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B.S.E Brokers Forum, Bombay & Others V. SEBI

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ABSTRACT

The President of India on 31st Jan, 1992, exercised the powers which are conferred upon him by Article 123(1) of the Constitution of India to promulgate the Securities & Exchange Board of India Ordinance, 1992. After that this ordinance changed into an act which was Securities & Exchange Board of India Act, 1992. The objective behind enactment of such an Act was to protect the interest of the investor in securities and to develop and to promote the development of and to regulate the securities market.

Under Section 3 of the act it provided for establishment of Securities & Exchange Board of India whereas Section 4 of the act provided for establishment of SEBI Management Board.

Number of Writ Petitions was filed before different High Courts challenging the validity of Regulation 10 of the Securities & Exchange Board of India (Stock Brokers & Sub-Brokers) Regulation, 1992 read with Schedule III of the Regulation which was issued by the Securities & Exchange Board of India.

I. FACTS OF THE CASE

- After the commencement of the SEBI Act of 1992 there was a letter which was sent by SEBI to all the President, Executive Directors, & stock brokers of the recognised stock exchanges all over the India to submit their application to the board so that they get themselves registered with the SEBI in accordance with Section 12(1) of the Act.
- The letter was sent by the SEBI to the members of different stock exchanges, stock brokers, and president of stock exchanges which required them to submit the application form with the required fees for getting themselves registered with the Board. The fees were to be paid on the basis laid down by the SEBI. The fees was divided into three categories: In Category A the stock brokers had to pay a sum of Rs 5 Lakhs as a Registration Fee & Rs 10000 as Annual Fee and the brokers registered under this category would be a member of Bombay, Delhi, & Calcutta Stock Exchanges. In category B the stock brokers had to pay sum of Rs 3 Lakhs as a

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Registration Fee & a sum of Rs 5000 as Annual Fee & the broker registered under this category would be a member of Bangalore, Cochin, Madras, & Ahmadabad Stock Exchanges. And the last one was the Category C in which the stock brokers had to pay Rs 1 Lakhs as a Registration Fee & Rs 4000 as Annual fee to the SEBI & the stock brokers registered under this category will be member of other Stock Exchanges.

- Such a demand of the fees from stock brokers led to a nation-wide perturbation of stock brokers due to which stock exchanges all over the India was closed down for several days. The only reason behind such a agitation was the high registration fee levied by the Board. Such was the pressure made by the stock brokers that led the SEBI Board to change the fees structure & gave two options to the stock brokers to get themselves register with the Board. Under Option a onetime registration fee had to be paid by the stock brokers in five annual instalments. Under Option B one time registration fee at rate of 1% had to be paid by the members on the basis of annual turnover of each broker for 5 years from 1990-91.

- The Central Government on 20th Aug, 1992 issued a notification exercising the powers conferred under Section 29 of the SEBI Act, 1992 came out with notification enacting the Securities & Exchange Board of India (Stock brokers & Sub-brokers) Rules, 1992. Under Rule 3 it provided that no stock broker shall buy, sell and deal in securities unless he holds a certificate granted by the board. The Regulation 10 of the said Rules read with Schedule III is reason behind the arising of the dispute.

II. CONSEQUENCES OF THE DISPUTE

There was a considerable amount of change made in the new proposal which was made by the Board. One of the most significant changes in the revised fee structure made by the Board was that the initial fee for registration was reduced by 50% and more instalment facility option was being given to the stock brokers. Though the registration fee was reduced then also the members, stock brokers were not satisfied and opposed the fee structure of the Board. All the 22 Stock Brokers which were regulated in India sent a letter to the Finance Minister of India on 25th April, 1992.

After the coming into the force of the Securities & Exchange Board of India (Stock Brokers & Sub-brokers) Rules, 1992 more complaints were being made by the members of the stock exchanges and the stock brokers. Due to which the SEBI Board had to appoint an expert committee to look into the matter and the complaint made by the stock brokers. After considering the matter the expert committee came to the conclusion that the fee levied by the Board was reasonable and not arbitrary in nature and was in accordance with the law.

III. PROCEDURAL HISTORY

When the members of the stock exchange and the stock brokers addressed letters to the Finance Minister and SEBI Board and when they didn't get any positive response from them they filed various Writ Petitions in different High Courts. A Writ Petition filed before the Bombay High Court having Petition Number 126/93 was filed by BSE Brokers Forum, Bombay. The High Court at interim stage appointed a committee headed by Justice A N Mody to submit a report as to reasonableness of the levy of fee.

This Petition is by a transfer order and was numbered Transfer Case No. 20/2000 and Writ Petition (Civil) 502 of 2000. The Appellant in this case is the BSE Brokers Forum, Bombay & others & the Respondent are the Securities and Exchange Board of India & others.

IV. ISSUE BEFORE THE COURT

- The issue raised before the court was that the Regulation 10 read with Schedule III of the SEBI (Stock brokers & Sub-brokers) Rules, 1992 was ultra vires to the act and void ab initio. The members of the stock exchanges also contended that the levy of such a high amount of fee for registration is not justifiable as it amounts to levy of a tax which is without any authority of law and not a fee. Stock Brokers all over the country contended that the board should put forth their justification regarding levy of such a high amount of fee and challenged the method of levy also.

- The further issue rose was that the demand was excessive and the collection of the fee was based on the turnover of a broker which was discriminatory, unreasonable and arbitrary in nature.

- Whether Brokers are being subject to a hostile discrimination because they are made to pay the fee on the basis of annual turnover & whether such levy of fee on basis of annual turnover has any nexus with the purpose for which the levy of fee is imposed because it is unreasonable and arbitrary in nature.

V. HOLDING OF THE COURT

The Section 11 of the SEBI Act, 1992 provide the powers and function of the board and it makes compulsory for the board to protect the interest of the investors in securities and to promote and develop the security market. The provision mandates the board to regulate the business in stock exchanges and to register and regulate the working of the depositories. Section 11(2) of the abovementioned Act empowers the board to levy fees or other necessary charges for achieving the goals which are provided under Section 11 of the Act. Under Section 30 of the Act the

Board enacted the Securities & Exchange Board of India (Stock broker & Sub-broker) Rules, 1992 with the prior approval of the Central Government. Under Regulation 10 of the abovementioned Regulation it provided for payment of fees to be made by the stock brokers for registering themselves with the SEBI & the basis of payment was specified under Schedule III of the Regulation.

It is evident from the provisions of the Act & the Regulation that the Board is empowered to levy two types of fee, the 1st one being levy of fee under Section 11(2) of the Act so that Section 11 purposes are achieved and the 2nd one being a fee for the purpose of registering the applicants under Section 12(2) of the Act.

Due to which it can't be contended by the Petitioner that the levy of fee was not authorised by law and is arbitrary in nature and this contention was rejected by the court.

The other contention of the appellants that brokers are being subject to hostile discrimination was negated by the court. The court after going through the material on record concluded that approx 50% of the total expenditure which the board would incur would be on broker related services and due to which the brokers form a distinct & separate class when they are compared to other intermediaries. Therefore the brokers form a separate class & are subject to levy on the bases of annual turnover because the number of transaction of the brokers has a direct bearing on the regulatory expenses of the board.

VI. RATIO DICTUM

The Hon'ble Supreme Court held that the Transfer Case No 20/2000 failed and the same was dismissed. The Writ Petition was dismissed by the court.

The Court considered the fact that such a levy of fee on the brokers on basis of turnover would not amount to a turnover tax or tax on income. The court accepted the levy of fee on the basis of turnover as valid & noticed that the changes recommended by the expert committee appointed by the board should be brought about. The court further stated that there is no need to go into the niceties of the levy of fee which is not in the realm of their jurisdiction but the reasonableness of the levy was in accordance with the statutory powers conferred upon them.

VII. CURRENT SCENARIO

There were many representation made by the Stock Brokers to the SEBI & the Government, which SEBI appointed an Expert Committee which was headed by R.S. Bhatt to interpret the term 'turnover'. The report by the committee was submitted on 18th December, 1992. The committee observed that the turnover was a fair basis upon which the determination of

registration fee.

In 2002 by the Securities & Exchange Board of India (Stock Brokers & Sub-Brokers) (Amendment) Regulation, there were certain amendments made under Schedule III of the Regulation. The normal transaction would attract a fee liability of one hundredth of 1%, whereas some different transactions would attract different rates.

- In such transaction where it's a jobbing transaction, the fees shall be calculated at the rate of one two hundredth of 1% in respect of the sale side of such transaction.
- In case of carry forward, renewal, or badla transaction the fee shall be computed at the rate of one hundredth of one percent of the turnover.
- Where the transaction is in government securities, the bonds issued by the Public Sector Undertaking & the units traded in a similar manner, the fee payable shall be computed at the rate of one thousandth of 1% of the turnover.

The date on which stock broker gets initially registered, after the lapse of 5 financial years the broker shall have to pay a sum of Rs. 5000 for every block of 5 financial years commencing from the 6th financial year so that his registration carries on. These were the changes which came after this case.

VIII. SYNTHESIS

The issue whether such a high amount of fee can be imposed was discussed in many landmark cases which were referred while deciding this case.

Vam Organic Chemicals Ltd & Others v. State of U.P & Others:² The issue before the court was whether there is any distinction between fees charged for license, & fees charged for rendering services. The court held that in case of levy of regulatory fee it is like the license fees, existence of quid pro quo is not necessary, though the fee imposed must not be excessive in nature.

Delhi Race Club Ltd v. Union of India:³ The power of any legislature to levy a fee is conditioned by the fact that it must be "by and large" a quid pro quo for the services rendered. However, correlation ship between the levy and the services rendered is one of general character and not of mathematical exactitude. All that is necessary is that there should be a "reasonable relationship" between the levies of the fee and the services rendered.

After considering the ratio behind the abovementioned cases the regulatory fee imposed here

² 1997 (2) SCC 715

³ (2012) 8 SCC 680

is no condition precedent that the service should be rendered and neither has it lost the character of fee though it is excessive in nature. In this case also it is quite evident that Section 11 of the Act, 1992 requires the board to undertake various activities to regulate the business of the securities market which requires constant supervision & instituting legal proceeding against the offending traders and therefore the fee levied is intra vires to the provisions of the Act.

In a case where fee is levied and the amount collected is used in the form of capital expenditure by the SEBI, then also if the statute itself intends that the necessary funds should be met up by collection of fee from the securities market it can't be challenged on the grounds that the amount cannot be used for capital expenditure.

IX. RECENT CASE LAW

In *National Stock Exchange Member's Association v. Union of India*:⁴ The petitioner dealt with sale & purchase of the securities & shares in India. There members were registered under SEBI (Stock Brokers & Sub-Brokers) Regulation, 1992. SEBI issued a circular in which it required separate registration fee for multiple registrations. A Writ Petition was filed by the petitioner challenging the multiple registration fees adopted by the SEBI on the grounds that it is contrary to Schedule III of the SEBI Regulation, 1992.

The Delhi High Court held that there is no straight jacket formula for levying registration fee. The mode & manner in which fee should be levied depends upon the SEBI to decide. The court held that the circular was intra vires to the Regulations.

⁴ (2006) 130 Comp. Case 468 (Delhi)