

* **THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl.M.C. No.6312/2006**

Date of Decision : September 29, 2008

Mrs. Kanchan Agarwal Petitioner

Through : Mr. Anurag Kumar Aggarwal
& Mr. Umesh Mishra,
Advocates

Versus

Securities And Exchange
Board of India & Anr. Respondents

Through : Mr. Ashish Agarwal, Advocate
for respondent No.1
Mr. Pawan Bahl,
Advocate for the State

CORAM :

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

- | | |
|--|-----|
| 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 the Digest ? | Yes |

SUDERSHAN KUMAR MISRA, J.

1. The petitioner has moved the court under Section 482 of the Code of Criminal Procedure praying that the Criminal Complaint No.106 of 2005 tilted, SEBI Vs. Yojna Agro Forestry Ltd. & Others, pending before the Learned Additional Sessions Judge, Tis Hazari Courts, Delhi, be quashed. The petitioner also seeks quashing of the order passed on 24.8.2006, by the Ld. Additional Sessions judge, dismissing his application for discharge. The facts in a nut shell are as follows:-

2. The petitioner, Mrs. Kanchan Agarwal, was one of the directors of Yojna Agro Forestry Limited. This company was engaged in raising money from the general public and operating Collective Investment Schemes. On 18.11.1997, the Government of India issued a notification that such schemes were governed by the SEBI Act 1992. On 15.10.1999, the Securities and Exchange Board of India (SEBI), notified the Securities and Exchange Board of India (Collective Investment Schemes) Regulations 1999. Chapter IX of these regulations required all the companies operating Collective Investment Schemes, including the said Yojna Agro Forestry Ltd., to register themselves with SEBI within a period of two months from the date of notification of the said regulations. Later on, this date was extended by SEBI to 31.3.2000. Under these regulations, the said company had to apply to SEBI for registration of its schemes. Meanwhile, vide its letters dated 15.12.1999, 29.12.1999 and by way of a public notice dated 10.12.1999, SEBI directed the said company to send an information memorandum to all its investors detailing the state of affairs of the schemes, the amount repayable to each investor and the manner in which such amount is determined, latest by 28.2.2000.

3. Since the company failed to take any steps in this regard and also did not apply for the grant of registration, therefore, on 7.12.2000, in exercise of its powers under Section 11B of the SEBI Act 1992, SEBI directed the said company to refund

the money collected under the aforesaid Collective Investment Schemes, to its investors, within one month, i.e, on or before 6.1.2001. The company however failed to do so.

4. Ultimately, on 16.12.2003 SEBI filed the impugned complaint before the Trial Court against Yojna Agro Forestry Ltd. as well as its directors. The petitioner was arrayed as accused No. 2 therein. The complaint, inter alia, states;

“ 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.”

The specific allegation against the petitioner and the other accused, all of whom are described as directors of the said company is as follows;

“ The Accused No.2 to 5 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 Securities and Exchange Board of India Act, 1992”.

5. Thereafter, on 15.4.2005, the petitioner moved the Trial Court under Section 227, Cr.P.C. praying that she be discharged on the ground that the relevant directions which the said company is said to have violated were admittedly given to the company after she had already resigned from the directorship of the said company on 1.9.1998, and therefore she could not held responsible for the actions of the said company after that date. Relying on the judgments of the

Supreme Court in ***Adalat Prasad Vs. Rooplal Jindal And Others (2004) 7 SCC 338*** and ***Subramaniam Sethuraman Vs. State of Maharashtra And Anr. (2004) 13 SCC 324***, the Trial Court dismissed this application on 24.8.2006, on the ground that it has no power under the Code to deal with the application at that stage without evidence being recorded in the trial.

6. Counsel for the petitioner contends that much before the filing of the complaint on 16.12.2003 and even before 6.1.2001, which was the last date for compliance by the company with the directions of SEBI, the petitioner had already ceased to be a Director of the Company. According to Learned Counsel for the petitioner his client resigned on 1.9.1998. He has relied on the Certified Copy of Form 32, filed by the Company with the Registrar of Companies in terms of Section 303 (2) of the Companies Act, 1956 for this purpose. In addition, my attention has also been drawn to the reply dated 10.2.2006, filed by the complainant to the petitioner's aforesaid application for discharge before the Trial Court, wherein the fact that the petitioner resigned from the directorship in the year 1998 has been admitted. Thus, it is contended by the counsel for the petitioner that the petitioner cannot be made liable for any offence under Section 27 of the SEBI Act, which was allegedly committed by the Company after she had admittedly ceased to be its director.

7. Per contra the counsel for respondent No.1 contends that whether the petitioner was a director or not at the relevant time is a disputed question of fact which cannot be decided by this Court in its exercise under Section 482 of Cr.P.C and can only be decided during trial. For this he has relied upon a number of decisions of the Supreme Court and of this Court, inter alia, ***Raj Lakshmi Mills Vs. Shakti Bhakoo (2002) 8 SCC 236; S.M. Dutta Vs. State of Gujarat AIR 2001 SC 3253 ; Sunaina R. Matahni Vs. N.C.T of Delhi 2002 1 AD (Delhi) 78.***

8. In order to appreciate these contentions Section 27 of the SEBI Act must be looked into. The relevant portion of Section 27 of the SEBI Act reads:

“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..”

9. To explain the scope of this section, counsel for the petitioner has relied on the decision of this Court in ***Virender Kumar Singh & Anr. Vs. Securities And Exchange Board of India, 2008 [2] JCC 802*** where it was held that:

“7... 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."

In that case, on reaching the conclusion that the petitioners were not the Directors of the company at the time of the commission of the offence, this Court quashed the criminal complaint against the petitioners.

10. In the case at hand, it appears that the complaint was filed because the company failed to comply with the direction of the first respondent within the time granted, which expired on 7.12.2000. Therefore, the cause of action can only be said to have arisen against the company on 7.1.2001 and not before.

11. To my mind, under the circumstances of this case, the question whether the petitioner was a Director of the said company at the relevant time is not something that cannot be decided without evidence being recorded at the trial. In

Virender Kumar Singh & Anr. Vs. Securities And Exchange Board of India (supra) this court held that:

"9.... Even an inspection of the record 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..... 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...”

12. Here, in this case, the only allegation against the petitioner was that as a director of the company, she was in charge of and responsible to the company for the conduct of its business. However, certified copies of the Form 32 showing that she had ceased to be a director on 1.9.1998 have been placed on the record. In addition, in its reply dated 10.2.2006, filed before the Trial Court, the complainant SEBI has itself taken the categorical stand that the petitioner, “.... resigned from the Directorship in the year 1998”.

13. The power of this Court under Section 482 Cr.P.C is well settled. In ***State of Punjab Vs. Kasturi Lal (2004) 12 SCC 195*** the Supreme Court discussing the scope of Section 482 of the Code held that:

“10. The section does not confer any new powers on the High Court. It only saves the inherent power which the court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely: (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction..... While exercising powers under the section, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised *ex debito*

justitiae to do real and substantial justice for the administration of which alone courts exist..... In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complainant, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto."

14. Under the circumstances, keeping in view the fact that the complainant itself admits that the petitioner had ceased to be a director of the accused company from 1.9.1998, and also the certified copy of Form 32 produced by her evidencing that fact; I have no doubt that it would be futile, and wholly unjust to permit the proceedings to continue against the petitioner and that it is appropriate for this Court to interfere in the exercise of its jurisdiction under Section 482 Cr.P.C.

15. Under the circumstances Criminal Complaint No.106 of 2005, and the order dated 24.8.2006 qua the petitioner are hereby quashed and set aside.

16. The petition is disposed of.

Sudershan Kumar Misra, J.

September 29, 2008

mb