IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO. 95 OF 2019

Vijayesh R. Atre ...**Applicant**
Versus
The State of Maharashtra and Anr. ...**Respondents**

....

Mr.Nikhil Sakhardande, Sr.Advocate i/by Mr. Aditya Mithe, Advocate for the Applicant.

Mr.Raja Thakare a/w Mr.Siddharth Jagushte a/w Ms.Shivani Kumbhojkar, Advocate for Respondent No.2-SEBI.

Mr. A. D. Khamkhedkar, APP for the Respondent – State.

....

CORAM : PRAKASH D. NAIK, J.

DATE : 13th JULY 2022.

PC :

1. The applicant has invoked revisional jurisdiction of this Court challenging the order dated 28th January 2019 passed by SEBI Special Judge, City Civil and Sessions Court, Gr. Bombay in SEBI Special Case No. 26 of 2014.

2. Complaint was filed by Respondent No.2 against Alfavision Plantations Ltd. and Ors. for offences under Sections 24(1), 27 of the Securities and Exchange Board of India Act, 1992 (for short 'SEBI' Act). The applicant was arraigned as accused No.6 as Director of accused No.1.

3. The gist of the allegations in the complaint filed by Respondent No.2 are as follows:-

(a) The applicant along with the other accused in the SEBI Case are the directors of one Alfavision Plantations Ltd. and are in charge and responsible for the conduct of Alfavision's business.

(b) In the year 1992, Respondent No.2 notified regulations for Regulating the activities of Collective Investments Schemes (CIS) titled as "Securities and Exchange Board of India Regulations, 1999". As per Chapter IX of the CIS Regulations, any person who had been operating a CIS at the time of commencement of the said regulations was deemed to be an Existing CIS and was liable to make an application to Respondent No.2 for grant of registration within a period of two months from the date of Notification of the CIS regulations.

(c) As per Regulation No.73(1) of CIS Regulations, an existing CIS which failed to make an application for Registration with Respondent No.2 was required to wind up its CIS and repay the amount collected from the investors. Furthermore, in terms of Regulation No.74, an Existing CIS which was not desirous of obtaining provisional registration from Respondent No.2 was required to formulate a scheme of repayment and make such repayment to its existing investors in the manner specified in regulation No.73.

(d) Alfavision was operating a CIS and raised an amount of Rs.0.29 Crores/Rs.29 lakhs from the general public. However, after coming into force of the CIS Regulations, Alfavision failed to procure a registration from Respondent No.2 and also failed to repay the investment amounts collected from the general public. In view of this, Alfavision and its directors (including the applicant have committed a violation of Section 12(1B) of the SEBI Act and Regulations 5(1) read with 68(2), 73 and 74 of CIF Regulations which is punishable under Section 24(1) of the SEBI Act.

4. The applicant filed application under Section 245 (2) of Cr.P.C. for discharge. Respondent No.2 filed its reply opposing the said application. The learned Special Judge for SEBI rejected the said application vide order dated 28th January 2019.

5. Learned Senior Advocate Mr.Sakhardande appearing for applicant submitted as under:-

(a) The applicant had resigned from accused No.1 as director on 2nd November 1998. Reliance is placed on form 32 indicating his resignation. CIS Regulations came into force on 15th October 1999. Since the applicant had resigned in 1998 i.e. prior to the commission of the alleged offence, the applicant cannot be prosecuted for the alleged violation. The annual returns of Alfavision Ltd. dated 20th September 1990 mentions that the applicant ceased to be director of

Alfavision Ltd. from 2nd November 1998.

(b) Learned Sessions Judge has erroneously held that the photocopy of the resignation alleged does not prove the resignation which fact is not admitted by SEBI, and the averments made in the complaint, do not show at this stage that there is no sufficient ground for proceeding against the accused.

(c) The trial Court has passed the impugned order without ascertaining whether the allegations in the complaint constitute the offence under the SEBI Act or any specific role has been attributed to the applicant in commission of offence.

(d) Section 12(1B) was inserted in SEBI Act vide amendment dated 25th January 1995. The said provision mandated the enactment of regulations to govern the business of collective investment schemes. These regulations/rules came into force on 15th October 1999 and were named as CIS Regulations. The proviso to Section 12 (1B) of the SEBI Act created two categories (1) Those who started collective investment schemes prior to 25th January 1995 i.e. prior to the insertion of section 12(1B) in the SEBI Act. These individuals/companies can be referred to as proviso category/Existing CIS; (2) Those who had not started collective investment schemes prior to 25th January 1995 i.e. prior to the insertion of section 12(1B) in the SEBI Act. These individuals/companies can be referred to as Non-proviso category/Non-Existing CIS.

(e) Section 12(1B) of the SEBI Act creates a clear bar prohibiting anybody in the non-proviso category to start running a CIS after 25th January 1995 without obtaining a certificate from the Respondent under the CIS regulations. However, those companies/individuals who were running a CIS prior to 25th January 1995 (Proviso Category/Existing CIS) were permitted to continue their business till the CIS Regulations came into force i.e. till 15th October 1999. It is submitted that once the CIS Regulations came into force on 15th October 1999, Regulation 5 of the CIS Regulations required an Existing CIS to obtain a registration from Respondent No.2 under the said CIS Regulations and only then could they continue with the business of CIS. If such an Existing CIS failed to obtain a certificate of Registration under Regulation 5, they were mandated to wind-up their scheme and repay the amounts collected by them from investors and if the Existing CIS fail to do so, they would have violated section 12(1B) of SEBI Act. Therefore, an Existing CIS/entity in proviso Category could only have violated section 12(1B) of the SEBI Act after 15th October 1999 i.e. the date on which the CIS Regulations came into force. However, since the applicant had resigned on 2nd November 1998 i.e. prior to the commission of the alleged offence, the applicant could never have violated either section 12(1B) of the SEBI Act or the CIS Regulations and hence, the applicant deserves to be discharged from the present SEBI Case and the trial Court has erred in not considering this fact.

(f) The offence would only arise after 15th October 1999 i.e. the date on which the CIS Regulations came into force. It is humbly submitted that the applicant had resigned from Alfavision on 2nd November 1998 and hence was not a director of the company at the time of commission of the alleged offence which could only have been committed after 15th October 1999. The applicant had filed an application placing additional documents on record wherein the applicant has relied upon a certified copy of the company's annual returns dated 30th September 1999. The said annual returns clearly mention that the applicant was appointed as a director of Alfavision on 13th November 1996 and ceased to be a director of Alfavision on 2nd November 1998. It is therefore clear that the applicant was not a director of the company at that time of the commission of the alleged offence and the applicant ought to have been discharged from the SEBI Case.

6. Learned Advocate for the applicant has relied upon the decision of the Supreme Court in the case of Securities and Exchange Board of India Vs. Gaurav Varshney and Anr.[1]

1 (2016) 14 SCC 430

7. Learned Senior Advocate Mr. Thakare appearing for Respondent No.2 submitted that, the learned Sessions Judge has rightly rejected the application for discharge. The grounds urged by applicant cannot be appreciated at this stage. The applicant was director of company. Specific role has been assigned to him. Whether the applicant was responsible in commission of offence or not would be a matter of evidence which has been dealt with during the trial. The accused failed to make an application for registration. SEBI passed order dated 7th December 2000. The accused failed to repay the amount to investors. The accused have committed an offence under Section 12(1B) of SEBI Act punishable under Section 24(1) of SEBI Act. The accused Nos. 2 to 7 were directors, and/or persons in-charge of and responsible to accused No.1/company for the conduct of its business as provided under Section 27 of the SEBI Act. The applicant described as a director of accused No.1 company. The accused No.1 operated CIS by raising 0.29 crores from general public. SEBI notified CIS Regulations in 1999. Accused No.1 had filed information of CIS after press release dated 26th November 1997 and public notice dated 18th December 1997. SEBI had issued notice dated 10th December 1999 and 29th December 1999 to the accused calling upon to send information memorandum to the investors by 28th February 2000. Again, by issuing public notice dated

31st March 2000, attention of accused was invited. Accused No.1 company has committed an offence and that Applicant/accused No.6 is liable as a director of the accused No.1/company.

8. The Respondent No.2 has filed complaint alleging offence under Section 24(1) read with Section 27 of SEBI Act. It is alleged that the accused No.1 company filed information with SEBI regarding collective investment schemes pursuant to SEBI press release dated 26th November 1997, and/or public notice dated 18th December 1997. Vide letter dated 10th December 1999 and 29th December 1999 and by way of public notice dated 10th December 1999 SEBI gave intimation in terms of regulation 73(2) to the accused which costs an obligation on the accused and send information memorandum to all the investors detailing the state affairs of the schemes, the amount repayable to each investor and the manner in which such amount is determined. It is further alleged that on 31st March 2000, SEBI issued a public notice in the newspapers inviting the attention of the accused No.1 to the aforesaid position and notice dated 12th May 2000 was issued to the accused No.1 calling upon it to show cause as to why the action cannot be initiated against it. The accused No.1 was directed to refund the money collected under the schemes of the accused No.1 to the persons who invested therein within stipulated period.

Accused No.1 has violated section 12(!B) of SEBI Act and regulation 5(1) read with regulation 68(1), 68(2), 73 and 74 of the SEBI Act which is punishable under Section 24(1) of SEBI Act. The accused also failed to adhere to the directions of SEBI passed under Section 11B of the SEBI Act. Accused Nos. 2 to 7 are the directors and/or persons in charge of and responsible to the accused No.1 company for the conduct of its business and are liable for the violations of the accused No.1 as provided under Section 27 of the SEBI Act.

9. The applicant has been impleaded as accused being director of accused No.1. Section 27 of the SEBI Act relates to offences by company. Apparently, except statutory averment, no role has been attributed to the applicant. The main ground urged by applicant is that he had resigned from the accused No.1/company as director on 2nd February 1998. Form 32 dated 10th November 1998 fortifies the facts of his resignation on 2nd November 1998. The annual returns dated 30th September 1999 also refers to the fact that the applicant has ceased to be director on 2nd November 1998. The question which arise for consideration is whether the applicant was a director of accused No.1 company at the time of offence by accused No.1/company.

10. Section 12(1B) was inserted in the SEBI Act vide amendment dated 25th January 1995. The said provision mandated enactment of

regulations to govern the business of collective investment schemes. These regulations/rules came into force on 15th October 1999 and were named as CIS Regulations. The proviso to section 12(1B) of the SEBI Act created two categories viz. (a) those who started collective investment schemes prior to 25th January 1995 i.e. prior to the insertion of section 12(1B) in the SEBI Act. These individual/companies can be referred to as Proviso category/Existing CIS and (b) those who had not started collective investment schemes prior to 25th January 1995 i.e. prior to the insertion of section 12(1B) in the SEBI Act. These individual/companies can be referred to as Non-Proviso Category/Non-Existing CIS. Whereas the CIS came into force on 15th October 1999, regulation 5 of the CIS Regulations required an Existing CIS to obtain registration from Respondent No.2 under the said CIS Regulation and only then could they continue with the business of CIS. If such Existing CIS failed to obtain a certificate of Registration under the Regulation 5, they were mandated to wind-up their scheme repay the amounts collected by them from investors.

11. Without prejudice to the above, the applicant submitted that the averments contained in the SEBI complaint are insufficient to make out even a prima facie case against the applicant. The contents of the complaint do not disclose any role against the applicant or do

not attribute any commission nor omission on the part of the applicant which has led to the alleged offence. In paragraph No.16 of the complaint, Respondent No.2 has simply stated that the accused No.2 to 7 are the directors and/or persons in charge of and responsible to the accused No.1 for the conduct of its business and are liable for the violations of the accused No.1, as provided under Section 27 of SEBI Act, 1992. It is submitted that neither in this paragraph or in the entire SEBI complaint has respondent No.2 given any role to the applicant in the affairs of Alfavision or explained as to in what manner the applicant was responsible for the conduct of the company’s business/affairs. There is not even a whisper or shred of evidence on record to show that there was any act committed by the applicant from which a reasonable inference can be drawn that the applicant could be vicarious held liable for the offences (as alleged in the SEBI complaint) under section 27 of the SEBI Act. Hence, the continuation of criminal proceedings against the applicant under Section 24 of the SEBI Act would be a pure abuse of process of law and the trial Court has erred in not considering this fact.

12. In several decisions of the Apex Court it is held that the directors can be impleaded as accused on the ground that there is vicarious liability on the act of the accused/company. However, the role played by the said directors is required to be specified in the

complaint. For making a director liable, held there must be specific averments against the director showing as to how and in what manner he/she was responsible for conduct of business of the company. Liable only if he/she was in charge of and was responsible to the company for the conduct of its business or if it is proved that offence was committed with consent or connivance of, or was attributable to any negligence on part of the Director concerned. Simply because a person is a director of a company, does not make him/her liable under N.I. Act. Mere verbatim reproducing words of section without a clear statement of fact supported by proper evidence, not enough to make accused vicariously liable.

13. In view of the above, the proceedings against applicant are required to be quashed and set aside.

ORDER

(i) Criminal Revision Application No.95 of 2019 is allowed and disposed off.

(ii) Order dated 28th January 2019 passed by SEBI Special Judge, City Civil and Sessions Court, Gr. Bombay below Exhibit-13 rejecting application for discharge is set aside and the proceedings against the applicant in SEBI Special Case No. 26 of 2014 are quashed and set aside.

(PRAKASH D. NAIK, J.)