

Registrar Of Companies West Bengal vs Goouksheer Farm Fresh Pvt Ltd & Anr on 19 November, 2020

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI

Company Appeal (AT) No. 127 of 2020

[Arising out of Order dated 22.01.2020 passed by the National Company Law Tribunal, Kolkata Bench, Kolkata in C.P. No. 183/KB/2020]

IN THE MATTER OF:

Registrar of Companies

Nizam Palace, IInd M.S.O. Building, 2nd Floor,
234/4, Acharya Jagdish Chandra Bose Road,
Kolkata - 700020,
West Bengal.

...Appellant

Versus

Goouksheer Farm Fresh Pvt. Ltd.

39, Sambhunath Pandit Street, Kolkata 700025

(To be represented through Respondent No. 2 being the

Interim resolution Professional of the company M/s

Goouksheer Farm Fresh Pvt. Ltd. as appointed by NCLT

Kolkata Bench as well as the Company is struck off and under
CIRP].

Sanjeev Jhunhunwala

S/o Sri Ramavtar Jhunhunwala

Siddha Weston, 9 Weston Street, Suite No. 134,

Kolkata 700013, West Bengal.

[Interim Resolution Professional of Respondent No. 1 in

CP (IB) No. 1582/KB/2019 and Applicant in CP No.

183/KB/2020 for revival of Respondent No. 1]

...Respondents

Present:

For Appellant: Mr. Sumit Kumar Jaiswal, Mr. Priyanshu Upadhyay
and Mr. Kumar Anurag Singh, Advocates

For Respondent: Mr. Sanjeev Jhunhunwala, Mr. Soumya Dutta (IRP)
and

Mr. Rahul Parasrampuriah (CS), for Respondents No.1&
2

J U D G M E N T

Venugopal M. J Introduction The Appellant has filed the instant Company Appeal being dissatisfied with the order dated 22.01.2020 passed by the 'National Company Law Tribunal', Kolkata Bench, Kolkata in C.P. No. 183/KB/2020 whereby the Company Petition was allowed with necessary directions.

2. The 'National Company Law Tribunal', Kolkata Bench, Kolkata while passing the impugned order dated 22.01.2020 had observed the following: -

"Ld. Counsel for the Petitioner appeared. Ld. Dy.

ROC, WB appeared.

CP No. 183/KB/2020 is filed by the RP for restoration of the name of the company (M/s Gouksheer Farm Fresh Pvt. Ltd.) in the register maintained by the Registrar of Companies.

2 Company Appeal (AT) No. 127 of 2020 This company is admitted in CIRP vide order dated 13.12.2019 in CP (IB)No. 1582/KB/2019. For completion of CIRP effectively, we restore this Company under Section 252(3) of the Companies Act, 2013.

We direct the ROC, WB to restore the name of the company in the register of companies. We further direct the ROC, WB to not to levy any fee/penalty to the company because company is in CIRP."

and consequently, allowed the Company petition with this direction and disposed of the same.

Resume of Facts

3. The Registrar of Companies (Appellant) had struck off the name of the First Respondent / Company M/s. Gouksheer Farm Fresh Pvt. Ltd. after complying with all the requirements of Section 248 of the Companies Act, 2013 and the relevant rules made thereunder viz. Companies (Removal of Names of Companies from Register of Companies) Rules 2016.

3 Company Appeal (AT) No. 127 of 2020

4. The 'Financial Creditor' (M/s. P.M. Cold Storage Pvt. Ltd.) filed an application u/s 7 of the 'I&B' Code r/w Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 against the First Respondent/ 'Corporate Debtor' M/s. Gouksheer Farm Fresh Pvt. Ltd. in CP (IB) No. 1582/KB/2019 wherein, by means of an order, the application to initiate 'Corporate Insolvency Resolution Process' against the 'Corporate Debtor' was admitted on 13.12.2019. Mr. Sanjeev Jhunjhunwala was appointed as an 'Interim Resolution Professional'.

5. The second Respondent in his capacity as an 'Interim Resolution Professional' pursuant to the direction of the 'National Company Law Tribunal', Kolkata Bench, Kolkata filed Company Petition No. 183/KB/2020 u/s 252(3) of the Companies Act, 2013 for restoration of the name of the First Respondent / Company together with the prayer to allow the second Respondent (Petitioner) to comply with the formalities of filing the pending Annual Returns of the said Company (struck off) without the payment of the penal fees levied by the Appellant / Authority.

6. The Tribunal through order dated 22.01.2020 disposed of the C.P. No. 183/KB/2020 ordering restoration of the Company with the direction to the Appellant not to levy any fee / penalty to the

Company because of the fact that the Company is in 'Corporate Insolvency Resolution Process'.

7. Assailing the Correctness, validity and legality of the impugned order dated 22.01.2020 passed by the Tribunal, the Appellant / Authority has 4 Company Appeal (AT) No. 127 of 2020 preferred the instant Appeal contending that Section 403 (1) of the Companies Act, 2013 specifies that any document required to be filed under the Act shall be filed within the time prescribed in the relevant provisions on payment of such fee as may be prescribed.

Appellant's Submissions

8. The Learned Counsel for the Appellant submits that as per first proviso to Section 403(1) of the Act, any document, fact or information required to be submitted, filed, registered or recorded, as the case may be, under Section 92 or 137 is not submitted, filed, registered or recorded, as the case may be, within the period provided in those Sections, without prejudice to any other legal action or liability under this Act, it may be submitted, filed, registered or recorded, as the case may be, after expiry of the period so provided in those sections, on payment of such additional fee as may be prescribed, which shall not be less than Rs. 100/- per day and different amounts may be prescribed for different classes of companies.

9. The Learned Counsel for the Appellant contends that in terms of Rule 12 of Companies (Registration Offices & fees) Rules, 2014, the documents required to be submitted, filed, registered or recorded or any fact or information required or authorised to be registered under the Act shall be submitted, filed, registered or recorded on payment of the fee or on payment of such additional fee as applicable, as mentioned in Table annexed to these Rules. However, the Tribunal directed the Appellant not to levy any fee / penalty to the Company.

5 Company Appeal (AT) No. 127 of 2020

10. It is the stand of the Appellant that as per Rule 87(a)(4)(d) of the 'National Company Law Tribunal' Rules, 2016 where the Tribunal makes an order restoring the name of a Company in the register of companies, the order shall direct that the Company shall file pending Financial Statements and Annual Returns with the Registrar and comply with the requirements of Companies Act, 2013 and Rules made thereunder within such time as may be directed by the Tribunal.

11. The Learned Counsel for the Appellant comes out with an argument that there is no enabling provision for 'Waiver of Fees/Penalty' under the Companies Act, 2013. It is further represented that there is no provision under the Companies Act, 2013 empowering the Appellant to enable filing of documents required to be registered / filed under the Act without payment of filing fee and /or payment of additional fee.

12. The other argument projected on the side of the Appellant is that the filing system in the office of 'Registrar of Companies' (under Ministry of Corporate Affairs) is fully online and the system exhibits the filing fee and additional fee (if there is a delay) pursuant to Section 403 r/w table of fees relating to Rule 12 of Companies (Registration Offices and Fees) Rules 2014 while uploading a particular

e-form/document by stakeholders and requires payment of the same for acceptance as part of the records of the 'Ministry of Corporate Affairs'.

6 Company Appeal (AT) No. 127 of 2020

13. The Learned Counsel for the Appellant brings to the notice of this Tribunal that the Company had filed its 'Balance Sheet' only upto the year 31.03.2015 and 'Annual Returns' only upto the year 31.03.2016.

14. It is represented on behalf of the Appellant that the second Respondent (IRP) has no locus standi to file an application for restoration of the Company u/s 252(3) of the Companies Act, 2013. Besides this, it is the plea of the Appellant that restoration of Company is not required for recovering the dues or carrying out 'Corporate Insolvency Resolution Process' or 'Winding Up' proceedings of the struck off Company as per Sections 248(8) and 250 of the Companies Act, 2013.

15. In effect, it is the prime stand of the Appellant that the Tribunal had no jurisdiction in issuing a direction to the Appellant to waive the payment of fee / penalty and any such endeavour would be devoid of Law. Second Respondent's Pleas

16. Section 403 of the Companies Act is to be referred and / or taken into consideration only at the time of filing of any documents, records which is required to be filed under this Act. Further, Rule 14 of 'National Company Law Tribunal' Rules, 2016 empowers the 'Tribunal' to exempt the parties from compliance with any requirement of these Rules.

17. Moreover, Rule 11 of the 'NCLT' Rules the grants power to the Tribunal to make such orders as may be necessary for meeting the ends of justice. The 7 Company Appeal (AT) No. 127 of 2020 Appeal filed by the Appellant is not maintainable. A duty is showered on the Registrar of Companies upon receiving the direction from the Tribunal to restore the Company as if the name of the Company had not been struck off from the 'Register of Companies'.

Appraisal

18. According to the Appellant, the present Appeal is well within the limitation period as per Section 421(3) of the Companies Act, 2013 as the Appellant's office came to know about the impugned order only on 05.02.2020 when it received the letter dated 03.02.2020 from the authorised representative of the second Respondent enclosing the copy of the impugned order dated 22.01.2020 passed by the Tribunal, Kolkata Bench in in C.P. No. 183/KB/2020. Thereafter, the office of the Appellant had applied for a certified copy of the impugned order on 04.03.2020 and the same was received on 11.03.2020.

19. The categorical stand of the Appellant is that the Ministry of Home Affairs, Government of India imposed a nationwide lockdown due to COVID 19 being declared as 'pandemic' by the World Health Organisation w.e.f. 24.03.2020 which was extended from time to time by the 'Ministry of Home Affairs' and the 'State Governments'.

20. Added further, the Appellant takes a plea that the Hon'ble Supreme Court issued a direction for extension of the period of limitation as per order 8 Company Appeal (AT) No. 127 of 2020 dated 23.03.2020 in Suo Motu Writ Petition (Civil) No. 3/2020. In fact, the 'National Company Law Appellate Tribunal' vide F.No. 10/37/2018 dated 24.03.2020 extended the period of limitation for filing the Appeal before it w.e.f. 15.03.2020 till further orders in terms of the direction dated 23.03.2020 issued by the Hon'ble Supreme Court in Suo Motu Writ Petition (Civil) No. 3/2020.

21. The Learned Counsel for the Appellant points out that the period of limitation of 45 days in the present case will lapse on 24.07.2020 and the details are as under:-

05.02.2020 to 04.03.2020 29 days 11.03.2020 to 14.03.2020 04 days 13.07.2020 to 24.07.2020 12 days and, therefore, it is contended on behalf of the Appellant that the instant Appeal is well within the period of limitation.

22. Taking into consideration of the aforesaid sufficient pleas of the Appellant in a careful, cautious, practical, meaningful and pragmatic manner, when no lack of bonafides or inaction or negligence is attributable to the Appellant, this Tribunal, by resorting to a result oriented approach and avoiding a pedantic approach without any haziness holds that the instant Appeal filed by the Appellant is well within the period of limitation.

23. It is to be pointed out that there are two circumstances in which the Tribunal can exercise power to restore the name of the Company (i) when it is 9 Company Appeal (AT) No. 127 of 2020 satisfied that the Company was at the time of striking off its name from the register, carrying on business or was in operation. (ii) When it appears to the Tribunal that it is 'otherwise just' that the name of the Company be restored as per decision 'M.A. Panjwani' V. 'Registrar of Companies and Ors.' reported in (2015) 124 CLA 109(Delhi).

24. At this stage, this Tribunal amply points out that the Hon'ble Supreme Court in the decision 'Helen C. Rebella' V. 'Maharashtra S.R.T.C.' reported in (1999) 1 SCC at page 90 had observed that the word "just" denotes equitability, fairness and reasonableness having a large peripheral field.

25. Furthermore, in the decision 'Sidhant Garg and Anr.' V. 'Registrar of Companies and Ors.' reported in (2012) 171 Comp.Cas. 326 it is held that the word "just" would mean that it is fair and prudent from a commercial point of view to restore the Company and that the Court has to examine the concept of 'justness' not exclusively from the perspective of a creditor or a member or a debtor but from the perspective of the society as a whole.

26. In the decision 'M.A. Rahim and Anr.' V. 'Sayari Bai' (DB) reported in (MANU/TN/0218/1973) it is held that the word 'just' connotes 'reasonableness' and something conforming to 'rectitude' and justice, something equitable and fair.

27. In this connection, this Tribunal, worth recollects and recalls the decision 'Ratanshi Panchan Tank' V. 'Registrar of Companies' Kerala and 10 Company Appeal (AT) No. 127 of 2020 others (Full Bench) reported in 1969 KLT p 858 wherein at paragraph 3 and 4 it is observed as under: -

"3. The services end when, on being so satisfied the Registrar proceeds to effect the registration, or, on not being so satisfied, he refuses registration. Although there would appear to be no express provision as in S. 80 of the Indian Registration Act that, "all fees for the registration of documents shall be payable on the presentation of such documents", it seems to us obvious that the fee payable for the registration of a Company, under S.611 r/w item 2 Schedule X of the Companies Act, is payable on the presentation for registration of the documents specified in sub-section (1) of S. 33 of that Act. That would only

11 Company Appeal (AT) No. 127 of 2020 be in keeping with the general scheme by which all statutory fees are invariably made payable before the commencement of the services for which they are intended.

4. The petitioner's case is that he has not been rendered the services for which he paid the fee and that therefore he is entitled to get back the fee but the Registrar never refused the services; in fact he has already rendered part of the services; and if the services have not been completed it is only because the petitioner does not want them. The Registrar is, and has been, ready to perform the services for which the fee was paid and complete the registration, or if the Company cannot be registered under the provisions of the Act, to refuse registration. Whatever be 12 Company Appeal (AT) No. 127 of 2020 the rights of a person who pays money under a contract for services to be rendered but subsequently declines the services, we do not think that, in the absence of a provision to that effect in the statute concerned, a person paying a fee under a statute has the right to get back the fee because he no longer wants the services for which the fee was paid. Whether he would have a cause of action for damages or for compelling the services, if the services are improperly declined, is an altogether different question."

28. In the decision 'Ascot Shoes Private Limited' V. 'Registrar of Companies' reported in (2017) 2 CompLJ118(Del) wherein at paragraph 12 it is among other things observed as under:-

"12.....At the same time, however, there is no gainsaying the fact that a greater degree of care was 13 Company Appeal (AT) No. 127 of 2020 certainly required from the petitioner Company in ensuring statutory compliances. Looking to the fact that annual returns and balance sheet were not filed for almost fourteen years, the primary responsibility for ensuring that proper returns and other statutory documents are filed in terms of the statute and the rules, remains that of the management."

and ultimately the petition was allowed by ordering the restoration of Company's name to the Register maintained by the 'Registrar of Companies' subject to the payment of costs of Rs. 22,000/-. Furthermore, liberty was granted to the Respondent therein to proceed with penal action against the Company, if so advised, under Section 162 of the Companies Act, 1956.

29. Section 252(1) of the Companies Act, 2013 deals with filing of an 'Appeal to Tribunal' by any person aggrieved by an order of the Registrar, notifying a Company as dissolved u/s 248 etc. Indeed,

an application to the Tribunal before the expiry of 20 years from the publication in the Official Gazette of the notice under sub-section 5 of Section 248 of the Act 14 Company Appeal (AT) No. 127 of 2020 can be made by any Member, Creditor or Workman thereof being aggrieved by the order of 'Registrar of Companies' striking off the name of the Company from the register of Companies as per Section 252(3) of the Companies Act.

30. In fact, every person having a pecuniary claim against the Company whether actual or contingent is a 'Creditor' as per decision 'State of Andhra Pradesh' V. 'Hyderabad Vegetable Products Company Ltd.' reported in 1962 32 Comp. cases p.164 (AP).

31. It is pertinently pointed out that Section 92 of the Companies Act, 2013 r/w Rule 11 of the Companies (Management and Administration) Rules, 2014 provides for filing of 'Annual Return' of a Company in the prescribed form. By filing the 'Annual Return' mentioning enough disclosures at the end of each 'Financial Year' no doubt, the 'Shareholders' interests and that of public' will be safeguarded. In reality, the liability under Section 92 of the Companies Act, 2013 is that even a defunct Company, like every other Company is under an obligation to file the statutory 'Annual Return' till it is wound up or till such time the Company is struck off by the Registrar as per Section 248 of the Companies Act, 2013.

32. Be it noted, that Section 403 of the Companies Act speaks of 'Fee for filing' etc. The Table of Fees for filing, etc. is given as Annexure to Companies (Registration Offices and Fees) Rules, 2014.

15 Company Appeal (AT) No. 127 of 2020

33. It is relevant to point out that a Court of Law / Tribunal may read any ancillary / incidental power in aid of main power. But, such an aid of incidental power ought not to fall in the domain of substantive power of any fora because substantive power is to be expressly conferred by the statute.

34. One cannot brush aside a primordial fact that there is no provision under the Companies Act, 2013 which permits the Appellant to file the documents sought to be registered /filed under the Companies Act without payment of the requisite filing fee and / or payment of additional fee. To put it cocksurely, there is no express / enabling for waiver of fees / penalty under the Companies Act.

35. It is to be remembered that Rule 12 of Companies (Registration Offices and Fees) Rules, 2014 says that the documents required to be submitted, registered or recorded or any fact or information required or authorised to be registered under the Companies Act shall be submitted, filed, registered or recorded on payment of the fee or on payment of such additional fee as applicable, as mentioned in table annexed to the Rules.

36. One cannot remain oblivious of the fact that, against the First Respondent / Company 'Corporate Insolvency Resolution Process' was initiated by a 'Financial Creditor' / P.M. Cold Storage Pvt. Ltd. in CP IB 1582/KB/2019.

37. An 'Appeal' can be filed by a 'person' aggrieved by the 'Registrar of Companies' 'Order' notifying the dissolution of the Company, within three 16 Company Appeal (AT) No. 127 of 2020 years from the date of order of the 'Registrar of Companies' communicating the reasons thereto.

38. In Law, the dissolution of a Company will not result in removing the 'Debtors' liability of the Company for the purpose of discharging the dissolved Company's obligations / liabilities /payment(s) it can carry on its operations.

39. As regards the plea of the Appellant that the restoration of Company is not needed for recovery of due(s) or carrying out the 'Corporate Insolvency Resolution Process' or winding up of the struck off Company as per Sections 248(8) and 250 of the Companies Act, 2013, it is to be pointed out that the C.P. No. 183/KB/2020 before the Tribunal was filed by the 'Interim Resolution Professional' (second Respondent) based on the direction issued by the Tribunal in its order dated 13.12.2019 to file necessary petition for restoration of the Company and hence, the said C.P. No. 183/KB/2020 is maintainable in Law.

40. In so far as the plea taken on behalf of the second Respondent that Rule 11 of 'National Company Law Tribunal' Rules, 2016 empowers the Tribunal to make such orders as may be necessary for meeting the ends of justice, it is to be pointed out that the same cannot be pressed into service, when Section 403(1) of the Companies Act, 2013 deals expressly with fee for filing etc. coupled with Rule 12 of Companies (Registration Offices and Fees) Rules, 2014 are regarded as an inbuilt, self-contained 17 Company Appeal (AT) No. 127 of 2020 and exhaustive ones. Viewed in that perspective, the invocation of Rule 11 of 'NCLT' Rules, 2016 by the second Respondent is of no avail.

41. Dealing with the stand taken on behalf of the second Respondent that Rule 14 of 'National Company Law Tribunal' Rules, 2016 empowers the Tribunal to exempt the parties on sufficient cause being shown from compliance with any requirement of these Rules etc., it is to be pointed out that when there is an existence of Rule 12 of Companies (Registration Offices and Fees) Rules, 2014 which is quite explicit, unambiguous, admits of no exception and deals with the documents required to be submitted, filed registered etc. to be made / done on payment of the fee or on payment of such additional plea as applicable, as mentioned in table annexed to these Rules, seeking umbrage to Rule 14 of 'National Company Law Tribunal' Rules, 2016 is an otiose one, because of the fundamental reason that the procedural wrangle cannot be permitted to be shaken or shackled with. Therefore, the contra stand taken on behalf of the second Respondent is not acceded to by this Tribunal.

42. For the foregoing detailed discussions and ongoing through the impugned order of the Tribunal in C.P. No. 183/KB/2020 dated 22.01.2020, this Appellate Tribunal, comes to a resultant conclusion that the issuance of direction to the Appellant / ROC, West Bengal to restore the name of the Company (M/s Gouksheer Farm Fresh Pvt. Ltd.) (First Respondent - in Appeal) for completion of 'Corporate Insolvency Resolution Process' effectively in the register of Companies cannot be found fault with.

18 Company Appeal (AT) No. 127 of 2020 However, the further direction issued by the Tribunal, to the Appellant 'not to levy any fee / penalty' to the Company because Company is in 'Corporate Insolvency Resolution Process' is legally untenable, especially in the absence of any express provision under the Companies Act, 2013 and the relevant Rules for waiver of fees / penalty in respect of filing of documents required to be registered / filed under the Companies Act and the said direction is set aside by this Tribunal, to secure the ends of substantial justice. Accordingly, the instant Appeal succeeds. Disposition In fine, the present Appeal is allowed. No costs.

[Justice Venugopal. M] Member (Judicial) [Kanthi Narahari] Member (Technical) NEW DELHI
19th November, 2020 ss 19 Company Appeal (AT) No. 127 of 2020