



Crl.O.P. No.2735 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	02.12.2022
Delivered on	12.12.2022

CORAM:

THE HONOURABLE MR.JUSTICE SUNDER MOHAN

Crl.O.P.No.2735 of 2017
and
Crl.M.P.Nos.1933 and 1934 of 2017

B.Kannan

...Petitioner/Accused

Vs.

The Deputy Registrar of Companies,
Tamil Nadu,
Having Office at Shastri Bhavan,
26, Haddows Road,
Chennai – 6000 06.

... Respondent

PRAYER: Criminal Original Petition filed under Section 482 Cr.P.C.
praying to call for the records in E.O.C.C.No.46 of 2016 pending on the
file of Additional Chief Metropolitan Magistrate Economic Offences
No.I, at Egmore, Chennai and quash the complaint.



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For Petitioner : Mr.Abudukumar Rajaratnam

For Respondent : Mr.K.Ramanamoorthy
Central Govt. Standing Counsel

ORDER

This petition has been filed to quash the private complaint filed in E.O.C.C.No.46 of 2016 by the respondent herein for the alleged offences under Section 165 r/w 165(6) of the Companies Act, 2013.

2. The allegations in the complaint are that the petitioner violated the provisions of the Companies Act by holding Directorship of companies in excess of the limits prescribed under the provisions of Section 165 of the Companies Act, 2013 and the said violation is an offence punishable under Section 165(6) of the Act. As per Section 165(1) of the Act, no person, after the commencement of this Act, shall hold office as a Director, including any alternate Directorship, in more than twenty companies at the same time, provided that the maximum number of public companies, in which, a person can be appointed as a Director shall not exceed ten. Further, Section 165(3) of the Act provides



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that any person holding office as Director in companies more than the limits as specified in sub-section (1), immediately before the commencement of this Act shall, within a period of one year from such commencement: (a) choose not more than the specified limit of those companies, as companies, in which, he wishes to continue to hold the office of Director; (b) resign his office as Director in the other remaining companies, and (c) intimate the choice made by him under clause (a) to each of the companies in which he was holding the office of Director before such commencement and to the Registrar having jurisdiction in respect of each such company. Further, 165(5) of the Act provides that no such person shall act as Director in more than the specified number of companies. The complaint therefore states that the petitioner herein had violated the provisions of Sections 165(1), (3) and (5) of the Companies Act by holding Directorship in 29 companies and hence, liable for punishment under Section 165(6) of the Act.

3. The learned counsel for the petitioner made the following submissions praying for quashing of the complaint as against him.



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4(a). Several of the companies in the petitioner is said to be a director have been struck off and had become dormant companies even prior to the filing of complaint. He listed out about five companies which were struck off prior to the filing of the complaint.

4(b). The learned counsel submitted that the violations alleged against the petitioner are under Sections 165(1), (3) and (5) of the Act, for holding an office of Directorship in excess of the limit prescribed under the Act. However, the complaint quotes Section 165(6) of the Act as the penal provision for the above violations. Section 165(6) of the Act cannot be treated as the penal provision for the violation prescribed under Sections 165(1)(3) and (5) of the Act, since Section 165(6) of the Act speaks about accepting an appointment. According to the learned counsel, accepting an appointment is different from holding the position of Directorship. Therefore, Section 165(6) of the Act cannot be the penal provision for the above said violations. The penal provisions for the violations prescribed under Sections 161(1) and 165(1)(3),(5) of the Act



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would only be under Section 450 of the Act. The learned counsel therefore, submitted that the entire prosecution is misconceived.

4(c) The learned counsel further submitted that the Companies Act, Amendment, 2020, which came into force on 21.12.2020, had reduced the rigour of punishment prescribed under Section 165(6) of the Companies Act. By virtue of the amendment, the contravention attracts only a penalty which has to be adjudicated by an officer appointed under Section 454 of the Companies Act. The violation under Section 165(6) of the Act is no longer an offence triable by a Magistrate. The learned counsel further submitted that since the rigour of the law has been mollified, the beneficial legislation has to be applied in favour of the accused and the existing prosecution also has to be transferred to the in-house adjudication mechanism.

4(d) The learned counsel further submitted that the statement of objects and reasons for bringing about these amendments would show that where lapses are essentially, technical or procedural in nature, it may



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be shifted to the in-house adjudication process. This would also serve twin purposes of ensuring the ease of doing business and for better corporate compliance. This would also reduce number of prosecution filed in the Special Court, which would in turn, facilitate the disposal of serious offences and the offender will be penalised. The objects and reasons, according to the petitioner is found in the Companies (Amendment) Act, 2018, Bill which contained a similar amendment, however, this Bill lapsed and ultimately, the Companies (Amendment) Act, 2020 was enacted.

4(e) The learned counsel further submitted that the intention of the Legislature was that the Companies must be able to do business easily and comply with the requirements and opportunity should be given to the Companies to comply with the provisions of the Act and only if they had failed to comply with the direction, it would constitute the offence. The learned counsel read to us Section 454(8) of the Companies Act, which is as follows:

“Section 454(8) (i) Where company 4[fails to



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comply with the order made under sub-section (3) or sub-section (7), as the case may be,] within a period of ninety days from the date of the receipt of the copy of the order, the company shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees

(ii) 5[Where an officer of a company or any other person] who is in default 6[fails to comply with the order made under sub-section (3) or sub-section (7), as the may be,] within a period of ninety days from the date of the receipt of the copy of the order, such officer shall be punishable with imprisonment which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, or with both.”

4(f). The amended provision has to be applied to even to the existing prosecutions as per the Judgment of the Hon'ble Apex Court in the case of **T.Barai vs. Henry Ah hoe** reported in (1983)1 SCC 177 and **Nemi Chand vs. State of Rajasthan** reported in (2018)17 SCC 448.

4(g) Further, the Explanation II in Section 165(1) of the Act was



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brought into force on 09.12.2018 by virtue of the Amendment Act 1 of 2018. The said explanation reads as follows:

“[Explanation II.-- For reckoning the limit of directorships of twenty companies, the directorship in a dormant company shall not be included.]”

This amendment also being a beneficial amendment to the accused, ought to be applied to the pending prosecution.

5(a). The learned counsel for the respondent/complainant would submit that the points relating to whether some of the companies were struck off prior to the prosecution are factual in nature and cannot be gone into Section 482 Cr.P.C petition.

5(b) The learned counsel submitted that the violation alleged in the complaint is holding directorship in excess of the prescribed limit and Section 165(6) is the penal provision for such a violation.

5(c) The subsequent amendments cannot take retrospective effect



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and the pending prosecutions have to be continued in the same manner as if the amended Act did not come into existence in view of Section 6(A) of the General Clauses Act. The learned counsel relied upon the Judgment of the Queen's Bench Division reported in **[1896]2 Q.B. 547** in support of his submission that the amendment in the Companies Act has to be applied prospective and prosecution launched prior to the amendment has to be governed by the provisions that were in force at the relevant point of time.

6. We have heard the learned counsel appearing on either side. Though the learned counsel strenuously made various submissions, he would ultimately submit that it would suffice if this Court considers the effect of the Companies Amendment Act 2020 to the pending prosecution. The only question hence to be decided by this Court is whether the amendment that was brought into force on 21.12.2020 by virtue of the Companies (Amendment) Act, 2020 can be applied to pending prosecutions.



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7. In this case, the complaint is of the year 2017. The law as stood on the date of complaint for the alleged violation committed by the petitioner is as follows:

“...(6) If a person accepts an appointment as a director in contravention of sub-section (1), he shall be punishable with fine which shall not be less than five thousand rupees but which may extend to twenty-five thousand rupees for every day after the first during which the contravention continues.”

8. At the relevant point of time, contravention was considered as an offence. Further, there was no Explanation II, which specifically clarified for the purpose of reckoning in the limit of Directorship of the 20 companies, the dormant companies shall not be included. By virtue of the Companies (Amendment) Act, 2019 and the Companies (Amendment) Act 2020, the contravention is now liable for penalty by the adjudicating officer appointed by the Central Government. If the contravention is liable for fine, it is triable by a Magistrate and it is an offence and therefore, triable by a Magistrate. Penalty, however, is



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imposed by the adjudicating officer by the Central Government and hence, the contravention is no longer an offence. The Act not only mollifies the punishment prescribed for contravention, but also the procedure, for determining the penalty.

9.The Hon'ble Apex Court in **T.Barai vs. Henry Ah hoe** reported in **(1983)1 SCC 177** had an occasion to consider the amendments made to Section 16(1)(a) of the Prevention of Food Adulteration Act, 1954. The Act originally prescribed punishment of 6 years for the said offence of the Act. In 1975, an amendment was made by the State of West Bengal by the West Bengal Amendment Act, which provided for punishment upto imprisonment for life for the said offence. Thereafter, the Parliament passed the Prevention of Food Adulteration (Amendment) Act, 1976, which provided for reduced punishment for the offence. The question that was raised before the Hon'ble Supreme Court *inter alia* was whether the amendment would be prospective or would apply to pending prosecutions as well in the State of West Bengal. The amendment not only brought about change in the punishment, but also change in the



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procedure. By virtue of the amendment, the punishment prescribed was only 3 years, whereas, in the West Bengal Act, the punishment prescribed was life imprisonment. Therefore, the earlier West Bengal Act provided a trial by the Court of Sessions and by virtue of the amendments, the trial was to take place before the Magistrate. The Hon'ble Court held in such circumstances, held as follows:

“22.It is only retroactive criminal legislation that is prohibited under Art. 20(1). The prohibition contained in Art. 20(1) is that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence prohibits nor shall he be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. It is quite clear that insofar as the Central Amendment Act creates new offences or enhances punishment for a particular type of offence no person can be convicted by such ex post facto law nor can the enhanced punishment prescribed by the amendment be applicable. But insofar as the Central Amendment Act reduces the punishment for an offence punishable under s. 16(1)(a) of the Act, there is no reason



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why the accused should not have the benefit of such reduced punishment. The rule of beneficial construction requires that even ex post facto law of such a type should be applied to mitigate the rigour of the law. The principle is based both on sound reason and common-sense. This finds support in the following passage from Craies on Statute Law, 7th edn. at pp. 387-88 :

"A retrospective statute is different from an ex post facto statute. "Every ex post facto law " said Chase J. in the American case of Calder v. Bull(1) "must necessarily be retrospective, but every retrospective law is not an ex post facto law. Every law that takes away or impairs rights vested agreeably to existing laws is retrospective, and is generally unjust and may be oppressive ; it is a good general rule that a law should have no retrospect, but in cases in which the laws may justly and for the benefit of the community and also of individuals relate to a time antecedent to their commencement : as statutes of oblivion or of pardon. They are certainly retrospective, and literally both concerning and after the facts committed. But I do not consider any law ex post facto within the prohibition that mollifies the rigour of the criminal law, but only those that create or aggravate the crime, or increase the punishment or change the rules of evidence for the purpose of conviction There is a great and apparent difference between making an unlawful act lawful and the making an innocent action criminal and punishing it as a crime."



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23.To illustrate, if Parliament were to re-enact s. 302 of the Indian Penal Code, 1860 and provide that the punishment for an offence of murder shall be sentence for imprisonment for life, instead of the present sentence of death or imprisonment for life, then it cannot be that the Courts would still award a sentence of death even in pending cases. This dictum was followed by the Hon'ble Apex Court in **(2018)17 SCC 448** (cited supra).

10. From the above extracted portion of the Judgment of the Hon'ble Apex Court, the following principles emerge:

(a) It is only retrospective criminal legislation that is prohibited under Article 20(1) of the Constitution of India.

(b) No person can be convicted by such *ex post facto* law nor can the enhanced punishment prescribed by the amendment be applicable.

(c) However, if the amendment reduces the punishment for an offence, the accused shall have benefit of such reduced punishment notwithstanding the fact that he had committed the offence prior to the amendment.

(d) In order to apply the third principle referred, the offence described under the old Act and the new Act must be one and the same.



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If the ingredients are different, then, the principle of awarding reduced punishment after the amendment, would not be applicable.

11. The Judgment in **In re Athlumney vs. Exparte Wilson** relied to the respondent reported in [1898]2 Q.B 547 does not deal with a case where the Amendment seeks to reduce the rigour of punishment. Hence, it is not applicable to the facts of the instant case.

12. Applying the above principles to the instant case on hand, we find that the Parliament had made amendments for the purpose of easing the doing of business and also for reduction of prosecution that are filed in the Special Court. The relevant portion of the Statement of Objects and Reasons for the amendments for the Amendment Bill 2018 which sought to make the amendment to Section 165(6) of the Companies Act as well, reads as follows:

“.....The Committee recommended that the existing rigour of the law should continue for serious offences, whereas the lapses that are essentially technical or procedural in nature may be shifted to in-house adjudication process. The Committee observed that this would serve the twin purposes of promoting of ease of



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doing business and better corporate compliance. It would also reduce the number of prosecutions filed in the Special Courts which would in turn facilitate speedier disposal of serious offences and the offenders shall be penalised....”

Though this Bill lapsed, the subsequent Act in the year 2019, 2020 brought about the same amendment in Section 165(6) of the Act. In the 2019 Amendment Act, penalty was fixed at Rs.5,000/- for each day the contravention continues. However, the 2020 Amendment Act further mollifies it by fixing Rs.2000/- per day as penalty, subject to a maximum of Rs.2,00,000/-. Therefore, the object and reason in 2018 Bill are relevant, though it had lapsed. When that being the intention of the Legislature, we find that there is no reason why the said Amendment cannot be applied in favour of the accused in the pending prosecution. The accused shall also be entitled to the benefit of Explanation-II to Section 165(1) of the Companies Act.

13. The Hon'ble Apex Court in the case of **B.Manna vs. State of West Bengal** reported in **AIR 1955 SC 84**, which was quoted with



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approval by the Hon'ble Apex Court in **T.Barai's case (cited supra)**, held that where the fresh legislation is brought on the same subject, the line of enquiry would be not whether the new Act expressly keeps alive, old rights and liabilities but whether it manifests an intention to destroy them. The new Act in the instant case i.e., the Companies (Amendment) Act, 2019 clearly manifestly an intent to treat the violations which are only technical to be adjudicated by a in-house process. Further, Section 454 of the Companies Act also makes it clear that where after adjudication and person either does not pay penalty or fails to comply with the order of adjudication, he is liable for punishment, either fine or imprisonment. Therefore, the object of the amendment Act is to give an opportunity to the person to comply with the provision and only after the order of adjudicating officer directing the compliance or his payment of penalty is violated, it would become an offence.

14. Therefore, we are of the view that the intention of the Parliament is very clear and the since of the Amendment Act 2020 mollifies the rigour of punishment the beneficial construction has to be



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applied in favour of the accused in pending prosecutions and all the prosecution has to be withdrawn and transferred to the adjudicating authority appointed under Section 454 of the Companies Act for further proceedings in terms of the said provision.

15. In the light above decision, this Court is of the view that it may not be necessary to deal with the other contentions of the parties.

16. In fine, the complaint in EOCC No.46 of 2016 Additional Chief Metropolitan Magistrate Economic Offences No.I, at Egmore, Chennai is transferred to the adjudicating authority appointed under the Companies Act to adjudicate the contravention committed by the petitioner in terms of Section 454 r/w 165(6) of the Companies Act.

17. With the above observations, this Criminal Original Petition is disposed of. Consequently, connected miscellaneous petitions are closed.

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Index: Yes/No

Speaking/Non speaking order

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To

1.The Additional Chief Metropolitan -
Magistrate Economic Offences No.I,
at Egmore, Chennai.

2.The Deputy Registrar of Companies,
Tamil Nadu,
Having Office at Shastri Bhavan,
26, Haddows Road,
Chennai – 6000 06.

3.The Public Prosecutor,
Madras High Court,
Chennai.



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SUNDER MOHAN, J.
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