

Brd Securities Ltd. vs the Securities and Exchange Board of India

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Court : Kerala

Decided On : Mar-08-2021

Judge : Honourable the Chief Justice Mr.S.Manikumar,Honourable Mr. Justice Shaji P.Chaly

Appeal No. : WA/444/2021

Appellant : Brd Securities Ltd.

Respondent : The Securities and Exchange Board of India

Judgement :

W.A. No. 444/2021 :1:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE THE CHIEF JUSTICE MR.S.MANIKUMAR & THE HONOURABLE MR. JUSTICE SHAJI P.CHALY MONDAY, THE 08TH DAY OF MARCH 2021 / 17TH PHALGUNA, 1942 WA.No.444 OF 2021 AGAINST THE JUDGMENT DATED 25.02.2021 IN WP(C) 4939/2020(N) OF HIGH COURT OF KERALA APPELLANT/PETITIONER: BRD SECURITIES LTD. HAVING ITS REGISTERED OFFICE AT DOOR NO. XIII/436, A 2, 1ST FLOOR, BETHANY COMPLEX, KUNNAMKULAM, THRISSUR-680 503. REPRESENTED BY ITS MANAGING DIRECTOR, MR. WILLIAM

VERGHESE CHUNGATH CHERU. BY ADVS. SRI.M.GOPIKRISHNAN NAMBIAR SRI.K.JOHN MATHAI SRI.JOSON MANAVALAN SRI.KURYAN THOMAS SRI.PAULOSE C. ABRAHAM SHRI.PRANOY HARILAL RESPONDENT/RESPONDENT: THE SECURITIES AND EXCHANGE BOARD OF INDIA, SEBI BHAVAN-1, PLOT C4A-G BLOCK, BANDRA KURLA COMPLEX, MUMBAI-400 051, REPRESENTED BY ITS CHAIRMAN/ WHOLE TIME MEMBER. R1 BY ADV. SRI.RAJU JOSEPH (SR.) R1 BY ADV. SRI.K.M.JAMALUDHEEN THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 08.03.2021, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: W.A. No. 444/2021 :2: Dated this the 8th day of March, 2021.

JUDGMENT

SHAJI P. CHALY, J.

The captioned writ appeal is filed by the petitioner in W.P.(C) No. 4939 of 2020 challenging the judgment dated 25.02.2021, whereby the learned single Judge declined the following reliefs sought for in the writ petition:

1. Call for the records leading to Exts.P1, P2 and P3 show cause notices and quash the same by the issuance of a writ in the nature of certiorari or any other appropriate writ, order or directions.

2. Issue a writ of mandamus or such other order or direction in the nature

of an injunction prohibiting the respondent from taking any action whatsoever against the petitioner or any of its Directors, pursuant to Exts.P1, P2 and P3 show cause notices.

3. Issue a declaration that the respondent has no jurisdiction to issue

Exhibits P1, P2 and P3 show cause notices as it is ultra vires the provisions of the Companies Act, 1956, the provisions of the Securities and Exchange Board of India Act, 1992 and violates Articles 14 and 19(1)(g) of the Constitution.

2. The necessary facts for the disposal of the appeal are as follows: The appellant is registered with the Reserve Bank of India as a Non Banking Finance Company (NBFC). It was served with Exts.P1, P2 and P3 show cause notices issued by the respondent i.e., the

W.A. No. 444/2021 :3: Securities and Exchange Board of India. According to the appellant, the show cause notices are ultra vires of the provisions of the Companies Act, 1956 as well as the Securities and Exchange Board of India Act, 1992 (Act, 1992 for short) and also violative of Articles 14 and 19(1)(g) of the Constitution of India. That apart, it was contended that directions were issued in the show cause notices against the appellant in gross violation of the principles of natural justice and the relevant provisions of the Companies Act, 1956 and the Act, 1992. In the show cause notices, allegations are raised to the effect that 8 private placement of equity shares were issued in contravention of the provisions of the Companies Act, 1956 and the Act, 1992 and directed refund of subscriptions with interest on the ground that those were not private placement offers, but public issues, and that the appellant failed to comply with the relevant provisions of the Companies Act, 1956 and Act, 1992 and the guidelines and regulations in regard to the issue of a prospectus. According to the appellant, the amount raised through 8 private placements of equity shares is Rs.9.75 crores of face value and Rs.27 crores, including the share premium raised in respect of two of the private placement issues.

3. It was predominantly contended that there is substantial delay and laches in commencing the proceedings, as more than 18

W.A. No. 444/2021 :4: years have elapsed since the first private placement issue was made in 2001 and more than 9 years have elapsed since the last such private placement issue was made and it would be impossible for the appellant to defend its case adequately and effectively. It was also pointed out

that during the last 18 years, the appellant, which is a registered NBFC, was regulated and inspected by the Reserve Bank of India from time to time, and has deployed the funds in its business and complied with all the reporting and compliance requirements and has legally discharged its obligations and created

substantial third party rights and obligations in the ordinary course of its business. Therefore, it is submitted that the commencement of the proceedings is highly prejudicial and is barred by limitation on account of the unreasonable delay and laches on the part of the respondent. Apart from the fact

that the show cause notices failed to specify any particular penalty/action that the respondent contemplates, it merely states that the appellant may be restrained from issuing any further securities from accessing the capital market for a period as deemed appropriate. Therefore, according to the appellant, the action of the respondent was in absolute violation of the principles of natural justice and totally illegal justifying the interference of the writ court , especially due to the fact that in the show cause notices, certain adverse findings are

W.A. No. 444/2021 :5: rendered by the respondent, due to which the possibility of an impartial adjudication has to be ruled out .

4. During the course of arguments, the learned Senior Counsel

appearing for the appellant also submitted that no copies of complaints were served on the appellant enabling it to defend the action threatened in the show cause notices. Therefore, all canons of law are violated by the respondent, which causes serious prejudice in the matter of issuing show cause notices and therefore, the show cause notices have no legal sustenance and the learned single Judge ought

to have quashed the same taking into account the peculiar facts

situations, including the question of limitation raised by the appellant.

5. The respondent had filed a detailed counter affidavit in the

writ petition refuting the allegations raised by the appellant. Among other contentions, it was submitted that the respondent administers the provisions of the Act, 1992, the Securities Contracts (Regulation) Act, 1956 and the Depositories Act, 1996. In terms of Section 24(1) of the Companies Act, 2013, SEBI administers the provisions of Chapter III, Chapter IV and Section 127 corresponding to Section

207 of the Companies Act, 1956 that was repealed by the Companies Act, 2013, insofar as they relate to the issue and transfer of securities and non

W.A. No. 444/2021 :6: payment of dividend by listed companies or those companies, which intend to get their securities listed on any recognised Stock Exchanges in India.

6. According to the respondent, it is an expert body having

administrative, legislative and quasi judicial functions entrusted upon it by the Act, 1992, which is recognised by the Supreme Court of India in one of the cases. Therefore, it was the case of the respondent that the writ petition is not maintainable, since the issue is at a show cause notice stage and the enquiry in regard to the allegations made against

the appellant need to be determined, which is a quasi judicial proceeding. That apart, it was contended that the issues raised involve disputed questions of fact and materials and such issues and contentions of the appellant would be able to be decided by a quasi judicial authority.

7. The sum and substance of the contentions was that the

respondent intends to conduct a full fledged enquiry, after providing sufficient opportunity to the appellant to participate in the proceedings and mere issuance of a show cause notice in order to ascertain certain

facts and circumstances would not, in any manner, violate the

fundamental rights guaranteed under the Constitution of India as is W.A. No. 444/2021 :7: alleged in the writ petition.

8. Anyhow, the learned single Judge, after assimilating the facts, law and the circumstances involved in the matter and also taking

into account the judgments of the Apex Court in Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and others [AIR 1999 SC 22], State of Bihar v. Deokaran Nenshi and another [1972) 2 SCC 890] and Adjudicating Officer, Securities and

Exchange Board of India v. Bhavesh Pabari [(2019) 5 SCC 90], has arrived at the following conclusions:

"15. From the pleadings, it has come out that in the Awareness Programme conducted by the SEBI during the year 2017, a few investors reported that the petitioner Company has been mobilising funds from the public and have issued bonus shares. It was alleged that the petitioner subsequently stopped buying back the shares. From a preliminary enquiry made by the SEBI, it was noticed that the petitioner-Company has passed resolutions authorising issue of equity shares to any person including existing members of the Company in any manner the board may deem fit. The language of the resolution indicated that what was intended by the Company was not strictly private placement. It was under the said circumstances that the SEBI issued notices to the petitioner-Company. Though the information sought for were expected to be maintained by the petitioner in their statutory records and registers, such information was not made available to the SEBI. It was under such circumstances that the SEBI has issued the show-cause notices impugned in the writ petition.

16. True, the information sought for by the SEBI related back to the year 2001. However, the required information are those which are W.A. No. 444/2021 :8: required by the petitioner to be statutorily maintained. Therefore, the delay in issuing these Show Cause Notices, cannot cause prejudice to the petitioner.

17. As regards reasons for the delay in initiation of the

proceedings, it is to be noted that under Section 11(2)(f) of the SEBI Act, 1992, promoting investor education is one of the functions of the Board. In one of such meetings of investors, allegations were raised against the petitioner. The SEBI made their own enquiry and noted that the annual reports of the Company indicated authorising issue of shares to any person including existing members of the Company in any manner the

Board may deem fit. The language of the resolutions indeed gives rise to a suspicion or indication that the Company proposed to issue shares to the public. It is for the said reason that the SEBI sought explanation from the petitioner.

18. The petitioner, instead of cooperating with the SEBI,

providing requisite information, has approached this Court challenging the show-cause notices. The allegation against the petitioner and the information sought for by the SEBI would indicate that what was sought for by SEBI are information a Company is expected to maintain. Going through the show-cause notices impugned in the writ petition, it cannot be said that jurisdictional facts necessary to initiate proceedings do not exist. Prima facie, the delay in initiation of the proceedings will not cause prejudice to the petitioner, in the nature of the information sought for by SEBI. Even if the petitioner is incapacitated to provide any information required by the SEBI, the petitioner can very well give reasoned explanation for the same to the SEBI.

19. The issue is presently only at a show-cause stage. It will be

thoroughly inappropriate for this Court to interfere with the statutory proceedings at this stage. In the circumstances, I find no reason to interfere with the proceedings initiated by the SEBI as per Exts.P1 to P3."

9. We have heard Sri.E. K. Nanda Kumar learned senior counsel

W.A. No. 444/2021 :9: appeared for the appellant assisted by Adv. Poulose C. Abraham and the learned Senior Counsel for the respondent Sri. Raju Joseph assisted by Adv. K.M. Jamaludheen, and perused the pleadings and materials on record.

10. We have gone through the contentions advanced by the

appellant as well as the respondent in extenso and according to us, the sole question to be considered is whether any manner of interference is warranted to

the judgment of the learned single Judge. It is an admitted fact that on receipt of show cause notice and the consequential clarifications sought for by the respondent, the appellant has participated in the proceedings. The basic contention advanced in the appeal is that the copies of the complaints received by the respondent were not served on the appellant and therefore, the appellant was unable to participate in the proceedings by effectively understanding the nature of complaints raised against the appellant. It was also pointed out that the private placement issues alleged to be public placement issues by the respondent was done 18 years and 9 years before and therefore, the appellant would not be able to produce necessary documents and defend the allegations raised against the appellant and there is no truth in the allegations apart from lacking bonafides.

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11. That apart, it was contended that there is no point in

relegating the appellant to the adjudicatory authority under the Act, 1992, since already the learned single Judge has entered into certain definite findings in regard to the issues raised in the show cause notices and therefore, if the appellant is relegated to the statutory authority, serious prejudice would be caused to the appellant. The learned senior Counsel for the appellant has taken us through the

judgment and we also find that certain observations are made by the

learned single Judge, which is likely to affect the appellant substantially and materially while conducting the proceedings before the statutory authority. However, when we expressed our disinclination

to interfere in the judgment, due to the peculiar

the respondent to consider the allegations by resorting to a fair procedure by serving copies of complaints and all other documents relied upon by the respondent, the appellant would be satisfied and it would also be meaningful to participate in the proceedings.

12. The learned Senior Counsel appearing for the respondent submitted that there was no complaint received and it was on the basis of the certain enquiries conducted by the respondent that it W.A. No. 444/2021 : 11 : came to know that in the guise of certain private placements, public

issues were issued without adhering to the provisions of the

Companies Act, 1956, the Act, 1992 and other related Rules and Regulations and therefore, there is no substance in the contention advanced by the learned Senior Counsel for the appellant that no copy of complaint was served on the appellant. However, it was submitted that after the filing of the writ petition, complaints were also received by the respondent, and it has no objection in serving copy of the complaint on the appellant as also copies of all the documents and necessary materials relied upon by the respondent to proceed in terms of the show cause notices and the clarifications sought for.

13. We have appreciated the rival submissions made across the

Bar. In our considered opinion, it is an admitted fact that pursuant to the show cause notices, the appellant participated in the proceedings. However, fact remains, if the materials and the documents relied upon by the respondent are not served on the appellant, it would seriously prejudice the appellant in the adjudication proceedings before the statutory authority. We find much force in the contention advanced by the learned Senior Counsel for the appellant. But, it is also relevant to note that the respondent has no objection in serving the copies of materials to the appellant enabling it to participate in the proceedings

W.A. No. 444/2021 : 12 : by giving appropriate reply.

14. The learned counsel for the appellant submitted that a time

limit may be fixed so as to finalise the proceedings, and if not done, it may cause serious prejudice to the appellant. Taking into account all the above aspects, we do not think, the appellant is entitled to get the reliefs as such as is sought for in the writ petition and we are also of the view that the learned single Judge was not misdirected or had committed any jurisdictional error, while considering the issues

raised by the appellant and rendering the judgment.

15. That being the situation, the reliefs sought for are declined.

However, the appeal is disposed of directing the respondent to serve copies of all the materials, complaint/ complaints, documents etc. relied upon by the respondent to the appellant at the earliest, at any rate, within two weeks from the date of receipt of a copy of this judgment, and the appellant would be free and at liberty to file any detailed objection within a week thereafter, but at any rate the entire adjudication proceedings shall be finalised by the respondent within a period of two months from the date of receipt of a copy of this

judgment after providing a full fledged participation to the appellant.

We further make it clear that all the adverse observations and

W.A. No. 444/2021 : 13 : findings rendered by the learned single Judge so as to interfere with the rights and interests of the appellant in the matter of participation in the adjudication proceedings and to have an impartial adjudication would stand vacated, and the appellant would be at liberty to take up all the material contentions in the adjudication proceedings.

S. MANIKUMAR, CHIEF JUSTICE. SHAJI P. CHALY, JUDGE. Rv W.A. No. 444/2021 : 14 : APPENDIX APPELLANTS'S EXHIBITS: ANNEXURE-A A TRUE COPY OF THE RECORD OF PROCEEDINGS DATED 26.02.2020. RESPONDENTS' ANNEXURES: NIL /True Copy/ PS To Judge. rv

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