IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 3416 OF 2022

NKGSB Co-operative Bank Ltd.
thro. Vinita Naresh Engineer ...Petitioner
Versus
State of Maharashtra and Ors. ...Respondents

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Mr. Ninad Muzumdar a/w Mr.Manish Kenia, Ms.Ankita Sovani, Advocate for Petitioner.

Ms. Pinky Bhansali a/w Adv. Mehernaz Contractor i/by Mr.Akshay Bafna, Advocates for Respondent Nos. 2 to 5.

Mr. Arfan Sait, APP for Respondent-State.

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CORAM : PRAKASH D.NAIK, J.
DATE : 29th JANUARY 2024.

P.C.:-

1. FIR was registered on 28th December 2018 with Cyber Police Station, Mumbai under Sections 420, 419 read with 34 of the Indian Penal Code, 1860 and Sections 46, 66, 66(c), 66(d) of the Information Technology Act by the Respondent No.2.

2. The Petitioner is the Scheduled Co-operative Bank. The Respondent No.2 is maintaining Bank Account No.004110100001584 with the petitioner-bank at Mahim Branch. It was alleged that some unknown

persons misused the computer data and hacked the Current Account No.004130100000880 of the complainant company and unauthorizedly transferred the amount of Rs.1,86,00,000/- to different account of unknown persons. Amount of Rs.20 lakhs was reverted back to account of complainant thereby the complainant was cheated for an amount of Rs.1,66,00,000/-.

3. During investigation, the Investigating Officer intimated the petitioner bank to freeze the aforesaid account and called for particulars of account.

4. The Respondent Nos.2 to 5 preferred Miscellaneous Application No.255/Misc/2020 for defreezing the account and seeking custody of seized amount.

5. The learned Magistrate vide order dated 7th September 2020 allowed the application and the Investigating Officer was directed to defreeze the bank account No. 004130100000880 with balance amount of Rs.1,86,00,000/-.

6. The petitioner preferred Criminal Revision Application No.104 of 2021 challenging the said order before the Sessions Court. Vide order dated 18th July 2022, the Revision Application was dismissed.

7. Learned Advocate for the Petitioner submitted that, the petitioner is aggrieved by the second part of the order wherein the trial Court had

directed defreezing the account with balance amount of Rs.1,86,00,000/-. The amount was not credited back into the bank account of Respondent Nos.2. The amount was not seized during the course of investigation. The amount cannot be returned to Respondents under Section 457 of Cr.P.C. The application preferred before the Court was misconceived. Learned Magistrate has committed an error in allowing the application with direction to maintain the amount as above. There was no balance of amount of Rs.1,86,00,000/- in the said account. There is no reasoning in the impugned order as to why there was direction to maintain the balance amount of Rs.1,86,00,000/-. The amount of Rs. 1,86,00,000/- could not be returned as it was not seized. The Sessions Court has failed to take into consideration scope of Section 457 of Cr.P.C. The application under Section 457 of Cr.P.C. is maintainable in respect to property which has been seized by Investigating Agency. In the FIR it is alleged that the money which is unauthorizedly debited has gone out from account to some other account and it is no longer in the account of Respondent No.2. At the time of freezing of account there was no balance amount of Rs.1,86,00,000/- in the said account. The Sessions Court proceeded under belief that what was challenged is defreezing of account which is not the case as account was defreezed in compliance of order by learned Magistrate. The Bank had given all details of account number to which the money has gone. The said account ought to have been seized. The Courts had no jurisdiction to decide responsibility or negligence of Bank while deciding application under Section 457 of Cr.P.C. The dispute had travelled to Banking ombudsman and as per directions of RBI the bank has given shadow credit to Respondent No.2 till the dispute is adjudicated. The shadow credit is not actual credit into account. It is only for the purpose of interest adjustment. What has been seized under Section 102 of Cr.P.C. can be returned/defreezed. Every Bank account is having two types of balances, one which is called as 'Actual Balance Available Balance',which amount can be utilized by the account holder and another is called as 'Ledger Balance' which is called as 'Shadow Credit Balance', which amount cannot be utilized by the account holder and it is for the purpose of accounting. Such balance is for maintaining record and not for utilization. Letter dated 4th November 2019 sent in response to complaint lodged by respondents is self explanatory. It was sent without prejudice and it was clarified that Bank giving shadow credit facility does not amount to acceptance of liability by bank and that the banks claim on the respondents on the amount of shadow reversal, the interest thereon from the date of alleged fraud shall continue to remain till the matter is settled in competent Court.

8. Learned Advocate for Respondent Nos. 2 to 5 submitted that, the respondent No.2 is engaged in business of manufacture and sale of bed sheets. Respondent Nos. 3 to 5 are the partners of the Respondent No.2.

Respondents are having bank account with the petitioner for the purpose of carrying the business activities. There were unauthorized and fraudulent transactions in the account of Respondent No.2. The transactions were to the tune of Rs.1,86,00,000/-. The Respondent No.2 had applied for cash credit facility/packing credit facility. Vide sanction letter dated 19th December 2018 cash credit/packing credit limit of Rs.2,80,00,000/- was allowed and cash credit account was allotted to Respondent No.2. The respondents had availed online Banking facility in their current account. There were huge transactions aggragating to Rs.1,86,00,000/- in their account on 27th December 2018 and 28th December 2018. Complaint was lodged with police. Amount of Rs.20,00,000/- was re-credited to cash credit account on 28th December 2018. FIR was lodged by Respondent No.2 with Respondent No.1 for unauthorized debits with respect to cash credit account No.004130100000880. On 28th December 2018, the amount was siphoned off Respondent No.2 bank account to various unknown beneficiary accounts. Respondents filed civil suit for injunction against petitioner before the City Civil and Sessions Court, Greater Mumbai for not charging interest on the cash credit siphoned off amount not utilized by the respondents. The Respondents also approached the banking ombudsman operated by Reserve Bank of India. The City Civil Court granted interim injunction restraining petitioner from charging interest and recalling the siphoned off amount. The ombudsman directed the petitioner to credit back the siphoned off amount in the bank account of Respondent which was allowed by petitioner and shadow credit of Rs.1,66,00,000/- was credited in bank account of Respondent No.2. The Respondent withdrawn the suit. As per circular issued by RBI bearing No.RBI/2017-18/109 it is the duty of the banker to safeguard and secure the account of customer. Order passed by learned magistrate indicates that amount is lying as balance in account of Respondent No.2 and the petitioner had credited the same in view of order passed by Banking Ombudsman of RBI. The Revision Application preferred by petitioner is dismissed. The money credited into the account of Respondent No.2 were duly freezed. The petitioner had written letter to Respondents on 4th November 2019 stating that, as per RBI directives dated 14th December 2017 the bnak shall be crediting (shadow reversal) amount involved in the alleged fraud to his cash credit of amount of Rs.1,66,00,501.50/-. Since the shadow credit will be given value dated as of 28th December 2018 i.e. the date of the alleged fraud, while applying interest for the month of November 2019, interest applied so far on the said amount will get reversed. The petition deserves to be dismissed.

9. The Respondent No.2 is having bank account with petitioner. The complainant had alleged that there were fraudulent transactions in his bank account. The FIR was lodged against unknown person. The grievance of the complainant is that the amount lying in his bank account was siphoned off

by unknown person. Petitioner is the bank in which the respondents hold the account wherein the alleged transactions were effected. The Investigating Officer instructed the petitioner to freeze the account of Respondents. During the course of investigation, the account of the respondents is freezed. The complainant had filed civil suit before the City Civil Court for Greater Bombay which has been kept for withdrawal as the amount was credited to cash credit account.

10. It is pertinent to note that the case of the complainant is that the account has been siphoned off his account by unknown person. The application for defreezing the account was allowed and the petitioner bank was directed to maintain the amount of Rs.1,86,00,000/-. The learned Magistrate has not assigned any reason for issuing direction to the petitioner to maintain the balance amount as stated above. The application preferred by respondents was for defreezing their account, the question of directing the bank to maintain balance amount of Rs.1,86,00,000/- does not arise. The order holds the petitioner bank responsible for maintaining the said account.

11. Section 102 of Cr.P.C. empowers the power of Police Officer to seize certain property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence. Pursuant to the complaint lodged by Respondents, the Investigating Officer directed the petitioner bank to debit/

freeze/stop and provide the details of fraudulent transaction done in the bank account No.004130100000880. The Respondent No.2 preferred application before the Court of learned Magistrate and contended that their account is freezed on direction of Investigating Officer. The Respondents had filed Civil Suit in the City Civil Court at Greater Bombay which has been kept for withdrawal as the bank has credit amount involved in the fraud to cash credit account as shadow credit. The bank has also reversed the interest amount charged to the complainant from 28th December 2018 till November 2019. It was prayed that notice be issued to bank to Respondent therein to show cause why the application should not be allowed and custody of the amount seized in the bank account of the complainant maintained with the bank should not be given to the complainant. The letter issued by Investigating Officer be set aside and bank be directed to defreeze the bank account of the complainant.

12. Learned Magistrate allowed the application and directed the Investigating Officer to defreeze the bank account of Respondent No.2 with balance amount of Rs.1,86,00,000/- which is in the name of the applicant. It is pertinent to note that the impugned order dated 7th September 2020 proceeds with the observation that the Respondents have lodged the complaint with Police and the FIR has been registered on the basis of their complaint. The Investigating Officer and Additional Public Prosecutor gave no objection for defreezing the account. Thus, the order indicated that the

Court shall allowing the prayer for defreezing the account. However, the operative part of the order indicate that the account be defreezed with balance amount of Rs.1,86,00,000/-. The entire order does not reflect any reason for issuing direction to maintain the balance amount of Rs.1,86,00,000/-. It is pertinent to note that, at the time of seizure the amount of Rs.1,86,00,000/- was not lying in the said bank account. The account was freezed. The amount was not freezed. The question of directing to maintain the balance amount of Rs.1,86,00,000/- does not arise.

13. Section 457 of Cr.P.C. reads as follows:-

> *"457. **Procedure by police upon seizure of property**.- (1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.*
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> *(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation."*

14. The aforesaid provision clearly stipulates that whenever the seizure of property by any police officer is report to the Magistrate, the Magistrate may make such order respecting the disposal of the such property or delivery of such property to the person entitled to the possession thereof.

In the present case, there was no seizure of the amount of Rs.1,86,00,000/-. Learned Magistrate has therefore, committed an error while issuing such directions. The direction to defreeze the account was justified but the question of maintaining the amount as directed by Magistrate does not arise. The petitioner cannot be directed to maintain such amount. The Court was not empowered to decide the liability of the bank or to declare that the petitioner bank was negligent in securing the account of the accused which also does not appear from the tenor. In fact the order does not reflect that any reason for directing to maintain the amount. The amount which was not existing at the time of seizure cannot be directed to be maintained by the bank. What was freezed during investigation is operation of the bank account. The amount of complainant was transferred to different bank account it does not appear that the Investigating Officer has taken any steps to seize the account in which the amount is transferred. At the time of freezing the account, there is no balance amount of Rs.1,86,00,000/- for the said account. The order of learned Magistrate and learned Sessions Judge travelled beyond scope of Section 457 of Cr.P.C. If the bank is in compliance with order of ombudsman on shadow credit amount of Rs.1,86,00,000/- to the account of the complainant. Thus, amount cannot be treated as the property recovered and seized under Section 102 of Cr.P.C. in which no application could be filed under Section 457 of Cr.P.C.

15. In view of the above, the impugned orders passed by learned Magistrate as well as learned Sessions Judge are bad in law and required to be set aside.

ORDER

(i) Criminal Writ Petition No.3416 of 2022 is allowed.

(ii) Impugned order dated 7th September 2020 passed by learned Additional Chief Metropolitan Magistrate, 37th Court, Esplanade, Mumbai and order dated 18th July 2022 passed by learned Additional Sessions Judge, City Civil and Sessions Court, Greater Mumbai dismissing the Criminal Revision Application No.104 of 2021 are set aside to the extent of directing the petitioner to maintain balance amount of Rs.1,86,00,000/- in the name of respondents.

(iv) Writ Petition stands disposed off.

(PRAKASH D. NAIK, J.)