

(2006) 01 MAD CK 0003

In the Madras High Court

Case No : Writ Appeal No. 1932 of 2005 and W.A.M.P. No. 3597 of 2005

Viswapriya Financial Services and Securities Limited

APPELLANT

Vs

The Executive Director, Reserve Bank of India, Department of
Non-Banking Supervision and The Deputy General Manager,
Reserve Bank of India, Department of Non-Banking
Supervision

RESPONDENT

Date of Decision : 05-01-2006

Acts Referred:

Constitution of India, 1950 — Article 226

Customs Act, 1962 — Section 122

Reserve Bank of India Act, 1934 — Section 45IA(1), 45IA(6), 45IA(7), 45N(2)

Citation : (2006) 1 MLJ 202 : (2006) 68 SCL 521

Hon'ble Judges : S.R. Singharavelu, J;M. Karpagavinayagam, J

Bench : Division Bench

Advocate : Rajeev Dhavan, S.C. for Menon and Goklaney Associates, for the
Appellant; A.L. Somayaji, S.C. for T. Poornam, for the Respondent

Final Decision : Allowed

Judgement

M. Karpagavinayagam, J.—M/s.Viswapriya Financial Services and Securities Limited, Chennai, a Non-Banking Financial Company

obtained a Certificate of Registration from the Reserve Bank of India in the year 1998. The said certificate had been cancelled by the order dated

6.8.2005 by RBI.

2. Questioning the said order, the petitioner filed the writ petition raising various issues. The learned single Judge ultimately, dismissed the petition

directing to avail the alternative remedy available under Sub-section (7) of Section 45-IA of the Reserve Bank of India Act, 1934 (hereinafter

referred to as ""the Act"".

3. Hence, this writ appeal.

4. The main grounds urged on behalf of the petitioner are three-fold:

(1) When a Certificate of Registration is cancelled by the Reserve Bank as per the first proviso to Sub-section (6) of Section 45IA, prior

opportunity ought to have been given by sending a rectification notice for taking necessary steps to comply with the provisions or conditions. No

such opportunity had been given in this case. Therefore, the order dated 6.8.2005 cancelling the Certificate of Registration is not sustainable.

(2) The Reserve Bank issued show cause notice on 18.10.2004 calling upon the petitioner to show cause for the following charges:

(i) The Company was carrying on the business of a non-banking financial institution without having a net owned fund of Rs.25 lakhs, which is

mandatory under Clause (b) of Sub-section (1) of Section 45IA of the Act.

(ii) The Company had accepted and continued to hold the public deposits in violation of the provisions.

(iii) The Company failed to produce the documents required by the Reserve Bank of India, thereby violated the provisions of Section 45N(2) of

the Act.

After receipt of the show cause notice, a reply was sent. Without referring to the reply notice, the final order, namely the impugned order was

passed on 6.8.2005 on the other following grounds:

(a) The net owned fund of the Company continued to be negative as against the required statutory minimum level of Rs.25 lakhs on account of the

investments in the shares of two other Companies, viz., Triad Trading Services Limited and Pentagon Trading Services Limited and credit

exposure to a group company, viz., Subhiksha Enterprises Private Limited.

(b) The Company had engaged in raising funds from individual public by way of issue of Pass Through Certificates.

These grounds were not mentioned in the show cause notice. Therefore, the impugned order is unsustainable.

(3) Before making any order of cancellation of Certificate of Registration, the Reserve Bank under second proviso to Sub-section (6) of Section

45IA shall give the Company a reasonable opportunity of being heard. In this case, though the Company was heard by the Reserve Bank Officer

at Madras, some other Officer passed the final order. This is violation of second proviso. On this ground also, the impugned order is not valid in law.

5. On considering these grounds in the light of the submissions made by the counsel appearing for the Reserve Bank, the learned single Judge, while dismissing the writ petition, held that the provisions relating to the rectification notice as contained in the proviso dealing with the first and second provisions of Section 45IA would not apply to this case and clauses (iv) and (v) of Sub-section (6) of Section 45IA alone would apply. As such, it cannot be said that natural justice has been violated which would entitle the petitioner to approach this Court under Article 226 and therefore, he must avail the remedy of appeal contemplated under Sub-section (7) of Section 45IA of the Act. Challenging the same, this writ appeal has been filed.

6. Assailing the said order passed by the learned single Judge, the learned senior counsel appearing for the appellant would make the following contentions:

(A) The order of the learned single Judge apparently suffers from incurable infirmity. The existence of the alternative remedy is not a bar as there has been a violation of principles of natural justice. Directing to go to the Appellate Authority to avail the alternative remedy by the learned single Judge after giving a finding foreclosing the question of law raised by the appellant is wrong and thus, the appellant is prevented from raising those question of law before the Appellate Authority.

(B) The first proviso to Section 45IA(6) of the RBI Act provides that before cancelling the Certificate of Registration, RBI should give an opportunity to the Company by issuing rectification notice indicating the violation of provisions. No such opportunity was given. Hence, the order is vitiated.

(C) The impugned order cancelling the Certificate of Registration would refer to the various issues. But, these issues were not raised in the show cause notice to enable him to give explanation for those issues. Therefore, the principles of natural justice have been violated.

(D) The second proviso to Section 45IA(6) would give the opportunity of personal hearing. Accordingly, personal hearings were given and the

matter was discussed with the officials of Channai. But, the impugned order was passed by the different officials who had not heard the matter. So, this is violation of the second proviso.

(E) The irregularities found in the show cause notice have been completely rectified. The net owned fund stood increased on 22.12.2003 upon conversion of Ordinary Preference Shares into Compulsorily Convertible Preference Shares. By virtue of the merger on 24.6.2004 with two other Companies, there is an increase in capital. Therefore, the impugned order dated 6.8.2005 without considering the explanation and the rectification is not valid in law.

7. Elaborating these points, Mr.Rajeev Dhavan argued at length. On these aspects, we have heard Mr.A.L.Somayaji, the learned senior counsel appearing for the respondent.

8. At the outset, it would be worthwhile to deal with the first contention questioning the propriety of the order of the learned single Judge. In the said order, the finding has been given by the learned single Judge to the effect that the first proviso which deals with rectification notice will not apply to this case because the issue does not fall under clauses (ii) and (iii) whereas the order of cancellation falls only under clauses (iv) and (v) of Sub-section (6) of Section 45IA and as such, the writ petitioner cannot approach the High Court under Article 226, without availing the appeal remedy available in the Act.

9. There is no dispute in the fact that when the counter had been filed by the Bank, it was admitted that the cancellation of Certificate of Registration was done in public interest and therefore, the first proviso is not mandatory. But, the learned single Judge instead of dealing with the point relating to the public interest which is the exception to the first proviso, would hold that clauses (ii) and (iii) will not apply and as the cancellation order would only fall under clauses (iv) and (v) relating to the non-compliance of direction and prohibition from accepting deposit and therefore, the first proviso would not apply and consequently, it is not necessary to give opportunity for rectification and as such, the writ petitioner shall go to Appellate Authority to exhaust his remedy as provided in Sub-section (7) of Section 45IA of the Act.

10. The thorough reading of Sub-section (6) of Section 45IA, which provides for

cancellation of Certificate, would give out various situations and procedures where the order of cancellation would be passed.

11. Clause (ii) of Sub-section (6) of Section 45IA would refer to failure to comply with any condition subject to which certificate of registration had been issued. The net owned fund of Rs.25 lakhs is a pre-condition for registration of certificate.

12. As per Clause (iii), if the company fails to fulfil any of the conditions referred to in clauses (a) to (g) of Sub-section (4), the cancellation can be done.

13. Clause (iv) would indicate failure to comply with any direction issued by the bank relating to maintenance of accounts and failure to make the books available for inspection when so demanded by the inspecting authority.

14. Clause (v) would refer to the prohibition from accepting deposit by an order made by the bank.

15. Mr.A.L.Somayaji, the learned senior counsel appearing for the Bank, the respondent would emphatically state that the first proviso would get

attracted, only when the cancellation order was passed on the grounds mentioned in Clause (ii) or (iii) of Sub-section (6) of Section 45IA alone,

but the present case is not only on the grounds mentioned in Clause (ii) or (iii) of Sub-section (6) of Section 45IA, but referable to grounds

mentioned in clauses (iv) and (v) also and therefore, the failure to invoke the first proviso would not invalidate the impugned order. While making

such submission, the alternative argument advanced by the counsel for the respondent-Bank is that public interest is involved in this case and as

such, the first proviso is not mandatory.

16. In brief, the learned senior counsel for the respondent would submit that since public interest is involved, rectification notice is redundant and

moreso, when the impugned order has been passed on the grounds not only falling under clauses (ii) and (iii), but also under clauses (iv) and (v),

the first proviso would become unnecessary.

17. On hearing the counsel for the parties on this aspect, we are of the considered view that when the learned single Judge has taken a decision to

direct the petitioner to go to the Appellate Authority to raise all the points before the Appellate Authority in order to look into the materials and

decide the issue on hearing both parties, the learned single Judge need not have gone into the question, whether the issue would fall under clauses

(ii) and (iii) which would attract the first proviso or would fall under clauses (iv) and (v) which may not attract the same. But, finding has been given

by the learned single Judge.

18. On the face of it, we are not able to accept the finding given by the learned single Judge that the case would fall under clauses (iv) and (v)

alone. On the other hand, as stated by the Bank at least before this Bench, this would fall not only under clauses (ii) and (iii), but also under clauses

(iv) and (v) which do not attract the first proviso.

19. On considering the materials placed before this Court, we are of the opinion that the finding given by the learned single Judge foreclosing the

question of law raised by the appellant is wrong. At the same time, we are not inclined to give any finding as to whether the first proviso alone

would be applicable in view of the fact that it would fall under clauses (ii) and (iii) or whether the rectification notice as provided in the first proviso

need not be issued in the light of the fact that the public interest is involved or whether it would fall under all the clauses, namely (ii), (iii), (iv) and (v)

and as such, invoking the first proviso would become unnecessary. In short, we feel that those questions are to be left open to the Appellate

Authority to hear the counsel for the parties at length and decide about those questions in the appeal to be filed by the appellant.

20. When we advised the appellant that it would be better to approach the Appellate Authority before whom all questions including this question

could be raised, Mr.Rajeev Dhavan, the learned senior counsel appearing for the appellant would politely and strenuously submit that existence of

the alternative remedy which is inefficacious is not a bar to approach High Court under Article 226 and that the alternative remedy is not to be

availed in a case of patent illegality where even the source of power is not clear to the person who exercised it and especially when the appellant-

Company has totally complied with all the conditions of registration and directions issued by the RBI and request this Court to permit him to urge

other points. For the above proposition, he would cite the following authorities:

1) Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, ;

2) State of H.P. and Ors. v. Ambuja Cement Ltd. JT 2005 6 298 ;

3) Assistant Collector of Central Excise Vs. Jainson Hosiery Industries, ;

4) Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, .

21. In the light of the above persuasive request, we have allowed him to make detailed submissions on other points made by the learned senior

counsel in order to find out whether such a patent illegality has been committed by the authority concerned so as to entertain the writ petition to

give the relief sought for in the writ petition here itself.

22. The other submissions in gist are as follows:

(A) The impugned order dated 6.8.2005 cancelling the COR discloses that it has been passed with reference to the issues which were not raised

or put against the petitioner in the show cause notice. Therefore, the principles of natural justice have been violated.

(B) The discussions and personal hearings etc. were at Chennai, whereas the impugned order is passed by different officials. This is violation of the

second proviso.

(C) The NOF stood increased on 22.12.2003 upon conversion of Ordinary Preference Shares into Compulsorily Convertible Preference Shares.

By virtue of merger on 24.6.2004 of two other companies with the appellant, there is increase in capital. Therefore, there is no violation of

conditions for registration. These details have been given in the reply for show cause notice, but these things have not been taken into

consideration, while the final order was passed. So, this is also violation of the principles of natural justice.

23. With reference to these grounds, we have heard Mr.A.L.Somayaji, the learned senior counsel appearing for the respondent. He would cite the

following authorities to show, when alternative remedy is available, writ proceedings are not to be resorted to:

1) Canara Bank and Others Vs. Shri Debasis Das and Others, ;

2) Secretary, Minor Irrigation and Rural Engineering Services, U.P. and Others Vs. Sahngoo Ram Arya and Another, .

24. In respect of the first point, the learned senior counsel for the respondent submitted that the issues mentioned in both the show cause notice

and the final order were raised from the very beginning. It is pointed out that the letter by RBI dated 5.1.2004, the show cause notice dated

18.10.2004, the appellant's reply dated 6.11.2004, RBI's letter dated 1.2.2005, the appellant's letter to RBI dated 7.2.2005, RBI's letter dated

16.3.2005 to the appellant giving opportunity for personal hearing, RBI's letter dated 26.3.2005, the appellant's letter dated 15.6.2005 and the

Minutes of the meeting held on 12.4.2005 would indicate that all these issues were raised and discussed in the meeting held where the opportunity

was given to the appellant by the authorities. All these documents referred to by the learned senior counsel for the respondent are found available

in the typed set filed by the appellant.

25. On the other hand, the learned senior counsel for the appellant would submit that new issues have been decided in the impugned order in

respect of which no opportunity was given to the appellant.

26. On the contrary, it is contended by the learned senior counsel for the respondent that subsequent to RBI's letter dated 5.1.2004 and the show

cause notice dated 18.10.2004, several correspondence were made between the authority and the appellant and those issues are found available

in the other documents with reference to which opportunity was given to the appellant for making his submission.

27. Therefore, we are not inclined to look into the nitty gritty details of the various documents including the show cause notice and final order as it

would amount to undertaking the job of appreciating the technical and minute materials. On the other hand, it would be appropriate for the

Appellate Authority to look into all the documents available with the Department as well as with the appellant prior to the impugned order since the

Appellate Authority is having more expertise and technical knowledge to understand those issues which are said to be referred to in various

documents by way of correspondence between the authority and the appellant culminating into the impugned order.

28. In regard to the second point, it is submitted that as per second proviso to Section 45IA(6), the authority before making any order of

cancellation of Certificate of Registration should give the Company a reasonable opportunity of being heard and this means that the officer who

heard the matter alone is competent to pass final order. But, in this case, the impugned order has been passed by a different official and as such,

this is a violation of second proviso.

29. The learned counsel for the appellant would cite the authority in Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road

Transport Corporation and Another, for the proposition that natural justice requires the person who hears to be the person who decides. The

relevant observation of the Supreme Court is as follows:

The second objection is that while the Act and the Rules framed thereunder impose a duty on the State Government to give a personal hearing, the

procedure prescribed by the Rules impose a duty on the Secretary to hear and the Chief Minister to decide. This divided responsibility is

destructive of the concept of judicial hearing. Such a procedure defeats the object of personal hearing. Personal hearing enables the authority

concerned to watch the demeanour of the witnesses and clear-up his doubts during the course of the arguments, and the party appearing to

persuade the authority by reasoned argument to accept his point of view. If one person hears and another decides, then personal hearing becomes

an empty formality. We therefore hold that the said procedure followed in this case also offends another basic principle of judicial procedure.

30. On the other hand, Mr.A.L.Somayaji, the learned senior counsel for the respondent, on the strength of the decision in Osseein and Gelatine

Manufacturers' Association of India v. Modi Alkalies and Cemicals Ltd. A.I.R.1970 S.C.1744, would submit that in the present case, the hearing

is an institutional hearing and the decision to cancel the Certificate of Registration is not taken by any designated official under the RBI Act, but the

Bank itself. The relevant observation of the Supreme Court in the said decision is as follows:

On the issue of natural justice, we are satisfied that no prejudice has been caused to the appellant by any of the circumstances pointed out by the

appellant. It is true that the order has been passed by an officer different from the one who heard the parties. However, the proceedings were not

in the nature of formal judicial hearings. They were in the nature of meetings and full minutes were recorded of all the points discussed at each

meeting. It has not been brought to our notice that any salient point urged by the petitioners has been missed. On the contrary, the order itself

summarises and deals with all the important objections of the petitioners. This circumstance has not, therefore, caused any prejudice to the

petitioners.

31. In the light of the above observation, it is contended by the counsel for the respondent that it is an institutional hearing and as such, no prejudice

has been shown by the counsel for the appellant in order to make the impugned order invalid. It is specifically contended that the Customs Act and

the Central Excise Act, the Commissioner of Excise and Customs are specifically designated to take decision as per Section 122 of the Customs

Act and Section 144(c) of the Central Excise Act. But, in this Act, the individual officers are not specifically designated. As such, the hearing in this

case is an institutional hearing and decision is finally taken by the Institution.

32. In the light of the stand taken by the counsel for the respondent, we cannot straightaway countenance the argument advanced by the counsel

for the appellant that the impugned order becomes automatically invalid since the same is passed by different official. However, this also can be

taken into consideration by the Appellate Authority as we do not propose to give any finding with reference to this.

33. As regards the third point, the learned senior counsel for the appellant submits that the conditions and directions have been fully complied with

and by virtue of merger on 24.6.2004 with two other companies, there is an increase in capital and as such, there is no violation of the condition

for registration.

34. This statement has been refuted by the learned senior counsel for the respondent that this is not substantiated by the appellant as the

appellant's statement showing revised capital as on 25.5.2005 sent along with his letter dated 15.6.2005 does not reflect this position. It is further

pointed out that the said statement would show that preference shares have become optionally convertible preference shares. Section 45IA(7)

explanation specifically includes equity share capital and not preference share capital. Optionally convertible preference shares cannot be taken into

account for calculation of NOF. It transpires from the records of the Company that the funds amounting to about Rs.41 crores purportedly

received under the schemes are not brought into the Books of Account of the Company. By this process, the Company which is handling the

public money is able to circumvent and avoid supervisory control and exercise of powers by the RBI in regard to acceptance of public deposits in

terms of the Act. Though the appellant had received so many directions issued by the RBI u/s 45N(2) of the Act to supply information and

records, the appellant has not complied with the same. The appellant's earlier statement is that a sum of Rs.189.23 lakhs is an advance

recoverable. However, through the letter dated 12.1.2004, the Company stated that this amount may not be treated as a loss asset, as it is a

management fee outstanding as on 31.3.2003. Thus, the stand of the appellant is prevaricating.

35. Pointing out the various documents produced before this Court, Mr.A.L.Somayaji, the learned senior counsel appearing for the respondent

would state that the appellant has been consistently violating the provisions of RBI Act as well as the directions issued by the Bank from time to

time and thus, the appellant has been indulging in the activities against the public interest.

36. On hearing the arguments on these lines from the respective counsel, it is clear that the stand of the appellant on the basis of the various

documents is that all the directions issued by RBI have been fully complied with and on the other hand, the stand taken by the learned senior

counsel for the respondent is that there is a chequered history which would show that the appellant has been consistently violating the conditions of

the COR and has not been complying with the directions given by the RBI.

37. The list of events would indicate that from 5.1.2004, the RBI has been sending letters to the appellant pointing out various irregularities,

violation of the conditions and giving out directions. Then, on 12.1.2004, the appellant sent a reply. Thereafter, there was some inspection.

Ultimately, on 18.10.2004, show cause notice was issued. On receipt of the reply dated 6.11.2004, the Company Representatives were

personally heard on 12.4.2005. The inspection of records and scrutiny were carried out by the RBI at the appellant's premises on various dates in

May 2005. On 15.6.2005, the appellant sent a letter giving other details about Pass Through Certificate. On the basis of the letter

correspondence, inspection, scrutiny, replies sent by the appellant on various dates and personal hearing, finally the RBI passed the impugned

order on 6.8.2005.

38. Under those circumstances, we cannot come to the conclusion that the final

order has been passed without giving any opportunity. In short, we do not propose to give any finding with reference to the issues raised both before the learned single Judge and before this Bench and on the other hand, it would be better in the interest of justice to allow the appellant/petitioner to approach the Appellate Authority to raise all these issues to enable the Appellate Authority to consider the question whether the final order dated 6.8.2005 has been validly passed after giving reasonable opportunity to the appellant. Accordingly, the finding given by the learned single Judge is set aside.

39. The appellant/petitioner is at liberty to approach the Appellate Authority by filing an appeal as provided u/s 45IA(7) of the Act. The Appellate Authority may entertain the appeal after deducting the period in which the writ petition and the writ appeal were pending, while calculating the period of limitation and give opportunity to both parties to urge their respective points by giving the opportunity of personal hearing and decide the issues in accordance with law, uninfluenced by any of the observations made either by the learned single Judge or by this Division Bench, preferably within two months from the date of receipt of the copy of this judgment.

40. Thus, the writ appeal is allowed. Consequently, W.A.M.P.No. 3597 of 2005 is closed. No costs.