

(2006) 01 GAU CK 0039

In the Gauhati High Court

Case No : Criminal Revision (P.) No. 540 of 2001

Jorhat Tea and Industries (P.) Ltd.

APPELLANT

Vs

State of Meghalaya

RESPONDENT

Date of Decision : 20-01-2006

Acts Referred:

Companies (Acceptance of Deposits) Rules, 1975 — Rule 1, 10, 11, 2, 2(6)
Companies (Amendment) Act, 1974 — Section 58A(3), 58A(4), 58A(5), 58A(6)
Companies (Amendment) Act, 1998 — Section 58
Companies Act, 1956 — Section 3(1), 58(2), 58A
Criminal Procedure Code, 1973 (CrPC) — Section 468, 468(3), 482
Mines Act, 1952 — Section 66, 79

Citation : (2007) 137 CompCas 379 : (2006) GLT 655 Supp : (2006) 72 SCL 310

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : A.K. Bhattacharyya, P.C. Borpujari and B.K. Singh, for the Appellant;
B. Dutta, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—By this application u/s 482 of the Criminal Procedure Code, 1973, the petitioner seeks quashing of the criminal proceeding in C.R. Case No. 364/98 which at the time of moving the application was pending in the Court of the Learned Judicial Magistrate, 1st Class, Shillong, Meghalaya. While entertaining the writ application by order dated 3-10-2001, the aforesaid proceeding was stayed.

2. The petitioner No. 1 is a Private Ltd. Company incorporated under the Companies Act, 1956 having its registered office at A.T. Road, Tarajan, Jorhat in the State of Assam. The petitioner Nos. 2 and 5 are the Directors of the said company.

3. The respondent No. 2 issued a letter dated 5-2-1998 to the petitioner No. 1 alleging that the company accepted unsecured loan to the tune of Rs.

22,58,159.12, but did not file the Return of Deposits as envisaged u/s 58A of the Companies Act, 1956 and the rules framed therein. On the basis of such allegation, the petitioner was asked to show cause as to why prosecution should not be launched against the company and every officer of the company u/s 58A of the Companies Act, 1956, read with Rule 11 of the Companies (Acceptance of Deposits) Rules, 1975 a copy of the notice has been annexed to the writ petition as Annexure-I.

4. On receipt of the aforesaid notice dated 5-2-1998, the petitioner No. 2 on behalf of the Company wrote a letter on 3-3-1998 to the respondent No. 2 furnishing therein a list of 10 items of "unsecured loans" for different amounts totalling to Rs. 22,58,159 showing its breakup, nature, character and year of receipt. According to the petitioner the amounts in question were not "deposits" under Rule 2(b)(ix) and 2(b)(vi) of the Companies (Acceptance of Deposits) Rules, 1975 and Section 58A of the Companies Act, 1956 and thus, the company was not required to file any Return of Deposits and consequently there was no violation of the provisions of the Act and the Rules.

5. On 31-3-1998 the Registrar of the Companies, Shillong (respondent No. 2) filed a complaint in the Court of Chief Judicial Magistrate, Shillong under the Rule (if) of the aforesaid Rules, read with Section 58A of the aforesaid Act alleging violation of Rule 10 of the Rules. In the complaint it was alleged that the company having not filed the Return of Deposits contravened the provisions and Rule 10 of the Rules, 1975, read with Section 58A of the Companies Act, 1956. The relevant paragraphs of the complaint are quoted below :

2. That the authorized capital of the company is Rs. 10 lakhs consisting of 90,000 equity shares of Rs. 10 each and 1,000 preference shares of Rs. 100 each. The paid-up capital of the company is Rs. 10 lakhs divided into 90,000 equity shares of Rs. 10 each and 1,000 preference shares of Rs. 100 each fully paid.

3. That the company filed its balance sheet as at 31-3-1997 in the office of the Registrar of Companies at Shillong (Complainant's office and on perusal of the said balance sheet it was observed that the company took unsecured loan to the tune of Rs. 22,58,159. Out of which the unsecured loan taken to the tune of Rs. 1,37,000 from Mrs. J.D. Purohit and Rs. 10,000 from Mrs. U. Purohit which attracted the provisions of Rule 10 of the Companies (Acceptance of Deposits) Rules 1975, read with Section 58A of the Companies Act, 1956. The matter was taken up with the company and its Directors vide letter No. TA/2358/5051-54 dated 5-2-1998. The company vide its letter dated 8-3-1998 made the reply but the explanation of the company was not satisfactory.

4. That till date the company has not filed the Return of Deposit and hence the provisions of Rule 10 of the Companies (Acceptance of Deposits) Rules 1975, read with Section 58A of the Companies Act, 1956 have been contravened and thereby rendered themselves liable for punishment under Rule 11 of the

Companies (Acceptance of Deposits) Rules, 1975.

5. That the offence, complained of, has been committed by the Company's Directors, therefore, this learned Court has jurisdiction to try the offence as the Return of Deposit is required to be filed in the office of the complainant.

6. The prayer made in the complaint inter alia is for summoning the accused persons under Rule 11 of the Rules for 1975, read with Section 58A of the Act, 1956 and to deal with the matter in accordance with law.

7. The aforesaid complaint was registered as C.R. case No. 364/98 vide order dated 31-3-1998 passed by the learned Chief Judicial Magistrate, Shillong and the case was made over to the learned Judicial Magistrate, 1st Class, Shillong for disposal. The learned Judicial Magistrate took cognizance of the offence lodged and ordered issuance of the summons to the petitioners. After a long delay of about two years from the date of issuance of summons and warrants due to non-appearance, the petitioner No. 3 appeared before the Court on 22-2-2001 and thereafter approached this Court by filing the instant writ petition. Primary ground on which Section 482, Cr.P.C. has been invoked towards quashing the complaint case and the proceeding thereof is that the offence alleged being punishable with fine only, the complaint having been filed beyond the period of limitation from relevant date, i.e., 31-3-1997, the date on which the plaint was submitted, no cognizance of the alleged offence could have been taken by the learned Magistrate. Referring to the provision of Section 468 of the Cr.P.C, it is the case of the petitioners that the alleged offence being punishable with fine only, the complaint ought to have been filed on or before 30-6-1997 which would have been within the period of limitation from the date of submission of the balance sheet showing the deposits in question which was on 31-3-1997. Thus, according to the petitioner, the cognizance of the offence could not have been taken by the Court on 1-1-1998 which was beyond 30-6-1997 in view of the express bar u/s 468, Cr.P.C.

8. Confining the above plea of the petitioners, Mr. A.K. Bhattacharyya, learned Sr. counsel assisted by Mr. B.K. Singh, learned Counsel for the petitioners argued that the learned Magistrate ought not have taken cognizance of the alleged offence there being express bar u/s 468, Cr.P.C. According to Mr. Bhattacharyya the offence if any, being punishable only with imposition of fine, the learned Magistrate could not have taken cognizance of the offence beyond the limitation prescribed u/s 468, Cr.P.C. Referring to the provision of Rules 10 and 11 of the Rules and placing reliance on the decision of the Apex Court as in *State of Bihar Vs. Deokaran Nenshi and Another*, and also the decision of the Karnataka High Court in *Shree Dharma Sugar Industries (P.) Ltd. v. Registrar of Companies* [1989] 66 Comp. Cas. 337. Mr. Bhattacharyya submitted that the penalty which could be imposed on the petitioners being only fine, from the date of submission of the balance sheet on 31 -3-1997 making a disclosure of the deposits, the limitation prescribed u/s 468, Cr.P.C. expired on 30-6-1997 and thus, the alleged offence could not have been taken cognizance, by the learned Magistrate, the

complaint having been filed on 31-3-1998.

9. Countering the above argument, Ms. B. Dutta earned Counsel appearing for the State submitted that a prima facie case having been established against the petitioners, the Trial Court rightly took cognizance of the matter. She submitted that the present case being not in the periphery of the abuse of the process of the Court, this Court in exercise of its jurisdiction u/s 482, Cr.P.C. will be reluctant to quash the criminal proceeding initiated against the petitioners.

10. Before appreciating the respective arguments made by the earned Counsel for the parties, it will be appropriate to refer to the provision of Section 58A of Companies Act, 1956 and Rules 10 and 11 of Companies (Acceptance of Deposits) Rules, 1975. According to the petitioners the amount in question "being not deposits" under Rule 2(b)(ix) and 2(b)(vi) of the Rules of 1975 and Section 58A of the Act, 1956, the Company was not required to file any "Return of Deposits" and thus, there was no violation of the provision of the Act, 1956 and the Rules 1975.

11. While definition of "deposits" in Rule 2 of the Rules, 1975 indicates the exclusion of deposit of money of any amount borrowed by a company, clause (ix) thereof requires furnishing to the company of the time of giving the money by a Director or by a shareholder of the company, a declaration in writing to the effect that the amount is not being given out of funds acquired by him by borrowing or accepting from others. Rule 1 of the Rules, 1975 deals with "Return of Deposits to be filed with the Registrar. Every Company to which these rules apply, shall or before the 30th day of June of every year file with the Registrar, a return in the form annexed to these rules and furnishing the information contained therein as on the 31st day of March of that year to be duly certified by the Auditor of Company. Further requirement of the rule is that the copy of the return shall also be simultaneously furnished to the Reserve Bank of India.

12. Rule 11 prescribes penalty. If a company or any other persons contravenes any provision of the rules for which no punishment is provided in the Act, the company and every officer of the company who is in default or such other person shall be punishable with fine which may extend to five hundred rupees and where the contravention is a continuing one, with a further fine which may extend to fifty rupees for every day after the first, during which the contravention continues.

13. Section 58A of the Act, 1956 is under the head "Deposit not to be invited without issuing an advertisement". The provision of this section empowers the Central Government in consultation with the RBI to prescribe the limits upto which, the manner in which and the conditions subject to which deposits may be invited or accepted by a company either from the public or from its members. Sub-section (2) of Section 58 lays down that no company shall invite or allow any other persons to invite or cause to be invited on its behalf any deposit unless : (a) such deposit is invited or is caused to be invited in accordance with

the rules made under Sub-section (b) an advertisement, including therein a statement showing the financial position of the company, has been issued by the company in such form and in such manner as may be prescribed and (c) the company is not in default in the payment of any deposit or part thereof and any interest thereupon in accordance with the terms and conditions of such deposits.

14. Sub-section (3) of Section 58A deals with the deposit accepted by a company at any time before the commencement of the Companies (Amendment) Act, 1974.

15. Sub-section (3A) which has been incorporated by an amendment in 1998 deals with deposit accepted by a company after the commencement of the Companies (Amendment) Act, 1998. Such deposits accepted by a company shall unless renewed in accordance with the rules made under Sub-section (1), be repaid in accordance with the terms and conditions of such deposits.

16. Further Sub-section (4) and Section 58A provides that wherein a deposit is accepted by a company after the commencement of the Companies (Amendment) Act, 1974, in contravention of the rules made under Sub-section (1), revocation of such deposits shall be made by the company within 30 days from the date of acceptance of such deposits or within such further time, not exceeding 30 days, as the Central Government may on sufficient cause being shown by the company allow. Sub-section (5) deals with the consequence of omission or failure on the part of the company to make payment of a deposit in terms of which apart from the punishment by way of fine, every officer of the company which is in default is liable for payment with imprisonment for a term which may extend to five years shall also be liable to be fined.

17. Sub-section (6) of Section 58A provides that where a company accepts, or allows or causes any other person to accept or invite on its behalf any deposit in excess of the limits prescribed under Sub-section (1) or in contravention of the manner or condition prescribed under that sub-section or its contravention of the provisions of Sub-section (2), as the case may be - (a) the Company shall be punishable with fine as indicated therein and (b) every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to five years and shall also be liable to fine.

18. From the above reading of the provisions of Section 58A, it will be seen that apart from the punishment of fine, there is also provision for imprisonment which may extend to five years. In the notice dated 5-2-1998 (Annexure-I) issued to the petitioner/company the following allegations were made:

8. Unsecured loan : The Company accepted unsecured loan to the tune of Rs. 22,58,159.12 but as per this office records the company has not filed the Return of Deposits pursuant to Section 58A of the Companies Act, 1956 and the rules framed thereunder. You are therefore, requested to show cause as to why prosecution proceedings should not be launched against the company and every officer of the company pursuant to Section 58A of the Companies Act, 1956 are

with Rules 10 and 11 of the Companies (Acceptance of Deposits) Rules, 1975.

19. In reply to the said notice, the petitioner/company stated inter alia as follows:

3. That the amounts received against d & c above were not against any "invitation", which is an essential to violate the provision of Section 58A(2) and not being repayable on demand or on notice or after a period, as required by Rule 3(1)(a) and being free of charge not to offend Rule 3(1)(c) of the above referred Rules, are not within the ambit of Section 58A of the Companies Act, 1956.

4. That the amounts received against items No. f, g, i, & j being Advances against sale/supply of the products (tea) of the company are not "deposits" as defined by Rule 2(6)(vi) of the Companies (Acceptance of Deposits) Rules, 1975.

As such, as explained above, your honour should appreciate that the company was not required to file a Return of Deposits pursuant to Section 58A and the Rules thereunder.

It is therefore apparent that there was no violation of the said section and the rules under the Companies Act, 1956 and prosecution proceedings thereunder can be launched against this company.

20. In the complaint filed before the Court the respondent No. 2 i.e., the Registrar of the Companies, Shillong has alleged violation of the Rule 10 of the Rules, 1975 read with Section 58A of the Act, 1956. The specific averments made in the complaint have been quoted above from which it will appear that not only violation of the Rule 11 of the Rules, 1975 has been alleged, but it has also been alleged that there is violation of the provisions of Section 58A. If that be so, apart from the penalty of fine, the penalty of imprisonment of the Director of the Companies is also attracted. This is precisely the reason as to why apart from arraying the company as accused, his Officers/Directors have also been arrayed as accused in the complaint.

21. I have gone through the decisions on which the learned Counsel for the petitioner placed reliance. In fact, the decision of the Karnataka High Court is based on the decision of the Apex Court in *Deokaran Nenshi* {supra}. In both the cases, the Courts were concerned with the provisions of Rules 10 and 11 of the Rules, 1975. It was held that the offence covered by Rule 11 cannot be said to be a continuing one. The facts involved in the Karnataka High Court was held to be similar to that of the Apex Court case in *Deokaran Nenshi* (supra). In that case, the company concerned had omitted to furnish the Return as required by Section 66 read with Section 79 of the Mines Act. The Apex Court held that non-filing of the return under the provision of said sections, amounted to an offence which can be committed once for all and it is not a continuing offence. The learned single Judge of the Karnataka High Court drawing an analogy of the provisions of the sections 66 and 79 of the Mines Act with that of Rules 10 and 11 of the Rules, 1975, held the offence allegedly committed by the company to

be barred by limitation as per the provisions of Section 468, Cr.P.C. It was a clear case of offence being punishable with fine only, since period of limitation for such offence is six months as prescribed in Section 468, Cr.P.C. it was held that complaints in respect of the alleged offence were barred by limitation same having been filed after expiry of prescribed period of six months.

22. In the instant case same is not the position. Apart from the plea of violation of the Rule 10 of the Rules, 1975, it has also been specifically contended that there is violation of the provisions of Section 58A of the Act, 1956, the provision of which have been noticed above. As per the said provision apart from imposition of fine on the company, the Officers/ Directors are also liable by way of imprisonment which may extend to five years. While it is true that the limitation prescribed in respect of penalty of fine is six months, but such limitation is one year, if the offence is punishable with imprisonment for a term exceeding one year and it is three years if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years. Sub-section (3) of Section 468, Cr.P.C. provides that the period of limitation in relation to offence which may be tried together, shall be determined with reference to the offence which is punishable with more severe punishment or as the case may be, the most severe punishment.

23. In the instant case, if the provision of Section 58A are attracted, then there is no provision of determining the limitation only in reference to the penalty of fine. The calculation carried out by the petitioners so as to establish that the complaint was beyond the period of limitation is only in reference to penalty of fine and not in reference to penalty of imprisonment. As per their own disclosure, the deposits in questions were reflected in the balance sheet of 31 -3-1997 which is basis of allegations made against the petitioners. The complaint having been filed on 31-3-1998, i.e., within one year of the submission of the balance sheet, in the event of attracting the provision of Section 58A, there is no question of the complaint being barred by limitation. It has been noticed as to how in the notice and in the complaint, violation of the provision of Section 58A of the Act, 1956 has been alleged. The petitioners also understood the same in that manner and accordingly in their reply also agitated that there was no violation of the provision of Section 58A.

24. As to whether the alleged violation is within the ambit of Section 58A of the Act will be a matter of evidence to be adduced during the trial of the criminal proceeding initiated pursuant to the complaint filed by the Registrar of Companies. At this stage, there is no basis to arrive at the conclusion that the provisions of Section 58A are not attracted. This is a question of fact which will have to be established on evidence during trial. As this stage, there is no question of quashing the complaint merely on the basis of the assertion made by the petitioners. As has been held by the Apex Court in the case of M.M.T.C. Ltd. and Another Vs. Medchl Chemicals and Pharma (P) Ltd. and Another, . It is the well-settled law that the power of quashing criminal proceeding should be

exercised very sparingly and with circumspection. It is a settled law that at this stage the Court is not justified in embarking upon an inequity as to the liability or genuineness or otherwise of the allegations made in the complaint. Expressing a note of caution, the Apex Court observed that the inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. Needless to emphasize that the exercise of inherent power is limited to very extreme exception.

25. In the instant case, the whole basis of the claim of the petitioners towards invoking the inherent power of this Court u/s 482, Cr.P.C. is that even if the alleged violation of Rule 10 of the Rules, 1975 is established, the offence and the complaint thereof being beyond the period of limitation prescribed u/s 468, Cr.P.C, the complaint and the initiation of proceeding thereof are not maintainable. This is the argument advanced at the time of hearing of the case. However, neither in the petition nor in the reply of the show-cause notice, the petitioners have taken the plea that there is no violation of the provisions of Section 58A of the Act, 1956.

26. It is another thing to plead that the amounts received by the company were not against any invitation which is essential element towards violation of the provisions of Section 58A and, thus, there is no question of offending Section 58A of the Act, 1956. As to whether there is violation of the provision of the Section 58A is a matter to be decided by the trial Court on the basis of the materials and the evidence to be adduced during the trial. While it is true that the violation of the provision of Rule 10 of the Rules, 1975, may lead to punishment by way of imposition of fine on the company, but there being express provision for providing punishment of imprisonment to the Officers/ Directors of the company which may extend to five years, the provisions of Section 468 of the Cr.P.C. will have to be construed in that manner and not merely on the basis of the assertion made by the petitioners that the offence alleged is only in respect of violation of Rule 10 of the rules, 1975.

27. In view of the above, I do not find merit in the application and accordingly it is dismissed. The case records shall be transmitted to the trial Court immediately and the petitioners shall appear before the trial Court to face the proceeding initiated in the aforesaid complaint case being No. C.R. 364/98 by the learned Judicial Magistrate, 1st Class, Shillong. Since the matter is pending from 1998, it is expected that the learned Magistrate shall strive for early disposal of the proceeding.

28. The parties shall appear before the Judicial Magistrate, 1st Class, Shillong on the date to be fixed by the learned Magistrate. Let a copy of this judgment and order be furnished to the respondent No. 2 immediately for their necessary follow up action. Bring this judgment to the notice of the Deputy Registrar (J) for his immediate follow up action.

29. The revision application stands dismissed. There shall be no order as to costs.