

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 1874 of 2019

With

CRAN 6 of 2024

Brabourne Commerce Private Limited & Ors.

Vs

The State of West Bengal & Anr.

For the Petitioners

: Mr. Jishnu Saha, Sr. Adv.
Mr. Kuldip Mullick,
Mr. Tirthankar Dey,
Ms. Somali Bhattacharjee,
Ms. Shukla Maity.

For the State

: None.

For the Opposite Party No. 2

: None.

Hearing concluded on

: 15.01.2024

Judgment on

: 13.03.2024

Shampa Dutt (Paul), J.:

1. The present revisional application has been preferred praying for quashing of the proceedings of Complaint Case No. (Comp.) 10 of 2019 under Section 135 read with Section 134(3)(o) of the Companies Act, 1956 pending before the Learned 2nd Special Court, Calcutta and all Orders passed in connection therewith.
2. In spite of due service, there is no representation on behalf of the opposite parties.
3. The petitioners' case is that the petitioner no. 1 is a company incorporated under the provisions of the Companies Act, 1956 and is an existing company as defined under the Companies Act, 2013. The petitioner Nos. 2, 3 and 4 are the Directors of the Petitioner no. 1, company.
4. On or about May 3, 2019 the opposite party No.2 filed a complaint under Section 135 read with Section 134(3)(o) of the Companies Act, 1956 before the Learned 2nd Special Court, Calcutta (hereinafter referred to as the "Learned Special Court") against the petitioners and the same was registered as Case No. Comp. 10 of 2019.
5. The allegations therein are as follow:-
 - i) *That the Net-Worth of the Company for the year ended 31.03.2012, 31.03.2013, 31.03.2014 and 31.03.2015 stood at Rs. 5353814196/-, Rs. 5389258383/-, Rs 5316582568/- and Rs. 5321782630/-, which are above the limit of Rs. 500 Crore as prescribed under Section 135(1) of the Companies Act, 2013 and therefore the*

Company was required to comply with the provisions of the Section 135 read with Section 134(3)(o) of the Companies Act, 2013.

- ii) *That on scrutiny of the Board's Report for the Financial year 2014-15 it is found that the Company has not complied with the provisions of Section 135 read with Section 134(3)(o) of the Companies Act, 2013 and in pursuant to that, show cause notices were issued to the company and the officers-in-default on 27.09.2016 by the office of the complainant quoting that – "the company neither spent any amount in regard to CSR despite having exceeded the prescribed limit of Net Worth laid down under the provisions of Section 135 of the Companies Act, 2013, in the Financial Years 2011-12 to 2013-14 nor stated the reasons for not spending the same in the Board's Report for the F.Y. 2014-15. Therefore this leads to non-compliance of the provisions of Section 135(5) read with Section 134(3)(o) of the Companies Act, 2013.*
- iii) *The Company replied vide its letter dated 03.10.2016 and taken the plea that the Net Worth of the Company is above the threshold because of amalgamation and the reserve created out of amalgamation is not included in the Net Worth as per the definition of Net-Worth given in Section 2(57) of the Companies Act, 2013 and stated that – "none of the conditions specified in the clause is fulfilled by the Company as a result of which company is neither required to spend any amount nor required to state the reasons for not spending the money in the Board's Report.*

- 6.** The complainant considering the reply of the company, observed as follows:-

"In view of the above as the Company has not made any reasons in respect of not spending the amount in its Board report for the year ended 31.03.2015 as required under the provisions of Section 135 read with 134(3)(o) of the companies Act, 2013, violation exists."

Thereafter, a report based on the above facts was forwarded to the Regional Director, Eastern Region vide letter No. ROC/CSR/S-135/(FY 14-15)/54375/282 dated 30.05.2017 seeking sanction of competent authority for filing of prosecution by the Complainant.

7. It is submitted by the petitioners that the Competent Authority of the Ministry of Corporate Affairs, Government of India has accorded sanction to launch prosecution against the subject company and its officers-in-default vide its letter F. No. 12/02/2019-CSR dated 29.03.2019, wherein following was observed:-

- i) *The Company was eligible to make CSR expenditure for FY 2014-15 under the provisions of Section 135 of the Companies Act, 2013 on the basis of net worth but failed to do so.*
- ii) *The Company has not specified any reasons for not spending CSR amount in its Board Report.*
- iii) *The Company has not disclosed constitution of CSR Committees in its Board Report.*
- iv) *The Company has not disclosed the contents of CSR Policy in its Board Report.*
- v) *The Company in its reply to show cause notice stated that none of the eligibility conditions specified under Section 135 of the Act were fulfilled by the company. Detailed statement of the company showing net worth for the FY 2011-12, 2012-13 and 2013-14 have been provided by the company. These calculations of net worth are at variance with the figures in the financial statements filed on MCA 21 portal. This difference has been attributed to Amalgamation of the Company. As per the records available on MCA 21 portal, the company amalgamated with HNG International Ltd. (U51909WB1994PLC061379) under Section 394 of the Companies Act, 1956 from the appointed date 01.04.2008 and order of amalgamation was filed in 04.09.2009 vide SRN A68557008. The changes in net worth of the company post amalgamation, as calculated in the reply furnished to the show cause notice are not reflected in the financial statements filed by the company FY 2010-11 onwards. This calculation is unverifiable and thus there is no veracity to the claim of the company as to its ineligibility to spend on CSR activities. It is eligible to spend in CSR on the basis of net worth as per the financial statements filed on MCA 21 portal.*

The Company has therefore violated the provisions of the Section 135 read with 134(3)(o) of the Act and Rules made there under.

8. The petitioners deny the allegations as stated.

The petitioners' case is that:-

- a) In the year 2009 a petition under Sections 391(2), 392 and 394 of the Companies Act, 1956 was taken out by the petitioner No. 1 and HNG International Limited for sanction of Scheme of Amalgamation whereby all the assets, interest and all liabilities of the transferor company being HNG International Limited would stand transferred to the petitioner No. 1 being Brabourne Commerce Private Limited. By an order dated July 14, 2009 the Hon'ble High Court was pleased to sanction the said scheme of amalgamation of the aforesaid company. Pursuant to the said order the assets, liabilities, properties and interest of the transferor company was vested into the transferee company being the petitioner No.1 herein. Thereafter by an order dated January 5, 2012, the Hon'ble Court was further pleased to dissolve the said transferor company without winding up, effective from the date of filing of the certified copy of the said order with the Registrar of Companies, West Bengal.
- b) That another application under Sections 391(2), 392 and 394 of the Companies Act, 1956 was taken out by the petitioner No. 1 and Ceramic Decorators Limited for sanction of Scheme of

Amalgamation whereby all the assets, interest and all liabilities of the transferor company being Ceramic Decorators Limited would get transferred to the petitioner No. 1 being Brabourne Commerce Private Limited. The said application was taken up for hearing and the Hon'ble Court by an order dated August 9, 2011 was pleased to sanction the said scheme of amalgamation of the aforesaid company. Pursuant to the said order the assets, liabilities, properties and interest of the transferor company vested into the transferee company being the petitioner No. 1 herein. Thereafter by an order dated April 25, 2012 the Hon'ble Court was further pleased to dissolve the said transferor company without winding up from the date of filing of the certified copy of the said order with the Registrar of Companies, West Bengal.

- c) **After the aforesaid amalgamation orders were passed,, all the assets and liabilities of HNG International Limited and Ceramic Decorators Limited vested in the petitioner No. 1 company.**
- d) The petitioners state that all of sudden on or about May 11, 2016 the petitioner No. 1 received a notice dated May 9, 2016 under Section 206 of the Companies Act, 2013 inter alia calling upon information under Section 206 of the Companies Act, 2013 regarding the company's Corporate Social Responsibility

(hereinafter “CSR”) expenditure. The petitioner No. 1 was directed to provide details of the CSR expenditure for the Financial Year 2014-15.

- e) The said notice was duly replied to by the petitioner No. 1 company by its letter dated May 17, 2016 inter alia stating that “Net Worth” of the company for the Financial year 2014-15 was Rs. 5,19,61,031/-, “Turn Over” of the company was Rs. 57,30,411/- and the “Net Profit” of the company was Rs. 52,00,062/- Therefore the company neither constituted the Corporate Social Responsibility Committee nor incurred any expenditure on “Corporate Social Responsibility Activities”.
- f) On August 23, 2016 the respondent No. 2 inter alia further called upon the petitioner No. 1 to submit detailed explanation with regard to “company neither spent any amount towards Corporate Social Responsibility nor stated reason for not spending the same in the Board Report for the Financial Year 2014-15, despite exceeding limit of Net Worth for the Financial year 2011-12 to 2013-14”. The petitioner No. 1 company by its letter dated September 8, 2016 inter alia provided all the documents as directed by the respondent No. 2 and further gave explanation inter alia stating that the said Section was not applicable to the said company.

- g) The petitioners state that “Net Worth” means the aggregate value of paid up share capital and all reserves created out of profits and securities premium account after deducting the aggregate value of accumulated loss, deferred expenditure and miscellaneous expenditure not written off, as per audited balance sheet of the company. Net worth does not include reserve created out of revaluation of assets, write-back of depreciation and amalgamation.
- h) The petitioners state that in spite of explanation by the petitioner No. 1 with regard to the purported notice issued by the respondent No. 2, in and around September 27, 2016 issued six purported show cause notices inter alia alleging that the petitioners have defaulted under Section 135 of the Companies Act, 2013.
- i) The said purported show cause notice were duly replied to by the petitioner No. 1 by a common letter dated October 3, 2016 inter alia stating that Section 135(1) of the Companies Act, 2013 has not been violated by the petitioner No. 1 and giving a details statement with regard to “Net Worth” turnover and “Net Profit (Loan)” during the Financial Years 2011-2012 to 2013-14. Further it was stated that the conditions specified in Section 135 of the Companies Act, 2013 does not apply to the petitioner No.1. As a result whereof, the respondent No.1 is neither

required to spend any amount, nor required to state their reason for not spending amount in the report, as alleged.

- j) The petitioner No.1 filed an additional reply dated October 17, 2016 inter alia enclosing a certificate from the Chartered Accountant, certifying the Net Worth of the company by way of a detailed calculation for the Financial Years 2011-12 to 2013-14.
- k) Thereafter on November 24, 2017 the respondent no. 2 by an electronic mail again called upon the petitioner No. 1 inter alia alleging that the petitioner No. 1 has not complied with the provisions of Section 135 of the Companies Act, 2013. The petitioner by a letter dated December 22, 2017 gave a detailed explanation as to why the company does not fall within the purview of the said Section of the Companies Act, 2013 and as to why the said Section of the Companies Act, 2013 is not applicable to the company and therefore the company has not constituted "Corporate Social Responsibility committee, nor incurred any expenditure with regard to Corporate Society Responsibility Activities".
- l) The petitioners by a letter dated June 17, 2019 gave their detailed reply to the allegations made by the respondent No. 2 and requested the respondent No. 2 to withdraw the complaint being No. Comp. 10 of 2019 being charge under Section 135 read with Section 134(3)(o) of the Companies Act, 2013.

9. The petitioners state that in spite of producing and handing over of documents inter alia showing that the company does not fall within the purview of Section 135 of the Companies Act, 2013, the respondents have maliciously and illegally filed the purported complaint.
10. The complaint filed by the opposite party no.2 against the petitioner is under Section 135 read with Section 134(3)(o) of the Companies Act, 2013, for the year ending 31.03.2012, 31.03.2013, 31.03.2014 and 31.03.2015.

11. Section 135 Companies Act:-

“135. Corporate Social Responsibility.- (1) Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during [the immediately preceding financial year] shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director:

[Provided that where a company is not required to appoint an independent director under sub-section (4) of Section 149, it shall have in its Corporate Social Responsibility Committee two or more directors.]

(2) The Board's report under sub-section (3) of section 134 shall disclose the composition of the Corporate Social Responsibility Committee.”

12. Section 134(3)(o) of the Companies Act:-

“134. Financial statement, Board's report, etc.-

(1)

(2)

(3) There shall be attached to statements laid before a company in general meeting, a report by its Board of Directors, which shall include-

.....

(o) the details about the policy developed and implemented by the company on corporate social responsibility initiatives taken during the year;”

13. Section 2 (57) of the Companies Act, 2013 defines:-

*“**Net Worth**” means the aggregate value of the paid-up share capital and all **reserves** created out of the profits, [securities premium account and debit or credit balance of profit and loss account], after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet, **but does not include reserves created out of revaluation of assets, write-back of depreciation and amalgamation.**”*

- 14.** Supplementary Affidavit has been filed by the petitioners, in respect of the Balance Sheets of the Company for the disputed period along with an auditor’s certificate.
- 15. Written notes of argument has been filed on behalf of the petitioners.**

16.

BRABOURNE COMMERCE PRIVATE LIMITED**Balance Sheet as at 31st March, 2012**

Particulars	Note No.	As at March 31, 2012	As at March 31, 2011
I. EQUITY AND LIABILITIES			
1. Shareholder's Funds			
(a) Share Capital	2.1	1,91,97,920	1,47,87,020
(b) Reserves and Surplus	2.2	5,33,46,16,276	11,29,21,621
2. Current Liabilities			
(a) Other current liabilities	2.3	54,185	21,655
(b) Short-term provisions	2.4	72,14,039	9,31,353
Total		5,36,10,82,420	12,86,61,649
II. Assets			
1. Non-current assets			
(a) Fixed assets			
(i) Tangible assets	2.5	49,343	36,008
(b) Non-current investments	2.6	5,19,37,28,377	9,89,18,509
(c) Long terms loans and advances	2.7	12,780	12,780
2. Current assets			
(a) Current Investments	2.5	1,86,59,881	
(b) Cash and bank balances	2.8	39,458	1,44,759
(c) Short-term loans and advances	2.9	14,85,92,581	2,95,49,593
Total		5,36,10,82,420	12,86,61,649
Significant Accounting Policies	1		
Notes on Financial Statement	2.1 to 2.23		

17.

BRABOURNE COMMERCE PRIVATE LIMITED**Balance Sheet as at 31st March, 2013**

Particulars	Note No.	As at March 31, 2013	As at March 31, 2012
I. EQUITY AND LIABILITIES			
1. Shareholder's Funds			
(a) Share Capital	2.1	1,91,97,920	1,91,97,920
(b) Reserves and Surplus	2.2	5,37,00,60,463	5,33,46,16,276
2. Current Liabilities			
(a) Other current liabilities	2.3	44,000	54,185
(b) Short-term provisions	2.4	88,34,413	72,14,039
Total		5,39,81,36,796	5,36,10,82,420
II. Assets			
1. Non-current assets			
(a) Fixed assets			
(i) Tangible assets	2.5		49,343
(b) Non-current investments	2.6	5,21,13,10,779	5,21,20,28,377
(c) Long terms loans and advances	2.7		12,780
2. Current assets			
(a) Current Investments	2.5	2,03,03,972	3,59,881
(b) Cash and bank balances	2.8	1,58,372	39,458
(c) Short-term loans and advances	2.9	16,,63,63,673	14,85,92,581
Total		5,39,81,36,796	5,36,10,82,420
Significant Accounting Policies	1		
Notes on Financial Statement	2.1 to 2.23		

18.

BRABOURNE COMMERCE PRIVATE LIMITED
Balance Sheet as at 31st March, 2014

(Amount in Rs)

Particulars	Note No.	As at March 31, 2014	As at March 31, 2013
I. EQUITY AND LIABILITIES			
1. Shareholder's Funds			
(a) Share Capital	2.1	1,91,97,920	1,91,97,920
(b) Reserves and Surplus	2.2	5,29,73,84,648	5,37,00,60,463
2. Current Liabilities			
(a) Short-term borrowings	2.3	1,00,000	
(b) Other current liabilities	2.4	51,500	44,000
(c) Short-term provisions	2.5	1,41,77,670	88,34,413
Total		5,32,82,11,738	5,39,81,36,796
II. Assets			
1. Non-current assets			
(a) Fixed assets			
(i) Tangible assets	2.6		
(b) Non-current investments	2.7	5,21,00,84,521	5,21,13,10,779
(c) Long terms loans and advances	2.8		
2. Current assets			
(a) Current Investments	2.7	16,95,335	2,03,03,972
(b) Cash and bank balances	2.9	3,92,74,410	1,58,372
(c) Short-term loans and advances	2.10	7,71,57,472	16,63,63,673
Total		5,32,82,11,738	5,39,81,36,796
Significant Accounting Policies	1		
Notes on Financial Statement	2.1 to 2.25		

19.

BRABOURNE COMMERCE PRIVATE LIMITED**Balance Sheet as at 31st March, 2015****[CIN-US1109WE1992PTC054375]**

(Amount in Rs)

Particulars	Note No.	As at March 31, 2015	As at March 31, 2014
I. EQUITY AND LIABILITIES			
1. Shareholder's Funds			
(a) Share Capital	2.1	1,91,97,920	1,91,97,920
(b) Reserves and Surplus	2.2	5,30.25,84,710	5,29,73,84,648
2. Current Liabilities			
(a) Short-term borrowings	2.3	1,00,000	1,00,000
(b) Other current liabilities	2.4	43,250	51,500
(c) Short-term provisions	2.5	1,40,87,670	1,14,77,670
Total		5,33,60,13,550	5,32,82,11,738
II. Assets			
1. Non-current assets			
(a) Non-current investments	2.6	5,24,92,29,314	5,21,00,84,521
2. Current assets			
(a) Current Investments	2.6	1,10,39,621	16,95,335
(b) Cash and bank balances	2.7	5,30,024	3,92,74,410
(c) Short-term loans and advances	2.8	7,52,14,591	7,71,57,472
Total		5,33,60,13,550	5,32,82,11,738
Significant Accounting Policies	1		
Notes on Financial Statement	2.1 to 2.22		

20.

As on March 31st, 2011	As on March 31st, 2012	As on March 31st, 2013	As on March 31st, 2014	As on March 31st, 2015
Rs. 12,86,61,64 9	Rs. 5,36,10,82,42 0	Rs. 5,39,81,36,79 6	Rs. 5,32,82,11,73 8	Rs. 5,33,60,13, 550

- (i) It thus appears that the Reserves and Surplus as on 31st March, **2011** is Rs. 11,29,21,621 and Total of Equated liability and Assets accounts to 12,86,61,649.
- (ii) As on 31st March, **2012** it amounts to Rs. 5,33,46,16,276 and total Rs. 5,36,10,82,420 **(on Amalgamation)**.
- (iii) As on 31st March, **2013** it amounts to Rs. 5,37,00,60,463 and total Rs. 5,39,81,36,796.
- (iv) As on 31st March, **2014** – Reserves and Surplus is Rs. 5,29,73,84,648 and total Rs. 5,32,82,11,738.
- (v) As on 31st March, **2015** – Reserves and Surplus is Rs. 5,30,25,84,710 and total Rs. 5,33,60,13,550.

21. Reserves of a Company **are the funds earmarked for a specific purpose, which the company intends to use in future.** A reserve is a retained earnings secured by a company to strengthen a company's financial position, clear debt & credits, buy fixed assets, company expansion, legal requirements, investment and other plans. These are usually done to save the cash from being used in other purposes.

- 22. Surplus** of a Company means in the context of corporations and business organizations, **the earnings resulting from the profitable operations of the company**. Also known as retained earnings, it is the portion of the profit that the company retains in order to reinvest in the business or repay debt.
- 23. In the present case, throughout the period of alleged default, the petitioner has shown the excess amount, on amalgamation under 'liability'. The 'Asset' part has been shown as below the amount required for compliance of Section 135 of the Act.**
- 24. Section 135 – Corporate Social responsibility is a beneficial provision** under the Act:– Corporate social responsibility (CSR) or corporate social impact is a form of international private business self-regulation which aims to contribute to societal goals of a philanthropic, activist, or charitable nature by engaging in, with, or supporting professional service volunteering through pro bono programs, community development, administering monetary grants to non-profit organizations for the public benefit, or to conduct ethically oriented business and investment practices.
- 25. The Supreme Court has in the following cases emphasized the importance of CSR.**
- (a) ***M.C. Mehta & Anr. vs Union of India & Ors., (1987 AIR 1086)***: This landmark case established the principle of "absolute liability" for industrial activities that harm the

environment and people. The Supreme Court ruled that industries engaged in hazardous activities are liable to compensate affected parties, emphasizing the importance of environmental protection and community welfare.

(b) *Union Carbide Corporation ETC. vs Union of India ETC., (1992 AIR 248)* : The Bhopal gas tragedy case highlighted the moral and legal responsibilities of corporations toward victims of industrial disasters. The Supreme Court upheld the importance of compensation rehabilitation, and environmental restoration as integral aspects of corporate accountability.

26. Section 2(57) of the Companies Act, 2013 provides that “Net Worth” means the aggregate value of the paid-up share capital and all reserves created out of the profits, [securities premium account and debit or credit balance of profit and loss account], after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet, **but does not include reserves created out of revaluation of assets, write-back of depreciation and amalgamation.**

27. The question arises as to whether the reserves created out of amalgamation (as in this case), can be kept out of “Net Worth” in the years following the year of amalgamation.

28. In the present case the amalgamation took place on 01.04.2008.

- 29.** All assets, liabilities, properties & interest of the Transferee Company was vested into the Transferee Company (petitioner no. 1) vide order dated July 14, 2009 of the Hon'ble Court and order dated 09.08.2011 when the other companies (2) merged with the petitioner Company.
- 30. Thus as per Section 2(57) of the Act. The Company gets the benefit of Section 2(57) of the Act, for the said financial year and not there after (subsequent financial years).**
- 31.** But the Company herein continued filing the Balance Sheet for the subsequent financial years being 2011-2012, 2012-2013, 2013-2014 & 2014-2015 in this case to take the benefit of amalgamation, year after year, **to avoid their corporate social liability for which the case has been initiated by the complainant.**
- 32.** The complaint is of such compliance as required under the act being evaded. The petitioner has continued showing the amount on amalgamation year by year under 'Reserve' as 'liability' to avoid the 'CSR' responsibility of the company. The company is not entitled to such benefit after the year of amalgamation. Such conduct to avoid social responsibility is not to be encouraged.
- 33.** There is thus sufficient materials on record making out a prima facie case against the petitioners in respect of the offences alleged, and as such the case is required to be permitted to proceed towards trial. **Interference at this stage would amount to abuse of the process of Court.**

- 34. CRR 1874 of 2019 is dismissed.**
- 35.** Trial Court to proceed with the trial expeditiously.
- 36.** All connected applications, if any, stand disposed of.
- 37.** Interim order, if any, stands vacated.
- 38.** Copy of this judgment be sent to the learned Trial Court for necessary compliance.
- 39.** Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)