

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Hearing : 18.03.2019

Date of Decision : 29.03.2019

Appeal No. 25 of 2017

Vijay Kumar Gaba
A-104, Durga Puja Apartment,
Sector 13, Plot No. 8, Dwarka,
New Delhi - 110075.

..... 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. Vinay Chauhan, Advocate with Mr. Ramesh Gogawat, Advocate
i/b Joby Mathew & Associates for the Appellant.

Mr. Mustafa Doctor, Senior Advocate with Mr. Vivek Shah,
Advocate for the Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Dr. C. K. G. Nair, Member
Justice M. T. Joshi, Judicial Member

Per : Justice M. T. Joshi, Judicial Member

1. Aggrieved by the order of the Whole Time Member
(hereinafter referred to as 'WTM') of Securities and Exchange Board
of India (hereinafter referred to as 'SEBI') in Adjudication Order No.
WTM/RKA/EFD/176/2016 dated October 28, 2016 directing the
appellant to cease and desist from acting as a portfolio manager and
not to solicit or undertake such activity or any other activity in the

securities market, directly or indirectly, for a period of one year and also not to divert any fund raised from any investors, the present appeal is filed.

Various allegations were made against the appellant by one Mr. Madan Mohan Sharma to the effect that the present appellant has duped Mr. Sharma to the tune of Rs. 6.60 crores by promising to invest the said amount in securities with a promise that he would give 30% return on the principal amount. However, thereafter nothing was repaid. In these circumstances, various complaints had been filed with Police etc. The appellant denied these facts. The criminal case as well as arbitration proceeding arisen between the parties ended in favour of the appellant.

2. Out of these disputed facts, the present appellant has however, admitted before the WTM that he has accepted an amount of Rs. 3,15,000/- on gratuitous basis as he has provided advisory services to Mr. Sharma during July 2006 to September 2006. In the view of the WTM, this was an admission that the present appellant had indulged into “portfolio managerial services” and the amount received by him cannot be termed as gratuitous but as fees. In these circumstances, finding that the appellant has rendered services in the nature of a portfolio manager without registration as required under Section 12(1) of the SEBI Act the impugned order was passed.

3. Learned counsel for the appellant Shri Vinay Chauhan took us through the definition of portfolio manager as contained in Regulation 2(cb) of Securities and Exchange Board of India (Portfolio Managers) Regulations, 1993 which reads as under :-

“2(cb). “portfolio manager” means any person who pursuant to a contract or arrangement with a client, advises or directs or undertakes on behalf of the client (whether as a discretionary portfolio manager or otherwise) the management or administration of a portfolio of securities or the funds of the client, as the case may be.”

4. He submits that the appellant has never rendered any services for fees. It was a gratuitous payment made by Mr. Sharma to the appellant. In the alternative, he submits that even financial advisory services rendered for a fee would not come within the definition of portfolio manager. In fact, such type of services required registration only after the regulations to that effect came into existence in the year 2013. In the circumstances, he submitted that the impugned order needs to be quashed and set aside.

5. On the other hand, the learned counsel for the respondent submitted that the interpretation of definition of portfolio manager as detailed (supra) would show that even an advice regarding fund would come within the portfolio managerial services and, therefore, in view of the admission that advisory services were rendered by the appellant to Mr. Sharma and an amount was paid to him, theory

putforth by the appellant that it was gratuitous cannot be accepted. He has, therefore, submitted that the appeal be dismissed.

6. Upon hearing both the sides, in our opinion, the appeal is required to be allowed and the impugned order needs to be quashed for the following reasons :-

REASONS

1. The definition of portfolio manager would show that when there is a contract between two persons to advise or direct or undertake on behalf of the other party management or administration of a portfolio of securities or the funds the first party can be called as portfolio manager.
2. In the present case, though we find that there was element of rendering some advisory services by the appellant to Mr. Sharma, the management or administration of the portfolio of securities or the management or administration of the fund was not at all involved. Mere advice by a person to another, may be regarding securities or a fund cannot clothe said advisor as portfolio manager.
3. In Financial world, portfolio management is understood as a discretionary portfolio management or non-discretionary portfolio management. So far as non-discretionary portfolio management is concerned the manager cannot himself undertake to invest or take decision regarding the portfolio.

He / she has to counsel the investors first. So far as the discretionary portfolio management is concerned the portfolio manager is given full leeway to make decisions for the investor. Thus, mere advice itself regarding any investment would not be enough to bring any person within the clutches of the definition of portfolio manager.

4. It is to be noted that in the year 2013, SEBI came with independent regulations called as Securities and Exchange Board of India (Investment Advisers) Regulations, 2013 whereunder certain norms are fixed for investment advisors, *inter-alia*, requiring them to be registered. However, during the present period in question no such regulations were in existence.

7. For all these reasons, the order of the WTM cannot be sustained. In the result, the appeal is hereby allowed with no order as to costs. The impugned directions of the WTM are hereby set aside.

Sd/-
Justice Tarun Agarwala
Presiding Officer

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

Sd/-
Justice M. T. Joshi
Judicial Member