PREMIUM GLOBAL SECURITIES PVT. LTD. & ORS. A

v.

SECURITIES & EXCHANGE BOARD OF INDIA & ANR.

(Civil Appeal No. 3682 of 2006)

DECEMBER 09, 2015 B

[VIKRAMAJIT SEN AND SHIVA KIRTI SINGH, JJ.]

Securities Contract (Regulation) Rules, 1957: rr.8(1)(f), 8(3)(f) – Fee Continuity Benefit – Circular dated 27.09.2002 contemplated that transfer of membership to group company/ 100% subsidiary company would not attract any fresh payment of registration fees – In view of bar under r.8(1)(f), transfer of membership to appellant company – SEBI refused to grant fee continuity benefits to the appellant – Whether there was any compulsion of law to transfer brokerage business and whether appellant can be granted benefit of fee continuity – Held: The restriction imposed under circular was to not have fund-based and trading activities together under one roof – Thus, any action taken by the appellants to comply with restriction of not participating in both the activities simultaneously would be under compulsion of law – Appellants entitled to fee continuity benefits – Securities and Exchange Board of India Act, 1992 – s.11(2). C D E F

Disposing of the appeals, the Court

HELD: 1. It is beyond cavil that SEBI, as a trade regulator in the securities market, is entitled to charge registration fees for enabling it to carry out its functions as stipulated in Section 11(2) of the SEBI Act, 1992. However, it appears at present that SEBI has pounced at the opportunity to charge fresh registration fees choosing to ignore the exemptions assured by it. [Para 12] [209-D-E] G H

A **2. The restriction imposed was to not have fund-based and trading activities together under one roof. Thus any action taken by the Appellants to comply with restriction of not participating in both the activities simultaneously would be under compulsion of law. The**
B **compulsion of law under the 1957 Rules is directed towards the desired end and not concerned with the means, and it would be wrong for us to ascribe otherwise. [Para 13] [209-F, G-H]**

C *SEBI v. BSE Brokers' Forum* **(2001) 3 SCC 482;** *Ratnabali Capital Markets Ltd. v. Securities Exchange Board of India* **2007 (11) SCR 629 : (2008) 1 SCC 439 – referred to.**

D **Case Law Reference**

(2001) 3 SCC 482	**referred to**	**Para 8**
2007 (11) SCR 629	**referred to**	**Para 9**

E CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3682 of 2006.

From the Judgment and Order dated 15.06.2006 of the Securities Appellate Tribunal, Bombay in Appeal No. 192 of 2004

F WITH

C.A. No. 3686 of 2006
C. A. No. 2310 of 2007
C. A. No. 6394 of 2009.

G S. Ganesh, Sr. Adv., Sameer Parekh, Ms. Rukhmini Bobde, Ms. Nandita Bajpai, Ms. Aakanksha Nehra, M/s. Parekh & Co., Anand Sukumar, S. Sukumaran, Bhupesh Kumar Pathak, Ms. Meera Mathur, Ashok Mathur for the Appellants.

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C. U. Singh, Sr. Adv., Bhargava V. Desai, Ms. S. Mehrotra, Dhawal Mehrotra, Rishi Gautam for the Respondents. A

The Judgment of the Court was delivered by

VIKRAMAJIT SEN, J. B

CIVIL APPEAL NO. 3682 OF 2006, CIVIL APPEAL NO. 3686 OF 2006 AND CIVIL APPEAL NO. 6394 OF 2009

1. These Appeals arise against the common Judgment of the Securities Appellate Tribunal ('SAT' for brevity) which affirmed the stance of SEBI refusing to grant fee continuity benefits to the Appellants herein. Common question of law and facts arise and for the sake of convenience we shall keep in perspective the factual matrix in Civil Appeal No. 3682 of 2006, in which the arguments in the main have been addressed. C D

2. Premium Capital Market & Investments Pvt. Ltd. was incorporated on 24.6.1992, which on 9.2.1994 changed its name to Premium Capital Market & Investments Ltd (hereinafter 'PCMIL', Appellant No. 3). On an application for Trading Membership of National Stock Exchange of India Ltd. (hereinafter 'NSE') in the Capital Markets Segment by PCMIL, vide letter dated 16.5.1994, NSE sent them an offer of membership subject to certain conditions enclosed in Annexure 'A'. In its letter dated 4.10.1994 SEBI made observations on the Draft Prospectus for Public Offer submitted by PCMIL, including the conditions for NSE membership, namely that the company could not carry on any other activities apart from broking. Pursuant to this observation, the draft prospectus was amended with an undertaking that PCMIL would promote a new company to which it would transfer the NSE membership. Thereafter on 16.12.1994, PCMIL was admitted to the membership of NSE and was registered as a stock broker with SEBI. E F G H

A 3. On 27.4.1995 SEBI reaffirming the applicability of Rule 8(1)(f) and 8(3)(f) of Securities Contract (Regulation) Rules, 1957 (hereinafter '1957 Rules') to corporate members, via a letter directed all corporate members to "sever connections with businesses other than securities business B forthwith" and requested NSE to report on compliance. In order to comply with this direction, Premium Global Securities Ltd. (later Premium Global Securities Pvt. Ltd., hereinafter 'PGSL', Appellant No. 1) was incorporated on 16.5.1995 for taking over the membership card of PCMIL. On 30.9.1995 PCMIL ceased C all its fund-based activities. On 8.8.1996 NSE was informed about the formation of PGSL and an application was made for transfer of NSE membership from PCMIL to PGSL. On 14.3.2000 NSE issued a show-cause notice to PCMIL under D Rule 8(1)(f) and (3)(f) of the 1957 Rules in pursuance of a complaint that PCMIL was not allowed to engage in any business other than that of securities. To this PCMIL replied that PCMIL had not transacted any other business and that the last leasing transaction was carried out in September 1995 E and that PCMIL was only receiving lease amounts.

4. Thereafter on 4.4.2000 a fresh application was made for transfer of membership to PGSL and the NSE approved the aforesaid application on 12.4.2000 without any transfer fees. Steps for registration with SEBI were initiated and PGSL F was issued the Registration Certificate on 20.9.2000. Meanwhile PCMIL received a letter from the NSE Disciplinary Committee dated 7.6.2000 directing PCMIL to cease all business in the nature of fund-based activities and to initiate G steps to segregate it within two months. Alternatively the Committee also advised that PCMIL could set up a separate subsidiary to take up the broking activity.

5. On 30.9.2002 SEBI issued a Circular on Fee Continuity benefits. The relevant portions of the Circular read H as follows:

TRANSFER OF MEMBERSHIP TO 100% SUBSIDIARY, GROUP COMPANY, HOLDING COMPANY, ETC.

Where brokers are forced by compulsion of law to transfer their membership to:-

i. 100% subsidiary company or

ii. Group company or

iii. holding company

they shall not be required to pay fees afresh. In such cases, the Exchange would have to enumerate the circumstances under law resulting in the said transfer to 100% subsidiary/group/holding company for consideration by SEBI.

For this purpose,

A company would be classified as a group company of another company, if the controlling persons/entities in both the companies are same i.e. such persons/entities hold atleast 51% of the paid-up capital (40% in case of listed company) in both the companies.

A Company would be classified as a holding company of the trading member corporate, if its shareholding in the member corporate was above 51%.

6. In response to the request for turnover details by NSE, PGSL vide letter dated 12.3.2003 elucidated that there had been a transfer of membership due to compulsion of law and as per SEBI circular dated 27.9.2002, such transfer to group company would not attract any fresh payment of registration fees. SEBI however, refused to grant PGSL the fee continuity benefits sought. On 4.12.2003 PGSL submitted another

A detailed representation to SEBI seeking grant of fee continuity. However no response was received from SEBI. Meanwhile on 15.7.2004, SEBI (Interest Liability Regularisation) Scheme 2004 came into force. The Scheme envisaged a waiver of 80% outstanding interest if the broker paid the outstanding B principal along with 20% outstanding interest during a specified period. SEBI issued a Provisional Fee Liability Statement demanding payment of fees and NSE along with its cover letter sent it to PGSL and PGSL filed an appeal before the SAT.

C 7. The primary issue before SAT was whether the Appellants were under any compulsion of law to transfer their brokerage business to a subsidiary. SAT ruled in favour of SEBI stating that since the Appellants were subject to the bar in Rule 8(1)(f) they were therefore required to sever themselves D from their fund-based activities to keep in line with the provision. As a natural corollary thereof, SAT stated that although there was a compulsion of law on the Appellants, it did not extend to the extent that they were compelled to sever their brokerage business and transfer it to their subsidiary as they have in the E present scenario; rather the Appellants could have severed their non-brokerage businesses, either give it up in entirety or transfer it to a subsidiary. The Appellants have assailed this common judgment of the SAT.

F 8. The issue for determination before this Court is a neat one - Whether the Appellants can be granted the benefit of fee continuity? To determine the answer we must first refer to the Circular under which these Appellants have made their respective claims. The Circular titled, "Fees Payable by Stock G Brokers" dated 30.9.2002 was issued in the form of a clarification pursuant to the direction passed by this Court in SEBI v. BSE Brokers' Forum (2001) 3 SCC 482, to implement the recommendation of the R. S. Bhatt Committee. The benefit in the said circular can be granted only when the two essential

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conditions are satisfied. First that the company to which the transfer was made is indeed a 100% Subsidiary Company, Group Company or a Holding Company and secondly, whether there was a compulsion of law to transfer the said membership. There are no disputes on the satisfaction of the first essential condition. Thus we find the sole question for determination before us to be whether there was a compulsion of law to transfer the membership to PGSL.

9. Mr. S Ganesh, learned Senior Counsel for the Appellant, has relied on **Ratnabali Capital Markets Ltd.** v. Securities Exchange Board of India (2008) 1 SCC 439, where the term 'compulsion of law' for the first time came to be discussed in light of the SEBI Circular dated 30.9.2002. The appellants in **Ratnabali Capital Markets Ltd.** underwent an amalgamation in order to increase their reserves and qualify themselves to enter the derivatives market. On the prevailing facts it was held that raising money to qualify for membership of a segment did not constitute a compulsion of law for the said merger. Mr. Ganesh submitted that in **Ratnabali Capital Markets Ltd.** this Court clearly demarcated that any action taken by the benefit-seeker must not be solely for profit-motive; its roots must emerge from a survival instinct which is so in the case before us. He stated that PGSL was put in the predicament of choosing one business over another; letting go or transferring of the financial activities would have brought with it a difficulty of having to transfer the main business whereas transfer of the brokerage business would involve the transfer of the trading license. PGSL therefore chose to transfer its brokerage business to a new group company. This he said purported to merely re-organisation, not for commercial profit but for compliance with the provisions of Rule 8(1)(f) and 8(3)(f) of the 1957 Rules. Mr. Sameer Parekh, one of the other Counsels for Appellants, submitted that PCMIL faced 4 options when told to comply with the aforesaid 1957 Rules. They could

A either: a) give up the fund-based business; b) give up the brokerage business; c) transfer the fund-based business to another company, which would cause great hardship to all involved as numerous contracts would have to be changed; or, d) transfer the brokerage business, and of the 4 the last B was the path of least resistance and hence the brokerage business was transferred to PGSL.

10. Learned Senior Counsel for the Respondents, Mr. C U Singh, submitted that the Appellants are precluded from C claiming compulsion of law as they themselves have admitted that they had other options besides transferring their brokerage membership to a group company. He submits that the mere existence of other options means that there was no compulsion imposed by law to follow this specific course and the D Appellants' plea of impossibility is neither a compulsion of law nor has it been raised earlier. Mr. Singh placed reliance on Rules 8(1)(f) and 8(3)(f) of the 1957 Rules to submit that right from the start, the Appellants were under the restriction to not engage themselves in a business other than that of securities. E He further brought to our attention 'Annexure A' of the letter of acceptance of membership to the Capital Market Segment of the NSE which placed certain conditions on Appellants to be fulfilled within three months and one of which was the requirement to sever all fund based activities. Mr. Singh was F also of the opinion that the Appellants' reliance on **Ratnabali Capital Markets Ltd.** is misplaced. According to him, this Court held that for an action to be compulsion of law, it needed to have been an alternative to liquidation or a correspondingly calamitous situation, essentially to prevent winding-up.

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11. To these submissions, Mr. Sameer Parekh responded by placing forth on record a copy of the original advertisement placed in the newspapers calling for applications for Trading Membership of the Capital Markets Segment of

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NSE. He points out that this advertisement was published on 11.2.1994 and the last date for submitting applications was 25.2.1994, leaving a gap of merely 14 days. He states that this becomes relevant in light of the submissions placed on record by SEBI that only those companies who had no other business involving financial liabilities could apply. He submits that SEBI could not have had the expectation that new companies would be incorporated and be ready with their applications for trading membership all within a span of 14 days. He also submitted that Rules 8(4) and 8(4A) are the provisions relevant to companies and on a reading of 8(4A)(iv) which specifically exempts the Directors of the companies from the provisions of 8(1)(f) and 8(3)(f) it can be concluded that it was not intended initially that Rules 8(1)(f) and 8(3)(f) would apply to companies.

12. It is beyond cavil that SEBI, as a trade regulator in the securities market, is entitled to charge registration fees for enabling it to carry out its functions as stipulated in Section 11(2) of the SEBI Act, 1992. However it appears at present that SEBI has pounced at the opportunity to charge fresh registration fees choosing to ignore the exemptions assured by it.

13. We find merit in the arguments furnished by the Appellants. In our opinion, the restriction imposed was to not have fund-based and trading activities together under one roof. Thus any action taken by the Appellants to comply with restriction of not participating in both the activities simultaneously would be under compulsion of law. The Respondents would have us say that only one line of action was compulsion of law but that would have the effect of adding 'process' to compulsion of law. The compulsion of law under the 1957 Rules is directed towards the desired end and not concerned with the means, and it would be wrong for us to ascribe otherwise.

A 14. We thus set aside the impugned Judgment of SAT and direct that the Appellants be given the benefit of fee continuity. These Appeals stand allowed accordingly. There will be no orders as to costs.

B **C.A. 2310 of 2007**

15. The original trading membership of the NSE had been obtained by Onida Finance Ltd. on 16.9.1994 but when the NSE raised objections about its fund-based activities, the license was transferred to OFL Securities Ltd. on 7.2.1995. C Thereafter in 1999-2000, OFL Securities Ltd. transferred its trading license to Gulita Securities Ltd. (Appellant No. 1). Thus the trading membership was transferred twice but only the first transfer was under compulsion of law. Therefore, we find neither D any merit in the Appeal nor any infirmity in the order of the SAT with regard to the Appellants in C.A. No.2310 of 2007. Thus this Appeal is dismissed accordingly. There will be no orders as to cost.

Devika Gujral Appeals disposed of.