

(2011) 08 CAL CK 0071

Calcutta High Court

Case No: CP No. 330 of 2010

Sanjay Somani and Others

APPELLANT

Vs

Registrar of Companies

RESPONDENT

Date of Decision: Aug. 3, 2011**Acts Referred:**

- Companies Act, 1956 - Section 209A, 295, 295(1), 628, 633(2)
- Criminal Procedure Code, 1973 (CrPC) - Section 190, 468, 469(1)

Citation: (2012) 1 CHN 26 : (2011) 105 CLA 135 : (2011) 167 CompCas 367**Hon'ble Judges:** I.P. Mukerji, J**Bench:** Single Bench**Advocate:** Bhutoria, for the Appellant; Bhaskar Prasad Banerjee, for the Respondent**Final Decision:** Allowed

Judgement

I.P. Mukerji, J.

This is another application u/s 633(2) of the Companies Act, 1956 ("the Act"). It is made by three persons. The first is the managing director of the company, Hindustan National Glass & Industries Ltd. The second is its chairman. The third is the joint managing director. They are the first, second and third petitioners respectively in this application. They seek an order from this court relieving them from the alleged offence with which they are charged by the show cause notice dated 14th July, 2010 issued by the Assistant Registrar of Companies, West Bengal.

2. Two usual points are taken. The first is that the alleged offence has become time barred and no court can take cognisance of it. The second is that considering the show cause and the answer given to it, it is possible for the court to hold that the petitioners had acted reasonably and honestly and that they should be let off u/s 633(2).

3. It appears that the Office of the Regional Director had conducted an inspection u/s 209A of the Act, of the books, papers, other documents and records of the company. The date of inspection is not available from the records. But, on 22nd December, 2008 that office wrote a letter to the company with copies, inter alia, to the petitioners. In item No. 5 of the subjects mentioned in that letter it was alleged that the Board of directors of the company at a meeting held on 16th May, 2006 had decided to buy 10,000 equity shares of Rs. 10 each of a company H.N.G. Float Glass Ltd. The shares were purchased. A sum of Rs. 30 crore was advanced to H.N.G. Float Glass Ltd. by the company as application money for shares. Subsequently, further sums were advanced. Rs. 3.50 crore was refunded to the company by H.N.G. Float Glass Ltd. and 42,000,000 equity shares of that company were issued and allotted to this company. According to the Central Government the said amount paid by the company to H.N.G. Float Glass Ltd. was loan and advance. Now according to them the directors of the company were holding 30 per cent of the paid-up share capital of the other company and for advancing money permission of the Central Government was required, which was not obtained. Therefore, there was violation of section 295(1)(d) of the Act. In the letter dated 22nd December, 2008 other alleged violations by the company were also alleged.

4. The company by its letter dated 6th January, 2009, the company discussed the provision of, inter alia, section 295(1)(d) and (e) of the Act which are copied below :

295. Loans to directors, etc. - (1) Save as otherwise provided in sub-section (2), no company ("the lending company") make any loan to, or give any guarantee or provide any security in connection with a loan made by any other person to, or to any other person by, -....

(d) anybody corporate at a general meeting of which not less than twenty-five per cent of the total voting power may be exercised or controlled by any such director or by two or more such directors together; or

(e) any body corporate, the Board of directors, managing director, or manager whereof is accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors, of the lending company.

5. It said that, their directors did not hold more than 4 per cent of the share capital of H.N.G. Float Glass Ltd. Furthermore, it was said that H.N.G. Float Glass Ltd. had three directors on their Board. These were non-executive directors in that court. Hence, they did not control the company, H.N.G. Float Glass Ltd. Moreover, they said that the sum advanced by the company, H.N.G. Float Glass Ltd. was not loan but share application money for purchase of shares by the company and its directors.

6. The office of the Registrar of Companies ("RoC") (West Bengal) on 14th July, 2010 issued a show cause notice alleging that every director of the company was to show cause against the said alleged violations complained of. It was said on behalf of the company that since they had replied notice to the office of the Regional Director,

Eastern Region dated 22nd December, 2008, on 6th January, 2009, they did not reply to this show cause notice.

7. The first ground, as I have said before is limitation. The alleged violation is of section 295 of the Act. The penalty for such violations, if proved is six months imprisonment or fine or both. Hence, u/s 468 of the Code of Criminal Procedure, 1973 the time limit for taking cognisance of the offence is one year from the date of its commission or knowledge by, inter alia, the person aggrieved by it. The period for which the violation had allegedly taken place ended 31st March, 2008.

8. Now it is the usual case of the RoC, that the date of knowledge is the date of the show cause notice which is 14th July, 2010. Hence, limitation did not set in when this application was filed.

9. The commencement of the period of limitation is from the date of the offence or from the date of knowledge of the offence by the person aggrieved [See section 469(1)(a) and (b) of the Code of Criminal Procedure]. Let me assume that on the date of the alleged offence the RoC had no knowledge. But by 22nd December, 2008 the RoC is deemed to have knowledge of the offence as knowledge by the office of the Regional Director is knowledge of the RoC - see the cases of Bithal D. Mundra v. Registrar of Companies (2011) 103 CLA 325 (Cal.) : (2011) 164 Comp Cas 375; Mishra Dhathu Nigam Ltd. v. State (1999) 32 CLA 441 (AP) : (1998) 92 Comp Cas 730; [Srikumar Menon and Others Vs. Registrar of Companies](#), and unreported judgment in CP No. 2906/ 2011 AI Champdany Industries Ltd. v. Registrar of Companies delivered by this court of 26th July, 2011. (since reported as [Ai Champdany Industries Ltd. and Others Vs. Registrar of Companies and Others](#),

10. This application was filed on 4th August, 2010. On that date no criminal complaint was lodged by the RoC, West Bengal. Therefore, if he is fixed with knowledge of the alleged offence by 22nd December, 2008 cognisance of the offence was barred when this application was filed. If cognisance of the offence is barred the alleged complaint is liable to be dismissed and the accused discharged. This has also been held in the above cases decided by this court.

11. In view of my analysis above cognisance of the offence has become barred. Regarding the substantial charge against the petitioners, the court has not made a factual enquiry as to whether the directors of the company hold 4 per cent or more than 4 per cent of the shares in the company H.N.G. Float & Glass Ltd. or whether the directors of the company control the affairs of the other company. Furthermore it is not possible for the court to hold an enquiry as to whether the sum advanced by the company to HNG Float & Glass Ltd. was loan or application money for shares. But, our Division Bench in the case of Bhagwati Foods (P.) Ltd. v. Registrar of Companies (2008) 85 CLA 168 (Cal.) : (2008) 143 Comp Cas 531 has held that if cognisance of alleged offence is barred by limitation the High Court could exonerate the accused and relieve him from liability. I would apply the same principle here.

12. Two points raised by Mr. Bhaskar Prasad Banerjee, learned counsel for the Central Government have to be decided before disposing of this case.

13. He argued that there was no complaint petition before the court u/s 190 of the Code of Criminal Procedure. Therefore, the court could not exercise the jurisdiction to dismiss the complaint against the accused or to discharge him.

14. Brother Sanjib Banerjee, J in the case of [S.B.I. Home Finance Ltd. and Kidambi Srinivash Varda Krishnamachari Vs. Regional Director, Deptt. of Company](#), has held that the High Court in a section 633(2) application becomes a criminal court and has the power to acquit or exonerate an accused. I, read the concluding part of that judgment.

16. Upon an application being filed u/s 633(2) of the Act, the High Court assumes the power and jurisdiction as the court before which the proceedings threatened to be instituted may have been brought. In such a case, the criminal court would have the jurisdiction to acquit the accused, to exonerate the accused or to find him guilty and to sentence him. Section 633(2) does not merely give the discretion to the High Court to pardon a person upon his admission of negligence or breach of trust or misfeasance or default or breach of duty. Upon the High Court coming to the conclusion that the apprehension referred to in the opening words of sub-section (2) was genuine, the High Court, willy-nilly becomes the criminal court in which the complaint against the petitioner may have been brought. The jurisdiction of the High Court in such a case is not limited to pardon the defaulter upon default being admitted or being found. The High Court in such a case may acquit or exonerate the petitioner upon arriving at a conclusion that there was no offence committed. In this case, I find that there was no false or misleading statement contained in the sentence, which has been made the subject-matter of the notice relating to the violation u/s 628 of the Act.

15. I have followed that judgment in Bithal D. Mundra" case (supra) and Srikumar Menon"s case (supra).

16. I would add that the papers in the section 633(2) application constitute the information u/s 190 of the Code of Criminal Procedure, on the basis of which the High Court can dismiss the complaint and discharge the accused.

17. The second point taken by Mr. Banerjee was that this application was not signed and verified personally by the petitioners. This point is also a bad point. This application is a civil proceeding. Therefore, the rules contained in order III, order VI and order XXIX of the Code of Civil Procedure, 1908 permitting the pleadings to be signed and affirmed by a person other than the party are applicable.

18. Therefore, on the ground that cognisance of the alleged offence is barred by the laws of limitation and secondly applying the ratio in the case of Bhagwati Foods (P.) Ltd. (supra). I dismiss the complaint against the petitioners and discharge them

from the offence with which they are charged by the show cause notice dated 14th July, 2010. This application is accordingly allowed.