

(2012) 03 GUJ CK 0006

In the Gujarat High Court

Case No : Special Criminal Application No. 2421 of 2007

Kalpesh Dagli

APPELLANT

Vs

State of Gujarat and another

RESPONDENT

Date of Decision : 05-03-2012

Acts Referred:

Companies Act, 1956 — Section 150, 150(1), 150(2), 5
Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 482

Citation : (2012) 111 CLA 116 : (2012) 173 CompCas 292 : (2012) 2 GLR 1116 : (2013) 117 SCL 498

Hon'ble Judges : M. R. Shah, J

Bench : Single Bench

Advocate : S.P. Majmudar, for the Appellant; L.B. Dabhi for Respondent No. 1, P.R. Abichandani and N.D. Gohil, Central Government Standing Counsel, for the Respondent

Judgement

M.R. Shah, J.—The present special criminal application under article 226 of the Constitution of India read with section 482 of the Code of Criminal Procedure, 1973, has been preferred by the petitioner original accused No. 6, director of M/s. Reliable Finstock Services Ltd., to quash and set aside the impugned complaint, being Criminal Case No. 610 of 1999 filed by respondent No. 2 herein the original complainant pending in the court of learned Additional Chief Metropolitan Magistrate, Ahmedabad. Respondent No. 2-original complainant-Assistant Registrar of Companies, Ahmedabad has instituted/filed the impugned complaint being Criminal Case No. 610 of 1999 in the court of learned Additional Chief Metropolitan Magistrate, Ahmedabad against the petitioner and others for the offence punishable u/s 150(1) read with section 150(2) of the Companies Act, 1956. In the said complaint, it is alleged that original accused No. 1 is the company and original accused Nos. 2 to 8 were the directors of original accused No. 1 company. It is further alleged that inspection was carried out u/s 290A of the Companies Act and the concerned officer detected the default and

contraventions, which are as under :

The company has not maintained the register of members and index of members. The details of the shareholders along with the names of the shareholders, folio number, date of appointment, date of cessation, etc., maintained in computer files/floppies and such details can be read on the screen of the computer.

2. It is further alleged in the said complaint that therefore the company as well as its managing directors and the directors have committed the breach of sub-section (1) of section 150 and sub-section (2) of section 150 of the Companies Act. In the said complaint the learned Additional Chief Metropolitan Magistrate, Ahmedabad directed to issue summons against the accused persons, inclusive of the petitioner for the offence punishable under sections 150(1) and (2) of the Companies Act. Being aggrieved and dissatisfied with the impugned criminal proceedings, the petitioner-original accused No. 6 has preferred the present special criminal application under article 226 of the Constitution of India read with section 482 of the Code of Criminal Procedure.

3. Shri S. P. Majmudar, the learned advocate appearing on behalf of the petitioner-original accused No. 6 has vehemently submitted that as such the petitioner was only the director of original accused No. 1 company at the relevant time and there was already a managing director appointed by original accused No. 1 company and, therefore considering section 5 of the Companies Act, 1956, the petitioner cannot be said to be "officer in default" and, therefore, it cannot be said that the petitioner has committed any offence as alleged. It is submitted by Shri Majmudar, the learned advocate appearing on behalf of the petitioner-original accused No. 6 that in a case where the company does not have any officer specified in clauses (a) to (c) of section 5 of the Companies Act, 1956, then and then only any other director who may be specified by the board and where no director is so specified, all the directors can be held liable for the offence of the default alleged to have been committed by the "officer who is in default" of the company.

4. Shri Majmudar, the learned advocate appearing on behalf of the petitioner has heavily relied upon the decision of the Rajasthan High Court in the case of Ravindra Narayan v. Registrar of Companies, Rajasthan reported in [1994] 81 Comp Cas 925 ; the decision of the Andhra Pradesh High Court in the case of Smt. G. Vijayalakshmi v. Securities and Exchange Board of India reported in [2000] 100 Comp Cas 726 and the decision of the Bombay High Court in the case of H. Nanjundiah v. V. Govindan, Registrar of Companies, Maharashtra reported in [1986] 59 Comp Cas 356, in support of his above submissions.

5. Shri Majmudar, the learned advocate appearing on behalf of the petitioner has submitted that even the department of Company Affairs has issued a circular relying upon the decision of the Rajasthan High Court in the case of Ravindra Narayan [1994] 81 Comp Cas 925. Making the above submissions and relying

upon the above decisions, it is requested to quash and set aside the impugned criminal proceedings by submitting that to continue the criminal proceedings against the petitioner for the alleged breach of section 150 of the Companies Act would be unnecessary harassment to the petitioner and the same would be an abuse of the process of law and the court.

6. Shri N. D. Gohil, learned Central Government Standing Counsel is not in a position to dispute that original accused No. 1 had appointed the managing director and the same was also communicated to the concerned Department. He is also not in a position to show any contrary decision to the decision of the Rajasthan High Court as well as Andhra Pradesh High Court. He is also not in a position to dispute that relying upon the decision of the Rajasthan High Court, the Department of Company Affairs had in fact issued a circular that in case when breach is alleged to have been committed by the company and the concerned "officer who is in default", in that case if the company had already appointed the managing director, whole-time directors, managers in that case the prosecution is not to be initiated against ordinary director and, therefore, considering the above, it is requested to pass an appropriate order considering the facts and circumstances of the case.

7. Heard the learned advocates appearing on behalf of the respective parties at length. At the outset, it is required to be noted that respondent No. 2 had instituted the impugned criminal proceedings against original accused No. 1 company--Reliable Finstock Services Ltd., and others for breach of sections 150(1) and 150(2) of the Companies Act, 1956 and the petitioner is arraigned as accused No. 6 as director of original accused No. 1 company. It is not in dispute that Shri Jayandra M. Shah was arraigned as original accused No. 2, which was also communicated to the concerned Department. As per sub-section (1) of section 150 of the Companies Act, every company shall keep one or more books in register of its members and enter therein the particulars mentioned in sub-section (1) of section 150. As per sub-section (2) of section 150 of the Companies Act if default is made in complying with sub-section (1) of section 150 of the Companies Act and every "officer of the company who is in default" shall be punishable with fine which may extend to Rs. 500 for every day for which the default continues.

8. Section 5 of the Companies Act defines "officer who is in default", which reads as under :

5. Meaning of "officer who is in default".--For the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any punishment or penalty, whether by way of imprisonment, fine or otherwise, the expression "officer who is in default" means all the following officers of the company, namely :--

(a) the managing director or managing directors ;

(b) the whole-time director or whole-time directors ;

(c) the manager ;

(d) the secretary ;

(e) any person in accordance with whose directors or instructions the board of directors of the company is accustomed to act ;

(f) any person charged by the Board with the responsibility of complying with that provision :

Provided that the person so charged has given his consent in this behalf to the Board ;

(g) where any company does not have any of the officers specified in clauses (a) to (c), any director or directors who may be specified by the Board in this behalf or where no director is so specified, all the directors :

Provided that where the Board exercises any power under clause (f) or clause (g), it shall, within thirty days of the exercise of such powers, file with the Registrar a return in the prescribed form.

9. On fair reading of section 5 of the Companies Act, 1956, the expression "officer who is in default" means (a) the managing director or managing directors ; (b) the whole-time director or whole-time directors ; (c) the manager ; (d) the secretary and other persons mentioned in clauses (e) and (f) of section 5. As per clause (g) of section 5 of the Companies Act where any company does not have the officers specified in clauses (a) to (c), any director or directors who may be specified by the board in this behalf or where no such director is so specified, all the directors can be said to be the officer who is in default and, therefore, on fair reading of section 5 of the Companies Act where the company, who is alleged to have committed the default does not have the managing director or managing directors and/or whole-time director or whole-time directors ; manager or any director(s) who may be specified by the board in this behalf then and then only all the directors can be said to be the "officer who is in default".

10. In the present case, as stated hereinabove, admittedly original accused No. 2 was appointed as managing director of original accused No. 1 company and original accused No. 1 company had also the whole-time directors and the manager. The petitioner was arraigned as an accused only as a ordinary director. Considering the aforesaid, when the company had a managing director ; whole-rime director and manager as mentioned in clauses (a) to (c) of section 5 of the Companies Act there cannot be any prosecution against the petitioner who was an ordinary director of original accused No. 1 company as he cannot be said to be "officer who is in default".

11. An identical question came to be considered by the Rajasthan High Court in the case of Ravindra Narayan [1994] 81 Comp Cas 925 as well as the Andhra Pradesh High Court in the case of Smt. G. Vijayalakshmi [2000] 100 Comp Cas

726 and considering section 5 of the Companies Act it is held that the directors are officer in default only where the company does not have managing director, whole-time director or manager. It is also required to be noted that even considering the decision of the Rajasthan High Court in the case of Ravindra Narayan [1994] 81 Comp Cas 925 the Department of Company Affairs have also issued Circular No. 6/1994 [F. No. 3/41/93-CL-V] dated June 24, 1994 and it is observed that where penal provisions provide for punishment of "officers in default" prosecution be filed against the managing director(s); whole-time director(s) and manager, apart from the secretary, if any, and the company and only in those cases where there is no such managerial personnel, i.e., managing director/whole-time director/manager, prosecution be filed against all ordinary directors, apart from the secretary, if any, and the company. Considering the aforesaid, to continue the criminal proceedings against original accused No. 6, who was at the relevant time only ordinary director, would not be maintainable and the same would be abuse of process of law and the court and, therefore, this is a fit case to exercise the powers u/s 482 of the Code of Criminal Procedure and to quash and set aside the criminal proceedings against the petitioner-original accused No. 6. However, the same would be without prejudice to the rights and contentions of respondent No. 2 and prosecution against rest of the accused persons, who may be tried in accordance with law and on its own merits, without, in any way, being influenced by the present order. In view of the above and for the reasons stated hereinabove, the present petition succeeds. The impugned complaint being Criminal Case No. 610 of 1999 filed by respondent No. 2 herein original complaint pending in the court of learned Additional Chief Metropolitan Magistrate, Ahmedabad is hereby quashed and set aside so far as the petitioner-original accused No. 6 is concerned. However, the same shall be without prejudice to the rights and contentions of respondent No. 2 original complainant as well as the prosecution against other accused persons, who shall be dealt with and tried by the concerned learned Magistrate in accordance with law and on its own merits, without, in any way being, influenced by the present order, which would be qua the petitioner-original accused No. 6 only. Rule is made absolute accordingly.