IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION (BA) NO.455 OF 2017

Ashok s/o Murlidhar Hemke,
aged about 63 years, occupation :
business, r/o Gandhi Ward No.9,
Wanjari Mohalla, Gadchiroli,
Tahsil and District Gadchiroli. ... Applicant

- Versus -

State of Maharashtra, through
Police Station Officer, Police
Station, Gadchiroli. ... Non-applicant

Shri Anil Mardikar, Senior Advocate for applicant.
Smt. G. Tiwari, Additional Public Prosecutor for non-applicant.

Date of reserving the order : 28/08/2017
Date of pronouncing the order : 01/09/2017

CORAM : P.N. DESHMUKH, J.
DATED : SEPTEMBER 1, 2017

ORDER :

This application is filed by one of accused involved in Crime No.193/2016 registered by Police Station Officer, Police Station, Gadchiroli for the offences punishable under Sections 409, 420, 465, 467, 468 and 471 read with Section 34 of Indian Penal Code on 5/8/2016.

2) Earlier application filed by applicant being Criminal Application No. 995/2016 was allowed to be withdrawn by this Court with liberty to applicant to file application before trial Court as charge-sheet was stated to be filed. From the record it is found that in view of liberty granted as aforesaid, applicant moved application for grant of bail before trial Court. However, same came to be rejected by learned Additional Sessions Judge-2, Gadchiroli vide impugned order dated 15/4/2017. Hence, applicant has filed the present application for bail.

3) Smt. Tiwari, learned Additional Public Prosecutor for non-applicant, with reference to facts as aforesaid, on instructions from Shri Sonu Choudhari, Investigating Officer present in the Court, has submitted that contents of reply to the effect that earlier application of applicant being Criminal Application No. 995/2016 was rejected by this Court and subsequent to such rejection, charge-sheet came to be filed before trial Court on 4/1/2017 are incorrect inasmuch as earlier application filed for grant of bail was simply

allowed to be withdrawn with liberty to applicant to approach trial Court in view of the fact that charge-sheet was filed and as such, it was not considered on merits. So far as fact of filing of charge-sheet subsequent to passing of order in Criminal Application No.995/2016, it is noted that said order is passed on 15/2/2017 while charge-sheet in this crime is admittedly filed on 4/1/2017. It is, therefore, clear that after filing of charge-sheet, order allowing withdrawal of earlier application came to be passed and, therefore, contents of para 2 of the affidavit-in-reply that "subsequent to rejection order, the charge-sheet was filed by the non-applicant before the trial Court on 4/1/2017" are contrary to record, which fact as aforesaid is not disputed by the prosecution.

4) In the backdrop of facts as afore-stated, coming to merits part of the application, Shri Mardikar, learned Senior Counsel for applicant, by referring to contents of the report dated 8/10/2016 has submitted that allegations mentioned therein are only against co-accused Nitin Bhole and applicant came to be arrested on 24/10/2016 and is in Jail since then in spite of the fact that there is no active participation of applicant in the present crime, except for his receiving funds in his Account No.31998458920 with State Bank

of India, Gadchiroli Branch. As such, it has been urged that role of applicant at the most can be that of receiver of stolen property and nothing more. To substantiate these submissions, Shri Mardikar has referred to the charge-sheet and pointed out that during the course of investigation, it is revealed that in Bank Account No.31998458920 of applicant, amount of Rs.55,23,197/- has been transferred by accused no.1 and accordingly he came to be arrested. From the charge-sheet it is further pointed out that accused no.1 has committed embezzlement of amount to the extent of Rs.1,39,92,964/- out of which amount of Rs.55,23,197/- has been deposited by accused no.1 in the Account of applicant.

5) It is further contended that since applicant is not a Government Servant, Section 409 of Indian Penal Code cannot be alleged against him while punishment prescribed for the offence punishable under Section 465 of Indian Penal Code is imprisonment upto 2 years or fine or with both and offences under Sections 420 and 468 of Indian Penal Code are punishable with imprisonment upto seven years. In fact, arrest of applicant was not necessary and for that purpose, relied upon the case of **Arnesh Kumar vs. State of Bihar and another** (AIR 2014 SC 2756) wherein

Hon'ble Apex Court has issued guidelines to the Police Officers not to arrest accused unnecessarily and to Magistrates not to authorise detention casually and mechanically in the cases involving offences punishable with imprisonment for a term, which may be less than seven years or which may extend to seven years with or without fine.

6) With regards to offence punishable under Section 467 of Indian Penal Code, which is punishable with imprisonment upto ten years, it is contended that from the contents of charge-sheet, said offence can be applied only against accused no.1, who is alleged to have forged the documents to receive money and on forging documents, siphoned huge amounts from Zilla Parishad's Accounts to his own Bank Account and to the Bank Account of applicant. It is thus submitted that having considered the case of prosecution as per its charge-sheet, as aforesaid, application of Section 467 of Indian Penal Code cannot be attracted against applicant.

7) To substantiate above, it is submitted that as per the case of prosecution, it is accused no.1 Nitin Bhole, who being employee of Zilla Prishad was instrumental in siphoning money from the Government Accounts of various schemes implemented through Zilla

Parishad and who fraudulently got transferred some amount in his Bank Account. On these lines, it is further submitted that statements of Accounts relied by prosecution and filed with the charge-sheet, which are in respect of State Bank of India, Gadchiroli Branch though considered, they by itself do not constitute any prima facie material to implicate applicant in the alleged offences in view of the fact that amounts shown to have been credited in applicant's Bank Account are transferred online and thus, it cannot be said that applicant was conscious of the fact of such transaction and in fact, at no point of time applicant had withdrawn any amount whatsoever transferred by accused no.1 Nitin Bhole in his account by adopting any method. It is, therefore, submitted that merely by considering the Bank statements, no liability can be fastened upon applicant nor can he be connected with the present crime. It is, therefore, prayed that applicant be released on bail by imposing suitable conditions.

8) Smt. Tiwari, learned Additional Public Prosecutor for non-applicant, has submitted on the lines of affidavit-in-reply on record that accused no.1 Nitin Bhole while working with Zilla Parishad, Gadchiroli as Accounts and Finance Officer was having control over Account Nos.32788945223 and 34224175102 with

State Bank of India, Branch Gadchiroli, which were for Jalswarajya Project and Rural Drinking Water Project respectively. On 6/10/2016 when Deputy Chief Officer of Zilla Parishad, Gadchiroli noticed that one cheque bearing No. 523120 was missing from the cheque book, he requested Bank not to release said cheque, if presented for realisation when Bank communicated to him in writing that above numbered cheque was already realised on 5/8/2016 and amount of Rs.30 lakhs was withdrawn from the Account of Zilla Parishad. It is further submitted by learned Additional Public Prosecutor that during the course of interrogation, applicant's involvement in the present crime is found to the extent of Rs.55,23,197/-, which were deposited in his Account No.31998458920 with State Bank of India, Gadchiroli Branch from time to time. It is contended that during the course of investigation, total amount of Rs.55,23,197/- was found deposited in the Account of applicant by co-accused Nitin Bhole and as such, applicant's Account was used to park the siphoned money from the Accounts of Zilla Parishad and as per audit report prepared by the Committee, total amount was found deposited in the Account of applicant to the extent of Rs.55,23,197/-. The Committee's report is filed on record along with charge-sheet. Though in para 7 of the reply it is stated that till date not a single pie has been recovered from accused persons, learned Additional Public Prosecutor has made a statement on instructions that amount found in applicant's Account as aforesaid as well as in accused no.1 Nitin Bhole's Account has been seized.

9) Smt. Tiwari, learned Additional Public Prosecutor has further contended that the quantum of punishment could not be the only determinative factor for the magnitude of the offence and one of the relevant considerations for the grant of bail is the interest of Society at large as opposed to the personal liberty of accused and that Court should not lose sight of the former and has relied upon judgments of Hon'ble Apex Court in the case of **Sanjay Chandra vs. Central Bureau of Investigation** (AIR 2012 SC 830) and **State of Bihar and another vs. Amit Kumar @ Bacha R**ai (JT 2017 (4) SC 508). It is, therefore, submitted that in the interest of Society, present application be rejected.

10) Considering the facts of the application in hand in which admittedly charge-sheet is already filed, it appears to be the case of prosecution that applicant out of amount, whatsoever has been deposited in his Account No.31998458920 with State Bank of India,

Gadchiroli Branch by accused no.1 Nitin Bhole, has not withdrawn any amount from same, but it is the case of prosecution that out of amount siphoned by co-accused Nitin Bhole from the Accounts of Zilla Parishad, said accused no.1 Nitin Bhole had invested Rs.17,75,000/- for purchase of house and Rs.11,00,000/- for construction. It is not the case of prosecution that applicant had used any amount for himself or for any other purpose. Though it is the primary ground of prosecution that offences alleged against applicant are serious involving deep rooted planning in which huge financial loss is caused to the State Exchequer, from the charge-sheet prosecution could not point out single instance by which applicant can be directly linked with the present crime to be instrumental or to be involved in any kind of planning with intention to cause huge financial loss to the State Exchequer except for use of his Bank Account by co-accused for parking funds siphoned by him alone in applicant's Bank Account.

11) As submitted on behalf of applicant, prima facie it is found that applicant not being a Government Servant, offence punishable under Section 409 of Indian Penal Code cannot be alleged against him while punishment prescribed for the offence

punishable under Section 465 of Indian Penal Code is imprisonment upto two years or fine or both and for the offences punishable under Sections 420 and 468 of Indian Penal Code, punishment is imprisonment upto seven years. In the case of **Arnesh Kumar** (supra) guidelines are issued by Hon'ble Apex Court to Police Officers not to effect arrest of accused unnecessarily and to Magistrates not to authorise detention casually and mechanically in the cases involving offences punishable with imprisonment for a term, which may extend to seven years with or without fine. Though the case relied by applicant related to offences punishable under Section 498-A of Indian Penal Code or Section 4 of the Dowry Prohibition Act, the Hon'ble Apex Court in clear terms has clarified that directions as such shall not apply only to the cases involving offences punishable under Sections 498-A of Indian Penal Code or Section 4 of the Dowry Prohibition Act. In other words, guidelines issued are applicable in the cases where offences involved are, as aforesaid, apart from Section 498-A of Indian Penal Code or Section 4 of the Dowry Prohibition Act. Then it is necessary to consider offence punishable under Section 467 of Indian Penal Code, which is also applied in the present charge-sheet. On this aspect, on perusal of reply, applicant's involvement in the present crime as alleged is that amount of Rs.55,23,197/- was found deposited in his Bank Account by co-accused Nitin. In that view of the matter, it is prima facie noted that applicant's Bank Account was used to park the siphoned money from the Accounts of Zilla Parishad by co-accused Nitin. In the circumstances, applicant, who prima facie is found to have made his Bank Account available for parking funds, by itself shall not make himself liable for the offence under Section 467 of Indian Penal Code, which is punishable with imprisonment upto 10 years as from the contents of the charge-sheet, said offence can be applied against co-accused, who is alleged to have forged the documents to receive money and on forging documents, siphoned huge amount from the Accounts of Zilla Parishad to his Bank Account and in the Bank Account of applicant.

12) In view of facts as aforesaid, though learned Additional Public Prosecutor while opposing the application has submitted that quantum of punishment could not be the only determinative factor, one of the relevant considerations for grant of bail is the interest of Society at large, it is to note that no doubt nature of charge may be relevant, but at the same time punishment to which party may be liable if convicted also bears upon the issue. Therefore, while

considering the case for grant of bail, it is necessary to look into seriousness of the charge as well as severity of punishment. Undoubtedly, grant or refusal to grant bail lies within the discretion of the Court and such discretion to a large extent is regulated by the facts and circumstances of each case. In the case of **Sanjay Chandra** (supra), in its paras 14 and 15 of the judgment, the Hon'ble Supreme Court has noted thus :

> "14) In bail applications, generally it has been laid down from the earliest times 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 preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial, but in such cases, `necessity' is the operative test. In this county, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon

which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of a refusal of bail one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson.

15) In the instant case, as we have already noticed that the "pointing finger of accusation" against the appellants is `the seriousness of the charge'. The offences alleged are economic offences which has resulted in loss to the State Exchequer. Though they contend that there is possibility of the appellants tampering witnesses, they have not placed any material in support of the allegation. In our view, seriousness of the charge is, no doubt, one of the relevant considerations while considering bail applications, but that is not the only test or the factor : The other factor that also requires to be taken note of is the punishment that could be imposed after trial and conviction, both under the Indian Penal Code and Prevention of Corruption Act. Otherwise, if the former is the only test, we would not be balancing the Constitutional Rights but rather "recalibration of the scales of justice". The provisions of Cr.P.C. confer discretionary jurisdiction on Criminal Courts to grant

bail to accused pending trial or in appeal against convictions, since the jurisdiction is discretionary, it has to be exercised with great care and caution by balancing valuable right of liberty of an individual and the interest of the society in general. In our view, the reasoning adopted by the learned District Judge, which is affirmed by the High Court, in our opinion, a denial of the whole basis of our system of law and normal rule of bail system. It transcends respect for the requirement that a man shall be considered innocent until he is found guilty. If such power is recognized, then it may lead to chaotic situation and would jeopardize the personal liberty of an individual."

13) Law in the case of **State of Bihar vs. Amit Kumar @ Bacha Rai** (supra) relied by prosecution having distinguishing facts is of no assistance to be used in favour of prosecution as in that case, accused was involved in tampering with the answer sheets by illegal means and interfering with the examination system of Bihar Intermediate Exam 2016 and thereby securing top ranks and during the course of investigation, when search was carried out, various documents relating to property and land to the tune of Rs.2.57 crores were recovered besides Rs.20 lakhs in cash along with number of written answer sheets of various students, letter heads and rubber stamps of several Authorities, etc., thereby

prima facie establishing case against accused, while in the application in hand, on considering the allegations made against applicant, there appears substance in the case of applicant when it is contended that at the most, role of applicant can be of receiver of stolen property punishable under Section 411 of Indian Penal Code with imprisonment upto three years or with fine or with both and even otherwise, other offences if proved, maximum punishment of imprisonment, which can be imposed upon applicant is upto seven years.

14) In view of law referred as aforesaid and considering involvement of applicant whereby role attributed to applicant is limited only of his making available his Bank Account for parking funds siphoned by co-accused, prima facie it is found that charge if proved, applicant may be punished for imprisonment for a term, which may be less than seven years or which may extend to seven years. In the circumstances, application can be allowed by imposing stringent conditions as while considering application for grant of bail, two paramount considerations are : seriousness of offences and likelihood of accused fleeing from justice and his tampering with prosecution witnesses. So far as present application is concerned,

there are 27 witnesses shown in the charge-sheet containing about eight hundred pages and documents upon which reliance is placed by prosecution. In the circumstances, it goes without saying that trial may take sufficient time to conclude and applicant is in Jail since date of his arrest, i.e. 24/10/2016. No doubt, offences alleged against applicant are serious in terms of alleged huge loss caused to State Exchequer, that by itself should not be the ground for refusing applicant from being enlarged on bail, more particularly when there is no serious contention of State that applicant, if released on bail, would interfere with trial or tamper with the evidence. Though prosecution in its reply has raised this ground, apparently there is no reason to detain applicant in custody and that too, after completion of investigation and filing of charge-sheet as apprehension put forth by prosecution of applicant's likelihood of tampering with witnesses can be taken care of by imposing suitable conditions.

15) In the similar set of circumstances in the case of **Sanjay Chandra** (supra), in para 28 of its judgment, Hon'ble Apex Court finding that investigation is complete and charge-sheet is filed, granted bail by imposing stringent conditions by observing thus :

"28) We are conscious of the fact that the accused are charged with economic offences of huge magnitude. We are also conscious of the fact that the offences alleged, if proved, may jeopardize the economy of the country. At the same time, we cannot lose sight of the fact that the investigating agency has already completed investigation and the charge-sheet is already filed before the Special Judge, CBI, New Delhi. Therefore, their presence in the custody may not be necessary for further investigation. We are of the view that the appellants are entitled to the grant of bail pending trial on stringent conditions in order to ally the apprehension expressed by CBI."

16) In the result, application is allowed as per order below :

Order

(i) Applicant shall be released on bail on his executing a P.R. bond in the sum of rupees two lakhs fifty thousand with one or two sureties in the like amount.

(ii) Applicant shall mark his presence with Police Station, Gadchiroli on first day of each month till commencement of trial and thereafter once in three months until further orders and shall not leave jurisdiction of trial Court without prior permission of trial Court.

(iii) Applicant shall not directly or indirectly make any inducement, threat or promise to witnesses or tamper with the witnesses in any manner whatsoever.

(iv) Applicant shall remain present before trial Court on the dates fixed for hearing of the case and shall surrender his Passport, if any, in trial Court. If applicant is not holding the same, he shall place this fact on affidavit before trial Court.

(v) Prosecution is at liberty to make necessary application for modification/recalling of order, if applicant is found violating any of the conditions imposed as aforesaid.

(vi) Learned trial Court shall not get influenced by the observations made in this order and shall consider the evidence on record independently.

JUDGE

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