N THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10782 OF 2024

N.S.J.L Nidhi Ltd Throu. Its
Rohit K Bhamburdekar and Ors ...Petitioners

Versus

The Regional Director (Wr)
Ministry Of Corporate Affair
And Anr. ...Respondents

Mr. Pradyumna Agrawal *a/w Ankit Rathod, Anshu Agrawal, Ishan Agrawal, Bhushan Shinde, for the Petitioners.*

Ms. Savita Ganoo *a/w Mr. D. P. Singh, for the Respondent No.1.*

CORAM: SOMASEKHAR SUNDARESAN, J.
DATE: APRIL 27, 2026

ORAL JUDGEMENT :

1. Rule. Rule made returnable forthwith by consent of the parties, and taken up for final hearing and disposal.

Context and Factual Background:

2. This Petition impugns an order dated October 11, 2023, by which a Learned Adjudicating Officer, exercising jurisdiction under the Companies

Act, 2013 (***"Companies Act"***), has sought to impose a penalty aggregating to Rs. 64 lakhs against the Petitioners for alleged failure to certify annexures to sixteen returns of allotment of securities uploaded by Petitioner No. 1, N.S.J.L Nidhi Ltd. ("***Company***"), between February 10, 2019 and January 26, 2021.

3. The two points for determination that lie at the heart of this Petition are whether the penalty is at all attracted in the facts of the case, and if so, whether the quantum of penalty imposed is compliant with the Companies Act and is a product of appropriate and reasonable exercise of jurisdiction.

Alleged Default and Relevant Provisions:

4. The Learned Adjudicating Officer was essentially adjudicating monetary penalty under Section 39(5) of the Act. The relevant portions of Section 39 are extracted below:

> ***"39. Allotment of securities by company.***—
>
> *(1) to (3)* *****
>
> *(4)* ***Whenever a company having a share capital makes any allotment of securities, it shall file with the Registrar a return of allotment in such manner as may be prescribed****.*
>
> *(5)* ***In case of any default under*** *sub-section (3) or* ***sub-section (4)****, the* ***company*** *and* ***its officer who is in default*** ***shall be liable to a penalty, for each default, of one thousand rupees for each day*** *during which such default continues* ***or one lakh rupees****,* ***whichever is less****."*

[Emphasis Supplied]

5. The upshot of the aforesaid provisions is that whenever a company allots securities, Section 39(4) of the Companies Act requires it to upload a return of allotment in the manner prescribed. In the event of default under Section 39(4), the *company* and its "*officer who is in default*" are liable to a penalty for each default. The quantum of penalty is stipulated on a per-day basis capped at Rs. 1 lakh.

6. Rule 12 of the Companies (Prospectus and Allotment of Securities) Rules, 2014 (***"Allotment Rules"***) is relevant for consideration of penalty under Section 39(5) in this case, are extracted below:

> ***"12. Return of Allotment.-***
>
> *(1)* ***Whenever a company*** *having a share capital* ***makes any allotment of its securities****, the* ***company shall, within thirty days thereafter, file*** *with the Registrar* ***a return of allotment in Form PAS-3****, along with the fee as specified in the Companies (Registration Offices and Fees) Rules, 2014.*
>
> *(2)* ***There shall be attached to the Form PAS-3 a list of allottees stating their names, address, occupation, if any, and number of securities allotted to each of the allottees*** *and* ***the list shall be certified by the signatory of the Form PAS-3 as being complete and correct*** *as per the records of the company.*
>
> *(3) to (7)* ****
>
> ***[Emphasis Supplied]***

7. Rule 12(1) fixes a deadline for filing of the return of allotment and the stipulated form in this regard – Form PAS-3. Rule 12(2) would indicate that along with the stipulated Form PAS-3, a list of allottees with their names, addresses, occupations and the number of securities allotted to each of the allottees is required to be annexed to the return of allotment. Specifically, such attached list is required to be certified by the signatory of the Form PAS-3, as being complete and correct as per the company's records. Evidently, this stipulation is reiterative in nature. The very same person who signs the Form PAS-3 has to certify the completeness and correctness of the list of allottees annexed to the return of allotment.

Liability to Penalty and Quantum:

8. Therefore, for compliance with Section 39(4) of the Companies Act, a return of allotment is to be filed *in the manner* prescribed. The prescription of the manner is in Rule 12 of the Allotment Rules. Rule 12(2) of the Allotment Rules contains the reiterative stipulation of certification of the list of allottees by the very same person who has signed the Form PAS-3. Failure in compliance with this requirement would attract the liability to monetary penalty stipulated in Section 39(5) of the Companies Act.

9. The meaning of the expression "*shall be* liable *to a penalty*" preceding the per-day rate, or Rs. 1 lakh, "*whichever is* less" is vital for purposes of this

Petition. This expression in Section 39(5) is the basis on which the Respondents canvass that the liability is absolute, with no judicial discretion being permitted for adjudication of penalty, regardless of the facts and circumstances surrounding a default.

Contentions of Parties:

10. Mr. Pradyumna Agrawal, Learned Advocate on behalf of the Petitioners would contend that the Petitioners are not liable to a penalty at all, on an accurate interpretation of the facts and the relevant provisions. The core basis of such contention is that the Form PAS-3, which is the prescribed form for the return of allotment has an affirmation clause for signature, that confirms that all the annexures are accurate and the list of allottees is complete and correct as per the company's records. The affirmation clause in Form PAS-3 confirms that the person signing it vouches for the accuracy of all its contents including all attachments to it. The verification clause in it contains the following:

> *"**I am authorized** by the Board of Directors of the Company vide resolution number [_] dated [_] **to sign this form and declare that all the requirements of Companies Act, 2013 and the rules** made thereunder in respect of the subject matter of this form and matters incidental thereto **have been complied with**. **Whatever is stated in this form and in the attachments thereto is true, correct and complete and no information material to the subject matter of this form has been suppressed or concealed and is as per the original records maintained by the promoters**

subscribing to the Memorandum of Association and Articles of Association.

It is further declared and verified that:

1. ***All the required attachments*** *have been* ***completely, correctly and legibly attached to this form.***

2. ***The list of allottees is correct and complete as per records of the company.***

3. *****

[Emphasis Supplied]

11. There is no separate stipulation on how to certify the list of allottees to be attached. The Company did not separately certify the list of allottees attached to the returns of allotment filed by the Company only because it was finding it difficult to upload the scanned versions of signed annexures to the Registry's server, which became large in file size. Therefore, the files in the form of a soft copy of the list were uploaded without a separate certification.

12. Therefore, Mr. Agrawal would submit, inherent in the contents of the affirmative signature content in Form PAS-3 is the confirmation and assurance by the person signing it about the completeness and correctness of the contents, *including all attachments*. Indeed, in particular, there is a clear affirmation that the list of allottees is correct and complete as per the records of the company. This is, in substance, an explicit certification of the contents of the attachments, and therefore, Mr. Agrawal would contend, no penalty at all ought to have been imposed. There is no separate prescription on how the attachments should be certified, and therefore, no penalty was at all attracted.

Yet, not only has the *maximum* penalty possible been imposed, but also such penalty has been multiplied by the number of directors of the Company.

13. In sharp contrast, Ms. Savita Ganoo, Learned Advocate for the Respondents would contend that Rule 12 of the Allotment Rules clearly requires the signatory to the return of allotment to also certify the list of allottees with all the particulars to be contained therein as being correct and complete. The certification requirement, Ms. Ganoo would submit, is specific and in addition to the signature on the return of allotment. Therefore, if the upload of the return of allotment has not been made in the manner prescribed in the Allotment Rules, the default is liable to be visited with a penalty.

14. Ms Ganoo would also submit that each of the Petitioners, namely, the Company and every director of the Company, is liable to a monetary penalty under Section 39(5). Further, she would contend that the penalty imposed on the Company and its directors is the *minimum* penalty because there is no discretion with the Adjudicating Officer to impose anything less than Rs. 1,000/- per day because of the expression "*shall be liable to a penalty*" in Section 39(5) of the Companies Act. The expression "*whichever is less*", she would indicate, points to the provision being a minimum penalty clause. The period of continuing default in the instant case is way above 100 days in each case, and therefore at the rate of Rs. 1,000/- per day, the penalty would

multiply to way beyond Rs. 1 lakh, and only the minimum penalty of Rs. 1 lakh for each default has been imposed.

15. Ms. Ganoo would then contend that the penalty has to necessarily be imposed not only on the Company but also on each of its three directors because the Company has not designated any "officer in default". She would rely on Section 2(60) of the Companies Act, which reads thus:

> *(60) "**officer who is in default**", for the purpose of **any provision in this Act which enacts that an officer of the company who is in default shall be liable to any penalty** or punishment by way of imprisonment, fine or otherwise, **means any of the following officers of a company**, namely:—*
>
> *(i) whole-time director;*
>
> *(ii) key managerial personnel;*
>
> *(iii) **where there is no key managerial personnel**, **such director or directors as specified by the Board** in this behalf **and who has or have given his or their consent in writing to the Board** to such specification, **or all the directors, if no director is so specified**;*
>
> *(iv) any person who, under the immediate authority of the Board or any key managerial personnel, is charged with any responsibility including maintenance, filing or distribution of accounts or records, authorises, actively participates in, knowingly permits, or knowingly fails to take active steps to prevent, any default;*
>
> *(v) any person in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act, other than a person who gives advice to the Board in a professional capacity;*

(vi) ***every director****, in respect of a contravention of any of the provisions of this Act,* ***who is aware of such contravention by virtue of the receipt by him of any proceedings of the Board or participation in such proceedings without objecting to the same****,* ***or where such contravention had taken place with his consent or connivance****;*

(vii) in respect of the issue or transfer of any shares of a company, the share transfer agents, registrars and merchant bankers to the issue or transfer;

[Emphasis Supplied]

16. In reliance on sub-clause (iii) above, Ms. Ganoo would contend that every director is liable to be treated as an officer who is in default for purposes of Section 39(5) of the Companies Act. As a result, each and every member of the Board of Directors is liable to a penalty, and therefore, the cumulative sum of the penalty, however large it may be canvassed to be, is but the statutory minimum penalty, Ms. Ganoo would submit. Being in strict compliance with the statutory provisions, Ms. Ganoo would contend, no case for interference by this Court in exercise of the writ jurisdiction is made out.

Analysis and Findings:

17. Having heard the parties and considered the issues presented by them, I must mention at the threshold that another identically drafted penal provision, namely Section 15-A of the Securities and Exchange Board of India Act, 1992 ("***SEBI Act***"), has undergone three rounds of interpretation by the

Supreme Court, culminating in a ruling by a larger three-judge bench endorsing the latter view that led to the reference to the larger bench. Section 2(95) of the Companies Act specifically provides that words and expressions not defined in the Companies Act would have the same meaning as they have in, among others, the SEBI Act, which makes the SEBI Act, a cognate legislation. Therefore, interpretation by the Supreme Court, of a provision in the SEBI Act containing the very same expressions and the very same design and architecture, would squarely apply to the interpretation of Section 39(5) of the Companies Act.

18. Under Section 39(5) of the Companies Act, the company and the officer in default shall be liable to monetary penalty in the sum of Rs. 1,000/- per day of continuing default, or Rs. 1 lakh, whichever is less. In other words, for a penalty at the rate of Rs. 1,000/- per day where the default continues for more than 100 days, the penalty cannot exceed Rs. 1 lakh. The question being raised is whether the Adjudicating Officer has any discretion at all in the adjudication of penalty or whether he should simply only establish that a default took place and proceed to mathematically compute the penalty.

Section 15-A of SEBI Act:

19. To set the context, the provisions of Section 15-A of the SEBI Act, as they stood between 2002 and 2014, and fell for interpretation by two benches followed by a larger bench of the Supreme Court, read as follows:

> *"**15A. Penalty for failure to furnish information, return, etc**. If any person, who is required under this Act or any rules or regulations made thereunder,*
> *(a) **to furnish any document, return or report to the Board**, fails to furnish the same, **he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less**;5*
> *(b) **to file any return or furnish any information, books or other documents within the time specified** therefor in the regulations, fails to file return or furnish the same within the time specified therefor in the regulations, **he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less**;*
> *(c) **to maintain books of account or records**, fails to maintain the same, he **shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less.**"*
>
> ***[Emphasis Supplied]***

20. Even a plain reading of the foregoing would show that the provision was identical in its wording in relation to liability of penalty, as compared with Section 39(5) of the Companies Act. The core elements of both the penal provisions i.e. Section 39(5) of the Companies Act and Section 15-A of the SEBI Act, are (i) the expression "*shall be liable to a penalty*"; (ii) a per-day

penalty amount; (iii) followed by a fixed sum as an outer limit; and (iv) the usage of the expression "*whichever is less*" to connote the outer limit.

21. Before proceeding to analyse the Supreme Court's rulings on Section 15-A of the SEBI Act, which would squarely apply to the interpretation of Section 39(5) of the Companies Act, it would also be necessary to examine the provisions entailing the manner of exercise of discretion by the Adjudicating Officer. Ms. Ganoo would contend that for imposing a penalty under Section 39(5) of the Companies Act, the Adjudicating Officer has no discretion whatsoever and he must compute and impose a penalty of Rs. 1,000/- per day. If the default exceeds 100 days, he must impose the minimum penalty of Rs. 1 lakh, which is canvassed as a minimum penalty.

22. Whether imposition of a penalty of Rs. 1,000 per day is a mandatory statutory minimum or whether the Adjudicating Officer has the power (coupled with the duty) to exercise discretion to impose penalty of less than Rs. 1,000 per day, is the question to answer. In my opinion, the reading of Section 39(5) of the Companies Act, a penal provision, as a stipulation that does not permit the Adjudicating Officer to exercise adjudicatory discretion to examine the nature, the gravity, and the impact of the default is an unreasonable reading of the provision, which would render it unconstitutional. The very same provision can be read in a constitutionally

valid manner and that entails the power of the Adjudicating Officer, which is indeed a power coupled with a duty to exercise such discretion in discharge of an adjudicatory function.

23. I am unable to agree with the proposition canvassed by the Respondents in this Petition – of having no discretion at all and the adjudicatory process being a mechanical computational exercise, on the premise that Section 39(5) stipulates a statutory minimum penalty. This is contrary to the declaration of the law by the Supreme Court in ***Bhavesh Pabari***[1] (the three-judge larger bench referred to above), endorsing the ruling in ***Chaturvedi***[2] (the two-judge bench that made the reference to the larger bench), and which had disagreed with the ruling in ***Roofit***[3] (the first two-judge bench that took the view now being canvassed by the Respondents in this Petition).

24. Before analysing the Supreme Court judgements, I must touch upon the legislative policy stipulation on how an Adjudicating Officer must adjudicate the penalty. The Companies (Adjudication of Penalties) Rules, 2014 (***"Penalty Rules"***) contain the framework in this regard, evidently aimed at ensuring that penalties are logical, reasonable, proportionate and constitutionally valid by ensuring that the penalty is commensurate with the gravity of the default for which the penalty is to be imposed. Indeed, the

[1] *SEBI v. Bhavesh Pabari* - ***(2019) 5 SCC 90***
[2] *Siddharth Chaturvedi v. SEBI* - ***(2016) 12 SCC 119***
[3] *SEBI v. Roofit Industries Ltd.* - ***(2016) 12 SCC 125***

Impugned Order invokes Rules 3(12) and 3(13) of the Penalty Rules, which read thus :

> *"**3. Adjudication of Penalties. –***
>
> *(12) **While adjudging quantum of penalty**, the **adjudicating officer shall have due regard to the following** factors, namely:-*
>
> *(a) size **of the company**;*
>
> *(b) **nature of business carried on** by the company;*
>
> *(c) **injury to public interest**;*
>
> *(d) **nature of the default**;*
>
> *(e) **repetition of the default**;*
>
> *(f) **the amount of disproportionate gain** or **unfair advantage**, wherever quantifiable, made **as a result of the default**; and*
>
> *(g) **the amount of loss caused** to an investor or group of investors or creditors **as a result of the default**:*
>
> *Provided that, **in no case, the penalty imposed shall be less than the minimum penalty prescribed, if any, under the relevant section** of the Act.*
>
> *(13) **In case a fixed sum of penalty is provided for default of a provision**, the **adjudicating officer shall impose that fixed sum**, in case of any default therein."*
>
> ***[Emphasis Supplied]***

25. A plain reading of Rule 3(12) would show that while imposing a penalty, the Adjudicating Officer is required to have due regard to various factors such as the size of the company, the nature of its business, the injury to public interest occasioned by the default, the nature of the default, the repetitive nature of default, and indeed whether any disproportionate gain or unfair advantage, wherever quantifiable, has been made as a result of the default.

The amount of loss caused to an investor or a group of investors or creditors as a result of such default is also a factor to be borne in mind.

26. What is evident is that the subordinate legislation has taken care to ensure that a penalty should not be mindlessly imposed without regard to proportionality principles in the context of the violation in question. Yet, admittedly, the Impugned Order contains no analysis whatsoever of how the factors set out in Rule 3(12) of the Penalty Rules have been applied, although this sub-Rule is invoked by the Adjudicating Officer. The absence of analysis of Rule 3(12) of the Penalty Rules, although invoked, is indeed defended in these proceedings on the premise that the Adjudicating Officer had no discretion in the matter because the proviso to Rule 3(12) bars discretion where the penal provision is one imposing minimum penalty, and that Section 39(5) stipulates a statutory minimum penalty.

Supreme Court Rulings:

27. This brings me to how the identically-worded provisions of Section 15-A of the SEBI Act have been interpreted by the Supreme Court. It must be stated that the Supreme Court analysed the interplay of Section 15-A of the SEBI Act with Section 15-J of the SEBI Act, which contains three of the factors listed in Rule 3(12) of the Penalty Rules, also with the identical objective of providing

guidance on exercise of discretion when adjudicating the imposition of penalty.

28. Initially, in ***Roofit***[4], the Supreme Court took the view now being canvassed by the Respondents. Notably, the Securities and Exchange Board of India ("***SEBI***") had canvassed the view that the Adjudicating Officer had discretion to measure and fashion the penalty by applying the factors set out in Section 15-J of the SEBI Act, but the Supreme Court ruled that when a default renders a person liable to a penalty under Section 15-A of the SEBI Act, the penalty would follow as a matter of course in a fixed sum. That bench relied on a subsequent amendment made in 2014 to Section 15-A, which specifically provided that a minimum penalty of Rs. 1 lakh would apply and the per-day penalty shall not exceed Rs. 1 lakh. The bench held that the penal provision became a minimum penalty provision with that amendment and before the amendment, it was a fixed penalty provision.

29. This view was doubted and questioned by another two-judge bench in ***Chaturvedi***[5], which, in close succession, found the interpretation in ***Roofit***[6] to lead to the vice of arbitrariness infecting the penalty provision. The bench referred the question to a larger bench. The final declaration of the law was rendered by the larger three-judge bench, which dealt with the issue, in

[4] *(2016) 12 SCC 125*
[5] *(2016) 12 SCC 119*
[6] *(2016) 12 SCC 125*

Bhavesh Pabari[7], to hold that discretion under Section 15-J would not be taken away by the language contained in Section 15-A of the SEBI Act. It was held that identically-worded Section 15-A of the SEBI Act could not be a fixed penalty provision and indeed, was also not a minimum penalty provision, with no discretion for imposing a lower penalty.

30. For clarity, the relevant extracts from each of ***Roofit***[8], ***Chaturvedi***[9] and ***Bhavesh Pabari***[10] are extracted below to set out the march of the law.

31. In ***Roofit***[11], the Supreme Court returned the following view:

> *"**6. In the connected appeals before us, the appellant has imposed a penalty of Rs 75 lakhs despite the failure having continued for substantially more than 75 days**. The learned **Senior Counsel for the appellant has contended that the appellant has discretion to impose a penalty below the number of days of default regardless of the words "whichever is less"**. He has argued that there would be **no purpose to Section 15-J if the adjudicating officer's discretion to fix the quantum of penalty did not exist, and that such an interpretation would render certain Sections of the SEBI Act as expropriatory legislation due to the crippling penalties they would impose. We do not agree with these submissions**. The clear intention of the amendment is to impose harsher penalties for certain offences, and we find no reason to water them down. **The wording of the statute clarifies that the penalty to be imposed in case the offence continued for over one hundred days is restricted to Rs***

[7] *(2019) 5 SCC 90*
[8] *(2016) 12 SCC 125*
9 (2016) 12 SCC 119
[10] *(2019) 5 SCC 90*
[11] *(2016) 12 SCC 125*

1 crore. No scope has been given for discretion. ***Prior to the amendment, the section provided for a penalty "not exceeding one lakh fifty thousand rupees for each such failure", thus giving the appellant the discretion to decide the appropriate amount of penalty. In this context, the change to language which does not repose any discretion is even more significant, as it indicates a legislative intent to recall and remove the previously provided discretion***. *Additionally,* ***Section 15-J existed prior to the amendment and was relevant at that time for adjudging quantum of penalty. Once this discretionary power of the adjudicating officer was withdrawn, the scope of Section 15-J was drastically reduced, and it became relevant only to the sections where the adjudicating officer retained his prior discretion, such as in Section 15-F(a) and Section 15-HB***. *This ought to have been reflected in the language of Section 15-I, but was clearly overlooked. Section 15-J has become relevant once again, subsequent to the Securities Laws (Amendment) Act, 2014, which changed* ***Section 15-A(a), with effect from 8-9-2014, to read as follows***:

> *"**15-A. Penalty for failure to furnish information, return, etc**.—If any person, who is required under this Act or any rules or regulations made thereunder—*
>
> *(a) to furnish any document, return or report to the Board, fails to furnish the same,* ***he shall be liable to a penalty****, which shall* ***not be less than one lakh rupees*** *but which* ***may extend to one lakh rupees for each day*** *during which such failure continues subject to a maximum of one crore rupees;"*

The ***purpose of amendment was clearly to reintroduce the discretion of the adjudicating officer which was taken away by the SEBI (Amendment) Act, 2002. Had the failure of the respondent taken place between 29-10-2002 and 8-9-2014, the penalty ought to have been Rs 1 crore, without the possibility of any discretion for reduction***."

[Emphasis Supplied]

32. The bench that declared the law in ***Chaturvedi***[12] took the view that such a reading would render the penalty provision arbitrary, inasmuch as it would be a penalty provision that makes no distinction on the basis of the nature of the default or the injury inflicted or benefit gained by the default, the cause of the default etc. ***Chaturvedi***[13] returned a finding that the factors listed in Section 15-J were illustrative, to hold that the language in Section 15-A of the SEBI Act does not lead to a mandatory fixed penalty or statutory minimum penalty, and that the factors for adjudicating penalty were indeed relevant. The Supreme Court expressed its views in the following words:

> *"**10.** **Prima facie, we find it a little difficult to subscribe to both the views contained in para 4 as well as in para 5 of the said judgment**. The expression "shall have due regard to" is a very known legislative device used from the time of Julius v. Bishop of Oxford [Julius v. Bishop of Oxford, (1880) LR 5 AC 214 (HL)] , and followed in many judgments both English as well as of our Courts as words vesting a discretion in an adjudicating officer. **The question which arises in the present appeals is whether the expression "namely" fixes the discretion which can be exercised only in the circumstances mentioned in the three clauses set out in Section 15-J, or whether it would also take into account other relevant circumstances, having particular regard to the fact that it is a penalty provision that the Court is construing.** As **this needs to be authoritatively decided for the future, it would be better if we refer it to a larger Bench for such authoritative pronouncement**.*

12 (2016) 12 SCC 119
13 (2016) 12 SCC 119

11. *We also find it a little difficult to accept what is stated in para 5 of the judgment. It is very difficult,* ***keeping in view, particularly, two important legal facets — one the doctrine of harmonious construction of a statute; and two, the fact that we are construing a penalty provision of a statute which is to be strictly construed, Section 15-A, post-amendment in 2002, is suddenly given a pride of place, and Section 15-J is made to yield entirely to it****. The familiar expression "notwithstanding anything contained" does not appear in the amended Section 15-A****. This being the case,* ***it is a little difficult to appreciate as to how one can construe Section 15-A, as amended, in isolation, without regard to Section 15-J. In fact, the facts of the present case would go to show that where there is allegedly only a technical default, and the three parameters of Section 15-J would allegedly be satisfied by the appellants, namely, that no disproportionate or unfair advantage has been made as a result of the default; no loss has been caused to an investor or group of investors as a result of the default; and there is in fact, no repetitive nature of default, no penalty at all ought to be imposed****. What has been done by the appellants here is to fail to adhere to Regulation 13, as alleged in the show-cause notice, which failure has occurred on three days and consequently, has allegedly not been repeated by the appellants anytime thereafter.* ***If we were to read Section 15-A, as amended in 2002, in the manner suggested by the Division Bench [SEBI v. Roofit Industries Ltd., (2016) 12 SCC 125 : (2015) 12 Scale 642] of this Court, it may lead to anomalous results in that the effect of continuing failure to adhere to statutory regulations alleged to have been continued well beyond the period of three days, and which continues till this day, has Rs 1 lakh per day as the minimum mandatory penalty under the provisions, which would culminate in the appellants herein having to pay Rs 1 crore in each of the three appeals****. We do not think that this could have been the intention of Parliament in enacting Section 15-A, as amended in 2002. We also feel that on the assumption that para 5 of the judgment is correct,* ***it would be very difficult for Section 15-A to be construed as a reasonable provision, as it would then arbitrarily and disproportionately invade the appellants' fundamental rights.***

> ***12.*** *This being the case, on both the conclusions reached by this Court in paras 4 and 5, as stated by us hereinabove,* ***these matters deserve consideration at the hands of a larger Bench****. The Registry is, accordingly, directed to place the papers of these appeals before the Hon'ble the Chief Justice of India for placing these matters before a larger Bench."*
>
> ***[Emphasis Supplied]***

33. Dealing with the reference, a three-judge Bench of the Supreme Court framed the following questions in ***Bhavesh Pabari***[14]:

> *"**1.1.** **Whether the conditions stipulated in clauses (a), (b) and (c) of Section 15-J** of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "the SEBI Act") **are exhaustive to govern the discretion in the adjudicating officer to decide on the quantum of penalty or the said conditions are merely illustrative?***
>
> ***1.2**. **Whether the power and discretion vested by Section 15-J of the SEBI Act to decide on the quantum of penalty**, regardless of the manner in which the first question is answered, **stands eclipsed by the penalty provisions contained in Section 15-A** to Section 15-HA of the SEBI Act?*
>
> ***[Emphasis Supplied]***

34. The Supreme Court, in ***Bhavesh Pabari***[15], went on to declare the law in the following terms:

> ***5.*** ***Insofar as the second question is concerned, if the penalty provisions are to***

[14] *(2019) 5 SCC 90*
[15] *(2019) 5 SCC 90*

be understood as not admitting of any exception or discretion and the penalty as prescribed in Section 15-A to Section 15-HA of the SEBI Act is to be mandatorily imposed in case of default/failure, Section 15-J of the SEBI Act would stand obliterated and eclipsed*. Hence, the question referred. Sections 15-A(a) to 15-HA have to be read along with Section 15-J in a manner to avoid any inconsistency or repugnancy.* ***We must avoid conflict and head-on-clash and construe the said provisions harmoniously. Provision of one section cannot be used to nullify and obtrude another unless it is impossible to reconcile the two provisions****. The Explanation to Section 15-J of the SEBI Act added by Act 7 of 2017, quoted above, has clarified and vested in the adjudicating officer a discretion under Section 15-J on the quantum of penalty to be imposed while adjudicating defaults under Sections 15-A to 15-HA.* ***Explanation to Section 15-J was introduced/added in 2017 for the removal of doubts created as a result of pronouncement in Roofit Industries Ltd. case [SEBI v. Roofit Industries Ltd., (2016) 12 SCC 125]*** *.* ***We are in agreement with the reasoning given in reference order dated 14-3-2016 [Siddharth Chaturvedi v. SEBI, (2016) 12 SCC 119] that Roofit Industries Ltd. [SEBI v. Roofit Industries Ltd., (2016) 12 SCC 125] had erroneously and wrongly held that Section 15-J would not be applicable after Section 15-A(a) was amended with effect from 29-10-2002 till 7-9-2014*** *when Section 15-A(a) of the SEBI Act was again amended. It is beyond any doubt that the second referred question stands fully answered by clarification through the medium of enacting the Explanation to Section 15-J vide Act 7 of 2017, which also states that the adjudicating officer shall always be deemed to have exercised and applied the provision.* ***We, therefore, deem it appropriate to hold that the provisions of Section 15-J were never eclipsed and had continued to apply in terms thereof to the defaults under Section 15-A(a) of the SEBI Act.***

6. Reference order in Siddharth Chaturvedi on the said aspect has observed that Section 15-A(a) could apply even to technical defaults of small amounts and, therefore, prescription of minimum mandatory penalty of Rs 1 lakh per day subject to maximum of Rs 1 crore, would make the section completely disproportionate and

arbitrary so as to invade and violate fundamental rights. *Insertion of the Explanation would reflect that the legislative intent,* ***in spite of the use of the expression "whichever is less" in Section 15-A(a) as it existed during the period 29-10-2002 till 7-9-2014, was not to curtail the discretion of the adjudicating officer by prescribing a minimum mandatory penalty of not less than Rs 1 lakh per day till compliance was made, notwithstanding the fact that the default was technical, no loss was caused to the investor(s) and no disproportionate gain or unfair advantage was made***. *The legislative intent is also clear as* ***Section 15-A(a) was amended by Amendment Act 27 of 2014 to state that the penalty could extend to Rs 1 lakh for each day during which the failure continues subject to a maximum penalty of Rs 1 crore. This amendment in 2014 was not retrospective and therefore, clarificatory and for removal of doubt*** *Explanation to Section 15-J was added by Act 7 of 2017.* ***Normally the expression "whichever is less" would connote absence of discretion by prescribing the minimum mandatory penalty, but in the context of Section 15-A(a) as it was between 29-10-2002 till 7-9-2014, read along with Explanation to Section 15-J added by Act 7 of 2017, we would hold that the legislative intent was not to prescribe minimum mandatory penalty of Rs 1 lakh per day during which the default and failure had continued. We would prefer to read and interpret Section 15-A(a) as it was between 25-10-2002 and 7-9-2014 in line with Amendment Act 27 of 2014 as giving discretion to the adjudicating officer to impose minimum penalty of Rs 1 lakh subject to maximum penalty of Rs 1 crore, keeping in view the period of default as well as aggravating and mitigating circumstances including those specified in Section 15-J of the SEBI Act.***

7. *This will require us to consider the first question referred. Having dealt with the submissions advanced by the rival parties, (both parties have actually canvassed for a wider and more expansive interpretation of Section 15-J),* ***we are inclined to take the view that the provisions of clauses (a), (b) and (c) of Section 15-J are illustrative in nature and have to be taken into account whenever such circumstances exist. But this is not to say that there can be no other circumstance(s)***

beyond those enumerated in clauses (a), (b) and (c) of Section 15-J that the adjudicating officer is precluded in law from considering while deciding on the quantum of penalty to be imposed.

10. ***Therefore, to understand the conditions stipulated in clauses (a), (b) and (c) of Section 15-J to be exhaustive and admitting of no exception or vesting any discretion in the adjudicating officer would be virtually to admit/concede that in adjudications involving penalties under Sections 15-A, 15-B and 15-C, Section 15-J will have no application. Such a result could not have been intended by the legislature. We, therefore, hold and take the view that conditions stipulated in clauses (a), (b) and (c) of Section 15-J are not exhaustive and in the given facts of a case, there can be circumstances beyond those enumerated by clauses (a), (b) and (c) of Section 15-J which can be taken note of by the adjudicating officer while determining the quantum of penalty.***

11. ***At this stage, we must also deal with and reject the argument raised by some of the private appellants that the conditions stipulated in clauses (a) to (c) of Section 15-J are mandatory conditions which must be read into Sections 15-A to 15-HA in the sense that unless the conditions specified in clauses (a) to (c) are satisfied, penalty cannot be imposed by the adjudicating officer under the substantive provisions of Sections 15-A to 15-HA of the SEBI Act****. The argument is too far-fetched to be accepted.* ***Section 15-J of the SEBI Act enumerates by way of illustration(s) the factors which the adjudicating officer should take into consideration for determining the quantum of penalty imposable. The imposition of penalty depends upon satisfaction of the substantive provisions as contained in Section 15-A to Section 15-HA of the SEBI Act.****"*

[Emphasis Supplied]

35. In a nutshell, dealing with the identically-designed and worded Section 15-A of the SEBI Act, the Supreme Court held that aggravating and mitigating factors should be considered by the Adjudicating Officer in imposing penalty, since the penal provision was neither a fixed penalty provision nor a minimum penalty provision. The view expressed in ***Chaturvedi***[16], that penalty could never have been envisaged in a fixed quantum regardless of the nature of facts and circumstances that led to the default, was endorsed. ***Bhavesh Pabari***[17], agreed with the view in ***Chaturvedi***[18] that to hold otherwise would make the provision arbitrary and unconstitutional.

36. I must also mention that Section 15-A of the SEBI Act also has subject matter commonality with Section 39(5) of the Companies Act - they both deal with filing of returns and failure to comply with the requirement of filing returns. The interpretation of an identically-worded penalty provision in the SEBI Act, a cognate legislation, and that too, covering the same subject matter (the filing of returns) would squarely apply to the interpretation of Section 39(5) of the Companies Act.

37. I have already extracted above, each of Section 15-A of the SEBI Act and Section 39(5) of the Companies Act. They are identical in design and usage of

[16] *(2016) 12 SCC 119*
[17] *(2019) 5 SCC 90*
[18] *(2016) 12 SCC 119*

expressions, which too has already been explained above. ***Bhavesh Pabari***[19] clearly declares the law that such formulation does not constitute a minimum penalty or a fixed penalty, without discretion (as had been held in ***Roofit***[20]). Rule 3(12), which corresponds to Section 15-J of the SEBI Act, in fact lists more illustrations of aggravating and mitigating factors to be borne in mind by the Adjudicating Officer. In view of the ruling extracted above, namely, that such a formulation does not constitute a minimum penalty provision, the proviso to Rule 3(12) of the Penalty Rules, which excludes the application of Rule 3(12) to minimum penalty stipulations, has no application to Section 39(5) of the Companies Act.

38. The factors stipulated in Rule 3(12) of the Penalty Rules too would necessarily be illustrative and they are in fact, more expansive than Section 15-J of the SEBI Act. However, the Impugned Order invokes Rule 3(12) but shows no application of mind to the factors to be applied for determining the quantum. The Impugned Order invokes both Rule 3(12), the proviso to which refers to minimum penalty provisions of the Companies Act; and Rule 3(13) which refers to fixed penalty provisions, when imposing penalty under Section 39(5). Suffice it to say, Section 39(5) cannot be both at one – a provision with a fixed penalty and a provision with a minimum penalty. It is not necessary to examine which provision of the Companies Act is in fact a fixed penalty

[19] *(2019) 5 SCC 90*
[20] *(2016) 12 SCC 125*

provision for Rule 3(13) to have meaning, and answer whether any such provision would at all be constitutionally valid – that is not the subject matter of controversy in this Petition.

39. What is clear is that the usage of the expression "*whichever is less*" does not make Section 39(5) of the Act a provision imposing a minimum penalty. For the very same reasons, that provision would also not qualify as a provision imposing a fixed penalty regardless of aggravating or mitigating circumstances. Either way it would be arbitrary. On the other hand, Section 39(5) of the Companies Act would be constitutionally valid when read with the proportionality elements stipulated in Rule 3(12) of the Penalty Rules. I have no hesitation in applying the very same principle to hold that Rule 3(13) of the Penalty Rules has no relevance to this case and that in any case, subordinate legislation cannot displace a constitutionally-valid interpretation of a statutory provision made by Parliament and make it arbitrary. If that were so, the subordinate legislation would be in conflict with the parent statute and would yield. In the same breath, subordinate legislation may indicate how the parent statute can in fact be saved from an arbitrary and constitutionally-invalid interpretation by its operation of the provision in the parent statute.

40. Therefore, in my opinion, Section 39(5) of the Companies Act imposed neither a minimum penalty nor a fixed penalty. It is identical to Section 15-A

of the SEBI Act, the interpretation of which would apply squarely to Section 39(5) of the Companies Act.

Affirmation Signature in Form PAS-3:

41. This leaves me with Mr. Agrawal's contention that considering the need for the Adjudicating Officer to exercise judicial discretion, he ought to have imposed no penalty at all in view of the affirmation clause in the return of allotment in Form PAS-3. I am afraid I am not able to accept this contention, not in the least because this is not a court of appeal but a writ court that must see if the decision to impose penalty was so gross and out of scope of jurisdiction that it warrants being set aside.

42. As explained earlier, Rule 12(2) of the Allotment Rules stipulates a dual iteration. The list of allottees to be attached to the return of allotment under that provision is also required to contain the names, addresses, occupation of the allottees, and the number of securities allotted to each allottee. The register of holders of securities is a critical and vital instrument in a company's operations. Its retention in the records is meant to be for a long-term. The return of allotment informs the Registry about the accurate position of who holds how many securities, their identity, and when they were allotted. The signature on the covering form and assertion does constitute substantial compliance, but the provisions of Rule 12(2) of the Allotment Rules cannot be

wished away and effaced by holding that the reiterative and dual certification does not mean anything.

43. This list is required to be certified by the same signatory of the Form PAS-3. The affirmation clause in Form PAS-3 simply states that the list of allottees is complete and correct as per the company's records. If I were to accept Mr. Agrawal's contention, I would necessarily have to hold that the proforma affirmation clause would efface the explicit stipulation in subordinate legislation i.e. Rule 12(2) of the Allotment Rules. Subordinate legislation that is tabled on the floor of Parliament for the specified period, after which it becomes part of the law cannot be wished away by an interpretation of the format of the return. The need for data integrity of a vital element of a company's operations, can indeed be backed by the reiterative element of Rule 12(2) – requiring the signatory of Form PAS-3 to also certify the list attached to the return.

44. The certification of the list and then the certification of the return of allotment is a requirement of dual iteration. This has not been done and therefore there is a default. Indeed, the affirmation clause does render the breach, in the facts of this case, where no aggravating circumstances are brought to bear, to be a technical breach. It may dilute the gravity of the breach necessitating a tempered measure of penalty but it cannot efface the

breach altogether as suggested. A related question is whether the Adjudicating Officer's discretion would extend to imposing no penalty at all, but in the facts of this case, I need not pronounce upon that question in a vacuum.

45. The Adjudicating Officer ought to have considered the absence of any aggravating factors listed in Rule 3(12) of the Penalty Rules and the mitigating factor of the return of allotment having certified the attachment as being correct and complete, which he did not. Therefore, in exercise of the extraordinary writ jurisdiction, I am not inclined to entirely quash and set aside the penalty, even while it is necessary to interfere with the Impugned Order for being directly contrary to declared law as discussed above, and also for the absurdity of treating Section 39(5) as a provision imposing both, a minimum penalty and a fixed penalty, with no analysis of any of the factors that the Adjudicating Officer must necessarily apply his mind to. Therefore, in my view, while the Impugned Order does call for interference in exercise of the extraordinary writ jurisdiction of this Court, particularly because a technical default without significant impact has led to a colossal penalty multiplied manifold being imposed, it would not be possible to hold that no penalty at all was justified.

46. The scale of the penalty has shot up because the Adjudicating Officer has not only imposed the maximum penalty under Section 39(5) of the

Companies Act (which is variously defended as a minimum penalty and a fixed penalty), but has also multiplied the maximum penalty by the number of directors the Company had. If the Company had ten directors, this approach would have led to a multiplication of the maximum penalty by ten; if the Company had only two directors, it would have led to a multiplication by two; and so on. This too has rendered the Impugned Order vulnerable to the charge of being arbitrary and unconstitutional in the quantification of penalty imposed.

47. I must also mention that the scheme of the Companies Act entails an element of remediation in the scope of the Adjudicating Officer's jurisdiction. Under Section 454(3), an Adjudicating Officer may not only impose penalty but also direct remedial measures to correct the default. Under Section 454A, double the penalty is stipulated for a repeat violation that is indulged in after imposition of a penalty. Therefore, it is apparent that the legislative objective of the Companies Act in the matter of penalty includes an element of remediation, and penalty is not meant to be imposed merely because the power to impose it exists. This, further underlines the importance of Rule 3(12) of the Penalty Rules. A disproportionate penalty on the wrong premise that the penalty provision entails a minimum penalty, and in the same breath also a fixed penalty; and then multiplying the penalty by the sheer number of directors who happen to occupy the Board of the Company, is wholly arbitrary.

48. Indeed, Section 2(60), which defines "officer who is in default" has sub-clause (iii) that leads to all directors being officers in default if no officer in default has been designated, but equally sub-clause (vi) of Section 2(60) deals with the terms on which "every director" would become an officer in default. Such director has to be aware of the contravention by virtue of his participation in the proceedings of the Board of Directors and he participated without objection or where he has connived or consented to the contravention. There is not a whisper of any such analysis in the Impugned Order. The definition contained in Section 2(60)(iii) of the Companies Act has been taken to be a license to hold every director of the Company liable to the same full penalty that is stipulated in Section 39(5) of the Companies Act, making the approach perverse. For a grave violation with serious consequences, it would be open to impose liability severally too, also applying the principles in Section 2(60)(vi) of the Companies Act, but that is not the situation at hand in this case.

49. Even adopting Section 2(60)(iii), and applying it to Section 39(5), there is nothing in the provision to indicate that the liability has to necessarily be several and has to be multiplied by the number of directors on the Board of Directors. This too leads to the absurdity of the same default leading to a multiple of the penalty amount being imposed, with no nexus to the gravity or mitigation in the circumstances surrounding the default. The liability to

penalty under Section 39(5) of the Companies Act can indeed also be imposed by making the Company and its directors jointly and severally liable. Instead of that approach, the liability of penalty imposed has gone up five times for each alleged default, despite such default not having been shown to be grave and despite the mitigation already discussed above.

50. Therefore, in exercise of the extraordinary jurisdiction of this Court, while the decision to impose a penalty is not being interfered with, the intervention with the Impugned Order, in my view, must take the form of making it reasonable. The Impugned Order is hereby modified by imposing a penalty of Rs. 1 lakh for each violation jointly and severally on the Petitioners i.e. the Company and its directors. Therefore, the penalty shall be re-computed as Rs. 1 lakh for each instance of return of allotment containing the list of allottees with the prescribed particulars not being separately certified. Such penalty shall be payable jointly and severally by all the Petitioners.

51. Such modification would make the penalty for the evident non-serious (in the facts of this case) default, reasonable and constitutionally valid, removing the vice of arbitrariness and non-application of mind to the stipulated factors for assessment of penalty under Rule 3(12) of the Penalty Rules. Such penalty shall be paid by the Petitioners within a period of three weeks from the upload of this judgement on the website of this Court.

Summary of Conclusions:

52. Therefore, to summarise:

A] The Impugned Order deserves interference for being in conflict with the scheme of the Companies Act by treating Section 39(5) as a provision imposing a minimum penalty (and in the same breath also as a provision imposing a fixed penalty) regardless of circumstances, ignoring the factors stipulated in Rule 3(12) of the Penalty Rules;

B] In view of the law declared by the larger bench of the Supreme Court in interpreting an identical penal provision and that too in a cognate legislation (Section 15-A of the SEBI Act) in ***Bhavesh Pabari***[21], endorsing the view expressed in ***Chaturvedi***[22], and rejecting the view expressed in ***Roofit***[23], the interpretation of Section 39(5) of the Companies Act would be on par. The Impugned Order not having applied itself to the factors for exercise of jurisdiction in adjudicating the penalty amount, calls for interference;

C] The Impugned Order cannot be faulted for a finding that Section 39(5) was attracted and that some penalty was to be imposed, but it

[21] *(2019) 5 SCC 90*
[22] *(2016) 12 SCC 119*
[23] *(2016) 12 SCC 125*

certainly calls for interference for arbitrary quantification that is also in conflict with the principles of law declared by the Supreme Court;

D] The penalty is hereby modified to a joint and several liability of Rs. 1 lakh for each return of allotment uploaded without the dual certification of the attached list of allottees by the signatory of the return of allotment.

53. With no other intervention, the Petition is ***finally disposed of*** in the aforesaid terms. No costs. Rule is made absolute in the aforesaid terms.

54. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]