

W.P.(MD)No.8037 of 2020

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 29.09.2020

PRONOUNCED ON : 12.10.2020

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

W.P.(MD)No.8037 of 2020

and

W.M.P.(MD)Nos.7469 & 9960 of 2020

Mahasemam Trust, A Public Trust,
Rep. by its Trustee,
Dr.Prabu Vairavan Prakasam,
Having its registered office at
519, 16th Steet, Karpaga Nagar,
K.Pudur,Madurai – 625 007. ... Petitioners

Vs.

1. Union of India,
Rep. by Secretary to Government,
Finance Department, New Delhi.
2. Reserve Bank of India,
Rep. by its Regional Manager,
Fort Glacis, No.16, Rajaji Salai,
Chennai – 600 001.
Tel:044-2536 1631;
Fax: 044-2536 5220
3. India Rating and Research Pvt. Ltd.,
Rep. by its Senior Director,
Wockhardt Towers, 4th Floor, West Wing,
Bandra Kurla Complex, Bandra East,
Mumbai – 400 051.
E-mail : infograp@indiaratings.co.in

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4. The General Manager,
Securities and Exchange Board of India,
Mumbai.

(R-4 is suo motu impleaded
vide order dated 23.09.2020)

... Respondents

PRAYER: Writ petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, to call for the records of the third respondent in its e-mail communication dated 21.04.2020, which was sent through e-mail to the petitioner on 28.05.2020 (Rating Letter for Bank Loan Ratings of Mahasemam Trust) and quash the same.

For Petitioners : Mr.K.Subramanian,
Senior Counsel,
for Mr.S.Ramesh

For R-1 : Mr.G.Rajaraman,
Central Government
Standing Counsel.

For R-2 : Mr.K.R.Laxman

For R-3 : Mr.P.Giridharan

For R-4 : Mr.Sivakumar

* * *

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ORDER

The writ petitioner is a registered public trust. Its activities include micro-financing women Self Help Groups. It is a Non-Banking Finance Company (NBFC). The petitioner is a client

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of the third respondent which is a credit rating agency. The rating agency has downgraded the petitioner's bank loans' rating to 'IND BB+' from 'IND BBB-'. The petitioner has been availing term loans from various banks and has fixed ambitious targets for the coming year. The petitioner's track record of repayment is claimed to be very good. Following Covid-19 pandemic outbreak, the Reserve Bank of India has announced moratorium for the period upto 31st May, 2020 vide Circular dated 27.03.2020. Pursuant thereto, the petitioner has also granted the benefit of moratorium to all the joint liability Self Help Groups, in order to enable them to tide over the economic fallout arising out of the pandemic disruption.

2. Securities and Exchange Board of India (SEBI) has also issued policy Circular dated 30.03.2020 setting out relaxation norms. According to the petitioner, the third respondent has downgraded the petitioner's rating disregarding the said Circular. Since this will have direct bearing on the capacity of the petitioner to raise loans from the banking institutions, this writ petition came to be filed.

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3.The third respondent whose communication is under challenge has filed its counter affidavit contesting the very maintainability of this writ petition. The third respondent would point out that the writ petition has to be dismissed as infructuous. What has been questioned is only the e-mail communication. The rating has been subsequently published in the website of the third respondent on 21.04.2020. Therefore, nothing survives for further adjudication. The third respondent cannot be considered as a “State” within the meaning of Article 12 of the Constitution of India. Hence it is not amenable to writ jurisdiction. The relationship between the petitioner and the third respondent is purely contractual in nature. The agreement between the parties is known as rating agreement. A dispute arising out of rating agreement cannot be resolved in writ proceedings. The petitioner is also having effective alternative remedies both under the contract as well as under the statute.

4.Since the issue turned on the construction of the circular issued by SEBI, I suo motu impleaded it as the fourth respondent.

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5.Heard the learned Senior counsel appearing for the writ petitioner, the learned Standing counsel appearing for the Union of India, Reserve Bank of India and the Securities and Exchange Board of India and the learned counsel appearing for the third respondent/Credit Rating Agency.

6.The learned Senior Counsel took me through the pleadings of both the parties and also the typed set of papers. He pointed out that the Hon'ble Principal Seat of this Court is seized of an identical issue and interim stay granted in the said writ petition is still in operation. He would also point out that before the Hon'ble Supreme Court of India, writ petitions have been filed raising identical issues and that therefore this Court can adjourn the case till the matter is settled either in the Principal Seat or in the Hon'ble Supreme Court of India. In the alternative, he prayed for time so that the petitioner can file transfer application before the Hon'ble Apex Court.

7.The learned Senior Counsel first took me through the statutory scheme set out in the Securities and Exchange Board of India(Credit Rating Agencies) Regulations, 1999. As per Clause

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2(f) of the Regulations, the petitioner qualifies as a client since their securities are rated by the third respondent/Credit Rating Agency. His core argument is that the Credit Rating Agencies discharge public functions and therefore they are clearly amenable to Writ jurisdiction. Though the dispute between the parties may appear to be contractual in nature, in substance, it throws up questions of public law. No ouster clause in the rating agreement can resist the jurisdictional reach of this Court under Article 226 of the Constitution of India. The petitioner is based in Madurai. Substantial part of the cause of action arose within the territorial jurisdiction of this Court. This Court does have the territorial jurisdiction to deal with the issue. The learned Senior Counsel also seriously faulted the stand taken by the learned Standing counsel for the Reserve Bank of India as well as the Securities and Exchange Board of India before this Court. He took me through the contents of the Circular dated 27.03.2020 issued by the Reserve Bank of India and that of the Circular dated 30.03.2020 issued by the Securities and Exchange Board of India. According to the learned Senior Counsel, even a bare textual reading of these two circulars can lead to only one conclusion, namely, that the events that have taken place during the

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moratorium period cannot be factored into the rating process. The learned Senior Counsel placed reliance on quite a few case laws.

8.I carefully considered the rival contentions. The objection regarding territorial jurisdiction is liable to be rejected in view of Article 226 (2) of the Constitution of India which reads as follows :

“226(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.”

Even though the third respondent may be located in Mumbai, in as much as part of the cause of action arose within the territorial limits of this Court, this writ petition cannot be dismissed on the ground of lack of territorial jurisdiction. Likewise, reliance on the ouster clauses in the rating agreement is equally misplaced.

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9. Before venturing further, it is necessary to acquaint ourselves with the circulars issued by RBI as well as SEBI. The standards for the credit rating agencies have already been laid down vide circular bearing No. SEBI/HO/MIRSD/MIRSD4/CIR/2016/119 dated 01.11.2016. Annexure-A1 of the circular lays down instrument-wise definition of default. For instance, delay of one day even of one rupee (of principal or interest) from the scheduled repayment date in the case of long term loans would fall within the definition of default.

10. Since Covid-19 outbreak had caused widespread disruption, Reserve Bank of India stepped in and came out with its policy package vide circular dated 27.03.2020 which permitted the lending institutions to grant a moratorium of three months on payment of all installments falling due between 1st March 2020 and 31st May, 2020. It was further extended from 31st May, 2020 to 30th September, 2020. Since Securities and Exchange Board of India (SEBI) has to dance in sync, it also came out with its Circular dated 30.03.2020. It reads as follows:-

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“SEBI/ HO/ MIRSD/ CRADT/ CIR/ P/ 2020/ 53

March 30, 2020

To,
All Credit Rating Agencies (CRAs) registered with SEBI

Dear Sir/ Madam,

Sub: Relaxation from compliance with certain provisions of the circulars issued under SEBI (Credit Rating Agencies) Regulations, 1999 due to the COVID-19 pandemic and moratorium permitted by RBI.

1. In view of the developments arising due to COVID-19 pandemic and in light of the moratorium permitted by Reserve Bank of India (RBI) (vide notification no. RBI/2019-20/186, dated March 27, 2020) on loan servicing, working capital facilities etc. for three months, a need for temporary relaxations in compliance by CRAs is felt. Accordingly, it has been decided to grant relaxations from the requirements stipulated vide circulars as under:

2. Recognition of Default

A. Currently, CRAs recognize default based on the guidance issued vide SEBI circular dated May 3, 2010 and November 1, 2016.

B. In view of the nationwide lockdown and the three month moratorium/ deferment on payment permitted by RBI, a differentiation in treatment of default, on a case to case basis, needs to be made as to whether such default occurred solely due to the lockdown or loan moratorium.

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C. Accordingly, based on its assessment, if the CRA is of the view that the delay in payment of interest/principle has arisen solely due to the lockdown conditions creating temporary operational challenges in servicing debt, including due to procedural delays in approval of moratorium on loans by the lending institutions, CRAs may not consider the same as a default event and/or recognize default. Appropriate disclosures in this regard shall be made in the Press Release.

D. The above shall also be applicable on any rescheduling in payment of debt obligation done by the issuer, prior to the due date, with the approval of the investors/lenders.

E. The above relaxation is extended till the period of moratorium by the RBI.

3. Extension in timelines for press release and disclosures on website

A. Considering that the CRAs are dependent on the issuers and third parties for information collection which is impaired due to current lockdown, relaxation from timelines for rating action/ issue of press release by CRAs stipulated vide SEBI circular dated June 30, 2017 is being granted. However, CRAs should endeavour to finish the exercise on a best effort basis. Such cases shall be put up for ratification by the Rating Sub-Committee of the Board of CRA.

B. Further, an extension of 30 days is being granted for making annual and semi-annual disclosures by CRAs on its website for the period ended March 2020.

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4. This circular is issued in exercise of the powers conferred by Section 11 (1) of Securities and Exchange Board of India Act, 1992 read with the provisions of Regulation 20 of SEBI (Credit Rating Agencies) Regulations, 1999, to protect the interest of investors in securities and to promote the development of, and to regulate, the securities market.

Yours faithfully,

Surabhi Gupta

General Manager

Tel No. 022-26449315

Email id: surabhig@sebi.gov.in

The above circular was followed by a subsequent one dated 31.08.2020. It reads as follows:-

**"SEBI/ HO/ MIRSD/ CRADT/ CIR/ P/ 2020/ 160
2020**

August 31,

To,

All Credit Rating Agencies (CRAs) registered with SEBI

Dear Sir/ Madam,

**Sub: Relaxation from default recognition due to
restructuring of debt.**

1. CRAs recognize default based on the guidance issued vide SEBI circulars dated May 3, 2010 and November 1, 2016. Further, SEBI vide circular dated March 30, 2020 had provided for relaxation from recognition of default owing to moratorium

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permitted by RBI and lockdown due to COVID-19 pandemic.

2. The Reserve Bank of India (RBI), vide notification no. RBI/2020-21/16 DOR.No.BP.BC/3/21.04.048/2020-21 dated August 6, 2020, has provided for a resolution framework for COVID-19 related stress.

3. Based on its assessment, if the CRA is of the view that the restructuring by the lenders/ investors is solely due to COVID-19 related stress or under the aforementioned RBI framework, CRAs may not consider the same as a default event and/or recognize default. Appropriate disclosures in this regard shall be made in the Press Release.

4. The above relaxation is extended till December 31, 2020.

5. This circular is issued in exercise of the powers conferred by Section 11 (1) of Securities and Exchange Board of India Act, 1992 read with the provisions of Regulation 20 of SEBI (Credit Rating Agencies) Regulations, 1999, to protect the interest of investors in securities and to promote the development of, and to regulate, the securities market.

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Yours faithfully,

Surabhi Gupta

General Manager

Tel No. 022-26449315

Email id: surabhig@sebi.gov.in ”

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11.The learned Senior Counsel for the petitioner took great pains to convince me that the impugned action of the third respondent is not in consonance with the policy announcements made by Reserve Bank of India and Securities and Exchange Board of India(SEBI) and called upon me to strike it down. He strongly asserted that the third respondent is amenable to the writ jurisdiction of this Court as they discharged public functions.

12.It is true that the writ petition filed under Article 226 of the Constitution of India is maintainable even against a private body provided it discharges public functions. As held in ***Rajbit Surajbhan Singh V. The Chairman, Institute of Banking Personnel Selection, Mumbai ((2019) 14 SCC 189)***, it is not easy to define what a public function or public duty is. It can reasonably be said that such functions as are similar to or closely related to those performable by the State in its sovereign capacity are public functions. In the very same decision, it was also held that the question as to whether a corporation/society would fall within the meaning of Article 12 should be decided after examining whether the body is financially, functionally and administratively dominated by or under the control of the

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Government. Such control should be particular to the body in question and must be pervasive. A control which is merely regulatory under the statute or otherwise would not make the body 'State' Under Article 12.

13.Rating is an evaluation and assessment of credit worthiness of an individual or company. The debtor's ability to repay the debt is analyzed and based on the same, credit-risk associated with lending is projected. These are normal corporate functions. Merely because they have implications for the general public and lending institutions tend to go by them, credit rating agencies cannot be considered as discharging public function or public duty. Secondly, SEBI has only regulatory and supervisory control over the credit rating agencies. Applying the aforesaid decision of the Hon'ble Supreme Court, I hold that the third respondent cannot be characterised as "State" within the meaning of Article 12 of the Constitution of India and that it is not discharging any public function.

14.When Securities and Exchange Board of India(SEBI) was asked to clarify its position, its standing counsel submitted

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that the petitioner's understanding of circular was incorrect. It was also pointed out that the instant case pertains to rating of bank loans of the petitioner and does not pertain to rating of debt securities. In the case of bank loan rating, relevant guidelines issued by the Reserve Bank of India would be applicable.

15. Though the petitioner repeatedly invoked RBI's circular dated 27.03.2020, its standing counsel took the position that it is merely permissive in character and that it cannot be read otherwise. I repeatedly asked the learned Senior Counsel if the lending institutions have granted moratorium in favour of the petitioner. I record that a direct response to this question was not forthcoming.

16. Rating is an exercise that is carried out by financial analysts and professionals. Writ Court should not assume jurisdiction in matters which are better handled by experts. It is not as if the petitioner is without remedy. There is provision for in-house appeal. It is certainly not akin to appealing from caesar to caesar's wife. In any event, in view of clause 29(2)(c), the petitioner can definitely complain before SEBI against the impugned action of the third respondent.

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17. Rating exercise is all about capturing the “as is condition” of the signified. Rating is expressed through signs and symbols to the world at large. Ironically the effect is far from symbolic. It is real. Semiotics is the academic discipline devoted to the study of symbols and signs and their meaning. Ferdinand d Saussure wrote that one characteristic of the symbol is that it is never wholly arbitrary. Symbol should correctly signify. There should be nothing misleading about it. A symbol in order to carry abiding credibility and lasting value should satisfy the test of truth function. It is like a Thermometer. The instrument should read the body temperature correctly. If I am running a temperature of 101 degree Fahrenheit, the thermometer should indicate it exactly and not as 100. Credit Rating indicates the fiscal health of the person or the institution concerned. It is one thing to say that notwithstanding the actual position, ameliorative relief must be provided. It is one thing to say that loans should be provided notwithstanding the downgrading. But it would be a completely different matter to say that rating should not reflect the actual state of affairs. Any remedial treatment must be preceded by correct diagnosis. Proper diagnosis can be made only if the symptoms are read correctly. If the patient is going to insist that

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the symptoms should be disregarded, then there can be no proper diagnosis, not to speak of the resulting treatment.

18.Since I have held that a) the third respondent is a private body and not a “State” within the meaning of Article 12 of the Constitution b) by rating its clients, the third respondent is not discharging any public function c) the subject matter involves analysis by financial experts d) and the petitioner is having effective alternative remedies, I dismiss this writ petition as not maintainable. I make it clear that I have not gone into the merits of the matter. The petitioner is at liberty to avail the in-house remedy available to them or move Securities and Exchange Board of India(SEBI) directly by filing a complaint against the third respondent. Whatever remedy that the petitioner may avail, the same shall be attended to with utmost expedition. All the other contentions and remedies of the petitioner are left open. No costs. Consequently, connected miscellaneous petitions are closed.

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12.10.2020

Index : Yes / No,
Internet : Yes/ No
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Note : 1.Issue order copy on 13.10.2020

2.In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

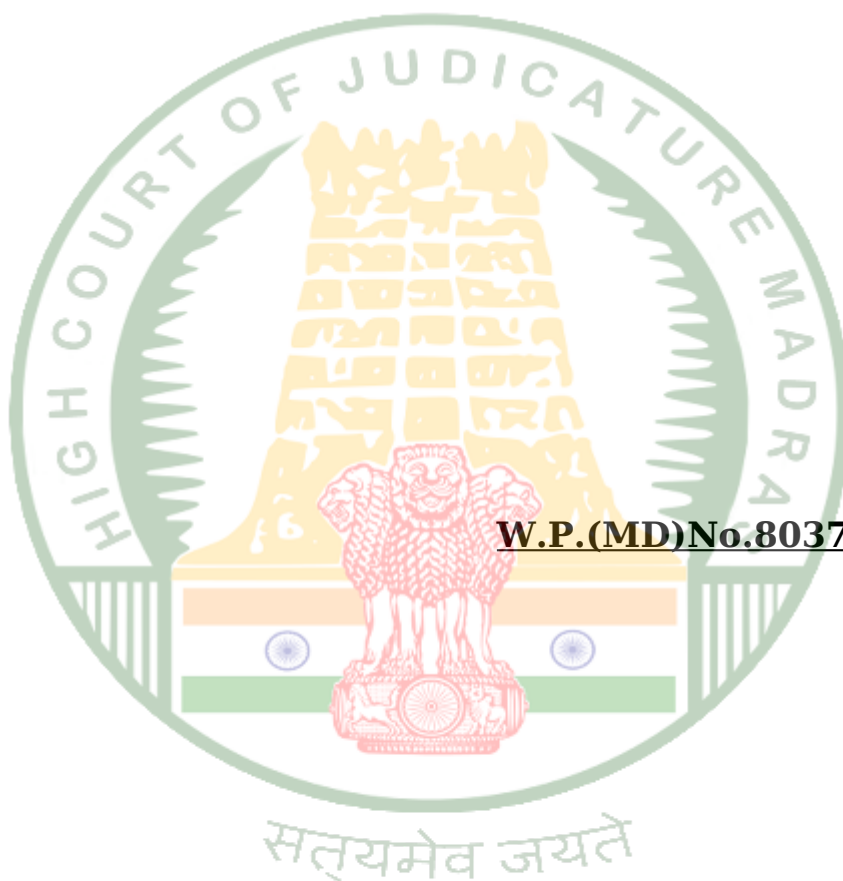
1. The Secretary to Government,
Finance Department, New Delhi.
2. The Regional Manager, Reserve Bank of India,
Fort Glacis, No.16, Rajaji Salai,
Chennai – 600 001.
- 3.The Senior Director, India Rating and Research Pvt. Ltd.,
Wockhardt Towers, 4th Floor, West Wing,
Bandra Kurla Complex,
Bandra East,
Mumbai – 400 051.
4. The General Manager,
Securities and Exchange Board of India,
Mumbai.

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G.R.SWAMINATHAN, J.

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