,062.34 units, which constituted a mere 0.3% of the total units of 6988317.20 outstanding as on 31.03.2000. Learned Counsel submitted that the course of action followed by the Appellant to reprint the AOD, recirculate the same etc. resulted in an additional expenditure of Rs.12 lakhs. He also submitted that the Appellant had also initiated administrative action to investigate into the lapses that led to the omissions and to punish the concerned officials responsible for the same and also to take measures to avoid recurrence of such lapses in failure. He reiterated that the omission was by oversight and unintentional and submitted that the Adjudicating officer has also accepted the same as could be seen from para 7.4 of the impugned order.

Shri Desai submitted that mens rea is an essential ingredient of the offence to warrant penalty and in the absence of the same as has been admitted by the Adjudicating Officer, penalty should not have been imposed. In this context he cited Supreme Court decision in Akbar Badruddin Jiwani v/s Collector of Customs 1990 (47) ELT 161), and also a recent Division Bench decision of the Bombay High Court in Mayri Pulse Mills & Others v/s Union of India and Ors. (2000 Dosh 335). Shri Desai referring to the observation made by the Adjudicating officer is bound to go by the interpretation of law made by the Tribunal, till such time the Tribunal's view is not over ruled by higher judicial authorities. He submitted that, the Adjudicating Officer having cited the tribunals decision in the case of VLS Finance has chosen to ignore the same and gone by his own version. In this context, to strengthen the view that the Adjudicating officer is not left with any discretionary powers to over look the decision of the Tribunal and the Courts above him, Shri Desai cited the observations made by the Supreme Court in the following 3 cases (1) Dhanki Mahajan and Ors. v/s Rana Chandubha Vakhatsing and ors (AIR 1969 SC 69) (ii) Union of India & Ors. v/s Godfrey Philips India Ltd. & Ors. 1985 (220 ELT 306 (SC) and (iii) Secretary Finance and Planning and Ors. v/s Salada S. Rao and Anrs. (AIR 1999 SC 1709). Learned Counsel further submitted that the Adjudicating Officer's finding in para 7.5 quoting extracts from Justice G P Singh's book "Principles of Statutory Interpretation" is not based on a full reading and understanding of the view expressed by the author as it has been clearly stated in the commentary that the Courts regard it as a fundamental principle that an offence cannot be made out without the existence of mens rea.

Learned Counsel submitted that, in the event the Adjudicating Officer, after inquiry, comes to the conclusion that the person had failed to comply with any of the statutory requirements specified in Section 151 and is satisfied that the defaulter should be penalised by imposing penalty, he is required to

take into consideration the factors provided in Section 15J of the Act. The Adjudicating Officer has very clearly mentioned in the order that in the light of the facts and circumstances of the case, there was neither any undue gain to the Appellant nor any loss to the investors, and that the Appellant had no past history of defaults. Thus there is a positive finding that none of the facts mentioned in Section 15J applied to the Appellant. The Adjudicating Officer also admitted the bonafides of the Appellant in the following words that "they (the Appellant) on their own, reprinted the detailed offer document containing full disclosures and mailed the same to all the investors to whom the earlier abridged offer document cum application form had been sent". He had also taken into consideration the submission of the Appellant that it had already incurred an expenditure of about Rs.12 lakes for the purpose of corrective action. Having come to such a clear conclusion as recorded in pares 7, 9, 7.10 and 7.11 of the impugned order, without any rhyme or reason the Adjudicating officer decided to impose Rs.3 lakhs as penalty in tune with his belief in "Danda Neeti". He submitted that the Adjudicating Officer is bound to go by the law under which he was discharging his duties and not by his personal views and that having exonerated the Appellant from the charges, had little justification to impose penalty. Thus imposition of penalty is bad and such the impugned order needs to be quashed.

Shri Krishna Mohan, learned representative of the Respondent submitted that the investor protection is best achieved by making proper disclosure of material facts to the investors at the right time. He submitted that the Regulations provide for adequate disclosure to the investors in the offer document and AOD. He cited various regulations and in particular regulation 29, relating to disclosures. Learned Representatives refuted the Appellant's version that it had on its own reprinted the AOD making good the deficiencies and circulated the same bearing additional expenditure. He submitted that the Appellant's follow up action does not in any absolve it from the failure to follow the requirements of the Regulation and the consequences attendant to such failure. He stated that in fact only on pointing out the omission by SEBI, the Appellant woke up and made good the deficiencies. The Appellant is an asset management company entrusted with the entire fund / investment management of the mutual fund and the instant failure is not a simple harmless technical lapse. It is not a matter, which deserve to be viewed leniently. The material particulars not found in the AOD are vital, to protect the interests of the investors. The particulars relating to expenses, financial details associate transactions, investors rights services and grievances, penalties, pending litigation etc. are not trivial matters of no consequences to a prospective investor. He further submitted that the Appellant's version that the omission was by oversight and unintentional is only an alibi to get absolved of the charge of serious failure in making disclosure as required under the law. The version that it had immediately reprinted and circulated the corrected version of the AOD cannot be considered a spontaneous voluntary action, that it was done perforce, as it knew that in case of failure to take corrective steps immediately, penal consequences would be visiting. It was not a praise -worthy prompt action as is being made out by the Appellant. Similarly the version that the Appellant had incurred an expenditure of Rs.12 lakhs to make good the omission is also not a matter to be viewed in its favour because the expenditure, if any, incurred was necessitated because of its own lapse. This does not in any way dilute the gravity of the failure on the Appellant's part.

Citing clause by clause from the rectified AOD, Shri Krishna Mohan submitted that each and every information omitted, was a paramount importance from the interest of investors. But for SEBI's intervention, the Appellant would have collected funds from the public merrily on a continuing basis suppressing the material facts, endangering the interests of the investors.

Referring to the Appellant's contention that mens rea is an essential ingredient of the offence to warrant punishment under Section 15E, the learned Representative submitted that there is no such requirement as could be seen from the said section. He cited the Supreme Court decision in Director of Enforcement v/s MCTM Corporation Pvt. Ltd. (1996) 2 SCC 471) in support of his proposition. This Tribunals' decision in SRG Infotech Ltd. v/s SEBI (1999) 22 SCL 422 (1999) 35 CLA 473 was also cited.

Shri krishna Mohan, refuted the Appellant's contention that the Adjudicating Officer had assumed authority beyond the ambit of the order of adjudication, stating that the reference to Section 15E, instead of Section 15ED is only a matter of citing proper section under which the penal provision has been provided in the Act and that it was not a question of resorting to any non existent penal provision as alleged. In support, he cited the Supreme Court decision in Union of India and Another v/s Tulsi Ram Patel & Ors. (1985) 3 SCC 398, that exercise of a power is referable to the actual source of such power. In the instant case according to him the exercise of power is actually referable to section 15E. He further submitted that there is every reason to believe that the Adjudicating Officer had properly appreciated the factors provided under section 15J of the Act while deciding the quantum of penalty as could be seen from the order itself, while imposing the penalty. The decision of the Tribunal in the case

of VLS Finance relied on by the Appellant, according to the learned Representative, has no application to the facts and circumstances of the case. Shri Krishna Mohan cited the decision of the Supreme Court in Disciplinary Authority cum Regional Manager and others v/s Nikunja Bihari Patnaik (1996) 9SCC 69 to bring home the point that blame worthy conduct of a party, irrespective of the resultant gain or loss, is sufficient to warrant penalty. Learned Representative submitted that the order is well reasoned and the penalty is well justified.

Mutual Funds are regulated by SEBI in exercise of the power conferred on it by Section 11(2)(c) of the Act. For the purpose of regulating the working of mutual funds SEBI has put in position the Securities and Exchange Board of India (Mutual Fund) Regulations 1996. It is clear from the scheme of the Regulations that in the management of mutual funds, asset Management Company has a very dominant role to play. The Regulations provide that those entities fulfilling the prescribed eligibility qualifications and registered with SEBI alone can be appointed as an asset management company of a mutual fund. No mutual fund is allowed to operate without appointing an asset management company approved by SEBI. Regulations 22 sets out the terms and conditions subject to which the registration is granted to act as asset management company. One of such conditions is that the asset Management Company will comply with the requirements of the Regulations.

Though a mutual fund entity is at liberty to offer more than one scheme, it is required to obtain prior approval of the scheme by the Trustees of the mutual fund. It is also required to file a copy of the offer document with SEBI. Though definition of the expression "offer document" in the Regulations simply describes it as "any document by which a mutual fund invites public for subscription of units of a scheme" it is very important document form the investor protection angle, as it is expected to provide proper inputs to the subscriber to decide as to whether investment in the units in the scheme is to his advantage and risk free. Regulation 29(1) stipulates that the offer document should contain disclosures, which are adequate to enable the investors to make informed investment decision. SEBI is empowered under sub regulation (2) of regulation 29, in the interest of the investors, to require the asset Management Company of a mutual fund to carryout such modification in the offer document as it deems fit. Asset Management company, is left with no option but to modify the offer document as suggested by SEBI and there is no discretionary power left with the asset management company to add or delete any thing from an approved offer document or AOD, at its will. Sub regulation (4) of regulation 29 mandates that every application from should without fail accompany a memorandum containing such information as may be specified by SEBI. SEBI has already notified exhaustive standard offer document and abridged memorandum containing key information. The AOD forming part of the application form is meant to serve as an instant referencer to benefit those who are desirous of making investment in the units offered by mutual funds. Thus it is clear that AOD is very important document designed to provide material disclosure to help the subscriber to take appropriate decision on investing his funds. The very object of requiring that every application form should accompany the AOD itself is indicative of the importance of the document.

The Appellant has filed a copy each of the defective AOD and the rectified one at Annexure C and G of the appeal respectively. On a perusal of these two documents it is clear that some of the particulars left out are of crucial importance. Few extracts from item 24 of the rectified document, which was found missing in the version circulated by the Appellant read as under:

> "24 PENALTIES & PENDING LITIGATION
>
> xxxxxxxxxxxxxxxx
>
> One of the executives of the Investment Manager has been held guilty of contempt of court by the Special Court constituted under the Special Court (Trial of Offence relating to transactions in Securities) Act, 1992 at Mumbai. The matter is pending in appeal in the Supreme Court. The fund has taken necessary steps as legally advised.
>
> A Criminal complaint No.CR 2319/95 has been filed by one Mr. Kiran Chand Lunawat on 8th November, 1995 in the Court of the Metropolitan Magistrate, Calcutta, against the Trustees of the Mutual Fund and the Managing Director, Executive Director of the AMC, concerning repurchase facility of Canstar units and the same is pending. The Fund has taken necessary steps as legally advised.
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> Writ Petition No.2677/97, filed by Midas Touch Investors Association and another before the Lucknow Bench of Allahabad High Court concerning suspension of re-purchase facility under

Canstar Scheme is pending. The Fund has taken necessary steps as legally advised.
There are two cases pending before the civil courts at Sholapur and Calcutta concerning repurchase of Canstar units. Owing to the encashment of units by the plaintiffs/ petitioners in response to the offer made by Canara Bank, the said suits are awaiting final disposal. A civil suit is also pending before the City Civil Court, Bangalore claiming Rs.13, 087.00 as compensation and interest in Canstar Scheme. Cases are also pending before various Consumer Foras alleging deficiency of services by R & T agents, and also concerning suspension of repurchase facility under Canstar Scheme. The case are at various stages of hearing /appeal. The Fund has taken necessary steps as legally advised.

The Mutual Fund is facing / has filed cases in the Special Court constituted under the Special Court (Trial of offences relating to transactions in Securities) Act, 1992. The fund has taken necessary steps as legally advised.

Writ Petitions have been filed before Hon'ble Bombay High Court & Hon'ble Calcutta High Court, for direction to prohibit Canbank Mutual Fund from converting the closed ended Cantriple + Scheme into open ended and for direction regarding payment of three times the original investment.

Two criminal complaints filed by Mr. Atul Kumar Bhupatrai Dhavda and Mr. Dilip Cheriwal before the Magistrate Court, Bhavnagar and First Class Judicial Magistrate, Patna against Canbank Mutual Fund and four of its former Trustees respectively in Cantriple + Scheme are pending. A petition filed by one Seth Sagarmal Bagrodia Charitable Trust against Canbank Mutual Fund and others in Cantriple + Scheme is also pending before MRTP, New Delhi. These cases are being defended as legally advised.

Cases are also pending before various Consumer Foras claiming three times the investment in Cantriple + Scheme. The cases are at various stages of hearing. The fund has taken necessary steps as legally advised.

Save and except what is stated at item no. 2, 3 and 7 above, no criminal cases are pending against the Sponsor, any company associated with the Sponsor in any capacity, AMC, Board of Trustees, any of the Directors or key personnel. The sponsor, Canara Bank, has about 2500 branches. To the best of our knowledge, no criminal cases which may affect the business of Mutual Fund are pending against the Sponsor or any company associated with the Sponsor in any capacity or any of the Directors of key personnel."

In item no.23 of the revised text statistical data for investor complaints / queries received has been stated as under:

From 01.04.96 01.04.97 01.04.98 01.04.99

To. 31.03.97 31.03.98 31.03.99 31.03.20

Complaints /

Queries received 23, 470 24, 133 25, 246 13, 271

Pending complaints 246 17, 04, 53, 318

What is cited above are only two examples of missing information in the AOD. Several crucial information on investors rights and services, borrowings of the scheme, associate transactions, accounting policies and standards, winding up of the scheme etc. etc. were not incorporated in the defective AOD. It is anybody's guess as to how a prospective investor would have responded in the wake of the information now furnished under items 23 and 24 stated above. The details left out from the AOD are not complements to the mutual fund, which would attract investment. Publication of the same would have adverse effect on fund mobilisation. In this context, it is also relevant to note that despite blacking out those particulars, according to the Appellant's own version, only 51 subscribers had responded to the offer purchasing 21-62 units. This itself shows the extent of investors' response to the Appellant's scheme at that point of time. In a scenario, wherein the investor response was lukewarm even without the knowledge of the pending criminal cases and litigations etc., the consequences of disclosing such damaging information can be imagined. Such disclosure would have scared away all

those investors who had occasion to read the same from making investments in the scheme and the scheme would have suffered.

On a perusal of the two documents i.e. defective one and the rectified one as made available in the proceedings, it is difficult to agree with the version of the Appellant that the failure to reprint the approved text in full was by oversight and unintentional. The weightage given by the Adjudicating Officer to the said version of the Appellant does not appear to be after considering the material facts which were made available before him. In fact the Appellant's claim that it had circulated the AOD as approved by SEBI earlier and only when the stock of the same exhausted and while reprinting was done the omissions crept in, remain unsubstantiated. Except the statement of the Appellant there is nothing on record to show the claim of printing and circulating the defect free full text of the AOD at any time before SEBI intervened. The possibility of selective omission of material facts from the AOD would be advantageous to the fund in mobilising money, seem to have escaped notice of the Adjudicating officer. Further, the claim of the Appellant that it has promptly withdrawn the defective document and circulated the rectified one, immediately on pointing out the deficiencies by SEBI, incurring an expenditure of about 12 lakhs rupees is not a factor which would go to prove the Appellant's bonafides or innocence in the matter as stated by the Adjudicating officer. It was an alert SEBI who discovered the fatal omissions in the AOD and called for the explanation from the Appellant. It is also to be remembered that the Appellant was in possession of an approved AOD and SEBI vide its letter dated 01.04.1999 had, amongst others, directed the Appellant to "ensure that the Memorandum i.e. Abridged offer document contains all information as prescribed by SEBI". It was also made clear in the said letter that "SEBI reserves the right to suspend the circulation of offer document, if the observations made in the Annexures are not incorporated in it, or the offer documents contains any ambiguous misleading statement or any matter contrary to the interest of the investors". Who could overlook such a glaring instruction from SEBI? The Appellant being an asset management company, it cannot be unaware of the requirements of regulation 29 and the consequences provided therein to meet with the defaults. Inspite of SEBI's instructions to ensure that AOD provided full disclosures the Appellants did not bother to do so. Therefore, the Appellant's conduct is suspect. Even if it was unaware of the need for disclosing certain details, at least on SEBI point out the need, it should have acted diligently. Failure to disclose material facts in such a scenario is difficult to be attributed to mere oversight". The Appellant was not left with any option but to withdraw the defective documents and re-circulate the rectified AOD and give option of exit from the scheme to those who had already purchased units based on the deficient AOD. As the so called expenditure of Rs.12 lakhs incurred in this context was necessitated due to the failure of the Appellant, it can not be considered as a sacrifice on its part as being made out. If the Appellant had been diligent which is expected to be, the need for such an expenditure would not arisen. Incidentally, there is no reference in the impugned order as to ultimately who suffered the additional expenditure, the Appellant or the mutual fund? In the light of the totality of facts and circumstances of the case, as could be seen from the material facts before the Adjudicating Officer, with due respect, I must say that it is difficult to endorse his conclusion that "the omission by Mutual Fund /AMC had taken place unintentionally due to over sight. The Adjudicating Officer has not stated the facts based on which he had come to the said conclusion. In this context it is to be remembered that AMC is a professional manager. By virtue of its position it is expected to be diligent in managing mutual fund schemes. A serious omission of the nature stated above cannot be trivialised by attributing it to oversight. It is evident from the conduct of the Appellant, as could be seen from facts on record that it had not only failed to act diligently but acted negligently in total disregard to the statutory obligations vested in it and also ignored SEBI's instructions. The requirement in Clause 9 of the Code of Conduct in the Regulation that "Trustees and the asset management company shall render at all times high standards of service, exercise due diligence, ensure proper care and exercise professional judgement" appears to have been given a good bye by the Appellant in this case.

The Appellant's submission that the Adjudicating Officer has usurped powers ignoring the order of the competent authority is not of any force. In this context it is considered necessary to have a close look at the relevant portion of the order dated 13.01.2000 whereby the adjudication was ordered. As per order, the Adjudicating Officer was appointed "to inquire into the following alleged violation by Canbank Investment Management Services Ltd. the asset Management Company of Canbank Mutual Fund:

> Canpep '93, which was initially launched as a close-ended tax saving cum growth (ELSS) scheme, was converted into open-ended w.e.f. 15.05.99. SEBI had vide letter dated April 01, 1999 advised the Asset Management Company inter alia to ensure that the Memorandum containing key information i.e. the abridged offer document contains all information as prescribed by SEBI. The standard format and the minimum disclosure requirements for the 'Memorandum containing key information' has already been specified vide SEBI Circular No. IIMARO / MF / CIR / 06 / 793 / 98 dated 31.03.1998 issued under

Regulation 77 of the SEBI (Mutual Funds) Regulations 1996. From a copy of the abridged offer document cum application form which was found to be in circulation, it is noticed that the AMC has not made certain disclosures like information with respect to associate transactions, investors rights, services and grievances and more importantly, penalties, pending litigation and criminal cases etc. in the document even though the same were included in the copy filed with SEBI. This is in violation of Regulation 29(2) and 29(4) of SEBI (Mutual Funds) Regulations, 1996.

The Adjudicating Officer may impose penalty if any, in terms of Section 15D (b) of SEBI Act, 1992 (15 of 1992) read with Regulation 10(a) and Regulation 76 of SEBI (Mutual Funds) Regulations, 1996".

In the light of the factual position relating to the failure stated in the order it is evident that reference to Section 15(D)(b) is only a mistake and the exercise of penal power is relatable to Section 15E. Therefore, exercising power under Section 15E cannot be considered as an exercise of power without authority. Authority exists. The concerned section was wrongly cited in the order. The legal position in such a situation has been well explained by the Supreme Court in several cases. The court had held that even the mention of a wrong provision or the omission to mention the provision which contains the source of power will not invalidate an order where the source of such power exists. In the instants case source of power exists under 15E and the Adjudicating Officer has rightly exercised that power.

Shri Desai's argument that in the absence of any evidence of mens era, penalty cannot be imposed is also of no force in view of the provisions of the Act governing adjudicating and imposition of penalty. Ratio of Jiwanis case (Supra) has no application to the present case. In Jiwani's case the party had categorically established its bonafide conduct, whereas that is not the case with the Appellant in the present case. Ratio in the Mayuri Pulses Mills case is also of no help to the Appellant. In fact in the said case the Division Bench of the Bombay High Court while considering the provisions of Section 138 of the Negotiable Instrument Act had observed that normally in criminal law existence of guilty intent is an essential ingredient of a crime and in principle is expressed the maxim actus non facit rum nisis mens sit rea. This is a general principle. However, the legislature can always create an offence of absolute liability or strict liability. Where mens rea is not at all necessary, such a measure is resorted to in public interest and such laws of strict liability are justified and cannot be said to be unreasonable" Such an exclusion can be construed from the legislative intent clearly discernable from the concerned statutory provision. The observation made by Dean Roscoe Pound in "the spirit of common law" (cited in the impugned order) is wroth remembering in this context. According to him certain statutes are not meant to punish the vicious will but to put pressure on the thoughtless and efficient do their whole duty. On a perusal of the penal provisions under various section of Chapter VI including the provisions of Section 151, irresistible conclusion is that mesnrea is not necessary to be established to impose monetary penalty.

Learned Counsel had also cited the decision of this Tribunalin VLS Finance Limited v/s SEBI (2000) 28 SCl 205 (2000) 39 CLA 257 with reference to the conduct of the Adjudicating Officer that even though he is bound to follow the principle laid down by the Tribunal, he had ignored the same in the present case. This is not correct. VLS's case was one in which the Adjudicating Officer had imposed the maximum penalty. The matter was remanded to reconsider the quantum of penalty taking into consideration the factors provided in Section 15J of the Act. In the instant case he has not imposed the maximum penalty provided under Section 15E. In view of the distinguishable facts of the case, it cannot be said that the Adjudicating Officer had ignored the principle laid down in VLS's case while deciding the penalty against the Appellant. Therefore, the authorities cited by the Learned Counsel are of no use.

It is difficult to agree with Appellant's viewpoint that in the light of the Adjudicating Officer's observation that none of the factors mentioned in Section 15J is applicable to the case, the Adjudicating officer should not have imposed the penalty. Section 15J does not state that penalty should not be imposed in the case of a proven failure. In terms of Section 15I is for the Adjudicating Officer has to decide as to whether a particular failure deserves to be punished by imposing monetary penalty. He has to take into consideration all the relevant facts and decide judicially. However, with a view to curtail arbitrary imposition of the maximum penalty provided for each of the failures covered under Section 15I, legislature has provided guidelines in Section 15J. Even though section 15E provides for a maximum penalty for Rs. 5 lakhs, in the instant case the Adjudicating Officer decided to impose only Rs. 3 lakhs. Taking into consideration the gravity of the failure, the decision cannot be considered as unjustified. In fact the Adjudicating Officer himself had stated in the order that "this being a case against the AMC of

Mutual Fund, to discourage the type of omission occurred, I thought of levy of penalty at the maximum of Rs.5 lakhs". However, he reduced the quantum and imposed only Rs. 3 lakhs.

The adjudicating officer in para 7.4 of the order after explaining the provision of regulation 29 has stated that:

> "the provision is enacted to enable SEBI to ensure that all the information, as it deems fit in the interest of the investors would get disseminated to the investors and the investors are able to take a well informed decision.
>
> In line with that regulatory framework, SEBI has to ensure that all the requisite information, along with the offer document, required for making a well-informed decision by investors should be made available to them. For that purpose, it is required to take alert action and to invoke penal provisions of the Act (where required) where there is a failure by AMC to comply with those provisions".

Having said the need to penalise AMC for the failure the Adjudicating Officer has given clear finding that:

> "As per the record, it is seen that the AMC of Canbank Mutual Fund had not made certain disclosures like information with respect to associate transactions, investors rights, services and grievances and more importantly, penalities, pending litigations and criminal cases etc. in the document, even though the same were included in the copy filed with SEBI."

The aforesaid failure has been admitted by the Appellant, stating that the failure is due to over sight and unintentional. The nature of material details found missing from the AOD has been discussed earlier in this order citing examples and the misleading effect of the same. There is nothing on record to show the bonfides of the Appellant but a bald statement that the omission was due to oversight and it was unintentional. But at the same time there is enough reason to believe that it was not a simple omission but suppression of the facts to lure the subscribers to invest in the scheme. In the light of the totality of facts, the conduct of the Appellant is found unbecoming of an Asset Management Company. The adjudicating Officer appears to have over looked the conduct of the Appellant and went by the unsubstantiated statement of the Appellant. As already explained, on the expenditure of Rs. 12 lakhs stated to have been incurred, there is not evidence on record to show that the Appellant had absorbed the said expenditure and not the fund. However, the fact that such an expenditure as necessitated due to the Appellant's own failure ha snot been considered. The Appellant's claim of promptitude in circulating a defect free AOD with exit option to those already invested in the scheme is not such a spontaneous voluntary action or display of goodwill as is being claimed. The Appellant had done it perforce, as there was no other option left to it as the SEBI had seized of the of the matter. Non compliance of SEBI's instructions could end up in cancellation of the Appellant's registration and also in prosecution of the Appellant and its officers. Not a very happy thing to welcome.

The adjudicating officer's endorsement of the views of the Appellant is contrary to the facts of the case, as could be seen from the order. The adjudicating officer in his order has clearly stated the conduct of the Appellant in the following words:

> "7.6 The fact remains and I find that the AMC of the Mutual Fund had not made disclosure as alleged in the abridged offer document even though the same were included in the copy filed with SEBI and inspite of SEBI's specific advice to the AMC with regard to the restrictions in making an abridged offer i.e. make the requisite disclosures (emphasis supplied).
>
> The AMC of the Mutual Fund did not act in accordance with the restrictions imposed by SEBI for the purpose of circulation of abridged offer document. Regulation 29(2) of SEBI (Mutual Fund) Regulations, 1996 provides for restrictions viz. that the AMC should carry out the modifications if any prescribed by SEBI to offer document.
>
> Regulation 29(4) also provides for restrictions on the AMC the effect that no AMC should issue application from unless the form is accompanies by the Memorandum containing such information as may be specified by the Board. That is the restrictions imposed on the AMC by SEBI Regulations. In this case, I find that the AMC failed to comply with that Regulation, which provided for restriction on the activities of the AMC.

That I find that the AMC violated restrictory provisions contained in Regulation 29 and consequently that of Regulation 19 which read with Regulation 10 of SEBI (Mutual Fund) Regulation, 1996 provides to the effect that the AMC should comply with the Regulations". (emphasis supplied).

The Adjudicating Officer has thus come to the categorical conclusion that the Appellant had failed to make certain material disclosures in the AOD, inspite of SEBI's direction and decided to impose a sum of Rs. 3 lakhs as monetary penalty. In the light of the facts and circumstances of the case I do not consider that the decisions of the Ajduciating Officer imposing Rs. 3 lakhs as penalty is unjustified.

For reasons stated above, imposition of penalty made by the Respondent vide order dated 10.11.2000 is upheld.

The appeal is dismissed.

(C. ACHUTHAN)
PRESIDING OFFICER

Place: Mumbai
Date: 30.03.2001