
(2009) 03 OHC CK 0030
In the Orissa High Court

Siddhartha Sen and Another

APPELLANT

Vs

Registrar of Companies

RESPONDENT

Date of Decision : 27-03-2009

Acts Referred:

COMPANIES ACT, 1956 — Section 159, 162, 192, 211, 220
Criminal Procedure Code, 1973 (CrPC) — Section 468, 472
Mines Act, 1952 — Section 66, 79

Citation : (2009) CLT 1111 (Suppl CrI) : (2009) CriLJ 4078 : (2009) 1 OLR 267
Supp : (2010) 7 RCR(Criminal) 974

Hon'ble Judges : Indrajit Mahanty, J

Bench : Single Bench

Judgement

Indrajit Mahanty, J.—The above noted batch of twenty Criminal Misc. Cases have been filed by the petitioners seeking to challenge the registration of 2(C)CC case Nos. 366 to 385 of 2001 before the Court of the learned A. C. J. M. (Spl.), Cuttack under Sections 159, 162 and 220(3) of the Companies Act, 1956 and also seeks to challenge the consequential summons issued to the petitioners apart from seeking to challenge the order dated 25-9-2001 taking cognizance in the aforesaid cases.

2. Mr. Bijay Ku. Mahanti, learned Sr. Advocate appearing for the petitioners contended that filing of the aforesaid complaint cases and the order dated 25-9-2001 taking cognizance against the petitioners is hopelessly barred by limitation. In the present case, complaints have been lodged for infraction of Sections 159, 162 and 220 of the Companies Act, 1956. Whereas Section 159 mandates filing of annual return within 60 days from the day on which Annual General Body Meeting was held, Section 162 stipulates penalty for non-compliance of the requirement of Section 159 with fine which may extend to fifty rupees for every day during which the default continues. Section 220 requires filing of balance sheet as well as profit and loss account within thirty days from the date on which the balance sheet and the profit and the loss account were laid before the Annual General Body Meeting and in default, prescribed for a penalty

as contemplated u/s 162 of the Companies Act, i.e., fine at the rate of Rs. 50/- per each day of default. It is further submitted that since the offences complained of contemplated levy of fine only, u/s 468(2) Cr. P.C. the period of limitation/bar to take cognizance stipulates that after lapse of the period of limitation stipulated therein is six months since the offences are punishable with fine only. According to the petitioners, the complaints having been lodged much after the period of limitation, the learned A. C. J. M. could not have taken cognizance of the offences alleged. In this respect, reliance was placed on a judgment of this Court in the case of NALCO and Others Vs. Registrar of Companies and Others, .

Further, on the proposition of failure to file return u/s 159 is a non-continuous offence and the cognizance thereof should have been taken within six months from the date, of commission of offence. In this respect, reliance was placed on a decision reported in the case of Pravin Jha v. State of U. P. and Anr. (2001) 106 CompCas 554. Relying on the above, it was stated that the complaint was filed by the Registrar of Companies after more than 11 years whereas the statutory period was within six months. Therefore, the complaint by the opposite party Registrar against the present petitioner is hopelessly barred by limitation.

3. Reliance was placed by the petitioners on a judgment of the Apex Court in the case of Commissioner of Wealth Tax, Amritsar Vs. Suresh Seth, wherein the failure to file a return on the due date was held to be "non-continuing wrong". Non-filing of return under the Wealth Tax Act was held to be an Act of non-continuous wrong giving rise to a "single default" and to a single penalty and the default, if any, is committed on the last date allowed to file the return. Such default cannot be held to be one committed every month thereafter. The provision for computing penalty on the basis of delay in every month indicate "only the multiplier" to be adopted in determining the quantum of penalty and do not have the effect of making the default in question a continuing one.

4. Learned Counsel for the petitioners has submitted a chart showing the date on which the annual return/balance sheet were filed before the Registrar of the Companies as well as the date on which the period of limitation expires and the date when the complaint was filed in different cases as well as the date when the cognizance was taken. The said chart is quoted below for convenience:

	Balance Sheet	Date for filing Return before 6 months	Complaint Date of Sheet, the Registrar of Companies	limitation petition	Cognizance	Profit for filed & initiation loss proceeding, A/c Offence and punishable Annual with fine Return only.	Year
							1989-90
		30-10-90 (Under Section 220)	30-11-90 (Under Section 159/162)	31-03-91			25-09-2001
							1990-91
		30-10-91 (Under Section 220)	30-11-91 (Under Section 159/162)	31-03-92			25-09-2001

-----	1991-92
30-10-92 (Under Section 220) 30-11-92 (Under Section 159/162) 31-03-93	
25-09-2001	25-09-2001
-----	1992-93
30-10-93 (Under Section 220) 30-11-93 (Under Section 159/162) 31-03-94	
25-09-2001	25-09-2001
-----	1993-94
30-10-94 (Under Section 220) 30-11-94 (Under Section 159/162) 31-03-95	
25-09-2001	25-09-2001
-----	1994-95
30-10-95 (Under Section 220) 30-11-95 (Under Section 159/162) 31-03-96	
25-09-2001	25-09-2001
-----	1995-96
30-10-96 (Under Section 220) 30-11-96 (Under Section 159/162) 31-03-97	
25-09-2001	25-09-2001
-----	1996-97
30-10-97 (Under Section 220) 30-11-97 (Under Section 159/162) 31-03-98	
25-09-2001	25-09-2001
-----	1997-98
30-10-98 (Under Section 220) 30-11-98 (Under Section 159/162) 31-03-99	
25-09-2001	25-09-2001
-----	1998-99
30-10-99 (Under Section 220) 30-11-99 (Under Section 159/162) 30-04-2000	
25-09-2001	25-09-2001

30-05-2000	

5. In this respect, it is further contended that petitioner No. 2- Company was registered on 15-1-1986 with an object of establishing an insulation project and had submitted its balance-sheet, statement of accounts and annual returns for the financial years ending on 31st March, 1987, 1988 and 1989 under the signature of one P.C. Das as the Managing Director and Sri S. K. Bhose as the Director. Accordingly, he submitted that since the signature of petitioner No. 1- Siddhartha Sen does not appear in any document, the said Sri Sen could not be termed as "an officer-in-default" nor as "a person in accordance with whose direction or instructions the company was accustomed to act". In this regard, reliance is placed on Section 5 of the Companies Act, 1956 and for convenience, the same is quoted hereinbelow:

Section 5. Meaning of "officer who is in default"

- For the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any punishment or penalty, whether by way of imprisonment, fine or otherwise, the expression "officer who is in default" means all the following officers of the company, namely:

(a) the managing director or managing directors;

- (b) the whole-time director or whole-time directors;
- (c) the manager;
- (d) the secretary;
- (e) any person in accordance with whose directions or instructions the Board of directors of the company is accustomed to act;
- (f) any person charged by the Board with the responsibility of complying with that provision;

Provided that the person so charged has given his consent in this behalf to the Board;

(g) where any company does not have any of the officers specified in Clauses (a) to (c), any director or directors who may be specified by the Board in this behalf or where no director is so specified, all the directors:

Provided that where the Board exercises any power under Clause (f) or Clause (g), it shall, within thirty days of the exercise of such powers, file with the Registrar a return in the prescribed form.)

6. Mr. Mahanty, learned Counsel appearing for the petitioners submitted that the annual returns and balance sheet filed for three financial years, i.e. 1986-87, 1987-88 and 1988-89 it would be clearly noticed that the Company could not proceed with the construction of the project and there was no activities carried out by the company, therefore, it was unanimously decided to dissolve the company and request was made to the Registrar of the Companies, Orissa to strike out the name from the register and declare it as a defunct company. It is further submitted that an application was filed by petitioner No. 2-Company on 30-12-2003 for striking out the name of the company u/s 560 of the Companies Act under simplified exit scheme and in terms of the said application the name of the company has, in fact, been struck off from the registrar of companies and the evidence of the same has been enclosed as Enclosed-D to the memorandum filed by the petitioners on 16-3-2009. Accordingly, Mr. Mahanti submitted that no real purpose would be served in continuing with the prosecution of petitioner No. 1 since the Company no longer subsists and has been struck off from the register of the Companies and the Company, in fact, has never carried out any business activities.

7. Mr. Mahanti, further submitted that since Shri P.C. Das has filed the annual returns indicating his own status as Managing Director and therefore, at best, he alone could have been prosecuted as the "Officer-in-default" as contemplated u/s 5 of the Companies Act, 1956 and all other Directors including petitioner No. 1 Siddhartha Sen should not have been proceeded against, since, admittedly he was merely a Director, and had no role to play in the administration of the Company. He further submitted that Shri P.C. Das, Managing Director was also proceeded against by the Registrar of the Companies by way of filing a complaint

case and the said proceeding was compounded by him depositing necessary fees/penalty. In this respect, Mr. Mohanti submitted that in other words, the Registrar of the Companies having accepted the compounding fees from said P.C. Das, Managing Director tantamounts to the Registrar of the Companies accepting the fact that said P.C. Das was the "Officer-in-default" and having accepted the compounding fees from him, no further proceeding against any other Director, far less, the present petitioner No. 1 can be continued in law.

8. A further contention has been raised on behalf of petitioner No. 1 to the effect that petitioner No. 1's resignation from the Board of Directors was accepted on 30-9-1989 and even though Form 32 was filed by the Company under Annexure-4 on 2(3-11-2001, the resignation should have been given effect from, the date of acceptance of resignation by the Board, i.e. on 30-9-1989 and not the date of filing of Form-32. In this respect, reliance was placed on the judgment of the Hon'ble Madras High Court in the case of Ashok Muthanna v. Wipro Finance Ltd. (2001) 105 CompCas 203 for the proposition that a Director who has resigned, would be deemed to have been resigned from the date of his resignation.

9. Mr. P. K. Parhi, learned Counsel appearing for the opposite party-Registrar of Companies, on the other hand, submitted that the defaulting company, namely, M/s. Eastern Insulation Company Pvt. Ltd. was registered on 15-1-1986 as a Private Ltd. Company under Companies Act, 1956 and as the Company and its "Officers-in-default" had not filed the statutory return for the years 1990 to 1999, necessary prosecution u/s 159/162(2) and Section 220(3) of the Companies Act have been launched in the Court of the learned A. C. J. M. (Spl.) Cuttack on 25-9-2001. He further submitted that in terms of Section 5 of the Companies Act, 1956, the expression "officer-in-default" is defined to mean "officers of the company" and placing reliance on Section 5(g) he claims to be applicable to the present case, since only the names of the Directors had been indicated, and further since, the company had not filed Form-32. The Board's Resolution for appointing the Managing Director as provided u/s 192(1) of the Companies Act and Clause (C) of Sub-section (4) of Section 192 which provides, inter alia, "any resolution of the Board of Directors of the Company or agreement executed by a company, relating to the appointment, re-appointment or renewal of the appointment, or variation of the terms of the appointment, of a Managing Director", is required to be filed in Form-32. Mr. Parhi further contended that the offences alleged against the officers of the Company are "continuing offences" u/s 472 Cr. P.C. and the bar of limitation does not apply to the instant case. In this respect, reliance was placed on a decision of the Supreme Court in the case of State of Bihar Vs. Deokaran Nenshi and Another, to the following effect:

Continuing Offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves penalty the liability for which continues until the

rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and recurs there is the offence continuing. The distinction between the two kinds of offences is between an act or omission which constitute an offence once and for all and an act or omission which continues and therefore constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence there is thus the ingredient of continuance of the offences which is absent in the case of an offence which takes place when an act or omission is committed once and for all.

10. Insofar as the alleged resignation of petitioner No. 1 is concerned, it is submitted that no Form No. 32 was filed in the office of the Registrar of the Companies before institution of the instant case on 25-9-2001 and, therefore, cognizance of the letter of declaration of filing of Form No. 32 is of no consequence.

11. Insofar as reliance placed by the Petitioner on the judgment of this Court in the case of NALCO and Ors. (supra), it is asserted that prosecution in that case had been lodged u/s 211 of the Companies Act and not u/s 159, 162(1) and 220(3) of the Companies Act as has been made in the present case. It is asserted that the test laid down in the case of State of Bihar Vs. Deokaran Nenshi and Another, should be applied to the facts of the present case and non-filing of the annual return must be held to be "continuous offence" as contemplated u/s 472 Cr. P.C. Accordingly, Shri Parhi submitted that the present Criminal Misc. Case should be dismissed being without any merit.

12. On consideration of the submissions made and as have been narrated herein-above, I am of the considered view that the present case can be decided by adjudicating essentially the most important issue, as to whether an offence under the Companies Act of the nature alleged in the present case is a "continuous offence" or not?

In the case of State of Bihar v. Deokaran Nenshi, Hon^{ble} Supreme Court held that a "continuous offence" is one which is susceptible of continuous and is distinguishable from the one which is committed once and for all. In the said case the Hon^{ble} Supreme Court was dealing with an offence under the Mines Act, 1952. Section 66 of the Mines Act, 1952 provides that any person omitting inter alia, to furnish any return notice etc. in the prescribed form or manner or act or within the prescribed time required by or under the Act to be made or furnished shall be punishable with fine which may extend to Rs. 1000/-. Section 79 however, lays down that no Court shall take cognizance of any offence under this Act unless a complaint thereof has been made within six months from the date on which the offence is alleged to have been committed or within six months from the date on which the alleged commission of the offence came to the knowledge of the Inspector, whichever is later. In the facts of the said case, the respondent, who was the owner of the stone quarry had failed to furnish to the Chief Inspector the annual returns for the year 1959 by the 21st of January, 1960. Although the Chief Inspector under the letter dated 28-3-1960 drew the

attention of the respondent to the said failure in filing necessary return, and had even threatened with initiation of proceeding unless return is filed by 11-4-1960, the complaint was lodged on 12-4-1961. In the facts of the aforesaid case, a question arose whether complaint was barred of limitation on having been filed one year after the default. Considering this issue, the Hon"ble Supreme Court also noted that failure to furnish the annual return either in the prescribed forms or within the time prescribed for it, i.e. 21-1-1960 in the succeeding year is undoubtedly an offence punishable u/s 66 of the Mines Act, a complaint in respect of such offence has to be filed within six months from the date of such default u/s 79, in the aforesaid case, within six months from 21-1-1960. It was held that if the offence is only u/s 79 and not under the Explanation thereto, the complaint was clearly time barred. The Explanation to Section 79 was held only to operate in "continuing offences". Their Lordships ultimately came to conclude that in paragraph-10 of the judgment that the High Court was right in holding that the complaint was time barrel as the offence in question fell within the substantive part of Section 79 of the Act and not under the Explanation attached thereto. Therefore, I am of the considered view that the aforesaid judgment does not support the contention raised by Mr. Parhi appearing for the Registrar of the Companies and on the contrary, supports the contention of the petitioner in this case.

13. The aforesaid view also gets further support from the law laid down by the Supreme Court in the case of Commissioner of Wealth Tax, Amritsar Vs. Suresh Seth, . In the said case the Hon"ble Supreme Court while dealing with levy of penalty for failure to file return under the Wealth Tax Act, categorically came to conclude that failure to file return under the Wealth Tax Act before the due date gives rise to a single default and to a single penalty. Admittedly, non-filing of return amounts to an act of non-performance and the measure of levy of such penalty is to be computed from the time lag between the last date on which the return has to be filed and the date on which it is filed. But the default, if any, is committed on the last date allowed to file the return and such default cannot be held to be committed every month thereafter. No doubt under the Companies Act, penalty of Rs. 50/- has to be imposed for every day during which the default continues. But similar to the Wealth Tax Act, the penalty that is leviable under the said stipulation is merely a "multiplier" to be adopted in determining the quantum of penalty and does not have the effect of making the default in question a continuing one.

Their Lordships of the Supreme Court came to hold that the distinctive nature of a continuing wrong is that the law that is violated makes the wrongdoer continuously liable for penalty. A wrong or default which is complete but whose effect may continue to be felt even after its completion is, however, not a continuing wrong or default.

14. In the light of the aforesaid discussions, I have no hesitation to hold that the offence alleged in complaint against the petitioner is not a "continuous wrong"

and therefore, the bar to take cognizance as contemplated u/s 468(2)(b) Cr. P.C. applies to the, complaint lodged in the present case and therefore, taking cognizance of such an offence after more than 11 years is clearly beyond the period of limitation prescribed and is clearly barred in law. Consequently, it is no longer necessary to deal with the other contentions raised on behalf of the petitioner and, therefore, without entering into the other issues raised in course of argument, the criminal misc. cases are allowed. The order of cognizance dated 25-9-2001 and the summons issued in the aforesaid cases are set aside, but in the circumstances without costs.

Criminal Miscellaneous Cases are allowed.