

*** "REPORTABLE"**
HIGH COURT OF DELHI AT NEW DELHI

+ CrI.M.C.3080/2007

Date of decision: 23.01.2009

RASHIMA VERMA PETITIONER

! Through : Mr. Sidharth Luthra, Sr. Adv.
Mr. Pramod Kr. Dubey, Adv.
Mr. Shri Singh, Adv.
Mr. Vivek Jain, Adv.

Versus

\$ SECURITIES & EXCHANGE
BOARD OF INDIA RESPONDENTS

^ Through : Mr. Ashish Agarwal, Adv.
Mr. R.K. Singh, Adv.

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CORAM:
HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not? Yes
- (3) Whether the judgment should be reported in the Digest ? Yes

ARUNA SURESH, J.

1. Petitioner has been summoned vide order dated 15.12.2003 in complaint case No. 1231/2003 titled 'Securities and Exchange Board of India v. M/s.

Divyabhoomi Agro (I) Ltd. & Ors.', as director of the company, in view of the violation under Section 27 of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as 'SEBI Act') by the learned Additional Sessions Judge. M/s. Divyabhoomi Agro (I) Ltd. (hereinafter referred to as 'the company') was operating Collective Investment Schemes (hereinafter referred to as 'CIS') at the time of coming into force of SEBI (Collective Investment Schemes) Regulations, 1999 and raised an aggregate amount of Rs. 8,26,800/- from the general public. The company filed details with Securities and Exchange Board of India (hereinafter referred to as SEBI) regarding its CIS, pursuant to SEBI press release dated 26.11.1997 and public notice dated 18.12.1997. As per the regulations, any person, who had been operating CIS at the time of commencement of the said regulations was deemed to be an existing CIS and after coming into force of these regulations, the said person was required to move an application before SEBI for grant of registration within a

period of two months from the date of notification of the said regulations.

2. On 15.12.1999 and 29.12.1999, vide letters and public notice dated 10.12.1999, the company was given intimation to send its information, memorandum of all the investors detailing the state of affairs of the investment schemes and the amount repayable to each investor and also the manner in which the repayment of the amount was to be determined. The company, however, failed to make an application with SEBI and therefore as per regulation 73(1), the company was to wound up, and was required to repay the amount collected from the investors and as per regulation 74, company was required to formulate a scheme of repayment to the existing investors. The company neither applied for registration under the regulations nor took steps for winding up of the schemes and repayment to the investors and thus violated provisions of SEBI Act and regulations framed thereunder.

3. On 07.12.2000, SEBI directed the company to

refund the money collected under the CIS to the persons who invested therein, within a period of one month from the date of such directions, but the company failed to comply with the same showing dishonest intention. Since the company allegedly caused huge pecuniary damage to the general public who invested their hard-earned money in the scheme operated by it, the company committed violation of regulations of SEBI under Sections 11B, 12(1B) of the SEBI Act and Regulation 5(1) read with Regulations 68(1), 68(2), 73 and 74 of the SEBI (CIS) Regulations punishable under Section 24(1), SEBI Act. The complaint was accordingly filed against the company as well as the directors/promoters of the company i.e. accused Nos. 2-8.

4. Petitioner is arrayed as accused No. 6 in the complaint and is shown as director/promoter of the company. The learned Trial Court, on perusal of the complaint, was of the view that complaint disclosed commission of offence punishable under Sections 24 and 27 of SEBI Act and summoned all

the accused persons including the petitioner vide order dated 15.12.2003. Aggrieved by the said order, the present petition has been filed.

5. Learned senior counsel for the petitioner, Mr. Sidharth Luthra, submitted that the summoning order dated 15.12.2003 deserves to be quashed as the same was passed without perusing the material available on the record and also that there are no substantive allegations in the complaint that petitioner was in charge of or responsible for the conduct of business or the day to day affairs of the company. It is further argued that petitioner was never a director of the company and was neither in charge of nor responsible for the conduct of the business of the company because as per Memorandum of Association of the company, petitioner was merely one of the initial subscribers of the shares of the company and was not the director.

6. Learned senior counsel for the petitioner has further argued that allegations against the petitioner are contained in paragraph 20 of the

complaint only and correspondence as regards SEBI regulations were addressed to and replied by the company and no such correspondence was made by the petitioner on behalf of the company. It is emphasized that Form No. 32, put on record; perusal of which would show that the petitioner was not the director of the company and hence the summoning order dated 15.12.2003 as against the petitioner is contrary to the material available on the record, bad and is liable to be quashed and set aside.

7. Petitioner has relied upon the following judgments:

- a. SMS Pharmaceuticals v. Neeta Bhalla (2005) 8 SCC 89***
- b. K. Srikanth Singh v. M/s. Northeast Securities Ltd. and Anr. 2007 (3) RCR (Crl.) 934***
- c. J.N. Bhatia v. State and Anr. 139 (2007) DLT 361***
- d. Anoop Jhalani v. State & Anr. 144 (2007) DLT 858***
- e. P.S. Srinivasan & Ors. v. M/s. VLS Finance Ltd. Crl.M.C. 7423-25/2006, 7430-32/2006, 735-37/2006, 7458-60/2006 (Unreported dated 28.3.2008)***

8. Learned counsel for the respondent, Mr. Ashish Aggarwal, on the other hand, has submitted that petition is not maintainable, as petitioner has

raised contentions on facts and not on law and the facts can only be considered by the trial Court during the course of trial on production of evidence and not at this stage. It is also argued that accused had failed to comply with the statutory provisions and the petitioner being the person in charge of and responsible for the affairs of the accused company, was required to wind up the existing collective scheme when the petitioner and the accused company failed to register the existing CIS even after being informed through public notices, press releases, letters etc. in utter violation of the regulations of SEBI.

9. Learned counsel for the respondent has further argued that as per the Government Press Release, accused company submitted information regarding its scheme vide letter dated 13.1.1998 and the name of the petitioner appeared in the list of promoters/subscribers to the shares as per Memorandum of Association and also in the letters dated 1.6.1998 and 25.11.1998 as submitted by the company; the petitioner was shown to be one of the

directors of the company. Learned counsel for the respondent has disputed the veracity of Form No. 32 produced by the petitioner to show that petitioner was not the director of the company. Learned counsel for the respondent has referred to the following judgments seeking dismissal of the petition and to emphasize that this Court should exercise its inherent powers under Section 482 Code of Criminal Procedure (hereinafter referred to as Cr.P.C.) in extreme cases:

a. N.Rangachari v. Bharat Sanchar Nigam Ltd. II(2007) CCR 258(SC)

b. Sushila Devi v. Securities & Exchange Board of India 144(2007) DLT 47

10. In the petition, petitioner had also raised an issue regarding the complaint being barred by period of limitation. However, learned senior counsel for the petitioner while arguing the case made it clear that petitioner was not pressing the issue of limitation and therefore I shall proceed to decide the petition only on merits of the case.

11. For considering the petition on merits and to

appreciate the submissions of the counsel for the rival parties, I feel the necessity of reproducing relevant paragraphs in the complaint whereby the directors of the company have been roped in by the complainant:

“7. The accused no. 1 is a company registered under the provisions of the Companies Act and accused nos. 2 to 8 are the directors of the accused no. 1 company. The accused no. 2 to 8 are the person incharge and responsible for the day to day affairs of the company and all were actively connived with each other for the commission of offences.

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20. The Accused no. 2 to 8 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 violations of the Accused No. 1, as provided under Section 27 of Securities and Exchange Board of India Act, 1992.”

12. Perusal of the complaint shows accusations as to the violation of SEBI Regulations and commission of offence under SEBI Act are essentially against the company, M/s. Divyabhoomi Agro (I) Ltd. The complaint contains the details as to the manner in

which the accused company had potentially violated the SEBI regulations and committed offences under SEBI Act. However, assertion of offences committed, putting the liability on the directors as contained in paragraph 7 and 20 and reproduced above, only state that, as the company had committed offences, all directors would be liable and are liable for the functioning and for conducting the day to day business of the company. Mere allegations contained in a line or two against the directors in paragraphs 7 and 20 without specifying the violative act committed by any of the directors would not suffice to make the directors offenders so as to summon them for the offences under SEBI Act.

13. Complainant is required to be specific and explicit as to the nature of allegations should be definite and coherent to the role played by the director in committing such offence in the complaint against the directors of the company. Mere bald averments in the complaint do not make the directors offenders. Minimum averments to be made in a

complaint has to contain that the person sought to be arraigned as an accused was in charge of the affairs of the company or responsible for the conduct of its business in such capacity at the time when the offence was committed, before he is deemed to be guilty of an offence committed by the company. A director, manager or secretary or any other officer of the company would also be deemed to be guilty, if an offence is committed with his consent or connivance or is attributable to any neglect on his part. For that purpose, he need not be in charge of and responsible to the company for the conduct of its business.

14. The initial burden is on the complainant to show that accused was in charge of the affairs of the company and was responsible for the conduct of its business or the offence had been committed with his consent or connivance or is attributable to any neglect on his part. Necessary averments in this behalf have to be there in the complaint. In case the complaint lacks such averments, and a person is arrayed as accused only on the ground that he

was a director, such a complaint qua him has to be quashed and no summoning orders in such like circumstance are called for. There has to be a specific accusation against the director or each of the persons arrayed as accused in the complaint and simple narration of the contents of the provisions under the statute or the requirements of law would not be enough to summon such person as accused.

15. In the present case, the complainant has only averred that petitioner was director and was in charge of the affairs of the company and was responsible for the conduct of its day to day business. But there is no further elaboration as to how petitioner was in charge of the affairs of the company and was responsible for the conduct of its business. There is not even a whisper nor a shred of evidence or anything else to show, apart from the presumption drawn by the complainant in the complaint that there is an act committed by the director from which a reasonable inference could be drawn that petitioner could be vicariously liable.

It was necessary for the complainant to make averments elaborating the role of such a director in respect of her working in the company from which the court could come to a prima facie conclusion that she was responsible for the conduct of the business of the company.

16. In ***SMS Pharmaceuticals v. Neeta Bhalla (supra)*** a reference was made to three judge bench, wherein one of the questions to be considered was whether a director of the company would be deemed to be in charge of and responsible for the day to day affairs of the company and for the conduct of its business and therefore deemed to be guilty of the offence committed by the company unless he proves to the contrary. It was observed that the said question was made in view of the fact that at the stage of issuance of process, the Magistrate has before him, only the complaint and the accompanying documents and since Magistrate has power to reject the complaint at the threshold, it necessarily suggests that a complainant should make out a

case for issue of process, i.e. prima facie the ingredients of the offence allegedly committed by the director are to be satisfied. It was further observed that simply because a person is director in the company, he would not be presumed to be discharging a particular function on behalf of the company. A person may be a director in the company but he may not know anything about the day to day functioning of the company. As a director, he may be attending meetings of the Board of Directors of the company where usually they decide policy matters and guide the course of business of the company. It may be that Board of Directors may appoint sub-committees consisting of one or two directors out of the Board of Directors of the company who may be made responsible for the day to day functioning of the company. Thus, it is clear that necessary averments are ought to be contained in a complaint before a person can be subjected to criminal process. A clear case should be spelled out in the complaint against the person sought to be made liable because a director is

fastened with vicarious liability for the offence committed by the company. Mere description of an accused as director in a company in the complaint is not sufficient to make him liable for the act of the company.

17. In the complaint, I do not find any narration or any specific pleadings against the petitioner to make her liable as person in charge and responsible for the day to day affairs of the company and, therefore, liable for violation of Section 27 of the SEBI Act, committed by the accused company.
18. Vide letter dated 1.6.1998, the Chairman-cum-Managing Director accused G.S. Verma, submitted information as desired, to the Chairman, SEBI, Bombay and along with this information he enclosed list of directors and Memorandum and Articles of Association of the Company. In the list of directors dated 1.6.1998, petitioner is shown as one of the directors and her occupation is shown as service. The Chairman-cum-Managing Director, accused G.S. Verma again submitted similar information vide another letter dated 25.11.1998 to

the Chairman, SEBI, Bombay.

19. In the Memorandum of Association, name of the petitioner appears at Serial No. 5 in the list of persons as 'Subscribers'. In Form No. 32 dated 29.09.1997, name of the petitioner does not appear in the list of Managing Director and Directors appointed as per the Article of Association indicating that petitioner was not the Director of the Company at the relevant time. Since petitioner is shown to be in service at that point of time, she could not have been actively participating in the day to day affairs of the company and therefore could not be said to be responsible for the conduct of its day to day business.
20. Learned counsel for the respondent has submitted that respondent could not have known the nature of work which was assigned to the petitioner as a director of the company and it is for the petitioner to prove in evidence during the trial of the case that she was neither Director nor was responsible for day to day affairs of the company and for the conduct of its business. I do not find force in these

submissions. The complainant could have collected information or derived knowledge, during its dealings with the company to know the role of the directors of the company in its day to day business and from the said personal knowledge which it could derive during its dealings with the company, complainant could have made necessary averments against the directors of the Company who dealt with it. The complainant could therefore, have specifically implicated each of the directors who dealt with it in due course of the business of the company, besides the Chairman-cum-Managing Director who otherwise also becomes liable for the violations committed by the company.

21. Perusal of paragraphs 7 and 20 of the complaint would show that apart from general allegations that accused Nos. 2 to 8 were collectively responsible for day to day affairs of the company and for the conduct of its business and the affairs of accused No. 1 were conducted by accused Nos. 2 to 8, there are no specific allegations against the petitioner. The nature or role played by the

petitioner, the type of transaction conducted by the petitioner on behalf of accused No. 1 with the complainant are conspicuously missing in the complaint. Only a general statement is made in the complaint that accused Nos. 2 to 8 actively connived with each other for the commission of offence being persons in charge and responsible for the day to day affairs of the company. The complainant, in this case, could have inspected the records of the Registrar of Companies, Balance Sheet of the company and such annual reports which are public documents.

22. It is pertinent to mention here that complainant had called upon the accused company to submit its Certificate of Incorporation, copy of Memorandum and Articles of Association, Audited Balance Sheet and list of all the Directors of the company showing their names, addresses and occupation as well as compliance certificate, as was required to be enclosed with the information. Necessary information was accordingly submitted by accused G.S. Verma, the Chairman-cum-Managing Director

of the company. Therefore, complainant had necessary material for the purpose of attributing role to the petitioner while arraying her as an accused. The tendency of making all the directors as accused for facing liability for an offence committed by the company is on the increase and it needs rationalization. In ***J.N. Bhatia & Ors. v. State & Anr.*** (Supra), the Court held as follows:

“No doubt, the complainant is an outsider and may not know the internal arrangement of the company and his knowledge, viz.-a-viz. the company has to be limited to his personal knowledge which he derives from his dealings with the company. However, at the same time from his personal knowledge which he derives from his dealings with the company he can make necessary averments regarding the persons who dealt with him. Apart from Chairman and Managing Director, who become liable in any case, in view of the ratio laid down in *SMS Pharmaceuticals v. Neeta Bhalla* (supra), the complainant can specifically state as to which other director dealt with him in the course of the business and in what manner. There may be a director and/or other person who dealt with him on behalf of the company in negotiating the particular deal with the complainant and/or in issuing the cheque(s) in question or in signing the documents while dealing with the complainant, depending upon the nature of business dealings between the company and the complainant. He may also be a person who had promised the complainant that the cheques(s) would be

honoured on presentation. That apart, the complainant cannot be totally in dark about the affairs of the company. Every company incorporated under the Indian Companies Act is supposed to file its annual returns with the Registrar of Companies. Balance-sheet of the company and such annual returns are public documents. The complainant can always inspect those documents available with the Registrar of Companies, which may throw light by spelling out the role the Directors of a particular company are playing. Thus, the complainant is not in a helpless situation and can gather necessary material for the purpose of attributing role to a particular director/person while arraigning him as accused person. However, tendency is to make all Directors as accused whether they are active Directors or not. It is for this reason that observations of the supreme Court in SMS Pharmaceuticals v. Neeta Bhalla (supra), become relevant where it is stated that since Section 141(1) of the NI Act makes such persons vicariously liable by deeming provision, conditions contained in Section 141(1) have to be strictly complied with by demonstrating that he "had a role to play in relation to the incriminating act" and further that "such a person should know what is attributed to him to make him liable". It may, however, be added here that if the complainant is able to show and there are imputation that such a person, who is Director, Manager, Secretary or other officer of the company and the offence is committed with his consent or connivance or is attributable to any neglect on his part, he can be arraigned as accused as per the provisions of Section 141(2) of the NI Act."

23. It is the paramount responsibility of a Magistrate to

carefully examine the complaint and the pre-summoning evidence before issuing summons. Summoning of an accused in a criminal case is a serious matter and not a mere formality. The Court issuing process under Section 204 Cr.P.C. has to be satisfied on the basis of the averments of the complaint, documents, evidence and other material available on record that there are sufficient grounds for proceeding against the accused. In a criminal complaint, it is the duty of the complainant to allege and make out all the ingredients of the offence before calling upon the court to proceed against the accused. Only legally permissible presumptions can be raised against the accused whereas the factual aspect of the allegations in the complaint are to be established by the complainant before seeking summoning of the accused, before a Magistrate sets into motion the criminal law as a matter of course.

24. ***N.Rangachari v. Bharat Sanchar Nigam Ltd. (supra) and Sushila Devi's case (supra)*** have no relevance to the facts and circumstances of this

case. In the said two cases, the petitioners were the Chairman and Managing Directors of the accused company respectively and the Chairman and Managing director of the company, in all circumstances are in charge of the affairs of the company and are responsible to the company for the conduct of its business.

25. In the present case, only Mr. G.S. Verma was the Chairman-cum-Managing Director of the Company at the time of commission of the alleged offence and therefore, was the person responsible for the business of the company. However the summons have been issued against all the accused persons who are impleaded as Directors despite prime accused being the company in the absence of a specific averments against the petitioner. Even without taking care of requirements of law whether prima facie case was made out against the petitioner, the Magistrate acted mechanically in passing the impugned order against the petitioner.
26. In view of my detailed discussion as above, the complaint as against the petitioner (accused No. 6

in the complaint) is not maintainable. Hence, the complaint and the impugned summoning order qua the petitioner is accordingly quashed.

Attested copy of the order be sent to the trial court.

**ARUNA SURESH
(JUDGE)**

**January 23, 2009
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