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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

ANTICIPATORY BAIL APPLICATION NO.1685 OF 2015

Mr. Ashok s/o Motilal Saraogi

..Applicant.

Vs.

The State of Maharashtra

..Respondents

Mr. Shirish Gupte, Senior Counsel a/w Mr. A. P. Mundargi, Senior Counsel
with Mr. A.H.H. Ponda, a/w Mr. S.V. Marwadi i/b R.R. Varma for
Applicant.

Ms. S.S. Kaushik, APP for the State.

Mr. Subhash.A. Borate, P.I. Azad Maidan Police Station.

CORAM: A.S. GADKARI, J.

DATE : 20th November 2015.

P.C.

1 The applicant is apprehending arrest in CR No.288 of 2015 registered with Azad Maidan, Mumbai under Sections 465, 466, 467, 468, 471, 200, 209 read with Section 120-B of the Indian Penal Code. The police Inspector Shri Haridas R. Kumbhar has lodged the first information report dated 17th October 2015 against the applicant and two other Advocates alleging that the applicant in conspiracy with other two Advocates namely Smt. I.V. Tauro and Shri Soheli E. Kazi with a view gain have monetary benefits, prepared forged and fabricated documents and

used the same in the Court proceedings with a view to deprive Smt. Nickee Ashish Bagaria of her legitimate right. It is alleged that in furtherance of the said conspiracy the applicant along with other accused persons filed collusive arbitration petition in the High Court with a view to give legitimacy to the fraudulently procured bogus and/or fabricated award issued by the accused Advocate Soheli Kazi.

2 The facts germane to the lodging of the said first information report no.288 of 2015 can briefly be summarised as under:

(i) Smt. Nickee Ashish Bagaria is the wife of Ashish Santoshkumar Bagaria and daughter-in-law of Santoshkumar Bagaria and Smt. Sushiladevi Bagaria. Mr. VindokumarJhunjhunwala is the uncle of Ashish Shantoshkumar Bagaria. Smt.Nickee Ashish Bagaria is the owner of the immovable properties bearing gut nos.30,18, 52, 51(5) together with House Nos.154, 155, 28, 24 and 31 lying and situate at village Kansal, Taluka Sudhagad, District Raigad.

(ii) Smt.Nickee A. Bagaria had executed powers of attorney in favour of Santoshkumar Bagaria and Ashish Santoshkumar Bagaria, the father-in-law and husband respectively. Though the copies of powers of attorney were handed over by her to her father-in-law and husband, the originals of the same were retained by her. That due to serious disputes,

differences and ill-treatment meted out to Smt.Nickee A. Bagaria, she was constrained to leave her matrimonial house at Mumbai and had to go to Kanpur initially at her parents' house and subsequently she started residing at Delhi where she is presently working. That Smt.Nickee A. Bagaria by her Advocate's letters dated 22.9.2014 and 24.9.2014 revoked the said powers of attorney. It appears from record that, Smt. Nickee Bagaria initiated proceedings for domestic violence in a Court at Delhi.

(iii) The Bagarias' and Jhunjhunwalas thereafter mutually decided to deprive the said Smt.Nickee A. Bagaria of her legitimate right upon the properties described hereinabove which are standing in her name. They thereafter in connivance with the present applicant and other two accused persons prepared Memorandum of Understanding (MoU) purportedly dated 15.4.2010 entered into by and between the Bagarias on one side and Jhunjhunwalas on the other side including the said Smt.Nickee A. Bagaria wherein it was stated that the Jhunjhunwala had advanced a loan of Rs.92 lacs to purchase the said properties at village Kansal in the name of Smt.Nickee A. Bagaria. It was provided in the said MoU that the said properties shall always remain the join property of Bagarias and Jhunjhunwalas and upon sale of the said properties the Bagarias shall pay fixed amount of Rs.1,00,00,000/- (Rupees One Crore) to the

Jhunjhunwalas over and above principal sum of Rs.92.85 lacs, even if the said property is sold for a lesser amount. It was further provided in the said MoU that in case of any disputes, the same shall be referred to Advocate Mr. Soheli Kazi (now accused) who shall be the sole arbitrator. As a matter of fact, the said Smt.Nickee A. Bagaria was not aware of any such MoU which was prepared on the basis of the powers of attorney executed by her in favour of her father-in-law and husband, after the said powers of attorney were terminated by her on 22.9.2014 and 24.9.2014 respectively as stated hereinabove.

(iv) In furtherance of their ill-designed plan, the Bagarias and Jhunjhunwalas in collusion and connivance with their Advocates i.e. applicant and Smt. I.V. Tauro fabricated a bogus award purportedly dated 9.6.2014 signed by the Advocate Soheli E. Kazi. In the said award apart from various admissions and directions mentioned therein it was provided that if the Bagarias including Smt.Nickee A. Bagaria fails to pay an amount of Rs.192.85 lacs within a period of 30 days from the date of passing of the order, the said properties standing in the name of Smt.Nickee A. Bagaria shall stand transferred in the name of Jhunjhunwalas.

(v) After the said bogus and fabricated award dated 9.6.2014 was prepared by the applicant in conspiracy with Advocate Shri Soheli Kazi and

Advocate Smt. I.V. Tauro, in furtherance of their conspiracy to give legitimacy to the said award and to put a seal of authenticity on it the Bagarias and Jhunjhunwalas in collusion with their Advocates i.e. the applicant and Smt. I.V.Tauro filed a collusive arbitration petition before this Court bearing no.140 of 2015 under Section 34 of the Arbitration and Conciliation Act. The learned Single Judge of this Court by its order dated 24.11.2014 dismissed the said Arbitration Petition. Though the said Smt.Nickee A. Bagaria was joined as one of the petitioners to the said arbitration petition no.140 of 2014, she was not made aware about the said petition at all. The record further indicates that Bagarias and Jhunjhunwalas in collusion and in connivance with each other and in conspiracy with their respective Advocates namely the applicant herein and other the two Advocates named hereinabove had almost succeeded in executing their illegal design and usurping the said property of Smt.Nickee A. Bagaria.

(vi) It is in January 2015 the said Smt.Nickee A. Bagaria learnt that a letter dated 25.11.2014 was addressed to the Tahsildar, Taluka Sudhagad by Advocate Smt. I.V. Tauro on behalf of the Jhunjhunwalas informing the said Tahsildar about award dated 9.6.2015 and that the said property owned by Smt.Nickee A. Bagaria has been ordered to be transferred in the name of Jhunjhunwalas. The said Smt.Nickee A. Bagaria

vide her Advocate's letter dated 13.1.2015 immediately informed the Tahsildar that she was not aware of any arbitration proceedings or award passed therein and she expressed her suspicion that in pursuance of criminal conspiracy, she was being deprived of her legitimate right over the said property by preparing forged and fabricated documents. The said Smt.Nickee A. Bagaria thereafter filed the Arbitration Petition (L) No.782 of 2015 under Section 34 of the Arbitration and Conciliation Act for setting aside the purported award dated 9.6.2014 on the ground that the same was fraudulently prepared by the Bagarias and Jhunjhunwalas.

(vii) The said arbitration petition (L) No.782 of 2015 came up for hearing before the learned Single Judge (Shri S.J. Kathawalla, J.) on 21.7.2015 when the learned Judge of this Court after taking into consideration the various aspects of the matter and after scrutinizing the entire evidence available on record, was pleased to pass a detailed order by recording his findings. The relevant excerpts from the findings recorded by the learned Single Judge in order dated 21.7.2015 are reproduced herein below for the sake of convenience and brevity:

“**11.2** Certain immovable properties as described in paragraph 2.1 above stood in the name of the Petitioner wife . Respondent Nos. 3, 4 and 5 were determined not to allow the

Petitioner wife to claim/take away the said Property. They have therefore contacted Advocates Mr. Ashok Saraogi and Ms. Ivy Tauro to advise them in the matter. Thereafter an Award has been procured from Mr. Sohail E. Kazi, Advocate. Mr. Kazi has admitted before this Court that there were no meetings held between the parties. He had not given notice to any party. Neither the MoU nor the Powers of Attorney were produced before him. That he had signed a copy of the Award which was provided to him by Mr. Jhunjhunwala. Mr. Jhunjhunwala has informed the Court that he has never met Mr. Kazi and that the documents and the Award was procured by the Advocates Mr. Ashok M. Saraogi and Ms. Ivy Tauro. The husband of the Applicant, Mr. Bagaria has also stated that he was in contact with Mr. Ashok Saraogi and Ms. Ivy Tauro, Advocates, and that the documents and the Award was prepared by them. The fact remains that the MoU was fabricated and on the basis of the same and the Powers of Attorney which were terminated, a collusive back dated Award was prepared whereunder the said Property of the Petitioner was illegally usurped by the Bagarias and the

Jhunjhunwalas;

11.3 The parties, to lend credence to the Award, through their Advocates filed a collusive Petition, being Arbitration Petition No. 140 of 2015 under Section 34 of the Act whereunder the husband of the Applicant along with his parents made a pretence of challenging the purported award passed by Mr. Sohel E. Kazi, Advocate and got the same rejected which fact is borne out from the file number on the docket of Arbitration Petition No. 140 of 2015 filed by the Bagarias against the Jhunjhunwalas and the Affidavits filed by the Bagarias and the Jhunjhunwalas in Arbitration Application (L) No. 809 of 2015.

12 Mr. Ashok Saraogi, Advocate personally appeared before this Court on 22nd June, 2015 for the Bagarias and on 23rd and 24th June, 2015, instructed Mr. S.Upadhyay to appear for the Bagarias. Ms. Ivy Tauro appeared for the Jhunjhunwalas on 22nd June, 2015 and 24th June, 2015 with Mr. Navin Parekh, Advocate and herself appeared on 23rd June, 2015 and 26th June, 2015. The Learned Advocate for the Petitioner wife had made very serious allegation qua the manner in which the purported Award was procured and a rejection order

obtained in Arbitration Petition No. 140 of 2015. Needless to add that the same included allegations against the Advocates for the parties i.e. Mr. Ashok Saraogi and Mr. Ivy Tauro. However, Mr. Saraogi chose not to appear in the matter on 26th June, 2015, and his junior informed the Court that Mr. Saraogi will no longer appear in the matter.

13. In view of what is told to the Court by the Arbitrator and by the parties, it prima facie appears that the Bagarias and the Jhunjhunwalas through their Advocates have with the assistance of the Arbitrator Mr. Soheli Kazi procured/fabricated an Award and tried to usurp the said Property of the Petitioner behind her back. To give credence to the fabricated Award, a collusive Arbitration Petition was also filed by the Bagarias and the Jhunjhunwalas through their Advocates before this Court pretending to impugn the said Award, and by collusion obtained an order of rejection to the said challenge, thereby committing a fraud on this Court.

14. The Judiciary is one of the The Judiciary is one of the important pillars of democracy. If an individual is allowed to perpetrate a fraud on the Courts/Judiciary, the entire judicial system runs the risk of being eroded and

ultimately destroyed, which can never be permitted and has to be dealt with an iron hand. In several matters this Court has time and again observed the flagrant violation of law and its basic tenets, and at times by the very persons who are entrusted with upholding the dignity of the rule of law, and the officers of the courts. It is noted with distress by this Court that at times such violations are committed for monetary benefits accruing to the persons committing such violations. The present case appears to be one such instance. Though it earlier appeared to me that Mr. Sohail Kazi has come clean with the Court, his disclosure raises some doubts after this Court recorded the disclosures made by Mr. Vinod Jhunjhunwala and Mr. Ashish Bagaria. The truth therefore needs to be investigated and ascertained. Therefore, before reaching any final conclusion qua the fraud that appears to have been committed, and looking at the gravity of the above facts, the Commissioner of Police, Greater Mumbai, to appoint any Deputy Commissioner of Police to examine this case in the light of facts set out in this order and ascertain whether a prima facie case of commission of offence is made out. If the Officer so nominated comes to the

conclusion that a case of commission of offence is made out, the criminal law shall be forthwith set in motion by registering First Information Report. The concerned DCP appointed for this purpose shall submit a compliance report to this Court in a sealed cover on 28th September, 2015, at 3.00 p.m. The Prothonotary and Senior Master shall forthwith forward a copy of this Order to the Commissioner of Police, Greater Mumbai, by hand delivery.”

3 In pursuance of the said order dated 21.7.2015 the Deputy Commissioner of Police, Zone-I, Mumbai after conducting preliminary enquiry submitted his report before the learned Single Judge of this Court on 13.10.2015. It further appears from the record that the applicant has given a statement dated 2.10.2015 in the said enquiry, refuting the allegations and stating his probable defence in the crime. The said report was taken on record. In the said report the Deputy Commissioner of Police had reached to the conclusion that the case of commission of offence is made out. Therefore the learned Single Judge by an order dated 13.10.2015 was pleased to observe that in view thereof further steps as per law may be taken in that behalf. After the said order dated 13.10.2015 was passed, the first informant i.e. the aforesaid police officer lodged the first information

report bearing CR No.288 of 2015 on 17.10.2015 on behalf of the State.

As stated hereinabove, it is in this background the applicant apprehends his arrest at the hands of the police.

4 Mr. Shirish Gupte the learned Senior Counsel for the applicant submitted that the applicant is a practicing Advocate of repute and has put in about 33 years in this profession. He further submitted that the applicant has only extended advise to his client i.e. the Bagarias and has appeared in cases under their instructions. He further submitted that appearing in a matter by an Advocate itself is no crime. He would contend that the present offence is pertaining to and related with documents which are already on record. The said documents (authenticated/attested copies) have been taken in custody by the police during the course of enquiry which was conducted by the Deputy Commissioner of Police in pursuance of order dated 21.7.2015 passed by the learned Single Judge of this Court. He contended that for that reason the custody of the applicant is not necessary.

5 Mr. Shirish Gupte, the learned Senior Counsel at the outset submitted that the applicant was not heard before lodging of the present first information report. He submitted that it was necessary for the Investigating Agency to hear him before lodging the first information report and then would have proceeded in the matter.

In my opinion the law does not postulate that an opportunity of being heard to the accused person should be given prior to registration of F.I.R. in a cognizable offence. At this stage, a useful reference can be made to the judgment of the Supreme Court reported in **AIR 1993 SC 1082** in the case of **Union of India & Anr. Vs. W.N. Chadha**. The Supreme Court has held that under the scheme of Chapter XII of the Code of Criminal Procedure, there are various provisions under which no prior notice or opportunity of being heard is conferred as a matter of course to an accused person while the proceedings is in the stage of an investigation by a police officer. That the accused has no right to have any say as regards the manner and method of investigation. It has been further held that save under certain exceptions under the entire scheme of the Code, the accused has no participation as a matter of right during the course of the investigation of a case instituted on a police report till the investigation culminates in filing of a final report under Section 173(2) or in a proceeding instituted otherwise than on a police report till the process is issued under Section 204 as the case may be. That, however, the provisions relating to the investigation under Chapter XII do not confer any right of prior notice and hearing to the accused and on the other hand they are silent in this respect. In view of the ratio laid down by the Supreme Court in the case of Union

of India & Anr. Vs. W.N. Chadha (supra) according to me the submission advanced by the learned Senior Counsel does not hold any substance in it.

6 Mr. Shirish Gupte, the learned Senior Counsel thereafter contended that after the alleged fraud came to the notice of this Court, by a separate order dated 21.7.2015 the learned Single Judge was placed to drop various proceedings a list whereof is mentioned on page-409 of the present compilation and according to him therefore even the directions issued by the learned Single Judge by his order dated 21.7.2015 passed in Arbitration Petition (L) No.782 of 2015 does not survive. Bear perusal of the second order dated 21.7.2015 passed in Arbitration Petition (L) No.782 of 2015 discloses that except the first order dated 21.7.2015 passed in the said Arbitration Petition thereby directing the Deputy Commissioner of Police to conduct enquiry into the matter, the other orders have been set aside by consent of the parties. The first order dated 21.7.2015 passed in Arbitration Petition (L) No.782 of 2015 and the directions issued in para-14 of the said order indubitably holds the field and therefore the said submission also has no substance in it.

7 Mr. Shirish Gupte, the learned Senior Counsel would then contend that Section 464 of the Indian Penal Code has been amended with effect from 17.10.2000 and in his submission antedating a document is in

itself, not an offence at all. He submitted that in the present case, it is the allegation that, the applicant has only antedated the MoU dated 15.4.2010 and therefore it is not an offence. He further submits that if a case under Section 464 itself is not made out, Sections 465, 466, 467, 468 and 471 which are aggravated form of Section 464 cannot at all be applied in the present case.

It is to be noted here that Section 464 of the Indian Penal Code defines, 'making false documents' and Sections 465, 466, 467, 468 and 471 prescribes punishment for commission of the offence mentioned therein. In the present case, it is not only the allegation that the applicant antedated the document which was already in existence, but it is the specific case of the prosecution that the applicant in furtherance of the conspiracy and in connivance with the other accused persons fabricated the documents namely MoU dated 15.4.2010 and the Award dated 9.6.2014 and subsequently used the said documents in the Court proceedings before the High Court in Arbitration Petition No.140 of 2015. In my opinion in the present case the definition of Section 464 of the Indian Penal Code squarely applies and therefore there is no substance in the contention of the learned Senior Counsel for the applicant

submitted has during the course of enquiry by the Deputy Commissioner of Police the statement of the applicant has been recorded. He further submits that the statement of the Shri Jhunjhunwala in the Court proceedings in the Arbitration Petition (L) No.782 of 2015 is contradictory to the statement of the Advocate Shri Soheli Kazi. That the statements of the said persons two amounts to a statement of an accomplice and cannot be relied upon in prosecuting the applicant.

It is to be noted here that it is the settled position of law that the statement made by a person called upon by the Court for answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceedings would squarely fall within the purview of Section 132 of the Indian Evidence Act and would not absolve any person from its implication. The order dated 21.7.2015 which is at page-390 to the present compilation is self-eloquent and the statements made by Mr. Vinodkumar Jhunjhunwala, Mr. Ashish Bagaria and Advocate Shri Soheli Kazi made before this Court in the said Arbitration Petition can be used against the applicant. It is the allegation against the applicant and Advocate Shri Kazi that they in connivance with each other and Advocate Ms. Ivy Tauro prepared and fabricated the purported Award dated 9.6.2014 for the Bagarias and Jhunjhunwalas and therefore the statements made by the said

three persons in the Court proceedings implicating the applicant can be safely relied upon at this stage.

9 Mr. Shirish Gupte, the learned Senior Counsel lastly contended that Section 200 and 209 of the Indian Penal Code will not have any application in the present crime qua the applicant as the applicant has only helped the Bagaris and Jhunjhunwalas in his capacity as an Advocate. He further submitted that therefore the Section 195(1)(b)(i) of the Cr. P.C. would come in fray and the applicant be given benefit of the same.

It is to be noted here that the investigation in the present crime is at a very primary stage. That the police after collecting the evidence in the present crime would only file final report as contemplated under Section 173(2) and will either add or delete appropriate Sections of the Indian Penal Code. It is however to be noted here that Section 195 of the Cr. P.C. deals with the stage of taking cognizance by the Court. In the present case, as stated above, the investigation is at very nascent stage and the stage of taking cognizance would arise only after the police files final report as contemplated under Section 173(2) of the Cr. P.C. before the Court of competent jurisdiction if the said Sections has any application at all after recording the statements of witnesses in the crime. Therefore in my opinion giving any benefit to the applicant under Section 195 of Cr. P.C. as

submitted by learned Senior Counsel will be too preposterous at this stage.

10 The learned APP submitted that the offence involved in the present crime is of very serious nature and if the applicant is granted pre-arrest bail then there is every possibility that he may abscond and may not be available for trial. She further contended that the applicant is a very influential person and would certainly influence the witnesses and tamper with evidence on record. She further submitted that when the applicant was having interim protection initially by the Trial Court and subsequently by this Court, the applicant did not co-operate with the investigation and gave evasive replies to the questions put by the Investigators. She contended that the applicant has played fraud upon the Court. She further submitted that the applicant gained substantial pecuniary benefit out of the said crime and the custody of the applicant is necessary to find out as to where and how the documents in question are prepared by the applicant. She lastly submitted that when the applicant was on bail in earlier case, he has committed the present crime and therefore the applicant does not deserve any sympathy from the Court.

11 A useful reference at this stage can be made to the celebrated judgment of the Supreme Court reported in (1997) 7 SCC 187 in the case of State Rep. by the C.B.I. Vs. Anil Sharma wherein the Supreme Court

has laid down the ratio on the point, when bail under Section 438 of Cr. P.C. should not be granted to an applicant holding high position or wielding considerable influence. The Supreme Court has held that :-

“Custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well ensconced with a favourable order under Section 438 of the Code. In a case like this effective interrogation of a suspected person is of tremendous advantage in disinterring many useful information and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual.”

12 After taking into consideration the entire material available on record, it is thus clear that, it is the allegation against the applicant that he in conspiracy with other accused persons and in connivance with the Bagarias and Jhunjhunwalas has fabricated and/or prepared a bogus MoU dated 15.4.2010 and in pursuance thereof fabricated an Award dated 9.6.2014 in the Arbitration Petition proceedings and with a view to give legitimacy and authenticity to the said award used the documents in Arbitration Petition No.140 of 2015 before this Court. The enquiry

conducted by the Deputy Commissioner of Police reveals the role played by the applicant in the present crime.

13 Taking into consideration the serious nature of the crime, a thorough investigation of the complaint lodged by the police officer is of utmost importance to unearth the truth involved in the present crime. The applicant has tried to exploit the judicial system for gaining pecuniary benefits to himself by fabricating bogus documents which are used in the Court proceedings and thereby he has taken the judicial system for a ride. It is equally important to note here that the applicant is also an accused in CR No.95 of 2011 registered with Economic Offences Wing, Mumbai under Sections 406, 420, 465, 467, 468, 471 read with Section 34 of the Indian Penal Code and is released on anticipatory bail by the order of this Court in the year 2011. The applicant when on pre-arrest bail in CR No.95 of 2011 is involved in the present crime and therefore the applicant does not deserve any sympathy from this Court to be released on pre-arrest bail.

14 In view of the above, the anticipatory bail application is rejected.

(A.S. GADKARI,J.)

