

(2008) 05 DEL CK 0041
In the Delhi High Court
Case No : Criminal M.C. No. 1279 of 2008

Mr. Anil Nanda

APPELLANT

Vs

State and Another

RESPONDENT

Date of Decision : 09-05-2008

Acts Referred:

Companies Act, 1956 — Section 42

Criminal Procedure Code, 1973 (CrPC) — Section 468, 468(1), 468(2), 473, 482

Citation : (2008) 104 DRJ 54

Hon'ble Judges : Manmohan, J

Bench : Single Bench

Advocate : Rajiv Nayyar, Sudhir Sharma, Ajit Warriar, Ritesh Kumar and Biju K. Nair, for the Appellant; U.L. Watwani, Public Prosecutor Malhotra, ASG, Maneesha Dhir and Preeti Dalal, for the Respondent

Judgement

Manmohan, J.—The Petitioner has filed the present petition u/s 482 Code of Criminal Procedure seeking quashing of summoning order dated 31st August, 2007 as well as for quashing of criminal complaint being CC No. 941/2007 hereinafter referred to as the "said complaint".

2. Briefly stated, the material facts of this case are that the Respondent No. 2 has filed the said complaint against the Petitioner for alleged violation of Section 42 of the Companies Act 1956. The said section renders any allotment or transfer of shares by a company to its subsidiary as void ab initio.

3. Mr. Rajiv Nayyar, Learned Senior Counsel for the Petitioner states that the said complaint is grossly barred by limitation as it has been instituted much beyond the period of limitation as prescribed in Section 468(2)(a) of the Code of Criminal Procedure, 1973 hereinafter referred to as Cr. P.C. He contends that the trial court while taking cognizance of the alleged offence and issuing the summoning order has failed to consider the factum that the complaint was time barred, despite the fact that the Respondent No. 2 had itself filed an application seeking condensation of delay. He submits that the trial court had also failed to even

consider the application for condensation of delay before taking cognizance of the alleged offence. In this connection Mr. Rajiv Nayyar relied upon the observations of the Division Bench of this Court in the case of State (Delhi Administration) Vs. Anil Puri and Others, . The relevant portion of the said judgment is reproduced herein below for ready reference:

9. Once a limitation is barred in favor of a person he acquires a valuable-right. This right cannot be taken away except under the law. It is, Therefore, necessary that before this right is taken away he gets an opportunity of being heard. We cannot, Therefore, agree with Mr. Mehta that once the court has taken cognizance of an offence after the expiry of the period of limitation, the accused lose his right to raise this objection despite the fact that he was afforded no opportunity of being heard before the cognizance was taken. We cannot subscribe to the view that in such circumstances it should be presumed that the court shall be deemed to have exercised its powers u/s 473 to lift the bar of limitation. Whenever the plea of limitation is raised it is for the parties to show whether proceedings are barred by limitation or not. Where cognizance is ex facie barred by limitation and the prosecution wishes to explain the delay to the satisfaction of the court the accused has a right to be heard. And in those cases where the court finds it necessary to take cognizance in the interests of justice it is but just and proper that the accused is heard before such a decision is arrived at. It is needless to add that wherever the court comes to the conclusion u/s 473 that the delay has been properly explained or that it is necessary to take cognizance in the interests of justice, the court must pass a speaking order. The order should indicate that the court taking cognizance has applied its mind to reach the conclusion. Order taking cognizance of an offence where the cognizance is barred by limitation without giving an opportunity to the accused and without passing any speaking order, must be struck down and it cannot be deemed that the trial court had exercised its powers u/s 473. After all it may happen that a court might take cognizance of an offence without applying its mind to the question whether the limitation has run in favor of the accused, and when this happens the accused has a right to raise the plea of limitation to convince the Court that limitation bars the cognizance. It is the duty of the Court at that stage to decide this question.

4. The learned Counsel for the Petitioner also relied on the judgment rendered by the Bombay High Court in Jethmal Himmatmal Jain and others Vs. State of Maharashtra, , wherein it has been held as under:

15. The learned Magistrate, in the present case could not subsequent to the passing of the order taking cognizance condone the delay and extend the period of limitation. The learned Magistrate has without condoning the delay proceeded to examine witnesses and to frame a charge. This has been done by the learned Magistrate after the period of limitation and Therefore, illegal. The complaint is, Therefore, liable to be quashed.

5. Mr. Nayyar also relied upon the judgment of Hon''ble Supreme Court in case

titled as "Zandu Pharmaceutical Ltd. v. Mohd. Sharaful Haque" and submitted that issue of limitation has to be considered while taking cognizance and the court has to apply its mind and give a reasoned order.

6. Mr. Nayyar further submitted that since Section 42 of the Companies Act renders any allotment of shares by a holding company to its subsidiary by way of statutory legal fiction as void ab initio, there cannot be said to be any contravention of any provision of law and consequently the said complaint discloses no commission of offence and is liable to be quashed. In the present petition quashing of the impugned complaint has also been prayed for on the ground that in view of Section 468(1) of Cr. P.C. there is an express legal bar to the institution and continuance of the said proceedings.

7. On the other hand, learned Additional Solicitor General, Mr. P.P. Malhotra contends that violation of Section 42 of the Companies Act is a continuing offence and as such the complaint is not barred by limitation. He further states that the application for condensation of delay u/s 473 Cr. P.C. has been filed by the Respondent No. 2 only by way of abundant caution. Mr. Malhotra sought to rely upon the judgment of Hon'ble Supreme Court in Sukhdev Raj v. State of Punjab wherein it has been held as under:

The High Court has considered this aspect and after referring to Section 473 CrPC held that in the facts and circumstances of the case the court can take cognizance if the delay has been properly explained or that it is necessary to do so in the interest of justice. In any event in this case an application was filed for condoning the delay and also explaining the delay at a later stage. According to the learned Counsel for the appellant such an application was filed only after almost at the time of conclusion of trial and before judgment was delivered. It may be noted Section 473 Cr. P.C. does not in any clear terms lay down that the application should be filed at the time of filing a challan itself. The words "so to do in the interest of justice" are wide enough and the court accepted the Explanation. Therefore, there are no merits in this appeal. The appeal is accordingly dismissed.

8. Mr. Malhotra also relied upon the judgment of Kerala High Court rendered in case titled as R.V. Kunhiraman and etc. Vs. Inspector of Police, Special Police Establishment, C.B.I. and etc., wherein it has been held as under:

...that the Court is not precluded from considering the question of condensation of delay on the petition moved by the prosecution after the cognizance was taken.

9. On the strength of these two judgments Mr. Malhotra sought to urge that the application for condensation of delay could have been moved at any stage, that is even after cognizance had been taken by the Magistrate.

10. Before I decide the rival submissions advanced by the parties, I would like to mention that in the said complaint filed by the Respondent No. 2, it is admitted in para 8 that there was some delay in filing the present complaint and as a

matter of abundant caution the complainant was filing a separate application u/s 473 Cr. P.C. for condensation of delay. In the petition it has nowhere been stated that the offence complained of is a continuing one. In the accompanying application u/s 473 Cr. P.C. the Respondent No. 2 had after giving reasons for the delay, made the following prayer to the trial court:

In view of the facts submitted here in above, it is Therefore, respectfully prayed that delay in filing the present complaint which occurred because of the aforesaid reasons may kindly be condoned in the interest of justice.

11. However, the trial court took cognizance of the said complaint and issued summoning order to the Petitioner without condoning the delay and without even referring to the application for condensation of delay.

12. At this stage it would be relevant to reproduce Section 473 of Cr. P.C. It states, "Extension of period of limitation in certain cases.-Notwithstanding anything contained in the foregoing provisions of this Chapter, any Court may make cognizance of an offence after the expiry of the period of limitations, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interest of justice."

13. In my opinion, when a complaint filed is ex-facie barred by limitation, the mere fact that the Magistrate has taken cognizance of the offence does not mean that the Magistrate has condoned the delay. Section 468 Cr. P.C. provides a bar on the court taking cognizance of offence after the period of limitation has lapsed. It is only Section 473 Cr. P.C. which extends the period of limitation. In my opinion, the trial court could have taken the cognizance of the present complaint only after it had condoned the delay by allowing the application filed by the Respondent No. 2. The two judgments relied upon by Mr. Malhotra only give an opportunity to the prosecution to belatedly file application for condensation of delay, in case it realises subsequent to a cognizance having been taken that the complaint is barred by limitation. In the present case, the Respondent No. 2 had itself at the initial stage realised that the complaint is barred by limitation and, Therefore, itself filed an application for condensation of delay.

14. To my mind the summoning order also reflects a complete non-application of mind by the trial court in as much as it does not even refer to the application of condensation of delay filed by the Respondent No. 2.

15. However, I do not agree with the Petitioner's prayer that the said criminal complaint filed by the Respondent No. 2 is liable to be quashed. To my mind, once the complaint has been filed by the Respondent No. 2 along with an application of condensation of delay, it cannot be said that there is any express legal bar to the institution and continuance to the criminal proceedings. Section 473 Cr. P.C. vests a power with the trial court to condone the delay and thereafter entertain a criminal complaint which is even otherwise barred by limitation. I also do not agree with the submission of Mr. Nayyar that once the

transfer of shares by a company to its subsidiary is void ab initio by way of a legal fiction, there cannot be said to be any offence that has been committed by the Petitioner. In fact, in response to a pointed query by this Court as to whether according to the Petitioner the acquisition of shares of M/s. Escorts Ltd. by its subsidiary was a non-existent act and liable to be reversed, Mr. Nayyar stated that his client did not accept such an interpretation.

16. Consequently, the present petition is allowed in part and only the summoning order dated 31st August, 2007 is set aside. The trial court is required to first issue notice to the Petitioner on the application for condensation of delay and after deciding the same expeditiously then proceed to take cognizance of the present case in the event it finds that the Respondent No. 2's application u/s 473 Cr. P.C. is to be allowed.

17. Since the complaint pertains to a transaction carried out in the year 2004, this Court directs the trial court to decide the application for condensation of delay within one month from the date of receipt of this order. The Petitioner through its counsel is directed to appear before the trial court on 19th May, 2008 on which day the trial court would hear arguments on the application u/s 473 Cr. P.C. In the meantime, the Petitioner shall file reply to the application for condensation of delay. With these observations the present petition is allowed in part but with no order as to costs.