'REPORTABLE'

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 827-830 OF 2012

Securities and Exchange Board of India … Appellant

Versus

Gaurav Varshney & Anr. … Respondents

WITH

CRIMINAL APPEAL NOS. 833-836 OF 2012

Securities and Exchange Board of India … Appellant

Versus

Parvesh Varshney … Respondent

WITH

CRIMINAL APPEAL NO. 252 OF 2015

Major P.C. Thakur … Appellant

Versus

Securities and Exchange Board of India … Respondent

WITH

CRIMINAL APPEAL NO. 251 OF 2015

Sunita Bhagat … Appellant

Versus

Securities and Exchange Board of India … Respondent

WITH

CRIMINAL APPEAL NO. 832 OF 2012

Securities and Exchange Board of India … Appellant

Versus

Raj Chawla … Respondent

J U D G M E N T

Jagdish Singh Khehar, J.

Criminal Appeal nos. 827-830 of 2012

1. Sub-Section (1B) was inserted into Section 12 of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as, the SEBI Act), on 25.1.1995. Section 12(1B) is extracted hereunder:-

> "12. Registration of stock-brokers, sub-brokers, share transfer agents, etc. –
>
> (1B) No person shall sponsor or cause to be sponsored or carry on or cause to be carried on any venture capital funds or collective investment scheme including mutual funds, unless he obtains a certificate of registration from 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 scheme 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.
>
> Explanation.– For the removal of doubts, it is hereby declared that, for the purposes of this section, a collective investment scheme or mutual fund shall not include any unit linked insurance policy or scrips or any such instrument or unit, by whatever name called, which provides a component of investment besides the component of insurance issued by an insurer."

The question that arises for consideration in the present criminal appeals is, whether respondent nos. 1 and 2 – Gaurav Varshney and Vinod Kumar Varshney, had violated Section 12(1B), by incorporating M/s. Gaurav Agrigenetics Ltd., under the provisions of the Companies Act, 1956, on 3.7.1995, in the capacity of its first directors and promoters. This position emerges, because it is not a matter of dispute, that M/s. Gaurav Agrigenetics Ltd. commenced a collective investment

scheme, immediately on its incorporation.

2. In order to highlight the implications of the amendment, made on 25.1.1995, the Government of India issued a press release dated 18.11.1997. The text of the same is extracted hereunder:-

> "The matter relating to regulating entities which issue instruments such as agro bonds, plantation bonds etc. has been receiving Government's attention. While the instruments may be funding agro based investment activity, it is observed that they often offer very high rates of return not consistent with normal returns in such activities. There is, therefore, a high element of risk associated with such schemes. In order to ensure that investors make investment decisions with the full knowledge of the risks involved in such schemes, Government has felt it necessary to put in place an appropriate regulatory framework for such schemes. Government after detailed consultation with the regulatory authorities concerned has decided to treat such schemes as "Collective Investment Schemes" coming under the provisions of the Section 11(2)(c) of the SEBI Act. <u>In order to regulate such Collective Investment Schemes, both from the aspect of investor protection as well as allowing legitimate investment activity to take place, SEBI would first formulate draft regulations for this purpose. These draft regulations would be made available for public discussion. The investors who have invested in such schemes as well as entities running such schemes will be requested to give their comments on pertinent matters to SEBI for enabling SEBI to formulate appropriate regulations for such Collective Investment Schemes.</u>
>
> <u>Once these regulations come into force, it is expected that they will promote legitimate investment activity on plantation and other agriculture based business, while at the same time give investors an adequate degree of protection for their investments.</u>"

For the same purpose, as stated above, the Securities and Exchange Board of India (hereinafter referred to as, 'the Board') also issued a separate press release, dated 26.11.1997. The text of the above press release, is reproduced below:-

> "The Central Government has by a press release dated 18.11.1997 decided that an appropriate regulatory framework for regulating entities which issued instruments such as agro bonds, plantation bonds, etc. has to be put in place. The Government has decided that schemes through which such instruments are issued would be treated as collective investment schemes coming under the provisions of the SEBI Act. In terms of the press release, SEBI has initiated action for drafting regulations for such collective investment schemes.

The provisions of section 12(1B) of the SEBI Act prohibit collective investment schemes including mutual funds from sponsoring any new scheme till the regulations are notified. While the regulations for mutual fund schemes have been notified by SEBI, regulations for collective investment schemes including plantations schemes require to be notified in view of the press release issued by the Central Government. These regulations are under preparation and will be issued in due course, first in draft form for the public discussion and later in the final form. Till these regulations are notified, as a result of the provisions of section 12(1B) of the SEBI Act, no person can sponsor or cause to be sponsored any new collective investment scheme and raise further funds.

The provisions of section 12(1B) provides that till regulations are notified all collective investment schemes which are operating can continue with their activities till the regulations are notified. Any collective investment scheme which is desirous of taking benefit of the proviso to section 12(1B) of the SEBI Act is directed to send to SEBI information within 21 days from today containing details such as:-

- Terms and conditions of the schemes launched
- Funds raised through all the schemes
- Promises or assurances or assured returns made in the scheme
- Copies of offer document of the scheme
- Names, details and background of promoters/sponsors

All collective investment schemes which want to take benefit of the proviso of Section 12(1B) are also directed to make an advertisement only in accordance with the advertisement code already prescribed by SEBI under the Disclosure and investors protection guidelines."

In addition to the above, 'the Board' also issued a public notice, on 18.12.1997. The instant public notice also related to, the implications of Section 12(1B). The contents of the public notice, are reproduced below:-

"The Central Government has by a press release dated 18.11.1997 decided that an appropriate regulatory framework for regulating entities which issued instruments such as agro bonds, plantation bonds, etc. has to be put in place. The Government has decided that schemes through which such instruments are issued would be treated as collective investment schemes coming under the provisions of the SEBI Act. In terms of the press release, SEBI has initiated action for drafting regulations for such collective investment schemes. A committee under the chairmanship of Dr. S.A. Dave has already been

constituted.

The provisions of section 12(1B) of the SEBI Act prohibit collective investment schemes including mutual funds from sponsoring any new scheme till the regulations are notified. While the regulations for mutual fund schemes have been notified by SEBI, regulations for collective investment schemes including plantations schemes require to be notified in view of the press release issued by the Central Government. These regulations are under preparation and will be issued in due course, first in draft form for the public discussion and later in the final form. Till these regulations are notified, it is hereby brought to the notice of the public that as a result of the provisions of section 12(1B) of the SEBI Act, no person can sponsor or cause to be sponsored any new collective investment scheme and raise further funds.

Further, the provisions of section 12(1B) provides that till regulations are notified all collective investment schemes which are in existence can continue with their operations till the regulations are notified. It is hereby brought to the notice of the public that existing collective investment schemes which are desirous of taking benefit of the proviso to section 12(1B) of the SEBI Act and continue their operations are directed to send to SEBI, by 15th January 1998 information containing details such as: Terms and conditions of the schemes launched, Funds raised through all the schemes, Promises or assurances or assured returns made in the scheme, Copies of offer document of the scheme and Names, details and background of promoters/sponsors.

Note: The above information regarding existing collective investment schemes in northern, southern and eastern region maybe filed with the respective regional office of SEBI.

In further exercise of the powers under section 11 read with section 11(B) all collective investment schemes which want to take benefit of the proviso of section 12(1B) are also directed to make an advertisement only in accordance with the advertisement code already prescribed by SEBI under the Disclosure and investors protection guidelines."

3. In order to appreciate the stance adopted on behalf of respondent nos. 1 and 2, it is essential to point out, that in consonance with Section 12(1B) of the SEBI Act, and in furtherance of the power vested with 'the Board', under Section 30 of the SEBI Act, 'the Board' framed regulations - the Securities and Exchange Board of India (Collective Investment Schemes) Regulations, 1999 (hereinafter referred to as, the Collective Investment Regulations). The Collective Investment Regulations,

were to come into force, on the date of their publication in the official gazette. It is not a matter of dispute, that the same were brought into force, on 15.10.1999.

4. Respondent nos. 1 and 2 – Gaurav Varshney and Vinod Kumar Varshney, were aggrieved by the criminal proceedings initiated against them, on the basis of a complaint filed by 'the Board', under Section 200 of the Code of Criminal Procedure, 1973 (hereinafter referred to as, the Cr.P.C.), read with Sections 24(1) and 27 of the SEBI Act, alleging, that they had breached the bar created by Section 12(1B), which had forbidden the sponsoring or carrying on of a collective investment initiative, without obtaining a certificate of registration from 'the Board'. Respondent nos. 1 and 2 approached the High Court of Delhi (hereinafter referred to, as the High Court), by filing Criminal Miscellaneous Case nos. 7468-7471 of 2006 and Criminal Miscellaneous no. 951 of 2007, for quashing Complaint Case no. 1241 of 2003, pending in the Court of the Chief Metropolitan Magistrate, Tis Hazari Courts, Delhi, titled as "SEBI vs. Gaurav Agrigenetics Ltd. and others", as well as, the order dated 15.12.2003, by which the Chief Metropolitan Magistrate had summoned them (in the aforementioned complaint case).

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5. The simple contention advanced at the hands of respondent nos. 1 and 2 was, that the bar against sponsoring or carrying on a collective investment scheme, without obtaining a certificate of registration from 'the Board' under the Collective Investment Regulations, could arise only after the Collective Investment Regulations were brought into existence. In this behalf it was pointed out, that the Collective Investment Regulations were admittedly brought into force from 15.10.1999. To exculpate their involvement in the proceedings initiated against them, the main

assertion advanced on behalf of respondent nos. 1 and 2 was, that respondent no. 1 – Gaurav Varshney had submitted Form-32 with the Registrar of Companies, communicating the factum of his resignation from the directorship of M/s. Gaurav Agrigenetics Ltd., on 10.5.1996. Since the aforesaid Form-32 had been submitted with the Registrar of Companies on 30.7.1998, it was contended on behalf of respondent no. 1, that he had no objection if it was assumed (for determination of the present controversy), that respondent no. 1 had resigned from the directorship of the concerned company on 30.7.1998. Likewise, it was pointed out, that respondent no. 2 – Vinod Kumar Varshney, had submitted Form-32 with the Registrar of Companies, communicating the factum of his resignation from the directorship of the company, on 15.9.1998. It was however acknowledged, that Form-32 with respect to his resignation, was submitted with the Registrar of Companies, on 23.12.1998. It was contended on behalf of respondent no. 2, that he had no objection to this Court assuming, that respondent no. 2 had severed his relationship with M/s. Gaurav Agrigenetics Ltd. on 23.12.1998, i.e. the date when Form-32 was submitted with the Registrar of Companies.

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6. In the background of the fact situation noticed hereinabove, it was urged, that if the date of resignation of respondent no. 1 – Gaurav Varshney from the directorship of M/s. Gaurav Agrigenetics Ltd. is taken as 30.7.1998, and that of respondent no. 2 – Vinod Kumar Varshney, is taken as 23.12.1998, both of them had admittedly resigned from the directorship of M/s. Gaurav Agrigenetics Ltd., prior to the coming into existence of the Collective Investment Regulations (with effect from 15.10.1999). The High Court, by its impugned order dated 13.5.2010, had agreed with the proposition canvassed on behalf of respondent nos. 1 and 2, and

had quashed Complaint Case no. 1241 of 2003 (pending in the Court of Chief Metropolitan Magistrate, Tis Hazari Courts, Delhi), as well as, the order dated 15.12.2003 issued by the said Chief Metropolitan Magistrate, summoning respondent nos. 1 and 2 in the above noted complaint case.

7. Dissatisfied with the determination rendered by the High Court (vide the impugned order dated 13.5.2010), 'the Board' approached this Court, through Criminal Appeal nos. 827-830 of 2012, to raise a challenge to the order passed by the High Court.

8. The primary contention advanced on behalf of 'the Board' was, that the High Court misunderstood and misconstrued the bar created by Section 12(1B) of the SEBI Act. It was submitted on behalf of the appellant, that the bar contemplated under Section 12(1B), came into effect on the very date Section 12(1B) was inserted into the SEBI Act (i.e. from 25.1.1995). It was asserted, that the said bar restrained everyone, from sponsoring or carrying on any collective investment activity, without obtaining a certificate of registration from 'the Board', under the Collective Investment Regulations. And as such, any act of sponsoring or commencement of a collective investment venture, without obtaining a certificate of registration, on or after 25.1.1995, was absolutely forbidden. It was submitted on behalf of the appellant, that the proviso under Section 12(1B), made the position absolutely clear and unambiguous. It was pointed out, that the proviso authorized all persons who had sponsored or were carrying on a collective investment scheme "… immediately before the commencement of the Securities Law (Amendment) Act, 1995, for which no certificate of registration was required prior to such commencement…", to

continue to operate, till regulations were framed under clause (d) of sub-Section (2) of Section 30. Therefore, relying on the proviso under Section 12(1B), it was submitted, that actions of sponsoring or carrying on an enterprise of collective investment, were permitted to only such persons, who had commenced such activities prior to the commencement of the Securities Law (Amendment) Act, 1995 (i.e., prior to 25.1.1995).

9. In order to substantiate the afore-noted contention, and also, in order to demonstrate, that the action of 'the Board' in not framing the Collective Investment Regulations, would have no bearing, to the bar created under Section 12(1B), learned counsel placed reliance on Orissa State (Prevention & Control of Pollution) Board vs. Orient Paper Mills, (2003) 10 SCC 421, and invited our attention to the following observations recorded therein:-

> 5. We may at this stage peruse the relevant provisions of the law. Section 21 of the Act provides that subject to the provisions of the said section no person shall establish or operate any industrial plant in an air pollution control area without previous consent of the State Government. An industry which is functioning since before the declaration of the area as air pollution control area shall apply to the Board for consent within the period prescribed for the purpose. Section 22 provides as under:
>
> > "22. Persons carrying on industry etc. not to allow emission of air pollutants in excess of the standards laid down by State Board.—No person operating any industrial plant in any air pollution control area shall discharge or cause or permit to be discharged the emission of any air pollutant in excess of the standards laid down by the State Board under clause (g) of sub-section (1) of Section 17."
>
> Section 19 empowers the State Government to declare an area as air pollution control area. The relevant part of Section 19 reads as follows:
>
> > "19. Power to declare air pollution control areas.—(1) The State Government may, after consultation with the State Board, by notification in the Official Gazette, declare in such manner as may be prescribed, any area or areas within the State as air pollution control area or areas for the purposes of this Act.

(2) The State Government may, after consultation with the State Board, by notification in the Official Gazette,—

(a) alter any air pollution control area whether by way of extension or reduction;

(b) declare a new air pollution control area in which may be merged one or more existing air pollution control areas or any part or parts thereof.

(3)-(5)***"

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10. The question for consideration is, as to whether, as long the manner is not prescribed under the rules for declaration of an area as air pollution control area, a valid notification under Section 19(1) of the Act can be published in the Official Gazette or not.

11. So far as the statutory provision is concerned, the Act under Section 19 vests the State Government with power to notify any area, in an Official Gazette, as air pollution control area, but to say that exercise of such power is solely dependent upon framing of the rules prescribing the manner in which an area may be declared as air pollution control area, does not seem to be correct. Section 19 of the Act would read as follows by omitting the words "in such manner as may be prescribed" which part we put into bracket as follows:

"19. Power to declare air pollution control areas.—(1) The State Government may, after consultation with the State Board, by notification in the Official Gazette, declare (in such manner as may be prescribed), any area or areas within the State as air pollution control area or areas for the purposes of this Act.

(2)-(4)***"

12. Section 19 says "… such manner *as may be prescribed*" and not "in the manner prescribed" or "… in the prescribed manner". The expression used leaves some lever or play in the working of the provision. We would like to lay emphasis on the use of the word "as" which is significant. The manner is dependent upon "as" may be prescribed, if it is not prescribed, there is no manner available such as to be followed. The meaning of the word "as" has been indicated in Concise Oxford English Dictionary, 10th Edn., 2002 amongst others to mean as follows:

*** *** ***

In one of the cases decided by this Court, to be referred later in this judgment "as may be prescribed" has been held to mean "if any". It is thus clear that such expression leaves the scope for some play for the workability of the provision under the law. The meaning of the word "as" takes colour in context with which it is used and the manner of its use as prefix or suffix etc. There is no rigidity about it and it may have the meaning of a situation of being in existence during a particular time or contingent, and so on and so forth. That is to say, something to happen in a manner, if such a manner is in being or

exists, if it does not, it may not happen in that manner. Therefore, the reading of the provision under consideration makes it clear that manner of declaration is to be followed "as may be prescribed" i.e. "if any" prescribed.

13. Thus, in case manner is not prescribed under the rules, there is no obligation or requirement to follow any, except whatever the provision itself provides viz. Section 19 in the instant case which is also complete in itself even without any manner being prescribed as indicated shortly before to read the provision omitting this part "in such manner as may be prescribed". Merely by absence of rules, the State would not be divested of its powers to notify in the Official Gazette any area declaring it to be an air pollution control area. In case, however, the rules have been framed prescribing the manner, undoubtedly, the declaration must be in accordance with such rules.

14. On the proposition indicated above, a decision reported in T. Cajee v. U. Jormanik Siem, AIR 1961 SC 276, would be relevant. The matter pertained to removal of Seim from the office, namely, the Chief Headman of the area in the District Council governed by Schedule VI of the Constitution. The High Court took the view that the District Council could act only by making a law with the assent of the Governor. So far as the appointment and removal from the office of a Seim is concerned, provision contained in para 3(1)(g) of the Schedule was referred to, which empowered the District Council to make laws in respect of the appointment and succession of office of Chiefs Headmen. The High Court took the view that in absence of framing of such a law, there would be no power of appointment of a Chief or Seim nor for his removal either. This Court negated the view taken by the High Court observing that: (AIR p. 281, para 10)

> "[I]t seems to us that the High Court has read far more into para 3(1)(*g*) than is justified by its language. Para 3(1) is in fact something like a legislative list and enumerates the subjects on which the District Council is competent to make laws. … But it does not follow from this that the appointment or removal of a Chief is a legislative act or that no appointment or removal can be made without there being first a law to that effect."

This Court found that para 2(4) relating to administration of an autonomous district, vested in the District Council such powers and further observed as under: (AIR p. 281, para 10)

> "The Constitution could not have intended that all administration in the autonomous districts should come to a stop till the Governor made regulations under para 19(1)(*b*) or till District Council passed laws under para 3(1)(*g*). … Doubtless when regulations are made … the administrative authorities would be bound to follow the regulations so made or the laws so passed."

15. It is thus clear from the decision referred to in the preceding paragraph that the power which vests in an authority would not cease to exist simply for

the reason that the rules have not been framed or the manner of exercise of the power has not been prescribed. So far as Section 54 of the Act is concerned, it only enumerates the subjects on which the State Government is entitled to frame rules.

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20. We feel that so far as the point relating to the meaning of the word "may" used under Section 19 of the Act is concerned, it is not relevant for resolving the controversy we are concerned with. Once the manner is prescribed under the rules undoubtedly, the declaration of the area has to be only in accordance with the manner prescribed but absence of rules will not render the Act inoperative. The power vested under Section 19 of the Act, would still be exercisable as provided under the provision i.e. by declaring an area as air pollution control area by publication of notification in the Official Gazette. Non-framing of rules does not curtail the power of the State Government to declare any area as air pollution control area by means of a notification published in the Official Gazette. The part of the provision "in such manner as may be prescribed" would spring into operation only after such manner is prescribed by framing the rules under Section 54(2)(k) of the Act. This view as indicated earlier, is amply supported by the decision of this Court referred to above in the case of T. Cajee, AIR 1961 SC 276, which is a decision by a Constitution Bench of this Court. It has been followed in a subsequent decision of this Court reported in Surinder Singh v.Central Govt., (1986) 4 SCC 667. The Central Government had not framed rules in respect of disposal of property forming part of the compensation pool as contemplated under the provisions of the relevant Act. It was claimed by one of the parties that the authority constituted under the Act had no jurisdiction to dispose of urban agricultural property by auction-sale in absence of rules. The contention was repelled with the following observations: (SCC p. 673, para 6)

> "Where a statute confers powers on an authority to do certain acts or exercise power in respect of certain matters, subject to rules, the exercise of power conferred by the statute does not depend on the existence of rules unless the statute expressly provides for the same. In other words framing of the rules is not condition precedent to the exercise of the power expressly and unconditionally conferred by the statute. The expression 'subject to the rules' only means, in accordance with the rules, if any. If rules are framed, the powers so conferred on authority could be exercised in accordance with these rules. But if no rules are framed there is no void and the authority is not precluded from exercising the power conferred by the statute."

A reference was also made to the decisions of this Court in the cases reported in B.N. Nagarajan v. State of Mysore, AIR 1966 SC 1942, and Mysore SRTC v. Gopinath Gundachar Char, AIR 1968 SC 464. Reliance was also placed on U.P.SEB v. City Board, Mussoorie, (1985) 2 SCC 16.

21. In view of the discussion held above, in our view it would not be correct

to say that simply because the rules have not been framed prescribing the manner it would render the Act inoperative. The area was notified as air pollution control area by the State Government as authorized and provided by virtue of the powers conferred under Section 19 of the Act. The declaration is provided to be made by means of a notification published in the Official Gazette. No other manner is prescribed nor exists. The relevant notifications issued by the Government cannot be said to be contrary to any rules in existence as framed by the Government. The respondent had knowledge of the notification and had also applied for consent of the Board which was granted to the respondent. But it may be clarified that this is not the reason for taking the view that we have taken, it is mentioned only by way of an additional fact and nothing more. The whole working and functioning of the Act which is meant for controlling the air pollution cannot be withheld and rendered nugatory only for the reason of absence of the rules prescribing the manner declaring an air pollution control area which otherwise is provided to be notified by publication in an Official Gazette which has been done in this case."

Reliance was also placed on U.P. State Electricity Board, Lucknow vs. City Board, Mussoorie, (1985) 2 SCC 16, wherefrom, emphasis was placed on the observations extracted hereunder:-

6. The material part of Section 46 of the Act reads thus:

"46. (1) A tariff to be known as the Grid Tariff shall, in accordance with any regulations made in this behalf, be fixed from time to time by the Board in respect of each area for which a scheme is in force, and tariffs fixed under this section may, if the Board thinks fit, differ for different areas.

(2) Without prejudice to the provisions of Section 47, the Grid Tariff shall apply to sales of electricity by the Board to licensees were so required under any of the First, Second and Third Schedules, and shall, subject as hereinafter provided, also be applicable to sales of electricity by the Board to licensees in other cases:

Provided that if in any such other case it appears to the Board that, having regard to the extent of the supply required, the transmission expenses involved in affording the supply are higher than those allowed in fixing the Grid Tariff, the Board may make such additional charges as it considers appropriate.

* * *"

7. The first contention urged before us by the City Board is that in the absence of any regulations framed by the Electricity Board under Section 79 of the Act regarding the principles governing the fixing of Grid Tariffs, it was not open to the Electricity Board to issue the impugned notifications. This

contention is based on sub-section (1) of Section 46 of the Act which provides that a tariff to be known as the Grid Tariff shall in accordance with any regulations made in this behalf, be fixed from time to time by the Electricity Board. It is urged that in the absence of any regulations laying down the principles for fixing the tariff, the impugned notifications were void as they had been issued without any guidelines and were, therefore, arbitrary. It is admitted that no such regulations had been made by the Electricity Board by the time the impugned notifications were issued. The Division Bench has negatived the above plea and according to us, rightly. It is true that Section 79(h) of the Act authorises the Electricity Board to make regulations laying down the principles governing the fixing of Grid Tariffs. But Section 46(1) of the Act does not say that no Grid Tariff can be fixed until such regulations are made. It only provides that the Grid Tariff shall be in accordance with any regulations made in this behalf. That means that if there were any regulations, the Grid Tariff should be fixed in accordance with such regulations and nothing more. We are of the view that the framing of regulations under Section 79 (h) of the Act cannot be a condition precedent for fixing the Grid Tariff…."

10. It was also the contention of learned counsel for 'the Board', that the bar created by Section 12(1B), forbidding everyone not already engaged in the activity of collective investment (before 25.1.1995), to so engage himself, was absolutely mandatory. Such person (not already engaged in a collective investment scheme before 25.1.1995), it was contended, could commence such activities (of sponsoring or carrying on of a collective investment scheme), only after obtaining a certificate of registration, from 'the Board'. For an effective interpretation of Section 12(1B), learned counsel placed reliance on Union of India vs. A.K. Pandey, (2009) 10 SCC 552, and the Court's attention was drawn to the following observations recorded therein:-

8. Rule 34 of the Army Rules, 1954 with which we are concerned reads as follows:

"34. Warning of accused for trial.—(1) The accused before he is arraigned shall be informed by an officer of every charge for which he is to be tried and also that, on his giving the names of witnesses whom he desires to call in his defence, reasonable steps will be taken for procuring their attendance, and those steps shall be taken accordingly. The interval between his being so informed and his arraignment shall

not be less than ninety-six hours or where the accused person is on active service less than twenty-four hours.

(2) The officer at the time of so informing the accused shall give him a copy of the charge-sheet and shall, if necessary, read and explain to him the charges brought against him. If the accused desires to have it in a language which he understands, a translation thereof shall also be given to him.

(3) The officer shall also deliver to the accused a list of the names, rank and corps (if any) of the officers who are to form the court, and where officers in waiting are named, also of those officers in court-martial other than summary court-martial.

(4) If it appears to the court that the accused is liable to be prejudiced at his trial by any non-compliance with this Rule, the court shall take steps and, if necessary, adjourn to avoid the accused being so prejudiced."

The key words used in Rule 34 from which the intendment is to be found are "shall not be less than ninety-six hours". As the respondent was not in active service at the relevant time, we are not concerned with the later part of that rule which provides for interval of twenty-four hours for the accused in active service.

9. In his classic work, Principles of Statutory Interpretation (7th Edn.), Justice G.P. Singh has quoted a passage of Lord Campbell in Liverpool Borough Bank v. Turner, [(1860) 30 LJ Ch 379], that reads:

"No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory whether implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered."

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14. In Mannalal Khetan v. Kedar Nath Khetan, (1977) 2 SCC 424, while dealing with Section 108 of the Companies Act, 1956 a three-Judge Bench of this Court held: (SCC pp. 429-31, paras 17-23)

"17. In Raza Buland Sugar Co. Ltd. v. Municipal Board, Rampur, AIR 1965 SC 895, this Court referred to various tests for finding out when a provision is mandatory or directory. The purpose for which the provision has been made, its nature, the intention of the legislature in making the provision, the general inconvenience or injustice which may result to the person from reading the provision one way or the other, the relation of the particular provision to other provisions dealing with the same

subject and the language of the provision are all to be considered. Prohibition and negative words can rarely be directory. It has been aptly stated that there is one way to obey the command and that is completely to refrain from doing the forbidden act. Therefore, negative, prohibitory and exclusive words are indicative of the legislative intent when the statute is mandatory. (See Maxwell on Interpretation of Statutes, 11th Edn., pp. 362 et seq.; Crawford: Statutory Construction, Interpretation of Laws, p. 523 and Bhikraj Jaipuria v. Union of India, AIR 1962 SC 113.

18. The High Court said that the provisions contained in Section 108 of the Act are directory because non-compliance with Section 108 of the Act is not declared an offence. The reason given by the High Court is that when the law does not prescribe the consequences or does not lay down penalty for non-compliance with the provision contained in Section 108 of the Act the provision is to be considered as directory. The High Court failed to consider the provision contained in Section 629(a) of the Act. Section 629(a) of the Act prescribes the penalty where no specific penalty is provided elsewhere in the Act. It is a question of construction in each case whether the legislature intended to prohibit the doing of the act altogether, or merely to make the person who did it liable to pay the penalty.

19. Where a contract, express or implied, is expressly or by implication forbidden by statute, no court will lend its assistance to give it effect. (See Melliss v. Shirley Local Board, [(1885) 16 QBD 446]. A contract is void if prohibited by a statute under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition. The penalty may be imposed with intent merely to deter persons from entering into the contract or for the purposes of revenue or that the contract shall not be entered into so as to be valid at law. A distinction is sometimes made between contracts entered into with the object of committing an illegal act and contracts expressly or impliedly prohibited by statute. The distinction is that in the former class one has only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract: if a contract is made to do a prohibited act, that contract will be unenforceable. In the latter class, one has to consider not what act the statute prohibits, but what contracts it prohibits. One is not concerned at all with the intent of the parties, if the parties enter into a prohibited contract, that contract is unenforceable. (See St. John Shipping Corpn. v. Joseph Rank Ltd. (1957) 1 QB 267) (See also Halsbury's Laws of England, 3rd Edn., Vol. 8, p. 141.)

20. It is well established that a contract which involves in its fulfilment the doing of an act prohibited by statute is void. The legal maxim a pactis privatorum publico juri non derogatur means that private agreements cannot alter the general law. Where a contract, express or

implied, is expressly or by implication forbidden by statute, no court can lend its assistance to give it effect. (See Melliss v. Shirley Local Board, (1885) 16 QBD 446). What is done in contravention of the provisions of an Act of the legislature cannot be made the subject of an action.

21. If anything is against law though it is not prohibited in the statute but only a penalty is annexed the agreement is void. In every case where a statute inflicts a penalty for doing an act, though the act be not prohibited, yet the thing is unlawful, because it is not intended that a statute would inflict a penalty for a lawful act.

22. Penalties are imposed by statute for two distinct purposes:

(1) for the protection of the public against fraud, or for some other object of public policy;

(2) for the purpose of securing certain sources of revenue either to the State or to certain public bodies. If it is clear that a penalty is imposed by statute for the purpose of preventing something from being done on some ground of public policy, the thing prohibited, if done, will be treated as void, even though the penalty if imposed is not enforceable.

23. The provisions contained in Section 108 of the Act are for the reasons indicated earlier mandatory. The High Court erred in holding that the provisions are directory."

15. The principle seems to be fairly well settled that prohibitive or negative words are ordinarily indicative of mandatory nature of the provision; although not conclusive. The Court has to examine carefully the purpose of such provision and the consequences that may follow from non-observance thereof. If the context does not show nor demands otherwise, the text of a statutory provision couched in a negative form ordinarily has to be read in the form of command. When the word "shall" is followed by prohibitive or negative words, the legislative intention of making the provision absolute, peremptory and imperative becomes loud and clear and ordinarily has to be inferred as such. There being nothing in the context otherwise, in our judgment, there has to be clear ninety-six hours' interval between the accused being charged for which he is to be tried and his arraignment and interval time in Rule 34 must be read as absolute. There is a purpose behind this provision: that purpose is that before the accused is called upon for trial, he must be given adequate time to give a cool thought to the charge or charges for which he is to be tried, decide about his defence and ask the authorities, if necessary, to take reasonable steps in procuring the attendance of his witnesses. He may even decide not to defend the charge(s) but before he decides his line of action, he must be given clear ninety-six hours."

It was submitted, on the basis of the legal position declared by this Court in the

above judgments, that the bar created through Section 12(1B), forbidding new entrepreneurs from commencing activities concerning collective investment, without obtaining a certificate of registration, was strict and mandatory.

11. Based on the assertions noticed above, as also, the legal position declared by this Court, it was sought to be canvassed, that by incorporating M/s. Gaurav Agrigenetics Ltd. on 3.7.1995, and immediately on its incorporation, by sponsoring or carrying on a collective investment enterprise, without obtaining a certificate of registration from 'the Board', in accordance with the Collective Investment Regulations, the respondents had clearly breached the bar created by Section 12(1B) of the SEBI Act. On account of the fact, that respondent nos. 1 and 2 had even on their own showing, continued to be the promoter-directors of M/s. Gaurav Agrigenetics Ltd. upto 30.7.1998 (with reference to the respondent no. 1 – Gaurav Varshney), and 23.12.1998 (with reference to the respondent no. 2 – Vinod Kumar Varshney) respectively, they were obviously in breach of the bar, contemplated under Section 12(1B) of the SEBI Act.

JUDGMENT

12. Mr. Jatin Zaveri, learned counsel representing respondent nos. 1 and 2, seriously disputed the above interpretation placed by learned counsel for the appellant, on Section 12(1B) of the SEBI Act. First and foremost, learned counsel for the respondents, referred to the press releases dated 18.11.1997 and 26.11.1997 issued by the Government of India and 'the Board', respectively, as also, the public notice dated 18.12.1997 issued by 'the Board'. We have already extracted the aforesaid press releases and the public notice above. We have also highlighted the portions thereof, relied upon by learned counsel for the respondents, to contend that

in the understanding of the Government of India, as also, 'the Board' itself, there was no bar on sponsoring or commencing or carrying on a collective investment scheme, even after the insertion of Section 12(1B) into the SEBI Act. It was submitted, that the aforementioned press releases and public notice merely highlighted the requirement of obtaining a certificate of registration from 'the Board', consequent upon the framing of the Collective Investment Regulations, contemplated under Section 12(1B) of the SEBI Act. It was, therefore the submission of learned counsel for the respondents, that the action of the respondents, in merely commencing the activity of sponsoring or carrying on a collective investment scheme, should not be treated as a violation of Section 12(1B), at their hands. It was also contended on behalf of the respondents, that a breach of Section 12(1B) could have arisen, only if M/s. Gaurav Agrigenetics Ltd., could be blamed of having carried on activities concerning collective investment, without obtaining a certificate of registration from 'the Board', in accordance with the Collective Investment Regulations. But that, according to learned counsel, was possible, only after the said regulations were framed, and the respondents had continued their activity, in breach of the said regulations. Since the Collective Investment Regulations were admittedly brought into force with effect from 15.10.1999, according to learned counsel for the respondents, carrying on such activity after 15.10.1999 would be unauthorized, if the persons concerned did not obtain a certificate of registration from 'the Board', in accordance with the notified regulations. It was submitted, that both the respondents had exited from the affairs of M/s. Gaurav Agrigenetics Ltd. (surely with effect from 30.7.1998 and 23.12.1998 respectively), well before the Collective Investment Regulations came into existence

(-on 15.10.1999). And therefore, neither of the respondents could be accused of violating Section 12(1B) of the SEBI Act, or of not complying with the provisions of the Collective Investment Regulations.

13. In order to controvert the submissions advanced at the hands of learned counsel for the appellant, based on the judgments rendered by this Court, emphatic reliance was placed on the decision in Vasu Dev Singh vs. Union of India, (2006) 12 SCC 753, wherefrom, the following observations, were sought to be highlighted:-

> "Conditional legislation and delegated legislation
>
> 16. We, at the outset, would like to express our disagreement with the contentions raised before us by the learned counsel appearing on behalf of the respondents that the impugned notification is in effect and substance a conditional legislation and not a delegated legislation. The distinction between conditional legislation and delegated legislation is clear and unambiguous. In a conditional legislation the delegatee has to apply the law to an area or to determine the time and manner of carrying it into effect or at such time, as it decides or to understand the rule of legislation, it would be a conditional legislation. The legislature in such a case makes the law, which is complete in all respects but the same is not brought into operation immediately. The enforcement of the law would depend upon the fulfillment of a condition and what is delegated to the executive is the authority to determine by exercising its own judgment as to whether such conditions have been fulfilled and/or the time has come when such legislation should be brought into force. The taking effect of a legislation, therefore, is made dependent upon the determination of such fact or condition by the executive organ of the Government. Delegated legislation, however, involves delegation of rule-making power of legislation and authorises an executive authority to bring in force such an area by reason thereof. The discretion conferred on the executive by way of delegated legislation is much wider. Such power to make rules or regulations, however, must be exercised within the four corners of the Act. Delegated legislation, thus, is a device which has been fashioned by the legislature to be exercised in the manner laid down in the legislation itself. By reason of Section 3 of the Act, the Administrator, however, has been empowered to issue a notification whereby and whereunder, an exemption is granted for application of the Act itself.
>
> 17. In Hamdard Dawakhana v. Union of India, AIR 1960 SC 554, this Court stated: (AIR p. 566, para 29)
>
> > "The distinction between conditional legislation and delegated

> legislation is this that in the former the delegate's power is that of determining when a legislative declared rule of conduct shall become effective; Hampton & Co. v. U.S., 276 US 394, and the latter involves delegation of rule-making power which constitutionally may be exercised by the administrative agent. This means that the legislature having laid down the broad principles of its policy in the legislation can then leave the details to be supplied by the administrative authority. In other words by delegated legislation the delegate completes the legislation by supplying details within the limits prescribed by the statute and in the case of conditional legislation the power of legislation is exercised by the legislature conditionally leaving to the discretion of an external authority the time and manner of carrying its legislation into effect as also the determination of the area to which it is to extend;"
>
> (See also M.P. High Court Bar Assn. v. Union of India, (2004) 11 SCC 766; State of T.N. v. K. Sabanayagam, (1998) 1 SCC 318, and Orient Paper and Industries Ltd. v. State of Orissa, 1991 Supp (1) SCC 81.)"

14. We have heard learned counsel for the rival parties. We are of the considered view, that it would be appropriate in the first instance, to interpret sub-Section (1B) of Section 12 of the SEBI Act. And only thereafter, proceed to deal with the other issues canvassed by learned counsel.

15. In our considered view, an effective interpretation of Section 12(1B) can be rendered, only upon understanding the intent behind Section 12(1B), and the exception created through the proviso thereunder. On being so considered it is apparent, that on the insertion of Section 12(1B) in the SEBI Act on 25.1.1995, two classes of persons were created. The first class comprised of such person(s) who had commenced the activity of sponsoring or carrying on a collective investment scheme prior to 25.1.1995 (this category will be referred to hereinafter as, the proviso category). This category would be governed by the proviso under Section 12(1B). The second category created by Section 12(1B) was constituted of persons who had not commenced the activity of sponsoring or carrying on a collective investment scheme prior to 25.1.1995 (this category will be referred to hereinafter

as, the non-proviso category).

16. The persons covered by the proviso category, referred to hereinabove, were permitted to continue their existing collective investment activities, till the framing of the Collective Investment Regulations. On the framing of the Collective Investment Regulations, the said persons covered by the proviso category, were required to obtain a certificate of registration, which would enable them to continue to operate their existing collective investment scheme(s).

17. Insofar as the non-proviso category is concerned, the same was barred from sponsoring or carrying on a collective investment initiative, without first obtaining a certificate of registration from 'the Board', in accordance with the Collective Investment Regulations. The non-proviso category, comprised of persons who had not commenced any activity in the nature of a collective investment, prior to 25.1.1995. In other words, Section 12(1B) introduced a clear bar, prohibiting any action of sponsoring or initiating a collective investment scheme after 25.1.1995, without obtaining a certificate of registration from 'the Board', under the Collective Investment Regulations. Stated differently, a new entrepreneur desirous of sponsoring or carrying on any activity in the nature of collective investment for the first time after 25.1.1995, could do so only after he/it had obtained a certificate of registration from 'the Board', in accordance with the Collective Investment Regulations. Therefore, till such time the Collective Investment Regulations were framed by 'the Board' under Section 12(1B), and a certificate of registration was obtained, no fresh entry could be made in the field of collective investment, by a person/entity not already carrying on such activity.

18. A perusal of the conclusions drawn by us in the foregoing two paragraphs, wherein we have interpreted Section 12(1B) of the SEBI Act would reveal, that persons governed by the substantive provision (the non-proviso category) were permitted to "commence" activities concerning collective investment, only after obtaining a certificate of registration; and persons covered under the proviso category (-who were already carrying on such activities), were permitted to "continue" their activities (concerning collective investment), and after the concerned regulations were framed, they could continue the said activities only after obtaining a certificate of registration.

19. The Collective Investment Regulations came into force on 15.10.1999. A person falling in the proviso category, namely, an individual who had commenced the activity of sponsoring or carrying on a collective investment initiative prior to 25.1.1995, was liable to move an application for registration under Regulation 5 of the Collective Investment Regulations. Regulation 5, is extracted hereunder:-

> "Application by existing Collective Investment Schemes
>
> 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."

An application under Regulation 5 could not have been made by an individual falling under the non-proviso category, for the simple reason, that an activity of sponsoring or carrying on a collective investment scheme by the said individual could not be termed as an "existing" collective investment scheme. An "existing" collective investment scheme (- as the heading of Regulation 5, suggests) within the meaning

of Section 12(1B) read with the Collective Investment Regulations, could only be one which had commenced prior to 25.1.1995, i.e. prior to the insertion of Section 12(1B) in the SEBI Act. A collective investment scheme, which commenced after 25.1.1995, could not be described as an "existing" collective investment scheme, because the same was statutorily barred, and therefore, wholly impermissible in law. This has been the clear and unambiguous stance even of the learned counsel representing 'the Board'. We may venture a different course, of reaching the same conclusion. What a statute bars, cannot be authorized through regulations. Any person/entity not falling in the proviso category (an "existing" operator, of a collective investment scheme) was barred from commencing to sponsor or carry on any collective investment activity, after the insertion of Section 12(1B) into the SEBI Act, till such time as he/it had obtained a certificate of registration from 'the Board', in accordance with the Collective Investment Regulations. Therefore, an "existing" collective investment scheme, at the time of notification of the regulations, could only be one which had commenced its activities prior to 25.1.1995. We may also notice, that the procedural details for obtaining a certificate of registration from 'the Board', have been enumerated in Regulations 68 to 72 of the Collective Investment Regulations (these regulations are not being extracted herein, for reason of brevity).

20. Insofar as persons falling in the non-proviso category (namely, those desirous of commencing activities concerning collective investment, after 25.1.1995) are concerned, such persons could commence an activity in the nature of collective investment, after seeking a certificate of registration under the Collective Investment Regulations. For which purpose, they were required to apply under Regulation 4 of the Collective Investment Regulations. Regulation 4 aforementioned is reproduced

below:-

> "Application for grant of certificate
>
> 4. Any person proposing to carry any activity as a Collective Investment Management Company on or after the commencement of these regulations shall make an application to the Board for the grant of registration in Form A."

A perusal of Regulation 4 extracted above, leaves no room for any doubt, that the same is applicable to a person "… proposing to carry any activity…" in the nature of a collective investment. On the analogy of the interpretation placed by us on Section 12(1B), all persons who had not commenced to sponsor or carry on a collective investment scheme before 25.1.1995, would fall in this category. In the above view of the matter, we are satisfied, that persons who were desirous to sponsor or carry on the activity in the nature of collective investment after 25.1.1995, were clearly and unambiguously barred from doing so, unless they were possessed of a certificate of registration, issued by 'the Board' under the Collective Investment Regulations.

21. In view of the above, we have no hesitation in holding, that an "existing" collective investment scheme within the meaning of Section 12(1B), as also, within the meaning of the Collective Investment Regulations, comprised only of such collective investment scheme(s), which had come into existence prior to 25.1.1995. And therefore, it was impermissible for a person who had not commenced a collective investment scheme prior to 25.1.1995, to do so thereafter, till the Collective Investment Regulations were framed. Thereafter, such new entrepreneur, had to obtain a certificate of registration from 'the Board' under Regulation 4 of the Collective Investment Regulations, before he could legally commence activities concerning collective investment operations. Our inevitable conclusion is, that

sponsoring or carrying on any collective investment activity, for the first time, on or after 25.1.1995, was a complete bar, in the absence of a certificate of registration from 'the Board'. It accordingly follows, that if a person/entity had commenced to sponsor or carry on a collective investment scheme after 25.1.1995, without obtaining a certificate of registration from 'the Board', it would tantamount to breaching the express mandate contained in Section 12(1B) of the SEBI Act.

22. In our considered view, there can be no doubt, that the date when the Collective Investment Regulations came into force (-15.10.1999), has no relevance, insofar as the breach of Section 12(1B) of the SEBI Act, with reference to such new entrepreneurs, is concerned. The bar to sponsor or cause to be sponsored, or carry on or cause to be carried on any collective investment activity by a new entrepreneur (-who had not commenced the concerned activities, before 25.1.1995) under Section 12(1B) of the SEBI Act, was not dependent on the framing of the regulations. The above bar was absolute and unconditional, till the new entrepreneur (described above) obtained a certificate of registration, in accordance with the regulations. The said bar would, therefore, undoubtedly extend till the framing of the regulations. The above bar, would further extend, even beyond the framing of the above regulations, till the concerned new entrepreneur was successful in obtaining a certificate of registration. Therefore, the period during which the concerned activities were barred (for the non-proviso category) under Section 12(1B) - commenced from the date of insertion of Section 12(1B) into the SEBI Act (-25.1.1995), and subsisted upto, the actual date when the new entrepreneur obtained a certificate of registration. We hold so accordingly.

23. In view of the above, we have no hesitation in accepting the contention advanced by learned counsel for 'the Board', that the bar created under Section 12(1B), forbidding persons who had not engaged themselves, in an activity of collective investment before 25.1.1995, continued till the concerned persons/entities successfully obtained the required certificate of registration, under the Collective Investment Regulations. Our conclusion hereinabove emerges from, inter alia, the following salient features. Firstly because, the Statement of Objects and Reasons of the Securities Laws (Amendment) Act, 1995, which resulted in the insertion of sub-Section (1B) in Section 12 of the SEBI Act, reveals that the same was brought in, on account of past experience of 'the Board', and the dire need to protect the interests of investors. Secondly because, the language of sub-Section (1B) of Section 12 of the SEBI Act is clear and unambiguous – it allowed existing collective investment scheme(s) entrepreneurs, to continue with the same by creating an exception in their favour, through the proviso under Section 12(1B). And it barred new operators from commencing collective investment scheme(s), till after they had obtained a certificate of registration. Thirdly because, of the use of negative words in sub-Section (1B) – "No person shall…", denotes mandatory intent, with reference to those not already engaged in collective investment operations. Fourthly because, of the use of negative words in conjunction with the word "shall", further makes the legislative intent absolutely clear, and also, mandatory, with reference to those not already engaged in collective investment operations. And fifthly because, contravention of Section 12(1B) entails penal consequences, and therefore, cannot be construed as directory. We therefore hereby accept the submission advanced on behalf of learned counsel for 'the Board', and hold, that the bar created for new

operators, of a collective investment initiative, was absolute and mandatory. The bar under Section 12(1B), restrained persons (who were not engaged in any collective investment venture upto 25.1.1995), from commencing activities concerning collective investment, till they had obtained a certificate of registration, in consonance with the Collective Investment Regulations.

24. We are also of the view, that the judgments relied upon by learned counsel for the appellant, namely, Orient Papers Mills, U.P. State Electricity Board, Lucknow, and A.K. Pandey (supra), have no relevance to the controversy in hand. In the above cases, the question which came up for consideration was, whether the authority concerned could have acted in the manner provided under the concerned statute, before the regulations were framed. The issue considered was the jurisdiction of the concerned authority, and nothing more. No such question, arises in the present case. Herein, a bar has been created, preventing a new entrepreneur from commencing a defined activity. No question of jurisdiction (of the competent authority), arise in the present controversy.

25. In spite of the position expressed hereinabove, it was the contention of learned counsel for the respondent nos. 1 and 2, that the aforementioned determination would not adversely affect the private respondents, because the complaint filed by 'the Board' under Section 200 of the Cr.P.C. read with Sections 24(1) and 27 of the SEBI Act, did not accuse the respondents, of having committed a breach of the bar expressed with reference to new entrepreneurs, under Section 12(1B) of the SEBI Act. It was submitted, that the only accusation levelled at the respondents was, for a breach of the Collective Investment Regulations, framed

under Section 12(1B). In order to substantiate his aforesaid contention, learned counsel for the respondents invited our attention to the complaint dated 15.12.2003. In order to appreciate the contention of learned counsel, an extract of the aforesaid complaint, including all the paragraphs relied upon by him, is reproduced below:-

> "7. The accused no. 1 is a company registered under the provisions of the Companies Act and the accused nos. 2 to 11 are the directors of the accused no. 1 company. The accused nos. 2 to 11 are the persons incharge and responsible for the day to day affairs of the company and all of them were actively connived with each other for the commission of offences.
>
> 8. The accused no. 1 is operating collective investment schemes and raised an aggregate amount of Rs.14,63,279/- (Rupees fourteen lakhs sixty three thousand two hundred seventy nine only) from the general public.
>
> 9. The accused no. 1 company filed information/details with SEBI regarding its collective investment schemes pursuant to SEBI press release dated November 26, 1997, and/or public notice dated December 18, 1997.
>
> 10. In terms of Chapter IX of the said regulations, any person who had been operating a collective investment schemes at the time of commencement of the said regulations shall be deemed to be an existing collective investment scheme and shall comply with the provisions of the said Chapter IX. Further, in terms of the said Chapter IX any person who immediately prior to the commencement of the said regulations was operating a collective investment scheme shall make an application to SEBI for grant of registration within a period of two months from the date of notification of the said regulations.
>
> 11. SEBI vide its letters dated December 15, 1999/December 29, 1999 and also by way of a public notice dated December 10, 1999 gave intimation to the accused no. 1 directing it to send an information memorandum to all the investors detailing the state of affairs of the schemes, the amount repayable to each investor and the manner in which such amount is determined. As per the aforesaid letters of SEBI, the information memorandum to the investors was required to be sent latest by February 28, 2000.
>
> 12. SEBI having regard to the interest of investors and request received from various persons operating collective investment schemes extended the last date of submitting the application by existing entities upto March 31, 2000 and the same was declared by SEBI vide a press release and a public notice.
>
> 13. However, the accused no. 1 failed to make any application with SEBI for registration of the collective investment schemes being operated by it as per the said regulations.
>
> 14. It is submitted that in terms of Regulations 73(1) of the said regulations,

an existing collective investment schemes which failed to make an application for registration with SEBI, shall wind up the existing collective investment schemes and repay the amounts collected from the investors. Further, in terms of Regulation 74 of the said regulations, an existing collective investment scheme which is not desirous of obtaining provisional registration from SEBI shall formulate a scheme of repayment and make such repayment to the existing investors in the manner specified in Regulation 73.

15. However, the accused no. 1 neither applied for registration under the said regulations nor took any steps for winding up of the schemes and repayment to the investors as provided under the regulations and as such had violated the provisions of Section 12(1B) of Securities and Exchange Board of India Act, 1992 and Regulation 5(1) read with Regulation 68(1), 68(2), 73 and 74 of the said regulations.

16. On December 7, 2000 SEBI by exercising its powers conferred upon it under Section 11B of Securities and Exchange Board of India Act, 1992 directed the accused no. 1 to refund the money collected under the aforesaid collective investment schemes of the accused no. 1 to the persons who invested therein within a period of one month from the date of the said directions.

17. However, despite repeated directions by SEBI, the accused no. 1 did not comply with the said regulations and from this, it is clear that the accused no. 1 is intentionally and with dishonest intentions evading the repayment of the amounts collected by it from the investors.

18. The accused no. 1 raised a total amount of Rs.14,63,279/- (Rupees fourteen lakhs sixty three thousand two hundred seventy nine only) by its own admission and its failure to refund the amounts to the general public who invested their hard-earned money in the schemes operated by the accused no. 1, caused huge pecuniary damage to them.

19. In view of the above, it is charged that the accused no. 1 has committed the violation of Section 11B, 12(1B) of Securities and Exchange Board of India Act, 1992 and Regulation 5(1) read with Regulations 68(1), 68(2), 73 and 74 of the Securities and Exchange Board of India (Collective Investment Schemes) Regulations, 1999 which is punished under Section 24(1) of Securities and Exchange Board of India Act, 1992.

20. The accused nos. 2 to 11 are the Directors of the accused no. 1, and as such persons in charge of and responsible to the accused no. 1 for the conduct of its business and are liable for the violations of the accused no. 1, as provided under Section 27 of Securities and Exchange Board of India Act, 1992.

21. The violation of the aforesaid laws by the accused were the acts of omission and were occurred within the jurisdiction of this Hon'ble Court and as such this Hon'ble Court has got jurisdiction to try punish the accused. This

complaint is within the limitation. The complainant craves the leave of this Hon'ble Court to produce the documents referred to hereinabove as and when required.

PRAYER

It is, therefore, most respectfully prayed to this Hon'ble Court to summon the accused and punish them in strictest terms as provided by law in the interest of justice."

26. Having given our thoughtful consideration to the accusations levelled by 'the Board' against the respondents (in the complaint dated 15.12.2003), there is absolutely no room for any doubt, that the private respondents were being treated as operating, an "existing" collective investment scheme. They were accused inter alia, for having not complied with Regulation 5 of the Collective Investment Regulations. Regulation 5, allows an "existing" enterprise operating a collective investment scheme, to apply for registration. We have already interpreted Regulation 5, more particularly, the term "existing", used in conjunction with collective investment schemes, in paragraph 19 above. The accusations levelled against the respondents, will have to be understood in the context of Regulation 5, on account of the express stance adopted by 'the Board' in paragraph 10 of the complaint, wherein, having treated the respondents as persons who had commenced the activity of a collective investment, they were accused of not having made an application to 'the Board' for the grant of registration in terms of Chapter IX (of the Collective Investment Regulations).

27. It would be relevant to mention that Chapter IX bears the heading "Existing Collective Investment Schemes", whereunder Regulations 68 to 72 delineate procedural details, for obtaining a certification of registration. The connotation of the term "existing" with reference to collective investment schemes, in Chapter IX, would

be the same, as has been interpreted by us, in paragraph 19 above. It was, therefore, submitted on behalf of the respondents, that they were not accused of having unauthorisedly commenced a collective investment scheme. It was contended, that the violation of Section 12(1B) of the SEBI Act, alleged against the respondents, had to be understood in the manner expressed in the complaint. The complaint described the respondents, as operating an "existing" collective investment venture. It was pointed out, that the respondents were proceeded against, only for their failure to obtain a certificate of registration under Regulation 5 of the Collective Investment Regulations, read with Chapter IX of the said regulations, and more particularly, Regulations 68, 73 and 74 (refer to paragraphs 8, 10, 11, 13 to 15, 18 and 19 of the complaint). Therefore, according to learned counsel for the respondents, the appellant had expressly treated the respondents as persons falling in the proviso category of Section 12(1B), namely, those who had commenced a collective investment undertaking prior to insertion of Section 12(1B) into the SEBI Act (-on 25.1.1995). It was, therefore submitted, that the respondents could not be proceeded against by treating them as belonging to the non-proviso category (-who had not commenced any activity associated with collective investment, before 25.1.1995) of Section 12(1B), by considering them as new entrepreneurs, who have commenced operating a collective investment scheme after 25.1.1995.

28. We express our complete agreement, with the stance adopted at the hands of learned counsel for the private respondents. The respondents were only accused of having not complied with, the provisions of the Collective Investment Regulations, pertaining to "existing" collective investment operators (those who had commenced

the activity before 25.1.1995). Thus viewed, the fact that the respondents commenced the activity of collective investment after the insertion of sub-Section (1B) of Section 12 of the SEBI Act (-25.1.1995), cannot be gone into, to determine whether or not the said activity was in breach of the bar contemplated under Section 12(1B) of the SEBI Act. Having so concluded it emerges, that the continuation of the activity of sponsoring or carrying on a collective investment scheme by the respondents, after 25.1.1995 (when Section 12(1B) was inserted into the SEBI Act), and in continuing therewith, without obtaining a certificate of registration, cannot be the basis for proceeding against the respondents. For the simple reason, that the respondents had not been so accused, in the complaint filed by 'the Board'. In this behalf, reference may be made to P.B. Desai vs. State of Maharashtra, (2013) 15 SCC 481, wherein this Court held as under:-

> "51. We would also like to make another aspect very explicit. The appellant was levelled a specific charge which was framed against him. The prosecution was required to prove that particular charge and not to go beyond that and attribute "rash and negligent" acts which are not the part of the charge. Culpability is specifically related to the "act" committed on 22.12.1987 at about 9 a.m. in the hospital viz. the act of performing surgical procedure. It is, thus, this act alone, and nothing more, for which the appellant and Dr. Mukherjee were charged and the appellant is supposed to meet this charge alone."

The fact that the respondents had actually commenced a collective investment undertaking after 25.1.1995, without obtaining a certificate of registration, in our considered view, is of no relevance whatsoever, with reference to the complaint filed by 'the Board' against the respondents (dated 15.12.2003).

29. A significant question which arises for consideration is, whether the respondents against whom the above complaint dated 15.12.2003 was filed, could be punished for violating Section 12(1B) of the SEBI Act. We may clarify, that

proceedings are permissible, against both categories. Against the non-proviso category, for having commenced the barred activity after 25.1.1995, without registration. And also against the proviso category, for having continued the concerned activity without obtaining registration, after the notification of the Collective Investment Regulations. It needs to be understood, that in the present case, the instant submission is canvassed before us on behalf of 'the Board', by describing the respondents as belonging to the non-proviso category, wherein persons not already engaged in an "existing" collective investment venture as on 25.1.1995, were precluded from activities concerning collective investment, till the time they obtain a certificate of registration from 'the Board' in accordance with the Collective Investment Regulations. As already concluded above, this course could not be pursued against the respondents, because they were not so accused, in the complaint dated 15.12.2003. The question posed, is answered accordingly.

30. The sequence of facts narrated hereinabove reveals, incorporation of M/s. Gaurav Agrigenetics Ltd. after 25.1.1995, and also, that it commenced a collective investment scheme prior to 15.10.1999 (the date, when the Collective Investment Regulations, were notified). Undoubtedly, M/s. Gaurav Agrigenetics Ltd., could have been proceeded against, for having violated Section 12(1B). And it would have been fully justified for 'the Board', to proceed against M/s. Gaurav Agrigenetics Ltd., for having violated the said provision. The issue which has emerged for consideration is, whether the complaint filed by 'the Board' against the company under reference, as also, its directors, factually accused M/s. Gaurav Agrigenetics Ltd. and its directors, of having violated Section 12(1B) of the SEBI Act? Were the accused described as falling in the non-proviso category? Were the accused,

proceeded against on the ground, that they had commenced activities concerning collective investment schemes after 25.1.1995, without seeking a certificate of registration? Answers to the aforesaid queries, by the erstwhile directors of M/s. Gaurav Agrigenetics Ltd., are in the negative. The above response of the accused, is seriously contested by Mr. Arvind Datar, learned senior counsel representing 'the Board'. We shall endeavour, in the first instance, to determine the veracity of the submissions advanced at the hands of 'the Board', namely, whether the accused were proceeded against, as belonging to the non-proviso category.

31. The contentions advanced at the hands of 'the Board' comprise of four independent submissions. First of all it was urged, that a collective perusal of paragraphs 8 and 15 of the complaint dated 15.12.2003, would leave no room for any doubt, that the directors of the company concerned were pointedly accused of having violated Section 12(1B) of the SEBI Act. The said paragraphs 8 and 15 are reproduced herein below:-

> "8. The accused no. 1 is operating collective investment schemes and raised an aggregate amount of Rs.14,63,279 (Rupees fourteen lakhs sixty three thousand two hundred seventy nine only) from the general public.
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> *** *** ***
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> 15. However, the accused no. 1 neither applied for registration under the said regulations nor took any steps for winding up of the schemes and repayment to the investors as provided under the regulations and as such had violated the provisions of Section 12(1B) of Securities and Exchange Board of India Act, 1992 and Regulation 5(1) r/w Regulations 68(1), 68(2), 73 and 74 of the said regulations."

32. Having given our thoughtful consideration to the factual assertions contained in the complaint, it is not possible for us to agree with the learned senior counsel representing 'the Board', for the simple reason, that a perusal of the above factual assertions, reveal two accusations against the accused. Firstly, that the accused did

not apply for registration under the Collective Investment Regulations. And secondly, the accused did not take any steps for winding up of the collective investment scheme(s) being operated by them, refunding deposits made by the investors, as per the provisions of the Collective Investment Regulations. The basis of the accusations levelled against the accused was not, that they had no right to commence a collective investment venture, during the period between 25.1.1995 when Section 12(1B) of the SEBI Act came to be inserted, till the requisite certificate of registration was sought. The complaint did not include any direct or indirect insinuation, that the accused had unauthorisedly commenced operations of a collective investment scheme, after 25.1.1995. Even the date of commencement of the collective investment operations, by the accused, was not expressed in the complaint. It was imperative for 'the Board', to lay the above charge, through express assertions, for proceeding against the accused, for violation of the non-proviso mandate, under Section 12(1B).

33. We are mindful of the fact that, paragraph 15 of the complaint relied upon by the learned senior counsel, does make a reference to the violation of Section 12(1B), but the violation alleged is on account of having not applied for registration, for carrying on the collective investment scheme, and alternatively, for not having taken steps to wind up the collective investment undertaking by making refunds to the investors, as provided for under the Collective Investment Regulations. In our considered view, reliance placed on the two paragraphs of the complaint is clearly insufficient, for the purpose canvassed by the learned senior counsel representing 'the Board'. We are of the view, that the above assertions in the complaint, assumed that the respondents were "existing" operators (-prior to 25.1.1995).

Because in our view, only "existing" operators, had to wind up, if they choose not to conform with the Collective Investment Regulations (after their notification).

34. There can be no doubt whatsoever, that the particulars of the offence, of which an accused is charged, have to be clearly stated to him. In case the accused in the present case were to be charged for having violated Section 12(1B) as new operators under the non-proviso category, it was imperative to inform them of all the relevant particulars, namely, that they had unauthorisedly commenced a collective investment scheme, during the period when there was a complete bar, against commencing to sponsor or carry on a collective investment scheme. In the absence of the above particulars of the offence, they could not have been tried or punished for the same. No amount of evidence can be looked into, for an accusation not levelled or made out, in a complaint. This is one of the basic tenets of the criminal jurisprudence.

35. We will now proceed to deal with the second submission, advanced at the hands of the learned senior counsel, for 'the Board'. In support of his second submission, the learned senior counsel relied on Section 251 of the Cr.P.C. The said provision is reproduced hereunder:-

> "251. Substance of accusation to be stated.- When in a summons-case the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked whether he pleads guilty or has any defence to make, but it shall not be necessary to frame a formal charge."

A perusal of Section 251 leaves no room for any doubt, that "… the particulars of the offence of which he is accused shall be stated to him…". The particulars for an offence postulated for the non-proviso category (-where the activity of a collective

investment scheme, is commenced after 25.1.1995), under Section 12(1B) of the SEBI Act, would be the date on which the accused commenced sponsoring or carrying on a collective investment scheme. If such date fell within the period when the initiation of a new collective investment endeavour stood barred under Section 12(1B), the accused had to be accosted of the same. And only thereupon, the accused would have understood, what charge was being levelled against him. Merely mention of the statutory provision, namely, Section 12(1B) of the SEBI Act, would not amount to disclosing to the accused, the particulars of the offence of which they were accused. One cannot lose sight of the fact, that implications for the proviso category (-those who commenced operations before 25.1.1995) and the non-proviso category (-those who commenced operations after 25.1.1995) are different. A perusal of the chargesheet reveals, that the respondents herein were being treated as belonging to the proviso category. But learned counsel for 'the Board' desires us to treat them as belonging to the non-proviso category, and to proceed against them for having engaged themselves in activities concerning collective investment, on the basis of the material available on the record of the case. This, in our considered view is clearly impermissible. We are also of the view, that Section 251 of the Cr.P.C. will not remedy the above defect and deficiency in the complaint. In the above view of the matter, for the reasons recorded hereinabove, and additionally, for the reasons recorded while rejecting the first contention advanced at the hands of the learned senior counsel for 'the Board', we find no merit in the submission founded on Section 251 of the Cr.P.C.

36. The third submission advanced on behalf of 'the Board', was based on the determination rendered by the trial Court, that the accused had violated Section

12(1B) of the SEBI Act. Learned senior counsel pointed out, that the date of incorporation of M/s. Gaurav Agrigenetics Ltd. (-3.7.1995), of which the respondents/accused were directors, was clearly brought out by way of concrete evidence, before the trial Court. M/s. Gaurav Agrigenetics was undisputedly incorporated after 25.1.1995. It was further urged, that neither of the accused directors disputed the fact that the company of which they were promoter-directors, was actually carrying on a collective investment scheme. Such being the undisputed factual position, it was asserted, that a breach of Section 12(1B), as applicable to the non-proviso category, was clearly established. And further, that such breach was affirmed by the trial Court. It was, therefore, the contention of the learned senior counsel representing 'the Board', that it was no longer open to the accused to canvass, that the particulars of the offence under Section 12 (1B) were not clearly disclosed, in the complaint filed by 'the Board'.

37. We have given our thoughtful consideration to the contentions advanced at the hands of the learned senior counsel, in support of his third submission. We are, however, inclined to accept the submissions advanced at the hands of the accused. Neither the complaint nor the charge-sheet filed against the accused before the trial Court demonstrates, that the company in question commenced its collective investment activities on its own for the first time after 25.1.1995. It could well be, that an existing collective investment scheme covered by the proviso category under Section 12(1B), came to be purchased or taken over by the concerned company, after its incorporation. There is no bar against a newly incorporated company, restraining it from taking over an existing business. If that was the case, there would be no violation of Section 12(1B), since an existing collective investment scheme,

which came into existence prior to 25.1.1995, could legitimately continue its operations under the proviso to Section 12(1B), without a certificate of registration, till the framing of the Collective Investment Regulations. Therefore, merely the fact that the company under consideration was incorporated after 25.1.1995, in our view, would not be sufficient to demonstrate the culpability of the accused, insofar as, the restraint against fresh commencement of collective investment activities under Section 12(1B) of the SEBI Act is concerned. In the above view of the matter, we find no merit even in the third submission advanced on behalf of 'the Board'.

38. The last submission advanced at the hands of the learned senior counsel for 'the Board', was based on Section 465 of the Cr.P.C. The said provision is extracted hereunder:-

> "465. Finding or sentence when reversible by reason of error, omission or irregularity.- (1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.
>
> (2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

Relying on Section 465 of the Cr.P.C. it was contended, that after the conclusion of a criminal case, resulting in recording an order of conviction, and also, the imposition of sentence, neither the findings nor the sentence were open to be revised or altered, merely "… on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or

during trial or in any inquiry or other proceedings under this Code…". It was accordingly urged, that the mention of Section 12(1B) of the SEBI Act in the complaint, should be taken as sufficient to understand the particulars, on the basis whereof, the accused were being proceeded against. It was accordingly submitted, that there was no justification whatsoever, in view of the clear mandate contained in Section 465 of the Cr.P.C., to interfere in the findings recorded by the trial Court, and/or to interfere with the sentence imposed. In addition to the aforesaid contention it was pointedly urged, that sub-Section (2) of Section 465 of the Cr.P.C. provided the benchmark, for interfering with such findings and sentence. It was submitted, that interference would only be permissible, in situations where the omission or irregularity would result in "failure of justice".

39. It was submitted, that the entire factual scenario was clear and transparent, and known to one and all. The date of incorporation of the concerned company, wherein the accused were directors, is a matter of record, substantiated through cogent evidence produced before the trial Court. The fact that the accused were directors of M/s. Gaurav Agrigenetics Ltd., was also undisputed. Neither the company concerned nor the accused, had contested the fact, that they had sponsored or had been carrying on a collective investment scheme, which was initiated after 25.1.1995. Based on the undisputed and clear factual position narrated above, it was asserted, that no one could arrive at the conclusion, in the facts and circumstances of the case, that the findings recorded by the trial Court, had occasioned a "failure of justice".

40. In order to support the above contention, the learned senior counsel for 'the Board', placed reliance on State of M.P. vs. Bhooraji, (2001) 7 SCC 679, wherefrom the Court's attention was drawn to the following observations:-

> "8. The real question is whether the High Court necessarily should have quashed the trial proceedings to be repeated again only on account of the declaration of the legal position made by the Supreme Court concerning the procedural aspect about the cases involving offences under the SC/ST Act. A de novo trial should be the last resort and that too only when such a course becomes so desperately indispensable. It should be limited to the extreme exigency to avert "a failure of justice". Any omission or even the illegality in the procedure which does not affect the core of the case is not a ground for ordering a de novo trial. This is because the appellate court has plenary powers for revaluating and reappraising the evidence and even to take additional evidence by the appellate court itself or to direct such additional evidence to be collected by the trial court. But to replay the whole laborious exercise after erasing the bulky records relating to the earlier proceedings, by bringing down all the persons to the court once again for repeating the whole depositions would be a sheer waste of time, energy and costs unless there is miscarriage of justice otherwise. Hence the said course can be resorted to when it becomes unpreventable for the purpose of averting "a failure of justice". The superior court which orders a de novo trial cannot afford to overlook the realities and the serious impact on the pending cases in trial courts which are crammed with dockets, and how much that order would inflict hardship on many innocent persons who once took all the trouble to reach the court and deposed their versions in the very same case. To them and the public the re-enactment of the whole labour might give the impression that law is more pedantic than pragmatic. Law is not an instrument to be used for inflicting sufferings on the people but for the process of justice dispensation.
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> 12. Section 465 of the Code falls within Chapter XXXV under the caption "Irregular Proceedings". The Chapter consists of seven sections starting with Section 460 containing a catalogue of irregularities which the legislature thought were not enough to axe down concluded proceedings in trials or enquiries. Section 461 of the Code contains another catalogue of irregularities which in the legislative perception would render the entire proceedings null and void. It is pertinent to point out that the former catalogue contains the instance of a Magistrate, who is not empowered to take cognizance of offence, taking cognizance erroneously and in good faith. The provision says that the proceedings adopted in such a case, though based on such erroneous order, "shall not be set aside merely on the ground of his not being so empowered".
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> 13. It is useful to refer to Section 462 of the Code which says that even proceedings conducted in a wrong sessions division are not liable to be set at naught merely on that ground. However, an exception is provided in that

section that if the court is satisfied that proceedings conducted erroneously in a wrong sessions division "has in fact occasioned a failure of justice" it is open to the higher court to interfere. While it is provided that all the instances enumerated in Section 461 would render the proceedings void, no other proceedings would get vitiated ipso facto merely on the ground that the proceedings were erroneous. The court of appeal or revision has to examine specifically whether such erroneous steps had in fact occasioned a failure of justice. Then alone the proceedings can be set aside. Thus the entire purport of the provisions subsumed in Chapter XXXV is to save the proceedings linked with such erroneous steps, unless the error is of such a nature that it had occasioned a failure of justice.

14. We have to examine Section 465(1) of the Code in the above context. It is extracted below:

> "465. (1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered by a court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any enquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that court, a failure of justice has in fact been occasioned thereby."

15. A reading of the section makes it clear that the error, omission or irregularity in the proceedings held before or during the trial or in any enquiry were reckoned by the legislature as possible occurrences in criminal courts. Yet the legislature disfavoured axing down the proceedings or to direct repetition of the whole proceedings afresh. Hence, the legislature imposed a prohibition that unless such error, omission or irregularity has occasioned "a failure of justice" the superior court shall not quash the proceedings merely on the ground of such error, omission or irregularity.

16. What is meant by "a failure of justice" occasioned on account of such error, omission or irregularity? This Court has observed in Shamnsaheb M. Multtani v. State of Karnataka, (2001) 2 SCC 577, thus: (SCC p. 585, para 23):

> "23. We often hear about 'failure of justice' and quite often the submission in a criminal court is accentuated with the said expression. Perhaps it is too pliable or facile an expression which could be fitted in any situation of a case. The expression 'failure of justice' would appear, sometimes, as an etymological chameleon (the simile is borrowed from Lord Diplock in Town Investments Ltd. v. Deptt. of the Environment), (1977) 1 All ER 813. The criminal court, particularly the superior court should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage."

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23. We conclude that the trial held by the Sessions Court reaching the judgment impugned before the High Court in appeal was conducted by a court of competent jurisdiction and the same cannot be erased merely on account of a procedural lapse, particularly when the same happened at a time when the law which held the field in the State of Madhya Pradesh was governed by the decision of the Full Bench of the Madhya Pradesh High Court. The High Court should have dealt with the appeal on merits and on the basis of the evidence already on record. To facilitate the said course, we set aside the judgment of the High Court impugned in this appeal. We remit the case back to the High Court for disposal of the appeal afresh on merits in accordance with law and subject to the observations made above."

41. We have given our thoughtful consideration to the last submission advanced at the hands of the learned senior counsel for 'the Board'. It is, however, not possible for us to accept the same. We are of the considered view, which clearly emerges from the observations rendered in Bhooraji's case (supra), that Section 465 of the Cr.P.C. pertains to omissions or irregularities in matters of procedure. It is, therefore, that both the sub-Sections of Section 465, pointedly refer to proceedings under the Cr.P.C. Added to the above it is of some significance, that Chapter XXXV of the Cr.P.C. include Sections 460 to 466. The heading of the instant Chapter is "Irregular Proceedings". Not only that, each one of the Sections in Chapter XXXV of the Cr.P.C. make pointed reference only to matters of procedure. There can be no doubt, therefore, that omissions and/or irregularities in matters of procedure can be overlooked, subject to the condition, that such an omission or irregularity does not occasion "failure of justice". This is our understanding of Section 465 of the Cr.P.C.

42. Having so interpreted Section 465 of the Cr.P.C., we may also indicate, that material facts constituting the offence, for which an accused is being charged, must mandatorily be put to the accused. Lack of material facts, which are vital to establish the ingredients of an offence, cannot be viewed as a procedural omission.

The above requirement is not procedural, but substantive. Accordingly, it is not possible for us to accept that the lapse which the appellant desires this Court to overlook and exempt, can be overlooked under Section 465. We are also of the considered view, that irregularity and omission in the present case, in not disclosing to the accused, the particulars of the offence for which they were being proceeded against, would occasion "failure of justice". Thus viewed, it is not possible for us to accept the contention advanced at the hands of the learned senior counsel, that the pending proceedings before the trial Court, should not be interfered with.

43. The sole allegation levelled against the respondents was, that they were guilty of having breached the provisions of the Collective Investment Regulations, by failing to make any application to 'the Board' for registration of the collective investment scheme(s) being operated by them, and by failing to wind up their existing collective investment scheme(s), and/or in repaying the amounts collected from the investors. That alone constituted the factual foundation of the complaint made against the respondents. Insofar as the instant charge against the respondents is concerned, it was the contention of learned counsel for the respondents, that the Collective Investment Regulations were notified on 15.10.1999. The said regulations, therefore, could not have been breached by the respondents, prior to 15.10.1999. It was submitted, that the respondent no. 1 – Gaurav Varshney, can indisputably be taken to have resigned from the directorship of M/s. Gaurav Agrigenetics Ltd. with effect from 30.7.1998, and respondent no. 2 – Vinod Kumar Varshney can likewise be taken to have resigned from the directorship of the said company with effect from 23.12.1998. Both respondent nos. 1 and 2, according to learned counsel representing them, ceased to have any

concern/relationship with M/s. Gaurav Agrigenetics Ltd., well before 15.10.1999 (when the Collective Investment Regulations were enforced). It was, therefore contended on behalf of the respondents, that this Court should not interfere with the impugned order passed by the High Court dated 13.5.2010, quashing the complaint preferred by 'the Board', as there were legally valid reasons for doing so.

44. Having given our thoughtful consideration to the contentions advanced at the hands of learned counsel for the respondents, we are satisfied, that the quashing of the proceedings initiated by 'the Board', against respondent nos. 1 and 2, calls for no interference, for the simple reason, that they relate to an alleged breach by M/s. Gaurav Agrigenetics Ltd., of the Collective Investment Regulations, by treating them as existing collective investment undertaking. Those belonging to the proviso category, could only be proceeded against for having continued their activities relating to collective investment, without obtaining registration, after the notification of the Collective Investment Regulations (see paragraph 29 above). The said regulations came into existence with effect from 15.10.1999. By the time the Collective Investment Regulations were notified, respondent nos. 1 and 2 – Gaurav Varshney and Vinod Kumar Varshney, had already severed their relationship with M/s. Gaurav Agrigenetics Ltd. In view of the uncontroverted factual position expressed by learned counsel for the respondents, we find no difficulty in concluding, that proceedings which were initiated against respondent nos. 1 and 2, and were quashed by the High Court, call for no interference. Ordered accordingly.

45. In the result, the appeals stand dismissed.

Criminal Appeal nos. 833-836 of 2012

46. It is not a matter of dispute, that the respondent herein – Mrs. Parvesh Varshney was one of the directors of M/s. Gaurav Agrigenetics Ltd., i.e. the same company involved in criminal appeal nos. 827-830 of 2012. We have, in our conclusions with reference to criminal appeal nos. 827-830 of 2012, upheld the order dated 13.5.2010 passed by the High Court in Criminal Miscellaneous Case nos. 7468-7471 of 2006 and Criminal Miscellaneous no. 951 of 2007, quashing the proceedings initiated against two of the directors of the above company, namely, Gaurav Varshney and Vinod Kumar Varshney. The High Court in the above judgment (pertaining to Gaurav Varshney and Vinod Kumar Varshney) had quashed the proceedings initiated against the co-directors of the respondent herein, arising out of a complaint dated 15.12.2003 filed by 'the Board' before the Chief Metropolitan Magistrate, Tis Hazari Courts, Delhi, in exercise of its jurisdiction under Section 482 of the Cr.P.C.. The said proceedings against the co-directors were initiated on the basis of a complaint made by 'the Board' in the Court of the Chief Metropolitan Magistrate, Tis Hazari Courts, Delhi against M/s. Gaurav Agrigenetics Ltd., and ten of its directors. In the above complaint, Gaurav Varshney was arrayed as accused no. 5 and Vinod Kumar Varshney was impleaded as accused no. 8.

47. Insofar as the instant criminal appeal is concerned, the same has been filed against the impugned judgment and order dated 12.8.2010, rendered by the High Court in Criminal Miscellaneous Case nos. 7468-7471 of 2006 and Criminal Miscellaneous no. 951 of 2007. It would be relevant to mention, that the respondent herein – Mrs. Parvesh Varshney had also assailed the same complaint dated 15.12.2003 filed by 'the Board' before the Chief Metropolitan Magistrate, Tis Hazari

Courts, Delhi, wherein she was arrayed as accused no. 6. The High Court by its judgment and order dated 12.8.2010, had quashed the complaint filed against the respondent herein, in exercise of its jurisdiction under Section 482 of the Cr.P.C.

48. The commonness of the factual position in the appeals adjudicated upon by us (Criminal Appeal nos. 827-830 of 2012), and the present criminal appeals is, that whilst Gaurav Varshney – accused no. 5, had tendered his resignation from the position of director of M/s. Gaurav Agrigenetics Ltd. on 30.7.1998, and Vinod Kumar Varshney – accused no. 8, had tendered his resignation from the above company on 23.12.1998, the respondent herein – Mrs. Parvesh Varshney – accused no. 6, had tendered her resignation from the position of director of M/s. Gaurav Agrigenetics Ltd. with effect from 6.4.1998. The resignation of the respondent herein, had taken effect before the Collective Investment Regulations were notified – on 15.10.1999. The said regulations, therefore, could not have been breached, by the respondent herein. Therefore, for exactly the same consideration and reasons as have weighed with us, for not accepting the pleas raised by 'the Board' in Criminal Appeal nos. 827-830 of 2012 against the other co-accused in the same complaint dated 15.12.2003, we decline to interfere with the impugned order passed by the High Court, dated 12.8.2010, with reference to the respondent – Mrs. Parvesh Varshney – accused no. 6, as well.

49. In the result, the instant appeals are dismissed.

Criminal Appeal no. 252 of 2015

50. Only a word of caution. In the connected earlier criminal appeals (nos. 827-830 of 2012, and 833-836 of 2012), 'the Board' was the appellant, and the

accused were the respondents. Herein, the accused – Major P.C. Thakur is the appellant, and 'the Board' is the respondent.

51. The instant appeal relates to M/s. Accord Plantation Ltd., a company incorporated under the provisions of the Companies Act, 1956, on 16.10.1996. Even though the list of dates describes the appellant - Major P.C. Thakur, as a promoter-director of the said company, learned counsel for the appellant was at pains to point out, that the appellant was inducted as director only in 1998. It was submitted, that the appellant's involvement in the functioning of M/s. Accord Plantation Ltd., was limited to tendering advice with reference to its agricultural activities, and that, the appellant – Major P.C. Thakur, was neither in charge of nor responsible to the company, for the conduct of its business activities.

52. In addition to the submissions noticed with reference to the earlier appeals (Criminal Appeal nos. 827-830 of 2012), it was the vehement contention of learned counsel for the appellant, that it was not open for 'the Board' to proceed against the appellant under Section 27 of the SEBI Act, which is extracted hereunder:-

> "27. Offences by Companies. - (1) Where an offence under this Act has been committed by a company, <u>every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly</u>:
>
> Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.
>
> (2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is

attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Explanation.- For the purposes of this section, -

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm."

Based on Section 27 of the SEBI Act, it was contended, that besides a bald statement made by 'the Board', in the show-cause notice dated 12.5.2000, and the complaint dated 21.1.2003, there was no material on the record of the case to demonstrate, that the appellant was in any manner "…in charge of, and was responsible to…" the company for the conduct of its business. It was, therefore submitted, that it was not open to 'the Board' to proceed against the appellant. In order to substantiate the instant contention, learned counsel placed reliance on S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla, (2005) 8 SCC 89, wherefrom our attention was invited to the following observations:-

"4. In the present case, we are concerned with criminal liability on account of dishonour of a cheque. It primarily falls on the drawer company and is extended to officers of the company. The normal rule in the cases involving criminal liability is against vicarious liability, that is, no one is to be held criminally liable for an act of another. This normal rule is, however, subject to exception on account of specific provision being made in the statutes extending liability to others. Section 141 of the Act is an instance of specific provision which in case an offence under Section 138 is committed by a company, extends criminal liability for dishonour of a cheque to officers of the company. Section 141 contains conditions which have to be satisfied before the liability can be extended to officers of a company. Since the provision creates criminal liability, the conditions have to be strictly complied with. The conditions are intended to ensure that a person who is sought to be made vicariously liable for an offence of which the principal accused is the company, had a role to play in relation to the incriminating act and further that such a person should know what is attributed to him to make him liable. In other

words, persons who had nothing to do with the matter need not be roped in. A company being a juristic person, all its deeds and functions are the result of acts of others. Therefore, officers of a company who are responsible for acts done in the name of the company are sought to be made personally liable for acts which result in criminal action being taken against the company. It makes every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of business of the company, as well as the company, liable for the offence. The proviso to the sub-section contains an escape route for persons who are able to prove that the offence was committed without their knowledge or that they had exercised all due diligence to prevent commission of the offence.

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10. While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. The key words which occur in the section are "every person". These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words:

> "Who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence, etc."

What is required is that the persons who are sought to be made criminally liable under Section 141 should be, at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for the conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a company may be liable if he satisfies the main requirement of being in charge of and responsible for the conduct of business of a company at the relevant time. Liability depends on the role one plays in the affairs of a company and not on designation or status. If being a director or manager or secretary was enough to cast criminal liability, the section would have said so. Instead of "every person" the section would have said "every director, manager or secretary in a company is liable"…, etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.

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12. The conclusion is inevitable that the liability arises on account of conduct, act or omission on the part of a person and not merely on account of holding an office or a position in a company. Therefore, in order to bring a case within Section 141 of the Act the complaint must disclose the necessary facts which make a person liable.

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15. Cases have arisen under other Acts where similar provisions are contained creating vicarious liability for officers of a company in cases where primary liability is that of a company. State of Karnataka v. Pratap Chand, (1981) 2 SCC 335, was a case under the Drugs and Cosmetics Act, 1940. Section 34 contains a similar provision making every person in charge of and responsible to the company for the conduct of its business liable for offence committed by a company. It was held that a person liable for criminal action under that provision should be a person in overall control of the day-to-day affairs of the company or a firm. This was a case of a partner in a firm and it was held that a partner who was not in such overall control of the firm could not be held liable. In Municipal Corpn. of Delhi v. Ram Kishan Rohtagi, (1983) 1 SCC 1, the case was under the Prevention of Food Adulteration Act. It was first noticed that under Section 482 of the Criminal Procedure Code in a complaint, the order of a Magistrate issuing process against the accused can be quashed or set aside in a case where the allegation made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which are arrived at against the accused. This emphasises the need for proper averments in a complaint before a person can be tried for the offence alleged in the complaint.

16. In State of Haryana v. Brij Lal Mittal, (1998) 5 SCC 343, it was held that vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises if at the material time he was in charge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of a company, it does not necessarily mean that he fulfils both the above requirements so as to make him liable. Conversely, without being a director a person can be in charge of and responsible to the company for the conduct of its business.

For the same purpose, reliance was placed on National Small Industries Corporation Ltd. vs. Harmeet Singh Paintal, (2010) 3 SCC 330, and this Court's attention was drawn to the following observations recorded therein:-

"12. It is very clear from the above provision that what is required is that the persons who are sought to be made vicariously liable for a criminal offence

under Section 141 should be, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. Only those persons who were in charge of and responsible for the conduct of the business of the company at the time of commission of an offence will be liable for criminal action. It follows from the fact that if a Director of a company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable for a criminal offence under the provisions. The liability arises from being in charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company.

13. Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent 1 was in charge of or was responsible to the accused Company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability.

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22. Therefore, this Court has distinguished the case of persons who are in charge of and responsible for the conduct of the business of the company at the time of the offence and the persons who are merely holding the post in a company and are not in charge of and responsible for the conduct of the business of the company. Further, in order to fasten the vicarious liability in accordance with Section 141, the averment as to the role of the Directors concerned should be specific. The description should be clear and there should be some unambiguous allegations as to how the Directors concerned were alleged to be in charge of and were responsible for the conduct and affairs of the company."

Last of all, learned counsel invited our attention to Gunmala Sales Private Limited vs. Anu Mehta, (2015) 1 SCC 103, wherefrom reliance was placed on the following observations:-

"22. In National Small Industries Corpn. Ltd. v. Harmeet Singh Paintal, (2010) 3 SCC 330, this Court was dealing with the same question. After referring to S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla (1), (2005) 8 SCC 89, S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla (2), (2007) 4 SCC 70, Saroj Kumar Poddar v. State (NCT of Delhi), (2007) 3 SCC 693, N.K. Wahi v. Shekhar Singh, (2007) 9 SCC 481, N. Rangachari v. BSNL, (2007) 5 SCC 108, Paresh P. Rajda v. State of Maharashtra, (2008) 7 SCC 442, K.K.

Ahuja v. V.K. Vora, (2009) 10 SCC 48, and other relevant judgments, this Court laid down the following principles: (National Small Industries Corpn. Ltd. case (supra), SCC pp. 345-46, para 39)

> "(i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.
>
> (ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.
>
> (iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make the accused therein vicariously liable for offence committed by the company along with averments in the petition containing that accused were in charge of and responsible for the business of the company and by virtue of their position they are liable to be proceeded with.
>
> (iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.
>
> (v) If the accused is a Managing Director or a Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.
>
> (vi) If the accused is a Director or an officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in complaint.
>
> (vii) The person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases."

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28. We are concerned in this case with Directors who are not signatories to the cheques. So far as Directors who are not signatories to the cheques or who are not Managing Directors or Joint Managing Directors are concerned, it is clear from the conclusions drawn in the abovementioned cases that it is necessary to aver in the complaint filed under Section 138 read with Section 141 of the NI Act that at the relevant time when the offence was committed, the Directors were in charge of and were responsible for the conduct of the business of the company. This is a basic requirement. There is no deemed

liability of such Directors. This averment assumes importance because it is the basic and essential averment which persuades the Magistrate to issue process against the Director. That is why this Court in SMS Pharma (1) (supra), observed that the question of requirement of averments in a complaint has to be considered on the basis of provisions contained in Sections 138 and 141 of the NI Act read in the light of the powers of a Magistrate referred to in Sections 200 to 204 of the Code which recognise the Magistrate's discretion to reject the complaint at the threshold if he finds that there is no sufficient ground for proceeding….."

*** *** ***

34. We may summarise our conclusions as follows:

34.1. Once in a complaint filed under Section 138 read with Section 141 of the NI Act the basic averment is made that the Director was in charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed, the Magistrate can issue process against such Director.

34.2. If a petition is filed under Section 482 of the Code for quashing of such a complaint by the Director, the High Court may, in the facts of a particular case, on an overall reading of the complaint, refuse to quash the complaint because the complaint contains the basic averment which is sufficient to make out a case against the Director.

34.3. In the facts of a given case, on an overall reading of the complaint, the High Court may, despite the presence of the basic averment, quash the complaint because of the absence of more particulars about the role of the Director in the complaint. It may do so having come across some unimpeachable, incontrovertible evidence which is beyond suspicion or doubt or totally acceptable circumstances which may clearly indicate that the Director could not have been concerned with the issuance of cheques and asking him to stand the trial would be abuse of process of court. Despite the presence of basic averment, it may come to a conclusion that no case is made out against the Director. Take for instance a case of a Director suffering from a terminal illness who was bedridden at the relevant time or a Director who had resigned long before issuance of cheques. In such cases, if the High Court is convinced that prosecuting such a Director is merely an arm-twisting tactics, the High Court may quash the proceedings. It bears repetition to state that to establish such case unimpeachable, incontrovertible evidence which is beyond suspicion or doubt or some totally acceptable circumstances will have to be brought to the notice of the High Court. Such cases may be few and far between but the possibility of such a case being there cannot be ruled out. In the absence of such evidence or circumstances, complaint cannot be quashed.

34.4. No restriction can be placed on the High Court's powers under Section 482 of the Code. The High Court always uses and must use this power sparingly and with great circumspection to prevent inter alia the abuse of the process of the court. There are no fixed formulae to be followed by the High

> Court in this regard and the exercise of this power depends upon the facts and circumstances of each case. The High Court at that stage does not conduct a mini trial or roving inquiry, but nothing prevents it from taking unimpeachable evidence or totally acceptable circumstances into account which may lead it to conclude that no trial is necessary qua a particular Director."

It was pointed out, that even though the judgments relied upon and referred to hereinabove, were with reference to Section 138 of the Negotiable Instruments Act, yet Section 141 thereof is exactly similar to Section 27 of the SEBI Act. And, therefore, insofar as the present issue is concerned, the cited judgments would be fully applicable to interpret and construe Section 27 of the SEBI Act. It was therefore asserted, that in the absence of any clear and firm assertion or material on the record of the case, to establish that the appellant was "… in charge of, and was responsible to…" the company for the conduct of its business, he could not be proceeded against.

53. It is not necessary for us to deal with the pointed issue at hand, on account of the clear findings recorded by the High Court in the impugned order dated 29.1.2014, depicting the role and involvement of the appellant in the activities of M/s. Accord Plantation Ltd. The conclusions drawn by the High Court in the impugned order, are extracted hereunder:-

> "18. … As would be evident from the balance sheet of the company, remuneration was being paid by it to Mr. P.C. Thakur. It has also come <u>in the deposition of DW2, an official from Punjab and Sind Bank that an authority letter from the company was received stating therein that Major P.C. Thakur was its director as on 24.2.1998 and he was authorized to operate the accounts of the company with the aforesaid bank</u>. A copy of the account opening form is Ex. DW2/B, whereas a copy of the extract from the minutes of the meeting of Board of Directors of the company is Ex. DW2/C. A copy of the authority letter is Ex. DW2/D. <u>The fact that Mr. P.C. Thakur was getting remuneration from the company and was also authorized to operate its bank accounts clearly shows that he was also a person incharge and responsible to the company for conduct of its business, during the period he was its director."</u>

In view of the fact, that the above factual position has not been disputed by learned counsel for the appellant, we are therefore satisfied in concluding, that the appellant – Major P.C. Thakur was in charge, and was responsible to the company, for the conduct of its business. It is not possible for us to accept, that the appellant – Major P.C. Thakur's activities concerning M/s. Accord Plantation Ltd., were confined to tendering advice with reference to its agricultural activities alone. In the above view of the matter, we find no difficulty whatsoever in affirming, that the appellant was liable to shoulder the responsibilities of the company relatable to its business activities, and therefore, was justifiably proceeded against, under Section 27 of the SEBI Act.

54. Insofar as the present appeal is concerned, a show cause notice dated 12.5.2000 was issued by the SEBI to M/s. Accord Plantation Ltd. A few of the relevant paragraphs of the show cause notice dated 12.5.2000 are extracted hereunder:-

> "As you are aware, SEBI (Collective Investment Scheme) Regulations, 1999 (hereinafter referred to as Regulations) came into force on October 15, 1999. As per regulation 5(1), any person who immediately prior to the commencement of these Regulations was operating a Collective Investment Scheme, shall subject to the provisions of Chapter IX of these Regulations make an application to SEBI for grant of certificate of registration within a period of two months from the date of notification (i.e. October 15, 1999). Subsequently, having regard to the interests of investors and requests received from entities, SEBI had extended the last date for submitting application by existing entities upto March 31, 2000 and the same was intimated by SEBI by a Press Release and Public Notice. Thus, you as an existing Collective Investment Scheme entity, subject to the provisions of Chapter IX of these Regulations, were required to apply for registration by March 31, 2000.
>
> As per Regulation 73(1) an existing Collective Investment Scheme (CIS) which has failed to make an application for registration to SEBI, shall wind up the existing scheme and repay the investors. Further, as per Regulation 74, an existing CIS which is not desirous of obtaining provisional registration from

SEBI shall formulate a scheme of repayment and make such repayment to the existing investors in the manner specified in Regulation 73(2). The existing Collective Investment Scheme to be wound up 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 SEBI.

Vide our letter dated December 15/29, 1999 and also by way of a public notice dated December 10, 1999 all the existing Collective Investment Schemes, including you, which were not desirous of obtaining provisional registration from SEBI or had failed to make an application for registration from SEBI were given individual intimation in terms of regulation 73(2) that casts an obligation on you to send an information memorandum to the investors detailing the sate of affairs of the scheme, the amount repayable to each investors and the manner in which such amount is determined. Accordingly you were required to send the information memorandum to the investors by February 28, 2000.

It is noted that you have not applied for registration by March 31, 2000 and also appear to have failed to take steps for winding up of the scheme(s) in terms of Regulations. You have, therefore, prima facie violated the provisions of Section 12(1B) of SEBI Act, 1992 and regulation 5(1) read with regulations 68(1), 68(2), 73 and 74 of SEBI (Collective Investment Schemes) Regulations, 1999."

55. Even in the complaint filed by 'the Board' under Section 200 of the Cr.P.C. read with Sections 24(1) and 27 of the SEBI Act, the accusations levelled against M/s. Accord Plantation Ltd., as also, the appellant herein, were similar. Relevant paragraphs of the complaint dated 21.1.2003 are being extracted hereunder:-

"7. The accused no. 1 company filed information/details with SEBI regarding the collective investment schemes pursuant to SEBI press release dated November 26, 1997 and/or public notice dated December 18, 1997.

8. In terms of Chapter IX of the said regulations, any person who had been operating a collective investment scheme at the time of commencement of the said regulations shall be deemed to be an existing collective investment scheme and shall comply with the provisions of the said Chapter IX. Further, in terms of the said Chapter IX any person who immediately prior to the commencement of the said regulations was operating a collective investment scheme shall make an application to SEBI for grant of registration within a period of two months from the date of notification of the said regulations.

9. SEBI having regard to the interest of investors and request received from various persons operating collective investment schemes extended the last date of submitting the application by existing entities upto March 31, 2000 and the same was declared by SEBI vide a press release and a public notice.

10. However, the accused no. 1 failed to make any application with SEBI for registration of the collective investments schemes being operated by it as per the said regulations.

11. It is submitted that in terms of regulation 73(1) of the said regulations an existing collective investment scheme which failed to make an application for registration with SEBI, shall wind up the existing collective investment schemes and repay the amounts collected from the investors. Further, in terms of regulation 74 of the said regulations, an existing collective investment scheme which is not desirous of obtaining provisional registration from SEBI shall formulate a scheme of repayment and make such repayment to the existing investors in the manner specified in regulation 73.

12. SEBI vide its letter dated December 10, 1999 and December 29, 1999 and also by way of a public notice dated December 10, 1999 gave intimation in terms of regulation 73(2) to the accused no. 1 which casts an obligation on the accused no. 1 to send an information memorandum to all the investors detailing the state of affairs of the schemes, the amount repayable to each investor and the manner in which such amount is determined. As per the aforesaid letters of SEBI, the information memorandum to the investors was required to be sent latest by February 28, 2000. SEBI vide another public notice published in newspapers on February 22, 2000 informed to the company that all the companies carrying out collective investment schemes who had not made any application for grant of registration or were not desirous of obtaining provisional registration were required to compulsorily windup their existing schemes as per the provisions of regulation 73(1) of the said regulations.

13. However, the accused no. 1 neither applied for registration under the said regulations nor took any steps for winding up of the schemes and repayment to the investors as provided under the regulations and as such had violated the provisions of section 11B, 12(1B) of Securities and Exchange Board of India Act, 1992 and regulation 5(1) r/w regulations 68(1), 68(2), 73 and 74 of the said regulations."

56. Based on the above show-cause notice and complaint (dated 12.5.2000 and 21.1.2003, respectively), it was the contention of learned counsel for the appellant, that 'the Board' treated M/s. Accord Plantation Ltd. as an "existing" collective investment enterprise, namely, a collective investment scheme falling within the meaning of the proviso under Section 12(1B) of the SEBI Act. Referring to the show-cause notice it was pointed out, that 'the Board' had accused the appellant for not having made an application under Regulation 5 of the Collective Investment

Regulations, upto 31.3.2000. It was pointed out that Regulation 5, pertains to "existing" collective investment schemes. It was contended, that even though under the Collective Investment Regulations originally drawn, such an application had to be preferred by 15.12.1999 (i.e. within the period of two months from the date of commencement of the Collective Investment Regulations), the said date was subsequently extended to 31.3.2000. It was submitted, that the imputations contained in the show-cause notice were clearly misconceived, as the appellant had ceased to have any concern with the company, with effect from 20.2.2000. The instant factual position was sought to be demonstrated by placing reliance on Form-32, submitted with the Registrar of Companies. Our attention was also drawn to the statement of DW6 – Vikram, Senior Dealing Assistant of the office of the Registrar of Companies, Jalandhar, who in his examination-in-chief, had acknowledged that in Form-32 (exhibited as DW6/1), Major P.C. Thakur was shown to have resigned from the directorship of M/s. Accord Plantation Ltd., with effect from 20.2.2000. Premised on the above factual position, it was submitted, that the appellant cannot be implicated for not having complied with the Collective Investment Regulations, because he had already resigned (-on 20.2.2000), before the cause of disobedience could have arisen (-on 31.3.2000, the extended last date for submitting applications for registration, by "existing" entities). We find merit in the contention advanced by learned counsel for the appellant, that since it has been effectively established, that the appellant ceased to be a director on 20.2.2000, and culpability, if at all, would arise only on 31.3.2000, the proceedings initiated against the appellant were not sustainable, and would be liable to be quashed.

57. Learned counsel for 'the Board' however seriously contested, that the appellant – Major P.C. Thakur had resigned from M/s. Accord Plantation Ltd. on 20.2.2000. In this behalf, he placed reliance on the statement of DW6 – Vikram, Senior Dealing Assistant of the office of the Registrar of Companies, Jalandhar. Even though in his examination-in-chief, DW6 – Vikram had clearly affirmed, that in terms of Form-32 (exhibited as DW6/1), Major P.C. Thakur was shown to have resigned from the directorship of M/s. Accord Plantation Ltd. with effect from 20.2.2000, yet in his cross-examination, he acknowledged "….. as per my record, the persons named as members of the Board of directors in the annual return of 20th September, 2002 – Exhibit DW6/4 and 5 are Sh. Ajay Vohra, Tejinder Singh, P.C. Thakur, Rajan Rana and Rajkumar Sharma. These returns have been submitted by the company…..". It was the contention of learned counsel, that annual returns are filed by a company under Section 159 of the Companies Act, 1956. Sub-Section (1) of Section 159 is extracted below:-

> "159. Annual return to be made by company having a share capital.-
> (1) Every company having a share capital shall within sixty days from the day on which each of the annual general meetings referred to in section 166 is held, prepare and file with the Registrar a return containing the particulars specified in Part I of Schedule V, as they stood on that day, regarding -
>
> (a) its registered office,
> (b) the register of its members,
> (c) the register of its debenture-holders,
> (d) its shares and debentures,
> (e) its indebtedness,
> (f) its members and debenture-holders, past and present, and
> (g) its directors, managing directors, managers and secretaries, past and present:
>
> Provided that any of the five immediately preceding returns has given as at the date of the annual general meeting with reference to which it was submitted, the full particulars required as to past and present members and the shares held and transferred by them, the return in question may contain only such of the particulars as relate to persons ceasing to be or becoming

members since that date and to shares transferred since that date or to changes as compared with that date in the number of shares held by a member.

Explanation.- Any reference in this section or in section 160 or 161 or in any other section or in Schedule V to the day on which an annual general meeting is held or to the date of the annual general meeting shall, where the annual general meeting for any year has not been held, be construed as a reference to the latest day on or before which that meeting should have been held in accordance with the provisions of this Act."

Relying on Section 159(1) extracted above, it was submitted, that annual returns filed by a company are submitted on a prescribed proforma, and as such, the same being a statutory requirement, will have to be accepted as correct, unless it was shown otherwise.

58. It was also submitted, that the aforesaid statutory requirement is akin to the statutory requirement under Section 303 of the Companies Act, 1956, inter alia, pertaining to the details of the existing directors and/or any change among the directors, managing directors, managers or secretaries of a company. Insofar as the instant aspect of the matter is concerned, section 303(2) of the Companies Act, 1956, which was also relied upon, is extracted hereunder:-

"303. Register of directors etc.- (1) *** *** ***

(2) The company shall, within the periods respectively mentioned in this sub-section, send to the Registrar a return in the prescribed form containing the particulars specified in the said register and a notification in the prescribed form of any change among its directors managing directors, managers or secretaries, specifying the date of the change.

The period within which the said return is to be sent shall be a period of thirty days from the appointment of the first directors of the company and the period within which the said notification of a change is to be sent shall be thirty days from the happening thereof;"

59. It was contended, that while it cannot be disputed that the name of Major P.C. Thakur existed on Form-32 sent to the Registrar of Companies, and DW6 – Vikram

in his statement duly brought out, that as per the record of the Registrar of Companies, Major P.C. Thakur had resigned from the directorship of the company with effect from 20.2.2000, yet an equally significant fact is, that in the annual return filed by M/s. Accord Plantation Ltd. on 30.9.2002, Major P.C. Thakur was shown as one of the directors. It was, therefore submitted on behalf of 'the Board', that Major P.C. Thakur had not been in a position to clearly and effectively establish, that he had resigned from the concerned company, with effect from 20.2.2000.

60. In order to repudiate the above contention, learned counsel representing the appellant - Major P.C. Thakur, placed reliance on the decision of this Court in Harshendra Kumar D. vs. Rebatilata Koley, (2011) 3 SCC 351, and highlighted the issue under consideration, by emphasizing on the following observations recorded therein:-

> "16. Every company is required to keep at its registered office a register of its Directors, Managing Director, manager and secretary containing the particulars with respect to each of them as set out in clauses (*a*) to (*e*) of sub-section (1) of Section 303 of the Companies Act, 1956. Sub-section (2) of Section 303 mandates every company to send to the Registrar a return in duplicate containing the particulars specified in the register. Any change among its Directors, Managing Directors, managers or secretaries specifying the date of change is also required to be furnished to the Registrar of Companies in the prescribed form within 30 days of such change. There is, thus, statutory requirement of informing the Registrar of Companies about change among Directors of the company.
>
> 17. <u>In this view of the matter, in our opinion, it must be held that a Director, whose resignation has been accepted by the company and that has been duly notified to the Registrar of Companies, cannot be made accountable and fastened with liability for anything done by the company after the acceptance of his resignation</u>. The words "every person who, at the time the offence was committed", occurring in Section 141(1) of the NI Act are not without significance and these words indicate that criminal liability of a Director must be determined on the date the offence is alleged to have been committed."

Based on the above, it was submitted, that no one could be permitted to dispute the fact that the appellant – Major P.C. Thakur, had resigned from M/s. Accord Plantation Ltd. with effect from 20.2.2000.

61. We have given our thoughtful consideration to the afore-stated contention, pertaining to the date when Major P.C. Thakur severed his relationship with M/s. Accord Plantation Ltd., by tendering his resignation and submitting the same with the Registrar of Companies in Form-32. Based on the judgment rendered by this Court in the Harshendra Kumar D's case (supra), there can be no doubt, that the submissions advanced on behalf of the appellant have to be accepted, unless the same can be effectively repudiated. The mere mention of the name of Major P.C. Thakur in the annual return filed on 30.9.2002, in our considered view, cannot per se lead to the inference, that Major P.C. Thakur, was still on the Board of directors of M/s. Accord Plantation Ltd.. We say so because, Section 159(1)(g) of the Companies Act, 1956, requires that alongwith the annual return, the particulars of the directors, managing directors, managers and secretaries, "… past and present…", have to be indicated. That being the mandate of Section 159, the assertion made at the hands of learned counsel for 'the Board' could only be justified if the name of Major P.C. Thakur (in the annual return submitted on 30.9.2002) projected him as a "present" director. It is, therefore, that we examined photocopies of DW6/4 and DW6/5, (referred to in the statement of DW6 – Vikram). DW6/5 was a part of the annual return of the concerned company. Details were provided therein by the said company, in the format prescribed in Schedule V of the Companies Act, 1956. At S.No. IV of the format, information was to be provided pertaining to the past and present directors/manager/secretary. In the information so provided by the

concerned company at S.No. IV, the names of Ajay Vohra, Tejinder Singh, PC Thakur, Rajan Rana and Rajkumar Sharma were admittedly depicted. The dates of their appointment as directors were also mentioned. Exhibit DW6/5 is silent, as to whether the names reflected in the annual return were of the past directors, or of the present directors. Since information of the past directors was also to be reflected at S.No. IV, in our considered view, no clear inference can be drawn from Exhibit DW6/5, that Major P.C. Thakur, was a "present" director at the time of filing of the above return. We are therefore of the view, that in the present case, there is no material to contradict the factual position depicted in Form-32, namely, that the appellant – Major P.C. Thakur had resigned from the company on 20.2.2000.

62. In addition to above, it is also relevant to mention, that a copy of Form-32, relating to the resignation of Major P.C. Thakur from M/s. Accord Plantation Ltd. on 20.2.2000, was placed on the record of the case (as Annexure P-3). The same was produced by DW7 – Ajay Vohra, while deposing before the trial Court in the case on hand. The veracity of Form-32 depicting the resignation of Major P.C. Thakur, was not contested by 'the Board', before the trial Court. Thus viewed, we find no justification whatsoever, in permitting 'the Board' to contest the same, before this Court. We, therefore, hereby affirm that Major P.C. Thakur had duly resigned from the directorship of M/s. Accord Plantation Ltd. on 20.2.2000.

63. On the issue of liability of the appellant – Major P.C. Thakur, we also consider it appropriate to make a reference to Section 27 of the SEBI Act. The above provision has already been extracted above, and the debate with reference thereto, and its conclusion, have also been recorded by us. The reference which we wish to

make to Section 27 at the instant juncture, is for a different purpose. Section 27 makes every person, who at the time when the offence was committed, was in charge of, and responsible for, the conduct of the company's business, guilty of the offence allegedly committed by the company. There can be no dispute about the fact, that a director of a company, may well be in charge of, and responsible for the conduct of the business of the company (though the above position would not emerge ipso facto, by holding the position of a director). Yet, after the concerned individual has resigned from the position of director, in our view, he cannot be considered to be responsible to the company, for the conduct of its business. Any action of omission or commission of the company, after the date on which the concerned director has resigned, would not affect him, insofar as, his culpability under Section 27 of the SEBI Act is concerned. Thus viewed, there can be no doubt, that Major P.C. Thakur ceased to be in a position, as would make him in charge of or responsible for the conduct of the business of the company, after 20.2.2000.

64. Based on the factual position noticed in the preceding paragraph, we are of the view, that for exactly the same reasons as have been recorded by us in Criminal Appeal nos. 827-830 of 2012, the appellant herein was not accused of having violated the substantive provision of Section 12(1B) of the SEBI Act, by commencing a collective investment undertaking as a new operator belonging to the non-proviso category (-who had not commenced the above activity before 25.1.1995). The appellant was only accused of having breached Regulation 5 of the Collective Investment Regulations, read with Chapter IX of the said regulations, and more particularly Regulations 68, 73 and 74 (see extracts of show cause notice dated

12.5.2000, and paragraph 13 of the complaint dated 21.1.2003). We are satisfied that the last date for moving an appropriate application under Regulation 5, having been extended from 15.12.1999 to 31.3.2000, the aforesaid regulations could be deemed to have been breached by M/s. Accord Plantation Ltd., as also, by the appellant herein, in case such an application had not been filed under Regulation 5 on or before 31.3.2000. The instant conclusion drawn by us is sufficient to exculpate the appellant, who had severed his relationship, with M/s. Accord Plantation Ltd. with effect from 20.2.2000, and to accept his plea that proceedings initiated against him, were not permissible in law.

65. We will be failing in effectively discharging our responsibility, if we do not examine another legal contention advanced on behalf of the appellant. It was also pointed out, that the question of initiation of proceedings against M/s. Accord Plantation Ltd. or the appellant, on account of a breach of Regulation 5 and Regulations 68 to 72 under Chapter IX of the Collective Investment Regulations, did not arise at all. Insofar as the instant aspect of the matter is concerned, learned counsel invited our attention to a communication dated 7.2.2000, which was addressed by M/s. Accord Plantation Ltd. to SEBI. The aforesaid communication is extracted hereunder:-

> "ACCORD PLANTATION LTD.
> HO Blue Peak Office Complex (Near Gainda Mull Stairs)
> The Mall Shimla 171 001
> Corp Office 19A Swastik Vihar Panchkula HR
> Phone No. 172-552962
>
> Date Feb 07, 2000
>
> Ref. No. HO/101/775/00
>
> Shri Suresh Gupta
> Division Chief
> SEBI

Earnest House, 194, Nariman Point
Mumbai 400 021

Kind Attn.: Mr. Suresh Gupta, Divisional Chief

Dear Sir,

This is with reference to plantation schemes of the Company and its registration with SEBI as per latest guidelines on registration. We wish to inform you that we are no more interested in operating this scheme due to stringent guidelines of SEBI.

However, the company intends to pay all the deposits from sale of tree on due date for year wise detail of income and payment of maturities is enclosed.

We are ready to provide any other information required at your end.

Thanking you.

Yours faithfully,
Sd/-
Managing Director"

Based on the aforesaid letter dated 7.2.2000, it was contended, that M/s. Accord Plantation Ltd. had decided to wind up its operations on account of the fact, that it was not possible for it to continue its erstwhile activities, because of the stringent conditions imposed in the Collective Investment Regulations. In the instant view of the matter, it was the contention of learned counsel for the appellant, that the question of making an application for registration under Regulation 5 of the Collective Investment Regulations, or for M/s. Accord Plantation Ltd. to follow the procedure stipulated under the Collective Investment Regulations, for seeking a certificate of registration, did not arise.

66. In the aforesaid context, learned counsel for the appellant also placed reliance on Regulations 73 and 74 to contend, that M/s. Accord Plantation Ltd. was required to repay to the investors the deposits made by them "… within two months from the

date of receipt of intimation from the respondent-Board, detailing the state of affairs of the scheme, the amount repayable to each investor and the manner in which such amount is determined…". Regulations 73 and 74 are reproduced hereunder:-

"Manner of repayment and winding up

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-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.

Existing scheme not desirous of obtaining registration to repay

74. An existing collective investment scheme which is not desirous of obtaining provisional registration from the Board shall formulate a scheme of repayment and make such repayment to the existing investors in the manner specified in regulation 73."

It was submitted, that intimation as was required to be furnished by 'the Board' under Regulation 73(2), was never furnished by the respondent-Board, either to M/s. Accord Plantation Ltd. or to the appellant herein, and as such, no question of repayment of the deposits made by the investors arose, by the time the appellant relinquished his position as director of the company (with effect from 20.2.2000).

67. Since the respondent-Board had not denied the fact, that M/s. Accord Plantation Ltd. did address the letter dated 7.2.2000 (extracted above), to the respondent-Board, making its intentions clear, that it was not desirous of continuing its activities any further, because of the stringent conditions postulated under the Collective Investment Regulations notified on 25.1.1995, the question of refund would arise only after intimation was furnished by 'the Board' under Regulation 73(2) to M/s. Accord Plantation Ltd., or to the appellant. Since details of such intimation by 'the Board' were not brought to the notice of this Court on behalf of 'the Board', we are of the view, that it was not open to 'the Board' to initiate action against M/s. Accord Plantation Ltd. or its directors, till the expiry of two months from the date of receipt of intimation from 'the Board'.

68. In view of the conclusions recorded hereinabove we are satisfied, that the proceedings initiated against the appellant were wholly misconceived, as it has not

been established, that the appellant either violated Regulation 5 read with Regulations 68 to 72, or Regulations 73 and 74 of the Collective Investment Regulations.

69. The instant appeal is accordingly allowed. The conviction and sentence imposed on the appellant – Major P.C. Thakur are set aside, and the complaint stands dismissed.

Criminal Appeal no. 251 of 2015

70. The instant appeal has been preferred by Sunita Bhagat, an accused in a complaint filed by 'the Board'. Obviously, therefore, 'the Board' is the respondent herein.

71. A complaint of the nature referred to in the earlier matters, was filed by the respondent-Board on 21.1.2003 under Section 200 of the Cr.P.C. read with Sections 24(1) and 27 of the SEBI Act, against M/s. Accord Plantation Ltd., and five of its directors. Sunita Bhagat, wife of Vinodh Bhagat was arrayed as accused no. 4. The charges levelled against the appellant – Sunita Bhagat emerge from paragraphs 13, 15 and 18 of the complaint, which are extracted hereunder:-

> "13. However, the accused no. 1 neither applied for registration under the said regulations nor took any steps for winding up of the schemes and repayment to the investors as provided under the regulations and as such had violated the provisions of Section 11B, 12(1B) of Securities and Exchange Board of India Act, 1992 and Regulation 5(1) r/w Regulations 68(1), 68(2), 73 and 74 of the said regulations.
>
> *** *** ***
>
> 15. On January 31, 2001, SEBI by exercising its powers conferred upon it under Section 118 of Securities and Exchange Board of India Act, 1992 directed the accused no. 1 to refund the money collected under the aforesaid collective investment schemes of the accused no. 1 to the persons who

> invested therein within a period of one month from the date of the said directions…
>
> *** *** ***
>
> 18. In view of the above, it is charged that the accused no. 1 has committed the violations of Section 11B, 12(1B) of Securities and Exchange Board of India Act, 1992 r/w Regulation 5(1) r/w Regulations 68(1), 68(2), 73 and 74 of the Securities and Exchange Board of India (Collective Investment Schemes) Regulations, 1999 which is punishable under Section 24(1) of Securities and Exchange Board of India Act, 1992. The accused nos. 2 to 5 are the directors and/or persons in charge of and responsible to the accused no. 1 for the conduct of its business and are liable for the violations of the accused no. 1, in terms of Section 27 of Securities and Exchange Board of India Act, 1992."

It is apparent from the complaint, that the appellant – Sunita Bhagat was accused, firstly, of not applying for a certificate of registration under the Collective Investment Regulations, and secondly, for not having taken steps for winding up the collective investment business being carried on by M/s. Accord Plantation Ltd., by way of repayment to the investors, as provided under the Collective Investment Regulations. After the complaint was preferred before the Additional Chief Metropolitan Magistrate, Tis Hazari Court, Delhi, the concerned Magistrate summoned the appellant vide an order dated 21.1.2003. On her appearance, the accused was given a notice of the accusations, alongwith the complaint preferred by 'the Board'. On 5.8.2005, the accused pleaded not guilty and claimed trial. The trial was conducted by the Additional Sessions Judge (Central-01), Delhi. After recording the evidence furnished by the complainant, as also the evidence produced in defence, the trial Court vide its judgment dated 25.3.2010 arrived at the conclusion, that the guilt of the accused-company – M/s. Accord Plantation Ltd., as also, of accused numbers 2 to 5 (-who were its directors), had been duly established.

72. The trial Court held, that the accused had floated a collective investment scheme, and mobilized funds from the general public, without obtaining a certificate of registration, as required under Section 12(1B) of the SEBI Act. The trial Court also concluded, that despite the notification of the Collective Investment Regulations on 15.10.1999, the accused-company had failed to apply for the registration of its collective investment scheme. Further, M/s. Accord Plantation Ltd. was found to have neither wound up its collective investment scheme, nor repaid its investors as per Regulations 73 and 74 of the Collective Investment Regulations. The accused were accordingly held guilty of violating Regulations 5(1) read with Regulations 68(1), 68(2), 73 and 74 of the Collective Investment Regulations read with Sections 26 and 27 of the SEBI Act. By a separate order passed on 26.3.2010, the trial Court sentenced accused numbers 2 to 5 to rigorous imprisonment for six months each. The accused-company and accused nos. 2 to 5 were ordered to pay a fine of Rs.10 lakhs each, and in default thereof, accused nos. 2 to 5 were required to undergo simple imprisonment for a further period of three months each.

73. Dissatisfied with the orders of conviction and sentence, dated 25.3.2010 and 26.3.2010 respectively, the present appellant – Sunita Bhagat filed Criminal Appeal no. 442 of 2010 before the High Court. The appeal preferred by the appellant – Sunita Bhagat alongwith the appeal preferred by Major P.C. Thakur (Criminal Appeal no. 464 of 2010) and the other appeals filed on behalf of the directors of M/s. Accord Plantation Ltd., were dismissed by the High Court on 29.1.2014. The instant criminal appeal arises from the said common judgment and order of the High Court, dated 29.1.2014.

74. During the course of hearing it was submitted, that M/s. Accord Plantation Ltd. was incorporated under the Companies Act, 1956, on 16.10.1996. The appellant herein – Sunita Bhagat was admittedly one of the promoter-directors of the said company. It was asserted that the appellant – Sunita Bhagat had resigned from the company on 31.8.1999 with immediate effect. It is not a matter of dispute, that Form-32, depicting the resignation of the appellant, was submitted and received in the office of the Registrar of Companies on 20.9.1999. The above factual position stands affirmed in the narration recorded by the High Court in the impugned judgment and order dated 29.1.2014. Paragraph 17 of the impugned judgment, is extracted hereunder:-

> "17. As far as the appellant, Sunita Bhagat is concerned, admittedly she was a Director of the appellant Company on 25.1.1995 when sub-section (1B) of Section 12 of the Act came to be notified, she having resigned only on 20.9.1999. She has also been operating the bank account of the Company. Therefore, the offence to the extent of contravention of sub section (1B) of Section 12 by the Company was committed during the period she was its Director. The first letter sent to SEBI on 9.12.1997, stating therein the main objects of the Company and giving information with respect to the funds mobilized from the investors and also enclosing returns, copies of offer documents and bio datas of Promoters was sent by her. She was also a Promoter of the Company and one of its first directors, as stated by DW6 Vikram besides being a Director in another company, Blue Peeks Floriculture Limited. A perusal of the balance sheet of the Company would show that she was also paid remuneration by the Company during the financial year 1997-1998. All these documents leave no reasonable doubt that she also was a person in-charge of and responsible to the Company for conduct of its business. No evidence has been led by her to prove that the contravention of sub-section (1B) of Section 12 of the Act was committed without her knowledge or that she had exercised all due diligence to prevent the commission of the aforesaid offence by the Company."

75. On the issue of resignation of the appellant – Sunita Bhagat from the company, our attention was invited to the statement of DW3 – Yashpal, JTA, Registrar of Companies, Jalandhar. The same is extracted hereunder:-

"I have brought the summoned records relating to the company Accord Plantation Ltd. The certified copy of Form 32 placed in the judicial record had been issued by our office. The same is Ex. DW3/A. The Form 32 reflects that as on 31.8.1999, the accused no. 4 Sunita Bhagat had resigned as Director of the Accord Plantation Ltd. The resignation letter is on my record. Copy of the same is Ex. DW3/B.

XXXX by counsel Sh. Sachit Setia for the SEBI

We have received the resignation letter on 20.9.1999. It is correct that no date of receipt had been mentioned on the resignation letter Ex. DW3/B. On receipt of the resignation letter we have placed it on the record, being accepted.

XXXX by counsel Sh. Neeraj Tiwari for A-5, Rajan Rai

We did not prepare any list of directors after accepting the resignation of Smt. Sunita Bhagat. However, the modified list of directors would have been furnished by the company alongwith the annual returns filed by the company. As per the record, the directors of the company prior to the resignation of Smt. Sunita Bhagat were Sh. Ajay Vora, Sh. Tejender Singh, Sh. P.C. Thakur, Sh. Pradeep Dewan and Mrs. Sunita Bhagat as per annual return dated 28.9.99. The copy of the same is Ex. DW3/C (OSR).

XXXX by counsel for accused no. 2.

It is correct that fees have to be deposited by the person applying for change in Board of Directors on the basis of resignation and the receipt No. 21181 dated 20.9.99. The copy of the receipt is Ex. DW3/D (OSR)….."

Learned counsel for the appellant reiterated the legal submissions advanced before this Court in the connected appeals, and submitted, that for exactly the reasons mentioned by a co-accused – Major P.C. Thakur, the proceedings initiated against the appellant herein, were also unsustainable, because the appellant herein had also resigned as director (-on 31.8.1999) just as Major P.C. Thakur had resigned (-on 20.2.2000).

76. Without going into the details of the matter, we have no hesitation in concluding, for exactly the same reasons as have been recorded by us in Criminal Appeal no. 252 of 2015 (Major P.C. Thakur vs. Securities and Exchange Board of

India), that the proceedings initiated against the appellant – Sunita Bhagat, were wholly misconceived, as there was no occasion whatsoever for the appellant to have violated Regulation 5, read with Regulations 68 to 72, or in the alternative, Regulations 73 and 74 of the Collective Investment Regulations.

77. Learned counsel for the appellant herein, had emphatically raised the plea of limitation, also. Since the contention was pressed, and also responded to, we consider it just and appropriate to deal with the same. It was the contention of learned counsel for the appellant, that the complaint preferred by 'the Board' on 21.1.2003 before the Additional Chief Metropolitan Magistrate, was incompetent in law, in view of the period of limitation stipulated under the provisions of the Cr.P.C. In order to support his claim under Section 468 of the Cr.P.C., learned counsel, in the first instance, placed reliance on Section 32 of the SEBI Act, which is reproduced below:-

> "32. Application of other laws not barred.-The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force."

Relying on Section 32 it was contended, that the provisions under the SEBI Act were in addition to, and not in derogation of, the provisions of any other law for the time being in force, including the Cr.P.C. This position was not repudiated on behalf of 'the Board'. We are satisfied in recording, that the above contention, advanced on behalf of the appellant, is fully justified.

78. With reference to the provisions of the Cr.P.C., and to substantiate the plea of limitation, reliance was placed on Section 468, which is reproduced below:-

> "468. Bar to taking cognizance after lapse of the period of limitation.- (1) Except as otherwise provided elsewhere in this Code, no Court, shall take

cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.

(2) The period of limitation shall be –

(a) six months, if the offence is punishable with fine only;
(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;
(c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years."

79. For invoking the plea of limitation, learned counsel also pointed out, that under Section 24 of the SEBI Act, before its amendment on 29.10.2002, a punishment of imprisonment of one year or fine or both, was postulated. Since the punishment contemplated under Section 24 of the SEBI Act was not in excess of one year, for the violation alleged against the appellant, it was submitted, that the competence to taking cognizance, would lapse after a period of one year, on account of the bar created by Section 468(2)(b) of the Cr.P.C (extracted above).

80. Referring to the factual position in the present controversy, it was asserted, that the appellant had ceased to be a director of M/s. Accord Plantation Ltd., with effect from 20.9.1999, and as such, her liability for any alleged act of omission or commission, with reference to M/s. Accord Plantation Ltd., could not legally extended beyond 20.9.1999. As such, according to learned counsel for the appellant, in view of the mandate contained in Section 468 of the Cr.P.C., the period of limitation for filing a complaint by 'the Board' against the appellant – Sunita Bhagat would expire one year after she severed her relationship with M/s. Accord Plantation Ltd., i.e. on 20.9.2000. It was asserted, that the admitted factual position is, that the complaint in the instant case came to be filed on 21.1.2003. In the above view of the matter it was asserted, that besides the other legal pleas raised at the

hands of the appellant, the complaint filed by 'the Board' against the appellant was barred by limitation.

81. We have, during the course of recording our consideration hereinabove, upheld the contention advanced on behalf of the appellant – Sunita Bhagat, that Section 468 of the Cr.P.C. could be relied upon, in criminal proceedings initiated under the provisions of the SEBI Act. Having so concluded we are of the view, that since the punishment contemplated under Section 24 of the SEBI Act at the relevant juncture, did not exceed one year, the period of limitation for taking cognizance under Section 468 of the Cr.P.C. would be one year. We are also inclined to accept the contention advanced at the hands of learned counsel for the appellant, that the period of limitation in the present case would commence to run with effect from the date the appellant – Sunita Bhagat tendered her resignation from the position of director of M/s. Accord Plantation Ltd., namely, with effect from 20.9.1999. Thus viewed, the bar of taking cognizance against the appellant – Sunita Bhagat, would operate with effect from 20.9.2000. Admittedly, the complaint in the present case was preferred by 'the Board' before the Additional Chief Metropolitan Magistrate, Tis Hazari Courts, Delhi, on 21.1.2003. The trial Court could not have taken cognizance of the same, in view of the clear bar contemplated under Section 468 of the Cr.P.C.

82. For the reasons recorded hereinabove, not only on account of the legal position expressed above, but also, on account of the plea of limitation, the proceedings initiated against the appellant were not sustainable in law. The instant appeal is accordingly allowed, and the conviction and sentence imposed on the

appellant – Sunita Bhagat is set aside, and the complaint filed against the appellant, stands dismissed.

Criminal Appeal no. 832 of 2012

83. The position stands reversed again. 'The Board' is the appellant in this matter and Raj Chawla, accused no. 10 before the trial Court, is the respondent.

84. The instant appeal has been preferred by 'the Board' against the respondent – Raj Chawla, who had approached the High Court by filing Criminal Miscellaneous Case 3937 of 2009, under Section 482 of the Cr.P.C., seeking quashing of the complaint filed by 'the Board', dated 15.12.2003 in the Court of Chief Metropolitan Magistrate, Tis Hazari Court, Delhi, under Section 200 of the Cr.P.C. read with Sections 24(1) and 27 of the SEBI Act. On the receipt of the above complaint, the Chief Judicial Magistrate had summoned the accused on 15.12.2003 for 21.2.2004. The High Court, through the impugned order dated 12.1.2010, quashed the criminal complaint filed by 'the Board' against Raj Chawla. 'The Board' has approached this Court by filing the instant criminal appeal, to assail the order of the High Court, dated 12.1.2010.

85. In order to effectively adjudicate upon the cause which has arisen with reference to the respondent – Raj Chawla, it would be essential to notice that the respondent – Raj Chawla was a promoter-director of M/s. Fair Deal Forests Ltd.. M/s. Fair Deal Forests Ltd. was incorporated under the Companies Act, 1956, on 16.10.1996. The respondent – Raj Chawla resigned from the directorship of the said company on 30.3.1997. On his resignation, he submitted Form-32 with the

Registrar of Companies. It was pointed out, that M/s. Fair Deal Forests Ltd. was operating a collective investment scheme, and had raised a sum of Rs.5,20,000/- from the general public, for the said purpose. M/s. Fair Deal Forests Ltd. had also submitted to 'the Board', an information memorandum, in response to the general public notice issued by 'the Board', detailing the particulars of the investors, including the amount payable to each investor, and the manner in which such amount was determined.

86. Dissatisfied with response received, 'the Board' filed a criminal complaint against M/s. Fair Deal Forests Ltd. and 9 of its directors, wherein the respondent – Raj Chawla was arrayed as accused no. 10. A relevant extract of the complaint is reproduced below:-

> "7. The accused no. 1 is a company registered under the provisions of Companies Act and the accused nos. 2 to 11 are the Directors of the accused no. 1 company. The accused nos. 2 to 11 are the persons incharge and responsible for the day to day affairs of the company and all of them were actively connived with each other for the commission of offences.
>
> 8. The accused no. 1 is operating collective investment schemes and raised an aggregate amount of nearly Rs.5,20,000/- from the general public.
>
> 9. The accused no. 1 company filed information/details with SEBI regarding its collective investment schemes pursuant to SEBI press release dated November 26, 1997, and/or public notice dated December 18, 1997.
>
> *** *** ***
>
> 12. SEBI having regard to the interest of investors and request received from various persons operating collective investment schemes, extended the last date of submitting the application by existing entities upto March 31, 2000 and the same was declared by SEBI vide a press release and a public notice.
>
> 13. However, the accused no. 1 failed to make any application with SEBI for registration of the collective investment schemes being operated by it as per the said regulations.
>
> 14. It is submitted that in terms of Regulations 73(1) of the said regulations, an existing collective investment scheme which failed to make an application for registration with SEBI, shall wind up the existing collective investment

scheme and repay the amounts collected from the investors. Further, in terms of Regulation 74 of the said regulations, an existing collective investment scheme which is not desirous of obtaining provisional registration from SEBI shall formulate a scheme of repayment and make such repayment to the existing investors in the manner specified in Regulation 73.

15. However, the accused no. 1 neither applied for registration under the said regulations nor took any steps for winding up of the schemes and repayment to the investors as provided under the regulations and as such had violated the provisions of Section 12(1B) of Securities and Exchange Board of India Act, 1992, and Regulation 5(1) read with Regulations 68(2), 73 and 74 of the said regulations.

*** *** ***

18. The accused no. 1 raised a total amount of nearly Rs.5,20,000/- by its own admission and its failure to refund the amounts to the general public who invested hard-earned money in the schemes operated by the accused no. 1, caused pecuniary damage to them.

19. In view of the above, it is charged that the accused no. 1 has committed the violation of Sections 11B, 12(1B) of the Securities and Exchange Board of India Act, 1992 and regulation 5(1) read with regulations 68(1), 68(2), 73 and 74 of the Securities and Exchange Board of India (Collective investment schemes) Regulations, 1999, which is punishable under Section 24(1) of the Securities and Exchange Board of India Act, 1992."

87. We are satisfied, that the controversy raised in the instant appeal is exactly similar to the one decided in Criminal Appeal nos. 827-830 of 2012 (Securities and Exchange Board of India vs. Gaurav Varshney and another), for the reason that the respondent herein had resigned from the position of director of M/s. Fair Deal Forests Ltd., on 30.3.1997. We are also satisfied, that the controversy raised in the instant appeal is also similar to the one decided in Criminal Appeal no. 251 of 2015 (Sunita Bhagat vs. Securities and Exchange Board of India) for the reason, that the complaint in the present case was filed against the respondent on 15.12.2003 i.e., well after the period of one year, calculated from the date of the respondent's resignation. For the reasons recorded in the two similar cases referred to above,

the instant appeal deserves to be rejected. Accordingly this appeal stands dismissed.

.....J.
(Jagdish Singh Khehar)

.....J.
(C. Nagappan)

New Delhi;
July 15, 2016.

<u>Note:</u> The emphases supplied in all the quotations in the instant judgment, are ours.

SUPREME COURT OF INDIA
JUDGMENT