

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Decision : 29.03.2022

Appeal No. 800 of 2021

Shailesh Kumar Mishra
4, Sight Florence, 126 West,
Mahamayapur, Flat No. 1C3,
Garia Garden,
Kolkata – 700 084.

..... Appellant

Versus

1. Securities and Exchange Board of India
SEBI Bhavan, Plot No. C-4A, G-Block,
Bandra-Kurla Complex, Bandra (East),
Mumbai – 400 051.
2. Aryan Agro Projects India Limited
Metro Plaza, 2nd Floor,
4, H.L. Sarkar Road, Bansdrone,
Kolkata – 700 070.
3. Rakesh Raushan
Metro Plaza, 2nd Floor,
4, H.L. Sarkar Road, Bansdrone,
Kolkata – 700 070.
4. Birendra Thakur
Metro Plaza, 2nd Floor,
4, H.L. Sarkar Road, Bansdrone,
Kolkata – 700 070.
5. Manoj Chauhan
Metro Plaza, 2nd Floor,
4, H.L. Sarkar Road, Bansdrone,
Kolkata – 700 070.
6. Abadh Kumar Singh
Metro Plaza, 2nd Floor,
4, H.L. Sarkar Road, Bansdrone,
Kolkata – 700 070.

7. Sheonath Sahni
Metro Plaza, 2nd Floor,
4, H.L. Sarkar Road, Bansdrone,
Kolkata – 700 070.
8. Uttam Das
Metro Plaza, 2nd Floor,
4, H.L. Sarkar Road, Bansdrone,
Kolkata – 700 070.
9. Robin Ojha
Metro Plaza, 2nd Floor,
4, H.L. Sarkar Road, Bansdrone,
Kolkata – 700 070.
10. Anil Kumar Mishra
Metro Plaza, 2nd Floor,
4, H.L. Sarkar Road, Bansdrone,
Kolkata – 700 070.
11. Rising Star Life Care Solutions Private
Limited
Das Villa, Plot No. 883,
Bijan Kanan Brahmpur,
Bansdrone, Kolkata – 700 096.

... Respondents

Mr. Abhishek Gupta, Advocate with Mr. Anirban Sen,
Advocate for the Appellant.

Mr. Abhishek Khare, Advocate with Mr. Sharvil Kala,
Advocate i/b Khare Legal Chambers for the Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Justice M.T. Joshi, Judicial Member
Meera Swarup, Technical Member

Per : Justice Tarun Agarwala, Presiding Officer (Oral)

1. The present appeal has been filed against the order dated
November 1, 2016 passed by the Whole Time Member

(‘WTM’ for short) of the Securities and Exchange Board of India (‘SEBI’ for short) directing the appellant along with other entities jointly and severally to refund the money collected through Secured Non-Convertible Redeemable Debentures (‘NCDs’ for short) to the allottees along with interest @ 15% per annum from the date of receipt of money till the date of such refund and further restrained him from buying, selling or otherwise dealing in the securities market, directly or indirectly, in whatsoever manner for a period of four years or till the date of refund of money to the allottees, whichever is later.

2. By a separate order the delay in the filing of the appeal was condoned for the reasons stated in the said order.

3. The facts leading to the filing of the present is, that the Company known as Aryan Agro Projects India Limited (‘the Company’ for short) issued NCDs during financial year 2011-2012 and 2012-2013. This was found to be in violation of Section 67(3) of the Companies Act and failure to comply with Section 56 and 60 of the Companies Act and other provisions of the SEBI (Issue and Listing of Debt Securities) Regulations, 2008. Accordingly, SEBI passed an ad-interim order dated August 12, 2015 directing the Company and its

directors to forthwith cease to mobilize fresh funds from investors through Offer of NCDs and were further prohibited them from issuing any prospectus or any offer document. By the said interim order the Company and the directors were directed to show cause as to why suitable directions should not be passed under Section 11 and 11B of the SEBI Act, 1992.

4. Insofar as the appellant is concerned he contended that he was never a director and that he had not signed any papers or documents to become a director of the Company and in this regard had filed a complaint before the Police Station, Kolkata where investigation is still pending. Further, the appellant contended that he never took part in decision making process of the Company nor was involved in the day to day affairs of the management of the Company. The WTM after considering the material evidence on record confirmed the interim order and directed the Company and its directors including the appellant to refund the amount so collected through NCDs along with interest.

5. In paragraph 21 of the impugned order the WTM observed that the public issue of NCDs was made by the Company during the financial year 2011-12 and further

observed that the appellant was appointed on the Board of the Company after the date of issuance of the NCDs. In paragraph 20 of the impugned order, we find that the appellant was appointed as a director from February 2, 2014 to June 3, 2015 i.e. for the financial year 2014-15 and 2015-16. The WTM in paragraph 22 of the impugned order further found that the directors who were present during the period when the Company made the offer and allotted NCDs were liable for violation of Section 56, 60 and 73 of the Companies Act and the ICDR Regulations. The WTM further held that the persons who have joined the Company's Board after the offer and allotment of the securities (which include the appellant) would also be liable if the Company or the concerned directors failed to make the refunds as mandated under Section 73(2) of the Companies Act.

6. We have heard Shri Abhishek Gupta, the learned counsel for the appellant and Shri Abhishek Khare, the learned counsel for the respondent.

7. Admittedly, the appellant was appointed as a director after the issuance of offer and allotment of NCDs at the time when the offer and allotment of securities had occurred. The appellant was not a director and therefore was not responsible

for the action of the Company and its Board of Directors for the issuance of the NCDs in violation of Section 56, 60 and 67(3) of the Companies Act. Section 67(3) of the Companies Act provides that offer or invitation to subscribe for the shares or debentures should not be made to more than 50 persons failing which it would become a public issue for which various compliances are required to be made. Since the allotment was made to more than 50 persons the issuance of NCDs was in violation of Section 67(3) and consequently the amount was liable to be refunded under Section 73. For facility, Section 73 of the Companies Act, 1956 is extracted hereunder:-

Section 73

“73. Allotment of shares and debentures to be dealt in on stock exchange

(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 recognized 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 recognised 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 22 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.*

(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 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.”

8. A perusal of Section 73 of the Companies Act makes it clear that in the first instance the Company is liable to repay the monies received from the investors / allottees and if the Company fails to repay the amount then the amount shall be

recovered jointly and severally from every director of the Company who is an officer in default.

9. Section 5(g) of the Companies Act creates a deeming fiction wherein all the directors of the Company would be officers in default provided a specific finding is given that there was no Managing Director in the Company.

10. In the instant case, we are of the opinion that under Section 73(2) the amount is required to be refunded from the expiry of 8 days from the date of the alleged allotment by the Company and every director of the Company who is an officer in default. The words 'every director' would only include those directors who were involved in the issuance of the NCDs and cannot take into its fold such directors who were appointed subsequently.

11. Further, where liabilities in the first instance is fixed upon the Company under Section 73(2) to repay the amount and where the Company fails to repay the amount then the amount could be recovered jointly and severally from every director of the Company who was an officer in default. Therefore, where the Company is the offender, vicarious liability of the directors cannot be imputed automatically and

a specific finding is required to be given that a director or director was 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.

12. We further find that merely by a deeming fiction the appellant cannot be made an officer in default under Section 5(g) of the Companies Act unless a specific finding is given that there was no Managing Director which in the instant case is lacking.

13. In the light of the aforesaid, we are of the opinion that since the appellant was not a director at the relevant moment of time he cannot be made responsible for refund of the amount under Section 73(2) of the Companies Act.

14. We also find that the controversy involved in the present case is squarely covered by a decision of this Tribunal in *Sayanti Sen vs Securities Appellate Tribunal, 2019 SCC OnLine SAT 132*.

15. For the reasons stated aforesaid, the impugned order cannot be sustained and is quashed insofar as the appellant is concerned. The appeal is allowed with no order as costs.

The bank accounts / demat account of the appellant shall be defreezed forthwith.

16. 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.

Justice Tarun Agarwala
Presiding Officer

Justice M.T. Joshi
Judicial Member

Meera Swarup
Technical Member

29.03.2022
msb