IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.06.2022

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

ORDERS RESERVED ON 26.04.2022	ORDERS PRONOUNCED ON 17.06.2022

CRL.O.P.NO.7370 OF 2015
AND M.P.NOS.1 & 2 OF 2015

1. Viswapriya Financial Services & Securities Ltd.,
Rep. by its Director
Mr.R.Subramanian,
No.2, First Cross Road,
Kasturiba Nagar, Adyar, Chennai – 600 020.

2. R.Subramanian
Director,
Viswapriya Financial Services & Securities Ltd.,
No.4/309-A, Singaravelan II Street,
Chinna Neelangarai, Chennai – 600 041.

... Petitioners/ Accused 1 & 2

Vs.

The Reserve Bank of India,
Represented by Shri.Raj Kumar
Department of Non-Banking Supervision,
Chennai.

... Respondent/ Complainant

PRAYER:

Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, to call for the records and to quash the complaint in E.O.C.C.No.343 of 2009 on the file of the Additional Chief Metropolitan Magistrate, Economic Offence-I, Egmore, Chennai.

For Petitioners : Mr.R.Subramanian
Party-in Person

For Respondent : Mr.T.Poornam
Standing Counsel

ORDER

This Criminal Original Petition is filed by the petitioners/A1 & A2 to quash the complaint in E.O.C.C.No.343 of 2009 on the file of the Additional Chief Metropolitan Magistrate, Economic Offence-I, Egmore, Chennai.

2.The gist of the complaint is that the First Accused Company is M/s.Viswapriya Financial Services and Securities Limited, which is a Non-Banking Financial Company as defined under Section 45I(f) of the Reserve Bank of India Act, 1934 [hereinafter referred to as "the Act"]. The second accused is Mr.R.Subramanian, Director of the A1/Company and A3 to A5 are the Directors of the A1/Company, of which case against A4/G.Ramanujam was quashed by this Court. As regards the case against A3 and A5, case against them got abated since they were reported dead and now the case is pending against A1 Company and A2/the petitioners herein alone. The directions and orders issued by the Reserve Bank of India [RBI] have not been complied with, thereby they become liable for prosecution and punishment under Sections 58B(2), 58B(5)(aa) and 58B(4A) read with Section 58C of the Act. The first accused Company was incorporated on 13.05.1991 with the main object of carrying on the business of trading, leasing and hire purchasing. The first accused Company applied for Certificate of Registration [COR] with RBI to carry on business of Non-Banking Financial Company [NBFC]. The A1/Company produced a certificate from its auditors to the effect that the Board of Directors passed a resolution to the effect that they will not accept public deposits. The RBI granted COR on 20.04.1998 with specific condition that it should not accept public deposits and in case they wanted to raise any public deposits, prior permission from the RBI to be obtained after furnishing necessary credit rating. It was observed that the A1/Company was accepting/holding public deposits under the guise of various investor schemes in violation of Non-Banking Financial Companies Acceptance of Public Deposits [Reserve Bank] Directors, 1977. Hence, RBI vide its letter dated 25.04.1995 advised the A1/Company to treat the monies collected under the guise of various investor schemes in various of the Directions as regulated deposits. The accused Company filed W.P.No.8786 of 1995. This Court by order dated 07.08.2003 dismissed the writ petition upholding the orders of the RBI. Against which, the accused Company preferred a writ appeal in W.A.No.3097 of 2003 and the same is pending before this Court.

3.The RBI conducted inspection of books of accounts of the accused Company on 02.12.2003, 03.12.2003 and 05.12.2003 with reference to its financial position as on 31.03.2003. The inspection revealed that the accused Company had all along operating the investor schemes in violation of the RBI direction and its Net Owned Fund was negative due to exposure to its group Companies and therefore, the COR issued to the accused Company was cancelled vide order dated 06.08.2005. As against the cancellation of COR, the accused Company preferred an appeal before the Appellate Authority which is pending with Government of India, Ministry of Finance. The accused Company was directed to repay the entire amount of public deposits with interest, further directed to furnish various returns prescribed, such as quarterly returns on liquid assets, the half yearly returns and continuance of periodical norms and the Annual returns, as per the directions issued by the RBI, from time to time. The accused Company was further directed to repay the deposits received from the public on the due date, to submit at monthly intervals within 15 days of the expiry of the reporting period. The accused Company was directed to dispose of its financial assets within three years from the date of cancellation of COR and convert into Non-Banking Non-Financial Company or wind up the Company. The accused Company had not submitted any of the returns and not furnished any details to the Bank with regard to the payment of deposits collected by floating various schemes. Further, the accused Company had not intimated the RBI about the final disposal of its financial assets within three years from the date of cancellation of COR.

4.This being so, in 'Economic Times' English daily reported on 05.02.2009 it was seen that the accused Company was selling Investment products with the assurance of generous returns, thereby the accused Company, not complied with the directions issued in the letter dated 17.08.2005. In view of the same, the RBI deputed one Mr.D.J.Babu, Assistant General Manager and Mr.Ramachandran, Manager to conduct scrutiny of books of account of the accused Company with a Directive dated 12.02.2009 directing the accused Company to cooperate with the Inspecting Officers in carrying out the inspection of its books of account. The Inspecting Officers by letter dated 13.02.2009 sought for information/documents to conduct scrutiny of the books of accounts of the Company. The accused Company refused to provide the information required by the Inspecting Officers on the round that the RBI has no regulatory jurisdiction after cancellation of COR. Finally, the accused Company furnished only its balance sheets for the years 2005-06, 2006-07 and 2007-08. Further, by letter dated 16.02.2009, the accused Company was advised to furnish the information/documents to conduct scrutiny of its books of account. The accused Company vide letter date 16.02.2009 reiterated that it is not a NBFC as on date and the provisions of Section 45N of the Act is not applicable. The RBI cancelled the COR of the accused Company, against which the accused Company preferred an appeal before the Appellate Authority and the same is pending. Though COR was cancelled, the accused Company continues to be under the regulatory purview of the Bank till it becomes Non-Banking Non Financial Company [NBNFC]. The RBI has to satisfy itself by conducting inspection of books of accounts of the accused Company, verify the statutory returns, balance sheet and other documents, about the nature of business the accused Company being carried out and the stage of repayment of public deposits accepted by the accused Company. Under such circumstances, the Bank vide letter dated 03.03.2009 directed the accused Company to cooperate with the Bank's Inspecting Team and furnish information. The accused Company had not complied with the directions issued by the Bank. Admittedly, the accused Company is a Non-Banking Institution and as per terms and clauses of Section 45N of the RBI Act, the Bank may carry out inspection of any Non-Banking Institution [NBI] including a financial institution for the purpose of verifying the correctness or completeness of any information furnished to the Bank. Therefore, Section 45N of the Act empowers the Bank to conduct inspection of all Non-Banking Institutions, any person responsible for non-compliance of provisions of Section 45N of the Act would be punishable with fine under Section 58B (2) of the Act and if he persist in such failure or refusal, with further fine. Section 45M of the Act states that it shall be the duty of every Non-Banking Institution to furnish the statements, information or particulars called for. Section 58B (5)(aa) of the Act states that if any person fails to comply with any direction given or order made by the Bank under any of the provisions of Chapter IIIB is punishable with imprisonment for a term which may extend to three years. Hence, the accused are liable for prosecution and punishable under the provisions of the Act. Under such circumstances, the complaint was filed with relevant documents. Against which, the present quash petition is filed.

5.The contention of the petitioners is that the first accused Company is a Non-Banking Financial Company since its incorporation in 1991. The provision of RBI amended in the year 1997 and Chapter IIIB was made as a part of the Act, thereby enabling the respondent to have supervisory control over the NBFC. As part of the newly introduced statute all Non-Banking Financial Companies were to register with the respondent. The first accused Company applied for registration and after due inspection registration as NBFC was granted to the first petitioner. The first petitioner's Books were inspected by the respondent in the year 2005 and thereon, the respondent license as NBFC was cancelled in August 2005. The first petitioner challenged the same. This Court directed the petitioner to avail the appeal remedy provided under the RBI Act. The petitioner filed appeal under RBI Act in respect of cancellation of its registration and the appeal has not been decided till dated. The petitioner ceased to be a NBFC since 2006. the petitioner is now under catch 22 situation, whether continuation of business as NBFC, without sanction in law or it would be an offence committed by the order of cancellation, not stayed. There is no provision in the RBI Act entitling a Company which held NBFC license to continue as NBFC pending disposal of the appeal when there is no specific stay of the order of cancellation of registration, the first petitioner bound to cease to be an NBFC. The respondent in the year 1999 set out that NBFC would get attracted only to Companies where over 50% of the income and 50% of the assets are related to financing. The stipulation continues to be followed by RBI even till date and every NBFC is required to file a Statutory Auditor Certificate [SAC] each year to show that they meet these requirements to continues to be a NBFC. The first petitioner Company had recast its business since August 2005 when the respondent cancelled its license as NBFC to ensure that it did not act as NBFC. The audited financial statements of the first petitioner Company filed before the Registrar of Companies contemporaneously in 2006, 2007 and 2008 will reveal that it is no more a NBFC in any of the three years. The first petitioner Company since 2006 not being an NBFC, there is no case made out by the RBI alleging that the petitioner violated the direction issued under Section 45IA of the RBI Act.

6.He further submitted that during 2009 there was a collapse of Subhiksha Trading Services Ltd., in which the second petitioner was the Managing Director. At that time, there was lot of media attention created, various reports published in the Newspapers as thought the first petitioner was raising deposits. Based on these reports, the RBI sought for inspection of its Books of accounts. The contention of the petitioner is that the respondent was not entitled to seek information from it except on the deposits raised by it and in any event, the inspection can only follow the demand for information. The petitioner Company is a Non-Banking Institution and not a Non-Banking Financial Companies and the scope of the respondent under the RBI Act were different in respect of the two types of Companies. The RBI issued a letter dated 03.03.2009 to the Directors of the first petitioner Company, wherein the RBI referred the first petitioner Company as Non-Banking Institution and not a Non-Banking Financial Companies by relying on Section 45N(1)(i) of the RBI Act. The Trial Court framed charges against the petitioners on 12.04.2022 for the offences under Section 58B(2) and 58N(5)(a) of the RBI Act. He further submitted that the regulation by RBI under Chapter IIIB is of two entities, Non-Banking Institutions [NBI] in general and of Non-Banking

Financial Companies [NBFC]. The powers of regulation of NBI is limited to Section 45K of the RBI Act which is to collect information from Non-Banking Institutions as to deposits and to give directions. The power to issue directions to NBFC is wider and is covered by provisions of Section 45JA and Section 45L of the RBI Act. This is with regard to every Non-Banking Institutions to furnish the statements, information or particulars called for and to comply with any direction given to it under the provisions of this Chapter. The provision of Inspection under Section 45N of the RBI Act are for NBFC's and NBI's. While NBI's are covered under Section 45N(1)(i) of the RBI Act which is limited in scope, the NBFC's are governed by wider provision of Section 45N(1)(ii) of the RBI Act. As such, RBI can only deal with matters of deposits in respect of NBI's and can deal with any issue of any NBFC by way of inspection and seeking information. The non-compliance of Section 45N being the refusal to permit inspection is an offence punishable under Section 45B(2) of the RBI Act and the offence under Section 458 (5)(aa) of the Act relates to non-adherence of direction issued by the respondent under Chapter IIIB of the Act. In sum and substance, there is no case for offence under Section 58B(2) of the RBI Act and there is no violation of any direction issued under Chapter IIIB of the Act.

7.He further submitted that the letter dated 03.03.2009 of the RBI cannot be construed as a direction under Chapter IIIB of the Act and it is merely a demand to comply with Section 45N of the Act. Since the petitioner is not an NBFC since 2006 and as per the financial statement, 2008 the information sought for can only be in respect of deposits as per Section 45K of the Act. The respondent had no power to seek information other than on deposits. The demand for information dated 13.02.2009 is without authority and hence, non-compliance of the same can made no offence. He further submitted that it is not in dispute that the Certificate of Registration was cancelled vide order dated 06.08.2005. The Income Pattern Statement for the year 2006, 2007 and 2008 would reveal that the petitioner Company have majority non-financial assets and majority income from non financial assets implying that the principal business of the Company is not financing and therefore, even any financing business carried on by our clients would not make them a NBFC. The petitioners' principal business has not been financing since 2006 and mere pendency of the appeal on cancellation of Certificate of Registration cannot be construed and taken that the petitioners are still an NBFC. He further submitted that the RBI by its communication dated 17.06.2015 addressed to one Mr.Krishna Kumar, a Depositor, confirmed that the petitioner Company is not registered under Non-Banking Financial Company [NBFC] with RBI. The RBI cannot blow hot and cold, in one stretch it is stated that the petitioner Company had violated the guidelines issued for NBFC, on the other hand stated that the petitioner Company is not registered under NBFC. He further produced the fresh Certificate of Registration dated 02.06.2011 wherein M/s.Viswapriya Financial Services and Securities Limited has passed necessary resolution as per the Companies Act and the name of the said Company was changed to M/s.Viswapriya [India] Limited. Assailing these points, he filed a typed set of papers enlisting the various communications received from the RBI, reply sent and also the submission of documents before the Registrar of Companies.

8.The learned Standing Counsel for the respondent made his submissions and filed a counter affidavit on 06.08.2021 reiterating the averments made in the complaint. The relevant paragraphs of the counter is as follows:

> "14.The Petitioners have violated the provisions of the RBI Act as stated in the complaint in E.O.C.C No.343 of 2009 and 2nd Petitioners being the Director who is responsible for the acts of commissions and omissions committed by the company. The offences committed by them are continuing offences. The Petitioners have not taken any steps to prevent the commission of the offence and all accused persons are responsible for contravention of the provisions of the Act and Directions issued by RBI. The Petitioners are therefore liable for prosecution and punishment.
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> 15.By virtue of the Section 58-E of the RBI Act, the RBI is empowered to file complaint for the contravention/violation of the provisions of the RBI Act. Therefore, it is totally incorrect to state that the complainant lacked locus to file the complaint and or that the entire prosecution is misconceived.
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> 16.It is submitted that Section 45M of Act states that it shall be the duty of the every NBFI to furnish the statements, information or particulars called for and to comply with any directions given to it under the provisions of Chapter III-B of the RBI Act. Therefore, it is totally incorrect to state that "The Respondent bank has attempted to camouflage its communication and replies to the company as directions under the Act merely with a view to attempt to intimidate the company of penal action under Sec 58B(5)(aa) of the Act - it is to be noted that the word "directions" is specifically used in certain sections such as

Sec. 45JA, Sec 45K(1) and (3), 45L(2) and Sec. 45MA (1A) and only instructions issued by the Respondent Bank under these are entitled to be held as directions. Merely adding the word “Direct” to every communication of the bank does not in any manner entitle the Bank to claim that these are directions issued under the Act as the Act itself stipulates the sections and provisions in respect of which the Bank may so direct. While considering that the entire complaint is misconceived and there is no offence made out in any case the issue of Directions is per se not relevant and this is cited merely to highlight the effort of the bank in brow beating the company and its officers by trying to hold out mere request for inspection as a direction despite their being no scope in law for issuing such a direction.

17.It is submitted that the entire case of the Petitioners herein and the grounds are based on a wholly misconceived notion and completely erroneous mis-interpretation of the provisions of the RBI Act.

18.It is submitted that the Petitioners herein had filed the following cases before this Hon'ble Court, which arise out of E.O.C.C. No. 343 of 2009.

a.Crl.O.P.No.22190 of 2009 before this Hon'ble Court to quash the proceedings of E.O.C.C. No. 343 of 2009 and the same was dismissed as withdrawn on 28.11.2011.

b.Crl.R.C.Sr. No.51352 of 2014 and M.P.No.I of 2014 was dismissed by this Hon'ble Court on 03.02.2015.

c.Crl.R.C.No.409 of 2017, filed by the petitioners herein was dismissed by this Hon ble Court on 17.0402017. It is to be noted that the Crl.RC.No.409 of 2017 was filed during the pendency of instant Crl.O.P.

d.Crl.M.P.No.2988 of 2016 in E.O.C.C. No. 343 of 2009 - The Petitioners herein had filed the Crl.M.P.No. 2988 of 2016 based on the similar grounds.

19.It is submitted that in the Order dated 17.04.2017 in Crl.R.C.No.409 of 2017, this Hon'ble Court has held as follows:

......

18.In the above circumstances, the contention of the first petitioner company that they have got ample materials to show that the first petitioner company is not a non banking financial institution, cannot be cannot be considered at the stage of framing of charges, it is a matter for trial, and based on the above materials produced by the first petitioner company, the petitioners cannot be discharged.

19.So far as the nest contention of the learned counsel for the petitioner that without issuing a direction under Section 45K of the Act, the respondent/complainant cannot proceed to inspect the accounts and issue direction under Section 45N of the Act, this contention also cannot be accepted for the reason that, already a notice under Section 45K of the Act has been issued for production of records and since the records were not produced as directed by the respondent, a further notice under Section 45N of the Act was issued for inspection of the Accounts.

20.In the above circumstances, the Court below, after considering the entire materials, came to a conclusion that a primafacie case is made out against the petitioners to frame the charges and dismissed the discharge application filed by the petitioners. I find no irregularity or illegality in the impugned order passed by the Court below. The revision fails and it is liable to be dismissed.

20.It is submitted that the Petitioners herein have filed this Crl.O.P. only to protract and delay the proceedings before the Trial Court and that there is no bona fide on the part of the Petitioners in filing this instant Crl.O.P."

9.The learned Standing Counsel further relied on the decision of the Hon'ble Supreme Court in the case of Union of India and others vs. Major General Madan Lal Yadav [Retd.] reported in [1996] 4 SCC 127 for the principal that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law, further for the maxim frustra legis auxilium invocate quaerit qui in legem committit and further for the principal that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned.

10.He further relied upon the decision of the Hon'ble Supreme Court in the case of Kusheshwar Prasad Singh vs. State of Bihar and others reported in [2007] 11 SCC 447, wherein the Apex Court held as follows:

> “14.In this connection, our attentiion has been invited by the learned counsel for the appellant to a decision of this Court in Mrutunjay Pani v. Narmada Bala Sasmal wherein it was held by this Court that where an obligation is cast on a party and he commits a breach of such obligation, he cannot be permitted to take advantage of such situation. This is based on the Latin maxim commodum ex injuria sua nemo habere debet [no party can take undue advantage of his own wrong].”

11.He also relied upon the decision of the Hon'ble Supreme Court in the case of Devenra Kumar vs. State of Uttaranchal and others reported in [2013] 9 SCC 363, wherein it is held as follows:

> “25.More so, if the initial action is not in consonance with law, the subsequent conduct of a party cannot sanctify the same, Sublato fundamento cadit opus - a foundation being removed, the superstructure falls. A person having done wrong cannot take advantage of his own wrong and plead bar of any law to frustrate the lawful trial by a competent court. In such a case, the legal maxim nullus commodum capere potest de injuria sua propria applies. The person violating the law cannot be permitted to urge that their offence cannot be subjected to inquiry, trial or investigation. [Vide Union of India v. Major General Madan Lal Yadav and Lily Thomas v. Union of India]. Nor can a person claim any right arising out of his own wrongdoing (jus ex injuria non oritur).”

12.Considering the submissions made and on perusal of the materials placed before this Court, it is not in dispute that the petitioner had registered under the RBI Act in the year 1991 and for violation the Certificate of Registration was cancelled on 06.08.2005. The petitioner admittedly questioned the cancellation of registration by approaching this Court, thereafter on the direction of this Court filed an appeal under the RBI Act and the same is still pending. The main grievance of the petitioners in the appeal is that the Certificate of Registration to be restored. Thereafter, now the petitioner is making a defence that his financial status and operation of business has been shifted from financial activities to other activities. The Income Pattern Statement and the balance sheet for the year 2006, 2007 and 2008 would reveal that majority of its business is non-financial assets and income are from non financial assets, thereby implying that the principal business of the Company is not financing cannot be countenanced at this stage. The petitioner on one stretch wants to retain its status as Non-Banking Financial Company, on the other hand now claims that its primary business got shifted from finance. The petitioners initially sent a reply, thereafter failed to furnish the documents, statements and allow the Inspecting Officers to inspect the books of accounts and thereby violated the directions given by RBI. The petitioners' stand seems to be contradictory depending upon the situation. Further the petitioners' contention are disputed and denied by the respondents. The contention of the petitioners are disputed facts and are factual in nature which are to be decided during trial and not in the quash petition. In view of the same, this Court is inclined to dismiss this petition.

13.Accordingly, this Criminal Original Petition is dismissed. Further, finding that E.O.C.C.No.343 of 2009 is kept pending from the year 2009, the Trial Court is directed to give preference and complete the trial without further delay. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

cse

To

1. The Additional Chief Metropolitan Magistrate,
   Egmore, Chennai.

2. Reserve Bank of India,
   Fort Glacis,
   Rajaji Salai,
   Chennai - 600 001.

Crl.O.P.No.7370 of 2015

GP(CO)
PM/13/07/2022