BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on: 21.06.2019

Date of Decision : 09.08.2019

Appeal No. 163 of 2018

Sayanti Sen
15C, Hindustan Park,
Ward No. – 88,
Kolkata – 700 029. ….. 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. Vinay Chauhan, Advocate with Mr. K.C. Jacob, Advocate i/b Corporate Law Chambers India for the Appellant.

Mr. Mustafa Doctor, Senior Advocate with Mr. Anubhav Ghosh, Ms. Rashi Dalmia and Mr. Abhishek Mishra, Advocates i/b The Law Point for the Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Dr. C.K.G. Nair, Member

Per : Justice Tarun Agarwala, Presiding Officer

1. Securities and Exchange Board of India ('SEBI' for short) received a complaint against Silicon Projects India Limited ('SPIL' for short) in respect of issue of Secured

Redeemable Non-Convertible Debentures ('NCDs' for short) and consequently made an investigation as to whether SPIL had made any public issue of securities without complying with the provisions of the Companies Act, 1956. On investigation, it was found that SPIL had made an offer of NCDs in the financial years 2009-10, 2010-11, 2011-12 and raised an amount of Rs. 18.03 crore from 406 allottees. This offer of NCDs was found to be in violation of the provisions of SEBI Act, 1992, the Companies Act, 1956 and SEBI (Issue and Listing of Debt Securities) Regulations, 2008 ('ILDS Regulations' for short). Accordingly, SEBI passed an order dated March 3, 2016 and issued certain directions including debarment and refund to the investors against SPIL and its Directors. Since the directions were not complied with, SEBI initiated recovery proceedings against the Company and its Directors.

2. Subsequently, it came to notice that the appellant along with Shri Shib Narayan Das and Ms. Antara Mukherjee were also Directors of SPIL during the issuance of the NCDs. SEBI also found that these persons were also engaged in fund mobilizing activity and also violated the provisions of SEBI Act, the Companies Act and ILDS Regulations and

accordingly issued an interim order dated March 7, 2016, namely:-

> *"i. The past Directors of SPIL viz. Mr. Shib Narayan Das (PAN: AGBPD7440C; DIN: 02414547), Ms. Antara Mukherjee (PAN: AWZPM5169R;DIN:02418378), Ms. Sayanti Sen (PAN: DGIPS5090H; DIN: 03442949), are prohibited from issuing prospectus or any offer document or issue advertisement for soliciting money from the public for the issue of securities, in any manner whatsoever, either directly or indirectly, till further orders;*
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> *ii. The abovementioned past Directors of SPIL are restrained from accessing the securities market and further prohibited from buying, selling or otherwise dealing in the securities market, either directly or indirectly, till further directions;*
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> *iii. The abovementioned past Directors of SPIL shall provide a full inventory of all their assets and properties."*

3. By the same interim order the appellant and the other Directors were directed to show cause as to why action should not be taken under Section 11 and 11B of the SEBI Act read with Section 73(2) of the Companies Act and Section 27(2) of the SEBI Act and why the appellant and two others should not be jointly and severally be directed to refund the money collected though the offer of NCDs along with interest and why they should be restrained from accessing the securities market etc.

4. In response to the interim order-cum-show cause notice the appellant filed a reply contending that she was appointed as a receptionist in the year 2009 on a salary of Rs. 3000/- which was increased to Rs. 4000/- in the year 2010 and, on March 2011, she was made a Director of the Company and her salary was increased to Rs. 5000/- per month. The appellant contended that she tendered her resignation as a Director on December 1, 2011 and Form 32 was filed before the Registrar of Companies. It was contended that the appellant had nothing to do with the issuance of NCDs and had never attended any meeting of the Board of Directors nor was signatory to any Resolution in relation to the issuance of NCDs. It was also stated that she was never involved in any activity of the Company. It was also brought on record that CBI investigated the case against the Company in 2016 and all the Directors including Shri Shib Narayan Das was arrested and though the appellant was questioned but was not arrested nor any charge sheet was filed against her though a charge sheet has been filed against other Directors.

5. It has also come on record that Shri Shib Narayan Das was the key person and, in his capacity of Chairman and Director of the Company used to sign all documents which

were filed before the Registrar of Companies and was also signatory to the audit report, annual report, and notice of the annual general meeting of member of the Company.

6. In the light of the aforesaid submissions the Whole Time Member ('WTM' for short) after considering the matter and after giving an opportunity of hearing passed the impugned order holding that the appellant is jointly and severally liable to refund the money collected by SPIL as she was a Director in the Company. The WTM further held that since Shri Shib Narayan Das was the key person of the Company, the recovery of the amount will be made from the assets of Shri Shib Narayan Das in the first instance and thereafter from the appellant and other Directors. The appellant being aggrieved by the aforesaid order has filed the present appeal.

7. We have heard Shri Vinay Chauhan, the learned counsel for the appellant and Shri Mustafa Doctor, the learned senior counsel for the respondent.

8. The WTM found that SPIL came out with an offer with NCDs which was in violation of Section 56, 60 read with Section 2(36), Section 73 and Section 117C of the Companies

Act read with ILDS Regulations. The WTM held that even though the appellant may not be involved in the decision making process, nonetheless, the appellant cannot wriggle out of her responsibility as a Director of the Company and plead ignorance of the affairs of the Company and therefore held that being a Director the appellant was responsible for the prospectus and for compliance of Section 56(1), 56(3) and 56(4) of the Companies Act and was liable jointly and severally under Section 73(2) of the Companies Act on the ground that every Director of the Company, were officers in default, and were liable to repay the money along with interest. The WTM further came to the conclusion that in view of Section 5(g) of the Companies Act there was no material brought on record to show that any of the officers set out in Clauses (a) to (c) of Section 5 of the Companies Act or any specified Director of the SPIL were entrusted to discharge the obligation contained in Section 73 of the Companies Act and consequently all the past and present Directors of the SPIL, as officer in default under Section 5(g) of the Companies act were liable to make refund jointly and severally along with interest.

9. In our view the order of the WTM is patently erroneous and against the provisions of Section 73(2) read with Section 5(g) of the Companies Act. The WTM has proceeded with the assumption that in the absence of any officer being nominated as an officer in default then all the Directors were liable under Section 5(g) of the Companies Act. The approach adopted by the WTM ignoring the evidence that has come on record makes the impugned order illegal and unsustainable.

10. Before proceeding further it would be essential to extract a few provisions of the Companies Act. For facility, Section 5 and Section 73 of the Companies Act is extracted hereunder:-

> ***Section 5***
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> ***"Meaning of "officer who is in default"***
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> *5. For the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any punishment or penalty, whether by way of imprisonment, fine or otherwise, the expression "officer who is in default" means all the following officers of the company, namely :*
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> *(a) the managing director or managing directors;*
>
> *(b) the whole-time director or whole-time directors;*
>
> *(c) the manager;*

(d) the secretary;

(e) any person in accordance with whose directions or instructions the Board of directors of the company is accustomed to act;

(f) any person charged by the Board with the responsibility of complying with that provision:

***Provided** that the person so charged has given his consent in this behalf to the Board;*

(g) where any company does not have any of the officers specified in clauses (a) to (c), any director or directors who may be specified by the Board in this behalf or where no director is so specified, all the directors:

***Provided** that where the Board exercises any power under clause (f) or clause (g), it shall, within thirty days of the exercise of such powers, file with the Registrar a return in the prescribed form."*

Section 73

"73. Allotment of shares and debentures to be dealt in on stock exchange

(1) Every company, intending to offer shares or debentures to the public for subscription by the issue of a prospectus shall, before such issue, make an application to one or more recognized stock exchanges for permission for the shares or debentures intending to be so offered to be dealt with in the stock exchange or each such stock exchange.

(1A) Where a prospectus, whether issued generally or not, states that an application under sub-section (1) has been made for permission for the shares or debentures offered thereby to be dealt in one or more recognised stock exchanges, such prospectus shall state the name of the stock exchange or, as the case may be, each such stock

exchange, and any allotment made on an application in pursuance of such prospectus shall, whenever made, be void, if the permission has not been granted by the stock exchange or each such stock exchange, as the case may be, before the expiry of ten weeks from the date of the closing of the subscription lists :

Provided *that where an appeal against the decision of any recognized stock exchange refusing permission for the shares or debentures to be dealt in on that stock 22 exchange has been preferred under section 22 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), such allotment shall not be void until the dismissal of the appeal.*

(2) Where the permission has not been applied under sub-section (1) or, such permission having been applied for, has not been granted as aforesaid, the company shall forthwith repay without interest all moneys received from applicants in pursuance of the prospectus, and, if any such money is not repaid within eight days after the company becomes liable to repay it, the company and every director of the company who is an officer-in-default shall, on and from the expiry of the eighth day, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent, as may be prescribed, having regard to the length of the period of delay in making the repayment of such money."

11. From a perusal of Section 73(2) of the Companies Act it is apparently clear that in the first instance it is the Company which is liable to repay the monies received from the investors and if the Company fails to repay the amount then the amount shall be recovered jointly and severally from

every Director of the Company who is an officer in default. Thus, when the Company is the offender, vicarious liability of the Directors cannot be imputed automatically. It is the cardinal principle that there can be no vicarious liability unless the statutes specifically provides for it.

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.

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.

15. In ***Agritech Hatcheries & Food Ltd. vs Valuable Steels India Pvt. Ltd., (1999) 96 Com Cases 534 (Mad)***, it has been held that where there is a managing or whole time director or a manager, it would be an abuse of the process of the court if proceedings are launched against the ordinary directors without examining their role in default. Similar view was also reiterated in ***Smt. G. Vijaylakshmi & Ors. vs. SEBI (2000)***

100 Comp Cases 726 (AP)]. The reason is not far to see. It is not necessary that every director is required to be penalized merely because he is a director on the ground that he is 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 did not perform his duties assigned to him under the agreement of his appointment, the presumption of guilt and thereafter penalty cannot be fastened upon him.

16. The Supreme Court in ***Sunil Bharti Mittal vs. Central Bureau of Investigation & Ors. in Criminal Appeal No. 35 of 2015 (arising out of Special Leave Petition (Crl.) No. 3161 of 2013)*** held that a Director can only be prosecuted if there was sufficient evidence of his active role or where the statutory regime attracts the doctrine of vicarious liability.

17. Ordinarily directors of a company are not allowed to be prosecuted under Section 220 of the Companies Act for default in filing the accounts when the company has a managing director at the relevant time as has been held in ***Ravindra Narayan vs ROC, Jaipur, (1994) 81 Com Cases 925 (Raj)***. This decision was accepted by the Department of Company Affairs and a circular dated 24.06.1994 was issued accordingly.

18. The contention that the appellant being a Director of the Company cannot disown responsibility for the acts of the Company is misconceived. In the instant case, the power under Section 11 or 11B of the SEBI Act has been exercised debarring the appellant from accessing the securities market on the ground that the appellant was responsible for the acts of the Company and thereby in an indirect manner has introduced the concept of strict liability of vicarious liability under Section 11 or 11B of the SEBI Act. In this regard it would be, thus, relevant to peruse Section 27 of the SEBI Act which reads as follows:-

> *"27(1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:*
>
> *Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.*
>
> *(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any*

> *neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.*

Section 27 of the Act states that a person is deemed to be guilty of an offence on condition that he was in charge and responsible to the company. The proviso to Section 27 states that:

> *"Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence."*

19. In our view it is not possible to lay down any hard and fast rule as to when a Director would be vicariously responsible for the acts of the Directors in charge of day today affairs of the Company. In a given case a Director who had no role to play in the day today affairs of the Company could still be made liable for any penal consequences under Section 11B but when there is an order debarring a Director under Section 11B, in that case the principles evolved under Section 27 of the SEBI Act or the ingredients mentioned therein are required to be considered, since the consequences under an

order under Section 11B is far reaching and similar to the consequences of an order under Section 27 of the SEBI Act. The spirit of Section 27 of the SEBI Act would indicate that if a finding is given that the appellants have nothing to do with the day today affairs of the Company then they cannot be held guilty of any violation as there is no such thing as vicarious liability under Section 11B of the SEBI Act.

20. Section 27 of the SEBI Act, 1992 deals with offences by companies. Section 27 of SEBI Act is pari materia to Section 141 of the Negotiable Instruments Act and similar provisions are also contained under the Drugs and Cosmetics Act, Income Tax Act, Essential Commodities Act, Food Adulteration Act, Environment Protection Act etc. Dealing with the directors of the company who did not have anything to do with the day to day affairs of the company, the Supreme Court in a number of pronouncements held as follows:-

Municipal Corporation of Delhi v. Ram Kishan Rohtagi and Ors. - (1983) 1 SCC 1 the Apex Court in paragraph 15 held as under:-

> *"vicarious liability being an incident of an offence under the Act. So far as the Directors are concerned, there is not even a whisper nor a shred of evidence to show, apart from the*

presumption drawn by the complainant, that there is any act committed by the Directors from which a reasonable inference can be drawn that they could also be vicariously liable. In these circumstances, therefore, we find ourselves in complete agreement with the argument of the High Court that no case against the Directors (accused 4 to 7) has been made out ex-facie on the allegations made in the compliant and the proceedings against them were rightly quashed."

Sham Sunder and Ors. v. State of Haryana - (1989) 4 SCC 630 - paragraph 10:-

"It is therefore, necessary to add an emphatic note of caution in this regard. More often it is common that some of the partners of a firm may not even be knowing of what is going on day to day in the firm. There may be partners, better known as sleeping partners who are not required to take part in the business of the firm. There may be ladies and minors who were admitted for the benefit of partnership. They may not know anything about the business of the firm. It would be a travesty of justice to prosecute all partners and ask them to prove under the proviso to sub-section (1) that the offence was committed without their knowledge. It is significant to note that the obligation for the accused to prove under the proviso that the offence took place without his knowledge or that he exercised all due diligence to prevent such offence arises only when the prosecution establishes that the requisite condition mentioned in sub-section (1) is established. The requisite condition is that the partner was responsible for carrying on the business and was during the relevant time in charge of the business. In the absence of any such proof, no partner could be convicted. We therefore, reject the contention urged by counsel for the State."

21. In this regard the Ministry of Corporate Affairs while initiating prosecution against the Directors under the Companies Act came across a lot of hurdles as to who was an officer in default and whether any Director could be prosecuted without there being evidence with regard to being responsible for the affairs of the Company. In this regard, the Ministry of Corporate Affairs issued a Master Circular dated 29th July, 2011 on prosecution of Directors and clarified that the prosecution should be filed primarily against the Managing Director and against such Directors who were in charge and responsible for the affairs of the Company. It was clarified that extra care should be taken in examining such cases and no such Director should be held liable for any act of omission or commission by the Company which would constitute a breach or violation of any provisions of the Companies Act which had occurred without his knowledge or consent or where he had acted diligently in the Board process.

22. In ***Manoj Agarwal vs. SEBI (Appeal No. 66 of 2016 decided on 14.7.2017)*** the Tribunal found that there was no material to show that any of the officers set out in Clauses (a) to (c) of Section 5 or any specified director of the said

Company was entrusted to discharge the obligation contained in Section 73 of the Companies Act.

23. In ***Mr. Yogesh G. Gemawat vs. SEBI (Appeal No. 227 of 2016 decided on 16.04.2019)*** this Tribunal found that in the absence of any document to show that any director was specified as per Clauses (a) to (c) of Section 5 of the Companies Act or any valid document to show that any person was authorized by the Board of Directors, the appellant could not escape the liability as per Clause (g) of Section 5 of the Companies Act.

24. 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.

25. 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.

26. In the light of the aforesaid the WTM has held that the Company has violated provisions of Section 73(2) of the

Companies Act and has therefore in the same breadth has booked all the Directors to be responsible for the day today affairs of the Company. This approach as stated earlier was wholly incorrect. Section 73(2) of the Companies Act makes it apparently clear that if in the first instance it was the Company which was liable to repay the monies received from the investors and if the Company failed to repay the amount then the amount would be recovered jointly and severally from every Director of the Company as an officer in default. Therefore, where the Company is the offender vicarious liability of the Directors cannot be imputed automatically.

27. Thus, the WTM was required to arrive at a specific finding that a Director or Directors were responsible for the acts of the Company. The mere fact that a person is a Director would not make him automatically responsible for refund of monies under Section 73(2) of the Companies Act.

28. In the light of the aforesaid, we find that the WTM has given a categorical finding that Shri Shib Narayan Das was responsible for the affairs of the Company. It was not open for the WTM to pass further orders on the other Directors, namely, the appellant especially when there is no finding nor

there is a shred of any evidence to indicate that the appellant was also responsible for the affairs of the Company.

29. Thus, the direction of the WTM against the appellant that she is also liable to refund the monies collected by the Company during the respective period of Directorship of the appellant along with interest cannot be sustained. The impugned order to that extent cannot be sustained and is quashed.

30. The appeal is allowed with no order as to costs.

Sd/-
Justice Tarun Agarwala
Presiding Officer

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

09.08.2019
Prepared and compared by:msb