

**BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI**

Date of Decision: 23/01/2018

Appeal No.262 of 2016

Kalidas Dutta
son of late Abinash Chandra Dutta,
Residing at B.C. Road,
(Lalpur) Chakdaha,
Nadia – 741 222.

... Appellant

Versus

1. Securities and Exchange Board of India
SEBI Bhavan, Plot No.C4-A,
G-Block, Bandra-Kurla Complex,
Bandra (East),
Mumbai – 400 051.
2. Registrar of Companies
Nizam Palace,
2nd MSO Building, 2nd Floor,
234/4, AJC Bose Road,
Kolkata – 700 020.
3. Golden Haven Agro Project India Ltd.
G-2, Ground Floor,
34, Bibekananda Road,
Gouravi Apartment,
Kolkata – 700 035.
4. Ashok Kumar Yadav
Rean State Daroyan Lain,
Nayasarai, Raghunathpur, Mogra,
Dist. Hooghly, West Bengal,
Pin – 712 513.
5. Sukdeb Halder
Village – Tetultala More,
P.O. Halishahar, North 24 Parganas,
Pin – 743 134.
6. Kalidas Biswas
Saradapally, P.O. Kampa,
District – North 24 Parganas,
Kolkata – 743 145.

... Respondents

Mr. Nirav Sharma a/w Mr. Hasmukh Ravaria and Mr. Rudra Pratap Sinha,
Advocates i/b Juris Link for Appellant.

Mr. Mustafa Doctor, Senior Advocate a/w Mr. Pulkit Sukhramani and
Ms. Vidhi Jhawar, Advocates i/b The Law Point for the Respondent.

CORAM : Jog Singh, Member
Dr. C.K.G. Nair, Member

Per : Jog Singh (Oral)

1. The appellant has preferred the present appeal against the impugned order dated 23rd February, 2016 by which following directions have been issued:-

- “a. The Company, Golden Heaven Agro Project India Limited [PAN: AAECG6236F], Mr. Pradip Kumar Bera [PAN: AHUPB3853F], Mr. Gouranga Sundar Chakraborty [PAN: ATZPC0359C], Mr. Kalidas Datta [PAN: ACOPD9805C], Mr. Anukul Patra [PAN: ATEPP2709C], Mr. Ashok Kumar Yadav [PAN: ABXPY7352F], Mr. Avijit Chakraborty [PAN: AQSPC7029H], Mr. Mrinal Kanti Paul [PAN: BIDPP6796G] and Ms. Minu Chakrabarti [PAN: ATZPC0321Q] jointly and severally, shall forthwith refund the money collected by the Company through the issuance of Redeemable Preference Shares (which have been found to be issued in contravention of the public issue norms stipulated under the Companies Act, 1956), to the investors including the money collected from investors, till date, pending allotment of RPS, if any, with an interest of 15% per annum compounded at half yearly intervals, from the date when the repayments became due (in terms of Section 73(2) of the Companies Act, 1956) to the investors till the date of actual payment.
- b. The repayments to investors shall be effected only in cash through Bank Demand Draft or Pay Order.
- c. The Company/ its present management are permitted to sell the assets of the Company only for the sole purpose of making the refunds as directed above and deposit the proceeds in an Escrow Account opened with a nationalised Bank.
- d. The Company/ its present management shall issue public notice, in all editions of two National Dailies (one English and one Hindi) and in one local daily with wide circulation, detailing the modalities for refund, including details on contact persons including names, addresses and contact details, within fifteen days of this Order coming into effect.

- e. After completing the aforesaid repayments, the Company shall file a certificate of such completion with SEBI, within a period of three months from the date of this Order, from two independent peer reviewed Chartered Accountants who are in the panel of any public authority or public institution. For the purpose of this Order, a peer reviewed Chartered Accountant shall mean a Chartered Accountant, who has been categorized so by the Institute of Chartered Accountants of India ('ICAI').
- f. In case of failure of the Company, Golden Heaven Agro Project India Limited, its directors including Mr. Pradip Kumar Bera, Mr. Gouranga Sundar Chakraborty, Mr. Kalidas Datta, Mr. Anukul Patra, Mr. Ashok Kumar Yadav, Mr. Avijit Chakraborty, Mr. Mrinal Kanti Paul and Ms. Minu Chakrabarti in complying with the aforesaid directions, SEBI, on expiry of three months from the date of this Order, -
 - i. shall recover such amounts in accordance with section 28A of the SEBI Act including such other provisions contained in securities laws. ii. may initiate appropriate action against the Company, its promoters/ directors and the persons/ officers who are in default, including adjudication proceedings against them, in accordance with law.
 - iii. would make a reference to the State Government/ Local Police to register a civil/ criminal case against the Company, its promoters, directors and its managers/ persons in-charge of the business and its schemes, for offences of fraud, cheating, criminal breach of trust and misappropriation of public funds; and
 - iv. would also make a reference to the Ministry of Corporate Affairs, to initiate the process of winding up of the Company.
- g. The Company namely Golden Heaven Agro Project India Limited is directed not to, directly or indirectly, access the capital market by issuing prospectus, offer document or advertisement soliciting money from the public and is further restrained and prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner, from the date of this Order till the expiry of four (4) years from the date of completion of refunds to investors, made to the satisfaction of SEBI, as directed above.
- h. The directors of the Company namely Mr. Pradip Kumar Bera, Mr. Gouranga Sundar Chakraborty, Mr. Kalidas Datta, Mr. Anukul Patra, Mr. Ashok Kumar Yadav, Mr. Avijit Chakraborty, Mr. Mrinal Kanti Paul and Ms. Minu Chakrabarti are restrained from accessing the securities market and are further prohibited from buying, selling or otherwise dealing in securities, directly or indirectly, with immediate effect. They are also restrained from associating themselves with any listed

public company and any public company which intends to raise money from the public, with immediate effect. This restraint shall continue to be in force for a further period of four (4) years on completion of the repayments, as directed above.

- i. The above directions shall come into force with immediate effect."

2. Heard Mr. Nirman Sharma, learned Counsel for the appellant and Mr. Mustafa Doctor, learned Senior Counsel for the respondent- SEBI. It is argued on behalf of the appellant that the appellant was not a director when the resolution regarding issuance of redeemable preference shares was passed by the company. Therefore, he should not be made responsible for the acts of other directors. It is also contended that he was fraudulently made one of the directors whereas he had never given his consent for the same. Per contra, learned Senior Counsel Mr. Doctor on behalf of SEBI submits that the name of the appellant has been appearing on the MCA portal and as such SEBI's action in making him responsible cannot be faulted with.

3. We have heard both the learned counsel for the parties for some time and during the course of hearing, both the parties have brought to our notice the judgment of this Tribunal dated 14th July, 2017 in Appeal No.66 of 2016 (Manoj Agarwal vs. SEBI). In Manoj Agarwal's case, the appellant was a director of a company named, Bharatiya Real Estate Development Limited from 19th August, 2010 till 1st May, 2012. SEBI passed confirmatory order dated 21st January, 2016 confirming the ex-parte order dated 2nd December, 2014 whereby the directors of Bharatiya Real Estate Development Limited including the appellant were directed to refund jointly and severally the moneys collected by the company through issuance of redeemable preference shares with interest at the rate specified therein. One of the contentions raised by the appellant therein was based on Sections 56 and Section 73(2) of

the Companies Act, 1956 to the effect that the appellant was not a person responsible for issuance of the redeemable preference shares in question. Therefore, Section 56 and Section 73(2) of the Companies Act read with Section 27 of the SEBI Act, 1992 were not attracted. During the course of hearing of Manoj Agrawal, learned Counsel for SEBI fairly stated that:-

“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.”

4. In the above background, this Tribunal held as under:-

“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 10 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.”

5. Relying upon the above said judgment, Mr. Mustafa Doctor, learned Senior Counsel fairly submits that the appellant is being held responsible, particularly in clause “f”, because he continues to be a director as per the records of ROC as reflected on MCA portal. The concern of SEBI seems to be that the present directors, wrongly or rightly, who have been shown as directors on MCA portal should be made responsible for ensuring the repayment of the amount collected illegally by the company pursuant to resolution passed on 15th February, 2012, although the appellant was not a director at that time remains an admitted position.

6. After hearing the learned counsel for the parties, we are of the considered opinion that this appeal can be disposed of with a direction to the

appellant to obtain appropriate documents/orders from the competent authority to the effect that he was fraudulently appointed as director of the company in question on 10th February, 2015. For this purpose, the appellant is granted time up to one year to do the needful and submit the same to SEBI. In the eventuality of appellant producing the documents to the satisfaction of SEBI that he was fraudulently inducted as one of the directors of the company, SEBI will pass appropriate orders as per law.

7. With the above said directions, the appeal stands disposed of with no order as to costs.

Sd/-
Jog Singh
Member

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

23/01/2018
prepared & compared by-dg