IN THE COURT OF THE ADDL. CHIEF METROPOLITAN

MAGISTRATE,

TEES HAZARI, DELHI

CC NO: 132/02
2/11/02

C-C-44/05

CC No. 61/11
24/02/11

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 -- 400 021 represented by its Legal Officer, Shri Sharad Bansode.

...Complainant

Vs.

1. Nexus Farms Ltd. a company incorporated under the provisions of Companies Act, 1956 and having its Regd. Office at Radhey Plaza, Sanjay Gandhi Puram, Faizabad Road, Lucknow.

2. Sh. Sanjay Kr. Sinha, S/o Not known to the complainant; Occupation Director of the Accused No.1; resident of B – 1113, Indira Nagar, Lucknow

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3. Sh. Virendra Sinha, S/o Not known to the complainant; Occupation Director of the Accused No.1; resident of Srinagar, Mohibullapur, Sitapur Road, Lucknow.

4. Sh. Atul Kishore Gupta, S/o Not known to the complainant; Occupation Director of the Accused No.1; L-4-M-70, Sector M, Aliganj Extn., Lucknow.

5. Sh. Lalit Awasti, S/o Not known to the complainant; Occupation Director of the Accused No.1; resident of 15, Narain Nagar, Faizabad Road, Lucknow. ...Accused

COMPLAINT UNDER SECTION 190 and 200 OF THE CODE OF CRIMINAL PROCEDURE, 1973 READ WITH SEC. 24(1) AND 27 OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992

It may please Your Honour:

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Item no. 6

08.06.2012

Present: Sh. Sanjay Mann, Advocate, Counsel for SEBI
Sh. Abhey Singh Yadav, Advocate, counsel for convict no. 2
Sh. Shahd Anwar, Advocate, counsel for convict no. 3 & 5
Sh. Amar Deep Singh, Advocate, counel for convict no. 4

Arguments heard on the point of sentence.

Vide separate order on the point of sentence, convicts no. 2 to 5 are sentenced rigorous imprisonment for a period for six month with a fine of ₹ 4 lac each in default further three months simple imprisonment for the offence punishable under Section 24(1) of the SEBI Act. Convict Company M/s Nexus Farms Ltd. is burdened with the fine of ₹ 6 lac for the offence punishable under Section 24(1) of the SEBI Act.

SEBI is ordered to make efforts to trace out the investors by giving advertisement in print and electronic media and after verification the documents shall submit a report in the Court. On receipt of the report the fine amount, if realized shall be utilized in compensating to the investors under Section 357 of the Code of Criminal Procedure. However, the amount of compensation shall not be released to the investors before the expiry of period of appeal or revision and if any appeal or revision is filed then till the decision of such appeal or revision.

Counsel for SEBI submits that SEBI shall take appropriate steps for the realization of the fine amount qua company accused

(convict no.1). Request is allowed.

Copy of judgment along with order on the point of sentence be given to the convicts/their counsel free of cost.

Separate application on behalf of convicts is moved for suspension of sentence under Section 389 Cr.P.C. Considering the fact that convicts were on bail during the trial, substantial sentence is suspended till 15.07.2012 provided they deposit the fine amount on furnishing a personal bond in the sum of ₹ 10,000/- each with one surety in the like amount.

Application stands disposed of.

(PAWAN KUMAR JAIN)
ADDITIONAL SESSIONS JUDGE
CENTRAL-01/THC/DELHI

ATTESTED

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IN THE COURT OF SH. PAWAN KUMAR JAIN, ADDITIONAL SESSIONS JUDGE-01(CENTRAL):DELHI

Complaint Case No. 01 of 2011
ID No: 02401R0164312002

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 400 021 represented by Ms. Versha Aggarwal, SEBI.

Versus

1. **Naxus Farms Ltd.**
a company under the provisions of
Companies Act, 1956, having its Regd.
Office at Radhey Plaza,
Sanjay Gandhi Puram
Faizabad Road, Lucknow.

.....Accused no.1

2. **Sh. Sanjay Kumar Sinha**
S/o Sh. B. S. Sinha
Occupation Director of accused no. 1
R/o B-1113, Indira Nagar,
Lucknow.

.....Accused no.2

3. **Sh. Virendra Sinha**
S/o Sh. Ravindra Singh
Occupation Director of accused no. 1
R/o Srinagar, Mohibullapur,
Sitapur Road, Lucknow

.....Accused no.3

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4. **Sh. Atul Kishore Gupta**
S/o Sh. K. K. Gupta
L-4-M-70, Sector M, Aliganj Extn.
Lucknow

.....Accused no.4

5. **Sh. Lalit Awasti,**
S/o Late Sh. V. N. Awasthi
R/o 15, Narain Nagar, Faizabad Road
Lucknow

.....Accused no.5

Date of Institution : 21.12.2002
Date of committal to Sessions Court : 31.01.2005
Judgment reserved on : 15.05.2012
Date of pronouncement of judgment : 06.06.2012

Present: Sh. Sanjay Mann, Advocate, Counsel for SEBI.
Sh. Abhey Singh Yadav, Advocate, counsel for accused no. 2
Sh. Shahd Anwar, Advocate, counsel for accused no. 3 & 5
Sh. Amar Deep Singh, Advocate, counel for accused no. 4

JUDGMENT:

1. **This** criminal complaint was preferred by the Securities & Exchange Board of India (hereinafter referred to as "SEBI" or "the complainant"), on December 21, 2002 in the Court of Additional Chief Metropolitan Magistrate (ACMM), alleging violation of the provisions of Section 12 (1B) of Securities & Exchange Board of India Act, 1992 (hereinafter, "the SEBI Act") and Regulation Nos. 5(1) read with 68(1), 68(2), 73 and 74 of the Securities & Exchange Board of India

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(Collective Investment Schemes) Regulations, 1999 (hereinafter referred to as "the CIS Regulations" or "the said Regulations"), constituting offence punishable under Section 24(1) read with Section 27 of the SEBI Act.

2. **Five** persons were arrayed as accused in the criminal complaint preferred under Section 200 Cr.P.C., they being M/s Nexus Farms Ltd. (hereinafter, "A1" or "the Company Accused"), accused No. 2 Sh. Sanjay Kumar Sinha, ("A2"), accused No.3 Sh. Virendra Singh ("A3"), accused No.4 Sh. Atul Kishore Gupta ("A4"), accused No.5 Sh. Lalit Awasti ("A5"). It is alleged that A2 to A5 were Directors of the company accused and as such persons were in-charge of, and responsible to, A1 for the conduct of its business within the meaning of the provisions contained in Section 27 of the SEBI Act.

3. It was alleged in the complaint that A1 had floated the Collective Investment Schemes (CIS) and raised amount approximately ₹ 0.29 crore from general public in violation of the provisions contained in Section 12 (1B) of the SEBI Act. It is also alleged that after coming into force of the CIS Regulations and in spite of public notice dated December 18, 1997, the accused persons had failed to get the Collective Investment Scheme registered with SEBI or to wind up the said scheme or repay the amount collected from the investors in terms of the CIS Regulations, thus constituting violation of the law and regulations framed thereunder and thereby committing the offence alleged as above.

4. **Cognizance** on the complaint was taken by the learned ACMM vide order dated December 21, 2002 whereby process were

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issued under Section 204 Cr.P.C. against all the accused persons.

5. **On** account of the amendment, particularly in Sections 24 and 26 of the SEBI Act, through Amendment Act which came into force w.e.f. November 24, 2002, pursuant to Administrative Directions of Hon'ble High Court, under orders of the Ld. District & Sessions Judge, this case was transferred on January 31, 2005 from the Court of Ld. ACMM to the Court of Sessions, then presided over by Ms. Asha Menon, the then Additional Sessions Judge, Delhi.

6. **Vide** order dated January 13, 2006, a notice for the offence punishable under Section 24 read with section 27 of the SEBI Act was served upon the A1(company) & A2 to A5 wherein they pleaded not guilty and claimed trial.

7. **To** bring home the guilt of accused, complainant has examined two witnesses namely Sh. Jyoti Jindgar, Dy. General Manager, SEBI as CW1 and Ms. Versha Aggarwal, Asstt. General Manager, SEBI as CW2. Thereafter, A2 to A5 were examined under Section 313 Cr.P.C. wherein they denied all evidence led by the complainant. A2, A3 and A5 took plea in their statement recorded under Section 313 Cr.P.C that head office of the company was sealed by the police on August 10, 1999. Letters sent after the said date were not received to them due to sealing of the head office. SEBI had not sent the letters to the registered office despite the fact that the same was with the SEBI. It was submitted that on January 7, 2000, High Court of Allahabad restrained the company from disposing of its assets and SEBI was well aware about the winding up proceedings going on before the High Court of Allahabad. Moreover, ROC Kanpur

had informed the SEBI about the same on October 9, 2001. On December 17, 2000 liquidation was notified and published in the newspaper. It was stated that company and its directors were co-operating to the official liquidator and were appearing before the local authority and Courts. It was submitted that all the assets of the company were handed over to the official liquidator of the company accused. Said accused admitted that they were directors in the company accused. A4 took the plea that he was director in the company accused till January 17, 1999 when he submitted his resignation. It was further submitted that he was not an active director, thus not involved in day to day affairs of the company. He was not authorized to operate the bank account. It was submitted that he was full time employee of M/s Mahatta Camera Corporation and he did not attend the AGM of the company for the financial year 1997-98 and 1998-99. It was further stated that the CIS Regulations were notifed after his resignation. To prove their innocence, they examined Sh. Anil Kumar Srivastava as DW1, Ms. Ranjana Srivastava, as DW2, Sh. Rajeeva as DW3, Sh. V.K.Srivastava as DW4, Smt. Asha Singh as DW5 and Sh. Alok Khare as DW6.

8. I have heard Sh. Sanjay Mann, Advocate, counsel for complainant, Sh. Abhey Singh Yadav, Advocate, counsel for A2, Sh. Shahad Anwar, Advocate, counsel for A3 & A5 and Sh. Amar Deep Singh, Advocate, counsel for A4 and perused the record carefully.

9. **Counsels** appearing for the accused persons raised the following contentions:-

(i) **That** the schemes launched by the company accused do

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not fall within the four corners of Collective Investment Scheme as defined under the SEBI Act. It was argued that Section 11AA was inserted in the Act in the year 2000 and prior to that there was no definition of CIS.

(ii) **That** the judgment of ***M/s Paramount Bio-Tech Industries Limited Vs. Union of India reported in 2003 INDLAW All 168*** is not applicable in the present case as Section 12 (1B) was not discussed in the said case.

(iii) **That** the complaint filed by the SEBI is barred by the period of limitation. It was argued that since May 12, 2000 was the last date of making payment to the investors, thus company accused had not committed any offence prior to that date. It was contended that under the Act only the Court of Sessions is competent to try the matter, despite that SEBI has filed the complaint before the Court of learned ACMM, thus, it was argued that the entire trial has been vitiated.

(iv) **That** the company had committed the offence when it did not comply with the regulations of Collective Investment Schemes Regulations, 1999. It was aruged that before that company had not violated any provisions of SEBI Act.

(v) **That** no charge has been framed against the accused that they had violated the provisions of Section 11B. It was further contended that no separate charge has been framed against the accused persons that they had violated the provisions of Section 12(1B) of the Act.

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(vi) **That** the company accused had gone in liquidation, and the process of winding up was initiated on December 8, 1999. It was submitted that High Court of Allahabad had granted stay on December 10, 1999, which is exhibited as Ex. CW1/DC. It was contended that official liquidator was appointed by the High Court and ₹ 16 lac was deposited in the High Court. It was contended that since official liquidator was appointed prior to issuance of directions by the SEBI, company accused had not violated any provisions of SEBI Act. It was contended that on November 8, 2001 official liquidator had taken over the charge of all the assets of the company and sold the same in the sum of ₹ 65 lac. That SEBI was aware about the appointment of official liquidator at the time of filing the present complaint despite that SEBI had not disclosed the same in the complaint.

(vii) **That** all the directors of the company were arrested in another case on August 8, 1999 and were released on bail August 30, 1999, thus they were not in a position to refund the amount to the investors.

(viii) **That** if we assume that company accused had violated the provisions of Section 12 (1B) of the Act. It was contended that SEBI had condoned the said violation by permitting the company accused to continue with the scheme after obtaining the credit rating certificate. It was contended that since company accused had not mobilized fund after May 18, 1996, company accused had not violated any provisions of SEBI.

(ix) **That** since SEBI has not received any complaint from any investor, it means that company accused had refunded the entire

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amount to the investors, thus company accused had not violated any provisions of SEBI Act.

(x) **That** SEBI had not sent any letters to the company accused at its registered office and also not sent any letter to its directors.

(xi) **That** the A4 Mr. Atul Kishore Gupta is not liable for the violations, if any, as he had resigned from the company accused *w.e.f.* January 17, 1999 whereas the complaint was filed in the year 2002. It was submitted that A4 was not authorised to operate the bank account of the company accused. It was submitted that A4 was not liable for the day to-day affairs of the company accused, thus, he can not be held liable for the violations committed by the company accused. It was further contended that there is no averment in the complaint that A4 was one of the directors of the company accused.

10. **Per** contra, learned counsel appearing for the SEBI refuted the contentions raised by the learned counsel appearing for accused persons and submitted that since company accused was incorporated on January 14, 1997 company accused was not supposed to raise funds without obtaining the mandatory certificate of registration. It was contended that since company accused had mobilized funds without obtaining necessary certificate of registration, company accused had violated the provisions of Section 12 (1B) of the Act. It was further contended that mere fact that there was no definition of collective investment scheme in the Act does not mean that terms was not in vogue. Reliance has been placed on ***Paramount's case***. It was further contended that A2 to A5 were the directors of the company accused and being directors they were liable for the violations

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committed by the company accused. It was further submitted that company accused had not complied with the provisions of CIS Regulations. It was argued that the complaint was within the period of limitation as the violation was continuing in nature.

11. **Counsel** appearing for the SEBI relied upon the judgments *i.e* ***Vishnu Prakash Bajpai v SEBI, (2010) 154 CompCas 147 (Delhi), Dinesh B. Patel v. State of Gujarat, (2010) 11 SCC 125, N. Rangachari v. Bharat Sanchar Nigam Ltd., AIR 2007 SC 1682, Om Prakash Choudhary & Another v. SEBI decided by High Court of Delhi on January 4, 2006 in CRL.M.C. 6011-12/2005, Ankur Forest and Project Development India Ltd and others v. SEBI 2011 III AD (Delhi) 163.***

12. **Counsel** appearing for A4 Mr. Atul Kishore Gupta relied upon the judgments *i.e* ***K.K. Ahuja v. V.K. Vora & another V(2009) SLT 429 (SC), SMS Pharmaceuticals Ltd. v. Neeta Bhalla and others, III (2007) SLT 143 (SC), Saroj Kumar Poddar v. State (NCT of Delhi) & another, I (2007) SLT 525 (SC), Jagdish Saran Aggarwal v. SEBI 2008 (4) JCC 2704 (Delhi), Virender Kumar Singh & others v. SEBI, 2008 (2) JCC Delhi, Samarpan Agro & Livestock Ltd. & others v. SEBI decided on October 25, 2010 in CRL.M.C. 969/2010 by the High Court of Delhi, Shri Raj Chawla v. SEBI 2010 (I) JCC 623 Delhi, Ramraj Singh v. State of M.P., III (2009) SLT 479 (SC), Anita Malhotra v. Apparel Export Promotion Council & another, 2011 (4) (NI) 261 SC and National Small Industries Corp Ltd v. Harmeet Singh Paintal & Another (2010) 154 CompCas 313 (SC).***

13. **Counsel** for both the parties relied upon the judgment ***M/s***

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Paramount Bio-Tech Industries Limited Vs. Union of India reported in 2003 INDLAW All 168.

14. I have gone through the citations relied upon by counsel for the parties carefully.

Contention relating to Section 11AA of the Act.

15. **Learned** counsel appearing for accused persons contended that the collective investment scheme was not defined in the Act prior to February 22, 2000 when Section 11 AA was inserted in the SEBI Act. It was urged that since collective investment was not defined under the Act, it cannot be said that the schemes launched by company accused were collective investment schemes as alleged by the SEBI. It was further contended that since there is no evidence that the schemes launched by the company accused were collective investment schemes, question of violation of Section 12(1B) of SEBI Act and CIS Regulations does not arise.

16. **Undoubtedly,** Section 11AA was inserted in the Statute *w.e.f* February 22, 2000 by way of amendment *i.e.* Act 31 of 1999. Now, question arises whether in the absence of any definite definition of collective investment scheme, can it be said that the said term was defined anywhere and it was in vogue. This question was dealt by ***High Court of Allahabad in M/s Paramount Bio-Tech Industries Limited Vs. Union of India reported in 2003 INDLAW All 168,*** wherein it was held:-

"The expression 'collective investment scheme' was not defined initially in the SEBI Act. However, it was used in Section 11 (2) (c), and its meaning explained in Chapter 2 of the Dave Committee Report (vide Annexure CA-12) which refers to the Howey's Test as laid down by the U.S. Supreme Court. We are of the opinion that in the absence of a statutory definition before 1999 the definition given by the Dave Committee report should be accepted as it is the opinion of experts. Courts should ordinarily refer to the opinion of experts. In the commercial world this expression had almost the same meaning which has now been specifically given in Section 11 AA which has been introduced by the Security Laws (Amendment) Act, 1999 which is as follows:-11-AA. 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 contribution, or payments made by the investors, by whatever name called, are pooled and utilized for the purpose 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.

"It has been alleged by the petitioner that since the expression Collective Investment Scheme' had not been defined in the Act prior to the amendment introduced by the Security Laws (Amendment) Act of 1999 w.e.f. 22.2.2000 hence the Regulations regarding Collective Investment Scheme' made on 15.10.99 were invalid. In our

opinion since the expression Collective Investment Scheme had been utilized in Section 11 (2) (c) of the SEBI Act right at the inception of the Act obviously that expression has to be given some meaning. In our opinion the meaning given to it by the Dave Committee Report (vide Annexure CA-12 Chapter 2 to the counter affidavit) should be treated to be the correct meaning, as we have already observed above, as it is the opinion of experts. In our opinion the amendment introducing Section 11 AA has only clarified the meaning, and it does not mean that prior to the Amendment of 1999 Regulations could not be framed at all regarding Collective Investment Scheme. To accept the argument of learned counsel for the petitioner would make the expression Collective Investment Scheme in Section 11 (2) (c) otiose and redundant. This would be against the settled principle of interpretation, according to which no word or expression in a statute should be treated as superfluous or redundant. Hence we cannot accept the submission of learned counsel for the petitioner in this connection."

17. **From** the above it becomes abundantly clear that in the absence of statutory definition prior to 2000, the definition given by the Dave Committee should be accepted as an opinion of experts. Moreover, in the commercial world this expression (CIS) had almost the same meaning which has now been defined in Sectior 11 AA. Thus, I do not find any substance in the contention raised by learned counsel appearing for accused persons that collective investment scheme was not defined anywhere.

18. **Now** I will proceed to examine the issue as to whether the schemes launched by the company accused fall within the four corners of Collective Investment Scheme as defined under the SEBI Act or not?

19. **In** the instant case, company accused had launched four different schemes *i.e. Plan (A): One time investment; Plan (B): Annual income Plan; Plan (C): Monthly income Plan and Plan (D): Monthly investment Plan.*

(i) **As** per the brochure of the said schemes, it was Tax free agricultural income. Learned Counsel appearing for accused persons submitted that the schemes launched by the company accused were not collective investment schemes but company had invited fixed deposits from the investors. However, the said contention is contrary to the terms and conditions mentioned in the brochure, which is part of Ex. CW1/2. As already stated that the said plans were Tax free agricultural income and clause 17 runs as under:-

> *"Factors beyond control are inherent in every transaction, specially Act of God & Act of State in which if the legislature enacting laws whereby the contract becomes impossible of performance, the Company shall be discharged of its obligations. The company has embarked on these projects after careful evaluation of the probability of enactment of such legislation in future."*

20. **Clause** 17 manifests that the yield on the investment amount was not fixed but it was dependant on many factors.

21. **As** per Section 11 AA, any scheme or arrangement made or offered by any company under which the contribution, or payments made by the investors, by whatever name called, are pooled and utilized for the purpose of the scheme or arrangement with a view to receive profits, income, produce or property, whether movable or immovable, from such scheme or arrangement. From the terms and

conditions of the schemes enumerated in the brochure, it becomes explicit that company accused had invited investors to invest in its schemes in order to utilize the invested amount in the agricultural sector and to distribute the profit earned from the activities of agriculture to the investors. Since the activities of agriculture was dependant on numerous factors, due to that reason, ccmpany accused had inserted clause 17 in the brochure of the schemes. Thus, to my mind, the schemes launched by the company accused were not fixed deposits as contended by learned counsel for accused persons but collective investment schemes as defined under Section 11 AA.

22. **Now,** coming to the contention raised by counsel for the accused persons that the ratio of ***M/s Paramount Bio-Tech (supra)*** is not applicable as Section 12 (1B) was not discussed in the said judgment.

23. **To** my mind, the said contention is contrary to the record as in ***M/s Paramount Bio-Tech (supra)*** Section 12 (1B) was discussed in detail as under:-

> *"As regards the public notice copy of which is Annexure 3 to the writ petition (and which has been quoted in entirety of this judgment) we are of the opinion that this has been issued by the Central Govt. under its power in Section 16(1) of the SEBI Act, and it is perfectly valid. It refers to Section 12 (1B) which had come into force on 25 January 1995. SEBI has only acted in accordance with this directive of the Central Government, which indeed it was bound to do in view of Section 16. It is true that there were no Regulations upto 1999 and hence certificate could not be granted under Section 12(1B). However, the proviso to Section 12(1B) permitted only those persons who were carrying on the business of*

Collective Investment Scheme prior to the 1995 Amendment (which came into force w.e.f. 25.1.1995) to continue to operate till Regulations were framed. The petitioner no. 1 was incorporated in 1996 (vide para 7 to the writ petition) and hence it was obviously not carrying on the said business before 25.1.1995. Hence it could not get the benefit of the proviso to Section 12 (1B). It follows that the business of Collective Investment Scheme which it was doing was wholly illegal. The letter of SEBI to the petitioner dated 27.2.1998 (vide Annexure-4 to the writ petition) thus indulgent to the petitioner. In fact by that letter SEBI took a lenient view by permitting the petitioner to operate after getting rating from a credit agency. In fact even this concession could not have been granted by SEBI, as the proviso to Section 12 (1B) does not apply to the petitioner, for the reasons given above. SEBI should in fact have totally prohibited the petitioner from doing the business of Collective Investment Scheme, and should have directed prosecution of the petitioner and its officials under Section 24 read with Section 27 of the SEBI Act."

24. **Similar** view was taken by High Court of Delhi in ***Ankur Forest and Project Development India Ltd. (supra)*** wherein it was held:-

"Section 12(1B) of the Act was inserted with effect from 21st January, 1995 wherein it was specifically provided 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 Schemes including mutual funds, unless he obtains a certificate of registration from the SEBI in accordance with the Regulations. Proviso to this sub-Section deals with the companies which were already carrying such business and they were also directed that they could continue the operation till such time Regulations are made under Clause (d) of sub-Section 2 of Section 30. Thus, as on the date of incorporation, there was a clear embargo on the

Appellant to sponsor or cause to be sponsored or carry or cause to be carried on any collective investment scheme without obtaining certificate of registration from the SEBI in accordance with the regulations. Only companies which were already carrying on prior to the incorporation of Section 12 (1B) were permitted to continue the same till the Regulations were framed. Even those companies on the Regulations coming into operation were statutorily bound to comply them. Since the Appellant was not a Company which were carrying on the collective investment scheme as on 21st January, 1995 it could not have started the same without the certificate of registration from the SEBI. Despite the embargo, the Appellant started the C.I.S and thus at this stage it does not lie in the mouth of the Appellant to contend that the Regulations related to existing CIS and did not apply to it because when the Regulations came into force i.e. on 15th October, 1999 the Appellant was running a collective investment scheme and thus was running an existing collective investment scheme and could do so without any registration or without applying for the same. Moreover, Regulation 5(1) provides that prior to the date of coming into force of the Regulations, any person who was running an existing collective investment scheme should apply for grant of certificate within two months from such date. This Regulation was also not complied with by the Appellant. Thus, there is no merit in the contention of the learned counsel that there is no violation of Regulation 68(1), 68(2), 73 and 74."

25. In the instant case, company accused was incorporated on January 14, 1997 and started its business *w.e.f* January 20, 1997. Thus, as per Section 12 (1B) of SEBI Act, company accused was not supposed to mobilize funds without obtaining certificate of registration. Since, company accused was incorporated in the year 1997, company accused was not entitled for relaxation as provided under proviso to Section 12(1B) of SEBI Act. Needless to say that relaxation provided

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under proviso to Section 12 (1B) was applicable to those companies which were operating the schemes at the time of insertion of Section 12(1B) in the Statute, which was inserted *w.e.f* January 25, 1995. In other words, companies which were operating any CIS on or before January 25, 1995, such companies were permitted to continue with such schemes till regulations were notified by the SEBI in terms of Section 30(2)(d) of the Act. Since, company accused was incorporated only in 1997, company accused can not claim any relaxation as provided under proviso to Section 12 (1B) of the Act.

Contention relating to the question whether the present complaint has been filed within the period of Limitation or not?

26. **Counsel** appearing for accused persons contended that the maximum sentence for the violation of Section 12 (1B) and regulations of CIS Regulations is one year. As per the complainant's version, the alleged offence was committed in the year 1997 when company accused had mobilized funds in violation of Section 12 (1B) of the Act and subsequently when company accused failed to comply with the regulations of CIS Regulations. It was contended that since Regulations were notified in October 1999, thus from both the angles, the present complaint is barred by the period of limitation in terms of Section 468 of Cr.P.C.

27. **Admittedly,** the present complaint was filed on December 21, 2002. The allegations against the company accused are that the company accused had not only mobilized funds in violation of Section 12 (1B) of the Act but also violated regulations 5, 68 and 73 of CIS Regulations, which is punishable under Section 24 of the SEBI Act. Admittedly, the maximum punishment under Section 24(1) in the pre-

amendment Act, was provided one year imprisonment or fine or with both. In terms of Section 468 Cr.P.Ç, the limitation period of such offence is one year. However, under Section 472 Cr.P.C., if the offence is continuing in nature, fresh period of limitation shall begin to run at every moment of the time during which the offence continues. Now question arises as to whether violation of Section 12 (1B) of the Act and violation of CIS Regulations are continuing in nature. Same question arose before High Court of Delhi in case ***Samparn Agro and Live Stock Ltd. vs. SEBI, Crl. M. C. 969/2010 decided on 25.10.2010*** wherein it was held :-

> *"13. In this case, under Section 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 petitioners, thus, infringement of Regulations 73 and 74 is continuing in nature and limitation envisaged under Section 468 Cr.P.C. would not be attracted.*

*14. In **Vishnu Prakash Bajpai vs. Securities and Exchange Board of India,** 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 M/s Rhodanthe Agro Limited vs. Securities and Exchange Board of India (supra)** is no different. It was held as under:-*

> *"23. In the above said circumstances, I am of the opinion that the non-compliance 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 ₹ 25 crore or with both. In such circumstances, I am of the opinion that the petition is not barred by limitation under Section 468 of Cr.P.C."*

28. In view of the law laid down in the aforesaid judgments, I am

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of the opinion that the violation of Section 12 (1B) as well as regulations 73 & 74 of CIS regulations are continuing in nature and the limitation period envisaged under Section 468 Cr.P.C is not attracted. To my mind, the complaint is well within the period of limitation.

29. **Learned** counsel appearing for the accused persons contended that the entire trial has been vitiated because the cognizance was taken by the Court of ACMM whereas Court of Session was competent to take the cognizance. The said contention is opposed by the counsel for the SEBI contending that prior to the amendment Court of Metropolitan Magistrate was competent to take cognizance.

30. **Previously** Section 26(2) , Court of Metropolitan Magistrate or a Judicial Magistrate of 1st class was competent to try any offence punishable under the SEBI Act. Sub-section (2) was amended by the Act 59 of 2002, consequently *w.e.f* October 29, 2002, a Court of Session becomes the only competent Court to try any offence punishable under the Act. Section 26 reads as under:

> *"Cognizance of offences by courts:*
>
> *(1) No court shall take cognizance of any offence punishable under this Act or any rules or regulations made thereunder, save on a complaint made by the Board.*
>
> *(2) No court inferior to that of a Court of Session shall try any offence punishable under this Act."*

31. **According** to Section 26(1), no Court shall take cognizance unless there is a complaint made by the Board whereas as per

Section 26 (2), no Court inferior to the Court of a Session shall try any offence punishable under the Act. In other words, Court of Sessions is earmarked to try the offences punishable under the Act whereas there is no embargo in taking the cognizance by any other Court. However, before taking the cognizance, Court has to see whether the complaint has been made by the Board or not. If the Board has made the complaint, the Court is competent to take cognizance. There is nothing under sub-section (1) to Section 26 that no Court inferior to the Court of Session, shall take the cognizance. In other words, the Court inferior to the Court of Sessions is competent to take cognizance for the offence punishable under the SEBI Act provided the complaint is made by the Board. However, the Court of Session is the only competent Court to try such offences. In the instant case, the cognizance was taken by the Court of ACMM on December 21, 2002 and pursuant to the amended sub-section (2) to Section 26, Hon`ble High Court vide its order bearing No. 31066/G3/SEBI/DHC/04 dated 1.12.2004 transferred all the cases of SEBI to the Court of Ms. Asha Menon, the then learned Additional Sessions Judge. Pursuant to the said directions, HMJ Ms. Rekha Sharma, the then learned Sessions Judge had withdrawn all the SEBI cases from the Court of learned ACMM and assigned the same to the Court of Ms. Asha Menon, the then learned Additional Sessions Judge.

32. In view of the above, I am of the opinion that there is no merit in the contention raised by learned counsel for accused persons.

Contentions relating to the time when the offence was committed by the company accused.

33. **Learned** counsel appearing for accused persons contended

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that the company accused had not committed any offence, at the time when company accused had mobilized funds because subsequently SEBI itself permitted the company accused to continue with the schemes after obtaining Credit Rating Certificate. It was submitted that the offence was completed when company accused failed to comply with the directions of the SEBI. On the other hand, learned counsel appearing for the SEBI contended that the company accused had violated Section 12(1B) of the Act, when it mobilized funds without obtaining the certificate of registration and also when the company accused failed to comply with the provisions of CIS Regulations.

34. **Before** dealing with the contentions raised by counsel for the parties, I deem it appropriate to have a look over the relevant provisions *i.e.* Section 12(1B) of the Act, Regulation 5, 68, 72 & 73 and same are read as under:

Section 12(1B):

> *"No person shall sponsor or cause to be, sponsored or carry on or caused to be carried on any venture capital funds or collective investment schemes including mutual funds, unless he obtains a certificate of registration from the Board in accordance with the regulations:*
>
> *Provided that any person sponsoring or cause to be sponsored, carrying or causing to be carried on any venture capital funds or collective investment schemes operating in the securities market immediately before the commencement of the securities Laws (Amendment) 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."*

Regulations 5:

"(1) 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.

(2) An application under sub-regulation (1) shall contain such particulars as are specified in Form A and shall be treated as an application made in pursuance of regulation 4 and dealt with accordingly."

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.

Explanation: *The expression 'operating a collective investment scheme' shall include carrying out the obligations undertaken in the various documents entered into with the investors who have subscribed to the scheme.*

(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

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regulation 12"

Regulation-72:

"(1) An existing Collective Investment Scheme which satisfies the Board that the requirements specified in regulation 9 and the conditions specified under regulation 71 have been fulfilled, shall be granted a certificate of registration under regulation 10 upon payment of registration fees as specified in paragraph 2 of the Second Schedule and on such terms and conditions as may be specified by the Board.

(2) An existing Collective Investment Scheme which has been granted certificate of registration under sub-regulation (1) may be allowed to float new schemes on such terms and conditions as may be specified by the Board.

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-

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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 :

***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 by the Board.

(emphasis supplied)

35. **Bare** perusal of Section 12(1B) of the Act reveals that the companies who were operating schemes prior to January 25, 1995, when Section 12(1B) was inserted in the Act, were permitted to continue with the said schemes till such time regulations are made under clause (d) of sub-Section (2) of Section 30. Admittedly, company accused was incorporated on January 14, 1997. It means that

company could not operate any scheme prior to its incorporation. Thus, company was bound to obtain certificate of registration before sponsoring any CIS. But company failed to obtain any such certificate. Thus, company accused had committed the offence first time when it mobilized fund without obtaining certificate of registration as mentioned under Section 12(1B) of the Act.

36. **For** the purpose of CIS Regulations 1999, an existing collective investment scheme was a scheme which was in operation at the time of commencement of the said Regulations. Thus, the schemes which were launched by company after January 25, 1995 without obtaining a certificate of registration were existing scheme for the purpose of CIS Regulations. Mere fact that such schemes were included in the CIS Regulations does not mean that the said company had not violated Section 12(1B) of the Act. Admittedly, there was no provision in the Act to regulate the schemes which were launched after January 25, 1995 in violation of Section 12 (1B). If such schemes would be excluded from CIS Regulations 1999, there would be no check on such schemes to ensure that the amount would be refunded to the unwary investors or not. Needless to say that the sole objective of CIS Regulations and Section 12(1B) was to protect the rights and interest of gullible and unwary investors. Thus, mere fact that the schemes, which were launched in violation of Section 12(1B) were included under CIS Regulations does not mean that the company accused had not violated Section 12(1B) when such company mobilized funds without obtaining mandatory certificate of registration.

37. **If** a person who was operating any scheme prior to the notification of CIS Regulations and intends to continue with the said

scheme. In terms of Regulation 5, such person was required to move an application within a period of two months from the date of such notification. Admittedly, in the instant case, company accused had not moved any such application. In other words, company accused was not interested to continue with the existing scheme. Once company accused failed to move an application in terms of Regulation 5 of CIS Regulations, company accused was liable to refund the amount to the investors and to submit the winding up and repayment report with the SEBI on the prescribed format in terms of Regulation 73 of CIS Regulations. Since company accused had neither refunded the amount to the investors nor filed the winding up and repayment report with the SEBI, company accused had also violated the provisions of CIS Regulations. Mere fact that SEBI had permitted the company accused to continue with the scheme after complying with the provisions of CIS Regulations, it does not mean that SEBI had either condoned or regularised the violation of Section 12(1B) of the Act. It is pertinent to mention here that provisions of Section 12(1B) were mandatory in nature and even SEBI had no power to permit a person or company to mobilize fund in violation of Section 12(1B) of the Act. As already discussed, the existing scheme for the purpose of Section 12(1B) of the Act and for CIS Regulations was different. Mere fact that the scheme launched by company accused is covered under the existing scheme as defined under Regulation 68 of CIS Regulations does not mean that it also qualifies the condition as mentioned under proviso to Section 12 (1B) of the Act.

38. **Considering** the above discussion, I am of the opinion that company accused had committed the violation at two occasions, firstly when company accused had mobilized funds in violation of mandatory

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provisions of Section 12(1B) of the Act without obtaining certificate of registration and second time when company accused failed to move an application for seeking registration certificate in terms of Regulation 5 and thereafter failed to comply with Regulation 73 of CIS Regulations. Thus, the persons who were in-charge of company accused either at the time of violating Section 12 (1B) or subsequently at the time of violating the regulations of CIS Regulations shall also be responsible in terms of Section 27 of the SEBI Act.

Contention relating to the liquidation of the company accused:

39. **Learned** counsel appearing for the accused persons contended that since the office liquidator was appointed by the High Court of Allahabad on December 10, 1999, the present complaint was not maintainable and the accused persons had not committed any offence. In this regard the observations made by the Hon'ble High Court of Delhi in ***Ankur Forest and Project Development India Ltd (supra)*** are relevant and same are re-produced as under:

> ***Pare 12:***
>
> *"I also do not find any force in the contention of learned counsel for the Appellant that since the Company was wound up vide order dated 5th July, 2001 no complaint could have been filed by the SEBI in December, 2002 as the Company which was a juristic person was non-existent and its Directors had lost their identity. This contention of the Appellant is wholly fallacious. DW1 vide Ex. DW1/1 has proved that on 5th July, 2001 the High Court for the States of Punjab and Haryana in Company Petition No. 187/1999 directed the winding up of the Appellant Company as it was admitted by the Company that it was in debt and could not make the payment of the petitioner therein due to financial crunch and further no secured assurance was given by the company.*

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Under the provisions of company law till the time the company is dissolved i.e. the process of liquidation continues, it does not lose its entity and hence, the directors, or person in charge would be liable for all the acts of the company. In the present case, it is proved fact that when the complaint was filed, the Appellant No. 1 i.e. the company was under liquidation which means that not only on the date of offence but also on the date of filing of the complaint, the company was in existence and had not lost its entity as a juristic person and in terms of Section 24 and 27 of the Act, the Appellant and its directors i.e. the persons responsible for day to day affairs of the company were liable for the offence committed by them for violation of the Act and Regulations. Similar view was taken in The Official Liquidator, Gannon Demkerley and Co. (Madras) Ltd vs. The Assistant Commissioner, Urban Land Tax and Anr. MLJ 1991 137 which reads as under: - "In my view, the Company under liquidation does not lose its existence. The effect of an order of winding up is to place the affairs of the company into the hands of the Official Liquidator for completing the process of winding up, the Official Liquidator being put in possession as "custodia legis" and managing the affairs for the limited purpose. In the course of administration by the Liquidator, after meeting out the liabilities of the company, he moves the Court for appropriate orders to adjust the rights of contributories among themselves and distribute any assets among the persons entitled thereto. Till such an order of the Court for such distribution is obtained and actually the assets have been distributed, the properties continue to be that of the Company. The Company under liquidation continues to exist as a juristic personality until an order under Sec. 481 of the Companies Act dissolving the Company is made by the competent Court. It is only thereafter the Company can said to become non-existent in the eye of law."

40. **Admittedly,** in the instant case there is nothing on record, which may show that company accused was dissolved on or before filing of the present criminal complaint. Mere fact liquidation proceeding was going on or that some interim order was passed

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restraining the company accused from disposing of its assets or that official liquidator was appointed, does mean that company accused was not in existence. Moreover, the liquidation proceedings could not exonerate the directors of the company accused from their criminal liability. Thus, to my mind, the said contention is without any substance.

Contention relating to non-receipt of complaint.

41. **Learned** counsel appearing for accused persons vehemently contended that since SEBI had not received any complaint from any of investors, thus presumption is that company accused had not violated any provisions of law. To my mind, the said contention is devoid of merit because the issue is not whether SEBI had received any complaint from any investor or not but the real issue is whether company accused had violated any provisions of law either at the time of mobilizing funds or thereafter or not? Moreover, it is admitted case of the accused persons that the company had gone into liquidation and they had deposited ₹ 16 lac with official liquidator, this itself shows that there were some complaints of investors against the company accused. Thus, to my mind the said contention is without any substance.

Contention relating to not sending the letters at the registered office of the company accused and its directors:

42. **Learned** counsel appearing for accused persons contended that SEBI had not sent any letter to the company accused at its

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registered office. Nor SEBI had sent any letter to its directors. Perusal of the record reveals that company accused had sent letters Ex. CW1/2, CW1/3, CW1/5 to the SEBI mentioning that its head office was located at Radhey Plaza, Sanjay Gandhi Puram, Faizabad Road, Lucknow. On the said letters, company accused had not mentioned its registered office. Consequently, SEBI had sent all its letters at the said address. Thus, it cannot be said that the SEBI had sent a letter at the wrong address. Mere fact that SEBI had sent the letters at the Head office of the company accused does not mean that SEBI had violated any provisions of law. Moreover, counsel for the accused persons failed to point out any provision of law wherein SEBI was bound to send the letters only at the registered office of the company accused and not at any other office. Admittedly, in the instant case, SEBI had not sent letters/notices to the individual directors. During the course of arguments, counsel for accused persons failed to point out any provision of law wherein SEBI was required to send separate letters/notices to the individual directors. Section 12(1B) is mandatory in nature. Similarly, the provisions of CIS Regulations were mandatory in nature and duty was cast upon the company who was operating the scheme to move the application. Once the company accused failed to comply with the provisions of CIS Regulations, SEBI was authorized to take action in accordance with law against the defaulting company. Thus, to my mind the said contention is without any substance.

Contention relating to framing of improper charge:

43. **Learned** counsel appearing for accused persons vehemently contended that the charge framed against the accused

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persons is improper as no separate charge has been framed against the accused persons for the offence punishable under Section 12(1B) of the SEBI Act and similarly no separate charge has been framed against the accused persons for the violations of Section 11(B) of the SEBI Act. The said contention is refuted by counsel appearing for the SEBI by arguing sagaciously that there is no impropriety in framing of the charge. Moreover, if there is any impropriety, same is not fatal to the SEBI as it does not prejudice the rights of the accused persons.

44. **Admittedly,** the complaint has been filed for the offence punishable under Section 24(1) of the SEBI Act (Pre-amendment) wherein maximum punishment is only one year imprisonment or fine or both. Thus, no charge was required to be framed against the accused persons. Rather a notice under Section 251 Cr.P.C was served upon the accused persons. In summon triable cases, no formal charge is required to be framed, only substance of allegations is to be explained to the accused persons. In the present case, allegations in detail were explained to the accused persons in writing. The substance of allegations is that the accused persons had mobilized funds to the tune of ₹ 0.29 crores from the general public without obtaining the certificate of registration and company accused had also failed to seek the certificate of registration after notification of CIS Regulations. The said acts amount violations of various provisions of SEBI Act such as Section 12(1B), 11B of the SEBI Act and Regulation 5 (I), 68(1), 68(2), 73 & 74 of CIS Regulations. The above provisions are punishable under Section 24(1) of the SEBI Act wherein the maximum punishment is imprisonment for one year or fine or both. From the evidence led by the parties, it is abundantly clear that

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accused persons were well aware about the allegations levelled against them, thus there is nothing on record which may show that any prejudice was caused to the accused persons even if we presume that there was some infirmity in the substance of notice served upon them.

45. **Though** Section 215 and 222 Cr.P.C are applicable in a warrant triable case, yet if we draw the same analogy, I do not find any substance in the contention raised by the counsel appearing for accused persons because under Section 215 Cr.P.C., an error or omission in framing of charge does not effect the prosecution unless accused is misled by such error or omission and such error or omission had caused failure of justice to the accused. Similarly, under Section 222 Cr.P.C where a person is charged for a particular offence but the facts which are produced reduces the charge to a minor offence, accused can be convicted for a minor offence, although no such charge has been framed against the accused person. In the instant case, the violation of Section 11B, 12(1B) and provisions of CIS Regulations is punishable under Section 24(1) of the SEBI Act wherein the maximum punishment is upto one year imprisonment or fine or both.

46. **Considering** the above, I am of the view that there is no substance in the contention raised by the counsel for parties.

Contention relating to the liability of A2 to A5 **:**

47. **Counsel** appearing for A4 Atul Kishore Gupta vigorously contended that he could not be held liable for the violations committed

by the company accused as he had resigned from the directorship *w.e.f* January 17, 1999 whereas the complaint was filed in the year 2002. It was submitted that A4 was not authorised to operate the bank account of the company accused and was not liable for the day to day affairs of the company accused. It was further submitted that there is no averment in the complaint that he was one of the directors of the company accused.

48. **On** the converse, counsel appearing for SEBI countered the said contention by arguing that A4 was one of the directors at the time of mobilizing funds in violation of Section 12(1B) of the Act. Thus, contended that he was the person in-charge of, and responsible to, the company accused at the time of committing the offence. It was argued that mere fact that he had resigned subsequently from the company accused is not sufficient to exonerate him from his liability.

49. **In** support of his contention learned counsel appearing for A4 relied upon numerous judgments to show that before imposing vicarious liability, complainant is bound to establish that the impleaded director was liable for day to day affairs of the company accused. At the outset, it is pertinent to state that all the judgments relied upon by the counsel for accused persons pertain to the offence punishable under Section 138 of Negotiable Instrument Act. All the judgments followed the laws laid down in ***SMS Pharmaceutical Ltd. (supra)***, the said judgment was considered in detail by the Apex Court in ***K. K. Ahuja vs. V. K. Vora and another (v) (2009) SLT.429***. After considering all the previous judgments on the question of vicarious liability of the directors of the company accused, Hon`ble Apex Court summarized the proposition under Section 141 of the Negotiable

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Instruments Act in para 20 and 21 and the same is reproduced as under:

Para 20: " The position under section 141 of the Act can be summarized thus : (i) If the accused is the Managing Director or a Joint Managing Director, it is not necessary to make an averment in the complaint that he is in charge of, and is responsible to the company, for the conduct of the business of the company. It is sufficient if an averment is made that the accused was the Managing Director or Joint Managing Director at the relevant time. This is because the prefix 'Managing' to the word 'Director' makes it clear that they were in charge of and are responsible to the company, for the conduct of the business of the company.

(ii)In the case of a director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible to the company, for the conduct of the business of the company or make any specific allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under sub-section (2) of Section 141. (iii) In the case of a Director, Secretary or Manager (as defined in Sec. 2(24) of the Companies Act) or a person referred to in clauses (e) and (f) of section 5 of Companies Act, an averment in the complaint that he was in charge of, and was responsible to the company, for the conduct of the business of the company is necessary to bring the case under section 141(1). No further averment would be necessary in the complaint, though some particulars will be desirable. They can also be made liable under section 141(2) by making necessary averments relating to consent and connivance or negligence, in the complaint, to bring the matter under that sub-section. (iv) Other Officers of a company can not be made liable under sub-section (1) of section 141. Other officers of a company can be made liable only under sub-section (2) of Section 141, by averring in the complaint their position and duties in the company and their role in regard

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to the issue and dishonour of the cheque, disclosing consent, connivance or negligence."

Para 21:"If a mere reproduction of the wording of section 141(1) in the complaint is sufficient to make a person liable to face prosecution, virtually every officer/employee of a company without exception could be impleaded as accused by merely making an averment that at the time when the offence was committed they were in charge of and were responsible to the company for the conduct and business of the company. This would mean that if a company had 100 branches and the cheque issued from one branch was dishonoured, the officers of all the 100 branches could be made accused by simply making an allegation that they were in charge of and were responsible to the company for the conduct of the business of the company. That would be absurd and not intended under the Act. As the trauma, harassment and hardship of a criminal proceedings in such cases, may be more serious than the ultimate punishment, it is not proper to subject all and sundry to be impleaded as accused in a complaint against a company, even when the requirements of section 138 read and section 141 of the Act are not fulfilled."

(emphasis supplied)

50. **This** issue was also dealt by the High Court of Delhi in ***Ankur Forest and Development India Ltd. (supra)*** in detail. The relevant paras are 14 & 15 and same are reproduced as under:

Para 14: I find no merit in the contention of the learned defence counsel that no role has been attributed to the Appellants Nos. 2 to 5. The Appellants were the promoters and Directors thus, the responsibility of day to day functioning of the Company as has been proved by the complainant witnesses from the memorandum and articles of association is also on them. The Hon'ble Supreme Court in ***SMS Pharmaceuticals Ltd. vs. Neeta Bhalla and others*** *2005 (8) SCC 89 held that a clear, unambiguous and specific allegation against a person impleaded as an accused that he was in*

charge of and responsible to the company in the conduct of its business at the material time when the offence was committed is sufficient. This issue was also considered by the Hon'ble Supreme Court in N. Rangachari vs. BSNL, 2007 Cri.L.J 2448, wherein it was held:

> *"13. A Company, though a legal entity, cannot act by itself but can only act through its directors. Normally, the Board of Directors act for and on behalf of the company. This is clear from Section 291 of the Companies Act which provides that subject to the provisions of that Act, the Board of Directors of a Company shall be entitled to exercise all such powers and to do all such acts and things as the Company is authorized to exercise and do. Palmer described the position thus:*
>
> *"A company can only act by agents, and usually the persons by whom it acts and by whom the business of the company is carried on or superintended are termed directors...."*
>
> *It is further stated in Palmer that:*
>
> *"Directors are, in the eye of the law, agents of the company for which they act, and the general principles of the law of principal and agent regulate in most respects the relationship of the company and its directors."*
>
> *The above two passages were quoted with approval in R.K. Dalmia & Ors. v. The Delhi Administration [(1963)1 SCR 253 at page 300] . In Guide to the Companies Act by A. Ramaiya (Sixteenth Edition) this position is summed up thus:*
>
> *"All the powers of management of the affairs of the company are vested in the Board of Directors. The Board thus becomes the working organ of the company. In their domain of power, there can be no interference, not even by shareholders. The directors as a board are exclusively empowered to manage and are exclusively responsible for that management."*

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Therefore, a person in the commercial world having a transaction with a company is entitled to presume that the Directors of the company are in charge of the affairs of the company. If any restrictions on their powers are placed by the memorandum or articles of the company, it is for the Directors to establish it at the trial. It is in that context that Section 141 of the Negotiable Instruments Act provides that when the offender is a company, every person, who at the time when the offence was committed was in charge of and was responsible to the company for the conduct of the business of the company, shall also be deemed to be guilty of the offence along with the company. It appears to us that an allegation in the complaint that the named accused are Directors of the company itself would usher in the element of their acting for an on behalf of the company and of their being in charge of the company. In Gower and Davies Principles of Modern Company Law (Seventh Edition), the theory behind the idea of identification is traced as follows:

"It is possible to find in the cases varying formulations of the under-lying principle, and the most recent definitions suggest that the courts are prepared today to give the rule of attribution based on identification a somewhat broader scope. In the original formulation in Lennard's Carrying Company case Lord Haldane based identification on a person 'who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation'. Recently, however, such an approach has been castigated by the Privy Council through Lord Hoffmann in Maridian Global case as a misleading "general metaphysic of companies". The true question in each case was who as a matter of construction of the statute in question, or presumably other rule of law, is to be regarded as the controller of the company for the purpose of the identification rule.

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But as has already been noticed, the decision in S.M.S. Pharmaceuticals ltd. (supra) binding on us, has postulated that a director in a company cannot be deemed to be incharge of and responsible to the company for the conduct of his business in the context of Section 141 of the Act. Bound as we are by that decision, no further discussion on this aspect appears to be warranted.

14: A person normally having business or commercial dealings with a company, would satisfy himself about its creditworthiness and reliability by looking at its promoters and Board of Directors and the nature and extent of its business and its memorandum or articles of association. Other than that, he may not be aware of the arrangements within the company in regard to its management, daily routine, etc. therefore, when a cheque issued to him by the company is dishonoured, he is expected only to be aware generally of who are in charge of the affairs of the company. It is not reasonable to expect him to know whether the person who signed the cheque was instructed to do so or whether he has been deprived of his authority to do so when he actually signed the cheque. Those are matters peculiarly within the knowledge of the company and those in charge of it. So, all that a payee of a cheque that is dishonoured can be expected to allege is that the persons named in the complaint are in charge of its affairs. The Directors are prima facie in that position.

15. .....

16. In the light of the ratio in S.M.S Pharmaceuticals Ltd. what is to be looked into is whether in the complaint, in addition to asserting that the appellant and another are the Directors of the company, it is further alleged that they are in charge of and responsible to the company for the conduct of the business of the company. We find that such an allegation is clearly made in the complaint which we have quoted above. Learned Senior Counsel for the appellant

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winding up and repayment report till now. The accused No.1 company and its directors accused Nos. 2 to 6 were intimated regarding obligations under SEBI regulations and directions passed by Chairman SEBI through public notices dated 10.12.1999 and 07.12.2000, which was published on 14.1.2001 which are Ex. CW-2/2 and Ex. CW-2/3 respectively." No cross examination of this witness had been conducted on this aspect. Thus the testimony of this witness on this aspect has gone unchallenged. In response to the question No. 2 that the Appellant No.1 that is the company had filed the details including the list of Directors, funds mobilized and memorandums and articles exhibited as Ex. CW1/1, Appellant Nos. 2 to 5 in their statements under Sec. 313 CrPC have stated that we did not file this information. They have shown ignorance even about the audited balance-sheets etc. However, the defence witness DW1 Tarsem Saini has stated in his testimony that the company was run by the Appellant Nos. 2 to 5 and Hemant Sharma as directors. The relevant part of the testimony of DW1 reads as under:

"....Accused No. 1 company had mobilized only Rs. 1 to 1.5 lac rupees and the same stand repaid. It is wrong to suggest that the accused no. 1 company has received Rs. 34,79,151/- as investment. I was the director of the accused company apart from me Sh. Hemant Sharma, Sh. Rajbir Singh, Sh. Jagjit Singh, Sh. Mohan Lal Saini were also directors of accused no. 1 company. I had stated that our company started few months before the filing of the petition for winding up. It is correct to suggest that the accused no. 1 company was incorporated on 22.09.1995 as per the certificate of incorporation however the commencement of business was from 22.08.1996.. We started business in the year 1998 Ex. CW1/1 was not sent by the accused company. Ex. CW1/2 was also not sent by the accused company. I have taken oath therefore I am not lying and I am not deposing falsely. It is wrong to suggest that the accused company was would wound up on account of non-payment to all the investors. The accused company had not

filed winding up and repayment report with the same."

51. In the light of the above settled propositions of law, the facts of the present case will be analysed to ascertain as to whether A4 was liable for the violations committed by the company accused or not?

52. It is admitted case of A4 that he was one of the directors in the company accused and this fact was admitted by the A4 in his statement recorded under Section 313 Cr.P.C by admitting that he remained director in the company accused for a short period. However, he took the defence that he was not responsible for day to day affairs of the company accused as he was not authorised to operate the bank accounts of company accused and during the said period he was full time employee of M/s Mahatta Camera Corporation. He also relied upon the deposition of DW2 to establish that he was full time employee in the said company *w.e.f* July 7, 1996 to March 7, 2007. He further relied upon the deposition of DW3 and DW4 to establish that he was not authorised to operate the bank account of the company accused.

53. **Form**-32 of A4 Atul Kishore Gupta is on the record, which shows that he had resigned from the company accused w.e.f January 17, 1999. His resignation letter is also placed on Court record. Accused has also filed the annual report of the company accused showing that A4 was director of the company accused w.e.f January 14, 1997. In other words, it is admitted case of A4 Atul Kishore Gupta that he was director in the company accused w.e.f January 14, 1997 to January 17, 1999. Besides that A4 had also signed the letter dated January 12, 1998, which is exhibited as Ex.CW1/2 which was

addressed to the SEBI, being the director of the company accused. His name is also mentioned in the list of first directors in the Articles of Association. He was also one of the subscribers and promoters of the company accused. All these un-rebutted evidence establish beyond the shadow of doubts that A4 Atul Kumar Gupta was one of the directors in the company accused *w.e.f* January 14, 1997 to January 17, 1999.

54. **No** doubt DW2 in her deposition deposed that A4 Atul Kishore Gupta had joined the company M/s Mahatta Camera Corporation on July 7, 1996 and worked there till March 7, 2007. In her cross examination, she admitted that A4 had not disclosed at the time of his joining that he was one of the promoters and directors in M/s Nexus Farms Ltd. She further deposed that if A4 had disclosed the same at the time of seeking employment, he would not have got the employment in the said company. This shows that A4 had got employment after concealing material facts from the said company. Moreover, there is no provision under law which restrained A4 to become the director of the company accused while serving in another company. Mere fact that he was working in the said company till March 7, 2007 is not sufficient to exonerate him from his vicarious liability if he is otherwise liable for the same. No doubt DW3 in his deposition deposed that as per Resolution passed by the Board of Directors, only A2, A3 & A5 were authorised to operate the bank account. However, in his cross examination, he admitted that the resolution was signed by all four directors including A4 Atul Kishore Gupta. Thus, it becomes abundantly clear that A4 was one of the persons who authorised the other directors to operate the bank account. Mere fact that he was not one of the authorised signatory to

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operate the bank account is not sufficient to exonerate him from his vicarious liability, if he is otherwise liable.

55. **SEBI** has filed the Memorandum & Articles of Associations of company accused which is part of Ex. CW1/3. Borrowing power of company accused is defined in clause No. 101 to 104 of Articles of Associations.

56. **It** emerges from the said clauses that only Board of Directors had power to borrow money and to issue debenture and securities on behalf of the company accused; Board of Directors comprising of all directors. Thus, all the directors who were part of Board of Directors at the time of mobilizing funds from the general public through various CIS were responsible for the said act of the company accused. Under the Articles of Associations of the company accused, no individual director whosoever it may be, was not competent to raise funds on behalf of the company accused from the general public. Only Board of Directors was competent to raise the funds. Since the decision was taken by the Board of Directors comprising of all the four accused persons. Thus, accused persons could not escape from their liability merely by stating that they were not involving in day to day affairs of the company accused. The business of raising funds from public could not be undertaken by any individual director. It was the collective decision of all the directors who were part of the Board of Directors at the relevant time. Since A2 to A5 were part of Board of Directors at the relevant time, thus presumption will be drawn that the decision of mobilizing funds was taken with the consent of all of them, thus they are liable under Section 27 (2) of the SEBI Act. Moreover, during the trial, A4 failed to produce any cogent evidence on record to establish

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that Board of Directors had taken the said decision without his knowledge or that he had exercised all dues diligence to prevent the company accused from raising funds in violation of Section 12(1B) of the Act or that he had not given his consent to the decision of Board of Directors.

57. In the instant case, it is undisputed fact that A2 to A5 were the directors in the company accused at the time when company accused had initially raised funds during the period 1997-1998 and this fact is also proved by CW1 in his deposition. As already discussed that company accused had violated Section 12(1B) when company accused had launched various CIS in the year 1997-1998 without obtaining the mandatory certificate of registration. No doubt, after notification of CIS Regulations in October 1999, SEBI had offered another opportunity to the company accused to seek certificate of registration. But this does not mean that company accused had not violated Section 12(1B) of the Act at the time of launching various CIS. The purpose of CIS Regulations is to protect the rights and interest of unorganized and unwary investors. Stringent conditions were required to be fulfilled by a company in terms of Regulation 9 before making an application for seeking registration of certificate such as net worth of the Company should not be less than ₹ 5 crores and 50 % of the directors should be independent. Admittedly, the net worth of the company accused was even less than ₹ 0.50 crores and there were only four directors in the company accused and all were the promoters, thus there was no independent directors in the company accused. Thus, company accused was not otherwise entitled for registration of certificate in terms of CIS Regulations. Had there not been any requirement of taking mandatory certificate of registration

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under Section 12(1B) of the Act at the time of mobilizing funds and CIS Regulations would be notified to regularize such schemes, probably in that eventuality A4 Atul Kishore Gupta would have a valid defence as the company accused had not committed any offence at the time of mobilizing funds and when CIS Regulations were notified A4 was not in the Board of Directors but in the instant case, A4 was very much in the Board of Directors when company accused had mobilized funds in violation of Section 12(1B) of the SEBI Act.

58. **Learned** counsel appearing for A4 strongly relied upon the judgement titled ***Jagdish Saran Aggarwal (supra) and Virender Kumar Singh (supra)*** wherein the Hon`ble High Court of Delhi quashed the proceedings qua petitioners on the ground that petitioner had resigned from Board of Directors before filing the criminal complaint. No doubt in the said case, the criminal proceedings were quashed on the grounds that the petitioners had resigned from the Board of Directors either much prior to the notification of the Regulation or prior to the filing of the complaint by the SEBI. Both judgments were passed under Section 482 Cr.P.C., thus the parties have not led the evidence. In the said judgments date of commission of offence was considered when the company accused failed to comply with the direction of the Chairman of the SEBI. In both the judgments, the attention of Hon`ble Court was not drawn towards Section 12 (1B) and the judgment of the ***Paramount's case***. Moreover subsequently in case ***Ankur Forest (supra)***, the Hon`ble High Court had categorically held that under Section 12(1B), the companies which were already carrying on CIS before the insertion of Section 12(1B) in the statute were permitted to continue with the scheme till the notification of Regulations. Since company accused

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was incorporated after January 25, 1995 when Section 12(1B) inserted in the Act, company accused was not entitled to mobilize fund without seeking certificate of registration. Thus, to my mind, the offence was committed first time in the year 1997-98 when company accused mobilized funds in violation of Section 12(1B) of the Act. Since A2 to A5 were the directors in the company accused at that time, they cannot be escaped from their liability merely taking the plea that before the notification of CIS, A4 had resigned from the company accused.

59. **Now** coming to the fact of the present case, company accused was incorporated on January 14, 1997 and this fact is proved from incorporation certificate which is part of Ex. CW1/3. Moreover this fact is not disputed by the counsel for parties during the arguments. Since the company accused was incorporated in January 1997, in terms of Section 12(1B) of the Act, company was not authorised to mobilize any fund through CIS without obtaining necessary certificate of registration from the SEBI. Admittedly, company accused had not obtained necessary certificate at the time of launching various CIS and raising funds pursuant thereto, thus company accused had violated Section 12(1B) of the Act in the year 1997-1998, which is punishable under Section 24(1) of the SEBI Act.

60. **Pursuant** to the press release dated November 26, 1997, company accused had sent a letter dated January 12, 1998 to the SEBI intimating about the details of schemes and its directors and other particulars. Company accused had also sent brochure of the schemes. Thereafter, company accused had sent another letter dated September 20, 1998 Ex. CW1/4 intimating the SEBI that company

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accused had mobilized a sum of ₹ 36.81 lac till March 31, 1998 in four different plans and total 818 investors had invested the amount in the said schemes. Thus, it becomes clear that company accused had mobilized the said amount in violation of Section 12(1B) of the SEBI Act.

61. **Under** CIS Regulations, an opportunity was given to the company accused to seek registration certificate after complying with the necessary conditions as mentioned under Regulation 9 & 11. But company accused failed to avail the said opportunity as company accused had not moved an application in terms of Regulation 5. Once company failed to move an application to seek the certificate of registration, company was bound to wind up the scheme and repay the amount to the investors in terms of Regulation 73 of CIS Regulations. Company accused was also supposed to submit the winding up and repayment report to the SEBI but company accused failed to comply with Regulation 73 & 74. The violation of the said Regulations is punishable under Section 24(1) of the SEBI Act.

62. **As** already discussed that A2 to A5 were the directors of the company accused at the time of violating the provisions of the SEBI Act, thus in terms of Section 27 of the SEBI Act, they are also liable for the said violations.

63. **Pondering** over the ongoing discussion, I am of the considered opinion that complainant has succeeded to establish beyond the shadow of all reasonable doubts that company accused had mobilized funds in violation of Section 12 (1B) of the SEBI Act and also violated Regulation 5 (1) & 73 of CIS Regulations, which are

punishable under Section 24(1) of SEBI Act. Simultaneously, SEBI has also succeeded to establish beyond the shadow of all reasonable doubts that A2 to A5 being the directors were the person in-charge of, and responsible to, the company accused for the conduct of its business at the time of said violations. Thus, I hereby hold A1 *i.e.* Naxus Farms Ltd. and A2 Sh. Sanjay Kumar Sinha, A3 Sh. Virendra Singh, A4 Sh. Atul Kishore Gupta and A5 Sh. Lalit Awasti guilty for the offence punishable under Section 24 (1) read with Section 27 of the SEBI Act.

Announced in the open Court on this 6th day of June 2012

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(PAWAN KUMAR JAIN)
ADDITIONAL SESSIONS JUDGE-01
CENTRAL-01/THC/DELHI

Copy given to the convicts in open court at 4pm on 6/6/12

Copy received for Virendra Singh 6/6/12

Lalit Awasti 6/6/12

Sanjay Sinha 6/6/12

ATTESTED 6/7/12 Date

IN THE COURT OF SH. PAWAN KUMAR JAIN,
ADDITIONAL SESSIONS JUDGE-01(CENTRAL):DELHI

Complaint Case No. 01 of 2011
ID No: 02401R0164312002

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 400 021 represented by Ms. Versha Aggarwal, SEBI.

Versus

1. Naxus Farms Ltd.
a company under the provisions of
Companies Act, 1956, having its Regd.
Office at Radhey Plaza,
Sanjay Gandhi Puram
Faizabad Road, Lucknow.

.....Convict no.1

2. Sh. Sanjay Kumar Sinha
S/o Sh. B. S. Sinha
Occupation Director of accused no. 1
R/o B-1113, Indira Nagar,
Lucknow.

.....Convict no.2

3. Sh. Virendra Sinha
S/o Sh. Ravindra Singh
Occupation Director of accused no. 1
R/o Srinagar, Mohibullapur,
Sitapur Road, Lucknow

.....Convict no.3

4. Sh. Atul Kishore Gupta
S/o Sh. K. K. Gupta
L-4-M-70, Sector M, Aliganj Extn.
Lucknow

.....Convict no.4

5. Sh. Lalit Awasti,
S/o Late Sh. V. N. Awasthi
R/o 15, Narain Nagar, Faizabad Road
Lucknow

.....Convict no.5

Present: Sh. Sanjay Mann, Advocate, Counsel for SEBI
Sh. Abhey Singh Yadav, Advocate, counsel for convict no. 2
Sh. Shahd Anwar, Advocate, counsel for convict no. 3 & 5
Sh. Amar Deep Singh, Advocate, counel for convict no. 4

ORDER ON THE POINT OF SENTENCE :

1. **Vide** separate judgment dated June 6, 2012, A1 *i.e* M/s Naxus Farms Ltd. and A2 Sh. Sanjay Kumar Sinha, A3 Sh. Virendra Singh, A4 Sh. Atul Kishore Gupta and A5 Sh. Lalit Awasti have been held guilty for the offence punishable under Section 24 (1) read with Section 27 of the SEBI Act.

2. **Learned** counsel appearing for convicts no.2 to 5 requests for a lenient view on the grounds that there is no criminal antecedent of any of the convicts and they are the sole bread earner of their respective families. It is further submitted that as per the balance-sheet of the

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5. **No** doubt as per the documents placed on record, the balance liability of the accused company seems to be ₹ 16,02,337/- as on March 31, 1999. Thus, it is admitted case of the convicts that at least company accused had not refunded the said amount to the investors till date. Admittedly, the amount was mobilized in the year 1997-1998 and presently we are in 2012. In the schemes launched by company accused, unwary and unorganized investors had invested their hard earned money with the hope that they would get handsome yield on their investments. At the time of investing their hard earned money, they were not aware that they might lost their principal amount. Considering the impact over the Society as a whole and to protect the rights and interest of the unorganized and unwary investors, legislature to its wisdom had enhanced the punishment to the extent of ten years imprisonment and fine to the tune of ₹ 25 crores by amending the Section 24(1) of SEBI Act. Thus, at the time of determining the sentence, Court has to keep in mind the intention of the legislature.

6. **Admittedly,** there is no criminal antecedent of the convicts but in such type of offences, generally the convicts have no criminal antecedent as the committed offence is a white collar offence. No doubt convict no. 4 Atul Kishore Gupta had resigned from the company accused *w.e.f* January 17, 1999, but to my mind, this is not the sufficient mitigating factor to treat him differently because he was not only one of the promoters of the company accused along with the other convicts but also one of the first directors of the company accused and also member of the Board of Directors when the decision of mobilizing fund was taken without following the mandatory provisions of Section 12(1B) of the Act.

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7. **Taking** into account, all the mitigating and aggravating factors, I am of the opinion that convicts deserve substantial punishment. Thus, I hereby sentence convicts no. 2 to 5 rigorous imprisonment for a period for six month and a fine of ₹ 4 lac each in default further three months simple imprisonment for the offence punishable under Section 24(1) of the SEBI Act. Convict Company *i.e.* M/s Nexus Farms Ltd. is burdened with a fine of ₹ 6 lac for the offence punishable under Section 24(1) of the SEBI Act.

8. **Considering** the fact that the numerous investors failed to get their hard earned money till date, SEBI is directed that SEBI shall make effort to trace out the investors by giving advertisement in print and electronic media and after verification of the documents shall submit a report in the Court. On receipt of the report the fine amount, if realized shall be utilized in compensating to the investors under Section 357 of the Code of Criminal Procedure. However, the amount of compensation shall not be released to the investors before the expiry of period of appeal or revision and if any appeal or revision is filed then till the decision of such appeal or revision.

9. **Counsel** for SEBI submits that SEBI shall take appropriate steps for the realization of the fine amount qua company accused (convict no.1). Request is allowed.

10. **Copy** of judgment along with order on the point of sentence be given to the convicts/their counsel free of cost.

Announced in the open Court
on this 8th June 2012

(PAWAN KUMAR JAIN)
ADDITIONAL SESSIONS JUDGE
CENTRAL-01/THC/DELHI

Copy given to the convicts in open Court