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

CRIMINAL APPLICATION NO. 242 OF 2015

Nailesh Swarupchand Mehta

Applicant..

VERSUS

The State of Bombay, through
the Economic Offence Wing,
Unit II, Carnak Bunder, Masjid, Mumbai.

Respondent..

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Mr Sunil Zalmi i/b MZD Legal Consultancy, Advocate for applicant.
Mr. S. H. Yadav, APP for State
Mr. Rajiv Patil, Sr. Counsel for Intervenor.

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CORAM : **V. L. ACHLIYA, J.**

DATE : 30th June, 2015.

Per Court:

. This application is filed to set aside the following two conditions imposed upon the applicant, while allowing the Anticipatory Bail Application No. 223 of 2015 filed by applicant, vide order dated 13th April, 2015, passed by learned Additional Sessions Judge, Greater Bombay, for the reasons set out in detail in the application.

“5. As a condition of this bail, the applicant shall deposit Rs. 12,25,755/- in the Court of Learned Magistrate on or before 22/04/2015. (Learned Magistrate to deposit said amount in fixed deposit scheme of a nationalized bank).

6. *Learned Magistrate is at liberty to decide the fate of the said amount and the interest accrued thereon after final decision in respect of the stamp duty under agreement dated 19/07/2013.*

2. Learned Counsel for the applicant mainly assailed the aforesaid conditions with contention that, such conditions cannot be imposed as pre-condition of bail as according to him imposition of such conditions is beyond the scope of Section 438 of the Code of Criminal Procedure. In support of the contention that such conditions cannot be imposed while granting bail, the learned Counsel has placed reliance upon the decision of Hon'ble Apex Court in the case of **Sumit Mehta Vs. State of N.C.T. of Delhi** reported in 2014(1) SCJ 190. The learned Counsel has further submitted that development agreement stamped and registered way back in the year 2003. Therefore there is no question of payment of deficit court fees arise in the matter.

3. Learned APP supported the order passed by learned Additional Sessions Judge, imposing the conditions upon the applicant. Mr. Rajiv Patil, learned Senior Counsel appearing for the intervenor/informant/complainant opposed the application with contention that, what is referred as condition in the order passed in fact

not a pre-condition imposed for release of applicant on bail but it is a usual condition imposed on due consideration of facts and circumstances of the case. He has submitted that the imposition of such conditions cannot be termed beyond the scope of Section 438 of Cr.P.C.

4. In order to appreciate the contentions advanced, I have perused the order dated 13th April, 2015 passed by learned Additional Sessions Judge, Greater Bombay. The reasons for imposing such conditions are discussed in para 26 of the said order, which reads as under.

“26. In this regard though the judge of a criminal Court is not bound to proceed u/s 33 of Bombay Stamp Act, but since the applicant is seeking discretionary relief from this Court, I am of the considered view that keeping open all the matters concerning to the payment of stamp duty, exemption etc. and the rights of the applicant, in order to protect and safeguard the financial interest/revenue of the government, directions need to be issued to the applicant to deposit the said amount (Rs. 12,25,755/-) in the Court of Learned Magistrate. The fate of said amount could be decided ultimately upon decision by competent authority under Bombay Stamp Act.

5. Thus, if we consider the reasons recorded by the learned Additional Sessions Judge, in para 26 of the order, then *prima facie* same appears to be imposed with a view to protect and safeguard the financial interest of the Government. It is specific case of the applicant that the Agreement of Development was duly stamped and registered way back in the year 2003 and undergone adjudication process as contemplated under Section 31 and 32 of the Bombay Stamp Act, 1958. According to the applicant, there is limitation of six years prescribed under the Bombay Stamp Act, so as to reopen the issue in respect of deficit payment of stamp duty. Since the document was registered under the Bombay Stamp Act in 2003, it is beyond the scope of competent authority to reopen the issue and to determine the liability. In my view, the condition imposed by the learned Additional Sessions Judge is beyond the scope of exercise of powers under Section 438 of the Cr.P.C. No such condition which has no nexus with grant of anticipatory bail can be imposed only for the reason that the relief to be granted under Section 438 of Cr.P.C. is a discretionary power. The grant of discretionary relief presupposes the exercise of power in a judicious manner. The question of payment of deficit court fee was not a subject matter for adjudication before the learned Additional Sessions Judge, nor same was the subject matter of offence

registered against the applicant. Determination of stamp duty and recovery of deficit of stamp duty exclusively lies within the domain of authority constituted under the provisions of Bombay Stamp Act, 1958. Therefore it was not proper on the part of the Additional Session Judge to have taken care of claim likely to be made in future or recovery may be sought against the applicant by the revenue authority. Imposition of such condition which has no nexus with grant of anticipatory bail is not sustainable in law and liable to be set aside.

6. In my view, even if any controversy exists relating to the payment of stamp duty, still same cannot be dealt in a trial to be conducted against the accused. The competent authority empowered under the Stamp Duty Act, 1958 can alone decide such controversy and also take measures for recovery of such amount. While deciding the application, the Court is expected to decide the application well within the settled parameters laid down for grant of anticipatory bail in exercise of powers under Section 438 of Cr.P.C. Imposition of such condition falls outside the scope of Section 438 of Cr.P.C. The learned Counsel for the applicant has rightly placed reliance upon the decision of the Hon'ble Apex Court in the case of Sumit Mehta Vs. State of N.C.T. of Delhi (cited supra) wherein the Apex Court has held in para

12 as under:-

“12. While exercising power Under Section 438 of the Code, the Court is duty bound to strike a balance between the individual's right to personal freedom and the right of investigation of the police. For the same, while granting relief Under Section 438(1), appropriate conditions can be imposed Under Section 438(2) so as to ensure an uninterrupted investigation. The object of putting such conditions should be to avoid the possibility of the person hampering the investigation. Thus, any condition, which has no reference to the fairness or propriety of the investigation or trial, cannot be countenanced as permissible under the law. So, the discretion of the Court while imposing conditions must be exercised with utmost restraint.

7. In view of the discussion made in foregoing paragraphs and the conclusion arrived at that the imposition of such conditions falls outside the scope of Section 438 of Cr.P.C., I am inclined to allow this application in terms of prayer clause (a) of the application.

8. Accordingly, the application is allowed in terms of prayer clause (a) of the Application. The conditions No. 5 and 6 contained in the order dated 13th April, 2015 passed by learned Additional Sessions Judge, Greater Bombay in Anticipatory Bail Application No. 223 of 2015, are hereby set aside. In the circumstances, there shall be no

order as to costs.

[V. L. ACHLIYA, J.]