

Court No. - 12

Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S
438 CR.P.C. No. - 1038 of 2024

Applicant :- Mrs. Richa Motiwala @ Richa Hitsaurabha Motiwala

Opposite Party :- State Of U.P. Thru. Station In Charge Office Ps
Hazratganj, Lucknow

Counsel for Applicant :- Amarjeet Singh Rakhra

Counsel for Opposite Party :- G.A.

AND

Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S
438 CR.P.C. No. - 1039 of 2024

Applicant :- Rahul Hemraj Oswal

Opposite Party :- State Of U.P. Thru. Station In Charge Office Ps
Hazratganj, Lucknow

Counsel for Applicant :- Amarjeet Singh Rakhra

Counsel for Opposite Party :- G.A.

AND

Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S
438 CR.P.C. No. - 1040 of 2024

Applicant :- Hitsaurabha B. Motiwala

Opposite Party :- State Of U.P. Thru. Station In Charge Office Ps
Hazratganj, Lucknow

Counsel for Applicant :- Amarjeet Singh Rakhra

Counsel for Opposite Party :- G.A.

Hon'ble Pankaj Bhatia,J.

1. All anticipatory bail applications have been filed by the applicants arise out of same crime no.0376 of 2020, as such, they are being heard together and common orders are being passed.

2. Heard learned counsel for the applicant; Shri Ran Vijay Singh, learned AGA for the State; Sri Vishva Deo, Sri Vikram Singh Chauhan along-with Sri Shreyas Jain Advocates who appears for the informant and perused the records.

3. The present anticipatory bail applications under Section 438 Cr.P.C. have been filed seeking anticipatory bail apprehending arrest in FIR No.0376 of 2020 under sections 406, 420 IPC P.S. Hazratganj, District Lucknow.

4. In terms of the FIR being case crime no.0376 of 2020, it was alleged that five persons named in the FIR had approached the

complainant company, which is a N.B.F.C. and is engaged in the business of granting loan, for grant of loan which was granted to the tune of Rs.2,84,15,052.00 after completing all the documentary formalities. It was further recorded that out of the said money advanced by the complainant, a part of it was used for purchasing of shares and the balance was taken in the accounts by the said persons. It was also stated that in respect of the said loan granted by the complainant company, the persons named stood as sureties to the said loan. It was also recorded that the guarantors had also, assured to the company that the business run by the company taking the loan was a good business and the loan would be repaid in time. In pursuance to the said promise, the loan was granted in the manner indicated through banking channels. It was also stated that to further secure the said loan, the shares were pledged in favour of the complainant company and an assurance was given that in case the share prices fall, the margin money shall also be paid by the borrowers and the guarantors. It was further recorded that after paying certain installments, the borrowers refused to pay the installments and the margin money was also not given.

5. In addition to the said, it was alleged that subsequently, when the information was received, the addresses and the documents furnished by the borrowers and guarantees were found to be forged, there was no one living on the addresses disclosed by the borrowers and the guarantors and their phones were also out of order because of which it had become impossible to talk on telephone. It was thus stated that based upon the forged and fabricated documents and addresses, the loan was taken which is an offence.

6. In the light of the said FIR, the investigation was carried out and ultimately the charge-sheet was filed against the applicants who are three in number and they were charged for the offences allegedly under sections 406 and 420 IPC. The other charges were not made out in pursuance of the charge-sheet, which is on record.

7. In the light of the said, Sri Amarjeet Singh Rakhra, appearing on behalf of the applicants argues that as per the FIR, the same is to be divided in terms of the allegations into two parts, the first part alleges the taking of loan based upon the documents and the same being secured by the sureties and the shares certificates which were kept as lien. He also argues that the second part of the FIR, alleges that the addresses disclosed were forged and fabricated, which would attract an offence under section 467 IPC, however, no charge-sheet has been filed under the said section. He further argues that it was a case of mere commercial transactions in between the two parties. He also

argues that the said agreement by virtue of which, the loan was granted contained an arbitration clause, which has been invoked by filing an appropriate application before the Delhi High Court. He further argues that even as per the statement of the Manager of the informant, no part of cause of action accrued or arose at U.P. for that he draws my attention to the statement of the Manager, who clearly stated that no part of the agreement or transaction happened at Lucknow. He further argues that the applicant had approached this Court by filing a petition Misc. Bench No.15021 of 2021 in which an interim protection was granted till filing of the charge-sheet by virtue of the order dated on 19.07.2021, however, when the charge-sheet was filed, the same petition came to be dismissed on 31.05.2022 giving liberty to the petitioners therein to avail their remedies as may be available under law.

8. It is further argued that after filing of the charge-sheet, proceedings were started before the trial court and the summons were issued. He also draws my attention to the order-sheet filed along with the documents which records that the applicants did not appear till 30.01.2024 on which date non-bailable warrants were issued. He further argues that subsequently, the applicants appeared through their advocate on 20.03.2024 when the matter was posted for 29.03.2024. He further argues that in the meanwhile, the applicants had also approached the trial court for recall of the order of issuance of non-bailable warrant in which, an order came to be passed on 19.02.2024 keeping the non-bailable warrants in abeyance. He further argues that thereafter the anticipatory bail application was filed in which initially an interim order was passed, however it came to be rejected by means of the order dated 07.05.2024 after which, the present anticipatory bail applications have been filed seeking enlargement on anticipatory bail.

9. In the backdrop of the facts, as narrated above, the submission of Sri Rakhra are to the following effect :

"that it was a case of commercial transactions going bad, the ingredients to attract the offence under sections 406 & 420 IPC were missing, civil remedies in the form of arbitration have already been invoked and no part of cause of action has arisen at Lucknow. He further undertakes that the applicants are ready and willing to cooperate with the trial and thus, they may be enlarged on anticipatory bail."

10. Sri Vishva Deo and Sri Vikram Singh Chauhan assisted by Sri Shreyas Jain appearing on behalf of the informant strongly oppose the bail application, by arguing that the affidavits sworn along with the bail application was sworn on 10/14-05-2024

whereas the applicant did not appear before the trial court on that date which was 14.05.2024 fixed in the trial court. He further argues that the applicants have been somehow avoiding their appearance and they appeared through an advocate, which is neither permissible under the Cr.P.C. or otherwise. He further argues that the applicants have taken huge amounts of money and are somehow avoiding the payment thereof and are not cooperating with the trial. It is further argued on behalf of the complainant that the address disclosed in the present bail application, is a wilful concealment inasmuch as the ICICI Bank, in exercise of the power under section 14 of the SARFAESI Act, has taken possession of the property disclosed as permanent residence in the present application. He further argues that not only the ICICI Bank the other back namely the Bank of Baroda has also initiated proceedings and the applicants have been declared as wilful defaulter of the said bank. He further clarifies that the wrong disclosure of address is confined to two persons namely Hitsaurabha B. Motiwala and Mrs. Richa Motiwala, the two applicants before this Court. He further clarifies that the Bank of Baroda has declared the loan taken by M/s Jinaam Dress Pvt. Ltd, of which one of the applicant is the Director, as a wilful defaulter.

11. It is further argued that the issue with regard to territorial jurisdiction was not decided by this Court while deciding the writ petition Misc. Bench No.15021 of 2021, as such, the same issue cannot be adjudicated at this stage. He agrees that at the instance of the informant, arbitration proceedings have been invoked around three months ago and an arbitrator has been appointed by the Delhi High Court. He further states that no other proceedings have been initiated for recovery of the dues allegedly due to the informant company.

12. In sum and substance, the argument of the counsel for the informant is that the conduct of the applicants in not cooperating with the trial, the applicants through their company being defaulters to various public financial institutions and the applicants not disclosing true and material facts in the form of address, dis-entitled them to grant of discretionary remedy in the form of the anticipatory bail. He further clarifies that he is not aware of any proceedings under section 138 of the Negotiable Instrument Act, if initiated against the applicant.

13. Considering the submissions made at the bar and recorded above, prima-facie in terms of the allegations levelled in the FIR and the proceedings which emanate on the basis of the charge-sheet, it was a case of commercial transactions, which was duly secured by creating a lien on the shares, it was also secured by the sureties given by the guarantors who are the

applicants before this Court. The very fact that the arbitration clause present in the agreement has been duly invoked by the informant, clearly points out that it was a commercial transaction. Prima-facie the ingredients for invoking sections 406 and 420 IPC are missing particularly in the light of the scope of section 405 and 415 inasmuch as the loan was taken after creating a due security in favour of the informant company, prima-facie no part of cause of action has arisen at Lucknow.

Section 405 and 415 of the IPC read as under :

Section 405 : Criminal breach of trust - *Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".*

Explanation (1) - A person, being an employer 3[of an establishment whether exempted under section 17 of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952) or not] who deducts the employees contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.]

Explanation (2) - A person, being an employer, who deducts the employees contribution from the wages payable to the employee for credit to the Employees State Insurance Fund held and administered by the Employees State Insurance Corporation established under the Employees State Insurance Act, 1948 (34 of 1948), shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.]

Illustrations

(a) A, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. A has committed criminal breach of trust.

(b) A is a warehouse-keeper. Z going on a journey, entrusts his furniture to A, under a contract that it shall be returned on payment of a stipulated sum for warehouse room. A dishonestly sells the goods. A has committed criminal breach of trust.

(c) A, residing in Calcutta, is agent for Z, residing at Delhi. There is an express or implied contract between A and Z, that all sums remitted by Z to A shall be invested by A, according to Z's direction. Z remits a lakh of rupees to A, with directions to A to invest the same in Company's paper. A dishonestly disobeys the directions and employs the money in his own business. A has committed criminal breach of trust.

(d) But if A, in the last illustration, not dishonestly but in good faith, believing that it will be more for Z's advantage to hold shares in the Bank of Bengal, disobeys Z's directions, and buys shares in the Bank of Bengal, for Z, instead of buying Company's paper, here, thought Z should suffer loss, and should be entitled to bring a civil action against A, on account of that loss, yet A, not having acted dishonestly, has not committed criminal breach of trust.

(e) A, a revenue-officer, is entrusted with public money and is either directed by law, or bound by a contract, express or implied, with the Government, to pay into a certain treasury all the public money which he holds. A dishonestly appropriates the money. A has committed criminal breach of trust.

(f) A, a carrier, is entrusted by Z with property to be carried by land or by water. A dishonestly misappropriates the property. A has committed criminal breach of trust.

Section 415 Cheating - Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section.

Illustrations

(a) A, by falsely pretending to be in the Civil Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit goods for which he does not mean to pay. A cheats.

(b) A, by putting a counterfeit mark on an article, intentionally deceives Z into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats.

(c) A, by exhibiting to Z a false sample of an article intentionally deceives Z into believing that the article corresponds with the sample, and thereby dishonestly induces Z to buy and pay for the article. A cheats.

(d) A, by tendering in payment for an article a bill on a house with which A keeps no money, and by which A expects that the bill will be dishonoured, intentionally deceives Z, and thereby dishonestly induces Z to deliver the article, intending not to pay for it. A cheats.

(e) A, by pledging as diamond articles which he knows are not diamonds, intentionally deceives Z, and thereby dishonestly induces Z to lend money. A cheats.

(f) A Intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats.

(g) A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats; but if A, at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract.

(h) A intentionally deceives Z into a belief that A has performed A's part of a contract made with Z, which he has not performed, and thereby dishonestly induces Z to pay money. A cheats.

(i) A sells and conveys an estate to B. A, knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to Z, without disclosing the fact of the previous sale and conveyance to B, and receives the purchase

or mortgage money from Z. A cheats.

14. None of the ingredients for invoking section 405 or section 415 are evident. In view of the aforesaid, a case for grant of anticipatory bail is made out. Thus, all the applications for anticipatory bail are accordingly ***allowed***.

15. In the event of arrest, let the applicants ***Mrs. Richa Motiwala @ Richa Hitsaurabha Motiwala, Rahul Hemraj Oswal and Hitsaurabha B. Motiwala*** be released on anticipatory bail till conclusion of the trial in aforesaid FIR number on their furnishing a personal bond with two sureties of Rs.50,000/- each by three applicants separately to the satisfaction of Court below concerned with the following conditions:

(a) The applicants shall execute a bond to undertake to attend the hearings;

(b) The applicants shall not commit any offence similar to the offence of which they are accused or suspected of the commission; and

(c) The applicants shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade them from disclosing such facts to the Court or to any police officer or tamper with the evidence.

16. It is clarified that these are the tentative observations made for the purpose of grant of anticipatory bail and not the conclusive view with regard to the allegations.

Order Date :- 16.5.2024
VNP/-

[Pankaj Bhatia J.]