IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO. 2717 OF 2014

Imitiyaz Esmail Sayed. ... Applicant.
Versus
The State of Maharashtra. ... Respondent.

Mr. Hasan Ali Ebrahim Mooman, advocate for Applicant.

Ms. P.P. Shinde, APP for State.

CORAM : SMT. SADHANA S. JADHAV,J
DATE : JULY 20, 2015

P.C.:

1 Heard the learned Counsel for the applicant and the learned APP for State. Perused the papers.

2 This is an application under Section 439 of the Code of Criminal Procedure, 1973. The applicant herein is arrested on 4/3/2014 in Crime No. 175 of 2014 registered at Santacruz Police Station for offence punishable under Section 143, 144, 145, 147, 149, 450, 387, 427, 307, 120B, 506(II) of the Indian Penal Code read with Section 4

and 25 of the Arms Act and Section 3(1)(ii), 3(2) and 3(4) of MCOCA Act.

3 It is the case of the prosecution that on 1st March, 2014 first information report was lodged by Shri Dynaneshwar Bhivson Javjal at Santacruz Police station alleging therein that he is working on the site of HDIL company. The office is situated at shop No. 47, Pioneer-2, Daulat Nagar, Santacruz. HDIL company has taken a project and the construction is in progress on the adjacent site. That on 1/3/2014 he was present in the office. The security guard was standing outside his cabin. At about 3.45 p.m. he heard noise of breaking of glasses and window pane of his office and there was hue and cry. He heard the people hurling and abusing. He came out of the office to see what was happening. He saw 10 to 15 people armed with iron sickles and iron rods entered into his office. Some of the miscreants had muffled their faces and had put on caps. The handkerchief of one of the person had slipped and the complainant identified him as Ajmal, a resident of Daulatnagar. He then identified associates of one Zulfikar namely Asif, Sayeen Khan @ Mavya, Sufiyan. Ajmal was armed with

a sickle. Asif was armed with iron rod. Mavya was armed with stump and Sufiyan was armed with wooden log. They were proceedings towards him and asking him the whereabouts of Yusuf Pathan and why he had not paid money. The miscreants were attempting to assault the complainant. At that juncture, the security guard fired in the air. The miscreants had caused damage to the office furniture and had fled from the spot. Surrounding shops in close proximity had pulled down their shutters. One of the adjacent shop was also attacked.

4 The complainant could identify some of the assailants. According to him, some of the accused had visited the office in November, 2013 and were enquiring about Yusuf Pathan. On every occasion, they used to say that the brother of Zulfikar is still in jail and Rs. 8 Lakhs are necessary for releasing him and therefore, they were demanding money from Yusuf Pathan. According to the complainant, Zulfikar and his associates had also attacked the house

and vehicle of Yusuf Pathan in Lohia Nagar. It is specifically alleged that all the accused were working at the behest of Zulfikar and were troubling the complainant and Yusuf Pathan since 2013. The name of the applicant does not find place in the FIR.

5 By an order dated 31st May, 2014 the Commissioner of Police, Brihan Mumbai in exercise of his powers under section 23(2) of the MCOC Act had accorded sanction to prosecute the accused in C.R. No. 175 of 2014 under Section 3(1)(ii), 3(2), 3(4) of M.C.O.C. Act, 1999.

6 The investigation is completed and charge-sheet is filed and the case was registered as MCOC Special Case No. 4 of 2014.

7 This Court (Coram : Smt. Sadhana S. Jadhav, J) by an order dated 11/11/2014 had granted bail to one of the accused namely Ashique Iqbal Shaikh @ Lukka in Crime No. 175 of 2014. The said order is not challenged before the Hon'ble Apex Court and hence, has attained finality.

8 As far as the present applicant is concerned, in the course of investigation, the Investigating Officer has recovered one cell phone from the present applicant pursuant to memorandum on 11/3/2014. It is also the case of the prosecution that in the confessional statement of Irfan Maulana Sayyed, involvement of the applicant is shown. That there is evidence to show that the applicant was in contact with the principal accused Zulfikar. According to the prosecution, SIM card No. 7738227267 was registered in the name of Smt. Badurnisa Ismail Sayeed who happens to be the mother of the present applicant. Her statement was recorded and she has disclosed that she had given the SIM card to her son.

9 The learned APP submits that there is evidence to show that the present applicant was well acquainted with the co-accused. That on the day of the offence, the applicant's mobile tower location was found at Shalimar Tower of S.V. Road, Santacruz. According to the learned APP, the present applicant had conspired and attempted to commit offence to facilitate commission of an organised crime and

therefore, he is being prosecuted under the provisions of M.C.O.C. Act. It is submitted by the learned APP that Zulfikar who is the principal accused is the leader of the crime syndicate and the present applicant and the co-accused are members of his gang. That there are cases pending against Zulfikar for offences of extortion and threats to life. That as per the C.C.T.V. Footage obtained of the scene of offence, the present applicant/accused was seen as a member of the said unlawful assembly. It is clearly admitted that the witnesses had not identified the applicant in the test identification parade. That the Investigating Officer has collected the clothes of the applicant from his father and the applicant has been identified in the C.C.T.V. footage on the basis of the clothes which are seized. Learned APP submits that in the eventuality that the applicant is enlarged on bail, the possibility that he would commit similar offences cannot be ruled out and therefore, he does not deserve to be enlarged on bail.

10 It is pertinent to note that he does not have any criminal antecedents. It is the allegation that he was in contact with Zulfikar

when he was in jail. There is nothing on record to indicate that he is a co-accused of Zulfikar in any other offence or that he was in direct contact with him.

11 The learned Counsel for the applicant submits that the applicant was swayed by the company in which he was moving. He had no direct animus against the employer of the complainant. He was moving in the company of the principal accused without any knowledge of their antecedents as well as consequences.

12 The learned APP submits that the contents of the charge-sheet would show that the principal accused Zulfikar was in jail and he was in contact with the present applicant and therefore, it can be said that the applicant is a member of the syndicate of Zulfikar and therefore, he does not deserve grant of bail.

13 Section 2(d) of the MCOC Act contemplates as follows :

> “2(d) "continuing unlawful activity" means an activity prohibited by law for the time being in force, which is a

> cognizable offence punishable with imprisonment of three years or more, undertaken either singly or jointly, as a member of an organised crime syndicate or on behalf of such, syndicate in respect of which more than one charge-sheets have been filed before a competent Court within the preceding period of ten years and that Court has taken cognizance of such offence;"

Prima facie, there is nothing on record to indicate that the applicant had participated in any continuing unlawful activities with the principal accused i.e. Zulfikar prior to the present incident and therefore, the applicant would be entitled to be enlarged on bail.

14 The Division Bench of this Court in the Judgment passed in **Criminal Appeal No. 25 of 2014** has considered the Judgment of the Division Bench of this Court in the case of **Govind Sakharam Ubhe v/s. State of Maharashtra reported in 2009 All M.R. (Cri) 1903** has held has follows :

> "The Division Bench in an unequivocal terms laid down the ratio that requirement of more than one charge-sheet is qua the unlawful activities of the organized crime syndicate and not qua individual member thereof."

15 In such a situation, it would be incumbent upon the prosecution to first demonstrate that the said accused is a member of the syndicate and he has been singly or jointly charge-sheeted with Zulfikar. In the present case, it was the first occasion, when the applicant has been to the office of the HDIL Company when the alleged incident had occurred. The principal accused Zulfikar has been charge-sheeted in several cases, however only because there was exchange of telephonic calls between Zulfikar and the present applicant, it cannot be said that he works for Zulfikar or has been his associates.

16 As far as the present case is concerned, it is seen that the only allegation against the applicant is that he had visited the premises on that day and caused damaged to the property of HDIL company.

17 The learned Counsel for the applicant submits that at the most it can be said that the applicant has committed offence punishable under Section 425 and 380 of the Indian Penal Code. However, this can be considered at the time of framing of charge or at the time of

trial. The applicant has been in jail for more than one year i.e. almost 15 months and in view of this applicant deserves grant of bail.

18 Taking into consideration the role attributed to the applicant in the present case, the applicant would be entitled to be enlarged on bail. Having regard to the facts of the case, compilation of the charge-sheet and the submissions advanced across the bar, prima facie, it would be difficult to record a subjective satisfaction that the applicant may in all probabilities commit similar offences, if enlarged on bail and therefore, in C.R. N. 175 of 2014 the applicant would be entitled to be granted bail.

19 It is made clear that the observations made hereinabove are restricted to an application under Section 439 of the Code of Criminal Procedure, 1973. The same shall not be considered while deciding the application for discharge or for quashing of FIR or at the time trial. The learned Trial Court shall decide the matter uninfluenced by the above said observations and arrive at a conclusion only on the

basis of the substantive evidence adduced by the prosecution at the time of trial.

20 Hence, following order is passed :

ORDER

(i) The application is allowed.

(ii) The applicant be enlarged on bail on furnishing P.R. Bond in the sum of Rs. 25,000/- and one or more local solvent sureties.

(iii) The applicant shall report to the concerned police station on 1st Sunday of every month till conclusion of trial.

21 The application is disposed of accordingly.

(SMT. SADHANA S. JADHAV,J)