

(2010) 10 DEL CK 0127

In the Delhi High Court

Case No : Criminal M.C. No. 969 of 2010

Samarpan Agro and Livestock Ltd.

APPELLANT

Vs

Securities and Exchange Board of India

RESPONDENT

Date of Decision : 25-10-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 468, 472

Factory and Workshop Act, 1901 — Section 10, 10(1), 135, 146

Metropolis Management (Amendment) Act, 1852 — Section 85

Securities and Exchange Board of India (Collective Investment Schemes) Regulations, 1999 — Regulation 10, 12, 5, 5(1), 5(2)

Securities and Exchange Board of India Act, 1992 — Section 12(1B), 24, 24(1), 27

Citation : (2011) 101 CLA 18 : (2011) 165 CompCas 169 : (2010) 104 SCL 584

Hon'ble Judges : A.K. Pathak, J

Bench : Single Bench

Advocate : Shaad Anwar, for the Appellant; Sanjay Mann and R.K. Pillai, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Pathak, J.—Short question which needs to be answered in this petition is "whether violation of Regulations 73 and 74 of the Securities and Exchange Board of India (Collective Investment Schemes) Regulations, 1999, (for short hereinafter referred to as "Regulations") punishable u/s 24 of the Securities and Exchange Board of India Act, 1992 (for short hereinafter referred to as "the Act") is a continuing offence or not".

2. Brief facts of the case, relevant for the purpose of disposal of this petition, are that Securities and Exchange Board of India (hereinafter referred to as "Board") has filed a complaint u/s 200 of the Code of Criminal Procedure, 1973 (for short hereinafter referred to as "Code of Criminal Procedure") read with Sections 24(1) and 27 of the Act in the court of Additional Chief Metropolitan Magistrate (ACMM), alleging therein that the Petitioner No. 1 had been operating a collective investment scheme and had collected an aggregate amount of Rs. 20.50 lakhs

from the general public. Petitioner No. 1 filed information with the Board regarding its collective investment scheme pursuant to the press release dated 26th November, 1997 and public notice dated 18th December, 1997 issued by the Board. In terms of Section 12(1B) no "person" could have sponsored or carried on any venture capital funds or collective investment scheme without obtaining a certificate of registration from the Board in accordance with the Regulations framed under the Act. It was further provided that in case any person had been carrying on such venture capital fund or collective investment scheme operating in the securities market immediately before the commencement of the Securities Laws (Amended) Act, 1995 for which no certificate of registration was required prior to such commencement, may continue to operate till such time Regulations are made under Clause (d) of Sub-section (2) of Section 30 of the Act. In the year 1999, Board notified the Regulations for regulating the activities of Collective Investment Schemes. Thereafter, vide letters dated 15th December, 1999, and 29th December, 1999, and also by way of public notice dated 10th December, 1999, Board intimated Petitioner No. 1 to send an information memorandum to all the investors detailing the state of affairs of the scheme, the amount repayable to each investor and the manner in which amount is to be determined. The information memorandum was required to be sent to each investor latest by 28th February, 2000. Later on, last date was extended up to 31st March, 2000. Petitioner No. 1 was also called upon to comply with the Regulations. In spite of this, Petitioner No. 1 had failed to make any application with the Board for the registration of collective investment schemes in terms of Regulation 68 or to wind up its affairs in terms of Regulation 73, nor it formulated a scheme of repayment and repay the money to the existing investors in terms of Regulation 74. Thus, Petitioner No. 1 was liable to be punished u/s 24 of the Act for having infringed the provisions of Section 12(1B) of the Act and Regulation 5(1), read with Regulations 68(1), 68(2), 73 and 74 of the SEBI Regulations. So far as Petitioner Nos. 2 to 5 are concerned, that they being directors were responsible for the conduct of day-to-day business of Petitioner No. 1 and were liable to be punished in terms of Section 27 of the Act.

3. Petitioner No. 2 filed an application u/s 468 of Code of Criminal Procedure praying therein that the complaint be dismissed being barred by time. It was contended that the offence u/s 24(1) of the Act was punishable with imprisonment for a period extending up to one year or fine or both. As per the averments made in the complaint, Petitioner No. 1 had failed to submit information to Board pursuant to their letter dated 7th December, 2000; meaning thereby offence had been committed way back in the year 2000 when Petitioner No. 1 failed to comply with the directions of the Board as contained in its letter dated 7th December, 2000. Complaint having been filed after more than three years, thus, was barred by time.

4. By following the judgment passed by the Madras High Court in *Rhodanthe Agro Ltd. v. Securities and Exchange Board of India* CrI. R.C. No. 842 (Mad.) of

2005. Trial Court came to the conclusion that non-compliance of Regulations 73 and 74 was a continuing offence, since Petitioner had failed to wind up the scheme and repay the amount to the investors. Consequently, the application u/s 468 of Code of Criminal Procedure was dismissed.

5. Relevant it would be to reproduce Regulations 68, 73 and 74, which reads as under:

Regulation 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.

(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.

Regulation 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 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 schemes, within two months from the date of receipt of intimation from the Board, detailing the state of affairs of the 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 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 scheme shall have to give a positive consent within one month from the date of the information memorandum to continue with the scheme.

(7) The investors who give positive consent under sub-Regulation (6) shall continue with the scheme at their risk and responsibility.

(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.

Regulation 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.

6. Section 24 of the Act prior to its amendment by virtue of the Securities and Exchange Board of India (Amendment) Act, 2002 (59 of 2002) reads as under:-

(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 one year, or with fine, 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 three years or with fine which shall not be less than two thousand rupees but which may extend to ten thousand rupees or with both.

7. A conjoint reading of the aforesaid Regulations clearly shows that if a person had been carrying on a collective investment scheme at the time of commencement of the Regulations, it was deemed to be an existing collective investment scheme. Such person was, thus, under a legal obligation to comply with these Regulations framed under the Act. As envisaged under the Regulation 68(2) such person had to make an application to the Board in the manner as specified in Regulation 5. If such an application was made, Board was to deal with the same in the manner as provided in the Regulation 68(3). In case any person carrying on the existing collective investment scheme failed to make such an application to the Board for registration or had been refused a provisional certificate, it was under a legal obligation to wind up the existing collective scheme by following the procedure as laid down in Regulation 73; to refund the payment to the existing investors in terms of Regulation 74 by following the

procedure as specified in Regulation 73.

8. Infringement of these Regulations is an offence punishable with the imprisonment for a term which may extend to one year or with fine or with both, which punishment now stands enhanced to ten years or with fine of Rs. 25 crores or both with effect from 29th October, 2002 by virtue of the Securities and Exchange Board of India (Amendment) Act, 2002 (59 of 2002).

9. Section 472 of Code of Criminal Procedure provides that in case of a continuing offence, a fresh period of limitation shall begin to run at every moment of the time during which the offence continues.

10. In *State of Bihar Vs. Deokaran Nenshi and Another*, , issue before the Supreme Court was whether failure to submit returns within the prescribed time under the Mines Act is a continuing offence or not. The Supreme Court after considering various judicial pronouncements summarized "continuing offence" as under:-

A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and recurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all.

11. In *Bhagirath Kanoria and Others Vs. State of M. P.*, , the issue involved was as to whether non-payment of employers' contribution under the Employees' Provident Fund and Family Pension Fund Act, 1952 (19 of 1952) was a continuing offence or not. It was held that failure on the part of employers to pay employers' contribution before the due date to the Employees' Provident Fund was a continuing in nature. Company was unquestionably liable to pay their contribution to the Provident Fund before the due date and it was within their power to pay it, as soon after the due date had expired as they willed. The late payment could not have absolved them of their original guilt but it would have snapped the recurrence. Each day that they failed to comply with the obligation to pay their contribution to the fund, they committed a fresh offence. Thus, law of limitation cannot apply. In para 21 of the judgment it was observed as under:-

For these reasons, we are of the opinion that the offence of which the Appellants are charged, namely non-payment of the employer's contribution to the Provident Fund before the due date, is a continuing offence and, therefore, the period of limitation prescribed by Section 468 of Code cannot have any

application. The offence which is alleged against the Appellants will be Governed by Section 472 of the Code, according to which, a fresh period of limitation begins to run at every moment of the time during which the offence continues.

12. For arriving at the aforesaid view, Supreme Court considered various judgments including three decisions from the courts at England and it would be relevant to refer these judgments and the view taken therein:-

12. In *Best v. Butlar and Fitzgibbon* (1932) 2 K.B. 108, the English Trade Union Act, 1871 made it penal for an officer or a member of a Trade Union to wilfully withhold any money, books, etc. of the Trade Union. It was held in that case that the offence of withholding the money was a continuing offence, the basis of the decision evidently being that every day that the moneys were wilfully withheld, the offence was committed.

13. In *Verney v. Mark. Fletcher & Sons Ltd.* (1909) 1 K.B. 444, Section 10(1) of the Factory and Workshop Act, 1901 provided that every fly-wheel directly connected with steam, water or other mechanical power must be securely fenced. Section 135 provided the penalty for non-compliance with Section 10(1), while Section 146 provided that information of the offence shall be laid within three months after the date on which the offence comes to the knowledge of the Inspector. It was held that the breach of Section 10(1) was a continuing breach and therefore, the information was in time. Every day that the fly-wheel remained unfenced, the factory was run otherwise than in conformity with the Act of 1901 and, therefore, the offence defined in Section 10 was a continuing offence.

14. The third English case referred to is *The London County Council v. Worley* (1894) 2 Q.B. 826, in which Section 85 of the Metropolis Management Amendment Act, 1852 prohibited the erection of a building on the side of a new street in certain circumstances, without the consent of the London County Council. The Court construed Section 85 as creating two offences: building to a prohibited height and, continuing such a structure already built after receiving a notice from the County Council. The Court held that the latter offence was a continuing offence.

15. In *Emperor Vs. Karsandas Govindji Ved*, , Section 390(1) of the Bombay City Municipal Act, 1888 provided that no person shall newly establish in any premises any factory of a certain description without the previous permission of the Commissioner nor shall any person work or allow to be worked any such factory without such permission. It was held by the High Court that establishing a new factory was an offence committed once and for all but working it without permission was a continuing offence.

16. In *State Vs. A.H. Bhiwandiwalla*, it was held that the offence of using the premises as a factory without a licence is a continuing offence.

17. In *State of Bihar v. J.P. Singh* 1963 BLJR 782, the High Court of Patna held

that conducting a restaurant without having it registered and without maintaining proper registers were continuing offences.

13. In this case, u/s 12(1B) no person could have carried out a collective investment scheme unless he obtained a certificate of registration from the Board in accordance with the Regulations framed under the Act. Regulations were framed in the year 1999 and notified to all concerned including the Petitioner. As per Regulation 68 any person operating a collective investment scheme at the commencement of the Regulations was under legal obligation to get the existing collective investment scheme registered with the Board and obtain a certificate of registration. If it failed to do so, it was a legal mandate to such person to wind up the existing collective investment scheme by following the procedure as prescribed under Regulation 73. Regulation 74 further provided that existing collective scheme which was not desirous of obtaining provisional registration from the Board was legally bound to formulate a scheme of repayment and make such repayment to the existing investors in the manner specified in Regulation 73. Nothing has been placed on record to suggest that Petitioners had taken any step to get registered with the Board or wound up the collective investment scheme and made the payment to the investors. The amount still continues to be retained by the Petitioner s, thus, infringement of Regulations 73 and 74 is continuing in nature and limitation envisaged u/s 468 of Cr. P.C. would not be attracted.

14. In Vishnu Prakash Bajpai v. SEBI (2010) 98 SCL 258 (Delhi) a Single Judge of this Court has also taken similar view. It was held as under:-

The Company N.R. Plantations (India) Limited contravened the provisions of SEBI Act by not refunding the money collected by it from the persons who had invested money in its Collective Investment Schemes and this offence is a continuing offence till the time the Company complies with the Regulations and directions issued by SEBI by refunding the money to the investors.

15. The view taken by the Madras High Court in Rhodanthe Agro Ltd. 's case (supra) is no different. It was held as under:-

23. In the above said circumstances, I am of the opinion that the noncompliance of Regulations 73 and 74 for winding up the company is continuing in nature. Hence, the trial court is correct in coming to the conclusion that the offence is continuing in nature. Section 24 of the SEBI Act is amended by SEBI Act (Act No. 59 of 2002) with effect from 29-10-2002 and the offence under the Act was punishable with imprisonment for a term which may extend to ten years or with fine which may extend to Rs. 25 crore or with both. In such circumstances, I am of the opinion that the petition is not barred by limitation u/s 468 of Code of Criminal Procedure

16. For the foregoing reasons, present petition is dismissed being devoid of merits.