BEFORE THE SECURITIES APPELALTE TRIBUNAL
MUMBAI

APPEAL NO. 27/2000

In the matter of:

S.K.D.C. Consultants Limited **Appellant**

Vs.

Shri P.Sri Sai Ram
Adjudicating Officer
Securities & Exchange Board of India **Respondent**

APPEARANCE:

Mr. K.Raghu
Director
SKDC Consultants Ltd **for Appellant**

Mr. J.Ranganayakulu
Division Chief, SEBI

Mr. R.Sridhar Reddy
Legal Officer, SEBI **for Respondent**

(Appeal arising from the order dated 31.8.2000 made by the Adjudicating Officer, Securities & Exchange Board of India)

ORDER

SKDC Consultants Ltd., the Appellant herein, is a public limited company registered on 18.2.1998. It is a category 1 Registrar to an Issue and Share Transfer Agent. As per the Memorandum of Association submitted by the Appellant for the purpose of registration before the Registrar of Companies, Coimbatore, one of the main objects to be pursued by it on incorporation was to take over as a going concern, 'Shreekrishna Data Centre, Coimbatore', engaged in the business of Registrars to Issue/Share Transfer Agents. The said Shree Krishna Data Centre, (SKDC) was a sole proprietary concern of one Mrs. Padma Sreedharan. SKDC was holding a certificate of registration from SEBI to act as a category I Registrar to an Issue and Share Transfer Agent. Though the original registration was valid for a period of 3 years from 16.12.1994 to 15.12.2997 the same was renewed for a further period of 3 years i.e. from 16.12.1997 to 15.12.2000. Consequential to the acquisition of SKDC by the Appellant, SEBI transferred the certificate of registration granted to the said sole proprietary concern to the Appellant.

SEBI, which is entrusted with the duty of regulating the activities of the market intermediaries including Registrars to an Issue and Share Transfer Agents, inspected the records of the Appellant sometime in December, 1998. Said inspection reportedly revealed certain irregularities on the part of the Appellant. Subsequently, Chairman, SEBI vide order dated 17.4.2000 appointed the Respondent as Adjudicating Officer to enquire into the alleged contravention of rule 4 (1) (b) of SEBI (Registrars to an Issue and Share Transfer Agents) Rules, 1993 (the Rules), read with section 15B of the Securities and Exchange Board of India Act, 1992 (the Act), by the Appellant. The Adjudicating Officer, after enquiry concluded that the Appellant had not entered into agreements as per the format prescribed by SEBI before acting as Registrar to an Issue in the cases of M/s. Single Window Securities Ltd., (issue opened on 27.11.1995 and closed on 1.12.1995) and M/s. Lambodhara Textiles Ltd., (issue opened on 8.12.1995 and closed on 12.12.1995…..). The Adjudicating Officer had also concluded that the Appellant did not enter into proper agreements with 10 companies (listed in the impugned order) before acting as their Share Transfer

Agents, but entered into valid MOU only on 02.02.1998, i.e. after commencing the activities as 'Share Transfer Agents'. In his view the aforesaid omissions amounted to violation of rule 4 (1) (b), and based on the said conclusion imposed a sum of Rs.25, 000/- as monetary penalty on the Appellant. Aggrieved by the said order (dated 31.08.2000), the Appellant has filed the present appeal.

Shri K.Raghu, one of the Directors of the Appellant, who appeared before the Tribunal, submitted that the Appellant did not commit any default knowingly and willingly to attract the penal provisions of the Act. Learned Representative submitted that the Appellant took over the business of SKDC, as a going concern with effect from 01.04.1998. SKDC acted as Registrar to the public issue of equity shares made by M/s. Single Window Securities Ltd and M/s. Lambodhara Textiles Ltd, based on the offer letter from it as agreed to by the said two companies. These offer letters covered all the requirements enumerated in Schedule I of the RRT circular No.1 dated 11.10.1994 issued by SEBI. He submitted that the offer letter from the said SKDC as accepted by the issuer companies was taken as the Memorandum of Understanding and the same, though not in the rigid format prescribed by SEBI, served the purpose; as it was substantially identical and near to the model agreement drawn up by SEBI and there was no complaint from anybody in this regard.

Referring to the ongoing share transfer agency work of the 10 companies referred to in the impugned order, Shri Raghu submitted that SKDC had been associated with these companies for quite some time providing services in the area of data processing, software development, etc. IPOs and Rights/Bonus issues of these companies were handled by it and continued to be their share transfer agents. An offer letter defining the 'scope of the services' as near as suggested to by SEBI was in force. He submitted that the omission to execute proper agreement, as per the model form suggested by SEBI was not at all intentional, but only by over sight. He submitted that, agreement in the requisite format has already been signed with all these companies on 02.02.1998. He further submitted that it was not the intention of the Appellant to violate any of the statutory requirements, and that by not executing the agreement in the proper format, nobody has been put to any loss. Since the omission being unintentional, imposition of penalty in this case was not warranted, said the learned Representative. He also referred to section 15J of the Act and submitted that none of those parameters has been taken into consideration by the Respondent. He also cited the Supreme Court decision in Hindustan Steel Ltd., Vs. State of Orissa (AIR1970 SC 253) to strengthen his view point that the unintentional default involved was not a case warranting penalty. He further submitted that Rs.25, 000/- imposed as penalty was too much for the Appellant to bear.

According to the learned Representative since SEBI vide its letter dated 10.04.2000 had already punished the Appellant by issuing a warning, imposition of monetary penalty based on the same set of facts was not legally sustainable.

Shri Raghu further submitted that since the alleged offences were committed by SKDC, the Appellant can not be penalised.

Shri J.Ranganayakulu, learned Representative of the Respondent submitted that the Appellant had failed to comply with the requirements of rule 4 (1) (b) and the failure has been admitted by the Appellant before the Respondent and also in its pleadings before the Tribunal. He pointed out that in the case of the public issue of equity shares made by M/s. Single Window Securities Ltd., and M/s. Lambodhara Textiles Ltd, the Appellant acted as Registrar to Issue without executing any agreement with the Issuer Company. The Appellant should have acted as Registrar to Issue only after executing the agreement as provided in the rule. There was nothing on record to establish the Appellant's contention that its offer letter accepted by the issuer companies contained the requirements specified in rule 4 (1) (b) and same was the case regarding its role as Share Transfer Agents in the case of 10 companies stated in the order. He submitted that proper agreement was entered into with the companies only in February 1998. According to him since the scope of the agreement having been set out in SEBI's circular, it was necessary to execute the agreements in the said format. Therefore, the offer letter along with the "scope of the work" stated to have been used, cannot be considered as an agreement in terms of rule 4 (1) (b). Shri Ranganayakulu submitted that the Appellant had accepted the fact that it had failed to enter into requisite agreement with issuer companies and thereby violated rule 4 (1) (b), attracting the penal provisions of section 15B of the Act.

Shri Ranganayakulu submitted that having admitted the failure to comply with the requirements of rule 4

(1) (b) in the case of 2 public issues as Registrars to an Issue and in 10 cases as Share Transfer Agents, the Appellant cannot absolve itself from the legal consequences attached to the default. Though, there was no visible gain or unfair advantage to the Appellant as a result of the non-compliance and no loss was caused to the investors, imposition of monetary penalty was fully justified, in view of the proven failure on the part of the Appellant to comply with the statutory requirements. He further submitted that 15B provided for a maximum penalty of Rs. 5 lakhs for every such failure, and that such failures were 12 in number (2 as Registrars to an Issue and 10 as Share Transfer Agents), invited a maximum penalty of Rs.60 lakhs. But the Adjudicating Officer imposed only a token penalty of Rs.25, 000/-, which by any standard is not unreasonable or unjustified.

Referring to the letter of SEBI dated 10.04.2000 warning the Appellant to ensure compliance of the statutory requirements, learned Representative submitted that the same cannot be considered as a penalty for the default already committed by the Appellant. It was in the nature of caution. Shri Ranganayakulu submitted that the decision of the Supreme Court in Hindustan Steel's case relied on by the Appellant had no application to the case, as mens rea is not an ingredient of the offence prescribed in section 15B of the Act. He further stated that since the Appellant had taken over the business of SKDC with assets and liabilities, it was responsible for the consequences of non-compliance of the statutory requirements by the said SKDC and liable to pay the monetary penalty provided for the same. Penalty is linked to the failure to comply with the statutory requirements, not to the financial position of the concerned defaulter, he submitted.

Since the Appellant had not filed copies of certain documents which were relied on by the learned Representative at the time of oral submission, Shri Raghu was directed to file copies of the same within 7 days. Accordingly the Appellant filed certain documents with copies to the Respondent.

It is an admitted fact that the Appellant is a public limited company incorporated under the Companies Act, 1956. The date of incorporation as could be seen from the certificate of incorporation issued by the Registrar of Companies, Coimbatore is 18.02.1998. Thus it is clear that the Appellant became a legal entity only from 18.02.1998, being its date of birth.

It is also on record that SKDC was a sole proprietary concern of Mrs. Padma Sreedharan and the said sole proprietary business set up was to be transferred to the Appellant on 1.4.1998 or the date on which permission of SEBI was received in this regard. This is born out of the Memorandum of Understanding entered into between the Appellant and the said Mrs. Padma Sreedharan on 25.02.1998. Adjudicating Officer in para 6.0 of his order quoting the Appellant has stated that the business of SKDC as a going concern was taken over by the Appellant with effect from 01.04.1998, and till 31.03.1998 the said SKDC continued to be a sole proprietary concern carrying on with its activities.

One of the allegations against the Appellant is that it acted as Registrar to the public issue of shares made in November/December, 1995 by M/s. Single Window Securities Ltd., and M/s. Lambodhara Textiles Ltd, without entering into proper agreement as required under rule 4 (1) (b). Another allegation is that the Appellant acted as Share Transfer Agents of 10 companies without executing agreements as required under rule 4 (1) (b) and that proper agreements were executed only on 02.02.1998.

Rule 4 (1) (b) which is stated to have been violated by the Appellant reads as under:

4 (1) The Board may grant or renew a certificate to a registrar to an issue or a share transfer agent subject to the following conditions namely:

(a)……

(b) without prejudice to the obligations under any other law the registrar to an issue or a share transfer agent, shall enter into valid agreement with the body corporate or the person or group of persons or on whose behalf he is buying or selling or dealing in securities as registrar to an issue or as transfer agent and the said agreement amongst other things may define allocation of duties and responsibilities between him and such body corporate or persons or group of persons as the case may be;

(c)……

(d)…….

(e)…… (emphasis supplied)

Section 15B of the Act which provides penal consequences, for failure to comply with the requirements including the requirement of rule 4 (1) (b) being relevant in the context is extracted as under:

> 15B: " If any person, who is registered as an intermediary and is required under this Act or any rules or regulations made thereunder to enter into an agreement with his client, fails to enter into such agreement, he shall be liable to a penalty not exceeding five lakhs rupees for every such failure".

Section 15J provides factors to be taken into account by the Adjudicating Officer, while adjudging the quantum of penalty. Said section reads as under:

> 15J: While adjudging 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
>
> (c) the repetitive nature of the default.

On a perusal of rule 4(1)(b) it is clear that what is envisaged therein is not an agreement simplicator, but an agreement amongst other things, containing well defined allocation of duties and responsibilities between the intermediary and the issuer company etc. This is one of the conditions subject to which the certificate of registration is granted to the intermediary. It has been made clear in the certificate of registration that the certificate of registration is granted to act as an intermediary (in this case as Registrar to an Issue and Share Transfer Agents in Category I) "subject to the conditions in the rules and in accordance with the regulations to carry out the activities as specified therein".

It is clear from the wording of section 15B of the Act that the penalty provided therein would visit the person who is registered as an intermediary, in the event of failure of that intermediary to enter into the requisite agreement with his client. Section 15 J provides guiding principles to the Adjudicating Officer while adjudging the quantum of penalty.

Thus on a reading of the provisions of rule 4 (1) (b) along with sections 15B and 15J of the Act it is clear that the responsibility to enter into requisite agreement is fastened on the concerned intermediary and in the event of failure to enter into such agreement he is liable to suffer penalty in such quantum as the Adjudicating Officer may decide taking into consideration the factors stated in section 15J.

The expression ‘penalty’ used in section 15B has not been defined in the Act.

It is an elastic term with many different shades of meaning. As Blacks Law Dictionary puts, "a penalty is a sum of money which the law exacts payment by way of punishment for doing some act which is prohibited or for not doing some act which is required to be done". In this context the following observation made by Blackburn, J in R Vs. Smith (1862) Le & Ca 131,138 referred to by Supreme Court in N.K.Jain & Others Vs. C.K Shah & Others (1991) 2 SCC 945 is a pointer – " I consider that the word penalty falls to be read in a wide popular sense……. and I select two definitions adequately conveying that sense. The late Mr. Roberton Christie (The Encyclopaedia, Vol.II, pg. 204) said " penalty in the broad sense may be defined as any suffering in person or property by way of forfeiture, deprivation or disability imposed as a punishment by law or judicial authority in respect of …… an act prohibited by statute". The Oxford Dictionary echoes the same wide conception by referring to " a loss, disability or disadvantage of some kind…… fixed by law for some offence". The monetary penalty provided in section 15B, thus undoubtedly is by way of punishment for failure to comply with the requirement of entering into an agreement by an intermediary with his client, as required under the Act,

rules or regulations made thereunder. It is thus clear that it is in the nature of punishment and relatable to the defaulter. Incidence of punishment cannot be shifted from the offender to some one unconnected with the commission of the offence.

As stated above, the Appellant came into existence on its incorporation on 18.02.1998 and thereafter with effect from 01.04.1998 it took over the business of SKDC as a going concern with all its assets and liabilities. It is clear from the adjudication order that the alleged violations relating to public issue of shares relate to November/December, 1995 and activities of Share Transfer Agent carried out prior to 02.02.1998, i.e., to a period prior to the incorporation of the Appellant.

In this context it is to be noted that the Appellant is a distinct legal personality from SKDC. The fact that the Appellant had taken over the business of the said SKDC or that Mrs. Padma Sreedharan, the sole proprietor of the said SKDC, is one of the 7 subscribers to the Memorandum of Association and that she is one of the first directors out of the 4 directors of the Appellant is not sufficient to hold that the said SKDC and the Appellant are one and the same entity for all purposes. It may not be forgotten that the Appellant is a public limited company and not even a private company owned by the said Mrs.Padma Sreedharan. The agreement between the Appellant and SKDC provides only for transferring the ongoing business with all the assets and liabilities of SKDC to the Appellant. The Adjudicating Officer had concluded that SKDC had failed to comply with the requirements of rule 4 (1) (b) well before the Appellant was brought into existence. In terms of section 15B, the penalty provided therein is to visit the person who had failed to comply with requirement of entering into agreement with his client. In this context it is to be remembered that the Supreme Court in Hindustan Steels Ltd., Vs. State of Orissa (AIR 1970 SC 253) had observed that " An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi criminal proceeding". It is not possible to assign the " failure" in complying with a statutory requirement to some one else who was not responsible for the same and make him suffer the penalty attendant to such failure. If there is any liability to pay penalty by way of punishment, that cannot be transferred to a successor as it remains the liability of the person who committed the offence. The liability is personal to the offender. Therefore, the adjudication order holding the Appellant in default for not complying with provisions of rule 4 (1) (b) and imposing monetary penalty on it for the said default cannot be sustained. The fact that the assets and liabilities of SKDC have been taken over by the Appellant does not mean that it is responsible for the offence committed by SKDC and liable to suffer the penal consequences.

As the adjudication order is misdirected to the Appellant, it cannot be sustained. Since the order cannot be sustained for the reason stated above, I do not consider it necessary to examine the other arguments advanced by the Appellant.

For the reasons stated above the appeal is allowed and the impugned order is set aside.

(C.ACHUTHAN)
PRESIDING OFFICER

Place: Mumbai
Date: February 28, 2001