(2000) 05 DEL CK 0022

In the Delhi High Court

Case No : Criminal M (M) 2291/99 along with Criminal M (M) No''s. 2292/99, 2293/99, 2294/99 and 2295/99

Paam Pharmaceuticals (DELHI) Ltd. (M/s.) — APPELLANT

Vs

State and Others — RESPONDENT

Date of Decision : 03-05-2000

Acts Referred:

Citation : (2000) 5 AD 15 : (2003) 115 CompCas 275

Hon'ble Judges : M.S.A. Siddiqui, J

Bench : Single Bench

Advocate : Mr. H.L. Desai, for the Appellant; Mr. N.S. Butalia, for the Respondent

Judgement

M.S.A. Siddiqui, J.—This batch of petitions u/s 482 Cr. P.C. raises the follow- ing questions for determination;

2. Whether a company can be proceeded against for having committed an offence u/s 138 of the Negotiable Instruments Act (for short the ''Act'') after the company has been declared sick under the provisions of the Sick Industrial Companies (Special Provisions Act) 1985 before the expiry of the period of payment of the cheque amount? Since a common question of law is involved in the Petitions before me, they are being disposed of by this common order.

3. The factual position about which there is no dispute may be stated thus: M/s. Paam Pharmaceutical (Delhi) Limited is a Public Limited company. Five complaints u/s 138 of the Act were filed against the petitioner company before the Metropolitan Magistrate New Delhi. The complaints contained the allegations that cheques were issued on behalf of the petitioner company in favor of the respondents. When these cheques were presented for payment they were dishonored by the drawee bank on the ground of insufficiency of funds in the account. Then respondents issued notices to the petitioner company demanding payment of the amounts covered by the cheques. Since no payment was made within the period stipulated under the Act, the respondents filed complaints

against the Company and its Directors for the offence punishable u/s 138 of the Act in respect of each cheque. The Magistrate took cognizance of the offence on each of the complaints and issued process against the accused. Aggrieved thereby the petitioners have filed the present petitions u/s 482 Cr. P. C. seeking quashment of the complaints filed against them.

4. The petitioners seek quashing of the complaints filed u/s 138 of the Act on the ground that since the offending company has been declared sick by the BIFR, no steps could be taken by the respondents (complainants) for realisation of the amounts said to be due to them and so the complaints filed by them are liable to be quashed. Reliance has been placed on Sections 22 of the Sick Industrial Companies (Special Provisions Act) 1985 (for short ''SICA''). According to the petitioner, on 31st March, 1999, the BIFR had submitted its report declaring the petitioner company as sick and has also issued a direction u/s 22-A of the SICA restraining the Company or its Directors not to dispose of any of its asset except with consent of the board. The offending cheques were issued in 1997. The question is whether Section 22 or 22-A of SICA affects a criminal case for an offence u/s 138 of the Act. A similar question was more recently considered by the Apex Court in Kusum Ingots and Alloys Ltd., etc. Vs. Pennar Peterson Securities Ltd. and Others, . Analysing the scope and ambit of the provisions of Sections 22 and 22-A of SICA, their Lordships have held that Section 22-SICA does not create any legal impediment for instituting and proceeding with the criminal case on the allegations of an offence u/s 138 of the Act against a company or its Director. Reference in this context, may usefully by made to the following passages of the Judgment.

17. "In our considered view Section 22, SICA does not create any legal impediment for instituting and proceeding with a criminal case on the allegations of an offence u/s 138 of the NI Act against a company or its Directors. The section as we read it only creates an embargo against disposal of assets of the Company for recovery of its debts. The purpose of such an embargo is to preserve the assets of the company from being attached or sold for realisation of dues of the creditors. The section does not bar payment of money by the company or its Directors to other persons for satisfaction of their legally enforceable dues".

18. "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 concerned High Court. 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 the 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 u/s 138, NI Act cannot be instituted during the period in which the restraint order passed by the BIFR remains operative cannot be rejected outright. Whether the contention can be accepted or not will depend on the enacts 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 the 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 dishonoring 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 the 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."

5. In BSI Ltd. and Another, etc. Vs. Gift Holdings Pvt. Ltd. and Another, etc., , it was held that "if commission of the offence u/s 138 of the Act was completed before the commencement of proceeding u/s 22(1) of SICA there is no hurdle in any of the provisions of SICA against the maintainability and prosecution of a criminal complaint duly instituted u/s 142 of the NI Act."

6. Bearing in mind the said principles of law enunciated by their lordships of the Supreme Court I am of the opinion that the criminal proceedings instituted u/s 138 of the Act cannot be quashed, at the threshold on the sole ground that the offending company has been declared sick u/s 22 of SICA. Consequently, I am not inclined to interfere in the matter in exercise of powers u/s 482 Cr.P.C. However, it would be open to the petitioners to place relevant materials in this regard before the trial court which will examine the matter at the appropriate stage of a particular case in the light of the observations made by their Lordships of the Supreme Court in M/s K. I. & Alloys Ltd. and BSI. Ltd. & Anr., (supra) and the evidence on record. The petitions are disposed of accordingly.

