

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

DATE : 14.02.2019

Appeal No. 291 of 2017

Pritha Bag
B-156/5/H/9,
A. P. C. Road,
Kolkata – 700006.

..... Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, Plot No. C-4A, G Block,
Bandra Kurla Complex, Bandra (East),
Mumbai - 400 051.

..... Respondent

Mr. Prakash Shah, Advocate with Mr. Chinmay Paradkar, Advocate
i/b Raju Mukharjee, Practicing Company Secretary for the Appellant.
Mr. Kumar S. Rai, Advocate with Mr. Abhiraj Arora, Advocate i/b
ELP for the Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Dr. C. K. G. Nair, Member

Per : Justice Tarun Agarwala, Presiding Officer (Oral)

1. On receipt of a complaint in January 2013, Securities and Exchange Board of India (hereinafter referred to as, 'SEBI') conducted an investigation against MaxBe Green Provision Ltd. (hereinafter referred to as, 'MGPL'). Pursuant to the investigation, SEBI observed that the company was offering Redeemable Preference Shares (hereinafter referred to as, 'RPS') to the public during the financial years 2011-2012 and 2012-2013 in violation of the provisions of Sections 56, 60 [read with Section 2(36)], 67 and Section 73 of the Companies Act, 1956 (hereinafter referred to as, 'Companies Act'). Based on this investigation, SEBI passed an ex-

parte interim order dated March 13, 2015 restraining the company and its directors including the appellant from fund mobilizing activities through the issuance of RPS. The appellant and other directors were being given opportunity of hearing and after considering their submissions, the Whole Time Member of SEBI (hereinafter referred to as 'WTM') passed a final order dated January 15, 2016 restraining the company and its directors including the appellant from accessing the securities market. The company and the directors including the appellant were jointly and severally directed to refund the money collected by the company through issuance of RPS alongwith interest at the rate of 15% p.a.

2. The appellant being aggrieved by the order filed an appeal No. 184 of 2016 before this Tribunal which was dismissed as withdrawn by an order dated September 7, 2017 passed by SAT permitting the appellant to withdraw the appeal and given liberty to file afresh. Based on the said order the present appeal has again been filed.

3. We have heard Shri Prakash Shah, the learned counsel for the appellant and Shri Kumar S. Rai, the learned counsel for the respondent. It was contended that the submissions placed by the appellant before the WTM was not considered nor any reasons given for rejecting such submissions, nor the provisions of law has been considered and that the WTM mechanically and without any application of mind has held that the appellant was responsible for affairs of the company and that since the RPS were allotted during the time when she was the director, therefore, the company and the appellant was responsible jointly and severally and for making the

refund alongwith the interest as mandated under Section 73(2) of the Companies Act read with Section 27 of the SEBI Act.

4. It was urged that the appellant is not an “officer in default” as contemplated under Section 73(2) of the Companies Act and could not be responsible for the affairs of the company and, consequently, no direction could be issued to the appellant for making the refund alongwith the interest under Section 73(2) of the Companies Act.

5. In order to appreciate the submissions of the learned counsel for the appellant, it is essential to note a few facts. The company allotted RPS on the following dates :-

Date of Allotment	Year	No. of Persons	Amount ()
31/07/2011	2011-12	176	19,08,000
10/10/2011		121	13,05,500
20/01/2012		1	6,000
20/01/2012		262	48,02,000
20/04/2012	2012-13	693	56,65,500
	Total	1,253	1,36,87,000

6. The allotment of RPS admittedly, exceeded 49 persons and, consequently, such allotment would be deemed to be a public issue in terms of the first proviso of Section 67(3) of the Companies Act. The appellant was admittedly, appointed as an additional director of the company on March 22, 2012 and during her period admittedly, the company allotted RPS to 693 persons for an amount of Rs. 56,65,500/-. It has been brought on record that a Memorandum of Agreement dated July 13, 2012 was executed between the outgoing directors and the incoming directors pursuant to which the appellant retired with effect from July 13, 2012 and Form 32 depicting the

resignation of the appellant was duly filed before the Registrar of Companies. Clause 4 of this agreement stipulated that the erstwhile directors, including the appellant, shall not be liable for payment of any interest or future liabilities of the business of the company.

7. The appellant further submitted that she was not involved in the management of the company, in any manner, and that the managing director, Mr. Indranath Daw who was known to her had requested her to become a director on account of resignation of two directors from the company. It was further stated that during her tenure as a director of the company, she had neither attended any Board meeting nor received any sitting fees and had not benefited from any quarter either directly or indirectly from the company.

8. In the light of the aforesaid assertions, it becomes essential to take a look at the provisions of Section 73 of the Companies Act which states as under:

“73(1) Every company intending to offer shares or debentures to the public for subscription by the issue of a prospectus shall, before such issue, make an application to one or more recognised stock exchanges for permission for the shares or debentures intending to be so offered to be dealt with in the stock exchange or each such stock exchange.

(1A) Where a prospectus, whether issued generally or not, states that an application under sub-section (1) has been made for permission for the shares or debentures offered thereby to be dealt in one or more recognized stock exchanges, such prospectus shall state the name of the stock exchange or, as the case may be, each such stock exchange, and any allotment made on an application in pursuance of such prospectus shall, whenever made, be void, if the permission has not been granted by the stock exchange or each such stock exchange, as the case may be, before the expiry of ten weeks from the date of the closing of the subscription lists:

***Provided** that where an appeal against the decision of any recognized stock exchange refusing permission for the shares or debentures to be dealt in on that stock exchange has been preferred under section 22 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), such allotment shall not be void until the dismissal of the appeal.*

73(2) Where the permission has not been applied 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 percent 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."

9. A perusal of the aforesaid provisions indicates that where the company intends to offer shares to the public for subscription has not been done by issue of a prospectus or where permission has not been sought from the stock exchange, in that event, the company and other directors of the company who is an officer in default shall be jointly and severally liable to repay that money alongwith interest at such rate as may be prescribed. From the aforesaid, it is apparently clear that the liability to repay the amount is upon that director of the company who is an officer in default. "Officer in default" has been defined under Section 5 of the Companies Act. For facility the said provision is extracted hereunder:-

"Meaning of "officer who is in default".

"5. 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.”

10. A perusal of the aforesaid provision indicates that the expression “officer who is in default” would mean the following officers, namely, the managing director or managing directors, whole time director or whole time directors, the manager, the secretary or any person in accordance with whose directions or instructions the Board of Directors of the company accustomed to act and would also include any person charged by the Board of responsibility of compliance with the provisions of Act. Section 5(g) of the Act further stipulates that where the company does not have any of these officers specified in clauses (a) to (c) in which case all the directors would be deemed to be an officer in default.

11. In the light of the aforesaid provision, the appellant had categorically submitted before the WTM that she was appointed as an additional director by the managing director and that she was not responsible for the affairs of the company. The appellant further stated that she did not attend any meeting and was never connected with the issuance of RPS. It was urged that the WTM without considering the submissions of the appellant has mechanically and without any application of mind has illegally held that since the appellant was a director, and was responsible for affairs of the company and was liable to the contravention found against the company and, therefore, was jointly and severally responsible for making a refund alongwith interest under Section 73(2) of the Companies Act.

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).

13. Reliance on the judgment of this Court by the respondent in the case of Manoj Agarwal vs. SEBI in Appeal No. 66 of 2016 decided on July 14, 2017 is not applicable and is distinguishable. The Tribunal in the case of Manoj Agarwal found that there was no material to show that any of the officers set out in clauses (a) to (c) of Section 5 or any specified director of the said company was entrusted to discharge the application contained in Section 73 of the Companies Act. In the instant case, there is sufficient material on record to show that there was a managing director and in the absence of any finding that the appellant was entrusted to discharge the application contained in Section 73 of the Companies Act, the direction to refund the amount alongwith interest from the appellant is wholly illegal.

14. For the reasons stated above, the appeal is allowed. The impugned order in so far as it relates to the appellant is quashed. In these circumstances, there shall be no order as to costs.

Sd/-
Justice Tarun Agarwala
Presiding Officer

Sd/-
Dr. C. K. G. Nair
Member

14.02.2019
Prepared & Compared by
PTM