

(2007) 07 CAL CK 0059

In the Calcutta High Court

Case No : C.P. No. 428 of 2006 and C.A. No. 651 of 2006

Chandra Kumar Dhanuka and Others

APPELLANT

Vs

Registrar of Companies

RESPONDENT

Date of Decision : 13-07-2007

Acts Referred:

Companies (Disclosure of Particulars in the Report of Board of Directors) Rules, 1988
— Rule 2A
Companies Act, 1948 — Section 448
Companies Act, 1956 — Section 127, 205, 205(2), 211, 211(1)

Citation : (2008) 141 CompCas 101 : (2008) 83 SCL 296

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : Ranjan Deb, Manju Bhuteria, Rohitendra Chandra Deb and Ravi Asopa, for the Appellant; L.K. Chatterjee and Aparna Banerjee, for the Respondent

Final Decision : Allowed

Judgement

Sanjib Banerjee, J.—Of the 12 show-cause notices in respect of which the present proceedings have been instituted, four have been pressed with more vigour than the others, though the Registrar has made no concession in respect of the others.

The first, second, third and sixth show-cause notices appearing at pages 80, 84, 88 and 102 of the petition, all relates to the alleged violation of Section 211 of the Companies Act, 1956. In the first three notices the violation complained of is u/s 211 (3A) read with one or the other Accounting Standards that have now been formally made the yardstick for writing and examining the company accounts by a recent amendment to the Act. The sixth notice complaint of violation u/s 211(1) of the Act read with Schedule VI thereto. The ninth notice complains of the petitioners having violated Section 211(2) of the Act read with Part II of Schedule VI thereto. The eight and eleventh notices complains of violation of Section 217(1)(e) of the Act in the matter as to the contents of the

director's report. The twelfth notice refers to the provisions of Sections 127 and 292 of the Act having been breached.

2. In the affidavit used by the Registrar, a point of law has been urged. The Registrar contends, in substance, that for the provisions of Section 633(2) of the Act to apply, the petitioning officer must first concede as to default and then seek pardon by demonstrating that he had acted honestly and reasonably. It is urged, that the High Court has to take into account the circumstances of the accepted default.

3. Such point needs first to be addressed before the merits of the charges levelled and the justification of excuses proffered can be gone into. The Registrar urges that there is material difference between Sub-sections (1) and (2) of Section 633 of the Companies Act and that what the criminal court receiving the Registrar's complaint can do, the High Court cannot under Sub-section (2). The Registrar contends that ordinarily oral evidence is not received by the High Court while dealing with a petition u/s 633(2) of the Act and as to whether there has been any default or not cannot be ascertained without oral evidence being received and other documents that may be tendered in the course of a trial, being assessed. Section 633 of the Act provides as follows:

633. Power of court to grant relief in certain cases.--(1) If in any proceeding for negligence, default, breach of duty, misfeasance or breach of trust against an officer of a company, it appears to the court hearing the case that he is or may be liable in respect of the negligence, default, breach of duty, misfeasance or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused, the court may relieve him, either wholly or partly, from his liability on such terms as it may think fit:

Provided that in a criminal proceeding under this Sub-section the court shall have no power to grant relief from any civil liability which may attach to an officer in respect of such negligence, default, breach of duty, misfeasance or breach of trust.

(2) Where any such officer has reason to apprehend that any proceeding will or might be brought against him in respect of any negligence, default, breach of duty, misfeasance or breach of trust, he may apply to the High Court for relief and the High Court on such application shall have the same power to relieve him as it would have had if it had been a court before which a proceeding against that officer for negligence, default, breach of duty, misfeasance or breach of trust had been brought under Sub-section (1).

(3) No court shall grant any relief to any officer under Sub-section (1) or Sub-section (2) unless it has, by notice served in the manner specified by it, required the Registrar and such other person, if any, as it thinks necessary, to show cause why such relief should not be granted.

4. Sub-section (2) confers on the High Court the same power as the criminal court in granting relief to the petitioning officer who apprehends that proceedings might be brought against him in respect of any negligence, default, breach of duty, misfeasance or breach of trust. Sub-section (2), in its closing part, identifies the criminal court and provides that the High Court will have the same powers as the criminal court to relieve a petitioning officer. The expression "if it had been a court before which a proceeding against that officer...had been brought under Sub-section (1)" makes it clear that the High Court in exercise of powers under Sub-section (2) will have the same powers as the court receiving the criminal proceedings. Such expression does not imply that the High Court will exercise only such powers under Sub-section (2) that the criminal court may, upon the criminal court finding the charged officer guilty. For the criminal court to relieve the charged officer, such court may or may not conclude that the charged officer is liable. There can be no other meaning to the expression "he is or may be liable" found in Sub-section (1). If the criminal court can relieve a charged officer without coming to any conclusion that the charged officer is actually guilty or is liable for the offence, so can the High Court. In taking into account the surrounding circumstances, the criminal court may form a tentative opinion, without a full-fledged trial, as to whether there may not have been any offence at all. In considering whether a charged officer should be relieved, and before conducting the trial at which guilt may be established, the surrounding circumstances that the criminal court can look into would include a tentative view of the likelihood of the charge being established.

5. Nothing in Sub-section (2) limits the authority of the High Court there under to not consider whether the petitioning officer against whom proceedings are threatened has committed no offence at all. If an officer has to admit first that there is default before invoking Sub-section (2) there would be serious prejudice occasioned to such officer in the event the High Court did not exercise the discretion to relieve the officer. In such event, when the criminal proceedings are instituted by the Registrar, not only can such officer no longer be relieved by the criminal court under Sub-section (1) (as the High Court has refused it), the default stands proven on admission. There is nothing so harsh as suggested by the Registrar that appears in Sub-section (2). If an officer of a company petitions the High Court under Sub-section (2) to be relieved as there was no default committed by him as suggested by the Registrar, merely because he refutes the charge that may ultimately be brought against him, would not disentitle him to invoke subsection (2) or force him to await the rigours of criminal proceedings before he can plead not guilty.

6. I In any event, the various charges levelled against the petitioners and in respect whereof they apprehend criminal proceedings being launched, are all matters of subjective assessment as to whether the provisions of, primarily, the Accounting Standards were complied with. The Registrar asserts that the Accounting Standards had been breached by the petitioners. The petitioners submit that in their considered view, they had complied with the requirements of

the Accounting Standards. None of the charges relate to any glaring omission and each charge, or the denial thereof, is based on the rival interpretations of the same provisions. Accounting Standards are, by their very nature, subjective and what is required to be seen is that whether, in the relevant accounts, there was complete disregard by the petitioners to the Accounting Standards or whether the treatment of the relevant accounts was such as would be permissible on the basis of a possible reading of the Accounting Standards.

7. The first, second and third show-cause notices allege that the accounts of the company for the relevant year did not comply with the Accounting Standards. Explanations have been given, which form part of the petition and it does not appear from such explanations that the petitioners have been completely unmindful of complying with the Accounting Standards. It is the subjective assessment of the Registrar against the subjective assessment of the petitioners and the explanations indicate a possible bona fide view that the petitioners have taken.

8. The sixth and ninth show-cause notices alleged that the balance-sheet and profit and loss accounts of the company for the financial year ended March 31, 2005, did not give a true and fair view of the state of affairs of the company or its profit and loss position as at that date. Again, the explanations furnished indicate a possible bona fide view taken by the petitioners and it does not appear that the petitioners attempted to conceal anything or that the petitioners attempted to actively present a different picture of either the state of affairs of the company or its profit and loss position at the relevant date other than what actually prevailed.

9. Similarly, in reply to the eighth, eleventh and twelfth show-cause notices the petitioners have given sufficient explanations to justify the contents of the directors' report for the relevant year and as to why, in their view, there was no violation of the provisions of Sections 127 and 292 of the Act. It may not be out of place to delve a bit into the charges levelled in the eighth, eleventh and twelfth show-cause notices, though such matters have not been vehemently pressed on behalf of the Registrar at the hearing. The eighth notice spoke of non-compliance with Rule 2(A) of the Companies (Disclosure of Particulars in the Report of Board of Directors) Rules, 1988, in that energy consumption figures relating to production had not been disclosed. But the eleventh show-cause notice complained of a discrepancy in the energy consumption figures forming part of the directors' report and the power and fuel cost appearing in the profit and loss account of the company. The assertion in the eighth notice by the Registrar is belied by the complaint in the eleventh notice. Implicit in the eleventh notice is the acceptance of the energy consumption figures having been included in the directors' report. As to the discrepancy between the figures in the directors' report and the profit and loss account, there is a simple explanation. The directors' report requires energy consumption figures given for the process of production of a company. The energy consumed by a company at

its registered office is not for the purpose of the manufacturing activity or the production process of the company. The difference between the power and fuel cost appearing in the profit and loss account and the energy consumption figure for production appearing in the directors' report, is on account of the energy cost on accounts other than the production activities of the company.

10. By the twelfth notice the Registrar complained that despite the assets of a transferor company having merged into the subject company pursuant to a scheme of amalgamation, there was a requirement u/s 127 to file the appropriate form relating to registration of charge u/s 127 of the Act. Section 127 requires a company to deliver in the prescribed manner the prescribed particulars of the charge, if such company acquires any property which is subject to an existing charge that was required to be registered under the Act. The transferor company had furnished particulars of the existing charge and upon the merger of its assets, u/s 394 of the Act, no further deed or act in respect of such merged asset was required to be done. Pursuant to the merger, the property vested in the transferee company and the benefit of the particulars of the charge filed by the transferor company could be enjoyed by the transferee company. The charge of violation of Section 292 is equally vague and the explanation furnished is adequate.

11. On behalf of the Registrar, the fourth, fifth, seventh and tenth charges-have been pressed with more enthusiasm than the others. The company has a subsidiary by the name of Madhuting Tea P. Ltd., and such company ran into rough weather, as it had a number of tea companies during the relevant period. The company had invested in shares in Madhuting at a high value and in the accounts for the financial year 2004-05 it provided for the value of investments at cost though the net worth of the investee company had by then been substantially eroded and the value of the investment was then certainly not equivalent to the cost of acquisition of the, shares.

12. In schedule 6 to the balance-sheet, the company indicated the acquisition cost of Madhuting shares as the value of such investment with a mention in schedule 17 that long-term investments had been stated at cost as, according to the company, diminution in value was temporary in nature. Note 4 of schedule 17 was specifically highlighted in the auditor's report on -the accounts and in keeping with Section 227(3)(e) , the relevant note in the auditor's report appeared in italics. According to the Registrar, the value of the investment had greatly diminished and the assessment of the value at cost price was nothing but an attempt to window-dress the accounts so that the diminution in value would not detract from the profit and loss figures of the company for the relevant financial year. Accounting Standard 13 (AS-13) is referred to and it is suggested on behalf of the Registrar that the company could not have ignored the great fall in the value of Madhuting shares.

13. The relevant Accounting Standards permit long-term investments to be stated at cost provided the diminution in value thereof is temporary in nature.

The petitioners seek to justify their conduct by referring to the subsequent improvement in the financial position of Madhuting. This, the petitioners cannot do. If the value of Madhuting shares had further dipped, though it is an unquoted share, the petitioners would not urge such a ground. The issue is whether it was possible to take a view that the fall in value was of temporary nature. As to what is temporary and what is permanent or long-term is not defined in AS-13. Accounting Standard No. 13 leaves latitude, as all guidelines on accounts must, for a company and its officers in the treatment of accounts. The vicissitudes in the tea industry over the last decade are all too well known and it could not be said with any degree of certainty that once booming and now doomed industry was headed from deep red to bright black or from light red to deeper red.

14. In the same set of accounts where the profit and loss figures are summarised in one page, the notes and schedules all appear. If the company or the petitioners had valued Madhuting shares at cost and had completely omitted to indicate its then financial position, the Registrar would have had better grounds to press the charge. But the company and the petitioners indicated in note 4 of schedule 17 to the accounts, the financial position of Madhuting and the auditor, in keeping with the amended provisions of Section 227 of the Act, had drawn the attention of anyone reading the accounts to such note. At the end of the day, it boils down to whether the subjective assessment of the petitioners that the diminution in the value of Madhuting shares was temporary, was justified or not. There cannot be a black and white answer to this and neither will the subsequent improvement in financial position of Madhuting exonerate the petitioners nor would the further erosion of Madhuting networth have confirmed the charge brought.

15. The surrounding circumstances, the indeterminate connotation of the word "temporary" and the specific inclusion of the relevant fact in schedule 17, would entitle the petitioner to be relieved, on terms, of the charge that may have been brought against them by the Registrar without going into the question as to whether there was any default on their part. The Madhuting matters are covered by the fourth, seventh and tenth show-cause notices.

16. The fifth show-cause notice complains of violation of Section 205(2) of -the Act and Schedule XIV thereto in the company having charged full depreciation in the relevant year in respect of assets each costing below Rs. 5,000 to the company. The company refers to Note 8 under Schedule XTV to justify the writing off of the full value of the relevant assets during the relevant financial year:

8. Notwithstanding anything mentioned in this Schedule depreciation on assets, whose actual cost does not exceed five thousand rupees, shall be provided depreciation at the rate of hundred per cent.:

Provided that where the aggregate actual cost of individual items of plant and machinery costing Rs. 5,000 or less constitutes more than 10 per cent, of the

total actual cost of plant and machinery, rates of depreciation applicable to such items shall be the rates as specified in Item II of the Schedule.

17. The Registrar had sought an explanation from the company's auditors on diverse counts including on the depreciation claimed as aforesaid. M/s. Lovelock and Lewes had this to say in response to the Registrar's query:

5. Note 8 to Schedule XIV of the Companies Act, 1956, states that "notwithstanding anything mentioned in this Schedule, depreciation on assets, whose actual cost does not exceed five thousand rupees, shall be provided depreciation at the rate of hundred per cent." Further, note 1(d) on schedule 17 to the financial statement of the company for the year ended March 31, 2005, sets out the depreciation policy with regards to assets costing below Rs. 5000. Accordingly, there is no noncompliance of Schedule XIV read with Section 205 of the Companies Act 1956 (the Act).

18. Matters relating to accounts are specialised business and the Registrar has not been able to demonstrate why reliance on Note 8 of Schedule XIV to the Act was misplaced. It is not necessary for the petitioners in proceedings of the present kind to conclusively establish that there was no departure from the guidelines found in the Accounting Standards. To repeat, such fiscal matters are always open to interpretation, divergence of opinion and never free from doubt. The petitioners and the auditors of the company have read Note 8 to justify charging of depreciation in the manner it has been done during the relevant financial year and there does not appear to be any palpable lack of bona fides on the petitioners' part on such score.

19. The petitioners refer to the judgment reported at *Duomatic Ltd. In re* [1969] 1 All ER 161 and the view of Buckley, J., as to the court's assessment of reasonableness of the conduct of a company's officer. Section 448 of the Companies Act, 1948, of England empowered a court to relieve an officer of a company in the manner that Section 633(2) of the Indian Act permits a High Court to relieve such officer. The considerations that ought to weigh with court are found in the following lines (at page 169):

Section 448 enables the court to grant relief where three circumstances are shown to exist. First of all, the position must be such that the person to be excused is shown to have acted honestly. Secondly, he must be shown to have acted reasonably. And thirdly, it must be shown that, having regard to all the circumstances of the case, he ought fairly to be excused.

20. In respect of the two major heads of charge seriously pressed by the Registrar, the petitioners appear to have acted honestly on their interpretation of AS-13 and Note 8 of Schedule XIV to the Act. In addition, the petitioners had specifically mentioned such matters in note 4 and note 1(d) of schedule 17 to the accounts for the relevant year. The petitioners have acted reasonably not only in complying with the accepted norms but in specifically drawing the attention of whoever cared to read the accounts to such matters. Even if there were any

violation on the part of the petitioners, and of which there is serious doubt, the petitioners ought fairly to be excused.

21. The petitioners are relieved of all liabilities in respect of the 12 show-cause notices being the subject-matter of these proceedings. That is not to suggest that the Registrar completely misdirected himself in raising the issues and in showing concern. The Registrar needs to be commended as to the manner in which the accounts of the company have been read and scrutinised.

22. The petition is allowed. The petitioners will pay costs assessed at 600 GMs to the Registrar.

Urgent photostat certified copies of this judgment, if applied for, be issued to the parties upon compliance with requisite formalities.