(2021) 02 KL CK 0103

In the High Court Of Kerala

Case No : Writ Petition (C) No. 4939 Of 2020

Brd Securities Ltd APPELLANT

Vs

Securities And Exchange Board Of India RESPONDENT

Date of Decision : 25-02-2021

Acts Referred:

Reserve Bank Of India Act, 1934 — Section 45, 67(3)
Securities And Exchange Board Of India Act, 1992 — Section 11(2)(f)
Constitution Of India, 1950 — Article 14, 19(1)(g), 226

Citation : (2021) 02 KL CK 0103

Hon'ble Judges : N. Nagaresh, J

Bench : Single Bench

Advocate : M. Gopikrishnan Nambiar, K. John Mathai, Joson Manavalan, Kuryan Thomas, Paulose C. Abraham, Raju Joseph, K.M. Jamaludheen

Final Decision : Dismissed

Judgement

1. The petitioner, a Non-Banking Finance Company, has approached this Court challenging Exts.P1, P2 and P3 show-cause notices issued by the

Securities and Exchange Board of India. The petitioner seeks to declare that the show-cause notices are ultra vires the provisions of the Companies

Act, 1956, the provisions of the Securities and Exchange Board of India Act, 1992, and violates Article 14 and Article 19(1)(g) of the Constitution of

India.

2. The petitioner states that they are a Public Limited Company registered with the Reserve Bank of India (RBI). The petitioner is a Non-Banking

Finance Company (NBFC). The Company is holding a Certificate of Registration from the RBI as a NBFC under Section 45 of the Reserve Bank of

India Act, 1934. The petitioner is subjected to stringent monitoring by its Auditors and RBI Inspectors. The petitioner has been regularly filing its compliances and returns with all the statutory authorities from time to time.

3. To augment its capital base and resources, the petitioner made private placement of equity shares from time to time. Such private placements were made to a very few persons who are associated with the petitioner as member/ staff/borrower. Applications for equity shares were given to specific persons. The Securities and Exchange Board of India (SEBI) issued Ext.P8 letter dated 19.10.2017, seeking information from the petitioner regarding alleged deemed public issue. The respondent called for information from the petitioner. The petitioner provided information and documents to the respondent.

4. Being not satisfied with the explanation provided by the petitioner, the respondent issued Ext.P1 show-cause notice dated 05.04.2019. The petitioner gave Ext.P15 reply. However, the respondent again issued Ext.P2 supplementary show-cause notice on 12.12.2019. The petitioner submitted Ext.P17 reply dated 02.01.2020. To the surprise of the petitioner, the respondent again issued Ext.P3 show-cause notice.

5. The learned Senior Counsel assisted by the counsel for the petitioner, would contend that there has been inordinate delay and laches in proceeding against the petitioner. The petitioner made its first issue of private placement in the year 2001. The last issue of private placement resulting in the show-cause notice, was of the year 2010. The respondent has issued Show Cause Notice after the expiry of nine years and it related to facts dating back to 19 years. The Apex Court in Government of India v. Citadel Fine Pharmaceuticals, Madras and others [AIR 1989 SC 1771] has held that in the absence of any period of limitation, the authority is required to exercise its powers within a reasonable period of time. The Apex Court has reiterated the said position in a number of subsequent judgments.

6. The belated initiation of investigation by the respondent is highly prejudicial to the petitioner. During the last 20 years, funds emanating from private placements have been utilised for business. The petitioner has been subjected to constant inspections by the RBI. The unreasonable delay in initiation of the investigation would be highly arbitrary, contended the learned Senior Counsel.

7. The learned Senior Counsel would further argue that the notice issued to the petitioner is vague. The respondent has not disclosed the proposed

penalty. For issuing a show-cause notice, the Authority should disclose the material grounds necessitating action and penalty/action proposed to be

taken. Both the elements are absent in Exts.P1 to P3. The petitioner has not made any public issues nor has published any prospectus, advertisement

or pamphlet, while making private placements.

8. Issuance of private placements was promptly intimated to the competent authority, namely Registrar of Companies, filing returns. Investigation

started after 17 years and show-cause notices are issued after 18 years. A reading of the show-cause notices would show that the respondent has

pre-judged the issue, which tendency is condemned by the Honâ??ble Apex Court in the judgment in Oryx Fisheries Private Limited v. Union of

India and others [(2010) 13 SCC 427]. The Investigator has become Adjudicator. The jurisdictional facts required to invoke Section 67(3) are absent

in this case, and hence the law laid down by the Apex Court in Arun Kumar and others v. Union of India and others [(2007) 1 SCC 732], Carona Ltd.

v. Parvathy Swaminathan & Sons [(2007) 8 SCC 559] and Harrisons Malayalam Ltd. v. State of Kerala [2014 (4) KLT 371], is violated.

9. The show-cause notices were issued based on certain complaints. In spite of requests, copies of the complaints were not made available to the

petitioner, thereby offending the settled principles of natural justice. The proceedings belatedly initiated are hit by limitation and the law laid down by

the Apex Court in Joint Collector Ranga Reddy District and another v. D. Narsing Rao and others [(2015) 3 SCC 695], Palitana Sugar Mills (P) Ltd.

and another v. State of Gujarat and others [(2004) 12 SCC 672] and State of Punjab and others v. Bhatinda District Co-operative Milk Producers

Union Ltd. [(2007) 11 SCC 363] are flouted, contended the Senior Counsel appearing at the instance of the petitioner.

10. The learned Senior Counsel assisted by the Standing Counsel for the respondent, on the other hand, submitted that by Ext.P8 letter dated

19.10.2017, the petitioner was required to make available certain documents. The petitioner did not provide all the documents sought for. Therefore,

Ext.P9 letter dated 07.11.2017 was issued seeking further information. Even Ext.P9 letter did not result in supply of requisite information. Under the

circumstances, the respondent was forced to issue show-cause notices.

11. A perusal of the resolutions passed by the Company indicated that the issues

announced by the petitioner were public issues. In spite of the

requisition made by the respondent, required documents were not produced by the petitioner to show that the issues were merely private placements.

The information sought for by the respondent are those readily available with the petitioner from their statutorily maintained records.

12. The learned Senior Counsel pointed out that the SEBI Act does not contemplate any annual returns, though the SEBI is the market controller.

Therefore, any violation of the SEBI Act or Rules would come to the knowledge of the respondent normally only from other sources. Challenge in the

writ petition is against show-cause notices. Though there is no absolute bar in challenging show-cause notices invoking Article 226 of the Constitution

of India, this Court should interfere in the matter sparingly. The law in this regard is settled by the judgment of the Apex Court in Whirlpool

Corporation v. Registrar of Trade Marks, Mumbai and others (AIR 1999 SC 22).

13. Though the transactions in question related to the year 2001 to 2010, the SEBI has acted as soon as it has received information. The Senior

Counsel urged that the offence involved is a continuing offence, in view of the law laid down by the Apex Court in 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]. The learned

Senior Counsel emphatically denied the allegation that the SEBI has pre-judged the issue. Taking the court to the statements made in show-cause

notices, the learned Senior Counsel pointed out that jurisdictional facts exist justifying initiation of the proceedings. The writ petition filed at show-

cause stage is therefore without any merit and it is liable to be dismissed, contended the Senior Counsel.

14. I have heard the learned Senior Counsel appearing for the petitioner and the learned Senior Counsel assisted by Advocate Sri. Jamaluddin,

Standing Counsel for the respondent.

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 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.

The writ petition therefore lacks merit and it is consequently dismissed.

