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S.S. Thakur Vs. Security Exchange Board of India therough Its Chai

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Court : Delhi

Decided On : Apr-28-2014

Judge : V. K. Jain

Appellant : S.S. Thakur

Respondent : Security Exchange Board of India therough Its Chai

Advocate for Pet/Ap. : Mr. Sanjay Mann, Mr. Amit Kumar, Mr. Sanjay Mann, Mr. Amit Kumar, Mr. Sanjay Mann, Mr. Sanjeev Bajaj, Mr. Sanjay Mann

Judgement :

* % + IN THE HIGH COURT OF DELHI AT NEW DELHI Date of Decision:

28. 04.2014 CRL.A. 1029/2009 S.S. THAKUR ..... Appellant Through: versus Mr. Amit Kumar, Adv. + SECURITY EXCHANGEW BOARD OF INDIA THEROUGH ITS CHAIRMAN ..... Respondent Through: Mr. Sanjay Mann, Adv. for SEBI CRL.A. 1030/2009 ROOP LAL KUNDAL ..... Appellant Through: Mr. Amit Kumar, Adv. versus + SECURITY EXCHANGE BOARD OF INDIA THROUGH: ITS CHAIRMAN ..... Respondent Through: Mr. Sanjay Mann, Adv. for SEBI CRL.A. 1031/2009 S.P. CHOUDHARY ..... Appellant Through: Mr. Amit Kumar, Adv. versus + SECURITY EXCHANGE BOARD OF INDIA THROUGH: ITS CHAIRMAN ..... Respondent Through: Mr. Sanjay Mann, Adv. for SEBI CRL.A. 24/2010 DALIP SINGH ..... Appellant Through: Mr. Sanjeev Bajaj, Adv. versus SEBI ..... Respondent Through: Mr. Sanjay Mann, Adv. for SEBI CORAM: HON'BLE MR.

JUSTICE V.K.JAIN

JUDGMENT
V.K.JAIN, J.

(ORAL) 1. These appeals are directed against the judgment dated 25.11.2009 and the Order on Sentence dated 30.11.2009 whereby the appellants were convicted under Section 24 read with Section 27 of SEBI Act, 1999 and were sentenced to undergo rigorous imprisonment for one year each and to pay fine of Rs.1 lac each or to undergo SI for six (6) months each in default.

2. 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.

3. The Securities and Exchange Board of India Regulations, 1999 (hereinafter referred to as the Regulations) came to be notified on 15.10.1999 4. SEBI vide its letter dated 10.12.1999 and 29.12.1999 and also by way of a public notice dated 10.12.1999 intimated Rim Zhim Agro Forest Limited (hereinafter referred to as the Company) of its obligation to send an Information Memo to all the investors detailing the state of affairs of its Collective Investment Scheme (for short the CIS), the amount repayable to each investor and the manner in which the said amount was determined. The information was required to be sent latest by February 28, 2000. Vide public notice dated February 22,2000, SEBI informed the company that the companies which had not applied for registration with it or were not desirous of

obtaining provisional registration were required to compulsorily wind up their existing schemes as per Regulation 73(1) of its CIS Regulations framed by it. The company however neither applied for registration nor did it take steps for winding up its Scheme and repayment to the investors in terms of the Regulations.

5. Subsequently, SEBI vide public notice dated March 31, 2000 drew attention of the company to the violations of the provisions of Section 11(1B) of the SEBI Act and Regulation 5(1) read with Regulation 68(1) 68(2), 73 and 74 of its CIS Regulations. The company did not response to the said notice and to the subsequent show cause notice. On December 2000, SEBI, in exercise of its powers under Section 11B of SEBI Act directed the company to refund the money collected under the aforesaid scheme, to the investors, within a period of one month from the date of the said directions. However, no information was given to SEBI as regards compliance of its order. Pursuant to the SEBI press release and/or notice, the Company furnished information with respect to its CIS Scheme to SEBI. The Company informed SEBI that about Rs.0.29 crores were raised by it by way of its aforesaid scheme which according to SEBI are Collective Investment Schemes (CIS). The information sent to SEBI was signed by the appellant Mr. P.S. Chaudhary, the Managing Director of the Company. Since the company had raised a total sum of Rs.0.29 crore from the investors under its CIS and failed to repay the said amount, a complaint by SEBI was filed against the company as well as by its Directors namely - Mr. P.S. Chaudhary, Mr. D.S. Thakur, Mr. S.S. Thakur, Mr. Roop Lal Kaundal, Mr. K.C. Kaundal and Mr. S.C. Mahajan.

6. SEBI examined one witness CW1 - Ms. Varsha Aggarwal and also proved documents including the letter Ex.CW1/5 which had been received from the company. No witness was examined in defence.

7. The expression Collective Investment Scheme has been defined in Section 2(ba) to mean any scheme or arrangement which satisfies the conditions specified in Section 11AA. Crl. A. Nos.1029,1030 and 1031 of 2009 &24 of 2010 provides that any scheme or arrangement made or offered by any company under which- (i) the contributions, or payment made by the investors, by whatever name called, are pooled and utilized for the purposes of the such or arrangement; (ii) the

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; (iii) the property, contribution or investment forming part of scheme or arrangement, whether identifiable or not, is managed on behalf of the investors; (iv) the investors do not have day-to-day control over the management and operation of the scheme or arrangement shall be a collective investment scheme. Though the aforesaid Section came to be inserted with effect from only 22.02.2000, the expression Collective Investment Scheme (CIS) even before the aforesaid incorporation was understood to mean any scheme, whereby funds were raised from the members of the general public for the purpose of making investment in any property.

8. Ex.CW1/2 is a letter purporting to be written by Mr. P.S. Chaudhary , Managing Director of the Company to SEBI, in response to a letter of SEBI dated 28.07.1998, seeking time till 30th September, 1998 to submit the information sought by SEBI. Ex.CW1/4 is a letter , again sent by Mr. P.S. Chaudhary on the letterhead of the company, to SEBI, certifying that they had not floated any new CIS subsequent to public notice dated 18.12.1997 and had not mobilized any further funds under their existing schemes. Ex.CW1/5 is the letter sent by Mr. P.S. Chaudhary to SEBI on the letterhead of the company, submitting copies of the offer documents, copy of the agreement being entered into with the investors, details of the funds raised in different schemes and details and background of the Directors of the company. The letter was sent in response to the letter of SEBI dated 28.07.1998. It is contended by the learned counsel for the appellants that the aforesaid documents should not be considered since they do not stand proved. It is pointed out that CW1 who is the only witness produced by the complainant SEBI has admitted that she had no personal knowledge of the matter and the aforesaid documents had been received by SEBI before her joining the said organization. I, however, find no merit in the contention. The documents formed part of the record of SEBI with respect to the Company, and were received by it from the company. It is not in dispute that Mr. P.S. Chaudhary was the Managing Director of the Company at the relevant time. In his statement under Section 313 of Cr.P.C., Mr. P.S. Chaudhary expressly admitted having written the letters Exhibits CW1/2, CW1/4 & CW1/5 to SEBI. He also admitted that the letter

Ex.CW1/5 ran into 9 pages signed by him and that he had filed the copy of the offer document, copies of the agreement with the investors, funds raised in different schemes and names, details and background of the Directors. He also admitted that as per the aforesaid documents, the total funds raised by the Company under its various schemes amounted to Rs.29,16,200/- and his co-accused Mr. D.S. Thakur, Mr. K.C. Kaundal, Mr. S.S. Thakur, Mr. Roop Lal Kaundal & Mr. S.C. Mahajan were the Directors of the Company. He also admitted that the Company did not file winding up and repayment report as per CIS Regulations and also failed to comply with the directions under Section 11(B) of the SEBI Act. In reply to question No.11, he stated that the Company was ready to return monies to the investors if anyone of those approaches its Directors, admitting thereby that the Company had not refunded the dues of all the investors. In reply to question No.13 he stated that the Company had made payment in respect of 90-95 per cent of the investors.

9. The appellant Mr. S.S. Thakur also admitted that Mr. P.S. Chaudhary was the Managing Director of the Company and the letters Exhibits CW1/2, CW1/4 & CW1/5 were sent by the Company. He also admitted that along with Ex.CW1/5, the Managing Director of the Company Shri P.S. Chaudhary had filed a copy of the offer document, copy of agreements with investors, funds raised in different schemes and the names, details and background of the Directors of the Company. He also admitted that the funds raised by the Company amounted to Rs.29,16,200/- and besides him Mr. K.C. Kaundal and Mr. S.C. Mahajan were the Directors of the Company. He also claimed that the Company had made payment to 90-95 per cent of the investors.

10. The learned counsel for the appellants submits that admission made by an accused in his statement under Section 313 of Cr.P.C. does not constitute evidence and, therefore, the documents Exhibits CW1/2, CW1/4 and CW1/5 as well as the accompanying documents cannot be said to be proved and cannot form basis of the conviction of the appellants. I, however, find no merit in the contention. The documents have come from the custody of SEBI and it has been admitted by two Directors of the Company that the aforesaid letters and documents were sent by none other than Mr. P.S. Chaudhary, Managing Director

of the Company at the relevant time. The evidence produced by SEBI in the form of the letters Exhibits CW1/2, CW1/4 and CW1/5 constitute piece of evidence and the said evidence finds corroboration from the admission made by Mr. P.S. Chaudhary and Mr. S.S. Thakur, Directors of the Company.

11. A perusal of the process issued by the Company to the prospective investors clearly shows that the Scheme floated by the Company was a Scheme meant for mobilization of funds by way of contribution of public at large and the corpus collected from the investors was sought to be invested in property with a view to share the benefits arising out of the corpus. Therefore, the Scheme of the Company was, in fact, a CIS.

12. As noted earlier sub-section (1B) came to be inserted in Section 12 of the SEBI Act w.e.f. 25.1.1995. A perusal of the information submitted by the Company would show that it raised funds from the investors w.e.f. 20.11.1995. In view of the absolute bar contained in the aforesaid sub-section, the Company could not have come out with such a 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 judgement of the Allahabad High Court in Paramount Biotech Industries Limited Vs. Union of India 2003 LawSuit (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 under Section 24 of the Act.

13. 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 69 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. Regulation 69 contains a prohibition against launching any new CIS or raising money from the investors, under the existing Scheme, without registration with SEBI. Since the scheme of the Company had not been liquidated by 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 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.

14. Ex.CW1/6 is the office copy of the letter whereby the Company was informed about its obligation to file the application for registration under the Regulations if it desired to carry on as sponsor or launching a CIS or to mobilize further funds under the existing Scheme. Ex.CW1/7 is the Public Notice dated 10.12.1999, issued by SEBI. Ex.CW1/15 is the letter whereby the order passed by the Chairman of SEBI was conveyed to the Company though it was received back undelivered. A public notice was then published by SEBI on 14.1.2001 published a list of 523 entities along with the text of directions issued under Section 11(B) of the SEBI Act read with CIS Regulations 55 & 73 of SEBI Regulations. The said notice is Ex.1/16 and the name of the Company appears in the list at serial No.370 of the aforesaid public notice.

15. There is no evidence of the Company sending the Information Memorandum to its investors, within two (2) months from the date of receipt of intimation from

SEBI. As noted earlier, the said memorandum was required to give details such as state of affairs of the scheme, the amount repayable to each investor and the manner in which the said amount was determined. No copy of the information memorandum, if any, sent to the investors has been proved by the appellant. As noted earlier, in terms of Regulation 73, the payment to the investors was to be made within three (3) months from the date of the information memorandum. This is not even the case of the appellants that the Company had actually sent information memorandum in terms of the Regulations to all its investors within two (2) months of receipt of intimation from SEBI and the said memorandum envisaged payment to the investors within three (3) months from its date.

16. It has come in the statement of Mr. P.S. Chaudhary and Mr. S.S. Thakur that the Company had made payment to 90-95 per cent of investors, but, there is no documentary proof of such payment. No investor has been produced in the witness box and no receipt or any other document evidencing such a payment was produced during trial. In any case, even as per the admission of the aforesaid two Directors there are some investors who are yet to be repaid the amount which the Company had collected from them under its CIS. By not making full payment in terms of the Regulations and the directions issued by the Chairman of SEBI, the Company contravened the provisions of the Regulations and also failed to comply with the direction issued by the Chairman of SEBI.

17. In M/s P.G.F Ltd. and others vs. Union of India and another AIR 2013 SC3702 direction was given by SEBI to a company which had collected money by way of Collective Investment Scheme, to collect any money from the investors or to launch any scheme with a further direction to refund the money collected by it within one month from the date of the order of SEBI. The aforesaid order was challenged by the appellant before the Apex Court, inter alia, on the ground that it was ultra vires of Section 11AA of SEBI Act. Rejecting the contention, the Apex Court, inter alia, held as under: 53. We, therefore, hold that Section 11AA of the SEBI Act is constitutionally valid. We also hold that the activity of the PGF Limited, namely, the sale and development of agricultural land squarely falls within the definition of collective investment schemed under Section 2(ba) read along with Section 11AA (ii) of the SEBI Act and consequently the order of the second

respondent dated 6.12.2002 is perfectly justified and there is no scope to interfere with the same. In the light of our above conclusions, the PGF Limited has to company with the direction contained in last paragraph of the order of the second respondent dated 6.12.2002. 18. It was held by this Court in Vishnu Prakash Bajpai versus Securities and Exchange Board of India 2010 (2) Crimes 394 (Del.) that the offence punishable under Section 24 of the Act is a continuous offence, till the time the company complies with the Regulations and the directions issued by SEBI by refund of money to the investors. Similar view was taken by another Bench of this Court in Samarpan Agro and Livestock Ltd. Versus SEBI2010(104) SCL584 19. For the reasons stated hereinabove, the Company has rightly been convicted for contravening sub-section (1B) of Section 12 of SEBI Act by collecting money from the investors under its CIS schemes without registration with SEBI and it also committed contravention of the provisions of Section 24 of the Act by not complying with the Regulations framed by SEBI and the directions issued by the Chairman. Therefore, no fault can be found with the conviction of the Company.

20. Coming to the vicarious liability of the appellants, the question which comes up for consideration is as to whether they, at the time the provisions of Section 12(1B) and/or CIS Regulations were contravened by the Company, they 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.

21. As far as the appellant Mr. P.S. Chaudhary, he being the Managing Director of the Company, was the person primarily concerned with managing the business of the Company. Being the Managing Director, he would be involved in day-to-day

business of the Company and raising funds from the investors under the Collective Investment Scheme floated by the Company. Therefore, he would certainly be a person in-charge of and responsible to the Company for conduct of its business. Mr. Chaudhary does not even claim that the contravention of sub section (1B) of Section 12 of SEBI Act and the CIS Regulation of SEBI was committed by the company without his knowledge or that he had exercised all due diligence to prevent the commission of the said offence by the company. In these circumstances, it can hardly be disputed that being the Managing Director and person in-charge and responsible to the Company for conduct of its business, he is vicariously liable for the contravention of the provisions of SEBI Act and the Regulations framed thereunder. Therefore, no fault can be found with his conviction.

22. However, as far as the other appellants are concerned though there is evidence in the form of the reply sent by the Company through Shri P.S. Chaudhary to show that they were Directors of the Company, there is no evidence which would show that they were also in charge of and responsible to the Company for conduct of its business. For conviction of the appellants other than Shri P.S. Chaudhary, SEBI was required to prove not only that they were Directors of the Company at the relevant time, but also that they were the persons in charge of and responsible to the Company for conduct of its business. No evidence to this effect, however, has been led by SEBI. This is also not the case of the SEBI that the offence by the Company was committed with the consent and connivance of the appellants other than Mr. P.S. Chaudhary and is attributable to some neglect on their part. In these circumstances the conviction of the appellants, Mr. D.S. Thakur, Mr. S.S. Thakur and Mr. Roop Lal Kaundal cannot be sustained.

23. For the reasons stated hereinabove appellants Mr. D.S. Thakur, Mr. S.S. Thakur and Mr. Roop Lal Kaundal are acquitted. As regards the sentence awarded to the appellant Mr. P.S. Chaudhary, considering that neither the Company nor Mr. P.S. Chaudhary produced any documentary evidence of having repaid to the investors and did not examine any investor to prove the alleged payment and also considering that admittedly all the investors do not stand paid, there is no scope for reducing the substantive sentence awarded to him. As regards the quantum of

fine, though there was no maximum fine at the relevant time, 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. Therefore, no ground made out for reducing the amount of fine imposed upon the appellant Mr. P.S. Chaudhary. The appeal filed by Mr. P.S. Chaudhary is, therefore, dismissed. He is directed to surrender forthwith before the trial court. If he does not surrender forthwith, the trial court shall take necessary steps to procure his presence and commit him to prison to undergo the sentence awarded to him. The fine imposed upon Mr. P.S. Chaudhary, unless already deposited, shall be deposited within a week. If the fine is not deposited within one (1) week, it shall be open to SEBI to take such steps as are open to it in law to recover the amount of fine. Crl. A. Nos.1029/2009, 1030/2009 & 24/2010 filed by Mr. S.S. Thakur, Mr. Roop Lal Kundal and Mr. Dalip Singh respectively are accordingly allowed. Crl. A. No.1031/2010 filed by Mr. P.S. Chaudhary is dismissed. Trial court record be sent back alognwith a copy of this order. APRIL28 2014 V.K. JAIN, J.

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