(2019) 09 CAL CK 0358

In the Calcutta High Court

Case No : Criminal Revision (CRR) No. 202 Of 2019

Ravi Kiran Realty India Ltd. & Anr — APPELLANT

Vs

Securities & Exchange Board Of India — RESPONDENT

Date of Decision : 27-09-2019

Acts Referred:

Securities And Exchange Board Of India Act, 1992 — Section 24(1), 26(1), 27
Companies Act, 1956 — Section 2(36), 55A, 56, 60, 67, 68, 70, 73, 621
Companies Act, 2013 — Section 40, 436, 439
General Clauses Act, 1897 — Section 6
Code Of Criminal Procedure, 1973 — Section 193, 340

Citation : (2019) 09 CAL CK 0358

Hon'ble Judges : Jay Sengupta, J

Bench : Single Bench

Advocate : R.M. Chatterjee, Manisha Chatterjee, Rajib Ray

Final Decision : Dismissed

Judgement

Jay Sengupta, J

1. This is an application for quashing of proceeding in Complaint Case No. SEBI/44/2018 pending before the Learned Judge, 5th Special Court, Kolkata under Section 26(1) read with Sections 24(1) and 27 of the SEBI Act, 1992 read with Regulation No. 3 of the SEBI Act Regulations, 2003 read with Sections 55A, 56, 60, 67, 68, 70, 2(36), 73 of the Companies Act, 1956 read with Section 40 of the Companies Act, 2013 along with Section 621 of the Companies Act, 1956 read with Sections 436 and 439 of the Companies Act, 2013 read with Section 6 of the General Clauses Act read with Section 193 of the Code of Criminal Procedure.

2. In the petition of complaint filed on behalf of the complainant/opposite party, it was alleged that the accused had violated the provisions of Sections 55A, 56, 60, 67, 68, 70, 2(36), 73 of the Companies Act, 1956 read with Section 40 of the Companies Act, 2013 along with Section 621 of the Companies Act, 1956 read

with Sections 436 and 439 of the Companies Act, 2013 read with Section 6 of the General Clauses Act read with Section 193 of the Code of Criminal Procedure. On 29.09.2018 cognizance was taken of the alleged offences and a warrant was issued.

3. Mr. R.M. Chatterjee, Learned Senior Counsel appearing on behalf of the petitioners, submitted as follows. While the petitioner no. 1 was the accused company in question, the petitioner no. 2 was a former director of the said company. On 01.03.2016 the Whole Time Member, SEBI passed certain directions upon the accused company for compliance of certain statutory provisions. In effect, the impugned petition of complaint relates of alleged violations of provisions of the company law as well as the SEBI Act that had been referred to in the order of the Whole Time Member. However, the Whole Time Member itself referred to the compliance by the petitioners. An appeal was filed before the Learned Securities Appellate Tribunal. On 05.08.2016, the Learned Securities Appellate Tribunal in Appeal No. 213/16, upon hearing the submissions made by the Learned Senior Counsel of the accused petitioners therein, was pleased to permit the petitioners to withdraw the appeal with a proposal for sale of the assets belonging to them. Reference was made to letter dated 13.10.2016 from the Manager, Eastern Regional Office, SEBI detailing compliance procedure as per the direction of the appellate authority. This was duly complied with by the petitioners. On 19.03.2018, the Learned Securities Appellate Tribunal in Appeal No. 58/2018 directed the SEBI to sell the assets of the appellants only if the amount realised from the sale of assets belonging to the company were not sufficient to repay the amounts due to the investors. After all these, on 30.11.2018, the complainant filed a false complaint leading to the initiation of the present proceeding. On 18.12.2018 the petitioners raised a preliminary objection and challenged the maintainability of the case. By reason of doctrine of merger, the order passed by the Whole Time Member got merged into the order of the Learned Securities Appellate Tribunal and did not exist anymore. Therefore, its observations could not have become the basis of a criminal complaint. Since the directions of the Learned Securities Appellate Tribunal to sell the assets of the company was being complied with by the petitioners as per the procedure laid down by the SEBI, no criminality could be imputed against the accused. As the accused were facilitating the repayment of dues of investors by selling their assets, no criminal offence could be sustained as against them. In the facts and circumstances, no prima facie case could be said to have been made out against the petitioners as alleged. Any further continuation of the impugned proceeding would be an abuse of the process of the Court.

4. Mr. Rajib Ray, Learned Counsel appearing on behalf of the complainant/ opposite party submitted as follows. The petitioner's company in its effort to mobilise funds from the public through issuance of redeemable preference shares had devised a unique method to make multiple allotments to stay away from the regulatory purview and evade the liability of complying with the public issue norms. The accused violated the provisions of 67 of the Companies Act as well as

Sections 56, 60, 67, 68, 70, 2(36) and 73 of the Companies Act, 1956. As the company failed to make an application for listing such securities, it ought to have forthwith repaid the money collected from the investors. If such repayments were not made within 8 days after the liability arose, the company and its other directors became liable to repay such sums with interest. The Whole Time Member, SEBI quite rightly directed the petitioners to refund to the investors the money collected from them. Despite this, the petitioners failed and neglected to refund the said money to the investors. There is no record available to show that the accused refunded the amounts as per law. In view of such illegalities, the SEBI filed the instant complaint. In the meantime the petitioner preferred writ application being WP No. 6717 (W) 2019, inter alia, praying for quashing of the instant prosecution case. An Hon'ble Single Bench of this Court disposed of the writ application directing the Learned Registrar General to file appropriate proceeding under Section 340 of the Code against the petitioner for making false statements and directing the petitioner to pay cost. Regardless of the offences committed by the company and the other accused, it was the duty of a company, which was a separate juristic person, to honour its civil liabilities. A subsequent part compliance by the accused of a direction passed by the Learned Securities Appellate Tribunal was no bar to prosecute of the accused for the offences they had already committed. The purported compliance with the said directions were not in the nature of compounding. A civil liability to repay dues was totally different from a criminal offence. Nor was a finding of a Learned Civil Court or an administrative authority binding on a Learned Criminal Court on this score. A prima facie case was made out as regards the offences alleged, which quite independently and on their own formed the basis for prosecution of the accused under the relevant laws. Reliance was placed on the decision of the Hon'ble Apex Court in Sahara India Real Estate versus Security and Exchange Board of India & another in Civil Appeal Nos. 9813 and 9833 of 2011.

5. In reply, Learned Senior Counsel appearing on behalf of the petitioners submitted that the challenge to the order passed by the Learned Single Judge in WP No. 6717(W) of 2019 has not finally ceased as yet.

6. I heard the submissions of the Learned Advocates appearing on behalf of the petitioners and the opposite party and perused the application for quashing along with the affidavits filed in this case.

7. A company is a juristic person, quite separate from its shareholders. In the course of conduct of its business, if a civil liability arose, whether the same also amounted to criminal offence or not, it was the duty of the company to honour such liability. By trying to honour such pecuniary liability, a company does no do any favour to its creditors. Nor can the said company showcase such efforts towards repayment of dues to thwart a legitimate criminal proceeding, especially if the cause of action had already arisen. This is besides the fact that such repayment, if any, may be taken into consideration at the time of passing a sentence in a criminal proceeding, if such a proceeding comes to be. If the

accused company ostensibly decides to sell its assets to repay its creditors, whether in pursuance of an order passed by the Learned Securities Appellate Tribunal or not, the same will not efface the offences that the accused might have committed. Such acts on the part of the company cannot be treated as acts done in pursuance of any compounding or compromise.

8. In any event, the Learned Securities Appellate Tribunal directed the accused to repay the investors forthwith and after completing repayments, to file a certificate of completion within three months from the date of the order i.e., 01.03.2016. Towards achieving this end, a liberty was granted to sell the company's assets. Even such time for full repayment had lapsed. The Learned Securities Appellate Tribunal had only granted liberty to the appellants to withdraw the appeal and approach the SEBI for sale of its assets. If such proposal was received within two weeks, the SEBI was to consider the same. In 2018, the Learned Tribunal only directed that the SEBI would sell the attached assets only if the assets of the company were insufficient to repay the investors. The submission of the Learned Senior Counsel appearing on behalf of the petitioners that efforts to repay were still on would not be of much help in the present facts in an application for quashing of a criminal proceeding.

9. In the instant case, the offences alleged are quite clearly made out against the petitioners as would be evident from a plain reading of the petition of complaint. There were several violations of law. It was clearly alleged that the accused raised at least Rs. 1.31 crores during the relevant period through issuance of redeemable preference shares to at least 1176 persons without complying with the regulatory provisions applicable to a public issue and thereafter failed to refund the amounts to the investors. There is no record to show that repayments were made as per law. The mere fact that the petition of complaint also reflects the facts referred to by the Whole Time Member, SEBI whose order was subsequently challenged before the Learned Securities Appellate Tribunal, does not render such facts non-est.

10. In a civil case, the standard of proof required for arriving at a decision is a preponderance of probabilities whereas in a criminal trial, a prosecution case has to be proved beyond reasonable doubt. The standards of proof being different in the two proceedings, except for certain exceptions made in the Evidence Act which are not relevant in the instant case, a finding of a Learned Civil Court is not binding on a Learned Criminal Court. Such finding given by a Learned Adjudicating Authority would quite commensurately not be binding on a Learned Criminal Court. On this reliance is placed on (i) K.G. Premshanker versus Inspector of Police & Anr, (2002) 8 SCC 87 and (ii) Collector of Customs versus L.R. Melwani, AIR 1970 SC 962. In fact, in M.S. Sheriff versus State of Madras, AIR 1954 SC 397, a Constitution Bench of the Hon'ble Supreme Court held that as between civil and criminal proceedings, the criminal matters should be given precedence. In the present case the probable dichotomy is clearly less worrisome. There is nothing present in the orders of the Learned Securities

Appellate Tribunal that would either condone any of the criminal offences alleged against the accused or impede any criminal prosecution for the same in the facts and circumstances of the present case.

11. Besides, it appears that the petitioners had also moved this Court earlier challenging the same impugned proceeding, albeit in the writ jurisdiction. The same was disposed without any order in favour of the petitioners. This appears as an additional hurdle for the petitioners in the instant application.

12. Considering the fact that a prima facie case is made out against the petitioners as would be evident from a plain reading of the petition of complaint and other materials available on record, I do not find any merit in the revisional application. Accordingly, the same is dismissed.

13. However, there shall be no order as to costs.

14. A copy of the judgment shall be sent down to the learned Trial Court forthwith by a Special Messenger for information and necessary action.

15. Urgent photostat certified copies of this judgment may be delivered to the learned Advocates for the parties, if applied for, upon compliance of all formalities.