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In Re: Tolaram Jalan and ors.

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Court : Mumbai

Decided On : Apr-30-1958

Reported in : AIR1959Bom245; (1958)60BOMLR1346; [1959]29CompCas34(Bom)

Judge : Shelat, J.

Acts : Companies Act, 1956 - Sections 63, 69(5), 70(5), 75(4), 101, 104, 141, 141(5), 159, 162, 166, 207, 209, 210, 211, 217, 220, 372(1), 372(2), 393(4), 474, 528, 529, 614, 633, 633(1) and 633(2); Companies Act, 1929 - Sections 141(3)

Appeal No. : I.C. Petition No. 40 of 1958

Appellant : In Re: Tolaram Jalan and ors.

Advocate for Def. : D.P. Mehta and ;N.B. Vakil, Advs.

Advocate for Pet/Ap. : P.N. Bhagwati, Adv.

Judgement :
ORDER

1. This is petition under Sub-section (2) of Section 633 of the Companies Act. 1956 for relief against liabilities for fines or penalties in regard to the failure of Filmistan Private Ltd. to file with the Registrar of Companies copies of balance sheet and Auditor's report for the year ending on the 31st of August 1956.

2. The reason given by the petitioners for this omission is that accounts up to the year 1950-51 used to be audited by M/s. Sharp and Tannon but that sometime in August 1955 the auditing of the accounts was entrusted to M/s. Kalyaniwala and Mistry, who were then appointed the Company's auditors and that the new auditors could not audit the accounts owing to a radical conflict of opinion between the Company on the one hand and the Income Tax authorities on the other hand as to the manner in which the unexploited value of five cinematographic pictures produced by the Company should be determined for the purpose of computing annual profits or losses of the Company. The case of the petitioner is that until the value of these unexploited pictures was finally determined, it would not be possible for the auditors to prepare a true and fair balance sheet and profit and loss account except on a hypothetical basis. It appears therefore that there is considerable force in the contention of the petitioners that it was due to this difference of views between the Company and the Income Tax authorities that the balance sheet and the profit and loss account for the year 1955-56 could not be prepared in time to enable the petitioners to file the same with the Registrar of Companies as required by the Act. It may be stated that it is not the case of the Registrar, who opposes this petition, that this omission to file the balance sheet and the profit and loss account was due to any deliberate attempt on the part of the petitioners to delay in preparing the profit and loss account and the balance sheet. On behalf of the Registrar it was conceded that no dishonesty could be imputed to the petitioners in respect of this omission. That being so, I would proceed upon the footing that the omission of the petitioners so far to file the balance sheet and the profit and loss account for the year 1955-56 as required by Section 220 of the Act was not mala fide but that there was a real difficulty in the way of the Company in having the balance sheet and the profit and loss account prepared in time.

3. The question that has been seriously canvassed before me is whether I have jurisdiction under Sub-section (2) of Section 633 of the Act to grant relief against the liability of the petitioners, who are Directors and Secretary of the Company respectively, which they apprehend they might have incurred and for which steps might be taken against them under Sections 159, 162 and 220 of the Act. Section 159 provides that every Company having a share capital shall within 42 days from

the day on which each of the annual general meetings referred to in Section 166 is held, prepare and file with the Registrar a return containing particulars et out therein. Section 162 is penalty section and provides that if a company fails to comply with any of the provisions contained in Sections 159, 160 or 161 the company and every officer of the company who is in default shall be punishable with a certain fine. There is no dispute that the petitioners are the persons to whom Sections 159 and 162 of the Act apply.

4. Section 633 under which the relief is sought is identical with Section 372 of the English Companies Act of 1929. Sub-section (1) of Section (1) of Section 633 contemplates proceedings for negligence, default, breach of duty, misfeasance or breach of trust against an officer of a company and gives power to the Court hearing the case in certain circumstances to grant relief. Sub-section (2) gives power on the other hand to the High Court to grant relief against a prospective liability in respect of a claim that an officer of a company apprehends might be made against him in regard to negligence, default, breach of duty misfeasance or breach of trust. Now, it is clear that whereas Sub-section (1) refers to proceedings already commenced, Sub-section (2) contemplates a claim which is anticipated as one which might be made in future. Under Sub-section (1) the important words are 'the Court hearing the case' which obviously mean the Court before which a proceeding is pending. These words, therefore, mean that it would not be this Court which can grant relief under Sub-section (1) but the Court before whom the proceeding has commenced and is pending. Sub-section (2) on the other hand creates a fiction and provides that in respect of an apprehended claim this Court shall have the same power to grant relief as it would have had under this section if it had been the Court before which proceedings for negligence default, breach of duty, misfeasance or breach of trust had been brought.

5. The question then is what meaning should be attached to the word 'claim' occurring in Sub-section (2) and whether the word 'claim' would also include proceedings such as penal proceedings under Section 162 read with Section 220 of the Act.

6. It is urged that the word 'claim' would prima facie mean a civil claim such as a claim for damages which may be made by a company against a defaulting director or an officer of the company or where the company is in liquidation by the liquidator or a creditor or a contributory and not a penal proceeding contemplated by sections such as Section 162. The dictionary meaning of the word 'claim' is undoubtedly an assertion of a right to something and a relief provided by statute. I have also been pointed out several sections of the Act where the Legislature has used the word 'claim' such as Sections 101, 104, 429, 474 and 529 and it is clear from these sections that the meaning that can be attached to the word 'claim' used in these sections must mean a demand or an assertion to a civil right. It was also urged that the Legislature could not have intended to include in the word 'claim' in Sub-section (2) of Section 633 proceeding of a penal mature for otherwise the Legislature would have used the word 'proceeding' rather than the word 'claim'. It was further urged that inasmuch as the Legislature has given relief from criminal proceedings by separate sections in the Act such as Sections 63, 69(5), 70(5), 75(4), 207, 209, 210, 211, 217 and 393(4), the Legislature could not have contemplated of including proceedings of a penal nature in the word 'claim' in Sub-section (2). It was therefore contended that the word 'claim' cannot be interpreted as inclusive of proceedings described in Sub-section (1) of Section 633 and therefore no relief is provided against an anticipated proceeding under Section 633, the only relief provided being in respect of a pending proceeding and that too by the Court before which such a proceeding has commenced and is pending. But then so far as Sections 63, 69(5) and other sections, which were pointed out to me to show that the Legislature has given relief in respect of criminal proceedings, are concerned, it is clear that what those sections and provisos thereto provide are by way of substantive defences to a director or an officer of a company charged under one of the penal sections of the Act. Those are not sections like Section 633 which empower the Court to grant relief in respect of liability incurred by such a director or an officer of a Company. A comparison between those sections and Section 633 cannot therefore help in the construction of the word 'claim' in Section 633(2).

7. It is true that the Legislature uses the word 'proceeding' in Sub-section (1) and the word 'claim' in Sub-section (2), no doubt a different phraseology. Nonetheless

it does provide in Sub-section (2) that the Court on an application for relief shall have the same power to grant relief as it would have had under this section if it had been a Court before which proceeding for negligence, default etc. had been brought. It seems to me that if the word 'claim' was intended to mean only a civil demand such as damages, Sub-section (2) would not have contained the word 'under this section' which must also mean relief against proceedings described in Sub-section (1). Besides misfeasance is a civil remedy and yet Sub-section (1) speaks of a proceeding connected with misfeasance and even breach of trust. It seems therefore that there is no clear demarcation made in this section between proceedings of a penal nature and a civil remedy by way of a claim provided in Sub-section (2) of this section. Inasmuch as a proceeding in connection with misfeasance is included in Sub-section (1), the word 'proceeding' therein used cannot be said to mean proceeding of a penal nature only but would include proceedings also of a civil nature.

8. As I have pointed out, Section 633 is the exact replica of Section 372 of the English Act of 1929. That section came up for consideration in at least two decisions pointed out to me. In re Barry and Stains Linoleum Ltd., (1934) 1 Ch 227 a director failed to obtain his qualification shares within the time fixed thinking that he had them at the date of his appointment, and having either overlooked or forgotten the definition of qualification shares in the company's articles of association. At the end of the time he ceased, in accordance with Sub-section (3) of Section 141 of the Companies Act, 1929 to be a director, but continued to act and to receive remuneration as a director, thus incurring penalties under Sub-section (5). Later he was re-appointed by the board pursuant to the company's articles of association, retired, and was re-elected by the shareholders. He applied to the Court under Sub-section (2) of Section 372 for relief against any liability which he had incurred by acting and receiving remuneration as a director after he had ceased to be a director. It is clear from the facts set out in the report that the petition was for relief not in respect of a pending proceeding but against an apprehended liability for penalty. It was in fact contended on behalf of the petitioner that where a director apprehending a claim made against him under Section 372(1) applies to the Court for relief, the Court can grant such relief having power to do so under Sub-section (2) of that section. In answer to this plea,

Maugham J. at p. 232 of the report observed that Sub-section (1) of Section 372 applied inter alia to a proceeding under Section 275 which was the misfeasance section as it applied to proceedings taken in a court of summary jurisdiction to recover one of the penalties imposed on directors and others under the Act and accordingly it included power to relieve against the penalty imposed under Section 141 of the Act. Construing Section 372 the learned Judge also remarked that Sub-section (2) gave power to the Court to grant relief in cases where an application is made for it by a director who, although no proceedings such as are described in Sub-section (1) are being taken against him, apprehends that a claim may be made against him under that Sub-section. A director apprehending such a claim may apply to the Court for relief, and the Court has under Sub-section (2) 'the same power to relieve him as under this section it would have had if it had been a court before which proceedings against that person for negligence, default breach of duty or breach of trust had been brought'. It is clear that Maugham J. did not make any distinction between a 'proceeding' and a 'claim' appearing in Section 372 as is sought to be urged. In fact he held that a proceeding would include a civil proceeding under the misfeasacee section as it would include proceedings for penalties in both of which he held that the Court would have the jurisdiction to grant relief under Sub-section (2) although no proceeding has commenced or is pending. The only distinction that Maugham J. seems to make is between a proceeding for a fine and a penalty and a proceeding where the company might make a claim with regard to something which the director may be liable to pay to the company in which case he thought the Company Court would not readily grant relief without knowing the wishes of the shareholders.

9. This section again came up for consideration by Crossman J. in In re. Gilt Edge Safety Glass, Ltd., (1940) I Ch. 495, where although the case fell under Sub-section (1) of Section 372 the learned Judge on the decision of Maugham J. being cited before him observes at p. 501 as follows.

'I think that it follows from the decision of Maugham, J., in 1934 1 Ch 227 that the phrase 'any claim ..... in respect of trust' in Section 372, Sub-section (2) of the Act of 1929, includes proceedings against the petitioners under Section 141, Sub-section (5), and so includes the proceedings against the petitioners which were

commenced last October at Bow Street Police Court, as in the case the learned Judge gave relief under Section 372, Sub-section (2), from prospective liability to fines and penalties under Section 141, Sub-section (5).'

10. As already pointed out, the important words in Sub-section (2) of Section 633 are 'the Court ..... shall have the same power to relieve him as it would have had under this section if it had been a Court before which proceedings against that person for negligence ..... had been brought.' These words, in my view mean proceedings described in Sub-section (1) including proceedings involving fines and penalties in respect of which, if already commenced only the Court which they are pending has the authority to grant relief but which if not pending or already commenced it would be this Court which would have jurisdiction to grant as if it had been a Court before which proceedings had been brought. In this view I have no difficulty in holding that I have the jurisdiction to grant relief under Sub-section (2) of Section 633 in respect of a proceeding which the petitioners apprehend might be adopted against them for their omission to file the balance sheet and profit and loss account for the year 1955-56.

11. On the question whether this is a fit case where I should grant the relief, no serious difficulty would seem to arise. As I have already pointed out, it is not urged on behalf of the Registrar that the omission of the petitioners has been due to any dishonesty or any deliberate remissness on their part or any deliberate attempt to delay the preparation of and the filing of the profit and loss account and the balance sheet. What was, however, urged was that the omission on the part of the petitioners was unreasonable inasmuch as accounts even for the years 1952-53 and onwards have until recently not only not been prepared and finalised but have not also been laid before the shareholders. That omission, if true, is one with which I am not at present concerned in this petition. The petition is restricted to the omission on the part of the petitioners to file the balance sheet and the profit and loss account for the year 1955-56 and is also restricted, as the learned Counsel for the petitioners stated before me, for relief against fine or penalty arising under Section 220 in respect of the balance sheet and the profit and loss account for the year 1955-56 only. As already observed, there being a conflict, and a radical conflict, of view between the Company on the one hand and the Income Tax

authorities on the other hand with regard to the manner in which the unexploited pictures produced by the Company should be valued, it would not have been possible for the Directors to prepare a fair and true balance sheet giving exact information with regard to the profit made in respect of these pictures to the shareholders. At best, such a balance sheet would be hypothetical. It would not have been possible also for the accountants of the Company to give an exact and a precise closing and opening stock, likewise it would not be possible for the Company to lay before the shareholders a true and correct picture of the state of affairs of the Company in respect of these five pictures. I understand, however, from the learned Counsel for the petitioners that the assessment orders are now finalised and the Auditors of the company say that they will now be able to finalise the balance sheet on the basis of the findings as to profits in these assessment orders. In these circumstances there being no element of mala fides or dishonesty or unreasonableness on the part of the petitioners, I should have no hesitation in granting relief under Sub-section (2) of Section 633 to the petitioners in respect of their failure to file with the Registrar of the Companies the balance sheet and the profit and loss account for the year 1955-56.

11a. The petition, therefore, is made absolute in that the petitioners are granted the relief from liability for any fine or penalty under Section 162 read with Section 220 for their failure to file the said balance sheet and the profit and loss account for the year 1955-56 and for which proceedings might in future be taken against them.

12. So far as prayer (b) is concerned, Mr. Bhagwati relies on Section 614 of the Companies Act and says that it is upon that section that that prayer is based. In my view, Section 614 does not apply to prayer (b) such as it is framed for that section contemplates an application by a member or a creditor of the Company or by the Registrar of the Companies for an order directing the Company or any officer thereof to make good the default in filing or registering or delivering or sending to the Registrar any return, account or other document etc. Obviously Section 614 can have no application to extend the time for filing the balance sheet and the profit and loss account in question with the Registrar of Companies. It is not therefore possible to grant prayer (b).

13. The point of construction being of a somewhat important nature, the Registrar was justified in appearing and putting his point of view before the Court. The fair order, therefore, of costs would be that each party will bear his own costs.

14. Order accordingly.

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