IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.12.2018

PRONOUNCED ON : 28.02.2019

CORAM:

THE HONOURABLE MR.JUSTICE B.PUGALENDHI

Crl.O.P.No.18852 of 2010

1.M/s.Kalrayan Teak Plantations P Ltd.,
Having its registered office at
Plot No.45, Rajeswari Illam Via Dobiganna,
Krishna Nagar West,
Lawspet PO,
Pondicherry - 605008.

2.A.R.Vaithianathan

3.S.Swaminathan ...Petitioners/Accused 1 to 3

Vs

The Securities and Exchange Board of India,
Rep. by its Assistant General Manager,
S.V.Divya ...Respondent

PRAYER: Petition filed under Section 482 of the Code of Criminal Procedure, to call for the records in C.C.No.10508 of 2003 on the file of the 5th Sessions and Fast Track Court No.5, Chennai and quash the same.

For Petitioners: Mr.Sudharshana Sundar

For Respondent : Mr.K.Balamurali
For M/s.Shivakumar & Suresh

ORDER

The accused in C.C.No.10508 of 2003 on the file of the Fast Track Court No.5, Chennai, have filed this quash application to quash the complaint pending against them.

2. The complaint was filed by the respondent herein as against the accused for the violation of Sections 11B, 12(1B) of Securities and Exchange Board of India (hereinafter referred to as 'SEBI') Act, 1992 and Regulation 5(1) read with Regulations

68(1), 68(2), 73 & 74 of the SEBI (Collective Investment Schemes) Regulations, 1999, which is punishable under Section 24 (1) of the SEBI Act, 1992.

3. According to the complainant, the first accused Company was promoting a Collective Investment Scheme and raised an aggregate amount of nearly Rs.0.087 Crores from the general public. The Government of India, in order to regulate the Collective Investment Schemes such as Agro Bonds, Plantation Bonds, etc, both from the point of view of investor protection as well as promotion of legitimate investment activity, asked SEBI to formulate the regulations and accordingly, SEBI had notified regulations for regulating the activities of Collective Investment Scheme titled as SEBI (Collective Investment Schemes) Regulations, 1999. Based on this, the first accused Company had filed the informations with SEBI regarding its Collective Investment Schemes. SEBI vide its letter dated 15.12.1999 and by way of public notice dated 10.12.1999 gave intimation to the first accused Company directing it to send the information / memorandum to all the investors detailing the state of affairs of the Schemes; the amount repayable to each investor and the manner in which such amount is determined. The time was extended upto 31.03.2000. But, the first accused Company failed to make any such application with SEBI for registration of the Collective Investment Schemes as required under the regulations.

4. As per the terms of Regulation 73(1), all existing Collective Investment Schemes, which fail to make an application for registration with SEBI, shall wind up their existing Collective Investment Schemes and shall repay the amounts collected from the investors. As per Regulation 74, the Company has to formulate a scheme of repayment and make such repayment to the existing investors in the manner specified under Regulation 73. The first accused Company neither applied for registration nor took any steps for winding up of the schemes and repayment to the investors as provided under the regulations and as such, they had violated the provisions of Section 12(1B) of SEBI Act, 1992 and Regulation 5(1) read with Regulations 68 (1), 68(2), 73 & 74 of the SEBI (Collective Investment Schemes) Regulations, 1999.

5. The petitioners have filed the present application before this Court stating that it is a small Company and its investors are only friends and relatives and the total corpus fund collected by the Company is only Rs.8,71,620/-. The Company is not eligible for registration as per the Regulations, as their net worth is below five Crores and that there is no complaint, whatsoever, from any of the investors, as such the complaint is liable to be quashed.

6. Heard the learned Counsel appearing on either side.

7. The learned Counsel for the petitioners submitted that the regulation was issued only in the year 1999 and their Company is in existence from 1994 and upon the regulation, they have intimated SEBI about their intention to wind up and they have also repaid most of its investors and the balance to be paid is only Rs.25,000/- and they are also willing to pay the same. He further submitted that the Company had submitted an audited balance sheet as a proof of winding up, but the same was not considered and there is no complaint, whatsoever, from any share holders and they have taken every steps to repay their customers and also wind up the scheme. Therefore, the learned Counsel prays for allowing the present application.

8. The learned Counsel further submitted that the second petitioner / A.R.Vaithianathan is not a Director of the Company as per the Form No.32, as he had resigned from the post of Directorship on 30.08.1999 itself and one N.Thirunavukarasu was appointed as Managing Director and the respondent, without verifying the status of the Company, filed the complaint mechanically, without even arraying the Managing Director, namely, N.Thirunavukarasu as accused.

9. Per contra, the learned Counsel for the respondent submitted that in terms of Regulation 73(1), an existing Collective Investment Scheme has to be registered with SEBI and if they fail to make an application for registration, they shall formulate a scheme of repayment and shall make such repayment to the existing investors as per Regulation 74. The first petitioner Company neither applied for registration under the said regulations nor took any steps for winding up of the schemes and repayment to the investors as provided under the regulation and as such, had violated the provisions of Section 12(1B) of SEBI Act, 1992 and Regulation 5(1) read with Regulations 68(1), 68(2), 73 & 74.

10. He further submitted that the petitioners, in the absence of taking steps for registration or winding up of the scheme, the details of the depositors / investors cannot be ascertained and it cannot be accepted that the petitioners have repaid the entire depositors and it is only Rs.25,000/- liable to be repaid.

11. Learned Counsel for the respondent had also relied upon the decision of the Delhi High Court reported in CDJ 2011 DHC 1805, wherein, it is has been held as follows:

> "18. ...In terms of Regulation 5(1), the Appellant was bound to make an application for grant of certificate within two weeks from the date of coming

into force of the Regulation which mandatory requirement was not complied with by the Appellants. They did not even comply with Regulation 74 which provided for the procedure as contemplated under Regulation 73 to formulate the scheme of re-payment. Merely writing to the Respondent that the Appellant was desirous of taking benefit of scheme under Section 12(1B), the Appellant was not absolved from the further liabilities.”

12. Admittedly, the first accused Company is not having transaction upto five Crores and therefore, they cannot be registered under the Regulations. In such an event, they ought to have submitted a scheme before the complainant, as required under Regulation 74 and therefore, they have committed the violations and they are liable to be prosecuted under the provisions of Section 12(1B) of SEBI Act, 1992 and Regulation 5 (1) read with Regulations 68(1), 68(2), 73 & 74 of the SEBI (Collective Investment Schemes) Regulations, 1999.

13. As regards the second petitioner, the learned Counsel for the petitioners, relying upon the Form No.32, had submitted that the second petitioner resigned from Directorship as early as on 30.08.1999 and only thereafter, the Regulation came into effect. Therefore, the offence for not registering and for not submitting the scheme based on the regulations cannot be attributed to the second petitioner, who already resigned from the post of Directorship from the Company.

14. Though the second petitioner resigned on 30.08.1999 itself, the deposits have been collected prior to that. In this regard, the Hon'ble Supreme Court in SMS Pharmaceuticals Ltd., v. Neeta Bhalla and others, reported in 2005 (8) SCC 89 has held that a clear, unambiguous and specific allegation against a person impleaded as an accused that he was in charge of and responsible to the company in the conduct of its business at the material time when the offence was committed is sufficient. This issue was also considered by the Hon'ble Supreme Court in N.Rangachari v. BSNL, reported in 2007 Cri.L.J 2448, wherein, it has been held as follows:

“13. A Company, though a legal entity, cannot act by itself but can only act through its directors. Normally, the Board of Directors act for and on behalf of the company. This is clear from Section 291 of the Companies Act which provides that subject to the provisions of that Act, the Board of Directors of a Company shall be entitled to exercise all such powers and to do all such acts and things as the Company is authorized to exercise and do. Palmer described the position thus:

> “A company can only act by agents, and usually the persons by whom it acts and by whom the business of the company is carried on or superintended are termed directors. ...””

15. If the said N.Thirunavukarasu is the Managing Director during the relevant point of time and is also responsible for the offence, as contended by the petitioner, and if there are materials to substantiate the same, it is for the trial Court to add him as an accused in the case, as per Section 319 of the Criminal Procedure Code, after satisfying itself as to his involvement, during the course of trial.

16. In view of the foregoing discussions and also taking into account the decision of the Hon'ble Supreme Court, as discussed supra, this Court is not inclined to entertain the present criminal original petition and the same is accordingly, dismissed. The Calender Case is of the year 2003 and therefore, the learned Judge is directed to expedite the proceedings and complete the same, as expeditiously as possible.

gk

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To
The 5th Sessions Judge,
Fast Track Court No.5,
Chennai.

Crl.O.P.No.18852 of 2010

Kak(06/05/2019)