Before the Securities Appellate Tribunal
Mumbai
Appeal No 1/ 2000

In the matter of

Chandrakant Gandhi StockBrokers Pvt. Ltd. Appellant

Vs

Securities and Exchange Board of India Respondent

Present

Shri C.V. Mathrani
Company Secretary For the Appellant

Ms Poonam Bamba
Division Chief (SEBI)

Mr CH Rajasekhar Reddy
Legal Officer (SEBI) For the Respondent

ORDER

This appeal is directed against the order dated December 15,1999 made by the Adjudicating Officer, imposing a sum of Rs. 15, 000/- as penalty against the appellant.

The appellant is private limited company, holding a certificate of registration for carrying on the business of stockbrokers. Securities and Exchange Board of India (SEBI), which is empowered to regulate the activities of stock exchanges, market intermediaries, etc had decided to inspect the records of the appellant to verify as to whether the appellant was maintaining statutory records, complying the requirements of the SEBI Act, etc. and the following conditions of registration of the appellant as stock broker and communication to this effect was issued to the appellant.

It has been stated that the appellant failed to furnish certain information called for by SEBI in the specific format within the stipulated time and further that the books and records called for were not produced before the inspectors. In the light of the observation made by the inspection team, adjudication was ordered and an Adjudicating Officer was appointed for holding an enquiry to ascertain the truth or other wise of the allegation that the appellant did not co-operate with SEBI's inspection team by not submitting the duly filled in questionnaire prior to inspection and not producing the books of accounts etc. Adjudicating officer was also authorised to impose monetary penalty, if considered necessary, in accordance with the provisions of the Act. The Adjudicating Officer after holding necessary enquiry imposed a sum of Rs 15, 000/- as penalty against the appellant.

Along with the appeal, the appellant has filed an application (No 1/2000) praying for dispensation of the requirement of pre-deposit of penalty amount provided under rule 9 of the Securities Appellate Tribunal (Procedure) Rules, 1995. Respondent has already filed its reply in the main appeal. Parties did consent to take up the appeal itself for final disposal, when the

matter was called. However, the respondent objected to the waiver of the requirement of rule 9 for the reason that the deposit of penalty amount would enable it to recover the penalty amount quickly in case the appeal fails. I do not consider this as a valid reason to reject the request for waiver. Since the parties have consented to take up the main appeal itself for disposal at one go, I do not consider it necessary to insist the appellant to deposit the penalty amount and consequently delay the disposal of the appeal in that process. The requirement of pre-deposit of penalty is waived and the appeal is taken up for final disposal.

Shri CV Mathrani, authorised representative of the appellant submitted that since the appellant being a stock broker, compliance requirements applicable to him are those provided in section 15F of the Act, and section 15A is not applicable. He further submitted that the alleged violation is not even covered under section 15F, as failure to co-operate with SEBI's inspection team is not a matter of warranting penalty under the said section. According to him, a broker for non-compliance of the statutory provision is not amendable to monetary penalty, as he is subjected to the penalty of suspension or cancellation of his registration, specifically provided in the Act.

He reiterated the grounds taken out in the Memorandum of appeal and submitted that the duly filled in questionnaire was given to the inspecting team during the course of hearing itself, that the short delay in furnishing the same was due to computer failure, that books of account, etc., were also produced before the Adjudicating Officer. The fact that the information was furnished during the course of inspection goes to establish the appellant's bonafides. He further submitted that since the Income Tax Authorities had seized the books etc of the firm, the books were not in the custody of the appellant and as such the same could not be readily produced, that the appellant had expressed readiness to produce the available books for inspection, and that all those books which the Adjudicating Officer directed to produce before him have been produced to his satisfaction. According to him, the Adjudicating Officer having accepted the submission that the appellant had not contravened any of the provisions of the Act or rules and regulations, should not have imposed monetary penalty on the appellant.

Ms Poonam Bamba, representing the respondent, read out the provisions from the Act and the regulations applicable to stock brokers, to drive home the point that share brokers are required to maintain books, etc. furnish information, produce records etc. for the purpose of inspection and that the law provided for imposing monetary penalty in the event of the concerned person's failure to do. She submitted that computer failure is not a valid excuse for delayed submission of the information, that the appellant could have procure the records from the Income Tax authorities and produced the same for inspection. She submitted that in terms of the "SEBI (Stock broker and Sub broker) Rules/Regulations and the conditions attached to the certificate of registration, broker is duly bound to maintain books of account, furnish information, etc. to SEBI as and when called for. According to her, information stored in computer is not a substitute for the books of accounts etc required to be maintained under the regulations, that computer is only to facilitate trading transactions in a quick and transparent manner. She urged to uphold the adjudication order as the same was well within the legal framework.

I have carefully considered the submissions and documents put forth by the parties. The appellant's contention that the provisions of section 15 A are not applicable to the brokers is untenable. Section 15 A contains a general provision providing penalty for failure to maintain books of accounts or records, furnish information, return etc., by any person who is required to do so under the Act or any rules or regulations. Regulation 17(1) of the SEBI (Stockbroker and sub-brokers) Regulations clearly specifies the books of account, records and documents required to be maintained by a stock broker. In terms of regulation 21, it is obligatory on the part of every director, proprietor, partner, officer and employee of the stock broker, who is being inspected, to produce to the inspecting authority such books of account and other documents in his custody or control and furnish him with the statements and information relating to the transactions in securities market within such time as the said officer may require.

These regulations applicable to stock brokers are made under the Act and as such the compliance of the same by the appellant who is a stock broker, is a statutory requirement, and the failure would attract the penalty provided under section 15A. Penalty provided under section 15F is specific to defaults by stock brokers such as failure to issue contract notices, failure to deliver security/payment to the investors, and excess collection of brokerage as enumerated in the section. Therefore the contention that the provisions of section 15A are not applicable to stockbrokers in view of the provisions of section 15F is not correct. Further, the power to cancel or suspend registration of an intermediary provided under section 12(3) of the Act does not in any way bar adjudication and imposition of monetary penalty for the defaults enumerated in chapter VIA of the Act.

It is seen that the impugned order that SEBI 's inspection team had asked the appellant to furnish certain particulars in a Performa questionnaire by 12.09.1997. The appellant furnished the duly filled in questionnaire on 25.09.1997 i.e. during the course of inspection itself (not 25.9.1998 as mentioned in para. 4.1 of the order). Respondent carried out inspection during 22nd to 29th September 1997. It is therefore, evident that the information was available to the inspection team during the course of inspection itself for their use. It is not the grievance of the respondent that the appellant did not furnish the requisite information at all. The grievance is that it was furnished not before the commencement of inspection, but only during the course of inspection. How this short delay of about 10 days "prevented the regulatory function of SEBI" as stated in the order is not clear. In this context, it is pertinent to mention according to the respondent's own version it was only a routine inspection to ascertain the extent of compliance of certain statutory requirements by the appellant.

The appellant has convincingly put forth that the short delay involved in furnishing the information was due to computer failure. It is seen from the letters exchanged by the appellant with the Vadodara Stock Exchange Ltd.(VSE) that the IBM computer provided by VSE at the appellant's office was non functional at the relevant point of time for certain unknown reasons and as such the appellant was incapacitated to retrieve the information from the computer to furnish the same to the inspectors before the D'day stipulated by them. The findings of the Adjudicating Officer on this aspect is very relevant in this context. Relevant portion from the impugned order extracted below is self- explanatory.

> "6.1 The member submitted that due to crash of hard disk, he was not able to furnish the information to the SEBI Inspection team. The experts were not able to give him a reason, hence he was not able to given a reason to SEBI. He had every intention with SEBI. He had now entered the data afresh in the computer. If there is any further inspection, he would furnish the records. In the mean time, he would furnish print outs of settlements wise trades from December 1996 to September 1997 as well as Clients ledger for that period within a period of one month. It is seen from the copy of the letter dated 18.9.1997 of Vadodara stock Exchange (VSE) to the member, that the fact of crash of hard disk of the computer belonging to the member is correct. VSE in that letter stated that it would not be possible to retrieve data. The submissions made by the member in this regard are acceptable (emphasis supplied).

The member further submitted that when his computer crashed somewhere in August 1997 to square up the transactions, the Exchange had helped him with the pool computers. Business that was done prior to August 1997 was mostly related to squaring up transactions. After August 1997 these were only squaring up transactions. IBM replaced the hard disk of the computer machine somewhere in November 1997. Thereafter, with the help of material from the stock exchange he entered the data in their computer and he is now ready for inspection. "

The Adjudicating Officer has also stated that as per the submission made by the appellant during the hearing, "the member vide his letter dated 30.10.1999 forwarded copies of Clients

ledger, Contract Register and Bill register for the period from 1.12.1996 to 30.09.1997."

There is nothing on record to show that the appellant could be held responsible for crash of the computer. The respondent has not even remotely attributed the 'crash' to the appellant. The computer belonged to the VSE. Since, its maintenance was the duty of VSE, the appellant had approached VSE to get it repaired and held him to reconstruct the lost material, so as to enable him to flourish the requisite information to the inspection team. VSE had also corroborated this version.

The appellant's failure to produce books, etc for inspection during the relevant time, attributed to seizure of books by Income Tax authorities goes unrebutted. The respondent's contention is that even if the records were with Income Tax Department, the appellant could have approached the Income Tax authorities and got the same released for the purpose of inspection. The procedural difficulties involved in quickly retrieving the seized records from the Government authorities is known to everybody. It is not the respondent's contention that the appellant had not maintained the requisite statutory records. The grievance against the appellant is that he did not produce the records for inspection at that point of time. The reason for the failure to produce the records, as stated by the appellant has been accepted by the Adjudicating Officer, as could be seen from his order.

Ms Bamba, during the argument had submitted that penalty provided under section 15A should visit a person in the event of failure to furnish the information or produce the books etc. to SEBI and such failure need not necessarily be willful or intentional. In this regard one cannot ignore the factors required to be taken into consideration for imposition of penalty set out by the Supreme Court in Hindustan Steel Ltd vs State of Orrisa (AIR 1970 SC 253). In the said case the Apex Court while deciding the question as to whether imposition of penalties for failure to register as a dealer under the Orrisa Sales Tax Act, 1947 in the given set of facts was justified, observed that " an order imposing penalty for failure to carry out a statutory obligation is the result of quasi criminal proceeding and penalty will not ordinarily be imposed unless the party obliged either acted or delibrately 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 to be exercised judicially and on a consideration of all the relevant circumstances. " In the light of the admitted fact, that the short delay in submitting the duly filled questionnaire was due to computer failure, that the up keep and maintenance of computer was to be done by VSE, that the appellant had approached VSE seeking help in this regard and that he furnished information during the course of inspection proves his bonafides. The appellant's statement that the Income Tax Authorities seized the records and those were not in his custody has to be considered. Therefore, it is clear that failure to comply with the requirements of section 15A was due to factors beyond the control of the appellant.

It is evident from the impugned order that the Adjudicating officer had taken into consideration the factual position submitted by the appellant before him during the adjudication proceedings as is evident from para 6.3 of his order, therein he had stated that " in the light of the submission made and material furnished, I find that the member had no deliberate intention for not co-operating with SEBI. However, the facts remain that as he was not able to furnish information to SEBI in time, SEBI was not able to make inspection of his records. That prevented the regulatory function of SEBI. Having stated so, he imposed "a limited penalty of Rs. 15, 000/- in terms of section 15A of the Act."

Since the Adjudicating Officer himself had accepted the appellant's version that the books, etc. were not in his custody or control as the Income Tax Authorities had seized the same, that short delay in furnishing the requisite information to SEBI's inspection team was due to computer

failure, that the up keep of the computer was within the province of VSE, and that the appellant was found not wanting in his efforts to furnish the details, it is difficult to uphold the imposition of monetary penalty against 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: March 27, 2000