

HIGH COURT OF GUJARAT

**MOHANRAJ M SINGHI
V/S
STATE OF GUJARAT & ANR**

Date of Decision: 16 August 2016

Citation: 2016 LawSuit(Guj) 1232

Hon'ble Judges: [S G Shah](#)

Eq. Citations: 2016 (199) CompCas 498, 2016 (137) SCL 401, 2016 (135) CLA 74

Case Type: Special Criminal Application

Case No: 3139 of 2012, 3140 of 2012, 3141 of 2012, 3142 of 2012

Subject: Company, Criminal

Acts Referred:

[Indian Penal Code, 1860 Sec 471, Sec 467](#)

[Code Of Criminal Procedure, 1973 Sec 468](#)

[Companies Act, 1956 Sec 211\(7\), Sec 628, Sec 209\(5\)](#)

Final Decision: Application allowed

Advocates: [Mihir Joshi](#), Pranit Nanavati, [Devang Vyas](#), [Manan Mehta](#), [P R Abichandani](#)

Reference Cases:

[Cases Referred in \(+\): 4](#)

Judgement Text:-

[1] In all these four petitions, common issues of facts and law are involved, so also parties are common in all the petitions and therefore, all such petitions are heard and decided together by this common judgment. It seems that the respondent No.2 - Serious Fraud Investigation Office has lodged different complaints against one Company, namely, Mardia Chemicals Limited so also against its Directors and other connected persons like its Officers and Chartered Accountant etc. Such complaints are for the offences punishable u/ss.209(5) r/w.Sections 211(7) and 628 of the Companies Act for nonmaintenance of proper books of accounts.

Therefore, prima facie though as per the Company Law, it is considered to be a punishable offence, practically, in absence of evidence regarding mens rea and intention to commit offence as alleged, practically, they are technical offences of not following the statutory provision of law, though such breach of statutory provision, may be punishable. Only in one complaint, there is reference of Sections 467 and 471 of the Indian Penal Code. However, the perusal of entire record makes it clear that, practically, there is no prima facie evidence and thereby, there is no reason or substance in the complaint itself to continue the criminal proceedings against several persons after long time of so-called and alleged commission of offence.

[2] Since we are dealing with different matters together, for the sake of convenience and brevity on record, following details are necessary.

a. In Special Criminal application No.3139 of 2016, the petitioner has challenged the proceedings of Criminal Case No.14 of 2006 wherein including Mardia Chemicals Ltd., in all there are 13 accused amongst which present petitioner is accused No.7.

b. In Special Criminal application No.3140 of 2016, the petitioner has challenged the proceedings of Criminal Case No.08 of 2006 wherein including Mardia Chemicals Ltd., in all there are 12 accused amongst which present petitioner is accused No.7.

c. In Special Criminal application No.3141 of 2016, the petitioner has

challenged the proceedings of Criminal Case No.24 of 2006 wherein including Mardia Chemicals Ltd., in all there are 13 accused amongst which present petitioner is accused No.7.

d. In Special Criminal application No.3142 of 2016, the petitioner has challenged the proceedings of Criminal Case No.15 of 2006 wherein including Mardia Chemicals Ltd., in all there are 16 accused amongst which present petitioner is accused No.7.

[3] At this juncture, it cannot be ignored that out of the four different complaints, at least so far as Criminal Case No.08 of 2006 is concerned, the respondent No.2 in all such complaints, namely, Rasiklal Shantilal Mardia has challenged the same order in Special Criminal Application (Quashing) No.5550 of 2014 and Co-ordinate Bench of this High Court has by its order dated 29.4.2015 while allowing such application, quashed and set-aside the Criminal Complaint No.08 of 2006 so far as applicants in that application are concerned. In that application, there are as many as 10 applicants, which include accused Nos.2 to 6 and 9 to 13. Therefore, practically, the complaint is quashed against practically majority of the accused, but unfortunately because present petitioner could not be joined or could not file the petition with such group of persons, since he has already filed it, for some unknown reason, it has been left undecided. Otherwise, practically, all such applications were required to be listed, heard and decided with this Special Criminal Application No.5550 of 2014.

[4] The Co-ordinate Bench has considered the relevant provision of law and decision in the case of [Udai Shankar Awasthi vs. State of Uttar Pradesh & Anr](#), 2013 2 SCC 435 and came to the conclusion that having regard to the nature of the contravention, it could not be said that the Sections 211(7), 209(5) and 628 of the Companies Act are continuous offences so that the period of limitation would keep on running.

[5] In view of above facts and circumstances, so also considering the available material on record, it can certainly be said that there is substance in the submission by the applicant, which is recollected hereunder.

Special Criminal Application No.3139/2012 (Criminal Case No.14 of 2006
(‘complaint’ for short) Allegations in Criminal Case No.14 of 2006

5.1 In balance sheet, by way of notes on accounts, disclosure was made as to payment of remuneration to related parties during the year 2001-2002, 2002-2003. However, disclosure as to advances paid for acquisition of mining lands from directors and their relatives was not made. Thus accounts have been falsified knowingly and intentionally to hide the fact of directors/relatives, enjoying the company's money without any tangible benefit to the company. Hence they are liable to be prosecuted under Section 628 of Companies Act, 1956.

5.2 Books of accounts for the year 1996- 1997, 1997-1998 and 1998-1999 did not present true and financial position and as such the accused being 2 to 13 are responsible and liable to be punishable under Section 209 read with Section 211 read with Section 628 of the Act.

5.3 The accused persons being 2 to 13 have knowingly and willfully approved the false annual accounts and thereby the accused persons have rendered themselves liable to be prosecuted under Section 209(5) read with Section 211 read with Section 628 of the Companies Act 1956. Submissions of the Petitioner

5.4 The Petitioner is a practicing lawyer and was appointed as a Director of the Company in view of his professional expertise. The Petitioner was neither in-charge of the Company nor in day to day management of the Company. Even otherwise, there is no averment in the complaint that the Petitioner was in-charge or that he was responsible for the conduct of the business of the Company. Further, there is nothing in the complaint to show that the act committee or the conduct of the Petitioner was such that an inference can be drawn that he could be held vicariously liable. Also, no overt act of commission or omission has been alleged against the applicant in the complaint. In the circumstances, the Petitioner cannot be held criminally liable. In this regard, the Petitioner relies upon the following judgments:

(a) [S.M.S. Pharmaceuticals Limited v/s Neeta Bhalla and another](#), 2005 8 SCC 89

(b) [State of Haryana v/s Brij Lal Mittal and others](#), 1998 5 SCC 343

(c) Judgment dated 11.9.1997 of this Hon'ble Court in Criminal Misc. Application No.1678 of 1990 - K.S. Nanavati v/s State of Gujarat

(d) Judgment dated 6.4.1999 of this Hon'ble Court in Criminal Misc. Application No.139 of 1997 - S.I. Nanavati v/s State of Gujarat

(e) Judgment dated 4.5.2007 of this Hon'ble Court in Criminal Misc. Application No.7302 of 2000 - K.S. Nanavati v/s Registrar of Companies

5.5 There is no averment in the complaint that the Company does not have a managing director or a manager for fixing the alleged liability on all the Directors of the Company, including the Petitioner. In the circumstances, more particularly in absence of any specific allegation against the Petitioner, the Petitioner cannot be said to be liable for the alleged offences in the complaint. In this regard, the Petitioner relies upon the judgment of the Hon'ble Calcutta High Court in the case of [Registrar of Companies, West Bengal v/s. S. Proshad & another](#), 1986 59 CompCas 780.

5.6 In fact, the Managing Director of the Company has also been arraigned as an accused in the complaint. As per Section 209(6) (a) and (d) of the Companies Act, 1956, where the Company has Managing Director or a Manager, every other Director of the Company is not a person referred to in Section 209 (5) of the Companies Act, 1956.

5.7 There is no allegation that the Petitioner was charged by the Managing Director, Manager or Board with the duty of seeing that the requirements of Section 209(7) are complied with.

5.8 A complaint alleging offence under Section 211 would also lie only against a person referred to in Section 209 (6) of the Companies Act, 1956.

5.9 Compliance with the relevant provisions of the statute is with those in charge of the management of the company. When they certify that the relevant provisions have been complied with, the Directors approve the accounts. Petitioner being a Professional Director on the Board of the Company, would have no knowledge of any false statement made in any return, report or balance sheet. In any case, as per the provision of Section 5 of the Companies Act, 1956, the Petitioner cannot be said to be an officer in default. In this regard, the Petitioner relies upon the judgment dated 5.3.2012 of this Hon'ble Court in Special Criminal Application No.2421 of 2007 - Kalpesh Dagli v/s State of Gujarat.

5.10 There is no specific allegation made in the complaint, holding the Petitioner liable for the offence alleged to have been committed under Section 628 of the Companies Act. Further, there is no averment in the complaint alleging mala fides or want of good faith on the part of the Petitioner. In the circumstances, the Petitioner cannot be said to be liable for the offence alleged to have been committed under Section 628 of the Companies Act. In this regard, the Petitioner relies upon the judgment of the Hon'ble Madras High Court in the case of In re G. Natesan and others, reported in AIR 1949 Mad 657.

5.11 The Petitioner resigned as a Director of the Company on 31.8.2009. Thus the Petitioner was not a Director of the Company during the period of 2001-2002, 2002-2003 and 2003-2004. The allegation made in respect of non-disclosure of party related transaction are in respect of the accounting periods of 2001-2002, 2002-2003 and 2003-2004, and hence the Petitioner cannot be held liable for the same.

5.12 The complaint has been filed on 17.2.2006, inter alia, in respect of some allegations prior to the Petitioner's resignation on 31.8.1998. The complaint is barred by limitation. In this regard, the Petitioner relies upon the judgment dated 29.4.2015 of this Hon'ble Court in Special Criminal Application No.5550 of 2014 - Rasik Shantilal Mardia v/s State of Gujarat.

Special Criminal Application No.3140/2012 (Criminal Case No.08 of 2006 ('complaint' for short))

Allegations made in Criminal Case No. 8 of 2006:

5.13 The Company knowingly falsified its accounts for the year 1997-98 and 1998-99 by capitalizing fixed assets without any particulars as to their existence and carried over such falsified amount in subsequent year's accounts (up to 2003-04). The auditors have also not made any independent verification regarding fixed assets and thus have not adhered to AAS 11.

5.14 The accused persons have deliberately and willfully not replied to the observations/reservations etc., and have thereby violated the provisions of Section 209(5) read with Section 211(7) of the Companies Act, 1956 read with Section 628. Submissions of the Petitioner

5.15 The submissions in paragraph Nos.5.4 to 5.8 and 5.9 to 5.11 by the petitioner with reference to Criminal Case No.14 of 2006 i.e. in Special Criminal Application No.3139 of 2012 are common in all the cases and therefore, they are not reproduced separately.

5.16 There is nothing in para 4.3 of the report quoted in para 6 of the complaint which would indicate that the Petitioner has deliberately or willfully not replied to the observations/reservations, etc. There is no statement in the complaint, which would indicate as to what observation/reservation has not been replied to. Non reply of any observation/reservation does not tantamount to any offence under Section 209(5) or 211(7) of the Companies Act, 1956.

5.17 The complaint has been filed on 4.2.2006, inter alia, in respect of some allegations prior to the Petitioner's resignation on 31.8.1998. The complaint is barred by limitation. In this regard, the Petitioner relies upon the judgment dated 29.4.2015 of this Hon'ble Court in Special Criminal Application

Special Criminal Application No.3141/2012 (Criminal Case No.24 of 2006 ('complaint' for short)

Allegations made in Criminal Case No. 24 of 2006:

5.18 The 30 subscribers to the allotment of 2 crores shares were involved in the mischievous movement of funds on the date of allotment i.e. 21.6.1994. Deeper analysis of the bank accounts and entries very clearly indicate that the movement of cheques from one account to another was carried out with a view to generate a web of entries and to confuse the authorities.

5.19 The cheques were rotated among the said companies through the Company's account without any movement of funds, the source of account being the account of the Company. This amounts to financial transaction of purchase of shares of the Company from out of the funds available with the Company, which is in violation of the provisions of Section 77 of the Companies Act, 1956.

5.20 The accused persons being 2 to 13 have knowingly and willfully approved and signed the false annual accounts and thereby the accused persons have rendered themselves liable to be prosecuted under Section 211 read with Section 209(5) and (6) read with Section 77 of the Companies Act, 1956 read with Section 467 and 471 of the Indian Penal Code, 1860. Submissions of the Petitioner

5.21 The submissions in paragraph Nos.5.4 to 5.8 and 5.9 to 5.12 by the petitioner with reference to Criminal Case No.14 of 2006 i.e. in Special Criminal Application No.3139 of 2012 are common in all the cases and therefore, they are not reproduced separately.

5.22 Only when a company does not have officers specified in clause (a) to

(c) of Section 5 of the Companies Act, 1956, and only when Director or Directors are not specified by the Board for the purposes of Section 5, that all Directors would be officers in default. There was a Managing Director and whole-time Director and consequently the other Directors, who are not in managerial capacity, would not be officers in default. In the circumstances, the filing of complaint, the issuance of process and the continuance of prosecution under Section 77 of the Companies Act against the Petitioner are without authority of law and abuse of the process of the law.

5.23 The allegation made in the complaint that the Petitioner has committed offence under Section 467 and 471 of the Indian Penal Code is devoid of merit. There is not even a whisper of allegation that the Petitioner has made any false document, much less with intent to cause damage or injury to the public or any person or to support any claim or title or to cause any person to part with property or to enter into any express or implied contract or with intent to commit fraud or that the fraud may be committed. The Petitioner submits that there is not a whisper of allegation that the Petitioner has forged the document, which purports to be a valuable security or which purports to give to any person make or transfer any valuable security or to receive the principal interest or dividends thereon or to receive or deliver any money, movable property or valuable security or any document purporting to be an acquaintance or receipt acknowledging payment of money or delivery of movable property or valuable security. The Petitioner further submits that there is no allegation that the Petitioner has used any document as genuine, which he knows or has reason to believe to be forged. None of the ingredients of Section 463, 464 read with Section 467 and 471 of the Indian Penal Code are found to be satisfied in the allegations made in the complaint, much less against the Petitioner.

Special Criminal Application No.3142/2012 (Criminal Case No.15 of 2006 ('complaint' for short)

Allegations made in Criminal Case No. 15 of 2006:

5.24 It is seen from the annual reports containing the auditor's report,

director's reports, balance sheets, profit and loss accounts etc. for the period from 1994-1995 to 2003-04 (Annexure-A) received from various agencies such as ROC, SEBI, Stock Exchange, Income Tax Department etc. that the auditor's reports have several remarks/observations which are in the nature of reservations or qualifications or adverse remarks but they have not been replied by the directors in their respective reports as required under sub-section (3) of section 217 of the Companies Act, 1956.

5.25 The directors have not furnished the fullest information and explanations in their reports on every reservation, qualification or adverse remark contained in the Auditor's Report relating to the financial years 1994-1995 to 2003-2004.

5.26 The accused persons being 2 to 16 have knowingly and willfully approved the accounts without furnishing fullest information and explanation to the adverse remark of auditors in the report on the said accounts and thereby the accused persons have rendered themselves liable to be prosecuted under Section 217(5) read with Section 628 of the Companies Act, 1956. Submissions of the Petitioner

5.27 The submissions in paragraph Nos.5.4, 5.12 by the petitioner with reference to Criminal Case No.14 of 2006 i.e. in Special Criminal Application No.3139 of 2012 are common and therefore, they are not reproduced separately.

5.28 There is no specific allegation made in the complaint, holding the Petitioner liable for the offence alleged to have been committed under Section 628 of the Companies Act. Further, there is no averment in the complaint alleging mala fides or want of good faith on the part of the Petitioner. In the circumstances, the Petitioner cannot be said to be liable for the offence alleged to have been committed under Section 628 of the Companies Act. In this regard, the Petitioner relies upon the judgment of the Hon'ble Madras High Court in the case of In re G. Natesan and others, reported in AIR 1949 Mad 657.

5.29 There is no allegation whatsoever that the Petitioner has made any false statement in material particular knowing it to be false in any return, report, certificate, balance sheet, prospectus, statement or other document by or for the purposes of any of the provisions of the Act or has omitted any material fact knowing it to be material.

5.30 It is submitted that Section 628 of the Companies Act, 1956 would have no application in the context of Section 217(3) of the Companies Act, 1956.

5.31 The Petitioner has been a Director of the Company upto 31.8.1998. The auditor's report for the financial year 1998-1999 was received on 12.4.1999. The Petitioner is concerned only in respect of the financial years 1994-1995 to 1997- 1998.

5.32 None of the remarks made for the year 1994-1995 to 1997-1998 can be considered an adverse remark, qualification or reservation, much less an adverse remark which requires the Board to give any information or explanation.

[6] The petitioner is a practicing advocate and it is his main vocation. Incidentally, he might have accepted Directorship, but merely he is a formal Director, no process can be issued against him unless specific allegation has been made against him in the complaint or prima-facie ingredients of the offence has been established against him. Here in this case, it is established from the complaint itself that, though the present petitioner has been named as an accused in the said complaint, neither there is specific allegation made nor prima-facie ingredients of the offence established from the said complaint against the petitioner. It seems that he has been joined as an accused in the said proceedings merely because he is a formal Director in the Company. In absence of any specific averments or ingredients in the complaint against the petitioner, the process issued against the petitioner requires to be quashed.

[7] A plain reading of Section 211(7) and 209(5) of the Act would go to show that the default is punishable with imprisonment for a term which may extend to six months and shall also be liable to fine which may extend to ten thousand rupees, or with both.

[8] Section 628 provides for punishment with imprisonment, which may extend to two years and shall also be liable to fine. It is not in dispute that the alleged contravention with regard to the maintenance of Registers of Directors are for a period spanning from 1997-98 and 1998-99. The complaint came to lodged in the year 2006

[9] The question which falls for my consideration is whether the learned Magistrate could have taken cognizance of the alleged offence, after the expiry of the period of limitation as provided under Section 468 of the Code of Criminal Procedure.

[10] Section 468 provides that the period of limitation shall be six months, if the offence is punishable with fine only, and three years if the offence is punishable with imprisonment for a term exceeding one year, but not exceeding three years.

[11] Having regard to the nature of the contravention, it could not be said that the Sections 211(7), 209(5) and 628 of the Companies Act are continuing offences so that the period of limitation would keep on running. What is continuing offence has been exhaustively explained by this Court, while disposing of Special Criminal Application No. 809 of 2014 today itself.

[12] In view of above facts and circumstances, the Special Criminal Applications are allowed. Thereby, the criminal proceedings of Criminal Complaint Nos.14 of 2006, 08 of 2006, 24 of 2006 and 15 of 2006 against the applicant pending before the Court of learned Addl. Chief Judicial Magistrate, Ahmedabad are hereby ordered to quashed.

[13] Rule is made absolute. Direct service is permitted.

