

(2010) 12 DEL CK 0218

In the Delhi High Court

Case No : Regular First Appeal No. 424 of 2001

Shoes East Ltd.

APPELLANT

Vs

Subhash B. Dalal

RESPONDENT

Date of Decision : 06-12-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9, 96
Companies Act, 1956 — Section 17
Securities and Exchange Board of India (Underwriters) Regulations, 1993 — Regulation 2
Securities and Exchange Board of India Act, 1992 — Section 11, 11(2), 11(3), 11(4), 11(C)

Citation : (2011) 1 AD 1

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Pawan Sachdeva, C.M.D. in R.F.A. Nos. 424, 427, 436, 437, 438, 439, 441, 459 and 462 of 2001 and 13/2003, for the Appellant; Parminder in RFA Nos. 427, 437, 441, 459 of 2001 and 13 of 2003, for the Respondent

Final Decision : Allowed

Judgement

Valmiki J Mehta, J.

RFA No. 441/2001

1. The present appeal u/s 96 of the Code of Civil Procedure, 1908 (CPC) has been filed against the judgment and decree dated 9.4.2001 (hereinafter referred to as the "impugned judgment and decree"). By the impugned judgment and decree the Appellant/Plaintiff's suit for recovery has been dismissed in view of Sections 15Y and 20A of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as the "SEBI Act") which provisions contain a bar of jurisdiction of the Civil Courts.

2. The facts of the case are that the Appellant/Plaintiff filed the suit for recovery of Rs. 3,85,000/- against the Defendant who had on payment of monetary

incentive entered into an agreement with the Appellant for procurement of applications for subscribing to a public issue of the Appellant. In order to raise funds for its projects, the Appellant-company floated a public-cum-right issue of shares aggregating to Rs. 699,00,00,000/- and also a public issue of fully convertible debentures aggregating to Rs. 349,93,75,200/-. The case of the Appellant-Plaintiff is that relying upon the representation of the Respondent/Defendant who undertook to procure subscription applications to the tune of Rs. 10crore in accordance with the incentive scheme dated 23.1.1995, the Appellant released an amount of 50% of the incentive amount of Rs. 2,50,000/- to the Respondent. The public issue, however, was not subscribed to the required extent and the Respondent also failed to get the committed subscription as per the incentive scheme. Since the public issue failed, the Appellant had to refund the amount to the various applicants-subscribers to the share issue and the fully convertible debentures issue. As per the incentive scheme, if the Defendant failed to get the committed subscription, he had to refund double the amount of the advance taken from the Plaintiff. The Appellant/Plaintiff thus filed the suit against the Respondent/Defendant for recovery of the amount of Rs. 2,50,000/- with interest @ 18% per annum w.e.f. 18.4.1995.

3. The Defendant appeared and contested the suit by filing the written statement. After completion of pleadings, the following issues were framed by the Court on 16.10.2000:

I. Whether the Plaintiff is entitled to the decree of Rs. 3,85,000/ alongwith the interest @ 11 per cent per annum?

II. Whether the present suit is within the period of limitation?

III. Relief.

4. By the impugned judgment and decree the suit has been dismissed on the ground that Civil Courts have no jurisdiction and the jurisdiction was said to be of the Board acting under the Securities and Exchange Board of India Act, 1992(SEBI Act) or the adjudicating officer appointed under the said Act and its relevant regulations. The operative paras of the impugned judgment and decree are paras 11 to 15 and which read as under:

11. I have heard Ld. counsel for the parties and have carefully perused the entire evidence on record and I find from the prosecution, that the public issue in question, floated by the Plaintiff, was within the parameters of the Companies Act,1956. In this prosecution, it is mentioned that the copy of application is to be made to Company Law Board u/s 17 of the Companies Act, 1956 and it also contains that the relevant provision of the Companies Act, 1956 and the guidelines issued by the Government have been complied with an no statement in the prospectus is contrary to the provisions of the Companies Act, 1956 and rules made there under. There is also letter dated 21.04.1995 on record which was sent by SBI Capital Market Ltd. (Lead Manager to the public issue) and the same is addressed to the Plaintiff as it contains a fax message in which there is a

reference to a letter dated 21.04.1995 received from Securities and Exchange Board of India (herein after referred to as SEBI) to the Lead Managers to the public issue and this letter has been also placed on record by the Plaintiff.

12. The Securities and Exchange Board of India Act, 1992 deals with matters relating to collective investment scheme and regulates substantial acquisition of shares and prohibits fraudulent and unfair trade practices relating to securities markets. The above-referred Act provides complete mechanism for redressal of grievances and to protect the interests of investors in securities and to promote the development of, and to regulate, the securities market and for matters connected therewith or incidental thereto and for this purpose, Securities and Exchange Board of India has been established and as per Section 15(Z) of the Securities and Exchange Board of India Act, 1992, any person aggrieved by any decision or order of Securities Appellate Tribunal may file an appeal to the High Court within 60 days from the date of communication of the decision or the order.

Section 15(Y) of the Securities and Exchange Board of India Act, 1992 reads as under:

15(Y). Civil Court not to have jurisdiction

No civil court shall have jurisdiction to entertain any suit for proceeding in respect of any matter which an Adjudicating Officer appointed under this Act or a Securities Appellate Tribunal constituted under this Act is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

13. Section 30 of the Securities and Exchange Board of India Act, 1992 authorizes the Securities and Exchange Board of India with previous approval of Central Government, to make regulations in the matters relating to issue of capital, transfer of securities and other matters incidental thereto.

14. Securities and Exchange Board of India, from time to time, has been issuing guidelines for issue advertisement, advertisement code and guidelines for disclosure and investor's protection.

15. In view of the above-referred legal position, I do not agree with Ld. counsel for the Plaintiff that the above-referred provisions of SEBI Act are not attracted to the present proceedings, simply because the incentive scheme is said to be not a part of Underwriting Agreement or any other document pertaining to the public issue. I also do not agree with Ld. counsel for the Plaintiff that the question of maintainability of the present suit is beyond pleadings because it is a legal issue and has to be dealt with at the very threshold, even if it is not so pleaded by the Defendant. I do find that a preliminary objection has been taken in the Written Statement by the Defendant to the effect that the present suit is totally misconceived and baseless. A legal issue can be raised at any stage of the suit proceedings. Once, legal issue regarding the maintainability of the present

suit has been raised by the Defendant at the time of arguments, the burden is upon the Plaintiff to satisfy the Court that the suit is maintainable. Question of maintainability/jurisdiction goes to the root of the matter. Ld. counsel for the Plaintiff has not been able to show as to how the subject matter of the present suit does not fall within the domain of the SEBI Act.

5. The only issue, therefore, to be decided by this Court is as to whether the jurisdiction of Civil Courts is barred by virtue of Sections 15(Y) and 20A of the SEBI Act. These sections are reproduced as under:

Section 15(Y) No civil Court shall have jurisdiction to entertain any suit or proceedings in respect of any matter which an adjudicating officer appointed under this Act or a Securities Appellate Tribunal constituted under this Act is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

Section 20A. No order passed by the Board (or the Adjudicating Officer) under this Act shall be appealable except as provided in (Section 15T or) Section 20 and no civil court shall have jurisdiction in respect of any matter which the Board (or the Adjudicating Officer) is empowered by, or under, this Act to pass any order and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any order passed by the Board (or the Adjudicating Officer) by, or under, this Act.

6. A reading of the aforesaid provisions being Sections 15(Y) and 20A shows that whereas Section 15(Y) provides that a Civil Court will not have jurisdiction with respect to any action taken or to be taken in pursuance to any power conferred by the SEBI Act and that the Civil Court will not have jurisdiction to entertain any suit or proceedings in respect to any matter which the adjudicating officer appointed under the SEBI Act or Securities Appellate Tribunal constituted under the said Act is empowered to decide. Section 20A deals with bar of jurisdiction of the Civil Court with respect to matters which are appealable as provided in Section 15T or Section 20. Though there does seem to be certain overlapping between Section 15(Y) and Section 20A, however, the substance of the two sections is that if the subject matter of adjudication before the Civil Court is such which either the Board or the adjudicating officer or the Appellate Tribunal can decide, then, it is only such an adjudicating officer or the Board or Appellate Tribunal which would decide the issue and not the Civil Court.

7. A reference to the impugned judgment shows that the Trial Court has not referred to any of the provisions of the SEBI Act or any of its regulations which would entitle the Board or the adjudicating officer or the Appellate Tribunal to entertain and decide the suit for recovery of money as the present by a company against the contracting party under an incentive scheme and which contracting party had offered to get a subscription of a particular amount for the company for its public issue. It may be noted that the Respondent is not an underwriter

because an underwriter subscribes to the share capital of a company. The expressions underwriter and underwriting have been defined in Securities and Exchange Board of India (Underwriters) Regulations, 1993. The definitions of these expressions are found in regulations 2(f) and (fa) and which read as under:

Underwriter means a person who engages in the business of underwriting of an issue of securities of a body corporate: "Underwriting means an agreement with or without conditions to subscribe to the securities of a body corporate when the existing share holders of such body corporate or the public do not subscribe to the subscribes offered to them.

It is, therefore, quite clear that the present agreement under which the recovery suit has been filed is not in the nature of an underwriting agreement and in fact the Appellant/Plaintiff company had entered into underwriting agreements with various other companies with whom litigations are said to be pending.

8. Though the Respondent has also filed detailed written submissions taking many pleas, in my opinion, the only issue which is required to be addressed by this Court is as to whether there exists a statutory provision in the SEBI Act or its regulations by which recovery of the amount as prayed for in the present suit can be decreed by an adjudicating officer or the Board or the Appellate Tribunal. I put a specific query to the learned Counsel for the Respondent to point out a specific provision in the SEBI Act by which such a recovery suit can be entertained by any of the authorities under the SEBI Act, however, the learned counsel could not point out any such provision either in the Act or any of the regulations. The learned Counsel for the Respondent has harped upon the scheme of the SEBI Act and its regulations to contend that there is a bar of jurisdiction of Civil Courts in terms of the aforesaid Sections 15(Y) and 20A. This argument is however without legs because the provisions of Sections 15(Y) and 20A come into force, only if, firstly the adjudicating officer or the Board or the Appellate Tribunal can decide such a suit for recovery of money. The object of bar of jurisdiction whether u/s 9 CPC or u/s 15(Y) and 20A of the SEBI Act is that there is an adjudicating mechanism which can be resorted to. Surely, it is not the intention of the legislature while enacting Sections 15(Y) and 20A of the SEBI Act that there cannot at all be adjudication and a person is barred from approaching any forum where the lis can be decided. The counsel for the Respondent also sought to urge that the contract in question is an illegal contract and consequently there is no question of refund of any amount received in such an illegal contract, however, this last argument is an argument which is not of jurisdiction but of merits which will have to be adjudicated upon by the Civil Court on merits.

9. At this stage, I may note a very surprising fact that in the entire written statement there is absolutely no reference either to the provisions of Sections 15(Y) or 20A of the SEBI Act. There is also no reference to any of the regulations which bars the Civil Court from deciding the suit. In fact, in the entire written statement there is no averment with respect to the Civil Court not having jurisdiction to try the suit. The counsel for the Respondent, however, contended

that this is a purely legal issue which could have been argued at any stage. Of course, a legal issue can be argued at any stage, however, there, more often than not, has to be some basis as to such an objection in the pleadings of a party more so in a case which is argued at the stage of final arguments after trial. The object of a pleading is to put the opposite party to notice as to what exactly the objection is so that the same can be met by the opposite party. I find that in the present case in absence of any pleadings, injustice has been done to the Appellant/Plaintiff because the Appellant/Plaintiff would not have known what are the exact arguments/stand and the provisions which he would have to meet to show that there was no bar of jurisdiction of the Civil Court. In fact, as already held, there is no provision in the SEBI Act or its relevant regulations which provide a mechanism for adjudication which is the subject matter of the suit in question.

10. The counsel for the Respondent in support of his arguments has sought to place reliance upon para 6 of Securities and Exchange Board of India Vs. Alka Synthetics Ltd. and Others, . This para 6 reads as under:

6. The learned single judge has passed an elaborate order after considering various grounds on which the aforesaid action and the order dated July 4, 1996, was challenged and has come to the conclusion that the SEBI has no authority of law under the existing statute to impound or forfeit the monies received by the stock exchange as concluded transactions for squaring up the outstanding transaction under its procedure and to use for any other purpose, and that the orders also suffer from breach of principles of natural justice which results in making them void ab initio. The learned single judge has found that the orders cannot be sustained and the reliefs could not be denied to the Petitioners even on the principles of unjust enrichment. Accordingly, the impugned order July 4, 1996, in Special Civil Application No. 2224 of 1996, and the order dated January 25, 1996, in Special Civil Application No. 5483 of 1996, made by the Board as affirmed by the Central Government by its order dated May 22, 1996, have been quashed to the extent they direct impounding of the monies recovered by the respective stock exchanges on the closing transactions.

I do not understand as to how at all this paragraph will help in determination of the issue in question in the present case. I do not find any discussion in this para as to which provision would entitle adjudication by the Board or the adjudicating officer or the Appellate Tribunal of the suit of the present nature.

The counsel for the Respondent finally sought to contend that since there is a vacuum in the regulations, SEBI is entitled to decide the issues which are subject matter of the present suit. If that be so, surely only when such regulations are framed which will permit the Adjudicating Officer or the Board or the Appellate Tribunal to decide the suit such as the present, then it can be canvassed that the Civil Court has no jurisdiction in view Sections 15(Y) and 20A otherwise as things stand at present except the Civil Court there is no adjudicating forum to decide the disputes which are the subject matter of the present suit.

11. The Chairman of Managing Director of the Company who represented the Appellant company, rightly placed reliance upon the Division Bench judgment of the Bombay High Court in the case of Mrs. Asha Anilkumar Kataria Sole proprietor of KAT STOCKS Vs. Ashokkumar Bafna, Proprietor of K. Ashokkumar Bafna and Ashok and Co., Rajkumar Bafna and Kevalchand Bafna, in which it was held that the ouster of jurisdiction of Civil Court is not to be easily inferred. It was held that unless a matter is specifically provided for adjudication by the appropriate authority under the SEBI Act or its regulations there is no bar in the Civil Court to decide such an issue. The relevant portion of this judgment is reproduced as under:

10. From the cross examination of Anilkumar, two things are clear. The Plaintiff has been dealing in the business of shares and securities since 1994 as a sub broker, but without having necessary registration as a sub-broker either with the SEBI or any other recognized Stock Exchange. Although, it is claimed that she has recently applied for such registration, as at present, we do not have any document, supporting such a claim. It is also admitted position that the suit claim is towards price of the shares purchased and sold by the Defendants.

This brings us to consider the scheme of SEBI Act, 1992 and whether the said Act specifically bars jurisdiction of the Civil Court. Reliance is placed upon Section 20-A of the said Act, which reads thus:

20-A Bar of jurisdiction:

Xxxxxxx

Since this is not a case wherein any order passed either by the Board or the Adjudicating Officer is being challenged or injunction being sought against any such order, we are not concerned with first and third part of the section. The relevant portion of the section, which creates a bar of jurisdiction is underlined for the purpose of emphasis. The jurisdiction of Civil Court is barred in respect of the matters which the Board or the Adjudicating Officer is empowered by or under this Act to pass any order. Naturally it becomes necessary to refer to the provisions which enable Board or Adjudicating Officer to pass any orders and the nature of the subject upon which those authorities are empowered to pass orders. Only subject matters of that nature shall stand excluded from the jurisdiction of Civil Court and for the purpose a reference to provisions elsewhere becomes necessary.

So far as nature of subjects and the orders those can be passed thereon by the Board, the same can be seen in Chapter IV titled as "Powers and Functions of the Board". From the text of Section 11, it is evident that it is the duty of the Board to protect the interest of investors in securities and to promote the development of and to regulate the securities market by measures as it thinks fit. Some of the measures those can be taken by the Board are enlisted in Sub-section (2), which includes registration and regulation of the working of the stock brokers and sub brokers. The nature of the orders those can be passed finds

place in Sub-section (4) of Section 11. By Sub-section (3), the Board is empowered with all the powers of Civil Court while exercising the powers under Clauses (i) and (i-a) of Sub-section (2) of Section 11, such as discovery and production of books of accounts, summoning and enforcing the attendance of witnesses, inspection of books, registers and documents, issuing commissions etc. Section 11-B is another provision speaking about powers of the Board to issue directions and the Board is empowered to issue appropriate orders in the interest of investors in the securities and the securities market, upon being satisfied that it is so necessary. Section 11-C empowers the Board to investigate when there are reasonable grounds for taking such a step. On going through entire chapter, there is nothing to indicate that the Board is empowered to resolve a dispute between sub broker and the client regarding non payment of dues. Section 15-Y is another provision which bars jurisdiction of the Civil Court. It reads:

15-Y Civil Court not to have jurisdiction:

Xxxxxxxx

Section 15-I refers to Adjudicating Officer and it is evident from the said provision that the Board is required to appoint an officer not below the rank of a division chief to be an Adjudicating Officer for holding an enquiry in the prescribed manner after giving any person concerned a reasonable opportunity of being heard for the purpose of imposing any penalty Under Sections 15-A, 15G, 15H, 15HA and 15HB. In fact, Chapter VI-A, which is titled as "Penalties and Adjudication" is the chapter within which Section 15-I is placed. Section 15-Y is placed in next Chapter VI-B regarding establishment, jurisdiction, authority and procedure of Appellate Tribunal. On reference to these provisions, it is evident that these are penal provisions empowering the Adjudicating Officer to impose penalty upon any person who commits a default as mentioned in those respective provisions. And the defaults are, failure to furnish information/return, failure to enter into agreement with clients, failure to redress investors' grievances, certain defaults in mutual funds, failure to observe rules and regulations by an asset management company, defaults on the part of stock brokers etc. Suffice it to say that these are penal provisions for various defaults and Adjudicating Officer does not seem to have any jurisdiction to deal with any civil disputes.

So far as Securities Appellate Tribunal is concerned, Section 15-T indicates that a person aggrieved by an order of the Board passed after commencement of the Securities Laws (2nd Amendment) Act, 1999, or by an order passed by an Adjudicating Officer, can prefer an appeal to Securities Appellate Tribunal. It is needless to say that the Securities Appellate Tribunal shall be dealing with the same subject matters which the Board and the Adjudicating Officer are empowered to deal with. A reference may be made also to Section 15-K(2), which runs thus:

15 K- Establishment of Securities Appellate Tribunal.

(1) ...

(2) The Central Government shall also specify in the notification referred to in Sub-section

(1) the matters and places in relation to which the Securities Appellate Tribunal may exercise jurisdiction.

No notification of the Central Government is relied upon by learned Counsel for the Respondents to demonstrate that the civil dispute regarding non payment by the client to the sub broker is covered as a subject over which Securities Appellate Tribunal can exercise jurisdiction. Having gone through all the provisions of SEBI Act, 1992, pertaining to various authorities under the Act and their powers, we have not been able to find out a provision that empowers either authority to deal with a dispute regarding non payment by client to the sub broker the amounts due. On the contrary, as pointed out by Shri Mandlik, senior counsel for the Plaintiff, Section 20-A regarding bar of jurisdiction of a civil Court is followed by a saving clause as contained in Section 21 of SEBI Act, 1992 and the said provision reads thus:

21. Savings Nothing in this Act shall exempt any person from any suit or other proceedings which might, apart from this Act, be brought against him. We are of a considered view that at least Section 21 indicates that civil Court shall continue to have jurisdiction over the subject matters for which the authorities under the Act are not empowered to decide.

15. xxxxxx

With above observations regarding provisions creating bar against jurisdiction of the civil court read with Section 21 of SEBI Act, 1992, laying down that nothing in this Act shall exempt any person from any suit or other proceedings which might, apart from this Act, be brought against him, it does not appear to be a situation wherein exclusion of jurisdiction of civil court can be readily inferred. This is not a case, where cognizance of suit for recovery of dues, although arising out of sale-purchase of securities, is expressly barred. The intent of the legislature, if to be examined, Section 21 of the SEBI Act, 1992, speaks against total exclusion of jurisdiction of civil court. Recovery of the dues is a right pre-existing under common law and not a right created by SEBI Act, 1992. This, therefore, is not a case wherein the statute itself creates a right and also provides machinery for enforcement of the same. On the contrary, it is a case wherein a right is pre existing under common law and one more remedy is provided by arbitration clause, if included in the agreement, without expressly excluding the jurisdiction of the civil court. Consequently, this is a case wherein both, the common law and the statutory remedies, are the concurrent remedies. Since the transactions are of a period prior to coming into force of Arbitration Act, 1996, the difference in the legal position as under Arbitration Act, 1940 and

Arbitration Act, 1996, also cannot be ignored, because when the model agreements were prescribed, Arbitration Act, 1996 was not in existence. We are, therefore, unable to accede to the submission of learned Counsel for the Respondents that there is implied agreement containing arbitration clause between sub-broker and client by virtue of statutory terms and conditions and that, therefore, jurisdiction of the civil court is taken away." (Emphasis added)

It is therefore quite clear that there is no question of bar of jurisdiction of Civil Court in a suit for recovery such as the present where the company seeks to invoke a contractual obligation against a person who promises to bring in a particular amount of subscription but fails to do so. There is no provision in the SEBI Act or its regulations for an adjudicating officer or the Board or the Appellate Tribunal to pass a decree for recovery in cases such as the present.

12. In view of the above, I find that the impugned judgment and decree is wholly unsustainable and is accordingly set aside. The trial Court failed to address the real issue as to which was the provision under which the adjudicating officer or the Board or the Appellate Tribunal can adjudicate upon a suit for recovery such as the present one which was filed before it. I have already reproduced the relevant paragraphs of the judgment of the trial Court and the same is conspicuously silent as to which of the provisions entitles adjudicating officer or the Board or the Appellate Tribunal to decide upon a suit for recovery such as the present.

The appeal is allowed and the impugned judgment and decree is set aside. Parties are directed to appear before the District and Sessions Judge on 22.12.2010 when the District and Sessions Judge will mark the cases to the appropriate Court for disposing of the same in accordance with law. Trial Court record be sent to the District & Sessions Judge by special messenger.

The appeal is therefore allowed, in the aforesaid terms, leaving the parties to bear their own costs.

RFA Nos. 438/2001 and C.M. Nos. 1288/2001 & 1902/2003

RFA No. 459/2001 and C.M. No. 1314/2001

RFA No. 462/2001 and C.M. No. 10304/2006

RFA No. 13/2003

In the present appeals, the suits were filed for recovery of Rs. 3,85,000/-, 4,98,750/-, 3,85,000 and 4,98,750/- respectively. Since the issue in these appeals is covered by the order passed in RFA No. 441/2001, the appeals are allowed and the parties in the these appeals are also directed to appear before the District and Sessions Judge on 22.12.2010 when the District and Sessions Judge will mark the cases to the appropriate Court for disposing of the same in accordance with law. Trial Court record be sent to the District & Sessions Judge by special messenger.

The appeals are therefore allowed, in the aforesaid terms, leaving the parties to bear their own costs.

RFA No. 424/2001

RFA No. 427/2001

RFA No. 436/2001 and C.M. Nos. 1286/2001 and 1901/2003

RFA No. 437/2001 and C.M. No. 1287/2001

RFA No. 439/2001 and C.M. No. 1285/2001

In the present appeals, suits were filed for recovery of Rs. 3,85,000/-, 4,98,750/-, 3,85,000/- 4,98,750/- and 3,85,000/- . In these appeals, the Defendant was proceeded against exparte and yet the suits were dismissed. Parties in the these appeals are also directed to appear before the District and Sessions Judge on 22.12.2010 when the District and Sessions Judge will mark the cases to the appropriate Court for disposing of the same in accordance with law.

Trial Court record be sent to the District & Sessions Judge by special messenger.

These appeals are therefore allowed, in the aforesaid terms, leaving the parties to bear their own costs.