

(2010) 02 DEL CK 0116
In the Delhi High Court
Case No : Criminal M.C. 1182 of 2009

Vishnu Prakash Bajpai

APPELLANT

Vs

Securities and Exchange Board of India

RESPONDENT

Date of Decision : 10-02-2010

Acts Referred:

Citation : (2010) 2 BC 529 : (2010) 154 CompCas 147 : (2010) 2 CompLJ 23 : (2010) 2 Crimes 394

Hon'ble Judges : V.K. Jain, J

Bench : Single Bench

Advocate : Parveen Mahajan, for the Appellant; Sanjay Mann, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Jain, J.—This is a petition u/s 482 of the Code of Criminal Procedure, for quashing criminal complaint filed by the respondent against the petitioner under Sections 24(1) and 27 of the Securities and Exchange Board of India Act, 1992. Quashing has been sought primarily on the ground that the petitioner was neither a director nor a person in charge of and responsible to the Company N.R. Plantations (India) Limited, for conduct of its business and, therefore, he is not vicariously liable for the offence committed by the company. The petitioner claims that he only subscribed to the Memorandum and Articles of Association of the Company, which does not make him a person in charge of and responsible to the Company for conduct of its business.

2. In order to regulate entities, which used to issue instruments such as Agro Bonds, Plantation Bonds, etc., Government of India decided to treat such schemes as Collective Investment Schemes and brought them under the purview of SEBI Act, 1992, with the object of protecting the investors and promoting legitimate investment activities. Securities & Exchange Board of India (Collective Investment Schemes) Regulations, 1999 were thereafter framed by SEBI. Vide its letter dated December 15, 1999/December 29, 1999 and also by way of a

public notice, SEBI directed M/s N.R. Plantations (India) Limited, which was operating Collective Investment Schemes and had raised a sum of Rs. 2,80,000/- from the general public, to send an information memorandum to all the investors, detailing the state of affairs of the Schemes, the amount repayable to each investor and the manner in which such amount was determined. The information was required to be sent latest by February 28, 2000, which was later extended to March 31, 2000. In terms of Regulation 73(1) of the above-referred Regulations, the Collective Investment Schemes, which failed to apply for registration with SEBI, were required to wind up the existing schemes and repay the amount, collected from the investors. Regulation 74 required the company to formulate a scheme of repayment and make repayment to the investors, in case it was not desirous of obtaining provisional registration from SEBI. N.R. Plantations (India) Limited, however, neither applied for registration with SEBI, nor did it take steps for winding up the Scheme and making repayment to the investors and thereby violated the provisions of Section 12(1B) of SEBI Act, 1992 and Regulation 5(1), read with Regulation 68(1), 68(2), 73 and 74 of the above-referred regulations. Thereupon, in exercise of powers conferred upon it by Section 11B of SEBI Act, SEBI directed the company to refund the money collected from the persons, who had invested money in its Collective Investment Schemes, within a period of one month from the date of the order. However, the company failed to comply with the directions given by the SEBI.

3. It was alleged in the complaint that accused Nos. 2 to 13, which includes the petitioner, were persons in charge of and responsible for day-to-day affairs of the Company and all of them actively connived with each other for the commission of the offence.

4. In support of his contention that he was neither a director nor the person in charge of and responsible to the company for conduct of its business, the petitioner has relied upon the Memorandum and Articles of Association of N.R. Plantations (India) Limited, as also on the copy of Form-32 submitted by the Company to Registrar of Companies. He has also relied upon copy of Form 29 submitted by three persons, namely, Naresh Kumar Mishra, Shyam Badan Singh and Ajay Kumar Pandey as first Directors of the Company and the copy of Statement in lieu of Prospectus.

5. A perusal of the Memorandum and Articles of Association would show that the petitioner was one of the initial subscribers to the equity of the Company. There were eight subscribers, including the petitioner and all of them had subscribed 100 shares each. The Articles of Association were also signed by the aforesaid eight persons, including the petitioner Vishnu Prakash Bajpai.

6. A perusal of copy of Form-32 presented to the Registrar of Companies on 27th March, 1997 would show that three persons, namely, Naresh Kumar Mishra, Shyam Badan Singh and Ajay Kumar Pandey have been shown as Directors of the Company since its incorporation. The copies of Form-29 submitted by the aforesaid three persons also contains their consent to be a director of the

company.

7. The statement in lieu of prospects delivered for registration by the Company gives the names of three persons Naresh Kumar Mishra, Shyam Badan Singh and Ajay Kumar Pandey as directors or proposed directors.

8. The respondents, on the other hand, have placed on record a letter dated 15.1.1998 written by N.R. Plantations (India) Limited. Para 3 of this letter contains the names of promoters/sponsors of the Company and names of seven persons, including the petitioner Vishnu Prakash Bajpai, have been given in para 3 of this letter. The bio data of the petitioner has also been annexed to this letter. The respondent has also placed on record a copy of the letter dated 29.4.1998 written to SEBI, forwarding therewith the details of Directors of the Company. The resume of four persons, including the petitioner Vishnu Prakash Bajpai, have been annexed to this letter.

9. Thus, the documents filed by the petitioner do not show him as a Director of N.R. Plantations (India) Limited, though it does show him as one of the eight initial subscribers to the paid-up capital of the Company and the number of shares subscribed by all the eight subscribers was equal. The documents filed by the respondent, on the other hand, contain a positive statement from the Company to the effect that the petitioner was not only a promoter but also a Director of this Company.

10. The scope of exercise of power u/s 482 Cr. P.C. and the categories of cases where the High Court may exercise power under it, relating to cognizable offences, to prevent abuse of process of any court or otherwise to secure the ends of justice were set out in State of Haryana and others Vs. Ch. Bhajan Lal and others, . The illustrative categories indicated by the Hon''ble Supreme Court are as follows:

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

11. In R. Kalyani Vs. Janak C. Mehta and Others, , the Hon''ble Supreme Court summarized the proposition of law on the subject as under:

(1) The High Court ordinarily would not exercise its inherent jurisdiction to quash a criminal proceeding and, in particular, a first information report unless the allegations contained therein, even if given face value and taken to be correct in their entirety, disclosed no cognizable offence.

(2) For the said purpose the Court, save and except in very exceptional circumstances, would not look to any document relied upon by the defence.

(3) Such a power should be exercised very sparingly. If the allegations made in the FIR disclose commission of an offence, the Court shall not go beyond the same and pass an order in favour of the accused to hold absence of any mens

rea or actus reus.

(4) If the allegation discloses a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue.

12. While exercising jurisdiction u/s 482 of the Code of Criminal Procedure, the High Court is not expected to appreciate and weigh the evidence sought to be produced by the complainant or to compare one set of evidence with the other set of evidence available before it. The appreciation of evidence being the function of the trial court and not of the High Court exercising jurisdiction u/s 482 of the Code of Criminal procedure, it would not be appropriate for this Court to say, at this stage in these proceedings, as to whether the evidence produced by the complainant should be preferred or the evidence produced by the petitioner is more reliable. For the purpose of proceedings u/s 482 of Code of Criminal Procedure, the allegations made in the complaint have to be taken as correct and on their face value and if on consideration of the allegations it appears to the High Court that ingredients of the offence or offences alleged to have been committed by the petitioners are made out and there is no material to show that the prosecution is mala fide, frivolous or fictitious, it would not be appropriate for it to interfere with the prosecution, in exercise of extraordinary power conferred upon it u/s 482 of the Code of Criminal Procedure. Ordinarily, an accused against whom criminal proceedings are instituted needs to face trial in accordance with procedure prescribed in the Code of Criminal Procedure and it is only in extreme cases that the High Court would be justified in interfering, at an interim stage, in exercise of its powers u/s 482 of the Code. The exercise of jurisdiction envisaged in Section 482 of the Code, to quash the complaint or a chargesheet being an exception, the petitions for quashing need to be entertained with care and circumspection.

13. In the present case, if the trial court finds that as alleged in the complaint, the petitioner, in fact, was a promoter and a director of N.R. Plantations (India) Limited, at the time offence was committed by the Company, and was a person in charge of and responsible to the Company for conduct of its business, he would be vicariously liable for the offence attributed to the Company. In fact, the petitioner will be vicariously liable even if he was not a director of the Company, provided, of course, that he was a person in charge of and responsible to the Company for conduct of its business, at the time offence is alleged to have been committed by the Company. For a person to be vicariously liable for an offence of this nature, he need not necessarily be a Director of the Company. Even without being a Director he can be shown to be a person in charge of and responsible to the Company for conduct of its business. Therefore, even if the petitioner was not a director of the Company but was one of its promoters, it is open to the complainant/respondent, to prove, during trial that being a promoter of the company, he was a person in charge of and responsible to the Company for conduct of the business of the Company.

14. In *K.K. Ahuja v. Vora and Anr.* 2009 (3) JCC (NI) 194 on the question as to

who would be the person responsible to the company for conduct of its business, the Hon''ble Supreme Court, inter alia, held as under:

A company though a legal entity can act only through its Board of Directors. The settled position is that a Managing Director is prima facie in charge of and responsible for the company's business and affairs and can be prosecuted for offences by the company. But insofar as other directors are concerned, they can be prosecuted only if they were in charge of and responsible for the conduct of the company's business. A combined reading of Sections 5 and 291 of Companies Act, 1956 with the definitions in Clauses (24), (26), (30), (31), (45) of Section 2 of that Act would show that the following persons are considered to be the persons who are responsible to the company for the conduct of the business of the company:

(e) any person in accordance with whose directions or instructions the Board of directors of the company is accustomed to act;

Therefore, it is quite possible for the complainant/respondent to establish, during trial that being a promoter of the company, the petitioner was a person in accordance with whose directions the Board of Directors of N.R. Plantations (India) Limited was accustomed to act. If this is shown, the petitioner would be a person in charge of and responsible to the Company for conduct of its business, even if he was not a Director of the Company.

15. It would be pertinent to note here that the petitioner has not filed copies of Form-32 for all the years starting the year in which the violation of the provisions of SEBI Act was committed for the first time by the Company, nor has he filed any certificate from Registrar of Companies to show that he was never a Director of N.R. Plantations (India) Limited during the relevant period. 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. If the petitioner was a person in charge of and responsible to the Company N.R. Plantations (India) Limited at any point of time since the time offence punishable under SEBI Act was committed for the first time by the company N.R. Plantations (India) Limited, he would be vicariously liable for the period during which he was managing or controlling the affairs of the company.

16. The learned Counsel for the petitioner has referred to a decision of this Court in *Raj Chawla v. SEBI and Anr.* CrI. M.C. 3937/09 decided on 12.1.2010. In the case of *Raj Chawla (supra)*, the petitioner had placed on record certified copy of Form-32 which showed that she had resigned as a Director of the concerned Company with effect from 30th March, 1997 and had given intimation in this regard to Registrar of Companies on or before 14th January, 1998. The respondent in that case did not dispute the authenticity and genuineness of

certified copy of Form-32 filed by the petitioner. The offence punishable under SEBI Act by Company in question, namely, Fair Deal Forests Limited, was committed for the first time much after the petitioner had ceased to be a director of that Company. The facts of that case are, therefore, altogether different from the present case where the respondents/ complainants have placed on record letters written by the Company itself, stating therein that the petitioner was a promoter and director of the company and, therefore, it has become a disputed question of fact as to whether he actually was a director of the company at the time when offence was committed by the company or not. Moreover, in the case of Raj Chawla (supra) there was no allegation that the petitioner was also a promoter of the company.

17. The petitioner has relied upon the decision of this Court in Crl. M.C. 6275/06 filed by one Ram Chander Singh. A perusal of the judgment would show that the learned Counsel, appearing for the SEBI, was unable to show any document other than Memorandum and Articles of Association of the Company for roping the petitioner in for the offence committed by the Company. In the present case, however, the respondent have placed on record the documents filed by the Company itself claiming that the petitioner was not only one of its promoters but was also one of its directors. Therefore, the question as to whether the petitioner was actually a director of the company at the relevant time or not needs to be adjudicated during trial and no view in this regard can be taken by this Court, while exercising jurisdiction u/s 482 of the Code of Criminal Procedure.

18. Since I have taken a view that the factual issue involved in this case need adjudication after trial, I need not examine the contention of the respondent that the document relied upon by the petitioner being his defence, cannot be considered in these proceedings, as neither they are public documents nor admitted documents.

19. For the reasons given in the preceding paragraphs, the petition is, hereby dismissed.