
(1985) 08 DEL CK 0012

In the Delhi High Court

Case No : Criminal Miscellaneous (Main) Appeal No. 552 of 1985

Vinod Kumar Jam

APPELLANT

Vs

Registrar of Companies

RESPONDENT

Date of Decision : 29-08-1985

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 473, 482

Citation : (1985) 28 DLT 474 : (1985) 9 DRJ 232 : (1985) RLR 603

Hon'ble Judges : J.D. Jain, J

Bench : Single Bench

Advocate : R.S. Sareen, K.C. Aggarwal, Jagat Singh and P.P. Khurana, for the Appellant;

Judgement

J.D. Jain, J.

(1) This is a petition u/s 482, Code of Criminal Procedure (for short "the Code") for quashing the proceedings in a company case pending in the court of an Additional Chief Metropolitan Magistrate, Delhi, u/s 229(4) read with Sections 299(1) & 299(2) of the Companies Act, 1956 (hereinafter referred to as "the Act") initiated on the complaint of the respondent-Registrar of Companies, Delhi & Haryana.

(2) The facts leading to this petition succinctly are that the petitioner- Vinod Kumar Jain was Managing Director of M/s. Jain Shudh Vanaspati Ltd., New Delhi (hereinafter referred to as "the Company") at the relevant time. On 29th August 1980 the Board of Directors of the Company passed a resolution in which a draft of the lease agreement regarding lease of 50% share of the 7th Floor of a building called "ARCADIA" situated at Nariman Point, Bombay, between the petitioner and his wife Smt. Anju Jain as Lessees and the Company as lessee was approved. Pursuant to the said resolution of the Board the lease deed as approved was executed by Shri S.K. Jain, a director of the Company on behalf of the Company and the petitioner and his wife Smt Anju Jain on 15th September 1980 (annexure 1" being copy of the lease deed). On 19th September 1984 the

respondent instituted a complaint against the petitioner u/s 299(4) of the Act read with Sub-sections (1) & (2) thereof on the allegation that the inspection of the books of accounts and other records of the Company was made by Shri O. P. Chadha, Deputy Director (Inspection) u/s 209A of the Act sometime in December 1980. During the course of inspection of the books of accounts and minutes books of the Board it transpired that the petitioners had not disclosed his interest in the contract of lease regarding the aforesaid property entered into by him and his wife with the Company. The said fact came to the notice of the respondent-complainant only on 24th January 1981 when a copy of the inspection report dated 17th January 1981 was submitted by Shri O.P. Chadha to the Department, Finding that the petitioner being Managing Director of the Company was legally bound under the statutory provisions of Section 299(1) of the Act to disclose his interest in the aforesaid lease but he had not done so and had thus contravened the aforesaid statutory provision, necessary sanction/instruction from the Govt. of India was obtained to institute a complaint against the petitioner on 17th July 1984 and thereafter the said complaint was lodged.

(3) The learned Magistrate passed the following order summoning the petitioner on the very day the complaint was instituted by the respondent :

"I have perused the complaint and find prima facie ground to proceed against the accused u/s 473 Cr P.C. and u/s 299(4) of the Companies Act. Process be issued accordingly and the accused be summoned to appear on 27th March, 1985."

(4) The petitioner appeared in the trial Court in obedience to the process issued to him but he has challenged the legality and validity of the summoning order through this petition.

(5) The learned counsel for the petitioner has at the outset assailed the cognizance of the complaint by the learned Additional Chief Metropolitan Magistrate on the ground that the complaint was hopelessly barred by time on the date it was presented and the learned Magistrate could not take cognizance of the same without first condoning the delay as envisaged in Section 473 of the Code and that too after notice to the petitioner. Hence, the impugned order, according to him, is vocative of principles of natural justice. Moreover, it betrays total non-application of judicial mind with regard to the facts spelt out by the respondent-complainant in the application made by him u/s 473 of the Code for condensation of delay. As pointed out by him, the cryptic order" and find prima facie grounds to proceed against the accused u/s 473 Criminal Procedure Code", does not disclose whether the learned Additional Chief Metropolitan Magistrate condoned the delay and if so, on what ground.

(6) SUB-SECTION (1) of Section 468 of the Code lays down that except as otherwise provided elsewhere in the Code, no court shall take cognizance of an offence of the category specified in Sub-section (2) thereof after the expiry of the period of limitation prescribed in clauses (a), (b) & (c) of the Sub-section. Obviously the bar of limitation operates before the court takes cognizance of an

offence. Under clause (a). Sub-section (2) of Section 468, the period of limitation is six months if the offence is punishable with fine only as is admittedly the position in the instant case. Section 469 of the Code prescribes the terminus a quo for the commencement of period of limitation. It is the date of the offence or where the commission of the offence was not known to the person aggrieved by the offence, the first day on which such offence comes to the knowledge of such person whichever is earlier. In the instant case, the contention of the respondent-complainant is that he came to know of the commission of offence on 24th January 1981 when he perused the report of the Inspecting Officer Shri O.P. Chadha. Obviously, Therefore, the complaint was hopelessly barred by time on the date of its institution.

(7) Section 473 of the Code, however, provides that notwithstanding anything contained in the foregoing provisions the court may take cognizance of an offence after the expiry of period of limitation provided Therefore if it is satisfied on the facts and in the circumstances of the case that (i) the delay has been properly explained; or that (ii) it is necessary so to do in the interests of justice.

(8) It is thus manifest that if a complaint is prima facie barred by time when it is filed, it becomes necessary for the prosecuting agency to explain the delay and seek condensation of the same. Unless the delay is condoned the court cannot take cognizance of the complaint. In other words, the Magistrate has to apply his mind to the question of limitation at the pre-cognizance stage and satisfy himself that delay has been properly explained or that it is necessary to condone the delay in the interests of justice. The Magistrate cannot hasten to issue the process without first recording his satisfaction that the delay was satisfactorily explained to him or that he was of the view that the condensation of delay was in the interests of justice. It is highly doubtful that the court can condone the delay and thus extend limitation subsequent to the taking of cognizance of the offence. Of course, the condensation of delay may be implied from the act of the Magistrate in taking cognizance after the expiry of the period of limitation and proceeding with the case but the order must be clear and categorical in this respect. He has no power or authority to condone the delay provisionally or ex facie as has been seemingly done in the instant case.

(9) In *State of Punjab Vs. Sarwan Singh*, , the accused Sarwan Singh was convicted of an offence u/s 406, Indian Penal Code, by the trial Court. However, on appeal having been preferred by him, the High Court set aside his conviction and acquitted him mainly on the ground that the prosecution launched against him was clearly barred by limitation under sections 468 & 469 of the Code. The State went in appeal by special leave to the Supreme Court but the same was dismissed with the following observations which are very pertinent to notice:.

"The object of Criminal Procedure Code in putting a bar of limitation on prosecutions was clearly to prevent the parties from filing cases after a long time, as a result of which material evidence may disappear and also to prevent abuse of the process of the court by filing vexatious and belated prosecutions

long after the date of the offence. The object which the statute seeks to subserve is clearly in consonance with the concept of fairness of trial as enshrined in Article 21 of the Constitution. It is, Therefore, of the utmost importance that any prosecution, whether by the State or a private complainant must abide by the letter of law or take the risk of the prosecution failing on the ground of limitation."

(10) Obviously an accused person acquires a valuable right the moment his prosecution is barred by limitation. Hence, that right cannot be taken away except in accordance with the provisions of law. It is, Therefore, imperative for the court taking cognizance of the offence to apply its judicial mind as to whether the prosecution has satisfactorily explained the delay in launching prosecution at the pre-cognizance stage i.e. when the Magistrate applies his mind for the purpose of proceeding u/s 200 and the succeeding Sections in Chapter 15 of the Code. Since the discretion vesting in the Magistrate to condone the delay or not has to be judicially exercised, the principles of natural justice require that the accused must be afforded an opportunity before he is called upon to face the prosecution in a time barred matter. As observed by a Division Bench of this Court in *State (Delhi Administration) Vs. Anil Puri and Others*, :

"And in those cases where the court finds it necessary to take cognizance in the interests of justice it is but just and proper that the accused is heard before such a decision is arrived at. It is needless to add that wherever the court comes to the conclusion u/s 473 that the delay has been properly explained or that it is necessary to take cognizance in the interests of justice, the court must pass a speaking order. The order should indicate that the court taking cognizance has applied its mind to reach the conclusion. Order taking cognizance of an offence where the cognizance is barred by limitation without giving an opportunity to the accused and without passing any speaking order, must be struck down and it cannot be deemed that the trial court had exercised its powers u/s 473."

(11) A Single Judge of the Punjab & Haryana High Court has held *Ghansham Dass Vs. Sham Sundar Lal*, that :

"Magistrate has to apply his mind to the question of limitation at the pre-cognizance stage. On his failure to do so the proceedings become obviously without jurisdiction. Necessarily the sequential orders of summoning the accused as also framing the charge against him become beyond jurisdiction and deserve to be quashed for these reasons. The course adopted is unexceptionable."

(12) Likewise a Division Bench of Kerala High Court observed in *Provident Fund Inspector v. Mohammed*, 1980 K L T 698 that :

"Protection has been given to an accused person u/s 468(1) Cr. PC. against belated and time barred prosecutions and this certainly is a benefit given to an accused. It cannot Therefore be said that Section 468 does not confer a right on an accused person to plead that an offence or offences disclosed in a complaint filed against him should not have been taken cognizance of as the prosecution

was barred by limitation. This is not a matter purely between the magistrate and the prosecutor and the accused has a right to come in and question the legality of taking cognizance of the offence against him. At any stage in the course of enquiry or trial of the case it is open to the accused to raise the plea that the magistrate could not have taken cognizance of the offence in question in view of the bar u/s 469. Section 468 creates an absolute bar and taking cognizance of an offence without condoning the limitation goes to the root of the jurisdiction of the court. The court has no jurisdiction to take cognizance of an offence after the expiry of the period of limitation prescribed."

(13) In *State v. Diamond Prabhu*, 1980 (1) KAR L. J 23 a Division Bench of the High Court of Karnataka expressed the view that:

The question as to whether the period of limitation should be extended or not cannot be reserved for argument and cognizance of the offence taken, because without taking cognizance of the offence in accordance with the provisions of law, the Court will not have the necessary power to issue process against the accused and try the case."

(14) In *Anil Mohan Banerjee v Registrar of Companies, West Bengal & Others*. 1978 (1) Cal. L. J. 617 a learned Single Judge of Calcutta High Court expressed the view that :

"It was incumbent upon the learned Magistrate to condone the delay before taking cognizance of the offence. He was not competent to condone the delay provisionally and then to take cognizance of the offence."

(15) It is thus manifest that the weight of authority supports the view that the Magistrate must apply his judicial mind to the question of condoning the delay before taking cognizance of the offence and he cannot, after making cognizance, rectify the illegality by passing an order u/s 473 so as to operate retrospectively.

(16) The learned counsel for the respondent has, on the other hand, submitted that where a court takes cognizance of an offence without making a specific order u/s 473 of the Code, it is open to the accused at any stage in the course of inquiry or trial of the case to raise the plea that the Magistrate could not have taken cognizance of the offence in question in view of the bar contained in Section 469. In this context he has invited my attention to the following statement of law appearing in *Anil Puri's* case (supra):

"After all it may happen that a court might take cognizance of an offence without applying its mind to the question whether the limitation has run in favor of the accused, and when this happens the accused has a right to raise the plea of limitation to convince the court that limitation bars the cognizance. It is the duty of the Court at that stage to decide this question."

(17) Certainly the accused has a right to challenge his prosecution when cognizance of the offence has been taken by a Magistrate without prior notice to him and without deciding the question of condensation of delay u/s 473 of the

Code on the ground that it is barred by time. However, that does not relieve the Magistrate or the court taking cognizance of the offence from applying its judicial mind to this aspect of the matter when the complaint is apparently barred by limitation at the time of its institution. Surely he cannot drag the accused to face the music by passing a mindless order at the time of taking cognizance. It will certainly amount to avoidable harassment, expense and hardship to the accused. In the instant case, the respondent has challenged the order of the learned Magistrate taking cognizance at the threshold. Hence, there is no reason why the same be not quashed if it is found to be bad in law.

(18) As stated above, the contravention of Section 299(1) by the petitioner came to the knowledge of the respondent-complainant on 24th January 1981. However, the complaint was instituted on 19th September 1984. The period of limitation prescribed for launching prosecution for an offence punishable with fine only, as in the instant case, is six months. Thus, there was a clear delay of more than three years and the only Explanation furnished by the respondent for the same is that :

"The said inspection report was examined at the various levels in the Department regarding various contraventions of the provisions of the Companies Act, 1956. After complete examination & obtaining Explanation from the company and after issue of show cause notices to the Company and its directors vide No. ROC/Inspn/5139/7845-52 dated 9-6-1982 (copy enclosed as annexure-II), the Department further accorded sanction/instruction to file the present only on 17-7-1984."

(19) Evidently the Explanation furnished by the respondent is very vague and too general in nature, the only justification being proverbial red tape in the functioning of bureaucracy. It is rather strange that the respondent took more than a year in issuing a show-cause notice to the company and its directors. Still worse, it took more than two years to launch the prosecution. No cause much less sufficient cause for this inordinate delay has been spelt out by the respondent. As for the "interests of justice" as envisaged in Section 473, suffice it to say that there is no magic in these words and the court has to hold the scales even when deciding whether it is really in the interests of justice that prosecution should be permitted to proceed that the complaint after the expiry of such an abnormal delay. The court is, Therefore, bound to take into consideration not only the gravity of offence but also the public interest which condensation of delay is likely to sub-serve. As shall be presently seen, no case for advancement of interests of justice is even made out.

(20) Section 299 of the Act deals with contracts and arrangements of the company in which the directors only and not their relatives, partners, etc. are interested, it requires every director of company who is, in any way, whether directly or indirectly concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into by or on behalf of the Company to disclose the nature of his concern or interest at a

meeting of the board of Directors. Obviously the principle underlying this provision is that as fiduciaries, directors must not place themselves in a position in which there is a conflict between their duties to the Company and their personal interests. The law will not allow a fiduciary to place himself in a situation in which judgment is likely to be biased and then to escape liability by denying that in fact it was biased. The object of the Section is that the Board of Directors should be made aware of all contracts and arrangements in which any director has an interest whether direct or indirect so that the Board may be in a position to satisfy itself as to the fairness and reasonableness etc. of the contract from the point of view of the Company and then accord its consent therefore. Otherwise an unscrupulous director may evade the provisions of the Section by withholding information about contracts and arrangements brought about/entered into by him with the Company, without the Board knowing the fact of his having an interest in the same. Palmer's Company Law (23rd Edition) contains the following statement of law on the subject at page 858 :

"In other respects he is, like a trustee, disqualified from contracting with the company and for a good reason, the company is entitled to the collective wisdom of its directors, and if any director is interested in a contract, his interest may conflict with his duty, and the law always strives to prevent such a conflict from arising. The director may enter into a contract only if he makes full disclosure of all material facts to the members of the company, who then approve the contract."

(21) "NO man," said Lord Cairns L.C. in *Parker V. Mckenna*, (1874) 10 Ch. App 96 "can in this court, acting as an agent, be allowed to put himself in a position in which his interest and duty will be in conflict."

(22) As stated above, the Board of Directors passed a resolution on 29th August 1980 in which a draft of the lease agreement regarding the premises in question between the petitioner and his wife Smt. Anju Jain on the one hand and the Company on the other was approved. An extract of the aforesaid resolution as reproduced by the respondent in the complaint itself reads as under:

"Resolved that the draft of the rent agreement in respect of the flat in the "Arcadia" Building, Bombay to be entered between the Company and Shri Vinod Kumar Jain, Managing Director and Mrs. Anju Jain, wife of Shri Vinod Kumar Jain be and is hereby approved."

"Further resolved that Shri S.K. Jain, a Director of the Company be and is hereby authorised to sign for and on behalf of the Company."

(23) Admittedly it was pursuant to the aforesaid resolution that a lease-deed was duly executed on 15th September 1980 between the petitioner and his wife on the one hand and the Company on the other. This broad fact stares one in the face the moment one peruses the complaint. It clearly reflects that the Board of Directors of the Company was fully aware that the contract of lease was being entered with the petitioner and his wife as Lessers. This affords intrinsic evidence

of the fact that the petitioner would have apprised the Board that he and his wife would be Lessers and, Therefore this circumstance alone should have put the learned Magistrate on guard whether to take cognizance of the complaint or not in the face of this inherent weakness in the prosecution case. The resolution afforded a presumptive proof of the disclosure and, Therefore, something more than mere assertion on the part of the respondent-complainant that no disclosure had been made should have come on record by way of evidence or otherwise. The following observations of a Division Bench of Madras High Court in Pydah Venkatachalapathi Vs. Guntur Cotton, Jute and Paper Mills Co. Ltd. and Another, are very pertinent to note in this context ;

" GENERALLY then ,the principle is this-that where the interest is such that it is likely to influence the director against the company's interest) likely to produce a conflict between his duty to the company and his duty to or interest in the other party to the contract, he is bound to disclose it. Beyond this, however, it is clear that. if the whole body of directors was already aware of the facts, formal disclosure is not necessary."

(24) Their Lordships while coming to this conclusion adverted to Certain observations appearing in Imperial Mercantile Credit Association v. Coleman. (1871) 6 Ch A. 558 and Costa Rica Railway Co. Ltd. v. Forwood. (1901) I Ch. 746 I am in respectful agreement with this view. Needless to say that at the time of issuing process the court has to satisfy itself that a prima facie case is made out against the accused and it can certainly take into consideration inherent improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations. It is not the law that the Magistrate must accept mere ipse dixit of the complainant when circumstances appearing in the complaint itself point out towards inherent weakness in the prosecution case. It may be pertinent to notice in this context that there was no prescribed format or mode for disclosure of his interest by a director at the relevant time and it was only in September 1982 that Form No. 24 Aa was prescribed by Gsr No. 555E dated 2nd September 1982, for this purpose. So, the disclosure could be made by any method whatsoever.

(25) The learned counsel for the respondent has urged rather vehemently that the truth, veracity and the effect of evidence which the prosecutor proposes to adduce are not to be meticulously judged at the stage of issuing process u/s 204 of the Code. Certainly no exception can be taken to this proposition of law which is well settled but the court can not blink at facts which appear in the complaint itself and render the prosecution case highly doubtful Such a Course would certainly be prejudicial to the rule of law and may work hardship and result in avoidable harassment to the accused. It is more so when the complaint itself is instituted after the expiry of" more than three years of the offence coming to the notice of the complainant i.e. the person compete it to institute a complaint for such offence. In other words, this circumstance too should have weighed with the learned Magistrate while considering the question of condensation of delay

and proceeding u/s 473 of the Code. However, as observed earlier, the learned Magistrate, without applying his judicial mind hastened to take cognizance by using stereo-typed language, perhaps much influenced by the fact that the complaint was by a public servant of the status of Registrar of Companies.

(26) The High Court does not ordinarily interfere at an interlocutory stage of a criminal proceeding pending in a subordinate court. However, it may invoke the inherent powers possessed by it u/s 482 of the Code if the facts and circumstances of the case reveal that the impugned order is likely to work injustice and result in manifest miscarriage of justice. It may amount to abuse of process of court. As held in Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi and Others, , an order of the Magistrate issuing process against the accused can be quashed or set aside:

"Where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused and where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible."

(27) Reference be also made to Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, where it was held that :

"This provision (Section 482 Criminal Procedure Code .) confers a separate and independent power on the High Court alone to pass order ex debito Justitiae in cases where grave and substantial injustice has been done or where the process of the Code has been seriously abused."

(28) It bears repetition that there was hardly any justification for the Magistrate to proceed u/s 473 of the Code when the application for condensation of delay did not even remotely explain the inordinate delay of more than three years in filing the complaint. Moreover to talk of "interest of justice" in the presence of Board's resolution dated 29th August 1980 is nothing but a myth and a moonshine.

(29) To sum up, Therefore, this petition is allowed and the impugned order is quashed.