

(2013) 02 MAD CK 0081

In the Madras High Court

Case No : Writ Petition No. 1214 of 2013 and M.P. No's. 1, 2 and 1 of 2013

M/s. Ram Kaashyap Investment Ltd.

APPELLANT

Vs

Securities and Exchange Board of India

RESPONDENT

Date of Decision : 20-02-2013

Acts Referred:

Companies Act, 1956 — Section 10FD

Constitution of India, 1950 — Article 226, 227, 323A, 323B

Securities and Exchange Board of India Act, 1992 — Section 11, 11(1), 11(2), 11(4), 11(b)

Citation : (2013) 118 SCL 337

Hon'ble Judges : S. Rajeswaran, J

Bench : Single Bench

Advocate : Ravi for M/s. Rugan and Arya in WP. No. 1214/2013 and Mr. R. Gandhi, for M/s. Rugan and Arya in WP. No. 1292/2013, for the Appellant; Masilamani, for the Respondent

Final Decision : Dismissed

Judgement

S. Rajeswaran, J.—Since the issue involved and the question of law in both the writ petitions the respondents and the relief sought for are

one and the same, a common order is being passed to dispose of these two writ petitions. WP. No. 1214 of 2013 has been filed by the company

and WP. No. 1292 of 2013 has been filed by the promoter of the company, challenging the order dated 31.12.2012 passed by the respondent.

2. The impugned order dated 31.12.2012 has been passed by the respondent in both the writ petitions under Sections 11 and 11(b) of the

Securities and Exchange Board of India Act, 1992 against the company M/s. Ram Kaashyap Investment Limited and its promoter Mr. A.

Venkatramani.

3. When both the writ petitions were taken up for final hearing, the learned senior counsel Mr. Masilamani, appearing for the respondent raised a preliminary objection with regard to the maintainability of these two writ petitions, as they have been filed against the order passed by the Securities and Exchange Board of India (in short Act 15 of 1992). According to the learned senior counsel appearing for the respondent, appeal has been provided u/s 15(T) Act, 1992. Further as per Section 15-T(3), 45 days time has been provided to file an appeal before the Appellate Tribunal.

According to him, the Tribunal as on today, is functioning with a non-judicial member. He adds that a number of appeals have been filed before the Tribunal and the same are being heard and disposed of. He has also in this connection refers to the notification of the Government dated

05.12.2011 issued by the Government of India, Ministry of Finance, Department of Economic Affairs, issued in respect of sitting of Appellate

Tribunal against temporary absence of Presiding Officer, till the assumption of charge by the new P.O. or until further orders whichever is earlier

u/s 5(2) of the Securities Appellate Tribunal (Procedure) Rules 2000.

4. Therefore his case is that there cannot be any impediment for the petitioners, i.e., both the company as well as the promoter, to file an appeal

before the Tribunal, instead of pursuing these writ petitions under Article 226 of the Constitution of India. He also refers to the judgment of the

Bombay High Court dated 26.11.2012 made in W.P. No. 5847 of 2012, wherein the power of Government of India in resorting to the provisions

of sub-rule (2) of Rule 5 of the Securities Appellate Tribunal (Procedure) Rules 2000 and authorising one of the two members to Preside over the

sitting of the Tribunal was upheld. Therefore, according to him, the company as well as the promoter could very well go before the Tribunal and

canvass all the points raised before this Court. Further he submits that neither the notification issued by the Government nor the rules have been

challenged by them, questioning the existence of the Tribunal functioning with one non-Judicial Member. Therefore, he submits that the writ

petitions before this Court are not maintainable under Article 226 of the Constitution of India, as there is an alternative remedy available by way of

Appellate Tribunal.

5. Per contra, the learned counsel, Mr. Ravi, appearing for the petitioner in W.P.

No. 1214 of 2013, filed by the company, would submit that when the impugned order has been passed u/s 11(1), 11(2) and 11(4) and when there is a jurisdictional error in the order passed, the same can be agitated only before this Court and not before the Tribunal. According to him, as per Section 15(i) of the Act, 1992, no enquiry has been conducted by the adjudicating officer and when any order has been passed in violation of Section 15(i), then such an order is deemed to be an order passed by the Board without jurisdiction and as it goes to the root of the matter, alternative remedy is not a bar and the writ petition is very much maintainable. He also refers to Section 15(k) and 15(1) of the Act 15 of 1992 to contend that the one man Appellate Tribunal functioning now cannot take up the appeal as it lacks the necessary forum. Relying the Rule 5(2), he submits that it deals with a Presiding Officer for a short while and not on a permanent basis. Therefore according to him, the Appellate Tribunal as is functioning now, lacks the jurisdiction and authority to decide the appeal. Referring to Rule 18 the learned counsel points out that every order of the Appellate Tribunal shall be signed by the Presiding Officer and two other members or else it cannot be an order passed by the Appellate Tribunal. Since only one member has been functioning as the Tribunal now, every order that could be passed by him will not be considered as an order of the Tribunal.

6. In support of his contention, he relied on the following judgments:

1. L. Chandra Kumar Vs. Union of India and others,
2. Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others,
3. An unreported judgment of the Hon"ble Supreme Court, dated 11.05.2010 (Union of India vs. R. Gandhi)
4. Babu Verghese and Others Vs. Bar Council of Kerala and Others,

7. Mr. R. Gandhi, the learned senior counsel appearing for the petitioner in W.P. No. 1292 of 2013, the promoter, would reiterate that having a

single non-judicial member in the Tribunal would be of no avail to anyone as question of complexity could never be dealt with by him. He further

adds that when the statute prescribes a thing to be done in a particular manner, it shall be done in such a manner only and not in any other manner.

Therefore, when the Act prescribes constitution of the Tribunal with three members, the same cannot function with one member, that too, a non-

judicial member. Therefore according to him, filing of writ petitions is the only remedy available and the same is maintainable.

8. I have heard the rival submission carefully with regard to facts and citations.

9. Admittedly, these two writ petitions have been filed challenging the orders passed by the respondent SEBI under Sections 11 and 11(b) of the

Act 15 of 1992 against the company as well as Mr. A. Venkatramani, the promoter. As against that, an appeal has to be filed before the Appellate

Tribunal. Further Section 29 of the Act, 1992, enables the Government to make Rules for carrying out the purposes of the Act and the notification

issued by the Central Government under Rule 5(2) is valid in law. The petitioners herein have not challenged the Rules nor the notification issued

thereunder. In the absence of that, the petitioners are bound to follow the provisions of law by filing an appeal before the Appellate Tribunal. The

contention that only one member that too, a non-judicial member is functioning as on today would not hold water as the Appellate Tribunal is

functioning as on today and discharging its functions as per law. Any rule has to be read meaningfully and what is applicable to two members is

applicable to one member. It is a necessity which has to be accepted. It is an admitted fact that, a number of appeals have been filed before the

Appellate Tribunal and the same are heard and orders passed.

10. Unfortunately the arguments advanced on behalf of the petitioners is a competency of a single member Appellate Tribunal which is not the issue

in the writ petition. Both the petitioners have not challenged nor questioned the functioning of the single member Appellate Tribunal. The issue

raised before him is that whether alternative remedy of appeal as provided in Act 15 of 1992 is a bar to entertain these writ petitions. On a perusal

of the Act and the Rules made thereunder, I am of the considered view that a fully-fledged appeal is provided under the Act, that too, with

member having special and technical knowledge in the relevant field. In such circumstances, I do not find any reason to waive on the appeal

remedy and to entertain the writ petition.

11. Let me refer to the judgments relied on by the learned counsel appearing for the writ petitioner in W.P. No. 1214 of 2013:

(1) In *L. Chandra Kumar Vs. Union of India and others*, wherein, the Hon'ble Supreme Court held that jurisdiction conferred on the High Courts

under Article 226/227 of the Constitution of India is a part of the basic structure of the Constitution and therefore the decisions of the Tribunals

created under Article 323A and 323B will be subject to scrutiny before a Division Bench of the High Court.

(2) In Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, the Hon"ble Supreme Court has held as follows:

14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the

Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo

warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other

purpose.

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a

writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available,

the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a

bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where

there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act

is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of

the evolutionary era of the constitutional law as they still hold the field.

(3)The unreported Judgment dated 11.05.2010 (cited supra) the Hon"ble Supreme Court held that as the National Company Law Tribunal

(NCLT) taken over the functions of the High Court, the members should as nearly as possible have the same position and status as High Court

Judges. Therefore only officers who are holding the ranks of Secretaries or Additional Secretaries alone can be considered for appointment as

Technical member of NCLT. Therefore the clauses (c) and (d) of sub-section (2) and clauses (a) and (b) of sub-section (3) of Section 10FD of

the Companies Act, 1956 is invalid and the Hon"ble Supreme Court further held

that Two-Member Benches of the Tribunal should always have a judicial member and whenever any larger or special benches are constituted, the number of technical members shall not exceed the judicial members.

(4) In Babu Verghese and Others Vs. Bar Council of Kerala and Others,), the Hon"ble Supreme Court held that when the statutes prescribing the doing of an Act in a particular manner, such an Act cannot be considered to have been done unless it was done in the prescribed manner.

12. All the above said judgments are rendered in different context and different situations and it is settled law that the law laid down by the Superior Court on the basis of facts and circumstances accompanying a particular case, cannot be straight away lifted and imported in a case of different facts and circumstances. Therefore these judgments do not come to the rescue of the petitioners.

13. Therefore, I am to hold that these two writ petitions are not maintainable before this Court and the petitioners have to avail the statutory appellate remedy available under the Act.

14. In the result, both the writ petitions are dismissed as not maintainable. No costs. Consequently, other miscellaneous petitions are closed.

Liberty is given to the petitioners to file appropriate appeal before the Appellate Tribunal in accordance with law. I take this opportunity to direct the Government of India, though not a party herein, to expedite filling up of vacancy in the Appellate Tribunal at the earliest.