IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992

Crl. Appeal No. 220/2010

Reserved on: 27th January, 2011

Decided on: 8th February, 2011

ANKUR FOREST & PROJECT DEVELOPMENT INDIA LTD. & ORS ..... Petitioner
Through: Mr. Amit Kumar & Ms. Nisha Neel, Advocates

versus

SECURITY EXCHANGE BOARD OF INDIA ..... Respondent
Through: Mr. Sanjay Mann and Mr. Rakesh Singh, Advocates

Coram:
HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. By the present appeal the Appellants i.e. Appellant No.1 the company and Appellant Nos. 2 to 5 its Directors, challenge the impugned judgment dated 29th January, 2010 convicting them for offences punishable under Section 24(1) read with Section 27 of the Securities and Exchange Board of India Act, 1992 (in short referred to as the 'Act') and the order on sentence dated 4th February, 2010 whereby Appellant Nos. 2 to 5 have been directed to undergo Rigorous Imprisonment for a period of one year and a fine of Rupees Five lakhs each to all the Appellants and in default of payment of fine to further undergo simple imprisonment for a period of six months to Appellant Nos. 2 to 5.

2. Briefly, the facts of the case are that the Securities and Exchange Board of India (in short 'SEBI'), a statutory body established under the provisions of the Act filed a complaint dated 21st December, 2002 against the Appellants and Sh. Hemant Sharma one more Director of the Appellant

No.1 who was declared a proclaimed offender during the trial. According to the complaint, the Appellant floated a Collective Investment Scheme (in short C.I.S.) and collected a sum of `0.35/- crores from the general public. SEBI had notified the Securities and Exchange Board of India (Collective Investment Scheme) Regulations, 1999 (in short 'the Regulations') which were not complied with by the Appellants. The SEBI filed a complaint against the Appellants for violation of Sections 11B, 12(1B) of the Act and Regulations 5(1), 68(1), 68(2), 73 & 74 punishable under Sections 24(1) read with Sec. 27 of the Act, as the Appellant Nos. 2 to 5 and Hemant Sharma being the Directors of the Appellant No. 1 were responsible for the conduct of its business.

3. In the complaint before the learned Metropolitan Magistrate SEBI examined CW 1 Ms. Versha Aggarwal, Assistant General Manager and CW2 Ms. Jyoti Jindgar, General Manager. CW1 inter alia deposed and exhibited the authorization to pursue the complaint vide delegation of power, the public notice dated 18th December, 1997, the issuance of bonds that is the agro bonds, plantation bonds floated by the Appellant No.1 which all came within the ambit of C.I.S. and thus the provisions of Act. As the Appellant no.1 had floated these C.I.S. schemes, it was statutorily bound to comply with the provisions of the Regulations which it failed to do and thus was liable to be punished under Section 24 of the Act and Appellant Nos. 2 to 5, under Sec. 24 read with Section 27 of the Act. CW2 Ms. Jyoti deposed and exhibited various public notices and stated that the Appellant No.1 did not get the scheme registered with the SEBI prior to mobilization of the fund and that till date i.e. till the date of her evidence, the Appellant No.1 had neither applied for registration nor any provisional registration was granted to it. The Appellant No.1 and its Directors did not even file the winding up and re-payment reports despite being intimated regarding the statutory obligations. After recording of the statements of the accused, they led their defence evidence by examining Sh. Tarsem Saini, Appellant No.2 as defence witness, who in his cross-examination admitted having not complied with the statutory provisions.

4. Learned counsel for the Appellant contends that the Appellant i.e. the Company and its Directors could not be prosecuted as the Company itself was wound up on 5th July, 2001 pursuant to the order passed by the Hon'ble Punjab and Haryana High Court and the complaint was filed on 21st December, 2002 when the Company which was a juristic person was no more in existence and its Directors also had lost their identity. Despite

Section 11C of the Act, SEBI conducted no investigation before filing of the complaint and prosecuted the Appellant only on the basis of documents supplied by them. Though the complaint is dated 21st December, 2002 however, the Appellants were summoned on 2nd December 2002 i.e., prior to the filing of the complaint, as observed by the learned trial court in para 2 of the judgment. The documents alleged to be sent by the company do not bear the signature of any of the Appellants. The complainant has produced no direct evidence nor any direct witness to the offence. Moreover, no role of commission of any offence has been attributed to any of the Appellants. In the cross-examination, PW1 has admitted that she did not know who was actually running the Company nor that the Company was directed to be wound up on 5th July, 2001. The learned Trial Court erroneously came to the conclusion that the offence continued, however, the said offence could not have continued once the Company was wound up. Notices sent by the SEBI were duly replied vide Ex. CW1/1 wherein it was specifically stated that the Company was desirous of taking the benefit of the provisions of Section 12(1B) of the SEBI Act. It is stated that a document cannot be read in piecemeal and it should be read as a whole. The Respondent SEBI relies on the undertaking to ensure compliance as stated in the reply dated 28th July, 1998 but does not take into account the first two sub-paragraphs where it is stated that they have not floated any C.I.S. subsequent to the public notice issued on 18th December, 1997 and they are not mobilizing any further funds under the existing schemes. It is contended that the provision was applicable to the existing collective investment schemes only. The scheme of the Appellant being an old one and no current funds being mobilized, the public notice did not relate to the Appellant. It is thus prayed that the learned Trial Court erroneously convicted the Appellants hence the appeal be allowed and the impugned order be set aside. In the alternative, the quantum of sentence is excessive as in the event of non-deposition of fine i.e. `5,00,000/- per Appellant, Appellant Nos. 2 to 5 have been directed to undergo imprisonment for a period of six months.

5. Learned counsel for the Respondent contends that the Regulation 68, 73 & 74 came into force on the 15th October, 1999 and under the Regulations it was clearly provided that a person can be prosecuted if he is running an existing collective investment scheme. To comply with Regulation 71, the grounds for winding up of the same existed before the learned Trial Court. The winding up of the Company under the Companies Act is different from the winding up of the C.I.S. as contemplated under Regulation 73. The provision of Section 11C of the Act conferring powers

of investigation on SEBI came into effect on 29th October, 2002 whereas the Company was directed to be wound up on the 15th July, 2001, thus no investigation could have been carried out by the SEBI in terms of Section 11C of the Act. The directions in terms of Section 11B of the Act were also passed on 7th November, 2000. The violation of Regulation 73 is continuing in nature till the amount is not paid back to the investors and the scheme is not wound up in terms of Regulation 73. Reliance is placed on Vishnu Prakash Vajpayee vs. SEBI, MANU/DE/0235/2010 to contend that the contravention of the provision of the Act by not refunding money collected by it from the persons who had invested the money in its collective investment schemes is a continuing offence till the time company complies with the Regulations and the directions issued by SEBI by refunding the money to the investors. Reliance is also placed on Sheoratan Aggarwal and another vs. State of Madhya Pradesh 1984 (4) SCC 352 to contend that along with company its Directors can also be convicted. It is thus prayed that the appeal be dismissed being devoid of any merit.

6. I have heard learned counsel for the parties and perused the record. Before proceeding with the evidence adduced on record, it would be relevant to note the provisions of the Act. Section 24 of the Act provides that, if any, person contravenes or attempt to contravenes or abets the contravention of the provisions of this Act or of any rules and regulations made thereunder, he shall be punishable with imprisonment for a term which may extend to ten years, or with fine, which may extend to twenty five crore rupees or with both. Prior to the amendment brought about on 29th October, 2002 the imprisonment was for one year or with fine, or with both and the amount of fine to be imposed was not spelt out. However, with effect from 29th October, 2002 the imprisonment has been provided for a term which may extend to ten years or with fine which may extend to `25 crores or with both. Since in the present case, the offence was committed prior to the amendment, the sentence provided would be one year imprisonment or with fine or with both.

7. Under Section 27 of the Act, in cases of offences by companies, every person who at the time when 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. As per Section 12(1B) of the Act, 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 including mutual funds, unless he

obtains a certificate of registration from the SEBI in accordance with the Regulations. The proviso to this sub-Section provides that any person sponsoring or cause to be sponsored, carrying or causing to be carried on any venture capital fund or Collective Investment Scheme operating in the securities market immediately before commencement of the Securities Law (Amendment) Act, 1995 for which no certificate of registration was required prior to such commencement, may continue to operate till such time regulations are made under Clause (b) sub-Section (2) of Section 30. Regulations 68(1) provides that any person who has been operating a C.I.S. at the time of commencement of these regulations, shall be deemed to be an existing CIS and shall also comply with the provisions of this chapter. Sub-clause (2) directs the applicant to give a written undertaking to the SEBI to comply with the conditions specified in Regulation (5). In terms of sub-Regulation (3) of Regulation 71 the applicant who has been considered eligible for the grant of provisional registration by the SEBI shall pay provisional registration fee as per second schedule. Sub-Regulation (4) of Regulation 71 states that an applicant who after grant of provisional registration fails to comply with the conditions as specified in sub-Regulation (1) and Regulation (9) shall not be considered eligible for the grant of certificate for registration under Regulation 10 and shall wind up the scheme in the manner specified in Regulation 73. Regulation 72 provides for grant of registration certificate to an existing C.I.S. which satisfies the SEBI that the requirements specified in Regulation 9 and the conditions specified under Regulation 71 have been fulfilled, upon the payment of registration fees as specified in para 2 of 2nd schedule and on such terms and conditions as may be specified by the SEBI. Sub-Regulation (2) of Regulation 72 permits the SEBI to grant the certificate to an existing CIS to float new schemes on such terms and conditions as may be specified by the Board.

8. Regulation 73 provides for a complete mechanism for the manner of re-payment and winding up of the existing collective investment scheme. Regulation 73 & 74 states as under:

"Manner of repayment and winding up

73. (1) An existing collective investment scheme which:

(a) has failed to make an application for registration to the Board; or

(b) has not been granted provisional registration by the Board; or

(c) having obtained provisional registration fails to comply with the provisions of regulation 71;

shall wind up the existing scheme.

(2) The existing Collective Investment Scheme to be wound up under sub-regulation (1) shall send an information memorandum to the investors who have subscribed to the schemes, within two months from the date of receipt of intimation from the Board, detailing the state of affairs of the scheme, the amount repayable to each investor and the manner in which such amount is determined.

(3) The information memorandum referred to in sub-regulation (2) shall be dated and signed by all the directors of the scheme.

(4) The Board may specify such other disclosures to be made in the information memorandum, as it deems fit.

(5) The information memorandum shall be sent to the investors within one week from the date of the information memorandum.

(6) The information memorandum shall explicitly state that investors desirous of continuing with the scheme shall have to give a positive consent within one month from the date of the information memorandum to continue with the scheme.

(7) The investors who give positive consent under sub-regulation (6) shall continue with the scheme at their risk and responsibility:

Provided that if the positive consent to continue with the scheme, is received from only twenty-five per cent or less of the total number of existing investors, the scheme shall be wound up.

(8) The payment to the investors shall be made within three months of the date of the information memorandum.

(9) On completion of the winding up, the existing collective investment scheme shall file with the Board such reports, as may be specified by the Board.

Existing scheme not desirous of obtaining registration to repay

74. An existing collective investment scheme which is not desirous of obtaining provisional registration from the Board shall formulate a scheme

of repayment and make such repayment to the existing investors in the manner specified in regulation 73."

9. Ms. Versha Aggarwal, Manager, SEBI who appeared as CW1 has deposed that she was working as Manager, SEBI and was authorized to continue this complaint by the delegation of power signed by the Chairman, SEBI. Mr. Sarad who had filed the complaint was authorized to file the same on behalf of the SEBI, identified his signature as she had seen him working during his duties. A public notice dated 18th December, 1997 was issued that the companies which had issued instruments such as agro bonds, plantation bonds would be treated as CIS coming under the provisions of SEBI Act. By the said notice companies were required to file their information i.e. details of Directors, fund mobilized, copy of memorandum and articles with SEBI. The Appellant No.1 vide its letter received on 18th December, 1997 submitted the aforesaid details vide Ex.CW1/1 consisting of 33 pages. As per said letter, Appellant Nos. 2-5 that is Sh. Tarsem Saini, Sh. Rajbir Singh, Sh. Jagjit Singh, Sh. Mohan Lal Saini and Sh. Hemant Sharma were the Directors of the Company which mobilized funds of `34,76,151/- under this C.I.S. As per Memorandum of Association the above named persons along with Mr. S. Singh and Mr. Jai Bhagwan were the promoters of the Company. Vide its letter dated 28th July, 1998 Ex. CW1/2, the company intimated that audit for financial year 1997-1998 had not been completed and they would submit the audited balance-sheets immediately after completion of the audit compliance certificate was enclosed. This compliance certificate which will be dealt later, is the bone of contention in the present appeal. SEBI C.I.S. Regulations were notified on the 15th October, 1999. The Company was duly informed of this notification vide press release dated 20th October, 1999 and by a specific letter dated 21st October, 1999. However, the same was returned undelivered with the report "left without address". Letter and the envelop has been exhibited as Ex.CW1/3 and Ex. CW1/4. The Company was further intimated about the regulatory requirements in terms of provisions of Regulations 5 (1), 73 and 74 for registration, winding up of the schemes and re-payments of the investors etc, vide letters dated 10th February, 1999 and 29th December, 1999. The letters came back with the report that "left without address" Ex. CW1/5 and Ex. CW1/6 are envelope and letter dated 10th December, 1999 and Ex. CW1/7 and Ex. CW1/8 are envelope and letter dated 29th December, 1999. A public notice dated 10th December, 1999 was also issued in this regard. The Appellant neither applied for registration nor informed the SEBI of the winding up of its scheme. The show-cause

notice dated 12th May, 2000 issued to the Company for taking action against it was also returned back undelivered with the report "left without address" vide Ex.CW1/9 and CW1/10. No reply to the show-cause notice was received from the Appellant. A reminder that on completion of winding up, the company was required to file a detailed report, was sent vide letter dated 31st July, 2000 along with the format of winding up and the said letter was also returned back undelivered with the same endorsement. The Company still failed to file the winding up and repayment report with the SEBI. Vide letter dated 7th December, 2000, Chairman, SEBI issued direction under Section 11B of the Act and directed the Company to refund the money collected under the scheme within a period of one month from the date of order failing which further action will be initiated. The contents of the said order was specifically brought to the notice of the Company vide letter dated 18th December, 2000 and by way of public notice date 14th January, 2001 wherein a list of 523 entities along with the text of directions issued under Section 11B of the Act was duly published. The name of the Company in the said list of 523 entities appeared at serial No. 37. According to CW1 till the date of her evidence i.e. 22nd March, 2007, the Company did not file the winding up and repayment report, thereby not complying with the Chairman's order and thus violated the provisions of the Act and the Regulations.

10. CW2 Ms. Jyoti Jindgar, Deputy General Manager, SEBI has deposed that she was competent to continue the said complaint in view of the delegation of powers dated 21st April, 2003 exhibited as Ex. CW2/1. She further stated that non-compliance of SEBI directions and the violations of Section 12 (1B) of the Act and the Regulations made thereunder is attributable to accused No. 2 to 6 who are the directors of the accused No.1, Company. Accused No. 1, company did not get the schemes registered with SEBI prior to realization of funds thereunder and that till date, that is, 29th August, 2008 the Appellant No. 1 or the Appellants 2 to 5 had not applied for registration nor any provisional registration was granted to them. The appellant have also not filed any winding up and repayment report till now. Though the Appellant Nos. 2 to 6 were statutorily bound to comply with the same being the directors of the company and were intimated regarding obligations under SEBI Regulations and Directions passed by Chairman, SEBI through public notices and thus this witness has exhibited the public notices dated 10th December, 1999 and 7th December, 2000 published on 14th January, 2001 vide Ex. CW2/2 and Ex. CW2/3 respectively.

11. Thus from the testimony of witnesses and the documents exhibited on record, it is proved that, that the Company was incorporated on 20th September, 1995. Section 12(1B) of the Act was inserted with effect from 21st January, 1995 wherein it was specifically provided 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 Schemes including mutual funds, unless he obtains a certificate of registration from the SEBI in accordance with the Regulations. Proviso to this sub-Section deals with the companies which were already carrying such business and they were also directed that they could continue the operation till such time Regulations are made under Clause (d) of sub-Section 2 of Section 30. Thus, as on the date of incorporation, there was a clear embargo on the Appellant to sponsor or cause to be sponsored or carry or cause to be carried on any collective investment scheme without obtaining certificate of registration from the SEBI in accordance with the regulations. Only companies which were already carrying on prior to the incorporation of Section 12 (1B) were permitted to continue the same till the Regulations were framed. Even those companies on the Regulations coming into operation were statutorily bound to comply them. Since the Appellant was not a Company which were carrying on the collective investment scheme as on 21st January, 1995 it could not have started the same without the certificate of registration from the SEBI. Despite the embargo, the Appellant started the C.I.S and thus at this stage it does not lie in the mouth of the Appellant to contend that the Regulations related to existing CIS and did not apply to it because when the Regulations came into force i.e. on 15th October, 1999 the Appellant was running a collective investment scheme and thus was running an existing collective investment scheme and could do so without any registration or without applying for the same. Moreover, Regulation 5(1) provides that prior to the date of coming into force of the Regulations, any person who was running an existing collective investment scheme should apply for grant of certificate within two months from such date. This Regulation was also not complied with by the Appellant. Thus, there is no merit in the contention of the learned counsel that there is no violation of Regulation 68(1), 68(2), 73 and 74.

12. I also do not find any force in the contention of learned counsel for the Appellant that since the Company was wound up vide order dated 5th July, 2001 no complaint could have been filed by the SEBI in December, 2002 as the Company which was a juristic person was non-existent and its Directors had lost their identity. This contention of the Appellant is wholly fallacious.

DW1 vide Ex. DW1/1 has proved that on 5th July, 2001 the High Court for the States of Punjab and Haryana in Company Petition No. 187/1999 directed the winding up of the Appellant Company as it was admitted by the Company that it was in debt and could not make the payment of the petitioner therein due to financial crunch and further no secured assurance was given by the company. Under the provisions of company law till the time the company is dissolved i.e. the process of liquidation continues, it does not lose its entity and hence, the directors, or person in charge would be liable for all the acts of the company. In the present case, it is proved fact that when the complaint was filed, the Appellant No. 1 i.e. the company was under liquidation which means that not only on the date of offence but also on the date of filing of the complaint, the company was in existence and had not lost its entity as a juristic person and in terms of Section 24 and 27 of the Act, the Appellant and its directors i.e. the persons responsible for day to day affairs of the company were liable for the offence committed by them for violation of the Act and Regulations. Similar view was taken in The Official Liquidator, Gannon Demkerley and Co. (Madras) Ltd vs. The Assistant Commissioner, Urban Land Tax and Anr. MLJ 1991 137 which reads as under: -

"In my view, the Company under liquidation does not lose its existence. The effect of an order of winding up is to place the affairs of the company into the hands of the Official Liquidator for completing the process of winding up, the Official Liquidator being put in possession as 'custodia legis' and managing the affairs for the limited purpose. In the course of administration by the Liquidator, after meeting out the liabilities of the company, he moves the Court for appropriate orders to adjust the rights of contributories among themselves and distribute any assets among the persons entitled thereto. Till such an order of the Court for such distribution is obtained and actually the assets have been distributed, the properties continue to be that of the Company. The Company under liquidation continues to exist as a juristic personality until an order under Sec. 481 of the Companies Act dissolving the Company is made by the competent Court. It is only thereafter the Company can said to become non-existent in the eye of law."

13. Learned counsel has strenuously argued that since the Company was directed to be wound up pursuant to the order passed by the High court of Punjab & Haryana which fact has been proved by the testimony of DW1 Sh. Tarsem Saini who has exhibited vide Ex. DW1/1 the certified copy of the order of High Court of Punjab and Haryana dated 5th July, 2001 in

Company Petition No. 187/1999 passing the order of winding up of the Appellant no. 1, thus no separate winding up would be required under the provisions of Regulation 73. This contention of the learned counsel also deserves to be rejected. The winding up of the Company under the provisions of the Companies Act is not akin to the winding up contemplated under Regulation 73. Regulation 73 provides that an existing Collective Investment Scheme which has failed to make an application for registration to SEBI or which has not been granted provisional registration or which has failed to comply with the provisions of Regulation 71 shall wind up the existing scheme. In order to wind up the existing CIS an information memorandum is required to be sent to the investors who have subscribed to the scheme, within two months from the date of receipt of intimation from the board, detailing the affairs of the scheme, the amount repayable to each investor and the manner in which such amount is determined. The information memorandum has to explicitly state that the investors desirous of continuing with the scheme shall have to give a positive consent within one month from the date of the information on the memorandum to continue with the scheme at their risk and responsibility and if the consent is received from only 25 per cent or less of the total no. of existing investors, the scheme shall be wound up. Only on the payment to the investors is the winding up of the scheme completed which report has to be sent to the SEBI as a winding up report. Regulation 74 provides that an existing CIS not desirous of obtaining provisional registration from the SEBI shall formulate a scheme of repayment and make such repayment to the existing investors in the manner specified in Regulation 73. Thus, the winding up contemplated under the SEBI (CIS) Regulations, 1999 is a different mechanism of winding up the scheme than what is provided under the provisions of the Companies Act, 1956 which is winding up of the Company itself, and non-compliance thereof is punishable under Section 24 read with Section 27 of the Act.

14. I find no merit in the contention of the learned defence counsel that no role has been attributed to the Appellants Nos. 2 to 5. The Appellants were the promoters and Directors thus, the responsibility of day to day functioning of the Company as has been proved by the complainant witnesses from the memorandum and articles of association is also on them. The Hon'ble Supreme Court in SMS Pharmaceuticals Ltd. vs. Neeta Bhalla and others, 2005 (8) SCC 89 held that a clear, unambiguous and specific allegation against a person impleaded as an accused that he was in charge of and responsible to the company in the conduct of its business at the material

time when the offence was committed is sufficient. This issue was also considered by the Hon'ble Supreme Court in N. Rangachari vs. BSNL, 2007 Cri.L.J 2448, wherein it was held:

"13. A Company, though a legal entity, cannot act by itself but can only act through its directors. Normally, the Board of Directors act for and on behalf of the company. This is clear from Section 291 of the Companies Act which provides that subject to the provisions of that Act, the Board of Directors of a Company shall be entitled to exercise all such powers and to do all such acts and things as the Company is authorized to exercise and do. Palmer described the position thus:

"A company can only act by agents, and usually the persons by whom it acts and by whom the business of the company is carried on or superintended are termed directors...."

It is further stated in Palmer that:

"Directors are, in the eye of the law, agents of the company for which they act, and the general principles of the law of principal and agent regulate in most respects the relationship of the company and its directors."

The above two passages were quoted with approval in R.K. Dalmia & Ors. v. The Delhi Administration [(1963)1 SCR 253 at page 300] . In Guide to the Companies Act by A. Ramaiya (Sixteenth Edition) this position is summed up thus:

"All the powers of management of the affairs of the company are vested in the Board of Directors. The Board thus becomes the working organ of the company. In their domain of power, there can be no interference, not even by shareholders. The directors as a board are exclusively empowered to manage and are exclusively responsible for that management."

Therefore, a person in the commercial world having a transaction with a company is entitled to presume that the Directors of the company are in charge of the affairs of the company. If any restrictions on their powers are placed by the memorandum or articles of the company, it is for the Directors to establish it at the trial. It is in that context that Section 141 of the Negotiable Instruments Act provides that when the offender is a company, every person, who at the time when the offence was committed was in charge of and was responsible to the company for the conduct of the business of the company, shall also be deemed to be guilty of the offence along with the company. It appears to us that an allegation in the complaint that the named accused are Directors of the company itself would usher in the element of their acting for an on behalf of the company and of their being in charge of the company. In Gower and Davies Principles of Modern

Company Law (Seventh Edition), the theory behind the idea of identification is traced as follows:

"It is possible to find in the cases varying formulations of the under-lying principle, and the most recent definitions suggest that the courts are prepared today to give the rule of attribution based on identification a somewhat broader scope. In the original formulation in Lennard's Carrying Company case Lord Haldane based identification on a person 'who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation'. Recently, however, such an approach has been castigated by the Privy Council through Lord Hoffmann in Maridian Global case as a misleading "general metaphysic of companies". The true question in each case was who as a matter of construction of the statute in question, or presumably other rule of law, is to be regarded as the controller of the company for the purpose of the identification rule.

But as has already been noticed, the decision in S.M.S. Pharmaceuticals ltd. (supra) binding on us, has postulated that a director in a company cannot be deemed to be incharge of and responsible to the company for the conduct of his business in the context of Section 141 of the Act. Bound as we are by that decision, no further discussion on this aspect appears to be warranted.

14. A person normally having business or commercial dealings with a company, would satisfy himself about its creditworthiness and reliability by looking at its promoters and Board of Directors and the nature and extent of its business and its memorandum or articles of association. Other than that, he may not be aware of the arrangements within the company in regard to its management, daily routine, etc. thereforee, when a cheque issued to him by the company is dishonoured, he is expected only to be aware generally of who are in charge of the affairs of the company. It is not reasonable to expect him to know whether the person who signed the cheque was instructed to do so or whether he has been deprived of his authority to do so when he actually signed the cheque. Those are matters peculiarly within the knowledge of the company and those in charge of it. So, all that a payee of a cheque that is dishonoured can be expected to allege is that the persons named in the complaint are in charge of its affairs. The Directors are prima facie in that position.

15. ……

16. In the light of the ratio in S.M.S Pharmaceuticals Ltd. what is to be looked into is whether in the complaint, in addition to asserting that the appellant and another are the Directors of the company, it is further alleged that they are in charge of and responsible to the company for the conduct of

the business of the company. We find that such an allegation is clearly made in the complaint which we have quoted above. Learned Senior Counsel for the appellant argued that in Saroj Kumar Poddar case this Court had found the complaint unsustainable only for the reason that there was no specific averment that at the time of issuance of the cheuqe that was dishonoured, the persons named in the complaint were in charge of the affairs of the company. With great respect, we see no warrant for assuming such a position in the context of the binding ratio in S.M.S Pharmaceuticals Ltd. and in view of the position of the Directors in a company as explained above."

15. Thus, testing of the facts of the present case in the light of the ratio laid down, it would be relevant to reproduce the relevant portion of the complaint filed by the respondent which is duly exhibited and proved by the statement of CW1 Versha Aggarwal:
"In view of the above, it is charged that the Acused No. 1 has committed the violation of Sec. 11B, 12 (1B) of Securities and Exchange Board of India Act, 1992 read with Reg. 5 (1) read with Reg. 68 (1), 68 (2), 73 and 74 of the Securities and Exchange Board of India (Collective Investment Schemes) Regulations, 1999 which is punishable under Sec. 24 (1) of Securities and Exchange Board of India Act, 1992. The Accused No. 2 to 6 are the directors and/or persons in charge of the responsible to the Accused No. 1 for the conduct of its business and are liable for the violations of the Accused No. 1, in terms of Sec. 27 of Securities and Exchange Board of India Act, 1992."

Besides CW2 in her testimony has stated: "The non-compliance of the SEBI directions and the violations of Sec. 12(1B) of the Act and the Regulations is attributable to accused Nos. 2 to 6, who are the directors of accused No.1 company. Accused No.1 company did not get the schemes registered with SEBI prior to mobilization of funds thereunder. Till date accused no.1 company has not applied for registration nor any provisional registration was granted to it. The accused No.1 company or its directors accused Nos. 2 to 6 have not filed any winding up and repayment report till now. The accused No.1 company and its directors accused Nos. 2 to 6 were intimated regarding obligations under SEBI regulations and directions passed by Chairman SEBI through public notices dated 10.12.1999 and 07.12.2000, which was published on 14.1.2001 which are Ex. CW-2/2 and Ex. CW-2/3 respectively." No cross examination of this witness had been conducted on this aspect. Thus the testimony of this witness on this aspect

has gone unchallenged. In response to the question No. 2 that the Appellant No.1 that is the company had filed the details including the list of Directors, funds mobilized and memorandums and articles exhibited as Ex. CW1/1, the Appellant Nos. 2 to 5 in their statements under Sec. 313 CrPC have stated that we did not file this information. They have shown ignorance even about the audited balance-sheets etc. However, the defence witness DW1 Tarsem Saini has stated in his testimony that the company was run by the Appellant Nos. 2 to 5 and Hemant Sharma as directors. The relevant part of the testimony of DW1 reads as under:

"….Accused No. 1 company had mobilized only Rs. 1 to 1.5 lac rupees and the same stand repaid. It is wrong to suggest that the accused no. 1 company has received Rs. 34,79,151/- as investment. I was the director of the accused company apart from me Sh. Hemant Sharma, Sh. Rajbir Singh, Sh. Jagjit Singh, Sh. Mohan Lal Saini were also directors of accused no. 1 company. I had stated that our company started few months before the filing of the petition for winding up. It is correct to suggest that the accused no. 1 company was incorporated on 22.09.1995 as per the certificate of incorporation however the commencement of business was from 22.08.1996. We started business in the year 1998 Ex. CW1/1 was not sent by the accused company. Ex. CW1/2 was also not sent by the accused company. I have taken oath therefore I am not lying and I am not deposing falsely. It is wrong to suggest that the accused company was would wound up on account of non-payment to all the investors. The accused company had not filed winding up and repayment report with the same."

16. The testimony of the complainant witnesses along with the relevant documents duly exhibited, together with the testimony of defence witness Sh. Tarsem Saini and the contradictory statements given by the Appellants under Section 313, Cr.P.C. it can be safely adduced that the case of the contention of the learned counsel for the Appellant is liable to be dismissed, as there is sufficient evidence on record i.e. the complaint, the memorandum of article of associations and the statement of DW1 Tarsem Saini which is cogent and sufficient to show that at the time when the violation of SEBI (CIS) Regulation was carried on by the Accused No.1 company, the Appellant Nos. 2 to 5 herein were the persons in-charge and responsible for the affairs of the company. As regards compliance of the Regulations and notices, they have stated that since their company was wound up, they were not aware of any such notices and compliance to be made. It would be relevant to note here that the order directing the winding up of the Company were passed on 5th July, 2001 whereas the SEBI (CIS) Regulations came

into force on 15th October, 1999 whereafter all the public notices and notices were sent to the company, which were all prior to the directions for winding up of the Company by the Hon'ble High Court of Punjab & Haryana.

17. Learned counsel for the Appellant has strenuously relied on the compliance certificate dated 28th July, 1998 Ex. CW1/2. Learned counsel states that this document cannot be read in part as the respondent is only relying on the undertaking given by the Appellant No.1 that they will comply with any further directions on collective investment scheme that may be issued by the SEBI from time to time but are not considering their explanation in the said exhibits that they had not floated any new collective investment scheme subsequent to public notice issued by SEBI on 18th December, 1997 and they were not mobilizing any further funds under the existing schemes. This statement of the Appellants does not absolve the Appellants of their criminal liability even if they have not floated any new CIS after the public notice issued on 18th December, 1997. In terms of Regulation 5(1) the Appellant was bound to make an application for grant of certificate within two weeks from the date of coming into force of the Regulation which mandatory requirement was not complied with by the Appellants. They did not even comply with Regulation 74 which provided for the procedure as contemplated under Regulation 73 to formulate the scheme of re-payment. Merely writing to the Respondent that the Appellant was desirous of taking benefit of scheme under Section 12 (1B), the Appellant was not absolved from the further liabilities. Moreover, in the statement recorded under Section 313 Cr.P.C. the Appellant Nos. 2 to 5 have specifically denied knowledge of Ex. CW1/2.

18. I find no merit in the present appeal. The same is dismissed. Copies of this judgment be sent to the Appellant Nos. 2 to 5 through the Superintendent, Tihar Jail.

(MUKTA GUPTA)
JUDGE