

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

ANTICIPATORY BAIL APPLICATION NO.1057 OF 2015
a/w
CRIMINAL APPLICATION NO.656 OF 2015

- 1) Teesta Setalvad
2) Javed Anand ... Applicants

Vs.

- 1) Central Bureau of Investigation
Economic Offences Wing, Fort Mumba
2) The State of Maharashtra ... Respondents

Mr.Aspi Chinoy, Sr.Adv. a/w. Mr.Mihir Desai, Sr.Adv. a/w V.Kapariha,
Mr.S.S. Jadhav, Mr.S.P. Sarnath and Mr.Chetan Mali i/b Mr.Vijay Hiremath
for the Applicants in ABA and for Resp. in APPP/656/2015

Mr.Anil Singh, Addl. Solicitor General with Mr.S.K. Shinde, Additional
Public Prosecutor and Mr.Y.M. Nakhwa, A.P.P. for Resp. No.1/ CBI and for
Applicant in APPP/656/2015

Mr.S.S. Pednekar, APP, for State / Resp. No.2

CORAM: MRS.MRIDULA BHATKAR, J.

DATE: AUGUST 11, 2015

P.C.:

1. This application is moved for anticipatory bail as the Central Bureau of Investigation, Economic Offences Wing, Mumbai has registered the case against the applicants/accused who are apprehending arrest in C.R. No.E00006 of 2015 for the offences punishable under section 120B of the Indian Penal Code and sections 35, 37 sections 3, 11 and 19 of the

Foreign Contributions (Regulation) Act, 2010 (for the sake of brevity, hereinafter referred to as 'the Act'). It is the case of the prosecution that the applicants/accused are the Directors of one company, namely, Sabrang Communication and Publishing Private Limited (for the sake of brevity, hereinafter referred to as 'the Company'). The Company is working on the socio, economic issues on national level and the said company had sought funding in the nature of donations from foreign organisation i.e., Ford Foundation, to the tune of 290000 USD from 2004 by way of two agreements i.e., 2004 and 2006. As per the case of the prosecution under the Act, it is necessary for any organization working on such issues is required to seek permission of the Central Government; so also registration of such company under the Act is mandatory. It is the case of the prosecution that the applicants/accused have committed various offences under the Act. The applicants/accused have misused the said funds for their personal requirements. Pursuant to the letter written by the Government of Gujarat dated 10.3.2015 to the Ministry of Home Affairs and Ministry of Finance, Government of India, prosecution was initiated. The applicants/accused made application for pre-arrest bail before the Special Judge, CBI, which was rejected by order dated 24.7.2015 and, therefore, the applicants/accused are before this Court.

2. Mr.Chinoy, the learned Senior Counsel appearing for the applicants/accused, has submitted that it is a matter of interpretation of

statute and the two agreements dated 5.4.2014 and 22.9.2006 between the Ford Foundation and the Company. These are the agreements for consultancy services and amount received is neither a donation nor a funding to the company. He submitted that the company has rendered the services to Ford Foundation which has engaged the company as it wanted to take the services on certain issues i.e., of communalism and caste based discrimination in India through action research, web based information and dissemination and development civil society network and media strategies. For this purpose, the services of the company were engaged and a payment was fixed for such services. He relied on the contents of the said agreements and submitted that the agreement is explicitly clear about the services rendered by the company. He has further submitted that when these amounts were paid by Ford Foundation, it deducted TDS and this shows that the amount given was a payment towards the services and not a donation. The Income Tax returns were also submitted by the company disclosing TDS and so also the company has claimed TDS and thus, this cannot be considered as a donation. The learned Senior Counsel further submitted that if at all it is not a donation , then it cannot be covered under the provisions of the Act. He relied on the explanation (iii) to section 2(h) of the Act. It reads thus:

“Explanation 3. - Any amount received, by any person from any foreign source in India, by way of fee (including fees charged by an educational institution in India from foreign student) or

towards cost in lieu of goods or services rendered by such person in the ordinary course of his business, trade or commerce whether within India or outside India or any contribution received from an agent of a foreign source towards such fee or cost shall be excluded from the definition of foreign contribution within the meaning of this clause”.

3. He submitted that only bald statements in respect of misuse of foreign contribution and in respect of the threat to the national security are made. He pointed out relevant contentions in his application and submitted that the applicant/accused no. 1 is a social activist and has fought for the rights of minority in Gujarat. So this is a false implication, politically motivated by the Government. He further argued that the applicants/accused have been cooperating with the police in the investigation and, therefore, their custodial interrogation is not required. He submitted that all the ledgers, books of accounts from 2004 are available and they are produced before the Investigating Agency and if required, the applicants are ready to produce all the documents. He submitted that under such circumstances, the applicants/accused are to be protected by pre-arrest bail.

4. Mr.Singh, the learned Additional Solicitor General, while opposing the anticipatory bail application, relied on the scheme of the Act. He relied on the relevant portion of the Parliamentary debate which has taken place while introducing the amended Act of 2010. He submitted that as the

foreign countries are funding individuals, associations, publishers, newspapers and also giving hospitality, it needs to be regulated. Though enough money can be raised within India for charitable causes and social causes, foreign money cannot be allowed to dominate social, economic and political discourse in India. However, if at all access is given to foreign contribution, then that is to be regulated and controlled by the State. He read over the relevant provisions under which the applicants/accused are prosecuted. He submitted that they have accepted the foreign contribution though being columnists and publisher, they are prohibited to accept. So also, there are specific prohibitions under sections 3, 11, 19 of the Act. However, the applicants/accused have violated all these sections. Under section 11, there is a specific prohibition which reads that no person having definite cultural, economic, educational, religious or social programme shall accept foreign contribution, unless such person obtains certificate of registration from Central Government. He pointed out that under section 12, power to grant certificate of registration is given to the authority, however, the government should be satisfied that such person has not indulged into activities detrimental to the sovereignty, integrity of India, public interest, security of the State, friendly relations with any foreign State or harmony between religious, racial, social, linguistic, regional groups, castes and communities. He relied on the two agreements entered by the company

with the Ford Foundation in April, 2014 and in September, 2006. He pointed out that the words used in these agreements for the amount are 'funds' or 'grant'. He pointed out that in the first agreement dated 5.4.2004 in para 3, it is mentioned that "there shall not be any sub-grant to any entity". In clause 9 of the agreement, there is repeated use of the word 'grant'. The second agreement is similar to the first agreement for the same cause the funds are to be paid. He pointed out that clause 3 of the second agreement dated 2.9.2006, states about restrictions on the use of funds as the funds may be expended only for charitable, scientific, literary or educational purpose. He relied on the last portion of clause 7 of the said agreement, wherein the Ford Foundation from which the money is received is authorised to conduct audits including on-site audits during the term of grant within 4 years after completion of the grant. Thus, it shows that a foreign organisation i.e., Ford Foundation is having a complete control over the fund utilisation of the company of the applicants/accused and this is because it was a funding in the nature of contribution and, therefore, it comes clearly within the sweep of the Act.

5. The learned Additional Solicitor General relied on the judgment of the trial Court and of the Gujarat High Court in criminal Miscellaneous Application i.e., for Anticipatory Bail Application No.4677 of 2014 in another criminal case filed against the applicants/accused. He submitted

that the applicants/accused have criminal antecedents and custodial interrogation of these applicants/accused is necessary. He opposed this application mainly on three counts – firstly, there is a violation of law; secondly, it is dangerous to the national safety and security and public interest and thirdly, that the custodial interrogation of the applicants/accused is necessary as they are not cooperating with the investigating agency. In order to buttress his submissions on the point of national safety and security, he submitted that these applicants/accused have played fraud in respect of the funds of their charitable trust and in respect of one Gulberg cooperative society in Gujarat. He pointed out that some points have emerged for investigation as according to the letter of Gujarat Court dated 10th March, 2015, he pointed out that the proposal of the company does not even have title. He pointed out that the Ford Foundation has encouraged the Sabrang Trust advocating for a religion specific and Muslim supportive criminal code and also supported to keep the 2002 riots incident in Gujarat alive. He submitted that the company is a proxy office of Ford Foundation that is being cultivated and positioned with some long term plan. He further argued that the proposal of the company claims that “in the past two decades, India has faced ever growing attacks on the constitution and there are recording of outbreaks condoning anti-minority carnages and programmes”. The learned Additional Solicitor General submitted that these are baseless and

judicially unproven allegations and defamatory to the republic encouraging wilful insinuation. The Ford Foundation has supported the institution in India to be operating on the premises of stalking religious tensions with their social prejudices.

6. The learned Additional Solicitor General on the point of custodial interrogation has submitted that the applicants/accused are required to give the account of contribution which is to the tune of 290000 USD from the period 2004 to 2006 and 2006 to 2008. The applicants/accused did not produce accounts in respect of utilisation of the amounts. Today, the prosecution has to find out where the money has gone to which the applicants/accused are answerable. He submitted that the only the applicants/accused have knowledge about this utilisation of the funds. However, they are not cooperating with the investigating agency and hence, their custodial interrogation is necessary.

7. By way of rejoinder, the learned Senior Counsel has submitted that they have submitted the accounts, however, the original vouchers of 2004-2005 are not available as they are not required to be maintained under the Income Tax Act. The books of accounts are available and they are already given to the investigating agency. However, it is controverted by the learned ASG.

8. Heard the learned Counsel for the parties. Perused the FIR, the documents produced by both the parties in this matter. The fact of receipt of amount from Ford Foundation is not disputed. The amount of 290000 USD has been received by the company of the applicants/accused pursuant to the two agreements of 2004 and 2006. The submissions made by the learned Senior Counsel for the applicants/accused that the Act is not applicable as the amount received by the applicants/accused is not a donation and, therefore, it is not a grant under the Act as it is a payment towards services hired by the Ford Foundation from the company of the applicants/accused is a defence of the accused. So also, the nomenclatures used therein as 'payment', 'grant', 'sub-grant' and 'fund' may be a matter of interpretation of the documents. So also the fact of deduction and further claim of TDS may have bearing over the issue at this stage. However, prima facie, after hearing the submissions of the learned Additional Solicitor General and after going through the documents placed before the Court, it appears that there is some misuse of amount they received from the Foundation for which the applicants accused are undoubtedly answerable. As per the case of prosecution, at this initial stage, it is accepted that the money received is a contribution and therefore the acceptance and utilization of the said amount requires regulation under the Act and therefore there is violation of the provisions of the Act.

9. Assuming that all these provisions of the Act under which the applicants/accused are prosecuted, are breached by the applicants/accused, it needs to be seen whether the applicants/accused can be protected under section 438 of the Criminal Procedure Code or not? While deciding this issue, I advert to section 438 of Criminal Procedure Code. While considering the application for pre-arrest bail, the Court has to take into account 4 factors as mentioned under the Section i.e., nature and gravity of the offence; secondly, antecedents of the applicants and whether previously undergone imprisonment on conviction; thirdly, possibility of applicant fleeing from justice; and fourthly, whether the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested. The power under section 438 is a discretionary power and while using this power, the Court has to strike a balance between individual liberty and also public and social interest. In light of this, on facts, these four factors are to be tested.

10. It is submitted that the applicants/accused have violated the provisions of the Act and the amount involved is huge and their activities as described i.e., threat to sovereignty and integrity of India and also dangerous to security, strategic and economic interest of the State, public interest, harmony between religious, social, regional groups, castes and

communities. After going through the submissions of the learned ASG and the papers of investigation which are placed before me, prima facie, I am unable to find out any threat to sovereignty and integrity of India or threat to the security strategic or economic interest of the State or public interest. The submissions made by the learned ASG that it is harmful to the State of secular democracy cannot be appreciated, at this stage.

11. Undoubtedly, an Act which is seditious in nature and dangerous to the security of India, cannot be tolerated under the law. However, a citizen may conduct social activities and may hold a different philosophy or view which may not be liked by the government. However, in a democratic state, a citizen has right to have different ideology, belief and different point of view and it is a duty of the State to protect the said right to have freedom of expression to the same. A dissenting view or expression cannot be always said to be against sovereignty of the nation. The terms 'against the nation' and 'against the government' are two different terms.

12. It is argued that the applicants/accused have antecedents and they have criminal record to their credit and especially the offences registered against them are in Gujarat. As pointed out by the learned Senior Counsel for the applicants/accused that some offence is registered in Gujarat in respect of alleged fraud of funds of their trust in respect of one Gulberg

society in Gujarat. However, the State of Gujarat is prosecuting the said matter and is pending before the Hon'ble Supreme Court.

13. It is submitted by the learned ASG that if there is a violation of sections 11 and 12, then, in the event of violation of section 11 of the Act, custodial interrogation is required. This submission cannot be appreciated.

14. Insofar as the third consideration is concerned, both the applicants/accused are Indian nationals. I do not find that any possibility of the applicants/accused fleeing from justice. On query, I am informed that the applicant/accused No.1 has deposited her passport with the Gujarat Sessions Court and the passport of the applicant/accused No.2 was not asked and therefore, it is with him. The learned Senior Counsel undertakes to deposit the same if at all it is asked by the investigating agency.

15. Insofar as the consideration No.4 is concerned, the learned Senior Counsel has made submissions that the applicants/accused are social activists and were involved in some highly contested cases in Gujarat. On the point of gravity and danger to the national sovereignty and security, the Court has to consider the scope of section 438 of the Criminal Procedure Code, in light of ratio laid down in **Gurbaksh Singh Sibbia vs. State of**

Punjab, 1980 SCR (3) 383, wherein it is held that personal liberty cannot be whittled down by a narrow interpretation of section 438 of the Criminal Procedure Code. While deciding the applications for anticipatory bail, when the prosecution comes out with a case, it is necessary for the Court to view the circumstances, facts and allegations made therein objectively and judiciously and to form its own legal opinion to use discretion. This can be explained through metaphor that when the prosecution alleges that it is a snake, it needs to be seen whether it is a snake or a rope and if it is confirmed that it is a snake, then it is to be verified whether it is poisonous or not and if it is poisonous, then it needs to be examined whether poison is fatal or not. After considering all these facts and circumstances, the Court has to use its discretionary power and reject or allow the anticipatory bail. I am, prima facie, of the view that the case is based on the accounts and documents which can be procured without custodial interrogations. The applicants/accused are the only persons having knowledge of how they utilised the funds. It is also true that if the accounts are not properly maintained and the applicants/accused failed to show its proper utilization, then the prosecution is justified. However, the charges faced under the Act by the accused are to be proved mainly on the basis of the documents as it is a matter of accounts and utilization of funds. Thus, considering the nature of the offence, I am of the view that custodial interrogation is not required.

16. Under such circumstances, I am of the view that custodial interrogation is not required and accordingly, I am inclined to allow the Anticipatory Bail Application on the following 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.20,000/-, with one or two 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 under the provisions of the Foreign Contributions (Regulation) Act, 2010, while on bail;
- iv) The applicants shall cooperate with the Investigating Agency and report to their office at Mumbai, as and when called.
- v) The applicants/accused shall make themselves available to the investigating agency and supply proper address of their residence, whenever they leave Mumbai, till filing of chargesheet.
- vi) The applicants/accused shall not leave India, without permission of the Court.

17. Anticipatory Bail Application stands disposed of accordingly.

18. In view of the disposal of the Anticipatory Bail Application, Application No.656 of 2015 also stands disposed of.

(MRS.MRIDULA BHATKAR, J.)