CALCUTTA HIGH COURT

Gopal Khaitan

Vs.

State

Criminal Appeal No. 722 of 1966

(N.C. Talukdar, J.)

12.07.1968

JUDGMENT

N.C. Talukdar, J.

1. This Appeal is against an order dated the 23rd November, 1966 passed by Shri A. Sen Gupta, Presidency Magistrate, 5th Court, Calcutta in case no. C/1452 of 1966 convicting the three accused - appellants under Section 614A (2) of the Companies Act, 1956 and sentencing them to pay a fine of Rs. 300/-each, in default to undergo simple imprisonment for six weeks each, with the further direction under Section 626 of the Companies Act, 1956 that one-tenth of the fine, if realised, is to be applied towards the payment of the costs of the proceedings.

2. The facts can be put in a short compass. The three accused-appellants, viz., Sri Gopal Khaitan, Sri Dhan Raj Khaitan and Sri Shew Bhagwan Mahe swari are the Directors of M/s. Khaitan Finance Corporation (Private) Limited, a company registered under the Companies Act. Two cases being cases Nos. C/380 and C/381 of 1965 were started against them under Sections 162 (1) and 220 (3) respectively of the Companies Act, 1956, by the Registrar of Companies before the Chief Presidency Magistrate, Calcutta, for failure to submit the Annual Return of the Company for the year ending the 31st December, 1963 and also three copies of the balance-sheet for the same period. As a result of the trial, the accused-appellants were convicted on 29-4-65 of the offences charged and sentenced in each case to pay a fine of Rs. 100/- each, with a further direction on them under Section 614A (1) of the Companies Act, 1956, to file the requisite documents and papers, within six months from the date of the said order, that is, within 28-10-65. After the above mentioned conviction a notice by registered post was sent on 14-5-64 by the Registrar of Companies (Ext. 2) for submission of the returns as directed in due time and the same was acknowledged duly by the accused persons (Ext. 3 collectively). The accused-appellants, however, did neither reply to the said notice (Ext. 2) nor comply with its directions. On 22-6-65, however, it appears that the accused-appellant No. 1, Sri Gopal Khaitan made over some documents to the Income Tax Officer as per receipts (Exhibit B). The documents concerned are some files relating to vouchers, bills, receipts, confirmation, income-tax notices, the party's confirmation and also some Rokar Khatas for 1960-1962. No Rokar Khatas for 1963 as well as no account books were made over to the Income-tax Authorities. After the expiry of

the period of six months, the Assistant Registrar of Companies filed on 16-4-66 the present two complaints dated 13-4-66 under Section 614A (2) of the Companies Act, 1956 for the failure on the part of the accused-appellants to comply with the order of the Court passed in case Nos. C/380 and C/381 of 1965 under Section 614A (1) of the said Act. On the prayer of the prosecution and in the absence of any objec tion on the part of the defence, the two cases Nos. C/1452 and C/1453 of 1966 were tried jointly by Shri A. Sen Gupta, Presidency Magistrate, 5th Court, Calcutta. The defence case inter alia is that the accused-appellants are not guilty; that it is the Managing Director who is responsible for submitting the returns and the compliance of the directors and the other Directors having not knowingly defaulted or non-complied, have no mens rea and are not consequently 'officers in default" within the meaning of the Act; and that in any event the accused-appellants could not comply with the Court's order passed under Section 614-A (1) of the Companies Act, 1956, due to circumstances beyond their control inasmuch as in the meanwhile the relevant books of account and other papers of the company were taken away by the Income-tax Authorities and are so lying with them since 22-6-65.

3. The prosecution in this case examined one witness, P. W. 1, Mahaprabhu Roy, Assistant Officer under the Registrar of Companies, Calcutta, to prove its case while the defence examined D. W. 1, Sunil Kumar Mazumdar, an Inspector of the Income-tax Department, attached to the Special Investigation Branch, to prove the defence version of affairs and as a result of the trial the trying Magistrate by his judgment dated 23-1-66 convicted and sentenced the three accused-appellants as mentioned above. It is the said order of conviction and sentence that has been impugned and forms the subject-matter of the present Appeal.

4. Mrs. Jyotirmoyee Nag Advocate (with Mr. Chinmoy Chowdhury, Advocate) appearing on behalf of the accused-appellants has made a three-fold sub mission. The first submission made by Mrs. Nag is that there has been no contravention of the provisions of Section 614A (1) of the Companies Act, 1956, as alleged or at all and the evidence on record at its highest only gives rise to a benefit of doubt. The second contention advanced on behalf of the accused-appellants is that even if there was such a contravention, it was due to the Managing Director who is responsible for submitting the returns and carry out the directions and the other Directors had not knowingly defaulted and consequently they have no mens rea and are not 'officers in default" within the meaning of the Act. The third and the last contention of Mrs. Nag is that in any event the default on the part of the accused-appellants in complying with the Court's order passed under Section 614A (1) of the Companies Act, 1956 is *bona fide* due to circumstances beyond their control because the relevant books of account and other papers of the company were taken away by the Income-tax Authorities and had been lying with them since 22-6-65. Mr. Madhusudan Banerjee, Advocate appearing on behalf of the Assistant Registrar of Companies has submitted that the evidence on record clearly establishes the requisite non-compliance on the part of the accused-appellants. Mr. Banerjee next contended that the accused had wilfully and knowingly failed to carry out the duties imposed upon them by law and had the requisite mens rea. Mr. Banerjee had further urged that the plea of seizure of the relevant books of account and other papers by the Income-tax Authorities, resulting in a consequent inability on the part of the accused-appellants to comply with the directions under Section 614A (1) of the Companies Act, 1956, is wholly unfounded and even ruled out by the evidence on record. Mr. Anil Kumar Sen, Advocate, appearing on behalf of the State has in the first place adopted the arguments advanced by Mr. Banerjee on behalf of the Assistant Registrar of Companies, West Bengal. He further contended that the Directors of a Company have definite duties imposed upon them under the Companies

Act, the provisions where of have been enacted to protect the shareholders and the general public and that the present flagrant violation of the directions given by the Court should not be condoned.

5. I will now proceed to determine the points at issue in the light of the respective contentions put forward by the learned Counsel appearing on be half of the different parties and on the evidence adduced in this case. The first submission made by Mrs. Nag regarding the non-contravention of Section 614A (1) of the Companies Act, 1956 is clearly unfounded. It would appear from the evidence of P. W. 1, Mahaprabhu Roy, Assistant Officer in the office of the Registrar of Companies Calcutta, that the certified copy of the Court's order in cases Nos. C/380 and C/381 of 1965 (Exhi bit 1) was produced duly proving that the present accused-appellants were convicted and sentenced previously on 29-4-65 of the relative offence charged and that directions were passed on them under Section 614A (1) of the Companies Act, 1956. Although the same was to be complied with within six months, that is by 28-10-65, it was not so done even on 26-9-66 and that in spite of the notices sent by registered post to the accused-appellants on 14-5-66 (Exhibit 2) and duly acknowledged by them (Exhibit 3 collectively). The accused even did not reply to the same. These facts go unchallenged and there is even no cross-examination on the point. The failure to comply with the mandatory provisions of Section 614A (1) of the Companies Act, 1956 is thus established clearly and conclusively and the contention advanced by Mrs. Nag in this behalf accordingly fails.

6. The second contention put forward by Mrs. Nag that even if there was such a contravention the same was due to the Managing Director who was responsible for the returns and the compliance and not the other Directors, who having not knowingly non-complied, have no mens rea and as such are not "officers in default", appears also to be a belated one and not ultimately borne put by the evidence on record. There is neither any line of cross-examination on this point when P. W. 1 was examined nor any averment thereof in the evidence of the only defence witness examined in this case. There is even no statement to that effect in the examination of the accused persons under Sections 242 and 342 of the Code of Criminal Procedure. The said contention is also not sustainable in law. There cannot be any such unqualified proposition as propounded by Mrs. Nag in her present submission. The offences laid down under the Companies Act are of two kinds. The first group consists of offences under Sections 162, 168, 210, 220 (3) and such similar sections where the language used by the legislature is either "officer who is in default" or a person who "fails to take all reasonable steps". In the second group falls an offence under Section 614A (2) of the said Act where the language used is "fails to comply". The concept of mens rea or a blameworthy mind, as contended by Mrs. Nag, is not applicable to the second group of offence, as catalogued above.

7. As regards the first group of offences as mentioned above, Section 5 of the Companies Act, 1956 defines an "officer who is in default" and lays down inter alia that the said expression means any officer of the company who is knowingly guilty of the default, non-compliance etc., or who knowingly and wilfully permits such default, non-compliance etc. Even in such cases the directors have got duties imposed upon them by law which cannot be observed in their breach and it is not the duty of the Managing Director alone, even if any, to comply with the requirements of the statute. A reference in this context may be made to some cases laying down the principles governing the point at issue. In the case of *Bhagirath Chandra Das v. Emperor, a case under the Companies Act, 1913, reported in*[1] Mr. Jus tice Lodge observed at p. 43 that

"It is clearly the duty of all the Directors to see that the particular returns, the list and summary under Section 32 and the copies of the balance sheet and profit and loss account are submitted under Section 134..... If Directors who are responsible for the management of a Company and who presumably know the duty imposed upon them by law, make no attempt to see that those duties are carried out, there is justification for holding, in my opinion, that they have wilfully and knowingly permitted the Company to fail to carry out those duties. The suggestion that these various Directors were mere figure heads not taking any active part in the control of the Company, is in my opinion not worthy of serious consideration." In the case of *In Re Arcot Citizen Bank Ltd., Arcot by A. E. Chandrasekhara Nayagar, Arcot, reported in*[2] Mr. Justice Remaswami ap proved of the view expressed in the case reported in AIR 1948 Calcutta 42 and observ ed at p. 678 that "We find that the prosecution has brought home to these revision peti tioners by circumstantial evidence know ing and wilful non-compliance. The revi sion petitioners knew what they had to do and deliberately refrained from com plying with those obligations and that too in spite of repeated reminders from the Registrar on pretexts which cannot bear scrutiny".

A reference in this context may also be made to the case of *Dulal Chandra Bhar v. State of West Bengal, reported in*[3] where in Justice Amaresh Roy referred to and agreed with the decision by Mr. Justice R. C. Mitter in the case of *Ballav Dass v. Mohanlal Sadhu, reported in*[4] and ultimately held that

"Offences under Sections 162, 168 and 200 of the Companies Act may be com mitted not only when the particular officer knowingly and wilfully authorised or permitted the defaults in question but the offence is also complete if the said officer knew of the said defaults and per mitted the defaults to take place by not taking any step to have the requirements under the Companies Act complied with".

In a more recent decision viz., in the case of *State of Bombay (now Maharash tra) v. Bandhanram Bhandari, reported in*[5] the Supreme Court held that a person charged with an offence could not rely on his own default as an answer to the charge. In the case under consideration the accused-appel lants had voluntarily handed over the relevant books of account and other papers of the company to the Income-tax Authorities on 22-6-65 about 2 months after the order of their conviction in the original trial without complying with the directions as given therein under Section 614-A (1) of the Companies Act, 1956 in spite of the sufficient time they had at their disposal and now they can not take advantage of the said delay and default. In the case of

[1] AIR 1948 Cal 42 [3]66 Cal WN 852 : (1963 (1) Cri LJ 521) [5] AIR 1961 SC 186
[2] AIR 1957 Mad 675 [4]39 Cal WN 1152

Madan Gopal Dey v. State, reported in[6] Mr. Justice T. P. Mukherji has held that

"any Director of the Company who is knowingly guilty of the default, or who knowingly or wilfully authorises or per mits such defaults is an officer who is in default under

> Section 2 (3) of the Com panies Act, 1956. The offence is complete if the officer of the company knew of the defaults and permitted the same".

I agree with the said observations made in the abovementioned cases. Mrs. Nag's further contention in this context that the non-compliance on the part of the accused-appellants is in fact due to in advertence and as such there is really no mens rea on their part, is not also tena ble in law. As has been observed by Mr. Justice Ramaswami in the case of *In Re : Arcot Citizen Bank Ltd. Arcot by A. E. Chandrasekhara Nayagar, Arcot*[7], that

> "It is possible to argue that although inadvertence involves the negative form of absence of realisation or foresight of consequences, it too can justifiably be termed a state of mind and therefore as forming in certain conditions part of the doctrine of mens rea".
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> A reference in this context may also be made to the Monograph on Mens Rea in Statutory Offences (English Studies in Criminal Science Series, Vol. 8, page 205 and Foll.) wherein Prof. Edwards has pointed out a wide range of judicial dicta wherein the view is expressed that "if a statutory offence is based upon proof of knowledge, such crimes can be commit ted negligently". I entirely agree with Prof. Edwards' conclusion at page 206 of that Monograph that so far as this parti cular field of criminal liability is con cerned, "negligence or blameful inad vertence or failure to supervise may pro perly be designated as mens rea."

8. As regards the second group of offence, which is the subject-matter of the instant case, the position is entirely different from that in the case of the first group of offences considered above. The language used by the legislature in Sec tion 614-A (2) is quite significant. It lays down that "any officer or other employee of the company who fails to comply with an order of the Court under sub-section (1) shall be punishable with imprison ment for a term which may extend to six months or with fine or with both." It is to be observed that the language used in Section 614-A (2) is "fails to comply" and not "every officer of the company who is in default". Section 614-A of the Companies Act, 1956, has been introduc ed by the Companies Amendment Act 65 of 1960 because Section 614 of the said Act neither provides for any punish ment for disobedience of the Court's order nor contains any provision for com pelling the performance of the duty of filing the returns, accounts or other docu ments even where a prosecution results in a penalty for breach of statutory duties. It is in this context that the pro visions of the said section should be ap proached and enforced. The offence under Section 614-A (2) of the Act is really a statutory offence requiring no mens rea. The offence is established ipso facto on proof of contravention as in the case of the company in offences under Sections 162 (1), 168, 220 (3) etc., of the Act. The remedy available in a *bona fide* case is to take proper steps in time by applying to the Court for extension of the time men tioning the genuine difficulties. No such steps having been taken, I hold that the accused-appellants have not complied with the mandatory provisions of Sec tion 614-A (2) of the Companies

[6]72 Cal WN 312 : (AIR 1968 Cal 79)

[7] AIR 1957 Mad 675

Act, 1956. The second contention of Mrs. Nag accordingly fails.

9. The third and the last submission of Mrs. Nag that the purported default in complying with the direction under Section 614-A (1) of the Companies Act, 1956, is through no fault of the

accused-appellants but *bona fide* due to circum stances beyond their control, is also un tenable upon ultimate analysis. It is neither borne out by the evidence on re cord nor even sustainable in law. The accused-appellants were convicted and sentenced on 29-4-65 in the two earlier cases for not complying with the relevant provisions of the Companies Act by 31-12-63. The direction under Section 614-A (1) of the Companies Act given by the trying Magistrate on 29-4-65 was to make the compliance within six months or by 28-10-65. All the books of account and relevant papers were with the accused-appellants but nothing was done. Ulti mately on 14-5-65 registered notices (Exhibit 2) were sent to the accused-ap pellants for submission of the returns as called upon by the Court and the same were acknowledged by them only (Exhi bit 3 collectively) but the accused-appel lants had neither any time to comply with the requirements nor even to reply to the notices. Ultimately on 22-6-65, as is borne out by the relevant receipt (Exhibit B), certain files of the company which did not include the Rokar Khata for the year 1963 and the account books, were handed over to the Income-tax Department voluntarily. D. W. 1, Sunil Kumar Mazumdar, an Inspector of the Income-tax Department attached to Spe cial Investigation Branch, proved the re ceipt dated 22-6-65 (Exhibit B) granted by Mr. Ramaswami, Income-tax Officer to the Khaitan Finance Corporation. In cross-examination the said witness signi ficantly stated that "the accused are allow ed to take notes from the A/C books lying with the Income-tax Department after due application". It would there fore appear from the evidence on record that the relevant account-books required for the compilation of the company's annual return and the balance-sheet for the year ending 31-12-63 were in the pos session of the company and as a matter of fact all the documents were with the accused at least uptill 22-6-65 and it is futile to argue on the basis of Ext. B that the said annual return or balance sheet could not be submitted to the Reg istrar of Companies, West Bengal for any purported non-availability thereof. It will be found, moreover, that the accused-appellants were sitting on the fence uptill 22-6-65 which is about two months from the date of the order of conviction and the direction under Section 614-A(1) of the Companies Act, 1956. If really they had the intention to comply with the same and were reasonably diligent, the said compliance could have been made duly by that time. Exhibit B does not prove again that the files and vouchers as mentioned therein were seized by the income-tax department as alleged or at all but merely proves that the accused-ap pellant No. 1, Sri Gopal Khaitan himself made over the documents to the incom-tax officer on 22-6-65. No requisition or ultimatum by the income-tax department has been proved and even if there was any, the accused-appellants could have asked for an extension of the time because of the relevant order passed by the Chief Presidency Magistrate, Calcutta on 29-4-65. It is also significant to note that even after the delivery of the documents to the income-tax department, the accused persons could have applied to the depart ment for a temporary return or for per mission to take inspection of the docu ments and files handed over, if at all those were relevant for the purpose of compila tion of the annual return and the balance-sheet. The evidence on record rules out any such attempt on the part of the ac cused-appellants for complying with the directions given by the court. It therefore appears that this is a belated attempt on the part of the accused-appellants to make out a case of a *bona fide* inability to com ply with the directions due to circum stances beyond their control.

10. In law again this proposition is not tenable. In the case of *Ramkrishna Dal mia v. Registrar, Joint Stock Co., Delhi, reported in*[8] Chief Justice G. D. Khosla and Mr. Jus tice Shamsher Bahadur have held that the primary responsibility to prepare the balancesheet as also the profit and loss account is on the directors and not the auditors.The plea that was raised in that case was that the account books of the company having been seized by the spe cial police establishment under a Magi strate's warrant and being in the custody of a Commission of Enquiry, the accused

therein were prevented by reasons beyond their control to prepare the balancesheet and the profit and loss account as re quired by law. In that case the accused had approached the special police esta blishment as also the Commission of En quiry that the books may be made acces sible to their auditors, which fact however is completely non est in the instant case. The auditors having written back that they are unable to prepare the balance sheet and the profit and loss account for reasons mentioned therein, the accused in R. K. Dalmia's case could not comply with the statutory requirements. Their Lordships held at page 343 that

> "It seems to us that the petitioners had ample time for preparation of balance sheet and profit and loss account which primarily is the concern of the company and not the auditors ..... As stated in Section 215 of the Companies Act every balancesheet and profit and loss account has to be authenticated by the directors. It follows that it is the primary respon sibility of the directors to have these documents prepared .....There is no con ceivable reason why the balancesheet and profit and loss account could not be pre pared without assistance of the books which are with the Commission of En quiry".

I respectfully agree with the said obser vations and hold that the conduct of the accused-appellants in this case is still worse. They did not even apply to the income-tax department for making an in spection and did not even inform the Regi strar of Companies, West Bengal about their purported difficulty in this respect. This submission therefore is quite un founded. A reference in this context may also be made to an unreported deci sion *Great India Steam Navigation Co. Ltd. v. Assistant Registrar of Companies, West Bengal*[9], wherein it has been held that

> "regarding the directors it would appear from the evidence as well as from the judgment of the learned magistrate that ample opportunities were given to the officers of the company in the matter of inspection and examination of books of accounts and other papers that had been seized by the police and that as a matter of fact those books and papers were examined and inspected on several occasions by the officers of the company. If in spite of that it is urged that it was physically impossible for the balance sheet and the profit and loss account to be prepared, the authority of the Dalmia case is there for the purpose of negativing that contention." I agree with the said observations and hold that in this case also the said argument is not sustainable in law. The third and last submission also of Mrs. Nag therefore fails.

[8](1962) 32 Com Cas 341 (Punj)

[9] D/d. 25-9-1965 by Mr. Justice T. P. Mukherji in Criminal Revision Cases Nos. 305-322 of 1965 (Cal)

11. There appears to be some mis apprehension as to the object underlying the provisions of the Companies Act. The definite duties imposed on all "officers" as defined in the Act, are not without their purpose. The Act has been enacted to prevent, amongst others, the snow balling of finance as also the formation of bubbles and the consequent effect thereof upon the economy of a Welfare State. The provisions of the Act are indeed like sentinels on duty at the threshold or graver offences under other Acts and the continued defaults and non disclosures under the Act are, in many cases, but attempts to draw a red-herring across the trail for preventing the detec tion of more serious offences. As has been observed by Mr. Justice Lodge in the case of AIR

1948 Calcutta 42 at p. 45 that "These provisions of the Companies Act have been deliberately enacted to protect shareholders and in some cases, to protect the general public and then impose a definite duty upon directors." A reference in this connection may be made to what is known as the "Organic Theory", a theory which treats certain offi cial as the organ of the company, for whose action the company is to be liable just as a natural person is for the action of his limbs. The theory mainly sprang from the well-known judgment of Lord Haldane in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd., reported in*[10] H. L. The Lord Chan cellor in delivering the judgment of the House said at pp. 713-714 that

> "a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and direct ing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corpora tion".

This new conception of an organic rela tionship between the company and its managers was adopted in a number of cases and as L. C. B. Gower observed in his "Modern Company Law" (2nd Edn.) at p. 136 that

> "the negligence of the company's gov erning body, directors, managing direc tors, or general manager was said to be the negligence of the company itself."

Lord Justice Greer observed in the case of *Fanton v. Denville, reported in*[11] at p. 329 that

> "It has, of course, to be remembered that in actions against companies a gene ral manager of the business is deemed to be the alter ego of the company and it would be responsible for his personal negligence".

It is therefore incumbent in the interest of the public that the provisions of the Companies Act relating to the directors should be strictly enforced and not ob served in their breach. Mrs. Nag's argu ments really overlook the duties imposed on the directors under the Companies Act and their liabilities thereunder.

12. In the facts and circumstances of the case and the evidence on record, I hold that the ingredients of an offence under Section 614-A (2) of the Compa nies Act, 1956 have been fully establish ed against the accused-appellants and ac cordingly the order of their conviction must be upheld. But in view of the facts and circumstances of the case and the

[10]1915 AC 705

[11](1932) 2 KB 309

nature of the offence, the quantum of sentence, in any event, appears to be severe. The learned Advocates appearing on behalf of the respondents have in their fairness left the matter of sentence entirely to the Court. Law is good but justice is better and it is expedient in the interests of justice that the sentence as passed in this case should reasonably be reduced, in the exigencies of the case.

13. In the result, I uphold the order of conviction dated the 23rd November, 1966, passed by Sri A. Sen Gupta, Presi dency Magistrate, 5th Court, Calcutta, in Case No. C/1452 of 1966, on the three accused appellants under Section 614-A (2) of the Companies Act, 1956; but I reduce the sentence of fine as passed there under to a fine of Rs. 100/- each, in default to suffer simple imprisonment for two weeks each; and I further direct under Section 626 of the said Act that one-third of the fine if realized, shall be applied towards the payment of the costs of the proceedings.

14. The Appeal is disposed of accord ingly.

Sentence reduced.