

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

#78

+ **W.P.(C) 6621/2010**

SOCIAL ACTION FORUM FOR MANAV ADHIKAR Petitioner
Through Mr. Rajiv Dutta, Sr. Adv. with Mr. A.
Prasad and Mr. Ajay Veer Singh Jain,
Advts.

versus

UNION OF INDIA & ORS Respondents

Through Mr. G.E. Vahanwati, Attorney General of
India, Mr. A.S. Chandhiok, ASG with
Mr. Pratap Venugopal, Adv. for R-1 & 2.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN

% **ORDER**
29.09.2010

The petitioner, Social Action Forum for Manav Adhikar, describing itself an organization, which has the motto to fight for social welfare and providing legal services to the under privileged and vulnerable sections of the society and establish human rights, has preferred this public interest litigation invoking the extraordinary jurisdictional power of this Court with the following prayers:-

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Signature Not Verified

Digitally Signed By: AMULYA
Certify that the digital file and
physical file have been compared and
the digital data is as per the physical
file and no page is missing.

- “a. Pending the hearing and final disposal of this petition, this Hon’ble Court be pleased to stay the orders of the Board of Respondent No.1 dated 02 February, 2010 and order of the Securities Appellate Tribunal, Mumbai dated 22.6.2010 in Appeal No.21 of 2010;
- b. Pending the hearing and final disposal of this petition, this Hon’ble Court be pleased to stay the decisions of Respondent No.1 dated November 9, 2009 relating to three orders of the Committee;
- c. The Hon’ble Court be pleased to issue a writ of certiorari or any other writ, order or direction in the matter thereof quashing the decisions/orders dated 9th November, 2009 and 02nd February 2010; and Order dated 22.6.2010 of the Securities Appellate Tribunal, Mumbai in Appeal No.21 of 2010;
- d. The Hon’ble Court be pleased to declare that the decisions of Respondent No.1 dated November 9, 2009 relating to three orders of the Committee and the orders of the Board of Respondent No.1 dated 02nd February, 2010 as *non est*;

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- e. The Hon'ble Court be pleased to issue a writ of mandamus or any other writ, order or direction in the matter thereof directing Respondent No.1 to implement the orders issued by the Committee;
 - f. The Hon'ble Court be pleased to declare that the opinion opined by Mr. C. Achuthan is biased as he is a Director on Board of National Stock Exchange of India Limited, a SEBI regulated entity and which is the promoter and major shareholder of NSDL;
 - g. The Hon'ble Court be pleased to order an investigation by an appropriate agency regarding various acts committed by C B Bhawe in his capacity as Chairman SEBI so as to do undue favors to NSDL
 - h. For ad-interim relief in terms of prayer (a) and (b);
 - i. Cost of the present petition; and
 - j. That such other and further reliefs as the nature and circumstances of the case may require be granted."

Mr. Rajiv Dutta, learned senior counsel appearing for the petitioner

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submitted the 3rd respondent, who is the chairman, SEBI is the chief protagonist in ushering in all kinds of irregularities inasmuch as he has indirectly and sometimes directly applied tools in a maladroit manner to help the National Securities Depositories Limited (for short 'NSDL') and his proactive role has really crossed all boundaries if the orders passed by the SEBI are scrutinized with a studied manner. The learned counsel further submitted that as a statutory body it has the sacrosanct duty to maintain and sustain the pious duty of adjudication but when allegations came up for consideration pertaining to NSDL, the respondent No.3 in a clever manner recused himself and constituted a two-member committee on 13th August, 2008 which recorded certain findings against the SEBI. Thereafter, an opinion was sought from Mr. Achuthan whether the SEBI has the jurisdiction to review the order and thereafter adopting maladroit disposition the order was reviewed partly in April, 2009. The learned counsel further submitted that the opinion that was further sought was whether the committee worked within the parameters of the SEBI framework. In essence, the proponent of Mr. Dutta is that the SEBI could not have sought such an opinion after constituting the committee inasmuch as the opinion of the committee was binding on it. The learned counsel has taken us through various paragraphs and the orders

including the orders passed by the Securities Appellate Tribunal, Mumbai (for short 'the SAT') to highlight that the entire gamut of facts would clearly exposit that collusion and conspiracy has been going through the marrow of the decision making process which makes the whole decision vulnerable and a sanctuary of errors.

It is urged by him that after the committee took the decision, the Board had become *functus-officio* and, therefore, there was no justification or warrant to seek an opinion from Mr. Achuthan, a biased person, to clothe with the power of review or relook as obtainment of a biased opinion was fundamentally an eye-wash. The learned senior counsel further submitted that the petitioner organisation which is dedicated and devoted to the social cause has felt obliged to arouse the judicial conscience of this Court under Article 226 of the Constitution of India to look into the functioning of the SEBI, the manner, the method and the modus operandi adopted by it to arrive at decisions.

Mr. G.E. Vahanwati, the learned Attorney General, combating the aforesaid submissions, urged that the present public interest litigation is a remarkable phenomenon inasmuch as an attempt has been made to unsettle and dislodge the orders which have been passed inter se parties which is

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unthinkable and inconceivable. The learned Attorney General has submitted that when the respondent No.3 had recused himself at all points of time as the orders and proceedings do clearly reveal, it is unfortunate that a social organization would come up and make unwarranted allegations since mudslinging is impermissible and unallowable in a court of law. It is his further submission that if this kind of writ petitions are entertained, there will be no sanctity in an institution, and unless the institutions are allowed to survive and function in a democratic body polity the anarchy and chaos are bound to entrench into the adjudicatory system. It is propounded by Mr. Vahanwati that if a person is grieved, he can always prefer an appeal before the Apex Court or he may come to this Court invoking the writ jurisdiction but it is really difficult to fathom how in a public interest litigation, the orders passed by the statutory authorities can be quashed. The learned Attorney General has invited our attention to the orders passed by the SAT on which the learned senior counsel for the petitioner has also placed reliance upon to bolster his submission that the said order remotely does not suggest that there was any kind of collusion or conspiracy and, in fact, the appellate authority has passed a reasoned order and has only recorded a concession that the strictures passed against the NSDL should be expunged and, accordingly, the

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same were expunged. It is also urged by him that this Court may in a fit case entertain the writ petition and quash the orders but does not have the requisite supervisory power to go into the functioning of the SEBI or the SAT.

To appreciate the rivalized submissions raised at the bar, we have perused the relevant provisions contained in the Securities and Exchange Board of India Act, 1992 (for brevity 'the Act') which was brought into existence by the parliament to promote orderly and healthy growth of the securities market and for investors' protection and for monitoring the stock exchange quite apart from other aspects to be looked into. In the case at hand, as is perceived from the prayers, it is not only manifold but absolutely ambitious. True it is, Mr. Dutta, learned senior counsel for the petitioner submitted that all the prayers may be deleted and the singular prayer that this Court should scrutinize is whether the activities of the SEBI and the activities of the respondent No.3 should be addressed. Many an allegation has been made and also an edifice has been sought to be built in course of arguments that the respondent No.3 could not have been appointed as the Chairman of SEBI. We have been apprised by the learned Attorney General that the respondent No.3 was appointed in the year 2008 and his term is going to be over in February, 2011. That apart, except making a bald allegation we

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perceive nothing how the respondent No.3 is disqualified to hold the post. In fact, on a query being made, the learned senior counsel candidly admitted that he is not really challenging the appointment of the 3rd respondent as the chairman of SEBI. To put it differently, it is beyond the scope of writ of quo warranto.

Thus understood, the hub of the matter is whether this Court should entertain a public interest litigation of this nature and direct an enquiry to be conducted by a third party agency with regard to the activities of the SEBI. On a perusal of the proceedings it is luminescent that the respondent No.3 has recused and constituted a committee. Hence, he had, in actuality, recused himself from the initial stage. A submission has been canvassed by the learned senior counsel for the petitioner that though the respondent No.3 had recused himself yet he had taken care to see that the interest of the NSDL is protected inasmuch as all officers do report to him. The Chairman of an institution, if we allow ourselves to say, has a dual role. When he functions as the administrative authority all officers are expected to be guided by him in the administrative capacity depending upon the Rule in vogue but as far as quasi-judicial functioning is concerned, they are absolutely independent and nothing has been brought on record that the respondent No.3 ever entrenched

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or encroached upon their quasi judicial functioning. It is easy to make an allegation of mala fide but extremely difficult to prove it. It is easier to make an allegation of bias but it is difficult to substantiate the same. Quite apart from the above it is noticeable from the order passed by the Board in respect of Rajnarayan Capital Market Services Limited, it has been mentioned as follows:—

“Mr. C.B. Bhawe, Chairman of SEBI, did not participate in these deliberations.”

It is worth noting, being dissatisfied with the aforesaid order, the NSDL preferred an appeal before the SAT forming the subject matter of the Appeal No. 21/2010. The Appellate Board in paragraph 2 has held thus –

“We have heard the learned senior counsel on both sides. In the light of the directions issued by the Board, the appellant has stated that it has revised its business rules and put in place additional procedures to deal with the accounts of the beneficial owners in the event of deactivation / termination of a depository participant. Having gone through the record, we are satisfied that no prejudice has been caused to the beneficial owners of the depository participant, namely, Rajnarayan Capital Markets Services Limited whose certificate of registration has since been cancelled. In this view of the matter and having regard to the interest of the securities market, we direct that the observations made in the impugned order, in so far as they are adverse to the appellant, shall stand expunged. Learned senior counsel on both

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sides agree that we need not record detailed reasons for expunging the observations in the impugned order.”

On a careful scrutiny of the said order, it is luculent to us that the Board has recorded its satisfaction that no prejudice has been caused to the beneficial owners of the depository participant. Thus, an opinion has been formed. Thereafter, on the concession of the learned senior counsel appearing for both sides, the observations in the order impugned were expunged.

From the aforesaid, we really do not perceive any kind of collusion or conspiracy. Whether the order is right or wrong, we are not required to dwell upon. Needless to say, such an order is assailable in appeal before the Supreme Court under Section 15Z of the Act.

In this context, we may profitably quote a passage from *L. Chandra Kumar v. Union of India and others*, AIR 1997 SC 1125 wherein the Apex Court has held thus –

“99. In view of the reasoning adopted by us, we hold that Clause 2(d) of Article 323A and Clause 3(d) of Article 323B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323A and 323B would, to

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the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other Courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under Article 323A and Article 323B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the concerned Tribunal falls. The Tribunals will, nevertheless, continue to act like Courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal. Section 5(6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated. “

We have reproduced the said paragraph only to show that an order passed by the Tribunal, namely, Central Administrative Tribunal or the State Administrative Tribunal would be amenable to challenge under Article 226/227 of the Constitution of India but the High Court does not have administrative control over it. Similarly, this Court does not have the power to supervise SEBI or SAT on the administrative side. This position is undisputable. However, the submission of the learned senior counsel for the

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petitioner is that it is not a question of supervising but exercising of power over the tribunal for the purpose of directing the third party to conduct an enquiry into the manner in which the affairs are carried out. To put it differently, the learned senior counsel would submit that how the decision making process is vitiated by personal involvement of the members of the SEBI or the appellate board. We are afraid that unless the controversy actually travels to this Court by an assail and requires to be decided within the parameters, this court should not direct any kind of enquiry to the affairs of SEBI or SAT. That is not within the domain of this Court while exercising the power either under Article 226 or 227 and Article 226/227 of the Constitution of India.

Ordinarily so saying, we have parted with the case, but, a pregnant one, we are constrained to add something more. A public interest litigation was innovated as a weapon to assist the under privileged and the marginalized sections. True it is, in certain cases, the Apex Court as well as High Courts have entertained public interest litigations where the collective good, environment pollution, matters relating to right to life under Article 21 of the Constitution, etc. are sought but when question of the present nature arises, as the learned Attorney General would submit, is an attempt, an endeavour, a

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deliberate and calculated effort to create a concavity and crack in the functioning of the institutions. The same is not permissible.

We cannot grant, despite our best efforts, a liberty to the petitioner organization which has pleaded that it is committed to the cause of poor and cause of the people in plight when allegations have been made painting others by ascribing dis-reputation to them and causing a dent in the functionalism in the institutions. The said attempt can be compared to one building a castle in Spain. If such kind of public interest litigations are entertained, we are afraid, the people who really need the intervention of the court will be kept at bay. The registered society might have nurtured an ambition to bring a litigation of this nature but there is an old saying "ambition must be combined with acceptance". The petitioner-society has not accepted its limitation and crossed its barriers and barricades. He who crosses the barriers, that is, 'laxman rekha' cannot be allowed to go scot free.

In view of the aforesaid, we direct dismissal of the writ petition with costs which is assessed at Rs.50,000/-. The said costs shall be deposited with the Blind Relief Association, Lal Bahadur Shastri Marg, Near Oberoi Hotel, New Delhi-110003. The costs shall be deposited within a period of four weeks from the date of receipt of the order.

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If the said costs is not deposited, Mr. A.S. Chandhiok, the learned Additional Solicitor General assisting Mr. G. E. Vahanvati, the learned Attorney General is given liberty to move an application in this writ petition so that appropriate steps can be taken and the persons who represent the society can be proceeded in accordance with law.

Manmohan
CHIEF JUSTICE

Manmohan
MANMOHAN, J

SEPTEMBER 29, 2010
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