

\$~8 & 9 (*common order*)

IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on:- 9 January, 2019

+ CRL.M.C. 4003/2016 and Crl.M.A.16758/2016

YOGESH CHANDRA GOYAL & ANR. Petitioners

Through: Mr. Purvesh Buttan, Advocate
with Mr. Fahad Imtiaz,
Advocate

versus

KAMLESH KUMAR GOEL & ORS Respondents

Through: Mr. Rajat Aneja, Advocate with
Mr. Sambit Nanda, &
Mr. Akshit Kapur, Advocates

+ CRL.M.C. 4013/2016 and Crl.M.A.16790-16791/2016

YOGESH CHANDRA GOYAL & ANR. Petitioners

Through: Mr. Purvesh Buttan, Advocate
with Mr. Fahad Imtiaz,
Advocate

versus

M/S GLORY APARTMENT PVT LTD & ORS.... Respondents

Through: Mr. Rajat Aneja, Advocate with
Mr. Sambit Nanda, &
Mr. Akshit Kapur, Advocates

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

ORDER (ORAL)

1. The petitioners had instituted criminal complaint (No.146/3 of 2012) alleging offences punishable under Sections 630 of the

Companies Act, 1956 and Sections 406/408/441 of Indian Penal Code, 1860 (IPC) against Kamlesh Kumar Goel (first respondent in CrI.M.C.4003/2016) and M/s. Glory Apartment Pvt. Ltd. (first respondent in CrI.M.C.4013/2016).

2. On the basis of preliminary inquiry initially held, the Additional Chief Metropolitan Magistrate (ACMM), by order dated 02.06.2012, had found case made out for issuance of process. The said order was challenged in the court of sessions both by Kamlesh Kumar Goel (the person described as the first accused) as also by M/s. Glory Apartment Pvt. Ltd. (referred to as the second accused), invoking the revisional jurisdiction (by CrI.Rev. Petition Nos.62/2012 and 70/2012). Both the petitions were allowed by order dated 08.07.2013, setting aside the summoning order dated 02.06.2012 but, remanding the complaint case for reconsideration of the evidence and to pass a speaking order thereupon. The said revisional order was challenged before this court, *inter alia*, by CrI.MC. 4319/2013 and 4321/2013 which was permitted to be withdrawn and dismissed accordingly, by order dated 15.05.2014, directions being reiterated that the metropolitan magistrate was expected to pass a speaking order.

3. After the remand by the revisional court, the ACMM held further inquiry under Sections 200 and 202 of the Code of Criminal Procedure, 1973 (Cr.P.C.) and permitted, on request being made, additional evidence to be adduced.

4. Three witnesses were examined at the pre-summoning inquiry including the first petitioner (co-complainant) seeking support from the evidence of two others, viz., Ms. Balika Sharma, Company

Secretary (CW-2) and Sub-Inspector Rakesh Yadav (CW-3). The ACMM, by order dated 15.09.2015, found once again that a case was made out for issuance of process. He, however, restricted the initiation of criminal action to the offence under Section 630 of the Companies Act, 1956 observing that there was no material on record to proceed for offences punishable under Sections 406/408/441 IPC.

5. The fresh summoning order dated 15.09.2015 was challenged (by the first respondent in these petitions) once again in the court of sessions invoking its revisional jurisdiction by filing criminal revision petitions (CR.Nos.28 and 29/2015). The said petitions were decided by the revisional court by a common order dated 02.04.2016. The revisional court, *inter alia*, concluded that the Board Resolution dated 02.04.2012 on the strength of which the first petitioner had presented the complaint for himself and on behalf of the complainant company (the second petitioner), “*appeared*” to be “*invalid and non est*”, this being the conclusion on the basis of impression gathered from a document presented by the respondents that in the year 2003 Mr. Ravi Kumar Lal, one of the directors, had resigned and thereafter the company was left with only two directors, this attracting the provision contained in Section 252 of the Companies Act, 1956 making the company dysfunctional and further that there was material indicating that the annual reports/balance sheets of the company in compliance with the statutory requirements were not being filed till 2009, this reflecting that the company was “*not doing any work*” nor any meetings of its Board of Directors was being held “*probably*” due to the fact that the company lacked quorum or competency. Though the

eventual decision of the revisional court did not turn on such conclusion, it was also observed, *inter alia*, in the impugned order that relationship between the complainants (*i.e.*, the petitioners) on one hand and of the first respondent in CrI.M.C.4003/2016 on the other did not “*appear to be of such nature*” that it can be interpreted as that of “*employer and employee*” so as to attract the penal clause in Section 630 of the Companies Act, 1956. As a result of the order dated 02.04.2016, the proceedings arising out of the aforementioned criminal complaint case were brought to an end.

6. Feeling aggrieved, the complainants have come up with these petitions invoking the inherent power and jurisdiction of this court under Section 482 Cr.P.C. submitting that there has been a serious miscarriage of justice on account of an uncalled intervention by the revisional court in a manner which was not permissible in law, impressions having been gathered from material which was extraneous and tentative conclusions drawn therefrom having resulted in findings on facts being returned, the circumspection within which the revisional court was to be exercised having been forgotten.

7. The learned counsel for the first respondent in these petitions vigorously opposed the prayer of the petitioners submitting that the revisional court has made a very detailed scrutiny of the background facts and has taken a balanced view, the parties being involved in litigation of various kind including certain complaint cases or FIRs instituted at the instance of the respondents against the petitioners, there being a case made out in such other proceedings about misappropriation of the property of the company in whose name the

complaint has been filed, it also being his submission that the Board Resolution on which reliance is placed, is a fabricated document.

8. Both sides have been heard at length and with the assistance of the learned counsel the record in entirety has been perused. Certain facts which come out as indisputable may be noted at the outset.

9. It is an admitted case of Kamlesh Kumar Goel (first respondent in Crl.M.C.4003/2016) that he was a director of the second petitioner (the complainant company) till he resigned on 25.09.2003, this fact having been formally communicated to the Registrar of Companies (ROC) by submission of Form No.32. There is abundant material presented in the pre-summoning inquiry to show that the property described as one bearing No.203/204, AJ Chambers, Karol Bagh, New Delhi is owned by the complainant company, it having been purchased by two separate sale deeds dated 03.07.1996, for valuable consideration. It is also substantiated by substantive material on record that the said premises is the registered office of complainant company in the records of ROC as well, this *prima facie* confirming the complaint and the evidence of CW-1 and CW-2 that the company has been operating from a portion of the said property throughout. It is also shown by substantive evidence presented in the pre-summoning inquiry that the company described as M/s. Glory Apartment Pvt. Ltd. has been functional from a part of said property, its address being described as 204, AJ Chambers, 4th Street, Naiwalan, Karol Bagh, New Delhi, the said company (described as the company accused) being controlled by Kamlesh Kumar Goel (described as the first accused). There are documents, including certain statements and

evidence gathered during investigation into FIR No.308/2009 of Police Station Pachim Vihar, confirming that Kamlesh Kumar Goel (person described as first accused) has been in continued use of the said premises 204, AJ Chambers, Karol Bagh, New Delhi till date, this in spite of he having resigned *w.e.f.* 25.09.2003 from the Board of Directors of the complainant company which owns the said premises.

10. It has been the case of the complainants that the first petitioner and Kamlesh Kumar Goel (the first accused) had had certain differences on account of which they had fallen apart, this leading to his eventual resignation from the Board of directors of the company. It has also been the case of the complainants that the Kamlesh Kumar Goel had come to occupy the premises in property No. 204, AJ Chambers, Karol Bagh, New Delhi on account of he being the director of the complainant company, the premises over which he, thus, acquired dominion also containing the official records and other moveable property of the company, it including the computer, printer, furniture, fixtures, etc. It has been the case of the petitioner that in spite of demand to return, the respondent Kamlesh Kumar Goel has continued to illegally and unlawfully occupy the property of the company, retaining its moveable properties as well, without any valid, proper or lawful justification.

11. The petitioners (the complainants) had led evidence to substantiate their case in the pre-summoning inquiry not only to bring on record supportive material to confirm that the property in question is owned by the complainant company and that dominion over it and the moveable property lying therein had come in the hands of the

persons sought to be prosecuted on account of the first accused being the erstwhile director of the complainant company, as indeed authorization for filing the complaint. The ACMM, however, apparently by way of abundant caution had called for a confirmation from the ROC. A report styled as “written statement on behalf of ROC” was submitted by the Assistant Registrar of Companies, NCT of Delhi and Haryana before the ACMM. Pertinent to note here that the said report indicated that in terms of the last annual report dated 30.09.2002 there were seven directors on the Board, these including the first petitioner as also Kamlesh Kumar Goel (the first accused), the latter having resigned *w.e.f.* 25.09.2003. The ROC also confirmed that the compliance with the statutory requirements of submissions for issuance of DIN had been made by three directors, these including the first petitioner (Yogesh Chandra Goyal), the others being Ravi Kumar Lal and Vishal Goyal. This *prima facie* showed, to the satisfaction of the ACMM that the complainant company was properly functional, including in terms of the statutory requirement of Section 252 of the Companies Act, 1956, vis-à-vis the prescription of “*minimum number of directors*”.

12. Before the revisional court, the prime argument raised by the persons summoned as accused was that Ravi Kumar Lal, one of the three directors mentioned in the report of ROC had resigned on 20.03.2003 and, therefore, the complainant company did not fulfill the prescription of Section 252(1) of the Companies Act, 1956, the number of directors on its Board having fallen to the figure of two. In order to satisfy the revisional court on this issue, the persons

summoned as accused placed reliance on communication dated 04.08.2015 which was addressed by Assistant Registrar of Companies to the complainant company, such communication having emanated on the basis of complaint from M/s. Glory Apartment Pvt. Ltd. (the company accused). The revisional court first observed that the documents of defence could not be seen at the stage of revisional scrutiny of the summoning order. But then, it went on to take into consideration the copy of the letter dated 04.08.2015 observing that it was “a public document”.

13. The crucial parts of the impugned order on the basis of which the complaint case of the petitioners has been thrown out may be taken note of verbatim. The same reading thus:-

“19. the petitioner has filed alongwith the present revision petitions a letter dated 04.08.15 issued by the Assistant Registrar of Companies notifying the Company H that after the resignation of one Ravi Kumar Lal on 20.03.2003, it has been seen that DIN-3 in the year 2008 had been filed by Sh. Yogesh Chandra Goel intimating the DIN numbers of three directors namely Sh. Yogesh Chandra Goel, Sh. Vishal Goel and Sh. Ravi Kumar Lal. Therefore, as per section 252 of the Companies Act, 1956 a limited company is required to have at least 3 directors on the Board. But from the above complaint it appears that after the resignation of Sh. Ravi Kumar Lal in 2003 and thereafter filing the requirement of Section 252 of the Companies Act, 1956. In view of the above, explanation was sought from the Company H as to how the compliance of Section 303 (2) for non-filing of Form 32 for resignation of Mr. Ravi Kumar Lal has been made and also to explain as to how the compliance of Section 252 of Companies Act, 1956 has been made.

Though, the document of the defence cannot be seen at this stage in view of the judgment State of Orissa vs. Debendra Nath Padhi (2005) 1 SCC 568, but at the same time, the said document is a public document issued by public authority and it goes into the root of the controversy and during the course of arguments, the authenticity of the said document had not been rebutted by Ld. Counsel for the respondent. In any case, Ld. Counsel for the respondent has himself also filed number of documents alongwith his reply to the application dated 15.02.2016 filed by the petitioner, many of which are also public documents from the office of Registrar of Companies. Therefore, the same can be looked into. From the said document, it appears that even ROC had issued notice to the Company H that as per Section 252 of the Companies Act, 1956, they were required to have at least three directors on the Board, being a limited company, but after the resignation of Ravi Kumar Lal, there were only two directors and the said letter was dated 04.08.2015 and no contrary recent document(s) have been shown by the Ld. Dcounsel for respondent after that of 04.08. 2015 in suport of his contention that there were more than three directors at the time of filing of the complaint in the year 2012.”

“22....competency of the complainant to file the complaint in question appears to be totally lacking, rather there appears to be total lack of competence. Further, from the perusal of the Trial Court Record it appears that one complaint case bearing no. 1531/2010 titled Registrar of Companies vs. M/s Himgiri Fincap Ltd. In which the respondent was also accused no.2, was filed by the Registrar of Companies before the Court of Ld. ACMM, Tis Hazari Courts u/s 162/220 (3) for violation of 159 and 220 of Companies Act 1956, as it was observed in the said complaint that annual returns/balance sheet upto year 2009 were not being filed which was in violation of the provisions of the Companies Act. This also shows that the Company H was not doing any work nor any board meetings were taking place, probably due to the fact that

Company lacked quorum/competency to hold any board meetings, as the company was not having minimum number of three directors for passing a valid resolution for doing any work/business under the Companies Act.”

“24. From the aforesaid judgment it is apparent that a Director as an independent Director has no power to act on behalf of the Company. He is only one of a body of Directors called the Board of Directors and alone he has no power except such as may be delegated to him by the Board of Directors or given to him by the articles of association of a company. In this case, as discussed above, the Company H was not having minimum of three directors which is sine qua non for a limited company to be active as per the Companies Act, that is to say that it is alive and functioning having competency to pass board resolution (s) and to do all the ancillary business for effective running of the company. For that a limited Company incorporated under the Companies Act 1956, ought to have three directors for a minimum without which it is not competent to pass any resolution or to do any business, as same would be violative of the provisions of the Companies Act. Therefore, the board resolution dated 02.04.2012 purportedly passed by the Board of Directors of the Company H authorizing the respondent to file the present complaint before Ld. ACMM u/s 630 of the Companies Act with regard to premises No. 203-204, A.J. Chambers, 4th Street, Naiwala, Karol Bagh, New Delhi appears to be invalid and non est”.

14. This court agrees that the submissions of the petitioners that the approach of the revisional court was wholly erroneous and in breach of the circumspection within which it was expected to subject the material on record to scrutiny. The communication dated 04.08.2015, at best, is one whereby the explanation of the complainant company had been solicited by the ROC. It cannot be treated as the whole or

complete truth of the matter. Whether or not the resignation tendered by Ravi Kumar Lal on 02.03.2003 had become effective was a question of fact which required proper inquiry or trial. Mere tender of resignation could not have been treated as effective resignation having reduced the number of Board of directors as per statutory requirement. The report of ROC, as submitted pursuant to directions of the ACMM, had shown facts to the contrary. Mr. Ravi Kumar Lal may have continued to be on the Board, as is the argument of the petitioners, which is why the requirements in his regard for issuance of DIN were also fulfilled in due course.

15. Questions of fact cannot be addressed properly in revisional jurisdiction unless unimpeachable evidence of sterling quality is presented which could be acted upon. Mere issuance of a notice seeking explanation has been treated as the last word on the subject. The observations of the revisional court as noted above, reveal that the conclusions were tentative but have resulted in definitive findings on facts which is wholly improper.

16. As regards the issue whether a case of “*employer-employee*” relationship between the complainant company and the first accused can be assumed, all that needs to be observed here is that the revisional court failed to notice that the penal clause contained in Section 630 of Companies Act, 1956 is not restricted to wrongful withholding of company property by its “employee”. The penal clause as contained in Section 630(1) reads thus:-

“630. Penalty for wrongful withholding of property.

(1) If any officer or employee of a company-

(a) wrongfully obtains possession of any property of a company; or

(b) having any such property in his possession, wrongfully withholds it or knowingly applies it to purposes other than those expressed or directed in the articles and authorised by this Act,

he shall, on the complaint of the company or any creditor or contributory thereof, be punishable with fine which may extend to ten thousand rupees.”

17. The expression “officer”, as appearing in the above penal clause, is defined by Section 2(30) of the Companies Act, 1956, thus:-

“(30)(i) “officer” includes any director, managing agent, secretaries and treasuries, manager or secretary, (ii) or any person in accordance with whose directions or instructions the Board of directors or any one or more of the directors is or are accustomed to act.”

18. It is clear from the above that the first accused Kamlesh Kumar Goel, being a director of the company, would be covered under the description “officer” as used in Section 630 of the Companies Act, 1956 and there is no escape from his accountability to restore and return the property of the company over which he may have had acquired dominion during the period he was associated with it.

19. For the above reasons, the impugned order of the revisional court is found to be wholly erroneous and, thus, must be set aside. At the same time, this court also finds substance in the submissions of the petitioners that the order of summoning passed by the ACMM was also deficient in that in spite of there being sufficient material presented in the pre-summoning inquiry, the summoning order does

not cover criminal prosecution for offences of criminal breach of trust or criminal trespass.

20. There is no inhibition in law that if the company seeks prosecution for the offence under Section 630 of the Companies Act, 1956, it cannot invoke the penal provisions under the general law, as provided in the Indian Penal Code, 1860. There is clear evidence adduced in the pre-summoning inquiry indicating that Kamlesh Kumar Goel (the first accused) had acquired dominion over the aforementioned premises of the complainant company on account of he being then a director on its Board. His acquiring dominion over the said immoveable property, and the moveable properties referred to earlier lying therein, initially may have been lawful. But then, they remained property – immoveable and moveables – over which he had no title of his own. They belong to the complainant company. His possession of the premises became unlawful, after he had resigned from the Board of directors, in the wake of which event he was duty bound to restore its possession to the lawful owner. His control over the moveable properties of the complainant company lying in the premises was also in the nature of trust. After he had resigned from the Board of directors he was obliged in law, particularly on demand being made to such effect (as is alleged), to return the said moveable property to its original owner and failure to do so would *prima facie* constitute the offence of criminal breach of trust.

21. In these circumstances, the complainants' request for summoning order to be passed additionally for offences under Section 408 IPC and 447 IPC should also have been properly construed,

considered and granted. The order of the ACMM dated 15.09.2015 declining to pass summoning order for such offences does not set out any reasons worth the name for such disinclination, rendering it vitiated.

22. For the foregoing reasons, the petitions are allowed. The impugned order dated 02.04.2016 of the Additional Sessions Judge in Criminal Revision Petition Nos.28 and 29/2015 setting aside the summoning order dated 15.09.2015 passed by the ACMM on the criminal complaint of the petitioners is vacated. The order of the ACMM summoning the respondents stands restored with modification to the effect that the respondent Kamlesh Kumar Goel shall also stand summoned additionally on the accusations for offences punishable under Sections 408/447 IPC.

23. The complaint case shall be taken up by the ACMM concerned on 18.02.2019 for further proceedings in accordance with law.

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R.K.GAUBA, J.

JANUARY 09, 2019

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