IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : Code of Criminal Procedure, 1973

CRL.M.C. 1170/2005 and CRL.MA 3661/2005

Date of decision: 6th February 2008

COL. B.S.SARAO .....Petitioner
Through Mr. Ravi P. Prakash, Mr. Varun Agarwal and Mr. Vikrant Ghumare, Advocates.

versus

SECURITIES AND EXCHANGE BOARD OF INDIA .... Respondent
Through Mr. Sanjay Mann, Advocate.

CRL.M.C. 1172/2005 and CRL.MA 3663/2005

K.S. CHEEMA .....Petitioner
Through Mr. Ravi P. Prakash, Mr. Varun Agarwal and Mr. Vikrant Ghumare, Advocates.

versus

SECURITIES AND EXCHANGE BOARD OF INDIA .... Respondent
Through Mr. Sanjay Mann, Advocate.

CRL.M.C. 1397/2005 and CRL.MA 4021/2005

SMT. PARMINDER JEET KAUR ..... Petitioner
Through Mr. Ravi P. Prakash, Mr. Varun Agarwal and Mr. Vikrant Ghumare, Advocates.

versus

SECURITIES AND EXCHANGE BOARD OF INDIA .... Respondent
Through Mr. Sanjay Mann, Advocate.

CRL.M.C. 1458/2005 and CRL.MA 4106/2005

S. PRITAM SINGH .....Petitioner
Through Mr. Ravi P. Prakash, Mr. Varun Agarwal and Mr. Vikrant Ghumare, Advocates.

versus

SECURITIES AND EXCHANGE BOARD OF INDIA .... Respondent
Through Mr. Sanjay Mann, Advocate.

CRL.M.C. 2756/2005 and CRL.MA 6516/2005

S.S.WALIA .....Petitioner
Through Mr. Ravi P. Prakash, Mr. Varun Agarwal and Mr. Vikrant Ghumare, Advocates.

versus

SECURITIES AND EXCHANGE BOARD OF INDIA ..... Respondent
Through Mr. Sanjay Mann, Advocate.

CRL.M.C. 3278/2005 and CRL.MA 7190/2005

SMT. GURBANS KAUR GOSAL ..... Petitioner
Through Mr. Ravi P. Prakash, Mr. Varun Agarwal and Mr. Vikrant Ghumare, Advocates.

versus

SECURITIES AND EXCHANGE BOARD OF INDIA .... Respondent
Through Mr. Sanjay Mann, Advocate.

CRL.M.C. 3282/2005 and CRL.MA 7195/2005

SH. G.S. GOSAL .....Petitioner
Through Mr. Ravi P. Prakash, Mr. Varun Agarwal and Mr. Vikrant Ghumare, Advocates.

versus

SECURITIES AND EXCHANGE BOARD OF INDIA .... Respondent
Through Mr. Sanjay Mann, Advocate.

CRL.M.C. 3286/2005 and CRL.MA 7204/2005

SH. H.S. GOSAL .....Petitioner
Through Mr. Ravi P. Prakash, Mr. Varun Agarwal and Mr. Vikrant Ghumare, Advocates.

versus

SECURITIES AND EXCHANGE BOARD OF INDIA .... Respondent
Through Mr. Sanjay Mann, Advocate.

and
CRL.M.C. 3287/2005 and CRL.MA 7211/2005

SH. K.S. GOSAL ..... Petitioner
Through Mr. Ravi P. Prakash, Mr. Varun Agarwal and Mr. Vikrant Ghumare, Advocates.

versus

SECURITIES AND EXCHANGE BOARD OF INDIA .... Respondent
Through Mr. Sanjay Mann, Advocate.

Dr. S. Muralidhar, J. (open court)

1. These petitions under Section 482 of the Code of Criminal Procedure, 1973 (`CrPC") seeking the quashing of criminal complaints filed against several plantation companies by the Securities and Exchange Board of India (SEBI) for offences under Sections 11-B, 12 (1-B) read with Section 24 of the Securities and Exchange Board of India Act, 1992 (`SEBI Act") read with Regulations 5(1), 68(1), 68(2), 73 and 74 of the Securities and Exchange Board of India (Collective Investment Schemes) Regulations, 1999 (`CIS Regulations"). These petitions raise common questions of law and are, therefore, being disposed of by this common judgment.

2. In the early 1990s, a large number of plantation companies came to be incorporated. Each of them promised attractive returns to persons prepared to invest their monies in what were known as "collective investment schemes". When it transpired that many of these schemes were in fact non-starters, and the investors were not getting back their monies, the SEBI stepped in to formulate certain regulations. The corrective action received impetus from orders passed by this Court in writ petitions that were filed by the investors seeking redress. Among the directions issued by a Division Bench of this Court were those contained in an order passed on 22nd January 2002 in C.W. No.3352 of 1998 (S.D.Bhattacharya v. SEBI and Ors.), the relevant portion of which reads as follows: "Having regard to the affidavit of the SEBI affirming that the aforesaid companies have not complied with the orders, and for securing the interests of the investors we are of the view that their bank accounts ought to be frozen. We are also of the opinion that not only the bank accounts of the aforesaid companies should be frozen but the bank accounts of their Directors and Promoters should also be frozen with immediate effect. We order accordingly. The concerned banks shall freeze the accounts and carry out the directions forthwith. The bank shall route the compliance reports through the R.B.I. The SEBI shall publish the order in Indian Express, Hindustan Times, Hindu and Business Standard. A copy of this order be given to the counsel for the Reserve Bank of India so that this order should be circulated to the various banks for compliance. In case any of the affected companies claim that they are complying with the directions of this court, it will be open to them to approach SEBI with necessary proof of compliance of the orders of this court and also with the Rules and Regulations of the SEBI. The SEBI on being convinced that the company is complying with the directions of this Court and the rules and regulations, shall file an appropriate application for modification of the order."

3. The SEBI thereafter swung into action and filed a large number of criminal complaints in various courts. The present petitions under Section 482 CrPC arise out of the complaints filed against the Petitioners here in the courts of the Additional Chief Metropolitan Magistrate (ACMM), Delhi for the offences under the SEBI Act as indicated in the first paragraph of this judgment.

4. The averments in most of the complaints are more or less similar. There is a narrative of the background to the framing of the SEBI (Collective Investment Schemes) Regulations 1999 which was preceded by press releases issued by SBI requiring compliance with directives issued for furnishing information to SEBI by the plantation companies about the collective investment schemes floated by them.

5. The complaints, inter alia, narrate how the companies floating collective investment schemes, were required to make an application with the SEBI for registration of the scheme under Regulation 73 (1) and also furnish information to all the investors detailing the state of affairs of the scheme, the amount repayable

to each investor, and the manner in which such amount determined. Time for furnishing the information kept getting extended by SEBI from time to time.

6. Thereafter the complaint states as under: "13. However, the Accused no. 1 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 regulations and as such had violated the provisions of Sec. 11B, 12 (1B) of Securities and Exchange Board of India Act, 1992 and Reg. 5(1) r/w. Reg. 68(1) 68(2), 73 and 74 of the said regulations. 14. Subsequently, on March 31, 2000 SEBI issued a public notice in the newspapers inviting the attention of the Accused No. 1 to the aforesaid position. Further, a notice dated May 12, 2000 was issued to the Accused No. 1 calling upon it to show cause as to why the action as stated therein be not initiated against it for its violations of the aforesaid provisions of law. However, the accused no. 1 neither responded to the said public notice nor the subsequent show cause notice. Subsequently, the Accused No. 1 was reminded by show cause notice dated May 12, 2000 to wind up the schemes and repay the amounts to the investors. 15. On December 7, 2000 SEBI by exercising its powers conferred upon it under section 11 B of Securities and Exchange Board of India Act, 1992 directed the Accused no.1 to refund the money collected under the aforesaid collective investment schemes of the accused no. 1 to the persons who invested therein within a period of one month from the date of the said directions. A copy of the said directions of SEBI dated December 7, 2000 is enclosed and marked as Annexure-B."

7. Ultimately, when the non-compliance by the plantation companies continued SEBI decided to file these complaints. In all these complaints, the first accused is the company and the remaining accused are described "directors and/or persons in charge of and responsible to the accused No. 1 for the conduct of its business." A sample is para 18 of Criminal Complaint No. 1311 of 2002 which reads as under: "18. In view of the above, it is charged that the Accused no. 1 has committed the violation of Sec. 11B, 12 (1B) of Securities and Exchange Board of India Act, 1992 read with 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 8 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 in terms of Sec. 27 of Securities and Exchange Board of India Act, 1992."

8. The submissions of learned counsel for the petitioners, common to all the petitions, and a few peculiar to some of them, could be summed up as under: (i) The scheme of the SEBI Act as evident from a reading of Section 11-AA read with Sections 11-B, 11-C and 11 thereof postulates an enquiry being conducted by

SEBI into the affairs of the company. Since the commencement of the criminal proceedings against any person is a serious matter, a prior investigation into the affairs of the company is mandatory before a criminal complaint is filed. (ii) The complaints have been prepared and filed in a mechanical manner with bald allegations against all the Directors of the company without any particular reference to the role played by each Director in being responsible for the failure by the company to comply with the requirements of the SEBI Act and the CIS Regulations. (iii) The requirement of Section 27 of the SEBI Act is that the liability will fasten to a person who "at the time offence was committed" was in charge of the affairs and responsible to the company for the conduct of its business. The complaints are vague about the time of the commission of the offence. It is, however, not disputed that the offences are of a continuing nature. (iv) In many of these cases, individuals who have been arraigned as co- accused were either not associated with the company in question or they had ceased to be the Directors long before the complaint was filed or the offence came to the knowledge of the SEBI. In any event, no precise role has been assigned to any of these individuals who have been arraigned as co-accused in the alleged commission of the offence by the company.

9. Reliance inter alia is placed on the judgments of the Supreme Court as well as of this Court in Pepsi Foods v. Special Judicial Magistrate AIR 1998 SC 128, S.M.S. Pharmaceuticals v. Neeta Bhalla AIR 2005 SC 3512, G.S. Rajgarhia v. Air Force Naval Housing Board 2004 (3) JCC (NI) 236, Everest Advertising Pvt. Ltd. v. State 2005 (4) LRC 95 (Del) and Mahender Prasad Singh Ratra v. N.K. Metals 75 (1998) DLT 155.

10. Counsel for the Respondent SEBI, on the other hand points out that the latest position of law has been explained by the Supreme Court in N. Rangachari v. Bharat Sanchar Nigam Ltd. AIR 2007 SC 1682, where it has been pointed out as long as there are averments to the effect that the persons named in the complaint, are in charge of the affairs of the company and responsible to it for the conduct of its business, nothing further is required to be averred at that stage. He also relies on the recent order dated 13th August 2007 passed by this Court in Sushila Devi v. Securities and Exchange Board of India [in Criminal M.C. 5638-44/2005].

11. In order to appreciate the submissions of counsel, a reference may first be made to Section 27 SEBI Act which reads as under: "27. (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 to be 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."

12. The above provision is more or less similar to Section 141 of the Negotiable Instruments Act 1881 ("NI Act") which stipulates that where the offence has been committed by a company, every person in charge of the affairs of the company and responsible to it for the conduct of its business "at the time of offence was committed" would be deemed to be guilty of the offence. This presumption of guilt can, however, can be rebutted by such person if he can prove that it was committed without his knowledge. However, this stage arises only after the complainant has discharged the initial burden. 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 averred in the complaint 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."

13. In N. Rangachari, which was a case arising under the NI Act, the averment in the complaint read as under: "That accused No. 1 is a company incorporated under the Companies Act. Accused Nos. 2 and 3 are its Directors. They are incharge of and responsible to accused No. 1 for conduct of business of accused No. 1 Company. They are jointly and severally liable for the acts of accused No. 1." After referring to the earlier judgments in S.M.S. Pharmaceuticals v. Neeta Bhalla AIR 2005 SC 3512, Saroj Kumar Poddar v. State (NCT of Delhi) AIR 2007 SC 912, Monaben Ketanbhai Shah v. State of Gujarat AIR 2004 SC 4274, Rajesh Bajaj v. State of NCT of Delhi AIR 1999 SC 1216, Bilakchand Gyanchand Co. v. A. Chinnaswami AIR 1999 SC 2182 and Rajneesh Aggarwal v. Amit J. Bhalla AIR 2001 SC 518, the Supreme Court concluded in N. Rangachari as under (AIR p. 1682): "18. In the case on hand, reading the complaint as a whole, it is clear that the allegations in the complaint are that at the time at which the two dishonoured cheques were issued by the company, the appellant and another were the Directors of the company and were incharge of the affairs of the company. It is not proper to split hairs in reading the complaint so as to come to a conclusion that the allegations as a whole are not sufficient to show that at the relevant point of time the appellant and the other are not alleged to be persons incharge of the affairs of the company. Obviously, the complaint refers to the point of time when the two cheques were issued, their presentment, dishonour and failure to pay in spite of

notice of dishonour. We have no hesitation in overruling the argument in that behalf by the learned Senior Counsel for the appellant. 19. We think that, in the circumstances, the High Court has rightly come to the conclusion that it is not a fit case for exercise of jurisdiction under Section 482 of the Code of Criminal Procedure for quashing the complaint. In fact, an advertence to Sections 138 and 141 of the Negotiable Instruments Act shows that on the other elements of an offence under Section 138 being satisfied, the burden is on the Board of Directors or the Officers incharge of the affairs of the company to show that they are not liable to be convicted. Any restriction on their power or existence of any special circumstance that makes them not liable is something that is peculiarly within their knowledge and it is for them to establish at the trial such a restriction or to show that at the relevant time they were not incharge of the affairs of the company. Reading the complaint as a whole, we are satisfied that it is a case where the contentions sought to be raised by the appellant can only be dealt with after the conclusion of the trial."

14. Relying on N. Rangachari, this Court in Sushila Devi declined to quash the complaint holding that the complaint contained sufficient averments to attract the offence under the SEBI Act. The precise averments in the complaint read as under: "7. The accused No. 1 is a company registered under the provisions of the Companies Act and the accused No. 2 to 9 are the directors of the accused No. 1 company. The accused No. 2 to 9 are the persons incharge and responsible for the day to day affairs of the company and all of them were actively connived with each other for the commission of the offences."

15. In view of the decision in Sushila Devi which is on identical facts concerning a complaint by SEBI against a plantation company, and which follows the judgment of the Supreme Court in N.Rangachari, the inevitable conclusion is that the complaints in question do make out a prima facie case against the petitioners for the offences complained of under the SEBI Act.

16. It is possible that in individual cases, a person might be able to, in his or her defence, show that such person had ceased to be the Director at the time of the commission of the offence or that he or she was not associated with the company at all. But that would essentially be a matter for evidence.

17. It may be noticed at this stage that there have been instances where petitioners have, along with their petitions under Section 482 CrPC, filed in this Court certified copies of the Form 32 filed by them in terms of the Companies Act, 1956 to show that they have ceased to be the Directors of the company at the time of commission of the offence. The document being a public document which can be easily verified even on an inspection of the records of the company with the Registrar of Companies does not require elaborate evidence at the trial. One such

instance was a complaint filed by SEBI which was quashed by this Court by an order dated 30th January, 2008 in Crl. MC No. 2145/2006 (Virender Kumar Singh v. Securities and Exchange Board of India). This Court held that where a certified copy of a Form 32 is placed on record and despite sufficient opportunities SEBI has not been able to rebut it, then the said certificate ought to be accepted as constituting sufficient proof of the fact that the person ceased to be a person in charge of the affairs of the company at the time of the commission of the offence. This again would depend on the facts and circumstances of every case. As pointed out by this Court in J.N.Bhatia v. State 139 (2007) DLT 361 where a Form 32 is filed after the date of the issuance of the cheque that still would be a matter of leading evidence at the trial. If however, the Form 32 was filed before the issuance of the dishonoured cheque then such Form 32 can safely be acted upon to quash the complaint. A reference may also be made in this regard to the decision in Sarla Kumar v. Srei International Finance Ltd. 132 (2006) DLT 363.

18. It must be also pointed out that in relation to this aspect, counsel for the petitioners sought time to place on record in these proceedings the Form 32 in respect of some of the individuals who have arraigned as co-accused along with the company. However, counsel was unable to show any averment in the petitions to the effect that a Form 32 had in fact been filed in respect of such person before the date of the commission of the offence. This Court is not prepared to adjourn these cases only to enable the petitioners to now apply for a copy of the Form 32 and place it on record. If in fact there is such a Form 32 in respect of any individual, it can certainly be produced before the trial court by way of evidence in order to persuade the trial court to hold that the person concerned cannot be made liable for the offence in terms of Section 27 of the SEBI Act.

19. An attempt was made by counsel for the petitioner to show that the petition Crl.MC 2756/2005 was a case of mistaken identity. It was submitted that the petitioner Shri S.S. Walia was not associated with the accused company in question and that the person who was really the Director happened to have the same name by coincidence. However, counsel for SEBI pointed out that since no stay of trial had been granted by this Court, the trial proceeded and the case is now at the stage of final arguments. The Petitioner here was himself examined earlier. He has advanced before the trial court the defence which is now sought to be urged in these proceedings. Given the stage of the proceedings before the trial court, this Court is not inclined to interfere with the pending criminal proceedings.

20. For all of the aforementioned reasons, this Court does not find any ground having been made out in any of these petitions for interference in exercise of its powers under Section 482 CrPC. Accordingly the petitions and the applications are dismissed but there will be no orders as to costs. Any observation made in this

order will not influence the verdict that would be reached by the trial court in each of the cases upon an independent assessment of the evidence on record.

Sd/-
S. Muralidhar J.