

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP-1838-2022 (O&M)

Reserved on: 11.05.2022

Date of Decision: 20.05.2022

Manish Goel and another

. . . . Petitioners

Vs.

Securities and Exchange Board of India and another

. . . . Respondents

**CORAM: HON'BLE MR JUSTICE M.S. RAMACHANDRA RAO
HON'BLE MR JUSTICE H.S. MADAAN**

Present: - Petitioner No.1 in person.

Mr.Ashwani Kumar Chopra, Sr. Advocate, with
Mr.Manish Jain, Advocate;
Mr.Raghubir Nijjar, Advocate;
Mr.Vidul Kapoor, Advocate, for respondent No.1.

Mr. Alok Kumar Jain, Sr. Panel Counsel,
for respondent No.2-UOI.

M.S. RAMACHANDRA RAO, J.

The Background facts

Petitioner No.1 is a Chartered Accountant and is also the
Director of petitioner No.2.

He claims to be actively involved for more than 15 years in
Securities Market and as having expertise in equity research and market
assessment. He got registered with SEBI as Research Analyst in 2017, and
petitioner No.2 was also registered on 29.05.2017 with SEBI as an
Investment Advisor.

Respondent No.1 had framed Securities & Exchange Board of India (Investment Advisors) Regulations, 2013.

These Regulations had been amended by the SEBI (Investment Advisors) (Amendment) Regulations, 2020 on 03.07.2020.

By virtue of this amendment Regulation 15A was inserted.

The Said Regulation 15A of the Regulations provided that *an Investment Advisor shall be entitled to charge fee for providing investment advice from a client in the manner specified by the Board.*

After the insertion of Regulation 15A in the (Investment Advisors) Regulations, 2013, respondent No.1 issued a circular No.SEBI/HO/IMD/DF-I/CIR/P/2020/182 dated 23.09.2020.

In this circular para 2(iii), provision was made as under with regard to charging of fee by Investment Advisors which states as under:

“(iii) Fees

Regulation 15 A of the amended Investment Advisor Regulations provide that Investment Advisers shall be entitled to charge fees from a client in the manner as specified by SEBI, accordingly Investment Advisers shall charge fees from the clients in either of the two modes:

(A) Assets under Advice (AUA) mode

- a. The maximum fees that may be charged under this mode shall not exceed 2.5 percent of AUA per annum per client across all services offered by Investment Advisor.*
- b. Investment Advisor shall be required to demonstrate AUA with supporting documents like demat statements, unit statements etc. of the client.*

- c. *Any portion of AUA held by the client under any pre-existing distribution arrangement with any entity shall be deducted from AUA for the purpose of charging fee by the Investment Advisor.*

(B) Fixed fee mode

The maximum fees that may be charged under this mode shall not exceed INR 1,25,000 per annum per client across all services offered by Investment Advisor.

General conditions under both modes

- a. *In case “family of client” is reckoned as a single client, the fee as referred above shall be charged per “family of client”*
- b. *Investment Advisor shall charge fees from a client under any one mode i.e. (A) or (B) on an annual basis. The change of mode shall be effected only after 12 months of on boarding/last change of mode.*
- c. *If agreed by the client, Investment Advisor may charge fees in advance. However, such advance shall not exceed fees for 2 quarters.*
- d. *In the event of pre-mature termination of the Investment Advisor services in terms of agreement the client shall be refunded the fees for unexpired period. However, Investment Advisor may retain a maximum breakage fee of not greater than one quarter fee.”*

The instant Writ Petition

In this Writ Petition, the petitioners seek a Writ of Mandamus to respondent No.1 to withdraw Regulation 15A of SEBI (Investment Advisors) Regulations and also the Circular dt.23.09.2020 referred to above, making provision for fixation of fee to be charged by Investment Advisors from their clients on the following grounds: -

- (a) The Regulation 15A and the consequent Circular violate Article 14, 19(1)(g) of the Constitution of India and deprive the Writ Petitioners of their fundamental rights of equality, practicing a profession and of the right to carry out occupation, trade or business by imposing unreasonable restrictions on the fee to be charged by an Investment Advisor from its clients.
- (b) The Regulation 15A and the consequent Circular are also violative of Section 11(1) and 30(1) of the Securities & Exchange Board of India, 1992 which requires SEBI to *protect interest of investors in securities markets* and to promote development and to regulate securities market, and to frame regulations consistent with the Act.
- (c) The Regulation 15A and the consequent Circular, by fixing the maximum fee to be charged by an Investment Advisor in a year from his client, kill the incentive for Investment Advisors to excel and beat other Investment Advisors; that the ceiling on maximum fee that can be charged as per the impugned Regulation 15A and the Circular is not based upon performance of the Investment Advisor in terms of financial returns generated but, it is either a fixed fee or fee based upon Assets Under Advise (AUA).

According to the petitioners, the fee would be the same both for an Investment Advisor who converts the

clients' AUA of ₹1 crore to ₹10 crores, and for another Investment Advisor, who converts the clients AUA of ₹1 crore to ₹10 lakhs.

According to them, highly skilled or expert Investment Advisors would not have any incentive to excel and to maximise clients' wealth, and only unskilled or non-expert Investment Advisor would have incentive to stay in the Investment Advisor business; and it is completely illogical and unjustifiable for the respondent No.1 to bring such a Regulation and the Circular.

- (d) It is contended that since the petitioners have outstanding track records in managing client's money, and some stocks identified by the petitioners had even multiplied 50 to 100 times, it is an unreasonable restriction imposed upon them and it makes them incapable of practicing their profession/business of Investment Advisor.
- (e) It is sought to be contended that if a clients AUA of ₹1 crore is managed by an Investment Advisor, he can only charge as fixed fee ₹1,25,000/- per annum or ₹2.5 lakh per annum based on AUA mode; if they convert AUA of ₹1 crore into ₹3 crore in one year generating a profit of ₹2 crore to the client, even then the Investment Advisor would get only ₹2.5 lakhs maximum fee.

- (f) It is alleged that this disparity will act as disincentive to the Investment Advisors from putting their best skills/hard work, vision, judgment, calculated risks; and Investment Advisors will then only work to the extent of generating enough returns to retain the client but, not to earn more for the client. Therefore, they are not in the best interest of the investors and are contrary to the duty cast on the SEBI under the SEBI Act 1992 to protect the interest of investors and securities.

The party-in person/Petitioner No.1 reiterated the said contentions.

The Stand of the SEBI (respondent No.1)

In the written statement filed on behalf of respondent No.1, it is contended that these contentions of the Writ Petitioners are not tenable.

It is contended that in the year 2013, SEBI, in exercise of the powers conferred by Section 30(1) read with Section 11(2)(b) of the Securities and Exchange Board of India Act (hereinafter : “SEBI Act”) issued the SEBI (Investment Advisors) Regulations, 2013 to register and regulate the working of the Investment Advisors in the interest of securities market and to project the interests of investors.

Post coming into force of the SEBI (Investment Advisors) Regulations, 2013, the Respondent No.1 was receiving numerous complaints from investors against the Investment Advisors such as (i) assuring of returns by Investment Advisors, (ii) Charging exorbitant fees

from clients with false promises of handsome returns, (iii) mis-selling by the Investment Advisors without adhering to the risk profile of the client, (iv) non-disclosure of complete service fees/charges, and (v) extracting money in the name of various charges.

The Respondent No.1 contends that such conduct of the Investment Advisors is against the interest of investors; and therefore, the respondent issued various orders under Section 11B (Power to issue directions) of the SEBI Act wherein the Investment Advisors were observed to be violating the provisions of the SEBI (Investment Advisors) Regulations, 2013 and SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003.

The respondent No.1 constituted a working group to, inter alia, review the SEBI (Investment Advisors) Regulations, 2013.

On 15.01.2020 after deliberations of the working group and its recommendations, the respondent issued a Public Consultation Paper proposing caps on maximum fees that an Investment Advisor can charge from its clients.

On 17.02.2020, the Board of the respondent No.1, after considering all points of view, approved the proposal to amend the SEBI (Investment Advisors) Regulations, 2013.

Pursuant thereto, Amendment Regulations were notified on 03.07.2020 in the official gazette and the same came into force on 30.09.2020, whereby, Regulation 15A was inserted in the SEBI (Investment Advisors) Regulations, 2013.

Regulation 15A, as inserted vide Amendment Regulations, 2020, read as follows: -

“Fees.

15A. Investment Adviser shall be entitled to charge fee for providing investment advice from a client in the manner as specified by the Board.”

Pursuant to insertion of Regulation 15A in the SEBI (Investment Advisors) Regulations, 2013, the respondent issued circular No. SEBI/HO/IMD/DF-1/CIR/P/2020/182 dt. 23.09.2020.

It is submitted that an Investment Advisor is expected to provide an advise based on the risk profiling of the clients, which is not akin to Portfolio Management Services, and so, performance based fees model for advisory services is not desirable.

It is submitted that the power to decide fees and put a ceiling on the fees existed in SEBI (Investment Advisors) Regulations, 2013 much before the insertion of Regulation 15A also.

Regulation 15(9) under the Chapter III-General Obligations and Responsibilities of the SEBI (Investment Advisors) Regulations, 2013 (hereinafter referred to as “Investment Advisor Regulations, 2013) provided as follows: -

“GENERAL OBLIGATIONS AND RESPONSIBILITIES

General responsibility.

15. (1)xx.....

(9) An investment adviser shall abide by Code of Conduct as specified in Third Schedule.”

The Third Schedule to the Investment Advisor Regulations, 2013 in its Clause 6 further provides that:

“(6) Fair and reasonable charge

An investment adviser advising a client my charge fee, subject to any ceiling as may be specified by the Board. The investment adviser shall ensure that fees charged to the clients is fair and reasonable.”

It is contended that petitioners had only referred in para 10 and 11 of their Writ Petition to a *profit sharing model* of fee i.e. higher the profit earned due to advice of the Investment Advisor, higher should be the fee of the Investment Advisor but, this submission fails to take in to account situation where clients suffer losses due to the advice of the Investment Advisor.

It is submitted that profit/loss arising due to the investment made by the client as per advice of the Investment Advisor ought to belong to the client since it is his funds which are involved and the client is the real risk taker.

It is contended that though suggestions were received by SEBI to the consultation paper seeking introduction of the profit sharing model, the same was not felt appropriate considering the role of the Investment Advisor envisaged in the Securities Market to provide fair advice to the investors.

It is pointed out that under the fixed fee mode, the maximum fee chargeable by an Investment Advisor is ₹1.25 Lakhs per annum and in the “assets under Advice mode”, an Investment Advisor can may charge his client fees upto 2.5% of the Assets under Advice per annum.

It is stated that if an Investment Advisor is managing asset of ₹2 Crore, then the maximum fees that can be charged by the Investment Advisor from the client under the AUA mode of fees is ₹5,00,000/- per annum (2.5% of ₹ 2 Crore); In case the AUA is increased i.e due to fresh investment or earning of profit etc., by the client from ₹2 Crore to ₹5 Crore, then the Investment Advisor can charge maximum fees of ₹12,50,000/- (2.5% of ₹5 Cr) in a year.

According to respondent No.1, the bigger the Asset under Advise of the Investment Advisor, the higher will be the maximum fees that can be charged by him from his client.

It is denied that fixation of a maximum cap of fee which may be charged by Investment Advisor violates any fundamental rights of the petitioners since there is no prohibition on the petitioners carrying on activity on Investment Advisors. It is also stated that the action of respondent No.1 thus falls within the ambit of the regulatory regime contemplated under Sections 11(1), 11(2)(2) and 12 of the SEBI Act 1992 and the Regulations made thereunder.

Contentions of counsel for the Respondent No.1

Mr.Ashwani Chopra, Sr. Advocate appearing on behalf of respondent No.1 supported the said submissions.

He further stated that SEBI is an expert body dealing with regulation of the Securities Market; that the decision to introduce Regulation 15A and issue the impugned Circular dt.23.09.2020 was taken after broad based consultations were done by inviting suggestions from the general public; that there is no violation of any fundamental rights of the petitioners; and this Court in exercise of its jurisdiction under Article 226 of the Constitution of India should be slow in interfering with the decision of SEBI as it is a matter of economical policy.

He also contended that the restrictions imposed by SEBI under the Regulation 15A and the Circular dt.23.09.2020 cannot be said to be unreasonable and would fall within the permissible limits as per Article 19(6) of the Constitution of India. He, therefore, prayed for the Writ Petition to be dismissed.

The consideration by the Court

In *Ehsan Khalid Vs. Union of India*¹, the Supreme Court had held that where there is a challenge to a Government policy, particularly economic policy, Court would not interfere in such policy matters in exercise of its power of judicial review unless such policy is found to be grossly arbitrary or unfair or unreasonable or irrational or violative of Constitutional provisions or contrary to statutory provision.

Similar view was expressed in *Zippers Karamchari Union Vs. Union of India*² holding that in matters of Trade, Commerce or Economic

¹ 2014(13) SCC 356

² 2000(10) SCC 619

Policy, the wisdom of the Government must be respected and Courts cannot lightly interfere in the same unless such policy is contrary to the provisions of Constitution or any law, or if such policy itself is wholly arbitrary.

This was reiterated in ***Bhaves D. Parish Vs. Union of India***³.

The reason for this reticence is explained in ***Small Scale Industrial Manufacturers Association Vs. Union of India***⁴, in the following terms:

“60. In catena of decisions and time and again this Court has considered the limited scope of judicial review in economic policy matters. From various decisions of this Court, this Court has consistently observed and held as under:

60.1. The Court will not debate academic matters or concern itself with intricacies of trade and commerce.

60.2. It is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are the courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. Wisdom and advisability of economic policy are ordinarily not amenable to judicial review.

60.3. Economic and fiscal regulatory measures are a field where Judges should encroach upon very warily as Judges are not experts in these matters.

*61. In **R.K. Garg**, it has been observed and held that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc.*

³ 2000(5) SCC 471

⁴ 2021(8) SCC 511

It is further observed that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straitjacket formula and this is particularly true in case of legislation dealing with economic matters.

... ..

63. This Court in **Nandlal Jaiswal** has observed that the Government, as laid down in **Permian Basin Area Rate Cases**, is entitled to make pragmatic adjustments which may be called for by particular circumstances. The court cannot strike down a policy decision taken by the State Government merely because it feels that another policy decision would have been fairer or wiser or more scientific or logical. The court can interfere only if the policy decision is patently arbitrary, discriminatory or *mala fide*.”

(emphasis supplied)

In view of this settled legal position, we are of the opinion that it is not the function of this Court to sit in judgment over a matter of economic policy such as that contained in the Regulation 15A and the Circular dt.23.09.2020 though, this Court might feel that a different policy would have been fairer or wiser or more scientific or more logical when such policy is not patently arbitrary, discriminatory or *mala fide*.

The SEBI is an expert body constituted to deal with the securities market and is empowered to regulate activities of various entities including Investment Advisors while protecting the interest of investors.

From a reading of Circular dt.23.9.2020, it is clear that the parties i.e. the client and the Investment Advisors are given a choice to choose between either a *fixed fee* mode or *fee fixed on the basis of AUA*. In the later mode, the fee is chargeable on the basis of AUA per annum.

We do not find anything arbitrary or illogical in this arrangement which would prevent Investment Advisors from giving proper advice to clients or dis-incentivising them.

Therefore, we do not find any merit in the Writ Petition. It is accordingly dismissed. No costs.

(M.S. Ramachandra Rao)
Judge

20.05.2022
Vivek

(H.S. Madaan)
Judge

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| 1. Whether speaking/reasoned? | Yes |
| 2. Whether reportable? | Yes |