Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

ANTICIPATORY BAIL APPLICATION No. 1843 OF 2016

Rajesh Tulsidas Nakhua ... Applicant
Vs.
1. The Senior Inspector of Police
DCB, CID, Crime Branch, Mumbai
2. The State of Maharashtra ... Respondents

WITH
CRIMINAL APPLICATION NO. 965 OF 2016
IN
ANTICIPATORY BAIL APPLICATION No. 1843 OF 2016

Mrs. Nutan Lalit Mange … Intervener
in the matter between
Rajesh Tulsidas Nakhua ... Applicant
Vs.
1. The Senior Inspector of Police
DCB, CID, Crime Branch, Mumbai
2. The State of Maharashtra ... Respondents

A/W.
ANTICIPATORY BAIL APPLICATION No. 1802 OF 2016

Miraa Devendra Chandan ... Applicant
Vs.
1. The Senior Inspector of Police
DCB, CID, Crime Branch, Mumbai
2. The State of Maharashtra ... Respondents

WITH
CRIMINAL APPLICATION NO. 966 OF 2016
IN
ANTICIPATORY BAIL APPLICATION No. 1802 OF 2016

Mrs. Nutan Lalit Mange … Intervener
in the matter between

Miraa Devendra Chandan ... Applicant
Vs.
1. The Senior Inspector of Police
DCB, CID, Crime Branch, Mumbai
2. The State of Maharashtra ... Respondents

Mr. Rizwan Merchant a/w. Mr. Swapnil Wagh i/b. Rizwan Merchant & Assciates, Advocate for the applicant in ABA/1843/2016.
Mr. Shirish Gupte, Senior Advocate i/b. Mr. Swapna P. Kode, Advocate for the applicant in ABA/1802/2016.
Mr. Aabad Ponda i/b, Dr. Pravin Singhal, Advocate for the intervener in APPP/966/2016 and APPP/965/2016.
Mr. S.K. Shinde, Spl. P.P. a/w. Mr. Sooraj S. Hulke, APP for the State.
Mr. Mahendra Ghag, A.P.I., DCB, CID, Unit-VI, Chembur, Mumbai.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE: **24th March, 2017.**

P.C.:

Anticipatory Bail Application No. 1843 of 2016 is moved by the applicant/accused Rajesh Nakhua under section 438 of Cr. P.C., as the applicant-accused is apprehending arrest in C.R. No.403 of 2016 registered with Powai Police Station, Mumbai for offences punishable under sections 420, 385, 465, 467, 506 and 120B of IPC. The offence was registered at the instance of one Nutan Lalit Mange.

2. It is the case of the prosecution that the applicant/accused Rajesh Nakhua is a distant relative and brother-in-law of the complainant. Her husband was having a partnership with the applicant/accused. Earlier, the applicant was residing in the house of

husband of the complainant as a family member. It is the further case of the complainant that in June 2015, the applicant/accused informed her that her husband was having an illicit relationship with one lady working as CEO in the firm of her husband. After few days, the applicant Rajesh visited the house of the complainant and showed some photographs of complainant's husband with the lady (CEO). Thereafter, the applicant/accused contacted some other person and got it confirmed that the husband of complainant and the lady (CEO) were in fact having illicit relationship and he convinced the complainant that he along with the co-accused Miraa Chandan was collecting information through one private detective. Thereafter, the applicant/accused Rajesh started giving some information continuously to the complainant about her husband in respect of the alleged illicit relationship. The applicant/accused, in the month of July informed her that her husband has purchased a house for the lady and her husband was dancing to the tunes of the CEO lady. Her husband was also likely to gift the lady all the ornaments of the complainant. The applicant/accused further suggested that the complainant can secure her ornaments by handing over the same to him so that he will keep those ornaments in the locker.

3. It is the further case of complainant that she was completely carried away by the allegations made by the applicant/accused about her husband and trusted the applicant. He along with her brother Divyang went to the bank and took her diamond ornaments and gold biscuits valued at about Rs.3 Crores from the locker of the bank and gave the same to the accused Rajesh, who on the same date kept those ornaments in the locker owned by the co-accused Miraa Chandan. It is further alleged that the accused obtained few blank papers with her signatures for the purpose of writing description of the ornaments. However, he never returned those papers with the descriptions of ornaments. In September 2015, the complainant wanted some ornaments to attend one wedding. She, therefore, requested the applicant/accused to take out some ornaments from the locker. However, he avoided. Thereafter, the complainant requested the applicant/accused to return all the ornaments but the accused, on one pretext or the other, avoided. Thereafter, the complainant doubted the intentions of the applicant/accused and disclosed these facts to her husband in November 2015. The complainant and her husband both, thereafter, informed to her father in law about handing over the ornaments to the applicant/accused. Complainant's husband and father- in-law questioned the

applicant/accused about the ornaments. Though, initially the applicant accepted that the ornaments were with him, later on he denied. It is the case of the complainant that the applicant/accused carries a revolver with him and he threatened her of the dire consequences and even to kidnap her daughter and to bring the complainant to disrepute. It is then, the complainant approached Unit VII of Crime Branch on 19th January 2016 with a written complaint.

4. The written complaint was given to initially Unit VII of Crime Branch on 19th January 2016. However, unit VII did not register the offence against the applicant/accused Rajesh Nakhua. Thereafter, on 18th August 2016, the statement of the complainant was recorded by Unit VI Crime Branch and the offence was registered with Powai police station, Mumbai under C.R. No. 403 of 2016.

5. The learned counsel Mr. Merchant has submitted that the applicant/accused is innocent and he has not committed the offence. He submitted that the allegations made against the applicant/accused Rajesh Nakhua are false. He submitted that the ornaments were handed over to him by the complainant on 20th July,

2015 and he kept those ornaments in the locker of co-accused Miraa and again on 24th July, 2015 the ornaments were taken out from the locker by the applicant Rajesh and Miraa and he returned those ornaments to her in the month of August, 2015. Hence, there is no inducement, no cheating and so also no extortion. The learned has submitted that as per the case of the complainant, she has handed over few blank papers with her signature. He submitted that the applicant/accused is facing the charge of forgery, which is false. The document which is alleged to be forged in fact is truly signed by her. It appears the genuine signature of the complainant wherein the applicant/accused have written about returning the ornaments to the complainant. He relied on the handwriting expert report of Mr. B.S. Biradhar to whom the applicant/accused has sent the documents with the natural handwriting of the complainant and complainant's signature and Mr. Biradhar, who is having a private practice, gave the expert's opinion that the signature appearing on the questioned document is of none but the complainant. He has further submitted that the report obtained by the handwriting expert though is contrary to the opinion of Mr. Biradhar, but the report of Mr. Biradhar, which is in favour of the applicant/accused is required to be considered and to be given weightage at this stage. On the point of falsity, the prosecution has submitted that the complainant has first approached Unit VII of the Crime Branch and she gave written complaint dated 19th January, 2016, however, no offence was registered by Unit VII. On the contrary, a query was made by the police from Unit VII by issuing notice to the complainant asking explanation in respect of weight of the jewellery, documents and details of the jewels and from where and how the ornaments were purchased. He further submitted that as per the explanation given by the complainant, it was her streedhan which was gifted by her father at the time of wedding. He further argued that the complainant is born and brought up in a family having average economic status and therefore, Unit VII did not register any offence in this case. He submitted that all of sudden how Unit VI started investigating and fresh first information was recorded on 18th August, 2016 is a matter of investigation. The learned counsel referred to the order dated 20th December, 2016 where this Court has raised a question that the case diary was not maintained by the Investigating officer in accordance with the provisions of Chapter XII of Cr. P.C. particularly the statements and other documents are not numbered chronologically and no index was given in all the case diaries. The learned counsel further submitted that the observations made by this Court are to be taken seriously and it fortifies his submissions that the complainant has made false allegations and there is no honest investigation. The learned counsel further submitted that the applicant/accused has attended the police station nearly for 90 times and he has cooperated the police. He submitted that when the applicant/accused was appearing the police station and cooperating the investigating agency, then he should not be arrested. In support of his submissions, he relied on the case of **Bhadresh Bipinbhai Sheth vs. State of Gujarat, (2016) 1 SCC 152**. He further submitted that the conditions imposed at the time of interim pre-arrest bail application are not violated.

6. Learned Spl. Public Prosecutor and learned counsel for the intervener both have opposed this Application. The Investigating Agency has procured report given by the State Handwriting Expert dated 25th January, 2017. He submitted that as per the report, the contents about the signature in the disputed document is in the handwriting of the applicant and the signature appearing below the contents is not of the complainant. Learned P.P. and learned counsel for the intervener both have submitted that the police have recorded the statement of very material witness, i.e., Pravin Mange, who is the

father-in-law of the complainant. He submitted that the father-in-law stated that the husband of the complainant have questioned to the applicant/accused about the possession of the ornaments and though the applicant/accused has refused initially but he has admitted subsequently but refused to handover those ornaments. Learned PP and learned counsel for the intervener has relied on other two statements, i.e., jeweller Arvind Soni who has stated before the police that in November 2015, the applicant Rajesh at night contacted him outside the panshop and told him that he want to hypothecate 2 to 3 kgs of gold ornaments, as he was in need of money. Learned Prosecutor has further relied on statement of Satish Gada recorded on 22nd August, 2016 who has stated that in November, 2015 applicant/accused has told him that he would hypothecate his ornaments and would return the loan of Rs.20,00,000/- which was given by the witness to the applicant/accused. Learned Prosecutor has further submitted that the custody of the applicant/accused is required and as per the instructions of Investigating officer, the applicant/accused has not cooperated the police and no ornaments are produced till now. Learned Prosecutor while explaining the recording of fresh FIR with Unit VI has submitted that earlier the complainant has given written complaint in the month of January, 2016 with Unit VII, however, it was not investigated properly and therefore, on her complaint, by the order of Joint Commissioner of Police, the complaint was transferred to Unit VI and as directed, fresh statement or FIR was recorded, pursuant to which, the offence was registered.

7. Perused the FIR, written complaint dated 19th January 2016 which was made to Unit VI, so also the statement/FIR dated 18th August, 2016 registered at Powai Police Station, Mumbai. Perused the statements of the witnesses. The contents in the FIR when *prima facie* compared with the statements of witnesses, Pravin Mange, father-in-law of the complainant, jeweller Arvind Soni and witness Satish Gade, the contents appear true. It appears that the complainant was carried away on the representations and the information given to her against her husband. The fact of handing over the ornaments on 20th July, 2015 to the applicant/accused is not disputed, as the contents in the note which is produced before the Court are admittedly written by the applicant/accused. The dispute is pertaining to return of the documents and the signature of the complainant on the said note. At this stage, there are two opinions of the two handwriting experts. The opinion of the private handwriting

expert is in favour of the applicant/accused. However, the applicant/accused stating that it is a genuine signature of the complainant and on the other hand, there is report of the Government handwriting expert who gave conclusive opinion that it is not a signature of the complainant. Therefore, this fact can be tested at the time of trial. It is an application under section 438 of Cr. P.C., this Court has to see whether prima facie offence is committed or not and whether custodial interrogation of the applicant/accused is required for effective investigation or not. The note which is produced as proof of return of the ornaments by the applicant/accused does not disclose the date of return of the ornaments, though the date of receipt of the ornaments is mentioned. There is also a register maintained about operation of the locker, which reveals that locker was operated on 24th July, 2015 and it is admitted fact by the applicant/accused that co-accused Mira has handed over all the ornaments to the applicant/accused on that date.

8. In the case of **Bhadresh Bipinbhai Sheth**, the Hon'ble Supreme Court has held that -

> “It is imperative for the Courts to carefully and with meticulous precision evaluate the facts of the case. The discretion to grant bail must be exercised on the basis of

> the available material and the facts of the particular case. In cases where the court is of the considered view that the accused has joined the investigation and he is fully cooperating with the Investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided. A great ignominy, humiliation and disgrace is attached to arrest. Arrest leads to many serious consequences not only for the accused but for the entire family and at times for the entire community. Most people do not make any distinction between arrest at a pre-conviction stage of post-conviction stage.
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> There is no justification for reading into Section 438 of Cr. P.C. the limitations mentioned in Section 437 of Cr.P.C. the plenitude of Section 438 must be given its full play. There is no requirement that the accused must make out a "special case" for the exercise of the power to grant anticipatory bail. This virtually, reduces the salutary power conferred by Section 438 Cr. P.C. to a dead letter. A person seeking anticipatory bail is till a free man entitled to the presumption of innocence. He is willing to submit to restraints and conditions on his freedom, by the acceptance of conditions which the Court may deem fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail."

9. The only question remained whether the ornaments were kept by the applicant/accused with him or whether they returned to the complainant. Prima facie after considering the statements of the witnesses, a strong case is made out by the prosecution that all the ornaments are with the applicant/accused. Once this Court has taken a view that *prima facie* the applicant/accused is having the ornaments worth of Rs. 3 crores, his custody is necessary to recover

the ornaments or trace out whether the ornaments are kept. Thus, in view of the ratio laid down in **Bhadresh Bipinbhai Sheth** *(supra)*, the custody is not justified if accused is cooperating the police. This is not in the present case.

10. The observations made and the ratio laid down by the Hon'ble Supreme Court is binding on this Court. The Hon'ble Supreme Court has held that though the grant of bail is discretionary, the said discretion is not to be used arbitrarily and it is to be used after considering the available material and facts of each case. It is also necessary for this Court to see whether the accused has cooperated in the investigation. The gold and diamond ornaments are not yet recovered. Considering the facts of this case, I am of the view that custodial interrogation of the applicant/accused Rajesh Nakhwa is required. Hence, Anticipatory Bail Application of applicant/accused Rajesh Nakhwa is rejected.

11. Much is argued by the learned counsel for the applicant/accused Rajesh in respect of change of investigation and non-registration of offence by Unit VII when the written complaint was given. At the time of granting interim bail, my brother Judge has

observed that the case diary is not properly maintained as per Chapter XII of Cr. P.C. Therefore, the learned trial Court will definitely look into the matter at the time of trial when the case diary will be produced, however, at this stage, considering the submissions of the witnesses and the facts of the case, I am of the opinion that part of the investigation cannot show *prima facie* it is a bogus case. Hence, Application is rejected.

12. The learned counsel has submitted that he wants to test this order before the Hon'ble Supreme Court and the interim stay which was granted earlier is to be continued for four weeks.

13. The learned Prosecutor objected to this prayer.

14. I have already considered the case of the complainant and given the reasons for rejection of this Application, as it is offence against the property and the property is with the accused. Under such circumstances, I am of the view that applicant/accused is required to be taken in custody. Therefore, I reject the prayer of stay of this order.

15. Anticipatory Bail Application No. 1843 of 2016 is moved by applicant/accused Miraa Chandan who is facing allegations that she is the friend of the applicant/accused Rajesh Nakhua and she has allowed the applicant/accused Rajesh to keep the ornaments in her bank locker on 28th July, 2016.

16. The learned senior counsel Mr. Gupte appearing for the applicant/accused Miraa has submitted that there are in fact no allegations against the applicant/accused Miraa and she should not have been made accused in this case. He submitted that it is an admitted position that ornaments of the complainant was kept in the locker on 20th July, 2016, however, as per the case of the prosecution, the applicant/accused Miraa along with principal accused went to the bank on 24th July, 2016 and has handed over all the ornaments to accused Rajesh Nakhwa. There are no further allegations against the applicant/accused Miraa and therefore, the interim pre-arrest bail granted to her be confirmed.

17. Learned APP opposed the Application.

18. *Prima facie* I do not find any evidence of cheating against the

applicant/accused Miraa. Considering the facts of the case, I allow this Application and confirm the order of interim per-arrest bail dated 15th October, 2016 granted to the applicant/accused Miraa Chandan. The applicant/accused Miraa Chandan is directed to attend the police station as and when called by the Investigating officer till the filing of the charge sheet. Anticipatory Bail Application No. 1802 of 2016 is allowed.

19. Criminal Application nos. 965 and 966 of 2016 are disposed of accordingly.

(MRIDULA BHATKAR, J.)