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SEBI Spl Case No.233/14

MHCC020131492014



Received on : 09.09.2014
Registered on : 09.09.2014
Decided on : 19.11.2024
Duration : Y M D
10 02 09

IN THE DESIGNATED SPECIAL COURT UNDER SEBI ACT, 1992

FOR MAHARASHTRA STATE

AT COURT ROOM NO.22, SESSIONS COURT, GREATER MUMBAI

(Presided over by R. M. Jadhav, SEBI Special Judge, Mumbai)

SEBI SPECIAL CASE NO. 233 OF 2014

Exh. 144

Complainant	: Securities and Exchange Board of India
Represented by	: Ms. Ushajee Peri, SPP
Accused	: 1. Shri. Shivkumar Agarwal Managing Director Gujarat Arth Ltd., having address at 21 B, Akash Apartment, Opp. Premchand Nagar, Judges Bungalow Road, Satellite, Ahmedabad 380022. 2. Shri. Bhupendra Panchal Director of Gujarat Arth Ltd., having address at 18, Om Parmatma, Nr. Municipal School, Isanpur, Ahmedabad 382443.
Represented by	: Advocate Mr. Sagar Sheth for accused.
Date of offence	: --
Date of FIR	: --
Date of Chargesheet	: --

Date of Framing of Charge	:	29.08.2019
Date of Commencement of Evidence	:	22.09.2021
Date on which judgment is reserved	:	19.11.2024
Date of the Judgment	:	19.11.2024
Date of the Sentencing Order, if any	:	

Accused details

Rank of the accused	Name of accused	Date of arrest	Date of release on bail	Offences charged with	Whether acquitted or convicted	Sentence imposed	Period of Detention undergone during Trial for purpose of Section 428 Cr.PC
1.	Shri. Shivkumar Agarwal	19.03.2016	-	U.S. 24(1) r/w 27 of SEBI Act.	Convicted	-	-
2.	Shri. Bhupendra Panchal	19.03.2016			Convicted		

LIST OF PROSECUTION/DEFENCE/COURT WITNESSES

A. Prosecution :

RANK	NAME	NATURE OF EVIDENCE
C.W. 1	Ms. P L. Leena Shree	Witness
C.W. 2	Barnali Mukharji	Witness
C.W. 3	Hitesh Vallabhji Savla	Witness
C.W. 4	Gopalkrishan K. Iyer	Witness

C.W. 5	Jeevan Naronha	Witness
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B. Defence Witnesses, if any : NIL

C. Court Witnesses, if any : NIL

LIST OF PROSECUTION/DEFENCE/COURT EXHIBITS

A. Prosecution :

Sr.No.	Exhibit Number	Description
1	66	Authority letter
2	Article -A	Report received from B.S.E.
3	67 colly	Order dated 22.07.2008 alongwith office note.
4	Article-B colly	Letter received from N.S.D.L. alongwith annexures.
5	Article-C and D	Cutting of public notices published by Gujarat Arth Ltd.
6	Article-E	B.S.E.'s letter
7	68 to 70	Certified copies of public announcement letter.
8	Articles F and G	Annual Reports filed with Registrar of companies by Gujarat Arth Ltd.
9	70 to 74	Form No. 32 pertaining to Gujarat Arth Ltd.
10	75	Certified copy of SEBI investigation report
11	76	List of witnesses filed by prosecution.
12	86	Certified copy of statement of Mr. Shivkumar Agarwal.
13	Article-H	Covering letter dated 17.02.2022.
14	Article-I	Certified copies of unaudited financial result for the quarter and year ended on 31.12.03.
15	Article-J	Unaudited financial result for the quarter and year ended on 30.09.2003.
16	Article-K	The certified copy of the Trade Log in the Scrip of Gujrat Arth Ltd.
17	Article-L	The certified copy of Share holding pattern of Gujarat Arth Ltd., for quarter ended in

		December, 2003.
18	Article-M	The certified copy of price volume details based on which annexure-III of BSE Report.
19	100	Audited financial result for the year ended 31.12.2003.
20	101	Unaudited financial result of the company for the quarter ended September, 2003.
21	102	Share holding pattern of company for the period of quarter ended September, 2003.
22	103	Share holding pattern of company for the period of quarter ended December, 2003.
23	104	Listing committee Minutes alongwith original minutes of listing committee dated 27.01.2004.
24	108	Documents (data having pages 1 to 243)
25	109	Certificate u/s. 65B of the Indian Evidence Act.
26	110	Copy of price volume details.
27	111	Certificate u/s. 65B of the Indian Evidence Act.
28	113	Report

B. Defence : NIL**C. Court Exhibits :**

Sr.No.	Court Exhibits	Description
1	43	Charge
2	122 and 123	Statement of accused No. 1 and 2 u/s. 313 of Cr. P.C.

D. Material Objects: - NIL

J U D G M E N T**(Delivered on 19.11.2024)**

The Accused No. 1 and the accused No. 2 being the directors of Gujarat Arth Limited are prosecuted for the offence punishable under Section 24(1) r/w Section 27 of Securities and Exchange Board of India Act, 1992 (hereinafter referred to as the “SEBI Act”).

2. The abridged facts of the prosecution case are as under :-

The complainant Securities and Exchange Board of India (hereinafter referred as SEBI) is body corporate established to protect the interest of investors in securities and to promote the development of, and to regulate the securities market and for matters connected therewith or incidental thereto.

In the year 1995 SEBI notified regulations for the prevention of fraudulent and unfair trade practices in transaction relating to the securities, titled as securities and exchange board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to the securities market) Regulations, 1995.

The SEBI has conducted investigation in the matter of Gujarat Arth Limited (hereinafter referred to as the GAL) is a company incorporated under the provisions of companies act and having its registered office at Ahmadabad. The complainant understands that the company GAL is under liquidation and winding up order for the company GAL is already issued on 03.03.2006 and assets of the said company were also taken over by the official liquidator. The accused No.1 Shri. Shivkumar Agarwal was the Managing Director and accused No. 2 Shri. Bhupendra Panchal was the Director of the company GAL

during the relevant time.

It is submitted that investigation in the scrip of the company GAL was initiated by the BSE on the basis of observation made on companies that have declared unaudited quarterly result for quarter ending December, 2003 showing manifold improvements in their performances. It was also observed that the prices and volumes in such scrips had increased prior to announcement of these quarterly results and GAL was on such scrip.

The complainant submits that the BSE selected period of investigation from October 06, 2003 to January 28, 2004 and observed that the scrip was traded regularly accompanied by high volumes and the price had gone up from Rs.9.5 to its highest of Rs.26.45 on November 11,2003 and reduced to Rs. 10.12 on December 18, 2003 amidst comparatively low volumes. It was also observed by the BSE that the company declared its results for the quarter ended September 2003 and December 2003 showing manifold increase in the turnover as well as the net profit. The company announced that it has by an agreement dated 25.10.2003 acquired w.e.f. 01.07.2003 the business and undertaking of Poonam Industries Ltd., alongwith trade mark "Poonam Sarees" having annual turnover of about Rs.100 crores.

On the basis of the BSE report the formal investigation was ordered by the complainant to ascertain the violation of SEBI Act and Regulation. It was observed during investigation that GAL was incorporated as a private limited company on 25.08.1993 and later on converted into public limited company on 20.10.1995. As per the annual report end December, 2003 the accused were directors of the GAL. The scrip of GAL was listed in Z category at BSE and ASE (Ahmadabad Stock Exchange). However, ASE has submitted that there is no trading in the scrip of GAL since April 2003. The scrip of GAL

traded on 18 days for 81, 16,559 shares. The price of scrip increase from opening price of Rs. 9.5 on 06.10.2003 to closing high price of Rs. 26.45 on 11.11.2003. Thereafter, from the opening price of Rs.27.75 on 12.11.2003 the price of scrip fall and reduced of Rs. 10.12 on 18.12.2003. The sensex during the period rise from 5040 to 5455. The result for the quarter ended December, 2003 were declared 14.01.2004. During this period the scrip recorded very large volume especially on 15,16 and 19 January, 2004. The price hit the lower circuit of 5% thereafter and closed at Rs.11.10 on 28th January, 2004. The volumes in the scrip were as low as 143 shares on 06.10.2003 and was as high as 804675 shares on 16.01.2004. It is submitted that the SEBI has investigated price movement of the scrip of company before investigation period. It was observed that in the year 2001 the scrip closed at Rs. 47.70 and in 2002 at Rs. 18.50 on low volumes. Prior to investigation period the scrip was traded regularly and August, 2003 to October 2006 the scrip was traded on only three days with one trade on each day at Rs. 8.05. It started trading actively from October 2003 and major volume was observed on 16.01.2004 which was for 804675 shares. Thereafter, the price and the volume started declining and the scrip closed at Rs. 4.63 in February, 2004, Rs. 1.62 in March 2004 and was last traded on BSE on 20.12.2004 at Rs. 1.25. The analysis of the trade log shows execution of 2,50,004/- trades for 81,16,559 shares. The trade log analysis further reveals that trades were executed when the time difference between placement of buy order and sell order was less than one minute as well as the price and quantity difference as zero.

It is further submitted that during 06.10.2003 to 11.11.2003 the company declared its quarterly result for September, 2003 and information about undertaking the business of Poonam

Industries. The price of the scrip increased from Rs.9.50 to Rs. 26.45 during the period. Thereafter, from 12.11.2003 to 08.12.2003 the price decreased from Rs.27.75 to Rs. 14.33. Thereafter from 02.01.2004 to 19.01.2004 the price of the scrip increased from Rs.11 to 15.06. Major volume was observed on 16.01.2004 which was for 804675 shares. During this period the company declared its quantity result for December, 2003. The company declared the results of the quarter ended September, 2003 on 07.11.2003 and the results were published in BSE website and economic times on 11.11.2003. Further, the company has declared the results of the quarter ended December, 2003 on 14.01.2004. The BSE sought explanation from the GAL the reason behind such tremendous rise in turn over and profits of the company for which the company failed give reasonable explanation. Further, in there explanation the company officials stated that the company terminated its arrangements with Poonam Industries for using brand name Poonam Saries and the company with the held payment of royalty amount.

It was observed from the analysis of depositories statement that the promoter of the GAL company had transferred their entire share holding in the off market to various entities who in turn have sold the shares in the market. The trading of these entities created huge volume in the market and mislead the genuine investors.

It is submitted that the change in share holding for the off market transferred by the promoters was not reflecting the share holding pattern available on the BSE website. A letter was issued to GAL in 2004 seeking details of the development regarding company equity capital and the transaction done by the promoter/directors/PAC. The GAL had submitted that there was no preferential allotment, buy back or any development regarding equity capital for the year 2002-2003 and 2003-2004. Subsequently letters to GAL returned undelivered. The

ASE had submitted that there is existence of GAL at the address of the company. The letter was also issued to 2008 to Poonam Industries on the address as per MCA website seeking information on the undertaking of the business by GAL which returned undelivered. The complainant submits the letter was also returned to economic times regarding the advertisement on 11.11.2003 but, no reply was received from economic times. The investigation revealed the fraud committed by the accused above named by violating the provisions and regulation of the SEBI Act. The fraudulent intention of the GAL is clearly established from the fact that the company announced acquisition of the business and undertaking of Poonma Industries and publish misleading results which is resulted in creation of artificial volume defrauding the innocent investors.

It is submitted that as per the annual report March 2003 - December, 2003 Shivkumar Agarwal accused No.1 and Bhupendra Panchal accused No. 2 did not resigned. As per the ROC of Ahmedabad accused No.1 Shivkumar Agarwal resigned on 11.06.2004. The promoter gave false and misleading statement regarding resignation of Shivkumar Agarwal and hence were aware of all the developments. It is submitted that accused Shivkumar Agarwal and Bhupendra Panchal had failed to exercise the duty of care and facilitated the GAL company to make false and misleading announcement creating artificial prices and volumes in the securities of the GAL to the detriment of innocent investors and thus committed the offence under Section 24(1) r/w Section 27 of the SEBI Act. The complaint containing above particular came to be filed by P. L. Leena Shree, the authorized officer on behalf of SEBI.

The cognizance of offence was taken and process for the offence punishable under Section 24(1) r/w Section 27 of the SEBI Act

came to be issued against the accused. Pursuant to process issued the accused appeared and they were released on bail.

3. Initially, complaint was filed before the Court of Ld. Additional Chief Metropolitan Magistrate, 09th Court, Bandra, Mumbai. Thereafter, in view of amendment in SEBI Act, the matter is transferred to this Special Court constituted as per the SEBI Act.

My Ld. Predecessor framed charge below Exh.43 against accused No.1 and 2 for the offence punishable under Section 24(1) r/w Section 27 of SEBI Act. The accused abjured the guilt and claimed trial. The defense of accused is of total denial and false implication.

4. Amid trial the SEBI examined C.W. 1 Ms. P. L. Leena Shree below Exh. 65, C.W. 2 Barnali Mukharji below Exh. 80, C.W. 3 Hitesh Vallabhji Savla below Exh. 92, C.W. 4 Gopalkrishan K. Iyer below Exh. 99 and C.W. 5 Jeevan Naronha below Exh. 107 and closed its evidence below Exh. 120.

5. Apart from the oral evidence the complainant SEBI relied upon the following documentary evidence.

Sr.No.	Exhibit Number	Description
1	66	Authority letter
2	Article -A	Report received from B.S.E.
3	67 colly	Order dated 22.07.2008 alongwith office note.
4	Article-B colly	Letter received from N.S.D.L. alongwith annexures.
5	Article-C and D	Cutting of public notices published by Gujarat Arth Ltd.
6	Article-E	B.S.E.'s letter
7	68 to 70	Certified copies of public announcement

		letter.
8	Articles F and G	Annual Reports filed with Registrar of companies by Gujarat Arth Ltd.
9	70 to 74	Form No. 32 pertaining to Gujarat Arth Ltd.
10	75	Certified copy of SEBI investigation report
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28	113	Report

6. Towards the mandatory compliance of Section 313 (1) (b) of Cr.PC. the incriminating circumstances appearing as evidence against the accused were explained to them and their responses to it were recorded. The defense of accused is of total denial. It is the defense of accused No.1 Shivkumar Agarwal that he is resigned the company 09.10.2003 and therefore he is not aware about the subsequent movement in price. The quarters results of September, 2003 were declared after his resignation. No inquiry was made to the other directors of the company at the relevant time. The company was running in loss during his tenure and alleged dividend were declared after his resignation. It is the defense of accused No. 2 Bhupendra Panchal that he was not the director of company as per the ROC record submitted by SEBI and as such not responsible for the alleged violation at the hands of the company.

7. Heard Ms. Ushajee Peri, Ld. SPP for the complainant/SEBI and Ld. Advocate Mr. Sagar Sheth for the accused.

8. It is argued by Ld. SPP Ms. Peri that the accused were the directors of the company during the relevant time. The accused made a statement before CW-02 about his status as the directors of GAL. Further the report of investigating authority CW-2 below Exh. 75 mentioned the fact that the accused Shivkumar Agarwal is managing director of the GAL company. The certified copy of the ROC record below exh. 71 to 74 goes to establish and prove the fact that the

accused Shivkumar Agarwal resigned from the directorship of GAL company on 11.06.2004. Further the accused Shivkumar Agarwal has filed an affidavit before the Hon'ble High Court Gujarat in company petition No. 214/04 stating therein that he is director of the company and said fact was observed in the order passed by Gujarat High Court. As such there is ample evidence on record to establish and prove that the accused Shivkumar Agarwal was a director of the GAL company. Further it is argued that the accused Bhupendra Panchal is mentioned as the director of GAL as per the investigation report Exh. 75. The accused No.1 Shivkumar Agarwal vide Exh. 86 statement before CW-02 stated that the accused Bhupendra Panchal is the other director of the GAL. The accused Bhupendra Panchal has filed the discharge application wherein he submitted that he resigned from the directorship of GAL Company at the time of alleged offence. The above averments in the discharge application lend corroboration to the case of SEBI that accused Bhupendra Panchal is the director of the GAL. Lastly, the adjudication order dated 28.01.2019 filed alongwith pursis Exh. 36 reflects the name of Bhupendra Panchal to be the director of GAL at relevant time. As such there is ample evidence on record to demonstrate and prove the fact that accused Bhupendra Panchal is the director of the GAL.

Ld. SPP further argued that the quarter ending results, the announcement, statements Exh. 86, the investigation authority report Exh. 75, the BSE report Exh. 113 share the holding pattern for the quarter ending September, 2003 below Exh. 102 and share holding pattern for quarter ended December, 2003 below Exh. 103 are filed on record. The witness examined on behalf of the SEBI has deposed about the alleged violations, the reports and the statements made. The evidence of the witnesses remain un-shattered during the course of

cross examination. There is no reason to disbelieve the evidence. Consequently, the prosecution i.e. the SEBI with the evidence on record has established and proved the guilt of the accused for the alleged violation done by the accused persons who are the directors of the company. The company is already windup and liquidator is appointed by the Hon'ble High Court Gujarat. Further, in view of the definition of fraud given Section 2 C of the Securities of Exchange Board of India (Prohibition of Fraudulent and unfair trade practices relating to the securities market) Regulation 2003 any person who is the dealing in the securities making expression, omission or concealment whether committed in deceitful manner or not is included. Therefore, the fact that the company GAL is not arrayed as accused is not fatal to the prosecution of the present accused who have made the alleged violations by facilitating the company. For the submission made above the Ld. SPP urged for convicting the accused and punishing them according to law. In addition to above the Ld. SPP filed written notes of arguments below Exh. 140. The Ld. SPP has placed reliance upon the following decisions :-

1. Hon'ble Apex Court in N. Narayanan Vs. Adjudicating Officer, SEBI reported in AIR 2013 Supreme Court 3191.
2. Hon'ble Apex Court in Securities and Exchange Board of India Vs. Shri. Kanaiyalal Baldevbhai Patel in Civil Appeal No. 2595 of 2013.
3. Hon'ble Apex Court in Dayle De'souza Vs. Government of India through Deputy Chief Labour Commissioner (c) and another reported in LL 2021 SC 622.
4. Order of Hon'ble High Court of Gujarat at Ahmedabad in Mukeshbhai G. Patel Vs. Gujarat Arth Limited in Company Petition No. 214 of 2024.

9. As against this Ld. Advocate Mr. Sheth argued that the complaint as such for prosecution of the accused without arraying GAL company as accused is not maintainable. There is no specific role of the accused is being mentioned in the complaint. No nexus of the accused with the crime is being demonstrated from the document produced on record. The accused simply were alleged to have shown responsible for the violations on the count that they are the directors of the company. There are other directors of the company but they are also not arrayed as an accused in the present prosecution. Certainly the other directors have also the duty to take care that company should not make any announcement, misrepresentation/ statement and declared false results but, those directors were exonerated, the reasons based known to the SEBI. Although it is mentioned that accused No. 1 and 2 are prosecuted by virtue of Section 27 of SEBI Act but, no responsibility of accused No.1 and 2 is mentioned in the complaint in order to hold them vicariously liable for the act committed by the company. It is argued that complainant has failed to establish and prove that the accused No. 1 and 2 have made any publication/ announcement on behalf of the GAL. On the contrary the advertisement placed on record shows that it was given Mr. Pravin Jain who was the director of the GAL. It is argued by Ld. Adv. for accused that the other directors were not summons by the investigating authority to inquire into the matter and thus without inquiring to the other directors this false prosecution is being filed against the present accused.

The Ld. Adv. for accused argued that the accused No.1 resigned from the directorship of GAL company on 09.10.2003. He made statement at Exh. 86 to that effect. The accused has no concern with the trading activities and the alleged illegality which occurred subsequent to 09.10.2003 therefore, he is not responsible to the

company, for those alleged violations. Further, as far as the accused No. 2 is concerned, no ROC record is placed by SEBI to show that accused No.2 was the director of the accused No.1 company. The ROC record below Exh. 71 to 74 did not support the case of SEBI that accused No. 2 Bhupendra Panchal was the director of GAL company, at the relevant time.

He further argued that the BSE is the private body and therefore it can not issued certified copy of any document as a public document. Therefore, the documents of BSE exhibited during trial has got no evidential value.

The Ld. Adv. for accused argued that the CW-01/ complainant has no personal knowledge of the matter and his evidence is based on SEBI record. She admitted during the course of cross-examination that name of the other four directors of the company are not mentioned as accused in the present prosecution. The CW-01 during the course of cross examination admitted that the company is supposed to file resignation of director to ROC and not the director personally and she is unable to state the action taken against other entities. Further it has come on record in her cross examination that accused No. 2 was not the director of GAL as per ROC below Exh. 71 to 74. The evidence on record do not go to establish and prove the specific role of the accused in the alleged violations. The SEBI by applying the method of pick and choose as per their own choice filed the present prosecution against the present accused without prosecuting the GAL company and other directors. The guilt of accused is not proved beyond all reasonable doubt. Therefore, he prayed for acquittal of the accused. In addition to the oral argument the Ld. Adv. of accused filed on record the written notes of argument below Exh. 138. the Ld. Adv. of accused has placed on record following decisions :-

1. The Hon'ble Apex Court in Sharad Kumar Sanghi Vs. Sangeeta Rane Criminal Appeal No. 1584 of 2007.
2. The Hon'ble Apex Court in Mrs. Anita Malhotra Vs. Apparel Export Promotion Council and Anr. in Criminal Appeal No. 2033 of 2011.
3. The Hon'ble Delhi High Court in Dr. J. S. Gambhir Vs. Millennium Health Institute and Diagnostics Pvt. Ltd. reported in (2014) 3 High Court Cases (Del) 11.
4. The Hon'ble Bombay High Court in Mr. Vijay Shamsunder Prabhu Vs. The State of Maharashtra & Ors. In Writ Petition NO. 816 of 2019.

10. In view of the adumbrated facts, evidence on record and rival submission, following points arise for my determination I have recorded my findings thereon for the reasons stated below:-

<u>Sr. No.</u>	<u>P O I N T S</u>	<u>F I N D I N G S</u>
1.	Does the complainant proves that you ... accused No.1 and 2 have facilitated the company Gujarat Arth Limited to make false and misleading announcement, there by created artificial prices and volumes in the security of Gujarat Arth Limited in the Stock Market violating the regulations 3(a), (b), (c), (d) and Regulation 4(1) and (2)(a)(d)(e)(f)(k)(r) of SEBI (Prohibition of Fraudulent and unfair Trade Practice Regulation 2003 and thereby committed offence punishable under Section 24(1) r/w Section 27 of SEBI Act, 1992.	In the affirmative
2.	What Order ?	... Both accused are convicted as per the final Order.

: R E A S O N S :

11. Before adverting to the evidence on record it is necessary to reproduced here the Section 24(1) of SEBI Act which reads as under :

24. (1) Without prejudice to any award of penalty by the adjudicating officer under this Act, if any person contravenes or attempts to contravene or abets the contravention of the provisions of this Act or of any rules or 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.

12. First up all let me advert on record the legal position pressed into service by the rival sides. The SEBI pressed into service the decision of Hon'ble Apex Court in **N. Narayana Vs. Adjudicating officer** as mentioned Supra wherein it is observed that :-

“SEBI Act read with Regulations of the Companies Act would indicate that the obligations of the Directors in listed companies are particularly onerous especially when the Board of Directors makes itself accountable for the performance of the company to share holders and also for the production of its accounts and financial statements especially when the company is a listed company.

The Directors of the company or the person in charge directly or indirectly use or employ, in connection with the issue, purchase or sale of any securities listed in stock exchange, any manipulative or deceptive device or contrivance in contravention of SEBI Act or the Regulations

made thereunder have necessarily to be dealt with in accordance with the provisions of the Act and the Regulations which is absolutely necessary for the investor's protection and to avoid market abuse.

Responsibility is cast on the Directors to prepare the annual records and reports and those accounts should reflect 'a true and fair view'. The over-riding obligation of the Directors is to approve the accounts only if they are satisfied that they give true and fair view of the profits or loss for the relevant period and the correct financial position of the company.

*Company though a legal entity cannot act by itself, it can act only through its Directors. They are expected to exercise their power on behalf of the company with utmost care, skill and diligence. This Court while describing what is the duty of a Director of a company held in *Official Liquidator v. P.A. Tendolkar* (1973) 1 SCC 602 that a Director may be shown to be 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 business of the company even though no specific act of dishonesty is provide against him personally. He cannot shut his eyes to what must be obvious to everyone who examines the affairs of the company even superficially."*

13. Further the Hon'ble Apex Court in **Securities and Exchange Board of India Vs. Shri. Kanaiyalal Baldevbhai Patel** as mentioned supra has observed as -

“Indisputably, the object and purpose of this regulation (FUTP 2003) is to safeguard the investigation public and honest businessmen. The aim is to prevent exploitation of the public by fraudulent schemes and worthless securities through misrepresentation, to place adequate and true information before the investor, to protect honest enterprises seeking capital by accurate disclosure, to prevent exploitation against the competition afforded by dishonest securities offered to the public and to restore the confidence of the prospective investor in his ability to select sound securities.”

14. The Hon’ble Apex Court in **Dayle De’souza Vs. Government of India through Deputy Chief Labour Commissioner (c)** and another observed that -

*“ In terms of the ratio above, a company being a juristic person cannot be imprisoned, but it can be subjected to a fine, which in itself is a punishment. Every punishment has adverse consequences, and therefore, prosecution of the company is mandatory. **The exception would possibly be when the company itself has ceased to exist or cannot be prosecuted due to a statutory bar.** However, such exceptions are of no relevance in the present case. Thus, the present prosecution must fail for this reason as well.”*

15. As against this Ld. Adv. for accused relied upon the decision of the Hon’ble Apex Court in **Sharad Kumar Sanghi Vs. Sangeeta Rane** wherein it is observed that -

“In the case at hand as the complainant's initial

*statement would reflect, the allegations are against the company, but the company has not been made arrayed as a party. Therefore, the allegations have to be restricted to the Managing Director. As we have noted earlier, allegations are vague and in fact, principally the allegations are against the company. There is no specific allegation against the Managing Director. When a company has not been arrayed as a party, no proceeding can be initiated against it even where vicarious liability is fastened on certain statutes. It has been so held by a three-Judge Bench in **Aneeta Hada v. Godfather Travels and Tours Private Limited**⁶ in the context of Negotiable Instruments Act, 1881.”*

16. The Hon’ble Apex Court in **Mrs. Anita Malhotra Vs. Apparel Export Promotion Council and Anr.** wherein it is observed that -

“This Court has repeatedly held that in case of a Director, complaint should specifically spell out how and in what manner the Director was in charge of or was responsible to the accused Company for conduct of its business and mere bald statement that he or she was in charge of and was responsible to the company for conduct of its business is not sufficient.”

17. The Hon’ble Apex Court in **Managing Director M/s. Castrol India Limited Vs. State of Karnataka, Criminal Appeal No. 1062/2017 arising out of SLP(Cri.) No. 7929 of 2012** observed that -

“it will not be necessary to burden this order by a detail reference to numerous pronouncement of this Court interpreting similar provisions of other statutes holding that a

clear and categorical statement to the above effect is required to be made in the complaint petition to proceeds against and officer of company so as to determine his vicarious liability for the offence committed by the Company. In the present case company is not arrayed as accused.”

18. The Hon’ble Delhi High Court in **Dr. J. S. Gambhir Vs. Millennium Health Institute and Diagnostics Pvt. Ltd.** reported in (2014) 3 High Court Cases (Del) 11 wherein it is observed that -

“In the aforesaid circumstances, the substratal controversy that needs to be addressed is whether filing of Form No. 32 or acceptance of resignation submitted by a Director is necessary for the same to be effective. It is well settled that unless otherwise specified in the Articles of Association of a company, a resignation by a Director would become effective from the date on which it is communicated. A resigning Director is not obliged to file Form No. 32 with the Registrar of Companies. A resignation by a director implies a relinquishment of his office. This is a unilateral Act which unless the Articles of Association otherwise provide, is not contingent on the acceptance by the company. Directors act as agents of the company and are, thus, also entitled to terminate their agency. The act of resignation or relinquishment of the office would not require the consent of the company and, therefore, would become effective from the time when the intention to relinquish the office as a Director is communicated.”

19. Lastly, the Hon’ble Bombay High Court in **Mr. Vijay**

Shamsunder Prabhu Vs. The State of Maharashtra & Ors. wherein it is observed that -

“ the document i.e. report can not be read in evidence unless the contents of the documents are proved by calling and expert by the prosecution.”

20. Now, let me appreciate the evidence on record. The CW-01 is the complainant who filed complaint on behalf of SEBI. The CW-01 deposed about his authority vide Exh. 66 to file the complaint. He deposed that on the basis of the BSE report Article-A (subsequently marked as Exh. 113) the CW-02 officer of SEBI Barnali Mukharji has investigated into the scrip of Gujarat GAL. The CW-02 found certain violations showing manifold improvements and agreement entered by GAL with Poonam Industries for acquiring trade name Poonam Series. However, said agreement was terminated by GAL but, no such disclosure was made to the BSE. Further, several off market transactions were observed from the statement provided by NSDL which indicate the promoter has transferred the entire share holding to several entities by end of October, 2003. The above violations in turn has created a artificial volume and price increase in the market misleading in the general public. He deposed that the public announcement are below Exh. 68 to 70. The CW-1 deposed that the accused No.1 was the managing director of the GAL and accused No. 2 director of the said company. The annual report below Article-F and G were filed with the registrar of the companies. In the given set of fact and circumstances the complaint is being filed.

The CW-02 is the investigating authority of the SEBI who conducted the investigation upon his appointment made vide Exh. 67. The CW-02 deposed that he examined the case of GAL and issued

summons to promoters/persons. The accused No. 2 responded the summons and appeared before him. The CW-2 deposed about the violations done with regard to declaration of unaudited quarterly results ending 31st September, 2003, audited financial statement for the quarter ending December, 2003 showing manifold improvements and agreement entered by GAL with Poonam Industries for acquiring trade name Poonam Saries. However, said agreement was terminated by GAL but, no such disclosure was made to the BSE. Further, several off market transactions were observed from the statement provided by NSDL which indicate the promoter has transferred the entire share holding to several entities by end of October, 2003. The accused No.1 Shivkumar Agarwal was the Managing Director of the company as per the ROC Ahmedabad and he resigned June 2004 i.e. after the alleged violations. The CW-02 deposed that he recorded the statement of accused No.1 vide Exh. 86, wherein he admitted that he was the director of the company GAL. The CW-02 further deposed that upon completion of investigation he filed report Exh. 75.

The CW-3 is the Chief of Trading Operation in NCDEX. Who was the Deputy Manager in Surveillance department of BSE at the relevant time. CW-03 deposed that he conducted investigation in the scrip of GAL. The reasons for investigations were the manifold increase in turn over and the profits of the company for the quarter ended September, 2003 and December, 2003. The company showing turn over of 26 crores and loss from 14,000 and profit 2.5 crores. The company has also declared that they have acquired business of Poonam Industries with brand name of Poonam Saries. Further the company has declared dividend of 40% to share holders which was never declared in the history of the company. The CW-3 deposed that the company official were called by listing committee of BSE and during meeting listing

committee the company official made statements they have terminated agreement with Poonam Industries and with held royalty amount. This fact was never disclosed at the investors. The CW-3 further deposed that after investigation he filed the report Exh. 113 with SEBI which bears his signature as well as one Krutika Daga and Deviki Shah. The CW-3 deposed that the promoter having that 25 lacs shares and all those shares were given in the off market in the month of October, 2003. No changes were shown in the statement of share holding pattern in the statement of December, 2003. The CW-03 further deposed that sudden price rise of shares was noticed and promoters sold their shares by declaring result and giving wrong declaration about dividend.

The CW-4 Gopalkrishan Iyer is the Chief General Manager of BSE. He deposed that the GAL is the listed company of BSE. He has produced the audited financial results for the year ended 31.12.2003 vide Exh. 100 and unaudited financial result of the company for the quarter ended September, 2003 vide Exh. 101 and the share holding pattern of the company for the period of quarter ending September, 2003 and ending December, 2003 vide Exh. 102 and 103 respectively. The CW-04 deposed about the bringing of corporate announcement dated 1.11.2003 and notice of extra ordinary general meeting of the company dated 17.12.2003 vide Exh. 68 and 69 respectively. He has further deposed about the listing committee minutes vide Exh. 104.

The CW-5 Jeevan Naronha is the Assistant General Manager of the BSE. He deposed that the he has generated the trade log date of GAL company vide Exh. 108 and given certificate under Section 65 B of Indian Evidence Act vide Exh. 109. The CW-05 further deposed that the price volume details derived from the system of BSE vide Exh. 110 alongwith certificate under Section 65 B of the Indian Evidence Act vide Exh. 111. This is the sum and substance in the

evidence led on behalf of the prosecution.

21. The evidence of CW-01 complainant is based upon the SEBI record. He categorically deposed about the violations at the hands of accused and the filing of the complaint. It has brought on record during the cross-examination of above witness that he has no personal knowledge of the matter and the fact that the accused No. 2 Bhupendra panchal is not mentioned as director of the GAL company, as per the ROC record below Exh. 71 to 74. Accused No. 1 has not disputed the fact that he was the director of GAL Company.

22. The CW-04 is the witness summoned to produce the financial results, the share holding pattern of the company, the announcement, the notice of extra ordinary general meeting. The CW-4 has brought the original documents and on comparison with the originals the copy of the documents below Exh. 100 to 104 are marked as exhibited. The absence of the authority to produce the documents and his no personal knowledge about the documents are the facts came on record during the course of his cross-examination. However, no suggestion are given that he has falsely produced the documents and the Exh. 100 to 104 are not the copies of the documents i.e. originals brought by CW-04.

23. The evidence of CW-5 is restricted to production of trade log data from the BSE system and the price volume details. The CW-05 has produced the trade log and price volume with the certificate under Section 65 B of Indian Evidence Act. Except the fact that there is no specific information about the computer system use for taking output and absence of authority nothing has been brought on record during his

cross-examination at the hands of the accused. Not a single suggestion is given to the accused to CW-05 that the trade log produced by him alongwith certificate are false and fabricated documents and not computer generated output. Therefore, for the discussion made supra the evidence of CW05 can not be doubted one.

24. The entire case to prove the guilt of accused hinges upon the evidence of CW-02 the investigating authority of the SEBI and CW-03 the officer of BSE who investigated in the scrip of GAL and noticed the alleged violations at hands of GAL. The CW-02 investigating authority of the SEBI categorically deposed about the violations at the hands of the accused is giving misleading reports, making announcement, acquiring of the Poonam Industries, declaration of the dividend and about the share holding pattern for the quarter ending September, 2003 and December, 2003. The evidence of CW-02 proved the contents of the investigation report Exh. 75. The CW-02 is the author of Exh. 75, therefore there is reason to believe that the prosecution with the evidence of the CW-02 has proved the contents of the documents Exh. 75.

The CW-03 is the BSE officer who allegedly conducted the investigation and found the violations noted above and filed report below Exh. 113. With the evidence of the CW-03 the prosecution has proved the contents of report Exh. 113. The evidence of the CW-03 and his report Exh. 113 appears to be consistent with the evidence of the CW-02 investigating authority of the SEBI and his report Exh. 75 on the point of alleged violations.

25. Apart from the evidence of CW-02 and CW-03 it appears that from the offline transaction BSE and SEBI concluded that the

promoters have transferred their entire shares holding. The conclusion was drawn on the statements received from NSDL. The certificate under the Bankers Book Evidence Act which is applicable to the Depositors Act is given by one Mr. Vishal Gajjar. Therefore the said statement is also the piece of evidence which I found to be relevant.

26. Looking to the tenor of the cross-examination done to CW-02 and CW-03 at the hands of the accused it appears that the accused have not seriously disputed the alleged violations. It has brought on record that the offence alleged is committed by the company and not the present accused. The company i.e GAL is not made accused in the present prosecution. The present accused were directors of the company therefore, only they are made an accused. Further, the ROC record below Exh. 71 to 74 relied by the complainant do not go to show that the accused No. 2 Bhupendra Panchal is the director of the GAL company. Further, the fact that the announcement Article-C which is marked as Exh. 88 was published in the newspapers by director P. C. Jain and not by the present accused. Further it has brought on record that transaction made by Bhupendra Panchal are not recorded in the report at Exh. 113.

27. Looking to the sum and substance of the above circumstances came on record during the course of cross-examination I found that the accused has not disputed the fact that the accused No.1 was the director of the accused company. The ROC record below Exh. 71 to 74 goes to show that the accused No. 1 Shivprasad Agarwal is the director of the GAL company. He retired on 11.06.2004 as per the same.

28. It would be relevant to mention here that the order of

Hon'ble High Court of Gujarat at Ahmedabad in Mukeshbhai G. Patel Vs. Gujarat Arth Limited in Company Petition No. 214 of 2024 is produced on record alongwith 65 B certificate. The perusal of the same order would reveal that the accused No. 1 Shivkumar Agarwal has given a affidavit on 17.02.2005 on behalf of the GAL company in the capacity of the director.

29. Further, the CW-02 during the course of investigation recorded the statement of the accused No.1 where he admitted that he was the director of the GAL Company. But he made a statement that he retired on 09.10.2003. The alleged violations are subsequent to the above date. It is the defense of the accused as can be gathered from the cross-examination and the 313 statement given that the violation occurred after his resignation therefore he got no concern with it. It would be relevant to mention here that the accused although took such defense but has not established and proved the same on the touch tone of preponderance of probability. On the contrary as mentioned supra there is ample evidence on record to establish and prove the fact the accused No.1 was the director of the company.

30. Apposite to mention here that as per the ROC record below Exh. 71 to 74 the name of accused No. 1 and his wife and two directors namely Ashish Raval and Vikas Mendha are mentioned. As per Exh. 73 Ashish Raval retired on 31.07.2000 and Vikas Mendha also retired at end of July 2000. So except the accused No.1 and his wife no one remained in the GAL Company. Therefore, I found that the accused No. 1 can not blame the company that his alleged resignation on 09.10.2003 was not sent to ROC of the company. Said defense of the accused No.1 is quite false and made just to avoid the liability of the

accused No.1 therefore, I found no substance in the same and the submissions to that effect in the light of the decision of the Hon'ble Delhi High Court **J. S. Gambhir Case**.

31. The accused No.1 appears to have denied the alleged violations on the count that he is not the director of the company with effect from the 09.10.2003 which goes to show that the alleged violations are not disputed by the accused No. 1. Not only this it is brought on record through cross-examination of the above witness that the violations are done by the company. Consequently, I hold that the evidence of CW-2 and CW-3 about the occurrence of the alleged violations and the fact that the accused No.1 is the director of the company as per the ROC record is reliable and can not be doubted. The accused No.1 during the course of recording of his statement of 313 Cr.P.C. has stated that he has transferred shares as there was willful buyer. Further, his statement goes to show that the company was making losses. The above statement of accused No.1 lend corroboration to the prosecution evidence that the company has made announcement of dividend although the company was losses and transferred the shares.

32. As far as the accused No. 2 is concerned his name is not appeared in the ROC record below Exh. 71 to 74. It is the defense of the accused No.2 that since the name of accused No. 2 is not mentioned in the ROC he is not the director of the GAL company. However, it is required to be borne in mind that the SEBI has produced on record annual report below Article-F and Article-G wherein the name of the present applicant accused No.2 Bhupendra Panchal is shown as the director of the GAL company. Further, the accused No.1 in his statement

to the CW-02 below Exh. 86 has mentioned the fact that the accused No.2 Bhupendra Panchal was the director of the GAL Company. But, he resigned. The statement of the accused No. 1 below Exh. 86 confessing himself to be director of the company and the accused No. 2 is relevant as per the Section 30 of the Indian Evidence Act.

33. Significant to mention here that the accused gave a suggestion to the CW-02 that there is no other documents showing that accused No. 2 is the director of the GAL company but, has not given a suggestion to the CW-02 that Article-G and F that is the annual report of the GAL Company wrongly mentioned his name as the director of the GAL Company although he was the not director of the said company. Further, it is necessary to add here that the accused Bhupendra Panchal has filed the discharge application below Exh. 16 contending that he is not director of the GAL company and resigned already. The above fact lends corroboration to the prosecution that the accused No. 2 was also the directors of the GAL Company although his name do not appear in the ROC record below Exh. 71 to 74. It was the fact within the special knowledge of the accused No.2 as to when he resigned. Obviously the burden to prove the same was on the accused No.2 but, he failed to do so.

34. The tenor of cross-examination of the present accused and his defense during statement under Section 313 of Cr.PC would reveal that he denied his responsibility and concerned with the violations only on the count that he is not the director of the GAL company as per the ROC Record. Thus, the present accused appears to have been taking disadvantage of the fact that his name is not mentioned in ROC Record Exh. 71 to 74. But, as discussed Supra there is evidence in the form of

annual report, Statement of accused No.1 below Exh. 86 and the discharge application filed by the accused No. 2 which goes to establish and prove the fact that the was the director of the GAL company. At the cost of repetition it is brought on record during the course of cross-examination done by the accused No. 1 and 2 that violations done by the company. So naturally the present accused No. 1 and 2 being the directors of the company are responsible for the alleged violations.

35. The decisions cited above on behalf of the accused were rendered under Section 138 of the NI Act and weights and measures Act i.e. under different statute. None of the decision is in relations to SEBI Act. So, not useful to the accused. However, the complainant has pressed into service the decision of the Hon'ble Apex Court in **Dayle De'souza case** wherein the reference of Anita Hada's case which was referred in Sharad Kumar Sanghi's case cited by Ld. Adv. for accused was made. The Hon'ble Apex Court after referring to the Anita Hada's case in **Dayle De'souza case**, held that the prosecution of company is mandatory however exception would possible when the company itself ceased to exists or can not be prosecuted due to statutory bar. Thus, in a matter of SEBI the prosecution of company is not mandatory if, exceptional situation arises. In the case in hand the accused have produced on record the ROC status of the GAL company which goes to status of the company as winding up. As can be gathered from the rival submissions and the material produced on record the winding up GAL company was made in the year 2006 and liquidator is appointed. So, practicably the company ceased to exists on account of the closure procedure started with the winding up of the company. Consequently, I found that the present case falls in the exceptional situation in view of the decision of the Hon'ble Apex Court in **Dayle De'souza case** as

mentioned Supra. So, I found that the prosecution of the accused without making the company and accused is not fatal. As a results the present prosecution without the prosecution of the company against the present director is perfectly maintainable.

36. It is the defense of the accused that there were other director who were not made accused in the present prosecution. To that effect it would be relevant to mention here that the CW-02 investigating authority of the SEBI during the course of the cross-examination deposed that *“the role of the other directors was not revealed in the commission of the alleged offence therefore no action was recommended against them. We had not done any investigation against the other directors because their role was not revealed.”* In the light of the above circumstances came on record during the cross-examination of CW-02 I hold that the fact of non prosecution of the other directors of the GAL company will not create any doubt on the present prosecution filed against the present accused persons.

37. As held by the Hon’ble Apex Court in N. Narayan Vs. Adjudication Officer the present accused who were the directors of the company were under duty to take care that company should not make such false statement/ disclosure and announcement of dividend and other violations.

38. To sum up prosecution with the evidence on record has established and proved being the directors of the company have failed in their duty to take care the company should not make such false statement, report and do the alleged violations and thus committed the offence punishable under Section 24(1) r/w 27 of SEBI Act. Hence, I

hold the accused guilty for the above said charge.

39. Since, I hold the accused guilty, I stop here to hear accused on the point of sentence.

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(R. M. Jadhav)
SEBI Special Judge
City Civil & Sessions Court,
Gr. Bombay (C.R.No.22)

Date : 19.11.2024

40. The accused No. 1 submitted that, he is 63 years old and has undergone angioplasty and has got many other health problems. So, leniency may be shown while imposing the punishment and he may not be awarded punishment of imprisonment. The accused No. 2 submitted that he was the employee director in the company. He is 59 years old. He has also prayed for leniency. The Ld. Adv. For accused Mr. Sagar also prayed for showing leniency.

41. As against this the Ld. SPP Ms. Ushajee Peri submitted that offence is serious one. Punishment is up to 10 years with fine up to Rs.25 Crores hence, maximum sentence of fine with imprisonment may be awarded.

42. Considered the rival submission.

43. Both accused are aged persons. The medical papers of accused No.1 are filed on record. The offence is of the year 2003. No complaint is on record of the investors. No criminal antecedents are produced on record. Considering the nature and gravity of the offence, I

found the following sentence will be sufficient to meet out the ends of the justice. In sequel, I pass following order :-

ORDER

1. The accused No. 1. Shivkumar Agarwal and accused No. 2 Shri. Bhupendra Panchal are convicted of the offence punishable under Section 24(1) r/w 27 of SEBI Act, 1992 vide Section 235(2) of Cr.P.C.
2. Accused No. 1 and 2 are sentence to suffer simple imprisonment for one month with fine of Rs.11,00,000/- (Rs. Eleven Lakhs only), each in default of payment of fine, both are directed to undergo simple imprisonment for six months.
3. Both the accused shall surrender their bail bonds.
4. Copy of judgment be supplied to both the accused free of cost.
5. Accordingly, SEBI Special Case No.233 of 2014 is disposed of.

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Date : 19.11.2024

(R. M. Jadhav)
SEBI Special Judge,
City Civil & Sessions Court,
Gr. Bombay (C.R.No.22)

Directly dictated on computer on : 19.11.2024
HHJ signed on : 19.11.2024

“CERTIFIED TO BE TRUE AND CORRECT COPY OF THE ORIGINAL SIGNED JUDGMENT/ORDER.”		
Upload Date	Upload Time	Name of Stenographer
19.11.2024	5.30 pm	Mrs. Manasi M. Kadam
Name of the Judge (With Court Room No.)		HHJ R. M. JADHAV (CR 22)
Date of Pronouncement of JUDGMENT /ORDER		19.11.2024
JUDGMENT /ORDER signed by P.O. on		19.11.2024
JUDGMENT /ORDER uploaded on		19.11.2024