SUPREME COURT OF INDIA

Securities & Exchange Board of India

Vs.

ICAP India Pvt. Ltd.

C.A.No.5275 of 2006

(Shiva Kirti Singh and Vikramajit Sen. JJ.)

24.11.2015

JUDGMENT

Shiva Kirti Singh, J.

1. This appeal under Section 15Z of the Securities & Exchange Board of India Act, 1992 (for brevity, 'the SEBI Act') has been preferred by the Securities & Exchange Board of India (for brevity, 'the SEBI') to challenge the judgment and order dated 14.08.2006 passed by the learned Securities Appellate Tribunal (hereinafter referred to as 'the SAT') in Appeal No.56 of 2004.

2. The substantial question of law falling for determination involves interpretation of the term 'annual turnover' as it finds mention in the Explanation after paragraph 3 of Schedule III to the Securities & Exchange Board of India (Stock Brokers & Sub¬brokers) Regulations, 1992 (for brevity, 'the Regulations'). The aforesaid Explanation reads as follows :

> "Explanation. - For the purpose of paragraphs 1, 2 and 3, "annual turnover" means the aggregate of the sale and purchase prices of securities received and receivable by the stock broker on his own account as well as on account of his clients in respect of sale and purchase or dealing in securities during any financial year."

3. The factual matrix may be noted only in brief. The respondent is a stock broker in the wholesale debt market segment of the National Stock Exchange and deals in debt market securities. The stand of the respondent is that the price of the dealt with securities would not form part of the concerned broker's 'annual turnover' and the same cannot be the basis for computing the registration fee of stock brokers like the respondent. This stand is based on a circular of Reserve Bank of India (for brevity, 'RBI') dated June 20, 1992, issued with a view to regulate the wholesale debt market. The dispute in respect of quantum of registration fee demanded by the SEBI was brought before the SAT by way of challenge to SEBI's order dated November 28, 2003 directing the respondent to pay Rs.33,51,45,620/- towards principal and Rs.3,78,29,623/- towards interest as on November 30, 2003. As noticed above

the SAT allowed the appeal of the respondent and set aside the order passed by SEBI vide its judgment and order under appeal.

4. The circular dated June 20, 1992 issued by RBI as a regulator of the wholesale debt market is the basis for the SAT to hold that for the permissible activity of bringing the parties together, no amount is received or receivable by the stock broker when he deals in the wholesale debt segment of the market and therefore the definition of "annual turnover" for the purpose of paragraphs 1, 2 and 3, as contained in the Explanation to Paragraph 3 of Schedule III to the Regulations is not satisfied. Before adverting to other relevant facts it is useful to notice the relevant part of this circular which reads as under :

> "III. DEALINGS THROUGH BROKERS
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> (i) If a deal is put through with the help of a broker, the role of the broker should be restricted to that of bringing the two parties to the deal together.
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> (ii) While negotiating the deal, the broker is not obliged to disclose the identity of the counterparty to the deal. However, on conclusion of the deal, he should disclose the counter party and his contract note should clearly indicate the name of the counterparty.
>
> (iii) On the basis of the contract note disclosing the name of the counterparty, settlement of deals between banks, viz., both fund settlement and delivery of security, should be directly between the banks, and the broker should have no role to play in the process.
>
> (iv) With the approval of their top managements, banks should prepare a panel of approved brokers which should be reviewed annually, or more often if so warranted. Clear-cut criteria should be laid down for empanelment of brokers, including verification of their creditworthiness, market reputation, etc. A record of broker wise details of deals put through and brokerage paid, should be maintained.
>
> (v) A disproportionate part of the business should not be transacted through only one or a few brokers. Banks should consider fixing aggregate contract limits for each of the approved brokers, and ensure that these limits are not exceeded."

5. The stand of the appellants is that the SAT has mis¬interpreted the Explanation to paragraph 3 to hold that the "turnover" for purpose of fee will not be the value of the stocks under transaction but only the value of brokerage earned by the stock brokers like the respondent. According to Mr. C.U. Singh, learned senior counsel for the SEBI the respondent is bound by the provisions of the SEBI Act, the rules framed thereunder as well as the Regulations. The law does not permit any one to act as a stock broker either in respect of shares in the equities segment or the Government securities in the wholesale debt segment until he is registered with the SEBI. Such registered broker has to pay the prescribed fee as

per Schedule III of the Regulations. He highlighted clause 1(bb)(ii) of Schedule III which was inserted by the Amendment Regulations of 2002 w.e.f. February 20, 2002. It is the case of the appellant that clause 1(bb)(ii) was introduced in the Regulations because the SEBI accepted the Bhatt Committee's recommendations for fixing a lower rate of fees for transactions in bonds and securities. The lower rate for transactions in bonds and Government securities was on account of comparative higher value of such transactions leading to higher turnover and that justified imposition of lower rate of fees. The grievance of the appellant is that the SAT did not consider such clear substantive provision and its history while interpreting the Explanation in a manner which amounts to doing violence to the main provision itself. Learned counsel for the appellant also referred to judgment of this Court in the case of *B.S.E. Brokers' Forum v. Securities & Exchange Board of India*[1] and pointed out that in paragraph 43 the Court noted that the petitioners of that case had strongly relied upon the Report submitted by the Bhatt Committee. Further in paragraph 47 the Court rejected the contention of the petitioners after noticing the recommendations of the Bhatt Committee to the effect that "on Government securities, PSU bonds and units, the turnover will have to be calculated separately and a fee of 1000th of 1% may be charged on such turnover than the present scale of 100th of 1%." Thereafter the Court observed that the Board was bound to bring about the corresponding changes so as to remove the anomalies pointed out by the Committee. It also noted that the Board or the SEBI had accepted the recommendations and they would be incorporated in the Regulations. The Court concluded that subject to the recommendations of the Bhatt Committee to be incorporated in the Regulations, the challenge made to the levy based on the measure of turnover had to be rejected.

6. On behalf of appellant it was further pointed out that through Notification No.S.O. 184(E) issued by the SEBI and Notification No.S.O.(E) issued by RBI, both dated March 01, 2000 it was made clear that all contracts for sale or purchase of Government securities when entered into through recognized stock exchanges, would be subject to the SEBI Act, Securities Contracts (Regulation) Act, 1956 as well as rules, regulations, bye-laws and circulars made under those Acts. It was also pointed out that Section 2(h) of the Securities Contracts (Regulation) Act, 1956 defines "securities" to include not only Government securities but also rights or interests in securities. Hence, according to appellant the physical receipt of securities or payments is not necessary. It was further contended on behalf of appellant that the circular of RBI of 1992 cannot affect the statutory regime governing fees payable by a registered broker to the SEBI as per provisions in the Regulations. Lastly it was submitted that the appellant has calculated and demanded the fee as per clause 1(b) instead of clause 1(bb) because the respondent did not disclose details of its different transactions.

7. On behalf of appellant reliance was placed upon judgment of this Court in the case of *K.P. Varghese v. Income-tax Officer, Ernakulam*[2] to highlight various principles relating to interpretation of statutes. In particular, reliance was placed upon the principle that plain meaning or literal construction may not be relied upon if it results in absurdity, injustice and unconstitutionality. In such a situation Court should construe the real meaning having regard to the object and purpose behind enacting the provision as well as the context of the setting in

which it occurs and with a view to suppress the mischief sought to be remedied by the Legislature.

8. In reply Mr. Jayant Bhushan, learned senior advocate submitted that in the case of B.S.E. Brokers' Forum this Court upheld the validity of the registration fees levied by the SEBI but there was no occasion in that case to interpret the term 'turnover' as defined through the Explanation. He also referred to an Explanation to clause 2 of Schedule IV of the Regulations only for comparing the two Explanations and pointing out that while laying down the Schedule of Fees to be paid by the Trading or Clearing Member or Self Clearing Member the expression 'annual turnover' has been defined differently so as to take into account.

> "the aggregate value of all trades executed by the trading member "Placing reliance upon pleadings of the SEBI, the view taken by the SAT in the impugned judgment was sought to be supported further on the ground that in respect of wholesale debt market SEBI merely 'monitors' and does not 'regulate' and therefore there can be no justification to include the entire value of stocks in the turnover for calculating the registration fee. It was conceded however that the wholesale debt market was considerably widened in 2003 and SEBI may claim that it is required to regulate the wholesale debt market from 2003 onwards but that should not affect the present case which is related to an earlier period, only upto December 2002. Mr. Bhushan took us through the documents and pleadings to counter the allegation that respondent did not disclose the details and particulars of its business deals/accounts. According to him, it is admitted in the inspection report that the respondent dealt only in the wholesale debt market segment."

9. On behalf of respondent reliance was placed upon case of Income-tax Officer, *Alleppey v. I.M.C. Ponnoose*[3] and case of *Government of Andhra Pradesh v. P. Laxmi Devi*[4] in support of a well established proposition of law that unless the Statute empowers the concerned authority to make a rule or regulation with retrospective effect, such authority cannot make a rule, regulation or bye-law with retrospective effect.

10. Lastly it was pointed out from the materials on record that respondent had raised several other grounds for objecting to the impugned action of the SEBI but the SAT allowed respondent's appeal on the basis of interpretation of the term 'annual turnover' and did not deal with other grounds.

11.We do not find any merit in the contention advanced on behalf of the respondent that the Explanation under clause 2 of Schedule IV can be used in contradistinction of differently worded Explanation under paragraph 3 of Schedule III to support the interpretation of the term 'annual turnover' given by the SAT. While Schedule III relates to Regulation 10 which governs fees to be paid by the stock broker or sub-broker, Schedule IV relates to Regulation 16G(1) which governs fees to be paid by the Trading or Clearing Member or Self Clearing Member of Derivatives Exchange/ Derivatives Segment/ Clearing Corporation/ Clearing

House. In such a situation, in our view, the term 'annual turnover' has to be understood only in the light of Schedule III and its contents including the relevant Explanation.

12. On a careful analysis of the Explanation occurring after paragraph 3 of Schedule III and the definition of 'annual turnover' contained therein as also the reasonings in the impugned order we are constrained to hold that the SAT has erred in limiting the annual turnover of the respondent only to the amount of brokerage earned by it. The earning by way of brokerage represents only the part of price of securities received by the stock broker on his own account. The other and more significant part of the 'annual turnover' as per the Explanation is the aggregate of the sale and purchase prices of securities, received or receivable by the stock broker on account of his clients in respect of sale and purchase or dealing in securities during the financial year. The view taken by the SAT that since in the wholesale debt market segment the broker has a limited role as per the RBI circular and since the broker does not receive the sale or purchase price because the payment is directly made to the seller, the broker will be saved from inclusion of the sale and purchase prices in his annual turnover, suffers from an apparent error. The error lies in not appreciating that the component of aggregate of sale and purchase prices which is receivable by the stock broker even on account of his clients is included in the annual turnover. Such sale and purchase price receivable by the stock broker on account of his clients, under the directions of the RBI through the circular dated June 20, 1992 presently goes directly to the seller but it is of no significance. Even if such sale and purchase price had actually been received by the stock broker not on his own account but on account of his clients, it could not belong to the broker and had to be passed on to the seller because such amount was receivable clearly on account of his clients in contradistinction to any part of sale and purchase price received or receivable by the stock broker on his own account. Thus viewed, the annual turnover of the stock broker as per the Explanation must include the value of entire transaction for the purpose of computing the registration fee as per Schedule III of the Regulations. In no case the term 'annual turnover' can be so interpreted as to mean only the amount earned by the stock broker by way of brokerage.

13. The same conclusion will emerge on considering the legislative history leading to insertion of clause 1(bb) in Schedule III whereby transactions in Government securities, bonds issued by any public sector undertaking and the units, traded in a similar manner were placed in a separate category for which the fee is kept at a much lower rate of 1000th of 1% of the turnover. The SAT erred in not considering the obvious purpose of such a provision brought through an amendment in the light of recommendations of the Bhatt Committee which had received not only approval of the SEBI but also of this Court as per judgment in the case of B.S.E. Brokers' Forum.

14. So far as defence of the respondent that in the wholesale debt market segment, at least prior to 2003, the SEBI was required only to 'monitor' and not to 'regulate' such market cannot cut any ice because the provisions relating to registration fee by the SEBI have already been held valid and in the present proceedings there is no challenge to the relevant provisions including those in Schedule III of the Regulations. As already noted, in the case of

B.S.E. Brokers' Forum this Court directed the SEBI to incorporate the relevant recommendations of the Bhatt Committee in the Regulations and as a result the rate of fee on Government securities etc. dealt in the wholesale debt market was lowered and pegged at 1/10th in comparison to fees payable by the stock brokers in other segment.

15. In view of the above discussions and the interpretation of the term 'annual turnover' indicated by us earlier, we are constrained to hold the impugned order passed by the SAT as erroneous in law. It is accordingly set aside. There is a consensus that in case the impugned judgment and order is set aside, the matter deserves to be remanded back so that other grounds earlier raised by the respondent may now be considered by the SAT in accordance with law. For that purpose the matter is remitted back to the SAT for deciding the other relevant issues and grounds as per law at an early date, preferably within six months. The appeal thus stands allowed to the extent indicated above. In the facts of the case there shall be no order as to costs. The amount of Rs.2.9 crores deposited by the SEBI with the Registry 5has been invested in an interest bearing account And the FDR is due to mature on 30.11.2015. As soon as the amount matures, the same should be refunded to the SEBI without any delay.

Cases Referred.

[1](2001) 3 SCC 0482
[2](1981) 4 SCC 0173
[3]AIR 1970 SC 0385
[4](2008) 4 SCC 0720