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

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Judgment delivered on: 05.02.2018

+ **CRL.M.C.2973/2014**

SUMER MISRI

..... Petitioner

Versus

NCT OF DELHI & ORS.

..... Respondents

Advocates who appeared in this case:

For the Petitioner :	Mr Neeraj Sharma with Mr Sanpreet Singh Ajmani
For the Respondent :	Respondent in person. Mr Akshai Malik, Addl. PP for the State SI Sanjeev Kumar, EOW, New Delhi.

CORAM:-

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

05.02.2018

SANJEEV SACHDEVA, J. (ORAL)

CRL.M.C.2973/2014 & CRL.M.A.10303/2014(stay)

1. The petitioner is aggrieved by the order dated 05.02.2014, whereby the petitioner has been summoned in a case filed under Section 200 of the Code of Criminal Procedure (Cr.P.C.) alleging commission of offence under Sections 420 & 406 IPC.

2. The respondent – complainant is a 50% shareholder in a Company – M/s. DSM Healthcare Private Limited (hereinafter

referred to as '*the Company*'), of which the petitioner was the Managing Director.

3. A complaint was filed by the complainant with the Economic Offences Wing (Crime Branch), Delhi Police, under Sections 403/406/420/34 IPC. It was alleged by the complainant that there was siphoning of funds. The complainant also filed a petition before the Principal Bench, Company Law Board alleging oppression and mismanagement as well as siphoning of funds.

4. The Company Law Board, on the petition filed by the petitioner, in its order dated 21.12.2006, noticed the following observations of the Auditor on the Accounts of the Company, as under:-

“10(iii) Discrepancy was noticed in the number of needles dispatched from the factory as per the challan/delivery books and the sales recorded. The difference between the dispatch records and the sales records is of the order of about 1.77 crore needles valued at Rs.85.93 lacs. This difference, according to the petitioner would indicate siphoning of funds. The 2nd respondent has explained that in the pharmaceutical business supply of free samples is unavoidable and according to him it could vary from 15% to 30% of the production. This stand has not been contested or controverted by the petitioner. If it were to be the correct position, then, I find that the discrepancy noted accounts for roughly about to 28% of the production and therefore no c large of siphoning of funds could be made on the basis of this shortage.”

5. The Company Law Board, by its order dated 21.12.2006, after noticing the above Auditor's observation, held that the allegation of siphoning of funds based on Special Audit Report had not been established.

6. The Company Law Board thereafter noticing that the Company remained closed for over two years and the machinery stood re-located and the respondent therein (petitioner herein) had offered the complainant to take over the Company along with the machinery, without any consideration, held that an option was available to the complainant to either take over the Company or file a petition for winding up. Noticing this option, the Company Law Board was of the view that no further relief could be granted in the facts of the case, like asking the petitioner (second respondent therein) to pay back the investment made by the complainant in the business venture. The petition was disposed of.

7. On the failure of the Economic Offences Wing to take cognizance and register an FIR, the complainant filed a Writ Petition being Writ Petition (Crl.) No.402/2008.

8. By order dated 13.03.2009, the said Writ Petition filed by the respondent – complainant was found to be without any merit. The Court observed that the Company Law Board had given clean chit to the petitioner as the complainant could not prove on record that there was any siphoning away of fund of the Company by the petitioner.

The Court also noticed the observations of the Company Law Board that upto 30% of the goods distributed by way of samples, was not disputed by the respondent. Noticing these observations, the Court observed that the Economic Offences Wing Cell had taken a stand that no case was made out, which requires registration of FIR. This Court was of the view that once the complainant approached the Company Law Board and was not successful, then, for the complainant to approach the Economic Offences Wing is not appreciable.

9. This Court, however, keeping in view the provisions of the Chapter XV of the Code of Criminal Procedure, noticed that despite the Company Law Board rejecting the petition of the complainant, the complainant was not remediless. The Court, further held that if the complainant had any grievance, which is left out and which could be substantiated by the complainant by examining himself and leading other evidences, which is in his power and possession and if the Magistrate was satisfied, then process could be initiated under Section 203 Cr.P.C.

10. The complainant – respondent, after the order of the Writ Court, initiated the process under Chapter XV of the Cr.P.C. by filing the subject complaint under Section 200 of the Cr.P.C. The complainant thereafter led the evidence and the Trial Court, after examining the evidence led by the complainant and hearing arguments by the

impugned order dated 05.02.2014, took cognizance and summoned the petitioner. It is this process, which is sought to be interdicted by the petitioner in these proceedings.

11. By the impugned order dated 05.02.2014, the Trial Court held as under:-

“Arguments were heard on the point of summoning of accused.

It is mentioned in the complaint that M/s. DSM Health Care Private Limited is engaged in the business of manufacturing and selling of disposable syringes and had its factory in Gurgaon and warehouse in Vishwas Nagar. It is further mentioned that the complainant and his mother, the investors in the company, were having combined shareholding of 50% in the company and accused Mr. Sumeer Misri, the Managing Director of company, had complete day to day management and control over the affairs of the company. Further, it is stated that in the year 2002, the mother of complainant invested a sum of Rs. 24 Lacs and the complainant invested Rs. 52 Lacs and at all time the accused represented that the company is in sound financial shape and complainant was shown audited balance sheet of company for the financial year 2002-03, in which it was shown that the company had outstanding receivable amounting to around one crore rupees. In May, 2004, accused informed the complainant that the company is facing cash flow problem as a result of outstanding monies not being received from dealers of the company. It is further stated that the complainant again arranged a loan of Rs. 35 Lacs and invested in the company. It is further stated that on 15.06.2004, a resolution was

passed that from now on only the complainant would be the authorized signatory to the bank accounts of the company and financial decisions would be taken by him and thereafter an investigation was launched and an independent chartered Accountant was hired with the consultation of Managing Director. During investigation, it was found that in 2003-04, the company produced a total of 2.51 Crore syringes, but out of these only 1.77 Crore syringes were accounted for. Further, it was found that the dealers claimed that they have cleared all the dues and further that the representatives of the company had directly collected that money from the retail shops including the sales tax amount, which should have gone to the dealer. Further, it was reported by Chartered Accountant that the books of the company have not been maintained properly. When the accused was asked to furnish an explanation qua above mentioned disclosures, he removed all the representatives of the complainant from the company and started operating the bank accounts of the company. Further, it is mentioned that 70 Lacs syringes are missing and accused had falsely claimed that these were distributed free of cost as samples. It is further mentioned that all these syringes were sent from the factory to the warehouse and these did not go to doctors or sales representatives as samples and these were sent to various dealers of surgical items, making it clear that these were sold in cash and money was not deposited and was siphoned off by the accused.

During the pre-summoning evidence, complainant entered into witness box as CW1 and deposed on the line of complainant. Further, he placed on record that the report of hired Chartered Accountant Mr. Lavlesh Ex. CW1/A, summary of his findings qua challans of syringes Ex. CW1/B, resolution dated 02.08.04 Ex. CW1/B1 whereby the earlier resolution dated 10.05.04 Mark A

was cancelled by accused at his back, copy of company petition CW1/C, stock register of Vishwas Nagar Ex. CW1/D, list of dealer to whom goods were sent Ex. CW1/E1, order dated 03.02.10 passed by ICAI against earlier Chartered Accountant Mr. Avdesh Kumar Ex. CW1/E2, complaint made to EOW Ex. CW1/F and order of High Court dated 13.03.09 Ex. CW1/G.

CW2, Sh. Sanjay Aggarwal, Chartered Accountant, deposed that he was appointed Chartered Accountant in EOW Cell vide order dated 22.12.2011 to conduct verification in the case of Raj Kachroo Vs. State for the period w.e.f. 01.04.03 to 31.03.2004 and he submitted his report Ex. CW2/1.

CW3, Sh. Manish Bhasin, testified that he was Marketing Manager of DSM Health Care Pvt. Ltd. from 2003 to May, 2004 and he was reporting to Mr. Sumeer Misri. It is further stated that the storekeeper was brother in law of Mr. Sumeer Misri and as per his knowledge, nothing was sold without any invoice and the statement that 30% of the total goods produced were given as samples is incorrect and only 1% to 2 % goods were given out as free samples and that was recorded in the statement of warehouse.

CW4, SI Ravinder Malik stated that he conducted inquiry and submitted his report Ex. CW4/1 on the directions of Ld. ACMM (South) in this case.

It is observed that complainant has deposed that he along with his mother was induced by accused Sumeer Misri to invest in the company M/s. DSM Health Care Private Limited and during the financial year 2003-04 about 70 Lacs syringes were sold in cash and that money was siphoned off by accused. CW2 corroborated the case of complainant to the effect that debtors were overstated to

conceal siphoning off goods and sales have been overstated in the accounts to show more recoverables towards goods siphoned off. Further, it was concluded in the report of Chartered Accountant that difference in dispatches gives credence to the siphoning off stock other than by way of regular dispatches. It was found that appointment of new auditors was made without proper legal process to cover illegal functioning of the people in charge of affairs of the company. CW3 has also corroborated the case of complainant to the effect that only 1% to 2 % goods were given as samples and not 30 % of the total goods produced by the company as claimed by the accused. In the inquiry report submitted U/s. 202 Cr.P.C., it was found that free samples were not more than 1% to 2% of the total sale.

In view of above, it is found that testimony of all the complainant witnesses is neither intrinsically untrustworthy nor self contradictory and there is sufficient material on record to hold, prima facie, that a case U/s. 420 and 406 IPG is made out against the accused Sumeer Misri. Accordingly, he be summoned for 04.04.2014 on filing PF and RC by complainant within seven days.”

12. Learned counsel for the petitioner contends that once the Writ Court, by its judgment dated 13.03.2009, gave only limited liberty to the respondent – complainant i.e. to initiate proceedings with regard to any grievance, which was left out, no complaint could have been filed.

13. It is contended that the expression “*any grievance, which is left out*” meant grievance other than the grievance raised before the Company Law Board, i.e. with regard to siphoning of 30% of

syringes.

14. Further, it is contended that these proceedings initiated by the respondent are out of personal vendetta. Reliance is placed on judgment of this Court dated 26.07.2012 in CO.A(SB) 43/2007 titled *Dr. Raj Kachroo And Anr. Versus Sumer Misri & Ors.*

15. The respondent, who appears in person, disputes that there is any industry practice. He submits that in fact the Company is not a pharmaceutical Company but is a manufacturing Company manufacturing medical equipments and further that syringes do not qualify as a pharmacy product, which is given as free sample.

16. I am unable to accept the contention of learned counsel for the Petitioner. The order of the Company Law Board, relied on by the petitioner, only noticed the observations of the Auditor in the Audit Report. The finding of the Company Law Board that the allegation of siphoning of funds has not been established, is based solely on the auditors note in the Special Audit Report. It is not based on any evidence or material brought before the Company Law Board after trial. It is an admitted position that parties were not given any opportunity for leading of evidence. The petitioner did not have any opportunity to lead evidence or substantiate the allegation of siphoning of funds.

17. It may be noticed that the observation in the Audit Report is

that in the pharmaceutical business, supply of free samples is unavoidable and as per the Auditor, 15 to 30% of the production is distributed as free samples. The Auditor has further noticed that the discrepancy alleged was only 28% the production. Because it was within the range of 15 to 30% the Auditor observed that no charge of siphoning of funds could be made out on the basis of shortage.

18. It is noticed that (i) there was no opportunity to parties to lead evidence, (ii) the Auditor has not reported that there is no siphoning of funds (iii) the observation is based on an assumption that there is an industry practise of giving free samples of 15 to 30% of the production and (iv) there is an assumption that 28% of the production has been given away as free samples.

19. There is no note on the observation of the Auditor based on the Account that after an audit it has been found as a fact that free samples were given out.

20. Further, it may be noticed that the standard of proof, as required before the Company Law Board for maintaining a petition of alleged oppression and mismanagement is different and distinct from the standard of proof, as required, to establish an offence under Section 406/420 IPC.

21. Since no opportunity of leading evidence was granted to the complainant at the stage when the Company Law proceedings were

entertained, it cannot be said that the order of the Company Law Board would operate either as *res judicata* or as issue estoppel.

22. Further the order dated 13.03.2009 of the Writ Court declining to entertain the petition of the complainant for a direction to the Economic Offences Wing to register an FIR was in the context of whether a direction could be issued to Economic Offences Wing to register a case and as to whether the complainant had made out a cognizable offence.

23. Even if a complainant has not been able to show, by his complaint made to the Economic Offences Wing, that a cognizable offence has taken place, it cannot be said that the complainant is precluded from approaching the Court of the Magistrate under Chapter XV of the Code of Criminal Procedure and establishing by leading evidence that an offence has taken place.

24. In the present case, the complainant has exercised the right conferred on the complainant under the Code of Criminal Procedure. The complainant has lodged the subject complaint under Section 200 Cr.P.C. and led evidence to substantiate his allegations.

25. The Court, after examining the evidence led by the respondent – complainant and hearing submissions, *prima facie*, has found material to proceed.

26. It may also be noticed that the material to proceed is distinct

from material to convict. In the facts of the case, it cannot be said that there is no sufficient material available to the Magistrate to form an opinion that there was a *prima facie* case made out to proceed and summon the petitioner.

27. In view of the above, I find no infirmity with the impugned summoning order. The petition is accordingly dismissed.

28. It is clarified that this Court has not examined the merits of the contentions of the either parties and all contentions of the parties are reserved and left open. The contention of the petitioner that free samples were given as a trade practice and the contention of the respondent that the concerned Company was not a pharmaceutical Company and not qualified to give free sample and they were not given is not being examined by this Court and is left open to be considered by the Trial Court at the appropriate stage. Nothing stated herein shall amount to an expression of opinion on merits of the case of either party.

29. Order Dasti under signatures of the Court Master.

SANJEEV SACHDEVA, J

February 05, 2018

‘Sd’