IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.1734 OF 2018

Dr.Pallavi Yashodhan Divekar ... Petitioner

Versus

Securities and Exchange Board of India & Ors. ... Respondents

ALONG WITH

WRIT PETITION NO. 1663 OF 2018

Ms.Rajani Iyer, Sr. Adv. a/w. Mr. Rohan Karande i/b. Mr.R.R.Chile for the Petitioners.
Mr.Arnav Mishra a/w. Mr. Mihir Mody i/b. M/s. K. Ashar and Company for Respondent No. 1.
Mr.P. Mody, Sr. Adv. a/w. Mr.Anubhav Ghosh, Ms. Arjita Chaturvedi i/b. The Law Point for Respondent Nos. 2 and 3.

CORAM: AKIL KURESHI &
S.J. KATHAWALLA, JJ.

DATE: 4th SEPTEMBER, 2019

P.C.:

1. These petitions involve similar issues. They have been heard together and would be disposed of by this common order. For convenience, we may refer facts from Writ Petition No.1663 of 2018. This Petition is filed by an individual praying for a direction to the Respondent Nos.2 and 3 to pay to the Petitioner a sum of Rs.15,00,000/- as compensation from the Investors Protection Fund (for short 'Fund') with interest. This challenge arises in the following

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background. The petitioner is an Advocate. Respondent No.1 is the Security Exchange Board of India Limited ('SEBI' for short), Respondent No.2 is the Bombay Stock Exchange Limited ('BSE' for short), Respondent No.3 is the Stock Exchange Investors Protection Fund, a registered trust and Respondent No.4 is a private limited company, who was at relevant time a registered broker with the BSE.

2. The petitioner had opened an account with the Respondent No.4 Company on 26th September, 2015 and was assigned a Unique Client Code Number. The petitioner paid certain amounts to the Respondent No.4 for purchasing specified shares on her behalf. However, such shares were not delivered to the Petitioner by the broker. It appears that the Respondent No.4 Company had likewise defaulted in its commitments for purchase and delivery of the shares of several other clients, on account of which a public notice dated 31st December, 2015 came to be published by the SEBI in a local daily on 1st January, 2016, inviting claims against the Respondent No.4, as a member of BSF. The clients whose money was not returned would file references for arbitration. The notice also specified that the eligible investors would be paid specified amounts from the Fund subject to the maximum limit of

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submitted that the petitioner's claim was duly verified by the arbitral tribunal and found to be genuine. Arbitration awards were passed. The Fund has been created by the SEBI to mitigate the hardship of small investors who are unable to recover the amounts from the defaulting brokers without protracted proceedings. Subject to the limit prescribed, the petitioner's claim should have been sanctioned by the Fund. She submitted that the circulars issued by the SEBI from time to time never provided that if the transaction is not made through the exchange, the compensation from the Fund would not be payable.This was included in the Circular dated 23rd February, 2017 for the first time. The case of the petitioner arose long before the said Circular was issued. This Circular cannot be applied with retrospective effect. The Respondent No.3 therefore, committed serious error in rejecting the petitioner's claim.

5. On the other hand, learned Counsel for the Respondent No.3 opposed the petitions. Relying on the affidavit in reply filed on behalf of Respondent No.3, learned Counsel submitted that the petitioner's transactions were not through the exchange. The petitioner had merely paid amounts to the Respondent No.4 broker. The broker had never purchased the shares through the platform of the BSE. As a policy decision, such claims are not accepted. There

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are no instances in the past also that in the similar circumstances, the Fund had paid compensation. This Circular dated 23rd February, 2017 only makes explicit what was implicit in the policy. He submitted that the petitions, it is doubtful whether would be maintainable for a direction to the Respondent No.4 for claiming the compensation, which is purely discretionary in nature. No vested right is created in the petitioner.

6. In the present case, we keep aside the availability of alternative remedy before the Securities Appellate Tribunal, though raised by the Counsel for Respondent No.3. We are also not inclined to dismiss the petitions as being not maintainable. The Respondent No.3 may be a registered trust, nevertheless is constituted and functions under the directives and guidelines of the SEBI. It appears the Fund is constituted to obviate the hardships of small investors, whose investments may be blocked on account of defaulting brokers and who would find it extremely difficult to recover even part of such investment after protracted litigation. We also notice that contribution to the fund is from various sources which trace their origin to public funds. As per the paragraph 5 of the comprehensive guidelines for Investors Protection Fund, the contribution to the Fund is made from the following sources :

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"a. 1% of the listing fees received, on a quarterly basis.

b. 100% of the interest earned on the 1% security deposit kept by the issuer companies at the time of the offering of securities for subscription to the public, immediately on refund of the deposit.

c. The difference of amount of auctions / close-out price in pursuance of circular No. SMDRP/Policy/Cir-10/1999, dated May 4, 1999.

d. The amount received from the proceeds of the sale of the securities written off as per paras 4 and 5 of SEBI circular No. FITTC/FII/02/2002, dated May 15, 2002.

d. The amounts specified in pursuance of Regulation 28(12)(e)(ii), Regulation 28(13) and Regulation 29(2) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997."

7. Under the circumstances, the grant of compensation from the Fund may retain its discretionary character, nevertheless the decision of the Fund cannot be based on arbitrary considerations. With this limited scrutiny, we may examine the facts on record. The petitioner as noted, had filed Arbitration References. The Arbitral

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Tribunal passed awards holding the petitioner entitled to receive certain sum from the Respondent No.4 broker. In the context of verifying the Petitioner's claim, these arbitration awards should be sufficient. However, the passing of the awards by itself is no guarantee that the compensation from the Fund must be made available. Firstly, the arbitration was between the petitioner and Respondent No.4. Secondly, the payment of compensation must depend on the policy of Respondent No.3 formulated and declared through Circulars issued from time to time by the SEBI. In this context, we may refer to the Circular dated 23rd February, 2017. This Circular amends the previous Circulars in order to comprehensively review investors' grievance redressal mechanism. This Circular lays down different guidelines for the purpose of examining the grievances of the investors. Paragraph 2 of the Circular pertains to Investors Protection Fund and other similar Funds and lays down guidelines for utilization of the Fund. Clause (b) of Paragraph 2 pertains to admissibility of claims for making payment out of the Fund and provides that in the event of default by the member, all transactions executed on exchange platform shall be liable for settlement from the Fund, subject to maximum limit and subject to the appropriate norms laid down by the defaulters

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committee. As per this paragraph, thus, payment out of the Fund, in case of the defaulting member, would be subject to the maximum limit laid down, subject to the appropriate norms laid down by the defaulters committee and would be available in case of the transaction executed on exchange platform. This requirement of eligibility for payment in relation to the transactions executed on exchange platform is thus an essential eligibility requirement. Admittedly, the case of the petitioner does not fall within this criteria and was therefore, rejected by the Respondent No.3. In the impugned communication dated 1st August, 2017, this is precisely what was conveyed to the petitioner. Relevant portion of this order reads as under :

> *"We refer to the Award in the captioned Arbitration Reference against defaulter, Dreams Broking Pvt.Ltd.*
>
> *The IPF Trustees considered the recommendation of the Defaulters Committee in respect of your claim against Defaulter, Dreams Broking Pvt. Ltd., (Arbitration Ref. No. 717/2016), which are as follows :*
>
> *Award is for Rs.52,74,953.65 (Rs.7,00,000/- non return of monies paid to broker and non delivery of shares of Rs.45,74,953.65). UCC*

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Dreams Broking Pvt.Ltd. stands rejected for payment from Investor Protection Fund."

8. In this communication thus, it has been pointed out that the shares were transferred from the applicant's account to broker account, which the broker did not return. It is further pointed out that there was no trade executed on the exchange. The transaction is therefore, construed as a loan transaction and therefore, not recommended for payment. This recommendation of the Committee was accepted by Respondent No.3 and the claim of the petitioner was accordingly rejected.

9. We do not find that the Respondent No.3 has committed any error. It may be that the previous Circulars issued by the SEBI from time to time, do not specifically include a clause that in case of transaction not executed through the platform of BSE, the claim would not be entertained by the Respondent No.3. Nevertheless, there is no instance cited before us by the petitioner that any such claim in the past was entertained and allowed. The case of the petitioner was considered and disposed off after the Circular dated 23rd February, 2017 was issued. The Circular was therefore, correctly applied. In any case, Clause (b) of paragraph 2 of the said

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Circular can be seen as clarificatory in nature and explicitly declares the policy of the SEBI to entertain only those claims of investors which arise out of the transaction carried out through the platform of BSE and not outside. The Writ Petitions are therefore, dismissed.

(S.J.KATHAWALLA, J.) **(AKIL KURESHI, J.)**

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Section Officer
High Court, Appellate Side
Bombay 400 032

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