

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on: 05.02.2021

Date of Decision : 23.02.2021

Appeal No. 470 of 2018

Subhra Jyoti Sardar
North Cabin Road
P.O. & P.S. – Baruipur,
Kolkata, West Bengal – 700 144. 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. Rajesh Khandelwal, Advocate i/b. Juris Link for the
Appellant.

Mr. Shyam A. Mehta, Senior Advocate with Mr. Anubhav
Ghosh, Advocate i/b. The Law Point for the Respondent.

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

Per : Justice Tarun Agarwala, Presiding Officer

1. The appellant has challenged the impugned order dated
June 15, 2018 passed by the Whole Time Member ('WTM'
for short) of the Securities and Exchange Board of India
(‘SEBI’ for short) by which the appellant and other directors
including the Company has been restrained from accessing

the securities market and have been further directed to refund the amount collected through Secured Non-convertible Redeemable Debentures (NCDs). The WTM further directed that till such time the refund is not made the restraint order will continue to operate and after the refund is made the appellant is restrained for a further period of four years from accessing the securities market.

2. The facts leading to the filing of the present appeal is, that the appellant was appointed as a non-executive director in the Company. In the year 2011-12 the Company issued NCDs in violation of Section 73 of the Companies Act, 1956. It has come on record that the appellant had submitted his resignation on July 6, 2011 which was accepted by the managing director of the Company on March 26, 2012. Further, it transpires that the appellant had also lodged some complaint against the Company on April 2, 2013.

3. Pursuant to complaints being lodged against the Company and investigation being made, SEBI issued an *ex-parte ad-interim* order on June 18, 2015 restraining the appellant and others from accessing the securities market. The said interim order was confirmed by an order dated June 15, 2018 which has been impugned in the present appeal.

4. We have heard Shri Rajesh Khandelwal, the learned counsel for the appellant and Shri Shyam Mehta, the learned senior counsel assisted by Shri Anubhav Ghosh, the learned counsel for the respondent.

5. The contention of the learned counsel for the appellant is, that a specific assertion was made by the appellant that he was never involved in the management of the Company or was involved in the day-to-day affairs of the Company. It was also asserted that the appellant is not an 'officer in default' under Section 5 of the Companies Act in view of the fact that there is a managing director in the Company.

6. The WTM taking note of the objections raised by the appellant came to a conclusion that since there has been a violation under Section 73 of the Companies Act, the Company as well as all the directors / promoters are liable to refund the amount collected through NCDs jointly and severally and accordingly directed them to refund the monies and also restrained the appellant from accessing the securities market.

7. In our view the controversy involved in the present appeal is squarely covered by the decision of this Tribunal in

Pritha Bag vs Securities and Exchange Board of India
(Appeal No. 291 of 2017 decided on February 14, 2019) and
in Sayanti Sen vs Securities and Exchange Board of India
(Appeal No. 163 of 2018 decided on August 8, 2019).

8. In Pritha Bag this Tribunal held:-

“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.”

9. In Sayanti Sen this Tribunal held:-

“26. In the light of the aforesaid the WTM has held that the Company has violated provisions of Section 73(2) of the Companies Act and has therefore in the same breadth has booked all the Directors to be responsible for the day today affairs of the Company. This approach as stated earlier was wholly incorrect. Section 73(2) of the Companies Act makes it apparently clear that if in the first instance it was the Company which was liable to repay the monies received from the investors and if the Company failed to repay the amount then the amount would be recovered jointly and severally from every Director of the Company as an officer in default. Therefore, where the Company is the offender vicarious liability of the Directors cannot be imputed automatically.”

10. In view of the aforesaid and in the absence of any finding that the appellant was involved in the day-to-day affairs of the management of the Company or was involved in the collection of the NCDs coupled with the fact that there is a managing director in the Company who is overall responsible and is an officer in default under Section 5 of the Companies Act, we are of the opinion that the impugned order cannot be sustained insofar as it relates to the appellant.

11. In the light of the aforesaid, the impugned order is quashed insofar as it relates to the appellant. The appeal is allowed. In the circumstances of the case, parties shall bear their own costs.

Justice Tarun Agarwala
Presiding Officer

Justice M.T. Joshi
Judicial Member

23.00.2021
msb