

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **Crl.M.C. 2606/2008**

% Date of reserve: 05.05.2009
Date of decision: 19.05.2009

S.K. BHARTI & ORS. ...PETITIONERS
Through: Mr. Harsh Jaidka, adv.

Versus

STATE OF NCT OF DELHI & ORS. ...RESPONDENTS
Through: Mr. Ashok Bhalla, adv. fo R-2
Ms. Santosh Kohli, APP for state

**CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG**

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. The present petition has been filed under section 482 of the criminal procedure code for quashing of the complaint dated 12.12.2005 and the subsequent proceedings arising therefrom filed under sections 209/630 of the companies Act along with sections 406/420 and 120-B IPC. However the petitioners were summoned by the Ld. ACMM, Delhi vide its order dated 15.03.2008 only to face

prosecution under Section 406 of the Indian Penal Code read with Sections 630 and 109 of the Companies Act. .

2. It is the case of the petitioner that on 31st May 1983 M/s Srya Estates Pvt. Ltd, was registered under the companies Act. In the said company initially there were six directors but from November 1985 there were three Directors namely Sh.S.K.Bharti (Petr. No.1), Sh. K.R.Gupta and Sh.A.M.Malhotra father of the respondent no.2/ Complainant. The first petitioner had taken charge of the company in July 1990 and remained in charge of the company till 27.11.2002. After him Sh. R.K. Malhotra the 2nd respondent/complainant took over the charge of the company. It is alleged that after noticing financial irregularities in the functioning of the company he filed the aforesaid complaint against the petitioners and other accused persons as a result of which petitioners were summoned. According to the petitioners the complaint was barred by limitation and therefore the Complaint as well as the summoning orders are liable to be quashed. Hence this petition.

3. However, according to the Complainant the petitioner/accused no.1 in collusion and in connivance with other accused persons handed over the premises owned by the company on license basis after executing a lease deed much later to the handing over of the premises that too at much lesser license fees. He also failed to deposit the said license fees in the account of the company and misappropriated the funds of the company. He also failed to surrender the Account Books of the Company which were lying in the registered office of the Company which is in possession of the petitioner No.1 after having taken it from

one Tara Singh despite request even till date. It is thus submitted that the petitioner No.1 is guilty of misappropriation qua the property of the Company of which he was admittedly the Director and Responsible for carrying out the affairs of the Company. It is submitted that there is no error apparent on the record of the case and thus the petition is liable to be dismissed. It is also denied that the Complaint is not within limitation.

4. The short question for determination in the present case is as to, ***“whether the complaint filed by the second respondent is barred by period of limitation as prescribed under Section 468 Cr.P.C.”***

5. Petitioners have supported their petition on the following grounds:

- i. That the petitioner No.1 was Director and in-charge of the affairs of the Company M/s Surya Estates Pvt. Limited from July 1990 and continued to remain a Director till November 2002 and resigned thereafter. Since then the management was taken over by Mr. R.K.Malhotra the complainant. It is submitted by the petitioner, that once he resigned as a Director of company, he is no more in-charge/ person responsible for the affairs of the company, the question of his being responsible for the company affairs does not arise and as such no offence has been committed by him. Regarding the offence under section 406 IPC as alleged against him it is submitted that as he was not entrusted with any property of the company after his disassociation

with the company the question of committing criminal breach of trust or misappropriating the funds of the company etc does not arise because whatever money was received from the purchaser of the various premises stands already deposited in the company and stands credited in the accounts of the company. Thus, there is no question of any conspiracy as alleged which may attract provisions of Section 120-B IPC.

- ii. It is further submitted that this petition is hopelessly barred by limitation because as per the complaint, offences were committed in 1994 whereas the complaint was filed in 2005 i.e. 11 years after the commission of the alleged offence and in any case has been filed beyond the prescribed period of limitation under 468 Cr.P.C. which provides limitation of only three years.

6. On the other hand learned counsel appearing for the respondent no.2/complainant opposed the petition by stating that despite taking over the management by Shri R.K. Malhotra the registered office of the company continues to be in possession of the first petitioner where the account books of the company were also maintained. The petitioner has not returned the account books despite repeated requests and, therefore, he is guilty of misappropriation of the account books. It is stated that the said offence is a continuing offence for which the limitation also continues. It is submitted that there is no dispute to the extent that the registered office of the company which is now in possession of the petitioner no.1 admittedly taken by him from Shri

Tara Singh. As such it is submitted that the complaint filed by the petitioner is within limitation. It has been further submitted that it was only in the year 2004 when a company petition was filed by the first petitioner which has been disposed by the Company Law Board on 21.12.2006, the material irregularities in the affairs of the company committed by the first petitioner came to the notice of the complainant company. It is submitted that in the facts and circumstances of this case the issue of limitation can also be looked into by the Magistrate in view of the powers conferred upon him under Section 473 of the Cr.P.C. Respondent No.2 has relied upon the following judgments:

- i. Bharat Damoder Kale & Anr. Vs. State of A.P. (2003) 8 SCC 55 (para 9-11)
- ii. Harnam Singh Vs. Everest Constn Co & Ors. JT (2004) (8) SC 353 (para 3-6)
- iii. State of H.P. Vs. Tara Dutt & Ors. (AIR 2000 SC 297) Para 5,7
- iv. Gurbachan Singh Gill Vs. J.S. Bagga (2005) 13 SCC 381 (para 3&4)

7. In the case of Bharat Damodar Kale & Anr. Vs. State of AP (Supra), it has been held that limitation period prescribed under Section 468 is only for the filing of the complaint or initiation of the prosecution and not for taking cognizance in view of maxims-“*actus curiae neminem gravabit*”

8. In the case of Harnam Singh Vs. Everest Construction Co. & Ors. (Supra) it was held that since the offence under Section 420 was punishable with imprisonment for a term exceeding three years, the complaint as filed was within limitation and, therefore, it could not have been thrown out at this threshold on the ground of limitation.

9. In the case of State of H.P. Vs. Tara Dutt & Anr. (Supra), it has been stated that when the accused was charged for the offences under Section 468 read with Section 120 B of the IPC for which the imposable punishment is seven years and Section 5(2) of the Prevention of Corruption Act, 1947, punishable with imprisonment for a term which may extend to seven years, the question of the challan being barred by limitation does not arise.

10. In the case of Gurubachan Singh Gill Vs. J.S. Bagga (Supra) it was held that the question of limitation was not a pure question of law but a mixed question of law and facts and for deciding the said question certain disputed questions of facts are to be adjudicated upon after giving opportunity to parties to adduce evidence said procedure having not been adopted, the trial Court committed error in dismissing the complaint on the ground that the same was barred by limitation and the High Court was not justified in upholding the said order. Matter remitted back to the trial Court with observation that the question of limitation, if raised, by the accused before the trial Court shall be decided in the main judgment upon conclusion of trial.

11. To appreciate the controversy involved in this matter it would be appropriate to take note of Section 468 and 473 of the Cr.P.C. which reads as under:

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.]

12. Section 473 of Cr.P.C. reads as under:

473. Extension of period of limitation in certain cases.

Notwithstanding anything contained in the foregoing provisions of this Chapter, any court may take cognizance of an offence after the expiry of the period of limitations, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice.

13. Admittedly in the present case no application for condonation of delay in filing of the complaint has been placed on record. It is also not disputed that the petitioner No.1 is no longer a Director and in-charge of the affairs of the company at least w.e.f. 27.11.2002. The complaint in this case has been filed on 12.12.2005 and, therefore, is beyond a period of 3 years even from the date when the petitioner had resigned as a Director.

14. At this stage, it will also be appropriate to take note of the averments made in some of the paragraphs of the complaint which are reproduced hereunder:

2. That the accused no.1 is Director of the Complainant Company and was Incharge of its day-to-day affairs upto 27.11.2002 whereupon Shri R.K. Malhotra was appointed as Managing Director in terms of Board Resolution dated 27.11.2002.

3. That after change of Management, various financial and material irregularities in the functioning of the Complainant Company were revealed. It was also inter-alia revealed that –

i) the accused no.1, the then director of the Complainant company had allotted the premises no. 305, at 3rd Floor in Surya Tower at Plot No. 30-31, D.D.A. Community Centre, Paschim Vihar, New Delhi-110063 to accused no.2 on 15.06.1994 by executing Licence Agreement and by issuing possession letter with retrospective effect from 02.11.1991 and No Dues Certificate without taking requisite payment/fee from him. The said premises was transferred by the accused no.2 to one Shri G.S. Verma who made the payment, however, the same was not deposited in the Company and was misappropriated by the accused was misappropriated by the accused no.1 & 2. The licence Fee in respect of the said premises having super area of 483.2 Sq. ft. amounting to Rs. 2,17,440/- was liable to be paid. The repeated requests of the Complainant company have failed to yield any result and despite giving so many opportunities. Accused No. 2 neither provided photocopy of "Receipts" nor responded the letters dated 26.08.2005 and 28.09.2005.

ii) The premises marked as G-6 in Surya Tower at Plot No. 31-31, DDA Community Centre, Paschim Vihar, New Delhi belongs to the Complainant Company. However, the accused No.1 allotted the said premises to his relatives Ms. Sandhya Batra and Shri Lalit Batra (sister-in-law and brother-in-law of accused no.1) by executing Licence Agreement dated 15.06.1994 for Rs. 65,898/- whereas only Rs. 10,000/- was deposited and rest of the amount was misappropriated by the accused no.1. As such, the Complainant Company on 26.02.2003 had cancelled the allotment of said premises. However, in order to cover his misdeeds, the accused no.1 showed said premises as the Registered Office of Company w.e.f. 01.04.1998, but all the Electricity Bills, in respect of said premises prior to 01.04.1998 were paid from the account of Complainant Company, thereby and thus the accused no.1 acted in connivance with accused no.3 & 4 and defrauded with the complainant company.

iii) The accused no.1 allotted premises no. 301, in Surya Tower at Plot No. 30-31, DDA Community Centre, Paschim Vihar, New Delhi to Shri Tara Singh, accused no.5 by executing Licence Agreement dated 22.06.1994 and issued possession letter with retrospective effect from 02.11.1991 in his favour without taking any Licence Fee. Later on, the accused no.1 by way of blank endorsement occupied the said premises. The complainant company vide letter dated 26.08.2005 asked the accused no.5 to give details of payment made by him to the Complainant Company in respect of space having the super area of 483.2 Sq.ft. for which the Licence fee amounting to Rs. 2,17,440/- was payable @ Rs. 450/- per sq.ft. along with interest @ 24% w.e.f. 22.06.1994. The accused no.5 without providing the receipts of the alleged payments, stated that he had sold the said premises to the accused no.1 for a consideration of Rs.1,20,000/- The premises was allotted by accused no.1 to accused no.5 on licence basis which could not have been sold by him to accused no.1. The accused no.1 in connivance with accused no.5 acted illegally to cause loss to the complainant company and misappropriated Licence Fee amounting to Rs.

2,17,440/-.

iv) The accused no.1 allotted Premises no. 302 in Surya Tower at Plot No. 30-31, DDA Community Centre, Paschim Vihar, New Delhi to Smt. Chanan Kaur, accused No. 6, by executing Licence Agreement date 22.06.1994 and issued possession letters with retrospective effect from 2.11.1991 in his favour without taking any Licence Fee. Later on, the accused no.1 by way of blank endorsement occupied the said premises. The complainant company vide letter dated 26.08.05 asked the accused no.6 to give details of payment made by her to the company in respect of space having the super area of 483.2 sq. ft. for which the Licence Fee amounting to Rs. 2,17,440/- was payable @ Rs. 450/- per sq. ft. along with interest @ 24% w.e.f. 22.06.1994. The accused no.6 without providing the receipts of alleged payments, stated that she has sold the said premises to the accused no.1 for a consideration of Rs. 1,20,000/-. The premises was allotted by accused no.1 to accused no.6 on licence basis which could not have been sold by her to accused no.1. The accused no.1 in connivance with accused no.6 acted illegally to cause loss to the complainant company and misappropriated the Licence Fee amounting to Rs. 2,17,440/-

4. The accused no.1, in order to conceal and suppress his illegal actions, has withheld the records and books of accounts of the complainant company and has not handed over the same despite repeated request of the complainant company.

5. That the accused no.1 had committed the offences in connivance with accused no.2 to 5 with the intentions to cheat the complainant company for which they are punishable in accordance with law.

6. That the accused have thus committed the offences under Section 406/420/120-B of IPC and Sections 209/629A/630 of the Companies Act 1956 within the jurisdiction of this Hon'ble Court, as such, this Hon'ble Court has jurisdiction of this Hon'ble Court, as such, this Hon'ble Court has jurisdiction to try the present complaint. It is most respectfully and humbly prayed that this Hon'ble Court may be graciously pleased to summon, try and punish the accused in accordance with law.

15. Moreover it is interesting to note that in the entire complaint there is not even an iota of averment that when the petitioner no.1 was asked to surrender or hand-over the books of the account of the company. Moreover, the averments made in para 3 of the complaint goes to show that all misdeeds for which the petitioner is sought to be prosecuted were allegedly committed somewhere between 02.11.1991 to 22.06.1994.

16. The only reference which is available in para 3 about the communication issued by the complainant is regarding a letter dated 26.08.2005 sent to accused no.5 who was asked to give details of payments made by him to the complainant company in respect of the space.

17. Perusal of the order dated 15.03.2008 whereby the summons were issued in this complaint goes to show that there is no observation as to when the petitioners were asked to produce the account books even though there is a reference in this regard in the summoning order.

18. Even though it has been stated by PW1 in his deposition, that the accused no.1 in order to conceal and suppress the illegal actions withheld the records and books of accounts of the complainant company and has not handed over those documents despite repeated requests of the complainant company vide letters dated 07.02.2003, 08.02.2003, 01.03.2003, 14.03.2003, 16.05.2003, 21.07.2003, 25.08.2003, 11.10.2003, 17.05.2004, 08.09.2005 and 06.10.2005 & that the accused no.1 vide letter dated 15.09.2005 and 24.10.2005 falsely denied having any records with him, and as such he has not handed over the records and books of accounts despite repeated requests by the complainant company. Firstly, the aforesaid averments are not there in the complaint and, therefore, are beyond pleadings. Secondly, if letters were written to the petitioner ever since 07.02.2003 for production of the records there is no reason as to why the complaint was not filed within 3 years of the expiry of the time which was granted to the petitioner to produce the records as non-

production of the records completes the offence.

19. It is also apparent from the order of the Company Law Board is available on file which shows that this is a fight between two different groups and one of the group is represented by Shri R.K. Malhotra and Shri K.R. Gupta and the dispute is about taking over the company which is in the nature of the partnership.

20. In these circumstances, it is apparent that the present complaint which has been filed after about 11 years of the alleged misappropriation or non-accounting of the affairs of the company or misappropriation of the funds of the company is mala-fide and is clearly barred by limitation. It is a matter of record that in the complaint as stated above there are no averments as to when the first petitioner was asked to hand-over the account books of the company or to give any statement of affairs of the company soon after his resignation as a Director of the company. Moreover, when the Magistrate while framing the charges had not framed the charge under Section 420 IPC.

21. With these observations the petition is partly allowed and the order dated 15.03.2008 passed by the learned ACMM is set aside. The case is remanded back to the trial Court who shall decide the issue of limitation taking into consideration the facts of this case and the provision contained in Section 473 of the Cr.P.C. Nothing stated herein would otherwise affect the merits of the case.

22. Parties shall appear before the trial Court on 25.05.2009.

23. Copy of the order be sent to the Trial Court concerned.

MOOL CHAND GARG, J.

MAY 19, 2009

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