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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 779 OF 2016

M/s. Fairwinds Asset Managers Ltd.
(earlier known as Reliance Equity
Advisors India Ltd.) representing
M/s. Reliance Alternative Investments
Fund-Private Equity Scheme I (A Trust
registered under the Indian Trusts Act, 1882)
M/s. Fairwinds Asset Managers Ltd.
is represented through Ramesh Venkat,
Managing Partner, Adult Indian Inhabitant
Aged 51 years, having its registered office
address at 1105, Level 11, Tower -1, One
Indiabulls Centre, 841 Senapati Bapat Marg,
Elphinestone Road, Mumbai – 400 034. .. Petitioner

Versus

1. State of Maharashtra
2. Additional Commissioner of Police
Economic Offences Wing, Criminal
Investigation Department, Mumbai Police,
Crime Branch Building, Office of
Commissioner of Police, Mumbai,
Opp. Crawford Market, Dr. D.N. Road,
Mumbai – 400 001. .. Respondents

Mr. Haresh Jagtiani, Senior Counsel a/w Mr. Siddhesh Bhole, Mr. Ryan Mendeo i/by Haresh Jagtiani & Associates for petitioner.

Mrs. Sangeeta D. Shinde, APP for respondents-State.

Mr. Abad Ponda a/w Mr. Ankit, Mr. Nikhil Koach i/by Croford Bayley & Co. for interveners.

CORAM: NARESH H. PATIL &
PRAKASH D. NAIK, JJ.

RESERVED ON : AUGUST 18, 2016.
PRONOUNCED ON : AUGUST 25, 2016

JUDGMENT [Per Naresh H. Patil, J.] :

1. Rule. Rule made returnable forthwith. Heard finally by consent of parties.

2. The petitioner prays for direction to register F.I.R. on the complaint addressed by him to the Joint Commissioner of Police, Economic Offences Wing, Crime Branch, Mumbai, dated 30/4/2015.

3. By communication dated 21/1/2016, Mr. Arvind N. Wadhankar, Sr. Inspector of Police, EOW, Unit-V, Mumbai informed the petitioner that the complaint is of civil nature and they have closed the enquiry.

4. In short, it is contended that petitioner is a Fund Manager which manages the fund set up under a Trust called Reliance Alternative Investments Fund – Private Equity Scheme I (RAIF). RAIF was

established in 2008 and since then had made various investments in diversified industries. It is stated that RAIF comprises constituents like Public Sector Banks viz. Bank of Baroda, Punjab National Bank, Indian Overseas Bank, Andhra Bank and also Army Group Insurance and LIC of India.

5. It is the petitioner's contention that Max Flex & Imaging Systems Limited is an unlisted public limited company incorporated in the year 2002 under the Companies Act, 1956. The Company is in the business of, inter alia, manufacturing, contract manufacturing and marketing of digital and offset printing consumables, including printing surfaces, printing inks, offset printing chemicals, offset printing plates and accessories. RAIF is also an investor and shareholder in the Company. According to the petitioner, Hitesh Jobalia, Nimesh Shah and Rahul Desai are the persons responsible for the dealings of the Company against whom, amongst other, the registration of crime and investigation is prayed for. It is stated that the Company is promoted and managed by Hitesh Jobalia as its Managing Director and Nimesh Shah as its Executive Director and Rahul Desai as its Vice President Finance and Accounts. Said Hitesh Jobalia and Nimesh Shah are also the promoters of the Company. Said

Hitesh Jobalia along with his wife Mrs. Dipti Jobalia holds more than 53% of the equity shares in the Company.

6. The petitioner's allegation is that the EOW failed to register the FIR in respect of serious fraud committed by the above stated accused persons with respect to an amount of Rs.136 crores invested by the petitioner through Trust. The grievance of the petitioner is that inspite of the fact that since last 8 to 9 months, the Investigating Agency did not communicate the petitioner about the decision on the said complaint. The petitioner has challenged the conclusion reached by the Investigating Officer (Senior Inspector, EOW, Unit – V, Mumbai).

7. In the complaint, the complainant had referred to details of transactions, annual report of the Company, financial status, the projected revenue, profit margin etc. In Clause 4.31 the complainant alleged as under :-

> **4.31.** Later that evening, Mr. Hitesh Jobalia called one of us i.e. Mr. Rahul Manek and asked him to come to the office of the Company urgently. Mr. Rahul Manek accompanied by Ms. Namrata Chotrani (as representatives of RAIF) went to

the office of the Company and entered Mr. Hitesh Jobalia's cabin. There, Mr. Hitesh Jobalia broke down and admitted to Mr. Rahul Manek and Ms. Namrata Chotrani that the Company was in heavy losses and that he had been making fraudulent entries in the books of accounts of the Company. Mr. Rahul Manek and Ms. Namrata Chotrani were shocked at the revelation as they had been receiving and relying upon monthly financial reports since their initial investment in the Company until August 2014 which reflected the sales and profits of the Company, both of which had been shown to have steady growth. Mr. Nimesh Shah was also privy to some of the aforesaid. Attached hereto as Annexures 8, 11, 13 and 17 are copies of the reports received by us. Mr. Hitesh Jobalia constantly repeated the fact that the Company was actually suffering heavy losses and that the balance sheet of the Company was false.

Clause 4.38 of the complaint reads as under :

4.38. Subsequently on 19 March 2015 Mr. Rubin Chheda visited the registered office of the Company in an attempt to procure additional information. There he met with Mr. Rahul Desai who described the three schemes used by the Promoters to inflate the sale and thereby falsify the accounts of the Company and/or misappropriate the property of the Company including RAIF's investments. Please find an outline of the schemes below :-

I. Generating funds out of non-funded limits :

(i) The Company would generate a fake purchase bill / order in the name of one of the following entities ("Purported Traders"):

a. Spectrum Opto owned by Mr. Amessh Ghandhi who is Mr. Hitesh Jobalia's close friend and employee of the Company,

b. Singh Digital owned by the father of Mr.Jaspal Singh, an employee of the Company,

c. Vision Infotech owned by Mr. Nishith Sheth, cousin of Mr. Hitesh Jobalia,

d. Pacific Printers owned by Mr. Amit Chugh, an employee of the Company,

e. Gurcharan Digital Meida owned by Mr. Nilesh Thole, an ex employee of the Company,

f. Spectrum International owned by Mr. Girdhar Menon, father of Mr. Prashant Menon, an employee of the Company.

g. Silver Photostore owned by Mr. Pratik Turakhia who is the nephew of Mr. Hitesh Jobalia.

(ii) The Company would then open a Letter of Credit in favour of one of the Purported Traders against such purchase bill / order.

(iii) The Purported Trader would discount the Letter of Credit and arrange payment to the account of one of the other Purported Traders.

(iv) Such other Purported Trader would then write a cheque in favour the Company under guise of making a purchase from the Company.

Annexed hereto as Annexure 21 are statements of the bank accounts held by the Company with various banks for the period from 1 September 2014 to 30 September 2014 showing transactions with the Purported Traders. As a result of the above, the revenue, profitability and current assets of the Company were continuously inflated allowing for higher drawing power which aided the Company for increasing the funded and non-funded bank limits which was one of the intents with which this exercise had been undertaken. Annexed hereto as Annexure 22 is a summary of the credit limits enjoyed by the Company with its various banks as on 16 September 2014. Further, we have been given to understand that the accounts of the Purported Traders are operated by Mr.Nimesh Shah.

II. Generating cash through fake purchases :

(i) The Company would purportedly purchase goods from one of the following entities :

a. Amit & Co.
b. N N Mehta
c. Ameeko Marketing

(ii) The Company would issue cheques to the party from whom it has purportedly purchased goods in terms of (i) above,

(iii) This party would handover cash to the Promoters, who would then misappropriate the funds of the Company.

III. Selling goods on a cash basis without showing any account entries :

(i) The Company would purchase goods from its suppliers;

(ii) The goods would then be sold for cash, but would remain as inventory in the books of the Company;

(iii) The cash would then be misappropriated by the Promoters.

It appears that as a result of these three schemes, the inventory and debtors of the Company were constantly inflated, thereby remaining on the higher side. Thereafter, in the draft balance sheet circulated to us on 5 December 2014, the falsely inflated inventory and debtors of the Company appear to have been discounted, which has resulted in the purported losses shown by the Company in these financials.

In Clause 5.4 of the complaint, the complainant alleges that,

5.4 Annexed hereto as Annexure 26 is a copy of the ledger account of Singh Digital (a Purported Trader) as maintained by the Company, for the period from 1 April 2014 to 31 March 2015. We have, unfortunately, been unable to procure copies of the ledger accounts maintained by the Company with any of the other Purported Traders. However, it is noteworthy that the quantum of business purported to have been done with Singh Digital alone in the past year is approximately Rs.79 crores, which is a rather large amount. Of this, it is not possible for us to ascertain how much business has been legitimately carried out with Singh Digital and how much is to create an inflation in revenues and expenditures in the manner described in Scheme I set out paragraph 4.38. Mr.Jaspal Singh, an employee of the Company, whose father purportedly is the proprietor of Singh Digital, has informed Mr.Rubin Chheda that he and his father are both unaware of the transactions undertaken by Singh Digital and that the accounts of Singh Digital are managed by Mr. Nimesh Shah.

In Clause 6 of the complaint, specific charges against the promoters, Mr. Rahul Desai and others are also made.

8. The petition was filed on 18/2/2016. By an order dated 7/3/2016, this court passed following order :-

> "P.C.
>
> 1. By communication dated 21/1/2016, Mr. Arvind N. Wadhankar, Senior Inspector of Police, EOW Unit -V for Mumbai communicated Mr.Rahul Manek/Mr. Rubin Chheda that they have come to the conclusion that prima facie no cognizable offence has been disclosed in the matter. According to the Investigating Agency, the complaint discloses violation of civil laws.
>
> 2. Learned Senior Counsel Mr. Jagtiani, appearing for the petitioner, submits a list of instances showing element of criminality regarding which no investigation has been carried out. It is submitted that complaint was filed before nine months. The Investigating Officer acted contrary to the Apex Court judgment in the matter of Lalita Kumari vs. Govt. of Uttar Pradesh and ors. [(2014) 2 SCC 1]. The learned APP submits that audit accounts for the years 2013-2014 and 2014-2015 are not available and, therefore, it is not possible for the Investigating Agency to inquire into the offence complained of.
>
> 3. We direct the ACP, EOW Unit, Mumbai to look into the matter and guide the Senior Police Inspector and Police Inspector in the light of the arguments advanced today and the list of instances submitted by the petitioner before this court.

The Investigating Agency shall file a short report in this regard.

Stand over for two weeks i.e. 21/3/2016. To be listed under the caption “fresh matter”.”

9. Learned APP submitted two reports, dated 1/3/2016 and 11/4/2016 signed by Mr. Rajesh Shinde, Inspector of Police and Mr. D. V. Chanvan, Sr. Inspector of Police, Unit – V, EOW, Mumbai.

10. As stated above, by communication dated 21/1/2016, the Investigating Agency had closed the complaint/enquiry. Said Communication reads as under :-

“To,
Mr. Rahul Manek/Mr. Rubin Chheda
Fairwinds Trustees Services Private Limited
1105, Level 11, Tower -1 One Indiabulls Centre,
841 Senapati Bapat Marg, Elphistone Road,
Mumbai -13.

Subject :- Inquiry in PE-No.-80/2015

Sir,

We conducted Preliminary Enquiry registered vide P.E.No. 80/15 on the basis of your application against Mr. Hitesh Jobalia & other's of Max Flex Imaging System Limited having its office at 102, Prime Plaza, J. V. Patel Compound, Balasaheb Madhukar Marg, Elphistone (West), Mumbai – 400 013.

After conduction of enquiry, we have come to the conclusion that prima facie no cognizable offence has been disclosed in this matter. All the acts of commission and omission on the part of non-complainant come under the purview of civil laws. As such the complaint is civil in nature we have closed the enquiry.

Yours faithfully,

Sd/-
(Arvind N. Wadhankar)
Sr. Inspector of Police, EOW, Unit -V,
Mumbai."

11. Learned Senior Counsel Mr. Haresh Jagtiani submitted that in view of the judgment of the Supreme Court in the case of **Lalita Kumari Vs. Government of Uttar Pradesh and ors. [(2014) 2 SCC 1]**, in the facts and considering the nature of allegations made by the complainant, it was mandatory for the Investigating Agency to register an F.I.R. The complainant had made out a case for commission of cognizable offence. Hence, there was no option but to register an FIR forthwith. It was submitted that the police took near about 9 months to communicate its decision that the complaint is of civil nature and, therefore, it was closed. The Investigating Agency avoided its duty in not registering the FIR and

instead has blamed the complainant and has treated the accused to have been already acquitted in the case. Learned counsel submitted that the reports filed by the Investigating Agency, more particularly report dated 11/4/2016 is not only unreasonable but it shocks the conscience. The Investigating Agency embarked upon a thorough investigation, appreciation of evidence for reaching a final conclusion wherein the complainant is shown to be blameworthy whereas accused to be innocent. The learned counsel submitted that the conduct of the Investigating Officer needs to be minutely scrutinized while deciding the matter. The Investigating Agency before registration of FIR has unnecessarily gone into a sort of in-depth analysis and investigation of the case, which itself supports the contention of the petitioner that a case was made out at least for registration of FIR.

12. Learned counsel has briefly referred to copies of some of the ledger account sheets placed on record, which, according to the counsel, were forwarded by the accused to the complainant. In that connection, learned counsel referred to page 434 and 444 of the paper book.

13. Learned APP submitted that the complaint was received by the

Investigating Agency on 12/5/2015. In the month of August and October, 2015, the complainant submitted relevant documents and thereafter the preliminary inquiry was conducted by the respondent under the supervision of ACP - 3, EOW, Unit, Mumbai. Learned APP submitted that the documents referred during the course of the arguments are not authentic one, they are notarized documents. It was submitted that Directors of the petitioner-Company attended meetings of the other companies which were allegedly run by the persons named in the complaint, which itself demonstrate that the Directors of the petitioner – Company were aware of the financial condition, profit-loss account, balance sheet position etc. It is the complainant who caused delay in filing the complaint, according to the learned APP. Learned APP referred to two reports submitted under the signature of the Investigating Officer. In the view of the learned APP, no case of commission of cognizable offence was made out after the Investigating Agency verified the record, conducted enquiry by contacting various persons. Learned APP further submitted that there is alternate efficacious remedy for the petitioner. The petitioner has remedy under the Code of Criminal Procedure and more efficacious remedy under the Company law. There are other forums which can go into the details and enquiry in case the petitioner approaches them. Learned APP submitted that still the final audit reports of the Companies, which according to the complainant are bogus, are not prepared and furnished to the Investigating Agency and, therefore, they are not in a position to make any statement of involvement of the persons named in the complaint.

14. During the course of hearing, learned counsel Mr. Abad Ponda, appeared and submitted that he is instructed to appear for the proposed accused/persons named in the complaint. The persons against whom complaint was lodged are not party-respondents to this petition. But on a request made by Mr. Ponda, we permitted the learned counsel to address the court very briefly on limited legal issue concerning the alternate remedies available to the petitioner-complainant.

15. The Constitution Bench of the Apex Court in the case of Lalita Kumari vs. Government of Uttar Pradesh and ors. (Supra), in para 119, observed as under :-

> "119. Therefore, in view of various counterclaims regarding registration or non-registration, what is necessary is only that the information given to the police must disclose the commission of a cognizable offence. In such a situation,

registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible, etc. These are the issues that have to be verified during the investigation of the FIR. At the stage of registration of FIR, what is to be seen is merely whether the information given ex facie discloses the commission of a cognizable offence. If, after investigation, the information given is found to be false, there is always an option to prosecute the complainant for filing a false FIR."

16. We have perused the following judgments :-

(a) Sunil Gangadhar Karve vs. State of Maharashtra and ors. **[(2014) 14 SCC 22]**.

(b) Aleque Padamsee and ors. vs. Union of India and ors. **[(2007) 6 SCC 171]**.

(c) Sakiri Vasu vs. State of U.P. & Ors. **[AIR 2008 SC 907]**.

17. The issue involved is as to whether the information given by the complainant discloses commission of a cognizable offence. In case such information discloses cognizable offence, the only outcome is registration of FIR. This exercise is mandatory in nature and in case it is found by the Investigating Agency, after investigation, that information given by the complainant was false, there is an option to prosecute the complainant for filing false FIR.

18. On behalf of the respondents it is submitted that the petitioner has alternate remedy of resorting to provisions of Sections 154 (1), (3) and 156(3) of Cr. P. C. in case Investigating Agency refuses to register FIR. Ordinarily a complainant would resort to alternate remedies which are, no doubt, efficacious in nature but at the same time, as a principle, it cannot be accepted that High Court is denuded of its powers of issuing appropriate direction to register FIR under writ jurisdiction under Article 226 of the Constitution of India merely because an alternate remedy is available. The exercise of constitutional power conferred under Article 226 of the Constitution of India of issuing directions would depend on the facts of each case and various attending features, gravity and seriousness of the

issue raised.

19. Though the respondent – Investigating Agency received the complaint on 12/5/2015, a formal response to the same in the shape of a decision taken by the Investigating Agency was received by the petitioner through a communication made by the respondent on 21/1/2016. The explanation provided for this delay of near about 9 months in taking the decision was that the petitioner was not cooperating with the Investigating Agency, which fact has been denied by the learned counsel for the petitioner. The learned APP further submitted that in the month of August and October, 2015, the complainant submitted some more documents and thereafter preliminary inquiry started. From the reports submitted on record and the submissions advanced, we find that the Investigating Agency conducted the preliminary inquiry as investigation in the case, which takes place after registration of FIR. It seems that the Investigating Agency had gone into much details, analysis, examination of voluminous documents, contacting various persons while conducting preliminary inquiry. In the facts, we find that such is not the objective of permitting the Investigating Agency to conduct a preliminary inquiry. In law, such a preliminary inquiry was to be conducted within seven days as directed by

the Supreme Court in the case of Lalita Kumari (Supra).

20. Word “Preliminary” is defined in Advanced Law Lexicon Dictionary, 3rd Edition, as under :-

> “Preliminary. - Introductory; initiatory; preceding; temporary; provisional – as preliminary examination, injunction, articles of peace, etc.”

The Investigating Agency need not embark upon a detailed analytical investigation into the information or complaint received.

21. Learned Senior Counsel for the petitioner placed reliance on the judgment of the Division Bench of this court in **Criminal Writ Petition No. 1937 of 2010 – Charu Kishor Mehta vs. State of Maharashtra and anr.** Decided on 26/11/2010. In paras 19 and 20, the Division Bench observed as under :-

> 19. It is no doubt true that normal/general rule is to leave the party to adopt remedy available under the Code, but this Court is not powerless to issue an appropriate writ when police have failed or avoided to use their powers available under the Code to unearth serious economic crimes complained of, if

evasiveness to book the real culprits is apparent in the facts and circumstances of the case. In the present case, the petitioner had sent a typed and detailed communication addressed to Shri Rakesh Maria I.P.S., heading Economic Offences Wing, Crime branch C.I.D. in Police Commissioners Compound Annex -1 Building, 2nd floor opp. Mahatma Phule Market at Mumbai -1. In view of the accusations made in details, in our view it was not a case of preliminary inquiry at all considering the serious nature of the accusations. The case, obviously, was not covered within the excepted category so as to resort to preliminary enquiry before registration of FIR. The police were duty bound to register the FIR and to proceed with the investigation, in the facts and circumstances of the case. Economic offences wing did not, except making few diary entries, bother to inquire with the suspects. Dilly-dallying tactics and evasiveness of police is apparent to us, while we went through diary entries of EOW with the help of Learned Addl. Public Prosecutor. Preliminary inquiry in this case did not really move further except for stopping at mere reference made to the Charity Commissioner, Mumbai. Even assuming that preliminary enquiry in this case has rightly been resorted to, even then the police machinery was expected to delve into details in respect of accusations made by the complainant to make it a real, effective, meaningful preliminary inquiry to summon & inquire with persons acquainted with facts of the case. In our opinion, the preliminary inquiry herein was to do mere paper compliance so as to record that the nature of complaint is a civil dispute. Notably, for the nature of allegations were serious such as fabrication of record, criminal breach of trust, fraud, criminal conspiracy etc., by no stretch of imagination all of them can be passed off as a civil dispute.

20. It is well settled that the High Court in exercise of its power under Article 226 of the Constitution of India can always issue appropriate directions at the instance of an aggrieved person if it is convinced that the power of investigation has been exercised by an Investigating Officer mala fide. The malafide exercise of power need not be malafide in fact. It can be a case of malafide in law. We are conscious that this power is to be exercised in exceptional and rarest of the rare cases where a clear case of abuse of power and non-compliance with the provisions falling under Chapter XII of the Code is clearly made out requiring the interference of the High Court. It is true that in such cases, the High Court cannot direct the police as to how the investigation is to be conducted but can always insist for the observance of process as provided for in the Code, i.e. recording of FIR< and to register a criminal case and to conduct full and complete investigation and to file the final report in competent criminal court upon completion thereof."

22. We have carefully perused the report dated 11/4/2016. On certain queries, the report dated 11/4/2016 itself supports the contention of the petitioner that the Investigating Agency ought to have registered the FIR and thereafter carried out the investigation. At the end of the report the Investigating Officer had prayed to dismiss the petition with exemplary costs. Considering the record placed before us, the reports filed by the respondent – Investigating Agency, we feel that the Investigating Agency contested this petition based on documentary material as if a mini trial is being conducted. We are not expressing any opinion on the stand taken by the contesting parties on merits.

23. We are not satisfied with the explanation given by the respondent – Investigating Agency in not taking appropriate decision on the complaint lodged by the petitioner diligently. A decision was taken after near about 9 months of filing of the complaint. Delay in taking decision was abnormal which ought to have been avoided. The petitioner alleged that due to mismanagement of the companies affairs done by the persons involved and named in the complaint, they suffered loss at least to the tune of Rs.136 crores which capital was invested by the petitioner. It was submitted by the learned counsel for the petitioner that RAIF

comprises constituents like Public Sector Banks, Army Group Insurance and LIC of India. An element of public money is involved. Therefore, it was submitted by the learned counsel that this is not a case wherein the complainant be relegated to alternate remedy at this stage. We find substance in the submissions of the learned counsel on this point.

24. In view of the allegations made and information provided by the complainant in the complaint, the affidavits filed by the complainant and the reports submitted by the respondent – Investigating Agency, we are of the view that necessary directions are required to be issued to the respondents for registration of FIR.

ORDER

(I) The impugned communication dated 21/1/2016 issued by Sr. Inspector of Police, EOW, Unit – V, Mumbai is quashed and set aside.

(II) We direct the respondent – Investigating Agency, Economic Offences Wing, Crime Branch, Mumbai to register FIR on the subject complaint annexed at page 681 to the petition and commence investigation in accordance with law.

(III) It is clarified that we have not expressed any opinion on the merits of the information provided by the petitioner or allegations made by the petitioner in the complaint. All issues on merits are kept open.

(IV) It is expected that the Investigating Agency would complete the investigation at the earliest and file appropriate report consequent to the completion of investigation. The investigation shall be conducted by some other officer than the one who conducted preliminary investigation and issued communication dated 21/1/2016. The investigation shall be supervised by a senior officer of the rank of Deputy Commissioner of Police.

24. Rule is made absolute in the above terms.

(PRAKASH D. NAIK, J.) (NARESH H. PATIL,J.)