
(2015) 10 BOM CK 0024

In the Bombay High Court

Case No : Writ Petition No. 1403 of 2015, Criminal Application No. 280 of 2015 in Writ Petition No. 1403 of 2015, Criminal Application No. 266 of 2015 in Writ Petition No. 1403 of 2015 and Criminal Application No. 198 of 2015 in Writ Petition No. 1403 of 2015

National Spot Exchange Limited

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 01-10-2015

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Criminal Procedure Code, 1973 (CrPC) — Section 482

Maharashtra Protection of Interest of Depositors (Financial Establishment) Act, 1999 — Section 2, 2(c), 2(d), 3, 4

Penal Code, 1860 (IPC) — Section 120(B), 409, 465, 467, 468

Citation : (2015) 10 BOM CK 0024

Hon'ble Judges : R.V. More, J; Anuja Prabhudesai, J

Bench : Division Bench

Advocate : Aspy Chinoy, V.A. Thorat, Mahesh Jethmalani, Senior Advocates, Ameet Naik, Abad Ponda, Anuj Jhunjunwala, Vaibhav Bhure, Aasattulla Thugel and Rohit Mangsule i/b Naik Naik and Co., for the Appellant; Anil Singh, Advocate General, Avinash Avhad, K.V. Saste

Final Decision : Disposed off

Judgement

R.V. More, J—The Applicant in Criminal Application No. 198 of 2015 is the original complainant. The Applicants in other applications claim that they also are the victims of the fraud committed by the Petitioner and therefore interested in the outcome of this petition. We therefore thought it fit to grant them a right of audience in the matter and accordingly they were heard in the matter.

2. Rule. Rule made returnable forthwith. By consent of the learned Senior Counsel and Counsel appearing for the respective parties, petition is taken up for final hearing.

3. Heard the learned Senior Counsel appearing for the Petitioner, the learned

Advocate General for the State and the learned Counsel appearing for the Intervenor.

4. By this writ petition filed under Articles 226 and 227 of the Constitution of India read with section 482 of the Code of Criminal Procedure, 1973, the Petitioner is seeking to quash the invocation of sections 3 and 4 of the MPID Act qua the Petitioner in relation to CR. No. 89 of 2013 registered with EoW, Unit-V, which is now numbered as Case No. 1 of 2014 before the Special Designated Court after filing of charge-sheet. For the sake of brevity, the Maharashtra Protection of Interest of Depositors (In Financial Establishments) Act, 1999 is referred to as "the MPID Act".

5. The Petitioner-NSEL is a company registered under the Companies Act, 1956. It provides electronic platform for spot trading in various commodities and operates from 16 cities across the country. The Petitioner-Exchange is permitted trading in commodities by and through its registered brokers/ trading members and such trading covered 52 specified commodities. The Petitioner started its full-fledged operations in the month of October 2008. They launched their first trader contract "Silver/Gold in intra trading" in Kolkatta. Thereafter they launched different types of contracts like farmer contract, paired contract and E-series contract. The T+2 and T+25 days contrasts are together called paired contracts. The first trader paired contract was launched on 22nd September 2009.

The functioning at the Petitioner's platform was that the Seller of the commodity was required to deposit his stocks, which were to be traded on the Petitioner's platform, in the ware-houses which were designated or owned by the Petitioner on or before "T" day [i.e., Trade Day]. The Petitioner was responsible for checking and verifying the quality and quantity of the commodities. After the Petitioner verifies the quality and quantify of such commodity, ware-house receipt is issued which was proof of ownership of commodity deposited in the ware-house. The depositor was supposed to receive photo / scanned copy of the ware-house receipt and the original was to be retained by the Petitioner-Exchange to transfer the same to the prospective buyer. On T-day, the investors would enter into a contract to buy the commodity with T+2 delivery cycle. Simultaneously, he would also enter into a contact to sell the commodities with a T+25 delivery cycle. On T+2, the Petitioner would issue a delivery allocation report in which the quantity and location of the commodities purchased would be mentioned. The allocation report contained details of the end client, ware-house receipt No. LoT/QC No. and warehouse location. Further it included a confirmation from the Petitioner that the original warehouse receipts were in its custody.

One Pankaj Saraf filed complaint / FIR on 30th September 2013 with MRA Marg Police Station, being CR. No. 216 of 2013 which was subsequently transferred to EoW where it was re-numbered as CR. No. 89 of 2013 in which the Petitioner, its Directors among others are named as accused. The first informant Panjak Saraf is the Director of a a private limited company doing the business of investment,

trading and financing. He alleged that he had been investing in the traders contracts offered by the Petitioner through Brokers -M/s. Capital Financial Commodities Ltd. and Way to Wealth Pvt. Limited. The complainant had entered into client broker agreement with his brokers and had submitted the necessary documents to them. The brokers were members of the Petitioner. The complainant was primarily transacting in T+2 and T+25 contracts. He alleged that during the period between October 2008 to July 2013 the Petitioner allowed 25 members who were named as accused to trade on the Petitioner's Exchange as sellers. It is alleged that in authenticating these companies due diligence was not followed. It is further alleged that during the relevant period, 25 sellers in connivance with the Petitioner, traded fictitious stocks on the Exchange for which they raised fake documents. It was also alleged that the Petitioner and their senior officers were hand in gloves with the defaulting parties and have in collusion with them defrauded the first informant. Though during the initial contracts between these member companies as sellers and buyers, the Company squared off the contracts on the date of maturity but later when the investment in these companies grew substantially, they did not honour their commitments and caused a wrongful loss to the tune of Rs. 2.2 crores to the first informant and approximately of Rs. 5,600 crores to other 13,000 investors.

Initially, the FIR was registered for the offence punishable under sections 409, 465, 467, 468, 471, 474, 477(A) read with 120(B) of the Indian Penal Code, 1860. Subsequently, provisions of the MPID Act were invoked pursuant to which the accused have now also been charge- sheeted under sections 3 and 4 of the MPID Act. Intimation of such invocation of the MPID Act was given to the Magistrate. Thereafter, by the order dated 18th October 2013, the matter was transferred to the Special Court under the MPID Act and registered as MPID Case No. 1 of 2014. As stated above, by this petition, the Petitioner is challenging the invocation of provisions of MPID Act against them and its Directors.

6. The learned Senior Counsel appearing for the Petitioner submitted that the Petitioner's Commodity Spot Exchange only provided an electronic / Online trading for the purchase and sale of commodities by registered trading member and their clients non-trading members and the Settlement of such contracts by payment by the buyer to the seller through the Exchange and Sale delivery of the commodity by the seller to the buyer. The Petitioner never received or accepted any deposit as defined in section 2(c) of the MPID Act. The Petitioner-Exchange provided for settlement of such contract by ensuring payment of the Pay-in amount / purchase price by the Purchasing trading member to the Selling Trading member and delivery of the VAT paid sale contract for the purchased/sold commodity by the Selling Trading Member to the Purchasing Trading Member. It is submitted that the pay-in amount was received from the purchasing trading member only for the purposes of being passed on to the Selling Trading Member on the very same day. This amount was not received as a deposit, i.e., an amount to be returned. The Petitioner's Exchange only enabled such trading and for all such contracts/trades effected on it and through

it, the Petitioner's Exchange received only a minuscule percentage of the total traded value, as a fee. It is further submitted that the Petitioner-Exchange substantially performed the same role qua the Commodity trading as the BSE or the NSE performs qua the Stock or Equity trading with some modifications necessitated by the nature and bulk of commodities as compared to the stocks-equity shares. It was also submitted that by enabling / facilitating trading in equities by effecting settlement of trades through payment and delivery, the stock Exchanges ex-facie do not accept deposits as defined under the MPID Act. Similarly in the event of any default in either payment or delivery obligations by some of the registered trading members and their non-member clients, or even in the context of alleged wrongful or fraudulent acts by the officers and employees of the Exchange in collusion with the defaulting trading members, their non member clients, resulting in such default, the Petitioner's Exchange and its Directors and officers cannot be proceeded against under the MPID Act. It is lastly submitted that the invocation / application of the provisions of MPID Act against the Petitioner's Exchange and its Directors is ex-facie illegal and without jurisdiction.

7. The learned Advocate General and the learned Counsel appearing for the Complainant and other aggrieved investors opposed the petition very vehemently. It is alleged that during the course of the investigation it is revealed that the Petitioner's Exchange never carried out its operations as per its bye-laws and as per the permission granted by the Government of India. The officials, directors of the defaulting companies came to be arrested as their role in the offence alleged was traced. On 16th January 2014, the charge-sheet was filed before the designated Court under the MPID Act. Further investigation is underway. It was submitted that in the fact-situation there is no need to interfere and moreso when the Petitioner has an alternate remedy to apply for discharge before the Court below.

8. The learned Advocate General and the learned Counsel appearing for the Complainant also submitted that the provisions of MPID Act are rightly invoked as the Petitioner promised and assured to its clients, who would trade on their platform, the returns at 14 to 16 percent per annum. The learned AG relied upon the Brochure published by the Petitioner, wherein the investors are assured fixed returns. It was lastly submitted that the representation by the Petitioner to its client that if they invest in T+2 and T+25, they would get assured returns of 14 to 16% per annum, will amount to "deposit" within the meaning of section 2(c) of the MPID Act.

9. Having considered the rival submissions and having gone through the memo of the writ petition along with annexures thereto, and the provisions of the MPID Act, we do not find any merit in the petition.

10. The material collected by the EoW during the course of the investigation reveals that the Petitioner did not carry out its operations as per the bye-laws and permission granted to it by the Government of India. From the statements

recorded by the Investigating Agency, copies of which were placed before us for our perusal, it would prima facie reveal that the Petitioner represented to the Traders / Suppliers of the goods that they would be provided security free loan. The Petitioner had assured its clients fixed returns @ 14% to 16% pa. A copy of the brochure published by the Petitioner -Exchange gives an assurance to its clients that if they enter into contract of T+2 and T+25, they would get returns in the range of 14% to 16% pa. The record indicates that the Petitioner convinced its clients that since the actual possession of the commodities will be kept in the accredited warehouses under its control, this will enable its members to trade on its platform without there being actual physical stock. The statements of various investors recorded during the investigation shows that the Petitioner had assured them a fixed returns of 14% to 16% on their investments. The statements recorded by the Agency prima facie also indicates that the Petitioner represented to them that it would provide security free loan. The record placed before us further reveals that transaction of the Petitioner and the traders / suppliers of the goods are not fully supported by the actual delivery of goods. In many cases, the accounts of the Petitioner and the suppliers of the goods are not tallying with each other due to bogus entries. The physical delivery of the commodities has not been verified and there has been no control over the stock lying in the ware-houses. The record further indicates that there are many accommodation entries which resulted into financial mishap due to collusion between the Petitioner and its selling trading members.

11. Section 3 of the MPID Act defines the offence, identifies the person liable and prescribes the penalty. Section imposes a penalty for fraudulent non payment of the deposit along with benefit by the financial establishment. Section 2(d) defines the term "financial establishment" means any person accepting any deposit under any scheme or arrangement or in any other manner. Section 2(c) defines the terms "deposit". The definition is inclusive. The inclusive definition when used enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural merit but also those things which the interpretation clause declares that they shall include. The terms "deposit" defined under clause (c) of section 2 includes any receipt of money or acceptance of any valuable commodity by any financial establishment to be returned after specified period of otherwise, either in cash or kind or in the form of specified services with or without any benefit in the form of interest, bonus, profit or any other form. In the present case, the provisions of MPID Act are invoked as the Petitioner assured its clients if they invest in T+2 and T+25 schemes they would get assured returns of 14 to 16% pa. Hence the said receipt of money, in our prima facie view fall within the definition of "deposit"

12. In that view of the matter coupled with the fact that charge-sheet and supplementary charge-sheets have already been filed, and further investigation is underway, we are not inclined to grant relief as sought in the petition at this stage, as the Petitioner has an alternate efficacious remedy to apply for discharge before the trial Court. In the result, writ petition is dismissed.

13. It is made clear that observations made hereinabove are prima facie in nature and made for the limited purpose to consider the grant of relief of quashing the action of invocation/application of provisions of the MPID Act. Needless to state that if the Petitioner files an application for discharge, the same shall be decided independently on its own merits without being influenced by any of the observations made herein.

14. Writ petition as well as applications taken out therein stand disposed of.