

Alliance Commodities Pvt Ltd vs Office Of Registrar Of Companies, West ... on 9 July, 2019

NATIONAL COMPANY LAW APPELLATE TRIBUNAL, NEW DELHI
Company Appeal (AT) No. 20 of 2019

[Arising out of Order dated 26th October, 2018 passed by the National Company Law Tribunal, Kolkata Bench, Kolkata in CP (Appeal) No. 321/KB/2018]

IN THE MATTER OF:

Alliance Commodities Private Limited,
P-50, Princep Street,
Kolkata, West Bengal - 700 072.

...Appellant

Vs

Office of Registrar of Companies - West Bengal,
Nizam Palace, 2nd MSO Building,
2nd Floor, 234/4,
A.J.C. B. Road,
Kolkata - 700 020.

....Respondent

Present:

For Appellant: Mr. Dhiran Dave, PCS.

For Respondent: Mr. Vikram Singh, Dy. ROC, West Bengal.

J U D G M E N T

BANSI LAL BHAT, J.

Appellant - 'Alliance Commodities Private Limited' is aggrieved of dismissal of its appeal preferred under Section 252 (3) of the Companies Act, 2013 (hereinafter referred to as "the Act") against striking off of its name by the Respondent - 'Registrar of Companies, West Bengal' (ROC). The impugned order was passed by the National Company Law Tribunal, Kolkata Bench, Kolkata (hereinafter referred to as the 'Tribunal') on 26th October, 2018 in exercise of its appellate jurisdiction after coming to conclusion that the Appellant Company was not in operation and was not doing any business on the date of striking off of the name of the company. The Tribunal was further influenced by the fact that the Appellant Company appeared to have engaged in advancing inter-corporate loans in violation of Section 186(1) of the Companies Act, 2013. Aggrieved by the order of Tribunal, the Appellant seeks reversal of its order passed in appeal as also setting aside of the order of striking off of its name by Respondent primarily on the ground that the Appellant Company had assets and had filed all its income tax returns which has been ignored by the Tribunal

which landed in error in holding that the Appellant Company was a Shell Company and had violated provisions of law in giving loans and advances. The impugned order is assailed as being legally unsustainable.

2. For proper appreciation of the issue in controversy it would be appropriate to notice the facts. The Appellant Company was incorporated on 1st day of February, 2008 with an object of doing business of trading in all types of commodities. The Appellant had been complying with the statutory requirements of filing returns and financial statements till 2013 but thereafter failed to abide by the statutory compliances resulting in the name of the Appellant Company being struck off by the Registrar of Companies, West Bengal. In its appeal before the Tribunal the Appellant contended that the Appellant was unaware of the notice issued by the Respondent and thereby the default committed by the Appellant Company Company Appeal (AT) No. 20 of 2019 was unintentional. It sought restoration of its name on the aforesaid ground. The Registrar of Companies contested the appeal on the ground that the Appellant Company failed to file its Annual Returns and Financial Statements for more than two consecutive years and it did not pray for obtaining the status of a 'Dormant Company'. The Appellant Company was accordingly struck off after complying with the mandate of Section 248 of the Act as there were reasonable grounds to believe that the Appellant Company was not carrying on any business or was not in operation for a period of two immediately preceding financial years. The Tribunal found that the Appellant Company had not filed its statutory returns and balance sheets since 2014. It is contended that the ROC has issued notice under Section 248(1) of the Act r/w Rule 7 of the Companies (Removal of names of companies from the Register of Companies) Rules, 2016 in the prescribed form for removal of the name of the Company from the Register of the Companies. The petitioner Company's name is appearing at S. No. 272 of the Register of Companies notice (STK - 7) dated 30.06.2017 which was published in the official gazette on 15th July, 2017. The Tribunal also recorded the specific finding that all statutory notices have been issued in terms of Section 248 (1) of the Act to the Appellant and there was no irregularity or illegality in the ensuing action. The Tribunal also found that the Appellant had not even pleaded that it was doing business or was in operation on the date of striking off of its name by the ROC. On analysis of financial statements for the financial years 2013 to 2017, the Tribunal found that the Appellant Company was not doing the business of trading in Company Appeal (AT) No. 20 of 2019 all types of commodities as per its object but was engaged in granting of short term loans and advances for which it was not incorporated. Even these advances were made to the sister concern of the Appellant Company. The Tribunal found that there was no business activity and not even a single employee was paid any salary though some administrative expenses were incurred. The Tribunal also noticed that the Income Tax Return for the Assessment Year 2014 reflected gross income of the Appellant Company as Zero. The Statement of Bank Account was also found to be only referring to the transfer of funds by the Appellant Company in favour of its own sister concern. The Tribunal also took note of the fact that no shareholder's meeting was convened and the Director's Report revealed that no loans were advanced to others though the balance sheets did show that the Company was engaged in advancing loans. On noticing these facts, the Tribunal found that the Appellant Company was not a going concern and was not engaged in the business for which it was incorporated but was advancing money to corporate persons which could be viewed as an illegal transaction by a Shell Company. The Tribunal also held the appeal to be non- maintainable on the ground that the same had been preferred by a Director who was disqualified in terms of provisions

of Section 164(2)(a) of the Act.

3. Learned counsel for Appellant submits that the factum of the Appellant Company having financial assets, placing of its financial assets in the Promoter Group Company/Firms and filing of Income Tax Returns being admitted facts as reflected in the impugned order, the Appellant Company Appeal (AT) No. 20 of 2019 could not be struck off just for the reason of non-filing of Annual Return and Accounts with ROC culminating in deactivation of Director's DIN. It is submitted that the Appellant Company is eligible to be restored even under the Condonation of Delay Scheme 2018 (CODS) as the Appellant Company applied for its restoration much before closure of CODS. It is further submitted that the Director's DIN should be activated for doing business in other Companies and LLPs where they have ceased to be Directors due to deactivation of Director's DIN. Lastly it is submitted that the restoration of the Appellant Company can be ordered under Section 252 on the ground that it is 'just' to restore the Company to the Register of Companies.

5. Per contra, it is contended on behalf of ROC that notice contemplated under Section 248(1) of the Act r/w the Rule 3 of the Companies (Removal of names of companies from the Register of Companies) Rules, 2016, the notice dated 22.03.2017 was issued on 06.04.2017 by Speed Post to the Appellant Company and its Directors, copies whereof form Annexure (ii) to the Counter Affidavit. The copy of notice was published in the official website calling for objections to proposed removal/ striking off of the name of the Company within 30 days from the publication of the notice. The copy forms Annexure B to the Counter Affidavit. The copy of notice was published in the Official Gazette on 06th May, 2017 to 12th May, 2017. Copy thereof forms Annexure C to the Counter Affidavit. Public Notice dated 7th April, 2017 published in Times of India and in Bengali Newspaper - 'Anand Bazar Patrika' both issues dated 30th April, 2017. Copies thereof form Annexure D to the Company Appeal (AT) No. 20 of 2019 Counter Affidavit. The copy of notice was published in the official website - 'Company stands struck off from the Register of Companies' copy thereof is annexed as Annexure E to the Counter Affidavit. The copy of notice dated 30th June, 2017 was published in the Official Gazette dated 15th July, 2017 to 21st July, 2017, copy whereof marks Annexure F to the Counter Affidavit. It is submitted that the Appellant's name was struck off by ROC, West Bengal after following due procedure laid down in the Act. It is submitted that the Directors of the Company stand disqualified and the office of Directors stands vacated on account of incurring disqualification under Section 164(ii)(a) r/w Section 167(1) of the Act. It is further submitted that the reasons assigned for failure to file annual statutory returns by the Appellant are not tenable and that the Appellant failed to establish that it was carrying on any business or was in operation during the relevant period.

6. Heard the rival sides and perused the record. At the very outset we may overrule the objection raised by Respondent qua maintainability of appeal before the Tribunal at the instance of a Director whose status even otherwise as a member of the Company is not disputed. The issue before the Tribunal was whether the Appellant Company could justifiably be restored. As the very basic edifice of the action taken by the ROC culminating in striking off of the Company was assailed, the question relating to disqualification of Directors and vacation of the position of the Appellant Director from Directorship was anterior to the issue raised in Company Appeal (AT) No. 20 of 2019 appeal and did

not warrant consideration, much less returning of a finding regarding disqualification or otherwise of the Directors. Reliance placed by learned counsel for the Appellant on 'Condonation of Delay Scheme 2018', General Circular No. 16/2017 dated 29.12.2017 circulated by the Ministry of Corporate Affairs in regard to reactivation of 'Directors DIN' under orders of Tribunal is irrelevant as the same falls beyond the scope of issue raised in this appeal. Any observation by the Tribunal on the issue not being the subject matter of appeal would be beyond its province and cannot be supported. Viewed thus, finding in respect of maintainability being legally infirm and unwarranted is overturned.

7. Now coming to the core issue, we take note of the affidavit in opposition filed by the Respondent - ROC, West Bengal spelling out in detail the procedure adopted in passing of impugned order. It is noticed that the notice contemplated under Section 248(1) of the Act r/w the Rule 3 of the Companies (Removal of names of companies from the Register of Companies) Rules, 2016 dated 22.03.2017 was issued on 06.04.2017 by Speed Post to the Appellant Company and its Directors. The copy of notice was published in the official website calling for objections to proposed removal/ striking off of the name of the Company within 30 days from the publication of the notice. The copy of notice was published in the Official Gazette on 06th May, 2017 to 12th May, 2017. Public Notice dated 7th April, 2017 was published in Times of India and in Bengali Newspaper - 'Anand Bazar Patrika' both issues dated 30th April, 2017. The copy of notice was Company Appeal (AT) No. 20 of 2019 published in the official website notifying that the 'Company stands struck off from the Register of Companies'. The copy of notice dated 30th June, 2017 was published in the Official Gazette dated 15th July, 2017 to 21st July, 2017. Copies of relevant notices etc. form part of the record. No legal infirmity or flaw is pointed out in adherence to the provisions relevant to the process of striking off of the Appellant Company. It is found that the Appellant's name was struck off by ROC, West Bengal after following due procedure laid down in the Act.

8. On the crucial issue of the Appellant Company being in operation and doing business in consonance with its object be it noticed that the financial statements covering fiscal period beginning 2013 through 2017 amply demonstrate that the Appellant Company was not in operation and did not conduct any business of the nature bearing nexus with its intended object. The Tribunal has tabulated the factual position emanating from such financial statements reflecting the assets, liability and turn-over of the Company as 'NIL'. Thus, the finding that the Appellant Company was not doing the intended business cannot be termed erroneous notwithstanding the fact that the Appellant Company is shown to have been engaged in granting short term loans and advances to its sister concern which was not the intended object of the Company. During hearing of this appeal, learned counsel for Appellant tried to rely upon the so called admissions of Respondent in regard to transactions of the Appellant Company post 2013, least realizing that in absence of any proof of transaction other than the Company Appeal (AT) No. 20 of 2019 loans and advances made in favour of its sister concern, that too without the knowledge of shareholders and specifically negated by the Director's Report, no benefit could be derived from the so called admission in regard to the Appellant Company's activity in advancing loans to its sister concern. No fault can be found with the view taken by the Tribunal that making of such loan advances being prima facie violative of Section 186 of the Act can be termed as illegal transactions by a Shell Company and that probability of advancing loans for the purpose of siphoning of the funds and for evasion of tax cannot be ruled out.

Indulging in business activity not falling within the ambit of object of the Company or not being incidental or ancillary thereto cannot be termed a legitimate business for demonstrating that the Company was in operation. The finding recorded by the Tribunal and the conclusions deducible from the material on record do not warrant interference as no contrary view is possible.

9. Section 252 (3) of the Companies Act, 2013 empowers the Tribunal to order restoration of a Company whose name has been struck off from the Register of Companies, if such company, any member or creditor or workman thereof feeling aggrieved by such striking off applies before the Tribunal seeking restoration of the struck off company to the Register of Companies before the expiry of twenty years from the publication in Official Gazette of notice under Section 248(5). The exercise of such power is properly regulated and depends upon satisfaction of the Tribunal that the Company at the time of its name being struck off was carrying on business Company Appeal (AT) No. 20 of 2019 or in operation or otherwise it is 'just' that the name of company be restored. We do not find ourselves persuaded to agree with the proposition canvassed by learned counsel for the Appellant that inspite of Appellant's inability to demonstrate that the Company was at the relevant time carrying on business or in operation, the Tribunal had vast powers to order restoration of Company on the ground "or otherwise". This term "or otherwise" has been judiciously used by the legislature to arm the Tribunal to order restoration of a struck off company within the permissible time limit to take care of situations where it would be just and fair to restore company in the interest of company and other stakeholders. Such instances can be innumerable. However, this term "or otherwise" cannot be interpreted in a manner that makes room for arbitrary exercise of power by the Tribunal when there is specific finding that the Company has not been in operation or has not been carrying on business in consonance with the objects of the Company. A Shell Company or a Company having assets but advancing loans to sister concerns or corporate persons for siphoning of the funds, evading tax or indulging in unlawful business or not abiding by the statutory compliances cannot be allowed to invoke this expression "or otherwise" which would be a travesty of justice besides defeating the very object of the Company. Such course would neither be just nor warranted. Arguments raised on this score are repelled.

10. For the foregoing reasons, we are of the considered view that the Appellant has failed to make out a just ground warranting interference with Company Appeal (AT) No. 20 of 2019 the impugned order which is neither shown to be legally infirm nor are the findings recorded therein shown to be erroneous, much less perverse. Being devoid of merit the appeal is dismissed.

[Justice Bansilal Bhat] Member (Judicial) [Balvinder Singh] Member (Technical) NEW DELHI 9th July, 2019 AM Company Appeal (AT) No. 20 of 2019