IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 31.01.2019
PRONOUNCED ON : 26.04.2019

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM
Crl.OP.No.653 of 2012
and
M.P.Nos.1 & 3 of 2012

1.Dinesh Dalmia
2. K.V. Omprakash ...Petitioners/Accused

Vs.

M.O. Roy ..Respondent/complainant

PRAYER: Criminal Original Petition filed under Section 482 of Cr.P.C, praying to call for the records and to quash the complaint in C.C.No.115 of 2006 on the file of the Additional Chief Metropolitan Magistrate Court, Economic Offences Court-I, Egmore, Chennai.

For Petitioners : Mr.Prakash Goklaney

For Respondent : Mr.G. Rajagopal, Senior Counsel for Mr.V.Venkatesan, Senior Central Government Standing Counsel

O R D E R

This petition has been filed by the accused Nos.2 and 3 to quash the proceedings against them in C.C.No.115 of 2006 on the file of the Additional Chief Metropolitan Magistrate (Economic Offences Court-I) Egmore, Chennai.

2. The respondent herein had filed a complaint alleging that A1 is the Company in which A2 and A3 are the Managing Directors and Company Secretary and they are the officers in default during the relevant period within the meaning of Section 5 of the Companies Act, 1956. He further stated that on scrutiny of balance sheet of the Company as on 31.12.2000, it was found that the authorised share capital of A-1 was Rs.75 Crores consisting of 5,00,00,000/- equity shares of Rs.10/-each and Rs.25,000/- redeemable preference shares of Rs.100/- each and

its subscribed called-up share capital was Rs.30,55,00000/- consisting of 3,32,50,000/-equity shares of Rs.10/- each amounting to Rs.33,25,00,000/- hence called unpaid amount to Rs.2,70,00,000/-. He further stated that in the compounding applications, A1 has stated that 17 million equity shares allotted to the share holders of Fortuna Technologies Inc. Sunny Vale, California, USA on 12.01.2001 increasing the subscribed capital of Accused No.1 to the tune of Rs.50,25,00,000/- consisting of Rs.50,25,00,000/- consisting of Rs.10/- each. Further as per Form No.2 filed by the Accused No.1, with Registrar of Companies, Chennai on 07.03.2001, the Accused No.1 allotted 24,825/- equity shares of Rs.10/- each thereby increasing the subscribed capital to Rs.50,27,48,250/- consisting of 5,02,74,825 equity shares of Rs.10/- each. He further stated that while making such allotments, company allotted equity shares more than the number of equity shares specified in authorised share capital Clause in its Memorandum of Association, hence contravened the provisions of Section 97 of the Companies Act, 1956. He further stated that 30,00,000 equity shares to New Vision Investments Ltd., 60,00,000/- equity shares to Technology Trust, the Trustee Dinesh Dalmia; 40,00,000/- equity shares to Softee Corporation Trustee Dr. Suryanil Ghosh; 40,00,000/- to the New Vision Investments Pvt. Ltd., He further stated that to rectify its mistake of issuing equity shares in excess number of equity shares specified in Capital Clause in its memorandum of Association company passed an ordinary resolution on 28.02.2001 and re-classified its Authorised Share Capital into 7,50,00,000 equity shares of Rs.10/- each as against the present classification of 5,00,00,000. Equity shares of Rs.10/- each and 25,00,000 Redeemable Preference Share of Rs.100/- each and filed Form No.5 to this effect with Registrar only on 07.08.2001. He further stated that there is a delay of 207 days in filing Form No.5 and hence the accused persons are liable to be prosecuted under Section 97 under Sub section (3) of 97 of the Companies Act, 1956.

3. Based on the aforesaid complaint, the learned Additional Chief Metropolitan Magistrate (Economic Offences Court-I) Egmore, Chennai in C.C.No.115 of 2016 had issued summons to the accused persons. After receipt of summons, the Accused Nos.2 and 3 have filed the present petition under Section 482 Cr.P.C., to quash the proceedings against them in C.C.No.115 of 2006 on the file of the Additional Chief Metropolitan Magistrate (Economic Offences Court-I) Egmore, Chennai.

4. Heard Mr.Prakash Goklaney, learned counsel for the petitioners and Mr.G.Rajagopal, learned Additional Solicitor General for Mr.V.Venkatesan, Senior Central Government Standing Counsel.

5. The learned counsel for the petitioners has submitted that the first accused Company did not contravene the provisions of the Companies Act as they had filed the required Form No.5 with the Registrar of Companies on 07.08.2001. He further submitted that the first accused company had filed the Form No.5 belatedly after 207 days and for the same had face proceedings before the Company Law Board and before the Regional Director, Southern Region, Chennai and both had passed compounding orders dated 29.11.2002 and 02.12.2012 respectively. He further submitted that since compounding orders had been passed by the Company Law Board and also by Regional Director, the respondent is not entitled to prosecute the petitioners. He further submitted that the offence under Section 97 (3) of the Act is punishable with fine only and alleged offence is said to have been committed in the year 2001. He further submitted that as per Section 468 Cr.P.C., in respect of the offences punishable with fine only, the limitation prescribed is only six months where as in this case, the complaint was filed only in the year 2006 for the offence said to have been committed in the year 2001 and therefore, the complaint is barred by limitation. Therefore, he prayed to quash the proceedings against the petitioners in the above C.C.

6. Per contra, the learned Additional Solicitor General has submitted that as per Sub -section (1) of Section 97 of the Act where a Company having a share capital, has increased its share capital beyond the authorised capital, it shall file with the Registrar, notice of the increase of the capital of members within 30 days after passing of the resolution, but in this case, the notice was filed with the Registrar with a delay of 207 days. He further submitted that the aforesaid act is punishable under Sub-section (3) of Section 97 of the Act and as per the said Section, the Company and every officer of the Company who is in default shall be punishable with fine which may extend to Rs.500/- for everyday during which the default continues and therefore the aforesaid offence is a continuing offence . He further submitted that as per Section 472 Cr.P.C, the aforesaid complaint is not barred by limitation. He further submitted that the petitioners herein had already filed a writ petition in W.P.No.32922 of 2003 challenging the appointment of the respondent herein as Inspector to investigate the affairs of the company and the said writ petition has been allowed and as against the same, the Ministry of Finance, Department of Company affairs, Sastri Bhavan New Delhi had filed W.A.No.595 of 2005 and the same has been allowed by the Hon'ble First Bench of this court on 27.04.2005 and thereby set aside the order passed by the Single Judge. He further submitted that this is the second round of litigation and there is no merit in this petition. He further submitted that there is a prima facie case

against the petitioners herein to proceed in the aforesaid case and therefore, he prayed to dismiss the petition.

7. It is seen from the copy of the order passed by the Hon'ble First Bench of this court in W.A.No.595 of 2005 dated 27.04.2005 that the first accused Company has filed a writ petition in W.P.No.32922 of 2003 before this court challenging the order of appointment of the respondent herein as inspector to investigate the affairs of the first accused company and the same was allowed. As against the same, the Ministry of Finance, Department of Company affairs Sastri Bhavan, New Delhi, had filed a Writ Appeal in W.A.No.595 of 2005 and the Hon'ble First Bench of this court by the judgment dated 27.04.2005 had allowed the said Writ Appeal and set aside the order passed by the learned Single Judge in W.P.No.32922 of 2003. Thereafter, the respondent herein filed a private complaint before the Additional Chief Metropolitan Magistrate alleging that the accused company and the petitioners herein have committed offence under Section 97 (3) of the Act. The petitioners have filed the present petition to quash the proceedings against them.

8. According to the respondent/complainant, the first accused is a public limited company incorporated under the Companies Act, 1956 with its Registered office at Chennai. The accused No.2 is the Managing Director and the Accused No.3 is the Secretary of the A1 company. His further case is that A1 was required to file with the Registrar, notice of the increase of capital of members within 30 days after the passing of the resolution authorising the increase and the Registrar shall record such increase and to make any alterations which may be necessary in the company Memorandum of Association and Articles of Association. His further case is that the first accused company has not filed the required Form No.5 in time and there is a delay of 207 days and hence, the accused Nos.1 to 3 have committed offence punishable under Section 97 (3) of the Companies Act.

9. The petitioners have not disputed the fact that they have submitted notice with the Registrar of Companies with a delay of 207 days. So, it is clear that they have violated the provisions of Sub-section(1) of Section 97 of Act. But their contention is that in respect of the aforesaid contravention, already proceedings initiated before Company Law Board (CLB) and Regional Director, Southern Region, Chennai and compounding orders were issued by the CLB and Regional Director and hence for the same act, criminal complaint cannot be filed. Whether they have compounded the matter or not is a question of fact and the same cannot be decided in this petition. Further, the petitioners have not shown any provision of law that if the

matter is compounded before CLB or Regional Director, Criminal prosecution cannot be launched.

10. Another contention of the petitioners is that the complaint is barred by limitation. Hence, we have to see Sub-Section (3) of Section 97 which reads thus:

> "(3) If default is made in complying with this Section, the company and every officer of the company who is in default, shall be punishable with fine which may extend to [five hundred] rupees for every day during which the default continues."

11. A plain reading of the aforesaid provision would show that if default is made in complying with the aforesaid section, the company and every officer of the company who is in default shall be punished with fine which may extend to Rs.500/- for every day during which the default continues. The aforesaid offence is a continuing offence. As per section 472 of Cr.PC., in the case of a continuing offence, a fresh period of limitation shall begin to run at every moment of the time during which the offence continues. In this case, as already pointed out that it is not the case of the petitioners that they have submitted notice within the time prescribed under Sub-section (1) 97 of the Act. Therefore, it is the continuing offence and the complaint is not barred by limitation. Therefore, this court is of the view that there is a prima facie case to proceed against the petitioners under the aforesaid provision of law.

12. In the result, this petition is dismissed. Consequently, connected miscellaneous petitions are closed. If really the petitioners have compounded the matter, it is open to them to produce the materials before the trial court and establish that they have not committed any offence. The trial court is directed to dispose of the case in C.C.No.115 of 2006 uninfluenced by the observations made by this court in this order.

s/d-
Assistant Registrar(CS-III)

True Copy

Sub-Assistant Registrar

gv

To

1. The Additional Chief Metropolitan Magistrate Court,
   Economic Offences Court-I,
   Egmore, Chennai.

+2 CCS to Mr.PRakash Goklaney, Advocate sr 41056.
+1 CC to Dr.V.Venkatesan, Advocate sr 41482.

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and
MP.Nos.1 & 3 of 2012

SPD(CO)
SP(30/07/2019)