(2022) 03 SEBI CK 0035

In the Securities Appellate Tribunal Mumbai

Case No : Appeal No. 171, 172 Of 2020

Soumen Ghosh APPELLANT

Vs

G. Mahalingam RESPONDENT

Date of Decision : 07-03-2022

Acts Referred:

Citation : (2022) 03 SEBI CK 0035

Hon'ble Judges : Tarun Agarwala, Presiding Officer;M. T. Joshi, J

Bench : Division Bench

Advocate : N. M. Mookerjee, Akash Rebello, Manish Chhangani, Ravi Shekar Pandey, Samreen Fatima

Final Decision : Dismissed

Judgement

Tarun Agarwala, Presiding Officer

1. Two appeals have been filed against a common order dated January 3, 2020 passed by the Whole Time Member ("WTM" for short) of the Securities and Exchange Board of India ("SEBI" for short) are being decided together.

2. By the impugned order the appellants have been directed to wind up the collective investment scheme offered by Sumangal Industries Limited ("the Company" for short) and refund the money collected to the investors as per the final order dated July 9, 2013, failing which the Recovery Officer would proceed to recover the sums due in terms of Recovery Certificate No. 672 of 2015. The appellants were further restrained from accessing the securities market till the completion of the refund.

3. The facts leading to the filing of the present appeal is, that the Company floated a scheme called "Flexi Potato Purchase Scheme" which was found to be a collective investment scheme which was not registered under the appropriate CIS Regulations. Accordingly, an ex parte ad interim order dated April 10, 2013 was passed and subsequently a final order dated July 9, 2013 was passed holding that the Company was involved in the running of an unregistered CIS

activity. The Company filed an Appeal no. 210 of 2013 before this Tribunal admitting that the scheme was a CIS activity and sought extension of time to refund the amount to the investors. By an order of February 3, 2014 this Tribunal extended the time till January 31, 2015 to the Company to refund the amount subject to certain terms and conditions as stated in the said order. Since the amount was not refunded a Recovery Certificate No. 672 of 2015 was drawn for recovery of Rs. 85 crores.

4. The appellants filed Appeal no. 290 of 2016 and Appeal no. 313 of 2017 alleging that the final order dated July 9, 2013 was passed without giving an opportunity of hearing to the appellants. This Tribunal by separate orders dated January 9, 2017 and December 18, 2017 quashed the final order dated July 9, 2013 insofar as it related to the appellants and remitted the matter to the WTM for reconsideration. Based on the direction of this Tribunal WTM passed a fresh order dated July 25, 2018 and July 26, 2018 which was challenged before this Tribunal in Appeal no. 401 of 2018 and 402 of 2018. By an order dated September 4, 2019 the orders of the WTM were set aside and the matter was again remitted to the WTM to decide the matter afresh. Based on the aforesaid directions the WTM passed the present order dated January 3, 2020.

5. We have heard Shri N. M. Mookerjee, Advocate for the Appellant and Shri Akash Rebello, the learned counsel for the respondent.

6. Admittedly, the scheme floated by the Company was a CIS which was not registered. This fact has not been disputed by the appellants and no arguments on this aspect have been raised. The only contention raised by the appellants was that they were appointed as directors for a short period. Shri Soumen Ghosh was a Director from May 23, 2012 to April 27, 2013 and Shri Kaushik Roy was a Director from January 4, 2011 to April 27, 2013. It was contended that they had never attended any meeting of the board of directors and had no knowledge of the affairs of the Company and that the entire accountability and responsibility was on the person Shri Subrata Adhikary who was looking after the affairs of the Company. This aspect was duly considered by the WTM who found that the appellants were directors of the Company and their role as directors cast a responsibility to be aware of the affairs of the Company and that the appellants had sufficient understanding of the business and affairs of the Company. It was further found that the appellants were qualified professionals and should have taken due care and caution while taking up the profession of a Director in a Company and cannot feign ignorance contending that they were not aware of the affairs of the Company nor can they place the entire blame on Shri Subrata Adhikary.

7. Having heard the learned counsel for the parties, we are of the opinion that the decision of the Supreme Court in Official Liquidator v. P.A. Tendolkar, [(1973) 1 SCC 602] is squarely applicable in the instant case wherein the Supreme Court held:-

"It is certainly a question of fact, to be determined upon the evidence in each case, whether a Director, alleged to be liable for misfeasance, had acted reasonably as well as honestly and with due diligence, so that he could not be held liable for conniving at fraud and misappropriation which takes place. A Director may be shown to be so placed and to have been so closely and so long associated personally with the management of the Company that he will be deemed to be not merely cognizant of but liable for fraud in the conduct of the business of a Company even though no specific act of dishonesty is proved against him personally. He cannot shut his eyes to what must be obvious to everyone whoexamines the affairs of the Company even superficially. If he does so he could be held liable for dereliction of duties undertaken by him and compelled to make good the losses incurred by the Company due to his neglect even if he is not shown to be guilty of participating in the commission of fraud. It is enough if his negligence is of such a character as to enable frauds to be committed and losses thereby incurred by the Company." (emphasis supplied)

8. In view of the aforesaid decision a director who is closely connected and associated with the management of the Company would be deemed liable for the fraud in the conduct of the business of a Company. Thus, it is irrelevant for this Tribunal to go into the issue as to whether any personal benefit was derived by the appellants in the scheme floated by the Company. The contention that the interim order dated April 10, 2013 cannot be made part of the show cause notice is patently erroneous. We are of the opinion that a reference to the interim order in the show cause notice does not vitiate the show cause notice. It only highlights that the Company was carrying out an unregistered CIS activity which has become final and conclusive insofar as the Company was concerned. Through the impugned show cause notice an opportunity was given to the appellants to contest this finding if so required. But in the instant case, the appellants have not disputed the fact that the Company was running a scheme which comes under the category of the CIS and was also not registered.

9. In the light of the aforesaid, we do not find any error in the impugned order. The appeal fails and is dismissed with no order as to costs.

10. The present matter was heard through video conference due to Covid-19 pandemic. At this stage it is not possible to sign a copy of this order nor a certified copy of this order could be issued by the registry. In these circumstances, this order will be digitally signed by the Private Secretary on behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Parties will act on production of a digitally signed copy sent by fax and/or email.