

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 4850 OF 2015

Shri Ashok Meghji Chheda)
Aged 54 years, of Mumbai, Indian)
Inhabitant, residing at 549, Meru-Tower,)
701/702, 7th and 8th Floors, Jame Jame)
Jamshed Road, Matunga, Mumbai-)
400 019.) Petitioner

vs.

1. State of Maharashtra)
Through Secretary,)
Home Department, Mantralaya,)
State of Maharashtra.)
2. The Senior Inspector)
Economic Offences Wing, Unit II)
above Yellowgate Police Station,)
Crime Branch, Mumbai.)
3. Mr. Navin Dharshi Shah)
Partner of M/s. Satyam Builders)
Office at 48-3, Parag Scheme)
No.6, Road No.5, Matunga (East))
Mumbai 400 019.) Respondents

Mr. Aabad Ponda a/w Mr. Chitranjan Kumar i/b. CLF and Co.
Advocate for the Petitioner.

Mr. Mahesh Jethmalani, Senior Counsel a/w Mr. Pranav Badheka i/b.

Mr. Rahul Moghe, Advocate for respondent No.3.

Mr. V.B.Konde-Deshmukh, APP, for the State.

CORAM: SMT.SADHANA S.JADHAV, J.

DATE : 21st July, 2016.

JUDGMENT:

1. Heard respective counsel. Perused the papers of investigation. Rule. Rule is made returnable forthwith.
2. The applicant herein is an accused in Crime No.176 of 2012 registered Matunga Police Station and the investigation was transferred to the Economic Offences Wing (EOW) and the crime was registered as Crime No.59 of 2012.
3. It is the case of prosecution that Satyam Builders is a partnership firm of which the applicant is also a partner. That on 12.4.2012, the complainant – Navin Shah lodged a report at the police station alleging therein that the firm Satyam Builders has completed development of the plot of land situated at Gokhale Road, Dadar (West). From the statement issued by the Bank dated 7.4.2012, it was revealed that the present applicant had, without the consent of the partners of the firm and without intimating to them, sold some of the flats and misappropriated the funds from the firm's Bank. It was revealed that he had siphoned and misappropriated an amount of

Rs.2,40,00,000/- by transferring the same in the personal account of his wife Tila Chheda. The informant had given details of the misappropriated amount. On the basis of the report, an offence was registered at Matunga Police Station for the offence punishable under Sections 420, 380 and 120B of the Indian penal Code and the detailed statement of the complainant was recorded.

4. On 14.9.2012, the applicant herein was arrested by the Economic Offences Wing. he was produced before the Addl. Chief Metropolitan Magistrate, Mumbai, who was pleased to grant police custody.

5. on 17.9.2012, when the applicant was in custody, the other co-accused had also filed an application seeking pre-arrest on bail. An undertaking was filed wherein the co-accused had agreed to give an undertaking that they would settle the dispute and a further undertaking was given by the co-accused that they would deposit the amount. The undertaking was given by Tila Chheda, who is accused No.2, Mr. Vijay Shah and Mr. Anup Shah. The first informant was

heard by the Court and he had given a conditional No objection to grant bail, to the applicant in the eventuality that the undertaking is abided by the executors. It is pertinent to note that the said undertaking was given by Navin Shah stating that the amount would be duly paid. It is on this undertaking that the learned Magistrate was pleased to grant bail to the present applicant on 25.9.2012. It was agreed between the parties that the amount of Rs.84 lakhs would be paid to the complainant.

6. It appears from the records that the applicant No.1 had filed an application seeking the relief of defreezing personal Bank guarantee with Indian Bank on 30.10.2012 in order to enable him to honour the cheque of Rs.84 lakhs issued to the firm in compliance with clause 2 of the undertaking. The said application was allowed on 23.11.2012 with a direction that the accused No.1 would pay the amount of Rs.84 lakhs to the complainant forthwith. It appears that the undertaking was given to the effect that the amount would be paid within one month from being enlarged on bail. The accused-applicant would pay to the firm the amount misappropriated which was calculated to the tune of Rs.2,40,00,000/-.

7. The State (EOW) filed an application seeking cancellation of bail on the ground that there was non-compliance of the undertaking given by Navin Shah that in the eventuality the applicant is granted bail, the amount would be paid within one month. The accused had submitted his Say objecting the very locus of the original first informant to file the application seeking cancellation of bail. It was contended by the informant that the applicant was enlarged on bail only on condition and consideration that he would pay the amount of Rs.2,20,00,000/- to the partnership firm for the losses incurred by the said firm. It was contended that it was a condition precedent for enlarging the applicant on bail. It is pertinent to note that the undertaking was given by the co-accused and the relatives and at that time, the applicant was in custody and the applicant had not given an undertaking that he would pay the said amount.

8. It appears that the accused had filed Criminal Writ Petition No.3416 of 2013, seeking the relief of quashing the FIR on the basis of which Crime No.59 of 2012 was registered. The said Writ Petition was

dismissed. It was in these circumstances that the order granting bail was recalled and cancelled. The learned Addl. C.M.M. in the order dated 14.1.2015 had observed that :-

“It is an admitted position that the opponent has never violated any terms and conditions of the order of bail dated 25/09/2012, but has breached the conditions by not abiding by the undertaking given by the Court on 17/09/2012.” Hence, the order granting bail was recalled and the bail was cancelled by an order dated 14.1.2015. The bail of all the accused was cancelled.

9. Being aggrieved by the said order, the applicant had filed a Revision Application No.120 of 2015 before the Sessions Court at Bombay. The Revision Application was admitted. The learned Sessions Court was pleased to dismiss the application by order dated 30.11.2015. Hence, the present Writ Petition.

10. The learned counsel for the petitioner submits that in fact, the petitioner Ashok Meghji Chheda was in police custody at the time

when the undertaking was given by the co-accused. The undertaking was given by the partners of the firm, wife of the applicant and others. It was contended in the undertaking that Saquib Bharmal would cancel the agreement for sale dated 23.3.2012 entered into in respect of Flat No.1101 of the firm located in the building of the Society. It was also undertaken that all other disputes would be settled within a month. It is also submitted that at the stage of granting bail, the conditions that were imposed were as if to say that in an application under Section 437 of Cr.P.C, the Court was deciding the entire dispute between the partners of the firm. It is also contended that the applicant was in custody from 17.9.2012 to 25.9.2012. The learned counsel further submits that the allegation against the present petitioner is that he has committed an offence punishable mainly under Section 420 of the IPC which is punishable upto seven years. That the offence is triable by the Court of Magistrate. That no notice was issued to the petitioner under Section 41 of Cr.P.C. and that there was no subjective satisfaction of the investigating agency to show that the custody of the petitioner would be imperative.

11. The learned counsel has drawn attention of this Court to the

undertaking given by all the accused in Crime No.59 of 2012. The last three lines of the undertaking read as follows :-

“These undertakings shall survive the FIR No.59/2012. IN case of any default committed by all or any of us above, the bail granted to all of us or any of us, as the case may be, shall stand cancelled.” It was specifically noted that the said undertaking was given/signed in the presence of M/s. Chitnis & Co. Advocates for the accused.

12. It is further submitted that the petitioner herein was coerced by rest of the partners to sign the said document at the behest of M/s. Chitnis & Co., which was in fact engaged by the first informant itself. It is further brought to the notice of this Court that the petitioner had signed the Vakalatnama in favour of Ms. M.M.Dave and Prutha Dave. The application seeking bail was also filed by the Advocate engaged by the applicant. However, subsequently, the application was filed by M/s. Chitnis & Co. and the Say of the said first informant was as follows :-

“In view of the affidavit dated 20th Sept. 2012, of the First Informant Mr. Navin Shah whereby the First

Informant has given No objection of Accused dated 17th Sept.2012.”

13. Be that as it may, the parameters and criteria for grant of bail and cancellation of bail are two different things.

14. The learned counsel for the petitioner has placed reliance upon the Judgment of the Hon'ble Apex Court in the case of **Biman Chatterjee vs. Sachita Chatterjee & Anr. (2004) 3 SCC 388**, wherein the Hon'ble Apex Court has held that Non-fulfillment of terms of the compromise cannot be basis of granting or cancelling a bail. The grant of bail under the Criminal Procedure Code is governed by the provision of Chapter XXXIII of the Code and the provision therein does not contemplate either granting of a bail on the basis of an assurance of a compromise or cancellation of a bail for violation of the terms of such compromise. What the court has to bear in mind while granting bail is what is provided for in Section 437 of the said Code. In our opinion, having granted the bail under the said provision of law, it is not open to the trial court or the High Court to cancel the same on a ground alien to the grounds mentioned for cancellation of bail in the said provision of

law.”

15. It is pertinent to note that the firm Satyam Builders and others have filed Suit No.996 of 2015 in this Court and the present petitioner is a defendant in the said suit. By an order dated 20.1.2016, the Hon'ble Single Bench of this Court (S.J. Kathawala,J.)

“iv. In the event of Defendant No.1 failing to forward any higher offer as set out above, the Plaintiffs shall finalize the deal with the purchaser who was recommended at the price intimated to the Defendant No.1.

v. The sale proceeds shall be deposited in the partnership account and the same shall not be used/withdrawn without seeking prior permission of this Court.

2. The order passed by this Court dated 15th December, 2015 is modified to the extent hereinabove and the other directions/orders shall continue to be in force until further orders.

3. The Defendant No.1 shall be at liberty to serve a notice of dissolution of the partnership on Plaintiff Nos. 2 to 6 and other Defendants.

4. *Stand over to 28th January, 2016.*
5. *Liberty to apply.”*

It appears that the matter is being settled before the Original Side of this Court in Civil Suit No.996 of 2015.

16. In any case, in several matters, this Court has observed that initiation of criminal proceeding is not for the purpose of recovery of the amount or to settle the financial dispute or transaction between two parties. In the present case, the complainant and the applicant are partners of the same firm. A civil dispute is pending for recovery of amount/rendition of accounts. In such circumstances, an undertaking given at the time of grant of bail cannot be considered for the purpose of cancellation of bail. Moreover, this Court cannot be oblivious of the fact that at the time when the undertaking was given the applicant was in custody. Moreover, the order granting bail does not indicate that the bail was granted on the sole ground that the undertaking was given. The very fact that the first informant had given No objection for grant of bail would clearly indicate that the complainant wanted to recover the amount in a criminal proceeding and thereafter nothing would

remain in the criminal proceeding.

17. In view of the above, Writ Petition deserves to be allowed. The order dated 14.1.2015 passed by the learned Addl. C.M.M. 47th Court, Esplanade, Mumbai in 738/Misc/2014 cancelling the bail of the petitioner deserves to be quashed and set aside and the order dated 25.9.2012 deserves to be restored.

Rule is made absolute accordingly. Writ Petition stands disposed of.

(SMT. SADHANA S.JADHAV, J.)