

(1997) 03 DEL CK 0010

In the Delhi High Court

Case No : Civil Writ Petition No. 796 of 1997

Yugantar and others

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 20-03-1997

Acts Referred:

Citation : (1998) 94 CompCas 621

Hon'ble Judges : Manmohan Sarin, J;M. Jagannadha Rao, J

Bench : Division Bench

Judgement

Manmohan Sarin, J.—The petitioners claim to have filed this writ petition in public interest, seeking a restraint on the Bank of India, respondent No. 5 herein, from issuing shares and collecting money from the public under its public issue of 15 crores shares at Rs. 10 each, for cash at a premium of Rs. 35 per share. The petitioners are also seeking, inter alia, to evolve standard rules in replacement of Government's absolute power to write off losses of banks. A direction is also sought for an enquiry into damage to records of the respondent-bank due to a fire.

2. Petitioner No. 1, Mr. Jagdish Chandra Sharma, is reported to be the convener of the newspaper Yugantar. Petitioner No. 1 claims to be attached to several social, cultural organizations in the capacity of patron. He is a former member of the Agra Development Authority. Petitioner No. 1 claims to be deeply interested in matters of public importance to the nation and society at large. Petitioner No. 2 is a society engaged in welfare activities and legal literacy and family counselling, etc. Petitioners Nos. 3 to 5 are social workers.

3. The petitioners were impelled to file the present writ petition, when they found that respondent No. 5, Bank of India, had taken out the public issue of 15 crores equity shares of Rs. 10 each at a premium of Rs. 35 per share, when the bank was suffering and incurring losses for the last several years. The petitioners claim that the losses for the year 1995-96, were Rs. 1,420 crores. The petitioners find the advertisement issued offering shares, deceptive and misleading. The

petitioners claim that SEBI, respondent No. 2 herein, has failed to discharge its statutory obligation u/s 11 of the Securities and Exchange Board of India Act, to protect the interest of the investors in the security market inasmuch as it failed to prohibit fraudulent and unfair trade practice, i.e., act of respondent No. 5 in offering shares at a heavy premium despite losses through misleading advertisement. It is claimed that the SEBI failed to make an enquiry to prevent the public issue which was detrimental to the interest of the investors. It is further alleged that as per the guidelines issued by the SEBI, it was obligatory that the prospectus and the advertisement for the issue of shares be vetted by it, which it failed to do. The petitioners also accuse the Reserve Bank of India of having failed to comply with the provisions of sections 58B and 58C of the Reserve Bank of India Act of 1934, since there was willful omission to mention in the advertisement the material fact of losses incurred by the bank. This was with the intention to collect public money through misleading information in the advertisement and the prospectus. The petitioners claim that it had sent a representation to the Governor, Reserve Bank of India, the chairman of the SEBI and the chairman of Bank of India, praying that the respondent-bank be restrained from collecting money from unsuspecting investors unless it is in a position to generate profit on its own without the help of writing off of losses. In the said representation, it was claimed that the bank had been running in losses and it is only after the loss of about Rs. 1,369 crores that had been written off by the Government in 1996-97, that the bank started showing profits. The said profit was not a reflection of the earnings but was due to the losses being written off by the Government. The bank misrepresented the facts by not disclosing the losses being written off while claiming profits of Rs. 150.39 crores in 1995 and Rs. 276.48 crores in 1996.

4. Reference is also made to a fire in the office of respondent No. 5, wherein records were damaged resulting in losses. Enquiry into the incident was sought. There was no response to the representation of the petitioners. Hence, the present writ petition.

5. The petitioners rely on the figures given in the annual report of 1995-96, as well as the terms of the application for public issue and advertisement offer in support of the averments made. The petition was filed on February 24, 1997, while the public issue had been opened on February 21, 1997, and was to close on February 28, 1997. The case was adjourned on February 28, 1997, when Mr. Arun Jaitley, senior advocate, instructed by Mr. Valmiki Mehta, to appear for the bank opposed the very admission of the petition, prior to issuance of notice. Ms. Barkha Babbar, entered appearance on behalf of respondent No. 1.

6. Learned counsel for the petitioners, Ms. Sunita Bhardwaj, made a very spirited and fervent plea for interference by this court to stop what she terms as a "deception on the investors" who had been led to believe that the bank was making profits, while in fact it had been incurring losses. She submitted that the net profit/(loss) position of the respondent No. 5, Bank of India, since 1992, was

as under :

1992 1993 1994 1995 1996 + 56.63 - 534.90 - 953.50 + 50.35 - 276.48
(Profit) (Loss) (Loss) (Profit) (Loss) 7. There were discrepancies inasmuch as this did not tally with the balance-sheet data appearing at page 38 which are as under :

1992 1993 1994 1995 1996 + 56.63 - 331.12 - 1089.15 + 50.35 - 276.48
(Profit) (Loss) (Loss) (Profit) (Loss) 8. In any case, she submitted that the factum of losses duly stood established.

9. It would, at this stage, be pertinent to look at the terms of the advertisement for offer of shares, application form and the prospectus of the public issue, hereinafter referred to as the "issue documents". Annexure P-III at page 42, which is the first page of public issue reads as under :

"The bank had incurred net losses in the year 1992-93 and 1993-94, to the extent of Rs. 534.90 crores and Rs. 953.50 crores respectively."

10. Clause 9 informs the investors that the CBI was investigating into charges against Shri T. P. Karunanandan, executive director of the bank relating to his earlier assignment in Indian Bank. Then reference is made to the pending litigation. The risk factors were also enumerated. As regards the market price of the equity shares after listing, it was stated as under :

"This being first issue of the bank there has been no formal market for the securities of the issuer. The issue price (has been determined and justified by the lead manager and the issuer bank as stated under justification of premium paragraph in the offer document) should not be taken to be indicative of the market price of the equity shares after the shares are listed. No assurance can be given regarding an active or sustained trading in the shares of the bank nor regarding the price at which the equity shares will be traded after listing."

11. In clause 6, general risks were given as under :

"General risks. - Investment in equity and equity related securities involve a degree of risk and investors should not invest any funds in this offer unless they can afford to take the risk of losing their investment. Investors are advised to read the risk factors carefully before taking an investment decision in this offering. For taking an investment decision investors must rely on their own examination of the issuer and the offer including the risks involved. The securities have not been recommended or approved by the Securities and Exchange Board of India nor does Securities and Exchange Board of India guarantee the accuracy or adequacy of the offer documents."

12. Relying on the last three lines of clause 6 above, learned counsel for the petitioner argued that the SEBI had not vetted the draft and approved the issue. Therefore, it should not have been issued without prior approval by the SEBI.

13. Learned counsel also relied on the statutory declaration, which is as under :

"The bank has received approval of the Government of India to return capital of Rs. 93.47 crores to the Government, vide letter F. No. 12/19/1996 BOA, dated October 28, 1996. Pursuant to the same, the capital of the bank stands modified to Rs. 489 crores from the level of Rs. 582.47 crores as on March 31, 1996. In the opinion of the bank save as above and as otherwise disclosed in the offer document, there are no material developments after the date of the latest balance-sheet which is likely to adversely affect the profitability of the bank and the value of its assets or its ability to pay its liabilities within the next twelve months."

14. We further find that in the memorandum containing salient features of the offer document, the following statement appears :

"The paid-up capital of the bank as on March 31, 1992, was Rs. 469 crores. The bank has received contributions towards its capital from the Government of India an aggregate of Rs. 1,483.38 crores as per details below :

Up to the year ended 31-3-94 Rs. 635 crores. Year ended March 31, 1995 Rs. 848.38 crores. Rs. 1,483.38 crores. The Government of India permitted the set off of the carried forward debit balance of Rs. 1,369.91 crores in profit and loss account against the bank's capital on March 29, 1996. Thus, the paid-up capital of the bank as on March 31, 1996, is Rs. 582.47 crores. The Government of India, Ministry of Finance, Department of Economic Affairs (Banking Division), vide letters F. No. 12/19/1996-BOA, dated October 28, 1996, and 12/19/96-BOA, dated January 9, 1997, have given their approval to the bank for public issue of 15,00,00,000 equity shares of Rs. 10 each for a cash at a premium of Rs. 30 to Rs. 40 per share and return of the capital of Rs. 93.47 crores to the Government as a part of capital restructuring. After the restructuring, the capital of the bank is Rs. 489.00 crores."

15. We, Therefore, hold that the prospective investors had been informed of the losses incurred by respondent No. 5 in the issue documents. Information as to pending litigation and enquiry against the bank's executive was conveyed. The various risk factors were also enumerated. The prospective investors were put on notice that the issue price with premium should not be taken to be indicative of the market price of the shares on listing. Details of paid up capital as well as contribution to the capital by the Central Government are given. The permission by the Government of India to set off the debit balance/loss against bank's capital are mentioned.

16. Learned senior counsel for the respondent opposed the very admission of the petition on the ground that it was an abuse of the legal process solely intended to cause damage to and harm the public issue. The writ petition had been filed on February 21, 1997, the very day on which the public issue was listed and opened for subscription. Learned counsel also objected to the institution of the petition before this court on the ground of territorial jurisdiction stating that the head office as well as regional office of the respondent-bank was in Bombay.

17. He relied on the observations of the Supreme Court in *Bloom Dekor Limited Vs. Subhash Himatlal Desai and Others*, . The apex court in the said decision reiterated the principles for grant of injunctions, as set down in *Morgan Stanley Mutual Fund Vs. Kartick Das*, in matters relating to debentures and share issues. The court observed that normally cases should be filed only where the registered office of the company is situated. The courts outside the place where the registered office is located, if approached, must consider that very often the court is approached in the last minute seeking injunction either on the allotment of shares or meeting of the board of directors or meeting of the general body. It would, at times, be difficult to undo the damage by such interim orders. The court, Therefore, must ensure that the plaintiff comes to the court well in time so that notice may be served on the defendant and he may have his say before any interim order is passed. Basing his argument on this, Mr. Arun Jaitley argued that the present petition, which has been filed while the issue was under way, even issuance of notice could have caused immense damage to the answering respondent. We find considerable merit in the submission of the answering respondent. The petitioner, if at all, should have approached the court much earlier, at least immediately after it claims to have sent the brief representation, said to be undated, which was reportedly ignored by the respondents. This court had not granted any interim order. The issue, we are informed has since been over-subscribed.

18. Mr. Arun Jaitley, has also produced before us the documents granting various approvals in order to rebut the arguments of learned counsel for the petitioners that the requisite approvals from the Securities and Exchange Board of India, Reserve Bank of India and the Stock Exchange authorities for the public issue and listing of shares, had not been obtained. We shall in the later part of the judgment deal with these documents.

19. Let us now deal with the main plank of the petitioners' submission that the respondent-bank despite incurring heavy losses had been permitted to issue shares at a premium. The Explanation of the bank is that while it is true that the annual report and issue documents mention the losses, the same is due to the revised accounting practice and requirements of the Reserve Bank of India. The factual position is that the bank had made operating profits in both the years 1993 and 1994. The financial statements of the bank are prepared as per the accepted accounting practices and statutory requirements and the norms prescribed by the Reserve Bank of India. The bank is required to arrive at the year's net profit position after providing for all usual and necessary provisions, as required by statute and the guidelines laid down by the Reserve Bank of India. The submission, in brief, is that the Reserve Bank in the year ending March 31, 1992, had introduced uniform prudential accounting norms in the areas of revenue recognition, asset classification, provisioning for non-performing assets classification and provisioning for investments, norms for capital adequacy, etc., to be followed by all the banks. The full impact of the norms was experienced by the banking industry in the year ending March 31, 1994, with the result that a

majority of the banks showed net losses for those two years. This was despite the fact that banks made operating profits during the relevant period. The gross operating profit of the respondent-bank in the year March 31, 1993, was Rs. 108.01 crores and in the year ending March 31, 1994, Rs. 204.81 crores. However, due to the RBI norms, referred to above, provision had to be made for Rs. 439.13 crores and Rs. 1,293.19 crores, thereby showing losses in the balance-sheet of Rs. 331.12 crores and Rs. 1,089.14 crores. The total accumulated loss at the beginning of the year 1994-95 was, Therefore, Rs. 1,420.26 crores. There was an operating profit of Rs. 50.35 crores thereby bringing the accumulated loss down to Rs. 1,369.91 crores. The Government of India then decided to contribute further capital to enable the banks to adhere to the stringent provisioning norms and meet the capital adequacy norms. Rs. 635.50 crores was advanced in the year 1993-94 and Rs. 848.38 crores in the year 1994-95, after adjusting the accumulated loss of Rs. 1,369.91 crores. To adhere to the revised accounting norms Government of India allowed the bank to adjust the accumulated loss from the capital. This adjustment of capital was only to wipe out the accounting entry that had been necessitated by the revised accounting norms. The capital contributed by the Government of India was required to be invested in the approved Government securities and did not result in any cash inflow to the bank. A statement showing the comparative performance of nationalised banks for the year ending March 31, 1994, shows that out of 18 banks listed therein 12 major banks had incurred losses due to the revision of accounting norms referred to above.

20. We find the bank's Explanation that the losses that had been shown were due to the revised accounting norms and not as a result of any operating loss suffered acceptable. The bank, as stated earlier, had made operating profits and it was only the compliance with the banking norms which resulted in the above loss being shown. Besides, and to meet the said loss the Government of India itself, which owns almost the entire shareholding of the bank, had put in more capital. We find that it is not for us to question the decision of the Government of India, which is the largest shareholder till date of the bank, to infuse capital into the bank to wipe out the loss reflected in the accounts due to the change in the norms. Moreover, the said losses had been duly reflected in the advertisement in the issue. Learned counsel for the respondent had submitted, in particular, that the representation made in the advertisement, "India's highest profit making nationalised bank public offer at Rs. 45 per share" was misleading. This notation is to be considered not in isolation but along with the other declarations and representations in the issue documents, a few of which have been reproduced in paras 6 and 7 above. The notation so considered, coupled with the factum of declaration of losses and the factum of operating profits of the bank, cannot be labelled as fraudulent or deceptive. In these circumstances, we do not find there being any willful misrepresentation of facts in the public issue.

21. Coming to the question of approvals, we find that the Reserve Bank of India vide letter dated January 17, 1977, had granted the approval to the issue of

equity shares of Rs. 10 each at a premium of Rs. 35 per share. The Government of India, Ministry of Finance, Department of Economic Affairs (Banking Division), by its letter dated January 9, 1997, gave approval to the respondent bank to charge a premium of Rs. 30 to Rs. 40 per share; and had earlier, by its letter dated October 28, 1996, exempted the bank from the provisions of section 13 of the Banking Regulation Act relating to payment of brokerage. The Ministry of Finance had also, by another letter of the same date, viz., October 28, 1996, exempted the bank from the provisions of section 15(1) of the Banking Regulation Act relating to payment of dividend. The Ministry had also approved the set off of accumulated losses against the capital by its letter to the respondent bank dated March 29, 1996. The Reserve Bank of India by its letter dated January 17, 1997, gave its permission to the respondent bank for preferential allotment of shares on reportable basis to NRIs/CBs. The Securities and Exchange Board of India by its letter dated January 24, 1997, gave approval to the respondent bank for listing of the shares on the stock exchanges at Mumbai and Ahmedabad and the National Stock Exchange. The respondent bank has also filed on record a copy of the letter dated January 21, 1997, from the SEBI containing their comments on the draft offer document. Learned counsel referred to the disclaimer clause in the issue documents to urge that the Securities and Exchange Board of India had not given the requisite approvals. We find that the disclaimer clause inserted is a usual one and, in any case, it cannot negate the factum of approvals, as placed on record by respondent No. 5. Thus, the argument of learned counsel for the petitioner that the public issue was devoid of the requisite approvals from the Securities and Exchange Board of India and the Reserve Bank of India does not hold good and is rejected.

22. Before parting with the case we must observe that the Securities and Exchange Board of India, the Reserve Bank of India and the Delhi Stock Exchange are expert bodies in financial, accounting and economic matters. The questions as to the accounting method adopted or the fixation of the premium at which the share can be issued or determining the rates at which premium should be allowed in public issues are matters which fall within their domain. The court does not have the expertise to embark upon the determination of these issues. In this connection the observations of the apex court in *Peerless General Finance and Investment Co. Limited and Another Vs. Reserve Bank of India*, may be usefully referred to :

"It is not the function of the court to amend and lay down some other directions and the High Court was totally wrong in doing so. The function of the court is not to advise in matters relating to financial and economic policies for which bodies like the Reserve Bank are fully competent. The court can only strike down some or entire directions issued by the Reserve Bank in case the court is satisfied that the directions were wholly unreasonable or violative of any provisions of the Constitution or any statute. It would be hazardous and risky for the courts to tread an unknown path and should leave such task to the expert bodies. In matters of economic policy even experts can seriously and doubtlessly differ.

Courts cannot be expected to decide them without even the aid of experts. The function of the court is to see that lawful authority is not abused but not to appropriate to itself the task entrusted to that authority. A public body invested with statutory powers must take care not to exceed or abuse its power. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably."

"It is not the concern of the court to find out as to whether actuarial method of accounting or any other method would be feasible or possible to adopt by the companies while carrying out the conditions contained in paragraphs (6) and (12) of the directions of 1987. The companies are free to adopt any mode of accounting permissible under the law but it is certain that they will have to follow the entire terms and conditions contained in the impugned directions of 1987, including those contained in paragraphs (6) and (12). It is not possible for the court to determine as to how percentage of deposit of first Installment should be allowed towards expenses which may consist of commission to agents, office expenses, etc."

23. In view of the foregoing discussion, we find no merit in the petition and the same is dismissed.