

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

DATE : 26.07.2016

Appeal No. 420 of 2015

Vijay Kumar Gaba
A1/704, Sunny Valley Apartment,
Sector 12, Plot No. 27, Dwarka,
New Delhi – 110 075.

..... Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No.C-4A, G-Block,
Bandra Kurla Complex, Bandra (East),
Mumbai – 400 051.

..... Respondent

Mr. Ankit Lohia, Advocate with Ms. Harshada Nagare, Advocate i/b Joby Mathew for the Appellant.

Mr. Kumar Desai, Advocate with Mr. Tomu Francis, Ms. Bhavya Bhandari, Advocates for the Respondent.

CORAM : Justice J. P. Devadhar, Presiding Officer
Jog Singh, Member
Dr. C. K. G. Nair, Member

Per : Jog Singh (Oral)

1. The appellant has preferred the present appeal against impugned order dated July 15, 2015 by which he has been restrained from making any application to Securities and Exchange Board of India (“SEBI” for short) for registration to provide Portfolio Management Services or Investment Advisory Services or any other activities connected with the securities market requiring registration. Restraint has been provided for a period of one year.

2. It is seen from the pleadings that a complaint was received on June 22, 2014 from Mr. Madan Mohan Sharma against the appellant and M/s. Master Capital Services Ltd. ("MCSL" for short). It is to be noted that the respondent had received certain complaints in 2012 and 2013 also against the appellant and MCSL from Mr. Sharma and the same were analyzed by the Market Intermediaries Regulation and Supervision Department (MIRSD) of SEBI. However, no violation of broker related regulations could be established against the appellant or MCSL. Subsequently, the aforementioned complaint received from Mr. Sharma was forwarded to the Investment Management Department (IMD) of SEBI for investigation relating to violation of the PMS Regulations by the appellant and pursuant thereto the present impugned order dated July 15, 2015 has been passed by the respondent.

3. The learned counsel for the appellant Shri Ankit Lohia, who appeared with Ms. Harshada Nagare, has argued that the appellant is a professional and is a Chartered Accountant by qualification. He had worked as Research Analyst with DSP Merrill Lynch Ltd. for almost five years from 2007 to 2012. The appellant submits that he had never offered any portfolio management services to anyone and that he did not receive any fund or securities from anyone for dealing in such alleged portfolio management services. It is further submitted that although the appellant is registered with AMFI as mutual fund distributor but has not undertaken any activity, in this regard, till date. The appellant specifically submits that he had never entered into a contract or agreement with Shri Madan Mohan Sharma, the complainant before SEBI for providing any service in respect of portfolio of securities or funds which might have been held by Mr. Sharma. The appellant submits that he had never managed or

administered any of the portfolios of Shri Sharma who had never given any power of attorney or any account of authority to the appellant in this regard.

4. It is submitted by Shri Ankit Lohia that there is no finding in the impugned order based on evidence that the nature of activities performed by the appellant amounted to investment advice to Mr. Sharma relating to his portfolio during the period from July 2006 to September 2006. There was no agreement to this effect and hence it would not fall within the provisions of Securities and Exchange board of India (Portfolio Managers) Regulations, 1993 (“PMS Regulations” for short). It is submitted that the finding against the appellant is cryptic and has been arrived at even without analyzing the documents submitted by Mr. Sharma alongwith his complaint and, therefore, the same cannot be sustained. It was one of the submissions of the appellant before the WTM that the appellant had provided investment advice to Mr. Sharma relating to his portfolio in July 2006, the same would, at the most, fall within the provisions of Securities and Exchange Board of India (Investment Advisor) Regulations, 2013 which were never in existence in the year 2006.

5. It is also argued by the learned counsel for the appellant that provisions of Sections 11(1), 11(4) and 11B are remedial in nature and could not have been invoked for passing an ex-parte ad-interim order on January 14, 2015 without hearing the appellant and that too lapse of eight years from the cause of action, if any. This ex-parte ad-interim order finally got merged into the impugned order dated July 15, 2015.

6. Per contra, the case of the respondent is that the appellant has been undertaking portfolio management services without getting registration from SEBI as required by provisions of PMS Regulations. A complaint

was received from one Mr. Madan Mohan Sharma. The appellant was conducting himself as portfolio manager in violation of Regulation 3 of PMS Regulations read with Section 12 of the Securities and Exchange Board of India Act, 1992.

7. Learned counsel Shri Kumar Desai with Mr. Tomu Francis, Ms. Bhavya Bhandari, learned counsel for the respondent has submitted that on receipt of complaint, the case of the appellant was examined by SEBI on the basis of material available on record and an ex-parte ad-interim order was passed on January 14, 2015 against the appellant directing the appellant to cease and desist from acting as a portfolio manager and not to solicit or undertake such activity or any other activities in the securities market, directly or indirectly, in any manner whatsoever; and not to divert any funds raised from any of its existing clients / investors.

8. Further the said ex-parte ad-interim order was treated as a show cause notice and appellant was called upon to furnish his reply within 21 days from the date of receipt of the said ex-parte ad-interim order. It is submitted on behalf of the respondent that an opportunity of hearing was also given to the appellant and present impugned order was passed thereafter only.

9. We have heard both the learned counsel for the parties at length and have perused the pleadings and material brought before us.

10. At the outset, it is relevant to note that the appellant has already undergone the restraint imposed the impugned order, the appeal has become infructuous. However, counsel for the appellant submits that in the present case, since the WTM of SEBI has proceeded on an erroneous

assumption that the appellant had admitted to have been rendering advisory services and has failed to consider the material evidence produced, it would be necessary to hear the matter on merits, even though the appellant has already suffered the restraint imposed under the impugned order.

11. A perusal of the impugned order at the outset reveals that the learned WTM has not considered the documents submitted by Mr. Sharma with his complaint, or any material / evidence to arrive at the finding that the appellant had indulged in offering unregistered portfolio management services in the year 2006. When the appellant had contended that he was rendering some services to the clients but the said services were not covered under the PMS Regulations, the WTM could not have proceeded on the footing that the appellant had admitted to have been rendering services under the PMS Regulations and could not have refused to consider the material evidence produced by the appellant. Thus, the WTM has failed to analyze the nature of activities being performed by the appellant in the year 2006, particularly between July - September 2006, to bring them within the purview of PMS Regulations, 1993.

12. In the circumstances, we have no option but to quash the impugned order and send the matter back to learned WTM for a fresh look. Accordingly, the impugned order dated July 15, 2015 is quashed and set aside and the matter is restored to the file of learned WTM with a direction to reconsider it in the light of submissions made by the parties and documents already on record or which may be brought on record by them any other reliable and convincing evidence during the course of fresh hearing in accordance with law and pass an appropriate order within a

period of four months from today. We make it clear that all the contentions and submissions made by the parties are kept open.

13. The appeal is, accordingly, allowed in the above terms with no order as to costs.

Sd/-
Justice J. P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

Sd/-
Dr. C. K. G. Nair
Member

26.07.2016
Prepared & Compared by
PTM