IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date of Reserving Judgment 20.11.2017	Date of Pronouncing Judgment 19.12.2017

CORAM :

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Criminal Original Petition No. 24432 of 2017
in Crl M.P. No. 14145 of 2017

B.Ganesh ... Petitioner

Versus

The Superintendent of Police,
Central Bureau of Investigation,
Economic Offences Wing,
Rajaji Bhawan, III Florr,
Besant Nagar, Chennai-600 090. ... Respondent

PRAYER: Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, to call for the records in C.C.No.2500 of 2017 on the file of the Additional Chief Metropolitan Magistrate, Egmore, Chennai, for alleged offences under Sections 120B r/w 420, 468 & 471 of Indian Penal Code and quash the said C.C.No. 2500/2017 as against the petitioner.

For Petitioner : Mr. A.Ramesh, Senior Counsel
for M/s.Ramalingam and Associates

For Respondent : Mr. K.Srinivasan
Special Public Prosecutor
for CBI cases

O R D E R

The petitioner is a Chartered Accountant by profession with 12 years experience. He is also a partner in the firm M/s. Sekaran and Venkatesh. Indian Bank, Korattur Branch has employed the service of the petitioner herein to verify the credentials of one of its borrowers by name M.Murugan, proprietor of MMM Enterprises. The petitioner herein has issued due diligence certificates based on which the bank has extended housing loan for a sum of Rs.20,00,000/- to Murugan. Later it has been found that the certificates and documents such as DIS certificate, statement of bank account maintained with Kotak Mahindra Bank, Porur Branch are forged and fabricated documents and this petitioner along with the builder and others have connived to cheat the Indian Bank by producing due diligence certificate based on fabricated documents and induced Indian Bank to sanction Housing loan of Rs. 20,00,000/- to Murugan. Based on the complaint by the Bank now he is facing trial in C.C.No.2500 of 2017 on the file of Additional Chief Metropolitan Magistrate, Egmore, Chennai for alleged offence under Section 120-B r/w 420, 468 and 471 of I.P.C.

2. The petitioner seeks quash of the criminal prosecution on the grounds that, the chartered Accountant, work in all fields of business and finance including Audit, Taxation, Finance and General Management. As a part of the work, Indian Bank has engaged him to

cross verify the credential of Housing loan applicant Mr. Murugan. The questionaire was given by the Bank to be filled and submitted, based on the documents given to him. As a professional, he is expected to make preliminary enquiry to verify and comment on the financial detail provided by the loan applicant through the bank. When the housing loan application of one Murugan and Bhuvashwari along with the documents was forwarded by the bank for verification, he verified the documents and he provided "Due Diligence certificate" to Indian Bank, Korattur Branch for which a professional fees of Rs.750/- was paid to him. Vide his invoice dated 31.08.2013.

3. Based on the complaint given by one Nagarajan, General Manager/Zonal Manager of Chennai (North) Zone of Indian bank, to CBI, he was examined by IO, who asked to explain his role in the process of sanctioning loan to MMM Enterprises by the Bank. Accordingly, he has forwarded the detailed letter to the investigating officer on 09.12.2016 explaining his role in the loan transaction between the borrower and the Bank. To his shock he had been arrayed has 10th accused in the final report filed by the investigating officer. The overt act attributed to him as found in the final report is as under:-

> "...*A1 connived with A-10 B.Ganesh, Chartered Accountant of M/s. Sekaran and Venkatesan who was*

employed by Indian Bank for verification of KYC and Income Credentials of borrowers of the Bank and on 29.08.2013, issued false Due Diligence/verification report to the Indian Bank that all the Information regarding M.Murugan are Genuine and Correct inducing the bank to sanction loans to the borrower M.Murugan..."

"....Further A-2 Shri.C.Ramamoorthy, Chartered Accountant, M/s. Sarathy and Babu, and A10 B.Ganesh, Chartered Accountant of M/s. Sekaran and Venkatesh, who were employed by the Indian Bank, Korattur for verifying the credentials of the borrowers like the salary slip, Form 16, Bank statements submitted by the borrowers. But A2 and A10 had connived with A1 Shri Rajendran and gave false report to the bank that all the false certificates are genuine and verified, without actually conducting any filed verification. A2 and A10 had knowingly issued false verification/due diligence report to Indian Bank, Korattur Branch, thus inducing the bank to sanction loans to the borrowers..."

4. The petitioner contents that the role of an Auditor in case of verifying credential of the proposed borrower is to verify whether the borrower has filed the Income Tax returns; whether the bank statement provided to them reflects regular transaction or whether they are frequent returns of cheques or whether there are any other loan re-payments liability for the proposed borrower and whether he has disclosed his liabilities and assets properly in his statement. In the

ordinary course of business transaction, Indian Bank, Korattur Branch had utilised his professional service by forwarding a set of documents for verification. The documents forwarded by bank were verified and after due verification it has been returned back to the bank along with the report. The petitioner is not expected to be a Forensic Audit or engaged to find out any forgery in the document. While so, the Due Diligence Certificate is issued by him based on the documents furnished by the bank. Such act done in the course of his professional duty does not attract any penal provision. Since, the Trial Court has not properly appreciated the documents before taking cognizance of the offence against the petitioner, which per se bad in law, requires interference by the superior court under its inherent power.

5. The learned Special Public Prosecutor filed counter, wherein it is stated that the petitioner without exercising reasonable application of mind colluded with A1 and issue a false Due Diligence Certificate. Quoting the statement of LW-14 that the Kotak Mahindra Bank Statement is forged and figures are inflated he submitted that the accused/petitioner has not at all verified the Kotak Mahindra Bank Statement. The duty expected from the Chartered Accountant to verify the genuineness/correctness of the document submitted by the borrower to the lending bank (here it is Indian Bank) and give due diligence certificate thereby enabling the bank to sanction the loan

assessing the income capacity of the borrower. This exercise is meant to prevent the occurrence of any fraud and disabling any ineligible income holder from availing the bank loan. In this case petitioner/accused in connivance with co-accused, without verifying the genuineness/correctness of the statement of accounts dishonestly issued by the Kotak Mahindra Bank and gave a false due diligence certificate which ended up in sanctioning Home loan to the A-18 M.Murugan.

6. However, the learned counsel for the petitioner submitted that the statement and documents relied by the prosecution do not indicate in any manner the petitioner role in the alleged conspiracy and there is no evidence worth consideration to indicate that the petitioner aided or abetted the other accused. While the petitioner had no contact or privy to the borrower, but have professional contract only with the Indian Bank it is unimaginable to state that the petitioner connived with the builder and the borrower in the alleged fraudulent transaction.

7. The First Information Report was under the Prevention of Corruption Act against the Bank Official (Public Servant) and builders whereas in the final report the Bank Official have been given up and final report has been laid against private individuals for I.P.C offence while the Bank Official who are responsible for sanctioning loan and collection of loan had been exonerated from criminal prosecution.

8. It is unfair and unjustice to array a professional as an accused who is no way concerned with the alleged cheating. He has verified the documents produced by the Bank and issue Due Diligence Certificate and collected professional fees of Rs.750/-. Therefore, cannot be held responsible for the fraud said to have been perpetrated as against the bank.

9. The learned counsel for the petitioner extensively quoting the pronouncements of this Court as well as Apex Court regarding the responsibility and liability of professionals in discharging their professional duty, submitted that an auditor is not be and to be a detective, He is a watchdog but not a blood hound. If there is anything calculated to excite suspicion he should probe it to the bottom, but in the absence of anything of that kind he is only be and to be reasonably cautious and careful.

10. The learned Special Public Prosecutor contended that the petitioner herein who is supposed to verify the documents and given the Due Diligence Certificate has failed to show due diligence in verifying the documents. He had certified that, he verified Bank statement of MMM enterprises with Kotak Mahindra Bank, bearing Account no: 04722120003243, for the period from 01.08.2012 to 30.07.2013 and found the balance as on 30.07.2013 is Rs.32,276.80/-.

Whereas, in the statement of LW-14, Mr. Sridar, branch Head of Kotak Mahindra Bank, Porur Branch, had stated that the statement of Account of MMM Enterprise between first week of August 2012 to 31st June 2013 handed over to the IO along with the Certificate u/s.2A of Banker's Books of Evidence Act. 1891 and u/s.65-B(4)(c) of the Indian Evidence Act 1872. This account started in the year 2011 and at present the account is Dormant. Further on showing the statement of Account of MMM Enterprises from the loan documents of Indian Bank, Korattur Branch, Chennai, he has categorically stated that the same was not issued by his Branch and it appears to be forged. Though it bears the name of "Kotak Mahindra Bank" Branch-Chennai-Porur, it is not issued by his branch and appears to be forged. While comparing it with original Statement it is found that the Account Details/figures were inflated and appears to be forged.

11. Further it has been ascertain from Kotak Mahindra Bank, Porur Branch, that MMM enterprises a proprietor concerned having Account No.04722120003243 have nil balance in his account, during the period from 01.08.2012 to 31.12.2013 and the statement of account alleged to have been given by Kotak Mahindra Bank is a fabricated document and not genuine one.

12. The petitioner herein without proper verification of the manipulation in the statement of account, had certified that he had

verified the balance of MMM enterprise, and as on 30.07.2013 the balance is Rs.32,276.80/-. When there are *primafacie* material available to frame charge against the accused person, the final report cannot be quashed.

13. Thus, relying upon the statement of LW.14 Shridhar, Branch Head, Kotak Mahindra Bank, Porur Branch and LW.16 Malliga Rani, Branch Manager of India Bank Korattur Branch, the Special Public Prosecutor submitted that the evidence collected in the course of investigation discloses the fact that the statement of account of MMM enterprises at Kotak Madindra Bank, Porur Branch claim to have verified and certified by the petitioner is a fake document. As an expert in the field of Audit, the petitioner ought to have found that the document is a fake document and should have informed the bank which has trusted him and engaged his professional service. Contrary to the trust, he had certified that the prospective borrower Murugan have a sum of Rs.32,276.80/- in his bank account. This certificate has induced the Indian Bank to sanction the above loan.

14. To verify whether the contention of the petitioner that he has shown due diligence before issuing the certificate and on the perusal of the records furnished by the bank, he could not find anything calculated to excite suspicion for a probe is true, even after verifying the

applicants in person and visiting the place to their business, this court called for records pertaining to the statement of bank account as produced by the borrower and as maintained by Kotak Mahindra Bank which form part of prosecution document D.16, D.17 and D.39.

15. While D.39 is that statement of account maintained by Kotak Mahindra Bank and produced by the Kotak Mahindra Bank through LW.14, the statement of accounts found in D.16 and D.17 are fabricated statement of account. A close scrutiny of these documents reveals, the letter ahead of the Kotak Mahindra Bank containing the details of the account holder name, address, account number etc., have been superimposed upon some others account to show as if MMM enterprises is having cash balance of Rs.32,276.80/- as on 30.07.2013. Being a photocopy, the petitioner herein had failed to see the superimposition. Had the petitioner shown better amount of alacrity he could have noticed the superimposition.

16. Having failed, should he be mulcted with criminal prosecution is a point for consideration.

17. The perusal of the Due Diligence certificate given by the petitioner indicates at the bottom, that Bank Statement of the applicant not been submitted. Which means that, the Indian Bank which has

sought the professional assistance of the petitioner had not furnished adequate document of its borrower but for sake of record had requested the petitioner to provide due diligence certificate.

18. This observation of this Court emanates from the verification of the documents relied by the prosecution which is found in the file of the document 16. The petitioner herein has received the request from the Indian Bank for due diligence certificate on 29.08.2013. The petitioner has handed over the certificate on 22.09.2013 with information that on his verification, he has found that the applicant is a proprietor of MMM enterprise located at No.44, Alapakkam main road, Maduravoyal and dealing with old scarp materials.

19. His certificate also indicates that he verified the entrepreneur memorandum of MSME issued by Ministry of Industries and Commerce with entrepreneur memorandum No. 33001123960E and had verified the bank statement with Kotak Mahindra Bank AC.No. 04722120003243 for the year from 01.08.2012 to 30.07.2013 which shows balance as on 30.07.2013 is Rs.32,276.80/- He has verified the Income Tax returns copies and other documents and has recorded that there is no liability commitment had come to light at the time of verification.

20. The lending bank namely the Indian Bank had obtained the information report from Credit Information Bureau (India) CIBIL with respect to the borrower Mr.Murugan and his concern MMM Enterprises which is found in the file marked as document D16. The report of CIBIL dated 03.09.2013 indicates that the borrower Murugan had availed two loans; one consumer loan of Rs.22,100/- and another Two-Wheeler loan Rs.35,750/-. He has scored 518 points as per CIBIL rating. The range for CIBIL Trans union version 2.0 for any consumer with more than six months credit history with 300 points is rated as high risk and consumer with 900 points is rated as low risk. The due diligence certificate had been handed over to the bank by the petitioner herein on 02.09.2013 whereas CIBIL report has been obtained by the bank on the next day i.e., on 03.09.2013. In this CIBIL report, the actual balance in the account of Murugan is show as Rs.3680/- only. While so, after obtaining the due diligence certificate from the petitioner the bank has received the CIBIL report about the borrower. Through the CIBIL report they were put to Knowledge that he has already availed two loans and his bank balance is not as found in the statement of account given to them, despite this Knowledge, the Bank officials have gone ahead to grant loan to Murugan.

21. PW.16, Malliga Rani had stated during the investigation that she assessed the eligibility of Murugan on 10.09.2013 and sanctioned

Rs.20 lakhs as housing loan 11.09.2013 she had not referred anything about CIBIL report which the bank has received on 03.09.2013. Thus it is very clear from the record that the bank Official who have advanced loan had fail to forward CIBIL report to the petitioner for getting due diligence certificate and even after obtaining the CIBIL report they have not considered the entries found in the CIBIL report for themself to cross verify whether the statement of account produced by the borrower is genuine or not.

22. It is the responsible of the bank officials who advance loan to place all the necessary documents before an expert for getting his opinion. While the builder in connivance with the bank officials had purported the crime of availing loan based on forged documents, the petitioner herein who as an auditor given his Due Diligence Certificate solely based on the documents produced by the Bank. From the records it is found that the bank officials have not placed all the necessary and vital records before the auditor/petitioner, which could have enabled him to suspect the statement of account produced by the borrower.

23. While the bank officials have not been prosecuted for extending the loan, despite the receipt of CIBIL report, indicating the loans availed by the borrower Murugan and his actual bank balance on

date of sanctioning loan, the petitioner herein who has discharged his professional duty based on the documents given by the Bank Official cannot be suspected for being party to the crime and put to the ordeal of prosecution.

24. In this regard, it is pertinent to quote the judicial pronouncements citied by the learned counsel for the petitioner which throw light upon the responsibility of a professional in discharge of their duty and when a professional can be held liable for criminal prosecution

In Union of India (UOI) by department of Company, Law Administration, Ministry of Commerce of Industry vs R.N.Rajam Iyer and **others** report in ***AIR 1964 Mad398***. In this case the duties of an auditor have been explained referring the House of Lords and the Courts of Appeal in England in the light of Chartered Accountant Act, 1949.

In re ***Kingston Cotton Mill Company 1896 2 Ch 279:***

> *1.* "The duty of an auditor generally was very *carefully considered by this Court in re London and General Bank and I cannot usefully add anything to what will be found there. It was there pointed out that an auditor's duty is to examine the books..... But it was also pointed out that an auditor is not an insurer, and that in the discharge of his duty he is only bound to exercise a reasonable amount of care*

and skill, It was further pointed out that what in any particular case is a reasonable amount of care and skill depends on the circumstances of that case; that if there is nothing which ought to excite suspicion, less care may properly be considered reasonable than could be so considered if suspicion was or ought to have been aroused. These are the general principles which have to be applied to cases of this description protest, however, against the notion that an auditor is bound to be suspicious as distinguished from reasonably careful. To substitute the one expression for the other may easily lead to serious error."

2. "It is the duty of an auditor to bring to bear on the work he has to perform that skill, care and caution which a reasonably competent, careful, and cautious auditor would use. What is reasonable skill, care and caution must depend on the particular circumstances of each case. An auditor is not bound to be a detective, or as was said, to approach his work with suspicion or with a foregone conclusion that there is something wrong. He is a watch-dog, but not a blood-hound. He is justified in believing tried servants of the company in whom confidence is placed by the company. He is entitled to assume that they are honest, and to rely upon their representations, provided he takes reasonable care. IE there is anything calculated to excite suspicion he should probe it to the bottom; but in the absence of that kind he is only bound to be reasonably cautious and careful. The duties of auditors must not be rendered *too onerous. Their work is responsible and laborious and the remuneration moderate."*

3. "On the face *of this explanation offered by the first respondent, is it possible for me to say that, as per the provisions of Section 21(5) and Section 22-A or the second schedule part I, R. (5), the respondent, a chartered accountant in practice, shall be deemed to be guilty of professional misconduct if he failed to disclose a material fact known to him which is not disclosed in a financial statement, but disclosure of which is necessary to make the financial statement not misleading. Neither the Registration of Companies nor the Deputy Secretary to the Government of India who laid the information to the Council of the Institute of Chartered Accountants, has ever said in clear and explicable terms that the auditor was aware of the material fact that the Managing Agents' term expired, at the time of the audit and still he approved the remuneration paid to them and that he did not disclose that fact in the financial statement. Absolutely there is no material in the record; nor any attempt has been made by Government to prove that he was aware of such a document at the time of the audit and yet he failed to discharge the duties of an auditor. The first respondent has been charged of professional misconduct. It is a serious charge. It is the duty of the concerned authorities to place sufficient material and also to adduce sufficient legal evidence to prove that he committed the offence with which he has been charged, namely, that he failed to disclose a material* *fact known to him. The members of the Disciplinary Committee themselves did not give a definite finding that he was aware of such a material fact at the time of audit. What they say in their report is that he was grossly negligent in not verifying at the time of audit whether the managing agents' agreement was still in force or not".*

25. As pointed out earlier, after due diligence certificate given by the petitioner herein, the bank has obtained report from CIBIL which has disclosed the actual credit worthiness of the borrower. Despite receiving the CIBIL report, the bank had gone ahead to sanction loan. The officials incharge and responsible for granting loan are not prosecuted. In the FIR this petitioner was not arrayed as an accused. Because he has given due diligence certificate based on the documents furnished by the bank which later found to be forged, this petitioner cannot be tried for the offence of conspiracy, coupled with forgery, cheating and breach of trust without basic materials to co-relate him with the alleged documents.

26. In this case, the records relied by the prosecution as against the petitioner herein is the statement of LW.16 Malliga Rani, Branch Manager that she sanctioned loan to Murugan based on the due diligence certificate given by the Audit/petitioner herein. When the record indicates that they have obtained CIBIL report rating of the borrower before advancing the loan and despite adverse information

they have extended loan, her statement does not appears to be correct or true. Therefore it is very clear from the statement of LW.16 that they have over looked the relevant materials which were available with them before granting loan. To make proper assessment and appraisal or to seek expert opinion the Bank should have furnished the CIBIL report to the Auditor. Without furnishing relevant documents but expecting the auditor to do the job of deductive, does not fall within the scope and ambit of Auditors profession.

27. In ***Central Bureau of Investigation, Hyderabad versus K. Narayana Rao*** reported in (2012) 9 SCC 512 the Hon'ble Supreme Court has observed that:

> *In the banking sector in particular, rendering of legal opinion for granting of loans has become an important component of an advocate's work. In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skills. A lawyer does not tell his client that he shall win the case in all circumstances. Likewise a physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be given by implication is that he is possessed of the requisite skill in that branch of profession which he is*

practising and while undertaking the performance of the task entrusted to him, he would be exercising his skill with reasonable competence. This is what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of the two findings, viz., either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess.

However, it is beyond doubt that a lawyer owes an "unremitting loyalty" to the interests of the client and it is the lawyer's responsibility to act in a manner that would best advance the interest of the client. Merely because his opinion may not be acceptable, he cannot be mulcted with the criminal prosecution, particularly, in the absence of tangible evidence that he associated with other conspirators. At the most, he may be liable for gross negligence or professional misconduct if it is established by acceptable evidence and cannot be charged for the offence under Sections 420 and 109 of IPC along with other conspirators without proper and acceptable link between them. It is further made clear that if there is a link or evidence to connect him with the other conspirators for causing loss to the institution, undoubtedly, the prosecuting authorities are entitled to proceed under criminal prosecution. Such tangible materials are lacking in the case of the respondent herein.

28. The material relied by the prosecution does not indicates any *primafacie* evidence against the petitioner to suspect that he had knowledge about the fabricated Statement of account or he had been privy to the alleged conspiracy with the builder, borrower and the Bank officials. The Due Diligence Certificate issued by the petitioner herein based on the documents given by the Bank for his perusal, does not reveal any suppression of facts or dereliction of duty or culpable state of mind to cheat the Bank.

29. For the above said reason, the case in C.C.No.2500 of 2017 as against this petitioner alone is quashed.

30. In the result, the Criminal Original Petition is allowed. Consequently, the connected miscellaneous petition is closed.

19.12.2017

speaking/non speaking
Index:Yes
Internet:Yes/No
bsm

To

The Superintendent of Police,
Central Bureau of Investigation,
Economic Offences Wing,
Rajaji Bhawan, III Florr,
Besant Nagar, Chennai-600 090.

DR.G.JAYACHANDRAN.J,

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