Prakash Gupta vs Securities And Exchange Board Of India on 23 July, 2021

Equivalent citations: AIR 2021 SUPREME COURT 3601, AIRONLINE 2021 SC 365

Author: D.Y. Chandrachud

Bench: M R Shah, Dhananjaya Y Chandrachud

Reportable

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

Criminal Appeal No 569 of 2021
(Arising out of SLP (Crl) No. 4728 of 2019)

Prakash Gupta .... Appellant

Versus

Securities and Exchange Board of India .... Respondent

JUDGMENT Dr Dhananjaya Y Chandrachud, J This judgment has been divided into sections to facilitate analysis. They are:

A The Appeal

B The IPO, SEBI's Investigation and the criminal complaint

C Application for Compounding

D Counsel's submissions

E Analysis

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E.3 Jurisprudential basis for 'Compounding'

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E.5 Regulatory role of SEBI

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PA

A The Appeal

1 The appellant is being prosecuted for an offence under Section 24(1) of the Securities and Exchange Board of India Act, 1992 ("SEBI Act"). The appellant sought the compounding of the offence under Section 24A. By an order dated 15 November 2018, the Additional Sessions Judge – 02 Central District at Tis Hazari Courts, Delhi ("Trial Judge"), rejected the application, upholding the objection of the Securities and Exchange Board of India that the offence could not be compounded without its consent. By a judgment of a Single Judge of the High Court of Delhi dated 1 April 2019 the order of the Trial Judge has been affirmed in revision. The High Court has held that the trial has reached the stage of final arguments and the application for compounding cannot be allowed without Securities and Exchange Board of India's ("SEBI") consent. The reasons of the High Court are extracted below:

> "6. Compounding at the initial stage has to be encouraged, but not at the final stage. The object of the SEBI Act has to be kept in mind. A stable and orderly functioning of the securities market has to be ensured. It will not be in the interest of justice to discharge the accused at the final stage of the proceedings by allowing the application for compounding without the consent of SEBI Act as it will defeat the objective of the SEBI Act. Though the Adjudicating Officer has found that the alleged violation committed by petitioner has not resulted in any loss to the investors, but this by itself would not justify discharge of accused at the fag end of trial. After considering the Supreme Court's decision in Meters and Instruments Private. Limited (Supra), and the view expressed by High Court of Bombay in N.H. Securities Ltd. (Supra) as well as the facts and circumstances of this case, I find no justification to allow petitioner's application under Section 24A of the SEBI Act, 1992." This view of the High Court has been called into question in these proceedings.

PART B B The IPO, SEBI's Investigation and the criminal complaint

2 The appellant is the director and promoter of a company by the name of Ideal Hotels & Industries Limited ("the Company"), which owns a 3-star hotel in Varanasi. While it was incorporated initially as a private limited company under the Companies Act, 1956 on 17 December 1985, the status of the company was changed to that of a public limited company with the approval of the Department of Company Affairs on 4 May 1994.

3 In 1995, the Company made an Initial Public Offer ("IPO") inviting a subscription to 38 lac equity shares at a par value of Rs 10 per share, aggregating to Rs 380 lacs. This offer was pursuant to a prospectus dated 6 October 1995. The IPO opened on 15 November 1995 and closed on 24 November 1995. The prospectus specified that the holding of the promoters of the Company after the IPO was 22 lac shares representing 32.83 per cent of the paid-up capital of 67 lac shares, with the shareholding of the appellant being 1,400 shares representing 0.02 per cent of the paid-up capital. The Company got listed in the stock exchanges at Delhi, Mumbai, Ahmedabad and Chennai, with the UP stock exchange being the parent exchange.

4 On 27 June 1996, SEBI received a complaint from one Mr Vijay Miglani alleging that certain Delhi/Bombay based brokers had, on the instructions of the Company, purchased its shares and that huge deliveries were kept outstanding in the grey market. SEBI also received an anonymous complaint in October 1996, PART B alleging price rigging and insider trading in the scrip of the Company. After a preliminary inquiry between 1996 and 1999, SEBI initiated an investigation against the Company on 2 February 1999. The Company was investigated for the period between 28 January 1996 and 29 February 1996. This was the period immediately preceding the listing of the scrip of the Company. This scrip moved from a low of Rs 11.25 on 30 January 1996 to a high of Rs 23.25 on 13 February 1996. The traded volume was unusually high during this period, with a daily turnover of 1,00,000 shares on many days. Thereafter, the price of the scrip registered a steep decline to Rs 17 on 29 February 1996, and the daily turnover also reduced to an average of a few hundred shares.

5 During its investigation, SEBI obtained the details of the top brokers who traded in the shares of the Company during this period on the Delhi Stock Exchange and Bombay Stock Exchange, and also of their clients who had made significant purchases or sales on the scrip. Consequently, SEBI came up with the name of six entities who had purchased approximately 51 per cent of the 38 lac equity shares on offer during the period between 28 January 1996 and 29 February 1996. They were found to have continued buying shares even after that period, and had ultimately purchased 28,38,000 equity shares, which was approximately 75 per cent of the post issue floating stock of the Company. As such, it was assumed that these entities were, therefore, responsible for the upward price movement in the scrip. 6 When SEBI issued summons to these six entities, it was the appellant who replied to them. In a statement given to SEBI on 7 June 1999, the appellant admitted PART B that these entities were directly/indirectly related to the Company and its directors, and that he managed their day-to-day affairs. He also admitted that approximately Rs 4.5 to 5 crores was invested by these entities in the purchasing the shares of the Company, for which funds were made available either from funds of the Company out of the proceeds of the IPO or from Inter Corporate Deposits raised by the entities from the market on personal verbal guarantees of the appellant and the Chairman and Managing Director of the Company (which had all been repaid subsequently). 7 On

24 August 1999, summons were issued by SEBI to the appellant under Section 11(3) of the SEBI Act regarding a potential violation of Regulations 4(a) and 4(e) of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995 ("1995 PFUTP Regulations"); Regulations 6(1), 6(3), 8(1), 10(1) and 10(2) of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 ("1994 Takeover Regulations") and Regulation 10 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 ("1997 Takeover Regulations"). On 18 November 1999, the Chairperson of SEBI appointed an Adjudicating Officer ("AO") to adjudicate upon the above allegations.

8 Prior to the decision of the AO, SEBI filed a criminal complaint 1 on 29 March 2000 before the Additional Chief Metropolitan Magistrate, Tis Hazari Court, Delhi alleging violations of Regulations 4(a) and 4(e) of the 1995 PFUTP Regulations, PART B read with Regulations 6(1), 6(3), 8(1), 10(1) and 10(2) of the 1994 Takeover Regulations, which are punishable under Sections 24 and 27 of the SEBI Act. 9 While the proceedings were pending before the AO, on 22 September 2000, SEBI's Chairperson passed an order under Section 11B read with Section 4(iii) of the SEBI Act accepting the proposal of the appellant and others to make an offer to purchase the shares owned by the shareholders of the Company who are not its promoters. The order directed that the offer presented would be at Rs 12 per share, which was higher than Rs 10 per share at which the shares of the Company were listed during the IPO. The appellant has stated that in compliance of the order, the promoters/directors of the Company acquired equity shares which raised their holding to the extent of about 95 per cent of the Company (post IPO). Thereafter, the Company also got its shares delisted from various stock exchanges. 10 On 19 June 2001, the AO passed an order in which it noted that the six entities were managed by the appellant, which can be determined from the fact that:

> (i) he received the summons sent to them; (ii) he had admitted in his statement on 7 June 1999 that he or his relatives were the directors in these entities; (iii) they purchased these shares on the basis of an oral commitment made by the appellant and by using funds obtained from the Company or on the basis of Inter Corporate Debtors obtained on the guarantee of the appellant, Chairman and Managing Director of the Company; (iv) the shares purchased were lying in the office of the appellant; and (v) it had also been admitted by the Chairman and Managing Director of the Company in his statement to SEBI on 5 July 1999 that this was done after PART B due consultation with him. As such, it held, inter alia, that the appellant had failed to comply with Regulations 8(1), 8(2) and 10 of the 1997 Takeover Regulations, and had thus violated the provisions of Section 15H of the SEBI Act.

11 The AO also noted the order of SEBI's Chairman under Section 11B of the SEBI Act, and observed that:

> "In response to that order [SEBI's Chairman's order], vide letter dated 25.05.2001, the acquirers have submitted that they have already acquired 95% of the total equity share capital of the company. They are planning to get the scrip of Ideal Hotels delisted from the rolls of all the Stock Exchanges where the scrips have been listed." The AO further observed:

> "In terms of the above order issued under section 11B of the SEBI Act, all the investors were offered an exit route at Rs.12/- per share. This was higher than the public issue price of Rs.10/-. Thus in the ultimate analysis I find there was no loss to any investor." However, according to the AO, the offer ought to have been made by the appellant/promoters on their own accord and not when proceedings under Section 11B were pending. Consequently, the AO levied a penalty of Rs. 20,000 on the appellant and two co-promoters. According to the appellant the penalty was paid.

12 Pursuant to SEBI's criminal complaint dated 29 March 2000, the Additional Chief Metropolitan Magistrate summoned the accused on the same day. In 2006-07, the appellant together with the other accused instituted proceedings under Section PART C 482 of the Code of Criminal Procedure, 1973 ("CrPC") before the High Court of Delhi for quashing the complaint case and the summoning order. The proceedings under Section 482 remained pending before the High Court for about six years, until they were eventually dismissed on 26 August 2013.

C Application for Compounding

13 On 12 September 2013, the appellant and the other accused persons filed a

'consent application' with SEBI, which was returned on 27 September 2013 with the intimation that the appellant and other accused persons could file an appropriate application for compounding in the criminal case.

14 On 14 October 2013, an application under Section 24A of the SEBI Act was filed before the Additional Chief Metropolitan Magistrate, Tis Hazari, Delhi by the appellant and other accused persons seeking the compounding of the offence in the criminal complaint filed by SEBI since they had already purchased the shares from the public in accordance with the order of SEBI Chairperson under Section 11B and had paid the penalty levied by the AO.

15 SEBI referred the compounding application for seeking the views of its High Powered Advisory Committee ("HPAC") headed by a former Judge of the High Court of Bombay. The HPAC has been constituted for examining proposals for compounding offences. The HPAC recommended that the offences should not be compounded following which an intimation was furnished to the Trial Judge and recorded in an order dated 7 May 2016.

PART D 16 In the interregnum, the criminal complaint was listed for recording the evidence of the complainant, but after the evidence was adduced, the appellant declined to cross-examine the witness until the compounding application was decided. The appellant also filed an application on 6 November 2017 before the Trial Judge, praying that the compounding application be decided before further evidence of the complainant was recorded in the criminal complaint. 17 By an order dated 15 November 2018, the Trial Judge dismissed the compounding application and the criminal complaint was listed for the cross- examination of the complainant's witness by the accused persons. The Trial Judge placed reliance on the decision of this Court in JIK Industries Limited vs Amarlal v.

Jumani 2 ("JIK Industries") for holding that no application for compounding an offence could be allowed without the consent of the complainant. A revision petition was filed by the appellant before the High Court of Delhi to challenge the order of the Trial Judge which, as stated earlier, has been dismissed by a Single Judge of the High Court of Delhi on 1 April 2019.

D Counsel's submissions

18 Mr Shyam Divan, learned Senior Counsel appearing on behalf of the

appellant has urged the following submissions:

(i) The Chairperson of SEBI in the order under Section 11B dated 22 September 2000 accepted the proposal of the appellant and co-promoters, (2012) 3 SCC 255 PART D that they would buy the remaining shares of the Company from the allotees/existing shareholders in the public issue at the rate of Rs 12 per share. This has provided an exit option;

(ii) The AO took note of the submission of the acquirers that they had already acquired 99 per cent of the total equity share capital of the Company and were planning to get the scrip de-listed from the rolls of the stock exchanges;

(iii) In terms of the order under Section 11B, all the investors were offered an exit route at Rs 12 per share, which was higher than the public issue price of Rs. 10; hence, in the ultimate analysis the AO held that no loss has been caused to any investor;

(iv) Contrary to the finding of the High Court, the application for compounding was not filed at the end of the trial but in 2013 after the petition under Section 482 of the CrPC was dismissed by the High Court of Delhi;

(v) The promoters are, even at this stage, ready and willing to make a further mop-up offer;

(vi) The criminal complaint was filed on 29 March 2000, prior to the order of SEBI's Chairperson under Section 11B dated 22 September 2000 and the order of the AO dated 19 June 2001, which concluded that no loss has been caused to the investors;

(vii) The purpose of the SEBI Act is to ensure the protection of the investors, which has been met by the deposit of penalty;

PART D

(viii) Section 24A confers adequate powers on Securities Appellate Tribunal ("SAT") and the Court to compound offences, and there is no provision in the statute for the consent of SEBI. Compounding should be allowed if, after an assessment of the overall facts, there is no reason to deny it;

(ix) The order of the Trial Judge is manifestly erroneous when it holds that "there is nothing on record to show that the investors have been duly compensated". Moreover, the observation that the offence could not be compounded under Section 24A without the consent of SEBI is contrary to the plain terms of the statute which do not contemplate the consent of SEBI; and

(x) In the facts of the present case, the application for compounding should be allowed since:

a. The appellant is a senior citizen;

b. The Company has been de-listed on the stock exchanges; and c. No loss is shown to have been caused to the investors.

19 Mr CU Singh, learned Senior Counsel appearing on behalf of SEBI opposed the submissions on the ground that:

(i) The criminal complaint which was filed on 29 March 2000 sets out the element of criminality involving:

a. Mis-utilization of the proceeds of the IPO to purchase the shares of the Company through the six related entities;

b. Manipulation of the price of the scrip in which the IPO took place;

PART D c. The artificial increase in the price of the shares of the Company to Rs.

23.5 per share, which was subsequently brought down;

d. The IPO was over-subscribed by four times, which implies that 75 per cent of the applicants were unable to obtain the shares of the Company;

(ii) The order of the Chairperson of SEBI dated 22 September 2000, in fact arrived at the following conclusions:

"In these circumstances, it can be concluded that the associate concern of IHL were mere front entities of IHL and its promoters and the entire exercise of transfer of public proceeds to associate concerns was for the purchase of its own shares. Transfer of shares is a part of their design to manipulate the price of the shares... IHL and its promoters were also afforded an opportunity of personal hearing to make their submissions. Accordingly, Shri L.R. Maurya and Shri Prakash Gupta appeared before

> me. The said individuals offered a proposal that they would buy the remaining shares of the company from the allottees/ existing shareholders in the public issue at the rate of Rupees Twelve per share. I have considered the said proposal of the promoters and I find that this provides a way to exit to the allottees/existing shareholders of IHL."

(iii) SEBI's investigation revealed that the Company had mis-utilized the funds which were raised in the IPO for buying back of its own shares. These funds of the public issue were made available to the six entities which were group companies managed by the appellant or to promoters or directors of group companies to purchase the shares. The dealing in the shares of the Company by these entities led to an increase in the price of its shares. The purchases by those entitles also cumulatively constituted almost the entire purchase made at the Delhi Stock Exchange, and a PART D substantial part of the floating stock of the Company. Hence, these entities purchased a substantial equity in the shares of the company without disclosures to the public. Therefore, a violation of the 1995 PFUTP Regulations and of the 1994 Takeover Regulations was found to have been committed. This, in substance, constitutes the basis of the criminal complaint;

(iv) The conduct of the appellant is also significant: after the criminal complaint was lodged on 29 March 2000, petitions under Section 482 of the CrPC were filed in 2006-07. They remained pending for seven years, until they were dismissed on 26 August 2013 by the High Court of Delhi. Once the Trial Judge took cognizance of the criminal complaint, the application for compounding was then submitted belatedly on 14 October 2013 when the evidence was being recorded; and

(v) A case does not exist for the interference of this Court under Article 136 of the Constitution.

20 Mr Mahesh Jethmalani, learned Senior Counsel has intervened in these proceedings and has urged submissions on the issue as to whether the power of compounding offences under Section 24A of the SEBI Act requires the consent of SEBI. Learned Senior Counsel submitted that:

> (i) Section 24A refers to only two authorities – SAT and a Court – before which the proceedings are pending. Section 24A has no reference to PART D SEBI, and it does not condition the power of the Court or SAT of compounding offences to the prior consent of SEBI;
>
> (ii) It is a well settled principle of statutory construction that while interpreting a statutory provision, no addition or subtraction from it is permissible;
>
> (iii) The submission of SEBI that its consent is mandatory in order to compound an offence under Section 24A would, if accepted, result in re-

writing the provisions of the statute. While considering Section 621-A of the Companies Act, 1956, which was inserted by an amending Act of 1988, this Court in VLS Finance Limited vs Union of India 3 ("VLS Finance") held that in the absence of a requirement of the sanction or prior permission of the Court before an offence is compounded by the Company Law Board, such a

requirement of prior permission could not be implied since it would be contrary to the terms of the statute; and

(iv) The decision in JIK Industries (supra), is an authority for the principle that a scheme under Section 391 of the Companies Act, 1956 does not amount to the compounding of an offence under Section 138 of the Negotiable Instruments Act, 1888 ("NI Act"). In the case of the NI Act, Section 147 merely states that offences under the Act shall be compoundable whereas Section 24A of the SEBI Act specifically provides for the power of SAT and the Court to compound offences.

21 These rival submissions now fall for our consideration.

(2013) 6 SCC 278

PART E

E Analysis

E.1 Structure of the SEBI Act

22 The long title to the SEBI Act stipulates that it has been enacted "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". The Statement of Objects and Reasons accompanying the introduction of the Bill in Parliament notes that SEBI was established in 1988 through a government resolution to promote the orderly and healthy growth of the securities market and for the protection of investors. SEBI had been monitoring the activities of stock exchanges, mutual funds, merchant bankers and other activities to achieve these goals. The Statement of Objects and Reasons elucidates that:

> "The capital market has witnessed tremendous growth in recent times, characterized particularly by the increasing participation of the public. Investors' confidence in the capital market can be sustained largely by ensuring investors' protection. With this end in view, Government decided to vest SEBI immediately with statutory powers required to deal effectively with all matters relating to capital market. As Parliament was not in session, and there was an urgent need to instill a sense of confidence in the public in the growth and stability of the capital market, the President promulgated the Securities and Exchange Board of India Ordinance, 1992 (No. 5 of 1992) on the 30th January, 1992." 23 Chapter IV of the SEBI Act delineates the power and functions of SEBI.

Within this chapter, Section 11 stipulates the functions of SEBI. Sub-Section (1) PART E casts upon SEBI the duty to protect the interests of investors in securities and to promote the development and regulation of the securities market, through such measures as it deems fit. Among the functions which are specified in sub-Section (2) are:

(i) Regulating the business in stock exchanges and any other stock exchange markets (clause (a));

(ii) Prohibiting fraudulent and unfair trade practices relating to securities markets (clause (e));

(iii) Prohibiting insider trading in securities (clause (g)); and

(iv) Regulating substantial acquisition of shares and takeover of companies (clause (h)).

24 Under sub-Section (2a) (inserted with effect from 29 October 2002), SEBI is empowered to undertake the inspection of any book, register, document or record of any listed public company or a public company which intends to get its securities listed on any recognized stock exchange, where SEBI has reasonable grounds to believe that such company has been indulging in insider trading or fraudulent and unfair trade practices relating to the securities market. Sub-Section (4) empowers SEBI to take certain measures in the interest of investors or the securities market either pending an investigation or inquiry or on its completion. 25 Section 11A deals with the power of SEBI to make regulations or to issue general or special orders prohibiting the issue of documents or advertisements PART E soliciting money from the public for the issue of securities. Section 11B empowers SEBI to issue directions and to levy penalties. Section 11C enunciates the powers of investigation entrusted to SEBI.

26 Chapter VA, which incorporates Section 12A, contains a prohibition of manipulative and deceptive devices, insider trading and substantial acquisition of securities or control in contravention of the provision of the Act and the Regulations. 27 Chapter VIA deals with penalties and adjudication. SEBI is empowered to impose penalties in a range of diverse situations including:

(i) Penalty for failure to furnish information, returns, documents or reports (Section 15A);

(ii) Penalty for failure to redress investors' grievances (Section 15C);

(iii) Penalty for defaults in the case of mutual funds (Section 15D);

(iv) Penalty for default in case of stock brokers (Section 15F);

(v) Penalty for insider trading (Section 15G);

(vi) Penalty for non-disclosure of acquisition of shares (Section 15H);

(vii) Penalty for fraudulent and unfair trade practices (Section 15 HA);

(viii) Penalty for alteration, destruction of records and failure to protect the

electronic database of the Board (Section 15HAA); and

(ix) Penalty for contravention where no separate penalty has been provided (Section 15HB).

PART E 28 Section 15-I has made provisions elucidating the power to adjudicate in the following terms:

"15-I Power to adjudicate: (1) For the purpose of adjudging under sections 15A, 15B, 15C, 15D, 15E, 15-EA, 15-EB, 15F, 15G,15H, 15HA and 15HB, the Board may appoint any officer not below the rank of a Division Chief to be an adjudicating officer for holding an inquiry in the prescribed manner after giving any person concerned a reasonable opportunity of being heard for the purpose of imposing any penalty.

(2) While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject-matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in subsection (1), he may impose such penalty as he thinks fit in accordance with the provisions of any of those sections.

(3) The Board may call for and examine the record of any proceedings under this section and if it considers that the order passed by the adjudicating officer is erroneous to the extent it is not in the interests of the securities market, it may, after making or causing to be made such inquiry as it deems necessary, pass an order enhancing the quantum of penalty, if the circumstances of the case so justify:

Provided that no such order shall be passed unless the person concerned has been given an opportunity of being heard in the matter:

Provided further that nothing contained in this sub-section shall be applicable after an expiry of a period of three months from the date of the order passed by the adjudicating officer or disposal of the appeal under section 15T, whichever is earlier." Section 15JB provides for settlement of administrative and civil proceedings in the following terms:

PART E "15-JB Settlement of administrative and civil proceedings: (1) Notwithstanding anything contained in any other law for the time being in force, any person, against whom any proceedings have been initiated or may be initiated under Section 11, Section 11-B, Section 11-D, sub-section (3) of Section 12 or Section 15-I, may file an application in writing to the Board proposing for settlement of the proceedings initiated or to be initiated for the alleged defaults.

(2) The Board may, after taking into consideration the nature, gravity and impact of defaults, agree to the proposal for settlement, on payment of such sum by the defaulter or on such other terms as may be determined by the Board in accordance with the regulations made under this Act.

(3) The settlement proceedings under this section shall be conducted in accordance with the procedure specified in the regulations made under this Act.

(4) No appeal shall lie under Section 15-T against any order passed by the Board or adjudicating officer, as the case may be, under this section.

(5) All settlement amounts, excluding the disgorgement amount and legal costs, realised under this Act shall be credited to the Consolidated Fund of India."

29 Chapter VIB provides for the establishment, jurisdiction, authority and the procedure of SAT. Section 15T provides for an appeal to SAT:

"15T. Appeal to the Securities Appellate Tribunal. (1) Save as provided in sub-section (2), any person aggrieved, —

(a) by an order of the Board made, on and after the commencement of the Securities Laws (Second Amendment) Act, 1999, under this Act, or the rules or regulations made thereunder; or (b) by an order made by an adjudicating officer under this Act; or (c) by an order of the Insurance Regulatory and Development Authority or the Pension Fund Regulatory and Development Authority, may prefer an appeal to a Securities Appellate Tribunal having jurisdiction in the matter..." PART E

30 An appeal lies to this Court, under Section 15Z, from a decision of SAT on a question of law:

"15Z Appeal to Supreme Court—Any person aggrieved by any decision or order of the Securities Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Securities Appellate Tribunal to him on any question of law arising out of such order:

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days."

31 As distinct from the provisions for penalties and adjudication in Chapter VIA, Chapter VII, which is titled 'Miscellaneous' deals with offences in Section 24. Section 24 as it stands presently, is in the following terms:

> "24. Offences.—(1) Without prejudice to any award of penalty by the Adjudicating Officer or the Board under this Act, if any person contravenes or attempts to contravene or abets the contravention of the provisions of this Act or of any rules or regulations made thereunder, he shall be punishable with imprisonment for a term which may extend to ten years, or with fine, which may extend to twenty-five crore rupees or with both.
>
> (2) If any person fails to pay the penalty imposed by the Adjudicating Officer or the Board or fails to comply with any directions or orders, he shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to ten years, or with fine, which may extend to twenty-five crore rupees or with both." 32 Section 24 was substituted by Act 9 of 1995 with effect from 25 January 1995.

Prior to its amendment by Act 59 of 2002 with effect from 29 October 2002, Section PART E 24 stipulated that offences punishable under sub-Section (1) would be punishable with imprisonment for a term which may extend to one year or with fine or with both. This provision was substituted by Amending Act 59 of 2002 to provide for imprisonment for a term of ten years or with fine which may extend to Rs 25 crores or with both. Similarly, the punishment under sub-Section (2) prior to Amending Act 59 of 2002 was for three years or with fine which shall not be less than Rs 2000 but which may extend to Rs 10,000 or with both. By Amending Act 59 of 2002, it has been enhanced to ten years or with fine which may extend to Rs 25 crores or with both.

33 Section 24A, inserted for the first time by the Amending Act 59 of 2002, provides for the compounding of offences:

> "24A. Composition of certain offences— Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any offence punishable under this Act, not being an offence punishable with imprisonment only, or with imprisonment and also with fine, may either before or after the institution of any proceeding, be compounded by a Securities Appellate Tribunal or a court before which such proceedings are pending"

34 Section 26 stipulates that:

> "26. Cognizance of offences by courts—(1) No court shall take cognizance of any offence punishable under this Act or any rules or regulations made thereunder, save on a complaint made by the Board." PART E

35 Section 27 provides for contraventions by companies:

> "27. Contravention by companies —(1) Where a contravention of any of the provisions of this Act or any rule, regulation, direction or order made thereunder has been committed by a company, every person who at the time the contravention was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly:
>
> Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such contravention.
>
> (2) Notwithstanding anything contained in sub-section (1), where an contravention under this Act has been committed by a company and it is proved that the contravention has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section,—

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner of the firm." 36 Section 24A, which provides for the compounding of certain offences, contains certain characteristic features which need to be understood while interpreting its provisions: firstly, Section 24A begins with a non-obstante clause, "notwithstanding anything contained in the Code of Criminal Procedure 1973"; secondly, any offence punishable under the SEBI Act can be compounded, provided PART E it is not an offence which is punishable only with imprisonment or with imprisonment and fine. Therefore, only where a fine is an alternative to imprisonment does the provision apply; thirdly, the offence may be compounded either before or after the institution of any proceeding; and fourthly, the offence may be compounded by SAT or by a Court, before which such proceedings are pending. 37 Offences punishable under sub-Section (1) of Section 24 are compoundable for the reason that the punishment which has been stipulated is for a certain term of imprisonment or with fine or with both (the term of imprisonment and the quantum of fine has been enhanced as we have seen earlier but that is not of relevance to this part of the interpretation). Whether an offence under sub-Section (2) of Section 24 is compoundable under Section 24A depends on the construction which is to be placed on the words "or with fine". One option would be to construe these words as an alternative to the whole of the preceding words which appear immediately before namely "he shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to ten years". The second option is that the words "or with fine" are an alternative to any sentence imposed

above the minimum of one month. Prima facie, it appears that for offences under sub-Section (2) of Section 24, prescribing imprisonment for a term which shall not be less than one month is mandatory. While the imprisonment may extend up to ten years, for any period in excess of one month a fine of up to Rs 25 crores is an alternative or in the cumulative. However, since the present matter does not turn on the construction of PART E the Section 24(2), it is not necessary to express any final view on whether an offence under that provision is compoundable.

E.2 SEBI Circulars in relation to Section 24A

38 Section 24A provides for the compounding of an offence either before or after

the institution of any proceeding. Since Section 24A provides for compounding prior to the institution of proceedings, the legislature has stipulated that an application can be made to SAT. However, once a proceeding has been instituted before a Court which is seized of it, it is the imprimatur of the Court that is required in such a situation. The expression "or a court before which such proceedings are pending" would indicate that once proceedings have been instituted before it, the Court has exclusive jurisdiction to compound offences. It would be instructive to also look at the circulars issued by SEBI in order to better understand the practical implications of the language of Section 24A.

39 In a circular dated 20 April 2007 4, SEBI issued guidelines for consent orders under Sections 15T of the SEBI Act and Section 23A of the Depositories Act, 1996, and for compounding of offences under Section 24A of the SEBI Act, Section 22A of the Depositories Act and Section 23N of the Securities Contracts (Regulation) Act, 1956. It noted that compounding of an offence "may cover appropriate prosecution cases filed by SEBI before the criminal courts" and "can take place after filing Available at <https://www.sebi.gov.in/legal/circulars/apr-2007/guidelines-for-consent-orders-and-for-considering-requests-for-composition-of-offences_9254.html> accessed on 20 July 2021 PART E criminal complaint by SEBI". Finally, it notes the procedure to be followed by an accused person while seeking compounding, in the following terms:

> "Any party who wishes to compound an offence shall file an appropriate application before the court where complaint is pending with a copy addressed to the Prosecution Division, Enforcement Department of SEBI's Mumbai office (address is given above) which will forward the application/ request to be placed before the High Powered Committee. The terms of compounding as recommended by the Committee and approved by the Panel of WTMs would be placed before the court by the Prosecution Division by way of written submissions or application, as appropriate, for passing orders as the court deems fit." Emphasis supplied

40 Accompanying this circular were certain Frequently Asked Questions ("FAQ") issued by SEBI 5. The relevant ones are extracted below:

> "Q6. What is the objective of Compounding of Offence? A. Compounding of offence allows the accused to avoid a lengthy process of criminal prosecution, which would save cost, time, mental agony, etc in return for payment of compounding charges.
>
> [...] Q14. At what stage Compounding of Offence can take place? A. At any stage after filing criminal complaint by SEBI. Where a criminal complaint has not yet been filed but is envisaged, the process for consent orders will be followed rather than the one for compounding.
>
> [...] Q 16 What is the process for passing consent orders/ compounding of offences?
>
> A. ... Any party who wishes to compound an offence shall file an appropriate application before the court where complaint is Available at <https://www.sebi.gov.in/sebi_data/commondocs/consentord-faq1_p.pdf> accessed on 20 July 2021 PART E pending with a copy addressed to the Prosecution Division, Enforcement Department of SEBI's Mumbai office which will forward the application/ request to be placed before the high powered Committee. The terms of compounding as recommended by the Committee and approved by the Competent Authority would be placed before the court by the Prosecution Division by way of written submissions or application, as appropriate, for passing orders as the court deems fit... [...] Q23. What will be the consequences of non-acceptance? A. ...In cases where SEBI is not inclined to accept Settlement/Compounding of offence, SEBI would file its objections before SAT/Court for consideration."

41 SEBI amended the circular dated 20 April 2007 through a circular dated 25 May 2012 6. While the circular primarily issues new guidelines in relations to consent orders, it also provides a list of offences which SEBI shall not settle, which includes:

> "ii. Serious fraudulent and unfair trade practices which, in the opinion of the Board, cause substantial losses to investors and/or affects their rights, especially retail investors and small shareholders or have or may have market wide impact, except those defaults where the entity makes good the losses due to the investors;"

42 A combined reading of the two circulars and FAQs issued by SEBI clarifies the following: firstly, a party can seek compounding under Section 24A at any stage once the criminal complaint has been filed by SEBI; secondly, the party shall have to file the application for compounding before the Court where the criminal complaint is pending; thirdly, a copy of the application for compounding must also be sent to Available at <https://www.sebi.gov.in/legal/circulars/may-2012/amendment-to-the-consent-circular-dated-20th-april-2007_22808.html> accessed on 20 July 2021 PART E SEBI, which will place it before the HPAC 7; and fourthly, the HPAC's decision on the application, be it an acceptance or an objection, shall be placed by SEBI before the appropriate Court, which will have to pass appropriate orders. Hence, this makes it abundantly clear that while the HPAC's decision on a party's application for compounding under Section 24A must be placed before the appropriate Court, the

final decision must remain in the domain of the Court. 43 However, since SEBI has argued before us that its consent must be deemed mandatory for compounding an offence under Section 24A, we must also independently evaluate the argument on its merits. In order to do that, we must first understand the jurisprudential basis for compounding of offences.

E.3 Jurisprudential basis for 'Compounding'

44 In tracing the history of compounding, we must begin with its origins in

English common law. Curiously, the original discussions surrounding compounding (or composition) of offences in the English common law do not occur in its context as a procedural tool (as we understand today) but rather as an offence itself. Under such an offence, a prosecutor or a victim would accept consideration in return for not prosecuting an offence 8.

Constituted under circular dated 25 May 2012 to "consist of a retired Judge of a High Court and three other external experts, as may be decided by the Board from time to time". Percy Henry Winfield, The Present Law of Abuse of Legal Procedure (Cambridge University Press, 2013) at page 117 PART E 45 Indeed, Blacks' Law Dictionary 9 contains a definition of the expression "compounding crime" as follows:

> "Compounding Crime. Compounding crime consists of the receipt of some property or other consideration in return for an agreement not to prosecute or inform on one who has committed a crime. There are three elements to this offense at common law, and under the typical compounding statute:
>
> (1) the agreement not to prosecute; (2) knowledge of the actual commission of a crime; and (3) the receipt of some consideration.

The offense committed by a person who, having been directly injured by a felony, agrees with the criminal that he will not prosecute him, on condition of the latter's making reparation, or on receipt of a reward or bribe not to prosecute.

The offense of taking a reward for forbearing to prosecute a felony; as where a party robbed takes his goods again, or other amends, upon agreement not to prosecute." 46 Similarly, P Ramanatha Aiyar's Advanced Law Lexicon 10 defines the expression "Compounding a crime" in the following terms:

> "The offence of either agreeing not to prosecute a crime that one knows has been committed or agreeing to hamper the prosecution.— Also termed theft-bote. (Black, 7th Edn., 1999) "If a prosecuting attorney should accept money from another to induce the officer to prevent the finding of an indictment against that person this would be compounding a crime if the officer knew the other was guilty of an offense, but would be bribery whether he had such knowledge or not." Rollin M. Perkins & Ronald N. Boyce, Criminal Law 539 (3d ed. 1982)." 9 th 5 Edition, at page 259 10 rd 3

Edition, Reprint 2007, at page 932 PART E

47 In this context we may refer to Sections 213 and 214 of the Indian Penal Code, 1860 ("IPC") which also introduce a similar crime in India, in the following terms:

> "213. Taking gift, etc., to screen an offender from punishment.—Whoever accepts or attempts to obtain, or agrees to accept, any gratification for himself or any other person, or any restitution of property to himself or any other person, in consideration of his concealing an offence or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment, if a capital offence.—shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;
>
> if punishable with imprisonment for life, or with imprisonment.—and if the offence is punishable with imprisonment for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;
>
> and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.
>
> 214. Offering gift or restoration of property in consideration of screening offender.—Whoever gives or causes, or offers or agrees to give or cause, any gratification to any person, or restores or causes the restoration of any property to any person, in consideration of that person's concealing an offence, or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment, PART E if a capital offence.—shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

if punishable with imprisonment for life, or with imprisonment.—and if the offence is punishable with imprisonment for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;

and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

Exception.—The provisions of Sections 213 and 214 do not extend to any case in which the offence may lawfully be compounded." While the "exception" to the provisions of Sections 213 and 214 make the provisions inapplicable to offences which may be compounded, it is important to note that the "exception" was only introduced through an amendment in 1882 (Act 8 of 1882). 48 On the other hand, it was in 1872, when the Code of Criminal Procedure was amended, that compounding was first introduced as a procedural tool in Indian criminal law. Section 188 therein stated:

> "Section 188 Compounding offences - In the case of offences which may lawfully be compounded, injured persons may compound the offence out of Court, or in Court with the permission of the Court." PART E As is evident, the above provision only provided that compounding of offences was possible out of Court, or in Court with its permission. However, while it referred to offences which may be "lawfully compounded", the decision on those was left to judicial discretion.

49 When the Code of Criminal Procedure was amended in 1882, it enumerated a list of offences which could be compounded by the Courts in Section 345. This list was expanded when the Code of Criminal Procedure was amended again in 1898. Finally, in its current form, the compounding of offences is permissible under Section 320 of the CrPC. The relevant parts of Section 320 are extracted below:

> "320. Compounding of offences—(1) The offences punishable under the sections of the Indian Penal Code (45 of 1860) specified in the first two columns of the Table next following may be compounded by the persons mentioned in the third column of that Table... (2) The offences punishable under the sections of the Indian Penal Code (45 of 1860) specified in the first two columns of the Table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that Table... (3) When an offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) or where the accused is liable under Sections 34 or 149 of the Indian Penal Code (45 of 1860) may be compounded in like manner.
>
> (4)(a) When the person who would otherwise be competent to compound an offence under this section is under the age of eighteen years or is an idiot or a lunatic, any person competent to contract on his behalf may, with the permission of the Court, compound such offence.
>
> (b) When the person who would otherwise be competent to compound an offence under this section is dead, the legal PART E representative, as defined in the Code of Civil Procedure, 1908 (5 of 1908), of such person may, with the consent of the Court, compound such offence.
>
> (5) When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the

leave of the Court to which he is committed, or, as the case may be, before which the appeal is to be heard.

(6) A High Court or Court of Session acting in the exercise of its powers of revision under Section 401 may allow any person to compound any offence which such person is competent to compound under this section.

(7) No offence shall be compounded if the accused is, by reason of a previous conviction, liable either to enhanced punishment or to a punishment of a different kind for such offence.

(8) The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded.

(9) No offence shall be compounded except as provided by this section." 50 Broadly speaking, the provisions of Section 320 indicate that there are three categories of offences:

(i) Those offences which can be compounded by the parties themselves;

(ii) Those offences which can be compounded by the parties but for which the permission of the Court is required; and

(iii) Offences which cannot be compounded at all.

51 Sub-section (1) of Section 320 of the CrPC stipulates that offences punishable under the sections of the IPC in the first two columns of the appended table may be compounded by the persons mentioned in the third column of that PART E table, without the permission of the Court. Column 1 of this table describes the offences, column 2 indicates the corresponding section of the IPC and column 3 provides the person by whom the offence may be compounded. Column 3 indicates that the compounding of the offence is essentially at the instance of a victim, person aggrieved or the injured person. Broadly speaking, the offences covered by sub- Section (1) of Section 320 are relatively of a minor nature directed against an individual without affecting the society at large. The maximum sentence for these offences may vary from five to seven years' imprisonment. Almost all the offences are bailable and several are non-cognizable.

52 Sub-Section (2) of Section 320 provides for offences where compounding requires the permission of the Court before which a prosecution for the offence is pending. As in the case of offences governed by sub-Section (1) of Section 320, column 1 of the table appended to sub-Section (2) describes the offences, column 2 specifies the corresponding section of the IPC and column 3 indicates the person by whom the offence may be compounded. A provision for the permission of the Court has been introduced in respect of offences governed by sub-Section (2) of Section 320 since the legislature has viewed those offences to be of a more serious nature as compared to the offences governed by sub-Section (1) of Section 320. 53 Sub-Section (3) of Section 320 provides that

where an offence is compoundable under the provision, the abetment of such an offence or attempt to commit such an offence or where the accused is liable under Section 34 or Section 149 of the IPC may also be compounded in a like manner. Sub-Sections (4a) PART E provides that where the person who would otherwise be competent to compound the offence under the provision is under the age of 18 or "is an idiot or a lunatic" a person competent to contract on their behalf may, with the permission of the Court, compound the offence. Similarly, under sub-Section 4(b), where the person who would otherwise be competent to compound the offence under the provision is dead, their legal representative as defined under the Code of Civil Procedure, 1908 may, with the consent of the Court, compound the offence. Sub-Section (5) provides that where the accused has been committed for trial or when the accused has been convicted and an appeal has been pending, no compounding shall be allowed without the leave of the Court to which the accused is committed or of the Court before which the appeal is to be heard. Under sub-Section (6), the High Court or Court of Sessions is empowered to allow a person to compound an offence in the exercise of its revisional powers which such a person is competent to compound under the provision otherwise. Sub-Section (7) provides that compounding will not be permitted when the accused is liable either to enhanced punishment or to a punishment of a different kind for such offence for a previous conviction. Sub- Section (8) provides that the effect of compounding under this provision would have the same effect as the acquittal of the accused. Finally, sub-Section (9) provides that no offence shall be compounded except as provided by the provision. PART E 54 In explaining the basis for the provision of compounding an offence in Section 345 of the 1898 Act, the Law Commission of India in its 41st Report stated as follows 11:

> "24.66...The broad principle that forms the basis of the present scheme is that where the offence is essentially of a private nature and relatively not serious, it is compoundable." emphasis supplied 55 The Law Commission of India in its 154th Report on the CrPC, explained the rationale for Section 320 in the following terms 12:
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> "2. The rationale for compounding of offences is that the chastened attitude of the accused and the praiseworthy attitude of the complainant in order to restore peace and harmony in society, must be given effect to in the composition of offences." However, it also goes on to then note:
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> "9. We recommend that as a matter of policy more offences be brought under the category of offences compoundable by the parties themselves without the intervention of the court. However, offences against the public at large, however small they may be, should not be compoundable." Emphasis supplied 56 Thereafter, in its 237th Report on Compounding of (IPC) Offences, the Law Commission of India explained the rationale for compounding as follows 13:
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> Available at <https://lawcommissionofindia.nic.in/1-50/Report41.pdf> accessed on 20 July 2021 Available at <https://lawcommissionofindia.nic.in/101-169/Report154Vol1.pdf> accessed on 20 July PART E "1.2 Compounding in the context of criminal law means forbearance from the prosecution as a result of an amicable settlement between the parties. As

observed by Calcutta High Court in a vintage decision in Murray [(1894)21 ILR 103 at 112], compounding of an offence signifies "that the person against whom the offence has been committed has received some gratification, not necessarily of a pecuniary character, to act as an inducement of his desiring to abstain from a prosecution". The victim may have received compensation from the offender or the attitude of the parties towards each other may have changed for good. The victim is prepared to condone the offensive conduct of the accused who became chastened and repentant. Criminal law needs to be attuned to take note of such situations and to provide a remedy to terminate the criminal proceedings in respect of certain types of offences. That is the rationale behind compounding of offences." 57 In Biswabahan Das vs Gopen Chandra Hazarika 14, a three judge Bench of this Court held that the principle underlying Section 320 is that wrongs of certain classes which affects the person mainly in their individual capacity or character may be sufficiently redressed by compounding.

58 In Sheonandan Paswan vs State of Bihar 15, a Constitution Bench of this Court was interpreting Section 321 of the CrPC. While drawing an analogy between Sections 320 and 321, Justice V. Khalid, speaking for himself and Justice Natarajan observed:

"85. The scope of Section 321 can be tested from another angle and that is with reference to Section 320 which deals with "compounding of offences". Both these sections occur in Chapter 24 under the heading "General Provisions as to Enquiries and Trials" ... Available at <https://lawcommissionofindia.nic.in/reports/report237.pdf> accessed on 20 July 2021 AIR 1967 SC 895 (1987) 1 SCC 288 PART E

86. These two sub-sections use the expression "with the permission of the court" and "with the consent of the court" which are more or less ejusdem generis. On a fair reading of the abovementioned sub-sections it can be safely presumed that the sections confer only a supervisory power on the court in the matter of compounding of offences in the manner indicated therein, with this safeguard that the accused does not by unfair or deceitful means, secure a composition of the offence. Viewed thus I do not think that a plea can be successfully put forward that granting permission or giving consent under sub-section (4)(a) or (4)(b) for compounding of an offence, the court is enjoined to make a serious detailed evaluation of the evidence or assessment of the case to be satisfied that the case would result in acquittal or conviction. It is necessary to bear in mind that an application for compounding of an offence can be made at any stage.." Emphasis supplied 59 Analyzing the above decisions, it is evident that that legislative sanction for compounding of offences is based upon two contrasting principles: first, that private parties should be allowed to settle a dispute between them at any stage (with or without the permission of the Court, depending on the offence), even of a criminal nature, if proper restitution has been made to the aggrieved party; and second, that, however, this should not extend to situations where the offence committed is of a public nature, even when it may have directly

> affected the aggrieved party. The first of these principles is crucial so as to allow for amicable resolution of disputes between parties without the adversarial role of Courts, and also to ease the burden of cases coming before the Courts. However, the second principle is equally important because even an offence committed against a private party may affect the fabric of society at large. Non-prosecution of such an offence may affect the limits of conduct which is acceptable in the society. The Courts play an important role in PART E setting these limits through their adjudication and by prescribing punishment in proportion to how far away from these limits was the offence which was committed.

As such, in deciding on whether to compound an offence, a Court does not just have to understand its effect on the parties before it but also consider the effect it will have on the public. Hence, societal interest in the prosecution of crime which has a wider social dimension must be borne in mind.

60 This formulation of this principle is also in alignment with the position under English common law, where in a judgment of the Queen's Bench in Keir vs F. Leeman and Pearson, Lord Denman CJ held 16:

> "We shall probably be safe in laying it down that the law will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it." Emphasis supplied

61 Singapore, where the procedure for compounding of offences was introduced in a manner similar to India 17, follows an analogous principle. In the Singapore High (1844) 6 Queen's Bench Reports 308 Ryan David Lim and Selene Yap, 'Composition: Legal and Theoretical Foundations' (2015) 27 SAcLJ PART E Court's decision in Public Prosecutor vs Norzian bin Bintat 18, Chief Justice Yong Pung How held:

> "55. ...Thus, in a case where the public interest is involved, it is proper to withhold consent to composition... [...]
>
> 57. On the other hand, the cases also show that, in the absence of aggravating factors, the courts should lean towards the granting of consent in cases where the public interest does not figure strongly..." (emphasis supplied)

62 However, Section 320 provides for the compounding of offences only under the IPC. Hence, in respect of offences which lie outside the IPC, compounding may be permitted only if the statute which creates the offence contains an express provision for compounding before such an offence can be made compoundable. The power of compounding must, in other words, be expressly conferred by the statute which creates the offence.

E.4 Compounding outside of CrPC

63 The provisions contained in Section 147 of the NI Act for compounding of

offences came up for consideration before a two judge Bench of this Court in JIK Industries (supra). Section 147 of the NI Act is in the following terms:

> "147. Offences to be compoundable.- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 [1995] SGHC 207 PART E of 1974), every offence punishable under this Act shall be compoundable." 64 In that case, the High Court had rejected several writ petitions challenging the processes which were issued by the Trial Judge on a complaint filed by the respondent in proceedings under Section 138 read with Section 141. The High Court held that the sanctioning of a scheme under Section 391 of the Companies Act, 1956 did not automatically amount to the compounding of an offence under Section 138 read with Section 141 of the NI Act. In other words, the sanctioning of the scheme under Section 391 of the Act of 1956 was held not to have the effect of terminating the proceedings for an offence under Section 138 of the NI Act. Justice AK Ganguly, speaking for the two judge Bench, observed that in most of the cases the offence under the NI Act had been committed prior to the scheme:
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> "19. In the instant appeal in most of the cases the offence under the NI Act has been committed prior to the scheme. Therefore, the offence which has already been committed prior to the scheme does not get automatically compounded only as a result of the said scheme. Therefore, even by relying on the ratio of the aforesaid judgment in J.K. (Bombay) (P) Ltd. [AIR 1970 SC 1041], this Court cannot accept the appellant's contention that the scheme under Section 391 of the Companies Act will have the effect of automatically compounding the offence under the NI Act." Reiterating further, the Court held:
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> "27. The compounding of an offence is always controlled by statutory provision. There are various features in the compounding of an offence and those features must be satisfied before it can be claimed by the offender that the offence has been compounded. Thus, compounding of an PART E offence cannot be achieved indirectly by the sanctioning of a scheme by the Company Court." 65 The submission of the appellant in the decision in JIK Industries (supra) was that a scheme of compromise under Section 391 of the Companies Act, 1956 operates as a 'deemed compounding' of an offence under the NI Act. This submission was rejected by the Court. Distinguishing between quashing of a case and compounding, the Court observed:
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> "43. Quashing of a case is different from compounding. In quashing the court applies it but in compounding it is primarily based on consent of the injured party. Therefore, the two cannot be equated. It is clear from the discussion made

hereinabove that Duncans Agro case [(1996) 5 SCC 591 :

1996 SCC (Cri) 1045] was not one relating to compounding of offence. Apart from that the Court found that the dues of the banks have been satisfied by receiving the money and the suits filed by the bank in the civil court have been compromised. The FIRs were filed in 1987-1988 and the investigation had not been completed till 1991. On those facts the Court, rendering the judgment in July 1996, felt that having regard to the lapse of time and also having regard to the fact that there is a compromise decree satisfying the banks' dues, there is no purpose in allowing the criminal prosecution to proceed. On those consideration, this Court, in the "special facts of the case", did not interfere with the order of the High Court dated 23-12-1992 whereby the criminal prosecution was quashed." 66 The Court then noted the submission of the complainant that there is no concept of "deemed compounding under the criminal law and that under the very concept of compounding, it cannot take place without the explicit consent of the complainant or the person aggrieved". Holding that the "Court finds a lot of substance in the aforesaid submission", Justice Ganguly observed:

PART E "54. Compounding of an offence is statutorily provided under Section 320 of the Code. If we look at the list of offences which are specified in the table attached to Section 320 of the Code, it would be clear that there are basically two categories of offences under the provisions of the Penal Code which have been made compoundable. There is a category of offence for the compounding of which leave of the court is required and there is another category of the offences where for compounding the leave of the court is not required. But all cases of compounding can take place at the instance of the persons mentioned in the Third Column of the Table. If the said Table is perused, it will be clear that compounding can only be possible at the instance of the person who is either a complainant or who has been injured or is aggrieved." 67 The above observations interpret the statutory provisions of section 320 which specify the person at whose instance compounding is permissible. Before moving forward, it is important to note a judgment of a three judge Bench of this Court in Damodar S Prabhu vs Sayed Babalal H 19 ("Damodar S Prabhu"), dealing with the provisions of Section 147 of the NI Act, where the Court held:

"10. ...At this point, it would be apt to clarify that in view of the non obstante clause, the compounding of offences under the Negotiable Instruments Act, 1881 is controlled by Section 147 and the scheme contemplated by Section 320 of the Code of Criminal Procedure (hereinafter "CrPC") will not be applicable in the strict sense since the latter is meant for the specified offences under the Penal Code, 1860." The Court then noted that:

"12. Section 147 of the Negotiable Instruments Act, 1881 is in the nature of an enabling provision which provides for the compounding of offences prescribed under the same Act, thereby serving as an exception to the general rule incorporated in

sub-section (9) of Section 320 CrPC which 2010 5 SCC 663 PART E states that "No offence shall be compounded except as provided by this section". A bare reading of this provision would lead us to the inference that offences punishable under laws other than the Penal Code also cannot be compounded. However, since Section 147 was inserted by way of an amendment to a special law, the same will override the effect of Section 320(9) CrPC, especially keeping in mind that Section 147 carries a non obstante clause." 68 The Court in Damodar S Prabhu (supra) observed that the permissibility of the compounding of an offence is linked to the perceived seriousness of the offence, and the nature of the remedy provided. In an offence involving the dishonor of a cheque, "it is the compensatory aspect of the remedy which should be given priority over the punitive aspect". At the same time, it was highlighted before the Court by the Attorney General, who appeared as amicus curiae, that cheque dishonor cases were being compounded or settled at the late stages of litigation, thereby contributing to delay in the delivery of justice. This, in part, was due to the fact that unlike Section 320 of the CrPC, Section 147 of the NI Act provides no explicit guidance on the stage at which compounding can or cannot be done and where compounding can be done at the instance of the complainant or with the leave of the Court. As a result, accused persons are willing to take a chance of progressing through various stages of a prosecution and to opt for the route of compounding only when no other option remains. Having regard to this problem, the Court prescribed certain guidelines to be followed in compounding, in exercise of its jurisdiction under Article 142 of the Constitution. The Court clarified that it was issuing these guidelines "which could be seen as an act of judicial law making and therefore an PART E intrusion into the legislature domain" because Section 147 did not carry any guidance on how to proceed with the compounding of offence under the NI Act. The Court again reiterated that it had "already explained that the scheme contemplated under Section 320 CrPC cannot be followed in the strict sense" and the jurisdiction under Article 142 was being exercised due to the presence of a legislative vacuum in the NI Act, in order to discourage litigants from unduly delaying the compounding of offence in cases involving Section 138. The Court in its guidelines indicated a scheme by imposing costs as a means for encouraging compounding at an early stage of the litigation.

69 The judgment in Damodar S Parabhu (supra) was cited before the two judge Bench in JIK Industries (supra) in support of the proposition that Section 147 of the NI Act, which is a special statute, does not incorporate the requirement of consent of the person aggrieved while compounding, as contemplated in Section 320 of the CrPC. This submission was however rejected by observing that though offences under the NI Act, which were previously non-compoundable in view of Section 320(9) of the CrPC, have now become compoundable, that did not do away with all the guidelines of Section 320:

"68. It is clear from a perusal of the aforesaid Statement of Objects and Reasons that offence under the NI Act, which was previously non-compoundable in view of Section

320 sub-section (9) of the Code has now become compoundable. That does not mean that the effect of Section 147 is to obliterate all statutory provisions of Section 320 of the Code relating to the mode and manner of compounding of an offence. Section 147 will only override Section 320(9) of the Code insofar as offence under Section 147 of the NI Act is concerned. This is also the ratio in Damodar [(2010) 5 SCC PART E 663 : (2010) 2 SCC (Civ) 520 : (2010) 2 SCC (Cri) 1328] (see para 12). Therefore, the submission of the learned counsel for the appellant to the contrary cannot be accepted." 70 The Court then relied on Section 4 of the CrPC, which is the governing statute in India for investigation, enquiry and trial of offences. Section 4, the Court held, deals both with offences under the IPC in sub-Section (1) and with offences under any other law in sub-Section (2). Hence, it was held that in the absence of a special procedure in the NI Act for compounding of offences, the procedure relating to compounding under Section 320 shall automatically apply in view of the clear mandate of sub-Section (2) of Section 4, which reads as follows:

"4. (2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences." In conclusion, the Court held:

"82. A perusal of Section 320 makes it clear that the provisions contained in Section 320 and the various sub- sections is a code by itself relating to compounding of offence. It provides for the various parameters and procedures and guidelines in the matter of compounding. If this Court upholds the contention of the appellant that as a result of incorporation of Section 147 in the NI Act, the entire gamut of procedure of Section 320 of the Code are made inapplicable to compounding of an offence under the NI Act, in that case the compounding of offence under the NI Act will be left totally unguided or uncontrolled. Such an interpretation apart from being an absurd or unreasonable one will also be contrary to the provisions of Section 4(2) of the Code, which has been discussed above. There is no other statutory procedure for compounding of offence under the NI Act.

PART E Therefore, Section 147 of the NI Act must be reasonably construed to mean that as a result of the said section the offences under the NI Act are made compoundable, but the main principle of such compounding, namely, the consent of the person aggrieved or the person injured or the complainant cannot be wished away nor can the same be substituted by virtue of Section 147 of the NI Act." 71 However, before we can apply the decision in JIK Industries (supra), it is important to acknowledge that there is a clear distinction between the provisions of Section 147 of the NI Act and Section 24A of the SEBI Act. A comparison of the provisions of Section 147 of the NI Act with Section 24A of the SEBI Act would indicate that both sets of statutory provisions begin with a non-obstante provision overriding the provisions of the CrPC, insofar as the compounding of offence is concerned. Having stipulated a non-obstante clause in Section 147 of the NI Act, Parliament has

provided that "every offence punishable under this Act shall be compoundable". Section 147 of the NI Act does not expressly incorporate the permission of the Court for compounding, conceivably because the impact of the crime is against an individual. Section 24A of the SEBI Act, while containing a similar non-obstante clause, excludes certain categories of offences, namely offences punishable with imprisonment only or with imprisonment and also with fine.

Section 24A stipulates that an offence punishable under the Act may be compounded by SAT or a Court before which such proceedings are pending. The power to compound is recognized either before or after the institution of any proceeding.

PART E 72 Hence, it is evident that Section 24A specifies the authorities vested with the powers to compound offences under the SEBI Act, while Section 147 of the NI Act merely states that the offence under the Act shall be compoundable. In a complaint filed under the NI Act, the complainant is an aggrieved party, invariably being the payee in a dishonored instrument. The consideration which weighed with the two judge Bench while interpreting the provisions of Section 147 of the NI Act in JIK Industries (supra) will therefore not be ipso facto attracted while construing the provisions of Section 24A of the SEBI Act. Further, since the two statutory provisions are not in pari materia, it is not necessary for this Court to express any opinion on the issue as to whether the judgment in JIK Industries (supra), which is of a two judge Bench, is contrary to the earlier three judge Bench decision in Damodar S Prabhu (supra). We are concerned in the present case with interpreting the provisions of Section 24A of the SEBI Act, and hence it is not necessary for this Court to construe Section 147 of the NI Act.

73 Subsequent to the decision in JIK Industries (supra), there is a decision of another two-judge Bench of this Court in VLS Finance (supra). The Company Judge of the Delhi High Court had dismissed an appeal assailing an order of the Company Law Board allowing an offence under Section 211(7) of Companies Act, 1956 to be compounded. A complaint was filed by the Registrar of Companies in the Court of the CMM, alleging that though the company had obtained certain land from the municipal corporation on a yearly license fee, the land had been shown in the schedule of fixed assets, which was not a fair view and was hence punishable under PART E Section 211(7) of the Companies Act, 1956. Before the Court in seisin of the case could proceed with the complaint, an application was filed before the CLB for compounding. Through the CLB's order, the offence was compounded against the payment of a fine.

74 For the purposes of the present discussion, it is material to note that the provision for compounding of offences was contained in Section 621-A of the Companies Act, 1956, in the following terms:

"621-A. Composition of certain offences —(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any offence punishable under this Act (whether committed by a company or any officer thereof), not being an offence punishable with imprisonment only, or with imprisonment and also with fine, may, either before or after the institution of any prosecution, be compounded by—

(a) the Company Law Board; or

(b) where the maximum amount of fine which may be imposed for such offence does not exceed five thousand rupees, by the Regional Director, on payment or credit, by the company or the officer, as the case may be, to the Central Government of such sum as that Board or the Regional Director, as the case may be, may specify:

> Provided that the sum so specified shall not, in any case, exceed the maximum amount of the fine which may be imposed for the offence so compounded:
>
> Provided further that in specifying the sum required to be paid or credited for the compounding of an offence under this sub- section, the sum, if any, paid by way of additional fee under sub-section (2) of Section 611 shall be taken into account." PART E Sub-Section (7) of Section 621-A provided as follows:
>
> "(7) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—
>
> (a) any offence which is punishable under this Act with imprisonment or with fine, or with both, shall be compoundable with the permission of the court, in accordance with the procedure laid down in that Act for compounding of offences;
>
> (b) any offence which is punishable under this Act with imprisonment only or with imprisonment and also with fine shall not be compoundable."

75 It was argued before this Court that when the Court was in seisin in the matter, it was only the Magistrate who could compound the offence. Further, in any event, the CLB had to seek the permission of the Court before it could compound. Dealing with the argument, Justice C K Prasad, speaking for the Bench, held:

> "17. Ordinarily, the offence is compounded under the provisions of the Code of Criminal Procedure and the power to accord permission is conferred on the court excepting those offences for which the permission is not required. However, in view of the non obstante clause, the power of composition can be exercised by the court or the Company Law Board. The legislature has conferred the same power on the Company Law Board which can exercise its power either before or after the institution of any prosecution whereas the criminal court has no power to accord permission for composition of an offence before the institution of the proceeding. The legislature in its wisdom has not put the rider of prior permission of the court before compounding the offence by the Company Law Board and in case the contention of the appellant is accepted, same would amount to addition of the words "with the prior permission of the court" in the Act, which is not permissible." PART E

76 The Court held that while interpreting the provisions of the statute, the words must be construed in their ordinary sense without any addition; and in that context it observed:

> "18. As is well settled, while interpreting the provisions of a statute, the court avoids rejection or addition of words and resorts to that only in exceptional circumstances to achieve the purpose of the Act or give purposeful meaning. It is also a cardinal rule of interpretation that words, phrases and sentences are to be given their natural, plain and clear meaning. When the language is clear and unambiguous, it must be interpreted in an ordinary sense and no addition or alteration of the words or expressions used is permissible. As observed earlier, the aforesaid enactment was brought in view of the need of leniency in the administration of the Act because a large number of defaults are of technical nature and many defaults occurred because of the complex nature of the provision." Hence, the powers under sub-Sections (1) and (7) of Section 621-A were held to be parallel powers to be exercised by the CLB or the authorities mentioned, and the prior permission of the Court was not necessary for compounding an offence when the power was exercised by the CLB.

77 Mr. Shyam Divan, learned senior Counsel, appearing on behalf of the appellant, has adverted, during the course of his submissions, to the judgment of a two Judge Bench of this Court in Meters and Instruments Pvt. Ltd. vs Kanchan Mehta 20 ("Meters and Instruments") where this Court observed that an offence under Section 138 of the NI Act "is primarily a civil wrong". It was held that the object of the NI Act being primarily compensatory, compounding at the initial stage has to (2018) 1 SCC 560 PART E be encouraged but is not debarred at a later stage subject to appropriate compensation as may be acceptable to the parties and the Court. Moreover, Justice A K Goel, speaking for the Bench, held that:

> "18.3. Though compounding requires consent of both parties, even in absence of such consent, the court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused."

78 Our attention has been drawn to the judgment of the Constitution Bench in Re: Expeditious Trial of cases under Section 136 of Negotiable Instruments Act 1881 in Suo Motu Writ Petition (Crl) No. 2 of 2020. The Constitution Bench considered the decision in Meters and Instruments (supra), where the two Judge Bench of the Court took the view that Section 143 of the NI Act confers an implied power on the Magistrate to discharge the accused if the complainant is compensated to the satisfaction of the Court. On that analogy, it was held that apart from compounding by consent of the parties, the Trial Court has jurisdiction to pass the jurisdictional order under Section 143 in exercise of its inherent power. The Constitution Bench, while disagreeing with the view in Meters and Instruments (supra) observed:

> "20. Section 143 of the Act mandates that the provisions of summary trial of the Code shall apply "as far as may be" to trials of complaints under Section 138. Section 258 of the Code empowers the Magistrate to stop the proceedings at any stage for reasons to

> be recorded in writing and pronounce a judgment of acquittal in any summons case instituted otherwise than upon complaint. Section 258 of the Code is not applicable to a summons case instituted on a complaint. Therefore, Section 258 cannot come into play in respect of the PART E complaints fled under Section 138 of the Act. The judgment of this Court in Meters and Instruments (supra) in so far as it conferred power on the Trial Court to discharge an accused is not good law. Support taken from the words "as far as may be" in Section 143 of the Act is inappropriate. The words "as far as may be" in Section 143 are used only in respect of applicability of Sections 262 to 265 of the Code and the summary procedure to be followed for trials under Chapter XVII. Conferring power on the court by reading certain words into provisions is impermissible. A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration.

He must not read in by way of creation [J. Frankfurter, "Of Law and Men: Papers and Addresses of Felix Frankfurter"]. The Judge's duty is to interpret and apply the law, not to change it to meet the Judge's idea of what justice requires [Dupont Steels Ltd. v. Sirs (1980) 1 All ER 529 (HL)]. The court cannot add words to a statute or read words into it which are not there [Union of India v. Deoki Nandan Aggarwal 1992 Supp (1) SCC 323]." Emphasis supplied 79 Before parting with the discussion on this aspect, it is necessary for us to refer to the judgment of the Bombay High Court in N H Securities Limited vs Securities and Exchange Board of India 21, where it was held that the consent of SEBI was necessary before an application of compounding could be allowed under Section 24A. A special leave petition challenging this judgment was filed before this Court22. This was disposed of by a two Judge Bench this Court through an order dated 17 September 2019, wherein SEBI agreed to "compounding of the offence subject to any penalty which may be imposed under Section 24(2)" of the SEBI Act. This was also allowed by this Court, keeping in mind the age of the directors of the appellant.

2018 SCC OnLine Bom 4040 Criminal Appeal No.1407 of 2019 (Arising out of S.L.P. (Criminal) No.1132 of 2019) PART E Pertinently, however, this Court noted that they "have not commented one way or the other on the larger questions sought to be raised by the appellants", i.e., on whether the consent of SEBI was necessary for compounding an offence under Section 24A. As such, the judgment and this Court's order have not adjudicated on the issue involved in the present case.

80 Section 24A of the SEBI Act commences with a non-obstante provision which operates notwithstanding anything contained in the CrPC. Sub-Sections (1) and (2) of Section 320 of the CrPC dealt with the compounding of offences under the IPC, while sub-Section (9) stipulates that no offence shall be compounded except as provided in the Section. However, the stipulation contained in sub-Section (9) of Section 320 ceases to have effect in relation to the compounding of offences under the SEBI Act by virtue of a specific non-obstante provision contained in Section 24A providing for the compounding by offences punishable under that legislation. Section 24A, by incorporating a non-obstante provision indicates a legislative intent to the effect that the power to compound offences punishable under the SEBI Act is not trammeled by the provisions of Section 320 of the CrPC. 81 At this stage, the ingredients of Section 24A of the SEBI Act must be delineated.

Section 24 A contains five ingredients when it specifies:

(i) The offences which can be compounded ("any offence punishable in this Act");

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(ii) The exceptions which the statutory provision carves out ("not being an offence punishable with imprisonment only or with imprisonment and also with fine");

(iii) The stage at which compounding may take place ("either before or after the institution of any proceedings");

(iv) The forum before which the compounding act takes place ("a Securities Appellate Tribunal or the Court before which such proceedings are pending"); and

(v) The entrustment of the power to compound to the SAT or the Court. 82 The entrustment of the exclusive power to compound offences under Section 24A of the SEBI Act to the SAT or the Court before which such a proceeding is pending is evinced by the expression "be compounded by a Securities Appellate Tribunal or a court before which such proceedings are pending". Section 24A thus contains a departure from the modalities which are prescribed in sub-Sections (1) and (2) of Section 320 of the CrPC. Section 320 of the CrPC, as we have noticed earlier, permits the compounding only of certain specified offences under the IPC. Section 320 contains a two-fold distinction between offences punishable under the IPC which can be compounded: (i) without the leave of the Court; and (ii) with the leave of the Court. In contrast, the power to compound under Section 24A is confined to offences punishable under the SEBI Act. The power is entrusted solely to the SAT or to the Court, before which the proceedings are pending. Hence, the PART E non-obstante provision contained in Section 24A must be given its natural meaning and effect.

83 The plain language of Section 24A does not provide for the consent of SEBI. The issue is whether this Court should read the requirement of the consent of SEBI into the provision, on the ground that this is a casus omissus. This would, however, amount to re-writing the statutory provision by introducing language which has not been employed by the legislature. In a two Judge Bench judgment of this Court in Union of India vs Rajiv Kumar 23, Justice Arijit Payasat speaking for the Court held:

> "22. While interpreting a provision, the court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. (See CST v. Popular Trading Co. [(2000) 5 SCC 511]) The legislative casus omissus cannot be supplied by judicial interpretative process.
>
> 23. Two principles of construction — one relating to casus omissus and the other in regard to reading the statute/statutory provision as a whole — appear to be well settled. Under the first principle a casus omissus cannot be supplied by the court

except in the case of clear necessity and when reason for it is found in the four corners of the statute itself. But, at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the legislature..." Emphasis supplied (2003) 6 SCC 516 PART E

84 In the present case, it is evident that Section 24A does not stipulate that the consent of SEBI is necessary for the SAT or the Court before which such proceedings are pending to compound an offence. Where Parliament intended that a recommendation by SEBI is necessary, it has made specific provisions in that regard in the same statute. Section 24B provides a useful contrast. Section 24B(1) empowers the Union Government on the recommendation of SEBI, if it is satisfied that a person who has violated the Act or the Rules or Regulations has made a full and true disclosure in respect of the alleged violation, to grant an immunity from prosecution for an offence subject to such conditions as it may impose. The second proviso clarifies that the recommendation of SEBI would not be binding upon the Union Government. In other words, Section 24B has provided for the exercise of powers by the Central Government to grant immunity from prosecution on the recommendation of SEBI. In contrast, Section 24A is conspicuously silent in regard to the consent of SEBI before the SAT or, as the case may be, the Court before which the proceeding is pending can exercise the power. Hence, it is clear that SEBI's consent cannot be mandatory before SAT or the Court before which the proceeding is pending, for exercising the power of compounding under Section 24A. 85 However, it is also important to remember that proceedings for the trial of offences under the SEBI Act are initiated on a complaint made by SEBI by virtue of Section 26 of the SEBI Act. SEBI is a regulatory and prosecuting agency under the legislation. Hence, while the statutory provisions do not entrust SEBI with an PART E authority in the nature of a veto under the provisions of Section 24A, it is equally necessary to understand the importance of its role and position.

E.5 Regulatory role of SEBI

86 The provisions of the SEBI Act, as analyzed earlier in this judgment, would

indicate the importance of the role which has been ascribed to it as a regulatory, adjudicatory and prosecuting agency. SEBI has vital functions to discharge in the context of maintaining an orderly and stable securities' market so as to protect the interests of investors. SEBI was established in 1988 by a government resolution, to urgently respond to the rapid growth of capital markets. In Sahara India Real Estate Corporation Ltd. vs SEBI 24 a two judge bench of this Court, considered this history in order to guide its interpretative exercise over the statutory provisions. Justice J S Khehar (as the learned Chief justice then was) noted in his concurring opinion that:

"298. The Securities and Exchange Board of India (SEBI) was established in 1988 by way of a government resolution to promote orderly and healthy growth of the securities market and for investors' protection. On account of tremendous growth of the capital market characterized particularly by increasing participation of the public, to sustain confidence in the capital market it was considered essential to ensure investors' protection. Accordingly, it was decided to vest SEBI with statutory powers, so as to enable it to deal effectively with all matters relating to the capital market." Justice Khehar also reproduced the rationale for the Amending Act of 2002, which would have a bearing on our present determination to the extent that it increased the (2013) 1 SCC 1 PART E quantum of imprisonment and monetary penalty that can be imposed under Section

24. The Court held:

"300. The SEBI Act was again amended in 1999, but insofar as the present controversy is concerned, the amendment of the SEBI Act in 2002 is of utmost relevance. The relevant part of the Statement of Objects and Reasons of the amendment of the SEBI Act in 2002 is being reproduced below: "2. Recently many shortcomings in the legal provisions of the Securities and Exchange Board of India Act, 1992 have been noticed, particularly with respect to inspection, investigation and enforcement. Currently, the SEBI can call for information, undertake inspections, conduct enquiries and audits of stock exchanges, mutual funds, intermediaries, issue directions, initiate prosecution, order suspension or cancellation of registration. Penalties can also be imposed in case of violation of the provisions of the Act or the Rules or the Regulations. However, the SEBI has no jurisdiction to prohibit issue of securities or preventing siphoning of funds or assets stripping by any company. While the SEBI can call for information from intermediaries, it cannot call for information from any bank and other authority or board or corporation established or constituted by or under any Central, State or Provincial Act. The SEBI cannot retain books of account, documents, etc., in its custody. Under the existing provisions contained in the Securities and Exchange Board of India Act, 1992, the SEBI cannot issue commissions for the examination of witnesses or documents. Further, the SEBI has pointed out that existing penalties are too low and do not serve as effective deterrents. At present, under Section 209-A of the Companies Act, 1956, the SEBI can conduct inspection of listed companies only for violations of the provisions contained in sections referred to in Section 55-A of that Act but it cannot conduct inspection of any listed public company PART E for violation of the SEBI Act or Rules or Regulations made thereunder.

3. In addition, growing importance of the securities markets in the economy has placed new demands upon the SEBI in terms of organizational structure and institutional capacity. A need was, therefore, felt to remove these shortcomings by strengthening the mechanisms available to the SEBI for investigation and enforcement so that it is better equipped to investigate and enforce against market

malpractices.

4. In view of the above, the Securities and Exchange Board of India (Amendment) Ordinance, 2002 (6 of 2002) was promulgated on 29-10-2002 to amend the Securities and Exchange Board of India Act, 1992.

5. It is now proposed to replace the Ordinance by a Bill, with, inter alia, the following features—

(a) increasing the number of members of the SEBI from six (including Chairman) to nine (including Chairman);

(b) conferring power upon the Board for—

(i) calling for information and record from any bank or other authority or Board or corporation established or constituted by or under any Central, State or Provincial Act in respect of any transaction in securities which are under investigation or inquiry by the Board;

(ii) passing an order for reasons to be recorded in writing, in the interest of investors or securities market, either pending investigation or enquiry or on completion of such investigation or inquiry for taking any of the following measures, namely, to— (A) suspend the trading of any security in a recognised stock exchange;

PART E (B) restrain persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities; (C) suspend any office-bearer of any stock exchange or self-regulatory organisation from holding such position;

(D) impound and retain the proceeds or securities in respect of any transaction which is under investigation;

(E) attach, after passing of an order on an application made for approval by the Judicial Magistrate of the First Class having jurisdiction, for a period not exceeding one month, one or more bank account or accounts of any intermediary or any person associated with the securities market in any manner involved in violation of any of the provisions of this Act, or the Rules or the Regulations made thereunder; (F) direct any intermediary or any person associated with the securities market in any manner not to dispose of or alienate an asset forming part of any transaction which is under investigation;

(iii) regulating or prohibiting for the protection of investors, issue of prospectus, offer document or advertisement soliciting money for issue of securities;

(iv) directing any person to investigate the affairs of intermediary or person associated with the securities market and to search and seize books, registers, other documents and records considered necessary for the purposes of the investigation, with the prior approval of a Magistrate of the First

Class;

(v) passing an order requiring any person who has violated or is likely to violate, any provision of the SEBI Act or any Rules or Regulations made thereunder to cease and desist for committing any (sic act) causing such violation;

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(c) prohibiting manipulative and deceptive devices, insider trading, fraudulent and manipulative trade practices, market manipulation and substantial acquisition of securities and control;

(d) crediting sums realised by way of penalties to the Consolidated Fund of India;

(e) amending the composition of the Securities Appellate Tribunal from one person to three persons;

(f) changing the qualifications for appointment as Presiding Officer and members of the Securities Appellate Tribunal;

(g) composition of certain offences by the Securities Appellate Tribunal;

(h) conferring power upon the Central Government to grant immunity;

(i) appeal to the Supreme Court from the orders of the Securities Appellate Tribunal;

(j) enhancing the penalties specified in the SEBI Act." (emphasis supplied) 87 Therefore, the SEBI Act and the rules, regulations and circulars made or issued under the legislation, are constantly evolving with a concerted aim to enforce order in the securities market and promote its healthy growth while protecting investor wealth. A three judge bench of this Court, in B S E Brokers' Forum vs Securities and Exchange Board of India25, appreciated the extent of the powers and functions that had been entrusted with the SEBI and held:

> "17.... The Act in question is 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. The Board is established (2001) 3 SCC 482 PART E under Section 3 of the Act. Section 11 of the Act defines the powers and functions of the Board which mandates that 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. Sub-section (2) of the said section enumerates the various areas in which the Board is mandated to take measures to fulfil the objects of the Act. They include such measures as (i) regulating the business in stock exchanges and any other securities markets; (ii) registering and regulating the working of stockbrokers and other intermediaries; (iii) registering and regulating the working of

> the depositories etc.; (iv) registering and regulating the working of venture capital funds and collective investment schemes, including mutual funds; (v) promoting and regulating self-regulatory organizations; (vi) prohibiting fraudulent and unfair trade practices relating to securities markets; (vii) promoting investors' education and training of intermediaries; (viii) prohibiting insider trading in securities;
>
> (ix) regulating substantial acquisition of shares and takeover of companies; (x) collection of information, inspection, conducting inquiries and audits of the stock exchanges, mutual funds, other persons associated with the securities market and other intermediaries and self-regulatory organizations in the securities market; (xi) performing such other functions as are delegated to it by the Central Government; (xii) conducting research for the above purposes; (xiii) providing necessary information for the efficient discharge of the functions of the organizations with securities markets etc. The said Board is also vested with certain powers of the civil courts under the Code of Civil Procedure, 1908 in regard to discovery, production, summoning and enforcing the attendance of persons and inspection of books, registers etc. Section 11(2)(k) of the Act empowers the Board to levy fees or other charges for carrying out the purposes enumerated in Section 11 of the Act.

Section 12 requires the stockbrokers, sub-brokers, share- transfer agents, bankers to an issue, trustees of trust deeds, registrars to an issue, merchant bankers, underwriters, portfolio managers, investment advisors and such other intermediaries who may be associated with the securities market to get themselves registered and obtain a certificate of registration from the Board in accordance with the Regulations made under this Act. Section 12(2) empowers the Board to collect such fees as may be determined by the Regulations from the applicants who seek registration." PART E 88 In a consistent line of precedent, this Court has been mindful of the public interest that guides the functioning of SEBI and has refrained from substituting its own wisdom over the actions of SEBI 26. Its wide regulatory and adjudicatory powers, coupled with its expertise and information gathering mechanisms, imprints its decisions with a degree of credibility. The powers of the SAT and the Court would necessarily have to align with SEBI's larger existential purpose. A two judge bench of this Court, in SEBI vs Kishore R Ajmera 27, had echoed this understanding when speaking through Justice Kurian Joseph, it held:

> "25. The SEBI Act and the Regulations framed thereunder are intended to protect the interests of investors in the Securities Market which has seen substantial growth in tune with the parallel developments in the economy. Investors' confidence in the capital/securities market is a reflection of the effectiveness of the regulatory mechanism in force. All such measures are intended to pre-empt manipulative trading and check all kinds of impermissible conduct in order to boost the investors' confidence in the capital market. The primary purpose of the statutory enactments is to provide an environment conducive to increased participation and investment in the securities market which is vital to the growth and development of the economy. The provisions of the SEBI Act and the Regulations will, therefore, have to be understood and interpreted in the above light." Similarly, a two judge bench of this

Court, in Securities and Exchange Board of India vs Ajay Agarwal 28, while determining the scope of the regulatory body's powers under Section 11(B) to restrain persons from accessing the securities market, had elaborated on the special nature of the legislation and implored the G L Sultania vs Securities & Exchange Board of India, (2007) 5 SCC 133, para 84; PGF Ltd vs Union of India, (2015) 13 SCC 50, paras 46-58; SEBI vs Akshya Infrastructure (P) Ltd., (2014) 11 SCC 112; SEBI vs Saikala Associates Ltd., (2009) 7 SCC 432, para 16 (2016) 6 SCC 368 (2010) 3 SCC 765 PART E Courts to exercise their interpretative role in a manner that furthers SEBI's statutory objectives. The Court, speaking through Justice A K Ganguly, held:

"33. If we look at the legislative intent for enacting the said Act, it transpires that the same was enacted to achieve the twin purposes of promoting orderly and healthy growth of securities market and for protecting the interest of the investors. The requirement of such an enactment was felt in view of substantial growth in the capital market by increasing the participation of the investors. In fact such enactment was necessary in order to ensure the confidence of the investors in the capital market by giving them some protection.

34. The said Act is pre-eminently a social welfare legislation seeking to protect the interests of common men who are small investors. It is a well-known canon of construction that when the court is called upon to interpret provisions of a social welfare legislation the paramount duty of the court is to adopt such an interpretation as to further the purposes of law and if possible eschew the one which frustrates it...." Therefore, in line with the object of the SEBI Act and the precedents of this Court, it would be our task to interpret Section 24A in a manner that furthers the statutory role of SEBI, rather than one which thwarts its considered course of action.

89 Section 24(1) is an omnibus provision for all offences punishable for contravention (or attempts or abetments) of the provisions of the Act or of any rule or regulation made under it. As we have seen earlier, prior to Amending Act 59 of 2002 which came into effect from 29 October 2002, the punishment for offences extended to a period of one year of imprisonment, or with fine, or with both under Section 24(1). The term of imprisonment has been extended to up to ten years and a fine of Rs twenty-five crores by the amending legislation of 2002. The rationale for this amendment, as evinced from its Statement of objects and reasons, was to provide PART E an effective deterrent for potential wrongdoers. Offences punishable under sub- Section (1) of Section 24 would cover a range of violations from the venial to the serious. The entrustment of the power to compound offences either before or after the institution of any proceeding is to SAT or a Court before which such proceedings are pending. The provisions of Section 24A must be read in a manner consistent with the object and purpose underlying the position of SEBI as an expert regulator. SEBI, as the regulator, is entrusted with diverse roles and functions including the power to regulate the securities' market, make regulations and to enforce the provisions of the Act. Its functions have been recognized in a panoply of statutory provisions. Independent of initiating a prosecution, SEBI has been entrusted with wide ranging powers and functions including the power to investigate, to issue directions and levy penalties and make cease and desist orders. 90 While the statute has entrusted

the powers of compounding offences to SAT or to the Court, as the case may be, before which the proceedings are pending, the view of SEBI as an expert regulator must necessarily be borne in mind by the SAT and the Court, and would be entitled to a degree of deference. While SEBI does not have a veto, having regard to the language of Section 24A, its views must be elicited. The view of SEBI, an envisaged in the FAQs accompanying SEBI's circular dated 20 April 2007, must undoubtedly be sought by the SAT or the Court, to decide on whether an offence should be compounded. For SEBI can provide an expert view on the nature and gravity of the offence and its implication upon the protection of investors and the stability of the securities' market. These considerations and others PART E which SEBI may place before the SAT or the Court, would be of relevance in determining as to whether an application for compounding should be allowed. We, therefore, hold that before taking a decision on whether to compound an offence punishable under Section 24 (1), the SAT or the Court must obtain the views of SEBI for furnishing guidance to its ultimate decision. These views, unless manifestly arbitrary or mala fide, must be accorded a high degree of deference. The Court must be wary of substituting its own wisdom on the gravity of the offence or the impact on the markets, while discarding the expert opinion of the SEBI. 91 It is also important to note that the legislative scheme of the SEBI Act delineates several actions that are liable for penalty under Section 15, but includes a common sentencing provision under Section 24. Therefore, Section 24 would be the sentencing provision for the most banal of offences, to the most egregious of market disruptions and frauds. The maximum punishment prescribed under Section 24 has also seen an amendment and increase by the Amending Act 59 of 2002, in order to ensure effective deterrence. In exercising the power of compounding under Section 24A, the SAT or the Court must be conscious of the gravity of the offences that the accused are being prosecuted for, considering that the legislative scheme does not individually prescribe separate sentencing provisions which would otherwise have provided an insight into the gravity and gradation of the offences. Hence, SEBI's view on the compounding would become all the more important, in this light.

PART F

F Guidelines for Compounding under Section 24A

92 Section 24A only provides the SAT or the Court before which proceedings are pending with the power to compound the offences, without providing any guideline as to when should this take place. Hence, we deem it necessary to elucidate upon some guidelines which SAT or such Courts must take into account while adjudicating an application under Section 24A:

(i) They should consider the factors enumerated in SEBI's circular dated 20 April 2007 and the accompanying FAQs, while deciding whether to allow an application for a consent order or an application for compounding. These factors, which are

non-exhaustive, are:

"Following factors, which are only indicative, may be taken into consideration for the purpose of passing Consent Orders and also in the context of compounding of offences under the respective statute:

1. Whether violation is intentional.

2. Party's conduct in the investigation and disclosure of full facts.

3. Gravity of charge i.e. charge like fraud, market manipulation or insider trading.

4. History of non-compliance. Good track record of the violator i.e. it had not been found guilty of similar or serious violations in the past.

5. Whether there were circumstances beyond the control of the party.

6. Violation is technical and/or minor in nature and whether violation warrants penalty.

7. Consideration of the amount of investors' harm or party's gain.

8. Processes which have been introduced since the violation to minimize future violations/lapses.

9. Compliance schedule proposed by the party.

10. Economic benefits accruing to a party from delayed or avoided compliance.

PART F

11. Conditions where necessary to deter future non-

compliance by the same or another party.

12. Satisfaction of claim of investors regarding payment of money due to them or delivery of securities to them.

13. Compliance of the civil enforcement action by the accused.

14. Party has undergone any other regulatory enforcement action for the same violation.

15. Any other factors necessary in the facts and circumstances of the case."

(ii) According to the circular dated 20 April 2007 and the accompanying FAQs, an accused while filing their application for compounding has to also submit a copy to SEBI, so it can be placed before the HPAC. The recommendation of the HPAC is then filed before the SAT or the Court, as the case may be. As such, the SAT or the Court must give due deference to such opinion. As mentioned above, the opinion of HPAC and SEBI indicates their position on the effect of non-prosecution on maintainability of market structures. Hence, the SAT or the Court must have cogent reasons to differ from the opinion provided and should only do so when it believes the reasons provided by SEBI/HPAC are mala fide or manifestly arbitrary;

(iii) The SAT or Court should ensure that the proceedings under Section 24A do not mirror a proceeding for quashing the criminal complaint under Section 482 of the CrPC, thereby providing the accused a second bite at the cherry. The principle behind compounding, as noted before in this judgment, is that the aggrieved party has been restituted by the accused and it consents to end the dispute. Since the aggrieved party is not present before the SAT or the Court and most of the offences are of a public character, it should be PART G circumspect in its role. In the generality of instances, it should rely on the SEBI's opinion as to whether such restitution has taken place; and

(iv) Finally, the SAT or the Court should consider whether the offence committed by the party submitting the application under Section 24A is private in nature, or it is of a public character, the non-prosecution of which will affect others at large. As such, the latter should not be compounded, even if restitution has taken place.

G Analysis on facts and conclusion

93 In the present case, we are clearly of the view that the nature of the

allegations against the appellant are such so as to preclude a decision to compound the offences. We have adverted, in a considerable amount of detail, to the circumstances which have been narrated in the counter affidavit filed by SEBI. We find merit in the submissions which has been urged before the Court by learned Senior Counsel who appeared on behalf of SEBI that the allegations in the present case involved serious acts which impinged upon the protection of investors and the stability of the securities' market. The observation in the order of adjudication of the Chairperson of the SEBI dated 22 September 2000, that no loss has been caused to the investors as a result of the proposal which was submitted by the promoters to purchase the shares at the rate of Rs 12 per share, would not efface the element of alleged wrong doing. Such alleged acts of price rigging and manipulation of the prices of the shares have a vital bearing on investors' wealth and the orderly PART G functioning of the securities market. SEBI was, therefore, justified in opposing the request for the compounding of the offences. The matter was referred to the HPAC constituted by SEBI and presided over by a former judge of the Bombay High Court, which denied the request for compounding. This decision which has been taken by SEBI is not mala fide nor does it suffer from manifest arbitrariness. On the contrary, having due regard to the nature of the allegations, we are of the view that an order for compounding was not warranted.

94 For the above reasons, we affirm the judgment of the High Court of Delhi, however, for the reasons which have been indicated in this judgment. 95 The appeal shall stand disposed of in the above terms. 96 Impleadment and interventions allowed. Pending application(s), if any, stand disposed of.

……..…..……J. [Dr Dhananjaya Y Chandrachud]
……J. [M R Shah] New Delhi;

July 23, 2021