

NATIONAL COMPANY LAW APPELLATE TRIBUNAL**NEW DELHI****Company Appeal (AT) No.320 of 2019****In the matter of:****Late Mona Aggarwal through her
Legal heir Mr. Vijay Kumar Aggarwal & Anr****Appellants****Vs****Ghaziabad Engg Company Ltd & Ors****Respondents:****Present:**

Mr. Jeevesh Nagrath and Mr. Chandan Dutta, Advocates for appellant.

Mr Simran Mehta with Mr. Javed Akhtar and Mr. Rohit Puri, Advocates for R2 and R3.

JUDGEMENT**JUSTICE JARAT KUMAR JAIN, MEMBER (JUDICIAL)**

This appeal filed by Late Smt Mona Aggarwal (since deceased) through her legal heirs Mr. Vijay Kumar Aggarwal and other shareholders of the Respondent No.1 company against the order dated 7.8.2019 passed by NCLT, New Delhi in Company Petition No.1176/2016 thereby dismissing the petition with liberty to file fresh one as and when the company's name is revived.

2. Brief facts of this appeal are that on 22.11.2016 appellants as shareholder of Respondent No.1 filed a petition before Hon'ble High Court of Delhi seeking winding up under the provisions of Section 433(c), (f) and (g) of the Companies Act, 1956. On 12.4.2017 the Hon'ble High Court as per notification Regd. No.D.L.-33004/99 dated 7.12.2016 issued by Ministry of Corporate Affairs transferred the said petition to NCLT Principal Bench, New Delhi. NCLT vide order dated 28.7.2017 directed the petition to be amended to refer to the relevant sections of the Companies Act, 2013. In compliance

of the directions the petition was amended i.e. the petition treated as filed under Section 271 of the Companies Act, 2013. On 19.9.2017 NCLT issued notice on the petition for winding up of the Respondent No.1 to the Respondents herein. During the pendency of the petition, ROC vide order dated 30.6.2017 exercising powers under sub-section (5) of Section 248 of the Companies Act 2013 struck off the name of the Company from register of companies with effect from 7.6.2017. The Respondent No.2 filed an appeal No.632-252-ND -2018 before NCLT Delhi under Section 252 of the Companies Act, 2013 for revival of the Company which is pending for adjudication before the NCLT. The petition for winding up was adjourned from time to time to await the outcome of the appeal under Section 252 of the Companies Act, 2013 filed for revival of the Respondent No.1 company. However on 7.8.2019 NCLT rejected the petition for winding up with liberty to the petitioner(Appellants) to file a fresh one as and when the respondent company is revived.

3. Being aggrieved with this order the appellants have filed this appeal.

4. Learned counsel for the appellant submitted that the petition for winding up filed before the Hon'ble High Court on 22.11.2016 which was subsequently transferred to the NCLT and during the pendency of the petition the name of the company was struck off by the ROC under Section 248 of the Act for which an appeal under Section 252 of the Companies Act, 2013 for revival of the company is pending. However, the NCLT has rejected the company petition on the ground that the company's name has been struck off

by the ROC and after revival the appellants herein are at liberty to file the petition. This order is erroneously passed. Even if the name of the company has been struck off the power of NCLT to wind up the company shall not be affected as per the provisions under Section 248 (8) of the Companies Act, 2013. For this purpose the learned counsel for the appellant placed reliance on the judgement of this tribunal in the case of *Hemang Phophalia Vs The Greater Bombay Cooperative Bank Ltd, Company Appeal(AT) No.765/2019 decided on 5.9.2019*. It is submitted that the impugned order be set aside and the matter be remitted back to NCLT for deciding the petition afresh on merit.

5. Learned counsel for the Respondents submits that the appeal is not maintainable as the appellants have sought the same relief on the same ground and cause of action as they have filed this appeal as well as filed the application before NCLT for review of the impugned order. Appellant cannot be permitted to exercise concurrent jurisdiction over the same dispute over the same parties for the same relief and on same ground and same cause of action. In such circumstances the possibility of conflicting decisions cannot be ruled out.

6. For the objection learned counsel for the appellants filed the copy of the order dated 25.2.2020 passed by the NCLT thereby the application No.2255/PB/2019 for review of the impugned order is disposed off as withdrawn.

7. Thus the objection in regard to maintainability of the appeal does not survive.

8. Learned counsel for Respondents opposing the prayer and submitted that appellant No.1 late Ms Mona Agarwal has passed away and as per her Will the beneficiaries of her estate are Vikas Agarwal and Sohini Sama, the son and daughter respectively of the deceased. Therefore, they can file the Appeal but not Mr. V. K. Agarwal. It is also submitted that the outcome of the appeal filed under Section 252(3) of the Act seeking restoration should be awaited before this company petition for winding up is heard on merits as the NCLT will be exercising two conflicting jurisdictions at the same time; one for restoration of the company and the other for winding up. NCLT has also given liberty to the appellant that they can file fresh petition after revival of the company. Thus there is no illegality in the order and the appeal is liable to be dismissed.

9. After hearing learned counsel for the parties, we have perused the record.

10. We have considered whether the appeal is filed by the competent person on behalf of late Ms Mona Agarwal. Ms Mona Agarwal by way of her Will dated 7.9.2015 bequeathed her all movable and immovable property for her husband Mr. Vijay Kumar Agarwal alone as the sole beneficiary. Thus on the basis of this Will Mr. Vijay Kumar Agarwal has filed this appeal on behalf of Ms Mona Agarwal as a legal heir. In the Will it is mentioned that only in the unfortunate event if her husband pre-deceases her than her property devolved on her son and daughter, Mr Vikas Agarwal and Sohini Sama, equally. Thus the learned counsel for the Respondents has misconstrued the Will. Mr. Vijay Kumar Agarwal is fully competent to file this appeal.

11. Admittedly appellants have filed petition for winding up of Respondent No.1 company on 22.11.2016. Subsequently this petition was transferred to NCLT New Delhi. During the pendency of this petition the name of the company has been struck off w.e.f. 07.06.2017 by ROC exercising power under sub-section (5) of Section 248 of the Companies Act, 2013. Ld NCLT by the impugned order has rejected the winding up petition with liberty to file a fresh one when the name of the company is revived.

12. The question for consideration before us that during the pendency of winding up petition the name of the company has been struck off under Section 248 of the Companies Act 2013. In such circumstances whether the NCLT can proceed with winding up petition or not.

13. For the purpose we would like to refer Section 248 of the Companies Act 2013 which is as under:-

“CHAPTER XVIII

**REMOVAL OF NAMES OF COMPANIES FROM
THE REGISTER OF COMPANIES**

248. Power of Registrar to remove name of company from register of companies.--(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; [or]

*[***]*

(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”

14. From sub-section (8) of Section 248, it is clear that Section 248 in no manner will affect the powers of the Tribunal to wind up the company, the

name of which has been struck off from the register of companies. Therefore, even after removal of the name of the company from the register of companies the NCLT can proceed with the petition for winding up under Section 271 of the Companies Act, 2013.

15. We have taken the same view in the case of *Mr Hemang P:hophallia (supra)*

16. With the aforesaid, we are of the considered view that the impugned order is not sustainable in law. Hence the order is hereby set aside and the matter is remitted to NCLT, New Delhi for deciding the winding up petition on merit as per law. However, no order as to cost.

17. Registrar to send the copy of this order to NCLT, Delhi. Parties are directed to appear before NCLT, New Delhi on 07.04.2020.

(Justice Jarat Kumar Jain)
Member (Judicial)

(Mr. Balvinder Singh)
Member (Technical)

(Dr. Ashok Kumar Mishra)
Member (Technical)

Dated: 18-3-2020
New Delhi

Bm/kam