

(2011) 04 CAL CK 0065

Calcutta High Court

Case No: C.A. 387 of 2009

South Asian Petrochem Limited

APPELLANT

Vs

The Registrar of Companies

RESPONDENT

Date of Decision: April 5, 2011

Acts Referred:

- Companies Act, 1956 - Section 113(2), 209(A), 211(1), 211(2), 211(3A)
- Criminal Procedure Code, 1973 (CrPC) - Section 190, 203, 468, 468(2), 469

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.]

4. 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.

5. 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).

6. It says that the High Court will have the same power to relieve an alleged offender as the Criminal Court has under 633(1).

7. 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.

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

9. 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.

10. 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 Ors. (- v. - Registrar of Companies, reported in (2008) 141 Comp. Cas 101

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

12. Our Division Bench in the case of 1. Bhagwati Foods P. Ltd., 2. [Bhagwati Foods P. Ltd. and Basudeo Gupta and Others Vs. Registrar of Companies](#), , 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:

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 notice³. 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.

13. There is a similar pronouncement by a learned Single Judge of our Court in an unreported judgment made on 30th November, 1992 in the case of Hindustan Development Corporation and others - v. - Registrar of Companies, West Bengal and others and Stock Holding Corporation of India Limited.

14. 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 committed (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.

15. On 2nd December, 2008 the Respondent wrote to the company that they would make an inspection u/s 209(A) of the Companies Act, 1956 of the books of accounts and other records of the company. Such inspection commenced on 29th December, 2008 and was completed in February, 2009.

16. On 23rd February, 2009 the Respondent issued a notice u/s 209(A), alleging that the company had violated several provisions of the said Act along with Companies (Disclosure of particulars in the report of Board of Directors) Rules, 1988 and accounting standards. The auditor of the company was also required to file a reply to the said notice. Both the company, and its chartered accountant replied to such notice of the Central Government. The company replied on 6th March, 2009, the auditor on 9th March, 2009. Eight show-cause notices were issued on 28th April, 2009 against the company and it is said directors/ officers who are Petitioners before me.

17. The first show-cause notice alleged violation of Section 217(1)(a) of the Companies Act, 1956. The violation, if proved, would result in six months' imprisonment or fine or both. The limitation for taking cognizance of such offence is one year. The period for which violation was alleged ended on 31st March, 2006.

18. According to the Respondent an investment by the company of a sum of rupees two crores in the equity of one Euro Info System Private Limited was not mentioned in the directors' report dated 30th May, 2006. The company in an earlier letter dated 6th March, 2009 in reply to the said notice dated 23rd February, 2009 had stated that such investment had been disclosed in schedule 7 (investment Schedule in the

balance-sheet). The disclosure of sale of the said shares was made in a note in Schedule 6 (Investment schedule of the balance-sheet) as on 31st March, 2007. Furthermore, this investment of two crores was relatively meager for the company as according to them it represented only .0023% of the total turn-over.

19. The second show-cause notice was also under the same Section of the Act. The period for which violation was alleged ended on 31st. March, 2007. The substance of the allegation was that the resignation of one officer and appointment of another in the post of Vice-President (Finance) were not mentioned in the directors" report. In the said reply of the company this was denied by stating that it was duly mentioned in the corporate information page of the annual report for the year 2006-2007.

20. The third show-cause notice was u/s 217(e) read with the said Rules. The period for which violation was alleged ended on 31st March, 2006. Both the alleged offences in the second and third show-cause notices, if proved, would result in a punishment of a maximum period of six months. Here, the allegation was that there was no disclosure of any import of technology in the balance-sheet. According to the company, by their said reply they had clarified that such disclosure had been made.

21. The fourth show cause notice was u/s 217(1)(e). The period for which violation was alleged were through the years ending 31st March, 2006, 31st March, 2007, 31st March, 2008. The allegation in the fourth show-cause notice was that the company did not disclose its export particulars and market under Clause 2c(f) of the Companies (Disclosure of particulars in the report of the Board of Directors) Rules 1988. By their said reply the company said that such disclosure had been made.

22. The fifth show-cause notice was u/s 211(1)(2) read with Schedule VI. The offence, if proved would result in a similar punishment. The period for which the violation was alleged was through the year ending 31st March, 2006 and 31st March, 2007. The Respondent alleged that the company did not disclose its dues to SSI and others to whom allegedly a sum of over one lakh was due. In their said reply the company stated that there was no such due.

23. The sixth show-cause notice was u/s 211(2) read with part II of Schedule VI of the Act. It related to some accounting error or omission. By their said reply the company tried to explain that the accounts were correct. This alleged offence was for the years ending 31st March, 2006, 31st March, 2007 and 31st March, 2008. The guilt if proved would result in similar punishment.

24. The seventh show-cause notice was also similar alleging accounting error which was explained by the Company in its said reply dated 6th March, 2009. The period was the years ending 31st March, 2006. The violation alleged was of Section 211(3A) read with accounting standard 5. The punishment, if the guilt was proved, was similar.

25. The eighth show-cause notice also related to discrepancy or omission or error in accounting which was similarly replied to the Petitioner by their said reply dated 6th March, 2009. The period during which the alleged offence was committed is not given in the show-cause notice. Other elements of the offence are similar. The Petitioner duly replied to that letter in the same vein.

26. u/s 468, read with Section 469 the Court has to take cognizance, that is cognizance u/s 190 of the Code of Criminal Procedure within one year from the date of commission of the alleged offence. Let us assume that some offences were continuing and continued through 31st March, 2008. This application was filed on 18th May, 2009. Therefore, at the time of filing of this application before the Court the cognizance of the offence had become barred.

27. I have scrutinized all the show-cause notices. I have also scrutinized the reply dated 6th March, 2009 of the company. There is sufficient explanation to the first, second, third, fourth and fifth show-cause notices. The notices alleged failure to disclose facts or information. According to the company such disclosure was properly made. When the ingredient of an offence like an act or omission of an act is controverted by another fact which tends to show that the act or omission may not have been committed, then the basic ingredient of the offence is absent. Moreover, in this particular case when the above act or omission alleged is based on opinion about the type of and extent to which disclosure is required, a criminal prosecution cannot be maintained, because there is a difference of opinion, and both opinions are tenable. Such is the case here.

28. Similarly, the sixth, seventh and eighth show-cause notices deal with accounts. Here, also if there is a bonafide dispute between the parties as to the accounting standards to be applied and accounting standards actually applied and the accused is able to advance a reasonable justification for the accounting, in my opinion, there cannot be any case for criminal prosecution, as the factual ingredient is missing. Here, by its reply and the letter of its auditor, who is a professional, specially skilled in preparation of accounts and balance-sheets, the company has been able to show that it adopted and applied an accounting standard which was thought by a professionally qualified auditor to be proper. In such a case there cannot be any criminal prosecution. As I have said there cannot be any criminal prosecution if there is a difference of opinion between two professionals regarding the method to be applied for preparation of accounts, balance-sheet, director's report etc., provided both the views are reasonable by ordinary professional standards.

29. 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". Moreover, the mental element like intention or negligence or recklessness is also missing.

30. In my view, the approach taken by the company is quite reasonable. 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.

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