

(2016) 10 BOM CK 0045

In the Bombay High Court

Case No : Criminal Writ Petition No. 109 of 2016

Sabina Fernandes

APPELLANT

Vs

Chief Secretary

RESPONDENT

Date of Decision : 24-10-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 154

Citation : (2017) ALLMRCri 1428 : (2016) 4 BomCR(Cri) 658 : (2017) 3 MhLJCrI 229

Hon'ble Judges : F.M. Reis and Nutan D. Sardessai, JJ.

Bench : Division Bench

Advocate : Mr. J. Vaz, Special Public Prosecutor, for the CBI; Mr. S.D. Lotlikar, Advocate General with Mr. P. Faldessai, Addl. Public Prosecutor, for the Respondents; Mr. Arun Bras De Sa and Mr. Sidhesh Shet, Advocates, for the Petitioners; Mr. Aires Rodrigues, Adv

Final Decision : Disposed Off

Judgement

F.M. Reis, J.(Oral) - Heard Mr. Arun Bras De Sa, learned counsel appearing for the petitioners, Mr. S.D. Lotlikar, learned Advocate General appearing for the respondents, Mr. J. Vaz, learned Special Public Prosecutor appearing for the CBI and Mr. A. Rodrigues, learned counsel appearing for the intervenor.

2. Rule. Heard forthwith with the consent of the learned counsel.

3. The learned counsel appearing for the respective respondents waive service.

4. The above petition inter alia prays for a writ or direction to the respondents to hand over the case to the Central Bureau of Investigation for reinvestigation and filing of an appropriate Final Report Form in accordance with law. Further, directions also sought to register the petitioners' complaints dated 16.04.2016, 15.04.2016, 18.04.2016, and 28.04.2016 as FIRs in terms of Section 154 of the Criminal Procedure Code.

5. It is the contention of the petitioners that Kamakshi Forex Private Limited is a Private Limited Company duly registered in terms of the Indian Companies Act, 1956 with Mr. Nilesh Raikar as the Managing Director and Mrs. Nilima Raikar and Mrs. Rekha Raikar, as Directors of the said company which primarily deals with the business of Forex/foreign exchange. Accordingly, the petitioners exchanged foreign exchange with the said company and also made fixed deposits of a fixed tenure with such company. It is further contended that the said business had dishonestly deceived the customers/clients from the very inception by prominently displaying the licence of Reserve Bank of India in their office premises to hold out that they were granted limited banking license to accept the fixed deposits both in foreign currency and national currency which were payable with a high rate of interest. It is further contended that they visited the office premises personally and contacted the Managing Director and the Directors but however, the said persons informed the petitioners that their funds were blocked in some Hawala transaction which has gone wrong and assured that they would honour the fixed deposits. It is further contended that thereafter they were shocked to learnt that an FIR No.51/2016 dated 15.04.2015 came to be filed against the said company and its Directors. The petitioner no.1 also registered a complaint with the Police Inspector which complaint according to the petitioners spelt out the commission of a cognisable offence. It is further contended that they filed a legal notice to register the complaint filed by the petitioners with the respondents herein. The respondent no.4 refused to register such complaint on the premise that an FIR No.51/2016 has already been registered and that a scam involved funds of magnitude of above Rupees 50 Crores and they could not register the petitioner no.1's complaint as an FIR as it would overburden the staff of the Economic Offence Cell though they recorded the statements under Section 161 of the Criminal Procedure Code. It is further contended that the investigation carried out by the respondents has not been conducted in a proper and objective manner and consequently, the investigation has to be transferred to an independent agency to meet the ends of justice. It is also pointed out that the investigation is being misdirected on account of the unholy nexus existing between the alleged accused, police officers, Central Government, State Government Officials and Hawala operators. It is therefore pointed out that the investigation be transferred to an independent agency. It is also pointed out that the Investigating Officer has deliberately not conducted the investigation into the matter and misdirected the investigation till date and no investigation has been done to investigate if the Reserve Bank of India has initiated any action against the said Kamakshi Forex Pvt. Ltd. According to the petitioners, no investigation has also been carried out as to whether the said company and its directors were filing any returns and also whether there was complicity of the statutory auditors or other auditors in deliberately not pointing out the acceptance of the fixed deposits from the investors de hors the licence from the Reserve Bank of India. It is also alleged that the Government Agencies have permitted such illegal banking business to be carried out by the said company. It is also contended that looking into the case papers produced under Section 173 of the Criminal

Procedure Code, it gives a feeling that the entire investigation system contemplated in Part XII of the Criminal Procedure Code has been given a go by and that the investigation appears to be faulty which would cause irretrievable damage to the petitioners and other investors. It is also contended that this is an exceptional case where there exist an unholy nexus between the accused, other Government Authorities including the officials of the Reserve Bank of India and auditors and therefore, the investigation has to be transferred to the Central Bureau of Investigation.

6. The Police Inspector, Economic Offence Cell has filed an affidavit in reply. It is pointed out that on 15.04.2016 an offence vide EOC Cr. No.51/2016 under Sections 406, 420, 120B of Indian Penal Code stood registered at Economic Offence Cell upon a complaint filed by Mr. Kamesh s/o Subhash Naik, resident of Canacona Goa, and 30 others investors. It is further pointed out that as per the complaint, it was alleged that prior to 13.04.2016 a criminal conspiracy was hatched and as such collected deposits in the form of foreign currency and Indian Currency at Kamakshi Forex Private Limited in the form of deposits/investments for a period of one month to five years. It is further pointed out that the accused persons have different bank accounts in various banks and more than 100 bank accounts in the name of the company Kamakshi Forex. It is also pointed out that the statements of the staff of the said company have been recorded and thereafter supplementary statements of the complainant and the investors were also recorded. It is also pointed out that they received documents from the Reserve Bank of India about the full fledged money changer license to the said company which was valid up to 30.04.2016. It is also pointed out that they have also taken up investigation under Foreign Exchange Management Act, 1999 and the letters are sent to the Reserve Bank of India, ROC, SEBI and the Commissioner of Income Tax informing about the crime and requested them to take necessary action. It is also submitted that as of now 861 complaints are received and all complaints are similar in nature. Another additional affidavit has been filed by the said Police Inspector, Economic Offence Cell stating that Crime No. 109/2016 under Sections 406, 420, 421, 423, 120B of Indian Penal Code is registered at the Economic Offence Cell upon the complaint filed by one Mr. Selvino Gonsalves. He has also given the details of the other FIRs registered against the said company. He has also pointed out that all the above accused persons have filed applications before the learned Sessions Judge seeking anticipatory bail and affidavit also filed by the CBI, ACB, Goa inter alia stating that they have short staff to carry out such investigation.

7. We have heard Mr. Arun Bras De Sa, learned counsel appearing for the petitioners, Mr. S.D. Lotlikar, learned Advocate General appearing for the respondents, Mr. J. Vaz, learned Special Public Prosecutor appearing for the CBI and Mr. A. Rodrigues, learned counsel appearing for the intervenor.

8. During the course of the hearing, we have also called upon the Investigating Officer to produce the case papers. We have gone through the case papers. We

have noted that one of the accused was remanded in police custody. Thereafter, he came to be released on bail in connection with one of the FIRs registered. We have also noted from the records that though the amount allegedly involved in the scam is more than 50 Crores, nevertheless, there is no material to show that the Investigating Agency has been able to ascertain the place where such huge amount has been kept nor the assets of the persons involved in such company. The bank balance on record do not match the amount allegedly involved in the scam. The investors are the persons who have kept their savings in fixed deposits and on account of criminal activities of the accused, they are sought to be deprived of their lifetime savings. Considering that more than 861 persons have invested their savings with the company in question, it would require a comprehensive, effective and credible investigation to unearth larger conspiracy angle and other important aspects which are involved in the activities which have deprived the investors of their lifetime savings. The Investigating Agency appears to lack the requisite efficiency of investigating the offence of this nature which require scientific, forensic and technical expertise to unearth the conspiracy which has defrauded the investors. The petitioners who are also the investors point out that they have a feeling that the investigation is not proceeding in a proper direction and they are seeking intervention of the Court to get the crime investigated by the CBI. The investigation may also involve transactions in foreign countries as it deals with foreign currency and alleged Hawala transaction and may even lead to examine the involvement, if any, of regulating authorities like SEBI, Registrar of Company, ROC and RBI which would require to be found out. The present Investigating Agency has failed to explain the huge gap between the amount collected and the amount allegedly found in the bank accounts of the concerned company and the investment made.

9. The present case involves more than 861 depositors mainly from the State of Goa and the persons living abroad. The accused have evolved newer and more ingenious ways of tantalising gullible member of the public to make fixed deposits in their fraudulent schemes as referred to in the complaints. On a perusal of the papers, we find that there is a significant discrepancy existing between the estimate amount which has been invested and the value of the assets found with the subject company. Looking into the nature of the scam and inter-state verification which may necessary, it would be appropriate to hand over the investigation to an independent agency to meet the ends of justice. This is primarily because a substantial amount has been collected from large number of public depositors which would require a speedy and efficient investigation against the persons involved in the crime.

10. The Apex Court in the judgment reported in (2016) 2 SCC 1 in the case of Subrata Chattoraj v. Union of India and others has observed at para 75 thus :

"75. It is unnecessary to burden this judgment any further with reference to the decided cases that declare in unequivocal terms that right to life guaranteed under Article 21 of the Constitution of India guarantees the right to speedy

justice which implies not only the right to speedy trial but right to speedy investigation in criminal cases as well. Investigation by ordinary State Investigating Agencies are often quick but not so very scientific and focused for a variety of reasons including the fact that the investigating branch of the State Police is either ill-trained in modern and scientific techniques of investigation or ill-equipped to handle complicated matters that require professional training and equipment, deeper understanding of the nuances of law and greater motivation to discover the truth. While these are found in a greater measure among those working for the Central Bureau of Investigation, the problem that has of late arisen is that of manpower crunch and the ever-increasing number of cases involving large scams transferred to CBI for investigation. The demand for CBI investigation into several other cases of public importance also appears to be increasing by the day. Courts are often hesitant, if not reluctant, to transfer cases to CBI knowing fully well that its hands are full with large number of cases already transferred for investigation. But that can be no reason why the agency should not be fully equipped in terms of men and material both to take up investigations whenever called upon to do so either by the Government or by the Courts. In a democratic country like ours governed by the rule of law citizens are entitled to not only expect but demand that investigations ought to be fair and effective as much as they ought to be quick and efficient. It is no answer to say that the agency's hands are full of or that it does not have the manpower to handle cases, no matter circumstances justify or demand investigation by an agency from outside a given State."

11. Taking note of the observations and for the aforesaid reasons, we hereby direct the respondents to take necessary steps to transfer the investigation from all the Police Stations in the State in connection with the said offences for investigation to the Central Bureau of Investigation in accordance with law. The C.B.I. shall submit the progress report every four months to this Court. Rule stands disposed of accordingly. The petition stands disposed of accordingly.