

CALCUTTA HIGH COURT

Ajit Kumar Sarkar

Vs.

Assistant Registrar of Companies

Criminal Revision Cases Nos. 732 to 734 of 1977

(Jyotirmoyee Nag, J.)

21.06.1978

JUDGMENT

Jyotirmoyee Nag J.

1. Criminal Revision Nos. 732-34 of 1977 are taken up together as they involve the same points of law and will accordingly be governed by this judgment. The rules in these cases are directed against criminal proceedings pending before the learned Metropolitan Magistrate for prosecution of the petitioner and others for offences under the Companies Act, viz., under Sections 159 and 162(1) of the said Act. The petitioner along with the other members of the family is a shareholder of the company carrying on a business in coal trade named A. Sircar Sons (Private) Ltd. of 60/20, Gouri Bari Lane, Calcutta. The petitioner is the managing director of the said company. It is the case of the petitioner that day-to-day management along with the management of the business was entrusted to his elder brother, Rajendra Nath Sarkar, one of the directors of the said company, as the petitioner had to manage another business as managing agent/contractor of a small colliery at Asansol and he was so engaged during the period 1954 to 1960. The petitioner would come to Calcutta on casual visits and then he enquired from his brothers about the functioning of the business at Calcutta and being assured by his brothers that the company was functioning smoothly and the statutory compliances were being regularly and timely made and relying upon such statements and assurances the petitioner did not make any further enquiry. After 1960, due to inundation by flood of the colliery, the business at Asansol had to be closed and the petitioner came to reside permanently in Calcutta. It is then that he began taking interest in the business of the company but his brothers refused to give him any access to the books of accounts, documents, papers and to the management of the company and declined to disclose any account and/or particulars about the affairs of the company during the period 1954 to 1960. In the meantime, serious disputes also arose amongst the members of the family and the company ceased to function from 1960 and its State Government licence for coal trade was cancelled, of which the Registrar of Companies was well aware, for notices were issued under Sections 560(1) and 560(2) of the Companies Act, dated March 21, 1960 and April 27, 1960, asking the company to show cause why the name of the company should not be struck off from the register in order to bring about its dissolution. Owing to misunderstanding and/or disputes amongst the members, i.e., shareholders, the petitioner was kept in complete darkness about the

affairs of the company by the said brothers and the petitioner in spite of his best efforts could not know as to whether annual returns by the company had been filed under Section 159 of the Companies Act. In such a predicament, the opposite party, Assistant Registrar of Companies, filed complaints against the petitioner and others, being Cases Nos. 3798 to 3813 of 1969, 8 cases for alleged non-filing of annual returns under Sections 159 and 162(1) and 8 cases for alleged non-filing of balance-sheets under Section 220(3) of the Companies Act for the financial years 1960 to 1967. In these 16 cases summons could neither be served upon the company nor upon the additional director, Nishit Bhattacharjee, in the result the cases against them were marked as " filed " and the cases proceeded only against the present petitioner. The petitioner appeared in these cases and challenged the maintainability of the proceedings by appropriate applications. On June 9, 1975, the proceedings in all the cases were stopped and order of release was made in respect of the petitioner by the learned 11th Presidency Magistrate, Calcutta. This was done in pursuance of the judgment of the Division Bench of this Hon'ble court presided over by N. C. Talukdar and A. N. Banerji JJ. *Brahmanand Goyal v. N.C. Chakraborty*¹, wherein their Lordships held that the violation of the mandatory provision of Section 200 of the Code of Criminal Procedure was fatal to the prosecution. This judgment of their Lordships was overruled by a Special Bench decision of this court, on December 16, 1975, *Tara Dutta v. State. Eight complaint*² cases were again started by the opposite party before the Chief Metropolitan Magistrate on the self same allegations as made in the previous cases (3798 to 3813 of 1969). In each of the said complaints, there was a statement that the offences for violation of Sections 159 and 162 of the Companies Act are continuing offences and hence the complaints are not barred by limitation as provided under Sections 468 and 469(1)(b) of the Code of Criminal Procedure as the offences complained of were for non-filing of annual returns within 60 days from holding of the annual general meeting and the default having continued till this date the complaints are within time. In these complaints, there is no averment as to when the annual general meeting should have been held and on what date the returns ought to have been filed. The only allegation is that the annual general meeting ought to have been held by due date "and the annual returns ought to have been filed "in time". Several points of law have been raised in these cases for quashing the proceedings that are pending before the learned Metropolitan Magistrate, Calcutta. The first and foremost point raised is that the offences are not continuing ones as stated in the petitions of complaint. Secondly, in the absence of specific averments regarding the dates of the annual general meetings and the " due time " within which the annual returns should have been filed, cognisance for violation of the provisions of the Companies Act is bad. The third ground taken is that under the Companies Act the Registrar alone is competent to launch prosecution for offences under the Companies Act and he can file complaints but the Assistant Registrar is incompetent to do so and, as such, the proceedings in the instant cases are bad and liable to be quashed inasmuch as the complaints have been filed by the Assistant Registrar. The fourth ground taken is that without the company being proceeded against the prosecution against the other directors or the managing director is not maintainable. The last point taken is that in view of the earlier proceedings on the self same facts having been stopped and the petitioner released, the subsequent proceedings on the same facts cannot go on, in view of the provisions of Section 300(5) of the Code of Criminal Procedure.

2. In respect of the 1st ground taken that the offences are not continuing offences and that

¹ reported in 79 CWN 601

² reported in AIR 1975 Cal 450

Section 472 of Criminal Procedure Code protects the present proceedings, I must hold that the contention made by the learned advocate for the petitioner in this regard is not acceptable. What

is a continuing offence has been clarified in the case reported in *Slate of Bihar v. Deokaran Nenshi*³. Before I go into the principles laid down in that case I may advert to the relevant sections of the Companies Act. Section 162 of the Companies Act provides that if a company fails to comply with any of the provisions contained in Sections 159, 160 and 161 the company and every officer of the company who is in default shall be punished with fine which may extend to Rs. 50/- for every day during which the default continues. It is argued by the learned advocate for the petitioner that as soon as the annual general meeting is not held by the due date, the default occurs and it becomes a completed offence on the expiry of the "due date" and no return is filed within the time provided under Section 159 of the Companies Act. Therefore, it cannot be said to be a continuing offence just because the section provides that for each day's default a penalty which may extend to Rs. 50/- is provided. In this connection, the learned advocate for the petitioner has referred me to a judgment reported in *Muralidhar Ram Narayan v. Corporation of Calcutta*⁴. That was a case under Section 385(1) read with Section 488(2) of the Calcutta Municipal Act, 1923 (III B.C. of 1923). In that case, the petitioner set up a flour mill in a room at premises No. 139/1, Russa Road, intending to work it by electricity without the previous written permission of the Corporation and was convicted under Section 385(1) read with Section 488(1) of the Calcutta Municipal Act and was sentenced to pay a fine of Rs. 10/-. Since the said conviction the accused, to quote the words of the Sanitary Officer, "worked the mill from the 1st April onwards". That officer further deposed thus :

"I inspected the mill in May and I found it working. After the last conviction the accused did not apply for permission under section 385 nor has he got any. If the accused had applied, the permission would have been refused as the site and locality are unsuitable for the working of an electrical mill. The accused was prosecuted for violation of section 385(1) read with section 488(2) of the Act for a period of 30 days commencing from the 1st April, 1927, and was sentenced to pay a daily fine of Rs. 10/-, i.e., an aggregate fine Rs. 300/-. He preferred a revisional application against his conviction."

3. The question that arose for consideration in that case was whether what was done by the petitioner amounted to a continuance of the offence mentioned in Section 385(1) of the Act. It was held in that case that the offence under Section 385(1) is not the same offence prescribed under Section 488(2) of the Calcutta Municipal Act. The offence under Section 488(2) is not a continuation of the offence under Section 385(1). It is provided under Section 488(2) that after having committed an offence referred to in Clauses (a), (b) or (c) of Sub-Section (1) if he continues to commit such an offence he shall be punished, for each day after the first during which he continues so to offend, with fine, which may extend to the amount mentioned in this behalf in the fourth column of the said table. On an analogy of that case it has been argued that the offence under Section 162 of the Companies Act is not a continuing offence. It must be observed that the language of Section 162 of the Companies Act is quite different from that of Section 488(2) of the Calcutta Municipal Act, 1923. In the latter Act, Sub-Section (2) of Section

³ AIR 1973 SC 908

⁴32 CWN 591

488 reads as follows :

"Whoever, after having been convicted of any offence referred to in clause (a), (b) or (c) of sub-section (1), continues to commit such offence shall be punished, for each day after

the first, during which he continues so to do, with fine which may extend to the amount mentioned in this behalf in the fourth column of the said table."

4. The condition precedent for imposition of fine under the latter part of Sub-Section (2) of Section 488 is that there should be a conviction first of an offence under clause (a), (b) or (c) of Sub-Section (1), therefore, it is argued that under the Companies Act also first there must be a conviction for non-filing of annual return and thereafter if the default continues that gives rise to an offence for which a daily fine may be imposed. I am afraid I cannot agree with this submission of the learned advocate as under the Companies Act under Section 162(1), it is clearly stated that whoever is in default under Section 159 or 160 or 161 shall be punished with fine which may extend to Rs. 50/- for every day, during which he continues to be in default. Here there is no indication that there must be conviction first as indicated in the Calcutta Municipal Act, I, accordingly, hold that the offences under Sections 159 and 160 of the Companies Act are continuing offences and, therefore, the bar imposed under Section 468 of the Criminal Procedure Code does not operate in the present cases. The case referred to by the petitioner's advocate reported in [(2) (*Wire Machinery Manufacturing Corpn. Ltd. v. State*⁴) related to the offences under the Provident Funds Act, where there is a provision for daily fine if the default continues after conviction, and an order is made by the Magistrate to deposit the amount of contribution after conviction. That case has no bearing to the facts of the present case. In this connection as to what is a continuing offence has been explained in the decision reported in (*G. D. Bhattar v. State*⁵). A continuing wrong or a continuing offence is after all, a continuing breach of a duty which itself is continuing. If a duty continues from day-to-day, the non-performance of that duty from day-to-day is a continuing wrong. The contention that the continuance of the offence contemplated under section 73 of the Mines Act comes into existence after there has been a conviction and not till then cannot be accepted as the conviction has got nothing to do with the question of limitation. When dealing with the provisions of Section 488(2) of the Calcutta Municipal Act, in this connection, their Lordships observed (at p. 488, para 14) :

"The question which arises under section 488(2) of the Calcutta Municipal Act, 1923, is... whether a particular person continues to commit the offence after having been convicted and if so whether he is liable to a daily fine such as is mentioned in the section..... it is not enough that the offence is continuing but it will have to be proved that it continued after a conviction."

Now I may refer to the principles laid down in this connection in the case reported in *State of Bihar v. Deokaran Nenshi*⁶ (at p. 909, para 5). " (A) continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty the liability for which continues until the rule or its requirement is obeyed

⁴1978] Calcutta High Court Notes page 293

⁶ AIR 1973 SC 908

⁵ AIR 1957 Cal 483

or complied with."

5. The case before their Lordships of the Supreme Court was for violation of regln. 3 read with section 66 of the Mines Act which makes failure to furnish annual returns for the preceding year

by 21st January of the succeeding year, an offence. The infringement, therefore, occurs on the 21st of the relevant year and is complete and the owner failing to furnish the annual return by that day. It was sought to be argued before me on the analogy of the Mines Act that the dead line for submitting return under the Companies Act is given under Section 159 of the Companies Act and if the return is not furnished by the date fixed therein the offence is completed and, therefore, it is not a continuing offence. It will, however, be seen that unlike the Mines Acts. 162 of the Companies Act provides that " if a company fails to comply with any of the provisions contained in section 159, 160 or 161 the company shall be punishable with fine which may extend to fifty rupees for every day during which the default continues." Therefore, the liability to furnish return continues until it is complied with and each day's failure is visited with penalty. Section 162 of the Companies Act is conspicuous by the absence of such expression as " every day that the breach continues after conviction " as provided under section 29 of the Industrial Disputes Act, 1947, and in Section 14-A of the Provident Fund and Family Pension Fund Act, 1952, such words as " where the order has not been complied with." There is no express provision in regln. 3 or in any other provision in the Mines Act or the Regulations, which renders the continued non-compliance an offence until its requirement is carried out as in the Companies Act. Moreover continued contravention after conviction has no connection with the question of limitation. In this connection, the case of *Public Prosecutor v. B. V. A. Lury Co.*⁷, may be referred to.

6. The present cases were filed for defaults made for the financial years ending 1962 to 1967 on 27th December, 1969. The learned Magistrate on May 9, 1975, released the accused persons and stopped the proceedings in view of the Division Bench judgment of this Hon'ble court in *Brahmanand Goyal v. N.C. Chakraborty*⁸, followed in *Jitendra Nath Mitra v. State of West Bengal, the latter case reported in*⁹ In this case it was held that the proceeding is void for non-compliance with the provisions of Section 200, Criminal Procedure Code. This decision was set aside by a decision of a Special Division Bench reported in (*Tara Dutta v. State*¹⁰). Thereafter, on 16th December, 1975, the Assistant Registrar of Companies again filed fresh petitions of complaint on the self-same facts before the learned Metropolitan Magistrate who took cognisance of the same. These cases are under challenge before me. It has been argued before me that the learned Magistrate could not have entertained fresh complaints on the self-same facts inasmuch as the provisions of Section 300(5) of the Criminal Procedure Code are offended thereby, as, when the learned Magistrate released the accused persons previously, that would operate as *res judicata* as such release will amount to discharge within the meaning of Section 300(5) of the Code. It must be remembered that the learned Magistrate did not discharge the accused persons nor did he acquit them. As cognizance was bad for non-compliance with the mandatory provision of Section 200 of the Code of Criminal Procedure, the learned Magistrate had no jurisdiction to go on with the said proceeding and, therefore, he had no jurisdiction to acquit or discharge the accused. All that he could do is to release the accused and stay the proceedings. Hence, the provision of Section 300(5), Criminal

⁷ AIR 1942 Madras 75,76

⁹ 79 CWN 325

⁸(1975) 79 CWN 601

¹⁰ AIR 1975 Calcutta 450

Procedure Code, are not attracted as the learned Magistrate did not make the order under Section 259, Criminal Procedure Code, as provided thereunder nor did he acquit the accused. The power to discharge presupposes that the learned Magistrate had jurisdiction to take cognizance of the matter. Therefore, this branch of the argument of the learned advocate for the petitioner that the

proceedings are bad for violation of the section, must fail.

7. The next point which has been urged by the learned advocate for the petitioner and also by the petitioner himself personally later on, is that the complaint filed by the Registrar is incompetent inasmuch as the Assistant Registrar is not a person entrusted with the task of registering a company under the Companies Act or by the regulations framed under the Companies Act.

8. In the previous Act of 1913, a Registrar means " Registrar, Additional, Joint, Deputy or an Assistant Registrar having the duty of registering companies under this Act". Stress is laid on the conjunction "or ". If the Registrar includes an Assistant Registrar, the conjunction "or" would not be before the words "Assistant Registrar " only, the conjunction would be of and". Under the regulations the duty of registering companies is left only to the Registrar and as the Registrar includes an Additional, Joint and Deputy Registrar they may file petitions of complaint under the Act but not so the Assistant Registrar who has not been authorized with the duties of registering companies under the Act or the Regulations. Therefore, the petitioner argues that the complaint having been filed by the Assistant Registrar who is incompetent to do so, the prosecution should fail on that ground alone. The petitioner has cited a case (*Emperor v. Sela Shib Das*¹¹), wherein it has been held that under the regulations framed by the Local Government under Section 220(b) of the Act VI of 1882, the Registrar is the only officer authorized for instituting and conducting all prosecutions under the Act, specially where the prosecutions are in connection with breach of the rules relating to submission of balance-sheets and other periodical returns. So a complaint under section 74 of the Indian Companies Act VI of 1882 for wilful default in filing a balance-sheet, not brought by the Registrar but by a clerk of his office and countersigned by the Public Prosecutor, is bad in law and not entertain able by a Criminal Court. Where by any law or Regulation a certain person is duly authorized to complain about a particular offence, the proceedings of a Magistrate based on a complaint relating to that offence, made by any unauthorized person is *ultra vires* and liable to be set aside in revision by the High Court at any time during the pendency of the case. In that case, the complaint was filed by a clerk of the office of the Registrar, and therefore, cognizance on that complaint was struck down as bad. For prosecution under Section 162 of the Companies Act, the Assistant Registrar is competent to file a complaint by the amended Act as in the defining Section 2(40) " Registrar " means Registrar or Additional, Joint, Deputy Registrar or Assistant Registrar. That so far as Additional, Joint and Deputy Registrars are concerned, they can function as Registrar in the matter of filing of complaint is not denied but it is contended that the expression " having duty of registering companies under this Act ", applies only to the Assistant Registrar and as under the Regulations no such power is given to the Registrar, he is incompetent to file complaints. That power must be presumed to be given to the

¹¹ reported in (1910) 8 Indian Cases 190

Assistant Registrar also as the expression " having the duty of registering companies under the Act " applies to all the Additional, Joint, Deputy Registrar and includes the Assistant Registrar. It is not contended that the Additional, Deputy and Joint Registrars do not have the power of registering companies under the Act. If that be so, I have no hesitation in holding that an Assistant Registrar is also competent to file a complaint for contravention of the provisions of the Act under the Companies Act as he along with the others, i.e., the Additional, Deputy, Joint Registrars is empowered to register Companies under the Act. Thus, this limb of the argument of the petitioner fails.

9. The next point taken is that the case against the company and one of the directors has not been filed as service could not be effected on them. Without the company being prosecuted along with the petitioner the present proceedings cannot go on. That the company is a necessary party goes without saying. Only if the company is convicted the others may be convicted as the directors derive their liability from the company. Hence, the company is a necessary party and the prosecution should be conducted only in the presence of the company, as accused.

10. Further, it is contended by the petitioner that the petition of complaint is liable to be quashed on the ground that there is no specific averment in it as to the officers who are in default apart from the company. In this connection, my attention has been drawn to section 5 of the Companies Act wherein " officer in default " has been defined and explained. It means "an officer who is knowingly guilty of default ". In Section 162 of the Companies Act it is provided that " the company and every officer of the company who is in default shall be punishable " which is further clarified in Section 162(2) that the expression " officer " shall include " any person in accordance with whose directions or instructions the Board of Directors of the company is accustomed to act ".

11. Here it was incumbent on the prosecution to fix the liability with respect to the particular " officer in default " and there should have been a specific averment to that effect in the complaint. In the petition of complaint it is only stated that " the accused Nos. 2 to 5 are the officers and directors of the company " and in para. 3 there is an averment that " the company and its directors are under a statutory obligation to file with the complainant an annual return. " This statutory obligation is imposed under Sections 159 and 162 of the Companies Act. If all the directors are liable for every default then the expression " every officer who is in default " becomes redundant and meaningless. As already stated above " an officer includes a director ".

12. In this connection, the case reported in [1978] CLJ 336 (sic) lends support to this contention of the learned advocate for the petitioner.

13. In view of what I have stated above on the last two points taken by the petitioner, I hold that the cognizance taken on the basis of such petitions of complaint is bad and accordingly the proceedings are quashed.

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