

Sen and Pandit Electronics (P) Ltd. Vs. Union of India and ors.

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Court : Kolkata

Decided On : Apr-23-1999

Reported in : AIR1999Cal293b,(1999)2CALLT488(HC),[2004]49SCL618(Cal)

Judge : Mahemmad Habeed Shams Ansari, J.

Acts : [Constitution of India](#) - Article 226;; [Companies Act, 1956](#) - Sections 20, 22, 22(1) and 32;; [Code of Civil Procedure \(CPC\), 1908](#) - Section 15 - Order 39, Rules 1 and 2;; [Limitation Act, 1963](#)

Appeal No. : Constitutional Writ Jurisdiction W.P. No. 10639(W) of 1998

Appellant : Sen and Pandit Electronics (P) Ltd.

Respondent : Union of India and ors.

Advocate for Def. : Mr. D. Prosad Pal, ;Mr. Ram Chandra Prasad, ;Mr. Shib Chandra Prasad and ;Mr. M. Chatterjee, Advs.

Advocate for Pet/Ap. : Mr. Gautam Chakraborty, ;Mr. S.N. Mukherjee and ;Mr. Soumen Sen, Advs.

Judgement :

M. H. S. Ansari, J.

1. This writ petition is filed questioning the order dated 15.9.97 being annexure 'Q' to the writ application of the Regional Director, Department of Company Affairs, informing the petitioner that no action can be taken under section 22 of the Companies Act (For short the Act) as the period stipulated for the same under the said provisions of section 22 has elapsed.

2. The facts leading to the filing of the above writ petition, briefly stated, are that the petitioner company [Sen & Pandit Electronics (P) Ltd.] was incorporated on 4.12.84 and is carrying on business of manufacturing and sale of voltage stabiliser, Inverter, emergency light, constant voltage transformers and other electronic products.

3. The respondent No. 3 [Sen & Pandit Equipment (P) Ltd.] Company was incorporated on 4.1.96. the petitioner lodged a complaint on 20.2.96 before the respondents No. 1 and 2 for rectification of the name of the new Company (Respondent No. 3.).

On 17.5.96, the respondent No. 3 on coming to know about the filing of the said complaint filed a Title Suit No. 193 of 1996 and also filed a petition for ad-interim injunction praying to restrain the defendant from taking steps in any court from interfering, cancelling the registration of the plaintiffs as per complaint and from publishing any notice against the business of the plaintiff in any paper. By orders dated 18.5.96, the learned 1st sub Judge, Patna Issued ex-parte Interim order of status quo and later on contest confirmed the same by order dated 8.8.96.

4. Aggrieved against the same, the petitioners preferred an appeal against the said order dated 8.8.96 before the learned District Judge, Patna. On an interlocutory application filed by the petitioners, the learned District Judge by his order dated 12.9.96 stayed the operation of the order passed by the learned 1st sub Judge to the extent that 'the defendants are restrained from taking any step in court for cancellation of plaintiff No. 1 company and to publish any notice against its Interest' (annexure 'H' to the writ petition). Thereafter, the appeal filed by the petitioners was allowed by orders dated 25.1.97 setting aside the order dated 8.8.96 passed by learned 1st sub Judge, Patna.

5. The petitioners requested the Regional Director, to take prompt action in the matter of their complaint, consequent on the order passed by the District Judge setting aside the order of the learned 1st sub Judge.

6. By letter dated 18.3.97, from the office of the Regional Director, the petitioners were required to satisfy him that the period of injunction i.e. from 17.5.96 to 11.9.96 can be excluded for the purpose of computation of 12 months time as stipulated in section 22(1)(b) of the Act. The petitioners responded to the same by their letter dated 22.4.96 enclosing therewith copies of the orders passed in the Title Suit and the appeal and also enclosing a legal opinion on the subject of exclusion of time covered by the injunction orders.

7. The Directorate appears to have issued notice to the respondent No.3 asking it to appear before it on 30.5.97 in the matter of the rectification of name. Thereafter, by letter dated 25.1.97, respondent No.3 was informed that personal hearing has been refixed on 30.6.97. Thereafter, the impugned letter dated 15.9.97 (annexure 'Q') was Issued by the Regional Director.

8. In effect by the impugned letter dated 15.9.97, the Regional Director has informed the petitioner that the period stipulated in section 22 having elapsed, no action can be taken by him for rectification of the name of respondent No.3 company based upon their complaint.

9. No affidavit-in-opposition has been filed on behalf of the respondents Nos. 1 and 2. Learned counsel on behalf of the said respondents, however, made oral submissions.

10. Affidavit-in-opposition has been filed on behalf of the respondent No.3. It is denied that the respondent No.3 has been registered with the name identical and/or too nearly resembling with the name of the petitioner company. Action as in the Impugned letter annexure 'Q' has been supported by the respondent No.3 and it is stated that the aforesaid action is bonafide and in due compliance of the mandate of the provisions of section 22 of the Companies Act. Various other averments have been made in the affidavit-in-opposition which, are not necessary or relevant for the purpose of the present enquiry.

11. The short question for determination is whether the Impugned order is valid in law and whether any directions can at all be Issued to the Regional Director when the period stipulated in section 22 of the Act has elapsed. The further question is when the period of limitation as prescribed in section 22 elapsed and whether the same can be extended or enlarged.

12. The submissions of Mr. Cautam Chakraborty, learned senior counsel appearing for the petitioners are that the respondents No. 1 and 2 in purporting to act as they did are gully of non-application of mind and failure to appreciate the statutory rights available to the petitioners under section 22 of the Act. No explanation has been offered by the respondents No.1 and 2 for their Inaction within the period stipulated under section 22 of the Act and for the said Inaction and default, the petitioners' legal rights cannot be allowed to be either violated or provision of section 22 rendered otiose.

13. Lastly, it was submitted that in any event, the period covered by the orders of injunction Issued by the court are liable to be excluded and the respondent No.3 having filed suit and obtained Injunction cannot be heard to say that the period of limitation having elapsed no action can be taken under section 22 of the Act.

14. On behalf of the respondent No.3, Dr. Debi Prosad Pal, learned senior counsel submitted that the limitation prescribed under section 22 of the Companies Act having elapsed, powers vested in the authority

under section 22 cannot be invoked thereafter. It was further submitted that the court can issue a writ of mandamus to an authority compelling it to perform its duties in accordance with the statute and not in derogation thereof. The authority vested with the power cannot be compelled to Invoke the said powers when the period prescribed therefor has statutorily expired. It is not within the province of this court either to extend or to enlarge the period of limitation which has been statutorily prescribed under section 22 of the Act, it was contended.

15. Before we deal with the contentions of the respective learned senior counsels, it may be appropriate to look at the relevant sections 20 and 22 of the Companies Act, which read as under:

'20. Companies not to be registered with undesirable names.--(1) No company shall be registered by a name which, in the opinion of the Central Government, is undesirable.

(2) Without prejudice to the generality of the foregoing power, a name which is identical with, or too nearly resembles, the name by which a company in existence has been previously registered, may be deemed to be undesirable by the Central Government within the meaning of sub-section (1).'

'22. Rectification of name of company.--(1) If, through inadvertence, or otherwise a company on its first registration or on its registration by a new name, is registered by a name which, in the opinion of the Central Government, is identical with, or too nearly resembles, the name by which a company in existence has been previously registered, whether under this Act or any previous companies law, the first mentioned company-

(a) may, by ordinary resolution and with the previous approval of the Central Government signified in writing change its name or new name; and

(b) shall if the Central Government so directs within twelve months of its first registration or registration by its new name, as the case may be. or within twelve months of the commencement of this Act whichever is later, by ordinary resolution and with the previous approval of the Central Government signified in writing, change its name or new name within a period of three months from the date of the direction or such longer period as the Central Government may think fit to allow.

(2) if a company makes default in complying with any direction given under clause (b) of sub-section (1), the company and every officer who is in default, shall be punishable with fine which may extend to one hundred rupees for every day during which the default continues.'

16. A bare perusal of the provisions of section 20 show that if in the opinion of the Central Government, it is undesirable to register a company with the proposed name, it shall not be so registered. In sub section (2) thereof, it has been stated that a name which is Identical with or too nearly resembles the name by which a company in existence has been previously registered may be deemed to be undesirable by the Central Government within the meaning of sub section (1).

17. If through inadvertence or otherwise a company is registered by a name which is Identical with or too nearly resembles the name by which a company in existence has been previously registered, the Central Government is conferred with the power within 12 months of the company's first registration to direct it to change its name. This section 22 thus provides a procedure as regards rectification of the name of a company and also confers power on the Central Government to compel a change of name and enforcing compliance with its direction by penalising the company in default. The powers under section 22 of the Act, it appears, have been delegated to the Regional Director by the Central Government.

18. In the instant case, the respondent No.3 company was registered on 4.1.96. The petitioners lodged their complaint with the respondents No. 1 and 2 and sought for rectification of the name by an application dated 20.2.96. The period of 12 months prescribed in section 22(1)(b) expired on 3.1.97. Meanwhile, however, interim order was granted on 18.5.96 by the learned sub Judge which continued until the stay thereof was granted by the learned District Judge, Patna by order dated 12.9.96 and the appeal itself was disposed of by

the learned District Judge on 25.1.97, setting aside the order of the learned sub Judge, Patna.

19. There can be no dispute with the proposition, as contended by Dr. Pal that the Central Government and/or the Regional Director, Company Affairs, is not a court though while exercising the powers conferred upon them under section 22 of the Act, they perform a quasi judicial function.

20. It was contended by Dr. Pal and as held by the learned single Judge of Andhra Pradesh High Court in Sidhvi Constructions (India) (P) Ltd. v. Registrar of Companies, Hyderabad & Ors., reported in 1997 (1) C L J 339 that when the limitation prescribed by the statute has expired, it would not be open for writ court to extend the same by exercising the power under Article 226 of the Constitution and that the court cannot compell the statutory authorities to pass orders in violation of provisions which has the effect of extending the period of limitation under the Act.

21. The actual decision in Sidhvi Construction's case (cited supra) though is not in point, I am respectful agreement with the observations as noted supra and made by Justice Bikshabathy of Andhra Pradesh High Court.

22. The distinguishing feature being that in Sidhul Construction's case, the application of the petitioner therein before the competent authority was made after the expiry of the period of limitation prescribed in section 22(1)(b). In the Instant case through the application was made well within time (20.2.96) i.e. within one month from the date of registration of respondent No.3 company, no action was taken thereon by the respondent authority. Meanwhile, by virtue of the interim Injunction order dated 17.5.96 no action could be taken until 12.9.96 when the Injunction was vacated by the learned District Judge, Patna temporarily. ,On 25.1.97, the Injunction order was set aside when the appeal was allowed by the learned District Judge.

23. It cannot be disputed much less by respondent No.3 herein (Plaintiff in Title Suit No.193 of 1996) that during the period the injunction order of court was in operation, respondents Nos. 1 and 2 (repository of the power under section 22) could not Invoke the power thereby vested in them under section 22.

24. The question, therefore, that arises is whether during the period the injunction order was in operation, the period covered thereby is liable to be excluded or not for the purpose of computing the period of twelve months time stipulated in section 22(1)(b) of the Act.

25. It is well established principle of judicial procedure that where any proceedings are stayed by an order of a court or by an injunction issued by any court that period should be excluded in computing any period of limitation prescribed by the statute.

26. Dr. Pal, learned senior counsel for the respondent No.3, however sought to contend that the said principle would apply only where a provision has been specifically made in the statute and not otherwise. It was the submissions of Dr. Pal that under the Companies Act, there is no such provision for excluding the period of stay.

27. Mr. Gautam Chakraborty, learned senior counsel for the petitioners countered the above submissions by submitting that non-existence of a provision in the Companies Act providing for exclusion of time covered by any injunction/stay order of court would not militate against the efficacy of the principle noted above. Even if there was such a provision in the Companies Act providing for exclusion of time covered by injunction/stay order of a court, the same would be superfluous. Mr. Chakraborty referred to and relied upon the Supreme Court Judgment in Director of Inspection of Income Tax (Investigation), New Delhi & Anr. v. Pooran Mall & Sons & Anr.. reported in : [1974]96ITR390(SC) , wherein it was held as follows;

'It was also argued based on Explanation 1 to section 132 and similar provision in certain other sections which lay down that in computing the period of limitation any period during which any proceeding is stayed by an order or Injunction of any court shall be excluded, that where it is Intended that the period of limitation prescribed by any of the provisions of the Income-tax Act should not be strictly enforced the law itself makes

a specific provision. It is a well established principle of Judicial procedure that where any proceedings are stayed by an order of a court or by an injunction issued by any court that period should be excluded in computing any period of limitation laid down by law. Especially after the [Limitation Act, 1963](#), the provisions of which are now applicable to all proceedings, a provision like Explanation 1 to section 132 is superfluous and no argument can be based on it.'

28. In view of the above. It must be held that the period covered by the order of Injunction is liable to be excluded while computing the period of 12 months laid down in section 22(1)(b) of the Companies Act. The contention of Dr. Pal to the contra has, therefore, to be rejected.

29. Even if the said period is excluded, as it has to be, then also the said period within which the power could have been Invoked expired in April, 1997. The Impugned order is dated 15.9.97 and, therefore, no direction as prayed for can be granted to the respondent authority to Invoke the powers or initiate any action by virtue thereof.

30. True, as contended by Mr. Chakraborty, learned senior counsel for the writ petitioner that the respondent No. 2 authority is solely responsible for the delay and default in not taking action within the prescribed period or thereafter, when the injunction order was no longer in operation.

31. It was Mr. Chakraborty' submissions that when the provisions of the statute relate to the performance of a duty and the authority acts in neglect of this duty to the detriment of and thereby causing to a person who have no control over those who are entrusted with the said duty, the writ court is not without jurisdiction or power and can compell such authority by a writ of mandamus to perform its duty in a lawful manner in order to prevent injustice.

32. The above submissions would have merited consideration. If it was a case of statutory duty Imposed under section 22 of the Act. A distinction has and needs to be drawn between a statutory 'duty' and statutory 'power', where a public officer is directed by a statute to perform a duty within a specified time, the cases establish that provisions as to time are only directory. However, if the statutory provision as to time is a condition for exercise of a statutory power as distinguished from a duty, the prescription as to time has been construed as mandatory.

33. In my judgment, what is conferred by section 22 of the Act is a discretionary power to be exercised by the repository of the power on the formation of an opinion. The said power may be exercised suo-moto and may be open an application by an aggrieved person.

34. For all the aforesaid reasons, the relief as prayed for cannot be granted. The period prescribed for the exercise of the power including the extended period having elapsed.

35. In the result, the writ petition must fall and is accordingly dismissed, however, without any order as to costs.

It must, however, be clarified that nothing contained in this Judgment and order shall be construed as decision on merits of the main controversy.

36. Petition dismissed

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