

Santosh

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION**

**ANTICIPATORY BAIL APPLICATION NO. 1535 OF 2023**

SANTOSH  
SUBHASH  
KULKARNI

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Kamilhusain Musaddik Shaikh ...Applicant  
**Versus**  
The State of Maharashtra and anr. ...Respondents

Mr. Nartaza Najmi, i/b Dilip Shukla, for the Applicant.  
Mr. M. G. Patil, APP for the State/Respondent.  
Mr. Ganesh Gole, a/w Aarif Ali M. Ali, for Respondent No.2.  
API Sarita Laykar, EOW Kolhapur, present.

**CORAM: N. J. JAMADAR, J.**  
**RESERVED ON: 1<sup>st</sup> NOVEMBER, 2023**  
**PRONOUNCED ON: 10<sup>th</sup> NOVEMBER, 2023**

**ORDER:-**

1. Heard Mr. Najmi, the learned Counsel for the applicant, Mr. Patil, the learned APP for the State and Mr. Gole, the learned Counsel for respondent No.2/first informant.
2. This is an application for pre-arrest bail in connection with CR No.157 of 2022, registered with Hatkanangale Police Station, Kolhapur, for the offences punishable under Sections 120-B, 420, 406, 409, 417, 504, 506 and 507 read with Section 34 of Indian Penal Code, 1860 ("the Penal Code").
3. The first informant is the proprietor of Dipak Babaso Balwan. His mother is the proprietress of Shobha Babaso

Balwan. Both the firms deal in the business of sale of gray cloth. The commodity is sold through agents, who charge commission of 1 to 2% of the value.

4. The co-accused Murlimanohar Parik and Pralhad Parik worked as agents at Ichalkaranji. They introduced the applicant as the proprietor of "Textile and More". Jatin Shah, another co-accused, was also introduced as a business partner of the applicant. Believing in the representations of co-accused agents, the first informant sold and delivered the commodity to "Textile and More". Part payments were made.

5. The first informant alleges, in the month of August, 2021, the applicant and co-accused Jatin Shah as well as the agents represented to him that they had another firm NK Enterprise based at Ahmadabad. The applicant and co-accused thus induced the first informant and Shobha Balwan to sale and deliver gray cloth. Against the price of the said cloth, a sum of Rs.2,67,80,961/- remained outstanding.

6. The first informant pursued the matter with the applicant and Jatin Shah through the agents. As the price of the goods was not paid, the first informant came to the office of the applicant at Mumbai. It was found shut. The first

informant went to the Ahmadabad office of the applicant. The latter and co-accused Jatin Shah dishonestly declined to pay the price of the commodity and threatened the first informant with dire consequences. Hence, the report.

7. Mr. Najmi, the learned Counsel for the applicant, submitted that the allegations in the FIR, even if taken at their face value, do not make out the offences of criminal breach of trust and cheating even remotely. It was submitted that at best, the applicant can be said to have committed breach of contract. For that, the first informant can resort to civil remedies. Mr. Najmi submitted that even a civil liability cannot be enforced against the applicant as accused Nos.1 and 2 the agents were, as alleged in the FIR itself, solely responsible for payment of the price of the commodity sold and delivered by the first informant. Being del credere agent they were liable to satisfy the claim of the first informant. Therefore, the applicant cannot be proceeded against. In any event, since investigation is complete and charge-sheet has been lodged against the co-accused, at this length of time, according to Mr. Najmi, custodial interrogation of the applicant is not at all warranted.

8. The learned APP countered the submissions of Mr. Najmi. It was urged that the applicant has deceived many traders by the same *modus operandi*. Custodial interrogation of the applicant is indispensable to unmask the parties to the fraud and recover the huge amount of which the first informant and his mother have been defrauded.

9. Mr. Gole, the learned Counsel for the first informant/respondent No.2, submitted that the applicant having received the goods and sold the same to other traders, cannot be permitted to urge that he is not liable to pay the price of the said commodity. This stand of the applicant itself indicates a dishonest intention on the part of the applicant.

10. If the allegations in the FIR are considered, as they stand, the submission that the dispute is of purely civil nature in the sense that there was default on the part of the applicant to pay the price of the goods purchased and that may not necessarily amount to cheating may appear attractive. However, the attendant circumstances cannot be lost sight of.

11. The stand of the applicant that being a *pakka adaty* or del credere agent, accused Nos.1 and 2, were solely responsible for the payment of the price of the goods, was

sought to be built up on the basis of the allegations in the FIR that the agent assured the payment of the price of the goods to the vendor. At the same breath, the first informant affirmed that even the purchaser is equally liable to pay for the goods sold and delivered.

12. The analogy of del credere agent was sought to be imported by placing reliance on a decision of this Court in the case of *Nandlal Pannalal Marwadi vs. Kisanlal Chaturbhuj*,<sup>1</sup> wherein a *pakka adatya* was considered akin to del credere agent in England meaning thereby an agent or factor who, being entrusted with the goods of his principal to dispose to the best advantage, is in lawful possession of them with a general power to deal with them without reference to his principal, but guaranteeing the solvency of the sub-purchasers, and while entitled to charge against his principal his expenses, and entitled also to an indemnity from his principal against all losses resulting from carrying out his duty, is under an obligation to pay to his principal the amount due after the accounts have been properly settled.

13. Mr. Najmi also placed reliance on a decision of the Supreme Court in the case of *Assam Small Scale Ind. Dev.*

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**1**(1928) 30 BOMLR 1391.

***Corp. Ltd. and ors. vs. M/s. J. D. Pharmaceuticals and anr.<sup>2</sup>,***

wherein the following observations were made:

“In certain circumstances, even an agent can become a purchaser where an agent pays to the principal on its own responsibility. [See Gordon Woodroffe and Co. (Madra) Ltd. vs. Shaik M. A. Majid and Co. [AIR 1967 SC 181] Law contemplates different types of agency. Under the Contract Act, the concept of del credere agent is well-know. A del credere agent assumes responsibility for the solvency and performance of their contract by the vendees and, thus, indemnifies his employer against loss. He gives an additional security to the seller. [See Bowstead & Reynolds on Agency, 17<sup>th</sup> Edition, para 1-038]. However, it is not necessary to dilate thereupon as the status of the parties herein must be determined in terms of the provisions of the 1989 Act.”

14. I am afraid, the aforesaid propositions are of any assistance to the applicant. Two factors are stark. One, it is not the case of the applicant that the applicant had parted with the consideration or any portion thereof in favour of the agents. Two, there was any independent contract between the applicant and the co-accused Nos.1 and 2 that the co-accused would be responsible for the payment of the commodity. On the contrary, an endeavour was made to show that the applicant had, in turn, sold the commodity to third party purchasers and they did not repay the amount. *Prima facie*, the concept of del credere agent does not apply in the present case.

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**2**Appeal (Civil) 6324/2005, dtd.7/10/2005.

15. Was it a mere failure to perform the promise or there was dishonest intent on the part of the applicant? The distinction between failure to perform the promise and cheating is well recognized. In the case at hand, there is material to indicate that the enterprise of the applicant was on paper. Secondly, the applicant, it seems, has been pursuing a course of continual deception of the persons with whom he entered into outwardly legitimate transactions. Apart from the instant case, as many as six crimes were shown to have been registered against the applicant. Two crimes have been registered at Shivaji Nagar Police Station, District Kolhapur and Hatkanangale Police Station with similar set of allegations.

16. It appears that the applicant and the co-accused entered into the transactions and induced persons to deal with them by initially performing a small part of the contract to make them repose confidence in them. And subsequently reneged from those promises with a dishonest intent. The registration of a number of crimes against the applicant, in each of which, he has been arraigned for cheating, dissuades the Court from readily accepting the submission on behalf of the applicant that it was a case of a breach of contract.

Cumulatively, the material on record indicates that the first informant and other similarly situated unsuspecting vendors were induced to enter into transactions by initial performance and later deception. In the aforesaid view of the matter, I am not inclined to exercise the discretion in favour of the applicant. Release of the applicant on pre-arrest bail will seriously prejudice the cause of effective and complete investigation.

17. Hence the following order:

**: O R D E R :**

- (i) Application stands rejected.
- (ii) Interim protection, granted by this Court, by an order dated 31<sup>st</sup> May, 2023, stands vacated.
- (iii) It is clarified that these *prima facie* observations are confined to determine entitlement to pre-arrest bail only.

**[N. J. JAMADAR, J.]**