

Reportable

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL No. 948 OF 2006

Varghese K. Joseph

.. Appellant

Versus

The Custodian & Ors.

..Respondents

J U D G M E N T

GYAN SUDHA MISRA, J.

This appeal has been filed under Section 10 of the Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992 (hereinafter referred to as 'the Special Court Act of 1992') challenging the order dated 28.11.2005 passed by the Special Court constituted under the Special Courts Act 1992 bearing Miscellaneous Application No. 536 of 2005 whereby the Special Court was pleased to reject the application summarily indicating that the application of the appellant for certification of shares by

the respondent – Custodian had been received on 27.8.2005 after the cut off date for the certification due to which it could not be entertained.

2. The question inter alia which arises for consideration in this appeal may be crystallised and stated as to whether the Special Court was right in rejecting the application of the appellant-investor seeking certification of the tainted shares on the ground of delay due to violation of cut off date in spite of absence of a statutory provision to that effect as also the fact that the appellant-investor admittedly had no role or involvement in treatment of the alleged equity shares as tainted which required certification before payment of dividends on the same.

3. The substantial details and circumstances under which this appeal arises indicate that the appellant herein who is a small investor had purchased 100 equity shares of the respondent No.2 Company namely Reliance Industries Ltd. on 12.6.1989 and payment of the same was made through his share broker - respondent No.4 – Abex and Company which perhaps is not in existence now. However, the payment for purchase of the shares had admittedly been

made through Union Bank of India by way of a demand draft. It is the case of the appellant herein that the respondent No.4 despite repeated enquiries never informed the appellant regarding the status of his shares and hence the appellant was absolutely in dark and had no clue about the same. The appellant in the meantime was also living abroad due to his professional obligation and could not ascertain the fate of his shares.

4. However, when the appellant finally approached respondent No.2 – Reliance Industries Ltd. seeking dividend and other consequential benefits like issue of rights and bonus on shares, it was informed to the appellant by the respondent No.2 that the shares of the appellant on which dividend was claimed, were found to be tainted and hence it was unable to consider the request of the appellant for payment of dividends. The appellant, thereafter also learnt that there had been mutual correspondence between the share broker companies i.e. respondent No.3 Karvy Consultants Ltd. and respondent No.4 – Abex and Company for taking the accounts of the shares in question vide Annexure-P1 in order to complete

certain procedural formalities. But as per the case of the appellant, neither the respondent No.3 nor respondent No.4 cared to inform the appellant about the said development through which he had purchased the shares. The appellant has annexed the copy of the letter dated 12.7.1995 vide annexure P-1 which was written by the respondent No.4 – Abex and Company to Respondent No.3 – Karvy Consultants Ltd.

5. Since the appellant had been informed by the respondent No.2 - Reliance Industries Ltd. that the dividends could not be paid to him as the shares were held to be tainted, the appellant also tried to ascertain the status of his shares purchased by him through respondent Nos. 3 and 4. However, it is alleged by the respondent No.3 –M/s. Karvy Consultants Ltd. that it had informed the appellant to submit appropriate application seeking certification of the tainted shares as the equity shares in question stood in the name of M/s. Fair Growth Financial Service Ltd. which subsequently became the subject matter of attachment as per the order of the Government of India since it was found to be involved in some scam and hence the shares issued by

this company required certification by the Custodian as per order of the Special Court (Trial of Offences relating to Transactions in Securities) Act, 1992. But the appellant's case is that he never received the said communication nor the said letter indicated anything about the cut off date for making application for certification of the tainted shares. Annexure P-2 is the copy of the letter dated 5.1.2001 which is allegedly written by the respondent No. 3- M/s. Karvy Consultants Ltd. to the appellant directing him to file the application seeking certification of shares.

6. The appellant in the meantime had also made further enquiries in regard to the certification of the tainted shares and also for consequential benefits which accrued on the shares in question. He then learnt that he would have to file an application before the Special Court seeking direction to the Custodian for certification of shares as it was reiterated that the shares in question stood in the name of M/s. Fair Growth Financial Services Ltd. – respondent No.5 which were the subject-matter of attachment as per the Government of India order since they were found to be tainted. A clarification also is alleged to have been issued

by the respondent No.3 –Karvy Consultants Ltd. that in order to do justice to the bonafide investors, the Special Court in its orders dated 27.7.1992 and 31.7.1992 bearing Misc. Application Nos. 1, 2 and 3 of 1992 laid down a procedure for certification of the tainted shares through the representative of the Custodian. It was informed that the said Hon'ble Court had fixed the last date for submission of such application for certification which was 16.8.1995 and the Special Court had further directed that whoever fails to submit application for certification on or before 16.8.1995, the party would have to approach the Special Court directly for certification. Subsequently, the cut-off date appears to have been extended to 27.06.2005 as per order of the Special Court on application having been made by the custodian. Hence, it claims to have requested the appellant - Mr. Joseph that he should file an application/petition mentioning therein the reliefs/directions intended to be sought from the Hon'ble Special Court (Torts) through the advocate along with the documents, papers at the address of the Special Court which was stated therein. It was further requested to the appellant to forward the relevant

order from the Special Court along with original share certificates and transfer deeds to enable it to do the needful. But the appellant's case is that he never received the said communication etc.

7. As per the appellant's version the original shares and transfer deeds had been delivered to the respondent No.4 –Abex and Company – the share broker company through whom the appellant had purchased the shares as under the rules, the share certificates were not issued from the company to the appellant but the same was lying in the hands of respondent No.3 i.e. Karvy Consultants Ltd. through respondent No.4 and so the appellant could not produce the share certificates. However, the respondent No.4 –Abex and Company had assured the appellant that it would return the share along with the Clearance Certificate from the Stock Exchange but the respondent No. 3 i.e. Karvy Consultants Ltd. was unable to process the share through respondent No.6 – Madras Stock Exchange as they were tainted. The appellant, therefore, stated that he is a bonafide purchaser and the owner of 100 tainted shares of respondent No. 2 and the said shares were required to be

transferred in the name of the appellant along with all the accrual till dates after certification. The appellant as already stated also learnt that the tainted shares required certification through respondent No.1 – the Custodian and for this purpose he would be required to seek permission from the Special Court under the Special Courts Act of 1992.

8. In view of the aforesaid position, the appellant filed an application before the Special Court under the provisions of Special Courts Act of 1992 wherein he prayed for certification of the shares by the respondent No.1 - Custodian and its release and payment of accruals but as per the letter from the office of the Special Court it was intimated that the last date to submit application for certification was 27.6.2005 and hence it could not be entertained.

9. The appellant, therefore, filed an application before the Special Court on 27.08.2005 stating that he was not aware of any cut off date regarding the filing of the application for certification of shares by the Custodian and was also not aware of the procedure or the last date of filing

any application for certification until he received the letter on 22.8.2005. Hence, the appellant/applicant was not able to file any application for certification of the tainted shares within the time fixed by the Special Court.

10. The learned Judge of the Special Court however, was pleased to dismiss the application on 28.11.2005 stating that the plea of the applicant that he was not aware of the procedure laid down by the Special Court for certification of the tainted securities etc. was devoid of merit and the application seeking permission for certification which was received on 27.8.2005 i.e. after the cut off date which was subsequently extended to 27.6.2005 was not found fit to be entertained. Hence, the application was dismissed by the Special Court against which this appeal has been filed by the appellant under Section 10 of the Special Courts Act of 1992 as already indicated hereinbefore.

11. A show cause notice was issued to all the respondents in this appeal but no one appeared except respondent No.1 – the Custodian based at Mumbai who has filed reply in this appeal. As per the reply of the Custodian

– Respondent No.1 herein, the process of certification was being done on a regular basis. But on 31.1.2005, the Custodian gave a report to the Special Court that the Custodian/Notified party receives accrual on shares which were in the name of the notified party but the same were not physically with the Custodian since such shares were with the 3rd party. Further, in respect of shares which may not be in the name of the notified party but which may have been dealt with by the notified party, the dividends on such shares were either kept in abeyance by the company or were passed on to the Custodian by the companies pending certification.

12. It is in view of the aforesaid procedure as also the fact that the shares were found to be tainted, the certification of the shares purchased through an intermediary which in this case is respondent No.4 – Abex and Company and respondent No. 3 –Karvy Consultants Ltd., became necessary. But it appears that the Custodian had been receiving applications for certification of the tainted shares off and on which dividend was to be paid to the party holding the shares and was to be disbursed to

them through the Custodian. It has been admitted by the Custodian in his reply that the dividends which were received by the Custodian came automatically from the company either by way of dividend warrants or through the Electronically Clearing System (ECS). The Custodian stated that these dividends were not kept separately from other moneys of the concerned notified party in the attached accounts. It was therefore suggested that bonus shares may be kept in abeyance by the companies or may be sent to the Custodian by the concerned companies. In such case also bonus shares received by the Custodian were disposed of by the Custodian as per the procedure for sale of shares laid down by the Special Court.

13. It was further stated by the custodian in his reply that the distribution/ad hoc payments from the attached account of the notified parties admittedly were made in accordance with the order passed by the Special Court from the moneys that were available in the attached bank account of the notified parties as these attached accounts also included accruals (dividends/sale proceeds of bonus shares) which was not separate from other moneys in the

attached account. It was, therefore, submitted before the Special Court by the Custodian in Miscellaneous Petition No.1 in Bombay Stock Exchange vs. The Custodian and Assistant Commissioner of Income Tax along with a batch of several other analogous petitions that as there was no time limit for the affected persons to approach the Hon'ble Special Court for certification and such certification could be directed by the Hon'ble Court (Special Court) at any point of time, it was apprehended that in such circumstance a situation might arise where shares may be allowed to be certified by the Hon'ble Court even after substantial payments were made either by way of distribution or ad hoc payments due to which it would be difficult for the Custodian to pay over the accruals on certified shares for want of moneys in the attached accounts. A direction, therefore, was sought by the Custodian from the Special Court to the following effect:-

“(a) That a Public Advertisement be issued by the Custodian calling upon all persons holding “Tainted” shares (i.e. shares either standing in the name of a notified party or dealt with by the notified party) to submit their applications for certification of such

shares to this Hon'ble Court within such period as this Hon'ble Court considers appropriate.

(b) That no applications for certification will be entertained by the Custodian or by this Hon'ble Court on the expiry of such period as the Court may direct under Clause (a).

(c) That no claims shall lie against the Custodian or against a notified party for payment of accruals on shares with the third party unless such third party has filed his application for certification within the period specified in Clause (b).

(d) Any other orders/directions as deemed fit by this Hon'ble Court in the matter."

14. The Special Court taking an overall view of the matter granted the request in terms of prayer clause (a), (b) and (c). However, for the purpose of clause (a) 60 days period was fixed.

15. Pursuant to the order dated 16.3.2005 notices were issued in 32 dailies which stipulated that the application for certification by the purchasers must be made within 60 days from the date of issuance of the notice. It was also clearly stipulated that no application for certification would be entertained after the period of 60 days

from the date of notice and that no claims shall lie against the Custodian or against the notified party after the lapse of 60 days of the notice. The public notice which were published in 32 different newspapers is dated 29.4.2005. Thus, according to the respondent – Custodian no claim for certification could have been entertained after the expiry of 60 days period which expired on 27.6.2005.

16. The appellant, however, filed an application bearing Misc. Application No.536/2005 in the Special Court at Bombay on 27.8.2005 praying therein for a direction to the Custodian that the 100 shares purchased by the appellant herein bearing Certificate Nos. 3489027 and 8170517, Distinctive Nos. D-915292605 to 654 and D-114196259 to 308 of the notified company may be declared as bonafide purchaser/owner of the said shares. A direction was sought to the Custodian and/or company to release/pay all the accruals declared from time to time till date on the said 100 shares. As already stated, the application was rejected by the Special Court by a summary order indicating that the application could not be

entertained since the same had been received after the cut off date of 27.6.2005.

17. Challenging the order passed by the Special Court, the counsel for the appellant submitted that the application filed by the appellant for certification of his shares and thereafter granting consequential benefits accruing on the 100 shares which were purchased by the appellant, could not have been rejected only on the ground that it had been filed beyond the cut off date i.e. 27.6.2005 as the appellant who was not in the country throughout and was living abroad had not been informed at all by any of the concerned respondents that the shares were tainted which required certification within a cut off date and when he made enquiries on his own, he could know of the developments.

18. Learned counsel for the respondent – Custodian however sought to justify when he submitted that the rejection of the application by the Special court for certification of the shares of the appellant was absolutely correct as the Special Court itself had permitted the Custodian to publish a notice inviting applications for

certification of the shares held by the public at large in which 60 days time was granted to file such application which expired on 27.6.2005. The counsel for the respondent – Custodian submitted that the cut off date having been laid down by the Special Court fixing a cut off date for filing application for certification of the shares through the Custodian, could not have been entertained beyond the cut off date and hence even though the appellant might be a bonafide purchaser of the shares of respondent No. 2 – Reliance Industries Ltd. which was purchased through respondent No.4 – Abex and Company, the same could not have been entertained for certification after the cut off date.

19. While testing the relative strength of the submission of the learned counsel for the parties in the light of the background, facts and circumstances of the case, it could not be overlooked that the transaction of sale of securities (as defined under the Securities (Control) Regulation Act, 1956) by a notified person either as a registered holder or as an intermediary purchaser is deemed to be bonafide provided such a transaction under

the provisions of Securities Contracts (Regulation) Act, 1956 is effected through a number of stock exchanges recognised under the provisions of Securities Contract Act and is in accordance with the rules and bye-laws of the stock exchanges. It further lays down that the purchase will be deemed to be bonafide provided the sale is at the price which is lower than the lowest price for which the securities were traded on the date of the transaction except in cases of discount given on bulk purchased by the institutions and the full sale price relating to the transaction is proved to have been received by the notified persons.

20. The aforesaid position is clearly admitted by the Custodian – Respondent No.1 himself which is borne out from the reply filed by him. Thus the appellant who had purchased the shares of the respondent No.2 – Reliance Industries Ltd. through respondent No.4 – Abex and Company whose affairs were later taken care of by respondent No.3 – Karvy Consultants Ltd. also and perhaps respondent No.5 – M/s. Fair Growth Financial Service Ltd. would clearly be deemed to be bonafide purchase.

However, since the shares in question were held to be tainted by order of the Government of India due to which it was not honoured by the respondent No.2 – Reliance Industries Ltd., the need arose for its certification through the Custodian under the control and supervision of the Special Court constituted under the Act of 1992. Meanwhile, long time had elapsed between the date of purchase and the application for certification of the shares and obviously during this long period it is the respondent – Custodian in coordination with the notified company and the share brokers respondent Nos. 3 and 4 (Karvy Consultants Ltd. and Abex and Company) who was responsible to certify the shares of the notified company so that the dividends accruing on the shares could be paid. In the process, no doubt, the respondent No.1 – Custodian encountered several procedural hassels as the claim of payment were made at frequent intervals by large number of investors holding the shares which were informed to be tainted and hence required certification by the Custodian.

21. The respondent No.1 – Custodian, therefore, although might have been justified in filing an application

before the Special Court requesting to fix a cut off date during which it could facilitate certification of the tainted shares, the cut off date sought by the custodian and accepted by the Special Court cannot be construed so as to have a binding effect of statutory nature under the provisions of the Transaction of Sale of Securities Act, 1956, wherein there is no fixed time limit for encashment of shares nor there is prescribed procedure for certification which emerged only on account of extraordinary situation when certain shares were found to be tainted which were floated by Respondent No.5 M/s. Fair Growth Financial Services for Respondent No.2 – Reliance Industries and were traded through share brokers like Respondent No.3 and 4 herein.

22. At this stage the salutary object and reasons of the Act also will have to be taken into consideration while interpreting and applying the provisions of a statute wherein efforts are required to be made in construing the different provisions so that each provision will have its play and in the event of any conflict, a harmonious construction is required to be made so that an honest and bonafide

investor is not duped of his hard earned money which he invests by purchasing the equity shares of a company. Admittedly, the Trial of Offences Relating to Transactions in Securities Act, 1992 had been enacted and given effect to in order to prevent undesirable transactions in securities by regulating the business of dealing therein as also certain other matters connected therewith which also provided for the establishment of a special court for the trial of offences relating to transactions in securities and for matters connected therewith or incidental thereto. The courts specially the Special Courts under the Act of 1992 has to bear in mind the objects and reasons of this Act which clearly indicate that in course of the investigations by the Reserve Bank of India, large scale irregularities and mal practices were noticed in transactions by both the Government and other securities through some brokers in collusion with the employees of banks, companies and financial institutions. The other irregularities and malpractices led to the divergence of funds from banks and financial institutions to the individual accounts of certain brokers. In order to deal with the situation and in

particular to ensure speedy recovery of the huge amount involved, to punish the guilty and restore confidence and to maintain the basic integrity and credibility of the banks and financial institutions, the Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992 was enacted for speedy trial of offences relating to transactions in securities and disposal of properties attached. This Act envisages the appointment of one or more custodians to take steps for guarding the interests with a view to check the diversion of funds invested in the form of shares by the offenders which may be in the form of companies or share brokers. Therefore, the duty of the custodian as also the special court is to take into consideration that while the plea of the custodian for facilitating certification of shares by fixing cut off date might have been reasonable in the given situation where large number of investors were filing applications for certification of the tainted shares time and again and hence cut off date might have been justified, it was also expected to take care and guard the interest of the investors who are based and live not merely within the geographical boundaries of the Special Court which had

fixed the cut off date but also live far and wide even across the boundaries of the country which is the fact in the instant matter also. Hence, in our considered view, it was obligatory on the part of the Special Court and the Custodian to notice an important fact that when the shares purchased by the appellant were reported to be tainted which was issued through Respondent No.5-M/s. Fair Growth Company by the share broker companies i.e. Respondent No. 4 and 5 and the same was ordered to be attached by the Custodian in view of the Government of India Regulation it was clearly nefarious and dubious activity on the part of the Respondent No.5-M/s. Fair Growth Financial Service Ltd. due to which the unnecessary hassle of certification of the shares issued in the name of M/s. Fair Growth Company became essential. The investors like the appellant herein had absolutely no role in such activity and hence even if the cut off date was fixed by the Special Court for certification of such shares, the same could not have been enforced oblivious of its repercussion on those investors who could not approach the Special Court for certification for reasons beyond their

control as it has happened in the case of the appellant herein who could not approach the Special Court for certification of his tainted shares for reasons which have been elaborated hereinbefore.

23. In the instant matter, we have noticed that the appellant/applicant had filed an application before the Special Court seeking a direction for certification of the shares on 27.8.2005 which even if counted from the cut off date, would at the most was delayed by two months as the appellant had not received any notice which could be proved, indicating that the application for certification had to be filed by 27.6.2005 although the same is asserted by the respondent-Custodian, which cannot be accepted in absence of appearance of respondent Nos. 3 and 4. But even if it were so, the Court should have certainly considered the circumstance whether a bonafide purchaser of shares could be denied his due merely on the ground of violation of a cut off date which clearly did not have its existence in the statute and hence had no statutory force. The order sought from the Special Court to fix a cut off date for receiving application for certification was, therefore,

based merely on the theory of convenience of the custodian clearly ignoring its ramification on the bonafide investor. It is common knowledge that when public at large invest in securities by purchasing shares of a notified company, it purchases through various modes including the modern tools and technique of internet and many other modern modes and methods. But thereafter, if the shares are held to be tainted which is clearly beyond the control of the appellant/investor and its certification is required, it is surely the custodian in co-ordination with the company floating shares as also the share broker company or the stock exchange, which has the onus and responsibility to take care of the interest of the investors under the supervision of the Special Court in view of the provision of the Special Courts Act of 1992. The 'Custodian' therefore cannot shirk away from his function and the duty cast upon him by limiting his responsibilities and seeking a cut off date during which only he could perform the duty of certification, oblivious of its consequence and other ramification on the investors which include small investors also who put in their hard earned money in the

shares of the company and later comes to know that the shares were tainted on which the investor has absolutely no role or control.

24. Even if we were to appreciate certain limitations on the discharge of duties of certification by the Custodian, the Special Court clearly had the duty to ensure that in absence of a statutory time limit prescribed for certification of shares under the Act of 1956, read with the Special Courts Act of 1992, the Special Court was duty bound to guard the interest of the investors through the Custodian at least in case of those investors who had bonafide purchased the shares of a notified company which for reasons beyond the control of investors, was held to be tainted.

25. Hence, in our considered opinion, the appellant under the facts and existing circumstances of the case where he ended up buying tainted shares for no fault on his part but had to seek its certification from the Custodian under compelling circumstance which was not his creation and also had no control, could not have been denied his due on the ground of delay in filing the application for

certification specially when the appellant had sought certification of his shares only after two months of the cut off date for reasons beyond his control which cut off date has no statutory effect or legal force. The appellant on the one hand was saddled with the tainted shares for no fault on his part through respondent Nos. 4, 5 and 6 on which he had no control or any role to play and on the top of it, when he sought a remedy of certification for claiming dividends, he had to suffer an order by which his application was rejected on the ground that he had not moved an application within the cut off date which had no statutory force as the same had been fixed at the instance of the Custodian seeking approval from the Special Court.

26. As a consequence of the aforesaid discussion, we set aside the impugned order of the Special Court and allow this appeal as a result of which the respondent – Custodian shall entertain the application filed before the Special Court for certification of his shares and verify the claim of the appellant in regard to the shares bearing Certificate Nos. 3489027 and 8170517 Distinctive Nos. D-915292605 to 654 and D-114196259 to 308 and ensure payment of

dividends on those shares after certification by the respondent No.2. If necessary the Custodian may co-ordinate with the concerned stock exchange and the share broker companies i.e. respondent No.4 – Abex and Company as also respondent No.3 – Karvy Consultants Limited for ensuring release of payment accruing as dividend on the shares noted hereinbefore. In case of default in any manner, it shall be the duty of the Custodian to take recourse to the remedy against any defaulting party in accordance with law. The appeal accordingly is allowed.

.....J
(Markandey Katju)

.....J
(Gyan Sudha Misra)

New Delhi,
January 31, 2011