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WPO/349/2024
IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
ORIGINAL SIDE

APEX TRADERS AND EXPORTERS LIMITED AND ANR
VS
THE REGISTRAR OF COMPANIES, WEST BENGAL
MINISTRY OF CORPORATE AFFAIRS AND ANR

BEFORE:
The Hon'ble JUSTICE SABYASACHI BHATTACHARYYA
Date: 3rd May, 2024.

Appearance:
Ms. Urmila Chakraborty, Adv.
Mr. Sayantan Bose, Adv.
Ms. Manisha Das, Adv.
. . .for the petitioners.

The Court: Despite service, none appears for the respondents. It transpires from the previous order that on the last occasion as well, the respondents were not represented. The affidavit of service indicates good service and as such the writ petition is taken up hearing on merits.

The grievance of the petitioner is that the petitioner is a small company, although coming within the purview of 'listed companies' as contemplated in the Companies Act, 2013. The petitioner has a small capital base of Rs.20 lakhs only and the total number of shareholders of the petitioner company is merely 142, out of which about 120 that is 82%, hold 100 shares or less and there has been no alteration in the shareholding pattern during the past 15 years or more.

Learned counsel also points out that there has been no movement in the capital of the company since a long time, also more than 15 years. The Company is listed with the Calcutta Stock Exchange, which has been practically defunct for almost a decade now. It is contended that despite the above mitigating circumstances, the Adjudicating Authority under Section 203 of the Companies Act 2013 imposed huge penalty on the petitioner to the tune of Rs.10,58,000/-.

It is submitted that when the petitioner approached with a challenge against the said order before the Regional Director, the Regional Director affirmed the order of the First Authority without taking note of the detailed representation highlighting the circumstances as narrated above, but mechanically confirming the order of the First Authority.

It is argued that as such, the orders of the Appellate Authority and the First Authority, that is, the Registrar of Companies (ROC) are vitiated for non consideration of material facts.

Upon a perusal of the language of Section 203(5) of the Companies Act 2013, it is clear that the same confers discretion on the ROC to impose penalty.

The said discretion also includes the converse, that ism the discretion not to impose penalty or to impose lesser penalty.

The language of sub-Section (5) of Section 203 is that if any company makes any default in complying with the provisions of the Section, such company "shall be liable to a penalty" of the amount as stipulated therein. Thus, payment of penalty is not mandatory. The "liability" to pay penalty is subject to adjudication by the concerned authority, that is, the ROC.

Such discretion has, associated with it, a responsibility of the adjudicating authority to take into consideration any mitigating or alleviating circumstances which might have visited the company in question before imposing such penalty and or deciding the quantum of the penalty.

In the present case, several substantial alleviating circumstances were placed before the ROC by the petitioner company by way of its representation. Although the representation has been substantially narrated in the order of the ROC, in the ordering portion thereof, it is found that the ROC mechanically observed that the applicant company and its officers have defaulted the provisions of Section 203(1) read with section 203(5) of the Act for non-appointment of whole-time Company Secretary and is accordingly liable for penalties under Sub-Section (5) of Section 203.

Apparently, the ROC also took into account the factors thereinabove and considered the relaxation period of limitation due to Covid-19 Pandemic. However, the ROC merely paid lip-service to such consideration since there is no reflection as such in the order of the ROC of any material consideration of any of the factors which were portrayed by the petitioner as mitigating circumstances. Insofar as the Appellate Authority, that is, the Regional Director is concerned, the said Authority mechanically affirmed the order of the ROC on the premise that no infirmity in the order of the ROC could be shown to the Appellate Authority. Such mode of adjudication indicates non-application of mind on the part of the Appellate Authority to the facts and circumstances of the case while considering the imposition of penalty on the petitioner company.

Thus, in the absence of any real consideration worth the name of the mitigating circumstances of the petitioner company and the small size of the petitioner company, including that of its number of shareholders and share capital, as well as the fact that a whole-time Company Secretary has already been appointed by the company since July 15, 2022 and was functioning on the date of passing the impugned order, the impugned orders of the Appellate Authority as well as the ROC are vitiated for non-consideration of material fact.

Accordingly, WPO 349 of 2024 is allowed, thereby setting aside the impugned order of the Regional Director dated January 1, 2024 as well as the order of the Registrar of Companies dated May 23, 2023, whereby penalty was imposed on the petitioner company under Section 203(5) of the Companies Act, 2013.

The Registrar of Companies shall reconsider the representation of the petitioner afresh in the light of the above observations, by taking into account and considering the mitigating circumstances relied on by the petitioner, and upon giving an opportunity of hearing to the petitioner, shall decide the issue of imposition of penalty under Section 203(5) of the Companies Act, 2013 afresh. It is expected that such reconsideration shall be concluded within a reasonably expeditious period, preferably within six weeks from the date of communication of the order to the ROC.

No order as to costs.

Urgent certified website copy of this order, if applied for, be made available to the parties subject to compliance with the requisite formalities.

(SABYASACHI BHATTACHARYYA, J.)

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