

RADHEY SHYAM KHEMKA AND ANR. ETC. A

v.

STATE OF BIHAR AND ANR. ETC.

MARCH 26, 1993

[DR. A.S. ANAND AND N.P. SINGH, JJ.] B

Code of Criminal Procedure, 1973:

Section 482—Quashing of criminal proceedings against officers of company—High Court not to usurp the jurisdiction of Trial Court—Not to hold a parallel trial—Remedy available under the provisions of the Companies Act—No bar to initiate criminal proceedings. C

The appellant, a Public Limited Company issued prospectus inviting public subscriptions of equity shares and preference shares. The prospectus stated that application was being made to the Stock Exchange for enlisting the shares of the Company for official quotation. Though the application was rejected by the Stock Exchange, the share money collected from different investors was held by the appellants and the share holders were neither informed of the rejection by the Stock Exchange nor paid back the share money. Further, the money was transferred to another account of the Company. The Secretary, Industrial Development and Company Affairs lodged a complaint with the CBI against the Company. D E

CBI started investigations and submitted a charge-sheet against the appellant along with some others for trial for the offence under s.409 IPC. The Special Judicial Magistrate, CBI cases, rejected the prayers made before it discharge the appellants. The validity of the said order was challenged by the appellants by filing an application under S.482 Cr. P.C. and the High Court rejected the same. Hence these appeals. It was contended that the provisions of the Companies Act took care of the investors by putting restrictions on the misbehaviour of the promoters and the Directors of the Company for any lapse on their part in such matters and they could not be summoned to stand trial for offences under the Penal Code. F G

Dismissing the appeals, this Court, H

A HELD: 1.1. The modern share-holder 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. In some cases later it transpires to the investors that the promoters had the sole object to form a
 B 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. [703 D-G]

C 1.2. From time to time amendments have been introduced in the Companies Act to safeguard the interest of the share-holders and to provide regulatory and penal provisions for misuse of the power by those who are in charge of the management of such companies. The persons
 D 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 the primary object of the incorporation and existence of the company is to defraud public. [703 G-H; 704 A-B]

E 2.1. 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 share-holders which constitute one or the other offence 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. [704 C]

F 2.2. In the present case, 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. [704 G]

G 2.3. The prosecution pending against the appellants cannot be quashed only on the ground that it was open to the applicants for shares to take recourse to the provisions of the Companies Act. [705 D]

H 3. The power under section 482 Cr. P.C. 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 the basis of the statements and documents collected during investigation or enquiry, for the purpose of expressing an opinion whether the accused concerned is likely to be punished if the trial is allowed to proceed. [705 G-H] A

4. 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 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. [705 E-F] B C

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 375 & 376 of 1985.

From the Judgment and Order dated 17.5.1983 of the Patna High Court in Criminal Misc. Nos. 1931/83 and 9240 of 1982. D

S.N. Misra, Manish Misra and P.C. Kapur for the Appellants.

Mrs. K. Amareswari, C.V.S. Rao, A.D.N. Rao and S.N. Jha for the Respondents. E

The Judgment of the Court was delivered by

N.P. SINGH. J 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 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 equity shares and 3,000 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 H

A exchange. In spite of the rejection the share money collected from different investors was held by the appellants and none of the share-holders were either informed or were repaid. It was also alleged that money lying in the bank, on account of the share applications, were 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.

C After investigation of the allegations made in the complaint aforesaid the CBI submitted a chargesheet 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.

E 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 share-holders, 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 applicants 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 prospectus has 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, has 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. In other words, the provisions of the Companies Act

take care of the investors and they put restrictions on the misbehaviour of the promoters and the 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. A

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? B C

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 share-holders and to the capital of which they have directly or indirectly contributed, have no idea how their contributions are being utilised. It can be said that modern share-holder 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 share-holders 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 alike, then whether the only H

- A 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.

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 share-holders 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 share-holders may launch prosecutions against the promotors, 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 of 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.

- G In the facts of the present case itself, the prosecution has to prove that the appellants as promotors or directors, had dishonest intention since 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 enquiry 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.

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 chargesheet has been submitted. On basis of that chargesheet 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 chapter 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 enquiry, for purpose of expressing an opinion whether the accused concerned is likely to be punished if the trial is allowed to proceed.

A 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.

G.N.

Appeals dismissed.