

Radheshyam Chiranjilal Goenka Vs. Adjudicating Officer,

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

Decided On : Apr-18-2001

Appellant : Radheshyam Chiranjilal Goenka

Respondent : Adjudicating Officer,

Judgement :

1. The Appellant is a member of the Stock Exchange, Mumbai (the exchange). One Shri YSN Swamy (Shri. Swamy) was one of the clients of the Appellant. 2nd Respondent received a complaint dated 1.5.1996 from Shri Swamy, alleging that the Appellant had failed to pay a sum of Rs. 2, 28, 291/- due to him arising out of certain share transactions he had with the Appellant. 2nd Respondent forwarded the said complaint to the exchange on 13.6.1996 asking them to redress the grievances of Shri Swamy. Matter dragged on for two years, exchanging correspondence, but without any tangible result. Shri Swamy went on pressing his claim. The Chairman of the 2nd Respondent vide order dated 20.7.1999, appointed an Adjudicating Officer to enquire into the alleged failure on the part of the Appellant to make payment to Shri Swamy and impose monetary penalty, if so warranted. The Adjudicating Officer, after enquiry held the Appellant guilty of failure to redress the grievances of Shri Swamy and imposed a sum of Rs.3,00,000 as monetary penalty vide order dated 25.10.2000. The Appellant preferred the present appeal, challenging the said order.

2. Shri Prakash Ganwani, learned Counsel for the Appellant submitted that since the contract for sale of shares was entered into between the parties in the year 1994, section 15F (b) of the Securities and Exchange Board of India Act, 1992 (the Act) was not attracted to the case, as the said section was brought into force with effect from 25.1.1995, that since the section is operative only prospectively, penal provisions of the said section cannot be invoked against the Appellant.

3. The learned Counsel submitted that Shri Swamy's claim is frivolous as could be seen from his conduct, that even though he claims that the transaction is relatable to the year 1994, he represented to the 2nd Respondent only on 1.5.1996, after a lapse of almost 2 years, claiming a sum of Rs. 2, 28, 921. Shri Ganwani submitted that in fact the Appellant was to receive a sum of Rs. 48, 404 from Shri Swamy and there was no amount payable to him from the Appellant. According to the learned Counsel the Appellant's claim was ascertained belatedly on the basis of the records available with it, since there was a massive fire in the office premises on 2.8.1994. As 2nd Respondent had referred Shri Swamy's complaint to the exchange, they had sought explanation from the Appellant and the same was furnished. The Appellant had informed the exchange that Shri Swamy had not given sufficient information to examine his claim as also had not taken into consideration the shares, which were delivered by the Appellant to him. According to the learned Counsel the sum and substance of the dispute is that Shri Swamy had made out a claim, ignoring the counter claim of the Appellant.

According to the learned Counsel, there was no money due to Shri Swamy from the Appellant. Shri Ganwani submitted that even though the exchange had requested Shri Swamy to come for discussions, he never turned up. The exchange in the light of the facts, referred the matter to its Investor Grievances Redressal Committee (IGRC). Shri Swamy did not attend even the IGRC meeting. The Appellant never failed to attend the meetings called by the exchange/committee. After perusing the papers and submissions made before it, the committee advised Shri Swamy to refer the matter to arbitration. But Shri Swamy did not heed to the said advice and preferred to pursue his complaint with the 2nd Respondent. Learned Counsel said that, the fact that the Appellant had raised bills against delivery of shares would show that there was a transaction

between the Appellant and Shri Swamy and Shri Swamy's version that delivery notes were not given to him is of no consequence.

4. Learned Counsel submitted that the Adjudicating Officer did not take into consideration the fact that the complaint of Shri Swamy was barred by the principles of resjudicata as IGRC had taken cognizance of the grievances of Shri Swamy and after hearing the Appellant and considering the materials available, it had on 11.7.1997 directed Shri Swamy to refer the matter to arbitration. Though the issue was already decided by IGRC, Shri Swamy had sought to re-agitate the dispute on the same cause of action by writing to the 2nd Respondent.

5. Shri Ganwani submitted that since the factual position has been contested by the parties, the Adjudicating officer should have gone by evidence and for that purpose he should have asked the complainant to produce his records. Adjudicating Officer has not done so, but proceeded unilaterally on the basis of the letters sent by the complainant, as a result the genuine claim of the Appellant was over looked and a non existing claim of the complainant was recognised According to the learned Counsel, the fact that Shri Swamy was claiming different amounts at different times has been overlooked by the Adjudicating Officer and without any cogent reason the Appellant's claim of Rs. 48, 404 was rejected. He further pointed out that the Adjudicating Officer has concluded that Shri Swamy has lost Rs. 79, 349 and bank interest thereon, without any evidence in support. Learned Counsel referred to documents filed by the Appellant along with the appeal to support the claim that Shri Swamy has not taken into consideration the amount due from him to the Appellant. Learned Counsel did attempt to establish that it was the Appellant who is aggrieved as a result of non-payment of its dues by Shri swamy and that there was nothing due to Shri Swamy from the Appellant. He pointed out that after making a complaint on 1.5.1996 Shri Swaly's next letter was after 2 years i.e. on 23.11.1998, that this indicates the extent of the genuineness of the claim alleged to be arising out of a transaction made in 1994. He also submitted that the Adjudicating Officer has wrongly held that the Appellant was in repetitive default as in an earlier matter the Tribunal had imposed a penalty of Rs.1 lakh on the Appellant, without appreciating that the said matter was subjudice as the Appellant has already preferred an appeal against the said order.

6. Ms Poonam A Bamba, learned Representative of the Respondents countering the Appellant's submission that the section 15F of the Act is not attracted to the case, submitted that the Appellant's failure to pay the money to Shri Swamy being a continuing one, section 15F is applicable. According to her the subject matter of adjudication has been the default/failure by the Appellant in making payment within the period specified by the law and that default/failure has not been made good till date and continues. She cited the requirement of bye law 247 of the exchange requiring broker to make payment to the clients within two working days of pay out unless the client has requested otherwise.

She pointed out that under rule 4 (b) of the SEBI (stockbrokers and Sub Brokers) Rules, 1992 redressal of grievances of the clients by broker within the stipulated time is a condition subject to which registration is granted to the broker. In this context attention of the Tribunal was drawn to regulation 7 and Schedule II of the Securities and Exchange Board of India (stockbrokers and Sub Brokers) Regulations, 1992.

Clauses A (1) (2) and (5) of the code of conduct specified in the said Schedule II provide, inter alia that a stock broker shall maintain a high standard of integrity, promptitude and fairness in conduct of his business, act with due skill care and diligence and abide by all the provisions of the Act, Rules and Regulations. Clause B (1) stipulates that a stock broker shall make prompt payment to the client in respect of securities sold.7. Ms Bamba, referring to the variation in the claim amount of Shri Swamy submitted that though he had initially claimed Rs. 78, 754 the same varied over a period of time as he included interest receivable and compensation for mental agony etc., She cited the findings of the Adjudicating Officer and submitted that the Appellant wrote to Shri Swamy on 18.6.1999 making a claim of Rs.48, 404 for the first time. The Appellant did not give any tangible evidence to support its claim at any point of time. Learned Representative submitted that the Appellant had been assuring the 2nd Respondent that it will redress the grievances of Shri Swamy thereby suggesting that there was nothing due from Shri Swamy to the Appellant. In the correspondence with the 2nd Respondent, the Appellant did not mention about any such claim till 18.6.1999. The Appellant's submission that as a result of fire in its office premises, the

accounts could not be retrieved, etc., are only excuses. In this context, Ms Bamba cited appeal No. 8/2000 of the Appellant and submitted that the Appellant is following a set pattern in denying payment to its clients providing the alibi of destruction of records in a fire. This is a standard excuse put forth by the Appellant to justify its failure to make payment to clients.

8. Learned Representative submitted that the impugned order has been made by 1st Respondent following the prescribed procedure and in particular following the principles of natural justice. The Appellant had been given sufficient opportunity to present its case. The Adjudicating Officer based on evidence, has established failure on the part of the Appellant to make payment to Shri Swamy and considering the relevant factors including the factors provided in section 15J, monetary penalty has been imposed. Referring to the Appellant's claim that since it had filed an appeal against the Tribunal's order in Appeal No. 8/2000 and pending disposal of the said appeal the default for which it has been penalised cannot be taken note of, Ms. Bamba submitted that the Respondent is not aware of any such appeal and that even if there was an appeal, in the absence of any stay order therein from the Court the Tribunal's finding survives. Learned Representative further submitted that there is no question of application of the rule of resjudicata to the case, as the factual position does not even remotely suggest that the matter has been adjudicated and decided by any court of law. She submitted that reference to arbitration by IGRC does not take away the power of the Respondents to adjudicate the matter under Chapter VI A of the Act. She referred to the Appellant's letters dated 17.5.1999 and 21.6.1999 forming part of the appeal and submitted that the Appellant itself had admitted Shri Swamy's claim and agreed to pay the dues to him.

9. I have carefully considered the rival contentions. It is to be remembered that Shri Swamy's complaint serves only as a source of information to the 2nd Respondent to examine the extent of compliance of the requirements of section 15F (b) by the Appellant. The complainant cannot expect the Respondent to decide the dispute and redress his grievance, by helping to get the claim amount, if any, in an adjudication under Chapter VIA of the Act. So, the basic question to be considered in the light of the complaint of Shri Swamy is as to whether the

Appellant had to pay any amount to Shri Swamy and if there was any such dues, the Appellant had failed to make the payment promptly. Thus slight variation in the quantum of money claimed by Shri Swamy is not of any significance to materially affect the proceedings in the adjudication.

10. The Appellant's contention that since the contract with Shri swamy was executed in 1994, section 15F(b) brought into force in January, 1995 has no application, is unfounded. According to section 15F(b) if any person who is registered as a stock broker fails to deliver any security or fails to make payment of the amount due to the investor in the manner within the period specified in the regulations, he shall be liable to a penalty not exceeding five thousand rupees per each day during which the failure continues. According to Shri Swamy's complaint dated 1.5.1996 the Appellant did not pay the amount due to him and the said failure continued even thereafter. On a careful perusal of the said section it is clear that the legislature has treated the failure as continuing one and that the Appellant's failure to make payment continued even after January, 1995. Therefore it can be safely concluded that said section 15F (b) is applicable and consequently the adjudication is legally tenable.

11. The Appellant's submission that Shri Swamy's claim is barred by the rules of resjudicata is also not legally sound. Under section 15I of the Act, the adjudicating officer is not adjudicating the claim of Shri Swamy. Adjudication is on the Appellant's failure to comply with statutory requirement of making prompt payment by the Appellant in its capacity as a broker to Shri Swamy, as its client. Instant case of adjudication is not meant to settle the disputes if any, between the parties and the IGRC's advise to Shri Swamy to resort to arbitration does not in any way disable the Respondent to adjudicate the matter under the Act.

12. One of the conditions for grant of certificate of registration to the Appellant was that it would abide by the requirements of the Act, rules and regulations. In terms of clause B (1) of the Code of Conduct, forming part of the Regulations, a stock broker is required to make prompt payment in respect of securities sold and arrange for prompt delivery of securities purchased by clients. The Appellant is a broker member of the stock exchange and as such is bound by the Rules,

Byelaws and Regulations of the said exchange. In terms of bye-law 247 of the exchange, a member broker is required to make payment to his clients or deliver the securities purchased, within two working days of pay out, unless the client has requested otherwise. Thus the legal obligation on the Appellant who is a stock broker, to make prompt payment to his client, stands well established.

13. It is seen from the factual position as made available in the proceedings that Shri Swamy had written to the 2nd Respondent only on 1.5.1996, complaining about the Appellant's failure to make payments to him with reference to the shares transacted through the Appellant sometime in July, 1994. The reason for such delayed reference to the 2nd Respondent has been explained by him vide his letter dated 23.9.1996. He has also stated about the fire in the office of the Appellant and shifting of its office. The fact that Shri Swamy did not pursue the matter with lightning speed with the Appellant or that he did not participate in the IGRC meeting does not matter much for the purpose of adjudication. As already stated above, adjudication is with reference to non-compliance of the requirements of section 15F (b) and it was not intended to settle the disputes between the parties. The Adjudicating Officer, after examining the material before him has come to the conclusion that the Appellant had failed to make prompt payment to Shri Swamy. According to the Adjudicating Officer the Appellant informed the Respondents vide letter dated 21.6.1999 that a sum of Rs. 48, 404 was due to the Appellant from Shri Swamy. In this context the following observation made by the Adjudicating Officer in the impugned order is very relevant.

It may be noted that the broker vide his letter dated 4.9.2000 stated that as per his account statement they have to receive an amount of Rs. 48, 404/- from Shri Swamy. The broker in his letter stated that Shri Swamy, the complainant never denied this. This statement of the member is blatantly wrong, as there is no admission of Shri Swamy on record to the effect that he has to pay Rs. 48, 404/- to the member. Shri Swamy, the complainant all through was harping on the amounts he has to recover from the broker. The broker has not submitted to the Adjudicating Officer copies of any claims/bills which he has sent to Shri Swamy claiming that sum during the period prior to the complaint made by Shri Swamy in the year 1996 to SEBI. Had the claim of the member to receive back Rs. 48, 404

from the complainant been true, the member would have pursued his claim with Shri Swamy for recovery of the money right from the beginning, but the record submitted by him does not show that. Further, if the claim of Shri R.C.Goenka member was borne by the records of the member, the member would have submitted that claim along with the records on 4.5.1999 to SEBI when SEBI (Shri S.V.Muralidhar Rao, Division Chief) took a meeting to resolve the contentious issue.

During the meeting, the member did not make any such claim, rather he has asked time to present all the required details to SEBI. Further, in his letter dated 17.5.1999 to SEBI also, the broker did not make that counter claim. Thereafter, a reminder letter was sent by SEBI to the broker vide its letter dated 11.6.1999. Further to that, vide his letter dated 21.6.99 to SEBI, the broker came with the version that he was to get Rs. 48, 404 from the complainant Shri Swamy. That means making such a counter claim was an after thought on the part of the member to defeat the complaint of Shri Y.S.N.Swamy.

5.5: In the light of what is stated above, I am of the view that the broker made a counter claim of Rs. 48, 404 to defeat the complaint of Shri Swamy, the complainant.

5.6: To sort out the contentious issue, one of the main discrepancies and to which clarification was sought related to the deliveries of shares of Empire Constructions, shares of Raymond Synthetics, shares of Alsa Constructions, shares of Sanghi Polyesters and shares of Moser Bear. The broker along with his letter dated 1.6.2000 forwarded copy of delivery note Nos. 5852 dated 2.10.1994 and 5384 dated 24.9.1994. Shri Swamy repeatedly mentioned that he never received those deliveries. Shri R C Goenka claimed that those delivery notes were sent to the outstation client by post. From the letter dated 1.6.2000 of the broker, it is seen that the shares were not sent by the Registered Post. It is seen that there is no claim from the broker that the shares were sent by Registered post and they have the acknowledgement. It is surprising to note the claim of the broker, namely that such valuable shares along with delivery notes were sent by ordinary post and the broker had no acknowledgement with him regarding receipt of the original shares

along with delivery notes by Shri Swamy, the complainant.

5.7: Shri Swamy vide his letter dated 28.6.2000 and in his earlier correspondence claimed that he had not received delivery of he shares. He observed that ever since he filed a complaint with SEBI, he was requesting the broker to give him certificate numbers and distinctive numbers which the broker claims to have sent. The delivery notes Shri Swamy said are incomplete without description of certificate numbers and distinctive numbers. A copy of that letter dated 28.6.2000 was sent to the broker by the adjudicating Officer vide our letter dated 20.7.2000 for his comments. The broker replied to that letter vide his letter dated 4.9.2000, the contents of which are mentioned in para 4.2.9 above. However, the broker in his reply letter to the Adjudicating Officer did not furnish distinctive numbers of shares, which the broker has claimed to have sent. As claimed by Shri Y.S.N.Swamy the delivery note should contain the description of distinctive/certificate numbers. The fact that the Broker did not furnish the distinctive numbers of shares even to Adjudicating Officer, shows that his claim of giving delivery of shares to the complainant is false".

14. The Appellant has not succeeded in producing enough evidence to establish that the findings of the Adjudicating Officer are wrong. The Appellant claims that it had delivered certain shares to Shri Swamy and that Shri Swamy's claim is without taking into consideration of those shares, remain unsubstantiated. The fact is that the Appellant has no evidence of sending the shares to Shri Swamy. It is difficult to believe the version that the share certificates and delivery notes were sent by ordinary post, that too in the context of the common knowledge of instances of unscrupulous elements stealing valuable articles including share certificates, while in transit. The Appellant's inability to provide certificate numbers and distinctive numbers of shares, of the shares stated to have been dispatched to Shri Swamy, further strengthens the view that the Appellant did not send the certificates to Shri Swamy.

15. In the totality of the facts and circumstances of the case, there is every reason to believe that the Appellant had failed to make prompt payment to Shri Swamy. In this context it is to be remembered, as already stated above that penalty provided

under section 15F (b) is for failure to make payment to the client by a broker within the stipulated time. It is not the actual quantum of money involved that attracts the penal provision. It is the failure that matters. The Adjudicating Officer in his order has reasonably established the failure of the Appellant to make prompt payment to Shri Swamy. He has explained the factors, which guided him in deciding the quantum of penalty. The plight of Shri Swamy is evident from his request to the Respondent to help him to get the money due from the Appellant, as could be seen from the following words extracted by the Adjudicating Officer in page 13 of his order: "Please look into all the parameters and get me justice. I am negotiating for my daughter and the bridegroom side wants the marriage to be done before August end, since the boy has to go back to States. I am not interested to lose this opportunity.

Unfortunately, I have no money to celebrate the marriage. I will be highly grateful if you could get me the finance within this period, at least on humanitarian grounds. Hope you will help me thinking this as your sister's/daughter's marriage".

16. I am not saying that compassion should over ride the statutory provisions. The law does not empower the Adjudicating Officer to direct the Appellant to make payment to Shri Swamy to help him to meet the wedding expenses of his daughter. But the Adjudicating Officer is very well within his authority to penalise the Appellant, within the statutory limits, for its failure to make prompt payment to Shri Swamy.

He has done so for the reasons recorded in the impugned order. Evidence on record relied on by him establishes the failure of the Appellant to make payments to Shri Swamy. He has justified imposition of Rs. 3 lakhs as monetary penalty.

17. In the light of the facts and circumstances of the case, I do not find any justification to interfere with the impugned order. The impugned order sustains. The appeal fails.

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