

(1983) 03 MAD CK 0031

In the Madras High Court

Case No : Criminal Miscellaneous Petition No. 2259 of 1979 in Company Case
No. 251 of 1979

P.R. Ramakrishnan and Others

APPELLANT

Vs

A. Mounaguruswami

RESPONDENT

Date of Decision : 07-03-1983

Acts Referred:

Companies Act, 1956 — Section 108, 108A, 108B, 108C, 108D

Citation : (1985) 57 CompCas 477

Hon'ble Judges : Natarajan, J

Bench : Single Bench

Advocate : N.T. Vanamamalai, for the Appellant; N. Natarajan, for the
Respondent

Judgement

Natarajan, J.—The petitioners seek quashing of the proceedings in C.C. No. 251 of 1979 on the file of the Judicial First Class Magistrate,

Coimbatore. The case arises out of a private complaint filed by the respondent herein against the petitioners and a public limited company, to wit,

Radhakrishna Mills Ltd., which has been arrayed as the fifth accused in the case. The complaint has been taken on file under ss. 108A, 187C(2)

and 308(3) of the Companies Act.

2. The averments of the respondent in the complaint filed by him are to the following effect.

The complainant is a shareholder in Radhakrishna Mills Ltd., the fifth accused, and holds 240 equity shares. The board of directors of the mill is

composed mainly of two families, one, that of Sri R. Venkataswami Naidu and his sons and the other, that of the first accused and his three sons,

viz., accused Nos. 2 to 4. There are only two outsiders in the board, viz., one R.

Palaniswami Naidu and one A. Narayanaswami Naidu. The first accused is, therefore, virtually controlled by the two families mentioned above. However, there appears to be some disputes between the two families and each family is attempting to gain control of the company. The complainant is not interested in the dispute between the two families, but as a shareholder he is interested in the proper management of the affairs of the company. The complainant found that a large number of shares in the fifth accused company had been purchased in the names of persons who do not actually hold them and that the purchasers were holding the shares benami for the benefit of accused Nos. 1 to 4. The complainant has given a list of the benami shares in the schedule attached to the complaint. The complainant gained intelligence about the purchase of benami shares by accused Nos. 1 to 4 after making an inspection of the relevant records of the company. On making the inspection, the complainant was shocked to notice that over 32,000 shares had been purchased by accused Nos. 1 to 4 within the months of July to September, 1978. He found many of the transferees to be either clerks or automobile drivers or to the employees serving under the effective control of accused Nos. 1 to 4. The other benami transferees are obliged to the accused. The holders of the shares do not have the pecuniary capacity to acquire the shares. Moreover, they would never have invested moneys in the purchase of shares in the company as they are hopelessly unproductive and there is no chance of these shares bearing dividends in the near future. As a matter of fact, the shares have been selling at a low price (below par) for quite a number of years. Accused Nos. 1 to 4 of whom the first accused is the head, and the concerns over which they exercise control, already hold 48,842 shares, viz., 19.36 per cent of the total number of equity shares. The break up figures of the shareholders are as under :

shares

1. First accused 12,510
2. Smt. Rajeswari Ramakrishnan (first accused`s wife) 2,060
3. Second accused 3,740
4. Third accused 2,050
5. Fourth accused 1,450

6. Smt. D. R. Durgambal & fourth accused 380
7. Jeypore Sugars Ltd. 16,601
8. Ramakrishna Machinery Corporation Pvt. Ltd. 6,345
9. R. S. Industrial Corporation (P.) Ltd. 1,661
10. Krishna Industrial Corporation Ltd. 2,040

If the 32,000 odd additional shares acquired benami by accused Nos. 1 to 4 are added to the shares already held by their group, the total holdings

of the group headed by the first accused will exceed 25 per cent. of the paid up capital of the company. However, accused Nos. 1 to 4 have not

obtained the permission of the Company Law Board under s. 108B for such acquisition. In order to by pass the mandate contained in s. 108A,

accused Nos. 1 to 4 have acquired the shares benami in the names of third parties. There is, therefore, a contravention of s. 108A of the

Companies Act. Moreover, there is also contravention of the provisions of s. 108C and s. 302 of the Companies Act, because a person having

beneficiary interest in a class or classes of shares of a company should declare the same to the company within thirty days of such acquisition.

Contrary to the provisions of law, there has been no such declaration by accused Nos. 1 to 4 to the company. That apart, under s. 308 of the

Companies Act, the directors of a company have to give notice to the company of their shareholdings in order to enable the company to comply

with the provisions of s. 307. Accused Nos. 1 to 4 have not given the required notice to the company as enjoined by law. The complainant sent a

letter to the company (fifth accused) to retransfer the shares to the original holders and to give him an assurance that the benami shareholders

would not be allowed to vote in the general body meeting held on July 30, 1978. Since no reply was received, the complainant sent a further letter

to the chairman of the meeting requesting him not to take into consideration the votes of the benami shareholders, but in spite of the request, the

shareholders holding shares benami for accused Nos. 2 or 4 exercised their voters against the reappointment of the auditors and they had thus

contravened s. 108 of the Companies Act. The complainant sent such a letter to the chairman against the benami shareholders, because he was of

the view that they may have the Act. Furthermore, the benami shareholders are helpless persons as they are under their effective control of

accused Nos. 1 to 4 and cannot, therefore, raise any protest. Accused Nos. 1 to 4 have been collecting proxies from shareholders even long

before the annual general meeting held on July 30, 1978, in order to get a majority of the votes for themselves. As a shareholder, the complainant

is interested in the fair management of the affairs of the company and it is for that purpose, he is forced to file a complaint against the accused. The

complainant has furnished list of witnesses who are to depose in the case to prove the averments in the complaint. On such averments, the

complainant has prayed for the case being taken on file and an enquiry held and for the accused being punished for the offences committed by

them.

3. As already stated, though contravention of several sections is complained of, the complaint has been taken on file only under ss. 108A, 187C(2)

and 308 of the Companies Act.

4. The petitioners seek quashing of the proceedings on the ground that the complaint does not disclose the commission of any offence by them, that

the averments in the complaint are vague and indefinite, that the complaint is based on mere surmises and assumptions, that even if the witnesses

cited by the complainant give evidence in support of the complaint, their testimony cannot establish the commission of any offence by the

petitioners, that the complaint is an after-thought and has presumably been filed as a counter-blast to another complaint filed by the petitioners

against other directors and that if, in such circumstances, the trial is allowed to proceed, it would only open the floodgates of persecution against

directors and companies in such a manner as to stifle and thwart all corporate business, industrial and mercantile activity, by motivated, dissatisfied

or mischievous persons.

5. Arguing the case of the petitioners, Mr. Vanamamalai, the learned counsel, referred to various featurers in the case which, according to him,

entitle the petitioners to seek quashing of the proceedings. He pointed out that even according to the complaint, the alleged purchase of benami

shares was about ten months prior to the filing of the complaint and that there had been no whisper till then about the shares having been purchased

benami. The counsel stated that if the shares had been purchased benami, the matter would have been known to people in the office as well as in

the share market. He emphasised the fact that while, in the schedule attached to the complaint, the names of 28 alleged benami purchasers of

shares are mentioned, the complainant has cited in the complaint only four of the alleged purchasers, namely, Nos. 4, 6, 13 and 14, who have been

arrayed as witnesses Nos. 7, 4, 5 and 6 in the complaint, and, therefore, the alleged purchase of shares by the other 13 persons has to stand only

on the ipso dixit of the complainant. The counsel then argued that even if witnesses Nos. 4 to 7 in the complaint are going to get into the box and

give evidence supporting the complaint, it would only mean that the petitioners had purchased 1,430 shares and by the acquisition of those shares,

the petitioners cannot be accused of having acquired more than 25 per cent. of the shares in the company. The further contention, in this behalf,

was that if the petitioners are to be held guilty of contravening s. 108A of the Companies Act, it should be proved that they had acquired more

than 14,400 shares in addition to their present holdings, but in this case, the complainant will be able to prove the purchase of only 1,430 shares

and the acquisition of those shares will not take the holdings of the petitioners to more than 25 per cent. of the shares in the company.

6. Another contention put forward by Mr. Vanamamalai was that none of the purchasers of shares had told anyone about their being benamidars

for the petitioners. The complainant claims to have discovered the purchase of the benami shares by the petitioners by making an inspection of the

records and registers of the company and, therefore, there is reason to think that the persons cited as witnesses in the complaint should have been

subsequently induced to make allegations against the petitioners so that the petitioners' interests will be harmed.

7. On another ground also, Mr. Vanamamalai attacked the complaint. He pointed out that there is no mention in the complaint as to who among

the petitioners had purchased shares benami and, in the absence of a specific averment, the petitioners cannot be generally charged for having

acquired shares benami for themselves. The averment in the complaint that ""many of the transferees were either clerks or automobile drivers and

other employees of the petitioners and serving under their effective control"", was disputed by Mr. Vanamamalai and he referred to the fact that

only one person is a driver and one person is a clerk in the Coimbatore Institute of Technology and, therefore, it will be wrong to say that all the

persons mentioned in the complaint are employees of the petitioners.

8. Arguing contra, Mr. Natarajan, learned counsel for the respondent-complainant, stated that the Magistrate was prima facie satisfied about the averments in the complaint and had, therefore, taken the case on file and, as such, the complainant should be given an opportunity to prove his case and the petitioners should not be allowed to thwart the proceedings by having the matter quashed without a trial taking place.

9. Before examining the contentions of the parties, it would be useful to refer to ss. 108A, 187C(2) and 308 of the Companies Act (hereinafter referred to as "the Act"), which the petitioners are alleged to have contravened. Sections 108A and 108H were newly introduced by the Companies (Amendment) Act XLI of 1974. Section 108A reads as follows :

108A. Restriction on the acquisition of shares. - (1) Except with the previous approval of the Central Government, no individual, group, constituent of a group, firm, body corporate, or bodies corporate under the same management, shall jointly or severally acquire or agree to acquire, whether in his or its own name or in the name of any other person, any equity shares in a public company, or a private company which is a subsidiary of a public company, if the total nominal value of the equity shares intended to be so acquired exceeds, or would, together with the total nominal value of any equity share already held in the company by such individual, firm, group, constituent of a group, body corporate or bodies corporate under the same management, exceed twenty-five per cent. of the paid-up equity share capital of such company.

(2) Any person who acquires any share in contravention of the provisions of sub-section (1), shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to five thousand rupees, or with both.

This section was introduced in order to meet the case of "take-over" bids by groups of companies, as they are apt to adversely affect the interests of non-controlling shareholders, particularly public financial institutions, as they are kept in the dark while secret negotiations are entered into with those having control of a company. Originally, the recommendation was that the proposed restrictions would apply to companies having a total paid-up capital of not less than Rs. 25 lakhs and private companies which are

subsidiaries of such public companies. The proposal was subsequently modified and the restriction has been made to apply to public limited companies with a share capital of Rs. 20 crores or more.

Consequently, s. 108H was enacted to govern the application of ss. 108A, 108B, 108C and 108D, to such companies to which the provisions of

Part A of Chapter III of the MRTP Act, 1969, apply. In the instant case, though it is not mentioned in the complaint, it has been ascertained from

counsel that the fifth accused has been registered under the provisions of Part A of Chapter III of the MRTP Act, 1969. Therefore, what needs

consideration is whether there has been an acquisition of shares by the petitioners in contravention s. 108A of the Act.

10. Section 187C is also a new section inserted by the Companies (Amendment) Act XLI of 1974. It comprises of seven sub-sections. Under

sub-s. (1) any person whose name is entered as a shareholder in the register of members of a company, but who does not hold the beneficial

interest in such shares should make a declaration to the company specifying the name and other particulars of the person holding the beneficial

interest in the shares. Sub-s. (2) casts a similar duty of making a declaration to the companies on the person holding there beneficial interest in the

shares of a company standing registered in the names of other persons. It is this provision which the petitioners are alleged to have contravened by

reason of their having failed to make a declaration to the company about the holding of benami shares by them. It is then necessary to refer only to

sub-s. (5) for the purpose of this case, which is the penal section and it lays down that any person contravening sub-s. (1) or sub-s. (2) or sub-s.

(3), without any reasonable excuse to do so, is punishable with fine which may extend to one thousand rupees for every day during which the

failure continues.

11. Lastly, we have s. 308. This section deals with the duties of a director in giving notice to the company of such matters relating to himself as may

be necessary for the purpose of enabling the company to comply with the provisions of s. 307. Sub-s. (3) is the punishment section and lays down

that any person who contravenes sub-ss. (1) and (2) of s. 308 shall be punishable with imprisonment for a term which may extend to two years or

with fine which may extend to five thousand rupees or with both.

12. It is with reference to these sections, we have to examine the complaint to find out whether a prima facie case exists for the proceedings to go

on or whether the complainant's averments are of such a nature that no case at all is made out against the petitioners and, therefore, if the trial

proceeds, it will only prove to be an exercise in futility.

13. Examining the first accusation of the complainant that the petitioners have acquired 32,000 odd shares benami and have there by swelled up

their total holding of shares beyond the 25 per cent. limit fixed by s. 108A, the complainant has not specifically stated the number of shares

acquired by each of the petitioners and furthermore, who the benami shareholders are for each person. On the other hand, the averment in the

complaint is that "they (benami shareholders) hold it benami for the benefit of accused Nos. 1 to 4". In the very nature of things, the accusation is a

loose and vague one. The complaint should set out specifically how much of benami shares have been acquired by each of the petitioners. Even

assuming that there has been acquisition of benami shares, it may well be that not all the four petitioners have acquired shares and it is only one or

two or three of the petitioners who have acquired the shares. If that be the case, it automatically follows that such of those petitioners who have not

acquired shares cannot be prosecuted for the purchase of benami shares by the other petitioners. Mr. Natarajan, learned counsel for the

respondent-complainant, would say that accused Nos. 1 to 4 act as a group. But, the word "group" has a definite connotation under the

Companies Act. It may be that the first petitioner is the father and petitioners Nos. 2 to 4 are his sons. But, even so, the question is still open

whether they would constitute a group under the Act. In this context, it is relevant to refer to s. 2(18A) which gives the definition of "group". The

definition reads as follows :

"Group" means a group of two or more individuals, associations, firms or bodies corporate, or any combination thereof, which exercises or is in a

position to exercise, or has the object of exercising control over any body corporate, firm or trust.

14. There is an Explanation to this definition, and it runs as follows :

Explanation. - If any question arises as to whether two or more individuals, associations, firms or bodies corporate, or any combination thereof,

constitute, or fall within a "group", the Company Law Board shall, after giving such individuals, associations, firms or bodies corporate, or any

combination thereof, a reasonable opportunity of being heard, decide the same.

Therefore, it is the Company Law Board which can make an authoritative pronouncement whether two or more individuals, associations, etc.,

constitute a group or not under the Act. In this case, there is no averment in the complaint that the Company Law Board has given a finding that

petitioners Nos. 1 to 4 constitute a group. In the absence of such a finding by the Company Law Board, the court cannot proceed on the

assumption that petitions Nos. 1 to 4 constitute a group within the meaning of the Act. There is also another aspect of the matter to be taken note

of in this connection. In paragraph 4 of the complaint, reference is made to ten persons as constituting the group of the first petitioner in the

company. While petitioners Nos. 1 to 4 are enumerated as Nos. 1 and 3 to 5, the second enumerated person is Smt. Rajeswari Ramakrishnan,

wife of the first petitioner. The sixth enumerated persons are Smt. D. R. Durgambal and the fourth petitioner. Then Nos. 7 to 10 are certain

companies incorporated under the Act. Therefore, when the complainant says that shares have been acquired by the group of the first petitioner

and then, according to him, it becomes incomprehensible as to how he can attribute the acquisition of shares only to petitioners Nos. 1 to 4, viz.,

accused Nos. 1 to 4. In such circumstances, there is an insurmountable feature of uncertainty in the case, the uncertainty being whether the

acquisition of benami shares is by one or more or all the four petitioners, or whether the acquisition is also by the other members of the alleged

group of the first petitioner. In view of this uncertainty, the Magistrate cannot take cognizance of the case against petitioners Nos. 1 to 4 and it will

not be proper to say that in spite of the uncertainty in the case, the trial should proceed against all the petitioners and if any one or more of them is

or are not found to have contravened s. 108A, he or they can be acquitted after they go through the ordeal of a trial.

15. Then, comes the question, whether there is apparent material in the complaint to suggest an inference that the petitioners have acquired benami

shares beyond the permitted limit without conforming to the provisions of s. 108A. According to the complainant, ""Accused Nos. 1 to 4 of which

the first accused is the head and the concerns over which they exercise full control already hold 48,842 shares, viz., 19.36 per cent. of the total

equity shares of the fifth accused company". If that be so, the total number of shares issued should be about 2,52,283. Twenty-five per cent. of the

total shares would come to 63,071. Giving set-off to the shares now held, the petitioners can well acquire additional shares to the tune of 14,229,

without offending the provisions of the Act. Though, in the complaint, it is alleged that 32,000 odd shares have been acquired, the complainant has

cited only four persons to speak about there acquisition of benami shares in their names. The total number of shares purchased by them, as already

mentioned, is only 1,430. Hence, even if they depose in favour of the complainant, the petitioners cannot be held guilty of having contravened s.

108A. Mr. Natarajan argued that the witnesses cited in the complaint may not only speak to the purchase of shares in their names, but contention

cannot be countenanced. That is because of the fact that the statute casts an obligation both on the benami shareholder as well as the beneficiary to

disclose to the company the purchase and holding of such shares. It would, therefore, not only be inadvisable, but also dangerous, for any court to

accept the evidence of someone regarding the purchase of shares by third parties benami for another and render any finding, because the holder of

the shares will be greatly prejudiced by any adverse finding rendered against him by the court. In fact, if a person holds a share benami for another

and fails to disclose it, he becomes punishable under s. 187C(5) for contravention of s. 187C(1). The punishment is as high a fine which may

extend to one thousand rupees for every day during which the failure continues. Having regard to the serious nature of the offence and the penalty

provided for it, it would be highly improper for any court to render a finding against anyone that he is holding shares in a company benami for

another, on the evidence of some other shareholder or shareholders. Such being the case, I see considerable force in the contention of Mr.

Vanamamalai that even if the four shareholders named by the complainant come and give evidence against the petitioner in the case, it would only

mean that the petitioners have acquired 1,430 shares in order to have beneficial interest in these shares themselves. When the acquisition of such

shares will not carry the total holdings of shares by the petitioners beyond the prescribed limit of 25 per cent., it can never be said that there is

prima facie evidence that the petitioners have contravened s. 108A of the Act.

16. In the course of arguments, it was urged on behalf of the complainant that drivers and clerks could not have purchased shares by themselves

and it is, therefore, obvious that they should have purchased the shares benami for the petitioners. On the other hand, Mr. Vanamamalai argued

that even drivers and clerks of companies are paid well these days and that, as such, they would have been able to command funds for purchase of

shares. He also argued that even, according to the complainant, there is a scramble between two families for purchase of shares and in view of that

the share prices had fallen. Therefore, he stated that taking advantage of the situation, the drivers and clerks could have made speculative

purchases in order to strike a bargain between the two groups and sell the shares to them at an appropriate stage for considerable profit.

Considering this aspect of the matter, I think there is a good deal of force in the contention of Mr. Vanamamalai. The status of the witnesses cited

by the complainant is not such that by one stroke of the pen it can be said that they are not men of means and, as such, they would not have

purchased the shares for themselves, but should have only lent their names for purchases of shares by others.

17. Proceeding onwards, on the alleged contraventions of ss. 187C(2) and 308, the contention on behalf of the complainant is that even if an

offence under s. 108A is not prima facie made out, there can be no answer by the petitioners to their having purchased shares benami in the names

of the four witnesses named in the complaint and their failing to make the declarations and returns under s. 187C(2) and 308 of the Act. On the

face of it, this contention may look an appealing one. But, if the matter is viewed in a wider perspective, it will be seen that it cannot be accepted. I

have already pointed out that under s. 187C(1) there is an obligation cast on the holder of a benami share to make a declaration to the company

specifying the name and other particulars of the person who holds the beneficial interest in such share. I have further pointed out that under sub-s.

(5) the holder of a benami share is also punishable, even as the person holding the beneficial interest in a benami share is punishable for failure to

make the necessary declaration to the company about the holding of the benami share. The punishment provided is a fine which may extend to one

thousand rupees for every day during which the failure continues. It is in the light of this penal provision the contention of the complainant that the witnesses cited by him have purchased shares benami for the petitioners should be examined. If the witnesses had purchased shares benami, they ought to have made a declaration to the company under s. 187C(1). If they have failed to do so, they are liable for prosecution and punishment under sub-s. (5). Such being the case, what falls for consideration is whether these witnesses would come and make incriminating statements against themselves and make themselves liable for prosecution under s. 187C(5). The preponderance of a probability is that they would not come and give evidence against themselves in court. Assuming, for argument's sake, that they would be prepared to give such evidence, the question would be whether such evidence can be accepted and acted upon, because it would be the evidence of accomplices. The possibility of the witnesses making incriminating statements in the witness box on the investigation of third parties inimically disposed towards the petitioners cannot be ruled out. If these witnesses do come and give evidence against the petitioners, the question would naturally arise why they had kept quiet for a period of ten months and suddenly took it into their minds to disclose to the complainant and others that they are name-lenders for the shares acquired by the petitioners and that they are prepared to give evidence about it in court. The strong possibility is that there should have been sufficient inducement to the witnesses to come and give evidence cannot be due to a desire on their part to reveal the truth or to make there is no material to show that till today the witnesses have made a declaration to the company under s. 187C(1) stating that they are benami shareholders. The question will be whether these witnesses can be allowed to come and depose something in court when they have failed to make a declaration under s. 187C(1). I think not, for, if such a course is encouraged, then it would be open to any shareholder to threaten a director of a company and hold him to ransom by saying that without making a declaration to the company under s. 187C(1), he will give evidence against the director in a court of law and see to it that the director is punished. Sub-ss. (1) and (2) of s. 187C (are of such a nature that a court cannot act on the unilateral statement of either party alone in court against the other without making a declaration under s. 187C(1) or (2), for it will lead to unhealthy

practices by the shareholders and directors of a company.

18. Since ss. 187C(2) and 308 are closely connected, it follows that unless irreproachable and incontrovertible materials are available materials are

available to hold that a prima facie case of contravention of these two provisions has been made out, the court will not be justified in taking

cognizance of a case and making a roving enquiry at the request of a complainant.

19. For the aforesaid reasons, I am of the opinion that the contention of the petitioners that the complaint does not disclose the commission of any

offence, is well founded. The case suffers from the several infirmities set out above, which go to the root of the matter. Consequently, the ration laid

down in Dr. Sharda Prasad Sinha Vs. State of Bihar, , can well be applied to this case. The Supreme Court had held in that case that if the

allegations in complaint or charge sheet do not constitute any offence, it is competent to the High Court, exercising its inherent jurisdiction under s.

482 of the Cr. PC, to quash the order passed by the Magistrate taking cognizance of the offence. Therefore, it follows that the proceedings relating

to the complaint filed by the respondent-complainant deserve to be quashed. In this connection, I may also point out that if there had been a

deliberate violation of the provisions of the Act, the Company Law Board would itself have taken action against the petitioners.

20. In the result, Criminal Miscellaneous Petition No. 2259 of 1979 will stand allowed and the proceedings relating to C.C. No. 251 of 1979 on

the file of the Court of the Judicial First Class Magistrate, Coimbatore, will stand quashed.