

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

+ CRL.M.C. 403/2011 & Crl.M.A. 1592/2011 (stay)

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Reserved on: 26th March, 2012

Decided on: 17th April, 2012

SHOUKAT RAI MALHOTRA & ANR.

..... Petitioner

Through Mr. Arvind Nigam, Sr. Adv. with Mr.
Viraj Datar, Mr. Chetan Lokur, Mr.
Ankur S. Kushwaha, Advs.

versus

DELLATORA ENTERPRISES LTD. & ANR.

..... Respondent

Through Mr. Sudhir Nandrajog, Sr. Adv. with
Mr. Nandan K. Jha, Mr. Sumit Arora,
Advs. for R-1.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present petition the Petitioners seek quashing of the summoning order dated 27th July, 2010 passed by the Learned Metropolitan Magistrate against the Petitioners in criminal complaint No. 1594/2001.

2. Learned counsel for the Petitioners contends that taking the contents of the complaint as also the pre-summoning evidence on their face value, the commission of any offence by the Petitioners punishable under Section 406/420 IPC read with Section 120-B IPC is not disclosed. The entire case of the Respondent is that on certain representations made by accused No.1 Sanjay Malhotra between May to September, 2006 the complainant/Respondent invested the money in the shares. There is no

allegation that the Petitioners misrepresented or entered into any correspondence. No evidence in this regard has been produced by the complainant/Respondent. The only allegation set out against the Petitioners in the complaint is that the Petitioners were the first Directors of the accused No.6 i.e. SRM Exploration Pvt. Ltd. (in short SRMEPL) being the initial subscribers to the Articles/Memorandum of Association. The Petitioners in any case had resigned as Directors of SRMEPL with effect from 15th February, 2007 on which date the Respondent had not even made the complete investment of funds. The allegations at best relate to breach of contract or violation of RBI Guidelines. Further no vicarious liability can be fastened upon the Petitioners merely because they were the first Directors of the accused No.6 company SRMEPL. Reference is made to *S.K. Alagh Vs. State of Uttar Pradesh & Ors.* AIR 2008 SC 1731 and *Maharashtra State Electricity Distribution Company Ltd. and Anr. Vs. Dattar Switchgear Ltd. and Ors* JT 2010 (11) SC 252. The complainant has also filed a civil suit and preferred a company petition. The allegations as set out by the complainant in the company petition and the civil suit are contrary to the allegations in the complaint. In the company petition the complainant has stated that it was enticed to invest in equity shares of SRMEPL by Sanjay Malhotra and the reference to discussions in this regard is only to Sanjay Malhotra and Vishal Rastogi and not to the Petitioners. In the civil suit filed being CS (OS) No. 957/2010 the Petitioners have not been made defendants and the suit for recovery of money for USD 16,59,762/- is sought against SRMEPL, Sanjay Malhotra, Gagan Rastogi as also 5 other companies. Relying upon *B. Suresh Yadav Vs. Sharifa Bee & Anr.* (2007) 13 SCC 107 it is contended that a contrary or inconsistent stand taken by a party in a civil

suit assumes significance and can be taken into consideration while exercising power under Section 482 Cr.P.C. for quashing of the criminal proceedings. In order to extract money Sanjay Malhotra, the son of the Petitioners was coerced. They sent an e-mail dated 22nd May, 2009 with a threat of registering a criminal case against the Petitioners as well, being the parents of Sanjay Malhotra. This Court in *Y.S. Manchanda Vs. Nand Singh & Ors.* 175 (2010) DLT 393 held that a threat of false prosecution amounts to coercion. In the absence of any overt act, merely being the shareholders and initial Directors of SRMEPL, the Petitioners cannot be fastened with the criminal liability. Further the ingredients of offence under Section 420 IPC are not made out since there was no dishonest or wrongful intention at the inception as the Respondent has admitted in his complaint as also in its pre-summoning evidence that the allotment of shares has been made by SRMEPL which was the very purpose of investment.

3. Learned counsel for the Respondent on the other hand contends that on the representation of the Petitioners and their son Sanjay Malhotra money was sent to the Petitioner's company in two installments. In September, 2006 USD 5,50,000/- were invested and on 10th May, 2007 USD 4,00,000/- were invested. The Petitioners retired as Directors only on 15th February, 2007 when part amount had been received by the company of the Petitioners. Till date, Sanjay Malhotra is not a Director of the company SRMEPL and the Petitioners had deliberately retired on 15th February, 2007 after having received part amount. As a matter of fact from the complaint and the documents enclosed, it is evident that the Petitioners' company sought for a subscription. The Petitioners being the Directors no subscription letters

could have been issued without the authority of the Petitioners. In the complaint it is clearly stated that in the course of several meetings, accused No. 1 to 3 i.e. the Petitioners and their son handed over the brochures including the subscription letters carrying a date of 22nd September, 2006 requiring the complainant to fax the same along with remittance to accused No.6 SRMEPL. The contention of the Petitioners that the money was utilized only for purchase of shares for the Respondent and thus no cheating or criminal breach of trust has been committed is incorrect. Since the money was for the share application, it cannot be used for any other purpose and only on allotment of shares, the money becomes the capital of the company. As per the terms of the agreement if shares were not allotted within 180 days, money had to be returned. It is the admission of the Petitioners that shares were not allotted within 180 days. In the absence of allotment of shares within the stipulated time, the complainant was justified in issuing a notice which the Petitioners are now terming as coercion. Notice for proposed action cannot be termed as coercion for false implication. Due to expected legal action the Petitioners gave option for settlement, however nothing was honoured. The allotment of shares was done after two years subsequent to the complainant intimating not to make such allotment. Further though the initial agreement was that the complainant will get shares at a premium of Rs. 10 per share, however the same was not honoured. Though it was agreed that the complainant/Respondent would hold 24.6 % share holding so as to have some control over the company, however the premium share granted were at 1%. The Petitioners can derive no mileage out of the different pleadings in the civil suit, company petition and criminal complaint. The gamut of all the three petitions is different and thus

averments have to be according to the scope of the said petition. Admittedly the Petitioners were Directors till 15th February, 2007 when USD 5,50,000/- had come to the company of the Petitioners. It was incumbent upon the Petitioners to have knowledge from where the money was coming. The facade of innocence put up by the Petitioners deserves to be rejected. Relying upon *Radhey Shyam Khemka & Anr. Vs. State of Bihar (1993) 3 SCC 54* it is contended that it is a fit case where this Court will lift the corporate veil which would thus show that the Petitioners deliberately retired from the company on 15th February, 2007 after having received the amounts. At the stage of issuance of summons detailed reasons are not required to be recorded by the Learned Metropolitan Magistrate and only a prima facie view of the matter has to be taken. In view of the fact that the allegations make out a prima facie case for offences punishable under Sections 406/420 read with 120B IPC, the Petitioners are liable to face trial and thus the present petition be dismissed.

4. I have heard learned counsel for the parties. Briefly the facts alleged in the complaint are that the Respondent is a company limited by shares and incorporated on 30th March, 2006 under the British Virgin Island Companies Act, 2004. As per Clause 5.2 of its Memorandum of Association there is no limitation on the business that the complainant company may carry on. The accused No.6 SRMEPL is an unlisted Pvt. Ltd. company registered at Delhi engaged in, inter-alia, oil exploration business and has an authorized share capital of 50 crores equity shares with a paid up share capital of 3 crores. It is alleged that during the period May to September, 2006 accused No.1 i.e. the son of the Petitioners met the complainant's representative claiming

himself to be representative of accused No.6 i.e. SRMEPL where his parents i.e. the Petitioners herein were the only shareholders and only two Directors. The accused No.1 presented an Article of Association of SRMEPL and further details as regards the lucrative oil projects being undertaken by the SRMEPL. It is further alleged that in the course of several meetings thereafter the accused No.1 to 3 i.e. the Petitioners and their son handed over the brochure including the subscription letter carrying a date of 22nd September, 2006 requiring the complainant to fax the same along with remittance to SRMEPL. It is alleged that in response to the complainant's legal notice dated 25th August, 2009 sent to accused No.6 SRMEPL the accused No.1 denied being the Director or authorized to act on behalf of the SRMEPL. It is thus relied that it is logical to thus construe the dubious role of the Petitioners who were the Directors of SRMEPL. The Petitioners cannot be oblivious to the receipt of USD 9,50,000 which is a substantial amount having been received in the company SRMEPL. The accused No.1 and the Petitioners also sent a performa letter dated 11th September, 2006 pre-signed by the authorized signatory of SRMEPL, inviting the attention to various discussions undertaken on the oil projects including a copy of the subscription letter to enable the complainant to make necessary confirmation about the subscription in the proposed issue of securities by the company. Based on the various discussions held between the Respondent, the accused No.1 and the Petitioners and on acknowledgement of the subscription letter dated 11th September, 2006 the complainant held a Board meeting on 13th September, 2006 and referring to the said subscription letter proceeded to make an investment of a sum aggregating to USD 5,50,000/- through inter-bank online Swift transfers into the account of SRMEPL. The Respondent

vide its Board Resolution of 27th April, 2007 decided to proceed with making another tranche of USD 4,00,000/- thus totaling the amount invested to USD 9,50,000/-. It is alleged that the accused persons more particularly accused No.1 having no intention to allot equity shares of SRMEPL falsely promised in the subscription letter of 11th September, 2006. Thus the accused including the Petitioners deployed the precious foreign currency and the assets of the complainant into their nefarious self-gains, violated the RBI Regulations and falsely manipulated the records to suit the deceitful intention of the Petitioners and their son accused No.1. The accused have till date not returned the aggregate sum of USD 9,50,000/- nor issued the shares within 180 days. The Respondent vide its e-mail of 19th June, 2009 agreed that in the event of failure of SRMEPL to allot the shares amounting to USD 1,33,00,000/- to the complainant by 26th June, 2009 the complainant was agreeable to a compromise that instead of receiving a promissory note the complainant was willing to accept USD 1,33,00,000/- towards refund of share application money along with interest in lieu of share application money. However, the Petitioners and accused No.1 postponed that issue and gave empty verbal assurances.

5. In the present case it is thus to be seen whether any role is attributed to the Petitioners or is it a case of fastening of vicarious liability or that the Petitioners having retired from the company on 15th February, 2007 have no role to play and thus the summoning order is liable to be set aside qua them. It may be noted that in the complaint and complainant's evidence there is specific averment of representations by the Petitioners and accused No.1. Thus no vicarious liability is being fastened on the Petitioner and there are

direct allegations against them. No subscription could have been sought without the consent of the Petitioners who were the sole Directors till 15th February, 2007. At the stage of summoning it is not required that the complaint or the evidence should disclose each and every date, time and place where the meetings took place and name of each person who attended the meetings. As held by the Hon'ble Supreme Court in *Radhey Shyam Khemka* (supra) where a person issues prospectus and collects money from the public assuring that it intends to do business with the public money for its benefit and the benefit of such public, but the real intention is to do no business other than collecting the money from the public for their personal gains, cannot be said to be immune from the provisions of the Penal Code.

6. The Petitioners have been summoned for offences punishable under Sections 406/420 IPC read with Section 120B IPC. In a case of criminal conspiracy each and every participant need not necessarily commit every overt act. Court has to infer from the circumstances whether there is meeting of minds or not. In the present case the first tranche of subscription which is a substantial amount of USD 5,50,000/- was received in the company when the Petitioners were the only Directors. The Petitioners cannot claim ignorance thereof and wash away their liability on account of the fact that they were no more Directors after 15th February, 2007. At this stage only a prima facie view of the matter is to be taken. From the facts stated above, it is evident that prima facie there is evidence on record that the Petitioners were conspirators with the accused No.1 their son and thus there is no illegality in the order summoning the Petitioners for the offences as stated above.

7. Further the contention of the Petitioners that in view of the judgment of the Hon'ble Supreme Court in *B. Suresh yadav* (supra) the Court will look at the different pleadings also deserves to be rejected being misconceived. No doubt, when a stand is taken in a complaint petition which is contrary or inconsistent, to the one taken in a civil suit, the same assumes significance. In the present case there is no contrary stand. The only difference is that the Respondent has not impleaded the Petitioners qua the recovery of the money decree and since they are not defendants in the suit no averments qua them has been made. The deletion of averments qua the Petitioners would not entail the averments made in the civil suit contrary or inconsistent. From the allegations on record prima facie offences for which the Petitioners are summoned are made out. At this stage this Court is not considering whether both the Sections 420 and 406 are attracting on the facts of the case as this would be decided by the learned Trial Court at the stage of charge.

8. I find no reason to interfere in the impugned order. Petition and application are dismissed.

(MUKTA GUPTA)
JUDGE

APRIL 17, 2012
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