

In the National Company Law Tribunal,
Kolkata Bench, Kolkata

CP/483/KB/2017

In the matter of:

An application under Section 252(3) of the Companies Act, 2013

In the matter of:

M/s Balaji Marcom Private Limited, a Company incorporated under the provisions of the Companies Act, 1956, and having its Registered Office at 7, Ganesh Chandra Avenue, 3rd Floor, Kolkata 700 013

.....Appellant/Petitioner

And

Registrar of Companies, having its Office at Nizam Palace, 2nd MSO Building, 234/4, A.J.C. Bose Road, 2nd Floor, Kolkata 700 020

..... Respondent

Order Delivered on 19th January 2018

Coram:

V. P. Singh, Member (J)

Jinan K.R., Member (J)

For the Financial Creditor : 1. Ms. Swapna Choubey, Advocate.
2. Mr. Sidhartha Sharma, Advocate.
3. Ms. Namrata Basu, Advocate.
4. Ms. Priyanka Tibrewal, Advocate.

ORDER

Per Jinan K R, (Member (J))

One of the authorised director of M/s **Balaji Marcom Private Limited** filed this application in the present appeal under Section 252(3) of the Companies Act, 2013 seeking restoration of the name of the petitioner company which has been struck off by the Registrar of Companies, West Bengal.

2. M/s Balaji Marcom Private Limited was incorporated on 27.07.2010 as a Private Limited Company, having its registered office, as per the Master Data in 7, Ganesh Chandra Avenue, 3rdFloor, Kolkata 700 013, within the jurisdiction of this Tribunal.

3. The Brief facts of the case leading to the present appeal, are as follows: -

- i. M/s Balaji Marcom Private Limited (hereinafter referred to as the 'Appellant Company') is a private Limited Company and was incorporated on 27.07.2010 in the State of West Bengal.
- ii. The Authorized share capital of the appellant company is Rs. 100,000/- (Rupees One Lakh only) divided into 10,000 (Ten Thousand) Equity Shares of Rs. 10/- (Rupees Ten only) each. The issued, subscribed and paid-up Equity Share capital of the company is Rs.1,00,000/- (Rupees One Lakh only) divided into 10,000 (Ten Thousand) Equity Shares of Rs.10/- (Rupees Ten only) each.
- iii. The main objects of the Company, in brief can be disclosed from the Memorandum and Articles of Association which enunciates that the company carries out business of traders, buyers, sellers, suppliers, commission agents, brokers, merchants, sub-agents, whole selling, consignor, distributors, dealers of all kinds of home care products and dealing in herbs, herbal products and natural derivatives for a enhancing metal power and physical strength , consumer goods, household goods, Industrial goods, engineering goods, electrical and electronics products, Food articles, Sugar, Spices, Petrochemical and petroleum products, plantation crops i.e tea, cotton, coffee, tobacco, vegetables, cosmetics goods, all kinds of cements, steels, zinc and alloys, building automobile parts and

devices, electronic goods, computers and computer software's, jewelries and miscellaneous other products and also fulfilling other ancillary objects to attain the main objects of the company like to purchase, acquire, build, construct, alter, maintain, enlarge, remove or replace and to works, manage and control any buildings, offices, factories, mills and laboratories, shops, machinery which may seem calculated directly and indirectly to advance the main objects of the Company and to join with any other person or body corporate in doing these things.

- iv. There are two shareholders in the Company holding 5000 (Five Thousand) Equity shares of Rs.10/- (Rupees Ten) each only and having two directors. The appellant company has started its operation and has been operational since the date of incorporation that is vide 27.07.2010 and the company has been doing business ever since, without any break. Due to some internal disputes in the management of the company appellant company failed to submit their balance sheet and annual return with the respondent but when approached learned that the status of the company was showing "Strike Off" and hence filed this appeal producing all the required documents including the Balance Sheets and annual return for the years for the months of August 2017. The balance sheets and annual return for the years showing the income and profits of the appellant company is given below:-

<i>Sl. No.</i>	<i>Financial Year</i>	<i>Income</i>	<i>Net Profit Income in Rs.</i>
1.	2012-2013	-	18,825/-
2.	2013- 2014	-	7,082/-
3.	2014-2015	-	10,758/-
4.	2015-2016	-	8,842/-

4. Based on the account of the non-filing of Annual Accounts and Annual Returns for the Financial Years, 2012-13 to 2015-2016, the Respondent had presumed that the Company has not undertaken any business further. The Audited Financial Statements for the Financial Years dated 2013-2016 has been marked and annexed as Annexure- **A-1**.

5. The Applicant further states that the Appellant company was still an going concern and was operational and the same appears from the balance sheets filed by the company. To understand that the company was a going concern although there is a Director's report mentioning the meetings were being held attached duly but no furnishing of further documents to show that the meetings were held on timely basis. The Director's Report for the Financial year ending 2016 has been duly attached marked and annexed as a continuation of (**A-1** page 33-37).

6. The appellant further submits that due to the inordinate delay in replying to the notice of the ROC (hereinafter referred as "Respondent" for brevity) had already removed the name of the appellant company's name and when the removal brought to the notice of the representative of the appellant went to file the statutory documents as per the requirement of the Act and produced the documents requesting to change the status of the company from the site after fulfilling the statutory compliance made as per the Act. But the respondent did not accept the audited account as the company name has been struck off.

7. Thus, as per the pleadings and submissions of the appellant, the respondent's act of striking off the name of the Company from the register is unjust and unreasonable unjustified restriction and, therefore, liable to be set aside prayed by the appellant.

8. ROC, West Bengal filed its reply. The appellant filed a supplementary affidavit answering the objections raised by the ROC, West Bengal. The objections raised by the ROC West Bengal in brief are the following: -

ROC, West Bengal in its affidavit in opposition stated that the appellant company's name was struck off and stand dissolved as on the date of striking off of the company's name and as per available records in the MCA Portal, the company has not filed its statutory documents, balance sheet from 31/3/2014 and annual return from 31/3/2013.

9. ROC, WB in its objection also raised an objection that pursuant to Sec.164(2)(a) read with Sec.167(1) of the Companies Act, 2013 the Directors of the company is disqualified and also Directors of the subject company stand vacated from their Directorship and since the Board of Directors is not in existence and, therefore, the Directors have no locus standi to place the application for and on behalf of the company.

10. ROC WB also contends that all the formalities to be complied were completed before striking of the appellant's name. As per provision of Sec.248(5) of the Companies Act, 2013 after expiry of the prescribed time period no response has been received from the company and the public, a notice (in STK No.7) dated 30/6/2017 was issued by the ROC, WB reflecting the name of the company as dissolved/strike off with effect from 9/6/2017. The ROC, WB has stated that the petitioner company name appears at Serial No.855 of the Registrar of Companies notice STK No.7 dated 30/6/2017 and the same was published in the Official Gazette on 15/7/2017. Upon raising the above said objections respondent prays for passing appropriate orders by this Tribunal.

11. Heard the Ld. Counsel for the appellant at length. Perused the records.

12. Ld. Counsel for the appellant submitted that the company is carrying on its normal business and was in the habit of filing statutory returns and due to the inadvertent mistake failed to file the documents in time and it is neither deliberate nor irrational on the part of the appellant company. He further submits that the impugned action of the striking off the company would adversely affect the functioning of the company and that the company is ready to comply by filing annual return within the stipulated time as granted by the Tribunal along with required fees. He prays for directing the respondent to restore the company's name in the register of the companies maintained by the ROC, WB.

13. It has been further submitted by the Ld. Counsel for the appellant company that there were some internal disputes in the management of the company and after such disputes were resolved, the company came up and took steps to avail the same with the respondent in July 2017 but the respondent refused to accept it as on the day the company has been struck off from the register.

14. What is the business in operation, nowhere stated in the appeal memorandum. There is a recital in the appeal memo that the object of the company contained in Clause 3 of the Memorandum and Article of Association of the company. Article 1 under clause 3 of the Memorandum and Article of Association of the company, stipulates the works and objects of the company and the nature of business that the company has been engaged into. However, whether the company is doing business as a supplier or as a trader or distributor or into ancillary objects of building or construction work of any sort has not been mentioned clearly and no supporting proof is given as well.

15. Reading the Director's report in the year end 31st March 2016, it is assimilated that the company is a still an going concern given in the area of business and still shall be. The company till date doesn't plan to explore new opportunity in the market or venture into any other business prospect. The nature and the course of the business remains to be the same. What business appellant has been carried on is silent in the report.

16. Looking into the statement of profit and loss produced by the Company of the years 2013 till 2016 miscellaneous forms of business is going on having got its fixed assets and cash in hand. However, looking into the expenses and the net profit and loss incurred by the company in the last 4 years shows that the company has been generating loss but no income has been generated by the company.

17. Looking into net profit of the company, it shows that the company has been trying to recoup the previous year's loss even though the surplus profit and loss shows to be in loss in total. However, there is no supporting proof to prove that any business as per the object of the company is doing business and the same cannot be formulated from the careful scrutiny of the Director's Report, statement of profit and loss, financial statement and balance sheet and the company's nature of the business remains to be the same and any business but not a closed one.

18. At this point it important to note that in **Purushottamdass And Another v. Registrar of Companies**, [(1986) 60 Comp. Case 154 Bom], *the Hon'ble High court of Bombay in an appeal filed under section 560 of the old Act, has held that:-*

"The objects of section 560(6) of the Companies Act is to give a chance to the company, its members and creditors to

revive the company which has been struck off by the Registrar of Companies, within a period of 20 years, and to give them an opportunity of carrying on the business only after the company judge is satisfied that such restoration is necessary in the interests of justice. The company judge may be satisfied that either the company was carrying on its business or was in operation or otherwise, and it is, in the circumstances of the case, equitable and just to restore the company. It, however, does not mean that the rights and liabilities of the company are lost during the interim period, inasmuch as section 560(6) of the Companies Act provides that after an order of restoration is passed, it shall be deemed as if the company was never struck of the register of companies. The section also provides the company judge with wide powers to put certain conditions or directions at the time of ordering the restoration”.

19. This appeal came up for consideration under section 252 (3) of the Companies Act, 2013. Similar power to the Company Tribunal is provided under section 252(3) of the Companies Act,2013. If this Tribunal is satisfied that the company is in operation without doing any active business even then an order of restoration can be allowed if interest of justice demands but upon certain conditions and directions. It is good to read section 252(3). It read as follows: -

“A company, or any member or creditor or workman thereof feels aggrieved by the company having its name struck off from the register of companies, the Tribunal on an application made by the company, member, creditor or workman before the expiry of twenty

years from the publication in the Official Gazette of the notice under sub-section (5) of section 248 may, if satisfied that the company was, at the time of its name being struck off, carrying on business or in operation or otherwise it is just that the name of the company be restored to the register of companies, order the name of the company to be restored to the register of companies, and the Tribunal may, by the order, give such other directions and make such provisions as deemed just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off from the register of companies”.

20. The objection of ROC that filing of appeal by a director of the company is not maintainable is found not sustainable under law. The financial statement for the year ended 31st March 2016 shows that the shareholders of the company as on 31st March 2016 are Bijay Kumar Agarwal and Punit Agarwal. Bijay Kumar Agarwal is holding 5000 shares i.e. 50% of its holding and Punit Agarwal also holding 50% i.e. 5000 shares. This appeal was filed by the appellant Balaji Marcom Private Ltd, through Punit Agarwal, son of Bijay Kumar Agarwal claiming that he is a director of the company since 27th July 2010. A supplementary affidavit has been produced to show that the appellant, Punit Agarwal is the Director, member and shareholder of the company and that he is permitted to file appeal for restoration alleging that he is holding 5000 equity shares amounting to 50% of the total shareholding and also subscriber to the memorandum of the company.

21. According to the Ld. Counsel for the appellant, the audited annual account for the year ending 31st March 2016 reflects status of the appellant

member shareholder. He also produced letter of authority issued by Bijay Kumar Agarwal another shareholder holding 5000 equity shares of the company. A reference to the letter of authority and the Memorandum and Article of Association shows that the appellant herein is an authorized person to file an appeal in the name of the company. Thus, filing of this appeal by the director who is also a shareholder is perfectly maintainable.

22. According to the Ld. Counsel for the appellant, the audited annual account for the year ending 31st March 2013 till 2016 reflects that the company is in operation although the company was generating a surplus loss. However, it is also seen on comparison and careful analysis of the profit and loss of year 2015 and 2016, although there has been a loss of Rs.10,758/- in the year 2014-15 as compared to the loss that was incurred in the year 2015-16 which is Rs.8,842/- shows that the company is trying to recoup from the losses incurred. But, it shows that the company is operational even though no active business is carried on.

23. The Facts and circumstances above referred enable us to hold that the appellant company even if not doing any active business it is found in operation. This appeal has been filed in time.

24. The above said discussion lead to a conclusion that the company is in operation even though it is not carrying on any active business as per its object. Therefore, the appeal is liable to be allowed in the interest of justice, equity and good conscience as held in the above cited decision.

In the result by exercising the powers conferred on this Tribunal under Section 252 of the Companies Act, 2013, this appeal is allowed upon the following directions:

- (a) The Registrar of Companies, the respondent herein, is ordered to restore the original status of the Applicant Company as if the name of the company has not been struck off from the Register of Companies with resultant and consequential actions like changing status of Company from 'strike off to Active; to activate DIN Nos of the applicants etc.
- (b) The Applicant company is directed to file all pending statutory document(s) including Annual Accounts and Annual returns for the financial years 2013-14, 2014-2015 and 2015-2016 along with prescribed fees/ additional fee/fine as decided by ROC within 45 days from the date on which its name is restored on the Register of companies by the ROC;
- (c) The Company's representative, who has filed the Company application is directed to personally ensure compliance of this order.
- (d) The restoration of the Company's name is also subject to the payment of cost of Rs.50,000/-(Rupees Fifty thousand only) through online payment in www.mca.gov.in under miscellaneous fee by mentioning particulars as "payment of cost for revival of company pursuant to orders of this Tribunal in CP NO.483 /KB/2017".
- (e) The applicant is permitted to deliver a certified copy of this order with ROC within thirty days of the receipt of this order.
- (f) On such delivery and after duly complying with above directions, the Registrar of Companies, West Bengal is directed to, on his office name and seal, publish the order in the official Gazette;
- (g) This order is confined to the violations, which ultimately leads to the

impugned action of striking of the Company, and it will not come in the way of ROC to take appropriate action(s) in accordance with law, for any other violations /offences, if any, committed by the applicant company prior or during the striking off of the company.

Sd / 11/18

(V.P. Singh)
Member (Judicial)

Sd

(Jinan K.R.)
Member (Judicial)

Signed on 19th January 2018.