

# Shri Subhinder Singh Prem vs Union Of India Through Roc on 17 May, 2017

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeals (AT) No.101 to 105 of 2017

(arising out of Order dated 06.02.2017 passed by the National Company Law Tribunal, New Delhi in CP Nos. 16/152/2015, 16/153/2015, 16/154/2015, 16/155/2015 and 16/157/2015)

IN THE MATTER OF:

Shri Subhinder Singh Prem

...Appellant

Vs

Union of India Through ROC

...Respondent

Present: Mr. Sanjiv Sen, Senior Advocate with Mr. Rakesh Kumar and Mr. Dev Roy, Advocates for the appellants.

Mr. Nawal Kishore Jha, Senior Panel Counsel UoI along with Mr. Rakesh Kumar Tiwari, RoC, NCT of Delhi & Haryana, for Respondent.

## ORDER

17.05.2017- In these appeals, as common order dated 6th February, 2017 passed by the National Company Law Tribunal, New Delhi ("Tribunal" for short) is under challenge, they were heard together and disposed of by this common judgment.

2. The Appellant, Mr. Subhinder Singh Prem, who was the Managing Director of the Company M/s. Reebok India Company preferred five applications before the Tribunal under section 621 A of the Companies Act, 1956 for compounding of the offences for violation of certain provisions during some of the financial years. The Tribunal by common order dated 6th February, 2017, rejected all the applications with following observations:

"6. The investigations in this case have clearly revealed that non adherence to statutory compliances was deliberate and malafide as there was vast scale fabrication of documents giving rise to fraud, in conspiracy with a larger group.

7. There is merit in the arguments advanced by the Ld. Counsel for the SFIO that non adherence to the statutory requirements under the Companies Act were intentional and deliberate. In certain cases of prosecution for an offence under the Companies Act, the defaults are sometimes rectified and compounding such defaults would have

no effect on any criminal prosecution. However, in the present cases, the defaults are incurable and cannot be rectified. Compounding of these offences would demolish and prejudice the prosecution under the Penal provisions also. Given the circumstances, I find that the present prayers for compounding in all these petitions cannot be permitted, as these were not due to any bonafide omission or a delayed rectification of a statutory requirement. The offences herein under the Companies Act and those under the Penal Code are intrinsically linked and incurable. Compounding of the offences under the Companies Act would hamper the Criminal Prosecutions and no accused should be allowed to get away with deliberate large scale bungling and fabrication of documents carried out with criminal intention.

8. Under such circumstances, the petitioner/applicant is not entitled to compounding of the offences under the Companies Act.

9. The prayers made for compounding of the various offences inter alia under sections 255 & 256, 297, 255, 217(4), 2(11) etc in CP Nos. 16/152/2015, 16/153/2015, 16/154/2015, 16/155/2015, 16/157/2015 are all rejected.

10. Consequently all the five CPs stand dismissed. Copy of the order be placed in all five petitions and consigned to the Record Room."

3. According to Appellant he was functioning as Managing Director since 1st October, 2003 and resigned from the company on 28th March 2012. During his tenure, in August, 2009. The Company received a notice from Registrar of Companies in respect of various non-compliance and violations under section 58A, 209(1) & (6) r/w 209(5) AS-9 r/w 211 (3A) (3B) & (3C), 211(1) & 2 r/w 211 (8), 217 (2AA) r/w 217(6), 227(2) r/w 233, 166(1) & 210 of the Companies Act, 1956. These violations pertain to Sections 295, 297, 255 & 256, 193(2), 217(4) & 211(1).

4. The office of the Registrar of Companies initiated prosecution against the Appellant and the company and several other persons for various defaults which are pending adjudication before different Courts. The offences were also referred to the SFIO which in turn has launched Criminal Prosecution for serious offences involving Sections 477A, 464, 471, 405 r/w 406, 418, 107, 409, 120A r/w 120B under the Indian Penal Code (r/w offences under the Companies Act, 1956). It was brought to the notice of the Tribunal that on the basis of documentary and oral evidences, a compliant case no. 38J/2014 against Appellant and 34 others was filed in the Gurgaon Court. The charge sheet has been filed under sections 420, 477A, 406 IPC r/w the relevant provisions of the Companies Act. The investigation carried out by the office of SFIO established that the sale of RIC products were grossly inflated by the Applicant in connivance with other executives of the RIC by raising fictitious invoices and booking fictitious sales and manipulating other documents.

5. Though the Registrar of Companies has sent a report quantifying the fees attracted for compounding and also bringing to the notice of the Tribunal the factum of pending Criminal Cases, the SFIO has filed a detailed report vehemently resisting any indulgence being granted to the Applicant. In view of the aforesaid objections, the Ld. Tribunal rejected all applications.

6. Ld. Senior Counsel appearing on behalf of the Appellant submitted a detailed chart showing defaulting section, relevant provision, period of default, details of default, penalty/punishment and additional information, as detailed below:

S.No. Case no. Default- Relevant Provision Period of Details of Penalty/ Additional  
ing default default Punishm Information section ent

1. Co. 217(2AA) 217(2AA):- 31.12.2008 The company Imprison Not covered Appeal  
r/w 217(5) Board's report shall include the has not ment for by 621A(2), No.  
Directors' Responsibility complied a term as no other 101(AT)/ statement, indicating  
the with AS-5 which default of 2017 following:- (manner of may Appellant,

1. that the Annual Accounts preparation extend to ever has been prepared by  
following of profit and 6 months compounded the accounting standards. loss  
account) or with a under the

2. accounting policies have and AS-20 fine Companies been applied so as to give true  
(calculation which Act, 1956 and fair view of the financial and may statement of the  
company. disclosure of extend to

3. adequate accounting records Earning per Rs.

have been maintained for share) r/w 20,000 or safeguarding the assets. section 211 with

4. annual accounts have been (3A), 211 (3B) both.

prepared on going concern  
basis.

and

2.	Co. Appeal No. 102(AT)/ 2017	217(1) (b) and 217 (5)	217(1) (b):-  (1) There shall be attached with every balance sheet laid before a company in general meeting, a report by its Board of Directors, with respect to- (b) the amounts, if any, which it proposes to carry to any reserves in such balance sheet (5) provision for punishment in case of default.	31.12.2008	Amou prop carr rese the shee disc the Repo
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3.	Co. Appeal	211 (1) read with	211 (1):- Every balance sheet should give a true and fair view	31.12.2008	Gain exch
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No. 103(AT)/2017	211 (7)	of the state of affairs of the Company.	211(7):- If officer/director fails to do so, shall be punishable with imprisonment for a term which may extend to 6 months, or with fine which may extend to Rs. 10,000/- or both.	fluc and amou been unde head inco oper and expe henc agai spir prov Sche
4.	Co. Appeal No.	255 and 256 r/w 629A	255:- Not less than 2/3 of the total number of directors to retire by rotation at every	The is subs
104(AT)/2017		Annual General Meeting of the Company. 256:-Director longest in the office to retire first.	the Limited Company and as per the provisions of Section 4(7) had to comply with the provisions applicable to Public limited Company, therefore, had to comply with Section 255 & 256, however, no mention was there in the notice about the rotational retirement of directors.	exte Rs. 5 and where contr tion conti g with furth fine may exten Rs. 5 for e day durin which defau conti .
5.	Co. Appeal	217(4) r/w 217(5)	217(4):- The Board's report shall be signed by chairman if	Board's report has Impri ment

No. 105(AT)/ 2017	he is authorized and where he is not so authorized, shall be signed by such number of directors as are required to sign the balance sheet and profit and loss account. (5):- Provision of penalty in case of default	been signed by Subhinder Singh Prem, Managing Director, which is in contravention of the provisions of Section 217(4).	a which may exten 6 mon or fine which may exten Rs. 20,00 with
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7. It is contended that there is a provision for compounding of offence where pendency of cases cannot be sole ground of rejecting the prayer to which the Appellant entitled under the law. It is also contended that the Appellant was working for certain period in the company which is subsidiary company of a foreign company. The violations were alleged by the Registrar of Companies has nothing to do the investigation made by the SFIO or the investigations which are pending. For example, violation of Section 217 (2AA) of the Companies Act relate to submission of Board's Report including the Directors' Responsibility statement indicating the Annual Accounts prepared, accounting policies applied for, adequate accounting records maintained or not, annual accounts prepared or not. Similarly, Section 217(1) (b) relates to non-attachment of every balance sheet laid before a company, the amounts, if any, which it proposes to carry to any reserves in such balance sheet. The other allegation is violation of Section 211(1) where under every balance sheet has required to provide a true and fair view of the state of affairs of the company. Similarly, Section 255 stipulates that there should not be less than 2/3rd of the total number of directors to retire by rotation at every Annual General Meeting of the Company. Section 256 talks of Director longest in the office is to retire first. Similarly, Section 217(4) relates to Board's Report to be signed by the Chairman if he is authorised or by such number of directors as are required to sign. For all those violations, penalty have been provided which may be imprisonment for a term which may extend to six months or with a fine which may extend to Rs. 20,000/- or with both. With regard to the violation of Section 255 read with Section 629 A, the only penalty which can be imposed is fine which may extend to Rs.5000/-, and where the contravention is continuing one, with a further fine which may extend to Rs.500/- for every day during which the default continues. No punishment of imprisonment has been prescribed thereunder.

8. Ld. Senior Counsel for the Appellant contended that the Tribunal failed to consider the aforesaid facts and treating all the cases as similar, only on the ground that serious allegations are there and cases under the Indian Penal Code are pending and that the investigation by the SFIO is continuing, has rejected the application.

9. Ld. Counsel appearing on behalf of Registrar of Companies contended that the Registrar of Companies have no objection if offences are compounded subject to outcome of the investigation as being conducted by the SFIO. It is further contended that if offences are compounded it cannot affect the cases pending before Courts for commission of offences under Indian Penal Code.

10. Having heard the parties and having gone through the records, we are of the opinion that merely on the ground that investigation by SFIO is going on or some other cases are pending Ld. Tribunal ought not have rejected all the appeals.

11. Section 621A of the Companies Act, 1956, deals with composition of certain offences which reads as follows:

"621A. Composition of certain offences- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any offence punishable under this Act (whether committed by a company or any officer thereof), not being an offence punishable with imprisonment only, or with imprisonment and also with fine, may, either before or after the institution of any prosecution, be compounded by the Central Government on payment or credit, by the company or the officer, as the case may be, to the Central Government of such sums as that Government may prescribe.

Provided that the sum prescribed shall not, in any case, exceed the maximum amount of the fine which may be imposed for the offence so compounded:

Provided further that in prescribing the sum required to be paid or credited for the compounding of an offence under this sub-section, the sum, if any, paid by way of additional fee under sub-section (2) of section 611 shall be taken into account.

(2) Nothing in sub- section (1) shall apply to an offence com-

mitted by a company or its officer within a period of three years from the date on which a similar offence committed by it or him was compounded under this section. Explanation.- For the purposes of this section, any second or subsequent offence committed after the expiry of a period of three years from the date on which the offence was previously compounded, shall be deemed to be a first offence; (3) (a) Every application for the compounding of an offence shall be made to the Registrar who shall forward the same, together with his comments thereon, to the Central Government.

(b) Where any offence is compounded under this section, whether before or after the institution of any prosecution, an intimation thereof shall be given by the company to the Registrar within seven days from the date on which the offence is so compounded.

(c) Where any offence is compounded before the institution of any prosecution, no prosecution shall be instituted in relation to such offence, either by the Registrar or by any shareholder of the company or by any person authorised by the Central Government against the offender in relation to whom the offence is so compounded.

(d) Where the composition of any offence is made after the institution of any prosecution, such composition shall be brought by the Registrar in writing, to the notice of the Court in which the prosecution is pending and on such notice of the composition of the offence being given, the company or its officer in relation to whom the offence is so compounded shall be discharged.

(4) The Central Government while dealing with a proposal for the compounding of an offence for a default in compliance with any provision of this Act which requires a company or its officer to file or register with, or deliver or send to, the Registrar any return, account or other document, may, direct, by order, if it or he thinks fit to do so, any officer or other employee of the company to file or register with, or on payment of the fee, and the additional fee, required to be paid under section 611, such return, account or other document within such time as may be specified in the order. (5) Any officer or other employee of the company who fails to comply with any order made by the Company Law Board or the Regional Director under sub-section (5) shall be punishable with imprisonment for a term which may extend to six months, or with fine not exceeding five thousand rupees, or with both.

(6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974 ),-

(a) any offence which is punishable under this Act with imprisonment or with fine, or with both, shall be compoundable with the permission of the Court, in accordance with the procedure laid down in that Act for compounding of offences;

(b) any offence which is punishable under this Act with imprisonment only or with imprisonment and also with fine shall not be compoundable.

(8) No offence specified in this section shall be compounded except under and in accordance with the provisions of this section."

12. Sub-section (1) of Section 621 prohibits compounding when an offence punishable with imprisonment only, or with imprisonment and also with fine. Where fine is alternative to the imprisonment or where there are no provisions of punishment is well within the jurisdiction of the Tribunal to compound the offence. Sub-section (6) of Section 621A further makes it clear that any offence which is punishable under Act with imprisonment or with fine, or with both, the case is liable to be compounded.

13. The Hon'ble Supreme Court in Civil Appeal No.2102 of 2004, V.L.S. Finance Ltd. Vs Union of India & Ors. by its judgment dated 10th May, 2013, while dealing with the provision of section 621 A observed and held as follows:

"15. From the conspectus of what we have observed above, it is more than clear that an offence committed by an accused under the Act, not being an offence punishable with imprisonment only or imprisonment and also with fine, is permissible to be compounded by the Company Law Board either before or after the institution of any prosecution. In view of Sub-section (7) of Section 621A, the criminal court also possesses similar power to compound an offence after institution of the prosecution.

16. Now the question is whether in the aforesaid circumstances the Company Law Board can compound offence punishable with fine or imprisonment or both without permission of the court. It is pointed out that when the prosecution has been laid, it is the criminal court which is in seisin of the matter and it is only the magistrate or the court in seisin of the matter who can accord permission to compound the offence. In any view of the matter, according to the learned Counsel, the Company Law Board has to seek permission of the court and it cannot compound the offence without such permission. This line of reasoning does not commend us. Both Sub-section (1) and Subsection (7) of Section 621A of the Act start with a non-obstante clause. As is well known, a non-obstante clause is used as a legislative device to give the enacting part of the section, in case of conflict, an overriding effect over the provisions of the Act mentioned in the non-obstante clause.

17. Ordinarily, the offence is compounded under the provisions of the Code of Criminal Procedure and the power to accord permission is conferred on the court excepting those offences for which the permission is not required. However, in view of the non-obstante clause, the power of composition can be exercised by the court or the Company Law Board. The legislature has conferred the same power to the Company Law Board which can exercise its power either before or after the institution of any prosecution whereas the criminal court has no power to accord permission for composition of an offence before the institution of the proceeding. The legislature in its wisdom has not put the rider of prior permission of the court before compounding the offence by the Company Law Board and in case the contention of the Appellant is accepted, same would amount to addition of the words "with the prior permission of the court" in the Act, which is not permissible.

18. As is well settled, while interpreting the provisions of a statute, the court avoids rejection or addition of words and resort to that only in exceptional circumstances to achieve the purpose of Act or give purposeful meaning. It is also a cardinal rule of interpretation that words, phrases and sentences are to be given their natural, plain and clear meaning. When the language is clear and unambiguous, it must be interpreted in an ordinary sense and no addition or alteration of the words or expressions used is permissible. As observed earlier, the aforesaid enactment was brought in view of the need of leniency in the administration of the Act because a large number of defaults are of technical nature and many defaults occurred because of the complex nature of the provision.

19. From what we have observed above, we are of the opinion that the power under Sub-section (1) and Sub-section (7) of Section 621A are parallel powers to be exercised by the Company Law Board or the authorities mentioned therein and prior permission of Court is not necessary for compounding the offence, when power of compounding is exercised by the Company Law Board."



14. In view of what we have observed above and decision of the Hon'ble Supreme Court, we hold that the Appellant is entitled for compounding of offence. We, accordingly, order as follows:

(i). Company Appeal (AT) No.101 of 2017 - The offence committed by violating of Section 217(2AA) is compounded with fine of Rs.20,000/-.

(ii). Company Appeal (AT) No.102 of 2017 - The offence committed by violating of Section 217(1) (b) is compounded with fine of Rs.20,000/-.

(iii). Company Appeal (AT) No.103 of 2017 - The offence committed by violating of Section 217(1) is compounded with fine of Rs.10,000/-.

(iv). Company Appeal (AT) No.104 of 2017- The offence committed by violating of Section 255 and Section 256 is compounded with onetime fine of Rs.5,000/- plus fine of Rs.300 per day for 1183 days is compounded with total fine of Rs.3,59,900/-.

(v). Company Appeal (AT) No.105 of 2017- The offence committed by violating of Section 217(4) (b) is compounded with fine of Rs.20,000/-.

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Total- Rs.4,29,900/-

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15. The Appellant is directed to deposit the total amount of Rs. 4,29,900/- (Rupees Four lacs twenty-nine thousand nine hundred) within 30 days, by Demand Draft(s) or through online payable in favour of "Pay and Accounts Officer, Ministry of Corporate Affairs, Government of India, New Delhi" and will also file Form INC-28 within 45 days.

16. The Registrar of Companies is directed to withdraw the complaint against Appellant for alleged violation of Sections 217 (2AA), 217(1) (b), 211(1) (b), 255, 256 and 217(4) of the Companies Act, 1956.

17. However, it is made clear that the compounding of offence as made above will not come in the way of investigation by SFIO and other proceedings pending against Appellant under the Indian Penal Code, 1908 or under any other law.

18. The impugned common order dated 6th February, 2017 passed by Tribunal in CP Nos. 16/152/2015, 16/153/2015, 16/154/2015, 16/155/2015 and 16/157/2015 is set aside. All the appeals stand disposed of with the aforesaid observations and directions.

(Justice S.J. Mukhopadhyaya) Chairperson (Mr. Balvinder Singh) `Member (Technical) ar