

02.08.2017
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J. Bagchi, J.
Ct. No.28
sl. no. 179

C.R.R. No. 1254 of 2017

MAHESH AGARWALLA

. . . PETITIONER

VERSUS

**ASSISTANT DIRECTOR,
DIRECTORATE OF ENFORCEMENT (E.D.),
GOVERNMENT OF INDIA**

. . . OPPOSITE PARTY

WITH

C.R.R. No. 2582 of 2016

MAHESH AGARWALLA

. . . PETITIONER

VERSUS

CENTRAL BUREAU OF INVESTIGATION (C.B.I.)

. . . OPPOSITE PARTY

In Re : An application under Section 401 read with section 482 of the Code of Criminal Procedure.

Mr. Sekhar Basu, Senior Advocate
Mr. Joy Segupta
Mr. V. Tibrewal
Ms. S. Roy

..... For The Petitioner

Mr. Asraf Ali
Mr. Sankar Banerjee

..... For The C.B.I.

Mr. Ranjan Roy

..... For The E.D.

Re: C.R.R. No.2582 of 2016

Order dated 28.4.2016 passed by the learned Judge, CBI Special Court, Asansol, Burdwan in Special Case No. 39/2011 rejecting the prayer for discharge of the petitioner has been assailed.

Petitioner has been arrayed as an accused person along with others in the instant prosecution on the allegation that as a chartered accountant he had been employed by co-accused Iltush Ahammed, his wife Smt. Taijunnehar Bibi, brother Sri Noor Jamal and brother-in-law Sri Aynal Hoque to prepare projected financial statements in collusion with Sri Atanu Kumar Mitra, senior manager of Indian Overseas Bank, Berhampore Branch for obtaining cash-credit facilities such as OCC, term loans etc. from the said branch on the strength of fraud and fabricated documents. It has also been alleged that such loans were advanced to the firms of the aforesaid accused persons by the said manager in violation of the procedure laid down by the bank and in excess of his lending powers causing wrongful loss to the tune of Rs. 5.24 crores. It appears that Atanu Kr. Mitra, senior manager Indian Overseas Bank posted at Berhampore Branch during the period 13.6.2005 to 16.5.2007 was empowered to sanction credit limit to the tune of Rs.40 lakhs only per borrower including borrowers of the same group. In violation of such permissible limit, Atanu Kr. Mitra during the period 2005 to 2007 in conspiracy with Iltush Ahammed his wife Smt. Taijunnehar Bibi and relations Sri Noor Jamal and Sri Aynal Hoque and the petitioner herein extended undue financial accommodation to them by sanctioning and disbursing cash credit limit and term loan facilities much above his permissible capacity and permitted the diversion of the cash credit limits for various other purposes

without ensuring requisite guarantee margin of 25% and thereby caused wrongful loss to the bank. To camouflage such dishonest activity, the aforesaid accused persons utilized the services of the petitioner, who in collusion and conspiracy with the accused persons prepared false and bogus projected financial statements and other documents to give an impression of credibility to the grant of cash credit and other facilities to the firms of the accused persons, some of whom were even fictitious.

It has further been alleged that the petitioner had not only prepared the projected financial statements in favour of the borrowers but had also written with his own hand the applications for enhancing cash credit and other facilities submitted before the principal accused, Atanu Kr. Mitra, the senior manager, exposing his deep rooted involvement in the aforesaid fraudulent transaction. Accordingly, in conclusion of investigation, police report was filed against the petitioner and the other accused persons under sections 120B/419/420/467/468/471 I.P.C. and under sections 11, 12, 13(2)/13(i)(d) of the Prevention of Corruption Act, 1988.

Petitioner prayed for discharge before the trial Court on the premise that he had merely acted in his professional capacity and had no role to play in the alleged conspiracy between the borrowers and the bank manager. It was his further case that the Committee constituted under the Chartered Accountants Act looking into the allegations of professional misconduct on his part, had given him a clean chit vide order dated 8th February, 2016. Accordingly, he ought to be discharged from the criminal prosecution also.

Mr. Basu, learned senior counsel appearing for the petitioner submitted that the petitioner's role was of a professional who had acted on the basis of information given to him by his clients. He had prepared the financial projections on the basis of materials supplied to him and any incorrect projection reflected therein cannot result in an inference of his involvement in a conspiracy between him and the other accused persons.

He strongly relied on the findings of the Disciplinary Committee constituted under the provisions of the Chartered Accountants Act in support of his contention and submitted that the certification of the nature of business of the petitioner which is the core accusation in the impugned prosecution was on the basis of certificates issued by the local Panchayet authorities and that the projected financial statements seeking an enhancement of cash credit limits to the companies were on the basis of reports of the former chartered accountant of the firm and other vouchers and/or documents handed over to him by his clients.

He further submitted that the findings of the Disciplinary Committee, therefore, renders the substratum of accusation against the petitioner groundless and, therefore, he is liable to be discharged.

On the other hand Mr. Ali appearing for the CBI submitted that the findings of the Disciplinary Committee were restricted to the professional conduct of the petitioner in his capacity as a tax auditor also. He strongly contested the finding of the committee that the scope of prosecution *vis-à-vis* the role of the petitioner was not restricted to mere certification of nature of business of the borrowers alone. On the other hand, it appears from the materials collected

during investigation that the petitioner as co-conspirator was entrusted with the duty of preparing false and bogus estimated projected financial statements for seeking enhancement of cash credit limits and had even written loan applications on behalf of the borrowers for such purpose. Mr. Ali strenuously contended that the findings of the Enquiry Committee are of no relevance to the allegations of conspiracy against the petitioner which is the subject-matter of prosecution in the instant case.

The short issue which, therefore, falls for consideration is whether the exoneration of the petitioner by the Disciplinary Committee vide order dated 8th February, 2016 would render the allegations against him in the impugned prosecution groundless so as to justify his discharge at this stage. In order to adjudicate such contention, I have gone through the allegations in the impugned charge sheet. I find that the role of the petitioner is not restricted to mere certification as to the nature of business of the accused borrowers as claimed by the Committee in its reports dated 8th February, 2016. He had been employed by the accused borrowers to prepare projected financial statements of the firms and there is ample materials on record to show that such projected financial statements were based on forged and fabricated documents and had been generated to create a false impression with regard to the financial viability of the said firms. Such financial statements were kept on record by the principal accused, that is the branch manager, Atanu Kr. Mitra, as a facile cover-up to justify his unauthorized extension and/or enhancement of cash credit facilities and other financial benefits to the borrowers in utter disregard to prudent banking procedure and his permissible lending limits thereby causing wrongful

loss to the bank. It has also come to light that the petitioner was acting as an agent of the accused borrowers and not as a *bona fide* professional. His role was not restricted to mere certification or preparation of projected financial statements but he had even written the loan applications on behalf of the accused borrowers on the strength of which the financial facilities were fraudulently extended.

It is true that the Disciplinary Committee had exonerated the petitioner from the allegation of professional misconduct under the provisions of Chartered Accountants Act. The reasoning adopted by the Disciplinary Committee was essentially founded on the premise that the petitioner had not been appointed as a professional tax auditor and, therefore, his failure to report the enhanced volume of business or furnishing of requisite forms under the law could not be treated as breach of professional responsibilities. However, it is accepted in the said order that the petitioner was specifically employed for preparation of projected financial reports for enhancement of the loan facilities to the accused borrowers and had even written the loan applications for the accused borrowers to avail of the illegitimate financial benefits in this case.

Such finding, in my opinion, reinforces the prosecution case of a special relationship between the accused borrowers and the petitioner and exposes the latter's incriminating role in the transaction to obtain aforesaid fraudulent loans in the instant case. Moreover, it must be borne in mind that the scope of enquiry before the Committee was a limited one and did not extend to the petitioner's role as a conspirator to defraud the bank. It is trite law that exoneration in a departmental proceeding would not *ipso facto* result in an exoneration from a

criminal case. Enunciating this proposition, the Apex Court in (***NCT of Delhi vs. Ajay Kumar Tyagi, (2012) 9 SCC 685***) held as follows:-

“24. . . .exoneration in departmental proceeding ipso facto would not lead to exoneration or acquittal in a criminal case. On principle also, this view commends us. It is well settled that the standard of proof in department proceeding is lower than that of criminal prosecution. It is equally well settled that the departmental proceeding or for that matter criminal cases have to be decided only on the basis of evidence adduced therein. Truthfulness of the evidence in the criminal case can be judged only after the evidence is adduced therein and the criminal case can not be rejected on the basis of the evidence in the departmental proceeding or the report of the Inquiry Officer based on those evidence.

25. We are, therefore, of the opinion that the exoneration in the departmental proceeding ipso facto would not result into the quashing of the criminal prosecution. We hasten to add, however, that if the prosecution against an accused is solely based on a finding in a proceeding and that finding is set aside by the superior authority in the hierarchy, the very foundation goes and the prosecution may be quashed. But that principle will not apply in the case of the departmental proceeding as the criminal trial and the departmental proceeding are held by two different entities. Further, they are not in the same hierarchy.”

It is nobody's case that the instant prosecution was initiated on the finding of the disciplinary authority which has been set aside by a superior authority. On the other hand, the instant prosecution and the proceeding under the Chartered Accountants Act have completely different scope and arena of enquiry and adjudication. While the former involves a prosecution into allegations of conspiracy with a public servant to misappropriate public funds of a bank, the latter is restricted to professional misconduct alone. The findings of the Disciplinary Committee by no stretch of imagination can be said to be binding on the criminal court where the accusation is to be proved on the basis of evidence adduced before it in accordance with law. Moreover, the findings do not render

the substratum of accusation of conspiracy between the petitioner and the other accused persons in extending unjustified financial assistance to the borrowers in the instant case patently absurd or inherently improbable. The Committee was not at all concerned with the allegations of criminal conspiracy and/or criminal misconduct which are the material issues in the impugned prosecution. Hence, I am of the opinion that no reliance could be placed on the findings of the Committee to negate the substantial materials on record which give rise to a strong suspicion as to the involvement of the petitioner in the alleged offences.

Accordingly, I am of the opinion that the prayer for discharge of the petitioner from the instant case was rightly turned down. The petitioner, however, shall be at liberty to raise all just defences in the course of trial of the instant case in accordance with law.

It is made clear that the findings recorded by me shall not have any bearing at the subsequent stage of the trial which needless to mention, shall be decided on the basis of the evidence adduced by the parties without being swayed by the observations in the instant order.

With the aforesaid observation, revision petition is disposed of.

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In view of reasoning given in CRR 2582 of 2016 I am not inclined to interfere with the impugned proceeding under section 3/4 of the Prevention of Money Laundering Act.

Petitioner, however, is at liberty to raise his just defences at the appropriate stage of the proceeding in accordance with law. However, as the prosecutions involve similar questions of fact and law and in the light of section 44 of the Prevention of Money Laundering Act, I am of the opinion that the prosecution in respect of the scheduled offences as well as the offences under the Prevention of Money Laundering Act ought to be tried by the same court.

Accordingly, I transfer the proceeding in special case no.39/2011 from the file of learned Judge, CBI Special Court, Asansole, Bardhaman, to the file of learned Judge, Special (CBI) court no. 1, Bichar Bhawan, Calcutta who shall proceed with the trial of both the cases in accordance with law particularly the provisions of section 43/44 of the Prevention of Money Laundering Act.

Certified copy of this order, if applied for, be given to the parties on priority basis.

(Joymalya Bagchi, J.)