HIGH COURT OF JUDICATURE AT BOMBAY
सत्यमेव जयते

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

WRIT PETITION (L) NO. 638 OF 2021

Purnartha Investment Advisers Pvt. Ltd. ....Petitioner

V/s.

Securities and Exchange Board of India ....Respondent

.....

Dr. Milind Sathe, Senior Advocate a/w Mr. Gaurav Shristav i/b Mr. Ashwin Poojari i/b Mr. Ashwin Poojari, RT Legal for the Petitioner.

Mr. Rafique Dada, Senior Advocate a/w Mr. Omprakash Jha a/w Adv. Shivani Kumbhojkar i/b M/s. The Law Point for Respondent (SEBI).

Mr. Anil C. Singh, ASG a/w Mr. Aditya Thakkar, Mr. D. P. Singh for UoI.

...

CORAM: A. A. SAYED AND
SURENDRA P. TAVADE, JJ.

DATE : 5th APRIL 2021

P.C. :

Learned ASG seeks time to file Affidavit-in-Reply. Learned Senior Counsel on behalf of the Petitioner, however, insists on stay as according to him compliance of measures under the impugned Clause 2(iii) of the Circular dated 23 September 2020 are to be made by 1 April 2021.

2. **Rule.** Respective Advocates on record waive service on behalf of Respondents.

<u>On Interim Relief:</u>

3. The Petitioner is an Investment Adviser registered with SEBI. The Petition is filed challenging the constitutional validity of Regulation 15A of the Securities and Exchange Board of India (Investment Advisers) Regulations, 2013 which was inserted by Regulation 3(XII) of the Securities and Exchange Board of India (Investment Advisers) (Amendment) Regulations, 2020, as

::: Uploaded on - 30/04/2021 ::: Downloaded on - 04/05/2021 12:35:38 :::

HIGH COURT OF JUDICATURE AT BOMBAY

also the consequential paragraph 2(iii) of the SEBI Circular dated 23 September 2020.

4. The impugned Regulation 15A which is inserted by the SEBI (Investment Advisers) (Amendment) Regulations 2020 (hereinafter referred to as the "impugned IA 2020 Amendment Regulations) reads as follows:

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

5. The impugned paragraph 2(iii) of the Circular dated 23 September 2020 ('the impugned Circular' for the sake of convenience) reads as follows:

> "Fees
>
> Regulation 15A of the amended IA Regulations provide that Investment Advisers shall be entitled to charge fees from a client in the manner as specified by SEBI, accordingly Investment Advisers shall charge fees from the clients in either of the two modes:
>
> (A) Assets under Advice (AUA) mode
>
> 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.

::: Uploaded on - 30/04/2021 ::: Downloaded on - 04/05/2021 12:35:38 :::

HIGH COURT OF JUDICATURE AT BOMBAY

(B) Fixed fee mode

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.

General conditions under both modes

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."

6. Learned Senior Counsel for the Petitioner submitted that the impugned IA 2020 Amendment Regulations and the impugned Circular are ultra vires the SEBI Act and there is no power under the SEBI Act to make Regulations in respect of prescribing fees which can be charged by Investment Advisers from their clients. In the alternative, it is submitted that in the event there is a power to cap the professional fees charges by Investment Advisers, the same is violative of the Petitioner's fundamental rights guaranteed under Article 14, 19(1)(g) and 21 of the Constitution. It is submitted that prescribing rate of fee to be charged by private professionals is an essential legislative function and there are no guidelines in that regard and therefore the impugned IA 2020 Amendment Regulations suffers from

::: Uploaded on - 30/04/2021 ::: Downloaded on - 04/05/2021 12:35:38 :::

HIGH COURT OF JUDICATURE AT BOMBAY

vice of excessive delegation. It is contended that the impugned IA 2020 Amendment Regulations and impugned Circular are arbitrary and unreasonable and the cap on fee is imposed without any rational criteria or rational basis or study. It is contended that the impugned Circular has been issued under the signature of the General Manager of the Investment Management Department and there is no authority or power under law for the said General Manager to issue the impugned Circular. Learned Senior Counsel for the Petitioner in support of his submissions has relied upon the following judgments- (i) **Petroleum and Natural Gas Regulatory Board v/s. Indraprastha Gas Limited and ors.,** (2015) 9 SCC 209; (ii) **State of Bihar and ors. v/s. Project Uchcha Vidya Sikshak Sangh and ors.,** (2006) 2 SCC 545; (iii) **Narinder S.Chadha and ors. v/s.Municipal Corporation of Gr.Mumbai and ors.,** (2014) 15 SCC 689; (iv) **Cellular Operators Association of India and ors. v/s. Telecom Regulatory Authority of India and ors.,** (2016) 7 SCC 703;

7. Learned Senior Counsel for the Respondent-SEBI, on the other hand, submitted that there are sufficient powers under the SEBI Act to issue the impugned IA 2020 Amendment Regulations and impugned Circular. He submitted that the restrictions imposed are reasonable and in the interest of public and there is no violation of the Petitioner's fundamental rights under Articles 14, 19(1)(g) or 21 of the Constitution. He has relied upon the following judgments- (i) **Sahara India Real Estate Corporation Ltd. and ors. v/s. Securities and Exchange Board of India and anr.,** (2013) 1 SCC 1; (ii) **Arun Kumar Agrawal v/s. Union of India and ors.,** (2014) 2 SCC 609; (iii) **Price Waterhouse and Co. and ors. v/s. Securities and**

::: Uploaded on - 30/04/2021 ::: Downloaded on - 04/05/2021 12:35:38 :::

HIGH COURT OF JUDICATURE AT BOMBAY

Exchange Board of India and ors., 2011 (2) BomCR 173; (iv) **Ramrakh R.Bohra and ors. v/s. Securities and Exchange Board of India and ors.,** (2001) 5 CompLJ 429(Bom.);

8. Having heard the learned Senior Counsel for the Petitioner and the learned Senior Counsel for the Respondents, we are not inclined to grant any interim relief.

9. The Security Exchange Board of India (Investment Advisers) Regulations, 2013 (hereinafter referred to as the IA principal 2013 Regulations) are framed in exercise of powers conferred by section 30(1) read with section 11(2)(b) of the SEBI Act. In the Affidavit-in-Reply it is stated that the IA principal 2013 Regulations are made to register and regulate the working of Investment Advisers in the interest of securities market and to protect the interest of investors. It is pointed out that the SEBI was receiving numerous complaints from the investors against Investment Advisers (IA), inter alia of (i) assured returns by IAs. (ii) charging exorbitant fees from clients with false promises of handsome returns. (iii) mis-selling by the IAs without adhering to the risk profile of the clients. (iv) non-disclosure of complete service fees/charges, (v) extracting money in the name of various charges. SEBI therefore constituted a Working Group and based on the deliberations of the Working Group and its recommendation a Public Consultation Paper was issued in January 2020 proposing caps on maximum fees that an IA can charge from its clients at Rs.75,000/- or 2.5% of ‘Assets under Advice’ (AUA) per annum.

::: Uploaded on - 30/04/2021 ::: Downloaded on - 04/05/2021 12:35:38 :::

HIGH COURT OF JUDICATURE AT BOMBAY

After considering the public comments the following propositions were placed before SEBI in the meeting which was conducted in February 2020:

i) In view of the various complaints received from investors against the IAs regarding charging of unreasonable fees to the clients, forcing clients to pay additional fees for buying weekly reports, assured returns etc., a regulatory stipulation on fees may be proposed as such conduct is against the interest of the investors;

ii) The cap on the fixed fees may be enhanced;

iii) Since an IA is expected to provide an advice based on the risk profiling of the client, which is not akin to Portfolio Management Services, performance based fees model for advisory services is not desirable.

The SEBI after considering all points of view, approved the following proposals to amend the IA principal 2013 Regulations:

i) Cap on fixed fee enchanced from INR 75,000 to 1,25,000 per annum per “Family of Client” across all schemes/products/services offered by IA;

ii) The maximum fees that can be charged under AUA Mechanism shall be 2.5% of AUA per annum per “Family of Client” across all schemes/products/services offered by IA;

iii) “Family of Client” constitutes individual, dependent spouse, dependent children and dependent parents;

iv) If agreed by client, IA can charge fees in advance. However, such advance cannot exceed fees for 2 quarters.

::: Uploaded on - 30/04/2021 ::: Downloaded on - 04/05/2021 12:35:38 :::

HIGH COURT OF JUDICATURE AT BOMBAY

v) In the event of pre-mature termination of the investment advisory services, the client shall be provided a refund of fees for unexpired period subject to a maximum breakage fee of not greater than one quarter fee can be retained by the investment adviser.

Pursuant to the approval of the SEBI, the impugned IA 2020 Amendment Regulations came to be notified on 03-07-2020 in the Official Gazette and the same came into force on 30-09-2020. It is submitted that the IA 2020 Amendment Regulations were issued after following the due process of public consultation and the approval of SEBI.

10. On perusal of section 11 and section 30 of the SEBI Act, we are of the prima facie view that there are sufficient powers conferred on SEBI under the SEBI Act in issuing the impugned IA 2020 Amendment Regulations and the consequential impugned Circular. The relevant extracts of section 11 and section 30 SEBI Act are reproduced heeinbelow:

"11. **Functions of Board.**

11(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.

(2) Without prejudice to the generality of the foregoing provisions, the measures referred to therein may provide for-

…

(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

::: Uploaded on - 30/04/2021 ::: Downloaded on - 04/05/2021 12:35:38 :::

HIGH COURT OF JUDICATURE AT BOMBAY

intermediaries who may be associated with securities market in any manner;

30. **Powers 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

(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:-

…

(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.

(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." (emphasis supplied)

11. Section 30(1) is an overarching provision which gives a general power to the SEBI to make Regulations which are consistent with the SEBI Act and to carry out the purposes of SEBI Act. Section 30(2)(d), inter alia, provides for the conditions subject to which certificate of registration is to be issued to the intermediaries including Investment Advisers. Section 30(2)(db) empowers SEBI to make regulations in respect of 'any other matter'. The term 'any other matter', in our view, is of wide amplitude. Under section 11(1) a duty is cast upon SEBI to protect the interest of the investors and to regulate the securities market by such measures as it

::: Uploaded on - 30/04/2021 ::: Downloaded on - 04/05/2021 12:35:38 :::

HIGH COURT OF JUDICATURE AT BOMBAY

thinks fit. Under section 11(b) SEBI may take measure to provide for registering and regulating the working of Investment Advisers and such other intermediaries who may be associated with securities market in any manner. The impugned IA 2020 Amendment Regulations are thus issued by SEBI in exercise of powers conferred by section 30 and section 11(2)(b) of the SEBI Act which empowers SEBI to make Regulation in respect of working of Investment Advisers. The impugned IA 2020 Amendment Regulation is intravires the SEBI Act.

12. It is important to note that the SEBI is a statutory authority and an expert body which has been established under the SEBI Act. The preamble from which the object of the SEBI Act can be discerned reads as follows:-

> "An Act to provide for the 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."

13. Learned Senior Counsel for the Respondent-SEBI has pointed out Form A of the IA principal 2013 Regulation which is the format of the Application for grant of certificate of Registration/Renewal as Investment Adviser. Clause 7 of the Application is the Declaration Statement to be signed by the IA declaring that the IA agrees that as a condition of registration the IA shall abide by such operational instructions/directions as may be issued by SEBI from time to time. It is pointed out by learned Senior Counsel for the Respondent-SEBI that SEBI has also prescribed limit on fees to be charged by the intermediaries under other Regulations.

::: Uploaded on - 30/04/2021 ::: Downloaded on - 04/05/2021 12:35:38 :::

HIGH COURT OF JUDICATURE AT BOMBAY

14 It is now well settled that the scope of judicial review of delegated legislation is limited. There is always a presumption of validity of legislation/ deligated legislation. In terms of Article 19(6) of the Constitution, reasonable restrictions in public interest can be imposed on the fundamental rights guaranteed under Article 19(1)(g). The Supreme Court in the case of **Internet and Mobile Association of India v/s. RBI,** 2020 SCC OnLine SC 275, has prescribed the five tests to examine the validity of a legislative action, be it a statute or a delegated legislation. The said tests are as under:-

(i) The direct and immediate impact of the legislation upon the fundamental rights of the citizens affected thereby;

(ii) the larger public interest sought to be ensured in the light of the object sought to be achieved;

(iii) the necessity to restrict the citizens' freedom;

(iv) the inherent pernicious nature of the act prohibited or its capacity or tendency to be harmful to the general public; and

(v) the possibility of achieving the same object by imposing a less drastic restraint.

15. We are of the view that the impugned IA 2020 Amendment Regulation and the impugned Circular satisfy the aforesaid tests. The impugned IA 2020 Amendment Regulation and impugned Circular are issued to carry out the objects of the SEBI Act which interalia provides for protection of interest of the investors. The impugned IA 2020 Amendment Regulation is a beneficial piece of legislation. The restrictions imposed in

::: Uploaded on - 30/04/2021 ::: Downloaded on - 04/05/2021 12:35:38 :::

HIGH COURT OF JUDICATURE AT BOMBAY

our view cannot be said to be unreasonable. The Respondent–SEBI is an expert body which plays the role of a watchdog. The impugned IA 2020 Amendment Regulations and impugned Circular are issued to curb the practices by the IAs which are detrimental to the interest of investors and the securities market as a whole. After the consultation process, SEBI has applied its mind and the proposal of cap of Rs.75,000/- was increased to Rs.1,25,000/- for the Fixed fee mode. The IA has been given the option to charge fee either by Assets Under Advice (AUA) mode or the Fixed fee mode. Price is neither the function nor the forte of the Court. The impugned IA 2020 Amendment Regulation and the impugned Circular cannot be said to be violative of Articles 19(1)(g) and 21 of the Constitution. Neither can it be said that the impugned IA 2020 Amendment Regulation and impugned Circular are manifestly arbitrary and violative of Article 14 of the Constitution. Under section 31 of the SEBI Act, the Regulations are laid before the Parliament. In the Additional Affidavit-in-Reply, it is pointed out that the Gazetted Notification of the impugned IA 2020 Amendment Regulations was laid before the both Houses of Parliament during the Monsoon Session of the year 2020.

16. Under section 19 of the SEBI Act, the SEBI is empowered to delegate its powers and functions by general or special order in writing to any member, officer of the SEBI or any other person subject to such conditions as specified by SEBI. Accordingly, the SEBI had issued SEBI (Delegation of Statutory and Financial Powers) Order, 2019 dated 31-07-2019 delegating various powers and functions to the members and officers

::: Uploaded on - 30/04/2021 ::: Downloaded on - 04/05/2021 12:35:38 :::

HIGH COURT OF JUDICATURE AT BOMBAY

of the SEBI, as approved by the Board. The said Delegation of Power Order is annexed at Exh.C to the Additional Affidavit-in-Reply. As per Clause 3(b) of Chapter-I of Part A of the Delegation of Power Order, a Deputy General Manager of the SEBI is authorised to issue and sign Guidelines/Schemes/Circulars under section 11(1) of the SEBI Act. In para 4 of the impugned Circular, it is clearly stated that the same is "issued in exercise of the powers conferred under section 11(1) of the Securities and Exchange Board of India Act, 1992, to protect the interests of investors in securities and to promote the development of an regulate the securities market". In Clause 3(2) of the Delegation of Power Order, the powers and functions delegated to any member or officer of the Board or authority under this Order may be exercised by any officer or authority, higher in grade or rank or position to the Deputy General Manager. The impugned Circular has been signed by Mr.Naveen Sharma, the General Manager in the Investment Management Department, who is stated in rank higher than the Deputy General Manager. In the circumstances, Mr.Naveen Sharma would be well within his authority to sign the impugned Circular issued under the SEBI Act.

17. The Division Bench of this Court in **Price Waterhouse and Co. v/s. SEBI**, MANU/MH/1027/2010, has held in para 17 of the judgment that the words employed in section 11(2) of the SEBI Act are of wide amplitude and would therefore take within its sweep a Chartered Accountant, if his activities are detrimental to the interest of the investors or the securities market. In **Arun Kumar Agrawal v/s. Union of India,** MANU/SC/1146/

::: Uploaded on - 30/04/2021 ::: Downloaded on - 04/05/2021 12:35:38 :::

HIGH COURT OF JUDICATURE AT BOMBAY

2013, it is held by the Supreme Court in para 29 that SEBI Act gives wide ranging authority to SEBI to take such measures as it thinks fit to perform its duty to protect the interest of investors in securities and to promote the development of, and to regulate the securities market and the wide sweep of the powers of SEBI leaves no manner of doubt that it is the supreme authority for the control and Regulations and orderly development of the securities market in India. In **Sahara India Real Estate Corporation Ltd. v/s. SEBI,** (2013) 1 SCC 1, the Supreme Court has held - "section 11 of SEBI Act casts 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 obligation 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. The said 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 of the SEBI Act, as no provision has been given overriding effect over sub-section (1) of section 11 of the SEBI Act."

18. **Petroleum and Natural Gas Regulatory Board v/. Indraprastha Gas Limited,** (2015) 9 SCC 209, relied upon by learned Senior Counsel for the Petitioner, was a case in relation to Petroleum and Natural Gas

::: Uploaded on - 30/04/2021 ::: Downloaded on - 04/05/2021 12:35:38 :::

HIGH COURT OF JUDICATURE AT BOMBAY

Regulatory Board Act and would not assist the case of the Petitioner. In the said case the Supreme Court after perusing the provisions concluded that the provisions of the said Act do not confer any power on the Board therein. **State of Bihar v/s. Project Uchcha Vidya, Sikshak Sangh**, (2006) 2 SCC 545, was a case in which the executive powers of the State under Article 162 was in issue and in these circumstances, the Supreme Court held that citizen cannot be deprived of the right under Article 19(1)(g) of the Constitution except in accordance with laws, and such law must be one enacted by the legislature and not by an executive order under Article 162. In the present case, the Regulations are a piece of delegated delegation and have been laid before the Parliament. In the circumstances, the said judgment also does not assist the case of the Petitioner. In **Narinder S. Chadha v/s. Municipal Corporation of Gr.Mumbai & ors., (2014) 15 SC 689,** it was held that the impugned Circular travels outside the Act and the Rules. The said judgment also does not help the Petitioner. In **Cellular Operators Association of India v/s. TRAI,** (2016) 7 SCC 703, it was held in para 48 of the judgment that apart from the common good in the form of consumer interest, the Regulation must also pass a separate and independent test of not being manifestly arbitrary or unreasonable. Having expressed a prima facie view that the impugned IA 2020 Amendment Regulation and impugned Circular are not manifestly arbitrary or unreasonable, the said judgment also does not help the Petitioner.

19 In **R.K.Garg v/s. Union of India,** (1981) 4 SCC 675, the Constitution Bench of the Supreme Court has held that laws relating to economic

::: Uploaded on - 30/04/2021 ::: Downloaded on - 04/05/2021 12:35:38 :::

HIGH COURT OF JUDICATURE AT BOMBAY

activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. and the Court should feel more inclined to give judicial deference to legislature judgment in the field of economic regulation than in other areas where fundamental human rights are involved.

20. As stated earlier, SEBI is an expert regulatory body established under the SEBI Act and the Court, therefore, would have to exercise judicial restraint and the scope of interference would be extremely narrow. The Court cannot substitute own views in place of views of the expert body. Moreover, it is well settled that the Court should be very slow in staying a law by way of interim relief when the constitutional validity of the law is challenged.

21 It is noticed that the power to specify a ceiling on the fees exists in the IA principal 2013 Regulations much before the insertion of the impugned Regulation 15A. Regulation 15(9) under Chapter-III “General obligations and responsibilities” of the impugned IA principal 2013 Regulation makes provisions for Code of Conduct of an Investment Adviser. The Regulation 15(9) is reproduced hereunder:

> “Regulation 15(9) is reproduced hereinbelow-
>
> > “General responsibility.
> >
> > 15
> >
> > ...
> >
> > (9) An investment adviser shall abide by Code of Conduct as specified in Third Schedule.

::: Uploaded on - 30/04/2021 ::: Downloaded on - 04/05/2021 12:35:38 :::

HIGH COURT OF JUDICATURE AT BOMBAY
सत्यमेव जयते

The Third Schedule to the IA Regulations 2013, in its clause 6, further provides that,

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

22. In view of the above discussion, the prayer for interim relief shall stand rejected. The hearing of the Petition is expedited.

(SURENDRA P. TAVADE, J.) **(A. A. SAYED, J.)**

::: Uploaded on - 30/04/2021 ::: Downloaded on - 04/05/2021 12:35:38 :::