

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

Company Appeal (AT) No.411 of 2017

[Against the order dated 18.08.2017 passed by the National Company Law Tribunal, New Delhi in C.P. No.16/110/2017]

With

Company Appeal (AT) No.412 of 2017

[Against the order dated 18.08.2017 passed by the National Company Law Tribunal, New Delhi in C.P. No.16/94/2017]

IN THE MATTER OF:

1. M/s. Sanchar Tele Systems Limited
Having its Registered Office at:
Ground Floor, Okhla Industrial Area,
Phase – II, New Delhi – 110020
2. Chandra Kant Bhardwaj,
S/o Shri Om Prakash Bhardwaj,
R/o B-392, Meera Bagh,
Outer Ring Road,
New Delhi – 110063
3. Sanjay Gupta,
S/o Shri Kanchi Lal Bandhu,
R/o 7, Rama Park, Kishan Ganj,
Delhi – 110007
4. Suresh Chandra Gupta,
S/o Late Shri Mutsaddi Lal Aggarwal,
R/o D-829, 1st Floor,
New Friends Colony, New Delhi – 110025
5. Priyanka Gupta,
W/o Late Shri Suresh Chandra Gupta,
R/o D-829, 1st Floor, New Friends Colony,
New Delhi – 110025

...Appellants Nos.1 to 5

Versus

1. Registrar of Companies, NCT of Delhi & Haryana,
4th Floor, IFCI Tower,
61, Nehru Place, New Delhi – 110019 ...Respondent

(Cause – Title in both the Appeals is same.)

**Present: Shri Krishnendu Datta and Shri Rahul Malhotra, Advocates
for the Appellants**

**Ms. Aparna Mudiam, Assistant Registrar of Companies
For ROC**

J U D G E M E N T

A.I.S. Cheema, J. :

Both these appeals relate to same Appellant No.1 Company with regard to defaults committed, and separate compounding applications filed for the different defaults which have been disposed. The RoC has filed common affidavit in reply in both the appeals. Both the appeals have been heard together and are being taken up for disposal together.

2. **Company Appeal (AT) No.411 of 2017**

This appeal is against impugned order dated 18.08.2017 passed in CP 16/110/17 by National Company Law Tribunal, New Delhi ('NCLT' in short).

3. The Company Petition was filed by the Appellants under Section 441 of the Companies Act, 2013 (new Act) for offence punishable under Section 383A of the Companies Act, 1956 (Old Act – in short) read with Section 203 of the Companies Act, 2013 (New Act – in short). Appellants prayed to compound offence of the default in appointment of whole-time Secretary during the

period from 01.04.2011 to 31.03.2017. The Appellants claimed that earlier they could not find suitable candidate but that they had now appointed a whole-time Secretary and sought compounding. The default Section attracted here is Section 203 of the New Act corresponding to old Section 383A(1A) of the Old Act. The default spanned the period when old Act was in force and continued even after the new Act came into force.

4. The NCLT considered the provisions and observed:

“In terms thereof, the RoC has recommended the fine as under section 383A (1A) of the 1956 for Rs.547500/- on the company and each of the applicants for 1095 days (being the period 01.04.2011 to 31.03.2014) and under Section 205(3) of the 2013 Act for Rs.5 Lakhs on the company and Rs.11,44,000/- on each of the other applicants for 1095 days (being the period 01.04.2014 to 31.03.2017).”

5. The NCLT recorded reasons and took a lenient view to impose one fifth of the maximum fine treating the same as just and equitable. Following fine was imposed on Appellants 1 to 5: -

| S. No. | Name Defaulter | Fine Under Section 383A(1A) (Old Act) | Fine Under Section 203(5) (New Act) | Amount (in Rs.) |
|--------|-----------------------------|---------------------------------------|-------------------------------------|-----------------|
| 1. | Sanchar Telesystems Limited | Rs.1,10,000/- | Rs.1,00,000/- | Rs.2,10,000/- |
| 2. | Mr. Chandra Kant Bhardwaj | Rs.1,10,000/- | Rs.2,25,000/- | Rs.3,35,000/- |

| | | | | |
|----|-------------------------|---------------|---------------|---------------|
| 3. | Mr. Sanjay Gupta | Rs.1,10,000/- | Rs.2,25,000/- | Rs.3,35,000/- |
| 4. | Mr Suresh Chandra Gupta | Rs.1,10,000/- | Rs.2,25,000/- | Rs.3,35,000/- |
| 5. | Ms. Priyanka Gupta | Rs.1,10,000/- | Rs.2,25,000/- | Rs.3,35,000/- |

NCLT directed that the Directors/Officers shall pay the fine from their personal accounts.

6. The learned counsel for the Appellants referred to copy of application being Company Petition 16/110/2017 to submit that the Appellants had mentioned in the Company Petition that the Appellant No.2 is the whole-time Director and Appellant Nos.3 to 5 were Directors. According to the learned counsel, only the Company and whole-time Director of the Company could have been held in default and not the other Directors. It has been argued that as per the provisions of the old and new Companies Acts, it is only the whole-time Director read with definition of “officer who is in default” could be responsible and not all the Directors. According to the learned counsel even if before NCLT, this legal question was not raised, the same can be raised in this appeal. Further submission is that the penal provisions have to be construed strictly and if the provisions are applied strictly, the Appellants 3 to 5 could not be held responsible. He submits that even if the Appellant committed mistake in making the application for compounding on behalf of all the Appellants, by that itself, liability cannot be imposed, and NCLT was bound to apply correctly.

7. **Company Appeal (AT) No.412 of 2017**

This appeal is arising out of impugned order passed in CP 16/94/2017 by the learned National Company Law Tribunal, New Delhi ('NCLT' in short). The Appellants filed application under Section 441 of the new Act read with Section 621A of old Act praying for compounding the offence under Section 137 of the new Act for the default in not filing the Financial Statements and Annual Returns of the Company for the Years 2013 – 2014. It was claimed that the compounding application was moved after making good the default.

It was claimed before NCLT that the default was made good by filing Annual Returns and Financial Statements on 11.04.2017 and 31.03.2017 for the two years.

8. The NCLT considered the relevant provisions and the fact that the RoC had recommended higher fine against all the five Appellants and decided that the one fifth of the maximum fine would be just and equitable. As the default spanned over period of the old Act as well as the new Act, NCLT imposed fine as under on the Appellants 1 to 5.

| S. No. | Name Defaulter | Fine Under Section 162 (Old Act) | Fine Under Section 137(3) (New Act) | Amount (in Rs.) |
|--------|-----------------------------|----------------------------------|-------------------------------------|-----------------|
| 1. | Sanchar Telesystems Limited | Rs.89,500/- | Rs.104,000/- | Rs.193,500/- |
| 2. | Mr. Chandra Kant Bhardwaj | Rs.89,500/- | 1,00,000/- | Rs.189,500/- |
| 3. | Mr. Sanjay Gupta | Rs.89,500/- | 1,00,000/- | Rs.189,500/- |
| 4. | Mr Suresh Chandra Gupta | Rs.89,500/- | 1,00,000/- | Rs.189,500/- |

| | | | | |
|----|--------------------|-------------|------------|--------------|
| 5. | Ms. Priyanka Gupta | Rs.89,500/- | 1,00,000/- | Rs.189,500/- |
|----|--------------------|-------------|------------|--------------|

9. In this matter, learned counsel for the Appellants referred to the complaint filed by the RoC before ACMM, Tis Hazari, Delhi copy of which is at page – 43 to submit that in that matter the RoC had arrayed only Appellant No.1 and Appellant No.2 as liable under concerned Sections 99 and 137 (3) for contravention under concerned Sections 96 and 137. According to the learned counsel, it was error on the part of the Appellants to have moved the application for compounding (copy of which is filed at page – 48) on behalf of the Appellants although it was mentioned in the petition that the Appellant No.2 was the whole-time Director and rest of the Appellants 3 to 5 were Directors. Like in the other matter, the learned counsel for the Appellants is referring to the concerned provisions and definition of officer responsible, to submit that in this matter also other than Appellants 1 and 2, rest of the Directors could not have been imposed fine.

10. Against this, the learned counsel for the RoC has submitted that even if with reference to the dispute in CA 412 of 2017, RoC had filed complaint only against the Appellant Nos.1 and 2, it would not mean that it had given up its right to proceed against the Directors separately. She states that the act of all the Appellants in moving compounding applications shows that all the Appellants were aware of their defaults in both the matters and all of them had sought compounding. They had thus admitted their offences. The RoC has right to move against all defaulting parties. According to the learned

Assistant Registrar of Companies if the common affidavit in reply filed by RoC in both these appeals is perused, the document at Annexure B which was filed with RoC shows that it was digitally signed by Suresh Chandra Gupta, Appellant No.4 who was authorized by the Board of Directors vide Resolution No.4 dated 31.03.2011 to submit the concerned form regarding increase of share capital which would attract Section 383A of old Act and Section 203 of new Act requiring appointment of whole-time Secretary. She also referred to Annexure C Form 23 AC for filing XBRL, document in respect of balance sheet and other documents, which was digitally signed by Ms. Priyanka Gupta, the Appellant No.5 who had been authorized by the Board of Directors vide Resolution No.5 dated 03.09.2014. She submitted that there was yet another document (Annexure D) which shows that for financial statement for the Financial Year 2014-2015 being filed by Appellant No.5. She has referred to notice at page – 19 with the affidavit in reply to show that the Directors whose DIN has been mentioned in the letter sent the notice regarding the Annual General Meeting. She stated that the DIN: 01036462 relates to Appellant No.4 - Suresh Chandra Gupta. The learned Assistant Registrar of Companies submitted that these documents on facts clearly show that even if Appellant No.2 is referred by them as Managing Director all these Appellants were participating in the day to day affairs of the Company and they were in-charge of the affairs of the Company and cannot avoid liability merely by pointing out the copy of complaint filed in Tis Hazari Court. It is stated that if the relevant Sections of the Companies Acts are seen, the Appellants are responsible and there was nothing to show that the Board had charged any

particular Director/s with responsibilities as no document to that effect is filed on record. She submitted that the Directors took part in the meetings, they knew the compliances required and for default they would be liable.

11. In reply the learned counsel for the Appellant submitted that even if the argument of the learned Assistant Registrar for RoC was to be seen, there was no material shown at least against Appellant No.3. It is then stated that when Annexure B was filed relating to increase of share capital, which would attract necessity to appoint full-time Company Secretary, in view of Annexure – B at the most liability can be shown against Appellant No.4 but that cannot be attributed to other Directors. On a query from the Bench, the learned counsel for the Appellant initially accepted that there was no Resolution to the effect of appointing Appellant No.2 as Managing Director or making any particular Director responsible for complying with the provisions of the Acts. Subsequently, of course the learned counsel, in the course of arguments started saying that he may be given time and he will file copy of Resolution assigning responsibilities. We have, however, not accepted that request as it may not be difficult to now come up with such document.

12. We agree with the learned counsel for Appellant that even if before NCLT, the question of liability of the different Directors was not taken up, the question can be raised even in the appeal, being a question of law. We also have no quarrel with the submission that the penal provisions are to be construed strictly.

13. In CA 411 of 2017, the Sections considered by the learned NCLT are Sections 383A(1A) of the old Act. Section 383A deals with requirement of certain companies to have a whole-time Secretary. Sub-Section 1A deals with the default. It reads as under:

“(1A) If a company fail to comply with the provisions of sub-section (1), the company and every officer of the company who is in default, shall be punishable with fine which may extent to [five hundred rupees] for every day during which the default continues:

Provided that in any proceedings against a person in respect of an offence under this sub-section, it shall be a defence to prove that all reasonable efforts to comply with the provisions of sub-section (1) were taken or that the financial position of the company was such that it was beyond its capacity to engage a whole-time secretary.”

14. The proviso is not applicable in the present set of facts. In view of its provision, the Company and “every officer of the company who is in default” is liable. The meaning of “officer who is in default” is to be traced in Section 5 of the old Act which reads as under:

5. Meaning of “officer who is in default”— For the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any

punishment or penalty, whether by way of imprisonment, fine or otherwise, the expression “officer who is in default” means all the following officers of the company, namely:-

- (a) the managing director or managing directors;
- (b) the whole-time director or whole-time directors;
- (c) the manager;
- (d) the secretary;
- (e) any person in accordance with whose directions or instructions the Board of directors of the company is accustomed to act;
- (f) any person charged by the Board with the responsibility of complying with that provision;

Provided that the person so charged has given his consent in this behalf to the Board;

- (g) where any company does not have any of the officers specified in clauses (a) to (c), any director or directors who may be specified by the Board in this behalf or where no director is so specified, all the directors:

Provided that where the Board exercises any power under clause (f) or clause (g), it shall, within thirty days of the exercise of such powers, file with the Registrar a return in the prescribed form.”

15. The new Section is 203(5) of the new Act. Section 203 of the new Act deals with appointment of key managerial personnel. The relevant Sub-Section (5) reads as under:

“203(5) If a company contravenes the provisions of this section, the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees and every director and key managerial personnel of the company who is in default shall be punishable with fine which may extend to fifty thousand rupees and where the contravention is a continuing one, with a further fine which may extend to one thousand rupees for every day after the first during which the contravention continues.”

16. Referring to Section 5 of the old Act, learned counsel for Appellants submitted that if Clause – “g” is seen, as the Company had a Managing Director, the other Directors could not have been held responsible. Although these submissions are being made, the Appellants did not show before the NCLT and did not file before us copy of any Return as per the Proviso which relates to Clauses - “f” and “g”. No document is shown of the Board taking Resolutions make any particular person responsible for complying with specific provisions. Merely referring to any person as Managing Director does not make the person Managing Director unless there is a Board Resolution appointing a person as Managing Director. In the absence of any pleadings to this effect before the NCLT and in the absence of any document brought

on record of any such Resolution passed or Return filed as per Proviso below Section 5 of the old Act, we find it difficult to give the benefit being sought by the learned counsel for the Appellant. The Appellants are clinging to straws. When the learned counsel for RoC pointed out the documents of the filings by Appellant Nos.4 and 5, the learned counsel submitted that at least relating Appellant No.3 nothing is shown. We do not find that in such manner the responsibilities under the Companies Acts could be avoided.

17. Even with regard to Section 203 of the new Act, the learned counsel for Appellant wanted to refer to Section 2(60) for definition of “officer who is in default” but we find that Sub-Section 5 itself does not refer to “officer who is in default”. Sub-Section 5 reproduced above makes it clear that “every director and key managerial personnel of the company who is in default shall be punishable”.

18. Sub-section (1) of Section 203 itself specifies 3 categories who would be referred as whole-time “key managerial personnel”. Relevant part of Sub-Section (1) reads as under:

“203(1) Every company belonging to such class or classes of companies as may be prescribed shall have the following whole-time key managerial personnel,—

(i) managing director, or Chief Executive Officer or manager and in their absence, a whole-time director;

(ii) company secretary; and

(iii) Chief Financial Officer:”

19. Section 203 deals with appointments of these key managerial personnel and contravention has been dealt with in Sub-Section 5. The learned counsel for the Appellant wanted to read the words “every director and key managerial personnel of the company who is in default”. In conjunction. He wanted to read them in conjunction to go to the definition clause of “officer who is in default”. We are also reading the word in conjunction but we are not reading the definition of “officer in default” in this Sub-Section as Sub-Section 5 of Section 203 has not used the said wording. The wording used is “key managerial personnel” and not officer who is in default. The Sub-Section makes “every director” and “key managerial personnel of the company who is in default” as liable.

20. For such reasons we discard the arguments made by the learned counsel for the Appellant to interfere with the order impugned in CA 411 of 2017.

21. Coming to CA 412 of 2017, the NCLT imposed fine under Section 162 of the old Act for a part of the period and under Section 137(3) of the new Act for the relevant part.

22. Section 162 of the old Act reads as under:

“162. Penalty and interpretation. – (1) If a company fails to comply with any of the provisions contained in sections 159,

160 or 161, the company, and every officer of the company who is in default, shall be punishable with fine which may, extend to [five hundred rupees] for every day during which the default continues.

(2) For the purposes of this section and sections 159, 160, and 161, the expressions “officer” and “director” shall include any person in accordance with whose directions or instructions the Board of directors of the company is accustomed to act.”

23. Section 137 of the new Act deals with filing of copy of financial statement with Registrar in specific time. Sub-Section (3) which is relevant reads as under:

“(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.”

24. We have already referred to Section 5 of the old Act which deals with “officer who is in default”. Section 137(3) does not refer to “officer who is in default”. As already observed, no Resolution passed or Return filed has been brought to our notice charging or fixing responsibilities. In the absence of bringing on record such Resolutions and Return filed, and in absence of specific pleadings in the petitions for compounding (which rather accepted liability) benefit under Section 137(3) of the new Act also, as sought, cannot be given. There are no pleadings and no documents filed charging or fixing responsibilities. Rather the learned counsel for RoC, on facts rightly pointed out documents to show that not merely Appellant No.2 but other Directors also were taking part in the day to day affairs and were responsible for compliance under the Companies Act. Applying law to the facts of the matters, we find no reason to interfere.

25. For such reasons, even in CA 412 of 2017 we find no reason to interfere.

26. CA 411 of 2017 as well as CA 412 of 2017 are both dismissed. No order as to costs.

[Justice A.I.S. Cheema]
Member (Judicial)

[Balvinder Singh]
Member (Technical)

New Delhi

9th March, 2018

/rs/nn