IN THE HON'BLE HIGH COURT OF JUDICATURE AT ALLAHABAD
LUCKNOW BENCH LUCKNOW

ORIGINAL SIDE COMPANY JURISDICTION

Group:
Code:
District:

COMPANY PETITION NO. 4 OF 2006

1) Sanjay Kumar Sinha aged about 40 years son of Late Bajrang Sahay Sinha R/o B-1113, Indira Nagar, Lucknow Police Station Gazipur, Ex. Director, Nexus Farms Ltd.
2) Lalit Awasthi aged about 40 years son e of Late V.N. Awasthi R/o 15, Narayan Nagar, Faizabad Road, Lucknow, Ex. Director, Nexus Farms Ltd.

……Petitioners

Versus

1) Securities and Exchange Board of India through its Chairman, Mittal Court, B-Wing, 224 Nariman Point, Mumbai-400 021
2) Smt. Asha Menon, Additional Session Judge, Tis Hazari, Delhi
3) The Official Liquidator, UP & Uttranchal, 33 Taskand Marg, Allahabad
4) The Registrar of Companies, UP and Uttranchal, West Cot Building, The Mall, Kanpur
5) The State of Delhi, NCT through Chief Secretary, Delhi

……Opp. Parties

COMPANY PETITION UNDER SECTION 633(2) & SECTION 446 OF COMPANIES ACT 1956

To,

Hon'ble Chief Justice
And his other Hon'ble Companion Judges of the aforesaid Court

MAY IT PLEASE YOUR LORDSHIP

The above named petitioner most respectfully begs to submit as under:-

COMPANY PETITION NO. 4 OF 2006

Sanjay Kumar Sinha and another
Versus
Securities and Exchange Board of India through its Chairman and others.

Hon'ble Vikram Nath, J.

This is petition under Section 633(2) read with Section 446 of the Companies Act, 1956 (in short referred to as the Companies Act) by the Directors of the Company in liquidation being Nexus Farms Ltd. Having its registered office at B-1113, Indira Nagar, Lucknow. The prayer sought by this Company Petition is to quash the criminal proceedings being Case No. 41 of 2005, Securities and Exchange Board of India Versus Nexus Farms Ltd. And 4 others, filed under Sections 190 and 200 of the Code of Criminal Procedure, 1973 read with Sections 24 (1) and 27 of the Securities and Exchange Board of India Act, 1992 (in short referred to as the SEBI Act) pending in the Court of Additional Sessions Judge, Tees Hazari Courts, Delhi.

The petitioners were Directors of the Company. On account of certain internal problems the company went into liquidation and the Official Liquidator, Allahabad High Court was appointed as the provisional liquidator, under the Companies Act by order dated 2nd May, 2001. In the meantime, the Securities and Exchange Board of India (hereinafter referred to as SEBI) called upon the company to submit the relevant information and the returns as required under the SEBI Act. Subsequently the SEBI issued notice dated 7th/8th December, 2000 under Section 11(B) of the SEBI Act calling upon the company to refund the money collected by it under the various schemes from the investors, within a period of one month otherwise coercive action under provisions of SEBI Act would be initiated. The company failed to comply with the terms of the notice and accordingly SEBI filed criminal complaint in the initial court of the Additional Chief Metropolitan Magistrate, Tees Hazari, Delhi and it was registered as Case No. 1321 of 2002. Later on the said case was transferred to the court of Additional Session Judge. Tees Hazari, Delhi and was registered as Case No. 41 of 2005, where the case is still pending. The present Writ Petition has been filed for quashing of the said criminal proceedings.

I have heard Sri P. Chakravarty, learned counsel for the petitioners, Sri S.K. Chaudhary, learned counsel for the SEBI and Sri N.K. Agrawal, learned counsel for the Official Liquidator.

Pleading have been exchanged between the parties and they have been perused by me.

Learned counsel for the petitioners has made his submissions seeking protection under the provisions of Sections 446 and 633 lf the Companies Act. As according to him, no coercive measures could be taken against the Directors of the Company as it is already under liquidation and the status of the Company still continues. Taking protection under the said section it has been submitted that the proceedings before the Addl. Sessions Judge, Tees Hazari Delhi cannot be continued in view of the facts that the company is already under going liquidation.

On the other hand learned counsel for the SEBI has submitted that the petitioners cannot take resort either to Section 446 of Section 633 of the Companies Act for quashing of the criminal proceedings initiated by SEBI as the said provisions at best can help the petitioners or the directors only with regard to any violation under the Companies Act and not under any other law. According to the learned counsel for the SEBI the complaint had been filed for violation of the provisions contained in SEBI Act and the Regulations framed there under. He has also placed reliance of the following decisions-

1. **M/s Counter Point Advt. P. Ltd Vs. M/s Harita Finance Ltd.** Reported on **CDJ 2006 MHC 808**.
2. **Rabindra Chamria and others versus The Registrar of Companies, West Bengal and Others,** reported in **AIR 1992 Supreme Court 398**.
3. **Haresh Chandra Magan Lal and others versus Union of India and others,** reported in **1991(071) Com. Case-0069(Bom)**
4. **M/s Hari Prasad Jayantilal and Co. Versus V.S. Gupta,** reported **in AIR 1966 Supreme Court 1481.**

Before proceeding further let us examine the relevant provisions. For the sake of convenience Section 446 and 633 of the Companies Act are quoted hereunder-

"446. ***Suits stayed on winding up order. (1)*** *When a winding up order has been made or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company except by leave of the (Tribunal) and subject to such terms as the (Tribunal) may impose.*

[(2) [Tribunal] l shall, notwithstanding anything, contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of-

- *(a) any suit or proceeding by or against the company;*
- *(b) any claim made by or against the company (including claims by or against any of its branches in India)*
- *(c) any application made under Section 391 by or in respect of the company*

(d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to rise in course of the winding up of the company.

whether such suit or proceeding has been instituted or is instituted or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960 (65 of 1960)]

[(4)] Nothing in sub-section (1) or sub-section(3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court]."

"633. Power of Court to grant relief in certain cases:- (1) *If in any proceeding for negligence, default, breach of duty, misfeasance or breach of trust against an officer of a company, it appears to the court hearing the case that he is or may be liable in respect of the negligence, default, breach of duty, misfeasance or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case including those connected with is appointment, he ought fairly to be excused, the Court may relieve him, either wholly or partly from his liability on such terms as it may think fit;*

[Provided that in a criminal proceeding under this sub-section, the Court shall have no power to grant relief from any civil liability which may attach to an officer in respect of such negligence, default, breach of duty, misfeasance or breach of trust.]

[2] Where any such officer has reason to apprehend that any proceeding will or might be brought against him in respect of any negligence, default, breach of duty, misfeasance or breach of trust, he may apply to the High Court for relief and the High Court on such application shall have the same power to relieve him as it would have had if it had been a Court, before which a proceeding against that officer for negligence, default, breach of duty, misfeasance or breach of trust had been brought under sub-section(1)

[3] No court shall grant any relief to any officer under sub-section(1) or sub-section (2) unless it has, by notice served in the manner specified by it, required the Registrar and such other person, if any, as it thinks necessary, to show cause why such relief should not be granted.]

Section 633 sub-section (1) of the Companies Act provides that the Court mat relieve any officer of the company either wholly or partly from liability with regard to any proceedings against such officer of the company for negligence, default, breach of duty, misfeasance or breach of trust provided he has acted honestly and reasonably. The proviso to sub-section (1) provides that the Court shall not have any power to grant relief from any civil liability in a criminal proceeding. Sub-section(2) of Section 633 refers to institution of any proceedings where the officer may have reason to apprehend and in such circumstances also the Court will have the same power to grant relief. Further sub-

section (3) provides that no relief can be granted under sub-section (1) or sub-section (2) of Section 633 of the Companies Act without service of notice to the Registrar or such other person as the Court may think necessary.

Section 446 provides for stay of suits where winding up order has been made. It refers to bar of filing of fresh suit or other legal proceedings and also stay of pending suits against the company without leave of the Tribunal. Sub-section (2) of Section 446 of the Companies Act gives power to the Court/Tribunal to have jurisdiction to entertain and dispose of any suit or proceeding by or against a company any claim made by or against the company or any of its branches in India, any application made under Section 391 of the Companies Act by or in respect of the company and any question of priorities or any other question relating to or arising in course of the winding up of the company wherther already instituted or which may be instituted. Sub-section (3) had been deleted by Central Act No. 11 of 2003. Sub-section (4) provides that sub-section (1) shall not apply to any proceedings pending in appeal before Supreme Court or the High Court.

We now refer to the provisions contained under SEBI Act.

The relevant sections being Section 11(B), 24 and 27 of the SEBI Act are reproduced hereunder-

"11B. ***Power to issue directions****. Save as otherwise provided in section 11 if after making or causing to be made an enquiry, the Board is satisfied that it is necessary-*

(i) in the interest of investors, or orderly development of securities market; or

(ii) *to prevent the affairs of any intermediary or other persons referred to in section 12 being conducted in a manner detrimental to the interests of investors of securities market; or*

(iii) *to secure the proper management of any such intermediary or person, it may issue such directions-*

(a) to any person or class of persons referred to in section 12 or associated with the securities market; or

(b) *to any company in respect of matters specified in Section 11A, as may be appropriate in the interests of investors in securities and the securities market]*

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 there under, 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 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]*

27. Offences by companies- (1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly;

Provided that nothing contained in this sub-section (1) where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or it attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the offence and shall also be liable to be proceeded against and punished accordingly.

Explanation:- For the purpose of this section-
(a) " Company"- means any body corporate and includes a firm or other association of individuals" and
(b) "director", in relation to a firm, means a partner in the firm."

Section 11(B) of the SEBI Act gives power to SEBI to issue directions keeping in mind the interest of the investors and prevent the conduct of the company in a manner detrimental to the interest of the investors and to secure proper management to any person associated with the securities market or to any company.

Section 24 sub-section (1) of the SEBI Act provides that any person contravening or admitting to contravene or abets the contravention of the SEBI Act or any rules or regulations would be punished with imprisonment or with fine, or with both. Sub-Section(2) thereof provides that where any person fails to pay the penalty imposed by the adjudicating officer or fails to comply with any orders or directions he shall be punishable with imprisonment for a term not less than one month which may extend to three years or with fine or with both.

Similarly Section 27 of the SEBI Act deals with offences by company. It refers to every person who was in-charge and was responsible to the company would be liable to be punished.

In the present case it is not in dispute that the company was not registered with the SEBI. Whereas chapter IX of the Regulations framed under the SEBI Act titled as "Securities and Exchange Board of India (Collective Investors Scheme)

Regulations, 1999 (for short referred to as the Regulations) makes it mandatory for any company or a firm running collective investors schemes to be registered with SEBI. Regulation 73 of the said Regulations provided that any existing collective investment scheme which fails to make registration with the SEBI shall wind up the existing investors collective scheme and repay the amount collected from the investors. Further Regulation 74 of the said Regulations provide that an existing collective investors scheme which is not desirous of obtaining provisional registration from SEBI shall formulate a scheme of repayment and shall pay existing investors in the manner specified in Regulation 73 thereof.

In the present case the SEBI issued directions under Section 11(B) of the SEBI Act to the company to refund the money to the investors under the provisions of Regulation 73 and 74 of the Regulations as the company had failed to secure registration. When the company and its officers responsible for management of the affairs of the company failed to comply with the directions and further failed to discharge their mandatory liability of registration, it filed the complaint against the company and its Directors.

Thus, we notice that the offence alleged against the petitioners by the SEBI in its complaint was with regard to violation of the provisions of the SEBI Act and the Regulations framed there under. The complaint is not with regard to any offence under the Companies Act.

The question is whether the petitioners would be entitled to claim protection under Section 446 and 633 of the Companies Act.

Interpreting Section 633 of the Companies Act, the Apex Court in the case of **Rabindra Chamria (supra)** has clearly held that the expression ' any proceedings' occurring under section 633 of the Companies Act cannot be interpreted to mean offences under any act or Statute other than the Companies Act. It further held that the protection under Section 633 of the Companies Act where the offence was under the Employees Provident Fund and Miscellaneous Provisions Act, 1952. The Apex Court refused to grant any relief.

Similarly the Bombay High Court in the case of **Haresh Chandra Maganlal (supra)** took the similar view and declined to grant protection of Section 633 of the Companies Act where the offence was under the Employees Provident Fund and Miscellaneous Provisions Act, 1952 and also the Employees Insurance Act.

In another decision Madras High Court in the case of **M/s Counter Point Advt. Pvt. Ltd. (supra)** declined to grant protection of Section 446 of the Companies Act with regard to the offence under Section 138 of the Negotiable Instrument Acts.

From the above discussions it is clear that Section 446 cannot be resorted to for criminal proceedings and further Section 633 cannot be resorted to an offence under an Act other that the Companies Act.

In the present case the offence being under an Act other than Companies Act and the proceedings being criminal proceedings the relief claimed for by this petition cannot be granted as Section 446 and 633 of the Companies Act would have no application.

The petition is devoid of merit and is, accordingly, dismissed.

There shall however be no order as to const.

Dated 17.09.2007
RPS