(2022) 03 SEBI CK 0021

In the Securities Appellate Tribunal Mumbai

Case No : Appeal No. 166, 485 Of 2018

Prayag Infotech Hi Rise Ltd And Others — APPELLANT

Vs

Securities And Exchange Board Of India — RESPONDENT

Date of Decision : 02-03-2022

Acts Referred:

Companies Act, 1956 — Section 2(19A), 2(45AA), 4A, 60, 67(3)
Companies Act, 2013 — Section 2(36), Section 55A, 56, Sections 67, 73, 73(1), 73(1A), 73(2), 73(3), 75(1)
Securities And Exchange Board Of India Act, 1992 — Section 11, 11A, 11C(3), 11C(5), 15A, 27(2)
Securities Contracts (Regulation) Act, 1956 — Section 2(h)
Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 — Section 2(zg)
Insurance Act, 1938 — Section 2(9)

Citation : (2022) 03 SEBI CK 0021

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

Bench : Division Bench

Advocate : Nimay Dave, Ankur Loona, Aparna Wagle, Swapna Roopavate, Shyam Mehta, Manish Chhangani, Ravishekhar Pandey, Samreen Fatima

Final Decision : Dismissed

Judgement

M.T. Joshi, J

1. Both the present appeals are arising in connection with the issue of making offer of Redeemable Preference Shares (‘RPS’ for short) by the appellant no.1 Prayag Infotech Hi-Rise Ltd (hereinafter referred to as the ‘Company’) of which the rest of the appellants were Directors during the relevant period. Respondent Securities and Exchange Board of India (hereinafter referred to as ‘SEBI’) had received a letter from Registrar of Companies (RoC), Kolkata in respect of issue of RPS without complying with the provisions of the Companies Act, 1956 (hereinafter referred to as the ‘Companies Act’), the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as the ‘SEBI Act’) and Securities and Exchange Board of India (Disclosure and Investor Protection) Guidelines,

2000 (hereinafter referred to as the ‘DIP Guidelines’) and Securities and Exchange Board of India (Issuance of Capital and Disclosure Requirements) Regulations, 2009 (hereinafter referred to as the ‘ICDR Regulations’). During the enquiry, respondent SEBI found that the Company had made an offer of RPS in the years 2007-08 and 2008-09 by which it raised an amount of Rs.24.95 crores from 24,237 allottees. During inspection further similar offers were also discovered. It was found to be deemed public issue of securities under the first proviso of Section 67(3) of the Companies Act, 1956 and, thus, violating the requirements under Section 60 read with Section 2(36), Section 56, Sections 73(1), 73(2) and 73(3) of the Companies Act read with Section 27(2) of the SEBI Act. In view of the same, interim directions cum show cause notice was issued to the appellants by the respondent SEBI on 30th September, 2013 which were ultimately confirmed by the impugned order of the learned WTM dated 30th August, 2018. Against this order appeal no.485 of 2018 is preferred.

2. It appears that during the course of the investigation as referred supra, various summonses were issued to the Company and other appellants’ dated 1st January, 2014, 17th January, 2014 and 27th January, 2014. Vide the said summonses the appellants were directed to produce documents listed in the said summonses. As per SEBI the appellants failed to give complete information. Therefore last of the summons was issued to produce the documents and to appear before the officer of SEBI. However as neither the necessary documents were produced not the appellants appeared in person. therefore a separate show cause notice was issued on 18th January, 2017 calling upon the appellants to show cause as to why penalty shall not be imposed under Section 15A of the SEBI Act for the alleged violation of Section 11C(3) and 11C(5) of the SEBI Act. It appears that the appellants did not appear in the proceedings, did not file any reply nor remained present for personal hearing and, therefore, the learned Adjudicating Officer taking into consideration the material available on record vide order dated 17th March, 2018 imposed a penalty of Rs.1 crore upon all the appellants to be paid jointly and severally. Aggrieved by the said order appeal no.166 of 2018 has arisen.

3. In the circumstances, though both the cases had arisen out of the same episode the subject matter being different those would have to be dealt with separately.

Appeal no.485 of 2018

4. It is an admitted fact that the appellant Company had issued RPS as detailed supra. After passing the interim order SEBI had conducted an inspection and as detailed supra sought further information from the appellants. As according to SEBI, the appellants failed to appear and give the information, respondent SEBI conducted an inspection on 11th July, 2014. During inspection it was found that the appellant had issued additional preference shares during 2009-2010, 2010-11 and 2011-12 and additionally mobilised the amount of Rs.106.42 crores by issuing RPS in violation of the provisions as quoted above. In view of the

same, a show cause notice dated 18th January, 2017 was issued.

5. The appellants submitted before the learned WTM that the RPS issued in the year 2007-2009 were not in violation of any regulatory requirement. In order to ensure that the issuance of RPS would be regular or not the appellant Company has approached RBI as well as SEBI seeking their guidance. The RBI vide its letter dated 13th August, 2008 and SEBI vide its letter dated 27th January, 2009 had communicated that the offer of RPS can be made. Further, the RPS were issued for private circulation with a specific condition that those are redeemable in nature and did not provide any option for conversion into preference shares. Appellant Company was neither a listed Company nor was it making any public issue therefore it did not approach SEBI for compliance of the DIP Regulations. When the appellants approached SEBI no query was made with regard to the number of allottees. Since RPS were issued by way of private placement, the non- compliance of provisions pertaining to non-compliance had occurred due to ignorance of the said provisions. It was submitted that this technical default deserves to be viewed leniently as the appellants have not caused any loss or inconvenience to the investors. Additionally, it was submitted that the appellants have not committed any breach of DIP Guidelines and ICDR Regulations as those were not applicable to the issue of RPS. In compliance with Section 75(1) of the Companies Act, the Company had even filed return of allotment with the RoC in prescribed format no.2. In the meantime, repayment to majority of the preference shareholders was made. The same being below Rs.20,000/- and as many preference shareholders were not having any bank account, the Company had made cash payment to such shareholders. The auditors have verified the authenticity of such payments and certificate to that effect dated 19th Decmber, 2013 was issued. Though such repayment is not reflected as redemption in the books of account, the Company has in fact made repayment of Rs.11,59,61,136. While the SEBI has alleged in the show cause notice that the appellant had not refunded an amount of Rs. 106.42 crore of the next issue, the appellant submitted that though the appellant had obtained the shareholders' approval for issuance of 2,50,00,000 RPS of Rs.10 each no allotment of the same was made. An amount of Rs.1,02,11,98,400/- as application money was refunded in the year 2011-12. Therefore, the said amount was shown as current liabilities in the balance sheet as on 31st March, 2011. It was submitted that had SEBI given the correct guidance the appellants would not have gone ahead with private issue. The RBI also did not raise any objection though guidance was sought and, therefore, the appellant wanted that they be discharged from the proceedings.

6. The learned WTM, however, did not accept these submissions and the impugned order wherein various directions were issued vide para no.67 directing the appellant to refund the amount with interest at 15% p.a. payable only through bank demand draft or pay order. It was further directed that the appellants have to provide fully inventory of their assets. It was directed that all the assets of the Company shall be sold only for the purpose of making the refund and while all the appellants were directed to make refund in personal

capacity the holding of appellant no.2 to 5 other than Company were prevented from selling their assets etc. as detailed in the order.

As in the meantime the High Court of Kolkata in various writ petitions as detailed in para 68 of the impugned order had appointed one man committee of Justice (Retd.) Shailendra Prasad Talukdar for sale of the Company's assets and distribution of the sale proceeds. The learned WTM therefore made his directions subject to the orders of the High Court or any other decision of Justice S.P. Talukdar.

7. Heard Mr. Nimay Dave, Advocate with Mr. Ankur Loona, Ms. Aparna Wagle and Ms. Swapna Roopavate, Advocates for the Appellant and Mr. Shyam Mehta, Senior Advocate with Mr. Manish Chhangani, Mr. Ravishekhar Pandey and Ms. Samreen Fatima, Advocates for the Respondent.

8. It was submitted before us that RPS are not the securities within the meaning of Section 67 of the Companies Act. Further, neither the DIP Guidelines nor ICDR Regulations are applicable. This issue, however, is squarely covered by the landmark decision of Supreme Court in the case of Sahara vs. SEBI and Anr.

9. Section 67(3) reads as under:

"67. Construction of references to offering shares or debentures to the public, etc.-

(3) No offer or invitation shall be treated as made to the public by virtue of sub-section (1) or sub-section (2), as the case may be, if the offer or invitation can properly be regarded, in all the circumstances-

(a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or

(b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation.

Provided that nothing contained in this sub-section shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more:

Provided further that nothing contained in the first proviso shall apply to the non-banking financial companies or public financial institutions specified in section 4A of the Companies Act, 1956 (1 of 1956)."

First proviso to Sub section 3 above declares that offer or invitation for issue of securities if is made to fifty or more persons then the exemption from treating the issue as public shall not be available.

10. While dealing with the issue as to whether invitation to more than 49 investors would invoke the provisions of Section 73(1), in para no.104 the Supreme Court declared as under:-

"104. Section 73(1) of the Act casts an obligation on every company intending to offer shares or debentures to the public to apply on a stock exchange for listing of its securities. Such companies have no option or choice but to list their securities on a recognized stock exchange, once they invite subscription from over forty nine investors from the public. If an unlisted company expresses its intention, by conduct or otherwise, to offer its securities to the public by the issue of a prospectus, the legal obligation to make an application on a recognized stock exchange for listing starts. Sub-section (1A) of Section 73 gives indication of what are the particulars to be stated in such a prospectus. The consequences of not applying for the permission under sub-section (1) of Section 73 or not granting of permission is clearly stipulated in sub-section (3) of Section 73. Obligation to refund the amount collected from the public with interest is also mandatory as per Section 73(2) of the Act."

11. As regards the issue as to whether RPS would be securities, the definition of the same Companies Act, provides that the definition of it given in Section 2(h) of the SCRA Act would be applicable. While dealing with similar issue, in para nos.128, 129 and 130 of the Sahara judgment cited supra, the Supreme Court declared as under:

"128. The scope of the definition of Section 2(h) of SCR Act came up for consideration before this Court in Sudhir Shantilal Mehta v. Central Bureau of Investigation (2009) 8 SCC 1 and the Court stated that the definition of securities under the SCR Act is an inclusive definition and not exhaustive. The Court held that it takes within its purview not only the matters specified therein, but also all other types of securities, thus it should be given an expansive meaning. In Naresh K. Aggarwala & Co. v. Canbank Financial Services Ltd. and Anr. (2010) 6 SCC 178, while referring to the definition of the term "securities" defined under SCR Act and the applicability of a Circular issued by the Delhi Stock Exchange, the Court endorsed the view of the Special Court and noted that the perusal of the above quoted definition showed that they did not make any distinction between listed securities and unlisted securities and, therefore, it was clear that the circular would apply to the securities which were not listed on the stock exchange.

129. Section 2(h) of the SCR Act gives emphasis to the words "other marketable securities of a like nature", which gives a clear indication of the marketability of the securities and gives an expansive meaning to the word securities. Any security which is capable of being freely transferrable is marketable. The definition clause in Section 2(h) of SCR Act is a wide definition, an inclusive one, which takes in hybrid also, which I have already indicated, defined vide Section 2(19A) of the Companies Act.

130. OFCDs issued have the characteristics of shares and debentures and fall within the definition of Section 2(h) of SCR Act, which continue to remain debentures till they are converted. In other words, OFCDs issued by Saharas are debentures in presenti and become shares in futuro. Even if OFCDs are hybrid

securities, as defined in Section 2(19A) of the Companies Act, they shall remain within the purview of the definition of "securities" in Section 2(h) of SCR Act. Further, it may be noted that Saharas have treated OFCDs only as debentures in the IM, RHP, application forms and also in their balance sheet. The terms "Securities" defined in the Companies Act has the same meaning as defined in the SCR Act, which would also cover the species of "hybrid" defined under Section 2(19A) of the Companies Act. Since the definition of "securities" under Section 2(45AA) of the Companies Act includes "hybrids", SEBI has jurisdiction over hybrids like OFCDs issued by Saharas, since the expression "securities" has been specifically dealt with under Section 55A of the Companies Act."

12. Though the issue in Sahara case was as to whether Optionally Fully Convertible Debentures (OFCDs) would be securities, the interpretation of Section 2(h)(2) made by the Supreme Court in para 129 above squarely applies to the RPS also. Section 2(h) of the SCRA Act defining securities is as under:

"2(h) "securities" include—

(i) shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;

(ia) derivative;

(ib) units or any other instrument issued by any collective investment scheme to the investors in such schemes;

(ic) security receipt as defined in clause (zg) of section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(id) units or any other such instrument issued to the investors under any mutual fund scheme;

Explanation.- For the removal of doubts, it is hereby declared that "securities" shall not include any unit linked insurance policy or scrips or any such instrument or unit, by whatever name called, which provides a combined benefit risk on the life of the persons and investment by such persons and issued by an insurer referred to in clause (9) of section 2 of the Insurance Act, 1938 (4 of 1938);

(ie) any certificate or instrument (by whatever name called), issued to an investor by any issuer being a special purpose distinct entity which possesses any debt or receivable, including mortgage debt, assigned to such entity, and acknowledging beneficial interest of such investor in such debt or receivable, including mortgage debt, as the case may be;

(ii) Government securities;

(iia) such other instruments as may be declared by the Central Government to be securities; and

(iii) rights or interest in securities."

13. In the circumstances RPS would be securities. Therefore, there is no escape to a listed or unlisted company from the applicability of the relevant provisions of the Companies Act once an invitation to more than 49 investors is made.

14. As regards the applicability of DIP Guidelines and ICDR, while the appellant relies on certain statements made in certain notes of SEBI, there is nothing in any of these instruments which would show that RPS are excluded from the application of either the DIP Guidline or ICDR Regulations.. Besides this, similar contention of the appellant in Sahara case was rejected by the Supreme Court in para nos.115 and 116 which are extracted as under:-

"115. The Senior counsels appearing for Saharas also raised a contention that DIP Guidelines were only departmental instructions, not having the sanction of law and, therefore, would not apply to the OFCDs issued. This argument, in my view, has no basis.

116. The DIP Guidelines had statutory force since they were framed by SEBI in exercise of its powers conferred on it under Sections 11 and 11A of the SEBI Act. The powers have been conferred on SEBI to protect the interests of the investors in securities and regulate the issue of prospectus, offer documents or advertisement soliciting money through the issue of prospectus. Section 11 of the Act, it may be noted has been incorporated, evidently to protect the interests of investors whose securities are legally required to be listed. The DIP Guidelines were implemented by SEBI with regard to the listed and unlisted companies, which made public offer, until it was replaced by 2009 ICDR."

15. There is no denial to the fact that invitation to more than 49 investors was made while issuing the RPS during the years 2007 to 2009. As regards next of the invitation made to the public later on in the year between the years 2009-2012. Admittedly, the invitation was made to more 49 investors and, therefore, the contention will have to be rejected.

16. As regards the statement that communication was made to SEBI as well as RBI before carrying the above exercise does not hold any water as merely advice was sought without explaining that the invitation would be to more than 49 investors.

17. As regards alleged repayment made by the appellant Company to the investors, the impugned order itself takes care of repayment, if any, made as one man committee appointed by Kolkata High Court as detailed supra is also looking in the same aspect and the impugned order is declared to be subject to the direction passed by the Kolkata High Court and the decisions to be taken by the one man committee in this regard. We, therefore, find no merit in this appeal. The appeal therefore fails.

Appeal no.166 of 2018

18. It is an admitted fact that SEBI issued summonses on 1st January, 2014, 7th January, 2014 and 27th January, 2014. Ultimately, according to it, since all the relevant documents were not submitted SEBI conducted inspection of the appellant Company on 11th July, 2014. During that inspection SEBI found that additional preference shares were issued from the year 2009 to 2012 for the amount of Rs.106.42 crores in violations of the provisions detailed supra.

19. To the summons dated 1st January, 2014 issued by SEBI calling for the documents, information mentioned at annexure 1 to the summons , vague reply of the appellant Company was that the key managerial persons including the managing directors, promoters etc. were travelling and, therefore, they required time for filing the information as required by SEBI . On 14th January, 2014, the Company replied to the 7th January, 2014 summons. The appellant Company responded that the final account for the year ended March, 2013 was not completed and the corporate office of the Company was sealed for over four months due to court order. However, in the earlier reply there was no mention of inability to produce the documents. Next of the summons was issued by SEBI on 17th January, 2014. The appellant Company replied to the said summons vide letter dated 22nd January, 2014 wherein it was communicated that the registered and corporate office of the Company was sealed for over four months due to court order, many record of the Company is misplaced or not readily available. The third reason was the appellant Mr. Basudeb Bagchi who was having full knowledge of the facts was out of the city.

20. SEBI thereafter issued summons dated 27th January, 2014 not only for production of documents but also to appear before the investigating authority. In response to this summons some information was provided and request was made to give more time to furnish the remaining information and even to reschedule the date of personal hearing. It was also asked that the venue of personal hearing be changed from Mumbai to Kolkata. In this background, respondent SEBI had carried out inspection wherein not only information regarding the earlier issue of RPS was collected but also the information regarding the additional preference share allotment process of the year 2009-2012 mobilising the amount of Rs.106.42 crores was found.

21. The appellant’s contention that information could not be supplied due to the sealing of the office of the appellant Company on the orders 0f the Kolkata high Court for the period of four months, cannot be accepted because the sealing was not a permanent one and various pretext were forwarded as detailed supra for not providing the information.

22. Considering the background of the case that crores of rupees were collected by the appellants illegally in the flagrant violation of the law as stated supra and for refund of the said amount Kolkata High Court was required to take action and to appoint a committee to oversee the repayment, we do not find that non submission of the information by the appellant in response to the summonses issued by the SEBI was a bonafide act.

23. In the result, the following order:-

ORDER

Both the appeals are hereby dismissed with no order as to costs.

24. 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 Private Secretary 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.