
(2010) 04 DEL CK 0018

In the Delhi High Court

Case No : Writ Petition (C) 7976 of 2007 and CM Appl No. 15084/07

Kimsuk Krishna Sinha

APPELLANT

Vs

Securities and Exchange Board of India and Others

RESPONDENT

Date of Decision : 09-04-2010

Acts Referred:

Companies Act, 1956 — Section 247, 55A, 55A(1), 62, 63
Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 482
Penal Code, 1860 (IPC) — Section 420
Securities and Exchange Board of India Act, 1992 — Section 11, 11A, 26

Citation : (2010) 155 CompCas 295 : (2010) 100 SCL 197

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Amit Sibal, Priyanka Kalra and Vinay Tripathi, for the Appellant; Neeraj Malhotra, for R-1, Rattan Lai, Legal Officer, Ranjana Roy Gawai, Shailesh Suman and Rajiv Kumar Jain for R-2 and U.K. Chaudhary and Mandeep Kaur, for R-3, 4 and 5, for the Respondent

Judgement

S. Muralidhar, J.—The Petitioner seeks a writ of mandamus to Respondent No. 1 Securities and Exchange Board of India ("SEBI") constituted under the Securities and Exchange Board of India Act 1992 ("SEBI Act") to investigate the affairs of Respondent Nos. 3 DLF Limited and Respondent No. 4 "DLF Group" respectively.

2. According to the Petitioner, he entered into business transactions with Respondent No. 2 Sudipti Estates Pvt. Limited ("SEPL") in the year 2006. At that point in time SEPL was controlled by two promoter companies namely DLF Home Developers Limited ("DHDL") and DLF Real Estate Developers Limited ("DREDL"), both of whom were wholly owned subsidiaries of DLF Limited. SEPL is stated to have been incorporated on 24th March 2006. The promoter companies are stated to be a part of the DLF Group of which the flagship company is DLF Limited, Respondent No. 3.

3. It appears that in connection with its proposed public issue, the DLF Limited

filed a Draft Red Herring Prospectus ("DRHP") with the SEBI on 12th May 2006. In the said DRHP it was indicated that SEPL was one of the joint ventures of DLF Ltd. However, the said DRHP was subsequently withdrawn by the merchant bankers of DLF Limited and a fresh DRHP was submitted on 2nd January 2007 in which SEPL was not mentioned as being associated with DLF Limited. It is stated that the merchant bankers of DLF Limited explained to SEBI that the shares of SEPL which had been held by DHDL and DREDL, the wholly owned subsidiaries of DLF Limited, had been sold in 2006. Thus, SEPL ceased to be an associate company of DLF Limited by the time the revised DRHP was filed in January 2007. Even in the final Red Herring Prospectus ("RHP") submitted by DLF Limited on 25th May 2007, the name of SEPL did not figure. Thereafter, the issue opened, shares were subscribed and the issue was closed.

4. According to the Petitioner DLF Limited and SEPL "ensnared and cheated" him of a sum of Rs. 31.09 crores towards sale proceeds of certain lands. An FIR was got registered at the instance of the Petitioner against SEPL on 26th April 2007. The Petitioner addressed a letter on 4th June 2007 to SEBI in this regard. According to the Petitioner, he was dismayed by the response of SEBI dated 25th June 2007 in which it was stated that his letter had been forwarded to SEPL and DLF Limited for their response. The DLF Limited by its letter dated 11th July 2007 addressed to the Petitioner denied the allegations and claimed that it had no connection with SEPL as on that date.

5. It may be mentioned here that FIR No. 249 of 2007 u/s 420 IPC was registered on 26th April 2007 at Police Station Connaught Place, New Delhi at the instance of the Petitioner against SEPL. It was investigated by the police and a closure report was filed. The Petitioner states that he has thereafter filed a private complaint which is now pending before the concerned criminal court. Also, he has challenged the filing of the closure report by a petition in this Court u/s 482 CrPC.

6. In an additional affidavit dated 18th December 2007 the Petitioner referred to Clause 6.11.1.1 of the SEBI (Disclosure and Investor Protection) Guidelines 2000 ["SEBI (DIP) Guidelines"] which requires disclosure of "outstanding litigation involving the issuer company". The Petitioner contends that by the date of the RHP, i.e. 25th May 2007, an FIR stood registered against SEPL, which was a constituent of the DLF Group. The alleged sale of the entire shareholding of DHDL and DREDL in SEPL was a sham transaction hurriedly executed only to avoid disclosure of the pending litigation involving SEPL in the RHP.

7. In counter affidavit dated 11th July 2008 filed on behalf of the SEBI a preliminary objection was taken that the Petitioner is not an investor in the securities market and therefore, has no locus standi to file this petition. It was contended that SEPL is an unlisted company and therefore, is not amenable to the SEBI regulations and guidelines. It is pointed out that the alleged misstatement in the prospectus is not a matter which is covered by Section 55A of the Companies Act 1956 ("Companies Act"). It is stated that the DRHP filed by

the Respondent No. 3 DLF Limited was made public for a period of 21 days from 2nd January 2007. In terms of Clause 5.6.1 of the SEBI Guidelines complaints/ comments, if any, had to be filed during the said period of 21 days. The Petitioner did not make any complaint during that period. Thereafter, the SEBI issued its observation on the DRHP on 7th May 2007 and the RHP dealing with the observations was filed by DLF Ltd. with the Registrar of Companies (ROC) on 30th May 2007. It is stated that the Petitioner's complaint dated 4th June 2007 was received only thereafter on 15th June 2007 by the SEBI. Since as on the date of DRHP, i.e. 2nd January 2007, on the basis of the information available with the SEBI, SEPL was not a subsidiary of the Respondent No. 3 DLF Limited or associated with it in any manner, there was no occasion for the SEBI to take action to prevent the public issue.

8. In para 22 of its counter affidavit dated 11th July 2008, the SEBI stated as under:

22. In any eventuality, the answering Respondent had vide letter dated 25th June 2007 sought the comments from the Merchant Bankers/Lead Managers of the public issue brought out by Respondent No. 3. The concerned Merchant Bankers vide reply dated 12th July 2007 had clarified that Respondent No. 3 had replied to the Merchant Bankers stating that Respondent No. 3 or its subsidiaries had as on that date no connection with Respondent No. 2 in terms of the information received by the answering Respondent, the shares of Respondent No. 2 which were held by wholly owned subsidiaries of Respondent No. 3 were sold in November 2006 and hence it ceased to be an associate company of Respondent No. 3. Consequently, it was not disclosed as an associate company of Respondent No. 3 in the Draft Red Herring Prospectus filed on 02.01.2007 and also the Red Herring Prospectus brought out by Respondent No. 3 on 25.05.2007.

9. The Petitioner's case is that the fact of the FIR having been registered against SEPL ought to have been disclosed by DLF Limited in the DRHP filed by it on 2nd January 2007. It is further asserted that SEPL continues to be held and controlled indirectly by DLF Limited. An additional affidavit was filed by the Petitioner on 19th September 2008 stating that it subsequently transpired that the two subsidiary companies of DLF Limited, DHDL and DREDL had sold their 100% shareholding in SEPL on 30th November 2006 to M/s. Shalika Estate Developers (P) Limited ("Shalika"), 100% of which is owned by DLF Ltd. through DHDL, DLF Retail Developers Ltd. (DRDL) and DLF Estates Developers Ltd. (DEDL). Further the 100% shareholding in Shalika held by the aforementioned three DLF Group companies was transferred to M/s. Felicite Builders & Construction (P) Limited ("Felicite") on that very date. The shareholding of Felicite, which was held by DRDL, DHDL and DEDL, was sold on 30th November 2006 to the spouses of the Senior Executives of DLF Limited. These facts emerged when Felicite filed its annual return and balance sheet on 10th April 2008 and 8th April 2008 respectively in the office of the ROC. Accordingly, it is submitted that the DLF Ltd still in effect controls SEPL.

10. In response to the preliminary objection raised by SEBI that there was no provision under the SEBI Act for any complaint to be entertained concerning the misstatement made in the prospectus, Mr. Amit Sibal, learned Counsel for the Petitioner, referred to Section 55A(1) of the Companies Act which requires the SEBI to deal with matters concerning the issue of securities and misstatement in the prospectus issued prior to a public issue of shares. In addition a reference is made to Section 11B of the SEBI Act which vests the SEBI with power to make an inquiry and issue directions to any company in respect of matters specified in Section 11-A of the SEBI Act. Mr. Sibal submits that this has to be read along with the SEBI Guidelines. In particular a reference is drawn to Clause 6.10.3.3 which requires disclosure of reasons if the promoters cease to be associated with any of the companies or firms during the preceding three years. A reference is made to Clause 6.11.1.3 concerning outstanding litigation involving the promoter and group companies. Emphasising the mandatory nature of the above provisions, Mr. Sibal relies on the judgment of the Supreme Court in Securities & Exchange Board of India v. Ajay Agarwal 2010 (2) SCALE 680.

11. Appearing on behalf of the SEBI Mr. Neeraj Malhotra, learned Counsel submitted that the SEBI acted on the basis of the information given by the merchant bankers of Respondent No. 3 and the decision taken by the SEBI was in the circumstances a reasonable one which did not call for interference by this Court under Article 226 of the Constitution. He nevertheless on instructions stated that the SEBI was empowered in terms of Sections 62 and 63 of the Companies Act read with Section 55A thereof to initiate action in respect of a misstatement in a prospectus.

12. Mr. U.K. Chaudhary, learned Senior counsel appearing for the Respondent No. 3 first submitted that the case about the misstatement in the prospectus was not made out by the Petitioner in his complaint dated 4th June 2007 and 19th July 2007 to the SEBI. According to him, u/s 55A of the Companies Act the scope of the enquiry by the SEBI will not include investigating the transfer of shares between one set of shareholders and another. It is submitted that the companies whose shares were transferred are not within the ambit of the SEBI. The transactions did not involve the shares by the DLF Limited. He further submitted that investigation into the ownership of companies can be undertaken, if at all, only by the Central Government in terms of Section 247 of the Companies Act. He submitted that the Petitioner was an extortionist and since he could not recover any amount from SEPL Respondent No. 2, he was seeking to proceed against Respondent No. 3 and was using this litigation for collateral purposes. He submits that the present petition is an abuse of process of law. He further submitted that despite knowing that the DRHP filed by the Respondent No. 3 in May 2006 was withdrawn by it, this fact was not mentioned in the writ petition. It was further submitted that the aforesaid FIR had been investigated and a closure report had been filed which itself showed that in any event not even a prima facie case has been made out by the Petitioner. In the meanwhile, a suit for recovery had been filed against Respondent No. 2. In the circumstances, the

present proceedings were an abuse of the process of law.

13. In rejoinder, Mr. Sibal points out that the facts are really not in dispute. The transfer of shares of DHDL and DREDL in SEPL to DLF controlled companies, first to Shalika and then the shareholding in Shalika to Felicite is not denied. The further transfer of the shareholding of DITDL, DEDL and DRDL in Felicite to the spouses of the Senior Executives of DLF Limited is also not denied. It is obvious therefore that these transactions were entered into only to avoid disclosure in the DRHP of the pending litigation involving the Petitioner and Respondent No. 2 SEPL. It is submitted that these facts were themselves enough for the SEBI to exercise statutory powers. If SEBI was itself not empowered to investigate into the ownership of the shares of the above companies, it could write to the Central Government to activate its powers u/s 247 of the Companies Act. Mr. Sibal points out that given the fact that its primary business of DLF Ltd. is real estate and it actually holds only 0.5% of its land reserves, it is obvious that the remaining lands are held by it indirectly through its subsidiaries and other entities over which it has a de facto control. It was, therefore, important for SEBI to investigate the case thoroughly to expose the real nature of these transactions. He further points out that there has been no change in the SEBI Guidelines between the time when the merchant bankers wrote to the SEBI and the present date. Therefore, the SEBI was bound to comply with those guidelines to examine the complaint. There was nothing to show that the Petitioner's complaint was received by SEBI only on 15th June 2007. There was no suppression of facts since the Petitioner had enclosed the replies sent to the Petitioner by the DLF Limited in which it was disclosed that earlier DRHP made in 2006 was withdrawn. Drawing attention to Section 26 of the SEBI Act, it is pointed out that it was the sole preserve of the SEBI to investigate into the matters concerning issues of shares.

14. The above submissions have been considered by this Court. The fact that the Respondent No. 3 filed a DRHP initially on 12th May 2006 in which it showed SEPL to be an associate company is not in dispute. What is also not denied is that at the relevant point in time the entire shareholding of SEPL was held by two promoter companies DHDL and DRDL both of which are subsidiaries of DLF Ltd. It is also not denied that Respondent No. 2 SEPL did enter into business transactions with the Petitioner in 2006. Between 12th May 2006 when DLF Ltd. filed its first DRHP with SEBI and 2nd January 2007 when it filed a revised DRHP the significant change that occurred was that DHDL and DRDL ceased to hold shares in SEPL.

15. There is also no denial of the facts stated the additional affidavit dated 19th September 2008 filed by the Petitioner. The said additional affidavit details the manner in which on 30th November 2006 the 100% shareholding of the two subsidiary companies of DLF Limited, DHDL and DREDL, in SEPL were transferred first to Shalika. Thereafter the shareholding in Shalika was transferred to Felicite on the same day. Thereafter the entire shareholding of DRDL, DHDL and DEDL in

Felicite was sold to the spouses of the Senior Executives of DLF Limited. These facts were available to the Petitioner subsequently when it accessed the records of the ROC.

16. From the counter affidavit dated 11th July 2008 filed by the SEBI it is plain that it went entirely by the reply dated 12th July 2007 of the merchant bankers stating that on that date the Respondent No. 3 had no connection with SEPL. Further in reply to the additional affidavit dated 19th September 2008 of the Petitioner, the SEBI has stated:

As regards the additional affidavit filed by the Petitioner dated 10.09.2008 it is stated that since the names of some group companies were not included in the Red Herring Prospectus (RHP) dated 25.05.2007 of Respondent No. 3 as its associate companies, the matter was taken up by the answering respondent with the merchant bankers to the public issue of Respondent No. 3 vide the answering respondents letter dated 14.10.2008 (Copy of letter dated 14.10.2008 is annexed herewith as Annexure R1). The merchant banker through its letter dated 11.12.2008 (Copy of letter dated 11.12.2008 is annexed herewith as Annexure R2) stated that the companies, whose names had not been disclosed in the RHP and which are also mentioned in additional affidavit filed by the Petitioner, had ceased to be associated with Respondent No. 3 (DLF Limited) on the date of filing of the RHP i.e. 25.05.2007 on account of (a) transfer of shareholding and (b) reduction in percentage of shares held on account of further allotment.

17. The letter dated 11th December 2008 addressed by the merchant bankers to SEBI in regard to shareholding of Respondent No. 3 confirms that Shalika ceased to be an associate company of DLF Ltd. with effect from 30th November 2006 and Felicite ceased to be an associate company of DLF Ltd. with effect from 29th November 2006. This by itself should have altered the SEBI in terms of Clause 6.10.3.3 of the SEBI (DIP) Guidelines which reads as under:

6.10.3.3 If the promoters have disassociated themselves from any of the companies/firms during preceding three years, the reasons therefore and the circumstances leading to the disassociation shall be furnished together with the terms of such disassociation.

It hardly needs to be stated that the SEBI (DIP) Guidelines are relatable to Sections 11 and 11A of the SEBI Act and are of statutory character. They are enforceable as such.

18. Obviously, SEBI did not have the complete facts before it when it first dealt with the Petitioner's complaint. However, after the above letter dated 11th December 2008 from the merchant bankers of DLF Ltd. SEBI cannot be heard to say that it was not aware of the facts relevant for putting it on enquiry. Since the earlier decision of the SEBI not to take any action on the Petitioner's complaint was based on the response of the merchant bankers of DLF Ltd. received at that point in time, the SEBI was now under a statutory obligation in terms of Section 55A of the Companies Act to take further action on the basis of the facts that

emerged subsequently in the letter dated 11th December 2008 of the merchant bankers of Respondent No. 3.

19. This Court is unable to agree with the submissions made on behalf of the Respondent No. 3 that the expression "issue and transfer of securities and non-payment of dividend" in Section 55A of the Companies Act does not cover misstatement in the prospectus. Section 55A reads as under:

55A Powers of Securities and Exchange Board of India - The provisions contained in Sections 55 - 58, 59 - 84, 108, 109, 110, 112, 113, 116, 117, 118, 119, 120, 121, 1122, 206, 206A and 207, so far as they relate to issue and transfer of securities and non-payment of dividend shall, -

(a) in case of listed public companies;

(b) in case of those public companies which intend to get their securities listed on any recognized stock exchange in India. be administered by the Securities and Exchange Board of India; and

(c) in any other case, be administered by the Central Government.

Explanation - For removal of doubts, it is hereby declared that the powers relating to all other matters including the matters relating to prospectus, statement in lieu of prospectus, return of allotment, issue of shares and redemption of re-redeemable preference shares shall be exercised by the Central Government, (Tribunal) or the Registrar of Companies as the case may be.

20. The above provision includes the provision makes a reference to Section 62 which talks of civil liability for misstatement in prospectus and Section 63 which talks of criminal liability for misstatement in prospectus. While enforcing the civil liability for any loss or damage u/s 62 may be restricted to persons who subscribed for shares on the faith of the prospectus, Section 63 can be set in motion by any person including SEBI. The purpose of inserting Section 55A in the Companies Act was to empower the SEBI to take both corrective and preventive action. This is perhaps because as a regulatory body SEBI gets to see the draft prospectus preceding a public issue by a company even before the public gets to see the RHP. SEBI is enabled and empowered to examine the DRHP and insist on complete and truthful disclosure of all relevant facts therein. The very purpose of having an independent regulatory authority like SEBI, and vesting it with statutory powers of inquiry, is to enable it to take prompt action in matters relating to issue and transfer of shares. Particularly, SEBI is expected to be the sentinel, read the fine print of prospectuses keeping the investors' interests in view. It has both a preventive and corrective role to perform. Therefore, it is not possible to place a narrow interpretation on the words "issue and transfer of securities" occurring in Section 55-A of the Companies Act. Given the object and purpose of the provision, it should be broadly construed. In any event, the word "securities" is defined u/s 2(h)(i) of the Securities Contracts (Regulation) Act 1956 to include shares.

21. In the instant case, even if it is assumed that the petitioner's complaint was received by SEBI only on 15th June 2007 i.e. one day after the closure of the public issue, it need not have prevented SEBI from taking action thereafter if on an enquiry into the complaint it was revealed that there had been a misstatement in the prospectus. In other words merely because the public issue was closed, SEBI could not be relieved of its statutory duty to conduct an enquiry into the complaint and into the veracity of the statements made in the prospectus (RHP). There are enough powers vested in it under the SEBI Act for this purpose. Illustratively this would include Sections 11 and 11-B of the SEBI Act. In *SEBI v. Ajay Agarwal* (supra) the Supreme Court noted that the SEBI Act "is pre-eminently a social welfare legislation seeking to protect the interests of common men who are small investors". This Court would like to add that the SEBI Act expects SEBI to act as an institution accountable to the investor public and be both accessible and responsive to complaints. In the instant case, as the facts reveal, SEBI was inexplicably slow in reacting to the Petitioner's complaints. Its subsequent failure to initiate further steps to investigate the transaction in question was also not consistent with its statutory obligation.

22. The Petitioner has enclosed a copy of complaint dated 4th June 2007 addressed to the SEBI in which it was brought out that the shares of SEPL are held by DHDL and DREDL which are "sister concerns and inextricably linked". It was stated that the latter two companies control the entire shareholding of the first mentioned company (i.e. SEPL). It further stated that the aforementioned three companies "are part of the well known DLF Group." Thereafter in paras 5, 6 and 7, it was stated as under:

5. That at the time of writing this, it has been reliably learnt that M/s. DLF Limited is stated to be listed on the Bombay Stock Exchange and an IPO is also in the offing soon.

6. That considering the imperative or safeguarding the interests of the general public it is hereby requested that the listing of M/s. DLF Limited be disallowed.

7. That the need for immediate action cannot be over emphasized given the unwarranted popularity of M/s. DLF Limited and the likelihood of innocent gullible investors being influenced to blindly invest in M/s. DLF Limited oblivious of the criminal conduct of the persons actually controlling that company.

23. In view of the above categorical statements it is not, therefore, possible for this Court to agree with the submission of Mr. Chaudhary that there was nothing set out in the complaint dated 4th June 1997 which should have altered the SEBI to the statements in the DRHP. Interestingly, in reply to the above complaint Respondent No. 3 stated in its letter dated 11th July 2007 that "our company and/or its subsidiaries have, as on date, no connection with M/s. Sudipti Estates Pvt. Limited." Therefore, DLF Ltd. impliedly did not deny that at some point in time prior to that date the situation was that SEPL was an associate of DLF Ltd. In the letter dated 19th July 2007 addressed by the Petitioner to the SEBI, he

referred to DLF's letter dated 11th July 2007 and thereafter stated as under:

Annexed herewith as Annexure A is a copy of the document dated 11th May 2006 submitted by the company in pursuance of its IPO, which unequivocally gives the lie to the claim of the company of not having any association with M/s. Sudipti Estates Pvt. Ltd. The latter Company is listed under the head "Joint Ventures & Associates at No. 268.

24. In view of the above statements by the petitioner in his complaints, it is not possible for this Court to accept the plea of the Respondent No. 3 that there was no allegation in the Petitioner's complaints about any misstatement in the prospectus. The counsel for the petitioner is right in his submission that SEBI can write to the Central Government, if so required, to exercise its powers u/s 247 of the Companies Act to investigate the ownership of the other companies like Shalika and Felicite. The transfer of shares to and by these entities on the same day which has the effect of relieving the DLF Ltd. of any connection with SEPL is a matter that requires investigation.

25. Mr. Chaudhary, learned Senior counsel relies upon the judgment of the learned Single Judge of the Calcutta High Court dated 23rd March 2007 in W.P. No. 3718 (W) of 2007 (Gujarat NRE Coke Limited v. SEBI). A perusal of the said judgment shows that the conclusion reached by that Court was that "no duty is cast either upon the Head Office of SEBI or its Regional Office to investigate into the complaint lodged by the Petitioners" and without any reference to Section 55A of the Companies Act which specifically empowers the SEBI to examine such complaints. In fact, it was observed in the said judgment that "no statutory provision has been brought to the notice of this Court on behalf of the Petitioners which confers a right of lodging complaint of the present kind before the SEBI by a person who feels aggrieved as a consequence of prospectus/offer letter being issued." Further it is stated that "also attention to this Court has not been drawn to any provision of the said Act or the rules framed there under or the guidelines which casts a duty on the SEBI to consider any such complaint that is made by a person or company objecting to issuance of prospectus/offer letter which is not a statutory complaint." Had the attention of the Calcutta High Court been drawn to Section 55A read with Section 63 of the Companies Act, its decision would perhaps have been different. It is also not understood why the attention of that Court was not drawn to the SEBI (DIP) Regulations.

26. Accordingly, a direction is issued to the SEBI to undertake an investigation into the aforementioned complaints made by the Petitioner and also the averments made in the affidavits and additional affidavits filed by the Petitioner in the instant case. The said inquiry will be undertaken in accordance with law by the SEBI and completed within a period of three months from today. The SEBI will communicate to the Petitioner a copy of report of investigation together with its decision thereon within a further period of two weeks thereafter. If it comes to a conclusion that any consequential action is to be taken the SEBI will do so without awaiting further directions.

27. It is clarified that this Court has not pronounced on the merits of the contentions of the parties. The SEBI will proceed in the matter independent of any observations that may have been made by this Court in its previous orders or this order. It will be open to any of the parties, if aggrieved by the decision of the SEBI, to seek appropriate remedies that are available to them in law.

28. The petition and the pending applications are disposed of.