

(2022) 06 GUJ CK 0120

In the Gujarat High Court

Case No : R/Special Criminal Application No. 4953 Of 2022

Kirankumar Vanmalidas Panchasara

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 20-06-2022

Acts Referred:

Constitution Of India, 1950 — Article 226, 227
Code Of Criminal Procedure, 1973 — Section 437, 439
Indian Penal Code, 1860 — Section 114, 120(B), 406, 420
Gujarat Protection Of Interest Of Depositors (In Financial Establishments) Act, 2003 —
Section 3, 4, 4(1), 4(5), 5, 7, 10(6)

Citation : (2022) 06 GUJ CK 0120

Hon'ble Judges : Niral R. Mehta, J

Bench : Single Bench

Advocate : Rahul R Dholakia, Pranav Trivedi

Final Decision : Allowed

Judgement

Niral R. Mehta, J

1. By way of this Special Criminal Application under Articles 226 and 227 of the Constitution of India r/w Sections 437 and 439 of the Cr.P.C., the petitioner has approached this Court for quashing and setting aside the impugned direction issued in Para.4 and 6 in CR.MA No.503 of 2022 by the Designated Court of Principal District and Sessions Judge, Rajkot.

2. Short facts of the case can be stated as under :

2.1 The FIR being CR No.11208055210354 of 2021 registered with DCB Police Station, Rajkot for offences punishable under Sections 406, 420, 114 and 120(B) of the IPC and Section 3 of the Gujarat Protection of Interest of Depositors (In Financial Establishments) Act, 2003 (for short 'the Act of 2003') by one Shri Mahendrabhai Dadbhai against the present petitioner.

2.2 In furtherance of the aforesaid FIR, the petitioner came to be arrested and

thereby, an application being Criminal Misc. Application No.503 of 2022 came to be preferred under Section 439 of the Cr.P.C. for seeking, inter-alia, regular bail. The said application came up for hearing before the learned Principal District and Sessions Judge (Designated Court), Rajkot, who, vide its order dated 22.4.2022, allowed the same with certain conditions, mainly Condition Nos.4 and 6, which read, thus :

"(4) The applicant to produce bank guarantee of Rs.33,06,695/- (Rupees Thirty Three Lacs Six Thou-sand Six Hundred Ninety Five Only) in the name of Nazir, District Court, Rajkot, within two weeks of his release from custody. However, the payment / dis-bursement shall be subject to the provisions of G.P.I.D. Act and/or final decision of the trial.

(6) In case the I.O. fails to recover the amount of Rs.33,06,695/- (Rupees Thirty Three Lacs Six Thou-sand Six Hundred Ninety Five Only) from the appli-cant, the bank guarantee shall stand forfeited in favour of the complainant -State."

3. Being aggrieved by the aforesaid, the petitioner has approached this Court by way of present Special Criminal Application for the reliefs stated herein-above.

4. This Court had an occasion to deal with and decide somewhat similar issue in Special Criminal Application No.1692, decided on 9.6.2022, wherein in Para.9 following question was framed and decided :

"9. So far as deletion of condition No.6 is concerned, short but interesting question of law arises for consideration of this Court is whether the Court while exercising powers under Section 439 of the Cr.P.C., can impose such condition which amounts to exercising powers envisaged under the another enactment i.e. Gujarat Protection of Interest of Depositors (In Financial Establishments) Act, 2003 ?"

5. This Court has in detail considered the provision of law and observed as under :

10. So as to decide the aforesaid question, in my view, it would be apt to consider relevant provisions of the Act of 2003, which is as under :

"4. Attachment of properties on default of return of deposit. (1) Notwithstanding anything contained in any other law for the time being in force,

(i) Where upon complaint received from the depositor or otherwise, the State Government is satisfied that any Financial Establishment has failed,

(a) to return the deposit on maturity on demand by the depositor; or

(b) to pay interest or other assured benefit; or

(c) to provide the service promised against such deposit; or

(ii) Where the State Government has reason to believe that any Financial Establishment is acting in a calculated manner detrimental to the interest of the

depositors with an intention to defraud them; and if the State Government is satisfied that such Financial Establishment is not likely to return the deposits or make payment of interest or other benefits assured or to provide the services against which the deposit is received, the State Government may, in order to protect the interest of the depositors of such Financial Establishment, after recording the reasons in writing, issue an order by publishing it in the Official Gazette, for attaching the money, property or assets belonging to or believed to have been acquired by such Financial Establishment either in its own name or in the name of any other person from out of the deposits collected by the Financial Establishment, or if it transpires that such moneys, properties or assets, is not available for attachment or not sufficient for repayment of the deposits, such other property or assets of the said Financial Establishment or of the promoter, director, partner or member of the said establishment as the State Government may think fit.

(2) On publication of the order under sub-sec. (1), all the moneys, properties and assets of the Financial Establishment and of the person mentioned therein shall forthwith vest in the Competent Authority pending further order from the Designated Court.

(3) The Collector of a district shall be competent within his jurisdiction to receive the complaint under sub-sec. (1) and he shall forward such complaint alongwith his report to the State Government at the earliest and shall send a copy of the complaint to the concerned Superintendent of Police or Commissioner of Police, as the case may be, for investigation.

5. Appointment of Competent Authority :-

(1) The State Government shall while issuing the order under sub-sec. (1) of Sec. 4, appoint an officer not below the rank of the Deputy Collector to be the Competent Authority to exercise control over the moneys, properties and assets attached by the State Government under Sec. 4.

(2) The Competent Authority shall have such other powers and discharge such other functions as may be prescribed by rules for carrying out the purposes of this Act.

(3) The Competent Authority shall apply, within thirty days from the date of the publication of the order made under Sec. 4 to the Designated Court, accompanied by one or more affidavits stating therein the grounds on which the State Government has issued the said order and the amount of moneys or other properties or assets belonging to or believed to have been acquired out of the deposits and the details, if any, or persons in whose name such property is believed to have been invested or acquired or any other property attached under Sec. 4, for such further orders as the Designated Court may find necessary.

(4) The Competent Authority may, also make an application to any Special Court or Designated Court or any other judicial forum established or constituted or

entrusted with the powers by any other State Government for adjudicating any issue or subject matter pertaining to moneys or properties or assets of the Financial Establishment under any similar enactment in respect of moneys or properties or assets belonging to or ostensibly belonging to the Financial Establishment or of any person notified under this Act situated within the territorial jurisdiction of that Special Court or Designated Court or any judicial forum, as the case may be, for passing appropriate orders to give effect to the provisions of this Act.

6. Duties and powers of Competent Authority:- (1) The Competent Authority, on receipt of order of his appointment, shall take such necessary actions as it is necessary or expedient for taking physical possession of all the moneys, properties and assets of the concerned Financial Establishment expeditiously and he shall have all the powers which are necessary for the aforesaid purpose.

(2) Without prejudice to the generality of the powers vested under sub-sec. (1), the Competent Authority shall be entitled to -

(a) require assistance of any police authority or any other authority or person and on such requisition, it shall be the duty of the police authority or such other authority or person to extend necessary assistance;

(b) open bank accounts in any scheduled commercial bank and credit all moneys realised and operate the bank accounts while dealing;

(c) to direct the person to furnish the necessary information relating to moneys, properties and assets of the Financial Establishment to hand over possession of such moneys, properties and assets to the Competent Authority and such person shall comply with the requisition without any loss of time;

(d) appoint legal practitioner or chartered accountant or any other person whose services are necessary for taking possession of assets and realisation of the assets of the Financial Establishment;

(e) sell, receive, transfer, endorse, negotiate or otherwise deal with any marketable security or negotiable instrument belonging to or in the control of the Financial Establishment and give proper discharge for the same;

(f) sell, transfer or otherwise realise any movable or immovable property belonging to or in the control of the Financial Establishment either by public auction or with the prior approval of the

Designated Court by private arrangements :

Provided that the perishable items of assets shall be sold by public auction at the earliest as the Competent Authority deems fit;

(g) make payment as per the orders passed by the Designated Court from out of the bank accounts; and

(h) do all and every acts and deeds which would be necessary for the speedy

realisation of the assets of the Financial Establishment.

Explanation. For the purpose of this section, the expression "Financial Establishment" includes the promoters, directors, partners, managers or members of the said establishment or any other person whose property or assets have been attached under Sec. 4.

7. Assessment of assets, deposits and liabilities:- (1) The Competent Authority shall, within thirty days from the date of his appointment, assess the assets, deposits and liabilities of the Financial Establishment and submit the statement thereof to the Designated Court.

(2) The Competent Authority thereafter shall issue notice either individually or by means of effective media publication inviting the claims by secured creditors, if any, and also the depositors of the Financial Establishment to submit their claims with sufficient proof in support thereof.

3) Every notice under sub-sec. (2) shall specify that if the statement of claims is not sent to the Competent Authority before the expiry of the period of one month from the date of such notice, the claims shall not be treated as claim entitled to be paid under the provisions of this Act.

(4) Every notice to a secured creditor shall require him to value the security before the expiry of the period of one month from the date of the notice and such notice shall also specify that if the statement of the claim together with the valuation of the security is not sent to the Competent Authority within such period, the Competent Authority himself shall value the security to the best of his judgment and his valuation shall be binding on such secured creditors.

(5) The Competent Authority shall prepare a statement of dues of the Financial Establishment which is due from various debtors, the assessments of the value of the property and assets of the Financial Establishment and the list of the depositors and their respective dues; and submit the same to the Designated Court.

8. Report by Competent Authority:- The Competent Authority shall, after complying with the provisions of Sec. 7, make an application to the Designated Court seeking permission to make payment to the depositors from out of the money realised. While making such application, the Competent Authority shall assess the liability to the depositors and the other liabilities and in case the money realised or realisable is not sufficient to meet with the entire liability, make a submission to the Designated Court seeking permission for making payment to the depositors and disburse the money as per the orders of the Designated Court.

9. Designated Court :- (1) For the purposes of this Act, the State Government may, with the concurrence of the Chief Justice of the High Court of Gujarat, by notification, in the Official Gazette, constitute one or more Designated Court of the level of the Court of a District and Sessions Judge for such area or for such

case or group of cases or such class as may be specified in the notification.

(2) No Court, other than the Designated Court shall have jurisdiction to deal with or decide any question which the Designated Court is empowered to deal with or decide by or under this 4.

(3) Any case or proceeding pending before any Court or any authority in relation to the moneys, properties or assets of the Financial Establishment covered by an order made under Sec. 4, shall stand transferred to the respective Designated Court and shall be dealt with and decided by such Court in accordance with the provisions of this Act.

10. Powers of Designated Court regarding attachment:- (1) Upon receipt of an application made under Sec. 5, the Designated Court shall issue to the Financial Establishment or to any other person whose moneys, properties or assets are attached by the State Government and vested in the Competent Authority under Sec. 4, a notice accompanied by the application and affidavits and copies of the evidence, if any, recorded, calling upon the said establishment or the said person to show cause on a date to be specified in the notice, why the order of attachment should not be made absolute.

(2) The Designated Court shall also issue such notice, to all other persons represented to it, as having or being likely to claim any interest or title in the property of the Financial Establishment or of the person to whom the notice is issued under sub-sec. (1), calling upon all such persons to appear on the same date as that specified in the notice and to make objection if they so desire, to the attachment of the moneys, properties or assets or any portion thereof on the ground that they have interest in such property or portion thereof.

(3) Any person claiming an interest in the moneys, properties or assets attached or any portion thereof may, notwithstanding that no notice has been served upon him under this section, make an objection as aforesaid to the Designated Court at any time before an order is passed under sub-sec. (4) or sub-sec. (6).

(4) The Designated Court shall, if no objection is made or no cause is shown on or before the specified date under sub-sec. (2), forthwith pass an order making the order of attachment absolute, and issue such direction as may be necessary for realisation of the property, and assets and moneys attached and for equitable distribution among the depositors of the money so realised.

(5) If cause shown or any objection is made as aforesaid, the Designated Court shall proceed to investigate the same and in so doing as regards the examination of the parties and in all other respects, the Designated Court shall, subject to the provisions of this 4, follow the summary procedure as contemplated under Order 37 of the Civil Procedure Code, 1908 (5 of 1908) and exercise all the powers of a court in hearing a suit under the said Code and any person making an objection shall be required to adduce evidence to show that at the date of the attachment he had some interest in the property so attached.

(6) After investigation under sub-sec. (5), the Designated Court shall pass an order either making the order of attachment passed under sub-sec. (1) of Sec. 4 absolute or varying it by realizing a portion of the property or assets or moneys from attachment or canceling the order of attachment:

Provided that the Designated Court shall not release from attachment any interest, which it is satisfied that the Financial Establishment or the person referred to in sub-sec. (1) has in the property or assets, unless it is also satisfied that there will remain under attachment an amount of property of value not less than the value that is required for re-payment to the depositors of such Financial Establishment.

(7) Where an application is made by any person duly authorised or constituted or specified by any other State Government under similar enactment empowering him to exercise control over any moneys or properties or assets attached by that State Government, the Designated Court shall exercise all its powers, as if, such an application were made under this Act and pass appropriate order or give direction on such application so as to give effect to the provisions of such enactment.

11. Power of Designated Court regarding realisation of assets and payment to depositors:-

(1) The Designated Court shall have all the powers for giving effect to the provisions of this Act.

(2) Without prejudice to the generality of sub-sec. (1), the Designated Court may-

(a) give any direction to the Competent Authority as it deems fit, for effective implementation of the provisions of this Act :

(b) approve the statement of dues of the Financial Establishment which is due from various debtors, the assessment of the value of the assets of the Financial Establishment and finalise the list of the depositors and their respective dues;

(c) direct the Competent Authority to take possession of any property or assets belonging to or in the control of the Financial Establishment and to sell, transfer or realise the attached property or assets either by public auction or by private sale as it deems fit depending upon the nature of property or assets and credit the sale proceeds thereof to the bank accounts;

(d) approve the necessary expenditure incurred by the Competent Authority for taking possession and realisation of the properties and assets of the Financial Establishment;

(e) pass an order to make payment to the depositors by the Competent Authority or for proportionate payment to the depositors in the case where the moneys so realised is not sufficient to meet with the entire deposit liability; and

(f) pass any order appropriate for realisation of the property or assets of the Financial Establishment and repayment to the depositors of such Financial Establishment or on any matter incidental thereto.

Explanation. For the purpose of this section, the expression "Financial Establishment" includes the promoter, director, partner, manager or member of the said Establishment or any other person whose properties or assets have been attached under Sec. 4."

11. Having considered the aforesaid provisions in detail, it appears that the Gujarat Protection of Interest of Depositors (In Financial Establishments) Act, 2003 itself has inbuilt mechanism with regard to offences related to said Act of 2003. It further appears that it is the State Government, who, upon receipt of a complaint, appoints an officer not below the rank of Deputy Collector as the Competent Authority to exercise control over the moneys, properties and assets attached by the State Government under Section 4. It is the competent authority, upon being appointed, takes necessary action of taking physical possession of all the moneys, properties and assets of the concerned financial establishment. The competent authority, after preparing report of the asset, deposit and liability of the financial establishment, submit the same before the Designated Court and thereafter, shall make an application seeking permission of the Designated Court to make payment to the depositors from the money realized and thereafter, the Designated Court, after due investigation, either make an order of attachment absolute or portion of such assets or money realizing from the attachment or cancelled the order of attachment.

12. In view of the aforesaid mechanism, it is clear that ultimate power of any attachment made under the Act of 2003 vests with the Designated Court. The mechanism of the Act of 2003 right from the passing of order under Section 4(1) and thereafter, appointment of competent authority under Section 5 and thereafter, the powers conferred to the Designated Court under Section 10(6) are the special powers and the same have to be in consonance with the provisions of the Act of 2003. The Designated Court has exclusive jurisdiction with regard to passing of any orders under Section 10(6) of the Act of 2003. The Designated Court may make attachment order as absolute or modify or cancel.

13. Keeping in mind the aforesaid legal provisions, more particularly if the Condition No.6 imposed by the learned Sessions Judge, is read over, the same is completely beyond jurisdiction of the learned Sessions Court while exercising powers under Section 439 of the Cr.P.C. I say so because the same is amounting to usurping powers envisaged under Section 10(6) of the Act of 2003, that too without following any procedure as prescribed. Thus, the impugned condition imposed by the Sessions Court while exercising powers under Section 439 of the Cr.P.C., in my considered opinion, is beyond its competence and is also contrary to the provision of the Act of 2003. The Sessions Court while exercising discretionary powers under Section 439 of Cr.P.C. and while imposing condition, could not have overlooked the provision of the Act of 2003 and could not have

passed an order imposing condition akin to provision of Section 10(6) of the Act of 2003. Thus, the bank guarantee which is furnished by the petitioner cannot be in such a way appropriated and/or forfeited in favour of complainant State, without following due procedure of law prescribed under the Act of 2003.

14. In view of the aforesaid discussion, in my considered opinion, Condition No.6 imposed by the learned Principal District and Sessions Judge (Designated Court), Rajkot while exercising its power under Section 439 of the Cr.P.C., is beyond its competence and thus, the said condition deserves to be deleted.

I answer the question accordingly.

6. Finally, this Court has allowed the aforesaid Special Criminal Application, by observing as under :

"15. Resultantly, this Special Criminal Application is hereby allowed in part. The order dated 2.2.2022 passed by the learned Principal District and Sessions Judge (Designated Court), Rajkot in Criminal Misc. Application No.2705 of 2021 is hereby modified to the extent that so far as condition No.4 is concerned, the petitioner shall furnish running bank guarantee of Rs.2,02,47,500/- within a period of two months from today and the Condition No.6 is hereby deleted. Rule is made absolute to the aforesaid extent. Direct service is permitted."

7. In view of above, the present Special Criminal Application is hereby allowed in part. The order dated 22.4.2022 passed by the learned Principal District and Sessions Judge (Designated Court), Rajkot in Criminal Misc. Application No.503 of 2022 is hereby modified to the extent that so far as condition No.4 is concerned, the petitioner shall furnish running bank guarantee of Rs.33,06,695/- within a period of two months from today and the Condition No.6 is hereby deleted. Rule is made absolute to the aforesaid extent. Direct service is permitted.