1960

September 23.

THE STATE OF BOMBAY

v.

BANDHAN RAM BHANDANI AND OTHERS.

(JAFER IMAM, A. K. SARKAR and K. C. DAS GUPTA, JJ.)

Company—General meeting not called wilfully—Whether it can be a defence—Indian Companies Act, 1913 (VII of 1913), as amended by Companies Act, 1936 (22 of 1936), ss. 5, 32(5), 131 and 133(3).

The respondents, directors of a company, were prosecuted under ss. 32(5) and 133(3) of the Companies Act, 1913, for breaches of ss. 32 and 131 of that Act for having knowingly and wilfully authorised the failure to file the summary of share capital for the year 1953 and being knowingly and wilfully parties to the failure to lay before the company in general meeting the balance sheet and profit and loss account as at March 31, 1953. The respondents contended that there was no default in complying with the requirements of the section as no general meeting had been held in the year concerned.

Held—A person charged with an offence cannot rely on his default as an answer to the charge and so, if the respondents were responsible for not calling the general meeting, they cannot be heard to say in defence to the charges brought against them that the general meeting had not been called.

The company and its officers were bound to perform the conditions precedent, if they could do that, in order that they might perform their duty.

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It is no less necessary to call a meeting for performing the obligations imposed by s. 32 because s. 76 creates an obligation to call a meeting and imposes an independent penalty for breach of that obligation. Liability under s. 32(5) or s. 133(3) would be incurred where the officer has wrongfully assisted in the meeting not being held though he might also be liable at the same time to the penalty under s. 76.

Sub-section (5) of s. 32 by imposing a daily fine during the continuance of the default does not indicate that the default is not committed till a meeting has been held. The default occurs after the expiry of twenty-one days from the day when the meeting should have been held.

Imperator v. *The Pioneer Clay and Industrial Works Ltd.*, I.L.R. 1948 Bom. 86, *Queen* v. *Newton*, (1879) 48 Law J. Rep. M.C. 77 and *Dorte* v. *South African Super-Aeration Ltd.*, (1904) 20 T.L.R. 425, distinguished.

Gibson v. *Barton*, (1875) L.R. 10 Q.B. 329, *Edmonds* v. *Foster*, (1875) 45 Law J. Rep. M.C. 41 and *Park* v. *Lawton*, [1911] 1 K.B. 588, approved.

Dorte v. *South African Super-Aeration Ltd.*, (1904) 20 T.L.R. 425, not applicable.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeals Nos. 93 & 94/1958.

Appeals by special leave from the judgment and order dated April 9, 1956, of the former Bombay High Court in Criminal Appeals Nos. 419 and 420 of 1956, arising out of the judgment and order dated October 15, 1955, of the Chief Presidency Magistrate, Bombay, in Cases Nos. 370/S and 371/S of 1955.

C. K. Daphtary, Solicitor-General of India, N. S. Bindra and *R. H. Dhebar*, for the appellant (in both the appeals).

S. P. Varma, for respondents Nos. 1, 2 and 3 (In both the appeals).

A. N. Goyal, for respondent No. 4 (In both the appeals).

N. P. Nathwani, S. N. Andley, J. B. Dadachanji, Rameshwar Nath and *P. L. Vohra*, for respondents Nos. 5 to 7 (In both the appeals).

1960. September 23. The Judgment of the Court was delivered by

SARKAR J.—The respondents were Directors of Hirjee Mills Ltd. They were prosecuted before the Chief Presidency Magistrate, Bombay, for two offences under the Companies Act, 1913, as amended by Act XXII of 1936. The first offence was that they knowingly and wilfully authorised the failure to file the summary of share capital for the year 1953 and thereby became punishable under sub-s. (5) of s. 32 of the Act, for a default in carrying out the requirements of that section. The second offence was that they were knowingly and wilfully parties to the failure to lay before the Company in general meeting the balance sheet and profit and loss account as at March 31, 1953 and thereby became punishable under s. 133(3) of the Act for a default in complying with the requirements of s. 131. There was a separate trial in respect of each offence.

The learned Magistrate found that no general meeting of the company had been held in the year concerned. Following *Imperator* v. *The Pioneer Clay and Industrial Works Ltd.* (1) he acquitted the respondents, being of the view that no offence under either section could be committed till the general meeting had been held. The learned Magistrate did not go into the merits of the cases on the facts. Appeals by the appellant to the High Court at Bombay from the orders of the learned Magistrate were summarily dismissed. It has preferred the present appeals from the decisions of the High Court at Bombay with special leave granted by this Court. The appeals have been heard together and are both disposed of by this judgment.

It appears that respondent No. 7, N. K. Firodia, was discharged by the learned Magistrate because it was conceded at the trial that he was not a director of the Company at any material time. He has been made a respondent to the present appeals clearly through some misapprehension. The appellant, the State of Bombay, does not and cannot proceed against him. The name of respondent Firodia should therefore be struck out from the records of this appeal.

(1) I.L.R. [1948] Bom. 86.

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Respondent No. 5, Fateh Chand Jhunjhunwala, died while this appeal was pending in this Court. The appeal is therefore concerned with the remaining five respondents only.

Sub-section (1) of s. 32 requires a company once at least in every year to make a list of its shareholders as on the date of the first or only ordinary general meeting in the year. Sub-section (2) requires that the list shall contain a summary specifying various particulars mentioned in it. Sub-section (3) states that the list and summary shall be completed within twenty-one days after the day of the first or only ordinary general meeting in the year and the company shall forthwith file a copy with the registrar together with a certificate from a director or the manager or the secretary of the company that the list and summary state the facts as they stood on the day aforesaid. Sub-section (5) contains the penal provision, that "If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding fifty rupees for every day during which the default continues, and every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty".

It is said on behalf of the respondents that there is no default in complying with the requirements of the section until a general meeting is held. That, it is said, follows from the language of the section, for it requires certain things as at the date of the meeting to be stated in the list and summary and also requires these to be filed within a certain time of the meeting. So, it is said, that, the section requires certain things to be done only after the meeting has been held and no question of performing those things arises till the meeting has been held.

A contrary view has been taken in England on the corresponding provisions of the English Companies Acts of 1862 and 1908: see *Gibson* v. *Barton* (1), *Edmonds* v. *Foster* (2) and *Park* v. *Lawton* (3). It was said in these cases that a person charged with an

(1) (1875) L.R. 10 Q.B. 329. (2) (1875) 45 Law J. Rep. M.C. 41.
(3) [1911] 1 K.B. 588.

offence could not rely on his own default as an answer to the charge, and so, if the person charged was responsible for not calling the general meeting, he cannot be heard to say in defence to the charge that the general meeting had not been called. It was also said that the company and its officers were bound, to perform the condition precedent if they could do that, in order that they might perform their duty. This seems to us to be the correct view to take. If the person charged with the failure to carry out the requirements of the section could have called the meeting, he cannot defeat the provisions of the section simply by not calling the meeting wilfully.

It is true that under s. 76 of the Act a general meeting of a company has to be held once at least in every calendar year and if a default is made, the company and every director or the manager of the company who is knowingly and wilfully a party to the default shall be liable to a fine not exceeding five hundred rupees. That however is, in our opinion, no reason for saying that a person charged with a failure to file the list and summary as required by s. 32 where a meeting had not been held, could only be prosecuted under s. 76 and not under s. 32. Section 76 imposes an obligation to hold a meeting and attaches a penalty to a failure to perform that obligation. In the case of s. 32 it is necessary that the meeting should be held in order that the requirements of that section may be carried out. It is no less necessary to call a meeting for performing the obligations imposed by s. 32, because under s. 76 there is an obligation to call a meeting the breach of which entails an independent penalty. The two sections deal with different matters and s. 76 does not interfere with the operation of s. 32. The effect of s. 32 must be derived from its terms: the terms cannot have different effects depending on whether there is a provision like s. 76 in another part of the Act or not. Without a provision like s. 76 a delinquent officer of the company may make s. 32 infructuous, and therefore, as already stated, it must be held that liability

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under s. 32 would be incurred where the officer has wrongly assisted in the meeting not being held. The result cannot be different because of the presence of a provision like s. 76.

Nor do we think that sub-sec. 5 of s. 32 by imposing a daily fine during the continuance of the default indicates that the default is not committed till the meeting has been held. In order that the default may continue it has no doubt first to occur. In our view, it occurs after the expiry of 21 days from the day when the meeting should have been held within the year.

The respondents referred to the case of *Queen* v. *Newton* (1) where it having been proved that the general meeting was not held, the persons charged with the default were acquitted. That case however is clearly distinguishable, "because the decision proceeded on the ground that, the summons having alleged in terms that the default was made after the general meeting had been held, it became essential to prove when the meeting was held as a matter of fact, and in the absence of proof the court held that the summons was rightly dismissed". In this case Cockburn, C. J., expressed some doubts about the correctness of the decision in *Edmonds* v. *Foster* (2). In *Park* v. *Lawton* (3) however, Lord Alverstone said that he was unable to share those doubts, and with this view, we agree. We may add that such doubts have not been shared by anyone upto now.

Another case to which we were referred on behalf of the respondents was *Dorte* v. *South African Super-Aeration Ltd.* (4). There a company was convicted for a failure to file the list and summary in a case where the general meeting had not been held and fined 1d and 1d per day upto certain day. Subsequently a further summons against it was taken out in respect of the same default for further penalties from that day to another later day. It was held that the word "default" implied a wilful and continued neglect to do an act required and that the company could not

(1) (1879) 48 Law J. Rep. M. C. 77.
(2) (1875) 45 Law J. Rep. M. C. 41.
(3) [1911] 1 K.B. 588.
(4) (1904) 20 T.L.R. 425.

be liable to a continuing daily fine for an omission which it was impossible to remedy. The report does not set out the arguments nor the judgment and it is not clear on what grounds the decision was given. It appears, however, that Lord Alverstone was one of the Judges who decided that case. In *Park* v. *Lawton* (1), Lord Alverstone himself observed with regard to the *Dorte's case* that there, "there was no question of the defendant being also in default as to the general meeting, and that decision, therefore, in no way conflicts with the earlier authorities." We do not think, therefore, that *Dorte's case* assists the respondents at all. It is authority only for the proposition that a continuing daily fine will not be exacted where, owing to no meeting having been held, it is impossible to remedy the default: see Buckley's Company Law (13th Ed.), p. 311.

Turning now to s. 131, we find that it requires the directors of a company, once at least in every calendar year, to lay before the company in general meeting a balance sheet and profit and loss account of the company. Sub-section (3) of s. 133 makes the company and every officer of it who is knowingly and wilfully a party to the default in carrying out the provisions of s. 131, punishable with fine which may extend to five hundred rupees. As in the case of s. 32 and for the same reasons, here also it is no defence to the charge for breach of s. 131 to say that a meeting was not called.

As regards *Imperator* v. *Pioneer Clay and Industrial Works Ltd.* (2), on which the courts below held that the respondents must be acquitted, we find that it turned on s. 134 of the Companies Act, 1913. The language of that section is to a certain extent different from the language used in ss. 32 and 131. Section 134(1) says, "After the balance sheet and profit and loss account.....have been laid before the company at the general meeting, three copies thereof.....shall be filed with the Registrar." Sub-section (4) of this section provides a penalty for breach of s. 134, in terms similar to those contained in sub-sec. (5) of s. 32. If the language of s. 134(1)

(1) [1911] 1 K.B. 588. (2) I.L.R. [1948] Bom. 86.

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makes any difference as to the principle to be applied in ascertaining whether a breach of it has occurred or not—as to which we say nothing in this case—then that case can be of no assistance to the respondents. If however no such difference can be made, then we think that it was not correctly decided. We observe that Chagla, C. J., who delivered the judgment of the Court in that case, did not question the correctness of the decision in *Park* v. *Lawton* (1) which he was asked to follow. All that he said with regard to that case was that the scheme and terms of the section on which it turned were different from s. 134 of the Companies Act, 1913. That may or may not be so. There is however no difference between s. 26 of the English Companies Act, 1908, on which *Parker's case* turned and which apparently through some mistake Chagla, C.J., cited s. 36, and s. 32 of the Indian Companies Act of 1913, except that the English section required the summary to include a statement in the form of a balance sheet containing certain particulars mentioned, whereas our section does not require that. Section 131 of our Act contains some provision about the laying of the balance sheet before the general meeting. This provision was inserted in the Act by the amending Act of 1936. The fact, that one of the requirements of the English section 26 is not present in s. 32 of our Act cannot create any material difference between s. 32 of our Act and s. 26 of the English Act. If the principle that a person charged with an offence cannot rely on his own default as an answer to the charge is correct, as we think it is, and which we do not find Chagla, C. J., saying it is not, then that principle would clearly apply when a person is charged with a breach of s. 32 of our Act.

We think therefore that the appeal should be allowed. The case will now go back to the learned Presidency Magistrate and be tried on the merits according to the law as laid down in this judgment.

Appeal allowed. Case remanded.

(1) [1911] 1 K.B. 588.