BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved On: 16.09.2019
Date of Decision : 25.09.2019

Appeal No. 220 of 2017

Dr. Uppal Devinder Kumar
58B, Raghunanth Enclave,
Aggar Nagar A,
Ludhiana, Punjab …Appellant

Versus

Securities and Exchange Board of India,
SEBI Bhavan, Plot No. C-4A, G-Block,
Bandra-Kurla Complex, Bandra (East),
Mumbai - 400 051 …Respondent

Mr. Somasekhar Sundaresan, Advocate with Mr. Paras Parekh and Mr. Robin Shah, Advocates i/b Parinam Law Associates for the Appellant.

Mr. Shyam Mehta, Senior Advocate with Mr. Mihir Mody and Mr. Sushant Yadav, Advocates i/b K. Ashar & Co. for the Respondent.

CORAM: Justice Tarun Agarwala, Presiding Officer
Dr. C.K.G. Nair, Member
Justice M. T. Joshi, Judicial Member

Per: Justice Tarun Agarwala

1. The facts leading to the filing of the appeal is that PACL Limited is a real estate company involved in the sale and purchase of agricultural land. The said company mobilised

funds from the general public by sponsoring a scheme which was in fact a Collective Investment Scheme without obtaining registration from Securities and Exchange Board of India ("SEBI" for convenience). SEBI conducted an investigation into the affairs of PACL Limited and eventually a show cause notice was issued in the year 2013 for violation of the SEBI (Collective Investment Schemes) Regulations, 1999 ("CIS Regulations, 1999" for convenience) and Section 12 (1B) of the SEBI Act, 1992. Based on the show cause notice an order dated August 22, 2014 was passed by SEBI under Section 11 & 11B of the SEBI Act directing the company to refund the amount collected under the Collective Investment Schemes ("CIS") and further restrained the directors including the appellant from accessing the securities market till such time the amount was refunded. The Company and other Directors filed an appeal before this Tribunal which was dismissed by judgement dated August 12, 2015. The appellant did not file any appeal against the order of SEBI dated August 22, 2014.

2. Penalty proceedings were also initiated against the Company and its Directors. The Adjudicating Officer ("AO" for convenience) of SEBI passed an order dated September 22, 2015 against the Company and its Directors imposing a penalty

of ₹ 7269.49 crores to be paid jointly and severally by the Company and its Directors. The AO found that the said directors were at the helm of the affairs in the collection of the monies under CIS and were also directly involved and instrumental in the implementation of the scheme and collection of the monies. The appellant was not a party in these proceedings.

3. However, a separate show cause notice dated February 11, 2015 was issued to the appellant to show cause as to why penalty should not be imposed for violating the CIS Regulations, 1999 as he was a director for a short period of 50 days from August 10, 1998 to September 29, 1998. The AO after considering the response of the appellant issued an order dated February 02, 2016 imposing a penalty of ₹ 2,31,50,000/- upon the appellant. The appellant being aggrieved by the said order filed an appeal contending vehemently that he was never appointed as a director and thus could not be made liable for the wrongs committed by the company. The Tribunal by an order dated June 23, 2016 allowed the appeal and set aside the order of the AO. The Tribunal remitted the matter back to the AO with a direction to decide the matter afresh and record a specific finding as to whether the appellant had acted as a director.

4. Based on the order of this Tribunal proceedings were again initiated and after considering the reply of the appellant a fresh order dated June 12, 2017 was passed imposing a penalty of ₹ 1 crore. The appellant being aggrieved by the said order has filed the present appeal.

5. We have heard Shri Somasekhar Sundaresan, Advocate for the appellant and Shri Shyam Mehta, Senior Advocate for the respondent.

6. The appellant contended before the AO that he was not appointed as a director and was only appointed as a consultant, as he was horticulturist and was an expert in this field. For his consultation he was paid a nominal sum of ₹ 5,000/- per month. The AO found that there was enough evidence to show that the appellant was appointed as a director in the company. There are letters issued by the company to the Registrar of Companies ("RoC" for convenience) along with Form 32 intimating the appellants' appointment as a director in the company. Further, the annual return for the period in question also shows the name of the appellant as a director. These documents are in the public domain which are not disputed. The appellant however made a feeble attempt to dispute the veracity of these documents by

making an application for cross examination which was rejected. It was thus contended that had an opportunity been granted it would have been proved that the appellant never gave his consent for being appointed as a director. Such contention in our opinion is bereft of merit in as much as the documents which had been sent by the company to the RoC's have not been disputed. The question of allowing cross examination thus does not arise.

7. Before us a new stand has been taken by the appellant that he has now turned 79 years and has no memory of having consented to be on the Board of Directors of the company. Such contention cannot be raised by the appellant at this stage. Having considered the show cause notice and the documents that has been brought on record, it becomes clear that the appellant was appointed as a director though for a brief period from August 10, 1998 to September 29, 1998.

8. The appellant has been penalized a sum of ₹ 1 crore for sponsoring the scheme and for being instrumental in carrying out that scheme without registration under Regulations 3 & 4 of the CIS Regulations, 1999. Even though a categorical finding has been given that the appellant was a director only for 50

days, the appellant has however been made responsible for sponsoring the scheme and for being instrumental in carrying out the scheme. In our opinion, these findings are perverse and against the material available on record.

9. Before proceeding further, it would be appropriate to refer to the provisions of Section 12 (1B) of the SEBI Act and Regulations 3 & 4 of the CIS Regulations, 1999 which are extracted hereunder:

> *Section 12(1B) "No person shall sponsor or cause to be sponsored or carry on or caused to be carried on any venture capital funds or collective investment schemes including mutual funds, unless he obtains a certificate of registration from the Board in accordance with the regulations:*
>
> *Provided that any person sponsoring or causing to be sponsored, carrying or causing to be carried on any venture capital funds or collective investment schemes operating in the securities market immediately before the commencement of the Securities Laws (Amendment) Act, 1995, for which no certificate of registration was required prior to such commencement, may continue to operate till such*

time regulations are made under clause (d) of sub-section (2) of section 30.

Explanation- For the removal of doubts, it is hereby declared that, for 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."

Regulations 3 & 4 of the CIS Regulations, 1999

"No Person Other than Collective Investment Management Company to Launch [collective investment scheme]

3. No person other than a Collective Investment Management Company which has obtained a certificate under these regulations shall carry on or sponsor or launch a collective investment scheme.

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."

10. A perusal of Section 12(1B) clearly indicates that it was inserted by Act 9 of 1995 w.e.f. 25.01.1995. It provides that no person shall sponsor or cause to be sponsored or carry on or cause to be carried on any collective investment scheme, unless he obtains a certificate of registration from the Board in accordance with the regulations.

11. According to Shorter Oxford Dictionary 6th edition "sponsor" means a person taking responsibility or standing surety for another; contribute to or bear the expenses of an event; support in a fund-raising activity by pledging money in advance. / Black's Law Dictionary 6th edition defines "sponsor" as a surety; one who makes a promise or gives security for another, particularly a godfather in baptism. In the civil law, one who intervenes for another voluntarily and without being requested.

12. From the aforesaid, it is clear that the appellant has not made a promise or given surety for another. The appellant has not sponsored not pledged any money in advance. There is no evidence to indicate that he had contributed to bear the expenses of the scheme in return for some gain. Section 12(1B) read with Regulations 3 & 4 further states that no person shall carry on or

cause to be carried on any collective investment scheme. There is no specific finding by the AO that the appellant was involved in carrying on the CIS or was involved in the execution of the scheme or was involved in the collection of the money pursuant to the scheme. There is no evidence brought on record to show that the appellant attended any meeting of the Board of Directors nor there is any document to show that the appellant had any role at all in connection with the CIS or sponsoring a CIS or being responsible for the registration of the CIS. In fact, the evidence on the record is writ large, namely, that the scheme was launched/ sponsored and executed by other directors of the company prior to the appointment of the appellant as a director. The AO in its order dated 22.09.2015 while penalizing other directors to a sum of ₹ 7269 crores has given a categorical finding that the said directors were directly involved in the initiation and sponsoring of the scheme and were directly instrumental in the collection of the monies. In the instant case, in so far as the appellant is concerned, there is no evidence at all to show that the appellant was instrumental either in the launching on the CIS or collection of the money. The finding of the AO in paragraph 27 of the impugned order that he had sponsored and carried on the CIS and was instrumental for the violation committed for 2315 days is patently based on surmises

and conjectures. Thus, we are of the opinion, that in the absence of any documentary evidence the AO was not justified in holding that the appellant had sponsored or carried on the CIS or was instrumental in the collection of the monies pursuant to the scheme especially when the AO has specifically recorded that month wise mobilization of the companies was not available.

13. In ***Sayanti Sen vs. SEBI (Appeal No. 163 of 2018 decided on 09.08.2019)*** the Tribunal held:

> *"12. The usual pattern in economic legislations is that when an offence is committed by a company, the liability is not imposed on all the officers of the company en bloc. Those who are guilty are generally sorted out from those who are not guilty. The Companies Act, however, makes a slight departure from this conventional pattern. It gives an opportunity to the board of directors to distribute the work as between the members of the board or to appoint a managerial person like managing director or whole time director or manager. If nothing of this sort is done, only then the whole board is liable to be prosecuted.*
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> *13. As per Section 5 of the Companies Act it becomes clear that a managing director, whole time director, manager, secretary and any person*

who has been authorized by the board or by any director are now officers in default. Section 5(g) of the Companies Act makes it apparently clear that if there is a managing director appointed in a company, he would be an officer in default. Further, in the absence of any managing director, if the board has specified any particular director or manager or any other person as an officer in default in which case only that specified director or manager etc. as the case may be would be an officer in default.

14. Section 5(g) of the Companies Act further provides that apart from the directors any officer can also be penalized if his role can be attributed to be an officer in default. If any officer has played some role in bringing about the default or he might have performed the duties assigned to him then he could be penalized as an officer in default. Section 5(g) of the Companies Act thus makes it clear that in the absence of any managing director or any specific order of a board, then by a deeming fiction, all the directors of the company would be officers in default."

Thus, if a company is liable to refund the monies received from the investors and if the company fails to pay the amount then the amount can be recovered jointly and severally from every Director of the Company who is an officer in default.

Therefore, when the company is the offender, the vicarious liability of the acts of the Directors cannot be computed automatically. The contention that being a Director of the Company the appellant cannot disown his responsibility for the acts of the Company is misconceived. It is not possible to lay down any hard and fast rule as to when a Director would be vicariously responsible for the acts as a Director in charge of day-to-day affairs of the Company. However a finding has to be arrived at that the appellant was responsible for the day-to-day affairs of the Company and was involved in the collection of the monies and in the implementation of the schemes. In our view, it is not necessary that every director is required to be penalized merely because he is a director on the ground that he was deemed to responsible for the affairs of the company. If the director can explain that he had no role to play in the alleged default or that he was not responsible for the affairs of the company in which case penalty could not be fastened upon him on the mere ground that he was a director.

14. In ***Pritha Bag vs. SEBI (Appeal No. 291 of 2017 decided on 14.02.2019)*** this Tribunal held that in the absence any finding that the appellant was entrusted to discharge his functions contained in Section 73 of the Companies Act and in

the absence of any material to show that the said appellant was entrusted to discharge as an officer in default as set out in Clauses (a) to (c) of Section 5 of the Companies Act, the said appellant could not be penalized under Section 73(2) of the Companies Act. The said decision is squarely applicable in the instant case.

15. In ***SEBI vs. Gaurav Varshney, (2016) 14 SCC 430*** the Supreme Court held that 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 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.

16. In the instant case, a penalty of ₹ 1 crore has been imposed which is wholly excessive and against the provision of Section 15D of the SEBI Act. Section 15D which was applicable at the point of time when the appellant was a director is extracted hereunder:

> ***15D.*** *If any person, who is—*
> *"(a) required under this Act or any rules or regulations made thereunder to obtain a certificate of registration from the Board for sponsoring or carrying on any collective investment scheme, including mutual funds, sponsors or carries on any collective investment scheme, including mutual funds, without obtaining such certificate of registration, he shall be liable to a penalty not exceeding ten thousand rupees for each day during which he carries on any such collective investment scheme including mutual funds, or then lakh rupees whichever is higher."*

A perusal of the aforesaid provision indicates that a maximum penalty of ₹ 10,000/- for each day could be imposed. The appellant was a director only for 50 days and if a maximum penalty of ₹ 10,000/- per day is taken into consideration then a

maximum penalty of ₹ 5 lakhs could be imposed. By no stretch of imagination a penalty of ₹ 1 crore could be imposed.

17. In view of the aforesaid, we are of the opinion that the AO by a separate order has already given a finding that the Company and its Directors were directly responsible for sponsoring the CIS without registration and were instrumental in generating the monies through this scheme in violation of the Regulations and the Act. The AO has already imposed penalties against the Company and the said Directors. The appellant in the instant case no doubt was a director only for a period of 50 days and in our opinion there is no finding that he was responsible either for sponsoring the scheme or for carrying out the scheme. We have also found that he was not instrumental in the launching/ sponsoring or carrying on the scheme. Thus, no penalty could be imposed upon the appellant. In view of the aforesaid the impugned order cannot be sustained and is quashed. The appeal is allowed.

Sd/-
Justice Tarun Agarwala
Presiding Officer

Sd/-
Dr. C.K.G. Nair
Member

Sd/-
Justice M. T. Joshi
Judicial Member

25.09.2019
Prepared & Compared By: PK