(2007) 07 BOM CK 0002

In the Bombay High Court

Case No : Criminal Writ Petition No. 1867 of 2006

B.R. Bajaj and Others APPELLANT

Vs

State of Maharashtra and Another RESPONDENT

Date of Decision : 17-07-2007

Acts Referred:

Companies Act, 1956 — Section 56, 58, 60(3), 63, 63(1)
Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 482
Negotiable Instruments Act, 1881 (NI) — Section 138, 141, 141(1)
Securities and Exchange Board of India Act, 1992 — Section 3

Citation : (2009) 148 CompCas 636

Hon'ble Judges : B.H. Marlapalle, J

Bench : Single Bench

Advocate : N.S. Boparai, R.K. Panday and Sanjiv Punalekar, instructed by P.R.S. Legal, for the Appellant; S.V. Gajare and Manjula Rao, for the Respondent

Judgement

B.H. Marlapalle, J.—This petition filed under article 227 of the Constitution read with Section 482 of the Code of Criminal Procedure press for quashing the process issued in Criminal Case No. 764/S/2000 by the learned Additional Chief Metropolitan Magistrate, 37th court, Esplanade, Mumbai, for an offence punishable u/s 63 of the Companies Act, 1956.

2. M/s. Omega Ag-Seeds (India) Ltd. and M/s. Punjab Agro Industries Corporation (PAIC) signed a financial collaboration agreement on October 22, 1992 and as per the same PAIC was entitled to nominate three directors on the board of directors of Omega Ag-Seeds (India) Ltd. (hereinafter referred to as "the company") and accordingly the present petitioners came to be nominated by PAIC as its nominee directors on the board of the company. The petitioners are the public servants inasmuch as they are the employees of the Punjab State Government and PAIC being a State undertaking which agreed to be collaborated for the formation of the company came to be nominated as the directors.

3. The Securities and Exchange Board of India (SEBI) is a statutory body created

u/s 3 of the Securities and Exchange Board of India Act, 1992 See [1992] 75 Comp Cas (St.) 193, inter alia, to protect the interest of the general investors in securities and to promote the development of and regulate such securities and also to deal with all matters connected therewith or incidental thereto. The company floated a public issue of 30,00,000 equity shares of Rs. 10 each for cash at par, aggregating to Rs. 3,00,00,000 in terms of the prospectus dated April 11,1994 and the issue opened for subscription on May 16,1994, with the earliest closing date was May 19,1994. Section 56 of the Companies Act, 1956, stipulates that all material facts specified in Part-I of Schedule-II and the report specified in Part-II of that Schedule was set out in the prospectus. Accused No. 1 company being a joint venture project of Omega Ag-Seeds (India) Ltd., and the corporation and the company was required to disclose all material facts in the prospectus of the promoter-company. The promoter-company, was placed in caution list of RBI vide their caution advice No. 186 dated April 13, 1993. Accused No. 8, Mr. M.M. Parekh, is one of the directors of the promoter-company and is the sole proprietor of M/s. Mayur M. Parekh, accused No. 7 N. M. Parekh was also shown as one of the directors of accused No. 1 company and he is a partner in M/s. Ketan M. Parekh and both the firms are placed in the caution list of RBI as per the letter dated April 13, 1993. Accused Nos. 6 and 7 were the directors of accused No. 1 company at the material time and were also the directors of the promoter-company. The said company had dues to repay to the Bank of India for an amount of approximately Rs. 6,45,76,396.79. All this information was not disclosed in the public issue and, therefore, the SEBI filed the said complaint u/s 63 of the Companies Act, 1956 and impleaded the present petitioners as accused Nos. 2, 4 and 5.

4. Learned Counsel for the petitioners submitted that the petitioners are not responsible and in fact, they do not participate in the day-to-day management of accused No. 1 company and they being only nominee directors could not have been prosecuted u/s 63 of the Companies Act, 1956. They are being harassed in the complaint instituted by the SEBI and they being public servants had no role to play in the non-disclosure of information by accused No. 1 company or the other full time directors of the said company who have been impleaded as accused Nos. 3, 6, 7 and 8. Accused No. 3 is the managing director of accused No. 1 company. It is further pointed out that the complaint of the SEBI substantially against accused Nos. 6 to 8 and there is no material in the complaint implicating any of the petitioners in the alleged offence u/s 63 of the Companies Act, 1956. In support of these contentions learned Counsel for the petitioners has placed reliance on the following decisions:

(a) N.K. Wahi Vs. Shekhar Singh and Others, ;

(b) S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla [2006] 136 Comp Cas 268 (SC).

5. Mrs. Manjula Rao, learned Counsel appearing for the complainant-SEBI on the other hand submitted that so long as the petitioners have signed the prospectus inviting public money, they are liable to face prosecution and it is not necessary

that all the petitioners or any one of them is required to be involved in the day-to-day management of accused No. 1 company. Whether the petitioners or any of them had no role to play in suppressing the material information is an issue which will have to be decided on the basis of the evidence that may be placed before the learned Additional Chief Metropolitan Magistrate during the trial of the complaint and at this stage when triable case has been made out, it would not be permissible for this Court to invoke inherent powers u/s 482 of the Code of Criminal Procedure and set aside the process issued against the petitioners, urged learned counsel. She has relied upon the following enunciations:

(a) Radhey Shyam Khemka and Another Vs. State of Bihar, ;

(b) A.V. Mohan Rao and Another Vs. M. Kishan Rao and Another, .

6. Section 63 of the Companies Act, 1956, reads as under:

63. Criminal liability for mis-statements in prospectus.- (1) Where a prospectus issued after the commencement of this Act includes any untrue statement, every person who authorised the issue of the prospectus shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to fifty thousand rupees, or with both, unless he proves either that the statement was immaterial or that he had reasonable ground to believe, and did up to the time of the issue of the prospectus believe, that the statement was true.

(2) A person shall not be deemed for the purposes of this Section to have authorised the issue of a prospectus by reason only of his having given-

(a) the consent required by Section 58 to the inclusion therein of a statement purporting to be made by him as an expert, or

(b) the consent required by Sub-section (3) of Section 60.

7. Section 141 of the Negotiable Instruments Act, 1881, reads as under:

141. Offence by companies.-(1) If the person committing an offence u/s 138 is 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 offene and shall be liable to be proceeded against and punished accordingly. Provided that nothing contained in this Sub-section shall render any person liable to punishment 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.

Provided further that where a person is nominated as a director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(2) Notwithstanding anything contained in Sub-section (1), where any 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 that 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 and other association of individuals; and

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

8. It is clear that there is a distinction between the scheme of both the provisions and Section 63(1) of the Companies Act does not speak of the accused persons being in charge of the administration and day-to-day activities of an accused-company. On the other hand anybody who is the signatory to the shares issued, prima facie, comes within the ambit of Section 63(1) but subject to the exception u/s 63(2) of the Companies Act. However, going by the complaint as it is, it prima facie appears that there is no complaint attributed to any of the petitioners on suppression of material facts and substantially the complaint filed by the SEBI is against accused Nos. 6 to 8. Whereas accused No. 3 is the full time employee of accused No. 1 company. Hence, the issues raised by the petitioners in this petition require considerations.

9. Hence, rule. Respondent No. 2 waives service.

10. Rule to be heard peremptorily on October 31, 2007, at 3 p.m.

Interim relief in terms of prayer clause (c) but only against the present petitioners and the trial of the complaint against the other accused, including accused No. 1 shall continue during the pendency of this petition. The said trial is hereby expedited.

