(2013) 02 DEL CK 0170

In the Delhi High Court

Case No : Criminal M.C. No''s. 878, 879, 880, 881, 882 and 886 of 2012

Ganesh Krishnamurthy APPELLANT

Vs

The State (NCT of Delhi) and Another RESPONDENT

Date of Decision : 07-02-2013

Acts Referred:

Citation : (2013) 135 DRJ 692 : (2013) 2 ILR Delhi 1354 : (2013) 1 JCC 788

Hon'ble Judges : G.P. Mittal, J

Bench : Single Bench

Advocate : Jyoti Singh with Ms. Shahila Lamba and Mr. Sudershan Rajan, for the Appellant; Rajdipa Behura, APP for the State and Mr. Saqib, for R-2, for the Respondent

Final Decision : Allowed

Judgement

G.P. Mittal, J.—In these six Petitions, the Petitioner invokes the inherent powers of this Court u/s 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.) for quashing of the six complaints filed under Sections 159/ 162 of the Companies Act, 1956 (the Act) filed against him. The Petitioner''s case as set up in the Petitions is that M/s. AKG Acoustics (India) Ltd. (AKG Acoustics) was incorporated on 07.03.1988 and was registered as a Public Limited Company under Registration No. 05-033134 under the Companies Act. The Petitioner was inducted as a Director in the said Company on 31.01.1997. However, he (the Petitioner) resigned from his post of Directorship on 28.07.1997 vide a letter of resignation of even date (Annexure P-2).

2. The Petitioner alleges that a notice dated 17.02.2000 was issued by Respondent No. 2 Registrar of Companies (ROC) to AKG Acoustics and its Directors for non compliance of some of the provisions under the Act. The said notice was also addressed to the Petitioner showing him as one of its Directors. The Petitioner sent a reply dated 25.04.2000 (Annexure P-3) to the ROC through his Chartered Accountant informing the ROC about his resignation w.e.f. 28.07.1997. The said reply was duly received in the office of ROC on 25.04.2000

itself. The Petitioner sent another reply dated 28.08.2000 under his own signatures (Annexure P-4) again intimating the ROC about his resignation from the Directorship w.e.f. 28.07.1997. According to the Petitioner a copy of the resignation letter was also enclosed with the reply submitted by him.

3. According to the Petitioner, Respondent No. 2 filed two complaints against AKG Acoustics for not filing its annual return for the year ending 31.03.2003 under Sections 159/ 162 of the Act and for not placing the balance sheet for profit and loss account of the Company as on 31.03.2002 in its Annual General Meeting (AGM) within the stipulated period. In the said complaints, the Petitioner was not prosecuted as one of its Directors presumably on the premise that Respondent No. 2 (ROC) acknowledged that the Petitioner had ceased to be its (AKG Acoustics) Director.

4. It is the case of the Petitioner that on 05.07.2007 Respondent No. 2 filed six cases against AKG Acoustics and its Directors including the Petitioner for violation of various provisions of the Act. His grievance is that since the factum of his resignation was in the knowledge of Respondent No. 2, he could not have been prosecuted as a Director of the Company, particularly in view of its own circular No. 42 (400)-CL-II-59 dated 29.12.1959. The Petitioner, therefore, moved an application dated 23.04.2009 (Annexure P-6) in the Court of learned ACMM who was seized of the Complaints for dropping the proceedings against him. Respondent No. 2 in spite of repeated adjournments failed to responds to the said application for a period of more than three years. The Petitioner, therefore, approaches this Court for quashing of the Complaints.

5. The Counter Affidavit to the Petitions was not filed by Respondent No. 2. During the course of arguments on 05.02.2013 while perusing the complaint case Nos. 818 and 819, it transpired that there were some contradictions in Para 4 of the Complaints in as much as in Complaint Case No. 818 of 2003, the title of the Complaint contained only two accused whereas in Para 4 it was stated that accused Nos. 2 to 5 were being prosecuted as Directors/officers of the Company. This Court, therefore, directed the learned counsel for Respondent No. 2 to examine this aspect. Deputy Registrar of ROC was also required to appear along with the record with respect to AKG Acoustics.

6. The record of AKG Acoustics was produced by Mr. Krushna Shanker Pradhan, Deputy Registrar, in the Office of ROC. A perusal of the record reveals that these are loose papers and the record has not been properly maintained. Since no counter affidavit was filed, the Deputy Registrar was examined in respect of some of the averments made in the Petition with regard to the record of Respondent No. 2. The Deputy Registrar in the office of ROC admitted that the reply dated 25.04.2000 to the notice dated 17.02.2000 was received in the office of ROC whereby the Petitioner had informed the ROC that he (the Petitioner) had resigned from the company w.e.f. 28.07.1997.

7. The submissions raised on behalf of the Petitioner are twofold. First, the filing

of Form 32 to the ROC is not the responsibility of the Director, it being the responsibility of the Company. Thus non-filing of Form 32 is immaterial and as soon as the information regarding resignation is received by ROC, it is expected to make an inquiry in terms of the Circular No. 42 (400)-CL-II-59 dated 29.12.1959 and also make an inquiry whether the resignation from the Directorship is bonafide or not. Once the resignation is communicated and is not disputed by the ROC, such a Director cannot be prosecuted for any violation being a Director of the Company after the date of receipt of resignation. Reliance is placed on a judgment of a coordinate Bench of this Court in B.N. Kaushik Vs. The Registrar of Companies, . Second, the offences punishable under Sections 159/ 162 of the Act are punishable with fine only. Since these offences are not continuing offences, the Complaint could have been filed against an accused only within a period of six months, the Court was debarred from taking cognizance beyond the period of six months. Reliance is placed on Shalini Marwah and Another Vs. The Registrar of Companies, Delhi and Haryana ; and Saumil Dilip Mehta Vs. State of Maharashtra and Others, .

8. On the other hand, learned counsel for Respondent No. 2 argues that unless Form 32 is received, it is difficult to accept that the Petitioner has resigned. The learned counsel points out that as per Form 32 received in the year 2000 Mr. S. Raja Gopalan had resigned from the post of Managing Director of M/s. AKG Acoustics (India) Ltd. If the Petitioner had also resigned, Form 32 in this regard would have been sent by the Company. Learned counsel urges that in exercise of its jurisdiction u/s 482 Cr.P.C., the High Court is not to go into the disputed questions of facts and the allegations made in the complaint will have to be accepted at its face value and its truth or falsity cannot be gone into by the Court at this stage. Reliance is placed on Iridium India Telecom Ltd. Vs. Motorola Incorporated and Others, .

9. On the issue of limitation, the learned counsel for Respondent No. 2 relies on earlier judgments of this Court in Anita Chadha Vs. Registrar of Companies, ; and Sugga Engineering Works (P) Ltd. & Ors. v. State & Anr. Crl.M.(M) No. 576-577/1987, decided on 17.11.1987 wherein a learned Single Judge of this Court had held that offence punishable under Sections 159/ 162 & 220/ 162 of the Act for failure of filing Annual Returns and balance sheet within the time are continuing offences and will be governed by the provision of Section 472 Cr.P.C. in the matter of limitation for lodging prosecution.

10. There is no gainsaying that the powers u/s 482 Cr.P.C. for quashing any criminal proceedings are to be exercised sparingly and with circumspection where the High Court is satisfied that the continuance of the proceedings would be abuse of process of any Court. As held in Iridium India Telecom Limited, the inherent powers ought not to be exercised to stifle legitimate prosecution but at the same time, when there is documentary evidence in possession of the Complainant or from the facts proved it is established that the accused is not liable to be prosecuted at all, the High Court in the exercise of its power u/s 482

Cr.P.C. must come forward to put an end to unnecessary harassment of a person who has been prosecuted without any basis.

11. In M.L. Gupta and Others Vs. DCM Financial Services Ltd., in spite of the allegations made in the Complaint that the Petitioner was the Director and in charge and responsible to the company for the conduct of its business on the date of the dishonour of the cheque, the criminal proceedings were initiated against him in spite of the fact that Form 32 filed by the company indicated that the Petitioner was no longer the Director of the Company on the alleged date of commission of the offence. The High Court quashed the proceedings in exercise of its powers u/s 482 Cr.P.C. Thus, if from the admitted documents, the Petitioner is able to show that he was not the Director of AKG Acoustics, he cannot be held responsible for filing the Annual Returns or for placing the balance sheet in the AGM of the Company, etc. Admittedly, an application dated 23.04.2009 (Annexure P-6) was moved by the Petitioner before the Trial Court for dropping the proceedings on the ground that he resigned from the Directorship w.e.f. 28.17.1997. He also stated that two letters with regard to his resignation were also written to the ROC. It is very intriguing that the ROC preferred not even to respond to this application for a period of almost three years compelling the Petitioner to approach this Court for quashing of the Complaint. The Petitioner had placed before the Trial Court not only the copy of his resignation letter but also the copies of letters through which he informed the ROC about his resignation.

12. According to the averments made in the Petition, a notice dated 17.02.2000 was issued by ROC to the Petitioner requiring him to show cause as to why he should not be prosecuted as a Director. The Petitioner avers that he submitted a reply dated 25.04.2000 through his CA (Annexure P-3) which was duly received in the office of ROC on 25.04.2000. The receipt of this reply is admitted by the Deputy Registrar office of ROC who appeared in the Court today. In the circumstances, it is established that the ROC was very much aware of the resignation tendered by the Petitioner, and, therefore, ROC was under obligation to hold an inquiry as envisaged by the Circular dated 29.12.1959.

13. The learned Single Judge of this Court in B.N. Kaushik relied on an earlier judgment of the coordinate Bench of this Court in Luk Auto Ancillary (India) Ltd. (In Liquidation) Vs. Laxmi Narain Raina and Others, ; and a judgment of the Division Bench of Bombay High Court in Saumil Dilip Mehta Vs. State of Maharashtra and Others, and held that Registrar of Public Limited Company or a Private Limited Company can tender his resignation unilaterally and without filing the Form 32 and without sending a notice to the ROC. Paras 5 to 7 of the report are extracted hereunder:-

5. In the instant case, the learned counsel for the petitioner submitted that the complaint initiated on behalf of the respondent is ex-facie contrary to the facts deposed by the respondent before the High Court in CA No. 606/1984 in CP No. 109/1984, that is, in the proceedings for winding up of the company titled Ram

Kishore Sharma vs. Toyo Lamps Pvt. Ltd. In the said proceedings, an affidavit had been filed by the respondent categorically admitting the receipt of the resignation letter dated 27.07.1971 from the petitioner No. 1. Paragraph 12 of the said reply by way of affidavit clearly admits that the petitioner addressed the said resignation letter to the Board of Directors and a copy was forwarded to the office of the respondent, which reads as follows:-

The averments made in para 16 are admitted to the extent that Shri B.N. Kaushik, Secretary of the company addressed a letter dated 27th July, 1971 to the Board of Directors and copy forwarded to the O ice of the respondent stating his inability to remain as honorary Secretary of the Company w.e.f. 27-7-1971. However, Form No. 32 has not been filed by the company in respect of the resignation of Sh. B.N. Kaushik as Secretary of the company w.e.f. 27-7-1971 and the other averments made in the aforesaid para are denied for want of knowledge.

6. Reliance is placed by the learned counsel for the petitioner upon the judgment of a learned Single Judge of this Court (Hon''ble Mr. Justice D.K. Jain as His Lordship then was) in Luk Auto Ancillary (India) Ltd. (In Liquidation) Vs. Laxmi Narain Raina and Others, , the relevant portion of which reads as follows:-

I have heard Mr. Sharma, learned counsel for the applicant, respondent No. 4 herein and Mr. Luthra, learned counsel for OL. In addition to what has been pleaded in the application, it is also pointed out by Mr. Sharma that at the time of recording of evidence of the parties, when Mr. M.C. Saxena, Junior Technical Assistant, O ice of the Registrar of Companies, North Zone, was examined on 18 July, 1986, he categorically admitted that an intimation about the resignation of the applicant was received in the Office of Registrar of Companies. Further, the attention of the Court has also been invited to a circular issued by the Department of Company Affairs, stating that where Registrar receives a communication from any Director about his resignation, Registrar should enquire whether the resignation of such Director is or is not bonafide and if he finds that Director has resigned bonafide from the Directorship of the company, he should not start prosecution against such Director, irrespective of the fact whether such resignation was or was not accepted by the company. It is pleaded by Mr. Sharma that no communication was received from the Office of Registrar of Companies, rejecting his letter of resignation. It is also contended that, thereafter, no prosecution was launched against the applicant by the Registrar of Companies for a default on the part of the company, which shows that his resignation was deemed have been accepted.

Mr. Luthra, on the other hand, has pointed out that in the statement of Mr. M.C. Saxena, it was stated that on receipt of intimation regarding the resignation by the applicant, he was asked to file Form No. 32 and the balance sheet etc. of the company in liquidation but it was done and, therefore, it could not be said that the applicant''s resignation had been accepted.

In view of the fact that letter of resignation, as sent to the Registrar of Companies was not rejected and the fact that after the receipt of the said letter no prosecution is stated to have been launched against him, presumably in terms of the aforesaid circular issued by the Department of Company A airs, the non-furnishing of Form No. 32 by applicant No. 2 is of no consequence.

Accordingly, for the foregoing reasons, the application is allowed and the applicant is discharged in Crl. O. 2/82.

7. Reliance is also placed by the learned counsel for the petitioner upon a Division Bench Judgment of the Bombay High Court in Saumil Dilip Mehta Vs. State of Maharashtra and Others, , wherein, in paragraph 6, it has been held as follows:-

6. The submissions advanced by the litigating parties are touching an important point involved in this matter which make us to express our views on the point whether a director of a public or private limited company can resign unilaterally and that too by writing a letter to the chairman of the said company or its secretary. It is necessary for such a director to fill up Form No. 32 and is obliged to give a notice or intimation to that effect to the Registrar of Companies (''ROC'')? The question arises for our Adjudication is whether that particular director is obliged to give such information to the ROC and whether he cannot retire without complying with the said requirement. Keeping in view the provisions of the Companies Act, 1956, the relevant articles of the Constitution of India, we come to the conclusion that a director of the public limited company or private limited company can tender his resignation unilaterally and without filling in Form 32 and without sending a notice to the Registrar of Companies. It is clear that the filling in of the said Form and the giving of due intimation and information to the Registrar of Companies is the duty of the company secretary and not of an individual director. Suffice it to say that what he has to do is to send in writing a letter informing either the chairman or the secretary of the company, as the case may be, his intention to resign from the post of the director of the said company. Thereafter the said letter has to be moved in the meeting of the directors of the company, it may be ordinary meeting or may be extraordinary or special meeting, as the case may be, and the board of directors have to take a decision whether the Board is accepting his resignation or not. An intimation should be sent to such director and after such resolution is passed, the company secretary is under the obligation to comply with the legal formalities for giving a finishing touch to the resolution which has been passed in the said meeting of the board of director. It is for the company secretary to fill in the forms as prescribed and to give due information and intimation to the ROC, as the law requires. Thereafter, it has to be so mentioned in all prescribed registers of the company, accounts and balance sheet of the company and thereafter the said fact is to be brought to the notice of the members of the company as early as possible and at the latest in annual general meeting.

14. In this case, not only that the factum of resignation was intimated to the

ROC; the ROC in Complaint Nos. 818/2003 and 819/2003 preferred not to prosecute the Petitioner as one of its Directors for non compliance for a period ending 31.03.2002 presumably accepting the Petitioner''s averments about his resignation.

15. Thus, in my opinion, the factum of the Petitioner''s resignation had come to the notice of the ROC at least on 25.04.2000 when the intimation with regard to same was submitted by the Petitioner in his reply to the show cause notice dated 17.02.2000. The Petitioner, therefore, could not have been prosecuted for violation of Sections 159/ 162 of the Act.

16. Since the Petitions are liable to be allowed on the short ground that ROC was informed about the Petitioner''s resignation on 25.04.2000. Admittedly, the prosecution was launched after the expiry of period of six months from the last date of filing the return etc. I would stay my hands off the question whether the offence u/s 159 read with Section 162 of the Act were continuing offences or not and the divergence of opinion in B.N. Kaushik on the one hand and Anita Chadha and Sugga Engineering Works (P) Ltd. on the other.

17. The Petitions are accordingly allowed and the prosecution in the earlier said complaints are quashed. Pending applications stand disposed of.