
(2015) 04 AP CK 0091

In the Andhra Pradesh High Court

Case No : Criminal Appeal Nos. 1576, 1577, 1578, 1579, 1580, 1581, 1582, 1583, 1584, 1585, 1586, 1587, 1588 and 1528 of 2005

Yousuf Bin Awad

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 01-04-2015

Acts Referred:

Andhra Pradesh Protection of Depositors of Financial Establishments Act, 1999 —
Section 13(1), 3, 4, 4(1), 5
Criminal Procedure Code, 1973 (CrPC) — Section 207, 238, 313
Penal Code, 1860 (IPC) — Section 341, 402, 406, 420
Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 —
Section 23(1), 3(1)(x)

Citation : (2015) 3 ALT(Cri) 171

Hon'ble Judges : M.S. Ramachandra Rao, J.

Bench : Single Bench

Advocate : J.C. Francis, Advocate, for the Appellant

Final Decision : Allowed

Judgement

M.S. Ramachandra Rao, J.—These appeals are filed by the accused, who have been found guilty of the charge under Section 5 of the A.P. Protection of Depositors of Financial Establishments Act, 1999 (for short "the Act") by the Metropolitan Sessions Judge, Hyderabad in C.C. Nos. 77 of 2003 and batch, by separate judgments. Heard Sri J.C. Francis and Sri A. Prabhakara Rao, learned counsel for appellants, learned Public Prosecutor for the State of Telangana and Sri Nazir Ahmed Khan, learned counsel for de facto-complainants/respondents in the appeals.

2. The facts in all these cases are similar and common questions of law arise for consideration in these cases. Therefore, all these appeals are being disposed of by this common judgment.

3. By way of illustration, the facts in Criminal Appeal No. 1581 of 2005 arising

out of C.C. No. 24 of 2004 on the file of the above Court are set out hereunder.

4. A-1 and A-2 are brothers. A-3 is wife of A-1, A-5 is son-in-law of A-1, A-4 is elder brother of A-5, A-4 and A-5 are residents of Sikh Village, Secunderabad. A-6 is son of A-1 and A-3.

5. The case of prosecution is that accused were running a finance company styled as Awad Agro Farms Private Limited with branches and having a registered office at premises bearing No. 16-3-994/B/23, opposite to Dawn High School, near Officers Mess, Malakpet, Hyderabad, and they had cheated the general public, collected huge deposits by promising high monthly dividends to them and later closed down their office. It is alleged that the accused collected deposits worth nearly Rs. 6.4 crores and dishonestly cheated the public investors; that the accused being closely related colluded with each other and collected deposits from the public with promise of high rates of Halal Munafa to be paid every month; that in order to attract common gullible and middle income groups of public, the accused introduced novel schemes such as Rice Scheme, Sheep and Goat Farm, Mineral Water unit, Housing Project scheme and Investment Scheme, and they collected deposits from the public with lucrative monthly dividend of Rs. 500/- on each investment of Rs. 10,000/- repayable after 18 months. It is alleged that the dividend was referred to as Halal and it grows to Rs. 9,000/- within 18 months, (which was 90% of the investment); that in the normal business in such period, no company pays such high remunerative short term dividends to public. It was contended that the purpose of introducing this scheme was only to collect deposits from public and cheat them by not paying the assured amounts of dividend and deposits to the investors.

6. It is alleged that P.W.1 is one of such investors who deposited Rs. 10,000/- at Malakpet branch of the above company and received a receipt of the amount on a bond paper. On 11-03-1999 he came to know that the above company is a fraud and was cheating the investors; that on that day he went to ask for the deposit; similarly other persons also came and made a demand to return the deposits, but the accused failed to convince them.

7. Therefore, on 16-04-1999 P.W.1 went to P.S., Dabeerpura and lodged a written complaint against the said company stating that it is a fraud and he has invested Rs. 10,000/-.

8. This complaint was registered at P.S. Dabeerpura as Cr. No. 33 of 1999 under Section 406 , 402 IPC. It was subsequently transferred to C.C.S., Hyderabad and investigation was entrusted to P.W.4. During the course of investigation, he examined several witnesses and recorded their statements. The accused were then arrested and a confession statement of A-1 was recorded allegedly which proved that A-1 invested the deposits collected from public in land, which he purchased under an agreement; and the said land was located at Shankerpalli, for which he paid Rs. 6 Lakhs as advance apart from Rs. 45 Lakhs to one Prasana Chand Bhandari, r/o. Himayathnagar. It is alleged that the said land is Ac. 19.37

gts and the original land papers were with the said Bhandari, and they were later collected by A-1 and kept at his home. It is said that the said documents were also seized from the house of A-1. Thus, according to prosecution, the evidence collected established that A-1 to A-6 committed the offences punishable under Sections 406 and 420 IPC.

9. A charge sheet alleging that accused had committed the offence under these two provisions of law was filed by P.W.4 on 02-11-2009.

10. Subsequently, the Inspector of Police, WCO Team-III, Hyderabad filed a memo before the XXI Metropolitan Magistrate, Hyderabad on 24-11-2004 adding Section 5 of the Act. Thereafter the case was transferred to the Metropolitan Sessions Judge, Hyderabad since it was a Special Court for offences under the Act.

11. Charges under Sections 406 , 420 IPC and Section 5 of the Act were framed, read over and explained to accused. The accused pleaded not guilty and claimed to be tried.

12. The prosecution examined P.Ws. 1 to 4 and marked Exs. P-1 to P-15.

13. After completion of prosecution evidence, all accused were examined under Section 313 Cr.P.C. and they pleaded that the incriminating material in evidence of prosecution witnesses is false.

14. By judgment dt. 10-10-2005, the Metropolitan Sessions Judge, Hyderabad acquitted all the accused of charge under Sections 406 and 420 IPC. He also acquitted A-2 to A-6 of the charge under Section 5 of the Act, but convicted A-1 of charge under Section 5 of the Act. He sentenced A-1 to undergo Rigorous Imprisonment for 5 years and to pay fine of Rs. 5,000/- in default to undergo Simple Imprisonment for 2 months.

15. Questioning the judgment in CC. No. 24/04, Criminal Appeal No. 1581 of 2005 was filed by accused therein.

16. A-1 and some of the accused were convicted in the other cases and a similar sentence was imposed on A-1 and on them. All the sentences as regards A1 were directed to run concurrently.

17. In respect of the conviction imposed on accused in other CCs also decided by the Metropolitan Sessions Judge, Hyderabad, the rest of the appeals have been filed.

18. It is pertinent to note that the allegations in the other cases are similar to those in C.C. No. 24/2004 (out of which Crl. A. No. 1581/2005 arises).

19. The learned counsel for appellants raised two main contentions. They are :

"(i) Under Section 4(1) of the Act, the State Government should appoint an authority or Competent authority to exercise control over the properties attached by the Government under Section 3 of the Act and under sub-section (2) thereof,

the said authority shall have such other powers and discharges such other functions as may be prescribed, in addition to the powers and functions specified under the Act; that Rule 5(2) of the A.P. Protection of Depositors of Financial Establishment Rules, 1999 (for short "the Rules"), provided that where the Competent Authority is satisfied or has reason to believe that a financial establishment has committed a default punishable under Section 5 of the Act, the Competent Authority shall be competent to launch prosecution before the Special Court against the financial establishment and any person responsible for the management of the affairs of the financial establishment including the promoter, manager or member of the financial establishment for levy of penalty under Section 5 of the Act; under Section 5 of the Act, the penalty for default committed by a financial establishment in the return of deposit or any. payment of interest on the deposit as agreed upon, shall be punished with imprisonment for a term which may extend to ten years and with fine which may extend to Rs. 1 Lakh and such financial establishment shall also be liable for fine which may extent to Rs. 5 Lakh; sub-rule (2) of Rule 5 of the Rules was introduced vide G.O. Ms. No. 346, Home (Gen. B), dt. 14-11-2000; in the present case, the charge under Section 5 of the Act was admittedly added after a memo was filed by the Inspector of Police, WCO Team-III, Hyderabad before the XXI Metropolitan Magistrate, Hyderabad for adding Section 5 of the Act; the competent authority under the Act is the Additional Director General of Police, CID as per notification issued under Section 4 of the Act vide G.O. Ms. No. 193, Home (Gen. B) dt. 23-08-2001; it was not the designated Competent authority who launched prosecution under this provision against the accused, but it was the Inspector of Police, WCO Team-III, Hyderabad who did so; that the latter is incompetent to do so; and as such, the very initiation of prosecution under Section 5 of the Act is illegal and without jurisdiction.

(ii) Exs. P-1, P-3 to P-11 in C.C. No. 24 of 2004 were not furnished to accused as mandated by Section 207 Cr.P.C; that the offences under this Act are to be tried as if they are warrant cases by the Special Court as per Section 13(1) of the Act; Section 238 Cr.P.C. contained in Chapter 19 of Cr.P.C. deals with trial of warrant cases by Magistrates instituted on police report, and it mandates that before commencement of trial, the Court shall satisfy itself that provisions of Section 207 Cr.P.C. are complied with; and without doing so, the trial was conducted and this also vitiated the prosecution. The learned counsel for appellants pointed out that during the course of evidence of P.W.1, Ex. P-1 was marked in C.C. No. 24 of 2004 and during the evidence of P.W.2, Exs. P-3 to P-11 were filed; thus, the accused was deprived of an opportunity to look into these documents; this caused grave prejudice to the defence of accused; and on account of noncompliance with Section 207 r/w 238 Cr.P.C, the trial is vitiated and judgment of the Court below is required to be set aside, and accused are entitled to be acquitted. This point arises only in Crl. Appeal 1581/2005 arising out of CC. No. 24/2004."

20. The learned Public Prosecutor on the other hand contended that the offence

in question was committed in 1998, before coming into operation of the Act, sub-rule (2) of Rule 5 of the Rules (introduced in G.O. Ms. No. 346, Home (Gen. B) dt. 14-11-2000) would not apply; the said sub-rule (2) of Rule 5 of the Rules would not have retrospective operation and apply to prosecutions initiated prior thereto. He contended that there is nothing wrong in the Inspector of Police, WCO Team-III, Hyderabad in filing a memo before Magistrate on 24-11-2004 for adding Section 5 of the Act to the charges under Sections 406 and 420 IPC framed against accused.

21. He however fairly stated that the requirements under Section 207 Cr.P.C. have not been complied with and the Court below did not satisfy itself that the provisions of Section 207 Cr.P.C. were complied with before it commenced trial. He however contended that it is a mere irregularity and would not vitiate prosecution.

22. The learned counsel for the de facto-complainants supported the stand of the prosecution.

23. I have noted the submissions of both sides.

RE : POINT (i)

24. Before dealing with respective contentions, the relevant provisions of the Act and Rules are set out below.

25. Section 4(1) and (2) of the Act states:

"4. Competent Authority:-- (1) The Government may, by notification, appoint an authority hereinafter called "the competent authority" to exercise control over the properties attached by the Government under Section 3 .

(2) The Competent authority shall have such other powers and discharge such other functions as may be prescribed, in addition to the powers and functions specified under this Act"

26. Section 5 of the Act states:

"5. Penalty for default:-- Where any financial establishment defaults in the return of the deposit either in cash or kind or defaults in payment of interest on the deposit as agreed upon, every person responsible for the management of the affairs of the financial establishment including the promoter. Manager or Member of the financial establishment shall be punished with imprisonment for a term which may extend to ten years and with fine which may extend to rupees one lakh and such financial establishment shall also be liable for fine which may extend to rupees five lakh "

27. Sub-Rule (2) to Rule 5 of the Rules states:

"5. Powers relating to Absconding persons:

(1) xxxx

(2) Where the Competent Authority is satisfied or has reason to believe that a Financial Establishment has committed a default punishable under Section 5 of the Act, the Competent Authority shall be competent to launch prosecution before the Special Court against the Financial Establishment and any person responsible for the management of the affairs of the Financial Establishment including the promoter, manager or member of the Financial Establishment for levy of penalty under Section 5 of the Act".

28. From the above provisions, it is clear that the powers of the Competent Authority are set out in sub-rule (2) of Rule 5 of the Rules, which was added by G.O. Ms. No. 346, Home (Gen. B) dt. 14-11-2000. Unless the Competent Authority is satisfied or has reason to believe that a financial establishment had committed a default punishable under Section 5 of the Act, prosecution cannot be launched before the Special Court against the financial establishment or persons responsible for management of its affairs. It was for the competent authority to launch such prosecution in case he is satisfied of the same.

29. No doubt sub-rule (2) of Rule 5 of the Rules was added only on 14-11-2000 to the Rules framed in G.O. Ms. No. 347, Home (General. B) dt. 29-10-1999 under the Act. Once sub-rule (2) of Rule 5 of the Rules had come on the statute book, unless its provisions are complied with, the prosecution under Section 5 of the Act cannot be launched.

30. Admittedly, the memo was filed by the Inspector of Police, WCO Team-III, Hyderabad before the XXI Metropolitan Magistrate, Hyderabad on 24-11-2004 for adding of Section 5 of the Act to charges framed against the accused in C.C. 24 of 2004 and then the Magistrate added the said provision of law as well. This is admitted by P.W.4 in his evidence.

31. By the date of filing of the said memo i.e., 24-11-2004, sub-rule (2) of Rule 5 of the Rules had already come on the statute book w.e.f. 14-11-2000. Therefore, it was not competent for the Inspector of Police, WCO Team-III to file a memo before the XXI Metropolitan Magistrate Court, Hyderabad for addition of Section 5 of the Act. In my opinion, any step to add Section 5 of the Act to the charges already framed against accused can only be by the Competent Authority, who admittedly, is the Additional Director General of Police, CID as per notification issued under Section 4 of the Act vide G.O. Ms. No. 193, Home (Gen.B) dt.23-08-2001.

32. It is pertinent to note that in the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Rules had been framed under Section 23(1) thereof in the year 1995. Rule 7 of the said Rules prescribed that any offence under the said Act should be investigated by an Officer not below the rank of Deputy Superintendent of Police and the Officer should be specifically appointed by the State Government for investigating offences under the said Act. This provision has been held to be mandatory by this Court as well as the Supreme Court.

33. In *D. Ramalinga Reddy @ D. Babu Vs. State*, the appellant had been convicted for offence under Section 341 IPC and also Section 3(1)(x) of S.Cs. & S.Ts. (POA) Act, 1989. It was contended on behalf of the appellant that the prosecution was initiated under the provisions of the said Act, which requires that the investigation should have been conducted by an Officer not below the rank of Deputy Superintendent of Police, and since investigation in the said case was conducted by the Sub-Inspector of Police and not by the Officer as envisaged under Rule 7 of the said Rules, there was prejudice caused to the accused and the trial was vitiated. This Court accepted the said contention and held that if investigation itself was conducted by an Officer, who was not authorized by law to conduct investigation, the whole trial would be vitiated.

34. A Division Bench of this Court in *Viswanadhula Chittibabu Vs. State of A.P.*, also held that Rule 7 of the S.Cs. & S.Ts. (POA) Rules 1995 was mandatory and not merely directory. It approved the ruling in *D. Ramalinga Reddy (supra)*. It held that the said Rule was framed by the Government after experiencing that the said Act was being misused and it was felt that under such Acts the investigation has to be done by a responsible Senior Officer and therefore they chose Deputy Superintendent of Police to make an investigation. It held that the Rules do not provide that all Dy. S.Ps. can investigate into the matter but provide that the Dy. S.P. named by the State Government or Director General of Police or Superintendent of Police have to select a Dy. S.P. with integrity and experience to investigate into such offences, and this will prevent the misuse of the said Act. It therefore held that the provisions contained in Rules should be interpreted as mandatory. It held that non-compliance of Rule 7 is not a mere procedural defect but is an inherent defect in making the investigation which would vitiate the entire trial. It further held that prejudice has to be presumed in cases of noncompliance with Rule 7 where investigation is done by a person not authorized under it.

35. The decision of the above Division Bench was upheld by the Supreme Court in *State of Andhra Pradesh Vs. Viswanadula Chetti Babu*, . The Supreme Court held:

"2. Rule 7 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995, framed under the Andhra Pradesh Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 reads as under:

"7. Investigating Officer.--(1) An offence committed under the Act shall be investigated by a police officer not below the rank of Deputy Superintendent of Police. The investigating officer shall be appointed by the State Government/Director General of Police/Superintendent of Police after taking into account past experience, sense of ability and justice to perceive the implications of the case and investigate it along with right lines within the shortest possible time.

(2) The investigating officer so appointed under sub-rule (1) shall complete the investigation on top priority basis within thirty days and submit the report to the

Superintendent of Police who in turn will immediately forward the report to the Director General of Police of the State Government.

(3) The Home Secretary and the Social Welfare Secretary to the State Government, Director of Prosecution, the Officer-in-charge of Prosecution and the Director General of Police shall review by the end of every quarter the position of all investigations done by the investigating officer."

3. A bare perusal of the Rule would reveal that the State Government/the Director General of Police/Superintendent of Police after taking into account the experience etc., of a Deputy Superintendent of Police shall appoint him as the Investigating Officer in cases under the above Act. Sub-rule (3) further provides that the Home Secretary and the Social Welfare Secretary to the Government and other officers in charge shall review the working of the Deputy Superintendent of Police and the investigations done by him at the end of every quarter. It is therefore apparent that authority to investigate has to be conferred on a specified officer not below the rank of Deputy Superintendent of Police.

4. We are, therefore, of the opinion that in view of the clear mandate of the Rules, it was only a specified Deputy Superintendent of Police who could investigate an offence under the Act. An investigation done by any officer below that rank and not specified as per Rule 7 would not be entitled to investigate any such offence. In the present matter the investigation has been made by an officer of the rank of an Assistant Sub-Inspector of Police. This was not permissible. We endorse the judgment of the High Court in this respect."

36. I am of the opinion that the rationale of the above decisions rendered under the S.Cs. & S.Ts. (POA) Act, 1989 would be attracted to the present cases also.

37. Since it was not the Competent authority i.e., Additional Director General of Police, CID (as per notification issued under Section 4 of the Act vide G.O. Ms. No. 193, Home (Gen.B) dt.23-08-2001) who filed the memo on 24-11-2004 in C.C. No. 24 of 2004 (out of which CrI. Appeal No. 1581 of 2005 arises) before the XXI Metropolitan Magistrate but it was the Inspector of Police, WCO, Team-III who filed such memo for addition of Section 5 of the Act, it could not be said that there was satisfaction of the competent authority that the above company and the accused had committed default punishable under Section 5 of the Act and it would not be a case where the competent authority had launched prosecution. This goes to the root of the matter and consequently the accused have to be presumed to be prejudiced by this act of the Inspector of Police and the Magistrate, and this vitiates the prosecution.

38. Since in all the other appeals also the charge under sec.5 of the Act was not added at instance of the Competent authority but at the instance of the Inspector of Police, WCO, Team-III, the same result would follow there as well.

39. Although the learned Public Prosecutor sought to contend that the necessity of the competent authority to launch prosecution before the Special Court is only

in cases where levy of fine was to be done under Section 5 of the Act, this contention cannot be accepted. Section 5 of the Act which lays down the penalty for default, deals with both imprisonment and fine. So the said Section cannot be interpreted to refer to the term "penalty" as only a "fine". Also at the stage of initiation of prosecution, it would not be known definitely whether on its conclusion, whether the accused would be convicted at all or he would be only sentenced to payment of fine on conviction.

RE: POINT (ii)

40. Even as regards the other contention raised by the learned counsel for accused about non-supply of the documents relied upon by the prosecution, I am of the opinion that under Section 207 Cr.P.C, all the material relied upon by the accused is to be furnished to the accused before the commencement of the trial. Section 238 Cr.P.C. mandates that when, in any warrant case instituted on a police report, the accused appears or his brought before a Magistrate at the commencement of the trial, the Magistrate shall satisfy himself that he has complied with provisions of Section 207 Cr.P.C.

41. From a reading of the depositions of the prosecution witnesses as well as the judgment of the Court below in C.C. 24 of 2004, it is obvious that it had not observed the mandate of Section 238 Cr.P.C. The accused was thus denied a reasonable opportunity to defend himself in the trial. It cannot be denied that non-supply of the material relied upon by the prosecution has caused prejudice to the accused and vitiated the trial.

42. Although these points were urged on behalf of the accused before the trial Court, on the first point, the Court below held that the Act or Rules made thereunder do not prohibit individuals to make a complaint or initiate proceedings for violations of the provisions of the Act. It relied upon the judgment reported in Gourishetty Prabhakar Vs. State of Andhra Pradesh and Another, , but the said decision did not deal with the issue as to whether a prosecution under the Act can be initiated by a person other than the Competent authority designated under the Act. Therefore, the said decision is inapplicable to these present cases. On the second point of non-supply of documents relied upon by the prosecution to the accused, the Court below in C.C. No. 24 of 2004 only ignored the documents filed by P.W.2 but took into account the documents filed by P.W.1 to convict A-1 even though the said documents were also filed on the day of the deposition of the witness in the Court. Therefore the decision of the Sessions Court on both points is unsustainable.

43. Therefore, on both counts, I am satisfied that the judgments of the Court below convicting the accused, cannot stand.

44. The appeals are accordingly allowed, and the conviction and sentence imposed on the accused therein are accordingly set aside. The fine amount, if any, paid by accused shall be refunded to them. The bail bonds of accused shall be cancelled and the accused are entitled to be set free. As a sequel, the

miscellaneous petitions pending, if any, shall stand closed.