

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
HYDERABAD BENCH AT HYDERABAD**

C.A.NO. 26/621A/HDB/2016

Date Of Order: 29.08.2016

In the matter of:

ICOMM Tele Limited

Plot No 40-46, Phase -IIDA, Cherlapally, HCL Post, Hyderabad – 500051,
Telangana represented by its Director Shri Sumanth Paturu

Shri Sumanth Paturu (Holding DIN: 00137669), Director, Son of Ramarao
Paturu, aged about 40 years, residing at C-10, 11, D.D. colony, Hyderabad –
500007

Shri Sreekumar Gopinadha Kurup, (holding DIN: 03500286) Son of
Gopinadha V K Kurup, aged 58 years, residing at Flat No. 402, Sita Rama
Nilayam, MLA Colony, Road No. 12, Banjara Hills, Hyderabad 500034

.....Applicants

Counsel for the Applicants

..Y. Suryanarayana

CORAM

Hon'ble Mr. RAJESWARA RAO VITTANALA, MEMBER (JUDL)

Hon'ble Mr. RAVIKUMAR DURAISAMY, MEMBER (TECH)

ORDER

(As per Rajeswara Rao Vittanala, Member (J))

1. This application was originally filed before Company Law Board, Southern Regional Bench, Chennai. Upon constitution of NCLT Bench at Hyderabad, the application is transferred to this Bench as the case relates to the State of Telangana. Hence, we have taken the case on records of NCLT, Hyderabad Bench and deciding the case.
2. This application is filed under Section 621A of Companies Act, 1956 read with Regulation 35, 40, 44 of Company Law Board Regulations, 1991 and also under S.149 of Companies Act, 2013 read with Rule 3 of Companies (Appointment and Qualification of Directors) Rules, 2014 by seeking direction to compound the offence by imposition of minimum composition fee.
3. The facts of the case as averred in the application and are material to decide the issue in question are as follows:
 - a. ICOMM TELE LIMITED was originally incorporated under the name and style "Advanced Radio Masts Private Limited" on 30.01.1989 (30th day of January, One Thousand Nine Hundred and Eighty Nine) under the provisions of Companies Act, 1956, vide Certificate of Incorporation No. 01-09561 of 1988-89 issued by the Registrar of Companies, Andhra Pradesh. In the year 1992, the Company converted itself into the public Limited Company by complying with the procedure laid down under the provisions of the Companies Act, 1956 and consequently the word "Private" was removed from the name of the Company w.e.f. 31.07.1992 (Thirty first day of July, One thousand Nine Hundred and Ninety Two). In the year 1995, the company changed its name to ARM Limited, by

complying with the procedure laid down under the provisions of Companies Act, 1956 and consequently obtain a fresh Certificate of Incorporation from the Registrar of Companies on 12.11.2002 (Twelfth day of November Two Thousand and Two). The Company further changed its name to ICOMM Tele Limited on 06.02.2003 (Sixth day of February Two thousand and Three). The present Corporate Identity Number (CIN) of the Company is U64203AP1989PLC009561.

The Registered Office of the Company is situated at Plot No. 40-46, Phase-I IDA, Cherlapally, HCL Post, Hyderabad, Andhra Pradesh – 500051 and that the subject matter of this application is within the jurisdiction of this Hon'ble Bench.

- b. The Authorised Share Capital of the Company is Rs.55,00,01,000/- (Rupees fifty five Crore and One Thousand only) divided into 5,50,00,100 (Five Crore Fifty Lakh and One Hundred) Equity shares of Rs10/- (Rupees Ten only) each.

The Issued, Subscribed and Paid-up Share Capital of the Company is Rs.48,49,45,350/- (Rupees Forty Eight Crore Forty Nine Lakh Forty Five Thousand Three Hundred and Fifty Only) divided into 4,84,94,535/- (Four Crore Eighty Four Lakh Ninety Four Thousand Five Hundred and Thirty Five) Equity shares of Rs.10/- (Rupees Ten only) each.

- c. The main objects of the company are to carry business of manufacturers, installers, maintainers, sellers, distributors, exporters, importers, agents and dealers of and in electrical and electronic devices, etc and it is currently engaged in the business of EPC Contractor and providing comprehensive infrastructure solutions for Power, Telecom, Defence, Water and Waste Water sectors in India and Abroad.

- d. When the scrutiny of records of the Applicant's company was undertaken, it was noticed that the company failed to appoint a Woman Director on its Board of Directors as per Section 149 of the Companies Act, 2013 read with Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014. Accordingly, the impugned show cause notice was issued to the company and its Directors by the Registrar of Companies (RoC), Hyderabad vide Ref No. RAP&TG/TBR/009561/2015/SCN/1054, dated 10.08.2015, under Section 149 of the Companies Act, 2013 read with Rule 3 of the Companies (Appointment and Qualification of the Directors) Rules 2014 questioning the applicants as to why penal action, under section 450 of the Companies Act, 2013, shall not be initiated against the applicants for not appointing a woman director on the Board of Director of the Company.
- e. The Company failed to reply to the said show cause notice.
- f. It was stated by the Applicants that the Company has appointed Mrs. Nivedita Rani Paturu, women director (Holding DIN: 02387966) on 28.09.2015, in accordance with the provisions of the Companies Act, 2013 and as per requirement laid down under Section 149 of Companies Act, 2013. However, the Company delayed in intimating the same to the RoC in Form DIR-12. Subsequently it was intimated to the RoC in Form DIR-12 only on 25.04.2016 .
- g. The RoC, in the absence of any communication or reply from any of the applicants and due to unavailability of any information with regard to the presence of a women director on the Board of Directors of the Company, filed a Criminal Complaint vide CC No. 900003 of 2016, under Section 450 of the Companies Act, 2013, before the Hon'ble Court of Special Judge for the Economic Offences-cum-VIII AMSJ Court, Hyderabad for prosecuting the applicants for non-compliance of Section 149 of the Companies Act, 2013 read with Rule 3 of the Companies (Appointment

and Qualification of Directors) Rules 2014. It is stated that the last hearing in the case was held on 28.04.2016 for examination under the Section 251 of the Criminal Code Procedure and the matter stands posted for Trial on 23.05.2016.

- h. It is stated that the provisions of Section 149 of Companies Act, 2013, came into force with effect from 01.04.2014. In terms of Section 149 of the Companies Act, 2013, a company, shall comply with such provisions within a period of one year from the date of the notification of section 149. The delay in the present case to appoint a Woman Director is 5 (five) months and 28 days.
- i. The applicants have filed affidavit dated 16th August, 2016 during the course of arguments by stating that the Company was undergoing a Corporate Debt Restructuring (CDR) scheme under the guidelines of Reserve Bank of India (RBI) since the Company is facing financial crisis. The reason stated for not appointing a woman director on the Board within the time prescribed is due to delay in obtaining various approvals and consents from various authorities.
- j. It is further stated that the Applicant Company or its officers/ directors have not intentionally, deliberately and wilfully committed the said offence and there was no malafide objective or purpose behind it.
- k. It is further submitted that the applicant Company incurred operating losses from previous year which are as follows

Sl No	Financial Year Ended	Losses during the year (Rs in Crores)	Accumulated Losses (Rs in Crores)
1	31 st March 2012	70	-
2	31 st March 2013	172	66
3	31 st March 2014	84	151
4	31 st March 2015	117	268

4. We have heard Mr Y. Suryanarayana, learned Counsel for Applicant on 10.08.2016 and 17.08.2016, carefully perused various averments made in the application dated 05.05.2016, additional averments made in the Affidavit dated 16th August, 2016 filed during the course of arguments and the report of RoC forwarded to CLB, Chennai vide proceedings No.ROCH/Legal/Sec149/621A/COMM/STACK/2016 dated 27.05.2016.
5. The Learned Counsel for the applicants, while reiterating the averments made in the application and in the Affidavit, has appealed to the Tribunal to consider the case by imposing minimum penalty as prescribed since the Company is not in good financial position and the violation in question is neither intentional nor deliberate and the violation was also made good later by appointing a woman Director.
6. The RoC while reiterating the averments made in application, it is stated that on 16.05.2016, the Company and its Directors Mr. Sumanth Paturu and Mr. Sreekumar Gopinadha Kurup have submitted an application under Section 621 A of Companies Act, 1956 for compounding of offence under Section 149(1) of Companies Act, 2013 for themselves and Company vide SRN: G03418597.

It is further stated that as per Section 172 of Companies Act, 2013; If a Company contravenes any of the provisions of this chapter and for which no specific punishment is provided therein, the company and every officer of the company who is in default shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees.

RoC has stated that, since the present offence is first offence committed by the Company, it can be considered on merits by the Tribunal

7. In the lights of above facts of the case, the issue to be decided in the present case is whether the NCLT is having power to permit the applicants to compound the offence in question, especially when prosecution was already initiated and the same is in advance stage.
8. We have noticed that similar issue arose for consideration in the case of *Reliance Industries Ltd Vs. Unknown* (1997 89 Comp Cases 67 CLB). After considering the relevant provisions and law, the Learned Member of Western Region Bench of CLB has held that the Company Law Board has been vested with the power, authority and jurisdiction to compound the offence and it is only when such compounding is done that the matter can be brought before the Learned Addl. Chief Metropolitan Magistrate, IIIrd Court, Esplanade, Mumbai to accord permission to compound the offences, which are punishable with fine or imprisonment or both. Accordingly, the case for compounding was considered on merits and then permitted the compounding of offences, subject to terms and conditions mentioned therein by the Learned Bench.
9. We have further noticed that the above decision was differed by Learned Member, Northern Region Bench, New Delhi by taking the stand that before taking up the issue of compounding offence by the Company Law Board, the applicants have to obtain prior permission of the Criminal Court, where prosecution for the same offence was pending. Accordingly, appropriate petition was moved before the concerned Criminal court by the applicant by seeking permission for composition of offence in question. However, the Learned Magistrate rejected the request by interalia observing that the court could not issue any direction to any of the parties to compound the offence.

10. The Learned Member of Company Law Board, by observing that there are two conflicting decisions rendered by the CLB benches on question of obtaining permission i.e., whether it is prior to or after compounding application, was of the opinion that the above question should be considered and decided by a larger Bench to be constituted by the Chairman of the Company Law Board.
11. Accordingly, a larger Bench, consisting of three members of CLB (Hon'ble P. Majumdar, Hon'ble S. Balasubramanian and Hon'ble C. Das) was constituted in the case known as Hoffland Finance Ltd Vs. Unknown (1997 Company Cases (Vol.90) 38). After considering the entire issue and law on the subject, it was ultimately held, by an order dated 12th May, 1997, that the exercise of powers by the Company Law Board under Section 621 A(1) is independent of exercise of powers by the Court under sub-section (7), and all offences other than those which are punishable with imprisonment only or with imprisonment and also fine, can be compounded by the Company Law Board without any reference to sub-section (7), even in cases where the prosecution is pending in a criminal court.
12. We have also come across another decision on the issue rendered by the Hon'ble High Court of Delhi in V.L.S Finance Ltd Vs. Union of India (UoI) and others (2003 VIII AD Delhi 166, 2005, 123 Company cases 433 Delhi, (2003)DLT 159) dealing with the said issue along with other issues raised therein. The Hon'ble Court, inter alia held at para 14 of the order dated 5th November, 2003, which is reproduced below:

“It is an accepted position that there is no decision of any High Court or of the Supreme Court on the aforesaid question except for the aforesaid decision of the Company Law Board in Hoffland Finance Ltd (Supra). I have carefully perused the decision of Hoffland Finance Ltd (Supra) and

also considered the arguments of the parties in order to arrive at a just and proper decision in the matter.”

It is further held therein that the Company Law Board can compound the offence of the nature prescribed under sub-section (1) either before the institution of the criminal proceeding or even after institution of criminal proceeding and the said power is not subjected to the provision of sub-section (7). Both are parallel powers to be exercised by the present authorities who have been empowered under the statute and one power is not independent on other. The Issue No. (ii) is accordingly answered against the appellant holding that the power exercised by the Company Law Board in the present case in compounding the offence although prosecution was pending, is legal and valid. The Hon'ble Supreme Court upheld the above decision.


13. In the light of above decision of the Larger Bench of Company Law Board and the subsequent decision of Hon'ble High Court of Delhi, the issue of the Company Law Board/NCLT having jurisdiction and power to compound offences, where no fine or imprisonment or both is prescribed under the Act, is no longer res integra. The Tribunal can exercise its jurisdiction under Section 621A of Companies Act, 1956 or its corresponding Section 441 of Companies Act, 2013. Though the applicants have filed the Application under Section 621A of the Companies Act, 1956, later they have mentioned Section 441 of the Companies Act, 2013 in their Affidavit dated 16th August, 2016. Hence, we are considering the merits of the case in question.
14. In the facts and circumstances of the case, especially when the violation in question was complied with by appointing a Woman Director with a delay of 5 months and 28 days and the Applicant Company was undergoing the Corporate Debt Restructuring (CDR) Scheme under the guidelines of Reserve Bank of India since the Company is facing financial crisis, we are convinced that prayer of the applicants deserved to be considered leniently by imposing a minimum penalty prescribed under the Act.

THIS BENCH DOTH ORDER

In the result, the application is allowed by imposing a compounding fee of Rs. 50,000/- to be paid by each of the applicants and deposit the same with the authorities within three weeks. After the receipt of compounding fee, the Registrar of Companies is directed to bring about the compounding of offence to the notice of the Learned Special Judge for Economic offences-cum-VIII AMSJ Court, Hyderabad for passing appropriate orders



RAVIKUMAR DURAISAMY (TECH)



RAJESWARA RAO VITTANALA (JUDL)