

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 2095 OF 2017

WITH

WRIT PETITION NO. 2096 OF 2017

Mr. Subrata Roy Sahara] Petitioner

Vs.

The State of Maharashtra & Ors.] Respondents

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Mr. Rajiv Chavan a/w Manoj Mohite a/w Priyatosh Tiwari, Anand Mishra a/w Sushil Upadhyay i/b A.M. Sarogi for petitioner in W.P. No. 2095 of 2017.

Mr. Priyatosh Tiwari a/w Mr. A. H. Ponda a/w Dhananjay Dubey i/b Mr. A.M. Sarogi, for petitioner in W.P. No. 2096 of 2017.

Mr. Omprakash Jha i/b The Law Point for SEBI, respondent No.2 in both the petitions.

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CORAM : R.G. KETKAR, J.

DATE : 6th June, 2017.

P.C.

Not on board. At the request of Mr. Chavan, learned Senior Counsel for the petitioner in Criminal Writ Petition No. 2095 of 2017 and Mr. Ponda, learned Counsel for the petitioner in Criminal Writ Petition No. 2096 of 2017 taken up in the production

board.

2. As regular Court presided over by Hon'ble Mr. Justice A.K. Menon passed 'not before me' order, the papers are produced before me as per the administrative order passed by the Hon'ble the Chief Justice.

3. Mr. Chavan for the petitioner in Criminal Writ Petition No. 2095 of 2017 and Mr. Ponda, for the petitioner in Criminal Writ Petition No. 2097 of 2017 submitted that matters are fixed tomorrow i.e on 7th June, 2017 for hearing on framing of charge. By order dated 18th May, 2017, learned Judge of the Special Court ordered that no discharge application by accused No.2 to 5 will be entertained hereinafter. They have, therefore, moved these Petitions for urgent interim reliefs.

4. Heard Mr. Chavan for petitioner in Criminal Writ Petition No. 2095 of 2017 and Mr. Ponda for petition in Criminal Writ Petition No. 2096 of 2017 instructed by Mr. Tiwari and Mr. Omprakash Jha, learned Counsel for respondent No.2 in both the Petitions at length.

5. Criminal Writ Petition No. 2095 of 2017 instituted by petitioner/accused No.5 takes exception to the judgment and order dated 18th May, 2017 passed by the learned Judge, SEBI Court, City Civil and Sessions Court, Greater Mumbai [for short 'trial Court'] below Exhibit 40 in SEBI Special Case No. 224 of 2014 to the extent of taking away rights of the petitioner to file discharge application as also permitting SEBI to ensure presence of the petitioner on the next date of hearing as also directing the Commissioner of Police to furnish necessary information about the movement of the petitioner on such terms as the Court may deem fit and proper. By order dated 18th May, 2017, the learned trial Judge rejected application Exhibit 40 made by the petitioner for seeking exemption of his personal appearance on 18th May, 2017.

6. Criminal Writ Petition No. 2096 of 2017 instituted by petitioner/accused No.5 takes exception to the judgment and order dated 18th May, 2017 passed by the learned trial Judge below Exhibit 40 in SEBI Special Case No. 223 of 2014 to the extent taking away rights of the petitioner to file discharge application as also permitting SEBI to ensure presence of the petitioner on the next date of hearing as also directing the Commissioner of Police to

furnish necessary information about the movement of the petitioner on such terms as the Court may deem fit and proper. By order dated 18th May, 2017, learned trial Judge rejected application Exhibit 40 made by the petitioner for seeking exemption of his personal appearance on the reason of sickness.

7. As common questions of law and fact arise in these Petitions, the same can conveniently be disposed of by this common order. Rule. Mr. Jha waives service on behalf of 2nd respondent. As 2nd respondent is the only contesting respondent in both the Petitions, notice to the first respondent is dispensed with. Having regard to the nature of controversy raised in these Petitions as also at the request and by consent of the parties, rule is made returnable forthwith and Petitions are taken up for final hearing. The relevant and material facts giving rise to filing of these Petitions, briefly stated, are as follows. For the sake of convenience, facts from Criminal Writ Petition No. 2096 of 2017 are taken into consideration.

8. Initially, 2nd respondent the Securities and Exchange Board of India [for short 'SEBI'] instituted criminal complaint being

Criminal Complaint No. 309/SW/2012 before the Additional Chief Metropolitan Magistrate 9th Court, Bandra, Mumbai under Section 26(1) read with Section 27 (1) of The Securities and Exchange Board of India Act, 1992 [for short 'Act'] for an offence under Section 24 (1) of the Act read with Sections 190 and 200 of the Code of Criminal Procedure, 1973 [for short 'Cr. P.C.] against accused No.1, Sahara Housing Investment Corporation Limited [SHICL] a Company incorporated under the provisions of the Companies Act, 1956, accused No.2, Ashok Roy Choudhari, accused No.3, Mr. Ravi Shanker Dubey, accused No.4, Ms. Vandana Bharrgava and accused No.5, Mr. Subrata Roy Sahara (petitioner herein). Respondent No.2 SEBI has alleged that accused have failed to comply with provisions of Companies Act, 1956 as also provisions of the Act and regulations framed thereunder. In view of amendments made to the Act, complaint was transferred by the Magistrate to the SEBI Special Court at Sessions Court at Mumbai. Accused No.5 filed bail application along with accused No.2 and 3. By order dated 5th August, 2015, the learned trial Judge allowed the application by granting bail subject to conditions. This order was challenged in this Court. By order dated 30th September, 2015 passed by this Court, the order granting bail was stayed. It is

common ground between the parties that stay continued till 19th December, 2016. In the meantime, by order dated 6th May, 2016, the Apex Court enlarged the petitioner from Jail for a period of four weeks on account of death of his mother. On 11th May, 2016, the Apex Court directed him to deposit Rs. 200 Crores by 11th July, 2016.

9. Respondent No.2/SEBI filed application on 1st April, 2017 at Exhibit 32 before the learned trial Judge for issuing warrant against accused No.2, accused No.3 and accused No.5. By order dated 1st April, 2017, learned trial Judge issued non bailable warrant against accused No. 2, 3 and 5. On the oral application made on behalf of the accused, learned trial Judge stayed that order as on behalf of the accused, it was stated by Advocate Mr. Tiwari that he will keep all the accused present on the next date. It was further clarified that if the accused fail to appear before the Court on the next date, order of non bailable warrant will become effective. Matter was adjourned to 12th April, 2017 for hearing on charge/appearance of accused. Accused in both the complaints, instituted Criminal Applications bearing No. 419 of 2017 and 420 of 2017 in this Court. In paragraph 11, this Court directed accused

[applicant and respondents No. 2 and 3] to give undertaking to the trial Court that they would attend the Court proceedings on every stipulated date. Undertaking was to be taken on record and upon failure to abide by the undertaking, learned trial Judge was to take coercive action against the accused. It was clarified that in the eventuality that the applicant files an application seeking exemption, the same may be considered on its own merits, more particularly, if a case is made out that there are inevitable circumstances due to which he cannot attend the Court. Learned trial Judge will not grant exemption to the accused at the stage of framing of charge and recording of evidence. Accordingly, applications were disposed of on 11th April, 2017.

10. Matter was thereafter heard on 21st April, 2017 when all the accused were present. Learned trial Judge cancelled non bailable warrant subject to the undertaking of the accused to attend Court proceedings on every stipulated date. After perusing undertaking, learned trial Judge directed accused to submit undertaking in proper format on the next date of hearing without fail. Though the matter was adjourned to 3rd May, 2017 for framing charge, by consent of both the parties the date was

postponed and matter was fixed on 18th May, 2017 and 19th May, 2017 for hearing on charge at 11.00 a.m.

11. On 18th May, 2017, accused No.5 filed application for exemption on the ground of sickness. Along with application, accused No.5 enclosed medical certificate issued by Dr. R.N. Jain. By impugned order dated 18th May, 2017, learned trial Judge rejected the application and issued notice to Dr. R.N. Jain to appear personally in the Court and file affidavit to support his contention along with medical literature pointing out as to how patient of Gastroenteritis should remain bedridden for five days and cannot attend the date of the Court when there are specific directions of the High Court. As except accused No.1, all other accused did not avail opportunity to hear on charge, the learned trial Judge made it clear that no discharge application by accused No. 2 to 5 will be hereinafter entertained. Operative part of the order reads thus:

“[1] Application Exh. 40 stands rejected.

[2] Issue notice to Dr. R.N. Jain, Noida Medicare Centre, Noida, to appear personally in the Court and file affidavit to support his contention alongwith medical literature pointing out as to how the patient of Gastroenteritis should remain bed ridden for five days and cannot attend the date of the Court, when there are specific directions of the Honourable High Court.

[3] Securities Exchange Board of India to take the necessary

steps to secure the presence of accused No.5, so that the directions of the Honourable High Court especially, in paragraph No. 11 as referred above, will be fruitful.

[4] Except accused No.1, all other accused have not availed opportunity to hear on framing charge. Hence, no discharge application by accused Nos. 2 to 5 will be entertained hereafter”.

Criminal Writ Petition No. 2096 of 2017 also challenges similar order. It is against these orders, above Criminal Writ Petitions are filed.

12. Mr. Chavan and Mr. Ponda submitted that admittedly as on date charge is not framed. They submitted that by clause 4 of the operative part of the impugned order, learned trial Judge has held that no discharge application of accused No. 2 to 5 will be entertained hereinafter. They submitted that said direction is clearly unsustainable in law. Mr. Chavan relied on the decision of this Court in case of **Shetiyyamma Pujari Dhotre Vs. State of Maharashtra, 1987 Mh. L. J. 216** to contend that accused is entitled to make a written application for discharge before framing of charge. In particular, he relied on paragraph 11 of this decision.

13. Mr. Ponda relied on the decision of this Court in case of

Pramod Narayan Bandekar and another Vs. State of Maharashtra, (2008) 4 Mh. L. J., 347 to contend that application for discharge can be filed before framing of charge. In this case the Apex Court referred to the decision of the Apex Court in case of **Ratilal Bhanji Mithani Vs. State of Maharashtra (1979) 2 SCC 179**. In this decision, the Apex Court has held that once charge is framed, Magistrate has no power under Section 227 of the Cr. P.C or under any other provision to cancel the charge, reverse the proceedings and discharge the accused.

14. Mr. Ponda further submitted that though Section 227 does not expressly provide for making of a written application for discharge, in order to ensure that the order on the discharge application deals with all the grounds raised in support of the discharge application, it is necessary that a written application is placed on record before the Court. He drew analogy from Section 437 and 439 of Cr.P.C. He submitted that even Sections 437 and 439 do not expressly provide for making written application for bail. However, as a matter of practice, written bail applications are made. It was submitted that by the impugned order, right of the accused to file discharge application is taken away. They,

therefore, submitted that order to the extent of taking away rights of the petitioner to file discharge application as also permitting SEBI to ensure presence of the petitioner on the next date of hearing as also directing the Commissioner of Police to furnish necessary information about the movement of the petitioner on such terms as the Court may deem fit and proper deserves to be set aside. Mr. Chavan assures that accused No.5 will remain present tomorrow i.e on 7th June, 2017 as also will file discharge application. Mr. Ponda submitted that accused No.1 namely Sahara Housing Investment Corporation Limited (SHICL) will file exemption application tomorrow. Mr. Chavan and Mr. Tiwari assures that accused in both the complaints will remain present tomorrow i.e on 7th June, 2017. Accused Nos. 2 to 4 will file discharge application tomorrow before the SEBI Special Court. Statements made by the learned Counsel for the accused are accepted in form of undertaking to this Court. They also assure that all the accused will attend the Court proceedings on every stipulated date. Mr. Ponda submits that Section 26D lays down that provisions of Cr. P.C shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session.

15. On the other hand, Mr. Jha submitted that Section 226 of Cr. P.C provides for opening case for prosecution. It lays down that when the accused appears or is brought before the Court in pursuance of a commitment of the case under section 209, the prosecutor has to open his case describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused. In short Mr. Jha submitted that Section 226 contemplates opening of the case by the prosecutor in presence of the accused before the Court. He further submitted that Section 227 provides for discharge and lays down that if upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in his behalf, the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing. He submitted that accused are deliberately not attending the Court proceedings, which has delayed framing of the charge. It is in this view of the matter, the learned trial Judge was fully justified in passing order directing that no discharge application of accused No. 2 to 5 will be entertained hereinafter. He, therefore, submitted that having regard to the conduct of the accused, no case is made

out for interfering with the impugned orders.

16. I have considered rival submissions of the learned Counsel for the parties. I have also perused material on record. Section 26D of Cr. P.C lays down that provisions of Cr. P.C shall be applicable to the proceedings before the Special Court. Chapter XVIII deals with trial before a Court of Session. Sections 226 and 227 read thus:

“226. Opening case for prosecution.- When the accused appears or is brought before the Court in pursuance of a commitment of the case under section 209, the prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused.

227. Discharge.- If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in his behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

17. A perusal of Section 226, more particularly opening part thereof namely **when the accused appears or is brought before the Court in pursuance of a commitment of the case under section 209, the prosecutor shall open his case** shows that the prosecutor has to open his case in the presence of the

accused. In view thereof, I do not find any merit in the submission of Mr. Ponda that at the time of opening of the case by the prosecutor, presence of the accused is not necessary. In any case, it is not open for the accused to contend that they will not appear at the time of opening of the case by the prosecutor as per Section 226 of Cr. PC in view of the order dated 11th April, 2017 passed by this Court in Criminal Application No. 419 of 2017 and 420 of 2017. Para 11 of that order reads thus:

“The applicant shall give undertaking to the court that he would attend the court proceedings on every stipulated date. The said undertaking may be taken on record and upon failure to abide by the undertaking, the learned Special Court may take coercive action against the applicant. In the eventuality that the applicant files an application seeking exemption, the same may be considered on its own merits, more particularly, if a case is made out that there are inevitable circumstances, due to which he cannot attend the Court. The learned Special Court shall not grant exemption to the accused at the stage of framing and recording of evidence.”

18. I need not dwell this issue in view of the fact that accused have given undertaking that they will attend the Court proceedings on every stipulated date. If the accused do not abide by the undertaking, learned trial Judge will take coercive actions against them.

19. This brings me to the challenge raised by accused No.5 to clause 4 of the operative part of the impugned order. It is no doubt true that complaints are pending since 2012 and the charge is not yet framed. Mr. Jha does not dispute that as on date charge is not framed. His grievance is that charge could not be framed as the accused are not attending the Court. In the case of **Ratilal** (supra) the Apex Court has held that once charge is framed, the Magistrate has no power under section 227 of Cr. P.C. In case of **State of Maharashtra Vs. B. K. Subbarao and another, 1993 CRI. L. J. 2984**, this Court has held that once charge is framed accused has to be put to trial and thereafter, either convicted or acquitted, he may not be discharged. Discharge post framing of charge is not contemplated in Cr. P.C. As the accused have given undertaking before this court that they will file discharge application tomorrow i.e on 7th June, 2017 and that they will attend the Court on every stipulated date as also at the stage of proceedings under Section 226 and 226 of Cr. P.C., in my opinion, direction issued by the learned trial Judge that discharge application of accused No. 2 to 5 will not be entertained deserves to be set aside. Accused have valuable right to file discharge application before framing of charge and that right cannot be taken

away, albeit after ensuring that they appear before the trial Court at the stage of framing of charge. Accordingly clause 4 of the operative part of the order dated 18th May, 2017 in both the Petitions is set aside. Mr. Jha assures that prosecution will open its case tomorrow i.e on 7th June, 2017 in terms of Section 226 of the Cr. P.C as all the accused have assured to remain present. Learned trial Judge will decide the discharge applications on their own merits and in accordance with law.

20. Rule is partly made absolute in aforesaid terms.

[R.G. KETKAR, J.]