

(1997) 01 AP CK 0018

In the Andhra Pradesh High Court

Case No : Company Petition No. 47 of 1995

R.K. Mahapatra and Others

APPELLANT

Vs

Secretary To Government and Another

RESPONDENT

Date of Decision : 20-01-1997

Acts Referred:

Companies Act, 1956 — Section 211, 292, 292(1), 292(3), 49
Criminal Procedure Code, 1973 (CrPC) — Section 211, 470(1), 470(3)

Citation : (1998) 92 CompCas 809

Hon'ble Judges : S. Dasaradharama Reddy, J

Bench : Single Bench

Advocate : S. Ravi, for the Appellant; P. Innayya Reddy, Public Prosecutor, for the Respondent

Judgement

S. Dasaratharama Reddy J.

1. This is a petition filed by the managing director and former directors of Mishra Dhatu Nigam Limited (a Government of India undertaking) u/s 633(2) of the Companies Act, 1956 (for short, "the Act"), for relieving them from liability, if any, on the ground that they have acted honestly and reasonably in depositing the surplus funds of the company in SBI Capital Markets Ltd., and in ANZ Grindlays Bank. In the petition they state that the Registrar of Companies issued a show-cause notice to the company on May 3, 1995, under sections 49, 211, 292, 292(1)(d) and 292(3) of the Companies Act, 1956, alleging that the meeting of the board of directors held on July 20, 1989, authorised the managing director to deal with the surplus funds without specifying the total amount up to which they can be invested and the nature of investments, thus violating section 292(3). It is also alleged that they contravened section 292(1)(d) in making investments in non-banking institutions like SBI Capital Markets Ltd., amounting to Rs. 735 lakhs and Rs. 1,965 lakhs in the years 1990-91 and 1991-92 respectively and Rs. 310.55 lakhs with ANZ Grindlays Bank, a foreign bank, as against the authorisation of the board of directors for deploying the

funds in short term deposits in public sector undertakings and financial institutions, and these being investments ought to have been disclosed under the heading "investment" instead of "inter-corporate loans and advances" in the balance-sheets, thus violating section 211 of the Act. There is also an allegation that the alleged investments which are in the nature of portfolio management scheme were not kept in the name of the company and physical delivery of documents was not taken in contravention of section 49(9). Yet another charge is that the investment in portfolio management scheme was not entered in the prescribed register violating section 49(7) and also that the company has violated section 292 in investing the surplus funds without the approval of the President of India as required under articles 85(XII) of the articles.

2. The company gave a reply on May 29, 1995, stating that funds were deposited as short-term deposits for reasonable interest and they cannot be construed as investments requiring the approval of the President of India, that the deposits were authorised by resolution of the board of directors on July 20, 1989, that there was no portfolio management scheme requiring disclosure in the balance-sheets wherein they were shown under the head "Loans and advances", that the balance-sheets were prepared following the normal accounting procedure and the same were audited by statutory auditors and certified by the Comptroller and Auditor-General u/s section 619(2) of the Companies Act, 1956, and that they never pointed out any objection regarding this method of exhibition. The petitioners apprehend that the Registrar may launch prosecution under various provisions of the Act and accordingly seek relief u/s 633(2) on the ground that they acted honestly, reasonably and in the interest of the company and that no loss has been incurred by the company nor any personal gain accrued to the petitioners as a result of these transactions.

3. Notice before admission was issued and pending admission, stay of prosecution of the petitioners was granted in C.A. No. 170 of 1995, dated September 7, 1995, initially till September 22, 1995, and was later extended till further orders. It may be noticed here that after filing of this petition, the Registrar of Companies has launched prosecution against the company in S.T.C. Nos. 11 to 14 of 1995, for offences under sections 49(1)(a), 292, 292(1)(d) and 292(3) of the Companies Act, 1956, and in view of the stay order, the directors were not impleaded as accused in those cases.

4. The Registrar of Companies filed counter-statement that section 292(3) does not distinguish between short-term deposits and long-term deposits, that the deposits made are in the nature of investments, and that the petitioners have not acted honestly or reasonably in investing in SBI Capital Markets Ltd., and ANZ Grindlays Bank. As these investments are in the nature of portfolio management scheme, approval of the President of India is required. It is also stated that the Grindlays Bank showed the amount of Rs. 310.55 lakhs as investment in its books.

5. Mr. S. Ravi, learned counsel for the petitioners, contended that :

(1) The deployment of funds in SBI Capital Markets Ltd., and Grindlays Bank is in the nature of short-term deposit and not in the nature of portfolio management scheme and hence there is no violation of the provisions of the Act;

(2) Even assuming that they are investments in the nature of portfolio management scheme, the offences covered by S.T.C. Nos. 11 to 14 of 1995, on the file of the Special Judge for Economic Offences, Hyderabad, launched against the company by the Registrar of Companies, subsequent to the filing of the company petition, are barred by limitation and hence the petitioners are entitled to be relieved from the liability;

(3) Even as regards the failure to comply with section 49(7) for not maintaining proper register and for not taking physical delivery of documents, the Department cannot now prosecute as the limitation is over;

(4) Even as regards the offence u/s 211 for non-disclosure of investments in balance-sheets, the prosecution is barred by limitation;

(5) In any event, the petitioners have acted honestly and reasonably and in the best interests of the company and hence are entitled to be relieved of the liability.

6. Now taking the second contention first, I have held in Criminal Petitions Nos. 5871 to 5874 of 1995, by separate order, just now pronounced, that the complaints are barred by limitation and hence the petitioners are entitled to be relieved of liability from the offences, viz., failure to comply with sections 49(1) (a), 292, 292(1)(d) and 292(3) of the Companies Act, 1956.

7. As regards the third contention regarding the offence of failure to maintain proper register or for not taking physical delivery of the documents, the punishment is fine up to Rs. 5,000 u/s 49(9) of the Act and for the reasons given in the judgment in Criminal Petitions Nos. 5871 to 5874 of 1995, no prosecution can be launched against the company for this offence due to expiry of limitation, namely, six months.

8. However, regarding the offence u/s 211 which is punishable with imprisonment for a term which may extend to six months or with fine up to Rs. 1,000 or with both, the limitation will be one year. Mr. Ravi contends that the receipt of balance-sheets, namely, October 14, 1991, and October 19, 1992, for the years 1990-91 and 1991-92, respectively, has to be taken as the date of knowledge. But as already held by me in Criminal Petitions Nos. 5871 to 5874 of 1995 (See *Mishra Dhathu Nigam Ltd. Vs. State*), mere receipt of balance-sheets does not amount to knowledge of commission of the offence and the date of knowledge has to be taken as September 19, 1994, when the Department of Company Affairs would have received, in the normal course, the reply dated September 16, 1994, sent by the company to the notice dated August 19, 1994, issued by it prior to issue of prosecution notice. If this date is taken, time to launch prosecution will be up to September 19, 1995. But as the petitioners have obtained stay of prosecution on September 7, 1995, and as the stay is subsisting as on date, that period has

to be excluded u/s 470(1) of the Criminal Procedure Code, 1973. Further, the period of notice of prosecution has to be excluded u/s 470(3) of the Criminal Procedure Code, 1973. The prosecution notice was issued on May 3, 1995, and reply was given on May 29, 1995. Thus, it cannot be said that the limitation for launching prosecution u/s 211 against the petitioners is over as on date. So, the contention of Mr. Ravi is accordingly rejected so far as the offence under this section is concerned.

9. Now coming to the first contention, that the deployment of funds is in the nature of short-term deposit and not in the nature of investment, as rightly pointed out by Mr. Ramesh, this cannot be decided in these proceedings but can be decided only on a fullfledged enquiry. This contention is accordingly rejected.

10. The last plea of Mr. Ravi, learned counsel for the petitioners, is that in any event, the petitioners have acted honestly and in good faith which is seen from the fact that the company has not incurred any loss and the petitioners have not secured any personal gain. He also submits that accounts have been audited by the statutory auditors and certified by the Comptroller and Auditor-General. Mr. Ramesh on the other hand submits that there is no material to hold that the petitioners have acted reasonably and honestly.

11. It is significant to note that the averments in the petition that the company is not put to loss as a result of the transactions in question and that on the other hand, the company has gained substantial interest on its surplus funds, and that the accounts are certified by the Comptroller and Auditor-General are not denied in the counter. The question whether the deployment of funds is in the nature of short-term deposit or investment in the nature of portfolio management scheme is debatable. There is no reason why the averments in the petition that the petitioners have acted honestly and reasonably and in good faith in treating the deployment of funds as short-term deposits should not be accepted, more so, when the company is not put to any loss or the petitioners have not gained any personal advantage as a result of these transactions. In view of these circumstances, I hold that the petitioners have acted honestly, reasonably and in good faith. Accordingly, they are entitled to be relieved of the offence u/s 211 of the Act. The decision of Mr. D. H. Nasir, J. in C.P. No. 25 of 1993, dated December 6, 1995 Progressive Aluminium Ltd. and Others Vs. Registrar of Companies and Another, relied on by Mr. Ravi is not directly applicable. It was a case of misstatement in prospectus u/s 63 of the Companies Act, 1956, and on the facts of that case it was held that the directors are entitled to be relieved of their liability.

12. In the result, the petitioners are entitled to be relieved of their liability of being charged for the offences under sections 49(1)(a), 292, 292(1)(d), 292(3), 49(9) and 211 of the Companies Act, 1956, and the company petition is accordingly allowed. No costs.