(2017) 11 BOM CK 0030

In the Bombay High Court

Case No : 734 of 2016

Smt.Sindhu & Ors. APPELLANT

Vs

State of Maharashtra & Ors. RESPONDENT

Date of Decision : 30-11-2017

Acts Referred:

Constitution of India, Article 226 - Power of High Courts to Issue certain writs
Code of Criminal Procedure, 1973, Section 173, Section 240, <a hre

Citation : (2017) 11 BOM CK 0030

Hon'ble Judges : Prasanna B. Varale, Arun D. Upadhye

Bench : DIVISON BENCH

Advocate : S. S. Sharma, M. S. Sharma, V. A. Thakare, P. K. Sathianathan, R. H. Rawlani

Judgement

1. By this petition, the petitioners have prayed to issue appropriate writ, order or direction, thereby directing the respondent Nos.1 to 4 to file additional charge sheet against respondent Nos.5 to 7 for an offence punishable under the provisions of Section 3 of the Maharashtra Protection of Interest of Depositors (In Financial Establishments) Act, 1999 and action be taken against respondent Nos.5 to 7 under the provisions of the said Act.

2. The petitioners have also sought declaration by appropriate writ or order that the action on the part of respondent Nos.1 to 4 in not taking action against respondent Nos.5 to 7 under the provisions of Section 3 of the Maharashtra Protection of Interest of Depositors (In Financial Establishments) Act, 1999 is illegal. The brief facts of the case are as under :

3. The petitioners have contended that the respondent No.5 is a Company constituted under the Companies Act of which respondent Nos.6 and 7 were the Directors. It is the case of the petitioners that respondent Nos.6 and 7 approached to them for giving financial assistance by way of giving deposits /

handloan for running the business of the company.

4. They have contended that petitioner No.1 had given total amount of Rs.34,50,000/(Rs. Thirty four lakhs fifty thousand only) to respondent Nos.5 and 6 as a handloan, from time to time. The respondent Nos.6 and 7 on their personal capacity and on behalf of company i.e. respondent No.5 acknowledged their liabilities.

5. The petitioner No.2 has also given amount of Rs.75,000/(Rs. Seventy five thousand only) on 31/08/2012 to respondent Nos.5 to 7 and they have acknowledged the receipt of the same. The respondent No.6 has signed the receipt on behalf of respondent No.5 ? Company as its Authorized Signatory. According to them, respondent No.6 has given a Cheque of Rs.1,50,000/(Rs.one lakh fifty thousand only) to the petitioner No.2 vide Cheque No.158951 dated 12/01/2014 for Rs.1,50,000/drawn on Union Bank of India, Gokulpeth, Nagpur. However, the said cheque could not be cashed for the reason "Exceeds arrangement". The petitioner No.2, therefore, has filed case under Section 138 of the Negotiable Instruments Act before the Judicial Magistrate, First Class, Nagpur. The petitioner No.2 has also filed a civil suit against the respondent No.5 before the Civil Court, Nagpur.

6. The petitioner No.3 has also given an amount of Rs.2,00,000/(Rs.Two lakhs only) to the respondent Nos.5 to 7 and they have acknowledged the receipt. The respondent Nos.6 to 7 issued a cheque for amount of Rs.2,54,000/(Rs.Two lakhs fifty four thousand only) bearing Cheque No.000011 drawn on HDFC Bank in the name of petitioner No.3. The respondent Nos.5 to 7 requested that the said due date be extended and they will positively repay the amount before 31st March, 2015 along with interest @ 24% per annum.

7. The petitioner No.4 has also given an amount of Rs.1,50,000/(Rs.One lakh fifty thousand only) to the respondent Nos.5 to 7 as a handloan / deposit. The respondent Nos.5 to 7 have acknowledged the same by issuing receipt. The respondent Nos.6 and 7, however, issued a cheque for Rs.2,04,000/(Rs.Two lakhs four thousand only) drawn on Union Bank of India, Gokulpeth, Nagpur. The petitioner No.4 has also filed a civil suit against respondent Nos.5 to 7 before the Civil Court, Nagpur. The petitioners have contended that they came to know that respondent Nos.5 to 7 have taken huge amount from several persons as a deposit and defrauded them. The petitioners along with others have made a report to the Crime Branch of the Nagpur Police. According to them, offence was registered against respondent Nos.6 and 7 under Sections 406, 420 r/w Section 34 of the Indian Penal Code and Section 3 of the Maharashtra Protection of Interest of Depositors (In Financial Establishments) Act, 1999 in the Police Station, Ambazari, Nagpur vide FIR No.26/2015 dated 23/01/2015. According to them after investigation, the police authorities filed a charge sheet i.e. final report under Section 173 of the Code of Criminal Procedure on 17/08/2015 against respondent Nos.6 and 7 for the offence punishable under Sections 406, 420, r/w Section 34 of the IPC and thereby, dropped the offence punishable

under Section 3 of the Maharashtra Protection of Interest of Depositors (In Financial Establishments) Act, 1999. According to them, respondent Nos.1 to 3, in collusion with the respondent Nos.5 to 7, have deliberately dropped the offence punishable under Section 3 of the Maharashtra Protection of Interest of Depositors (In Financial Establishments) Act, 1999. According to them, the police authorities are protecting the respondent Nos.5 to 7 and have deliberately dropped the offence under the said Act. It is their case that the accused persons are required to be punished under the said Act and their properties are also required to be confiscated. However, the action on the part of respondent Nos.1 to 4 is not taken under the said Act, is patently illegal. Hence, this petition.

8. The respondent No.3 has filed affidavitinreply and opposed the petition. According to respondent No.3 initially, nine persons have lodged a joint complaint with the Crime Branch, Nagpur against the respondent Nos.4 to 7. After enquiry, on the basis of statement of Surendra Sharma, FIR was lodged on 23/01/2015 vide Crime No.26/2015 for the offence punishable under Sections 406, 420 r/w Section 34 of the IPC at Ambazari Police Station, Nagpur. After a detailed enquiry, it was found that there are total eleven persons, who have invested with the accused persons in the company in the name of Jayams Information Services Pvt. Ltd. and out of that four persons, they received amount. According to this respondent, the investigation is completed and charge sheet came to be filed on 17/08/2015 and at that time, Section 3 of the Maharashtra Protection of Interest of Depositors (In Financial Establishments) Act, 1999 came to be deleted. As the company run by the accused persons, is not Financial Establishment as defined under the said Act. Lastly, it is submitted that the Investigation Agency has rightly deleted the provisions of Section 3 of the said Act and there is no substance in the petition filed by the petitioners and same is devoid of merit and petition be dismissed.

9. The respondent Nos.5 and 7 have filed affidavitinreply and objected this petition. According to them, petitioners have alternate remedy under Section 216 of the Cr.P.C. for alternation or addition of charge. However, no such application is filed by the petitioners in the Trial Court and therefore, the present writ petition is not maintainable and it be dismissed. The respondent No.6 has also taken similar stand by filing separate reply. These respondents have also filed additional reply and prayed for dismissal of the writ petition.

10. We have heard respective sides at length. Shri Sharma, learned counsel for the petitioners has vehemently submitted that though initially, offence was registered under Section 3 of the Maharashtra Protection of Interest of Depositors (In Financial Establishments) Act, 1999, but subsequently, the said Section is deleted while filing charge sheet before the Court. He submitted that the accused persons have committed offence under Section 3 of the Maharashtra Protection of Interest of Depositors (In Financial Establishments) Act, 1999. However, charge sheet only refers Section 406, 420, r/w Section 34 of the IPC. He submitted that as per the provisions of Section 2 (c), which deals with the

definition of deposit as well as Section 2 (d), the term defining the Financial Establishments. The definition of 2 (c) reads as under :" 2 (c) : "deposit" includes and shall be deemed always to have included any receipt of money or acceptance of any valuable commodity by any Financial Establishment to be returned after a specified period or otherwise, either in cash or in kind or in the form of a specified service with or without any benefit in the form of interest, bonus, profit or in any other form, but does not include." (i) to (vii) : The definition of 2 (d) reads as under :

" 2 (d) : "Financial Establishment" means any person accepting deposit under any scheme or arrangement or in any other manner but does not include a corporation or a cooperative society owned or controlled by any State Government or the Central Government or a banking company defined under clause (c) of Section 5 of the Banking Regulation Act, 1949 (10 of 1949)." The offence under Section 3 of the said Act is attracted. He also pointed out the receipts and acknowledgments made by the accused persons and submitted that the police be directed to file additional charge for the offence punishable under Section 3 of the MPID Act, 1999.

11. Shri V. A. Thakare, learned APP for respondent Nos. 1 to 4 has submitted that though offence was registered under Section 3 of the MPID Act, 1999, but after investigation, it was found that the provisions of Section 3 of the MPID Act are not attracted and therefore, the police have rightly not included the said Section at the time of filing of charge sheet. The petitioners have remedy to argue the case at the time of framing of charge and therefore, no such directions be issued. The prayer of the petitioners for filing of additional charge sheet, cannot be considered. He, therefore, prayed that the petition be dismissed.

12. Shri Rawlani, learned counsel for respondent No.6 has submitted that the alternative remedy is available to the petitioners to agitate the grounds before the Magistrate for framing of the charge under Section 3 of the MPID Act, if it is attracted. The petitioners cannot invoke the jurisdiction under Section 226 of the Constitution of India for the said Act. The petition is devoid of any merit and it be dismissed.

13. Shri Sathianathan, learned counsel for respondent Nos.5 and 7 has submitted that if in the evidence, any offence is made out, the charge can be altered and framed, therefore, the petition be dismissed.

14. Considering the submission of respective sides, we have gone through the contents of the petition as well as reply filed on record and also documents filed by the parties. It appears that the offence was registered on 23/01/2015 under Section 406, 420 r/w Section 34 of the IPC and Section 3 of the MPID Act on the complaint of Surendra Sharma. The police investigated the case and filed charge sheet on 17/08/2015 for the offence punishable under Sections 406, 420 r/w Section 34 of the IPC. The only grievance made by the petitioners that the offence punishable under Section 3 of the MPID Act was registered, however, at

the time of final report, same was not included in the charge sheet and therefore, sought directions under Section 226 of the Constitution of India directing the police officials to file additional charge sheet for the said offence. It is to be noted that it is not the case of the petitioners that police have not properly investigated the case and sought further investigation in the matter. The grievance of the petitioners is of not adding Section 3 of the MPID Act in the charge sheet. It is to be noted that the remedy to the petitioners is available to agitate the point at the time of framing of charge. The charge sheet is filed against the accused persons under Sections 406, 420, r/w Section 34 of the IPC.

15. The case is to be tried by the Magistrate, as per the Chapter XIX of the Cr.P.C. The Section 240 of Cr.P.C. runs as under : 240. Framing of charge

(1) If, upon such consideration, examination, if any, and hearing, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

(2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty of the offence charged or claims to be tried. The petitioners have not availed the remedy before the Trial Court and if at all the charge under Section 3 of the MPID Act is made out, they can point out to the Court for framing of the charge under the said Section. Moreover, the respondents have also pointed out that there is another provision under Section 216 of the Cr.P.C. that the Court may alter or add to any charge at any time before the Judgment is pronounced. Shri Sathianathan, learned counsel put forth submission on behalf of respondent Nos.5 and 7 to that effect, appears to be forceful. Shri Rawlani, learned counsel has rightly pointed out that there is alternative remedy available to the petitioners for the same relief and without availing the same, the petitioners have directly approached this Court under Article 226 of the Constitution of India for direction.

16. Shri Rawlani, learned counsel for the respondent no.6 has relied upon the ruling in the case of Anuran Rastogi and others Vrs. State of U.P. and another, reported in 2007 Criminal 377. In the above ruling, the Hon''ble Apex Court has held that the Magistrate is not bound to take cognizance of offence indicated in the police report, but it should be seen at the stage of framing of charge.

In the above ruling, it is held that at the time of framing of charge, the Magistrate could consider that as to what are the offences for which the accused persons have to be tried. Having held so, the Hon''ble Supreme Court could not have found fault with Magistrate''s observation with similar effect.

17. Considering the ratio laid down in the above ruling, we are of the considered view that it is for the Magistrate to consider the offence made out against the accused persons and frame charge accordingly and therefore, any observation made in this petition will certainly lead to contrary conclusion.

18. The submission put forth on behalf of the petitioners that the police have wrongly not included Section 3 of the MPID Act, cannot be accepted. In the petition, though allegations are made against the respondent Nos.1 to 4 that in collusion with respondent Nos.5 to 7, they have dropped Section 3 of the MPID Act at the time of filing of charge sheet, but no material is placed on record to that effect. The submission put forth by the learned counsel for the petitioners that the case of the petitioners is covered under the provisions of Section 3 of the MPID Act and more particularly, under Sections 2 (c) and 2(d) of the said Act, cannot be considered, at this stage. It is for the petitioners to satisfy the concerned Court while framing of charge against the accused persons for the said Section.

19. Petition filed by the petitioners, therefore, is devoid of any merit and liable to be dismissed and accordingly dismissed.

