2006 (134) CC 586

GUJARAT HIGH COURT

Hon'ble Judges:R.S.Garg and Ravi R.Tripathi JJ.

Dhiren Dave, Company Secretary Versus Surat Dyes

ORAL JUDGEMENT APPEAL No. 53 of 2004 ;
COMPANY APPLICATION No. 245 of 2004 ;
COMPANY APPLICATION No. 42 of 2004 ;
CIVIL APPLICATION No. 109 of 2004 ; *J.Date :- JULY 14, 2005

- COMPANIES ACT, 1956 Section - 483
- CODE OF CRIMINAL PROCEDURE, 1973 Section - 195 , 341
- COMPANY SECRETARIES ACT, 1980 Section - 21
- CONTEMPT OF COURTS ACT, 1971 Section - 19

Companies Act, 1956 - S. 483 - Code of Criminal Procedure, 1973 - S. 195, 341 - Company Secretaries Act, 1980 - S. 21 - Contempt of Courts Act, 1971 - S. 19 - contempt proceedings - winding up order - O.J. appeal on realizing that certain important evidence could not be produced - allowed to withdraw O. J. appeal - review application - rejected on the observation that factual averments on affidavit, were prima facie untrue - Company Judge directed criminal proceedings against the applicant and petitioner under S. 195 of Cr.P.C. for committing an offence relating to submission of the false documents - the Court also directed contempt proceeding against both of them - maintainability of said appeal - whether Ld. Company Judge can take cognizance of the affidavit - whether there is any bar under S. 341 of Cr.P.C. or under S. 19 of Contempt of Courts Act - words "any court" used in S. 340 of Cr.P.C. - "implied" would include each and every court - S. 341 Cr.P.C. would make the present appeal incompetent because against the rejection of the prayer for filing of the complaint an appeal shall lie to a Court to which ordinarily appeal lies from the order of said court - an appeal against the order of the Ld. Single Judge shall not lie to the Division Bench of High Court when he exercises its criminal powers - direction for prosecution would not be maintainable - S. 19 of the Contempt of Courts Act does not provide for such an appeal - appeal shall lie to a Division Bench in case of order awarding punishment in contempt jurisdiction only - question regarding affording an opportunity of hearing to appellant - this Court cannot interfere with as appeal is not maintainable - correctness of findings of Company Judge may not be looked into - appeal accordingly dismissed.

Imp.Para: [6] [7] [8]

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JUDGMENT :-
R.S.GARG, J.

1 Heard the learned Counsel for the appellant on the question of maintainability of this appeal.

2 Present is an appeal under Section-483 of the Companies Act, 1956 at the instance of the appellant, who was not a party before the learned Company Judge, against Order dated 24th August, 2004. It will have to be seen that against an order passed by the learned Company Judge on 7th May, 2005 in Company Application No. 42 of 2004, the learned Company Judge directed winding up of the Company after rejecting the plea of the Company that it had taken all necessary steps for its voluntary winding up. The said order dated 7th May, 2004 was challenged by the Company in O.J. Appeal No. 30 of 2004. The Company, after realising that certain important evidences could not be produced before the learned Company Judge and certain facts if could be brought to the notice of the learned Company Judge, they may obtain an order in review, made a submission before the Division Bench that they be allowed to withdraw O.J. Appeal No. 30 of 2004 with a liberty to go to the learned Company Judge. Vide Order dated 2nd July, 2004, the permission was accorded in favour of the Company. It is to be noted that in O. J. Appeal No. 30 of 2004, an affidavit sworn by one Mr.Dhiren Dave, Company Secretary, sworn on 1st July, 2004, was filed. After withdrawal of the appeal, a Review Application was filed, which was registered as Company Application No. 245 of 2004 in Company Application No. 42 of 2004. After giving anxious consideration to the submissions made before the learned Company Judge and also after taking into consideration the documents, by Order dated 24th August, 2004, the learned Company Judge rejected the Review Petition. While rejecting the Review Petition, he observed that the Director, namely, Shailendra K.Agrawal, had made false statements; he was trying to take advantage of a plot provided by Mr.Dhiren Dave. He also recorded a finding that the statement made by Mr.Dhiren Dave in the affidavit that with his covering letter dated 29th June, 2003, necessary information was submitted to the Registrar of Companies on 2nd July, 2003 was a wrong statement, rather it was a created statement. He also observed that in fact, a validly constituted declaration was submitted with the Registrar of Companies on 29th July, 2003. He also observed that in the affidavit dated 1st July, 2004 sworn by Mr.Dhiren Dave and affidavit of Shailendra K. Agrawal dated 5th July, 2004, there were material contradictions, which could not be reconciled. He also observed that the acknowledgment on the covering letter of Mr.Dhiren Dave appeared to be

not genuine because from the records of the Registrar of Companies, it appeared that during the said period, in relation to the Company, no such documents were received. The learned Company Judge, after summarising the facts, observed that the appellant failed to make out any case for review. The Court observed that the applicant tried to build a case on the basis of non-existent document with the help of Shri Dhiren Dave, Company Secretary, and both of them have made factual averments on affidavit, which were prima facie untrue. After recording these findings, the learned Company Judge directed that the applicant (Shailendra Agrawal) and Shri Dave be prosecuted for the offence punishable under Section-195 of the Code of Criminal Procedure, 1973 for committing an offence relating to submission of the false documents. The Court also directed that contempt proceedings be also drawn against both of them and it simultaneously ordered that the Council of the Institute of Company Secretaries of India, constituted under the Company Secretaries Act, 1980, is required to initiate appropriate action under Section-21 of the Company Secretaries Act.

3 It is to be noted that Shailendra K. Agrawal is facing prosecution before a competent Magistrate and has also filed his reply to the contempt proceedings, which are registered as Miscellaneous Civil Application No. 76 of 2004. The said Miscellaneous Civil Application though was to be heard by the Division Bench separately, but, in view of the present O. J. Appeal No. 53 of 2004, the proceedings have been tagged with O.J. Appeal No.53 of 2004.

4 At the very threshold, we asked the learned Counsel for the appellant as to how the appeal would be maintainable under Section-483 of the Companies Act, to which, after taking us through the Order dated 7th May, 2004 passed in Company Application No. 42 of 2004, Order dated 2nd July, 2004 passed in O.J. Appeal No. 30 of 2004 and Order dated 24th August, 2004 (impugned order) passed in Company Application No. 245 of 2004, the learned Counsel for the appellant submitted that the appellant would be entitled to invoke the appellate jurisdiction of this Court in the Company matters because in this appeal, the appellant challenges the findings, which have been recorded against him and the said findings would be conclusive and the appellant, for all practical purposes, would be defenceless. His further submission is that when a Company Court exercises its powers to initiate the contempt proceedings or issues directions for registration of the offence or for filing of the complaint, it does not become a Criminal Court, but, continues to be a Company Court.

5 After taking us through the findings recorded by the learned Company Judge, it was vehemently argued that the appeal is maintainable. The submissions are that:

> (a) before any order, adverse to the interest of the appellant was made, an opportunity of hearing ought to have been given to him;

(b) the appellant is entitled to challenge the findings because they lead to an action against him;

(c) as there is an order of inquiry, the bar contained under Section-341 of the Code of Criminal Procedure or under Section-19 of the Contempt of Courts Act, 1971 does not apply;

(d) till filing of the complaint in accordance with the directions of the Court, the Court continues to be a Company Court and does not become a Criminal Court; and,

(e) that the affidavit in original was not filed before the Company Court and, therefore, the learned Company Judge could not take cognisance of the affidavit and could not even issue direction for filing of the complaint.

6 Before we enter into the merits of the matter, we shall look into the question of jurisdiction.

7 Section-340 of the Code of Criminal Procedure provides that either upon an application made to it in this behalf or otherwise, any Court is of the opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in clause (b) of sub-section (1) of Section-195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary may record a finding to that effect, make a complaint thereof in writing, send it to a Magistrate of the First Class, take sufficient security for the appearance of the accused before such magistrate and bind over any person to appear and give evidence before such magistrate.

7. The words, "any Court", would include each and every Court before which such offence relating to the documents has been committed. The language of Section-340 is very clear where it says that the offence has been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court. A fair understanding of the phrase used in Section-340 would make it clear that if the offence is committed in any Court, the said Court can direct filing of a complaint. The Court can also direct filing of the compliant if it is in relation to a document, which has been filed in that Court as evidence. In the present matter, a copy of the affidavit of Mr.Dhiren Dave, which was filed in original in O. J. Appeal No. 30 of 2004, was filed before the Company Court. The affidavit was not a simple statement, but, was a document, which was used by Shailendra Agrawal in support of his submission that the learned Company Judge was required to review his earlier order in view of the facts, which he was producing subsequently. Mr. Shailendra Agrawal

was relying upon the submissions made in the affidavit that the covering letter was dated 29th June, 2003; the documents/declaration were filed before the Registrar of Companies on 2nd July, 2003; and, Mr.Dhiren Dave having retained the original receipt, Mr. Shailendra Agrawal did not know about the facts and made a submission that the documents were sent by post. It's not that a document was simply filed for not using or utilising it. The document was filed for taking advantage of the fact that necessary requirements of Section-486 of the Companies Act were religiously observed. It is further to be seen that the letter, which bears the inward seal of the Registrar of Companies, produced by Mr.Dhiren Dave, has also been found to be bad and a created document by the learned Company Judge. That was yet another document, which was coming out of the custody of Mr.Dhiren Dave. Under such circumstances, it would not be possible for us to hold that the findings, which were recorded, can be challenged in an appeal under Section-483. Even otherwise, Section-341 would make the present appeal incompetent because against the rejection of the prayer for filing of the complaint, an appeal shall lie to a Court to which ordinarily appeal lies from the order of the said Court. Ordinarily, an appeal against the order of the learned single Judge shall not lie to the Division Bench of the High Court when he exercises its criminal powers for directing prosecution of someone. The learned single Judge would not be subordinate to the High Court. Under the circumstances, the appeal relating to the direction for prosecution would not be maintainable.

8 So far as maintainability of the appeal, challenging the initiation of the contempt proceedings is concerned, we must immediately observe that Section-19 of the Contempt of Courts Act, 1971 does not provide for such an appeal. Section-19, Sub-section (1), says that an appeal shall lie as of right from any order or decision of High Court in the exercise of its jurisdiction to punish for contempt. If there is an order awarding punishment in its contempt jurisdiction, then only, the appeal shall lie to a Division Bench where the order or decision is made by the learned single Judge. In the present matter, the order of punishment has yet not been issued. Initiation of the proceedings cannot be taken to be equivalent to an order of punishment. Even on that count, the appeal would not be maintainable.

9 So far as the question of affording an opportunity of hearing to the present appellant is concerned, we must observe that such an opportunity, ordinarily, could have been given by the learned Company Judge, but, if he decided not to provide such an opportunity, then, in an appeal, which is not maintainable before us, we cannot interfere in the matter.

10 The findings recorded by the learned Company Judge though are on merits of the matter for rejecting the Review Petition, but, based on the said findings, he has formed an opinion that the appellant and Shailendra Agrawal are liable

to be prosecuted. At this stage, Mr.Joshi, learned Counsel for the appellant, submits that if this Court is holding that the appeal is not maintainable, then, the correctness of the findings may not be looked into. He also submitted that the learned Company Judge directed for holding an inquiry and, therefore, the observations made by us that the appellant is directed to be prosecuted or proceeded with under the Contempt of Courts Act, may be contrary to the records. If the submission made by the learned Counsel for the appellant is accepted, then, the appeal will have to be thrown at the threshold because such an order cannot be challenged before this Court. At this stage, we would also again refer to paragraphs 35 and 36 of the impugned order. The learned Company Judge had observed that both these persons are liable to proceeded with. If the learned Company Judge, to be sure on the point, observed that an inquiry be made, then, the appeal even at the instance of the present appellant would not be maintainable. The appellant, however, may make a request to the learned Company Judge that if any inquiry is to be made in accordance with the directions of the learned Company Judge, then, he may be given an opportunity of hearing.

11 In our considered opinion, the appeal is not maintainable. It is accordingly dismissed.

12 Consequently, the O.J. Civil Application is also rejected. Rule is discharged. Ad interim stay granted earlier shall stand vacated.

> The effect and operation of this order shall remain in abeyance for a period of four weeks form today.