BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

**Order Reserved on : 22.11.2022**

**Date of Decision : 05.01.2023**

**Misc. Application No. 829 of 2021**
**And**
**Appeal No. 492 of 2021**

1. BRD Securities Ltd.
   Door No. XIII/436, A2 1st Floor,
   Bethany Complex, Kunnamkulam,
   Thrissur – 680 503.

2. Surendran Thazhathpurakkal Krishnan
   Thazhathupurakkal House,
   Kanippayyoor P., Kunnamkulam,
   Thrissur – 680 517.

3. Chanayil Gopalan Surendran
   Villa No. 26, Sivaprasadan,
   Skyline, Kingsmead,
   Cheroor Road, Peringavu,
   Trichur – 680 018.

4. William Verghese Chungath Cheru
   Chungath House, Guruvayur Road,
   Kunnamkula P.O.
   Thrissur – 680 503.

5. Gigy Verghese Pulikkottil
   Joy Villa, Opposite BSNL,
   Microwave Station,
   Thrissur Road, Kanipayur,
   Thrissur – 680 517.

6. Prasad Punnoose
   Mangalam, Punnsylavania,
   Kalady P.O.,
   Ernakulam – 683 574.

7. Porathur Devassy Antony
Porathur House, Vellattanjur P.O.
Thrissur – 680 601.

8. Mary Williams
Chungath House, Guruvayur Road,
Kunnamkula P.O.,
Thrissur – 680 503.

9. Cheruvathoor Kuriappan
Cheruvathoor House, Santhi Nagar,
Kunnamkulam,
Thrissur – 680 503.

10. Thomas Augustine
Sreyas, Puthenpurakkal House,
Velupadam P.O.,
Thrissur. …Appellants

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. Somasekhar Sundaresan, Advocate with Mr. P. R. Ramesh and Ms. Yugandhara Khanwilkar, Advocates for the Appellants.

Mr. Pradeep Sancheti, Senior Advocate with Mr. Abhiraj Arora, Mr. Shourya Tanay and Mr. Deepanshu Agarwal, Advocates i/b. ELP for the Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Ms. Meera Swarup, Technical Member

Per : Justice Tarun Agarwala, Presiding Officer

1. The appellants have questioned the veracity and legality of the order dated May 25, 2021 passed by the Whole Time

Member (‘WTM’ for short) of the Securities and Exchange Board of India (‘SEBI’ for short) directing the appellants to refund the money collected through the offer and allotment of equity shares of the Company along with interest @ 15% per annum jointly and severally and further restrained them from accessing the securities market and further prohibited them from buying, selling or otherwise dealing in securities market for a period of two years.

2. The facts leading to the filing of the present appeal is, that BRD Securities Limited is a Non-banking Financial Company registered with the Reserve Bank of India (RBI). Based on a complaint in the year 2017, SEBI conducted an examination in the matter to ascertain the possible violation of various laws pertaining to public issue of securities. In the course of examination, it was observed that the Company had made allotment of shares on 8 instances from 2001 to 2010 and, in each instance, the allotment was made to over 49 persons. Such allotments were, however, made pursuant to a resolution passed by the Board of Directors. It was observed that these issues were deemed public issues in violation of Section 67 of the Companies Act, 1956 and since the Company had made allotment of equity shares to a total 3534 persons on 8 instances

from 06.10.2001 to 25.11.2010 which was not in compliance with various provisions of the Companies Act and SEBI (Disclosure and Investor Protection) Guidelines, 2000 ('DIP Guidelines' for short) and SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 ('ICDR Regulations' for short), a show cause notice dated April 5, 2019 along with a supplementary show cause notice dated December 12, 2019 was issued to appellants to show cause as to why appropriate directions should not be issued, namely, refund of the subscription money to the investors in terms of Section 73 of the Companies Act and to restrain the Company and its directors from issuing any further securities and from accessing the securities market and to restrain them from accessing the securities market for appropriate period.

3. Based on the reply given by the appellants the impugned order was passed holding that the appellant had made the allotment to various persons in violation of Section 67 of the Companies Act and consequently violated various clauses of the SEBI DIP Guidelines and various provisions of ICDR Regulations 2009 read with ICDR Regulations 2018.

4. The WTM further found that the evidence filed by the appellants were cryptic and did not discharge the burden of

proof. The WTM came to the conclusion that the Company was required to prove that the said allotments were not public issues but private placement and it was duty of the Company to document the entire process of private placement and preserve such records. Since the excel sheet that was filed was not supported / backed by relevant registers, minutes of the meetings and other records the said excel sheet was cryptic and could not be relied upon and consequently the burden was not discharged by the appellants.

5. The WTM further found that even though the show cause notice was issued after 20 years from the date of the first allotment and 10 years from the date of the last allotment held that since the show cause cannot be discharged on the ground of undue delay since no limitation period applies to enforcement action under the SEBI Act.

6. We have heard Shri Somasekhar Sundaresan, the learned counsel for the appellant and Shri Pradeep Sancheti, the learned senior counsel for the respondent.

7. The entire allegation against the appellants revolves on the issue as to whether the allotment of shares through private placement between the year 2001 to 2010 in 8 instances qualify

as an offer and invitation to public to subscribe to securities as provided under Section 67 of the Companies Act. In this regard it would be relevant to refer to Section 67 of the Companies Act which is extracted herein under:-

> *"67. (1) Any reference in this Act or in the articles of a company to offering shares or debentures to the public shall, subject to any provision to the contrary contained in this Act and subject also to the provisions of sub-sections (3) and (4), be construed as including a reference to offering them to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.*
>
> *(2) any reference in this Act or in the articles of a company to invitations to the public to subscribe for shares or debentures shall, subject as aforesaid, be construed as including a reference to invitations to subscribe for them extended to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.*
>
> *(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 subsection 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 non-banking financial companies or public financial institutions specified in section 4A of the Companies Act, 1956 (1 of 1956).”*

8. A perusal of the aforesaid provisions indicates that any offer and invitation to subscribe to securities of a Company qualifies as a public issue, except in the following circumstances, namely-

(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.

9. The first proviso to Section 67(3) provides that the above provisions would not apply in case whether the offer or invitation to subscribe the shares or debentures is made to 50 persons or more. Second proviso to Section 67(3) states that the first proviso will not apply to non-banking financial companies or public financial institutions as specified in Section 4A of the Companies Act, 1956.

10. The appellant being NBFC if it makes an offer to more than 49 persons is still required to comply with the requirements of a private placement as mentioned under Clause (3) of Section 67 as has been held by this Tribunal in ***Alchemist Holdings Ltd. vs SEBI in Appeal no. 423 of 2015 decided on June 29, 2018 and in Vistra ITCL (India) Ltd. vs SEBI, Appeal no. 484 of 2018 decided on October 17, 2019***. Further, in ***Vistra ITCL (India) Ltd. (supra)*** this Tribunal held as under:-

> *"6. We also find that one of the cardinal principle of inviting subscription of NCD under Section 67 of the Companies Act is to issue an invitation to a certain set of persons inviting them to subscribe to the NCDs. There is nothing on record to show or demonstrate that the Company or the appellant that invitation for subscription was made only to specific or predetermined persons or persons who were associated in some manner with the company so as to make the offer in the nature of private placement. On the other hand, evidence has come on record to show that the Company on its website was advertising seeking public subscription to the said issue even after the closure of the said issue. No evidence has been brought forward to show that the investors to the NCDs were employees, workers or associated in some form or the other with the company. Consequently, we are of the opinion that the Adjudicating Officer was justified in holding that the exemption available to an NBFC is in terms of the second proviso to section 67(3) of the Companies Act, 1956 but the requirement of section 67(3)(a) and (b) of the Companies Act has to be followed to show that the offer was not made to the public which in the instant case has not been provided by the appellant."*

11. In the instant case we find that the impugned order cannot be sustained for the following reasons: -

12. The first private allotment was made on October 6, 2001 and the last allotment was made on November 25, 2010. The show cause notice issued on April 5, 2019 after more than 18 years from the date of the first allotment and 9 years from the date of the last allotment. The private placements are part of the record which is in the public domain and which is reflected in the annual reports etc. before RoC. Dividends are being paid by the Company to the shareholders year to year, and therefore, in our opinion there has been an undue delay in the issuance of the show cause notice for refund of the allotment of money in terms of Section 73(2) of the Companies Act. The contention that SEBI only came of the irregularities only in 2017 cannot be accepted when everything was in the public domain.

13. This Tribunal in a catena of cases over the past 15 years have held that proceedings must be initiated in a timely manner and that proceedings are liable to be set aside only on the ground of undue delay in the initiation of the proceedings. One such recent decision that comes to the notice of this Tribunal is in the case of ***Mr. Rakesh Kathotia & Ors. vs SEBI, Appeal no. 7 of 2016 decided on May 27, 2019*** wherein the proceedings

were quashed on account of inordinate delay. This Tribunal held:-

> *"23. It is no doubt true that no period of limitation is prescribed in the Act or the Regulations for issuance of a show cause notice or for completion of the adjudication proceedings.* ***The Supreme Court in Government of India vs, Citedal Fine Pharmaceuticals, Madras and Others, [AIR (1989) SC 1771]*** *held that in the absence of any period of limitation, the authority is required to exercise its powers within a reasonable period. What would be the reasonable period would depend on the facts of each case and that no hard and fast rule can be laid down in this regard as the determination of this question would depend on the facts of each case. This proposition of law has been consistently reiterated by the Supreme Court in* ***Bhavnagar University v. Palitana Sugar Mill (2004) Vol.12 SCC 670, State of Punjab vs. Bhatinda District Coop. Milk P. Union Ltd (2007) Vol.11 SCC 363 and Joint Collector Ranga Reddy Dist. & Anr. vs. D. Narsing Rao & Ors. (2015) Vol. 3 SCC 695****."*

14. Similar order was passed in ***Ashok Shivlal Rupani vs SEBI, Appeal no. 417 of 2018 decided on August 22, 2019***. This order was taken to the Supreme Court by SEBI in ***Civil Appeal No. 8444 – 8445 of 2019, Securities and Exchange Board of India vs. Ashok Shivlal Rupani & Anr,*** etc was dismissed by the Supreme Court on November 15, 2019 thus affirming the decision of this Tribunal.

15. Recently, the Supreme Court in ***Adjudicating Officer, SEBI vs Bhavesh Pabari (2019) SCC Online SC 294*** held as under:-

> *"There are judgments which hold that when the period of limitation is not prescribed, such power must be exercised within a reasonable time. What would be reasonable time, would depend upon the facts and circumstances of the case, nature of the default/statute, prejudice caused, whether the third-party rights had been created etc."*

16. Similar orders were passed by this Tribunal in ***Ashlesh Gunvantbhai Shah vs SEBI (Appeal no. 169 of 2019) decided on January 31, 2020, SIC Stock & Services Pvt. Ltd. vs SEBI (Appeal no. 639 of 2021)***, ***Morepen Laboratories Limited vs SEBI (Appeal no. 62 of 2020) decided on April 15, 2021 and in ICICI Bank Limited vs SEBI (Appeal no. 583 of 2019) decided on July 8, 2020***.

17. In the light of the aforesaid, the finding of the WTM that there is no limitation period prescribed under the SEBI Act is in total disregard and disrespect to the various orders passed by this Tribunal and by the Supreme Court.

18. It may be stated here that a decision on a point of law when decided by this Tribunal and by the Supreme Court is binding on the subordinate authorities such as the WTM. It is not open to the WTM to keep on repeating itself that there is no period of limitation. The WTM cannot disregard various decisions on this issue.

19. In Union of India vs ***Kamlakshi Finance Corporation Ltd. 1992 supp (1) SCC 648***, the Supreme Court held as under:-

> *"The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department – in itself an objectionable phrase – and is the subject-matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws."*

20. Thus, on the aforesaid short point we find that there has been undue delay in the initiation of the proceedings and on this short ground the impugned order cannot be sustained.

21. Apart from the aforesaid, we find that there has been a substantial compliance of the conditions required to be discharged by the Company under Section 67(3) of the Companies Act. The appellant not only produced the application form and the resolution of the Board of Directors but also filed a computerized excel sheet which gave relationship details in the remark column indicating "Already a shareholder", "Staff", "Relationship with Associated Firm", "Investment Customer"

etc. This detail, in our opinion, was sufficient to discharge the burden of proof with regard to the conditions mentioned under Section 67(3) of the Companies Act. The finding that the excel sheet is required to be backed by the relevant registers, minutes of meetings and other records and the same are required to be preserved is not based on any statutory Rule or any provisions of the Companies Act. Further, the finding of the WTM that the details mentioned in the excel sheet is cryptic is patently erroneous. When details are given that the person to whom the shares are allotted is already a shareholder or is a member of the staff or he has a relationship with an associated firm, such details, in our opinion, is sufficient to discharge the burden and the onus shifts upon the respondent SEBI to find out and prove that the entries in the excel sheet are incorrect or fictitious. We find that no such enquiry was made to verify the veracity of the contents of the excel sheet and therefore to brush aside such evidence in a casual manner by saying it is a cryptic document is purely erroneous.

22. Under the Companies Act, 1956 in exercise of the powers conferred by sub-section (1) of section 642 read with sub-section (1-A) of Section 163 of the Companies Act, 1956, the Central Government made the following rules, namely, The

Companies (Preservation and Disposal of Records) Rules, 1966. Rule (2) provides that the records which Company is required to maintain under Section 163 of the Companies Act may be destroyed after the expiration of 8 years and 15 years. Thus, asking the Company to produce the original records after 18 years was unwarranted quite apart from the fact that no Rule or provisions has been shown by the respondent with regard to preservation of application form for private placement of allotment of shares under Section 67 of the Companies Act.

23. In addition to the aforesaid, under the Companies Act, 2013, Companies (Prospectus and Allotment of Securities) Rules, 2014 was framed. Under this Rule, the private placement is required to be made in Form PAS-5. A perusal of this format only indicates that the name of the allottee and father’s name and address including phone number and email ID, if any, is required to be given. The relationship with the Company or its directors etc is not required to be indicated.

24. We also find that under Section 67(3) of the Companies Act, the refund is required to be made within 8 days. The direction to refund the money after 20 years, in our opinion, is totally misplaced where much water has flown.

25. Thus, in our opinion, the finding that it was the duty of the appellant Company to preserve such records is patently erroneous in the absence of any Rules relating to such preservation of records. Further, the burden required upon the Company under Section 67(3) was discharged and the onus shifted to the SEBI which they failed to discharge.

26. In view of the aforesaid, the impugned order cannot be sustained and is quashed. The appeal is allowed. In the circumstances of the case, parties shall bear their own costs. Miscellaneous application is disposed of.

27. 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

Ms. Meera Swarup
Technical Member

05.01.2023
msb

MADHUKAR SHAMRAO BHALBAR
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