

(2008) 01 DEL CK 0123
In the Delhi High Court
Case No : Criminal M.C. 5673 of 2005

A.G. Gaggar

APPELLANT

Vs

State and Another

RESPONDENT

Date of Decision : 02-01-2008

Acts Referred:

Citation : (2008) 8 ILR Delhi 17

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Avtar Singh, for the Appellant; U.L.Watwani, APP. and Maneesha Dhir, for ROC, for the Respondent

Final Decision : Allowed

Judgement

S. Muralidhar, J.—Crl.M.C. No. 5673 of 2005 is an application u/s 482 of the Code of Criminal Procedure, 1973 (CrPC) seeking the quashing of proceedings against the Petitioner in Complaint Case No. 272 of 2005 under Sections 162/220 read with Section 220(3) of the Companies Act, 1956 (Act). The complaint in question was filed on 14th February, 2005 by the Assistant Deputy Registrar of Companies, National Capital Territory of Delhi and Haryana in the Court of learned Additional Chief Metropolitan Magistrate (ACMM) against M/s. Neha Exports Limited and five individuals, including the Petitioner here Mr. Anand Gopal Gaggar in their capacity as Directors or Officers of Neha Exports Limited for failing to file the balance sheet and profit and loss account of the company as on March 31, 2004 with the Office of the Registrar of Companies (ROC) in compliance with Section 220 of the Act.

2. Crl. M.C. No. 5674 of 2005 is an application u/s 482 CrPC seeking the quashing of proceedings against the Petitioner in Complaint Case No. 273 of 2005 under Sections 159 read with Section 162 of the Act. The said complaint was filed by the Assistant Registrar ROC, NCT of Delhi and Haryana in the Court of learned ACMM against M/s. Neha Exports Limited and five individuals, including the Petitioner here Mr. Anand Gopal Gaggar, in their capacity as

Directors or Officers of Neha Exports Limited. The allegation was that they were liable for failing to file the annual returns of the company made up to 30th September 2004 in accordance with Section 159 of the Act.

3. Since both petitions involve the same parties and similar issues, they are disposed of by this common judgment.

4. According to the complaint in Complaint Case No. 272 of 2005, the Balance Sheet and the Profit and Loss Account of the company as on 31st March, 2004 were required to be placed in the Annual General Meeting (AGM) not later than 30th September, 2004 and filed with the office of the ROC not later than 29th October, 2004 i.e. within 30 days of the holding of the AGM. The complaint then proceeds to state that the accused No. 1 company did not file the Balance Sheet as on 31st March, 2004 despite a show cause notice dated 20th January, 2005 sent to the Company and its Directors/Officers and, Therefore, the company and each of the Directors were liable for the default. It was prayed that the ACMM should issue summons to the accused for the offences under Sections 220 read with Section 162 of the Act. The complaint in the second case, i.e. Complaint Case No. 273 of 2005, was occasioned by the failure of the company to file annual returns in terms of Section 159 of the Act,

5. By an order dated 14th February, 2005 in Complaint Case No. 272 of 2005, the learned ACMM directed that the accused should be summoned for 19th July, 2005. At the hearing on 19th July 2005 accused No. 5 Mr. Kailash Nath Gupta was discharged on the ground that he had already resigned in 1996. Likewise at the hearing on 8th September, 2005 accused No. 6 Mr. Sanjiv Grover was discharged after he showed that he had joined another company as Company Secretary in 1997. The ACMM directed fresh process under Sections 82/83 CrPC against the other accused. It was at that stage that Mr. A.G.Gaggar filed the present petitions seeking the quashing of the complaints.

6. According to the Petitioner he resigned as Director of the Neha Exports Limited on 14th July, 1998. He submitted Form 32 to the ROC on 25th September, 1998 which was accepted without demur. He Therefore could not be held liable for any failure on the part of the company thereafter. He further pointed out that by a judgment dated 26th February, 2003 in another case the learned ACMM held him guilty under Sections 159 and 162 read with Section 220(3) of the Act for not filing of the annual returns, the Balance Sheet and Profit and Loss Accounts of the company for the years ending 31st March, 1997 and 31st March, 1998. His contention is that he cannot be prosecuted for any offence of a similar nature after he ceased to be the Director.

7. The Respondent No. 2 ROC has in its reply dated 13th December, 2005 to the present petitions admitted in para 4 is that the Petitioner had filed Form No. 32 with the Registrar of Companies on 25.09.1998. Annexed to the reply of the ROC is a copy of the Form 32 as filed by the Petitioner and available in the records of the ROC. The stand however is that this form should have, in terms of Section

220(2) of the Act been filed by the Company and not the Director who resigned. It is then stated that the occasion for verifying the correctness of the Form 32 which was filed way back on 25th September, 1998 arose only when a default was committed by the company in filing the Balance Sheet and Profit and Loss Account as on 31st March, 2004. It is submitted that it is for the trial court to satisfy itself after perusing the certified copy of the Form 32 filed whether the Petitioner had indeed resigned in 1998 as claimed by him,

8. Mr. Avtar Singh, learned Counsel for the Petitioner, while reiterating the submissions made in the petition contends that the filing of Form 32 by the Petitioner on 25th September, 1998, which is an admitted fact, served as an intimation to the ROC of the fact of his resignation. Relying on Circular Letter No. 42 (400)-CL-II/59 dated 29th December, 1959 issued by the Department of Company Affairs, learned Counsel contended that it was incumbent on the ROC in the event that the Form 32 was filed not by the Company itself to make an enquiry whether the resignation of such Director was bonafide. That Circular further requires that where the ROC finds upon such an enquiry that resignation was bonafide, he should not start any prosecution against such Director irrespective of the fact whether such resignation was or was not accepted by the company. Reliance was also placed on a judgment of this Court in *Luk Auto Ancillary (India) Ltd. (In Liquidation) Vs. Laxmi Narain Raina and Others*, where the complaint against a Director who had resigned 5 years prior to default by the company was quashed by this Court. The further contention is that the ROC itself is the complainant in the present case and admittedly the Form 32 filed by the Petitioner was available with the ROC even at the stage the show cause notice was issued followed by the filing of the complaint. Therefore the ROC could not plead ignorance of the fact of resignation of the Petitioner as Director of the company. In the circumstances, the issuance of the show cause notice followed by the filing of the complaint, as far as the present Petitioner is concerned, was bad in law.

9. Appearing for the ROC, Ms. Maneesha Dhir, learned Advocate, submits that there was no occasion for the ROC to enquire into the correctness of Form 32 filed by the Petitioner in September 1998. In terms of Section 303(2) Form 32 had to be filed by the company; its filing by the Petitioner was to no avail. Relying on the judgment of the Calcutta High Court in *Fateh Chand Bhansali Vs. Hindusthan Development Corporation Limited*, she submits that the proper stage for examining whether the Form 32 filed depicts the correct factual position regarding the resignation of the Petitioner ought to be examined at the trial. The contention is that the Petitioner did not reply to the show cause notice issued and this led to the filing of the complaint in the court of the ACMM. Once summons were issued to the Petitioner, this Court should not interfere u/s 482 CrPC to quash such a complaint and that the entire matter should be left to the trial court. The reliance is placed on the judgment of this Court in *Anita Chadha Vs. Registrar of Companies*, where it was held that the mere resignation of a person from the directorship of a company would not bring to an end the liability of such

person in law for the offences under Sections 159/162 of the Act.

10. Admittedly the Petitioner did file a Form 32 with the ROC on 25th September, 1998. This much is evident from the reply and the annexed documents filed by the ROC. The only question, Therefore, is whether the ROC, at the stage of issuance of the show cause notice to the Petitioner on 20th January, 2005 ought to have taken note of the fact that the Petitioner was no longer a Director of the company. This was important because according to the ROC the failure to receive a reply to the show cause notice led to the filing of the complaint against the company and its directors and officers including the petitioner.

11. The Act requires the ROC to take some positive action in the event there is a non-compliance with the provisions concerning the filing of Form 32. The relevant provisions in this regard are Sections 303(2) and 303(3) which read as under:

(2) The company shall, within the periods respectively mentioned in this sub-section, send to the Registrar [a return in duplicate in the prescribed form] containing the particulars specified in the said register and [a notification in duplicate in the prescribed form] of any change among its directors managing directors, managers or secretaries, specifying the date of the change.

The period within which the said return is to be sent shall be a period of thirty days from the appointment of the first directors of the company and the period within which the said notification of a change is to be sent shall be thirty days from the happening thereof;

(3) If default is made in complying with Sub-section (1) or (2), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to [five hundred rupees] for every day during which the default continues.

12. It is trite that where a statutory authority is required to take action it is expected to act within a reasonable time. If according to the ROC, at a stage subsequent to 25th September 1998, it found that the Form 32 filed was beyond time or not by the company itself, it was incumbent on the ROC under Sub-section (3) of Section 303 to proceed against the company as well as every officer of the company in default. There is no indication whatsoever in the reply of the ROC that any such action was taken against either the company or any officer responsible for the affairs of the company for the non compliance with Sub-section (2) of Section 303.

13. There is also no information available with the ROC whether the Petitioner himself, acting for the company, was involved in filing the returns or the Balance Sheet and the Profit and Loss Account of the company for any year subsequent to the year ending March 31, 1998. What is interesting is that the judgment dated 26th February, 2003 passed by the ACMM convicting the Petitioner pertains to the non-filing of the annual return, the Balance Sheet and the Profit and Loss

Account in terms of Section 159/162 of the Act for the years ending 31st March, 1997 and 31st March, 1998. It was never the case of the ROC that such default for a subsequent year was attributable to the petitioner. The information that the Petitioner was not longer the Director of the company was available in the form of Form 32 in the records of the ROC. At the stage of issuance of show cause notice, that is, on 20th January, 2005 clearly this information ought to have been examined. The Circular relied upon by the Petitioner, which is not denied by learned Counsel for the ROC, makes it incumbent on the ROC, even if it finds at that stage that the Form 32 was not filed by the company to enquire if whether in fact, the resignation of the Petitioner did take place. Clearly no such enquiry was made at the stage of issuance of the show cause notice. To this Court it appears that independent of the Circular even Section 303(3) would require the ROC to make some enquiry before proceeding to prosecute the company for the failure to file Form 32 in terms of Section 303(2) of the Act.

14. In the circumstances, there can be no manner of doubt that the show cause notice issued to the Petitioner here was without application of mind. It was done in a mechanical manner ignoring the evidence available on record and without any effort made to enquire into the correctness of those facts. Since the genesis of the present complaint is failure by the petitioner to reply to the show cause notice, it is clear to this Court that the complaint is, as far as the Petitioner is concerned is unsustainable in law.

15. The judgment in Fateh Chand Bhansali dealt with the offences u/s 138 of the Negotiable Instruments Act, 1861 and certain provisions of the Reserve Bank of India Act. The circumstances under which criminal liability fastens on to directors of a company under those statutes are distinct from the liability in terms of Sections 159 and 161 of the Act. This is further explained by the Circular of the Department of Company Affairs referred to hereinabove which enjoins the ROC to first satisfy itself that the resignation was not bonafide before proceeding to prosecute such director. This indicates that the statutory power in Section 303(3) of the Act Section was not meant to be invoked in a mechanical manner. It is not surprising Therefore that there is no discussion of the said Circular in Fateh Chand Bhansali. The said decision is of no assistance to the learned Counsel for the ROC.

16. For the aforementioned reasons, this Court finds that the complaints filed by the ROC against the Petitioner are unsustainable in law. Accordingly Complaint Case Nos. 272 and 273 of 2005 stand hereby quashed. Both these petitions are allowed but in the circumstances with no order as to costs.