

C 5118/2019

Order dated 23/6/2023

Ld. Advocate for accused and Ld. Counsel for ROC present.

Today is fixed for hearing with respect to petition dated 19/1/2023 filed by the accused persons.

Heard both sides.

Fix 27/7/2023 for passing order.

Order dated 27/7/2023

As fixed record is taken up for passing order with respect to petition dated 19/1/2023 filed by the accused persons challenging maintainability of instant case.

I had heard both sides at length previously with respect to the same.

Vide the said petition, accused have submitted that on 15/10/2019 the Complainant filed the instant case under section 628 of the Companies Act, 1956 and Ld. Court took cognizance and issued process against the accused persons but the instant proceedings are void ab initio as there was no authority to sanction launching of prosecution as per the Notification by Ministry of Corporate Affairs, New Delhi dated 30/1/2019 which is contrary to provision of section 465 of the Companies Act, 2013.

Section 465 of the Companies Act lays down:

“465. (1) The Companies Act, 1956 and the Registration of Companies (Sikkim) Act, 1961 (hereafter in this section referred to as the repealed enactments) shall stand repealed:

*1[***]*

2[Provided that] until a date is notified by the Central Government under subsection (1) of Section 434 for transfer of all matters, proceedings or cases to the Tribunal, the provisions of the Companies Act, 1956 in regard to the jurisdiction, powers, authority and functions of the Board of Company Law Administration and court shall continue to apply as if the Companies Act, 1956 has not been repealed:

3[Provided further that] provisions of the Companies Act, 1956 referred in the notification issued under section 67 of the Limited Liability Partnership Act, 2008 shall, until the relevant notification under such section applying relevant corresponding provisions of this Act to limited liability partnerships is issued, continue to apply as if the Companies Act, 1956 has not been repealed.

(2) Notwithstanding the repeal under sub-section (1) of the repealed enactments,—

(a) anything done or any action taken or purported to have been done or taken, including any rule, notification, inspection, order or notice made or issued or any appointment or declaration made or any operation undertaken or any direction given or any proceeding taken or any penalty, punishment, forfeiture or fine imposed under the repealed enactments shall, insofar as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;

(b) subject to the provisions of clause (a), any order, rule, notification, regulation, appointment, conveyance, mortgage, deed, document or agreement made, fee directed, resolution passed, direction given, proceeding taken, instrument executed or issued, or thing done under or in pursuance of any repealed enactment shall, if in force at the commencement of this Act, continue to be in force, and shall have effect as if made, directed, passed, given, taken, executed, issued or done under or in pursuance of this Act;

(c) any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure or existing usage, custom, privilege, restriction or exemption shall not be affected, notwithstanding that the same respectively may have been in any manner affirmed or recognised or derived by, in, or from, the repealed enactments;

(d) any person appointed to any office under or by virtue of any repealed enactment shall be deemed to have been appointed to that office under or by virtue of this Act;

(e) any jurisdiction, custom, liability, right, title, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not in existence or in force shall not be revised or restored;

(f) the offices existing on the commencement of this Act for the registration of companies shall continue as if they have been established under the provisions of this Act;

(g) the incorporation of companies registered under the repealed enactments shall continue to be valid and the provisions of this Act shall apply to such companies as if they were registered under this Act;

(h) all registers and all funds constituted and established under the repealed enactments shall be deemed to be registers and funds constituted or established under the corresponding provisions of this Act;

(i) any prosecution instituted under the repealed enactments and pending immediately before the commencement of this Act before any Court shall, subject to the provisions of this Act, continue to be heard and disposed of by the said Court;

(j) any inspection, investigation or inquiry ordered to be done under the Companies Act, 1956 shall continue to be proceeded with as if such inspection, investigation or inquiry has been ordered under the corresponding provisions of this Act; and

(k) any matter filed with the Registrar, Regional Director or the Central Government under the Companies Act, 1956 before the commencement of this Act and not fully addressed at that time shall be concluded by the Registrar, Regional Director or the Central Government, as the case may be, in terms of that Act, despite its repeal.

(3) The mention of particular matters in sub-section (2) shall not be held to prejudice the general application of section 6 of the

General Clauses Act, 1897 with regard to the effect of repeal of the repealed enactments as if the Registration of Companies (Sikkim) Act, 1961 were also a Central Act.”

Ld. advocate for accused contended that by enforcing section 465 of Companies Act, 2013 Companies Act 1956 has been repealed but instant criminal proceeding was instituted before the Court on 15/10/2019 and MCA had given sanction to file prosecution on 20/9/2019 to the Regional Director(E.R.) but as per provision of 465(2)(i) of the Companies Act, 2013 only prosecution that had been instituted under the repealed enactments and **pending immediately before the commencement of this Act before any Court** could subject to the provisions of this Act, continue to be heard and disposed of by the said Court and section 465(3 of the Companies Act, 2013 did not give blanket application of section 6 of the General Clauses Act, 1897 but limited itself only to the effect of repeal of Registration of Companies (Sikkim) Act 1961 and hence ROC had no ground to file the case under section 628 of the Companies Act on 15/10/2019 as prior to 30/1/2019 section 465 of the Companies Act, 2013 had no applicability and no cognizance could be taken of offence punishable under the Companies Act, 1956 after commencement of section 465 of the Companies Act, 2013. Under such circumstances maintainability of instant case has been challenged as no charges could be framed against the accused persons and doing so would be a gross abuse of process of law and accused persons prayed for dismissing the case on ground of non maintainability.

Ld. counsel for ROC opposed the application tooth and nail and submitted that case was filed against the accused for violation of section 628 of the Companies Act, 1956 (for furnishing false information which relates to relevant financial year) on 15/10/2019 after getting sanction of MCA vide File No. 1/94/2017/CL-II(E/R) dated 20/9/2019 and that provision of section 465 of the Companies Act, 2013 has to be read as a whole and not in isolated manner and so repeal and saving

provision has to be read as a whole to construe the true purport/ meaning and intention of the legislature. Particular attention has been drawn to section 465(2)(a) and 465(h)(i) of Companies Act, 2013. Moreover it has been submitted that section 465(2)(a) of the Companies Act 2013 is exhaustive deeming provision which subsumes all acts done under the repealed act and that section 465(2)(i) of the Act of 2013 would only apply to those cases where prosecution has been filed before coming into effect of Section 465 of the Act of 2013 whereas section 465(2)(a) validates all proceedings done under the repealed Companies Act, 1956. It has also been submitted that the proceeding was also valid in view of section 6 of the General Clauses Act.

In reply Ld. advocate for accused cited judgement of the Hon'ble Apex Court in **Mahmadhusen Abdulrahim Kalota vs Union of India (2009) 2 SCC 1** to drive home the point that if any Central Act was repealed without making provision for savings the provisions of section 6 of the General Clauses Act, 1897 would apply but latter would not be applicable where the repealing Act itself contains specific provision as to savings, the express or special provision in the Act would apply as in the case of Companies Act, 2013.

Ld. advocate for accused also placed reliance on judgement of the Hon'ble High Court, Madras in **M/s Kanya Resorts Pvt Ltd and others vs Assistant Registrar of Companies, Tamil Nadu [CRL O.P. no 28730 of 2019]** where it was held:

"The Companies Act 1956 was repealed and replaced by Companies Act 2013. Only the cases instituted and pending at the time of commencement of 2013 Act were saved by the 2013 Act. However, all theses cases have been instituted only in the year 2017 and therefore, they are not legally maintainable.

23. Section [465](#) of Companies Act, 2013 deals with repeal of certain enactments and savings. As per this section, Companies Act 1956 and Registration of Companies Act, 1961 (Sikkim Act) were stood repealed. Section 465 (2) (i) saves " any prosecution initiated under the repeal enactments and pending immediately

before the commencement of this Act before any Court, subject to the provisions of this Act, continue to be heard and disposed of by the said Court. This Section only saves the prosecution instituted under the repealed enactments i.e., under 1956 Act and pending immediately before the commencement of the 2013 Act. Companies Act 2013 was notified on 12.09.2013. Admittedly, all these afore stated cases had not been instituted and pending immediately before the commencement of 2013 Act.

Thus, this Court finds merits in the submissions of the learned counsel for the petitioners that the prosecution launched in the aforesaid cases under the repealed act cannot be maintained. It is observed in **(2009) 2 SCC 1 Mahmadsen Abdulrahim Kalota Shaikh v. Union of India and others**, as follows:

34.(f) If any Central Act is repealed, without making any provision for savings, the provisions contained in section 6 of the General Clauses Act, 1897 will apply. But where the repealing Act itself contains specific provisions in regard to savings, the express or special provision in the repealing Act will apply. section 6 of the General Clauses Act makes it clear that it will not apply when a different intention appears in the repealing statute. Where the provision relating to savings is excluded, the repeal will have the effect of complete obliteration of the statute.

.....

36.Parliament in its plenary power, can make an outright repeal which will not only destroy the effectiveness of the repealed Act in future, but also operate to destroy all existing inchoate rights and pending proceedings. This is because the effect of repealing a statute is to obliterate it completely from the record, except to the extent of savings. If Parliament specifically excludes any saving clause in a repealing Act, or severely abridges the provision for savings, which it has the power to do, the effect would be that after the repeal of the statute, no proceeding can continue, nor can any punishment be inflicted for violation of the statute during its currency.”

Heard both sides and perused the cited judgements respectfully.

Here accused have been arraigned for commission of offence punishable under section 628 of the Companies Act, 1956.

Section 628 of the Companies Act, 1956 lay down:

Sec 628 - Penalty for false statements.

If in any return, report, certificate, balance sheet, prospectus, statement or other document required by or for the purposes of any of the provisions of this Act, any person makes a statement

(a) which is false in any material particular, knowing it to be false ; or

(b) which omits any material fact, knowing it to be material ;

he shall, save as otherwise expressly provided in this Act, be punishable with imprisonment for a term which may extend to two years, and shall also be liable to fine."

Alleged offence is hence summons triable.

I have perused the cited judgements and also heard Ld. advocate for accused and also Ld. Counsel for ROC. The contention of the Ld. advocate for accused does indeed bear merit especially in light of the judgement of the Hon'ble High Court, Madras referred to. However it must be remembered that Hon'ble High Court, Madras passed the order in exercise of power under section 482 Cr.P.C.

Here cognizance has been taken and process issued against the accused persons.

It has been repeatedly held in a plethora of judgements viz **Adalat Prasad vs Roolal Jindal and others (2004) 7 SCC 338]** and also **Subramaniam Sethuraman v. State of Maharashtra & Anr (2004) 13 SCC 324** by the Hon'ble Apex Court recalling the order issuing summons upon the accused in summons triable cases is not permissible in the scheme of the Cr.P.C. This has also been reiterated by the Hon'ble Apex Court in a recent judgement being **SUO MOTU WRIT PETITION (CRL.) NO.2 OF 2020 In Re: EXPEDITIOUS TRIAL OF CASES UNDER SECTION 138 OF N.I. ACT 1881** on 16/4/2021 where the

Hon'ble Apex Court reiterated the observations made in **Adalat Prasad vs Rooplal Jindal and others (2004) 7 SCC 338]** wherein the Hon'ble Apex Court held:

“It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provision of Sections 200 & 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking section 203 of the Code because the Criminal Procedure Code does not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482 of Code.”

Thus the question of non maintainability of the instant case on ground stated therein cannot be considered by this Court at this stage after it has taken cognizance and issued process against the accused person as doing so would in effect amount to recalling/reviewing order issuing process which this Court is not competent to do being bereft of any “inherent powers” unlike the Hon'ble High Court/Hon'ble Apex Court.

In view of the above discussion, the petition dated 19/1/2023 filed by the accused challenging maintainability of instant proceedings on grounds stated therein is rejected being misconceived.

To 13-10-2023 for appearance of accused persons and examination under section 251 Cr.P.C.

C.J.M.

Dictated and corrected by me :

C.J.M. , Alipore