

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **BAIL APPLICATION NO. 1511/2011**
BAIL APPLICATION NO. 1512/2011

Date of Decision : 09.11.2011

BAIL APPLICATION NO.1511/2011

Homi Rajvansh **..... Petitioner**
(Through Alka Rajavansh)

Through: Mr.Dinesh Mathur and
Mr.Arun Bhardwaj, Sr.
Advs. with Mr. Mohit
Mathur, Adv.

Versus

Central Bureau of Investigation **..... Respondent**

Through: Mr.P.K.Sharma,
Standing Counsel for the
CBI

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**CORAM :
HON'BLE MR. JUSTICE V.K. SHALI**

1. Whether Reporters of local papers may be allowed to see the judgment ? YES
2. To be referred to the Reporter or not ? YES
3. Whether the judgment should be reported in the Digest ? YES

V.K. SHALI, J.

1. This order shall dispose of two bail applications filed by Homi Rajvansh bearing Bail Application nos. 1511/2011 and 1512/2011. Both these bail applications were filed with the supporting affidavit of Alka Rajvansh, wife of the petitioner. However, a question of maintainability of the petitions was raised by the learned counsel for the CBI during the course of issuance of notice. Subsequently, the petitioner has filed his own affidavit in support of both the petitions. In both these petitions, the CBI/respondent is investigating the matter.
2. The bail application bearing no. 1511/2011 pertains to CBI case bearing RC No. 6(E)/2010-EOU-VII under Section 120 B read with section 406/409/420 IPC and

the second bail application bearing no. 1512/2011 pertains to CBI case bearing RC No.7(E)/2010-EOU-VII under Section 120 B read with section 406/420/467/468/471 IPC which were registered by the Economic Offences Wing, Delhi Police, Delhi.

3. So far as the first bail application no. 1511/2011 is concerned, the allegations in the FIR, in brief are that M/s Zenith Mining Pvt. Ltd. through its CMD Shri Syed Najam Ahmed and others, during the year 2004-2005, in pursuance to a criminal conspiracy and on the basis of false claims about their business, obtained loan/advance of ₹90.22 crores from NAFED for carrying out business of procurement and export of iron ore fines. It was alleged that M/s Zenith Mining Pvt. Ltd. had repaid only ₹30.47 crores upto 22.03.2005, and thereafter, they stopped payment to NAFED, and accordingly, an amount of ₹67.11 crores including the interest and service charges was outstanding against them.

4. During the investigation by the CBI, the regular bail application of the co-accused Syed Najam Ahmed and Vinod Gupta was dismissed on 18.10.2011 and 21.10.2011 respectively. Both the co-accused persons are presently stated to be in judicial custody. In the investigation, it was revealed that during the relevant period of time, the petitioner, though not named in the FIR, was posted as Additional Managing Director of NAFED and he was a part of the conspiracy with the co-accused Syed Najam Ahmed and Vinod Gupta, office bearers of M/s Zenith Mining Pvt.Ltd.and he had fraudulently and unauthorizedly executed an agreement dated 12.02.2004 with NAFED for supplying 60,000 MTs of iron ore fines on tie up basis after fraudulently obtaining conditional approval of the then Managing Director, NAFED. NAFED was to export the iron ore fines which was to be supplied by the M/s Zenith Mining Pvt. Ltd. It is alleged against the petitioner that he had signed the agreement for and on behalf of the NAFED and falsely represented that

NAFED has obtained a contract the foreign buyers for export of the iron ore fines, while as there was none. The petitioner is purported to have released a sum of ₹9 crores to M/s Zenith Mining Pvt. Ltd. without obtaining the mandatory approval of the competent authority i.e. Managing Director of the NAFED and no requisite documents were purported to have been executed as mandated in the agreement. It is alleged by the CBI that the proposal for the release of ₹9 crores was objected by the subordinate officials of the petitioner to which no heed was paid and bogus certificates were submitted by the co-accused persons. It is alleged that no material was ever supplied against this advance of ₹9 crores given in pursuance to the agreement dated 12.02.2004 and no export was made. It is further alleged that despite no material having been supplied by the accused company i.e. M/s Zenith Mining Pvt. Ltd. against the first agreement, the petitioner without even obtaining the approval of the competent authority, again entered into

another agreement dated 16.03.2004 with the same company for export of 90,000 MTs of iron ore fines. Against this agreement also, the accused/petitioner further released advance to the tune of ₹81.22 crores without obtaining the approval of the competent authority. It is alleged that fake certificates of quality/quantity were submitted by the co-accused to facilitate the release of the amount. It is alleged that the petitioner released the advances willfully ignoring the follow-up of the advances to ensure their utilization for the intended purpose. It is alleged by the CBI that out of the advance, an amount of ₹6.5 crores was shared among the petitioner, co-accused Vinod Gupta and one Himanshu Tayal, who is yet to be located and examined. The petitioner is alleged to have received an amount of ₹4 to ₹4.5 crores. It is alleged that the petitioner has not joined the investigation despite the number of notices having been sent to him on 04.10.2011, 07.10.2011, 11.10.2011, 17.10.2011 20.10.2011 and 28.10.2011.

The wife of the petitioner and the servants available at the residence of the petitioner are not furnishing the details of his whereabouts, and therefore, the custodial interrogation is required.

5. So far as the second bail application bearing no. 1512/2011 is concerned, the said case was also registered vide FIR No. 166/2007 dated 20.04.2007, under Section 120B read with section 406/420/467/468/471 IPC by P.S. Srinivasapuri, New Delhi on the complaint of Sh. S. N. Solanki, Branch Manager, NAFED, New Delhi against M/s Roshan Lal Lalit Mohan, 6 & 7 Gopinath Building, New Delhi Gadodia Market, Khari Bawli, Delhi-110006. However, in pursuance to the orders of Hon'ble Lt. Governor, Delhi, the investigation of this case was also transferred to CBI.
6. During investigation, it was revealed that proposal was submitted by M/s Roshan Lal Lalit Mohan to the present petitioner for tie up business for procurement of dry fruits and kirana items. For this purpose, a memorandum of understanding dated 05.07.2004 was signed between the

present petitioner, for and on behalf of NAFED and the proprietor Mr. Lalit Mohan of the aforesaid concern. In the investigation, it was revealed by the CBI that some conditions in the MoU were contrary to the conditions as approved by the Managing Director of NAFED. Condition as approved by MD, was that delivery shall be made against 100% payment but in MoU it was against PDC of not more than 30 days. A clause of advance of ₹21 crores to M/s Roshan Lal Lalit Mohan was also unauthorizedly inserted in the MoU by the present petitioner as the same was not approved by the competent authority. It is alleged that these changes were made to benefit the said private party with a dishonest intention. It is also alleged that in the said MoU the provision of advance was contrary to the guidelines of the Business Committee as well as to the payment Clause 5(b) of the MoU. Investment Clause 5(b) of the said MoU is that NAFED shall finance 90% value of the goods purchased, hypothecated and deposited in the reputed cold storages in the name of NAFED. While as at the

time of release of payment of ₹21 crores no stocks were deposited by M/s Roshan Lal Lalit Mohan in the cold storages in the name of NAFED.

7. It is also alleged that the present petitioner ignored the objections of the subordinate officials that against the advance of ₹36 crores stock worth ₹19.48 crores only has been submitted and thus in nutshell the investigation revealed the role of the present petitioner which was suspected to be not bona fide. It is further the case of the CBI that apart from this, six other cases are registered against the present petitioner. The learned senior counsel for the petitioner has contended that the petitioner is either on anticipatory bail or on regular bail in all such cases, details of which are given in the applicaiton.
8. So far as the present cases are concerned, it was contended by the learned counsel for the CBI that they want custodial interrogation of the petitioner to be conducted with a view to reach at the bottom of the matter.

9. It was contended by the learned senior counsel for the petitioner that the CBI cannot insist on the custodial interrogation of the accused in cases, unless and until it was imperative to go to the root of the matter.
10. Although, both the petitions were filed by the same counsel, but it seems that from strategic point of view two senior counsel Mr.Dinesh Mathur and Mr. Arun Bhardwaj appeared and made extensive submissions for grant of anticipatory bail to the present petitioner. The submissions which were made by the learned senior counsel in two separate matters are somewhat common and therefore, I feel it will be convenient to sum up the submissions made by the learned senior counsel on the basis of which the anticipatory bail was sought.
 - (i) It was contended by the learned senior counsel for the petitioner that the petitioner was posted in NAFED as an Additional Managing Director between the period of 2003 to 2006 and he did take decisions in the discharge of his duties with regard to the conduct of the business of the NAFED with

the approval of the Managing Director or the Board Resolution or the Business Committee, and therefore, he alone could not be made liable. It has also been contended that in a given case, there may be an error of judgment in taking a decision that can certainly be not made as a basis of criminal liability so far as the petitioner is concerned.

- (ii) That admittedly the petitioner has joined the investigation right from 2004 onwards when the FIRs were registered by Delhi Police on number of occasions. Presently, he is posted as Commissioner of Income Tax at Agra and despite this, his residence in Delhi has been raided on two occasions and the arrest of the petitioner is being sought with a view to humiliate and embarrass him. It was contended that the petitioner has a fixed place of residence, roots in the society and is not going to abscond, but certainly the petitioner should not be made a victim of witch hunting being done by the respondent/CBI. No recovery could be effected

with regard to the money which is alleged to have been defalcated or misappropriated by the private parties from the petitioner.

(iii) It was contended that the civil suits or arbitration proceedings have already been initiated by the NAFED against the defaulting parties to affect financial recoveries. Therefore, this is nothing but an effort to convert a civil recovery case arising out of a breach of an agreement into a criminal offence by falsely implicating the petitioner.

(iv) On merits, it was contended by Mr.Mathur, the learned senior counsel that so far as the offences under Sections 409 and 420 IPC are concerned, both of them cannot co-exist. In this regard, it was contended by Mr. Mathur, the learned senior counsel that Section 409 IPC is applicable only in the case of public servant while as NAFED itself had issued a circular that a person who is posted on deputation in NAFED or is an employee of NAFED could not be treated as a public servant, and

therefore, the said Section prima facie is not applicable. It was also contended that offence of cheating is not made out when the case of CBI itself is that the party which had been advanced loan has returned a portion of the money.

- (v) It was also contended that the objections which were put up by the subordinates were not necessarily to be followed by the petitioner. It was contended that the superior is not bound by the objections or the observations made by his subordinates. The petitioner was competent to take a decision of his own if it is in the interest of the organization concerned, he is competent to take the same, though in retrospect it may prove to be an error of judgment but it will not have the contours of a dishonest intention, so as to deny the anticipatory bail to the present petitioner. As regards the offence under Section 420 IPC, it was contended that the ingredients of Section 420, 467 and 468 IPC are not satisfied and a reference was

made in this regard to the various judgments which are reported are as under:

Central Bureau of Investigation, Hyderabad Vs. B. Ramaraju & Ors. (2011) 5 SCC 340

Maksud Saiyed Vs. State of Gujarat & Ors. (2008) 2 SCC (Cr.) 692

S. K. Alagh Vs. State of Uttar Pradesh & Ors. (2008) 2 SCC (Cri.) 686

(v) The learned senior counsel has also referred to the judgment of the Apex Court in case titled **Siddharam Satlingappa Mhetre Vs. State of Maharashtra** 2011 (1) SCC 514 in order to canvass the question of grant of anticipatory bail.

11. The learned counsel for CBI has vehemently opposed the grant of anticipatory bail. It has been contended by the learned counsel for the CBI that the allegations against the petitioner are very serious in nature and although he is not specifically named in the FIR but the evidence which has been gathered during the course of investigation clearly show his complicity in the commission of offence. It is contended since public funds

are involved to a huge extent, custodial interrogation of the petitioner only will be able to help the investigating agency to reach at the bottom of the matter. So far as the fact that the petitioner having been granted anticipatory bail or regular bail in other cases are concerned, it was contended that the CBI did not arrest the accused/present petitioner or oppose his bail, until and unless it is absolutely necessary for the fair investigation of the matter. It is in this background that the custodial interrogation of the petitioner is prayed for.

12. I have carefully considered the submissions made by the respective sides. I have also gone through the record.
13. So far as the judgment of the Apex Court in **Siddharam's** case (Supra) is concerned, there is no dispute about the proposition of law laid down therein that Section 438 Cr.P.C. is not an extraordinary law in the sense that it is to be invoked only in exceptional or rare cases. It is also not disputed that a great deal of ignominy and humiliation is attached to the arrestee, and

in case the accused has joined the investigation and fully cooperating with the investigating agency or he is not likely to be absconded in that event custodial interrogation should be avoided.

14. However, in the light of the directions passed by the Apex Court in **Siddharam's case (Supra)** the question to be considered by this Court as to whether this is a fit case for grant of anticipatory bail are almost the same which are applicable to the grant of regular bail. These are:-

- (a) Enormity or the seriousness of the allegations.
- (b) Chances of the accused absconding or whether he has roots in the society.
- (c) Chances of the petitioner creating hurdles in the fair investigation or the trial in other words the chances of the petitioner tampering with the evidence.
- (d) Whether the petitioner has joined the investigation or is prepared to join the same or whether this is a fit case for custodial interrogation.

15. Coming back to the facts of the present case there is no dispute about the fact that the present petitioner is an employee of the Indian Revenue Service and is presently stated to be posted as Commissioner Income Tax, Agra. The petitioner has admittedly roots in the society and owns property in Delhi and may be elsewhere also, and therefore, the chances of his fleeing from the processes of law are very remote. Therefore, so far as this consideration for grant of anticipatory bail is concerned, it certainly is in favour of the petitioner.
16. The next question which arises is as to whether the allegations against the petitioner are serious or not, and if, serious as to whether it warrants his interrogation by insulating his liberty by granting him anticipatory bail or whether the investigating agency be given free hand to interrogate the petitioner in custody. In this regard, the conduct of the petitioner in so called joining the investigation will have to be seen, with regard to the enormity of charges and the seriousness of the

allegations. There is no dispute about the fact that the enormity of the charges or the allegations against the petitioner are very serious in nature. I was informed during the course of oral submissions by the learned counsel for the CBI that an amount of ₹630 crores approximately has been pilferaged or misappropriated /cheated from the NAFED by the number of persons and different organizations under the garb of various kind of business propositions. It may be pertinent here to refer to the observations of Hon'ble Mr. Justice Manmohan Singh while entertaining three petitions for arbitration, the learned Judge had observed as under:

"1. In a short span of about five months, I have come across three cases wherein petitioner-NAFED, a national level cooperative society set up under the Multi-State Co-operative Societies Act, 2002, has filed proceedings to secure its interest in financial transactions.

2. While in OMP No. 589/2007 petitioner-NAFED advanced a sum of Rs.223.93 Crores as a means of finance for the purpose of procurement of iron ore, in OMP No. 449/2007 petitioner-NAFED advanced an

amount of Rs.90.7 Crores for export of iron ore. Similarly, in A.A. No. 73/2010 petitioner-NAFED advanced a sum of Rs.2.3 Crores towards financial assistance for export of fuel oil, sugar and other products.

3. In the above three cases, according to petitioner-NAFED, larger amount of monies advanced were misappropriated by the parties to whom the same were disbursed. In OMP 589/2007, which was disposed of by me vide order dated 3rd November, 2009, it was the petitioner-NAFED's case that the amount advanced by it, namely, Rs. 223.93 Crores was utilised for buying immovable properties and for buying paintings of a famous painter. I may mention that in the said case, it was the petitioner-NAFED's case that Central Bureau of Investigation had initiated criminal prosecution against not only private beneficiaries but also against its own officials.

4. In all these three matters, petitioner-NAFED has now initiated arbitral proceedings to seek recovery of monies advanced by it, which shows that huge amount of public money has been siphoned off by various private companies/individuals by taking huge loans/advances from petitioner-NAFED. It is apparent that the above three transactions reflect a systematic failure of internal process of an organisation registered under a Statute and controlled by the Government.

5. I am also of the prima facie opinion that these three cases need to be taken as case

studies by a committee comprising a representative each from Cabinet Secretariat, Comptroller and Auditor General of India and Department of Agriculture and Co-operation, Ministry of Agriculture, Government of India to consider whether structural changes are required to be carried out to ensure that there is a proper system of checks and balances so that in future similar transactions do not recur.

6. Consequently, I direct the Registry of this Court to open a separate Public Interest Litigation file in which it should place copies of petitions filed by petitioner-NAFED in OMP Nos. 449/2007, 589/2007 and A.A. 73/2010 along with a copy of this order. The said PIL be listed before a Division Bench of this Court according to Roster on 7th April, 2010.

7. List the present petition before this Court for further proceedings on 22nd March, 2010.

Sd/-

*MANMOHAN, J
MARCH 18, 2010*

17. Nobody has informed the Court as to what happened to the subsequent proceedings which were directed by the Hon'ble Mr. Justice Manmohan by converting the

order passed in three OMPS/Arbitration Application as PIL in order to ensure not only the recovery of the money belonging to the NAFED but also in order to prevent subsequent pilferage of money. This clearly reflects the enormity of the public money being squandered by the various employees of the organizations in conjunction with private parties. No doubt, the petitioner is involved in as many as five or six cases in this regard and he has been able to get the anticipatory bail or the regular bail from different Courts but that ground of getting regular bail or anticipatory bail in other five cases does not necessarily mean that he must also get an anticipatory bail in these cases also. So far as the grant of anticipatory bail in the given case is concerned, the application of each cases is to be decided on the facts and circumstances of the individual case. The other connected question which is to be considered by this Court is as to whether the decision taken by the present petitioner could be said to be a bona fide decision, even if

it was a decision which did not go well, so far as the money of the Organization is concerned. I do not agree with the submissions made by the learned senior counsel that merely because a decision was taken by the petitioner on the basis of the resolution having been passed by the Board or by the Business Committee, it could not be said that the petitioner did not have any role in the pilferage and in the mis-utilization of the funds. A genuine administrative decision may be wrong or an administrator in a given case may err in taking a decision which may cause financial loss, but that cannot ipso facto be construed as a negligence entailing criminal liability but in a given case, if there are series of transactions done by such person and all of them resulting in financial loss to the organization and benefit to the private parties, it is bound to raise suspicion regarding the intention of the present person. This is precisely the case in hand. There are series of decisions taken by the petitioner with or even without valid authority which has

caused serious financial loss to the organization which give rise to suspicion and registration of several cases against him and rightly so. It is the case of the prosecution that in the case of M/s Roshan Lal Lalit Mohan i.e. Bail Appl. no. 1512/2011, an MoU got approved of giving some loan to a proprietary concern for the purpose of export of dry fruits. The terms and conditions for grant of this loan were also approved by the Board. The allegation against the petitioner is that after the terms and conditions of the Board were approved, the petitioner had inserted a condition of advancing an amount of ₹ 21 crores as advance to the said party when there is no authorization in this regard. The petitioner was the signatory to the agreement/MoU. This kind of addition or interpolation with the terms and conditions of MoU could, certainly, by no stretch of imagination be said to be a bona fide error of judgment. More so, if this is seen in the light of the fact that not one decision but various decisions which has been taken by

the present petitioner with regard to the contract, MoU and agreement for giving the loan/advances or entering into the business transactions with other parties has resulted in financial loss to the NAFED, it clearly show that there is something more than what meets the eye. Obviously, this needs to be investigated.

18. I agree with the contention of Mr. Dinesh Mathur, the learned senior counsel for the petitioner that the petitioner was not bound to follow the objections raised by his subordinates. But this is not an argument to be seen in isolation. In the particular case if there are series of acts done or decisions taken by a superior officer overruling the objections raised by a subordinate, it normally ought to be for the betterment of the organization and not for its financial loss. Since in the instant case, a series of decisions taken by the petitioner have not only caused loss to NAFED but helped private parties and it has prima facie come in evidence that this

was done for consideration, obviously offences under various provisions of IPC are made out.

19. Similarly, in regard to the other case bearing B.A. no. 1511/2011, the petitioner had advanced an amount of ₹6 crores in the first instance in pursuance to an agreement which was to be secured by pledging the stock. The subordinates of the organization had taken an objection that the parties concerned had not secured the interest of NAFED by pledging the stocks yet they were overruled by the present petitioner and a fresh amount of ₹9 crores was purported to have been released to such a party without securing the interest of NAFED. These kinds of decisions of the petitioner, working to the detriments of the organization causing financial loss to it and to the definite advantage of the private parties can certainly, not be said to be bona fide decisions of a public servant. I am cognizant of the fact that there is a circular which has been cited by the learned senior counsel for the petitioner, issued by NAFED that the employee of NAFED

are not treated as public servant. I have not referred to the petitioner as a public servant within the parameters or definition of the word 'public servant' as given in Section 21 of the IPC. This is to be seen by the Court at an appropriate stage. I am referring to him as a public servant as a holder of a trust of the public. Admittedly, NAFED is a cooperative society, and therefore, it is an office which has entrusted to him to discharge the duties expected to be bona fide, lawful and that of a honest person for the welfare of the society and its members, which he prima facie failed to do.

20. The learned counsel for the CBI had also during the course of his arguments referred that there is a pilferage of public funds to which the learned senior counsel for the petitioner had raised a serious objection that the funds of the organization are not given by the Government, therefore, they could not be treated as public funds. It was contended that it is a society registered under the Multi State Cooperative Societies

Act. I fully agree with the contention of the learned senior counsel that NAFED may not be receiving any funds from the Government of India, but when learned counsel for the CBI referred to the funds, of NAFED as public funds it only meant to show that the funds of NAFED are not private funds in as much as they did not belong to any particular individual but are of the society.

21. Therefore, in the light of these facts, I do not subscribe to the view sought to be canvassed by the learned senior counsel that the petitioner's complicity is absent and any dishonest decision was at all taken by the petitioner. It was bona fide decision and an error of judgment in taking a decision could not be treated as a criminal offence. It is followed by the series of decisions in various cases which have been registered against the present petitioner.

22. Another argument which was sought to be canvassed by the learned senior counsel for the petitioner was that civil litigation have already been initiated and the matters are

pending before the learned Arbitrator. Admittedly the recovery proceedings stand initiated by way of arbitration proceedings or OMP against the party concerned, but merely, because such actions have been initiated by NAFED, it does not prima facie absolve the petitioner of its criminal liability, if any, of having committed an offence. I also do not subscribe to the contention of the learned senior counsel Mr. Dinesh Mathur that basic ingredients of Section 420 and 409 IPC are not satisfied. The judgments which are deciding the questions of criminal liability on the touch stone of Section 420 and 409 IPC are essentially on merits and not for the purpose of grant of bail, therefore, I am not inclined to refer to the said authorities at this stage. At the stage of grant of bail, the Court may not do the minute dissection of the ingredients of Sections 420 and 409 IPC in respect of which the allegations are levelled against the petitioner.

23. The last aspect on the basis of which the bail is sought by the petitioner is that he has joined the investigation and

for this purpose he has gone to the CBI and the police for more than 20 to 30 times and moreover, his premises has already been raided and nothing has been recovered from his house. The fact that the petitioner has joined the investigation is disputed by the learned counsel for the CBI in the status report which is duly supported by an affidavit. So far as the question of petitioner joining the investigation is concerned, I feel that this is not a case where the petitioner can be permitted to join the investigation while insulating his liberty. The Apex Court in number of judgments have made a distinction in custodial or non-custodial interrogation and the consequent result of the investigation. It has also taken the note of the fact that the results are different. Reliance in this regard is placed on **State Vs. Anil Sharma** AIR 1997 SC 3806 & **Muraleedharan Vs. State of Kerala** AIR 2001 SC 1699. There is a perceptible difference in the results of the interrogation when a person who has an order of anticipatory bail in his pocket and goes to the investigation agency. He is bound not to

cooperate and not to give the correct answer to the questions put to him to reach at the bottom of the case as against the person who is in custody or who does not have the protection of the anticipatory bail. Admittedly, during the interrogation CBI does not resort to any third degree measures nor is there any allegation made by the petitioner that during the course of investigation he was subjected to any third degree measures.

24. For the above mentioned reasons and keeping in view the totality of circumstances, I feel that this is not a fit case where the petitioner is entitled to the benefit of anticipatory bail and the IO has to be given a free hand for the purpose of investigation so as to reach at the bottom of the nexus and racket of defalcating the monies of the Cooperative Society, especially NAFED for its substantial amount of money. Accordingly, both the applications are rejected.

V.K. SHALI, J.

NOVEMBER 09, 2011/KP