IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 182 OF 2016
IN
SUIT NO. 3022 OF 2009

Hetal Rajesh Patel ...Applicant/ Defendant no.8

In the matter between

Networth Stock Broking Ltd. & ors. ...Plaintiffs

Versus

Mr. Mukesh Konde & ors. ...Defendants

Mr. Dharam Jumani, a/w Suraj Iyer, Debashir Mandpe, i/b Ganesh & Co., for the Applicant/Defendant no.8.
Mr. Mayur Vinod Faria, for the Plaintiffs.
Mr. Roop Basu, i/b M/s. The Law Point, for Defendant no.5.
Mr. Ayush Agarwal, i/b M/s. The Law Point, for Defendant no.9.

CORAM: N. J. JAMADAR, J.
DATED : 7th FEBRUARY, 2020

Oral Order :-

1. This notice of motion is taken out by defendant no.8 for rejection of plaint under the provisions of Order VII Rule 11(d) of the Code of Civil Procedure, 1908, ('the Code').

2. The suit is instituted for the following reliefs:

> (a) That defendant no.5 be ordered to carry inquiry in the entire trade of the said scrip in between the period September 2008 to February 2009 and annul the entire transaction in respect of the said scrip on 11.02.2009 with respective plaintiffs by respective defendants 1 to 4.
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> (b) That till the investigation of the fraud and manipulation of trade is carried out, defendant no.5 should restrain all its members from paying out.

(c) That even defendants 1, 2, 3 and 4 jointly and/or severally be ordered and decree to pay to the respective plaintiffs the amount mentioned in particulars of claim with interest @ 24% p.a. from 11.02.2009 till the payment of realization.

(d) That in the event of this Hon'ble Court annulling the said transactions of respective plaintiffs in respect of the said scrip, defendant no.5 be ordered to refund the said amount to the plaintiffs in such manner and in such proportion, as the plaintiffs respectively have paid for the said shares to defendant no.5.

(e) That in the event of defendant no.5 not annulling the transactions in that even defendants 1, 2, 3 and 4 jointly and/or severally be ordered and decree to pay to the respective plaintiffs the amount mentioned in particulars of claim (Exhibit "J" hereto) with interest @ 24% per annum for 11.02.2009 till the payment of realization.

(f) That this Hon'ble be pleased to order defendant no.5 to restrain such brokers who are passing the moneys in respect of the sale/purchase of shares of the said scrip of 11.02.2009 for settlement no.0809-214 from paying their respective clients or to deposit the entire amount with defendant no.5 pending the inquiry.

(g) That pending hearing and final disposal of the suit defendant no.6 be ordered by this Hon'ble Court to give particulars of account of defendant nos.1, 2 and 3 with them and also the statement of account in respect of the said respective accounts from 01.08.2008 till date.

(h) That pending hearing and final disposal of the suit, defendant nos.1, 2, 3 and 4 be also directed by this Hon'ble Court to give entire statement of all the accounts they had in any other banks over and above defendant no.6 and the statement of accounts of such banks from 01.08.2008 till date including particulars of their assets."

3. In the backdrop of the aforesaid reliefs defendant no.8 asserts that the suit is not tenable as there is an express bar under the provisions contained in Section 15Y and 20A of the Securities and Exchange Board of India Act 1992 ('the SEBI Act') in respect of the matters which the Securities and Exchange

Board or the Adjudicating Officer is empowered by and/or under the said Act to deal with.

4. The defendant no.8/applicant contends that the issues sought to be raised by the plaintiffs in the instant suit including the alleged fraudulent transaction in the securities in breach of Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 ('FUTP Regulations') clearly fall within the province and jurisdiction expressly conferred upon the Board and the Adjudicating Officer under the provisions of the SEBI Act. Thus, there is a bar to entertain the suit. Consequently, the plaint deserves to be rejected under the provisions of Order VII Rule 11(d) of the Code.

5. An affidavit-in-reply is filed by the constituted attorney of plaintiff no.2. The application is stated to have been filed with a view to delay the disposal of the suit. The *bona fide* of defendant no.8 is called in question as defendant no.8 got impleaded in the suit by filing a chamber summons. The plaintiffs assert that the suit is instituted for recovery of the amount which the plaintiffs were made to fraudulently part with on account of the transactions of defendant nos. 1 to 3. The plaintiffs aver that the provisions contained in Sections 15Y and

20A of the SEBI Act, have no application to the issues raised by the plaintiffs in the instant suit. Conversely, neither the Board nor the adjudicating officer is empowered to deal with, decide or grant relief prayed for in the instant suit, by the plaintiffs. Thus, the application be rejected with costs.

6. Heard Mr. Jumani, the learned Counsel for defendant no.8 and Mr. Faria, the learned Counsel for the plaintiffs, at some length. Perused the averments in the plaint and the material on record.

7. It is fairly well recognized that the plea of rejection of plaint being in the nature of a plea of a demurer, the averments in the plaint are required to be considered and not the defence which the defendants may raise. The enquiry which the Court is expected to embark upon is whether by the averments in the plaint itself, any bar of law to entertain the suit is made out. The averments in the plaint are required to be construed as they stand. However, the plaint is required to be read in a meaningful manner. If by way of a clever drafting a cause of action is attempted to be made out where none exists, the Court would be justified in construing the averments in the plaint in a purposive manner.

8. From the perusal of the plaint, it becomes evident that the plaintiffs claim that they are the trading members of the Bombay Stock Exchange Ltd. The defendant nos.1 to 3, are the constituents of the plaintiffs. Defendant nos.1 to 3 gained the confidence of the plaintiffs as *bona fide* and genuine traders. Defendant nos.1 to 3, on 11th February, 2009, had traded in the scrips, namely of Sesa Goa, Satyam Computers, Reliance Natural Resources Limited (RNRL). However they did not square off their position till 3.10 pm. Though the plaintiffs had tried to square off those scrips they could not do it as the shares were hit by lower circuit in the market. The plaintiffs were thus constrained to take delivery of those scrips by making payment to the Stock Exchange – defendant no.5. The plaintiffs alleged that defendant nos.1 to 3 had systematically rigged the prices. It is alleged that defendant nos.1 to 3 created an artificial volume in those scrips. The plaintiffs have thus sought enquiry into those transactions by defendant no.5 – Stock Exchange annulling all those transactions and refund of the amount which the plaintiffs were made to pay to defendant no.5. Certain reliefs in the nature of a direction to defendant no.5 to restrain all its members from paying out their respective clients are also sought.

9. The plaintiffs have also claimed a decree against defendant nos.1 to 4 jointly and severally in the sum of Rs.7,34,10,000.90 along with interest.

10. In the backdrop of the aforesaid nature of the claim, the learned Counsel for defendant no.8 would urge that there is an express ouster of the jurisdiction of the Civil Court in view of the provisions contained in Section 15Y and 20A of the SEBI Act. The learned Counsel for the defendant no.8 urged that the SEBI Act envisages a comprehensive mechanism for dealing with the allegations of fraudulent and deceptive transaction in securities. The Board constituted under Section 3 of the SEBI Act is entrusted with the duties and functions enumerated under Section 11 of the Act. Prohibiting fraudulent and unfair trade practices relating to securities, 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 and calling for information and records from any person for the purpose of any investigation or inquiry in respect of any transaction in securities fall within the prescribed functions of the Board. Sub-section (3) of Section 11 vests the powers of the Civil Court in the Board for the purpose of the discharge of the said functions. Sub-section (4) specifically empowers the Board, *inter alia,* to suspend the trading of any recognised stock exchange and impound and retain any proceeds or securities in respect of any transaction, which is under investigation. Section 11B of the Act further empowers the Board to issue directions and levy penalty, *inter alia,* to prevent the affairs of any intermediary or other persons referred to Section 12 being conducted in a manner detrimental to the interests of investors or securities market. Section 12A of the Act incorporates specific prohibition of manipulative and deceptive devices, insider trading and substantial acquisition of securities or control.

11. The learned Counsel for defendant no.8 further urged that if the provisions of the Act are considered in the backdrop of the object of the SEBI Act, then it becomes abundantly clear that comprehensive provisions have been made in the SEBI Act not only for prevention of fraudulent activities resulting in prejudice to the investors but also remedial mechanism is provided therein. Attention of the Court was invited to the provisions contained in Chapter VIA under heading 'Penalties and Adjudication'. Emphasis was laid on the provisions contained in Section 15HA which provides penalty for fraudulent and unfair trade practices, and Section 15-I which provides for adjudicatory power. Section 15-I of the Act reads as under:

> "**15-I Power to adjudicate:-**
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> (1) For the purpose of adjudging under sections 15A, 15B, 15C, 15D, 15E, 15F, 15G, [,15H, 15HA and 15HB], the Board [may] appoint any officer not below the rank of a Division Chief to be an adjudicating officer for holding an inquiry in the prescribed manner after giving any person concerned a reasonable opportunity of being heard for the purpose of imposing any penalty.
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> (2) While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in sub-section (1), he may impose such penalty as he thinks fit in accordance with the provisions of any of those sections.
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> [(3) The Board may call for and examine the record of any proceedings under this section and if it considers that the order passed by the adjudicating officer is erroneous to the extent it is not in the interests of the securities market, it may, after making or causing to be made such inquiry as it deems necessary, pass an order enhancing the quantum of penalty, if the circumstances of the case so justify.
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> Provided that no such order shall be passed unless the person concerned has been given an opportunity of being heard in the matter:
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> Provided further that nothing contained in this sub-section shall be applicable after an expiry of a period of three months from the date of the order passed by the adjudicating officer or disposal of the appeal under section 15T, whichever is earlier.]

12. The learned Counsel for the defendant no.8 submitted that if the aforesaid provisions are read in conjunction with Section 15Y and 20A of the SEBI Act, the ouster of the jurisdiction of the Civil Court becomes clear and explicit. Section 15Y and Section 20A of the SEBI Act read as under:

> **"15Y. : Civil Court not to have jurisdiction.**
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> No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an adjudicating officer appointed under this Act or a Securities Appellate Tribunal constituted under this Act is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.
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> **20A. : Bar of jurisdiction.**
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> No order passed by the [Board or the Adjudicating Officer] under this Act shall be appealable except as provided in [section 15T or section 20] and no civil court shall have jurisdiction in respect of any matter which the [Board or the Adjudicating Officer] is empowered by, or under, this Act to pass any order and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any order passed by the [Board or the Adjudicating Officer] by, or under, this Act.]

13. Section 15Y bars the jurisdiction of the Civil Court to entertain the suit or proceeding in respect of any matter which an Adjudicating Officer or a Securities Appellate Tribunal is empowered by or under the SEBI Act to determine. Section 20A, on the other hand, bars the Civil Court from dealing with any matter in respect of which the Board or the Adjudicatory Officer is empowered by or under the Act to pass any order.

14. The pivotal question which comes to the fore is, whether the dispute, which is sought to be raised by the plaintiffs in the instant suit, falls in its entirety within the ambit of the matters entrusted by the provisions of the SEBI Act for determination to the Adjudicating Officer or the Board. The learned Counsel for defendant no.8, inviting attention of the Court to the averments in the plaint, would urge that the foundation of the claim of the plaintiffs is the alleged fraudulent transactions in the specified securities and the resultant loss caused to the plaintiffs. Since the plaintiffs seek both an inquiry into those transactions and also annulment thereof, the issue is completely within the powers of the Board or the Adjudicating Officer, as the case may be. The fact that the plaintiffs have also sought a money decree, according to the learned Counsel for defendant no.8, does not change the nature of the claim of the plaintiffs.

15. The learned Counsel for the defendant no.8 urged that from the tenor of the plaint, it becomes evident that the plaintiffs have alleged that the prices of the scrips were fraudulently inflated in breach of the provisions of the Act and the FUTP Regulations, 2003. Inviting the attention of the Court to Clauses (3) and (4) of the Regulations, wherein the nature of manipulative, fraudulent and unfair trade practices have been enumerated, and the Clause (11) of the Regulation, wherein the Board is empowered to take remedial action including impounding of the scrips, prohibiting the disposal of the securities, direct disposal of the securities in a specified manner for restoring the *status quo ante*, it was submitted that reliefs sought in the instant suit can only be granted by the authorities constituted under the SEBI Act.

16. In opposition to this, the learned Counsel for the plaintiffs submitted that the primary nature of the suit is of money claim. The plaintiffs seek to recover the amount which they were made to fraudulently pay to defendant no.5 – Stock Exchange on account of the transaction of defendant nos.1 to 3. The allegations of fraud and necessity of inquiry are secondary in nature. Inviting the attention of the Court to the averments in paragraphs 8 to 10 of the plaint, wherein the plaintiffs have averred that they are entitled to recover the amount from defendant nos.1 to 3 and have, in fact, debited their accounts with respective due amount, coupled with the prayer clause (c), extracted above, a strenuous effort was made to draw home the point that the suit is primarily for recovery of the said amount. The fact that some part of the claim may be barred by the provisions of the SEBI Act, according to the learned Counsel for the plaintiffs, is not a justifiable ground for rejection of the plaint as the substantive cause of action and relief against defendant nos.1 to 4 survive and properly fall within the jurisdiction of the Civil Court.

17. To lend support to this submission, the learned Counsel for the plaintiffs placed a strong reliance on a judgment of the Supreme Court in the case of ***Madhav Prasad Aggarwal and another vs. Axis Bank Limited and another***[1]**.**

18. The phraseology of the Order VIII Rule 11, on its plain construction, envisages the rejection of the plaint as a whole. Recourse to the said provision become justifiable only when the plaint does not disclose a cause of action as is barred by any law. An exercise of dissection of plaint to determine as to whether it does not disclose cause of action qua a particular defendant or claim is not envisaged by the said provisions. A plaint either discloses a cause of action or it does not disclose any right to sue. It seems to be impermissible to embark upon an inquiry to determine whether the particular part is barred, and reject the plaint to that extent.

19. An useful reference, in this context can be made to the judgment of the Supreme Court in the case of ***Sejal Glass Limited vs. Navilan Merchants Private Limited***[2], wherein after adverting to the various judgment of the High Courts, it was enunciated that if the plaint survives against certain defendant and/or properties, Order VII Rule 11(d) will have no application

1 2019 (7) SCC 158.

2 (2018) 11 Supreme Court Cased 780.

at all, and the suit as a whole must then proceed to trial. This position was reiterated by the Supreme Court in the case of ***Madhav Aggarwal*** (supra), on which reliance is placed by the learned Counsel for the plaintiffs. The observation of the Supreme Court in the paragraphs 10 and 12 are of significance. They read as under:

> "**10**. Per contra, respondent No.1 - bank would urge that the Division Bench was justified in allowing the notice of motion filed by respondent No.1 - bank to reject the plaint qua the bank being barred by Section 34 of the 2002 Act. According to the said respondent, the appellant(s) are not genuine home buyers but are investors of developers i.e. Orbit Corporation Ltd. (In Liq.). Due to the close acquaintance/ business relationship, the concerned appellant(s) took commercial unsecured risk by purportedly investing huge amount under the guise of purchasing flats and entered into transactions which were contrary to the provisions of 1963 Act. Thus, the appellant(s) cannot claim any right merely on the basis of a self-serving allotment letter pertaining to the concerned flat, purportedly given by the builder. Noticeably, contends learned counsel for respondent No.1 that the averments in the plaint(s) regarding allegation of fraud played upon the appellant(s) are vague and general. The same are baseless and unsubstantiated. Rather, no case can be culled out from the averments in the plaint so as to hold that the suit filed by the concerned appellant(s) comes within the excepted category predicated in Mardia Chemicals Ltd. (supra). Respondent No.1 has supported the impugned judgment of the Division Bench and would contend that the bank is not a necessary or even a proper party to suit for specific performance of the alleged agreement and including in relation to alternative relief of damages claimed against the developers.
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> **11**. We do not deem it necessary to elaborate on all other arguments as we are inclined to accept the objection of the appellant(s) that the relief of rejection of plaint in exercise of powers under Order 7 Rule 11(d) of CPC cannot be pursued only in respect of one of the defendant(s). In other words, the plaint has to be rejected as a whole or not at all, in exercise of power Order 7 Rule 11 (d) of CPC. Indeed, the learned Single Judge rejected this objection raised by the appellant(s) by relying on the decision of the Division Bench of the same High Court. However, we find that the decision of this Court

> in the case of Sejal Glass Limited (supra) is directly on the point. In that case, an application was filed by the defendant(s) under Order 7 Rule 11(d) of CPC stating that the plaint disclosed no cause of action. The civil court held that the plaint is to be bifurcated as it did not disclose any cause of action against the director's defendant(s) 2 to 4 therein. On that basis, the High Court had opined that the suit can continue against defendant No.1 company alone. The question considered by this Court was whether such a course is open to the civil court in exercise of powers under Order 7 Rule 11(d) of CPC. The Court answered the said question in the negative by adverting to several decisions on the point which had consistently held that the plaint can either be rejected as a whole or not at all. The Court held that it is not permissible to reject plaint qua any particular portion of a plaint including against some of the defendant(s) and continue the same against the others. In no uncertain terms the Court has held that if the plaint survives against certain defendant(s) and/or properties, Order 7 Rule 11(d) of CPC will have no application at all, and the suit as a whole must then proceed to trial.
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> **12**. In view of this settled legal position we may now turn to the nature of reliefs claimed by respondent No.1 in the notice of motion considered by the Single Judge in the first instance and then the Division Bench of the High Court of Bombay. The principal or singular substantive relief is to reject the plaint only qua the applicant/respondent No.1 herein. No more and no less."

20. In the backdrop of the aforesaid exposition of the legal position, reverting to the facts of the case, undoubtedly, it is the claim of the plaintiffs that defendant nos.1 to 4, adopted fraudulent and deceptive means, to rig the prices of the particular scrips and, on a particular day, did not square of their positions and the plaintiffs were made to pay the price of those scrips as they were struck with lower circuit. Indisputably, the plaintiffs have sought directions for inquiry and annulment of those transactions with remedial action of refund of the money which they were made to part with. At the same time, the plaintiffs seek to recover the said amount from defendant nos.1 to 4, who allegedly indulged in those fraudulent practices. The claim of recovery of the amount from defendant nos.1 to 4 stands on an independent footing and can be prosecuted by the plaintiffs independently of any inquiry or adjudication by the Adjudicating Officer or Board. It is a different matter that in the absence of the determination about the alleged fraud by the competent authority, the plaintiffs may not be in a position to establish those facts. However, that is not a ground for rejection of the plaint. As a substantial part of the claim falls within the jurisdiction of the Civil Court, the bar as regards the consideration of fraud and inquiry therein envisaged under Section 15Y and 20A, does not preclude the Court from entertaining the suit. Thus, the aforesaid pronouncement, in the case of ***Sejal Glass*** (supra) and ***Madhav Aggarwal*** (supra), govern the facts of the case with equal force.

21. The learned Counsel for defendant no.8 urged that this Court may be persuaded to adopt the course which it had taken in the case of ***Taru Meghani vs. Shree Tirupati Greenfield,***[3] wherein, this Court after adverting to the provisions contained in Section 8 of the Arbitration and Conciliation Act, 1996 and

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3 2020 SCC Online Bom 110.

Rules 3 and 6 of Order II of the Code, had referred the party to arbitration in respect of a part of the claim with liberty to the plaintiffs to institute a fresh suit in respect of the cause of action for which there was no arbitration agreement. The learned Counsel for defendant no.8 urged that in the instant case as well the Court may direct the plaintiffs to institute a separate suit in respect of the money claim.

22. I find it rather difficult to accede to aforesaid submission on behalf of defendant no.8. The fact – situation, in the case of ***Taru Meghani*** (supra) is completely distinct. In the said case, this Court was of the view that the provisions of the special statute like Arbitration and Conciliation Act cannot be defeated by simply adding a claim which is not susceptible to arbitration. In the case at hand, defendant no.8 has urged that the plaint be rejected on the count that the elements of fraud and inquiry therein are within the ambit of the powers of the Board or the Adjudicating Officer. The instant case, is squarely governed by the pronouncement in the case of ***Madhav Aggarwal*** (supra). Thus, the submission does not deserve countenance.

23. The conspectus of aforesaid consideration is that in view of the nature of the suit it cannot be said that the provisions contained in SEBI Act, constitute a bar to entertain the suit, as a whole. Resultantly, the Notice of Motion deserves to be rejected.

24. Hence the following order:

The Notice of Motion stands rejected.

[N. J. JAMADAR, J.]