

SMT JUSTICE T. RAJANI

CRIMINAL PETITION No.7794 of 2013

ORDER:

The criminal petition is filed for quash of the proceedings in CC.No.131 of 2013 on the file of the Special Judge for Economic Offences cum Additional Metropolitan Sessions Judge, Hyderabad.

2. Heard the counsel for the petitioner and the learned Public Prosecutor appearing for the first respondent and the counsel for the second respondent.

3. The counsel for the petitioner submits that this Court has already passed orders in CRLP.Nos.8618 and 8835 of 2013 dated 22.12.2017, which hold good to this case also, as the facts are one and the same.

4. The counsel for the respondents also does not deny the said submission. They do not refute the contentions and do not state that the facts of this case are different.

5. The petitioner herein is an auditor in A1 bank. This Court in CRLP.Nos.8618 and 8835 of 2013 dated 22.12.2017, after considering the rival contentions therein, which are the same contention in this petition, held as under:

“Criminal Petition No.8618 of 2013 is filed by A6 in CC.No.124 of 2013, while Criminal Petition No.8835 of 2013 is filed by A3 in CC.No.125 of 2013 seeking for quash of the proceedings against the petitioners in CC.Nos.124 and 125 of 2013 respectively on the file of Special Judge for Economic Offences—cum-Additional Metropolitan Sessions Judge, Hyderabad.

2. The grounds, on which the petitions are filed, are almost the same. Hence, they are taken up for a common consideration and disposal.

3. A perusal of the complaint in the foremost would be profitable, in order to understand the allegations against these petitioners. M/s. Global Trust Bank is Banking Company and obtained Certificate of Incorporation on 29.10.1993 vide registration No.01-16502 of 1993-94 issued by the Registrar of Companies, Hyderabad and the Certificate of Commencement of Business on 10.11.1993. A1 to A3 are the Directors of the Company at the relevant point of time and A4 is the Company Secretary and signatory to the balance sheet of the company, for the relevant period. The balance sheet in C.C.No.8835/2013 pertains to the year 2002-03 and in C.C.No.8618/2013 it is for the years 1998 to 2002. A6 in CC.No.124 of 2013 and A3 in CC.No.125 of 2013 are stated to be the Auditors of the Company and signatories to the balance sheet at the relevant point of time.

4. The facts of the case, as narrated in the complaint, are that e-GTB, under the Chairmanship of one Ramesh Gelli, acquired a reputation for aggressive growth. Lending/advances was made in volatile and risky sectors, including the Capital Market, often at the cost of prescribed norms, guidelines and procedures. The stock market scam of 2001, led by one Ketan Parekh group, further hit at the fundamentals of the Bank. With the crisis of banking operations coming to a halt, Mr. Ramesh Gelli, came under increasing fire and was removed as CMD, to be replaced by Mr. R.S. Hugar. Consequent to mounting troubles, the bank was placed under moratorium, by the Reserve Bank of India (RBI) in July 24, 2004 up to October 23, 2004 and subsequently was amalgamated with the Oriental Bank of Commerce (OBC) in August 2004. Subsequent to the amalgamation, the OBC came across, in its view, serious irregularities in the prior working of e-GTB management. There was an investigation by the Serious Fraud Investigating Office (SFIO). Prior to the said investigation, e-GTB has been subject to scrutiny by the various agencies. RBI has conducted periodical Annual Financial Inspection (AFI) and it observed number of irregularities. It was found during investigation by

SFIO, that the promoters, along with their relatives and associates, were found to have concealed material facts. From the records, it was seen that e-GTB committed various irregularities. It is evident that RBI, during Annual Financial Inspection, also noticed several irregularities in A6 and A3 audit period, such as the Bank not maintaining the real value of the minimum capital prescribed. The auditors' report annexed with the relevant balance sheet was silent on certain issues, though it was the duty of the statutory auditor to report such matters in the auditors report.

5. With the allegation that A6 and A3, being auditors, did not submit auditors' report and that they also signed the balance sheet, the complaint was filed against them also.

6. Now in these quash petitions, the petitioner's counsel raises several technical grounds which do not permit the sustenance of the prosecution against A3 and A6. He submits that A3 is not a signatory to the balance sheet and the same is admitted and is evident from the balance sheet. He submits that in spite of A6 being a signatory to the balance sheet, prosecution cannot be launched against him under the Companies Act (for short 'the Act'), as Section 211 is not applicable to the Banking Company.

Section 211 of the Act reads as under:

"211. (1) Every balance sheet of a company shall give a true and fair view of shall, subject to the provisions of this section, be in the form set out in Part I of Schedule VI, or as near thereto as circumstances admit or in such other form as may be approved by the Central Government either generally or in any particular case; and in preparing the balance sheet due regard shall be had, as afar as may be, to the general instructions for preparation of balance sheet under the heading "Notes" at the end of that Part:

Provided that nothing contained in this sub-section shall apply to any insurance or banking company or any company engaged in the generation or supply of electricity or to any other class of company for which a

form of balance sheet has been specified in or under the Act governing such class of company.”

The proviso clearly exempts banking company from the application of sub-section (1) of Section 211. Hence, even if a balance sheet does not disclose true and fair facts of the state of affairs of the company, a banking company cannot be prosecuted under the Companies Act. There is no counter argument to the said submission made by the petitioners’ counsel.

7. The next contention is that Section 628 of the Act does not apply to the petitioners, as the balance sheet, which is prepared under Section 211 of the Act, is hit by Section 211 and hence, the Banking Company having been exempted under the proviso to Section 211(1), Section 628 of the Act also does not apply to the petitioners.

8. Section 628 of the Act is a penal provision not only for a false statement but also for a false report. According to the complaint, there was an auditor’s report annexed to the balance sheet, which contain false particulars. Hence, *prima facie*, Section 628 of the Act applies. But the counsel raises an objection for the case to be taken on file, on the ground that there is no authorisation for the complainant to file complaint against these petitioners, who are auditors.

9. The other contention is that Section 235 of the Act does not authorise the ministry of corporate affairs or any member of SFIO to summon the petitioner to give any evidence.

Section 235 is extracted hereunder for ready reference:

“235. (1) the Central Government may, where a report has been made by the Registrar under sub-section (6) of the Section 234, or under sub-section (7) of that section, read with sub-section (6) thereof, appoint one or more competent persons as inspectors to investigate the affairs of a company and to report thereon in such manner as the Central Government may direct.

(2) Where-

(a) in the case of a company having a share capital, an application has been received from not less

than two hundred members or from members holding not less than one-tenth of the total voting power therein, and

(b) in the case of a company having no share capital, an application has been received from not less than one-fifth of the persons on the company's register of members.

The Tribunal may, after giving the parties an opportunity of being heard, by order, declare that the affairs of the company ought to be investigated by an inspector or inspectors, and on such a declaration being made, the Central Government shall appoint one or more competent persons as inspectors to investigate the affairs of the company and to report thereon in such manner as the Central Government may direct."

10. According to the above provision, the Central Government shall appoint one or more competent persons as Inspectors, to investigate the affairs of the company and report therein in such a manner as the Central Government may direct.

11. The counsel takes this court through the order of the Director of Serious Fraud Investigation, wherein it is mentioned that on the basis of the report submitted by the Inspectors appointed by the Central Government in exercise of its powers under Section 235 of the Act, in respect of Global Trust bank Limited, Ministry of Corporate Affairs by virtue of a letter, dated 23.07.2012 authorised Serious Fraud Investigation Office to file complaints in respect of offences committed by the company and its Directors under the Act.

12. It is specific that the company and its Directors are the persons against whom the complaint was directed to be filed. The letter addressed by the Joint Director, Ministry of Corporate Affairs, Government of India to the Director of Serious Fraud Investigation, shows that the RBI is the Regulatory Authority of the Bank and it has already filed complaint in the Court. It also shows that it was taken note of, that regarding prosecution under Section 628 of the Act, Section 211 exempts Banking Company. SFIO was also advised to forward his findings/charges to RBI for further necessary action. It was also

further advised to re-examine the issue of prosecution under Section 628 as to how it was applicable to the company, which was a banking company.

13. While observing as such, SFIO was advised to initiate prosecution against statutory auditors of relevant period under Section 227 read with Section 233 and under Section 628 of Act. But, however, it states that the matter may further also be referred to the Institute of Chartered Accountants of India to initiate disciplinary action against the statutory auditors of the Bank.

14. Section 227 of the Act only lays down the powers and duties of auditors while Section 233 of the Act is a penal provision for the auditors report or any document of the company being signed or authenticated otherwise than in conformity with the requirement of Sections 227 and 229 of the Act. The material and the correspondence between the Ministry of Corporate affairs and the SFIO would show that they were conscious of the fact that the Act would not apply to the Banking Company and that the Global Trust Bank is a banking company. It was also conscious of the fact that Section 211 exempts the auditors from the application of sub-section (1) of Section 211, thereby, Section 628 of the Act does not apply, as the authorization to file the complaint is only with regard to the company and its directors.

15. The counsel for R2 contends that the authorisation is given not only to prosecute the company and its Directors but also others, as the word 'etc' is used in the said authorisation. No doubt, the authorisation, in the prologue mentions the word, 'etc'. But while authorising one D.A. Sampath, who is the complainant herein, it did not specify that apart from Company and Directors, others also should be prosecuted. Hence, the word, 'etc' cannot be understood to mean that prosecution against others was also intended by virtue of the said authorisation. Nothing prevents the authorisation to clearly specify the persons, against whom complaint is directed to be filed. However, this court was hesitant to allow the petition with regard to the offence under Section 227 of the Act simply on the ground that the authorization was not there, with a

doubt that the said error can be rectified subsequently by obtaining proper authorisation to prosecute the auditors also. No support could be drawn by either side in support of their respective contentions. The contention of the petitioners, being that since the very basis of the complaint is the authorisation, the prosecution gets vitiated in the absence of any authorisation, the contention of the respondent is that the lack of authorisation does not vitiate the prosecution. But however, a ruling of this court could be picked up by me, which is rendered in *Satish & Co., v. S.R.Traders and Ors.*¹, wherein with a reasoning, which is satisfactory to this court, it was held that the lack of authorisation at the time of filing of the complaint cannot be rectified subsequently. The Court posed to itself the question whether even in cases where proper authorization letter or power of attorney was not filed, along with the complaint, whether the company can ratify such actions later or whether such authorization letter can be filed later so as to regularize the irregular proceedings. By observing that the object of law in all such cases, that the complaint or suit shall be filed by a person duly authorised, is that, such proceedings will definitely have financial consequences on the company so as to bind the company for the actions of such persons, held that even subsequent authorisation would not regularize the irregularity which was there at the time of filing the complaint. Here, in this case, though such interest is not involved in the complainant department, as is involved in case of a company, there should be proper authority to file the complaint. When so much of exercise goes into the decision of prosecuting a person, as has gone in this case, a complaint cannot be filed casually against a person, without there being any authorisation. The complainant in this case is not acting individually and he is acting on behalf of the department, which has authorised him only to do a certain thing. The complainant cannot go beyond the authorisation and file the complaint against those persons, in respect of whom he is not authorised. Hence, though, the matter dealt with by this High Court related

¹ 1997(1) ALD (Cri.) 745 (AP)

to a Company, on an analogical plane, it can be applied to this case.

The material produced by the petitioners is looked into as it is permitted by the Apex Court in *Rajiv Thapar and others vs. Madan Lal Kapoor*². Relevant paragraph reads as follows:

“29. The issue being examined in the instant case is the jurisdiction of the High Court under [Section 482](#) of the Cr.P.C., if it chooses to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under [Section 482](#) of the Cr.P.C., at the stages referred to hereinabove, would have far reaching consequences, inasmuch as, it would negate the prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section - 482 of [Cr.P.C.](#) the High Court has to be fully satisfied, that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such, as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such, as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality.

² 2013(3) SCC 330

The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under [Section 482](#) of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashing, raised by an accused by invoking the power vested in the High Court under [Section 482](#) of the Cr.P.C.:-

(i) Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?

(ii) Step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.

(iii) Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/complainant?

(iv) Step four, whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal - proceedings, in exercise of power vested in it under [Section 482](#) of the Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings

arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused.”

15. Hence, in view of the above, continuance of further proceedings in C.C.Nos.124 and 125 of 2013, against the petitioners, on the file of Special Judge for Economic Offences–cum-Additional Metropolitan Sessions Judge, Hyderabad would be a futile exercise and would only result in abuse of process of law.

16. The Criminal Petitions are allowed and further proceedings in C.C.Nos.124 and 125 of 2013 respectively on the file of Special Judge for Economic Offences–cum-Additional Metropolitan Sessions Judge, Hyderabad against the petitioners, who are A6 and A3, are hereby quashed.

As a sequel, the miscellaneous applications, if any pending, shall stand closed.”

In the light of the above, the criminal petition is allowed and the further proceedings in CC.No.131 of 2013 on the file of the Special Judge for Economic Offences cum Additional Metropolitan Sessions Judge, Hyderabad, against the petitioner, are hereby quashed. As a sequel, the miscellaneous petitions, if any pending, shall stand closed.

August 23, 2018
DSK

T. RAJANI, J