HIGH COURT OF JUDICATURE AT BOMBAY

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO.638 OF 2021

Purnartha Investment Advisers Private Limited .. Petitioner

vs.

Securities and Exchange Board of India & anr. .. Respondents

Mr. Rahul Totala a/w Mr. Ashwin Poojari and Mr. Neil Chettiar I/b. Ashwin Poojari RT Legal for the Petitioner.

Mr. J.J. Bhatt, Senior Advocate a/w Mr. Omprakash Jha and Ms. Shivani Kumbhojkar I/b. The Law Point for Respondent No.1-SEBI.

Mr. Anil C. Singh, Additional Solicitor General a/w Mr. Aditya Thakkar and Mr. D.P. Singh for Respondent No.2-UOI.

CORAM : S.C. GUPTE &
M.S.KARNIK, JJ.

DATE : 18th JUNE, 2021
(THROUGH V.C.)

ORAL JUDGMENT (PER S.C. GUPTE, J.)

Heard learned counsel for the Petitioner and learned counsel for Respondent No.1-Securities and Exchange Board of India ('SEBI') and for Respondent No.2-Union of India.

2. This Petition challenges constitutional validity and vires of Regulation 3(XII) of the Securities and Exchange Board of India (Investment Advisors) (Amendment) Regulations, 2020 ("Amendment Regulations"), by which Regulation 15A was inserted into the Securities and Exchange Board of India (Investment

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HIGH COURT OF JUDICATURE AT BOMBAY

Advisors) Regulations, 2013 and Circular issued in pursuance thereof, being Circular Reference No.SEBI/HO/IMD/DF1/CIR/P/2020/ 182 dated 23.09.2020, providing for modes of charging fees to their clients by Investment Advisors. The challenge is on the footing of both want of legislative power in SEBI (by delegated authority) to make a provision such as regulation 15A or to issue a Circular such as Circular dated 23.09.2020 and breach of fundamental right of Investment Advisors to carry on a profession of their choice by enacting unreasonable restrictions.

3. In 2013, SEBI issued the Securities and Exchange Board of India (Investment Advisors) Regulations, 2013 for regulating the business of Investment Advisors. On 15.01.2020, SEBI circulated a consultation paper for revision of these original regulations amongst various stakeholders and interested parties. On 23.01.2020, the present Petitioner submitted its response to the consultation paper. On 17.02.2020, after taking into account the response received from various stakeholders to the consultation paper, a proposal was formulated and placed for consideration of the Board. The Board approved the proposal and issued the impugned amendment Regulations on 03.07.2020. The Petitioner challenges the Amendment Regulations to the extent that they introduce Regulation 15A into the original SEBI Regulations of 2013. Regulation 15A provides for fees to be charged by Investment Advisors and is in the following terms :-

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HIGH COURT OF JUDICATURE AT BOMBAY

"**15A.** Investment Advisor shall be entitled to charge fees for providing investment advice from a client in the manner as specified by the Board."

4. In pursuance of this Regulation, SEBI has issued a Circular dated 23.09.2020 titled as "Guidelines for Investment Advisors" inter alia providing for execution of Investment Advisor agreements with their clients by Investment Advisors containing terms and conditions provided in a Schedule annexed as Annexure-A to the Circular. The Circular also prescribes fees in pursuance of Regulation 15A of the amended Regulations. The Circular provides for charging of fees by Investment Advisors from their clients in either of the two modes which are set out below :-

" (A) <u>Assets under Advice (AUA) mode</u>

a. The maximum fees that may be charged under this mode shall not exceed 2.5 percent of AUA per annum per client across all services offered by IA.

b. IA shall be required to demonstrate AUA with supporting documents like demat statements, unit statements etc. of the client.

c. Any portion of AUA held by the client under any pre-existing distribution arrangement with any entity shall be deducted from AUA for the purpose of charging fee by the IA.

(B) <u>Fixed fee mode</u>

The maximum fees that may be charged under this mode shall not exceed INR 1,25,000 per annum per client across all services offered by IA."

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HIGH COURT OF JUDICATURE AT BOMBAY

The Circular also prescribes general conditions applicable to both modes in the following terms :-

> **"(B) <u>General conditions under both modes</u>**
>
> a. In case "family of client' is reckoned as a single client, the fee as referred above shall be charged per "family of client".
>
> b. IA shall charge fees from a client under any one mode i.e. (A) or (B) on an annual basis. The change of mode shall be effected only after 12 months of on boarding/last change of mode.
>
> c. If agreed by the client, IA may charge fees in advance. However, such advance shall not exceed fees for 2 quarters.
>
> d. In the event of pre-mature termination of the IA services in terms of agreement, the client shall be refunded the fees for unexpired period. However, IA may retain a maximum breakage fee of not greater than one quarter fee."

5. The Petitioner claims to be an Investment Advisor having a huge pan-country reputation for its practices, with about 7800 clients. It is the Petitioner's case that SEBI has no authority under the SEBI Act to make regulations concerning fees to be charged by Investment Advisors such as the Petitioner. Secondly, it is submitted that making of the impugned Regulation (Regulation 15A) and prescribing fees under the Circular of 23.09.2020 tantamount to a breach of the Petitioner's fundamental right to practice a profession or business of its choice. It is submitted that restrictions introduced by the Regulation and the Circular amount to unreasonable restrictions on the Petitioner's business or profession.

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HIGH COURT OF JUDICATURE AT BOMBAY

6. The Securities and Exchange Board of India Act, 1992 ('SEBI Act') provides for establishment of a Board to protect the interests of investors in securities and to promote the development of, and to regulate, the securities market and for matters connected therewith or incidental thereto. The Act, in Chapter II thereof, provides for establishment of the Securities and Exchange Board of India ('Board'). It provides for, in Chapter IV thereof, powers and functions of the Board. Section 11 is the pivotal Section of Chapter IV. Sub-section (1) of Section 11 is in the following terms :-

> "**11.Functions of Board.**
>
> (1) Subject to the provisions of this Act, it shall be the duty of the Board to protect the interests of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit."

The provisions of sub-section (2) of Section 11, which we are concerned with in the present case, are as follows :-

> "(2) Without prejudice to the generality of the foregoing provisions, the measures referred to therein may provide for -
>
> (a) regulating the business in stock exchanges and any other securities markets;
>
> (b) registering and regulating the working of stock brokers, sub-brokers, share transfer agents, bankers to an issue, trustees of trust deeds, registrars to an issue, merchant bankers, underwriters, portfolio managers, investment advisers and such other intermediaries who may be associated with securities markets in any manner;
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HIGH COURT OF JUDICATURE AT BOMBAY

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(k) levying fees or other charges for carrying out the purposes of this Section."

7. Section 12 of the SEBI Act provides for Registration of various professionals such as stock-brokers, sub-brokers, share transfer agents, etc., including Investment Advisors. It provides for a compulsory certificate of registration to be obtained from the Board in accordance with the Regulations made under the SEBI Act by these professionals and intermediaries who may be associated with securities market.

8. Section 19 of the SEBI Act provides for delegation by the Board, by general or special order in writing, to any member, officer of the Board such of its powers and functions under that Act (except the powers under Section 29) as may be deemed necessary.

9. Section 30 of the SEBI Act provides for the power of the Board to make regulations with a view to carry out the purposes of the Act. Section 30, so far as the same is relevant for our purposes, is quoted below :-

"**30. Power to make regulations.**

(1) The Board may, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the purposes of this Act.

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HIGH COURT OF JUDICATURE AT BOMBAY

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely :-

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(d) the conditions subject to which certificate of registration is to be issued, the amount of fee to be paid for certificate of registration and the manner of suspension or cancellation of certificate of registration under Section 12.

(da) the terms determined by the Board for settlement of proceedings under sub-section (2) and the procedure for conducting of settlement proceedings under sub-section (3) of section 15JB;

(db) any other matter which is required to be, or may be, specified by regulations or in respect of which provision is to be made by regulations."

10. Section 31 of the SEBI Act requires every regulation made under that Act to be laid, as soon as after it is made, before each House of Parliament, while it is in session, for a period of thirty days. If both houses of Parliament agree that any regulation should not be made or should be made in a modified form, such modification or annulment has to follow. The regulation then has effect only in such modified form or is of no effect, as the case may be.

11. The Securities and Exchange Board of India (Investment Advisors) Regulations, 2013 are made by the Board in pursuance of its powers under sub-section (1) of Section 30 read with Clause (b)

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HIGH COURT OF JUDICATURE AT BOMBAY

of sub-section (2) of Section 11 of the SEBI Act. Regulation 3 provides for an application to be made by an Investment Advisor for grant of certificate of registration under Section 12 of the SEBI Act. Regulation 6 prescribes the contents of such application and eligibility criteria for grant of certificate of registration. Upon the Board being satisfied about the applicant's compliance with the requirements specified in Regulation 6, a certificate of registration is issued in a form provided under the First Schedule to the Regulations subject to such terms and conditions as the Board may deem fit to the Applicant Investment Advisor. Regulation 15 provides for the general responsibility of every Investment Advisor. Clause (9) of Regulation 15 provides that an "Investment Advisor shall abide by Code of Conduct as specified in Third Schedule". The Third Schedule to the Regulations, titled as 'Code of Conduct for Investment Advisor', in Clause (6) provides for fair and reasonable charges to be claimed by Investment Advisors from their clients. Clause 6 is in the following terms :-

> "**6. Fair and reasonable charges**
>
> An investment advisor advising a client may charge fees, subject to any ceiling as may be specified by the Board, if any. The investment advisor shall ensure that fees charged to the clients is fair and reasonable."

12. As noted above, Regulation 15A was introduced by the Amendment Regulation of 2020 enjoining Investment Advisors to charge fees for providing investment advice to their clients in the

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HIGH COURT OF JUDICATURE AT BOMBAY

manner specified by the Board. The Circular issued by the Board in pursuance of this regulation provides for two modes of charging of fees by Investment Advisors and general conditions to be applied to both modes. Both modes have a ceiling on fees that may be charged.

13. Having regard to this apparatus of law, what we have to decide is, whether the Board has the requisite authority under the SEBI Act, in the first place, to make regulations concerning charging of fees by Investment Advisors from their clients. The power of SEBI to do so is said to be sourced from three different provisions of the SEBI Act. Firstly, Section 11 provides for powers and functions of the Board, which include making of different measures with a view to protect the interest of investors in securities and promote the development of, and regulate, the securities market. The provisions of sub-section (1) of Section 11 are in general form; they do not admit of any restrictions on the powers of the Board. Sub-section (2) of Section 11, which opens with the words “without prejudice to the generality of the foregoing provisions”, then sets out various measures which the Board may provide for in accordance with its powers and functions under Section 11. These measures, as we have noted above, include regulating the working of various functionaries connected with securities market including Investment Advisors. These may also include provisions for levying fees or other charges for carrying out the purposes of Section 11.

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HIGH COURT OF JUDICATURE AT BOMBAY

14. As a matter of general principles of statutory interpretation, statutes delegating power to make rules, as observed by the Supreme Court in the case of **Academy of Nutrition Improvement Vs. Union of India**[1], follow a standard pattern. As the Supreme Court noted, the relevant Section would first contain a provision granting the power to make rules to the delegate in general terms, by using the words “to carry out the provisions of this Act” or “to carry out the purposes of this Act”. This is usually followed by another sub-section enumerating matters/areas in regard to which specific power is delegated by using the words “in particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters”. Interpreting these provisions, the Supreme Court has in a number of decisions held that where power is conferred on a delegate to make subordinate legislation in general terms, the subsequent particularisation of matters/topics has to be construed as merely illustrative and not limiting the scope of the general power.

15. In particular reference to Section 11 of the SEBI Act, the Supreme Court, in the case of **Sahara India Real Estate Corporation Limited and Others Vs. Securities and Exchange Board of India and another**[2], has observed as follows :-

1 (2011) 8 SCC 274
2 (2012) 10 SCC 603

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HIGH COURT OF JUDICATURE AT BOMBAY

"**303.1.** Sub-section (1) of Section 11 of the SEBI Act casts an obligation on SEBI to protect the interest of investors in securities, to promote the development of the securities market, and to regulate the securities market, "by such measures as it thinks fit". It is therefore apparent that the measures to be adopted by SEBI in carrying out its obligations are couched in open-ended terms having no prearranged limits. In other words, the extent of the nature and the manner of measures which can be adopted by SEBI for giving effect to the functions assigned to SEBI have been left to the discretion and wisdom of SEBI. It is necessary to record here that the aforesaid power to adopt "such measures as it thinks fit" to promote investors' interest, to promote the development of the securities market and to regulate the securities market, has not been curtailed or whittled down in any manner by any other provisions under the SEBI Act, as no provision has been given overriding effect over sub-section (1) of Section 11 of the SEBI Act.

303.2. Coupled with the clear vesting of the power with SEBI referred to above, sub-section (2) of Section 11 of the SEBI Act illustratively records the measures which can be adopted by SEBI. For the present controversy, reference may be made to clauses (i) and (i-a) of sub-section (2) which ordain that SEBI would be at liberty to call for information from, or undertake inspections of, or conduct inquiries, or audits into "stock exchanges", "mutual funds", and "other persons associated with the securities market", "intermediaries", and "self-regulatory organisation in the securities market". The power to call for information was expressly extended to "banks", "any other authority or board or corporation", in respect of any transaction in securities which is under investigation or inquiry (at the hands of SEBI) by adding clause (i-a) to sub-section (2). Sub-section (2-A) of Section 11 of the SEBI Act extends to SEBI the power to inspect (in addition to power already delineated in sub-section (2) of Section 11 referred to above) books, registers

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HIGH COURT OF JUDICATURE AT BOMBAY

> or other documents or records "of any listed public company or a public company ... which intends to get its securities listed on any recognised stock exchange."

The above observations have been noted with approval by the Supreme Court in the case of **Arun Kumar Agrawal Vs. Union of India and others[3].**

16. Having regard to the general principles of statutory interpretation and observations of the Supreme Court in particular reference to Section 11 of the SEBI Act, noted above, it cannot be gainsaid that measures to be adopted by SEBI, in carrying out its obligations of protection of interest of investors in securities and promotion of development, and regulation, of securities market, being couched in open-ended terms, have no prearranged limits. The nature and manner of measures, which can be adopted by SEBI for giving effect to the functions assigned to it, have been left to the discretion and wisdom of SEBI, such discretion not being curtailed or whittled down in any manner by any other provision of the SEBI Act.

17. In any event, the power to regulate the working of Investment Advisors, which is a specific power or function of the Board under Clause (b) of sub-section (2) of Section 11, even if one disregards the generality of the provisions of sub-section (1) of Section 11, would surely encompass within itself the power to make provisions concerning fees to be charged by Investment

3 (2014) 2 SCC 609

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HIGH COURT OF JUDICATURE AT BOMBAY

Advisors from their clients. In particular reference to levying of fees or charges for carrying out the purposes of Section 11, a special provision even finds place in Clause (k) of sub-section (2) of Section 11. We are not basing our analysis, however, on this provision, since it is possible to say that this provision relates to the power of SEBI to fix fees or charges for it to carry out its functions under Section 11.

18. In pursuance of these provisions and in keeping with their mandate, the Regulations of 2013 have been framed by SEBI for regulating the business of Investment Advisors. These regulations, which were tabled before both houses of Parliament, inter alia provide for various conditions for grant of certificate of registration. These conditions include the duty to abide by the provisions of the Regulations on the part of Investment Advisors including the duty to abide by the Code of Conduct specified in the Regulations. The Code of Conduct inter alia enjoins upon an Investment Advisor advising a client to charge fair and reasonable fees, subject to any ceiling as may be specified by the Board. Though SEBI had the requisite power to prescribe the manner for charging of fees by Investment Advisors, under the original Regulations, it has framed Amendment Regulations inter alia inserting Regulation 15A in the original Regulations, which entitles it to specify the manner for charging of fees by Investment Advisors. Even these Amendment Regulations were placed before both houses of Parliament and have become the law of the land. In pursuance of these

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HIGH COURT OF JUDICATURE AT BOMBAY

Regulations, SEBI has issued its Circular of 23.09.2020 inter alia providing for two permissible modes of fees to be charged by Investment Advisors with general conditions applicable to both modes. There is ample authority with the board, in the premises, to prescribe the modes of fees and general conditions applicable to such modes.

19. The judgment of **Petroleum and Natural Gas Regulatory Board Vs. Indraprastha Gas Limited and others**[4], relied upon by learned counsel for the Petitioner, is clearly distinguishable on facts. What was called in question in that case was the tenability of a judgment of Delhi High Court, which had ruled that Petroleum and Natural Gas Regulatory Board (for short 'Board') was not empowered to fix or regulate retail prices at which gas was to be sold by entities such as the Petitioner before the Court to consumers or any component of network tariff or compression charge for entities having their own distribution networks. Such power was claimed by the Board under the provisions of Section 11 of Petroleum and Natural Gas Regulatory Board Act, 2006. Under that Section, the Board had the power to regulate, by regulations, (i) access to common carrier or contract carrier so as to ensure fair trade and competition amongst entities and for that purpose specify pipeline access code; (ii) transportation rates for common carrier or contract carrier; and (iii) access to city or local natural gas distribution network so as to ensure fair trade and competition

4 (2015) 9 SCC 209

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HIGH COURT OF JUDICATURE AT BOMBAY

amongst entities as per pipeline access code (Section 11(e)). The Supreme Court agreed with the view of the High Court that there was no intent on the part of the legislature in these provisions to confer any power to fix the maximum retail price on the Board. The Court observed that only functions of enforcing retail service obligations and marketing service obligations were conferred on the Board by the legislature. The Court was of the view that Section 11(e) only used the word “common carrier” or “contract carrier” and this did not clothe the Board with the power to command any entity to put/reflect a price as may be determined by the Board as a part of its bill to a consumer. The Court held that the Board, accordingly, did not have the power to fix tariff charges. The law laid down in this case has nothing to do with the facts of our case. In our case, the Board not only has the general power to make measures so as to protect the interest of investors in securities, to promote the development of, and regulate, the securities market, it has the particular power to regulate the working of Investment Advisors. Any regulation of working of Investment Advisors would, as we have noted above, clearly include making of provisions for the manner of charging of fees by Investment Advisors as well as maximum fees that may be charged by them for their services. The Board thus has the requisite delegated authority for specifying appropriate measures concerning fees to be charged by Investment Advisors.

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HIGH COURT OF JUDICATURE AT BOMBAY

20. The case of **Narinder S. Chadha and others Vs. Municipal Corporation of Greater Mumbai and others[5],** cited by learned counsel for the Petitioner, is also on an altogether different point. That case concerned implementation by Municipal Corporations of various cities of the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply & Distribution) Act, 2003 ("Cigarettes Act"). The conditions of licence issued by Mumbai Municipal Corporation under Section 394 of the Mumbai Municipal Corporation Act inter alia prohibited tobacco or tobacco related products in any form, whether in the form of cigarette, cigar, bidi or otherwise with the aid of a pipe, wrapper or any other instrument, in the licensed premises. Whereas Section 6 of the Cigarettes Act permitted sale of cigarettes and other tobacco products, except to persons under 18 years of age and in an area within a radius of 100 yards of any educational institution, the condition of licence prohibited the sale of cigarettes or other tobacco products in premises licensed by the Municipal Corporation. The Supreme Court was of the view that this licence condition would amount to adding another exception to sale of cigarettes or other tobacco products which was in keeping with the provisions of the Cigarettes Act. The Court, in the premises, did not agree with the High Court when it held that all that the Municipal Corporation did in that case was to follow the provisions of the Cigarettes Act and the Rules made thereunder. It was in this backdrop that the Supreme Court

5 (2014) 15 SCC 689

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HIGH COURT OF JUDICATURE AT BOMBAY

set aside the judgment of this Court and deleted the particular condition forming part of the licence issued by the Municipal Corporation.

21. The case of **Cellular Operators Association of India and others Vs. Telecom Regulatory Authority of India and others**[6] dealt with Regulations issued by Telecom Regulatory Authority of India (for short 'TRAI') inter alia for ensuring the quality and standard of service by licensees as may be prescribed by the licensor or TRAI. The amending regulation, which was challenged in that case, made every originating service provider, who provided cellular mobile telephone services, liable to credit the calling consumer with one rupee for each call drop which took place within its network, upto a maximum of three call drops per day. This amendment was made purportedly in exercise of powers conferred on the Board by Section 36 read with Section 11 of the Telecom Regulatory Authority of India Act, 1997, and particularly Section 11(1)(b)(i) and (v) of that Act. The functions of the Board under Clauses (i) and (v) of Section 11(1)(b) were to, respectively, ensure compliance of terms and conditions of licence and to lay down the standards of quality of service to be provided by the service providers and conduct periodical survey of such service so as to protect the interest of consumers of telecommunication services. The Court was of the view that the impugned Regulation could have no reference to these provisions; it did not lay down any

6 (2016) 7 SCC 703

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HIGH COURT OF JUDICATURE AT BOMBAY

standard of quality of service to be provided by the service provider, and it was not made with a view to ensure compliance with the terms and conditions of the licence or to lay down any standard of quality of service that needed compliance. The impugned Regulation was thus held to be dehors the above referred to provisions of Section 11. It was also held that it not only did not carry out the purposes of the Act but was contrary to such purposes. In particular, the Court observed that in attempting to protect the interest of consumers of the telecom sector at the cost of the interest of service providers (who complied with the leeway of an average of 2% of call drops per month given by another Regulation framed under Section 11(1)(b)(v)), the balance that was sought to be achieved by the Act for orderly growth of the telecom sector had been violated. It was in these premises that the Court held the impugned Regulation as not carrying out the purposes of the Act and therefore, ultra vires. This statement of law by the Supreme Court can have no bearing on the facts of our case, where there is a specifically delegated power in the Board to regulate the business of Investment Advisors, and there is no case of the impugned Regulation being either dehors, or inconsistent with the purpose of, the Act, which is to protect the interest of investors, and develop and regulate the securities market. Providing for charging of fair and reasonable fees to their investor clients by Investment Advisors is but a measure, as noted above, for protecting the interest of investors and healthy growth of the securities market.

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HIGH COURT OF JUDICATURE AT BOMBAY

22. Learned Counsel for the Petitioner argues that a stipulation as to fees, being in the nature of a fiscal measure, a delegated authority can make such stipulation only if its delegation in that behalf is specific; there is no scope for an implied authority. Learned Counsel relies on the case of **Ahmedabad Urban Development Authority Vs. Sharadkumar Jayantikumar Pasawalla and ors.**[7] in support of the proposition advanced. In that case, the Ahmedabad Urban Development Authority, established under the Gujarat Town Planning and Urban Development Act, 1976 ("Town Planning Act"), had levied a development fee under the regulations impugned in that case. The Gujarat High Court held that the Authority was not vested under the Town Planning Act with the power to charge any betterment or development fee. The argument of the Development Authority before the Supreme Court, which was the appellant before the Court, was that if the state legislature was competent to impose such fees, the Development Authority, by virtue of delegated legislation, could also impose betterment fee or development fee and simply because imposition of such fee was not specifically mentioned in the delegating provision, it could not be held that the Authority had no power to do so. The Supreme Court rejected the contention, observing that "in a fiscal matter it will not be proper to hold that even in the absence of express provision, a delegated authority can impose tax or fee.... such power of imposition of tax and/or fee by delegated authority must be very specific and there

7 (1992) 3 SCC 285

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HIGH COURT OF JUDICATURE AT BOMBAY

is no scope of implied authority for imposition of such for imposition of such tax or fee". These observations and the law stated therein have no bearing on the controversy that we are considering here. Specification of manner of charging fees by Investment Advisors and fixation of a ceiling of such fees by SEBI, in our case, does not amount to imposition of tax or fee; it is simply a measure of regulation of the business of Investment Advisors in the interest of investors and for healthy growth of the securities market. And, as we have noted above, power to make such regulation is specifically delegated to the Board by virtue of Section 30 of the SEBI Act read with Section 11 of that Act.

23. Learned Counsel for the Petitioner does not press his alternative prayer to declare Sections 30(1) and 30(2)(d) of the SEBI Act as ultra vires the Constitution of India, being arbitrary, unreasonable and violative of Articles 14, 19(1)(g) and 300A of the Constitution, if these Sections are interpreted to confer/delegate power to cap professional fees charged by Investment Advisors to their clients. What is instead submitted is that the Amendment Regulation, to the extent it inserts Regulation 15A in the original Regulations of 2013, is violative of Section 30(1) read with Section 30(2)(d) of the SEBI Act. Section 30(1) of the SEBI Act empowers the Board to make regulations "consistent with this Act and the rules made thereunder" so as "to carry out the purposes of this Act". As an illustrative measure, whilst exercising this power, the Board is authorised, under Section 30(2)(d), to provide inter alia for

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HIGH COURT OF JUDICATURE AT BOMBAY

conditions subject to which a certificate of registration under Section 12 is to be issued and suspension or cancellation of such certificate. As we have noted above, whilst discussing the contours of Section 11 of the SEBI Act, even Section 30(1) is an omnibus provision, conferring wide and sweeping powers on the Board to make regulations, the only restrictions being that such regulations have to be (i) consistent with the SEBI Act and the rules and (ii) necessary for carrying out the purposes of that Act. Sub-section (2) of Section 30 merely provides for illustrative measures which the Board may specify whilst making such regulations; it does not in any way detract from the wide amplitude of powers conferred on the Board. In other words, SEBI does possess ample power to make regulations in matters not covered by the illustrative measures provided under Section 30(2) (including clause (d) thereof) so long as such regulations are consistent with the SEBI Act and the rules and carry out the purposes of that Act. As we have seen above, specifying measures for protection of investors and development and regulation of securities market being the duty of the Board under Section 11 of the SEBI Act and without prejudice to the generality of such duty the Board having the express power to regulate the working of Investment Advisors (under Sub-Section (2)(b) of Section 11), which, as noted above, encompasses measures to provide for the manner of charging of fees as well as cap of fees, the impugned regulation (Regulation 15A) is clearly within the delegation made in favour of the Board under Section 30(1) of the SEBI Act. If charging of fees in

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HIGH COURT OF JUDICATURE AT BOMBAY

accordance with the specification of the Board is accordingly made a condition of continued registration under Section 12 of the SEBI Act, such condition would be covered by Section 30(2)(d) of the SEBI Act.

24. On the subject of violation of Article 19(1)(g) of the Constitution of India, it is important to note that the impugned Regulation as well as the Circular issued by SEBI in pursuance thereof does not in any way prohibit any party from carrying on the business or profession of Investment Advisor. The Regulation and Circular merely put restrictions, and reasonable restrictions at that, on the general right of businessmen and professionals to carry on the business or profession of Investment Advisor. Prescribing a mode for charging of fees as also the ceiling of fees to be charged by Investment Advisors amounts to a reasonable restriction, at least in principle, in the matter of carrying on the business or profession of Investment Advisors, apart from being an important measure for protection of investors and development and regulation of securities market. In so far as reasonableness of the particular quantum of ceiling of fees determined by SEBI or conditions laid down for charging of such fees are concerned, there is no material placed on record by the Petitioner to suggest that the fees fixed or conditions stipulated are so unreasonable or capricious as not to admit of Investment Advisors' freedom to practice their profession or business.

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HIGH COURT OF JUDICATURE AT BOMBAY

25. The case of **Institute of Chartered Accountants of India Vs. K. Bhagvatheeswaran and another[8],** cited by learned Counsel for the Petitioner, involved restrictions placed by the Union of India on chartered accountants' right to practice their profession. These restrictions included the ceiling limit of the number of tax audit assignments in a financial year permissible to an individual practitioner or firm (maximum 30 audits) as well as a cap on audit fees. A breach of these restrictions was made an instance of professional misconduct. The Madras High Court, which decided the case, was of the view that professions of lawyers, chartered accountants, etc. had their own historical conventions, traditions, customs and practices; and placing of restrictions on the number of cases/audits was an unreasonable restriction under 19(6) of the Constitution, which was also violative of Article 14. A client, the Court observed, must be free to choose his lawyer/chartered accountant, and conversely, the number of cases/audits which can be accepted by a professional must be left to such professional. As for capping of fees and making of any charge above it being made a professional misconduct, the Court was of the opinion that the restriction was arbitrary and violative of both Article 14 and Article 19(1)(g); such restriction was not in keeping with the conventions and traditions of the profession. The Court held that what would be the fee was a matter to be decided by mutual consent of the client and the professional and parties ought to be left free to decide the same; charging of higher or lower fee could not be regarded as

8 AIR 2005 Mad 287

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HIGH COURT OF JUDICATURE AT BOMBAY

professional misconduct. In our view, the Petitioner herein cannot seek much assistance from this decision. In the first place, unlike in that case, which did not have any regulatory statutory framework for fixing of a ceiling of permissible tax audits or fees for such audits, in our case the SEBI Act makes particular provisions empowering the Board to regulate the working of Investment Advisors. The profession or business of Investment Advisor is not a traditional profession having its own customs and conventions. Nothing at least has been pointed out to us by learned counsel for the Petitioner in that behalf. If anything, Investment Advice is a profession/business which has come about as an adjunct of the securities market; the Investment Advisor works because investors need professional advice for participating in the affairs of the securities market. It is the statutory duty of SEBI to protect such investors, and develop and regulate that market inter alia by regulating the working of Investment Advisors. If, for performing such duty, SEBI fixes the manner of charging of fees by Investment Advisors or the maximum permissible fees, such fixation *per se* cannot be faulted as being violative of Article 14 or 19(1)(g). It is another matter, if, whilst fixing these matters, SEBI acts in an unreasonable or capricious manner; in such case, its legislative (or executive) exercise may be vitiated by arbitrariness eschewed by Article 14 or unreasonable restriction not being covered under Article 19(6) and thus infringing Article 19(1)(g). That, we are afraid, has not been the case here.

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HIGH COURT OF JUDICATURE AT BOMBAY

26. There is, accordingly, no merit in the challenge to the impugned Regulation as well as the impugned Circular prescribing modes as well as ceiling of fees to be charged by Investment Advisors.

27. In the premises, the Petition is dismissed. No order as to costs.

(M.S.KARNIK, J.) **(S.C.GUPTE, J.)**

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