
(1997) 08 GUJ CK 0006
In the Gujarat High Court

Rameshchandra Manilal Kotia and Others	APPELLANT
Vs	
State of Gujarat and Another	RESPONDENT

Date of Decision : 08-08-1997

Acts Referred:

Companies Act, 1956 — Section 123, 5, 73
Penal Code, 1860 (IPC) — Section 107, 108, 109, 110, 111

Citation : (1998) 2 GLR 1222 : (1998) 3 RCR(Criminal) 458

Hon'ble Judges : N.J. Pandya, J

Bench : Single Bench

Judgement

N.J. Pandya, J.—Petition Nos. 106 of 1997, 661, 663 and 110 of 1997 are for offences under the Companies Act and Petition Nos. 662, 108, 107, 109, 664, 665, 666, 3085 and 3086 all of 1997 are for offences under the Indian Penal Code. These two groups of matters, though apparently filed for offences under different Acts, are very much interconnected not only because of the parties joined, but also because of the factual background which they share in different complaints allegedly constituting the offence under either the Companies Act or under the Indian Penal Code.

2. As many as 19 accused came to be joined in different complaints in respect of which, in all, aforesaid 13 petitions have been filed. Accused No. 1 and accused No. 7 in all the complaints are respectively a Private Limited Company and a Public Limited Company. Accused Nos. 2 to 6 are connected with accused No. 1 Company either as a Director or as a Managing Director, as the case may be. Same is the situation with regard to accused Nos. 8 to 19 in relation to accused No. 7 Company.

3. Accused No. 7 Company had decided to come out with a public issue on or about 9-12-1995 worth Rs. 446.76 lakhs. 44,67,600 Equity Shares of the face value of Rs. 10/- were, therefore, floated and offered to public.

4. The complainant, in each of the cases, had applied for the shares and had paid money also for shares being allotted to them.

5. Accused No. 1 Company was acting, as Registrar to issue, as understood under the capital issue market and regulations, statutes, etc. governing the same, though strictly speaking, under the Companies Act, they do not find any mention whatsoever. For the offences under the Companies Act, therefore, if at all there be any one responsible, it would be accused No. 7 Company and all or any of its Directors from accused Nos. 8 to 19. As a corollary thereto for offences, if any, under the Companies Act, accused No. 1 Company which will now be referred to as "Registrar to issue", and its Directors from Nos. 2 to 6 could not be held responsible.

6. So far as the complaints are concerned, either it be under the Companies Act or under the Indian Penal Code, the averments made are identical and except for the change to be found as to the reference of provisions constituting the alleged offences either under the Companies Act or under the Indian Penal Code and this is the only difference to be found between the two sets of complaints.

7. In this background, all the matters are being disposed of by this common judgment with the consent of the parties.

8. The grievance made in the complaint is that the original complainants, though had paid the amount and had fulfilled all other conditions as to the allotment, were not given the share certificates. Had this been the only base, probably, there would have been hardly any discussion with regard to the alleged offences particularly for accused Nos. 7 to 19. To an extent, probably, accused Nos. 1 to 6 also should be held responsible.

9. However, the facts, as borne out from the record is that, after the closure date of the public issue, within reasonable time, the various applicants to the issue should receive the share certificates, or intimation as to allotment, but the complainants did not get any definite information. So far as the original share certificates are concerned, it is an agreed position that the complainants did not receive the same.

10. However, the complaints that came to be filed on or about 18-3-1996 was preceded by exchange of correspondence between the complainant and accused No. 7 Company, as also with accused No. 1 Company. The prompt response of accused Nos. 1 and 7 Company was that though the share certificates are despatched, in case they are not received by the respective allottee/applicant, the Company is prepared to undertake the exercise of issuing duplicate share certificates for which the allottee/applicant will have to comply with certain requirements. The requirements were public advertisements as to the loss, proposed issue of duplicate shares, as also about the indemnity bond valid for one year atleast required to be given, so that fraudulent transfer can be taken care of.

11. This exchange took place between the parties on different dates starting on or about 14-1-1996. As a result, public advertisements came to be issued for duplicate shares and the original accused No. 7 also passed necessary resolution

and issued duplicate share certificates.

12. The aforesaid different petitions now being disposed of by this order were preceded by earlier petitions being M.C.A. No. 1571 of 1996 and M.C.A. No. 6334 of 1996 with M.C.A. Nos. 2451, 1581, 1591, 1598 and 1599 all of 1996. Except for M.C.A. No. 6334 of 1996, which came to be withdrawn, rest were dismissed by different learned Judges of This Court on different dates. However, in course of these different applications and petitions as well as during the pendency of the present applications and petitions, duplicate share certificates for each of the complainants came to be deposited with the Registrar of the High Court.

13. Civil litigation also was initiated in the Court of City Civil Court of Ahmedabad being Civil Suit No. 985 of 1996 and others. The reliefs claimed thereunder are very interesting. The suit is filed against accused No. 1 and accused No. 1 Company joining them as defendant Nos. 1 & 2 respectively. The other defendants are: No. 3-President, Ahmedabad Stock Exchange, No. 4-Secretary, Bombay Stock Exchange, No. 5-Executive Director by name one Mr. Rao of Securities and Exchange Board of India (SEBI), No. 6-SEBI, No 7-Registrar of the Companies, State of Gujarat, Ahmedabad, No. 8-Company Law Board, Western Region, Bombay.

14. The relief claimed was (1) licence of defendant No. 1, i.e., accused No. 1-Company be cancelled by defendants 3 to 8 and the whole issue of defendant No. 2 Company, i.e., accused No. 7 also be cancelled by the said defendants. Alternatively, it was prayed that if defendant Nos. 3 to 8 are not able to cancel the licence of defendant No. 1, i.e., accused No. 1 Company and likewise, if they are unable to cancel the trading in the issue of defendant No. 2, i.e., accused No. 7 Company, the Court should grant relief in respect of both the said defendant-Companies.

15. By way of cause of action, averments made in para 5 of the plaint to the effect that the shares which were allotted to the plaintiff were never sent to them and in spite of that, they have conspired together to fabricate false certificates which have been submitted before the defendants Nos. 3 to 8. Neither share certificates are sent by registered post, nor share certificates were despatched to the plaintiff by either of the said two defendant-Companies.

16. The said suit No. 985 of 1996 has a reference to earlier suit No. 580 of 1996 filed against accused No. 7-Company as defendant No. 1, defendant No. 2-President of Ahmedabad Stock Exchange, defendant No. 3-accused No. 1 Company and Bombay Stock Exchange, as defendant No. 4. The averment made in the plaint is to the effect that shares worth Rs. 2 lakhs have been allotted to the plaintiff, but the certificates are not delivered and the said two defendants are likely to transfer the same illegally and make huge profit. In this background, injunction was sought.

17. It is thus clear that the money that was paid by way of either stock-invest or cheque was received by the Company and in turn, shares were allotted.

Certificates were not received by the respective applicant/allottees and therefore, procedure for issuing duplicate certificates was initiated and duplicate share certificates having thus been issued after cancelling the original certificates, the entire set of duplicate share certificates has been deposited with the High Court Registry.

18. The details given above are taken from the record that has been produced in application No. 106 of 1997. Pages 10 to 15 relate to duplicate share certificates, advertisements, etc. Papers relating to civil suits are produced from page 16 onwards.

19. Copy of the complaint is at pages 40 to 50. It is for offence u/s 73 read with Section 123 of the Companies Act. The complaint for offences under different sections of Indian Penal Code has been read on the agreed position between the parties and it is produced at pages 40 to 50. The offences disclosed are Sections 197, 403, 421, 464, 466, 468, 471 of I.P.C.

20. So far as the petitioners before the Court in different applications are concerned, they are original accused Nos. 3, 4, 8, 9, 13 and 15. As the complaints pending before the trial Court have not been challenged by all accused and particularly with regard to the offence under the Companies Act and the matter has to be dealt with in two clear parts with reference to respective accused Nos. 1 to 6 and 7 to 19, obviously, it will not be proper to enter into the merits of the case. To the extent necessary, I will be referring to the provisions of various offences and to the extent possible, without reference to the merits of various allegations, the plea of the respective applicant-petitions will be decided as to whether complaint against all or any of them be quashed or not. So far as the offences under the Companies Act are concerned, obviously, accused Nos. 3 and 4 will get a relief as they have nothing to do with accused No. 7-Company which floated the issue. Section 73 of the Companies Act deals with allotment of shares and debentures to be dealt with in Stock Exchange. Assuming that, no shares have been allotted to the complainant, who may or may not be the plaintiff in the civil suit, the fact remains that, that is the responsibility of accused Nos. 3 and 4. They have connection with accused No. 1 Company which had undertaken the work of the Registrar to the issue. The Registrar will handle the application and will act on the basis of the allotment made by the Company that has floated the shares. Obviously, therefore, the alleged offences under the Companies Act, cannot even remotely be levelled against the petitioner Nos. 3 and 4.

21. In relation to the remaining petitioners who are accused Nos. 8, 9, 13 and 15, the case will have to be considered on the basis of the definition given in Section 5 of the Companies Act as to the officer of the defaulter-Company. Section 73 in the event of default, makes the Company and every Director of the Company who is an officer in default, liable.

22. When Section 5 is referred to for this purpose, primarily the person required

to answer the charge will be the Managing Director, Full-time Director or Directors, the Manager, the Secretary or any person in accordance with whose directions or instructions the Board of Directors of the Company is required to act. The averments made in the complaint are totally silent in this regard and when the complaint is considered in connection with said 4 accused Nos. 8, 9, 13 and 15 and when they are not shown to be falling into any of the aforesaid categories, obviously, they cannot be held answerable for the alleged offence under the Companies Act. Merely because they are Directors, they cannot be held responsible. There are two more provisions in Section 5 indicating that a person may be charged by the Board with responsibility of complying with the provisions of the Companies Act or a Company that does not have any of the officer specified over here, then Director or Directors, who may be specified by the Board in this behalf can be held answerable. As this is not the situation, in the instant case, obviously, these provisions will not be attracted.

23. I fail to understand as to how Section 123 of the Companies Act is attracted.

24. Now comes the question of offences under the Indian Penal Code. The first and foremost section required to be considered for the purpose is Section 197, which reads as under:

Whoever issues or signs any certificate required by law to be given or signed or relating to any fact of which such certificate is by law admissible in evidence, knowing or believing that such certificate is false in any material point, shall be punished in the same manner, as if he gave false evidence.

Rest of the allegations are based on the alleged forged certificates said to have been given by the accused in collusion with each other. When a specific question was asked to the learned Advocate for the respondent-complainant Mr. R.B. Desai with Shri Y.S. Lakhani as Senior Counsel, the following certificate was read over. It reads as under:

This is to certify that we have completed on 22nd January 1996 the despatch of all share certificates, refund orders, justation brokerage cheques and cancelled stockinvest to all investors/brokers including stockinvest applicants of M-TOUCH FINANCE LTD. AND we have also despatched allotment advice on 22-1-1996 to N.R.I. allottees and the share certificates to N.R.I., allottees will be despatched on receipt of R.B.I. permission.

It is an admitted position that the signatory to the certificate is not a petitioner before the Court in any of these matters. The certificate taken at its face value, merely states that the certificate is self-explanatory. Though in the complaint as well as in the plaints, there is an averment to the alleged requirement of sending share certificates by registered post, the certificate does not make any claim as to despatch having been effected by registered post. Moreover, in the background of the aforesaid provision of Section 197, if the certificate is evaluated it is not possible to hold that it is a certificate required by law to be given or signed or that it relates to any facts of which certificate, by law, is

admissible in evidence.

25. With regard to offence u/s 197, Calcutta High Court had an occasion to consider the same in the case of Prafulla Kumar Khara and Another Vs. Emperor, . The Division Bench of the Calcutta High Court, while interpreting Section 197, has held that the certificate contemplated therein must be such that it should by some provision of law be admissible in evidence as such certificate without proof. The case involved is a medical certificate and it was not a certificate that would be admissible without proof. It was held that Section 197 is not attracted. Once the aforesaid certificate is evaluated in relation to Section 197, on its own, as also coupled with the interpretation put thereon by the Calcutta High Court, it is very clear that offence u/s 197 is not made out so far as the petitioners-accused are concerned. The remaining offences have, as their base, the said certificate, but, for which there is no question of misrepresentation, forgery of document, fabrication of false evidence etc. Obviously, therefore, so far as the petitioners-accused are concerned, prima facie, no offence whatsoever is made out.

26. Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, . is also relied upon. It has been held therein that when offences alleged against a Company without clear allegation against Manager and Directors indicating that they were responsible for conduct of business and had something to do with the alleged series of acts which would amount to offences, the proceedings against Directors will have to be quashed.

27. Apart from this, when a Company is said to be an offender for the purpose of offences under the Indian Penal Code, merely because a person happens to be a Director to consider his or her involvement in the offence cannot be assumed. Involvement has to be pleaded specifically. For making out the allegation of constructive liability, either there has to be sharing of common intention, as provided in Section 34 of I.P.C. or common object, as per Sections 149, 120-B, if there is allegation of conspiracy and allegations of abetment, if made, as per Sections 107 to 114. In absence of any of these evidences, mere holding of post of Director in a Company cannot make an accused responsible for the alleged offences.

28. The provisions of the Companies Act, as made in Section 5, clearly identify, could be the officer held to be in default. Either for offence under the Companies Act or for offence under the Indian Penal Code, for the aforesaid reasons, nothing is to be found in the complaint prima facie against the accused.

29. The petitions are, therefore, required to be allowed. They are accordingly allowed. The complaints filed against the petitioners-accused are quashed. The process issued is ordered to be set aside. Rule is made absolute accordingly.