IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

<u>Present</u> :

Hon'ble Justice Moushumi Bhattacharya

<u>IA No: CA 1 of 2023</u>

In

<u>CP 1 of 2023</u>

Girdhar Tracom Private Limited and

Narendra Dhanuka and Ors.

vs

The Registrar of Companies WB

For the petitioner	:	Mr. Ratnanko Banerji, Sr. Adv. Ms. Manju Bhuteria, Adv. Ms. Ramya Hariharan, Adv. Ms. Asmita Rakhecha, Adv. Mr. Abhirup Chakraborty, Adv. Ms. Priyanka Jain, Adv. Mr. Soumyajit Saha, Adv.
For the respondent	:	Mr. Subhankar Chakraborty, Adv. Ms. Oisani Mukherjee, Adv. Ms. Ruchira Manna, Adv.
Last heard on	:	16.02.2024
Delivered on	:	20.02.2024

Moushumi Bhattacharya, J.

1. The petitioners pray for being excused of any criminal liability and relieved of the alleged defaults complained of by the respondent in the notice dated 6.10.2020. The petitioners also pray for an injunction restraining the respondent / Registrar of Companies (ROC), West Bengal from initiating criminal proceedings in respect of any of the matters referred to in the notice dated 6.10.2020.

2. The present petition has been filed under section 463(2) of the Companies Act, 2013 which confers power on a Court to grant relief in certain cases including where an Officer of a Company has reason to apprehend that any proceeding will be brought against him in respect of any negligence, default, breach of duty, misfeasance or breach of trust. The High Court in such cases has the same power to relieve the Officer on an application made by him / her as it would have had it been a Court before which a proceeding against that Officer for negligence, default, breach of duty, misfeasance or breach of trust had been brought under section 463(1) of the Act.

3. The application arises out of a notice issued by the Ministry of Corporate Affairs, more specifically by the Deputy Registrar of Companies, West Bengal, where the Company was charged with contravention under several sections of the Companies Act, 1956 and the Act of 2013. The Notice was also sent to the petitioners as Officers and Directors of the Company. The petitioners were asked to submit their para-wise comments to the points along with documentary evidence within 15 days from the date of the

Notice as to why necessary action including prosecution as contemplated under the respective provisions of the Companies Act, 1956 / 2013 would not be taken against the Company and the petitioners.

4. Learned counsel appearing for the petitioners assails the impugned Notice on the ground of limitation and relies on section 468(2) of the Code of Criminal Procedure, 1973 in this respect. Counsel submits that the offence alleged in the impugned notice / preliminary findings later issued by the ROC are barred by limitation and cannot be taken cognizance of. Counsel submits that the petitioners had reasons to apprehend that a criminal proceeding may be initiated against them and that mere filing of a criminal complaint would not oust the jurisdiction of the High Court under section 463(2) of the 2013 Act. It is also submitted that the respondents have not followed due procedure before initiating criminal proceedings and further that sanction from the Central Government was not required for initiating criminal proceedings under the Act. Counsel submits that the petitioners have acted honestly and with due diligence and should hence be excused from any criminal liability and relieved of the alleged defaults complained of in the impugned Notice.

5. Learned counsel appearing for the respondent / Registrar of Companies (ROC) submits that a proceeding under section 463(2) of the Companies Act, 2013 is applicable only where the petitioner has reasonable apprehension of a proceeding and where the proceeding itself has not been initiated. Counsel submits that a proceeding has already been initiated in the present case before the Metropolitan Magistrate Court on 11.8.2023 prior to filing of the instant application. It is submitted that the Metropolitan

Magistrate is a designated Special Court for the offences stated in the impugned notice and that the High Court only has the power of appeal or revision from the proceedings arising out of the Special Court. Counsel relies on the Departmental Circular dated 20.6.2016 which was notified for the purpose of ensuring that prosecutions are not indiscriminately filed and that proceedings are to be initiated only upon obtaining sanction from the competent authority. Counsel submits that exercise of power under section 463(2) can only be done where the petitioners have acted *bona fide*. Counsel submits that the respondents are legally entitled to initiate independent proceedings against each of the petitioners for the violations committed by the Company at the relevant point of time.

6. The following dates are undisputed and relevant to the adjudication.

7. The petitioner received the first Inquiry Notice dated 6.11.2018 issued by the Office of the ROC under section 206(4) of The Companies Act, 2013 enclosing an anonymous complaint received by the ROC. The petitioner replied to this Notice on 20.11.2018 requesting the ROC to drop the matter in view of the complaint being devoid of merit. The petitioner however provided the answers to the notice. The ROC issued a show cause notice dated 22.11.2018 to the petitioners on the allegation that no reply was given to the first Inquiry Notice. The Company replied on 28.11.2018 to the show cause notice.

8. A second Inquiry Notice was issued by the ROC on 3.1.2019 under section 206(4) of the Act of 2013 enclosing another anonymous complaint received by the ROC. The Company replied to this Notice on 18.1.2019. Thereafter, the ROC issued a third Inquiry Notice again under section 206(4)

of the 2013 Act enclosing a third anonymous complaint received by the ROC. The Company replied to the third Inquiry Notice on 23.5.2019.

9. The Deputy ROC thereafter issued a Notice for inspection under section 207 of the Act for inspection of the books of accounts and records of the Company. The Company replied to this Notice on 24.7.2019 providing all the documents which were requested for by the ROC. The Company also replied to the Deputy ROC's letters enclosing further documents on 5.9.2019. The Deputy ROC issued a mail of 13.1.2020 seeking further documents from the Company and the Company replied to this mail on 20.1.2020 whereby further documents were provided. The Deputy ROC issued yet another mail on 12.5.2020 seeking further documents and the Company replied on 5.6.2020 providing the documents requested for.

10. The impugned Notice / preliminary findings letter was issued by the Inspecting Officer cum Deputy ROC on 6.10.2020 to the Company listing alleged contraventions. The letter was also issued to the petitioners / Directors of the Company. The Company sent a detailed reply on 17.11.2020 responding to each and every allegation contained in the impugned notice dated 6.10.2020. A summons was thereafter issued on 5.3.2021 by the Joint Director cum Inspecting Officer under section 207(3) of the Act.

11. The ROC instituted criminal proceedings against a group Company, namely, Shivpujan Vyapaar Private Limited, which subsequently merged with the Company in June, 2023. Shivpujan had earlier provided a detailed response on 12.11.2020 to the preliminary findings letter dated 6.10.2020.

12. The petitioners filed the present writ petition on 18.10.2023. A supplementary inspection Notice was issued by the Office of the Regional

Director on 9.11.2023 under section 206(5) of the 2013 Act requesting for disclosure of documents which had already been disclosed by the Company during the earlier inspection.

13. Section 463(2) of The Companies Act, 2013 confers the High Court with the power to grant relief in certain cases. The provision is premised on certain pre-conditions. These are set out below and flow from one to the next:

i) Where an Officer of a Company is faced with a proceeding for negligence, default, breach of duty, misfeasance or breach of trust;

ii) The Officer apprehends that any proceeding may be brought against him in respect of the above;

iii) The High Court on an application made by such Officer;

iv) Will have the same power as a Special Court before which a proceeding against that Officer for the charges under (i) may have been brought under section 463(1);

v) Section 463(2) underlines the scope of interference by a Court where it appears to the Court that the Officer has acted honestly and reasonably and there are other fit circumstances;

vi) Which warrants an order from the Court excusing the Officer and relieving him / her wholly or partly of the liability on appropriate terms.

14. The petitioners, in the present case fulfill all the criteria set out above. The petitioners had reasons to apprehend that a criminal proceeding may be initiated against them. The reason for such apprehension was that the respondents had issued a preliminary findings letter to a Group Company of Girdhar Tracom, namely, Shivpujan Vyapaar Private Limited on the same date i.e. 6.10.2020. The respondent instituted criminal proceedings against the Group Company of which the petitioner nos. 2 and 4 are Directors. The petitioners in this case have acted honestly, reasonably and with diligence, which would be evident from at least 9 of the replies sent by the petitioners on behalf of the Company to each and every Inquiry Notice / Notice for Inspection together with the letters / mails for further documents from the Company.

15. Section 463(2) makes it clear that the High Court has been conferred with jurisdiction for granting relief in respect of a petition filed under section 463(2).

16. The relevant part of section 463 is set out below:

> *463. Power of court to grant relief in certain cases - …….*
> *(2) Where any such officer has reason to apprehend that any proceeding will or might be brought against him in respect of any negligence, default, breach of duty, misfeasance or breach of trust, he may apply to the High Court for relief and the High Court on such application shall have the same power to relieve him as it would have had if it had been a court before which a proceedings against that officer for negligence, default, breach of duty, misfeasance or breach of trust had been brought under sub-section (1).*

17. The respondent's contention of only Special Courts being vested with that power is hence not acceptable.

18. The Court also finds substance in the petitioners' contention that the respondent has not followed due process before initiating the criminal proceedings. In *Venkatesan Thyagarajan vs. Registrar of Companies, Tamil Nadu (Company Petition Nos. 405 to 409 of 2014)* a Learned Single Judge of the Madras High Court held that a show cause notice should result in an adjudication wherein the decision should be communicated to the person whose rights are liable to be affected. The Court also held that the decision should take into consideration the replies of the concerned person.

19. In the present case, the respondent did not pass any reasoned order pursuant to the reply given by the Company on 17.11.2020. This letter was a detailed reply to the impugned Notice dated 6.10.2020. Criminal proceedings were instituted in June, 2023 after almost 3 years from the date of issuance of the preliminary findings letter. In the present case, the respondent issued the Notice dated 9.11.2023 which is a supplementary Inspection Notice from the Office of the Regional Director after filing of the present writ petition. Thus, the petitioner's apprehension was correct and ultimately came true by issuance of the Notice dated 9.11.2023.

20. The Court disagrees with the contention made on behalf of the respondent that filing of a criminal complaint ousts the jurisdiction of the High Court under section 463(2) for the following reasons.

21. First, there is no evidence that the petitioners were aware of the criminal proceedings. Second the power vested on the High Court under section 463(2) is in addition to the powers vested under section 463(1) of the 2013 Act. The writ petition was filed at a time when the petitioners had reasons to apprehend that a proceeding will or may be brought against the

petitioners in respect of negligence, default, breach of duty, misfeasance or breach of trust. The Supreme Court in *Visram Financial Services (P) Ltd. vs. V. Rajendran; (2018) 209 Comp Cas 400* held that the affected parties can approach the High Court even after receipt of summons in a criminal complaint and that the power of the High Court to grant relief in such cases cannot be interpreted in a restricted sense. In *Ai Champdany Industries Ltd. vs. Registrar of Companies; (2012) 2 CHN 255* a Co-ordinate Bench held that cognizance of the alleged offences was barred at the time of filing of the application under section 633(2) of the Companies Act, 1956, which is *pari materia* to section 463(2) of the Companies Act, 2013. A Single Bench of the Madras High Court in *Arathi Krishna vs. The Registrar of Companies in C.P No. 6 to 9 of 2019* was of the view that the court has power to grant relief under section 463(1) and (2) of the 2013 Act even after initiation of criminal proceedings and also while such proceedings are pending before the Criminal Court.

22. The Court also finds substance in the argument made on behalf of the petitioner that the offences alleged in the impugned notice dated 6.10.2020 are barred by limitation. The reason for this is the offences alleged relates to the year 2014 - 2019 and under section 468(2) of The Code of Criminal Procedure, 1973, the limitation period for offences punishable with fine is 6 months and for offences punishable for imprisonment not exceeding 1 year is 1 year. Even if the limitation is reckoned from the date on which the first notice of enquiry was issued i.e. 6th October, 2018 or the date of issuance of inspection notice i.e. 15th July, 2019 or even the date of the preliminary finding letter i.e. 6th October, 2020, even then the offences are barred by

limitation. This has also been clearly stated in the petition which considers each of the sections in the Companies Act, 1956 and under the 2013 Act in respect of offences which have been alleged against the petitioner.

23. The provisions under which the notices have been issued, the limitation period of such offences are 6 months to a maximum period of 1 year. Hence, the Court agrees with the argument that the offences alleged in the impugned notice are barred by limitation and cannot be taken cognizance of. A Division Bench of this Court took the same view on the offences being barred by limitation in *Bhagwati Foods P. Ltd. v. Registrar of Companies, West Bengal; (2008) 143 Comp Cas 531*. A similar view was also taken by a Coordinate Bench in *Srikumar Menon v. Registrar of Companies, West Bengal; (2011) 164 Comp Cas 382* and in *Ai Champdany Industries Ltd. v. Registrar of Companies; (2012) 2 CHN 255.*

24. The Departmental Circular dated 20th June, 2016 relied on by the respondent is an internal document. The contents of the circular are mostly illegible. In any event, the consent/sanction referred to in section 470(3) of The Code of Criminal Procedure would only be applicable where the prosecution has exceeded the limitation period due to the requirement for sanction from the concerned authority : M/s. *Dalmia Bharat Ltd. v. The Assistant Registrar of Companies, Tamil Nadu; Crl. O.P. No. 16721 of 2021*.

25. The above reasons persuade the Court to allow the prayers in the writ petition and excuse the petitioners and each one of them of any criminal liability in respect of the alleged defaults complained of by the respondent in the impugned notice dated 6th October, 2020. The respondent is accordingly restrained from instituting or proceeding with any criminal proceedings in

respect of the matter referred to in the notice dated 6th October, 2020 or take any further steps in respect thereto.

26. CP 1 of 2023 is accordingly allowed and disposed of along with all connected applications in terms of this judgment.

Urgent Photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(**Moushumi Bhattacharya, J.**)