S.E.B.I. And Ors vs Alliance Finstock Ltd And Ors on 3 November, 2015

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Bench: Shiva Kirti Singh, Vikramajit Sen

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.4493 OF 2006

S.E.B.I. …..Appellants

Versus

Alliance Finstock Ltd. & Ors. Etc. Etc. …..Respondents

W I T H

C.A.No. 4743 of 2006

J U D G M E N T

SHIVA KIRTI SINGH, J.

Both the appeals have been preferred under Section 15Z of the Securities & Exchange Board of India Act, 1992 (for brevity 'the SEBI Act') against a common judgment and order dated 09th May 2006 rendered by the learned Securities Appellate Tribunal (for brevity 'the SAT') in Appeal No.123 of 2004 and other analogous appeals filed by the stock brokers (respondents herein) to challenge the action of the Securities & Exchange Board of India (for short, 'the SEBI') denying them the benefit of fee continuity in terms of paragraph 4 of Schedule III to the Securities & Exchange Board of India (Stock Brokers and Sub-Brokers) Regulations, 1992 [hereinafter called 'the Regulations'].

The SAT formulated the issue falling for determination in the form of a question – "whether stock brokers who have converted their individual/partnership membership into a corporate entity prior

to April 01, 1997 are entitled to the fee continuity benefit in terms of paragraph 4 of Schedule III ....". Since the SAT answered the question in favour of the stock brokers (the respondents herein), SEBI is in appeal. The basic facts are common in all the matters inasmuch as the concerned broker was previously member of the Bombay Stock Exchange (for short, 'BSE') in his individual capacity or as a partnership firm. He opted to form a corporate entity under the provisions of the Companies Act 1956 prior to April 01, 1997 and carried on the brokers' business under the name and style of new corporate entity by getting its membership converted through approval of BSE leading to registration by the SEBI as a corporate entity. Undoubtedly, no stock broker or sub-broker can buy, sell or deal in securities unless it is granted Certificate of Registration by SEBI under the Regulations and for that, ordinarily the stock broker is required to pay the requisite fees in the manner provided in the Regulations. In particular, Regulation 10 provides that every applicant eligible for the grant of a certificate shall pay such fees and in such manner as is specified in Schedule III to the Regulations.

Although the controversy relates to paragraph 4 of Schedule III, some other paragraphs are also relevant and hence these along with paragraph 4 are extracted hereinbelow :

> "I. Fees to be paid by the Stock Broker.
>
> 1. Every stock broker shall subject to paragraphs 2 and 3 of this Schedule pay registration fees in the manner set out below :
>
> where the annual turnover does not exceed rupees one crore during any financial year, a sum of rupees five thousand for each financial year;
>
> where the annual turnover of the stock-broker exceeds rupees one crore during any financial year, a sum of rupees five thousand plus one hundredth of one per cent of the turnover in excess of rupees one crore for each financial year;
>
> .... after the expiry of five financial years from the date of initial registration as a stock-broker, he shall pay a sum of rupees five thousand for every block of five financial years commencing from the sixth financial year after the date of grant of initial registration to keep his registration in force.

2. Fees referred to in clauses (a) and (b) of paragraph 1 above shall be paid -

in respect of the financial year 1992-93 within one month of the commencement of these regulations;

in respect of the financial year beginning on the 1st day of April, 1993 and the following financial years, on or before the first day of October of the financial year to which such payment relates, and such fees shall be computed with reference to the annual turnover relating to the preceding financial year.

.... Where a corporate entity has been formed by converting the individual or partnership membership card of the exchange, such corporate entity shall be exempted from payment of fee for the period for which the erstwhile individual or partnership member, as the case may be, has already paid the fees subject to the condition that the erstwhile individual or partner shall be the whole-time director of the corporate member so converted and such director will continue to hold a minimum of 40 per cent shares of the paid-up equity capital of the corporate entity for a period of at least three years from the date of such conversion.

Explanation: It is clarified that the conversion of individual or partnership membership card of the exchange into corporate entity shall be deemed to be in continuation of the old entity and no fee shall be collected again from the converted corporate entity for the period for which erstwhile entity has paid the fee as per the regulations.

4A. .... If a stock broker fails to remit fees in accordance with Paragraphs 1 and 2, he shall be liable to pay interest at 15% per annum for each month of delay or part thereof.

Provided that the liability to pay interest as aforesaid may be in addition to any other action which the Board, may take as deemed fit against the stock broker under the Act, or the Regulations.

Provided further .... Manner of Fees to be paid.

The fees specified above shall be paid on or before the 1st day of October each year payable by draft in favour of "The Securities and Exchange Board of India" at Bombay, or at the respective regional office".

Case of the SEBI is that since Para 4 of Schedule III was introduced by an amending notification dated 21.1.98 which states in Para 2 that the amendment will be effective from the date of notification i.e, 21.1.98, the annual fee payable by registered brokers would remain unaffected for the earlier year ending 31.3.97 and it can at best be effected only in respect of fees payable for the year 1.4.97 onwards. On such premise it has been forcefully contended on behalf of the appellants that the SAT has erred in granting retrospectivity to the provisions of para 4 by granting the benefit of fee continuity even to entities which acquired corporate membership on conversion even prior to 1.4.97.

The submission of Mr. C.U. Singh, learned Senior Counsel for the SEBI, are to the following effect:-

(1) SEBI cannot make retrospective Regulations.

(2) Rules and regulations are generally prospective unless explicitly made retrospective.

(3) While bestowing a new benefit, the concerned statutory authority can always choose a cut off date.

(4) Unless the cut off date suffers from arbitrariness, there can be no interference.

(5) Materials like press statement or letter cannot act as estoppel against the statutory provisions such as the Regulations.

In support of the first and second submission it has been pointed out that Section 30 of the SEBI Act vests the Board with the power to make regulations consistent with the Act and the rules made thereunder so as to carry out the purposes of the Act and there is nothing specific in this Section granting power to frame regulations with retrospective effect. To further support this proposition, reliance has been placed upon judgments in the case of (1) K Narayanan v. State of Karnataka, 1994 Supp. (1) SCC 44, (2) Mohd. Rashid Ahmad v. State of U.P., (1979) 1 SCC 596 and (3) Mahadeolal Kanodia v. The Administrator General of West Bengal, (1960) 3 SCR 578 = AIR 1960 SC 936. In K. Narayanan a retrospective rule was struck down on ground of unjust and unfair effect upon a section of officials and therefore held discriminatory and violative of Articles 14 and 16. In Mohd. Rashid Ahmed the Court was dealing with service matter and was called upon to decide whether a particular rule could be given retrospective effect. Since the statute vested the State Government with power to frame rules even with retrospective effect, the relevant provision was held to be retrospective after reiterating an established rule of construction "that retrospective operation is not to be given to a statute so as to impair an existing right or obligation other than as regards the matter of procedure, unless that effect cannot be avoided without doing violence to the language of enactment." Similar view was expressed in the case of Mahadeolal. Reliance was also placed upon a Constitution Bench judgment in the case of K.S. Paripoornan v. State of Kerala & Ors., (1994) 5 SCC 593. There the issue related to retrospectivity but in an entirely different context of whether there must be clear intendment in the law if an amendment dealing with substantive rights is to apply to pending legal proceedings, initiated prior to the commencement of the amending Act. The majority held that the intendment in such a situation must be in clear terms. In the case of C. Gupta v. Glaxo-Smithkline Pharmaceuticals Ltd., (2007) 7 SCC 171 the Court, in the context of benefits under the Workmen's Compensation Act, reiterated the well established law that an enactment in order to be read as retrospective, must have an express provision to that effect or same effect must flow by necessary implication or intendment. The aforementioned case laws have been noticed out of deference to the submissions but in fact they do not serve much purpose because the law governing the field is otherwise also quite settled. Although the amending notification introducing para 4 of Schedule III is effective from 21.1.1998, on the plea of convenience and logic the appellant has itself clarified that the provisions of para 4 will be effective from an earlier date, viz., 1.4.1997. By relying upon some case laws such as in the case of National Council For Teacher Education v. Shri Shyam Shiksha Prashikshan Sansthan (2011) 3 SCC 238 it has been contended that appellant is entitled to fix a cut-off date such as 1.4.1997. It has been highlighted that fees are to be computed and paid for every financial year hence introduction of the concession under paragraph 4 w.e.f. beginning of a financial year 1997- 1998 is reasonable and serves a purpose. Appellant emphasized the reasons for introducing incentive for corporatisation of individual or partnership entities for carrying out business of brokerage in shares etc. by referring to a speech of the then Finance Minister as well as a Memorandum explaining the provisions in the Finance Bill, 1997. It was argued on behalf of appellant that capital gains exemptions were granted as a one time measure during the concerned financial year to encourage corporatisation of stock brokers' cards and hence the action of SEBI in

introducing paragraph 4 of Schedule III in the Regulations needs to be construed only as a prospective measure and not as one conferring benefit to even such entities who had acquired corporate entity prior to 1.4.1997.

In reply Mr. Shyam Divan, learned senior advocate appearing for some of the respondents used the same background facts to contend that in principle SEBI accepted the proposition that if the same entity had paid fees as a stock broker and it continues to do the same business by converting into a corporate entity then fees paid for the earlier years needed recognition. On this principle the effect of paragraph 4 to Schedule III was to place an embargo on the powers of SEBI on and after the amendment introduced w.e.f. 21.1.1998 to collect any fees from the new entity by ignoring the fees earlier paid by the previous avatar of the new entity. According to Mr. Divan a fee is a fiscal levy and, therefore, principles applicable to interpretation of legal provisions governing a fiscal levy are attracted in the present case and not the rules of interpretation governing other laws. According to him the plain language of paragraph 4 is decisive and that led to the decision under appeal against SEBI. According to him even if some amount of ambiguity is found in the relevant provision then the interpretation which is favourable to the brokers needs to be adopted. He further made a distinction between power to a levy duty or fee and the power of collection. According to him a competent authority, in this case SEBI, can decide for itself whether to proceed with collection or not. Embargo on collection, according to him, is clearly prospective in the present facts.

On behalf of respondents reliance was placed upon judgment in the case of Mathuram Agrawal v. State of Madhya Pradesh (1999) 8 SCC 667 wherein, in the context of municipal taxes, this Court held that the intention of the Legislature in a taxing statute is to be gathered from the express language particularly where it is plain and unambiguous. It is not permissible to add or substitute words for giving a meaning to such statutes for the purpose of serving the perceived spirit or intention of the Legislature. Reliance was also placed upon Somaiya Organics (India) Ltd. v. State of U.P. (2001) 5 SCC 519 for supporting the submission that in law there is a clear distinction between levy and collection of taxes. In the case of Somaiya Organics the Constitution Bench noted that Article 265 of the Constitution uses the words ‘levy’ and ‘collect’. The Court went on to hold that these words are not synonymous terms. This distinction was required to be made in that case because certain provisions had been declared illegal only prospectively. In that context it was held that while “levying” would mean the assessment or charging or imposing of tax, “collection” would mean the fiscal realization of the tax levied or imposed. It was also pointed out that ordinarily collection of tax is a stage subsequent to the levy of the same. It is not necessary to multiply case laws cited on these points.

Respondents referred to a Press Release dated 28.12.2001 publicising the decisions that were taken in the meeting of the SEBI Board on that date. In sub-para (e) of para 2 it is disclosed that the SEBI Board considered the representations made by the brokers in the light of relevant materials and decided the following :

> “2. Broker Fees – Amendment to SEBI (Stock Broker and Sub Broker) Regulations a. ....
>
> b. ….. ….. …..

c. …. …. ….
d. …. …. ….

e. the fee-continuity benefit which was given to all brokers, who had

corporatised after January 21, 1998 (the date on which the SEBI (Stock Broker and Sub Broker) Regulations were amended) and also to those who corporatised between April 1, 1997 and January 21, 1998 would be extended to all brokers who had corporatised prior to April 1, 1997, provided that SEBI has not collected fees from any such broking entity already.

f. …. …. ….” It was also pointed out that Explanation of paragraph 4 to Schedule III of the Regulations was inserted through an amendment regulation of 2002 w.e.f. 20.2.2002 and submitted that the entire provision in the Explanation was to give statutory base to the decision contained in the Press Release highlighted above. The Explanation reads thus :

“Explanation : It is clarified that the conversion of individual or partnership membership card of the exchange into corporate entity shall be deemed to be in continuation of the old entity and no fee shall be collected again from the converted corporate entity for the period for which the erstwhile entity has paid the fee as per the regulations.” Reliance was placed upon judgments in the case of K.P. Varghese v. Income Tax Officer Ernakulam (1981) 4 SCC 173 and also in the case of Commissioner of Sales Tax, U.P. v. Indra Industries (2000) 9 SCC 66 in support of the submission that the Press Release may not be having statutory effect but it helps in understanding the intention of SEBI Board which issued the Release. In other words, the respondents sought to rely upon the principle of contemporanea expositio as propounded in the case of K.P. Varghese. In Indra Industries the circulars issued by the Income Tax Department were held to have binding effect upon the taxing authorities though it may not be binding on the courts or on the assessee.

For highlighting the general principles concerning retrospectivity of a statutory Act, Rule or notification, Mr. Divan relied upon a Constitution Bench judgment in the case of CIT v. Vatika Township (P) Ltd., (2015) 1 SCC

1. In paragraphs 27, 28 and 29 the Court recollected the clear legal position agreed to by the parties and thereafter some exceptions as to when and why the general rule against retrospectivity is inapplicable, was pointed out in paragraph 30 which is as follows:-

“30. We would also like to point out, for the sake of completeness, that where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators’ object, then the

presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. In Govt. of India v. Indian Tobacco Assn., (2005) 7 SCC 396 the doctrine of fairness was held to be relevant factor to construe a statute conferring a benefit, in the context of it to be given a retrospective operation. The same doctrine of fairness, to hold that a statute was retrospective in nature, was applied in Vijay v. State of Maharashtra, (2006) 6 SCC 289. It was held that where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature. However, we are (sic not) confronted with any such situation here." The Court then concluded that "In such cases, retrospectivity is attached to benefit the persons in contradistinction to the provision imposing some burden or liability where the presumption attaches towards prospectivity." The Court also extracted relevant explanation in respect of "declaratory statutes" from the book Principles of Statutory Interpretation by Justice G.P. Singh to make the legal position clear that if a statute is curative, explanatory or merely declaratory of an earlier law, it is generally intended to have retrospective operation.

Learned counsel appearing on behalf of several other respondents have supported the contentions advanced by Mr. Divan that on plain construction of the concerned Regulation i.e, para 4 of Schedule III, it can safely be held that the provisions merely look at some past happenings but the benefits are to accrue to the eligible entities only in future and hence the provisions do not operate retrospectively. Further stand of the respondents is that SEBI itself cannot question the validity of the circulars and policy decisions declared by the SEBI Board and such circulars and declarations granting benefits even from a retrospective date cannot be held bad in law in view of law noticed and laid down in Vatika case. The matter could have been different if SEBI had attempted to impose liabilities or create obligations upon stock brokers from a retrospective date. In case of conferment of benefits, no vested rights are adversely affected and in such cases retrospective operation is protected and permissible on the principles noticed in Vatika case. In reply Mr. C.U. Singh referred to policy circular dated 28.3.2002 which inter alia states that pursuant to a judgment of this Court dated 1.2.2001 directing SEBI to amend the Regulations in light of recommendations of the R.S. Bhatt Committee report, SEBI had examined representations from the brokers and issued clarifications contained in part A of the circular. Part A, inter alia, contains a clarification in respect of applicability of the notification on exemption from fees on corporatization. The clarification reads thus "the spirit behind notification dated 21.1.1998 was to give benefit of this amendment to stock brokers who have converted their individual stock partnership membership into corporate on or after 1.4.1997. Accordingly such stock brokers shall be given the benefit of continuity subject to the satisfaction of conditions mentioned in the notification." On a careful consideration of rival submissions and keeping in view the relevant case laws relied upon by the parties we have examined analytically and carefully paragraph 4 as well as the explanations thereto in Schedule III of the

> Regulations. We find that para 4 was no doubt inserted through an amendment with effect from 21.1.1998 but it does not disclose, either explicitly or even by necessary implication, that although possessing the required qualifications, a corporate entity formed earlier to 21.1.1998 would not be exempted from payment of fee for the period for which the erstwhile individual or partnership members has already paid the fees. In respect of a legislation of fiscal character such as the present provision which relates to fees, it will not be proper or permissible to read into or delete words which do not exist in the provision. Further even if there is any scope of doubt, the benefit of such doubt will go to the subject i.e., the stock brokers and not to authority, in this case the SEBI. We further find that the explanation to para 4 introduced with effect from 20.2.2002 takes complete care of any doubt, if at all it could exist, by providing a deeming fiction that in the case of conversion of entities having individual or partnership membership card into a corporate entity, the corporate entity shall be deemed to be a continuation of the entity in respect of collection of fees from the converted corporate entity.

Further, an embargo has been created against collection of fees again from the converted corporate entity. This explanation is statutory in nature and like para 4 it also does not restrict the benefits of conversion to entities converted on or after any particular date. The explanation does not talk of making any refund nor does it render the initial levy or assessment of fee as bad but forbids the collection of such fees if the converted corporate entity is entitled to fee continuation benefit in terms of paragraph 4 of Schedule III to the Regulations.

Following the judgment in the case of Somaiya Organics, we agree that 'levy' and 'collection' are not synonyms and generally they occur at different stages. In the present case the legislative intention is to put an embargo on collection in future, in case the converted corporate entity is found entitled to the benefits of fee continuity. Such embargo is clearly to operate prospectively even if there existed some kind of liability in the past on account of fees leviable prior to insertion of paragraph 4 of Schedule III to the Regulations. In any case the rationale in not permitting retrospective operation of laws is only to ensure that subjects are not adversely affected by creation of legal liabilities and obligations for a period already bygone. In the present case the provisions do not create any obligation or liability. They only confer benefits by way of fee continuity on account of fees already paid by the earlier entity before its conversion into a new corporate entity.

Even if we were to apply the test of fairness, no exception can be taken to extention of the benefit of fee exemption as provided by the relevant provision in the Regulations. Since the policy behind grant of benefits is to encourage corporatization of individual or partnership members of a stock exchange, the action of extending such benefits without any curb on the basis of date of conversions cannot be held as unfair.

As noted earlier the SEBI itself extended the benefit to those converting not only from 21.1.1998 but from 1.4.1997. There is nothing in paragraph 4 or in the explanation to support the stand of the SEBI that the benefits must be confined to conversions taking place after a particular date when no such date finds place in the Regulations. As a result, appeals preferred by SEBI are dismissed and

the judgments and orders under appeal passed by SAT are upheld. In the facts of the case the parties shall bear their own costs.

.....J. [VIKRAMAJIT SEN] .....J. [SHIVA KIRTI SINGH] New Delhi.

November 03, 2015.