
(2005) 04 OHC CK 0019
In the Orissa High Court
Case No : Writ Petition (C) No. 2595 of 2004

Tulsi D. Bhayana	Vs	APPELLANT
Bhubaneswar Stock Exchange and Others		RESPONDENT

Date of Decision : 27-04-2005

Acts Referred:

Companies Act, 1956 — Section 25
Constitution of India, 1950 — Article 158, 159, 167, 226
Penal Code, 1860 (IPC) — Section 120B, 409
Securities and Exchange Board of India Act, 1992 — Section 11(1), 11(2), 4(3), 6
Securities Contracts (Regulation) Act, 1956 — Section 11(1), 6, 6(3)
Securities Contracts (Regulation) Rules, 1957 — Rule 11
Stock Exchange Board of India (Procedure for Holding Enquiry by Enquiry Officer and Imposing Penalty) Regulations, 2002 — Regulation 13(1), 13(4)

Citation : (2005) 04 OHC CK 0019

Hon'ble Judges : S. Barman Roy, C.J.; Madan Mohan Das, J

Bench : Division Bench

Advocate : Sarada Prasanna Sarangi, B.C. Mohanty, P.P. Mohanty, D.K. Das and P.K. Dash, for the Appellant; P.K. Mohanty and M.K. Panda, for the Respondent

Final Decision : Allowed

Judgement

S. Barman Roy, C.J.—By this petition under Article 226 of the Constitution of India, the Petitioner has prayed for quashing the notice dated 16.1.2003 under Annexure-12 issued by opposite party No. 3 being the Administrator of Bhubaneswar Stock Exchange, Bhubaneswar expelling the Petitioner from membership of the said Exchange.

2. The case, in brief, is that the Petitioner is a Chartered Accountant. He is one of the promoter members of Bhubaneswar Stock Exchange, a corporate body incorporated under the Indian Companies Act, 1956. Bhubaneswar Stock Exchange was given recognition by the Stock Exchange Division, Ministry of Finance, Government of India in the year 1989 under the provisions of Securities Contracts (Regulation) Act, 1956. Petitioner is also a registered stock broker with

the Securities and Exchange Board of India (hereinafter referred to as "SEBI"). As a member of Bhubaneswar Stock Exchange Petitioner has a right to carry on business of stock broking at Bhubaneswar Stock Exchange. It is the further case of Petitioner that he is also a Director of the Indian Finance Guaranty Ltd. (hereinafter referred to as "IFGL"). Said IFGL is a corporate member of the equity market segment of National Stock Exchange (hereinafter referred to as "NSE") since 1996. Said IFGL as a member of equity market segment is also a registered stock broker with SEBI. Said IFGL is carrying on business on stock broking in its offices at Bhubaneswar, Delhi, Hissar and Meerut. Bhubaneswar Stock Exchange is a Company Limited by Guarantee registered u/s 25 of the Companies Act, 1956, which was incorporated on 17.4.1989 with the Registrar of Companies, Orissa.

3. The Council of Management of the Bhubaneswar Stock Exchange in its meeting held on 7.8.1996 established a trust called Bhubaneswar Stock Exchange Members Welfare Trust (hereinafter referred to as the "said Trust".) A deed was executed and registered between Bhubaneswar Stock Exchange and the trustees on 23.9.1996. Every member of the Bhubaneswar Stock Exchange contributes Rs. 3000/- per annum to the trust fund. The objective of the said trust is to extend loans for benevolent purposes to member brokers and/or their families like reimbursement of medical expenses, ex gratia payment to the family in case of the death of a member, their daughters' marriage, higher education of children of member brokers and also to tide over temporary financial difficulties in payment of dues of the clearing house of the Exchange.

4. The Bhubaneswar Stock Exchange by its letter dated 24.9.2001 requested the Chairman of SEBI for an enquiry into the allegations of siphoning of funds of the Trust. In this connection an elaborate report of the members of the Trust from its inception till 22.9.2001 which included, inter alia, the details of various loans sanctioned by the Trust from time to time since its inception, security taken against such loan, the name of the office bearer of the Bhubaneswar Stock Exchange and Members Welfare Trust on the date on which such loans were sanctioned, details of outstanding loans etc. as considered necessary by the Council of management of Bhubaneswar Stock Exchange in its meeting held on 22.9.2001 was forwarded to SEBI along with the aforesaid letter dated 24.9.2001. It is stated that SEBI is the ultimate regulatory body in India constituted under the Securities and Exchange Board of India Act, 1992 for regulating the stock exchanges and stock brokers. In response to the aforesaid request made by the Bhubaneswar Stock Exchange by its letter dated 24.9.2001, Chairman of SEBI in exercise of his power conferred upon him by or under Sub-section (3) of Section 6 of the Securities Contracts (Regulation) Act, 1956 appointed an Enquiry Officer on 28.9.2001 to enquire into the affairs of the said Trust and various allegations made in this regard. Accordingly, the enquiry team visited the Stock Exchange of Bhubaneswar on 1.10.2001 and conducted elaborate investigation into the affairs of the Trust.

5. It is further stated in the petition that with regard to same allegations which were enquired into by the enquiry team as appointed by the Chairman of SEBI, Principal Secretary to the Government of Orissa, Finance Department and the Director of the Council of Management of Bhubaneswar Stock Exchange by a letter dated 26.3.2002 requested the Director General of Police, C.I.D., Crime Branch, Cuttack to investigate into the same allegations as regards siphoning out Bhubaneswar Stock Exchange funds to the extent of Rs. 1.30 crores. The said letter was registered as an F.I.R. and the matter was investigated by the Crime Branch. The said F.I.R. is annexed to the petition as Annexure-5. After completion of aforesaid statutory enquiry u/s 6 of the Securities Contracts (Regulation) Act, the Enquiry Officer appointed by SEBI under his letter dated 20.5.2002 submitted his report to the Executive Director of Bhubaneswar Stock Exchange. The said enquiry report dated 20.5.2002 is annexed to the petition as Annexure-6. When the matter stood thus, Bhubaneswar Stock Exchange issued notice dated 17.6.2002 to the Petitioner to show-cause within fifteen days as to why he should not be expelled from his membership of Bhubaneswar Stock Exchange under Article 158 of the Articles of Association of the Exchange read with Bye-laws 347 and 348 of the Bye-laws of the Exchange. In the show-cause notice, it has been, inter alia, alleged as follows:

... an amount of Rs. 40,00,000/- (Rupees forty lacs only) have been illegally transferred from the Stock Exchange through BHSE Members' Welfare Trust and subsequently through M/s. Pradeep Investments on different dates to M/s Indian Finance Guaranty Ltd., a Company owned by you jointly with Ors. wherein you are a Director.

In the said notice to the Petitioner it was further stated that the Petitioner is guilty of misconduct which is detrimental to the interest, good name and welfare of the Exchange in terms of Article 158 of the Exchange for the reasons set out therein.

6. The Petitioner submitted his reply to the said show-cause notice on 1.7.2002 when he was detained in custody in connection with some police case. In the said reply the Petitioner denied all the allegations made against him and further prayed that he should be given an opportunity of personal hearing in accordance with the principles of natural justice before any decision is taken against him. At that time the Petitioner was in custody from 31.5.2002 to 31.1.2004 in connection with Sessions Trial Case No. 2/30 of 2003 and on 31.1.2004 the Petitioner was acquitted in the said case. Copy of the reply given by the Petitioner to the said show-cause notice is annexed to the petition as Annexure-8. Details of expenditure and payments as given by the Petitioner in his reply to the said show-cause notice are not required to be set out here as we are of the view that this petition can be disposed of on two other grounds without entering into the details of the controversy involved. However, by notice dated 11.7.2002 the Executive Director of the Bhubaneswar Stock Exchange permitted the Petitioner to appear in person or through his representative before

the meeting of the Council of Management of Bhubaneswar Stock Exchange on 17.7.2002. But, same was not possible for the Petitioner as he was in custody. So by his letter dated 17.7.2002 he informed the Chairman of the said Council that as the Petitioner was detained in custody it was not possible for him to appear before the Council for personal hearing. However, a date may be fixed two weeks after his release on bail for personal hearing. On the other hand, the Inspector of Police, CID, Crime Branch, Cuttack upon completion of his investigation on the basis of the aforesaid letter of the Principal Secretary, Finance Department, Government of Orissa, filed charge-sheet under Sections 120-B/409, IPC in the Court of S.D.J.M., Bhubaneswar against six persons in connection with the alleged offence of siphoning of funds to the extend of Rs. 1.3 crores belonging to the said Trust. However, Petitioner was not charge-sheeted. Therefore, the Investigating Officer who held the investigation has exonerated the Petitioner from all the allegations against him. On the same day, i.e., 3.1.2003 the Council of Management of Bhubaneswar Stock Exchange was superseded and a sole Administrator was appointed to manage the administration of Bhubaneswar Stock Exchange. The said Administrator assumed the charge of his office on or about 10.1.2003. Soon after assuming his office the said Administrator expelled the Petitioner from the membership of Bhubaneswar Stock Exchange for allegedly siphoning of Rs. 40 lacs. The Administrator passed the order under Articles 158 and 159 of the Articles of Association of Bhubaneswar Stock Exchange read with Bye-law 347 of the Bye-Laws of Bhubaneswar Stock Exchange. The said notice issued by the Administrator of the Bhubaneswar Stock Exchange is annexed to the petition as Annexure-12. The notice dated 16.1.2003 expelling the Petitioner from the membership of the Bhubaneswar Stock Exchange reads as under:

"NOTICE"

Securities and Exchange Board of India (SEBI) in exercise of powers conferred and vested u/s 11(1) of the Securities Contracts (Regulation) Act, 1956 has superseded the Council of Management of Bhubaneswar Stock Exchange and has appointed the undersigned as the Administrator to exercise and perform all the powers and duties of the Council of Management. In exercise of the powers conferred and vested under Article 158 of the Articles of Association read with Bye-law 347 of the Bye-laws of the Exchange governing the Bhubaneswar Stock Exchange, it is notified for the information of the general public and all concerned that the following member is hereby expelled from the membership of Bhubaneswar Stock Exchange with effect from 16th day of January, 2003.

On careful perusal and scrutiny of all relevant records, documents, the notice calling upon the member concerned to show cause as well as his reply thereto, I am satisfied that the member concerned is guilty of breach of the rules, bye-laws and regulations governing the field and that his conduct siphoning huge funds originating from Bhubaneswar Stock Exchange is dishonourable, disgraceful and unbecoming of a member of the Exchange and inconsistent with the just and

equitable principles of trade and detrimental to the interest, credibility and welfare of the Exchange and prejudicial subversive to its objectives and purposes.

Name of the Member - Shri Tulsi D. Bhayana S/o. Late V.C. Bhayana Firms?
Name and Address M/s. Tulsi D. Bhayana

A-22, Falcon House, 2nd floor, Cuttack Road, Bhubaneswar- 751006 Business
Code 17-0021-9/TLB

SEBI Registration No. INB 170264715 It is further notified that in terms of provisions enjoined in Article 167 of the Articles of Association of Bhubaneswar Stock Exchange, the member (supra) forfeits to the Exchange his rights of membership, all rights and privileges as a member of the Exchange including any right to use of or any claim upon or any interest in property or funds of the Exchange. However, the liability of the member concerned to Bhubaneswar Stock Exchange or to any other member of the Exchange shall subsist and remain unaffected by his expulsion. As a consequence of such expulsion the right of nomination of the membership shall vest with the Exchange. A copy of this notice be sent to the member concerned and Anr. copy be affixed on the Notice Board of the Exchange.

Dated: 16th January, 2003. Sd. J.P. Verma Notification No. 232/2003.
ADMINISTRATOR.

It is this notice dated 16.1.2003 by which the Petitioner was expelled form membership of Bhubaneswar Stock Exchange is now under challenge in this petition on various grounds. Learned Counsel for the Petitioner raised many grounds in support of the petition. However, we prefer to dispose of this petition after considering the two grounds agitated before us by the learned Counsel for the Petitioner.

6. The first contention of the learned Counsel for the Petitioner is that it is the requirement of the provisions of Section 6 of the Securities and Exchange Board of India Act, 1992 that no member should be removed form membership of Stock Exchange unless he is given a reasonable opportunity of being heard in the matter. According to the learned Counsel for the Petitioner, before passing the order of expulsion under challenge in this petition, the Petitioner was not given any opportunity of hearing. Second contention of the learned Counsel for the Petitioner is that in the enquiry held under the direction of the Chairman of SEBI, the Petitioner has been completely exonerated form all the allegations levelled against him in the show-cause notice in question and that the decision taken by the Chairman of the SEBI on the basis of enquiry report is binding upon all the authorities subordinate to him. The Administrator of Bhubaneswar Stock Exchange being an authority subordinate to the Chairman of the SEBI, he had absolutely no power or jurisdiction to issue the impugned order of expulsion against the Petitioner after the Petitioner was exonerated form all such allegations by the Chairman of SEBI.

7. We have heard learned Counsel for both parties. It is not denied by the learned Counsel for the opposite parties that as the Petitioner was in judicial custody during the time when the show-cause notice under Annexure-7 was issued, the Petitioner couldn't appear in person before the Administrator for personal hearing though he submitted his reply to the show-cause notice issued in this regard and he also prayed for fixing of a date for personal hearing after the Petitioner was released on bail. But, instead of giving that opportunity the decision for expulsion of the Petitioner was passed by the Administrator. It is indeed true that Section 6 of the Securities and Exchange of Board of India Act, 1992 requires that no member shall be removed under the said provision unless he has been a given reasonable opportunity of being heard in the matter. It is rightly contended by the learned Counsel for the Petitioner that as the Petitioner was not given any opportunity of hearing, the impugned order of expulsion was passed in violation of the principles of natural justice. The enquiry report dated 13.8.2004 of the Enquiry Officer under Regulation 13(1) of the Stock Exchange Board of India (Procedure for Holding Enquiry by Enquiry Officer and Imposing Penalty) Regulations, 2002 in respect of these allegations is annexed to the affidavit filed on behalf of the Petitioner on 29.9.2004. We have also perused the order of the Chairman under Regulation 13(4) of the said Regulations read with Section 4(3) of the Stock Exchange of Board of India Act, 1992 in this regard on the said report. It appears that the Chairman duly considered the report submitted by the Enquiry Officer in this regard. In his order the Chairman has detailed the findings of the Enquiry Officer upon conclusion of enquiry. On perusal of the order of the Chairman of the SEBI, we find that the Chairman fully exonerated the Petitioner from all the allegations made against him. We are not quoting here the various conclusions arrived at by the Enquiry Officer in his report or various findings given by the Chairman of the SEBI. But, it will suffice to observe here that the Petitioner was not found guilty of any misconduct and he was completely exonerated from all the allegations. Sub-section (1) of Section 11 of the Securities and Exchange Board of India Act, 1992 provides that subject to the provisions of this Act, it shall be 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 such measures as it thinks fit. Sub-section (2) thereof further provides that without prejudice to the generality of the foregoing provisions, the measures referred to there in may provide for, inter alia, calling for information from, undertaking inspection, conducting inquiries and audits of the stock exchange, mutual funds, other persons associated with the securities market, intermediaries and self-regulatory organizations in the securities market. Therefore, the Board of the SEBI has been given wide powers under the Statute to conduct enquiries etc. Sub-section (3) of Section 6 of the Securities Contracts (Regulation) Act, 1956 further provides that the Board, if it is satisfied that it is in the interest of the trade or in the public interest so to do, may, by order in writing, (a) call upon a recognized stock exchange or any member thereof to furnish in writing such information or explanation relating to the affairs of the stock exchange or of the member in relation to the stock

exchange as the Board may require, or (b) appoint one or more persons to make an inquiry in the prescribed manner in relation to the affairs of the governing body of a stock exchange or the affairs of any of the members of the stock exchange in relation to the stock exchange and submit a report of the result of such inquiry to the Board within such time as may be specified in the order or, in the case of an inquiry in relation to the affairs of any of the members of a stock exchange, direct the governing body to make the inquiry and submit its report to the Board. Therefore, the report submitted by the Enquiry Officer pursuant to the direction of the Chairman of the said Board is in fact a statutory report. Rule 11 of the Securities Contracts (Regulation) Rules, 1957 also provides that after receiving the report of the result of an enquiry made under Clause (b) of Sub-section of (3) of Section 6 of the Act, the Board may take such action as they deem proper and, in particular, may direct the governing body of the stock exchange to take such disciplinary action against the offending member, including fine, expulsion, suspension or any other penalty of a like nature not involving the payment of money, as may be specified by the Board; notwithstanding anything to the contrary contained in the Rules or Bye-laws of the stock exchange concerned, the governing body shall give effect to the directions of the Board in this behalf and shall not in any manner commute, revoke or modify the action taken in pursuance of such directions, without the prior approval of the Board, The Board may, however, either of its own motion or on the representation of the member concerned, modify or withdraw its direction to the governing body. It, therefore, appears from the aforesaid provision that the decision of the Board is binding on all concerned. The Administrator of Bhubaneswar Stock Exchange could not have taken any decision or imposed any penalty upon a member which will be inconsistent with the decision arrived at by the Board. The Chairman of the Board in his decision has completely exonerated the Petitioner from all the allegations levelled against him, and therefore, the Administrator of Bhubaneswar Stock Exchange being an authority inferior to the Chairman could not have passed the impugned order, which is without or in excess of his jurisdiction.

8. In these circumstances, we are constrained to hold that the decision taken by the Administrator of Bhubaneswar Stock Exchange is inconsistent with the decision or finding given by the Chairman of the Board and therefore, it is clearly without jurisdiction, and accordingly the same cannot be sustained. We are of the further opinion that when the Administrator knew that the Chairman of the Board had already appointed an Enquiry Officer and upon conclusion of enquiry he had to submit a report, the Administrator of Bhubaneswar Stock Exchange should not have taken the impugned action before the Board gave its decision. He should have been little more patient to wait for the ultimate decision that could be given by the Board's Chairman. As the Chairman of the Board while acting upon the report of the Enquiry Officer has given a finding exonerating the Petitioner from all the allegations, the order passed by the Administrator of the Bhubaneswar Stock Exchange cannot be sustained. After the said decision of the

Chairman of the SEBI was communicated to the Administrator, he should have taken appropriate steps for rescinding/recalling the order of expulsion issued against the Petitioner so as to conform to the decision of the Chairman. After all, the decision of the Chairman of SEBI is binding upon every one. Rule 11 of the Securities Contracts (Regulation) Rules, 1957 clearly mandates that the governing body of the stock-exchange should give effect to the direction of the Board in its behalf, and shall not in any manner modify the same. Accordingly, in view of the ultimate finding given by the Chairman of the Board while acting upon the report submitted to him by the Enquiry Officer, we are constrained to quash the impugned order of expulsion dated 16.1.2003 issued by the Administrator of Bhubaneswar Stock Exchange under Annexure-12.

The writ petition is thus allowed and disposed of.

M.M. Das, J.

9. I agree.