

(2020) 08 SEBI CK 0037

In the Securities Appellate Tribunal Mumbai

Case No : Appeal No.156 Of 2020

Nimain Charan Biswal

APPELLANT

Vs

Securities And Exchange Board Of India

RESPONDENT

Date of Decision : 18-08-2020

Acts Referred:

Companies Act, 1956 — Section 5, 56, 60, 73, 117C, 283(1)(g)

Citation : (2020) 08 SEBI CK 0037

Hon'ble Judges : Tarun Agarwala, Presiding Officer; Dr. C. K. G. Nair, Member; M. T. Joshi, J

Bench : Full Bench

Advocate : Nimain Charan Biswal, Mustafa Doctor, Ravishekhar Pandey

Final Decision : ?Allowed

Judgement

Tarun Agarwala, Presiding Officer

1. The present appeal has been filed against the order dated April 7, 2020 passed by the Whole Time Member (â??WTMâ? for short) of the

Securities and Exchange Board of India (â??SEBIâ? for short) directing the appellant to refund the amount collected through Optionally Convertible

Debentures (OCD) jointly and severally along with other Directors together with interest @ 15% per annum. By the said order, the appellant was also

restrained from accessing the securities market for a period of four years from the date of refund of amount and was further restrained from

associating with any public listed company.

2. In this appeal, SEBI was arrayed as Respondent No1. Union of India through the Ministry of Corporate Affairs, Government of India was arrayed

as Respondent No. 2 and the State of Maharashtra through the Advocate General was arrayed as Respondent No. 3. An affidavit has been filed by

the appellant stating that the Respondent Nos. 2 and 3 are formal parties and since no relief has been claimed against them they may be deleted from

the array of parties. We accordingly accept the prayer of the appellant and direct that the names of Respondent Nos. 2 and 3 shall be deleted from

the array of parties in the memo of appeal. Necessary correction shall be carried out by the appellant on the physical copies of the memo of appeal.

3. The facts leading to the filing of the present appeal is, that there is a company known as Neesa Technologies Limited. It is the case of the appellant

that a recruitment interview was held by the company on November 7, 2013 in which a consent letter was obtained by the company which was

misused and was utilized showing the appellant as Managing Director of the company. It was also contended that when the appellant came to know

about this mischief he submitted his resignation papers and filed all compliances with the Registrar of Companies but for reasons best known the

Registrar of Companies did not update its record for more than three years. As a result, the appellant had to file a Writ Petition before the Gujarat

High Court for appropriate direction and that pursuant to the order of the Gujarat High Court dated July 5, 2017 the period as a Director / Managing

Director was fixed from November 7, 2013 to March 6, 2014, based on which the Registrar of Companies updated its record thereafter.

4. It is alleged that in relation to the issuance of NCDs by the company and alleged violation of the Companies Act an ex-parte interim order was

issued by SEBI on June 3, 2015 which was consequently confirmed on June 2, 2016. The appellant filed Appeal No. 204 of 2016 before this Tribunal

which was allowed by judgment dated July 14, 2016. The order of SEBI was quashed on the ground that SEBI had travelled beyond the show cause

notice. This Tribunal while allowing the appeal remitted the matter again to SEBI to decide the matter afresh.

5. Pursuant to the order of this Tribunal, SEBI passed a fresh order dated September 7, 2016 exonerating the appellant from all the charges leveled in

the show cause. A specific finding was given by SEBI that the appellant did not attend any meetings of the Board of Directors during the period when

he is alleged to have been appointed as the Director nor did he receive any remuneration. Even otherwise the allotment of NCDs was completed on

August 22, 2013, that is, prior to the appointment of the appellant as a Director. The relevant extract of the order of SEBI dated September 7, 2016

exonerating the appellant is extracted hereunder:-

5. I note that in the interim order dated June 3, 2015, the main allegation levelled against NTL and other entities is that NTL had engaged in fund mobilizing activity from the public, through its offer and issue of NCDs and violated the provisions of sections 56, 60, 73 and 117C of the Companies Act, 1956 and the relevant provisions of the SEBI (Issue and Listing of Debt Securities) Regulations, 2008. In this regard, I note from the record that Mr. Biswal was a director of NTL only for a period of approximately 4 months i.e. from November 7, 2013 to March 6, 2014. Further, it is also a matter of record that the allotment of NCDs by NTL was completed on August 22, 2013 i.e. before Mr. Biswal joined NTL as a director. In view thereof, I find that Mr. Biswal became a director of NTL after the offer, issue and allotment of NCDs by NTL was complete and therefore, he cannot be held responsible for violations of NTL regarding offer, issue and allotment of NCDs.

6. The appellant further contended that since the Registrar of Companies continued to show his name as Managing Director in the company and no effort was being made to update its record, the appellant filed Writ Petition No. 4497 of 2017 praying for deletion of his name from the record of the Registrar of Companies. The Gujarat High Court by judgment dated July 5, 2017 disposed of the Writ Petition holding that in the absence of any evidence, the period of the appellant as a Director / Managing Director in the company was confined from November 7, 2013 to March 6, 2014.

7. The appellant further contends that in January 2017 the Registrar of Companies filed 34 criminal cases before the Magistrate for violation of the Companies Act implicating the appellant for not complying with the orders of the Company Law Board dated October 13, 2014 with regard to refund of FDR to 17 investors, issuance of NCDs and issuance of OCDs. The appellant filed Criminal Writ Petition No. 1117 of 2017 which was allowed by judgment of the Gujarat High Court dated February 3, 2018 whereby all the 34 criminal cases filed against the appellant were quashed. The Gujarat High Court found that the complaints filed by the Registrar of Companies relate to the alleged violations for the financial year ending March 31, 2012, March 31, 2013 and March 31, 2014 in which the appellant had no role to play and that the appointment of the appellant as a Director / Managing

Director was only a paper arrangement and that too only for a period of less than four months. The Gujarat High Court also found that there is no material to show that the appellant attended any meeting of the Board of Directors and that there was no involvement of the appellant's role in any decision making process which would attract the offence under the Companies Act. The Gujarat High Court therefore held that the appellant was not an officer in default u/s 5 of the Companies Act, 1956.

8. It is the case of the appellant that in spite of aforesaid decision, SEBI issued a fresh show cause notice dated December 13, 2018 against the appellant and other Directors of the company with regard to the issuance of the OCDs by the company. The allegation in the show cause notice, in a nutshell is, that during the tenure of the appellant as Managing Director of the company, the OCDs were issued and allotted and that the appellant as a Managing Director, being an officer in default u/s 5 of the Companies Act, was responsible.

9. Before the WTM, the appellant contended that he had no nexus with the company as he was neither a promoter or a director or a shareholder or an employee and that in the employment interview the consent letter was misused by the company. The appellant vehemently submitted that in relation to the issuance of the NCDs the respondent had exonerated him and for the same period the issuance of a fresh show cause notice involving the appellant for issuance of OCDs was a misuse of the process of law and that he was unnecessarily being harassed by the respondent for reasons best known to them. It was contended that in view of the two decisions of the Gujarat High Court the matter should be dropped and consigned to the record insofar as the appellant is concerned.

10. The WTM after considering the aforesaid passed the impugned order dated April 7, 2020 restraining the appellant from accessing the securities market and from associating himself with any public listed company and also directing the appellant to refund the amount collected during his tenure along with interest @ 15% per annum.

11. We have heard the appellant in person and Shri Mustafa Doctor, the learned senior counsel along with Shri Ravishekhar Pandey, the learned counsel for the respondent SEBI.

12. At the outset, the learned senior counsel Shri Mustafa Doctor for SEBI made

a submission and submitted that he has received instructions from SEBI to intimate the Tribunal that the direction relating to refund of the money will not be enforced insofar as the appellant is concerned but submitted that the restraint order debarring the appellant for a period of four years should continue considering the fact that the appellant was a Managing Director and during his period the OCDs were issued. This concession was not accepted by the appellant and accordingly we have heard the matter on merits.

13. The contention of the appellant was the same, namely, that he was never appointed as a Director or Managing Director in the company; that he had no nexus with the company; that he had never issued any OCDs nor attended any meetings of the Board of Directors nor signed any attendance register and therefore u/s 283(1)(g) of the Companies Act, 1956 for not attending the board meetings he is deemed to have been removed as a Director of the company.

14. On the other hand, the respondent acknowledged the judgment of the Gujarat High Court as well as the decision of SEBI dated September 7, 2016 in relation to the appellant but contended that as per the Gujarat High Court the tenure of the appellant as Managing Director of the company was fixed from November 7, 2013 to March 6, 2014 and therefore during this period the appellant was the Managing Director which he cannot escape and cannot contend that he was never a Managing Director. It was also urged that in the financial year 2013-14 the OCDs were issued and the appellant being the Managing Director was responsible and was an officer in default u/s 5 of the Companies Act. It was therefore contended that the order of the WTM does not suffer from any error of law and the appeal consequently should be dismissed.

15. Having heard the appellant in person and the learned senior counsel for the respondent and having perused the order of SEBI dated September 7, 2016 and the two judgments of the Gujarat High Court dated July 5, 2017 and February 3, 2018 and upon a perusal of the show cause notice we are of the opinion that the impugned order cannot be sustained. The only reason given by the WTM implicating the appellant is that OCDs appears (emphasis is ours) to have been issued and allotted during the financial year 2013-14 when the appellant was the Managing Director. The word 'appears' is

of importance. A presumption has been drawn by the WTM that because the appellant was the Managing Director for a limited period from

November 7, 2013 to March 6, 2014 it is presumed that the OCDs were issued during the period when he was appointed as a Managing Director.

16. This presumption is patently erroneous for the following reasons:-

(i) The earlier order of SEBI dated September 7, 2016 in relation to the issuance of NCDs clearly indicate that the appellant did not attend any

meetings of the Board of Directors nor was he paid any remuneration and the allotment of NCDs were completed on August 22, 2013;

(ii) A perusal of Exhibit â?" I to the memo of appeal indicates that the resolution of the Board of Directors for the issuance of allotment of OCDs was

passed on May 28, 2012 i.e. prior to the appointment of the appellant as Managing Director;

(iii) Exhibit â?" J to the memo of appeal indicates that OCDs were issued on various dates and the last OCD was issued on September 30, 2013 i.e.

prior to the date of the alleged appointment of the appellant on November 7, 2013. There is no evidence to show that OCDs were issued during the

period when the appellant was appointed as a Managing Director.

(iv) The Gujarat High Court in its decision dated February 3, 2018 has categorically held that the appellant had no role to play and that the appointment

of the appellant as Managing Director was only a paper arrangement. The Gujarat High Court further held that there was no material to show that the

appellant attended any meeting of the Board of Directors and that he was not involved nor had any role in the decision making process for issuance of

OCDs / NCDs;

(v) The Gujarat High Court in the same decision dated February 3, 2018 found that the appellant was not an officer in default u/s 5 of the Companies

Act;

17. In the light of the aforesaid admitted findings it was not open to the WTM to implicate the appellant only on the sole ground that the appellant was

the Managing Director and during his period OCDs were allotted. The WTM should have given a specific finding that the OCDs were allotted during

the period when the appellant was appointed as the Managing Director. The records suggests otherwise and merely on surmises the WTM without

looking into the records and without applying its mind has wrongly and illegally

implicated the appellant.

18. In view of the fact that the appellant did not attend any meetings of the Board of Directors during the alleged period of his tenure as Managing

Director coupled with the fact that the resolution of the Board of Directors for issuance and allotment of OCDs was passed on February 28, 2012 that

is much before the alleged appointment of the appellant as Managing Director and in the absence of any finding that the OCDs were issued and

allotted during the period when the appellant was the Managing Director, we are of the opinion that the impugned order insofar as it relates to the

appellant cannot be sustained and is quashed. The appeal is allowed.

19. In our view the appellant has been harassed since 2015 when an ex-parte interim order was passed against him in relation to the issuance and

allotment of NCDs. The said order was set aside by the Tribunal in 2016 and thereafter SEBI exonerated him on September 7, 2016. In spite of the

decision of the Gujarat High Court on February 3, 2018, a fresh show cause notice dated December 13, 2018 was issued against the appellant, which

in our opinion, was issued without any application of mind. We also find that there was enough evidence to show that the appellant was not involved in

the issuance and allotment of OCDs which the WTM has conveniently ignored and implicated the appellant on the basis of presumption. Further, from

the date of the impugned order dated April 7, 2020 the appellant has been restrained from accessing the securities market or from being associated

with any public listed company. In our opinion the appellant is entitled for costs which we compute at Rs. 50,000/- (Rupees Fifty Thousand Only) which

the respondent shall pay to the appellant by means of a demand draft or bank transfer within four weeks from today.

20. The present matter was heard through video conference due to Covid-19 pandemic. At this stage it is not possible to sign a copy of this order nor

a certified copy of this order could be issued by the registry. In these circumstances, this order will be digitally signed by the Presiding Officer on

behalf of the bench and all concerned parties are directed to act on the digitally signed copy of this order. Parties will act on production of a digitally

signed copy sent by fax and/or email.