WTM/GM/ERO / 57 /2019-20

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA,

MUMBAI

ORDER

Under Sections 11, 11(4) and 11B of the Securities and Exchange Board of India Act, 1992 read with Regulation 65 of the Securities and Exchange Board of India (Collective Investment Scheme) Regulations, 1999

IN THE MATTER OF SUMANGAL INDUSTRIES LTD.

In respect of 1) Soumen Ghosh [PAN NO. AHGPG1610B] and 2) Kaushik Roy [PAN NO. AANPR5592F]

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1. Background –

1.1. The present matter is before me pursuant to the Order dated September 04, 2019 of the Hon'ble Securities Appellate Tribunal ("**SAT**") passed in Appeal Nos. 401 and 402 of 2018 filed respectively by the Noticees named in the title of the order.

1.2. The Hon'ble SAT by way of its above mentioned Order quashed the SEBI Orders dated July 25, 2018 and July 26, 2018 passed in respect of the above named Noticees and remitted the matter to WTM, SEBI. The Hon'ble SAT further directed the Noticees to appear before the WTM on October 10, 2019, on which

date the WTM would serve the show-cause notice along with the material, if any, and thereafter proceed in the matter after giving an opportunity of hearing.

1.3. Before proceeding further, it will be relevant to narrate briefly the events in the matter prior to the Hon'ble SAT's Order of September 04, 2019:-

Sl. No.	*Event*	*Date*
a.	*Ex parte ad interim* order passed by SEBI (the "**Interim Order**") holding that Sumangal Industries Limited (the "**Company**"/ "**SIL**") was involved in the running of a 'Flexi Potato Purchase Scheme' which was prima facie an unregistered Collective Investment Scheme ("**CIS**").	April 10, 2013
b.	Final Order passed by SEBI holding that SIL was involved in the running of unregistered CIS activities.	July 9, 2013
c.	SIL filed Appeal No. 210 of 2013 before SAT against the above Final Order seeking extension of time for refund to the investors. The said appeal was considered by SAT and the time was extended to January 31, 2015, subject to the conditions set out therein.	February 3, 2014
d.	SEBI approached SAT as SIL failed to comply with the conditions. SAT upon consideration of the same modified its order dated February 03, 2014 and permitted SEBI to take action.	September 12, 2014
e.	Pursuant to the above, Recovery Certificate No. 672 of 2015 was drawn for the recovery of a sum of Rs. 85,00,00,000 along with returns due to investors, along with further interest, all costs, charges and expenses incurred in respect of all proceedings taken for recovery of the said sum.	June 02, 2015

f.	SIL along with seven directors of the Company, namely, Subrata Adhikary, Madhumita Adhikary, Somnath Adhikary, Gopal Chandra Adhikary, Sarbani Adhikary, Astick Kumar Roy, Debika Adhikary filed Appeal No. 75 of 2016 before SAT disputing the computation of the recovery amount. SAT dismissed the appeal.	April 21, 2016 (SAT Order)
g.	Kaushik Roy filed Appeal No. 290 of 2016 before the SAT stating that the Final Order of July 09, 2013 had been passed without providing an opportunity of hearing. SAT quashed the SEBI order of July 09, 2013 qua Kaushik Roy and remanded the matter for reconsideration.	January 09, 2017 (SAT Order)
h.	Soumen Ghosh filed an Appeal No. 313 of 2017 before the SAT stating that the Final Order of July 09, 2013 had been passed without providing an opportunity of hearing. SAT quashed the SEBI order of July 09, 2013 qua Soumen Ghosh and remanded the matter for reconsideration.	December 18, 2017 (SAT Order)
i.	Kaushik Roy was given an opportunity of hearing and further to the same, SEBI passed order.	July 25, 2018
j.	Soumen Ghosh given opportunity of hearing and further to the same, SEBI order passed.	July 26, 2018
k.	Kaushik Roy and Soumen Ghosh filed Appeal Nos. 401/2018 and 402/2018 challenging respectively the SEBI orders of July 25, 2018 and July 26, 2018, and the same was remanded to WTM, SEBI as indicated in the introductory part of the order.	September 04, 2019 (SAT Order)

2. Issuance of Show-Cause Notice –

2.1. Pursuant to the directions contained in the Hon'ble SAT's Order of September 04, 2019, the Noticees by way of letters dated September 25, 2019 were informed to present themselves before me on October 10, 2019 at the SEBI Head Office in Mumbai. Further to the same, letters dated September 27, 2019 and October 03, 2019 were received from the Noticees communicating their inability to appear before me in Mumbai. In consideration of the said letters, SEBI by way of letters dated October 03, 2019 informed the Noticees to collect the Show-Cause Notice dated October 10, 2019 (the "**SCN**") from SEBI's Eastern Regional Office in Kolkata.

2.2. Accordingly, in compliance of the Hon'ble SAT's Order of September 04, 2019, a SCN was issued to the Noticees on October 10, 2019. The SCN has *inter alia* alleged:

a. that the Noticees were the Directors of SIL at the relevant time when the CIS Scheme was floated and are liable to wind up the Scheme and refund the amount to the investors; that the Register of Directors obtained from MCA shows the Noticees as Directors of SIL during the period of money mobilization; that the Form 23AC filed by SIL with the Registrar of Companies, West Bengal bears the signature of Kaushik Roy, who has signed the balance sheet of SIL for the period 2010-2011 as a Director of SIL; that the inquiry report dated September 25, 2012 of the Enforcement Branch, West Bengal *inter alia* names Soumen Ghosh and Kaushik Roy as the Directors of SIL; and

b. that the Noticees as Directors of SIL are responsible for running a CIS without obtaining a certificate of registration from SEBI as required under section 12 (1 B) of the SEBI Act, 1992 and the CIS Regulations, thereby violating section 12 (1 B) of the SEBI Act, 1992 and Regulation 3 of the CIS Regulations read with section 11AA of the SEBI Act, 1992.

2.3. Further, the SCN allowed the Noticees, seven days' time from the receipt of the SCN, to file their replies, if any. Also, the SCN provided that in case the Noticees wished to avail any opportunity of personal hearing then the same should be intimated to SEBI, in which case it was stated that the personal hearing would be held on October 22, 2019 at 3.30 pm at SEBI Bhavan, Mumbai.

2.4. Consequent to the above, letters dated October 10, 2019 were received from the Noticees requesting four weeks' time to file their replies, and sought personal hearing, with the venue being Kolkata. Considering the said requests, SEBI by way of letters dated October 14, 2019 informed the Noticees that they were being granted time till November 07, 2019 to file their replies, and opportunity of personal hearing on November 18, 2019 at 3.30 pm by way of video conference at SEBI's Eastern Regional Office in Kolkata.

3. Personal Hearing and Replies and Written Submissions Received From the Noticees –

Personal Hearing

3.1. As communicated by SEBI in its letter dated October 14, 2019, the personal hearing was held on November 18, 2019 at 3.30 p.m. through video conference

from SEBI's Eastern Regional Office in Kolkata connected to the WTM in Mumbai.

3.2. The Noticees were jointly represented by their Advocate, Nitindra Mohan Mookerjee and made their submissions before me.

Replies and Submissions Received

3.3. In addition to the oral submissions made by the Noticees before me at the aforesaid personal hearing, replies dated November 05, 2019 and written submissions dated December 02, 2019 have been received from the Noticees in response to the SCN. By way of the above, the following has been *inter alia* submitted by the Noticees:

General/Preliminary Objections

a. the SCN was without jurisdiction and not in consonance with the spirit of the Order, as passed by the Hon'ble Tribunal;

b. the Interim Order of the Learned WTM, SEBI dated April 10, 2013 could not be considered as the Order dated July 9, 2013 passed by the Learned WTM of SEBI, as regards the Noticees, stood quashed by the Orders of the Hon'ble SAT, Mumbai dated January 09, 2017 and December 18, 2017 passed in Appeal Nos. 290 of 2016 and 313 of 2017, and as such the Interim Order of the Learned WTM, SEBI, dated April 10, 2013 relied and/or referred to in the said orders also stood quashed;

c. no primary evidence and/or material has been provided by SEBI showing that the Noticees had committed any violation, even prima facie;

d. the materials provided by SEBI did not make out any charge against the Noticees;

e. the Noticees had no role regarding the publication of the advertisement dated September 11, 2012, allegedly published in the Bengali Newspaper, Anandabazar Patrika;

f. the Noticees were not involved or instrumental in the formulation of such scheme and had no knowledge how the purported Scheme was formulated or its working;

g. the Noticees were not made personally aware as to how SEBI initiated an alleged examination into the activities of SIL;

h. the Noticees did not receive any letter either from SEBI or any other authority calling for information regarding the affairs of SIL;

i. No document was collected from the Noticees by any investigating agency nor statements of their' s recorded;

j. the Noticees question the admissibility of the purported preliminary inquiry conducted by the Enforcement Branch, West Bengal, Kolkata and did not have any knowledge of the same;

k. the Noticees have a right to cross - examine the officer who had conducted such purported preliminary inquiry;

l. the preliminary inquiry report does not implicate the Noticees in any manner whatsoever, so as to make the Noticees vicariously liable;

m. the Noticees state that had proper enquiry/ investigation been conducted, SEBI would have found that the Noticees had no role to play in the day to day management affairs and control of the company;

n. the Noticees were absolutely innocent and SEBI authorities may proceed against Subrata Adhikary, who was solely responsible for the conduct, control and business of SIL;

o. The Noticees were not aware of any CIS Scheme floated by SIL and were not responsible for sponsoring, launching, running, managing or publication of such Scheme.

p. the Noticees were not aware whether SIL has obtained any certificate of registration from SEBI and had no knowledge that SIL was conducting its affairs illegally and wrongfully, and the services rendered by the Noticees to the Company were in absolute good faith and in the belief of the representation of Subrata Adhikary to the effect that the Company was conducting its affairs in accordance with law and the Noticees should not worry;

q. the conditions pre-requisite for initiation and formulation of the proceeding, as against the Noticees, have not been complied with;

r. the materials so provided with the SCN did not make any case so as to make the Noticees liable or responsible for the conduct of business of SIL;

Specific submissions on merit by Soumen Ghosh, Noticee No. 1

s. the Noticee was not aware of the purported FORM 23A and that his name did not appear in such form;

t. the said form appeared to have been confirmed and filed by the Managing Director, Subrata Adhikary;

u. the Noticee was in no way connected with the purported Audit Report and Accounts for the year ending on March 31, 2011 and he had no knowledge

about the same, and his name does not appear either in the letter of the auditor or in the documents attached therein;

v. the Noticee by profession was an Advocate practising in various courts, especially in taxation matters and used to look after certain legal matters of the Company, and as such Subrata Adhikary induced the Noticee to lend his name for a brief period as an Independent Director sometime in May, 2012;

w. Subrata Adhikary had represented to the Noticee that it would be an Honorary post and the Noticee need not worry about the management, control and day to day running of the business activities of the Company;

x. the Noticee was not certain whether his so-called nomination as Honorary Director was acted upon by the Company at the relevant point of time;

y. the Noticee's services were availed of by SIL on honorary basis and that he was inducted as an Independent Director.

z. the relationship of the Noticee with SIL was of an Advocate and client, working on legal fees basis;

aa. the Noticee never intended to be a part of any management of the company in any manner whatsoever and never attended any Board Meeting(s) nor was involved in policy making and day to day activities of the functioning of the Company;

bb. the Noticee did not have any financial powers nor did he have any eligibility share, and did not own any share of the company;

cc. the Noticee did not take get any remuneration from SIL for the post of Independent Director and did not receive any share of the profits;

dd. The Noticee did not make any disproportionate gain nor had taken any unfair advantage from the business activities of SIL;

ee. Subrata Adhikary misbehaved with the Noticee, as a result of which, he expressed his intention to sever his relationship with the Company, as an Advocate, and as such tendered his resignation to the Company on April 24, 2013;

Specific submissions by Kaushik Roy, Noticee No. 2

ff. the Noticee, who had retired in the year 2010, after serving the United Bank of India, for about 37 years, was induced by Subrata Adhikary to look after the administration of some of its businesses, which the Noticee took it as a voluntary service but later on, the said Subrata Adhikary started paying him some remuneration from April, 2012;

gg. upon the resignation of one of the directors, namely Somnath Adhikary sometime in the year 2011, the Noticee was requested to fill in the position, since Subrata Adhikary had to fulfil the criteria of 3 directors;

hh. The noticee was only addressed as a Director, without being assigned any duties of a Director;

ii. he never attended any Board Meeting(s) and was not involved in policy making and the day to day functioning of the company and did not have any financial powers and did not have any eligibility share and was a puppet in the hands of Subrata Adhikary;

jj. no document was collected from him by any investigating agency nor any statement was recorded from him;

kk. the Noticee was not aware of the purported FORM 23A and the said form appeared to have been confirmed and filed by the Managing Director, Subrata Adhikary;

ll. the Noticee was induced by Subrata Adhikary to lend his signatures in Balance Sheet for the year ended on March 31, 2011;

mm. the Noticee could not have derived knowledge of the contents of the said balance sheet, which was in the special knowledge of Subrata Adhikary, and more so the Noticee was a Director in the Company from January 4, 2011, and therefore he could not have authenticated or verified any transaction of the Company for the year April 01, 2010 to March 31, 2011;

nn. the Noticee never intended to hold any key managerial post in the Company or had any intention to be engaged in any policy matter or in the management and control of the same, as all the decisions were unilaterally taken by Subrata Adhikary, who was in absolute control of the day to day activities;

oo. Subrata Adhikary induced a belief in the mind of the Noticee that he was conducting his businesses in a lawful manner and the Noticee need not worry about anything;

pp. in some documents, Subrata Adhikary induced the Noticee to lend some signatures without allowing him to go through the contents of the same, which the noticee had to lend in absolute good faith and in the belief of the representations that there was nothing to worry about and nothing was illegal;

qq. the Noticee was also induced to invest money in the Company by Subrata Adhikary;

rr. the Noticee felt absolutely insulted with the ways and functioning of the said Subrata Adhikary and on March 31, 2013, he tendered his resignation from the Company, and that he had also stopped visiting the company earlier to the said date.

Cases relied upon

ss. Prem Chandra Agarwal & Anr V. U.P. Financial Corp. & Ors. [2009 (6) SCR 931];

tt. Rahul H. Shah and Nimisha H. Shah V. Securities and Exchange Board of India [2004 55 SCL 416 SAT]; and

uu. K.K. Ahuja V. V.K. Vora & Anr. [Criminal Appeal Nos. 1130-31 Of 2003, In the Supreme Court of India]

4. Issues framed –

4.1. *Issue- I*: Whether the Interim Order dated April 10, 2013 can be referred to in the SCN dated October 10, 2019?

4.2. *Issue II*: Whether the Noticees, as Directors of the Company, can be held responsible for running a CIS without obtaining a certificate of registration from SEBI as required under section 12 (1 B) of the SEBI Act, 1992 and the CIS Regulations, thereby violating section 12 (1 B) of the SEBI Act, 1992 and Regulation 3 of the CIS Regulations read with section 11AA of the SEBI Act, 1992?

5. Consideration of issues and findings –

Issue- I

5.1. The SCN dated October 10, 2019 issued to the Noticees alleging the violations contained therein makes a reference that the said SCN shall be read along with the Interim Order passed in the matter. In this respect, it has been stated by the Noticees that the Interim Order dated April 10, 2013 could not be considered as the same stood quashed qua the Noticees by virtue of the quashing of the final order dated July 09, 2013, which had relied/referred to the Interim order, pursuant to the Hon'ble SAT's orders dated January 09, 2017 and December 18, 2017.

5.2. A reference to the Interim Order in the SCN does not vitiate the SCN. In fact, the Interim Order which was finally disposed of vide SEBI order dated July 09, 2013, was upheld by SAT as against the Company by order dated February 03, 2014. The finding in the order to the effect that SIL was engaged in unregistered CIS activities has become final and conclusive. In fact, the Interim Order was the beginning point of initiation of enforcement action against the Company and its Directors. In view of this, I do not find any merit in the submission of the Noticees in this regard.

5.3. In this regard, reliance has been placed by the Noticees on the Supreme Court's order in *Prem Chandra Agarwal & Anr V. U.P. Financial Corp. & Ors.* [2009 (6) SCR 931]; wherein it was held that once a final order is passed, the interim orders cease to exist independently. In the present case, the Hon'ble SAT has set aside the final orders dated July 25, 2018 and July 26, 2018 passed by SEBI, on preliminary grounds of non-compliance with the principles of natural justice, without getting

into the merits. The Interim Order dated April 10, 2013 passed in exercise of powers under section 11(4) of the SEBI Act was upheld as against the Company and other directors, as on the date of the remand by SAT vide order dated September 04, 2019. Therefore, a reference made to the Interim Order in the SCN issued subsequent to the SAT remand is not out of place. The reference in the SCN to the Interim Order is purely from the angle of tracing the genesis of the violations alleged against the Noticees. It is clear that the Noticees are merely indulging in raising technical objections without merit.

Issue- II

5.4. It is reiterated that SIL was carrying on unregistered CIS activities, as found in the SEBI final order dated July 09, 2013 and upheld by the Hon'ble SAT in its order dated February 03, 2014

5.5. Thus, this Order is limited to the consideration of the role of the Noticees, namely, Soumen Ghosh and Kaushik Roy, who were Directors in the Company during the periods May 23, 2012 to April 27, 2013 and January 04, 2011 to April 27, 2013 respectively, in carrying on unregistered CIS activities.

5.6. The common submissions/objections raised by the Noticees with respect to the material adduced to the SCN are summarised below:

a. no primary evidence and/or material has been provided by SEBI showing that the Noticees had committed any violation, even prima facie;

b. the materials provided by SEBI did not make out any charge against the Noticees, the materials so provided with the SCN did not make any case so as to make the Noticees liable or responsible for the conduct of business of SIL;

c. the Noticees did not receive any letter either from SEBI or any other authority calling for information regarding the affairs of SIL;

d. No document was collected from the Noticees by any investigating agency nor were their statements recorded;

e. the admissibility of the Inquiry Report dated September 25, 2012 of the Enforcement Branch, Government of West Bengal;

f. the Noticee have a right to cross - examine the persons who had conducted such purported preliminary inquiry;

g. the said preliminary inquiry report did not implicate the Noticees in any manner whatsoever, so as to make the Noticees vicariously liable;

h. the conditions pre-requisite for initiation and formulation of the proceeding, as against the Noticees, have not been complied with.

5.7. The documents provided along with the SCN are 1) Advertisement in the newspaper, 'Anand Bazar Patrika' on September 11, 2012 soliciting funds from the public under a 'Flexi Potato Purchase Scheme'; 2) FORM 23AC filed by SIL with the Registrar of Companies, West Bengal; 3) Inquiry Report dated September 25, 2012 of the Enforcement Branch, West Bengal; 4) Register of Directors as obtained from the MCA; and 5) copy of the Interim Order.

5.8. As regards the advertisement in the newspaper, 'Anand Bazar Patrika' on September 11, 2012 soliciting funds from the public under a 'Flexi Potato Purchase Scheme', both the Noticees have denied knowledge of the same. As regards their names having been included in the Inquiry Report dated September 25, 2012 of the Enforcement Branch of the Government of West Bengal, the Noticees have

contended that it does not implicate them of being vicariously liable. The Noticees have also disputed the reliance placed on the above-mentioned report without providing cross-examination of the relevant persons involved in the preparation of such report. Further, Noticee No.1 has stated that he lent his name for a brief period as an Independent Director on an 'Honorary' basis, which he resigned on April 24, 2013. Similarly, Noticee No.2 has stated that he was induced as a director to look after the administration of the business, which the Noticee took up as voluntary service. After denial of their knowledge of the Potato schemes and the activities of the Company, two of the Noticee Directors, have contended that, as they were not aware of the day to day affairs of the Company and did not attend any of the Board Meetings, the charges still need to be proved against them.

5.9. Noticee No. 1, Soumen Ghosh has stated in his defence that he was appointed as an 'Independent Director' in SIL, although the term 'Independent Director' was not in vogue in respect of companies not listed, as per Companies Act, 1956. The Noticee is using the term Independent Director under the mistaken belief that this term gives him immunity from the responsibilities cast upon the director of a company. What is relevant for examination are the circumstances indicating the association of the Noticee with SIL, whether such association was during the time when the schemes were floated with public dissemination of information, and the extent of due diligence exercised by the director in ensuring that the company does not indulge in any act of illegality.

5.10. Thus, I find that both the Noticees namely, Soumen Ghosh and Kaushik Roy were Directors, with all the concomitant duties cast upon a Director of a company by

law, during the period of mobilisation of funds by way of Advertisement in the newspaper, 'Anand Bazar Patrika' on September 11, 2012 soliciting funds from the public under a 'Flexi Potato Purchase Scheme'.

5.11. The Noticees' primary grounds of defence have been that they had no knowledge about the affairs of the Company since they did not attend any of the Board meetings; They also feign no knowledge of the contents of the advertisement in the newspaper; no knowledge of the potato schemes being floated by the Company etc. In effect, the Noticees have adopted a strategy of flat denial of all the allegations without trying to explain the circumstances which would prove their non-involvement with the alleged activities of the Company. To buttress their defence, they have relied on case laws dealing with imposition of liability with respect to criminal offences under Negotiable Instruments Act. This raises the question regarding the standard of proof required in these kind of quasi-judicial proceedings vis-à-vis criminal matters. I am of the view that in a civil proceeding, as contemplated in Section 11B of the SEBI Act, SEBI cannot be loaded with the burden of adducing such proof, which beyond reasonable doubt establishes that the director of a Company was aware of the specific schemes of the Company. The circumstances pointing out the fact of the association of the Noticees with SIL as Directors, during the relevant time, are sufficient to draw the inference that they were aware of the activities of the Company. SEBI cannot be expected to produce concrete evidence attesting the knowledge of the directors of schemes floated by the company to mobilise funds from the public through advertisements in newspapers. The denial of the contents of the newspaper advertisements, the

denial of the knowledge of the activities of the business of the Company, seeking cross-examination of the officials of the Enforcement Branch, West Bengal Government, who made the report etc. only show the attempts of the Noticees to somehow wriggle out of the allegations. The admitted fact remains that the Noticee No.1 was associated with the Company with respect to its legal matters and that he occupied the position of a Director in the Company, and was using office space in the building premises of the Company. His contentions that he did not receive remuneration or profits is not sufficient to absolve him from the liabilities fastened to a director. Being a lawyer, he would have been well aware of his obligations as a Director of a public company. Likewise, Kaushik Roy, being an ex-banker has stated that he was looking after the administration of some of its business and started getting remuneration from April, 2012 onwards. He resigned only in March, 2013. Both the Noticees knew Subrata Adhikary and also were sufficiently qualified to understand the responsibilities of the position of a director of a public company, including the periodic attendance of board meetings and acquisition of sufficient information with respect to the affairs of the Company.

5.12. It is noted that Noticee No. 1, Soumen Ghosh was a director from May 23, 2012 to April 27, 2013 i.e., about one year. Similarly, Noticee No. 2, Kaushik Roy was a director from January 04, 2011 to April 27, 2013 i.e., two years and three months.

5.13. Thus, considering the stature of the Noticees as qualified professionals, who are presumed to be aware of the role and responsibilities of directors in a company, the Noticees cannot at this stage feign ignorance, and fix all the accountability on Subrata Adhikary.

5.14. In this respect, reliance is placed on the decision of the Hon'ble Supreme Court in the matter of *Official Liquidator v. P.A. Tendolkar, [(1973) 1 SCC 602],* referred to in the case of *N. Narayanan Vs. Adjudicating Officer, SEBI, [AIR 2013 SC 3191]*, wherein the Hon'ble 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 who examines 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)

5.15. The Noticees have in this regard placed reliance on *K.K. Ahuja Vs. V.K. Vora & Anr. [(2009) 10 SCC 48]* and *Rahul H. Shah and Nimisha H. Shah V. Securities and Exchange Board of India [[2004] 55 SCL 416 (SAT)].*

5.16. In K.K. Ahuja Vs. V.K. Vora & Anr., the Supreme Court looked into the question as to whether an employee of a company can be said to be a person "in charge of, and was responsible to the company for the business of the company" as provided in Section 141 of the Negotiable Instruments Act, and held that an employee

cannot be said to be criminally liable under the above provision. The above precedent being in the context of criminal liability under the Negotiable Instruments Act has no bearing on the instant proceedings. Further, the Noticee Nos. 1 and 2 being employees of SIL cannot place reliance on the said finding of the Hon'ble Supreme Court.

5.17. As regards Rahul H. Shah and Nimisha H. Shah Vs. Securities and Exchange Board of India, the Hon'ble SAT held that the Directors of a company, two college going students, who did not attend the board meetings and on whose behalf the father had accepted the responsibility for the alleged violations, cannot be said to be in charge of the company for the purposes of imposition of penalty by Adjudicating Officer, SEBI. As the decision of the SAT was based on the peculiar facts and circumstances of that case, the Noticees cannot rely on the same.

5.18. In this regard, it would be relevant to examine the facts and circumstances surrounding the role of the Noticees as Directors of the Company:

A. *Noticee No. 1, Soumen Ghosh* –

The Noticee has submitted that he was retained as an Advocate by the Company for looking into the legal and taxation matters of the Company, and as such Subrata Adhikary induced him to lend his name for a brief period as a Director. The Noticee being an Advocate would have been well aware that for being retained as an Advocate of the Company, he was not required to become a director. Therefore, the above submission is not acceptable. Further, in the hearing granted on June 13, 2018 pursuant to the

Order of the Hon'ble SAT dated December 18, 2017, it was stated by the Noticee that to induce him to join the Company as a Director he was allowed to use the premises of the Company at a prime location in Kolkata, as office space for his practice as a lawyer. So, the claim by the Noticee that he did not derive any benefit/remuneration from his position of a Director of the Company and from the activities of the Company stands belied by the above admission on the part of the Noticee. Furthermore, the claim by the Noticee that he was inducted only as an Independent Director is not acceptable, as brought out above. Accordingly, it is evident from the facts and circumstances that Noticee No.1 was involved in the affairs of the Company, and had an interest in continuing his association as a Director in the Company. Thus, the claims of the Noticee about his complete ignorance of the activities being undertaken by the Company cannot be accepted.

B. *Noticee No. 2, Kaushik Roy* –

The Noticee has submitted that upon retiring from the United Bank of India, after serving for about 37 years, he was induced by Subrata Adhikary to look after the administration of some of his businesses, which he took up as voluntary service. However, it has been submitted by the Noticee that some remuneration was received by him from April, 2012. Considering the said fact, the submission that the assignment was a voluntary service cannot be accepted. Further, the Noticee has submitted that the FORM 23AC annexed to the SCN was filed by Subrata Adhikary, and that the Noticee was induced by Subrata Adhikary to lend his signatures in the Balance Sheet

for the financial year ending on March 31, 2011. It is stated that the Noticee has not denied that the signature contained in the said documents is his. That being the case, the Noticee cannot now claim ignorance of the said documents on the pretext that he signed consequent to the instructions received from Subrata Adhikary. In this regard, reliance is placed on *The Municipal Corporation of Greater Bombay Vs. P.S. Malvenkar and Ors. [AIR 1978 SC 1380]*. The Hon'ble Supreme Court quoting the Black's Law Dictionary (1951 Edition) has stated that "*generally when a person attaches his signature to a written document he does so in token of knowledge, approval or acceptance.*" Accordingly, the Noticee cannot claim ignorance of the contents of the said document as the signature implies knowledge, approval or acceptance of the contents of the said document. Schedule No. 10 of the balance sheet, which enlists the Current Liabilities of the Company, shows a liability of Rs. 14,372,900 as " Advance for Potato purchase". Also, Schedule No. 14 of the Balance Sheet, under the heading Business Segment states, "*As the Company's business activity falls within a single primary business segment, viz. Sale of potatoes', the disclosure requirements of Accounting Standard-17 "Segment Reporting", issued by the Institute of Chartered Accountants of India are not applicable.*" After signing the Balance Sheet, Kaushik Roy cannot plead ignorance or lack of awareness of Potato Schemes of the Company. Furthermore, in the hearing granted on November 13, 2017 pursuant to the Order of the Hon'ble SAT dated January 09, 2017, it was informed by the Noticee that the Company used to purchase potatoes from farmers at cheap rate during potato season and stored them in cold storage and later sold them at high prices, thereby

generating profits. He further informed that the Company was collecting money for potato business and had collected around Rs.80 Crore, out of which Rs 30 Crore was repaid to the investors. The Noticee also stated that he himself had invested Rs.12.5 Lakh in the Company and had earned around Rs.5.5 Lakh on the said investment, and had further invested Rs.1.20 Lakh in the Potato Scheme of the Company in the name of his family members. It is, thus, clearly evident from the above facts and circumstances that the Noticee was sufficiently aware of the affairs of the Company and had a pecuniary interest in the activities of the Company. Thus, the claims of the Noticee about his ignorance of the activities being undertaken by the Company cannot be accepted.

5.19. Moreover, the law casts a duty on a director to attend the Board meetings and maintain a sufficient knowledge and understanding of the company's business; and as such, a director must act honestly and without negligence, with such amount of care as an ordinary man would be expected to take, as if the business were his own. Further, directors have, both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them to properly discharge their duties as directors. Thus, the Noticees who claim to have not attended any Board meeting and did not have any knowledge of the affairs of the Company, cannot now take shelter in the purported ignorance that flowed from such negligence and dereliction of duty. It is an established principle of law that one cannot take advantage of one's own wrongs.

5.20. In view of the aforesaid, I conclude that the present facts and circumstances demonstrate a clear awareness and appreciation on the part of the Noticees of the nature of business activities being undertaken by the Company. Further, the inquiry report of the Enforcement Branch, Government of West Bengal dated September 25, 2012 arrays the Noticees as the Directors of the Company and states that the advertisement was brought out by the Company inviting common people to invest money in Potato Bonds with assured profit amounting to 22% per annum on the invested money. The inquiry report further states that "*it is not known whether the said firm has any back-up guarantee, from any bank or financial institutions, to understate the proclamations/promises made to the prospective investors about possible quantum of assured returns. Failure or non-existence of such a financial guarantee may qualify the said advertisements as misleading one resulting in registration of cases for cheating by the potato bond-holders.*" In this regard, the Noticees have failed to prove that the findings contained in the said inquiry report are wrong, baseless or misplaced.

5.21. Upon an overall evaluation of the facts and circumstances of the case, it becomes evident that the Noticees have employed a strategy of protracting the proceedings. The SEBI Interim Order in the matter was passed in April, 2013, which became final in July, 2013. Subsequent to this, the said final order was challenged by SIL in Appeal No. 210 of 2013 before SAT, whereby the Hon'ble SAT vide its order dated February 03, 2014 upheld the directions contained in the said SEBI Order. Consequently, a Recovery Certificate No. 672 of 2015 was drawn for the recovery of a sum of Rs. 85,00,00,000 along with returns due to investors, along with further interest, all costs, charges and expenses incurred in respect of all proceedings taken

for recovery of the said sum. SIL along with seven Directors (other than the Noticees) filed Appeal No. 75 of 2016 before the Hon'ble SAT disputing the computation of the said recovery amount, which was dismissed by the Hon'ble SAT vide its order dated April 21, 2016. In this regard, it stated that the Noticcees could have raised their specific objections at any of the above two occasions. However, the Noticees raised their grievances much later only after the above appeals filed by the Company and the Directors were finally disposed of by the Hon'ble SAT holding that the Company and its Directors were liable for carrying on unregistered CIS activities and directing them to repay the investors, thereby upholding the Recovery Certificate No. 672 of 2015 for the recovery of a sum of Rs. 85,00,00,000 issued in the matter. After such disposal in April, 2016, Noticee No. 2, Kaushik Roy filed Appeal No. 290 of 2016 before the Hon'ble SAT in September, 2016, and Noticee No. 1, Soumen Ghosh filed Appeal No. 313 of 2017 before the Hon'ble SAT in September, 2017 claiming that SEBI had passed orders without providing the Noticees an opportunity of hearing. On the said prayer, the Hon'ble SAT passed orders dated January 09, 2017 and December 18, 2017 quashing the Final order qua the Noticees and remanding the matter back to the WTM, SEBI. In compliance of the Hon'ble SAT's Orders, personal hearing was provided to the Noticees. The Noticees along with their Advocates appeared before me and had also made oral submissions by mode of video conference from Kolkata on November 13, 2017 and June 13, 2018. Upon consideration of the said submissions, separate Orders dated July 25, 2018 and July 26, 2018 were passed with respect to the Noticees herein. If the Noticees had not received the SCNs (as subsequently contended), this should have been their prime argument during their

oral submissions on November 13, 2017 and June 13, 2018, preceding the Orders dated July 25, 2018 and July 26, 2018. On the other hand the Noticees advanced arguments addressing the merits of the matter without insisting on the show-cause notice. The fact that such an argument of non-receipt of show-cause notice and annexures was never advanced at that stage, puts into doubt the very veracity of such a contention raised at a subsequent stage in the written submissions and in the appeal before the Hon'ble SAT.

5.22. The Noticees, Kaushik Roy and Soumen Ghosh, challenged the above orders in Appeal Nos. 401/2018 and 402/2018 before the Hon'ble SAT claiming that they had not received Show-Cause Notice. It is noted that further to the above, the Hon'ble SAT by way of Order dated September 04, 2019 remanded the matter and directed SEBI to issue Show-Cause Notice to the Noticees and consider the matter thereafter. Further to the same, the Noticees in their representation to SEBI have stated that they did not attend any board meetings and had no knowledge of the activities undertaken by the Company. This is quite contrary to the oral submissions made earlier during personal hearing on November 13, 2017 and June 13, 2018, as brought out above. This is a deliberate change of tack. I note that the Noticees are challenging the Orders of SEBI on different occasions on different grounds without raising all the defences at one go, with the strategy of reserving some unexhausted grounds for the next appeal.

6. Conclusion –

6.1. In consideration of the above findings, I conclude that the Noticees had reasonable and sufficient understanding of the business and affairs of the Company. The

Noticees being qualified professionals should have taken due care and caution in taking up the position of a director in the company, and as such cannot now feign ignorance and pin all the blame on Subrata Adhikary. Also, the Noticees cannot claim that no benefit accrued to them as a consequence of their position as directors of the Company as it has been demonstrated that benefit- pecuniary and otherwise, had accrued to the Noticees. Further, the Noticees' defence that they did not attend any board meetings cannot be given credence as law casts a duty on the directors to attend board meetings, and as such acceptance of such a defence would amount to allowing the Noticees to take advantage of their own wrongs. Also, it is relevant to note that the inquiry report dated September 25, 2012 of the Enforcement Branch, Government of West Bengal has arrayed the Noticees and directors of SIL, and *inter alia* observed that SIL had brought out advertisement inviting people to invest in Potato Bonds with assured profits. The Noticees have remained silent regarding the status of the said inquiry proceeding. Furthermore, the Noticees have tried to protract the proceedings by adopting a strategy of challenging SEBI's Orders on different occasions on different grounds. It is noted that the menace of illegal fund mobilisation from the public through various schemes has become difficult to deal with, and unless these orders are pursued seriously, the object of the provisions would stand defeated. In this context, I find that the Noticees, after having such close association with SIL, have failed to comply with the directions which came into effect in 2013 itself.

6.2. In the said context, I find that the Noticees, who were directors of the Company at the relevant time of mobilisation are liable for the running of schemes

determined as unregistered CIS activities. Accordingly, the aforesaid findings provide adequate grounds for the exercise of powers and imposition of liability on the Noticees under the SEBI Act and Regulations made thereunder.

7. Directions –

7.1. In view of the foregoing, I, in exercise of the powers conferred upon me under Sections 11, 11(4) and 11B read with the Regulations 65 of the Securities and Exchange Board of India (Collective Investment Schemes) Regulations, 1999, hereby issue the following directions:

a. The Noticees, namely, Soumen Ghosh [PAN NO. AHGPG1610B] and Kaushik Roy [PAN NO. AANPR5592F] along with Sumangal Industries Ltd. and other directors, shall wind up the collective investment scheme offered by SIL and refund the money collected by the said company under the schemes with returns which are due to the investors as directed vide order dated July 9, 2013, failing which the Recovery Officer shall proceed with recovery of the sums due in terms of Recovery Certificate No. 672 of 2015 drawn in the matter.

b. The Noticees are restrained from accessing the securities market, directly or indirectly, and are further restrained and prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner from the date of this Order, till the completion of refund.

c. This Order shall come into force with immediate effect.

7.2. A copy of this order shall be forwarded to the Noticees immediately. A copy of this Order shall also be forwarded to the Enforcement Branch, Government of West Bengal for necessary information, and all the recognized stock exchanges and depositories for ensuring compliance with the above directions.

Place: Mumbai **G. MAHALINGAM**

Date: January 03, 2020 **WHOLE TIME MEMBER**

SECURITIES AND EXCHANGE BOARD OF INDIA