

(2014) 06 AP CK 0170

In the Andhra Pradesh High Court

Case No : Company Appeal Nos. 4 and 5 of 2014

Union of India

APPELLANT

Vs

Tech. Mahindra Limited

RESPONDENT

Date of Decision : 23-06-2014

Acts Referred:

Companies Act, 1956 — Section 10-F, 162, 220, 220(1), 220(3)
Criminal Procedure Code, 1973 (CrPC) — Section 357

Citation : (2014) 186 CompCas 501

Hon'ble Judges : C.V. Nagarjuna Reddy, J

Bench : Single Bench

Advocate : C. Raghu, Advocate for the Appellant; S. Ravi, Senior Advocate for K. Vivek Reddy, Advocate for the Respondent

Final Decision : Dismissed

Judgement

C.V. Nagarjuna Reddy, J.—These Company Appeals arise out of order, dated 16.10.2012, in Company Application Nos. 233 and 234/621A/CB/2010 of the Company Law Board, Chennai Bench, Chennai.

2. The facts, in brief, leading to the filing of these Company Appeals are stated hereunder:

3. M/s. Satyam Computer Services Limited (for short "the Company") which was subsequently renamed as Tech Mahindra Limited, in pursuance of the order of merger dated 11-6-2013 in C.P. No. 123 of 2012, and respondent No. 2, are accused in C.C. Nos. 394 and 400 of 2009 on the file of the learned Special Judge for Economic Offences, Hyderabad. C.C. No. 394 of 2009 was registered for violation of provisions of Section 309 of the Companies Act, 1956 (for short "the Act") i.e., failure of respondent No. 1-company to obtain the opinion of the Central Government before payment of remuneration to one of its Directors. C.C. No. 400 of 2009 was registered for violation of provisions of Section 220(1) read with Section 162 of the Act, i.e., failure to electronically upload the attachments to the Profit and Loss Account along with the Directors' Report before the

Registrar of Companies.

4. The Company and respondent No. 2 herein, who are accused Nos. 1 and 4 in both the CCs, filed Company Application Nos. 233 and 234 of 2010 u/s 621A of the Act for compounding the two offences before the Company Law Board. By a common order, dated 16.12.2011, the then member of the Company Law Board has declined to permit the applicants to compound the offences. Feeling aggrieved by the said order, respondent Nos. 1 and 2 have filed two statutory appeals, viz., Company Appeal Nos. 1 and 2 of 2012 before this Court. By a detailed order passed on 12.03.2012, this Court has remanded the cases to the Company Law Board for consideration of the Applications afresh in accordance with law.

5. It needs to be mentioned at this stage the reasons that prompted this Court to remand the cases. It was pleaded on behalf of respondent Nos. 1 and 2 before this Court that respondent No. 1-company was made a victim of the fraud played by its Directors; that following the fraud of a great magnitude indulged in by the then Chairman, Managing Director and other Directors of the Company, a fresh life was infused into the company by the new Management, viz., M/s. Tech-Mahindra; and that the Company itself, even before it was reconstituted after its taking over, was not an accused in the criminal cases involving the fraud by its Directors (hereinafter; referred to as "main cases" investigated by the CBI). It was further pleaded that the CBI, after investigation, found absolutely no role whatsoever by respondent No. 2-the Company Secretary (accused No. 4), which fact was informed by the CBI to the new Management of the Company, vide its letter, dated 27.08.2010 and that besides giving a clean chit to respondent No. 2-accused No. 4, the CBI has cited him as a prosecution witness in the main cases, as evident from letter, dated 7/11-7-2011, addressed to the Chairman of the Company.

6. This Court referred to the aforesaid plea advanced on behalf of the Company and respondent No. 2 in its order, dated 12.03.2012, in Company Appeal Nos. 1 and 2 of 2012 and made the observations as noted herein below:

"As noted hereinabove, C.C. Nos. 394 and 400 of 2009 have not been clubbed with the other five cases (C.C. Nos. 395 to 399 of 2009) nor has evidence been recorded in all these seven cases together. All these cases have been dealt with separately, though they are said to be listed on the same day. The letters to which Sri S. Ravi, Learned Senior Counsel, has drawn the attention of this Court to does indicate that the Ministry of Corporate Affairs of the Union of India, the CBI and the SFIO itself had no reason to suspect the involvement of Sri G. Jayaraman, Company Secretary in any of the offences in which the Chairman and Managing Director and other Directors of Satyam Computer Services Limited are said to be involved in. While it may not be appropriate for this Court to examine the authenticity of those letters, which have been relied upon by the appellants, (since these are matters which the CLB is required to examine while exercising its discretion u/s 621-A), it cannot, however, be lost sight of that, in one of the

letters addressed by the CBI, it is stated that Sri G. Jayaraman had appeared on behalf of the prosecution, and was examined as a prosecution witness. The submission of Sri S. Ravi, Learned Senior Counsel, that the erstwhile Chairman and Managing Director, and the other erstwhile Directors of the company, are no longer involved in the company's management; and the company itself was a victim of the fraud played by them, cannot be said to be without merit. These are relevant factors which the CLB should take into consideration while exercising its discretion to compound/not to compound the offences in exercise of its jurisdiction u/s 621A of the Act. Though Section 621A confers discretion on the CLB to also determine the quantum of the compounding fee, Sri S. Ravi, Learned Senior Counsel, would fairly state that the appellant company was ready and willing, if so ordered by the CLB, to pay the maximum amount prescribed u/s 621-A of the Act for compounding of such offences."

7. By the above reasoning, the learned Judge has set aside the impugned orders of the Company Law Board and remanded the compounding applications filed by the Company and respondent No. 2 to the Company Law Board for its fresh consideration in accordance with law. A further direction was given to the Company Law Board to bear in mind the contentions of the parties and the aspects noted by this Court for deciding whether or not to permit the compounding of the offences.

8. After the cases were remanded, the Company Law Board has passed a fresh order, dated 16.10.2012, whereby it has allowed the applications the Company and respondent No. 2 compounding the offences by levying the compounding fees, viz., Rs. 7,50,000/- on the Company and Rs. 50,000/- on respondent No. 2 in C.C. No. 394 of 2009 (C.A. No. 233 of 2010) and Rs. 2,50,000/- on the Company and Rs. 25,000/- on respondent No. 2 in C.C. No. 400 of 2009 (C.A. No. 234 of 2010). It is admitted the fine imposed on the Company-accused No. 1 is the maximum fine that could be imposed u/s 629A of the Act.

9. It is also apt to note in this context that after the cases were remanded, Serious Fraud Investigation Office (SFIO) which has preferred these two Company Appeals has received special notices from the Company Law Board for hearing. Having received the notices, the SFIO has not participated in the hearing. However, it has filed the present Company Appeals feeling aggrieved by the order of the Company Law Board compounding the offences.

10. Sri C. Raghu, the learned counsel for the appellant, has submitted that the order passed by the Company Law Board after remand is liable to be set aside for the simple reason that despite the categorical direction given by this Court to it to consider the scope of Section 621-A of the Act and decide whether the composition is mandatory or discretionary and also to consider the authenticity or otherwise of the letters addressed by the CBI, the Company Law Board failed to examine these aspects. Learned counsel also submitted that the Company Law Board has not assigned any reason whatsoever in support of its decision to compound the offences, which according to him, is also in violation of the

remand order of this Court.

11. Opposing the above submissions, Sri S. Ravi, the learned senior counsel appearing for the Company and respondent No. 2, has submitted that the SFIO, which has not even responded to the special notices issued by the Company Law Board and failed to participate in the proceedings before the Company Law Board after remand, cannot plead that it is aggrieved by the order passed by the Company Law Board after remand. He has further argued that assuming that the SFIO has locus in technical sense to file these appeals, it cannot succeed in the appeals for two reasons viz., (i) that no question of law arises in these appeals and (ii) that the appellant has not disputed the veracity of the letters addressed by the CBI, which clearly reveal that respondent No. 2 was completely absolved from the allegation of fraud and that on the contrary, he was cited as a prosecution witness in the main case pertaining to the fraud played by the Directors of the Company. He has, therefore, submitted that in the absence of any allegations of fraud against respondent No. 2-Company Secretary and in the light of reconstitution of the company with the new Management, there is no reason for the appellant to oppose the applications for composition. He has further submitted that the order of the Company Law Board was partly implemented by the Registrar of Companies by receiving the compounding fees, but, however, the Registrar has failed to inform the same to the criminal jurisdictional Magistrate (Special Court) on account of which, the Court is continuing the criminal proceedings.

12. I have carefully considered the submissions of the learned counsel for both parties and perused the record.

13. Before proceeding further, this Court is unable to desist from expressing its absolute dissatisfaction at the way the Company Law Board has conducted itself in disposing of the applications after remand. Despite the mandatory direction issued by this Court to consider the case afresh after taking into consideration the material relied upon by the Company and respondent No. 2, it has not bothered itself to discuss the said material. It has also failed to give any reasons whatsoever in support of its decision allowing the applications for composition.

14. Though Sri S. Ravi, learned Senior Counsel, has submitted that no question of law arises in these appeals, which is a sine qua non u/s 10-F of the Act for their maintainability, I am of the view that failure to furnish reasons by the Company Law Board allowing the applications for composition of the offences, itself gives rise to a question of law. Therefore, this Court is not inclined to throw out the appeals on the ground of absence of a question of law.

15. It is an accepted proposition of law that the jurisdiction of the appellate Court is co-extensive with that of the primary authority. Generally, while adjudicating the appeals arising u/s 10-F of the Act, High Court would not deal with questions of fact. As the Company Law Board failed to deal with the questions of fact, this Court would have set-aside the order and remanded the case to the Company

Law Board for fresh determination. But, this Court has been persuaded by the submissions of the learned Senior Counsel that the course of remand would needlessly prolong the agony of his clients and that while exercising the appellate jurisdiction, this Court may deal with the facts of the case in order to examine the correctness or otherwise of the decision of the Company Law Board to compound the offences.

16. My inclination towards delving into the facts of the case is bolstered by the Judgment of the Supreme Court in *Dale and Carrington Invt. (P) Ltd. and Another Vs. P.K. Prathapan and Others*, . In that case, the decision of the Company Law Board was set-aside by the High Court after delving deep into the facts. The aggrieved party has pleaded before the Supreme Court that the High Court has no jurisdiction u/s 10-F of the Act to deal with the findings of fact and set-aside the order of the Company Law Board. While repelling this plea, the Supreme Court held that if a finding of fact is perverse and is based on no evidence, it can be set-aside in appeal even though the appeal is permissible only on the question of law, for, perversity of a finding itself becomes a question of law. In the case on hand, the approach of the Company Law Board while dealing with the applications for composition is rather perverse.

17. These cases raise two issues - (i) whether the Company Law Board has any discretion u/s 621-A(1) of the Act not to accept the request of the accused for compounding the offences?; and (ii) whether on the facts of the case, the accused are entitled to have their offences compounded?

18. As noted above, though this Court in the earlier round of appeals left the first issue to be decided by the Company Law Board, regrettably, it has not dealt with the same. The appellant has also contributed in this regard by neglecting to appear and contest the applications despite service of special notices by the Company Law Board. Even before this Court, this issue has not been addressed by the learned counsel for either side. Hence, I do not propose to deal with the same. Instead, this Court proceeds on the premise that the Company Law Board has discretion to refuse compounding of the offences. Therefore, I will proceed to deal with the second issue.

19. The facts recorded above would reveal that the gravamen of the accusation against the accused in C.C. No. 394 of 2009 is that they have failed to obtain the opinion of the Central Government for payment of special fees to accused No. 6 as envisaged under proviso (b) to Section 309(1) of the Act. In C.C. No. 400/2009, the accused have been alleged to have failed to upload some statutory documents along with the Directors' Report. It is not in dispute that no specific penalties for violation of the provisions of the Act in this regard have been stipulated under the Act. In the absence of specific penalties provided elsewhere in the Act, the general provision i.e., Section 629-A of the Act is applicable. This provision reads as under:

"If a company or any other person contravenes any provision of this Act for

which no punishment is provided elsewhere in this Act or any condition, limitation or restriction subject to which any approval, sanction, consent, confirmation, recognition, direction or exemption in relation to any matter has been accorded, given or granted, the company and every officer of the company who is in default or such other person shall be punishable with fine which may extend to five thousand rupees, and where the contravention is a continuing one, with a further fine which may extend to five hundred rupees for every day after the first during which the contravention continues."

20. It is pertinent to note that the accused are not charged with any offences under the Indian Penal Code and no mens, rea has been attributed for allegedly violating the provisions of Sections 309 and 220(1) r/w. Section 162 of the Act. It is also not the case of the appellant that the accused have indulged in violation of the above mentioned statutory provisions with a view to make wrongful gain or defraud the shareholders or the general public. The reliefs claimed in the two complaints are as under:

C.C. No. 394/2009:

(a) the service of summons may kindly be effected upon the accused as mentioned in the complaint who have violated the requirements of provision (b) of Section 309(1) of the Act and rendered themselves liable for penal action u/s 629A of the Act and upon Shri Krishna G. Palepu, Ex-Director (Accused No. 6) as he is liable to refund to SCSL the amount of Professional charges wrongly received by him during the years 2005-06 to 2007-08 in contravention of Section 309 of the Companies Act 1956.

(b) the complainant submits that a list of documents and the witnesses to be relied upon has been annexed with the complaint. The complainant craves leave of this Hon"ble Court to refer to and to rely upon additional list of documents and witnesses, if necessary, during the course of trial.

(c) the Hon"ble Court may while convicting the accused award cost of the proceedings to the Complainant in terms of Section 357 of Cr.P.C. 1973 and Section 626 of the Companies Act, 1956.

(d) Shri Krishna G. Palepu, Ex-Director of SCSL (Accused No. 6) directed to refund to SCSL forthwith the amount of Rs. 2.66 crores wrongfully received by him as Professional charges during 2005-06 to 2007-08 as detailed in para 13 hereinabove.

(e) any further orders, which this Hon"ble Court deems fit and proper in the circumstances of the case may kindly be passed.

C.C. No. 400 of 2009:

(a) That the service of summons may kindly be effected upon the accused as mentioned in the complaint who have violated the provisions of Section 220(1) of the Act and rendered themselves liable for penal action u/s 220(3) of the Act.

(b) That, a list of documents and witnesses has been annexed with the complaint. The complainant craved leave of this Hon"ble Court to refer to and to rely upon additional list of documents and witnesses, if necessary, during the course of trial.

(c) That Hon"ble Court may while convicting the accused award cost of the proceedings to the Complainant in terms of Section 357 of Cr.P.C. 1973 and Section 626 of the Companies Act, 1956.

(d) That any such orders, which this Hon"ble Court deems fit and proper in the circumstances of the case, may kindly be passed.

As can be seen from the reliefs claimed in C.C. No. 394 of 2009, even if accused Nos. 1 and 4 are convicted by the jurisdictional Court, they are liable to be punished with fine u/s 629-A of the Act as prescribed therein and no further. Even in the event of conviction by the criminal court, the disqualification envisaged by Section 274(1)(d) and Schedule XIII of the Act may not apply to the respondent Nos. 1 and 4 who are the Company and its Secretary only. [With regard to accused No. 6, if his guilt is proved, the jurisdictional Court may direct him to refund the alleged excess remuneration. In C.C. No. 400 of 2009, the accused are liable to be sentenced to pay fine u/s 629-A of the Act, if the alleged offence is proved. This being the undisputed position, I do not find any conceivable reason for the appellant to oppose the request of accused Nos. 1 and 4 for composition of the offences.

21. Where a penal provision is made compoundable, ordinarily, the accused have an option to seek compounding of the offence rather than contesting the case and inviting a Judgment on merits. Assuming that the court or the authority conferred with the power of such composition has discretion not to compound the offence, such discretion cannot be exercised arbitrarily. Unless public interest compels such authority not to accept the request for composition of an offence, such a request cannot be refused. It is worth noticing that in the present case, it is only the company and its Chartered Accountant who are arraigned as accused Nos. 1 and 4 respectively in both the cases, who have filed the applications for composition. The Chairman, the Managing Director and the whole-time Director who are accused in these cases and also the main cases filed for fudging or falsification of accounts, have not applied for composition. Even accused No. 6 in C.C. No. 394 of 2009 against whom a direction for refund of the fees paid to him is sought, has also not applied for composition.

22. It is not out of place to note in this context that the alleged; confessional statement of accused No. 3 i.e., the erstwhile Chairman of the Company has thrown the whole company into; a deep crisis. With the intervention of the Central Government and the Company Law Board, the affairs of the company were put back on the rails. Indeed, in his order dated 16-4-2009 the Chairman of the Company Law Board, Principal Bench, New Delhi, whereby he has permitted reconstitution of the company following global tenders has titled the said order

metaphorically as "Adoption of orphan. Satyam" or "Orphan Satyam adopted". The new management i.e., M/s. Tech Mahindra which has taken over the company has stabilized the sinking ship and ensured that the Company is pulled from the depths of darkness to its past glory. It would therefore be wholly inequitable to subject the revamped company to needless criminal prosecutions when it has gracefully decided to put a quietus to the vexing problem of prosecution. It would be a travesty of justice, if the Company, after its revamp is subjected to persecution.

23. As regards accused No. 4, he is also presently the Company Secretary. In the previous round of appeal, he has placed before this Court, copies of letters dated 27-8-2010 and 7/11-7-2011 addressed by the Central Bureau of Investigation to the C.F.O. of Mahindra Satyam and the Chairman of the Company, respectively, which in unequivocal terms show that it has given a clean chit to accused No. 4, and, on the contrary he has been examined as; a prosecution witness in the main case (Satyam scam case). The Authenticity of these letters has not been disputed by the appellant before the Company Law Board. At the hearing before this Courts Sri C. Raghu, the learned counsel for the appellant, has fairly admitted the authenticity of these letters. Thus, I have no hesitation to hold that the refusal to compound the offences on behalf of accused Nos. 1 and 4 in both these cases causes grave and immense prejudice to their interests. On the contrary, instead of affecting public interest, composition of the offences would serve public interest as the Company, after its reconstitution would be encouraged to function with more zeal and efficiency by getting rid of the needless criminal prosecution.

24. This Court, indeed is unable to appreciate the conduct of the appellant herein in needlessly filing these appeals knowing well that accused Nos. 1 and 4 have no complicity in the alleged commission of the scam with respect to which separate prosecution has been launched. Such conduct on the part of the appellant would only encourage frivolous and vexatious litigation and discourage entrepreneurs with positive approach to undertake the arduous task of resuscitating the discredited companies such as the company in question.

25. On the analysis as above and for the reasons mentioned which are supplied to fortify the conclusions of the Company Law Board, the appeals must fail.

26. The Registrar of Companies, who is stated to have already received penalty from accused Nos. 1 and 4 and issued Form-21 is directed to inform the learned Special Judge for Economic Offences, Hyderabad before whom C.C. Nos. 394 and 400 of 2009 are pending about the composition of the offences qua accused Nos. 1 and 4 as envisaged u/s 621-A(3)(d) of the Act within one week from the date of receipt of this order.

27. Before parting with this case, this Court will have a qualm of conscience if it does not place on record its thorough dissatisfaction at the manner in which the Company Law Board has dealt with the case. This court is unable to fathom the

mind-set of the Member of the Company Law Board, Chennai Bench, in being delightfully oblivious of his responsibility to carry out the direction of this Court given in its order dated 12-3-2012 in C.A. Nos. 1 and 2 of 2012. The Member, Company Law Board, will do well to realize that he has neither option nor discretion in carrying out the directions of superior courts. Any failure or laxity on his part to religiously follow the mandate given by superior courts would not only bring the institution to disrepute in public esteem but also expose himself to the risk of contempt as well. The Secretary, Ministry of Corporate Affairs, Government of India, New Delhi, is directed to closely watch the performance of the Member of the Company Law Board, Chennai Bench and do the needful to set-right the functioning of the Bench at Chennai.

28. In the result, the Company Appeals are dismissed with costs of Rs. 10,000/- in each appeal payable to respondent No. 1.

29. As a sequel to the dismissal of the Company Appeals, Company Applications Nos. 530 and 536 of 2014, filed in the respective Company Appeals for interim relief, are disposed of as infructuous.