REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.14730 OF 2015

SIDDHARTH CHATURVEDI **Appellant(s)**

Versus

SECURITIES AND EXCHANGE BOARD OF INDIA **Respondent(s)**

W I T H

CIVIL APPEAL NO. 14728 OF 2015

ANKUR CHATURVEDI **Appellant(s)**

Versus

SECURITIES AND EXCHANGE BOARD OF INDIA **Respondent(s)**

CIVIL APPEAL NO. 14729 OF 2015

JAY KISHORE CHATURVEDI **Appellant(s)**

Versus

SECURITIES AND EXCHANGE BOARD OF INDIA **Respondent(s)**

SUPREME COURT OF INDIA
JUDGMENT

O R D E R

1. These appeals raise an interesting question of the interplay between section 15A, as amended in the year 2002, and Section 15J of the Securities and Exchange Board of India Act, 1992 (in short 'the SEBI Act') .

2. The brief facts necessary to understand the present controversy are that the appellants before us made certain purchases of shares of the Brijlaxmi Leasing and Finance Company between October and December, 2012. On 16th June, 2014, in Civil Appeal No.14730 of 2015, a show cause notice came to be issued by the respondent SEBI to the appellant under Rule 4(1) of the Securities and Exchange Board of India (Procedure for holding inquiry and imposing penalty by adjudicating officer) Rules, 1995 for the alleged violation of the provisions of Regulations 13(4), 13(4A) and 13(5) of the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992.

3. A detailed reply was filed by the appellant to the show cause notice, on 13th August, 2014, submitting that there was no intention to violate any

rule or regulation. The entire transaction value of purchases and sale of the shares did not exceed Rs.55,000/-. It was further submitted that the transaction was neither made with a view to make any disproportionate gain or unfair advantage nor was it for the purpose of causing any loss to investors. The default, if any, was a technical default that did not call for any penal action.

4. The Adjudicating Officer, by various orders imposed a penalty of Rs.5 lacs, 7 lacs and 11 lacs respectively, in the three civil appeals, before us. An appeal made to the Securities Appellate Tribunal suffered the same fate, and was dismissed by the Tribunal stating that there is no dispute that there was violation of mandatory regulations, and that in any case, a penalty of Rs.one crore could have been imposed on facts, whereas, in fact, the Adjudicating Officer penalised the appellants with a penalty of Rs.5 lacs, 7 lacs and 11 lacs respectively, which cannot be said to be excessively harsh or unreasonable.

5. It is these judgments of the Securities Appellate Tribunal, Mumbai that have come up before us in these appeals.

6. Learned counsel appearing on behalf of the appellants has argued that Section 15A, after its amendment in 2002, which was the law until the section was further amended in the year 2014, would undoubtedly apply to the present facts of the case. However, learned counsel submitted that Section 15A would, at all times, have to be read with Section 15J of the SEBI Act and that, this being so, it is clear that the violation of the regulations being only technical, and not involving any disproportionate gain to the appellant, or unfair advantage or loss to any investor, SEBI was not, in the first instance, correct in imposing any penalty at all. According to the learned counsel for the appellants, the defaults that were made were technical, and were made on three days only, and there was no repetitive nature of any default as well.

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7. Mr. C.U. Singh, learned senior counsel appearing on behalf of the respondent SEBI has placed before us a judgment of a Division Bench of this Court titled as SEBI Through its Chairman versus Roofit Industries Limited, reported in 2015 (12) SCALE 642. Mr. Singh has pointed out, one may say fairly, to us that observations made in paragraph 5 of the said judgment would completely foreclose the arguments made by the learned counsel for the appellants in the

present cases, but that these observations may not constitute the ratio of the judgment for the reason that the judgment ultimately construed Section 15A prior to its amendment in the year 2002.

8. It is necessary at this juncture to set out paragraphs 4 and 5 of the aforesaid judgment in order to first ascertain as to what this Court has stated :-

> "4. We find merit in the contentions of learned senior counsel for the appellant that the penalty imposed by the Adjudicating Officer should not have been reduced on wholly extraneous grounds not mentioned in Section 15J of the SEBI Act. Section 15J reads thus :
>
> 15J. While adjudging the quantum of penalty under Section 15-I, the adjudicating officer shall have due regard to the following facts, 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.
>
> The use of the word "namely' indicates that these factors alone are to be considered by the Adjudicating Officer. Black's Law Dictionary defines "namely" as "by name or particular mention. The term indicates what is to be included by name. By contrast, including implies a partial list and indicates something that is not listed." In this context, we find no reason to read "namely" as "including", as learned senior

counsel for the respondent would have us do.

5. It would be apposite for us to begin our analysis of the penalty to be imposed by laying out Section 15A(a) as it stood subsequent to the 2002 amendment, for the facility of reference:

15A. If any person, who is required under this Act or any rules or regulations made thereunder,-

a. to furnish any document, return or report to the Board, fails to furnish the same, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less;
……..

In the connected appeals before us, the appellant has imposed a penalty of Rs.75 lakhs despite the failure having continued for substantially more than 75 days. Learned senior counsel for the appellant has contended that the appellant has discretion to impose a penalty below the number of days of default regardless of the words "whichever is less". He has argued that there would be no purpose to Section 15J if the Adjudicating Officer's discretion to fix the quantum of penalty did not exist, and that such an interpretation would render certain Sections of the SEBI Act as expropriatory legislation due to the crippling penalties they would impose. We do not agree with these submissions. The clear intention of the amendment is to impose harsher penalties for certain offences, and we find no reason to water them down. The wording of the statute clarifies that the penalty to be imposed in case the offence continued for over one hundred days is restricted to Rs.1 crore. No scope has been given for discretion. Prior to the amendment, the section provided for a penalty "not exceeding one lakh fifty thousand rupees for each such failure", thus giving the appellant the discretion to decide the appropriate amount of penalty. In this context, the change to language which does not repose any discretion is even

more significant, as it indicates a legislative intent to recall and remove the previously provided discretion. Additionally Section 15J existed prior to the amendment and was relevant at that time for adjudging quantum of penalty. Once this discretionary power of the adjudicating officer was withdrawn, the scope of Section 15J was drastically reduced, and it became relevant only to the Sections where the Adjudicating Officer retained his prior discretion, such as in Section 15F(a) AND Section 15HB. This ought to have been reflected in the language of Section 15-I, but was clearly overlooked. Section 15J has become relevant once again, subsequent to the Securities Laws (Amendment) Act, 2014, which changed Section 15A(a), with effect from 8.9.2014, to read as follows :-

15A. Penalty for failure to furnish information, return, etc. - If any person, who is required under this Act or any rules or regulations made thereunder :-

a. to furnish any document, return or report to the Board, fails to furnish the same, he shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees;

The purpose of amendment was clearly to re-introduce the discretion of the adjudicating Officer which was taken away by the SEBI (Amendment) Act, 2002. Had the failure of the respondent taken place between 29.10.2002 and 8.9.2014, the penalty ought to have been Rs.1 crore, without the possibility of any discretion for reduction."

9. Two things have been clearly stated by this Court in so far as the amended Section 15A read with Section 15J is concerned. First, this Court has indicated that by the use of the expression "namely"

in Section 15J, SEBI in adjudging the quantum of penalty under Section 15A can have due regard only to the three factors set out therein and not to other relevant factors as the expression "namely" cannot be equated with the expression "including", being an exhaustive provision on the subject matter covered by the provision. This Court has also clearly held that Section 15J would suffer an eclipse for the period 2002 to 2014 inasmuch as the intention of the Legislature, by amending Section 15A, seems to be that no scope for any discretion for this period is to be exercised, if in fact, there is any infraction of Rules or Regulations. This Court clearly held that the discretionary power of the Adjudicating Officer having been withdrawn, the scope of Section 15J would correspondingly stand drastically reduced.

10. Prima facie, we find it a little difficult to subscribe to both the views contained in paragraph 4 as well as in paragraph 5 of the said judgment. The expression "shall have due regard to" is a very known legislative device used from the time of *Julius v Bishop of Oxford (1880) LR 5 AC 214 (HL),* and followed in many judgments both English as well as of our Courts as words vesting a discretion in an Adjudicating Officer. The question which arises in the present appeals is whether the expression

"namely" fixes the discretion which can be exercised only in the circumstances mentioned in the three clauses set out in Section 15J, or whether it would also take into account other relevant circumstances, having particular regard to the fact that it is a penalty provision that the Court is construing. As this needs to be authoritatively decided for the future, it would be better if we refer it to a larger Bench for such authoritative pronouncement.

11. We also find it a little difficult to accept what is stated in paragraph 5 of the judgment. It is very difficult, keeping in view, particularly, two important legal facets – one the doctrine of harmonious construction of a statute; and two, the fact that we are construing a penalty provision of a statute which is to be strictly construed, Section 15A, post amendment in 2002, is suddenly given a pride of place, and Section 15J is made to yield entirely to it. The familiar expression "notwithstanding anything contained" does not appear in the amended Section 15A. This being the case, it is a little difficult to appreciate as to how one can construe Section 15A, as amended, in isolation, without regard to Section 15J. In fact, the facts of the present case would go to show that where there is allegedly only a technical default, and the three

parameters of Section 15J would allegedly be satisfied by the appellants, namely, that no disproportionate or unfair advantage has been made as a result of the default; no loss has been caused to an investor or group of investors as a result of the default; and there is in fact, no repetitive nature of default, no penalty at all ought to be imposed. What has been done by the appellants here is to fail to adhere to Regulation 13, as alleged in the show cause notice, which failure has occurred on three days and consequently, has allegedly not been repeated by the appellants anytime thereafter. If we were to read Section 15A, as amended in 2002, in the manner suggested by the Division Bench of this Court, it may lead to anomalous results in that the effect of continuing failure to adhere to statutory regulations alleged to have been continued well beyond the period of three days, and which continues till this day, has Rs.1 lakh per day as the minimum mandatory penalty under the provisions, which would culminate in the appellants herein having to pay Rs.1 crore in each of the three appeals. We do not think that this could have been the intention of the Parliament in enacting Section 15A, as amended in 2002. We also feel that on the assumption that paragraph 5 of the judgment is correct, it would be very difficult for Section 15A to be construed as a

reasonable provision, as it would then arbitrarily and disproportionately invade the appellants' fundamental rights. This being the case, on both the conclusions reached by this Court in paragraphs 4 and 5, as stated by us hereinabove, these matters deserve consideration at the hands of a larger Bench. The Registry is, accordingly, directed to place the papers of these appeals before Hon'ble the Chief Justice of India for placing these matters before a larger Bench.

12. Interim orders passed by this Court shall continue to operate.

.....J.
(KURIAN JOSEPH)

.....J.
(ROHINTON FALI NARIMAN)

New Delhi,
March 14, 2016

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