
(2019) 11 SEBI CK 0006

In the Securities Appellate Tribunal Mumbai

Case No : Appeal No.05 Of 2018

G Unnikrishnan Nair And Others

APPELLANT

Vs

Securities And Exchange Board Of India

RESPONDENT

Date of Decision : 27-11-2019

Acts Referred:

Companies Act, 1956 — Section 56(1), 56(3), 60, 73, 73(2)

Companies Act, 2013 — Section 2(70), 5, 5(a), 5(b), 5(c), 33(1), 40, 42(10), 149(12)

Citation : (2019) 11 SEBI CK 0006

Hon'ble Judges : Tarun Agarwala, Presiding Officer; M. T. Joshi, J

Bench : Division Bench

Advocate : Rohit Gupta, Smita Vora, P. Parikh, Mihir Mody,, Shehaab Roshan, K. Ashar

Final Decision : ?Allowed

Judgement

Tarun Agarwala, Presiding Officer

1. The present appeal has been filed against the Directors of Kerala Housing Finance Limited (â??the Companyâ? for convenience). The said appeal

was dismissed for want of prosecution by this Tribunal by an order dated May 20, 2019. On the application of Appellant No. 3, P. Parameswaran the

order dated August 20, 2019 was recalled only in so far as Appellant No. 3 was concerned and to that extent the appeal was restored. The appeal

relating to Appellant Nos. 1, 2, 4 and 5 remained dismissed.

2. The facts leading to the filing of the present appeal is, that an ex-parte interim order dated July 31, 2015 and November 20, 2015 was passed

restraining the directors and the promoters of the company from accessing the securities market and were also restrained from taking up any new

assignment in any issue of debentures. By the said interim orders the company

and its directors were found to have contravened the provisions of Sections 56(1), 56(3), 60 and 73 of the Companies Act, 1956 read with Sections 2(70), 33(1) and 40 of the Companies Act, 2013 and the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations (â??ICDR Regulationsâ?) as well as SEBI (Disclosure and Investment Protection) Guidelines, 2000 (â??DIP Guidelinesâ?). Accordingly, the appellants and other entities were directed to show cause as to why a direction should not be issued to refund the money jointly and severally collected through the offer and allotment of equity shares, debentures and preference shares of the company along with the interest.

3. The Appellant No. 3, P. Parameswaran filed a reply contending that he was an independent director appointed by the Board of Directors on July 18, 2014 and had only attended the Board Meeting for the first time on November 21, 2014 and was neither in charge of nor was responsible for the conduct of the affairs of the company. It was also urged that being an independent director of the company, no allotment of securities were made nor any decision was taken during his period for issuance of debentures. It was thus contended that there was no consent or connivance of the appellant in the issuance of the debentures or allotment letters and consequently no liability can be fastened upon the appellant.

4. The Whole Time Member (â??WTMâ? for convenience) after considering the replies took into consideration that the appellant was appointed as an independent director on July 18, 2014 and that he had attended several Board Meetings from November 21, 2014 onwards and came to the conclusion that the appellant was involved in the decision making process relating to the issuance of debentures in these Board Meetings and therefore was liable for refund of the monies collected by the company in terms of Section 73(2) of the Companies Act, 1956. The WTM found that the issuance of debentures of the company and the collection of money thereupon was in violation of the Companies Act, ICDR Regulations and SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013. The WTM accordingly directed the appellant that he is liable jointly and severally along with others to refund the money collected through the offer and allotment of equity shares, debentures and preferential shares of the company.

5. Having heard the learned counsel for the parties at some length, we find that admittedly the appellant was appointed as an independent director on

July 18, 2014 and that he had attended the Board Meeting for the first time on November 21, 2014 and thereafter. The decision to issue the

debentures was taken by the company and its directors on March 05, 2014 prior to the appointment of the appellant. Further, we find that from Table

6 of the impugned order that the allotment of the debentures was made from May 15, 2014 to September 19, 2014. The said Table 6 makes it

apparently clear that the allotment of the debentures were issued prior to the first meeting attended by the appellant on November 21, 2014.

6. Thus, it can be safely concluded that the decision to issue debentures and consequent allotment was made by the company during the period when

the appellant had never attended the Board Meeting. The decision making process done by the company was concluded in the absence of the

appellant. The appellant had no say in the decision making process made by company and its directors with regard to the issuance of debentures.

Thus, the finding of the WTM in paragraph no. 18. 4.2 of the impugned order that the appellant was involved in the decision making process relating to

the issuance of debentures is factually incorrect and based on surmises and conjectures. The said finding in the light of the aforesaid cannot be

sustained.

7. Admittedly, the appellant was appointed as an independent director and was not involved in the day to day affairs. Section 42(10) of the Companies

Act, 2013 indicates that where the company makes an offer or accepts monies in contravention of this Section in that case the company and its

promoters and directors shall be liable for penalty. The provision makes it apparently clear that the liability of director is only to the extent of penalty

and not for the refund of the monies collected from the subscribers. The liability to refund the amount under Section 42(10) of the Companies Act,

2013 is fastened upon the company. Thus, the direction of the WTM directing the appellant to refund the money is wholly incorrect.

8. Section 149(12) of the Companies Act, 2013 provides as under:-

â??(12) Notwithstanding anything contained in this Act,-

(i) an independent director;

(ii) a non-executive director not being promoter or key managerial personnel,

shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.â??

A perusal of the aforesaid makes it clear that an independent director shall be held liable only in respect of such acts of omission or commission by a company which had occurred with his knowledge, consent or connivance or where the independent director had not acted diligently. In the instant case, there is no finding that the appellant had given his consent or that he had connived with the other directors in the issuance of debentures or had not acted diligently and therefore the liability to refund the amount cannot be fastened.

9. In *Pritha Bag vs. SEBI*, Appeal No. 291 of 2017 decided on 14.02.2019, the Tribunal held as under:-

â??12. Having heard the learned counsel for the parties, we are of the view that the WTM has failed to consider the provisions of Section 5 of the

Companies Act and has mechanically held that the appellant was responsible jointly and severally for making the refund alongwith interest under

Section 73(2) of the Companies Act. Unless and until a finding is given that the appellant is an officer in default, the mandate provided under Section

73(2) cannot be invoked against the appellant. In the instant case, the appellant has annexed documents to indicate that the company had a managing

director, namely, Mr. Indranath Daw and, therefore, as per the provisions of Section 5 the managing director would be an officer in default. We also

find that there is no finding given by the WTM that the appellant was the managing director or whole time director or was a person charged by the

Board with the responsibility of compliance with the provisions of the Companies Act and, consequently, could not be made responsible for refunding

the amount under Section 73(2).â??

â??This Tribunal held that in the absence of any finding that the appellant was entrusted to discharge his functions contained in Section 73 of the

Companies Act and in the absence of any material to show that the said appellant was entrusted to discharge as an officer in default as set out in

Clauses (a) to (c) of Section 5 of the Companies Act, the said appellant could not be penalized under Section 73(2) of the Companies Act. The said

decision is squarely applicable in the instant case.â??

10. In Sayanti Sen vs. SEBI, Appeal No. 163 of 2018 decided on 09.08. 2019, the Tribunal held as under:-

Â â??26. In the light of the aforesaid the WTM has held that the Company has violated provisions of Section 73(2) of the Companies Act and has

therefore in the same breadth has booked all the Directors to be responsible for the day to day affairs of the Company. This approach as stated earlier

was wholly incorrect. Section 73(2) of the Companies Act makes it apparently clear that if in the first instance it was the Company which was liable

to repay the monies received from the investors and if the Company failed to repay the amount then the amount would be recovered jointly and

severally from every Director of the Company as an officer in default. Therefore, where the Company is the offender vicarious liability of the

Directors cannot be imputed automatically.

27. Thus, the WTM was required to arrive at a specific finding that a Director or Directors were responsible for the acts of the Company. The mere

fact that a person is a Director would not make him automatically responsible for refund of monies under Section 73(2) of the Companies Act.

28. In the light of the aforesaid, we find that the WTM has given a categorical finding that Shri Shib Narayan Das was responsible for the affairs of

the Company. It was not open for the WTM to pass further orders on the other Directors, namely, the appellant especially when there is no finding

nor there is a shred of any evidence to indicate that the appellant was also responsible for the affairs of the Company.

29. Thus, the direction of the WTM against the appellant that she is also liable to refund the monies collected by the Company during the respective

period of Directorship of the appellant along with interest cannot be sustained. The impugned order to that extent cannot be sustained and is

quashed.â??

11. In Adi Cooper vs. SEBI, Appeal No. 124 of 2019 decided on 05.11.2019, the Tribunal held that the appellant who was a whole time director was

neither directly or indirectly involved in any fraudulent activity nor employed any scheme to defraud any shareholder or investor and therefore cannot

be held liable merely because he was party to a resolution of the Board of Directors. The aforesaid decisions of this Tribunal are squarely applicable

in the instant case.

12. For the reasons stated aforesaid, the impugned order in so far as it relates to the appellants cannot be sustained and is quashed. The appeal is allowed. The amount realised by the respondent pursuant to the impugned order from the accounts of the appellants shall be refunded within four weeks from today along with the interest @ 12% per annum.