

(2011) 07 AP CK 0070

In the Andhra Pradesh High Court

Case No : Writ Petition No"s. 27354 of 2008 and 8471 of 2009

SVPCL Ltd.

APPELLANT

Vs

Securities Exchange Board of India and Another

RESPONDENT

Date of Decision : 18-07-2011

Acts Referred:

Companies Act, 1956 — Section 612, 73, 73(1A), 73(2), 73(5)
Securities and Exchange Board of India Act, 1992 — Section 11, 11A, 11B, 12, 15C
Securities Contracts (Regulation) Act, 1956 — Section 22A

Citation : (2011) 167 CompCas 221 : (2011) 110 SCL 168

Hon'ble Judges : C.V. Nagarjuna Reddy, J

Bench : Single Bench

Advocate : B. Adinarayana Rao, for the Appellant; S.R. Ashok for P.V.S.S.S. Rama Rao, for the Respondent

Judgement

C.V. Nagarjuna Reddy, J.—W.P. No. 27354 of 2008 is filed by M/S. SVPCL Limited and W.P. No. 8471 of 2009 by its Directors for a mandamus to set aside notice in proceedings No. CFD/DIL/NB/NB/SCN/146318/2008, dated 02.12.2008, of Respondent No. 1. They sought for a consequential direction to the Respondents to desist from taking any coercive steps in pursuance of the impugned notice.

2. Since the issues raised in both these writ petitions are identical, they are heard and are being disposed of by this common order. For convenience, the parties are referred to as they are arrayed in W.P. No. 27354 of 2008.

3. The Petitioner is a Company incorporated under the provisions of the Companies Act, 1956 (for short "the Companies Act"). Its authorised share capital is Rs. 27.50 crore. Intending to raise its capital for expansion of its business operations, its Board of Directors passed a resolution on 23.02.2007 to raise capital by inviting subscriptions of 76,66,668 equity shares from the public by way of 100% voluntary book building process at a price band of Rs. 40-45/-. The public issue was opened on 22.10.2007 and closed on 26.10.2007. In the public issue, BOB Capital Markets Limited was the book running lead manager

and Standard Chartered Capital Markets Limited was the co-book running lead manager responsible for post-issue compliances. M/S. Aarthi Consultants (P) Limited was the Registrar to the issue. The prospectus issued by the Petitioner named BSE and NSE as stock exchanges, wherein the proposed shares have to be listed. It has ultimately turned out that the efforts of the Petitioner for listing its shares has become abortive with the 4 CVNR, J W.P. Nos. 27354/08 & 8471/09 BSE refusing to grant permission for such listing. The decision of the BSE was communicated to the Petitioner vide letter, dated 21.01.2008. The Petitioner unsuccessfully questioned the decision of the BSE in W.P. No. 1061 of 2008. The Petitioner was also unsuccessful in its effort to get the said decision reversed in the appeal before the Securities Appellate Tribunal.

4. Be that as it may, Respondent No. 1 issued the impugned show-cause notice purportedly under Sections 11 and 11B of the Securities and Exchange Board of India Act, 1992 (for short "the SEBI Act"). It is inter alia stated therein that the Petitioner's application for listing made with the NSE is deemed to have stood rejected in terms of Section 73(5) of the Companies Act, that in terms of Section 73 of the Companies Act, the issue of shares of the Petitioner has become void and the application money along with applicable rate of interest has to be repaid to the investors. It is further stated that in the appeal filed by the Petitioner, the Securities Appellate Tribunal held that Section 73(5) of the Companies Act postulates deemed rejection and that as No. appeal u/s 73(1A) of the Companies Act r/w Section 22-A of the Securities Contracts (Regulation) Act, 1956 was preferred by the Petitioner against the deemed refusal by the NSE, the entire public issue has failed. Respondent No. 1 referred to the correspondence exchanged between it and the Petitioner in relation to the latter's liability for payment and interest, and observed that u/s 73(2) of the Companies Act, the Petitioner is liable to refund all the money received from the applicants in its public issue along with interest at the rate of 15%. Respondent No. 1 has concluded that the Petitioner has committed default in compliance with Section 73(2) of the Companies Act, which constitutes an offence u/s 73(3) of the Act and also not complying with its advice to refund the application moneys along with the stipulated interest. It is also observed that the default on the part of the Petitioner also constitutes violation of the declarations and undertaking given in prospectus and the Petitioner's application form, besides violation of Clause 6.13.2 of SEBI (DIP) Guidelines, which requires payment of interest at 15% if the refund orders are not dispatched within the specified time. While opining that non-compliance with these provisions is detrimental to the investors' interests in particular and securities market in general, which may invite suitable action under Sections 11A and 11B of the SEBI Act and Clause 17 of SEBI (DIP) Guidelines, Respondent No. 1 has accordingly called upon the Petitioner to show-cause why it is not liable to pay interest at 15% for the period of delay in repaying the application money as per Section 73(2) of the Companies Act and without prejudice to prosecute the Petitioner u/s 73(3) of the Companies Act r/w Section 621 thereof and appropriate action including direction under Sections 11,

11A, 11B of the SEBI Act r/w Clause 17 of the SEBI (DIP) Guidelines and decision u/s 15C of the SEBI Act should not be initiated against it.

5. Before proceeding further, it is pertinent to note that Sri S.R. Ashok, learned Senior Counsel appearing for Respondent No. 1, has fairly conceded that Section 15C of the SEBI Act is not applicable to the facts of this case and that therefore, Respondent No. 1 will not proceed against the Petitioner with reference to the said provision.

6. With this understanding, let me refer to and consider the respective submissions of the learned Counsel for the parties.

7. Sri B. Adinarayana Rao, learned Counsel for the Petitioner, submitted that the impugned show-cause notice even sans Section 15C of the SEBI Act is without jurisdiction, because none of the provisions referred therein, namely, Sections 11, 11-A and 11-B of the SEBI Act, would bring the Petitioner under the regulatory authority or control of Respondent No. 1 for the simple reason that the Petitioner is neither a listed company nor an intermediary nor any person who is associated with the securities market. The learned Counsel submitted that while it is the default of the merchant banker in payment of interest as envisaged u/s 73(2) of the Companies Act, which has lead to failure of the Petitioner to pay interest as envisaged u/s 73(2) of the Act, the Petitioner cannot be found fault with and proceeded against by Respondent No. 1. Since Respondent No. 1, argues the learned Counsel, suffers from inherent lack of jurisdiction in issuing the show-cause notice, the Petitioner ventured to file the writ petition questioning the show-cause notice itself.

8. Opposing the above contentions, Sri S.R. Ashok, learned Senior Counsel, submitted that Section 11 of the SEBI Act enumerates the functions of Respondent No. 1, which inter alia include the responsibility to protect the interests of the investors in securities and to promote the development of, and to regulate the securities market by such measures as it thinks fit. The learned Senior Counsel further submitted that u/s 11A(1)(a) of the SEBI Act, Respondent No. 1 is empowered to specify by Regulations the matters relating to issue of capital, transfer of securities and other matters incidental thereto and the manner in which such matters shall be disclosed by the companies. Sub-clause (b) thereof empowers Respondent No. 1 by general or special orders from prohibiting any company from issuing of prospectus, any offer document, or advertisement soliciting money from the public for the issue of securities and specify the conditions subject to which, such offer document or advertisement, if not prohibited, may be issued. The learned Senior Counsel also placed reliance on Section 11B of the SEBI Act in support of his submission that under Sub-clause (iii) of the said provision, Respondent No. 1 is empowered to give directions to any company in respect of the matters specified in Section 11A of the Act.

9. I have carefully considered the submissions of the learned Counsel for the

parties.

10. This writ petition in effect is in the nature of prohibition. The law is well settled that the jurisdiction for grant of writ of prohibition is primarily supervisory and the object of that writ is to restrain the Courts or inferior Tribunals from exercising the jurisdiction which they do not possess at all or else to prevent them from exceeding the limits of their jurisdiction (see *Govinda Menon Vs. Union of India (UOI)*),

11. Now the question that needs to be considered is - whether a case is made out for restraining Respondent No. 1 from proceeding further in pursuance of the impugned show-cause notice?

12. Section 11 of the SEBI Act prescribes the powers and functions of Respondent No. 1. As submitted by the learned Senior Counsel that one of the functions of Respondent No. 1 is to protect the interests of the investors in securities and to promote the development of, and to regulate the securities market by taking appropriate measures as it thinks fit. The provisions of Section 11A and 11B of the SEBI Act need to be interpreted in the light of this onerous responsibility of Respondent No. 1 to protect the interests of the investors. It is No. doubt true that u/s 11B, Respondent No. 1 is empowered to issue directions to any person or class of persons referred to in Section 12 of the SEBI Act or associated with the security market or to any company in respect of the matters specified in Section 11A. Section 12 of the SEBI Act enumerates various categories of persons, who are associated with securities market. The question is whether the Petitioner, which is not a listed company, also falls within the expression of the "persons who may be associated with the security market"?

13. While the learned Counsel for the Petitioner says that the Petitioner-company does not fall within the said expression, the learned Senior Counsel submits that in order to make a purposive interpretation of the provisions of the SEBI Act, it is necessary to bring a company like the Petitioner, which failed to get its shares listed after having collected the application fees within the said expression with a view to check the irregularities that may be indulged in by such companies. u/s 11A of the SEBI Act, on which, strong reliance was placed by the learned Senior Counsel, Respondent No. 1 is empowered to make Regulations with 9 CVNR, J W.P. Nos. 27354/08 & 8471/09 respect to the matters relating to issue of capital, transfer of securities and other matters incidental thereto. Respondent No. 1 has made guidelines called SEBI (Disclosure & Investor Protection) Guidelines, 2000 which according to the learned Senior Counsel appearing for Respondent No. 1 are almost in pari materia with the statutory Regulations made in the year 2009. The learned Senior Counsel relied on Clause 7.3.1. of the said Guidelines which postulates that Lead Merchant Banker shall actively associate himself with post-issue activities, namely, allotment, refund, despatch and giving instructions to Self Certified Syndicate Banks and shall regularly monitor redressal of investor grievances arising therefrom in support of his submission that the Merchant banker has only supportive role. He made a strong emphasis on Section 73(2) of

the Companies Act, under which, it is the responsibility of the company to pay interest to the applicants in the event the applications are not returned within eight days of rejection of the public issue.

14. The learned Senior Counsel submitted that it is the company which is principally liable for refund of the application fee along with interest and that SEBI being entrusted with the duty of protecting the investors' interests, it has power and authority to take such action as is necessary for non-compliance with the Section 73(2) of the Companies Act and also other statutory provisions contained under the SEBI Act and the Guidelines issued or the Regulations made therein.

15. As noted above, the short question for the present purpose is whether Respondent No. 1 inherently lacks jurisdiction to issue the impugned show-cause notice. At this stage, it is neither necessary nor proper for this Court to render conclusive findings on the scope and purport of the various provisions on which the learned Counsel for both the parties have placed reliance and which have been noted hereinabove. Respondent No. 1 being an apex statutory body, which is inter alia vested with the onerous responsibilities and functions not only to regulate the stock market, securities etc., but also to protect the investors' interests, shall first decide as to whether the Petitioner, which is not a listed company, can be proceeded against under the provisions of Sections 11, 11A and 11B of the SEBI Act and the statutory Regulations made by it. The questions, such as, whether the Petitioner falls under the expression "any company" as envisaged in Section 11B(iii)(b) of the SEBI Act and whether the Petitioner has violated any of the Regulations which are framed by Respondent No. 1 in exercise of its power u/s 11A of the SEBI Act etc, need to be decided by Respondent No. 1 in the first place. It is only thereafter that the Petitioner can invoke its remedies available to it under law if it feels aggrieved by any such decision of Respondent No. 1.

16. In my considered opinion, this is not a case where Respondent No. 1 inherently lacks jurisdiction to issue the impugned show-cause notice. The question whether Respondent No. 1 can proceed against the Petitioner as proposed under the impugned show-cause notice can only be decided after the Petitioner files its objections and makes out a case of lack of jurisdiction on the part of Respondent No. 1 with reference to the interpretation of scope and object of the SEBI Act and the provisions of the Companies 11 CVNR, J W.P. Nos. 27354/08 & 8471/09 Act, besides the Regulations and the Guidelines, if any, issued under the SEBI Act.

17. In the premises as above, while holding that Respondent No. 1 will not proceed against the Petitioner u/s 15C of the SEBI Act, the Petitioner is permitted to file its objections to the impugned show-cause notice within a period of one month from today. On receiving such objections, Respondent No. 1 shall examine the same in the light of the provisions of the SEBI Act and the Regulations made thereunder and the Companies Act and pass a detailed order

and communicate the same to the Petitioner before seeking to proceed against the Petitioner. Needless to observe that if the Petitioner feels aggrieved by such an order, it is entitled to invoke the appropriate remedy available to it under law.

18. Subject to the above directions, the writ petitions are disposed of.

19. As a sequel to disposal of the writ petitions, the interim orders, if any, shall stand vacated and the interlocutory applications, if any, pending shall stand disposed of as infructuous.