**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CRM-M No.6175 of 2017
Date of Decision: 16.03.2017**

**Anil Nanda**

**.....Petitioner**

**Vs**

**State of Haryana**

**....Respondent**

**CORAM:** ***HON'BLE MR. JUSTICE RAJ MOHAN SINGH***

Present: Mr. R.S. Cheema, Sr. Advocate with
Mr. Vir Inder Pal, Advocate
Mr. Arshdeep Cheema, Advocate
Mr. Abhimanshu Dhyani, Advocate
for the petitioner.

Mr. P.P. Chahar, D.A.G., Haryana.

Mr. Amit Prasad, Advocate and
Mr. Alok Kumar Jain, Advocate
for the complainants.

Mr. Sumit Choudhary, Advocate
for M/s Appogee Manufacturing Pvt. Ltd.

****

***RAJ MOHAN SINGH, J.***

[1]. Petitioner has prayed for grant of regular bail in FIR No.56 dated 27.01.2016, U/s 406, 409, 420, 34 IPC and U/s 7(1)/10 of the HDRUA Act, P.S. Kherki Daula, Gurgaon/now Gurugram.

[2]. The petitioner is a Chairman/MD of AKME Projects Ltd.

i.e. company incorporated under the Companies Act, 1956. Complainants are individuals and association of purchasers, who have booked their flats in the housing project known as "AKME Raaga Project".

[3]. Factual matrix is that a complaint was filed on 26.05.2015 before the Commissioner of Police, Gurgaon. The said complainant was referred to Economic Offences Wing, South, Gurgaon (in short 'EOW') and an inquiry was done with reference to the evidence and explanation taken from the petitioner/Company. On collection of data and material evidence in physical verification, the EOW, found that the complaint was of civil nature and a closure report was filed on 28.09.2015, after finding that the structure of the towers was complete, whereas plaster and finishing work was pending. Due to stay order passed by the Hon'ble Apex Court with regard to the construction, the same could not be completed. As soon as the stay is vacated, the needful would be done in the context of delivery of possession of flats to the rightful claimants. No cognizable offence was found to have been committed in the said inquiry.

[4]. Thereafter the present FIR came to be registered at the instance of Rakesh Sareen on the basis of additional allegations

in continuation of the allegations already decided by the EOW. The factum of closure report was not adverted to in the FIR. The FIR in question was registered on 27.01.2016. The petitioner was arrested on 29.12.2016.

[5]. The allegations set forth in the FIR are firstly, that the Company has delayed handing over the possession of flats to the buyers. The possession was to be delivered in the month of February, 2015 i.e. much before the order dated 24.04.2015 passed by the Hon'ble Apex Court. Secondly, the Company sold 24 flats to M/s AAA Land mark/Arun Anand, which were allegedly sold to different vendees and also sold 3.13 lac sq. ft. area of the project which was already mortgaged with Yes Bank Ltd. and thirdly, the Company had approval of the concerned Authority only for the construction of building upto $15^{th}$ floor, whereas the petitioner has misled the vendees and allotted them $16^{th}$, $17^{th}$ and $18^{th}$ floor.

[6]. Petitioner associated in the investigation and also furnished his explanation to the allegations vide reply dated 22.02.2016. Firstly, it was submitted that the delay in handing over the possession of the flats was caused not because of any *mala fide* on the part of the petitioner, but the same was due to the financial crunch, as Mr. Arun Anand, CEO of the Company

played fraud with the Company and thereafter due to the stay order granted by the Hon'ble Apex Court in case titled "*Rameshwar & Ors. vs. State of Haryana and Ors.*", the construction was stopped by the District Town Planner (Enforcement), Gurgaon. 70% of the work was completed at the spot which was duly recited in the closure report of the EOW.

[7]. Secondly, it was submitted that the Company had never sold 24 flats to M/s AAA Landmark/Arun Anand. The aforesaid act was the handiwork of Mr. Arun Anand the then, CEO of the company, who played fraud with the Company. Mr. Arun Anand was the close confidant of the petitioner and he played a calculative fraud by executing fraudulent documents including the agreement to sell, vide which M/s AAA Landmark claimed that 24 flats were sold to it. When the petitioner and his company came to know about the said fraud by Arun Anand, termination notice was issued immediately followed by public notice. FIR No.746/14 was registered against Arun Anand by the Company and his bank accounts were also seized.

[8]. Thirdly, it was submitted that the company has the approval from the District Town Planner for G + 17 floors in its A, B and C towers and also got approval to build G + 16 floors in its D, E, F and G towers. As per lay out plan of the project,

ground floor was to be numbered as first floor and the building would not be having any 13th floor, therefore, after 12th floor, the next floor would be numbered as 14th floor.

[9]. Learned Senior counsel for the petitioner submitted that M/s AKME Projects Ltd. had already completed 65% of the work upto the month of April 2014. The initial delay was on account of fraud committed by the then CEO of the Company due to which the project came to halt for a few months. Later on the delay was occasioned on account of stay order passed by the Hon'ble Apex Court. The circumstances were beyond the control of the petitioner and his Company and the same fell within the purview of '*force majeure*'. As per the buyers' agreement there is a penalty clause which provides for redressal mechanism and brings the case within the purview of civil profile. Instead of pursuing, the lawful remedy, the complainant got the FIR registered with an evil design. The project was completed upto 70%, when the stay order was passed by the Hon'ble Apex Court. The delay, if any, could not be attributed to the petitioner and no criminal act was committed by the petitioner.

[10]. Learned Senior counsel also submitted that Arun Anand was a close confidant of the petitioner and he played a very systematic fraud by executing fraudulent documents

including agreement to sell which prompted M/s AAA Landmark to claim that 24 flats were sold to them by M/s AKME Projects Ltd. As soon as the petitioner and his company came to know about the said fraud, notice of termination and public notice were issued and bank accounts of the then CEO were seized, besides registration of FIR No.746 of 2014 at EOW, Delhi. Complainant Rakesh Sareen had also filed a suit against M/s AAA Landmark and M/s AKME Projects Ltd., before the Civil Judge (Jr. Divn.) Gurgaon and the said suit is still pending, where the trial Court has stayed the operation of the said fraudulent agreement to sell. M/s AAA Landmark has also filed petition under Section 9 of the Arbitration and Conciliation Act, before the Additional District Judge, Gurgaon on the basis of agreement to sell dated 25.10.2012 which was allegedly used by M/s AAA Landmark to claim 24 flats on the basis of alleged agreement to sell. No relief has been granted to the said M/s AAA Landmark till date. Mr. Arun Anand, also filed a complaint against M/s AKME Projects Ltd., before the EOW, Delhi which was closed for want of material and evidence, rather allegations against Mr. Arun Anand were found to be genuine.

[11]. Learned Senior counsel further submitted that the customers by citing their flat numbers as C-1603, B-1702 and A-1803 claimed that the flats are on 16$^{th}$ 17$^{th}$ and 18$^{th}$ floor

respectively. M/s AKME Projects Ltd., has the approval from the District Town Planner for G + 17 floors in its A, B and C towers and approval to build G + 16 floors in its D, E, F and G towers. Figure 13 being an unlucky number, M/s AKME Projects Ltd., did not number any floor on the 13th floor and numbered the floors directly from 12th floor to 14th floor. The ground floor was treated to be first floor for the purpose of numbering, therefore, the said allegation was totally unfounded.

[12]. Learned Senior counsel vehemently submitted that offence in terms of Section 409 IPC has been intentionally introduced so as to debar the petitioner from claiming benefit of Section 167(2) Cr.P.C. as the challan has not been submitted so far. Ingredients of offence under Section 409 IPC are missing altogether. Learned Senior counsel also submitted that the petitioner has joined the investigation before the EOW as well as by filing a reply after registration of the case. FIR was registered in January 2016 and the construction was stopped by the District Town Planner (Enforcement) Gurgaon due to the stay order passed by the Hon'ble Apex Court on 24.04.2015. The stay on construction was granted by the Hon'ble Apex Court on several projects in three villages namely Nakhraula, Naurangpur and Manesar, which includes the present project in the village Nakhraula.

[13]. Learned Senior counsel submitted that the Company received the money from the vendees for AKME Raaga projects in Yes Bank Ltd., Escrow Account No.000180200003154 and the amount so received has been invested exclusively in the project and the account allegedly siphoned off by Arun Anand, the then CEO cannot in any way treated to be an amount invested by the vendees in the project. The cash outflow of AKME Raaga shows an amount of Rs.1,940,640,251/- whereas the inflow of amount is shown to be Rs.1,900,929,080/-. Learned Senior counsel also submitted that M/s AAA Landmark does not claim ownership over unit No.A-1202 and the same does not affect the right of the complainant in any manner. The reference has been made to judgment dated 01.10.2015 titled "*M/s AAA Landmark Private Ltd. vs. Rakesh Sarin and ors*." passed by Additional District Judge, Gurgaon.

[14]. Learned Senior counsel also submitted that the project was financed by the Yes Bank in the year 2012. The loan was obtained from the Bank with a condition that the funds will be transferred through the escrow account. No fund was used for personal use and the amount was used only in the project. The substantial part of loan amount has been repaid to the Bank towards principle and interest. Yes Bank has transferred its claim in favour of third party and the project has been taken

over by the new party. Challenge to this effect has been made by the petitioner in the Delhi High Court.

[15]. Learned Senior counsel further submitted that as per order dated 10.11.2015 passed by the District Magistrate, Gurgaon in the application under Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, it was found that there were 80 NOC issued by the Bank for creating third party charge by way of booking flats. There was an issue that had to be decided whether property and creditor is secured. They have agreed to underwrite the liabilities as reflected by receipts of all parties to whom M/s AKME Projects Ltd., had allotted flats. In this way, they have agreed to take over both the assets and liabilities. To this extent rights of all such allottees are secured.

[16]. Learned Senior counsel by referring to the ratio of ***Sundeep Kumar Bafna vs. State of Maharashtra and another, (2014) 16 SCC 623*** contended that the complainant has no vested right in the prosecution of the case. They can only assist the State counsel in discharging its responsibility. The constant and frequent interference by the complainant in prosecution of the case, particularly at the stage of bail will be having deleterious impact on its impartiality.

[17]. Learned Senior counsel also relied upon ***Gurbaksh Singh Sibbia vs. State of Punjab, (1980) 2 SCC 565***; ***Siddharam Satlingappa Mhetre vs. State of Maharashtra & Ors., (2011) 1 SCC 694***; ***Sanjay Chandra vs. Central Bureau of Investigation, (2012) 1 SCC 40***; ***Bhadresh Bipinbhai Sheth vs. State of Gujarat & Another, (2016) 1 SCC 152***; ***Bhagirathsinh Jadeja vs. State of Gujarat, (1984) 1 SCC 284*** and ***Arnesh Kumar vs. State of Bihar & another, (2014) 8 SCC 273*** and contended that the accused will be in better position to look after his case and defend himself while on bail, rather to be in custody. The benefit of bail should not be withheld as a measure of punishment, particularly when the petitioner has already visited number of countries even after registration of case. The Court has to consider whether there is any possibility by the accused to tamper with the evidence and influence the witnesses. Once these tests are satisfied, the bail should be granted to the accused as the accused enjoys freedom and will be in better position to defend himself properly while on bail. The petitioner has been arrested on 29.12.2016 in violation of the principles laid down in ***Arnesh Kumar's*** case (supra).

[18]. At last learned Senior counsel highlighted that the bail has been declined on wrong assumption of facts. No amount

deposited in escrow account has been siphoned off by the then CEO, nor the petitioner is a British citizen. Petitioner is having Indian passport and has already joined the investigation. After joining investigation on 22.02.2016, petitioner went to UAE on 07.07.2016 and then to USA. He came to India on 20.11.2016 and has not misused the process of law in any manner. In the absence of offence under Section 409 IPC, which is apparently not attracted, the petitioner is entitled to bail under Section 167(2) Cr.P.C., as the challan has not been submitted within the prescribed period of 60 days for the offences under Sections 406 and 420 IPC. The offence in terms of Section 7(1)/10 of the HDRUA Act is bailable and compoundable in nature.

[19]. As against this, learned State counsel duly assisted by the learned counsel for the complainants submitted that the stand of the petitioner in the enquiry conducted by EOW and in the present petition are contradictory. The same amounts to an admission of fact that Arun Anand has siphoned off the amount of the Company including that of the project in question. The Bank had issued a sale notice dated 02.04.2016 in respect of subject land on which 380 flats have been partly constructed by the Company by invoking provisions of Section 13(12) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 in view of the inability

of the Company to repay the due amount.

[20]. Learned State counsel assisted by learned counsel for the complainants referred to the compilation of documents and submitted that as per brochure/condition, the project would be charged to Yes Bank Limited and all customers' payments shall be routed through the 'YBL' Escrow account. Reference was made to the demand letter dated 29.11.2012, wherein it was shown that the cheque needs to be made in favour of AKME Projects YBL Escrow Account No.000180200003154. As per Income Tax Return, it was shown that the Company was formed in the form of Cherry Hills Investment Limited and the audit report of the Company also showed diversion of funds as per clause XVI of the audit report.

[21]. Learned counsel for the complainants also referred to the documents viz. certificate of incorporation of company showing Mr. Anil Nanda to be the company Director, who is also shown to be resident of United Kingdom with British nationality. This fact was noticed as it was on account of individual person with significant controlled details of the petitioner himself. As per order dated 27.02.2017 passed by ACMM (South East) Saket Court at Delhi, an amount of Rs.2 crores was transferred through RTGS in the account of the accused. Additionally, the

accused also gave personal guarantee to the complainant. Post-dated cheques given by the accused have already been dishonoured. Since the project had already been mortgaged with Yes Bank Ltd., therefore, accused was not authorized to sell the said flats to the complainant. In this backdrop, it was argued that mentioning of the petitioner to be UK citizen in the order is on the basis of factual mechanism.

[22]. On wholesome consideration, I find that before registration of the FIR, the subject matter of the allegations contained in the complaint were *prima facie* enquired by the EOW after physical verification at the spot and it was found that the structure of towers was complete and only plaster/finishing work remained. It was due to the stay order granted by the Hon'ble Apex Court, the needful could not be completed. It was also found in the report that as soon as the stay order would be vacated, the possession of the flats would be delivered to the concerned persons after completing the construction work as per rules. The allegations forming subject matter of the complaint were enquired into by the Economic Offenses Wing, South, Police Commissionerate, Gurgaon vide its report dated 28.09.2015 and the present incriminating allegations would be on debatable note. All the three added allegations in view of facts and circumstances, particularly in view of explanation

furnished by the petitioner would be arguable at the relevant stage.

[23]. At present, no such opinion on the allegations and counter allegations can be formed, lest it may prejudice the case of either side at the trial. *Prima facie*, the petitioner has already joined the investigation and has already visited number of countries even after registration of FIR. Challan has not been filed. It would also be debatable as to whether ingredients of offence under Section 409 IPC are attracted or not and the petitioner would have availed the benefit of Section 167(2) Cr.P.C. by now.

[24]. By taking into consideration, the nature of offence, the triable issues by the Magistrate and the custody of the petitioner, I deem it appropriate to enlarge the petitioner on regular bail, subject to his furnishing heavy bail bonds and heavy surety bonds to the satisfaction of the Chief Judicial Magistrate, Gurugram. The petitioner is directed to surrender his passports in the trial Court and shall not leave the country without prior permission of the Court.

[25]. Since challan has not been filed as yet, therefore, this order will not preclude the State from seeking cancellation of bail in the event of finding violation of any condition of bail or on

finding any incriminating evidence, necessitating cancellation of bail in accordance with law.

[26]. Nothing expressed hereinabove would be construed to be an expression of any opinion on merits of the case, as the facts have been noted according to arguments raised by both the sides during course of hearing.

[27]. Petition stands disposed of accordingly.

March 16, 2017 **(RAJ MOHAN SINGH)**

*Atik* **JUDGE**

Whether speaking/reasoned Yes/No

Whether reportable Yes/No