
(1999) 05 RAJ CK 0016

In the Rajasthan High Court

Case No : Criminal Miscellaneous Petition No. 827 of 1998

Herdillia and Others

APPELLANT

Vs

Ms. Aparajita Chauhan

RESPONDENT

Date of Decision : 21-05-1999

Acts Referred:

Companies Act, 1956 — Section 113(2), 53

Citation : (2000) 99 CompCas 145

Hon'ble Judges : P.K. Tewari, J

Bench : Single Bench

Advocate : Mahendra Singh, for the Appellant; P.K. Khaitan, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Tewari, J.—This petition u/s 482 of the Criminal Procedure Code, 1973, has been filed to set aside the order dated May 2, 1998, and to quash the criminal complaint and proceeding pending against the petitioners in the court of the Special Judicial Magistrate (Economic Offences), Rajasthan, Jaipur.

2. In short, the facts of the case are that the respondent had submitted a joint application along with her sister, Ashiya Chouhan, seeking allotment of 200 shares each and for that purpose the required amount was remitted by cheque. They were allotted 100 shares each. According to the respondent, the company failed to deliver the share certificates till the filing of the complaint whereas the company was required to deliver the shares within three months from the date of allotment by registered post at the registered address of the applicant. Therefore, a complaint was filed in the Court of the Special Judicial Magistrate (Economic Offences) Rajasthan, Jaipur, against the present petitioner and others. The learned Magistrate after recording the statement under Sections 200 and 202 of the Criminal Procedure Code took cognizance of the offence u/s 113(2) of the Companies Act, 1956, against the present petitioners.

3. A petition u/s 482 of the Criminal Procedure Code was filed by the petitioners

before this court for quashing the criminal proceedings pending before the Special Judicial Magistrate which was dismissed with the observation that the accused should approach the trial court with a proper application in view of the apex court judgment in the case of K.M. Mathew Vs. State of Kerala and another, In compliance with the aforesaid direction of this court, the petitioners submitted an application u/s 203 of the Criminal Procedure Code for reconsideration of the matter but that application has been dismissed by the Special Magistrate vide its order dated May 2,1998. Therefore, this petition u/s 482 of the Criminal Procedure Code has been filed in this court.

4. Learned counsel submitted that the share certificates along with the refund of the balance amount were sent to the complainant-respondent by registered post but on account of lapse on the part of the Post and Telegraph Department the complainant-respondent did not receive the aforesaid share certificates and refund amount. The complainant submitted an application in the prescribed form for issuance of duplicate certificates along with the indemnity bond on August 3, 1993. After observing procedural formalities the duplicate certificates were sent by registered post to the respondent but just to pressurise the directors of the company, this criminal complaint has been filed concealing the true facts, no offence u/s 113(2) of the Companies Act is made out. He has also submitted on the basis of the pronouncement of the apex court in the case of Union of India (UOI) Vs. The Lonavla Borough Municipality of Lonavla, District Poona, by its Chief Officer and Another, that as per the statutory prospectus which was issued by the petitioner-company for commencement of the public issue in response to which the complainant had submitted her application for the allotment of shares, the letters of allotment and share certificates for equity shares and debentures, etc. were to be despatched by registered post at the applicant's sole risk. The registered office of the petitioner-company is situated at Mumbai. Section 113 read with Section 53 of the Companies Act makes it clear that it is permissible for a company to discharge its obligation by sending the share certificates, debentures, etc. through registered post. As the registered office of the company is situated at Mumbai, the Special Judicial Magistrate, Jaipur, has no territorial jurisdiction to try the case. Only the courts located at Mumbai had jurisdiction to entertain criminal complaint for the offence u/s 113 of the Companies Act. It has also been submitted that no complaint can be filed against the company and its chairman as the company had appointed a Registrar to the issue to handle all procedural formalities in the matter of processing of applications and despatching of allotment letters, share certificates or refund orders, etc. It was also made clear in the prospectus itself that the allotment orders, share certificates, refund orders, etc. will be sent at the sole risk of the applicant. The complaint has been filed after a lapse of 4-5 years. Therefore, it is time barred. Learned counsel has submitted that to allow the proceedings in the criminal court amounts to abuse of the process of the court, therefore, this petition must be allowed and the complaint and the proceedings pending in the court of the Special Judicial Magistrate be quashed.

5. On the other hand, learned counsel appearing for the respondent has submitted that the complainant did not receive the share certificates and the refund within the stipulated period, therefore, the offence u/s 113(2) is made out against the company and its chairman. He has also contended that the aforesaid judgment of the Supreme Court is not applicable in the present case because that was in connection with the payment of dividend u/s 207 of the Companies Act. The offence u/s 113 is a continuing offence. Therefore, it cannot be said that the complaint is time-barred. The learned Magistrate has jurisdiction to take cognizance of the offence u/s 113 of the Companies Act at Jaipur and the learned Magistrate has rightly taken cognizance of the offence against the present petitioners.

6. I have perused the order passed by the learned Special Judicial Magistrate and the record available. Before deciding the point raised by the petitioner it would be proper to quote the observations made by the apex court in regards to the powers u/s 482 of the Criminal Procedure Code. The apex court in the case of Mrs. Rupan Deol Bajaj and another Vs. Kanwar Pal Singh Gill and another, has observed as under (page 203) :

"We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases ; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the first information report or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."

It would be useful to reproduce the relevant provisions of the Companies Act which are required for the disposal of this petition. Sections 113, 53 and 207 are reproduced as under :

"113. (1) Every company, unless prohibited by any provision of law or of any order of any court, tribunal or other authority, shall, within three months after the allotment of any of its shares, debentures or debenture stock and within two months after the application for the registration of the transfer of any such shares, debentures or debenture stock, deliver, in accordance with the procedure laid down in Section 53, the certificates of all shares, debentures and certificates of debenture stocks allotted or transferred . . .

(2) If default is made in complying with Sub-section (1), the company and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees for every day during which the default continues.

(3) If any company on which a notice has been served requiring it to make good any default in complying with the provisions of Sub-section (1), fails to make good the default within ten days after the service of the notice, the Company Law Board may, on the application of the person entitled to have the certificates or the debentures delivered to him, make an order directing the company and

any officer of the company to make good the default within such time as may be specified in the order ; and any such order may provide that all costs of and incidental to the application shall be borne by the company or by any officer of the company responsible for the default."

"53. Service of documents on members by company.--(1) A document may be served by a company on any member thereof either personally or by sending it by post to him to his registered address, or if he has no registered address in India, to the address, if any, within India supplied by him to the company for the giving of notice to him. (2) Where a document is sent by post,--

(a) service thereof shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document, provided that where a member has intimated to the company in advance that documents should be sent to him under a certificate of posting or by registered post with or without acknowledgment due and has deposited with the company a sum sufficient to defray the expenses of doing so, service of the document shall not be deemed to be effected unless it is sent in the manner intimated by the member ; and

(b) such service shall be deemed to have been effected-

(i) in the case of a notice of a meeting at the expiration of forty-eight hours after the letter containing the same is posted, and

(ii) in any other case at the time at which the letter would be delivered in the ordinary course of post.

(3) A document advertised in a newspaper circulating in the neighbourhood of the registered office of the company shall be deemed to be duly served on the day on which the advertisement appears, on every member of the company who has no registered address in India and has not supplied to the company an address within India for the giving of notices to him.

(4) A document may be served by the company on the jointholders of a share by serving it on the jointholder named first in the register in respect of the share.

(5) A document may be served by the company on the persons entitled to a share in consequence of the death or insolvency of a member by sending it through the post in pre-paid letter addressed to them by name, or by the title of representatives of the deceased, or assignees of the insolvent, or by any like description, at the address, if any, in India supplied for the purpose by the persons claiming to be so entitled, or until such an address has been so supplied by serving the document in any manner in which it might have been served if the death or insolvency had not occurred."

"207. Penalty for failure to distribute dividends within forty-two days.--Where a dividend has been declared by a company but it has not been paid, or the warrant in respect thereof has not been posted, within forty-two days from the date of the declaration, to any shareholder entitled to the payment of the

dividend, every director of the company shall, if he is knowingly a party to the default, be punishable with simple imprisonment for a term which may extend to seven days and shall also be liable to fine :

Provided that no offence shall be deemed to have been committed within the meaning of the foregoing provision in the following cases, namely :

- (a) where the dividend could not be paid by reason of the operation of any law ;
- (b) where a shareholder has given directions to the company regarding the payment of the dividend and those directions cannot be complied with ;
- (c) where there is dispute regarding the right to receive the dividend ;
- (d) where the dividend has been lawfully adjusted by the company against any sum due to it from the shareholder ; or
- (e) where, for any other reason, the failure to pay the dividend or to post the warrant within the period aforesaid was not due to any default on the part of the company."

7. First of all, it would be proper to decide whether the Special Judicial Magistrate is competent to take cognizance of the offence against the present petitioners for the offence u/s 113(2) of the Companies Act. As stated earlier according to learned counsel for the petitioner, the courts located at Mumbai only have jurisdiction to entertain the complaints against the company or its officers for the offence u/s 113(2) because the registered office of the company is situated at Mumbai, on the basis of the judgment of the Supreme Court in H.P. Gupta Vs. Hiralal, . It has been observed by the Hon"ble Supreme Court as follows (headnote of AIR) :

"Section 207 casts an obligation on the company to pay dividend which is declared to the shareholder entitled within 42 days from its declaration. The offence under this section takes place when there is failure to pay or a cheque or warrant is not posted to the registered post of the shareholder. This section makes the failure to post within the prescribed period and not the non-receipt of the warrant by the shareholder, an offence. Therefore, the obligation to pay within the prescribed period is satisfied once the dividend is paid or a cheque or a warrant is posted at the registered address of the shareholder".

8. But, Section 113 casts an obligation upon the company within three months after the allotment of any of its shares, debenture or debenture stock, and within two months after the application for the registration of the transfer of any such shares, debentures or debenture stock, deliver in accordance with the procedure laid down in Section 53, the certificates of all shares, debentures and certificates of debenture stocks allotted or transferred.

9. Therefore, in my opinion, the aforesaid judgment is not applicable in the present case because the provisions of Sections 113 and 207 of the Companies Act are different.

10. Learned counsel appearing on behalf of the respondent has cited the following judgments in support of his contention that the Special Judicial Magistrate at Jaipur has jurisdiction to take cognizance of the offence u/s 113(2) against the present petitioners though the head office of the company is situated at Mumbai. In the case of Vatsa Industries Ltd. v. Shankerlal Saraf [1996] 87 Comp Cas 918, the Hon''ble Supreme Court has held as under (headnote) :

"Proceedings were filed in Consumer Forums and Magistrates' courts in various States against the petitioner-company in respect of forfeiture of shares. The company in a transfer petition sought transfer of all the proceedings to one single court. It was held that transfer of proceedings in various States to one single court would cause hardship and unavoidable expenses to the respondents, permitted the company to move the respective High Courts to have the cases within each State transferred to a single court within that State, to minimise the hardship."

11. It was held by this court in the case of Ranbaxy Laboratories Ltd. v. Smt. Indra Kala [1997] 88 Comp Cas 348 as follows (headnote) :

"The petitioner-company had its registered office in Punjab and its corporate office in Delhi. The respondent filed a complaint against the company, its managing director and three others in the Special Magistrates' Court at Jaipur, alleging that she had purchased 200 shares in the company from three shareholders and had duly sent such shares to the head office of the petitioner-company for registration of the transfer in its books, but despite repeated requests, reminders and efforts made by the respondent, the petitioner-company did not register the transfer of the shares in her name. After examining the respondent and her witness and looking into the documents filed along with the complaint, the Magistrate took cognizance and issued process against the company and its managing director. On a petition to have the magistrate's order quashed u/s 482 of the Code of Criminal Procedure :

Held, dismissing the petition, (i) that the powers of the court u/s 482 of the Criminal Procedure Code are quite limited and extraordinary and should be exercised with great care and caution in the rarest of rare and exceptional cases only to prevent the abuse of the process of the court or otherwise to secure the ends of justice . . .

(iii) That registration of the transferred shares was amongst the duties of the petitioner-company in the course of conducting its business according to the provisions of law applicable to its business. Once the petitioner-company and the law applicable to its functioning permitted transactions of purchase and sale of its shares throughout the breadth and length of the country for its gain, the interest of the members of the public transacting such business could not be allowed to be defeated on the plea that relief to the aggrieved persons could be granted only at the place where the office of the company was located. Such an approach would frustrate the very purpose of the relevant provisions in the Act and in

other allied Acts. The objection that the magistrate had no jurisdiction was not sustainable."

12. This court has held in the case of *Herdilia Unimers Ltd. v. Smt Renu Jain* [1995] 4 Comp LJ 45 : [1998] 92 Comp Cas 841 as under (head-note of Comp LJ) :

"The designation of a person as chairman cannot be considered as not falling within the definition of "officer who is in default" in Section 5 of the Companies Act, 1956, unless it is so proved by the memorandum and articles of association of the company and/or by an agreement entered into with him as to what are his duties. Similarly, the question as to whether Clauses (a), (b) or (c) of Section 5 is applicable so as to exclude the other directors is also to be determined with reference to the documents which may be placed before the trial court.

Section 113 of the Companies Act, 1956, contemplates delivery of share certificates, etc., within three months after the allotment. Section 53 provides that a document may be served by a company or any member thereof either personally or by sending it by post to him to his registered address. A presumption has been drawn that where a document is sent by post, service thereof shall be deemed to be effected by properly addressing, pre-paying and posting the letter containing the document. The presumption which has been raised u/s 53 is rebuttable and a shareholder may allege that he has not been delivered the share certificate or it is not properly addressed. The document here refers to bulk registered receipt with the name of the addressee and post office of destination. From the above document, it is not evident as to whether it was sent to the registered address and on the basis of a document which is not complete in itself, it cannot be said that the proceedings are to be quashed at that stage.

The moment the shares are allotted and the share certificate is signed, and the name is entered in the register maintainable for the purpose, the person becomes the shareholder, whether the person receives the share certificate or not. Such a person can file a complaint u/s 621 of the Companies Act, 1956.

Looking to the provisions of Section 113(2) of the Companies Act, 1956, it is clear that the statutory recognition has been given to the default committed under Sub-section (1) of Section 113 as a continuing one. It is provided that the company and every officer of the company who is in default shall be punishable with fine which may extend to Rs. 500 for every day during which the default continues. The words "default continues" make a declaration of law that it is a continuing offence by the company and, therefore, it cannot be said that the complaint is barred by limitation."

13. It has been held in the case of *Mohan P. Wag v. State of Rajasthan* [1998] 94 Comp Cas 507 : [1998] 1 Comp LJ 103 as under (page 513) :

"In the present case though the registered office of the company is situated at

Bombay and the accused persons are residing at Bombay and the disputed prospectus was published and printed at Bombay, but the said document was delivered at Jaipur and an offer was invited on the basis of this prospectus at Jaipur. The complainant respondent applied and paid the money to the bankers of the accused at Jaipur for allotment of debentures at Jaipur on the basis of the prospectus delivered to her at Jaipur and the debentures were required to be delivered to her at Jaipur as per the terms of the prospectus. Thus the entire cause of action in this case arose at Jaipur and, as per Sections 179 and 181(4) of the Criminal Procedure Code, the trial of the offence of misrepresentation should be taken at the court of Jaipur only and in no other court."

14. A careful perusal of the above decisions of the Supreme Court and this court show that the Special Judicial Magistrate at Jaipur has territorial jurisdiction to take cognizance against the present petitioners for the offence u/s 113(2) of the Companies Act. Whether cognizance against the present petitioner can be taken or not is to be decided by the trial court.

15. It has also been held in the case of *Herdilia Unimers Ltd. v. Smt. Renu Jain* [1995] 4 Comp LJ 45 : [1998] 92 Comp Cas 841 that "offence u/s 113 of the Companies Act is a continuing offence", whether cognizance against the present petitioner can be taken or not under the present circumstances is a matter to be decided by the trial court considering the material placed before it during trial. It would not be proper for this court to express any opinion on it, at this stage.

16. Therefore, looking through all the controversy raised before me, I am of the view that it is not a fit case in which the powers u/s 482 of the Criminal Procedure Code, 1973, be exercised to quash the complaint and proceedings pending in the court of Special Judicial Magistrate, Rajas-than, Jaipur. This petition is accordingly dismissed.