

(2018) 12 BOM CK 0159

In the Bombay High Court

Case No : Criminal Application (Apl) No. 274 Of 2018

Dinesh Kashiram Mange

APPELLANT

Vs

State Of Maharashtra And Ors

RESPONDENT

Date of Decision : 21-12-2018

Acts Referred:

Special Courts (Trial Of Offences Relating To Transactions in Securities) Act, 1992 — Section 3(2)
Indian Penal Code, 1860 — Section 34, 120B, 406, 409, 420, 468, 471
Code of Criminal Procedure, 1973 — Section 28, 397, 482
Depositories Act, 1996 — Section 2(e), 2(g), 4, 5, 19A, 19C, 19E, 19 FA, 19G, 19IA, 20, 20(1), 21, 22A, 22C, 22C(3), 22D, 23
Securities and Exchange Board of India Act, 1992 — Section 21
Securities and Exchange Board of India Act, 1992 — Section 15A, 21
Constitution of India, 1950 — Article 22(2)

Citation : (2018) 12 BOM CK 0159

Hon'ble Judges : Z.A. Haq, J

Bench : Single Bench

Advocate : Anil S, Mardikar, Sumit G. Joshi, Mrunal Barabde, H.T. Agrawal

Final Decision : Allowed

Judgement

Z.A.HAQ, J.

1] This criminal application was heard on 13/12/2018 and part of the judgment was dictated. At the time of hearing of the arguments, photo copy of the print out of the Special Courts (Trial Of Offences Relating To Transactions in Securities) Act, 1992 was referred by the learned Senior Advocate appearing for the applicant. In the photo copy which was supplied at the time of hearing, Section 3 (2) of the Act of 1992 is shown as follows:-

"S. 3 (2). The Custodian may, on being satisfied on information received that any person have been involved in any offence relating to transactions in securities after the 1st day of April, 1991 and on and before notify the name of such person in the official Gazette."

The hearing was complete and dictation of the judgment was started on 13/12/2018. Considering the provisions of Section 3 (2) of the Act of 1992 as reproduced above, part of the judgment was dictated, however, at the time of dictation of the judgment, the book of the Special Courts (Trial Of Offences Relating To Transactions in Securities) Act, 1992 was made available and when Section 3 (2) of the Act of 1992 was referred, it was found that the relevant date was missing in the copy made available at the time of hearing.

In the book, Section 3 (2) of the Act of 1992 is as follows:-

"S. 3 (2) The Custodian may, on being satisfied on information received that any person has been involved in any offence relating to transactions in securities after the 1st day of April, 1991 and on and before 6th June, 1992, notify the name of such person in the Official Gazette."

The relevant date "06th June, 1992" was missing in the photocopy.

Therefore, the dictation was stopped and the matter was kept for re-hearing. It was directed that the judgment which was dictated in part be kept in sealed envelope.

2] The hearing of the criminal application is taken today.

3] Heard Shri Anil S. Mardikar, Senior Advocate assisted by Shri Sumit G. Joshi, Advocate for the applicant, Ms. Mrunal Barabde, learned APP and the non-applicant no. 2 (in person).

4] ADMIT.

Taken up for final hearing.

5] The non-applicant no. 2 has filed complaint before the Chief Judicial Magistrate, Akola under Sections 406, 409, 420, 468, 471, 120B and 34 of the Indian Penal Code (for short "IPC") praying that the accused (present applicant) and six others be punished.

According to the complainant, the accused no. 1 is a private limited company, the accused nos. 2 and 3 are the Directors, the accused no. 4 is the Director as well as the Manager of the Company and the accused nos. 5 to 7 are the Managers of the Company. The present applicant is the accused no. 7 in the complaint. According to the complainant, the accused nos. 2 to 7 are looking after the day-to-day business and affairs of the accused no. 1 - Company. According to the complainant, the accused had induced him with malafide intention to sign the Demat slips with instructions being filled up in the slips, and those slips were kept with the accused to be used in emergency, however, the accused committed breach of trust and misused the Demat slips with fraudulent intention and transferred valuable shares worth Rs. 44,89,422/- to the accounts of the accused and their associates.

6] After examining the complaint and recording the verification statement and

the evidence of the complainant, by the order dated 29/09/2017, the learned Magistrate directed issuance of process against the accused for the offences punishable under Sections 409, 468, 471 and 34 of IPC. This order was challenged by the applicant before the Sessions Court under Section 397 of the Code of Criminal Procedure in revision which is dismissed by the impugned judgment. Being aggrieved in the matter, the applicant - accused has filed this application under Section 482 of the Code of Criminal Procedure.

7] The learned Senior Advocate appearing for the applicant - accused has assailed the impugned order and judgment on the following grounds:-

(i) that as per Section 22-D of the Depositories Act, 1996, any offence under the Depositories Act, 1996 is required to be tried by the Special Court established under the Depositories Act, 1996.

(ii) The complainant is making a grievance in respect of the transactions which had taken place prior to 23/05/2006.

(iii) The Magistrate cannot take cognizance of the complaint as the earlier complaint filed by the complainant with the Assistant Commissioner of Police, Mumbai was inquired into and the police had not taken cognizance as it was found in the preliminary enquiry that there was no substance in the complaint.

To support the submission, the learned Senior Advocate has relied on the communication sent by the Senior Inspector of Police, Economic Offences Wing, Unit-V, CB, C.I.D., Mumbai to the Assistant Commissioner of Police, Information Officer (Crime), Office of the Commissioner of Police, Mumbai on 18/12/2007.

(iv) In any case, the Court at Akola has no jurisdiction to entertain and try the complaint as the cause of action, if any, has arisen at Mumbai.

8] Per-contra, the non-applicant no. 2 who appears in person has submitted that the argument made on behalf of the applicant - accused, relying on the provisions of Section 22-D of the Depositories Act, 1996 (for short "the Act of 1996") is misdirected. The non-applicant no. 2 has pointed out Section 21 of the Securities and Exchange Board of India Act, 1992 (for short "the SEBI Act") to urge that the accused can be prosecuted for the offence under IPC. It is further submitted that the Special Court established under the Act of 1996 would be able to try the offences under that Act of 1996 only, and the Special Court will not be able to try the offences under IPC. It is submitted that the accused are being tried for the offence punishable under Section 409 of IPC also for which the punishment is imprisonment for life or imprisonment for a term which may extend to 10 years and fine, and the Special Court will not have the jurisdiction to try this offence.

To support the submission, reliance is placed on the judgment given by the Hon'ble Supreme Court in the case of Chairman, SEBI vs. Shriram Mutual Fund and another reported in (2006) 5 SCC at page 361 and the judgment given by the Division Bench of this Court in the case of Mrs. Asha Anilkumar Kataria Sole

vs. Ashokkumar S/o Kevalchand Bafna reported in 2007 (4) Mh.L.J. at page 149.

As far as the point of the territorial jurisdiction is concerned, the non-applicant no. 2 contends that the amount pursuant to the transactions was required to be deposited in the account of the applicant at Akola as it was done earlier also, and therefore the cause of action has arisen at Akola and the Court at Akola has jurisdiction to entertain and try the complaint.

9] After hearing the learned Senior Advocate appearing for the applicant - accused, the learned APP and the non-applicant no. 2, in my view, the point raised on behalf of the applicant - accused regarding implied bar to the jurisdiction of all other Courts except the Special Court established under the Act of 1996 should be dealt with first.

The learned Senior advocate appearing for the applicant - accused has referred to the preamble and Sections 2 (e), 2 (g), 4, 5, 19-A, 19-C, 19-E, 19- FA, 19-G, 19-IA, 20, 21, 22-A, 22-C, 22-D and 23 of the Act of 1996, and has argued that the Act of 1996 is a complete Code in itself.

It is further submitted that the Special Court is established at Mumbai as per Section 22-C of the Act of 1996 and the Special Court at Mumbai exercises the jurisdiction in respect of the offences under the Act of 1996 throughout the State of Maharashtra. It is further submitted that though the complaint is filed seeking prosecution and conviction of the accused for the offences under IPC, on reading of the complaint, it is clear that the allegations are about the offences under the Act of 1996. It is submitted that after the Securities Laws (Amendment) Act 2014, all the offences under the Act of 1996 committed prior to the commencement of the Securities Laws (Amendment) Act, 2014 or on or after the date of commencement of that Act, are to be taken cognizance of and tried by the Special Courts established for the area in which the offence is committed and in the above facts the complaint has to be transferred to the Special Court at Mumbai.

10] The submission made by the non-applicant no. 2, referring to the provisions of Section 21 and Section 15-A of the SEBI Act, is misdirected. Section 21 of the SEBI Act provides that any person who is liable for an action under any law other than the SEBI Act, cannot take protection of the provisions of the SEBI Act and cannot seek exemption from any suit or other proceedings which he is liable to face. It cannot be said that Section 21 of the SEBI Act enables the Court other than the Special Court under the Act of 1996 to take up proceedings on the complaint for an offence under the Act of 1996.

On the basis of the judgment given in the case of Chairman, SEBI vs. Shriram Mutual Fund (supra), it cannot be said that the complaint filed by the non-applicant no. 2 before the Chief Judicial Magistrate, can be tried by the Chief Judicial Magistrate as the allegations are in respect of the offences under IPC. In the judgment given in the case of Chairman, SEBI vs. Shriram Mutual Fund (supra), the Hon'ble Supreme Court considered the scheme of the SEBI Act

particularly Chapter VI and Chapter VI-A, and recorded that Chapter VI of the SEBI Act deals with the defaults or failures of the statutory civil obligations provided under the Act and regulations, and the proceedings under Chapter VI-A are neither criminal nor quasi-criminal. It further recorded that the penalty leviable under Chapter VI-A of the SEBI Act is penalty in cases of default or failure of statutory obligations or breach of civil obligation and under the scheme of penalty under Chapter VI-A of the SEBI Act, there is no element of criminal offence or punishment under the criminal proceedings. Section 15-A of the SEBI Act provides for "penalty" for failure to furnish information, return, etc. and the defaulter is liable to pay the penalty as provided under the provision.

None of the provision under Chapter VI-A of the SEBI Act provides for punishment or imprisonment but under the Act of 1996, the offences under the Act of 1996 are punishable with imprisonment for a term which may extend to 10 years or with fine or both. Thus, the submission made by the non-applicant no. 2, relying on the judgment given in the case of Chairman, SEBI vs. Shriram Mutual Fund (*supra*), cannot be accepted and the judgment is distinguishable.

11] Now, the point which requires consideration is whether the Special Court established under the Act of 1996 can try the offences under IPC. Section 22-C (3) of the Act of 1996 provides for the qualifications of a person who can be appointed as a Judge of a Special Court under the Act of 1996. It lays down that a person shall not be qualified for appointment as a Judge of a Special Court unless he is, immediately before such appointment, holding the office of a Sessions Judge or an Additional Sessions Judge, as the case may be.

As per Section 28 of the Code of Criminal Procedure, the Sessions Judge or an Additional Sessions Judge can pass any sentence authorized by law subject to the limitation that any sentence of death passed by the Sessions Judge or the Additional Sessions Judge shall be subject to confirmation by the High Court.

If the provisions of Section 22-C (3) of the Act of 1996 are read harmoniously with Section 28 of the Code of Criminal Procedure, it cannot be said that the Special Court presided over by a person who had been a Sessions Judge or an Additional Sessions Judge immediately before his appointment as Special Judge, cannot try the complaint in respect of the offences under IPC alongwith the complaint in respect of the offence/offences under the Act of 1996.

If the submission made on behalf of the non-applicant no. 2 that the Special Court cannot try the complaint in respect of the offence/offences under IPC is to be accepted, then it would lead to a situation where on the basis of the same complaint the accused would be tried before the Special Court for the offence/offences under the Act of 1996, and on the basis of the same complaint in respect of the offence/offences under IPC, the complaint would lie before the Ordinary/Regular Criminal Court. Such dichotomy would be against the basic principles of criminal jurisprudence and would be violative of Article 20 (2) of the Constitution of India.

12] Though the complaint filed by the non-applicant no. 2 shows that he is seeking prosecution and conviction of the accused for the offences under IPC only and there is no prayer in the complaint to punish the accused for the offence/offences under the Act of 1996, the learned Senior Advocate has rightly pointed out that if the accusations/allegations made in the complaint make out an offence under the Act of 1996, then it cannot be said that the complaint can be tried by the Chief Judicial Magistrate.

13] Section 20 of the Act of 1996 provides that for the offence under the Act of 1996. Sub-section (1) of Section 20 of the Act of 1996 provides that if a person contravenes or attempts to contravene or abets the contravention of the provisions of the Act of 1996 or of any rules or regulations or bye-laws made under it, he shall be liable for the punishment as provided under the Act of 1996.

Section 21 of the Act of 1996 lays down that where a contravention of any of the provisions of the Act of 1996 or any rule, regulation, direction or order made under it has been committed by a company, every person who at the time of the contravention was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable for punishment as provided under the Act of 1996.

14] The accusations made in para nos. 6, 7 and 8 of the complaint filed by the non-applicant no. 2 before the Chief Judicial Magistrate refer to certain Acts on the part of the accused which are not in consonance with the practice which is required to be followed regarding On-Market transactions and Off- Market transactions. The non-applicant no. 2 complains that the Demat slips signed by him with filled up instructions slip, were kept with the accused with the understanding / trust that the same would not be used by the accused unless the non-applicant no. 2 gives instructions, but those slips have been misused to transfer the shares illegally causing huge loss to the non-applicant no. 2.

15] As the complaint in respect of the offence/offences under the Act of 1996 is to be tried by the Special Court under the Act of 1996, in my view, whether the accusations made in the complaint filed by the non-applicant no. 2 cul out an offence under the Act of 1996 will have to be examined and determined by the Special Court under the Act of 1996.

In view of the facts of the case and considering the provisions of Section 22-D of the Act of 1996, I hold that the Chief Judicial Magistrate, Akola has no jurisdiction to entertain and try the complaint, and in view of the Securities Laws (Amendment) Act 2014, the complaint is required to be transferred to the Special Court established under the Act of 1996. Consequently, it has to be held that the order passed by the learned Magistrate directing issuance of process against the accused and the judgment passed by the learned Sessions Judge dismissing the criminal revision application are also not sustainable.

Hence, the following order is passed:-

O R D E R

a) The order passed by the Chief Judicial Magistrate in R.C.C. No. 565/2011 on 29/09/2017 is set aside.

b) The judgment passed by the learned Sessions Judge in Criminal Revision Application No. 192/2017 on 20/02/2018 is set aside.

c) The learned Chief Judicial Magistrate is directed to transfer the complaint (R.C.C. No. 565/2011) filed by the non- applicant no. 2 against the applicant and the other accused, to the Special Court at Mumbai.

(d) The non-applicant no. 2 shall appear before the Special Court at Mumbai on 18/03/2019.

The criminal application is allowed in the above terms.

In the circumstances, the parties to bear their own costs.

The non-applicant no. 2 has prayed that this judgment be kept in abeyance for six weeks to enable him to take appropriate steps in the matter.

The learned Chief Judicial Magistrate shall initiate the process of transferring the case after six weeks.

CRIMINAL APPLICATION (APPP) NO. 1073/2018

In view of the disposal of the criminal application, this application praying for grant of permission to file the additional documents on record does not survive. It is disposed accordingly.