The Chairman, Sebi vs Shriram Mutual Fund & Anr on 23 May, 2006

Equivalent citations: AIR 2006 SUPREME COURT 2287, 2006 (5) SCC 361, 2006 AIR SCW 2997, 2006 CLC 817 (SC), 2006 (5) COM LJ 30 SC, 2006 (6) SCALE 154, 2006 (7) SRJ 418, (2006) 4 MAD LW 974, (2006) 5 ALLMR 52 (SC), (2006) 3 CTC 569 (SC), (2006) 5 COMLJ 30, 2006 ALL CJ 3 2177, (2006) 72 CORLA 279, (2006) 5 SUPREME 1, (2006) 131 COMCAS 591, (2006) 6 SCALE 154, (2006) 3 MAD LW 1036, (2006) 4 SCJ 439, (2006) 3 BANKCAS 392

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Bench: Ar. Lakshmanan, Lokeshwar Singh Panta

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           CASE NO.:
Appeal (civil)  9523-9524 of 2003

PETITIONER:
The Chairman, SEBI

RESPONDENT:
Shriram Mutual Fund & Anr.

DATE OF JUDGMENT: 23/05/2006

BENCH:
Dr. AR. Lakshmanan & Lokeshwar Singh Panta

JUDGMENT:
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J U D G M E N T Dr. AR. Lakshmanan, J.

The Securities and Exchange Board of India (hereinafter referred to as 'the SEBI') is the appellant in the present appeal under Section 15-Z of the Securities and Exchange Board of India Act, 1992. This appeal was filed against the final judgment and order dated 21.08.2003 passed by the Securities Appellate Tribunal, Mumbai (hereinafter referred to as 'the Tribunal') in appeal No. 50 of 2002 and 51 of 2002 raising an important question of law as to whether once it is conclusively established that the Mutual Fund has violated the terms of the Certificate of Registration and the statutory Regulations i.e. SEBI (Mutual Funds) Regulations, 1996 (hereinafter referred to as 'the Regulations") the imposition of penalty becomes a sine qua non of the violation.

The respondents have not chosen to enter appearance though they were served with the notice. Since the service is complete and the appeals are ready for hearing, the above appeals were listed for final hearing.

The Appellant Board, a body corporate, has been established under the Securities and Exchange Board of India Act, 1992 by the Central Government, inter alia, to protect the interest of the investors in securities and to promote the development of, and to regulate the securities market and for matters connected therewith.

Shriram Mutual Fund was registered in the year 1994. It had floated 5 schemes. It conducted business through brokers associated with its sponsor in excess of the permissible limits prescribed under Regulation 25(7)(a) of the Regulations, 1996 on 12 occasions. The respondent failed to comply with the terms and conditions attached to the Certificate of Registration which are statutory in nature, as prescribed by Regulation 15 (D)(b) of the Securities and Exchange Board of India Act, 1992. The instances of excess transactions conducted by the respondents are as follows:-

Sr. Quarter ended Name of the Associate Percentage of No. Brokers Business

1. June 1998 Springfield Securities 10.65%

2. September 1998 -do- 6.6%

3. March 1999 -do- 16.57%

4. September 1999 -do- 9.57%

5. December 1999 -do- 91.68%

6. September 1998 SIS Shares and Stock 19.59% Brokers

7. March 1999 -do- 33.81%

8. September 1999 -do- 38.01%

9. September 1998 Shriram Indus Stock 9.86%

10. December 1998 -do- 6.39%

11. March 1999 -do- 28.95%

12. September 1999 -do- 52.42% The Chairman, SEBI in exercise of the powers conferred on it under Section 15(I) of the said Act and Rule 3 of the SEBI (Procedure for Holding Enquiry and Imposing Penalty by Adjudicating Officer) appointed an Adjudicating Officer to enquire into the violations of exceeding by the respondents of the permissible limit of 5% of aggregate purchases and sales of securities made by the Mutual Fund in all its Schemes, as prohibited under Regulations 25(7)(a) of the said Regulations.

The Appellant-Board issued notice dated 01.04.2002 under Rule 4 of Rules, 1995 calling upon the respondents to show cause as to why an inquiry should not be held and penalty imposed under the Rules, 1995. The respondents filed a common reply before the Enquiry and Adjudicating Officer, SEBI. The Adjudicating Officer, after hearing the parties, imposed penalty of Rs. 5 lacs under Section 15E on respondent No.2 for failure to comply with Regulations 25 (7)(a) of SEBI (Mutual Funds) Regulations, 1996 with regard to routing of transactions through associate brokers.

The Adjudicating Officer also imposed a penalty of Rs. 2 lacs under Section 15D(b) of SEBI Act, 1992 on respondent No.1 for its failure to comply with the terms and conditions of Certificate of Registration granted to it. Aggrieved by the order dated 24.06.2002 passed by the Adjudicating Officer, the respondents filed appeals before the Securities Appellate Tribunal, Mumbai on 21.08.2003, inter alia, contending that the transactions with the associate brokers were related to thinly traded Securities, for which there were no ready markets available through the normal Stock Exchange, or were relating to securities which did not have any large volume or trade in the market. It was further contended that these securities were either thinly traded, or did not have any volumes. It was submitted that the percentage of excess business carried out with associate brokers were as high as 91.68% and 52.42%, while the total volume of business done with the associate brokers was Rs.4.55 lacs.

The Tribunal set aside the order of the Adjudicating Officer on the purported ground that the penalty to be imposed for failure to perform a statutory obligation is a matter of discretion. The Tribunal has held that the penalty is warranted by the quantum which has to be decided by taking into consideration the factors stated in Section 15-J. Aggrieved by the order dated 21.08.2003, the Chairman, SEBI filed the above statutory appeal under Section 15-Z of the Act of 1992 as amended by the Securities and Exchange Board of India (Amendment) Act, 2002. We heard Mr. L. Nageswara Rao, learned senior counsel ably assisted by his junior counsel for the appellant. Mr. Rao advanced elaborate arguments and took us through the pleadings, the reply received to the show cause notice, the order of the Adjudicating Authority and of the Appellate Tribunal. He drew our specific attention to Regulation 25 (7)(a) of the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996 and Sections 15-D(b), 15-E, 15-I, 15-J, and 12-B of the SEBI Act, 1992 which are extracted hereunder:

> "25. Asset management company and its obligations:
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7. (a) An Asset management company shall not through any broker associated with the sponsor, purchase or sell securities, which is average of 5% or more of the aggregate purchases and sale of securities made by the mutual fund in all its schemes;

Provided that for the purpose of this sub-

regulation, aggregate purchase and sale of security shall exclude sale and distribution of units issued by the mutual fund:

Provided further that the aforesaid limit of 5% shall apply for a block of any three months".

"15-D Penalty for certain defaults in case of mutual funds:

(a) If any person, who is .

(b) Registered with the Board as a collective investment scheme, including mutual funds, for sponsoring or carrying on any investment scheme, fails to comply with the terms and conditions of certificate of registration, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less;"

"15-E Penalty for failure to observe rules and regulations by an asset management company Where any asset management company of a mutual fund registered under this Act fails to comply with any of the regulations providing for restrictions on the activities of the asset management companies, such asset management company shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less."

"15(I) For the purpose of adjudging under Sections 15A, 15B, 15C, 15D, 15E, 15F, 15G and 15H, the Board shall appoint any officer not below the rank of a Division Chief to be an adjudicating officer for holding an enquiry 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 sub-section (1), he may

impose such penalty as he thinks fit in accordance with the provisions of any of those sections."

"15-J. While adjudging quantum of penalty under Section 15-I, the adjudicating officer shall have the due regard to the following factors, namely:-

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;

(b) the amount of loss caused to an investor or group of investors as a result of the default;

(c) the repetitive nature of the default."

Statutory Scheme Chapter VI-A of the SEBI Act provides for Penalties and Adjudication, which provisions were introduced in SEBI Act by the Amendment Act 9 of 1995. Section 15-A to Section 15 HB are in the form of mandatory provisions imposing penalty in default of the provisions of the SEBI Act and Regulations. The provisions of penalty for non-compliance of the mandate of the Act is with an object to have an effective deterrent to ensure better compliance of the provisions of the SEBI Act and Regulations, which is crucial for the appellant Board in order to protect the interests of investors in securities and to promote the development of the securities market.

Chapter VI-A of the SEBI Act deals with the penalties and the adjudication. Section 15-l of the SEBI ACT envisages appointment of Adjudicating Officer for holding an inquiry in the prescribed manner, after giving reasonable opportunity of being heard for the purpose of imposing any penalty. Section 15-J provides various factors which are to be taken into consideration while adjudging the question of penalty under Section 15-l namely, the amount of disproportionate gain or unfair advantage whenever quantifiable, loss caused to an investor or group of investors and the repetitive nature of default. The legislature in its wisdom had not included mens rea or deliberate or wilful nature of default as a factor to be considered by the Adjudicating Officer in determining the quantum of liability to be imposed on the defaulter.

Sections 15A to 15H and 15HA employ the words "shall be liable" and, therefore, mandatorily provides for imposition of monetary penalties for respective breaches or non-compliance of provisions of the SEBI Act and the Regulations. Default or failure, as contemplated under the Act includes :

15A Failure to furnish information, return 15B Failure to enter into agreement with clients 15C Failure to redress investors' grievances 15D Default in case of mutual funds 15E Failure to observe rules and regulations by an asset management company 15F Default in case of stock brokers 15G For insider trading 15H Non-disclosure of acquisition of shares and takeovers 15HA Fradulent and unfair trade practices 15HB Penalty, if not separately provided The Scheme of the SEBI Act of imposing penalty is very clear. Chapter VI nowhere deals with criminal

> offences. These defaults for failures are nothing, but failure or default of statutory civil obligations provided under the Act and the Regulations made thereunder. It is pertinent to note that Section 24 of the SEBI Act deals with the criminal offences under the Act and its punishment. Therefore, the proceedings under Chapter VI A are neither criminal nor quasi-criminal. The penalty leviable under this Chapter or under these Sections, is penalty in cases of default or failure of statutory obligation or in other words breach of civil obligation. In the provisions and scheme of penalty under Chapter VI A of the SEBI Act, there is no element of any criminal offence or punishment as contemplated under criminal proceedings. Therefore, there is no question of proof of intention or any mens rea by the appellants and it is not essential element for imposing penalty under SEBI Act and the Regulations.

As already noticed, the Tribunal allowed the appeals of the respondent on the ground that there was no mala fide intention to act in violation of Regulation 25 (7((a) and Section 15(D)(b) of the SEBI Act but due to circumstances respondents were forced to act in excess of the limits prescribed under Regulation 25(D)(b) of the said Regulation.

Question of law The important question of law which arises for consideration in the present appeal is whether the Tribunal was justified in allowing the appeals of the respondent herein and that whether once it is conclusively established that the Mutual Fund has violated the terms of the Certificate of Registration and the statutory Regulations i.e. the SEBI (Mutual Funds) Regulation, 1996, the imposition of penalty becomes a sine qua non of the violation.

In other words, the breach of a civil obligation which attracts penalty in the nature of fine under the provisions of the Act and the Regulations would immediately attract the levy of penalty irrespective of the fact whether the contravention was made by the defaulter with any guilty intention or not. Mr. Rao took us through the orders passed by the Adjudicating Authority. It is seen that the respondents themselves have admitted the violation of the Regulations during a continuous period of 2= years in 12 instances, covering 6 quarters. Regulation 25 (7)(a) of the Regulation provides that an Asset Management Company shall not through any broker associated with sponsor, purchase or sell securities, which is average of 5% or more of the aggregate purchases and sale of securities made by the Mutual Fund in all its schemes. The second proviso to the said Regulation clearly provides that the aforesaid limit shall apply for a block of 3 months. Hence, there has been a repetitive violation of the said Regulation, and the terms of the Certificate of Registration. In these circumstances, the learned senior counsel submitted that the Tribunal has erroneously allowed the appeals filed by the respondents against the order passed by the Adjudicating Officer on 24.06.2002. The Tribunal has given a clear finding that the respondent No.1 Fund has admittedly exceeded the prescribed limit of more than 5% when it had transacted business through brokers, associated with its sponsors which is in contravention of provisions of Regulation 25(7)(a) of the SEBI (Mutual Funds) Regulation, 1996. We have already noticed the instances of excess transactions conduced by the respondents and reproduced the same in paragraphs (supra). It is an admitted fact that the respondent had on 12 occasions routed transactions through its associated brokerage houses in excess of the permissible limits prescribed under Regulation 25 (7)(a) of the Regulations. In the present case, the contesting respondent is a Mutual Fund and the Asset Management Company. During the period from June,

1998 to September, 1999, the respondent had conducted business through associated brokers, in excess of the limits prescribed under Regulation 25 (7)(a) of the Regulations on 12 occasions covering 6 quarters. The respondent had failed to comply with the terms and conditions attached to the Certificate of Registration granted to it, inasmuch as it did not exercise diligence to ensure that the transactions by its own Asset Management Company were confined to the permissible limits. In this case, the SEBI appointed an Adjudicating Officer in terms of Section 15-I to inquire into and adjudge the alleged contravention of Section 15-E of the Act of 1992. The Adjudicating Officer, after inquiry, confirmed the charges and imposed a sum of Rs. 5 lacs as penalty on respondent No.2 under Section 15-E of the said Act for failure to comply with Regulation 25 (7)(a) and Rs. 2 lacs on the other respondent for failure to comply with the terms and conditions attached to the Certificate of Registration.

Mr. Rao submitted that under Regulation 25 (7)(a) an Asset Management Company shall not through any broker associated with the sponsor, purchase or sell securities, which is average of 5% or more of the aggregate purchases and sale of securities made by Mutual Funds in all its schemes and that the aforesaid limit of 5% shall apply for a block of any three months. In the present case, the respondents on their own admission have violated the aforesaid statutory Regulations during 6 quarters. Hence Mr. Rao submitted that the violation is ex facie wilful and hence the penalty imposed by the Adjudicating Officer ought not to have been set aside by the single member Tribunal. Mr. Rao further argued that unless the language of the statute indicates the need to establish the element of mens rea it is generally sufficient to prove that a default in complying with the statute has occurred. Under Sections 15-D(b) and 15-E of the Act, there is nothing which requires that mens rea must be proved before penalty can be imposed under these provisions. Hence, it was contended that once the contravention is established, the penalty has to follow.

The Tribunal set aside the order passed by the Adjudicating Officer on the ground that the penalty to be imposed for failure to perform a statutory obligation is a matter of discretion which has to be exercised judicially and on a consideration of all the relevant facts and circumstances. The Tribunal also held that the Adjudicating Officer has to be satisfied with the material placed before him that the violation deserves punishment. It was held that the penalty is warranted by the quantum which has to be decided by taking into consideration the factors stated in Section 15J of SEBI Act. In our opinion, the Tribunal has miserably failed to appreciate that by setting aside the order of the Adjudicating Officer the Tribunal was setting a serious wrong precedent whereby every offender would take shelter of alleged hardships to violate the provisions of the Act. In our opinion, mens rea is not an essential ingredient for contravention of the provisions of a civil act. In our view, the penalty is attracted as soon as contravention of the statutory obligations as contemplated by the Act is established and, therefore, the intention of the parties committing such violation becomes immaterial. In other words, the breach of a civil obligation which attracts penalty under the provisions of an Act would immediately attract the levy of penalty irrespective of the fact whether the contravention was made by the defaulter with any guilty intention or not. This apart that unless the language of the statute indicates the need to establish the element of mens rea, it is generally sufficient to prove that a default in complying with the statute has occurred. Under a close scrutiny of Section 15 D(b) and 15-E of the Act, there is nothing which requires that mens rea must be proved before penalty can be imposed under these provisions. Hence, we are of the view that once the

contravention is established, then the penalty has to follow and only the quantum of penalty is discretionary. Discretion has been exercised by the Adjudicating Officer as is evident from imposition of lesser penalty than what could have been imposed under the provisions. The intention of the parties is wholly irrelevant since there has been a clear violation of the statutory Regulations and provisions repetitively, covering a period of 6 quarters. Hence we hold that the respondents have wilfully violated statutory provisions with impunity and hence the imposition of penalty was fully justified. The Tribunal, in this context, failed to appreciate that every Mutual Fund has to redeem the units as per terms and conditions of the scheme on the request of the unit holders and this cannot, in any manner, be considered as an extraordinary circumstance or something which was not known to the respondents. The facts and circumstances of the present case in no way indicate the existence of special circumstances so as to waive the penalty imposed by the Adjudicating Officer. A perusal of the order passed by the Adjudicating Officer would clearly go to show that factors such as small size of the funds, low volume of transactions, thinly traded securities, administrative and operational exigencies were duly considered and appreciated by the Adjudicating Officer while passing the order and that is why the Adjudicating Officer did not impose the maximum permissible penalty. The Tribunal failed to appreciate that the objective behind imposing certain limit on the business that can be conducted by mutual fund through the associate broker is to eliminate any undue advantage to the class of brokers by virtue of their close association with the Asset Management Company, sponsors etc. In other words, the object of imposing such limits is to ensure that there is no concentration of business only in such entities, so that there is an indirect pecuniary advantage to the person associated with the Asset Management Company, sponsors etc. Any undue concentration on the business of the mutual fund with its affiliated brokers by paying huge commissions to such brokers is neither desirable nor in the interest of the unit holders. It is a matter of record that in the 12 admitted instances of violation by the respondents, the percentage of the business through the associated brokers was as high as 91.68% and 52.2% in certain factors. This apart, the respondent's excessive exposure to the associate brokers is not only established from the record, but has also been admitted by respondents.

It is settled law that when a penalty is imposed by an Adjudicating Officer, it is done so in adjudicatory proceedings and not by way of fine as a result of prosecution of an accused for commission of an offence in a criminal proceeding. In the instant case, the Tribunal has failed to appreciate that the respondents had given undue and unfair advantage to the associated brokers, which is detrimental to the interest of the unit holders.

In the present case, it has been established by the Adjudicating Officer as well as admitted by the respondents that there has been a conscious disregard of the obligation inasmuch as the respondents were aware that they were acting in violation of the provisions of Regulations. The Adjudicating Officer had, after taking into account all the facts and circumstances of the case, imposed only a token of Rs. 5 lacs against the respondents for its failure on 12 occasions though the charging section permits imposition of a maximum penalty of Rs. 5 lacs for each such violation.

The Appellant Board has been established by the Parliament under the Securities and Exchange Board of India Act, 1992 to protect the interest of investors in securities and to promote the development of, and to regulate the securities market and for matter connected therewith or

incidental thereto. The Board was set up to promote orderly and healthy growth of the securities market and for investors protection SEBI has been monitoring and regulating the activities of Stock Exchanges, Mutual Funds and Merchant Bankers, etc. to achieve these goals. 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. That it became imperative to impose monetary penalties also in addition to other penalties in cases of default. Mens rea : Whether an essential element for imposing penalty for breach of civil obligations?

This Court in a catena of decisions have held that mens rea is not an essential element for imposing penalty for breach of civil obligations.

(a) Director of Enforcement vs. MCTM Corporation Pvt. Ltd. & Ors. , (1996) 2 SCC 471 "It is thus the breach of a "civil obligation" which attracts "penalty" under Section 23(1)(a) FERA, 1947 and a finding that the delinquent has contravened the provisions of Section 10 FERA 1947 that would immediately attract the levy of "penalty" under Section 23, irrespective of the fact whether the contravention was made by the defaulter with any "guilty intention" or not. Therefore, unlike in a criminal case, where it is essential for the 'prosecution' to establish that the 'accused' had the necessary guilty intention or in other words the requisite 'mens rea' to commit the alleged offence with which he is charged before recording his conviction, the obligation on the part of the Directorate of Enforcement, in cases of contravention of the provisions of Section 10 of FERA, would be discharged where it is shown that the "blameworthy conduct" of the delinquent had been established by wilful contravention by him of the provisions of Section 10, FERA 1947. It is the delinquency of the defaulter itself which establishes his 'blameworthy' conduct, attracting the provisions of Section 23(1)(a) of FERA, 1947, without any further proof of the existence of "mens rea". Even after an adjudication by the authorities and levy of penalty under Section 23(1)(a) of FERA, 1947, the defaulter can still be tried and punished for the commission of an offence under the penal law ."

> "In Corpus Juris Secundrum. Vol.85 at page 580, para 1023, it is stated thus:
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> "A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws."
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> "We are in agreement with the aforesaid view and in our opinion what applies to "tax delinquency"

equally holds good for the 'blameworthy' conduct for contravention of the provisions of FERA, 1947. We, therefore, hold that mens area (as is understood in criminal law) is not an essential ingredient for holding a delinquent liable to pay penalty under Section 23(1)(a) of FERA, 1947 for contravention of the provisions of Section 10 of FERA, 1947 and that penalty is attracted under Section 23(1)(a) as soon as contravention of the statutory obligation contemplated by Section 10(1)(a) is established. The High Court apparently fell in error in treating the "blameworthy

conduct" under the Act as equivalent to the commission of a "criminal offence", overlooking the position that the "blameworthy conduct" in the adjudicatory proceedings is established by proof only of the breach of a civil obligation under the Act, for which the defaulter is obliged to make amends by payment of the penalty imposed under Section 23(1)(a) of the Act irrespective of the fact whether he committed the breach, with or without any guilty intention."

(b) J.K. Industries Ltd. & Ors. Vs. Chief Inspector of Factories and Boilers & Ors., (1996) 6 SCC "The offences under the Act are not a part of general penal law but arise from the breach of a duty provided in a special beneficial social defence legislation, which creates absolute or strict liability without proof of any mens rea. The offences are strict statutory offences for which establishment of mens rea is not an essential ingredient. The omission or commission of the statutory breach is itself the offence. Similar type of offences based on the principle of strict liability, which means liability without fault or mens rea, exist in many statutes relating to economic crimes as well as in laws concerning the industry, food adulteration, prevention of pollution etc. in India and abroad. "Absolute offences" are not criminal offences in any real sense but acts which are prohibited in the interest of welfare of the public and the prohibition is backed by sanction of penalty "

(c) R.S. Joshi Sales Tax Officer, Gujarat & Ors.

Vs. Ajit Mills Ltd. & anr.etc. , (1977) 4 SCC 98 " Even here we may reject the notion that a penalty or a punishment cannot be cast in the form of an absolute or no-fault liability but must be preceded by mens rea. The classical view that 'no mens rea, no crime' has long ago been eroded and several laws in India and abroad, especially regarding economic crimes and departmental penalties, have created severe punishments even where the offences have been defined to exclude mens rea. Therefore, the contention that Section 37(1) fastens a heavy liability regardless of fault has no force in depriving the forfeiture of the character of penalty."

(d) M/s Gujarat Travancore Agency, Cochin vs. C.I.T. , (1989) 3 SCC 52.

> " It is sufficient for us to refer to Section 271(1)(a), which provides that a penalty may be imposed if the Income Tax Officer is satisfied that any person has without reasonable cause failed to furnish the return of total income, and to Section 276-C which provides that if a person wilfully fails to furnish in due time the return of income required under Section 139(1), he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine. It is clear that in the former case what is intended is a civil obligation while in the latter what is imposed is a criminal sentence. There can be no dispute that having regard to the provisions of Section 276-C, which speaks of wilful failure on the part of the defaulter and taking into consideration the nature of the penalty, which is punitive, no sentence can be imposed under that provision unless the element of mens rea is established. In most cases of criminal liability, the intention of the legislature is that the penalty should serve as a deterrent. The creation of an offence by statute proceeds on the assumption that society suffers injury by the act or omission of the defaulter and that a deterrent must be imposed to discourage the repetition of the offence. In

> the case of a proceeding under Section 271(1)(a), however, it seems that the intention of the legislature is to emphasise the fact of loss of revenue and to provide a remedy for such loss, although no doubt an element of coercion is present in the penalty. In this connection, the terms in which the penalty falls to be measured is significant. Unless there is something in the language of the statute indicating the need to establish the element of mens rea it is generally sufficient to prove that a default in complying with the statute has occurred. In our opinion, there is nothing in Section 271(1)(a) which requires that mens rea must be proved before penalty can be levied under that provision."

(e) Swedish Match AB and Anr. Vs. SEBI & anr. , (2004) 11 SCC 641.

> " The provisions of Section 15-H of the Act mandate that a penalty of rupees twenty five crores may be imposed. The Board does not have any discretion in the matter and, thus the adjudication proceeding is a mere formality. Imposition of penalty upon the appellant would, thus, be a forgone conclusion. Only in the criminal proceedings initiated against the appellants, existence of mens rea on the part of the appellants will come up for consideration."

(f) SEBI vs. Cabot International Capital Corporation, (2005) 123 Comp. Cases 841 (Bom).

> "Thus, the following extracted principles are summarised:
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> (A) Mens rea is an essential or sine qua non for criminal offence.
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> (B) Strait jacket formula of mens rea cannot be blindly followed in each and every case.

Scheme of particular statute may be diluted in a given case.

(C) If, from the scheme, object and words used in the statute, it appears that the proceedings for imposition of the penalty are adjudicatory in nature, in contra-distinction to criminal or quasi criminal proceedings, the determination is of the breach of the civil obligation by the offender. The word "penalty" by itself will not be determinative to conclude the nature of proceedings being criminal or quasi-criminal. The relevant considerations being the nature of the functions being discharged by the authority and the determination of the liability of the contravenor and the delinquency.

(D) Mens rea is not essential element for imposing penalty for breach of civil obligations or liabilities ..

(E) There can be two distinct liabilities, civil and criminal under the same Act.

(Para 52) The SEBI Act and the Regulations are intended to regulate the Security Market and related aspects, the imposition of penalty, in the given facts and circumstances of the case, cannot be tested on the ground of "no mens rea no penalty". For breaches of provisions of SEBI Act and Regulations, according to us, which are civil in nature, mens rea is not essential. On particular facts and circumstances of the case, proper exercise or judicial discretion is a must, but not on a foundation that mens rea is an essential to impose penalty in each and every breach of provisions of the SEBI Act.

(para 54) However, we are not in agreement with the appellate authority in respect of the reasoning given in regard to the necessity of mens rea being essential for imposing the penalty. According to us, mens rea is not essential for imposing civil penalties under the SEBI Act and Regulations."

The Trbunal has erroneously relied on the judgment in the case of Hindustan Steel Ltd. Vs. State of Orissa, AIR 1970 SC 253 which pertained to criminal/quasi-criminal proceeding. That Section 25 of the Orissa Sales Tax Act which was in question in the said case imposed a punishment of imprisonment up to six months and fine for the offences under the Act. The said case has no application in the present case which relates to imposition of civil liabilities under the SEBI Act and Regulations and is not a criminal/quasi-criminal proceeding.

In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulation is established and hence the intention of the parties committing such violation becomes wholly irrelevant. A breach of civil obligation which attracts penalty in the nature of fine under the provisions of the Act and the Regulations would immediately attract the levy of penalty irrespective of the fact whether contravention must made by the defaulter with guilty intention or not. We also further held that unless the language of the statute indicates the need to establish the presence of mens rea, it is wholly unnecessary to ascertain whether such a violation was intentional or not. On a careful perusal of Section 15(D)(b) and Section 15-E of the Act, there is nothing which requires that mens rea must be proved before penalty can be imposed under these provisions. Hence once the contravention is established then the penalty is to follow.

In our view, the impugned judgment of the Securities appellate Tribunal has set a serious wrong precedent and the powers of the SEBI to impose penalty under Chapter VIA are severely curtailed against the plain language of the statute which mandatorily imposes penalties on the contravention of the Act/Regulations without any requirement of the contravention having been deliberated or contumacious. The impugned order sets the stage for various market players to violate statutory regulations with impunity and subsequently plead ignorance of law or lack of mens rea to escape the imposition of penalty. The imputing mens rea into the provisions of Chapter VI A is against the plain language of the statute and frustrates entire purpose and object of introducing Chapter VIA to give teeth to the SEBI to secure strict compliance of the Act and the Regulations.

In the result, the Civil Appeal Nos. 9523 and 9524 of 2003 are allowed and the order passed by the Securities Appellate Tribunal, Mumbai dated 21.08.2003 in Appeal Nos. 50 and 51 of 2002 are set aside. No costs.