

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ CRL.REV.P. 692/2012

Date of reserved: 02.07.2015

Date of decision: 21.07.2015

PRATIMA SRIVASTAVA PETITIONER
Through: Mr.Sunil Chaudhary, Advocate.

versus

STATE OF NCT OF DELHI &ANR. Respondent
Through: Mr.Lovkesh Sawhney, APP for
State
Mr.Ashish Aggarwal, Adv. for
R-2.
Mr.Vivek Yadav, Official,
SEBI

CORAM:
HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR , J.

1. The revisionist petitioner is aggrieved by the order dated 19.11.2012 passed by the learned ACMM (Special Acts) Central Delhi passed in SEBI Vs. M/s.Assured Agro Park whereby the prayer for discharge from the complaint case filed by SEBI has been rejected.
2. The discharge application of the petitioner was structured on the ground that she had ceased to be a director of the Assured Agro Park Ltd ('the company' for short) long before the alleged violations of the requirements under the SEBI Act were committed.
3. Brief facts which led to the filing of the complaint by the SEBI are as hereunder.

4. Assured Agro Ltd (the company) was incorporated on 4.4.1997 with its registered office in Delhi. The company engaged itself in Collective Investments Schemes ('CIS' for short). The petitioner was inducted as a director of the company on 1.1.1998 and remained on the Board of Directors till 25.7.1998, when for personal reasons she resigned from the directorship of the company.

5. Section 12(1B) of the Securities and Exchange Board of India Act (hereinafter referred to as 'the Act') came to be inserted in the Act with effect from 25.1.1995. It provided that no person shall sponsor or cause to be sponsored or carry on or caused to be carried on any venture capital funds or Collective Investment Schemes (CIS) including mutual funds, unless he obtains a certificate of registration from the Securities and Exchange Board of India (for short 'SEBI') in accordance with the regulations. The proviso to the aforesaid sub Section permits that any person sponsoring or causing to be sponsored, carrying or causing to be carried on any such fund or scheme operating in the securities market immediately before 25.1.1995, for which no certificate of registration was required prior to the said date, may continue to operate till such time regulations were made under clause (d) of sub-section (2) of section 30.

6. The Government of India in order to regulate entities which issued instruments like agro bonds, plantation bonds etc came out with a press release dated 18.11.1997 conveying that such schemes should be treated as Collective Investment Schemes which would come under the purview of the SEBI Act.

7. In order to regulate the Collective Investment Schemes, for the benefit of investors as well as for promotion of legitimate investment activity, SEBI came out with Regulations in the year 1999 under the name Securities and Exchange Board of India (Collective Investment Scheme) Regulations, 1995 (hereinafter referred to as CIS Regulations). In terms of the said Regulations, any person who, immediately prior to the commencement of CIS Regulations was operating a Collective Investment Scheme had to make an application to the SEBI for grant of registration within a period of two months.

8. The date of submission of such application was later on extended to 31.3.2000.

9. The company failed to make any application with SEBI for registration of the collective investment schemes operated by it as per the Regulations.

10. Regulation 73 of the Regulations referred to above reads as hereunder:-

73. (1) An existing collective investment scheme which:

(a) has failed to make an application for registration to the Board; or

(b) has not been granted provisional registration by the Board; or

(c) having obtained provisional registration fails to comply with the provisions of regulation 71; shall wind up the existing[collective investment scheme].

(2) The existing Collective Investment Scheme to be wound up under sub-regulation (1) shall send an information memorandum to the investors who have subscribed to the [collective investment scheme]s, within two months from the date of receipt of intimation from the Board, detailing the state of affairs of the

[collective investment scheme], the amount repayable to each investor and the manner in which such amount is determined.

(3) The information memorandum referred to in sub-regulation (2) shall be dated and signed by all the directors of the [collective investment scheme].

(4) The Board may specify such other disclosures to be made in the information memorandum, as it deems fit.

(5) The information memorandum shall be sent to the investors within one week from the date of the information memorandum.

(6) The information memorandum shall explicitly state that investors desirous of continuing with the [collective investment scheme] shall have to give a positive consent within one month from the date of the information memorandum to continue with the [collective investment scheme].

(7) The investors who give positive consent under sub-regulation (6), shall continue with the [collective investment scheme] at their risk and responsibility :Provided that if the positive consent to continue with the [collective investment scheme], is received from only twenty-five per cent or less of the total number of existing investors, the [collective investment scheme] shall be wound up.

(8) The payment to the investors, shall be made within three months of the date of the information memorandum.

(9) On completion of the winding up, the existing collective investment scheme shall file with the Board such reports, as may be specified by the Board.

11. The company was intimated about its obligations under Regulation 73(2) vide letter dated 15.12.1999 and 29.12.1999 as also by way of public notice dated 10.12.1999.

12. On 22.2.2000, SEBI, by way of public notice informed the company that all companies carrying out Collective Investment Schemes which had not made any application for grant of registration or were not desirous of obtaining provisional registration were required to compulsorily wind up their existing schemes in terms of Regulation 73.

13. As the allegation stands, the company of which the petitioner was director (claims to be a director for a short period from 1.1.1998 to 25.7.1998) neither applied for registration under the Regulation referred to above nor took any steps for winding up the schemes and repayment to the investors as provided under the Regulations and, therefore, the company had violated the provisions of Sections 11B, 12(1B) of the SEBI Act, 1992 and Regulation 5(1)(b) read with Regulations 68(1), 68(2), 73 and 74 of the Act.

14. For ready reference and for the sake of completeness, Regulation 5(1) and Regulations 68, 73 and 74 are being reproduced hereunder:-

“5. (1) Any person who immediately prior to the commencement of these regulations was operating a 15[collective investment scheme], shall subject to the provisions of Chapter IX of these regulations make an application to the Board for the grant of a certificate within a period of two months from such date.

68. (1) Any person who has been operating a collective investment scheme at the time of commencement of these regulations shall be deemed to be an existing collective investment scheme and shall also comply with the provisions of this Chapter.

Explanation : The expression ‘operating a collective investment scheme’ shall include carrying out the obligations undertaken in

the various documents entered into with the investors who have subscribed to the [collective investment scheme].

(2) An existing collective investment scheme shall make an application to the Board in the manner specified in regulation 5.

(3) The application made under sub-regulation (2) shall be dealt with in any of the following manner:

(a) by grant of provisional registration by the Board under sub-regulation (1) of regulation 71;

(b) by grant of a certificate of registration by the Board under regulation 10;

(c) by rejection of the application for registration by the Board under regulation 12.

73. (1) An existing collective investment scheme which:

(a) has failed to make an application for registration to the Board; or

(b) has not been granted provisional registration by the Board; or

(c) having obtained provisional registration fails to comply with the provisions of regulation 71; shall wind up the existing [collective investment scheme].

(2) The existing Collective Investment Scheme to be wound up under sub-regulation (1) shall send an information memorandum to the investors who have subscribed to the [collective investment scheme]s, within two months from the date of receipt of intimation from the Board, detailing the state of affairs of the [collective investment scheme], the amount repayable to each investor and the manner in which such amount is determined.

(3) The information memorandum referred to in sub-regulation (2) shall be dated and signed by all the directors of the [collective investment scheme].

(4) The Board may specify such other disclosures to be made in the information memorandum, as it deems fit.

(5) The information memorandum shall be sent to the investors within one week from the date of the information memorandum.

(6) The information memorandum shall explicitly state that investors desirous of continuing with the [collective investment scheme] shall have to give a positive consent within one month from the date of the information memorandum to continue with the[collective investmentscheme].

(7) The investors who give positive consent under sub-regulation (6), shall continue with the[collective investment scheme] at their risk and responsibility :Provided that if the positive consent to continue with the[collective investment scheme], is received from only twenty-five per cent or less of the total number of existing investors, the [collective investment scheme] shall be wound up.

(8) The payment to the investors, shall be made within three months of the date of the information memorandum.

(9) On completion of the winding up, the existing collective investment scheme shall file with the Board such reports, as may be specified by the Board.

74. An existing collective investment scheme which is not desirous of obtaining provisional registration from the Board shall formulate a scheme of repayment and make such repayment to the existing investors in the manner specified in regulation 73.”

15. A public notice in the newspaper was issued by SEBI on 31.3.2000 inviting the attention of the company to the aforesaid position. Another notice dated 12.5.2000 was issued calling upon to show cause as to why action be not initiated against the company for its violation of the law in this regard.

16. The company neither responded to the said public notice nor the subsequent show cause notice.

17. The company, therefore, in the year 2000 was directed to refund the money collected under the CIS Scheme within a period of one month.

18. The complaint alleges that the company had raised a total amount of Rs.0.885 crores and had failed to repay the amount to the investors causing huge pecuniary losses to them.

19. The complaint, therefore, came to be filed on 22.5.2002 against the company and its directors including the petitioner for violation of Section 11B, 12(1B) of the SEBI Act, 1992 read with Regulation 5(1), 68(1), 68(2), 73 and 74 of the SEBI (CIS Scheme Regulations, 1999) which is punishable under Section 24(1) and Section 27 of the SEBI Act, 1992.

20. The petitioner while praying for discharge submitted that she was the director of the company from 1.1.1998 to 25.7.1998 which period was much before the alleged violations. In support of her contention the petitioner relied upon Form 32 and the minutes noting which indicate that the petitioner resigned from the Board of Director on 25.7.1998 (P2 to the petition).

21. Be it noted that Form 32 referred to above was filed with the Registrar of Companies on 22.9.2004 i.e. after the complaint was lodged against the company.

22. It was further submitted on behalf of the petitioner that she was not a director of the company when the notification of the year 1999 came into existence. The other ground taken by the petitioner is that in

a complaint case filed by the Registrar of the Companies against M/s.Assured Agro Park Ltd for non filing of the annual return and the balance sheet of the year 1997-98, one of the directors, who has been arraigned as an accused in the present case, was acquitted on the ground that he had resigned from the company in the year 1998, i.e. prior to the date when the balance sheet and the annual return of the company had to be filed.

23. The learned counsel appearing for SEBI countered such an argument and referred to Section 12(1B) of the Act, one of the sections which was violated by the accused persons including the petitioner. The aforesaid section namely Section 12(1B) which prohibit sponsoring or carrying on of any CIS without obtaining certificate of registration from the board, was notified on 25.1.1995 i.e. even prior to the petitioner being inducted in the board of the company as a Director or her resignation.

24. It was further argued that Form 32 which was relied upon by the petitioner was filed with the ROC on 22.9.2004 i.e. after the lodging of the complaint. It was submitted that the resignation of the petitioner on a particular date is a disputed question of fact and the same could not have been relied upon for discharging the petitioner from the case.

25. A reference was made to various unreported decisions in which it was held that though Form 32 is a public document but it is required to be proved in evidence if it has to be accepted as a defence of the accused. Submission of Form 32, therefore, could not have absolved the petitioner of the charges at the threshold, subject to the framing of the charges.

26. From the perusal of Form 32 (P2 to the petition), it would appear that the same was filed with the Registrar of Companies much later than the filing of the complaint. It is a matter of common knowledge that such form could be filed by ROC even after sufficient lapse of time after paying nominal fee or fine. In such circumstances, the petitioner was on the board of the company as a director and whether she participated in the day to day functioning of the company remains a disputed question of fact which could only be thrashed out or settled in a full fledged trial.

27. In *Vishnu Prakash Bajpai vs. Securities and Exchange Board of India*, 2010 (2) Crimes 394, the Supreme Court held that the offences punishable under Section 24 of the Act is a continuous offence i.e till the time the company complies with the Regulations and directions issued by SEBI by refund of money to the investors.

28. Now the issue is as to when an accused shall be discharged.

29. Section 239 of the Code of Criminal Procedure provides that if the charge against an accused is found to be groundless, he would be discharged by the Court. At the stage of framing of the charges, no detailed discussion or in-depth enquiry is to be made. What is required to be seen by the Court while framing charges is whether on the complaint or the materials before the Court, a prima facie case under the sections charged is made out or not.

30. At the time of framing of charges, any material brought forward by an accused is not to be taken unless such material is of impeachable quality and nature and is so sterling that it can never be doubted upon.

31. In *State of Orissa vs. Debendra Nath Padhi*, (2005) 1 SCC 568, the Supreme Court while considering whether the Trial Court, at the time of framing of charges can consider materials filed by the accused. The question was answered in the negative. Paras 18 and 23 of the said judgment reads as under:-

“18. We are unable to accept the aforesaid contention. The reliance on Articles 14 and 21 is misplaced...Further, at the stage of framing of charge roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini trial at the stage of framing of charge. That would defeat the object of the Code. It is well-settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the learned Counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea of alibi taken by the accused may have to be examined at the stage of framing of charge if the contention of the accused is accepted despite the well settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would be entitled to produce materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention out forth on behalf of the accused. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the accused as postulated by Section 227 is to be understood. It only means hearing the submissions of the accused on the record of the case

as filed by the prosecution and documents submitted therewith and nothing more. The expression 'hearing the submissions of the accused' cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the state of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police.

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23. As a result of aforesaid discussion, in our view, clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce any material.”

32. The petitioner would get the opportunity at the trial for proving that she was not at all concerned with the affairs of the company, much less, day to day affairs of the company and whatever violation of the Act is alleged was not in her knowledge.

33. On the basis of the aforementioned discussion, no interference is required with the order dated 19.11.2012 refusing to discharge the petitioner.

34. The petition is dismissed.

ASHUTOSH KUMAR, J

July 21, 2015

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