



1993 Legal Eagle(SC) 281

IN THE SUPREME COURT OF INDIA

Equivalent Citations : 1993 (1) Crimes(SC) 1132 : 1993 CrLJ(SC) 2888 : 1993 (2) JT 523 : 1993 (2) Scale 266 : 1993 (3) SCC 54 : 1993 (2) SCR 699 : 1993 (2) UJ(SC) 5

Before : A.S.Anand : N.P.Singh

**Radhey Shyam Khemka: Nand Kishore Tulsian
Versus
State of Bihar**

Case No. : 375 of 1985

Date of Decision : 26-Mar-1993

Advocates Appeared:

Rao C.V.Subba, Rao A.D.N., Mishra S.N., Mishra Manish, Kapur P.C., Jha S.N., Amareshwari K.

HEADNOTE :

Companies Act, 1956

Sections 63,69 and 73 -- Criminal Procedure Code, 1973; Section 482 -- Penal Code of India, 1860; Sections 409 and 405 read with Section 40 -- Offence prima facie falling under the Penal Code, the same cannot be thwarted by the High Court under Section 482 of Criminal Procedure Court on the ground that penal action was open under any other statute -- Where the cognizance of the offence was taken by the Magistrate under Section 409 I.P.C. against Managing Director and Director of a Public Limited Company, the same cannot be sought to be quashed under Section 482 Cr. P.C. on the ground that penal provisions were available under the Companies Act.

The criminal proceedings pending against the appellants under Section 409 I.P.C. challenged saying that it amounted to abuse of process of the court because the penal provisions were available under Company's Act and it was pointed out that in view of Section 69 of Companies Act all money received from the applicants are shares have to be deposited and kept in an account and in the event shares are not issued the money so received have to be repaid with interest. The reference was also made to Section 73 requiring any company intending to offer share or debentures to public to make an application before such issue to one or more recognised stock exchanges for permission for shares intended to be so offered and all the money received have to be kept in separate bank account and if the permission is not granted such money has to be repaid and if default is made the officer of the company will be liable to be punished with a fine extended to rupees five thousand. It is true that Companies Act contain such provisions but at the same time while taking cognizance of alleged offences which constitute an offence or other under Penal Code, court must be satisfied that prima facie offence under penal code has been disclosed. Quashing the proceedings under Penal Code only on the ground that it was open to the applicants for share to take recourse to the provisions of Companies Act cannot be accepted and it will for the trial court to examine the matter produced by the Prosecution and that exercise cannot be performed by the High Court or the Supreme Court and the proceedings cannot be quashed under Section 482 of Criminal Procedure Code.

Criminal Procedure Code, 1973

Section 482 -- Penal Code of India, 1860; Sections 409 and 405 -Company's Act, 1956; Sections 63, 69 and 73 -- If the offence prima facie falls under Penal Code launching of the prosecution under IPC cannot be thwarted by the High Court under Section 482 merely because penal action open under any other statute namely under Companies Act, 1956 in the instant case -- Where the Magistrate took cognizance of the offence under Section 409 IPC against the Managing Director and Directors of a Public Limited Company on the basis of charge-sheet submitted by C.B.I. the same cannot be quashed under Section 482 on the ground that penal provisions were available under Companies Act.

Though the Company's Act contains provisions regarding the issuance of prospectus, applications for share and allotment thereof and provides different cheques over the misuse of fund but where persons issue prospectus and collect money for their benefit and the benefit of such conflict but real intention is to do no business other than collecting the money for personal gain such persons cannot be said to be immune from the provisions of Penal Code. In the present case the quashing of prosecution pending against the appellants only on the ground that it was open to the applicants for shares to take recourse to the provision of Companies Act, cannot be accepted. The power

under Section 482 has been vested in the High Court to quash a proceeding which amounts to abuse, of process of the court but not to hold a parallel trial.

MENS REA

Mensrea -- Penal Code of India, 1860; Section 40 -- To constitute an offence under the Penal Code, usually mens rea is essential ingredient, however, under Social Welfare Legislation mere breach or contravention of provisions of such legislation would be sufficient irrespective of existence of mens rea -- There is a basic difference between the offences under the penal code and acts and omissions which have been made punishable under different Acts and Statutes which are in the nature of Social Welfare Legislation and for framing charges in respect of those acts and omission, in many cases, mens rea is not an essential ingredient.

It is true that Companies Act contains provisions regarding the issuance of prospectus, application for shares and allotment thereof and provides different cheques over the misuse of the fund collected from the public for issuance of shares of debentures but where persons issue prospectus and collect money from public assuring them that they intend to do business with the public money for their benefit and the benefit of such public but real intention is to do business other than collecting the money from the public for their personal gain, such persons will not be immune from the provisions of Penal Code. But at the same time while taking cognizance of alleged offences in connection with the registration, issuance of prospectus collection of moneys from the investors and misappropriation of fund collected from the shareholders which constitute one offence or other under the Penal Code, Court must be satisfied that prima facie an offence under the penal Code has been disclosed on the materials produced before the Court. It cannot be overlooked that there is basic difference between offences under Penal Code and the acts and omissions which have been made punishable under different acts and statutes which are in the nature of social Welfare Legislation for which mens rea need not be proved and is not an essential ingredient. In the instant case the prosecution has to prove that the appellants had dishonest intentions since the very beginning and ingredients of different offences under the Penal Code need not be proved only by direct evidence.

Penal Code of India, 1860

Section 40 -- Presence of mens rea for the offence under Penal Code of India, is a condition precedent, but in cases constituting offence under any Social Welfare Legislation mens rea need not be proved and conviction can be based on mere breach or contravention of its provisions.

For the purpose of Prosecution complainant has to make out a prima facie case against the individual concerned regarding their acts or missions constituting different ingredients of the offences under the Penal Code. There is a basic difference between the offences and under the Penal Code and the acts and omissions which have been made punishable under different acts and statutes which are in the nature of social welfare Legislation. For framing charges in respect of those acts and omissions, in many cases mens rea need not be proved. The ingredient of the different offences under the Penal Code need not be proved only by direct evidence and there can be shown from circumstances of the particular case that the intention of the promoters or directors who was dishonest since the very inception or that they developed such intention at some stage. Thus the Companies Act contains provisions regarding the procedure as well as penalties. The persons managing the affairs of such company cannot use the juristic entity and corporate personality of the Company as a shield to evade themselves from the prosecution for offences under the Penal Code.

STATUTES REFERRED:

1. Indian Penal Code, 1860, Section 409
2. Indian Penal Code, 1860, Section 40
3. Companies Act, 1956, Section 63
4. Companies Act, 1956, Section 69
5. Code of Criminal Procedure, 1973, Section 482
6. Indian Penal Code, 1860, Section 405

JUDGMENT/ORDER:

N. P. SINGH, J.

(1) THE appellants on the relevant date, were managing director and directors of a Public Limited Company registered as M/s Bihar Cable and Wire Industries Limited (hereinafter referred to as "the Company"). A case was instituted by the central Bureau of Investigation (hereinafter referred to as "the CBI") against the appellants and others on the basis of a complaint made by the then Deputy secretary, Ministry of Industrial Development and Company Affairs, government of India. It was alleged that after the registration of the company aforesaid as a Public Limited Company, the appellants as managing

director and directors issued prospectus inviting public subscriptions of 42,000.00 equity shares and 3,000.00 preference shares. It was given out by the appellants to the investors that application was being made to the Calcutta Stock Exchange for enlisting the shares of the Company for official quotation. Such application which was made on behalf of the Company was rejected by the stock exchange. In spite of the rejection the share money collected from different investors was held by the appellants and none of the shareholders was either informed or was repaid. It was also alleged that money lying in the bank, on account of the share applications, was transferred to another account of the Company. The circumstances were pointed out in the complaint made to the CBI as to how the acts of the appellants clearly indicated their dishonest intentions to convert the share application money for their own benefit, and as such they had committed the offence under Section 409 read with Section 405 of the Penal Code.

(2) AFTER investigation of the allegations made in the complaint aforesaid the CBI submitted a charge-sheet against the appellants along with some others for their trial for the offence under Section 409 of the Penal Code. When the Special Judicial Magistrate, CBI Cases, Patna, rejected the prayer of the appellants to discharge them, validity of that order was questioned by filing an application under Section 482 of the Code of Criminal Procedure. The High court rejected the said application.

(3) THE criminal proceeding pending against the appellants has been challenged saying that it amounted to an abuse of the process of court because instead of invoking the different provisions of the Companies Act which are meant to cover such situations and to protect the interest of shareholders, a prosecution has been launched against the appellants before a criminal court for offences under the Penal Code. It was pointed out that in view of Section 69 of the Companies Act all moneys received from the applications for shares have to be deposited and kept in an account and in event the shares are not issued the moneys so received have to be repaid with interest. Reference was also made to Section 73 of the Act which requires every company intending to offer shares or debentures to the public for subscriptions by the issue of a prospectus to make an application before such issue to one or more recognised stock exchanges, for permission for shares or debentures intended to be so offered to be dealt with in the stock exchange. All moneys received from applicants in pursuance to the prospectus, have to be kept in a separate bank account until the permission is granted and where permission is not granted, such money has to be repaid within time, in the manner specified and if default is made in complying with the same the company and every officer of the company who is in default is liable to be punished with a fine which may extend to Rs. 5,000.00. In other words, the provisions of the Companies Act take care of the investors and they put restriction on the misbehaviour of the promoters and directors of the Company and for any lapse on their part in such matters, they cannot be summoned to stand trial for offences under the Penal Code.

(4) IT is true that the Companies Act contains provisions regarding the issuance of prospectus, applications for shares and allotment thereof and provides different checks over the misuse of the fund collected from the public for issuance of shares or debentures. But can it be said that where persons issue prospectus and collect moneys from public assuring them that they intend to do business with the public money for their benefit and the benefit of such public, but the real intention is to do no business other than collecting the moneys from the public for their personal gain, still such persons are immune from the provisions of the Penal Code?

(5) ORIGINALLY the concept of a company implied association of persons for some common object having a juristic entity separate from those of its members. In due course the gap between the investors in such companies and those in charge of management was widened. A situation has reached today that in bulk of the companies in which many individuals have property rights as shareholders and to the capital of which they have directly or indirectly contributed, such individuals have no idea how their contributions are being utilised. It can be said that modern shareholder in many companies has simply become supplier of capital. The savings and earnings of individuals are being utilised by persons behind such corporate bodies, but there is no direct contact between them. The promoters of such companies are not even known to many investors in shares of such companies. It is a matter of common experience that in some cases later it transpires to the investors that the promoters had the sole object to form a bogus company and foist it off on the public to the latter's detriment and for their own wrongful gain. In this process the public becomes victim of the evil design of the promoters who enrich themselves by dishonest means without there being any real intention to do any business. From time to time amendments have been introduced in the Companies Act to safeguard the interest of the shareholders and to provide regulatory and penal provisions for misuse of the power by those who are in charge of the management of such companies. But, if the promoters or those in charge of managing affairs of the company are found to have committed offences like cheating, criminal breach of trust, criminal misappropriation or the like, then whether the only remedy to which the investor is entitled is to pursue under and in accordance with the provisions of the Companies Act? The persons managing the affairs of such company cannot use the juristic entity and corporate personality of the company as a shield to evade themselves from prosecution for offences under the Penal Code, if it is established that primary object of the incorporation and existence of the Company is to defraud public.

(6) BUT, at the same time, while taking cognizance of alleged offences in connection with the registration, issuance of prospectus, collection of moneys from the investors and the misappropriation of the fund collected from the shareholders which constitute one offence or other under the Penal Code, court must be satisfied that prima facie an offence under the Penal Code has been disclosed on the materials produced before the court. If the screening on this question is not done properly at the stage of initiation of the criminal proceeding, in many cases, some disgruntled shareholders may launch prosecutions against the promoters, directors and those in charge of the management of the company concerned and can paralyse the functioning of such company. It need not be impressed that for prosecution for offences under the Penal Code the complainant has to make out a prima facie case against the individuals concerned, regarding their acts and omissions which constitute the different ingredients of the offences under the Penal Code. It cannot be overlooked that there is a basic difference between the offences under the Penal Code and acts and omissions which have been made punishable under different Acts and statutes which are in nature of social welfare legislations. For framing charges in respect of those acts and omissions, in many cases, mens rea is not an essential ingredient; the concerned statute imposes a duty on those who are in charge of the management, to follow the statutory provisions and once there is a breach or contravention, such persons become liable to be punished. But for framing a charge for an offence under the Penal Code, the traditional rule of existence of mens rea is to be followed.

(7) IN the facts of the present case itself, the prosecution has to prove that the appellants as promoters or directors, had dishonest intention since the very beginning while collecting the moneys from the applicants for the shares and debentures or that having collected such moneys they dishonestly misappropriated the same. The ingredients of the different offences under the Penal Code need not be proved only by direct evidence: they can be shown from the circumstances of a particular case that the intention of the promoters or the directors was dishonest since very inception or that they developed such intention at some stage, for their wrongful gain and causing wrongful loss to the investors. All the circumstances and the materials to prove such a charge have to be collected during investigation and inquiry and ultimately have to be produced before the court at the stage of trial for a verdict as to whether the ingredients of offence in question have been established on behalf of the prosecution.

(8) THE complaint made by the Deputy secretary to the government of India to the CBI mentions different circumstances to show that the appellants did not intend to carry on any business. In spite of the rejection of the application by the Stock Exchange, Calcutta they retained the share moneys of the applicants with dishonest intention. Those allegations were investigated by the CBI and ultimately charge-sheet has been submitted. On basis of that charge-sheet cognizance has been taken. In such a situation the quashing of the prosecution pending against the appellants only on the ground that it was open to the applicants for shares to take recourse to the provisions of the Companies Act, cannot be accepted. It is a futile attempt on the part of the appellants, to close the Ch. before it has unfolded itself. It will be for the trial court to examine whether on the materials produced on behalf of the prosecution it is established that the appellants had issued the prospectus inviting applications in respect of shares of the Company aforesaid with a dishonest intention, or having received the moneys from the applicants they had dishonestly retained or misappropriated the same. That exercise cannot be performed either by the High court or by this court. If accepting the allegations made and charges levelled on their face value, the court had come to conclusion that no offence under the Penal Code was disclosed the matter would have been different. This court has repeatedly pointed out that the High court should not, while exercising power under Section 482 of the Code, usurp the jurisdiction of the trial court. The power under Section 482 of the Code has been vested in the High court to quash a prosecution which amounts to abuse of the process of the court. But that power cannot be exercised by the High court to hold a parallel trial, only on basis of the statements and documents collected during investigation or inquiry, for purpose of expressing an opinion whether the accused concerned is likely to be punished if the trial is allowed to proceed.

(9) THE appeals are accordingly dismissed. The trial court should proceed with the case in accordance with law. We make it clear that we have not expressed any opinion on the merit of charges levelled against the appellants.

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