

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO.1635 OF 2017
WITH CIVIL APPLICATION NOS. 3084 OF 2020 WITH CIVIL
APPLICATION NO.3599 OF 2018 WITH CIVIL APPLICATION NO.7546
OF 2017

Mr.P.R.Katneshwarkar a/w Mr.G.R.Syed, Advocate for the appellant.
Mr.S.P.Brahme, Advocate for respondent Nos.1/1 and 1/2.
Mr.P.D.Bachate, Advocate for respondent Nos. 1/4 to 1/6.
Mr.D.S.Bagul, Advocate for respondent Nos. 2, 3, 5 and 6.

(CORAM : RAVINDRA V. GHUGE &
S.G. MEHARE, JJ)

DATE : DECEMBER 1, 2021

PER COURT :

1. The appellant, original plaintiff in Spl.Civil Suit No.34/2012, is aggrieved by the judgment dated 01/04/2017 by which the suit has been dismissed as not being maintainable on the ground that the plaintiff/company was de-registered on 14/02/2008 by the Registrar of Companies (ROC In short). During the pendency of this appeal, the National Company Law Tribunal (The Tribunal) delivered it's judgment on 21/02/2018 by which the petition filed by the plaintiff was allowed. The decision of the ROC of de-registering the company was set aside and the plaintiff company was restored on the rolls / register of

companies.

2. By CA No.3599/2018, the plaintiff prayed for leave to produce the record as regards the proceedings before the Tribunal. Since we have considered the said record, **CA No.3599/2018 stands allowed.** In view of the above, the entire complexion of the proceedings undergoes a change with the restoration of the registration of the plaintiff/company.

3. There is no dispute that the Trial Court has not dealt with the suit on its merits. The defendants raised a plea that a Company has a legal/perpetual existence. If the Company is de-registered and on the date of the filing of the suit, if such company is not on the roll of registered companies, the suit would be untenable. Based on these submissions, the Trial Court has dismissed the suit as being untenable.

4. Both the sides have canvassed extensive submissions before us and have travelled to the extent of the plaintiff having made an incorrect statement in the suit, and that the cheques issued by the plaintiff were dishonoured, and that the defendants were never ready

and willing to perform the contract in the light of the sale deed dated 12/09/2003 and that a fictitious sale deed was created on 11/01/2009 so that the suit would be deemed to have been filed within the period of limitation, which is 3 years from the date of refusal to execute the agreement. All these issues have not been gone into by the Trial Court and as such, we are not required to advert to the submissions of the parties to this extent.

5. The issue before us today, in view of the judgment of the Tribunal delivered on 21/02/2018, is whether the restoration of the registration of the plaintiff would be from the date of the de-registration of the company when its name was struck off from the register of Companies by the ROC ?

6. The learned Advocates representing the plaintiff have drawn our attention to Section 560 of the Companies Act, 1956 which was applicable to the cause of action before the Trial Court. Section 560 reads as under :-

"560. Power of Registrar to strike defunct company off register.

(1) Where the Registrar has reasonable cause to believe that a company is not carrying on- business or in operation, he shall send to the company by post a

letter inquiring whether the company is carrying on business or in operation.

(2) If the Registrar does not within one month of sending the letter receive any answer thereto, he shall, within fourteen days after the expiry of the month, send to the company by post a registered

1. Explanation omitted by Act 62 of 1956, S. 2 and Sch. (w. e. f. 1- 11- 1956).

2. Subs. by Act 31 of 1965, s. 62 and Sch., for "twenty- one" (w. e. f. 15- 10- 1965).

letter referring to the first letter, and stating that no answer thereto has been received and that, if an answer is not received to the second letter within one month from the date thereof, a notice will be published in the Official Gazette with a view to striking the name of the company off the register.

(3) If the Registrar either receives an answer from the company to the effect that it is not carrying on business or in operation, or does not within one month after sending the second letter receive any answer, he may publish in the Official Gazette, and send to the company by registered post, a notice that, at the expiration of three months from the date of that notice, the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved.

(4) If, in any case where a company is being wound up, the Registrar has reasonable cause to believe either that no liquidator is acting, or that the affairs of the company have been completely wound up, and any returns required to be made by the liquidator have not been made for a period of six consecutive months, the Registrar shall publish in the Official Gazette and send to the company or the liquidator, if any, a like notice as is provided in subsection (3).

(5) At the expiry of the time mentioned in the notice referred to in subsection (3) or (4), the Registrar may, unless cause to the contrary is previously shown by the company, strike its name off the register, and shall publish notice thereof in the Official Gazette; and on the publication in the Official

Gazette of this notice, the company shall stand dissolved: Provided that-

[\(a\)](#) the liability, if any, of every director, the managing agent, secretaries and treasurers, manager or other officer who was exercising any power of management, and of every member of the company, shall continue and may be enforced as if the company had not been dissolved; and

[\(b\)](#) nothing in this sub- section shall affect the power of the Court to wind up a company the name of which has been struck off the register.

[\(6\)](#) If a company, or any member or creditor thereof, feels aggrieved by the company having been struck off the register, the Court, on an application made by the company, member or creditor before the expiry of twenty years from the publication in the Official Gazette of the notice aforesaid, may, if satisfied that the company was, at the time of the striking off, carrying on business or in operation or otherwise that it is just that the company be restored to the register, order the name of the company to be restored to the register; and the Court may, by the order, give such directions and make such provisions as seem 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.

[\(7\)](#) Upon a certified copy of the order under sub- section (6) being delivered to the Registrar for registration, the company shall be deemed to have continued in existence as if its name had not been struck off.

[\(8\)](#) A letter or notice to be sent under this section to a company may be addressed to the company at its registered office, or if no office has been registered, to the care of some director, the managing agent, secretaries and treasurers, manager or other officer of the company, or if there is no director, managing agent, secretaries and treasurers, manager or officer of the company whose name and address are known to the Registrar, may be sent to each of the persons who subscribed the memorandum, addressed to him at the address mentioned in the memorandum.

(9) A notice to be sent under this section to a liquidator may be addressed to the liquidator at his last known place of business.

7. The contention of the plaintiff is that as the judgment of the learned Tribunal is not set aside by a Superior Court / authority, it has attained finality. The registration of the company has been restored by setting aside the order of the ROC de-registering it. The said decision of the learned Tribunal has led to the company being restored on the register of companies. Such decision of the learned Tribunal would amount to the de-registration being non existent in the eyes of Law and it's effect would be that there was no de- registration at all.

8. The learned Advocate for the defendants have strenuously contended that Section 560(6) mandates the Court / Tribunal to record it's satisfaction that the Company was carrying on business or was in operation or 'for any other reason' and the striking off of such company will have to be set aside for a 'just' reason. The learned Tribunal has not recorded it's satisfaction on these grounds and has set aside the order of de-registration on the ground that the Special Civil Suit No.34/2012 (in short the suit) was dismissed on account of the de-registration of the Company and the present first appeal was pending

before this Court. The learned Advocate further submits that the Tribunal has to observe that the Company shall be placed in the same position as it was when its name was struck off.

9. The learned Advocate, therefore, submits that since the learned Tribunal had not passed a specific order for placing the company and all other persons in the same position, it will have to be believed and assumed that the re-registration of the company is prospective and would be effective from the date of the order of the learned Tribunal.

10. The learned Advocate for the plaintiff has contended that Sub Section 7 of Section 560 would indicate that the service of the certified copy on the ROC would automatically lead to the company being brought on the register of companies and the deeming fiction that it continued in existence as if its name has not been struck off, would mean that the company's registration has continued uninterruptedly.

11. The learned Advocate for the defendants placed reliance upon Section 248 and 252 of the Companies Act, 2013, which read as under :-

Power of Registrar to Remove Name of Company from Register of Companies.

248. (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 ¹[or];

(b) ²[* * * *]

(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.

(2) Without prejudice to the provisions of sub-section (1), a company may, after extinguishing all its liabilities, by a special resolution or consent of seventy-five per cent. members in terms of paid-up share capital, file an application in the prescribed manner to the Registrar for removing the name of the company from the register of companies on all or any of the grounds specified in sub-section (1) and the Registrar shall, on receipt of such application, cause a public notice to be issued in the prescribed manner:

Provided that in the case of a company regulated under a special Act, approval of the regulatory body constituted or established under that Act shall also be obtained and enclosed with the application.

(3) Nothing in sub-section (2) shall apply to a company registered under [section 8](#).

(4) A notice issued under sub-section (1) or sub-section (2) shall be published in the prescribed manner and also in the Official Gazette for the information

of the general public.

(5) At the expiry of the time mentioned in the notice, the Registrar may, unless cause to the contrary is shown by the company, strike off its name from the register of companies, and shall publish notice thereof in the Official Gazette, and on the publication in the Official Gazette of this notice, the company shall stand dissolved.

(6) The Registrar, before passing an order under sub-section (5), shall satisfy himself that sufficient provision has been made for the realisation of all amount due to the company and for the payment or discharge of its liabilities and obligations by the company within a reasonable time and, if necessary, obtain necessary undertakings from the managing director, director or other persons in charge of the management of the company:

Provided that notwithstanding the undertakings referred to in this sub-section, the assets of the company shall be made available for the payment or discharge of all its liabilities and obligations even after the date of the order removing the name of the company from the register of companies.

(7) The liability, if any, of every director, manager or other officer who was exercising any power of management, and of every member of the company dissolved under sub-section (5), shall continue and may be enforced as if the company had not been dissolved.

(8) Nothing in this section shall affect the power of the Tribunal to wind up a company the name of which has been struck off from the register of companies.

252. Appeal to Tribunal :- *(1) Any person aggrieved by an order of the Registrar , notifying a 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 and 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:

Provided that before passing any order under this section, the Tribunal shall give a reasonable opportunity of making representations and of being heard to the Registrar, the company and all the persons concerned :

Provided further that if the Registrar is satisfied, that the name of the company has been struck off from the register of companies either inadvertently or on the basis of incorrect information furnished by the company or its directors, which requires restoration in the register of companies, he may within a period of three years from the date of passing of the order dissolving the company under section 248, file an application before the Tribunal seeking restoration of name of such company.

(2) A copy of the order passed by the Tribunal shall be filed by the company with the Registrar within thirty days from the date of the order and on receipt of the order, the Registrar shall cause the name of the company to be restored in the register of companies and shall issue a fresh certificate of incorporation.

(3) If 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."

12. It is then submitted that most of the sub-clauses under Section 560 are incorporated under Section 258. However, sub section 6 of Section 560 has been segregated and a similar provision is introduced in Section 252. The contention is that sub section 7 of Section 560 does not exist in Section 252. We find from sub section 3 of section 252 that the Tribunal 'may' issue an order for placing the company 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 the companies. However, sub section 7 of Section 560 is found in a different form under sub section 2 of Section 252 wherein the Registrar is duty bound to cause the name of the Company to be restored in the register of the registered companies and issue a fresh certificate of incorporation.

13. There is no dispute that the plaintiff was de-registered when the 1956 Act was applicable. Since the forum of approaching the Court upon being aggrieved by the order of the Registrar of striking off the

name of the company had changed and a Tribunal had been created, the plaintiff was left with no option but to approach the Tribunal since the jurisdiction of a Court in entertaining such a dispute was vested in the learned Tribunal.

14. We refer to Section 6 of the General Clauses Act, 1897 which reads as under :-

"6 Effect of repeal. —Where this Act, or any 1 [Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

15. The repeal of the 1956 Act would not affect the right, privilege or obligation or liability acquired, incurred or accrued under the repealed enactment. The 2013 Act came into effect on 03/01/2013. The plaintiff had approached the Gujrat High Court in 2016 and with the creation of the Tribunal, the matter was referred to the Tribunal and re-registered in 2017. Since the Tribunal was constituted in 2017, the case already registered as a company petition before the High Court, was transferred. The second proviso below Section 465 (1) of the 2013 Act, would protect a litigant to the extent of the provisions of the Companies Act, 1956 being applicable to his proceedings.

16. Notwithstanding the above, we would have to assess as to what was the specific order of the learned Tribunal which led to the restoration of the name of the plaintiff in the register. While concluding its order dated 21/02/2018, the learned Tribunal held in paragraph Nos.17 to 21 as under :-

"17. In the case on hand, first of all the ROC did not follow the procedure laid down in Section 560 sub-section (1), (2) and (3) of the Companies Act, 1956.

17.1 Secondly, in view of the pendency of First Appeal No.1635 of 2017 before the Hon'ble High Court of Judicature, Bombay at Aurangabad

which is filed by the Company against the Judgment and Order dated 1.4.2017 passed by learned 2nd Joint Civil Judge (SD), Dhule in Special Civil Suit No.34 of 2012 which is filed by the Company for specific performance of the contract against the original owner and the Intervening Applicant, it is otherwise just to restore the name of the Company in the Register of Companies maintained by the ROC.

18. The objections of the Intervening Applicant are not at all sustainable in view of the above discussion, and hence overruled.

19. The ROC in his Representation stated that the Company has not filed its Annual Returns and Balance Sheets and therefore the name of the Company has been struck off for non-filing of statutory returns. The ROC has stated that the petitioner has not given specific reasons for restoring the name of the Company. However, the ROC has stated that he has no objection if this Tribunal passes an appropriate order for restoring the name of the Company as per provisions of Section 560 subject to the following ;

(a) Filing of overdue statutory returns;

(b) Publication of notice in two leading newspapers circulating in the District and Official Gazette of Government of India in respect of restoration of the name of the Company in the Register maintained by the ROC.

20. Considering all the aforesaid aspects, this Tribunal is of the view that it is just to restore the name of the Company in the Register of Companies maintained by the Registrar of Companies, Gujarat.

21. In view of the above, this petition is allowed. The Registrar of Companies, Gujarat, Dadra and Nagar Haveli is directed to restore the name of the Company, M/s Kamran Kapadia Land Developers Private

Limited, to the Register of Companies upon the petitioners complying with the following conditions ;

- (i) The petitioners shall file all over due statutory returns with fee and additional fee as required under the Companies Act;*
- (ii) The petitioners shall publish a notice in leading newspapers circulating in the District as well as in the official Gazette of the Government of India with regard to the restoration of the name of the Company in the Register of Companies maintained by the Office of the Registrar of Companies, as per the draft notice approved by the Registrar of Companies at the expenses of the petitioners;*
- (iii) The petitioners shall also pay an amount of Rs.10,000/- to the Ministry of Corporate Affairs by way of Demand Draft drawn on Nationalised Bank towards the cost incurred by the Government in striking off the name of the Company within 3 (three) weeks from the date of this order."*

17. It is thus apparent that the Tribunal directed the restoration of the registration of the plaintiff keeping in view that the suit was dismissed by the Trial Court on account of the de-registration of the plaintiff and the first appeal filed by the plaintiff was pending before this Court. The learned Tribunal therefore found it to be "*otherwise just to restore the name of the company in the register of companies maintained by the ROC*". Consequentially, the no objection (consent) of the ROC for restoring the name of the company as per the provisions of

the Section 560 of 1956 Act, was accepted by the Tribunal.

18. The learned Tribunal has specifically used the word ‘restoration of the registration” and not that the company either be re-registered or a fresh registration certificate be issued. The intention of the Tribunal in restoring the registration is apparent from the reasons assigned in paragraph No.17.1 reproduced above. It was thus desired by the Tribunal that the plaintiff ought not to suffer adverse orders because of its de-registration and, therefore, the Tribunal directed restoration of the name in the register and did not direct that the name of the plaintiff be freshly entered in the register of companies.

19. Even if the decision of the Tribunal is said to be as per Section 252(3) of the 2013 Act, the Tribunal was within its powers to direct restoration of the registration of the company in the register thereby placing the company back to the place / entry from where it was struck off from the register of the companies.

20. The submission of the defendants that the Tribunal did not specifically order that the company would be deemed to be placed in

the same position, does not impress us for the reason that the Tribunal considered the effect of the de-registration of the company in paragraph No.17.1 of its judgment and in order to nullify the disadvantage suffered by the plaintiff on account of the de-registration, has specifically directed to restore the registration of the company in the register of the companies. The language in paragraph Nos.17.1, 19, 20 and 21 of judgment of the Tribunal may not be to the liking of the defendants. However, the specific intention of the Tribunal indicates that the Tribunal intended to restore the company in the register of companies from where it was struck off.

21. In view of the above, the effect in Law would be that the de-registration of the plaintiff is non-existent in the eye of the Law. It stands restored in the register from where it was struck off. By the doctrine of relation back, such restoration would relate back to 14/02/2008 when it was de-registered and as such, to the extent of the ground of being a registered company, the suit would be maintainable.

22. It is in these peculiar circumstances that this First Appeal is allowed. The impugned judgment of the learned Trial Court dated

01/04/2017 is quashed and set aside and Spl.C.S.No.34/2012 stands restored before the Trial Court at Dhule with the following directions :-

(a) The litigating parties shall appear before the Trial Court on 15/01/2022 and the Trial Court need not issue notice of hearing to the parties.

(b) All the contentions of the litigating parties are kept open, save and except, the reason of de-registration, unless it is pointed out that the plaintiff has again been de-registered or has been struck off the register for non-compliance of the directions of the learned Tribunal set out below paragraph No.21 of it's judgment.

23. Pending civil applications, if any, do not survive, and are disposed off.

24. No costs.

(S.G. MEHARE, J.)

(RAVINDRA V. GHUGE, J.)