

Shri Santosh Meenakshi Textiles Pvt Ltd vs Registrar Of Companies, ... on 1 July, 2019

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NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI
COMPANY APPEAL(AT) NO.335 OF 2018

(ARISING OUT OF JUDGEMENT AND ORDER DATED 20.07.2018 PASSED
BY NATIONAL COMPANY LAW TRIBUNAL, CHENNAI BENCH, CHENNAI IN
CP/270/(131)/2018)

IN THE MATTER OF:

Shri Santosh Meenakshi Textiles Pvt Ltd.
"Sethuram", No.15, Sundaresa Iyer Layout,
Trichy Road,
Coimbatore-641018
Tamil Nadu.

Appellant

Vs

Registrar of Companies, Tamilnadu, Coimbatore
Stock Exchange Building,
II Floor, No.683,
Trichy Road,
Coimbatore 641005

Respondents

For Appellant:- Mr Ayush Chaudhury, Advocate with Mr. S. Ramachandran, CA.
For Respondents: - Mr P.S. Singh, Advocate.

JUDGEMENT

(1st July, 2019) Mr. Balvinder Singh, Member (Technical) The present appeal has been filed by the appellant under Section 421 of the Companies Act, 2013 against the impugned order dated 20.7.2018 of National Company Law Tribunal, Chennai passed in Company Petition CP/270/(131)/2018 by which the appellant company is held liable to spend the amount of Corporate Social Responsibility (CSR) for the FY 2014-15 taking into account only the net profit for the FY 2013-14; the appellant company is held liable to adhere to the other provisions of Section 135 of the Act and the company is permitted to file an application for revision of financial statement or Board report after incorporating the information of CSR. Company Appeal (AT) No.335 of 2018

2. The brief facts of the case are that the appellant is a Private Limited Company incorporated on 1.9.2005. The appellant company made a net profit (profit after tax) of Rs.4,60,14,897/- and net profit (profit before tax) of Rs.5,68,70,023/- for the FY ended 31.3.2014. The company filed its financial statement alongwith Board Report with the ROC. On observing the Board Report of the company, ROC issued Show Cause Notice dated 23.1.2017 (Page 39 and 40) to the Company as to

why they have not complied with Section 135(1), 135(5) and Section 134(3)(o) of the Companies Act, 2013. In its reply dated 6.2.2017 (Page 41 and 42) the company intimated to the ROC that Section 135(1) of the Act is not applicable to the company, therefore, question of spending 2% of the average net profit and constitution of CSR Policy/CSR Committee pursuant to Section 135(4) does not arise. The company further replied that when Section 135(1) is not applicable to it, then Section 134(3)(o) is also not applicable and there is also no obligation on the part of the company to incur any expenditure and Section 135(2) does not apply.

3. The appellant filed Company Petition before the NCLT, Chennai under Section 131 of the Companies Act, 2013. Section 131 provides Voluntary revision of financial statements or Board's report. Copy of the Company Petition has not been annexed with the appeal. The appellant stated before the NCLT that the company was of opinion that the threshold limit of Net profit in Section 135(1) is profit after tax and hence do not attract provisions of Corporate Social Responsibility (CSR) and even if CSR [provisions are applicable the average net profit under Section 135(5) is negative and hence no amount could be set apart for CSR spending and hence the provisions of Section 135 are not attracted. The appellant further stated that the Act is a Company Appeal (AT) No.335 of 2018 New Act and that the CSR provisions are new and the company did not understand the provisions clearly and hence did not disclose the composition of the CSR Committee and the CSR Policy in its Report for the financial year ended 31.3.2015.

4. In reply ROC stated that the appellant should comply with the CSR provisions for the FY 2014-15. ROC further stated that the petition is not maintainable as ignorance of law is no excuse. ROC further stated that it disagrees with the contention of the appellant that even if the appellant fails within the purview of Section 135(1) of the Act since the average net profit for the 3 preceding financial years were negative it was not attracted by the provisions of Section 135.

5. After hearing the parties, the NCLT passed the impugned order dated 20.7.2018, the relevant portion is as under:-

"In view of this the Tribunal is of the opinion that the petitioner company is liable to spend the amount on account of CSR for FY 2014-15 taking into account only the net profit before tax for the FY 2013-14.

xxxx "The method of calculating the net profit is mentioned in Section 198 by which the calculation for arriving at the average net profit which is applicable from the FY 2014-15 is also mentioned. It is seen that sub-section (4) of Section 198 does not mention about taking into account the losses during the financial year prior to the commencement of this Act. However, there is no mention about excluding profit also for calculation of average net profit. In view of this the Tribunal is of the opinion that the petitioner company is liable to spend the amount on account of CSR for the FY 2014- 15 taking into account only the net profit before tax for the FY 2013-14. The Company is directed to adhere to the other provisions of Section 135 regarding constitution of the Board's committee on CSR and evolving a policy for implementing the same. Hence the company is permitted to file an application for revision of

financial statements or board's report after incorporating the information regard CSR for the FY 2014-15 as the FY in question falls within the "three preceding financial years", the section 131 reads as follows:

Company Appeal (AT) No.335 of 2018 "131 (1) If it appears to the directors of a company that-

(a) The financial statement of the company; or

(b) The report of the Board Do not comply with the provisions of Section 129 or Section 134 they may prepare revised financial or revised report in respect of any of the three preceding financial years after obtaining approval of the Tribunal on an application made by the company in such form and manner as may be prescribed and a copy of the order passed by the Tribunal shall be filed with the Registrar."

With the above directions the company petition CP/270/(131)/2018 stands disposed of."

6. Being aggrieved by the impugned order dated 20.7.2018 the appellant has preferred the present appeal. The appellant has prayed for the following relief:-

i) Impugned order dated 20.7.2018 be quashed.

ii) The applicant company is not attracted by the provisions of Section 135(1) for the FY 2014-15.

iii) The average net profit for the purpose of Section 135(5) shall be calculated considering the Net Profit of all the three preceding financial years; and

iv) The average net profit of the last 3 preceding financial years being Negative, the company is not required to appropriate any amount towards CSR expenditure during the Financial Year 14-15.

7. The appellant has stated that the appellant suffered losses in the earlier two financial years i.e. 2011-12 and 2012-13. Appellant further stated that the appellant made a Net Profit of Rs.4,60,14,897/- (profit after tax) and Rs. 5,68,70,023/- (Profit Before Tax). The appellant stated one of three criteria mentioned in Section 135 of the Companies Act is Net Profit of Rs.5 crores or Company Appeal (AT) No.335 of 2018 more during the immediately preceding financial year. Appellant further stated that if the company is covered by Section 135(1) it has to constitute a CSR Committee and state the CSR Policy in its Board Report under Section 134(3)(o) and shall spend at least 2% of the Average Net Profit of the last 3 preceding financial years under Section 135(5) of the Act.

8. The appellant stated that the threshold limit of Net Profit mentioned in Section 135(1) is Profit After Tax and hence the Company is not attracted by the CSR Provisions. The appellant stated, therefore, it did not constitute CSR Committee and did not state the CSR Policy of the Company in the Board's Report. The appellant further stated that even if the Section 135(1) is attracted, the Average net profit calculated under Section 135(5) is Negative and hence there is no amount that could be set apart for CSR spending and hence the provisions of Section 135 are not attracted.

9. Appellant further stated that net profit earned by it in the FY 2013-14 has to be calculated as per Rule 2(f) of the Companies (Corporate Social Responsibility Policy) Rules, 2014 and stated when it is so calculated the net profit (profit after tax) earned by it in FY 2013-14 is not within the threshold limited stipulated in Section 135(1) of the Companies Act.

10. In reply, Respondent has stated that the Ministry of Corporate Affairs has in its FAQ dated 12.01.2016 clarified that "Computation of Net Profit for Section 135 is as per Section 198 of the Companies Act, 2013 which is primarily Profit Before Tax that shall be considered for determining the Net Profit and as such in the present case, the appellant's profit before tax for the FY ending 31.3.2014 admittedly is Rs.5,68,70,023/-, which amount is above Company Appeal (AT) No.335 of 2018 the threshold limit for Net Profit in terms of Section 135(1) of Companies Act, 2013..

11. Respondent further submitted that the Respondent strictly disagrees to the contentions of the appellant that even if it is attracted by Section 135(1) of the Act, since the Average Net Profit (ANP) for the 3 preceding FY 2011-12, 2012-13 and 2013-14 was negative, it cannot be held accountable under the Section 135(5) of the Companies Act, 2013.

12. Rejoinder has been filed by the appellants reiterating its statement as stated in the appeal. Learned counsel for the appellant stated that even for the FY 2014-15 the appellant has already spent the amount on CSR activities and the same is reported in the Board's Report for the FY 2016-17.

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

14. Learned counsel for the Appellant argued that the net profit earned by the company in FY 2013-14 has to be calculated as per Rule 2(f) of the Companies (Corporate Social Responsibility Policy) Rules, 2014 and as per Rule 2(f) of Rules 2014 the net profit (profit after tax) earned by the company is not within the threshold limit stipulated in Section 135(1) of the Companies Act, 2013. Learned counsel further argued that the explanation appended to Section 135(5) of the Act has no relevance at all for the purpose of calculating the net profit earned by the company as the same was brought about by way of amendment only in the years 2018. Learned counsel further argued that prior to the amendment made to the explanation in the year 2018, there was no method for calculating 'net profit' earned by a company except as per Rule 2(f) and the net profit calculated as per the said Rule is the profit earned after Company Appeal (AT) No.335 of 2018 tax. Appellant further argued that the appellant is not attracted by the provisions of Section 135(1) for the FY Year 2014-15.

15. Learned counsel for the Respondent argued that the interpretation of 'Net Profit' and Section 135 proffered by the appellant is totally misplaced. Learned counsel for the Respondent argued that the explanation presently appended to Section 135(5) now reads as follows:-

"Explanation-for the purposes of this section "net profit" shall not include such sums as may be prescribed, and shall be calculated in accordance with the provisions of Section 198."

Learned counsel for the Respondent further argued that by amending the original explanation appended to Section 135(5) of the Act, the Legislature has not introduced a new method for calculating net profit but has only caused a clarification to the existing method of calculation. Learned counsel for the Respondent further argued that Section 198(5)(a) of the Act clearly stipulates that while calculating net profits, the income tax and super tax payable by the Company shall not be deducted, i.e. the net profits have to be reckoned before payment of tax and not after tax. Learned counsel for the Respondent further argued that method of calculating the net profit is applicable for the purposes of Section 135(5) as well as Section 135(1) of the Act. Learned counsel for Respondent further argued that there cannot be a situation where the net profit for the purpose of Section 135(1) is one and for the purpose of Section 135(5) is another. Appellant has filed calculation of net profit under Section 198 of the Act and average profit under section 135(5) of the Companies Act, 2013 at Page 38 of the appeal paper book (Annexure -1) which is as under:-

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16. We have heard the parties on this issue. The issue involved is whether the appellant is covered under Section 135(1) of the Act or not. Section 135(1) of the Act provides that every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crores or more during the immediately preceding financial year shall constitute a Corporate Social Responsibility of the Board consisting of three or directors, out of which at least one director shall be as independent director. As per the appellant's own calculation as quoted above the net profit is Rs.5,68,70,023/- for the FY 2013-14 which is apparently more than Rs. 5 crores i.e. threshold limited prescribed under Section 135(1) of the Act. Therefore, the company is covered under Section 135(1) of the Act. As such Appellant was liable to constitute Corporate Social Responsibility Committee of the Board in the year 2014-15. Section 135(5) of the Act stipulates that Board of every company who comes under Section 135(1) of the Act shall ensures that the company spends in every year at least 2% of the average net profit of the company made during the three immediately preceding financial years in pursuance of the CSR. The net profit will be calculated as per Section 198 of the Companies Act,2013 and that the profit before tax will be taken as 'Net Profit'.

17. The next issue argued by the learned counsel for the appellant that even if it is the company is deemed to be covered under Section 135(1) of the Act, then also it is not liable to expend any sum towards CSR in as much since the company had incurred losses in FY 2011-2012 and 2012-13 and the average net profit calculated for the three FY comes in negative. Company Appeal (AT) No.335 of 2018

18. Learned counsel for the Respondent argued that the appellant has not gone through the contents of Section 198(4)(l) which clearly provides the period from when the deduction of excess expenditure over income shall be applicable while computing the Net Profit. Learned counsel for the Respondent argued that the deduction of excess of expenditure over income is permissible only from the FY 2014-15 and not prior to that. Learned counsel for the Respondent further argued that the act of the appellant in deducting the excess of expenditure incurred during FY 2011-12 and FY 2012-13 from the Net Profit Before Tax for FY 2013-14 and the Average Net Profit calculated and arrived at post the said deductions, is not valid as per Companies Act, 2013.

19. The NCLT has directed the appellant herein to spend the amount on account of CSR for the FY 2014-15 taking into account only the net profit before tax for the FY 2013-14. We are unable to agree with this observations of the NCLT which is clearly against the mandate of law that the amount to be spent is to be at least 2% of the average net profit of the company made during the three immediately preceding financial years in pursuance to its CSR Policy. In this connection the appellant has submitted the calculation at Page 38 (Annexure 1) of the appeal paper book in which net profit for FY 2011- 12 is -2,32,31,787/- and for FY 2012-13 is -1,97,68,641 and for FY 2013-14 is Rs.5,68,70,023/-. Thus in the last three years the company is made a profit of Rs.1,38,69,595/- and average net profit of three years will come to Rs.46,23, 198/-. If this contention of NCLT is accepted then it will defy the logic of provisions contained in the Act. If 2% of net profit of 2013-14 is required to be spent in FY 2014-15 on the same logic, 2% of net profit for the Company Appeal (AT) No.335 of 2018 FY 2014-15 will be spent in 2016-17 and so on. Hence the company would never be covered under the average net profit of three preceding years.

20. We have also gone through the calculation of appellant at page 38 of appeal book and the argument of the appellant that net profit of three years comes to negative. In the said calculation the figures of FY 2011-12 and 2012- 13 has been deducted twice from the figures of 2013-14, therefore, the figures have reached at negative level. We donot appreciate that the appellant has resorted to deducting the losses twice over to somehow arrives at a negative figure to show that it is not required to spend any amount on the CSR for the FY 2014-15. In the chart reproduced above Rs. 1,38,69,595/- will be the net profit of three years and dividing the same by three the average net profit for three years will have to be considered. Formula would be-from the net profit before Tax of 2014, first deduct the loss as reflected in 2012 and 2013 and the yield being still positive, will be the net profit of the three years. The method of calculation of average net profit for immediately preceding three years as discussed is applicable and not as directed in the impugned order.

21. The company has not constituted the CSR Committee. Further though it was asserted that the company did spent money on CSR activities (para 2 of rejoinder) but no proof has been placed before us of the amount spent on this exercise. Therefore, the company is defaulter for spending this amount during the year 2014-15.

22. In the impugned order the company has been permitted to file an application for revision of financial statements or board's report after incorporating the information regarding CSR for FY 2014-15. Appellant has Company Appeal (AT) No.335 of 2018 not challenged this observation. Hence we are not expressing our opinion on this issue and direction of NCLT stands.

23. For the above reasons we partially modify the impugned order:

ORDER

i) We hold that the appellant was liable to constitute Corporate Social Responsibility Committee of the Board in terms of Section 135(1) in 2014-15 as net profit of the company in the preceding year was more than Rs.5 crores.

ii) The method of calculation for the purpose of Section 135(5) would be as indicated by us in para 20 (supra).

iii) Appeal is disposed accordingly. Parties to note and act accordingly.

No costs.

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

(Mr. Balvinder Singh)
Member (Technical_

New Delhi:

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