37

NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
AHMEDABAD

CP No. 8/621A/NCLT/AHM/2016

Coram: **Present: Hon'ble Mr. BIKKI RAVEENDRA BABU**
MEMBER JUDICIAL

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD BENCH OF THE NATIONAL COMPANY LAW TRIBUNAL ON 16.03.2017

Name of the Company: Nexans India Pvt. Ltd.

Section of the Companies Act: Section 309 (5B) of the Companies Act, 1956

S.NO.	NAME (CAPITAL LETTERS)	DESIGNATION	REPRESENTATION	SIGNATURE
1.				
2.				

ORDER

None present for both parties.

Order Pronounced in open Court vide separate sheet.

Dated this the 16th day of March, 2017.

16/3/17
BIKKI RAVEENDRA BABU
MEMBER JUDICIAL

37

NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
AHMEDABAD

CORAM: SRI BIKKI RAVEENDRA BABU, MEMBER JUDICIAL

Date: 16th day of March, 2017

C.P. No.8/621A/NCLT/AHM/2016

In the matter of: -

1. M/s. Nexans India Pvt. Ltd.,
   A company incorporated under the
   provisions of the Companies Act, 1956
   and having its Registered Office at
   316, Phoenix Complex,
   Sayajigunj,
   Vadodara – 390 005.

2. Mr. Hemant Prabhakar,
   Managing Director,
   M/s Nexans India Pvt. Ltd.,
   Residing at: C-1104, Sunbreeze Tower-III,
   Sector – 4, Vaishali,
   Ghaziabad – 201010 (U.P.).

3. Mr. Nicholas P. Ballas,
   Director,
   M/s. Nexans India Pvt. Ltd.,
   Having its Registered Office at
   316, Phoenix Complex,
   Sayajigunj,
   Vadodara – 390 005 and
   Residing at 116, Cairnhill Road,
   Singapore – 229702,
   Singapore. ... Petitioners

Appearance: -

Mr. Pankaj Nigam, PCS, for the petitioners.

FINAL ORDER
(Date: 16.03.2017)

1. This petition is filed by M/s Nexans India Pvt. Ltd., its Managing Director and Director under Section 621A of the Companies Act, 1956 for compounding of offence for the violation of Section 309(5B) of the Companies Act, 1956 (hereinafter referred to as "the Act" for short) read with Schedule XIII of the Act.

2. The facts, in brief, that are germane for the disposal of this petition are as follows :-

3. M/s Nexans India Pvt. Ltd. is a deemed public company within the meaning of Section 4(7) of the Act. The Board of Directors of the 1st petitioner-company, under the instructions of the holding company, which is incorporated in France, vide resolution dated 07.04.2010, appointed Mr. Jean Michel Antoine Marie Nicolai (a foreign national) as Managing Director of 1st petitioner-company with effect from 01.04.2010, subject to approval of members and subject to approval of Central Government, under the provisions of Section 269 read with Schedule XIII of the Act. The authorised share capital of the 1st petitioner-company is Rs.320,00,00,000/- (Rs. 320 crore) divided into 32,00,00,000/- equity shares of Rs.10/- each. The paid up share capital of the 1st petitioner-company is Rs.15,00,00,000/- (Rupees fifteen crore) divided 1,50,00,000/- equity shares of Rs.10/- each.

4. The 1st petitioner-company paid managerial remuneration aggregating to Rs.115 lakhs and Rs.188 lakhs during the year ended

31st December, 2010 and 31st December, 2011, respectively, to the Managing Director, Mr. Nicolai. Mr. Jean Michel Antoine Marie Nicolai resigned as Managing Director of the company with effect from 10th August, 2011.

5. The company filed an application before Central Government in the prescribed e-form No.25A on 07.02.2012 for approval of the Central Government for appointment of Mr. Nicolai as Managing Director. The Central Government vide its letter dated 16.08.2012 rejected the aforesaid application stating that the company had already paid the remuneration to the appointee and, therefore, it needs to make application for waiver of excess remuneration paid to the appointee during the period from 01.04.2010 to 07.2.2011 after complying with the statutory requirements. It is also stated in the order of the Central Government that with effect from 08.02.2011, the approval of the Central Government was not necessary in view of Gazette Notification No.70(E) dated 08.02.2011.

6. In pursuance of the order of the Central Government dated 16.08.2012, the company filed a fresh application on 7th September, 2012 in e-form No.25A seeking waiver of remuneration from 1st April, 2010 to 7th February, 2011. The said application was also rejected by the Central Government vide its letter dated 25.11.2013 on the ground that the company has not obtained approval for initial appointment in respect of the appointee under Section 269 read with clause (e) of Part I to Schedule XIII of the Act. Thereafter, the

company, its Managing Director and Director filed this compounding application before the Registrar of Companies on 21.04.2016. The Registrar of Companies, by report dated 20th October, 2016, forwarded the same to this Tribunal and this Tribunal registered it as C.P. No.8 of 2016.

7. Heard learned Practising Company Secretary, Mr. Harish Khurana, for the petitioners.

8. The point for consideration is whether the petitioners are entitled to compound the offence before this Tribunal for the violation of Section 309(5B) of the Act.

9. Section 269(2) of the Act says that appointment of a person as a managing or whole-time director or manager in a public company or a private company which is a subsidiary of a public company shall be made only with the approval of the Central Government unless such appointment is made in accordance with the conditions specified in Parts I and II of Schedule XIII and a return in the prescribed form is filed within ninety days from the date of such appointment. There is violation of Section 269(2). Sub-section (3) of Section 269 says that every application seeking approval to the appointment of managing or whole-time director or a manager shall be made to the Central Government within a period of ninety days from the date of such appointment. There is also violation of Section 269(3). The Central Government by its order dated 16.8.2012

rejected the application of the company on the ground that remuneration had already been paid and the company needs to make an application for waiver of such excess amount paid to the appointee.

10. Section 309(5B) of the Act says that the company shall not waive the recovery of any sum refundable to it under sub-section (5A) unless permitted by the Central Government.

11. No doubt, the company made an application on 7th September, 2012 to the Central Government, but the same was rejected on the ground that the company had not obtained approval for initial appointment under Section 269 read with clause (e) of Part I to Schedule XIII of the Act.

12. The crucial question is that, in these circumstances, what is the option left to the company and its Managing Director and Director. Section 269(7) says that the Central Government *suo motu* or any information received by it, if it is of the opinion that any appointment made under sub-section (2) of Section 269 without the approval of the Central Government has been made in contravention of the requirements of Schedule XIII, it shall refer the matter to the Tribunal for decision.

13. Sub-section (8) of Section 269 says that on receipt of a reference under sub-section (7), the Tribunal shall issue notice to the company,

its Managing Director, Director or other officers responsible for complying with the requirements of Schedule XIII to show cause as to why such appointments shall not be terminated and why penalties provided under sub-section (10) shall not be imposed. In the case on hand, no such course of action was initiated by the Central Government.

14. Sub-section (9) of Section 269 says that the Tribunal may terminate the appointment if it is in contravention of requirements of Schedule XIII. Sub-section (10) of Section 269 says that the Tribunal may, while passing an order declaring there is contravention of requirements of Schedule XIII, pass an order imposing fine on the company and its officers. Therefore, this Tribunal is given power under Section 269(9) of the Act to declare that there is contravention of requirements of Schedule XIII and to impose fine on the company and its officers. Further, sub-section (11) says that, if the company contravenes the orders passed by the Tribunal under sub-section (10) of Section 269, the company and its officers shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to pay a fine which may extend to 500 rupees.

15. Unless and until a reference is made to the Tribunal, unless and until the Tribunal declares contravention of requirements of Schedule XIII and unless and until the Tribunal proposed to imposes fine as contemplated under sub-section (10), there is no cause of action for the petitioners to invoke Section 621A of the Act.

16. The Registrar of Companies in his report also stated that the application does not appear proper.

17. In view of the above discussion, it is held that the petitioners cannot seek compounding of violation of Section 309(5B) before this Tribunal under Section 621A of the Act.

18. In the result, this application is dismissed. No costs.

16/3/17

BIKKI RAVEENDRA BABU
MEMBER JUDICIAL

Pronounced by me in open court on this
16th day of March, 2017.

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