

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No.171 of 2018

(ARISING OUT OF ORDER DATED 6th APRIL, 2018 PASSED BY NATIONAL COMPANY LAW TRIBUNAL, KOLKATA BENCH, KOLKATA IN APPEAL NO.525/KB/2017).

IN THE MATTER OF:

BEFORE NCLT BEFORE NCLAT

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| <p>1. Basant Kumar Berlia,
S/o Shri Ramabtar Berlia,
R/o Arun Tea Warehouse,
Bankimnagar,
P.O. Sevoke Road,
P.S. Bhaktinagar,
District Jalpaiguri,
Siliguri 734001
West Bengal.</p> | <p>2nd Petitioner</p> | <p>1st Appellant</p> |
| <p>2. Ashok Agarwal,
S/o Late Amilal Agarwal,
R/o 55, M.R. Road,
Khalpara,
Siliguri-734005
West Bengal.</p> | <p>3rd Petitioner</p> | <p>2nd Appellant</p> |
| <p>Vs</p> | | |
| <p>1. Registrar of Companies,
West Bengal Nizam Palace,
2nd MSO Building,
2nd floor,
234/4, Acharya Jagadish
Chandra Bose Road,
Kolkata 700017</p> | <p>1st Respondent</p> | <p>1st Respondent</p> |
| <p>2. M/s Horizon Ispat Company
Private Limited,
40/107 Ramkrishna
Samity Building,
Panitanki More,
Sevoke Road,
Siliguri
West Bengal 734001</p> | <p>1st Petitioner</p> | <p>2nd Respondent</p> |

Present: Mr Rajshekhar Rao, Ms Neha Sharma, Advocates and Ms Neha Somani, CS for Appellant.

None for Respondent.

J U D G M E N T**BALVINDER SINGH, MEMBER (TECHNICAL)**

The appellants, original 2nd and 3rd petitioners, have filed this appeal, under Section 421 of the Companies Act, 2013, being aggrieved by the impugned order passed in Appeal No.525/KB/2017 filed in National Company Law Tribunal, Kolkata Bench, Kolkata (NCLT in short) whereby the Appeal was dismissed on 6th April, 2018.

2. The brief facts of the case are that the 2nd respondent is a Private Limited company incorporated under the Companies Act, 1956 on 24th April, 2008. 1st and 2nd appellants are two directors in the Company and both of them are shareholders and each shareholder is having 5000 equity shares. As per Memorandum of Association, the main object, the company is engaged in the business of iron and steel including sponge iron, pig iron, hot rolling and cold rolling steel strips and objects incident or ancillary to the attainment of the main object is real estate development and construction.

3. 2nd respondent, since its incorporation in 2008, has always been regular in filing its financial statements and annual returns with the Registrar of Companies. The last financial year for which the filing was done, was 31.03.2013. Appellants stated that due to some internal problems the statutory returns of the 2nd respondent after 31.03.2013 could not be filed before the Registrar of Companies, West Bengal and therefore, 2nd respondent had not applied under Section 455 of the Companies Act, 2013 to take the benefit of being a Dormant Company. Appellants state that the company is still carrying on its business. Appellant did not take steps to file the annual

returns and the financial statements with ROC due to internal problems, therefore, the name of the company was struck off by the 1st respondent on June 9, 2017 (Page 87). A notice was issued dated 7.4.2017 (Page 85) giving 30 days' time to the 2nd respondent to file their objections, if any, otherwise their company's name will be struck off. 2nd respondent did not file their objections to ROC, therefore, 1st respondent struck off the name of the 2nd Respondent from the register of companies on 9.6.2017 and issued a Form No.STK-7, Notice of Striking Off and Dissolution, dated 30.6.2017 (Page 87) on the subject.

4. On coming to know, the original petitioners, 2nd, 3rd appellants and 2nd respondent herein, filed the company appeal/petition under Section 252(3) of Companies Act, 2013 before the NCLT, Kolkata praying that the name of the 2nd respondent be restored to the register of the Registrar of Companies and direct to modify the master data by modifying the status from "Strike Off" to "Active".

5. 1st respondent filed their reply and stated that under Section 248 of the Companies Act, 2013 the Registrar can strike off the name of a company from his register after complying with certain formalities as provided in the said Section when he has reasonable cause to believe that the company is not carrying on business or in operation. 1st respondent further stated that the competent authority has struck off the name of the 2nd respondent under Section 248 since he had reasonable cause to believe that the 2nd respondent was not carrying in business or in operation for the last three years. 1st respondent stated that the 2nd respondent company filed its Balance Sheets

and Annual Returns upto 2013 and thereafter did not file any Balance Sheet and Annual Returns under the Companies Act, 2013 before the ROC. 1st respondent further submitted that the Ministry of Corporate Affairs vide letter No.F.No.3.53/2017-CL II dated 17.02.2017 has observed that a large number of companies which have failed to file their Financial Statements or Annual Returns for the immediately two preceding financial years and have also not filed application under Section 455(1) of the Companies Act, 2013 for marking the company as Dormant and directed the ROC to take appropriate action for removal of names of such companies from ROC under Section 248 of the Companies Act, 2013. 2nd respondent was struck off after complying with the provision of Section 248 of the Companies Act, 2013.

6. After hearing both the parties the NCLT passed the impugned order dated 6th April, 2018. The relevant portion of the impugned order is as under:-

“19.xxxxxx It is significant to note that the provisional allotment was on 12.03.2012 and the company filed its balance sheets and annual return upto 2013 and thereafter the company did not file any balance sheets or annual return. If the petitioner is really interested to do business upon getting provisional allotment worth Rs.59 crores, certainly they would have been vigilant in processing the allotment and would have fulfilled the terms of allotment. From the data available it is understood that they have committed breach of terms of allotment and committed default in non-filing of statutory returns which they are duty bound to submit with the office of the ROC under the Companies

Act, 2013. From the above said discussion we can come to a legitimate conclusion that the appellant company is a sham company ever engaged in any business from the time of inception or it was in operation as alleged. We also found no valid reason for restoring a company of this nature. The appeal is, therefore, liable to be dismissed.

20. In the result, this appeal is dismissed. However, there will be no order as to costs.”

7. Being aggrieved by the impugned order dated 6th April, 2018 the appellants have filed this appeal and sought the following relief:-

a) The impugned order dated 6th April, 2018 passed by the Hon'ble National Company Law Tribunal, Kolkata Bench, Kolkata be set aside.

b) Stay of operation of the impugned order dated 6th April, 2018 till the disposal of the instant appeal.

c) The name of the company namely M/s Horizon Ispat Company Private Limited be restored to the file and/or to the register of the Registrar of Companies, West Bengal.

d) The respondent be directed to rectify the master data by modifying the status of the company namely M/s Horizon Ispat Company Private Limited from “Strike Off” to Active within the specific time as may be allowed by this Hon'ble Tribunal.

- e) An order be passed directing the respondent to place the name of the company in the same position as if the name of the company namely, M/s Horizon Ispat Company Pvt Ltd had not been struck off.
- f) An order of injunction be passed restraining the respondent whether by itself or by servants, men or assigns from taking any steps or further steps in terms of the Gazettee of India notification dated June 30, 2017.
- g) Ad-interim orders in terms of prayers above;
- h) Cost of and/or incidental to this application be paid by the respondent;
- i) Such further or other order or orders as this Hon'ble Tribunal may deem fit and proper.

8. The appellants have stated that the NCLT has caused injustice by passing the impugned order dated 6th April, 2018.

9. Appellants submitted that the NCLT erred in law and in fact by holding that none of the documents produced before it would show or conclusively hold that the appellant company is a going concern.

10. Appellants stated that the NCLT failed to consider that the 2nd respondent is the owner of a valuable piece of land admeasuring 4.65 acres situated in Jalpaiguri under registered deeds of conveyance.

11. Appellant stated that the financial statement of company commencing from 2013-14 disclosed that there were several long term borrowing taken in
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the name of the company from various creditors whose names are also reflected in the said financial statement.

12. Appellant stated that the NCLT erred in dismissing the appeal/company petition thereby destroying the valuable right which had accrued in favour of the company under the provisional letter of allotment dated March 12, 2012 issued by Luxmi Township Limited.

13. Appellant stated that NCLT erred in holding that 2nd respondent has no valid reason for not striking off the name of company.

14. Appellants stated that balance sheet for the financial years from 2014 to 2016 could not be filed with the ROC but the said financial statements was always prepared in time and was part of the company petition and also submitted before the Income Tax.

15. Appellant stated that the NCLT has wrongly held the company was not in business of trading, there was no revenue generation for some length of time and this was because the company was focused on real estate development projects.

16. Affidavit-in-opposition has been filed on behalf of Registrar of Companies through Mr. N. Chinnachamy, Dy. Registrar of Companies, West Bengal. 1st respondent stated that under Section 248 of the Companies Act, 2013 the Registrar can strike off the name of a company from his register after complying with certain formalities as provided in the said Section when he has reasonable cause to believe that the company is not carrying on business or in operation. 1st respondent further stated that the competent authority

has struck off the name of the 2nd respondent under Section 248 since he had reasonable cause to believe that the 2nd respondent was not carrying in business or in operation for the last three years. 1st respondent stated that the 2nd respondent company filed its Balance Sheets and Annual Returns upto 2013 and thereafter did not file any Balance Sheet and Annual Returns under the Companies Act, 2013 before the ROC. 1st respondent further submitted that the Ministry of Corporate Affairs vide letter No.F.No.3.53/2017-CL II dated 17.02.2017 has observed that a large number of companies which have failed to file their Financial Statements or Annual Returns for the immediately two preceding financial years and have also not filed application under Section 455(1) of the Companies Act, 2013 for marking the company as Dormant and directed the ROC to take appropriate action for removal of names of such companies from ROC under Section 248 of the Companies Act, 2013. 2nd respondent was struck off after complying with the provision of Section 248 of the Companies Act, 2013.

17. 1st respondent submitted that as per Section 252 of the Companies Act, 2013 a struck off company can be restored only on the direction of the NCLT within a period of three years from the date of the order of the ROC. 1st respondent further submitted that in terms of the said provisions the Hon'ble NCLT while passing an order of restoration is to be satisfied that the company is carrying on business or in operation.

18. 1st respondent further submitted that they are not at all concerned whether the 2nd respondent has filed any income tax return and 1st

respondent is also not aware whether the 2nd respondent is carrying on business or in operation after the notification dated 30.6.2017.

19. 1st respondent stated that pursuant to Section 164(2)(a) read with Section 167(1) of the Companies Act, the directors of the company are disqualified and also directors of the 2nd respondent stand vacated from their directorship.

20. We have heard the learned counsel for the parties and perused the record.

21. The main issue raised by the appellants that they are regularly filing the statutory returns and there were some internal disputes between both the directors and when the disputes were resolved, it was brought to their notice about non-filing of statutory returns with the ROC. When they approach the ROC they came to know the fact of striking off the name of the company and they filed the appeal/petition before the NCLT. Appellant stated that non filing of statutory returns and balance sheets is neither deliberate nor intentional on the part of the company.

22. On the other hand the 1st respondent had stated in its affidavit in opposition that Section 248 of the Companies Act, 2013 empowers the Registrar of Companies that he can strike off the name of a Company from the register after complying with certain formalities as provided by the said Section when he has reasonable cause to believe that the company is not carrying on business or in operation. 1st Respondent stated that he has

reasonable cause to believe that the company was not carrying in business or in operation for the last three years.

23. We have perused the record and noted that the 2nd Respondent has not filed the statutory returns after the year 2013. 1st Respondent vide its Form No.STK-5, Public Notice, dated 07.04.2017 (Page 85) gave notice to the company that it proposes to remove/strike off the names of the company from the register of companies and dissolve them unless a cause is shown to the contrary, within thirty days from the date of this notice. In spite of notice the company did not respond to the notice of ROC. Then vide Form No.STK-7, Notice of Strike off and Dissolution, dated 30.6.2017 (Page 87) the 1st respondent struck off the name of the 2nd respondent company from the register of companies. We have further perused the Income Tax Return Acknowledgement filed by the appellants for the Assessment year 2014-15, 2015-16 and 2016-17. We have noted, as per acknowledgement, that the Income Tax Returns have been filed on 30.3.2016, 31.3.2017 and 16.8.2017 respectively. These Income Tax Return for the year 2014-15 have been signed by Mr. Ashok Kumar Agarwal, Director and the Income Tax Returns for the years 2015-16 and 2016-17 have been signed by Mr. Basant Kumar Berlia, Director. We further noted that the Balance Sheets for years March, 2014, March 2015 and March, 2016 purport to have been signed by both directors and the Chartered Accountant on 27.8.2014, 27.9.2015 and 27.8.2016 respectively. These dates i.e. 30.3.2016 and 31.3.2017 for filing Income Tax Return for the FY 2014-15 and 2015-16 are prior to issuance of notice dated 7.4.2017. Similarly, the dates i.e. 27.8.2014, 27.9.2015 and 27.8.2016 on

which dates the Balance Sheets purport to have been signed by both the directors and the Chartered Accountant are also prior to issuance of notice dated 7.4.2017. If these documents were then available there is no reason why Notice dated 7.4.2017 was not responded to. Again from these documents filed by the appellants what appears is that there is no substance in the claim that there were dispute between the directors/shareholders and this is an afterthought that they could not file the statutory returns due to internal dispute.

24. Further to prove that the company is in operation, the appellants have filed bank account statement, copies of income tax return acknowledgement and a copy of letter of allotment dated 12th March, 2012 allotting land measuring 22.457 acres for residential cum commercial purpose on the Southern side of NH-31 at Uttorayon Satellite Township at Siliguri. We have perused these documents. We have noticed that copies of the Income Tax Return Acknowledgement have been filed and copies of the income tax returns have not been filed. Further the provisional allotment is based on a grant of lease for 99 years upon fulfilling certain clauses contained in the lease deed. No such lease deed produced for the perusal of this Appellate Tribunal.

25. We have also perused the directors' report at Page 97 for the FY 2013-14. The said directors' report has been signed by both the directors. It is clearly mentioned in the directors' report under heading **“Business Operations”- No business operation was carried during the previous year 2013-14. Your directors are hopeful to commence the business operation very soon.** This is precisely the position which is envisaged by law under

Section 455 of the Companies Act, 2013 for availing the benefit of being a dormant company. No efforts have been made by 2nd respondent to take the benefit of this provision. Similarly, for the Directors' report for the years ended 31st March, 2015 and 31st March, 2016 it is mentioned that **“No revenue generating activities took place during the year.”**

26. We have also perused the copies of income tax return acknowledgement filed by the appellants for the defaulted years to prove that the company is in operation. Filing of income tax return will not establish the company is in operation as this is primary/statutory responsibility to file the income tax return. Similarly, this is also the primary /statutory responsibility/duty of the directors to file the statutory returns/financial statements to ROC to establish that they are operational and compiling all the compliances as per the Act. The gross income for all these defaulted years upto the financial year ending on 31.3.2017 is zero. None of these documents satisfy us that the company is a going concern, or in operation.

27. We have gone through the argument of 1st respondent in which it is stated that as per Section 252 of Companies Act, 2013 a company can be restored only on the direction of Hon'ble NCLT within a period of three years from the date of the order of the Registrar. We also noted that the appellants had filed Company petition before the NCLT under Section 252(3) of the Companies Act, 2013. Section 252(3) of the Companies Act, 2013 states as under:

“If a company, or any member or creditor or workmen thereof feels aggrieved by the company having its name struck off from the register of companies, the Tribunal on an application made by the

company, member, creditor or workman before the expiry of twenty years from the publication in the Official Gazette of the notice under sub-section (5) of section 248, may, if satisfied that the company was at the time of its name being struck off, carrying on business or in operation or otherwise it is just that the name of the company be restored to the register of companies, order the name of the company to be restored to the register of companies, and the Tribunal may, by the order, give such other directions and make such provisions as deemed just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off from the register of companies.”

Thus the appellants are entitled to file company petition/appeal before the Tribunal under Section 252(3) of Companies Act, 2013. Therefore, we are satisfied that the appellants can file petition/appeal under Section 252(3) of the Act. 1st respondent while submitting his reply seems to have only dealt with Section 252(1) of the Companies Act, 2013 and have not dealt with Section 252(3) of the Companies Act, 2013 on the basis of which the appellants are seeking relief for restoration of the name of company which has been struck.

28. Further while arriving at the conclusion to struck off the name of the 2nd respondent from the register of companies, the ROC has to act as per Section 248(6) of the Companies Act, 2013. Section 248(6) of the Companies Act, 2013 states as under:-

“(6) The Registrar, before passing an order under sub-section (5), shall satisfy himself that sufficient provision has been made for the realisation of all amount due to the company and for the payment or discharge of its liabilities and obligations by the company within a reasonable time and, if necessary, obtain

necessary undertakings from the managing director, director or other persons in charge of the management of the company. Provided that notwithstanding the undertakings referred to in this sub-section, the assets of the company shall be made available for the payment of discharge of all its liabilities and obligations even after the date of the order removing the name of the company from the register of companies.”

As per the above Section the Registrar, before passing of order under Section 248(5), have to satisfy himself that sufficient provision has been made for the realisation of all amount due to the company and for payment or discharge of its liabilities and obligations and, if necessary, to obtain undertaking from the appellant and the assets of the company will be made available for payment. By not responding to the ROC of its notice, the appellants shall not be relieved from the responsibility which they were bound to give in the shape of undertaking under this provision.

29. Appellants have argued that the Hon'ble NCLT has erred in law in dismissing the appeal filed by them under Section 252(3) of the Companies Act, 2013. Appellants have argued that they have the fixed assets since 2011 and they have filed the returns upto 31.3.2013. We have noted that the Balance Sheet as on 31.3.2013 has not been filed with the appeal but the same has been filed for the years 31.3.2014, 31.3.2015, 31.3.2016. We have perused the Balance Sheet as on 31st March, 2014 in which the figures of previous year i.e. 31.3.2013 have also been reflected. In this Balance Sheet the Fixed Assets (land) of Rs.1,479,660.00 (Page 101) for the year as on 31.3.2014 and 31.3.2013 have been shown. Further the long terms loan and advances to the tune of Rs.108,311,111.00 (Page101) for the years 2013 and

2014 have been shown. These advances have been paid to M/s Laxmi township Ltd and Bandana Developers Pvt Ltd (Page 105). We have also perused the copies of conveyance deeds filed by the appellants at Page No.226 to 300 and found that the conveyance deeds were executed in favour of 2nd respondent on 4.5.2011, 30.4.2011. Similarly we have also perused the Balance Sheets for the years 31.3.2014 and 31.3.2015 now filed with the appeal. We find that the figures for Fixed Assets, Long Term Loans and Advances and Short Terms Loans and advances have been shown in these Balance Sheets. Further as per the company has cash and Cash equivalents. The company has a short term loan of Rs.2,000,000/- as on 31.3.2013 which has been shown as 'Nil' as on 31.3.2014 (Page 101). Further as per Profit & Loss for the year ended 31st March, 2013 the loss is Rs.11,194/- and for the year ended 31st March, 2014 the loss is Rs.16,973/- (Page 101). From the Balance Sheet we found that they have advanced money to the people and have also taken short term loans from other persons. In the light of this we do not agree with the observations of the Learned NCLT that the 2nd respondent is a sham company.

30. We have noted that when the 1st respondent had issued Public Notice dated 7.4.2017 (Page 85) intimating the companies, including 2nd respondent, that their names of the companies would be struck off under Section 248(1) of Act, 2nd respondent was given 30 days' time from the date of publication of notice to send their objection to the ROC. 2nd respondent did not respond to the said notice. Thereafter, 1st respondent vide notice dated 30.6.2017 (Page87) struck off the name of the 2nd respondent from the register of

companies. Now these appellants had filed petition/appeal before the NCLT stating that the company is going concern and they have valuable assets, long terms loan and advances and filed petition/appeal under Section 252(3) of the Act. If the appellants had pleaded it before the ROC, then the ROC before striking off the name of the company under Section 248(5), would have considered the pleas now taken under Section 248(6) of the Companies Act, 2013. The appellants have now filed with this appeal the Balance Sheets for the years 2014, 2015 and 2016 which they could not file with ROC as the company name was struck off. Seeing the balance sheets and the company's huge investment which the company is having since 2011 and there are large amount of the loan and advances, it is possible that creditors could also be aggrieved persons, feeling aggrieved of company's name being struck off, may file an application for restoration of company's name, if its name is not restored. Thus it would be just and equitable to restore the name of the company to even avoid further legal proceedings.

31. The ROC in its reply also mentioned that pursuant to Section 164(2)(a) read with Section 167(1) of the Companies Act, the directors of the company are disqualified and also directors of the 2nd respondent stand vacated from their directorship. We are noting that the issue is restoration of the company and not related to disqualification of the directors or otherwise. As this is not the matter of the appeal, therefore, no opinion has been expressed by us over this matter as it is beyond the ambit of this appeal.

32. From the above discussions and observations we have come to the conclusion that in the light of huge investment made by the company and

above reasons it would be just that the name of the company is directed to be restored. The following orders/directions are passed:-

(i) Impugned order is quashed and set aside. The name of Respondent No.2 company shall be restored to the Register of Companies subject to the following compliances:

(ii) Appellants shall pay costs of Rs.1 lac to the Register of Companies within 30 days.

(iii) Within 30 days' of restoration of the company's name in the register maintained by the Registrar of Companies, the company will file all their annual returns and balance sheets due for the period ending 31.3.2014 to date. The company will also pay requisite charges/fee as well as late fee/charges as applicable.

iv) In spite of present orders, ROC will be free to take any other steps, punitive or otherwise under the Companies Act, 2013 for non-filing/late filing of statutory returns/documents against the company and directors.

34. The appeal is accordingly disposed of. No order as to costs.

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

(Mr. Balvinder Singh)
Member (Technical)

New Delhi
Dated:24.1.2019

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