Ashwini

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 10440 OF 2022

Vishwanatha Sridhar Prabhu …Petitioner
Versus
Union of India through GP & Anr …Respondents

Mr Bhavesh Parmar, *with Rahul Gaikwad, Nikita Abhyankar, Reshma Nair, Aman Jhawar, Vivek Akshali & Garima Joshi, i/b Gravitas Legal, for the Petitioner.*
Mr Pankaj Vijayan, *with Sushmita Chauhan, for Respondent No. 2-IBBI.*

CORAM G.S. Patel &
S.G. Dige, JJ.
DATED: 12th January 2023

PC:-

1. The vakalatnama of Insolvency and Bankruptcy Board of India ("**IBBI**") the 2nd Respondent is filed. There is an Affidavit in Reply. It takes the limited point that there is an appellate remedy that is available to the Petitioner.

2. That may be so, but the existence of the appellate remedy is not always, or in every situation, an absolute bar to the exercise of equitable and discretionary writ jurisdiction under Article 226 of the Constitution of India. This is *inter alia* evident from a recent

decision of the Supreme Court in *Radhakrishna Industries vs State of Himachal Pradesh & Ors.*[1] In particular, paragraph 27 makes this position clear. There are well known exceptions to the rule that an alternate remedy must first be exhausted. An express finding is that the existence of an alternate remedy does not *per se* divest a High Court of its powers under Article 226 of the Constitution of India in an appropriate case although ordinarily a writ Court would not entertain a writ petition where there exists an efficacious alternate remedy. While the rule of exhaustion of a statutory alternate remedy is a rule of policy and convenience, it is also one of discretion.

3. One of the principles that attaches to evaluating any administrative or executive action in judicial review is whether the standard applied is reasonable and proportionate. Other well settled tenets of natural justice are of course that an opportunity of being heard must be given and that a reasoned order must be passed. Equally, no authority can exercise jurisdiction that is not vested in it. A hearing is not to be an empty formality. It must be an effective hearing and must result in a reasoned order that reflects a proper application of mind. This speaks to the decision-making process, not the resultant decision itself. Where these elements are found even *prima facie* to be lacking, a writ Court is not denuded of its powers, nor can it be told that its extraordinary jurisdiction is completely fettered.

4. Where the petitioner is able to prima facie dispute the existence of an effective alternate appellate remedy, that is to say,

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1 (2021) 6 SCC 771.

where the petitioner points out that if the alternate appellate remedy invoked by the respondent is likely to result in a serious question of jurisdiction or maintainability of the appeal, a writ court can certainly exercise its discretionary and equitable powers under Article 226 of the Constitution of India.

5. The facts of this case persuade us that even though the Respondent may claim there is an appellate remedy, *prima facie* not only is the action of the 2nd Respondent so egregious and so shocks the conscience of the Court in the manner in which the impugned order was made that we believe we must step in immediately, but there is also a very serious issue about the existence of an appellate remedy at all.

6. The Petitioner is a Chartered Accountant. He is highly qualified with a Doctorate, an LLB, and a BBM. He is government registered valuer under Section 34AB of the Wealth Tax Act 1957 for the purposes of the Wealth Tax Act, Income Tax Act and Gift Tax Act specifically for stocks, shares, debentures, securities, etc. The Petitioner and other valuers incorporated a company known as Yardi Prabhu Consultants and Valuers Pvt Ltd. The Petitioner is one its directors.

7. One of the clients of this firm Yardi Prabhu Consultants was the Punjab and Maharashtra Cooperative Bank Ltd ("**PMC**").

8. In 2016, The Insolvency and Bankruptcy Code (**"IBC"**) came into force and with it, under Section 188, the 2nd Respondent

Board, the IBBI, came to be established. In 2017, the Union of India passed the Companies (Registered Valuers and Valuation) Rules 2017 ("**the RV Rules**"; "**the Rules**"). These came into effect on 18th October 2017.

9. There was then in 2017 a delegation of the powers by the Union of India to the IBBI.

10. In April 2019, the Petitioner sought enrolment as a valuer with the IBBI in accordance with the RV Rules. The Petitioner's application was accepted and he was enrolled around 1st May 2019.

11. A copy of the RV Rules is annexed from Exhibit "D" onwards starting from page 26. Chapter 2 of the Rules deals with eligibility, qualifications, and registrations of valuers. For our purposes today Rule 3(1)(k) is important: =

> "**3 Eligibility for registered valuers.—(1) A person shall be eligible to be a registered valuer if he—**
>
> (a) ...
>
> … … …
>
> **(k) is a fit and proper person:**
>
> *Explanation.*— **For determining whether an individual is a fit and proper person under these rules, the authority may take account of any relevant consideration, including but not limited to the following criteria—**
>
> **(i) integrity, reputation and character,**
>
> (ii) absence of convictions and restraint orders, and

(iii) competence and financial insolvency."

(*Emphasis added*)

12. The Rules also provide that throughout the period of registration, that is to say as long as the person is registered, these qualifications and eligibility criteria must be maintained.

13. Some time in September 2019, a First Information Report No. 86 of 2019 came to be registered by the Economic Offences Wing ("**EOW**") through its Banking Unit-II, a Division of Mumbai Police. This was directed against certain officials of the PMC . The case was one of on creation of fictitious and the siphoning off huge sums of money for the benefit of a corporate entity known as Housing and Development Infrastructure Ltd ("**HDIL**"). That company was already being put through the insolvency and bankruptcy process apart from other criminal charges against its various directors.

14. The consultancy of which the Petitioner was a promoter-director, Yardi Prabhu Consultants, had PMC as a client. The Petitioner was not on the board of HDIL. The Petitioner was not on the board of PMC. That bank had a panel of valuers. Yardi Prabhu Consultants was one amongst several valuers on the panel of the PMC. It is because of this association that the EOW called the Petitioner for enquiry and investigation. The Petition fairly states that the Petitioner was arrested on 12th March 2020. The EOW filed charge-sheets. The Petitioner is accused No. 14 in one such charge-sheet. From 12th March 2020, until he obtained bail on 20th

June 2022, the Petitioner was in judicial custody. There is no dispute that the Petitioner was enlarged on bail on 20th June 2022.

15. While the Petitioner was in judicial custody, the IBBI by an email issued a show cause notice dated 4th May 2021 to the Petitioner asking why the registration of the Petitioner with the IBBI should not be cancelled. The basis of the show cause notice was the charge-sheet filed by the EOW for an alleged role in the activities of the PMC. The charge-sheet set out alleged offences *inter alia* under Sections 201, 406, 420, 465, 467, 468, 471 and 477A of the Indian Penal Code read with Section 120B of that Code and Sections 46(1) and 47A of the Banking Regulation Act. The show cause notice of 4th May 2021 said that the Petitioner being in judicial custody and the filing of the charge-sheet *might* or had 'significantly impugned (sic)' (perhaps to be read as 'impeached') the 'integrity, reputation and character' of the Petitioner, thus rendering him ineligible under Rule 3(1)(k), which we have extracted above.

16. At the time of show-cause notice, the Petitioner was in judicial custody. His daughter Kajal replied to the show-cause notice and said that she would submit an explanation. Then, through his Advocates, the Petitioner replied to the show cause notice by email on 28th May 2021. His contentions were, and this assumes importance today, that the mere filing of a charge-sheet did not constitute proof of the allegations in the charge-sheet. The matter was still to be tried. The Petitioner claimed that whatever be the case against the PMC and HDIL, as against the Petitioner the entire case was based on conjecture and surmise.

17. It is true that the Petitioner was afforded a personal hearing which his Advocates attended on 4th August 2021. However, on 28th February 2022, the IBBI through its Whole Time Member ("**WTM**") issued the impugned order. The operative portion of that order at page 22 reads thus:

> "5. In view of the above, the Authority, in exercise of powers *vide* notification of Central Government no. GSR 1316(E) dated 18.10.2017 under Section 458 of the Companies Act, 2013 and in pursuance of rule 15 and rule 17 of the Companies (Registered Valuers and Valuation) Rules, 2017, **hereby, suspends the registration of Mr. Vishwanath Shridhara Prabhu as a registered valuer till he is exonerated of the charges.**
>
> 6. In accordance with provisions of Rules 174(8) of the Valuers Rules, the directions of this order shall come into force with immediate effect in view of para 5 above.
>
> 7. A copy of this order shall be forwarded to IIV India Registered Valuers Foundation where Mr. Vishwanath Shridhar Prabhu is enrolled as a member.
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> 8. Accordingly, the show cause notice is disposed of."
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> (*Emphasis added*)

18. On 6th August 2022, the Petitioner made a representation to the Union of India pointing out that the impugned order had no cogent reasons and was contrary to law. There is no response. Hence this Petition.

19. What is important for our purposes today are paragraphs 4.5, 4.6 and 4.7 of the impugned order at page 21. These are reproduced below.

"4.5 The Authority has considered the SCN, the reply of Mr. Prabhu and the oral submissions made by his advocate and materials available on record. Mr. Prabhu has submitted that the entire case put up against him was based on conjectures and surmises in an attempt to tarnish his image ad propriety and there was no material which can be termed as evidence against him. **At the outset, the Authority notes that the limited issue for consideration before it is whether the pendency of criminal proceedings impacts the integrity and reputation of the registered valuer and whether the same effects his eligibility for continuing as RV. In the instant matter, the Authority finds that the chargesheet has been filed against Mr. Prabhu. The provisions of IPC under which charges have been framed are served in nature and pertains to professional conduct of a valuer which are as follows**—

(a) Section 201—Causing disappearances of evidence of offence, or giving false information, to screen offender—punishable with imprisonment may extend from 7 years to one-fourth part of the longest term of the imprisonment provided for the offence.

(b) Section 406—Punishment for criminal breach of trust—punishable with imprisonment up to 3 years, or with fine, or with both.

(c) Section 420—Cheating and dishonestly inducing delivery of property—punishable with imprisonment up to 7 years and fine.

(d) Sections 465 and 471—Punishment for forgery and using as genuine a forged document or electronic record—punishable with imprisonment up to 2 years or fine.

(e) Section 467—Forgery of valuable security, will, etc.—punishable with imprisonment for life or with imprisonment up to 10 years and fine.

(f) Section 468—Forgery for purpose of cheating-punishable with imprisonment up to 7 years and fine.

(g) Section 477A read with section 120B—Falsification of accounts and punishment of criminal conspiracy—punishable with imprisonment up to 7 years or fine or both.

4.6 It is pertinent to note that the foundation of valuation services in a market economy lies on mutual trust between the valuer and the stakeholders. Based on the professional opinion of a valuer, for the purposes of Corporate Insolvency Resolution Process, CoC takes prudent commercial decisions. Therefore, it becomes crucial to engender as well as maintain the reputation and integrity of the valuation profession and the trust of the stakeholders, so that the decision makers in the market have adequate comport to take any crucial economic decision without any fear or doubt.

4.7 In view of the foregoing, the Authority finds that **pendency of the criminal proceeding against Mr. Prabhu for the offences as stated above, adversely affected his integrity and reputation and makes him a person who is not *'fit and proper'* to be eligible as a RV. Hence, the Authority finds that this is in violation of Rule 3(1)(k) of the Companies (Registered Valuers and Valuation) Rules, 2017.**"

(*Emphasis added*)

20. On the face of it, it is difficult to comprehend the reasoning, logic or rationale in this order, especially in paragraph 4.7. Anyone may set the criminal process in motion against anyone. There may be an FIR. There may even be a charge-sheet. But, except in certain specific statutes, the presumption in criminal jurisdiction in this country is still that a person is innocent until he is proved guilty.

Today, even charges have not been framed. It is entirely possible that the court in question, when it takes up the charge-sheet, may not in fact frame charges against the Petitioner at all. Even that is not known. The Petitioner may apply for or may obtain a discharge or a quashing order at some appropriate stage. Even that is unknown. We believe that in fact a quashing application is in the process of being filed. There is in addition the possibility of the Petitioner's acquittal. The impugned order proceeds on the basis that a simple allegation or accusation is enough to impeach the 'integrity, reputation and character' of a person, and that on a mere accusation a person is rendered unfit and improper.

21. The impugned order seems to us to have completely overlooked the inherent absurdity that it creates. It proceeds on the basis that the mere pendency of a criminal proceeding robs a person such as the Petitioner of his "fit and proper person" status because it supposedly affects his 'integrity, reputation and character'. We note that there is no case about the absence of a conviction, restraint orders, competence, or financial solvency. But if any of the eventualities that we have noted above occurs, i.e., no charges are framed, there is a discharge, quashing or an acquittal, we are asked to believe that the fit and proper person requirement, and the integrity, reputation and character of the Petitioner will suddenly get restored to some position anterior in time. In other words, it is being suggested that on account of mere accusations and allegations the Petitioner is *already* so guilty that his professional integrity, reputation, and character are tarnished. He has, in other words, already been found guilty — and not just before trial, but before charges are even framed. .

22. As to the question of alternate remedy, our attention is drawn to the general order of delegation of powers and functions issued on 2nd July 2020. The additional Affidavit of the Petitioner contests the submission of the 2nd Respondent that there exists an alternate remedy. The relevant submissions are from pages 108 to 110. Shortly stated, the submissions of Mr Parmar for the Petitioners is that an appeal is provided to the chairperson from the matters that have delegated to the Whole Time Member (Administrative Law or AL). This includes the disposal of a show cause notice under Rule 17 of the RV Rules. But suspension and cancellation of a registered valuer is within the jurisdictional remit of a Whole Time Member or WTM as per the table at Part C. There is no specific provision that provides for an appeal against an order or a WTM (as opposed to a WTM (AL)). Now the impugned order shows, at page 22, that it was passed by a Whole Time Member or WTM and not by a 'Whole Time Member (AL)'. We note this because of the emphatic submission by Mr Vijayan for IBBI that an efficacious alternate remedy exists. If that is a matter of controversy and is not undisputed, then it is difficult to see how the intervention of the writ court can be resisted on that limited ground.

23. For the reasons set out above, we are satisfied that the impugned order must be stayed. We propose to hear the Petition finally at an early date.

24. Consequently, we issue Rule.

25. We also grant interim relief in terms of prayer clause (c) which is set out below:

> "c. Pending the hearing and final disposal of the present Writ Petition, stay the operation and effect of the Order dated February 28, 2022 passed by the Respondent No.2."

26. An Affidavit in Reply on merits is to be filed and served on or before 24th February 2023. A Rejoinder is permitted by 10th March 2023.

27. The Petition is to be listed peremptorily for final disposal at 2.30 pm on 16th March 2023.

(S.G. Dige, J) **(G. S. Patel, J)**