**(1989) 08 BOM CK 0032**

**In the Bombay High Court**

Hareshchandra Maganlal and others APPELLANT

Vs

Union or India and others RESPONDENT

**Date of Decision :** 23-08-1989

**Acts Referred:**

Companies Act, 1956 — Section 448, 448(1), 524, 621, 622
Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14
Employees State Insurance Act, 1948 — Section 40

**Citation :** (1990) 1 BomCR 328 : (1991) 71 CompCas 69

**Hon'ble Judges :** M.L. Pendse, J

**Bench :** Single Bench

**Advocate :** Virendra V. Tulzapurkar, for the Appellant; B.J. Rele, Neeta Masurkar, K.R. Jaykar and A.R. Kini, for the Respondent

## Judgement

M.L. Pendse, J.—Petitioners Nos. 1 to 3 are directors of Raghuvanshi Mills Ltd., being a company incorporated and registered under the Companies Act, 1956, while petitioner No. 4 is manager of the company. The company had engaged several workmen in the running of the mills. Under the provisions of section 40 of the Employees'' State Insurance Act, 1948, the company is required to pay, in respect of every employee, both the employer''s contribution and the employees'' contribution. the employees'' contribution is paid after deduction the amount from the wages payable to the employees. The company is also required to pay a Deposit-linked Insurance Fund in accordance with section 6C of the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952. The company failed to pay its dues both under the Provident Funds Act and the Employees'' State Insurance Act. Respondent No. 2, the Regional Provident Fund Commissioner, thereupon issued several show-cause notices to the petitioners to show cause as to why action should not be taken for having committed an offence under sections 14(1A) and 14(2) kby contravening the provisions of the Provident Funds Act. Respondent No. 4, the Regional Director, Employees'' State Insurance Corporation, also issued notices to show cause why proceedings u/s 85 of the Insurance Act should not be adopted for failing to pay the contribution. In pursuance of the notices, respondent No. 3, the Provident Fund Inspector, filed prosecutions against the petitioners for having committed default and the said prosecutions are pending in the court of the Metropolitan Magistrate. Prosecutions were also launched by respondent No. 5 in respect of violation of the provisions of the Employees'' State Insurance Act. Respondents NOs. 2 and 4 also passed orders determining the amount due from the company in respect of the contributions to be made under the Provident Funds and the Insurance Acts.

2. The present petition was filed on April 3, 1989, u/s 633(2) of the Companies Act, 1956, claiming that the petitioners should be relieved in respect of criminal and civil liabilities. The petitioners claimed that there is a reasonable apprehension that further prosecutions would be launched against the petitioners and the civil liability to pay the amount would be enforced by the concerned officers. The petitioners claimed that default in making contribution or payment is not mala fide but the petitioners have acted honestly and reasonably and the default had occurred for reasons beyond their control and, therefore, they should be excused. The petitioners claimed that the company is facing serious financial difficulties since the year 1982-83 and a reference is made under the Sick Industrial Companies (Special Provisions) Act, 1985, for being declared "a sick company". The petitioners further claimed that the Board for Industrial and Financial Reconstruction has appointed the Industrial Development Bank of India as the operating agency for rehabilitation of the company. The default, claim the petitioners, is because of the financial difficulties which are beyond their control.

3. The respondents raised a preliminary objection to the maintainability of the petition claiming that the petitioners cannot be relieved from criminal prosecutions and civil liabilities in exercise of the power under sub-section (2) of section 633 of the Companies Act in respect of breaches or violations arising under statutes other than the Companies Act. It is claimed that the powers or jurisdiction of the High Court under sub-section (2) of section 633 is restricted only in respect of criminal and civil proceedings which are likely to be instituted in respect of any default prescribed under the Companies Act. The preliminary objection raised on behalf of the respondents is correct and deserves acceptance.

4. Section 633 of the Companies Act reads as under :

"633. (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 was acted honestly and resonably, 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 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."

5. The relief sought in the present petition is not in respect of criminal proceedings already instituted but only in respect of proceedings which th petitioners apprehend would be instituted hereafter. Shri Tulzapurkar, learned counsel appearing on behalf of the petitioners, submitted that the ambit of sub-section (2) of section 633 of the Companies Act is very wide and the expression "any proceeding" would include proceedings arising not only out of the default committed under the provisions of the Companies Act, but defaults under any statute. It is not possible to accede to the submission of learned counsel.

6. Section 621 of the Companies Act provides that no court shall take cognizance of any offence against this Act except on a complaint in writing of the Registrar or of a shareholder of the company or of a person authorised by the Central Government in that behalf. Section 622 of the Companies Act provides that no court inferior to that of a Presidency Magistrate or a Magistrate of the first Class shall try any offence under this Act. Section 524 provides that every offence under the Act shall be deemed to be non-cognizable within the meaning of the Code of Criminal Procedure, 1989. The subsequent sections deal with the procedure to be followed in respect of complaints and the penalty to be imposed. The subject of "offence" is dealt with in Part XIII of the Companies Act and section 621 to section 635AA deals with the offences committed under the Act and the procedure to be followed for taking action against the offender. While examining the ambit of sub-section (2) of section 633, it must be borne in mind that though the expression "any proceeding" is used in the sub- section, the Legislature intended to restrict it only to those proceedings arising our of negligence, default, breach of trust, misfeasance or breach of duty in respect of duties prescribed under the provisions of the Companies Act. Although sub-section (2) was expressed in wide language, looking to the context and placement of the sub-section and on its true construction, the only proceedings for which relief under sub-section (2) of section 633 could be claimed are proceedings against the officer of the company for breach of duty to the company or criminal proceedings for breach of the provisions of the companies

 

Act. Sub-section (2) cannot apply to proceedings instituted against the officers of the company to enforce liability arising our of violation of provisions of other statues. There is an intrinsic indication in sub-section (3) of section 633 to hold that exercise of powers under sub-section (2) must be restricted in respect of proceedings arising our of violations of the Companies Act. Sub-section (3) provides that relief under sub-section (2) shall not be granted without notice being served in the manner specified to the Registrar and such other person to show cause why the relief should not be granted. The expression "such other person" would cover shareholders of the company or the person authorised by the Central Government of launch a prosecution. Sub-section (3) does not contemplate service of notice on any other authorities who are likely to institute prosecution or enforce a civil liability in accordance with statutory provisions other than the provisions under the Companies Act.

7. Section 14AC of the Provident Funds Act provides that no court shall take cognizance of any offence punishable under the Provident Funds Act except on a report in writing of the facts constituting such offence made with the previous sanction of the Central Provident Fund Commissioner. Section 86 of the Employees'' State Insurance Act prescribes that no prosecution shall be instituted except by, or with the previous sanction of the Insurance Commissioner and except on a complaint made in writing within six months of the date on which the offence is alleged to have been committed. The prosecution proposed to be launched under the Provident Funds and Miscellaneous Provisions Act and the Employees'' State Insurance Act are not at the behest of the Registrar of Companies or the shareholders of the company or by a person authorised by the Central Government in that behalf. It is, therefore, obvious that such prosecution to be instituted by the officers appointed under the provisions of statutes other than the Companies Act cannot be prevented by resort to the provisions of sub-section (2) of section 633 of the Companies Act.

8. A provision identical to section 633 of the Companies Act came up for consideration before the Court of Appeal in the decision in Customs and Excise Commissioners v. Hedon Alpha Ltd. [1981] 2 All ER 697 (CA). The company in that case carried on the business of an off-course book-marker. The company failed to pay general betting duty due u/s 2(1) of the Betting and Gaming Duties Act, 1972, and, thereupon, the Commissioner of Customs and Excise brought proceedings u/s 2 (2) of the 1972 Act to recover the duty due from the company from another director who was the holder of the bookmarker''s permit and betting office licence and from another director of the company suing them jointly and severally. The director claimed that he had acted honestly and reasonably and should be excused and relieved from liability pursuant to section 448(1) of the Companies Act, 1948. Section 448 (1) of the Companies Act, 1948, inter alia, provided that the court may relieve the officer of the company in respect of neglignce, default, breach of duty or breach of trust, if he has acted honestly and reasonably.

 

9. The director sought relief u/s 448 and the Court of Appeal refused to accede to the request. Lord Justice Stephenson, presiding over the Court of Appeal, observed ( at p. 701) :

"Furthermore, the language of section 448 was apt to describe the area in which a company director might be in breach of his duties to the company, and the ambit and concern; the context or matrix, of the section was company law and the relation of the officer (or auditor) of a company to the company and not to third persons. The proceedings which qualified for the statutory relief were claims made by companies, or on their behalf or for their benefit by, e.g., liquidators, the Board of Trade, private prosecutors, including penal proceedings for the enforcement of the Companies Act, but not proceedings for the recovery of debts or the enforcement of civil liability to strangers."

10. Lord Justice Griffiths observed in his judgment (at page 704) :

"In my judgment, section 448 has no application to the present claim. Although the section is expressed in wide language, it is, in my view, clearly intended to enable the court to give relief to a director who, although he was behaved reasonably and honestly, has nevertheless failed in some way in the discharge of his obligations to his company or their shareholders or who has infringed one of the numerous provisions in the Companies Acts that regulate the conduct of directors."

11. I am in respectful agreement with the decision of the Court of Appeal.

12. Shri Tulzapurkar heavily relied upon the decision of the Delhi High Court in Beejay Engineers Pvt. Ltd., In re and Satinder Sandhu, In re [1983] 53 Comp Cas 918. The Division Bench of the Delhi High Court heard a reference made by a single judge expressing doubt as to whether sub-section (2) of section 633 of the Companies Act enables the Court to grant relief against prosecutions under other Acts. The Division Bench held that the protection is sought to be given to an officer of a company which necessarily implies that the liability arises on account of negligence or default in relation to the affairs of the company which he is required to conduct honestly and reasonably, and the protection will not extend to and cover acts of misfeasance or breach of trust, etc., which have no connection whatsoever with his status or duties as an officer of the company. The Division Bench then observed (at p. 922 of 53.

" The expression ''any proceeding'' occurring in the section is of wide amplitude and comprehensive enough to include all kinds of proceedings, i.e., civil as well as criminal. There is nothing in th language or the context in which this section is laid to limit, restrict or confine its operation to a liability arising out of negligence, default, breach of duty, misfeasance or breach of trust under the Act alone. In our opinion, protection under this section will be e available to an officer of a company against liability to be proceeded against for negligence, default, breach of duty, etc.,even under other Acts so long as it is with regard to the affairs and functioning of the company."

 

13. I am afraid, that it is not possible to agree with the view taken by the Division Bench. The Division Bench, with respect, has not examined the context and the placement of sub-section (2) as well as sub-section (3) of section 633 of the Companies Act and which, in my judgement, clearly indicates that the Legislature desired to restrict the powers to proceedings to be instituted for violation of provisions of only the Companies Act. Mr. Justice D. P. Wadhwa of the Delhi High Court in the later case, Jagannath Prasad Jhalani and others Vs. Regional Provident Fund Commissioner (Haryana) and others, , felt doubt about the correctness of the decision of the Division Bench.

14. Shri Tulzapurkar also made reference to the decision in In Re: Muktsar Electric Supply Co. Ltd. (In Liquidation), , where a single judge of the Punjab High Court held that the High Court can grant relief under sub-section (2) as the sub-section is wide enough to cover criminal prosecutions. There cannot be any quarrel with the proposition, but the sub-section is not wide enough to cover criminal prosecutions commenced under Acts other than the Companies Act. In my judgement, the preliminary objection raised on behalf of the respondents that the petitioners cannot be relieved of civil and criminal prosecutions commenced under Acts other than the Companies Act. In my judgement, the preliminary objection raised of civil and criminal liabilities arising out of violation of the Provident Funds Act and Employee''s State Insurance Act by resorting to sub-section (2) of section 633 of the Companies Act is required to be upheld and the petition must fail.

15. Accordingly, the petition is dismissed with costs.

 