IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE JURISDICTION
CRIMINAL WRIT PETITION NO. 4223 OF 2016

Radheshyam Surajmal Khandelwal and another ….Petitioners

Vs.

Security and Exchange Board of India and another …. Respondents

Mr. Ram Upadhyay i/b Law Competere Consultus
Advocate for Petitioners
Ms. Omprakash Jha i/b The Law Point for Respondent SEBI
Mr. S. R. Agarkar APP for the State.

CORAM: SMT.SADHANA S.JADHAV, J.
DATED : 20th APRIL, 2017.

P.C.

1) Heard.

2) Rule. Rule made returnable forthwith with the consent of the parties.

3) Petitioners herein are facing prosecution for offence punishable under sections 24 & 27 of Security and Exchange Board of India Act (Hereinafter referred as 'SEBI') in SEBI Special Case No. 58 of 2014 pending before 22nd Sessions Court at Mumbai. Petitioners are seeking relief of quashing of SEBI

Special Case (Complaint) No. 58 of 2014. Respondent no. 1 has filed a complaint before additional Chief Metropolitan Magistrate, 8th Court, Esplanade Mumbai alleging therein that petitioners herein are the directors of a company namely 'Green Eco Bond, Green Orchards Schemes, Green Eco Bond-II'. That they had raised an aggregate amount of Rs. 7,58,07,500/- from the general public. That original accused no. 1 namely Green Agro Products Ltd had mobilized the said scheme and had gained trust of about 10,628 investors. Accused no. 1 had filed information regarding investors and details of accounts with SEBI. It was incumbent upon the company to comply with the provisions of Chapter 9 and make an application to SEBI for grant of registration within a period of two months from the date of modification of the regulations. Accused no. 1 had failed to make any application with SEBI for registration of collective investment schemes being operated by it as per the regulations. Regulation no. 73 (1) contemplated that if an application was not made for registration with SEBI, the company had to wind up the existing collective investment schemes and repay the amounts collected from the investors. SEBI had informed accused no. 1 that section 73 (1) casts an obligation upon the company to provide the requisite information to all the investors and also to inform them that they are entitled for repayment of amount deposited by them. Accused no. 1 had violated the regulations of SEBI. SEBI was constrained to issue public notice to invite the attention of the scheme floated by accused no. 1 and had also informed him about the same. A show cause notice was issued to the effect that upon failure to abide by the regulations of the SEBI, the company would be liable as per the penal provisions of the Statute. SEBI exercised powers under section 11 (b) of the SEBI Act and had directed the accused no. 1 to refund the amount to the investors. Accused no. 1 had not responded to the accused. The complainant had referred to show that accused no. 1 had raised a total amount of Rs. 7.50 Crores as per its own admission.

4) Complainant SEBI in para no. 18 of the complaint has contended as follows:

> "*In view of the above, it is charged that the Accused No. 1 to 4 have committed the violation of Sec.12 (1B) of Securities and Exchange Board of India Act, 1992 and Reg.5 (1) read with Reg. 68 (1), 68 (2), 73 and 74 of the Securities and Exchange Board of India (Collective*

Investment Schemes) Regulations, 1999 which is punishable under Sec. 24 (1) of Securities and Exchange Board of India Act, 1992. The Accused No. 2 to 4 are the directors and/or 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 Sec. 27 of Securities and Exchange Board of India Act, 1992".

5) It is in these circumstances that present petitioners who are original accused nos. 3 & 4 are seeking discharge from the said special case. It is contended by the petitioners that it is admitted that they are the directors of the company. It is contended by the petitioners that accused no. 3 is father of accused no. 2 who is Managing Director of accused no. 1 and accused no. 4 is wife of accused no. 2. It is submitted that accused no. 3 is 83 years old and is suffering from old age ailments. It is also submitted that accused/petitioners are family members of accused no. 2 and that they have been appointed only to complete the quorum of directors as contemplated under the Companies Act. It is also contended that in the complaint, there is no specific averment against the present petitioners and the allegations are levelled against them in

a mechanical manner and therefore, they deserve to be discharged. According to the petitioners, offence was committed by original accused no. 1 of which they had no knowledge and therefore, they deserve to be discharged. Petitioners had filed an application under section 245 of Code of Criminal Procedure, 1973 seeking discharge. The learned Sessions Judge has rejected the said application by an order dated 25/10/2016 and hence, this petition.

6) The learned counsel for the petitioners submits that provisions in the SEBI Act, more particularly section 27 are *para materia* to the provisions under section 141 of the Negotiable Instruments Act. The learned counsel has placed implicit reliance upon the Judgment of the Hon'ble Apex Court in the case of **S.M.S. Pharmaceuticals Ltd V/s. Neeta Bhalla and Anr. [A.I.R. 2005 SC 3512]** and which reads thus:

> “*Section* 203 *of the Code empowers a Magistrate to dismiss a complaint without even issuing a process. It uses the words "after considering" and "the Magistrate is of opinion that there is no sufficient ground for proceeding". These words suggest that the Magistrate has to apply his mind to a complaint at the initial stage itself and see whether a case is made out against the accused persons*

> *before issuing process to them on the basis of the complaint. For applying his mind and forming an opinion as to whether there is sufficient ground for proceeding, a complaint must make out a prima facie case to proceed. This, in other words, means that a complaint must contain material to enable the Magistrate to make up his mind for issuing process".*

7) According to the learned counsel, in the present case, the learned Magistrate has issued process mechanically against the proposed accused persons without applying his mind as to whether a sufficient cause was made out to issue process against the present petitioners also. The learned counsel has drawn the attention of this Court to paragraph 10 of the said Judgment which reads as follows:

> "*The conclusion is inevitable that the liability arises on account of conduct, act or omission on the part of a person and not merely on account of holding an office or a position in a company. Therefore, in order to bring a case within Section* 141 *of the Act the complaint must disclose the necessary facts which make a person liable".*

8) The learned counsel for the respondent has filed an affidavit contending therein that the directors of a company have fiduciary relation with the company. That present petitioners are squarely covered under the ambit and purview of provisions of section 27 of the SEBI Act and therefore, they are responsible to the conduct of the business of accused no. 1 company.

9) The learned counsel for the petitioner has then placed implicit reliance upon the judgment of the Hon'ble Apex Court in the case of **Ramrajsingh Vs. State of M.P. And Anr [2009 (4) BomCR 213]** and has drawn the attention of this Court to para 7 & 8 which reads as follows:

> "*7. This provision clearly shows that so far as the companies are concerned if any offence is committed by it then every person who is a Director or employee of the company is not liable. Only such person would be held liable if at the time when offence is committed he was in charge and was responsible to the company for the conduct of the business of the company as well as the company. Merely being a Director of the company in the absence of above factors will not make him liable.*
>
> *8. To launch a prosecution, therefore, against the alleged Directors*

there must be a specific allegation in the complaint as to the part played by them in the transaction. There should be clear and unambiguous allegation as to how the Directors are incharge and responsible for the conduct of the business of the company".

10) The learned counsel for the petitioner submits that the Judgment in the case of **Ramrajsingh** (*Cited Supra)* is the judgment by 3 Judges of the Hon'ble Apex Court and the observations made therein would prevail over any other subsequent judgment passed by the Hon'ble Apex Court.

11) The learned counsel submits that in the case of **S.M.S. Pharmaceuticals Ltd** (*Cited Supra)* three Judge Bench has ruled that it is a settled Law that at the time of issuing process, the Magistrate is required to see only the allegations in complaint and where the allegations in the complaint or the charge-sheet do not constitute an offence against the person, the complaint is liable to be dismissed.

12) The reason for contending that the Judgment of a Larger Bench would,

prevail over any other judgment of the Hon'ble Apex Court was that this Court had brought to the notice of the learned counsel for the petitioner, the Judgment of the Hon'ble Apex Court in the case of **Standard Chartered Bank Vs. State of Maharashtra and Oters Etc.** in Criminal Appeal Nos. 271-273 of 2016 delivered on 06/04/2016. The Hon'ble Apex Court has held that :

> “*...........that they are whole-time Director and Executive Director and they were in charge of day to day affairs of the Company, we are of the considered opinion that the High Court has fallen into grave error by coming to the conclusion that there are no specific averments in the complaint for issuance of summons against the said accused persons. We unhesitatingly hold so as the asseverations made in the complaint meet the test laid down in **Gunmala Sales Pvt. Ltd**”*.

13) Section 27 of the SEBI Act contemplates as follows:

> “*(1) 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 tobe 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.

Explanation : For the purposes of this section,

(a) — "company" means any body corporate and includes a firm or other association of individuals; and

(b) — "director", in relation to a firm, means a partner in the firm".

14) The section itself contemplates a deeming provision and the Legislature has laid down that every person who was incharge of and responsible to the company for the conduct of the business of the company at the time when the offence was committed, as well as the company shall be deemed to be guilty of the offence. **The said person in the capacity of a director shall be liable to be proceeded against and punished according to Law**. That the 3 Judge

Bench Judgment in the case of **Ramraj Singh** *(Cited supra)* has held that :

> *"It is true that precise words from the provisions of the Act need not be reproduced and the court can always come to a conclusion in facts of each case"*.

15) This Court is of the opinion as in the present situation, it would not be open to this court to interpret the mandatory deeming provision in the Statute itself. These are rebuttable presumptions and the same can be rebutted at the time of recording of evidence. It would not be appropriate to exonerate the accused, only upon considering mechanically, that the complainant has not ascribed any specific role to the particular accused persons. That by virtue of being director, Statutory provision would not render any person liable to be punished if he proves that offence was committed without his knowledge or that he had exercised due diligence to prevent the commission of the offence. In short, the onus shifts on the accused to disprove the allegations.

16) In a company, passing of resolutions and specific responsibility in the conduct of the business are inhouse proceedings and the complainant would

be in no position to ascertain the same at the time of filing of the complaint. Hence, the directors would be liable to be prosecuted by virtue of deemed mandatory provisions and it would be open to them to rebut the same at the time of trial.

17) This Court is of the opinion that the accused cannot get a complaint quashed merely on the ground that apart from the basic averment, no particulars are given in the complaint about his role because ordinarily the basic averment would be sufficient to send him to trial and specific role to be attributed to him could be a matter of substantive evidence. The director is to make out the case that would suggest that taking the averments in the complaint by itself and sending him to trial would be an abuse of process of Law. In view of the deeming provision, complaint cannot be quashed for the asking and that it is incumbent upon the courts to follow the statutory provisions and take the intention of Legislature to its logical end. It is in these circumstances that the Court is of the opinion that no case is made out for quashing the complaint.

18) Hence, writ petition stands dismissed.

19) Rule is discharged.

(SMT. SADHANA S. JADHAV, J.)