(2009) 12 DEL CK 0110

In the Delhi High Court

Case No : Criminal M.C. No. 819 of 2009 and Criminal M.A. No. 3012 of 2009

Nirmal Bhanwarlal Jain APPELLANT

Vs

GHCL Employees Stock Option Trust RESPONDENT

Date of Decision : 14-12-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Penal Code, 1860 (IPC) — Section 120B, 177, 181, 191, 192

Citation : (2010) 1 JCC 574

Hon'ble Judges : V.K. Jain, J

Bench : Single Bench

Advocate : Jayant Bhushan and Sidharth Luthra, Buddy Ranganthan, Diwakar Maheshwari, Neeraj Chouhan and Arindam Mukherjee, for the Appellant; Rakesh Tikku, for the Respondent

Judgement

V.K. Jain, J.—These seven petitions are directed against the order of the learned Metropolitan Magistrate dated 27th September, 2008, whereby the petitioners have been summoned to face trial u/s 415/409/34/120B of IPC, on a complaint filed by the respondent. The petitioner in Crl. M.C. No. 1892/2009 is a company India Infoline Limited. Petitioner in Crl. M.C. No. 819/2009 is the Managing Director of the company, petitioner in Crl. M.C. No. 801/2009 is the Secretary of the company and the petitioners in other cases are the Directors of India Infoline Ltd.

2. A complaint alleging commission of offences u/s 406/409/420/477A/34/120B IPC was filed by the respondent against the petitioners. It was alleged in the complaint that the respondent/complainant opened a Demat account with accused No. 1-India Infoline Ltd. on 11th September, 2007 and placed orders from time to time for purchase of shares and also made payments, from time to time, against its running account with the company. The accused company claimed that there was an outstanding debit of Rs. 10.48 crores against the complainant, in its Demat account with it. Accused No. 1 was having lien on 20,46,195 shares purchased by the complainant in that account. Vide letter

dated 30th April, 2008, accused No. 1 informed the complainant about the aforesaid debit. The complainant cleared the amount outstanding against it, by making payment of Rs. 10.48 crores, by a cheque. Later on, it transpired that the correct debit against the complainant was Rs. 10,22,77,522/- only and the accused dishonestly received a sum of Rs. 25,22,477.53 from the complainant by making false demand. It was stated in the complaint that on receipt of the amount of Rs. 10.48 crores, the accused were under legal obligation to transfer the shares purchased by the complainant, from the Pool Account to its Demat Account, but, instead of doing that and refunding the excess amount of Rs. 25,22,477.53/ they vide letter dated 14th May, 2008 asked the complainant to clear the debits of five companies, namely, (i) Carissa Investments Pvt. Ltd. (ii) Altar Investments Pvt. Ltd. (iii) Oval Investments Pvt. Ltd. (iv) Dalmia Housing Finance Ltd. (v) Dear Investment Pvt. Ltd. in terms of its letter dated 1st March, 2008 failing which, they would regularize the aforesaid five accounts by selling the stock of the complainant. Since no letter dated 1st March, 2008 had been written by the complainant to the accused, it refuted the averments made in their letter dated 14th May, 2008. It has been further alleged that on numerous occasions, the complainant met accused Nos. 2 to 7 and requested to refund the excess amount and transfer its shares to Demat Account, but those meetings failed to bring any result. The accused, according to the complainant, thus committed criminal breach of trust and also the offence of cheating. The accused sold off 876668 shares of the complainant on 23rd June, 2008 and misappropriated the sale proceeds.

3. The bone of contention between the parties is a letter dated 1st March, 2008 purporting to have been written by Shri Bhuwneshwar Mishra, Trustee of the respondent to the Director, India Infoline Ltd. referring to its debit balance of Rs. 7,99,29,681/-in the account of the complainant with the company and requesting the company to clear the same by selling the shares in the same account. The letter also contained a request that the account could be clubbed with Promoter Group Companies of GHCL, mentioned in the letter, for the purpose of margin requirement. These are the five companies referred in the complaint. The case of the respondent is that neither any such letter was written by Shri Bhuwneshwar Mishra nor the Trust had the authority to allow its funds to be used towards clearance of the liabilities of any other company or person.

4. During the course of arguments, it was contended by the learned Counsels for the petitioners that the complainant is also an associate organization of GHCL Group and there have been instances in the past whereby the complainant has joined other group companies of GHCL Group for taking loan and pledging its assets for grant of loan to those companies. Referring to the observations made by the Hon''ble Supreme Court in All Cargo Movers (I) Pvt. Ltd. and Others Vs. Dhanesh Badarmal Jain and Another, to the documents can be considered in proceedings u/s 482 of the Code of Criminal Procedure and in support of this contention, he has referred to Annexure P-9 (Colly.) to the petition which are seven OMPs filed by various group companies of GHCL Group and Annexure P-10

(Colly.), which are the copies of agreement executed jointly by those group companies and the complainant Trust for taking loan from Birla Global Finance Ltd.

5. In my view, at this stage, it is neither permissible nor feasible for this Court, in exercise of its extraordinary jurisdiction u/s 482 of the Code of Criminal Procedure, to go into such disputed questions of fact and take a view, one way or the other. The case of the complainant is that the letter dated 1st March, 2008 was not sent by Shri Bhuwneshwar Mishra to India Infoline Ltd. Shri Bhuwneshwar Mishra has been produced before the Metropolitan Magistrate to prove that the letter was not written by him. If there is a connection between the complainant and Group Companies of GHCL Group and the complainant has been pledging its assets for grant of loan to those companies that may probablize the defence that the letter dated 1st March, 2008 was actually written by Shri Bhuwneshwar Mishra to the accused company on behalf of the complainant-Trust. But, a definite view in this regard can be taken only after evidence has been taken during trial.

Therefore, for the purpose of deciding these petitions, I proceed on the assumption that the letter dated 1st March, 2008 was not written by Shri Bhuwneshwar Mishra to the accused company.

6. The main contention of the learned senior counsel for the petitioners was that even if it is presumed that the letter dated 1st March, 2008 was not written by the complainant- Trust and consequently, criminal breach of trust was committed by appropriating the sale proceeds of the shares of the complainant towards liquidating the dues payable to the accused company, by group companies of GHCL Group, offence is made out only against the company and not against any of the petitioners.

7. This is not the allegation of the complainant that the letter dated 1st March, 2008 was forged or got forged by any particular Director or officer of India Infoline Ltd. Admittedly, the letter dated 14th May, 2008 to the complainant was not written by any one out of accused Nos. 2 to 7. This letter has been written by someone who signed as Authorized Signatory of India Infoline Ltd. and there is no material on record to indicate as to who the author of this letter is. This is not the case of the complainant that the letter dated 1st March, 2008 was forged by anyone out of accused Nos. 2 to 7 or that it was forged pursuant to criminal conspiracy to which any of them was a party. The Demat Account was opened by the complainant with India Infoline Ltd., which is a company. The shares were purchased by the complainant through the company. It was the company which claimed that it had adjusted the sale proceeds of the shares purchased by the complainant towards liquidation of the dues payable by group companies of GHCL Group. It was the company India Infoline, which sold the shares purchased by the complainant and adjusted the sale proceeds against dues recoverable from group companies of GHCL Group. Thus, it was the company which was entrusted with the property of the complainant or with dominion over its

property. It is the company which allegedly disposed of the shares of the complainant and adjusted the sale proceeds in violation of the contract between complainant-Trust on the one hand and accused No. 1 on the other hand, whereunder Demat Account was opened and shares were purchased by the complainant through accused No. 1-India Infoline Ltd.

8. This is not the case of the complainant that the decision to sell its shares and to appropriate the sale proceeds towards the liquidation of the outstanding against group companies of GHCL Group was taken by any of the accused out of accused Nos. 2 to 7. Admittedly, accused No. 1 is a large company. Assuming the allegations made in the complaint to be true, there is no allegation or material to show as to who either forged or got forged the letter dated 1st March, 2008 and who decided to sell the shares purchased by the complainant and to proceed the sale proceeds in liquidation of the amount due from group companies of GHCL Group instead of crediting the same in the Demat Account of the complainant.

9. The following are the ingredients of criminal breach of trust:

1. Entrusting any person with property or with any dominion over property.

2. That person entrusted (a) dishonestly misappropriating or converting to his own use that property; or (b) dishonestly using or disposing of that property or willfully suffering any other person so to do in violation

(i) or any direction of law prescribing the mode in which such trust is to be discharged, or

(ii) of any legal contract made touching the discharge of such trust.

In the present case, entrustment of shares was to the company and not to anyone out of accused No. 2 to 7. There is also allegation in the complaint that anyone out of accused No. 2 to 7 had taken the decision to appropriate the sale proceeds of shares towards adjustment of dues payable to accused No. 1, by other group companies of GHCL Group. Hence, no offence u/s 406 of IPC or of being party to a criminal conspiracy is made out against any of them.

10. The learned Counsel for the complainant has drawn my attention to the averments made in para 2 of the complaint that the employees of the accused No. 1 acts as per the direction given by the accused No. 2 to 7 from time to time. They in connivance with each other in order to fulfil the mala fide intention and in order to make illegal gain have cheated the petitioner company by in breach of trust also sold the shares worth Rs. 9 crores approximately.

The above referred allegations, in my view, are not definite allegations of fact Constituting commission of offence u/s 406 and/or 415/420 of IPC. Such general allegations without factual foundation Constituting an offence, to my mind, are not sufficient to array accused Nos. 2 to 7 at a trial for the offences punishable u/s 406 and/or 415/420 of IPC. It is true that a company being a judical person acts through its Directors and employees, but, before a Director or an Employee of the company can be prosecuted for a criminal offence, there has to be definite factual evidence against them Constituting offence alleged to have been committed by them. In the absence of a statutory provision holding the Directors and/or employees of a company, vicarious liable for the criminal acts committed by the company, it is not permissible to subject them to the agony and harassment of a criminal trial.

11. In S.K. Alagh v. State of Uttar Pradesh and Ors. (2008) 5 SCC 622, the complainant sent two demand drafts to a company in which the appellant was the Managing Director, alleging commission of an offence u/s 406 of IPC by him. It was contended before the Hon''ble Supreme Court that since the appellant was in-charge of and in control of the business of the company, he would be deemed to be liable for the offence committed by the company. Rejecting the contention, the Hon''ble Supreme Court observed that the Penal Code save and except some provisions specifically providing therefore ,does not contemplate any vicarious liability on the part of a party who is not charged directly for commission of an offence. Noticing that the drafts were drawn in the name of the company, it was held that the appellant who was its Managing Director cannot be said to have been committed an offence u/s 406 of IPC. The Hon''ble Supreme Court noted that if and when a Statute contemplates creation of such a legal fiction, it provides specifically therefore and held that in the absence of any provision laid down under the Statute, a Director of a company or an employee cannot be held to be vicarious liable for any offence committed by the company.

12. In Maksud Saiyed Vs. State of Gujarat and Others, , a complaint u/s 120B/425/191/192/177/181 and 500 of IPC was filed against Dena Bank and its Directors alleging commission of the above referred offences by them. The allegation of the complainant was that the prospectus published by the bank for the purpose of its public issue contained false and misleading information with regard to sanction limits, the dues and export bills of the company. The Hon''ble Supreme Court noted that the complaint did not disclose as to who had acted on behalf the bank and held that the acts of omission and commission on the part of the bank, if any, may give rise to a statutory violation of its part, but the respondents (Directors) were not personally liable therefore .The Hon''ble Supreme Court, inter alia, observed as under:

The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions Constituting vicarious liability.

13. The judgment of the Hon''ble Supreme Court in the case of Maksud Saiyed (supra) squarely applies to the facts of the present case as the complaint shows no personal allegation against anyone out of accused No. 2 to 7 except a general allegation in para 2 of the complaint without giving any particulars and without disclosing any factual averments required to constitute an offence punishable u/s 406 and/or 415/420 of IPC.

14. In Keki Hormusji Gharda and Others Vs. Mehervan Rustom Irani and Another, , the Hon''ble Supreme Court, inter alia observed as under:

The Penal Code, 1860 save and except in some matters does not contemplate any vicarious liability on the part a person. Commission of an offence by raising a legal fiction or by creating a vicarious liability in terms of the provisions of a statute must be expressly stated. The Managing Director or the Directors of the Company, thus, cannot be said to have committed an offence only because they are holders of offices.

15. In Madhavrao Jiwajirao Scindia and Ors. v. Sambhajirao Chandrojirao (1998) 1 SCC 692, the Hon''ble Supreme Court, inter alia, observed as under:

The legal position is well-settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage.

16. The learned Counsel for the respondent/complainant has referred to the decision of a learned Single Judge of this Court in Jia Lal Sharma v. Madhav Prasad G. Poddar 22 (1982) DLT 288. In that case, the petitioner had paid some money to the respondent, a commission agent, as an advance money for purchase of a boiler. The respondent was to charge commission from the petitioner @ 2%. The petitioner was informed by the respondent that the boiler had been sold by the seller to another party. When asked to return the money, the respondent failed to do so. A complaint u/s 409 of IPC was, in these circumstances, filed against the respondent, which was dismissed by the learned Magistrate holding that there was no dishonest intention found from the letters written by the respondent and the matter was a case of a civil liability. Setting aside the order of the learned Magistrate, this Court held that failure to account was prima facie evidence of dishonest intention when entrustment was admitted by the agent and all that Magistrate had to consider was that there was a prima

facie evidence of a criminal offence. This judgment of no help to the complainant since there are no factual allegation making out a prima facie case of a criminal breach of trust and/or cheating on the part of any out of accused No. 2 to 7.

17. In Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others, , the Hon''ble Supreme Court, inter alia, observed as under:

Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused

18. Keeping in view the facts and circumstances of the case and considering the nature of a personal allegation made in the complaint, without any material, either in the form of oral statements or in the form of documentary evidence, indicating involvement of any particular person, it would not be appropriate to subject accused No. 2 to 7 to undergo the agony and harassment of a criminal trial, particularly when I see no reasonable possibility of their being convicted on the basis of allegations made in the complaint against them.

19. As regards the alleged cheating, it was contended by the learned Counsel for the respondent that though the amount outstanding against the complainant was only Rs. 10,22,77,522/- the accused claimed Rs. 10.48 crores vide its letter dated 30th April, 2008 and thus dishonestly induced the complainant to part with an excess amount of Rs. 25,22,477.53/-.

20. Cheating has been defined in Section 415 of Indian Penal Code. The essential requirements of cheating are:

1. Deception of any person.

2. (a) Fraudulently or dishonestly inducing that person:

(i) to deliver any property to any person, or

(ii) to consent that any person shall retain any property, or

(b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

Unless there is a fraudulent or dishonest intention on the part of the person accused of cheating, the offence u/s 415 of Indian Penal Code is not made out against him. The complainant himself has filed a statement of account with the complainant. A perusal of the statement of the account would show that a sum of Rs. 21,15,545.34/- has been debited in the account of the complainant towards delayed payment charges for the month of April, 2008 and another sum of Rs. 68185.00/- has been debited towards delayed payment charges from the period from 1.05.2008 to 05.05.2008, leaving credit balance of Rs. 3,38,747.19/- as on 5th May, 2008. The case of the petitioners, as stated in para 8 of the petition, is that this balance amount was adjusted in clearing of the debit balance of group companies of GHCL Group in terms of the letter dated 1st March, 2008. The very fact that accused company has given credit for the balance amount in the account of the complainant with it leaves no reasonable doubt that it had no dishonest or fraudulent intention to retain that amount. It appears from the documents that there was some dispute between the parties as regards the rate of interest to be charged for delayed payment. If either on account of higher interest being claimed by the accused company or on account of some mathematical error, a higher amount was claimed that by itself would not show any dishonest intention on the part of the accused company when the credit for the balance amount has been given in the account maintained by the complainant with the accused company. Whether the accused company was entitled to interest of delayed payment or not may be a disputed question of fact, but, no cheating is made out by making a claim for interest. As regards adjustment of the balance amount towards clearance of the liabilities of group companies of GHCL Group, the company, in any case, is facing trial for criminal breach of trust on the allegation that the letter dated 1st March, 2008 was not written to it by the complainant. No separate offence of cheating is, however, made out against it by making these adjustments.

21. For the reasons given in the preceding paragraphs, the impugned order dated 27th September, 2008, to the extent it summons the petitioners Nirmal Bhanwarlal Jain, Venkataraman Rajamani, Nimish Ramesh Mehta, Nilesh Shivji Vikamsey, Kranti Sinha and Arun Kumar Purwar for the offences punishable under Sections 415/409/34/120B of IPC and further to the extent it summons the company India Infoline Ltd. u/s 415 of IPC is hereby set aside. The learned Magistrate will, however, proceed with the trial against the accused India Infoline Ltd. under other Sections of IPC. The parties are directed to appear before the learned Magistrate at 10.00 am on 21st December, 2009.