(2023) 08 SEBI CK 0032

In the Securities Appellate Tribunal Mumbai

Case No : Appeal No. 140 Of 2022

Channel Nine Entertainment Limited And Others — APPELLANT

Vs

Securities And Exchange Board Of India — RESPONDENT

Date of Decision : 10-08-2023

Acts Referred:

Securities And Exchange Board Of India (Issue Of Capital And Disclosure Requirements) Regulations, 2009 — Regulation 4(2)(d), 4(2)(e), 5,6,7,25,26,36,37,46,47,57, 59

Companies Act, 1956 — Section 67, 67(3), 73, 73(2)

Citation : (2023) 08 SEBI CK 0032

Hon'ble Judges : Tarun Agarwala, Presiding Officer;Meera Swarup, Technical Member

Bench : Division Bench

Advocate : Prakash Shah, Kushal Shah, Vyom Shah, Ravishekhar Pandey, Amarpal Singh Dua,Shefali Shankar

Final Decision : Partly Allowed

Judgement

Tarun Agarwala, Presiding Officer

1. The appellants have filed the present appeal questioning the order dated March 03, 2021 passed by the Whole Time Member ("WTM" for convenience) of the Securities and Exchange Board of India ("SEBI" for convenience) directing the appellants to refund the money collected through the offer and allotment of equity shares along with interest @ 15% per annum jointly and severally. The appellants were further restrained from selling their assets till the refund was made and were further restrained from accessing the securities market for a period of 2(two) years.

2. The facts leading to the filing of the present appeal is, that a show cause notice dated September 19, 2018 was issued alleging that the Company had made preferential allotment of equity shares to a total of 100 persons on three instances from November 01, 2012 to November 10, 2012. Since the number of

allottees were above the prescribed limit of 49 persons under Section 67 of the Companies Act, 1956, the Company was under an obligation to file a prospectus in connection with the issue of securities and comply with the provisions of the Companies Act, 1956 as well as the provisions of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 ("ICDR Regulations"). The show cause notice, thus, alleged that the Company and its directors had violated Section 56(1) & (3), 60,73(1),(2) & (3) read with Section 67(1), (2) & (3) of the Companies Act, 1956 and Regulations 4(2)(d), 4(2)(e), 5,6,7,25,26,36,37,46,47,57 and 59 of the ICDR Regulations.

3. Subsequently, a supplementary show cause notice dated November 21, 2019 was issued calling upon the appellants to show cause why directions to refund the subscription money in terms of Section 73 of the Companies Act, 1956 should not be issued and further why the appellants should not be restrained from accessing the securities market. The WTM after examining the matter and after considering the replies of the noticees held that the issuance of the preferential allotment to 100 persons was in violation of Section 67(3) of the Companies Act and the ICDR Regulations. The WTM accordingly directed the appellants i.e. noticees no. 1 and 2 to refund the money collected through the offer and allotment of equity shares along with interest and further restrained them from accessing the securities market and prohibited them from buying, selling or otherwise dealing in the securities market for a period of two years.

4. We have heard Shri Prakash Shah, the learned counsel for the appellants and Shri Vyom Shah, the learned counsel for the respondent.

5. It has come on record that after the allotment of preferential shares the Company also came out with an Initial Public Offering ("IPO") issue and, upon successful completion of the IPO, the shares of the Company was listed on March 12, 2013 on the Bombay Stock Exchange.

6. It was urged by the learned counsel for the appellants, that the allotment of preferential shares never exceeded 49 persons at a time and, therefore, there was no violation of Section 67 of the Company Act. This submission cannot be accepted, in view of the Hon'ble Supreme Court of India in Sahara India Real Estate Corporation Limited & Ors. vs. SEBI (2013) 1 SCC 1 wherein it was held that if the offer is made to fifty persons or more, then it will have to be treated as a public issue and not as a private placement. Since the procedure relating to public issue was not followed, the Company had violated Section 67(3) of the Companies Act, and accordingly the WTM directed refund of the money in terms of Section 73(2) of the Companies Act.

7. The only question which thus arises for consideration is, whether in the given circumstances the direction of the WTM to refund the amount in terms of Section 73(2) of the Companies Act was an appropriate direction in the facts of the present case. In this regard, Section 73(2) of the Companies Act is extracted hereunder:-

"73(2) Where the permission has not been applied for under sub-section (1), or, such permission having been applied for, has not been granted as aforesaid, the company shall forthwith repay without interest all moneys received from applicants in pursuance of the prospectus, and, if any such money is not repaid within eight days after the company becomes liable to repay it, the company and every director of the company who is an officer in default shall, on and from the expiry of the eighth day, be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent, as may be prescribed, having regard to the length of the period of delay in making the repayment of such money."

8. The scope of the Section 73 of the Companies Act is, that every public company is required before issuing shares or debentures for public subscription by issue of a prospectus, to make an application for listing the security in one or more recognized stock exchanges. In case permission is not granted by any stock exchange then no allotment can be made. However, in case, where no application is made or permission has not been granted, then the Company is required to repay all monies received from the applicants/ investors. Failure to repay the money within 8 days will make the Company and Directors liable to repay the amount along with interest. Thus, one of the necessary ingredients is listing permission and failure to get the shares listed entails refund of the allotment money to the investors/ applicants.

9. In the instant case, admittedly the shares of the Company got listed on March 12, 2013 at the Bombay Stock Exchange.

10. Thus, in the given facts and circumstances of the case, and considering that the shares of the Company were listed pursuant to the successful completion of the IPO which allowed the shareholders an option to exit, we are of the view, that the investors in the deemed public issue through allotment of preferential shares have not been substantially prejudiced due to non-compliance with the provisions of Section 67 of the Companies Act read with Section 73 of the Companies Act. Hence, the directions of the WTM directing the appellants to refund the money collected through preferential allotment under Section 67 along with interest cannot be sustained and, to that extent the directions are quashed. However, since the appellants did violate Section 67 of the Companies Act, the directions debarring the appellants from accessing the securities market etc. is affirmed.

11. In view of the aforesaid, the appeal is partly allowed.

12. This order will be digitally signed by the Private Secretary on behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Certified copy of this order is also available from the Registry on payment of usual charges.