

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Hearing : 27.03.2019

Date of Decision : 16.04.2019

Appeal No. 227 of 2016

Mr. Yogesh G. Gemawat
16 Sampran Avenue Rambaug
Maninagar, Ahmedabad - 380 008.

..... 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. Pulkit Sharma, Advocate with Mr. Sumit Agrawal,
Mr. Mahaveer Rajguru, Advocates i/b Regstreet Law Advisors for
the Appellant.

Mr. Mustafa Doctor, Senior Advocate with Mr. Anubhav Ghosh,
Ms. Vidhi Jhavar, Advocates i/b The Law Point for the Respondent.

With
Appeal No. 228 of 2016

Mr. Kamlendra Chunilal Joshi
A/4, Tulsi Row House, Satellite Area,
Jodhpur Village Road,
Ahmedabad - 380015

..... 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. J. J. Bhatt, Advocate with Ms. Hiral Shah, Advocate i/b Keval
Ponkiya & Associates for the Appellant.

Mr. Aditya Chitale, Advocate with Mr. Anubhav Ghosh, Ms. Vidhi Jhavar, Advocates i/b The Law Point for the Respondent.

**With
Misc. Application No. 90 of 2018
And
Appeal No. 156 of 2017**

Sanjay Raghunathprasad Gupta
An adult, Aged about 54 years,
Occupation Business, having
Residential address at Flat No. B-202,
Dhananjay Tower, 100 Feet Road,
Satellite, Ahmedabad, Gujarat - 380051. 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. Piyush Raheja, Advocate i/b Santosh Thakur for the Appellant.

Mr. Aditya Chitale, Advocate with Mr. Anubhav Ghosh, Ms. Vidhi Jhavar, Advocates i/b The Law Point for the Respondent.

**With
Misc. Application No. 91 of 2018
And
Appeal No. 159 of 2017**

Arvind Kumar Jagannath Prasad Gupta
An adult, Aged about 43 years,
Occupation - Service, having his
Residential address at A/304, Sagar
Samrat Apartment, Times of India
Road, Satellite, Ahmedabad,
Gujarat- 380 051. 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. Piyush Raheja, Advocate i/b Santosh Thakur for the Appellant.

Mr. Aditya Chitale, Advocate with Mr. Anubhav Ghosh, Ms. Vidhi Jhavar, Advocates i/b The Law Point for the Respondent.

CORAM : Justice Tarun Agarwala, Presiding Officer
Dr. C. K. G. Nair, Member
Justice M. T. Joshi, Judicial Member

Per : Justice M. T. Joshi, Judicial Member

1. Aggrieved by the order of Whole Time Member (for short 'WTM') of Securities and Exchange Board of India (for short 'SEBI') dated June 2, 2016 holding the present appellants jointly and severally liable for contravention of the provisions of Sections 56, 60, 73, 117C of the Companies Act, 1956 (hereinafter referred to as, Companies Act) and Regulations in respect of offer and issue of the Non-Convertible Debentures (NCDs) by the Neesa Technologies Ltd. (hereinafter referred to as, 'NTL') without complying with the listing provisions, all the present appellants allegedly being directors, the present appeals are preferred.

2. So far as the present appellants are concerned by the impugned order they are restrained from accessing securities market and further prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner, with immediate

effect. They are also restrained from issuing prospectus, offer document or advertisement soliciting money from the public and associating themselves with any listed public company and any public company which intends to raise money from the public, or any intermediary registered with SEBI. It was also directed that NTL as well as the present appellants along with other directors who were not before us jointly and severally refund the money collected by NTL through issuance of NCDs to the investors with interest at the rate of 15% p.a. compounded at half yearly intervals till the date of actual payment in the method as provided by the said order.

3. It appears from the record that some investors complained to SEBI vide complaint dated September 15, 2014, wherein it was alleged of non-payment of amounts arising from subscription of NCDs by NTL. Thereupon, the WTM took investigation which ultimately led to the passing of an ex-parte order dated June 3, 2015 and issuing notices to NTL as well as present appellants. Upon hearing the above order came to be passed therefore, the present appeals are filed.

4. As per the WTM the NTL had offered NCDs during the financial year 2013-2014 for an amount of Rs. 5.96 crores and issued to 341 persons, hence it was a public issue of NCDs in term of first proviso of Section 67 of the Companies Act. However, since the provision of

compulsorily listing such securities in compliance with Section 73(1) of the Companies Act was not made by the NTL as well as its directors of relevant period, were liable and, therefore, the impugned order came to be passed.

5. Before us, there is no dispute that the NCDs were offered and issued by NTL without complying with the provisions of the Companies Act, etc. The appeal filed by Neesa Technologies Ltd. bearing Appeal No. 311 of 2016 was dismissed by this Tribunal by judgment dated April 28, 2017. The main thrust of the present appellants is that they are not liable for the action of NTL for the separate facts placed by them before the WTM and additionally placed before this Tribunal. Their cases are as under :-

Appeal No. 227 of 2016 Mr. Yogesh G. Gemawat

6. Appellant Mr. Yogesh Gemawat has contended before the WTM that in fact he was an employee of the Neesa Group of which present NTL is a member company and was appointed as a director on April 1, 2013 in NTL. He had however resigned on May 15, 2014. He sent his resignation letter to NTL and filed necessary e-form DIR11 to the Registrar of Companies (ROC) through MCA portal on May 24, 2014 vide SRN: S30043103.

7. According to him, in fact Sanjay Gupta, Appellant in Appeal No. 156 of 2017 is the key promoter of Neesa group of companies

including the NTL. The appellant had no knowledge regarding the mobilization of funds and, therefore, requested the WTM to remove his name from the proceedings.

In the appeal, the appellant filed an additional affidavit and submitted that in fact one Mr. Manoj Singhal was the managing director of NTL as can be seen from the information he has received from M/s. IDBI Trusteeship Services Limited (ITSL) which was the debenture trustee appointed by NTL. ITSL has sent a copy of the letter sent by it to the Ministry of Corporate Affairs on October 29, 2014 wherein said Mr. Manoj Singhal was described as a managing director of NTL. Vide the said letter, it is clarified that Debenture Trust cum Hypothecation Deed (DTD) was entered into by NTL with ITSL only after ITSL was provided with the security of Rs. 11,50,78,019/- by way of assets and the said fact is not taken into consideration by WTM.

8. Further, in additional affidavit in rejoinder filed by the appellant dated September 6, 2017, the appellant additionally submitted that in fact, the whole scheme was started by Chairman Mr. Sanjay Gupta, appellant in Appeal No. 156 of 2017 and his family members. He additionally submitted that he was merely non-executive director for a short period without holding any share in the company, and this fact was not considered in the impugned order.

9. Learned counsel for the appellant submitted that in view of the above facts, the appellant had no role in fund raising. Before the appellant was appointed as a director fund raising through NCDs was already started. The appellant being an employee was appointed as a director. He further submitted that in fact, one Mr. Manoj Singhal was the managing director and the appellant never attended the Board meeting during 15 months of his tenure. The WTM merely finding that the appellant was director held him liable. The learned counsel relied on the judgment of this Tribunal in **Manoj Agarwal vs. SEBI [Appeal No. 66 of 2016 dated July 14, 2017]** wherein a director was held liable for the collection of amount for the period he was director and not further.

Appeal No. 228 of 2016 Mr. Kamendra Chunilal Joshi

10. The appellant submitted before WTM that he was also an employee of the Neesa Venture Holding Ltd. and was appointed as an additional director of the NTL on August 6, 2012. He resigned with effect from July 15, 2013 and, therefore, he cannot be termed as a director for the disputed period. In fact, since September 2012 he expressed his unwillingness to be in the board. Only in 2013 he was allowed to resign. The appellant did not participate in the affairs of the company. The control of the company vested with Mr. Sanjay Gupta Appellant in Appeal no. 156 2017 and his team. Financial decision was taken only by Mr. Sanjay Gupta. The appellant never

participated or consented to any resolution for issue of debentures or other connected matters. He never attended any board meeting and no board agenda was circulated to him. He was not concerned with the day to day operations of the company. He therefore, requested the WTM to discharge him from the proceedings.

11. SEBI filed an affidavit in reply to the Appeal memo. In rejoinder, the appellant submitted that he was merely additional non-executive director of the company. There is no document on record to show the appellant is responsible for financial affairs. In fact, all group level fund raising through FD, OCD, NCD and other financial products was given to one Mr. Rahul Shah under the supervision of Mr. Sanjay Gupta. Hence, he submitted that the appeal be allowed.

Appeal No. 156 of 2017 Mr. Sanjay Raghunath Prasad Gupta

12. The appellant replied to the WTM as under :-

1. The Company is the IT arm of the Neesa group and NCDs were issued by NTL through private placement and cannot be termed as public issue.
2. The NCDs were issued under various series. Though the total number of investors may be more than 300, NTL had issued this through private placement which would be less

than 49 in numbers only per series, and as such cannot be called as public issue.

3. Thereafter, NTL suffered acute financial crisis. Income tax department also started taking action. NTL has made a MOU with the group of NCD investors for making the payments though with some delay.
4. NTL is in constant contact with NCD investors. Payments have been made to the investors to the extent possible during the financial crunch.
5. During the period of private placement, appellant Mr. Sanjay Gupta was not on the board of the company. Financial affairs of NTL were being looked after by Mr. Yogesh Gemawat (Appellant in Appeal No. 227 of 2016) and other directors.
6. He had joined NTL as an additional director on July 12, 2013 and resigned from the additional directorship on November 8, 2013. NCDs were issued on April 1, 2013 to July 11, 2013 to the extent of 80%.

Appeal No. 159 of 2017 Arvind Kumar Jagannath Prasad Gupta

13. Appellant Arvind Kumar Gupta at Annexure 'D' filed a copy of the letter dated March 8, 2016 which according to him was sent to SEBI. This copy records the claim of Appellant Arvind Kumar

Gupta that he was appointed as an independent director and was not involved in the day to day affairs and policy making decisions of the company. Exhibit 'C' in his appeal is the copy of the letter claims to have been sent to Hon'ble Presiding Officer of Securities Appellate Tribunal, Mumbai dated August 16, 2016 wherein he had applied to join him as a party in the appeal filed by NTL bearing Appeal no. 222 of 2016.

FINDINGS OF WTM :

14. The WTM at the time of passing of the ex-parte order had already collected information from the Registrar of Companies (ROC) regarding the directors and the resignations if any of the director. He found that all the present appellants alongwith other persons were directors at the time NCDs were issued in the year 2013-2014 and continued to remain directors. Therefore, relying on the provision of Sections 5 and 73(2) of the Companies Act read with Section 27 of the SEBI Act, the present appellant's alongwith NTL and the other directors were held responsible as detailed (supra).

15. Heard the respective learned senior counsel, learned counsel for the appellants and the respondent. In our view, there is no merit in any of the appeal for the following reasons :-

REASONS

16. The thrust of the submissions from the side of all the appellants is that none of them is liable. In fact, each director has blamed the other director. On the other hand, Mr. Mustafa Doctor, the learned senior counsel for the respondent submitted that in view of the provisions of Section 5 and 73(2) of the Companies Act read with Section 27 of the SEBI Act, the present appellants cannot escape the liability.

17. The submissions of all the appellants would show that during the financial year 2013-2014 they were directors for some period. Some of them stated that they discontinued to remain directors by tendering resignations or that they did not participate in the Board meeting. The learned counsel for the appellants submitted that some other persons as detailed in the facts above were appointed specifically for generating funds by various means including NCDs and, therefore, in view of the Sections 5 and 73(2) of the Companies Act the appellants would not be liable.

18. The relevant provisions read as under :-

“5. MEANING OF "OFFICER WHO IS IN DEFAULT"

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.”

73. ALLOTMENT OF SHARES AND DEBENTURES TO BE DEALT ON STOCK EXCHANGE

(1).....

(2). Where permission has not been applied under subsection (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.”

19. The reading of the provisions of Section 5 of the Companies Act would show that in the absence of any of the officers specified in Clauses (a) to (c) any director or directors who may be specified by the Board would be called as “officer who is in default” and in absence of such specification all the directors would be termed as

“officers who are in default”. The necessary consequence of Section 73(2) of the Companies Act would therefore follow.

20. The learned counsel for the appellant Yogesh Gemawat merely pointed out certain emails under which purportedly one Mr. Rahul Shah was directed to look after the work of raising funds as detailed (supra) and, thus, according to the appellants as there was a person charged by the Board with the responsibility as provided by Clause (f) of Section 5 of the Companies Act, the appellants would not be liable. However, it is merely an e-mail purported to have been sent by Mr. Sanjay Gupta. There is no regular appointment as such as per the provisions of the Companies Act nor there is anything to show that Mr. Rahul Shah has given his consent in this behalf. The prescription is found in this regard in Rule 4BB(2) and (3) under Companies (Central Government's) General Rules and Forms, 1956 and Form of consent is Form 1AB. In the absence of any document to show that any director was specified as per Clauses (a) to (c) of Section 5 of the Companies Act or any valid document to show that any person was authorized by the Board of Directors, the appellant cannot escape the liability as per Clause (g) of Section 5 of the Companies Act.

21. Similar is the case regarding the other appellants. The WTM in his order dated June 3, 2015 has relied on the ratio of the decision of

High Court of Madras in the matter of Madhavan Nambiar vs.

Registrar of Companies (2001 108 Comp Cas 1 Mad) which reads

as under :-

“13. It may be that the petitioner may not be a whole-time director, but that does not mean he is exonerated of the statutory obligations which are imposed under the Act and the rules and he cannot contend that he is an ex officio director and, therefore, he cannot be held responsible. There is substance in the contention advanced by Mr. Sridhar, learned counsel since the petitioner a member of the Indian Administrative Service and in the cadre of Secretary to Government when appointed as a director on the orders of the Government to a Government company or a joint venture company, he is expected not only to discharge his usual functions, but also take such diligent care as a director of the company as it is expected of him not only to take care of the interest of the Government, but also to see that the company complies with the provisions of the Companies Act and the rules framed thereunder. Therefore, the second contention that the petitioner cannot be proceeded against at all as he is only a nominee or appointed director by the State Government, cannot be sustained in law. A director either full time or part time, either elected or appointed or nominated is bound to discharge the functions of a director and should have taken all the diligent steps and taken care in the affairs of the company.

14. In the matter of proceedings for negligence, default, breach of duty, misfeasance or breach of trust or violation of the statutory provisions of the Act and the rules, there is no difference or distinction between the whole-time or part time director or nominated or co-opted director and the liability for such acts or commission or omission is equal. So also the treatment for such violations as stipulated in the Companies Act, 1956.

15. Section 5 of the Companies Act defines the expression "officer who is in default". The expression means either (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 ; (g) any director or directors who may be specified by the board in this behalf or where no director is so specified, all the directors.

16. Section 29 of the Companies Act provides the general power of the board and such power has been exercised by the petitioner as a member of the board or the chairman of the board with respect to the affairs of the company. Therefore it follows there

cannot be a blanket direction or a blanket indemnity in favour of the petitioner or other directors who have been nominated by the Government either ex officio or otherwise. Hence the second point deserves to be answered against the petitioner.

17. As regards the first contention, it is contended by Mr. Arvind P. Datar, learned senior counsel appearing for the petitioner that the company or its board had resolved that Thiagaraj S. Chettiar shall be the director in charge of the company of all its day-to-day affairs and, therefore, the petitioner, an ex officio chairman and director, cannot be expected to attend to the affairs on a day-to-day basis. This contention though attractive cannot be sustained as a whole. There may be a delegation, but ultimately it comes before the board and it is the board and the general body of the company which are responsible.”

22. In this view of the matter, we do not find merits in any of the appeals. The same are, therefore, dismissed with no order as to costs. The Misc. Application Nos. 90 and 91 of 2018 for the stay of the impugned order are also stand disposed of.

Sd/-
Justice Tarun Agarwala
Presiding Officer

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

Sd/-
Justice M. T. Joshi
Judicial Member

16.04.2019
Prepared & Compared by
PTM