

SE-32: Training Programme for Securities and Exchange Board of India (SEBI) Officers, 29th to 31st January, 2024

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The National Judicial Academy (NJA) organised a 3 days Training Programme for Securities and Exchange Board of India (SEBI) Officers from 29th to 31st January, 2024 at the NJA, Bhopal. Around 50 Adjudicating Officers (AOs) and their team members from SEBI participated in the training programme. The programme focused on discussing skills in adjudication, appreciation of evidence including electronic evidence, disputes relating to securities and use of ICT in dispute resolution. The core subjects covered during the programme included Quasi-Judicial Adjudication by SEBI including applicability of Principles of Natural Justice in Enquiries and Adjudication; Collection and Appreciation of Evidence including Electronic Evidence; Power & Jurisdiction of Tribunals; Principles of Insolvency and Bankruptcy Code; Imposition of Penalties: Exercise of Discretion by Adjudicating Officers; E-Court Services: Scope & Usage; Obligation of Government Agencies under Data protection Laws; and Evolving Jurisprudence under RTI Act, 2005. A brief of the key deliberations during each session is reported below.

The session on ***Quasi-Judicial Adjudication by SEBI***, commenced by highlighting that Securities and Exchange Board of India (SEBI) officers serve as adjudicators, applying the law impartially and fairly in their quasi-judicial role under the SEBI Act and related laws. It was pointed out that their primary duty is to uphold the rule of law by applying legal principles to factual situations presented in various cases. This involves understanding their jurisdiction, the issues at hand, and the foundational principles of adjudication. It was emphasized that the SEBI Act was established to form the SEBI board, which aims to protect investors' interests, promote the development of the securities market, and regulate it. It was underscored that investment in securities is crucial for both the economy and individuals, necessitating robust investor protection and market growth. Key sections of the SEBI Act which were discussed include Sec. 4 that provides for the constitution of SEBI, including the chairman and members from the Ministry of Finance, RBI, and other full-time members; Section 11 which outlines SEBI's functions, such as regulating stock exchanges, registering and disciplining market intermediaries, and overseeing depositories and custodians; and Section 11A that empowers SEBI to inspect records and undertake investigations into suspected insider trading or fraudulent activities. It was pointed out SEBI officers represent the board in the functions under Section 11.

It was underscored that SEBI's authority includes inspecting books, summoning witnesses, issuing commissions, barring entities from accessing the securities markets, suspending office bearers, and impounding proceeds to ensure compliance and maintain market integrity. Through these powers, SEBI officers play a vital role in maintaining a fair and transparent securities market. As adjudicators they can levy penalties for various defaults as outlined in Sections 15A to 15HB of the SEBI Act, they can conduct inquiries and impose penalties while ensuring a fair hearing and adherence to the principles of natural justice. It was explained that natural justice, although not explicitly defined in the SEBI Act, requires fair and impartial decision-making, giving affected parties the opportunity to be heard. It was pointed out that this principle was reinforced by SEBI Procedure Rules and judicial rulings like *T. Takano v. SEBI*, 2022 SCC OnLine SC 210. An emphasis was also drawn on the regulatory functions of SEBI like suspending trading, managing stock exchange operations, and investigating transactions under Sections 11(4), 11A, 11B, 11C, and 11D. The session also threw light on quasi-judicial role of SEBI drawing a comparison with other regulatory bodies, such as pollution control board, which also exercise extensive powers to enforce compliance. It was underscored that across all regulatory bodies, fairness, reasonableness, and natural justice are crucial in the exercise of their powers.

In the session, the essentials of legal drafting for show cause notices and orders were discussed stating that a show cause notice must clearly specify the charges and potential actions. It was put forth that the person receiving the notice has access to the material evidence and the opportunity to defend themselves and that the notice should provide enough information for a response. It was mentioned that drafting of orders differ from notices and involve four main components viz. the allegation, the defense, the issues to be adjudicated, and the decision with reasons. Orders have to be clear, specifying the violation and the penalty imposed, and must be guided by principles like proportionality as outlined in Section 15J of the SEBI Act. It was also highlighted that an alternative mechanism for resolving enforcement proceedings, such as settlements, is also provided under Section 15JB that allow for time-saving resolutions when both parties agree on a settlement amount. The importance of clearly specifying charges in show cause notices was stressed, as vague charges could lead to orders being set aside. It was suggested that if a charge is not initially included but later deemed necessary, a supplementary notice should be issued to ensure a fair opportunity for defense.

The session emphasized the importance of including all relevant material in show cause notices and ensuring its availability to the noticee to uphold fairness and transparency. It was highlighted that introducing new material after the hearing, could invalidate an order, referencing past cases like *SEBI v. Shruti Vora*, 2022 SCC OnLine SC 1311 and *Price Waterhouse & Co. v. Securities and Exchange Board of India*, 2019 SCC OnLine SAT 165, where inconsistent material disclosure led to issues which were resolved by the Supreme Court in Takano case. Additionally, the session covered the need for consistency in penalty decisions, addressing all arguments in orders, and the proper handling of settlement regulations. The session also examined the recent Bombay High Court judgement involving Times Group questioning whether a hearing is required before revoking a settlement under Regulation 28, underscoring that while settlements are agreements, they are subject to judicial review and must comply with legal standards.

The session on ***Collection and Appreciation of Evidence*** focused on five key aspects: Cross-examination and inspection of documents in Quasi-Judicial Proceedings, duty to disclose material relevant to the proceedings (highlighted in *T Takano v. SEBI*, 2022 SCC OnLine SC 210), Standard of Proof as discussed in *Balram Garg v. SEBI* [(2022)9 SCC 425], the Contours of Section 65B of the Evidence Act in light of *Arjun Panditrao Khotkar v Kailash Gorantyal* [AIR 2020 SC 4908], and the new horizons, collection, preservation, and appreciation of electronic evidence.

It was emphasized that Cross-examination, under Section 137 of the Evidence Act, 1872, is essential for testing the credibility and consistency of witnesses in trials. A reference was made to the case of *Securities and Exchange Board of India v. Mega Corporation Limited* 2022 SCC OnLine SC 361, wherein it was held that while the right to cross-examination is not absolute, denying it when adverse material is considered violates natural justice principles. Inspection of documents in quasi-judicial proceedings, such as those before SEBI, ensures fairness, as demonstrated in *Smitaben Shah v. SEBI*, where it was ruled that limiting access to documents cited in the show cause notice is unjust.

It was highlighted that the duty to disclose all relevant materials, excluding privileged communications under Sections 121 to 131 of the Evidence Act, 1872, was underscored in *T Takano* case. The Supreme Court ruled that all relevant materials, not just those relied upon, must be disclosed to ensure transparency and a fair trial. It was pointed out that this ruling was further expanded in *Reliance Industries Limited v. SEBI* [2022 SCC OnLine SC 979]. SEBI's duty to maintain transparency and uphold the rule of law, marking a shift towards greater accountability was outlined.

The session also included discussion on the standard of proof, highlighting that though it is not explicitly mentioned in the Evidence Act, it pertains to the level of evidence required to substantiate a claim. In

this regards the case of *Balram Garg* was discussed wherein the Supreme Court ruled that direct evidence of communication of Unpublished Price Sensitive Information (UPSI) is necessary, rejecting circumstantial evidence as insufficient. It was opined that the decision factually, lower standard of proof sufficed in insider trading cases and raises the bar, requiring direct evidence, thus complicating SEBI's enforcement role.

It was stressed that Section 65B of the Evidence Act governs the admissibility of electronic records. The case of *Arjun Panditrao Khotkar* was discussed at length to emphasize on the necessity of Section 65B(4) certificate for electronic evidence unless the original device is produced in court.

Lastly, the session discussed the importance of assessing and complying with Section 65B for court proceedings, emphasizing the need for appropriate IT personnel to issue Section 65B(4) certificates. A mention was also made to new evidence Act i.e. The Bharatiya Sakshya Adhiniyam, 2023, which will further expand the definition of "document" to include electronic records, admits electronic evidence stored in "computer output," and allows courts or police to direct the production of electronic.

On the theme ***Obligation of Government Agencies under Data Protection***, discussion began by highlighting fundamental rights enshrined in the Constitution, particularly the right to personal liberty and the right to privacy, as affirmed in the landmark case *K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1. It was highlighted that central to understanding these rights are key definitions such as 'Data Fiduciary', referring to any entity determining the purpose and means of personal data processing, and 'Data Principal', the individual to whom the data pertains. The concept of 'Significant Data Fiduciary' was also explained, designated by the Central Government.

The session delved into Chapter II of the data protection framework, outlining stringent obligations for Data Fiduciaries, including lawful grounds for data processing, specified purposes for which consent is obtained, and stringent security measures. Notably, participants were briefed on the comprehensive duties of Data Fiduciaries, ranging from providing clear notices to data principals to ensuring secure data handling and promptly reporting breaches. The session also focussed on the rights of Data Principals, akin to those under the GDPR, emphasizing their entitlement to transparent information regarding data processing activities. The judicial and administrative framework governing these issues was explored during the session, stressing procedural fairness in inquiries and the importance of clear and reasoned judicial orders. The discussion included a reference to various case law such as *Indian Commodity Exchange Ltd. v. Neptune Overseas Ltd.* [Civil Appeal No. 9037 of 2019 and Civil Appeal No. 629 of 2020] and *State Bank of India v. Ajay Kumar Sood* [2022 SCC OnLine SC 1067].

It was outlined that India's primary data protection framework comprises the Information Technology Act, 2000 (IT Act) and the Digital Personal Data Protection (DPDP) Act, 2023. It was highlighted that the IT Act was established to recognize electronic transactions and ensure data security. Key provisions include Section 43, which mandates compensation for damages caused by unauthorized computer access, and Section 43A, which requires body corporates to implement reasonable security practices to protect sensitive personal data. Section 72 imposes penalties for unauthorized disclosure of information, while Section 79 provides liability exemptions for intermediaries adhering to due diligence obligations. It was mentioned that the Privacy Rules, 2011, under the IT Act, further outline the obligations of body corporates in handling personal and sensitive data, including publishing privacy policies, obtaining consent, and ensuring data security.

It was emphasized that the DPDP Act, 2023, introduced a comprehensive legal framework following extensive consultations post Puttaswamy judgments and the Srikrishna Committee Report. The Act, influenced by the European GDPR, defines personal data broadly and outlines the roles of Data

Principals and Data Fiduciaries. It emphasizes principles such as consent, notice, and cross-border data transfers, and includes provisions for significant penalties. The Act notably extends to government agencies, unless exempted, and imposes specific obligations on data handling and protection.

The session also focussed on SEBI's intersection with Data Protection Laws wherein it was mentioned that it is primarily through the regulatory frameworks for cybersecurity within the entities it oversees. It was pointed out that while SEBI's regulations do not directly address data protection, they encompass measures critical for safeguarding data. SEBI mandates market infrastructure institutions, such as stock exchanges and depositories, to appoint Chief Information Security Officers, identify and secure critical assets, encrypt data, and conduct regular vulnerability assessments. Similar requirements are prescribed for other financial entities like stock brokers, mutual funds, and KYC registration agencies. It was opined that these frameworks ensure that entities under SEBI's purview adhere to stringent cybersecurity measures, thereby aligning with broader data protection objectives.

Lastly it was mentioned that SEBI has proactively incorporated cybersecurity measures within its regulatory ambit to protect sensitive data. Additionally, periodic reporting on cybersecurity incidents and preventive measures is mandated. These regulations ensure that entities regulated by SEBI maintain high standards of data protection and resilience against cyber threats, indirectly contributing to the broader data protection landscape in India.

Fourth session on ***Powers of Tribunals vis-à-vis SAT Procedures*** highlighted the difference between original and appellate jurisdictions of tribunals and provided an overview of SAT's jurisdiction under the Securities and Exchange Board of India (SEBI) Act. The session began with an emphasis on Section 15T of the SEBI Act, which outlines that any person aggrieved by an order of SEBI, an adjudicating officer, the Insurance Regulatory and Development Authority (IRDA), or the Pension Fund Regulatory and Development Authority (PFRDA), may appeal to the SAT. The SAT exclusively exercises appellate jurisdiction, meaning it can only review decisions made by SEBI or other adjudicating authorities but cannot exercise original jurisdiction.

The session highlighted the distinction between SAT and other tribunals like the National Green Tribunal (NGT), which can exercise *suo motu* jurisdiction and address issues reported in the media. SAT, however, cannot initiate cases on its own and can only adjudicate based on appeals against decisions made by SEBI or other specified authorities. The session discussed the Supreme Court judgement where the SAT overstepped by granting an exemption that SEBI had not initially adjudicated. The Supreme Court clarified that SAT's powers, although co-terminus with SEBI, require a prior adjudication by SEBI before SAT can exercise its appellate jurisdiction. Further discussion revolved around the scope of the term "any person aggrieved" in Section 15T, extending the right to appeal beyond directly involved parties to include shareholders in certain situations, such as when unfair valuations in open offers occur.

The session also touched upon the extent of SAT's powers when modifying penalties. It was highlighted in this regard that while SAT can confirm, modify, or set aside orders, it cannot enhance penalties without SEBI's initial adjudication. This principle was reinforced by citing cases like *SEBI v. Saikala Associates Ltd.* [(2009) 7 SCC 432] and *Sunil Krishna Khaitan v. SEBI* [(2022) 10 Scale 200], where the Supreme Court restricted SAT from imposing penalties without SEBI's preliminary decision. It was emphasized that once a show cause notice is issued, a SEBI officer may choose to impose a remedial direction or substitute it with a penalty under the amended Section 11B. The amended law allows SEBI this flexibility, but the general principle remains that SEBI must first make a decision before the appellate tribunal can review it. The session highlighted that SAT does not permit appeals by SEBI, but only by aggrieved parties, unlike the income tax laws which allow departmental appeals. Enhancing

penalties upon appeal is generally avoided due to the principle that an appellant should not be worse off after appealing. SAT typically sends cases back to SEBI if it believes a penalty was too lenient, rather than enhancing the penalty itself.

The Supreme Court case *State of Kerala v. M/s. Vijaya Stores* [AIR 1979 SC 355] was referred, establishing that in tax law, if the department does not appeal, it is deemed to accept the order, preventing enhancement. This principle was applied to SEBI's operations, where SEBI cannot appeal its own orders and must accept the adjudicating officer's decisions unless a specific statutory provision allows otherwise. It was discussed that Section 15-I(3) of the SEBI Act allows SEBI to enhance penalties if the original order is deemed detrimental to the securities market, but this power is limited to penalties and does not extend to other directions. It was further noted that Section 15-I(3) of the SEBI Act focuses solely on enhancing penalties, not reducing them. This limitation arises from the punitive nature of the provision, which must be read strictly.

The discussion also reflected upon the debate about whether SEBI's power under Section 11B includes modifying its own orders. It was pointed out that since the power of review is explicitly not given to SEBI under Section 11B, it cannot be impliedly read into the provision. The session included a deliberation on the case *Rajiv Bhanot & Ors v. SEBI* [(2021) SCC Online SAT 2815], where SEBI's delayed action was challenged. SAT intervened, indicating that an open offer was not appropriate after significant time had elapsed. It was mentioned that the case underscores the importance of timely action and the potential for tribunals to interfere if SEBI's orders are not reasoned adequately.

A mention was made to the dispute on whether SEBI's authority to impose penalties, as outlined in Section 15A and 15-I(2) of the Act, is absolute or allows for discretion. In this regards it was highlighted that while Section 15A mandates penalties for non-compliance with disclosure requirements, Section 15-I(2) provides that an adjudicating officer "may" impose penalties, suggesting discretion. It was opined that various judgments, including those from the Supreme Court and High Courts, suggest that while minimum penalties exist, discretion regarding whether to impose a penalty is inherent. Lastly, the discussion also touched on related cases and judicial interpretations, indicating that SEBI's discretion to impose penalties must align with the statutory objectives of investor protection and market development, and should be exercised judiciously.

The fifth session on **Principles of Insolvency & Bankruptcy Code** commenced providing the participants with an overview of the Insolvency and Bankruptcy Code, 2016. The position of the minority shareholders under the IBC was dwelt upon discussing the constitution and composition of the committee of creditors in the corporate insolvency resolution process. Discussion was undertaken on Sections 30 and 31 of the IBC which provides for the submission and approval of resolution plans. Further, the discussions also dwelt upon Section 53 of the IBC with regard to the distribution of proceeds of sale of liquidation assets. Reference was made to *Jaypee Kensington Boulevard Apartments Welfare Association v. NBCC* (Civil Appeal No. 3395 of 2020) on the issue of the right of minority shareholders to raise objection against the resolution plan. IN this case the Supreme Court held that only the Committee of Creditors is entrusted with the task of dealing with and approving the resolution plan, and shareholders have no participation. Further, the shareholders would stand last in order of priority under section 53, in the event of liquidation. Reference was also made to the decision of the NCLAT in *Keshav Agrawal v. Abhijit Guhathakurta* (Company Appeal (AT) (Ins.) No. 610 of 2021).

The discussions further dwelt upon the conflict between the IBC and the SEBI Act, and the provision of Section 238 IBC was examined at length. It was noted that the recovery of proceeds under Section 28A SEBI Act is subject to Section 238 IBC. Reference was made to the judgment of the Supreme Court in *Pr. Commissioner of Income Tax v. Monnet Ispat and Energy Ltd.* (SLP 6483/2018; Order dated 10 August 2018). Reference was also made to the following judgments - *Anju Agarwal v. Bombay*

Stock Exchange (Company Appeal (AT)(Insolvency) No. 734 of 2018; NCLAT Order dated 23 April 2019; and *DHFL v. SEBI* (SAT, Mumbai; Appeal No. 206 of 2020, Order dated 9 October 2020).

The amendments in the SEBI Regulations on account of the IBC were discussed including the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, SEBI (Delisting of Equity Shares) Regulations, 2009, and the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015

The sixth session on **Imposition of Penalties: Exercise of Discretion by Adjudicating Officers** commenced advising the participants to test their action on the rule of law to ensure fair exercise of powers and discretion. It was stated that the adjudicating officer exercises quasi-judicial function and hence, must be aware of his/her authority and powers and the necessity of fair and judicious exercise of the said powers and authority. The expectations from the adjudicating authority to ensure fair hearing and fair decision-making were highlighted. The participants were urged to ensure equality of arms and parity between the parties in hearing. Further, the need to guard against bias was underscored. Emphasis was placed on independence, fairness, neutrality, integrity in exercise of discretion by adjudicating officers. The challenges in ensuring consistency in imposition of penalties and the factors to be considered in determination of penalty were dwelt upon. The importance of reasoning in the order was underscored.

The seventh session on **E- Court Services Scope & Usage** commenced with a discussion underscoring the utility of technology in streamlining judicial processes. It was stated that technology can serve as a source of information and management for the judicial system and can inform regarding the administration of justice and the functioning of the courts, thereby enabling informed decision-making regarding the court processes. Technology by tackling administrative and management aspects of court functioning enables the courts to channelize human resource for core purposes and responsibilities. Further it leads to efficiency in court functioning in terms of hours of operation and optimizes court locations. Discussions were undertaken on introduction of e-filing and its benefits, the digitization of court processes and the initiatives of SEBI in this regard. Maintenance of digital records was focused upon and reference was made to *Arjun Panditrao Khotkar v. Kailash Kishanrao Gorantyal*. The session also involved a discussion on process reengineering of the judicial system as a measure to ensure transparency, standardization and efficiency. An overview of the E-Courts project was provided with specific focus on its objectives, phases, and achievements. The measures introduced under the e-Courts Mission Mode Project for the technological transformation of the Indian judiciary were discussed including National Judicial Data Grid, ICJS, e-filing, e-payment, NSTEP, JustIS etc.

The eighth session on **Evolving Jurisprudence under RTI Act, 2005** commenced emphasizing on the role of informed citizenry and public scrutiny in curbing corruption, accountability and ensuring effective governance and the role of the RTI Act in achieving the same. Reference was made to the judgment in *SP Gupta v. Union of India*, AIR 1992 SC 149. The scope of the term 'information' was dwelt upon along with Sections 8, 9 and 11 of the RTI Act. The obligations of SEBI as a public authority under Section 4 was discussed. Severability of information in cases where information requested pertains to private or personal information was also dwelt upon. Reference was made to *RBI v. Jayantilal N. Mistry*, (2016) 3 SCC 525 with regard to the issue of disclosure of information detrimental to economic interests of country. It was stated that information impacting commercial confidence and public interest could harm the national economy. However lower level economic and financial

information life contracts and departmental budgets should not be withheld. Reference was also made to *Supreme Court of India v. Subhash Chandra Agarwal*, (2020) 5 SCC 481 with regard to of balancing public interest vis-à-vis disclosure of confidential information. Emphasis was placed on transparency and accountability in public function which is the objective of the RTI Act. The role of SEBI as the guardian of the interests of the common public and the commercial interests of the nation while ensuring disclosure of information was underscored. The culture of opacity in public administration was noted and the reasons for the same were examined.