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Court : SEBI Securities and Exchange Board of India or Securities Appellate Tribunal SAT

Decided On : Jan-01-2001

Appellant : M/S. Cabot International Capital

Respondent : Adjudicating Officer and

Judgement :

1. This appeal under section 15T of the Securities and Exchange Board of India Act, 1992 (the Act), is directed against the adjudication order dated August 31, 2000 made by the Adjudicating Officer, under section 15I of the Act, imposing monetary penalty against the Appellant.

2. Cabot International Capital Corporation, having its registered office at Suite 1300, Two Seaport Lane, Boston MA-02210-2019, the Appellant herein, is the foreign collaborators of an Indian company namely Cabot India Ltd (the company). The company shares are listed in the Stock Exchange, Mumbai. The issued subscribed and paid up share capital of the company as of December 1996 was Rs. 7, 13, 33, 800 consisting of 71, 33, 380 equity shares of Rs. 10/- each. In 1996, the Appellant held 51% of the issued capital of the company. Subsequently, the company allotted 16,05,020 equity shares to the Appellant through a preferential allotment. As a result of the said allotment the Appellant's aggregate holding in the Company's issued capital increased to 60%. This was in 1997. On 10.11.1998, the Appellant through its Merchant Bankers made an application to the Respondent seeking exemption under regulation 3 of the SEBI (Substantial

Acquisition of Shares and Takeovers) Regulations, 1997 (the 1997 Regulations) to make a public offer to acquire 14% of the issued capital of the company as against a minimum of 20%, required to be offered to the public under the Regulations. While examining the said proposal, the Respondent felt that since the holding of the Appellant in the company's capital increased from 51 % to 60%, as a result of allotment of 16, 05, 020 equity shares in 1997, the said acquisition attracted regulations 3 (4) and 11, of the 1997 Regulations, and decided to inquire into the matter. For the purpose, Chairman of the Respondent issued two separate orders, on 30.9.1999 and 10. 12.1999, ordering adjudication in the matter of violation of regulation 11 and regulation 3 (4), respectively. Shri P. Sri Sai Ram, an officer of the Respondent was the Adjudicating Officer appointed in both the cases. The Adjudicating Officer issued a common notice to the Appellant on 8.2.2000, asking to show cause as to why action should not be taken against it for the alleged violation of regulations 3 (4) and 11, as provided under sections 15A and 15H of the Act, respectively. Responding to the notice, the Appellant submitted a detailed reply and also made oral submissions before the Adjudicating Officer. In the light of the Appellant's submissions the Adjudicating Officer spared it from the pain of penalty provided under section 15H, observing that: "In this case from the letter dated August 8, 2000 of the Acquirer and from the statement of the Acquirer during the hearing, it is seen that the Acquirer received the shares on 2.6.97 and hence 1 consider 2.6.97as the date of acquisition. In this case, through the process of preferential allotment, the Acquirer acquired 9% of the voting rights of the Issuer Company. As per regulation 11 (1) of SEBI (Sub) Regulations, 1997 as it stood (prior to the amendment 28.10.1998), they should not have acquired more than 2% of the voting power by way of creeping acquisition without making a public offer. Not making such public offer amounts to violation of Section 15H (ii) of SEBI Act, which provides as under: If any person who is required under the SEBI Act or Regulations may thereunder fails to make public announcement to acquire shares at a minimum price, he shall be liable to a penalty not exceeding Rs. 5 lacs.

This case however relates to a transitional period. The process of acquisition took place while the 1994 Regulations was in force. The actual allotment/ acquisition took place while the 1997 Regulations came into force.

In that process there was lack of clarity on the part of the Acquirer as to the applicability of 1997 Regulations. Keeping all the factors in view, the benefit of doubt is given to the Acquirer on the basis that the Acquirer is exempted from the purview of the Regulations in making a public offer, and no penalty in terms of section 15H (ii) of SEBI Act is levied, on the Acquirer in this count".

3. But, the Adjudicating Officer was not ready to extend the "benefit of doubt" to the alleged violation of regulation 3 (4) punishable under section 15A. He observed: "that however does not mean that the Acquirer is not required to submit a report to SEBI under regulation 3 (4) of the 1997 Regulations".

4. On this count, the Adjudicating Officer imposed a sum of Rs. 1, 50, 000/- as penalty on the Appellant. The Appellant is aggrieved on this count.

5. Shri Aspi Chinoy, learned Counsel appearing for the Appellant narrated various steps taken by the company in the process of effecting the preferential allotment. He submitted that the meeting of the Board of Directors of the company held on 24.12.1996 recommended the preferential allotment. Thereafter an extra ordinary general meeting of the share holders, after due notice, was held on 23.1.1997 and therein the resolution for preferential allotment as required under section 81(1A) of the Companies Act, was passed. The company had informed the Stock Exchange, Mumbai (the stock exchange) well in time the preferential issue proposal put for consideration before the Board of Directors and the general body. Minutes of the general body meeting was also forwarded to the stock exchange. The company had received from the Appellant firm commitment to subscribe to the preferential allotment vide letter dated 21.1.1997. Approval from the Foreign Investment Promotion Board for issue of shares to the Appellant was received on 18.2.1997. Reserve Bank of India accorded in principal approval of the issue on 1.3.1997 (final approval received on 11.4.1997). The Appellant on 3.3.1997 remitted US $ 7,712,346.42 in favour of the company to City Bank, Mumbai being the purchase consideration payable towards the subscription. On 16.4.1997 the company made an application to the stock exchange seeking permission for listing the said 16, 05, 020 equity shares allotted to the Appellant stipulating a 'lock in period' of 5 years from 11.4.1997. The stock exchange granted listing permission on 16.5.1997 with

the 'lock in' stipulation as put in by the company.

Pursuant to the said preferential allotment the Appellant's holding in the company rose to 60% of its issued capital.

6. The learned Counsel submitted that the decision to issue and allot 16, 05, 020 equity shares of the company could, have been implemented within 3 months from 23.1.1997 in terms of para 10, of the SEBI Guidelines for preferential allotment which provided that action on any resolution passed at a meeting of the share holders of a company granting consent to the preferential issue of any financial instrument could be completed within a period of three months from the date of passing of the resolution and that since the resolution in the instant case predates the effective date of the notification, the allotment should be considered to have taken place before notification of the 1997 Regulations. Since the Appellant had already communicated on 21.1.1997 its irrevocable decision to purchase the shares, date of remittance of purchase money is of no relevance. According to the learned Counsel the events such as the actual receipt of inward remittance and the board resolution allotting the shares, occurring after the notification of the Regulations on 20.2.1997 were only to effectuate/implement the binding commitment between the company and the Appellant for the preferential allotment arrived at before the date of notification of the 1997 Regulations. He submitted that since all the substantive requirement relating to the preferential allotment were completed before the notification of the 1997 Regulations on 20.2.1997 and that the said Regulations have no retrospective force, the preferential allotment did not attract the 1997 Regulations.

7. Shri Chinoy further submitted that even if it is assumed for argument sake that the 1997 Regulations were applicable to the instant case, the allotment being preferential allotment covered under regulation 3, there was no requirement to comply with the provisions of regulation 11, as concluded by the Respondent. According to regulation 3 nothing contained in regulations 10, 11, and 12 of the Regulations shall apply to the type of acquisition covered therein.

8. Coming to the charge of non compliance of the provisions of regulation 3 (4), the learned Counsel submitted that the Appellant was under bonafide belief that

the provisions of the 1997 Regulations did not apply to the preferential allotment. The 1997 Regulations came into force on 20.2.1997, whereas the Appellant had agreed to buy the shares and the general body of the company had accorded the requisite approval before the said date. To show that failure to report under regulation 3 (4) by the Appellant was unintentional, the learned Counsel pointed out the fact that the company had reported well in time the proposed allotment to the stock exchange and filed the requisite returns with Registrar of Companies. Reporting to the stock exchange is meant for enlightening the shareholders. This shows that transparency was not wanting in the allotment. Further, in reality there was nothing that the Appellant could gain by not reporting the acquisition to the Respondent and that the moment the Respondent pointed out that a report should have been filed under the regulation the same was filed with a request to take the same on record by condoning the delay. Condonation of delay was specifically sought vide letter dated 10. 11. 1998 in the context of seeking partial exemption from making public offer. The report has been taken on record. The exemption was granted without demur on 8.12.1998 thereby suggesting that the delay has also been condoned, as sought by the Appellant. In view of the same there was no cause of action left with to be proceeded against the Appellant.

9. Shri Chinoy submitted that as the facts would clearly show, the delay in submitting the report was purely unintentional and did not warrant any penal action against the Appellant, that the Appellant had acted bonafide and openly, that requisite disclosures were made at every stage to all concerned that transparency requirement was fully met with, and that no prejudice has been caused to the share holders of the company or anybody else in any manner by late submission of the report.

10. The learned Counsel submitted that liability to pay penalty under section 15A or 15H of the Act arises only when the Adjudicating Officer imposes the penalty after having satisfied in the inquiry that the person had willingly defaulted in complying with the specific statutory provisions. Referring to the submission made by the Respondent in its written reply to the appeal that the whole purpose of timely disclosures and information under the Regulations is to enlighten the investors, the learned Counsel pointed out that this requirement has been fully met

with by reporting to the stock exchange and the Registrar of Companies and also by issuing explanatory statement to the notice of the resolution scheduled to be placed before general body meeting, to each of the share holders of the company. It is not the Respondent's case that in this case there was no transparency. He further submitted that the delay in filing the report with the Respondent has not in any way resulted in any gain to the Appellant or any loss to anybody. In this context the learned Counsel pointed out that Adjudicating Officer himself had agreed with the Appellant's submission that the delay in filing the report has not resulted in any gain, and that he has not mentioned anywhere in the order that the delay has caused any loss to anybody. Further that this is the first time that such a lapse occurred on the part of the Appellant. Analysing the provisions of section 151, the learned Counsel submitted that it is not mandatory on the part of the Adjudicating Officer to impose penalty even if he comes to the conclusion that the person had failed to comply with the specified requirements of the section. The Adjudicating Officer is vested with the discretion to impose penalty and that discretion is governed by Section 15J, which clearly provides the factors to be taken into consideration for the purpose of deciding the quantum of penalty. Countering the Respondent's contention that against the maximum penalty leviable under the Act the Adjudicating Officer had imposed only a token penalty, the learned Counsel submitted that it is not the quantum of monetary penalty but the stigma involved is the disturbing factor. He submitted that in the light of facts and circumstances of the case, the Adjudicating Officer should not have imposed any penalty.

11. In support of his contention that the Adjudicating Officer should not have imposed any penalty in the case, the learned Counsel cited Supreme Court's decision in Hindustan Steel Ltd., v. The State of Orissa (AIR 1970 SC 253) in which the Court had held that "penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation". Shri Chinoy also cited Supreme Court's observation in Jiwani's case [Akbar Badruddin Jiwani V. Collector of Customs (1990 (47) ELT 161 SC], to show that it was necessary to establish 'mens rea' for imposition of penalty, therein the Supreme Court had held that in the light of the finding arrived at by the Customs, Excise and

Gold Control Appellate Tribunal that the product was imported on a bonafide belief that it was not marble, the imposition of such a heavy fine is not at all warranted and 'justifiable". He also referred to the Calcutta High Court's observation in Extrusion v. Collector of Customs, Calcutta [1994 (70) ELT. 52 (Cal)] that confiscation of goods under Customs Act should not have been made "having regard to the bonafide conduct of the applicant". He submitted that the Respondent has no where questioned the conduct of the Appellant. Referring to the word "shall be liable to a penalty" occurring in sections 15A, 15H etc., in the Act, the learned Counsel submitted that there is no strict built in obligation to suffer penalty as such. In support he cited the Supreme Courts observation in Superintendent and Remembrancer of Legal Affairs to Government of West Bengal Vs. Abani Maity,(1979 (4) SCC 85) that "the word 'liable' occurring in many statutes has been held as not conveying a sense of an absolute obligation or penalty, even if this word is used along with the words 'shall be'. The learned Counsel submitted that in the light of the fact that the Appellant was under bonafide belief that the 1997 Regulations were not applicable, that the delay involved was clearly unintentional and was of no consequential effect and in view of the legal provisions and the Apex Court's observations, the Appellant should not have been penalised.

12. Shri Ananta Barua, authorised Representative of the Respondent submitted that there is no dispute about the material facts relating to the preferential issue of equity shares to the Appellant. According to him, the procedures preceding the preferential allotment followed by the company are of no relevance, to decide the applicability of the 1997 Regulations. The date of "the actual allotment" is the relevant date to be considered to decide the applicability of the 1997 Regulations and it was undoubtedly 4.3.1997. But he conceded that the Adjudicating Officer had accepted 2.6.1997 as the relevant date of acquisition, being the date on which the Appellant received the shares.

He admitted that accepting 4.3.97 or 2.6.97 as the date of allotment is of no consequence for the limited purpose of deciding the applicability of the Regulations as both these dates are after the notification of the 1997 Regulations. According to Shri Barua in terms of regulation 3 (4) of the 1997 Regulation, an

acquirer is required to report to SEBI certain details with supporting documents, in the event of his voting rights reaches 10% or more in the Target Company as a result of the acquisition. Regulation 3 (4) provides a time limit of 21 days to submit the report. 15A of the Act provides penalty to meet the failure.

The Appellant has admitted that report was submitted belatedly.

Submission of report was delayed by 529 days. For the reasons that the allotment was made after the notification of the 1997 Regulations, the provisions of the 1997 Regulations applied to the acquisition and in the face of the admitted failure to file the report within the stipulated time, imposition of penalty is justified.

13. Shri Barua submitted that partial exemption from compliance of the requirements of regulation 11 in respect of a public offer of shares in December, 1998, granted by the Respondent cannot be considered as condonation of the default in complying with the requirements of regulation 3 (4), committed in June, 1997. The order dated 3.12.1998 is limited to the extent of granting exemption prospectively for further acquisition of shares in the company. There is nothing in the order indicative of condonation of the delay, as claimed by the Appellant.

14. On the imposition of penalty, the learned Representative submitted that the Adjudicating Officer has taken a very lenient view in the matter, as is evident from the fact that only a sum of Rs. 1, 50, 000 has been imposed as penalty, though the law provided for a higher amount of penalty. Obviously this could be after taking into consideration the factors specified in section I5J and the Appellant's submission that the delay was unintentional. With a view to highlight the gravity of the failure, Shri Barua submitted that the essence of making the specified disclosures to the Respondent under regulation 3 (4) is to ensure transparency in such transactions and also assist the Respondent in monitoring the transactions to ascertain whether acquirer was required to make a public offer or not in the interests of the investors and to provide adequate transparency to the benefit of the investors. He further submitted that where a statute creates an offence simpliciter, it is not necessary to probe in to see the existence of mens rea, as the assumption is that the statute itself has dispensed with the requirement of mens rea as a condition to penalise the offender and created strict liability. According to

him on a plain reading of section 15A it is clear that mens rea is not required for imposition of penalty under the section. The language of the section is clear enough to bring thereunder those persons who fail to comply with the requirement specified therein, irrespective of whether the persons had guilty intent or not. Since any person violating the provisions of the law would be liable to visit with the penalties prescribed irrespective of guilty intent, the decision of the Adjudicating Officer imposing monetary penalty on the Appellant is justified. In support of his contention that mens rea is not an essential ingredient of the offence to impose monetary penalty under 15A of the Act, Shri Barua cited the Supreme Court's observation in Gujarat Travancore Agency vs.

The Commissioner of Income Tax (AIRAddl Commissioner of Income Tax vs. I.M.Patel & Company (AIR 1992 SC 1762) and the view expressed by this Tribunal in the SRG Infotech Ltd Vs. SEBI (1999 (22) SCL 422: 1999(35) CLA 473: 2000 CLC 225).

15. I have carefully considered the propositions put forth by the Appellant and the opposition made by the Respondent in their respective pleadings and oral submissions. Shri Chinoy's proposition that since substantive requirements of preferential allotment such as passing the requisite resolution by the company's general body, firm commitment by the Appellant to buy the shares, requisite approval from FIPB etc., were effected before publication of the 1997 Regulations and that the Regulations had no retrospective effect, the requirements of the 1997 Regulations are not applicable to the preferential allotment is difficult to accept. The procedures to be followed and preparations to be made preceding the allotment of shares cannot be considered as allotment itself. It is not necessary that the preparations/procedures followed should ultimately end up in actual allotment of shares to a person. There is an element of uncertainty till such time the shares are actually allotted complying with all the statutory requirements.

The company also knew this, otherwise it would not have shown 11.4.1997 as the date of allotment in the Return of allotment pursuant to section 75 (1) of the Companies Act. In the letter dated 16.4.1997 addressed to the Registrar of Companies, forwarding the Return of Allotment also the company had stated that

the allotment was made with effect from 11.4.1997. A copy each of the letter and the Return of Allotment is a part of the appeal before the Tribunal. It is also seen from the application made for listing that the company had stated that the shares issued under preferential allotment were not transferable for a period of 5 years from 11.4.1997. The sanctity of 11.4.1997 is that it was on this date the Reserve Bank of India granted its final approval for the issue and completed the legal process required to sustain the allotment legally. In fact it is very clear from the language used in regulation 3 (1) (c) itself as the sub regulation (c) states - "preferential allotment, made in pursuance of a resolution passed under section 81(1A) of the Companies Act, 1956". As the reference is to "the allotment made in pursuance of a resolution passed", there is hardly any scope to view that the allotment of share is complete by passing the resolution itself. Allotment is a distinct event post the resolution referred in section 81 (1A). It is ultimately that date on which the board of directors validly allotted the shares, which in the present case is after the notification of the 1997 Regulations.

Compliance of the provisions of regulation 3 (4) is a post acquisition requirement. Therefore, I have no hesitation to hold that the preferential allotment made to the Appellant comes under the purview of the 1997 Regulations and thereby regulation 3 (4) is attracted.

16. Yet another submission by the Appellant is that since its request for exemption from the compliance of regulation was granted by the Respondent on 3.12.1998 and the delay in complying with requirement under regulation 3 (4) was within the knowledge of the Respondent at that point of time and the Appellant had also sought condonation of the delay specifically while seeking the exemption referred to above and that the 'report' having been already taken on record, the inference is that the delay is also condoned. But this is only the assumption, and not the reality. The Respondent's order dated 3.12.1998 is with regard to compliance of the requirements of regulation 11 relating to further acquisition of shares and its scope is limited to the said extent. The Appellant had sought condonation of delay involved in complying with the provisions of regulation 3 (4) while seeking exemption and as such, grant of exemption itself would mean condonation of delay, is not possible to accept. I have perused the order dated 3.12.1998. There

is nothing to the effect that the delay has been condoned. In this context, it has to be remembered that it was not a suo moto decision of the Adjudicating Officer to adjudicate the failure to comply with the provisions of the Act. It was the order of the same Board, which had granted the exemption. If the Board had condoned the delay as claimed by the Appellant, it would not have ordered adjudication. That is the reality. Thus the order itself shows that the Board had not condoned the delay, foreclosing action under section 151 of the Act.

17. The third proposition is that imposition of penalty is not warranted in the facts and circumstances of the case. In fact the main thrust of the argument was on this aspect. It is not the Respondent's contention that the acquisition of shares involved is not covered in the exempted category falling under regulation 3 of the 1997 Regulations. In terms of regulation 3 (1) (c) preferential allotment made in pursuance of a resolution passed under section 81 (1A) of the Companies Act, 1956 is out of the purview of regulations 10, 11 and 12.

But that exemption is available on fulfilment of two conditions - (i) sending the relevant resolution to the concerned stock exchanges and (ii) disclosure of the identity of the class of allottees and the name, etc. of these allottees who would be exercising 5% or more of the post issued capital and certain other information, in the notice of the general meeting called for the purpose of the preferential allotment.

It is on record that the said two conditions have been fulfilled.

Therefore, the allotment is undoubtedly covered under the exemption provided in regulation 3 (1) (c). The Respondent has also accepted this position, otherwise it would not have asked the Appellant to comply with the requirements of regulation 3 (4). Only when an acquisition is covered under regulations, the acquirer is required to report to the Board under sub regulation 4 within the specified time. There is no denial of the fact that the reporting was delayed and the delay was unintentional. According to the Respondent's version the essence of making disclosure under regulation 3 (4) is to ensure transparency and provide input to the regulator to ascertain whether the requirement of public offer attracted the case and if so the same has been done.

Objective is no doubt laudable. But the question is whether non- reporting in the instance case has in any way defeated the said objective, effected transparency or the shareholders interest. On a perusal of the sequence of events narrated in the pleadings it is clear that the Appellant or the company had no intention to suppress any material information from the Respondent or the shareholders. The company had informed the stock exchange, Registrar of Companies, etc.

well in time the details of the proposal such as the quantum of shares proposed to be issued by a way of preferential allotment, the price at which the shares were proposed to be issued, the name of the party to whom the allotment was proposed to be made, etc. In fact, while forwarding to the stock exchange the notice of the Extra Ordinary Meeting of the share holders convened for seeking approval for the preferential allotment, the company had requested the exchange to display the notice on the Notice Board for information of the members of the exchange, as could be seen from the copy of the forwarding letter dated 2.1.1997 annexed to the appeal. It is not that the Respondent was unaware of the preferential allotment and for that reason prevented from monitoring / pursuing further course of action.

S.R.Batliboi & Associates, Chartered Accountants, being statutory auditors of the company had written on 14.1.1997 to the Respondent and Reserve Bank, interalia reporting the company's decision to make preferential allotment under section 81 (1A) of the Companies Act, as could be seen from Annexure V to the appeal. It defies logic to believe that the Appellant had intentionally avoided filing such a report with the Respondent as the company had dutifully notified all the other concerned agencies like Registrar of Companies, RBI, stock exchange, etc., the preferential allotment and the relevant details.

18. According to section 15A of the Act, if any person who is required under the Act or any rules or regulation made thereunder fails to comply with the requirements stated therein he shall be liable to a penalty not exceeding the specific sum provided therein, for each such failure.

19. Section 15I empowers SEBI to adjudicate. Said section 15(I) reads as under: "15 I (1) For the purpose of adjudging under Sections 15A, 15B. 15C, 15D, 15E, 15F, 15G and 15 H, the board shall appoint any officer not below the rank of a

Division Chief to be an adjudicating officer for holding an inquiry 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".

20. Section 15J is one factor to be taken into account by the Adjudicating Officer reads as under: " I5J While adjudging quantum of penalty under section 15-I, the adjudicating officer shall have 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; 21. On a perusal of section 151 it could be seen that imposition of penalty is linked to the subjective satisfaction of the Adjudicating Officer. The words in the section that "he may impose such penalty" are of considerable significance, especially in view of the guidelines provided by the legislature in 15J "the Adjudicating Officer shall have due regard to the factors" stated in this section is a direction and not an option. It is not incumbent on the part of the Adjudicating Officer, even if it is established that the person has failed to comply with the provisions of any of the sections specified in sub section (1) of section 151, to impose penalty. It is left to the discretion of the Adjudicating Officer, depending on the facts and circumstances of each case.

22. In this context, it is relevant to have a look at the clear-cut guidelines provided by the Supreme Court in Hindustan Steel's case (supra). Para 7 from the judgement considered relevant in this context is extracted below: " Under the Act penalty may be imposed for failure to register as a dealer: Section 9 (1) read with Section 25 (1)(a) of the Act. But the liability to pay penalty does not arise merely

upon proof of default in registering as a dealer. An Order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed by the statute".

23. The background of the said case leading to the above observation by the court is as follows: In proceedings for assessment of tax under Orrisa Sales Tax Act, 1947, the Sales Tax Officer held that the Company was a dealer in building material, and had sold the material to contractors and was on that account liable to pay tax at the appropriate rates under the Orissa Sales Tax Act. The Sales Tax Officer directed the Company to pay tax due for ten quarters ending December 31, 1958, and penalty in addition to the tax for failure to register itself as a dealer.

The Appellate Assistant Commissioner confirmed the order of the Sales Tax officer. In second appeal the Tribunal agreed with the tax authorities and held that the Company was liable to pay tax on its turnover from bricks and cement and steel supplied to the contractors. The Tribunal however substantially reduced the penalty imposed upon the company".

24. The observation of the Court cited above was in answer to the question "whether the Tribunal is right in holding that the penalties under section 12 (5) of the Act (Orissa Sales Tax Act, 1947) had been rightly levied?" 25. The facts of the present case are reasonably comparable with the case cited above. In the light of the clear observation of the Court as to when penalty for failure to carry out a statutory obligation could be imposed, it is to be seen as to whether the facts of

the present case warranted penalty. The facts to be considered are whether there is anything to show that the Appellant acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. It is also to be seen that whether the breach flows from a bonafide belief of the Appellant that it was not liable to act in the manner prescribed by the statute.

26. In this context it is also relevant to know the significance of the expression "shall be liable to a penalty" appearing in the section 15A.The Supreme Court in Superintendent & Remembrancer of Legal Affairs to Govt. of West Bengal (supra) held that "the expression shall be liable to a penalty" occurring in many statutes has been held as not conveying the sense of absolute obligation or penalty but merely importing a possibility of such obligation or penalty".

27. As already stated above, in terms of section 15I whether penalty should be imposed for failure to perform the statutory obligation is a matter of discretion left to the Adjudicating Officer and that discretion has to be exercised judicially and on a consideration of all the relevant facts and circumstances. Further in case it is felt that penalty is warranted the quantum has to be decided taking into consideration the factors stated in section I5J. It is not that the penalty is attracted perse the violation. The Adjudicating Officer has to satisfy that the violation deserved punishment.

28. Supreme Court's decision in Additional Commissioner of Income tax (supra), which is a reiteration of the ratio in the Gujarat Travancore Agency case (supra) relied on by the Respondent to show that it is not necessary to prove mens rea for imposing penalty is not relevant to the present case in view of the distinguishable nature of the relevant provisions under the Income Tax and the SEBI Act. These two decisions are with specific reference to provisions of section 271 (I) (a) of the Income Tax Act. The said section 271 (1) (a) 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 income.

Thus the burden is ultimately on the assessee to plead and prove the reasonable cause. Consequently no mens rea could arise at all. On the contrary there is no

such requirement in section 15A. The section does not require pre-existence of a guilty mind to impose penalty. But the Act itself circumscribes the powers of the Adjudicating Officer in the field of imposition of penalty. The case law relied on by the Respondent is of no help to the Respondent to justify imposition of penalty against the Appellant in view of the facts and circumstances peculiar to this case discussed in detail above.

29. It is not the case of Respondent, that the Appellant had "acted deliberately in defence of law or was guilty of conduct, contumacious, or dishonest or acted in conscious disregard of its obligation". On the contrary from the conduct of the company, which is also a party to the preferential allotment, in furnishing information and making disclosures to the agencies like stock exchange, Registrar of Companies, etc. it is impossible to conclude that reporting under regulation 3 (4) was held back intentionally. There is no reason, in the absence of clinching evidence, to disbelieve the Appellant's version that it was under genuine belief that regulation 3 (4) was not applicable to the allotment. The breach flows from the bonafide belief that it was not liable to comply with the requirements under rule 3 (4) and this has to be viewed in the light of the Supreme Court's observation in Jiwani's case relied on by the Appellant. In fact the Adjudicating Officer himself has admitted in para 4.1.4 of the order that "this case however relates to a transitional period. The process of acquisition took place while the 1994 regulation was in force. The actual allotment/acquisition took place while the 1997 Regulations come into force. In that process there was lack of clarity on the part of the acquirer as to the applicability of 1997 Regulations". Keeping all the factors in view, the benefit of doubt was given to the acquirer and no penalty was imposed in terms of section 15H (ii) of the Act. In this context I am tempted to observe that even otherwise regulation 11 will not be attracted to the company's preferential allotment in view of the fact that the acquisition is covered under regulation 3. Even though the Adjudicating Officer has given the benefit of doubt to the Appellant in the matter of the alleged violation of regulation 11/ section 15 (ii), for the reasons best known to him he has not extended that benefit as far as non compliance of regulation 3 (4) is concerned, though the facts and circumstances applicable are the same in both the cases. This differential treatment, in the absence of adequate explanation cannot stand. The observation made by the

Adjudicating Officer based on his satisfaction cannot be limited to applicability to regulation 11/section 15 (ii) alone as the facts are common. Further the Adjudicating Officer has also clearly stated in the order " that the delay in filing of the report has not resulted in any gain" to the Appellant. There is not even a whisper in the impugned order of any loss to any body. There is nothing on record to show that the Appellant had a past record of default. None of the factors of section 15 J is attracted in this case. In the light of the totality of the facts and circumstances of the case and in view of the Supreme Court's guidelines in the Hindustan Steel's case imposition of monetary penalty on the Appellant in my view is unwarranted.

30. For the reasons stated above I am of the view that the order-imposing penalty on the Appellant cannot be sustained and the same deserves to be set aside. I do so.

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