

WTM/AB/EFD-1/DRA-IV/5015/2019-20

SECURITIES AND EXCHANGE BOARD OF INDIA
CORAM: ANANTA BARUA, WHOLE TIME MEMBER

FINAL ORDER

Under Sections 11(1), 11(4), 11A and 11B of the Securities and Exchange Board of India Act, 1992 - in the matter of Bishal Distillers Limited.

Noticee No.	Name of the Noticee	DIN/CIN	PAN
1.	Prabir Chowdhury	05194455	AIPPC9212K

1. Securities and Exchange Board of India (hereinafter referred to as “**SEBI**”) received a complaint on September 8, 2014, against Bishal Distillers Limited (hereinafter referred to as “**Bishal Distillers**” or “**the Company**”) *inter alia* alleging illegal mobilization of funds by the Bishal Distillers. SEBI examined the records available on *MCA21 Portal* and noted that Bishal Distillers had issued and allotted *Redeemable Preference Shares* (hereinafter referred to as “**RPS**”). Details regarding the aforesaid illegal mobilization of funds by issue of *Redeemable Preference Shares* is as under –

Table: 1

Details of Redeemable Preference Shares Issued		
Financial year	No. of Allottees	Value of Allotment (₹)
2011-12	238	4,00,00,000/-

2. Since, the aforementioned issue of securities by Bishal Distillers during the Financial Year 2011-12 (issue and allotment of RPS) qualified as an offer made to the public in terms of Section 67(3) of the Companies Act, 1956 (hereinafter referred to as “**Companies Act**”), Bishal Distillers and its directors were alleged to have violated Section 56, Section 60 read with Section 2(36) and Section 73 of the Companies Act, and SEBI issued an *ex parte interim order*

on May 6, 2015, against Bishal Distillers and its directors. Subsequently, SEBI passed a final order dated May 16, 2016, *inter alia* directing Bishal Distillers and its directors –

- a. To jointly and severally refund the money collected by the Company through the issuance of Redeemable Preference Shares (which have been found to be issued in contravention of the public issue norms stipulated under the Companies Act and SEBI regulations), to the investors including the money collected from investors, till date, pending allotment of securities, if any, with an interest 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) to the investors till the date of actual payment.*
 - b. Not to, directly or indirectly, access the capital market by issuing prospectus, offer document or advertisement soliciting money from the public and are further restrained and prohibited from buying, selling or otherwise dealing in the securities market, directly or indirectly in whatsoever manner, from the date of this Order till the expiry of 4 years from the date of completion of refunds to investors as directed above.*
3. During the course of the proceedings conducted prior to the passing of the final order dated May 16, 2016, it was brought to the notice of the then Whole Time Member (“WTM”) that certain entities who were/are director(s) of Bishal Distillers were in fact responsible for the offer and allotment of RPS. The list of such entities as extracted from the final order dated May 16, 2016 is shown below –

Table: 2

Sl. no	Name of the person	Capacity	Date of Appt.	Date of Cessation
1	Prabir Chowdhury	Director	26.12.2012	10.10.2013
2	Ajoy Paul	Director	18.02.2014	26.03.2014
3	Litan Saha#	Director	27.04.2015	–
# Litan Saha is at present a director in Bishal Distillers having been appointed on April 27, 2015.				

4. Accordingly, SEBI was directed by the WTM in the final order dated May 16, 2016 to examine the role of the aforementioned entities (who were not covered by the interim order dated May 06, 2015) and initiate appropriate action against them, in accordance with law.
5. Pursuant to examination of the role of the aforementioned entities in **Table: 2**, an interim order cum show cause notice dated October 10, 2018 (hereinafter referred to as “**SCN**”), was issued to the entities with the following directions:
 - i. *The Directors of Bishal Distillers, viz. Prabir Chowdhury, Ajoy Paul and Litan Saha, shall not access the securities market or buy, sell or otherwise deal in the securities market, either directly or indirectly, or associate themselves with any listed company or company intending to raise money from the public;*
 - ii. *The abovenamed Directors of Bishal Distillers shall co-operate with SEBI and shall furnish all information/ documents in connection with the offer and allotment of Redeemable Preference Shares sought vide letters dated December 28, 2017.*
6. Further, the entities were also informed that:
 12. *The findings at paragraphs 3 and 10 of this Order are made on the basis of the information obtained from MCA21 Portal and other relevant material on record by SEBI, which form the basis of the Final Order dated May 16, 2016. The Directors of Bishal Distillers, viz. Prabir Chowdhury, Ajoy Paul and Litan Saha (collectively referred to as “**Noticees**”) are hereby called upon to show cause as to why suitable directions/prohibitions under Sections 11, 11(4), and 11B of the SEBI Act should not be issued/imposed, including the following direction, viz. –*
 - i. *To be restrained/prohibited from accessing the securities market and buying, selling or otherwise dealing in securities in any manner whatsoever, directly or indirectly, for a period of **four** years from the date of the Company and its Directors effecting the refund as directed in the Final Order dated May 16, 2016.*

13. The Noticees may, within 21 days from the date of receipt of this Interim Order-cum-Show Cause Notice, file their respective replies. In the event the Noticees intend to avail an opportunity of personal hearing, they may do so by seeking a confirmation in writing from SEBI for the same within 90 days from the date of receipt of this Order. In the event of the respective Noticees failing to file replies or requesting for an opportunity of personal hearing within the said 90 days, the findings at paragraph 10 of this Order shall become final and absolute against the respective Noticees automatically, without any further orders. Consequently, the Noticees shall automatically be bound by the directions contained in paragraphs 11 and 12, as applicable.

7. Shri Ajoy Paul and Shri Litan Saha, have failed to file replies or request for an opportunity of personal hearing within the 90 days given in the SCN. Hence, the findings at paragraph 10 of the SCN has become final and absolute against Shri Ajoy Paul and Shri Litan Saha, without any further orders.
8. Shri Prabir Chowdhury (hereinafter referred to as “**Noticee**”) vide his letters dated December 18, 2018 and December 24, 2018, replied to the SCN. An opportunity of personal hearing was granted to the Noticee on October 09, 2019. However, the Noticee neither appeared for the said hearing and nor did he request for an adjournment or another opportunity for personal hearing.

Submissions of the Noticee:

9. The brief of the submissions made by the Noticee in his replies dated December 18, 2018 and December 24, 2018, is as under:
 - a. That the contravention raised against the company had been affected during the year 2011-12, and Noticee had been appointed as director in the said company for the period between 26-12-2012 to 10-10-2013 and during his tenure no contravention of any kind had taken place and thus as per the rules of equity no liabilities should devolve upon him because he was in no way involved with transaction.

- b. That currently, Noticee is affected by paralysis and have lost ability to move around and thus in no way involved with the functioning of the said company.
- c. That Noticee only knew to put his signature and he had acted upon the instructions of Partha Manna (Director of Finance).
- d. That Noticee has no objection if the asset of the company are sold to pay off the creditors of the company.

Consideration of submissions and findings:

10. Before dealing with the various contentions raised by the Noticee it would be pertinent to point out that the company of which the Noticee was a director, has already been found to have violated the provisions of the Companies Act, 1956 and SEBI Act, 1992, vide SEBI's final order dated May 16, 2016, in issuance of RPS. It is understood that the company and its directors against whom the order dated May 16, 2016 was passed, have not appealed against the said order within the time specified for filing appeal against such order and thus the said order has attained finality. In the present proceedings also the Noticee has not disputed the issue of RPS by the company and consequential violations committed by the company. The Noticee has merely contended that he is not liable for the violations committed by the company as he became director in the company post issue of RPS. Therefore, the issue that arises for consideration before me is whether the Noticee, as a director in the company Bishal Distillers Limited, is liable for the violation as alleged in the SCN.

11. I note that the Noticee in his replies has not disputed that he was appointed as the director of the company for the period December 12, 2012 to October 10, 2013, as alleged in the SCN. The company was found to be involved in raising the money through issue of RPS during the financial year 2011-12, i.e. prior to the Noticee joining as director, as mentioned in SEBI order dated May 16, 2016. Further, I note that his only contention is that during his tenure, there has been no contravention of any kind and as per the rules of equity no liabilities should devolve upon him because he was in no way involved with the transactions. In this regard, it would be appropriate to refer to the Section 73 of the Companies Act, 1956, relevant extract of which is provided hereunder:

"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)

(2) Where the permission has not been applied under subsection (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 per cent 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. In this regard, I note that in the *Sahara Case*, the Hon'ble Supreme Court examined Section 73 of the Companies Act, 1956, wherein it observed that –

"Section 73(1) of the Act casts an obligation on every company intending to offer shares or debentures to the public to apply on a stock exchange for listing of its securities. Such companies have no option or choice but to list their securities on a recognized stock exchange, once they invite subscription from over forty nine investors from the public. If an unlisted company expresses its intention, by conduct or otherwise, to offer its securities to the public by the issue of a prospectus, the legal obligation to make an application on a recognized stock exchange for listing starts. Sub-section (1A) of Section 73 gives indication of what are the particulars to be stated in such a prospectus. The consequences of not applying for the permission under sub-section (1) of Section 73 or not granting of permission is clearly stipulated in sub-section (3) of Section 73. Obligation to refund the amount collected from the public with interest is also mandatory as per Section 73(2) of the Act. Listing is, therefore, a legal responsibility of the company which offers securities to the public, provided offers are made to more than 50 persons.

... Section 73(2) says that every company and every director of the company who is an officer in default, shall be jointly and severally liable to repay that money with interest at such rate, not less than four per cent and not more than fifteen per cent, as may be prescribed. The scope of the above mentioned provisions came

up for consideration before this Court in Raymond Synthetics Ltd. & Ors. V. Union of India (supra), wherein the Court held that in a case where the company has not applied for listing on a stock exchange, the consequences will flow from the company's disobedience of the law, the liability to pay interest arises as from the date of receipt of the amounts, for the company ought not to have received any such amount in response to the prospectus. I am, therefore, of the view that since Saharas had violated the listing provisions and collected huge amounts from the public in disobedience of law, SEBI is justified in directing refund of the amount with interest."

13. As interpreted in the aforesaid judgment by the Hon'ble Supreme Court, if the application for listing is not made or if made, listing permission is not granted then the liability under Section 73(2), to refund all the monies collected, arises from the date of receipt of the amounts by the company. Since, the liability of the company to repay under section 73(2) is continuing and such liability continues till all the repayments are made, the Noticee, who was a director during the time the liability of the company to make refund was existing and continuing, is co-extensively responsible along with the company for making/ensuring refunds along with interest as specified under section 73(2) of the Companies Act, 1956. Any person who becomes a director of a company is expected to know the liabilities of the Company. I observe that he was a director from December 12, 2012 to October 10, 2013, a period during which, the company had incurred liability to make refund under Section 73(2) of the Companies Act, 1956.
14. There is no material available on record to suggest that there was any managing director or whole time director or the manager/secretary in the company. There is no material to show that there was some person on whose instruction the board of director of the company was accustomed to act or any person is charged by the board of the company to comply with Section 73 or one of the director was specified. Thus, all the directors become officer in default, in terms of Section 5 of the Companies Act, 1956, for the purposes of Section 73 of the Companies Act, 1956. As mentioned above, though the Noticee was not the director of the company during the period when the fund mobilization by the company through issue of RPS took place, however, as the company had incurred the liability to refund the moneys collected by it which it failed to discharge, therefore, any person who is or becomes director of such

company also becomes liable for ensuring refund by the Company in terms of Section 73 of the Companies Act, 1956.

15. In view of the above, I find that the Noticee is liable for the violation committed by Bishal Distillers Limited, as found in the SEBI order dated May 16, 2016.

DIRECTIONS:

16. In view of the above, I, in exercise of the powers conferred upon me under Sections 11, 11(4) and 11B read with Section 19 of the SEBI Act, 1992, hereby restrain/prohibit the Noticee from accessing the securities market and from buying, selling or otherwise dealing in securities in any manner whatsoever, directly or indirectly, for a period of four years from the date of this order or till the expiry of four years from the date of completion of refunds to investors as directed in the order dated May 16, 2016, whichever is later.
17. This order shall come into force with immediate effect.
18. A copy of this order shall be forwarded to the recognized stock exchanges and depositories for information and necessary action. A copy of this order may also be forwarded to MCA/concerned RoC for their information and necessary action with respect to the directions issued above.

Place: Mumbai

Date: October 17, 2019

Sd/

ANANTA BARUA

WHOLE TIME MEMBER

SECURITIES AND EXCHANGE BOARD OF INDIA