

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CrI.M.C.1777/2005

% Date of reserve : 25.02.2009
 Date of decision : 18.03.2009.

SUNAIR HOTELS LTD. & ANR. Petitioners
Through: Mr.H.S. Phoolka, Sr. Adv. with Mr.
Vinod Kumar, Mr. Kanwar Faisal,
Mr. Mohit Mudgil, advs.

Versus

THE REGISTRAR OF COMPANIES & ANR. Respondents.
Through: Mr. Akash Pratap, adv. for R-1.
Ms. S. Kohli, APP for the State.

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

: MOOL CHAND GARG, J.

1. This is a petition filed under Section 482 of the Code of Criminal Procedure (Cr.P.C.) seeking quashing of the complaint filed by respondent No.1 in the Court of learned ACMM, Delhi under Section 374 of The Companies Act, 1956. The only short point involved in this petition is as to whether the complaint filed by the respondents was barred by limitation and as such was liable to be dismissed.
2. The petitioner has been called upon to appear before the

Court of ACMM to face the aforesaid complaint filed by the Registrar of Companies under Section 200 Cr.P.C. disclosing commission of an offence under Section 374 of the Companies Act, 1956 for 13.10.2004. It is submitted that the ACMM has taken cognizance of the alleged offence vide her order dated 21.07.2004 without application of mind and has passed the impugned order in a most mechanical and casual manner.

3. It has been submitted by the petitioners that M/s VLS Finance Ltd. a subsidiary of the petitioner had been harassing the petitioner for a long time and it is at their behest that the present complaint was filed after a long delay. Yet the ACMM has taken cognizance of the complaint though the cognizance thereof cannot be taken in view of the bar contained under Section 468 of Cr.P.C. as the period of limitation for the offence, as alleged against the petitioner, is only 6 months inasmuch as the offence punishable with fine only. However, in this case the complaint has been filed in 2004 whereas the period of limitation expired on February 2000 inasmuch as the inspection which is the basis of the filing of the complaint was carried out by the Registrar of Companies under Section 209-A in the affairs of the petitioner-company was conducted in 1999. Reference has also been made to a judgment of this Court reported in Vinod Kumar Jain Vs. Registrar of Companies, Delhi and Haryana (1987) 2 Comp LJ 188 (Del). It is, thus, submitted that since the cognizance could not have been taken by the ACMM, the question of proceeding the

matter any further against the petitioner by the Registrar of companies is an abuse of process of Court and, therefore, the petitioner is entitled to discharge forthwith after the dismissal of the complaint.

4. Before reverting to the submissions which have been made by the respondents we may take note of certain paragraphs of the complaint which are material for the purpose of deciding the petition, which are as under:

4. That during the course of inspection Dr. Navrang Saini in the Inspecting Officer noticed from the accounts and record for the financial year as at 31.3.93 that the company is wholly owned subsidiary viz. Sunair Ltd. Formed in Oct. 1993. An amount of Rs. 75,000 was spent on incorporation of subsidiary company out of which equity shares for Rs. 7000/- were issued by the subsidiary company to it making it the wholly owned subsidiary company since incorporation and the balance remained in the books of both the companies as share application money for which shares have now been issued. It has stated that as on 31.3.1993 it had paid up capital of Rs. 99.00 lac and reserves of Rs. 2.85 lacs. According to Notification No. 621(E) dated 24.9.93 (Amending Rule 11C) company can invest up to 30% of the subscribed equity share capital of the aggregate of paid up equity and preferential share capital of such other body corporate whichever is less. Thus it had made invest exceeding 30% subscribed capital of invest company without previous approval of Central Govt. required under Section 372(4) of the Act. As such all the accused have contravened the provisions of Section 372(4) of the Companies Act, 1956 punishable under section 374 of the companies Act 1956. Photocopy of the balance sheet as at 31.3.1993 is annexed as Annexure 3 to the complaint.

5. That no sooner the commission of the offence came to the knowledge of complainant, show cause notice dated 19.05.2004 (copy marked as Annexure-4) to the complaint) was thereafter issued to the company and the accused.

6. That complainant most respectfully submits that in terms of the present complaint, offence under Section 372 is punishable with fine only. In the absence of the instructions/sanction from the Department of Company Affairs Shastri Bhawan, New Delhi, the complainant could not have filed the present complaint. Department of Company Affairs, Shastri Bhawan, New Delhi accorded its sanction only on 13.4.2004 and in terms of Section 468 of Cr.P.C. 1973, the present complaint is not barred

by limitation. Photocopy of sanction letter is marked as Annexure 5 to the complaint.

5. At this stage, it would be also appropriate to take note of the provisions contained under Sections 372(4) & 374 of the Companies Act which reads as under:

372. Purchase by company of shares, etc., of other companies

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[(1) A company, whether by itself or together with its subsidiaries (hereafter in this section and section 373 referred to as the investing company), shall not be entitled to acquire, by way of subscription, purchase or otherwise (whether by itself, or by any individual or association of individuals in trust for it or for its benefit or on its account) the shares of any other body corporate except to the extent, and except in accordance with the restrictions and conditions, specified in this section.]

(2) [The Board of directors of the investing company shall be entitled to invest in any shares of any other body corporate up to such percentage of the subscribed equity share capital, or the aggregate of the paid-up equity and preference share capital, of such other body corporate, whichever is less, as may be prescribed:]

Provided that the aggregate of the investments so made by the Board in all other bodies corporate shall not exceed [such percentage of the aggregate of the subscribed capital and free reserves of the investing company, as may be prescribed:]

Provided further that the aggregate of the investments made in all other bodies corporate in the same group shall not exceed [such percentage of the aggregate of the subscribed capital and free reserves of the investing company, as may be prescribed].

(3) In computing at any time the percentages specified in sub-section (2) and the provisos thereto, the aggregate of the investments made by the investing company in other body or bodies corporate [whether before or after the commencement of the Companies (Amendment) Act, 1960] up to that time shall be taken into account.

[(3A) A company, which has defaulted in the repayment of any deposit referred to in section 58A or part thereof or interest due thereupon in accordance with the terms and conditions of such deposit, shall not make any investment under this section till the default is made good.]

(4) The investing company shall not make any investment in the shares of any other body corporate in

excess of the percentages specified in sub-section (2) and the proviso thereto, unless the investment is sanctioned by a resolution of the investing company in general meeting and [unless previous approved] by the Central Government:

Provided that the investing company may at any time invest up to any amount in shares offered to it under clause (a) of sub-section (1) of section 81 (hereafter in this section referred to as rights shares) irrespective of the aforesaid percentages:

Provided further that when at any time the investing company intends to make any investments in shares other than rights shares, then, in computing at that time any of the aforesaid percentages, all existing investments, if any, made in rights shares up to that time shall be included in the aggregate of the investments of the company.

(5) No investment shall be made by the Board of directors of an investing company in pursuance of sub-section (2), unless it is sanctioned by a resolution passed at a meeting of the Board with the consent of all the directors present at the meeting, except those not entitled to vote thereon, and unless further notice of the resolution to be moved at the meeting has been given to every director in the manner specified in section 286.

6. Section 374 of the Companies Act reads as under:

374 - Penalty for contravention of section 372 or 373:- If default is made in complying with the provisions of¹[section 372 [excluding sub-sections (6) and (7)] or section 373], every officer of the company who is in default shall be punishable with fine which may extend to²[fifty thousand rupees.

7. Similarly, it will also be appropriate to take note of Section 468 of Cr.P.C.

468. Bar to taking cognizance after lapse of the period of limitation.

(1) Except as otherwise provided elsewhere in this Code, no court, shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.

(2) The period of limitation shall be-

(a) Six months, if the offence is punishable with fine only;

(b) One year, if the offence is punishable with imprisonment for a term not exceeding one year;

(c) Three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

¹[(3) For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment.]

8. In view of the aforesaid it is apparent that the limitation to take cognizance of the offence alleged to have been committed by the petitioner expired long ago before the filing of the compliant which has been filed sometimes in 2004.

9. The only explanation given by the respondents to justify the delay is that the sanction for lodging the prosecution against the petitioner company was required to have obtained prior to the filing of this complaint which was received from the Department of Company Affairs, Shastri Bhawan, New Delhi. They have also relied upon the provisions of Section 470(3) of the Code of Criminal Procedure and submits that in the circumstances, the period taken by them in obtaining the prior sanction which they say has to be excluded from the period of limitation as provided under Section 468 of the Cr.P.C. Since the sanction was received only on 13.04.2004 and, therefore, filing of the complaint within 6 months thereafter is justified and brings the complaint within limitation.

10. Coming to the judgments which have been relied upon by the petitioner I find that in the case of Vinod Kumar Jain (supra) it

has been held:

(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 under Section [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 under Section [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 v. Sarwan Singh*, AIR 1981 SC1054, the accused Sarwan Singh was convicted of an offence under Section [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 under Section [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) v. Anil Puri and others* ILR 1979 Delhi

11. On the basis of the aforesaid judgment the petitioner submits that in the present case the complaint filed by respondent no. 1 being delayed is liable to be dismissed.

12. As observed earlier only justification given by the respondents for the delay in filing the complaint, about which there is no dispute, is that in this case, the complaint has been filed by them within a period of limitation after they received sanction of the department of Company Affairs, Government of India and, therefore, they are entitled to seek condonation of delay of the period which has been taken by the Government Department in granting prior permission. They have relied upon Section 470(3) of the Cr.P.C. which reads as under:

470. Exclusion of time in certain cases:-(1) In computing the period of limitation, the time during which any person has been prosecuting with due diligence another prosecution, whether in a Court of first instance or in a Court of appeal or revision, against the offender, shall be excluded.

Provided that no such exclusion shall be made unless the prosecution relates to the same facts and is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) Where the institution of the prosecution in respect of an offence has been stayed by an injunction or order, then, in computing the period of limitation, the period of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

(3) Where notice of prosecution for an offence has been given, or where , under any law for the time being in force, the previous consent or sanction of the Government or any other authority is required for the institution of any prosecution for an offence, then, in computing the period of limitation, the period of such notice or, as the case may be, the time required for obtaining such consent or sanction shall be excluded.

Explanation.—In computing the time required for obtaining the consent or sanction of the Government or any other authority, the date on which the application was made for obtaining the consent or sanction and the date of receipt of the order of the Government or other authority shall both be excluded.

13. It may be observed here that in the whole complaint which has been filed by the respondent no. 1 it has nowhere been stated that as to when the application for seeking sanction for the prosecution of the petitioner was lodged before the Department of Company Affairs, Shastri Bhawan, New Delhi though it has been stated that sanction was granted only on 13.04.2004. It is submitted in para 4 of the complaint, as quoted above, that the inspection of the records of the petitioner company was conducted on 31.03.1993. Thus, in the complaint there is no averment to justify the delay which has been caused in filing of the complaint. In the order of summoning also, there is no mention about the moving of any such application by the respondent no.1 which might go to show that when such an application was filed and the explanation if any for the delay caused in filing the complaint.

14. In these circumstances, it is apparent that the complaint filed by the second respondent was barred by limitation inasmuch as for the purpose of computing the time required for obtaining the sanction of the Government it was necessary for the complainant to have specified the date on which the application was made for obtaining the consent/sanction for computing the

period of limitation because as per the explanation only that period which could have been executed was the time required for obtaining the sanction of the Government or any other authority can only be excluded if an application is filed after a period of 6 months then the question of exclusion does not arise. As such, there is no merit in the contentions raised by the respondents.

15. Thus, neither the order passed by the ACMM in issuing the process in this case nor the complaint can be sustained. Accordingly, the order issuing process in the complaint filed by the respondent no.1 against the petitioner including the complaint is quashed. In view of the aforesaid the bail bond, if any, of the petitioner will stand discharged.

16. Copy of the order be sent to the Trial Judge for information.

MOOL CHAND GARG, J.

MARCH 18, 2009
ag/anb