

(2021) 04 SEBI CK 0026

In the Securities Appellate Tribunal Mumbai

Case No : Appeal No. 76 Of 2021

IL&FS Securities Services Ltd

APPELLANT

Vs

Securities & Exchange Board Of India

RESPONDENT

Date of Decision : 06-04-2021

Acts Referred:

Constitution Of India, 1950 — Article 226
Securities And Exchange Board Of India (Prohibition Of Fraudulent And Unfair Trade Practices Relating To Securities Market) Regulations, 2003 — Regulation 3, 4
Companies Act, 2013 — Section 241, 242
Securities And Exchange Board Of India Act, 1992 — Section 11, 11B, 11B(1), 11B(2), 11B(2A), 11B(3), 12, 15A, 15B, 15C, 15D, 15E, 15EA, 15EB, 15F, 15G, 15H, 15HA, 15HB, 15JB, 15I, 26A, 28A
Insolvency And Bankruptcy Code, 2016 — Section 14
General Clauses Act, 1977 — Section 2(42)
Indian Penal Code, 1860 — Section 11
Securities Contracts (Regulation) Act, 1956 — Section 12A, 23JA
Depositories Act, 1996 — Section 19, 19IA

Citation : (2021) 04 SEBI CK 0026

Hon'ble Judges : Tarun Agarwala, Presiding Officer; M. T. Joshi, J

Bench : Division Bench

Advocate : Pradeep Sancheti, Shrey Sancheti, Adarsh Saxena, Rohan Banerjee, Aditya Sikka,, Vikash Jha, Nikitha Shenoy, Mitakshi Lakhani, Drishti Das, Varun Srinivasan, Rafique Dada, Nidhi Singh, Deepti Mohan, Kinjal Bhatt, Drashti Jani, Vidhii Partners

Final Decision : Dismissed

Judgement

Tarun Agarwala, Presiding Officer

1. The present appeal has been filed against an order dated 8th January, 2021 passed by the Whole Time Member rejecting the application of the appellant for stay of the proceedings.
2. The facts leading to the filing of the present appeal is, that the appellant is a professional clearing member empaneled with various clearing corporations

including NSE Clearing Ltd. and provides clearing and settlement services in the equity and currency derivative segment of certain stock exchanges like National Stock Exchange of India Ltd., the BSE Ltd and the Metropolitan Stock Exchange of India Ltd. The appellant, as a clearing member, is responsible for clearing trades executed by its clients who are trading member registered with the stock exchanges.

3. Securities and Exchange Board of India (hereinafter referred to as "SEBI") conducted an investigation into certain unauthorized transfer of mutual fund units from the account of Allied Financial Services Pvt. Ltd., a depository participant of NSDL. In this connection, the role of the appellant as a clearing member was also examined and, upon investigation, a show cause notice dated 9th December, 2019 was issued alleging that the appellant had violated certain provision of the Securities and Exchange Board of India (Stock Brokers) Regulations, 1992 (hereinafter referred to as "Stock Brokers Regulations"), the bye-laws of the NSE Clearing Ltd. and Regulations 3 and 4 of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 (hereinafter referred to as "SEBI"). In these proceedings the appellant filed an application for stay of the proceedings.

4. The background leading to the filing of the application is, that the Ministry of Corporate Affairs filed a company petition before the National Company Law Tribunal (hereinafter referred to as "NCLT") under section 241 and 242 of the Companies Act, 2013 alleging that the affairs of the Company were being conducted in a manner prejudicial to public interest. In this company petition it was prayed that the board of directors should be suspended and a new board of directors should be appointed. NCLT by an order dated 1st October, 2018 issued an interim order suspending the board of directors and appointed new persons as board of directors. Subsequently, an application was filed before the NCLT praying for stay on the institution or continuation of suits or proceedings against them before any court of law/Tribunal or arbitration authority. This application was rejected by NCLT by an order of 12th October, 2018 holding that there is no such provision under the Companies Act, 2013 to grant moratorium as provided under the Insolvency and Bankruptcy Code ("IBC" for short) and that separate application, in any case, was required to be filed for initiation of the Corporate Insolvency Resolution Process ("CIRP" for short) under the IBC for the Company as well as for its 348 associate companies and, consequently, a blanket moratorium cannot be passed under IBC.

5. The Tribunal further held that a moratorium order as provided under IBC cannot be extended to an application under sections 241 and 242 of the Companies Act, 2013 and that the power under sections 241 and 242 of the Companies Act, 2013 can be exercised when it is satisfied that the affairs of the Company has been mismanaged which relief has already been granted by the Tribunal in 1st October, 2018.

6. The matter was taken to National Law Appellate Tribunal (hereinafter referred to as "NCLAT"). NCLAT by an order dated 15th October, 2018 passed the following interim order.

"Taking into consideration the nature of the case, larger public interest and economy of the nation and interest of the Company and 348 group companies, there shall be stay of

(i) The institution or continuation of suits or any other proceedings by any party or person or Bank or Company, etc. against

"IL&FS" and its 348 group companies in any Court of Law/Tribunal/Arbitration Panel or Arbitration Authority; and

(ii) Any action by any party or person or Bank or Company, etc. to foreclose, recover or enforce any security interest created over the asset of "IL&FS" and its 348 group companies including any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(iii) The acceleration, premature withdrawal or other withdrawal, invocation of any term loan, corporate loan, bridge loan, commercial paper, debentures, fixed deposits, guarantees, letter of support, commitment or comfort and other financial facilities or obligations vailed by "IL&FS" and its 348 group companies whether in respect of the principal or interest or hedge liability or any other amount contained therein.

(iv) Suspension of temporarily the acceleration of any term loan, corporate loan, bridge loan, commercial paper, debentures, fixed deposits and any other financial facility by the "IL&FS" and its 348 group companies by any party or person or Bank or Company, etc. as of the date of first default.

(v) Any and all banks, financial institutions from exercising the right to set off or lien against any amounts lying with any creditor against any dues whether principal or interest or otherwise against the balance lying in any bank accounts and deposits, whether current or savings or otherwise of the "IL&FS" and its 348 group companies.

The interim order will continue until further orders and not be applicable to any petition under Article 226 of the Constitution of India before any Hon"ble High Court or under any jurisdiction of the Hon"ble Supreme Court."

7. The aforesaid order of 15th October, 2018 was challenged by the Maharashtra Metro Rail Corporation Ltd. before the Supreme Court which appeal was dismissed on 19th November, 2019. Thereafter, NCLAT confirmed its interim order on 12th March, 2020. It has been stated that appeals against the confirmatory order is pending before the Supreme Court.

8. Pursuant to the show cause notice dated 9th December, 2019 the appellants filed a reply contending that in view of the interim order passed by NCLAT on

15th October, 2018, the WTM had no jurisdiction to continue with the proceedings. The appellant prayed that this issue may be decided as a preliminary issue. The WTM considered the submissions of the appellant and rejected it by the impugned order dated 8th January, 2021. The Tribunal came to the conclusion that SEBI is not a "person" and that the show cause notice issued by the WTM is not a "proceeding" as contemplated under the interim order of the NCLAT and, in any case, SEBI/its delegated authority, namely, WTM is not a Tribunal and, therefore, the interim order of the NCLAT of 15th October, 2018 is not appealable nor is binding upon the WTM.

9. We have heard Mr. Pradeep Sancheti, Senior Advocate assisted by Mr. Shrey Sancheti, Mr. Adarsh Saxena, Mr. Rohan Banerjee, Mr. Aditya Sikka, Mr. Vikash Jha, Ms. Nikitha Shenoy, Ms. Mitakshi Lakhani, Ms. Drishti Das and Mr. Varun Srinivasan, Advocates for the Appellant and Mr. Rafique Dada, Senior Advocate assisted by Ms. Nidhi Singh, Ms. Deepti Mohan, Ms. Kinjal Bhatt and Ms. Drashti Jani, Advocates for the Respondent.

10. The contention of the appellant remains the same as that raised before the WTM, namely, that SEBI is a "person" and that the show cause notice issued by the WTM is a "proceeding" and that the SEBI and its delegated authority, ie, the WTM has the trappings of a court and for all practical purposes is a Tribunal and, therefore, the order of NCLAT is applicable and binding. It was, thus, urged that the proceedings which have been initiated by the WTM is against the letter and spirit of the order dated 15th October, 2018 passed by NCLAT. It was contended that even though SEBI acts as a Regulator, one of the functions of SEBI is to adjudicate and, therefore, exercises quasi-judicial functions. It was urged that SEBI while exercising quasi-judicial functions has the trappings of the court and, therefore, for all practical purpose the authority is a Tribunal. In support of his submissions the learned senior counsel placed reliance on *Clariant International Limited and Anr. vs. SEBI* (2004) 8 SCC 524 wherein the Supreme Court held that SEBI acts in three capacities i.e. legislative, executive and judicial capacities. It was, thus, urged that SEBI while conducting a hearing and exercising quasi-judicial functions becomes a Tribunal.

11. In support of his submission the learned senior counsel has placed reliance upon various case laws and reports, namely,

- a. 272nd report on the "Assessment of Statutory Framework of Tribunals in India" of the Law Commission of India;
- b. *Shivji Nathubhai vs. The Union of India*, AIR 1960 SC 606;
- c. *All Party Hill Leaders' Conference vs. Capt. W.A. Sangma*, (1977) 4 SCC 161;
- d. *State of Gujarat & Anr. vs. Gujarat Revenue Tribunal Bar Association and Anr.*, (2012) 10 SCC 353;
- e. *Union of India vs. R. Gandhi, President Madras Bar Association* (2010) 11 SCC 1;

f. Madras Bar Association vs. Union of India, (2014) 10 SCC 1;

g. Jaswant Sugar Mills Ltd. Lakshmi Chand, AIR 1963 SC 677;

h. Bharat Bank Ltd., Delhi & Ors. vs. Employees of Bharat Bank Ltd., Delhi and the Bharat Bank Employees Union Delhi, AIR 1950 SC 188;

12. On the other hand, the stand of the respondent is that the respondent is a Regulator and its functions have been defined under section 11 of the SEBI Act. It was contended that SEBI has not been treated as a judicial authority and its power has been given to regulate the business of the stock exchanges and other securities market functions including regulating the working of the stock brokers, depositories, etc. It was contended that merely because certain limited quasi judicial powers are being exercised does not make SEBI a Tribunal. It was also contended that regulatory authority is not covered by the order of NCLAT neither the powers exercised by NCLAT under sections 241 and 242 of the Companies Act is akin to section 14 of the IBC. The powers under the Companies Act and under the IBC are totally different and distinct.

13. Having heard the learned senior counsel for the parties and having perused the impugned order and the written submissions filed before this Tribunal, we find that a lot of effort has been made to dissect and bisect each and every word of the order of NCLAT dated 15th October, 2018. We are of the opinion that if there was any ambiguity in the said order it would have been appropriate for the appellant to move an appropriate application for clarification and for extension of the order to operate against other authorities. We find that the order of NCLAT is very clear and explicit and requires no interpretation.

14. A lot of submissions was made on the interpretation of the word "person" which has not been defined under the Companies Act and help has been taken of the definition clause under section 2(42) of the General Clauses Act and Section 11 of the IPC to put forth the point that definition clause is only illustrative and not exhaustive. The learned senior counsel also dwelt in length on the word "proceeding" and submitted that proceedings initiated pursuant to the show cause notice issued under section 11 and 11B of the SEBI Act are proceedings contemplated by the interim order of NCLAT.

15. In our opinion it is not necessary to go into the question as to whether SEBI is a "person" or whether the proceedings initiated pursuant to a show cause notice amount to a "proceeding" as per the order of NCLAT in view of the fact that the primary fact which has to be answered is whether SEBI is a Tribunal or not.

16. In this regard, we may point out that legislature in its wisdom has created Tribunals and transferred the work which are regularly done by the Civil Court or Supreme Court so as to reduce the burden of the court. Thus, the Tribunal has been established in substitution of the existing courts. The Tribunal possesses independence and is vested with judicial powers. A Tribunal has the authority to

pronounce valuable rights of party in a judicial manner. The Tribunal exercises the judicial power of the State and is constituted under a special statute to deal with cases under special laws and provide specialized adjudication. Thus, a Tribunal is a creature of a statute and there exists a basic feature of the basic administration of justice and inherent judicial power of the State.

17. We are of the opinion that the basic and essential consideration which makes a body or authority a Tribunal is, that it should be constituted by the state and should be vested with the States inherent judicial powers. Further, the main function of the Tribunal is to adjudicate the dispute between the party as held in *Jaswant Sugar Mills vs. Laxmichand & Ors.*, AIR 1961 SC 1669; *Associated Cement Companies Limited vs. P.N. Sharma*, AIR 1695 SC 1595 and in *Rojer Mathew vs. South Indian Bank Limited and Ors.*, 2019 (15) SCALE 615.

18. In view of the aforesaid we find that SEBI's main functions have been provided under section 11 of the SEBI Act which is extracted hereunder:

"POWERS AND FUNCTIONS OF THE BOARD

Functions of Board.

11. (1) Subject to the provisions of this Act, it shall be the duty of the Board to protect the interests of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit.

(2) Without prejudice to the generality of the foregoing provisions, the measures referred to therein may provide for-

- (a) regulating the business in stock exchanges and any other securities markets;
- (b) registering and regulating the working of stock brokers, sub-brokers, share transfer agents, bankers to an issue, trustees of trust deeds, registrars to an issue, merchant bankers, underwriters, portfolio managers, investment advisers and such other intermediaries who may be associated with securities markets in any manner;
- (ba) registering and regulating the working of the depositories, participants, custodians of securities, foreign institutional investors, credit rating agencies and such other intermediaries as the Board may, by notification, specify in this behalf;
- (c) registering and regulating the working of venture capital funds and collective investment schemes, including mutual funds;
- (d) promoting and regulating self-regulatory organisations;
- (e) prohibiting fraudulent and unfair trade practices relating to securities markets;
- (f) promoting investors' education and training of intermediaries of securities markets;
- (g) prohibiting insider trading in securities;

- (h) regulating substantial acquisition of shares and take over of companies;
- (i) calling for information from, undertaking inspection, conducting inquiries and audits of the stock exchanges, mutual funds, other persons associated with the securities market, intermediaries and self-regulatory organisations in the securities market;
- (ia) calling for information and records from any person including any bank or any other authority or board or corporation established or constituted by or under any Central or State Act which, in the opinion of the Board, shall be relevant to any investigation or inquiry by the Board in respect of any transaction in securities;
- (ib) calling for information from, or furnishing information to, other authorities, whether in India or outside India, having functions similar to those of the Board, in the matters relating to the prevention or detection of violations in respect of securities laws, subject to the provisions of other laws for the time being in force in this regard:

Provided that the Board, for the purpose of furnishing any information to any authority outside India, may enter into an arrangement or agreement or understanding with such authority with the prior approval of the Central Government;
- (j) performing such functions and exercising such powers under the provisions of 23 [* * *] the Securities Contracts (Regulation) Act, 1956 (42 of 1956), as may be delegated to it by the Central Government;
- (k) levying fees or other charges for carrying out the purposes of this section;
- (l) conducting research for the above purposes;
- (la) calling from or furnishing to any such agencies, as may be specified by the Board, such information as may be considered necessary by it for the efficient discharge of its functions;
- (m) performing such other functions as may be prescribed.

(2A) Without prejudice to the provisions contained in sub-section (2), the Board may take measures to undertake inspection of any book, or register, or other document or record of any listed public company or a public company (not being intermediaries referred to in section 12) which intends to get its securities listed on any recognised stock exchange where the Board has reasonable grounds to believe that such company has been indulging in insider trading or fraudulent and unfair trade practices relating to securities market.

(3) Notwithstanding anything contained in any other law for the time being in force while exercising the powers under clause (i) or clause (ia) of sub-section (2) or sub-section (2A), the Board shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a

suit, in respect of the following matters, namely:-

(i) the discovery and production of books of account and other documents, at such place and such time as may be specified by the Board;

(ii) summoning and enforcing the attendance of persons and examining them on oath;

(iii) inspection of any books, registers and other documents of any person referred to in section 12, at any place;

(iv) inspection of any book, or register, or other document or record of the company referred to in sub-section (2A);

(v) issuing commissions for the examination of witnesses or documents.

(4) Without prejudice to the provisions contained in sub-sections (1), (2), (2A) and (3) and section 11B, the Board may, by an order, for reasons to be recorded in writing, in the interests of investors or securities market, take any of the following measures, either pending investigation or inquiry or on completion of such investigation or inquiry, namely:-

(a) suspend the trading of any security in a recognised stock exchange;

(b) restrain persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities;

(c) suspend any office-bearer of any stock exchange or self-regulatory organisation from holding such position;

(d) impound and retain the proceeds or securities in respect of any transaction which is under investigation;

(e) attach, for a period not exceeding ninety days, bank accounts or other property of any intermediary or any person associated with the securities market in any manner involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder:

Provided that the Board shall, within ninety days of the said attachment, obtain confirmation of the said attachment from the Special Court, established under section 26A, having jurisdiction and on such confirmation, such attachment shall continue during the pendency of the aforesaid proceedings and on conclusion of the said proceedings, the provisions of section 28A shall apply:

Provided further that only property, bank account or accounts or any transaction entered therein, so far as it relates to the proceeds actually involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder shall be allowed to be attached;

(f) direct any intermediary or any person associated with the securities market in any manner not to dispose of or alienate an asset forming part of any transaction

which is under investigation:

Provided that the Board may, without prejudice to the provisions contained in sub-section (2) or sub-section (2A), take any of the measures specified in clause (d) or clause (e) or clause (f), in respect of any listed public company or a public company (not being intermediaries referred to in section 12) which intends to get its securities listed on any recognised stock exchange where the Board has reasonable grounds to believe that such company has been indulging in insider trading or fraudulent and unfair trade practices relating to securities market:

Provided further that the Board shall, either before or after passing such orders, give an opportunity of hearing to such intermediaries or persons concerned.

(4A) Without prejudice to the provisions contained in sub-sections (1), (2), (2A), (3) and (4), section 11B and section 15-I, the Board may, by an order, for reasons to be recorded in writing, levy penalty under sections 15A, 15B, 15C, 15D, 15E, 15EA, 15EB, 15F, 15G, 15H, 15HA and 15HB after holding an inquiry in the prescribed manner.

(5) The amount disgorged, pursuant to a direction issued, under section 11B of this Act or section 12A of the Securities Contracts (Regulation) Act, 1956 or section 19 of the Depositories Act, 1996, or under a settlement made under section 15JB or section 23JA of the Securities Contracts (Regulation) Act, 1956 or section 19-IA of the Depositories Act, 1996, as the case may be, shall be credited to the Investor Protection and Education Fund established by the Board and such amount shall be utilised by the Board in accordance with the regulations made under this Act."

19. A perusal of the aforesaid would indicate that the main function of SEBI is to regulate the business in the stock exchanges and other securities market and to regulate the working of the stock brokers, sub brokers, share transfer agents, intermediaries, depositories, custodian of securities etc. Merely because SEBI exercises quasi-judicial power in a limited form and in a limited way does not mean that it has the trappings of a court. In any case, trappings of a court is only one of the features of a Tribunal/Court and exercising limited judicial power does not make the authority a full-fledged Court or a Tribunal. One should keep in mind that a Tribunal is vested with judicial powers of the State which SEBI lacks. Further, the main function of a Tribunal is to adjudicate the disputes between the parties and, on the other hand SEBI's main function is not to adjudicate disputes between the parties.

20. Thus, the decisions cited by the learned senior counsel for the appellant are totally distinguishable and are not applicable to the facts and circumstances of the case.

21. Reliance was also placed on a decision of this Tribunal in the case of Deewan Housing Finance Corporation Ltd. vs. SEBI, 2020 SCC Online SAT 162. That was a decision under section 14 of the IBC which is totally different and

distinguishable from the provisions of sections 241 and 242 of the Companies Act.

22. The interim order dated 15th October, 2018 passed by NCLAT was passed in order to avoid multiple proceedings initiated by the shareholders and creditors and to restrict such persons from taking any debt recovery action under sections 241 and 242 of the Companies Act and, therefore, the said interim order is only confined to the mismanagement of the Company vis-a-vis its shareholders and creditors. The interim order cannot be extended to cover the regulatory authorities. In view of the aforesaid, we do not find any error in the impugned order. The appeal fails and is dismissed with no order as to costs.

23. The present matter was heard through video conference due to Covid-19 pandemic. At this stage it is not possible to sign a copy of this order nor a certified copy of this order could be issued by the registry. In these circumstances, this order will be digitally signed by the Private Secretary on behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Parties will act on production of a digitally signed copy sent by fax and/or email.