25# $~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CRL.M.C. 2801/2016

IFCI FACTORS LTD ..... Petitioner

Represented by: Mr. M.S.Vinaik, Advocate.

versus

STATE & ORS. ..... Respondents

Represented by: Ms. Rajni Gupta, APP for the State with SI Jitendra Singh, PS EOW.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

O R D E R

% **05.08.2016**

Crl. M.A. No. 11944/2016 (Exemption)

Allowed, subject to all just exceptions.

CRL.M.C. 2801/2016

1. By the present petition the petitioner seeks cancellation of the bail of respondent Nos. 2 and 3 and setting aside/modifying the impugned order dated 9th May, 2016. The respondent Nos. 2 and 3 were granted interim bail on the ground that they would settle the matter and deposit the amount, however, thereafter both of them absconded. Respondent No.2 was later arrested on 22nd November, 2015. Thereafter he remained in custody and by the impugned order the respondent No.2 has been granted bail, cancellation whereof has been sought in the present petition.

2. As regards respondent No.3, after he absconded he has not been arrested as yet and thus no bail has been granted to him. Therefore, the

present petition qua respondent No.3 does not survive as no cancellation of the bail can be sought in the absence of any bail order in favour of respondent No.3.

3. Faced with this situation learned counsel for the petitioners submits that he does not press the present petition qua respondent No.3.

4. In respect of respondent No.2 the contention of learned counsel for the petitioner is that having agreed to pay part sum on the basis of which the interim bail was granted and thereafter refusing to comply with the undertaking, the learned Chief Metropolitan Magistrate erred in granting regular bail to the respondent No.2. It is further contended that the order impugned is perverse for the reason the learned Chief Metropolitan Magistrate failed to notice the severity of the allegations, conduct of the accused and that the investigation qua the money trail was still pending.

5. The respondent No.2 was remanded to judicial custody on 3rd June, 2013 in case FIR No.116/2012 under Sections 420/120B/471/468/409/471 IPC registered at PS Economic Offences Wing, Delhi and vide order dated 17th July, 2013 he was granted interim bail till 7th August, 2013 as he expressed his willingness to settle the dispute. The respondent No.2 undertook to pay a sum of Rs.25 lakhs to the complainant within three weeks. Since the learned counsel for the complainant without prejudice to his contentions did not object to the grant of interim bail, so that the parties could settle the matter, an interim bail order was passed on 17th July, 2013 as noted below:

> *"Heard on the bail application filed on behalf of applicant/accused.*
>
> *Ld. Counsel for applicant/accused submits that*

applicant/accused is ready to settle the disputes with the complainant and is ready to join the mediation proceedings. It is submitted that since he is in custody, he is not in a position to settle the matter with the complainant. In this regard, to show his bona fide towards his endeavour to settle the matter with the complainant, applicant/accused has filed an affidavit, in which he has undertaken to pay a sum of Rs.25 lacs to the complainant within three weeks. Applicant/accused has also placed on record original of agreement to sell dated 28.01.2008 pertaining to an agricultural land bearing no. Survey no.2, ad-measuring about 1.60 HR, within the limits of Tehsil Nagpur.

Ld. Counsel for complainant submits that without prejudice to their contentions, complainant has no objection in granting interim bail to applicant/accused in order to enable him to settle the matter with complainant.

Applicant/accused is in JC since 03.06.2013. Without expressing any opinion on merits, at this stage, on considering the submissions made and in order to enable applicant/accused to settle the matter with complainant, applicant/accused Ashok Kumar Rathi is admitted to interim bail till 07.08.2013 on furnishing a personal bond in the sum of Rs.2,00,000/- with one surety in the like amount to the satisfaction of the concerned MM/Link MM/Duty MM with the conditions that applicant/accused shall not leave India without prior permission of the Court. Applicant/accused shall appear in person on 07.08.2013 and shall comply with his undertaking.

Ld. Counsel for both the parties have agreed that the applicant/accused will have a meeting with the AR of the complainant on 06.08.2013 at mutually agreed time and place.

Concerned clerk of Bail section shall keep agreement to sell dated 28.01.2008 in a safe custody.

Matter be renotified on 07.08.2013.

Copy of this order be sent to Superintendent Jail for information.

Dasti."

6. This interim bail was extended from time to time however, vide order dated 29th March, 2014 the application for bail filed on 8th July, 2013, wherein interim bail was granted, was dismissed. The order dated 29th March, 2014 reads as under:

"This order shall dispose of application dated 08.7.2013 of Shri Ashok Rathi seeking grant of regular bail and application dated 18.2.2014 of Shri Kishor N. Rathi, seeking grant of anticipatory bail. As per both the sides, these applications are based on same factual matrix and legal position.

Briefly stated, the prosecution case is that there was factor agreement consisting of M/s Maven Industries (manufacturer), M/s Jayesh Oil (buyer) and IFCI Factors Ltd. (factor). As per the said agreement of factoring, the goods to be manufactured by Maven were to be purchased by Jayesh and for the cost of manufacturing, IFCI advanced a loan of approximately rupees five crores, which dues have now risen to the tune of rupees eight crores. It is further the case of the prosecution, on the complaint lodged by IFCI that the said two companies fabricated and forged records of sale/purchase of the oil and created false accounts to reflect that Maven had delivered the goods but Jayesh did not make payments and as per Jayesh, the goods were not even supplied, though Jayesh admitted the notice of assignment and bills of exchange also. The accused/applicants before this court are the two Directors of Maven Industries.

As per the accused persons, it was only a business transaction that unfortunately failed.

On last date, both the accused/applicants were directed to remain present in person but neither of them is present today. As regards absence of the said accused persons, two sketchy medical certificates of some paediatrician and gynaecologist of Ambedkar Chowk, Nagpur have been filed. Neither of the said certificates inspire confidence, for want of any attendant medical record. It appears that both the accused/applicants have deliberately not appeared today, despite the fact that the applicant Shri Ashok Rathi was on interim protection granted while he was in judicial custody.

As reflected from records, the accused Shri Ashok Rathi in the course of hearing on his bail application on 17.7.2013 represented before my predecessor court that since he was in jail, he could not make efforts to settle the matter, so he be released on interim bail and assured to join mediation proceedings. The accused Shri Ashok Rathi, to show his bonafide also undertook to pay a sum of rupees twenty five lacs to the complainant to refurbish the public money of more than rupees five crores. Prior to 17.7.2013 also, this application was repeatedly listed before my learned predecessor. Apparently, in view of the above submissions on behalf of accused Shri Ashok Rathi, my learned predecessor was persuaded to grant interim bail to the accused till 07.8.2013 only in order to enable him to settle the matter. It is informed by both the sides that towards payment of the said amount of rupees twenty five lacs, even one of the cheques issued by the accused got bounced for the reason of stop payment, though subsequently, the amount of the bounced cheque was paid but till date, as against the original loan of more than rupees five crores, only rupees forty lacs has been paid as per both the sides.

Today, learned counsel for accused/applicants submitted that despite efforts, the accused/applicants have not been able to arrange money and are not in a position to pay. Learned counsel for accused/applicants also contended that what is to be seen today is only the efforts of the accused/applicants and that the accused/applicants never assured to pay the entire amount pursuant to the interim bail. This submission of learned counsel is contrary to record in so far as, before my learned predecessor, admittedly the accused/applicant Shri Ashok Rathi gave an affidavit, stating on oath that an amount of rupees twenty five lacs would be paid by 30.1.2014 followed by rupees one crore fifty lacs by 25.3.2014 and balance by 25.6.2014. Also admittedly till date, the amount payable by 25.3.2014 has not been paid. Rather, the accused/applicants have flatly expressed that the said amount cannot be paid. As per learned counsel for accused/applicants, the said undertaking was given under misconception of facts that they could sell away their property mentioned in the undertaking but subsequently discovered that the said property is owned by about 15 persons, while at the time of purchase the accused/applicants were informed that the property could be sold to them by only two persons. Admittedly, despite having come to know about the above mentioned fraud, the accused/applicants have not lodged any complaint in that regard.

Learned counsel for the complainant through learned APP strongly opposes the applications, citing the judicial precedents to the effect that such an act rather amounts to stealing the bail order. As per learned counsel for the complainant, the court have to be conscious of an effort by such applicants who initially persuade the court to grant interim relief on the basis of promises which never get fulfilled and then the permanent relief is sought.

In the case of M.R. Narayanan vs. State, reported as 2003 Crl.L.J. 1472, a division bench of Hon'ble Delhi High

Court recapitulated the various judicial pronouncements and laid down the distinction between a case in which bail is granted subject to some condition imposed by the court and a case in which bail is granted by the court on being persuaded by some assurances given by the accused. The Hon'ble Court held that when a court is persuaded to accept the terms and conditions for grant of indulgence, it will not be permissible for the party to later on resile from the said terms and conditions. Rather in the case of Shikha Bhatia vs. Gaurav Bhatia, reported as 178 (2011) DLT 128, relied upon by the prosecution side, the Hon'ble Delhi High Court observed that if the respondent of that case was allowed to resile from the settlement, recorded on the basis of expressed representation of the respondent, relying on which the court considered the anticipatory bail application favourably, it would amount to allowing the respondent to steal an order of bail from the court and interfering in the course of justice.

In the course of arguments, when it came out that the accused/applicants are unable to pay back the public money in terms of their assurances, I also heard both sides as regards merits of the case, irrespective of failure of accused/applicants to fulfil their assurances.

Learned counsel for accused/applicants in this regard submits that the accused/applicants have a right to be released on bail on the principles of parity since the director of Jayesh Oil also has been granted regular bail. It is further submitted by learned counsel that the bail proceedings are not akin to civil suit, so recovery of money cannot be the criteria.

Per contra, from prosecution side, it is pointed out that in the present day scenario, even the Hon'ble Supreme Court has come down heavily on organisations like Sahara Group, where large scale money is involved, courts have to be cautious. In response to a specific query, the IO submits *that investigation was till date kept in abeyance on the assurance of the accused/applicants to pay and now the investigation has to proceed further for trailing down the money taken by the accused persons. It is also informed that the accused Ashok Rathi has been declared proclaimed offender in a Gurgaon court and even in the present court, neither of the applicants have been appearing for long.*

As regards the issue of parity with the director of Jayesh Oil, admittedly even the said bail was granted by my predecessor court on the basis of another parity that accused Ashok Rathi had been granted interim bail. That interim bail having been granted on the basis of an assurance which not fulfilled, the present application cannot be taken as a matter of parity with the director of Jayesh Oil.

There is certainly no dispute that the criminal court is not a forum for recovery of money. But at the same time, a clear distinction has to be kept in mind between private money and public money. What has been taken away by the accused persons is the public money. It is not the question of amount of money involved. It is the texture of money involved, which is public money in this case. It also cannot be ignored that the accused/applicants obtained indulgence of my predecessor by promising through an undertaking to pay back the entire public money, which has not been adhered to.

Further, accused/applicants are powerful industrialists and there is a reasonable apprehension expressed by the IO that if granted bail, the accused/applicants will interfere in the investigation, especially trailing down the money. As mentioned above, it is not a case of loan simplicitor which was not paid back and hence mere civil liability. It is a case of alleged fraud and forgeries, which have to be investigated into.

In view of above discussion, in my considered view neither Ashok Rathi is entitled to be on bail nor accused Kishor N. Rathi deserves to be granted anticipatory bail. Since accused Ashok Rathi was already in custody at the time of grant of interim bail and even period of that interim bail has expired but despite directions, Shri Ashok Rathi did not appear today, he is directed to surrender immediately before the IO and be arrested.

Both the applications are dismissed."

7. After the order dated 29th March, 2014 Ashok Rathi failed to surrender and was finally taken into custody on 22nd November, 2015. Ashok Rathi filed the second bail application after spending more than three months in custody which was dismissed vide order dated 3rd March, 2016. After remaining in custody for six and a half months respondent No.2 filed a third bail application in which bail was granted vide the impugned order by the learned Chief Metropolitan Magistrate as under:

"1. By this order, I shall dispose of the application filed on behalf of accused/applicant Ashok Rathi u/s 437 Cr.PC for grant of bail.

2. Briefly stated, the facts of the prosecution case are that there was a factor agreement consisting of M/s Maven Industries (Manufacturer), M/s Jayesh Oil (Buyer) and IFCI Factors Ltd. (factor). As per the factoring agreement, the goods to be manufactured by Maven were to be purchased by Jayesh Oil and towards the cost of manufacturing, IFCI agreed to advance a loan of about 5 crore rupees. It is further stated that a complaint was lodged by IFCI therein stating that two companies as above noted fabricated and forged records of sale/purchase of oil and created false accounts to reflect that M/s Maven had delivered the goods to M/s Jayesh Oil and that M/s Jayesh did not make *payments towards it. As per M/s Jayesh, the goods were not even supplied, though there was an admission of notice of assignment and bills of exchange. It is in the context of this complaint that the present case FIR was registered and investigated. The investigation has culminated into filing of the charge sheet inter alia against the accused applicant Ashok Rathi for the offence punishable u/s. 406/409/420/467/468/471/477A/120B IPC. The present accused Ashok Rathi is one of the Directors of M/s Maven Industries Ltd. and as such has been instrumental in cheating the complainant by fabricating and forging documents and falsifying its accounts.*

3. Ld. APP for the State, Ld. Counsel for the complainant and Ld. Counsel for the accused/applicant were heard at length and the file was carefully perused.

4. Ld. Counsel for the complainant through Ld. APP has strongly opposed the bail application primarily on the grounds of severity of the offence, of the conduct of the accused and that the investigation qua the money trail is still pending.

5. Ld. Counsel for the accused/applicant, on the other hand, in his arguments made a reiteration of the averments of the bail application to the extent that applicant is not a previous convict and as such there is no chance of his absconding or tampering with the evidence. Further, after the dismissal of the earlier bail application on 03.03.2016, there has been no further investigation in the matter and as such accused cannot be kept in judicial custody for any further period as a punitive measure. While so arguing, Ld Defence Counsel placed reliance on the judgement of Hon'ble High Court of Delhi in Jitender Kumar Vs. Govt. of NCT of Delhi, 2016 (1) 3JCC 652.

6. The law is well settled that the Court granting bail should exercise its discretion in a judicious manner and not *as a matter of course. Though at the stage of granting bail, a detailed examination of evidence and elaborate documentation of the merits of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted, particularly, where the accused is charged of having committed a serious offence.*

As can be seen, while dismissing the earlier bail application of the accused/applicant vide order dated 03.03.2016, it was observed that the accused/applicant is not entitled to bail not only on the grounds of grave allegations but also that the investigation qua the other suspects and the money trail is still being carried out. Subsequent thereto and till the date when the arguments on the bail application were advanced, there was absolutely nothing having been done in further investigation by the IO. Almost two months have passed since then. IO who was present during the course of hearing on the bail application submitted that as he remained on leave, therefore, further investigation could not be carried out. He submitted that he would take up the further investigation and would carry it out expeditiously. Be that as it may, for having nothing been done by the IO qua further investigation ever since the bail application of the accused/applicant was earlier dismissed, accused cannot be kept in custody endlessly only for the reason that further investigation is still pending when evidently there was sufficient time and opportunity with the IO to conclude it. Also, in Sanjay Chandra Vs. CBI, 2012 (1) SCC 40, Hon'ble Supreme Court held that "the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventive. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The Court owe more than verbal respect to the principle that punishment begins after conviction, and that every men is deemed to be innocent until duly tried and duly *found guilt". Though nature of accusation and the severity of punishment in case of conviction as well as reasonable apprehension of tampering with the witnesses are some of the important considerations while granting or refusing bail but in the case in hand, one cannot forget that sufficient time and opportunity was given to the prosecution to conclude the further investigation and to bring on record material further nailing down the accused vis a vis the offence in question. Nothing has been so done. Considering these facts, the accused/applicant has become entitled to bail. For these reasons, the bail application is allowed and the accused/applicant Ashok Kumar Rathi is directed to be released upon his furnishing bail bond in the sum of Rs. One Lac with one surety of the like amount. The grant of bail is further subject to the condition : (a) That the accused shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him to disclose such facts to the court or to any other authority; (b) the accused shall remain present before the Court on all dates and shall not absent himself for two consecutive dates without any plausible explanation; (c) if the accused has a passport, the same shall be surrendered immediately by him with the Court; (d) that the accused shall participate in the further investigation and would offer all assistance to the IO; and (e) that the accused shall not leave the country without seeking prior approval of the Court.*

Should the applicant violate any one of the terms and conditions stated above, it would be open for the prosecution to move an application for cancellation of his bail. Ordered accordingly.

8. As noted above the grounds taken by the petitioner to challenge the impugned order dated 9th May, 2016 and seeking cancellation of bail of respondent No.2 are threefold, that is, the offence is serious for the reason

public fund to the tune of Rs.12.62 crore was involved, the conduct of the respondent No.2 and by grant of regular bail the money trail cannot be now investigated. The offences alleged against the petitioner are under Sections 406/409/420/467/468/471/ 477A/120B IPC. Except for the offences punishable under Section 409/467 IPC the maximum punishment that can be awarded is imprisonment which may extend to 7 years or with fine or both. Undoubtedly, the loan amount is high but that would not entail that the respondent No.2 should be kept in jail indefinitely till the conclusion of the trial due to the failure of respondent No.2 to surrender after dismissal of his first bail application. He has been in custody for nearly eight months. Discretion has been exercised by the learned CMM by imposing stringent conditions as noted above so that the presence of respondent No.2 is ensured during trial.

9. Merely because the petitioner is a government company, the bail of the respondent cannot be cancelled. As held in the decision reported as 2012 (1) SCC 40 *Sanjay Chandra vs. CBI* no doubt, true that the nature of the charge may be relevant, but at the same time, the punishment to which the party may be liable, if convicted, also bears upon the issue. Therefore, in determining whether to grant bail, both the seriousness of the charge and the severity of the punishment should be taken into consideration. Supreme Court also noted that despite the charge being of economic offence of high magnitude, which, if proved, may jeopardise the economy of the country, at the same time investigation was complete and charge-sheet had been filed, the presence of the accused for further investigation was not necessary and stringent conditions while granting bail were being imposed to allay the apprehension of CBI, the accused therein had spent six months in custody

and they could not be kept in custody for indefinite period.

10. Considering that the respondent No.2 was in custody from 3rd June, 2013 till 17th July, 2013, that is, for a period of around 1½ months and thereafter from 22nd November, 2015 to 9th May, 2016 having spent nearly eight months in pre trial detention; charge sheet has already been filed; no further police custody of the respondent No.2 can be sought; stringent conditions have already been imposed on the respondent No.2 while granting bail for the reason that earlier he did not surrender despite the interim bail granted having expired; I find no perversity in the impugned order.

11. Petition is dismissed.

MUKTA GUPTA, J.

AUGUST 05, 2016
'vn'