

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

Reserved on: 9th April, 2013
Pronounced on: 9th May, 2013

+ **Crl. M.C.3938/2012**

MRS PAVITA BOPARAI

..... Petitioner

Through: Mr. K.T.S. Tulsi, Senior Advocate with
Mr. N.S.Boparai, Mr. Aadil Boparai and
Mr. A.Faraz Khan, Advocates

versus

NEERAJ SARAF & ANR

..... Respondents

Through: Mr. Ranjan Kumar, Mr. John Maphew
and Mr. Rohini Kumar, Advocates for the
Respondent No.1.
Ms. Jasbir Kaur, APP for the Respondent
No.2/State

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J.

1. By virtue of this Petition, the Petitioner seeks setting aside of the order dated 14.08.2012 passed by the learned Additional Sessions Judge (ASJ) whereby in the event of his arrest Respondent No.1 was ordered to be admitted to bail on furnishing a personal bond in the sum of ₹2,00,000/- with two sureties each in the like amount to the satisfaction of the IO/SHO concerned. A condition was further put in the pre-arrest bail

order that the First Respondent shall join investigation as and when required and shall cooperate in furnishing the documents as may be sought by the Investigating Officer and that he shall not leave the country without the prior permission of the Court.

2. In May, 2007 on the basis of an investment proposal received through some broker, the Petitioner along with her husband approached the office of the Respondent. A representation was made by the Respondent (Neeraj Saraf) and his father (now deceased) that the Petitioner shall earn an income of 18 to 20% per annum on her investment in purchase of a shop (approximately 682.86 sq.ft) under construction in the Mall. An agreement to sell was executed between the Petitioner and the Respondent. The Petitioner paid 84% of the total sale consideration as down payment, that is, ₹29,00,000/- out of a total sale consideration of ₹34,82,586/-. The Petitioner was assured a monthly return of ₹47,885/- in terms of clauses 3 and 4 of the agreement to sell and some post dated cheques were also delivered to the Petitioner.
3. On 07.07.2008, the Petitioner was informed that the area of the shop agreed to be sold to her had increased 37.71 sq.ft. (i.e. from 682.86 sq.ft. to 720.57 sq.ft.) and she was required to make further payment of ₹1,90,000/- more which she paid on 21.07.2008. The assured return as per the representation made by the Respondent was increased from ₹47,885/- to ₹50,665/- for which postdated cheques upto December, 2008 @ ₹50,665/- were issued.
4. On 08.12.2008, the Respondent wrote a letter to the Petitioner assuring her that the entire project would be completed in two months and thus the

Respondent would not be making the assured payment of rent from January onwards which was mentioned in clauses 3, 4 and 6 of the agreement to sell. On 16.12.2008, the postdated cheque for the month of December, 2008 was returned with the remarks “Drawer’s signature incomplete/illegible/differs”. On 23.12.2008, the Petitioner wrote a letter to the Respondent reminding him about the clauses 3 and 4 of the agreement to sell which were duly executed on 31.05.2007 between the parties. In response to the said communication by a letter dated 27.12.2008 the Respondent stated that the aforesaid clauses in the agreement to sell were mistake of fact and were inserted without their knowledge. According to the Petitioner, in another case in an Application for anticipatory bail moved by the Respondent, this Court, in pursuance of the mediation between both parties, directed the registry to release an amount of ₹60,90,803/-. According to the Petitioner, the Respondent since the very beginning had criminal intent to cheat the Petitioner. Although, by a letter dated 08.12.2008 the Respondent assured that the project would be completed in two months, yet even in the year 2013 the project is far from nearing completion.

5. The Application for setting aside of the order dated 14.08.2012 for grant of bail is contested by the Respondent by filing a written reply. It is stated that the project was subject to *force majeure* clause. The agreement to sell was executed between the Petitioner and the Respondent’s father Dr. V.N. Saraf who was solely in-charge of Saraf Mall, its conceptualization and collaboration with the land owner and all the agreements were signed by him. The project could not be completed

because of unforeseen circumstances and thus there is no ground for setting aside of the order granting bail which amounts to cancellation of bail.

6. Mr. K.T.S. Tulsi, learned senior counsel appearing for the Petitioner argues that in the agreement to sell dated 31.05.2007 the Respondent assured that the project shall be completed in one year. In the agreement, it was represented that till the time the space agreed to be sold to the Petitioner is not leased out to any good brand at a rate of not less than the assured return rate of ₹53,166/-, the Petitioner shall be entitled to an assured return of ₹47,885/-. Referring to the brochure of Saraf Mall(Annexure P-5), the learned Sr. Counsel argues that Neeraj Saraf, the Respondent herein, who was one of the Directors was projected as the main person who was to build the Mall. Although, the Mall was projected to be completed in one year from the date of agreement to sell, that is, 31.05.2007, a representation was made even in December, 2008 that the project shall be completed in two months but even on this date the project is far from completion. The letter dated 27.12.2008, in response to a letter dated 23.12.2008, written by the Petitioner informing the Respondent of the dishonour of the cheque, the Respondent's plea that the clauses 3 and 4 in the agreement were a "mistake of fact" would show that the Respondent from the very beginning did not intend to honour the clauses of the agreement to sell with regard to the assured payment and thus the Respondent duped not only the present Petitioner but a large number of investors and that is why in another case, the Respondent's Application (Bail Appln. No.1714/2010) was referred for

mediation by an order dated 28.10.2010 passed by the learned Single Judge of this Court where he (the Respondent) agreed to make the payment of ₹60,90,803/-. After enjoying the liberty, the Respondent wanted to resile from the settlement and wanted this Court not to release the amount of ₹60,90,803/- which was deposited in the Court and the Application was dismissed by a Coordinate Bench of this Court on 12.12.2011.

7. Referring to *State of U.P. through CBI v. Amarmani Tripathi*, (2005) 8 SCC 21, the learned Sr. Counsel argues that the principles governing setting aside of an order granting bail and cancellation of bail are entirely different and that the Court can go into the circumstances which weighed with the Trial Court in granting bail. If the Court finds that the relevant material was not considered or the Trial Court did not apply its mind properly to the material placed before the Court, the High Court can cancel the bail granted by the Trial Court even in the absence of any supervening event after the grant of bail.
8. On the other hand, learned counsel for the Respondent relying on *Dolat Ram & Ors. v. State of Haryana*, (1995) 1 SCC 349 and *Bhagirathsinh v. State of Gujarat*, (1984) 1 SCC 284 urges that there have to be compelling reasons for cancellation of bail and that the law is now in favour of granting bail. Para 7 of *Bhagirathsinh* which is specifically relied on is extracted hereunder:

“7. In our opinion, the learned Judge appears to have misdirected himself while examining the question of directing cancellation of bail by interfering with a discretionary order made by the learned Sessions Judge. One could have

appreciated the anxiety of the learned Judge of the High Court that in the circumstances found by him that the victim attacked was a social and political worker and therefore the accused should not be granted bail but we fail to appreciate how that circumstance should be considered so overriding as to permit interference with a discretionary order of the learned Sessions Judge granting bail. The High Court completely overlooked the fact that it was not for it to decide whether the bail should be granted but the application before it was for cancellation of the bail. Very cogent and overwhelming circumstances are necessary for an order seeking cancellation of the bail and the trend today is towards granting bail because it is now well-settled by a catena of decisions of this Court that the power to grant bail is not to be exercised as if the punishment before trial is being imposed. The only material considerations in such a situation are whether the accused would be readily available for his trial and whether he is likely to abuse the discretion granted in his favour by tampering with evidence. The order made by the High Court is conspicuous by its silence on these two relevant considerations. It is for these reasons that we consider in the interest of justice a compelling necessity to interfere with the order made by the High Court.”

9. The agreement to sell dated 31.05.2007 between the Petitioner and M/s. Saraf Projects Pvt. Ltd. is not in dispute. Clauses 3, 4 and 6 are extracted hereunder:

“3. That Seller No.1 hereby agrees to pay a sum of ₹47,885/- (Rupees Forty Seven Thousand Eight Hundred Eighty Five only) per month to the purchaser as assured return on down payment of ₹29,00,000/- (Rupees Twenty Nine Lakh only) till such time the unit referred is actually leased out to any good brand at the rate not less than the assured return rate of ₹53,166/-.

4. *That after the purchaser has paid the balance amount of ₹5,82,586/-(Rupees Five Lakh Eighty Two Thousand Five Hundred Eighty Six only) to be paid at the time of possession/registration, the amount of assured return will be ₹53,166/-(Rupees Fifty Three Thousand One Hundred Sixty Six only) which the seller hereby agrees to pay after receiving the balance amount of ₹5,82,586/-(Rupees Five Lakh Eighty Two Thousand Five Hundred Eighty Six only). Till such time it is not leased to any good brand at the rate of not less than ₹53,166/-(Rupees Fifty Three Thousand One Hundred Sixty Six only).*

.....

6. *The amount of assured return will be paid by the Seller No.1 on the purchaser till such time till the unit is actually leased out to a good brand mutually agreed by the Seller No.1 and the Purchaser at the rate not less than the assured return amount of ₹53,166/-(Rupees Fifty Three Thousand One Hundred Sixty Six only)."*

10. The first para of the second page of the brochure of the Mall specifically refers to the Respondent (and not his father) is extracted hereunder:

"Saraf Projects Private Limited was founded in 1966 in London, Great Britain. A private limited firm with three directors, the operations of the group are today looked over by Mr. Neeraj Saraf, a technocrat with engineering background from the U.K. who has studied and worked in England. In the space of almost 40 years, Saraf Projects and its team has mastered the art of architectural design using the latest cutting edge techniques for construction and interior design. In the 40 years of its operations Saraf Projects has built over 40 residential apartments and houses including restaurants and shopping centres in England. The company's first venture in India in 1984, was a multistory apartment block in Patna,

Bihar. This project is still revered as one of the aesthetically superior residential blocks in Patna.”

11. Clauses 3, 4 and 6 clearly spell out that the purchaser was entitled to an assured return of ₹47,885/- till the time the project is not only completed but till such time the unit is leased out to any good brand at a rate not less than the assured return rate of ₹53,166/-. The factum of assured return and its rate was reiterated in clause 6 of the agreement. The Respondent, for the first time, by a letter dated 27.12.2008, that is, after one year and seven months of entering into the agreement tried to convey to the Petitioner that the clauses 3, 4 and 6 in the agreement to sell were a mistake of fact. It has not been explained either in the letter dated 27.12.2008 or even now as to how these clauses were mistake of fact. Moreover, this mistake of fact was revealed only when by a letter dated 23.12.2008, the Petitioner informed the Respondent about the dishonour of the cheque issued by the Respondent company. The learned ASJ's observations that the Respondent's intention to cheat the complainant at the time of execution of the agreement was a mixed question of law and fact is therefore, ill-founded.
12. As has been noticed by me earlier in another Bail Application filed by the Petitioner relating to FIR No.53/2010, the Respondent agreed to pay an amount of ₹60,90,803/- on an investment of ₹44,26,992/- made by the complainant in that case along with interest @ 11% w.e.f. 01.06.2008. In the said Bail Application, the Petitioner(the Respondent herein) had made a statement that his company M/s Saraf Projects will make an effort to dispose of the building/project known as Saraf Mall at Haryana at the earliest in order to raise money to pay its various debtors including the

complainant (in that case). The Respondent's conduct was noticed by a Coordinate Bench of this Court when (after securing the bail), he wanted to place obstacles in the release of the draft in the name of the complainant in that case. The order dated 12.12.2011 passed in Bail Appln. No.1714/2010 by a Coordinate Bench of this Court reveals that the Respondent has misused the money of a large number of investors. The Respondent No.1 not only made representation at the time of entering into agreement to sell but also projected himself that the operation of the Saraf Projects Pvt. Ltd. which was founded in London in the year 1966 was being looked after by Mr. Neeraj Saraf (the Respondent herein) a technocrat with an engineering degree from U.K., who had studied and worked in England. In the brochure, it was represented that the company started with the development of residential flats in the upmarket and posh areas of Delhi such as Shanti Niketan, Vasant Vihar etc.

13. The decision in *Dolat Ram and Bhagirathsinh* relied upon by the learned counsel for the Respondent were distinguished by the Supreme Court in *Amarmani Tripathi* where it was stated that the Application for cancellation of bail and an Appeal against orders granting bail have to be considered on a different criteria. It was stated that all the aspects that are relevant under Section 439 Cr.P.C. read with Section 437 Cr.P.C. will be relevant while setting aside an order of granting bail. A Coordinate Bench of this Court in *Directorate of Revenue Intelligence v. Harsh Vasant & Anr., 2010(1) Crimes 1042*, dealt with the principles relevant for setting aside of the order granting bail in greater detail and after

referring to *Dolat Ram; Amarmani Tripathi; Rizwan Akbar Hussain Syeed v. Mehmood Hussain & Anr.*, (2007) 10 SCC 368 and *Subodh Kr. Yadav v. State of Bihar & Anr.*, 2009 (3) JCC 2362 held as under:

“7. The proposition of law which emerges from the above referred judgments is that if an order granting bail is challenged on merits and it is claimed that in the facts and circumstances of the case, the bail ought not to have been granted, it is permissible for the superior Court to consider not only the post bail conduct and supervening circumstances, but also the facts and circumstances which prevailed at the time of granting bail and which ought to have been taken into consideration by the Court, which granted bail. Irrespective of whether the prosecution seeks cancellation of bail or challenges the order whereby bail is granted, the net effect, in the event of such a petition being allowed, would be the same. Hence, post-bail conduct is not irrelevant even while considering a petition seeking setting aside of bail order, though such a conduct alone would not be the determinative factor. A bail would normally be cancelled if the accused tries to interfere with the course of justice by influencing the witnesses or he evades the process of the Court by remaining absent during investigation or otherwise tries to abuse the concession of bail granted to him. But, even if no such post-bail conduct on the part of accused is alleged, it is still permissible for a superior Court, while considering a petition challenging grant of bail, to examine whether the Court, which granted bail, took into consideration the material, which was not relevant or germane or it granted bail without due application of mind to the facts and circumstances of the case, whether the bail was granted in disregard of a statutory provision or by totally misapplying the settled principles governing grant of bail or whether there was any other gross procedural illegality or impropriety committed in granting bail.

8. But, an order granting bail cannot be disturbed except for compelling reasons and the superior Court ought to interfere only in a case where gross injustice has been done on

account of grant of bail. The superior Court will not be justified in setting aside an order of bail merely because had it been the Court concerned, it would not have granted bail in the case before it. The Petitioner seeking cancellation of bail or setting aside of an order granting bail must make out a strong case and must show that the order granting bail was manifestly illegal, unjust or improper.”

14. Turning to the facts of the instant case from the letter dated 27.12.2008, it is evident that the Respondent since the very beginning had the intention not to honour the clauses 3, 4 and 6 of the agreement. The defence “*force majeure*” will not be helpful to the Respondent as he had not come up with the circumstances which came in the way of completion of the project. Although, the Respondent has not contended any dispute with regard to the payment etc. with the owner of the land, such a dispute cannot otherwise be relevant in view of the fact that the Respondent had taken 84% payment at the time of entering into the agreement to sell. The economic offences are far more serious than the other offences. In the instant case, the Petitioner who is a 77 year old senior citizen invested her savings so that she and her family may get a fixed income at the fag end of her life as the return assured by the Respondent was much higher than the interest on a long term deposit from a nationalized bank. Since the intention to cheat was writ large and the Respondent had defrauded so many investors, it was not appropriate for the learned ASJ to exercise the discretion to grant anticipatory bail to the Respondent.
15. It is urged by the learned counsel for the Respondent that the bail not jail is the rule. The Respondent has not misused the liberty of bail and that

the Respondent has got roots in the society and is not going to flee from justice. Thus, the learned counsel for the Respondent opposing the Petition for setting aside the bail order urges that the order granting bail ought not to be interfered with.

16. It is true that when a person is available to face trial, normally the Court shall enlarge the person on bail. It is also true that there are no allegations of the Respondent misusing the liberty of grant of pre-arrest bail but, at the same time, the gravity and seriousness of the offence and the circumstances in which the same is committed are the factors relevant for consideration at the time of grant of bail.
17. The Petition is accordingly allowed. The order dated 14.08.2012 granting anticipatory bail to the Respondent is set aside. The Respondent is directed to surrender before the Court of learned Metropolitan Magistrate, P.S. Barakhamba Road on or before 31.05.2013 failing which the IO shall be entitled to obtain warrants of arrest against the Respondent for committing him to custody.
18. Pending Applications stand disposed of.

(G.P. MITTAL)
JUDGE

MAY 09, 2013
pst