IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

ANTICIPATORY BAIL APPLICATION NO.402 OF 2015

Nilesh Hirachand Pagariya & anr. ... Applicants

Vs.

The State of Maharashtra ... Respondent

Mr.Subhash Jha a/w Ms.Rushita Jain i/b Law Global for the Applicants
Ms.R.V. Newton, APP, for Respondent – State
Mr.K.M. Palve, PSI, Dattawadi police station, Pune – present
Mr.Nitin Vhatkar, for proposed intervener / complainant

CORAM: **MRS.MRIDULA BHATKAR, J.**

DATE: **MARCH 20, 2014**

P.C.:

1. This is an application moved for anticipatory bail as the applicants are being prosecuted for the offences punishable under sections 420, 467, 471, 120B r/w 34 of the Indian Penal Code in C.R. No.203 of 2014, which is registered pursuant to the directions given by the Magistrate Court under section 156(3) of the Criminal Procedure Code. The offence is registered at Dattawadi police station, Pune. It is the case of the prosecution that the land belongs to the complainant. The father of the co applicant/accused as also the applicant/accused contacted the complainant and showed their willingness to purchase the land bearing survey No.2163 (old survey No.138) of Parvati admeasuring 6400 sq.ft. The complainant and the applicant/accused alongwith his father are the

partners of one partnership firm namely M/s.Milestone Properties. They all entered into a sale deed on 27.7.2012 for the sale of the land for a consideration amount of Rs.6 crores. It is an admitted fact that the applicants/accused and their father paid an amount of Rs.65 lacs by demand draft at the time of the agreements on 27.7.2012 and gave three cheques totalling Rs.5,35,00,000/-. However, three cheques were bounced. The complainant handed over the possession of the land to the father of the applicants/accused. The applicants/accused have started construction of the flats on the said land. As earlier 3 cheques were bounced, the parties entered into another supplementary deed on 5.2.2013 and the applicants/accused and their father handed over 6 cheques amounting to Rs.5,35,00,000/- to the complainant. However, those six cheques were also bounced. On 26.3.2014, the father of the applicants/accused, i.e., accused No.3, expired. No amount was paid to the complainant by the applicants/accused out of Rs.5,35,00,000/- inspite of several demands. The complainant, therefore, lodged a private complaint before the learned Magistrate, Pune. In that, the learned Magistrate gave directions under section 156(3) of the Criminal Procedure Code pursuant to which the police registered the offence against the applicants/accused on 12.5.2014.

2. The learned Counsel for the applicants/accused has submitted that the applicants/accused are innocent. It is entirely a commercial

transaction for which the custody of the applicants is not required and this commercial transaction cannot be considered as a commercial activity. Dishonouring of the cheque cannot be an offence punishable under sections 420, 467, 471 of the Indian Penal Code In support of his submissions, he relied on the judgment in the case of **Vir Prakash Sharma vs. Anil Kumar Agarwal & anr.**[1] and especially para 8 of the said decision. He further submitted that the learned Magistrate ought not to have given directions under section 156(3) of the Criminal Procedure Code as no steps were taken by the complainant to approach the police and the police ought to have recorded FIR under section 154 of the Criminal Procedure Code. Directly approaching the Court and presenting a private complaint inspite of approaching the police in a normal course is to be deprecated. He therefore submitted that the directions given by the learned Magistrate under section 156(3) are illegal and bad in law. Under such circumstances, the applicants are entitled to pre-arrest bail. In support of his submissions, he relied on the judgment of the Full Bench of this Court in the case of **Panchabhai Popotbhai Butani & anr. vs. The State of Maharashtra & Ors.**[2]

3. He further submitted that there was an agreement between the complainant and the applicants for payment of interest @15% per annum by way of supplementary deed and the applicants/accused have paid

1 (2007) 7 SCC 373
2 2010 CR.L.J. 2723

nearly Rs.70 lacs till January, 2014. However, they stopped the payment due to the interference in the construction by the complainant. He submitted that 70% of the building construction is complete till today. He further argued that he has filed civil Suit No.558 of 2015 for seeking injunction against the complainant.

4. He further submitted that he is not aware of any letter issued by ABN Amro Bank as the applicants have not entered into any transaction in respect of the property which is the subject matter of the impugned sale deed with the said ABN Amro Bank. He submitted that M/s.Milestone Properties sold 2 floors of the constructed building to one Janata Sahakari Bank at Thane.

5. He further submitted that everything is done by the father of the applicants/accused and the applicants/accused are not aware of any such transaction. The applicants/accused took over the business of the father only after his demise i.e., after 26.3.2014. He further submitted that the custody of the applicants/accused is not required by the police and the applicants/accused are available throughout and they have been visiting the police station often and their statements are also recorded. They have also furnished all the documents.

6. The learned Prosecutor has opposed the Anticipatory Bail Application the Investigating Officer is present in the Court. She submitted

that the applicants/accused have committed the offence of cheating against the complainant. The Investigating Officers are still investigating the offence and they need the custody of these applicants/accused. She submitted that the property i.e., the land which is offered and accepted as security by ABN Amro bank and t that effect, a letter dated 29.3.2013 is produced before the police.

7. The contention of the learned Counsel for the applicants/accused is that this is a case of civil nature and it cannot be treated as a criminal act on the part of the applicants/accused. It is true that purchase of a land is definitely a civil transaction. If the cheques are dishonoured, then it can be a criminal case under the Negotiable Instruments Act as the recourse is open to the complainant. *Ipso facto*, as argued by the learned Counsel, if no payment is made towards the purchase of the land, it cannot be labelled as a criminal act. However, each and every transaction is required to be looked into independently considering the steps taken by the parties and the intentions behind the said steps. The civil transaction takes the colour of criminal cheating or breach of trust or criminal misappropriation depending on entirely on the intentions of the parties. The criminal intention can be gathered on the basis of the manner in which the transactions flows and the parties act. In the present case, the first 3 cheques were dishonoured on 27.7.2012 and thereafter six cheques were given of the same amount pursuant to the supplementary deed on

5.2.2013. They were also dishonoured. This shows the intention of the party not to pay the amount. Further, possession of the entire land was handed over to the partnership firm of the applicants/accused and till today, 70% of the construction is complete. The payment is made only of Rs.65 lacs. This itself shows that if we go by the usual norms of the transaction that prima facie, there is definitely an intention of cheating. Moreover, a letter of ABN Amro bank is produced. The applicants/accused have expressed total ignorance about the said letter and also denied the transaction orally about the same. Though there is no specific denial that the land was not offered to the bank as a security, it shows that the loan is raised by offering this land as a security for which the applicants/accused have not paid the complete consideration to the complainant.

8. In view of the above, I am of the view that prima facie, there is evidence against the applicants/accused that they have committed cheating.

9. One more point is raised by Mr.Jha about the illegality of filing of private criminal complaint before the learned Magistrate that taking recourse of approaching the police so that the police could have taken steps by registering the FIR under section 154 of the Criminal Procedure Code. In the judgment of the Full Bench, the Full Bench has observed that invocation of the provisions of section 154 in its entirety should be

treated as a condition precedent to invocation of the powers of the Court under section 156(3) of the Criminal Procedure Code. It is further observed that there could be exception when the facts and circumstances of the case justify a case of directly approaching the Court where it is possible that crucial material evidence can be destroyed or tampered. This is an application for anticipatory bail. It is informed by the learned Counsel that the applicants/accused had knowledge of such filing of the complaint before the learned Magistrate in June 2014 as they were called to the police station. It is to be noted that this is not a matter to be entertained under section 482 of the Criminal Procedure Code and though the applicants/accused are aware of filing of this case, they have not filed any proceedings before the appropriate forum as, according to them, the order passed by the learned Magistrate or directions given by the learned Magistrate under section 156(3) are illegal. The Court has to consider in the limited scope of section 438 as to whether pre-arrest bail is to be granted to the accused considering the facts of the case. It is to be noted that the complainant has filed a civil Suit bearing Suit No.715 of 2014 in the civil Court. It is to be noted that no injunction order in favour of the applicants was passed in the suit filed by them i.e., Suit No.558 of 2014 in the civil Court. However, one more factor the Court has to consider while deciding such application, as to whether the police really wants the custody and whether the applicants/accused are available to the police or not. Considering the submissions of the learned Counsel for both the sides, it appears that the applicants/accused are available to the police. They also attended the police station when they were called. Moreover, the learned Sessions Judge has rejected their pre-arrest bail on 5.3.2015 and thereafter, nearly for two weeks, neither the Sessions Court nor this Court granted any interim protection to the applicants/accused and yet, the applicants/accused were available and they were not arrested.

10. Considering this, I grant pre-arrest bail to the applicants/accused on the following terms and conditions:

i) In the event of arrest, the applicants/accused shall be released on bail upon furnishing P.R. Bond in the sum of Rs.1,00,000/- (Rupees One Lakh) each, with one or two solvent sureties in the like amount;

ii) The applicants shall not tamper with the evidence;

iii) The applicants shall not indulge into any kind of offence, especially the offence of cheating or forgery, while on bail. If it is so, the prosecution is at liberty to move an application for cancellation of the bail.

iv) The applicants shall cooperate with the Investigating Officer and attend the concerned police station on every Monday and

Thursday, between 11am to 1pm, till the filing of chargesheet or for a period of two months, whichever is earlier.

11. Anticipatory Bail Application is disposed of on the above terms.

(MRS.MRIDULA BHATKAR, J.)