(2016) 01 CAL CK 0040

In the Calcutta High Court

Case No : CRR 2077 of 2013

Rose Valley Real Estates Constructions Ltd. APPELLANT

Vs

Securities and Exchange Board of India RESPONDENT

Date of Decision : 14-01-2016

Acts Referred:

Constitution of India, 1950 — Article 129, Article 20 (1), Article 20(2)
Criminal Procedure Code, 1973 (CrPC) — Section 200, Section 202, Section 300
Securities and Exchange Board of India Act, 1992 — Section 11, Section 11A, Section 1

Citation : (2016) 01 CAL CK 0040

Hon'ble Judges : Sudip Ahluwalia, J.

Bench : Single Bench

Advocate : Sudipto Moitra, Sandipan Ganguly, Subhashree Patel, Aarup Nath Bhattacharjee, Swaswati Chatterjee and Namita Das, for the Appellant; B.R. Bhattacharjee and G. Basu, for the Respondent

Final Decision : Dismissed

Judgement

Sudip Ahluwalia, J.—1. In this matter the petitioner is a Company having its registered office in Kolkata. It has assailed the Order passed by the Ld. Chief Metropolitan Magistrate, Kolkata on 26th April, 2013 in complainant Case No. C/14214 of 2013, for commission of the alleged violations of Sections 117A & 117C (4) (5) of the Companies Act, 1956, as also offences punishable U/Ss. 24 and 27 of the Securities and Exchange Board of India Act, 1992 (referred to hereafter as the SEBI Act). It has also prayed for quashing of the proceedings arising out of the aforesaid complaint case filed on behalf of the Securities and Exchange Board of India through its Assistant General Manager.

2. It may be mentioned that during pendency of the Revision, an application had been filed on behalf of the Directorate of Enforcement for being added as a party in the proceeding. But the same was disposed off with a liberty to the applicant to approach the Ld. Court below at an appropriate stage if the pending complaint survived after disposal of the Revisional application.

3. It has been urged on behalf of the petitioner that neither the allegations in the petition of complaint disclose any offence per se, nor there is any veracity in those allegations. Besides, the Ld. Trial Court did not hold the complete enquiry in terms of Section 202 of the Cr.P.C before issuance of process. It has also been asserted that the complainants were incompetent to lodge any complaint in respect of the offences covered under the Companies Act, 1956, and even the SEBI Act, 1992, and that the Ld. Trial Court also lacked jurisdiction to entertain the same, and so continuation of the proceedings would clearly be an abuse of the Court''s process.

4. Apart from the contentions made in the original revisional application, the petitioner, on the 30th of September 2015, filed a Supplementary Affidavit to which a number of documents were annexed. On going through the same along with the original case made out in the revisional application, and after having heard Ld. counsel appearing for the petitioner extensively, the sum and substance of the contentions raised on its behalf can be summarised as follows:--

"1) Incompetency of the SEBI to file the complaint;

2) Incompetency of Complainant/Assistant General Manager under Section 19 of SEBI Act;

3) Lack of any Investigation prior to lodging the complaint;

4) Admitted compliance of Section 11C by the petitioner;

5) Virtual Clean chit by Adjudicating/Appellate authority;

6) Unnecessary invocation of Section 24;

7) Existence of prescribed procedure for alleged non-compliance with SEBI regulations/guidelines, which foreclose the scope for criminal prosecution;

8) Court taking cognizance not competent to try the matter, and non-compliance of section 202 Cr.P.C;"

5. During the course of hearing, Ld. Counsel for both sides referred to various provisions of the Companies Act, 1956 as well as the Securities and Exchange Board of India Act, 1992, along with its relevant Rules and Regulations, apart from several decisions of the Apex Court in support of their respective contentions. This Court will refer to the relevant cited provisions of law and judgments in deciding the aforesaid points raised on behalf of the petitioners which are now taken up for consideration one by one as follows:--

6. Incompetency of the SEBI to file the complaint -

6.1. The first contention raised on behalf of the petitioners is that the complainant/Securities and Exchange Board of India (SEBI) has no legal sanction or authority to lodge a complaint in violation of any provisions under the Companies Act, which essentially falls in the domain of the Registrar of Companies, or of the Shareholder(s) or the Central Government in terms of

Section 621 of the Companies Act.

6.2. This contention has however been countered on behalf of the respondent/ SEBI by drawing attention of the Court to Section 55A of the Companies Act, as also the relevant decision in that regard pronounced by the Supreme Court in "Sahara India Real Estate Corporation Limited & Ors. v. Securities and Exchange Board of India & Anr."

6.3. The respondent has pointed out that cognizance in the present case was taken under Sections 117A & 117C (4) (5) of the Companies Act, apart from certain other offences under the SEBI Act, 1992, and so the SEBI does have the authority to lodge the complaint. The relevant observations of the Apex Court in this regard which have been contained in Paras 62 to 71 of the decision in "Sahara India" (supra) are as follows:--

"62. I may straightway deal with the first question posed on the jurisdiction of SEBI over various provisions of the companies Act in the case of public companies, whether listed or unlisted, when they issue and transfer securities.

63. Section 55A, the scope of which has been extensively argued, is given below for easy reference:

"55A. Powers of Securities and Exchange Board of India.--The provisions contained in sections 55 to 58, 59 to 81, (including Sections 68A, 77A and 80A) 108, 109, 110, 112, 113, 116, 117, 118, 119, 120, 121, 122, 206, 206A and 207, so far as they relate to issue and transfer of securities and non-payment of dividend shall,-

(a) in case of listed public companies;

(b) in case of those public companies which intend to get their securities listed on any recognized stock exchange in India, be administered by the Securities and Exchange Board of India; and

(c) in any other case, be administered by the Central Government.

Explanation.--For the removal of doubts, it is hereby declared that all powers relating to all other matters including the matters relating to prospectus, statement in lieu of prospectus, return of allotment, issue of shares and redemption of ir-redeemable preference shares shall be exercised by the Central Government, Tribunal or the Registrar of Companies, as the case may be."

64. Section 55A was inserted in the Act by the Companies (Amendment) Act, 2000 w.e.f. 13.12.2000. Clauses (v) to (x) of the Statement of Objects and Reasons give an indication of the intention of the Legislature. Clauses (v) and (x) read as follows:

"Clause (v) - to provide that the Securities and Exchange Board of India be entrusted with powers with regard to all matters relating to public issues and transfers including power to prosecute defaulting companies and their directors.

(x) to provide that any offer of shares or debentures to more than 50 persons shall be treated as a public issue with suitable modification in the case of public financial institutions and non-banking financial companies."

(emphasis supplied)

65. Legislative intention to entrust the powers with SEBI, with regard to all matters relating to public issues and transfers including power to prosecute default companies and their directors, is based on information derived from past and present experiences. Powers have been specifically conferred on SEBI because it was established under the SEBI Act, 1992, in order to protect the interest of investors in securities and to promote the development of and to regulate the securities market and for matters connected therewith or incidental thereto. When we look at Section 55A it is clear that it deals with the following three categories:

a) Listed public companies

b) Public companies which intend to get their securities listed on any recognized stock exchange in India; and

c) "in any other case" that is, all other unlisted public companies, which do not make a public offer of securities and private companies.

66. Public companies which fall under categories (a) and (b) are to be administered by SEBI and with regard to various provisions mentioned in the first part of Section 55A, so far they relate to issue and transfer of securities and non-payment of dividend and rest of the matter be administered by the Central Government. Power of administration of Sections 56, 62, 63 and 73 with respect to issue of OFCDs lies with SEBI and not with the Central Government since they relate to issue of securities.

67. We shall now examine the structure of Section 55A and when we do that, we have to necessarily keep in mind the object and purpose of that section, the intention of the Legislature and the role and function to be performed by the specialized forum, SEBI, created by the SEBI Act. Powers conferred on SEBI under Section 11A to protect the interest of investors that too without prejudice to the provisions of the Companies Act, may also be borne in mind when we interpret Section 55A, as already indicated. Provisions which relate to issue and transfer of securities and non-payment of dividend have to be administered by SEBI, a legal obligation cast on SEBI. Section 55A specifically refers to Sections 55 to 58 and Sections 59 to 81 with an emphasis to Sections 68A, 77A and 80A within brackets. Specific reference has been made to Sections 108, 109, 110 and Sections 116, 117, 118, 119, 120, 121, 122, 206, 206A and 207. The Original Companies (Second Amendment) Bill of 1999 [Bill No. 139 of 1999] did not have the parenthetical clause in Section 55A (i.e. including Sections 68A, 77A and 80A) which was introduced as corrigendum before the leave was sought and granted to introduce the Bill in the Lok Sabha and with this corrigendum the bill

was passed in the Lok Sabha on 27.11.2000 and then on 30.11.2000 by the Rajya Sabha and later assented by the President. Contention was, therefore, raised that when the Bill was introduced it was provided that Sections 59 to 81 were to be administered by SEBI, in respect of listed public companies and companies intended to get their securities listed in a stock exchange. But, it was pointed out, that Sections in between Sections 59 to 81, which had letters ''A'' or ''B'' as a suffix, were not all intended to be covered by Section 55A, hence the necessity for the parenthetical clause added by a corrigendum, i.e. (including Sections 68A, 77A and 80A). Further, it was also contended that where provisions ending with the suffix ''A'', ''AA'' or ''B'' were intended to be included in Sections 59 to 81, it was specifically so provided. Reference was made to Section 206A which finds a place in Section 55A. For the above, it was submitted by Saharas that Section 60B could not have been intended to be included in the parenthetical portions and could not be said to have covered by Section 55A.

68. All sections falling within Sections 55 to 58 of the Companies Act will fall under those sections. So far as Section 55A is concerned, it is the very Section which deals with powers of SEBI, Central Government, Tribunal, Company Law Board, Registrar of Companies etc. Reference to Sections 59 to 81 indicated that Parliament intended to include all sections in that range which takes in Sections 60B, 62, 63, 67, 73 etc. of the Companies Act. Section 67 is also a section of considerable importance because the expression "offer of shares or debentures to the public" finds a place in various sections of the Act, as well as the articles of a company. Further, the first proviso added to Section 67(3) vide the Companies (Amendment) Act, 2000 w.e.f. 13.12.2000 is also of considerable bearing in determining whether a public company offering shares or debentures to the public has to list its securities on a recognized stock exchange. Expression ''to'' clearly has a meaning i.e. everything in between or destination of an action. The meaning of the expression ''to'' came up for consideration before this Court in Hindustan Lever Ltd. v. Ashok Vishnu Kate and Ors. , (1995) 6 SCC 326. Further, the specific inclusion of Sections 68A, 77A and 80A in a bracket, would not mean the exclusion of all sections between in Sections 59 to 81 with suffix ''A'' or ''AA'' or ''B''. The word ''including'' used in the parenthetical clause is only to give emphasis to those sections. Lord Watson in Dilworth v. Commissioner of Stamps (1999) AC 99 said that the word ''include'' is very generally used in interpretation clause in order to enlarge the meaning of words or phrases occurring in the body of the Statute and, when it is so used, these words and phrases must be construed as comprehending, not only things they signify according to their natural import, but also those things which the interpretation clause declares that they shall include." In Delhi Judicial Services Association v. State of Gujarat , AIR 1991 SC 2176, the expression used in Article 129 of the Constitution i.e. including the power to punish for contempt of itself which was interpreted by the Court stating that the expression ''including'' has been interpreted by Courts to extend and widen the scope of power. Giving emphasis to Sections 68A, 77A and 80A does not mean the exclusion of all such similar sections.

69. Legislature, in its wisdom, thought some emphasis has to be given to Sections 68A, 77A and 80A because all those sections provide certain offences to be punishable with imprisonment. Further clue for that reasoning, we may get, if we examine the manner in which the Legislature has used succeeding sections. In Section 55A there is a specific reference to Section 108, not Sections 108A to I. So also Section 55A specifically refers to Section 109, not Sections 109A and B. Legislature wanted inclusion of Sections 108A to I, Section 109A etc., then it would have said Sections 108 to 110. Further, the Legislature never wanted the inclusion of Sections 117A to C, hence it used Section 117 alone, not Sections 116 to 122. If it has used so, then Sections 117A to C also would have been included. Legislature in that sequence wanted inclusion of Sections 206 and 206A, hence both the sections have been included. Hence, when the legislature has used the expression Sections 59 to 81, 60B which falls in between, stands included. Further, the entrustment of powers on SEBI, under Section 55A, is in addition to the then existing powers of SEBI under SEBI Act, 1992, which takes Sections 11, 11A and 11B as well.

70. Explanation has been added to Section 55A to harmonize and to clear up doubts and allay groundless apprehensions. In S. Sundaram Pillai & Ors. v. V.R. Pattabiraman & Ors. , (1985) 1 SCC 591, this Court has ruled that the purpose of the explanation is to clarify where there is any obscurity or vagueness in the main enactment and to make it consistent with the dominant object which it seems to serve. The main part of Section 55A confers jurisdiction on SEBI with regard to three categories i.e. issue of securities, transfer of securities and nonpayment of dividend. The expression "all other matters" mentioned in the explanation would refer to powers other than the above mentioned categories. Further, it may also be remembered that the explanation does not take away the powers conferred on SEBI by other sections of the Companies Act. At the same time, matters relating to prospectus, statement in lieu of prospectus, return of allotment, issue of shares and redemption of irredeemable preference shares be exercised by the Central Government, Tribunal, Company Law Board, Registrars of Companies, as the case may be. Further, Section 60B(9) clearly indicates that upon closing of the offer of securities, a final ''prospectus'' has to be filed in the case of listed company with SEBI and Registrar, hence the explanation to Section 55A can never be constructed or interpreted to mean that SEBI has no power in relation to the prospectus and the issue of securities by an unlisted public company, if the securities are offered to more than forty nine persons.

71. I am, therefore, of the view that the mere fact that emphasis has been given to Sections 68A, 77A and 80A, does not mean the exclusion of Section 60B from Section 59 to 81. We, therefore, hold that, so far as the provisions enumerated in the opening portion of Section 55A of the Companies Act, so far as they relate to issue and transfer of securities and nonpayment of dividend is concerned, SEBI has the power to administer in the case of listed public companies and in the case of those public companies which intend to get their securities listed on a recognized stock exchange in India. In any other case, i.e. rest of the matters,

that is excluding matters relating to issue and transfer of securities and non-payment of dividend be administered by the Central Government in the case of listed public companies and those companies which intend to get their securities listed on any recognized stock exchange in India. Explanation to that section further clarifies the position so as to remove doubts, saying all powers relating to other matters including the matters relating to prospectus, statement in lieu of prospectus, return of allotment, issue of shares and redemption of irredeemable preference shares, should be exercised by the Central Government, Tribunal or the Registrar of Companies, as the case may be. Section 55A, therefore, makes it clear that SEBI has the power to administer the above mentioned select provisions of the Companies Act relating to matters specified therein. Contention raised by Saharas that without regulations being framed under Section 642(4) of the companies Act, SEBI cannot exercise powers of administration, is totally unfounded and is rejected."

6.4. On considering the aforesaid highlighted observations of the Supreme Court, this Court has no hesitation in coming to the conclusion that the SEBI was well within its right to lodge the complaint by virtue of section 55A of the Companies Act.

7. Incompetency of Complainant U/S. 19 of SEBI Act-

7.1. It has been asserted that the complainant Shri Chandan Kumar Mitra, being the Assistant General Manager in the present case is not authorised to file the complaint and that his alleged authority is insufficient, since according to the Statute only the Board is authorised to lodge a complaint under section 19 of the SEBI Act.

7.2. On the other hand it has been contended on behalf of the SEBI, that by virtue of delegation of authority by the Regional Manager, vide his order passed on 3rd of May, 2010, followed by the separate order passed by the CGM, Regional Manager, SEBI ERO, dated 10th January, 2013, the complainant was well within his powers to file the complaint. The relevant orders cited on behalf of the Respondent in this regard are reproduced as follows:--

"[Order NO.1] -

SEBI/LAD/DRA-II/242//2010

SECURITIES AND EXCHANGE BOARD OF INDIA GENERAL ORDER DELEGATION OF POWERS

In terms of Section 19 of the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Board is empowered to delegate such of its powers and functions by general or special Order in writing, to any member, officer of the Board or any other person subject to such conditions, as may be specified in the Order.

2. Accordingly, the Board had issued on 21st April, 2003 a General Order

delegating various powers and functions to the members and officers of the Board, as approved by Board in its meeting -held on 28th March, 2003 vide the Securities and Exchange Board of India (Delegation of Financial Powers) Order, 2002 and the Securities and Exchange Board of India (Delegation of Administrative and Functional Powers) Order, 2002.

3. Based on the experience of administering the said General Order and taking into account the subsequent amendments to the securities laws, restructuring of the organization, and changes in market environment, the Board has decided to replace the said Order by a new Order,

4. Now, therefore, the Board issues this Securities and Exchange Board" of India (Delegation of Powers) Order, 2010 in supersession of the earlier General Order. This Order shall come into force with effect from 3rd day of May, 2010.

SD/- C.B. Bave Chairman Securities And Exchange Board of India

Date : May 03. 2010 Place : Mumbai"

7.3. The details of such delegated powers have been set out in the annexed to/ schedule to the aforesaid order, and the relevant extract for the purpose of the present case is contained in page 3 thereof which is set out as under:--

NOTE : Assistant General Manager holds a rank superior to the post of Manager Operational Department hence there is no bar of AGM SEBI to lodge a complaint.

The same if any relates to any person holding a rank inferior to the post of Manager Operational Department."

"[Order NO.2] -

DELEGATION OF POWERS

The instant Order is in furtherance of the Delegation of Powers as delegated by Chairman, SEBI vide Delegation of Power - Order dated May 03, 2010.

All Assistant Managers/Managers/Assistant General Managers/Deputy General Managers/Legal Officers/Assistant Legal Advisors of Securities and Exchange Board of India, Eastern Regional Office are hereby empowered to file complaints/ civil cases, launch prosecution and file affidavits before any Court of law.

This delegation of power will come into effect immediately.

Order issued under my hand and seal this 10 day of January, 2013

By Order

S.V. Krishna Mohan, CGM Regional Manager, SEBI ERO."

7.4. In view of the aforesaid delegation of authorities in relation to Section 19 of the SEBI Act, it cannot be said that the complainant had no authority to file the complaint just because he happens to be simply an Asst. General Manager in the

SEBI. The petitioner''s contention in this regard is therefore found to be untenable.

8. Lack of Investigation prior to lodging the complaint -

8.1. It has also been urged on behalf of the petitioner that no investigation U/S. 11 was conducted before filing of the complaint, which cuts the complaint at its very root, and that, in any event, the result of any such prior investigation, even if actually conducted, has not been revealed, nor was any communication made to the petitioner regarding the alleged violations imputed to it.

8.2. The petitioner has further asserted that the complaint was lodged even before commencement of the preliminary investigation U/S 11, of which a notice was issued to the petitioner in the month of September, 2013, which was long after actual filing of the complaint. A copy of such notice dated 13th September 2015, which is Annexure - X3 to the Supplementary Affidavit filed on 30.09.2015, has been placed on record. Perusal of the same goes to reveal that a show cause notice was issued to the petitioners for what were virtually identical allegations which had already been made out in the petition on complaint lodged Six months earlier.

8.3. On the other hand, the explanation for such subsequent notice issued upon the petitioner by the SEBI is that it was done with a view to mitigate/rectify the wrongs done to the investors/public at large from whom the proceeds were wrongfully collected, in exercise of the SEBI''s regulating power in accordance with law, which function is altogether distinct and unconnected to the separate function of a criminal prosecution for violation of the relevant provisions of law covered under the Companies Act, or the SEBI Act.

8.4. In the opinion of this Court, the power conferred upon the SEBI to conduct an enquiry under Section 11 of the Act is essentially for enabling it to exercise its administrative and regulatory obligations more effectively, and holding such enquiry is not at all any statutory precondition for the purpose of a criminal prosecution. As such this Court finds no substance in the contention that the complaint is untenable simply because no enquiry under Section 11 was conducted before filing.

9. Admitted compliance of Section 11C by petitioner & Virtual Clean chit by the Adjudicating/Appellate authority -

9.1. These two points urged on behalf of the petitioner are being considered together as the matter involved therein is closely interlinked.

9.2. The petitioner has drawn attention to the fact that the complaint itself states that the petitioner/accused did submit partial replies to the summons issued, and there is no case that it altogether refused to comply with the same (Para 12). The petitioner has further asserted that again from the complaint itself (Para 14) it becomes clear that all the documents required from the petitioner had already been submitted from its side to the Registrar of Companies, if not to the SEBI itself.

9.3. It is therefore contended that in the given circumstances the SEBI had no justification to seek prosecution of the petitioner for the alleged non-compliance of the summons issued under Section 11C.

9.4. The petitioner has placed on record firstly the copy of the Order No. PG/AO -19/2013 passed by the Adjudicating Officer under Section 15 -I on 26th of March 2013, by virtue of which a penalty of Rs. 1,00,00,000/- (One Crore) was imposed upon it for the alleged non-compliance. Thereafter a copy of the judgment of the Appellate Authority passed on 12.12.2013 in Appeal No. 106 of 2013 against the aforesaid order of the Adjudicating Officer has also been filed. In that judgment that the Appellate Authority reduced the penalty to Rs. 1,00,00,00/- (Ten Lakhs only) after observing inter alia, "In these circumstances, looking to the fact that the applicant has been willing to furnish documents relating to issuance of debenture through private placement from time to time and has in fact fully furnished particulars though belatedly in the adjudication proceedings which were also initiated belatedly in our opinion, it would be just and proper to reduce the penalty to Rs. 10 lac."

9.5. Hence the contention raised on behalf of the petitioner is that after passing of the order by the Appellate authority in the course of the adjudicatory proceedings U/S 15(1), it virtually stands absolved of any culpability in respect of the alleged violation of Section 11C(3) of the (SEBI Act).

9.6. It however needs to be remembered that any penalty imposed in the course of any adjudicatory proceeding under Section 15-I, is without prejudice to the fate of any criminal proceeding according to the statute, although the petitioner has cited the decision of the Supreme Court in "Radheyshyam Kejriwal v. State of West Bengal & Anr." [, (2011) 3 SCC 581], in which it was observed -

"38. The ratio which can be culled out from these decisions can broadly be stated as follows:

(i) Adjudication proceedings and criminal prosecution can be launched simultaneously;

(ii) Decision in adjudication proceedings is not necessary before initiating criminal prosecution;

(iii) Adjudication proceedings and criminal proceedings are independent in nature to each other;

(iv) The finding against the person facing Prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution;

(v) Adjudication proceedings by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20(2) of the Constitution or Section 300 of the Code of Criminal procedure;

(vi) The finding in the adjudication proceedings in favour of the person facing trial or identical violation will depend upon the nature of finding. If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue and

(vii) In case of exoneration, however, on merits where the allegation is found to be not sustainable at all and the Person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases.

(Emphasis added).

9.7. Be that as it may, in the present case no cognizance for the offence under Section 11C has been specifically taken by the Ld. Magistrate. On the contrary, the cognizance has been taken under Sections 117B & 117C of the Companies Act, as also for the offences under Sections 24/27 of the SEBI Act. It may be mentioned that Section 24 itself does not specify any particular offence, but happens to be the penal provision for violation/non-compliance of any provisions of the Act or its relevant Rules, Regulations and Guidelines. The various violations/non-compliances imputed to the petitioners have been explicitly mentioned in the petition of complaint in paras 19, 20, 21, 22, 23, 24, 25, 26, summarized in paragraphs 27, 28 including paragraph 32. A reference to the same makes it clear that these violations/non-compliances are altogether distinct from the alleged offence under Section 11C, and so in any event the result of the adjudicatory proceedings after the decision by the appellate authority has no bearing on the separate violations/non-compliances which on their own form the basis for prosecution of a Company under Sections 24/27 of the SEBI Act.

10. Unnecessary invocation of Section 24 -

10.1. The petitioner has further drawn attention of this Court to Para 19 of the petition of complaint in which it has been made out that its liability is in respect of Section 67(3) of the Companies Act. So it is contended that there was no reason for prosecution under Ss. 24 & 27 of the SEBI Act. According to the petitioner, the punishment for violation of the offences U/S 11C (6) is itself prescribed for an upper limit of imprisonment upto one year and/or fine of Rs. 1 crore. As such there was no reason for the complainant to seek prosecution of the petitioner under a much more stringent Section 24 in which the punishment prescribed is up to 10 years or fine up to Rs. 25 Crores. In this regard the petitioner has cited the decision of the Supreme Court in "T. Barai v. Henry AH Hoe & Anr." [, AIR (1983) SC 150], wherein it was held -

"20. It is only retroactive criminal legislation that is prohibited under Article 20 (1). The prohibition contained in Article 20 (1) is that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence prohibits nor shall he be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. It is quite clear that insofar as the central Amendment Act creates new offence or enhance punishment for a particular type of offence no person can be convicted by such ex post facto law nor can the enhanced punishment prescribed by the amendment be applicable. But insofar as the Central Amendment Act reduces the punishment for an offence pun ish able under section 16 (1) (a) of the Act, there is no reason why the accused should not have the benefit of such reduced punishment. The rule of beneficial construction requires that even ex post facto law of such a type should be applied to mitigate the rigour of the law. The principle is based both on sound reason and commonsense..............

26. In the premises, the Central Amendment Act having dealt with the same offence as, the one punishable under Section 16 (1) (a) and provided for a reduced punishment, the accused must have the benefit of the reduced punishment. We wish to make it clear that anything that we have said shall not be construed as giving, to the Central Amendment Act a retrospective operation insofar as it creates new offences or provides for an enhanced punishment."

10.2. Now it has already been seen in deciding the point numbers 4 and 5 raised on behalf of the petitioner earlier, that no cognizance of the alleged offence under Section 11C has at all been taken. On the other hand the cognizance has been taken under Sections 24/27 of the SEBI Act on account of various separately specified violations/non-compliances of the SEBI Rules, Regulations and Guidelines, which themselves independently form the basis for prosecution under the aforesaid Sections. Consequently the Court again finds no substantive merit in this contention raised on behalf of the petitioner.

11. Existence of prescribed procedures for alleged non-compliance with SEBI regulations/Guidelines, which foreclose the scope for criminal prosecution -

11.1. It has also been urged that the complaint alleges non-compliance with various Guidelines framed under the SEBI Regulations, for which the consequences have been prescribed in the regulations themselves, and so there is no scope to book the petitioner for any separate criminal liability inasmuch as non-compliance with the Guidelines cannot be equated with the commission of any "Criminal offences". The specific contentions of the petitioner in this regard are as follows:--

"a) For violation of SEBI (DIP) Guidelines, 2000, Board can only pass an order under Regulation 17 of the SEBI (DIP) Guidelines, 2000 by giving directions under provision of Section 11B of the SEBI Act, 1992 and the order under sub clauses of Regulation 17 of the SEBI (DIP) Guidelines, 2000. Again the Section 11B of the SEBI Act provides the power of SEBI to issue directions. Section 11B also does not provide for any prosecution and therefore for violation of SEBI (DIP) Guidelines, 2000 no prosecution can be launched by SEBI except taking steps, that too upon hearing the alleged defaultee, in issuing directions under Section 11B of the SEBI Act, 1992.

b) The specific regulation made in this regard read with Section 11B the SEBI

Act, 1992 makes it clear that no criminal prosecution can be initiated by SEBI under either the regulation alleged or above section of the SEBI Act 1992.

c) Admittedly no direction or order has yet been passed either under Regulation 17 of the SEBI (DIP) Guidelines, 2000 or Regulation 25 of SEBI (Debenture Trustee) Regulation, 1993 read with Chapter V of SEBI (Intermediaries) Regulation, 2008 or under Section 11B of the SEBI Act, 1992. Therefore no criminal proceeding for violation of SEBI (DIP) Guidelines, 2000 as well as Regulation 7 of SEBI (Debenture Trustee) Regulation, 1993 can be initiated.

d) It is well settled that once a procedure has been laid down by the statute and the Rules and Regulations framed thereunder, such procedure has to be followed by the authorities. Any departure from such procedure is impermissible under the law.

e) The only consequences for violation of the aforesaid regulations, therefore, are of civil consequences and no other.

f) It is therefore humbly submitted that violation of the provisions of Regulation and/or guidelines as enumerated in the complaint does not provide for any criminal prosecution."

11.2. This Court has gone through the text of Section 11B relied upon by the petitioner. The same empowers the Board to issue appropriate directions upon any person or class of persons referred to in Section 12, or upon any Company in relation to matters under Section 11A, in the interests of the investors in securities and the securities market. But nowhere does Section 11B create any bar against any criminal prosecution for violation of any rules, regulations or guidelines. On the other hand, Section 24(1) specifically lays down, "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 any 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 that both."

11.3. Here again there is no qualifying or limiting clause for the purpose of prosecution under this Section to the effect that such prosecution shall not lie on account of the administrative/regulatory procedure otherwise having been separately prescribed under the Act and its relevant Regulations etc. Consequently it is difficult to hold that criminal prosecution for non-compliance with the regulations/guidelines of the SEBI automatically stands to become barred simply because any specific prescribed procedure separately exists for the Board to intervene in the interest of the investors or the securities market.

11.4. In this connection, the petitioner has also drawn attention to certain observations in para 116 of the Supreme Court''s judgment in "Sahara India" (supra), to emphasise that no criminal proceedings against the appellant "Sahara India" had been initiated by the SEBI in similar circumstances. The relevant observations of the Apex Court are set out below -

"CIVIL AND CRIMINAL LIABILITY-

116. I have found, in this case, that Saharas had not complied with the legal requirements of Section 56 and hence the second proviso to Section 56(3) may apply and it is also stated in sub-section (6) of Section 56 that the liability under the General Law has been excluded. Section 62 casts civil liability for mis-statement in prospectus and Section 63(1) speaks of criminal liability. Section 68 speaks of penalty for fraudulently inducing persons to invite, which also leads to imprisonment and fine. Section 68A prescribes punishment for violation of what is provided under Sections 68A(1)(a) and (b), with imprisonment for a term of five years. Section 73(3) also speaks of imposition of fine. Over and above the penal provisions, Section 628 of the Companies Act also proposes imprisonment and fine, for making false statements. Further, furnishing false evidence may also attract punishment with imprisonment for a term which may extend to seven years and also fine under Section 629 of the Companies Act. The provisions for imposing civil and criminal liability and refund of the amount with interest would indicate that, of late, economic offences in India like the one committed by Saharas be treated with an iron hand, or else we may land in another security market pandemonium."

11.5. This Court is however of the view that firstly the facts and circumstances in which the proceedings were drawn up against the appellant "Sahara India", which ultimately culminated in the appeal before the Supreme Court are not exactly identical with those in the present case. In any event, the fact that criminal proceedings were not drawn up against the erring party for violations of the relevant provisions of the Companies Act quoted in the Supreme Court''s judgment, is ipso facto no ground to hold that no criminal proceedings are at all liable to be drawn up as against the present petitioner as well. Suffice it to say, in its revisional jurisdiction, this Court is only required to be satisfied as to whether a prima facie case for violation of the statutory provisions under the SEBI Act, or the Companies Act in respect of which the SEBI is competent to file a complaint is made out or not. On the contrary, the observation in the last sentence of the cited paragraph, only emphasises the need for taking recourse to tough legal measures in the matter of large-scale violations of the statutory provisions in the manner of acquisition of Securities which adversely affect a vast multitude of innocent investors and the economy as a whole. Those observations of the Supreme Court are being repeated here - "The provisions for imposing civil and criminal liability and refund of the amount with interest would indicate that, of late, economic offences in India like the one committed by Saharas be treated with an iron hand, or else we may land in another security market pandemonium."

12. Incompetency of Court taking cognizance, and non-compliance with Section 202 Cr.P.C. -

12.1. The impugned order of taking cognizance has also been assailed by the petitioner by contending that the Ld. Chief Metropolitan Magistrate taking cognizance was incompetent to try the complaint in view of the position of law prior to 18.07.2013 in terms of Section 26 of the Act as in operation at the relevant time, by virtue of which trial could not be conducted by any Court below a Court of Sessions.

12.2. Hence according to the petitioner, it was incumbent upon the Ld. Court/ Magistrate taking cognizance to examine the all the witnesses including the complainant in terms of Section 202 of the CrPC, and he could not have exempted the complainant from being examined under Section 200.

12.3. It is a matter of record that the Ld. Magistrate had exempted the complainant from being examined under Section 200 of the CrPC on the ground that the complainant was a Public Officer. To this extent there was no illegality on the part of the Ld. Magistrate as exemption of a Public Officer for such purpose is authorised by the Statute. Of course, no such exemption would lie in case of other witnesses. But a perusal of the petition of complaint goes to reveal that no other witness apart from the complainant had been cited. It has been mentioned in the relevant column -"Any other person or persons with the leave of this Learned Court."

12.4. In this view of the matter there was clearly no scope for the Ld. Magistrate to examine any other witness, as none had been cited in the complaint, and otherwise the Ld. Magistrate was well within his authority to take cognizance on the basis of the allegations made in the petition of complaint, without examining the complainant who admittedly is a Public Officer. Consequently there appears to be no illegality in the cognizance taken by the Ld. Magistrate.

13. To sum up therefore, this Court finds no reason to interfere with the impugned Order of taking cognizance and issuance of processes by the Ld. Chief Metropolitan Magistrate. The Revisional application is therefore dismissed. Interim Order if any, stands vacated.

Later:

After passing of the above order, Ld. Counsel appearing for the petitioners prays for returning the original agreement filed from their sides.

Let the same be returned subject to placing a Photostat copy of the same on the record.

