IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 13.02.2020

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THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

W.P.No.8050 of 2019 and
WMP Nos.8649 and 8651 of 2019

Swisscon Steels (India) Private Limited
Represented by its Managing Director,
Mr.Shanavas Kozhiparamban,
NatukkalPalayam Road,
Ponnapuram Post,
Dharapuram Taluk,
Tirupur District. .. Petitioner

..Vs..

1. Union of India,
   Represented by its
   Ministry of Corporate Affairs,
   Shastri Bhawan, Dr.Rajendra Prasad Road,
   New Delhi.

2. Registrar of Companies,
   No.7, AGT Business Park, I Floor,
   Phase II, Avinashi Road,
   Civil Aerodrome Post,
   Coimbatore - 641 014. ..Respondents

PRAYER : Writ Petition filed Under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records of the 2nd respondent relating to the impugned publication dated 07.07.2017 which is uploaded in the website of the 1st respondent in so far as the petitioner company herein and quash the same, consequently direct the respondents herein to revert the status of the petitioner company to active and to continue its day to day activity without any bar.

For Petitioner : Mr.T.V.Suresh Kumar

For Respondent : Dr.G.Babu, (for R1 and R2)
Central Government Standing counsel

ORDER

The writ petition has been filed in the nature of Certiorarified mandamus, calling for the records of the 2nd respondent namely the Registrar of Companies, Coimbatore, relating to the publication dated 07.07.2017 which was uploaded in the website of the 1st respondent namely the Ministry of Corporate Affairs, Union of India, New Delhi in so far as the petitioner company is concerned and set aside the same and consequently direct the respondents to revert the status of the petitioner company to activate.

2. In the affidavit filed by the Managing Director of the petitioner company in support of the writ petition, it had been stated that the company had been incorporated under the provisions of the Companies Act, 1956 and the main objects of the company was to manufacture Iron and Steel products. It is stated that due to various factors, the petitioner company could not commence the business operation from the date of its incorporation. Subsequently, they tried to commence the manufacturing process during the year 2011-2012. However, due to taxing issues and other factors, again they could not commence the manufacturing process. It is stated that since there were no business operations in their company, they could not avail services of professional or appoint employees to take care of filing of returns with the 2nd respondent.

3. In these circumstances, the respondents have invoked Section 248 of the Companies Act, 2013 for striking off the name of the petitioner company from the Registrar of Companies and also published Form STK-5A (Public Notice) dated 17.04.2017 in the Website of the 1st respondent namely the Ministry of Corporate Affairs. Aggrieved with such publication, striking of the company, the present writ petition has been filed.

4. A counter affidavit has been filed by the respondents in which they have stated that the 1st respondent by letter dated 17.02.2017, had advised the Registrar of Companies to initiate action under Section 248 of the Companies Act, 2013 for striking of the names of the companies which have failed to file financial statements or annual returns for immediately preceding two financial years. Therefore, a notice under Section 248 of the Companies Act, 2013 in Form STK-I had been issued to those companies which have failed to file financial statements or annual returns for immediately preceding two financial years. The notice was also published in official Gazette and 1st respondent Ministry's website. It was also published in English and Tamil Dailies on 17.04.2017. The respondents maintained the provisions of Section 248 of the Companies Act, 2013 before striking of the petitioner's company and have justified for

striking of the company in their counter affidavit. It was also stated that the notice was also sent as required under Section 248 (1) of the Companies Act. But the notice had been returned and thereafter it had been stated that the company had been struck off by the respondents.

5. An additional counter affidavit had also been filed by the respondents. In the said additional counter affidavit, it had been stated that this Court had earlier directed the respondents to clarify whether the provisions of Section 248 (6) of the Companies Act, 2013 were satisfied before passing an order under Section 248 (5) of the Companies Act,2013. In the additional Counter affidavit, it had also been stated that the company has been struck off due to non filing of the financial statements since it was incorporated during the year 2009 and therefore, the respondents were not in possession of any documents of the company indicating the status of the application for payment or discharge of its liabilities or obligations. It was also stated that the notice was returned as "addressee not found" and the notices issued to the Director were not returned to the office. But there was no response from the Director against the striking off of the name of the company. Since there was no undertaking received from the Directors or any other persons in-charge as contemplated under Section 248 (6) of the Companies Act, 2013, the respondents had approved striking off the company.

6. Heard Mr.T.V.Suresh Kumar, learned counsel for the petitioner and Dr.G.Babu, learned Central Government Standing counsel for the respondents.

The main grievance of the learned counsel for the petitioner is that there should have been an obligation on the respondents to pass an order under Sections 248 (5) and 248 (6) of the Companies Act, 2013. As per Section 248 (6) of the Companies Act, 2013, before passing an order under Section 248(5) of the Companies Act, 2013 (to strike off) the Registrar shall satisfy himself that sufficient provision has been made for the release of all amounts due to the company for payment or discharge of its liability and obligations by the company and also shall obtain necessary undertakings from the Managing Directors/Directors or the person in-charge of the companies with respect to such discharge of liabilities. It is also stated that in the said provisions, notwithstanding the said undertaking, assets of the company will be available for payment of the liability, even after the name of the company is struck off.

7. In this connection, the learned counsel for the petitioner places reliance on an order of the Division Bench of

this Court in CRP (NPD) No.1476 of 2018 dated 01.10.2018 in the case of AGD Private Limited, represented by its Director Mr.N.Vijayakumar, Coimbatore Vrs. Registrar of Companies, Coimbatore, wherein it had been held that the conjoint reading of Sub-Sections 5 and 6 of Section 248 and 248 of the Companies Act, 2013, makes it clear that there should be an order passed by the Registrar of Companies, which requires to be published in the official Gazette and before passing such an order under Section 248 (5) of the Companies Act, the Registrar has to satisfy certain parameters set out in Section 248 (6) of the Companies Act, 2013. When there is no order under Section 248 (6) of the Companies Act, 2013 passed by the Registrar of Companies, the consequential publication effected under Section 248 (5) of the Companies Act, 2013, is not valid and would necessarily invite interference by this Court.

8. The learned counsel also pointed out that Section 455 of the Companies Act which related to dormant companies and more particularly pointed out that Section 455 (4) of the Companies Act which provides that in case of a company which has not filed financial statements or annual returns for two financial years consecutively, the Registrar shall issue a notice to that company and enter the name of such company in the Register maintained for dormant companies. It is stated that this procedure was not followed by the respondents in the present case. The learned counsel therefore stated that the order of the Registrar of Companies requires interference and has to be set aside.

9. The petitioner herein namely, the Swisscon Steels (India) Private Limited had been incorporated under the provisions of the Companies Act, 1956. It had been incorporated in the year 2009. Even in the affidavit filed, it had been very clearly stated that the manufacturing activities did not commence from the date of incorporation. It was also stated that the annual returns were not filed from the date of incorporation. It was also stated that no responsible staffs had been appointed for filing of annual returns. In fact, the company is only a company on paper. However, documents are filed relating to further facts. In proceeding Ref.No.ROC/CBE/STK1/2017/015578 dated 17.12.2019, the Registrar of Companies, Coimbatore had addressed the Tahsildar, Dharapuram Taluk, Tirupur District regarding an enquiry about the writ petitioner company having registered office at Natukkal Palayam Road, Ponnapuram Post, Dharapuram Taluk, Tirupur District - 638657. It had been very specifically stated that there was no company by that name in the registered office address and it was only a barren land with a small holo block shed. There were no company officials in the shed. Photographs have also been taken, which are also annexed, along with the typed set of papers filed by the respondents. It

is also clear that they have not filed any returns for two consecutive financial years from the year 2009.

10. Dormant Companies are dealt under the chapter Miscellaneous which comes under Chapter XXIX of Companies Act, 2013. According to the said provisions, the dormant company is a company which has been incorporated for a future project which project is to take of after sometime. In the interregnum period, if the company seeks to get exemption from filing of returns, they may make an application to the Registrar of Companies. Then, they can obtain the status of dormant company/inactive company where a company has not filed any returns for two financial years. Section 255 (4) of the Companies Act, 2013 which is relied on by the learned counsel for the petitioner follows the provisions of an inactive company as provided under section 255 (i) of the said Act. The company has already made an application and seeks to classify itself as a dormant company/as an inactive company and if that inactive company had not filed returns for two consecutive years, then under Section 455(5) of the Companies Act, 2013, the Registrar shall issue a notice to the said Company and place the said company under the Registrar of Dormant Companies. For initiating all those steps, the company must made an application under Section 455 (1) of the Companies Act.

11. In the instant case, the records do not show that the petitioner had actually filed any application seeking to classify it as a dormant company or inactive company. Hence, the provision under Section 455 of the Companies Act, 2013 will not be applicable. Even otherwise, Section 245 (1) (c) of the Companies Act, an exemption from a company not to be struck off can be granted only, when the company voluntarily applied to the Registrar, seeking to declare it as a Dormant company. If it makes an application under Section 248 (c), then the Registrar will have to follow the procedure under Section 455 of the Companies Act, 2013.

12. In the present case, the petitioner had not taken recourse to the provisions of Section 248 (c) of the Companies Act, 2013. Therefore, the judgment relied on by the learned counsel for the petitioner is not applicable to the facts of this case.

13. Further, the Judgment is a Judgment under Article 227 of the Constitution of India and unlike in the present case, the company was in existence in the registered office of the company.

14. But the fact of this case is that it was only in a shed. There are no business activities carried on by them. There is only one block holo shed in the property, which is laid to be the office of the company. The petitioner who claims that he had incorporated the company for doing business in manufacturing of Iron and steel products in the year 2009 cannot seek exemption for taxes, when the Registrar of Companies in compliance of the order of the Director of the 1st respondent Ministry of Corporate Affairs had issued a notice under Section 248 (1) of the Companies Act, 2013 and had also published the form STK – 5 or STK-7 in the website of the 1st respondent/Ministry of Corporate Affairs, official Gazette and in English and Vernacular language Newspaper. Notices have also been issued to the company also. Notice had been returned as undelivered and addressee not found. Addressee could not been found in the vacant land. Thereafter, sufficient time had been given for making enquiry with respect to the liabilities of the company and the amounts due to the company.

15. In the instant case, when the addresses of the company could not been found, there could not be no possibility for directing any enquiry as contemplated under Section 248(6) of the Companies Act, 1913. It has been very specifically stated in the counter affidavit that the Directors of the petitioner company did not come forward to give any undertaking relating to any liability of the company. Since there is only a block holo shed was found in the lands, the notice was returned. Therefore, the Registrar of Companies did not pass any orders under Section 248 (6) of the Companies Act. This is only justifiable.

16. Even during the arguments today, this Court granted an offer to the petitioner to request the Director of Companies to approach the Registrar of Companies regarding the issues raised. However, that came to be turned down. The petitioner company had been incorporated only on paper. There are no staffs and nobody knows the status of the company. Hence, I am not convinced with the arguments advanced by the learned counsel for the petitioner.

17. In view of the above, this writ petition is dismissed. However, the petitioner company is at liberty to approach the appropriate forum. Consequently, connected Miscellaneous petitions are closed. No costs.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

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To

1. Ministry of Corporate Affairs,
   Shastri Bhawan, Dr.Rajendra Prasad Road,
   Union of India,
   New Delhi.

2. Registrar of Companies,
   No.7, AGT Business Park, I Floor,
   Phase II, Avinashi Road,
   Civil Aerodrome Post,
   Coimbatore - 641 014.

+2 cc to Dr.G.Babu, Advocate SR.No.11952/20
+2 cc to M/s.Genicon & Associates SR.No.11836/20

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