

**BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI**

DATE : 31.01.2018

**Misc. Application No. 329 of 2017
And
Appeal No. 354 of 2017**

Pinku Kumar Das
Palaspai, Palshpai-11,
Khanakul, Hooghly,
West Bengal – 711 401.

..... Appellant

Versus

Securities and Exchange Board of India
SEBI Bhavan, C-4A, G-Block,
Bandra Kurla Complex,
Bandra (E), Mumbai – 400 051

..... Respondent

Mr. Vishal Arun Hegde, Advocate for the Appellant.

Mr. Mustafa Doctor, Seior Advocate with Mr. Pulkit Sukhramani,

Ms. Vidhi Jhavar, Advocates i/b The Law Point for the Respondent.

CORAM : Justice J. P. Devadhar, Presiding Officer
Jog Singh, Member
Dr. C. K. G. Nair, Member

Per : Jog Singh, Member (Oral)

1. The appellant has preferred the present appeal challenging the impugned order dated June 02, 2017 passed by the Whole Time Member of the Securities and Exchange Board of India, by which following directions have been passed against him :

- (a) He along with Newland Agro Industries Ltd. and other directors, as mentioned on order dated October 19, 2015, shall jointly and severally, refund the money collected by the Company through the issuance of RPS, which have been found to be issued in contravention of the public issue norms, to the investors

including the money collected from investors, till date, pending allotment of RPS, if any, with an interest at the rate 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) He should provide the updated detailed inventory of all assets and properties and details of all bank accounts, demat accounts and holdings of shares/securities, if held in physical form.
- (c) He should not access the securities market and is further prohibited from buying, selling or otherwise dealing in securities, directly or indirectly, with immediate effect. He is also restrained from associating himself 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 years on completion of the repayments as mentioned on order dated October 19, 2015.
- (d) In case of failure to comply with the aforesaid directions SEBI, on expiry of the three months period from the date of this order, shall recover such amounts in accordance with law and may initiate any other proceedings as per law.

2. The case of the appellant is that he was appointed as an Additional Director of Newland Agro Industries Limited [for short 'the Company'] on December, 20, 2010. The Company was incorporated on September 01, 2009 with the Registrar of Companies at Kolkata. The company was given Corporate Identity No. as U01400WB2009PLC138143 with its registered

office at Bankadaha, P.S. Bishnupur, Kolkata 722 164, West Bengal. At the time of incorporation of the company, it had three directors namely – Mr. Gopal Hazra, Mr. Dipankar De and Mr. Koushik Roy. Subsequently, the company appointed five more directors, including the appellant, on different dates between 10.03.2010 to 31.10.2012. The company offered and issued Redeemable Preference Shares [for short ‘RPS’] during the financial year 2009-2010 without complying with the public norms stipulated under Sections 56, 60 and 73 of the Companies Act, 1956. The company and its Directors continued the money mobilization activity till the financial year 2012-2013, the last date being 07.06.2012 and in this process the company mobilized funds to the tune of Rs. 37.64 crore from 48,886 investors.

3. The appellant is stated to have tendered his resignation letter from the post of Additional Director on 21.09.2011 to the Board of Directors of the Company. The Board of Directors approved the resignation letter of the appellant in the Board meeting held on 10.10.2011. However, the name of the appellant was still appearing on the MCA portal so by way of abundant caution he tendered his resignation letter for the second time on 26.02.2013. The name of the appellant still reflected as Director of the company in the MCA portal in the month of April, 2013 even after submission of Form 32 on 26.02.2013, so he once again tendered his resignation letter to the Board of Directors on April 01, 2013.

4. The appellant contends that his liability can only be to the extent of the RPS issued during his tenure as the Director of the company from 20.12.2010 to 09.04.2011, i.e., the deemed date of vacation of the office of Director of the Company in terms of the provisions of Section 283 (1)(g) of the Companies Act, 1956 or from 20.12.2010 to 21.09.2011, i.e., the date when he tendered his first resignation letter.

5. Per contra, the respondent submits that since the appellant was one of the Directors of the Company when the offer and allotment of RPS was being made in violation of Sections 56, 60 and 73 of the Companies Act, it was obligatory on his part to exercise all such powers and do all such acts as the company is authorized to exercise and do so. The appellant is, therefore, responsible along with other directors for the affairs of the company and its failure to make refunds to the subscribers of RPS.

6. The Learned counsel for the appellant argues that the appellant was not a director when the resolution regarding issuance of RPS was passed by the company. Therefore, he should not be made responsible for the acts of other directors. It is also argued that the appellant neither attended any Board meetings of the company nor did he ever visit the company since his appointment as the head office of the company was situated at a far away place from Kolkata. The appellant did not receive any remuneration from the said company and he also did not participate in the day to day affairs of the management of the company. It is further submitted by the Learned Counsel that the appellant did not acquire any shares of the company and was never construed as a beneficial owner in the company in his personal capacity. In these circumstances, the appellant could not be said to be an “officer in default” as provided under Section 73(2) of the Companies Act, 1956.

7. The Learned Counsel for the appellant further submits that since the Company had not issued any notice of board meetings to the appellant, the appellant is deemed to have vacated the office of the Additional Director under Section 283(1)(g) of the Companies Act w.e.f. 09.04.2011, i.e. on the

expiry of three months from the date of first Board meeting held after his appointment as Additional Director on 20.12.2010.

8. On the other hand, the Learned Counsel for the respondent submits that the question of applying section 283(1)(g) of the Companies Act, 1956 to the case of the appellant does not arise as no material has been furnished to show that he did not attend any or three consecutive meetings of the Board of Directors of the company and that such absence was without the leave of the company. The Learned Counsel further submits that the appellant has neither expressed any grievance against the company in his subsequent resignation letters dated 26.02.2013 and 01.04.2013 for still reflecting his name as the Director of the company on the MCA portal of ROC nor did he mention anything about his first resignation letter dated 21.09.2011 in the subsequent resignation letters submitted by him. This plea is an after-thought. The Learned Counsel submits that the name of the appellant has been appearing on the MCA portal till he tendered his resignation on 01.04.2013.

9. We have heard both the learned counsel for the parties and perused the pleadings along with the documents annexed therewith.

10. This is the second round of litigation. The appellant had earlier approached this Tribunal by way of Appeal No. 2 of 2016 challenging the order passed by SEBI on October 19, 2015 against the company and its eight directors, including the appellant. The order dated October 19, 2015, inter alia, directed the company and its directors to, jointly and severally, refund the money collected by the company through issuance of RPS to the investors with an interest @15% per annum compounded at half yearly intervals. This Tribunal, vide its order dated August 09, 2016 set aside the

SEBI's order dated October 19, 2015 qua the appellant and restored the matter to the file of the Whole Time Member for passing a fresh order on merits and in accordance with law.

11. For the sake of convenience, the order of this Tribunal dated August 09, 2016 is reproduced herein below :

“1. The appellant is aggrieved by the order passed by the Whole Time Member (‘WTM’ for short) of Securities and Exchange Board of India (‘SEBI’ for short) on October 19, 2015. By the said order New Land Agro Industries Ltd. (‘company’ for convenience) and its directors including the appellant have been, inter-alia, called upon to refund the money collected by the company through the issuance of redeemable preference shares to the investors with the interest at the rate of 15% per annum.

2. Grievance of the appellant is that, inspite of recording the submission of the appellant in para 6 of the impugned order, the WTM has not dealt with the said submissions in the impugned order. Apart from the 2 above, it is submitted for the first time before this Tribunal that the appellant had erroneously stated before the WTM that the appellant had resigned as an independent director of the company with effect from April 1, 2013 when in fact, the appellant had resigned on September 21, 2011. In support of the above contention appellant has annexed certain documents to the memo of appeal.

3. Since the above documents were not placed before the WTM of SEBI and since the WTM has not considered the plea that the appellant had never attended any Board meetings of the company, we deem it proper to set aside the impugned order dated October 19, 2015 qua the appellant.

4. Accordingly, the impugned order dated October 19, 2015 is set aside qua the appellant and restored to file of WTM of SEBI for passing a fresh order on merits and in accordance with law. It would be open to the appellant to submit additional documents before the WTM of SEBI within two weeks from today and thereupon the WTM of SEBI shall proceed to pass fresh order on merits and in accordance with law.

5. Appeal is disposed of accordingly in the above terms with no order as to costs.”

12. Pursuant to the order of this Tribunal dated August 09, 2016, the appellant filed his reply dated August 18, 2016. He was also granted an

opportunity of hearing on January 05, 2017. However, acceding to his request made vide letter dated January 03, 2017, SEBI granted an opportunity of hearing to the appellant at Eastern Regional Office of SEBI at Kolkata on February 17, 2017. The appellant, however, did not avail of the said opportunity of personal hearing and, therefore, SEBI, proceeded on the basis of the documents available on record and passed the impugned order dated June 02, 2017 challenged in the present appeal.

13. There seems to be some obscurity about the exact date of resignation and acceptance thereof. According to the appellant, his date of resignation is 21.09.2011 but as per SEBI, it is 01.04.2013. If the contention of the appellant is accepted that certain facts were not considered by SEBI, it would require remittance of the matter to the file of the concerned SEBI officer, which will not be in the interest of justice as the matter would linger on for another two to three years without any substantive benefit to any of the parties. Therefore, we proceed to analyse this aspect in our appellate jurisdiction to give finality to this issue.

14. The appellant has produced the following documents in support of his case, namely -

- i. A copy of his resignation letter dated 21.09.2011.
- ii. A copy of letter dated 12.10.2011 addressed to him by the company whereby he was communicated that the Board of Directors have unanimously approved his resignation with immediate effect in the Board meeting held on 10.10.2011.
- iii. A copy of his resignation letter dated 26.02.2013.
- iv. A copy of his resignation letter dated 01.04.2013.

15. For the sake of convenience, the three resignation letters tendered by the appellant are reproduced herein below :

First Resignation letter dated 21.09.2011

*“To
The Board of Directors,
Newland Agro Industries Limited,
Bankadaha P.S. Bishnupur,
Bankura,
West Bengal 722 164*

Sub – Resignation as a Additional Director of the company.

Dear Sir,

Due to some unavoidable circumstances, I hereby tender my resignation from the Board of Directors of your company with immediate effect.

I shall be highly obliged if the Board of Directors of the company considers my resignation at the earliest.

You are requested to please arrange for filling of Form 32 with the Register of Companies to that effect and give intimation to all the concerned departments as soon as possible and give a copy of the same to me for my reference and record.”

Second Resignation letter dated 26.02.2013

“Re : Resignation as a Director of the company.

Dear Sir,

Due to some unavoidable circumstances, I hereby tender my resignation from the Board of Directors of your company with immediate effect.

I shall be highly obliged if the Board of Directors of the company considers my resignation at the earliest.

I hereby give me felicitation to all the members of the Board for the unstinted faith and cooperation that I have received during the tenure of my directorship.

You are requested to please arrange for filing of E-Form 32 with the Registrar of Companies to that effect and give intimation to all the concerned departments and give a copy of the same to me for my reference and record.”

Third resignation letter dated 01.04.2013

“Re : Resignation

Dear Sir,

Due to my pre-occupation elsewhere, I am not in a position to devote my time to the affairs of the company. Accordingly, I am submitting my resignation as Director of the company with immediate effect.

Kindly acknowledge the receipt and arrange to submit the necessary forms with the office of the Registrar of companies, Kolkata accordingly.”

16. From the above-said it is evident that the appellant did not resign on 21.09.2011 and even if it was so, he never pursued it with the Registrar of Companies or with the company for filing Form 32 with the ROC. On the contrary, after one-and-a half years he furnished fresh resignation letters on 26.02.2013 and thereafter again on 01.04.2013. Even in the subsequent resignation letters the appellant neither raised any grievance with the company nor mentioned about his resignation tendered on September 21, 2011. We, therefore, find that the appellant remained as the Director of the Company from 20.12.2010 to 01.04.2013.

17. Next, we turn to the argument advanced by the Learned Counsel for the appellant that the appellant was never called upon to attend any Board meetings of the company and accordingly he never attended any of the Board meetings of the company, as such, the appellant is deemed to have vacated the office in terms of the provisions of Section 283(1)(g) of the Companies Act, 1956 and consequently no action could be taken against the appellant. Section 283(1)(g) of the Companies Act, 1956 is reproduced herein below :

“283. Vacation of office by Directors

(1) The office of a director shall fall vacant if -

.....

(g) he absents himself from three consecutive meetings of the Board of directors, or from all meetings of the Board for a continuous period of three months, whichever is longer, without obtaining leave of absence from the Board;”

18. A simple perusal of the above provision shows that it applies only to a director who in spite of notice absents himself from three consecutive meetings of the Board of Directors or absents himself from all the meetings

of the Board for a continuous period of three months. In the present case, it is the case of the appellant that notice of Board meeting was never served on him. In such a case, question of the appellant remaining absent from the Board meetings does not arise and consequently the question of applying Section 283(1)(g) of the Companies Act, 1956 to the case of the appellant also does not arise.

19. It is pertinent to note that in view of the judgment of this Tribunal in **Manoj Agarwal Vs. SEBI [Appeal No. 66 of 2016 decided on 14.07.2017]**, the appellant cannot escape the liability for the period 20.12.2010 to 01.04.2013 in any case. In paragraphs 21 and 22 of the said judgement, in somewhat similar circumstances, this Tribunal has held as under :

“21. Argument advanced on behalf of the appellant that the appellant had not attended any board meeting of BREDL and therefore, the appellant is deemed to have vacated the office under Section 283(g) of the Companies Act and consequently no action could be taken against the appellant is also without any merit. Section 283(g) of the Companies Act, 1956 applies only to a director who in spite of notice absents himself from three consecutive meetings of the Board of Directors or absents himself from all the meetings of the Board for a continuous period of three months. In the present case, it is the case of the appellant that no notice of Board meeting was issued to him. In such a case, question of the appellant remaining absent from the Board meetings does not arise and consequently question of applying Section 283(g) of the Companies Act, 1956 to the case of the appellant does not arise.

22. For all the aforesaid reasons, we see no merit in the appeal and the same is hereby dismissed with no order as to costs. However, it is made clear that the liability of the appellant under the impugned order is restricted to refunding the amount of Rs.40 lac with interest jointly and severally with BREDL and other directors of BREDL.”

20. Accordingly, the appeal stands dismissed. However, it is made clear that the liability of the appellant under the impugned order is restricted to the period from 20.12.2010 to 01.04.2013 with interest jointly

and severally with the company and other directors of the company. The M.A. No. 329/2017 also stands dismissed. No order as to costs.

Sd/-
Justice J. P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

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

31.01.2018
Prepared & Compared by
PTM