BEFORE THE RECOVERY OFFICER, MUMBAI
SECURTIES AND EXCHANGE BOARD OF INDIA
MUMBAI

Certificate No. 23 of 2013, 245 & 246 of 2014

Defaulters	**- Mr. Shirish Chandrakant Shah** **Mrs. Sandhya Shirish Shah** **Mrs. Praveen Chandrakant Shah** **Sicorp Finlease Limited**
Claimant	**- Mr. Chandrakant Bhogilal Shah through Mr. J.J. Bhat, Ms. Rinku Valanju & Mr. Pratham Masurekar, Advocates**
Date of Hearing	**June 05, 2015**

Order under Section 28A of SEBI Act, 1992 read with Section 221 to 232 and Second Schedule to the Income Tax Act, 1961 and the rules framed thereunder

1. SEBI has initiated recovery proceedings vide Certificate No. 23 of 2013 dated December 03, 2013 and 245 & 246 of 2014 dated July 14, 2014 for recovery of sum of Rs.1,00,00,000 (Rupees One Crore only), Rs.40,00,000 (Rupees Forty Lakh only) and Rs.1,00,00,000 (Rupees One crore only) respectively towards penalty imposed by the Adjudicating Officer vide two separate orders dated October 31, 2011 and March 31, 2011 along with interest, all costs, charges and expenses, inter alia, against the aforesaid defaulters in the matter of G-Tech Info Training Limited. The total dues jointly and severally against the said defaulters and their associates is about Rs. 3,53,06,328/- along with further interest, cost, etc., out of which SEBI has so far recovered Rs. 14,01,887/- and the remaining is outstanding.

2. In order to prevent the defaulters from disposing the money, assets, etc. held with the banks, in exercise of powers conferred under section 28A of the SEBI Act and section 226 of the Income Tax Act, notice of attachment was issued vide Attachment Proceeding No. 275 of 2013 and 930 of 2014, attaching all the accounts, including lockers held by the

defaulters. In response to the attachment proceedings, The Saraswat Co-operative Bank Limited has, inter alia, informed SEBI that the aforesaid three defaulters, viz. Mr. Shirish Shah, Mrs. Sandhya Shirish Shah and Mrs. Pravina Chandrakant Shah are holding three bank lockers accounts (Nos. A-2254, A-1547 and D-678) jointly with Mr. Chandrakant Bhogilal Shah ("Claimant") at the Girgaon Branch. SEBI was in the process of collecting the details pertaining to the joint accounts and other details available with the bank to take further steps in the matter. In the meantime, the Claimant through his Advocate filed an application dated October 13, 2014 before the Recovery Officer stating that the bank lockers of the Claimant have been wrongly attached as he was not the defaulter and the lockers are exclusively held by him. It is also stated that the three defaulters were joined in the said locker account only due to his complicated health problems for operating the same on his behalf and sought an opportunity of personal hearing. From the said application of the Claimant, it was also learnt that the Claimant and the three defaulters are also having a bank locker account bearing No. F-139 with Bank of Baroda, V.P. Road branch, Mumbai. Therefore, the details of bank locker account of Bank of Baroda were also called for from the said bank. An opportunity of hearing was granted to the Claimant on November 10, 2014 and November 18, 2014. The hearing was attended by the Advocates of the Claimant.

3. After considering all the submissions made by the Advocates on behalf of the Claimant and material available on record, the Recovery Officer passed an order dated December 10, 2014 wherein it was concluded as under:

   a) The Claimant has failed to establish that he is the exclusive holder of the lockers or the contents in the said lockers are exclusively owned by him.

   b) The request of the Claimant to release the said bank lockers was rejected. However, the Claimant was directed to be present when the lockers are opened and identify his exclusive belongings in the lockers with sufficient documentary evidence for considering release of his exclusive items, if any.

4. Pursuant to the aforesaid orders, SEBI has vide letter dated December 23, 2014 advised the Claimant and defaulters to be present when the lockers at Saraswat Bank are opened on January 06, 2015 along with sufficient documentary evidence and identify exclusive

SECURITIES AND EXCHANGE BOARD OF INDIA * RECOVERY DIVISION

belongings of the Claimant in the lockers held with Saraswat Bank. In the meantime, the Claimant appealed against the said order dated December 10, 2014 before the Hon'ble Securities Appellate Tribunal ("SAT") and sought stay of opening lockers at Saraswat Bank. The Hon'ble SAT, after hearing both the parties, vide order dated January 05, 2015, permitted SEBI to open the said lockers in the Saraswat Bank in the presence of the representatives of the Claimant and directed SEBI to make inventory of all the documents and valuables lying therein signed by the officers of SEBI as well as the representatives of the Claimant and thereafter keep back the items in the lockers..

5. In execution of the said order of Hon'ble SAT, the three lockers at Saraswat Bank were opened on January 06, 2015 and a detailed inventory of all the items found was prepared. The items were kept back in the lockers and the lockers were sealed again. Further, vide letter dated January 15, 2015, Claimant, along with other defaulters, was informed that the locker in Bank of Baroda, V.P. Road branch will be opened on January 19, 2015 and the Claimant was directed to identify with sufficient documentary evidence of his exclusive assets in the locker. Upon request from the Claimant, the opening of locker was postponed to January 29, 2015. On the said date, the locker at Bank of Baorda was opened and a detailed inventory of the items found was prepared and kept back in the locker and sealed again. Even though the Claimant was personally present in the Saraswat Bank and, through his representative at Bank of Baroda, but failed to identify or furnish any piece of evidence to show that assets in the lockers are his exclusive property. The inventory of the items found in the lockers is as follows:

Particulars	**Value (in Rs.)**
Saraswat Bank	
Jewellery	43,38,871 (approx.)
Cash	6,31,000
Foreign Currency	3,27,636 (approx.)
Bank of Baroda	
Cash	1,18,52,000
Total	**1,71,49,507**.

When the appeal of the Claimant came up before the Hon'ble SAT on April 07, 2015, the Claimant informed the Hon'ble SAT that he would make representation before the

Recovery Officer that all the assets in four lockers are belonging to the Claimant and not pressed the appeal. Accordingly, the Hon'ble SAT while disposing the appeal permitted the Claimant to make a representation before the Recovery Officer within four weeks and Recovery Officer to consider the same and pass appropriate order thereon within a period of four weeks thereafter. The Claimant filed an application before the Hon'ble SAT, seeking extension of time by two more weeks to make representation to SEBI, which was allowed by the Hon'ble SAT.

7. The Claimant filed a representation, dated May 18, 2015 (received on May 19, 2015), before the Recovery Officer, along with some documents and sought an opportunity of personal hearing. The Claimant was granted personal hearing on June 05, 2015, where the Advocates appeared on behalf of the Claimant and made oral submissions. The Advocates for the Claimant further requested time till June 08, 2015 to submit copies of some more documents in support of his claim. The said documents, along with further written submission were submitted by the Claimant on June 09, 2015.

8. The sum and substance of the submissions made by the Claimant during the hearing and in the written submissions are as follows:

   a. *Mr. D.V. Sekhar, Recovery officer, SEBI had become functus officio after he passed the order dated December 10, 2014; yet, he was present at the opening of the locker. On an overall basis, the Recovery Officer showed great haste and unwarranted speed at every stage for proceeding against the Claimant. There is a great chance that Mr. D.V. Sekhar will not be able to give him justice and his decisions, as was apparent during the time of the early hearings, are precognated and biased. Therefore, in the interest of justice, SEBI is requested to not entrust this matter again to Mr. D.V. Sekhar, who in all probability will consider these submissions with biased mind and act prejudicially against the Claimant.*

   b. *Despite the Claimant being a person against whom there has not been a single proceeding of SEBI, the Recovery Officer, in involving the Claimant, has been biased and vindictive in nature.*

D.V. Sekhar

SECURITIES AND EXCHANGE BOARD OF INDIA * RECOVERY DIVISION *

c. *The recovery certificates were issued in the names of Mrs. Pravina Shah, Mr. Shirish Shah and Mrs. Sandhya Shah and Sicorp Finlease Limited and not in the Claimant's name.*

d. *The Claimant is not a defaulter and there is no penalty pending against him. The Claimant does not come within the purview and jurisdiction of SEBI and the attachment proceedings are bad-in-law and perverse.*

e. *SEBI has initiated criminal proceedings against Mr. Shirish Shah, Mrs. Sandhya Shah and Mrs. Pravina C Shah wherein the Claimant has not been made a party. Section 28A of the SEBI Act is applicable only to defaulters and the Claimant cannot be considered as a defaulter as contemplated under Section 28A.*

f. *The bank lockers cannot be treated and equated as bank accounts under Section 6 of the Banking Regulation Act, 1949. There is a vast difference between a bank account and a bank locker and both are not same and cannot be given same weight, significance and treatment. Nothing in the provisions contained in the provisions of Banking Regulation Act, 1949 makes a bank account at par with a safe deposit vault/locker with a savings bank account.*

g. *The penalties imposed by SEBI on the defaulters are not a statutory due, nor tax, nor any fee and therefore, no coercive action can be taken to collect the same on the pretext that the funds will go to the Consolidated Fund of India.*

h. *The Claimant should not be required to prove that the contents of lockers belong to him as this will amount to self - incrimination under Article 20(3) of the Constitution of India. Similarly, he cannot be deprived of his property without the authority of law in violation of Article 300A of the Constitution of India.*

i. *The Claimant's is an old family having many generations. The family wealth passed on from one generation to another, comprising of gold jewellery, ornaments, silver items, precious stones, diamonds, etc. which were preserved and passed on to the next generation.*

j. *The Claimant and his younger brother formed a partnership in 1985 for trading, selling and buying gold, diamond, ornaments, etc. The Claimant used to take care of the business in Mumbai and opened three bank lockers with Saraswat Bank for safe keeping of the jewellery and valuable items of the business. During the initial years, he used to*

SECURITIES AND EXCHANGE BOARD OF INDIA * RECOVERY DIVISION

pay the locker rent for all the lockers in cash, for which receipts have been submitted. After the RBI regulations, locker rents are now collected by debiting the locker holder's account and that bank of Baroda account is a joint account of him with three defaulters. Further, he does not own a bank account with Saraswat Bank and accordingly, the rent payments are directly debited from Shirish Shah's bank account.

k. *Upon, the demise of the Claimant's father in 1990, he inherited precious and semi-precious stones, gold ornaments and Rs.9 lakhs. Some of the inherited items were converted into cash and about Rs. 45 lakhs was realized and kept in locker for future use.*

l. *Upon retirement from partnership with his brother, the Claimant received his share of business net worth and goodwill in terms of gold/silver ornaments/bars worth about Rs. 80 lakhs. The Claimant has submitted copies of settlement deed and change of partnership deed.*

m. *The Claimant sold most of the jewellery and ornaments that were received in lieu of separation from partnership and converted the same in to cash and deposited it in Bank of Baroda locker. He further purchased certain valuable items which were bought in bulk/scrap for investment purpose. The Claimant has submitted documents showing items purchased by him for such investment purpose. The Claimant did not part with the possession and control of such precious items, cash and ornaments to anyone.*

n. *One of the close relatives of Claimant, Mr. Ramniklal Shah died in 2012 and his wife Mrs. Shantaben R. Shah (mother of Mrs. Sandhya Shirish Shah-defaulter) had handed over Rs.7 lakhs in cash and some jewellery to him for safekeeping which he arranged to deposit in his lockers.*

o. *The Claimant added the three Defaulters as joint holders in the lockers for operational convenience due to his complicated health condition.*

p. *Summary of cash received by him in respect of Saraswat Bank and Bank of Baroda lockers is as follows:*

Particulars	*Amount (Rs. in lakhs)*
Share received on father's death	*9*
Share of precious stones received on father's death and sold subsequently	*45*
Share received upon retirement from partnership with	*75*

SECURITIES AND EXCHANGE BOARD OF INDIA * RECOVERY DIVISION *

N.V. Sen

brother	
Receipt from Mrs. Shantaben R. Shah	*7*

q. *The Claimant has submitted an affidavit stating that the several items which have been lying in his locker and which have been inventoried are his and exclusively belong to him.*

r. *During 2002-2008, the Claimant along with his wife, son, daughter-in-law and grandson visited various countries and the expenses abroad were met from the currencies purchased by his son Shirish shah and others and the currencies left were kept in the bank locker.*

9. Before dealing with the contentions of the Claimant on the assets lying in the lockers, I shall first deal with the Claimant's allegations of bias, actions etc. of the Recovery Officer i.e. me.

(a) I observe that the Claimant did not make any such allegation or accusation of bias etc. before the Hon'ble SAT. In fact, the Claimant himself has represented before the Hon'ble SAT on April 07, 2015 that he would like to make a representation before the Recovery Officer and not pressed for the appeal filed against the order dated December 10, 2014 passed by me. Accordingly, while disposing off the appeal, the Hon'ble SAT has directed the Recovery Officer to pass orders within four weeks from the date of receipt of representation from the Claimant.

(b) As regards the contention of the Claimant that I had become functus officio after passing the order dated December 10, 2014 but I was personally present when the bank lockers were opened on January 06, 2015 at Saraswat Bank, the Claimant has failed to appreciate and understand that the Second Schedule to the Income Tax Act, 1961 read with section 28A of SEBI Act, 1992 authorizes the Recovery Officer himself or any officer authorized by him to attach the properties and there is no restriction or prohibition either in section 28A of SEBI Act or under Income Tax Act that Recovery Officer's personal presence in the attachment proceedings. Further, in the recovery proceedings, the question of Recovery Officer becoming functus officio does not arise as the Recovery Officer is required to take all steps till the entire dues to SEBI are recovered. Moreover, the said order dated

SECURITIES AND EXCHANGE BOARD OF INDIA * RECOVERY DIVISION *

December 10, 2014 was under challenge and the Hon'ble SAT has directed SEBI to open the lockers and after making inventory of all the documents and valuables lying therein would be duly signed by the officers of SEBI and representatives of the Claimant. Further, when the lockers were opened at Bank of Baroda on January 29, 2015 and movable assets were attached on March 12, 2015, I was not present and only the officers of Recovery Division of SEBI executed the inventorization task.

(c) As regards the contention that the Recovery Officer has threatened the Claimant by issuing the notice dated 15.01.2015 for opening the locker at Bank of Baroda, when he filed appeal on 22.12.2014, it may be stated that the Hon'ble SAT vide order dated January 05, 2015, in the appeal filed by the Claimant directed SEBI to open the lockers at Saraswat Bank and take inventorization of the contents in the locker and there was no stay/prohibitory order passed by the Hon'ble SAT for opening the locker held with Bank of Baroda. Therefore, simply because the notice was issued to the Claimant for opening the locker, the same cannot be regarded as any threatening or otherwise.

(d) As regards the contention that the Claimant was involved unnecessarily in the mater with bias and vindictive nature despite there was no proceeding of SEBI against the Claimant, it may be stated that the notices of attachment of Bank Accounts, lockers were issued only against the Defaulters and not against the Claimant. The Claimant has come into the proceedings only because the Claimant was one of the joint holder in the bank accounts and lockers along with the Defaulters. When the action is pointed against the Defaulters, SEBI has every right under section 28A of SEBI Act r/w relevant provisions of Income Tax Act to attach the properties of the Defaulter even though the said property is jointly held with a third party who is not a Defaulter. The relevant Rules in connection with the issue under the Second Schedule to the Income Tax Act, 1961 are as under:

Rule 26(1)(c)(iii): *In case of other movable property not in possession of the defaulter except property deposited in, or in the custody of, any court, the attachment shall be made by a written order prohibiting the person in possession of the same from giving it over to the defaulter.*

SECURITIES AND EXCHANGE BOARD OF INDIA * RECOVERY DIVISION *

Rule 28: *Where the property to be attached consists of the share or interest of the defaulter in movable property belonging to him and another as co-owners, the attachment shall be made by a notice to the defaulter prohibiting him from transferring the share or interest or charging it in any way.*

Rule 11: *where any claim is preferred to, or any objection is made on the attachment or sale of, any property in execution of a certificate, on the ground that such property is not liable to such attachment or sale, the Recovery Officer shall proceed to investigate the claim or objection.*

Accordingly, the attachment notices in the matter were issued to the concerned bank/s and to the Defaulters. Since the Claimant has made claim over the assets in the lockers, the Recovery Officer is competent to investigate the said claim and pass orders thereon which was done by the Recovery Officer vide order dated December 10, 2014.

(e) As regards the allegations of bias, the Hon'ble Supreme Court in various cases including **AK Kraipak v Union of India**, AIR 1970 SC 150, held that a mere suspicion of bias is not sufficient and there must be a reasonable likelihood of bias. The existence of bias is a question of fact and is to be proved in each case. The proceedings at every stage in the present matter have been conducted in accordance with the procedure established by law. The Claimant has not established any fact indicating personal or pecuniary interest that the Recovery Officer has in the matter. All the proceedings were conducted after giving ample opportunity of hearing to the Claimant and adhering to the time lines laid down by Hon'ble SAT in opening lockers at Saraswat Bank.

(f) As regards the contention that the Recovery Officer has showed great haste and unwarranted speed at every stage of proceeding against the Claimant, it may be noted that the proceedings were against the Defaulters and not against the Claimant as the Defaulters failed to pay the penalties since 2011 and not even responded to the reminders sent by SEBI from time to time. Further, the recovery proceedings against the Defaulters commenced in December, 2013 and July, 2014. However, the lockers were specifically prohibited in August, 2014 based on which the Claimant has made application before the Recovery Officer in October, 2014 which

D.V. Sh

SECURITIES AND EXCHANGE BOARD OF INDIA * RECOVERY DIVISION *

was after giving sufficient opportunity of hearings disposed vide order dated December 10, 2014 wherein an opportunity was again given to the Claimant to identify his exclusive belongings with documentary proof when the lockers were opened. Vide letter dated December 23, 2014, the Claimant was advised to be present in the bank on January 6, 2015 to enable him to identify his assets in the lockers. The Claimant has challenged the said opening of lockers by an appeal in which the Hon'ble SAT directed SEBI to open the lockers at Saraswat Bank on January 06, 2015 at 11.00 AM and take inventorization. Accordingly, the three lockers at Saraswat Bank were opened in the presence of the Claimant. Vide letter dated January 15, 2015, an opportunity was given to the Claimant to identify his exclusive assets in the locker held with Bank of Baroda on January 19, 2015 which was adjourned at the request of the Claimant to January 29, 2015. Inspite of these no. of opportunities, the Claimant has failed to identify any items or furnish any documentary evidence when the lockers were opened. These circumstances clearly show that there was no haste in the proceedings or unwarranted speed as alleged by the Claimant or otherwise.

10. In view of the aforesaid, the contention of the Claimant that I shall not deal with his present representation is devoid of any merit.

11. Now, I will deal the contentions on the lockers raised by the Claimant in his representation. Even though the contentions of the Claimant referred at para 8 (b) to (g) were already raised by the Claimant which were dealt vide Order dated December 10, 2014, since the appellant has again raised the same contentions, I am now dealing the same as under:

(i) I note that the recovery proceedings have been initiated, inter alia, against Mrs. Pravina Chandrakant Shah (wife of the Claimant), Mr. Shirish Chandrakant Shah (son of the Claimant), Mrs. Sandhya Shah (daughter-in-law of the Claimant) and Sicorp Finlease Limited (where Mr. Shirish Shah is a Director). It is admitted fact that the defaulters are joint account holders in all the four lockers held jointly with

SECURITIES AND EXCHANGE BOARD OF INDIA * RECOVERY DIVISION *

D. V. Bhave

the Claimant. The said penalty is due inter alia, from the defaulters since March, 2011 and the defaulters have not taken any steps to repay the said dues in spite of repeated reminders from SEBI. The said dues arise out of the penalties imposed, inter alia, on the four defaulters for committing fraudulent transactions in the securities market. In this connection, the Hon'ble Bombay High Court in **SEBI vs. State of Maharashtra & another** (Criminal Writ Petition No. 2176 of 2005 dated November 18, 2005) held that person facing action for manipulation of the scrip on the stock exchange must have cascading effect on the economy.

(ii) I also note that even after initiation of recovery proceedings in December, 2013 & July, 2014, the defaulters failed to take any pro-active steps to pay the dues, except stating that the lockers are exclusively held by the Claimant herein.

(iii) It has been rightly pointed out by the Claimant in his written submissions that SEBI has initiated criminal proceedings only against Mr. Shirish Shah, Mrs. Sandhya Shah and Mrs. Pravina Shah wherein he has not been made a party. This clearly shows that the SEBI proceedings, whether criminal or recovery, have been initiated only against the defaulters. At no point, the Claimant has been made as a party to the proceedings. Further, the order dated December 10, 2014 categorically stated that "it is open to the Claimant that he may present when the lockers are opened in execution of recovery certificates and may identify any of his exclusive belongings in the lockers with sufficient documentary evidence for considering release of his exclusive items." The defaulter was, accordingly, before opening of both lockers duly informed. However, he failed to furnish any documentary evidence and/or identify his exclusive belongings/assets in the lockers.

(iv) As regards the contention of the Claimant that penalty imposed by SEBI is not a statutory due nor tax or any fee and therefore no coercive action can be taken to collect the same on the pretext that the funds will go to the Consolidated Fund of India, it is noted that the penalty imposed by SEBI is under Chapter VIA of the SEBI Act, 1992 and the same is recoverable under section 28A of the SEBI Act. The said penalty, upon recovery is remitted to the Consolidated Fund of India under Section 15JA of the SEBI Act. Therefore, any dues towards penalty imposed by SEBI is a statutory dues. In any case, Claimant has no locus standi to raise this

SECURITIES AND EXCHANGE BOARD OF INDIA * RECOVERY DIVISION *

contention as the recovery proceedings are not against him. I also note that for the last more than three years the Defaulters were not bothered about payment of the dues. Hence, there is no illegality in initiating recovery proceedings against the defaulters. The Hon'ble Supreme Court in **The Collector of Malabar v. Erimal Ebrahim Hajee,** 1957 AIR 688 held that when dues in the shape of money are to be realized by the process of law and not by voluntary payment, the element of coercion must necessarily be found at all stages in the mode of recovery of money due. The coercive element, perhaps in its severe form, is the act of arrest in order to make the defaulter to pay his dues.

(v) As regards the contention that no adjudication order was passed against the Claimant and no recovery certificate has been issued, therefore he being a non-defaulter, his locker cannot be attached, it is noted that the lockers have been attached for the reason that the three defaulters are also joint holders of the lockers with the Claimant which were done in accordance with Rule 26 and 28 of the Second Schedule to the Income Tax Act.

(vi) As regards the contention of the Claimant that Section 226 of the Income Tax Act is not applicable for attaching bank lockers, it is noted that section 226 has been invoked in the Notice of Attachment dated 14/7/2014 only for the limited purpose of attaching money held with the banks as the said section permits recovery officer to attach money held with any persons. During the hearing it has been pointed out to the advocate that there is specific mention of Section 28A(1)(b) of the SEBI Act in the notice of attachment which authorises the recovery officer to attach the bank accounts of the defaulter. Hence, the contentions made in respect of Section 226 of Income Tax Act has no bearing in the present facts and circumstances.

(vii) As regards the contention that a bank locker is not a bank account and hence, cannot be attached in exercise of powers u/s 28A(1)(b) of SEBI Act, it is noted that the commercial banks in India operate within the legal frame work of the Banking Regulation Act and the circulars/instructions issued by the banking regulator viz., Reserve Bank of India. The banks cannot do any business or activity other than what has been permitted under the Banking Regulation Act. Extending locker facility by the banks to its customers is one of the permitted activities under section

SECURITIES AND EXCHANGE BOARD OF INDIA * RECOVERY DIVISION *

A.V. Sd

6 (1) (a) of the Banking Regulation Act. The RBI circular RBI/2012-13/50 dated July 01, 2013 on Customer Services in India though applicable to Urban Co-Op Banks in India, similar circular has been issued by RBI vide Master Circular dated July 1, 2014 regulating the customer services in the commercial banks which deals with extension of safe deposit lockers by the banks to its customers. Therefore, it is clear that providing locker services by the bank to its customers is part of the banking services provided by the banking companies.

(viii) The Hon'ble Supreme Court in **Mehsana District Central Coop Bank v. ITO** (2009) 17 SCC 621 held that provision of safe deposit vault is part of the ordinary banking business of a bank and this is shown by section 6 (1) (a) of the Banking Regulation Act. The Hon'ble Madras High Court, while interpreting section 6 of the Banking Regulation Act, observed in Varamani David C. v. Bank of Madurai Ltd., A.I.R. 1983 Mad. 15 at p. 16 that Section 6 of the Act provides elaborately for a wide variety of business which a banking company may engage itself in. A fair consideration of this section as well as the definition of "banking" in the Banking Regulation Act, 1949, would have no doubt in any one's mind that chit fund transaction indulged in by a banking company at any rate partakes the character of a banking activity. Similarly, the Hon'ble Kerala High Court in Bishop of Kottayam & others vs. Union of India AIR 1986 Ker 126 while interpreting section 6 of the Banking Regulation Act held that when bank acts as an authorised dealer in foreign exchange, the said transaction is a banking business.

(ix) The contention of the Claimant that bank lockers are not bank accounts has no legal support and it is clear from the above that the bank locker is also a type of bank account and as such the Recovery Officer is empowered to attach the bank lockers held by the defaulters by invoking section 28A(1)(b) of SEBI Act.

(x) Even for the sake of argument if the locker facility extended by the bank to its customer is not a bank account within the meaning of Section 28A(1)(b) of SEBI Act and the Recovery Officer cannot attach the lockers, it is noted that as per section 28A (1) (a) of SEBI Act, the Recovery Officer is empowered to attach movable assets of the defaulter. The purpose of attachment of the locker in the recovery process is to prohibit access to the movable articles lying in the locker. As

SECURITIES AND EXCHANGE BOARD OF INDIA * RECOVERY DIVISION *

per Rule 26(1)(c)(iii) of Second Schedule to the Income Tax Act, 1961, in case of other movable property not in possession of the defaulter except property deposited in, or in the custody of, any court, the attachment shall be made by a written order prohibiting the person in possession of the same from giving it over to the defaulter. Therefore, I find that there is no illegality in attaching the lockers held by the defaulters.

12. As regards the reliance placed by Claimant on Article 300A of the Constitution of India that except under the authority of law he cannot be deprived of his property, it may be stated that the Hon'ble Supreme Court in **K.T. Plantation Pvt. Ltd. & Anr v State of Karnataka,** AIR 2011 SC 3430 expounded that no person can be deprived of his property save by authority of law, meaning thereby that a person cannot be deprived of his property merely by an executive fiat without any specific legal authority or without the support of law made by a competent legislature. It is noted that the penalty imposed by SEBI is under chapter VIA of the SEBI Act, 1992 and the same is recoverable under Section 28A of the SEBI Act. Therefore, any dues towards penalty imposed by SEBI is a statutory due and the Recovery Officer is duty-bound to recover the same under Section 28A of the SEBI Act. Since sufficient opportunities were granted to the Claimant in the entire proceedings to identify/establish his exclusive right over the assets in the lockers and the Claimant has failed to do so, the question of denial of property to him does not arise.

13. As regards the contention that requiring the Claimant to prove that the contents of the locker belong to him will amount to self-incrimination under Article 20(3) of the Constitution of India which provides that "No person accused of any offence shall be compelled to be a witness against himself", it may be stated in the present proceedings, as mentioned above, no proceedings have been initiated against the Claimant and the purpose of the present proceedings is only to determine the claim of the Claimant over the contents/assets in the locker, which are sealed in execution of the recovery proceedings against the Defaulter. In the present case, there is no compulsion on the Claimant to make a defence. In the case of **Apeejay Pvt. Ltd. v Raghavachari**

D.V. Subramanian

SECURITIES AND EXCHANGE BOARD OF INDIA * RECOVERY DIVISION *

Narasimhan & Ors. (1997) 1 Cal 255 HC it was held "the cardinal point involved in the protection of Article 20(3) relates to the question of compulsion. There is no question of compulsion in the defendant's filing a written statement in the civil suit or in examining himself as a witness to protect his own interest in such suit." It is undisputed fact that all four lockers are jointly held by three Defaulters and the Claimant. Unless contrary is proved, the assets in the lockers are jointly held by the four holders of the lockers. If, any one, claims that it is his exclusive assets, the burden lies on him to prove with substantial documents that the assets are his own. Therefore, there is no compulsion on the Claimant and it is his own case before the Hon'ble SAT that he want to prove his ownership of assets before the Recovery Officer. Further, these proceedings cannot be equated with proceedings against an accused in a criminal offence, hence, the question of applicability of article 20(3) does not arise.

14. The Claimant has furnished the following documents to support his contentions that all the assets in the lockers are his exclusive property and not that of Defaulters. It is noted from the affidavit dated May 19, 2015 the Claimant has merely reiterated the contentions made out in the main submissions. This was brought to the notice of the Advocates of the Claimant at the time of hearing hence it is not necessary to deal with the same documents/contentions of the affidavit again.

Date/Period	Particulars
March 23, 1990	Partnership Deed
March 30, 2002	Change of Partnership Deed
May 13, 2002	Settlement Deed on a plain paper
January 27, 2010	Will of the Claimant
1997 – 2008	Receipts of Locker Rent
Various dates	Certificates of weight of jewelleries
No date mentioned	Unauthenticated slips containing weights of jewellery
2009-10 to 2012-13	Income Tax Returns of the Claimant

SECURITIES AND EXCHANGE BOARD OF INDIA * RECOVERY DIVISION *

May 19, 2015	Affidavit of Claimant
June 02, 2015	Affidavit of Mrs. Pravina C. Shah
June 02, 2015	Affidavit of Mrs. Sandhya Shah
June 03, 2015	Affidavit of Mrs. Shantaben R. Shah
June 04, 2015	Affidavit of Mr. Shirish Shah

15. The Claimant has placed reliance on the copies of partnership deed dated 23.03.1990 between Chandrakant Bhogilal Shah and Navinchandra Bhogilal Shah, Change of Partnership Deed dated March 30, 2002 between Navinchandra Bhogilal Shah and his three sons and a Settlement Deed dated May 13, 2002 between Claimant and his brother. The Claimant has submitted that a major portion of the Claimant's wealth has been received by him when he retired from the partnership with his brother in the year 2002 and received his share of business's net worth and goodwill. Even though as per the partnership deed dated 23.03.1990, the Claimant was partner of Parimal Jewellers, but the said deed does not contain any details of the assets that are lying in the lockers. I note that the Claimant was neither party nor signatory in the Change of Partnership Deed dated March 30, 2002 nor does the document contain signature of the Claimant despite he was going out of the partnership firm. The said change of partnership deed was between the brother of the Claimant and his sons on reconstitution of the Firm. No document has been furnished by the Claimant to show that the firm was registered with the Registrar of Firms. Neither the partnership deed nor the change of partnership deed contain any details of assets more particularly, the assets lying in the four lockers that were received by the Claimant towards his share on his retirement from the firm. Therefore, the said documents will not help the Claimant to establish that the assets in the lockers are his exclusive property.

16. The Settlement Deed dated May 13, 2002 furnished by the Claimant contending that the assets in the lockers were derived from the said deed. I note that the said deed was stated to have been executed pursuant to separation of partnership business between the Claimant and his brother. While the partnership firm after the retirement of the Claimant was reconstituted on March 30, 2002, surprisingly, the settlement deed takes

SECURITIES AND EXCHANGE BOARD OF INDIA * RECOVERY DIVISION *

A.V. Sathe

place on a later date i.e. May 13, 2002 dividing the firm's property. Generally, the division of the assets between partners takes place at the time of retirement of a partner and before the firm is reconstituted with new incoming partners. Even though the said deed contains transactions relating to immovable assets shared between the Claimant and his brother, the said settlement deed is on a plain paper, not stamped or registered under the Indian Stamp Act and Registration Act. The said document does not contain any witnesses nor has any specific details of the jewellery viz., quantum, value etc. or the amount received in cash towards the share of the Claimant. The Claimant's contention is that the partnership firm Parmial Jewellers was divided and he got his share of jewels, precious stones, etc. However, it is noted from para 12 of the said settlement deed, that the jewels held and kept in Parimal Jewellers shall be divided between the Claimant and his brother and the said process of division shall be administered and governed by some of his friends/relatives. Therefore, admittedly, under the said settlement deed, there are no details of the jewellery, precious stones that were received towards his share nor any document has been filed by the Claimant showing the details of jewellery, precious stones that were divided between him and his brother. Another contradiction that may be noted is that as per the Partnership deed dated 23.03.1990 it has been mentioned at Clause (11) that "No goodwill shall have to be calculated in respect of this partnership firm" and whereas the Claimant has submitted that he received his share of business's networth and goodwill in terms of gold/silver ornaments, etc., which is patently incorrect. Thus, whatever has been stated by Claimant has without any cogent basis to establish that the assets held in the lockers are his exclusive assets got out of dissolution of partnership firm or through settlement deed dated May 13, 2002.

17. The Claimant has furnished copies of various slips mentioning total weights of 716.900 gms, 305.300 gms, 233.300 gms etc., contending that the jewellery in the lockers were purchased by him for investment purposes. I note that the said slips contain merely a list of items with their weight but without any money value ort shop name, bill number, date, name or signature of the seller/buyer, etc. The said copy shows a faded notary stamp. As per the comments noted on the said slips, it is stated that the said documents



D.V. Sch

were kept as record for his understanding. Except this, the Claimant has not furnished any cash memo or bill or receipt etc. matching with the jewels or the items kept in the lockers. In **Kachwala Gems v JCIT, Jaipur**, 288 ITR 10 (SC), it was held that in absence of evidence/document or record to verify the basis of the closing stock valuation the rejection of book of account was justified. Therefore, in the absence of a cash memo or any receipt or bills, the claim of the Claimant remains unsupported. On the contrary, when the lockers were opened, along with the jewellery etc. certain scribbled slips were also found in the said lockers which were prepared as Paper Set I to III copies whereof were already provided to the Claimant and Defaulters at the time of inventorization of contents of lockers in Saraswat Bank. As per page Nos. 5,6,15,17,22 of the Paper Set-I most of the jewellery items in the lockers were stated in the names of Mr. Shirish Shah, Mrs. Pravina Shah and Mrs. Sandhya Shah who are Defaulters. Not even a single slip contains the name of Claimant in respect of the jewellery or any other items in the locker.

18. The Claimant has submitted copies of the certificates of weight by Mumbai Diamond Merchant's Association bearing No. 488098 and 508350. It is noted that the Claimant's name is not mentioned on it, but the name of Mr. Shirish Shah in Gujarati is scribbled over it. Similarly, in two other valuations of diamond items, which do not bear the name of the shop/certifying entity, name of Claimant is not to be found and only the name of Mr. Shirish Shah is mentioned. In another set of certificates of valuation by The Mumbai Diamond Merchants Association bearing number 513383 and 507788 and 507789, the name of the Claimant is not mentioned and only name of Mrs. Sandhya Shah in faint handwriting can be noted. Another slip issued by Mettler Weight bearing No.16654 also stands in the names of Mrs.Sandhya and Mr.Shirish Shah. These set of documents furnished by the Claimant show that the said items/assets are in the names of Defaulters.

19. It is noted from the English translation (typed version) of Will dated 27.01.2010 submitted by the Claimant that he intend to bequeath his assets to his wife, daughter-in-law, grandson and future wife of his grandson etc. It is settled law that Will shall

SECURITIES AND EXCHANGE BOARD OF INDIA * RECOVERY DIVISION *

D.V. Salvi

come into force only after the demise of the Testator. The Will is a self-created document of the Claimant and also does not contain any description of the items matching with the assets in the lockers nor has any reference to the jewellery/assets held in the lockers. The said Will does not establish that the contents of the lockers exclusively belong to the Claimant. The fact remains that the contents of the lockers remain in the joint custody of the three defaulters along with the Claimant. Therefore, the Will submitted by the Claimant also does not help the Claimant to show that the cash and jewellery in the lockers are exclusively belong to him. In **Commissioner of Income Tax v Naval Kumar Chhabra** (IT Appeal no. 896 of 2008), decided on November 17, 2014, the Hon'ble High Court of Karnataka relying on Section 106 of the Evidence Act, 1872 held that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him and the burden of proving unexplained money cannot be shifted on the revenue. In the present case, the Claimant has not furnished any documents to establish that the contents in the locker are his exclusive property.

20. As regards the foreign currency found in the locker, it is admitted by the Claimant at para 21 of his written submissions that during his visits to foreign countries during the years 2002-2008 with his wife, son, daughter-in-law and grandson, expenses abroad were met from the currencies purchased by his son Mr. Shirish Shah and others. The Claimant has also not furnished any proof that the foreign currencies were purchased by him. Therefore, it can be safely concluded that entire foreign currency lying the locker does not belong to the Claimant.

21. As regards the affidavit of Mrs. Shantaben R. Shah, furnished by the Claimant stating that she had handed over Rs.7 lakhs in cash and jewellery to the Claimant for safekeeping, it may be stated that Mrs. Shantaben R Shah is none other than mother of Mrs. Sandhya Shah (Defaulter) and mother-in-law of Mr. Shirish Shah (Defaulter). Except the affidavit dated June 03, 2015 and death certificate of husband of Mrs. Shantaben, no other document showing that some of the cash and jewellery were owned by Mrs. Shantaben, or that the same were handed over to the Claimant for safe

SECURITIES AND EXCHANGE BOARD OF INDIA * RECOVERY DIVISION *

D.V. Sd/-

keeping in the lockers were furnished. Even if it is accepted that Mrs. Shantaben had handed over the jewellery and cash to the Claimant, it cannot be concluded that the same are lying in the said lockers.

22. The Claimant has relied on the affidavits of the Defaulters who are joint holders of all four lockers wherein the Defaulters have stated that the contents in the lockers are exclusive assets of the Claimant. Since the Claimant and the Defaulters are members of the same family and the Defaulters are aware that if the assets in the lockers are claimed to be theirs, the same will continue to be attached till all the dues are paid by them. Sufficient opportunities were given to the Defaulters, they failed to pay the dues for the last four years. On the contrary, the locker charges were paid from the accounts of the Defaulters, as stated above, some of the papers lying in the lockers show that the some of the jewellery are in the names of the Defaulters. The Hon'ble High Court of Gujarat in **Vijay Proteins Ltd. v. Commissioner of Income Tax,** (Tax Appeal No. 243 of 2002) decided on December 09, 2014 held that the contents of the affidavit without any record nor corroborated with any cogent evidence cannot be relied upon. Therefore, in the absence of any documentary evidence, the affidavits relied upon by the Claimant cannot be a piece of evidence to conclude that the entire assets in the lockers are exclusive property of the Claimant.

23. The case law submitted by the Claimant viz. **Supdt. and Remembrancer of Legal Affairs, WB v Anil Kumar Bhunja 2015 ALL SCR (O.C.C.) – Apr** is related to criminal proceedings where the facts involves the possession of fire arms. In the said case, 'possession' was debated for establishing criminal liability, hence the same are not relevant for the present proceedings. Similarly, the reliance placed on **Badrinath v State of Tamil Nadu & Ors.,** AIR 2000 SC 3243 is equally misplaced as the case deals with service law matter and has nothing to do with any kind of recovery proceedings. However, the Claimant has relied on the said case to state that once the basis of proceeding is declared as invalid all consequential acts, actions, orders would also automatically become invalid. Since the recovery proceedings initiated against the Defaulters is in accordance with law and no court or tribunal has declared the said

SECURITIES AND EXCHANGE BOARD OF INDIA * RECOVERY DIVISION *

D. V. Selvam

proceedings as invalid, the question of invalidating the attachment of lockers and/or its contents does not arise.

24. As regards the contention of the Claimant at para 8(o) that he could not go to the banks for accessing the lockers due to his complicated health conditions and it was accessed through one of the Defaulters, Mrs. Sandhya Shirish Shah, it is noted from the extracts of locker access registers furnished by the banks that not even on one single occasion, the Claimant has accessed the locker. On the contrary, the lockers were continuously accessed by Mrs. Sandhya Shirish Shah who is also one of the defaulters herein and also joint holder of all the four lockers. Hence, this contention of the Claimant will not help to hold that he alone has exclusive right over the lockers.

25. The Claimant has furnished copies of certain receipts towards payment of locker charges to Saraswat Bank randomly for some years during 1997 to 2008 and contended that all the contents in the lockers are his exclusive assets as he was paying the locker charges. However, it is noted from the copies of the documents taken from the lockers which were also furnished to the Claimant and Defaulters at the time of inventorization that there are some receipts in the name of Mrs. Pravina C Shah (one of the defaulters) during the same period. Even though the copies of locker opening forms for the period prior to 2002 were not available with Saraswat Bank but in 2002, all the three lockers were opened jointly by all the three Defaulters with the Claimant. The charges towards the lockers were also paid from the accounts of the Defaulters. Even though the Claimant is the first holder of the lockers that does not mean the assets contained in the said lockers are his exclusive assets or the other joint holders, who are defaulters, have no right over the same.

26. As regards the contention of the Claimant at para 8(j) that he was not having saving account with Saraswat Bank at the time of opening all the three lockers, he used the saving bank accounts of his son (Mr. Shirish Shah) for payment of locker charges, it is noted that as per the terms and conditions of lockers issued by Saraswat Bank, it is mandatory that the locker rent shall be payable from the deposit/ saving account of the

SECURITIES AND EXCHANGE BOARD OF INDIA * RECOVERY OFFICER

hirer. It is clear from the bank account statements that locker charges are paid from Mr. Shirish Shah's savings bank account continuously till date and not even one instance has been established to show that the Claimant has made locker charges to Saraswat Bank from his accounts or otherwise. The contention of the Claimant that the locker charges were paid in cash to Mr. Shirish Shah is not believable in the absence of any documentary evidence on record and on that basis it could not be held that the Defaulters have no right over the said locker and/ or the contents therein.

27. A careful examination of the locker opening form for Locker No. F-139 held with Bank of Baroda dated July 24, 2002, it is noted that the locker was let out to Chandrakant B. Shah, Pravina C. Shah, Sandhya S. Shah and Shirish C. Shah and the signatures of all the four are appearing on the said form. The rent for the said locker is paid from the Bank Account no. 13100100007119 of Mr. Shirish Shah on July 17, 2012, July 27, 2009 and July 30, 2008. Similarly, the rent has been paid from bank account No. 13100100018556, held jointly by Claimant along with Mrs. Pravina C. Shah and Mr. Shirish Shah on July 30, 2014. Therefore, the contention of the Claimant that he is exclusive holder of the items contained in the locker and the three Defaulters were joined for operational convenience stands discredited.

28. I note from the income-tax returns for the period 2009-10 to 2012-13 furnished by the Claimant, his gross annual income was in the range of Rs.2 to 2.44 lacs per annum. No latest income-tax returns were filed by the Claimant nor any Balance Sheet showing cash balance of more than Rs.1 crore is filed during the proceedings. As per Wealth Tax Act, any person who is holding wealth of Rs.30 lacs and above are required to file Wealth Tax Returns. However, no wealth tax returns have been submitted by the Claimant. Therefore, in the absence of any sufficient documentary evidence showing that the cash and jewellery lying the lockers are exclusive property of the Claimant, it would not be possible to conclude that the same worth more than Rs.1.70 crore, are exclusive property of the Claimant.

29. As discussed above, the Claimant has failed to prove that the entire assets in the lockers are his exclusive property. It is, therefore, presumed to be the property of all the four

persons i.e. three Defaulters and the Claimant. As per Section 226 (3)(ii) of the Income Tax Act, any money lying in the accounts of joint holders shall be presumed to be equal until the contrary is proved. Similarly, if the assets are jointly held by more than one person, unless the individual shares are established, it is presumed to be equal. Therefore, in the interest of justice by applying the said principle, the Claimant who is a joint holder along with the three Defaulters is entitled for one-fourth share of the assets lying in all four lockers.

30. In view of the above, I order that the Claimant is entitled to one-fourth share of the assets lying in all four lockers held in Locker Nos. A-2254, A-1547 and D-678 at Saraswat Bank and Locker No. F-139 at Bank of Baroda. It is open for the Claimant to approach the Recovery Officer, SEBI to seek release of one-fourth share of assets. It is also ordered that the remaining three-fourth share of assets shall continue to be under attachment and liable to be appropriated towards the dues under the aforesaid certificates in accordance with law.

31. The representation/application of the Claimant dated May 18, 2015 is disposed of in terms of above order. A copy of this order is being sent to the Claimant and the Defaulters.

Dated June 17, 2015

SECURITIES AND EXCHANGE BOARD OF INDIA * RECOVERY DIVISION *

D.V. SEKHAR
Dy. General Manager &
Recovery Officer

D.V. Sekhar
डी. वी. शेखर
Dy. General Manager & Recovery Officer
उप महाप्रबंधक एवं वसूली अधिकारी
Securities And Exchange Board of India
भारतीय प्रतिभूति और विनिमय बोर्ड
Mumbai
मुंबई