IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO.2109 OF 2013

1. Aftab Abdul Latif, &
2. Sharif Altaf Furniturewala. ..Applicants

Versus

State of Maharashtra ..Respondent

ALONG WITH

CRIMINAL APPLICATION NO.781 OF 2013
IN
CRIMINAL BAIL APPLICATION NO.2109 OF 2013

Rubina Zahir Ansari ..Applicant/Intervenor [Orig.Complainant]

IN THE MATTER OF :
Sharif Altaf Furniturewala
and another. ..Applicants

Versus

The Senior Inspector of Police,
and another. ..Respondents

.....

Mr. Subhash Jha a/w. Rishab H. Vakharia i/b. Law Global, for the Applicants.
Mr. Rajesh More, APP, for the Respondent – State.
Mr. Rizwan Merchant a/w. Faiz Merchant and Swapnil L. Wagh i/b. Rizwan Merchant & Asso., for the applicant/intervenor in APPLN No.781/2013.

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CORAM : A. R. JOSHI, J.

RESERVED ON : 18th DECEMBER,2013
PRONOUNCED ON : 20th DECEMBER, 2013

ORAL ORDER :

1. Heard the learned Counsel for the applicants. Also heard the learned Counsel for the intervenor / original complainant and the learned APP for the State.

2. The present application for bail is preferred by the two applicants for their release on bail in the matter of offences punishable under Sections 465, 467, 468, 471, 474 and 420 read with Section 34 of IPC. The first information report was lodged by the intervenor Rubina Ansari on 18.10.2013 with Bandra police station. The offence was registered as C.R. No.547 of 2013. The allegations against the applicants are that they cheated the complainant – woman and also created fabricated documents and it occurred from December, 2009 till date. Initially, the complaint was lodged against the present applicants and also other known and

unknown persons.

3. At this juncture, it must be mentioned that the investigation is still going on and the charge-sheet is not yet filed.

4. The case of the complainant can be narrated in nutshell as under :-

The applicants entered into a MOU with the intervenor/complainant for sale of a flat on 5th floor i.e. flat No.3, around 600 sq. ft. built up area in the building known as Concrete Construction (Heritage). Said building was under construction at Bandra CTS No.B/357, B/359, B/360 and B/362, H West ward. The said MOU was entered into between the parties on 24.1.2010. The total consideration was fixed at Rs.78 lakhs, out of which admittedly an amount of Rs.50 lakhs has been received by the applicants. According to the intervenor, she was assured a flat on the 5th floor of the said building. Apparently, that time a representation was made by the applicants that the building would be having total seven floors and all the necessary clearances have been obtained from the concerned authorities. Believing such representations, the MOU was entered into. Apparently believing on the words of the applicants, regarding flat on the 5th floor to be sold to the complainant, she sold her own flat where she was then residing and now she is residing in a rented flat at Bandra Reclamation as she could not get flat No.503 as agreed under the MOU. In fact, there were no sanctions by the Municipal Corporation of Greater Bombay beyond ground plus two-storey & half portion of the third floor, and as such sensing that the applicants have deceived her and such intention of deceit was since the beginning of the transaction between the parties, she lodged a complaint for the offences detailed in the First Information Report.

5. Prior to lodging the complaint, a notice was issued to the applicants asking for return of money as by then the complainant had already revealed that the commencement

certificate granted for the said building was only till the third floor. In spite of such notice, the applicants avoided the payment and also threatened the complainant. Moreover, it was almost impossible that the flat on the 5^{th} floor would be given to the complainant as the said building had permission only upto part of third floor and there was no construction beyond the third floor.

6. During the arguments, the learned Counsel for the applicants stated that without prejudice to any rights available to the applicants, they are ready and willing to deposit the total amount of Rs.50 lakhs received by the applicants and that the said amount can be given to the original complainant / intervenor and on such condition the applicants may be released on bail. It is further argued that the applicants are in custody for 59 days. So far as the applicant No.1 is concerned, there are no criminal antecedents, however, so far as applicant No.2 is concerned there is only one antecedent as far as collapse of one building by name Aftab Manzil taking the tole

of 11 lives. However, this antecedent may not come in the way for grant of bail, further argued.

7. In support of the arguments on behalf of the applicants, following authorities are cited before the Court :

[i] (2005) 4 Supreme Court Cases 640
[Arvind Mohan Johri and another
Vs.
State of U.P. and another]

By taking shelter of this authority, it is submitted that no fruitful purpose would be served by keeping the applicants in continued detention and on certain stringent conditions bail can be granted.

[ii] (2005) 11 Supreme Court Cases 119
[C.R. Patil
Vs.
State of Gujarat and others]

In this matter, the Apex Court observed in para 5 as follows :

> "5. …..... It was also submitted that the petitioners were ready to repay the loan of Rs. 50.40 crores as mentioned in the proposal. Moreover, special leave petitions would come up for hearing in near future. They are in jail since long and no useful purpose would be served by keeping them behind the bars,

> particularly when they have shown their *bona fide* and have expressed their willingness to pay the amount to the respondents. If they will be enlarged on bail, no prejudice will be caused to the respondents inasmuch as even in the past when they were on bail, they had complied with terms and conditions imposed on them. .... ”

[iii] (2008) 7 Supreme Court Cases 591
[Sureshchandra Ramanlal
Vs.
State of Gujarat and another]

Though shelter of the above authority is taken on behalf of the applicants, it is not squarely clinching the issue involved in the present case inasmuch as the said authority is on the aspect as to grant of anticipatory bail and discussion as to what are the considerations or grounds. As such, in that matter on medical grounds anticipatory bail was granted to the accused.

(iv) (2012) 1 Supreme Court Cases 40
[Sanjay Chandra
Vs.
Central Bureau of Investigation]

This is a matter under the 2G Spectrum Scam case wherein various considerations were enumerated which are mentioned in Head-Note (A) thus :

> "A. Criminal Procedure Code, 1973 – Ss. 437 and 439 – Bail – Conditional bail to balance competing considerations – Relevant considerations in granting such conditional bail – Gravity of alleged offence – Severity of punishment prescribed in law – Both parameters, held, ought to be taken into consideration simultaneously – Gravity alone cannot be decisive ground to deny bail – Competing factors to be balanced by court while exercising its discretion – Protection of personal liberty against securing attendance of accused at trial – Presumed innocence till a person is convicted – Hardship caused to individual on account of detention before conviction – Unnecessary burden on State to keep a person who is yet to be proved guilty – Constitutionally protected liberty, held, must be respected unless detention becomes a necessity – Bail is the rule and jail an exception – Each case however to be decided on its own merits – Apprehended tampering of evidence – Denial of bail on this count – Held, to be resorted to in most extraordinary circumstances only – Lengthy trial which may prolong beyond maximum sentence awardable under relevant law – Relevance of
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> – 2G Spectrum Scam case – Charge-sheet already filed – Telecom licences under Unified Access Services (UAS) policy and radio spectrum alleged to have been obtained by indulging in cheating and forgery – Eligibility criteria manipulated – Public exchequer alleged to have suffered huge loss – Appellants charged for various economic offences under Prevention of Corruption Act, 1988 and IPC – Seventeen persons booked for scam – Statement of witnesses running into several hundred pages – Other documentary evidence also too voluminous – Trial in these circumstances likely

to take considerable time – Longest sentence that can be imposed is seven years' imprisonment under 1988 Act – No serious apprehension raised before Supreme Court that accused persons, if released on bail, would interfere with trial or tamper evidence

– Balanced approach, held, is to grant bail subject to certain conditions, rather than to keep individuals under detention for an indefinite period – Liberty also given to CBI to seek cancellation / modification of bail if appellants violate conditions imposed on them.

– Trial court and High Court, further held, erred in denying bail solely by taking into account seriousness of offences, deep-rooted conspiracy involved and loss of public money, overlooking other relevant aspects – Prevention of Corruption Act, 1988 – S. 13 – Penal Code, 1860 – Ss. 415, 420, 109, 120-B, 463, 464, 468 and 471 – Telecommunications Laws – Telecom services – Licence and spectrum obtained fraudulently – Criminal liability."

By pointing out this, it is also argued that balanced approach is required to be taken while granting bail on certain conditions rather than to keep an individual under detention for an indefinite period.

[v] Unreported decision of this Court (Coram: S.C. Dharmadhikari,J.) dated 9th May, 2013 in Bail Application No.751 of 2013 in the case of Amiya

Kumar Gourishankar Jha Vs. The State of Maharashtra.

Paragraph 6 of the said unreported decision reads thus :

> "6 After having perused the application and annexures thereto and applying the tests as laid down by the Honourable Supreme Court in a recent judgment in the case of Sanjay Chandra v/s CBI reported in **AIR 2012 SC 830**, I am of the opinion that the offences alleged are of cheating and forgery. The case is based primarily on documents. The bank accounts have been frozen at least qua the Applicant. Equally, the Applicant has given permanent residence address in Thane district. In such circumstances by imposing stringent and appropriate conditions, the Applicant's presence for questioning interrogation and for trial can be secured."

By pointing out the above observations, it is strongly submitted on behalf of the applicants that in the case of forgery and cheating when the case is based on the documentary evidence, further custody of the accused person is not warranted in this case and if the aggrieved party can be suitably compensated then the bail application can be favourably considered.

[vi] Unreported decision of this Court (Coram: S.C. Dharmadhikari,J.) dated 25th April, 2013 in Bail Application No.494 of 2013 in the case of Ashok Ratanchand Jain Vs. The State of Maharashtra.

Again this is an order on a Bail Application in the matter of offences punishable under Sections 406, 409, 420 read with Section 34 of Indian Penal Code.

(vii) [1995] 3 Crimes (HC) 386

[Menino Lopes
Vs.
State of Goa]

Paragraph 6 of the said decision reads thus :

> "6. Coming to the merits, we would try to be brief because, as pointed out by Krishna Iyer, J., in Gudikanti Narasimhulu v. Public Prosecutor, High Court of A.P., for a bail order - once awareness of matters of relevance is assured - the briefer the betterm and prolixity may be fraught with unwitting injury to the prosecution or the defence. As pointed out further by the learned Judge, the question "Bail or Jail - at the-pre-trial or post-conviction stage- belongs to the blurred area of the criminal justice system and largely hinges on the hunch of the bench, otherwise called judicial discretion". The learned Judge has reminded us of the dictum of Lord Camden that "the discretion of a Judge is the law of tyrants; it is always unknown, it is different" in different men; it is casual, and depends upon constitution, temper and passion. In the best, it is often times caprice; in the worst, it is every vice, fully and passion to which human nature is liable. These observations, uncharitable and unpalatable as they are, may contain some truth, but only partial truth and never the whole truth. In the

exercise of judicial discretion our courts have evolved some principles for their own guidance in matters relating to bail and we would like to think that the tendency of modern Courts in India, inspired by the Constitutional theme as enshrined in Articles 21 and 14 of the Constitution now operating in our country since the decision in Meneka Gandhi in its majestic grandeur, is to grant bail, wherever practicable, unless the courts are satisfied that there are reasonable likelihood of the accused fleeing from justice or absconding or polluting the same, whether by absconding, by tampering of evidence or otherwise. As pointed out by Krishna Iyer, J., in The State of Rajasthan v. Balchand, without intending to be exhaustive but only illustrative, "the basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the, course of justice". And as to the allegation of possible abscondence of the accused, it is always good to remember the classic observations of Lord Russell of Killowen, quoted with approval by Justice Krishna Iyer in Gudikanti Narasimhulu (supra), that "it was not the poorer classes who did not appear, for their circumstances were such as to tie them to the place where they carried on their work. They had not the golden wings with which to fly from justice". As to the allegation of tampering of evidence, it would be equally useful to remember the classic observations of Chief Justice Harries, while speaking for the Division Bench of the Calcutta High Court in Kamla Pandey v. The King, that "it is common knowledge that in every bail case the police allege that there is a danger of, tampering with witnesses, and if witnesses can be tampered with in this way, it does not speak very highly of the efficiency of the police". We are satisfied from the submissions of the learned Counsel for the parties and on the materials on record that the accused-applicant has his roots, tying him to his place of work and residence."

By pointing out the above observations, it is strongly submitted that there should not be a punishment to the accused prior to their trial and as such the bail is a rule and jail is an exception, further submitted.

8. In short the argument on behalf of the applicants is that though it is accepted that they failed to give the requisite flat No.3 on the 5th floor in their building and though they had received an amount of Rs.50 lakhs, still are ready and willing to reimburse back the said amount to the complainant and in fact giving of such flat on 5th floor is apparently beyond their control and for that purpose there is no need for the applicants to be kept in custody till the disposal of the case. As such, it is tried to establish on behalf of the applicants that this is simplicitor a civil transaction, but, it has been given a criminal touch by the original complainant / intervenor and as such considering the ratios propounded by the above cited

authorities, the present applicants may be enlarged on bail on any stringent conditions, further argued.

9. Counter to the above arguments, initially the learned Counsel for the intervenor strongly argued on various aspects including the conduct of the applicants since inception of the transaction between the parties i.e. since the time of the MOU entered on 24.1.2010. By pointing out the annexures to the MOU and also the contents of the MOU, it is brought to the notice of this Court that it is represented in the said MOU that the applicants have got the plans for construction of a new building comprising of ground and seven upper floors, sanctioned from the authorities concerned vide CC No.CE/2269 dated 29-11-2007. It is also brought to the notice of the Court that a photograph of the proposed building having seven floors was also annexed to the said MOU.

10. On this aspect, the copy of the C.C. which is apparently forged is shown to the Court along with the copy of the C.C. without such forgery. It is further argued that the said

CC dated 29.11.2007 was initially for the work only upto the top of the basement as per the approved plan dated 18.4.2007. In fact, that CC was granted in the name of original owner of the plot Mr. Ikbal Ibrahim granted vide his application No.7991 dated 4.8.2006. The said original CC then was extended and made valid till 28.11.2009 by endorsement dated 26.3.2009 showing the permission for first floor slab top level. It was further extended on 10.12.2010 valid upto 28.11.2011 for post facto commencement certificate for entire work i.e. two tier basement plus ground to second floor, third floor part. As such, beyond this permission, there was no other further construction allowed vide the said CC; whereas on plain reading of the copy of the C.C. which is apparently a forged one, it do not show the last extension till 28.11.2011 but it only show the first extension upto 28.11.2009 but in the said endorsement showing the extension apparently it is shown as extended upto 7^{th} floor. On plain viewing both the said copies, the real CC and the forged CC, it is apparent that the said words “1^{st} floor” has been changed to “7^{th} floor”. This aspect was much hampered by the learned Counsel for the intervenor saying that there was manipulation and fabrication of the Municipal record and grant of permission by the Municipal Authority thereby representing to the complainant that there is a valid permission to build upto 7^{th} floor. By pointing out this, it is further submitted on behalf of the intervenor/complainant that not only this falsification of the documents but further conduct on the part of the applicants render the matter more grave than apparently argued on behalf of the applicants being a simple civil transaction and breach of the agreement.

11. In order to substantiate the above arguments, various documents are produced before the Court by way of different compilation of about 298 pages on behalf of the intervenor. It is submitted that there are at least five documents prepared and forged for the same property constructed by the applicants. A registered agreement entered into by the applicants with one Mohd. Zaki dated 29.6.2009 is brought to the notice of this Court. It is entered into between M/s. Concrete Constructions,

a Partnership Firm of the present applicants and one Mohd. Zaki s/o. Mohd. Javed. It is registered with the Sub-Registrar of Assurances, Bandra and wherein it is represented that the owners have demolished the existing structure and have commenced the construction of the new building as per the plans duly sanctioned by the municipal Corporation vide IOD/ C.C. No. CE/2269 dated 29th November, 2007. By pointing out this, it is strongly submitted that *per se* it is a false statement as the said concerned CC No.2269 dated 29.11.2007 was only upto the third floor (part) and not beyond the third floor. When this was brought to the notice of the Court on behalf of the intervenor, the learned Counsel for the applicants brought attention of this Court towards an affidavit filed by the said Mohd. Zaki which is at page No.113 to the present bail application. Said affidavit is sworn on 25.10.2013 and it is a notarized affidavit wherein said Mohd. Zaki had specifically mentioned in paragraphs 2, 3, 4 & 5 thereof as under :

> "02]. I state that I had purchased a flat for my family from Concrete Construction (Heritage) Private

Limited, of whom the above Mr. Aftab Abdul Furniturewala and Mr. Sharif Altaf Furniturewala are the directors.

03] I state that both Mr. Aftab Abdul Furniturewala and Mr. Sharif Altaf Furniturewala never gave me any false or misleading documents or forged documents and never induced me by any illegal means and I further state that the entire deal was conducted in a straightforward manner.

04] I state that I am presently residing with my family in Concrete Heritage, Varoda Village, at Bandra, and I have no grievance against the above Mr. Aftab Abdul Furniturewala and Mr. Sharif Altaf Furniturewala, and they have not made any misrepresentations and/or they have never cheated me.

05] I state that I have never given any statement to the Police against the above Mr. Aftab Abdul Furniturewala and Mr. Sharif Altaf Furniturewala stating that they cheated or showed any false or misleading or forged documents."

12. By placing reliance on the above contents of the affidavit, it is submitted on behalf of the applicants that there was no misrepresentation or any misleading documents given to said Mohd. Zaki. On carefully going through the contents of the registered agreement with Mohd. Zaki specifically mentioning in the agreement itself as to the commencement certificate granted by Municipal Corporation for construction upto 7th floor and in fact no such commencement beyond third

floor is in fact granted, *per se,* it must be said that the said obtaining of affidavit is an attempt on the part of the applicants to create a false evidence as argued on behalf of the intervenor.

13. Moreover, on this aspect the learned Counsel for the intervenor submitted that there was no question of said Mohd. Zaki to swear such an affidavit and in that event it must be accepted that it was so sworn due to the pressurizing tactics of the applicants in order to suit their case and come out of clutches of the offences leveled against them in the FIR lodged by the intervenor/complainant. This argument sound to reason and thus definitely it is a mitigating circumstance so far as plea of the applicants asking for bail.

14. It is also brought to the notice of the Court on behalf of the intervenor that as per the Commencement Certificate, the basement should be of two tier and for car parking. However, the said premises has been sold to one Alhadi Group which is apparently a terrorist outfit, further argued. It is submitted that this is one more attempt on the part of the

applicants to violate the Rules and Regulations of the Public Body i.e. Municipal Corporation and to indulge in high handed activities not having any regard to the local laws much less the Rules and Regulations for construction of the building which if collapse will cause casualty of human lives – as has happened in the building collapse of “Aftab Manzil” wherein the applicant No.2 is involved. Definitely this aspect is also required to be considered by the Court while deciding the present application for bail.

15. It is further brought to the notice of the Court that the said entire building in which the flat on the 5th floor was agreed to be given to the complainant, was agreed to be sold to one Sunil Rathod vide deed on 13.4.2013. Again, false representations were made to the knowledge of the applicants regarding grant of CC upto 7th floor etc. It is further submitted that the said person Sunil Rathod is none else than man of the applicants themselves and has been set up for allegedly taking over the rights under the said building as a camouflage. Not

only this but still there is one more act on the part of the applicants that in August, 2012 an irrevocable General Power of Attorney was executed in favour of one Abdul Aziz, thus still creating third party rights with respect to the property.

16. By pointing out the above in the summing up it is argued on behalf of the intervenor that this is not a simple case of cheating the intervenor but it is a case of a purposeful design to construct a building upto 7th floor without there being any sanction from the local authorities and design to earn huge profits at the costs of lives of the flat purchasers. As such, further argued, thus this case need not be viewed as a usual case of cheating and forgery of document and thus granting bail to the applicants presuming that the case is based on documentary evidence and the said document purported to have been forged or fabricated is already recovered or is available with the Municipal Corporation. In support of those submissions, specifically mentioning that it is a sort of epidemic of illegal constructions and also a sort of contiguous disease,

various authorities are cited before the Court on behalf of the intervenor as under :

[I] **(2013) 1 Supreme Court Cases 613**
Pratapbhai Hamirbhai Solanki
Versus
State of Gujarat

[II] **(1978) 1 Supreme Court Cases 118**
Gurcharan Singh and others
Vs
State (Delhi Administration)

Reliance is placed on the observations made in paragraph 29 & 30, which read thus :

> "29. We may repeat the two paramount considerations, viz. likelihood of the accused fleeing from justice and his tampering with prosecution evidence relate to ensuring a fair trial of the case in a Court of justice. It is essential that due and proper weight should be bestowed on these two factors apart front others. There cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or cancelling bail.
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> 30. In dealing with the question of bail under Section 498 of the old Code under which the High Court in that case had admitted the accused to bail, this Court in the State v. Captail Jagjit Singh [1962] 3 SCR 622 (supra) while setting aside the order of the High Court granting bail, made certain general observations with regard to the principles that should govern in granting bail

in a non-bailable case as follows :

> "It (the High Court) should then have taken into account the various considerations, such as, nature and seriousness of the offence, the character of the evidence, circumstances which are peculiar to the accused, a reasonable possibility of the presence of the accused not being secured at the trial, reasonable apprehension of witnesses being tampered with, the larger interests of the public or the State, and similar other considerations, which arise when a Court is asked for bail in a non-bailable offence. ……."

[III] **(2012) 9 Supreme Court Cases**
Ash Mohammed
Vs.
Shiv Raj Singh

Paragraph 8 of the said decision reads thus :

> "8. In Ram Govind Upadhyay v. Sudarshan Singh, (2002) 3 SCC 598, it has been opined that the grant of bail though involves exercise of discretionary power of the Court, such exercise of discretion has to be made in a judicious manner and not as a matter of course. The heinous nature of the crime warrants more caution and there is greater chance of rejection of bail, though, however dependent on the factual matrix of the matter. In the said case the learned Judges referred to the decision in Prahlad Singh Bhati v. NCT, Delhi, (2001) 4 SCC 280 and stated as follows:-
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> "(a) While granting bail the court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.

> (b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.
> (c) While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the court in support of the charge.
> (d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail, and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail. " "

[IV] **(1987) 2 SCC 684**
Shahzad Hasann Khan
Vs.
Ishiaq Hasan Khan

In paragraph 6 of the said decision, observations are made as follows :

> "6. …...... Liberty is to be secured through process of law, which is administered keeping in mind the interests of the accused, the near and dear of the victim who lost his life and who feel helpless and believe that there is no justice in the world as also the collective interest of the community so that parties do not lose faith in the institution and indulge in private retribution. ….......”

[V] Decision of the Apex Court (Coram: K.S. Radhakrishnan & A.K. Sikri,JJ.) dated 7th

August, 2013 in the case of Nasiruddin Vs. State (NCT) Delhi and others.

In the said decision the Apex Court in para-12 observed thus :

> "12. ………... The question as to whether the case will fall under Section 326 Indian Penal Code could be determined only after the investigation is completed. …............ We are of the view that it was too early for the learned Additional Sessions Judge to express any opinion merely looking at the medical report. …..."

17. Considering the ratios propounded by the above authorities, it must be said that the present matter is required to be viewed in different perspective than that is argued on behalf of the applicants. In other words, it must be mentioned that the present matter cannot be viewed as a simple breach of contract and cheating an individual and as such entitling the applicants to the bail on their willingness to deposit an amount of Rs.50 lakhs with the Court or with the intervenor / complainant. This is a matter in which the conduct of the applicants is spelt out from various documents entered into by

them, as detailed above, and as explained by the learned Counsel for the intervenor and in that event mainly considering that the present matter is still under investigation, it is not in the fitness of the situation to release the present applicants on bail. Hence, the present application is dismissed and accordingly disposed of. Intervention application also stands disposed of.

(A.R. JOSHI, J.)