

(2006) 09 DEL CK 0031

In the Delhi High Court

Case No : Criminal Rev. Ps. 24-31/06

Panther Fincap and Management Services Ltd. and Others

APPELLANT

Vs

Securities and Exchange Board of India

RESPONDENT

Date of Decision : 05-09-2006

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 110A, 110F, 2, 209, 251
Limitation Act, 1963 — Section 5
Negotiable Instruments Act, 1881 (NI) — Section 138, 142
Securities and Exchange Board of India (Amendment) Act, 2002 — Section 1(2)
Securities and Exchange Board of India Act, 1992 — Section 24(1), 26, 26(2), 27

Citation : (2006) 09 DEL CK 0031

Hon'ble Judges : Badar Durrez Ahmed, J

Bench : Single Bench

Advocate : D.P. Singh, for the Appellant; Neeraj Malhotra, for the Respondent

Final Decision : Dismissed

Judgement

Badar Durrez Ahmed, J.—By a separate order dated 5.9.2006 I had dismissed the revision petition and had indicated that the reasons for the same shall follow. These are the reasons.

2. This revision petition has been filed against the order dated 05.10.2005 passed by the learned additional Sessions Judge whereby the respondent's application u/s 473 of the code of criminal procedure, 1973 for extension of time for filing the complaint was allowed.

3. The respondent (SEBI) had filed a complaint, inter alia, u/s 24(1) and Section 27 of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as the SEBI act) before the court of the Additional Chief Metropolitan Magistrate. This complaint was filed on 28.5.2004 along with an application u/s 468 read with Section 473 of the code of criminal procedure, 1973 for extension of time in filing the complaint.

4. There is no dispute that the offences alleged to have been committed by the petitioners relate to the period 24.03.1999 to 21.02.2000. There is also no dispute that the punishment u/s 24(1) of the SEBI act (as it then stood) could extend to imprisonment for one year or with fine or both. The SEBI act was amended by the Securities and Exchange Board of India (Amendment) Act, 2002. In terms of Section 1(2) of the Amendment act, the amendments were deemed to have come into force on 29.10.2002. After the amendment, the punishment prescribed u/s 24(1) of the SEBI act, could now extend to imprisonment up to 10 years or with fine up to rupees 25 crores or both. Another important amendment carried out was in respect of Section 26 of the SEBI act. Section 26(2) of the SEBI act, prior to amendment, provided that no court inferior to that of a metropolitan magistrate or judicial Magistrate first-class shall try any offence punishable under the act. Post amendment, this provision stipulated that no court inferior to that of the court of session shall try any offence punishable under the act.

5. Before I consider the rival contentions raised by the parties, it would be appropriate to set out the provisions of Section 468 and 473 of the Code of criminal procedure, 1973. They read as under: --

468. Bar to taking cognizance after lapse of the period of limitation.-- (1) Except as otherwise provided elsewhere in this code, no court, shall take cognizance of an offence of the categories specified in Sub-section (2), after the expiry of the period of limitation.

2. The period of limitation shall be --

(a) six months, if the offence is punishable with fine only;

(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;

(c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

(3) For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment.

473. Extension of period of limitation in certain cases.-- Notwithstanding anything contained in the foregoing provisions of this chapter, any court may take cognizance of an offence after the expiry of the period of limitation, 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 interests of justice.

6. Reading the above provisions, it becomes clear that in respect of the offence u/s 24(1) of the SEBI act, prior to amendment, the punishment prescribed was up to one year of imprisonment and, Therefore, the period of limitation for taking

cognizance would be one year in terms of Section 468(2)(b) of the Code criminal procedure, 1973. In the present case, there is no dispute that the un-amended Section 24(1) of the SEBI act would be applicable. Therefore, the period of limitation would be one year. The offences were said to have been committed up to 21.2.2000, whereas the complaint was filed on 28.5.2004, that is, beyond the period of one year. Clearly, in the absence of any extension of the limitation u/s 473 of the code, there would be a bar to taking cognizance in view of Section 468 of the code.

7. Another circumstance which is of importance is that the complaint along with the application for extension of time in filing the complaint came up for hearing before the Additional Chief Metropolitan Magistrate on 1.6.2004. On that date, the learned Additional Chief Metropolitan Magistrate issued summons in the complaint and notice on the application for extension of the period of limitation. The matter was listed before the learned Additional Chief Metropolitan Magistrate on several dates and ultimately the complaint itself was transferred to the court of the additional Sessions Judge on 7.1.2005 pursuant to administrative orders issued by the High Court on 4.12.2004 whereby complaints filed by the SEBI after the date of the said amendment in the SEBI act were assigned to the sessions court for trial irrespective of the date of commission of the offence. The sentencing would however be in accordance with the provisions as they existed at the time the offence was committed. It is consequent upon the transfer of the complaint to the Court of the learned Additional Sessions Judge that the impugned order dated 5.10.2005 came to be passed whereby the application filed on behalf of SEBI for extension of time in filing the complaint was allowed.

8. It was contended on behalf of the petitioners that the learned Additional Chief Metropolitan Magistrate did not consider the application for confirmation of delay and, without condoning the delay, issued summons on the filing of the complaint. The subsequent condensation of delay by the Court of session is, according to the petitioners, bad, firstly, on account of lack of jurisdiction and secondly, on account of improper procedure, as the delay has to be condoned first after giving due notice to the accused who ought to be allowed to oppose the same and it is only thereafter, if delay is condoned, that the complaint procedure as provided in chapter XV of the code is to be followed.

9. The first contention of the petitioners on the question of jurisdiction has been raised on the premise that prior to the amendment which took effect on 29.10.2002, the offence u/s 24(1) was triable by a magistrate. It is only after the amendment that the said offence is triable by a Court of session. It is submitted that had the complaint been filed within the limitation prescribed, the complaint would have fructified into a trial by a metropolitan magistrate. It was also submitted that the jurisdiction conferred on a magistrate could not be taken away as was held in the case of A.S. Impex v. Delhi High Court 2003 8 AD (Delhi) 189 by a division bench of this Court. It was also submitted that such transfer of the complaint from the magistrate's court to the Court of session also

amounted to taking away available remedies of appeal and revision.

10. A related contention has been raised by the learned Counsel for the petitioners that in a trial by the sessions court, the procedure to be followed is prescribed under chapter xviii of the code where the Court of sessions assumes jurisdiction only after committal of the proceedings by the magistrate u/s 209 of the Code.

11. The second contention relates to the sequence in which the condensation of delay application is required to be dealt with. According to the learned Counsel for the petitioners, in the context of Sections 468 and 473 of the code, the condensation of delay application ought to have been disposed of prior to the act of taking cognizance and issuing summons. That has not been done in the present case and, Therefore, the entire proceeding is without jurisdiction.

12. On behalf of the respondent (SEBI) it was contended that the Additional Sessions Judge had the jurisdiction to pass the impugned order. According to the learned Counsel for the respondent the Additional Sessions Judge dealt with the matter as a successor court and not as the Sessions Court. He submitted that since the sentence for the offence u/s 24(1) of the SEBI act would be in terms of the unamended provision, the maximum punishment prescribed is imprisonment up to one year. Referring to the provisions of Section 2(w) and Section 2(x) of the code, which define the expressions "summons case" and "warrant case", the learned Counsel for the respondent submitted that in view of the fact that the punishment for the alleged offences in the present case could extend up to imprisonment of one year, the present case is to be regarded as a summons case and not as a warrant case. He further contended that, in terms of Section 251 of the code, no formal charges are required to be framed in a summons case. In the present case, the learned Additional Sessions Judge has proceeded u/s 251 of the code. The court has not framed charges under chapter XVII but has described the particulars of the offence under chapter XX, as it is required to do in a summons case. It was Therefore contended by the learned Counsel for the respondent that the Additional Sessions Judge is conducting proceedings in the present matter as a special court and a successor court of the Additional Chief Metropolitan Magistrate and is following the procedure of a summons case as provided in chapter XX of the code.

13. It was further contended by the learned Counsel for the respondent that, in any eventuality, the trial court has to follow the administrative orders passed by the High Court, which till date have not been assailed or challenged by the petitioners. It was also submitted that the petitioners have not argued the application for condensation of delay on merits, having refused to do so, as is apparent from the impugned order dated 5.10.2005.

14. It was lastly contended that an application for condensation of delay u/s 473 of the code could be filed at any stage of the trial prior to judgment. Reliance was placed on the Supreme Court decision in the case of Sukhdev Raj v. State of

Punjab It was submitted that the delay, if any, can be condoned by the court either when the delay has been properly explained or if it is in the interests of justice to do so even if the delay has not been properly explained. Reliance was placed on the Supreme Court decision in the case of Vanka Radhamanohari (Smt) Vs. Vanka Venkata Reddy and Others, . In any event, the learned Counsel submitted, the respondent had filed a detailed application of 33 paragraphs for condoning the delay in filing the complaint and that application was allowed by the trial court on merits. Therefore, no interference with the impugned order is called for.

15. Since the petitioners have strongly relied upon the decision of a division bench of this Court in the case of A. S. Impex Ltd (supra), I shall take up discussion with regard to that case. The facts were that the High Court, in exercise of its powers on the administrative side, transferred all the cases u/s 138 of the Negotiable Instruments Act, 1881 which were pending as on the 31.12.2001 from the courts of Metropolitan Magistrates to the courts of Additional Sessions Judges. The said administrative order was gazetted on 13.03.2002. Pursuant to the gazette notification, the District Judge by an order dated 21.03.2002 transferred the cases to be tried by Additional Sessions Judges. The said administrative order as well as the order dated 21.03.2002 were challenged before this Court as being violative of the Constitution of India as well as of the legislative provisions. It was contended, inter alia, that only the Metropolitan Magistrates or the Judicial Magistrates, first-class had exclusive jurisdiction to try the complaints u/s 138 of the Negotiable Instruments Act, 1881 and that no jurisdiction vested in the Courts of Additional Sessions Judges to try complaints under the said Section 138. The expediency of issuing such an administrative order was that the High Court, on the administrative side, was of the view that the mandate of trying cases u/s 138 of the Negotiable Instruments Act, 1881, expeditiously, should be implemented. The High Court found that the number of cases could not be disposed of expeditiously because of lack of judicial officers at the magisterial level. It is in these circumstances that the High Court issued the aforesaid administrative order transferring all the cases u/s 138 of the Negotiable Instruments Act, 1881 which were pending on 31.12.2001 from the courts of Metropolitan Magistrates to the courts of Additional Sessions Judges. The division bench, after considering the relevant provisions of the Negotiable Instruments Act, 1881 as well as the code, came to the conclusion that while Section 142(c) of the Negotiable Instruments Act, 1881 prescribes that the Metropolitan Magistrate or a judicial Magistrate first-class will try cases under the said Section 138, by no stretch of imagination, could it mean that any superior court to the Court of Metropolitan Magistrate would also have jurisdiction to try those cases. The division bench observed that while the non obstinate clause in Section 142 excluded the jurisdiction of magistrates inferior to the Metropolitan Magistrate or the Judicial Magistrate, first-class, at the same time, it did not widen the scope of the provision so as to include in its ambit the jurisdiction of Additional Sessions Judges. The court observed that the jurisdiction to try

offences u/s 138 of the Negotiable Instruments Act, 1881 had been specifically conferred on the Metropolitan Magistrates or Judicial Magistrates, first-class and that such jurisdiction could not be taken away by invoking the provisions of Article 227 of the Constitution. The division bench categorically held:

The High Court in its plenary jurisdiction cannot bypass the special legislation which empowers the Metropolitan Magistrate or judicial Magistrate, first-class to try the cases.

16. Although the learned Counsel for the petitioners has relied heavily upon the Division Bench decision in *A.S. Impex Ltd. (supra)*, the foregoing discussion indicates that the same is clearly distinguishable and would be inapplicable to the situation which presents itself in the present case. In *A.S. Impex Ltd (supra)*, there was a pure administrative action on the part of the High Court in purported exercise of its powers under Article 227 of the Constitution of India. The administrative orders were not backed by any legislative provisions. Secondly, the administrative orders were the subject matter of challenge and they were quashed by the Division Bench holding that the High Court in its plenary jurisdiction cannot bypass the special legislation which empowers the Metropolitan Magistrate or Judicial Magistrate, 1st Class, to try the cases. In the present case the scenario is entirely different. The administrative orders passed by the High Court whereby the cases pending before the Metropolitan Magistrate were transferred to the Courts of Additional Sessions Judges was preceded by the amendment in Section 26(2) of the SEBI Act. Prior to its amendment Section 26(2) of the SEBI Act read as under:

(2) No Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the First Class shall try any offence punishable under this Act.

After the amendment which took effect from 29.10.2002 the said Sub-Section (2) of Section 26 of the SEBI Act reads as under:

(2) No Court inferior to that of a court of Session shall try any offence punishable under this Act.

The effect of the amendment was that the offences under the SEBI Act now became triable by a Court of Session and not by any court inferior to that of a Court of Sessions. In this background, the High Court passed the administrative order on 4.12.2004 whereby complaints filed by the SEBI after the date of the amendment in the SEBI Act (i.e. 29.10.2002) were assigned to the Sessions Court for trial irrespective of the date of the commission of the offence. It is subsequent to this administrative order of the High Court that the complaint in this case was transferred to the court of the Additional Sessions Judge on 7.1.2005. The clear distinction between the present case and that of *A.S. Impex Ltd. (supra)* is that while in the present case the administrative order has the backing of a statutory provision, in the case of *A.S. Impex Ltd (supra)*, the administrative order passed by the Court in purported exercise of its powers under Article 227 of the Constitution were held to be an attempt on bypassing

the special legislation which empowered Metropolitan Magistrates or Judicial Magistrates of the First Class to try cases. The second distinguishing feature is that while in the case of A.S. Impex Ltd (supra), the administrative orders were the subject matter of the challenge, in the present case there is no challenge to such orders. Therefore, the decision in A.S. Impex Ltd (supra) is of no assistance to the petitioners.

17. With regard to the submission that as the complaint had already been filed prior to the date of amendment, the same would have to be tried by the Metropolitan Magistrate or a Judicial Magistrate of the First class, it must be noted that the question of operation of amendments in a statute are considered differently with regard to the amendments which affect substantive rights and amendments which are only procedural in nature. The scope has been clearly laid down by the Supreme Court in the case of Hitendra Vishnu Thakur and Others Vs. State of Maharashtra and Others, wherein, it observed:

...From the law settled by this Court in various cases the illustrative though not exhaustive principles which emerge with regard to the ambit and scope of an Amending Act and its retrospective operation may be culled out as follows:

(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(vi) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished .

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.

18. The amendment that has been brought about in Section 26 of the SEBI Act is only an amendment relating to the forum and, Therefore, in view of Clause (ii) mentioned in the aforesaid extract from the Supreme Court decision in Hitendera Vishnu Thakur (supra), the amendment would be only of a procedural nature. Since the amendment merely affects procedure and there is nothing in the language used to enable us to take a contrary view, it must be presumed to have retrospective application.

19. A reference to another decision of the Supreme Court would also be apposite. In *New India Insurance Co. Ltd. Vs. Smt. Shanti Misra, Adult*, held as under:

5. On the plain language of Sections 110A and 110F there should be no difficulty in taking the view that the change in law was merely a change of forum i.e. a change of adjectival or procedural law and not of substantive law. It is a well-established proposition that such a change of law operates retrospectively and the person has to go to the new forum even if his cause of action or right of action accrued prior to the change of forum. He will have a vested right of action but not a vested right of forum. If by express words the new forum is made available only to causes of action arising after the creation of the forum then the retrospective operation of the law is taken away. Otherwise the general rule is to make it retrospective.

Therefore, the transfer of the case to the Additional Sessions Judge and his passing of the impugned order would not be without jurisdiction. I am also in agreement with the submission made on behalf of the learned Counsel for the respondents that since the amendment insofar as the substantive rights are concerned, would only be prospective, the unamended Section 24(1) of the SEBI Act would apply. Indicating thereby that the term of imprisonment would be one year or with fine or with both. This, read with the definitions contained in Section 2(w) and 2(x) of the Code, which define "summons-case" and "warrant-case" (respectively), clearly goes to show that the present case would not be a warrant case inasmuch as a warrant case means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years. Clearly, the present case would fall in the category of "summons-case" and would have to be tried as such following the procedure under Chapter XX of the Code. It is an altogether different matter that the Sessions Court would be trying the offences in view of the special provisions of Section 26(2) of the SEBI Act. It would all the same remain a summons trial.

20. Coming now to the submission of the learned Counsel for the petitioners that prior to taking cognizance, the condensation of delay application ought to have been disposed of. The submission is that because, in this case, the cognizance was taken when the delay had not yet been condoned, it violated the express bar contained in Section 468 of the Code. Therefore, the taking of cognizance itself was without jurisdiction and any proceeding pursuant to such an order sans jurisdiction would also be bad in law. The answer to this submission is provided by the decision of the Supreme Court in the case of *Sukhdev Raj* (supra) which makes it clear that the delay can be condoned u/s 473 of the Code at any stage and it is not at all necessary that before cognizance is taken the delay ought to be condoned. In *Sukhdev Raj* (supra), the Supreme Court was dealing with the case where an application for condoning delay had been filed at a stage much after the taking of the cognizance and, in fact, after almost the entire trial was over but, before judgment was delivered. In that case, the Supreme Court held

that Section 473 of the Code does not in any clear terms lay down that the application should be filed at the time of filing the challan itself. The Court observed that the words "so to do in the interest of justice" are wide enough to engulf such a situation.

21. In *Vanka Radha Manohari* (supra), the Supreme Court considered the scope and interplay of Sections 468 and 473 of the Code. The Supreme Court was of the view that u/s 473 a Court can take cognizance of an offence not only when it finds, on the facts and circumstances of the case, that the delay has been properly explained, but also, in the absence of proper Explanation, if the Court is satisfied that it is necessary so to do in the interest of justice. The Supreme Court observed that Section 473 has a non-obstante clause which means that it would have an over-riding effect on Section 468, if the Court is satisfied on the facts and in the circumstances of a particular case, that either the delay has been properly explained or that it is necessary to do so in the interest of justice. The Supreme Court also cautioned the courts from treating the provisions of Section 468 and 473 of the Code as provisions parallel to the period of limitation provided in the Limitation Act and the requirement of satisfying the Court that there was sufficient cause for condensation of delay u/s 5 of that Act. The Court observed that there is a basic difference between Section 5 of the Limitation Act and Section 473 of the Code. The difference being that, for exercise of powers u/s 5 of the Limitation Act, the onus is on the applicant to satisfy the Court that there was sufficient cause for condensation of delay, whereas Section 473 enjoins a duty on the Court to examine not only whether such a delay has been explained but also as to whether it is a requirement of justice to condone or ignore such delay. The Supreme Court concluded:

As such, whenever the bar of Section 468 is applicable, the court has to apply its mind on the question, whether it is necessary to condone such delay in the interests of justice. While examining the question as to whether it is necessary to condone the delay in the interest of justice, the Court has to take note of the nature of offence, the class to which the victim belongs, including the background of the victim.

22. In this context, it must be observed that the learned Additional Sessions Judge after examining the matter in detail, has thought it fit to condone the delay and I find that in its examination of the case for the purposes of condensation of delay there is no warrant for this Court to interfere.

23. In view of the foregoing discussion, there is no merit in the revision petition filed by the petitioners and the same is dismissed.