

Legal Updates

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Supreme Court on Retrospective nature of SEBI amendments

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The Supreme Court has recently pronounced a very remarkable judgment on the retrospective nature of SEBI amendments. The issue was decided in case of *SEBI vs. Ajay Agarwal* on 25th February 2010.

An Important judgment by Justice A. K. Ganguly and Justice G S Singhvi:

In the case under consideration, Mr. Ajay Agarwal was appointed as the Joint Managing Director of Trident Steel Ltd. The offence was committed in 1993 to the effect that there was misstatement in the prospectus. The respondent was restrained from associating with any corporate body in accessing the securities market and prohibiting him from buying, selling or dealing in securities as per the provisions of section 11B of the Securities and Exchange Board of India (SEBI) Act, 1992. It is to be seen that Section 11B of Securities and Exchange Board of India (SEBI) Act, 1992 was amended w.e.f. 25th January 1995. Therefore, it was urged on behalf of the appellant that the alleged misconduct if any was for a period of time when Section 11B was not on the statute book. Thus, the question arose whether any direction can be issued under Section 11B for the alleged misconduct said to have been committed prior to introduction of Section 11B. The Securities Appellate Tribunal (SAT) was of the view that the provision of Section 11B cannot be invoked in respect of the alleged misconduct which took place at a point of time when Section 11B was not on the statute book.

On appeal by SEBI, the Supreme Court held thus:

"....., the provisions of Section 11 (4) (B) of the said Act also came by way of amendment in 2002. It should, however, be noted that by the time the Board passed the order on 31st March 2004 all the amendments were on the statute. Therefore, the question here is not of retrospective operation of the amendments. Even if the amendments to the said Act are allowed to operate prospectively by the time the order was passed by the Board, it was empowered by the aforesaid amendments to do so."

The Apex Court thereafter went on to decide whether the Board could pass the order in respect of allegations which was committed prior to the coming into effect of those

amendments in 1995 and 2002. In other words, the Apex Court felt that the question of protection against ex-post facto laws fell for consideration. In this respect it held thus:

"The right of a person of not being convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence and not to be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence, is a Fundamental Right guaranteed under our Constitution only in a case where a person is charged of having committed an "offence" and is subjected to a "penalty"."

The court held that the restraint order is not a penalty and hence the protection against ex-post facto law will not be available in the instant case.

If we look at the legislative intent for enacting the said Act, it transpires that the said provision was enacted to achieve the twin purposes of promoting orderly and healthy growth of securities market and for protecting the interest of the investors. The court therefore held that the said Act is pre-eminently a social welfare legislation seeking to protect the interests of common men who are small investors. It is a well known canon of construction that when Court is called upon to interpret provisions of a social welfare legislation the paramount duty of the Court is to adopt such an interpretation as to further the purposes of law and if possible eschew the one which frustrates it.

In case of *A.G. v. Vernazza*, (1960) 3 All ER 97 and *K. Eapen Ghako v. The Provident Investment Company (P) Ltd.* AIR 1976 Supreme Court 2610, the Supreme Court held that if a statute deals merely with the procedure in an action, and does not affect the rights of the parties it will be held to apply prima facie to all actions, pending as well as future.

The Apex court finally held that

"the Provisions of Section 11-B being procedural in nature can be applied retrospectively".

The General Principle behind the pronouncement of the ruling:

The general principle is that the Parliament has the power to promulgate such amendments which can have retrospective effect. Procedural amendments can be enacted to have an effect retrospectively even if the amendment is explicitly pronounced to have a prospective effect. But with respect to the substantive provisions, the Parliament has to

specifically lay down that the substantive amendments would have retrospective effect. If this is a matter of substantive law, then it is necessary that there should be a special provision to indicate that the new substantive law is retrospective.

Moving ahead with the discussion, it should be brought to the notice that it is a well-settled principle that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if the concerned provisions had not come into force. The Parliament does not have the power to levy penal provisions with retrospective effect. Such penal provisions giving retrospective effect is violative of the Constitution of India. The said principle has been established by way of many remarkable judgments, few of them are cited below:

In case of *C.J. Paul & Ors vs District Collector & Ors* on 31 July, 2009, it was discussed: Sections 47A and 19B of the Act provide for penalty. A statute of limitation conferring jurisdiction upon the statutory authorities to impose penalty must, therefore, be construed strictly. A penal statute, as is well-known, unless expressly provided, cannot be given a retrospective effect. [See *Ritesh Agarwal and Another v. Securities and Exchange Board of India* (2008) 8 SCC 205]

In case of *BOC India Limited vs Commissioner Of Central Excise* on 5 July, 2004, the following was discussed:

The question is whether the interest was imposable in the instant case or if it, from which date. In present case the duty was made effective from May, 2000 for the period 16-11-97 to 1st June, 1998. Prior to it, it was declared ultra vires by the Hon'ble Apex Court: Consequently, the appellant was not under an obligation to discharge the duty liability pertaining to period 16-11-97 to 1st June, 98. The levy of tax was not in force from 16-11-97 to 1-6-98. It is futile or a farce fallacy to deposit a tax and get it refunded. From above discussion it is clear that appellant was under an obligation to discharge the Tax liability from 16-11-97 to 1st June, 98 only on May, 2000 and consequently he was not liable to pay interest prior to May, 2000 i.e. the date on which the duty was payable. In the instant case the interest has been realised from 16-11-97 which is contrary to law. The appellant is liable to pay interest from May, 2000 onwards.

We may further notice a decision of the Supreme Court of India in the case of *M/s J. K. Cotton Spg. and Wvg. Mills Ltd. v. Union of India*, AIR 1988 SC 191. According to him on the basis of law laid down by the Supreme Court, penalty cannot be imposed with retrospective effect. In the aforementioned case, the Supreme Court was considering the scope of Explanation to Section 51 of the Finance Act, 1982. This explanation reads as

under :-

"Explanation.- For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this section had not come into force."

While interpreting the scope of the aforementioned provisions, the Supreme Court observed that for any act or omission before the amendment, no penal action can be taken against the defaulting party.