

(2000) 06 AP CK 0088

In the Andhra Pradesh High Court

Case No : Criminal Petition No. 874 of 2000

M. Kishan Rao and Others

APPELLANT

Vs

Mrs. P. Santha Reddy and Another (No. 1)

RESPONDENT

Date of Decision : 07-06-2000

Acts Referred:

Companies Act, 1956 — Section 297, 299, 300, 629A
Criminal Procedure Code, 1973 (CrPC) — Section 468, 468(3)
Penal Code, 1860 (IPC) — Section 409, 441

Citation : (2000) 2 ALD(Cri) 247 : (2000) 2 ALD(Cri) 212 : (2000) 2 ALT(Cri) 294 : (2001) 40 CLA 126 : (2002) 111 CompCas 361 : (2001) CriLJ 2729

Hon'ble Judges : Vaman Rao, J

Bench : Single Bench

Advocate : B. Adinarayana Rao, for the Appellant; C. Praveen Kumar and Public Prosecutor, for the Respondent

Final Decision : Partly Allowed

Judgement

Vaman Rao, J.—In this petition, the petitioners seek quashing of proceedings in C. C. No. 3 of 2000 on the file of the Special Judge for Economic Offences, Hyderabad, which was taken on file on a complaint filed by the first respondent herein in which the petitioners herein face prosecution for offences punishable under Sections 299(4) and 304 of the Companies Act, 1956 and u/s 409 of the Indian Penal Code, 1860. Besides, accused No. 1 also faces a charge for an offence u/s 411 of the Indian Penal Code.

2. These proceedings are sought to be quashed on the ground that no offence could be made out even assuming the allegations in the complaint are true. It is then contended that offences under Sections 299 and 300 of the Companies Act being punishable with fine of Rs. 5,000 and the limitation for filing the complaints in respect of these u/s 468 of the Criminal Procedure Code, 1973, being only six months, the complaint in question is thus barred by limitation. It is thus contended that continuation of the proceedings in the complaint would amount to

an abuse of the process of the law.

3. The parties shall be referred to as arrayed in the complaint for the sake of convenience.

4. Before these contentions are examined, it is necessary to refer briefly to the allegations in the complaint :

The complainant is a shareholder in Spectrum Power Generation Limited, Hyderabad (for short "SPGL") holding 2,700 equity shares. The complainant met Dr. A.V. Mohan Rao one of the promoters and director of SPGL and enquired into the reasons for non-payment of dividend by SPGL in spite of making the investment in the shares way back in 1995. It has come to the notice of the complainant that accused No. 4-company has contravened several provisions of the Companies Act with various acts and omissions which are punishable under the Indian Penal Code. Accused No. 4 -SPGL was incorporated on October 26, 1986. Accused No. 1 was functioning as managing director of accused No. 4 since its formation and has been in full control of all its affairs including finances. Accused Nos. 2 and 3 are the sons of accused No. 4 and also directors of accused No. 4-company. Kris Engineers is a registered partnership firm with accused No. 1 and accused No. 2 as its partners which has been floated with the sole purpose of lending its name for the purpose of making illegal payments to it for the purpose of being misappropriated by accused Nos. 2 and 3.

5. Accused No. 4-company was formed for implementation of 208 MW Godavari Gas based power project at Kakinada pursuant to the memorandum of understanding dated July 23, 1992, between National Thermal Power Corporation Limited (NTPC), a Government of India undertaking and Spectrum Technologies, USA Inc. (STUSA). Incorporation of the joint venture company SPGL was entrusted to accused No. 1--M. Kishan Rao, of Jaya Food Industries (JFI). Subsequently, a promoters' agreement dated June 29, 1999, was signed by three promoters namely, NTPC, STUSA and JFI represented by accused No. 1. The other two promoters reposed confidence in accused No. 1 by appointing him as managing director of A-4-company.

6. The implementation of the 208 MW Godavari Gas based power project at Kakinada was entrusted to Rolls Royce plc., U. K. group companies on a turnkey basis in November, 1993, by entering into an engineering, procurement and constructing (EPC) contract. NTPC was appointed as the site engineers for effective guidance and supervision of the work of the EPC contractor in implementation of the project. The Industrial Development Bank of India appraised the cost at Rs. 778 crores and on August 11, 1994, a loan agreement was executed between SGPL and IDBI. An operation and maintenance contract was entered into with Rolls Royce Plc., a fuel supply agreement with GAIL and HPCL, a power purchase agreement with APSEB. Mr. M. Kishan Rao (accused No. 1) was entrusted with the management of day-to-day affairs of SPGL, i.e., A4-company and has been having full control and domain over the funds of accused

No. 4.

7. Accused No. 1 took undue advantage of the situation and committed breach of trust by several acts of omission and commission by ensuring dominance in the board of A-4 through his family members and nominees. Accused Nos. 1 to 3 are authorised to operate the bank account of accused No. 4-company either jointly or severally by virtue of resolution of accused No. 4-company and thus A-1 to A-3 as agents of accused No. 4-company were having domain and control over its funds. Several contracts were entrusted to bogus companies and the funds of accused No. 4-company were siphoned off to the tune of several crores. One such contract was awarded to Kris Engineers in October, 1993, for Rs. 3.30 crores for purportedly carrying out the works relating to site levelling, earth filling, construction of storage facilities (water tank) for green belt area and construction of internal roads, bridges, culverts and storm drains on the northern side of the site. This complaint is confined to a transaction of Rs. 50,00,000 (rupees fifty lakhs) transferred from A-4-company to Kris Engineers which is owned by A-2 and A-3 resulting in misappropriation by A-2 and A-3 with the active co-operation and connivance of A-1 and A-4. It is stated that Kris Engineers have entered into a contract with A-4-company in October, 1993, for the value of Rs. 3.30 crores for carrying out the above works. In pursuance of it, accused No. 4 advanced Rs. 50 lakhs under a cheque dated May 8, 1995, to Kris Engineers as an on account payment towards contract purported to have been entrusted to it. Kris Engineers on the same day transferred the said amount of Rs. 50 lakhs to A-1 under cheque No. 590040, dated May 8, 1995. It is stated that there are several other instances of payments by A4 to Kris Engineers on the basis of the alleged contract.

8. It is stated in the complaint that the amount paid by A-4 to Kris Engineers allegedly towards contract is not backed by any consideration as Kris Engineers did not execute any work under the contract for accused No. 4 and in fact there was no necessity for accused No. 4 to enter into such contract with Kris Engineers as the entire work relating to the project was entrusted to Rolls Royce on a turn key basis and nobody except the EPC contractor had actually executed the work at the site. It is thus alleged that the contract between A-4-company and Kris Engineers was a sham and a mere device to illegally transfer funds from accused No, 4-company to Kris Engineers which is owned by A-2 and A-3. It is stated that Kris Engineers by transferring the said amount to accused No. 1, had converted the said amount of Rs. 50 lakhs to its own use. Thus, it is alleged that A-2 and A-3 had committed an offence punishable u/s 409 of the Indian Penal Code and A-1 and A-4 knowing well that the amount that is paid to Kris Engineers was not intended for the purpose of a real contract had aided and abetted the commission of offence by accused Nos. 2 and 3.

9. In regard to the offences of contravention of Sections 297, 299 and 304 of the Companies Act punishable under the relative provisions and Section 629A of the said Act, it is stated that at the time of the transaction with Kris Engineering

Company, A-4-company's board was consisting of A-1 to A-3 and Mr. Bharat Bhattacharya and the said agreement with Kris Engineers was thus entered into in gross violation of the provisions of Sections 297, 299 and 300 of the Companies Act by accused No. 4 as A-2 and A-3 are directly interested in the said contract entered into with Kris Engineers and they being the only partners in the said firm, the provisions of Sub-sections (1) and (4) of Section 297 have not been complied with as no resolution of the accused No. 4-company was passed for entering into such contract. In fact, no such resolution could have been passed at the board meeting as three out of the total strength of the four directors were interested in the said contract either directly or indirectly which makes them ineligible to participate or vote in the board proceedings u/s 300 of the Companies Act, 1956. Thus, it is alleged that the provisions of Sections 299 and 300 of the Companies Act, 1956, have been violated by accused No. 4-company. Hence, A-1 to A-4 committed offences punishable under the relevant provisions of the Companies Act.

10. The proceedings in this complaint which has been taken cognizance of by the learned special judge for economic offences are sought to be challenged in this petition on various grounds. One of the grounds is that the complaint has been filed beyond the period of limitation as prescribed in Section 468 of the Criminal Procedure Code, 1973, as far as the offences under Sections 299, 300 and 297 of the Companies Act read with Section 629A of the Companies Act, are concerned.

11. The contention of learned counsel for the petitioner is that the complaint has been filed on January 10, 2000, and the cheque for Rs. 50 lakhs which was said to have been fraudulently issued in favour of Kris Engineering firm for misappropriating the said amount was issued on May 8, 1995. It is stated that the alleged contract has been executed with Kris Engineers in October, 1993, allegedly in contravention of various provisions in the Companies Act. The complaint must be held to have been filed beyond the period prescribed in Section 468 of the Criminal Procedure Code inasmuch as the offences under the relevant provisions of the Companies Act are punishable with fine only and the limitation for such offences u/s 468 of the Criminal Procedure Code is only six months. It may be mentioned, in the complaint, it is stated that the complainant came to know about these fraudulent contracts subsequently. At any rate, the contract allegedly in contravention of provisions of the Companies Act which is said to be punishable under relative provisions and u/s 629A of the Companies Act was entered into, according to the complainant, to facilitate misappropriation of the funds of accused No. 4-company. Thus, the offence u/s 409 of the Indian Penal Code which is one of the offences alleged against the petitioners is inextricably connected with the alleged offences under the Companies Act. Sub-section (3) of Section 468 of the Criminal Procedure Code contemplates that the period of limitation in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment.

12. In this case, inasmuch as the offence u/s 409 of the Indian Penal Code is punishable with imprisonment for life or ten years, no limitation is prescribed for the said offence u/s 409 of the Indian Penal Code. The question of prosecution in respect of offence u/s 629A and other sections of the Companies Act being barred by limitation does not arise and the proceedings in respect of the said prosecution cannot be questioned on that ground.

13. It is then contended by learned counsel for the petitioners, Sri B. Audinarayana Rao, that the allegations in the complaint do not make out any offence and that it has been filed to harass the petitioners and it is thus a gross abuse of the process of the law. Referring to the allegation in the complaint as to the contravention of Section 299 of the Companies Act, it is stated that in view of the allegation that no resolution has been passed by the board of directors authorizing to enter into contract with Kris Engineers and in fact as stated in the complaint no such resolution could have been passed as out of four directors, three were interested, the said provision of Section 299 of the Companies Act does not apply to the facts of the case and that there could be no contravention of the said provision.

14. Section 299 of the Companies Act read as follows :

"299. (1) Every director of a company who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement, or proposed contract or arrangement, entered into or to be entered into, by or on behalf of the company, shall disclose the nature of his concern or interest at a meeting of the board of directors.

(2) (a) In the case of a proposed contract or arrangement, the disclosure required to be made by a director under Sub-section (1) shall be made at the meeting of the board at which the question of entering into the contract or arrangement is first taken into consideration, or if the director was not, at the date of that meeting, concerned or interested in the proposed contract or arrangement, at the first meeting of the board held after he becomes so concerned or interested.

(b) In the case of any other contract or arrangement, the required disclosure shall be made at the first meeting of the board held after the director becomes concerned or interested in the contract or arrangement.

(3) (a) For the purpose of Sub-sections (1) and (2), a general notice given to the board by a director, to the effect that he is a director or a member of a specified body corporate or is a member of a specified firm and is to be regarded as concerned or interested in any contract or arrangement which may, after the date of the notice, be entered into with that body corporate or firm, shall be deemed to be a sufficient disclosure of concern or interest in relation to any contract or arrangement so made.

(b) Any such general notice shall expire at the end of the financial year in which

it is given, but may be renewed for further period of one financial year at a time, by a fresh notice given in the last month of the financial year in which it would otherwise expire.

(c) No such general notice, and no renewal thereof, shall be of effect unless either it is given at a meeting of the board, or the director concerned takes reasonable steps to secure that it is brought up on and read at the first meeting of the board after it is given . . ."

15. The gravamen of the offence of contravention of Section 299 of the Companies Act, is the failure on the part of the director of a company to disclose his interest in any contract or arrangement or proposed contract or arrangement to be entered into by or on behalf of the company as contemplated under Sub-section (1). Sub-section (2) mandates that such disclosure of interest shall be made at the meeting of the board at which the question of entering into the contract or arrangement is first taken up for consideration or if as on that date, the director concerned has not acquired such interest, then such information shall be conveyed at the first meeting of the board held after he becomes so concerned or interested. Sub-section (3) postulates that it would be sufficient compliance with requirement of Sub-sections (1) and (2) if a general notice is given to the effect that he is a director or a member of a specified body corporate or is a member of a specified firm and is to be regarded as concerned or interested in any contract or arrangement which may, after the date of the notice, be entered into with that body corporate or firm. Clause (b) of Sub-section (3) contemplates that such notice shall expire at the end of the financial year in which it was given.

16. There is a specific averment" in the complaint that there was violation of Section 299 of the Companies Act on the part of accused Nos. 1 to 3 on account of their failure to inform at a meeting of directors of A-4 company, Spectrum Power Generation Limited, that they are interested in Kris Engineers inasmuch as accused Nos. 2 and 3 are the partners of that firm and inasmuch as they are no other than the sons of accused No. 1. There is also an allegation that the provisions of Sub-sections (1) and (4) of Section 297 of the Companies Act have been contravened inasmuch as no resolution of the board of accused No. 4-company was passed recording the consent of board of directors of A-4 company for entering into contract with Kris Engineers in respect of execution of a contract of which A-2 and A-3 are the only partners who are related to A-1, the managing director of A-4 firm.

17. The further statement in the complaint that "the "profound fact" is that no such resolution could have been passed at the board meeting as three out of the total strength of four directors were interested in the said contract either directly or indirectly which makes them ineligible to participate or vote in the board proceedings u/s 300 of the Companies Act, 1956" does not detract from the substantive allegation that the accused Nos. 1 to 3 being the managing director and directors respectively of A-4 company have violated the provisions in Section

297 of the Companies Act.

18. Whether the circumstances that out of four members of board of directors, three were interested in the alleged contract with Kris Engineers has the effect that there was no violation of Section 297 of the Companies Act and that the concerned accused are not liable for such violation is a matter involving questions of fact and law which have to be gone into during the trial.

19. The complaint also makes an allegation in respect of violation of Section 300 of the Companies Act which prohibits a director from taking part in the discussion of, or vote on, any contract or arrangement entered into, or to be entered into, by or on behalf of the company if he is in any way whether directly or indirectly concerned or interested in the contract or arrangement. It also contemplates that his presence in the meeting does not count for the purpose of forming a quorum at the time of any such discussion or vote and if he does vote, his vote shall be void. Here again, whether any such meeting in fact has been convened and whether accused Nos. 1 to 3 have violated the provisions of Section 300 of the Companies Act are questions of fact which are required to be enquired into during the trial. Thus, it cannot be held at this stage that the allegations in the complaint do not prima facie make out violations of Sections 297, 299 and 300 of the Companies Act on the part of accused Nos. 1 to 3. The contravention of provisions for which no specific punishment is provided for is rendered punishable u/s 629A of the Companies Act.

20. The far more serious allegations against petitioners Nos. 1 to 3 are that A-1 to A-3 being the directors of the company have entered into a sham contract for levelling of the site with Kris Engineers of which A-2 and A-3 are the only partners who apart from being the directors of A-4-company are the sons of A-1. The allegation is that the fake and fictitious contract has been used as a mere device for transferring a sum of Rs. 50 lakhs from the funds of A-4-company to the said Kris Engineers, a partnership firm, in which accused Nos. 2 and 3 are directly interested as partners.

21. The further allegation in para. 8 of the complaint is that the said amount has again been retransferred to A-1. It is specifically alleged that Kris Engineers has not utilised the said amount for any work for A-4-company and that the whole amount has been misappropriated by A-1 to A-3 and they have committed breach of trust in respect of the said amount. Thus, it is alleged that A-1 to A-3 being the directors of A4 company have committed an offence u/s 409 of the Indian Penal Code.

22. If the facts as alleged in the complaint are taken to be true, there can be no manner of doubt that the alleged facts constitute an offence prima facie of criminal breach of trust in respect of Rs. 50 lakhs transferred from A-4-company at the behest of A-1 to A-3 to Kris Engineers of which A-2 and A-3 are the partners.

23. Thus, as far as A-1 to A-3 are concerned, there is a little doubt that on the

basis of the facts alleged in the complaint, it cannot be contended that the offences as alleged have not been made out and hence there is no warrant for quashing the proceedings as against A-1 to A-3.

24. However, a question arises whether any offence has been made out against accused No. 4-company. The allegations in the complaint, whether relating to contravention of the provisions under Sections 297, 299 and 300 of the Companies Act or whether as to commission of offence of criminal breach of trust would show that the offences in the question are specifically alleged to have been committed by accused Nos. 1 to 3. It is accused Nos. 1 to 3 who are alleged to have violated the provisions of Sections 297, 299 and 300 of the Companies Act. The criminal breach of trust in respect of Rs. 50,00,000 transferred from accused No. 4-company to Kris Engineers is specifically alleged to have been committed by A-1 to A-3 by entering into a fictitious contract with Kris Engineers on behalf of A-4-company violating the relative provisions of the Companies Act.

25. In fact, the facts of this case as narrated in the complaint would disclose that the criminal offences in question have been committed against accused No. 4-company and not by the said company. It is the company which has been given a short shrift by its directors by entering into a sham contract on its behalf. The result of the alleged acts of A-1 to A-3 appears to be that it was SPGL which was duped and drained of its funds. In fact, the company could have been the complainant in this case.

26. It is true that under various provisions of the Companies Act, a company can be held to be guilty of an offence of violation of the said provisions which are punishable under specific provisions or which could be said to be punishable u/s 629A of the Companies Act in respect of contraventions for which no punishment is specifically provided for. For instance, under Sub-section (5) of Section 123 of the Companies Act, refusal to allow inspection or making of an extract from the register of members of the company as contemplated under Sub-section (2) of the said section renders the company and "every officer of the company in default" liable for punishment with fine. Similarly, if there is a contravention of Section 167 of the Companies Act by committing default in holding general body meeting of a company, for such default the company and "the officer of the company who is in default" are punishable with fine u/s 168 of the Act.

27. It may, however, be seen that under Sub-section (2) of Section 197 of the Companies Act circulating or advertising a report of the proceedings of any general meeting of a company in contravention of Sub-section (1) renders every officer of the company who "is in default" liable for punishment. Thus, the company is excluded from the liability under this provision. Similarly, violation of provisions of the Companies Act regarding maximum managerial remuneration u/s 198 of the Act or contravention of the provisions regarding payment of any remuneration, fee or any tax as provided for u/s 200 of the Companies Act can be held to render the company liable for punishment u/s 629A of the Companies

Act. It may be noted that Sub-section (8) of Section 205A of the Companies Act renders the company and every officer of the company who is in default punishable with fine or contravention of the said Section 205A in respect of the dividends declared. Similarly, Section 207 of the Companies Act renders every director of the company, its managing agent or secretaries or treasurers liable for punishment for failure to distribute the dividends declared within 42 days. Section 209 of the Companies Act makes various provisions in regard to maintenance and preservation of various books relating to a company including account books, etc. Sub-section (5) of Section 209 of the Companies Act contemplates that if any officer mentioned in Sub-section (6) fails to take reasonable steps to secure compliance by the company with the requirements of this section, or has by his own wilful act been the cause of any default by the company thereunder, he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees or with both. Sub-section (6) indicates the various officers who could be rendered liable under Sub-section (5). Thus, these provisions which have been mentioned as illustrative show that under the Companies Act, the company and "the officer who is in default" are liable in respect of certain violations and whereas in respect of certain contraventions, only certain specified officers of the company are rendered liable and not the company.

28. The allegations in the complaint in this case make it abundantly clear that the offences alleged are not against the company at all. As far as the contraventions of the provisions of the Companies Act in Sections 297, 299 and 300 are concerned, they are directed against the directors of the company. By no stretch of imagination, these failures can render the company as such liable u/s 299, 300 or 629A of the Companies Act.

29. In regard to the principal allegation as to the commission of criminal breach of trust, it is inconceivable that a company would commit criminal breach of trust in respect of its own funds. In fact, it is the company that could be the aggrieved party as far as this allegation is concerned. Clearly, the allegations in the complaint go to show that it was A-1 to A-3, the directors of the company, who are alleged to have entered into a fictitious contract with Kris Engineers, a partnership firm of which A-2 and A-3 are the partners and who are no other than the sons of accused No. 1. Thus, the crux of the allegation is that A-1 to A-3 used fraudulent methods to drain the company (A-4) of its funds with a view to misappropriate them. Thus, the allegations in the complaint do not make out any offence as against accused No. 4-company.

30. In fact, when this specific question was posed to learned counsel appearing for both the sides, they conceded that no offence could be made out against the company A-4 on the basis of the allegations in the complaint.

31. In the result, it has to be held that the proceedings in respect of accused No. 4 in C. C. No. 3 of 2000 on the file of the special judge for economic offences,

Hyderabad, deserve to be quashed and are accordingly quashed and accused No. 4 shall be deleted from the array of the accused. The proceedings as against A-1 to A-3 shall, however, continue.

32. Accordingly, this petition is partly allowed.