IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: January 10, 2008
Date of Decision: January 31, 2008

CRL.MC. 304/2005

VINAY BHARAT RAM & ANR. .....PETITIONERS
Through : S/Shri R.N. Mittal, Senior Advocate with
Mr. D. Arya & Mr. P.K. Mittal, Advocates

versus

REGISTRAR OF COMPANIES .... RESPONDENTS
Through: Ms. Divya Chaturvedi, Advocate

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

Dr. S. Muralidhar, J.

1. Aggrieved by an Order dated 18th December 2004 passed by the Additional Sessions Judge, Delhi (`ASJ') in C.R. No. 79 of 2004, the Petitioners, i.e., the Managing Director of DCM Limited (`the Company') as well as the Company have filed this petition under Section 482 of the Code of Criminal Procedure (`CrPC'). The other prayers include the quashing of the Complaint [Company Case No. 227 of 2001] titled "***Registrar of Companies v. DCM Ltd. & Others***" pending in the Court of the Metropolitan Magistrate (MM), New Delhi and the further proceedings consequent thereto including an order dated 11th April, 2002 of the learned MM summoning the Petitioners to face trial for the contravention of Section 349 (4) of the Companies Act, 1956 (`Act').

2. An inspection of the books of accounts and records of the Company was ordered by the Department of Company Affairs by a letter dated 25th June 1998. An inspection was conducted by the Joint Director (Inspection) on 21st May 1999. It was noticed that the computation of the net profit for the purposes of determining the permissible managerial remuneration for the year 1994-95 had not been arrived at as per the provisions of Sections 349 and 350 of the Act. The view was that the unprovided depreciation for the previous years amounting to Rs. 52.93 crores had also to be deducted while computing the net profit for the purposes of the managerial remuneration. A show cause notice was issued to the Company on 22nd May 2000, and thereafter sanction to launch the prosecution was granted by the Regional Director on 5th December 2000. Consequently, a complaint, being Company Case No. 227 of 2001, was filed by the Registrar of Companies (ROC) in the Court of the learned ACMM, New Delhi under Section 629-A of the Act against the Company for the contravention of Section 349 (4) of the Act.

3. A summoning order was issued by the learned MM prompting the Petitioners to file an application in that court for recall. By an order dated 11th April 2002, the learned MM rejected the application for recall. In response to the submission on behalf of the petitioners that they had not included the total depreciation as per legal advice, the learned MM opined that this would have to be proved by the accused persons by way of evidence at the trial, and could not form a ground for discharge.

4. Aggrieved by the order dated 11th April 2002, the Petitioners filed a revision petition before the learned ASJ. By the impugned order dated 18th December 2004, the learned ASJ held that the revision petition was not maintainable in view of the judgment of the Supreme Court in ***Adalat Prasad v. Rooplal Jindal & Ors. 113 (2004) DLT 356 (SC)***.

5. Mr. R.N. Mittal, the learned Senior Counsel, appearing for the Petitioners submits at the outset that the impugned order dated 18th December 2004 of the learned ASJ dismissing the revision petition of the petitioner challenging the summoning order on the ground of maintainability cannot be faulted in view of the decision of the Supreme Court in ***Adalat Prasad***. Nevertheless he submits that by virtue of that very judgment, the only remedy available to the petitioner against the summoning order dated 11th April 2002 of the learned MM is by way of the present petition under Section 482 CrPC.

6. It is submitted that the learned MM erred in failing to appreciate that the offence under Section 629A was punishable with the fine of Rs. 5,000/-and that the maximum period of limitation, within which the cognizance had to be taken was six months in terms of Section 468 CrPC. No application was filed by the complainant under Section 473 CrPC seeking condonation of the delay in approaching the court of the learned MM, and therefore, there was no occasion for the learned MM to hold that the complainant could have the benefit of that provision. Even on merits, he submits that the Petitioners were relying on the wording of Section 309 read with Section

349 (4) of the Act to contend that depreciation was not an expenditure which was required to be deducted for the purposes of arriving at managerial remuneration. This was not a matter for evidence but interpretation, and for which trial was not necessary.

7. Despite the matter being passed over once, the counsel for the ROC did not appear. Instead, a proxy counsel appeared and made a request for further adjournment. This Court noticed that there have already been several adjournments in the matter and the ROC had also not availed of several opportunities for filing a reply. In the circumstances, at the conclusion of the hearing an order was passed on January 10 2008 in the presence of the proxy counsel for the ROC permitting parties to file their respective written submissions within one week. Till date the ROC has not filed its written submissions either.

8. The Petitioners are right in the contention that Section 629A of the Act states that where no specific penalty is provided elsewhere in the Act, the maximum punishment is a fine of Rs.5,000/- and where the contravention is a continuing one, a further fine of Rs.5,000/- for every day during which the contravention continues is imposable. Section 349 (4) which talks of the sums that are required to be deducted for determining net profits for the purposes of managerial remuneration does not itself describe the punishment. As far as the limitation for taking cognizance of such an offence, Section 468 (2) CrPC stipulates that the period of limitation shall be six months if the offence is punishable with fine only. The exception to

this is Section 473 which reads as under:

> "**473-Extension of period of limitation in certain cases**. Notwithstanding anything contained in the foregoing provisions of this Chapter, any Court may make cognizance of an offence after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice."

9. The factual position which is not in dispute is that inspection of the company was ordered by the Department of Company Affairs on 25th June, 1998. The inspection was carried out on 21st May 1999. Clearly, therefore, the ROC had the knowledge of the commission of offence on the date of the inspection, i.e., 21st May 1999. The six months period of limitation in terms of Section 469 (1) (b) CrPC would have to run from that date. Even if the date has to be taken as on 22nd May 2000, the date on which the show cause notice for contravention is issued to the Petitioners, the complaint was filed only on 20th March 2001. The only explanation offered is that the sanction for prosecution was received on 5th December 2000, and thereafter the complaint was filed. Further, there is no explanation forthcoming for the delay in thereafter filing the complaint only on 20th March 2001. This cannot be said to be reasonable explanation for the delay since the limitation would necessarily have to be computed from the date of the knowledge of the commission of offence. This is also not in the nature of a continuing offence. Apart from the fact that there is no such averment in the complaint, the type of contravention alleged does not admit of such description. The contravention alleged is of Section 349 (4) which requires a certain deduction to be made of a sum while computing profits for the

purpose of managerial remuneration for a particular financial year at the time of finalizing the accounts for that year. The learned MM therefore could not have taken cognizance since the complaint was filed beyond the period of limitation under Section 629A of the Act read with Section 468 CrPC.

10. Even if it were to be held that the delay in the learned MM taking cognizance of the complaint could be explained with reference to Section 473 CrPC a reading of Section 349 (4) itself indicates that while determining net profits in any financial year, the sums which have been required to be deducted is the depreciation to the extent specified in Section 350, which is the depreciation for the current year. The other sum that is required to be deducted in terms of sub-clause (l) of Section 349 (4) of the Act is the "excess of expenditure over income" insofar as "such excess had not been deducted in any subsequent year preceding the year in respect of which the net profits have to be ascertained." If the ROC has to succeed in its complaint, it would have to show that the unprovided depreciation of the previous years partakes of the character of an 'expenditure.'

11. The question whether for the purposes of Section 349 (40 the unprovided for depreciation of earlier years is an 'expenditure' is no longer *res integra*. The question was answered in the negative by the Calcutta High Court in ***J.K. Industries v. Ganges Manufacturing Company 38 (1968) Company Cases 603.*** No contrary view of any other High Court has been brought to the knowledge of this Court. This Court finds that the

language of Section 349 (4) which details the specific heads of deduction for arriving at the net profit clearly contemplates "depreciation" in sub-clause (k) as separate and distinct from an item of excess "expenditure" in sub-clause (l). If it was the legislative intent of Parliament to include unprovided depreciation of the previous years as one other head of deduction, then there is no reason why it would not have so provided or at least included it in sub-clause (k) itself. The intent therefore appears to be to not include unprovided depreciation of the previous years as a head of deduction and restrict the deduction to depreciation for the year in question in terms of Section 350. Nothing in the language of sub-clause (l) of Section 349 (4) appears to indicate that it is some kind of a catch-all residuary clause which can accommodate all heads of deduction not elsewhere specified in Section 349 (4). This Court therefore respectfully adopts the view taken by the Calcutta High Court and holds that the unprovided depreciation of the previous years does not fall within the purview of "excess expenditure" in sub-clause (l) of Section 349 (4) of the Act. The basis of seeking to prosecute the company for the contravention of Section 349 (4) is therefore non-existent in the eye of law.

12 On both the grounds therefore, the Petitioners are right in their contention that the complaint in question is not sustainable in law.

13. For all the aforementioned reasons, the petition is allowed and the complaint Company Case No. 227 of 2001 titled "***Registrar of Companies v. DCM Ltd. & Others***" pending in the Court of the learned MM and all

proceedings consequent thereto including the summoning order dated 11th April 2002 passed by the learned MM hereby stand quashed. In the circumstances, there will be no orders as to costs.

January 31, 2008 (S. Muralidhar)
ak Judge