

(2017) 01 DEL CK 0035
In the Delhi High Court
Case No : Crl.M.C. No. 1341 of 2011

SEBI

APPELLANT

Vs

Information Technologies (India) Ltd

RESPONDENT

Date of Decision : 09-01-2017

Acts Referred:

Companies Act, 1956 — Section 113, Section 621
Criminal Procedure Code, 1973 (CrPC) — Section 468, Section 469, Section 473

Citation : (2017) 200 CompCas 217 : (2017) 1 JCC 376 : (2017) 139 SCL 348

Hon'ble Judges : Ms. Mukta Gupta, J.

Bench : Single Bench

Advocate : Mr. Anendra Kr. Saraswat, Advocate, for the Respondent Nos. 7 to 12; Mohd. Auram, Advocate, for the Respondent No. 3; Mr. Ramesh Gupta, Sr. Adv. with Mr. Shakeel, Mr. Y.K. Sharma, Advocates, for the Respondent Nos. 1, 2, 4 and 5; Mr. Ravi Nayak, APP, for the State; Mr. Anantram Nadkarni with Mr. Ashish Aggarwal, Advocates, for the Petitioner

Final Decision : Disposed Off

Judgement

Ms. Mukta Gupta, J. - The petitioner Securities and Exchange Board of India (in short the SEBI) filed a complaint under Section 113 and Section 621 of the Companies Act, 1956 being CC No.159/05 against the respondents along with an application for condonation of delay. Vide order dated 4th June, 2008 the application for condonation of delay was rejected. Hence, the petitioner filed a revision petition which was dismissed vide the impugned order dated 18th January, 2011. Hence the present petition.

2. In the application under Section 473 Cr.P.C. seeking condonation of delay and extension of period of limitation in filing the complaint, the petitioner stated that by the complaint dated 23rd December, 2002 M/s. Industrial Finance Corporation of India Limited (in short IFCIL) informed the petitioner that in spite of repeated requests respondent No.1 did not transfer the 2.265 million equity shares of the respondent No.1 company having face value of Rs. 5/- each to the account of M/s. IFCIL. On receipt of the complaint, the petitioner forwarded the same to the

respondent No.1 requiring it to provide the information in regard to the Dematerialization Request Number (DRN), name of the Depository Participant (DP), number of shares lodged by IFCIL for dematerialization, credit given in this regard and the difference of the items if any and the reasons thereof. Further para wise comments to the complaint of IFCIL was called, however no reply was received from respondent No.1, hence a reminder was sent on 10th February, 2003. Despite the same, no reply was received from respondent No.1.

3. Thus on 21st April, 2003 the petitioner ordered for carrying out the inspection of the books of accounts, other records and documents of respondent No.1 company and in this regard the Chairman SEBI in exercise of his power conferred under Section 4(3) of the SEBI Act read with Section 18 of the Depositories Act, 1996 and Regulation 59 of the SEBI (Depositories and Participants) Regulations, delegated its power to the Executive Director Shri Pratip Kar and appointed Shri G.S. Reddy as the inspecting authority. Thereafter the petitioner requested the National Security Depository Limited to provide with certain information in which regard reply was received on 30th April, 2003. Respondent No.1 was informed that inspection of books of accounts, records etc. would be carried out as per the procedure by the official of the petitioner on 14th May, 2003. However when the team went to A-41, Mohan Cooperative Estate, Mathura Road, respondent No.1 could not be traced and it was reported that educational institution was being run there by respondent No.2 and others in the name of M/s. Rai Foundation. Persons at M/s. Rai Foundation claimed ignorance about respondent No.1, hence the other addresses were contacted. It was finally found that respondent No.1 had shifted to Microwave Towers, Adekhi Colony, Shankar Vihar Colony, Hardaoi Road, Lucknow. Even at this address, there was no trace of respondent No.1. Different addresses which came to the knowledge were inspected, however everybody showed ignorance. Further efforts were made to trace the location and notices were sent to all the addresses known but the same were delivered back with the report "shifted". S.V. Krishnamohan was appointed as Enquiry Officer. Since the respondent could not be traced, thus the records were taken from M/s. IFCIL on 25th August, 2004 and the complaint was filed on 30th September, 2004. Hence the complaint for offence punishable under Section 113 of the Companies Act could not be filed within the period of limitation of six months as prescribed under Section 468 read with Section 469 Cr.P.C. Thus it was prayed that the delay be condoned.

4. The learned ACMM took cognizance of the offence on 30th September, 2004 and besides issuing summons to the respondent also issued notice in the application seeking condonation of delay. In a revision petition being Crl. Rev. Pet No. 428/2005 filed by the respondents before this Court, it was held that the learned ACMM could not have issued composite summons as it was incumbent upon the trial court to first decide the application seeking condonation of delay and if the same is decided in favour of the complainant, only then the cognizance could have been taken.

5. On remand, the learned ACMM vide order dated 4th June, 2008 held that SEBI made no efforts to collect the address of the respondents from the office of ROC and there was no reason to wait for disclosure of the incriminating facts from the accused company and its director; ultimately the complainant was supplied documents by M/s. IFCIL which it could have taken within the period of limitation. Hence the application seeking condonation of delay was dismissed.

6. In the revision petition filed by SEBI, the learned ASJ vide the impugned order dated 18th January, 2011 agreed with the view expressed by the learned ACMM. The Court noted that enquiry into the complaint of M/s. IFCIL was a mere bureaucratic exercise rather than an investigative process of statutory body empowered to hold enquiry of this nature and in the process the complaint was filed after a period of one year and nine months from the date of knowledge of offence to the complainant. The learned ASJ also noted that criminal action could have been initiated even by M/s. IFCIL as per the provisions of Section 621 of the Companies Act, it being shareholder of respondent No.1 and was thus an "aggrieved person" who had knowledge of the breach of law that had been committed on elapse of period of two months after equity shares had been lodged for dematerialization with the letter dated 17th November, 2000. M/s. IFCIL had the knowledge of the offence by middle of January 2001, thus the complaint was highly belated. In view of the decision of this Court in M/s. Nestle India Ltd. & Ors. v. State & Anr. 81(1999) DLT 283 the revision petition was dismissed.

7. Before this Court the contention of learned counsel for the petitioner is two-fold; firstly that sufficient cause had been shown in the application seeking condonation of delay and secondly that the offence being continuous in nature, there was no delay in filing the complaint and it ought to have been entertained on merits. Reliance is placed on Sanjay Suri & Ors. v. State & Anr. (2010) 157 Comp Cas 10 (Delhi); Registrar of Companies v. Rajshree Sugar & Chemicals Ltd. & Ors. AIR 2000 SC 1643; Herdillia & Ors. v. Ms. Aparajita Chauhan (2000) 99 CompCas 145(Raj); Ghanshyam Chaturbhuj v. Industrial Ceramics P. Ltd. & Ors. (1990) 68 Comp Cas 36(Mad) and Anita Chadha v. Registrar of Companies 74 (1998) DLT 537.

8. Contradicting the arguments, learned counsel for the respondents contend that the two Courts below have held that there was no sufficient cause to condone the delay and this Court will not interfere in the concurrent finding of fact. Moreover the plea that it is a continuing offence was not taken before the learned Metropolitan Magistrate. Reliance is placed on B. Parameswaran v. Small Industries Development Bank of India ; Vinod Baid v. State of Andhra Pradesh (2007) 139 Comp Cas 324 (AP) and Nestle India Ltd. & Ors. v. State & Anr. 81 (1999) DLT 283.

9. The decision of this Court in Nestle India (supra) relied upon by the learned Additional Sessions Judge giving a restricted meaning to the words "person aggrieved by the offence" has since been overruled by the Supreme Court in the

decision reported as AIR 2000 SC 1643 Registrar of Companies v. Rajshree Sugar & Chemicals Ltd. & Ors. and it was held:

"14. The only decision cited by the respondents which is on Section 113 of the Act is the decision in Nestle India Limited (supra). Neither the learned Judge in his decision in Nestle India nor the High Court in the judgment under appeal considered the provisions of Section 621(1) of the Companies Act, which provides:

621(1) No Court shall take cognizance of any offence against this Act (other than an offence with respect to which proceedings are instituted under Section 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.

15. Under this Section therefore, the appellant is competent to file a written complaint in respect of offences under, inter alia, Section 113 of the Act.

16. The phrase "person aggrieved" has not been defined in the Code. However, as far as offences under the Companies Act are concerned, the words must be understood and construed in the context of Section 621 of the Act. If the words "person aggrieved" are read to mean only "the person affected" by the failure of the Company to transfer the shares or allot the shares, then the only "person aggrieved" would be the transferee or the allottee, as the case may be. Under Section 621 of the Act, no Court can take cognizance of an offence against Companies Act except on the complaint of a share-holder the Registrar or the person duly authorised by the Central Government. Where the transferee or allottee is not an existing share-holder of the Company, if the words "person aggrieved" is read in such a limited manner, it would mean that Section 469(1) (b) of the Code would be entirely inapplicable to offences under Section code of the Act. There is, in any event, no justification to interpret the words "person aggrieved" as used in Section 469(1)(b) restrictively particularly when, as in this case, the statute creating the offence provides for the initiation of the prosecution only on the complaint of particular persons. Having regard to the clear language of Section 621 of the Act, we have no manner of doubt that the appellant would be a "person aggrieved" within the meaning of Section 469(1) (b) of the Code in respect of offence (except those under Section 545) against the Companies Act.

17. Apart from overlooking the provisions of Section 621 of the Act, the High Court erred in construing the provisions of Section 113(2) with reference to Section 113(3). The latter deals with the civil liability of the Company and its officers for a breach of Section 113(1) at the instance of the transferee of the shares. Section 113(2) deals with the criminal liability arising out of a violation of Section 113(1). The objects of the two subsections are disparate. Section 113(3) is primarily compensatory in nature whereas Section 113(2) is punitive. An application under Section 113(3) can only be made by the transferee. And as

already seen, a transferee who is not an existing shareholder of the Company cannot file a complaint under Section 113(2) at all.

18. For the reasons stated, we are of the view that the appellant as a person aggrieved would be entitled to the benefit of the provisions of Section 469(1)(b) of the Code. It is not in dispute that the appellant came to know of the offences on 20th July 1992. The commencement of the period of limitation of six months for initiating the prosecution would have to be calculated from that date. The complaint was filed on 20th August 1992 well within the period specified under Section 468(2) of the Code."

10. Following the decision of the Supreme Court in *Rajshree Sugar* (supra) learned Single Judge of this Court in *Sanjay Suri* (Supra) held that not only the shareholder was an aggrieved person but the Registrar of Companies to whom the complaint was forwarded was also an aggrieved party. Similar view was expressed by the Calcutta High Court in the decision reported as 1983 (53) Comp. Cas 54 *Sushil Kumar Lahiri v. Registrar of Companies*. Thus the date to compute the delay in filing the complaint is not the date of knowledge of the shareholder but that of the complainant who files the complaint in the Court, which in the present case is SEBI, the petitioner herein.

11. In *Sanjay Suri* (Supra) the learned Single Judge further held that even the date on which the contraventions came to the knowledge of the Inspecting Officer will not be deemed to be the date when the offence came to the knowledge of the complainant. In fact, it is on receipt of the Inspecting Officer's report that knowledge of the offence can be attributed to the complainant. Noting the various decisions of the different High Courts this Court in *Sanjay Suri* (supra) held:

"18. Since the prescribed period of limitation starts from the date the offence came to the knowledge of the person aggrieved by the offence., the next question which comes up for consideration is when the offence alleged to have been committed by the petitioners came to the knowledge of the complainant/respondent. The contention advanced by the learned Counsel for the petitioners is that since the office of the respondent is required to scrutinize the balance sheet, etc. at the time it is filed and not to just store the document in its godown, the offence alleged to have been committed by the petitioners came to the knowledge of the complainant on the date Balance Sheet was filed. In support of his contention, the learned Counsel for the petitioners has referred the decision in *Assistant Registrar of Companies v. H.C. Kothari and Ors.* 1992 (75) Comp Cas 688. In the case before Madras High Court, complaint was filed on the allegations that Balance Sheets of the company had revealed that investments made by the company for the financial years 1980-81 & 82 in shares of other bodies corporate was in excess of 30% limited prescribed in Section 372(2) of the Companies Act and the approval of Central Government as well as Resolution under Section 376(2) having not been obtained, the respondents had committed an offence under Section 377(2)(4) read with Section 374 of Companies Act. It

was held by the High Court that the Registrar of Companies was deemed to have knowledge of the contents of the Balance Sheets and of the offence, on the day, the same were received by him. During the course of the judgment, the High Court, inter alia, observed as under:

After receiving the balance-sheets, it is not open to the Registrar to keep these balance-sheets in cold storage, keep his eyes closed to them and then to deny knowledge of these contents, thereby defeating the law of limitation. The very object of the bar of limitation would be defeated if the contention of the appellant is accepted. When the balance-sheets are received by the Registrar of Companies, he is deemed to have knowledge about the contents of the balance-sheets and, consequently, of the offence, and limitation will start running from that day onwards.

19. As against this, the learned Counsel for the respondent has referred to decision of Kerala High Court in *Thomas Philip and Ors. v. Assistant of Registrar of Companies and Anr.* 2006 (133) Comp Cas 842. In the case before Kerala High Court, a complaint was filed on October, 24, 2001 under Section 628 of Companies Act, 1956 alleging fictitious entries in the books of accounts and Balance Sheet of a company for the period 1995-1996. The petitioners, directors of the Company, filed a petition under Section 482 of the Code of Criminal Procedure, contending that the complaint was barred by limitation since the Balance Sheet was filed on December 24, 1996. The High Court considered the decision of Madras High Court in the case of *H.C. Kothari (supra)*, but did not agree with the view taken in that case and preferred to go by the view taken by Andhra Pradesh High Court in *Mishra Dhathu Nigam Ltd. v. State* 1998 (92) Comp Cas 730. During the course of judgment, the High Court observed that there may be patent as well as latent offences revealed from the Balance Sheet and that at least regarding latent offences, merely because a Balance Sheet comes into the hands of the Registrar, it cannot be assumed that the Registrar had come to know of all the offences revealed on a vetting of the Balance Sheet. The learned Counsel for the petitioners, before the High Court, relied upon Regulation 17 of Companies Act to contend that Registrar, on receipt of a document like Balance Sheet, is required to examine the document or cause it to be examined and which further stipulates that if there be any defect or incompleteness in the document, it has to be returned within a period of 15 days. The High Court, however, felt that an offence like the one before it cannot be said to have come to the notice of the Registrar, actually or constructively, on the date when the Balance Sheet was delivered at his office, so as to hold that the period of limitation starts running from that date. It was noticed that Balance Sheets and Annexures thereto are usually voluminous documents and receipt of Balance Sheet or even a cursory perusal cannot and may not bring to the knowledge of the Registrar and his officials, information about the commission of the offence. The learned Judge of the High Court felt that detailed consideration and application of mind would be necessary and this was taken note of by law when it provided that limitation would start running only when commission of the

offence is known to the person aggrieved. The apprehension of the petitioner that giving such an interpretation may enable the Registrar to file complaint at any time and claim that it had come to its knowledge only at a later date, the learned Judge of the High Court, *inter alia*, observed as under:

The contention that if such an interpretation were placed on Section 469(1)(b) the complainants will be able to assert that the offence came to their knowledge only on a later point of time that suits them is disturbing. But the contra interpretation may result in graver injustice and prejudice. In an appropriate case the indicate will be able to contend and establish that the complainant did have actual knowledge or at least constructive knowledge about the offence and the period of limitation had started running from that day. That option will secure the interests of prevention of misuse of the provisions of Section 469(1)(b). The Legislature advisedly has chosen to stipulate that in a case where the person aggrieved did not have knowledge of the commission of offence, not the date of offence but the date of knowledge of the offence alone must be reckoned as the date of commencement of limitation.

20. In the case of *Mishra Dhathu Nigam Ltd.* (*supra*), Andhra Pradesh High Court, while rejecting the contention that mere filing of Balance Sheet is sufficient to impute knowledge of the offence to the Registrar of Companies, *inter alia*, observed as under:

Mere filing of the balance-sheets with voluminous annexures does not necessarily mean that the offence can be detected by the Registrar immediately. As there are a number of limited companies, it is humanly impossible for the Registrar to closely scrutinise each and every balance-sheet the moment it is filed and to find out whether any offence has been committed by a particular company. It is only after close scrutiny, which is done as in the case of inspection, that any offence committed by the company can be detected. Moreover, whether the particular deployment of funds is in the nature of investment or deposit cannot be detected by a mere look at the balance-sheets with its annexures and can be detected only after due inspection and close Scrutiny. Thus, I respectfully disagree with the decision of the Madras High Court in *Asst. Registrar of Companies v. H.C. Kothari* [1992] 75 Comp Cas 688. Accordingly, the first contentions of Mr. S. Ravi is rejected.

21. Though the complaints, subject matter of these petitions, were filed within one year from the date inspection was concluded, even the date on which the contraventions came to the knowledge of the Inspecting Report, cannot be said to be the date when the offence came to the knowledge of the complainant. It was only on receipt of Inspecting Officer, in its office that the complainant came to know of these offences. In taking this view, I find support from the decision of a Division Bench of this Court in *Oriental Bank of Commerce and Anr. v. DDA and Anr.* 23 1983 DLT 46 where this Court held that the knowledge of Inspecting Officer cannot be imputed to DDA because until the matter comes to the notice of the proper person, who is authorised to file a complaint, it cannot be said that

the knowledge of the Inspecting Officer is the knowledge of DDA.

22. In the complaint subject matter of Crl. M.C. 531/2009, the allegation in the complaint is that the Company having acquired 95 % of Total Paid Capital and Total Care Limited, the Balance Sheet of the acquired Company was also required to be attached to the Balance Sheet of the company and that having not been done, there was contravention of Section 212(1) of Companies Act. Even if the office of Registrar of Companies were to scrutinize the Balance Sheet of the Company, it could not have known that Total Care Limited had become a subsidiary company of the Company.. This could have been ascertained only by scrutinizing the Balance Sheet and other documents pertaining to Total Care Limited. Unless the official scrutinizing the Balance Sheet of the Company also knows what is total paid up capital of Total Care Limited, he cannot find out how much per cent of the paid up capital of that company had been acquired by the Company, by purchasing 8,86,716 shares of Total Care Limited. Therefore, there was no way the complainant could have known commission of this offence, unless it is carried out detailed inspection of the record of the Company and also cross-checked the information given in its Balance Sheet with the information given in the Balance Sheet and other documents of Total Care Limited. Therefore, the offence alleged to have been committed by the petitioners, cannot be said to be a patent one, which could be detected merely by examination of the Balance Sheet.

23. The allegation in the complaint subject matter of Crl. M.C. 532/2009 is that the company had not made proper disclosure in terms of Schedule VI of Companies Act since it had not disclosed that it had not made any provision in its Balance Sheet for the contingent liability on account of the company having given collateral security pursuant to order of this Court attaching its bank account to the extent of Rs. 6.24 crores. Without a detailed examination of the account books, etc. of the company, the Registrar or his official could not have known that there was an order of this Court attaching its bank account and that the company had given collateral security pursuant to that order. Hence, it cannot be said that the offence committed in this case could have come to the knowledge of the Registrar merely from scrutiny of the Balance Sheet filed by the company.

12. No doubt IFCIL had informed the petitioner on 23rd December, 2002 however, complete knowledge till all the facts are revealed cannot be attributed to the petitioner. A perusal of the complaint and the application seeking condonation of delay reveals that efforts were made to trace the respondents and to inspect the records which were all frustrated and finally reverting back to the IFCIL, the petitioner collected the documents and filed the complaint. Thus in line with the decisions noted above the date of knowledge of offence to the petitioner can be attributed only when complete facts with incriminating documents were disclosed by IFCIL after appointment of the inquiry officer. Hence it cannot be held that there was a delay of one year and nine months in

filing of the complaint from the date of knowledge of the offence. Considering the fact that the date of knowledge of the offence to the petitioner which falls in the category of a "person aggrieved by the offence" could be attributed only on 25th August, 2004, when complete records were given by IFCIL and the complaint was filed on 30th September, 2004. Thus there was no delay in filing of the complaint. Hence there was no need for seeking condonation of delay in filing the complaint.

13. The impugned orders are thus set aside. The learned ACMM would now proceed with the complaint in accordance with law. Petition is disposed off.