

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved on: 29.11.2019

Date of Decision : 19.03.2020

Appeal No. 6 of 2017

Mr. Debasis Padhy
C/o Sunil Kumar Acharya,
Basudev Nagar, 4th Lane,
Gajpati Nagar, Berhampur,
Ganjam District, Appellant
Odisha – 760 010.

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. Mahaveer Rajguru, Advocate i/b Regstreet Law Advisors
for the Appellant.

Mr. Vishal Kanade, Advocate with Aksha Hudda, Advocate
i/b Juris Corp for the Respondent.

AND
Appeal No. 17 of 2017

Panchanan Pradhan
Kotari, Khanata,
Balugaon, Pin 752030
Dist. Khordha, Odisha Appellant

Versus

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

2. Green India Infra Projects Limited
Plot No. 10, Satya Nagar,
Bhubaneswar – 751007. Odisha.
3. Pradeep Kumar Singh
Main Road, Gandhi Nagar,
Paramjyoti Cinema Hall Square,
Berhampur,
Pin – 760001. Odisha.
4. Debasis Padhy,
Somanath Nagar, 2nd Line,
Bada Bazar, Berhampur,
Ganjam, Pin – 760001. Odisha.
5. Trinath Panda,
Gajapati Nagar, 14th Lane,
Bada Bazar,
Berhampur, Pin – 760010. Odisha.
6. Snehlata Singh,
C/o Makhanlal Modi,
Ram Nagar, 1st Line,
Lanjipalli, Baidyanathpur,
Berhampur, Ganjam,
Pin – 760008. Odisha.
7. Suchitra Rani Panda,
C/o S.D. Pattnaik, Somnath Nagar,
2nd Lane, Aska Road,
Berhampur, Pin – 760001. Odisha.
8. Sandeep Kumar Singh,
Gandhi Nagar, 4th Line East,
Orissa, Pin – 760004. Odisha.
9. Sanjeeb Kumar Das,
Somnath Nagar, 2nd Lane,
Aska Road, Berhampur,
Pin – 760001. Odisha.

....Respondents

Mr. Prakash Chandra Sethi, Advocate for the Appellant.

Mr. Vishal Kanade, Advocate with Aksha Hudda, Advocate
i/b Juris Corp for Respondent No. 1.

CORAM : Justice Tarun Agarwala, Presiding Officer
Justice M.T. Joshi, Judicial Member

Per : Justice M.T. Joshi, Judicial Member

1. Aggrieved by the slew of directions issued by the Whole Time Member ('WTM' for short) of the Securities and Exchange Board of India ('SEBI' for short) dated October 28, 2016 in exercise of the powers conferred under sections 11(1), 11(4), 11A and 11B read with section 19 of the Securities and Exchange Board of India Act, 1992 and regulation 107 read with regulation 111 of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 ('ICDR Regulations' for short) against the present appellants, the present appeal is filed.

2. In short, the WTM directed that the present appellants along with other directors and Green India Infra Projects Limited ('GIPL' for short) shall make full repayment of the money collected through issuance of Secured Optionally Convertible Debentures ('SOCD' for short) with interest @ 15% per annum as per the directions given in detail in the impugned order.

3. The facts on record would show that GIPL issued SOCD on December 16, 2010 to two companies, namely, Green India Retailing Pvt. Ltd. and Green India Properties Pvt. Ltd. which are the group companies of GIPL. These group companies, in turn, allotted these SOCDs to 751 persons within a period of one month.

4. SEBI, therefore, alleged that the allotment and transfer of SOCDs to the two group companies was merely a device to misguide the regulatory authorities to circumvent the provisions of Section 67(3) of the Companies Act, 1956 as issue of more than 50 securities would be a public issue attracting the provisions of the Companies Act as well as of ICDR Regulations.

5. It appears that GIPL or its representative did not appear before SEBI despite the efforts to serve notices upon them by respondent SEBI. The learned counsel for the respondent SEBI adverted the attention of the Tribunal to the fact noted in the interim order dated March 4, 2015 which inter alia records that as the show cause notice could not be delivered to the GIPL, SEBI officers visited the registered premises of the company on November 25, 2015 and found that the office did

not exists at the address. It also records that a crime was already registered by Odisha Police regarding the money raising activities of the GIPL and that the Supreme Court of India had directed Central Bureau of Investigation (CBI) to take over the investigation in the overall affairs of the GIPL.

6. Other noticees including the present appellant Mr. Debasis Padhy and Panchanan Pradhan appeared before the WTM. They placed their respective cases before the WTM. The WTM, however, passed the impugned order. Hence, the present appeal.

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7. Appellant Mr. Debasis Padhy right from October 29, 2015 till July 29, 2016 either sought time to file written submissions or went on requesting that the hearing be conducted at Bhuvaneshwar. He had, however, sent his written submissions vide letter dated October 29, 2015 and July 29, 2016. In these letters cum submissions the appellant submitted that GIPL had issued SOCDs only to two companies and therefore there was no breach either of the Companies Act or ICDR Regulations. During the relevant period he had not participated in the affairs of the company nor enjoyed the amount received through SOCDs. He was

only a name lender director of the company. According to him Mr. Pradeep Kumar Singh and Sunilkumar Panda were responsible for the issue of SOCDs. In the circumstances, he wanted that he be exonerated from the proceedings.

8. The WTM of SEBI upon perusal of Memorandum of Association and Articles of Association found that the present appellant Debasis Padhy was one of the original subscribers to the same and was also promoter of the company. During the relevant period he was director. In the circumstances, taking aid of the Section 291 of the Companies Act the appellant was held liable.

9. The learned counsel for the appellant submitted before us that the appellant was only an additional director. The issue of SOCD was not a public issue. The Managing Director Mr. Sandeep Kumar was responsible for all the acts. Since the present appellant cannot be termed as officer in default, in view of the provisions of Section 27 of the SEBI Act and Section 5 of the Companies Act. He further submitted that a circular of Ministry of Corporate Affairs dated July 28, 2011 annexed to the rejoinder would show that a differentiation between officers in default and the directors are required to be taken into consideration. He also relied on decisions of this

Tribunal in the cases of *Sayanti Sen vs. Securities and Exchange Board of India (Appeal No. 163 of 2018 decided on August 9, 2019)* and *Pritha Bag vs. Securities and Exchange Board of India (Appeal No. 291 of 2017 decided on February 14, 2019)* and submitted that the appeal be allowed.

10. The learned counsel for the respondent relying on the material as discussed detailed earlier submitted that the appellant was the promoter of GIPL. The two other private limited companies were group companies of GIPL and therefore the appellant cannot take benefit of other provisions or decisions of this Tribunal.

11. According to us, it cannot be gainsaid that the appellant is the promoter of GIPL. He was admittedly the director during the relevant period. The appellant has not placed any case before the respondent SEBI that any other person was Managing Director of GIPL and placed a new case before us. He was given sufficient opportunity to put his case before respondent SEBI as detailed (supra). Section 73 of the Companies Act, 1956 reads as under:-

“73(1) Every company intending to offer shares or debentures to the public for subscription by the issue of a prospectus shall, before such issue, make an

application to one or more recognised stock exchanges for permission for the shares or debentures intending to be so offered to be dealt with in the stock exchange or each such stock exchange.

(1A) Where a prospectus, whether issued generally or not, states that an application under sub-section (1) has been made for permission for the shares or debentures offered thereby to be dealt in one or more recognized stock exchanges, such prospectus shall state the name of the stock exchange or, as the case may be, each such stock exchange, and any allotment made on an application in pursuance of such prospectus shall, whenever made, be void, if the permission has not been granted by the stock exchange or each such stock exchange, as the case may be, before the expiry of ten weeks from the date of the closing of the subscription lists:

***Provided** that where an appeal against the decision of any recognized stock exchange refusing permission for the shares or debentures to be dealt in on that stock exchange has been preferred under section 22 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956), such allotment shall not be void until the dismissal of the appeal.*

73(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 percent 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.”

12. The WTM relying on the provisions of sub section 2 of Section 73 of the Companies Act has observed that the

liability of the Company and directors would remain until the whole of the subscription amount along with interest is refunded to the allottees.

13. This being the position the appellant cannot escape from the liability of the repayment. In the case of *Sayanti Sen (supra)* this Tribunal has observed that WTM in the impugned order therein had given a categorical finding that one Shri Shib Narayan Das was responsible for the affairs of the company. In the present case the appellant during the relevant period being a promoter director of GIPL cannot escape from the liability.

14. In the case of *Pritha Bag (supra)* also finding that one Late Indranath Daw was the Managing Director of the defaulting company, the director Pritha Bag was exonerated by this Tribunal. Since facts are distinguishable the ratio of the same cannot be applied in the present case.

15. The circular of the Ministry of Corporate Affairs dated July 29, 2011 is also on the similar line indicating as to who can be held as an officer in default. Considering all the materials on record the appeal is dismissed.

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16. Appellant Panchanan Pradhan vide the written submissions dated August 25, 2015 and August 19, 2016 submitted before the WTM that GIPL did not issue SOCDs to the private entities but only to the two companies (supra). He had not participated in the affairs of the GIPL directly or indirectly in the issue of SOCDs. He has not mobilized funds through the issue of SOCDs and therefore he should be exonerated.

17. The WTM found that present appellant Panchanan Pradhan was original subscriber to the Memorandum of Association as well as promoter of the GIPL. He was director during the relevant period of GIPL and moreover director / promoter in the group companies of GIPL to whom the SOCDs were issued which, in turn, were issued to the number of private entities as detailed (supra). Therefore, applying the reasons as applied to the cases of Mr. Debasis Padhy and other noticees similar order was passed against him.

18. The learned counsel for the appellant submitted before us that the appellant did not attend the meetings of the GIPL. He was merely a name lender director in both the companies.

He was not connected with any of the affairs. One Mr. Sanjit Kumar was held responsible by WTM in his opening paragraph but in the final order no order was passed against the said Sanjit Kumar who was also the promoter of GIPL. Further, relying on the ratio of *Madhavan Nambiar vs Registrar of Companies [2002 108 Com Cases 1]* as extracted in the written note of submissions, submitted that the appeal be allowed.

19. On the other hand, learned counsel for the respondent submitted that the record as detailed (supra) would show that GIPL and its directors played a fraud upon the investors in which the CBI conducted the investigation on the directions of the Supreme Court of India. A new plea is raised before this Tribunal that GIPL had a Managing Director. The appellant himself was promoter / director of GIPL as well as of the group companies and therefore in the facts of the case he submitted that appeal be dismissed.

20. In our view the appeal is liable to be dismissed. No plea was taken before the WTM that the GIPL was run by a Managing Director. The appellant was admittedly promoter cum director of GIPL as well as of the group companies.

21. Insofar as a case of Sanjeeb Kumar is concerned we find that in paragraph 25 of the impugned order the WTM clearly held that said Sanjeeb Kumar was responsible. However, in the final order his name was not merely included so far as direction no. 29(i). However, his name is included in other directions and thus it is a case of inadvertent mistake on the part of the WTM of which present appellant cannot take any benefit. The case of *Madhavan Nambiar (supra)* would show that the facts of the same were different. The appeal is therefore liable to be dismissed.

22. We, therefore, pass the following order:-

- (a) Appeal Nos. 6 of 2017 and 17 of 2017 are hereby dismissed with no order as to costs.

Sd/-
Justice Tarun Agarwala
Presiding Officer

Sd/-
Justice M.T. Joshi
Judicial Member

19.03.2020

Prepared and compared by:msb