Securities & Exchange Board Of India vs Ajay Agarwal on 25 February, 2010

Equivalent citations: AIR 2010 SUPREME COURT 3466, 2010 (3) SCC 765, 2010 AIR SCW 1638, 2010 CLC 465 (SC), 2010 (2) SCC(CRI) 491, 2010 (2) SCALE 680, (2010) 88 ALLINDCAS 41 (SC), (2010) 1 WLC(SC)CVL 371, (2010) 79 ALL LR 752, (2010) 96 CORLA 72, (2010) 2 GUJ LR 1698, (2010) 2 BOM CR 794, (2010) 7 MAD LJ 133, (2010) 2 BANKCAS 173, (2010) 2 SCALE 680

Bench: Asok Kumar Ganguly, G.S Singhvi

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.1697 OF 2005

Securities & Exchange Board of India ..Appellant(s)

Versus

Ajay Agarwal ..Respondent(s)

J U D G M E N T

GANGULY, J.

1. The question which arises for consideration in this appeal is whether Section 11-B of the Securities and Exchange Board of India Act, 1992 (for short, `the Act') could be invoked by the Chairman of the Securities and Exchange Board of India (for short, `SEBI') in conjunction with Sections 4(3) and 11 for restraining the respondent from associating with any corporate body in accessing the securities market and prohibiting him from buying, selling or dealing in securities.

2. The factual background in which the present appeal arises is noted as under.

3. The respondent was appointed the Joint Managing Director of Trident Steel Limited (hereafter referred to as "the said Company) on or about 20th May 1993. The Board initiated certain preliminary investigations about the affairs relating to public issues by the said Company on the basis of a complaint received from a member of Bombay Stock Exchange (for short B.S.E.). The public issue of the said Company was of 52 lacs shares of Rs.10 each at a premium of Rs.3.50 per share aggregating to Rs.7 crore 2 lacs. The Lead Managers to the issue were Bank of Baroda and Apple Industries Limited. Such issues opened on 26th November, 1993 and closed on December 1993 and one of the Directors of the Company appeared to be the chief promoter of the same.

4. The complaint was to the effect that there was misstatement in the prospectus filed by the company at the time of the public issue with regard to alleged non-disclosure of pledge of 7 lac 50 thousand shares held in the company by directors of the company to avail of working capital from Bank of Baroda. The second aspect of the complaint was that the Directors of the company had also given a non-disposal undertaking to Bank of Baroda in respect of the same shares and that the prospectus does not mention the same. The further complaint is that the 2000 investors complained regarding non- receipt of dividend and the such complaint was filed before the Investor Service Cell, B.S.E. The company while replying to the investors stated that it had not declared any dividend during the preceding year in respect of which complaint has been made. Therefore, prima facie, a case of misstating the facts in the prospectus and misguiding the investors was made out. It appears that the company had deliberately not dispatched share certificates to investors based in Jalgaon and failed to produce the share transfer records and proof of records of the applicants in Jalgaon.

5. In the course of investigation it appeared that the Directors of the company had pledged their personal holding of 7 lac 50 thousand shares with the Bank of Baroda and its Director, namely, Mr. A.A. Kazi and Dowell Leasing and Financing Limited had given non-disposal undertaking to Bank of Baroda. This was not disclosed in the prospectus of the company. This appears to be, prima facie, a case of violation of SEBI guidelines for disclosure for investor protection. Thus an important aspect of the capital structure of the company had not been disclosed in the prospectus as a result of which the investors were misguided. In view of such complaint having been received investigation was undertaken. Ultimately, a show cause notice dated 22.12.99 was issued to the respondent asking it to show cause why directions under Section 11-B of the Act restraining the company and its Directors from accessing the capital market for a suitable period will not be issued. A reply was demanded within 15 days from the receipt of the show cause notice.

6. Pursuant to such show cause notice the respondent gave his reply on 1.3.2000 and 10.7.2002. Thereafter, an opportunity of personal hearing was granted to the respondent on 14.5.2002 and the same was adjourned to 5.7.2002 and on that date the Board made its submissions. Ultimately, on 31st March, 2004 Chairman of the Board passed an order, the concluding portion whereof is as under:

> "Therefore, in exercise of the powers conferred upon me by virtue of Section 4(3) read with Section 11 and Section 11B of SEBI Act, I hereby direct that Shri Ajay Agarwal be restrained from associating with any corporate body in accessing the securities market and also be prohibited from buying, selling or dealing in securities

for a period of five years. This direction shall come into force with immediate effect".

7. Against the said order an appeal being Appeal No.85 of 2004 was filed before the Tribunal.

8. Before the Appellate Forum the only point argued is that Section 11-B of the Act came by way of amendment to the said Act with effect from 25th January, 1995 whereas the public issue in respect of which the impugned order was passed was of November 1993 and the prospectus was of October 1993. Both public issue and prospectus were prior to 1995. The shares were listed with effect from 15.2.1994. Therefore, it was urged on behalf of the appellant that the alleged misconduct if any was for a period of time when Section 11-B was not on the statute book. Thus, the question arose whether any direction can be issued under Section 11-B for the alleged misconduct said to have been committed prior to introduction of Section 11-B. The Appellate Tribunal was of the view that the provision of Section 11-B cannot be invoked in respect of the alleged misconduct which took place at a point of time when Section 11-B was not on the statute book. While passing the said order the Appellate Forum recorded that the respondent before the said Forum, the appellant herein, wants to withdraw the impugned order.

9. In fact, against the said recording a review was filed for reviewing the contents of paragraphs 13 and 14 of the order passed by the Appellate Tribunal.

10. Paragraphs 13 and 14 of the order passed by the Appellate Tribunal are set out below:

> "13. We have heard the learned counsel for the respondent. The learned counsel fairly conceded that such wide powers as in section 11-B cannot be retrospectively applied.
>
> 14. The learned counsel for the respondent seeks leave of this court to withdraw the impugned order".

11. After reviewing the said order the Appellate Tribunal ultimately deleted paragraph 14 by the order dated 9.12.04.

12. Again in the order dated 9.12.04 it was unfortunately mentioned that the order was passed with the consent of the parties. Subsequently the said recital in the order, as noted above, was deleted.

13. Assailing order of the Appellate Tribunal, the learned counsel for the appellant-Board mainly urged that the finding given by the Tribunal that the powers under Section 11-B can only be used prospectively and not retrospectively had been given on an erroneous appreciation of the legal provision under the said Act. It appears that the Appellate Tribunal passed its order by relying on the decision of this Court in the case of Govinddas and others v. Income Tax Officer and another - 1976 (103) ITR 123 (S.C.).

14. The decision of this Court in Govinddas (supra) was on totally different facts and legal questions.

15. It is well known that the substantive laws to be applied for determination of tax liability must be the law which is in force in the relevant assessment year.

16. It is well settled that law to be applied for assessment is the one which is extant in the assessment year unless there is an amendment which is made retrospective either expressly or by necessary implication. See M/s Reliance Jute and Industries Ltd. v C.I.T West Bengal, Calcutta [1980 (1) SCC 139 at p.141 para 6]. Same principles have been followed in the case of Controller of Estate Duty, Gujarat-I, Ahemadabad v. M.A. Merchant and etc., [AIR 1989 SC 1710 at p.1713 para 8].

17. In Govinddas (supra), this Court held that Subsections (1) to (5) of Section 171 of the 1961 Act provide for the machinery of assessment of Hindu Undivided Family after partition. Subsection (6) of Section 171 of 1961 Act is the substantive provision imposing tax liability on the members which is payable by the joint family. But these provisions are, rightly held to be, not applicable for recovery of tax assessed on the Hindu Undivided Family for a period prior to the enactment of those provisions. Therefore, this Court held that the income tax officer was not correct in taking recourse to sub-sections (6) to (7) of Section 171 of the Income Tax Act, 1961 for the purpose of recovery of tax assessed on the Hindu Undivided Family for assessment in respect of the years 1950-1951 and 1956-1957 since the relevant provisions of 1961 Act were not given any retrospective operation. It is not in dispute that the assessment of tax in respect of the assessment year for the Hindu Undivided Family was completed under the corresponding provisions of the 1922 Act. Therefore, the Supreme Court held that such a case would be governed by Section 25-A of the old Act which does not impose any liability on members of the Hindu Undivided Family in case of partial partition since no such liability existed under Section 25-A of the old Act.

18. It is clear from the aforesaid discussion that the ratio in Govinddas's case does not apply to this case in as much as no tax liability has been created under the order of the Board.

19. The appellate Tribunal without at all discussing the facts and law involved in Govinddas erroneously applied its ratio in the impugned order.

20. It may be noted in this connection that the impugned order was passed by the Board in exercise of its power under Section 4(3) read with Section 11 and Section 11-B of the said Act. Under Section 11 of the said Act the Board has the power of restraining a person from accessing the securities market or prohibiting any person associated with securities market to buy, sell or deal in securities. Such power is given to the Board under Section 11(4)(b) of the said Act. Section 11(4)(b) of the said Act is as follows:

> "11(4)(b) restrain persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities"

21. Therefore, restrain order passed on the respondent strictly speaking was not under Section 11-B of the said Act. However, the provisions of Section 11(4)(B) of the said Act also came by way of amendment in 2002. It should, however, be noted that by the time the Board passed the order on

31st March 2004 all the amendments were on the statute.

22. Therefore, the question here is not of retrospective operation of the amendments. Even if the amendments to the said Act are allowed to operate prospectively by the time the order was passed by the Board, it was empowered by the aforesaid amendments to do so.

23. Therefore, without giving any retrospective operation to those provisions, the impugned order can be passed by the Board in as much as the amendments in questions empowered the Board to pass such an order when it passed the order. So, the question that survives is whether the Board could pass the order in respect of allegations which surfaced prior to the coming into effect of those amendments in 1995 and 2002.

24. It is here that question of protection against ex-post facto laws fall for consideration.

25. In this connection it may be noticed that Section 11-B of the Act was invoked even at the show cause stage. Therefore, it cannot be said that any provision has been invoked in the midst of any pending proceeding initiated by the Board. The respondent was, thus, put on notice that the Board is invoking its power under Section 11-B which was available to it under the law on the date of issuance of show cause notice.

26. In the premises, it cannot be said that any new provision has been invoked in connection with any pending proceeding. Nor can it be contended by the respondent that there was any unfairness in the proceeding. Respondent was given adequate notice of the charges in the show cause notice. He was given an opportunity to reply to the show cause notice and, thereafter, a fair opportunity of hearing was given before the order was passed by the Board. The entire gamut of a fair procedure was thus observed.

27. This Court also finds that there is no challenge to the amended provision of the law. Even if the law applies prospectively, the Board cannot be prevented from acting in terms of the law which exists on the day the Board passed its order.

28. It was urged on behalf of the respondent that on the date when the violations were alleged against him, the Board did not have the power either under Section 11-B or under Section 11 (4)(b) as those provisions came subsequently by way of amendment. This contention weighed with the appellate forum and the respondent was given the protection against ex post facto law even though it was not clearly mentioned in the order of the Appellate Forum.

29. The right of a person of not being convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence and not to be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence, is a Fundamental Right guaranteed under our Constitution only in a case where a person is charged of having committed an "offence" and is subjected to a "penalty".

30. In the instant case, the respondent has not been held guilty of committing any offence nor has he been subjected to any penalty. He has merely been restrained by an order for a period of five years from associating with any corporate body in accessing the securities market and also has been prohibited from buying, selling or dealing in securities for a period of five years.

31. The word `offence' under Article 20 sub-clause (1) of the Constitution has not been defined under the Constitution. But Article 367 of the Constitution states that unless the context otherwise requires, the General Clauses Act, 1897 shall apply for the interpretation of the Constitution as it does for the interpretation of an Act.

32. If we look at the definition of `offence' under General Clauses Act, 1897 it shall mean any act or an omission made punishable by any law for the time being in force. Therefore, the order of restrain for a specified period cannot be equated with punishment for an offence as has been defined under the General Clauses Act.

33. Under Criminal procedure code, `offence' has been defined under Section 2(n) as follows:

"2(n) "offence" means any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under Section 20 of the Cattle-trespass Act, 1871 (1 of 1871);"

34. On a comparison of the aforesaid two definitions we find that there are common links between the two. An offence would always mean an act of omission or commission which would be punishable by any law for the time being in force.

35. Article 20(1) was interpreted by the Court in Rao Shiv Bahadur Singh and another v. State of Vindhya Pradesh (AIR 1953 SC 394). Justice Jagannadhads speaking for Constitution Bench, on a comparison of similar provisions in English Law and American Constitution, opined that the language used in Article 20 is in much wider terms. This Court held that:

> "...what is prohibited is the conviction of a person or his subjection to a penalty under `ex post facto' laws. The prohibition under the Article is not confined to the passing or the validity of the law, but extends to the conviction or the sentence and is based on its character as an `ex post facto' law"

36. The ratio of this judgment has again been affirmed in State of West Bengal v. S.K. Ghosh, (AIR 1963 SC 255), wherein another Constitution Bench of this Court speaking through Justice Wanchoo, as His Lordship then was, held that a forfeiture by a District Judge under Section 13(3) of Criminal Laws Amendment Ordinance of 1944 cannot be equated to a forfeiture under Section 53 of IPC inasmuch as forfeiture under Section 13(3) of the Ordinance involved embezzlement of government money or property and the same is not punishment or penalty within the meaning of Article 20(1) of Constitution (See paras 14 and 15 of the judgment).

37. Even if penalty is imposed after an adjudicatory proceeding, persons on whom such penalty is imposed cannot be called an accused. It has been held that proceedings under Section 23(1A) of Foreign Exchange Regulation Act, 1947 are adjudicatory in character and not criminal proceedings (See Director of Enforcement v. M.C.T.M. Corporation Pvt. Ltd. and others, (1996) 2 SCC 471). Persons who are subjected to such penalties are also not entitled to the protection under Article 20(1) of the Constitution.

38. Following the aforesaid ratio, this Court cannot hold that protection under Article 20(1) of the Constitution in respect of ex-post facto laws is available to the respondent in this case.

39. 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 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.

40. The said Act is pre-eminently a social welfare legislation seeking to protect the interests of common men who are small investors.

41. It is a well known canon of construction that when 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.

42. Keeping this principle in mind if we analyse some of the provisions of the Act it appears that the Board has been established under Section 3 as a body corporate and the powers and functions of the Board have been clearly stated in Chapter IV and under Section 11 of the said Act.

43. A perusal of Section 11, Sub-Section 2(a) of the said Act makes it clear that the primary function of the Board is to regulate the business in stock exchanges and any other securities markets and in order to do so it has been entrusted with various powers.

44. Section 11 had to be amended on several occasions to keep pace with the `felt necessities of time'. One such amendment was made in Sub Section (4) of Section 11 of the said Act, which gives the Board the power to restrain persons from accessing the securities market and to prohibit such persons from being associated with securities market to buy and sell or deal in securities. Such an amendment came in 2002.

45. From the statement of objects and reasons of the Amendment Act of 2002, it appears that the Parliament thought that in view of growing importance of stock market in national economy, SEBI will have to deal with new demands in terms of improving organisational structure and strengthening institutional capacity.

46. Therefore, certain shortcomings which were in the existing structure of law were sought to be amended by strengthening the mechanisms available to SEBI for investigation and enforcement, so that it is better equipped to investigate and enforce against market malpractices. (See Paragraph 3 of the Statement of objects and reasons).

47. Section 11-B which empowers the Board to issue certain directions also came up by way of amendment in 1995 by Act 9 of 1995. The Statements of Objects and Reasons of such amendments show one of the objects is to empower the Board to issue regulations without the approval of the Central Government. (See para 3(e) of the Statements of Objects and Reasons). Section 11-B of the Act thus empowers the Board to give directions in the interest of the investors and for orderly development of securities market, which, as noted above, is one of the twin purposes to be achieved by the said Act. Therefore, by the 1995 amendment by way of Section 11-B Board has been empowered to carry out the purposes of the said Act.

48. As noted above, there is no challenge to those provisions which came by way of amendment. In the absence of any challenge to those provisions, it cannot be said that even though Board is statutorily empowered to exercise functions in accordance with the amended law, its power to act under the law, as amended, will stand frozen in respect of any violation which might have taken place prior to the enactment of those provisions. It is nobody's case that Board has exercised those powers in respect of a proceeding which was initiated prior to the enactment of those provisions. In fact Board has issued the show cause notice in terms of Section 11-B and considered the reply of the respondent. In such a situation, there has no infraction in the procedure.

49. Therefore, the entire basis of the order of the Appellate Tribunal that provision of Section 11- B cannot be applied retrospectively has been passed on an erroneous basis, as discussed herein above.

50. Provisions of Section 11-B being procedural in nature can be applied retrospectively.

51. The appellate Tribunal made a manifest error by not appreciating that Section 11-B is procedural in nature. It is a time honoured principle if the law affects matters of procedure, then prima facie it applies to all actions, pending as well as future. See K.Eapan Chako v. The Provident Investment Company (P.) Ltd.,[AIR 1976 SC 2610] wherein Chief Justice A.N. Ray laid down those principles.

52. Maxwell in his "Interpretation of Statutes" also indicated that no one has a vested right in any course of procedure. A person's right of either prosecution or defence is conditioned by the manner prescribed for the time being by the law and if by the Act of Parliament, the mode of proceeding is altered, and then no one has any other right than to proceed under the alternate mode. [Maxwell Interpretation of Statutes, 11th Edition, p.216].

53. These principles, enunciated by Maxwell, have been quoted with approval by the Supreme Court in its Constitution Bench judgment in Union of India v. Sukumar Pyne [AIR 1966 SC 1206 at p.1209]

54. For the reasons discussed above, this Court is constrained to quash the order of the Appellate Tribunal and upholds the order of the Chairman of the Board.

55. The appeal is allowed. There will be, however, no orders as to costs.

.....J. (G.S SINGHVI) .....J. (ASOK KUMAR GANGULY) New Delhi February 25, 2010