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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPLICATION NO.3990 OF 2015

1. Paras s/o Zumbarlal Lalwani,
Age : 52 years, Occu.Business/Agril.,
R/o Pachora Road, Jamner,
Tq. Jamner, Dist. Jalgaon
2. Vilas s/o Tilupuri Gosawai,
Age : 52 years, Occ. Contractor,
R/o Teacher Colony, Jamner,
Tq. Jamner, Dist. Jalgaon ..APPLICANTS

VERSUS

The State of Maharashtra,
through Police Inspector,
Police Station Jamner,
Tq. Jamner, Dist. Jalgaon ..RESPONDENT

Mr M.S. Deshmukh, Advocate for applicants;
Mr D.R. Kale, Public Prosecutor for respondent;
Mr Vijay Sharma, Advocate holding for Mr B.K. Patil Advocate, to assist
Public Prosecutor

CORAM : N.W. SAMBRE, J.

DATE : 4th September, 2015

ORAL ORDER :

This is an application under section 438 of the Code of Criminal Procedure, in the matter of grant of anticipatory bail, in C.R. No.112 of 2015, registered with Police Station, Jamner, Taluka Jamner, Dist. Jalgaon on 2nd July, 2015, for offences punishable under sections 408, 409, 420, 468, 120-B and 166-A of the Indian Penal Code.

2. Facts, as are necessary for decision of the present application, are as under :-

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3. Pursuant to the general elections of Municipal Council, Jamner, applicant no.1 came to be elected as President on 29th April, 2013.

4. Before election of applicant no.1 as President, the Municipal Council issued tender notice on 17th February, 2013, for laying down of water supply pipeline. The said tender notice was re-published on 17th April, 2013, in response to which three tenderers submitted their offer, of which two were not qualified. Applicant no.2 herein, being a qualified tenderer, was awarded the work. The work in question was to be executed under the supervision of Maharashtra Jeevan Pradhikaran, Jalgaon Division, Jalgaon and pursuant to the approval of agreement by the said agency of the State Government, an agreement between the Municipal Council, Jamner, Dist. Jalgaon and the Maharashtra Jeevan Pradhikaran. Amongst other, terms no.3 and 8 speak that the Technical Officer of the Jeevan Pradhikaran shall carry out visits and shall supervise the work as a third party. It is also provided therein that the general control as to the execution of the work which was to be carried out in technical manner and to keep follow-up of the time schedule was entrusted with the Jeevan Pradhikaran.

5. Pursuant to the tender, an agreement was entered into between the Municipal Council and applicant no.2 – contractor for laying down of HDPE pipeline for a total consideration of Rs.41,06,572/- and the work order was issued to applicant no.2 by the Chief Officer of the Municipal Council on 4th May, 2013. Amongst other, item number and description of the item incorporated in the contract was as under :-

Quantity	Item No. & Description of Item	Rate	Unit	Amount
	Providing and supplying in standard lengths Polyethelene Pipes, confirming to I.S. 4984/14151 / 12786/13488 with necessary jointing material like mechanical connectors i.e. thread / insert /joint / quick release coupler joint / compression	1433	Rmt	2149500

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	fitting joint of flanged joint, including all local & central taxes, transportation & freight charges, inspection charges, loading /unloading charges, conveyance to the departmental stores / site & stacking the same in closed shade duly protecting from sunrays & rains, etc. complete			
1500	280 MM dia H.D.P.E. 6 KG/cm2	126390	L.S.	126390

6. As the work in question was completed and it was noticed that 103 pipes and other material remained unused/surplus, which was handed over by the contractor to the Municipal Council in view of orders of the Chief Officer and appropriate receipt to that effect was executed. It is also required to be noted that the Maharashtra Jeevan Pradhikaran has also certified completion of the work, pursuant to which the inspection test report by one supreme agency was issued in terms of the contract. Sub-clause (4) of clause 14 of the contract provides that in case of any alterations in the items originally tendered, the curtailment in the quantity of the item shall create a right in the contractor, if such curtailment exceeds 25% to withdraw from the contractual obligation. The said part of the contract reads as under :-

“[4] : In the event of :-

(i) Any total stoppage of work on notice from the Engineer under sub-clause (i) in that behalf.

(ii) Withdrawal by the Contractor from the contractual obligations to complete the remaining unexecuted work under sub clause (2) on account of continued suspension of work for a period exceeding 90 days.

(iii) Curtailment in the quantity of item or items originally tendered on account of any alterations, commission or

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substitutions in the specifications, drawings, designs or instructions under clause 14 (1) where such curtailment exceeds 25% in quantity and the value of the quantity curtailed beyond 25% at the rate for the item specified in the tender is more than Rs.5,00/-

It shall be open to the Contractor, within 90 days from the service of the notice of withdrawal from the contractual obligations under the contract on account of the continued suspension of work or (iii) notice under clause-14 (1) resulting in such curtailment to produce to the Engineer satisfactory documentary evidence that he had purchased or agreed to purchase materials for use in the contracted work, before receipt by him of the notice of stoppage. Suspension or curtailment and require the JMC to take over on payment such material at the rates determined by the Engineer, provided however such rates shall in no case exceed the rates of which the same required by the Contractor. The JMC shall hereafter take over the material so offered. Provided the quantities offered are not in excess of the requirements of the unexecuted work as specified in the accepted tender and are of quality and specifications approved by the Engineer.”

The agreement also provides for an appointment of arbitrator, which reads thus :-

“Arbitrator will not be appointed in case of any dispute, the decision to & finally will be governed by Principal Secretary, Urban Development Department, Govt. of Maharashtra, and Mumbai and will be final appealing authority. If at all the Contractor goes in the Court, in the interest of work, the process of getting work done from another Contractor will be in continuation.

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(b) BREAK-UP PAYMENT FOR THE ITEMS OF SUPPLY OF PIPES, VALVES, ETC. WILL BE AS UNDER :

85% payment for supply of pipes and valves on production of third party inspection certificate and 5% will be made till they are laid / fixed and 10% after hydraulic tested as per the requirement.

(c) THE THIRD PARTY INSPECTION SHOULD BE THROUGH THE AGENCIES, VIZ.

(I) M/s Iteng Engineering (A Division of Dr. Amin Controllers PVT Ltd)

(II) M/s SGS Indian Ltd.

(III) M/s Superintendence Company of India Pvt. Ltd.

7. The third party inspection of the work executed was already carried out and satisfactory report to that effect could be noticed at page 103.

8. It is upon the audit report of 2013-14 of the Municipal Council, an objection was raised about excess payment of Rs.11,05,992/-, which was formed to be a basis for initiation of a complaint case against the present applicants, at the behest of one Shriram Waman Mahajan, resulting into passing of order by the Magistrate of registration of offence against the applicants. Thus, the applicants are before this Court.

9. Mr Deshmukh, learned Counsel appearing on behalf of the applicants, while making out a case for grant of pre-arrest bail, would urge that the audit objections as are raised in the present case, are always subject to the provisions of the Bombay Local Fund Audit Act, 1930 and has drawn support from Rules 10, 11 and 13 of the said Rules. According to him, before considering the explanation to the audit objection, the

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complainant has rushed to the criminal court and the criminal court has ordered registration of the offence. According to him, if the payment in excess is made, appropriate orders to that effect could be passed after considering the explanation to the audit objections. He would further urge that if the explanation is accepted, the audit objection can be withdrawn as provided under sub-rule (2) of Rule 10 of the Audit Rules. He would also submit that the inbuilt provision in sub-rule (4) of Rule 11 speaks of an opportunity of obtaining explanation and there is a provision for waiving objection also.

10. Apart from above, learned Counsel would urge that the execution of the work is strictly in accordance with the terms of the contract and would urge that the receipt of surplus material by the Municipal Council and acknowledgment thereof by the Chief Officer and under the orders of the Chief Officer, demonstrates that there was no intention to commit the crime in question. Apart therefrom, while relying upon the terms of the agreement with that of Maharashtra Jeevan Pradhikaran and the contractor, he would urge that the excess material was rightly received by the Municipal Council, pursuant to the terms of the agreement. According to him, the registration of the offence against the applicants is politically motivated, as the payment of the amount to the concerned contractor is under the joint signature of applicant no.1 and that of Chief Officer. He submits that it is not the case of the prosecution that applicant no.1 has pressurized the Chief Officer to release the payment.

11. While opposing the bail application, learned Addl. Public Prosecutor would urge that there is direct involvement of the applicants in the commission of the crime in question. According to the prosecution, by surrendering the excess material to the Municipal Council, monetary loss of Rs.10,60,057/- is caused. According to him, 103 pipes which were surplus, should have been taken away by the contractor, however, by depositing the same with the Municipal Council, in connivance with applicant no.1 by applicant no.2 and the officials of the Municipal Council,

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the offence in question is committed. He would further urge that the bill for total pipes, i.e. 250 ought not to have been paid as only 147 pipes were utilized and remaining were stored with the Municipal Council.

12. Learned Addl. Public Prosecutor, by inviting my attention to the audit objection, submits that there is *prima facie* involvement of the applicants in the commission of the crime in question and as such, submits that custodial interrogation of the applicants is necessary and prayed for rejection of the bail application.

13. Upon considering the rival submissions, it is noticed that the work in question was executed pursuant to the technical approval and sanction and an agreement executed by the expert body, i.e. Maharashtra Jeevan Pradhikaran with that of the Municipal Council. It is the Maharashtra Jeevan Pradhikaran who has approved the execution of the work in question and requirement of number of pipes, the length for which the work is to be executed.

14. Pursuant thereto, an agreement was entered into between the Municipal Council and that of applicant no.2 – contractor. There is no complaint about execution of the work and deposit of 103 pipes out of 250, which were not utilized, as was agreed in the agreement for execution of the work for the Municipal Council. What is objected, as is apparent from the audit report, is payment of excess amount of Rs.11,05,992/- towards the cost of the material which was not used in execution of the work. In my opinion, it is really difficult to blame the present applicants for the said issue, as applicant no.1 is not a technical expert, who has an authority as the “President”, within the meaning of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965. As a President of the Municipal Council, applicant no.1 is required to approve the release of payment upon processing of the same by the Chief Officer. He has proceeded to approve the same and release the payment, having noticed that 103 pipes which were not used, are given in the custody of the

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Municipal Council. It is required to be noted that once there was a concluded contract and 147 pipes were utilized in execution of the work in question, in my opinion, if the parties who are to be blamed for the excess calculation of work, are the technical staff from the Maharashtra Jeevan Pradhikaran and the technical staff from the Municipal Council. However, this Court cannot lose sight of the fact that 103 pipes are in the custody of the Municipal Council, which are voluntarily tendered and deposited by applicant no.2. The same demonstrates absence of *mens rea* on the part of applicant no.2 to commit the crime.

15. The audit objection which is formed to be the basis for registration of the crime in question, it is required to be noted that in the light of the provisions of Rules 10 and 13 as discussed herein above, the same was formed to be the basis for registration of the crime against the applicants prematurely and it is open for the authority to waive or withdraw the objection, upon considering the explanation submitted within the time stipulated.

16. Apart from above, the fact remains that the if any amount is finally decided to be paid in excess, the same can be recovered from the concerned contractor, who are responsible for the same.

17. It is, no doubt, true that applicant no.1 enjoys the respectable position in the vicinity as the President of the Municipal Council. There is no likelihood of the applicants fleeing away from the judicial process and will repeat the similar offence.

18. Reliance can be placed on the judgment dated 1st September, 2015, rendered by the Supreme Court in the matter of **Bhadresh Bipinbhai Sheth vs. State of Gujarat & anr.**, in **Criminal Appeal Nos.1134-1135 of 2015 (arising out of Special Leave Petition (Cri.) Nos.6028-6029 of 2014)**. Paragraph 23 of the said judgment is required to be taken into account.

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19. In view of above, in my opinion, a case for grant of pre-arrest bail is made out. Hence, following order :-

In the event of arrest of the applicants, in connection with C.R. No.112 of 2015, registered with Police Station, Jamner, Tq. Jamner, Dist. Jalgaon, for offences punishable under sections 408, 409, 420, 468, 120-B and 166-A of the Indian Penal Code, they be released on bail, on each of them furnishing P.R. Bond of Rs.25,000/- with two solvent sureties each in the like amount. The applicants shall attend the concerned police station, initially for three days, between 10.00 a.m. and 11.00 a.m. and thereafter as and when called by the Investigating Officer. The applicant shall not tamper with the investigation.

Criminal Application stands allowed in above terms.

(N.W. SAMBRE, J.)

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