

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISC APPLICATION (BAIL) NO. 215 OF 2017

Mr. Shaikh H. Mohammed
S/o Mohammed Shaikh
Age 30 years,
R/o House No-204,
Behind Shafi Masjid,
Katembaina,
Vasco Da Gama Goa.

...Applicant/Petitioner

Versus

State of Goa (through)

- 1 Police Inspector
Incharge of Porvorim Police
Station
Porvorim Bardez Goa.
- 2 The Public Prosecutor
High Court of Bombay at Goa.
High Court Building, Althino
Panajim, Goa.

...Respondents

Shri Rohan P Dessai, Advocates for the Applicant.

Shri P. Faldessai, Additional Public Prosecutor for the respondents.

CORAM: NUTAN D. SARDESSAI, J.

Reserced on : 28th September 2017

Pronounced on : 5th October 2017

ORDER :-

1. Heard Shri Rohan P. Dessai, learned Advocate for the applicant and Shri P Faldessai, learned Additional Public Prosecutor for the respondents.

2. The applicant seeks bail in anticipation of arrest in the Crime No.24/2017 under Section 420 IPC of the Porvorim Police Station under Section 438 of Cr.PC. on the apprehension that he had not committed any crime and that he was apprehending his arrest at their hands. The order passed by the learned Additional Sessions Judge-I, Fast Track Court, Mapusa was illegal, perverse and unsustainable in law and the learned Judge had not appreciated the material on record in its correct perspective and dismissed the application. It was the contention of Shri Desai, learned Advocate for the applicant that the complaint was lodged more than a month and half later from the alleged incident. No notice was issued to him as required under Section 41A Cr.P.C. and yet the learned Additional Sessions Judge held him to be an absconder and on that premise held that he was not entitled to the benefit of bail apart from being influenced by the value of the goods to deny him the said benefit. It was further his contention that there was no material evidence on record that the vitrified tiles of which he was alleged to have taken possession were at all in existence with the complainant in the stated quantity. Initially, the respondents had opposed the bail application before the Additional Sessions Judge on the premise that he was

absconding and that his presence was required in another crime of a similar nature in the Vasco Police Station and to recover the boxes of vitrified tiles numbering 895 which he had purchased from the complainant by cheating him. Subsequently, in the reply filed before this Court, the respondent had set out a plea for the first time that the witness Chandrashekar Shirodkar who had received the Delivery Challan from the applicant had corroborated the case of the complainant and which was after a lapse of more than 8 months from the date of alleged incident. The respondent was seeking his custodial interrogation to recover the boxes of vitrified tiles and as there was a possibility of more number of persons being involved in the crime. He placed reliance in **Arnesh Kumar v State of Bihar and another** [(2014) 8 SCC 273], **Siddharam Satlingappa Mhetre v State of Maharashtra and others** [(2011)1 SCC 694], **Rakesh Baban Borhade v State of Maharashtra and Anr** [2015 ALLMR (Cri) 3935 (SC)], **Shashikant Piraji Sonawane v The State of Maharashtra** [2016 All MR (Cri) 2891], **Ravindra Saxena v State of Rajasthan** [(2010) SCC 684], **Maulana Mohammed Amir Rashadi v State of Uttar Pradesh and another** [(2012) 2 SCC 382] and **Harsh Sawhney v Union Territory**

(Chandigarh Admn)[1978 (2) SCC 365] to support his case for his release on bail. The present case was a clear fallout of a business gone haywire and the possibility of false implication could not be ruled out more particularly when no bills, tax invoices etc. were produced by the complainant.

3. Shri P Faldessai, learned Additional Public Prosecutor contended that Section 41A Cr.PC was attracted only in case where arrest was not required. It was also not the case of the applicant that the police were harassing him. There were more number of persons involved in the crime whose whereabouts were yet to be confirmed and therefore looking to the gravity and the seriousness of the crime, he was not entitled to the benefit of such order. Moreover, there was another similar offence registered against the applicant at the Vasco Police Station and on that premise too and looking to the aspect that there was a series of such offences, the applicant was not entitled to any favourable order.

4. i have considered the contentions of Shri Dessai, learned Advocate for the applicant and Shri P. Faldessai, learned

Additional Public Prosecutor, the Judgments relied upon and the nature of the investigation carried out thus far.

5. Section 41 Cr.P.C. deals with the powers of the police to arrest without warrant and enlists the circumstances in which arrest could be made without warrant. Section 41A Cr.P.C. which has been introduced by the Amendment Act, 2008 requires a prior notice to be issued to an accused for appearance before the Police Officer. It opens with the words, the police officer shall, in all cases where the arrest of a person **is not required under the provisions of sub-section (1) of section 41**, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice. Therefore, on a bare reading of Sections 41 and 41A of the Act it is abundantly clear that it is the discretion of the Police Officer to issue such a notice in terms of Section 41A Cr.P.C. where the arrest of a person is not required under the provisions of sub-section 1 of Section 41 and considering the powers to arrest any person without warrant and in the circumstances enumerated

thereunder. Therefore, the contention of Shri R. Desai that he was not issued any notice under Section 41A Cr.P.C. cannot operate as a bar to his custodial interrogation in the event the police are able to make out the case that they can invoke their power of arrest in terms of Section 41 Cr.P.C. It is only where the police not require the arrest of the person in terms of a Section 41A Cr.P.C. that the notice will be issued in terms of section 41A Cr.P.C. for his appearance before the Police Officer and it is not as if it is a *sine qua non* in all cases without exception. Therefore, it is not open to the applicant to canvas a plea that no notice was issued to him under Section 41A Cr.P.C. and/or that the learned Additional Sessions Judge was not justified in recording a finding that he was reported to be absconding.

6. In **Siddharam Mhetre** (supra), the Hon'ble Apex Court held that Section 438 Cr.P.C. is not extraordinary in the sense that it should be invoked only in exceptional or rare cases. A great ignominy, humiliation and disgrace is attached to the arrest. In cases where the court is of the considered view that the accused has joined investigation and he is fully cooperating with the investigating agency and he is not likely to abscond, in

that event, custodial interrogation should be avoided and the anticipatory bail should be granted which after hearing the Public Prosecutor should ordinarily be continued till the end of the trial. The Hon'ble Apex Court while laying down the various factors and parameters to be taken into consideration while dealing with the Anticipatory bail at paragraph 112 noted namely the nature and gravity of the accusation and the exact role of the accused in the proceedings, the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction, the possibility of the applicant fleeing from justice or repeat similar or other offences. It also considered another factor namely that while considering the prayer for grant of anticipatory bail that a balance had to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused, amongst others.

7. **Ravindra Saxena** (supra), was before the Hon'ble Apex Court on rejection of his application for anticipatory bail for the third time by the High Court of Rajasthan, Jaipur Bench. The complaint was lodged against him and FIR was registered under

Sections 420, 467, 468 and 120B IPC on the premise that the complainant had agreed to purchase the flats from the appellant for which the necessary consideration was received by the accused Nos.1 and 2 which was subsequently sold to the another person. In the facts of that case, the appellant with his father and other family members were named as the accused in the FIR which according to them was taken over by ASI Samunder Singh who happened to be a close relative of the complainant and the criminal process was abused at his instance. It was pointed out at the time of the hearing that the complainant was a property dealer, the parties were well known to each other and had commercial transactions and that the criminal complaint was filed in order to pressurise the appellant not to pursue the civil litigation pending between the parties. Besides, the complainant had filed a suit for specific performance which he was pressurised to compromise and in which he filed an anticipatory bail application which came to be rejected by the Sessions Judge and then by the High Court which also rejected the petition for quashing the FIR and the subsequent bail application and the third on the premise that the case of the petitioner could not be said to have improved with the filing of the challan against him when prima facie case

has been found against the petitioner - accused. In that view of the matter, the Apex Court was of the considered opinion that the approach of the High Court was wholly erroneous and the application for anticipatory bail was rejected without considering the case of the appellant solely on the ground that the challan had been presented. The High Court erred in not considering the application for anticipatory bail in accordance with law and allowed the bail.

8. In **State of Maharashtra** (supra), the learned Single Judge of this Court at Aurangabad Bench held in a case of an offence of forgery and cheating that the claim of the Police that the custody of the applicant was required for the purpose of investigation could not be a ground for refusing anticipatory bail. The applicant could be directed to appear before the Police Officer whenever required and in that view of the matter granted anticipatory bail.

9. In **Maulana Rashadi** (supra), the accused, a sitting Member of Parliament was arrested and was in jail since 24/09/2009. A charge-sheet was filed against him under Sections 302 and 307 IPC on 15/07/2010 and thereafter the

prosecution had examined two witnesses till 26/07/2010. The appellant contended that the accused was a habitual criminal with more than three dozen criminal cases involving serious offences against him. The appellant received threats from the accused and his supporters warning him not to pursue the case against him. Most of the cases against the accused had ended in acquittal for want of proper witnesses or pending trial. The High Court observed that merely on the basis of criminal antecedents, the claim of the accused could not be rejected and the Court had to find out the role of the accused in the case in which he had been charged and other circumstances such as possibility of fleeing. The Apex Court while dismissing the appeal held that the High Court while granting the conditional bail to the accused had imposed several conditions which provided sufficient safeguard in respect of the apprehension of arrest by the appellant and upheld the bail.

10. In **Harsh Sawhney** (supra), the Hon'ble Apex Court in the facts of the case held that the bail should be granted observing that the principles bearing on grant or refusal of bail had already been explained by it in **Gurucharan Singh v. State (Delhi Admn)** (AIR 1978 SC 179). on the basis of that

decision this was clearly a case where the appellant was entitled to bail and allowed the bail.

11. Coming to the facts of the case, the incident giving rise to the complaint against the applicant was sometime in November 2016 and followed in December 2016 while the offence was registered only on 16/02/2017 based on the information received on 13/02/2017. What is available as a material circumstance against the applicant is the statement of one Chandrashekar Shirodkar which indicates that the applicant had sometime in November 2016 come to Saligao showroom for selecting tiles and thereafter he had finalised the tiles. The applicant had come to their office at Defence Colony, Porvorim to complete further formalities and when the deal of supplying 895 boxes was finalised. His statement indicates that the applicant had signed the Delivery Challan and when asked about the payment, had sought for time to make the full payment of about ₹6,50,000/- to ₹7,00,000/-. A perusal of the investigation papers leaves much to be desired inasmuch as there is nothing forthcoming since the filing of the complaint to the registration of the offence and till 6-7 months later when the application has come at the instance of the applicant seeking his bail in

anticipation of arrest. For that matter as rightly contended by Shri R. Desai, learned Advocate for the applicant there is only a Delivery Challan and no material to indicate when at all the complainant had placed an order with his stockist in Gujarat and received the order. None of these documents form a part of all the investigation records and which leaves a lot of scope of prevarication.

12. It appears that there was a breach of contract between the applicant and the complainant and that the transaction had a civil flavour which is sought to be criminalised pursuant to the complaint setting the criminal law in motion. Although it has been the contention of Shri P. Faldessai, learned Additional Public Prosecutor that the applicant had criminal antecedents, there is no such material forthcoming even on the records of investigation except for the bare statement in reply to the application of bail. In any event, considering the law on the point as laid down in Mhetre and the other Judgments and in the absence of any criminal antecedents, there is no reason to withhold the relief in the applicant's favour.

13. Looking to the tenor of the investigation, that there has been no progress whatsoever in the investigation and positively not attributable to the applicant. i do not see any reason why the applicant should not be given the benefit of bail in anticipation of arrest. He could always be put to terms to ensure that he cooperates with the course of investigation and assists in its further progress. i, therefore, allow the application and pass the following:

O R D E R

(i) In the event of arrest the applicant shall be enlarged on bail on executing a Bail Bond in the sum of ₹15,000/-(Rupees Fifteen Thousand Only) with one local surety in the like amount to the satisfaction of the Investigating Officer.

(ii) He shall report at the Police Station for a period of five (5) days w.e.f. from tomorrow between 10.00 hrs to 13.00 hrs and further if called upon to facilitate the course of investigation.

(iii) He shall not tamper with the witnesses or otherwise hinder the course of investigation.

(iv) He shall also not leave the State of Goa without

the prior written permission of the Investigating Officer.

(v) The application stands disposed off in the aforesaid terms.

(vi) Parties to act upon the authenticated copy of this order.

NUTAN D. SARDESSAI J.

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