(1994) 03 P&H CK 0040

In the Punjab And Haryana At Chandigarh

Case No : Criminal Miscellaneous No. 4041-M of 1993

S.C. Bhatia — APPELLANT

Vs

P.C. Wadhawa — RESPONDENT

Date of Decision : 31-03-1994

Acts Referred:
Companies Act, 1956 — Section 5, 545, 621, 73, 73(2A)

Citation : (1998) 92 CompCas 511 : (1994) 107 PLR 676

Hon'ble Judges : H.K. Sandhu, J

Bench : Single Bench

Advocate : Rajiv Kataria and K.S. Ruppal, for the Appellant; Party in person, for the Respondent

Final Decision : Allowed

Judgement

Mrs. Harmohinder Kaur Sandhu, J.—Shri S. C. Bhatia, director, Indana Spices and Food Industries Ltd., 72, Janpath, New Delhi, has filed this petition u/s 482 of the Criminal Procedure Code, for quashing complaint annexure "P-7", summoning order annexure "P-8" and the proceedings arising therefrom pending in the court of Shri T. R. Bansal, Judicial Magistrate, Ist Class, Chandigarh. The brief facts of the case relevant for the disposal of this petition are that P. C. Wadhawa, respondent, filed a complaint u/s 73 of the Companies Act, 1956, against the petitioner alleging that Indana Spices and Food Industries Limited floated debentures in August, 1991. He applied for 40 debentures of the company and issued cheque for a sum of Rs. 3,000 bearing No. 569179, dated August 9, 1991, on Haryana State Co-operative Apex Bank Limited, Sector 28-D, Chandigarh, for the purchase of the debentures. The application form and cheque were deposited with the Canara Bank. Debentures were, however, not allotted to him within the stipulated period, On non-allotment of debentures, the company was required to refund the amount of Rs. 3,000 within eight days of the expiry of a period of 10 weeks from the date of closure of the issue, but the company illegally withheld and used the amount of Rs. 3,000 for its own gain. The amount was refunded by

Shri S. C. Bhatia, vide cheque which was received on April 10, 1992, but was presented to the bank on April 14, April 11 and 13 being holidays. The amount was illegally retained by the company for a period of five and a half months after the lapse of the statutory period of 10 weeks plus eight days and no interest was paid for this period in spite of various letters written to the company. The director of the company violated the provisions of Sub-section (2A) of Section 73 of the Companies Act, 1956, and was liable for action under Sub-section (2B) of that section.

2. After hearing counsel for the complainant and going through the record, the Chief Judicial Magistrate, Chandigarh, summoned the present petitioner to stand trial for an offence u/s 73 of the Companies Act.

3. The petitioner alleged that the complaint, annexture "P-7", was in abuse of the process of law having been filed with a malicious intention to tarnish the image of the company in the eyes of the general public and the respondent had no locus standi to file the same. The complaint could not have been filed against the petitioner as Section 73 of the Companies Act stipulated that criminal liability shall be that of the company and every director of the company who was an officer in default. No act of negligence or mens rea regarding commission of an offence by the petitioner was disclosed.

4. No return was filed by the respondent.

5. 1 have heard Mr. Rajiv Kataria, learned counsel for the petitioner, and Mr. P. C. Wadhawa, respondent and have perused the record.

6. It was argued on behalf of the petitioner that the complaint annexure "P-7" was liable to be quashed as the allegations made therein did not disclose the commission of any offence by the petitioner nor did the complainant have any locus standi to file the complaint. The petitioner against whom the complaint had been filed could not be punished u/s 73 of the Companies Act, as the complaint was not maintainable against him. He referred to Section 621 of the Act, which runs as under:

"(1) No court shall take cognizance of any offence against this Act (other than an offence with respect to which proceedings are instituted u/s 545, which is alleged to have been committed by any company or any officer thereof, except on the complaint in writing of the Registrar, or of a shareholder of the company, or of a person authorised by the Central Government, in that behalf :

Provided that nothing in this sub-section shall apply to a prosecution by a company of any of its officers.

(1A) Notwithstanding anything contained in the Criminal Procedure Code, 1898 (5 of 1898), where the complainant under Sub-section (1) is the Registrar or a person authorised by the Central Government, the personal attendance of the complainant before the court trying the offence shall not be necessary unless the court for reasons to be recorded in writing requires his personal attendance at the trial.

(2) Sub-section (1) shall not apply to any action taken by the liquidator of a company in respect of any offence alleged to have been committed in respect of any of the matters included in Part VII (Sections 425 to 560) or any other provisions of this Act relating to the winding up of companies.

(3) A liquidator of a company shall not be deemed to be an officer of the company, within the meaning of Sub-section (1)."

7. It was urged that according to the provisions of the above section, the court could not take cognizance of any offence u/s 73 of the Act, unless the complaint was filed in writing by the Registrar or by a shareholder of the company or by a person authorised by the Central Government in that behalf. The respondent was neither a shareholder nor was he authorised by the Central Government to file the complaint. Even if debentures had been allotted to him still he could not become a shareholder of the company unless he held shares.

8. The contention of learned counsel for the petitioner is quite tenable. Under the Act, protection is given to companies from frivolous and malicious prosecution hatched by any person who has no locus standi to file a complaint. In case any person is aggrieved of any act of the company and he is not a shareholder of the company, then the only remedy open to him is to approach the Registrar of Companies, who shall file the complaint in a court of law, if any offence was committed by the company. The only exception to Section 621 of the Act is when the prosecution for the offence happens to be u/s 545 of the Act, then the person filing the complaint need not be a shareholder or a person duly authorised by the Central Government but this provision is not applicable to the present case as that is available during the course of winding up of a company.

9. The respondent contended that whereas all other acts which provide for criminal prosecution referred to the offences "under the Act", Section 621 provided for offence against the Act. So Section 621 was not attracted and he was competent to file a complaint for an offence punishable u/s 73 of the Act. This submission of the respondent is, however, not valid. The only grouse of the complainant was that the company had failed to refund his money within the time period stipulated u/s 73, and, therefore, the company had committed an offence by acting against the mandatory provisions of Section 73(2A) punishable u/s 73(2B). The words "against the Act" or "under the Act" connote the same meaning and the respondent failed to distinguish the two by showing as to what were the offences "against the Act" and which were "under the Act". In the light of the express bar u/s 621 of the Act, the respondent had no locus standi to file the complaint.

10. Section 73(2B) stipulated that the company and every officer of the company who was an "officer in default" shall be punished. An officer in default has been defined in Section 5 of the Act, which is as under :

"5. Meaning of ''officer who is in default''.--For the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any punishment or penalty, whether by way of imprisonment, fine or otherwise, the expression ''officer who is in default'' means all the following officers of the company, namely :--

(a) the managing director or managing directors ;

(b) the whole-time director or whole-time directors ;

(c) the manager ;

(d) the secretary ;

(e) any person in accordance with whose directions or instructions, the board of directors of the company is accustomed to act ;

(f) any person charged by the board with the responsibility of complying with that provision :

Provided that the person so charged has given his consent in this behalf to the board ;

(g) where any company does not have any of the officers specified in Clauses (a) to (c) any director or directors who may be specified by the board in this behalf or where no director is so specified, all the directors :

Provided that where the board exercises any powers under Clause (f) or Clause (g), it shall, within thirty days of the exercise of such powers, file with the Registrar a return in the prescribed form."

11. The petitioner does not fall under any of the categories mentioned in the above section. He is neither a managing director nor a whole-time director nor manager nor secretary. In order to prosecute the petitioner it was necessary for the respondent to mention in the complaint whether the petitioner was a managing director or a whole-time director as it is only those two types of directors who could be termed as officer in default. A person who is simply a director cannot be prosecuted u/s 73 of the Act. In the instant case, neither the respondent had a locus standi to file the complaint nor the petitioner was liable for the commission of any offence and the complaint is liable to be quashed on these grounds.

12. As a result, I allow this petition and quash the complaint, annexure "P-7", summoning order, annexure "P-8", and all subsequent proceedings arising therefrom pending in the court of the Judicial Magistrate, Ist Class, Chandigarh.