

In Re: Paramount Biotech

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Court : SEBI Securities and Exchange Board of India or Securities Appellate Tribunal SAT

Decided On : Jan-28-2005

Judge : G Bajpai

Appellant : In Re: Paramount Biotech

Judgement :

1. Securities and Exchange Board of India (hereinafter referred to as SEBI) was established for the protection of investors in securities and to promote the development of and to regulate the securities market and for matters connected therewith and incidental thereto. Section 11 of SEBI Act, 1992 deals with powers and functions of the Board.

Sub-section (1) of Section 11 of SEBI Act provides that subject to the provisions of this Act, it shall be the duty of the Board to protect the interests of investors in securities and to promote the development of, and to regulate the securities market, by such measures as it thinks fit. Section 11(2)(c) of SEBI Act, 'inter alia' provides for registration and regulation of the working of venture capital funds and collective investment schemes, including mutual funds.

2. It came to the notice of the Government of India that there were entities which were issuing instruments such as agro bonds, plantation bonds etc. against the investments by offering very high rate of return not consistent with the normal returns in such schemes. Such entities mobilised huge amount from public and then misutilised the funds collected for the purposes not disclosed at the time of

inviting investment, thereby causing loss not only to the investors, who lost their life savings with such unscrupulous entities, but also eroded confidence of the general public. The Central Government was concerned with the high element of risk of the investors associated with such schemes and therefore, felt it necessary to set up an appropriate Regulatory framework to regulate such entities. In order to protect the interest of the investors and also for ensuring that only legitimate investment activities are carried on, the Central Government by its Press Release dated 18th November, 1997 communicated its decision that the schemes through which instruments such as agro bonds, plantation bonds etc. are issued by entities would be treated as Collective Investment Schemes (hereinafter referred to as CIS) coming under the provisions of SEBI Act, 1992 and directed SEBI to formulate Regulations for the purpose of regulating the Collective Investment Schemes.

3. Pursuant to the above, SEBI (Collective Investment Schemes) Regulations, 1999 (hereinafter referred to as the "said Regulations") were notified on 15.10.1999.

4. As per the said Regulations, any person, who immediately prior to the commencement thereof was operating a Collective Investment Scheme, was required to make an application to SEBI for grant of registration within a period of two months from the date of notification. Regulation 68 of the said Regulations specifically provides that any person who has been operating a Collective Investment Scheme at the time of commencement of these regulations shall be deemed to be an existing Collective investment scheme and shall also comply with the provisions of the chapter. By way of an Explanation to this provision the expression "Operating a Collective Investment Scheme" has been explained to include carrying out the obligations undertaken in the various documents entered into with the investors who have subscribed to the scheme. SEBI having regard to the interests of the investors and requests received from various entities, extended the last date for submitting of applications by existing schemes upto March 31, 2000 and the same was intimated by SEBI vide a press release and a public notice.

5. In terms of Regulation 69 of the said regulations no existing Collective Investment Scheme can launch any new scheme or raise money from the investors even under the existing schemes, unless a certificate of registration is granted to it by the Board.

6. As per regulation 73(1) of the said Regulations an existing Collective Investment Scheme which has failed to make an application for registration with SEBI or has not been granted provisional registration or having obtained provisional registration, fails to comply with the provisions of Regulation 71, is required to wind up the existing scheme(s) and repay the investors. Further as per Regulation 74, an existing Collective Investment Scheme which is not desirous of obtaining provisional registration from SEBI is required to formulate a scheme of repayment and make such repayment to the existing investors in the manner specified in Regulation 73.

7. SEBI by way of public notice dated December 10, 1999, intimated to all existing Collective Investment Schemes that in terms of Regulation 73(1), in case an existing collective investment scheme fails to make an application for registration with SEBI, it has to wind up the existing schemes and repay the investors. It was further informed that in terms of Regulation 73(2) an Information Memorandum was to be sent to all the investors detailing the state of affairs of the scheme(s), the amount payable to each investor and the manner in which such amount is determined. Regulatory requirement of sending Information Memorandum, repayment and filing up of detailed report as per SEBI's format was also brought to the notice of existing Collective Investment Schemes vide SEBI Public Notice published on 22.02.2000. Public Notice drawing attention of investors/existing Collective Investment Schemes was published on 27.3.2000 inter-alia, informing the entities, who had not made an application for grant of registration or were not desirous of obtaining provisional registration, that the last date to make repayment pursuant to the winding up was 28.5.2000.

8. M/s Paramount Biotech Industries Limited (hereinafter referred to as Paramount/company) did not file an application for grant of registration with SEBI but instead filed a Writ Petition No. CWP No.51911/99 before the Hon'ble High

Court of Judicature at Allahabad challenging, inter-alia, the vires of the SEBI Act, 1992 and the SEBI (Collective Investment Scheme) Regulations, 1999 and certain provisions of Securities Laws (Amendments) Act, 1999. Paramount also contested that its schemes were not in the nature of CIS. The Hon'ble Allahabad High Court, vide Order dated 25.11.2003, while dismissing the Writ Petition, upheld the vires of the SEBI Act, Regulations and the Amendment Act held that as far as the schemes of the Paramount were concerned, it was for SEBI to investigate and decide as to whether the schemes in question were CIS or not. The Hon'ble Allahabad High Court also held that the petitioner should not have any grievance as it has remedy under Section 20 of SEBI Act, if it is aggrieved by the order of SEBI. Subsequently, the Review Petition filed by Paramount before the Hon'ble Court was also dismissed.

9. Pursuant to the dismissal of the Writ Petition by the Hon'ble High Court, a Show cause notice dated July 19, 2004 was issued to Paramount.

In reply to the same, vide its letter dated 11.08.2004, Paramount submitted that it was not possible to place the unpaid amounts in separate investors in the name of each investor, as advised by SEBI. It was thereafter advised vide SEBI letter dated 25.08.2004 that it may make separate FDs for amounts due to each investor and submit copies of the FDs and the Winding Up and Repayment Report signed by all Directors and duly certified by the statutory auditors along with an affidavit that the amounts so placed in FDs shall not be alienated for any other purpose except to repay the investors. Paramount vide its letter dated 17.09.2004 stated that the Statutory Auditor's certificate with respect to the funds mobilized / repaid and copies of the FDs in respect of investors whose current addresses were not available would be submitted to SEBI shortly. However, the statutory Winding Up & Repayment Report has not been submitted by Paramount till date. Paramount requested for a personal hearing before Chairman, SEBI., which was granted on November 11, 2004.

10. During the Hearing, Paramount made oral submissions to the effect that it intended to continue with its business of sale and purchase of land and sought liberty to file additional written submissions. As requested, further period of 15

days was granted to Paramount for this purpose. Paramount filed detailed written submissions dated 25.11.04.

The submissions of Paramount made on 11.11.2004 & 25.11.2004 are briefly discussed below: That the company has been into two agricultural related businesses namely (a) collective hybrid hi-tech agro farming/plantation projects (b) sale & purchase of agricultural land and related services.

That the first business has been adjudicated upon by the Hon'ble Allahabad High Court vide Order dated 25.11.2003. That the second business has to be examined by SEBI as to whether it is CIS or not.

That with respect to the agro farming business, out of the total amount of Rs 2.36 crores mobilized (approx), Rs 2.30 crores (approx) have been repaid and that they had not been able to put the balance amounts in separate FDs but could give an undertaking that as and when it was contacted by these investors/Joint Venture Associates, the due amount would be paid immediately.

That with respect to the business of sale and purchase of agricultural land, the same could not be termed as CIS within the meaning of Section 11AA of the SEBI Act, 1992 for the following reasons: - The said business did not fulfil any of the conditions mentioned in Clauses (i) to (iv) of sub section 2 of Section 11AA of the SEBI Act, 1992.

- There was no pooling of the payments made by the purchasers. It was the cost of the property which was paid by the purchaser for buying the property which was already owned by the company. Each purchaser individually paid a fixed amount towards sale consideration of the land/plot allotted to him, whereafter sale deed was executed and registered in his favour.

- That in their line of business, it could never be termed that the investor/purchaser makes contribution or payment with a view to receive profits, income, produce or property. That the company after having sold the land only renders its expert services for the development of the said land. That the term "receiving" and "buying" of property have different connotations.

- That the purchaser, right from day one, has full right over his property and it is his sweet will whether to hire the services of the company for development or not. That engaging the company as a service provider did not restrict the purchaser/owner in any way from his rights as owner.
- That there was no deprivation of the purchaser from day- to-day control over the management of his property.
- Various provisions of the agreement were quoted to support their aforesaid submissions.

That the said business of the company and the documents could not be termed as "securities" within the meaning of Section 2 (h) of the Securities Contracts (Regulation) Act, 1956. That the said documents like sale deed, agreement etc. could not be traded in the Stock Exchanges as contemplated in Regulation 36 of the said Regulations.

The SEBI Act, 1992, the Securities Contracts (Regulation) Act, 1956 and the said Regulations were not applicable on the aforesaid activities of the company.

That even in this business of sale and purchase of agricultural land, they had returned the money to some of the purchasers who had so desired.

That the company has more than 100 acres of land at Bareilly and Garhmukteshwar where agriculture, floriculture and plantation activities were being carried out and that in case of action by SEBI, efforts of the company would go in vain.

That the company, if so directed by SEBI, was ready to follow the procedure as prescribed in Regulation 73 & 74 for winding up the said business provided its agriculture, floriculture and plantation activities were not hampered.

In case SEBI directs, the company was ready to make amendments in any of the features of the said development agreements.

11. Paramount had admittedly not closed down the business of collective hybrid hi-tech agro farming/plantation projects in all its aspects and was under obligation

to repay the investors of the said scheme in terms of the said Regulations. Admittedly by Paramount only Rs 2.30 crores out of Rs 2.36 crores (approx) mobilized have been repaid to investors/Joint Venture Associates and dues of 63 investors still remain pending repayment. Further as Paramount was admittedly carrying out the obligations, undertaken in the documents entered into with the investors, even after the notification of the Regulations, it was incumbent upon the company to comply with the Regulations by either applying for registration under Regulation 68 or by winding up of the schemes and making repayment to the investors in terms of Regulation 74 in the manner provided under Regulation 73. Having failed to do so, Paramount has violated the provisions of the SEBI Act, 1992 and the Regulations.

12. A detailed analysis of the business of sale and purchase of agricultural land operated by the company reveals that it has all the features of Collective Investment Scheme as defined in Section 11AA of the SEBI Act. Some of the clauses of the brochure and the agreement are being reproduced below as falling under separate sub-sections of Section 11AA (2).

a) Section 11AA(2)(i): The contributions or payments made by the investors, by whatever name called, are pooled and utilized for the purposes of the scheme or arrangement.

13. The bifurcation of composite funds collected as consideration into separate heads of 'land' and 'development' and what instruments cover them has not been given. As per Clause 5 of the Agreement submitted by Paramount, "the Orchard Farms Owner(s) shall pay a consideration comprising of cost of land, its development, maintenance (for the first year) and other related services to be rendered by Paramount." Further as per Clause 6 (a) of the agreement, "considerations payable by the orchard farms owner(s) to Paramount also covers the cost of conveying the scheduled property in favour of the ORCHARD FARM OWNER(S), developing the same, planting the required sapling and other such services." Clause 6 (b) of the agreement provides that: "Paramount shall be entitled to recover the cost of maintenance for the second, third and fourth year, which cost shall be recovered by Paramount from the produce raised out of the

inter crops / filler crops raised in the schedule property." 14. These clauses clearly suggest pooling of resources collected from the investors in terms of Section 11AA (2) (i) of the SEBI Act.

b) Section 11AA(2)(ii): Contributions or payments are made to such scheme or arrangement by the investors with a view to receive profits, income, produce or property, whether movable or immovable from such scheme or arrangement.

15. It is apparent that an investor makes payment to receive property/developed farm (appreciated) at the end of the term in terms of Section 11AA (2) (ii). As per Clause 6 (b) of the Agreement, namely Cost of Maintenance for Second, Third & Fourth year, "Paramount shall be entitled to recover the cost of maintenance for the second, third and fourth year, which cost shall be recovered by the Paramount from the produce raised out of the inter-crops/filler crops raised in the schedule property. In any event the Orchard Farm owner(s) shall not be liable for the payment of the maintenance cost, nor shall he/she be entitled for any return or profit from the said crops." This implies that income generated (irrespective of quantum) during the 2nd to 4th year of the schemes which actually belongs to the investors is being taken back by the company against maintenance expenses. The recovery of this accrual by the company is over and above the consideration being charged from the investor and the transactions between Paramount and its investors cannot be termed as being characteristic of a simple sale and purchase of land.

16. The Company in its brochure has been indicating "Projected appreciation of the land value" as per tables given therein. Based on these projections, investors were enticed by indicating high appreciation on their investment. Point No. 2 of the Main Features of the Scheme contained in the brochure under the head "Appreciation" mentions that "Regular income to the buyer after the expiry of the development / agreement period, in case he / she decides to continue undertaking Agricultural activity. This could be in addition to the appreciation in the value of the said land." Under the Head "Concept" of the brochure it is mentioned that "Paramount Group has launched a novel and unique concept, orchards and farms as a part of overall project of high tech agro and bio tech farming, where the client

becomes proud, safe and comfortable owner of his / her own orchard or mini farm. Only that, the orchard or the farm offered by us will be real, real piece of the 'Real Estate' which could be encashed, at appreciated value, as per the prevailing market rate at any particular point of time." 17. Under the head "Business Model" it is mentioned that "the agricultural lands in question are semi - developed and therefore offered at relatively lower price to the prospective buyers. We would do value addition to the land by developing the land by using modern scientific techniques of ploughing, manuring and enriching the soil by strategic cropping and would also plant high yield long term plants and fruit bearing trees etc. The customer shall not be entitled to any yield or profit during the currency of the agreement as whatever yield or income comes to the company to take care of various crops and profits etc. However, after the expiry of the agreement the customer is exclusively entitled for all value additions or appreciation in the value of his / her property as well as any produce or revenue generated out of it through his efforts." 18. These clauses clearly suggest that investors make contributions or payments to the scheme or arrangement with a view to receive profits, income, produce or property, as provided under Section 11AA(2)(ii) of the SEBI Act, 1992.

c) Section 11AA(2)(iii): the property, the contribution or investment forming part of scheme or arrangement, whether identifiable or not, is managed on behalf of the investors; d) Section 11AA(2)(iv): the investors do not have day to day control over the management and operation of the scheme or arrangement.

19. As per sample agreement it is stated that the Paramount is engaged in the business of providing its expert services by selling, developing and maintaining agricultural land at various places, that the said projects envisaged by Paramount under the above referred business covers large extent of lands to be developed into value added agricultural land and referred to therein as ORCHARD FARMS and that the Orchard - Farm Owner(s) by application, which is the basis of this agreement have expressed the desire of purchasing the said land with a request to Paramount to provide its services of developing the same into an ORCHARD FARMS by rendering various services.

20. Under Clause 13 : "Right and Discretion of Paramount with reference to Development and Maintenance of Schedule Property" it is provided that Paramount shall have absolute right and discretion with reference to the development of the Schedule Property, to do / decide on the following during the period of this agreement: vi) Quantity / quality / method of providing / applying fertilizers / pesticides etc.

viii) Type / nature / manner of periodical care and protection to be taken while providing its services.

ix) Quantity / quality with reference to workers / supervisors / technical advisors /consultants / person to be employed / engaged.

21. Clause 14 relating to "Inter crops and Filler Crops" states that Paramount shall explore all possibilities after considering the nature of soil and strategic crops and availability of water for raising suitable inter crops / filler crops for enriching the soil of the schedule property to facilitate realization of maintenance cost for the second, third and fourth year as detailed in Clause 6(b). Paramount shall exclusively be entitled for the entire income from and out of inter crops / filler crops. In view of this it is agreed between Paramount & Orchard Farms Owners that it is not necessary for Paramount to render any accounts in respect of inter crops /filler crops. It is further agreed that the Orchard Farms Owner(s) shall not be entitled for any returns out of these crops nor shall he/she/they be liable to pay or compensate for any amounts for maintenance etc to Paramount.

22. The brochure of the company under the head "Our Offer & Your Investment" reads : "The offer is unique because though you do not sow, yet you still reap the fruit of your land. Once you have invested and purchased the said land, you need not worry about the hassles of developing the land and can continue with your routine business /activity while the land is supervised and developed by the experts of Paramount".

23. This indicates that all major decisions regarding the development, maintenance, plantation and sale of produce during the tenure of the scheme are being taken by the company. Thus it is clear that the scheme property is managed

by the company on behalf of investors and as such the investors do not have day to day control over the management and operation of the scheme in terms of Section 11AA (2)(iii) & (iv) of SEBI Act.

24. Further, while the sale deed executed by the company covers consideration paid towards the cost of the land, it is not clarified which instrument, if any, covers the investors interests for the development part during the currency of the agreement. During the hearing before me, the company has admitted that no investor has agreed solely for purchase of property without opting for the development component. Furthermore there is no segregation of the components of consideration paid by an investor/Orchard Farms Owner into separate heads of value of land and development costs and there is practically no option for mere purchase of land without development thereof.

25. Therefore, I am of the view that the present schemes have all the features of CIS as defined in Section 11 AA of the SEBI Act, 1992 and Paramount was under an obligation to comply with the provisions of SEBI Act, 1992 and the SEBI (CIS) Regulations, 1999. By non-compliance, Paramount has made itself liable for appropriate action under SEBI Act read with the Regulations.

26. Further it is their own contention that in the agro farming business, which has been adjudicated by the Hon'ble High Court of Allahabad as being CIS, out of the total amount of Rs 2.36 crores mobilized (approx), Rs 2.30 crores (approx) have been repaid so far and that they have not been able to put the balance amounts in separate FDs but could give an undertaking that as and when it is contacted by these investors/Joint Venture Associates, the due amount would be paid immediately.

27. It had been claimed by Paramount before the Hon'ble High Court of Allahabad that it had repaid to all the investors as per the understanding reached between the company/Paramount and the investors.

Therefore the claim of Paramount is obviously contradictory and cannot be accepted. It is seen that the company has neither completed repayments to the investors nor has wound up its scheme in accordance with Regulation 74 of the

said Regulations. Further, on completion of winding up and repayment, a report in this regard, duly certified by the statutory auditors and signed by all the directors was required to be filed with SEBI, which the company has failed to comply with.

28. I have carefully considered the facts and circumstances of the case and the submissions made on behalf of Paramount. In light of the findings recorded hereinabove, I am of the considered view that both the businesses/schemes floated by Paramount fall squarely within the definition of Collective Investment Scheme as defined under Section 11AA of SEBI Act, 1992. Therefore, Paramount was required to comply with the provisions of the SEBI Act, 1992 and the SEBI (Collective Investment Schemes) Regulations, 1999.

29. In the Written Submissions filed by Paramount before me it has been contended that it was ready to follow the procedure as prescribed in Regulations 73 & 74 of the Regulations for winding up the said business provided its agriculture, floriculture and plantation activities are not hampered. Further that Paramount was ready to make amendments in any of the features of the said development agreement (pertaining to the current business of sale and purchase of agricultural land), if SEBI directed. In this regard it is pertinent to state that a conditional or selective compliance of provisions of the said Regulations cannot be accepted since the Regulations are required to be complied with in entirety. It is not for SEBI to suggest amendments to agreements of the company so as to make them compliant with the Regulations.

30. Regarding the contention of Paramount that the documents issued by the company cannot be termed as "Securities" within the meaning of Section 2 (h) of the Securities Contracts (Regulation) Act, 1956, I am of the view that the documents like sale deed and agreement to sell are only cover-up for the underlying transactions/activities of the company which are in the nature of CIS. I am fortified by the judgement pronounced by the Hon'ble High Court of Punjab & Haryana at Chandigarh, in the case of PGF Limited v. UOI and Ors. where the Hon'ble Court had the opportunity of examining and analysing in depth similar documents i.e. sale deeds and agreements to sell and had observed as under: ".....The impracticality, for the vendee to put the agricultural land purchased by

him, for use as agricultural land, is obvious from the fact that the land is inaccessible for agricultural purposes. It would not be possible for any four-wheeled vehicle, be it a bullock cart, a tractor, a tempo, or a truck, to ply on a 5 feet wide road (by which the land purchased by the vendor is bound), without trespassing over a private adjoining property.The absurdity of the situation is demonstrated from the practical impossibility of utilizing the land for agricultural purposes. PGFL admittedly allured the customer/investor into the purchase in question, by describing the land as agricultural land. The very fact that it would be practically impossible to carry the required inputs to, the agricultural land purchased by the customer/investor/vendee, or even, to carry away the agricultural produce emerging therefrom, leads one to conclude that the land sold to the customer/investor by the PGFL, does not satisfy the accepted norms for effective utilization of land, as agricultural land.The closer one examines the terms and conditions of sale and purchase documents, between the PGFL and its customers/investors, the more one realizes that the transactions in question are merely a paper transactions." 31. Having considered the facts and circumstances of the case, submissions made by Paramount and non-compliance of the Regulations, I, in exercise of the powers conferred upon me under Section 11B and 11 (4) of the SEBI Act, 1992, r/w Regulation 65 of the said Regulations, hereby direct Paramount neither to collect any money from investors nor to launch any new schemes and further direct Paramount to refund the money collected under the scheme(s) with returns which is due to the investors as per the terms of the offer within a period of one month from the date of this order failing which SEBI may initiate the following actions against Paramount, as available under SEBI Act and SEBI (Collective Investment Scheme) Regulations, 1999: 1. Initiating prosecution under section 24 of SEBI Act, 1992 against the company/its promoters/directors/managers/persons in charge of the business of its scheme.

2. Debarring the company/its promoters/ directors/managers/persons in charge of the business of its scheme from operating in the capital market for a period of 5 years.

3. Writing to the state governments/local police to register civil/criminal cases against the company for apparent offences of fraud, cheating, criminal breach of

trust and misappropriation of public funds.

4. Writing to the Department of Company Affairs to initiate the process of winding up of the company.

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