(2011) 10 BOM CK 0126

In the Bombay High Court

Case No : Criminal Writ Petition No. 84 of 2010

Shri Naresh chandra Agarwal and Shri Kedarnath P. Agarwal — APPELLANT

Vs

Government of India,Ministry of Companies Affairs, Office of Registrar of Companies, Shri Sanjay kumar Gupta, Registrar of Companies — RESPONDENT

Date of Decision : 20-10-2011

Acts Referred:

Companies Act, 1956 — Section 113(2), 25(1), 25(5), 25(6), 25(7)
Company Regulations, 1956 — Regulation 18
Criminal Procedure Code, 1973 (CrPC) — Section 325(1), 468, 469, 469(1), 482

Citation : (2011) 113 BOMLR 4000

Hon'ble Judges : A.P. Lavande, J

Bench : Single Bench

Advocate : N. Sardessai, for the Appellant; M. Amonkar, Special Public Prosecutor, for the Respondent

Judgement

A.P. Lavande, J.—The Petitioners, who are the original accused Nos. 2 and 3 in Labour Case No. 43/2009/B pending before Judicial Magistrate First Class Panaji, have invoked jurisdiction of this Court u/s 482 of the Code of Criminal Procedure.

2. The Respondent filed a private complaint alleging commission of offence u/s 97(3) of The Companies Act ("The Act" for short) against the Petitioners and Ors. on the ground that they have committed offence punishable u/s 97(3) of The Act by not filing with the Registrar of the Companies notice of increase of share capital in terms of Section 97(1) of The Act.

3. Learned Magistrate, by order dated 17th February, 2010, issued process against the Petitioners and the company. The Petitioners preferred Criminal Revision Application to the Sessions Court at Panaji bearing No. 86/2010 against the order issuing process. The Petitioners annexed certain documents with the revision application before the Sessions Court in support of their stand that no offence was committed by the Petitioners. The Petitioners contended before the

revisional Court that the complaint and material produced did not disclose contravention of Section 97(3) of The Act and that complaint was barred by limitation. Additional Sessions Judge, who heard the revision application by judgment and order dated 7th October, 2010 dismissed the revision application holding that offence u/s 97(3) was continuing offence. Learned Additional Sessions Judge, held that form 5 was not filled by the Petitioners till the date of the judgment and as such offence punishable u/s 97(3) was made out.

4. Mr. Sardessai, Learned Counsel appearing for the Petitioners submitted that as on the date of filing of the complaint i.e 13th February, 2009, the complaint was barred by limitation as the material on record clearly discloses that the cause of action for filing the complaint arose on 21st June, 2006. Learned Counsel further submitted that learned Magistrate has no jurisdiction to entertain the complaint as he could not pass a sentence of fine not exceeding Rs. 10,000/- since in terms of complaint fine if imposed would go above Rs. 10,000/-. According to Learned Counsel, perusal of the complaint filed by the Respondent discloses that the complaint has been filed on the allegation that the accused had not filed form 5 within the stipulated time but the complaint does not mention that a challan was generated which the accused failed to pay. Learned Counsel further submitted that even in the show cause notice dated 27th January, 2009 issued to the Petitioners there is no reference to the challan having been generated or that there was non-payment of fees. Learned Counsel therefore submitted that on the meaningful reading of the complaint, it is evident that offence alleged is non-filing of form 5 which is not contemplated u/s 97(3) of The Act and as such, the complaint is not maintainable. According to Learned Counsel, even if it is assumed that the Petitioners have committed an offence punishable u/s 97(3) of The Act, the alleged offence came to the notice of the Respondent on 21st June, 2006 and therefore the complaint filed on 13th February, 2009 is barred by limitation u/s 468 of Code of Criminal Procedure, since the period of limitation for filing the complaint is six months for the offence punishable with fine only. Learned Counsel further submitted that there is no continuing offence as held by the Sessions Judge. Learned Counsel further submitted that reliance placed by the Respondent on the Regulations does not advance the case of the Respondent inasmuch as Regulations are made under Sections 25(1), (5) to (8) and 611 of The Act and not u/s 97 of The Act and therefore these Regulations are not attracted in the present case. Learned Counsel further submitted that a subordinate legislation like Regulation cannot provide that the particular act would constitute an offence since Regulation cannot travel beyond the Statute. It is only by valid legislation it can be provided that the particular act would amount to an offence and such an exercise is not possible by a subordinate delegated legislation.

5. According to Learned Counsel, predicates of Section 97(3) of The Act are not made out. According to Learned Counsel Sections 97 and 611 operate in different and independent fields and no prosecution is provided u/s 611 of the Act. Learned Counsel therefore submitted that the process issued against the

Petitioners is abuse of process of Court and therefore the order dated 17th February, 2010 passed by the learned Magistrate and the judgment and Order dated 7th October, 2010 passed by the learned Sessions Judge in Criminal Revision Application No. 86/2010 are liable to be quashed and set aside and Petitioners are liable to be discharged of the offence for which they have been prosecuted. In support of his submissions, Mr. Sardessai placed reliance on the following Judgments:

i. Registrar of Companies Vs. Rajshree Sugar and Chemicals Ltd. and Others, .

ii. Commissioner of Wealth Tax, Amritsar Vs. Suresh Seth, .

iii. State of Bihar Vs. Deokaran Nenshi and Another, .

iv. Bhagirath Kanoria and Others Vs. State of M. P.,

v. Webcity Infosys Ltd. Vs. Registrar of Companies (Delhi and Haryana), .

vi. National Cotton Mills and Others Vs. Assistant Registrar of Companies and Another, ,

vii. Siddhartha Sen and Another Vs. Registrar of Companies, .

viii. Anita Chadha Vs. Registrar of Companies,

6. Per contra, Mr. Amonkar, learned Special Public Prosecutor appearing on behalf of the Respondent submitted that no case has been made out by the Petitioners for exercise of inherent jurisdiction u/s 482 of Code of Criminal Procedure. Mr. Amonkar submitted that complaint is filed within a period of limitation inasmuch as offence punishable u/s 97(3) against the Petitioners is continuing offence. According to Learned Counsel, the Petitioners have not filed form 5 for increase of non-authorised capital and allotted shares beyond its authorised capital. According to Learned Counsel show cause notice was issued on the basis of master data itself which does not contain date of increase in the authorised capital. Learned Counsel further submitted that fees payable under The Act are governed by Section 611 of The Act and in terms of Section 611(2) of The Act in case of delay in filing form No. 5 relates to increase in authorised capital, fees of 2% per month has to be paid in terms of schedule ''X'' for a period of one year and at the rate of 2.5 % per month for the delay over a period of one year. According to Learned Counsel, Company and the Petitioners are liable to pay fees as per Section 611 till the default continues. Placing reliance upon Sub-Section 2 of Section 609 of The Act Mr Amonkar submitted that the Central Government is entitled to appoint Additional, Joint, Deputy and Assistant Registrar as it deems fit and also entitled to make Regulations in respect of their duties. He further submitted that the offence is clearly made out against the Petitioners and the complaint is filed within period of limitation prescribed. Mr. Amonkar placed reliance upon following Judgments:

i. Maya Rani Punj Vs. Commissioner of Income Tax, Delhi, .

ii. Amison Foods Limited and Others Vs. Registrar of Companies, .

iii. S. Irani (Sorkhab) v. M/s Dinshaw and Dinshaw and Ors. in Criminal Writ Petition No. 1379 of 1996.

7. I have carefully considered the rival submissions and perused the record and the judgments relied upon.

8. In view of the rival submissions, the following points arise for determination in the present application:

I. Whether the learned Judicial Magistrate, First Class at Panaji, has no jurisdiction to entertain the complaint?

II. Whether the offence punishable u/s 97(3) of The Act prima facie, is made out against the Petitioners?

III. Whether the complaint filed against the Petitioners is barred by limitation?

IV. whether the offence alleged against the Petitioners is continuing one?

9. Firstly, it is the case of the Petitioners that the learned Judicial Magistrate, First Class, Panaji has no jurisdiction to entertain the complaint in as much as the fine which the Petitioners are liable to pay in case of conviction for the offence punishable u/s 97(3) of The Act would exceed Rs. 10,000/- and u/s 29 of Code of Criminal Procedure., the Judicial Magistrate, First Class cannot impose the fine exceeding Rs. 10,000/-. I find absolutely no merit in this submission in as much as firstly it is not necessary for the Magistrate to impose fine of Rs. 500/- for each day if default continues and the Magistrate has discretion to impose fine which may extend to Rs. 500/- and in the event of conviction of the Petitioners, the Magistrate is entitled to impose fine not exceeding Rs. 10,000/-. Secondly, even if the learned Magistrate holds the accused / the Petitioners guilty of the offence punishable u/s 97(3) of The Act and forms an opinion that the Petitioners ought to receive the punishment more severe than that which the said Magistrate is empowered to inflict u/s 325(1) of Code of Criminal Procedure., the Magistrate is entitled to record his opinion and submit the proceedings and forward the accused to Chief Judicial Magistrate to whom he is subordinate. In terms of Section 325(3) of Code of Criminal Procedure., the Chief Judicial Magistrate to whom the proceedings are submitted, is entitled to examine the parties and recall and examine any witness and take further evidence and pass such judgment and the sentence or order as he thinks fit. Therefore, this contention of the Petitioners has absolutely no merit and deserves to be rejected and is hereby rejected.

10. It is the further the case of the Petitioners that the offence punishable u/s 97(3) of The Act is not made out since in terms Section 97(3) when the share capital of the Company is increased beyond the authorised capital, the Company has to file with Registrar notice of the increase of capital, within 30 days after passing of the resolution authorising the increase and the Registrar has to record

increase and also make any alterations which may be necessary in the Company''s Memorandum and Articles or both. It is further the case of the Petitioners that Section 97(3) of The Act does not prescribe the payment of any fees and, therefore, the prosecution which is initiated against the Petitioners for non-payment of fees is not tenable in as much as the Companies'' Regulation, 1956 are not applicable nor there is any averment in the complaint that the prosecution is being launched also on account of non-payment of fees as prescribed.

11. I do not find any merit in the submission made on behalf of the Petitioners in as much as the Regulations have been framed in exercise of the powers conferred under the provisions of The Act. Regulation 18 provides that no document required or authorised by or under the Act to be registered, recorded or filed by or with the Registrar shall be registered, recorded and taken on file until fee, if any, payable in respect thereof under Schedule X to the Act and any additional fee imposed by the Registrar u/s 611(2) are paid. Admittedly, under Schedule X to the Act fees are payable when the share capital of the Company is increased. It is also pertinent to note that this Court is exercising the jurisdiction u/s 482 of Code of Criminal Procedure. and as such, is not entitled to go into the validity of the Regulations passed. It is the case of the Respondents that pursuant to the receipt of information given on 21st June, 2006 regarding increase of share capital, challan was generated for payment which was required to be paid within two weeks. The Petitioners did not pay the same. It is the case of the Petitioners that the Petitioners were never informed about the generation of the challan. All these disputed questions of facts cannot be decided in exercise of jurisdiction u/s 482 of Code of Criminal Procedure. and these disputed facts can be decided by the Magistrate after giving opportunity of leading evidence to the parties. Therefore, the contention of the Petitioners that no prosecution can be launched against the Petitioners for the offence punishable u/s 97(3) of The Act on the ground of non-payment of fees, is also not tenable.

12. The next contention of the Petitioners is that the complaint is barred by limitation. It is the case of the Petitioners that at least on 21st June, 2006, the complainant had knowledge that the Petitioners had committed an offence punishable u/s 97(3) of The Act and, therefore, the complaint filed on 13th February, 2009 was barred by limitation in terms of Section 468 of Code of Criminal Procedure., having been filed after six months.

13. In order to appreciate the argument, it would be appropriate to consider provisions of Sections 468 and 469 of Code of Criminal Procedure. Section 468 of Code of Criminal Procedure. provides that no Court shall take cognizance of offence punishable with fine after the expiry of period of six months. Section 469(1) of Code of Criminal Procedure. provides that

The period of limitation in relation to an offender, shall commence,

(a) on the date of the offence or

(b) where the commission of offence was not known to the person aggrieved by the offence or to any police officer, the first day on which such offence comes to knowledge of such person or to any police officer, whichever is earlier."

14. In the case of Registrar of Companies v. Rajshree Sugar and Chemicals Ltd. and Ors. (supra) relied upon by Mr. Sardessai, the Apex Court was dealing with a complaint alleging the commission of offence by Respondent punishable u/s 113(2) of the Companies Act filed by the Registrar of Companies u/s 621 after expiry of six months from the date of offence, but within the period of six months from the date on which the offence came to knowledge of Registrar. The Apex Court held that complaint was within the period of limitation u/s 469(1)(b) of Code of Criminal Procedure. since the expression "person aggrieved" used therein included Registrar of Companies. The Apex Court held that there was no bar for taking cognizance of offence.

15. In the present case, in the complaint, it has been stated that the cause of action for filing the complaint arose on 27th January, 2009; default was commenced on 27th January, 2009 and the offence is continuing within the meaning of Section 469 of Code of Criminal Procedure. The Petitioners have not placed any conclusive material on record to establish that the Registrar had knowledge of commission of offence punishable u/s 97(3) of The Act on 21st June, 2006 or on any particular date. Whether the Respondent could be said to have knowledge of the increase of share capital on 21st June, 2006, is a matter which can be decided after the evidence is led in the case. It is also to be noted that the proceedings u/s 482 of Code of Criminal Procedure. cannot be equated to mini-trial and inherent jurisdiction of this Court can be exercised for making such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of process of any Court or otherwise to secure the ends of justice. If the accused is able to make out by cogent material that prosecution against him or her is entirely barred by limitation, this Court in exercise of jurisdiction u/s 482 of Code of Criminal Procedure. has jurisdiction to pass appropriate orders quashing the criminal proceedings, but in the present case, the materials produced by the Petitioners do not conclusively establish that the Respondent had knowledge about the commission of offence u/s 97(3) of Code of Criminal Procedure. on 21st June, 2006 or on any particular date. Therefore, the issue of limitation has to be decided by the Magistrate depending upon the nature of the evidence that would be led by the complainant and the accused before the learned Magistrate. The question of limitation being mixed question of law and fact, considering the factual background in the present case, it is difficult to accept the submission made on behalf of the Petitioners that the complaint is barred by limitation and as such, the proceedings against the Petitioners deserve to be quashed. Needless to mention that the Petitioners are entitled to contend before the Magistrate that the complaint filed by the Respondent is barred by limitation either by leading evidence or by cross-examining the witnesses on behalf of the prosecution in the criminal case.

16. In so far as the issue as to whether the offence is continuing offence or not is concerned, in view of the finding given above that the complaint on the face of it cannot be held to be barred by limitation, it would be neither appropriate nor necessary for me to go into this question at this stage. However, the finding given by the learned Additional Sessions Judge in Criminal Revision Application No. 86/2010 that the offence is continuing offence deserves to be quashed and set aside and is hereby set aside. The question as to whether the offence is continuing offence is kept open and the Petitioners are at liberty to urge this point before the learned Magistrate, if occasion arises.

17. In view of the findings given hereinabove, I do not deem it necessary to refer to the several authorities referred to by and on behalf of the Petitioners as well as the Respondent. In my considered opinion, the matter has to go back before the learned Magistrate in view of the findings given hereinabove.

18. In view of the above discussion, the matter is remanded to the learned Magistrate, who shall decide the Labour Case No. 43/09/B in the light of the findings given and the observations made hereinabove. Interim order dated 16th November, 2010 stands vacated. The Petitioners to appear before the learned Judicial Magistrate, First Class, Panaji on 22nd November, 2011 at 10.00 a.m.

20. Writ Petition stands disposed of in aforesaid terms with no order as to costs.