

**IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPLICATION (BAIL) NO.160 OF 2017**

Mr. Ritesh Mahale

... Applicant

Versus

The State of Goa,
through Public Prosecutor.

... Respondent

Shri Ryan Menezes, Advocate for the Applicant.

Shri Mahesh Amonkar, Additional Public Prosecutor for the Respondent.

Coram:- NUTAN D. SARDESSAI, J.

Reserved on :- 10th August, 2017

Pronounced on:-11th August, 2017

ORDER :

Heard Shri Ryan Menezes, learned Advocate for the applicant who submitted at the outset that at the highest the offence under Section 403 IPC and not 405 IPC was attracted to the case at hand. The amount allegedly misappropriated was ₹75.00 lakhs and from which an amount of ₹5.00 lakhs was repaid by the applicant. In his contention, the offence under Section 405 IPC was not at all attracted to the case. Even assuming without admitting that Section 405 IPC was attracted, it was his contention that the respondent had to follow the guidelines laid down in **Arnesh Kumar V/s. State of Bihar & Anr. [AIR 2014 SC 2756]**. It was his further contention that even considering the grounds urged by the respondent, there was no basis for the custodial interrogation of the applicant and when he had no books, etc. in his

custody. No case whatsoever was made out for custodial interrogation and therefore he had to be given the benefit of bail in anticipation of arrest. He relied in **Bhadresh Bipinbhai Sheth V/s. State of Gujarat & Anr. [2015 AIR (SC) 3090]** and **Siddharam Satlingappa Mhetre V/s. State of Maharashtra & Ors. [2011 AIR(SC) 312]**.

2. Shri M. Amonkar, learned Additional Public Prosecutor on behalf of the respondent contended that the amount misappropriated by the applicant was not restricted to ₹75.00 lakhs alone but the amount was approximately ₹4.00 crores. The judgment in **Arnesh Kumar** (supra), was clearly distinguishable and not applicable to the case of the applicant. In so far as a pre-arrest notice under Section 41 was concerned, it was his submission that the applicant was concealing himself from the date of the registration of the offence and not submitting himself to interrogation. No case whatsoever was made out for the grant of bail in anticipation of arrest. Besides, the applicant was under a duty to deposit the amounts received by him and which details were not at all accessible to the Police. The applicant was therefore not entitled to any liberty and the bail application had to be

dismissed. A bare reading of the complaint would indicate that the applicant as the then employee of GSHCL was engaged in the service of collection of fund from the supervisors towards the supply of vegetables and grocery items in mobile cars and was to deposit the same in the account of the Corporation at the assigned branch and submit the records to the Department which accounts were administered and monitored by their Panaji office. The applicant instead had breached the trust and had misappropriated large sums then estimated at ₹75.00 lakhs and had committed the offence of criminal breach of trust punishable under Section 405 IPC.

3. Shri R. Menezes, learned Advocate tried to bring his case within the predicates of Section 403 IPC on the premise that assuming the case of the respondent was true, he was at the highest liable in terms of Section 403 IPC and that he could not be said to be entrusted with any property or with the dominion over the property which he could misappropriate or convert to his own use as to attract the offence under Section 403 IPC. A reading of the complaint does not at all support his contention and therefore his plea on that count

fails.

4. **Bhadresh** (supra), challenged in appeal the validity of the judgment passed by the High Court of Judicature at Gujarat cancelling the anticipatory bail granted to him by the Additional Sessions Judge, Ahmedabad City Sessions Court. The complainant had made allegations of rape, emotional blackmail and threats against the appellant after writing a complaint to the Assistant Police Commissioner, Crime Branch, Ahmedabad City on 29/05/2011 and the statement was recorded on 31/05/2001. However, in this statement which was recorded by the Investigating Officer, the allegations of rape were conspicuously missing. An FIR was registered on the basis of the statement made on 31/05/2001 and charge under Section 506(2) of IPC and the appellant was admitted to bail. In 2010, she made an application for addition of charge under Section 376 IPC and the Metropolitan Magistrate held that the application should be taken into consideration only after chief examination of the complainant which order was challenged before the Court of City Sessions Judge at Ahmedabad who remanded the matter back to the Metropolitan Magistrate with a direction to hear the

application afresh after giving an opportunity to both the parties.

5. In **Bhadresh** (supra), the Metropolitan Magistrate directed the Police to carry out special investigation under Section 173 (8) Cr.P.C. which was challenged by both the parties and the matter travelled upto the Apex Court. Ultimately, a revised chargesheet was filed by the Police stating that a prima facie case was made out under Section 376 IPC and accordingly the Magistrate passed an order for committal of the proceedings to the Court of Sessions and taking the appellant in custody. This order was stayed and in the meantime he moved for the grant of anticipatory bail which was ultimately granted. The complainant filed the revision petition which was allowed by the High Court cancelling the anticipatory bail granted to him and questioned in appeal before the Hon'ble Apex Court. In the background of the facts of the case the Hon'ble Apex Court laid down several guidelines one of them being that no inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail because all circumstances and situations of future cannot be clearly visualised for the grant

or refusal of anticipatory bail. In consonance with the legislative intention, the grant or refusal of anticipatory bail should necessarily depend on the facts and circumstances of each case.

5. **Siddharam S. Mhetre** (supra), dealt with the issues pertaining to the importance of an individual's personal liberty and society's interest and in that context dealt with its Constitution Bench judgment in **Sibbia's** case where certain principles were laid down with regard to the anticipatory bail. Some of the principles which were reiterated were that while considering the prayer for the grant of anticipatory bail, a balance had to be struck between two factors namely that 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. The Court had to consider the reasonable apprehension of tampering of the witness or apprehension of threat to the complainant. Arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of the case and these being some of the factors which should be

taken into consideration while deciding the anticipatory bail application.

6. In **Arnesh Kumar** (supra), the Hon'ble Apex Court observed at para 14 as follows:

"14. Our endeavour in this judgment is to ensure that police officers do not arrest accused unnecessarily and Magistrate do not authorise detention casually and mechanically. In order to ensure what we have observed above, we give the following direction:

(1) All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A of the IPC is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41, Cr.P.C.;

(2) All police officers be provided with a check list containing specified sub- clauses under Section 41(1)(b)(ii);

(3) The police officer shall forward the check list duly filed and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;

(4) The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;

(5) The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of police of the district for the reasons to be recorded in writing;

(6) Notice of appearance in terms of Section 41A of Cr.PC be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the District for the reasons to be recorded in writing;

(7) Failure to comply with the directions aforesaid shall apart from rendering the police officers concerned liable for departmental action, they shall also be liable to be punished for contempt of court to be instituted before High Court having territorial jurisdiction.

(8) Authorising detention without recording reasons as aforesaid by the judicial Magistrate concerned shall be liable for departmental action by the appropriate High Court."

The Apex Court gave directions one of them being to serve a notice of appearance in terms of Section 41A of Cr.P.C. to be served on the accused within two weeks from the date of the institution of the case. These directions were to apply not only to cases under Section 498-A or Section 4 of the Dowry Prohibition Act, but also to such cases where the offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years; whether with or without fine.

7. Coming to the facts of this case, the applicant was alleged to have misappropriated an amount not less than ₹75.00 lakhs and which was extending to ₹4.00 crores as per the contention of the learned Additional Public Prosecutor on

behalf of the State and confirmed from their records of investigation. Although it has been the mandate in **Arnesh Kumar** (supra) that the notice under Section 41A Cr.P.C. was required to be given to the applicant, the statement made by the learned Additional Public Prosecutor across the bar that the accused had gone in hiding and was not making himself available to serve him with such a notice was not seriously disputed or rebutted on behalf of the applicant. Even otherwise, the applicant has submitted himself to the jurisdiction of this Court only by the present application but without showing any bonafide of his intention to co-operate with the course of the investigation but for bare statements to that effect. The records also bear out that the applicant had not been accessible to the Police much less the amount which he had allegedly misappropriated and that besides the relevant books and registers were required to be attached at his instance.

8. Shri R. Menezes, learned Advocate for the applicant on inquiry submitted that a substantial amount was spent by the applicant towards the medical treatment of his wife who was in the family way and in that context placed on record the

pathology reports and those of the diagnostic laboratory apart from the Discharge Card of a case centre. None of these records in any manner justify much less substantiate his case that considerable amounts were spent by him towards the treatment of his wife. In any event, the nature of the offence alleged against him is serious in nature for which just the presence of the applicant reporting at the Police Station would not suffice and his custodial interrogation would be the need of the hour to unearth the gravity of the crime and recover the documents including the money allegedly misappropriated by him. Even considering the guidelines laid down in **Siddharam** (supra), which reiterated those in the Constitution Bench judgment of **Sibbia's** case, the applicant would not be entitled to the benefit of bail in anticipation of arrest and in view thereof the application is found lacking in merits and is hereby dismissed. It goes without saying that the applicant shall surrender to the custody of the respondent and co-operate with the course of investigation.

NUTAN D. SARDESSAI, J.

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