

(2015) 09 DEL CK 0026
In the Delhi High Court
Case No : Criminal Rev. P. 455 of 2011

Kalptaru Agro Ltd.

APPELLANT

Vs

SEBI

RESPONDENT

Date of Decision : 23-09-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 216, 244, 245, 246
Securities and Exchange Board of India Act, 1992 — Section 11(B), 11B, 12(1B), 24, 24(1)

Citation : (2015) 234 DLT 259

Hon'ble Judges : Ashutosh Kumar, J

Bench : Single Bench

Advocate : Udit Mehra, for the Appellant; Sanjay Mann and R.K. Pillai, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Ashutosh Kumar, J—The petitioners are aggrieved by the order dated 6.9.2011 passed by the learned ASJ-01/Central/Delhi in CC No. 16/2010 whereby acting on an application preferred by the respondent, SEBI under Section 216 of the Code of Criminal Procedure, the learned Court below has converted the case, which was being tried as summons case, into a warrant case.

2. In order to appreciate the contention of the parties, it is necessary first to refer to the complaint lodged by the respondent, SEBI. The complaint alleged that accused no. 1 (petitioner no. 1) ran a collective investment scheme and raised an aggregate amount of Rs. 7.04 crores from the general public. Pursuant to SEBI press release dated 26th November, 1997 and public notice dated December 18, 1997, the petitioner company filed information/details with the SEBI (respondent) regarding the scheme.

3. It has been averred that in terms of Chapter IX of the SEBI (Collective Investment Schemes) Regulation 1999, any person who had been operating a collective investment scheme at the time of commencement of said regulation

would be deemed to be an existing collective investment scheme and would be required to comply with the provisions of Chapter IX. An application was required to be made to the SEBI for grant of registration within a period of two months from the date of notification of the said regulation.

4. The petitioner company made an application for registration on January 17, 2000 with SEBI as collective investment management company under the regulations. Since the petitioner company did not satisfy the eligibility criterion under the regulations, the application of the company was rejected by the SEBI and the fact of rejection was conveyed vide SEBI letter dated July 05, 2002. By the aforesaid letter (dated July 05, 2002), the petitioner company was made aware of the requirement of Regulation 73 which made it imperative for the company to wind up its existing collective investment schemes and to make repayment to the investors. On completion of the winding up and repayment to the investors, the company was again required to file a detailed report in a format specified by the SEBI within 3 1/2 months of the date of the information memorandum.

5. The petitioner company failed to comply with the aforesaid requirements prescribed under the said regulations and, therefore, they made themselves liable for being prosecuted for violation of provisions of sections 11B, 12(1B) of the SEBI Act, 1992 and Regulation 5(1) read with Regulations 68(1), 68(2), 73 and 74 of the said Regulations.

6. On February 10, 2003, the respondent SEBI, by exercising its powers conferred under Section 11B of the Act directed the petitioner company to refund the money collected under the Collective Investment Scheme to the persons who had invested, within one month from the date of such direction. No information was received by SEBI whether the petitioner company had complied with the directions and SEBI was of the opinion that the petitioner company had intentionally and with dishonest intentions evaded the repayment of amount collected by it from the investors.

7. Thus the petitioners were charged of violating the provisions of Section 11B, 12(1B) of SEBI Act, 1992 read with Regulation 5(1) read with Regulations 68(1), 68(2), 73 and 74 of the SEBI (Collective Investment Scheme) Regulation, 1999 which is punishable under Section 24(1) of the SEBI Act, 1992.

8. Be it noted that the other petitioners are the directors or persons in charge of and responsible for the running of the business of the petitioner company (petitioner No. 1).

9. Pursuant to the complaint lodged on 26.6.2003, a notice was framed on 31.3.2006 under Section 251 of the Code of Criminal Procedure. Thereafter the complainant/respondent produced CW-1 in the witness box on 7.5.2010 when he was partly cross examined on 24.11.2010. Before the case could proceed any further, an application was moved by the respondent complainant (SEBI) purportedly under Section 216 of the Code of Criminal Procedure on 15.2.2011

seeking to treat the case as warrant case and frame formal charges instead of trying the case in a summary manner wherein notices were framed under Section 251 of the Code of Criminal Procedure.

10. Acting on the above application, the learned Trial Court vide order dated 6.9.2011 converted the case into one under a warrant case and notified the case for pre-charge evidence for 14.10.2011. While passing the aforesaid order, the Court took note of the fact that by virtue of an amendment in the year 2002 in the SEBI Act, Section 24(1) was amended and the punishment prescribed was increased to ten years with fine which could extend to 25 crores rupees or with both in place of sentence for one year or with fine or with both. The Court was thus of the opinion that by virtue of amendment enhancing the punishment from one year to ten years and the amount of fine upto 25 crores, the case was to be tried as a warrant case and not a summons case.

11. The Trial Court also took note of the fact that the directions to the petitioner/accused company were issued on 10.2.2003 i.e. after the amendment in Section 24(1) of the Act and, therefore, the charges had to be framed formally after hearing the prosecution and taking all such evidence as would be produced in support of the prosecution under Section 244 of the Code of Criminal Procedure.

12. Challenging the aforesaid order, it was submitted on behalf of the petitioners that the respondent SEBI at the time of the filing of the criminal complaint was aware of the fact that there had been an amendment in Section 24 of the SEBI Act in the year 2002 but still made a prayer for issuance of summons and not treating the case as a warrant case. It was further argued that the proceedings commenced as if the case was a summons case, which proceeding continued from 2006 to 2011. It was argued that much belatedly, on 15.2.2011 i.e after eight years of filing of the complaint, an application was moved by the respondent under Section 216 of the Code of Criminal Procedure for amendment of the charge, which was wrongly allowed by the impugned order. It was further argued that since no charges were framed by the Trial Court, therefore, the application preferred by the respondent under Section 216 for amendment of charge was misconceived. The conversion of the summons case into a warrant case is only by virtue of Section 259 of the Code of Criminal Procedure. Section 259 of the Code of Criminal Procedure reads as hereunder:-

"Power of Court to convert summons-cases into warrant cases

When in the course of the trial of a summons-case relating to an offence punishable with imprisonment for a term exceeding six months, it appears to the Magistrate that in the interests of justice, the offence should be tried in accordance with the procedure for the trial of warrant- cases, such Magistrate may proceed to re-hear the case in the manner provided by this Code for the trial of warrant- cases and may recall any witness who may have been examined."

13. Thus a two pronged attack has been made against the order impugned

namely inordinate delay in making an application for getting the case tried as a warrant case and not as a summons case, despite the complainant respondent being aware of the amendment Act, 2002 and then also the prayer made in the complaint was for issuance of summons; and a misconceived application preferred by the respondent was allowed by the Trial Court.

14. Countering such arguments, learned advocate appearing for SEBI submitted that the company/petitioners were accused of sponsoring and causing to be sponsored collective investment scheme without obtaining registration from SEBI in violation of Section 12(1B) of the SEBI Act; non complying with and violating the provisions of the SEBI (Collective Investment Scheme) Regulation, 1999 and flouting the directions issued to them on 10.2.2003 under Section 11B of the SEBI Act. It was submitted that the petitioners were required to wind up the scheme which was being run by the company and had to submit a detailed and audited winding up and repayment report (hereinafter referred to as WRR) as required under Regulation 73 and 74 of the Collective Investment Scheme Regulation, 1999. This was necessary as the application of the company for registration with the SEBI was rejected on 29.6.2002 and the same was communicated vide letter dated 5.7.2002. Thus as per Regulation 73, the petitioner company was required to circulate information memorandum to its investors within two months from intimation and thereafter within a period of three months from the information memorandum, the investors had to be repaid and the company had to file the report with the SEBI. Since the prescribed WRR was not submitted, the petitioner company made themselves liable for being prosecuted under the SEBI Act.

15. The order impugned was thus sought to be defended on the ground that the complaint was filed after the amendment in the SEBI Act and, therefore, it was only a mistake in trying the aforesaid complaint as a summons case.

16. Section 24 of the SEBI Act reads as hereunder:-

24. Offences."

(1) Without prejudice to any award of penalty by the adjudicating officer under this Act, if any person contravenes or attempts to contravene or abets the contravention of the provisions of this Act or of any rules or regulations made thereunder, he shall be punishable with imprisonment for a term which may extend to [ten years, or with fine, which may extend to twenty- five crore rupees or with both].

(2) If any person fails to pay the penalty imposed by the adjudicating officer or fails to comply with any of his directions or orders, he shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to [ten years or with fine, which may extend to twenty-five crore rupees or with both]."

17. The aforesaid section was amended in the year 2002 by Act of 1959 of 2002

wherein instead of a sentence of one year and fine or with both was substituted with a sentence of 10 years or with fine which could extend to 25 crores of rupees or with both.

18. The complaint was lodged on 26.6.2003. The prayer made in the complaint read as follows:-

"The complainant hence prays this Honourable Court to summon the accused and punish them in strictest terms as provided by law in the interest of justice."

19. What was intended by the prayer was after hearing the prosecution and taking of evidence as may be produced in support of the prosecution, if the Court was of the opinion that the offence was committed, the accused persons to be tried and for that purpose charges be framed against them. Merely because the word "summons" was used in the prayer of the complainant, the Court ought not to have treated it as a summons case and the same ground cannot be taken by the petitioner for challenging the order impugned.

20. For trial of warrant cases which are instituted otherwise than on a police report the provisions of Section 244 to 247 have been provided.

21. 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.

22. 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.

23. 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.

24. 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."

25. 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 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.

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."

26. Thus the complaint lodged by the respondent for violation of the provisions of sections 11(B), 12(1B) of the SEBI Act, 1992 read with Regulation 5(1) read with Regulation 68(1), 68(2), 73 and 74 of the SEBI (CIS Regulations, 1999), punishable under Section 24(1) of the SEBI Act, was in the nature of a warrant case and it was only a mistake on the part of the Court as well as the respondent complainant in not treating it as a warrant case from the beginning.

27. The delay of eight years in realizing the mistake would not make the case a summons case. The cause of action, admittedly, has arisen after the amendment in the SEBI Act.

28. Any mistake of law cannot be permitted to be perpetuated and no sooner the same is discerned, remedial measures ought to be taken.

29. Thus the order impugned dated 06.09.2011 cannot be faulted with.

30. The Trial Court is directed to proceed with the case in the manner in which a warrant case is tried. Considering the delay which has been caused in conclusion of the proceedings, the Court below is further directed to expedite and dispose of the case at the earliest.

31. The revision petition is dismissed with the aforesaid observations.

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32. In view of the petition having been dismissed, no orders are required to be passed in the instant applications.

33. Dismissed as infructuous.