



SEBI Vs. Harbasnaram Tree Magnum Resorts Ltd. and others .

IN THE COURT OF MS. POONAM CHAUDHARY
ASJ (CENTRAL-01) : DELHI

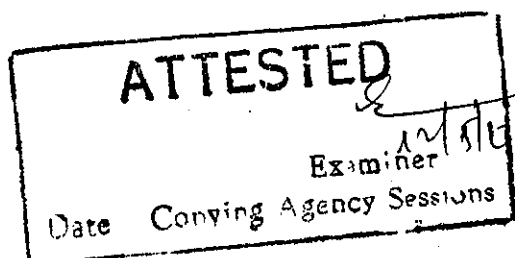
CC No. 77/09

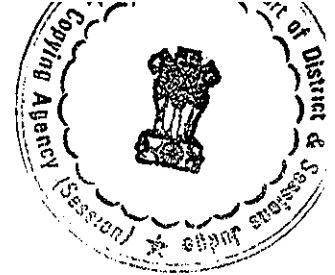
SECURITIES AND EXCHANGE BOARD OF INDIA, a statutory body established under the provisions of Securities and Exchange Board of India Act, 1992, having its head Office at Mittal Court, B-Wing, 224 Nariman Point, Mumbai - 400021 represented by its Legal Officer, Shri Sharad Bansode.

VERSUS

- 1 **Harbasnaram Tree Magnum Resorts (I) Ltd. and others company Ltd.** a company incorporated under the provisions of Companies Act, 1956 and having its registered office at : YMCA Building 13, Rana Pratap Marg, Lucknow (UP.)
- 2 Sh. Rajesh Kumar Srivastava, S/o Sh. K. C. Srivastava ; Director of the Accused no. 1; R/o Vivekanandpuri, Daudpur, Gorakhpur (UP)
- 3 Sh. Ajit Kumar Srivastava, S/o Sh. P. P. Srivastava ; Director of the Accused no. 1; R/o 197 Muftipur, Gorakhpur (UP)
- 4 Sh. Yogendra Nath Singh, S/o Sh. Late Sh. Umed Singh ; Director of the Accused no. 1; Rachchpal Sadan, Tulsipark, Balrampur (UP)

Arguments heard on : 15.02.2010
Judgments reserved for : 24.02.2010
Judgments announced on : 24.02.2010





SEBI Vs. Harbasnaram Tree Magnum Resorts Ltd. and others .

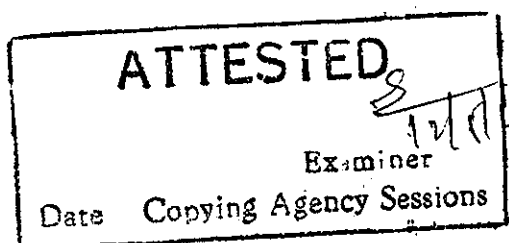
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JUDGMENT

1. In brief the case of the Securities and Exchange Board of India (herein after referred to as 'SEBI') a statutory body established under the provisions of Securities and Exchange Board of India Act 1992 (herein after referred to as the 'Act') as disclosed in the complaint is that accused no. 2 to 4 being the directors of accused no. 1 (herein after referred to as accused company) floated Collective Investments Scheme (in short referred as 'CIS') and collected funds from the general public. It is also averred that for the Regulations of CIS, being run by entrepreneurs, SEBI notified the Securities and Exchange Board of India Regulation 1999 (herein after referred to as the 'Regulations'). However, accused company neither applied for registration nor took any steps for winding up its CIS and repayment to the investors as per the Regulations. Therefore, according to the SEBI, accused company committed violations of Sections 11(B), 12(1B) of the Act read with Regulations 5(1), 68(1), 68(2), 73 & 74 punishable under Section 24(1) of the Act. SEBI also claimed that accused no. 2 to 4 being the directors of the accused no.1 company were responsible for the conduct of its business and, therefore, are liable for the said violations under Section 27 of the Act.

2. After the filing of the complaint, all the accused were summoned vide order of Ld. ACM, Delhi dated 16.12.2003.

3. After the appearance of accused notice of accusation was given to all the accused to which they pleaded not guilty self and on behalf of the



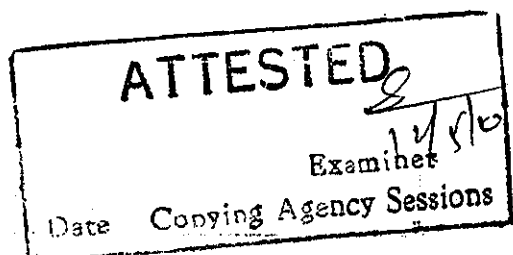


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company and claimed trial.

4. In support of its case the complainant SEBI examined CW1 Ms. Jyoti Jindgar, Deputy General Manager, SEBI and CW2 Sh. Rakesh Bhanot, Assistant General Manager, thereafter closed its evidence.
5. Thereafter statement of accused no. 2 to 4 for self and on behalf of the company were recorded under section 313 Cr.P.C.
6. Accused examined one witness in support of their defence and closed its defence evidence.
7. I have heard the Ld. Counsel for parties and perused the record.
8. The question for consideration is whether SEBI has been able to prove its case against the accused beyond reasonable doubt. The present case hinges more or less on the admitted documents issued by SEBI and the accused company prior to the institution of the present case.
9. CW 1 Ms. Jyoti Jindgar DGM SEBI had deposed that in pursuance of the press release issued by SEBI dated 26.11.97 and public notice dated 18.12.97 company which were running CIS were to file the information with SEBI regarding their scheme in case they were desirous to obtain registration under section 12 (1B) of the SEBI act. Accused company filed information



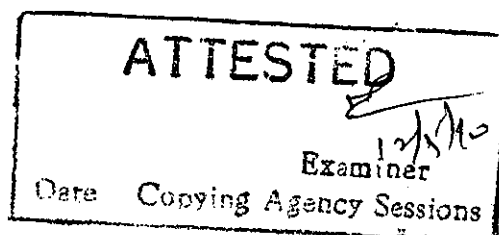


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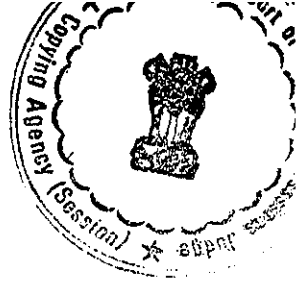
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with SEBI regarding its CIS vide Ex. Cw 1/1 received by SEBI on 2.03.98, as per this letter accused company had mobilized Rs. 9.54 lac under its CIS. Along with Ex. CW 1/1 accused company also furnished the details of its promoters. Subsequently the company vide letter dated 25.05.98 also submitted a list of its directors which is Ex. CW 1/2. CW 1 further stated that accused company had also filed Memorandum and articles of association which is Ex. CW 1/3, as per the certificate of incorporation appearing therein the accused company was incorporated on 28.10.1996.

10. CW 1 further stated that SEBI CIS Regulations were notified on 15.10.99 and intimation of the same was sent to the accused company vide public notice and letters sent by registered post which were returned undelivered with the remarks "Left without address". She further stated that in terms of the regulation company was either required to apply for registration or wind up its scheme in terms of the regulation 73 and 74 of the regulations and as per procedure the accused company was required to circulate information memorandum to its investors and to repay and wind up its schemes and submit the winding up and repayment reports with SEBI within 5 ½ months. CW 1 also testified that these regulatory obligations were communicated to the accused company vide specific letters dated 10.12.99 which was returned with the remarks "left without address". She further stated that returned envelope is Ex. Cw 1/6 and the letter is Ex. CW 1/7. She also stated that these requirements were also communicated vide public notice dated 10.12.99. She further stated that as the accused company neither applied for



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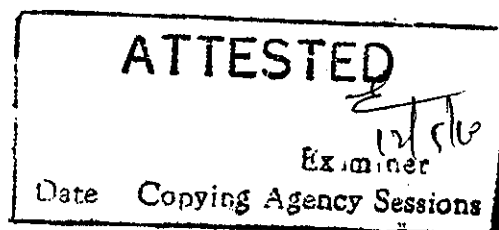
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registration nor intimated regarding its winding up of its scheme, hence Show cause notice dated 12.05.2000 was issued which was also returned undelivered with the remarks "left without address". She also testified that SEBI vide letter dated 31.07.2000 forwarded the format of winding up report in which companies were required to file information regarding winding up of its CIS and repayment done thereafter but the accused company failed to comply with the regulatory provisions. The "company" was thereafter directed vide order of chairman SEBI on 7.12.2000 to repay the investors as per the original terms of the offer within one month of the order. The same was communicated to accused company vide letter which was returned undelivered with the remarks "left without address". It is also alleged that contents of the order of chairman SEBI under section 11B of the act were also published in all the leading national newspapers as well as vernacular newspapers, public notice issued on 14.01.2000 which is Ex. CW 1/14. CW 1 further stated that name of accused no. 1 company appeared at serial no. 196 of the public notice Ex. CW 1/14. She further stated that accused company did not file any application for registration under SEBI CIS regulation.

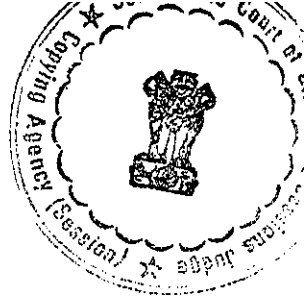
11. The Act came into force w.e.f. 30.01.92 Chapter V relates to the registration certificate. Section 12(1B) was incorporated on 25.01.95 and provides that

"No person shall sponsor or cause to be sponsored or carry on or cause to be carried on any venture capital funds or collective investment scheme including mutual funds, unless he obtains a certificate of registration from

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the Board in accordance with the Regulations"

12. Therefore according to section 12(1B) of the Act no person could sponsor CIS without registration from SEBI in accordance with the regulations. The regulation came into force w.e.f. 15.10.99.

13. CIS has been defined in 11AA of the Act. The contents specified in sub-section 2 thereof are as follows :-

"Collective Investment Scheme - (1) Any scheme or arrangement which satisfies the conditions referred to in sub-section (2) shall be a collective investment scheme.

(2) Any scheme or arrangement made or offered by any company under which, -

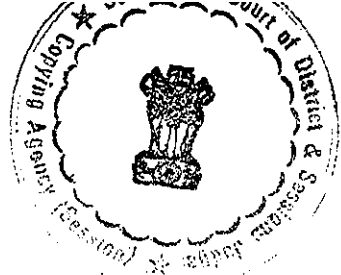
- (i) the contributions, or payment made by the investors, by whatever name called, are pooled and utilized for the purposes of the scheme or arrangement;*
- (ii) the contributions or payments are made to such scheme or arrangement by the investors with a view to receive profits, income, produce or property, whether movable or immovable, from such scheme or arrangement;*
- (iii) the property, contribution or investment forming part of scheme or arrangement, whether identifiable or not, is managed on behalf of the investors;*
- (iv) the investors do not have day-to-day control over the management and operation of the scheme or arrangement.*

14. The authenticity and genuineness of the letter Ex. CW 1/1 dated

Handwritten signature and checkmark.

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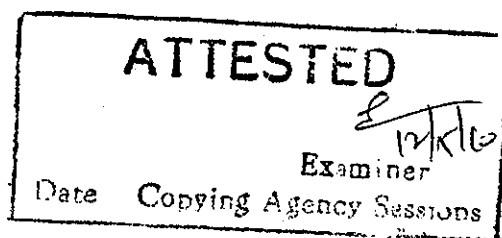
02.01.98 has not been challenged by accused, therefore it is deemed to be correct. The contention of Ld. counsel for SEBI Sh. Sanjay Mann is that on the date of its issue of Ex. CW 1/1 on 02.01.98 accused no. 2 to 4 were the directors of accused company. The next contention of Ld. counsel for SEBI is that as per admitted document Ex. CW 1/1 accused company had invited general public to invest in its various scheme and as per Ex. CW 1/2 accused no. 2 to 4 were the directors of accused company.

15. However contention of Ld. counsel for accused is that all the accused had resigned from the directorship of accused no. 1 company prior to the notification of regulations on 15.10.99.

16. The contention of Ld. counsel for accused no. 2 is that accused no.2 was not a director of accused no. 1 company at the time of notification of SEBI CIS regulation 1999 which were intimated to accused no. 1 company through registered post and public notice dated 20.10.99 for compliance. It was further contended that accused no. 2 Sh Rajesh Kumar Srivastava resigned from accused company on 23.06.99. In this regard accused examined DW 1 Sh. Suman Kumar LDC ROC Kanpur who stated that as per Form 32 of the Companies Act 1956 accused Rajesh Kumar Srivastava had resigned from the directorship of company w.e.f. 23.06.99. He proved the certified copy of the Form 32 of the Companies Act which is Ex. DW 1/B.

17. It was submitted on behalf accused no. 3 that he had resigned as

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director from accused no. 1 company on 15.07.98. DW 1 stated that receipt Ex. DW 1/C was issued by the Registrar of Companies as per the same resigned from accused company w.e.f. 15.07.98. It was contended on behalf of the accused that Form 32 is a public document and conclusive evidence regarding resignation of accused no. 3 and his resignation was accepted by the board of directors of accused company on 15.07.98.

18. It was also contended on behalf of accused no. 4 that he had resigned as director of accused company on 16.11.98. It is also alleged that SEBI did not question the date of resignation of accused no. 4.

19. It is also alleged that in the complaint there is no averments against accused no. 2 to 4 that they violated SEBI CIS regulation and further contended that CW 1 stated in her cross examination that no inquiry was made to verify whether accused no. 2 to 4 were the director of accused company, when the CIS regulations came in to force w.e.f. 15.10.1999. It is also alleged on behalf of the accused that SEBI CIS regulation came in to force w.e.f. 15.10.1999. The chairman SEBI passed an order under section 11 B on 07.12.2000 and as accused no. 2 to 4 had resigned prior to the said order they did not violate the SEBI CIS regulations. It was further stated there is no evidence against accused no. 2 to 4 that they were incharge of and responsible to the company for the conduct of its business at the time of commission of the alleged offence.

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In course of their contentions & counsel for accused have placed reliance on the

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2009 (3) JCC [NI] 194

K. K. Ahuja

Vs.

V. K. Vora & Anr.;

wherein it has been held as under

"Negotiable Instruments Act, 1881- Sec. 141 (2) -Constructive liability-If the person responsible to the company for the conduct of the business of the company was not in charge of the conduct of the business of the company-Then he can be made liable only if the offence was committed with his consent, connivance as a result of his negligence"

"Negotiable Instruments Act, 1881- Sec. 141 (1) - Vicarious liability -If the accused is not one of the persons who falls under the category of 'persons who are responsible to the company for the conduct of the business of the company'- Then merely by stating that 'he was in charge of the business of the company' or by stating that 'he was in charge of the day to day management of the company' or by stating that 'he was in charge of and was responsible to the company for the conduct of the business of the company' - He cannot be made vicariously liable."

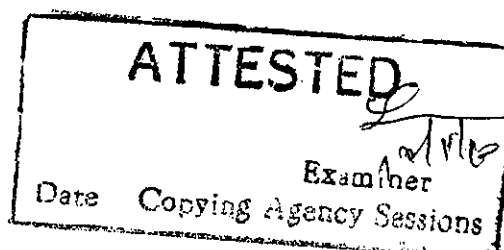
2008 (2) JCC 802

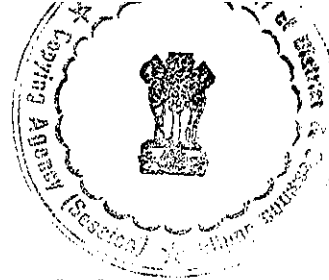
VIRENDER KUMAR SINGH & ANR.

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wherein it has been held as follows:

"Securities and Exchange Board of India Act, 1992—Sec. 27—SEBI alleged in its complaint against company and





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its directors, petitioners herein that company floated a collective investment scheme but failed to file the requisite information or details pursuant to a Government of India press release—Petitioners in a complaint alleged to be directors of the company and as such persons in charge of and responsible to the company for the conduct of its business and are alleged to be liable for the violation of the company—SEBI in its complaint itself indicates that offence took place when the company failed to make any application for registration of the scheme and the deadline in this regard was extended by SEBI to Dec. 2000—Petitioners had already resigned as directors much before and on Dec. 2000 which can be proved by a statutory document—It would be unfair to require the petitioners to go through the ordeal of a trial only to prove the statutory document—Complaint is quashed against petitioners under Sec. 482 Cr.P.C."

2009 (2) JCC (NI) 156

RAMRAJSINGH

VS.

STATE OF M.P. & ANR.

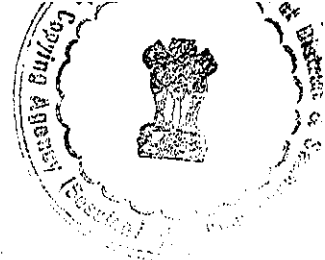
wherein it has been held as under :

"Negotiable Instruments Act, 1881—Sec. 141—Vicarious Liability—Conviction under Sec. 138 for dishonour of cheque—Appellant who was GM of the Company cannot be made vicariously liable as there was no specific role attributed to him in the complaint petition—Even there was no evidence that

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appellant was in charge and responsible for the conduct of the business of the company—Appeal allowed—(Ref. Neeta Bhalla (2007 (1) JCC [NI] 73 and N.K. Wahi 2007 (1) JCC [NI] 112) case).

2002 (2) Crimes 89

NEETA BHALLA

VS.

S.M.S. Pharmaceuticals Ltd., Heyderabad and anr.

wherein it has been held as under:

“ Negotiable Instruments Act, 1881—Sections 138 and 141—Dishonour of cheque—Offence by company—Vicarious liability of Director or any other person who, at the time offence committed, was incharge of and was responsible to company for conduct of its business, shall be deemed to be guilty—Accusation against each of the Director/person accused must be specific and unambiguous—Complaint if read as a whole must clearly disclose role played by each of the Director of company—A bald allegation by merely repeating the words mentioned in Section 141 of the Act would not be enough.”

20. It is also contended on behalf of the accused that notification of SEBI CIS regulation were intimated to accused company through public notice and by registered post for compliance and as accused no. 2 to 4 were not the director of accused company at the time of notification of SEBI C regulations, hence no liability can be fastend upon them and they could n

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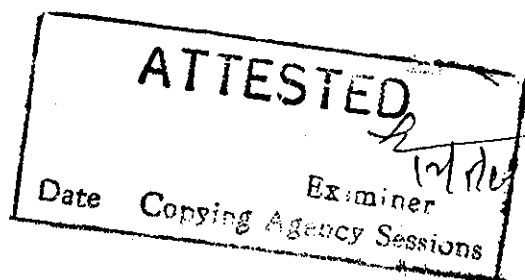
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be held vicariously liable for the violation of the regulation and direction issued by SEBI. It is also contended that there is no averments in the complaint or in the evidence of CWs that regulations and directions of SEBI were violated by company with the consent and connivance of accused no. 2 to 4. It is also stated that section 27 of the Act is not applicable to accused no. 2 to 4.

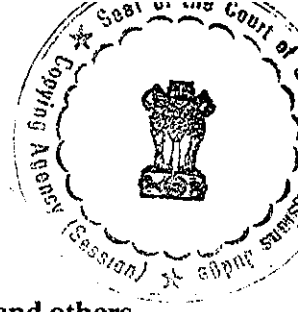
21. It is further stated that accused no. 1 company had complied with the press release dated 26.11.97 of SEBI vide its letter dated 2.01.98. It is further alleged that accused company vide Ex. CW 1/D2 informed SEBI that the company had not floated any new CIS subsequent to the public notice issued by SEBI on 18.12.97 and were not mobilizing funds under existing CIS and would do so only after obtaining rating of its existing schemes.

22. It is also contended on behalf of accused that accused company had repaid the investors before the SEBI CIS regulations were notified on 15.10.97. It is also submitted that company vide Ex. CW 1/D4 dated 22.07.2005 requested SEBI for grant of NOC for winding up its CIS and in response to the same SEBI vide letter dated 12.09.2005 which is Ex. CW 1/D5 advised the company to submit statutory auditors certificate signed by the directors in the format and also informed that in order to verify the authenticity of the claim contained in the certificate Ex. CW 1/D11 an independent audit was required to be conducted by SEBI appointed auditors, the cost of which was to be borne by the company.

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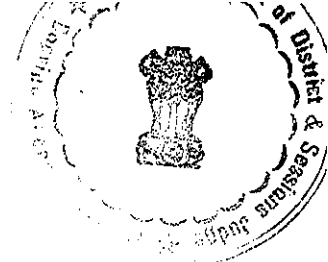
23. It is also argued on behalf of accused that CW 1 stated in her cross examination that no complaint has been received against accused company or its director from any investors and also stated that all the correspondence of SEBI was with the company and not with the directors and as SEBI did not intimate to directors for compliance of the notification or the violations by the accused company, hence no liability can be fastened on the directors and accused no. 2 to 4 could not be held vicariously liable for the violation of the regulation and directions issued by SEBI to accused company. It is also stated that there is no allegation in the complaint or evidence of SEBI that the regulations were violated with the consent or connivance with the accused no. 3. It is also alleged that accused no. 2 to 4 were not liable under section 3 of the Act as they were not incharge of or responsible to the company for the conduct of its business at the time of notification of regulations.

24. On the other hand Ld. Counsel for SEBI Sh. Sanjay Mann has alleged that as per the undisputed documents Ex. CW 1/1 accused company has been running CIS since its incorporation on 28.10.96 and even as on 02.01.1997 date of issue of the letter Ex. CW 1/1 and had been mobilizing funds from the general public to invest in various scheme and accused no. 2 to 4 were the directors of accused company, as per Ex. CW 1/2 furnished by accused company to SEBI. According to section 12 (1B) of the act no person can sponsor or cause to be sponsored collective investment scheme without obtaining certificate for registration from SEBI in accordance with the

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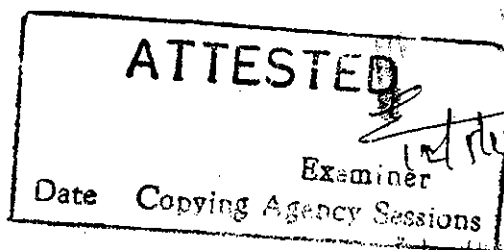
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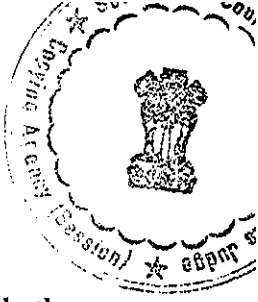
Regulations and are liable to be punished under section 24 of the Act.

25. CW 1 had also stated that intimation of notification of SEBI C. regulations was sent to the accused company vide public notice and letter which were returned undelivered and by virtue of the letter Ex. CW 1, various provision of regulation were brought to the notice of accused company. As per regulation 5 (1) accused company had to apply for registration of its CIS. As per regulation 73 (1) CIS which failed to make an application for registration with SEBI, would wind up the same and repay the investors. Apart from this as per Regulation 74, existing CIS which was not desirous of obtaining provisional registration from SEBI, would formulate a scheme of repayment and make such repayment to the existing investors in the manner specified in Regulation 73. According to Regulation 73(2) the existing CIS to be wound up, shall send an information memorandum to the investors who had subscribed to the schemes, within two months from the date of receipt of intimation from SEBI.

26. In their statement under section 313 Cr.P.C. it was admitted by accused no. 2 and 3 that in pursuance of the said press release and public notice the accused company filed information with SEBI vide letter Ex. CW 1/1 stating that company had mobilized funds of Rs. 9.54 lac under its CIS. It was also admitted that details of director were submitted to SEBI by company vide Ex. CW 1/2 thereby admitting that accused no. 2 to 4 were the directors of the company, whereas accused no. 4 gave evasive reply. Accused no. 2 to 4 further

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stated that company had shifted its office hence the intimation of SEBI regulations was not received by company and they had not seen public notices issued by SEBI on 10.12.99 and had also not seen the order of chairman SEBI under section 11 B of the SEBI Act published in all the leading national newspapers as well as vernacular newspapers Ex. CW 1/10.

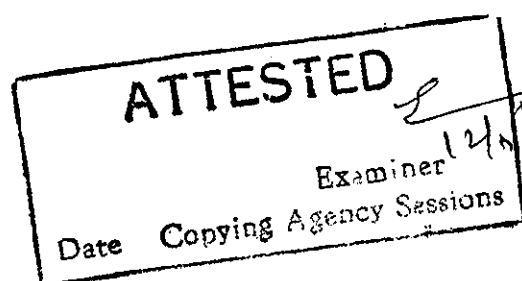
27. Ld. Counsel for accused had also contended that SEBI had addressed the letters to the directors hence they were not aware of requirements under regulations and no malafide can be attributed to them and non compliance if any by accused company was on account of genuine reason.

28. On the other hand Ld. counsel for SEBI Sh. Sanjay Mann argued that regulations had been notified with public interest in mind. Ld. counsel for SEBI further contended that accused company were themselves responsible for non receipt of communication from SEBI since they did not care to inform SEBI of the change of the address of the company and ignored public notice which were issued to remind the defaulters that they were required to confirm compliance. It is further stated that accused cannot plead ignorance of law to absolve themselves of the liability.

29. The question for consideration is 'whether accused company complied with the regulations or not. It was argued on behalf of accused that investors had been repaid and accused company vide letter Ex. CW 1/10.

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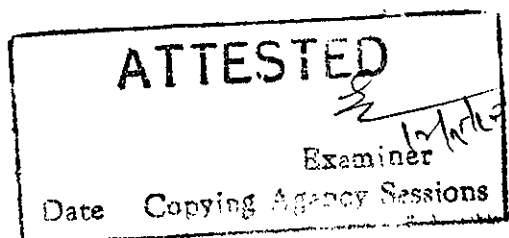


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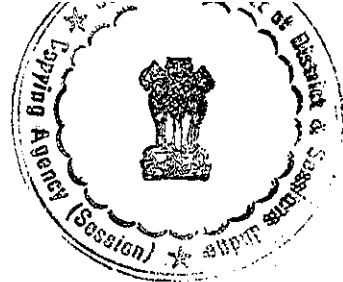
informed SEBI that accused company had not floated any new C subsequent to the public notice issued by SEBI on 18.12.97 and the accused company was not mobilizing any further funds under existing schemes and would do so after obtaining rating of its existing schemes.

30. It was also alleged on behalf of accused that investors had been repaid prior to the notification of regulations and accused company had requested SEBI for no objection certificate for winding up of accused company vide letter ex. CW 1/D4. Ld. Counsel for accused further submitted that vide certificate Ex. CW 1/D 11 dated 14.11.2005. Company informed SEBI that the entire amount /funds raised by company under its CIS has been refunded to all the investors along with the returns due to such investors prior to the notification of SEBI CIS regulations 1999 and there was no outstanding liability against the company in respect of the deposit raised under their CIS. The details of refund of funds raised under CIS was enclosed with this letter. However SEBI vide letter Ex. CW 1/D5 advised accused company to submit statutory auditors certificate duly signed by all the directors in a form supplied by SEBI and to ascertain and verify the authenticity of the claims of accused company regarding repayment to its investors SEBI directed audit to be conducted by SEBI appointed auditors. SEBI vide letter Ex. CW 1/D6 appointed S. N. Dhawan and company to carry out the audit of accused company to verify the claims of the company regarding repayment to investors under its CIS. The report of auditor Ex. CW 1/D7.

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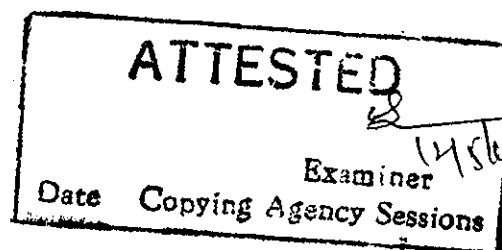


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31. It is further submitted on behalf of the accused that CW 1 deposed that SEBI has not received any complaint against the accused company or its directors from any investors. SEBI appointed auditor vide their report Ex. CW 1/7 stated that the authenticity of Ex. CW 1/D11 could not be commented upon as the company's books of account and subsidiary records revealed different repayment amounts. It was also submitted that since the company had made all repayments in cash to verify the authenticity of such payments, letters were sent to a few depositors on a random basis to get their confirmation of having received back their money, however, no reply was received of the 2 letters sent and 3 letters were returned undelivered due to incomplete address. It was also submitted that the company had repaid only the principal amount without any promised returns. It was also stated that the contention of the accused that funds were kept only for a short period, therefore, no interest was paid was not correct as the company had kept funds for a year or more in various schemes mentioned in the report Ex. CW 1/7. Ld. Counsel for SEBI Sh. Sanjay Mann submitted that auditors informed SEBI that report Ex. CW 1/8 was received from one Sh. Surender Pratap Singh one of the depositors under the company's CIS denying having received back his deposit of Rs. 15,000/- which was contrary to the claim made by the company of having repaid all the investors. Therefore, the accused company had failed to prove that all the investors had been repaid.

32. It was further argued by Ld. Counsel for the accused that SEBI requires only those companies to submit the winding up and repayment report which





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had not repaid the investors. However Ld. Counsel for SEBI argued that repayment report had to be submitted by all companies even if they repaid the investors. As per the regulations all the existing CIS had confirmed compliance. In this respect it is pertinent to note that accused no. 2, 4 to 6 in their statement under section 311 Cr.P.C. gave evasive reply to the question as to whether company had confirmed compliance to the regulations or not. Accused had stated that accused company shifted its address.

33. The question for consideration is whether accused company violated the statutory obligations or not. CW 1 had stated that accused company did not file application seeking registration under SEBI regulations and further stated that subsequent to the directions of chairmen of SEBI under section 11 B of the SEBI act dated 7.12.2000, accused company did not furnish any report with SEBI confirming compliance. It was further alleged that the directors who were the persons in charge of the affairs of the company were duly intimated of the SEBI CIS regulations through public notice and press releases. CW 1 proved Ex. CW 1/2 dated 25.05.98, as per which same accused no. 2 to 4 were responsible for mobilizing funds hence it was not necessary to make further verification from ROC as to whether accused no. 2 to 4 were the directors of the accused company when the regulations came into force in 1999.

34. Thus accused company was bound to submit winding up and repayment report to SEBI in terms of the regulations 73 and 74 which the

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failed to do till the filing of the complaint. Accused stated that they did not receive the communication sent by SEBI as company had left the given address as such the accused were themselves responsible for non-receipt of communication by SEBI. Accused ignored the public notices and press releases. In these circumstances they cannot plead ignorance for non-compliance of the regulations. Thus the violations continued till the filing of the complaint.

35. It was further contended on behalf of the accused that the complaint was filed by SEBI on the allegations that the company failed to comply with the regulations within the time granted which expired on 7.12.2000 as such the cause of action can be said to have arisen on 7.01.2000 and not before that, hence accused no. 2 to 4 cannot be vicariously liable for violations of regulations as they resigned prior to the notification of regulations. In support of the said contention Ld. Counsel for accused placed reliance upon

2008 [4] JCC 2717

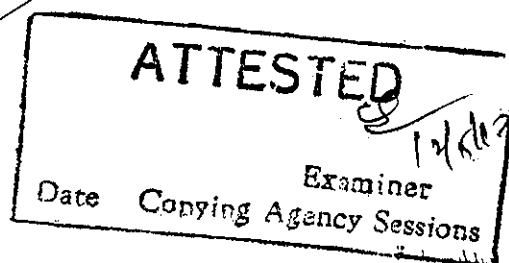
Mrs. Kanchan Aggarwal

Vs.

Securities and Exchange Board of India and anr.

wherein it has been held as follows:

*"Securities and Exchange Board of India Act. 1992
-Sec. 27 - Securities and Exchange Board of India
(Collective Investment Schemes) Regulations, 1999
-Scheme under-Violation of -Complaint was filed
because the company failed to comply with the*





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directions of the first respondent within the time granted, which expired on 7.12.2000-Therefore, the cause of action can only be said to have arisen against the company on 7.01.2001 and not before-Whether the petitioner was a Director of the said company at the relevant time is not something that cannot be decided without evidence being recorded at the trial-2008 (2) JCC 802 relied upon."

36. On the other hand Ld. Counsel for SEBI has placed reliance upon decision of Hon'ble High court in

CrI. M. C. 1182/2009

Vishnu Prakash Bajpai

Vs.

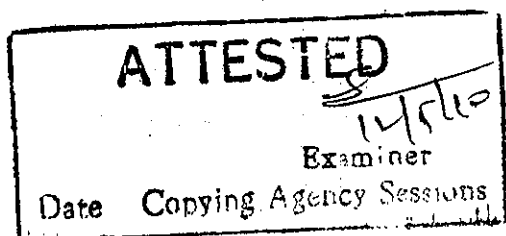
Securities and Exchange Board of India,

wherein it has been held as follows:

"If the petitioner was a person in charge of and responsible to the Company N. R. Plantation (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. Plantation (India) Ltd.he would be vicariously liable for the period during which he was managing or controlling the affairs of the company."

37. As per the admitted documents Ex. CW 1/1 and Ex. CW 1/2 accused were the directors of the accused company and had mobilized funds of 9.54 lacks as on 02.01.98, hence in view of the above decision of the Hon'ble High court relied upon by the SEBI accused no. 2 to 4 were the persons

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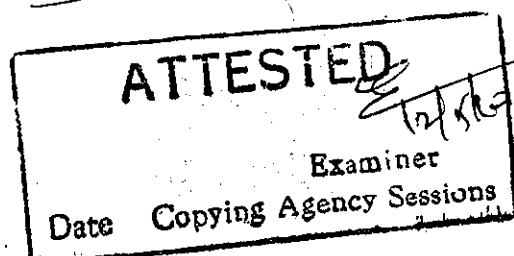


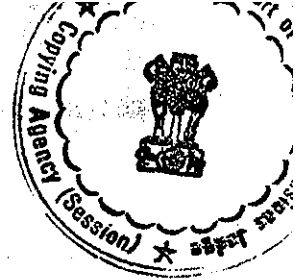
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incharge and responsible for the affairs of the company at the time when the offence punishable under SEBI act was committed for the first time by the company. The company was incorporated on 28.10.1996 and had not obtained registration as per section 12 (1B) of the Act. Accused no. 2 and 3 admitted in their statement under section 313 Cr.P.C. company had mobilized funds of Rs. 9.54 lacks under its CIS and also admitted that they were the directors of the accused company as per the details furnished to SEBI vide letter Ex. CW 1/2. Whereas accused no. 4 gave evasive reply. Accused had also stated that they had not obtained registration of the CIS even after the act came into force. Moreover, as per Ex. CW 1/D4 dated 22.07.2005 the company requested for NOC for winding up of its CIS stating that the company had decided to repay the investors and wind up the company operations.

38. However the accused failed to prove that all the investors had been repaid neither the CIS had been wound up. According to section 12(1B) a person carrying on CIS without obtaining registration from SEBI in accordance with the regulation is liable to be punished u/s 24 of the Act.

39. For the sake of repetition regulation came into force w.e.f. 15.10.99. Section 27 relates to the commission of offences by the company. According to sub section (1), if 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



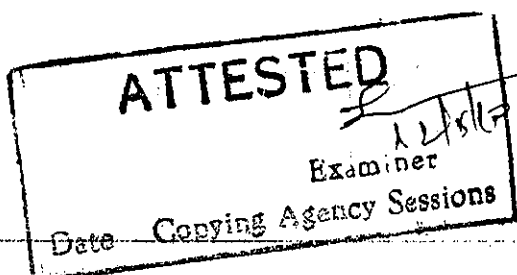


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business of the company, as well as the company, would be guilty of offence . In view of the decision of Hon'ble High court relied upon by Ld. Counsel for SEBI accused no. 2 to 4 were the directors of the company at the time when offence punishable under SEBI Act was committed for the first time by the company and are vicariously liable for the period during which they were managing and controlling the affairs of the company. Even though accused no. 2 to 4 resigned but CIS had not been wound up and funds of Rs. 9.54 lacks raised under its CIS remained unpaid even as on 22.07 2005 when the company applied for winding up its CIS vide Ex. CW 1/D 4. Hence violations continued till filing of the complaint.

40. The contention of Ld. Counsel for accused Sh. A. K. Bansal is that in view of the decision of the Hon'ble High court in Crl. M.C. 3937/2009, dated 12.01.2009 Shri. Raj Chawala Vs. Securities & Exchange Board of India (SEBI) & Anr. as accused no. 2 to 4 had resigned from the company prior to the notification of the regulations which has been proved as Form 32 of Companies Act, hence accused no. 2 to 4 are not vicariously liable for violation of the SEBI CIS regulations.

41. On the other hand Ld. Counsel for SEBI submitted that as per admission documents Ex. CW 1/1 and Ex. CW 1/2 accused no. 2 to 4 were the directors of the company as such incharge and responsible for the company for the conduct of the business of the company at the time when offence punishable under SEBI act was committed for the first time by the company.





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vicariously liable for the period which they were managing and controlling the affairs of the company.

42. Ld. Counsel for SEBI Sh. Sanjay Mann further argued that accused company failed to place any document on record to show that all the investors had been repaid so it is continuing offence as the statutory obligations were not complied with and the default constitutes continuing offence as held in

Crl.R.C. No. 842/2005

M/s Rhodanth's Agro Limited and Ors

Vs.

Securities and Exchange Board of India;

by Hon'ble High court of Judicature at Madras

wherein it has been held as follows:

"The expression continuing offence means that if an act or omission constituting an offence continues from day to day, then fresh offence is committed every day on which the act or omission is repeated, recurred or continues.

Continuing offence is an act or omission over which the offender can exercise his control irrespective of the penal provision of daily fine. Law may cast an obligation upon a person either to discontinue an act or abstain from continuing an omission. If the obligation continues and it is not discharged, the default constitutes a continuing offence.

The non-compliance of Regulations 73 and 74 for winding up the company is continuing in nature. Hence



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the trial court is correct in coming to the conclusion that the offence is continuing in nature.

43. SEBI filed the complaint for violation of the offence for no registration u/s 12 (1B) of the act and regulation 5(1), 68(1), 73 and 74 of the regulations. The accused company of which accused no. 2 to 4 were the directors in charge of and responsible to the company at the time when the offence was committed for the first time by the company are vicariously liable for the period during which they were managing and controlling the affairs of the company and the offence being continuing one.

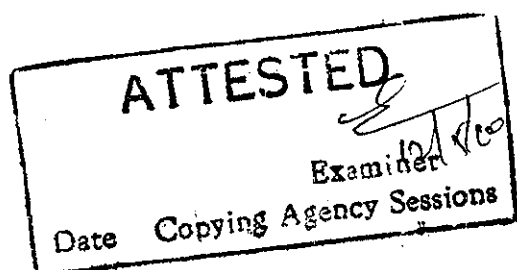
44. Section 5(1) of the regulations is as follows:

"Any person who immediately prior to the commencement of these regulations was operating a scheme, shall subject to the provisions of Chapter IX of these regulations make an application to the Board for the grant of a certificate within a period of two months from such date. "

45. Regulations 68, 73 and 74 of SEBI Act reads as under

68(1) Any person who has been operating a collective investment scheme at the time of commencement of these regulations shall be deemed to be an existing collective investment scheme and shall also comply with the provisions of this Chapter.

Explanation : The expression 'operating a collective





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investment scheme' shall include carrying out the obligations under taken in the various documents entered into with the investors who have subscribed to the scheme.

(2) An existing collective investment shall make an application to the Board in the manner specified in regulation 5.

(3) The application made under sub-regulations (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 on by the Board under regulation 10;

(c) by rejection of the application for registration by the Board under regulation 12.

46.

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 scheme, within two months from the date of receipt of intimation from the Board, detailing the state of affairs of the scheme, the amount

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repayable to each investors and the manner in which such amount is determined.

(3) *The information memorandum referred to in sub-regulations (2) shall be dated and signed by all the directors of the scheme.*

(4) *The Board may specify such other disclosure 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 stated that investors desirous of continuing with the scheme shall have to give a positive consent within one month from the date of the information 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:*

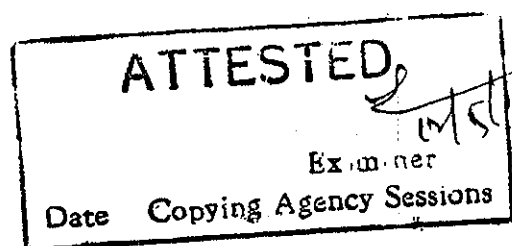
Provided that if the positive consent to continue with the scheme, is received from only twenty-five per cent or less of the total number of existing investors, the scheme shall be wound up.

(8) *The payment to the investors, shall be made within three months of the date of the information memorandum.*

(9) *On completion of the winding up the existing collective investment scheme shall file with the Board such reports, as may be specified.*

47.

74. An existing collective investment scheme



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which is not desirous of obtaining provisional registration from the Board shall formulate a scheme or repayment and make such payment to the existing investors in the manner specified in regulations 73.

48. From the Ex. CW 1/D4 it is apparent that company applied for winding up only in the year 2005 to SEBI. In the circumstances when WRR had not been submitted to SEBI and the violations of the act and regulations being continuing offence accused are held guilty for violation of the regulation this continuing offences punishable u/s 24/27 of the act.

49. For the foregoing reasons I hold that SEBI has been able to prove its case against the accused company of which accused no. 2 to 4 were its directors. It has been proved beyond reasonable doubt the CIS as contemplated by section 11 AA of the Act had been floated and fund mobilized from general public without obtaining certificate of Registration as required u/s 12(1B) of that Act. Further it has been proved that despite notification of regulations on 15.10.99, accused company failed to apply for registrations of its CIS and did not wind up its CIS or repay the investors as per regulations 73 and 74.

50. I accordingly hold that accused company Harbansram Tree Magnum Resorts Ltd. and its director accused no. 2 to 4 guilty for violation of Regulation 5(1) read with regulations 68 (1), 68(2), 73 & 74 of SEBI CIS



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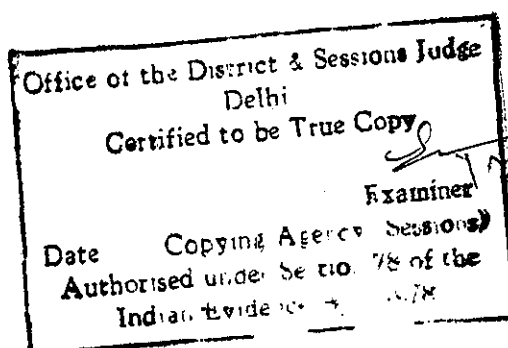
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regulations 1999 r/w section 24 & 27 of the SEBI Act, 1992. Accused to be heard on the point of sentence on 10.03.2010.

Poonam Chaudhary

Announced in the open Court
On this day of 24th February 2010

(POONAM CHAUDHARY)
ASJ (Central-01) : DELHI



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