

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: January 30, 2008

CRL.M.C. 2145/2006

VIRENDER KUMAR SINGH & ANR Petitioner
Through Mr. Anil K. Batra and Mr. Keshari K.
Tiwari, Advocates.

versus

SECURITIES AND EXCHANGE BOARD OF INDIA
..... Respondent
Through Mr. Sanjay Mann, Advocate.

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR

ORDER

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| 1. Whether Reporters of local papers may be
allowed to see the judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in
Digest? | Yes |

Dr. S. Muralidhar, J (open court)

1. This is a petition under Section 482 of the Code of Criminal Procedure, 1973 ('CrPC') seeking the quashing of Criminal Complaint No. 17/2004 pending before the learned Additional Sessions Judge, Delhi ('ASJ').

2. The Respondent Securities and Exchange Board of India (SEBI) a statutory body incorporated under the Securities and Exchange Board of

India Act 1992 (SEBI Act) filed a complaint being Complaint No. 60 of CRL.MC.No.2145-46/06

2004 on 14th January 2004 against M/s Swaran Bharat Forests Ltd. ('Company') and eight others, including the petitioners here, who are described in the complaint as Directors of the said company. The allegations in the complaint were that the Company floated a collective investment scheme but failed to file the requisite information or details pursuant to a Government of India press release dated 18th November, 1999. It is stated SEBI wrote letters dated 15th December, 1999 and 29th December, 1999 to the Company asking it to submit the information and also send an information memorandum to all the investors giving the detailed status of the schemes at least by 28th February, 2000. This date was thereafter extended. The specific allegation against the Company in the complaint is that "accused No. 1 failed to make any application with SEBI for registration of the collective investment schemes being operated by it as per the said regulations." It is then stated that on 7th December, 2000 in exercise of its power under Section 11 B of the SEBI Act, the Company was directed to refund the money collected within one month from that date. It is then stated in para-15 as under:

"However, despite repeated directions by SEBI, the Accused No. 1 did not comply with the said Regulations and from this, it is clear that the Accused no.1 is intentionally and with dishonest intentions evading the repayment of the amount collected by it from the investors."

3. As regards the specific role of the persons who are stated its Directors, the allegations in the complaint read as under:

"The Accused No. 2 to 9 are the Directors of the Accused No.1 and as such persons in charge of and responsible to the Accused No. 1 for the conduct of its business and are liable for the violation of the Accused No. 1 as provided under Section 27 of

4. Learned counsel for the Petitioner submits that Petitioner No. 2 resigned as a Director on 1st October, 1997 and Petitioner No. 1 resigned as a Director on 19th August, 1999. Therefore much prior to the filing of the Complaint on 14th January, 2004 and much before end December 2000, the last date for compliance with the direction of the SEBI to the Company, the petitioners had ceased to be Directors. He points out that the cause for the complaint was the failure of the Company to comply with the regulations which themselves came into force only sometime in 1999, and the time for compliance with which was kept extended by SEBI itself. The certified copies of Form-32 filed with the Registrar of Companies intimating the resignation of each of the Petitioners 1 and 2 from the directorship of the Company in terms of Section 303 (2) of Companies Act, 1956 have been placed on record. It is submitted that in as much as Section 27 of the SEBI Act mandates that “where an offence under this Act has been committed by a company, every person who **at the time of the offence** was committed was in charge of and was responsible to the company for conduct of the business.....”, neither Petitioner can be held liable for the offence that was committed by the Company after their ceasing to be its Director..

5. No reply has been filed to the petition till date although the notice was directed to issue to SEBI way back on 20th April, 2006. Learned counsel for SEBI however was prepared to proceed with the arguments even without a counter affidavit. He submitted that the question whether the Petitioners had ceased to be Directors of the Company at the time of commission of the

offence was a question of fact which could not be examined in the present proceedings. He submitted that even if the Petitioners had resigned and the Form-32 was filed with the Registrar of Companies, such defence could be examined only at the trial and cannot constitute a ground for quashing the criminal complaint itself. He placed reliance on the judgment of this Court in *Sunaina R. Mathani v. National Capital Territory of Delhi & Others, 2002 I AD (Delhi) 78* and an order dated 16th February, 2006 passed by a learned Single Judge of this Court in *Criminal Misc (M) No. 4141/2005*. Reliance has also been placed on the order of the Hon'ble Supreme Court in *Raj Lakshmi Mills v. Shakti Bhakoo (2002) 8 SCC 236*.

6. In order to appreciate the submissions of counsel, a reference may first be made to Section 27 SEBI Act which reads as under:

“Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the offence and shall be

liable to be proceeded against and punished accordingly.”

7. The above provision is more or less similar to Section 141 of the Negotiable Instruments Act 1881 which stipulates that where the offence has been committed by a company, every person in charge of the affairs of the company and responsible to it for the conduct of its business “at the time of offence was committed” would be deemed to be guilty of the offence. This presumption of guilt can, however, be rebutted by such person if he can prove that it was committed without his knowledge. However, this stage arises only after the complainant has discharged the initial burden. Where the offence has been committed by a company, in order to invoke the deeming provision of 27 (1) SEBI Act it will have to be shown by the complainant that the person who is arraigned in his capacity as a Director of such company was in charge of the affairs of the company and responsible to it for the conduct of its business “at the time of commission of the offence.” The averment in the complaint concerning the time of commission of the offence is therefore crucial for determining even the prima facie liability of the individual directors.

8. As far as time of commission of offence is concerned, the complaint itself on a collective reading appears to indicate that according to SEBI, the offence took place when the company failed to make any application for registration of the collective investment schemes with it in terms of the regulations made under the SEBI Act. Also it appears that SEBI itself extended the time for compliance even as per its own admission and the deadline in this regard was end of December 2000. The complaint was filed

only in 2004. Therefore, even according to SEBI any non-compliance with the regulations by the Company prior to end December 2000 stood condoned. In other words, if the Company had complied with the regulations by the end of December 2000, SEBI would not have filed a complaint against the Company for the offence complained of.

9. As regards the Petitioners the only allegation in the complaint is in para 18 to the effect that they were in charge and was responsible to the Company for the conduct of its business. However, the fact that the petitioners had already resigned much before end December 2000, as evidenced by the Form-32 filed with the ROC has not been controverted. The only explanation is that this fact can be established only at the trial. The existence of a Form-32 in the office of the Registrar of Companies in respect of any company is really not a complicated question of fact. Even an inspection of the records in the office of Registrar of Company can confirm whether in fact such Form-32 has been filed or not. It is not possible to accept the submission that this question can be examined only by the trial court when it can easily be verified by a mere inspection of the record of the Registrar of Companies. It would indeed be unfair to require the petitioners to go through the ordeal of a trial only for proving a statutory document available for inspection by the SEBI in the office of the ROC. Although in *Sunaina R. Mathani* this Court had opined that the question whether there was a Form-32 should also be examined by the trial court, this Court does not find it necessary to do so here because certified copies of the Form 32 have been placed on record and despite sufficient time available to it SEBI has not

brought anything on record to doubt their genuineness. In neither of the

other decisions cited, was a similar question concerning Form 32 involved.

10. An attempt was made by learned counsel for SEBI to contend that the offence was a continuing one and took place from the very date that the company was incorporated and in any event from the date the SEBI Act was notified, i.e. 4th April 1992. The Court is unable to accept this submission. There is not a whisper of an averment to this effect anywhere in the complaint. The time of commission of an offence is a matter of fact and not conjecture.

11. In that view of the matter, Criminal Complaint No. 17/2004 and the order dated 14th January, 2004 passed by the learned ACMM summoning the Petitioners is hereby quashed and set aside.

12. The petition is allowed but with no order as to costs.

S. MURALIDHAR, J

JANUARY 30, 2008
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