

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1946 OF 2019

WITH

INTERIM APPLICATION NO.1 OF 2019

AND

INTERIM APPLICATION NO.2 OF 2019

IN

CRIMINAL WRIT PETITION NO.1946 OF 2019

PRESHIT S/O. ANIL BHARATEY

)...PETITIONER

V/s.

THE STATE OF MAHARASHTRA

)..RESPONDENT

Mr.Shyam Dewani a/w. Mr.Vinay Kumar i/b. Dewani and Associates, Advocate for the Petitioner.

Mr.Amit Palkar, APP for State.

CORAM : A. M. BADAR, J.

DATE : RESERVED ON 7th OCTOBER 2019

PRONOUNCED ON 16th DECEMBER 2019

JUDGMENT :

1 By this petition under Article 227 of the Constitution of India and under Section 482 of the Criminal Procedure Code, 1973 (hereinafter referred to as Cr.P.C. for the sake of brevity), the petitioner/accused is praying for quashing and setting aside order

dated 8th March 2019 passed below Exhibit 48 in MPID Case No.11 of 2004 by the learned Designated Court under the Maharashtra Protection of Interest of Depositors (In Financial Establishments) Act 1999 (hereinafter referred to as the 'MPID Act for the sake of brevity) thereby rejecting his application under Section 265B of the Cr.PC. for plea bargaining.

2 Heard. Rule. Heard finally by consent of parties.

3 According to the petitioner, who happens to be an accused in MPID Case No.11 of 2004 for offences punishable under Sections 406, 420 read with 34 of the Indian Penal Code as well as under Sections 3 and 4 of the MPID Act, the learned Designated Court committed an error of law in rejecting his application moved under Section 265-B of Cr.PC. The petitioner contended that at the instance of investor named Meena Jayant Kulkarni, the crime in question came to be registered and ultimately, on 29th March 2004, the charge-sheet came to be filed against him, he being the Director of M/s.Shivaji Estate Live Stock

and Farms Private Limited. It is alleged that the Financial Establishment of which he was a Director, has fraudulently defaulted in repayment of deposits amounting to Rs.2,90,33,107/- collected from 2458 investors. During the course of investigation, immovable properties belonging to said Financial Establishment worth approximately Rs.5,03,67,522/- came to be attached at various places in Maharashtra. The Deputy Collector, Nagpur then came to be appointed as Competent Authority in pursuant to provisions of Section 5 of MPID Act though charge-sheet came to be filed in the City Civil and Sessions Court, Mumbai. The Petitioner further contended that on 30th April 2012, a statement was made before the learned Designated Court that the petitioner/accused and the co-accused would pay an amount of Rs.35 crores and despite directions of the court, they failed to deposit the said amount within a period of 45 days from 30th April 2012 as directed by the learned Designated Court. This, according to the learned counsel was despite pendency of trial for more than 15 years there is virtually no progress in the matter. No steps could be taken by the Competent Authority in respect of

properties attached in the case. It is pointed out that while deciding Criminal Application bearing No.7 of 2017 on 19th April 2017, Nagpur Bench of this court had directed the State to issue necessary Notification for appointing the Competent Authority at Mumbai by modification of the Notification dated 27th April 2005 as investigation was carried out by the Economic Offence Wing of Mumbai Police and charge-sheet was also filed in the Court at Mumbai. Ultimately, in the Official Gazette of 29th June 2017, the Notification dated 23rd June 2017 came to be published. It was issued in exercise of the powers conferred by sub-section (1) of Section 4, Section 5 and Section 8 of MPID Act, attaching properties of Financial Establishments as well as properties in the name of the Chairman/Directors of the said establishments, came to be published by recording the satisfaction that the Financial Establishments and its Chairman/Directors are not likely to return the deposits to the depositors.

4 The petitioner contended that according to the prosecution case, number of investors is now increased to 30,093

and the amount payable to them is also increased to the tune of Rs.41,80,84,408/-. Valuation reports of the attached properties were also called by the learned Designated Court during pendency of the case. The petitioner contended that considering the fact that virtually there was no progress in the trial and nothing was done despite attachment of properties of the the Financial Establishments, he ultimately preferred an application under Section 265-B of the Cr.PC for plea bargaining. The petitioner further contended that the said application was entertained by the learned Designated Court as seen from the progress of the trial reflected from order sheets maintained by the learned Designated Court. Even the preliminary order also came to be passed on 15th November 2016 by the learned Designated Court and the Report was called in the form of the Minutes of the Meeting of all stakeholders in the matter. This was done after examining the petitioner/accused for satisfying that the application for plea bargaining was made voluntarily. According to the petitioner, however, subsequently, by impugned order dated 8th March 2019, the learned Designated Court, committed an error in law by

rejecting the said application despite the fact that follow up steps in pursuant to said application, were taken under the directions of the learned Designated Court.

5 The learned counsel for the petitioner argued that the impugned order passed by the learned Designated Court, rejecting the application (Exhibit 48) for plea bargaining is patently erroneous on the face of record. It is argued that the learned Designated Court has usurped the power conferred to the Central Government for declaring offences as “offences affecting socio-economic condition of the country”, by wrongly concluding that the offence under Section 3 of MPID Act is an offence affecting the socio-economic condition of the country. Similarly, according to the learned counsel for the petitioner, aspects which were irrelevant for the purpose of deciding the application under Section 265B of the Cr.P.C. were considered by the learned Designated Court for rejecting the application. It is urged on behalf of the petitioner/accused that the impugned order virtually amounts to reviewing its earlier order reflected in roznama dated

15th November 2016 annexed as Annexure-F at page 38A of the paper book. This review is beyond the scope of jurisdiction vested to the learned Designated Court. Therefore, according to the petitioner, impugned order needs to be quashed and set aside.

6 The learned APP appearing for the State has supported the impugned order by contending that the petitioner, being the Director of the Financial Establishment, has duped large number of investors by not repaying their deposits and as such, offence with which he is sought to be charged, is certainly an offence affecting the socio-economic condition of the country. Therefore, according to the learned APP, the impugned order is perfectly correct.

7 I have perused the reply affidavit dated 7th September 2019 of the intervenors/investors. I have also heard the learned counsel appearing for intervenors who happen to be depositors of the Financial Establishment. It is argued on behalf of the intervenors that solemn undertaking given by the petitioner/

accused and the co-accused to the learned Designated Court regarding deposit of an amount of Rs.35 Crore within a period of 45 days from 30th April 2012, is not complied by the petitioner/accused and therefore, the petition deserves to be dismissed. The learned counsel for the intervenors submitted that interest of investors in the Financial Establishment, needs to be kept in mind while deciding the application for plea bargaining. The learned counsel for the intervenors/investors, however, accepted the fact that, as noted by the learned Designated Court in paragraph 6 of the impugned order, the investors had no objection for plea bargaining, subject to certain guidelines for mutual satisfactory disposition of the matter. He further submits that this court may protect the interest of investor who are waiting for justice from the year 2003.

8 I have carefully considered the submissions so advanced and also perused the material placed on record including the impugned order.

9 It is not in dispute that provisions of the Cr.P.C. is applicable to the MPID Case No.11 of 2004 in hand. Way back on 29th March 2004, the charge-sheet came to be filed against the accused persons before the learned Designated Court under the MPID Act at Mumbai and that is how, MPID Case No.11 of 2004 came to be registered. Offence alleged against the accused persons in the said MPID Case No.11 of 2004 are under Sections 406 and 420 read with 34 of the Indian Penal Code as well as under Sections 3 and 4 of the MPID Act. It is reported by the learned counsel for the petitioner/accused that the said case is pending on the file of the learned Designated Court without any progress. At this juncture, it is apposite to quote provisions of Section 13 of the MPID Act which read thus :

“13 Procedure and powers of Designated Court regarding offences -

(1) The Designated Court may take cognizance of the offence without the accused being committed to it for trial and, in trying the accused person, shall follow the procedure prescribed in the Code of Criminal Procedure, 1973 (2 of 1974), for the trial of warrant cases by Magistrates.

(2) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall so far as may be, apply to the proceedings before a Designated Court and for the purposes of the provisions, a Designated Court shall be deemed to be a Magistrate.”

It is, thus, clear that, the Designated Court has to follow the procedure prescribed for trial of warrant cases by Magistrate under the Cr.P.C., 1973 while dealing with the cases relating to offences under the MPID Act. The case in hand is a case instituted on Police Report. It is, thus, clear that, the trial of the case is required to be conducted by following the provisions of the Cr.P.C.

10 As procedure prescribed by the Cr.P.C. is applicable to the proceedings before the learned Designated Court, Chapter XXIA of the Cr.P.C. regarding plea bargaining is certainly applicable to cases involving offences punishable under penal provisions of the MPID Act. Section 265-A from Chapter XXIA of the Cr.P.C. deals with application of plea bargaining. In case of the accused against whom the report has been forwarded by the Officer in-charge of the Police Station under Section 173 of the

Cr.P.C., the accused can invoke provisions of plea bargaining if offences alleged against him are not punishable with death or imprisonment for life or imprisonment for term exceeding 7 years. In the case in hand, the accused is sought to be charged for offences punishable under Sections 406 and 420 read with 34 of the Indian Penal Code as well as under Sections 3 read with 4 of the MPID Act. Punishment for the offence punishable under Section 406 of the Indian Penal Code can go up to 3 years whereas punishment for the offence punishable under Section 420 of the Indian Penal Code can be up to 7 years. The offence under Section 3 of the MPID Act is punishable with imprisonment for a term which may extend to 6 years. It is, thus, clear that Chapter XXIA of the Cr.P.C. is applicable to the case of the petitioner/accused against whom offences alleged are punishable with imprisonment for a term not exceeding 7 years. Similarly, as per mandate of Section 265-A of the Cr.P.C., plea bargaining is not applicable where the offence alleged against the accused is affecting the “socio-economic condition of the country.” The power to decide as to whether the offence affects the socio-

economic condition of the country is vested by virtue of provisions of sub-section (2) of Section 265-A of the Cr.P.C. with the Central Government. Sub-section (2) of Section 265-A reads thus :

“265A Application of the Chapter -

(1)

(a)

(b)

(2) For the purposes of sub-section (1), the Central Government shall, by notification, determine the offences under the law for the time being in force which shall be the offences affecting the socio-economic condition of the country.”

11 Thus, it is for the Central Government to determine as to which offence affects the “socio-economic condition of the country” in order to disentitle the accused in such offences to take recourse to plea bargaining. Now let us revert to the impugned order by which the application for plea bargaining came to be rejected by the learned Designated Court, Mumbai. In paragraph 9 of the impugned order, the learned Designated Court, after taking note of the Notification bearing No.S.O.1042(E) dated 11th July 2006 observed that offences falling under the enlisted

legislations in that Notification has only one Informant or the aggrieved person. It is further observed by the learned Designated Court that the Acts mentioned in the said Notification are only Central Acts and the said Notification does not include any State or Local Acts. It is further observed by the learned Designated Court that the case in hand is a case under the special statute enacted to protect interest of depositors and therefore, request for plea bargaining cannot be considered in respect of offences under the MPID Act, as there are huge number of investors. Further reasoning reflected from the impugned order can be gathered from paragraph 11 and 12 of the impugned order. Those read thus :

“11 Due to huge number of investors/victims, it is not practicable for the Court to consider request of the applicant for plea bargaining. Further the offences leveled against the applicant and other accused persons is punishable under the various sections of the IPC and Section 3 of the MPID Act. The MPID Act is a special penal local statute. Admittedly offence under Section 3 of the MPID Act is a offence affecting socio-economic condition of

the country. Thus it cannot be said that plea bargaining is applicable to the MPID Act.”

“12 In the present case, initially the non applicant received complaints from about 29749 investors and their defaulted amount was Rs.36,25,88,894/-. Now number of investors increased up to 30,093 and their defaulted amount is Rs.41,80,84,408/-. According to the prosecution, there is likelihood of increase in number of investors and their defaulted amount. The investors invested the amount in the FE in the year 2003. Thus they are entitled for benefits on their principal defaulted amount.”

12 It is, thus, clear that the learned Designated Court proceeded on the presumption that “admittedly offence under Section 3 of the MPID Act is an ‘offence affecting socio-economic condition of the country’ and therefore plea bargaining is not applicable to the MPID Act.” On the face of record, such reasoning given by the learned Designated Court for disentitling the petitioner from availing provisions of Chapter XXIA of the

Cr.PC., in respect of plea bargaining, are wholly unsustainable. Error of law has been committed by the learned Designated Court by rejecting the application for plea bargaining by holding that admittedly the offence punishable under Section 3 of the MPID Act is an offence affecting the socio-economic condition of the country and therefore, provisions regarding plea bargaining are not applicable to the MPID Act. Record does not reflect that the petitioner/accused has accepted the said fact. On the contrary, he has placed the Notification of the Central Government on record to show that the MPID Act is not included in the said Notification issued in exercise of powers under Section 265-B of the Cr.PC. Sub-section (2) of Section 265-A of the Cr.PC. dealing with application of the chapter plea bargaining as noted above, makes it clear that the authority to determine which offence affects the 'socio-economic condition of the country' is vested only with the Central Government and such power is required to be exercised by the Central Government by issuing Notification enlisting the offences affecting the socio-economic condition of the country. The Notification bearing No.S.O. 1042(E) dated 11th July 2006

issued by the Central Government makes it clear that the Central Government has not determined the offence under the MPID Act as an offence affecting the socio-economic condition of the country. It is exclusively in the realm of jurisdiction of the Central Government to decide as to offences either from the Central Act or from the State or Local Acts are offences affecting the 'socio-economic condition of the country.' As the Central Government has chosen not to enlist the offence under the MPID Act as an offence affecting the socio-economic condition of the country, the learned Designated Court committed patent error of law in holding that the offence under Section 3 of the MPID Act is admittedly an offence affecting the socio-economic condition of the country. Such finding is totally perverse, erroneous and illegal and therefore, cannot be sustained. Moreover, the learned Designated Court has no jurisdiction to choose and decide as to whether the offence is affecting the socio-economic condition of the country. The Designated Court is left with no alternative by mandate of sub-section (2) of Section 265-A of the Cr.P.C. but to consider only those offences determined by the Central

Government by the Notification as offences affecting socio-economic condition of the country. The learned Designated Court lost sight of settled principles of statutory interpretation that the court cannot add or mend anything that is left out. The court cannot reframe the legislation as it has no power to legislate. Thus, a matter which should have been but has not provided for in a statute cannot be supplied by the court. In this view of the matter, finding of the learned Designated Court that the offence under the MPID Act is an offence affecting the 'socio-economic condition of the country' cannot be sustained.

13 Be that as it may, the impugned order cannot be sustained for one more reason. By the impugned order, the learned Designated Court had rejected the application for plea bargaining made by the petitioner/accused under Section 265-B of the Cr.P.C. by virtually reviewing its earlier order which is reflected from the roznama placed on record at page 38A of the paper book. It is titled as "ROZNAMA DTD. 15/11/16" and relevant portion thereof reads thus :

“Later on.

11/04

Adv.Sham Devani for A-2 present.

Accused was confronted in camera as to whether he has filed application Exh.48 u/s. 265/B of Cr.PC. for plea bargaining whereas it seems that accused has filed the application voluntarily. As per the notification dated 11/07/2006 by Central Government the offence for which accused is charged does not fall within the ambit of offence affecting socio-economic condition.

Prosecutor SPP Adv. Malankar is present. P.A., API Pawar attached to EOW is present. It is necessary to have mutual agreement between the accused/applicant, prosecutor, I.O., ASP Mukane attached to LA2 Mumbai and C.A., at the office of Competent Authority, so as to work out a mutual satisfactory disposition of the case, including giving compensation by the accused to the victims. As per P.A. there are in all 29,749 victim depositors whose amount of alleged default is Rs.36 plus crores that too in the year of prior to

2004. Taking into consideration, the said facts by the parties in the meeting the mutual satisfaction is to be arrived. As such P.A. is directed to arrange for such meeting at the office of C.A. on or before next date and file report in the form with minutes of meeting in confidential envelope.

Already adjd. to 20/12/2016.

Signed Illegible
Judge”

14 It is, thus, clear that, way back and on or about 15th November 2016, the learned Designated Court in terms of provisions of Section 265-B of the Cr.P.C. had taken cognizance of the application for plea bargaining moved by the petitioner/accused, which was accompanied by an affidavit sworn by the petitioner/accused stating that he is preferring said application after understanding the nature and extent of punishment provided by the law for the offence with which he is charged. The application under Section 265-B of the Cr.P.C. moved by the

petitioner/accused accompanied by the affidavit is at record page 19 at Exhibit A. The petitioner/accused in the duly sworn affidavit supporting his claim for plea bargaining has made categorical averment that he has applied for plea bargaining voluntarily without any influence and pressure on him. His affidavit further makes it clear that the petitioner has not previously been convicted in a case in which he had been charged with the same offence. Thus, the application under Section 265-B of the Cr.P.C. along with supporting affidavit filed at Exhibit A shows due compliance of procedural provision of Section 265-B of the Cr.P.C. by the petitioner/accused. Therefore, it appears that the learned Designated Court had rightly taken cognizance of the said application on 15th November 2016 and interviewed the petitioner/accused in-camera for ascertaining voluntariness in filing the said application. In compliance of requirement of sub-section (4) of Section 265-B of the Cr.P.C., the learned Designated Court upon examining the petitioner/accused in-camera, in absence of the other party got itself satisfied that the petitioner/accused had filed the application for plea bargaining

voluntarily. After complying with this important procedural formality, the learned Designated Court then proceeded to examine whether offences with which the petitioner/accused is charged are falling under the category of “offences affecting the socio-economic condition of the country.” The Notification dated 11th July 2006 issued by the Central Government in exercise of powers conferred on it by sub-section (2) of Section 265-A of the Cr.P.C. then came to be perused by the learned Designated Court. Thereafter, the learned Designated Court has recorded a finding that as per the Notification dated 11th July 2006 issued by the Central Government, the offence for which the petitioner/accused is charged, is not falling within the scope and ambit of ‘offences affecting the socio-economic condition of the country.’ The order of the learned Designated Court reflected from the order-sheet and which is quoted above, thus, makes it clear that after taking cognizance of the application for plea bargaining made by the petitioner/accused, the learned Designated Court proceeded further in processing that application by taking steps as envisaged by Section 265-B of the Cr.P.C. After coming to the conclusion that

the petitioner/accused is entitled for taking recourse to Chapter XXIA regarding plea bargaining, by doing preliminary examination of the matter, the learned Designated Court proceeded further in the matter on 15th November 2016 itself and issued necessary directions as contemplated in Clause (a) of sub-section (4) of Section 265-B of the Cr.P.C. for working out mutual satisfactory disposition of the case. The learned Designated Court had directed the Special Public Prosecutor, the Investigating Officer, ASP Mukane attached to LA2, Mumbai, as well as the Competent Authority under the MPID Act to work out a formula for mutual satisfactory disposition of the case including that of giving compensation to the victims of the crime in question by the petitioner/accused. It was directed by the learned Designated Court by this order dated 15th November 2006 that a meeting should be convened by the Presenting Officer at the office of the Competent Authority on or before the next date of hearing and the report should be submitted to the Competent Court in the form of Minutes of that Meeting, confidentially. It is, thus clear that way back and on 15th November 2016 itself, the learned

Designated Court had accepted the application for plea bargaining moved by the petitioner/accused and had acted upon that application after getting itself satisfied about the maintainability of that application. Further directions to the stakeholders came to be issued by the learned Designated Court on 15th November 2016 itself by entertaining the application for plea bargaining and this fact is writ large from the order of the learned Designated Court, reproduced in earlier paragraph of this judgment and found at page 38A of the paper book.

15 In this view of the matter, the learned Designated Court had no jurisdiction to review the earlier order dated 15th November 2016 and to pass the impugned order on 8th March 2019 i.e. after more than two years of taking necessary steps after accepting the claim of the petitioner/accused for plea bargaining. By rejecting the application for plea bargaining on 8th March 2019, the learned Designated Court had virtually reviewed its earlier order passed on 15th November 2016 accepting the said application and taking consequential steps in the matter. Such

review of its earlier order by the learned Designated Court is not permissible under the law and on this count also, the impugned order is not sustainable.

16 The impugned order rejecting the application for plea bargaining passed on 8th March 2019 itself shows that investors had participated in the hearing conducted before the learned Designated Court. Paragraph 6 of the impugned order makes it clear that the learned advocate for Investors had given no objection for considering the application for plea bargaining but had requested the learned trial court for giving certain guidelines for mutual satisfactory disposition of the case. Even before this court also, the learned counsel for the Investors, who intervened in the matter, requested that interests of the investors should be protected. At this juncture, it is apposite to note that record reveals that the charge-sheet against the petitioner/accused and the co-accused was filed in the year 2004. Subsequently, properties of the Financial Establishment and its Chairman/Directors came to be attached by issuing and publishing

necessary Notification as per provisions of the MPID Act. However, investors have not received any solace in all these 15 years as no steps seem to have been taken for liquidating the attached properties. Earlier undertaking by the accused to deposit the amount of Rs.35 crore and their failure to comply with the undertaking is not relevant for the purpose of deciding the application under Section 265-B of the Cr.P.C. With passage of more than 15 years after registration of crime and after filing of the charge-sheet, it cannot be said that the Investigator has not quantified the number of the investors who had deposited money with the Financial Establishment involved in the instant case. It is not in dispute that the Competent Authority is already appointed by the State and properties and assets of the Financial Establishment are already attached. In this view of the matter, presence of Investors can very well be secured while arriving at mutual satisfactory disposition of the case through instrumentality of the Competent Authority as well as the Investigator. Scope of the Chapter of plea bargaining cannot be restricted to the case involving only one victim or the informant or the aggrieved person

as held by the learned trial court. On such count, the application for plea bargaining cannot be rejected, and therefore, this finding of the learned Designated Court on this aspect is not in consonance with law. Number of investors or victims of the crime in question is not relevant for deciding the application for plea bargaining moved under Section 265-B of the Cr.P.C. What is relevant is to work out a mutually satisfactory disposition of the case as per the mandate of the law by adhering to the guidelines given for the same in Section 265-C of the Cr.P.C. The victims of the crime in which application for plea bargaining is moved are certainly entitled for compensation and other expenses and modality for arriving at such disposition of the case is also prescribed in Chapter XXIA of the Cr.P.C. Only because number of Investors are more, the learned trial court ought not to have rejected the application for plea bargaining of which the cognizance was taken earlier and necessary directions were already issued by the learned Designated Court for arriving at a mutually satisfactory disposition of the case. Hence, the petition deserves to be allowed.

17 Therefore, the following order :

ORDER

- i) The petition is allowed.
- ii) Rule is made absolute in terms of Prayer Clause (b).
- iii) With disposal of the petition, all pending applications stand disposed off.

(A. M. BADAR, J.)