# BEFORE THE SECURITIES APPELLATE TRIBUNAL MUMBAI

**Appeal No.122 of 2012**

**Date of Decision: 8.11.2012**

Bharat Shantilal Thakkar
196/A, Dr. Viegas Street,
Carvel X Lane No.8,
3rd Floor, Room No.32,
Chirabazar, Mumbai – 400 002. …… Appellant

Versus

The Adjudicating Officer
Securities and Exchange Board of India
SEBI Bhavan, Plot No. C-4A, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai - 400 051. …… Respondent

Mr. Ankit Lohia, Advocate with Mr. Manish Chhangani, Advocate for the Appellant.

Dr. Mrs. Poornima Advani, Advocate with Mr. Mobin Shaikh, Advocate for the Respondent.

CORAM : P. K. Malhotra, Member & Presiding Officer (*Offg*.)
S.S.N. Moorthy, Member

Per : S.S.N. Moorthy

This order will dispose of five Appeals no.122, 123, 127, 128 and 129. Since the facts of the case are identical in all the appeals a single order is passed taking out the facts from Appeal no. 122 of 2012 filed by Shri Bharat Shantilal Thakkar. The appellants are investors in securities and had been dealing in securities market for the past several years. The present appeals arise out of orders passed by the adjudicating officer of Securities and Exchange Board of India (the Board) in the case of the appellants. The adjudicating officer, acting under section 15I of the Securities and Exchange Board of India Act, 1992 (the Act), imposed penalties as enumerated hereunder in respect of the appellants.

1) Shri Bharat Shantilal Thakkar [Appeal no.122 of 2012] - ` 3,50,000/-
2) Shri Kishore Balubhai Chauhan [Appeal no.123 of 2012] - ` 3,50,000/-
3) Shri Hemant Madhusudan Sheth [Appeal no.127 of 2012] - ` 3,50,000/-
4) Shri Prem Mohanlal Parikh [Appeal no.128 of 2012] - ` 3,50,000/-

5) Shri Bhavesh P. Pabari [Appeal no.129 of 2012] - ` 3,50,000/-

2. The adjudicating officer, acting under the powers conferred under section 23 I of the Securities Contracts (Regulation) Act, 1956 (SCRA), imposed penalties on the appellants as enumerated below:-

1) Shri Bharat Shantilal Thakkar [Appeal no.122 of 2012] - ` 1,50,000/-
2) Shri Kishore Balubhai Chauhan [Appeal no.123 of 2012] - ` 1,50,000/-
3) Shri Hemant Madhusudan Sheth [Appeal no.127 of 2012] - ` 2,00,000/-
4) Shri Prem Mohanlal Parikh [Appeal no.128 of 2012] - ` 2,00,000/-
5) Shri Bhavesh P. Pabari [Appeal no.129 of 2012] - ` 3,00,000/-

3. The appellants were held to be guilty of violating section 11C of the Act and hence penalty under section 15A(a) was imposed as mentioned above. Similarly, the appellants were found to be guilty of violating sections 13 and 18 read with section 2(i) of the SCRA and penalty was imposed under section 23H of the SCRA as mentioned above. The appellants challenge the imposition of the above penalties in these appeals.

4. The brief facts, leading to the imposition of penalties, are the following. The Board conducted investigation in the trading in the scrip of M/s. Indo Pacific Software and Entertainment Ltd. engaged in the business of providing software development, entertainment activities, development of multiplexes etc. The investigations revealed that ten entities transferred/ received shares in off-market transactions in respect of 70,78,108 shares. Investigation was conducted into the nature of the off market transactions and the appellant was directed to explain the circumstances leading to the off market transfers. The appellant contended before the investigating authority and the adjudicating officer that the off market transfers were in the nature of repayment of old loans, advancement of new loans or transactions between his own demat accounts. The investigating authority called for specific details regarding the alleged off market transfers. Notices were issued to the appellants setting forth specific details for explaining the nature of the impugned transactions. When complete and convincing reply was not received from the appellant, summons was issued enclosing specific details to be furnished and for personal appearance of the appellant. After a series of such correspondence the investigating officer concluded that the queries raised during the investigation were not answered fully by the appellant and there was default in responding to the summons issued by the

authorities. He concluded that there was violation of the provisions of section 11C of the Act in as much as the appellant had failed to appear as directed and failed to provide the required information as per summons issued. It was also noticed by him that the appellant failed to furnish evidence for the off market transfers as contended by him and so the exact purpose and modus operandi of the off market transfers could not be established. It was noted that the appellant failed to furnish evidence as promised in the replies to the summons to establish the claim that off market transfers were in the nature of loan repayment/fresh loan. There was no evidence for payment of consideration as well. In view of the failure to furnish the above mentioned evidence in support of the off market deals, the adjudicating officer concluded that there was violation of the provisions of sections 13 and 18 read with section 2(i) of the SCRA. A show cause notice was issued to the appellant setting out the above allegations on July 4, 2011 and after considering the submissions of the appellant the adjudicating officer imposed penalties as mentioned above by way of an order dated February 29, 2012.

5. We have heard learned counsel Mr. Vicky Singh for Bhavesh P. Pabari and Mr. Ankit Lohia for Bharat Shantilal Thakkar and others and Dr. (Mrs) Poornima Advani for the respondent Board.

6. The first objection in this appeal relates to imposition of penalty under section 11C of the Act for non response/non furnishing of information as per summons issued. It is the case of the appellant that replies were furnished to the letters issued by the investigating authority and the adjudicating officer and extension of time for filing specific particulars was sought from time to time and the appellant cannot be charged with non response to summons. In the grounds of appeal it is submitted in detail that the appellant had informed the respondent Board that the off market transfers were in the nature of short term loans and repayment of old dues and the appellant had only business relations with the entities involved in the transaction. According to the grounds of appeal, the appellant had submitted all the details called for and he had extended full cooperation and there was no default in furnishing any report, document or information. It is specifically submitted that the appellant did not have any document in support of the off market transactions, there was no bank transaction and in this background the issue of non furnishing of any document does not arise. According to the appellant, the

transactions were made on the basis of good faith and market goodwill and hence there was no supporting document. It is also contended by the appellants' learned counsel that the show cause notice has mainly alleged non appearance before the adjudicating officer whereas the penalty imposed under section 15 A(a) deals with non furnishing of documents, information and reports to the Board.

7. The learned counsel appearing for the Board took us through the letters and summons issued by the investigating and adjudicating authorities and submitted that the appellants had failed to furnish specific information as called for in the summons. The appellant had repeatedly sought extension of time for filing specific particulars since they had to be collected and collated from various sources and promised to furnish the same after the extended time sought for. According to the learned counsel for the Board, the appellant has taken dilatory tactics without answering the specific queries and there was clear violation on his part and so the provisions of section 11C stand attracted.

8. We have considered the rival submissions. It is necessary to have a look at the factual matrix of the case for a proper appreciation of the contentions raised by both the parties. On August 3, 2009, assistant general manager of the investigation department of the Board issued a letter to the appellant calling for certain details with reference to the off market transactions entered into by the appellant. The details mainly related to reasons for entering into the said transactions, relationship with the parties, details of payments made/received, details of bank statement, disclosures made as per regulation 13 of the Securities and Exchange Board of India (Prohibition of Insider Trading). Regulations, 1992 (PIT Regulations) etc. A reminder was issued to the appellant on August 17, 2009 to expedite the reply. The appellant submitted a reply to the above queries on September 22, 2009. Since the investigating authority required further particulars regarding the impugned transactions a summons was issued to the appellant on June 8, 2010. The appellant was directed to furnish documentary evidence in support of the off market transactions, explain the relationship with the counter parties, file details of payments, furnish copies of bank statement etc. The appellant furnished a reply on January 15, 2010 reiterating the stand already taken in reply to the first letter of the investigating officer. The main submission of the appellant was that the impugned transactions related to temporary loans/ loan repayment in the form of shares. The

investigating authority issued another summons on June 7, 2010 calling for details of the alleged loan transactions and supporting documents in respect of the same. The appellant filed a reply on July 1, 2010 seeking more time to locate necessary documents in support of the loan transactions since the said transactions took place more than three years ago. On July 17, 2010 the appellant intimated the investigating officer that he required fifteen more days to submit the required particulars since he could not locate the requisite details and the process was likely to take some more time. After this letter, there was a long silence on the part of the appellant. The adjudicating officer issued a show cause notice on July 4, 2011.

9. For proper appreciation of the contentions raised by the appellant, it is necessary to focus on the submissions made by him on July 1, 2010 and July 17, 2010. For ease of reference the relevant portions are extracted below.

> "With regard to query no.2, I request you to grant me sometime to submit the necessary documents since it pertains to the financial transactions taken place during the period which is more than three years from now and therefore I require some more time to locate the same.
> ……..
>
> As far as Query no.2 is concerned, through the said reply I had sought some time to provide information and relevant documents. However, I have still not been able to locate the requisite details, the process is likely to take some time.
>
> In view of the same I request you to kindly give me 15 more days time to submit the required details and hence request you to treat the same as compliance of the captioned summons and I further request that on submission of the details I be exempted me from personal appearance."

10. The tone and tenor of the above submissions suggests that the appellant is in possession of the required details and more time is required for locating and submitting the same to the investigating officer. Admittedly, the appellant has not furnished the requisite particulars as per his own admission till July 17, 2010. Summons are issued for eliciting necessary information in respect of certain cases under investigation and if the details called for are not furnished, in spite of the issue of summons, the appellant has to be held guilty. The learned counsel appearing for Shri Bhavesh P. Pabari submitted that there was substantial compliance to the summons and all the material in possession of the appellant was submitted. This cannot be accepted in the face of the very admission of the appellant mentioned hereinabove that fifteen more days time should be granted to submit the required details. It is also to be noticed that the appellant had sought exemption from

personal appearance on submission of the required details. When required details were not furnished by the appellant and he has himself admitted that the same would be filed within the extended time, the theory of substantial compliance advanced by the appellants' learned counsel cannot be accepted.

11. There is no material on record to show that the request of the appellant was turned down. On the other hand, the investigating authorities were under the impression that the required particulars would be furnished within the extended time sought for by the appellant. In fact, the appellant had a long interregnum before the issue of the show cause notice, but the appellant failed to comply with the commitment given in response to the summons.

12. In the grounds of appeal, the appellant has taken a stand that all details required by the investigating officer were furnished and he had extended full co-operation necessary in the matter. It is also submitted that the Board failed to appreciate that the appellant had no documents in his possession in relation to the impugned transactions and, therefore, the issue of non furnishing of documents is of no consequence. This argument of the appellant goes counter to the stand taken in the replies furnished in response to the summons issued by the investigating officer, reference to which has been made above. There is no whisper in the replies filed before the investigating officer that the appellant was not in possession of the required details. On the contrary, the commitment by the appellant was for submission of the documents within the extended period of time. It is noteworthy that the appellant himself has stated in the reply filed on July 17, 2010 that exemption from personal appearance may be granted on submission of the required details.

13. The above analysis of the facts on record shows that the appellant was guilty of non appearance before the investigating officer in response to the summons and guilty of non furnishing of details as called for. We are of the view that shorn of all technical arguments relating to the provisions of section 11C of the Act, the factual conceptus of the case narrated above would be sufficient to hold the appellant guilty.

14. The appellant's learned counsel argued at length to drive home a proposition that penalty under section 15A(a) cannot be imposed for violation of section 11(C) of the Act. According to him, the provisions of section 11(C)(6) provide for penalty for violation of

section 11(C) of the Act and so the general provisions contained in section 15A(a) of the Act cannot be invoked.

15. We cannot accept the above contention of the appellant's learned counsel. It is not necessary to discuss the nuances of section 11(C)(6) and section 15A(a) for considering the issue at hand. The issue has been considered by this Tribunal in the case of DKG Buildcon Pvt. Limited vs. Securities and Exchange Board of India, [Appeal no.106 of 2006 decided on January 7, 2009]. The adjudicating officer has highlighted the decision of this Tribunal in the above case and also the salient portions of the order. Suffice it to say that the provisions of section 11(C)(3) empower the investigating authority to call for relevant information for the purpose of investigation and the provisions of section 15A(a) deal with penalties for failure to furnish any document or return to the Board. In order to advance the objective of the enactment the provisions have to be given a wider meaning and viewed from this angle, provisions of section 15A(a) can be invoked for failure to furnish information/document/returns as called for by the investigating authority. The relevant portion of the observation of this Tribunal in the above case is extracted below.

> "Section 11C of the Act was introduced with effect from 29.10.2002 and sub-section (3) thereof provides that the investigating authority may require any person associated with the securities market "to furnish such information, or produce such books, or registers, or other documents, or record before him…". The power to require a person to furnish any information or record or documents includes the power to require such person to make a statement and give clarifications with regard to the information and documents produced by him. In the absence of such a power the purpose of the legislature in introducing section 11C would be frustrated and the Board will not be able to investigate properly the market irregularities and offences. In order to advance the object of Parliament the language used in sub-section (3) of section 11C has to be given a wider meaning. We are, therefore, of the considered opinion that section 11C (3) gives the power to the investigating authority to call upon any person to make a statement while furnishing any information, document or record."

In the above view the imposition of penalty under section 15A(a) by the adjudicating officer cannot be faulted.

16. The appellant objects to the stand taken by the adjudicating officer with regard to violation of the provisions of sections 13 and 18 read with section 2(i) of the SCRA. According to the appellant, the findings recorded by the adjudicating officer that the impugned transactions are in the nature of sales/purchases defy the rules of evidence and the facts on record. It is very strenuously argued that the adjudicating officer has acted

without bringing on record any evidence or material to substantiate the stand taken by him that the off market transfers are in the nature of sales/purchases. It is submitted that the onus is on the adjudicating officer to bring on record sufficient and convincing evidence to establish his stand. The conclusion drawn in the impugned order that the transactions in question have to be considered to be sales/purchases in the absence of specific proof in support of the alleged loan transactions by the appellant is a serious infirmity. It has been admitted before the investigating authority and the adjudicating officer that the impugned transactions were in the nature of loan/repayment of loan and relevant entries have been made in the delivery instruction slip. In other words, the submissions made by the appellant absolve him of any further responsibility and the adjudicating officer should have established the transactions to be in the nature of sales or purchases. Off market transactions, according to the appellant, are legal in nature and the impugned transactions fall within the exclusion carved out in section 18 of the SCRA. With reference to section 2(i)(b) of the SCRA, it is argued that in the present case, there is a transfer of securities by the depository from the account of one beneficial owner to the account of another beneficial owner and this is not circumscribed by any time period for payment of consideration and the transaction in question being covered in the form of loan/repayment of loan no such payment is envisaged. In short, the argument of the appellant's learned counsel is that the restrictions relating to actual delivery of securities and payment of consideration within a specified period cannot be made applicable to the impugned transactions and so there is no violation of sections 13 and 18 as concluded by the adjudicating officer.

17. The learned counsel for the Board supported the stand taken by the adjudicating officer on the ground that the aim of SCRA is to prevent all kinds of undesirable transactions and in the present case, appellant has taken a stand of alleged loan transactions to escape the clutches of the provisions of the SCRA without discharging the primary onus of proving the claim of the said loan dealings. With reference to the submissions made before the investigating officer, it is contended that the appellant had sought time to locate and furnish documents in support of the loan transactions, but eventually has failed to do so. According to the learned counsel for the Board, the adjudicating officer cannot be faulted in the backdrop of the above admissions made by

the appellant. According to her the provisions of sections 2(i)(a) and 2(i)(b) of the SCRA have to be harmoniously construed. A reference is also made to the decision of this Tribunal in the case of Mrs. Bhanuben Jaisukhlal Shah vs. Securities and Exchange Board of India, [Appeal no.271 of 2011 decided on March 5, 2010].

18. We have considered the submissions of both the parties. For the sake of convenience the impugned provisions of SCRA are extracted below:

> **Definitions.**
> **2.** In this Act, unless the context otherwise requires, -
>
> ……..
>
> (*i*) "spot delivery contract" means a contract which provides for,—
>
> *(a)* actual delivery of securities and the payment of a price therefore either on the same day as the date of the contract or on the next day, the actual period taken for the despatch of the securities or the remittance of money therefore through the post being excluded from the computation of the period aforesaid if the parties to the contract do not reside in the same town or locality;
>
> *(b)* transfer of the securities by the depository from the account of a beneficial owner to the account of another beneficial owner when such securities are dealt with by a depository;
>
> **Contracts in notified areas illegal in certain circumstances.**
>
> **13.** If the Central Government is satisfied, having regard to the nature or the volume of transactions in securities in any State or area, that it is necessary so to do, it may, by notification in the Official Gazette, declare this section to apply to such State or area, and thereupon every contract in such State or area which is entered into after the date of the notification otherwise than between the members of a recognised stock exchange in such State or area or through or with such member shall be illegal
>
> ……
>
> **Exclusion of spot delivery contracts from sections 13, 14, 15 and 17.**
>
> **18.** (1) Nothing contained in sections 13, 14, 15 and 17 shall apply to spot delivery contracts.
>
> (2) Notwithstanding anything contained in sub-section (1), if the Central Government is of opinion that in the interest of the trade or in the public interest it is expedient to regulate and control the business of dealing in spot delivery contracts also in any State or area (whether section 13 has been declared to apply to that State or area or not), it may, by notification in the Official Gazette, declare that the provisions of section 17 shall also apply to such State or area in respect of spot delivery contracts generally or in respect of spot delivery contracts for the sale or purchase of such securities as may be specified in the notification, and may also specify the manner in which, and the extent to which, the provisions of that section shall so apply."

As observed by the adjudicating officer off market transfers in the present case are covered under section 2(i)(b) of the SCRA. There has been off market deals between the appellant and other entities of the group by way of transfer of beneficial ownership through the depository. The case of the appellant is that the restriction of time and payment imposed on spot delivery cannot be imputed to a situation covered under section 2(i)(b) in as much as the provisions of section 2(i)(a) and 2(i)(b) are not connected by a conjunction and so they stand alone as unconnected provisions. The charge levelled against the appellant by the adjudicating officer is that the impugned off market transfer, not having been substantiated as a loan transaction by the appellant, should be considered to be a normal sale/purchase and the restrictions contained in section 2(i)(a) should be harmoniously applied to the present situation as well. The issue under consideration has got two limbs - (1) the real nature of the transaction and (2) the harmonious construction of sections 2(i)(a) and 2(i)(b) of the SCRA. With regard to the first limb, the case of the appellant is that the impugned transfer is in the nature of loan/loan repayment. Admittedly, it is for the appellant to advance evidence in support of his claim. The adjudicating officer provided the appellant with sufficient opportunities to furnish documentary proof in support of the claim. The appellant sought extension of time to locate and furnish the relevant documents. There was no refusal of this prayer from the investigating officer. The appellant did not furnish the required documentary evidence in spite of getting a long interval between the summons issued by the investigating officer and the show cause notice issued by the adjudicating officer. So the theory of loan transaction could not be accepted by the adjudicating officer. He, then, proceeded to deal with the transaction as one in the nature of sale/purchase which is reasonable and logical. Thus, the facts on record show that the adjudicating officer has characterised the transactions based upon the fact situation and the failure on the part of the appellant to prove his claim. Once the transaction is regarded as sale/purchase, it has to be examined whether the provisions of sections 2, 13 and 18 of the SCRA are complied with.

19. The second limb of the argument, as aforementioned, deals with the harmonious construction of the provisions of section 2(i)(a) and 2(i)(b) of the SCRA. We find that this issue has been decided by this Tribunal in the case of Mrs. Bhanuben Jaisukhlal Shah mentioned supra. The adjudicating officer has considered this issue in detail in the light

of the decision of this Tribunal cited above. The observations of this Tribunal, though relied on by the adjudicating officer, require reiteration to reinforce the stand taken by the adjudicating officer. The relevant portions are extracted below for the sake of convenience.

> "According to clause (b), when securities are transferred from one beneficial account to another, it would be treated as "actual delivery" of securities within the meaning of clause (a). It is, thus, clear that clause (b) is not an independent clause but only an explanation to the words "actual delivery" as used in clause (a). We cannot, therefore, accept the argument of the appellant that clause (b) is an independent clause and that the spot delivery contract is complete with the mere transfer of securities from the account of one beneficial owner to that of another without reference to the payment of consideration. This could never be. If that were so, the contract itself would become void being without consideration. Clause (b) cannot be picked up and interpreted in a manner which defeats the very purpose for which it was enacted. While interpreting the provisions of Section 2(i) of the Act, we have to keep in mind the consequences which are likely to flow from the intended interpretation. We cannot but hold that clause (b) in Section 2(i) was not meant to stand on its own and it has to be read in conjunction with clause (a)."

20. The fact situation in the present case and the legal position as enunciated in the decision of the Tribunal mentioned above make it clear that the transactions entered into by the appellant are not in compliance with the requirements laid down for spot delivery contracts under section 2(i) of the SCRA and from this it flows that they are in violation of the provisions of sections 13 and 18 of the SCRA.

21. The learned counsel for the appellants attempted to put forward a very strong argument that the adjudicating officer has failed to bring on record evidence and material to substantiate the stand taken by him with reference to the off market transactions. Shri Ankit Lohia, learned counsel for the appellants, very stoutly argued that there is no evidence to substantiate the finding of the adjudicating officer that the transactions were not in the nature of loan/loan repayment. Shri Vicky Singh learned counsel appearing for Shri Bhavesh P. Pabari, contended that the wrong doing of the appellant must be established on the basis of the evidence placed on record by the adjudicating officer and the onus is squarely on the adjudicating officer to prove that there was the alleged violation. A reference was made to section 106 of the Indian Evidence Act, 1872. According to him, the defense advanced by the appellant is not material and it is not relevant even if the appellant has failed to bring in evidence in support of the claim made by him. It is submitted that the adjudicating officer should have brought on record positive evidence to establish a case of sale/purchase transaction and the absence of

explanation on the part of the appellant cannot be a ground for holding him guilty. The adjudicating officer failed to establish his case of the transaction being one of the sale/purchase and on this ground the charge against the appellant should be dropped.

22. The learned counsel for the Board submitted that the appellant has failed to discharge his primary onus even though the nature and details of transactions have been communicated by the adjudicating officer and specific response was called for in respect of the transactions. With reference to section 106 of the Indian Evidence Act, 1872, it is pointed out that the facts especially in the knowledge of the appellant should be proved by him. A plea of innocence cannot be advanced taking a legal ground that the adjudicating officer has not brought on record positive evidence in spite of the non response of the appellant to specific queries raised by the adjudicating officer.

23. We have considered the submissions of the parties. At the outset, it has to be mentioned that every case is built on the foundation of the facts relevant to that case. The propositions of law have to be applied after taking into account the facts on record and whether the facts fit in with the general legal principles. In the present case, we have already dealt with the fact situation in detail. The investigating officer called for specific details and documentary evidence in support of the alleged loan transactions of the appellants. It is on record that the appellant sought time to furnish the required details and this has not been refused by the adjudicating officer. So, in the present case, the burden of proof still rests with the appellant. If the appellant had already discharged his onus by providing satisfactory explanation and requisite evidence, it can be said that the onus shifts to the adjudicating officer. The provisions of section 106 of the Evidence Act relied on by the appellants' learned counsel deal with the burden of proof of a fact especially within the knowledge of any person: "When any fact is especially within the knowledge of any person the burden of proving that fact is upon him". A perusal of the record shows that the documents relating to loan transactions were within the knowledge of the appellant and there was a commitment to produce the same after a specific period. So, the facts of the case squarely fall within section 106 of the Evidence Act where the burden is on the person who had knowledge of the fact. Admittedly, this has not been discharged. We cannot appreciate the contention of the appellants' learned counsel that the adjudicating officer has to prove his case. We hasten to add that it would have been

so if the appellant had discharged his primary onus. The appellants' learned counsel would like to import the requirements of evidence in criminal case to the present case also and argue that the accused is not expected to prove his innocence. As is well known, the degree of proof and evidence in criminal case and civil case is different. The appellants' argument cannot be accepted in the facts of the present case especially when the commitment made before the investigating officer has not been fulfilled by the appellant. In the absence of the furnishing of the documents as committed, the adjudicating officer was forced to draw his conclusion which is logical and reasonable in the circumstances of the case. The appellants' learned counsel would argue that the adjudicating officer himself is not sure about the real nature of the transactions and so he has considered them to be in the nature of sale/purchase in a vague and inchoate fashion. We cannot accept this contention again in view of the fact situation in the present case. So we conclude that the adjudicating officer has taken a proper and reasonable stand on the basis of the facts placed before him as regards the character of the transactions.

24. The appellants' learned counsel made a reference to the following case laws to bring home the contention regarding specific evidence to be adduced by the Board.

1. George vs. State [1996CriLJ1755]

2. S.L. Goswami vs. State of Madhya Pradesh [AIR1972SC716]

In the case of George vs. State, the appellants' learned counsel highlighted the role of the prosecution in proving its case in a clinching fashion beyond any shadow of doubt by adducing necessary evidence. This case cannot be equated with the facts of the case under appeal since the principle relates to a criminal case and the fact situation in the case in hand is quite different. In the case of S.L. Goswami also, the appellants' learned counsel would harp on the principles laid down therein that the onus of proving all the ingredients of an offence is always upon the prosecution. Here also, the facts in the case under appeal stand on a different footing and the principles of criminal jurisprudence cannot be wholly made applicable to civil proceedings.

25. The case laws relied on by the learned counsel for the Board, on the other hand, support the stand taken by the adjudicating officer. In the case of Sucha Singh vs. State of Punjab [2001(2)ACR1182(SC)] it has been held that section 106 of the Evidence Act would apply to cases where prosecution has succeeded in providing facts for which a

reasonable inference can be drawn regarding the existence of such another fact unless the accused by virtue of special knowledge regarding such facts fails to offer any explanation which may lead to a different inference. The decision of the Supreme Court in State of Andhra Pradesh vs. Bathu Prakasa Rao [1976 AIR 1845] also lays down the principle that the burden of proving the exact character and circumstance of the acts committed by a person is upon him.

26. The appellants' learned counsel then contended that the quantum of penalty is on the higher side having regard to the facts of the case. According to him, the factors enumerated in section 15J of the Act have not been given proper regard and penalty has not been imposed in a uniform manner in respect of all the entities of the group. A reference is made to certain orders of the adjudicating officer in similar circumstances. The appellants' learned counsel made specific reference to orders of the adjudicating officer in the case of Nirchem Associates [Adjudicating order no.BM/AO-60/2011] dated April 26, 2011 and M/s. Uttar Pradesh Trading Company Limited [Adjudicating order no.PKK/AO/153/2011] dated August 29, 2011.

27. We have considered the arguments advanced by the learned counsel for the appellants. It is settled law that quantum of penalty is related to the facts and circumstances of each case. It depends on the consideration of the gravity of the offence/violation by the adjudicating officer. Admittedly, penalty cannot be arbitrary, excessive or unjust and should have due regard to the facts and circumstances of the case. There cannot be uniformity among all the delinquents on the issue of imposition of penalty since it depends on the gravity of mistakes and consideration of the same by the adjudicating officer. The orders of the adjudicating officer referred to by the appellants' learned counsel cannot lay down any standard parameter or uniform practice. In the present set of cases, we are of the view that the penalty imposed is commensurate with the gravity of the violation and the adjudicating officer has given due regard to the factors enumerated under section 15J of the Act. So the quantum of penalty does not call for any interference.

28. During the appeal proceedings certain ancillary issues were raised which require to be mentioned in passing. One of the issues raised by the appellants was that the entire investigation report was not provided to them. We do not consider this to be a fatal flaw.

The contents of the investigation report have been paraphrased in the show cause notice and the appellant has been given a clear picture of the factors leading to the wrong doing alleged in the show cause notice. So there cannot be any prejudice to the appellant on this ground. Another argument advanced by the learned counsel for the appellant is that the show cause notice does not provide a clear picture of the alleged wrong doing and there is no reference to the transaction in the nature of sale and purchase. We cannot accept this ground also since the show cause notice gives a clear and specific picture of the wrong doing with reference to the provisions of law and we do not find any vagueness or lack of clarity in the show cause notice. It is contended by the appellant that off market transfers entered into by the appellant have not in any way affected the securities market and there has been no attempt at manipulation and so there is no case for any penalty. We have considered this issue in the background of the objects contained in the provisions of SCRA. It is to be noted that SCRA is intended primarily to prevent "undesirable transactions in the securities". In the present case, the appellant was found to have entered into certain transactions which were prima facie undesirable and for which no proper explanation was offered by him. No fault, therefore, can be found with the findings arrived at by the adjudicating officer.

In view of the discussion above we uphold the order of the adjudicating officer and dismiss the appeals. No costs.

Sd/-
P.K. Malhotra
Member &
Presiding Officer (*Offg*.)

Sd/-
S.S.N. Moorthy
Member

8.11.2012
Prepared and compared by
RHN