

(2014) 01 DEL CK 0304
In the Delhi High Court
Case No : Criminal A. No. 329 of 2010

Shalender Kaushik

APPELLANT

Vs

Securities and Exchange Board of India (SEBI) and Another

RESPONDENT

Date of Decision : 22-01-2014

Acts Referred:

Companies Act, 1956 — Section 291

Securities and Exchange Board of India Act, 1992 — Section 12 12(1B) 24 27 27(1)

Citation : (2014) 119 CLA 41 : (2014) 182 CompCas 480 : (2014) 2 CompLJ 427 : (2014) 124 SCL 209

Hon'ble Judges : V.K. Jain, J

Bench : Single Bench

Advocate : Pankaj Kumar, for the Appellant; Sanjay Mann and Mr. P.K. Pillai for R-1/SEBI, for the Respondent

Judgement

V.K. Jain, J.—Section 12(1B) of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "the Act"), which came to be inserted w.e.f. 25.1.1995, provides that no person shall sponsor or cause to be sponsored or carry on or cause to be carried on any venture capital funds or collective investment scheme (for short "CIS") including mutual funds, unless he obtains a certificate of registration from the Securities and Exchange Board of India (for short "SEBI") in accordance with the regulations. The proviso to the aforesaid sub-section, permits any person, sponsoring or causing to be sponsored, carrying or causing to be carried on any such fund or scheme operating in the security market immediately before 25.1.1995, for which no certificate of registration was required prior to the said date, to continue to operate till such time Regulations are made under clause (d) of sub-section (2) of Section 30, which to the extent it is relevant, permits SEBI to make Regulations inter alia providing for the conditions subject to which certificate of registration is to be issued, the amount of fee is to be paid for certificate of registration and the manner of suspension or cancellation of certificate of registration u/s 12 of the Act. The Securities and Exchange Board of India Regulations, 1999, (hereinafter referred to as "the

Regulations") came to be notified only on 15.10.1999. The appellants in CrI.A. Nos. 330/2010, 331/2010, 332/2010 & 334/2010, namely Mr. Brijinder Makkar, Mr. S.P. Kalia, Mr. Manoj Kapur & Smt. Sudha Mittal respectively, are the Directors of the Company, Asian Plantations Limited, and the appellant in CrI.A. No. 329/2010, Mr. Shalender Kaushik, is one of the subscribers to its Memorandum and Articles of Association.

2. Pursuant to a Government press release dated 18.11.1997, notifying that the schemes issuing instruments such as agro bonds, plantation bonds, etc. shall be treated as CIS coming under the Act, the Company vide its letter dated 26.11.1997 (Ex. CW1/1) submitted to SEBI-(1) Copy of Memorandum & Article of Association of Company, (2) Application/offer document stating terms & conditions of plans/scheme floated by the Company, (3) Investment plans giving complete details in respect of plans floated by the Company, (4) Details of funds raised through the scheme launched till date, (5) Bio data of present Directors/Sponsors, (6) Promises or assurances or assured returns made in scheme are covered in Investment Plans & application Form as per para 2 & 3.

3. Vide public notice published in the Hindustan Times on 19.12.1999 (Ex. CW1/15) SEBI intimated to all the persons operating CIS of the obligations imposed on them under Regulations 73 & 74 in case they had not applied for registration under the Regulations. Admittedly, the Company did not apply to the SEBI seeking registration under its CIS Regulations. An order dated 7.12.2000 was then passed by the Chairman, SEBI requiring the Company, to pay to its investors, as per the original terms of offer, within one (1) month of the said order. The contents of the said order were also published in the newspaper vide public notice dated 14.1.2001 (Ex. CW1/14).

Vide its letter received by SEBI on 18.3.2008 and signed by all its Directors, the Company submitted to SEBI the winding up and repayment report in terms of Regulation 73 of SEBI's CIS Regulations. Vide its letter dated 14.7.2008 (Ex. CW1/D2) SEBI pointed out certain discrepancies in the report submitted by the Company. Vide its communication dated 22.8.2008, received by SEBI on 26.8.2008 (Ex. CW1/D3), the Company submitted an explanation to SEBI. In para 2(a) of the aforesaid letter, the order passed by the Chairman of SEBI on 7.12.2000 was acknowledged and it was claimed that the said order could not be complied with since the Company had already repaid the investment till 31.3.2000.

4. Since the Company came out with its scheme after 25.1.1995 when sub-section (1B) of Section 12 of the Act came into force and also alleging contravention of Regulation 5(1) read with Regulations 68(1), 68(2), 73 & 74 of SEBI CIS Regulations, 1999, a complaint was filed before the ACMM, Delhi.

Vide impugned order dated 15.2.2010 and order on sentence dated 23.2.2010, the appellants were convicted under Sections 24 & 27 of the Act and were sentenced to pay fine of Rs. 5.00 lakh each. The appellants were also sentenced

to undergo RI for six (6) months each. They were also to undergo RI for six (6) months each in default of payment of fine. Being aggrieved the appellants are before this Court by way of these appeals.

5. Admittedly, the Company came to be incorporated on 21.9.1995, which was much after sub-section (1B) of Section 12 of the Act came to be notified. In view of the absolute bar contained in the aforesaid subsection, the Company could not have come out with any scheme, without obtaining a certificate of registration from SEBI, in accordance with its Regulations on the subject. Admittedly, no such registration was even applied for by the Company before it came out with its scheme. As far as the proviso is concerned, it is evident from its bare perusal that it applies to only those schemes which were already in operation on 25.1.1995 when Security Laws (Amendment) Act, 1995, came into force. Though really not necessary, a reference in this regard may be made to a judgment of the Allahabad High Court in Paramount Biotech Industries Limited Vs. Union of India 2003 LS (All.) 1206 where noticing that petitioner No. 1 was incorporated in 1996, and, therefore, was not carrying on business on 25.1.1995, it was held that the proviso to sub-section (1B) of Section 12 of the Act was not applicable to it and was not entitled to the benefit of the said proviso. Therefore, by coming out with its CIS, the Company contravened the provisions of Section 12(1B) of the Act which is punishable u/s 24 of the Act.

6. Regulation 74 of the SEBI CIS Regulations, which came into force on 15.10.1999, provides that an existing CIS which is not desirous of obtaining provisional registration from the Board shall formulate a scheme of repayment to the existing investors in the manner specified in Regulation 73. Moreover, Regulation 5(1) provides that if prior to the date of coming into force the Regulations, any person was running an existing collective investment scheme he should apply for grant of certificate within two months from such date. Since the scheme of the Company was in operation at the time the aforesaid Regulations came into force, the Company was under an obligation to formulate a scheme of repayment and make such repayment to its investors in terms of Regulation 73, which inter alia required the scheme to be wound up and the investors to be intimated within two (2) months from the date of receipt of intimation from SEBI, detailing the state of affairs of the scheme, the amount repayable to each investor and the manner in which such amount was determined. The information was to be sent within one (1) week from the date of the information memorandum. The information memorandum was to explicitly state that the investors desirous of continuing with the scheme shall have to give a positive consent within one (1) month from the date of the information memorandum to continue with the scheme. The payment to the investors was to be made within three (3) months from the date of the information memorandum and on completion of winding up a report as specified by the Board was to be filed with it.

7. Admittedly, the Company did not comply with the provisions of Regulation 73.

This was expressly admitted by the learned counsel for the appellants during the course of arguments. Even otherwise, this is not the case of the appellants that the Company had sent information memorandum to the investors within two (2) months from the date of receipt of intimation from SEBI, and such memorandum detail the state of affairs of the scheme, the amount repayable to each investor and the manner in which such amount was determined. A perusal of the report Ex. CW1/D1 submitted by the appellants to SEBI does not show compliance with the provisions of Regulation 73. In fact, the report does not even indicate that the information memorandum was sent to the investors, nor does it show when the alleged payment was made to them. As noted earlier, the information memorandum was to be sent within two (2) months from the receipt of intimation from SEBI and the payment was to be made within three (3) months from the date of the information memorandum. Clause 3 of Annexure A to the report required the Company to indicate the date of sending the information memorandum. No date, however, is given against the said clause and it is stated that the terms of Regulation 73 was not made as the management itself decided to wind up the Company and start repayment of investors' money. The alleged decision of the management to wind up the Company and start repayment did not relieve the Company of its obligations under the Regulations to send information to the investors within two (2) months from the date of receipt of intimation from SEBI. Therefore, there was a clear contravention of the Regulations by the Company. Moreover, admittedly, interest was not paid by the Company to its investors. The Company, in my opinion, was required to refund not only the principal amount but also interest on that amount in terms of the scheme and, therefore, it contravened the provisions of the Regulation, also by not paying interest to the investors.

8. As rightly pointed out by the learned counsel for SEBI, the purpose of submitting wind up and repayment report to SEBI is to enable SEBI to verify whether the Company had actually complied with the provisions of the Regulations or not. For this purpose SEBI was entitled to call for the record of the Company to satisfy itself that the payment as alleged in the report had actually been made to the investors. Admittedly, no documentary evidence of payment even of the principal amount to the investors was furnished by the Company to SEBI. As noted in its letter dated 14.7.2008, SEBI could appoint an independent auditor for verification of claims of repayment at the cost of the Company. In fact, even the report submitted to SEBI did not conform to the Regulations since it was not signed by one of the Directors, namely, Mr. Ashwani Berry.

9. Since the Company contravened the provisions of Regulations 73 & 74 of SEBI CIS Regulations, it was rightly convicted u/s 24 of the Act for contravention of the said Regulations.

10. Coming to the vicarious liability of the Directors of the Company, the question which comes up for consideration is as to whether the individual appellants before this Court, at the time the provisions of Section 12(1B) and

CIS Regulations were contravened by the Company, were in-charge of and responsible to the Company for conduct of its business or not. Of Course, even if they were in-charge of and responsible to the Company for conduct of its business they would not to be guilty of commission of offence if they are able to prove that the offence by the Company was committed without their knowledge or that they had exercised all due diligence to prevent the commission of such offence. If SEBI is able to prove that the offence by the Company was committed with the consent or connivance of any of the appellants or is attributable to any neglect on their part, they shall be guilty in terms of sub-section (2) of Section 27 even if they were not persons in-charge of and responsible to the Company for conduct of its business.

11. As per the bio datas submitted by the Company along with the letter Ex. CW1/1, the appellant, S.P. Kalia was a Director of the Company looking after Personnel Management Section and day-to-day routine work of the Company; the appellant, Brijinder Makkar, was a Director taking part in policy making in respect of Agriculture Projects of the Company; the appellant, Manoj Kapur, was a Director looking after Administration and policy making; whereas the appellant Sudha Mittal was a housewife. The appellant Shalender Kaushik was one of the subscribers to its Memorandum and Articles of Association. In view of the above-referred bio datas, there can be no dispute that the appellants, S.P. Kalia, Brijinder Makkar & Manoj Kapur were in-charge of and responsible to the Company for conduct of its business. No evidence has been led by them to prove that contravention of subsection (1B) of Section 12 and CIS Regulations of SEBI was committed without their knowledge or that they had exercised all due diligence to prevent the commission of the said offence by the Company. Therefore, they have rightly been convicted u/s 24 read with Section 27(1) of the Act.

12. As regards appellant in Crl.A. No. 334/2010, Smt. Sudha Mittal, as per the bio data furnished to SEBI she was a housewife. She came in the witness box as DW1 and stated on oath that she knew nothing about the business of the Company and never attended any affairs of the Company at any point of time. In cross-examination she stated that she was not aware whether the Company had mobilized Rs. 32,37,220/- nor was she aware whether the said amount has been refunded or not. According to her she had signed some papers at the behest of Mr. Ashwani Berry, an absconding Director of the Company and she has been falsely implicated in this case. Admittedly, she was not either the Managing Director or the Executive Director of the Company. Considering the bio data provided to SEBI and deposition of Smt. Sudha Mittal on oath which could not be impeached during her cross-examination I see no reason to disbelieve her deposition and, therefore, have no hesitation in holding that SEBI has failed to prove that she was person in-charge of and responsible to the Company for conduct of its business. No evidence has been led by SEBI to prove that offence by the Company was committed with her consent or connivance or was attributable to any neglect on her part. Therefore, sub-section (2) of Section 27

of the Act is not attracted.

13. The learned counsel for SEBI drew my attention to the fact that the winding up and repayment report submitted to SEBI was inter alia signed by Smt. Sudha Mittal. That, to my mind, does not prove that she was a person in-charge of and responsible to the Company for conduct of its business since signing of the said report by all the Directors, being a statutory requirement in terms of CIS Regulations of SEBI she had no option but to sign the said report even if she was not a person in-charge of and responsible to the Company for conduct of its business.

14. The learned counsel for SEBI drew my attention to the decision of the Hon"ble Supreme Court in N. Rangachari Vs. Bharat Sanchar Nigam Ltd., , wherein the Apex Court observed that a Company though a legal entity by itself but can only act through its Directors and normally the Board of Directors act for an on behalf of the Company, as is evident from Section 291 of the Companies Act which provides that subject to the provisions of that Act, the Board of Directors of a company shall be entitled to exercise all such powers and to do all such acts and things as the company is authorized to exercise and do.

There is no quarrel with the proposition of law enunciated by the Hon"ble Supreme Court in N. Rangachari (supra) but mere being a Director of the Company does not render a person liable to conviction with the aid of Section 27 of the Act unless it is shown that such a person was also in-charge of and responsible to the Company for conduct of its business or it is proved that the offence was committed with the consent or connivance or was attributable to any neglect on the part of such a person. No such consent, connivance or neglect on the part of Smt. Sudha Mittal, however, came out during the course of her deposition and no evidence in this regard was produced by SEBI.

For the reasons stated hereinabove, the appellant, Smt. Sudha Mittal is given benefit of doubt and is hereby acquitted.

15. As far as appellant, Shalender Kaushik, in CrI.A. No. 329/2010 is concerned, admittedly, he has never been a Director of the Company and there is no evidence to show that he was in-charge of and responsible to the Company for conduct of its business. This is not the case of SEBI that the offence by the Company was committed with the consent or connivance of Mr. Shalender Kaushik and is attributable to any neglect on his part. Moreover there is no evidence of his even being a Director, Manager, Secretary or officer of the Company. Therefore, sub-section (2) of Section 27 would not apply to him. He cannot be said to be a person in-charge of and responsible to the Company for conduct of its business only because he had subscribed to its memorandum and articles of association. In fact, the learned counsel for SEBI fairly conceded during the course of arguments that the charge against him could not be established during the course of trial. Mr. Shalender Kaushik is, therefore, liable to be acquitted.

16. As regards sentence awarded to the appellants in Crl.A. Nos. 330/2010, 331/2010 & 332/2010, being Mr. Brijinder Makkar, Mr. S.P. Kalia, Mr. Manoj Kapur respectively, though it was submitted by the appellants, during the course of arguments that the principal amount stands paid to all the investors, the learned counsel for SEBI pointed out that no material in this regard was produced either before SEBI or before the trial court despite specific opportunity given for this purpose. In the absence of production of evidence which the Company must be having in its possession and, therefore, could easily have produced either before SEBI or before the trial court, the contention of the learned counsel for the appellants cannot be accepted. In fact no receipt from any investor is annexed to the report submitted to SEBI.

17. Section 24 has since been amended so as to enhance the maximum substantive sentence to ten (10) years, and to prescribe a fine up to Rs. 25.00 crore. The amendment clearly indicates the seriousness, which the Legislature attaches to such contraventions. The purpose obviously is to deter persons such as the appellants from trapping the gullible investors, by promising them returns which are unrealistic and can never be given. Any unwarranted leniency towards such persons will be highly misplaced, besides being detrimental to the larger interest of the society. In the facts & circumstances of the case, I find no good ground for reducing either the substantive sentence awarded to the individual appellants, Mr. Brijinder Makkar, Mr. S.P. Kalia, Mr. Manoj Kapur, or to reduce the fine imposed upon the aforesaid three appellants. The appeals filed by the appellants, Mr. Brijinder Makkar, Mr. S.P. Kalia, Mr. Manoj Kapur, being Crl.A. Nos. 330/2010, 331/2010 & 332/2010 respectively, are, therefore, dismissed. They are directed to surrender forthwith before the trial court. If they do not surrender forthwith, the trial court shall take steps to procure their presence and commit them to prison to undergo the sentence awarded to them. The balance amount of fine, if not already paid, shall be paid within one (1) week from today failing which the individual Mr. Brijinder Makkar, Mr. S.P. Kalia, Mr. Manoj Kapur, being appellants in Crl.A. Nos. 330/2010, 331/2010 & 332/2010 respectively, shall undergo the sentence awarded by the trial court in default of payment of fine.

Crl.A. Nos. 330/2010, 331/2010 & 332/2010 are dismissed and Crl.A. Nos. 329/2010 & 334/2010 are allowed in the aforesaid terms.