(1961) 03 CAL CK 0027

Calcutta High Court

Case No: Criminal Revision No''s. 1249, 1250, 1251, 1252, 1253, 1254, 1255, 1256, 1257, 1258, 1259, 1260, 1261 and 1262 of 1960

Dulal Chandra Bhar and Others		APPELLANT
	Vs	
The State of West Bengal and Another		RESPONDENT

Date of Decision: March 22, 1961

Acts Referred:

- Companies Act, 1956 - Section 134, 159, 160, 161, 162
- Evidence Act, 1872 - Section 114, 161

Citation: 66 CWN 852

Hon'ble Judges: Amaresh Roy, J

Bench: Single Bench

Advocate: Prasun Chandra Ghosh with Pramode Ranjan Roy, for Dulal Chandra Bhar and Mr. Bejoy Kumar Bhose for Assistant Registrar of Companies, for the Appellant;P.C. Mukherjee for Opp. Parties Nos. 1, 2 and 3 in Criminal Revision Nos. 1587 to 1602 of 1960 and S.B. Mukherjee, counsel with Mr. Amal Kumar Ghosal for Opp. Parties Nos. 4 and 5 in Criminal Revision Nos. 1587 to 1602 of 1960, for the Respondent

Judgement

Amaresh Roy, J.

In this case a company named Bhusan Chandra Bhar and sons (Private) Limited and four directors of that company (1) Raj Krishna Bhar (2) Gadadhar Bhar (3) Panchkari Bhar (4) Dulal Chandra Bhar and the Secretary of the company (5) Sanatan Bhar were prosecuted for offences under sections 162(1), 168, 210(5) and 220(3) of the Indian Companies Act, 1956 in respect of non-compliance of provisions of that Act for the years 1956, 1957, 1958 and 1959. In all, 25 cases were tried in 14 groups. In each of the cases the accused persons pleaded not guilty and at the trial one witness was examined on behalf of the prosecution and one witness was examined on behalf of the defence. Upon that trial the company accused was found guilty and fined Rs. 50/- in each case. The directors accused Nos. 1 to 3 were found guilty but

were given relief u/s 633 of the Indian Companies Act, 1956 and no fine was imposed on those three accused but the accused Nos. 4 and 5 were found guilty of each of the offences charged against them and each of them was fined Rs. 5/- in each case. Although the final order was passed in each case separately, one judgment was pronounced by the learned Presidency Magistrate to govern all the cases. This was done as the learned Presidency Magistrate has mentioned in his judgment.

In view of the fact that although there is difference of years the parties, the evidence the argument and the charges are practically the same.

The procedure adopted, however, has been subject-matter of complaint in the Revision petition in this court on the ground that the learned Presidency Magistrate recorded evidence only in one case which was adopted in all the other cases and he did not record evidence separately in each case.

2. Against the order of conviction and sentence Dulal Chandra Bhar and Sanatan Bhar who are accused Nos. 4 and 5 before the learned Presidency Magistrate moved this court and upon these applications Rules in Criminal Revision Cases Nos. 1249 to 1262 of 1960 were issued. The company accused and the accused Nos. 1, 2 and 3 did not challenge the order of conviction passed against them.

3. The Assistant Registrar of Companies, West Bengal moved against the orders of the learned Presidency Magistrate in each of the cases praying for enhancement of sentences in each case and also for imposition of fines against those Directors who have been convicted but have been granted relief u/s 633 of the Indian Companies Act and on those applications of the Assistant Registrar of Companies West Bengal the Rules in Criminal Revision Cases Nos. 1587 to 1602 of 1960 were issued.

4. The two groups of Rules arising out of the same judgment passed by the learned Presidency Magistrate were directed to be heard together and they were heard together. One feature in respect of the representation of the accused persons in this court need mention. In Rules Nos. 1249 to 1262 which are Rules directed against the orders of conviction and sentence the two petitioners Dulal Chandra Bhar and Sanatan Bhar are represented by the learned Advocate Mr. Prasun Chandra Ghosh. But those two accused persons have entered appearance in the Rules for enhancement of their sentences which are Rules in Revision Cases Nos. 1587 to 1602 through the learned Advocate Amal Kumar Ghoshal. In these Revision cases the company and the three directors Raj Krishna Bhar, Gadadhar Bhar and Panchkari Bhar have appeared through the learned Advocate Mr. Provash Chandra Mukherjee. A short history of the company and circumstances that led to the defaults complained of by prosecution as also the contentions of each of the accused persons regarding the circumstances under which the defaults occurred and the responsibility for these defaults are necessary to be stated for appreciating the points argued in these cases. The company Bhusan Chandra and Sons (Private)

Limited was incorporated on or about 11th April, 1951. The five accused persons were the Directors of the said company at all relevant times, and it is also admitted that they were under a statutory obligation u/s 159 of the Companies Act, 1956. to file the Annual Return containing the particulars as required in Part I of Schedule V as they stood on the day of tits Annual General Meeting held in accordance with provisions of section 166 of the said Act every year after the expiry of the financial year in 1956. Prosecution alleged that the company and the five accused persons failed and neglected to file the said annual returns in spite of the repeated reminders and thereby knowingly and wilfully authorised or permitted the default in complying with the provisions of the Act and have thereby committed offences punishable under the several sections of the Indian. Companies Act, 1956 charged against them.

5. The two Directors, Dulal Chandra Bhar and Sanatan Bhar pleaded not guilty and their defence inter alia, was that after the incorporation of the said company in 1951, Fakir Chandra Bhar and Jaharlal Bhar were the joint Managing Directors. The said Fakir Chandra Bhar died soon after the incorporation of the company and Jahar Bhar thereafter alone continued to act as only Director of the company and Ganga Ram Bhar was acting as a Secretary of the said company. It is the contention of Dulal Chandra Bhar and Sanatan Bhar that ever since the incorporation of the company they never had any hand in looking to the matters relating to the preparation and submission of the annual summary of capital, in convening the Annual General Meeting of the company, preparation and filing of profit and loss account, preparation and filing of annual return and other documents under the Companies Act and that they had all along acted honestly and reasonably under the bonafide belief that the duties were being performed by the Secretary of the company and they were not guilty of intentional default on their part.

6. On behalf of the other three accused persons it has been contended that since the death of Fakir Chandra Bhar there was a dispute between the directors and the Secretary of the company who are members of the same family and the books of account remained in the possession of accused Dulal Chandra Bhar and Sanatan Bhar and despite the efforts of the other directors and due to the non-co-operation of Dulal Chandra Bhar and Sanatan Bhar the Annual General Meeting of the company in respect of the relevant years could not be held and the other duties enjoined by the Companies Act could not be performed. There have been several litigations between the directors of the company that reveal the extent of the internal feud that has led to the defaults in performance of the duties which are the subject-matter of the present prosecution.

7. The learned Advocate Mr. Prasun Chandra Ghosh raised several contentions on behalf of his clients. His first contention was that the procedure adopted by the learned Presidency Magistrate in the matter of recording the deposition of witness has been illegal and in violation of the provisions of Code of Criminal Procedure and

that has vitiated the entire proceeding and the order of conviction must be quashed. Mr. Ghosh contends that what was done was that the deposition of the vitness was taken in one case and typed copies of that deposition was incorporated in the records of each of the other cases and the learned Presidency Magistrate did not record evidence separately in each case. This is stated in paragraph 6 of the petition in Criminal Revision No. 1249 of 1960. That statement has been supported by affidavit of one Taranada Sarkar who says that he is an employee of the petitioners and as such he is acquainted with the facts and circumstances of the case; but he does not say that he was present in Court when the evidence was taken before the learned Presidency Magistrate and therefore, he is not a person who is capable of making a statement about the manner of recording deposition from his knowledge. But that some short cut method was adopted by the learned Presidency Magistrate appears from the statement in the petition filed on behalf of the Assistant Registrar of Companies, West Bengal in Criminal Revision No. 1587 of 1960 wherein it is stated:

The Court recorded evidence of both sides only in the group of two cases and only copies of that evidence were put in all the other groups of cases.

8. Another affidavit filed on behalf of the Assistant Registrar of Companies, West Bengal in Criminal Revision Case No. 1249 of 1960 sworn to by Subodh Gobinda Chowdhury, a Legal Assistant in that office states in paragraph 6 of that affidavit-in-opposition that he was present throughout the trial before the learned trying Magistrate and that

No objection was raised on behalf of any of the accused with regard to the procedure sought to be adopted, the different sets of defence lawyers welcomed the said procedure by the learned Magistrate and thereafter proposed procedure was adopted.

9. The question, therefore, is what was the exact procedure adopted and whether the procedure adopted was illegal or a mere irregularity, and if an irregularity only, whether that has caused any prejudice to the recused persons so as to vitiate the trial or whether that is curable under sections 535 and 537 of the Code of Criminal Procedure.

10. By referring to the order sheet in each case I find that it has been recorded in each case that the witness was examined in that case. In the records of each case there is record of deposition of the witnesses but that record of deposition does not bear any signature of the witness although it contains an endorsement signed by the learned Presidency Magistrate that the deposition was recorded at his dictation. In view of that state of the record the presumption u/s 114 of the Evidence Act, illustration (e) that the judicial acts have been regularly performed, clearly arises. The defect in this respect, if any. would be non-compliance of section 356 and section 360 and such defect, in the absence of actual or possible failure of justice,

would not affect the legality of the trial as has been held by the Privy Council in the cases of Abdul Rahaman v. The King Emperor (1) reported in 54 I.A.. 96. In the present instance another answer to Mr. Ghosh''s contention is clearly provided by the fact that section 356 and section 360 provide for "trials before the Court of Session and Magistrates (other than Presidency Magistrate)". The present trials were before a learned Presidency Magistrate and even if appellate sentence had been awarded the section applicable would be section 362 Cr. P. C. That section provides for taking down evidence in "any other case tried by a Presidency Magistrate in which an appeal lies". Sub-section (4) of that section provides:

In cases other than those specified in sub-section (1) it shall not be necessary for a Presidency Magistrate to record evidence or frame a charge.

11. The sentences awarded in these cases are such that appeal would not lie. Therefore, these cases are governed by sub-section (4) to section 362. My conclusion, therefore, is that there has not been any illegality at all in this respect nor there was irregularity. Even if an irregularity is contemplated by not making the witness repeat the same language as many times as were the number of cases, even then that irregularity cannot by any contemplation, cause an actual or even possible failure of justice and on the authority of that Privy Council decision referred to above in Abdul Rahman''s case (1) (54 I.A., 96) that irregularity is cured by sections 535 and 537 Cr. P. C. That case held:

The bare fact of such an omission or irregularity as occurred in the case under appeal, unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction, which in their Lordships'' view may be supported by the curative provisions of sections 535 and 537.

12. In the present case it has been shown that not only no objection was taken before the learned Presidency Magistrate on behalf of any of the accused with regard to the procedure sought to be adopted but also the different sets of defence lawyers welcomed the said procedure. In such circumstances neither actual nor possible failure of justice can be contemplated. This contention of Mr. Ghosh, therefore, fails.

13. Next contention of Mr. Ghosh was that by section 161 and other sections following in Indian Companies Act, 1956 defaults in respect of offences under sections 168, 210(5) and 220(3) cannot arise because the respective duties enjoined cannot be performed either by the company or by the Directors unless Annual General Meeting has been held. That is certainly the effect of all the several provisions of that Act. That being the characteristic of the duties enjoined, Mr. Ghosh contended that no prosecution can lie in respect of the defaults other than the default of holding the annual General Meeting. Prima Facie this contention appears to have great force of reason behind it and it undoubtedly finds support in

a decision of this Court by Henderson, J. sitting singly in the case of Surendra Nath Sarkar v. The Emperor, (2) reported in 45 C.W.N. 1130, although that learned Judge did not decide the point in that case because the Rule in that case was made absolute on a question of fact. In that decision Henderson, J. referred to the English decision in the case of Park v. Norton (3) reported in L.R. (1911) 1 K.B., 588 and if the matter had stood at the stage that availed when that decision was pronounced, it would, perhaps, be necessary for me to refer this case to a Division Bench. But fortunately for us a decision on this point has been given by the Supreme Court of India in the case of The State of Bombay Vs. Bandhan Ram Bhandani and Others, where their Lordships in the Supreme Court considered the English decision and decisions of other High Courts in India and held that the principle enunciated in the decision, in the case of Park v. Norton (3) L.R. (1911) 1 K.B. 588 clearly apply when a person is charged with breach of Indian Companies Act. It is true that the decision of Henderson, J. reported in 45 C.W.N., 1103 as also the decision of the Supreme Court above mentioned were in respect of offences under sections of the Indian Companies Act, 1913 but the language of the corresponding sections in the Indian Companies Act, 1956 are exactly similar and there is no difference in principle in this respect between those two Acts. This contention of Mr. Ghose, therefore must be overruled.

14. Another contention was raised by Mr. Prasun Chandra Ghosh in respect of the offence alleged u/s 162 of the Indian Companies Act, 1956. That section reads:

(1) If a company fails to comply with any of the provisions contained in sections 159, 160 or 161, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to fifty rupees for every day during which the default continues.

(2) For the purposes of this section and sections 159, 160and 161, the expressions ''officer'' and ''director'' shall include any person in accordance with whose directions or instructions the Board of Directors of the company is accustomed to act.

15. Mr. Ghosh has argued that by the definition in section 2(30) the word "officer" includes a director and also the Secretary, yet section 2(31) defines "Officer who is in default" by reference to section 5. Section 5 of the Act runs thus:

Meaning of ''officer who is in default'' for the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any punishment or penalty, where by way of imprisonment, fine or otherwise, the expression ''officer who is in default'' means any officer of the company who is knowingly guilty of the default, non-compliance, failure, refusal or contravention mentioned in that provision, or who knowingly and wilfully authorises or permits such default, non-compliance, failure, refusal or contravention.

16. Therefore unless it is shown that any of the Directors or Secretary was knowingly guilty of the default or knowingly and wilfully authorised or permitted such default he cannot be convicted u/s 162 of the Act. Consequently the offence u/s 168 for default in compliance with the section 166 where the duty of holding the general meeting rests in the company itself the element of authorising or permitting the default knowingly and wilfully is a necessity. Similar is also the position for an offence u/s 220(3) and with regard to the offence u/s 210(5) it is necessary for the prosecution to show that a particular accused has failed to take all reasonable steps to comply with the provision of this section. In that view of the law Mr. Ghosh contended that the onus to show that the acts of defaults were done knowingly and wilfully is on the prosecution and that onus is not discharged by merely showing that there were defaults and accused persons were directors or the Secretary.

17. The element of "knowingly and wilfully authorising or permitting a default" occurring in section 5 of the Indian Companies Act, 1956 is not a new introduction because this phrase occurred in the Companies At, 1913 in several sections of that Act including section 32(5), section 76(2) and section 134(4) which correspond to sections 162, 166, 210 of the Companies Act of 1956. The meaning of that phrase has been interpreted in a decision of this Court and the extent of the onus on prosecution was summarised by R. C. Mitter, J., in the case of Ballav Dass v. Mohan Lal Sadhu (5) reported in 39 C.W.N. 1152 thus:

In order that a conviction under these sections, of an officer of a company may be sustained, the only thing to prove is that particular officer knowingly and wilfully authorised or permitted these defaults. The sections speak also of authorization of those defaults, but it is not necessary to prove that. The offence is also complete if the officer of the company knew of the defaults and permitted the defaults.

18. In course of his judgment the learned Judge also said "In fact the general meeting was never held, and the petitioner also knew of that fact. The provisions of section 134 were therefore not complied with. It appears that he took no steps to have the above mentioned requirements under the Companies Act complied with. Under the circumstance it can be safely held that he permitted the default to continue."

19. I respectfully agree with that decision regarding the meaning of the word "knowingly and wilfully authorised or permitted these defaults." Although in the judgment of the learned Chief Presidency Magistrate these points are not fully stated, the evidence amply supports the conclusion. In the present case each of the directors who are accused in these cases knew of the defaults and did not take any step to have the requirements under the Companies Act complied with. I have therefore no hesitation in holding that the element necessary has been established and the prosecution has discharged the onus to bring home the charges levelled against the directors. Similar is the view taken in the Madras High Court in a recent decision in the case of In Re: Arcot Citizen Bank Ltd., Arcot by A.E. Chandrasekhara

Nayagar, Arcot and Others, in which not only the sections of the Act of 1913 but also the relevant sections of the Act of 1956 were the subject-matter of consideration. I, therefore, hold that Mr. Ghosh''s arguments on this point also must be overruled.

20. That disposes all the contentions of law that was raised by Mr. Ghosh on behalf of his client. Regarding the decision on fact Mr. Ghosh''s client has sought to shift the responsibility on to the shoulders of the other three directors who in their turn have tried to shift the burden to the two accused who are Mr. Ghosh''s clients. That the Directors were aligned against each other in groups for carrying on a family feud is the basic fact emphasised by both groups of the directors. As it happens often in mutual recrimination, the defaults of each of the directors have been brought out in bold relief. The family feud is a concern of these directors individually but in carrying out that feud of theirs they cannot shirk the responsibilities that have been enjoined on them as officers of the company so long as they continue as such directors. Indeed that the defaults have been wilfully and knowingly permitted as a means of carrying their battle in that private quarrel of theirs is not only not an extenuating circumstance either in fixing the guilt or in assessment of punishment but is a material consideration for awarding adequate punishment authorised by the Indian Companies Act to bring homo to these delinquent persons the necessity of obeying the law even when they are quarrelling amongst themselves. Not to do so would be, in my view, inviting the directors of a company to flout the provisions of the Companies Act as a modus operandi to spite the co-directors in, their petty and private quarrels. As a result of these considerations I have come to conclusion that the Rules in Criminal Rev. Cases Nos. 1249 to 1262 must be discharged by affirming the convictions of the two petitioners in those cases and the Rules in Criminal Rev. Cases Nos. 1587 to 1602 must be made absolute by enhancing the sentence of each of the accused persons.

21. A question arises whether the fact of the quarrel amongst the directors provide any basis for granting relief u/s 633 of the Indian Companies Act. 1956 as the learned Presidency Magistrate has done by not awarding any sentence against the three directors although they have been convicted of each of the offences alleged against theme Section 633 since its original form has undergone amendment by section 206 of the amending Act, 65 of 1960 and in its present form there is no doubt whatsoever that sub-section (1) of that section has application in criminal prosecutions also. But then, what is the ''liability'' from which an accused may be relieved? The liability from prosecution and conviction or the liability of punishment upon conviction? It appears that the learned Presidency Magistrate has taken the latter view and he has convicted the three directors but has granted relief by not awarding any punishment. I have held that in the circumstances of the present case the accused persons are not entitled to any relief u/s 633 of the Indian Companies Act, 1956 because in the matter of their responsibilities as directors of the limited company they have not acted either honestly or reasonably. The order of conviction passed against these three directors have not been challenged and the principle of

law is well settled that in criminal prosecution upon conviction punishment must follow. In the matter of quantum of punishment also for the reasons I have discussed above adequate punishment against each of the directors is called for and each of the directors in the circumstances of the present case must bear equal responsibility and punishment against each must be the same. The company has been fined Rs. 50/- in each case. I, therefore, enhance the sentences imposed against Dulal Chandra Bhar and Sanatan Bhar to a fine of Rs. 50/-in each of the cases and also I award a fine of Rs. 50/- against each of the other three directors Raj Krishna Bhar, Gadadhar Bhar and Panchkari Bhar in each of the offences of which they have been convicted. Half of the fine, if realised, will be paid to the Registrar of Companies as costs of the proceeding.