(2002) 08 MP CK 0071

In the Madhya Pradesh High Court

Case No : Miscellaneous Criminal Case No. 3838 of 2001

Kirti Prem Raj Jain APPELLANT

Vs

Ved Prakash Gupta RESPONDENT

Date of Decision : 23-08-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Penal Code, 1860 (IPC) — Section 406
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22A

Citation : (2002) 2 MPJR 595 : (2003) 1 MPLJ 394 : (2003) 47 SCL 104

Hon'ble Judges : P.C. Agarwal, J

Bench : Single Bench

Advocate : R.K. Goyal, for the Appellant; Momin Ali Shah, for the Respondent

Final Decision : Dismissed

Judgement

P.C. Agarwal, J.

On complaint of respondent, Judicial Magistrate First Class, Gwalior, in his case Ved Prakash Gupta v. Kirti Premraj Jain [Criminal Case No. 67 of 2000] has taken cognizance of an offence u/s 406 of the Indian Penal Code (IPC for short). Such cognizance was taken after record of statement of Vedprakash Gupta, the respondent, u/s 200 of the Code of Criminal Procedure (Code for short) and one of his witness u/s 202 of the said Code.

In this petition, u/s 482 of the Code, petitioner seeks quashment of this impugned order claiming that a direction u/s 22A of the Sick Industrial Companies (Special Provisions) Act, 1985, not to dispose of its asset has been given by Board for Industrial and Financial Reconstruction (BIFR for short). On 21-5-1999, the petitioner-Company is debarred from making payments. As per petitioner, the respondent should have brought these facts to the knowledge of the Magistrate.

The Hon. Apex Court in Kusum Ingots and Alloys Ltd., etc. Vs. Pennar Peterson

Securities Ltd. and Others, and BSI Ltd. and Another, etc. Vs. Gift Holdings Pvt. Ltd. and Another, etc., held that merely because a Company is declared a sick unit, prosecution under Sections 138, 141 and 142 of the Negotiable Instruments Act and protanto for any other offence is not barred. A.P. High Court in B. Mohan Krishnan v. Union off India Vl 1995 (2) Crimes 795, has held that no permission of the B.I.F.R. is necessary. The only condition when a prosecution can be barred, can well be understood from the following passage in the Kusum Ingots & Alloys Ltd, (supra) :-

" 19. The question that remains to be considered is whether Section 22A of SICA affects a criminal case for an offence u/s 138 NI Act. In the said section provision is made enabling the Board to make an order in writing to direct the sick industrial company not to dispose of, except with the consent of the Board, any of its assets - (a) during the period of preparation or consideration of the scheme u/s 18; and (b) during the period beginning with the recording of opinion by the Board for winding up of the company under Sub-section (1) of Section 20 and up to commencement of the proceedings relating to the winding up before the High Court concerned. This exercise of the power by the Board is conditioned by the prescription that the Board is of the opinion that such a direction is necessary in the interest of the sick industrial company or its creditors or shareholders or in the public interest. In a case in which BIFR has submitted its report declaring a company as ''sick'' and has also issued a direction u/s 22A restraining the company or its directors not to dispose of any of its assets except with consent of the Board then the contention raised on behalf of the appellants that a criminal case for the alleged offence u/s 138 NI Act cannot be instituted during the period in which the restraint order passed by BIFR remains operative cannot be rejected outright. Whether the contention can be accepted or not will depend on the facts and circumstances of the case. Take for instance, before the date on which the cheque was drawn or before expiry of the statutory period of 15 days after notice, a restraint order of BIFR u/s 22A was passed against the Company then it cannot be said that the offence u/s 138 NI Act was completed. In such a case it may reasonably be said that the dishonouring of the cheque by the bank and failure to make payment of the amount by the Company and/or its Directors is for reasons beyond the control of the accused. It may also be contended that the amount claimed by the complainant is not recoverable from the assets of the company in view of the ban order passed by BIFR. In such circumstances it would be unjust and unfair and against the intent and purpose of the statute to hold that the Directors should be compelled to face trial in a criminal case." (p. 755)

The Hon''ble Apex Court has further held that :-

"20... It will be open to the appellants to place relevant materials in this regard before the learned Magistrate before whom the cases are pending and the learned Magistrate will examine the matter keeping in mind the discussions made in this judgment...." (p. 756)

It is well-settled that such objections should first have been taken by the petitioner before the Magistrate, who could have decided the same on merits after consideration of material put before him. This Court in exercise of inherent powers vested in it u/s 482 of the Code cannot decide such factual matters, which arise in a case after considering additional material, which was not put in trial Court but has been produced before this Court.

Hence,-this petition is dismissed with the direction that the petitioner should raise the point before the trial Court, who shall decide the same after consideration of materials put before it, in accordance with the directions of this Court and Hon''ble Apex Court. Parties shall remain present before trial Court on 9-9-2002.