BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved On: 10.02.2020
Date of Decision : 25.02.2020

Appeal No. 459 of 2018

1. Zenith Highrise Infracon Ltd.
2. Mr. Kalyan Banerjee

Narhuya Dharammatala,
Dakshin Chandernagore,
Hooghly- 712 136 …Appellants

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
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Kuntal Banerjee
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Mumbai - 400 051 …Respondent

Mr. Ejaz Khan, Advocate with Mr. Pradip Kumar De, Advocate for Appellants.

Mr. Pradeep Sancheti, Senior Advocate with Mr. Mihir Mody and Mr. Shehaab Roshan, Advocates i/b K. Ashar & Co. 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

1. The appellants have filed the present appeals against the order dated July 27, 2018 passed by the Whole Time Member ("WTM" for convenience) of the Securities and Exchange Board of India ("SEBI" for convenience).

2. The facts leading to the filing of the present appeal is, that the appellant no. 1 company Zenith Highrise Infracon Ltd. raised its capital in the financial year 2012-2013 by allotment of 43,040 Redeemable Preferential Shares ("RPS") of ₹ 100 each through private placement, that is, to friends and relatives of the members/ directors and raised an amount of ₹ 43,04,000 from 47 allottees. Since the allotments were made through friends and relatives of the members/ directors no written invitation or offer was ever issued by the company. The auditor's report also stated that the company had not accepted any deposits from the public within the meaning of the Companies Act, 1956. A list of the allottees was filed before the Registrar of Companies ("RoC"). Three allottees made complaints to SEBI in respect of issue of RPS with regard to non-inclusion of their names in the list submitted before the RoC. On this complaint, SEBI

undertook an enquiry to ascertain whether the company had made a public issue of securities without complying with the provisions of the Companies Act, 1956. On enquiry it was observed that the company had raised an amount of ₹ 43,04,000 from 52 allottees whereas the RoC record showed allotment of RPS to 49 persons. Based on this discrepancy, a show cause notice was issued and, after considering the reply, the WTM found that the RPS was made to 50 persons in violation of Section 67(3) of the Companies Act, 1956 and consequently the WTM exercising the powers under Section 11(1), 11(4), 11A(1)(b) and 11B of the SEBI Act directed the company and its directors to refund the monies collected through RPS along with interest at the rate of 15% per annum and further restrained the directors from associating them with any listed company which would operate from the date of completion of refund to the investors. The appellants being aggrieved by the order of the WTM of SEBI have filed the present appeals.

3. Before the WTM and before us the contention of the appellants is that the list submitted to the RoC contained clerical errors. The list which was submitted before RoC stated that the allotment was made to 49 allottees which number is correct but the list contained clerical errors in as much as the names of the

three allottees were not included by inadvertent mistake and the name of three allottees were repeated twice. The company vide their reply dated June 01, 2018 has stated these facts in detail which has been recorded by the WTM in paragraph 16 of its order. Paragraph 16(iii) and 16(vi) of the order of the WTM is extracted herein below:

> *"iii. The list of allottees, filed with RoC, contained clerical mistakes made inadvertently. The names of Krishna Chandra Das appeared thrice, Mr. Rajendra Prasad Boot appeared twice and Mr. Srikanta Gorai appeared thrice.*
>
> *vi. Therefore, after removing the repetitions and adding the names of the three complainants, the total number of allottees is 47."*

4. The WTM considered this fact and accepted the contention of the appellants that there was a clerical error in the list supplied to the RoC and found that the company had allotted RPS to 47 investors but further went on to hold that this number of 47 does not include the name of the three complainants. This fact is erroneous and is against the evidence recorded by the WTM in paragraph 16(vi) wherein the company clearly stated

that after removing the repetitions and adding the names of the three complainants, the total number of allottees is 47. Thus, from the material evidence on record we find that the total numbers of allotments made were 47. In the light of the aforesaid, we do not find any violation of Section 67(3) of the Companies, Act, 1956.

5. For ready reference, the provision of Section 67(3) of the Companies Act, 1956 is extracted hereunder.

> *"67. (1) Any reference in this Act or in the articles of a company to offering shares or debentures to the public shall, subject to any provision to the contrary contained in this Act and subject also to the provisions of sub-sections (3) and (4), be construed as including a reference to offering them to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.*
>
> *(2) any reference in this Act or in the articles of a company to invitations to the public to subscribe for shares or debentures shall, subject as aforesaid, be construed as including a reference to invitations to subscribe for them extended to any section of the public, whether selected as*

members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner.

(3) No offer or invitation shall be treated as made to the public by virtue of sub-section (1) or sub- section (2), as the case may be, if the offer or invitation can properly be regarded, in all the circumstances-

(a) as not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation; or

(b) otherwise as being a domestic concern of the persons making and receiving the offer or invitation ...

***Provided** that nothing contained in this sub-section shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more:*

***Provided further** that nothing contained in the first proviso shall apply to non-banking financial companies or public financial institutions specified in section 4A of the Companies Act, 1956 (1 of 1956).”*

6. The Hon’ble Supreme Court in Sahara India Real Estate Corporation Limited and Ors. vs. Securities and Exchange

Board of India and Anr. (2013) 1 SCC 1 while examining Section 67 of the Companies Act held:-

> *"Section 67(1) deals with the offer of shares and debentures to the public and Section 67(2) deals with invitation to the public to subscribe for shares and debentures and how those expressions are to be understood, when reference is made to the Act or in the articles of a company. The emphasis in Section 67(1) and (2) is on the "section of the public". Section 67(3) states that no offer or invitation shall be treated as made to the public, by virtue of subsections (1) and (2), that is to any section of the public, if the offer or invitation is not being calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer or invitation or otherwise as being a domestic concern of the persons making and receiving the offer or invitations. Section 67(3) is, therefore, an exception to Sections 67(1) and (2). If the circumstances mentioned in clauses (1) and (b) of Section 67(3) are satisfied, then the offer/invitation would not be treated as being made to the public.*
>
> *The first proviso to Section 67(3) was inserted by the Companies (Amendment) Act, 2000 w.e.f. 13.12.2000, which clearly indicates, nothing*

> *contained in Sub-section (3) of Section 67 shall apply in a case where the offer or invitation to subscribe for shares or debentures is made to fifty persons or more. ... Resultantly, after 13.12.2000, any offer of securities by a public company to fifty persons or more will be treated as a public issue under the Companies Act, even if it is of domestic concern or it is proved that the shares or debentures are not available for subscription or purchase by persons other than those receiving the offer or invitation."*

7. In the light of the aforesaid, the expression "offer to the public" is not a technical expression but has to be understood in its ordinary popular sense of indicating an approach to the general public by advertisement, circular etc. as distinguished from an offer made privately such as to friends and relatives or a selected set of customers. The objects and reasons for insertion of the first proviso to Section 67(3) of the Companies Act was that in order to keep an issue outside the arena of public issue and make it a "domestic concern" of the issuer and the offeree, would not apply in cases where the offer or invitation is made to fifty persons or more. The effect is, that an issue would remain in the category of a "domestic concern" only when the offer is confined to less than fifty persons. As offer extending to fifty or more persons will tantamount to a public issue.

8. In the instant case, the evidence indicates that an invitation was made by the management of the company to selected persons for subscription or purchase by less than fifty persons. Such persons receiving the offer or invitation was not calculated directly or indirectly to be availed of by other persons, and consequently such invitation or offer could not be treated as an offer or invitation to the public. The finding of the WTM on this aspect is absolutely perverse. The reasoning given that merely because three allottees had made the complaints indicates that the offer or invitation falls in the category of one which is calculated to result directly or indirectly in the shares, debentures becoming available to persons other than those receiving those offer or invitation is based on surmises and conjectures. No evidence has come forward by these complainants or otherwise to show that the company had made a public offer other than these 49 persons.

9. In the light of the aforesaid, on evidence we find that the allotment was made to less than fifty allottees. Once allotment is made to less than fifty allottees by way of private allotment the first proviso to Section 67(3) clearly makes it a private issue and not a public issue. Consequently, there is no violation of

the provisions of the Companies Act. The order of the WTM cannot be sustained and is quashed. The appeals are allowed.

Sd/-
Justice Tarun Agarwala
Presiding Officer

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

Sd/-
Justice M. T. Joshi
Judicial Member

25.02.2020
Prepared & Compared By: PK