

**NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI**

**Company Appeal (AT) No. 12 of 2019**

**IN THE MATTER OF:**

**The Registrar of Companies West Bengal**

**Nizam Palace, 2<sup>nd</sup> M.S.O Building,**

**2<sup>nd</sup> Floor, 234/4, A.J.C. Bose Raod,**

**Kolkata- 700 020**

**...Appellant**

**Versus**

**Sabyasachi Bagchi**

**S/o Sudhakrishna Bagchi,**

**R/o 15C/D/4, Jubilee Park, Jadavpur,**

**Kolkata- 700033, West Bengal**

**...Respondent**

**Present:**

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

**For Respondent: Mr. Kunal Chatterji, Advocate.**

**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 11.07.2018 passed by National Company Law Tribunal, Kolkata Bench, Kolkata in Company Petition No. 190/KB/2018. Whereby allowed the compounding application subject to payment of compounding fees Rs. 25,000/-.

2. Brief Facts of this case are that Respondent Sabyasachi Bagchi was holding Directorship of 17 Companies on 01.04.2014 when section 165 (1) of the Act, came into force. However, he vacated directorship of three companies during the period of 01.04.2014 to 31.03.2015. After receipt of the notice from Appellant the Respondent has resigned from the Directorship of four Companies on 22.02.2016, thus, the Respondent has contravened the provisions of Section 165(1) of the Act, for a period of 01.04.2015 to 21.02.2016 i.e. 326 days. The reply of show cause notice of Respondent found unsatisfactory, therefore, the Appellant filed a complaint under Section 165 (6) of the Act, against the Respondent before Chief Metropolitan Magistrate, Kolkata. During the pendency of the Prosecution, Respondent filed an Application under Section 441(1) of the Act, before the National Company Law Tribunal, Kolkata (in brief Tribunal) for compounding the offence. The Appellant, RoC West Bengal, filed his report on compounding application before the Tribunal. After hearing the parties Learned Tribunal allowed the Application subject to payment of compounding fees Rs. 25,000/- within 15 days from the date of order.

3. Being aggrieved with the order the Appellant filed this Appeal on 04.01.2019 along with Application for condonation of delay in filing the Appeal.

4. After hearing Learned Counsel for the parties and being satisfied of the grounds and exercising power keeping in view sub Section 3 of Section 421 of the Act, delay of 41 days in preferring the Appeal is condoned by this Appellate Tribunal vide order dated 12.04.2019. Respondent challenged this interim Company Appeal (AT) No. 12 of 2019

order in Civil Appeal No. 4543 of 2019 before Hon'ble Supreme Court. However, the Appeal has been dismissed vide order dated 09.05.2019. Thus, the order of condonation of delay attained finality.

5. Learned Company Prosecutor appearing on behalf of the Appellant submitted that the Respondent has accepted that he contravened the provisions of 165 (1) of the Act, for a period of 01.04.2015 to 21.02.2016 i.e. 326 days. However, in the impugned order the period of default is shown 21 days only and Learned Tribunal has imposed compounding fees of Rs. 25,000/-. The Tribunal has ignored the provisions of sub-Section 6 of Section 165 of the Act, and directed to deposit compounding fees less than a minimum prescribed for the offence. The Tribunal has no jurisdiction to reduce the fine less than the minimum prescribed for the offence. For this purpose, he placed reliance on the order of this Tribunal in the case of Company Appeal (AT) No. 249/2018 Registrar of Companies cum Official Liquidator Vs. Gyan Chandra Agarwal order dated 12.09.2018. it is further, submitted that the Tribunal should have imposed minimum compounding fees i.e. Rs. 5,000/- per day for default to be continued 326 days amounting to Rs. 16,30,000/-. Thus, the order is liable to be set aside and Respondent be directed to deposit remaining compounding fees.

6. Learned Counsel for the Respondent submitted that Tribunal's power under Section 441(1) of the Act, are not restricted to impose minimum fine prescribed for the offence. The Tribunal has 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.

7. 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 purpose, he placed reliance on the Judgments of Hon'ble Supreme Court in the case of M/s Hindustan Steel Ltd. Vs. State of Orisa 1969 (2) SCC 627 and 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. 25,000/- as the offence is technical. Hence, the Appeal be dismissed.

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

9. 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.*
- (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.”*

10. 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 21.06.2016 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.”*

11. 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 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 vacated the Directorship of three Companies. However, after receipt of the notice from the Appellant the Respondent has resigned from the Directorship of four Companies on 22.02.2016 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.

12. 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 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?

13. 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.

14. 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).

15. 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:*

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*“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 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.”*

16. From the impugned order its manifest 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.

17. In view of the error apparent in the impugned order dated 11.07.2018 passed by the Tribunal, thus, the order cannot be upheld. It is accordingly, set aside.

18. 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. 326 days. We quantified penalty to Rs. 16,30,000/-. The Respondent has already paid Rs. 25,000/- after adjustment, now he is liable to pay Rs. 16,05,000/-. 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.

The Registry is directed to send the copy of Judgment to National Company Law Tribunal, Kolkata, and Registrar of Companies West Bengal for information & compliance.

**Justice Jarat Kumar Jain)**  
**Member (Judicial)**

**(Balvinder Singh)**  
**Member (Technical)**

**(Dr. Ashok Kumar Mishra)**  
**Member (Technical)**

**NEW DELHI**

SC