NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
AHMEDABAD

TP No. 164/621A/NCLT/AHM/2016(New)
C.A. No. 201/621A/CLB/MB/2014(Old)

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 18.01.2017

Name of the Company: Lov Kush Properties Pvt. Ltd.

Section of the Companies Act: Section 295 of the Companies Act, 1956;

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

ORDER

None present for Petitioners.
Order pronounced in open court. Vide separate order attached.

18.1.17

(BIKKI RAVEENDRA BABU)
MEMBER JUDICIAL

Dated this the 18th day of January, 2017.

NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
AHMEDABAD

CORAM: SRI BIKKI RAVEENDRA BABU, MEMBER (JUDICIAL)

Date: 18th day of January, 2017

T.P. No. 164/621A/NCLT/AHM/2016 (New)

C.A. No.201/621A/CLB/MB/2014 (Old)

In the matter of: M/s Lov Kush Properties Pvt. Ltd.

1. Mr. Narendra G. Somani,
   18, Shyam Vihar Bungalows,
   Shilaj Road, Thaltej,
   Ahmedabad.

2. Mr. Devanand G. Somani,
   17, Shyam Vihar Bungalows,
   Shilaj Road, Thaltej,
   Ahmedabad.

3. Mr. Bakul R. Parikh,
   23, Suvas Colony,
   St. Xaviers School Road,
   Navrangpura,
   Ahmedabad. ..... Petitioners.

Mr. Rakesh Sharma, Advocate for the Petitioners.

FINAL ORDER

1. This petition is filed by the then three Directors of Lov Kush Properties Private Limited, seeking compounding of the violation of Section 295(4) of the Companies Act, 1956.

2. Lov Kush Properties Private Limited is a 100% subsidiary of TGB Banquets and Hotels Limited. Lov Kush Properties Private Limited provided corporate guarantee coupled with security in the form of equitable mortgage of its immovable property situated at Magdalla, Surat, in favour of financial institutions on a consortium finance in which the State Bank of India was acting as a lead banker and the ICICI Bank, Religare Finvest Limited and Indian Overseas Bank were the participating institutions for the due repayment of the credit facility availed from them by the holding company, TGB Banquets and Hotels Limited.

3. The Petitioners being the Directors of TGB Banquets and Hotels Limited, they had to obtain previous approval of the Central Government for providing corporate guarantee by Lov Kush Properties Private Limited as per the provisions of Section 295(1) of the Companies Act, 1956. Further, it is the case of the Petitioners that Lov Kush Properties Private Limited made an application to the Central Government on 12.02.2013, seeking approval under Section 295(1) of the Companies Act, 1956, but the Central Government, vide its letter 05.12.2013, pointed out that the provisions of Section 185 of the Companies Act, 2013 came into force with effect from 12.09.2013 and, therefore, the company had to comply with the requirements of Section 185 of the Companies Act, 2013, as and when required.

4. It is further the case of the Petitioners that they are deemed to have committed a default under Section 295 of the Companies Act, 1956 and, therefore, liable for the penalty prescribed under Section 295(4) and (5) of the Companies Act, 1956. According to the Petitioners, it is only a bona fide mistake on the part of the company due to ignorance of law and inadvertence.

5. The Petitioners filed an application before the Registrar of Companies on 16th January, 2014.

6. The Registrar of Companies forwarded a report dated 4th April, 2014 to the Company Law Board, Mumbai. In the said report, in column No.11, the Registrar of Companies stated that the offence committed is under Section 295 of the Companies Act, during the period from June, 2009 till the filing of the application.

7. In column No.12 of the report, the Registrar of Companies indicated the penalty provided under Section 295(4) of the Companies Act, 1956 and under Section 185(2) of the Companies Act, 2013. In column No.13, the Registrar of Companies has stated that the provisions of Section 185 of the Companies Act, 2013 came into force with effect from 12.09.2013.

8. Learned Advocate appearing for the Petitioners vehemently contended that the period of violation is prior to 12.09.2013 and, therefore, the violation has to be treated as violation of Section 295(1), which is punishable under Section 295(4). He further contended that providing corporate guarantee by Lov Kush Properties Private Limited to its holding company, TGB Banquets and Hotels Limited, is not at all a continuing offence and the offence was completed in all forms on the date on which it provided the guarantee. In support of his contention that the violation of Section 295(1) is not a continuing offence, he relied upon the decision in ***Mohit Kumar Mookherjee v. Registrar of Companies West, reported in LAWS (CAL)-1981-4-3 High Court of Calcutta***. In support of his contention that Section

295 of the Companies Act, 1956 applies, he relied upon the judgment of the Honourable Supreme Court in ***Star India (P) Ltd. v. Commissioner of Central Excise, Mumbai & Goa, reported in (2005) 7 SCC 203***.

9. In the light of the above said contentions, the following points emerge for determination: -

1) Whether the violation committed by Directors of Lov Kush Properties Private Limited in providing corporate guarantee to TGB Banquets and Hotels Limited in the year 2009 is a continuing offence or not.

2) Whether providing of corporate guarantee by Directors of Lov Kush Properties Private Limited to the banks and financial institutions that lend money to TGB Banquets and Hotels Limited in the year 2009 has to be treated as an offence under Section 295(1) of the Companies Act or an offence under Section 185 of the Companies Act, 2013.

3) What is the compounding fee that is to be levied on the petitioners?

Point (1): -

10. The providing of corporate guarantee coupled with security in the form of equitable mortgage of immovable property by Lov Kush Properties Private Limited in favour of banks and financial institutions for due repayment of credit facility availed from them by the holding company, TGB Banquets and Hotels Limited, without obtaining previous approval of the Central Government, which amounts to violation of Section 295(1)

punishable under Section 295(4) of the Companies Act, 1956, took place in the year 2009. Now, it has to be seen whether such violation can be treated as a continuing offence or a completed offence.

11. The Honourable Supreme Court in ***State of Bihar v. Deokaran Nenshi, reported in AIR 1973 SC 908***, made a distinction between a "completed offence" and a "continuing offence". The relevant portion at page 909 is as follows:-

> *"Continuing offence is one which susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs or recurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues and, therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all."*

12. In the decision in ***Mohit Kumar Mookherjee (supra)***, it is clearly held that advancing of loan by the Petitioners without prior approval of the Central Government is not a continuing offence. In another decision of Gwalior Bench of Madhya

Pradesh High Court, in the matter of ***Jagdishsingh Mehta and Another v. Registrar of Companies, reported in (1988) 63 Comp Cas 492***, it is clearly held that non-compliance in the matter of filing of extract of the accounts for any particular half-year period, as enjoined by Section 42L of the Companies Act, is *"a completed offence"* and not *"a continuing offence"*.

13. There is no indication either expressly or impliedly in Section 295(1) or in Section 295(4) of the Companies Act, 1956 or in Section 185 of the Companies Act, 2013 that it is a continuing offence. Even in sub-section (4) of Section 295 of companies Act 1956 or in sub-section (2) of Section 185 of the Companies Act, 2013, no punishment is provided for the continuation of the offence.

14. In the light of the above said decisions, this Tribunal is of the considered view that the violation of Section 295(1) of the Companies Act, punishable under Section 295(4) of the Companies Act is not a continuing offence and is a completed offence in the year 2009 itself.

Point No.2: -

15. Admittedly, Lov Kush Properties Private Limited provided corporate guarantee coupled with security in the form of equitable mortgage of its immovable property situated at Magdalla, Surat, in favour of the banks and financial institutions for due repayment of credit facility availed from them by the holding company, TGB Banquets and Hotels Limited, in the year 2009.

16. Section 185 of the Companies Act, 2013 came into force with effect from 12.09.2013. Even though this application is filed on

16th January, 2014, since the violation was committed in the year 2009, i.e. before coming into force of Section 185 of the Companies Act, 2013, and it is not a continuing offence, this Tribunal is of the considered view that this violation shall be treated as violation under Section 295(1) of the Companies Act, 1956, punishable under Section 295(4) of the Companies Act, 1956. This view of the Tribunal is supported by the judgment of the Honourable Supreme Court in ***Star India (P) Ltd. (supra)***.

17. The Ministry of Corporate Affairs by way of notification dated 01.06.2016 SO 1936E declared that the matters transferred from CLB to NCLT shall be disposed of in accordance with provisions of Act 18 of 2013 or Companies Act, 1956. Therefore, the violation relates to the period before the Act 18 of 2013 came into force. Moreover, Section 621A has to be followed in this case which enables the tribunal to compound the violation punishable with imprisonment or fine or both, since section 441 of Companies Act 2013 came into force only with effect from 01.06.2016.

18. Now, coming to the compounding fee to be levied, it is the case of the Petitioners that due to ignorance of law, inadvertence and bona fide mistake, they could not obtain the previous approval of the Central Government for providing corporate guarantee to financial institutions and banks that lent money to TGB Banquets and Hotels Limited. Considering the fact that the violation took place in the year 2009 and that the company, Lov Kush Properties Private Limited, is a 100% subsidiary of TGB Banquets and Hotels Limited, and also considering the plea of the Petitioners, this Tribunal is of the view that compounding fee can be reduced to some extent.

19. Hence, contravention of Section 295(1) of the Companies Act, 1956 committed by Petitioners 1 to 3 is compounded by this Tribunal on payment of Rs. 45,000/- each (Rupees forty-five thousand) by way of Demand Drafts drawn on Nationalised Bank in favour of Pay and Accounts Officer, Ministry of Corporate Affairs, Mumbai, within three weeks from the date of this order and deposit the Demand Drafts before the registry of this Tribunal on or before 8th February, 2017.

20. In case the Petitioners fail to pay the amount that is ordered herein above, the Registrar of Companies, Gujarat, Ahmedabad, shall take action, including prosecution, as per the applicable law, under intimation to this Tribunal forthwith.

21. Petition is disposed of accordingly. Send copy of this order to the Petitioners for compliance and the Registrar of Companies Gujarat, Ahmedabad for information.

22. For reporting compliance of the order by the Petitioners, list the matter on 10.02.2017.

18.1.17

(Bikki Raveendra Babu)
Member (Judicial)

Pronounced by me in open court on this
18th day of January, 2017.

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