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Determining the Standard of Proof for Fraud under Indian Securities Law

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Abstract

Fraud is considered as one of the serious charges in the securities industry. If proved, the consequences involve a complete shutdown in the business and distrust among the various market participants involved, which is not only adversarial for them but for the whole market. In addition, a little media attention is enough to embarrass the entity against whom the fraud has been alleged. Therefore, it is not reasonable to impose such serious allegations on the basis of ordinary standard of proof used in other civil cases. In this light, this article examines the current standard of proof for securities law fraud in India and analyzes it to bring it in line with the current established practices.

Keywords: Fraud, securities industries, securities law, standard of proof, business

INTRODUCTION

Fraud is considered as one of the most serious, stigmatizing, and penal forms of liability imposed in modern corporations & financial markets [1]. The utterance of a fraud corrodes the image of several participants in the financial markets, consequently disturbing the confidence of investors in the market & penalizing all businesses [2]. Securities market is a fragment of financial markets where buying and selling of securities takes place [3]. Similar to any other financial market, securities market is also vulnerable to frauds, scams & other illicit activities [4].

The key legislation dealing in securities fraud in India is the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 ("**PFUTP Regulations**") read with the Securities and Exchange Board of India Act, 1992 ("**SEBI Act**"). The objective of the PFUTP Regulations is to act as a deterrent against fraudulent & manipulative behavior & practices in the securities market & to provide exemplary punishment for violations [5]. This is patently, in line with the SEBIs twin objectives of investor protection and market development [6]. However, while settling this balance between its dual objectives, the standard of proof & nature of evidence required to determine fraud are some crucial facets.

Not only in India but throughout the world, the charge of fraud, in whatever form it may be, is seen as one of the gravest in nature. Therefore, since a long time, the standard of proof required to prove such charge has always been set high by the courts worldwide. In the specific context of securities law fraud in India, there appears to have been a shift by the courts from relying on *clear & convincing* evidences to rely completely upon *preponderance of probabilities* as a standard of proof.

This article highlights the nature of civil securities fraud, & the current standard of proof required to prove the same. In light of the same, it

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analyzes whether the current standard of proof is appropriate, taking into consideration various factors like the gravity of the offence & the existing jurisprudence available in this regard.

NATURE OF PROCEEDINGS BEFORE SEBI & SECURITIES FRAUD

The SEBI Act and the Regulations, are made to regulate the Securities Market & the related aspects and the imposition of penalty under the same cannot be tested on the ground of "no mens rea, no penalty" [7]. The penalty imposable under the SEBI Act & the Regulations made thereunder is deterrent in nature so as to ensure that the parties or person concerned complies with the Regulations strictly [8]. Such penalty is civil in nature & so cannot be said to be penal in character [9]. Defaults or failures under the Act or Regulations are nothing but failure or default of statutory civil obligations provided under the Act and the regulations made thereunder [10]. Thus, the adjudication for imposing penalty by Adjudicating Officer, after due inquiry, is neither a criminal nor a quasi criminal proceeding [11]. Similarly for fraud under the PFUTP Regulations, intent to deceive is not required [12]. In other words, mens rea or criminal intent is not an essential ingredient to establish such fraud [13]. Therefore, it can be concluded that the proceedings for fraud arising out of the SEBI Act & PFUTP Regulations are civil in nature [14].

It is to be noted that concept of fraud in securities laws is inclusive & therefore, wider than the concept of *common law fraud*, which is too restrictive to deal with the complexities of the securities markets [15]. While the restrictions may not applicable vis-a-vis the SEBI since it is not the one defrauded, several of the broader concepts relating to common law fraud are equally applicable to securities laws are definitely applicable, in view of section 32 of the SEBI Act, [16] 1992 & also because the definition of fraud adopted in PFUTP Regulations reflects in large measure the definition of fraud in section 17 of the Indian Contract Act, 1872, which assimilates the *common law doctrine of fraud* [17].

In the adjudicative process, it is the necessary to prove alleged facts on which the adjudicatory authority could ponder upon to come to a decision. Adjudicatory process, in a crisp, is a challenge between parties in demonstrating their own version of facts. It is mainly upon the ability of a party to prove his/her versions true that the favorable decision lies. Therefore, the rules and principles governing the process by which facts are to be proved in an adjudicative process are very significant so to ensure the objectives of the adjudicative process [18]. Here arises the question of standard of proof which is discussed below in detail.

Standard of Proof

The term *standard of proof* refers to the extent or degree to which the burden of proof must be discharged. It is the degree of cogency of the evidence supplied by a party, so as to discharge the burden of proof borne upon it [19]. In other words, it is the measure of the degree of certainty or probability, which the evidence must generate in the mind of the fact-finding authority (the judge) [20]. Generally, the common law recognizes two standards of proof – *beyond reasonable doubt* & *preponderance of probabilities*.

Proof '*beyond reasonable doubt*', which usually governs criminal trials, requires a higher degree of conviction as the same involves the question upon the liberty of the person involved, which may not be taken away on a mere preponderance of probabilities [21]. However, the test of *beyond reasonable doubt* does not mean a proof beyond the shadow of a doubt [22]. The law will fall short to shield the community if it admits whimsical possibilities to avert the course of justice [23]. If the evidence is strong enough against someone as to leave only a mere possibility in his favor & which can henceforth be dismissed with the sentence "of course, it is possible but not in the least probable"; the case is said to have been proved beyond reasonable doubt [24]."

In civil cases, the standard of proof which is generally used is the *preponderance of probabilities* also known as *preponderance of evidence* or *balance of probabilities* [25]. This is a lower standard of proof than the criminal standard. In notional numerical terms, *balance of probabilities* means that the probability of a fact being true is atleast 50.1% whereas while applying the test of *beyond reasonable doubt*, a threshold of 90-95% may be assumed [26].

Upon a literal interpretation, the term "preponderance", means nothing more than an outweighing in the process of balancing, however slight may be the tilt of the balance [27]. As Lord Denning put it:
"If the evidence is such that the tribunal can say 'we think it is more probable than not, the burden is discharged'. But if the probabilities are equal it is not [28]*."*

Further, on the application of preponderance as a standard of proof, the Supreme Court in the case of *Dr. N.G. Dastane v Mrs. S Dastane* [29] held that:
"The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies."

Therefore, it can be inferred from the above that the tipping of scales in favor of the party on whom the burden of proof exists, is sufficient to discharge his burden [30]. This is also known as the *sliding scale principle*. This principle uses a metaphor for a balance scale, where evidence in favor of plaintiff is placed in one pan & evidence in favor of defendant is placed in the other [31]. In serious civil cases like the civil fraud, the pan should tip exceedingly in plaintiff's favor to constitute proof, effectively requiring it to slide towards where the pan should lie in criminal cases [32].

Standard of Proof for Civil Fraud in UK

Lord Denning in the case of *Bater v. Bater*, [33] recognized the test of *sliding scale* as a legal principle in 1950 [34]. He observed that although the law recognizes higher standard of proof in criminal cases than in civil cases, but in reality, there is no actual standard of proof in either cases & within each standard, there are many more degrees/layers of standards. This means that serious cases like fraud require a higher degree of probability as compared to other cases, though not touching the criminal standard [35]. The following was laid down in the case:
"It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case. In civil cases, the case may be proved by a preponderance of probability, but there may be ***degrees of probability within that standard****. The degree depends on the subject matter. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear.* ***A civil court, when considering a charge of fraud, will naturally require a higher degree of probability*** *than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion."*

In *Hornal v. Neuberger Products Ltd*., [36] it was once again reiterated that standard of proof is directly proportional to seriousness of the allegations imposed. In this regard it was held that:
"In a civil action where fraud or other matter which is or may be a crime is alleged against a party or against persons not parties to the action, the standard of proof to be applied is that applicable in civil actions generally, namely, proof on the balance of probability, and not the higher standard of proof beyond all reasonable doubt required in criminal matters; but there is no absolute standard of proof, and no great gulf between proof in criminal and civil matters; for in all cases the degree of probability must be commensurate with the occasion and proportionate to the subject-matter. The elements of gravity of an issue are part of the range of circumstances which have to be weighed when deciding as to the balance of probabilities."

After citing Lord Morris in *Hornal*, it was clearly expressed by Ungoed-Thomas J expressed in *In re Bellow's Will Trusts* [37]:
"The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it."

The above judgments clearly propose a flexible or *sliding scale* approach where the standard of proof itself will shift in relation to the gravity of the allegations or possible consequences [38]. Fraud, for instance, requires a higher degree of proof than negligence.

This test of sliding scale/floating standard of proof was rejected in the case of H. (Minors) (Sexual Abuse: Standard of Proof) In re [39]. It was held that mandating stronger evidence in serious civil cases does not affects the standard of balance of probabilities. To build this foundation, the test of *inherent probability* was emphasized. Lord Nichollas in the case observed that:
"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury….Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

In the same vein, it was observed by Lord Hoffmann in the case of *In re B (Children)* [40] that:
"There is only one rule of law, namely that the occurrence of the fact in question must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities."

Consistently with Lord Hoffmann, Baroness Hale in the same case held that:
"Neither the seriousness of the allegation nor the consequences affect the standard of proof, therefore inherent probability should be considered, where relevant, in deciding where the truth lies."

Thus, following are the combined inferences which could be drawn from the cases of *In re H* & *In re B*:

1. There is only one standard of proof in civil cases i.e., *preponderance of probabilities* which is applicable irrespective of the seriousness of the allegations.
2. The more serious the allegation is, the more improbable the event becomes &, hence, the stronger must be the evidence required to prove it (i.e., the test of *inherent probabilities*).
3. The standard of preponderance of probabilities is a flexible standard. This means the more serious the allegation (like fraud); the higher has to be the probabilities.

Lord Hoffmann's opinion in *In Re B* has been reiterated by the Supreme Court in *Re S-B (Children) (Care Proceedings: Standard of Proof)* [41]. Despite this, subsequent cases have continued to adopt the earlier stance.

In *Red Bull GmbH v. Sun Mark Ltd*. [42], raised an issue of an issue of bad faith. The judge held that "*an allegation of bad faith was serious, and thus notwithstanding the standard of proof being the civil standard, "cogent evidence" was still required due to the seriousness of the allegation."*

In *Food Co. UK LLP v. Henry Boot Developments Ltd*. [43] ("*Food Co. UK*"), Lewison J, in respect of a case involving fraud, stated that:

"Although the standard of proof is the same in every civil case, but where fraud is alleged, cogent evidence is needed to prove it, because the evidence must overcome the inherent improbability"

The above position was subsequently applied by Vivien Rose J in *Ludsin Overseas Ltd. v. Eco3 Capital Ltd.* [44] ("*Ludsin Overseas*"), wherein it was held that:

"The standard of proof in a claim for deceit is the civil standard, but since allegations of fraud are levelled at the defendants, convincing evidence is needed."

In *Fiona Trust v Privalov*, [45] the court held that claimants who allege fraud & dishonesty need to provide more clearer & cogent evidence unlike to what they have to do for most other torts. The underlying reasoning for this was that, fraud & dishonesty are serious in nature & in the court's view, majority of the people are not serious wrongdoers. In other words, it is assumed that most people are not fraudsters.

The Court of Appeal recently in *Bank St Petersburg PJSC v Vitaly Arkhangelsky* [46] made it clear that cogent evidence is the starting point when it comes to establishing civil fraud.

Therefore, it can inferred from the above cases that while establishing the serious allegations like fraud in civil cases, 'clear'/'cogent'/'convincing' evidences are required. Though the courts in UK have not clearly expressed that such types of evidences denote a higher standard of proof, courts in America have been successful in establishing that the need for such evidences denote a higher standard of proof i.e., the intermediate standard (which is something between the test of 'balance of probabilities' & 'beyond reasonable doubt').

Standard of Proof for Civil Fraud in USA

Like any other jurisdiction, the standard of proof in America is reflected on the degree of confidence American society thinks the fact-finder should have in the correctness of the factual conclusions for a particular type of adjudication [47]. The more serious the allegation, the less likely should be the possibility of any erroneous judgment (this is the reason why the highest proof i.e., *beyond reasonable doubt*, is required in criminal cases) [48]. Moreover, the grounds for differentiating between actions involving civil suits and criminal or regulatory offences, and their respective standards of proof, reflects the sensitivity of the society regarding the alleged moral guilt of the conduct of the accused [49]. The issued toughens if this well-defined model gets disrupted when civil actions engage allegations with some level of moral blameworthiness [50]. For instance, allegations or a finding of civil fraud are similar to criminal offences in regards that there may be a resulting loss of reputation and significant social stigma from any judicial sanction—despite the absence of a criminal record [51].

Therefore, in cases of civil fraud, America has adopted an intermediate standard of proof i.e., a standard which is between *preponderance of probabilities* & *beyond reasonable doubt* [52]. Chief Justice Burger of the United States Supreme Court in the landmark judgment of *Addington v. Texas* [53], described the third/intermediate standard as follows:

The intermediate standard, which usually employs some combination of the words 'clear', 'cogent', 'unequivocal' and 'convincing', is less commonly used but nonetheless 'is no stranger to the civil law' […] One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof.

In the case of *Hardware Mutual Ins v Jacob Hieb Inc.*, [54] court of appeals agreed that to sustain a charge of fraud, the evidence should be clear and convincing. In *Lockwood v. Christakos*, it was again held that fraud must be shown by "*clear and convincing evidence*". The same was also reiterated by the US Supreme Court in the case of *Schneiderman v. United States* [55]. In *Liquid Air Corp. v. Rogers*, [56] it was held that "*the clear and convincing evidence standard is an intermediate standard of proof, requiring more than proof by a preponderance of the evidence but less than proof beyond a reasonable doubt. It is used in civil cases in which more is at stake than mere loss of money*."

In *Collins Securities Corp. v. Securities Exchange Commission,* [57] petitioners violated various antifraud provisions of the federal securities laws. The case was remanded to SEC for a reconsideration of the evidence under a higher standard of proof. It was found that the standard of proof required in civil fraud is that of "clear and convincing evidence". It was noted that concerning the extreme serious consequences to the petitioners of the sanctions imposed by the SEC, it was erroneous on the part of commission to employ a low standard (i.e., preponderance of probabilities).

Relying on the judgment in *Collins*, it was held in the case of *Whitney v. S.E.C* [58], involving violations of the anti-fraud provisions of the Securities Exchange Act, that the standard of proof in such cases is that of "*clear & convincing evidence*".

As the standard for proof required for proving fraud is established to be the intermediate standard of proof, the next question which arises is how much of evidence is required when such standard is applied to the cases? Clear & convincing evidence is often defined as "*that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established* [59]." The standard is typically set to 70 per cent or above probability, [60] higher than the civil standard of balance of probabilities, mathematically quantified at 50 per cent+1 in a typical civil case [61]. The US Supreme Court in *Addington* accepted the difficulty of quantifying exactly how much evidence is required in serious civil cases when the intermediate standard is applied; however, it saw the third standard as also having an important communicative function [62]. It reminded fact-finders that, owing to the seriousness of what is alleged or what is at stake, the need for careful deliberation becomes necessary. This means the risks of error in decision-making, in serious cases, are not to be distributed more or less equally between the parties, which is the function performed by the normal balance of probabilities.

Therefore, in the light of the above, it can be easily inferred that the courts, both in UK as well as US, have always demanded a high degree of proof than mere preponderance of probabilities for cases related to fraud.

Standard of Proof for Civil Securities Fraud in India

In 2016, the Supreme Court of India in the landmark case of *SEBI v. Kishore R.Ajmera,* [63] which dealt with degree of proof required to hold brokers/sub-brokers liable for fraudulent/ manipulative practices under the PFUTP Regulations, held that if concerned about the adjudication of civil liability arising out of violation of the SEBI Act or the Regulations framed thereunder, the correct standard of proof in such cases is preponderance of probabilities. While upholding the use of preponderance of probabilities as the standard of proof, the Supreme Court focused on lack of direct evidence in such cases & held that:

"proof of an allegation leveled against a person may be in the form of direct substantive evidence or, as in many cases, such proof may have to be inferred by a logical process of reasoning from the totality of the attending facts and circumstances surrounding the allegations/charges made and leveled. While direct evidence is a more certain basis to come to a conclusion, yet, in the absence thereof the Courts cannot be helpless. It is the judicial duty to take note of the immediate and proximate facts & circumstances surrounding the events on which the charges/allegations are founded & to reach what would appear to the Court to be a reasonable conclusion therefrom. The test would always be that what inferential process that a reasonable/prudent man would adopt to arrive at a conclusion"

This judgment has been heavily relied in the subsequent cases dealing with fraud, manipulative practices & insider trading in the Indian securities market [64]. Howbeit, the jurisprudence which has been set by the Securities Appellate Tribunal (SAT) over the last many years & even subsequent to *Kishore R.Ajmera* signifies a strong need to rely upon clear, cogent & convincing evidences to prove the charge of fraud.

Time & again, SAT has held that fraud is a serious offence in securities market. In *Mr. R.S. Agarwal v. SEBI* [65], SAT held that "fraud" in securities market is a serious offence as defined in law & as dealt in the PFUTP Regulations. In *Ess Ess Intermediaries Anand Saurashtra Society v. SEBI* [66] ('*Saurashtra'*), it has held that fraud may shake the very foundation of the business of the entity in question and may adversely affect the same. Even the Supreme Court in the case of *Kanaiyalal* had observed that fraud is among the most serious, costly, stigmatizing, & punitive forms of liability imposed in modern corporations & financial markets. It is in light of gravity of the offence that the standard of proof has to be determined.

In *P.G. Electroplast Ltd. v. SEBI,* [67] SAT while observing that charge relating to violation of PFUTP Regulations is a serious charge, held that a higher degree of proof is required to sustain it. In doing so, it also emphasized on adducing cogent reasoning & convincing evidence. In *Bhanwar Lal Paliwal v. SEBI,* [68] SAT while founding that the Adjudicating Officer did not produce sufficient evidence to substantiate case of violation of PFUTP Regulations, also focused on the need to rely upon 'substantial or clinching evidence' to prove the charges of market manipulation. In *Hansraj Gupta v. Dehra Dun Mussoorie Electric Tramway Ltd,* [69] it has been held that the party alleging fraud is bound to establish it by cogent evidence & suspicion cannot be accepted as proof. In *DLF Ltd. & Ors v. SEBI,* [70] SAT while observing that 'fraud' within the meaning of PFUTP Regulation should have an element of some motive or ill-conceived idea or design, held that:

"*Without bringing out any piece of reliable or convincing evidence on record, the Appellant has been sought to be held guilty of the gravest possible allegation, leading to a harsh and stigmatic penalty. This Tribunal has consistently held that even if fraud is to be proved on the basis of probability & not the strict principles of evidence, it is incumbent upon the Respondent to bring out cogent, convincing evidence & prove the charge of fraud against a company only as per the procedure established in the PFUTP Regulations & above all, on the basis of a high degree of probability to prove the same*".

In *R. K. Global Shares and Securities Ltd v. SEBI,* [71] SAT while demanding a higher degree of probability for establishing the charge of fraud held that:

"*Let us not forget that the appellant has been charged for executing fraudulent trades which is, indeed, a serious charge and cannot be established on mere suspicion & should have a firmer ground to stand upon. A high degree of probability must exist before such a charge could be found to have been established*".

In *Sterile Industries (India) Ltd. V. SEBI*, [72] while dealing with price manipulation & violation of regulation 4 (a) and (d) of the PFUTP Regulations, it was held that:

"Evidence merely probabalising and endeavouring to prove the fact on the basis of preponderance of probability is not sufficient to establish such a serious offence of market manipulation. When such a serious offence is investigated and the charge is established, the fall out of the same is multifarious. The impact of such an adverse finding is wide especially in the case of a large public company having large number of investors. The stigma sticks and it also hurts, not the company alone, but its shareholders as well".

Three years down the judgment in *Kishore R.Ajmera*, the SAT in 2019 in the case of *S. Gopalakrishnan v. Sebi* [73] held that:

"*Fraud cannot be proved only on alleged gross negligence, carelessness or recklessness as amounting to collusion & connivance on a preponderance of probabilities… In the instance case,* *there is no finding that the appellants had induced someone & thereby played a fraud in the securities market. Assuming without admitting that the concept of preponderance of probabilities would also apply in the case of the appellants, still, it must be proved by cogent evidence that the appellants are guilty of inducement"*

The Hon'ble SAT also, during the same year, while dealing with the charge of self-trade, held in the case of *Shri Nagad Sarvar vs Sebi* [74] that "even though preponderance of probability is sufficient to prove PFUTP violations still fraudulent & unfair trade has to be established with some degree of confidence." The same has been upheld by SAT in 2011 in *Parsoli Corporation Ltd. & Ors. v. SEBI* [75] in which it was found that since the charge of fraud is serious, higher has to be the degree of probability to establish the same.

The Hon'ble SAT has even relied on *Bater* & *Hornal* in cases related to insider trading. In *Dilip S. Pendse* [76], SAT while upholding the sliding scale test laid down in both these cases, held insider trading to be one of the most serious allegations in securities market which so required a higher degree of preponderance of probabilities. The judgment in *Pendse* was reiterated by SAT in 2012, in the case of *V.K. Kaul v. SEBI* [77], wherein it was held that the degree of proof in criminal or civil cases is not absolute & within each standard there are more degrees of proof, which is dependent on the subject-matter; like fraud demand a higher degree of proof than negligence.

Even the Supreme Court in *Maharashtra State Board Of ... v. K.S. Gandhi & Ors* [78] had agreed that although in civil cases the standard of proof is satisfied on a balance of probabilities; however, even within this formula variations in subject matter or in allegations will affect the standard required. The serious the allegation is, the higher will be the degree of proof required to establish it.

Analyses

The above cases in India highlight the need for a 'higher degree of proof' or 'high degree of probability' for proving charges of securities fraud. Similar to UK, the demand for using the 'cogent' or 'convincing' or 'clear' or 'clinching' evidences by SAT reveals a hidden discovery of a higher standard of proof, just like the intermediate standard developed in the US. Also, the use of both 'cogent' & 'convincing' evidence & 'preponderance of probabilities' at the same time (as done in *Gopalakrishnan)* shows the lack of caution by SAT while choosing the correct terminologies for defining a higher standard of proof. It is argued that judges cannot expect cogent evidence & at the same time state that the standard is the civil standard of probabilities [79]. This approach breaches the principle of non-contradiction by asserting 'P' & 'Not-P' simultaneously (which is logically unsustainable) [80]. Also, since the definition of standard of proof, as also elucidated above, explicitly states that it is the degree of cogency or weight of the evidence that determines whether the standard has been met, it is difficult to rationalize how mandating more cogent evidence would not affect the degree of proof. A case for a higher standard of proof is, thus, made which is better known as the intermediate standard of proof [81].

It is not the case that the requirement of clear, cogent & convincing evidence is a new concept in India. *First*, the frequent reliance of SAT on such evidences clarifies the scope of the use of such evidence. *Second*, the order of SAT in *Brahaspati Financier Ltd. v SEBI* [82] in which it was observed that in the case of violations of FUTP Regulations, the standard of proof, at its best could be one notch higher than preponderance of probabilities but could never be beyond reasonable doubt, further exemplifies the need for a third/intermediate standard, as already developed in America. *Third*, the Supreme Court of India, in 2012, in *Heinz India Pvt. Ltd. & Ors v. State of U.P. & Ors.* [83], clearly expressed the need for clear & convincing evidence. While deciding the standard of proof required to rebut the presumption arising under the provisions of a statue, it was held that the standard of proof in such cases ought to be clear & convincing, no matter the degree of proof may not be as high as proving the fact to the contrary beyond a reasonable doubt. Further, the court expressly laid

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down that ‘clear & convincing’ evidence is a heightened standard of proof than mere preponderance of probabilities.

As held in *Kishore Ajmera,* the reasoning behind adopting mere preponderance of probabilities as a standard of proof, is the non-availability of direct evidences in cases of securities violations. As seen above also, the standard of proof is dependent upon the gravity of the offence. It allocates the risk of an erroneous decision between the litigants [84]. As the individual defendant's interest increases or the public's or plaintiff's decreases, the court may shift the allocation of the risk of erroneous decision away from the defendant & increase the degree of proof required [85]. Thus, the balance of interests in criminal cases has been weighted heavily in favor of the individual's interest in retaining his life and liberty [86]. Therefore, the thumb rule i.e., the graver the offence, higher the standard of proof is required.

This brings us to the question of gravity of securities fraud. Although the courts, as discussed above, have agreed that fraud in securities markets is a very grave charge, yet the actual consequences of it are needed to be understood, in order to demand a higher degree of proof. Although an individual, found to have committed fraud, is not deprived of his physical liberty as a result of proceedings under the PFUTP regulations, the other sanctions can deprive him of other significant liberty interests. For instance, one of the severe consequences that could come with the commitment of fraud is the cancellation/suspension of the registration of intermediary [87]. Once imposed, this could result in the complete shutdown in the business of the intermediary involved [88]. Another is the suspension of any office-bearer of any stock exchange or self-regulatory organization from holding such position [89]. Prohibition or restriction of any individual from accessing the securities market is another such example [90]. It is submitted that by preventing an individual from engaging in any aspect of the securities industry, these sanctions deprive him of his right to pursue a livelihood, a constitutionally protected right that cannot be impaired absent procedural due process safeguards [91]. This was upheld by the SAT in *Bpl Limited v. SEBI* [92] wherein it was stated that indulging in fraudulent & unfair trade practices is a serious charge visiting serious consequences, which enables the Respondent even put a brake on a person's right to do business for his livelihood.

Although securities fraud is a wider concept than common law fraud, [93] the stigma generated with it is analogous to that generated by the common law fraud [94]. Courts have long recognized that allegations of fraud indicate corruption & moral turpitude [95] & "might seriously damage one's standing and associations in the community [96].” Even the mere characterization of the violation as fraud is ample to let the investing public draw a stigmatizing surmise [97]. In fact, the certainty of being stigmatized is higher when dealing with securities fraud than with common law fraud [98]. As the daily operations of securities industry are based on reputation & trust, [99] a media attention is significant enough to bring embarrassment [100] & to break the long standing confidence of the investors. Therefore, as correctly held in *Saurashtra,* the charge of fraud in securities market can affect the very foundation of a business. It is the loss of livelihood combined with the stigma attached with it that makes fraud one of the gravest economical offences.

Another inference to the high gravity of fraud is the precedents set by the Supreme Court itself. In many cases, it has been held that the standard of proof for establishing fraud in civil cases should touch similar to the standard required in criminal cases. In *Union Of India v. M/S.Chaturbhai M. Patel & Co.,* [101] the apex court held that “fraud like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt.” In *Svenska Handelsbanken v. Indian Charge Chrome*, [102] it was again held that “fraud like any other charge of a criminal proceeding must be established beyond reasonable doubt. A finding as to fraud cannot be based on suspicion and conjuncture". In *D. Weston And Ors. v. Peary Mohan Dass,* [103] the Calcutta High Court held that “whatever be the form of the proceeding, charges of a fraudulent or criminal character are made against a party thereto, it is right to insist that such charges be proved clearly and beyond reasonable doubt, though the nature and extent of such proof must necessarily vary according to the circumstances of each case.” The Gujarat HC, in 2018, in the case of *Madhabhai Dahyabhai Mithapara v. Jivanbhai Tapubhai Jadav* [104], held that “when the party comes before the Court with a case of fraud, the burden would be on him to establish. In the civil proceedings, the degree of proof is not beyond reasonable double, but on the preponderance of probabilities. However, if fraud is alleged, then the burden is quite heavy on the plaintiff to prove it in accordance with law.”

Though these cases do not deal with securities law violations, yet an inference which could be drawn is that fraud, in whatever form of proceedings it may be, requires a higher degree of proof, almost touching the standard of beyond reasonable doubt as used in criminal proceedings. Equating the standard of proof with criminal cases itself evidences the high gravity of fraud.

Coming back to the ratio in *Kishore R. Ajmera*, given that there is a lack of direct evidence in cases related to fraud in securities market, the reliance on circumstantial evidence is understood [105]. But at the same time, it is necessary to ensure that such reliance does not become a source of unbridled power in the hands of the authorities [106]. Thus, even if reliance has to be placed on circumstantial evidences to prove the complex securities violations, it must be such that the trier of the fact must establish that the event is ‘highly probable to be true’ (i.e., the test of cogent & convincing evidence) rather than establishing it to have happened ‘more likely than not’ (i.e., test of preponderance of probability) [107].

It is to be noted that the procurement of evidence, to a great extent, depends upon the fact-finding powers & technology for monitoring the securities market on tap with SEBI [108]. SEBI, unlike the other regulators worldwide, has a restricted fact-finding power [109]. For instance, the Securities Exchange Commission in the US has the power to intercept & wire-tap phone calls, which have been used in several high profile cases resulting in convictions [110]. Even the other regulatory agencies in India, like the Central Board of Direct Taxes, have been given the power to intercept telephonic conversations to deal with economic offences [111]. Therefore, an increase in the fact-finding powers of SEBI can itself, up to some extent, solve the problem of non-availability of evidence for establishing the charge of fraud. Regarding the standard of proof, it is submitted that theoretically, the imposition of a heightened standard of proof could make it tougher for SEBI to impose severe sanctions for violating the provisions of securities law. But nonetheless, such a possibility does not hinder against mandating a standard that will more accurately reflect the individual interests at stake in a disciplinary hearing [112].

CONCLUSION

Fraud under the ambit of securities law is very grave in its nature. Therefore, mere preponderance of probabilities as the standard of proof is not sufficient enough to hold the establishment of fraud. The Supreme Court, while settling for this standard, has refrained from going deeply into the precedents set by before in this regard. Neither has it taken into consideration the gravity of fraud or its repercussions to analyze the level of persuasion required to prove such gross charge. Therefore, analyzing the jurisprudence available in this regard, the correct standard of proof should be that of clear, cogent & convincing evidence.

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