
(2011) 12 PAT CK 0034

In the Patna High Court

Case No : Criminal Miscellaneous No. 4322 of 2010

Binay Kishore Prasad and Mr. Salahudding @ Salahuddin

APPELLANT

Vs

The Union of India

RESPONDENT

Date of Decision : 09-12-2011

Acts Referred:

Citation : (2011) 12 PAT CK 0034

Final Decision : Dismissed

Judgement

Honourable Mr. Justice Aditya Kumar Trivedi

1. Aditya Kumar Trivedi, J. Petitioners, Binay Kishore Prasad and Md. Salahuddin @ Salahuddin have challenged order dated 6.7.2007 by which the Presiding Officer, Special Court of Economic Offence, Patna has summoned to face trial for an offence punishable u/s 162p of the Companies Act in connection with Complaint Case No. 355(C)/2007.

2. Briefly stated, the Registrar of Companies, Bihar & Jharkhand filed a complaint against altogether five persons including the Company and its Board of Directors for an offence punishable u/s 162(1) of the Companies Act on account of default of submission of annual return in pursuance of Section 159 of the Companies Act for the period 31.3.1992 to 31.3.2006. The aforesaid complaint was filed on 4th of July 2007 over which the learned Presiding Officer had taken cognizance on 6.7.2007.

3. It has been contended on behalf of the petitioner that the prosecution of the petitioners are false and malicious and cannot be permitted to proceed as it suffers from factual as well as legal deficiencies. For that submitted that it happens to be hit by Section 468 of the Cr.P.C., whereunder period of limitation has been prescribed for taking of cognizance of an offence. Because of the fact that it happens to be an offence which prescribes only fine as a result of which the cognizance should have been taken within six months from the date of alleged offence and so submitted that order of cognizance happens to be barred

by law of limitation. Then submitted that because of the fact that prosecution is also bad for want of encircling the petitioners to be at default as they have not been entrusted to discharge his function including furnishing of annual return in accordance with Section 159 of the Companies Act. Also relied upon decisions reported in Atul Krishna Biswas Vs. State of Bihar and Another,

4. On the other hand, though the learned counsel representing the Union of India was absent on the date of hearing but from the counter affidavit so filed, it is evident that the assertions of the petitioners have been challenged on the ground that it happens to be a continuing offence as a result of which Section 468 of the Cr.P.C. is not applicable. To support the plea, Annexure-C has been annexed which happens to be the judgment delivered by the Delhi High Court wherein it has been observed that it happens to be a continuing offence and so the scope of limitation is not at all available.

5. Before coming to adjudge the rival contention, first of all Section 5 of the Companies Act appears to be relevant to be taken first to decide and see whether the petitioners should be proceeded with and further the prosecution against them be permitted to continue:-

(5. 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, whether by way of imprisonment, fine or otherwise, the expression "office who is in default" means all the following officers of the company, namely:

- (a) the managing director or managing directors;
- (b) the whole-time director or whole-time directors;
- (c) the manager;
- (d) the secretary;
- (e) any person in accordance with whose directions or instructions the Board of directors of the company is accustomed to act;
- (f) any person charged by the Board with the responsibility of complying with that provision:

Provided that the person so charged has given his consent in this behalf to the Board;

(g) where any company does not have any of the officers specified in clauses (a) to (c), any director or directors who may be specified by the Board in this behalf or where no directors is so specified, all the directors;

Provided that where the Board exercises any power under clause (f) or clause (g), it shall, within thirty days of the exercise of such powers, file with the Registrar a return in the prescribed form.)

6. Section-5 identify the officers who are to be found at fault having negligence in discharging the obligation shared by them in accordance with law as prescribed under Companies Act whereunder at Sub-Clause (b) the whole time director or whole time directors do find place. Sub-Clause (G) contains a scope whereunder in absence of officers falling under category (a) to (c), any director or directors who have been entrusted by the Board and where no director is so specified, all the directors are to be held responsible. In the present case, as is evident for want of necessary pleading on this score by the rival party, Clause (G) appears to be applicable and that happens to be reason behind that all the Directors including the Company has been made an accused. The prosecution u/s 162 is to be attracted only in case, there happens to be default on the part of Company to perform and discharge its obligation which it shares in accordance with Sections 159, 160 and 161 of the Companies Act. Section-159 speaks like so:

159. Annual return to be made by company having a share capital.- (1) Every company having a share capital shall within (sixty) days from the day on which each of the annual general meetings referred to in section 166 is held, prepare and file with the Registrar a return containing the particulars specified in Part I of the Schedule V, as they stood on that day, regarding-

- (a) its registered office,
- (b) the register of its members,
- (c) the register of its debenture-holders,
- (d) its shares and debentures,
- (e) its indebtedness,
- (f) its members and debenture-holders, past and present, and
- (g) its directors, managing directors, (managers and secretaries), past and present:

(Provided that (any of the five) immediately preceding returns has given as at the date of the annual general meeting with reference to which it was submitted, the full particulars required as to past and present members and the shares held and transferred by them, the return in question may contain only such of the particulars as relate to persons ceasing to be or becoming members since that date and to shares transferred since that date or to changes as compared with that date in the number of shares held by a member.

Explanation.- Any reference in this section or in section 160 or 161 or in any other section or in Schedule V to the day on which an annual general meeting is held or to the date of the annual general meeting shall, where the annual general meeting for any year has not been held, be construed as a reference to the latest day on or before which that meeting should have been held in accordance with the provisions of this Act)

(2) The said return shall be in the Form set out in Part II of Schedule V or as near thereto as circumstances admit (and where the return is filed even though the annual general meeting has not been held on or before the latest day by which it should have been held in accordance with the provisions of this Act, the company shall file with the return a statement specifying the reasons for not holding the annual general meeting):

Provided that where the company has converted any of its shares into stock and given notice of the conversion to the Registrar, the list referred to in paragraph 5 of Part I of Schedule V shall state the amount of stock held by each of the members concerned instead of the shares so converted previously held by him.

160. Annual return to be made by company not having a share capital.- (1) Every company not having a share capital shall, within (sixty) days from the day on which each of the annual general meetings referred to in section 166 is held, prepare and file with the Registrar a return stating the following particulars as they stood on that day:-

(a) the address of the registered office of the company; ((aa) the names of members and the respective dates on which they became members and the names of persons who ceased to be members since the date of the annual general meeting of the immediately preceding year, and the dates on which they so ceased;)

(b) all such particulars with respect to the persons who, at the date of the return, where the directors of the company(its manager and its secretary) as are set out in section 303.

(2) There shall be annexed to the return a statement containing particulars of the total amount of the indebtedness of the company as on the day aforesaid in respect of all charges which are or were required to be registered with the Registrar under this Act or under any previous companies law, or which would have been required to be registered under this Act if they had been created after the commencement of this Act.

161. Further provisions regarding annual return and certificate to be annexed thereto.- (1) The copy of the annual return filed with the Registrar u/s 159 or 160, as the case may be, shall be signed both by a director and by the manager or secretary of the company, or where there is no manager or secretary, by two directors of the company, one of whom shall be the managing director where there is one:

(Provided that where the annual return is filed by a company whose shares are listed on a recognized stock exchange, the copy of such annual return shall also be signed by a secretary in whole-time practice.)

(2) There shall also be filed with the Registrar along with the return a certificate signed by (the signatories) of the return, stating-

(a) that the return states the facts as they stood on the day of the annual general meeting aforesaid, correctly and completely;

((aa) that since the date of the last annual return the transfer of all shares and debentures and the issue of all further certificates of shares and debentures have been appropriately recorded in the books maintained for the purposed; and)

(b) in the case of a private company also, (i) that the company has not, since the date of the annual general meeting with reference to which the last return was submitted, or in the case of a first return, since the date of the incorporation of the company, issued any invitation to the public to subscribe for any shares or debentures of the company, and (ii) that, where the annual return discloses the fact that the number of members of the company exceeds fifty, the excess consists wholly of persons who under sub-clause(b) of clause(iii) of sub-section (1) of Section 3 are not to be included in reckoning the number of fifty.

7. The aforesaid event has to be guided by another Section which commands the conduction of general meeting as provided under Section-166.

166. Annual general meeting.- ((1) Every company shall in each year hold in addition to any other meetings a general meeting as its annual general meeting and shall specify the meeting as such in the notices calling it; and not more than fifteen months shall elapse between the date of one annual general meeting of a company and that of the next:

Provided that a company may hold its first annual general meeting within a period of not more than eighteen months from the date of its incorporation; and if such general meeting is held within that period, it shall not be necessary for the company to hold any annual general meeting in the year on its incorporation or in the following year:

Provided further that the Registrar may, for any special reason, extend the time within which any annual general meeting (not being the first annual general meeting) shall be held, by a period not exceeding three months.)

(2) Every annual general meeting shall be called for a time during business hours, on a day that is not a public holiday, and shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situate.

(Provided that the Central Government may exempt any class of companies from the provisions of this sub-section subject to such conditions as it may impose:

(Provided further that-

(a) a public company or a private company which is a subsidiary of a public company, may by its articles fix the time for its annual general meetings and may also by a resolution passed in one annual general meeting fix the time for its subsequent annual general meetings; and

(b) a private company which is not a subsidiary of a public company, may in like manner and also by a resolution agreed to by all the members thereof, fix the times as well as at the place for its annual general meeting.)

8. Here, it looks pertinent to incorporate Section-162 of the Companies Act whereunder cognizance has been taken:

162. Penalty and interpretation.- (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 (five hundred rupees) for every day during which the default continues.

(2) For the purposes of this section and sections 159, 160 and 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.

9. The penal Section 162 prescribes punishment by way of fine which is to be charged on every day during which the default continues. This aspect is indicative of the fact that the fine has got no limitation and further it will be chargeable on day to day basis till the day of offending. Certainly, the petitioners have not challenged or controverted the period for which they have been found at default by non filing of annual general meeting return.

10. The decision as referred above cited on behalf of the petitioners do not apply to the facts and circumstances of the case because of the fact that in none of the decision scope of 162 of the Companies Act has been discussed and further taking into consideration to decide whether it happens to be a continuing offence or not.

11. Continuing offence has been taken into consideration at Section 472 of the Cr.P.C. wherein it has been " in the case of continuing offence, a fresh period of limitation shall begin to run at every moment of the time during which the offence continues." Therefore, for the purpose of continuing offence, application of 468 or 469 or 470 or 471 of the Cr.P.C. has got no application.

12. whether the allegation so alleged happens to be continuing offence, for that a reference may have The State of Bombay Vs. Bandhan Ram Bhandani and Others, which also deals with the status of all the directions and the relevant paragraphs are as follows:

6. A contrary view has been taken in England on the corresponding provisions of the English Companies Acts of 1862 and 1908 : see Gibson v. Barton, (1875) 10 QB 329, Edmonds v. Foster (1875) 45 LJ MC 41 and Park v. Lawton, (1911) 1 KB 588. It was said in these cases that a person charged with an offence could not rely on his own default as an answer to the charge and so, if the person charged was responsible for not calling the general meeting, he cannot be heard to say in defence to the charge that the general meeting had not been called. It was also said that the company and its officers were bound to perform the condition

precedent if they could do that, in order that they might perform their duty. This seems to us to be the correct view to take. If the person charged with the failure to carry out the requirements of the section could have called the meeting, he cannot defeat the provisions of the section simply by not calling the meeting willfully.

8. Nor do we think that sub-section (5) of Section. 32 by imposing a daily fine during the continuance of the default indicates that the default is not committed till the meeting has been held. In order that the default may continue it has no doubt first to occur. In our view, it occurs after the expiry of 21 days from the day when the meeting should have been held within the year.

13. Nature of offence to be continuing one has also been considered by bench of this Court, as reported in 2004 (2) East Cr.C. 213 wherein at para 12 it has been held:-

Applying the norms and guidelines given by the Supreme Court in Bhagirath Kanodia's case and all the more looking to the purpose which has been intended to be achieved by constituting a particular Act as the offence, it is held that the default in filing the balance-sheet of the profit and loss of the Companies within the prescribed statutory period was a continuing offence.

14. In the aforesaid facts and circumstances of the case, I do not see it a fit case for invoking extraordinary power as governed u/s 482 of the Cr.P.C.

15. Consequent thereupon, the petition is dismissed.