

\$~15 & 16 (*common order*)

IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on: 22nd January, 2019

**+ CRL.M.C. 4284/2016 and Crl.M.A.17848/2016, 3296/2017,
19366-19367/2017, 35958/2018**

UNITECH LTD.

..... Petitioner

Through: Mr. Saket Sikri, Advocate with
Mr. Vikalp Mudgal, & Ms. Adwaita
Sharma, Advocates

versus

REGISTRAR OF COMPANIES DELHI & HARYANA

..... Respondent

Through: Mr. Vikram Jetly, CGSC

+ CRL.M.C. 4285/2016 and Crl.M.A.17851/2016, 3297/2017

SUNIL KESWANI

..... Petitioner

Through: Mr. Sangram S. Saron, Advocate

versus

REGISTRAR OF COMPANIES DELHI & HARYANA

..... Respondent

Through: Mr. Vikram Jetly, CGSC

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

ORDER (ORAL)

1. Section 74 of the Companies Act, 2013, prior to its amendment of 2018, read as under:-

“74. Repayment of deposits, etc., accepted before commencement of this Act. - (1) Where in respect of any deposit accepted by a company before the commencement of this Act, the amount of such deposit or part thereof or any

interest due thereon remains unpaid on such commencement or becomes due at any time thereafter, the company shall—

(a) file, within a period of three months from such commencement or from the date on which such payment are due, with the Registrar a statement of all the deposits accepted by the company and sums remaining unpaid on such amount with the interest payable thereon along with the arrangements made for such repayment, notwithstanding anything contained in any other law for the time being in force or under the terms and conditions subject to which the deposit was accepted or any scheme framed under any law; and

(b) repay within one year from such commencement or from the date on which such payments are due, whichever is earlier.

(2) The Tribunal may on an application made by the company, after considering the financial condition of the company, the amount of deposit or part thereof and the interest payable thereon and such other matters, allow further time as considered reasonable to the company to repay the deposit.

(3) If a company fails to repay the deposit or part thereof or any interest thereon within the time specified in sub-section (1) or such further time as may be allowed by the Tribunal under sub-section (2), the company shall, in addition to the payment of the amount of deposit or part thereof and the interest due, be punishable with fine which shall not be less than one crore rupees but which may extend to ten crore rupees and every officer of the company who is in default shall be punishable with imprisonment which may extend to seven years or with fine which shall not be less than twenty-five lakh rupees but which may extend to two crore rupees, or with both.”

2. The petitioner company (Crl.M.C.4284/2016) had received deposits from certain investors at large, the value of the outstanding

liability on such account at the time of commencement of the Companies Act, 2013 having been assessed to be in the sum of Rs.6,03,06,73,000/-, the number of depositors statedly being 56,436. The relevant provisions of the Companies Act, 2013 came into force *w.e.f.* 6th June, 2014. Under the new dispensation, by virtue of the legislative command in Section 74(1), the company was obliged to repay the said amounts within the period prescribed, it being indicated in the original enactment to be one year, from the date of commencement of the new law or from the date on which the payments were to fall due, whichever was earlier, the said period prescribed in Section 74(1) (b) having been later revised and modified to three years in terms of the Companies (Amendment) Act, 2017. The law, however, would permit a company under the statutory liability to seek enlargement of time for discharge of liability to pay by making an application before National Company Law Tribunal (“the tribunal”) under Section 74(2). The default in payment of the requisite amounts either within the statutorily prescribed period or by close of the extended time allowed by the tribunal attracts penal clause contained in Section 74(3) of the Companies Act, 2013.

3. It is undisputed case on both sides that the petitioner company approached the tribunal by Company Petition (T) No.10/18/2015 and in the course of consideration of the prayer made therein it was permitted the enlargement of time for compliance with the statutory provisions of Section 74(1) and (2) by a series of orders, the last effective order passed by the tribunal being of 11.03.2016, it having

been granted on the basis of affidavit submitted by managing director of the company giving undertaking to make some payment (to the tune of Rs.30 crores) by the dates specified (30.04.2016, 31.05.2016, and 30.06.2016). Neither the directions of the tribunal nor the undertaking were complied with and concededly no payment was made within the said extended period granted by virtue of order dated 11.03.2016. Eventually, by order dated 04.07.2016, the tribunal found no good reason to grant any further enlargement of time for compliance. While dismissing the petition to that effect moved by the petitioner company, the tribunal also suggested to the Registrar of Companies (ROC) to take appropriate action against the company under Section 74(3) the Companies Act, 2013.

4. Primarily on the above noted facts and the result of the petition under Section 74(2) the Companies Act, 2013 by the aforementioned order dated 04.07.2016 of the tribunal, the ROC filed a criminal complaint (CC No.01/2016) in the court of sessions, it being allocated to an Additional Sessions Judge. Since the complaint was presented by a public servant (authorized officer of ROC), the pre-summoning inquiry was dispensed with. Upon consideration of the facts set out in the complaint, and the documents filed therewith, taking note of the dismissal of the petition under Section 74(2) of the Companies Act, 2013 by the tribunal, the Additional Session Judges took cognizance by order dated 20.09.2016 and summoned the company and five of its officers as accused to appear and answer the charge for the offence under Section 74(3) the Companies Act, 2013.

5. These two petitions seek to question the validity of the above said summoning order passed by the criminal court on the complaint of the respondent ROC, the company being the petitioner in CrI.M.C.4184/2016 and its Chief Finance Officer (CFO) being the petitioner in CrI.M.C.4285/2016. Though the second captioned petitioner also raises certain other issues, the consideration of such other contentions is found to be unnecessary in view of the common submissions made by the petitioners in both the matters on the basis of certain subsequent developments that had taken place.

6. From the pleadings on record and from the submissions made at bar, it is clear that the petitioner company had challenged the order dated 04.07.2016 of the tribunal before the National Company Law Appellate Tribunal (“the Appellate Tribunal”) by company appeal (AT) No.7/2016. There is no dispute, rather the counsel for ROC fairly conceded, that the order dated 04.07.2016 of the tribunal was subject to remedy of appeal before the appellate tribunal under Section 421 of the Companies Act, 2013. The petitioners place reliance on certain orders that were passed by the appellate tribunal in the said appeal. The same may be briefly taken note of at this stage.

7. While entertaining the appeal, the appellate tribunal, by order dated 20.09.2016, directed that no coercive steps shall be taken against the appellants pursuant to the order dated 04.07.2016 of the tribunal. Noticeably, by the said date the ROC, in part compliance of the directions of the tribunal had already presented criminal complaint and as it so happened on the same date, the criminal court had taken

cognizance on the said complaint and had issued process. Be that as it may, on 26.10.2016 the appellate tribunal, *inter alia*, directed that the request of the tribunal in the order dated 04.07.2016 to the ROC to take action under Section 74(3) of the Companies Act, 2013 was “stayed”. This order again would be of no consequence inasmuch as the complaint had already been filed and the matter was within *seisin* of the competent criminal court, it being beyond the jurisdiction of the appellate tribunal to inhibit any action on the part of the criminal court on such complaint. At the most, such stay could be construed as inhibiting the ROC from prosecuting the said complaint further.

8. What is of import and consequence, however, is the order dated 03.11.2016 of the appellate tribunal. The concluding paragraph of the said order needs to be quoted in *extenso*. It reads thus:-

“11. Until further orders, the operation of interim order dated 26.10.2016 passed by the Appellate Tribunal shall continue. The date of payment to the depositors under Section 74(1) of the Companies Act, 2013 stands extended upto 31st December, 2016.”

9. It is highlighted by the counsel for ROC that the company appeal of the petitioner eventually failed before the appellate tribunal, it being dismissed by order dated 31.01.2017. Since reference is made by both sides to the said order, relevant paragraphs (no.23 and 24) thereof need to be extracted here. The same read as under:-

“23. Taking into consideration the aforesaid facts and the delaying tactics followed by appellant and its Directors and no specific effort has been taken by the company to pay back the dues of the depositors in terms of Sub-Section (1) of

Section 74 read with sub-section (2) of Section 74 of the Act, 2013, and the Managing Director, Directors and Members of the company are not interested to generate any amount to pay back the dues of depositors and that three year period is going to complete on 31st March 2017, and there is no likelihood of depositing the defaulted amount as is due to depositors, this Appellate Tribunal is not inclined to grant any further time to the appellant.

24. For the reason aforesaid, the interim order of stay passed by this Appellate Tribunal is vacated. We find no ground to extend the period beyond 31st December, 2016, as was allowed earlier.”

10. It is the submission of the petitioners, and this court finds substance in the same, that by virtue of the order dated 03.11.2016, the period of compliance with the requirement of Section 74(1) of the Companies Act, 2013, as extended earlier by the tribunal in the company petition in terms of order dated 11.03.2016 stood further extended upto 31.12.2016 pursuant to directions of the appellate tribunal in appeal. This remains the factual position as shown by careful reading of the final order in appeal passed on 31.01.2017, wherein the appellate tribunal expressly said that it had found no grounds to extend the period “*beyond 31st December, 2016*”.

11. It is clear that the gravamen of the charge on which the prosecution under the penal clause contained in Section 74(3) is to be founded has to be to the effect that the company to be prosecuted had failed to abide by its liability under Section 74(1) or within the extended period granted by the tribunal on a petition to that effect. Since the order of the tribunal does not attain finality inasmuch as there is a remedy of appeal available there against, the provision

contained in Section 74(2), in so far as it refers to the time allowed “*by the tribunal*” will have to be construed as the time allowed “*by the tribunal*” alongwith modification in such regard if ordered in appeal by the appellate tribunal. By such reading of the law, it is clear that the criminal complaint on which the cognizance was taken on 20.09.2016 was rendered premature or infructuous upon the appellate tribunal entertaining the appeal under Section 421 and granting an interim protection extending the period of compliance upto 31.12.2016. By virtue of the subsequent order of the appellate tribunal, bottom had gone out of the case of the respondent in the aforementioned criminal complaint case, continuation whereof would undoubtedly be an abuse of the process of the court.

12. Thus, both the petitions are allowed. The impugned order dated 20.09.2016 passed in CC No.01/2016, titled *Registrar of Companies vs. United Ltd. & Ors.*, summoning the petitioners, as indeed five other officers of the company, is hereby set aside and vacated.

13. Nothing in this order however, shall inhibit the respondent/ROC from initiating a criminal action in accordance with law in light of subsequent facts. This observation, of course, is without prejudice to the right of the petitioners and others to raise such defences as may be available to them in law.

14. This disposes of pending applications as well.

R.K.GAUBA, J.

JANUARY 22, 2019

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