

Registrar Of Companies vs Apoorva Leasing Finance & Investment ... on 4 December, 2019

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NATIONAL COMPANY LAW APPELLATE TRIBUNAL
NEW DELHI

COMPANY APPEAL(AT) NO.88 OF 2019

(Arising out of impugned order dated 18.01.2019 passed by National Company Law Tribunal, New Delhi in CP No.179/271-272/ND/19).

In the matter of:

Registrar of Companies
NCT Delhi and Haryana,
4th Floor, IFCI Tower,
61, Nehru Place,
New Delhi.

Appellant

Vs

1. Apoorva Leasing Finance & Investment Co Ltd
Third Floor
13/331, Geeta Colony,
Delhi-110031

2. Union of India,
Through the Secretary,
Ministry of Corporate Affairs,
A Wing, Shastri Bhawan,
Dr. Rajendra Prasad Road,
New Delhi.

Respondents

Mr. Kamal Kant Jha, Sr.Panel counsel for ROC and Mr. Gopal Singh for ROC.
Mr. Arun Kathpalia, Sr. Advocate with Ms Anjali Sharma, Advocate for R1.
Mr. Shankar Kumar Jha, Sr. Panel Counsel for Union of India, R2.

JUDGEMENT

(4th December, 2019) Justice Jarat Kumar Jain, Member (Judicial) The appellant, Registrar of Companies has preferred this appeal against the order dated 18.1.2019 passed by National Company Law Tribunal, New Delhi whereby the winding up petition under Section 271-272 of Companies Act, 2013 filed against the Respondent No.1 company was dismissed with costs. Company Appeal (AT) No.88 of 2019 Union of India through MCA, being sanctioning authority was impleaded as Respondent No.2 in this appeal.

2. The Respondent NO.1 company was incorporated on 7.10.1983 with an authorised capital of Rs. 20 crores and a paid up capital for more than Rs.19.97 crores. The company is portrayed that it was in business of financing industrial enterprises. The Central Government in exercise of its powers under Section 235 of the Companies Act had ordered investigation into the affairs of one M/s NKS

Holding Pvt Ltd to Serious Fraud Investigation Office (SFIO). As per the final report submitted by SFIO it was revealed that Jain Brothers were found to be in control of NKS Holdings Pvt Ltd and the Jain Brothers were persons behind operations involving 49 shell companies whose business were financing industrial enterprises. SFIO in its report running more than 7000 pages also found that these companies are carrying out non-banking financial business without valid registration. The investigation pointed out to transactions pertaining to one M/s Jagat Projects Ltd whose shares were sold at a premium of Rs.390/- per share in January, 2009. These shares were purchased by 49 companies and were off loaded within a period spanning over a week to few months back to the nominee companies of Jagat Project. The transactions of sale of the shares in which a premium of Rs.390/- were reversed at a price of Rs.10/- per share. The entire transactions is alleged to be mere book entry no actual transfer of shares had taken place and only a commission being given to those involved in money laundering. Upon considering the report of SFIO, the Central Government accorded sanction on 29.08.2017 to the ROC to initiate winding up Company Appeal (AT) No.88 of 2019 proceedings against all 49 companies. The Respondent No.1 company is one of them.

3. Respondent No.1 company resisted the prayer mainly on the ground that before granting the sanction for initiation of winding up proceedings no reasonable opportunity of hearing has been given. However, after receiving the notice dated 07.07.2017 in reply to the notice Respondent No.1 requested for providing the copy of report to understand the allegations against the company and also prayed for personal hearing. But, without providing the copy of the report on 29.08.2017 sanction to initiate winding up proceedings has been granted. The sanction does not contain the allegations and documents which were considered for granting the sanction. It shows non-application of mind. Thus the sanction is not valid.

4. It is further stated that the Respondent No.1 company is incorporated in the year 1993 with paid up capital of Rs.19.97 crores. Its present business under a different Management is flourishing and legal. Winding up a company is a serious affair. It will adversely affect the interest of shareholders. Therefore, the petition be dismissed.

5. After considering the submissions and documents, NCLT has found that the petition has been filed without issuance of a proper sanction, and without giving a reasonable opportunity of being heard. Hence dismissing the petition with a notional cost of Rs.25000/- to be paid by the Department to Prime Minister's Relief Fund.

6. Being aggrieved ROC has filed this appeal.

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7. Senior Panel Counsel appearing on behalf of Appellant ROC submitted that ROC had sent a notice on 07.07.2017 (Annexure A-4) which contains substance of allegations against the Respondent No.1 company and it was directed to submit justifiable representation within 15 days. Respondent No.1 in response to the notice, had not submitted any representation. However, on 01.08.2017 reply was received from the Respondent No.1. On 29.8.2017 considering the material Respondent No.2 granted sanction for initiating winding up proceedings against the Respondent No.1. Respondent

No.1 company did not give reply to the specific allegations that the company was controlled by the Jain Brothers. During the year 2009-10 the Respondent Company was indulged in organised crime of money laundering activity and had subscribed the share capital of many beneficiaries during 2009-10. It is also submitted that the appellant has filed balance sheets, profit and loss accounts and the list of shareholders of the Respondent company. From these documents it is proved that the Respondent income was less than the expenditure in the year 2008-2009. On careful examination it was found that the figures were manipulated. NCLT has not considered these documents thus the finding of NCLT is liable to be set aside.

8. Learned Sr. Panel Counsel appearing for Respondent No.2 supports the argument of appellant and submits that it is settled law that by granting sanction the competent authority does not determine or decide any question and issue against the company but records its prima facie and administrative satisfaction for sanction for presenting the winding up petition which by itself does not affect any civil right of the company. In this regard cited the Company Appeal (AT) No.88 of 2019 Judgement of Hon'ble Calcutta High Court in the case of Kumarapuran Gopal Krishnan Ananthakrishnan Vs Burrdhwani Cutwa Railway Co Ltd (1978) 48 Company cases 611 (Calcutta) at Page 633.

9. Learned Senior Counsel for Respondent No.1 supports the impugned order and submits that Central Government had ordered investigation into the affairs of M/s NKS Holding Pvt Ltd to the SFIO. During this investigation Respondent no.1 was never called by the investigation agency. Therefore, there was no occasion for them to represent before the investigation agency. Respondent Company when received a notice dated 07.07.2017 then only they came to know that during the investigation into the affairs of M/s NKS Holdings Pvt Ltd involvement of Respondent No.1 was found. In the notice dated 07.07.2017 some conclusions are mentioned but it is not mentioned that how the Respondent No.1 company was involved in money laundering activity and no specific allegation against Respondent No.1 company. Therefore, the Respondent No.1 in reply to the notice requested for providing copy of report of SFIO so that they may be able to give a suitable reply of the notice. However, without providing the copy of the report Respondent No.2 has accorded the sanction for initiation of winding up proceedings against the Respondent no.1. Sub Section (3) of Section 272 of Companies Act, 2013 provides that Central Government shall not accord its sanction unless the company has been given a reasonable opportunity of making representations. But no such opportunity has been given to the Respondent No.1. Learned Sr. Counsel further submits that sanction dated 29.08.2017 does not contain the material which was considered by the sanctioning authority at the time of Company Appeal (AT) No.88 of 2019 granting sanction. It shows that in a very casual manner the sanction has been granted without applying mind. It is also submitted that the sanction letter is addressed to Director, SFIO whereas the proceedings has to be initiated by ROC, Delhi. Thus the Tribunal has rightly dismissed the petition for want of proper sanction under Section 272 of Companies Act, 2013.

10. We have considered the issue of sanction.

i) Whether the Respondent company has been given a reasonable opportunity of making representation; and

ii) Whether the Central Government has accorded the sanction as per law.

11. Undisputedly the Central Government ordered investigation into the affairs of M/s NKS Holdings Pvt Ltd to SFIO and the report was submitted on 31.03.2016 to the Ministry of Corporate Affairs. It is nowhere on record that during the investigation Respondent No.1 company was noticed. Therefore, the argument advanced by the Learned Sr. Counsel of Respondent No.1 that Respondent No.1 received notice on 07.07.2017 then only they came to know that in the report involvement of Respondent No.1 was found. The SFIO's report runs in more than 7000 pages incriminating 49 companies including Respondent NO.1. The Respondent No.1 company in reply to notice dated 07.07.2017 requested for supplying the copy of such report but copy has not been supplied to Respondent No.1. That even without considering this reply which was received on 01.08.2017 by the Respondent No.2 on 29.08.2017 sanction was accorded against the Respondent No.1 Company Appeal (AT) No.88 of 2019

12. Sub Section (3) of Section 272 of Companies Act, 2013 provides that "the Central Government shall not accord its sanction unless the company has given a reasonable opportunity of making representations."

13. The appellant and Respondent No.2 utterly failed to show that before granting sanction the Respondent No.1 has been given a reasonable opportunity for making representation.

14. Now we have considered the sanction. The relevant part is as under:

"To The Director, Serious Fraud Investigation Office, 2nd Floor, Pt Deendayal Antodaya Bhawan, B-3 Wing, CGO Complex, Lodhi Road, New Delhi-110003.

Sub:In the matter of M/s NKS Holdings Pvt Ltd & Ors-Issue of SCN U/s 272 (4) of the Companies Act, 2013-reg.

Sir,

I am directed to refer to the letter number

RD(NR).Inv/235/NKS/2017/5944 dated 11.08.2017 (copy enclosed) from RD(NR) on the subject cited above inter alia stating that complete files regarding issuance of SCNs to the companies be transferred to the O/o ROC Delhi for taking action pursuant to directions of the Ministry vide letters No.5/10/2013/CL-II dated 23.5.2017 and 15.6.2017. RD(NR) has also requested that SFIO's IOs may be directed to coordinate and assist the ROC, Delhi while finalizing and defending the winding up petition before the NCLT.

Company Appeal (AT) No.88 of 2019 In connection with above, I am directed to request you to forward copies of complete files to the O/o ROC Delhi and Inspecting Officer be directed to coordinate and assist the ROC, Delhi for filing winding up petition before the NCLT.

This issues with approval of Competent Authority.

Yours faithfully, Sd/-

(Sanjay Shorey) Joint Director."

15. This sanction order does not contain what are the allegations against the Respondent No.1 company and to substantiate the allegations what documents were placed before him. It is also not mentioned that before according sanction the company has been given reasonable opportunity of making representations. It is also not mentioned that the sanctioning authority prima facie satisfied with the allegations against the Respondent No.1 company. In this regard it is useful to cite the judgement of Punjab & Haryana High Court in the case of ROC Vs Suraj Bachat Yojna Pvt Ltd and Others 1973 (43) Comp Case 343. Though this case was under the old Act, 1956 but in substance the provisions of the new Act, 2013 are same.

"5.xxxxx The legislature enacted a safeguard for the companies not to be harassed by frivolous or doubtful-of-success petitions for its winding-up by the Registrar in Section 439(6) of the Act by enjoining on the Central Government not to accord its sanction to the Registrar u/s 439(5) unless an opportunity is afforded to the Company Appeal (AT) No.88 of 2019 company of making representations, if any. The delegate of the Central Government while according sanction, has a solemn duty to perform of informing himself about the true position of the company in the light of the explanations made by it. The explanations have to be considered with a judicial mind and outlook and are not to be discarded off-hand unless considered to be flimsy, fallacious or frivolous. It is not a mere formality to receive the explanations from the company and dismiss them as unsatisfactory without getting the doubts cleared. Xxxxx"

16. It is apparent that without giving reasonable opportunity of representation to Respondent No.1 the sanction has been granted that too without applying the mind thus we find no ground to interfere in the order passed by the NCLT. The appeal is dismissed. No order as to cost.

(Justice Jarat Kumar Jain) Member (Judicial) (Mr. Balvinder Singh) Member (Technical) (Dr. Ashok Kumar Mishra) Member (Technical) New Delhi Bm Company Appeal (AT) No.88 of 2019