

(1970) 06 KL CK 0012

In the High Court Of Kerala

Case No : Company Petition No. 18 of 1969

M.O. Varghese

APPELLANT

Vs

Thomas Steaphen and Co. Ltd. and Another

RESPONDENT

Date of Decision : 29-06-1970

Acts Referred:

Companies Act, 1956 — Section 283(1), 283(2A), 299(2), 633, 633(1)

Citation : AIR 1971 Ker 223

Hon'ble Judges : M.U. Isaac, J

Bench : Single Bench

Advocate : G. Vishwanatha Iyer, for the Appellant; P.K. Kurian, K.A. Nayar, V. Desikan and P. Raman Menon, S. Subramaina Iyer, for Managing Director of the Company, T.N. Subramonia Iyer and S. Narayanan Poti for Director of the Company, for the Respondent

Judgement

M.U. Isaac, J.—The petitioner is a director of Thomas Stephen & Co. Ltd.. which is a public company governed by the Companies Act. 1956. He has been a director of this company continuously for the past more than 18 years, by virtue of re-election from time to time. He was last elected as Director in August 1963. The petitioner's father, Shri P. Oommen. was carrying on a business under the style P. Oommen & Sons. In the course, of that business Shri Oommen was buying Roods from the company. There was an arrangement between them, under which the company had allowed sales on credit to Shri Oommen- He died in 1960; and his business devolved on his wife and sons, including the petitioner, as co-owners. The business has been continued; and it is being carried on by the elder brother of the petitioner. The arrangement with the company for supply of goods on credit has also been continued; and it is still in existence. The Company was inspected in March 1969 by the Inspection Directorate of the Company Law Board. The Registrar of Companies, by his letter Ext. P-I dated 3-9-1969, wrote to the company bringing to its notice certain irregularities discovered during the said inspection, and instructing it to take necessary steps to rectify them. Ext. P-I stated, among other things, that the petitioner had not disclosed to the Board of

Directors of the Company as required by Section 299 of the Act his interest in a firm with which the company was having transaction, and that the petitioner had consequently ceased to be a director u/s 283(1)(i) from the date of occurrence of the contravention. Ext. P-I also required the company to notify immediately the cessation of directorship of the petitioner and to recover from him all remuneration drawn by him since the date of contravention. The Company was further asked to take similar action against other directors who had contravened Section 299 of the Act. The petitioner apprehended that proceedings would be taken against him pursuant to the directions contained in Ext. P-I; and he has filed this petition u/s 633(2) of the Act, (a) for a declaration that he has not contravened the provisions "of Section 299, and (b) to relieve him from the liabilities that may arise consequent on such contravention, if the declaration sought for cannot be granted.

2. The petitioner states that the arrangement that his father had with the company in respect of the business P. Oommen and Sons and his interest therein as co-owner after his father's death are well-known to all the directors of the company, that the petitioner was not attending to the said business, that the fact that he has such an interest, therein has been recorded in the minutes of the Board of Directors dated 31-8-1963 and 7-4-1969, that these disclosures would satisfy the requirements of Section 299 of the Act and that he has not intentionally failed to disclose about any transaction with the company.

3. The Company has filed a counter-affidavit, which does not support or oppose the petitioner. It states, among other things, that the vacation of office of directorship by the petitioner and other directors for contravention of Section 299(1) of the Companies Act has been notificationed to the Registrar of Companies u/s 303(2) as required in the Registrar's letter, Ext. P-I. The Registrar of Companies has joined issue with the petitioner. He has filed an affidavit stating that the first meeting of the Board of Directors during the financial year ending 31-12-1909 was held on 9-1-1969, that the petitioner should have disclosed his interest in the business of P. Oommen & Sons at that meeting, that the alleged disclosure at the meeting of the Board held on 7-4-1969 does not comply with the requirements of Section 299, that the petitioner cannot escape the statutory consequence of ceasing to be a director on account of the said default, and that, on the facts and circumstances of the case, the petitioner does not deserve to be excused in respect of the said default, or relieved wholly or partly from the liabilities arising therefrom.

4. This case raises some interesting questions- The first is whether the petitioner is entitled u/s 633 of the Companies Act to the declaration prayed for by him, namely that he has not contravened the provisions of Section 299(1). I shall read Section 633:

"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 has acted honestly and reasonably, 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 may 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 Subsection (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." I have no doubt that the above provision does not contemplate the granting of any declaration. The petitioner is not entitled to the declaration sought for by him.

5. The next question is whether the petition is maintainable in respect of the other reliefs. The contention is that, a person seeking to be relieved from his liability arising on account of any negligence, default, breach of duty, misfeasance or breach of trust must confess or admit his guilt, and then make out a case for being excused therefrom. In other words, a person, who contends that he has not committed any of the above things, cannot call on the Court to decide whether he is guilty or, not and to relieve him from the liability, in case he is found to be guilty. This controversy has to be resolved on a true construction of the section. Sub-section (1) of Section 633 deals with the powers of the Court in which any proceeding for negligence default, breach of duty, misfeasance or breach of trust against an officer of a company is pending. Sub-section (2) enables any such officer apprehending that any such proceeding will or might be brought against him to apply to the High Court for relief; and the High Court's power on such application is the same as it would have, if it were Court before which a proceeding under Sub-section (1) had been brought. Under Sub-section, (1) in order to grant relief to a person against whom a proceeding is pending, it is not necessary that he should confess or admit his guilt, or that the Court must find him guilty. It is sufficient that it appears to the Court "that he is or may be liable". In other words, the Court can relieve him of the liability in a case in which it appears to the Court that he may be liable. The same is the scope of the power of the High Court under Sub-section (2). It is not necessary in an application

under Subsection (2) that the applicant should confess or admit that he is guilty of any negligence, default, breach of duty, misfeasance or breach of trust, or that the Court must find that he is guilty of any of those things, before relief can be granted to him. Any officer of a company, who has reason to apprehend that any proceeding will or might be brought against him in respect of any such matter, may apply to the High Court under this sub-section for relief. All that is necessary is a reasonable apprehension of such a proceeding. In this case, the Registrar of Companies held that the petitioner has contravened Section 299 of the Act, and directed the Company to take steps to recover from the petitioner all remuneration drawn by him as director, since the date of the contravention. Hence the petitioner has reason to apprehend that proceedings may be taken against him in respect of his liabilities arising from the said contravention. The objection raised to the maintainability of this petition cannot therefore, be sustained.

6. The next question for consideration is what are the reliefs that the petitioner can be given in this case. The consequences of contravention of Section 299(1) of the Companies Act are:--

- (1) Liability to be prosecuted u/s 299(4);
- (2) Cessation of the office of directorship u/s 283(1) (i);
- (3) liability to be prosecuted u/s 283(2A); and
- (4) liability to refund to the company all remuneration received by the petitioner as director, after the cessation of his directorship.

There is no dispute that the petitioner can be relieved from consequences (1), (3) and (4) u/s 633(2) of the Act. The controversy is only whether he can be relieved from consequence (2), namely the cessation of his office of directorship occurring u/s 283(1)(i). Counsel for the petitioner submitted that cessation of directorship is also a liability arising from the contravention of Section 299(i) of the Act, and that the petitioner can be relieved u/s 63(2) from the said liability. I am unable to agree. By ceasing to be a director, he does not incur any liability, whether civil or criminal. He only loses an office; and it is the consequence of a statutory mandate. There is no provision in the Act to restore to him that office under any circumstance. All that Section 633(2) provides is to empower the High Court to relieve a person, who may be liable in a proceeding that might be taken against him in any Court for negligence, default, breach of duty, misfeasance or breach of trust from. his liability, subject to the conditions mentioned in the said section. Speaking of the scope of this provision, Raman Nayar, J. in *Pothen v. Registrar of Companies* 1965 KLT 1124 stated:--

"What this Court can do under Subsection (2) of Section 633 is to relieve the officer in the same manner and to the same extent as a Court, before which a proceeding in respect of the default has been initiated, could do under Sub-section (1). Therefore it follows that relief can be granted under Sub-section (2)

only in respect of a matter for which a proceeding could be brought in a Court. And that, only to the extent to which the Court before which it could be brought could itself grant. Now the liability in respect of which a Court can grant relief under Sub-section (1) of Sec. 633 can only be a liability which that Court itself could enforce; the Court cannot give the defaulter complete absolution in respect of all liability arising from his default." If I may say so with respect, the above statement contains a very lucid exposition of the true scope of Sub-section (2) of Section 633.

7. Reference may also be made to the following passage in the judgment of Shelat J. in *in re In Re: Tolaram Jalan and Others*, :

"Section 633 under which the relief is sought is identical with Section 372 of the English Companies Act of 1929. Subsection (1) of Section 633 contemplates proceedings for negligence default, breach of duty, misfeasance or breach of trust against an officer of a company and gives power to the Court hearing the case in certain circumstances to grant relief. Sub-section (2) gives power on the other hand to the High Court to grant relief against a prospective liability in respect of a claim that an officer of a company apprehends might be made against him in regard to negligence, default, breach of duty, misfeasance or breach of trust. Now. it is clear that whereas Sub-section (1) refers to proceedings already commenced, Sub-section (2) contemplates a claim which is anticipated as one which might be made in future. Under sub-section (1) the important words are "the Court hearing the case" which obviously mean the Court before which a proceeding is pending. These words, therefore, mean that it would not be this Court which can grant relief under Sub-section (1) but the Court before whom the proceeding has commenced and is pending. Sub-section (2) on the other hand, creates a fiction and provides that in respect of an apprehended claim this Court shall have the same power to grant relief as it would have had under this section if it had been the Court before which proceedings for negligence, default, breach of duty, misfeasance or breach of trust had been brought."

The same view has been taken by P. B. Mukharji J., in *in re. In Re: Coal Marketing Co. India Private Ltd.*, . In the above case, the petitioners applied u/s 633(2) of the Act for being relieved from their liabilities for not holding annual general meetings and for not filing balance-sheets and profit and loss accounts within the prescribed periods. Dealing with the scope of Section 633 of the Act. the learned Judge stated:--

"The power u/s 633 is a power to relieve from liability. The expression "relieve from liability" appears in Sub-section (1) and the word "relieve" in Sub-section (2) must be read in that context, specially when it refers to the Court before which a proceeding for such negligence, default, breach of duty, misfeasance or breach of trust could be brought under sub-section (1). Relief from liability in this context means relief from the consequences, namely, fines and penalties, that follow u/s 168 of the Act from the negligence, default, breach of duty,

misfeasance or breach of trust. Relief from" liability cannot mean power to suspend operation of the Companies Act directing holding of annual general meetings or filing annual returns, balance-sheets and profit and loss accounts". I respectfully agree with the above statement of law; and I hold that Section 633(2) of the Act does not empower the High Court to relieve a director of a company from the statutory consequence of his vacating the office of directorship for contravention of Section 299(1).

8. It now remains for me to consider whether the petitioner deserves to be relieved from liability in respect of proceedings which may be taken against him for the above contravention. Before I do so, I shall deal with a contention strenuously pressed by the petitioner's counsel, that on the facts of this case, the petitioner has not contravened Section 299(1) of the Act. In order to appreciate the above contention, it is necessary to read sub-sections (1) and (2):

"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 at 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."

Clause (a) of sub-section (2) deals with a proposed contract or arrangement, and not with an existing one. That clause has obviously no application to the instant case. Clause (b) deals with any other contract or arrangement; and the petitioner's case must fall under this clause. His counsel, however, submits that this clause does not apply in the case of a contract or arrangement, which had existed before a person becomes a director, but only in the case of a contract or arrangement entered into after he becomes a director. According to him, the expression "after the director becomes concerned or interested in the contract or arrangement" means after a person becomes a director and then becomes concerned or interested in the contract or arrangement. I am unable to accept this contention. I do not think that a grammatical construction of the above clause necessarily yields to such a meaning. In my view Clause (b) applies to a case of a contract or arrangement in which a person was concerned or interested before he becomes a director, and also to a case of a contract or arrangement, in

which he becomes concerned or interested after ie becomes a director. In both cases he must disclose the nature of his concern or interest at the first meeting of the Board, after he becomes concerned or interested in it. The words "becomes concerned or interested" denote a present State of things. In the case of a person who was already concerned or interested in the contract or arrangement, the liability for disclosure arises, the moment he accepts office as director; and in the case of a person who gets concerned or interested in any contract or arrangement entered into with the Company after he becomes a director, the said liability arises the moment he becomes so concerned or interested. In both cases, the time for discharging the said liability is the first meeting of the Board held after the said person, holding the office of a director becomes concerned or interested in the contract or arrangement. The construction sought to be put by the petitioner's counsel would defeat the obvious object of the section and would lead to a ridiculous result. On the facts of the case, there is no room for doubt that, by virtue of his ownership in the business of "P. Oommen & Sons", the petitioner is interested in an arrangement with the company. Clause (b) of sub-section (2) applies to him; and he should have disclosed his interest in that arrangement at the first meeting of the Board after he became a director, which was held on 9-1-1969. The petitioner has got a case that he has disclosed his interest in the said arrangement at the meetings of the Board held on 31-1-1968 and 7-4-1969. The petitioner was re-elected as Director in August 1968; and therefore the alleged disclosure on 31-1-1968 is of no avail to him. The Registrar of Companies has stated in his affidavit that the disclosure said to have been made on 7-4-1969 does not satisfy the requirements of Sec. 299. It is sufficient for me to say that this disclosure is also of no avail to the petitioner, as he suffered all the consequences of the contravention of Section 299(1). when he failed to disclose his interest at the first meeting of the Board held on 9-1-1969.

9. On the facts of the case, I am satisfied that the petitioner acted honestly and reasonably, and that, having regard to all the circumstances, he ought to be fairly excused. The arrangement which P. Oommen & Sons had with the Company was a very old one, which the petitioner's father entered into several years ago. He became a co-owner of that business by succession on his father's death. It is not disputed that he has not been taking any direct interest in the said business, which was being managed by one of his brothers. There is also no case that the petitioner took any unfair advantage in respect of the continuance of that arrangement by virtue of his position as director. The continuance of the arrangement was also to the advantage of the Company. It is not also disputed that the interest that the petitioner had in the said arrangement as a co-owner of the above business was well-known at all times to all the directors. In these circumstances, I relieve the petitioner of all liabilities in any proceeding that might be taken against him in any Court for the contravention of Section 299(1) of the Act.

10. This petition is allowed to the above extent, and dismissed in other respects.

In the circumstances of the case, I make no order as to costs.