
(2022) 06 SEBI CK 0078

In the Securities Appellate Tribunal Mumbai

Case No : ??Miscellaneous Application No. 162, 165 Of 2021, Appeal No. 139, 197, 397, 569 Of 2020

Girishchandra Mukundram Baluni And Others

APPELLANT

Vs

Securities And Exchange Board Of India

RESPONDENT

Date of Decision : 17-06-2022

Acts Referred:

Companies Act, 2013 — Section 67, 73
Companies Act, 1956 — Section 5, 67, 73, 73(2)

Citation : (2022) 06 SEBI CK 0078

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

Bench : Full Bench

Advocate : Rakesh Puri, Mustafa Doctor, Manish Chhangani, Ravi Shekar Pandey, Samreen Fatima, Garvit Khandelwal, Jaitegan Singh Khurana

Final Decision : Dismissed

Judgement

M. T. Joshi, J

1. Aggrieved by the common order dated April 7, 2020 passed by the Whole Time Member (hereinafter referred to as 'WTM') of the respondent Securities and Exchange Board of India (hereinafter referred to as 'SEBI') restraining the appellants from accessing the securities market, in any manner, and also restraining them from associating with any listed public company both till the expiry of four years from the date of completion of refunds of the amounts collected by appellant M/s. Neesa Technologies Ltd. (hereinafter referred to as 'Neesa') in the nature of Optionally Convertible Debentures (hereinafter referred to as 'OCDs'), the present appears are preferred.

2. Appellant Neesa in the years 2012-13 and 2013-14 had issued OCDs to total 156 entities. Those were issued to 85 investors in the year 2012-13 and 71 investors during the financial year 2013-14. According to SEBI, the issuance of the OCDs in the above number was in violation of provisions of Companies Act,

1956 (hereinafter referred to as 'Companies Act, 1956') and Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 (hereinafter referred to as 'ICDR Regulations'), therefore, the show cause notices were issued to appellant Neesa and its directors and other appellants as well as other noticees presently not before us.

3. Appellant Neesa did not deny the factum of raising of funds from the entities as detailed (supra). It contended that those were in fact deposit certificates and not the OCDs. According to those certificates, the depositors were required to make written request to appellant Neesa at least 15 days before the date of completion of the term of deposit. Thus, those were not OCDs. It was further argued that since none of the depositors had sent any redemption request, it cannot be alleged that the appellant Neesa did not repay the dues and, in fact, the depositors are responsible for not applying for redemption. The rest of the appellants, namely, appellant Arvind Kumar Jagannath Prasad Gupta and appellant Manoj Singhal denied their liability for the reasons submitted by them in the reply to the show cause notice. The learned WTM however did not agree with them, the impugned order, therefore, came to be passed. Hence the present appeals.

4. We have heard Mr. Rakesh Puri, Mr. Garvit Khandelwal, Mr. Jaitegan Singh Khurana, the learned counsel for the appellants and Mr. Mustafa Doctor, the learned senior counsel with Mr. Manish Chhangani, Mr. Ravi Shekar Pandey, Ms. Samreen Fatima, the learned counsel for the respondent.

5. It is not in dispute that if the funds raised by the appellant Neesa is 'securities' as the definitions contained in by the Companies Act 1956, appellant Neesa would be in violation of provisions of Section 67 of the Companies Act, which provided that if any offer or invitation to subscribe shares or debentures is made to more than 49 persons, it would be deemed as a public issue and, therefore, all the provisions of Section 73 of the Companies Act, 1956 would come into play which provides for making application, seeking permission and to comply with the provisions thereunder is required. The claim of appellant Neesa, however, is that this fund is not raising securities but accepting deposits.

6. The certificates issued by appellant Neesa copy of which was annexed as Annexure A to the show cause notice showed that the certificate was optionally convertible debentures certificate. It was contained in the statement of the certificate that it was an optionally convertible redeemable unsecured debenture for the face value of Rs. 25000/- each. The maturity period of the certificate was 36 months from the date of issue of debentures. Further, in the relevant annual reports, appellant Neesa had described these certificates as optionally convertible debentures certificate as a part of long term borrowing. The learned WTM, therefore, held that the funds raising was in the nature of issuance of OCDs, therefore, relying on the ratio in the case of Sahara India Real Estate Corporation Ltd. & Ors. vs. SEBI [(2013) 1 SCC 1], the learned WTM concluded that the appellant Neesa has violated the provisions of Section 67 of the Companies Act,

1956.

7. Before us, the learned counsel for the appellant Neesa submitted that since the decision of the Hon'ble Supreme Court has come after the issuance of the OCDs, the same would not be applicable in the present case. All the documents clearly showed that the appellant Neesa had issued OCDs i.e. securities within the meaning of recommendation of Companies Act read with ICDR Regulations. Section 67 of the Companies Act, 2013 clearly provides the issuance of any such securities offering such debentures to more than 49 persons would attract the provisions of Section 73 of the Companies Act, 1956 as detailed (supra). Therefore, so far as the appellant company is concerned, it cannot escape the liability of making refund of the money under the OCDs, consequently, the order of the learned WTM directing it either to refund the money or to debar it from accessing the securities market till the expiry of the four years from the date of completion of the refunds to the investors cannot be faulted with.

8. So far as the appellant Girishchandra M. Baluni (original noticee no. 4) is concerned, he submitted before the respondent SEBI that he was additional director of the company from September 12, 2011 to December 1, 2012. Thereafter, he was non-executive director from January 21, 2014 and tendered his resignation on March 30, 2014. The company however did not file the requisite form to the Registrar of Companies (hereinafter referred to as 'ROC') to give effect to the resignation. Further, as the company had not regularized his appointment as additional director in its annual general meeting dated March 30, 2014, the company indirectly took cognizance of his resignation. During his tenure as a director, allotment to OCDs to only 12 persons was made, therefore, he cannot be held liable for breach of the provisions Section 67 of the Companies Act as the same took place after the resignation from the company. Later on, he was again appointed as director on January 21, 2014 and resigned on May 27, 2015. During that period no OCDs were issued. Even otherwise, he sent his resignation from the post of director on March 4, 2015 by speed post to the company but the company did not take cognizance of the same by filing Form DIR 11 to ROC. Further, noticee nos. 5, Mr. Nimain Charan Biswal was appointed as managing director of the company from November 7, 2013. Therefore the appellant cannot be held liable as he cannot be termed as 'officer in default'. Noticee nos. 6, Mr. Sanjay Gupta (not before us) was the chairman and managing director of the company as can be seen from memorandum of understanding dated October 20, 2014. He was the main promoter and, therefore, officer in default. Further, the appellant neither attended any board meeting nor participated in the decision making process of the company and, therefore, he is unnecessarily implicated in the proceedings. ROC, Gujarat had filed 34 criminal cases under the Companies Act against the appellant including the company and others. All these criminal cases were quashed by the Hon'ble High Court at Gujarat so far as the appellant is concerned. Further till February 2017, even after three years of the vacating the office as a director, his name was still reflected as director on MCA 21 portal. Therefore, he was required to file

Civil Writ Petition before the Hon'ble High Court at Gujarat for removal of his name on the basis of which the Hon'ble High Court at Gujarat had directed MCA and ROC to modify the records at MCA 21 portal. Out of the 34 criminal cases instituted by ROC, Gujarat as detailed (supra), 11 cases related to OCDs issues which were quashed by the Additional Chief Metropolitan Magistrate Court at Ahmadabad. On all these grounds he wanted that he should be exonerated from the proceedings.

9. The learned WTM recorded that from September 12, 2011 to December 1, 2012, the appellant was non-executive director. He was again appointed as non-executive director from January 21, 2014 data record of the MCA portal showed that he still continued to be a director of the company. As regards, the contention of the appellant that he had resigned from the directorship, the learned WTM on the basis of the provisions of the Companies Act concluded that from the date of the resignation received by the company i.e. with effect from May 29, 2015, he discontinued to be a director during his next tenure which begun from January 21, 2014. Since the OCDs in violation of provisions of Section 67 of the Companies Act, 1956 were issued in the financial years 2012-13 and 2013-14, when the appellant was non-executive director, relaying on the provisions of Section 5 of the companies Act, 1956, the appellant was held jointly and severally liable as officer in default alongwith all other directors. It was noted that during that period there was no managing director and except for a period January 21, 2014 to May 27, 2015 and, therefore, all the directors were held jointly and severally liable.

10. The learned counsel for the appellant Girishchandra Baluni strenuously submitted before us that the appellant was not involved in allotment of the OCDs. Respondent SEBI was not able to give exact date of allotment of OCDs. Sanjay Gupta was the main promoter alongwith his cousin brother another appellant Arvind Kumar Jagannath Prasad Gupta for a period between January 24, 2014 to May 6, 2014, company had a managing director noticee nos. 5, Mr. Nimain Charan Biswal. As the said noticee was held to be not a managing director by this Tribunal in the appeal filed by him, the present appellant submitted that his exoneration cannot increase the liability of the appellant. Therefore, relying on the decisions of this Tribunal in the cases of Pritha Bag vs. SEBI in Appeal No. 291 of 2017 decided on February 14, 2019, Sayanti Sen vs. SEBI Appeal No. 163 of 2018 decided on August 9, 2019, G. Unnikrishnan Nair & Ors. vs. SEBI Appeal No. 5 of 2018 decided on November 27, 2019, he wanted that the appeal be allowed.

11. On the other hand, the learned senior counsel for the respondent SEBI submitted that in appeal no. 156 of 2020, this Tribunal vide order dated August 18, 2020 held that noticee nos. 5 the appellant therein Mr. Nimain Charan Biswal was in fact not a managing director of the company. His appeal was, therefore, partly allowed. In the circumstances, even for the number of period as detailed (supra), since there was no managing director, for the said period as well as for

rest of the period, it would be the case where there is no managing director or whole time director of the company.

12. So far as the appellant Arvind Kumar Jagannath Prasad Gupta in appeal no. 397 of 2021 is concerned, vide his reply dated July 19, 2019, he submitted that he was appointed as Honorary director with the company and, therefore, was not involved in any business or financial decision. SEBI found that appellant was non-executive director from August 2010 to December 2011 and then from January 2013 to March 2017 as per the MCA 21 record. The appellant however did not specify any dates regarding his directorship.

13. So far as the appellant Manoj Singhal in appeal no. 197 of 2021 is concerned, he was non-executive director from January 2013 to July 2013 during which period some of the OCD certificates were issued. He submitted that he had not attended any board meetings of the company and have no knowledge about the issuance of the OCDs. During his tenure allotment of 37% of OCDs were made on the dates detailed by him. He defended that the violation of the provisions would have happened only when the number of allotment exceeds 49 and, therefore, he cannot be taken as liable.

14. From the submissions of all these appellants, it is clear that either they plead ignorance or submit that during their limited period, number of allotment did not cross 49 and, therefore, they would not be liable.

15. So far as the issue of Mr. Nimain Charan Biswal being the managing director is concerned, this Tribunal in appeal no. 156 of 2020 upon hearing both the sides had found vide order dated August 13, 2020 that he was not managing director of the company. Therefore, the contention of the some of the appellants that there was a managing director during this period cannot be accepted.

16. It can be seen from the record besides the present OCDs, the company had also issued Non-Convertible Debentures (hereinafter referred to as 'NCDs') in violation of the same provisions. Therefore, various orders against the company as well as some of the present noticees who were alleged to be director during the period was initiated by respondent SEBI. Respondent SEBI ultimately held the company as well as the directors responsible for violation of the provisions of the Companies Act and ICDR Regulations. Similarly, various appeals were preferred before this Tribunal. This Tribunal on the basis of the provisions of Section 5 of the Companies Act held all the directors liable. So far as the appellant Girishchandra M. Baluni is concerned, it was found that he was not the director during the relevant period of issuance of those NCDs. His appeal no. 340 of 2017 was allowed by this Tribunal on April 20, 2018.

17. However, in the present proceedings since all the present appellants were the directors for one period or the other of issuing OCDs, merely because part of the OCDs were issued during their period, they cannot escape liability. Issuance of OCDs had occurred on the basis of the single decision of the company and merely the formality of issuance of OCDs continued.

18. While dismissing the appeal of Mr. Yogesh G. Gemawat and others the then director including the present appellant Arvind Kumar Jagannath Prasad Gupta, this Tribunal in this group of appeals in its decision dated April 16, 2019 vide paragraph nos. 17 to

19 observed as under :-

"17. The submissions of all the appellants would show that during the financial year 2013-2014 they were directors for some period. Some of them stated that they discontinued to remain directors by tendering resignations or that they did not participate in the Board meeting. The learned counsel for the appellants submitted that some other persons as detailed in the facts above were appointed specifically for generating funds by various means including NCDs and, therefore, in view of the Sections 5 and 73(2) of the Companies Act the appellants would not be liable.

18. The relevant provisions read as under :-

"5. MEANING OF "OFFICER WHO IS IN DEFAULT"

For the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any punishment or penalty, whether by way of imprisonment, fine or otherwise, the expression "officer who is in default" means all the following officers of the company, namely :

- (a) the managing director or managing directors;
- (b) the whole-time director or whole-time directors;
- (c) the manager;
- (d) the secretary;
- (e) any person in accordance with whose directions or instructions the Board of directors of the company is accustomed to act;
- (f) any person charged by the Board with the responsibility of complying with that provision : Provided that the person so charged has given his consent in this behalf to the Board;
- (g) where any company does not have any of the officers specified in clauses (a) to (c), any director or directors who may be specified by the Board in this behalf or where no director is so specified, all the directors:

Provided that where the Board exercises any power under clause (f) or clause (g), it shall, within thirty days of the exercise of such powers, file with the Registrar a return in the prescribed form."

73. ALLOTMENT OF SHARES AND DEBENTURES TO BE DEALT ON STOCK EXCHANGE

(1).....

(2). Where permission has not been applied under subsection (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."

19. The reading of the provisions of Section 5 of the Companies Act would show that in the absence of any of the officers specified in Clauses (a) to (c) any director or directors who may be specified by the Board would be called as "officer who is in default" and in absence of such specification all the directors would be termed as "officers who are in default". The necessary consequence of Section 73(2) of the Companies Act would therefore follow."

19. These observations are applicable in the present case. In view of the foregoing reasons, there is no merit in the present appeals and the same are, therefore, dismissed without any order as to costs.

20. 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.