

Registrar Of Companies, West Bengal vs Karan Kishore Samtani on 24 June, 2020

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 13 of 2019

IN THE MATTER OF:

The Registrar of Companies, West Bengal
Nizam Palace, 2nd M.S.O. Building,
2nd Floor, 234/4, A.J.C. Bose Road,
Kolkata-700 020

...Appellant

Versus

Karan Kishore Samtani
S/o Kishore Vashdev Samtani,
R/o 1B, Debendra Lal Khan Road
(Previously 1B, Minto Park)
Kolkata - 700027, West Bengal

...Respondent

Present:

For Appellant:- Mr. Sumit Kumar Jaiswal, Company Prosecutor.

Respondent: Mr. Dhruv Surana and Mr. Ashish Choudhury Advocates.

JUDGEMENT

(24.06.2020) Jarat Kumar Jain. J.

The Appellant Registrar Companies West Bengal, filed this Appeal under Section 421 of the Companies Act, 2013 (in brief the Act) against the order dated 03.04.2018 passed by National Company Law Tribunal, Kolkata Bench, Kolkata in Company Petition CP No. 690/KB/2017. Whereby, allowed the compounding application subject to payment of compounding fees 50,000/-.

2. Brief Facts of this case are that the Respondent was the Director, for more than 20 Companies till 31.03.2015. The Respondent tendered his resignation as the Director of the Company M/s Fabius Properties Pvt. Ltd. the same was accepted by the Board of Directors of the Companies on 29.12.2015. However, the intimation of his resignation was sent to the Registrar of Companies vide Form DIR-12 on 10.02.2016.

3. On 27.01.2016 the Registrar of Companies, West Bengal sent show cause notice and asking him as to why prosecution under Section 165(1) read with Section 165(3) of the Act, should not be initiated against him on the ground that he was the Director of more than 20 Companies at once. The Respondent admitted the guilty and sent representation to the Registrar with a request to compound the offence under Section 441(1) of the Act. RoC forwarded the representation along with

his report to the Tribunal.

4. After hearing the parties Ld. Tribunal allowed the compounding application under Section 441(1) of the Act, subject to payment of compounding fees Rs. 50,000/-. Being aggrieved with this order RoC has filed this Appeal.

5. Learned Company Prosecutor submits that the certified copy of the impugned order was received on 05.12.2018. Hence from the receipt of the copy of the impugned order i.e. 05.12.2018 within a period of 45 days, the Company Appeal (AT) No. 13 of 2019 appeal is filed on 04.01.2019. Hence the Appeal is well within a period of limitation as prescribed under Section 421 (3) of the Act.

6. This Appellate Tribunal after hearing the Parties vide order dated 12.04.2019 held that the appeal is within limitation. Respondent challenged this interim order in Civil Appeal No. 4584 of 2019 before Hon'ble Supreme Court. However, the appeal has been dismissed vide order dated 09.05.2019. Thus, the order attained finality.

7. Learned Company Prosecutor submits that the compounding fees under Section 441 (1) of the Act should be minimum amount which is prescribed for the offence as held by this Tribunal, in the case of Company Appeal (AT) No. 249 of 2018 Registrar of Companies cum Official Liquidator, Rajasthan, Jaipur Vs Gyan Chandra Agarwal decided on 12.09.2018. The Appellant has contravened the provisions of Section 165(1) read with Section 165(3) of the Act, for a period of 272 days. Therefore, as per the provisions of Section 165 (6) of the Act, he is liable for minimum fine prescribed for the violation i.e. Rs. 5000/- per day which comes to 13,60,000/-. Whereas Ld. Tribunal has imposed compounding fees Rs. 50,000/- which is less than the minimum prescribed in Section 165 (6) of the Act. Hence, the Appeal be allowed and Respondent be directed to pay minimum compounding fees.

8. On the other hand, Learned Counsel for the Respondent opposes the prayer and submits that the Respondent's resignation was received by the Company on 14.10.2014 i.e., within a period of one year from the date on Company Appeal (AT) No. 13 of 2019 which Section 165 (1) of the Act, came into force i.e. 01.0.2014 and hence, the Respondent has not contravened provisions of the Act. Learned Counsel for the Respondents also submits that Section 165 (1) of the Act, provides that no person after the commencement of the Act shall hold office as Director in more than 20 Companies and cannot be director in more than 10 public Companies. The Appellant after the commencement of the Act, has not accepted appointment of the Director in any company. Hence, the Respondent has not contravened provisions of Section 165(1) of the Act. Learned Counsel for the Respondent also submits that in case of compounding of the offence the principal of imposing as minimum fine is not mandatory and hence, the impugned order has not suffered from any infirmity.

9. Learned Counsel for the Respondent also submits that the Tribunal's powers under Section 441(1) of the Act, are not restricted to impose minimum fine prescribed for the violation of the offence. The Tribunal has after, taking into consideration circumstances of the case, exercised its judicial discretion therefore, no interference is called for in the Appeal and Appeal is liable to be dismissed.

10. Learned Counsel for the Respondent submits that even if a minimum penalty is prescribed, the Competent Authority will be justified in refusing to impose minimum penalty, when there is a technical or venial breach of the provisions of the Act, or where the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed by the statute, for this Company Appeal (AT) No. 13 of 2019 purpose, he placed reliance on the Judgments of Hon'ble Supreme Court in the case of M/s Hindustan Steel Ltd. Vs. State of Orissa 1969 (2) SCC 627. and the Adjudicating Officer Securities and Exchange Board of India Vs. Bhavesh Pabari (2019) 5 SCC 90. Learned Tribunal considering the mitigating circumstances imposed compounding fees Rs. 50,000/- as the offence is technical. Hence, the Appeal be dismissed.

11. After hearing Learned Counsel for the parties we have gone through the record.

12. This Appellate Tribunal in the case of M/s Viavi Solutions India Pvt. Ltd. & Ors. Vs. Registrar of Companies, NCT Delhi and Haryana (C.A (AT) No. 49 to 53 of 2016 decided on 28.02.2017 held that:

"the Tribunal is required to notice the relevant factors while compounding any offence, such as:-

- (i) The gravity of offence;
- (ii) The act is intentional or unintentional;

(iii) The maximum punishment prescribed for such offence, such as fine or imprisonment or both fine and imprisonment.

- (iv) The report of the Registrar of Companies.
- (v) The period of default.
- (vi) Whether petition for compounding is suo moto before or after notice from Registrar of Companies or after imposition of the punishment or during the pendency of a proceeding.

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- (vii) The defaulter has made good of the default.

(viii) Financial condition of the company and other defaulters.

- (ix) Offence is continuous or one time.
- (x) Similar offence earlier committed or not.
- (xi) The act of defaulters is prejudicial to the interest of the member(s) or company of public interest or not.
- (xii) Share value of the company, etc."

13. Admittedly, in this case, the Respondent has violated the provisions under Section 165(1) read with Section 165(3) of the Act, for a period 01.04.2015 to 28.12.2015 which is punishable under Section 165(6) of the Act, (before amendment) which reads as under:-

"(6) if a person accepts and appointment as a director in contravention of sub-section 1, he shall be punishable with fine which shall be less than five thousand rupees but which may extend to twenty-five thousand rupees for every day after the first during which the contravention continues."

14. We have considered the arguments of Learned Counsel for the Respondent Hon'ble Supreme Court in the case of M/s Hindustan Steel Ltd. (Supra) while dealing the provisions of Sales Tax Act, held that penalty will not ordinarily be imposed unless the party obliged either acted deliberately in Company Appeal (AT) No. 13 of 2019 defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. In this case, the Respondent was conscious that after coming into force the provisions under Section 165(1) of the Act, he cannot hold Directorship in more than 20 companies and Directorship in more than 10 Public Companies, at the same time. As per the Section 165 (3) of the Act, till 31.03.2015 Respondent was required to resign from the Directorship of the Companies more than the limits specified in sub- Section 1 of Section 165 of the Act, within the specified period. The Respondent has resigned from the Directorship of M/s Fabius Properties Pvt. Ltd. and resignation was accepted by the Company on 29.12.2015 and there is nothing on record to presume that the Respondent violated the provisions on a bonafide belief. The conduct of Respondent shows that he acted in conscious disregard of its obligation.

15. Hon'ble Supreme Court, in the case of Adjudicating Officer, Securities and Exchange Board of India (Supra) dealt with different questions in reference to Securities and Exchange Board of India Act, 1992, which are as under:-

(i) Whether the conditions stipulated in Clauses (a), (b) and (c) of Section 15-J of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "SEBI Act") are exhaustive to govern the discretion in the Adjudicating Officer to decide on the quantum of penalty or the said conditions are merely illustrative?

(ii) Whether the power and discretion vested by Section 15-J of the SEBI Act to decide on the quantum of penalty, regardless of Company Appeal (AT) No. 13 of 2019 the manner in which the first question is answered, stands eclipsed by the penalty provisions contained in Section 15-A to Section 15-HA of the SEBI Act?

16. Thus, we are not convinced with the argument of Learned Counsel for the Respondent that the Tribunal while dealing with under Section 441 (1) of the Act, can impose the compounding fees less than minimum which is prescribed for the offence.

17. The issue for consideration is, whether Tribunal can impose the compounding fees under Section 441 (1) of the Act, less than minimum prescribed for the offence under Section 165 (1) read with Section 165(6).

18. This Appellate Tribunal in the case of Registrar of Companies cum Liquidator, Rajasthan, Jaipur (Supra) held as under: -

"2. Learned Company Prosecutor appearing on behalf of the Registrar of Companies, Jaipur referred to sub-section (6) of Section 165 of the Companies Act, 2013, which reads as follows:-

"165(6). If a person accepts an appointment as a director in contravention of sub-section (1), he shall be punishable with fine which shall not be less than five thousand rupees but which may extend to twenty-five thousand rupees for every day after the first during which the contravention continues."

3. It is submitted that though the Tribunal had noticed the aforesaid provision and the punishment attributed for the default pursuant to the provision but notwithstanding the minimum quantum of fine imposed, the impugned order has been passed.

4. Mr. Suresh Sharma, Practicing Company Secretary appearing on behalf of Respondent/ Petitioner submitted that the penalty Company Appeal (AT) No. 13 of 2019 provided under sub-section (6) of Section 165 of Companies Act is not mandatory.

5. However, we do not agree with such submission in view of the provision as quoted above, which prescribe minimum penalty. The legislature having prescribed minimum fine, which shall not be less than five thousand rupees for every day and maximum fine of twenty-five thousand rupees for every day, the Tribunal has no jurisdiction to reduce the fine less than the minimum fine prescribed for the offence."

19. From the impugned order its manifesto and clear that the Tribunal failed to notice the minimum fine prescribed under Sub-Section 6 of Section 165 of the Act, which was applicable at relevant time i.e. before the amendment.

20. In view of the error apparent in the impugned order dated 03.04.2018 passed by the Tribunal, thus, the order cannot be upheld. It is accordingly, set aside.

21. The Respondent has contravened the provisions of 165(1) of the Act, which is punishable under Sub-Section 6 of Section 165 of the Act. Taking into consideration, the facts and circumstances of the case, we imposed minimum fine at the rate of five thousand rupees for every day for the period 01.04.2015 to 21.02.2016 i.e. 272 days. We quantified penalty to Rs. 13,60,000/-. The Respondent has already paid Rs. 50,000/- after adjustment, now he is liable to pay Rs. 13,10,000/-. Therefore, The Respondent is directed to pay such amount within a period of 60 days in National Company Law Tribunal, Kolkata. The Registrar of Companies will ensure compliance of the order.

Thus, the Appeal is allowed. No Costs.

Company Appeal (AT) No. 13 of 2019 The Registry is directed to send the copy of judgment to National Company Law Tribunal, Kolkata, and Registrar of Companies West Bengal for Information and Compliance.

Justice Jarat Kumar Jain) Member (Judicial) (Balvinder Singh) Member (Technical) (Dr. Ashok Kumar Mishra) Member (Technical) NEW DELHI SC Company Appeal (AT) No. 13 of 2019