
(2010) 04 CAL CK 0059
In the Calcutta High Court
Case No : A.P.O. No. 498 of 2006

Securities Exchange Board of India

APPELLANT

Vs

Chandi Das Ghosh and Others

RESPONDENT

Date of Decision : 13-04-2010

Acts Referred:

Constitution of India, 1950 — Article 265

Securities and Exchange Board of India Act, 1992 — Section 11(2), 24, 30, 31

Citation : AIR 2010 Cal 132 : (2011) 1 BC 11 : (2011) 105 SCL 68

Hon'ble Judges : Md. Abdul Ghani, J;Kalyan Jyoti Sengupta, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Kalyan Jyoti Sengupta, J.—The appellant above-named has preferred this appeal against the judgment and order of the Learned single Judge dated 20 September 2004 which has also been impugned by the cross-objection filed by the writ petitioner-respondent.

2. All the parties advanced common argument in both the matters therefore the same are disposed of by the following judgment and order before the learned trial Judge. The aforesaid writ petition W. P. No. 1597 of 2004 was filed by the writ petitioner-respondent/cross-objector on the following summarized fact:

The writ petitioner Chandidas Ghosh in the capacity of the Secretary of the Security, Stock Brokers' Welfare Association of India (hereinafter the said Association) which is a registered association under the Societies Registration Act and is espousing the cause of all the members of the said Association. The members of the said Association being the share brokers were required to register themselves with the appellant and for such registration the Board had earlier levied fees by notification dated 10th April 1992 since modified from time to time. In order to realize registration fee the turnover data of all the Brokers are required to be collected. The appellant herein by circular no SMD/Policy/Cir.07/2002 dated 28th March 2002, circulated a format of auditors certificates

for furnishing turnover data and breakup thereof. The term "turnover" given in the said notification was not acceptable to the various Stock Brokers so writ petition was filed by one Stock Broker namely Lalit Kumar Marodia for declaratory relief of true construction and interpretation of the word "turnover" mentioned in the said Regulation.

3. In the said writ petition it was contended that word "turnover" meant not what had been stated in the said regulation, but "the net amount" receivable after day's transaction, should be treated as turnover for the purpose of levying registration fee. In the said writ petition an interim order was passed directing the respondents including appellant to maintain status quo with regard to the realization of the registration fee and the said interim order continued till the disposal of the writ petition. A large number of share and Stock Brokers either individually or through their association including the present association came to be added as parties and indeed they were added. However, the said writ petition was dismissed by this Court by judgment and order dated 22 April 2004. An appeal has been preferred against the said dismissal order of the earlier writ petition and appeal Court granted conditional order of stay of the operation of the learned trial Judge.

4. During pendency of the above appeal on 15 July 2004 the present appellant notified a scheme namely Securities and Exchange Board of India (Interest Liabilities Regularization) Scheme 2004, (hereinafter referred to as "the said Scheme") whereby respondent No. 2 provided for benefit of one time payment by the Stock Broker who had not paid their registration fee in terms of Schedule III of SEBI (Stock Brokers & Sub-Brokers Regulation) 1992. Under this Scheme broker could pay entire principal amount of registration fee together with 20 per cent of the outstanding interest. The benefit given by the said Scheme was framed intending to absolve the defaulter Stock Brokers from paying the balance 80 per cent. of the outstanding interest. The said scheme for regularization was for a limited period commencing from 15 October 2004 and ending on 15 November 2004. Under the said Scheme it was provided amongst others that after expiry of the period of the said scheme a Broker having outstanding registration fee liabilities, shall be liable to pay the entire outstanding amount including full interest, and shall also be subjected to appropriate enforcement action under the said SEBI Act, 1992 and regulations framed thereunder and such broker may face suspension or cancellation of certificate of registration or prosecution u/s 24 of the said Act of 1992. Obviously, the said registration fee has to be calculated and paid basing on turnover data with break up as certified by the Auditors.

5. The members of first writ petitioner wanted to have the benefit of the said scheme. However they were not allowed to submit audited turnover data with break-up and also to make payment of the registration fee. In view of refusal as above the aforesaid writ petition was filed for the following reliefs:

a) A declaration that clauses 2 and 3 of part II of the Securities and Exchange

Board of India (Interest Liabilities Regularization) Scheme, 2004 insofar as the same prevents stockbrokers from filing turnover data with break up with exchange thereby depriving them of concessional rates of fee, is void;

b) A writ of and/or in the nature of Mandamus do issue commanding the respondent No. 2 to forthwith recall, rescind and/or revoke clauses 2 and 3 of Part II of the Securities and Exchange Board of India (Interest Liabilities Regularization) Scheme, 2004, insofar as the same prevents the stockbrokers from filing turnover data with break up with exchanges and the exchanges thereby depriving them of concessional rates of fee;

c) A writ of and/or in the nature of Mandamus do issue commanding the respondent No. 3 to forthwith accept the turnover data prepared by the members of the Stock Brokers Welfare Association of India, and to submit the same to the respondent No. 2 for the purpose of payment of outstanding registration fees by the members of the Stock Brokers Welfare Association of India;

d) A writ of and/or in the nature of Prohibition do issue prohibiting the respondents and each of them, from giving any effect or further effect to or acting in terms of or taking any steps in furtherance of the clauses 2 and 3 of Part II of the Securities and Exchange Board of India (Interest Liabilities Regularization) Scheme, 2004, insofar as the same prevents the stockbrokers from filing turnover data with break up with exchanges thereby depriving them of concessional rates of fee;

e) Rule NISI in terms of prayers above;

f) If no cause or insufficient cause is shown, the Rule be made absolute;

g) An order of injunction restraining the respondents Nos. 2 and 3 and each of them whether by themselves or their servants agents, or assigns or otherwise howsoever, from giving any effect or further effect to or acting in terms of or taking any steps in furtherance of the clauses 2 and 3 of Part II of the Securities and Exchange Board of India (Interest Liabilities Regularization) Scheme, 2004, insofar as the same prevents the stockbrokers from filing the turnover data with break up with exchanges thereby depriving them of concessional rates of fee;

h) An appropriate order directing the respondent No. 3 to forthwith accept the turnover data prepared by the members of the Stock Brokers Welfare Association of India, to submit the same to the respondent No. 2 for the purpose of payment of outstanding registration fees by the members of the Stock Brokers Welfare Association of India;

i) Ad interim order in terms prayers (g) and (h) above.

j) Costs of and incidental to this application be borne by the respondents;

k) Such further or other order or orders be made and/or directions be given as to this Hon"ble Court may seem fit and proper.

6. The said writ petition was opposed by the appellant herein by filing affidavit. Learned trial Judge by the impugned judgment and order has held that the provision made in part II of the scheme for payment of registration fee at flat rate of 0.01 per cent. on the gross turnover reported by the Stock Exchange to the Board in case of failure of submission of turnover data within time stipulated is ultra vires the provision in the schedule of its regulation. However, in spite of holding that the Learned Trial Judge did not grant any relief to the writ petitioner allowing them to avail of the benefit of the said scheme. The appellant has preferred appeal against the part of the judgment as against the declaration of ultra vires of the said rate, whereas the writ petitioner filed cross-objection against the portion of the judgment not granting relief as prayed for, for deposit of the registration fee.

7. Mr. Soumen Sen learned Counsel appearing for the appellant submits that learned Trial Judge has erred in holding that the said flat rate of 0.01 per cent. of the gross turnover reported by Stock Exchange for levying registration fee as provided in the scheme being ultra vires of the Regulation.

8. He submits that under the Act and the Rules framed thereunder the appellant has wide authority to regulate the functioning of the Stock Brokers and in furtherance of such legal provision in the said scheme was framed to cover not only to tackle a special situation but to compel the Brokers to comply with the stipulation and directive contained in such regulation. The said scheme was evolved for one time amnesty for a limited period because of the large-scale default. The said regulation provided computation of fee on the basis of turnover on each type of transaction that was made by the Brokers. However, the Brokers refused to furnish this turnover. A method was required to be adopted so that SEBI could levy and collect fees.

9. He further argues that the rate 0.01 per cent. is a general rate and the other rates are special one and were applicable in each type of transaction. Having found no alternative to tackle the problem that arose because of large-scale default above Scheme had to be framed. He has drawn our attention to Section 11(2)(k) of the said Act by which the SEBI has been given wide power to implement the object of the said Act.

10. He submits that in a situation like this a statutory authority has every power to take such measure so that express provision of the Act and Regulation are not defeated, and such power may not be expressed but could be found to be implicit in the said Act itself.

11. In support of the aforesaid proposition of law he has placed reliance on the following authorities:

1. AIR 1956 AP 91.

2. Bidi, Bidi Leaves" and Tobacco Merchants Association Vs. The State of Bombay,

3. Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco

Co. of India Ltd.,

4. Arabinda Das and etc. Vs. State of Assam and Others,

12. The steps taken for fixing the aforesaid flat rate is the best possible method which could be compared with the concept of- "best judgment" as frequently adopted under Income Tax Act, 1961. In fact in a similar case Gujarat High Court has held that the aforesaid flat rate is legally acceptable. In spite of the aforesaid legal proposition and factual position of acceptance by the Gujarat High Court the learned Trial Judge did not discuss and consider the same.

13. Mr. Surojit Nath Mitra, Advocate, appearing for the writ petitioner-respondent elaborating the facts mentioned in the writ petition submits that action taken by the SEBI floating the aforesaid scheme is incomplete breach of the status quo order passed by this Court in the previous writ petition on 22 March 2002 which continued till 4 July, 2004 by virtue of Appeal Court's order. Under such circumstances, the SEBI could not float the aforesaid scheme. Similarly the petitioners being parties to the earlier writ petition could not file the turnover data nor could avail of the aforesaid scheme. Therefore, refusal of the SEBI to accept the payment of registration fee with the amount of outstanding interest is wholly invalid and illegal. According to him the SEBI could not take unilateral decision breaching order of status quo and they should have approached the Court for clarification before taking any action. In this connection he has invited attention of this Court to the two decisions of the Supreme Court reported in AIR 1988 SC 125 and Satyabrata Biswas and others Vs. Kalyan Kumar Kisku and others, All the Stock Brokers including the members of the first writ petitioner were not notified nor do they have their knowledge about the aforesaid scheme as such they should have allowed to submit turnover data and to pay registration fee.

14. He urges that Clauses 2 and 3 of Part II of the said Scheme is contrary to regulation and as such void and learned Trial Judge has held so rightly. The portion of the said scheme that provides for filing of turnover data without the registration fee being contrary to the Regulation of 1992 which has statutory force, is liable to be declared void. It is not within the competence of SEBI under the regulation to call for or accept turnover data independent of registration fee. Such action is ultra vires of the said regulation. In this context reference has been drawn to a decision of the Supreme Court reported in Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, .

15. He further urges that hostile discrimination has been meted out by not accepting the registration fee or turnover data from the writ petitioner, while in case of other stock brokers in other part of the country the SEBI has accepted.

16. Mr. Mitra contends that in exercise of powers conferred by Section 30 of the SEBI Act 1992 (the said Regulation 1992) was made and in view of Section 31 of

the said Act the said Regulation has statutory force. The said scheme is an administrative order and has no statutory force. By the administrative Order SEBI was not empowered to claim Registration Fee at a flat rate of 0.01 per cent. or at any other rate contrary to the provisions of paragraph 1(BB) of Schedule III of the said Regulation of 1992. The paragraph 5 of Schedule III of the said Regulation provides that in case of stock-broker fails to remit fees in accordance with paragraph 1 within a stipulated period the brokers shall be liable to pay interest at the rate of 15 per cent. per annum for each month of delay or part thereof. Neither in the Act of 1992 nor the Rules framed thereunder nor even the Regulations of 1992 empower SEBI to claim Registration Fee at a flat rate of 0.01 per cent. or to take away right of the brokers to pay such Registration Fee at concessional rates mentioned in paragraph 5(BB) of Schedule III of the said Regulation of 1992. He urges on the strength of an authority namely Hukam Chand Shyam Lal Vs. Union of India (UOI) and Others, that when an act is required to be done in a particular way it has to be done in that manner only or not at all. Besides Article 265 of the Constitution of India does not allow any authority to impose any tax or levy whatever may be without any authority of law.

17. He further submits that the said administrative order is conflict with the Act, Rules and Regulations hence it must yield to the latters. He refers to a Supreme Court judgment reported in Union of India (UOI) and Others Vs. Arun Kumar Roy, to support this legal submission. The concept of implied authority of the SEBI is wholly base-less and fallacious, as a statutory authority has to act within the power expressly vested in law. Principle of best judgment has no application unlike Income Tax Act and Rules as the concept of best judgment emanates from the statutory provisions, here there is none. In view of the aforesaid circumstances the portion of the judgment declaring the said flat rate of 0.01 per cent. for payment of Registration Fee being ultra vires does not require any interference.

18. On the other hand, it is thus clear that because of the difficulty beyond the control of the writ petitioners/respondents, the benefit of other portion of the Scheme could not be availed of. Therefore, the respondents/Writ petitioners should be allowed to file turnover data and also to pay the Registration Fee. Hence the appeal should be dismissed and the cross-objection filed by the respondents/writ petitioners should be allowed.

19. After hearing learned Counsel for the parties and having gone through the records in this appeal and cross-objection following points for decision of this Court have been raised:

i) Whether Learned Trial Judge has correctly held that the writ petitioner and the members of the Stock Broker Association represented by the writ petitioner is not entitled to get the benefit of the scheme being the subject-matter of the writ petition or not?

ii) Whether the declaration of the Learned Trial Judge that the provision for levy of Registration Fee at a flat rate of 0.01 per cent. in the scheme in question being ultra vires is legally sustainable or not?

20. We shall be dealing with the first point raised in this matter namely dis-entitlement of the writ petitioners/respondents from getting benefit of the scheme namely for one time payment of Registration Fee with payment of interest at a concessional rate. Learned Trial Judge has decided that the writ petitioners/respondents are not entitled nor they have made such payment within time framed in the scheme. As such the writ petitioners are not entitled to get any benefit under the scheme dated 15th July 2004. We are of the view that Learned Trial Judge has correctly come to conclusion that they are not entitled to going by the provisions of the scheme.

21. It was argued before the Learned Trial Judge and reiterated before us that in view of the order of status quo passed by the Court in earlier writ petition as well as appeal the appellant SEBI has no right to issue any notification calling upon the Stock-Brokers to furnish turn over data by notice dated 13th October 2003. In view of the continuance of the order of status quo which continued till 22nd April 2004 in terms of the order of the Learned Trial Judge when writ petition was dismissed and during the period from 20th May 2004 till 4th June 2004 passed by the appeal Court. According to them such action of this appellant SEBI is in violation of order of status quo and that interpretation of the order of status quo, of the appellant ought not to be accepted. If there be any ambiguity with regard to scope and purport of any order of the Court one has to approach Court. He refers to the Supreme Court decisions reported in AIR 1988 SC 125 and Satyabrata Biswas and others Vs. Kalyan Kumar Kisku and others, to support this plea.

22. We find that the Learned Trial Judge has interpreted the scope and purport of the order of status quo and held that said order of status quo does not extend to dis-entitle the SEBI from issuing subsequent notification. The Learned Trial Judge held that order of status quo passed in the context of the facts and circumstances placed in the earlier writ petition, and it only applies in connection with payment of Registration Fee having correlation with the words "turnover" and also for taking punitive measure. When the Learned Trial Judge has reasonably interpreted and the same does not appear to be absurd one appeal Court will not substitute its own interpretation even if there be another possible interpretation. We accept the interpretation recorded by the Learned Trial Judge regarding scope and purport of the order of status quo. We have gone through the notice of 13th October 2003 nowhere it says that one must make payment of registration and in default of payment, penal measure is to be taken. The decisions cited by the learned Counsel for the appellant quoted above in our view are no manner of application as action taken by the SEBI appellant issuing the said notice nowhere near touching nor violating order of status quo. According to us, one is to approach Court for clarification when the litigant entertains genuine

doubt in his/her mind, or in given fact and situation when there is apparent possibility that any action taken may fall in breach of the order passed by the Court on understanding of the ratio of the two decisions AIR 1988 SC 125 and Satyabrata Biswas and others Vs. Kalyan Kumar Kisku and others,

23. Learned Trial Judge has factually found that even after the order of status quo being vacated on dismissal of the writ petition on 22nd April 2004 or even after effect of the conditional order of the appeal Court stood extinguished no action was taken by the writ petitioners/respondents for furnishing turnover data consequently depositing for Registration Fee. These fact findings of the Learned Trial Judge of the cross-objection remains un-assailed and we find the fact finding is correct and it cannot be assailed under any circumstances. Learned Trial Judge in our view has correctly held that when there is a lapse or laches of the writ petitioners/respondents in spite of having knowledge and/or notice of the said notification they did not avail of the chance of the getting benefit under scheme. They are debarred from pressing such claim, as the Learned Trial Judge totally disbelieved the story of ignorance of the writ petitioners any notice or knowledge of the said notice dated 13th October 2003. In view of the factual findings of the Learned Trial Judge we do not think that the writ petitioner has been able to make out the case as a matter of right to get the benefit of the aforesaid concession under scheme being part I thereof.

24. It is urged before us the portion of the scheme providing for consequences of failure to furnish turn over data without payment of Registration Fee being contrary to Regulation of 1992 is liable to be declared void and that SEBI could not call for furnishing turnover data independent of Registration Fee. We are of the view that such argument has no force at all as unless the turn over data is furnished the Registration Fee cannot be levied. The decision of the Supreme Court reported in Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, is completely misplaced here as we find there has been direct nexus if not basis for computation and realization of the Registration Fee. Registration Fee can legitimately be calculated and realized only when turnover data is furnished or is made available. Therefore, we do not see any reason that any scheme or notice asking for filing turnover data without Registration Fee is void or contrary to Regulation. Sections 11 and 12 of the said Act is wide enough empowering appellant to frame amongst other schemes in order to fulfil the object of the said Act and such scheme should always be consistent with extant rules, regulation and the provision of the Act. The scheme providing for furnishing turnover data is not inconsistent with any of the aforesaid provisions.

25. On the question of discrimination urged by the learned Counsel for the appellant, we are of the view that Learned Trial Judge is legally correct in holding an order passed on consent or concession in any Court does not create any justifiable right. Hence it is possible for some times before the Court of law for

settling a dispute some concession is made and this concession in our view would be applicable to the parties concerned in the same lis as order passed on concession is not a precedent to follow to grant relief to the parties in any subsequent proceedings. Therefore, we think that the Learned Trial Judge has correctly come to conclusion on law that going by the provision of the scheme writ petitioners/respondents are not entitled to get any benefit, but the Learned Trial Judge having noted there has been concession and/or relaxation of time limit in favour of one set of stock and shares brokers, should have held that there has been discrimination.

26. Now turning to the question of declaration of the portion of the scheme namely provision for levy Registration Fee at a flat rate of 0.01 per cent. in case of default of furnishing turnover data within the time, we find that the Learned Trial Judge has held correctly in this case that said provision for levy of Registration Fee at a flat rate of 0.01 per cent. ultra vires the regulation. This portion of the Scheme contained in the part II runs:

The Exchanges were advised to submit gross turnover data based on their own records of the stock brokers do not submit turnover data, after giving sufficient notice and intimating the stock brokers concerned that they would not be eligible for concessional rates of fee and that fee at a flat rate of 0.01% would be levied on the gross turnover reported by the Exchanges to the Board.

27. It is of course urged that Section 11(2)(k) of the said Act confers wide power upon SEBI generally to levy fees and in exercise of such power the aforesaid provision has been made as a penal measure where a Stock-Broker has defaulted as above. Unless the SEBI had an access to actual turnover data of the Stock-Brokers concerned computation and levy of the Registration Fee is not possible. It is also urged with four authorities as quoted above that even if the general power is not there, there has been an implied power in favour of the authorities to make the Act workable. We have gone through the aforesaid decisions cited by the learned Counsel namely , Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd., and Arabinda Das and etc. Vs. State of Assam and Others, . In those decisions factually found that the authority concerned under the respective Acts did not have any specific power to deal with the situation aiming at to prevent non-fulfilment of the object of the Act. In this case, we find that problem basically is for realization of the Registration Fee which has to be done on the basis of the turnover data. The Regulation already framed has made it clear in case of failure of a Registration Fee the penal consequences will follow. We are of the views that for failure to furnish turnover data by the Stock-Broker there was no warrant to frame a scheme for payment of Registration Fee at a flat rate of 0.01 per cent. for turn over data is not asked to be furnished for furnishing sake, it is intended to be done with the object of realizing Registration Fee. According to us when the regulation framed under law provides for penal measure to achieve same object, it is not simply permissible under the law to frame scheme in conflict with existing legal provision. Therefore,

Learned Trial Judge has correctly found that a thing which is required to be done shall be done in the manner as it has been prescribed and not otherwise.

28. We failed to understand why the principle of best judgment in this case is sought to be made applicable. It is misplaced argument, therefore, decisions cited in support of the aforesaid is not required to be discussed nor to be dealt with. We, therefore, hold that the Learned Trial Judge has correctly held that the said portion of the scheme asking providing for levy of 0.01 per cent. in default of furnishing the turnover data ultra vires Act and Regulation and this portion is severable from the scheme itself.

29. Having considered all the aspects of the matter we think that when the petitioners have approached with a prayer for furnishing turnover data and also for payment of Registration Fee a chance should be given. It is not that SEBI has no power to waive interest liability or to extend the time. It appears from the record that it was done in Delhi case hence we cannot allow discrimination to be perpetrated in this case as the writ petitioners are similarly placed. We, therefore, dispose of these matters allowing the writ petitioners to furnish turnover data within a period of 4 weeks from the date of receipt of this order and no receipt of the same SEBI will consider to receive the same without realizing any aforesaid payment of registration fee at a flat rate of 0.01 per cent. and will process the same at the rate as stipulated in the Regulation and also calculate the interest leviable at the specified rate. The SEBI will consider whether a concession of reduction of interest should be allowed or not. We desire that the SEBI will do the same sympathetically as we feel that if such approach is taken it will be possible for the SEBI to mop up the outstanding Registration Fee from large number of Stock-Brokers. This shall be done by the SEBI within a period of 8 weeks from the date of receipt of such communication.

Md. Abdul Ghani, J.

30. I agree.