

(2011) 04 CAL CK 0021**Calcutta High Court****Case No:** Company Petition No. 300 of 2010 and Company Application No. 532 of 2010

BOC India Ltd.

APPELLANT

Vs

Registrar of Companies

RESPONDENT

Date of Decision: April 26, 2011**Acts Referred:**

- Companies Act, 1956 - Section 209, 209A, 269, 295(1), 300(1)
- Criminal Procedure Code, 1973 (CrPC) - Section 190, 203, 468, 469(3), 470(2)

Citation: (2012) 110 SCL 46**Hon'ble Judges:** I.P. Mukerji, J**Bench:** Single Bench**Advocate:** Ranjan Deb and Ms. Manju Bhutoria, for the Appellant; Dipak Basu and Bhaskar Prasad Banerjee, for the Respondent**Final Decision:** Allowed**Judgement**

I.P. Mukerji, J.

This is an application u/s 633(2) of the Companies Act, 1956.

2. The petitioners pray for being exonerated from the various alleged offences with which they are charged by three show-cause notices all dated, 9 July, 2010 mentioned in prayer (a) of the summons for direction.

3. The first show-cause notice which was issued u/s 295(1)(c) of the Act related to inter-corporate deposit. The lender or depositor was BOC India Limited. The borrower or recipient was BOC Global Support Services Private Limited. These two companies had a common director. It was alleged that permission of the Central Government was required for making the intercorporate deposit. Such permission was not obtained. Hence there was violation. The reply of the company which was made on 19 August, 2009, to an earlier identical notice was to the effect that in the decision making process for advancing the inter-corporate deposit, this director did not participate.

4. The alleged period of violation was August 2007. Conviction would result in a maximum imprisonment of six months for the offender.

5. The second show-cause notice was u/s 300(1) of the Act. The offence was alleged to have been committed from 2005 till February, 2009. The allegation was that on inspection of the minutes of the board of directors it was found by the Central Government that there was no recording in the minutes whether the directors were interested in any matter discussed there.

6. The company replied on 19 August, 2009, to an earlier identical notice by advancing various grounds. It said that one board meeting was held on 30 March, 2005. The director concerned was not appointed as a director when the decision was taken. For the other board meetings and resolutions, it was said that the interested directors did not participate in them and their presence was not included. The offence, if proved, would result in punishment with fine only.

7. The third show-cause notice alleged violation of section 269 read with section 309 and Schedule XIII of the Act. The period of violation was from January, 2005, till October, 2007. It alleged that the travelling expenses of some family members of the directors were shown as expenses of the company and hence there was mis-utilization of the company's fund. The company replied to an earlier identical notice on 19 August, 2009, saying that the presence of the spouse was necessary in the business meetings which the directors of the company attended. The presence of the spouse promoted the company's business interests. Hence, their presence was justified.

8. A very interesting point of limitation is raised. According to the petitioner all the alleged offences are barred by limitation.

9. The time prescribed by section 468 to take cognizance of the alleged offences indicated in the first show-cause notice, was one year. For the second and third show-cause notices it was six months as only a fine was involved.

10. The learned counsel for the Union of India, Mr. Bhaskar Prasad Banerjee, raised a point of considerable importance. He argued that the date of commencement of the period of limitation should be the date when the commission of the offence came to the knowledge of the Registrar of Companies. Furthermore, such date of knowledge should be from the date of issuance of the show-cause notice.

11. Section 469(3) of the Code of Criminal Procedure, *inter alia*, states that the period of limitation in relation of an offence shall commence, where, *inter alia*, the commission of the offence was not known to the person aggrieved by it, on the first day when such offence came to his knowledge. Other parts of this subsection relate to the date of knowledge of a police officer. In this case no police officer is involved. The knowledge of the person aggrieved by the offence is material. In such type of cases the person aggrieved by the offence is the Central Government.

12. The exact date on which the investigation and inspection by the inspecting officer was carried out u/s 209A of the Companies Act, 1956, is not available from the record. The inspection report is also not available in the record. On 20 July, 2009, the Assistant Director (Inspection) of the Office of the Regional Director, Eastern Region, Ministry of Corporate Affairs of the Government of India issued a show-cause notice to the petitioner. Therefore, by 20 July, 2009, the Central Government, being the person aggrieved by the alleged offence, had knowledge of all the alleged offences.

13. However, in my opinion, the date the inspection is ordered can be taken as the date when the Central Government has knowledge of the alleged offence, just like a police officer can be fixed with knowledge of a crime when he orders an enquiry.

14. This application was filed on 21 July, 2010. The order of injunction restraining the Central Government from prosecuting the petitioner was made by me on 28 July, 2010.

15. Within the aforesaid period of limitation, the criminal court is to take cognizance of the offence u/s 190 of the Code of Criminal Procedure. No such cognizance was taken by any court.

16. Now, the question is: What is the power of this court in an application u/s 633(2) of the Act, in such cases?

17. When a prosecution under the Act is apprehended, any officer may u/s 633 apply to the High Court for exoneration.

18. In dealing with such application, the High Court has power u/s 635(1). That sub-section reads as follows:

633(1) If in any proceeding for negligence, default, breach of duty, misfeasance or breach of trust against an officer of a company, it appears to the Court hearing the case that he is or may be liable in respect of the negligence, default, breach of duty, misfeasance or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused, the Court may relieve him, either wholly or partly, from his liability on such terms as it may think fit:

Provided that in a criminal proceeding under this sub-section, the Court shall have no power to grant relief from any civil liability which may attach to an officer in respect of such negligence, default, breach of duty, misfeasance or breach of trust.

19. In my unreported judgment delivered on 5 April, 2011, in Company Petition No. 8 of 2010 and Company Application No. 5 of 2010, Bithal D Mundra v. Registrar of Companies [2011] 164 Comp. Cas. 375 /107 SCL 133 (Cal.), I held that the High Court u/s 633(1) and 633(2) had the same power as the criminal court to relieve an alleged offender. The power to relieve includes the power to discharge an alleged offender

when no cause of action against him is disclosed. The said provisions of the Act conferred a power upon the High Court to exonerate the accused if it appeared to it that he may be liable but had acted "honestly and reasonably" and, furthermore, having regard to the circumstances he ought to be excused [See section 633(1) of the Act]. Now, this power given to the High Court is part of the power given to it to relieve an accused. Such discretion is also vested in the criminal court to relieve an offender, if similar circumstances exist. In passing that judgment I had relied upon two decisions of our court in SBI Home Finance Ltd. v. Regional Director, Department of Company Affairs [2007] 138 Comp. Cas. 106/75 SCL 460 and Chandra Kumar Dhanuka v. Registrar of Companies [2008] 83 SCL 296.

20. I read the following passage from the said unreported judgment delivered by me on 5 April, 2011, in the case of Bithal D Mundra (supra).

Section 633(1) relates to the powers of the court, in which proceedings have already been instituted for any violation of the Companies Act. It says that when it appears to such court that an officer is or is likely to be liable for contravention of the Act, but nevertheless, according to the court, he has acted honestly and reasonably, it might exonerate him.

The High Court has been given the same power. While granting such power to the High Court, Parliament has enacted a provision which is part of section 633(2) and which is in the following terms:

"633(2)... the High Court on such application shall have the same power to relieve him as it would have had if it had been a court, before which a proceeding against that officer for negligence, default, breach of duty, misfeasance or breach of trust had been brought under sub-section (1)"

It says that the High Court will have the same power to relieve an alleged offender as the criminal court has u/s 633(1).

Now, the criminal court proceeds on such complaint as if it is a criminal complaint. Therefore, as in other criminal proceedings, on receipt of a complaint a Criminal court is to examine whether it should take cognizance of the offence u/s 190 of the Code of Criminal Procedure. Thereafter, it is to examine whether any case has been made out against the accused. If it decides that no case has been made out, it is to discharge the accused. When a *prima facie* case has been established against him the trial proceeds by framing of charges and so on. If the charge cannot be established at the trial the accused is acquitted. These are the elementary principles of our criminal procedure.

A very relevant consideration in initiating criminal proceedings is the law of limitation. Section 468 of the Code enacts that no court is to take cognizance of an offence after expiry of the period of limitation. The court takes such cognizance when, *inter alia*, a complaint petition is filed before it u/s 190. Considering section

468, the Magistrate has the power u/s 203 to dismiss the complaint on the ground of limitation.

Therefore, the powers of the Magistrate u/s 633(1) to exonerate the accused in case he is of the opinion that the accused is likely to have committed the offence but there are grounds for his exoneration are in my judgment in addition to his powers to take cognizance and proceed with the trial and not an isolated power.

Therefore, the High Court is also invested with similar powers. First, to ascertain whether there is cause for proceeding with the complaint and then to consider whether the accused should be exonerated [see S.B.I. Home Finance Ltd. and Kidambi Srinivash Varda Krishnamachari Vs. Regional Director, Deptt. of Company, and Chandra Kumar Dhanuka and Others Vs. Registrar of Companies,

21. I would elucidate upon my above judgment by clarifying that the power to relieve includes the power to dismiss the complaint and to discharge the accused. This power can be exercised before exercising the power to exonerate the accused; exoneration is, ordered after the court is satisfied that the accused is likely to be guilty. The High Court has no power to try and sentence the accused in my opinion.

22. Furthermore, when a section 633(2) application is pending in the High Court, within the period of limitation, the Central Government should seek an injunction u/s 470(2) of the Code of Criminal Procedure, instead of allowing limitation to set in, particularly so, when it follows the practice of not prosecuting an accused during the pendency of a section 633(2) proceeding. I also observe that in this case the offences if proved were minor.

23. Nevertheless, in my judgment, the Central Government has deliberately not chosen to take steps within the period of limitation.

24. The order of injunction made by this court on 28 July, 2010, in my opinion, does not help the Central Government u/s 470(2) of the Code of Criminal Procedure, 1973, because on the date the order of injunction was passed cognizance of the alleged offence had become hopelessly barred. It became hopelessly barred even assuming that time began to run from 20 July, 2009.

25. As the offences are minor and as no arguments were advanced in this behalf, I am not in favour of exercising powers extending the period of limitation u/s 473 of the Code.

26. Therefore, on the basis of the above authorities I am of the view that the petitioners ought to be discharged from the accusation on the ground of limitation. Since the petitioners are being discharged on the ground of limitation there is no need for the court to probe into the alleged offences.

27. This application is accordingly allowed by discharging the petitioners.

28. In the facts and circumstances there is no order as to costs.