BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on: 4.7.2017
Date of Decision : 14.7.2017

Appeal No.66 of 2016

Manoj Agarwal,
Non-Executive Director,
Bhartiya Real Estate Development Ltd.
3, North Goalapara Road, Angus Bhadreshwar,
Hooghly, West Bengal – 712 221. …Appellant

Versus

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

Mr. Subir Kumar, Advocate for the Appellant.

Mr. Mustafa Doctor, Senior Advocate with Mr. Rakesh Puri and Mr. Rohan Agrawal, Advocates i/b. MDP & Patners for the Respondent.

CORAM : Justice J.P. Devadhar, Presiding Officer
Jog Singh, Member
Dr. C.K.G. Nair, Member

Per : Justice J.P. Devadhar

1. This appeal is filed to challenge the order passed by the Whole Time Member ('WTM' for short) of the Securities and Exchange Board of India ('SEBI' for short) on 21.1.2016. By the said order the WTM of SEBI while confirming the ex-parte order dated 2nd December, 2014 has directed that the Bharatiya Real Estate Development Limited ('BREDL' for short) and its present and past directors including the appellant shall jointly and severally refund the money collected by BREDL through issuance of redeemable preference shares with interest at the rate of 15% p.a. compounded on half yearly intervals, from the date when the repayment became due (in terms of Section 73(2) of the Companies Act, 1956) to the investors till the date of actual payment. Further, by the impugned order, BREDL and its

directors including the appellant are restrained from accessing the securities market for a period of 4 years.

2. Appellant became a Director of BREDL on 19th August, 2010 and resigned as Director of BREDL on 1.5.2012.

3. During the years 2011-12 and 2012-13 BREDL had collected Rs.40 lac and Rs.59.06 lac (total Rs.99.06 lac) respectively from various preferential allottees. Since the aforesaid amounts were collected without complying with the 'public issue' norms stipulated under Section 56, 60 read with Section 2(36) and Section 73 of the Companies Act, 1956, ex-parte order was passed on 2.12.2014 directing BREDL and its directors not to mobilize funds from investors through the offer of Redeemable Preference Shares/equity shares till further orders. By the said order, BREDL and its directors including the appellant were prohibited from issuing prospectus or any document soliciting money from the public until further orders. Thereafter, by the impugned order dated 21.1.2016, BREDL and its directors including the appellant are directed to refund jointly and severally the money collected by BREDL through the issuance of Redeemable Preference Shares with interest at the rate specified therein.

4. In view of the fact that out of the amount of Rs.99.06 lakh, amount of Rs.59.06 lakh was collected by BREDL after the appellant ceased to be a Director of BREDL, counsel for SEBI fairly stated on instruction that the obligation of the appellant to refund the amount with interest jointly and severally with BREDL and other Directors set out in the impugned order may be limited to Rs.40 lakh only, because, that was the amount collected by BREDL during the period when the appellant was a Director of BREDL.

5. Before setting out the arguments advanced by counsel on both sides, it would be appropriate to quote Section 5 and Section 73(2) of the Companies Act, 1956 which reads thus:-

"**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."

"Allotment of shares and debentures to be dealt in on stock exchange

73. (1) .....

(1A) .....

(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.

2(A) .....

2(B) ....."

6. Arguments advanced by Mr. Subir Kumar, learned counsel for the appellant may be summarized as follows:-

(a) Appellant was not the person responsible for issuance of redeemable preference shares of BREDL so as to attract the penal provisions contained in Section 56 and 73(2) of the Companies Act, 1956 read with Section 27 of the Securities and Exchange Board of India Act, 1992.

(b) Appellant had no knowledge about the real estate business and the appellant had merely lent his name to be a director of BREDL at the instance of Mr. Soumen Majumder and in fact for becoming a director of BREDL, the appellant had neither paid any subscription money to BREDL nor the appellant after becoming a director was involved in the day to day affairs of BREDL. Appellant as a Non Executive Director of BREDL had neither attended any of the board meetings to approve any of the accounts, balance sheets and/or management/policy decisions of BREDL. In these circumstances, the appellant could not be said to be an "officer in default" under Section 73(2) of the Companies Act, 1956.

(c) Section 2(26) of the Companies Act, 1956 defines the expression "Managing Director" to mean a director who exercises substantial power of management of the company. In the present case, the substantial power of management of BREDL was always with Mr. Soumen Majumder and Ms. Shipra Banerjee. Relying on various documents signed and filings made by Mr. Soumen Majumder and Ms. Shipra Banerjee it is submitted by counsel for the appellant that Mr. Soumen Majumder and Ms. Shipra Banerjee would alone fall within the purview of 'Officer who is in default' defined under Section 5(a) of Companies Act, 1956.

(d) In the absence of a designated Managing Director appointed by BREDL, admittedly Mr. Soumen Majumder and Ms. Shipra Banerjee pursuant to the responsibility cast on them had signed and filed various

documents with the Registrar of Companies. On all the letters of allotment issued by BREDL, Ms. Shipra Banerjee had signed as "Authorised Signatory" and therefore Mr. Soumen Majumder and Ms. Shipra Banerjee would only be the officer in default covered under Section 5(e) and 5(f) of the Companies Act, 1956.

(e) Case of the appellant does not fall within Section 5(g) of the Companies Act, 1956 as pleaded orally by the counsel for respondent, even though there is no finding recorded to that effect in the impugned order.

(f) As per Rule 4BB of the Companies (Central Government's) General Rules and Forms 1956, within thirty days of exercising its powers under section 5(f) or section 5(g) of the Companies Act, 1956, BREDL was required to file with the Registrar of Companies a return in Form 1AA duly signed by the Secretary or, where there is no secretary by a director. In the documents annexed at page 46 to 49 of the affidavit in reply filed by SEBI, Ms. Shipra Banerjee is shown as authorised person to submit returns on allotment. Therefore, when there was a authorised person appointed by BREDL, the WTM of SEBI could not have applied Section 5(g) of the Companies Act and hold that for violation of Section 73(2) of the Companies Act, 1956 committed by BREDL all the directors including the appellant were liable to be penalised.

(g) In the complaint filed by a complainant which is set out at page 107 of the affidavit in reply filed by SEBI, Mr. Soumen Majumder is shown as Managing Director of BREDL. Therefore, for the violation of Section 73(2) the Managing Director of BREDL could be said to be an

"officer in default" under Section 5 of the Companies Act, 1956 and not all the directors of BREDL.

(h) BREDL had not intended to raise funds by issuing redeemable preference shares to the general public. However, on account of issuing redeemable preference shares to more than 50 entities, as per settled law, issuance of redeemable preferential shares became a deemed public issue covered under Section 56 of the Companies Act, 1956. Section 56 of the Companies Act, 1956 which is akin to Section 27 of SEBI Act casts certain obligation on the specified directors or on any other person to whom the responsibility of issuing the prospectus was entrusted. In the present case, the special resolution for issuance of redeemable preferential shares was signed by Ms. Shipra Banerjee and notice of extra ordinary meeting was signed jointly by Ms. Shipra Banerjee and Mr. Soumen Majumder. Section 56(4) of the Companies Act, 1956 provides that a director or other person responsible for the prospectus shall not incur any liability by reason of any non compliance or any contravention if he satisfies the three conditions set out therein. In the present case, appellant had no knowledge about issuance of redeemable preference shares and therefore the appellant could not be penalized for the failure on part of BREDL and other directors.

(i) Before issuance of redeemable preference shares, it was obligatory on part of the authorised person of BREDL to make an application to the stock exchanges seeking permission for issuance of redeemable preference shares, however, no such application was made. Thus, there was contravention of Section 73(2) of the Companies Act, 1956, which is akin to Section 27 of the SEBI Act. In the present case the appellant had neither participated in any of the board meetings nor any

notice of such meeting were received by the appellant and therefore the appellant was neither aware of the acts done by other directors nor the appellant was signatory to any of the board resolution or documents. In such a case, for failure of BREDL to refund the amount to the investors, the appellant could not be held to be an officer in default and made liable to refund the amount jointly and severally. In support of the above contention reliance is placed on a decision of the Bombay High Court in case of H. Nanjundiah vs. V. Govindan reported in (1986) 59 Company Cases 356 (BOM) and a decision of the Supreme Court in case of S.M.S. Pharmaceuticals Ltd. vs. Neeta Bhalla and others reported in (2005) 3 BLJR 2018 (SC).

(j) Relying on the master circular issued by the Ministry of Corporate Affairs on 29.7.2011 it is submitted that a Company Secretary could also be treated as an officer in default. In the present case, it is submitted that Mr. Jayakrushan Das was the Company Secretary of BREBL and therefore, for non compliance of Section 73(2), the Company Secretary of BREDL ought to have been held to be an officer in default. As per the master circular, status of a director and the timing of commission of the offence are relevant factors to be taken into consideration for holding a person to be an officer in default. In the present case, it is submitted that neither the status of the appellant nor the timing of issuance of preferential allotment shows that the appellant could be considered as an officer in default.

(k) As BREDL had not issued any notice of board meeting to the appellant, the appellant is deemed to have vacated the office of a director under Section 283(g) of the Companies Act, 1956. Therefore,

the appellant who is deemed to have vacated the office of director could not be declared to be an officer in default.

(l) In the website of Ministry of Corporate Affairs, BREDL is still shown as an active company and Mr. Soumen Majumder is still shown as a Director of BREDL. In these circumstances counsel for the appellant submitted that the impugned order be quashed and set aside qua the appellant and amount due to the investors be directed to be refunded jointly and severally by BREDL and other directors of BREDL.

7. We see no merit in the above contentions.

8. In the present case, fact that Rs.40 lac was collected by BREDL through issuance of redeemable preference shares during the period when the appellant was a director of BREDL is not in dispute. Similarly fact that the redeemable preference shares were issued to more than 50 entities and as a result BREDL and its directors were obliged to follow the public issue norms laid down under Section 56 of the Companies Act, 1956 is also not in dispute.

9. In view of the fact that BREDL failed to follow the public issue norms contained in Section 56 of the Companies Act, 1956 before issuance of redeemable preference shares to more than 50 entities and no officer was authorised by BREDL to comply with the public issue provisions contained in the Companies Act, 1956 including the obligation to refund the amount under Section 73(2), the WTM of SEBI has held that all directors of BREDL were “officer in default” and accordingly directed BREDL and all its directors including the appellant to refund the amount collected from the investors with interest at the rate as more particularly set out in the impugned order.

10. Argument that the appellant was not a person responsible for issuance of redeemable preference shares and therefore for failure on part of BREDL and its directors to comply Section 73(2) of the Companies Act, 1956 the appellant could not be made liable is without any merit. In the present case, even though the intention of BREDL was to collect Rs.40 lac by issuance of redeemable preference shares through private placement and not by the general public, admittedly allotments were made to more than 50 entities and therefore BREDL was obliged to follow the public issue norms specified under the Companies Act, 1956. Since the said norms were not followed, under Section 73(2) of the Companies Act, 1956 it was obligatory on part of BREDL to refund the amount collected within the time stipulated therein. As the amounts were not refunded to the investors it is held that BREDL and every director of BREDL who is an "officer in default" shall refund jointly and severally the amount with interest. Therefore, fact that the appellant was not responsible for issuance of redeemable preference shares does not absolve the obligation of all the directors of BREDL including the appellant to refund the amount collected from the investors with interest as set out in the impugned order.

11. Argument of the appellant that he could not be said to be an "officer in default" is without any merit. Section 5 of the Companies Act, 1956 defines the expression 'officer who is in default' to mean the officers named therein. Section 5(g) provides that where any company does not have any of the officers specified in clauses (a) to (c) of Section 5, then any director who may be specified by the Board in that behalf or where no director is so specified then all the directors would be "officer who is in default". In the present case, no material is brought on record to show that any of the officers set out in clauses (a) to (c) of Section 5 or any specified director of BREDL was entrusted to discharge the obligation contained in Section 73 of the Companies Act, 1956. In such a case, as per Section 5(g) of the Companies Act, 1956 BREDL and all the directors of BREDL are liable. Therefore, decision of the WTM that all

directors of BREDL including the appellant would constitute "officer in default" cannot be defaulted.

12. Fact that appellant had merely lent his name to be a director of BREDL at the instance of Mr. Soumen Majumder and for becoming a director of BREDL the appellant had neither paid any subscription money to BREDL and the fact that the appellant was not involved in the day to day affairs of BREDL would not absolve the appellant from his obligation to refund the amount to the investors in view of the specific provisions contained in Section 73(2) read with Section 5 of the Companies Act, 1956. Admittedly, the appellant was a director of BREDL when amounts were collected by BREDL in contravention of the public issue norms and there is nothing on record to suggest that any particular officer/director was authorised to comply with the public issue norms. In such a case, all directors of BREDL including the appellant would be "officer in default" under Section 73(2) read with Section 5 of the Companies Act, 1956.

13. Fact that Mr. Soumen Majumder and Ms. Shirpa Banerjee had signed various documents and made filings before various authorities as authorised representatives of BREDL would not mean that they were authorised to discharge the obligation arising on account of deemed public issue. In other words, fact that Mr. Soumen Majumder and Ms. Shipra Banerjee were authorised to perform various other functions could not be a ground to infer that they were also authorised to discharge the public issue obligation contained in Section 56 & 73 of the Companies Act, 1956. Therefore, fact that Mr. Soumen Majumder and Ms. Shipra Banerjee had signed certain documents as authorised person of BREDL cannot be a ground to presume that they were authorised to discharge the obligation arising on account of deemed public issue.

14. Fact that the impugned order does not specifically refer to Section 5(g) of the Companies Act, 1956 would not render the impugned order invalid. In the impugned order it is specifically recorded that for non compliance of Section 73(2), obligation to

refund the amount with interest is on BREDL and the "officer in default". Expression "officer in default" used in Section 73(2) has to be read with Section 5 of Companies Act, 1956 which defines the expression "officer who is in default". Therefore, argument of the appellant that impugned order does not refer to Section 5(g) of the Companies Act, 1956 is without any merit.

15. Similarly, argument of the appellant that Mr. Soumen Majumder who was instrumental in raising funds through issuance of redeemable preference shares and Ms. Shipra Banerjee who had signed all the letters of allotment issued by BREDL would be covered under the expression "officer in default" set out in Section 5(e) and 5(f) of the Companies Act, 1956 is also without any merit. Specific case of the appellant is that BREDL had no intention to raise funds by offering redeemable preference shares to the general public. In such a case, authority given to Mr. Soumen Majumder and Ms. Shipra Banerjee to raise funds by issuing redeemable preference shares through private placement could not be considered as authority given for discharging the obligation arising on account of deemed public issue.

16. From the documents brought on record it is seen that BREDL had filed with the Registrar of Companies an annual return form, wherein, designation of all the persons named therein including the appellant are shown as directors of BREDL, which obviously means that BREDL had not appointed any person as Managing Director or Whole Time Director or Secretary or Manager. Moreover, there is no material to show that any director was authorised to discharge the obligation arising on account of deemed public issue. In these circumstances, decision of the WTM of SEBI that all directors of BREDL were "officer in default" and that they are jointly and severally liable to refund the amount with interest to the investors cannot be faulted.

17. Fact that one complainant in his complaint had considered Mr. Soumen Majumder to be a Managing Director of BREDL would not mean that Mr. Soumen

Majumder becomes a Managing Director of BREDL. Right to appoint a Managing Director is with the Company and not with any complainant.

18. Reliance was placed by counsel for appellant on a decision of Bombay High Court in case of H. Nanjundiah (supra). That decision has no relevance to the present case, because that decision was rendered in context of Section 5 of the Companies Act as it stood prior to its amendment in the year 1988. Section 5 of the Companies Act, 1956 as amended in the year 1988 does not contain the words "knowingly and wilfully" to describe the officer of the company who is deemed to be an "officer in default". Hence the decision of the Bombay High Court in case of H. Nanjundiah (supra) rendered in the context of unamended Section 5 of the Companies Act, 1956 is not relevant to the facts of present case.

19. Reliance was also placed by the counsel for the appellant on a decision of the Supreme Court in case of S.M.S. Pharmaceuticals Ltd. (supra). That decision dealt with the expression "officer in default" referred to in Section 141 of the Negotiable Instruments Act, 1881. In the present case we are concerned with the expression "officer who is in default" as defined under Section 5 of the Companies Act, 1956. Since the expression "officer in default" defined under Section 5 of the Companies Act, 1956 is not pari materia with that expression defined under the Negotiable Instruments Act, the Apex Court decision in the case of S.M.S. Pharmaceuticals Ltd. (supra) would have no relevance to the fact of the present case.

20. Relying on a master circular issued by the Ministry of Corporate Affairs on 29.7.2011 it was contended that in the present case, Since Mr. Jaykrushan Das was appointed as a Company Secretary by BREDL the said Company Secretary could be an officer in default for non compliance of Section 73(2). We see no merit in the above contention, because, there is nothing on record to suggest that Company Secretary was authorised to comply with the obligations relating to the deemed public

issue. Hence the argument that the Company Secretary of BREDL ought to have been made liable cannot be accepted.

21. Argument advanced on behalf of the appellant that the appellant had not attended any board meeting of BREDL and therefore, the appellant is deemed to have vacated the office under Section 283(g) of the Companies Act and consequently no action could be taken against the appellant is also without any merit. Section 283(g) of the Companies Act, 1956 applies only to a director who inspite of notice absents himself from three consecutive meetings of the Board of Directors or absents himself from all the meetings of the Board for a continuous period of three months. In the present case, it is the case of the appellant that no notice of Board meeting was issued to him. In such a case, question of the appellant remaining absent from the Board meetings does not arise and consequently question of applying Section 283(g) of the Companies Act, 1956 to the case of the appellant does not arise.

22. For all the aforesaid reasons, we see no merit in the appeal and the same is hereby dismissed with no order as to costs. However, it is made clear that the liability of the appellant under the impugned order is restricted to refunding the amount of Rs.40 lac with interest jointly and severally with BREDL and other directors of BREDL.

Sd/-
Justice J.P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

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

14.7.2017
Prepared and compared by
RHN