

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Order Reserved On: 03.05.2016

Date of Decision : 10.05.2016

Appeal No. 380 of 2014

Pro Fin Capital Services Ltd.
B-503, Western Edge 2, Fifth Floor,
Western Express Highway,
Borivali (East),
Mumbai- 400 066

...Appellant

Versus

1. Over the Counter Exchange of India (OTCEI)
92, Maker Tower “F”, 9th Floor
Cuffe Parade,
Mumbai-400 005

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

...Respondent

Mr. Karan Bhosale, Advocate i/b Neha Bhosale, Advocate for the Appellant.

Ms. Ankita Singhania, Advocate with Mr. Nishith Doshi, Advocate i/b DSK Legal for Respondent No. 1

Mr. Kumar Desai, Advocate with Mr. Roopadaksha Basu, Advocate i/b The Law Point for Respondent No. 2

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

Per: Justice J.P. Devadhar

1. By filing this appeal, the appellant initially sought an order directing the ‘Over the Counter Exchange of India’ (“OTCEI” for short) to refund of ₹ 20 lac paid by the appellant as advance towards the onetime membership fee with interest at the rate of 15% per annum. The

appellant had also annexed to the appeal an order passed by OTCEI on 13.08.2014 whereby the appellant was expelled from the membership of OTCEI with effect from 30.08.2014. Appellant had also annexed to the appeal various letters addressed by the appellant to the Securities and Exchange Board of India (“SEBI” for short) seeking their intervention in recovering ₹ 20 lac from OTCEI. As the appellant had not specifically prayed for quashing the expulsion order dated 13.08.2014 and had not made SEBI as party respondent, amendment of the Appeal Memo was allowed, thereby adding a prayer to the Memorandum of Appeal for quashing the expulsion order dated 13.08.2014 and also adding SEBI as party respondent in the appeal.

2. During the course of hearing, counsel for the parties including counsel for SEBI submitted that the dispute in the present case being the interse dispute between OTCEI and the appellant, it would be just and proper that the appeal is heard on merits, instead of directing SEBI to pass an order on the letters addressed by the appellant against OTCEI. Hence, the appeal is heard on merits.

3. Facts relevant for the purposes of this appeal are as follows:-

- a) By a letter dated 27.10.1994, appellant submitted an application seeking sponsor membership of OTCEI in the prescribed format. In the said letter it was stated that the appellant is a professionally managed company with a three year profitable record of dealing in capital and money markets. It was further stated that the company has successfully concluded their maiden public issue and having

rich experience in all segments of money market and capital markets, the company now proposes to focus on issue management and related activities. It was also stated that with a view to obtain sponsor membership from OTCEI the appellant has sought registration as Category 1 Merchant Banker from SEBI and that the company is committed to bring at least 9-10 issues on OTCEI in the first year of operation.

- b) OTCEI by its letter dated 17.04.1995, informed the appellant that the Board of Directors of OTCEI have approved appointment of the appellant as a member of OTCEI subject to the conditions set out therein. The said letter addressed by OTCEI reads thus:-

*“Ref. No. 04/17/11
Date: 17th April 1995*

*Mr. Rajan Sehgal
Managing Director
Profin Capital Services Ltd.
202, Nidhi House,
B-2/1B Safdarjung Enclave,
New Delhi-110 029*

Dear Sir,

Ref: Order of OTCEI Membership

This is with reference to your application for Membership on the OTC Exchange of India and subsequent interview. We are pleased to inform you that the Board of Directors have approved your appointment as a Member of our Exchange. You are

now requested to comply with the following formalities at the earliest.

- 1. Please arrange for a demand draft of Rs. 21.50 lacs to be made out in favour of “OTC Exchange of India” payable at Bombay (Rs. 20 lac towards onetime, non-refundable membership fees and Rs. 1.5 lacs towards annual membership fees, for the period ending September 1995).*
- 2. Please send us an undertaking (on Rs. 20/- stamp paper) agreeing to comply with the conditions/requirements of a Member of OTC Exchange and Form A to be submitted. The format of the same is enclosed.*
- 3. Please send us the name(s) of the designated official(s) in your organisation, for future correspondence and interactions.*

This offer for appointment as a member of our exchange is valid upto 15th May 1995. We reserve the right to reconsider this offer, if the same is not accepted and the conditions set forth are not complied with prior to the above mentioned date. OTC Exchange of India may consider extension of the validity period, at its sole discretion, upon such terms

and conditions as it deems fit, including levy of interest on the amount payable.

We look forward to your active participation on the OTC Exchange and view this as the beginning of a longterm association with your organisation. OTC Exchange expects that the member will sponsor and list a minimum of six companies on the Exchange during the financial year.

We are enclosing alongwith the Byelaws, Code of Conduct and Business Rules of the OTC Exchange, which you are requested to study carefully before commencement of operations. Please do contact us for any clarifications that you may need.

Thanking you,

Yours sincerely,

*SASI NAMBIAR
REGIONAL MANAGER*

(emphasis supplied)”

- c) By a letter dated 20.04.1995 the appellant accepted the offer of membership of OTCEI. Thereafter appellant addressed a letter on 30.05.1995 to OTCEI, enclosing therewith an undertaking on ₹ 20/- stamp paper executed on 28.04.1995 and a pay order for ₹ 20 lac towards the membership fee (not ₹ 21.50 lac is stipulated in the letter dated 17.04.1995). By the said letter the appellant sought clarification from

OTCEI as to whether the appellant, in the absence of SEBI registration be able to act as sponsor member and if so, would the annual charges of ₹1.50 lac (referred to in letter dated 17.04.1995 as a condition for grant of membership) commence from the date of registration with SEBI.

- d) There is nothing on record to suggest that OTCEI responded to the aforesaid letter addressed by the appellant on 30.05.1995.
- e) By a letter dated 13.11.1995, appellant called upon OTCEI to pursue the matter with SEBI so that the appellant could procure business as member of OTCEI. In para 11 of the affidavit in reply filed by OTCEI on 26.02.2016 it is submitted by OTCEI that since the appellant had not paid the annual membership fees, had not paid fees of ₹ 5000/- required to be paid as SEBI registration and had not submitted requisite documents, OTCEI could not forward the application of the appellant for SEBI registration.
- f) Thereafter, by a letter dated 25.08.2003 appellant informed OTCEI that the appellant was never registered as a member with SEBI and hence the question of paying annual fees does not arise. By the said letter appellant called upon OTCEI to refund the advance amount of ₹ 20 lac lying with OTCEI. Similar letter was also addressed by the appellant to OTCEI on 05.09.2003.

- g) By a letter dated 16.09.2003, OTCEI informed the appellant that on 17.04.1995, the appellant was appointed as a dealer on the Exchange and the amount of ₹ 20 lac paid by the appellant towards non-refundable admission fees cannot be refunded. It was further stated in the said letter that since the appellant continues to be a dealer on the Exchange, the appellant is bound and liable to comply with the directives of OTCEI/SEBI and also liable to pay the annual fees and SEBI fees.
- h) By a letter dated 06.10.2003 the appellant reiterated that ₹ 20 lac was paid as advance for admission as a sponsor member and not as a dealer as stated by OTCEI in their letter dated 16.09.2003.
- i) Thereafter several letters were exchanged between the parties, wherein the appellant insisted on refund of ₹ 20 lac on ground that the appellant was not admitted as a member and therefore, the appellant is entitled to seek refund of ₹ 20 lac whereas, OTCEI maintained that the appellant was admitted as a member and hence the non-refundable amount of ₹ 20 lac paid towards membership fee cannot be refunded.
- j) Appellant addressed several letters to SEBI seeking their intervention in obtaining refund of ₹ 20 lac from OTCEI. However, there was no response from SEBI.

- k) Ultimately OTCEI issued show cause notice to the appellant on 15.01.2014 and after giving an opportunity of hearing by its order dated 13.08.2014 OTCEI expelled the appellant from the membership of the Exchange with effect from 30.08.2014. Challenging the said order present appeal is filed.

4. Counsel on both sides have extensively argued the case on behalf of their respective clients. From the arguments advanced by counsel on both sides, it is apparent that the following two questions arise for consideration in this appeal, viz:-

- a) Whether OTCEI is justified in contending that the appellant was admitted as a member of OTCEI and hence the non-refundable amount of ₹ 20 lac paid as admission fee cannot be refunded to the appellant.
- b) If so, whether OTCEI by its order dated 13.08.2014 is justified in expelling the appellant from the membership of OTCEI on ground that the appellant consistently failed to comply with the terms and conditions of OTCEI as well as the Bye-laws framed by OTCEI.

5. At the outset, it is relevant to note that there is some confusion in the arguments advanced on behalf of the respective parties. According to the appellant only provisional membership was granted but the same could not be confirmed in the absence of registration of the appellant with SEBI, whereas OTCEI on one hand claims that the appellant was

admitted as a member, and on the other hand in its letter dated 16.09.2003 OTCEI states that the appellant was admitted as a dealer and the appellant continues to be a dealer. Counsel for OTCEI submitted before us that the appellant was not admitted as a 'dealer' and the statement made to that effect in the letter dated 16.09.2003 is an error on part of OTCEI.

6. Basic argument of OTCEI is that the appellant could not be appointed as a 'sponsor' because under the Bye-law framed by OTCEI, only a Merchant Banker registered with SEBI can be appointed as a sponsor. Admittedly, appellant is not registered with SEBI as Merchant Banker and hence the appellant could not be appointed as a 'sponsor'. It is the case of OTCEI that the appellant was admitted as a 'member' and because the appellant failed to pay requisite fees, the application of the appellant in Form 'A' was not forwarded to SEBI. It is further contended by the counsel for OTCEI that as per the terms and conditions set out in the letter dated 17.04.1995, appellant was to be appointed as a member on payment of ₹ 21.50 lac (₹ 20 lac towards admission fees and ₹ 1.5 lac towards annual fees for the period ending September 1995) and that the admission fee of ₹ 20 lac was neither refundable nor the membership was transferable. Therefore, having accepted the terms and conditions and having paid the amount of ₹ 20 lac knowing fully well that the said amount was not refundable, the appellant is not justified in seeking refund of the said amount. Counsel for OTCEI further submitted that grant of membership by OTCEI and registration as a member with SEBI are two different processes and it is only after a person is appointed as a

member by OTCEI, registering that member with SEBI arises. In the present case, the appellant by paying ₹ 20 lac became member of OTCEI but failed to pay the requisite fees and therefore, the application for registration in Form 'A' was not forwarded to SEBI. In these circumstances, it is submitted that the appellant who after becoming a member has failed to pay requisite annual fees and SEBI fees is not justified in seeking refund of the non-refundable amount of ₹ 20 lac paid towards admission fees.

7. We see no merit in the above contentions.

8. In the application filed on 27.10.1994, the appellant has specifically sought 'sponsor membership' of OTCEI. Since the Bye-laws of OTCEI provide that only a 'Merchant Banker' duly registered with SEBI is entitled to be appointed as a 'sponsor' by OTCEI, it was stated in the application that the appellant has applied to SEBI seeking registration as a Merchant Banker Category I and the approval from SEBI is awaited. Thus, it is crystal clear that the appellant had applied for being appointed as a 'sponsor' by OTCEI.

9. However, OTCEI by its letter dated 17.04.1995 informed the appellant that the Board of Directors of OTCEI have approved appellant's appointment as a Member of OTCEI and that OTCEI expects that the appellant as a member will sponsor and list a minimum of six companies on the Exchange during the financial year. In the affidavit in reply filed by OTCEI on 22.01.2015 it is stated in para 14, that the

appellant has failed to use the membership of OTCEI for sponsorship activities for which registration with SEBI was not required.

10. Since the appellant had applied for 'sponsor' membership by stating that it has applied for registration as Category 1 Merchant Banking status from SEBI, OTCEI could either admit the appellant as a 'sponsor' or reject the application and refund the amount deposited by the appellant. However, contrary to the application, OTCEI deemed it fit to admit appellant as a 'member' subject to the conditions set out therein.

11. Assuming that the appellant by paying ₹ 20 lac had agreed to be a 'member', appellant could not appointed or admitted as a 'member', because the appellant had failed to comply with the conditions set out in the approval letter dated 17.04.1995. As per the letter dated 17.04.1995, appellant could be admitted as a member of OTCEI only on payment of ₹ 21.50 lac (₹ 20 lac towards onetime, non-refundable membership fees and ₹ 1.5 lac towards annual membership fees, for the period ending September 1995). Since the appellant failed to comply with that condition, the appellant could not be admitted as a member of OTCEI.

12. Thus, the argument of OTCEI that on payment of ₹ 20 lac, appellant stood admitted as a member is not correct, because, admittedly appellant failed to pay ₹ 21.50 lac which was condition precedent for being admitted as a member. Therefore, argument of OTCEI that the appellant was admitted as a member of OTCEI and hence OTCEI was not obliged to refund the amount of ₹ 20 lac cannot be accepted.

13. It is relevant to note that while paying ₹ 20 lac on 30.05.1995, the appellant had specifically sought clarification from OTCEI as to whether the appellant, in the absence of SEBI registration be able to act as sponsor member and if so, whether the annual charges of ₹ 1.5 lac demanded by OTCEI would commence from the date of registration with SEBI. Instead of giving the clarification sought by the appellant, OTCEI purported to appropriate ₹ 20 lac paid by the appellant which is wholly unjustified.

14. In the facts of present case, since the appellant had failed to comply with the conditions set out in the letter 17.04.1995, in the first instance, OTCEI ought to have rejected the application of the appellant and refunded the membership fees of ₹ 20 lac received from the appellant. Alternatively, OTCEI could have furnished the clarification sought by the appellant and call upon the appellant to comply with the condition by paying ₹ 1.5 lac within such time as extended by OTCEI. Without giving any clarification and without extending the time for compliance of the conditions, OTCEI could not arbitrarily treat the appellant to have been admitted as a member and appropriate ₹ 20 lac paid towards the membership fee.

15. It is not the case of OTCEI, that as per their Bye-laws, on payment of ₹ 20 lac, a person is deemed to be admitted as a member even if the conditions for admission as member are not fully met with. There is nothing on record to suggest that OTCEI had permitted the appellant to carry on activities as a member even though the appellant had not complied with the conditions imposed for being appointed as a member.

Very fact that OTCEI after receiving ₹ 20 lac from the appellant on 30.05.1995, addressed a letter after about 2 ½ years on 12.01.1998 demanding annual charges clearly shows that initially OTCEI had not considered the appellant to have been appointed as a member and that plea is raised belatedly with a view to avoid refund of the amount of ₹ 20 lac due to the appellant.

16. Argument of OTCEI that by treating the appellant to be a member it had assigned Unique ID Number to the appellant and had shown the name of the appellant as member in the unpublished membership list maintained by OTCEI is without any merit because it is not known as to the date on which Unique ID was assigned to the appellant. In any event OTCEI could grant Unique ID only if the appellant complied with the conditions imposed. Apart from the above, it is strange that OTCEI deemed it fit not to interact with its deemed member (appellant) for years together even after allegedly treating the appellant as member on receipt of ₹ 20 lac on 30.05.1998 and deemed it fit to address a letter on 12.01.1998 for the first time demanding the annual fees for several years. Thus, it is evident that OTCEI was only interested in saving ₹ 20 lac and had not taken any steps to extract work from the appellant which obviously goes to show that the appellant was not treated as a member.

17. As noted earlier, admission fee of ₹ 20 lac was not refundable only when a person is admitted as a member. If a person fails to comply with the conditions imposed for being admitted as a member, then that person cannot be admitted as a member and in that case, the amount deposited

towards membership fee would have to be returned. Unless all conditions were fulfilled, appellant could not said to have been admitted as a member only on payment of ₹ 20 lac. Fact that OTCEI, though belatedly has demanded annual fees from the appellant cannot be a ground to hold that the appellant was admitted as a member, because in the absence of fulfilling the preconditions, appellant could neither be treated as a member nor annual charges be demanded from the appellant. It is relevant to note that it was not a condition that in case of failure to comply with the conditions, the amount of ₹ 20 lac would be forfeited. The condition imposed was that ₹ 20 lac paid as admission fee is non-refundable which obviously means that once admitted as a member, the admission fee becomes non-refundable. Therefore, in the facts of present case, since the appellant had not fulfilled the conditions, the appellant could not be admitted as a member and consequently, OTCEI was liable to refund the amount of ₹ 20 lac paid by the appellant.

18. For all the aforesaid reasons we hold that OTCEI is not justified in contending that the appellant was admitted as a member of OTCEI and therefore, ₹ 20 lac paid towards admission fee cannot be refunded to the appellant. Since the appellant could not be admitted as a member on account of failure to comply with the preconditions, the question of expelling the appellant from the membership of OTCEI does not arise. In this view of the matter, the order of OTCEI dated 13.08.2014 purporting to expel the appellant as a member of OTCEI is quashed and set aside.

19. Although, the appellant has claimed interest on the said amount of ₹ 20 lac, we see no reason to grant interest on the said amount of ₹ 20 lac because the appellant is also guilty of not approaching this Tribunal within a reasonable time. Apart from the above, it would not be just and proper to award interest on the amount of ₹ 20 lac from 1995 till date because as on date OTCEI has become defunct.

20. In the result appeal succeeds. OTCEI is directed to refund the amount of ₹ 20 lac within four weeks from today. If OTCEI fails to pay ₹ 20 lac to the appellant within four weeks from today, the appellant would be entitled to recover the said amount of ₹ 20 lac with interest at the rate of 15% per annum from today till payment.

21. Appeal is disposed of in the above terms with no order as to costs.

Sd/-
Justice J.P. Devadhar
Presiding Officer

Sd/-
Jog Singh
Member

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

10.05.2016
Prepared & Compared By: PK