

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

COMPANY APPEAL (AT) NO. 17 of 2022

[Arising out of the Order dated 24th September, 2021 passed by the NCLT (National Company Law Tribunal, New Delhi, Bench – V) in Appeal No. 03/252/ND/2021]

IN THE MATTER OF:

**Agerson Telecommunications Private Limited
Through Legal Heirs of the Deceased
Shareholders and Directors**

1. Ashok Aggarwal

117A, Ground Floor, Maidan Garhi, Auto Stand,
IGNOU Road, New Delhi – 110068.

...Appellant No. 1.

2. Vijay Kumar Aggarwal

117A, Ground Floor, Maidan Garhi, Auto Stand,
Ignou Road, New Delhi – 110068.

...Appellant No. 2.

Versus

1. Union of India

Through Ministry of Corporate Affairs
Shastri Bhawan,
Dr. Rajendra Prasad Road,
New Delhi – 110001.

...Respondent No. 1.

2. Registrar of Companies

NCT of Delhi and Haryana
4th Floor, IFCI Tower,
61, Nehru Palace,
New Delhi – 110019.

...Respondent No. 2.

3. Department of Income Tax

Through Principal Chief Commissioner
of Income Tax
Room No. 356, C.R. Building, IP Estate,
New Delhi – 110002.

...Respondent No. 3.

Present

For Appellant:

**Mr. Saurabh Kalia and Mr. Sarvik Singhai,
Advocates.**

For Respondent: Mr. Jaswinder Singh, Advocate for R-1 & R-2.

J U D G E M E N T
(Through Virtual Mode)

[Per: Ajai Das Mehrotra, Member (T)]

1. The present Appeal has been filed under Section 421 of the Companies Act, 2013, (hereinafter referred to as the `Act') against the Impugned Order dated 24.09.2021 passed by the NCLT (National Company Law Tribunal, New Delhi, Bench – V,) in Appeal No. 03/252/ND/2021. Before the NCLT, the Appeal was filed by the Members and Shareholders for restoration of the name of the Company, Agerson Telecommunications Private Limited, in the Register maintained by the Registrar of Companies (`RoC'). The registered office of the Company is situated at 10/62, Kirti Nagar, Industrial Area, New Delhi – 110015 and the CIN No. is U32101DL1988PTC032890.

2. The relevant facts of the case, as given in the NCLT Order dated 24.09.2021 are as under:

“3. A sweeping action was initiated by the ROC, at the instance of MCA, in striking off the names of several Companies who had failed to file their Statutory Returns. The Appellant had failed to file its Financial Statements and Annual Returns since incorporation thereby giving rise to the surmise that the business of the Company was not in operation. Consequently, its name was struck off by the Respondent from the Register of Companies under Section 560(5) of the Companies Act, 1956 on 31/05/2007 vide gazette notification dated 23.06.2007 (sl. No. 1799, page 159 of Memo of Appeal). They admit their default in carrying compliances but submit that the same was unintentional and due to lack of professional support and guidance and that their legal heir/successors were unaware about the existence of the Company and hence could not comply with the legal requirements as and when falling due. The Appellant is ready to submit its Financial Statements and Annual Returns before the Respondent.

4. The Appellant submits that the applicants herein got aware of the Company incorporated after receipts of two notices from the Rajasthan State Industrial Development & Investment Corporation Ltd (RIICO), a Rajasthan Government Undertaking for deposit of dues in respect of Plot No. G-576 area 1000 sqm. Industrial Area, Bhiwadi, being given on the lease to the Company.

5. The Appellant submits that as per Section 248 of the Companies Act, 2013 or erstwhile Section 560 of the Companies Act, 1956, the Registrar of Companies was required to issue notice/letter to the Company to show cause as to why the name of the Company should not strike off from the register of companies maintained by it. However, in the instant case, no such notice under either of the Sections was received by the Company or any of its directors, which give arise to the cause of action herewith.

6. The Appellant submits that the Appellant Company has been in continuous business operation and holds immovable properties. Further, it is submitted that if the name of the Company be restored, the Appellant Company would be able to start the work which would, inter-alia, benefit the Central/State Government in terms of the Income Tax, Goods and Service Tax and other taxes. In order to corroborate this submission, the appellant has placed before un the following evidence:

- i. Copies of Provisional Financial Statements for the year ending on 31.03.2015 to 31.03.2020.
- ii. Financial Years ending on 31.03.2015 to reflecting Revenue from Operations as NIL.
- iii. Copy of Lease Deed dt. 15.10.1988.
- iv. Copy of notices received from RIICO towards economic rent and service charges.

7. The Respondent RoC has filed their reply and submitted that there are no records of the Annual Returns and Balance Sheet submitted by the Appellant Company to the Respondent. Moreover, no subsequent documents had been filed by company to obtain the status of a "Dormant Company" under Section 560 of the Companies Act, 1956. Therefore, the name of the company was considered for striking off from Register of Companies. Further, it has been found in the enclosed Financial Statements that there was 'Zero' revenue from operations in all financial year, which fails to support the claim of the Company that it was carrying on any business.

8. That vide order dated 11.03.2021, the last opportunity was given to the IT Dept to file the report but till 11.08.2021, no report had been filed. Therefore, the right to file report was closed vide order dt. 11.08.2021.

9. We have heard the Ld. Counsel for the appellant and the AROC and perused the averments made in the memo of appeal and the reply.

10. It is seen that the Appellant has failed to produce the audited Balance Sheet to show the Company had revenue from operation for the immediate two preceding Financial Years when the name of the Company was struck off by the RoC. It is further seen that the Appellants in the Memo of Appeal admit this fact that there is no revenue from operation from Financial Year 2014-15 to 2019- 2020. Therefore, we are of the considered view, the Appellant Company has failed to produce any document show that the Appellant Company had revenue from operation or carrying on business at the time when the name of the Company was struck off by the Registrar of Companies or even prior to that.

11. Therefore, at this juncture, we would like to refer to the decision of Hon'ble NCLAT in the case of M/s Alliance Commodities Pvt Ltd Vs. Office of Registrar of Companies in WA, CA(AT) No. 20 of 2016 and the same is quoted below:

"9.....The exercise of such power is properly regulated and depends upon satisfaction of the Tribunal that the Company at the time of its name being struck off was carrying on business or in operation or otherwise it is 'just that the name of Company be restored.... This term "or otherwise" has been judiciously used by the legislature to arm the Tribunal to order restoration of a struck off Company within the permissible time limit to take care of situations where it would be just and fair to restore Company in the interest of Company and other stakeholders. Such instances can be innumerable. However, this term "or otherwise" cannot be interpreted in a manner that makes room for arbitrary exercise of power by the Tribunal when there is specific finding that the Company has not been in operation or has not been carrying on business in consonance with the objects of the Company...."

3. The RoC has struck off the name of M/s. Agerson Telecommunications Private Limited from the Register of Office under Section 560(5) of the Companies Act, 1956 on 31.05.2007 on the grounds that the said Company had failed to file its Financial Statements and Annual Returns. Before the NCLT, the Appellants had submitted that the default in carrying out statutory compliances was unintentional due to lack of professional support and guidance, and they being legal heirs/successors were not aware about the existence of the Company. It was submitted before the NCLT that the Applicants got aware of the Company after receipt of two Notices from the Rajasthan State Industrial Development and Investment Corporation Ltd. (RIICO), a Rajasthan Government Undertaking, for deposit of dues in respect of Plot No. G-576 in Industrial Area of Bewari, Bhiwadi, Rajasthan. It was submitted that the Appellant Company was in continuous business operations and holds Immovable Property, and that if the name of the Company is restored, they will be able to start the work. The Applicants before NCLT filed copies of provisional Financial Statements for the Year ending 31.03.2015 to 31.03.2020, copy of Lease Deed dated 15.10.1998 and copy of Notices received from RIICO.

4. While dismissing the Appeal of the Appellants herein, NCLT had observed that there was no revenue from operation in the immediately preceding two Financial Years. The NCLT relied upon the Judgement of this Tribunal in the case of '*Alliance Commodities Private Limited*' Vs. '*Office of Registrar of Companies-West Bengal*', in *Comp. App. (AT) No. 20 of 2019*, and it was noted that the subject Judgement has been affirmed by the Hon'ble Supreme Court in the matter of '*Alliance Commodities Private Limited*' Vs.

'Office of Registrar of Companies-WB', reported in *Civil Appeal No. 7258 of 2019*, vide Order dated 23.09.2019.

5. Learned Counsel for the Appellant submitted that Company was incorporated with two Directors namely Late Sh. Nathu Ram Aggarwal and Late Smt. Ram Devi Aggarwal. Late Sh. Nathu Ram Aggarwal died on 10.08.2014 and Late Smt. Ram Devi Aggarwal died on 10.02.2009, leaving behind their sons and daughters as their lawful legal heirs and successors. Therefore, non-filing of the Financial Statements and Annual Returns by the Promoters/Shareholders was neither wilful nor intentional but due to lack of professional support and guidance and that the legal heirs/successors were unaware about the existence of the Company and hence could not comply with the legal requirements.

6. It was submitted that the Appellant Company has a leased land, granted to it by Rajasthan State Industrial Development & Investment Corporation Ltd. ('RIICO'), a Rajasthan Government Undertaking having address Plot No. G-576 area 1000 sqm. Industrial Area, Bhiwadi, the Lease Agreement of which was executed on 15.10.1988 and which is capable of generating revenue for the Appellant Company. Further it was submitted that the Company also has plant and machineries, the book value of which as on the 31.03.2020 amounts to Rs.31,500/-.

7. It is further submitted that the Appellant Company has some pending liabilities of approximately Rs. 1 Lakh towards Economic Rent and Services Charges and interest thereon payable to RIICO. Therefore, striking off would not only be unjust to the Appellant Company but will also cause financial loss to the lessor i.e., RIICO.

8. The Counsel for the Appellant further submitted that their case is different from that of this Tribunal's Judgement in the case of '*Alliance Commodities Private Limited*' Vs. '*Office of Registrar of Companies-West Bengal*', *Comp. App. (AT) No. 20 of 2019* and affirmed by the Hon'ble Supreme Court in the matter of '*Alliance Commodities Private Limited*' Vs. '*Office of Registrar of Companies-WB*', (*Civil Appeal No. 7258 of 2019*).

9. The relevant part of the submission of the Appellant distinguishing its case from that of '*Alliance Commodities Private Limited*' cited supra is reproduced below for reference:

“3. Misplaced reliance on Alliance Commodities Private Limited vs. Office of Registrar of Companies-WB Company appeal (AT) No 20 of 2019

That the Hon'ble NCLT has erred in placing its reliance on the judgment of Hon'ble NCLAT in the matter of Alliance Commodities Private Limited vs. Office of Registrar of Companies-West Bengal, Company appeal (AT) No 20 of 2019 and Hon'ble Supreme court in the matter of Alliance Commodities Private Limited vs. Office of Registrar of Companies-WB (CA no. 7258 of 2019). It is submitted that the facts of the aforesaid matter are completely different and the same ipso facto cannot be applied in the present appeal. The facts of the said judgment are summarized below for the sake of convenience:

a. The appellant company was having NIL assets, liability and turnover.

b. In the said matter, the appellant company was not engaged in the business for which it was incorporated but was advancing money to corporate persons in violation of Section 186 (1) of the Companies Act, 2013 as illegal transactions as a shell company.

c. Indulging in business activity not falling within the ambit of object of the Company or not being incidental or ancillary thereto cannot be termed a legitimate business for demonstrating that the Company was in operation.

d. As shell company or a Company having assets but advancing loans to sister concerns or corporate persons for siphoning of the funds, evading tax or indulging in unlawful business or not abiding by the statutory compliances cannot be allowed to invoke this expression "or otherwise" which would be travesty of justice besides defeating the very object of the Company....

Thus from the above findings of the judgment, it can be clearly inferred that the said appeal is not allowed to invoke the expression "or otherwise" solely on the ground of carrying unlawful business such as advancing loans to corporates, siphoning of funds, tax evasion etc. A Company having assets and liabilities is well within the ambit of the wide expression of "or otherwise" as a valid ground for its restoration.

10. It was submitted that the Appellant is supported by the following Judgements by coordinate Benches of this Tribunal:

- *‘M/s Durga Builders Pvt. Ltd.’ Vs. ‘Registrar of Companies’, Comp. App. (AT) No. 154 of 2021.*
- *‘Dashmesh Impex Pvt. Ltd. & Ors.’ Vs. ‘Registrar of Companies’, Comp. App. (AT) No. 116 of 2021.*
- *‘Tweak The Future Innovations Private Limited’ Vs. ‘Registrar of Companies, Punjab & Chandigarh’, Comp. App. (AT) No. 300 of 2019.*
- *‘Basant Kumar Berlia & Ors.’ Vs. ‘Registrar of Companies’, Comp. App. (AT) No. 171 of 2018.*

11. While relying on the aforesaid Judgements, the Appellant has given gist of the Judgements as under:

- In *‘M/s Durga Builders Pvt. Ltd.’*, cited supra, wherein it was observed by this Tribunal that the Appellant Company is in litigation therefore, the Company has not filed the Financial Statements and also without giving opportunity of hearing, RoC struck off the name of the Appellant

Company from the Register maintained by him, but in view of the fact and also the Bank Statements of the Appellant Company from 2015-2018 shows that the Appellant Company is having substantial movable as well as immovable assets. Therefore, it cannot be said that the Appellant Company is not carrying on any business or operations. In para 10 of the said Judgement, it has been observed as under:

“10. After hearing the parties and going through the pleadings made on behalf of the parties, we observe that the Appellant Company is in litigation therefore, the Company has not filed the financial statements and also without giving opportunity of hearing, the Respondent No. 1/Registrar of Companies struck off the name of the Appellant Company's from the Register maintained by him, but in view of the fact and also the Bank Statements of the Appellant Company from 2015-2018 shows that the Appellant Company is having substantial movable as well as immovable assets. Therefore, it cannot be said that the Appellant Company is not carrying on any business or operations. Hence, we are of the view that the order passed by the National Company Law Tribunal (Court-V, New Delhi) as well as Registrar of Companies, NCT Delhi & Haryana is not sustainable in law.”

- In ‘Dashmesh Impex Pvt. Ltd. & Ors.’, cited supra, wherein it was held by this Tribunal that if the Appellant Company is having substantial movable as well as immovable assets, it cannot be said that the Appellant Company is not carrying on any business or operations. In para 5 of the Judgement, it has been held as follows:

“5. After hearing the parties, going through the pleadings made on behalf of the parties and in view of the fact that the financial statements 2016-2017, 2017-2018, 2018-2019, 2019-2020 and Income Tax Return of the Appellant Company shows that the Appellant Company is having substantial movable as well as immovable assets. Therefore, it cannot be said that the Appellant Company is not carrying on any business or operations. Hence, we are of the view that the order passed by the NCLT, New Delhi as well as RoC, NCT Delhi & Haryana is not sustainable in law.”

- In '*Tweak The Future Innovations Private Limited*', cited supra, wherein it was held by this Tribunal that "Operation" in commercial sense means developing business platform also. The relevant para 17 of the Judgement is reproduced as under:

“17. All the above reveals that the Appellant is in operation as they are entering into MOU’s. The Directors are professionals and to develop an I.T platforms also takes considerable time; it is supplementing “Make in India” programme. No doubt, Company’s business volume is too low but attempting to enter USA Market through MOU is a good sign. All this reflects that the Appellant is in operation. “Operation” in commercial sense means developing business platform also.”

- In '*Basant Kumar Berlia & Ors.*', cited supra, wherein it was held by this Tribunal that Creditors may file an Application for restoration of Company's name, if its name is not restored and would be just and equitable to restore the name of the Company to even avoid legal proceedings. In para 30 of the said Judgement, this Tribunal has observed as follows:

“30. We have noted that when the 1st respondent had issued Public Notice dated 7.4.2017 (Page 85) intimating the companies, including 2nd respondent, that their names of the companies would be struck off under Section 248(1) of Act, 2nd respondent was given 30 days’ time from the date of publication of notice to send their objection to the ROC. 2nd respondent did not respond to the said notice. Thereafter, 1st respondent vide notice dated 30.6.2017 (Page87) struck off the name of the 2nd respondent from the register of companies. Now these appellants had filed petition/appeal before the NCLT stating that the company is going concern and they have valuable assets, long terms loan and advances and filed petition/appeal under Section 252(3) of the Act. If the appellants had pleaded it before the ROC, then the ROC before striking off the name of the company under Section 248(5), would have considered the pleas now taken under Section 248(6) of the Companies Act,

2013. The appellants have now filed with this appeal the Balance Sheets for the years 2014, 2015 and 2016 which they could not file with ROC as the company name was struck off. Seeing the balance sheets and the company's huge investment which the company is having since 2011 and there are large amount of the loan and advances, it is possible that creditors could also be aggrieved persons, feeling aggrieved of company's name being struck off, may file an application for restoration of company's name, if its name is not restored. Thus, it would be just and equitable to restore the name of the company to even avoid further legal proceedings."

12. Learned Counsel representing the Office of the RoC, Delhi submitted that that Company was incorporated on 22.08.1988 and since launching of MCA-21 Portal in 2006, no records of the Annual Return & Balance Sheet were submitted by the Appellant Company. Moreover, no subsequent documents had been filed by the Company to obtain the status of a 'Dormant Company' under section 455 of the Companies Act, 1956. Hence, RoC had reasonable cause to believe that the Company was not in operation.

13. It is stated that as per the record available with the Office of RoC and submission made by the Appellant, Company has not filed any form since incorporation i.e., since 1988 or since launching of MCA-21 Portal in 2006 and accordingly no record is available with respect to shareholding of the Company.

14. It is stated that through its Affidavit dated 20.04.2023, Appellant has submitted extract of 'Register of Member' and following is highlighted:

- i. The date of transfer of share has been mentioned 20.10.2014 & 15.03.2009 which is the date after the Company was struck off
- ii. Further, there is no authentication or signature against the entry made in the 'Register of Member'

iii. That it is submitted that Form No. MGT 1 in respect of Register of Members was first notified under Rule 3 of the Companies (Management and Administration) Rules, 2014 w.e.f. 01.04.2014 whereas the Company has already got struck off i.e., much before notification of the Form MGT 1. Therefore, the maintenance of the Register of the Members is also doubtful.

However, we note that no such plea by RoC is mentioned in the Order of the NCLT.

15. We have gone through the submissions of the Appellant and Respondents and have perused the records. The Learned Counsel for the Appellant has brought out difference in the facts of his case with the case of '*Alliance Commodities Private Limited*' cited by the NCLT while rejecting the Appeal of the Appellants. It was submitted that the Company is not a shell Company and is not in any illegitimate business. It is seen that Company owns one Leasehold Property and has assets and liabilities. We have gone through the decisions of the coordinate Benches cited by the Appellant as also decisions of the coordinate Bench in the case of '*GRS Properties Private Limited*' Vs. '*Office of Registrar of Companies, NCT of Delhi & Haryana*', in *Comp. App. (AT) No. 165 of 2021* and '*Calcutta Rubber Factory Pvt. Ltd. & Ors.*' Vs. '*Registrar of Companies, Delhi and Haryana*', 2019 SCC OnLine NCLAT 851, wherein restoration of the Company was considered just and equitable on the grounds that the Company is having Assets.

16. The relevant portion of the Judgement of this Tribunal dated 08.02.2023, in *Comp. App. (AT) No. 165 of 2021*, in the matter of '*GRS Properties Private Limited*' Vs. '*Office of Registrar of Companies, NCT of Delhi & Haryana*', is reproduced below for reference:

Comp. App. (AT) No. 17 of 2022

“7. After hearing the parties, going through the pleadings made on behalf of the parties and in view of the fact that the Audited Financial Balance Sheets of the Year 2015-16, 2016-17, 2017-18, 2018-19 & 2019-20 of the Appellant /Company shows that the Appellant/Company is having substantial movable as well as immovable assets. Therefore, it cannot be said that the Appellant/Company is not carrying on any business or operations. Hence, we are of the view that the order passed by the National Company Law Tribunal (New Delhi, Bench-V) as well as Registrar of Companies, NCT Delhi & Haryana is not sustainable in law.”

17. The relevant portion of the Judgement of this Tribunal dated 06.12.2019, in the matter of ‘*Calcutta Rubber Factory Pvt. Ltd. & Ors.*’ Vs. ‘*Registrar of Companies, Delhi and Haryana*’, 2019 SCC OnLine NCLAT 851, is given below for ready reference:

“11. The company is having a lease hold plot allotted by HUDA and the appellant company undertakes to file the returns and the financial statements after the period 2012-13. The company was carrying on business but was running into losses which accumulated to Rs. 630589/- from the year ending 31st March, 2013 and loss of Rs. 3500/- and Rs. 3500/- from the year ending as on 2016-17, 2017-18. From these facts it cannot be said that the company is not carrying on any business.

12. From the above discussions and observations we have come to the conclusion that it would be just that the name of the company is directed to be restored.....”

18. Since the Company Agerson Telecommunications Pvt. Ltd. is having substantial assets and liabilities, it cannot be said that the Company is not carrying on any business for operations.

19. Considering the facts and circumstances of this case, we find that the Order passed by the NCLT (National Company Law Tribunal, Court – V, New Delhi as well as RoC, NCT of Delhi & Haryana is not sustainable in law.

20. In view of the aforesaid, we set aside the Impugned Order dated 24.09.2021, passed by the National Company Law Tribunal, New Delhi, Bench – V, in Appeal No. 03/252/ND/2021. The name of the Appellant Company is restored to the Register of Companies subject to the following compliances:

- i. Appellant/Company shall pay costs of Rs. 2,00,000/- (Rupees Two Lakh) to the Registrar of Companies, NCT Delhi & Haryana within eight weeks from the passing of this Judgment.
- ii. The Company shall file all their Annual Returns and Balances Sheets. The Company shall also pay requisite charges/fee as well as late fee/charges as applicable.

21. In spite of present Order, the RoC shall be free to take any other steps, punitive or otherwise, under the Act for non-filing/late filing of statutory returns/documents against the Company and Directors.

22. The instant Appeal is allowed to the above extent.

**[Justice Anant Bijay Singh]
Member (Judicial)**

**[Ajai Das Mehrotra]
Member (Technical)**

**Principal Bench,
New Delhi
22nd December, 2023**

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