



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO.1528 OF 2016

Rajendra Shah s/o. Ambalal Shah

... Petitioner

Vs.

The State of Maharashtra & anr.

... Respondents

Mr.Amit Desai, Senior Advocate with Pranav Badheka and Abhay Jadeja, P.Mane I/b Prashant Bhikaji Pawar for the Petitioner

Mr.Vinod Chate, APP, for the Respondent – State

Mr.Dhirendra Pratap Singh for Resp. No.2

CORAM: Mrs.MRIDULA BHATKAR, J.

JUDGEMENT RESERVED ON: JANUARY 15, 2019

JUDGEMENT DELIVERED ON: JANUARY 30, 2019

JUDGEMENT:

1. Admit. Respondents waive notice through their respective Counsel. By consent of the parties, the Petition is heard finally at the stage of admission.
2. The petitioner, the original accused No.6, challenges the order of issuance of process dated 24.5.2002 and the issuance of summons dated 3.11.2015 and prays that all proceedings and the orders are to be set aside in Criminal Case No.3847/SS/15 from the Court of Metropolitan Magistrate, 18th Court, Girgaum, Mumbai.

Respondent No.2, the Registrar of Companies, has filed this complaint under section 295 (4) of the Companies Act, 1956 for contravention of section 295 (4) of the Companies Act (for short, hereinafter referred to as 'the Act'). U/s 295(4) of the Act, a company needs to take prior sanction for giving loans to the other parties. However, there is a violation of the provisions under section 295 of the Act as the loans were disbursed by accused No.1 company to its sister concern. Accused Nos.7 and 8 are the companies to whom the loan is disbursed by the company, namely, M/s.Baron International Ltd. of which accused Nos.1 to 6 are the Directors. During inspection of the company's books of accounts and the records taken on 3.11.1999 by the concerned officer from the Office of the Registrar of Companies, it was found that this disbursement of loans to accused Nos.7 and 8 was without prior sanction of the Registrar of Companies and therefore, criminal complaint is lodged on 24.5.2002.

3. The learned Senior Counsel appearing for the applicant/accused has submitted that the order of issuance of process against the applicant/accused is illegal and bad in law on the following grounds:

i) He submits that the applicant/accused is not an Executive Director but he was an alternate Director. He submits that in the averments made in the complaint, no substantial role is attributed to accused No.6, who is an advocate and solicitor by profession and is a senior partner in the firm M/s.Crawford Bayley & Company, advocates & Solicitors. He is not a signatory of the cheque which is subject matter of the prosecution. In the complaint also, it is specifically mentioned that the original accused No.2 has signed and issued the said cheque. The averments are mainly against the accused Nos.2 to 4 and not against accused No.6.

ii) In the balance sheet of 30.6.1999, the amount of Rs.112,240/- has been shown as the loan amount due from Jaykaba Trading and Investment Ltd., accused No.8 and Rs.26 lakhs has been shown as amount due from Shakun Mulchanani and Kabir Mulchandani of M/s.Sprite Electronics Private Ltd. of which accused Nos.2 and 3 are the directors. The petitioner is not connected with those companies.

4. They held the position of Directors in these two companies. Thus, both accused Nos.1 and 2 are the ones, who were active in disbursement and maintaining the books of accounts. He further submitted that as per the Advocates Act, the applicant/accused, being an advocate, is not supposed to sign any balance sheet or cannot be a witness in any proceedings. Moreover, a mere signature is not to be taken that he had approval and knowledge about such disbursement of loans and whether this disbursement is without sanction? He submitted that accused No.6 was an alternate Director and not Managing Director. He signed as an alternate director on the balance sheet and not as a Managing Director. On the balance sheet, the signatures of a Chairman and accused No.2 as a Managing Director are appearing. Therefore, the signature of applicant/accused appearing on the balance sheet is in fact insignificant and no vicarious liability can be saddled on accused No.6 in this company affair. He also pointed out that company is not a party to the proceedings. The learned Counsel has submitted that in para 2, the complainant has mentioned that accused Nos.1 to 6, at the relevant time, were the officer in default of the company as per annexure A. The learned Counsel relied on the definition of officer, who is in default, under section 5 of the Act.

He argued that he does not fall in the category of A, B, C, D, E and F. In clause (G), he may fall, however, accused No.2 is working as a Managing Director and, therefore, clause (g) will not be attracted to the present applicant/accused.

5. He further argued that the inspection has taken place in 1999; the complaint was filed in 2002 i.e., after more than 2 years and, therefore, as per section 468 of the Criminal Procedure Code, cognisance of this offence can be taken only within one year where the punishment is of one year. In the present case, the punishment is prescribed for one year and so, the complaint filed is beyond limitation and the trial Court ought not to have taken cognisance of this complaint.

6. In support of his submissions, he relied on the judgments in **Srikumar Menon and Ors. vs. Registrar of Companies.**¹; **Atul B. Munim vs. Registrar of Companies & Ors.**² and in **Homi Phiroz Ranina & Ors. vs. State of Maharashtra & Ors.**³

7. Mr.Singh, the learned Counsel appearing for Respondent No.2, while opposing this application has submitted that at the

1 MANU/WB/0525/2011

2 1999 SCC Online Bom 893

3 2003 (3) Mh.L.J. 34

stage of issuance of process, the learned Judge has to only consider the averments made in the complaint. In the present case, the petitioner is admittedly a Director of the said company. It is also admitted that the loans were disbursed to the respondents/accused Nos.7 and 8 without taking prior sanction of the government, which are the sister companies of the company. He submitted that there is no delay in filing the complaint because time was taken for show-cause notice dated 3.1.2002 issued by the office to accused No.6 and it was received by the wife of the accused on 26.5.2005 and it was served. The show-cause notice was served immediately at the residence of respondent No.6. The learned Counsel submitted that there is no delay in filing the complaint because the sanction to launch prosecution by the respondents was obtained by the complainant on 12.10.2002 and immediately in 2002. Then, the complaint was filed in May, 2002.

8. In support of his submissions, he relied on the judgment of the Madras High Court in the case of **R.M. Subramaniam & Ors. vs. Inspector of Labour, Tiruchirapalli**⁴; so also of the Delhi High Court in the case of **Bhupinder Kaur Singh & Ors. vs. Registrar**

⁴ MANU/TN/1049/1999

of Companies⁵.

9. Heard. Perused the complaint and other record before the Court. In the case of **Srikumar Menon and Ors. vs. Registrar of Companies (supra)**, a show-cause notice was sent under section 295(1C) of the Act. An application was filed under section 633(2) of the Companies Act, where without permission of the Central Government, intercorporate deposits were created. For such violation, conviction prescribed was maximum imprisonment of 6 months for the offender. The complaint was filed, however, objection was raised on the ground that it was barred by limitation under section 468 of the Code of Criminal Procedure. The learned Single Judge of the Calcutta High Court held that under section 469(3) of the Code of Criminal Procedure, the period of limitation in relation to offence shall commence on the day, when such offence came to his knowledge of the aggrieved person. In that case, therefore, if the Central Government is aggrieved by the act of company then, the date of inspection was considered as the date of knowledge to the Central Government and from that date, the limitation was to be computed.

5 142 (2007) Delhi Law Times 277

10. In the case of **Atul B. Munim vs. Registrar of Companies & Ors (supra)**, a learned Single Judge of this Court has considered section 5 of the Companies Act. It was held that if the petitioner was not a whole time or executive director of the company, then, he is to be treated as alternate to the whole time director or executive director of the company. He also stated that the process cannot be issued mechanically without applying mind to the facts of the case and the provisions of law.

11. In **Homi Phiroz Ranina & Ors. vs. State of Maharashtra & Ors.**, the complaint was filed for delay in remitting the tax deducted. The applicant has taken stand that he was non-executive Director of the company and they are also practising advocates and, therefore, they are prohibited under the law to act as full time directors. They could only act as non-executive directors not exercising administrative powers or performing administrative duties. It is held that unless the complaint discloses a prima facie case against the applicant/accused of their liability and obligation as principal officers in the day to day affairs of the company as Directors of the company, the applicants cannot be prosecuted for the offences committed by the company and held

that it will be a travesty of justice to prosecute all the Directors if the offence is committed without their knowledge. The set of the facts are quite similar to the facts in the present case. The status of the applicant/accused in the case of Homi Phiroz Ranina & ors. vs. The State of Maharashtra & ors. (supra), is similar to the status of the petitioner in the case in hand. The applicant is also a practising advocate and solicitor. So, he could only act as non-executive Director unless specific material is brought on record, the liability of a principal or active Director cannot be fixed on him. Admittedly, he is not a signatory to the cheque, which is the subject matter of the complaint.

12. In R.M. Subramaniam & Ors. vs. Inspector of Labour, Tiruchirapalli (supra), a revision was preferred against conviction under the Industrial Disputes Act. A learned Single Judge of the Madras High Court in that case has held that where notice of prosecution for an offence has been given and where previous sanction of the government is required, the period of such notice and the time spent for obtaining sanction has to be excluded in admitting the period of limitation. In the said case, the learned Judge has taken a different view from the earlier view taken by the

Bombay High Court in the case of **H.H. Wagh vs. State of Maharashtra & anr.**⁶. In the said case, the offence was committed under the Industrial Disputes Act but the learned Single Judge of this Court has taken a view that when there is no provision of taking sanction in the act of the government or the authority and though the sanction is taken, there is no such period of sanction which can be excluded from computing the period of limitation.

13. In Bhupinder Kaur Singh & Ors. vs. Registrar of Companies⁷. In this case, the learned Single Judge of Delhi High Court while dealing with the proceedings under the Companies Act, has dealt with the issue of period of limitation for prosecution. In the said case, the funds collected by way of public issue were not utilised in the leasing business as stated in and promised in the prospectus and, therefore, the act was made punishable under section 63 and 628 of the Companies Act. In the said case, the complaint was filed immediately after receiving permission from the Department of Company Affairs. The learned Judge has held that the question of limitation is a mixed question of law and fact. The learned Judge has held that the complaint cannot be thrown out on

⁶ 1991 (1) Bom.C.R. 206

⁷ 142 (2007) Delhi Law Times 277

the ground of limitation and it is to be decided at the stage of trial. In the said case, in November, 2015, the prospectus was sent in November, 1995 and the issue was opened on 29.1.1996 and closed on 8.2.1996 and the complaint was filed 6 years thereafter i.e., in the year 2002, though the period of limitation was 3 years.

14. In the present case, the inspection was carried on 3.11.1999 by the Income Tax department and the complaint was filed in May 2002. The view taken by the Madras High Court in the case of **R.M. Subramaniam (supra)** is different than the view taken by the Bombay High Court. However, it is also true as laid down in the case of **Bhupinder Kaur Singh (supra)**, it is a matter of mixed question of law and facts. Therefore, this issue can be kept open in the complaint.

15. The other point in respect of the status of the petitioner as an active partner and was having knowledge of not taking prior approval for disbursement, is not made out in the averments. A specific role is attributed to accused Nos.1 and 2. Accused No.2 is a Managing Director and therefore, he has signed the cheque. The petitioner had not signed the books of accounts but he has signed the balance sheet. The submissions of the learned Senior

Counsel that the said balance sheet was signed in a routine manner as the signature of the Managing Director and the chairman were appearing, carries substance. Thus on the basis of only signature, it cannot be said that there is enough material to show the knowledge of the petitioner of disbursement of the loan without prior approval. A significant circumstance also to be addressed to is that the accused Nos.1 and 2 are the Directors of those companies in whose favour the loans were disbursed. Thus, the accused Nos.1 and 2 had direct interest in the disbursement of loan. There is nothing to show that the petitioner has any interest or any connection with the other two companies. In view of these facts and the submissions of the learned Counsel for both the parties, I hold that no case is made out to issue process under section 295 (4) of the Companies Act, 1956 is made out to swaddle the vicarious liability on the petitioner.

16. Hence, the process issued by the learned Magistrate under section 295 (4) of the Companies Act, 1956 on 24.5.2002 and the summons dated 3.11.2015 are quashed and set aside. Rule is made absolute accordingly.

(MRIDULA BHATKAR, J.)

loans were disbursed by the company run by accused Nos. 1 and 2 to its sister concern”.

- (ii) On page No. 3, paragraph 3(i), 7th line, the sentences “He is not signatory of the cheque which is subject matter of the prosecution. In the complaint also, it is specifically mentioned that original accused No. 2 has signed and issued the said cheque” are deleted.
- (iii) On page no.3, paragraph 3(ii), 4th and 5th line, the names Shakun Mulchandani and Kabir Mulchandani are deleted.
- (iv) On page no.3, paragraph 3(ii) sixth line the sentence “Private Ltd. of which accused nos. 2 and 3 are directors” is substituted as “Private Ltd. of which accused nos. 1 and 2 are directors”
- (v) In paragraph 4, 5th line, the sentence “being an advocate, is not supposed to sign any balance sheet or cannot be a witness in any proceedings” is to be substituted as ““being an advocate, is not supposed to act as an Executive Director of the Company.”
- (vi) In paragraph 4, 9th line, the sentence “is without sanction? is to be read as “is without sanction.”

- (vii) In paragraph 11, the sentence “Admittedly, he is not a signatory to the cheque, which is the subject matter of the complaint” is to be deleted.
- (viii) On page 11, paragraph 13, second line the words “in November 2015” are deleted.
- (ix) In paragraph 14, second line, the words “inspection was carried on 3.11.1999 by the Income tax Department” is to be substituted as “inspection was carried on 3.11.1999 by the Registrar of Companies”
- (x) In paragraph 15, 5th line, the words “and therefore he has signed the cheque” are deleted.

3. The original order dated 30th January, 2019 stands modified accordingly.

(MRIDULA BHATKAR, J.)