



ERGO

Analysing developments impacting business

OFFENCES UNDER THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 CANNOT BE COMPOUNDED UNDER THE CODE OF CRIMINAL PROCEDURE, 1973

27 July 2021

The Supreme Court of India's judgment dated 23rd July 2021 in "**Prakash Gupta v. Securities and Exchange Board of India**", Criminal Appeal No. 569 of 2021, has for the first time, interpreted Section 24A of the Securities and Exchange Board of India Act, 1992 (**SEBI Act**) holding that an offence under the SEBI Act can be compounded only under the SEBI Act and not as per Section 320 of the Code of Criminal Procedure, 1973 (**CrPC**).

The case was against the promoters of Ideal Hotels & Industries Limited for indulging in fraudulent activities of the initial public offering of shares. Pursuant to a complaint, the Securities and Exchange Board of India (**SEBI**) issued summons to the promoters under the SEBI Act alleging violations of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 1995 (**PFUTP Regulations**); the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 (**1994 Takeover Regulations**) and the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (**1997 Takeover Regulations**). SEBI also filed a criminal complaint before the Additional Chief Metropolitan Magistrate, Tis Hazari Court, New Delhi (subsequently redesignated Additional Sessions Judge - 02 Central District at Tis Hazari Courts, Delhi) (**Trial Judge**) alleging violations of the PFUTP Regulations and the 1994 Takeover Regulations. After failing to quash the proceedings under Section 482 of the CrPC, the promoters filed an application under Section 24A of the SEBI Act before the Trial Judge for compounding. SEBI, as per procedure, referred the application to its High - Powered Advisory Committee (**HPAC**). The HPAC, constituted for examining compounding applications, rejected the application which was informed to the Trial Judge by SEBI. The Trial Judge, relying on a decision of the Supreme Court held that an application for compounding could not be allowed without the consent of the complainant and dismissed the application which was upheld on appeal by the Delhi High Court.

The Supreme Court referred to the provisions of the SEBI Act dealing with compounding, circulars dated 20th April, 2007 and 25th May, 2012 issued for compounding and the Frequently Asked Questions (**FAQs**) on compounding. It observed that the HPAC's opinion on compounding under Section 24A must be placed before the judicial forum which is seized of the proceedings and the decision on compounding would be that of the judicial forum without being bound by the views of the HPAC.

The Supreme Court observed that the principle underlying compounding was that certain offences may be compounded as the party aggrieved may not want to continue

prosecution. The Court observed that under Section 320 of the CrPC, compounding would arise in two manners, cases compounded:

- by the parties themselves and
- with the leave of the court.

There were also offences which could not be compounded, by the parties themselves or with the leave of the court.

The Supreme Court held that Section 320 of the CrPC provided for compounding of offences under the Indian Penal Code, 1860 and that for offences not under the Indian Penal Code, 1860, compounding was possible only if the statute which created the offence contained a provision for compounding.

The Supreme Court noted that Section 24A of the SEBI Act began with a *non - obstante* clause, which read:

"Notwithstanding anything contained in the Code of Criminal Procedure, 1973..."

The court noted that Section 24A of the SEBI Act permitted any offence to be compounded only by the Securities Appellate Tribunal or the court before which proceedings were pending and never without the leave of the judicial forum. The court held that by incorporating a *non - obstante* clause in Section 24A, the power to compound offences punishable under the SEBI Act would not be controlled by the provisions of Section 320 of the CrPC and would be regulated only by the provisions of the SEBI Act. The Supreme Court appears to have applied the legal principle "*generalia specialibus non derogant*", in that a general law must yield to a special law, even though it is not mentioned in the judgment.

The Supreme Court also held that the language of Section 24A does not provide for the consent of SEBI to be mandatory for an offence to be compounded under Section 24A. The Supreme Court drew specific reference that where the recommendation of SEBI was necessary, it had been provided for as in Section 24B of the SEBI Act, where the Central Government could, on the recommendation of SEBI, grant immunity to a person from prosecution for offences under the SEBI Act.

In passing this judgment, the Supreme Court referred to a judgment of the Bombay High Court in **N H Securities Limited v. Securities and Exchange Board of India**, 2018 SCC OnLine Bom 4040, where the Bombay High Court held that the consent of SEBI was necessary for compounding application to be allowed. The challenge before the Supreme Court in Criminal Appeal No.1407 of 2019 (Arising out of S.L.P. (Criminal) No.1132 of 2019), was disposed by an order dated 17 September, 2019 where, the Court did not decide the question on whether the consent of SEBI was necessary for compounding an offence under Section 24A, which has now been determined in this judgment.

The Supreme Court also observed that since Section 24A was a provision that did not have any guidelines for its application, it laid down four guidelines to be followed while adjudicating applications for compounding:

- consider the factors in SEBI's circular dated 20th April, 2007 and the FAQs;
- give deference to the opinion of HPAC and differ from the opinion only when the reasons provided are *mala fide* or manifestly arbitrary;

- not to treat compounding applications as application for quash under Section 482 of the CrPC and
 - test whether the offence is private or public in nature and whether non - prosecution would affect others at large.
- *Thriyambak J. Kannan (Partner)*

For any queries please contact: editors@khaitanco.com

We have updated our [Privacy Policy](#), which provides details of how we process your personal data and apply security measures. We will continue to communicate with you based on the information available with us. You may choose to unsubscribe from our communications at any time by clicking [here](#).