

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.07.2022

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

Crl.A.No.626 of 2019
and
Crl.M.P.No.13469 of 2019

1.Kunnamkulam Paper Mills Ltd.,
A Company Registered under the Companies
Act, 1956, having its Registered Office at
Pannithadavam Road, Akkikavn, Kunnamkulam,
Thrissur 680 519, Kerala.

2.K.C.Rajan
3.C.U.Binoy
4.P.M.Benny
5.P.D.Gopalan
6.M.M.Mohammed Asharaf
7.Sebastian Choondal

... Appellants

Versus

Securities and Exchange Board of India,
A statutory body established under the
provisions of the Securities and Exchange
Board of India Act, 92, having its regional
office at D'Monte Building, 3rd Floor, 32,
D'Monte Building, TTK Road, Alwarpet,
Chennai – 18 and Represented by its
Assistant Legal Advisor

... Respondent

Prayer : Criminal Appeal filed u/s.374(2) of the Code of Criminal Procedure,
1973, praying to call for the records in the judgment dated 25.04.2017 passed

by the learned XIX Additional Sessions Judge, Chennai – 1 in Sessions Case 356 of 2010, set it aside by acquitting the Appellants.

For Appellants : Mr.R.Yashod Vardhan,
Senior Counsel
for M/s.R.Sunilkumar

For Respondent : Mr.N.P.Kumar
Special Public Prosecutor

JUDGMENT

The first appellant is a Company incorporated under the Companies Act, namely Kunnamkulam Paper Mills Ltd., and the appellants 2 to 7 are its Directors.

2.On 28.03.2001, they made an allotment of 1,73,995 equity shares of Rs.10/- each to 163 persons. The said allotment is directly in violation of the provisions of SEBI (Disclosure and Investor Protection) Guidelines 2000. Therefore, the matter was taken up by SEBI and by an order dated 10.04.2003, the appellants were directed to refund the money collected under the issue made by the offer document dated 15.02.2001 to the investors with interest not below the bank rate charged by the commercial bank for long term fixed deposits. The appellants were directed to refund the money within a period of 30 days from

the date of the order and to file compliance report within a period of 15 days there from. It is mentioned that, on failure to comply with the above, the appellants will firstly, will not access the capital market for a period of 5 years and secondly, will invite penalty under Section 15HB of the SEBI Act and also prosecution under Section 24 of the SEBI Act.

3.The said direction was not complied and therefore, under the authority of SEBI, its Assistant Legal Advisor, one *G.V.Chitra* presented a private complaint under Section 200 of Cr.P.C. for the offences under Section 24(1) r/w Section 27 of Securities and Exchange Board of India Act, 1992 (in short 'the SEBI Act'), before the XXIII Metropolitan Magistrate, Saidapet. Even though was initially taken on file as C.C.No.8959 of 2003, as per Section 26 of the SEBI Act, the offence is triable by Sessions Judge. Therefore, after furnishing the copies to the accused under Section 207 of Cr.P.C., committed the case under Section 209 of Cr.P.C. to the Principal Sessions Judge, Chennai. The case was taken on file as S.C.No.356 of 2010 and thereafter, was made over to the learned XIX Additional Sessions Court, Chennai. After considering the materials on record, the Trial Court framed charge under Section 24(1) read with 27 of the SEBI Act. Upon being questioned, accused denied the charges and stood trial. Thereafter, the prosecution examined one *Pradeep*

Ramakrishnan as P.W.1 and *Ex.P-1* to *Ex.P-23* were marked on behalf of the prosecution. Upon questioned about the material evidence on record and incriminating circumstances, the second accused examined himself as D.W.1 and *Ex.D-1* to *Ex.D-3* were marked on behalf of the second appellant/accused.

4.The Trial Court thereafter, proceeded to hear the learned Counsel on either side and the learned Central Government Public Prosecutor for the prosecution and the Counsel for the respondents/accused and by a judgment dated 25.04.2019, found A1, A2, A5, A6, A7, A10 and A13 guilty for the offence under Section 24(1) of SEBI Act and imposed a fine of Rs.50,00,000/- on each of the accused and in default of payment of fine, to undergo simple imprisonment for a period of one year. Aggrieved by the same, present appeal is laid before this Court.

5.Heard *Mr.R.Yashod Vardhan*, learned Senior Counsel on behalf of the appellants and *Mr.N.P.Kumar*, learned Special Public Prosecutor on behalf of the respondent.

6.The learned Senior Counsel would submit that, in this case, the petitioner/Company had issued 1,73,995 equity shares of Rs.10/- each to 163

persons on 28.03.2001, which was in violation of the guidelines and hence the violation of the Act. He would submit that the offence is said to have been committed on 28.03.2001. As on the said date, the unamended Section 24 was in force.

7. Similarly, under Section 26 of the pre-amended Act, the offence was triable by the Magistrate. Therefore, the maximum penalty that could have been issued for the said offence is only imprisonment for a period of one year or a fine of Rs.10,000/-, which is the maximum fine leviable by the Magistrate at that point of time. Therefore, he would submit that the charging of the accused under Section 24(1) of the SEBI Act as it stands as on date of the complaint itself is erroneous in as much as the new enhanced punishment under Section 24(1) of which, the offence in the complaint is alleged, came into effect only on 29.10.2002 i.e., after the alleged offence said to have been committed. Therefore, straightaway the case of the prosecution is hit by Article 20 of the Constitution of India and therefore, the appellants are entitled to acquittal.

8. Per contra, *Mr.N.P.Kumar*, learned Special Public Prosecutor submitted that even though the initial issue of shares was on 28.03.2001, in this case, the show cause notice was issued on 25.10.2002 followed by an order of the SEBI,

which is dated 10.04.2003. By the order of the SEBI, the appellants are directed to refund the entire amount collected by virtue of the said issue and it has been specifically stated that if they fail to comply, prosecution under Section 24 of the SEBI Act will be undertaken. By the time the said direction was given, the new Section 24 as well as the Section 26 have come into force and therefore, the Trial Court rightly convicted the appellants and imposed fine on the accused.

9.I have considered the rival submissions made by the learned Counsel on either side and perused the material records of the case.

10.In this case, admittedly, there are two distinct violations or commissions/omissions are alleged as against the appellants. The first violation is that, on 28.03.2001, in violation of the guidelines of the provisions of the SEBI Act, allotment of 1,73,995 equity shares of Rs.10/- each, was made to 163 persons. The second omission or commission is that, upon the direction of the SEBI by an order dated 10.04.2003, the appellants/accused did not comply with the same and therefore, it amounts to an offence under Section 24 of the SEBI Act.

11.In this connection, it is useful to extract the unamended as well as the amended Section 24 and Section 26 of the Act:-

Unamended Section 24:-

“24.Offences:

(1) Without prejudice to any award of penalty by the adjudicating officer or the Board under this Act, if any person contravenes or attempts to contravene or abets the contravention of the provisions of this Act or of any rules or regulations made thereunder, he shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

(2) If any person fails to pay the penalty imposed by the adjudicating officer or the Board or fails to comply with any of his directions or orders, he shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to three years or with fine which shall not be less than two thousand rupees but which may extend to ten thousand rupees or with both.”

Amended Section 24:-

“24.Offences :

(1) Without prejudice to any award of penalty by the adjudicating officer 4[or the Board] under this Act, if any person contravenes or attempts to contravene or abets the contravention of the provisions of this Act or of any rules or regulations made thereunder, he shall be punishable with imprisonment for a term which may extend to ten years, or with fine, which may extend to twenty-five crore rupees or with both.

(2) If any person fails to pay the penalty imposed by the adjudicating officer or the Board or fails to comply with any 5[of his] directions or orders, he shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to ten years or with fine, which may extend to twenty-five crore rupees or with both.”

Unmended Section 26 :-

“26.Cognizance of offences by courts.

(1) No court shall take cognizance of any offence punishable under this Act or any rules of regulations made thereafter, save

on a complaint made by the Board with the previous sanction of the Central Government.

(2) No court inferior to that of a Court of Session shall try any offence punishable under this Act.”

Amended Section 26 :-

“26 (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.”

12. Before the amending Act, it may be seen that the punishment, which was originally there was imprisonment for a period of one year or with fine or with both. A reading of the original Section 26 of the SEBI Act, it would be clear that the offence was triable by the Magistrate and therefore, the maximum fine leviable was Rs.10,000/-. But, the Section 24(1) was amended by the SEBI amendment Act, 2002, which came into force on 29.10.2002, from there upon, the punishment was increased as imprisonment for a period of 10 years or with fine, it may extend to twenty five crore rupees or with both. Similarly, the Section 26 was also amended by stating that no Court inferior to a Court of Sessions shall try the offence punishable under this Act. As a matter of fact, Section 24(2) of the SEBI Act was also amended by increasing the penalty by the same amended act.

13.A perusal of both the unamended and amended Section 24 of the SEBI Act, it would be clear that there are two distinct offences under Section 24(1) and Section 24(2) of the SEBI Act. Under Section 24(1) of the SEBI Act, if any person contravenes or attempts to contravene or abets the contravention of the provisions of the Act or of any rules or regulations made thereunder, then he is liable for punishment. Under Section 24(2) of the SEBI Act, if any person fails to pay the penalty imposed by the Adjudicating Officer or fails to comply with any of the direction, then he is liable for punishment under Section 24(2).

14.In this case, as seen above, there are two different acts. One, is the violation of the rules and regulations under the Act by issuing 1,73,995 equity shares i.e., that was on 28.03.2001. Therefore, the punishment imposable was as per the provision of Section 24(1) as it stood prior to the amendment. As far as the second violation is concerned, i.e., punishable under Section 24(2) of the SEBI Act i.e., the same is after the amendment and therefore, the appellants will be liable for the punishment as per the amended Act. In this case, the learned Senior Counsel would contend that the charges are framed only under Section 24(1) and therefore, the accused can be imposed with a fine only for Rs.10,000/- and but, not more than that.

15.Per contra, the learned Special Public Prosecutor would submit that the violation is after the amendment and therefore, such amount of fine of Rs.50,00,000/- is leviable. But, a perusal of the same would indicate that of the two violations complained, the first falls under Section 24(1) and the second falls under Section 24(2), but both violations are alleged under a single charge. Therefore, as far as the Section 24(1) is concerned, I am in agreement with the learned Senior Counsel that the fine amount extending up to Rs.25 crore is not leviable, because as on date in which the alleged offence was committed i.e., on 28.03.2001, the amendment did not come and therefore, imprisonment of one year or a fine amount of Rs.10,000/- alone is leviable.

16.No serious submission was made on the merits of the case on behalf of the appellants and the learned Senior Counsel argued only on the sentence and therefore, I find that the act of the appellants/accused in issuing 1,73,995 equity shares on 28.03.2001 as violating the guidelines framed under the Act and accordingly, amounting to an offence under Section 24(1) of the SEBI Act and considering the nature of the offence and sentence and fine of Rs.10,000/- each is imposed.

17. Be that as it may, there was also a direction by the SEBI to refund the said amount within a period of 30 days from the order. Admittedly, the same was not refunded and the direction was not complied with. The non-compliance of the direction cannot amount to an offence under Section 24(2) of the SEBI Act. Even though a specific charge is not framed, but in this case the charge framed clearly included the ingredients and facts of the said offence. It was only an omission to mention the provision of law. No prejudice is caused to the accused in any manner arising by not framing a specific charge under Section 24(2) of the SEBI Act. In this regard, it is useful to quote the relevant portion of the judgment of the Hon'ble Supreme Court in the case of *Anil Vs. Admn. of Daman & Diu, Daman*¹, which is read as follows :-

"54. The propositions of law which can be culled out from the aforementioned judgments are:

- (i) The appellant should not suffer any prejudice by reason of misjoinder of charges.*
- (ii) A conviction for lesser offence is permissible.*
- (iii) It should not result in failure of justice.*
- (iv) If there is a substantial compliance, misjoinder of charges may not be fatal and such misjoinder must be arising out of mere misjoinder to frame charges."*

18. As a matter of fact, the Hon'ble Supreme Court in the case of *Abdul Sayeed v. State of M.P.*², has held as follows :-

¹ (2006) 13 SCC 36

² (2010) 10 SCC 259

“43. A Constitution Bench of this Court in Willie (William) Slaney v. State of M.P. [AIR 1956 SC 116 : 1956 Cri LJ 291] considered the issue of failure to frame charges properly and the conviction of an accused for the offences for which he has not been charged and reached the conclusion as under : (AIR p. 137, paras 86-87)

“86. ... In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out. ...

87. ... If it is so grave that prejudice will necessarily be implied or imported, it may be described as an illegality. If the seriousness of the omission is of a lesser degree, it will be an irregularity and prejudice by way of failure of justice will have to be established.”

44. This Court in Gurpreet Singh v. State of Punjab [(2005) 12 SCC 615 : (2006) 1 SCC (Cri) 191] referred to and relied upon its earlier judgments in Willie (William) Slaney [AIR 1956 SC 116 : 1956 Cri LJ 291] and Thakkidiram Reddy [(1998) 6 SCC 554 : 1998 SCC (Cri) 1488] , and held that unless there is a failure of justice and thereby the cause of the accused has been prejudiced, no interference is required if the conviction can be upheld on the evidence led against the accused. The court should not interfere unless it is established that the accused was in any way prejudiced due to the errors and omissions in framing the charges against him. A similar view has been reiterated by this Court in Ramji Singh v. State of Bihar [(2001) 9 SCC 528 : 2002 SCC (Cri) 760] and Sanichar Sahni v. State of Bihar [(2009) 7 SCC 198 : (2009) 3 SCC (Cri) 347].

45. There is no bar in law on conviction of the accused with the aid of Section 34 IPC in place of Section 149 IPC if there is evidence on record to show that such accused shared a common intention to commit the crime

and no apparent injustice or prejudice is shown to have been caused by application of Section 34 IPC in place of Section 149 IPC. The absence of a charge under one or the other or the various heads of criminal liability for the offence cannot be said to be by itself prejudicial to the accused, and before a conviction for the substantive offence without a charge can be set aside, prejudice will have to be made out. Such a legal position is bound to be held good in view of the provisions of Sections 215, 216, 218, 221 and 464 of the Code of Criminal Procedure, 1973. (Vide Dalip Singh v. State of Punjab [AIR 1953 SC 364 : 1953 Cri LJ 1465] , Malhu Yadav v. State of Bihar [(2002) 5 SCC 724 : 2002 SCC (Cri) 1190] , Dhaneswar Mahakud v. State of Orissa [(2006) 9 SCC 307 : (2006) 2 SCC (Cri) 505] and Annareddy Sambasiva Reddy v. State of A.P. [(2009) 12 SCC 546 : (2010) 1 SCC (Cri) 630])”

19. Therefore, this is a case where, whether the charge is complaining of both Section 24(1) and 24(2) and the only error of the Trial Court was not to mention the Section 24(2) expressly. However, Section 24(2) being an offence of the same genus, no prejudice was caused to the appellants and I hold that the second act committed by the appellants after coming into force of the amendment, would amount to an offence under Section 24(2) of the SEBI Act as amended and therefore, under the amended provision, the Sessions Court was right in trying the offence.

20. However, now coming to the punishment imposed, even though there is power for the Court to impose a fine up to twenty five crore rupees, the same

has to be exercised on a rational basis. In that regard, I find that there is no discussion or reason contained in the order of the Sessions Court and therefore, I am inclined to interfere with the said sentence.

21. In this case, it is seen that the direction issued was to refund the amount collected by issuing 1,73,995 equity shares of Rs.10/- each. Therefore, the amount, which was ordered to be refunded was Rs.17,39,950/-. Therefore, I am of the view that it would be appropriate to impose a total fine of the said sum to be jointly or separately payable by all the accused and in default of payment of the said sum within a period of eight (8) weeks from the date of receipt of a copy of the order, the accused, namely A2, A5, A6, A7, A10 and A13 are liable to undergo a simple imprisonment for a period of one year.

22. Therefore, this appeal is partly allowed on the following terms :-

(i) the appellants are convicted for an offence punishable under Section 24(1) of the SEBI Act as it stood prior to the SEBI (amendment act, 2002) and imposed a fine of Rs.10,000/- each;

(ii) the appellants 1 to 7 are also convicted for the offence punishable under Section 24(2) of the SEBI Act as it stands after the SEBI (amendment act, 2002) and are

jointly and separately imposed with a fine of Rs.17,39,950/-;

(iii) the appellants shall deposit the entire fine amount within a period of four weeks from the date of receipt of a copy of this order, in default of the payment of fine amount, the appellants shall undergo simple imprisonment for a period of one year;

(iv) upon the deposit of the fine amount as stated above, a sum of Rs.17,39,950/- shall be transferred to the account of Securities and Exchange Board of India (SEBI) and on receipt of the same, the said Board will disburse the same to the persons, who are entitled to the amount in accordance with law.

23. Accordingly, this Criminal Appeal is partly allowed. Consequently, connected criminal miscellaneous petition is closed.

05.07.2022

Index : yes/no
Speaking order/Non-speaking order
sp

To

1. The XIX Additional Sessions Judge, Chennai – 1.

2. The Assistant Legal Advisor,
Securities and Exchange Board of India,
D'Monte Building, 3rd Floor, 32,
D'Monte Building, TTK Road, Alwarpet, Chennai – 18.

Crl.A.No.626 of 2019

D.BHARATHA CHAKRAVARTHY, J.

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