IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO. 60 OF 2017

Ratan Mishra ... **Applicant**
V/s.
Securities and Exchange
Board of India & Anr. ... **Respondents**

Mr.Subodh Desai a/w. Ms.Kathleen Lobo i/b. Khaitan & Co. for Applicant.
Mr.Raghav Shekhar i/b. The Law Point for Respondent No.1.
Mr.R.M. Pethe, APP for Respondent No.2.

CORAM : A.S. GADKARI, J.

DATE : 9th October 2019.

P.C. :

1] By the present Petition under Section 397 of the Criminal Procedure Code (for short, "Cr.P.C."), the applicant/original accused No.2 has questioned the correctness, legality and propriety of Order dated 16th November 2016 passed below Exhibit-11 in SEBI Special Case No. 318 of 2014, rejecting the application preferred by the applicant for his discharge under Section 239 of Cr.P.C. from the said case.

2] Heard Mr.Desai, learned counsel for the applicant, Mr.Raghav Shekhar, learned counsel for the respondent No.1 and Mr.Pethe, learned APP for the respondent No.2-State. Perused the record annexed to the application.

3] The applicant is accused No.2 in SEBI Special Case No.318 of 2014. It is the allegation against the applicant and other accused persons that, the accused No.1 AMI Computers (I) Limited is a company within the meanings of Companies Act, 1956 and accused Nos.2 to 6 are the 'Directors' of the accused No.1 and are responsible for the offence of accused No.1-company. That Mr.Satish Chaudhary residing at Vile Parle (West), Mumbai, has made a complaint to the complainant, *inter-alia,* against Maikaal Fibers Limited, a listed company, having its office at 206/207, Maker Bhavan No.3, 21, Marine Lines, Mumbai, in respect of transfer / pledge of shares of Maikaal Fibers Limited and its Share Transfer Agent i.e. the accused No.1 herein, namely, AMI Computers (I) Limited. It is the precise allegation that, the accused No.1 including its Directors registered as a category-I Registrar to issue and share transfer agent. The registration of the accused No.1 had expired on 15th September 2006 and as required under Section 12 of the Securities and Exchange Board of India Act, 1992 (for short, "SEBI Act"), the accused No.1 had not applied for renewal of its registration. That though the accused No.1 had ceased to be category-I Registrar to issue as share transfer agent in the month of September-2006 they represented the complainant and acted in their capacity as category-I Registrar to issue as share transfer agent. In this premise the complainant SEBI filed the aforestated complaint initially in the Court of Additional Chief Metropolitan Magistrate, 9th Court, Bandra, Mumbai.

4] Learned Magistrate took cognizance of the said offence and issued process against the accused persons on 20th October 2008. The said complaint was subsequently transferred before the Special Court constituted under the SEBI Act in due course of time.

The record further indicates that, the applicant/original accused No.2 thereafter filed an application below Exhibit-11 under Section 239 of the Cr.P.C. for his discharge from the said case. The learned Judge of the SEBI Special Court, Greater Mumbai, by its impugned Order dated 16th November 2011 has rejected the said application.

5] Mr.Desai, learned counsel for the applicant submitted that, the applicant had resigned from the company as a 'Director' on 7th April 2003 and therefore in July 2008 for the acts committed by the accused No.1- company, he can not be held responsible. He further submitted that, the resignation of the applicant was accepted and acted upon by the accused No.1-company. That the accused No.1-company in its 'Annual General Report' for the year 2003-2004 has mentioned the said fact. He submitted that, there is sufficient material available on record to infer that the applicant infact ceased to be a 'Director' of the accused No.1-company with effect from 7th April 2003.

Mr.Desai, submitted that, in its letter dated 12th November 2009 issued by the Deputy Registrar of the Companies, Kolkata, West Bengal, it is stated that, one Form No.32 dated 7th April 2003 had been filed/presented by

Mr.Kundan Mal Jain of the said company informing changes in the particulars of the earstwhile Board of that Corporate Entity by resignation of Mr.Ratan Mishra from that Board with effect from 7th April 2003. He therefore submitted that, there is supporting material for submission of Form No.32 by the Accused No.1-company depicting the resignation of the applicant from the Board of Directors of the said company.

He further submitted that, the order of issuance of process passed by the learned Magistrate is a cryptic order which does not reflect that the learned Magistrate had infact applied its mind before issuance of process in the matter. In support of his contention Mr.Desai relied upon a decision of the Hon'ble Supreme Court in the case of *Birla Corporation Limited V/s. Adventz Investments and Holdings Limited and Others, reported in 2019 SCC Online SC 682*. He further submitted that, the pleadings in the complaint even if taken at its face value does not make out any case against the applicant and therefore also, the applicant deserves to be discharged from the complaint instituted by the respondent.

6] Learned counsel for the respondent No.1/original complainant vehemently opposed the application and pointed out the relevant and necessary documents and submitted that, even after submission of the alleged resignation on 7th April 2003, the applicant continued to be 'Director' of the said-company. He submitted that, there is no substance in the contention of the applicant that he resigned from the Board of Directors of the said company on 7th April 2003. He further submitted that, the complainant has made out a strong *prima-facie* case against the applicant and therefore, the trial Court has rightly rejected the discharge application. He therefore prayed that the present Revision application may be dismissed.

7] The Supreme Court in the case of *R.S. Nayak vs. A.R. Antulay and Anr. Reported in AIR 1986 SC 2045,* while dealing with the provisions of Sections 227, 239 and 245 of Cr.P.C., in unequivocable terms, in Para 44 has held as under:-

> *"The Code contemplates discharge of the accused by the Court of Sessions under Section 227 in a case triable by it; cases instituted upon a police report are covered by Section 239 and cases instituted otherwise than on police report are dealt with in Section 245. The three sections contain some what different provisions in regard to discharge of the accused. Under Section 227, the trial Judge is required to discharge the accused if he 'considers that there is not sufficient ground for proceeding against the accused.' Obligation to discharge the accused under Section 239 arises when "the Magistrate considers the charge against the accused to be groundless." The power to discharge is exercisable under Section 245(1) when "the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction...." It is a fact that Sections 227 and 239 provide for discharge being ordered before the recording of evidence and the consideration as to whether charge has to be framed or not is required to be made on the basis of the record of the case, including documents and oral hearing of the accused and the prosecution or the police report, the documents sent along with it and examination of the accused and after affording an opportunity to the two parties to be heard. The stage for discharge under Section 245, on the other hand, is reached only after the evidence referred to in Section 244 has*

> *been taken. Notwithstanding this difference in the position there is no scope for doubt that the stage at which the Magistrate is required to consider the question of framing of charge under Section 245(1) is a preliminary one and the test of "prima facie" case has to be applied. In spite of the difference in the language of the three sections, the legal position is that if the trial Court is satisfied that a prima facie case is made out, charge has to be framed."*

8] A minute perusal of record would indicate that, though Form No.32 mentions that the applicant herein has resigned from the Board of accused No.1-company with effect from 7th April 2003, the acknowledgment put by the Registrar of Companies thereon mentions that, it was received by the said office in its inward register vide Serial No.95 dated 10th November 2009. It is to be further noted hear that, the letter dated 12th November 2009 issued by the Deputy Registrar of Companies, Kolkata, nowhere mentions that, the said Form No.32 was received by its office on a particular day. When the said Form No.32 was received by its office, a vague reference is made in the said letter that, after verification of Cash Section records of the said office, it was noticed that one Form No.32 dated 7th April 2003 had been filed/presented by Mr.Kundan Mal Jain of the said company informing the changes in the particulars of the earstwhile Board of that Corporate Entity. The said letter is conspicuously silent about the date of receipt of the said Form No.32 submitted by the company through Mr.Kundan Mal Jain.

9] *Prima-facie*, it appears that, after the complainant filed the complaint on 5th August 2008 and the learned Magistrate issued process on 20th October 2008 the applicant with a view to create defence in his favour has created the said document. The record is silent on the aspect of the submission of the Form No.32 with the Registrar of Companies and the acknowledgment given by the office of the Deputy Registrar of Companies, Kolkata.

10] The record further clearly indicates that, the accused No.1-company submitted a letter dated 24th July 2003 with the complainant for renewal of Certificate of Registration and to the said letter an Organization Chart had been annexed. In the said chart, the name of the applicant has been shown as 'Director' at the top of the said Chart. Thus it is apparently clear that, even after the alleged resignation by the applicant from the accused No.1-company, he continued to be a 'Director' of the said company and was infact a 'Director' of the said company on the date of commission of the offence. Therefore, I find no substance in the submission made by the learned counsel for the applicant.

11] As far as the submission of the learned counsel for the applicant that the learned Magistrate, at the time of taking cognizance of the offence has passed a cryptic order of issuance of process is concerned, it is to be noted hear that, the said Order was passed on 20th October 2008. The applicant never challenged the said Order and infact has accepted the same. Even at the time of filing an application under Section 239 of CrPC for discharge, the applicant did not raise the said plea before the trial Court. Even otherwise due to the inordinate delay and latches on the part of the applicant, the applicant is now estopped from raising the said plea. However, a minute perusal of record would further indicate that, the learned Magistrate after perusing the complaint has issued process, which according to me, has been rightly issued after *prima-facie* evaluating the allegations made against the applicant and other accused persons mentioned in the complaint.

12] After perusing the entire record, this Court is of the considered view that the trial Court has not committed any illegality or impropriety while passing the impugned Order.

13] Application being dehors of merits is accordingly rejected.

[A.S. GADKARI, J.]