IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 06.03.2020
Pronounced on : 16.03.2020

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.O.P.No.26460 of 2014
and
Crl.M.P.Nos.1, 1 & 2 of 2014

Shri.J.Narayanamurthy ... Petitioner/8th accused

Vs.

M.O.Roy,
Assistant Director,
Serious Fraud Investigation Office,
Ministry of Company Affairs,
Government of India,
2nd Floor, Paryavaran Bhawan,
CGO Complex, Lodhi Road,
New Delhi-110 001. ... Respondent/complainant

PRAYER: Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, to call for records and quash the proceedings pending in E.O.C.C.No.137 of 2006 on the file of the learned Additional Chief Metropolitan Magistrate E.O.I, Egmore, Chennai.

For Petitioner : Mr.Shivakumar

For Respondent : Mr.B.Rabu Manohar
Senior Central Government
Panel Counsel

ORDER

This Criminal Original Petition has been filed to quash the proceedings in E.O.C.C.No.137 of 2006 pending on the file of the Additional Chief Metropolitan Magistrate E.O.I, Egmore.

2.The brief facts of the case is that the respondent was working as Assistant Director in Serious Fraud Investigation Office, Ministry of Company Affairs, Government of India, New Delhi and he filed a complaint under Section 211(7) r/w Section 628 of the Companies Act, 1956 against the 1st accused company viz., M/s.DSQ Software Limited/A1 and its Managing Directors and Directors (other accused). The accused company mainly is in the business of development of computer software. The Serious Fraud Investigation Office conducted an investigation and found that the 1st accused company and its Directors committed fraud, created false book entries for boost sales, income and earning per share and thereby, falsified the accounts in the balance sheets and violated the provisions of Sections 211(7) r/w 628 of the Companies Act, 1956. Hence, the petitioner/A8 along with other Directors of the 1st accused company are being prosecuted for the said company fraud.

3.The petitioner/A8, who was on Board of the company as Director during the relevant period, had given a note dated 01.09.1999, wherein he has stated as follows:-

> "The revised accounts, were placed on table at the meeting. It was noted with concern by the Directors that the accounts, as finalised by the statutory auditors, continued to contain several qualifications which might have serious implications. Various features noticed by the statutory auditors in the accounts of DSL, which formed basis for the qualifications are summarised as follows:-
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> i.DSL has accounted for in its books certain revenue (Rs.183.90 Crore) and expenditure (Rs.96.97 crore) transactions, arising out of software consultancy provided through its overseas subsidiaries/overseas associates, based on the invoices raised on such Companies. Incidentally, the MD of DSL is a director in all these Companies. Arrangements/agreements relating to these transactions were not fully supported by documents. No reconciliation/confirmation of balances in respect of transaction was received by DSL from the concerned Companies. Further, no application seems to have been made to RBI, seeking approval for arrangements/ agreements.
>
> ii.The branch opened by DSL at Abudabhi and the bank account operated there at would need RBI's approval. However, no details of business transacted by the branch were furnished to the auditors while the remittances made through the bank account were not reflected in the books of DSL at H.O
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> iii.No clarifications were furnished to auditors regarding the steps taken/status of various approval from RBI particularly in respect of:
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> "a. Arrangements/agreements relating to the overdue export receivables regrouped under loans/advances and proposed to be converted into investments in the overseas subsidiaries/overseas associates of the company.
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> b.Overdue export receivables of Rs.8.29 crore not yet realised and
>
> C. Additions made to fixed assets (Rs. 21.25 crores) by way of adjustments made out of export

receivables from the Overseas customers concerned.

iv. Overdue export receivables were inclusive of sundry debtors (Rs. 2.60 crore) and loans/advances (Rs. 2.47 crore) due from an overseas associate. DSL intends to DSL had already collected the amounts from the overseas Customer and deposited the amount with an overseas associate under a collection agreement, for which there convert these amounts into investments was no approval of RBI.

V. Auditors could not verify certain items of plant and machinery acquired during the year, particularly software aggregating Rs. 87 crore (inclusive of additions of RS.21.25 crore made through adjustments form export receivables). It would not, therefore, be possible for statutory Auditors to arrive at the exact value of fbxed assets of the Co., appearing in the balance sheet, which are charged as security for institutional loans."

4.This finding which were within the knowledge of the Directors of the 1st accused company indicates that despite the aforesaid observation, no cogent action was taken. Hence, the Directors who attended the meeting were arrayed as accused.

5.The contention of the learned counsel for the petitioner is that the petitioner is only a Nominee Director and he is no way connected to the day to day affairs of the company. The petitioner being Chief General Manager of Industrial Development Bank of India (IDBI), Mumbai was nominated as Director on behalf of IDBI in the board of the 1st accused company with effect from 20.08.1999 and his nomination was withdrawn on 03.07.2002. The petitioner was serving as Chief General Manager of Industrial Development Bank of India and was made nominee Director of A1 company, which nomination was in the nature of GC officio and as per Section 30A of the Industrial Development Bank of India Act, 1964, he was not to be proceeded against.

6.Section 30A of the Industrial Development Bank of India Act, 1964 is extracted as follows:-

30A. Arrangement with Development Bank on appointment of directors to prevail.—

Where any arrangement entered into by the Development Bank with an industrial concern provides for the appointment by the Development Bank of one or more directors of such industrial concern, such provision and any appointment of directors made in pursuance thereof shall be valid and effective notwithstanding anything to the contrary contained in the Companies Act, 1956 (1 of 1956) or in any other law for the time being in force or in the memorandum, articles of association or any other instrument relating to the industrial concern, and any provision regarding share qualification, age-limit, number of directorships, removal from office of directors and such like conditions contained in any such law or instrument aforesaid, shall not apply to any director appointed by the Development Bank in pursuance of the arrangement as aforesaid.

(2)Any director appointed as aforesaid shall--

(a) hold office during the pleasure of the Development Bank and may be removed or substituted by any person by order in writing of the Development Bank.

(b) not incur any obligation or liability by reason only of his being a director or for anything done or omitted to be done in good faith in the discharge of his duties as a director or anything in relating thereto;

(c) not be liable to retirement by rotation and shall be taken into account for computing the number of directors liable to such retirement.

7.Section 32 of the Industrial Development Bank of India Act, 1964, clearly shows that the protection of action taken against any director or any officer or other employee of the Development Bank and the same is extracted as follows:-

> "32. Protection of action taken under this Act. --- No suit or other legal proceeding shall lie against the Development Bank or any director or any officer or other employee of the Development bank or any other person authorized by the development Bank to discharge any functions under this Act for any loss or damage caused or likely to be caused by anything which is in good faith done or intended to be done in pursuance of this Act or any other law of provision having the force of law."

8.Further as per the Industrial Development Bank (Transfer of Undertaking and Repeal) Act, 2003, the provisions of Section 30A of Industrial Development Bank of India Act, 1964 is applicable, which is a saving clause. Further the Government of India, Ministry of Corporate Affairs had sent a General Circular No.08/2011, dated 25.03.2011 to All Regional Directors, All Registrars of Companies, All Official Liquidators for penal action against defaults committed under the Companies Act, 1956 "officer in default" or a "Directors (s)" or " persons", wherein it has been mentioned that penal actions are initiated against certain directors who are not charged with the responsibility of the company and had clarified that the directors including Non Executive Director and officers in connection with the responsibility with the above provisions should not be arrayed as delinquent directors for default. Further, directed that the cases which are pending against the Directors of Companies must be relooked at, based on these parameters and a report must be sent by each Regional Director with Specific recommendation in case the proceedings are proposed to be discontinued.

9.In continuance to it, in communication dated 14.07.2011, it has been clarified that the Nominee Directors on behalf of the Public Financial Institutions and Financial Institutions and banks on the board of companies should also be treated in the same manner as provided in para 2 of the said circular. The petitioner is a Nominee Director on behalf of the Public Financial Institution. Further, this Court in Crl.O.P.No.1689 of 2010, dated 14.08.2013 had quashed the proceedings against P.N.Swaminathan/A10, who was a Nominee Director of Industrial Financial Corporation (IFC). The petitioner is also on the same footing.

10.It is further contended that the proceedings as against the 11th accused N.Ramesh Ranjan was also quashed by this Court in Crl.O.P.No.2727 of 2007 by order dated 08.02.2008. The petitioner being a Nominee Director cannot be prosecuted in the above offences.

11.As per Section 5 of the Companies Act, only the person in accordance with whose direction or instruction the Board of directors of the company is accustomed to act or any person charged by the Board with the responsibility of complying with that provision of the act. They are alone to be construed as "officers who is in default".

12.Further as per Section 5(a) the managing director or managing directors; (b) the whole- time director or whole-time directors; (c) the manager; or officers who are in default, if there are no such Managing Director, whole time Director or Manager, thereafter only the person in accordance with whose direction or instruction the Board of directors of the company is accustomed to act or any person charged by the Board with the responsibility of complying with that provision of the act. They are alone to be construed as "officers who is in default". As per Section 5(g) where any company does not have any of the officers specified in clauses (a) to (c) then only all directors to the prosecuted. In this case, the 2nd accused is the Managing Director. Such being the case by no stretch of imagination, the petitioner would be stated to be a officer, who is in default. Added to it, the Government of India by circular No.08/2011, dated 25.03.2011 had exempted Nominee Directors being prosecuted under the Companies Act.

13.Further as per Section 628 of the Companies Act, the maximum punishment is only two years for penalty for false statements. As per Section 468 of Cr.P.C., when the punishment is only of two years, within three years cognizance of the offence has to be taken. In this case the cognizance has been taken beyond the period of limitation.

14.In order to substantiate his arguments, the learned counsel for the petitioner relied upon the following citations:-

> "i)N.Kumar Versus M.O.Roy, Assistant Director, Serious Fraud Investigation Office reported in CDJ 2007 MHC 2229.
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> ii)S.Govind Rajan & others Versus M.O.Roy reported in CDJ 2014 MHC 6150."

15.The learned Senior Central Government Panel Counsel appearing for the respondent filed a counter and opposed this quash petition by stating that the petitioner was part of the board, in which he along with other accused deliberated the mismanagement of the funds. The petitioner had not taken any remedial steps or informed the authorities concerned. The petitioner failed to alert IDBI about the falsified accounts of M/s.DSQ Software Limited which is listed company were more public interest were involved. The petitioner was also a Director of DSQ Software Limited/A1 company during the relevant time and participated in the board meetings especially when the accounts/financial statements were approved. The investigation team has unearthed the falsification of accounts by DSQ Software Limited and therefore, all the Directors and Managing Directors of the company are responsible for all the decisions taken on the activities of the said company and as such they cannot plead ignorance of any statutory provisions governing the activities of the company. Further, the points raised by the learned counsel for the petitioner are disputed question of facts which have to be decided only during the trial.

16.He further submitted that in the cases filed by the respondent under the Companies Act, the limitation will start from the date of knowledge and from the date of instructions. Though the investigation was carried out in the year 2003, the investigation report is dated 29.11.2005. Thereafter, the sanction was obtained on 01.02.2006 and the complaint was filed immediately on 28.06.2006. Hence, it is within the limitation period. He further submitted that the contention of the petitioner will not apply as per Section 2(30) of the Companies Act, 1956 and the same is extracted as follows;-

> "(30) 'officer' includes any director, manager or secretary 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;”

17.In this case, the petitioner is inducted as Nominee Director, who had played active role in the board meeting and aware of the fraud committed by the company. Hence, he opposed for quashing the proceedings.

18.In order to substantiate his arguments, the learned Senior Central Government Panel counsel relied upon the following citations:-

(a)In the case of Registrar of Companies Versus Rajshree Sugar & Chemicals Limited., and others reported in 2000 6 SCC 133 it has been held that“appellant as aggrieved person entitled to benefit under Section 469(1)(b) period of limitation starts from date on which offence comes to knowledge of aggrieved person”

(b)In the case of State of Rajasthan Versus Sanjay Kumar & Ors reported in 1998 5 SCC 82 it had been held that “For the above reasons, in the instant case, the limitation for the purpose of Section 468(2)(c) will commence from July 2, 1988, the date of knowledge of the commission of offence to the concerned officer under Section 469(1)(b) but not from February 29, 1988 (the date of collection of samples by the Drugs Inspector) and as the complaint was filed on June 28, 1991 which is within three years so the complaint is not barred by limitation under Section 468(2)(c). The High Court has missed this germane aspect erroneously took the date of commencement of the limitation as Drugs Inspector from accused No.16. It is thus clear that the High Court has committed illegality in so computing the period of limitation, which results in miscarriage of justice.”

19.This Court considered the rival submissions and perused the materials available on record.

20.It is an admitted fact that the petitioner was Chief General Manager of the IDBI and being the officer of IDBI, he was a nominee to the board of the 1st accused as Nominee Director, pursuant to the arrangement entered into between IDBI and the 1st accused. Further on going through the averments filed in the complaint, there is absolutely no specific allegations made against the petitioner, who is a Nominee Director of the 1st accused company.

21.In this regard, a reference could be placed in the Judgment in the case of K.Subramony, Kerala Financial Corporation Limited., Vs. The Official Liquidator reported in 2009 Ker HC 228, wherein it has been held that a Nominee Director of a financial institution is not engaged in regular management of the company such as maintenance of books of accounts, filing of returns and the nominee director has immunity from proceedings. The Nominee Director is not responsible for the day to day affairs of the company and he cannot be equated with the allegation made against the other directors, Managing Directors. Further as could be seen from the petitioner/Nominee Directors report dated 01.09.1999, he has informed about attending the board meeting of the 1st accused made deliberation and his observations made therein and the report has been submitted to IDBI. Further, the Industrial Development Bank of India in its report dated 30.09.2005 had nowhere attributed any motive, violation in functioning of the petitioner as Nominee Director/petitioner. On the other hand the responsibility has been fixed on Dinesh Dalmia, Managing Director and R.Sunderarajan, GM (Finance). This report of Industrial Development Bank of India, is part of the investigation of the respondent dated 29.11.2005.

22.Taking into consideration of the above facts, this Court finds that the petitioner being a Nominee Director, he is no way connected with the day to day affairs of the company. Similarly placed Nominee Director's case has been quashed by this Court and the petitioner is also on the same footing.

23.In view of the above, the proceedings in E.O.C.C.No.137 of 2006 pending on the file of the Additional Chief Metropolitan Magistrate Court E.O.I, Egmore, Chennai against the petitioner/A8 is hereby quashed. Accordingly, this Criminal Original Petition is allowed. Consequently, the connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The Additional Chief Metropolitan Magistrate
Court E.O.I,
Egmore, Chennai.

2.The Assistant Director,
Serious Fraud Investigation Office,
Ministry of Company Affairs,
Government of India,
2nd Floor, Paryavaran Bhawan,
CGO Complex, Lodhi Road,
New Delhi-110 001.

3.The Public Prosecutor,
High Court, Madras.

+1cc to Mr.B.Rabu Manohar, Advocate, S.R.No. 22920
+2cc to Mr.Shivakumar and Suresh, Advocate, S.R.No. 23481

Crl.O.P.No.26460 of 2014

SVI(CO)
GN(30/07/2020)