

(2011) 03 CAL CK 0021
In the Calcutta High Court

Rose Valley Real Estates and Constructions Ltd. and Another	APPELLANT
Vs	
Securities and Exchange Board of India and Others	RESPONDENT

Date of Decision : 23-03-2011

Acts Referred:

Companies Act, 1956 — Section 2(23A), 55A
Constitution of India, 1950 — Article 136, 226, 227, 32
Criminal Procedure Code, 1973 (CrPC) — Section 482
Securities and Exchange Board of India (Collective Investment Schemes) Regulations, 1999 — Regulation 3, 36, 65
Securities and Exchange Board of India Act, 1992 — Section 11, 11(4), 11AA, 11B, 12(1B)

Citation : (2012) 1 BC 170 : (2011) 3 CALLT 86 : (2011) 4 CHN 91 : (2011) 102 CLA 325 : (2011) 165 CompCas 234 : (2011) 106 SCL 598

Hon'ble Judges : Jayanta Kumar Biswas, J

Bench : Single Bench

Advocate : Surojit Nath Mitra, P.C. Sen, Anindya Kumar Mitra, Samaraditya Pal, Sudipto Sarkar, Pratap Chatterjee, Raja Basu Choudhary, Mousumi Bhattacharya, Arup Nath Bhattacharya, Sutapa Sanyal and Amritalall Chatterjee, for the Appellant; HIRAK KUMAR MITRA PRASANTA KUMAR DUTTA, SUSANTA DUTTA, RUPAK GHOSE and R. AUDDY, for the Respondent

Final Decision : Dismissed

Judgement

Jayanta Kumar Biswas, J.—The Petitioners in this Article 226 petition dated January 14, 2011 are questioning an order of the Securities and Exchange Board of India (hereinafter referred to as "the Board") dated January 3, 2011 (at p.80).

2. The whole-time member of the Board passing the order under the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "the Act") directed the first Petitioner (hereinafter referred to as "the company") as follows:

15. In view of the same, I, in exercise of the powers conferred upon me u/s 11B of the SEBI Act, 1992 and regulation 65 of CIS Regulations, hereby direct the company:

- a. not to collect any money from investors or to launch any scheme;
- b. not to dispose of any of the properties or delineate assets of the scheme;
- c. not to divert any fund raised from public at large kept in bank account and/or at the custody of the company.

3. By a letter dated January 8, 2010 (at p.51) the Board informed the second Petitioner (the chairman of the company) as follows:

It has been brought to our notice that you are mobilizing deposits from the public. In this regard, please note that in terms of Section 12(1B) of the SEBI Act, 1992 and the provisions of SEBI (Collective Investment Schemes) Regulations, 1999 (said Regulations), no entity can carry on or sponsor or launch a Collective Investment Scheme without obtaining a certificate of registration under the said Regulations. Also in terms of Chapter IX of the said Regulations, no existing Collective Investment Scheme shall launch any new scheme or raise money from investors even under the existing schemes, unless a certificate of registration is granted to it under the said Regulations.

4. By the letter dated January 8, 2010 the Board directed the company to supply the information and documents specified therein within fifteen days from the date of receipt thereof. On receipt of the letter the company wrote a letter dated January 22, 2010 (at p.52) stating and requesting the Board as follows:

We acknowledge receipt of your letter No. SEBI/ERO/RPS/10/190202 dated 8/01/2010, the contents of which have been duly noted.

As directed by you, we are in the process of preparing all documents and in this connection we request you to kindly allow us a further period of 15 days to enable us to submit the same to your good self.

5. By a letter dated February 4, 2010 the Board extended the time till February 8, 2010. Apprehending that before it submitted its reply to the Board's letter dated January 8, 2010 the Board might take "coercive action", the company moved W.P. No. 136 of 2010 before this Court under Article 226. By an order dated February 5, 2010 the petition was disposed of recording submissions of the Board's counsel that till February 8, 2010 or till submission of reply, whichever was earlier, the Board would not take any "coercive action" and granting the company liberty to supply the information and documents by February 8, 2010.

6. By a letter dated February 8, 2010 (at p.53) the company replied to the Board's letters dated January 8, 2010 and February 4, 2010 stating and contending as follows:

Your said notice is vague and does not disclose the source as to who had allegedly brought to your notice that we are mobilizing deposits from public within the meaning of C.I.S. scheme under the SEBI Act.

Without any prejudice to aforesaid, we proceed to deal with the allegations made

in your letter under reference.

Neither of our group companies are carrying on any business within the meaning of Collective Investment Schemes nor have sponsored or launched any Collective Investment Schemes.

The documents mentioned at serial No. 1 to 3 of your letter under reference are enclosed for your perusal and inspection. All the audited balance sheets of the companies have been duly filed with the Registrar of the Companies, West Bengal.

The question of furnishing documents, in particular, at serial No. 4 & 5 do not apply in respect of any of our group companies in as much as none of our group companies are carrying on any business under the Collective Investment Schemes.

Your said notice is malafide and not informed by reason and as such you are requested to withdraw the said notice.

7. By a letter dated March 3, 2010 (at p.56) the Board asked the company to supply the following information and documents pertaining to its "Ashirbad Scheme":

- a. Copies of offer documents, application form/pamphlets/brochures of the scheme;
- b. Terms and conditions of the scheme;
- c. Options available with the investor if he does not want to possess land;
- d. Whether any instrument is issued to the investors after receipt of fund;
- e. If such instruments are issued whether they are transferable;
- f. Total amount of fund raised through the scheme from the public along with period of scheme."

8. The company replied to the Board's letter by a letter dated March 18, 2010 (at p.57), the last two parts thereof are quoted below:

f) We have not raised any fund from the public, nor the scheme has any validity period. We receive the earnest money for the transaction in equated monthly installments. Once the entire earnest money is paid, we offer the intending purchaser to take delivery of land upon payment of balance consideration amount. We however provide benefit to the intending purchaser of the earnest money so deposited by them together with credit value thereof, which are adjusted against the total consideration amount of the land.

In case if any intending purchaser do not opt to purchase the land so booked by them, we refund the earnest money along with credit value. The advance so received by the company is shown in the balance sheet as "unsecured loan" as

mentioned in your letter under reference itself. Copy of the balance sheet has already been forwarded to you.

9. By letters dated May 17, 2010 (at p.68) and July 9, 2010 (at p.73) the Board asked the company to supply the specific information about the things mentioned in the letters; by letters dated June 18, 2010 (at p.69) and August 20, 2010 (at p.75) the company supplied the information recorded in its letters. Then by a letter dated November 3, 2010 (at p.77) the Board asked the company to provide a list of all the purchasers including the purchasers who cancelled the booking and received refund of their deposits since the inception of the Ashirbad Scheme, within seven days from the date of receipt of the letter.

10. In response the company wrote a letter dated November 15, 2010 (at p.78) stating and requesting as follows:

This is to acknowledge receipt of your letter referred above and in reply we would like to state that the information required by you being a voluminous exercise, it involves lot of manual job because previously most of the records were maintained manually numbering lot of books and registers. Since we have to collect and compile details as back as from the year 2005 onwards from different units, we would appreciate if you would be kind enough to allow us an extension of at least three months time by when we expect to complete the process and provide you with the information to your satisfaction. However, we would like to inform you that we may furnish the desired details in phased manner due to difficulties mentioned herein above. For your kind information, immediately on receipt of your letter, we have already initiated necessary steps which you may please note.

We trust you would kindly consider our genuine request and grant us extension as desired above.

11. Under the circumstances, after examining the information and documents supplied by the company, the whole-time member of the Board passed the order recording the following findings:

12. Thus, the company is raising funds in the name of sale of plots of land. It first receives earnest money in installments from a purchaser, pools and fund so mobilized and uses it to develop the land, and thereafter provides return at the option of the investor on the amount invested at the end of the scheme in the form of credit value. This credit value can then be utilized by the investor to either adjust partly against the cost of land or to get refund for the investments made from the company. These activities of the company are akin to the features of a CIS, specified under the Section 11AA of the SEBI Act read with regulation 3 of the CIS regulations.

12. On the basis of the findings, the whole-time member of the Board came to the following conclusion:

13. In view of the foregoing, it prima facie appears that the company is running

CIS schemes without obtaining a certificate of registration on SEBI. Thus M/s. Rose Valley Real Estate and Construction Ltd. has prima facie violated regulation 3 of CIS Regulations read with Section 11AA of the SEBI Act, 1992.

13. And the whole-time member of the Board giving the company opportunity of filing objections, if any, within 15 days from the date of the order and hearing on a date to be fixed on the basis of its request decided to make the order stating as follows:

14. The interest of investors is the first and foremost mandate for SEBI. Under the facts and circumstances of the case, SEBI has to take emergent steps to prevent activities indulged into by companies or entities defrauding the investors, damaging the orderly development of the securities market. I note that M/s. Rose Valley Real Estate and Construction Ltd. Has to be prevented from further carrying on the activities of a CIS, including soliciting money from the public, without due registration from SEBI.

14. Mr. Sen appearing for the Petitioners has submitted as follows. The provisions of the Act apply only to a listed public company within the meaning of s. 2(23A) of the Companies Act, 1956 or to a public company that has applied for listing. Since the company is neither a listed company nor has applied for listing, the Board ought not to have made the enquiries and could not pass the order. In any case, the order is vitiated by gross violation of the principles of natural justice, because it has been passed without (a) considering the request dated November 15, 2010 for extension of time, and (b) giving opportunity of showing cause and hearing. Since the order is without jurisdiction and also vitiated by violation of the principles of natural justice, non-exhaustion of the alternative remedy of appeal under s. 15T of the Act is not a bar to move the Writ Court.

15. He has relied on the statement of objects and reasons dated December 16, 1999 appended to the Companies (Second Amendment) Bill, 1999; the provisions of s. 55A of the Companies Act, 1956; reg. 36 of the Securities and Exchange Board of India (Collective Investment Schemes) Regulations, 1999 (hereinafter referred to as "the regulations"); and several provisions of the Act.

16. He has cited the decisions in *Israil and Ors. v. Samset Rahman and Ors.*, AIR 1914 Cal 362; *Kiran Singh and Others Vs. Chaman Paswan and Others*, ; *Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar*, ; *K.I. Shephard and Others Vs. Union of India (UOI) and Others*, ; *Kleinwort Benson Ltd. v. Barbrak Ltd.* (1987) 1 A.C. 597; *Hindustan Petroleum Corporation Ltd. v. H.L. Trehan and Ors.* (1989)1 SCC 765 *Morgan Stanley Mutual Fund Vs. Kartick Das*, ; *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others*, *The State of Maharashtra and Another Vs. The Jalgaon Municipal Council and Others*, ; *Kalpna Bhandari and Others Vs. Securities and Exchange Board of India and Others*, ; *Gurmej Singh Vs. State of Punjab and Another*, ; *Godrej Sara Lee Ltd. Vs. Asst. Commissioner (AA) and Another*, ; and *Securities and Exchange Board of India Vs. Ajay Agarwal*,

17. He has also cited an interlocutory order of a Division Bench of the Allahabad High Court dated December 13, 2010 in Sahara India Real Estate Corporation Ltd. v. Union of India Misc. Bench No. 11702 of 2010; and an order of the Supreme Court dated January 4, 2011 disposing of the Petition for Special Leave to Securities & Exchange Board of India v. Sahara India Real Estate Corporation Ltd. and Ors. Appeal (Civil) No. 36445 of 2010 from the Division Bench order of the Allahabad High Court.

18. Mr. Mitra appearing for the Board has submitted that since the remedy of appeal under s. 15T of the Act was the only remedy and not an alternative remedy, the company, neither raising the question of jurisdiction before the Board nor pressing the issue in its first Article 226 petition, is not entitled to question the impugned order under Article 226 on the grounds that the Board had no jurisdiction to pass it; and that, in any case, in view of the provisions of the Act, the Securities Contracts (Regulation) Act, 1956 and the regulations, there is no reason to say that the Board did not have jurisdiction to pass the order.

19. His further submissions are that since the Board passed the order solely on the basis of the information revealed by the documents the company submitted from time to time in response to the enquiries made by the Board and the provisions of s. 11(4) of the Act gave the Board a discretion to decide when the opportunity of hearing would be given, there is no reason to say that the order is vitiated by violation of the principles of natural justice, for, on the facts, the Board, yet to receive response to its last enquiry, decided to give the company opportunity of hearing after passing an interim order.

20. He has relied on the decisions in Liberty Oil Mills and Others Vs. Union of India (UOI) and Others, Lloyd and Ors. v. McMahon (1987) 1 A.C. 625; The State of Maharashtra and Another Vs. The Jalgaon Municipal Council and Others, ; Garh-Moyna Samabay Krishi Unnayan Samiti Ltd. and Another Vs. State of West Bengal and Others, ; and Securities and Exchange Board of India Vs. Ajay Agarwal, and an unreported Division Bench decision of the Rajasthan High Court dated October 29, 2010 in 21st Century Entertainment Pvt. Ltd. v. Union of India and Ors. Civil Writ Petition No. 4333 of 2010.

21. The first question is whether in view of the remedy of appeal available under s. 15T of the Act the petition should be entertained.

22. If the remedy available under s. 15T of the Act was the only remedy, then this petition just cannot be entertained. I, however, do not find anything anywhere that can lead to a conclusion that for a person aggrieved by an order of the Board the remedy of appeal under s. 15T is the only available remedy in the sense that the remedy under Article 226 of the Constitution is not available to him under any circumstances. I, therefore, do not find any reason to hold that the s. 15T remedy was the Petitioners' only remedy.

23. In my opinion, the answer to the question whether in view of the remedy of

appeal available under s. 15T of the Act this petition should be entertained should be searched not on the basis of the proposition that availability of an "alternative remedy" is not a bar to seek the remedy under Article 226, but on the basis of the proposition that availability of "other remedy" is not a bar to seek the remedy under Article 226, for every "other remedy" cannot necessarily be an alternative to the Article 226 remedy; an alternative remedy is only a species of the genus other remedies. And the answer to the question whether a remedy is an alternative to the Article 226 remedy, in my opinion, depends entirely on the nature of the former remedy.

24. Between two remedies the one is alternative to the other when the person concerned is free to choose either one or the other. The expression "alternative remedy" should mean a remedy that is available instead of some other remedy. The other remedy is an alternative to the Article 226 remedy when the aggrieved person is free to choose between the two remedies either one or the other. In such case he cannot seek the Article 226 remedy after exhausting the other remedy. A few, first to hand, pairs of such remedies are Article 32 and Article 226, Article 227 and Article 226, s. 482 Code of Criminal Procedure and Article 226, suit and Article 226. And when an alternative remedy, except the one under Article 32, is available, the Article 226 remedy cannot be denied unless the alternative remedy is as cheap, speedy and efficacious as the Article 226 remedy.

25. When the other remedy is a statutory remedy, e.g. a remedy of appeal, and after exhausting which the aggrieved person is entitled to seek the Article 226 remedy, it cannot be said that it is an alternative to the Article 226 remedy. A statutory remedy denotes one particular remedy as distinct from every other. And in such case what is relevant for deciding whether power under Article 226 should be exercised is not the question whether the available other remedy is as cheap, speedy and efficacious as the Article 226 remedy, but the exhaustion thereof; and the principle is that non-exhaustion of the available statutory remedy is not a bar to seek the Article 226 remedy when the order or decision or action is questioned raising the question of jurisdiction or violation of the principles of natural justice or both.

26. When the other remedy is a statutory remedy after exhausting which the aggrieved party has a further statutory remedy, the nature of the other remedy and the further remedy, none of which can be considered an alternative to the Article 226 remedy, is the decisive factor. If after exhausting the further remedy the Article 226 remedy is available, then the High Court when approached raising the question of jurisdiction or violation of the principles of natural justice or both is to exercise its discretion applying the principle that non-exhaustion of available statutory remedy is no bar to seek the Article 226 remedy; and when after exhaustion of the other or further remedy the Article 226 remedy is not available, the High Court, when approached, should not entertain an Article 226 petition unless it is absolutely necessary to exercise the power in the interest of justice or for preventing a miscarriage of justice.

27. Now in so far as this case is concerned s. 15T of the Act provides that any person aggrieved by an order of the Board under the Act or the rules or regulations made there under may prefer an appeal to a Securities Appellate Tribunal having jurisdiction in the matter; that the Tribunal may pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against; and that it shall deal with the appeal as expeditiously as possible and Endeavour to dispose of it finally within six months from the date of receipt thereof.

28. An extraordinary feature in this case is that s. 15Z of the Act provides that any person aggrieved by any decision or order of a Tribunal may appeal to the Supreme Court on any question of law arising out of such order. It is a remedy of statutory appeal, as opposed to the Article 136 remedy. The present s. 15Z was substituted for the previous one with effect from October 29, 2002; and under the previous s. 15Z of the Act any person aggrieved by any decision or order of the Tribunal could appeal to the High Court concerned on any question of fact or law arising out of such order. Elimination of this forum resulting in tapering of the judicial examination of the decisions or orders of the Board and Tribunal is very significant.

29. In view of the provisions of s. 4(5) of the Act the Chairman and the other members of the Board shall be persons who have shown capacity in dealing with problems related to securities market or have special knowledge of or experience in law, finance, economics, accountancy, administration or in any other discipline which, in the opinion of the Central Government, shall be useful to the Board. The Board has been enjoined by s. 11 of the Act to take such measures as it thinks fit for protecting the investors in securities and promoting the development of, and regulating the securities market. It is evident that it is an expert regulatory body.

30. As provided in s. 15M of the Act, only a sitting or retired Judge of the Supreme Court or a sitting or retired Chief Justice of a High Court can be appointed as the Presiding Officer of the Tribunal whose the other members must be those persons who have already shown their capacity in dealing with problems related to securities market and have qualification and experience in corporate law, securities laws, finance, economics or accountancy. Thus the Presiding Officer and the other members of the Tribunal make a formidable combination collectively representing judicial and specific subject expertise of extraordinary level.

31. The High Courts judicially reviewing, under Article 226, decisions or orders of the Board and the Tribunal made under the Act or the rules or the regulations made there under, besides making the Tribunal take, of course, a back seat and idle the days away, will (a) make s. 15Z of the Act otiose by derailing the proceedings, and (b) slow the speed at which the proceedings are supposed to attain finality. It is not that the Tribunal is incompetent to decide whether a decision or order of the Board under appeal to it is without jurisdiction or vitiated

by violation of the principles of natural justice. On the contrary, it is quite competent to do that.

32. In my opinion, in view of the charted specific statutory course, up to the highest Court of the country, that the proceedings initiated by the Board, the lowest in the three-tier machinery, are supposed to travel, it cannot be said that the remedy of appeal under s. 15T is an alternative to the Article 226 remedy. And, as to the s. 15Z remedy, under no circumstances, it can be considered an alternative to the Article 226 remedy. Hence, in my opinion, even if it is alleged that the decision or order of the Board is without jurisdiction or is vitiated by violation of the principles of natural justice, a petition under Article 226 should not be entertained for exercising the power of judicial review, unless there are exceptional reasons, e.g. absence of a functioning Tribunal.

33. In my opinion, while the power under Article 226 can be exercised for (a) judicially reviewing a decision or order of the Board in absence of a functioning Tribunal, and (b) for examining the validity of the decision or order when its validity is challenged questioning the vires of the statute or the provision under which the decision or order is made, it can also be exercised in the interest of justice or for preventing a miscarriage of justice, e.g. when the aggrieved person is unable to appeal under s. 15T or s. 15Z for absence of decision or order of the Board or the Tribunal.

34. In this case there is no extraordinary situation that can be treated as a warrant for holding that it is necessary to exercise the power under Article 226 in the interest of justice or for preventing a miscarriage of justice. From the order of the Board the Petitioners were entitled to appeal to the Tribunal that has been functioning and is competent to decide all the questions including the questions of jurisdiction of the Board to pass the order and violation of the principles of natural justice. I am, therefore, of the view that this Court should not exercise the power under Article 226 to review the order of the Board judicially.

35. The decisions in Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar, Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, Kalpana Bhandari and Others Vs. Securities and Exchange Board of India and Others, ; Godrej Sara Lee Ltd. Vs. Asst. Commissioner (AA) and Another, Sahara India Real Estate Corporation Ltd. v. Union of India Misc. Bench No. 11702 of 2010 dated December 13 2010 (All); and Petition for Special Leave to Securities & Exchange Board of India v. Sahara India Real Estate Corporation Ltd. and Ors. Appeal (Civil) No. 36445 of 2010 dated January 2011 (SC) 4 - all relied on by Mr. Sen - in my opinion, do not help in resolving the question that has arisen in this case.

36. In none of the cases decided by the Supreme Court such a question as the one involved in this case was examined. Before the Division Bench of the Allahabad High Court that made the interlocutory order cited to me and before the Supreme Court disposing of the Petition for Special Leave to Appeal from the

Division Bench order of the Allahabad High Court the question this Court has been asked to examine and decide did not arise. It is evident that the Division Bench passing the order proceeded on the basis that the remedy of appeal under s. 15T of the Act was an alternative to the Article 226 remedy; I have held that it is not.

37. My foregoing opinion on the first question involved in the case raises a question whether I should express my opinions on the other questions raised by the Petitioners; the other questions are concerning (a) jurisdiction of the Board to pass the order and (b) violation of the principles of natural justice; and I have heard Mr. Sen and Mr. Mitra on the question whether I should express my opinions on these questions.

38. While Mr. Sen has submitted that if this Court holds that the Petitioners' remedy was before the Tribunal under s. 15T of the Act, then it should not express any opinion on any other question involved in the case, Mr. Mitra has submitted that in view of the elaborate arguments made by counsel for the parties covering all questions involved in the case, this Court, irrespective of its opinion on the s. 15T appeal remedy, should give its opinions on the questions of jurisdiction of the Board to pass the order and violation of the principles of natural justice.

39. In my opinion, it will not be appropriate for this Court to express opinions on the other questions involved in the case, once the opinion of this Court on the first question is that in view of the remedy of appeal available to the Petitioners under s. 15T of the Act this petition should not be entertained.

40. For these reasons, I dismiss this petition saying that the Petitioners are at liberty to appeal from the order of the Board to the Tribunal under s. 15T of the Act. No costs. Certified xerox.