(2017) 01 MAD CK 0019

In the Madras High Court

Case No : 116 of 2010

C.K.Rajkumar APPELLANT

Vs

Deputy Registrar of Companies RESPONDENT

Date of Decision : 19-01-2017

Acts Referred:

Companies Act, 1956, Section 97, Section 633(2), Section 633, Section 97(3) - . - Power of Court to grant relief in certain cases. - Power of Court to g

Citation : (2017) 01 MAD CK 0019

Hon'ble Judges : Rajiv Shakdher

Bench : SINGLE BENCH

Advocate : Rajiv Shakdher

Judgement

1. This is a petition filed under Section 633(2) of the Companies Act, 1956 (in short the 1956 Act) read with Rule 11(a)(23) of the Companies

(Court) Rules, 1959 (in short the 1959 Rules).

2. By virtue of this petition, the petitioners, who are directors in a company, by name, Velvette International Pharma Products Ltd. (in short the

company) seek a direction from this Court to relieve them of the liability, which arises on account of failure to file Form 5, adverted to in paragraph

3 of the show cause notice dated 15.04.2010 (in short SCN), issued by the Deputy Registrar of Companies (in short ROC).

3. The broad facts, which, have given rise to the captioned petition are as follows:

3.1. It appears, in October, 2002, the Board of Directors (BOD) of the company had decided to make a Rights Issue. Consequently, a

concomitant decision to increase the authorised capital of the company. This decision of the BOD was approved at the Annual General Meeting (in short AGM) of the shareholders held on 23.12.2002.

3.2. Resultantly, the company had an approval of its shareholders, to not only make a Rights Issue, but also, correspondingly increase its

authorised share capital.

3.3. Pertinently, the BOD of the company in their October, 2002 meeting had decided to make a rights issue of 1,47,98,310 equity shares. These

shares were to be issued in the ratio of 3: 1. Since, the value of the shares thus issued, would have exceeded the, then, prevailing authorised share

capital, the corresponding decision was taken, as indicated above, to increase its authorised capital. Thus the authorised capital of the company

was required to be increased from Rs.7.50 crores to Rs.23.00 crores.

3.4. Apparently, the BOD in their meeting held on 14.01.2003, after examining the, then, prevailing market scenario and having regard to the

financial position of the company, came to the conclusion that the proposed Rights Issue would not come to fruition, and, resultantly, there was,

perhaps, no necessity to increase the authorised capital.

3.5. The net effect was that, the BOD of the company did not implement the decision taken by its shareholders at the AGM held on 23.12.2002.

3.6. In view of the aforesaid development, the petitioners took the stand that the requisite form, i.e., Form 5, which is required to be filed within

thirty (30) days of the decision to increase the authorised capital, was not filed.

3.7. It is also the stand of the petitioners that the authorised capital of the company has remained unchanged, since then, and that all through out,

annual returns and balance sheets have been filed with the ROC, wherein, the authorised capital of the company continued to be shown at the

figure at which it was initially pegged, that is, Rs.7.50 crores.

3.8. The fact that annual returns and annual accounts for the years 2003-2004 till 2007-2008 were filed with the ROC, and that the authorised

capital was pegged at Rs.7.50 crores is, specifically, averred in paragraph 16 of the petition filed with this Court.

3.9. It appears that, in or about January, 2010, in a routine inspection carried out by the Regional Directorate under Section 209A of the 1956

Act, a query arose, as to why Form 5 had not been filed by the company. The petitioners aver that, despite, having given explanations to the

Inspecting Officers, no resolution was found and therefore, the ROC decided to issue a Show Cause Notice dated 15.04.2010 (in short SCN),

wherein, it was indicated that criminal proceedings would be initiated against them, unless Form 5 was filed with the ROC within 10 days of the

receipt of the SCN.

4. It is, in this background, that the petitioners approached this Court via the captioned petition.

5. Notice in this petition was issued on 29.04.2010. On that date, this Court also granted an interim injunction in favour of the petitioners in terms

of the prayer made in C.A.No.963 of 2010, which was ordered to continue till further orders. Consequently, the injunction has continued to

operate to date.

6. In opposition, the respondent has filed his counter affidavit. In the counter affidavit, the ROC has taken the stand that, though, the company has

filed its annual returns, the profit and loss account and balance sheets, year after year which show no change in its authorised capital, then, by itself

would not help its cause, as after the expiry of 30 days from the date when the decision was to increase its authorised capital, the company''s

liability to pay additional fee had got crystallized, which could not be effaced by, merely, taking recourse to the instant petition.

7. It is, in the context of the aforesaid broad facts, that arguments have been advanced by Mr.Ramakrishnan Vijayaraghavan on behalf of the

petitioners and by MrArockiam on behalf of the ROC.

8. Mr.Ramakrishnan, broadly made the following assertions:

8.1. Firstly, that the decision taken by the BOD to increase the authorised share capital from Rs.7.50 Crores to Rs.23.00 Crores, which was

affirmed in the AGM held on 23.12.2002, was reversed by the BOD, at this subsequent meeting held on 14.01.2003, and that, thereafter, the

annual accounts prepared by the company had imprimatur the shareholders of the company.

8.2. In otherwords, the contention was that the shareholders had ratified the subsequent decision of the BOD taken on 14.01.2003, which was not

to increase the authorised share capital.

8.3. That this Court had the power under Section 633 of the 1956 Act, which was pari materia to Section 463 of the 2013 Act to compound the offence, on terms, which this Court could stipulate, as what is, essentially involved, is a technical breach of the provisions of the statute.

9. On the other hand, Mr.Arockiam, on behalf of the ROC submitted that, once, the company had failed to file with the Registrar, the notice of

increase in the authorised share capital, within the period of thirty (30) days, as prescribed, after the date of passing of the resolution, authorising

the increase, the offence had got triggered under sub-section (3) of the very same Section.

9.1. It was further contended that the default, being a continuing offence, it was punishable with fine, which could extend to Rs.500/- for each day,

during which the default continued. Furthermore, learned counsel submitted that, since, the default had continued with effect from 23.1.2003, each

of the petitioners were liable to pay a fine, as prescribed under Section 97(3) of the 1956 Act.

9.2. It was also the contention of the learned counsel that the company would have to pay the fee for increase of authorised capital based on the

rules in vogue, since 2014. According to the learned counsel, since, increase in the authorised capital was sought from Rs.7.50 crores to Rs.23.00

crores, the company would have to pay a fee of Rs.15.50 crores at the rate of Rs.75/- per Rs.10,000/- as per the table of fees I A(2d) of Rule 12

of the Companies (Registration of Office and Fees) Rules 2014. According to the ROC, the fee component alone would, thus, work out to

Rs.11,62,500/- (Rs.75/- over Rs.10,000/- x Rs.15.50 Crores).

9.3. Besides this, according to the learned counsel, the petitioners would also have to pay additional fee at the rate of 3% per month on

Rs.11,62,500/-, as prescribed under table of fees I (c) of Rule 12 of the Companies (Registration of Office and Fees) Rules 2014. As per the

circular submitted by the learned counsel, for the period spanning between 23.1.2003 and 22.11.2016, the petitioners would have to pay a

cumulative sum of Rs.57,89,250/- towards additional fee.

9.4. Thus, in effect, according to the ROC, the total liability that had befallen on the petitioners would be a sum of Rs.69,51,750/- (Rs.11,62,500/-

+ Rs.57,89,250/-).

9.5. I must also note, that I had asked Mr.Arockiam to also submit a calculation of fee and additional fee that would become payable, if Schedule

X of the 1956 Act and the circular dated 16.2.1995 were to be applied. Accordingly, following calculation was submitted, though, without

prejudice to the contentions by the ROC: i. Fee payable for authorized capital of Rs.7.5Cr = Rs. 4,81,000/- ii. Fee payable for authorized capital

of Rs.23Cr = Rs.12,56,000/- iii. Fee payable for increase of authorized capital from Rs.7.5Cr to Rs.23Cr (2-1) = Rs. 7.75,000/- Date of

increase of capital 23.12.2002. Form 5 is due for filing on 22.01.2003. Additional fee payable at the rate of 2.5% p.m on Rs.7,75,000 from

23.1.2003 to 22.1.2016 (13 years) @ 19,375 per month Rs.2,32,500 p.a. = Rs.30,22,250 From 23.1.2016 to 22.11.2016 @ 19,375 Per

month for 10 months = Rs. 1,93,750 Total fee and additional fee payable = Rs.32,16,250 Note: Additional fee @ 2.5% is payable for filing form

5 relating to increase of authorized capital with effect from 1.5.1995 for delay of more than one year as per ministry''s press note 2/95 - file

No.14/3/87-CL V dated 21.3.1995.

10. As would be evident from what has been noted above by me under the 2014 Rules, the petitioners would have to pay towards fee and

additional fee as on 22.11.2016, a total sum of Rs.57,89,250/-, whereas, under the provisions of the 1956 Act, the petitioners would be required

to pay towards fee and additional fee, a total sum of Rs.32,16,250/-, albeit, as on 22.11.2016. Besides the aforesaid fee, if the petitioners are

prosecuted and convicted, they could be required to pay fine to a maximum extent, a sum of Rs.500/-, for each day for which the default

continued.

10.1. As noticed above, for each of the petitioners, the default continued for a period of 13 years. Decidedly, the liability would be huge.

Therefore, given the aforesaid circumstances, the first aspect, which I am required to deal with was whether the decision taken by the BOD of the

company on 14.01.2003, which was not to increase the authorised share capital, had been ratified by its shareholders. This aspect of the matter

was argued, quite extensively, before me by counsels at the proceeding held on 03.08.2016.

10.2. At the said hearing, I came to a prima facie conclusion that the argument advanced on behalf of the petitioners by Mr.Ramakrishnan could

not be accepted, as the notes to the accounts, as set out in the annual report, for the period 2002- 2003 continued to be reflected in the

subsequent balance sheets as well.

10.3. It would be relevant to note herein, at the risk of repetition, that the annual report for 2002-2003 would be the first statement of account,

which would record the financial status of the company including its decision to increase its authorised share capital from Rs.7.50 Crores to

Rs.23.00 Crores.

10.4. It is in this context, that what get recorded in the notes to accounts for 2002-2003 attains importance. For the sake of convenience, the same

is extracted hereafter: ""The authorised share capital of the company has been increased from Rs.7.5 Crores to Rs.23 Crores by passing a Special

Resolution at the Annual General Meeting held on 23rd December, 2002 for which Form No.23 has been filed with the Registrar of Companies.

However, necessary Notice in Form No.5 has not been filed with the Registrar of Companies along with requisite fee.

10.5. As indicated above and in the proceedings on 03.08.2016 Mr.Ramkrishnan had conceded before me that in the subsequent financial years,

the notes to accounts of 2002-2003 continued to get replicated in the same form. In other words, the subsequent decision of the BOD of the

company, which was taken on 14.01.2003 did not form part of the notes to accounts and, therefore, the shareholders had, ostensibly, no

knowledge of the decision taken at the said meeting, which was not to increase the authorised share capital.

10.6. As was indicated by me, on 03.08.2016; a position that I still hold is that ratification by implication as was argued by Mr.Ramakrishnan

could only take place, if, the shareholders, while approving the subsequent balance sheets were not made aware of the decision taken by the BOD

on 14.01.2003.

11. Therefore, in my view, Mr.Ramakrishnan''s submission that the shareholders had ratified the decision taken by the BOD at its meeting held on

14.01.2003, is unsustainable, and hence, the same is rejected.

11.1. It was, perhaps, because, this realisation donned on Mr.Ramakrishnan that he took the decision to move an application before me, which

was numbered as C.A.No.769 of 2016 to seek permission to place the special resolution, if any, passed by the shareholders at the AGM, which was slated to be convened on 23.09.2016. The special resolution, which was intended to be placed before the shareholders, concerned, the issue

pertaining to ratification of the decision of the BOD taken on 14.01.2003. The aforementioned application, i.e., C.A.No.769 of 2016, thus, came

up for hearing before me, on 24.08.2016. The said application was disposed of by me, with an observation that the decision, if any, which the

shareholders may take at their AGM, was, completely, within their domain and, therefore, did not require any permission of the Court.

11.2. I am informed, though, by Mr.Ramakrishnan that the shareholders at the AGM held on 23.09.2016 had ratified the BOD''s decision taken at

their meeting held on 14.01.2003.

12. Having said so, what it is emerged based on the pleadings and records before me, is that, while the petitioners, had on 23.12.2002 taken a

decision to increase its authorised share capital from Rs.7.50 Crores to Rs.23.00 Crores, it appears, that the decision was not taken forward, as

the market conditions were, at that point in time, not conducive to issuance of Rights shares. The company, to my mind, would have been liable to

pay the fee and additional fee, only, if, it had sought an increase, in its authorised share capital.

12.1. In this particular case, the company, on the other hand, had taken a decision, albeit, via its BOD, not to increase its authorised capital, and

because, such a decision was taken, Form 5 was not filed with the ROC within the prescribed period of 30 days, which ended on 22.1.2003. The

difficulty that the petitioners face is that, the decision, which the BOD took on 14.1.2003 was not conveyed to the ROC. As a matter of fact, the

shareholders of the company have ratified the decision of the BOD only on 23.09.2016. This apart, what has added to the misery of the

petitioners, is that, the infraction of the provisions of Section 97 of the 1956 Act became known, only upon an inspection being carried out by the

Regional Directorate, in January, 2010, followed by issuance of a SCN.

12.2. As indicated above, the SCN was issued on 15.4.2010. A perusal of the SCN would show that the ROC had given a period of 10 days to

the petitioners to file Form 5 along with the requisite fee, failing which, the ROC threatened launching of prosecution against the petitioners.

13. This Court, however, vide order dated 29.04.2010 stayed the institution of

criminal complaint against the petitioners. Therefore, what clearly

emerges is that while the company was not interested in increasing its authorised capital and, therefore, does not want to, in a sense, cure the

defect by paying fee and additional fee, as prescribed under the law, it wants the Court to compound the offence with regard to the alleged

violation of Section 97 of the 1956 Act.

14. I may only indicate that Section 97 of the 1956 Act is pari materia with Section 64 of the 2013 Act. The only difference being that under sub-

Section (2) of Section 64 of the 2013 Act fine has increased from Rs.500/- for each day''s default to Rs.1,000/- or, Rs.5.00 lakhs, whichever is

less.

14.1. Similarly, Section 633 of 1956 Act is pari materia with Section 463 of the 2013 Act. The said Section came into force, with effect from

12.09.2013. Under these provisions, clearly, power is vested in the Court to relieve an officer of the company wholly or partly, from any liability,

which may arise on account of any negligence, default, breach of duty, misfeasance or breach of trust that he may have committed, given the fact

that he acted honestly or reasonably and circumstances arising in a case including those connected with his appointment. Notably, this power is

available, both to the Magistrate, before whom prosecution is launched, as also co-terminously to the High Court, where a relief is sought in terms

of Section 633 of the 1956 Act or under Section 463 of the 2013 Act. The only caveat to the exercise of such a power by a Court, whether a

Magisterial Court or the High Court, is that, the concerned Court will have no power to grant any relief from any civil liability, which may attach to

an officer of the company in respect of the alleged negligence or default, breach of duty, misfeasance or breach of trust. Therefore, there can be no

doubt that the High Court has power to compound the offence, if an application is moved by an officer of a company, who apprehends

prosecution.

15. In this case, prosecution was launched and this Court had stayed the institution of criminal complaint vide order dated 29.04.2010. Since then,

nearly six (6) years have passed. The alleged offence took place nearly thirteen (13) years ago. If prosecution had been launched and had the

petitioner been convicted, they would have been liable to pay a fine to a maximum extent of Rs.500/- for every day that the default continued. To

my mind, since the offence was committed when the 1956 Act was in force, the petitioners would have been liable under Section 97 of the 1956

Act and, therefore, fine, if at all, would have to be paid subject to a maximum of Rs.500/- for each day''s default.

15.1. The fact that, prosecution has been stayed since, 29.04.2010, in my opinion, would have me conclude that no purpose would be served, at

this juncture, to vacate the stay and permit prosecution for an offence, which is, more a case of procrastination in failing to follow the prescribed

norms, than, a case of wilful infraction of law. Therefore, to my mind, this is a case where this Court should exercise its power to compound the

offence.

15.2. Furthermore, I may also note that the petitioners before the Court are the five (5) Directors of the company. The company itself has not

approached this Court for any relief. That the company can be prosecuted has been settled by the Supreme Court in the Constitution Bench

judgment rendered in the case of Standard Chartered Bank and others V. Directorate of Enforcement and others - (2005) 4 SCC 530. Therefore,

in so far as the company is concerned, I am not called upon to give my view in the matter.

16. The argument advanced on behalf of the ROC that 2013 Act and the concomitant 2014 Rules should apply is, to my mind, not tenable. In my

opinion, the 2014 Rules will not be applicable, as not only was the alleged offence committed prior to the Rules coming into force, but also the

prosecution of the petitioners was stayed by this Court vide order dated 29.04.2010, which was again prior to 2013 Act and 2014 Rules coming

into force. The petitioners cannot be, retrospectively, exposed to a harsher rigour of law for an offence committed prior to the enactment of 2013

Act and 2014 Rules.

17. Having regard to the totality of the circumstances stated above, the interest of justice would be served, if the petitioners were called upon to

pay, if a fee of Rs.7,75,000/- with additional fee, calculated at the rate of Rs.2,32,500/- per annum for the period 23.1.2003 till 29.04.2010.

17.1. As per the ROC, the monthly fee under the 1956 Act would work out to Rs.19,375/- per month. 17.2. Therefore, for the period spanning between 23.1.2003 and 29.04.2010, i.e, 7 years, 3 months and 7 days, the total amount towards additional fee would work out to

Rs.16,90,147/-.

18. The petition is disposed of, accordingly, with the aforesaid directions leaving the parties to bear their own costs. Consequently, connected

Company Application No.963 of 2010 is closed.

18.1. The petitioners will pay the aforesaid amount towards fee, i.e., Rs.7,75,000/- and additional fee of Rs.16,90,147/- to the ROC within a

period of two (2) weeks from the date of receipt of a copy of the order.

