IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.311 OF 2018

1. Shashikant Bhanudas Zambre,
Age : 42 years, Occu. Agri.

2. Chintaman Waman Nehate,
Age : 65 years, Occu. Agri.

3. Dr. Narendra Waman Kolhe,
Age : 54 years, Occu. Agri.

4. Mohan Gopal Ingle,
Age : 55 years, Occu. Agri.

5. Pralhad Pandit Waghulde,
Age : 69 years, Occu. Agri.

6. Suresh Pralhad Kulkarni,
Age : 60 years, Occu. Agri.

7. Sanjay Baliram Rane,
Age : 57 years, Occu. Agri.

8. Murlidhar Kedar Nath,
Age : 56 years, Occu. Agri.

9. Sau. Pratibha Rajendra Rane,
Age : 50 years Occu. Household

10. Sau. Sindhu Prabhakar Sarode,
Age : 58 years, Occu. Household

All r/o At post Bamnod,
Tal. Yawal, Dist. Jalgaon **PETITIONERS**

VERSUS

1. The State of Maharashtra,
through Faizpur Police Station
Office In-Charge, Faizpur,
Tal. Yawal, Dist. Jalgaon

2. Pradip Ananda Thoke,
Age : 43 years, occu. Ex-Chairman

3. Dilip Nathu Jawale,
Age : 55 years, occu. Ex-Chairman

4. Jagannath Dhondu Bhangale,
Age : 58 years, Occu. Chairman

A.. r/o at Post Bamnod,
Tal. Yawal, Dist. Jalgaon

5. Dilip s/o Chintaman Shinde,
Age : 46 years, Occu. Service,
R/o Mohan Nagar, Plot No.34,
Samartha Houg. Society,
Jalgaon, Tq. & Dist. Jalgaon **RESPONDENTS**

Mr. Shailesh P. Brahme, Advocate for the petitioners
Mr. S.D. Ghayal, A.P.P. for the respondent/State
Mr. Chetan Jadhav, Advocate for respondent Nos.2 to 4

CORAM : SANGITRAO S. PATIL, J.

DATE : 8th JUNE, 2018

ORAL JUDGMENT :

The petitioners have taken exception to the order dated 16th February, 2018 passed below application (Exh-193) in Regular Criminal Case (RCC) No.147 of 2011 by the learned Judicial Magistrate First Class, Yawal, whereby the petitioners have been summoned as accused vide Section 319 of the Code of Criminal Procedure ("Code", for short).

2. The informant namely Dilip Chintaman Shinde, the Auditor of Cooperative Societies, conducted audit of Bamnod Rural Cooperative Credit Society Ltd., Bamnod, Taluka Yawal, District Jalgaon ("Society", for short) in respect of the period from 1st April, 2008 to 31st March, 2009. During the audit, he noticed that the loan was sanctioned to three of the borrowers (accused Nos.8, 9 and 10), exceeding the maximum limit of Rs.50,000/- and further without taking any security from them. It was further noted that the loan was sanctioned and disbursed exceeding the permissible limit to four of the borrowers (accused Nos.4, 5, 6 and 7), who were closely related to some of the Directors of the Society. Moreover, the loan was sanctioned exceeding the permissible limit to one of the Directors (accused No.2). It was further noticed that the Chairman and Directors of the Society invested the funds of the Society in some of the other societies, which were not financially sound, resulting into loss to the Society and its members. The informant observed that there was a fraud in the sum of Rs.1,85,35,568/-, for which the Chairman, Directors, Manager and the above mentioned borrowers were responsible.

3. The informant submitted the audit report to the Special Auditor, who, in turn, forwarded it to the Public Prosecutor for his opinion. After seeking opinion of the Public Prosecutor, the informant lodged FIR against the above mentioned twelve accused persons, who, prima facie, were involved in the above mentioned illegal activities. Accordingly, Crime No. 3 of 2011 came to be registered against them for the offences punishable under Sections 406, 408, 409, 420 read with Section 34 of the Indian Penal Code ("IPC", for short) and under Section 70 (d) of the Maharashtra Cooperative Societies Act, 1960. The investigation followed. After completion of the investigation, those twelve accused persons came to be chargesheeted for the above mentioned offences.

4. The borrowers/accused Nos.4,7,9 and 10 filed Criminal Applications before this Court, seeking discharge of the above mentioned offences. The said applications came to be disposed of vide order dated 4th July, 2017 and the learned Magistrate was directed to decide the criminal case as expeditiously as possible, preferably within a period of one year from the date of

the order.

5. The learned Judicial Magistrate First Class framed charges against all the twelve accused persons and recorded examination-in-chief of the informant by 8th September, 2017, on which date, the cross-examination was postponed. It seems that when the case came up for hearing on 6th October, 2017, ten of the accused persons filed an application (Exh-193) for adding the present petitioners as accused in the above numbered case on the ground that in the examination-in-chief of the informant, he produced copy of the proceeding book (Exh-139) containing resolution No.3 passed in the meeting dated 5th July, 2003, whereunder the loan was sanctioned to six borrowers, including accused No.8 Abhijit Ashok Deshmukh and that the said resolution was unanimously passed by the then Chairman and Directors, including the present petitioners. It is stated that the said meeting was attended by the Chairman, Vice-Chairman and eleven Directors, out of which only the Chairman (accused No.1), the Vice-Chairman (accused No.2) and one of the Directors (accused No.3) only were arrayed as accused persons. It was prayed that it would be necessary in the interest of justice to add all other Directors as

accused persons.

6. The application (Exh-193) filed by the accused persons was resisted by the petitioners. They clarified that the Auditor did not find any offending act committed by the petitioners. The informant obtained opinion of the Public Prosecutor prior to filing of the FIR. The Public Prosecutor Pleader also did not find anything against the present petitioners. Therefore, they were not made accused by the informant. Even during the course of investigation, nothing transpired against them. Therefore, the Investigating Officer did not add them as the accused persons. It was stated that the petitioners did not commit any offence. The accused/ respondents filed the application with malafide intention just to protract trial and harass the petitioners. The petitioners, therefore, prayed for rejection of that application.

7. After hearing the learned counsel for the accused/respondents and the petitioners and considering the evidence of the informant, coupled with the copy of the resolution (Exh-139) dated 5th July, 2003, the learned Judicial Magistrate held that the present

petitioners also were the signatories to the resolution sanctioning loan to borrowers. Therefore, they also are responsible for misappropriation of the funds of the Society. He, therefore, passed the impugned order adding the present petitioners as accused persons and directed issuance of summons against them.

8. The learned counsel for the petitioners submits that there is absolutely no evidence against the petitioners to connect them with any of the above mentioned offences. He submits that as per the resolution dated 5th July, 2003 (Exh-139), the loan was sanctioned to six borrowers. One of the borrowers was Abhijit Ashok Deshmukh (accused No.8). It is mentioned in the audit report that the amount of Rs.10,00,000/- was sanctioned to him by way of loan without getting security from him and that the amount of Rs.6,17,353/- was due from him by 31st March, 2009. He pointed out to the certificate issued by the Manager of the Society wherein it is mentioned that accused No. 8 Abhijit Ashok Deshmukh has repaid the entire loan amount with interest by 26th December, 2011. The learned counsel submits that since accused No. 8 Abhijit has repaid the entire loan amount with interest, no loss can be said to have been

caused to the Society because of disbursement of loan to him. He submits that even if it is accepted for a while that the loan was sanctioned to accused No.8 Abhijit, exceeding permissible limit and without obtaining adequate security from him, that by itself would not constitute any offence. At the most, according to him, it would be an irregularity and in case the said loan remains unpaid, the amount of loss is liable to be recovered from the Directors. However, they cannot be said to have committed cheating, fraud or misappropriation in respect of the amount sanctioned in such a manner. The learned counsel submits that since there is only one allegation against the present petitioners that they disbursed the loan to accused No.8 Abhijit exceeding permissible limit without getting security and since accused No.8 has repaid the entire loan amount alongwith interest on 26th December, 2011, the petitioners cannot be connected with the above mentioned offences. He submits that the other signatories to the resolution dated 5th July, 2003 (Exh-139) are connected to many other transactions constituting the above mentioned offences. Therefore, it cannot be said that any pick-and-choose method was used by the Auditor and the Investigating Officer and the accused/respondents alone came to be prosecuted by deliberately excluding the present petitioners. The learned counsel submits that as held in the case of ***S. Mohammed Ispahani Vs. Yogendra Chandak and others AIR 2017 SC 4994***, the power under Section 319 of the Code is discretionary and extraordinary, which has to be exercised sparingly and only in case where the circumstances of the case warrant. He submits that there is absolutely no evidence against the petitioners to show, prima facie, that they are involved in the above mentioned offences. According to him, the learned Judicial Magistrate did not consider the facts of the case properly and wrongly passed the impugned order, adding the present petitioners as the accused persons. According to him, prosecuting the petitioner, in the circumstances of the case, would be nothing but an abuse of the process of law. He, therefore, prays that the impugned order may be set aside.

9. The learned counsel appearing for the accused/ respondents supports the impugned order. He submits that though the petitioners were the signatories to the resolution (Exh-139) dated 5^{th} July, 2003, whereunder the loan of Rs.10,00,000/- was sanctioned to accused No.8

Abhijit Ashok Deshmukh, they have been excluded by the Auditor as well as the Investigating Officer and the other signatories only have been prosecuted for the above mentioned offences. According to him, such pick and choose method cannot be used by the Auditor and the Investigating Officer. He submits that it would not be permissible to sanction loan exceeding the permissible limit. However, the petitioners are the signatories to the resolution sanctioning loan of Rs.10,00,000/- to accused No.8 Abhijit and that too without taking security from him. In view of this resolution (Exh-139), the learned counsel submits that there is prima facie case to show involvement of the present petitioners in the above mentioned offences. He, therefore, prays that the petition may be dismissed.

10. There is no dispute that the petitioners have signed the resolution (Exh-139) dated 5th July, 2003, being the Directors of the Society, whereunder loan of Rs.10,00,000/- was sanctioned to accused No.8 Abhijit Ashok Deshmukh. The informant has noticed that no security was obtained from accused No.8 Abhijit. It is also not in dispute that accused No.8 Abhijit has repaid the entire loan amount with interest by 26th December,

2011. As such, no loss has been caused to the Society because of the loan that was sanctioned to accused No.8 Abhijit. Even if it is accepted for a while that the loan exceeding the permissible limit was sanctioned to accused No.8 Abhijit without getting security from him, that by itself would not amount to committing of any of the above mentioned offences. At the most, it would be an irregularity and in case the loan sanctioned to accused No.8 Abhijit could not have been recovered, the Chairman and the Directors of the Society would have been under an obligation to make good the loss sustained by the Society. Therefore, only because the petitioners are the signatories to the resolution (Exh-139), prima facie, they cannot be connected with the above mentioned offences, more particularly when neither the Auditor nor the Investigating Officer found the petitioners connected with any of the offences.

11. Here, reference may be made to the judgment in the case of ***S. Mohammed Ispahani*** (supra), cited by the learned counsel appearing for the petitioners, wherein it is observed that only where strong and cogent evidence occurs against a person from the evidence led before the Court that the power under Section 319 of the

Code should be exercised and not in a casual and cavalier manner. It is further observed that the power under Section 319 of the Code is extraordinary and discretionary, which has to be exercised sparingly and only in those cases where the circumstances of the case so warrant. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom the charge-sheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the Court that such power should be exercised. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity.

12. In the present case, as stated above, the petitioners have been ordered to be added as accused persons only on the sole ground that they also were the signatories to the resolution (Exh-139) dated 5th July, 2003, under which the loan of Rs.10,00,000/- was sanctioned to accused No.8 Abhijit Ashok Deshmukh. Except this, there is absolutely nothing to connect the petitioners with the above mentioned offences. As stated above, accused No.8 Abhijit has already repaid the entire loan amount alongwith interest. In the

circumstances, sanction of loan to accused No.8 Abhijit exceeding the permissible limit without obtaining security from him, by itself, would not constitute any offence.

13. The learned Judicial Magistrate did not consider the facts of the case correctly and properly and wrongly directed to add the petitioners as accused persons. The learned Judicial Magistrate did not exercise the discretion vested in him judiciously. The impugned order is illegal and perverse. It is liable to be set aside.

14. As per the order dated 4th July, 2017 passed by the Division Bench of this Court, the learned Judicial Magistrate was directed to decide the above numbered case expeditiously and preferably within a period of one year from the date of that order. Because of the impugned order, it seems that the trial of the case has been prolonged. In the normal course, the learned Judicial Magistrate was supposed to seek extension of time from this Court, which directed to decide the case within a particular time limit. There is nothing on record to show that the learned Judicial Magistrate

applied for extension of time from the Division bench of this Court for deciding the case. If he has not applied for extension of time, he shall make necessary application with the reasons for the delay and seek extension of time. He shall decide the case expeditiously within the time fixed by this Court.

15. In the result, I pass the following order:-

ORDER

(I) The order dated 16th February, 2018 passed below application (Exh-193) in Regular Criminal Case (RCC) No.147 of 2011 by the Judicial Magistrate First Class, Yawal is quashed and set aside.

(II) The Criminal Writ Petition is accordingly allowed and disposed of.

[**SANGITRAO S. PATIL**]
JUDGE

npj/criwp311-2018