

**In the National Company Law Tribunal
Kolkata Bench
Kolkata**

Before Shri Jinan K.R., Hon'ble Member (J)

C.P. (Appeal) No. 525/KB/2018

In the matter of:

An application Under Section 252 and other applicable provisions of the of the Companies Act, 2013;

-And-

In the matter of:

Mangaljoyti Infracon Private Limited (Company Name Struck Off by Registrar of Companies);

-And-

In the matter of:

Amit Srivastava, working for gain at 7A, Bentinck Street, Kolkata 700001 within the jurisdiction of this Hon'ble Tribunal;

...

...

Appellant/Petitioner

-Versus-

The Registrar of Companies, having its office at Nizam Palace, IInd MSO Building, 2nd Floor, 234/4, A. J. C. Bose Road, Kolkata 700020 within the jurisdiction of this Hon'ble Tribunal.

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Respondent

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Counsel appeared:

1. CA Shashi Agarwal] Appellant/Petitioner

Order pronounced on 04/09/2018

ORDER

1. This is an appeal filed by one Shri Amit Srivastava, a shareholder of Mangaljoyti Infracon Private Limited u/s. 252 of the Companies Act, 2013 challenging the order of striking off of the name of appellant's company by the Registrar of Companies, West Bengal (In short, ROC) and to restore the name of the company in the Register of Companies, West Bengal.

2. Brief facts for the consideration of the appeal is the following:-

(a) The appellant / petitioner is a shareholder of the company. The authorised capital of Rs. 1,00,000/- is divided into 10,000 equity shares of Rs. 10/- and issued subscribed, paid up capital of the company is Rs. 1,00,000/- divided into 10,000 equity shares of Rs. 10/- each.

(b) The appellant company was incorporated in the year 2012 and since incorporation all the legal formalities and compliance has been made by the company from time to time and there has been no fault or violation of the provisions of the Companies Act, 1956/Companies Act, 2013 except non-filing of annual returns and balance sheets for the year ended 31/03/2013 and for subsequent years. *The company is in operational and active. The Company is in*

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operational even though not active. Inadvertently the annual return and balance sheet could not be filed for the period ended 31/03/2013 due to disqualification of the directors of the company. When came to the knowledge that the balance sheet and annual return was not up-to-date filed to the Registrar of Companies, immediate steps were taken by the Director of the company. But at the time of filing it came to the knowledge of the director of the company that name has been struck off through the portal of Ministry of Corporate Affairs. This fact was informed to the shareholders. The company was active but unable to start business for which it was incorporated due to unfavourable business conditions. The delay in non-filing the return and annual statement on the part of the company had occurred because of the company accountant, who was responsible for statutory compliance along with the aforesaid work had failed to carry out his duties and at the same time directors/shareholders of the company are person who do not know all the provisions of Companies Act.

(c) The appellant company has not received any letter enquiring whether it was carrying on business or in operation. There is no question of respondent having any reasonable cause to believe that the company was not carrying on business or in operation. Non-filing of annual return and balance sheet cannot be ground for concluding that the company was not carrying business activities. The respondent had removed the name of the company from its List of Companies for the reason known to them. Respondent has not complied with the mandatory steps as suggested under the Companies Act. The Registrar of Companies has mechanically and without application of mind struck off the name of the company without referring to the accounts filed with the Registrar of Companies upto the period of 31/03/2013. STK-5 and STK-7 notice is self explanatory of the fact that the Registrar of

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Companies has struck off the name of the company in general notice without application of mind. In the notice it is not clear whether the company was not carrying business activities since incorporation or was not carrying any business activities since last two years just prior to the notice issued by the Registrar of Companies. Therefore, the final notice issued by the Registrar of Companies is a nullity as it has been issued without following the Rules and/or Statutes relating to the issue of notice. Due to non-filing of documents applicant is disqualified pursuant to Section 164 of the Companies Act, 2013 and in view of the notification by the Ministry of Corporate Affairs the appellant is entitled to submit the defaulted annual returns and financial statements on or before 2018 and that on filing those documents the Hon'ble NCLT is required for making the status of the company active.

(d) The name of the company was struck off contrary to the provisions of Section 248 of the Companies Act, 2013 as the name has been struck off and thereafter notice was issued u/s. 248. Official Gazette notice was published after the striking off the name of the company. The Registrar of Companies never investigated whether the company was carrying business activities. The Registrar of Companies has not sent individual notice as stated in the Companies Act, 2013 and accordingly the action of the Registrar of Companies u/s. 248(5) is a nullity. The company has regularly carrying on business as on the date of the company name struck off and was regularly filing income tax returns with the Income Tax Department. Therefore, action of striking off the name of the appellant company is unjustified and should not be permitted. The order of the Registrar of Companies is to be set aside and the name of the company is to be restored in the Register of Companies, West Bengal.

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3. The respondent, the Registrar of Companies, West Bengal, filed its report contending in brief is the following:-

(a) That as per the available records maintained by the office of the Registrar of Companies, West Bengal M/s Mangaljoyti Infracon Pvt. Ltd. was incorporated on 23.10.2012 and the aforesaid company was struck off on 09.06.2017 after complying with the provision of section 248 of the Companies Act, 2013. The Registrar of Companies has issued notices to the companies as well as to the directors under Section 248 (1) (in e-form STK-5) of the Companies Act, 2013 read with Rule 7 of the Companies (Removal of names of Companies from the Registrar of Companies) Rules 2016 for removal of name of the Company from the register of companies as there was reasonable cause to believe that the Company was not functioning or in operation for the period of last two (2) immediate preceding financial years and has not made any application within such period for obtaining the status of dormant company under Section 455 of the Companies Act, 2013.

(b) It is submitted further that due to non-filing of statutory returns by the Company, the competent authority drew an opinion that the Company was not carrying on business or in operation. Further, it is submitted that as per provision of Section 248 (5) of the Companies Act, 2013 after the expiry of the prescribed time period and as no response has been received from the company and the public, a notice (in STK No.7) dated 30.06.2017 was issued by the Registrar of Companies, West Bengal reflecting the name of the Company as strike off w.e.f. 09.06.2017. The petitioner company's name appears at Sl. No. 4038 of the Registrar of Companies Notice (STK-7) dated 30.06.2017 and the same was published in the Official Gazette on 15.07.2017.

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4. Heard the Ld. Pr. Chartered Accountant Mr. Shashi Agarwal and perused the records.

5. The Ld. Pr. C.A. submits that this is an appeal preferred under Section 252 (1) and not an application filed under Section 252 (3). Though the appeal seen filed quoting section 252 with out Sub-Section 1, he asserted that the appeal was intended to move under section 252(1) and not under section 252(3). He reiterated that the appeal is to be treated as an appeal under Section 252 (1) and not under Section 252 (3). The said submission was recorded by me at the time of hearing the appeal on 24th August 2018.

6. As per Section 252 (1), any person aggrieved by an order of the Registrar notifying the Company as "dissolved" under Section 248 may file an appeal to the Tribunal within a period of three years from the date of the order of the Registrar. The appeal seen filed on 28.03.2018 and the order of striking off the appellant Company was on 09.06.2017. That being so, if the appeal preferred is under section 252(1) is within the period of limitation.

7. As per Section 252 (1) if the Tribunal is of the opinion that the removal of the name of the Company from the Register of Companies is not justified in view of the absence of any of the grounds on which the order was passed by the Registrar, it may order restoration of the name of the Company in the Register of Companies. So, burden is heavy on the side of the appellant to prove that the ROC West Bengal strike off the name of the Company in violation of provisions of the Companies Act 2013.

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8. As per Section 248 no doubt the Registrar is competent to strike off the name of the Company upon two grounds. It is good to read Section 248(1) (a) and (c) quoted below:

"248. Power of Registrar to remove name of company from register of companies -

(1) Where the Registrar has reasonable cause to believe that -

(a) a company has failed to commence its business within one year of its incorporation [or];

...

(c) a company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under section 455,

he shall send a notice to the company and all the directors of the company, of his intention to remove the name of the company from the register of companies and requesting them to send their representations along with copies of the relevant documents, if any, within a period of thirty days from the date of the notice."

9. ROC West Bengal has filed reports submitting that he had complied with all the requirements which is mandatory under Section 248. The report of ROC indicates that he had issued STK-1, STK-5 and STK-7 notice and strike off the name of the Company in compliance of section 248(1) of the Act.

10. The Ld. Chartered Accountant submits that ROC has struck off the name of the Company without application of mind, without carrying proper investigation and that ROC erred in wrongly assuming that the Company is not carrying business activities. According to him ROC erred in concluding that the appellant Company is not carrying business activities based on non-filing of Annual Return and audited accounts. He

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reiterated that ROC wrongly struck off the name of the Company. He would submits that ROC without application of mind struck of the name of the company and without referring to the accounts filed with the Registrar of Companies up to the period 31.03.2013. He also contends that ROC has not sent individual notice as provided under the provisions of the Companies Act, 2013 and accordingly the action of the ROC under Section 248 (5) is a nullity as it has been issued without following the Rules / Statute relating to the issue of notice.

11. He further submits that as per Sub-Section 4 of Section 455 of the Companies Act, 2013 in a case the Company has not filed financial statements or annual return for two financial years consecutively, the Registrar shall issue notice to that Company and enter the name of such Company in the Register maintained for dormant Companies. According to him, in this case, instead of putting the Company in the register maintained for dormant companies, the registrar issued notice under Section 248 (1) and suo motu strike off the name of the Company assuming that the non-filing of the Company amount to non-operation of the Company and that presumption is illegal and baseless.

12. The appellant Company admittedly incorporated in the year 2012 i.e. on 23rd October 2012. It has come out in evidence that from the date of incorporation, the Company did not choose to file annual return or balance sheets. It is alleged that the ROC West Bengal failed in looking into the balance sheets of the appellant Company upto the period 31.03.2013. What is meant in the aforesaid pleading that ROC has mechanically and without application of mind struck of the name of the Company without referring to the accounts filed with the ROC upto the period 31.03.2013. In the notice it is stated that the Company's

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name is being struck off due to the following reason as per notice under Section 248 (5) of the Companies Act, 2013:-

"Notice is hereby given that the Registrar of Companies has a reasonable cause to believe that -

- (i) The following companies have not commenced business within one year of their incorporation.*
- (ii) The following companies (as per Annexure) have not been carrying on any business or operation for a period of two immediately preceding financial years and have not made any application within such period for obtaining the status of dormant company under Section 455."*

13. Truly the above notice is in a general format. Which default is applicable to the appellant is not specified as per the notice. It is the copy of notice. The original being not forthcoming whether there is any tick mark in it or not is not certain. On the other hand from the date of incorporation the appellant do not file any returns or financial statements with the ROC. Therefore, no defect in issuing notice as shown above can be inferred from the notice as alleged.

14. The appellant Company in the appeal memorandum on the other hand admitted its default in filing of annual return and balance sheets from the year ended 31.03.2013. The Company being incorporated on 23.10.2012, the filing of annual return and balance sheets does not arise prior to 31.03.2013. Therefore, evidently no return or balance sheet has been filed prior to 31.03.2013 with the ROC West Bengal. Therefore, the question of verification of the statement of account not filed with the ROC West Bengal does not arise. The contention that ROC

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not verified the statements of accounts before the order of striking off is therefore, found devoid of any merit.

15. Regarding the operation of the Company on the date of striking off the Company also there is inconsistency in the pleading in the Paragraph 7 of the appeal memorandum. Firstly, it is stated that the Company is operational and active. Immediately thereafter it is stated that the Company is operational even though not active. So, the appellant is not certain as to whether it is active or not. Therefore, the next question is whether the Company was in operation as on the date of striking off the name of the Company. To prove that the Company was in operation, what is produced on the side of the appellant is the financial statements from the year ending 31.03.2013. A look at the financial statements shows the following data:

F.Y. Ending	Asset	Liability	Current Asset		Turnover	Profit & Loss
31-03-2013	97,700	97,700	--		Nil	(2,300)
31-03-2014	95,052	95,052	--		Nil	(2,648)
31-03-2015	92,752	92,752	--		Nil	(2,300)
31-03-2016	11,90,267	11,90,267	681380 (Cash)	506587 Tangible	Nil	(2,485)
31-03-2017	11,87,393	11,87,393	680806 (Cash)	506587 Tangible	Nil	(2,874)

16. The aforesaid data provided in the Balance Sheets proves undoubtedly that the Company was not doing any business nor generated any income. Truly, as per the note annexed to the financial statements for the year ending 31.03.2016 and 31.03.2017 an expenditure for purchasing a machine is shown. According to the Pr. CA said machine was purchased for the purpose of manufacturing bricks. Ld. Pr. C.A. submits that till 2016 there was no business. However, the

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Directors desirous to operate its business by manufacturing bricks and for that purpose they have acquired a machine in the year 2016 and the cost spent in that year is shown in the Balance Sheet.

17. To strengthen that the machine has been purchased in the year 2016 is meant for construction of bricks, nothing is forthcoming. On the other hand, in the financial statement of 2017 the revenue is zero. There is also no rise in the expenses as per the statement. The overall screening of the financial statement, what I understood is that the expenses as shown in the Balance Sheet is related to office maintenance expenses including the Chartered Accountant's fees and nothing else. The expenditure for the maintenance of office not at all indicate that the company was doing any kind of business as alleged.

18. It is also alleged that the office is maintained by its staff. But nothing shows that any one employees are working in the company. On the other hand no expenditure towards salary seen spent as per the balance sheets. Under the head "Employees' Expenditure" no amount is shown as per the financial statement. Revenue on operation by way of sale for the financial year is also 'Nil'. Therefore, there is no employees working in the appellant Company as alleged. Preparation of Directors' Report in the above said background can only be inferred that it was prepared for stage-manage evidence.

19. The Directors report produced though shows that meetings of Directors have been convened, no proof produced to prove that shareholders' meeting has been convened. Copy of minutes books proving convening of meeting of shareholders not at all forthcoming. The financial statement and Director's Report forthcoming in the case in hand does not strengthen the case of the appellant that it was in

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operation on the date of striking off the name of the appellant. Being found that the appellant failed to file returns and financial statements for more than two years and evidence in the case in hand doesn't prove that the company was functional on the date of striking off the name of the company, the inference of the ROC that the company was not in operation is found true.

20. The appellant also produced copies of Annual Returns. A look at the extract from annual return of all the years produced shows that principal business activities of the Company is 'Nil'. Therefore, copy of annual return also not helpful to prove the appellant's contention that it was in operation and it was active on the date of striking off the name of the Company.

21. Though the appellant was asked to produce the copy of Bank Accounts, what is produced is a copy of statement of accounts dated 29.12.2017. Admittedly, there was no account maintained by the appellant Company prior to 29.12.2017. So, opening of account subsequent to the striking off the name of the Company not at all improve the case of the appellant. Therefore, the statement of accounts also not helpful to strengthen the contention of the appellant that the company was in operation. It is also significant to note here that without opening a bank account the appellant is keeping cash in hand which is barred after demonetization. Keeping of cash in hand can be revealed from the financial statements.

22. The next contention on the side of the appellant is that the ROC committed irregularity and illegality in striking off the name of the

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Company without complying Section 248 (1) of the Companies Act 2013. What is produced is the copy of the Notice STK-5 and STK-7.

23. No doubt ROC is competent to strike off the name of the Company but only after complying the requirement as provided under Section 248. Before striking off the name of the Company, ROC has to issue notice in Form STK-1 directing the Company or its directors to make representation within 30 days from the date of notice as provided under Rule 3(2). This notice is a 'Pre-Striking off Notice'. It is a notice sent to the appellant Company for enabling the Registrar to presume that the Company is inoperative. The appellant has no contention that he was not in receipt of STK-1 notice. The appellant has no contention that he has sent reply within 30 days of the receipt of the notice. It is in the said circumstances the Registrar has issued pre-strike off notice in Form STK-5 under Section 248(1) read with Rule 7.

24. This notice truly has to be issued to the Company and its Directors. It is submitted that the Directors were not served notice. That submission seen raised by the appellant only in the rejoinder and the rejoinder copy has not been served upon the ROC and ROC was not asked to submit its reply to the rejoinder. In the absence of calling for report as to the contention raised subsequent to the filing of report by the ROC, it cannot be inferred that there was no individual notice to the directors as alleged.

25. The said notice was also published in the official gazette under Sub-Section 4 of Section 248. ROC has recorded that he has published it in the official gazette. He also issued public notice in newspaper - English and Vernacular. The appellant has no contention that it was not published in the newspaper. Therefore, serving of STK-5 notice to the

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Company as reported by ROC West Bengal is to be believed in the absence of counter evidence on the side of the appellant.

26. ROC then again has to issue third notice after period of 30 days and upon expiry of 30 days ROC has to publish notice in the official gazette under Section 248 (5) read with Rule 9 in Form STK-7. STK-7 is a notice deemed to be a notice to the Company when the Company is dissolved. So, striking off the name of the Company is much before dissolution.

27. Here in this case ROC has stated that the name of the Company was struck off on 09.06.2017. STK-5 notice since served on 07.04.2017 as per the copy of the notice produced by the appellants and STK-7 notice has been served on the appellant on 31.06.2017. The copy of STK-1 notice not seen produced on the side of the appellant nor on the side of the respondent. It is submitted that there was no publication but in the report of the ROC he has reiterated that the publication as provided has been done and the appellant Company's name appearing at S. No. 4038 and the Gazette was published on 15.07.2017. The Annexure to STK-7 produced on the side of the appellant shows that S. No. 4038 is corresponding to the name of the appellant Company. Therefore, the contention on the side of the appellant that there was no publication of notice and the dissolution was without publication and strike off of the name of the Company was before 09.06.2017 is devoid of any merits.

28. On perusal of the documents produced on the side of the appellant and contention taken by the respondent in the report submitted by the ROC West Bengal, it appears to me that the Registrar has complied all the mandatory requirement which he obliged under

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Section 248 and discharged his obligation fairly and assumed that the Company was not in operation for want of filing returns for more than two years immediately before the date of strike off. Admittedly there is no application filed by the appellant for obtaining the status of the dormant Company under Section 455. Therefore, there is no irregularity or illegality in the order of striking off as alleged by the appellant.

29. At this juncture, Ld. Pr. C.A. asserted that Section 248(1) cannot be invoked by the Registrar without invoking Sub-Section 4 of Section 455. Sub-Section 4 of Section 455 is dealt with entering the name of an inoperative Company who fails in filing return for two financial years consecutively. Section 445 cannot be clubbed with Section 248. The power of invoking Section 248(1) and Sub-Section 4 of Section 445 are different. The power of Registrar under Section 248(1) is a power under the statute and not a duty as alleged by the Ld. Pr. C.A.

30. Being admitted the failure on the side of the appellant in filing the annual return even from the date of incorporation and evidence led in disprove the contention that the company was active and functioning since incorporation till the date of striking off the name of the company both grounds as provided under Section 248(1) seen fulfilled in the case in hand. It has come out in evidence that the appellant Company never functioned within one year from the date of incorporation and continued not to function even thereafter and failed to file returns and the balance sheets. It is a strong reason enabling the Registrar of Companies to have a presumption that it was not in operation. Therefore, the contention that the ROC passed order of striking off wrongly is found unsustainable under law.

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31. Being found that there is no irregularity or illegality in the finding of the Registrar that the Company was not in operation on the date of striking off the name of the Company and there is no justifiable reason to set aside the order of the ROC upon the ground as alleged I am of the view that the appeal cannot succeed. It is liable to be dismissed.

32. In the result the appeal is dismissed. However, no order as to costs.

Certified copy of the order may be issued to all the concerned parties, if applied for, upon compliance with all requisite formalities.

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(Jināth K.R.)
Member (J)

Signed on this, the 4th day of September, 2018.

hb/Aloke.