(1987) 01 BOM CK 0023

In the Bombay High Court

Kisan Mehta and another — APPELLANT

Vs

Universal Luggage Manufacturing Co. Ltd. and another — RESPONDENT

Date of Decision : 29-01-1987

Acts Referred:
Companies Act, 1956 — Section 56, 6, 62, 63

Citation : (1988) 63 CompCas 398

Hon'ble Judges : H. Suresh, J

Bench : Single Bench

Judgement

Suresh, J.—While I must compliment the plaintiffs for their very gallant effort in exposing what they consider a public wrong, the constraints of a civil a civil action must necessarily deter me from giving any relief the them, despite invocations from Delhi to a liberal reception at the judicial doorsteps in matters of public interest litigation. The plaintiffs are public spirited citizens, well-known for their public battles to save Bombay and I am afraid that zeal would not do here. Of course, Mr. Cooper for the defendants describes this action as mala fide, though I must say that the plaintiffs herein cannot be considered as "the idle and whimsical plaintiffs" as described elsewhere. Yet, when they choose to tread on wary grounds of civil law, they must show that they have a sure cause of action.

2. The plaintiffs say that theirs is a quia timet action. Their case is that the defendants have indulged in fradulent misrepresentations mainly with a view to "hoodwink" the public investors and if the public is lured to accept the offer to subscribe, it would be too late for them to realise that they all have been plain victims of deceit. They also allege that there is a breach of statute in the issue of the prospectus and also in the offer to subscribe by virtue of the order given by defendant No. 2 and, therefore, the public would be misled. They say that our experience should tell us that in such cases, though individual action is possible, it is rarely resorted to, with the result that the defendants will be able to amass money from the public by these means.

3. The plaintiffs state in the plaint that the first defendants have issued their

prospectus and public statements whereby they have given a very rosy picture of their company. In effect, they have shown various items which are, in fact, liabilities, but in the prospectus and in the statement these have been described as profits. According to them, though the statements show that the company has made profits of Rs. 2.02 crores for the year ending May, 1985, in effect, it is really a loss of Rs. 1.15 crores on proper adjustments being made a required under the law. Similarly, in the year ending May, 1986, though the profits have been shown as Rs. 1.32 crores, it is really a loss of Rs. 2.84 crores on proper adjustments being made. In this connection, the plaintiffs have drawn my attention to certain things which appeared in the prospectus, particularly at pages 9 and 10. Broadly, the representation as contained in these notes is as follows : For example, there is an item showing that the company has received various deposits amounting to a sum of Rs. 74 lakhs odd, which under the note has been shown as profit on the basis that there is hardly any claim for refund of the said deposits. Similarly, there is an item of Rs. 79.44 lakhs being the amount payable to the workmen, and they show the same as profit for the year ending Mar 31, 1986. There are a number of similar other items which are all in the nature of liabilities and/or in the nature of non-recurring profits, but all have been shown as profits for the years ending May 31, 1985, and/or May 31, 1986. On the basis of these allegations, they have submitted in the plaint that the prospectus does not give a fair and true picture of the company with the result that the statements contained in the prospectus would mislead the public and might result in public injury.

4. They have also contended that since the statements contained in the prospectus are false, it can be said that they are issued in violation of the Companies Act, 1956. In particular, they rely on section 56 of the Companies Act and submit that the first defendant-company have not complied with the requirements of section 56. It appears that the second defendant by an order dated November 28, 1986, granted his consent to the first defendant-company to the proposed issue and, therefore, the plaintiff submit that the same has been obtained on the basis of falsified accounts and is, therefore, null and void. In the plaint, they seek a declaration that the prospectus issued by the company is false, misleading and in contravention of the provisions of the Companies Act, 1956, and, therefore, null and void. They also seek a declaration that the order dated November 28, 1986, passed by the second defendant granting permission to the first defendant-company to the proposed issue of equity shares and non-convertible debentures is illegal, bad in law and null and void and consequently they are seeking an order of injunction restraining the first defendant-company from taking any action with regard to the issue of those public shares.

5. In the notice of motion, their prayer for injunction is to restrain the first defendant from taking any action of any description, directly or indirectly, in pursuance of or in connection with the said issue of equity shares and debentures and the allotment of shares and debentures. Significantly, there is no relief sought as against the second defendant.

6. Mr. I.M.Chagla, appearing for the palintiffs, submitted that if one analyses the prospectus, it becomes clear that the statements contained in the prospectus are per se misleading and they are false. He also submitted that the first defendant-company have deliberately not given a correct picture of the company with a view to mislead the public. He submitted that this suit is on behalf of the general public and having obtained leave under Order I, rule 8 of the Code of Civil Procedure, this suit is maintainable as against the defendants. He also submitted that it is necessary that the plaintiffs should necessarily go to a writ court under article 226 of the Constitution of India but that they can as well maintain an action in a civil court. He, of course, relied on certain observations in the case of Fertilizer Corporation Kamgar Union v. Union of India, AIR 1981 SC 344, and also in the case of S.P. Gupta Vs. President of India and Others, . In substance, the passages that Mr. Chagla relied on are all to show as to how a public interest litigation can be maintained, wherever there is a wrong and it is not necessary that the plaintiff should have a particular interest so as to sustain any action in a civil court. He submitted, on the basis of those observations, that public interest litigation is a part of the process of "participate justice" and a public citizen must be encouraged, wherever a public wrong is found. Mr. Chagla also submitted that in the present case, apart from the fact that there is an attempt to fraudulently misrepresent the statement of affairs of the company, there is also a violation of the statute and, therefore, it is open to the plaintiffs to seek redress in such cases by a suitable order of injunction, declaration, etc. In the rejoinder, an attempt was made to enlarge the scope of the present suit by referring to certain guidelines which according to the plaintiffs have been violated while issuing the prospectus and also while the second defendant granted permission to the first defendant for the issue of public shares.

7. As against this, Mr. Cooper for the defendants pointed out that the plaintiffs have no cause of action whatsoever. He submitted that if the cause of action is based on "fraudulent misrepresentation", it can be considered as the tort of "deceit". Then, in that event, an action is maintainable only when the person to whom such a representation is made acts upon the same. He drew my attention to certain cases and in particular to the following passage which is found in Clerk and Lindsell on Torts, fifteenth edition, paras 17-38 :

"The tort of fraudulent misrepresentation is not complete when the representation is made. It becomes complete when the misrepresentation - not having been corrected in the meantime - is acted upon by the representee. Damage giving rise to a claim for damages may not follow or may not result until a later date, but once the misrepresentation is acted upon by the representee, the tortious act is completed provided that the representation is false at that date. If false when made but true when acted upon this is no misrepresentation."

8. Mr. Cooper also submitted that assuming that the action is on the basis that there is a violation of the statute, viz., the Companies Act, then the plaintiffs can seek remedies, provided they fall within the scope of section 62 or section 63 of

the Act. The relevant portion of section 62 of the Act, which provides for civil liability for mis-statement, is as follows :

"(1) Subject to the provisions of this section, where a prospectus invites persons to subscribe for shares in or debentures of a company, the following persons shall be liable to pay compensation to every person who subscribes for any shares or debentures on the faith of the prospectus for any loss or damage he may have sustained by reason of any untrue statement included therein,......"

9. This, of course, is founded plainly on the principle involved in the "tort of deceit". Mr. Cooper for the defendants also submitted that in a given case where a liability is created by a statute, the remedy provided by that statute must be availed of. He also submitted that assuming that there might be a liability which might arise partly by virtue of the statute and partly by virtue of the common law, it is open to the party suing to elect and pursue whichever remedy is possible. In this connection, he drew my attention to the following passage in the case of N.P. Ponnuswami Vs. Returning Officer, Namakkal Constituency and Others, :

"It is now well-recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by the statute only must be availed of. This rule was stated with great clarity by Willes J. in Wolverhampton New Water Works Co. v. Hawkesford [1859] 6 CB (NS) 336, in the following passage :

''There are three classes of cases in which a liability may be established founded upon statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy; there, the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it...... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.''"

10. As regards the contention of Mr. Chagla that public interest litigation through civil action is maintainable, Mr. Cooper pointed out that even the Supreme Court has circumscribed the scope of public interest litigation only to such cases where there is a public duty as against public authority, and in this connection, he relied upon the following passage which is in the very case of S.P. Gupta Vs. President of India and Others, . The relevant observations are at page 192 and are as follows :

"If public duties are to be enforced and social, collective ''diffused'' rights and interests are to be protected, we have to utilise the initiative and zeal of public-minded persons and organisations by allowing them to move the court and act for a general or group interest, even though, they may not be directly injured in their own rights. It is for this reason that in public interest litigation-litigation undertaken for the purpose of redressing public injury, enforcing public duty, protecting social, collective ''diffused'' rights and interests or vindicating public interest, any citizen who is acting bona fide and who has sufficient interest has to be accorded standing. What is sufficient interest to give standing to a member of the public would have to be determined by the court in each individual case. It is not possible for the court to lay down any hard and fast rule or any strait-jacket formula for the purpose of defining or delimiting ''sufficient interest''. It has necessarily to be left to the discretion of the court."

11. On the other hand, it is contended that u/s 9 of the Code of Civil Procedure, all suits of civil nature can be entertained by a civil court. It is also contended that unless there is an express bar, it cannot be said that the civil court has no jurisdiction to entertain any action. It is also contended that the normal rule of law is that the exclusion of the civil court is not to be readily inferred, the rule of construction being that every presumption should be made in favour of the existence rather than the exclusion of jurisdiction of the civil court. It was also contended that under Order I, rule 8 of the Code of Civil Procedure, even though the plaintiffs have no interest as such, it is possible for them to maintain a suit in public interest.

12. In my view, Order I, rule 8 of the CPC is an enabling provision. It enables any person to sue on behalf of himself and others provided they have a common interest or a common question of law or fact to be agitated upon. In the present case, the plaintiffs themselves cannot have any cause of action based on the "tort of deceit". Their only apprehension is that by virtue of the prospectus and the statements issued by the first defendant company, it is possible that the members of the public might subscribe to this company. I cannot understand as to how that can ever be a cause of action in a civil suit. It is contended that there is a violation of law inasmuch as the prospectus does not contain statements of true facts. It is contended that there is no prohibition in the Companies Act preventing any person from filing any action as against the company or against any person for violation of the provisions of the Companies Act. Reliance is also placed on section 56, sub- section (6) of the Companies Act, which says as follows :

"(6) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or under this Act apart from this section."

13. And, therefore, it is submitted that assuming that the plaintiffs themselves have no interest whatsoever, they can still maintain an action.

14. I am afraid that, that is not the correct legal position. It is true, if a

subscriber wants to take an action in addition to what is contemplated u/s 62 or u/s 63 of the Companies Act, it is open to him to take such action; but that does not mean that any other person who is not interested in this company at all can ever come forward and say that the statements contained in the prospectus are false and that they are void, and that a future investor might be duped and that he might suffer, and, therefore, the company should be restrained from acting in any particular manner.

15. Of course, the notes referred to above and which are contained in the prospectus refer to what has been described as "the changed method of accounting." As for me, it may be a bit of jugglery in accounting. But, I am not investor. The plaintiffs themselves are not cheated. There is no compulsion that the public must necessarily accept the offer of the first defendant-company. If that is so, I am not prepared to accept that those voluntary public investors are so gullible enough as to fall a prey to such an invitation. It is well-known that fluctuations in the stock market do not necessarily depend upon the profit and loss of any company. Investments in shares depend upon a variety of factors. The investors have their own calculations and the court cannot circumscribe the same. What is required in all matters of this type, assuming that there is some truth in what the plaintiffs say, is public knowledge and not any judicial interdiction.

16. In the result, I am of the view that the plaintiffs have no known cause of action nor is there any sure foundation for any innovative action. In the result, this motion stands dismissed. However, there will be no order as to costs.