

SECURITIES AND EXCHANGE BOARD OF INDIA
FINAL ORDER

Under Sections 11(1), 11(4), and 11B of Securities and Exchange Board of India Act, 1992

S. No.	Noticee	PAN
1.	Ms. Sapna Karmokar (Former Company Secretary, Sudar Industries Limited)	ATBPK1115G

In the matter of Initial Public Offer of Sudar Industries Limited

1. Present order is being passed in compliance with order dated September 05, 2022 passed by Hon'ble Securities Appellate Tribunal, Mumbai (hereinafter referred to as "**Hon'ble SAT**") in Appeal No. 694 of 2021 whereby Hon'ble SAT *inter alia* directed as under:

"4. In view of the aforesaid, we are satisfied that it is a fit case for remand. Since the matter proceeded ex-parte, we set aside the order of the WTM in so far as it relates to the appellant and remit the matter to the WTM to pass a fresh order in accordance with law after giving an opportunity of hearing. The WTM will also consider the order of the AO. The appeal is allowed."

2. Aforesaid SAT Appeal No. 694 of 2021 was filed by Ms Sapna Karmokar (hereinafter referred to as "**the Noticee**") before Hon'ble SAT, challenging the order no. WTM/GM/ EFD 1 – DRA 4/02 /2021-22 dated April 20, 2021 (hereinafter referred to as "**the Final Order**") passed by Securities and Exchange Board of India (hereinafter referred to as "**SEBI**"). The Final Order came to be passed by SEBI in the proceedings emanating from issue of show cause notice dated March 24, 2017 (hereinafter referred to as "**SCN**") issued by SEBI to 18 entities including the aforesaid Noticee wherein *inter alia* it was alleged that Sudar Industries Limited (hereinafter referred to as "**SIL/the Company**") had deviated from the objects of

the issue as per the prospectus of SIL and there were misstatements in the prospectus and thus, it was, *inter alia*, alleged that the Noticee had violated Regulations 57(1) and 60(7)(a) of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 (hereinafter referred to as “**ICDR Regulations, 2009**”) and Clauses 2(VII)(G), 2(VIII)(D)(5) and 2(XVI)(B)(2) of Part A of Schedule VIII read with Regulation 57(2)(a) of the ICDR Regulations, 2009. The SCN called upon the Noticee to show cause as to why suitable directions under Sections 11(1), 11(4) and 11B of the SEBI Act, 1992 should not be issued against her for the alleged violations.

3. Pursuant to issuance of SCN, the Final Order was passed by SEBI in the matter (the Noticee herein was Noticee no. 8 in the Final Order), *inter alia*, issuing the following directions to the Noticee:

“

10.1.4.....Noticee No. 8 (*Sapna Karmokar*) shall be restrained from accessing the securities market, and further prohibited from buying, selling or otherwise dealing in securities, directly or indirectly, and associating with the securities market in any manner, whatsoever, for a period of 5 years;

10.1.5. Noticee Nos. 4 to 8 shall also be restrained for a period of 5 years from holding any position of Director or key managerial personnel in any listed company or any intermediary registered with SEBI, and during the said period shall be restrained from associating themselves with any listed public company or a public company which intends to raise money from the public or any intermediary registered with SEBI;

.....”

4. Aggrieved by the aforesaid order of SEBI, the Noticee filed Appeal No. 694 of 2021 before Hon’ble SAT. Vide its order dated February September 05, 2022, Hon’ble SAT set aside the Final Order in so far as it related to the Noticee and remitted the matter to SEBI to pass a fresh order after giving an opportunity of hearing. Hon’ble SAT also directed that the order of Adjudicating Officer dated May 31, 2022, in which the Noticee has been exonerated from the charges levelled against her in

another show cause notice dated December 15, 2017, shall also be considered by SEBI. SAT also directed the Noticee to appear before the Whole Time Member, SEBI on September 30, 2022. Thereafter, the file in the matter was placed before me on September 19, 2022, for granting a date of hearing in the matter. Vide email dated September 26, 2022 the Authorised Representative (AR) of the Noticee was advised to collect the SCN on September 30, 2022. Vide email dated September 29, 2022 the AR of the Noticee filed a reply in the matter. Hearing in the matter was scheduled for November 04, 2022. At the request of the Noticee, the hearing was re-scheduled to November 07, 2022. On the date fixed for hearing, the Noticee along with her AR appeared and made submissions.

5. In her written submissions filed in the present proceedings, the Noticee has *inter alia* submitted as under:

- 5.1. Another SCN dated December 15, 2017 issued to the Noticee and the present proceedings emanate from the same factual matrix and contain virtually identical allegations in so far as the Noticee is concerned. The Adjudicating Officer has by the Order dated 31st May 2022 exonerated the Noticee from the charges alleged against her in the said SCN dated December 15, 2017. The Noticee also refers to the order of Hon'ble SAT in Nirmal Kotecha v. SEBI (Appeal No. 580 of 2019).

- 5.2. The present SCN dated March 24, 2017 has been issued in respect of Initial Public Offer ("IPO") of SIL that took place in February 2011. The Noticee resigned as company secretary of SIL in June 2012 and has no access to the records of SIL. The Noticee is handicapped due to the lack of contemporaneous records, which would have been available had the SCN been issued within a reasonable time. The time period of over six years between the IPO and the SCN shows gross delay in the present proceedings. The continuation of these proceedings over such an extended period also defeats the interest of justice. The Noticee also refers to the orders of Hon'ble SAT in Rakesh Kathothia & Ors. v. SEBI (Appeal No. 7 of 2016) dated 27th

May, 2019, HB Stockholding Ltd. v. SEBI, reported in Manu/SB/0039/2013, Libord Finance Ltd. v. SEBI, dated March 31, 2008 and Khandwala Securities Limited v. SEBI, dated September 7, 2012.

5.3. The allegations in the SCN appear to be predominantly against SIL, its promoters, certain directors and employees and others. There are no allegations against the Noticee regarding personal involvement or knowledge of any transactions referred in the SCN. There is no allegation in the SCN that the Noticee was aware of or involved in the alleged fraud. In the SCN, the name of the Noticee has been incorrectly clubbed with various other Noticee under the title of directors.

5.4. The Noticee received her enrolment with the ICSI on or around 12th July 2010. The Noticee joined SIL as a company secretary on June 14, 2010 and resigned on June 09, 2012. Prior to her resignation, the Noticee was not involved in the decision making process of SIL for utilization of the funds raised during the IPO process. At the time of the Noticee's resignation, there were no allegations of any nature against the Noticee.

5.5. The role of the Noticee was to ensure compliances with various statutory provisions and she was not involved in the commercial transactions and commercial affairs of SIL and was not responsible for the same. The Noticee was not expected to doubt or verify whether the statements of the Key Managerial Personnel, including the Promoter, Directors or Chairman were correct or not and had no reason to disbelieve the representations and documents provided to her.

5.6. The Noticee did not have investigative powers to unearth fraudulent schemes, if any and had no reason to seek any further information or documents from SIL other than that provided to her during the period when the Noticee was company secretary of SIL, as there was no apprehension and/ or indication of any wrongdoing by SIL.

- 5.7. When the Noticee joined SIL, preparation for the process of the IPO was ongoing and a Merchant Banker, namely, Ashika Capital Ltd. and a reputed firm of company secretaries, namely, M/s Deep Shukla and Associates, were involved in the preparation of documents, information and compliances required for the IPO process and the Noticee had a negligible role in the IPO.
- 5.8. The Noticee was instructed to work under the guidance and supervision of the M/s Deep Shukla and Associates. Most of the forms and documents to be filed with various statutory authorities were verified, certified and filed by M/ s Deep Shukla & Associates. The Noticee was neither invited nor formed part of any of the IPO meetings.
- 5.9. Based on assurances by executives, the Merchant Banker and firm of company secretaries including representations that the necessary compliance of all legal procedures/ practices had taken place, the Noticee had signed the prospectus in her capacity as company secretary as directed and not as a Director and not to verify the content of the Prospectus.
- 5.10. The Noticee *bonafide* believed that the persons responsible for the IPO including the Promoters, Directors, Merchant Banker and firm of company secretaries would act in a proper and appropriate manner, and in accordance with law, and had no reason to believe or suspect otherwise. The Noticee had also, during her tenure as company secretary not received any adverse information or communication in respect of any of the activities undertaken by SIL, including from the Merchant Banker, as well as from the independent and statutory auditors and therefore, also had no reasons to doubt the representations made by the professionals handling the IPO as well as the affairs of SIL and the manner in which they were being conducted.
- 5.11. There was no discussion with her or any documents provided to her apropos any of the alleged transactions with related suppliers/customers of SIL and/or

alleged concocted sales figures and/ or alleged mis-statements related to KMP and Customers. The Noticee as company secretary of SIL was kept in the dark about the same and there were no means by which the Noticee could access the information to unearth the same.

- 5.12. The SCN does not manifest the manner in which it seeks to make the Noticee liable for actions of SIL. Merely being a company secretary of the Company in the ordinary course of business cannot be a ground for raising serious allegations of fraud and malfeasance and/or being aware of any fraud being played or likely to be played by the executives.
- 5.13. The role and scope of duties of a company secretary differs from that of the Directors of a Company. The company secretary acts on the instructions provided to him/her and has no decision-making powers inter alia including in respect of the commercial business and utilization of funds.
- 5.14. Even in cases for assessing the vicarious liability for acts of the Company, various elements have to be established, which have been recognized in the judgments of the Supreme Court of India from time to time. It is required to establish that the concerned person was in charge of and responsible for the company's business amongst other aspects and merely the position of a person does not make him liable for acts of the company, what has to be established is that the person was in charge and responsible for the company's business. In the facts and circumstances of the present proceedings, the Noticee was a mere fresher who was appointed to the post of company secretary after preparations for the IPO had already commenced. It is not the case in the SCN and it has not even been alleged that the Noticee was in charge of or responsible for the business of SIL or involved in the commercial decisions and/ or decision making process at all.

- 5.15. It is trite law that in order to hold a person liable for acts of the company, the specific individual role of such person must be stated and established. In the facts of the present case, there is no specific allegation against the Noticee.
- 5.16. The PFUTP regulations do not provide any vicarious liability of the company secretary and/or Directors for the acts of the company. It requires SEBI to establish that the individual had personally perpetrated a fraud or unfair trade practice as colluded in the same. There is no such allegation in the Show Cause Notice against the Noticee. While the SEBI Act, in Section 27 provides for vicarious liability of directors for acts of the company, the same would not be applicable in the facts and circumstances of the present proceedings in view of the fact that no offence has been committed. Without prejudice, SEBI in the present case has not invoked Section 27 at all. As such it cannot contend the Noticee is vicariously liable for the acts of the Company.
- 5.17. The fundamental premise on the basis of which the alleged violations by SIL and its Directors as stated in paragraph 24 of the SCN appears to have been made on the basis of the summary contained in paragraph 23 of the SCN viz. (i) SIL deployed only Rs. 5.54 Crores out of Rs. 69.97 Crores that it had collected from the IPO proceeds, (ii) SIL had suppressed key material facts pertaining to its KMPs, customers etc. in the offer documents and (iii) therefore, SIL had deviated from the objects of the issue as per the Prospectus of SIL and had siphoned off an amount of Rs. 64.43 Crores from the IPO proceeds.
- 5.18. Regarding the alleged failure to make related party disclosures with respect to KMPs, customers etc. the SCN has not alleged or established that the Noticee no. 8 was aware, or had knowledge of the fact and/or means to ascertain that the entities were related parties, especially when other entities such as Merchant Banker and Auditor had not raised any issues. The Noticee no. 8 therefore not being aware that the entities were related parties, cannot be held liable for any such allegations of failure to make disclosure either in the Prospectus and/ or to the exchange.

- 5.19. In the absence of the violations being established *qua* the Noticee, the question of imposing any penalty does not arise. The SCN merely refers to an array of legal provisions, *inter alia*, being the provisions of ICDR Regulations, 2009 without attempting to apply the facts and circumstances to the ingredients of the above regulations. This, in itself, make the charges vague, ambiguous and totally unsustainable in law and on facts.
- 5.20. There has been no violation of ICDR Regulations, 2009 by the Appellant in as much as the Noticee did not prepare the offer document. The SCN does not in any manner demonstrate any actions on the part of the Noticee no. 8 that would constitute a violation of the aforesaid provisions. The SCN has also failed to demonstrate how the Noticee no. 8 has violated the aforesaid provisions. The Noticee was not in charge of and was not a part of the decision-making process for the utilization of funds.
- 5.21. The SCN lacks any allegation that the Noticee was involved in the decision-making processes of SIL that resulted in the alleged deviation from the objections of the IPO and siphoning of funds. The SCN has not alleged that the Noticee had the requisite knowledge and/or means to ascertain that there was a deviation from the objects of the IPO and/or siphoning of funds. The Noticee as company secretary was in no manner involved in the decision-making process for the utilisation of the IPO funds and therefore cannot be held liable for any alleged deviation and/or siphoning, if any.
- 5.22. It is well settled law that where fraud and collusion are alleged, it would be incumbent on the authority to set out the nature of the fraud along with full particulars. In view of the above, the charges in the Notice are vague, incomprehensible and incoherent.
- 5.23. Without prejudice, the mere fact that the Noticee was a company secretary cannot suffice to allege that the Noticee has acted in a manner necessary to

establish breach of the SEBI Act and/or Regulations framed thereunder including the ICDR Regulations and resulting in directions under directions under Sections 11(1), 11(4) and 11B of the SEBI Act, 1992.

5.24. The SCN is based on mere conjectures without having any actual evidence of any wrongdoing being committed by the Noticee. Pertinently, the present SCN does not contain any cogent reasoning or convincing evidence to demonstrate that the Noticee has willingly or deliberately or with knowledge failed to carry out any statutory obligation under the SEBI Act.

5.25. Hon'ble SAT in its order in P. G. Electroplast & Ors. v/s SEBI, dated August 02, 2019, *inter alia*, reiterated that if it is found that a party has not acted deliberately, then the authority has a discretion, to be exercised judicially, whether in a given case, after taking into consideration of all the relevant circumstances, as to whether a penalty should be imposed or not. Hon'ble SAT also held that the mere fact that a person is a Director would not make them liable and that there must be specific findings that such a person as a Director was responsible for the alleged violation and were in charge of the affairs of the company. While the Noticee is a company secretary and not a Director, the aforesaid principles would also apply in the present proceedings. Significantly, *qua* the Noticee no. 8 there is no allegation of (i) negligence, (ii) lack of due diligence or (iii) that the Noticee as company secretary was responsible for the alleged violation and was in charge of the affairs of SIL.

6. Vide email dated November 07, 2022, the AR of the Noticee also filed a note on judgements relied upon during the hearing.

Consideration of Submissions and findings:

7. I have considered the aforementioned order dated September 05, 2022 passed by Hon'ble SAT in the matter, reply filed by the Noticee and submissions made during the hearing and written submissions filed in the matter.

8. Before proceeding further, it would be appropriate to mention here that in the present matter, SCN was issued against 18 entities including the Noticee herein. In the SCN, it was *inter alia*, alleged that SIL had deviated from the objects of the issue as per the prospectus and had siphoned off an amount of Rs. 64.43 crore from the total IPO proceeds of Rs. 69.97 crore. In view of this, it was alleged that the Company, its directors, its VP (Finance) and its company secretary, i.e. Noticee nos. 1 to 8, had violated Regulations 57(1) and 60(7)(a) of ICDR Regulations, 2009 and Clauses 2(VII)(G), 2(VIII)(D)(5) and 2(XVI)(B)(2) of Part A of Schedule VIII read with Regulation 57(2)(a) of the ICDR Regulations, 2009. SCN also alleged that Noticee nos. 9 and 10 were the statutory auditors of the Company and Noticee nos. 11 to 18 were the conduit entities who were used to siphon off the IPO proceeds, and has thus, violated Section 12A (a), (b) & (c) of SEBI Act, 1992 and Regulations 3(b), (c) & (d) and 4(1) of SEBI (PFUTP) Regulations, 2003. SCN further alleged that the auditors of the Company (Noticee nos. 9 and 10), its promoter/directors (Noticee nos. 2 to 6) and entities related to the Company (Noticee nos. 11 to 18) had violated Section 12A (a), (b) & (c) of SEBI Act, 1992 and Regulations 3(b), (c) & (d), 4(1) and 4(2)(k) & (r) of SEBI (PFUTP) Regulations, 2003.
9. I note that the main allegation in the SCN was that the IPO proceeds of the Company were used for the objects other than the one disclosed in the prospectus. As the IPO proceeds were not used for the objects stated in the prospectus, it was alleged that it was the fraudulent scheme of the Noticees to the SCN, to siphon off of the proceeds of the IPO, to give effect to which objects in the prospectus were misstated. I note that in the Final Order, the allegations made in the SCN were sustained against all the Noticees. As stated above, vide Hon'ble SAT's order dated September 05, 2022, the Final Order passed by SEBI, has been set-aside *qua* Noticee no. 8 and directed SEBI to pass a fresh order after giving an opportunity of hearing to the Noticee and after considering the order of the Adjudicating Authority, SEBI whereby the Noticee has been exonerated of the same charges in the adjudication proceedings for monetary penalty.

10. I note that the Noticee joined as company secretary of SIL on June 14, 2010 and resigned from the Company on June 09, 2012. The SCN does not attribute any specific act to the Noticee with respect to deviation from objects of issue and siphoning off of IPO proceeds. I note that Noticee was a signatory to the prospectus of the Company in her capacity as company secretary of the Company. In order to find out as to whether the Noticee can be held liable for deviation in objects and/or siphoning off of IPO proceeds, which is main allegation in the SCN, by virtue of being signatory to the prospectus, allegations in the SCN have to be examined vis-à-vis the role of the Noticee in the Company. The SCN alleges that substantial part of the IPO proceeds (Rs. 64.43 crore from the total IPO proceeds of Rs. 69.97 crore) was siphoned off. The Company's explanation was that the said amount was used by it to repay the ICDs and return of advance received for the sale of land. These were not the stated objectives of the IPO, as per the prospectus. In view of this, it was alleged in the SCN that there was a scheme of siphoning off of IPO proceeds. In this regard, I note that decisions regarding objects of the issue or use of IPO proceeds or temporary deployment of IPO proceeds, are the issues which falls in the realm of board of directors of a company. The Noticee herein was a company secretary and not a director of the Company. Noticee being company secretary was responsible for secretarial compliance of the Company. Hence, she was neither the part of the board of directors nor can she be said to be involved in the day to day affairs of the Company. The SCN does not attribute any specific act to the Noticee with respect to deviation in objects of the issue or siphoning off of IPO proceeds. Therefore, merely by signing the prospectus, she cannot be attributed with the fraudulent acts of the Company as there is no evidence of her involvement.

11. I also note that in terms of Clause 2(XVI)(B)(1) of Part A of Schedule VIII to the ICDR Regulation, 2009 which deals with declaration by the issuer with respect to the disclosures made in the offer document, the offer document is required to be approved by the board of directors of the issuer and also to be signed by all directors, the Chief Executive Officer, i.e., the Managing Director or Manager within

the meaning of the Companies Act, 1956 and the Chief Financial Officer, i.e., the whole-time finance director or any other person heading the finance function and discharging that function and the signatories are required to certify that all disclosures made in the offer documents are true and correct. The said clause does not require a company secretary to approve the offer document or sign it. As stated earlier, the Noticee was company secretary of SIL and not a director in SIL. Thus, even signing of the prospectus by the Noticee was an act which was not otherwise required under the provisions of ICDR Regulations, 2009.

12. I note that the Noticee has contended that SCN does not allege that the Noticee had the requisite knowledge and/or means to ascertain that there was a deviation from the objects of the IPO and/or siphoning of funds. In this regard, I note that guidance may derived from Section 62 of the Companies Act, 1956 (since repealed), as applicable at the relevant time, which provided civil liability for misstatement in prospectus. In terms of Section 62(2) of the Companies Act, 1956 a person is not held responsible for an untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, if he can prove that he had reasonable ground to believe, and did up to the time of the allotment of the shares or debentures, as the case may be, believe, that the statement was true. In the present case, the objects of the issue disclosed in the prospectus have been found to be untrue because of the subsequent deployment of the IPO proceeds by other Noticees to the SCN for different objects like repayment of ICDs, refund of advance received towards sale of property, etc. Therefore, at the time of signing of prospectus the Noticee could not be attributed with requisite knowledge regarding any intended change in deployment of IPO proceeds for objects other than those disclosed in the prospectus, subsequent to signing of prospectus, in the absence of any proof to the contrary.

13. In view of the aforesaid, the allegation made in the SCN are not made out against the Noticee.

14. I also note that another show cause notice dated December 15, 2017 was issued in the adjudication proceedings initiated against the Noticee, in the same matter for imposition of monetary penalty. The concerned Adjudicating Officer, SEBI, vide order dated May 31, 2022, exonerated the Noticee from the charges alleged against her. In its order dated September 05, 2022, Hon'ble SAT has directed to take the aforesaid order of the Adjudicating Officer, SEBI, into account in the present proceedings, which is accordingly being taken.

15. In view of the aforesaid, I, in exercise of the powers conferred upon me in terms of Sections 11(1), 11(4) and 11B of the SEBI Act, 1992 read with Section 19 thereof, hereby dispose of the SCN issued to the Noticee without any directions.

16. This order comes into force with immediate effect.

17. A copy of this order shall be sent to the Noticee.

Sd/-

ANANTA BARUA

Date: May 09, 2023

WHOLE TIME MEMBER

Place: Mumbai

SECURITIES AND EXCHANGE BOARD OF INDIA