

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.10.2020

CORAM

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

W.P.NOS.24325 & 24326 OF 2018

W.P.No.24325 of 2018

A.Kumar

.. Petitioner

Vs.

1. Financial Intelligence Unit - India
6th Floor, Hotel Samrat
Kautilya Marg, Chanakyapuri
New Delhi - 110 021
2. National Stock Exchange of India Ltd.,
Exchange Plaza, C-1, Block G
Bandra Kurla Complex, Bandra (E)
Mumbai - 400 051
(R2 impleaded as per court order dated
5.10.2018 made in W.M.P. No.30770/2018 in
W.P. No.24325/2018)

.. Respondents

W.P.No.24326 of 2018

A.Kumar

.. Petitioner

Vs.

1. Ministry of Corporate Affairs
Government of India
A Wing, Shastri Bhawan
Rajendra Prasad Road, New Delhi - 110 001
2. Serious Fraud Investigation Office
2nd Floor, Deendayal Antyodaya Bhawan
CGO Complex, Lodhi Road
New Delhi - 110 003.
3. National Stock Exchange of India Ltd.,
Exchange Plaza, C-I, Block G
Bandra Kurla Complex, Bandra (E)
Mumbai - 400 051
(R3 impleaded as per court order dated
5.10.2018 made in W.M.P.No.30774/2018)

.. Respondents

COMMON PRAYER :

Writ Petition filed Under Article 226 of the Constitution of India praying to issue a Writ of Mandamus, directing the respondents herein to dispose of the representation of the petitioner dated 21.08.2018 in accordance with law by passing a reasoned and speaking order within a reasonable time period to be fixed by this Hon'ble Court.

For Petitioner : Mr.Nithyaesh Natraj,
for Mr.Narasimha Varman

For Respondents : Mr.G.Karthikeyan, ASGI for R1
Mr.P.S.Raman, Senior Counsel
Assisted by Mrs.Sonali Mathur &
Mr.Prabhav Shroff
for Mr.P.Giridharan for R3

COMMON ORDER

The petitioner in both the writ petitions, has sought for a writ of mandamus directing the respondents herein to dispose of his representations dated 21.08.2018, in accordance with law, by passing a reasonable and speaking order, within a reasonable time period that may be fixed by this Court.

2. The petitioner has alleged that the National Stock Exchange of India Ltd (in short NSE) is having two main objectives, viz. (i) Scientific, Efficient and Transparent price discovery; and (ii) Equal access opportunities to all market participants. While so, it is alleged that some officials of NSE have conspired with Software Vendor and OPG Securities and few other brokers by running illegal co-location service, which led to manipulative price discovery and preferential access opportunities to few brokers.

3. According to the petitioner, this has not only resulted in the monetary loss to NSE, but also shattered the public confidence. The complaint of the petitioner is that, the then Managing Director & Chief Executive Officer of NSE had launched co-location facility, which allowed the members to rent rack space with low latency connectivity to the exchange. The guidelines for co-location facility and the high frequency trading were issued by the Securities and Exchange Board of India (in short SEBI) which NSE is duty bound to follow. It is alleged that NSE has blatantly violated the statutory and regulatory norms.

4. According to the petitioner, though the guidelines were issued only in 2012, prior to that itself, without any

authorisation or approval from SEBI, select brokers misused the co-location facility and enriched themselves. It is stated that the wrongful gain by the select brokers by this illegal preferential access through co-location service had wrongfully gained several crores of rupees for the past five years, which amounts to a scandal. While so, an Expert Committee to conduct an independent investigation, based on the letters of a whistleblower was appointed by the SEBI Technical Advisory Committee. As per the report of the said Committee, as, there was no load balancer and randomizers, a few brokers were able to log on to the fastest dissemination servers. There is no adequate system in place to check this fraud, which allowed the brokers to have unfair and illegal advantage. In the report it is stated that NSE had not fully cooperated with the committee.

5. It is further alleged by the petitioner that NSE had once again tried to sabotage the regulatory enforcement action by SEBI as the second attempt. However, NSE had refuted the findings of the report to SEBI. Petitioner has further alleged that there was one more attempt by the then Managing Director of NSE to sabotage the regulatory enforcement action by SEBI. Thereafter, an independent professional entity was pressed into service to investigate the following:

- (a) Whether norms of fair access were breached;
- (b) Whether some brokers were unduly benefitted; and
- (c) If so, whether this was because of any collusion/misconduct by NSE employees.

6. The petitioner has further stated that the report of the independent entity had confirmed the wrong doing of the NSE and that the architect of the NSE is prone to manipulation. Despite the report of the independent entity, there was again an attempt by NSE to sabotage regulatory enforcement action by SEBI.

7. The next allegation is that on the role of individuals, who were Ex Managing Director & Chief Executive Officers of NSE and the petitioner had named the individuals, who according to them, had involved themselves in the co-location fraud.

8. Thirdly, the petitioner had alleged that there were several beneficiaries, who made wrongful gains by abusing the server of architect, NSE, which were also confirmed by the report of the independent investigating agency. Not stopping with that, he has referred to the FIR, which stated that bribe was paid to NSE officials and SEBI and there was a criminal misconduct on the part of many public servants for showing undue favour to a particular private limited company. The petitioner

has also made allegations against several other individuals. Hence the petitioner is seeking action against the NSE and its officers under the Prevention of Money Laundering Act, 2002.

9. After enlisting the several frauds alleged to have been done by the NSE with the connivance of the board of directors, etc. the petitioner is seeking action against them to be taken by the Financial Intelligence Unit - India. The Financial Intelligence Unit - India, has the power to take action under Section 12 and 12A of the Prevention of Money Laundering Act, 2002. The petitioner has pointed out that the Central Government has passed an order in the case of NSEL scam constituting the Serious Fraud Investigation Office (in short SFIO) to investigate the matter under Section 212(1)(c) of the Companies Act, 2013. Therefore, the same power ought to be exercised in the present case as well.

10. As narrated in the petition, already a representation on the above mentioned matters to SEBI for action to be initiated under the SEBI Act and allied Securities laws, was given by the petitioner on 6.7.2018. As there was no response, he has filed a writ petition in W.P. No.19724 of 2018, which was later on withdrawn by the petitioner. Yet another representation to the respondents on 21.08.2018 was sent by the petitioner. The same having been received by them on 27.08.2018, no action has been taken and hence the petitioner has approached this court seeking a mandamus directing the respondents to dispose of the representation dated 21.08.2018.

11. NSE has filed counters alleging that the petitioner in both the writ petitions, is a lawyer practising in this Hon'ble High Court. He has no locus standi to even seek for a mandamus, as at the relevant time between 2010 and 2014 or even later, the petitioner had never availed the co-location service provided by NSE nor is he aggrieved as a broker or an investor or even as the user of the NSE service. Since he has not suffered any legal injury as per the alleged fraud, he cannot be called an aggrieved person to maintain the writ petitions.

12. Secondly, it is mentioned that the writ petitions are filed in the welfare of the public. There is no public interest, as trading in the stocks is only a private interest, therefore, the petitioner, who is in no way connected with either of the organisation or suffered any loss or damage, cannot maintain the writ petitions. This respondent also challenged the jurisdiction of this court for entertaining the writ petitions, as NSE itself is based out of Mumbai and the technological infrastructure, which the petitioner is speaking about, are in Mumbai, this Hon'ble court is not the appropriate forum to take cognizance of the petition. It is also not the case of the petitioner that he

is espousing the cause of the other brokers, who are trading in Tamil Nadu.

13. It is pointed out that the technological aspects of the architecture used for providing co-location services for the relevant period between 2010 - 2014 was "TCP/IPTick-By-Tick (TBT)" mechanism. The said TBT technology has been discontinued since 2014 and replaced with Multicast TBT (MTBT) by NSE. SEBI has never questioned the same at any point of time. The co-location services are statutorily permitted and the same is offered globally and in India. The SEBI has also conducted a detailed investigation in the matter and seven forensic reports from various agencies were filed with SEBI and the enquiry is in progress. Thus the petitioner has no right to compel an agency to investigate into the affairs of the NSE.

14. The first respondent in W.P. No.24326 of 2018, namely the Ministry of Corporate Affairs, has filed an affidavit through the Registrar of Companies, wherein, it is stated that any order on representation dated 21.08.2018 to the respondent i.e. Union of India and SFIO be disposed of in accordance with law by passing reasoned and speaking order within a reasonable time to be fixed by the court can be passed by the respondent only after due consideration of the merits in each case. It is further submitted that the issues raised by the petitioner is on account of alleged fraud by NSE by running illegal co-location services leading to manipulated price discovery and preferential access opportunity to few brokers. When such activities are admittedly, monitored and regulated by SEBI, without adding SEBI as a party to the petition, the petition is not maintainable for non-joinder of parties.

15. The first respondent, namely Financial Intelligence Unit of India, has also filed a counter in W.P. No.24325 of 2018. In paragraph 23 of the affidavit, it is specifically stated that the representation of the petitioner dated 21.08.2018, was addressed to the Chairman, SEBI and a copy was marked to the Director, FIU-IND, New Delhi apart from other authorities, like Prime Minister's Office, Enforcement Directorate, Competition Commission of India, Serious Fraud Investigation Office and Ministry of Corporate Affairs.

16. It is further stated that a representation was considered and a decision as deemed fit was also already taken. Being an intelligence organization, FIU-IND, cannot be required to divulge the details of action taken on the basis of individual's representation or complaint, as it may have severe repercussion in the outcome of investigations/actions by other investigative/law enforcement agencies. The learned Assistant Solicitor General also mentioned that the copy of the report was

available with him and unless and otherwise the court wanted to see that, it will not be shared with anyone.

17. In the above background, the interest of the petitioner is only private and if the same is a public interest, the locus will be tested in a different way. The term dual test is whether the petitioner is a person aggrieved, as admittedly, he is an advocate and had never traded with the NSE nor had suffered any loss on account of the alleged co-location service. The petitioner being a complete stranger, there is no cause of action for him to maintain a writ petition, much less, any cause of action that arose within the jurisdiction of this court to maintain a writ petition here. Therefore, on the ground of maintainability itself the petitioner has to be non-suited.

18. Admittedly, there were issues when co-locations were introduced on 22.05.2017. The first show cause notice was issued by SEBI to NSE, to conduct an extraordinary investigation. Deloitte, a private independent professional agency was appointed and a report was filed and other private investigators were also engaged to find out whether any profits were made by the brokers. On 3.7.2018, a second show cause notice was issued and a full-fledged enquiry by SEBI was conducted. The enquiry was held from February 2019 to April 2019. On 30.04.2019, SEBI passed an order of imposing a disgorgement penalty of Rs.624.00 Crores for certain failures for not having safeguards. However, no case was made out against NSE for fraud.

19. Against the above said order, NSE had preferred an appeal before the Securities Appellate Tribunal (SAT). Before the Securities Appellate Tribunal, the appeal was also heard in length and reserved for orders on 05.03.2020. The petitioner also has impleaded himself in the appeal, besides filing an independent appeal. From the above, it is evident that the representation of the petitioner has already been disposed of.

20. The learned senior counsel Mr.P.S.Raman, appearing for the National Stock Exchange of India Ltd would contend that SEBI is a referring body for NSE, like Reserve Bank of India is for any banking and financial company. When the jurisdictional body is monitoring and having a check on the operation of NSE, it is not necessary or relevant to take action under Section 212 of the Companies Act. Already two independent bodies, namely SEBI and CBI have taken action and registered FIRs. SEBI is a sole regulatory body and the allegation of co-location scam is a brokerage related problem, the same has to be resolved only by SEBI.

21. Section 6(3) of the Securities Contracts (Regulation) Act, 1956, mentions about the power of the Central Government to

call for periodical reports or direct enquiries to be made. Already show cause notice was issued under Section 11 of the Securities Contracts (Regulation) Act. When the prayer in both the writ petitions, is to consider the representation of the petitioner dated 21.08.2018, and action has already been taken and that the SAT is seized of the matter and having reserved orders in the appeal, issuance of mandamus, is not warranted. It is not in dispute that the petitioner himself has filed an independent appeal besides impleading himself in the other appeal. Hence these writ petitions are unnecessary and the same are liable to be dismissed.

22. Accordingly, both the writ petitions are dismissed. However, there shall be no order as to cost.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

Asr

To

1. Financial Intelligence Unit - India
6th Floor, Hotel Samrat, Kautilya Marg, Chanakyapuri
New Delhi - 110 021
2. National Stock Exchange of India Ltd.,
Exchange Plaza, C-1, Block G
Bandra Kurla Complex, Bandra (E)
Mumbai - 400 051
3. Ministry of Corporate Affairs
Government of India, A Wing, Shastri Bhawan
Rajendra Prasad Road, New Delhi - 110 001
4. Serious Fraud Investigation Office
2nd Floor, Deendayal Antyodaya Bhawan
CGO Complex, Lodhi Road, New Delhi - 110 003.

+1cc to Mr.G.Karthikeyan, Advocate, S.R.No.33465
+1cc to Mr.P.Giridharan, Advocate, S.R.No.33463

W.P.Nos.24325 & 24326 of 2018

RLD(CO)
CS/01/12/2020