
(2000) 07 BOM CK 0036

In the Bombay High Court

Case No : Notice of Motion No. 1957 of 2000 in Suit No. 2737 of 2000

Indo Shares and Fintrade Ltd.

APPELLANT

Vs

The Stock Exchange and Another

RESPONDENT

Date of Decision : 26-07-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : (2000) 4 ALLMR 217 : (2001) 1 BomCR 186

Hon'ble Judges : S.S. Nijjar, J

Bench : Single Bench

Advocate : M.M. Vashi and S. Wasudeo, for the Appellant; G. Vahanvati and P.N. Mody, Nihar Mody and Sagar Divekar, instructed by Wadia Ghandy and Co., for Defendant No. 1 and D.H. Mehta, instructed by Amit Seth, for Defendant No. 2, for the Respondent

Judgement

S.S. Nijjar, J.—The plaintiff has filed this suit for a declaration to the effect that the action of the first defendant in calling upon the plaintiff to make an early pay in of 2,90,764 shares of Vakarangee Software Ltd., hereinafter referred to as VSL, withholding plaintiff's margin money of Rs. 43,11,662/-, withholding of the BASE capital of Rs. 25 lakhs, not paying out the shares and securities for which the plaintiff has already made payments on behalf of its clients in Vallan Nos. 13 and 12 of 2000-2001, is totally bad and illegal. A further declaration is sought that the action of the first defendant of auctioning the aforesaid shares is totally bad and illegal. A declaration is also sought to the effect that the decision of the first defendant declaring the plaintiff a defaulter through letter dated 6th July, 2000 is bad and illegal. Directions are sought for refund of the amounts illegally detained by the first defendant.

2. This Notice of Motion has been taken out for interim reliefs. By prayer clause (a) a direction is sought to the first defendant to reactivate the plaintiff's bolt, pay out the shares and securities for which the plaintiff has already made payments and generally permit the plaintiff to carry on its business as a main

broker of the first defendant. Plaintiff also seeks restoration of the Bank Guarantee. Number of other prayers are also made which are in the form of injunctions and directions to the first defendant.

3. The plaintiff is a Public Limited Company. The first defendant is the Bombay Stock Exchange (BSE). The second defendant is the client of the plaintiff. The plaintiff is a Member of BSE having membership (clearing) No. 319. Under the Bye-Laws of the Stock Exchange, Mumbai, the broker is required to pay-in-shares (in case of sale of shares) and pay out the shares (in case of purchase of shares). In case the broker is unable to give delivery or take delivery of shares against payment the broker is responsible for the price of shares remaining undelivered or unpaid. It is the case of the plaintiff that he has never defaulted in making pay-in of shares or money. The plaintiff further claims to have cleared all his liabilities till 20th June, 2000. He further claims to have a credit balance on 29th June, 2000 of Rs. 27,33,045.64 with the BSE. The plaint was originally filed on 3rd July, 2000. In view of the order passed on 6th July, 2000 the plaint was amended and the order declaring the plaintiff as defaulter has also been challenged.

4. It is stated in the plaint that the plaintiff has sold 2,90,764 shares of VSL on behalf of the second defendant under Rolling Settlement Nos. 61 to 63, through a sub-broker viz. M/s. J.B. Shares & Stocks Ltd., hereinafter referred to as "the sub broker". In paragraph 7 of the plaint, it is mentioned that " it may be pointed out here that the plaintiff's sub broker had sold 1,50,000 shares of VSL in the open market after having received them from its owner viz. Mr. Prem Meiwal along with signed transfer form and a covering letter dated 4th October, 1999". Prem Meiwal has filed a suit in this Court against VSL and had obtained an ad-interim injunction. The sub broker had taken out a Notice of Motion for vacating the injunction. The injunction was vacated by the Single Judge but in Appeal the Division Bench had directed the parties to maintain status quo. It is further stated that a complaint had been lodged with the first defendant and Securities and Exchange Board of India (SEBI) regarding rigging of share prices of VSL. Other complaints were also lodged by investors. After investigations the first defendant has suspended the trading in the shares of VSL with effect from 27th June, 2000. On 27th June, 2000 the first defendant called upon the plaintiff to give details about the name, address of the ultimate client with regard to 2,90,764 shares of VSL. The plaintiff was also directed to make early pay-in of shares of VSL. By a letter of the same day, the plaintiff informed the first defendant that the shares had been sold on behalf of the sub-broker. By a separate letter dated 28th June, 2000 the first defendant was informed that the ultimate client of the first defendant was the second defendant. By letter dated 28th June, 2000 the first defendant informed the plaintiff that the BOLT of the plaintiff has been deactivated at the close of business hours on 27-6-2000. On the same day i.e. 28th June, 2000 the plaintiff called upon the first defendant to inform the plaintiff as to why BOLT had been deactivated. Instead of giving reasons, by letter dated 29th June, 2000 the plaintiff was called upon to explain

as to why the plaintiff has failed to make early pay in of the shares. By letter dated 30th June, 2000, the plaintiff informed the first defendant that the plaintiff's ultimate client was reluctant to give delivery of the shares as the plaintiff's bolt had been de-activated. The second defendant apprehended that the first defendant may withhold the margin money. By letter dated 30th June, 2000 the plaintiff again requested the first defendant to release the Base capital as well as margin money. Instead of returning the margin money and the base capital the first defendant gave a press release in the Economic Times on 30th June, 2000 announcing that the plaintiff's bolt had been deactivated. When all the requests of the plaintiff were denied, the plaintiff filed the present suit and look out the present Notice of Motion.

5. A notice was given of the hearing of the notice of motion on 3rd July, 2000 and that the plaintiff will be moving for ad-interim reliefs before this Court on 4th July, 2000. However, the suit was not numbered till 6th July, 2000. Hence the notice of motion came up for hearing on 7th July, 2000. After hearing the Counsel for the parties, this Court (Das, J.) was prima facie of the opinion that there has been a breach of principles of natural justice. Hence ad-interim relief in terms of prayer Clause (a) was granted which in effect meant that plaintiff was permitted to carry on the business as a main broker of the first defendant. Aggrieved against the aforesaid order, the B.S.E. filed an appeal which was heard on 8th July, 2000. A statement was made on behalf of the plaintiff to the effect that though there is an order passed by the learned Single Judge in his favour on 7th July, 2000, he will not act upon that order. Parties were directed to complete the pleadings. Notice of motion was directed to be placed before the Single Judge on 12th July, 2000. In the meantime the order dated 7th July, 2000 has been passed by defendant No. 1. Hence the plaint has been amended in pursuance of the orders passed by this Court on 14th July, 2000.

6. It is the case of the plaintiff that the action of defendant No. 1 as narrated above i.e. deactivating the Bolt, giving of the press release, withholding of the margin money and the base capital is wholly bad and illegal. It is the pleaded case that the responsibility for delivery of shares sold on behalf of second defendant arises after 7 days of the sale. The plaintiff has sold 2,90,764 shares on 3 days i.e. 22nd, 23rd and 26th June, 2000. Thus the responsibility of the plaintiff for delivery of the shares arises only after 29th June, 2000, 30th June, 2000 and 3rd July, 2000. The first defendant had illegally called upon the plaintiff to make an early pay in of the shares without giving any reasons. It is stated that the decision is mala fide and taken for ulterior motives. It is further stated that the first defendant is acting illegally at the behest of V.S.L. It is further pleaded that the plaintiff has a large number of clients who are buying and selling shares through him. As the plaintiff's BOLT is deactivated, 8 terminals given under the said bolt are also deactivated. To make matters worse, the press release in the Economic Times has caused a great deal of damage to the reputation of the plaintiff. It is further pleaded that the plaintiff is suffering a loss of Rs. 50,000/- per day on account of the bolt being deactivated. Thus damages

are increasing day by day. By amendment certain another set of facts have been brought on the record which may now be noticed.

7. The first defendant had auctioned 2,90,764 shares, the details of which are as under.

The plaintiff had informed the first defendant by his letters dated 30th June, 2000 and 3rd July, 2000 that defendant No. 2 is ready and willing to give delivery of the shares provided the share prices are paid over by the first defendant to the second defendant. Again by letters dated 4th July, 2000 and 5th July, 2000 the plaintiff expressed his willingness to pay in any other amount other than the difference in the auction price and the sale price of 2,90,764 shares. It is also pleaded that the order declaring the plaintiff a defaulter passed on 6th July, 2000 was served on the plaintiff at its office on 7th July, 2000 at 11.00 a.m. This was the time when the plaintiff was in Court seeking interim reliefs in the present suit.

8. A reply has been filed to the notice of motion by the Assistant General Manager of defendant No. 1. In this reply a preliminary objection is taken to the effect that the plaintiff is guilty of knowingly and wilfully making false statements in the plaint and suppressing material facts with a view to mislead this Court. It is stated that in paragraph 5 the plaintiff has falsely stated that "so far the plaintiff company has never defaulted in making the pay in of shares or money". The plaintiff, according to the first defendant, has made repeated defaults in delivery of shares. These repeated defaults along with other facts have resulted in the plaintiff's bolt being de-activated. It is further stated that the plaintiff has falsely stated that ""there is a credit balance of Rs. 27,33,045.64 in favour of the plaintiff (in the plaintiff's valan account"". It is stated that it is to the knowledge of the plaintiff that the credit entries are made on account of shares sold and expected to be delivered (but not delivered) by the plaintiff. Therefore, this is merely a temporary credit entry which has been given only because of the accounting system adopted by the B.S.E. This is stated to be a mere entry which would be reversed as the shares were not delivered, within the next 2-3 days time. Thus this is not a sum to which the plaintiff is really entitled. It is stated that the plaintiff has totally suppressed the facts of the meeting held between the plaintiff and the B.S.E. officials in the evening on June 27, 2000 when the plaintiff was given notice of the proposed deactivation of his bolt and was informed of the reasons therefore. He was given an opportunity to have his say and also to avoid the temporary deactivation by agreeing not to sell and default in delivery of any further shares of V.S.L. He was asked to secure the outstanding exposures. The affidavit thereafter goes on to set out the details of the meetings and the events which ultimately prompted the B.S.E. to deactivate the bolt. The details of the sale of shares and the alleged defaults committed are given in a table which has been handed in at the time of the hearing. Learned Counsel are agreed that the table may be reproduced which is as under :

It is, therefore, pleaded that the action of defendant No. 1 is perfectly legal and

has been taken after complying with the rules of natural justice. Faced with this situation, the plaintiff filed a rejoinder. Plaintiff denies that there is suppression of any material facts. It is accepted that the entry relied upon by the plaintiff showing credit of the Valan Account in the sum of Rs. 27,33,045.64 is on account of shares sold and expected to be delivered and is a temporary credit. It is however stated that it would be reversed only if the delivery of shares was not given. Since the second defendant has refused to give delivery of shares due to the illegal acts of the first defendant the reversal entry could not be made. Therefore no fault can be found with the behaviour of the plaintiff. The plaintiff reiterates that no meeting had taken place between the officials of the first defendant and the plaintiff in the evening of 27th June, 2000. It is denied that the plaintiff was given notice of the proposed deactivation of the bolt or that the plaintiff was informed the reasons. It is also denied that any opportunity was ever given to the plaintiff to rectify the situation. Thereafter the case of the plaintiff has been reiterated. In the rejoinder the plaintiff has denied even the meeting which was held on 6th July, 2000.

9. Now that the meeting dated 27th June, 2000 has been emphatically denied by the plaintiff. 5 separate affidavits have been filed by B.S.E. officials to clarify the situation. The executive director Mr. A.N. Joshi has emphatically stated that he was personally present at the meeting/hearing held on 6th July, 2000 with the plaintiff's director. It is stated that Mr. Jasmin B. Shah, Director of the plaintiff, attended the meeting/hearing on behalf of the plaintiff. The executive director, however, does not mention anything about the meeting dated 27th June, 2000 nor has he stated that he was present in the said meeting. An affidavit has been filed by Mr. Srichand T. Gerela, Chief Executive Officer of the defendant No. 1 in which the details are set out with regard to the meeting on 27th June, 2000. It is stated that he had personally telephoned the plaintiff's office. The person who had attended the telephone was directed to inform the plaintiff that he should attend the office of the C.E.O. It is stated that in response to the telephone call the plaintiff attended. It is further pointed out that Jasmin B. Shah directly held 66.6% shares in the plaintiff's company and indirectly held 33.3% of the issued share capital through J.B. Share and Stocking Broking Limited, defendant No. 2 herein. Thus J.B. Shah is said to be the person solely in control of the plaintiff as well as the sub-broker. Thereafter details of the discussions which took place are set out. These are not necessary for the decision of the notice of motion at this stage.

10. Mr. Vashi has submitted that the various requests made by the plaintiff for supply of reasons to the defendants were never acceded to. On the other hand it is submitted by Mr. Vahanvati that the whole story put forward by the plaintiff is concocted. He knew perfectly well as to why the bolt had been deactivated. He had been in default in particular with regard to the shares of V.S.L. since 20th June, 2000. Prima facie, looking at the table which has been reproduced hereinabove, I am of the considered opinion that it would not be possible at this stage to disregard the case which has been put forward by defendant No. 1. On

each transaction since 20-6-2000 there was non-delivery of the shares. Auction of shares had to be held on numerous occasions. On 26-6-2000 the plaintiff sold 217,334 shares. It was this sale that created panic. Hence the plaintiff was asked to desist from dealing in V.S.L. shares. But he persisted in his right to continue trading, even in the meeting dated 27-6-2000. Taking an overall prima facie view, I am of the opinion that there has been sufficient compliance with the rules of natural justice. Final decision on this point can only be rendered when the entire evidence has been led. At this prima facie stage it has to be seen as to whether or not there has been a plain and obvious breach of rules of natural justice. Facts which have been narrated above clearly indicate that there is a failure on the part of the plaintiff to make delivery of the shares. It is also accepted by all the parties, as a matter of law, that under the bye-laws the Bombay Stock Exchange recognise trading/dealings only between the members. It is not relevant as to who the ultimate client is. If the ultimate client defaults in delivery of the shares or in making payment of the money it would be the responsibility of the stock broker. This position is set out quite clearly in Bye-law 191 of the Rules, Bye-laws and Regulations of the Stock Exchange, Mumbai, 1957. Under this bye-law it is categorically provided that the Exchange does not recognise parties to any bargain in the market, any parties other than its own members. This bye-law further provides that every member is directly and primarily liable to every other member with whom he effects a bargain for its due fulfilment in accordance with the Rules, Bye-laws and Regulations of the exchange whether such bargain be for account of the member or for account of a principal. Bye-law 192 is in a mandatory form and provides that all bargains in securities in which dealings are permitted shall in all cases be deemed made subject to the Rules, Bye-laws and Regulations. In fact the Rules and Bye-laws are incorporated into the bargain by virtue of Bye-law No. 192. Apart from this, the case put forward by the defendants cannot at this stage be disbelieved. It is prima facie apparent that the plaintiff has been indulging in non-delivery since 20th June, 2000 till the deactivation of the bolt. Yet the impression which is given in the plaint is that the action has been taken only on the basis of the non-delivery of the shares with regard to rolling settlement Nos. 61 to 63. An impression is also sought to be given that the plaintiff had never defaulted before that. But a perusal of the table which has been reproduced above, prima facie, goes to show that defaults have been committed by the plaintiff even prior to the latest default which led to deactivation of the bolt. I am also prima facie satisfied that the plaintiff has tried to play hide and seek with the Court. In the plaint it is nowhere disclosed that there was a meeting between the plaintiff and the officers of the defendants. Yet, 5 responsible officers of the B.S.E. have sworn affidavits to the effect that meetings did take place on 27th June, 2000 and on 6th July, 2000. Whether or not there is actual suppression of material facts can only be determined on the basis of the evidence led. This is not such a case where the plaintiff has been so clearly denied opportunity of hearing that the Court would be justified in granting the equitable relief which is prayed for, at this interim stage. Furthermore, at this stage it has to be seen that it is the private interest

of the plaintiff which has to be weighed against the general public interest. It has been painstakingly set out in the affidavits as to how the continuous defaults committed by the plaintiff have led the officials of the B.S.E. into a panic situation. Even prior to taking any action of temporarily deactivating the bolt of the plaintiff he was called upon remedy the situation but he has steadfastly stuck to the demand that B.S.E. should first release the payment for the shares and only then the delivery of the shares can be made. Whenever defaults are committed the primary losers are the general investors. The public interest when weighed against private interest always has to take precedence. I do not see much force in the submissions of Mr. Vashi to the effect that the decision has been taken arbitrarily or capriciously. It is to be seen that the Executive Director of B.S.E. is not even permitted to be a member of the Stock Exchange under Rule 98 of the Rules. If at the time of appointment he is already a member, he is required to resign from membership forthwith. Subject to overall management by the Governing body, the Executive Director is vested with executive powers to run the day to day administration of the exchange and to enforce the Bye-laws, Rules and Regulations. Therefore, it cannot be said that the decision has been taken by the B.S.E. against the provisions of bye-laws. Apart from one averment, in one of the paragraphs of the plaint that the decision is mala fide, no details are given whatsoever in the plaint as to why any of the officers of B.S.E. would hold a grudge against the plaintiff. It is a settled proposition of law that allegations of mala fide have to be proved beyond reasonable doubt. For an action to be held mala fide, meticulous pleadings are required along with the particulars of the mala fides.

11. Faced with this situation in rejoinder Mr. Vashi had argued that even if it is accepted that a meeting did take place, the Executive Director never participated. Since emergency powers of deactivation could only have been exercised by the Executive Director the decision to deactivate is against the provisions of the bye-laws and the rules. This submission of Mr. Vashi may have had some significance had deactivation of the BOLT not been superseded by subsequent events. According to the defendants, a decision has been taken by the competent authority to declare the plaintiff a defaulter on 6-7-2000. The plaintiff has challenged the decision in this suit. It is permissible for the plaintiff to make an application for being re-admitted after satisfying the B.S.E. under the Rules and Regulations.

12. Keeping this in view, this Court had given an opportunity to the plaintiff to approach the B.S.E. to see if some settlement could be reached. In fairness to Mr. Vashi, it has to be stated that all efforts had been made to reach a settlement. Unfortunately once a person is declared a defaulter even on re-admission by virtue of Rule 62(b) the defaulter is not permitted to have direct trade on the B.S.E. for a period of 2 years. Prima facie, there seems to be no provision also under the bye law for the waiver of the condition. In such circumstances it would not be possible to grant relief at this stage in the notice of motion which cannot be granted by the B.S.E. itself. This apart, no irreparable

loss is being caused to the plaintiff, as the bar is only on the plaintiff directly trading on the exchange. Any loss suffered can be compensated by award of damages. As noticed earlier, public interest must always prevail over the private interest of a litigant. Otherwise also to grant the relief in terms of prayer clause (a) would be virtually granting the final relief in the suit.

13. Keeping all the aforesaid facts and circumstances in view, I find no merit in the notice of motion. The same is dismissed.

Certified copy expedited.

Notice of Motion dismissed.