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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CO.PET. 200/2011

SIDDHANT GARG AND ANR. Petitioners

Through: Mr. Arun Bhardwaj, Senior Advocate
with Vishal Malhotra, Advocate.

versus

REGISTRAR OF COMPANIES & ORS. Respondents

Through: Mr. K.S. Pradhan, Deputy Registrar of
Companies for Registrar of Companies.
Mr. Amit Sibal, Advocate with
Mr. Bishwajit Dubey, Mr. Tamal
Mandal and Mr. Abhay Chattopadhyaya,
Advocates for appl. in CA 2103/2011.

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Date of Decision: 8th February, 2012.

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J (Oral):

Co. Appl. 2103/2011 in Co. Pet. 200/2011

This application has been filed on behalf of ZTE Corporation under Order 1 Rule 10 read with Section 151 Code of Civil Procedure for impleadment/intervention.

Since the applicant has been heard on merits, the present application has become infructuous. It accordingly stands disposed of.

Co. Pet. 200/2011

1. Present petition has been filed under Section 560(6) of the Companies Act, 1956 (for short 'Act') read with Rule 9 of the Companies (Court) Rules, 1959 seeking restoration of respondent No.2 company in the register maintained by the Registrar of Companies.

2. Both the petitioners claim to have worked as consultants to the respondent No.2 company. In the petition, it has been stated that the petitioners have not been paid their outstanding salaries amounting to ₹ 6,54,000/-.

3. Mr. Arun Bhardwaj, learned senior counsel for petitioners has drawn the attention of this Court to the Balance Sheet of the respondent No.2 company at page 10 of the paper book to show that the current liabilities of the company amounting to ₹ 10,94,665.21/- include the amount due and payable to the petitioners by the respondent No. 2 company.

4. It is further stated in the petition that respondent No.2 company has won an arbitration case against one M/s. ZTE Corporation (ZTE) which is a company based in China. It is the case

of the petitioners that respondent No.2 company is not taking any steps to enforce the Foreign Award.

5. Mr. Arun Bhardwaj, learned senior counsel for petitioners submits that the petitioners who are creditors of the respondent No.2 company are aggrieved by the malafide action of the former management of the respondent No.2 company by virtue of which, they have got respondent No.2 struck off from the Register of Companies under the Simplified Exit Scheme 2003. In this connection Mr. Arun Bhardwaj, learned senior counsel for petitioners has drawn my attention to paragraphs 2, 3 and 6 of the present petition. Mr. Bhardwaj prays that the respondent No.2 company be restored to the register maintained by the respondent No.1 and the respondent No.2 company be placed in the same position as if its name had never been struck off.

6. Mr. Amit Sibal, learned counsel appearing for the intervenor-M/s. ZTE Corporation contends that respondent No.2 company had suppressed the fact that it had been struck off from the Register of Companies not only from the arbitral tribunal, but also from the High Court in OMP No. 359/2006, OMP No. 65/2008 and Ex.P. No.

334/2010.

7. Mr. Sibal states that the petitioners are colluding with the respondent No.2 company inasmuch as the petitioners have filed the Foreign Award and other documents which could only be in the possession of the respondent No.2 company.

8. Mr. Sibal also submits that the petitioners have no locus standi to file the present petition as they have not produced any material to show that petitioners had ever claimed their debt from the respondent No.2 company.

9. Mr. Sibal further submits that the present petition is barred on the ground of res judicata inasmuch as Hon'ble Mr. Justice Sudershan Kumar Misra vide order dated 23rd April, 2010 has already rejected the respondent No.2 company's application for restoration. He points out that the said order has attained finality.

10. Mr. Sibal lastly submits that the intervenor is willing to repay the entire debt of the petitioners provided the present petition is dismissed.

11. Mr. K.S. Pradhan, Deputy Registrar of Companies states that the respondent No.2 company had itself made an application for

being struck off in terms of the Simplified Exist Scheme 2003 and at the time of making the said application, every Director of the company had submitted an indemnity bond making them liable for any dues and claims of the creditors.

12. Having heard the parties at length, this Court is of the view that it is essential to first outline the scope and ambit of Sub-section 6 of Section 560 of the Act. The said Sub-section reads as under:-

“560. Power of Registrar to strike defunct company off register.—

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(6) If a company, or any member or creditor thereof, feels aggrieved by the company having been struck off the register, the [Tribunal], 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 [Tribunal] 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.”

13. From a perusal of the said Section, it is apparent that this Court on an application filed either by the company or by any shareholder or by a creditor can restore the company, provided it is carrying on business or if this Court is convinced that it is 'just' to restore the company.

14. Keeping in view the explicit language of Section 560(6) of the Act, this Court is of the view that it must exercise its discretion to restore a company, after looking at all the circumstances of the case. This Court is of the opinion that a petition under Section 560(6) needs to be allowed unless there are special circumstances against restoration. In fact, it should be the Court's endeavour to support revival of a company rather than otherwise. The Chancery Division (Companies Court) in *Re Priceland Ltd., Waltham Forest London Borough Council vs. Registrar of Companies & Ors. (1997) 1 BCLC 467 (Ch. D)* has held as under:-

“.....In other words, the exercise of discretion only arises after the court has been satisfied that (a)the company was at the time of striking off carrying on business or in operation, or (b) otherwise that it is just that the company be restored. The first of these amounts to the court being satisfied that the registrar's reasonable beliefs which were the basis for the original order striking the company off, were not in fact correct.

The second means that, prima facie, the court has been persuaded that it is just to restore. In either case it seems to me that, absent special circumstances, restoration should follow. Exercising the discretion against restoration should be the exception, not the rule.” (Page 476)

Once the court has acquired jurisdiction on the basis that the new applicant’s interests make restoration ‘just’ it would be harsh indeed to refuse the relief sought because some other third party may be inconvenienced by it.

These considerations lead me to the view that the court should be very wary of refusing restoration so as to penalize a particular applicant or in a possibly futile attempt to safeguard the special interests of a single or limited class of affected persons. It would need a strong case to justify a refusal on these grounds.....(Page 477)

(emphasis supplied)

15. Further in the opinion of this Court, the expression ‘just’ would mean that it is fair and prudent from a commercial point of view to restore the company. The Court has to examine the concept of ‘justness’ not exclusively from the prospective of a creditor or a shareholder or a debtor, but from the prospective of the society as a whole. Once this Court is convinced that it is just to restore the company, then to refuse the relief because some thirty party may be

inconvenienced by it, would be harsh.

16. In the opinion of this Court, since today the respondent No.2 company has a Foreign Award of more than a million dollars in its favour, it would be just, fair and prudent to restore the company to its original status.

17. It is pertinent to mention that if the respondent No.2 company is today restored, it would be in a position to prosecute its execution petition for recovery of the Foreign Award and if it is successful in its endeavour, then not only would the company revive, but also society would gain as a defunct company would stand restored as a healthy company.

18. In fact, this Court in *Kesinga Paper Mills Private Limited vs. Ministry of Corporate Affairs, 2010 (101) SCL 321(Del.)* has held as under:-

“10. Further, when a litigation is pending by or against a company, it is only proper that its name be restored to the Register to enable the matter to be carried to its conclusion, as has been held by this Court in *M/s. Indian Explosives Ltd. v. Registrar of Companies, CP. No. 185/2008, decided on 21st April, 2010.*”

(emphasis supplied)

19. Moreover, keeping in view the averments in the petition, it cannot be said that petitioners have no locus standi to file the present petition or that the petitioners are acting in collusion with the respondent No.2 company. In fact, in paragraphs 2 and 3 of the petition, petitioners have taken a categorical stand that a sum of money is due and payable to them by the respondent No.2 company. In the Balance Sheet annexed with the petition, the current liabilities and provisions are also shown. The aforesaid facts have not been disputed by respondent No.2 company despite service. It is pertinent to mention that though this Court is not adjudicating upon the claim of the petitioners on merits, but it has referred to the aforesaid facts only to show that there is some material on record to show that the petitioners are alleged creditors of the respondent No.2 company.

20. Further in the opinion of this Court, the petitioners certainly have a locus standi to maintain the present petition as according to Section 560(6) of the Act, a petition can be filed by any creditor.

21. The argument that petitioners are in collusion with respondent No.2 company inasmuch as they have produced certain documents which the respondent-company could only be privy to, cannot be

accepted as proceedings between the parties stand disposed of and any party can inspect a disposed of file.

22. This Court is also of the opinion that it is not the right forum either to adjudicate the dispute between the petitioners and respondent No. 2 company or to record any compromise between the petitioners and intervener. In any event, the offer was outrightly rejected by the learned senior counsel for the petitioners.

23. As a matter of law, it cannot be said that where the company's name has been struck off on an application filed under Simplified Exit Scheme, the company cannot be restored. In fact, the Madhya Pradesh High Court in *VI Brij Fiscal Services P. Ltd. vs. Registrar of Companies (2010) 155 Comp. Cas. 157 (MP)* has restored a company which had been struck off under the Simplified Exit Scheme.

24. As far as the plea of res judicata is concerned, this Court finds that Hon'ble Mr. Justice Sudershan Kumar Misra while rejecting the application under Section 560(6) of the Act had clearly observed that the respondent No.2 company's counsel had failed to show "*discovery of some properties or debtors or creditors of the*

company which requires that be company be restored.....” From the facts placed on record in the present petition, it is apparent that respondent No.2 company, on the date the said order was passed, had an arbitral award in excess of a million dollars in its favour, which was not disclosed to this Court. This fact also lends the credence to the petitioners’ argument that respondent No.2 company had not proceeded with its remedies diligently and fairly. In any event, the principle of res judicata would not apply as the present petitioners were not parties to the earlier proceedings.

25. Consequently, the present petition is allowed and respondent No.2 company is restored to its original status. However, the intervenor’s submission that respondent No.2 company had concealed the fact that it had been struck off from the arbitral tribunal and from this Court in the execution proceedings, is left open to be decided by the concerned Court in accordance with law. It is clarified that this Court has not dealt with the aforesaid issue. In fact, the rights and contentions of both the parties with regard to the said issue are left open.

26. The ex-management of the respondent No.2 company are directed to file all statutory returns along with prescribed fees in compliance with all statutory requirements. In the event of their failure to do so, the petitioners are directed to fulfil the aforesaid obligation.

27. With the aforesaid observations, present petition stands disposed of.

MANMOHAN, J.

February 08, 2011

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