

(2011) 04 CAL CK 0023

Calcutta High Court

Case No: C.A No. 5 of 2010 in C.P. No. 8 of 2010

Bithal D. Mundra and Others

APPELLANT

Vs

Registrar of Companies

RESPONDENT

Date of Decision: April 5, 2011

Acts Referred:

- Companies Act, 1956 - Section 113(2), 211(1), 211(2), 211(3A), 211(7)
- Criminal Procedure Code, 1973 (CrPC) - Section 190, 203, 468, 468(2), 469

Citation: (2011) 164 CompCas 375

Hon'ble Judges: I.P. Mukerji, J

Bench: Single Bench

Advocate: Somen Sen, Manju Bhutoria and G.S. Asopa, for the Appellant; Dipak Kumar Mukherjee and Aparna Banerjee, for the Respondent

Final Decision: Allowed

Judgement

I.P. Mukerji, J.

The provision of the Companies Act, 1956, which is under consideration in this application is Section 633(2). It reads as follows:

633.(2) Where any such officer has reason to apprehend that any proceeding will or might be brought against him in respect of any negligence, default, breach of duty, misfeasance or breach of trust, he may apply to the High Court for relief and 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).

2. This Act, elsewhere provides for numerous acts and duties to be done by the company and its officers and registers, returns, statements of accounts, other records and documents to be maintained by them. Breach of any obligation is visited by punishment.

3. When such prosecution is apprehended, any officer may u/s 633(2) apply to the High Court for exoneration.

4. In dealing with such application, the High Court has powers u/s 633(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.

5. 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.

6. 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).

7. 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).

8. 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, 1973. 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.

9. 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.

10. 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.

11. 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, see also Chandra Kumar Dhanuka and Others Vs. Registrar of Companies,).

12. An important, if not the most important point of defence in favour of the Petitioners is the point of limitation.

13. Our Division Bench in the case of Bhagwati Foods P. Ltd. v. Registrar of Companies, West Bengal reported in [2008] 143 Comp Cas 531, noted that time bar is one of the circumstances which the court can take into account for the purpose of exoneration of the accused. The Division Bench pronounced as follows (page 540):

Moreover, for grant of relief u/s 633(2), the court is to take into account, the entire circumstances of the case. In the instant case, penal action for contravention of Section 211(1) and (2) of the Companies Act, 1956, has become time-barred. The allegations in the sixth show-cause notice do not constitute the ingredients of an offence u/s 628 of the Companies Act, 1956, as observed above.

It is now settled that this Court might in exercise of jurisdiction u/s 633(2) and excuse a person from liability, if the time for filing a complaint, for the offence alleged, as prescribed u/s 468 of the Code of Criminal Procedure, 1973, has become time-barred.

It is true, that relief u/s 633(2) of the Companies Act, 1956, is discretionary. No person can claim to be excused from liability as of right. We are, however, of the view that in the facts and circumstances of this case, discretion should have been exercised to excuse the Appellants from liability in respect of the sixth show-cause notice too.

We are of the considered opinion that the learned single judge erred in not giving the same relief to the Appellants with regard to the sixth show-cause notice. Consequently, the appeal is treated as on the day's list and allowed, however, subject to payment of costs of Rs. 5,000 as has been imposed by the learned single

judge.

The application is, accordingly disposed of.

The undertakings, if any, given in the appeal are discharged.

14. There is a similar pronouncement by a learned single judge of our court in an unreported judgment made on November 30, 1992, in the case of Hindustan Development Corporation v. Registrar of Companies, West Bengal.

15. It is as follows:

However, the matter is concluded in favour of the applicants beyond question by reasons of Section 468(2)(a) of the Code of Criminal Procedure which prescribes for a period of limitation of 6 months from the date of offence. Even assuming that the applicants had committee (sic) default in compliance with the provisions of Section 113(2) of the said Act, the last of such default was committed in April, 1991. Not only were no criminal proceedings initiated within the period of 6 months, but even the show-cause notice has been issued to the applicants beyond that period.

For the reasons aforesaid, the application is allowed. The interim order already granted is made absolute.

16. The first show-cause notice is dated December 23, 2009. The period during which the offence was allegedly committed was the financial years ending on March 31, 2007, March 31, 2008 and March 31, 2009. Now, the contravention alleged was of Section 211(1), (2) read with Parts I and II of Schedule VI of the Companies Act, 1956. The imprisonment for such an offence is six months. The period of limitation is one year. u/s 468, read with Section 469 the court has to take cognizance, that is cognisance u/s 190 of the Code of Criminal Procedure, 1973, within one year from the date of commission of the alleged offence. Let us assume that the offence was a continuing one and continued through March 31, 2007, March 31, 2008 and March 31, 2009.

17. This application was filed on January 6, 2010. It was moved only on May 5, 2010. Therefore, at the time of moving of this application before the court the cognizance of the offence had become barred. Just filing of an application does not tantamount to an order of injunction, suspending the period of limitation u/s 470(2). If there is a Departmental practice, not to prosecute during the pendency of a Section 633(2) application, the Registrar of Companies ought to have obtained the injunction.

18. For all the offences alleged, except the one in the fourth show-cause notice the maximum imprisonment is six months. For the fourth, it is fine. Therefore, for the first three offences the period of limitation is one year and for the fourth it is six months.

19. Similarly, the alleged offences in the second and third show-cause notice are barred by limitation as they relate to the same period, more or less. The alleged

offence in the fourth show-cause notice is till December 31, 2007 and also hopelessly barred.

20. Now, let me deal with the nature of offences.

21. In the first show-cause notice, the objection was with regard to some accounting principles in preparing the profit and loss account for the accounting years ending on March 31, 2007, March 31, 2008, March 31, 2009. Such objection was raised by the Respondent by an earlier notice dated October 8, 2009, which was replied to by the company on October 27, 2009, stating that they had complied with the requirements of the Act.

22. The second show-cause notice of the same day was also related to discrepancy in the accounts. This time the alleged discrepancy was with regard to the notes to the accounts for the financial years ending March 31, 2007 and March 31, 2008, in alleged violation of Section 211(3A). In similar circumstances, the company had replied to an earlier notice alleging such discrepancy by stating that there was no error in the note and that it was prepared according to proper accounting standards. The third show-cause notice, also of the same date alleged a discrepancy in the disclosure of the names and other particulars of the employees in alleged violation of Section 217(2A) for the financial years ending March 31, 2007, 2008 and 2009. This allegation was also raised in an earlier letter dated October 8, 2009, which was replied to by the company on October 27, 2009. The last show-cause notice is dated December 27, 2009, alleging violation of Section 305(1) of the Act. The allegation was that Petitioner No. 3, Ms. Apurba Mukherjee, was appointed as director of one Bagryys India Ltd., on December 31, 2007. According to the Petitioner the date should be December 31, 2005. Petitioner No. 3 did not disclose to the company his said appointment within twenty days thereof. This allegation was also made in an earlier letter dated October 8, 2009, which was replied by the company on October 27, 2009. The Petitioners say that Mr. Mukherjee had declared his interest for the financial year 2006, and subsequent years. His directorship was registered in the register maintained u/s 303(1) of the Act.

23. The relevant sections provide that if any of the directors and other officers of the company fail to take reasonable steps to secure compliance of the requirements of the Act they will be punished with imprisonment for up to six months. Such is provided in Section 211(7). Similar is the language of Section 217(5). But in this section the obligation is only of the director. On my examination of the complaint of the Department it relates to the way profit and loss account was prepared, the information to be contained therein, the way the information has to be projected, the contents of the notes to the accounts and so on. One complaint was regarding non-disclosure of the appointment of a director of the company in another company.

24. I have also examined all the replies of the company to the letters of the Respondent. Those accounts and statements were prepared and audited by a qualified auditor. The company tried to explain each and every objection of the Department by justifying the above accounts, information, notes, etc., by acceptable professional standards, which according to the company, were applied in the preparation of those documents. Furthermore, according to them, they were prepared after taking proper professional assistance and opinion. Hence according to the company they were correct.

25. When such is the factual position it cannot be said that the directors and other officers of the company who are Petitioners before me have "failed to take reasonable steps". If a professional opinion is tenable and accounts and the directors" report have been prepared according that professional opinion, it cannot be said that reasonable steps were not taken by the company and its directors and other officers to comply with the provisions of the Act. In any case to prove contravention the mental element like intention or negligence or recklessness has also to be proved. On an assessment of the above facts those elements are also absent, in my opinion.

26. For the above reasons including the ground of limitation, the Petitioners have to be discharged. Therefore, this application is allowed by passing orders discharging the Petitioners from the offences alleged in the show-cause notices mentioned in the summons for direction.

27. Urgent certified photocopy of this judgment and order, if applied for, to be provided upon complying with all formalities.