

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

+ BAIL APPLN. 1698/2011 & CrI.M.B.No.2109/2011

% Judgment reserved on : 24th January, 2012
Judgment delivered on: 06th February, 2012

SYED NIZAM AHMED Petitioner
Through : Mr.Vikas Singh, Senior Advocate
with Mr.S.S.Mishra, Adv.

versus

CBI Respondent
Through : Mr.P.K. Sharma Standing Counsel
with Mr.Uday Prakash Yadav, Adv.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. In the instant petition, the petitioner has assailed the order dated 03.11.2011 whereby learned Additional Sessions Judge, Central District, Delhi dismissed the bail application of the petitioner.

2. The facts of the instant case in brief are that vide FIR No.630/2006 dated 21.11.2006 by the Economic Offence Wing of Delhi Police at Sri Niwas Puri police station, has been registered under Section 406/409/ 420/ 120B Indian Penal Code, 1860. From the date of registration of the FIR, Look Out Circular (LOC) was opened against the petitioner so that he could not flee from India.

3. Mr.Vikas Singh, learned Senior Advocate appearing on behalf of petitioner submitted that he was regularly joining the investigation as and when called upon by the investigating officer of Economic Offence Wing of Delhi. The petitioner filed various documents before the investigating agency.

4. In the year 2010, the investigation of the case was handed over to Central Bureau of Investigation (CBI) by way of an administrative order apparently because of the reasons that there were many cases of similar nature which were pending against 'National Agricultural Cooperative Marketing Federation of India Limited' (**NAFED**).

5. The petitioner also joined investigation before CBI on various dates and also filed some documents relating to the present FIR. The seizure memo establishes that the petitioner had been joining the investigation before the IO. However, finally he was arrested on 26-27th September, 2011 by CBI at Bhuvneshwar, Orissa.

6. Learned Senior Advocate has submitted that the petitioner earlier moved bail application before concerned Additional Chief Metropolitan Magistrate where his application for concession of interim bail was turned down vide order dated 18.10.2011.

7. Thereafter, the petitioner, on 19.10.2011 moved a regular bail application before learned Sessions Court which was heard on the same day. Meanwhile, the petitioner had prayed for an interim bail on the ground of *Nikaha* (marriage) ceremony of his only sister, which

was to be solemnized on 21.11.2011. Vide order dated 20.11.2011, the prayer for interim bail was declined and notice to CBI was issued for 31.10.2011. Learned Additional Sessions Judge, Delhi vide order dated 03.11.2011, dismissed the regular bail application of the petitioner.

8. The instant application is second in row.

9. Learned Senior Advocate for the petitioner submitted that under the changed circumstances, and on the basis of the records available in the present proceedings, the petitioner has filed the copy of the FIR and the RC under which the Sections under IPC have been invoked against him. Out of all the allegations contained in the FIR and in which the Sections of IPC are invoked are not at all applicable on the present petitioner.

10. The petitioner has asserted that since then the FIR was registered on 21.11.2006, the applicant consistently has been cooperating in the investigation. There are two investigating agencies involved in the present case and none of the agencies would have any grievance regarding non-appearance of the applicant. The applicant is a resident of Cuttack, Orissa, still he has been the first person to extent all possible cooperation to the investigating agency.

11. Learned counsel has further submitted that the allegations in the FIR and subsequent investigation hinges upon the documents which are the part of the record before NAFED. The investigating agency

has seized all those documents. It is not the case of the prosecution that the case is depending upon any oral evidence. The applicant has already been confronted with the documents concerning with the transaction alleged to have been taken place under the command of the applicant.

12. Learned Senior Advocate had further submitted that the investigating agency has so far failed to bring any allegations against the applicant except sweeping remarks regarding the conspiracy. There has also been no allegation or material so far collected, which would make out any case much less than the substantive offence against the applicant. The offence alleged in the FIR is under Section 120B Indian Penal Code, 1860 read with substantive offences under Section 406/409/120B Indian Penal Code, 1860. The allegations against applicant and the material on record would not disclose any offence as mentioned above, if at all except offence under Section 120B Indian Penal Code, 1860.

13. Learned Senior Advocate has further submitted that on 12.02.2004 an agreement was entered between NAFED and Zenith Mining Private Limited (**ZMPL**) wherein NAFED obtained a license to export Iron Ore Fines (IOF) from India. Accordingly, NAFED entered into a contract with ZMPL to buy IOF of cut off grade of 62.5% to 63.5% from different mines in Orissa, a transporter to arrange trucks for transfer of IOF from mining areas to port areas and a stevedoring company to unload the IOF into port plot from trucks and

load into vessels/ships for which they need a party to supply the same on freight on board (FOB) Paradip Port.

14. He has further submitted that another agreement dated 16.03.2004 was entered into between both the parties, wherein NAFED agreed for financing of export of IOF by ZMPL.

15. It is further submitted that the entire thrust of the prosecution in the present case is against the other accused persons particularly, Vinod Kumar Gupta, (regarding whom Bail Application No.1816/2011 is pending), Himanshu Tayal, Homi Rajvanshi. However, prosecution insisted the case against the applicant on the ground that he being CMD of ZMPL as such, is a conspirator because eventually ZMPL is alleged to be the beneficiary company. However, the investigating agency has lost focus in the entire investigation by not examining the bank statement of the company, by which the case could have been solved with clarity, if the agency placed the records straight as to when and how the money got transferred from NAFED to the company and subsequently from the company's account to whose account.

16. Learned counsel for the applicant has asserted that the statement of company account may be perused to arrive at a conclusion as to who is the real beneficiary of the entire dealing. The applicant is not the beneficiary of the fraudulent transaction, rather he is the victim being the CMD of the company.

17. It is the case of the prosecution that the advances/loans have

been granted pursuant to the agreement to ZMPL and as per the agreement despite having received the finances, ZMPL has partly complied with the terms of the contract. As a result of this contractual obligation ZMPL could only repay ₹ 30.47Crores out of ₹ 90.22Crores. Out of these allegations, two things are eminently clear on the facts and consequential legal action would follow accordingly. Firstly, there was a contractual obligation which could not be fulfilled leading to the non-payment of the dues, for which civil consequences is being followed. The NAFED has already initiated arbitration proceedings which would determine as to how much is the due and whether the due is recoverable or not. The secondly consequence is that being the CMD of ZMPL, the applicant is vicariously liable for the civil consequences of recovery, but there is no criminal liability at all.

18. Learned Senior Advocate further submitted that if at all there is omission or commission on the part of the applicant that would be a sheer negligence because of the poor entrepreneurship but *mens rea* cannot be read into such omission or commission.

19. It is further submitted that that in the arbitration proceedings, the pleadings placed on behalf of the company only shows that there is a differential amount less than ₹ 02.00Crores which would be recoverable from the company and not from the applicant.

20. Learned counsel for applicant has referred to Annexure 'F' placed at page No.55 of the paper-book, a detailed chart regarding the payments received by ZMPL from NAFED and material supplied to

the satisfaction of the NAFED.

21. On perusal of the Annexure 'F' mentioned above and from the comparison of these two charts it reveals that NAFED had advanced ₹87.03Crores whereas ZMPL has already returned approximately ₹ 85.65Crores. Therefore, the total amount is less than ₹ 02.00Crores which is recoverable from the applicant.

22. Learned counsel has further submitted that in the proceedings before this Court under Section 9 of the Arbitration and Conciliation Act, 1996 necessary orders are being passed to ensure the recovery of the amounts from ZMPL qua the applicant in the event of any impending award by the sole arbitrator. AS per the direction of this Court, bank account of ZMPL have been frozen. The immovable properties of the applicant has been injuncted so that the applicant may not create any charge or any third party interest. Apart from the directions, the applicant has also been directed to make payment of ₹ 4.50Lacs per month from out of the profit generated from the mining business of ZMPL. It is an admitted fact that mining business of ZMPL has been stopped by the order of Orissa Government, despite that he has been making necessary payments in compliance of the order of the Court.

23. Learned counsel for petitioner has drawn the attention of this Court at Annexure 'H' at page No.63, whereby the petitioner's company has filed a petition before High Court of Orissa at Cuttack being Writ Petition (Crl) No.326/2011 which is pending adjudication.

24. He further submitted that the petitioner was arrested on 27.09.2011. Vide order dated 03.09.2011 his application was rejected. The charge-sheet has already been filed by the prosecution on 19.12.2011, and charges have yet not been framed. Therefore, the trial will taken substantial time. The petitioner is settled in India and he is the CMD of the company mentioned above, therefore, no chances to flee from India.

25. Learned counsel has relied upon **Sanjay Chandra v. CBI 2011 (4) JCC 2913** wherein the Apex Court has been held that the investigating agency has already completed the investigation and the charge-sheet has already been filed, therefore, their presence in the custody may not be necessary for further investigation and the petitioners are entitled to grant of bail pending trial.

26. Learned counsel has emphatically relied upon the observation made in para No.28 of **Sanjay Chandra(supra)** which reads as under:-

“28) We are conscious of the fact that the accused are charged with economic offences of huge magnitude. We are also conscious of the fact that the offences alleged, if proved, may jeopardize the economy of the country. At the same time, we cannot lose sight of the fact that the investigating agency has already completed investigation and the charge sheet is already filed before the Special Judge, CBI, New Delhi. Therefore, their presence in the custody may not be necessary for further investigation. We are of the view that the appellants are entitled to the grant of bail pending trial on stringent conditions in order to allay the apprehension expressed by CBI.”

27. He further submitted that there is no apprehension of the petitioner to flee from trial or from the country. In the present case, charge-sheet has been filed and he is no more required for any custodial interrogation.

28. Learned Senior Advocate for petitioner has also relied upon the decision rendered by coordinate bench of this Court on 19.01.2012 in **Bail Application No.1692/2011** titled as **Suresh Kalmaadi v. CBI.**

29. On the other hand, Mr.P.K. Sharma, learned Standing Counsel for CBI has submitted that the applicant being the CMD of ZMPL in connivance with the other co accused on the basis of the false claims obtained loan/advances to the tune of ₹ 90.22Crores from NAFED for carrying out business of procurement and export of IOF. Out of the said amount, ₹ 30.47Crores was paid back. An amount of ₹67.11Crores including interest and service charges are outstanding. ZMPL has executed an agreement dated 12.02.2004 with NAFED for supplying 66000 MTs of IOF on tie-up basis. Against this agreement, the co accused Vinod Kumar Gupa, on behalf of accused wrote letters to NAFED to release the advances and an amount of ₹ 09.00Crores was released and credited to the account of the company, operated by the accused/applicant. Out of the advance of ₹ 09.00Crores, ₹ 06.65Crores were got released even after expiry of the agreement and that too by producing a bogus SGS certificate to NAFED. No material was supplied against the said advance of ₹ 09.00Crores released

against the agreement dated 12.02.2004 and entire amount was misappropriated by the applicant and other co-accused persons.

30. Learned counsel for respondent further submitted that subsequently another agreement dated 16.03.2004 with NAFED for export of 90000 MTs of IOF was signed between ZMPL and NAFED. Against this agreement, an amount of ₹ 18.22Crores was released on the basis of fake and bogus SGS certificates and claiming quality and quantity of the material.

31. Learned counsel relied upon the decision rendered by this Court on 21.12.2009 **Mukesh Jain v. CBI** 2010(1) AD (Delhi) 443 wherein co-ordinate bench has observed as under:-

“It is true that the petitioner has been in custody for more than eight months and the charge-sheet has already been filed, but considering the huge amount of public money, being retained by him, his having been in custody for eight months by itself would, in the facts and circumstances of this case, not entitle him to grant of bail at this stage. The economic offences having deep rooted conspiracies and involving huge loss of public funds whether of nationalized banks or of the State and its instrumentalities need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of our country. Therefore, the persons involved in such offences, particularly those who continue to reap the benefit of the crime committed by them, do not deserve any indulgence and any sympathy to them would not only be entirely misplaced but also against the larger interest of

the society.”

32. In the instant case, though the petitioner has spent more than four months in custody. The petitioner was the CMD of the company involved in the offence. His responsibility and involvement cannot be denied. The charge-sheet has already been filed and the petitioner has all liberty to argue his case on charge. The Trial Court may discharge the accused, if the Trial Court so desired on the material placed before it. Public money is involved in the present case and if he is admitted on bail, he shall enjoy the ill-gotten wealth obtained by illegal means, which will encourage other persons to commit similar crime on the belief that they could lead a lavish and comfortable life after spending few months in jail, therefore, a wrong message will go in public. The public funds are involved being obtained on loan by the company and petitioner.

33. In Bail application No.1511/2011 co-ordinate bench of this Court on 09.11.2011 in matter of **Homi Rajvansh v. CBI** has observed regarding conduct of present applicant in para No.16 which can be quoted with profit as under:-

“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 3rdNovember, 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.”

34. Therefore, I am not inclined to admit the applicant to bail at this stage, especially when the charges has are yet to be framed against

him and matter is not tracked for trial.

35. Accordingly, Bail Application No.1698/2011 is dismissed.

36. Before parting with the present order, it is made clear that nothing observed herein shall amount to an observation on the merits of the case, as still it is pending adjudication before learned Trial Court.

37. In view of above, CrI.M.B.No.2109/2011 does not require any further adjudication and stands disposed of as such.

38. No order as to costs.

SURESH KAIT, J

FEBRUARY 06th, 2012

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