IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.07.2020

PRONOUNCED ON : 06.08.2020

CORAM:

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

CRL.O.P.No.21260 of 2013

1.Bank of Baroda
Rep.by its Chairman and Managing Director,
Shri M.D.Mallya
Baroda Corporate Centre,
C-26, G Block Bandra East,
Mumbai-400 051.

2.S.Selvaraju
S/o. Late R.Sellamuthu
Bank of Baroda Corporate Financial Service Branch,
No.21, Gopalakrishna Street,
T.Nagar, Chennai-600 017. ... Petitioners/Accused

Vs.

R.Subramanian ... Respondent/Complainant

Prayer : Criminal Original Petition filed under Section 482 of Cr.P.C., to call for the records in C.C.No.2557 of 2013 pending on the file of XIV Metropolitan Magistrate, Egmore, Chennai and quash the same.

For Petitioner : M/s.A.Sasidharan

For Respondent : Mr.R.Subramanian
Party in Person

O R D E R

This petition is filed to call for the records in C.C.No.2557 of 2013 pending on the file of the XIV Metropolitan Magistrate, Egmore, Chennai and quash the same.

2. The gist of the case is that the Subhiksha Trading Services Limited(STSL) is a pioneer in organized retailer in India, commenced business in the year 1997. The respondent had pioneered an India-centric model of retailing, in which, the stores operated by the Subhiksha Trading Services Limited (STSL) catered to the middle class persons for day to day items at much lower prices than those offered by other

retailers. The respondent was the promoter of the STSL and is a well qualified professional having graduated from IIT Madras and IIM Ahmedabad. The respondent is well recognized for his achievements and has won various awards and he was also the Chairman of the Indian Retail Forum for the year 2008-09 and a Governing Board Member of the Retailers Association of India. As such, the STSL was having high reputation and standing, well known for business in society. The STSL , who had established chain of stores, sells products in FMCG, Pharma, Groceries, Fruits, Vegetables, telecom products etc. The retail shops of the STSL are opened in the brand name of "SUBHIKSHA". The STSL for their business had availed loan facility with various banks and financial institutions. Since the STSL is going through a Debt restructuring, the scheme in this regard is under consideration of the Hon'ble High Court of Madras pursuant to the orders of the Hon'ble Apex Court.

3. The First petitioner is the Chairman and Managing Director and the second petitioner is the Chief Manager of Bank of Baroda, Corporate Financial Service Branch, T.Nagar, Chennai, one of the largest banks in the Country, had granted some loans to the STSL. The loans become NPA and the said Bank of Baroda filed an application in O.A.No.71 of 2010 and later re-numbered as O.A.No.178 of 2011 for recovery of Rs.88,16,33,236.28/- before the Debt Recovery Tribunal-II, Chennai, in which, proof affidavit was filed by the second petitioner and the matter contested by the respondent. In the said proof affidavit, in paragraph Nos.23 and 31, the petitioners have stated as under:

> " 23. The first defendant has played a fraud on the system by not bringing in required equity and resorting to huge debt financing".
>
> "31.The amount availed by the first defendant from the bank is public money which has been fully used for their business and as situation would demonstrate and establish the amounts have been siphoned".

4. The learned counsel for the petitioners submitted that the petitioners Bank sanctioned term loan to the extent of Rs.50 crores and cash credit to the extent of Rs.25 crores to the STSL. Since Subhiksha Trading Services Limited did not repay the loan amount, the petitioners filed O.A.No.71 of 2010 for recovery of due amount and later re-numbered as O.A.No.178 of 2011, in which, D1 and D3 are the Company, D2 is the respondent herein and D4 to D15 are the other banks, who had given financial assistance and extended loan facility to the STSL. In paragraph No.19 of the proof affidavit, it is mentioned that the 15th defendant has also filed O.A.No.52/2009 before the Hon'ble Tribunal, Chennai against the defendants 1 and 2 and 11 other banks for recovery of the dues. Thereafter, it is further learnt that the defendants 1 and 2 and 11 other

banks has filed O.A.No.22/2010 before the Hon'ble Tribunal against the applicant bank. The fifteenth defendant, namely, KOTAK MAHINDRA BANK LIMITED, Chennai had set out at length in its application, various details of the perpetuated fraud committed by the second defendant. Further, such statement was necessary to protect the interest of the Bank, where public money is involved, since it is a public sector bank. Further, unless pleadings are made, evidence cannot be led in the suit, reading of the paragraph Nos.23 and 31 of the proof affidavit on the whole would clearly show that there is nothing defamatory. Taking certain words in isolation and attributing motive would not constitute an offence of defamation. The entire affidavit filed by the petitioner has to be read in full and not in piecemeal. The respondent in their complaint have not stated, any harm was caused to their reputation. He further submitted that the respondent filed defamation case not only against the petitioners, but also, against ICICI Bank, Kotak Mahendra Bank. On similar accusation, this Court, by order dated 31.07.2018, in Crl.O.P.Nos.25422, 25458, 26906, 26910 & 31446 of 2012, quashed the proceedings. The petitioners submit that in counter to the proof affidavit filed before the DRT, the first defendant had not made any such objections and averments of defamation. Hence, he prayed for quashing of the complaint. The petitioners relied on the order passed by this Court in the batch cases, in quashing the complaint of the respondent, filed against officials of ICICI Bank, Kotak Mahindra Bank, Honkong and Shanghai Bank in Crl.O.P.No.25422 of 2012.

5. Mr.R.Subramanian, party in person, submitted his written submissions with citation and advanced arguments that the STSL availed term loan and cash credit for the purpose of their business. The statements made in paragraph Nos.23 and 31 of the affidavit are false, such statements are per se defamatory made only with a view to defame the respondent and belittle them in the eyes of various other banks. The defamatory statements by the petitioner are deliberately made to sabotage the restructuring efforts of the respondent. The respondent had sent a legal notice dated 27.02.2012 which was not replied.

6. The respondent in counter affidavit stated quashing of complaint filed by the respondent against certain banks by this Court are per inquirum, not good in law, as the finding is contrary to the provisions of the statute. Further, the respondent had challenged the findings of this Court, by way of S.L.P. Further he submitted that the petitioner placing reliance on exception 8 to Section 499 IPC is not applicable for the averments made and it is to be decided only during trial and not in a quash petition.

7. The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDBFI Act) is now known as Recovery of Debts and Bankruptcy Act, 1993. As per RDDBFI Act, the

power given to the DRT to adjudicate on the amount claimed as due by the Banks or Financial Institution, once such claim is determined, to issue recovery certificate for the same. By no stretch of imagination, DRT can decide or adjudicate any issue of fraud and as such, any averment of fraudulent conduct made in pleadings before DRT is not a matter covered, as one over which DRT exercise lawful authority.

8. Further, he submitted that it is a settled law that when a Court proceeds to decide an issue without either noting the correct provisions of law or without noting the law settled and binding on it, the said decision is rendered per incurium and is not good law and sets no precedent.

9. In respect of the same, he relied on the Hon'ble Apex Court Judgment in the case of K.S.Panduranga vs. State of Karnataka reported in 2013(3)SCC 721 and the State of Uttar Pradesh vs. Synthetics and Chemicals Limited and various other citations. The learned counsel for the respondents further submitted in the case of Subramanian Swamy vs. Union of India reported in 2016 (7) SCC 221, the vires of Section 499 IPC was challenged and in that case, the Apex Court elaborately discussed all aspects in the case of defamation and held that the provisions of Section 499 IPC are constitutional. Further, person, who is claiming the exception, has to prove it.

10. Further, he submitted that what is public good is a question of fact depending on the facts and circumstances of the case. In respect of this contention, he relied on the case of M.A.Rumugam vs. Kittu reported in 2009 1 SCC 101. Further, he submitted that where the utterances are per se defamatory, there is no need for the complainant to prove that he was defamed. In respect of this contention, he relied on the case of John Thomas vs. Dr.K.Jagadeesan reported in 2001 6 SCC 30. Further, he submitted that the averments are unambiguously defamatory. The averments specifically allege "fraud" and "siphoning" both of which are acts of criminal nature and are per se defamatory, requiring no proof of defamation. Further submitted that the DRT is only for recovery of due amount, and there is no manner, in which, DRT could consider or decide any issue of criminal misconduct and as such, the averments were made for the sole purpose of defaming the respondents. Therefore, he prayed for dismissal of the petition.

11. The respondent submitted that S.L.P. is filed, the respondent is unable to furnish the particular of proceedings or any material to show whether the S.L.P. is filed and it is pending or not?.

12.This Court, on the rival submissions and on perusal of the materials, finds the availment of financial assistance by the respondent from the petitioners bank and its default, the loan account becoming NPA, are not in dispute. The petitioner's Bank is a Public Sector Bank, in which, Public money is involved. To safeguard the Bank interest, and to recover the loan, which has become NPA, the second petitioner filed proof affidavit and the Bank of Baroda filed an application before Debt Recovery Tribunal-II, in O.A.No.71 of 2010, renumbered as O.A.No.178 of 2017.

13. It is seen, in paragraph Nos.23 & 31, passing reference are made:

> "23. As a matter of fact the said averment would clearly demonstrate that the first defendant without a strong support of equity base has ventured into expansion with a clear motivation and intention to use the banks fund, which is nothing but public money, for their corporate development. The first defendant has played a fraud on the system by not bringing in required equity and resorting to huge debt financing.
>
> 31. The applicant bank respectfully states that huge amount has to be recovered from the defendants 1 to 3 being the outstanding due payable in the credit facilities availed by the first defendant. The amount availed by the first defendant from the bank is public money which has been fully used for their business and as situation would demonstrate and establish the amounts have been siphoned. The applicant bank is bound to recover the huge outstanding and in terms of the contract defendants 1 and 3 are bound to repay the same."

14. The paragraph and the sentence read as a whole, makes it clear and apparent that they are not defamatory.

15. The respondent admitted that the imputation has caused no harm directly or indirectly in the estimation of others. According to the respondent, imputation are per se defamatory. Hence, the burden to establish such imputation has lowered him in the estimation of the others, which does not arise in this case. On perusal of the notice, it is seen that there is no mention of any imputation being per se defamatory. In the complaint, no witnesses other than the respondent is shown. Thus, the wording of per se defamatory in the complaint is an after thought, improvement made, while filing the complaint. On the facts of the case and perusal of materials, it is found that no imputation can be said to harm the respondents reputation and Section 499 IPC explanation No.4 squarely applicable in this case.

16. The petitioner filed an application for recovery of Rs.88,16,33,236.28/-, before the Debt Recovery Tribunal, the relevant facts, to decide the issue of debt and its recovery, are to be made therein. If these averments are not made in the pleadings before the Debt Recovery Tribunal, the petitioner would not be permitted to plead on that subject orally and lead evidence. As a result, they may not be in a position to succeed in getting the recovery certificate. Therefore, it cannot be stated that these averments are totally unnecessary.

17. This Court finds the petitioner have made averments in the pleadings before the Debt Recovery Tribunal which are very relevant to the issues and according to the petitioner, it was stated with care and attention. The respondent had not objected for the same before the Debt Recovery Tribunal.

18. Admittedly, the petitioner had succeeded in the claim before DRT-II, Chennai and now, the respondent had filed an appeal against the order of the Tribunal.

19. As discussed earlier, the averments made in the pleadings have got relevance to the issues involved in the proceedings before the Debt Recovery Tribunal. Hence, it cannot be said that the imputations are per se defamatory.

20. In view of the foregoing discussion, I hold this is not a case where the statements are per se defamatory so as to allow the respondent to go ahead with the prosecution. Hence, continuation of the proceedings further would amount to abuse of process of law.

21. In view of the above, the Criminal Original petition is allowed and the case in C.C.No.2557 of 2013 on the file of the XIV, Metropolitan Magistrate, Egmore, Chennai is hereby quashed.

Sd/-
Assistant Registrar(CS-III-MDU)

//True copy//

Sub Assistant Registrar

Ssb
The XIV Metropolitan Magistrate,
Egmore, Chennai

+1cc to Mr.A.Sasidharan, Advocate SR.No.26215

CRL.O.P.No.21260 of 2013

VS(CO)
GMY(07/09/2020)