IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 1611 OF 2001

1. The Stock Exchange, Mumbai
P.J.Towers, Dalal Street,
Mumbai 400 001

2. Jaswant Parekh
Former President of the Stock Exchange
Mumbai, P.J.Towers,
Dalal Street, Fort,
Mumbai 400 001

3. R.C.Mathur (Former Executive Director)
The Stock Exchange, Mumbai.
P.J.Towers,
Dalal Street, Fort,
Mumbai 400 001

4. M.G.Damani,- (deceased)
Former President of
The Stock Exchange, Mumbai
P.J.Towers,
Dalal Street, Fort,
Mumbai 400 001

5. J.J.Bhatt, The Director-
Investor Services Cell & Listing
The Stock Exchange, Mumbai.
Mumbai, P.J.Towers,
Dalal Street, Fort,
Mumbai 400 001 ..Applicants

v/s.

1. Yogesh Babulal Mehta,
Calcot House, 8/10 Tamarind Lane,
Fort, Mumbai 400 001.
and res. at 1/6, Padma Society,
S.V.Road, Vile Parle (West),
Mumbai 400 056

2. Presto Finance Limited
a company incorporated under
the Companies Act, 1956 and
having its registered office at
131, 1st floor,
Sarvodaya Commercial Center
Salapose Road, Near GPO.
Ahmedabad.

3. Hitendra B. Vasa
Chairman & Managing Dirctor,
a company incorporated under
the Companies Act, 1956 and
having its registered office at
131, 1st floor,
Sarvodaya Commercial Center
Salapose Road, Near GPO.
Ahmedabad, and
res. at Bavchandbhai Vasa,
202/203, Abhushan Flats,
Ankur Jain Derasar,
Naganpura,
Ahmedabad

4. Naman Securities Finance Pvt Ltd.,
Clg. No. 515 Kakad House,

Opp. Bombay Hospital,
Barrack Road, Mumbai 400 020

5. Ashwin C. Choksi , Clg. No.1,
57, 3rd floor, Bhupen Chambers,
Dalal Street, Mumbai 400 001

6. Suresh Rthi & Co. Clg. No.727,
Parekh Vora Chambers,
N.M.Road, Fort, Mumbai 400 001

7. Subhash V. Shah. Clg. No.747,
32B, Khatau Bldg.
A.D.Mody Marg,
Fort, Mumbai 400 001

8. Active Fins Stock Pvt. Ltd.,
60-C, Bhupen Chambers,
Dalal Street, Mumbai 400 001

9. Mahendra A. Shah, Clg. No.466
Karmer Bldg, Room NO.30,
4th floor, 38 Cawasji Patel Street,
Mumbai 400 001

10. Dhanesh T. Gandhi Clg. No.144,
66 Tamarind Lane,
Haji Kasam Bldg.,
Fort, Mumbai 400 001

11. Gaurang M. Gandhi,
Clg. No.211, 1218 Maker Chambers,
V. Nariman Point,
Mumbai 400 021

12. M/s. Jaswantlal Chhotalal & Co.

Clg. No.340, Bhupen Chamber,
Dalal Streeet, Fort,
Mumbai 400 001.

13. Kantilal Chhaganlal & Co.
Clg. No.391, 605, Commerce House,
N.M.Road, Fort,
Mumbai 400 001

14. The State of Maharashtra ..Respondents
(Resp. No.1 Org. Complainant
Resp. Nos.2 to 13 Org. Acc.
Nos.1 to 12))

Mr. Amit Desai a/w. Sanjog Parab for the Applicant.
Mrs. Preeti Shah for the Respondent No.4.
None for the other Respondents.
Mrs. R.M.Gadhvi APP for the State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.
RESERVED ON : 23rd JUNE, 2016.
DATED : 02 AUGUST, 2016.

JUDGMENT .

1. This is an application under Section 482 of Cr.P.C. challenging order dated 30th March 2000, in C.C.No.518/S/2000 whereby the learned Metropolitan Magistrate, 33rd Court, Ballard Estate, Mumbai, has issued process against the applicants (Org. accused nos.13 to 17) for offence under Section 409 rw. 34 of the Indian Penal Code.

2. The applicant no.1 is a stock exchange recognized under the provisions of the Securities Contract Act, 1956 and governed by the Rules, Bye-laws and Regulations, 1957 of the Stock Exchange. The applicant no.2 and 4 were the former Presidents, and the applicant no.3 was the former Executive Director, and the applicant no.5 was the investor of the applicant no.1 exchange.

3. The equity shares of M/s. Presto Finance Ltd. were listed in the Stock Exchange, Mumbai w.e.f. 28.02.1996 for trading. The respondent no.1, hereinafter referred to as the complainant, was a cardholder member of the applicant no.1 exchange. He had traded in the shares of the PFL from 26.2.1996 to 6.4.1996 as per the requirements and orders of his various clients. After completing all transactions with the brokers, sub-brokers in delivering 96000 shares to his clients, he was having with him, 184,000 shares valued at Rs.43 lakhs. These shares were totally paid up by him as a member of BSE on behalf of his client through debit entries in his valan account and through cheques as per regular functioning of payment system. The

said shares were found to be duplicate, defective and invalid. The applicant no.1 Exchange therefore suspended trading of the script w.e.f. 9th April 1996.

4. The complainant has stated that the applicants due to their official post and position were privy to some classified information regarding the shares of PFL. The applicants did not share the said information with the member brokers. The complainant claims that said act smacked of deep-rooted conspiracy. The complainant has alleged that the applicants in connivance with the other accused have perpetuated the fraud on innocent victims like him and his clients.

5. The complainant has further stated that the action of the Applicant-Exchange of declaring that the transactions in suspended scripts resulted in bad delivery share would be squared up by declaring a close out at a standard rate, was fundamentally unjust. The complainant has stated that the Applicants had chosen arbitrary, discriminatory, unjust and illegal way of settling the vexatious

problem of bad delivery of shares.

6. The complainant has stated that the fraud of PFL share transaction had cascading effect on his business as a stock broker and card holder member of Applicant No.1-Exchange. he has stated that all his sub brokers, clients and financial institutions has stopped doing business with him and that he has sustained financial loss, loss of reputation, physical, mental and personal agony. He has stated that witch hunt by the applicant No.1 Exchange and its Directors has resulted of him being declared as a defaulter. The complainant has therefore, filed the complaint against the accused Nos.2 to 12 who had introduced the fake shares in the market as well as against the applicant No.1 Exchange and its Directors alleging that they were involved in the said conspiracy.

7. After recording the verification statement, by order dated 31.7.1998 the learned Magistrate referred the complaint to the concerned Police Stn. for inquiry under section 202 of Cr.P.C. The

police had not submitted the report on 23.10.1998 as directed by the Magistrate. subsequently, pursuant to the application dated 23.7.1998 filed by the complainant the learned Magistrate recalled the complaint and by order dated 30th March, 2000 issued process against the present applicants for offence under section 409 of the IPC. Being aggrieved by the said order, the applicants have invoked the jurisdiction of this court for quashing the said order.

8. The learned Sr. Counsel Shri Desai has submitted that the applicant no.1 and its governing body has acted in accordance with the bye laws, rules and regulations and that no process could be issued against the applicant on the bare allegations of 'criminal conspiracy', 'mis-appropriation' or 'cheating'. He has further submitted that in the absence of any material, no process could be issued as against the applicants for offence under Section 409 of the IPC. The learned Counsel for the applicants has further submitted that the impugned order is erroneous and untenable in law.

9. The complainant was not represented by any counsel despite due service of notice. Consequently, no arguments have been advanced on behalf of the complainant /respondent no.1. I have perused the records and considered the submissions advanced by the learned Senior Counsel Shri Desai for the applicant and the learned APP for the State.

10. At the outset, it may be stated, in ***M/s. Pepsi Foods Ltd. & Anr. v. Special Judicial Magistrate & Ors, (1998) 5 SCC 749*** the Apex Court has observed that summons to an accused in a criminal case is something very serious as it puts the accused person, so summoned, to a great degree of peril of facing an unending trial, mental torture and harassment, and therefore this should not be done in a casual manner.

11. In ***M/s. Indian Corporation vs NEPC India Ltd. & Ors. dated 20.7.2006***, the Apex Court after considering its previous decisions on the principles relating to exercise of jurisdiction under Section 482 of Criminal Procedure Code has reiterated the principles as under :

“9(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused.

For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with malafides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) A given set of facts may make out : (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceedings are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not.

10. While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable break down of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure though criminal prosecution should be deprecated and discouraged. In G. Sagar Suri vs. State of UP [2000 (2) SCC 636], this Court observed :

“"It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other

> remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this Section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."
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> While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law. One positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power under section 250 Cr.P.C. more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant."

12. In the light of the above well settled principles, the question which falls for consideration is whether the averments in the complaint taken at its face value, make out the ingredients of criminal breach of trust as defined under section 405 of the IPC.

13. Section 405 IPC defines criminal breach of trust as under:

> **405. Criminal breach of trust**.—Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

14. A plain reading of these provisions indicates that the offence of criminal breach of trust involves the following essential ingredients:

1) Entrustment with property or dominion over property.

2) Dishonest mis-appropriation of such property, or conversion to own use or disposal of the property by the person entrusted with such property.

15. In the instant case, the applicant herein is a recognized stock exchange under the provision of Security Contract (Regulation) Act, 1956. The activities of the applicant are governed by rules, bye laws and regulations of the Stock Exchange, Mumbai. The main object of the applicant no.1 as set out in Exchange Rules, Bye-laws and

regulations is to support and protect (in the public interest) the character and status of progress of dealers and to further their interest both of brokers and dealers as well as of the public interested in securities, to assist, regulate and control (in the public interest. The exchange primarily provides facilities for trading in shares and other securities which are listed/quoted on the exchange and also provides facilities for settling such trades/purchases/sales by payment of purchase price and delivery of the concerned shares/securities on "net".

16. As per the procedure the shares and securities are traded in exchange on every trading day. Under bye-law 191 of the Exchange Rules, the Exchange does not recognize as parties to any bargain in the market other than its own members and every member is directly and primarily liable to every other member with whom he effects a bargain for its due fulfillment in accordance with the Rules.

17. The bargain bye-law 192 further provides that all bargains at the

stock exchange are regulated by rules, bye-laws and regulations of the exchange. As per the said rules and regulations each member broker is liable to fulfill/ perform his obligations to a contract by paying money for shares bought by him and by delivering shares which were sold. In case of 'bad delivery' i.e. in the event the shares delivered by a member do not meet the description, and cannot be transferred either due to technical defect or on account of shares being forged, fabricated, hypothecated etc, the introducing member/broker is primarily responsible to rectify the defect or to replace the bad delivery shares with an equivalent numbers of other good delivery shares of the same company. If the broker/member fails to rectify the defect or replace the shares, the exchange is required to conduct an auction, purchase the requisite number of shares on the selling members account, and deliver the same to the buying members. If the shares of the company are not available in the market due to delisting of the company, or suspension of scrip etc, the transaction is closed out by the Exchange and compensation is paid to the buying member on the selling member's account, in accordance with the fixed prescribed formula.

As regards the market settlement as approved by the Central Government as well as SEBI, the member is required to maintain the requisite capital for the purpose of conducting the transaction on the floor of the Exchange. This amount is reflected on the Valan account of the member broker. The said account is like a ledger account and it reflects a type of credit and debit position of money and securities of the member broker. As per the norms the member is statutorily required to maintain the credit balance to discharge his obligation and in the event of bad delivery or in order to fulfill market obligation unless there is any order passed by any regulatory authority or court.

18. Reverting to the facts of the present case, the averments in the complaint reveal that equity shares of Presto Finance Ltd. Company were listed for trading on the applicant no.1 stock exchange w.e.f. 28.2.1996. The ASE had informed the applicant that it had received complaints against the company Presto Finance Ltd. and that it intended conducting investigation. The said ASE had also informed the applicant exchange that it had suspended trading of equity shares

of the said company for a period of three days.

19. The scrip of the company was listed between 28.2.1996 and 8.4.1996 during which period regular trading activities in connection with the scrip was done on the floor of the applicant no.1 exchange. The applicant no.1 exchange having received information from ASE that some defective/ duplicate/ invalid share certificates of the said company were circulating in the exchange and in the market, the applicant no.1 vide notice dt. 6.4.96 suspended trading of the scrip w.e.f. 9.4.96. The applicant no.1 exchange vide notice dt. 9.4.96 informed the members that the trading which had taken place on 9.4.96 were deemed to be cancelled, and further by notice dt. 12.4.96 informed its members that defective/duplicate/invalid shares had been introduced. The applicant no.1 further informed its members that the board of the applicant no.1 had decided to retain the shares of the said company and consequent payments for settlement in the clearing house of the applicant no.1 till further instructions. The applicant no.1 also requested the members who had delivered the said scrips to

deposit their cheques at the standard rate in the clearing house of the applicant no.1 exchange and the members who had received shares of Prestor company were requested to deposit the same by giving full details in form 11 and 12.

20. The correspondence placed on record by the applicant, the genuineness of which is not disputed also reveals that the applicant exchange had brought these facts to the notice of SEBI with a request to initiate inquiry into the matter on urgent basis. By letter dt. 16.4.1996, the applicant no.1 exchange had brought these facts to the notice of Sr. Inspector of Police CID, Mumbai and requested to investigate the matter and to take appropriate action. Pursuant to the said complaint crime no. 69 of 1996 was registered and the investigation was initiated. The copy of the said letter was also forwarded to SEBI for necessary action. In the course of the investigation of the said crime, at the request of the Investigating officer, the applicant no.1 handed over all the required documents including duplicate share certificates along with transfer deeds with a

request to return the same after completion of the investigation.

21. The documents placed on record reveal that the High Court of Gujrat had passed an order of winding up of said Presto Company. By notices dt. 25.10. 1996 and 26.10.1996 the applicant no.1 informed the members about the said order. The applicant no.1 decided to release the other shares of the company to the concerned buyer members valan account by adjusting the debit in the members valan account. The buyer and seller members were called upon to collect the relevant shares as well as the amount. Accordingly, an amount o Rs.57,46,515/- was paid by the clearing house to about 90 selling members.

22. The averments in the complaint vis-à-vis the documents which are placed on record clearly indicate that Presto Finance Ltd. had perpetuated fraud by circulating fake and duplicate share certificates in the market and pursuant to the complaint lodged by the applicant no.1 exchange, crime was registered against the said company. During the

pendency of the investigation, the complainant filed a private complaint against the applicant exchange and its Directors alleging criminal conspiracy. Apart from the bold allegations of criminal conspiracy the averments in the complaint do not disclose essential ingredients of conspiracy. On the contrary, the complaint vis-à-vis the documents on record indicate that upon being informed of the said fraud, the applicant on.1 had suspended trading and had taken further action in accordance with the procedure under rules, bye laws and regulations. The complaint along with the annexures and the verification statement, taken at its face value do no directly or indirectly indicate entrustment of money or property to the applicant no.1 and consequent mis-appropriation or dishonest inducement and cheating. This being the case, there was no justification for issuing process against the applicants (accused nos.13 to 17) for offences under Section 409 of IPC.

23. It is also pertinent to note that after having recorded the verification statement under Section 200 of Cr.P.C., the learned

Magistrate had postponed issuance of process and by taking recourse to section 202 of Cr.P.C., the learned Magistrate had directed the police to enquire whether there were sufficient grounds to proceed against the applicant. The records reveal that subsequently the investigation was transferred to EOW and after completion of investigation the EOW had submitted a report that no offence was made out against the applicants herein. There is no dispute that the Magistrate can take cognizance and issue process despite an adverse report by the Investigating Agency provided the records prima facie reveal essential ingredients of offence. It is equally true that the Magistrate is not required to give detail reasons for issuance of process, nonetheless the order has to show application of mind. In the instant case the complaint alongwith the annexures the statement under Section 200 of Cr.P.C. as well as the report of EOW, taken at its face value, do not disclose essential ingredients of the offence. Despite which the learned Magistrate has ordered issuance of process against these applicants mechanically without application of mind. Allowing the proceedings to continue against these applicants will be abuse of process of law. Hence the order cannot be sustained .

24. Hence the application is allowed. The impugned Order dt. 30.3.2000 in C.C.No.518/S/2000 passed by the Metropolitan Magistrate, 33rd Court, Ballard Estate, Mumbai is hereby quashed and set aside qua the applicants (org. accused nos.13 to 17).

(ANUJA PRABHUDESSAI, J.)