BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Date of Hearing : 07.11.2019
Date of Decision : 14.11.2019

Appeal No. 441 of 2018

Saikat Brahmachari
Mauja-Barjora (Part), Barjora,
Bankura, West Bengal - 722202. ….. 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

With
Appeal No. 77 of 2019

Sadhan Chandra Brahmachari
Mauja-Barjora (Part), Barjora,
Bankura, West Bengal - 722202. ….. 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

Ms. Prachi Pandya, Advocate i/b Corporate Attorneys for the Appellants.

Mr. Kevic Setalvad, Senior Advocate with Mr. Vivek Shah, Mr. Abhiraj Arora, Ms. Misbah Dada, Advocates i/b ELP for the Respondent.

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

Per : Justice Tarun Agarwala, Presiding Officer

1. Two appeals have been filed against a common order and consequently both the appeals are being decided together.

2. The appellants are aggrieved by the order of the Whole Time Member (hereinafter referred to as, 'WTM') of Securities and Exchange Board of India (hereinafter referred to as, 'SEBI') passed under Section 11 and 11B of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as, 'SEBI Act') directing the appellants to refund the money collected by the Company during their respective period of directorship through issuance of Non-Convertible Debentures (hereinafter referred to as, 'NCDs') including the application money collected from investors alongwith interest at the rate of 15% p.a. The WTM also issued other directions which are indicated in the impugned order.

3. The appellant Saikat Brahmachari in Appeal No. 441 of 2018 was appointed as a director in MBK Business Development (India) Ltd. on September 1, 2009 and continued till May 2, 2013. The appellant Sadhan Chandra Brahmachari in Appeal No. 77 of 2019 was appointed as a director on September 1, 2009 and continued till April 10, 2013. During the financial years 2010-11, 2011-12, 2012-13, the Company made an offer of NCDs and raised an amount of Rs. 9.06 crores from 4,518 allottees. Since there was violation of SEBI Act, Companies Act, 1956 (hereinafter referred to as, 'Companies Act') and Securities and Exchange Board of India (Issue and Listing of Debt Securities) Regulations, 2008 (hereinafter referred to as, 'ILDS Regulations), SEBI passed an order dated February 4, 2016 issuing certain directions including debarment and refund to investors against the Company and its directors / promoters.

4. Subsequently, after the passing of the aforesaid order, it came to the notice that the present appellants were also directors of the company and during their period the offer of NCDs was issued. Accordingly, an interim order dated November 20, 2015 was passed against the appellants and a show cause notice was issued to show cause as to why suitable direction under Section 11 and 11B read

with Section 73(2) of the Companies Act should not be passed against them. After giving an opportunity of hearing, the WTM found the appellants were involved in the issuance of the offer of NCDs during the time when they were directors which was in violation of the Companies Act and ILDS Regulations. Accordingly, the WTM issued directions for refund of the money alongwith interest etc.

5. We have heard Ms. Prachi Pandya, the learned counsel for the appellants and Mr. Kevic Setalvad, the learned senior counsel assisted with Mr. Vivek Shah, Mr. Abhiraj Arora, Ms. Misbah Dada, the learned counsel for the respondent.

6. The issuance of the NCDs and violation has not been disputed by the learned counsel for the appellants. What the learned counsel for the appellants contend is that the order directing the appellants to refund the amount alongwith interest under Section 73(2) of the Companies Act is erroneous in as much as there is no finding that the appellants were “officers in default” and consequently, the mandate provided under Section 73(2) of the Companies Act cannot be invoked. In support of her submission, the learned counsel for the appellants has placed reliance upon a decision of this Tribunal in

Pritha Bag in Appeal No. 291 of 2017 decided on February 14, 2019.

7. In our view, the decision of this Tribunal in Pritha Bag is not applicable to the facts and circumstances of the present case. We find that the WTM has considered and has given a finding that the appellants were "officers in default" as defined under Section 5(g) of the Companies Act. No evidence was filed to show that any of the officers set out in clauses (a) to (c) of Section 5 of the Companies Act was entrusted to discharge the obligation contained in Section 73 of the Companies Act. In Pritha Bag case (supra), there was no finding that the said appellant in that appeal was an "officer in default" and, therefore, the Tribunal had held that the mandate provided under Section 73(2) of the Companies Act could not be invoked. The said decision was also distinguishable on the ground that there was a managing director in that company who was responsible for the affairs of the company.

8. Further, we find from a perusal of paragraph 36 of the impugned order that the appellants have admitted before the WTM that they were aware of the collection of the money from the investors by the company and further submitted that the appellants were willing to make refund to the investors.

9. In the light of the aforesaid admission, the appellants cannot escape the liability of refund of the amount alongwith interest as directed by the WTM. Consequently, we do not find any error in the impugned order passed by the WTM. Both the appeal fails and are accordingly dismissed.

Sd/-
Justice Tarun Agarwala
Presiding Officer

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

Sd/-
Justice M. T. Joshi
Judicial Member

14.11.2019
Prepared & Compared by
PTM