

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

CP No.: 57/441/NCLT/MB/MAH/2017

Under section 441 of the Companies Act, 2013

In the matter of

M/s. Eversmile Construction Co. Pvt.
Ltd., DB House, Gen. A. K. Vaidya
Marg, Goregaon (E), Mumbai,
Maharashtra - 400063.

.... Applicant Company

Heard on : 12.09.2017
Order delivered on: 21.09.2017

Coram :

Hon'ble M. K. Shrawat, Member (J)
Hon'ble Bhaskara Pantula Mohan, Member (J)

For the Petitioner :

Mr. Ketan Shantilal Dand, Practising Company Secretary - Authorised
Representative for the Applicants

Per: M.K. Shrawat, Member (J)

ORDER

Applicants/Defaulters Herein:

- 1) M/s. Eversmile Construction Co. Pvt. Ltd.
- 2) Mr. Narendra Shridhar Shastri - Director.
- 3) Mr. Timmurajapuram Subramaniam Venkatesh - Director.
- 4) Mr. Rajiv Batekrishna Agarwal - Director.

Section Violated:

S. 134 (3) (o) of the Companies Act, 2013.

WME

Punishment Provided Under:

S. 134 (8) of the Companies Act, 2013.

1. This Compounding Application was filed before the Registrar of Companies, Mumbai (hereinafter as **RoC**) on 25th November, 2016 and the same has been forwarded to the NCLT, Mumbai on 07th February, 2017. The Learned RoC has informed that, this application was filed because the Company has violated the provision of S. 134 (3) (o) of the Companies Act, 2013 (hereinafter as **Act**) r.w. Rule 8 of Companies (Corporate Social Responsibility Policy) Rules, 2014 for the Financial Year 2014-2015.
2. According to the provision of S. 135 (5) of the Act, the Board of Company was required to spend, in every financial year, at least 2% of the average net profit of the Company during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility (CSR) policy, applicable to every company having net worth of ₹ Five Hundred Crore or more, or turnover of ₹ one thousand crore or more, or having net profit of ₹ Five Crore or more, during Financial Year. Further the provision of S. 134 (3) (o) provides that, if company fails to comply with the provision of S. 135 (5), then the Board in its report shall specify the reasons for not spending the amount. But the Defaulters herein, neither spend the CSR amount as per S. 135 (5) of the Act nor they have complied with the provision of S. 134 (3) (o) of the Act. Hence, this Compounding Application has been filed by the Applicants/Defaulters herein so as to put the matter at rest.
3. The Learned RoC also reported that, the Company has made the said default good and subsequently filed the Form AOC – 4 with the RoC, by which the Directors Report for the Financial year 2015-2016 has been filed and in the same report the Defaulters have complied with the provisions of S. 134 (3) (o) for the Financial Year 2014-2015. on 15th Feb 2017

Facts of the Case:

4. As per the Applicant's own submissions made in the Compounding Application filed by them for violation of Section 134 (3) (o) of the Act, the Applicant has committed default as follows:-

"

➤ Under S. 134 (3) (o) r.w. Second proviso of S. 135 (5) of the Companies Act, 2013, the Petitioner Company was required to mention the reasons for not spending the CSR amount in the Directors' Report for the Financial year ended 2014-2015.

➤ The Petitioner Company has not mentioned the reasons for not spending the amount in its Directors' Report for the Financial Year 2014-2015 as required under the second proviso of S. 135 (5).

➤ With respect to the above contravention the Petitioner the Petitioner Company had received letter No. ROC/CSR/548 dated 19th May, 2016 requiring the Company to submit the details of CSR Expenditure made by the Company. The reply to the above mentioned letter was submitted on 1st July, 2016. Thereafter, a show cause notice ROC/CSR/548/134/2016/2391 dated 19th September, 2016 was again issued to the Company as the reply was not satisfactory according to MCA....."

Submissions:

5. The Ld. Representative for the Applicants/Defaulters herein submitted that, the Company has made good the default by spending ₹ 75,00,000/- on 12th August, 2016 towards contribution to undertake CSR activities approved by the CSR Committee through Goenka & Associates Educational Trust, a public trust, Registered under Bombay Public Trust Act, 1950 and which is well established long back in the year 1982 in local area at Mumbai with the

object of serving, pursuing and promoting education, including special education and employment enhancing vocation skills especially among children, Women, elderly and the differently abled and livelihood enhancement projects. It includes contribution towards sponsorship for the payment of school fees which helps in educating the needy and deserving students of schools and the same has also been mentioned in the Board's Report for the Financial Year 2015-2016 in point number 18 and Annexure 3 of the Board's Report. The same has been submitted to this Bench at the time of hearing of the Application. Further the Learned RoC in its report also recognises the same.

6. It is further submitted that, inadvertently the Applicants/Defaulters herein could not fulfil the conditions laid down under said section of the Companies Act, 2013 although the Applicants/ Defaulters herein were willing to comply with the provisions of the Companies Act, 2013 *bona fide*. Ld. Representative also stated that the aforestated violation was unintentional and without any wilful or *mala fide intention* as S. 135 of the Act was notified in the year 2014 and as the Company was not having full time Company Secretary there is ambiguity regarding applicability of the Section to the Company.

Findings:

7. Accordingly, the conclusion can be drawn that, the Applicants/Defaulters herein had violated the Provision of S. 134 (3) (o) of the Act. And for the said violation the punishment is provided u/Section 134 (8) of Companies Act, 2013, which is relevant in this Case, is as follows:-

"If a company contravenes the provisions of this section, the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three

*years or with fine which shall not be less than fifty thousand rupees
but which may extend to five lakh rupees, or with both."*

8. This Bench has taken into consideration that, this provision regarding CSR is newly incorporated in the Statute and thereafter number of circulars were issued and as a result of those circulars no clear clarification regarding the provision can be recorded by the Company or its Directors. The list of those Circulars is as follows :

- i) S. O. 582 (E) dated 27th February, 2014 which talks about Commencement of CSR Provision and Schedule VII of the Act.
- ii) G.S.R. 130 (E) dated 27th February, 2014 which talks about the Amendment in Schedule VII of the Act.
- iii) G.S.R. 261 (E) dated 31st March, 2014 which talks about the further Amendment in Schedule VII of the Act.
- iv) General Circular No. 21/2014 dated 18th June, 2014 which gives clarifications with regard to the provisions of CSR u/S. 135 of the Act.
- v) General Circular No. 36/2014 dated 17th September, 2014 which gives clarifications with regard to the provisions of CSR u/S. 135 of the Act.
- vi) General Circular No. 01/2015 dated 3rd February, 2015 which talks about the Constitution of CSR Committee.

9. The further important argument taken into consideration that, the determination of the Quantum of the CSR responsibility can only be ascertained/quantified after the finalisation of accounts at the close of the Books of Accounts of a particular financial year. As a result, the amount to be contributed for charitable purpose as CSR responsibility can be intimated to the concerned authorities thereafter only i.e. after the finalisation of accounts of a particular financial year.

10. This Bench has gone through the Application of the Applicants/ Defaulters herein and the Report submitted by the RoC and also the submissions made

by the Ld. Representative at the time of hearing and noted that Application made by the Applicants/Defaulters herein for compounding of offence committed under S. 134 (3) (o) of the Companies Act, 2013, merits consideration.

11. On examination of the circumstances as discussed above a Compounding Fee of ₹ 5000/- by each Applicant/Defaulter herein, (i.e. 20,000/- in total) who is in default, shall be sufficient as a deterrent for not repeating the impugned default in future. The imposed remittance shall be paid by way of Demand Draft drawn in favour of "Pay and Accounts Officer, Ministry of Corporate Affairs, Mumbai" within 30 days from the receipt of this order.

12. This Compounding Application No. 57/441/NCLT/MB/2017 is, therefore, disposed of on the terms directed above. Needless to mention, the offence shall stand compounded subject to the remittance of the Compounding Fee imposed. A compliance report, therefore, shall be placed on record. Only thereafter the Ld. RoC shall take the consequential action.

13. Ordered accordingly.

Sd/-

BHASKARA PANTULA MOHAN
MEMBER (JUDICIAL)

Sd/-

M. K. SHRAWAT
MEMBER (JUDICIAL)

Dated : 21.09.2017