

IN THE NATIONAL COMPANY LAW APPELLATE TRIBUNAL

COMPANY APPELLATE JURISDICTION

COMPANY APPEAL (AT) No.137 OF 2017

(arising out of order dated order dated 7th March, 2017 passed by the National Company Law Tribunal, New Delhi Bench, New Delhi in Company Petition No. 16/147/2016).

In the matter of:

M/s. Cinepolis India Pvt Ltd. & Ors. ... Appellants

Vs

**Registrar of Companies, NCT of
Delhi & Haryana, New Delhi Respondent**

Present: -

For Appellant: - Mr Vishwas Panjiar, Chartered
Accountant

For Respondent: - Mr Rajiv Kumar, Advocate.

J U D G M E N T

SUDHANSU JYOTI MUKHOPADHAYA, J.

This appeal has been preferred by Appellants under Section 421 of the Companies Act, 2013 against impugned order dated 7th March, 2017 passed by the National Company Law Tribunal

(hereinafter referred to as Tribunal), New Delhi Bench, New Delhi in Company Petition No. 16/147/2016.

2. The Appellants failed to file its Annual Return for the financial year ended 31st March 2013 within 60 days of holding the Annual General Meeting resulting in non-compliance of statutory requirement under Section (s) 92, 137,96 and 129 of the Companies Act, 2013.

3. In view of the alleged failure, as penal action under section 92(5), 137 (3), 99 and 129 (7) of the Companies Act, 2013 were attracted, the Appellants preferred an application under Section 441 of the Companies Act, 2013 for compounding the offences.

4. The Tribunal dismissed the application by impugned order dated 7th March 2017 with following observation and direction: -

“3. The provisions of Companies Act, 2013 mandate that offence which is punishable with imprisonment even in the alternative of fine, should be dealt with by the Special Court constituted for violation of the Companies Act. This application is therefore being returned to the applicant to file it before the proper forum i.e., in the Special Court constituted at Dwarka, New Delhi which is the Court of ASJ-3.

4. The RoC may be intimated to file their report in the concerned Court.”

5. One of the ground taken by the Appellants to assail the impugned order is that no case is pending against the company or its officers before any Special Judge for punishment under any of the provisions as referred to above or for alleged violation of any provision of the Companies Act.

6. The question involved in this appeal is whether the Tribunal had jurisdiction to compound the offences under Section 441 for the alleged violation of Section (s) 92, 137,96 and 129 of the Companies Act, 2013.

For violation of Section 92 of the Act the penalty is prescribed under sub-section (5) of Section 92 as quoted below: -

“92. Annual Return - (1) *Every company shall prepare a return (hereinafter referred to as the annual return) in the prescribed form containing the particulars as they stood on the close of the financial year regarding—*

(a)

to

(k)

(4) *Every company shall file with the Registrar a copy of the annual return, within sixty days from the date on which the annual general meeting is held or where no annual general meeting is held in any year within sixty days from the date on which the annual general meeting should have been held*

(5) *If a company fails to file its annual return under sub-section (4), before the expiry of the period specified under section 403 with additional fees, the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to five*

lakhs rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both."

7. From the aforesaid sub-section (5), it is clear that while the company is punishable with fine of not less than fifty thousand rupees which may extend to five lakh rupees, every officer of the company who is in default is *"punishable with 'imprisonment' for a term which may extend to 6 months or fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both."*

8. For violation of section 137, punishment prescribed under sub-section (3) thereto which is as follows: -

"137. Copy of financial statement to be filed with Registrar.— (1) *A copy of the financial statements, including consolidated financial statement, if any, along with all the documents which are required to be or attached to such financial statements under this Act, duly adopted at the annual general meeting of the company, shall be filed with the Registrar within thirty days of the date of annual general meeting*

.....

(3) *If a company fails to file the copy of the financial statements under sub-section (1) or sub-section (2), as the case may be, before the expiry of the period specified in section 403, the company shall be punishable with fine of one thousand rupees for every day during which the failure continues but which shall not be more than ten lakh rupees, and the managing director and the Chief Financial Officer of the company, if any, and, in the absence of the managing director and the Chief Financial Officer, any other director who is charged by the Board with the responsibility of complying with the provisions of this section, and, in the absence of any such director, all the directors of the company, shall be punishable with imprisonment for a term which may extend to*

six months or with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees, or with both.”

9. From the aforesaid sub-section (s) of Section 137, again it is clear that while the company is punishable with fine of one thousand rupees for every day during which the failure continues but which shall not be more than ten lakh rupees but the Managing Director and CFO of the company, if any, and in absence of Managing Director and CFO, any other director who is in-charge are *“punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees or with both.”*

10. Section 99 is a penal provision for violation of Section 96. If Annual General Meeting is not called for more than 15 months and there is a gap of holding Annual General Meeting to that extent between the earlier date and the next, Section 99 prescribes the following punishment: -

“99. Punishment for default in complying with provisions of sections 96 to 98.—If any default is made in holding a meeting of the company in accordance with section 96 or section 97 or section 98 or in complying with any directions of the Tribunal, the company and every officer of the company who is in default shall be punishable with fine which may extend to one lakh rupees and in the case of a continuing default, with a further fine which may extend to five thousand rupees for every day during which such default continues.”

11. From Section 99, it is clear that the company and every officer of the company who are in default are “*punishable with fine which may extent to one lakh rupees and in case of continuing default, with further fine which may extend to five thousand rupees for every day during which such default continues.*” No punishment of imprisonment or imprisonment with fine has been prescribed therein.

12. Similarly, for violation of Section 129, penal provision has been prescribed under sub-section (7) of Section 129 thereto which reads as follows: -

129. Financial statement. — (1) *The financial statements shall give a true and fair view of the state of affairs of the company or companies, comply with the accounting standards notified under section 133 and shall be in the form or forms as may be provided for different class or classes of companies in Schedule III:*

Provided that the items contained in such financial statements shall be in accordance with the accounting standards:

xxxxxx

xxxxxx

(7) *If a company contravenes the provisions of this section, the managing director, the whole-time director in charge of finance, the Chief Financial Officer or any other person charged by the Board with the duty of complying with the requirements of this section and in the absence of any of the officers mentioned above, all the directors shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both.”*

From the aforesaid provision, it would be evident that if the 'financial statement' do not reflect the true and fair view of the state of affairs of the company or do not comply with the 'accounting standard' as notified under Section 133 of the Companies Act, 2013, are not filed in the prescribed form, the Managing Director, whole-time Director in-charge of finance, CFO or any other person charged by the Board with the duty of complying with the requirement for the said Section and in the absence of any officers, all the directors are "*punishable with imprisonment for a term, which may extend to one year or with fine which shall not be less than fifty thousand rupees which may extend to five lakh rupees or with both.*"

13. From the provisions, as referred to above, while we find that except for violation of Section 96, where no imprisonment has been prescribed, for violation of other provisions as referred to, imprisonment or fine or both have been prescribed. Therefore, it is open to the Tribunal to compound the offences under Section 96 by imposing fine in terms of Section 99 of the Companies Act, 2013 and for that no permission of Special Judge is required.

14. Section 441 while empowers the Tribunal to compound certain offences, in following circumstances compounding can either be done with the permission of the Special Court, in accordance with the

procedure laid down in the Act and/or in some cases there is a prohibition to compound offences, as apparent from sub-section (1) and (6) of Section 441 and quoted below: -

“441. Compounding 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) with fine only, may, either before or after the institution of any prosecution, be compounded by— (a) the Tribunal; or (b) where the maximum amount of fine which may be imposed for such offence does not exceed five lakh rupees, by the Regional Director or any officer authorised by the Central Government, 220 on payment or credit, by the company or, as the case may be, the officer, to the Central Government of such sum as that Tribunal or the Regional Director or any officer authorised by the Central Government, as the case may be, may specify: Provided that the sum so specified 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 specifying 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 403 shall be taken into account: Provided also that any offence covered under this sub-section by any company or its officer shall not be compounded if the investigation against such company has been initiated or is pending under this Act.

xxx xxx xxx

(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 fine, or with imprisonment or fine or with both, shall be compoundable with the permission of the Special Court, in accordance with the procedure laid down in that Act for compounding of offences; 221 (b) any offence which is punishable under this Act with imprisonment only or with imprisonment and also with fine shall not be compoundable.

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

15. Prior to Section 441 of the Companies Act, 2013, Company Law Board (now National Company Law Tribunal) was empowered under Section 621A of the Companies Act, 1956 to compound certain offences as stood at the relevant time 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-

(a) the Company Law Board; or

(b) where the maximum amount of fine which may be imposed for such offence does not exceed five thousand rupees, by the Regional Director, on payment or credit, by the company or the officer, as the case may be, to the Central Government of such sum as that Board or the Regional Director, as the case may be, may specify: Provided that the sum so specified 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 specifying the sum required to be paid or credited for the compounding of an offence under this subsection, the sum, if any, paid by way of additional fee under subsection (2) of section 611 shall be taken into account.

.....
(6) 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.

(7) 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.”

16. From the aforesaid provision it is clear that sub-section (6) of Section 441 of the Companies Act, 2013 is para-materia same. No change has been made therein.

17. Similar provision fell for consideration before the Hon'ble Supreme Court in "*VLS Finance vs Union of India & Ors*" (2013) SCC 278. Having noticed the provision, the Hon'ble Supreme Court held

:-

"11. From a plain reading of Section 621A(1) it is evident that any offence punishable under the Act, not being an offence punishable with imprisonment only or with imprisonment and also with fine, may be compounded either before or after the institution of the prosecution by the Company Law 11 Page 12 Board and in case, the minimum amount of fine which may be imposed for such offence does not exceed Rs. 5000/-, by the Regional Director on payment of certain fine. The penal provisions of the Act provide for different kinds of punishments for variety of offences and can be categorised as follows:

- (i) offences punishable with fine only,*
- (ii) offences punishable with imprisonment only,*
- (iii) offences punishable with fine and imprisonment,*
- (iv) offences punishable with fine or imprisonment,*
- (v) offences punishable with fine or imprisonment or both.*

12. Section 211(7) of the Act provides for punishment with imprisonment for a term which may extend to six months or with fine or with both. Therefore, an accused charged with the offence under Section 211(7) of the Act has not necessarily to be visited with imprisonment or imprisonment and 12 Page 13 also fine but can be let off by imposition of fine only. Therefore, the punishment provided under Section 211(7) of the Act comes under category (v) aforesaid. Section 621A (1) excludes such offences which are punishable with imprisonment only or with imprisonment and also with fine. As we have observed above, the nature of offence for which the accused has been charged necessarily does not invite imprisonment or imprisonment and also fine. Hence, we are of the

opinion that the nature of the offence is such that it was possible to be compounded by the Company Law Board.

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 15 Page 16 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 sub-section (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 16 Page 17 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 17 Page 18 prior permission of the court" in the Act, which is not permissible.*

19. *From what we have observed above, we are of the opinion that the power under sub-section (1) and 18 Page 19 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. In view of what we have observed above, the order impugned does not require any interference by this Court."

18. Thus we find that if an offence is punishable under the Act with imprisonment only or with imprisonment and also with fine cannot be compounded by Tribunal in view of clause (b) of sub-section (6) of Section 441.

19. However, if any offence which is punishable under the Act "*with imprisonment or fine or with imprisonment or fine or with both*" can be compounded by the Tribunal but only with the permission of the Special Court in accordance with the procedure laid down by the Act for compounding of offences as prescribed in clause (a) of sub-section (6) of Section 441.

20. In the present case, we find that apart from violation of Section 96, where punishment fine has been prescribed, for violation of Section (s) 92, 137 and 129 of the Companies Act, 2013, alternative punishment of imprisonment or fine or imprisonment with fine, have been prescribed. In view of such provision we hold that for offences under Section (s) 92, 137 and 129 etc., where alternative punishment of fine has been

prescribed, apart from imprisonment, the Tribunal is empowered to compound the offence only with the permission of the Special Court.

21. The Appellants have specifically pleaded that no case for alleged violation is under investigation or pending before any Special Court. This fact has not been disputed by the Registrar of Companies, NCT of Delhi & Haryana. It is also clear from paragraph 4 of the impugned order dated 7th March 2017 wherein the Tribunal has directed the Registrar of Companies to file their report to the concerned court (Special Court). In such a situation, in absence of investigation or pendency of any case before any court of law for alleged violation of Section (s) 92, 137, 96 and 129 of the Companies Act, 2013, we hold that there is no requirement for the Tribunal to seek any permission from Special Court for the purpose of compounding any of such offence. It is well within the jurisdiction of the Tribunal to compound the offence where alternative punishment of fine is prescribed in place of imprisonment and where no case is pending before the Special Court. We further hold that the Tribunal is also empowered to compound such offence (s) under section (s) 92, 137 and 129 etc., where the alternative punishment of fine in place of imprisonment has been prescribed even where case (s) are pending

before the Special Court, but in such cases, permission of the Special Court is required to be obtained prior to compounding the offence.

22. In view of the position of law and facts of the case, we are of the view that the Tribunal was not correct in returning the file to the Appellants to move application before the Special Court constituted at Dwarka, New Delhi nor it had jurisdiction to direct the Registrar of Companies to file their report in the concerned Special Court. In the facts and circumstances of the case, the Tribunal, was required to decide as to whether alternative punishment of fine can be imposed on the company and/or the Managing Director, Director (s), CFO or any officer, after taking into consideration the report, called for from the Registrar of Companies.

23. The Registrar of Companies has filed its reply but as noticed, has not denied the fact that no case has been lodged against the Appellants before the Special Court and no investigation is pending.

24. The Registrar of Companies referred to the decision of this Appellate Tribunal in "*Subhinder Singh Prem vs UoP*" in C.A. (AT) No. 101 to 105 of 2017 wherein this Appellate Tribunal by order dated 17th May 2017 held :-

"Sub-section (1) of Section 621 prohibits compounding when an offence punishable with imprisonment only or with

imprisonment also with fine. Where fine is alternative to the imprisonment or where there are no provision of punishment is well within the jurisdiction of the Tribunal to compound the offence. Sub-section (6) of Section 621 A 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.”

25. The Register of Companies has requested this Appellate Tribunal to pass appropriate order on merit of the case. However, as no report has been submitted by the Registrar of Companies as to what is maximum fine payable by Appellants for the alleged offences, as noticed above and the period of such offences etc., have not been detailed, we are not expressing any opinion about fine, if any, to be imposed on the company or one or other Managing Director/Director or Director or CEO or officer of the company.

26. For the reasons aforesaid, the impugned order dated 7th March 2017 passed in C.P. No. 16/147/2016 by the Tribunal is set aside. The case is remitted back to the Tribunal, New Delhi Bench, to decide the quantum of penalty as may be imposed on the company and its officers like Managing Director, Director, CEO, CFO etc., for alleged violation after calling for report from the Registrar of Companies, Delhi & Haryana, New Delhi and notice to the parties.

27. The Appellants are directed to bring this Judgment to the notice of the Tribunal with a request to implead the Registrar of

Companies, NCT of Delhi & Haryana, New Delhi, if not yet impleaded. The impugned order is set aside with aforesaid observations. However, in the facts and circumstances, there shall be no order as to cost.

(Mr. Balvinder Singh)
Member (Technical)

(Justice S.J. Mukhopadhaya)
Chairperson

NEW DELHI

29th August, 2017

Re