IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPLICATION (BAIL) NOS.95 AND 101 OF 2018

CRIMINAL APPLICATION (BAIL) NO.95 OF 2018

DELCY BORGES, PRESENTLY
IN CUSTODY LODGED IN
CENTRAL JAIL, COLVALE, THR
JOSEPH BORGES .. Applicant.

V/s.

POLICE INSPECTOR IN CHARGE,
ECONOMIC OFFENCE CELL,
PANAJI AND ANR. .. Respondent

Mr. C. A. Ferreira with Mr. Shane Gomes, Advocates for the applicant.

Mr. S. R. Rivankar, Public Prosecutor for the respondents.

AND
CRIMINAL APPLICATION (BAIL) NO.101 OF 2018

NITIN RAJARAM BANDODKAR,
PRESENTLY IN JUDICIAL CUSTODY
AT CENTRAL JAIL COLVALE, .. Applicant

V/s.

STATE, THR. THE POLICE INSPECTOR,
ECONOMIC OFFENCES CELL, PANAJI
AND ANR. .. Respondents

Mr. S. G. Dessai, Senior Advocate with Mr. Pavitran A. V., Advocate for the Applicant.

Mr. M. Amonkar, Additional Public Prosecutor for the respondents.

CORAM: C. V. BHADANG, J.

Reserved on : 10th April, 2018.

Pronounced on : 12th April, 2018

ORDER

Both these applications for bail arise out of Crime No.23/2018 of Crime Branch (EOC) and as such, they are being disposed of by this common order.

2. On 06/02/2018, the aforesaid offence came to be registered on the basis of a complaint lodged by Shri Prajyot Fadte on behalf of the State for the offences punishable under Sections 406, 420, 120-B of Indian Penal Code (IPC) and Sections 3 and 5 of the Goa Protection of Interest of Depositors (in Financial Establishmenst) Act, 1999 (the Act of 1999, for short).

3. The applicant Delcy Borges and Nitin Bandodkar happen to be the Directors of Across the Globe Hospitality Limited Company (AGL, for short) and M/s. FXP Fincon Pvt.Ltd. The gravamen of the allegations against the applicants and the co-accused are that the applicants along with co-accused had hatched a criminal conspiracy and in furtherance thereof, had induced various investors/ depositors to invest in the AGL and M/s. FXP Fincon Pvt. Ltd, with a promise of 5 % per month or higher monetary returns. After getting the amount entrusted, they had dishonestly misappropriated the amount and converted them to

their own use and thus, failed to repay the promised returns and thereby cheated the investors and depositors to the tune of approximately Rs.5,10,58,500/-. It is also the case that the two companies were neither having any permission from the Reserve Bank of India nor from the Securities and Exchange Board for India (SEBI) for accepting deposits / investments/ or to conduct the business of Non-Banking Financial Company (NBFC).

4. It appears that prior to the said complaint by Mr. Fadte, about 47 investors had lodged a complaint with the Economic Offences Wing about failure on the part of the applicants to pay the assured returns. The record further discloses that six months prior thereto, a raid was conducted by the Economic Offences Wing on the concerned establishments after obtaining a search warrant from the Magistrate. After the search was conducted and certain seizure of the record, etc. was effected, a report was filed before the learned Magistrate. However, for a period of about six months thereafter, there was no further movement and it is only after some of the investors had approached the Economic Offences Wing that FIR came to be registered on the basis of complaint lodged by Mr. Fadte. Be that as it may, the applicant Delcy Borges was arrested on 22/02/2018 while the applicant Nitin Bandodkar has been arrested on 16/02/2018 and were initially in Police custody remand.

Presently, for more than a period of one month, both the applicants are in judicial custody. During this period, there is no request or attempt made by the Investigating Agency for interrogation of the applicants.

5. The investigation is stated to be in progress.

6. Both the applicants had approached the learned Sessions Judge for bail and their bail applications came to be dismissed on 07/03/2018. Para 39 of the order of the learned Sessions would show that basically the learned Sessions Judge was of the opinion that some more time is required for the Investigating Agency to find out the truth and locate the other Directors and also to interrogate the applicants with the permission of the Court. In that view of the matter, the learned Sessions Judge found that the applicants are not entitled for bail.

7. It may be mentioned that after the said order was passed, all the other Directors have been arrested by the Investigating Agency. One of the Directors has been granted anticipatory bail by the learned Sessions Judge by an order dated 15/03/2018 in Anticipatory Bail Application No.73/2018, on the ground that the said accused had retired as Director on 30/01/2017.

8. As noticed earlier, after rejection of the application for bail by the learned Sessions Judge till today, there is no request made by the Investigating Agency for interrogation of any of the applicants or the other co-accused.

9. I have heard the learned Counsel for the applicants and the learned Public Prosecutor and the learned Additional Public Prosecutor for the respondents in the two applications. Perused record and the case diary.

10. On behalf of the applicants several contentions are raised, which may be briefly noticed as under :

(i) That there is non-compliance with Section 41 of the Code of Criminal Procedure, in as much as, there was no notice/ prior intimation served on any of the applicants and in so far as the applicant Delcy is concerned, there was no woman police personnel available when the applicant Delcy was arrested. It is submitted that there is manipulation of the record by the Investigating Agency to show that there is such compliance.

(ii) There is delay in registration of the FIR in as much as the raid was conducted initially somewhere in the month of July, 2017. However, the offence came to be registered in February, 2018 and, therefore, the Investigating Agency has not made out any necessity to arrest the accused.

(iii) The learned Counsel for the applicants have placed reliance on the decision of the Supreme Court in the case of ***Arnesh Kumar vs. State of Bihar;*** (2014)8 SCC 273, in order to submit that the arrest may not be resorted to as a matter of course and it is not in every case that the arrest is necessary.

(iv) That initially, the offence was registered only under Sections 406, 420 and 120-B of IPC and Sections 3 and 5 of the Act of 1999 and Section 409 of IPC was invoked only after the applicants moved for obtaining bail before the learned Sessions Judge.

(v) Reliance is placed on the decision of the Supreme Court in the case of ***Joginder Kumar vs. State of U.P. And others***; (1994)4 SCC 260, in order to submit that there is no necessity to arrest in this case.

(vi) The learned Counsel has then referred to the provisions of the Act of 1999. It is submitted that out of the two sections invoked, Section 3 does not provide for any offence as such and it provides only for attachment of the properties on default of return of deposits.

(vii) In so far as the offence under Section 5 is concerned, it is submitted that initially a Company incorporated under the Companies Act, was not included in the definition of a 'Financial Establishment' and a 'Company' came to be included only by virtue of an amendment with effect from 29/08/2017. It is submitted that the raid having been conducted prior thereto, no offence can be said to be made out in so far as Section 5 of the Act of 1999 is concerned against a Company. It is submitted that the liability of the Directors can only arise by way of vicarious liability in the event the Company is found to have committed the offence. It is submitted that once the Company was not included in the definition of the 'Financial Establishment' on the relevant date, the applicants, in their capacity as Directors, cannot be roped in for an offence under Section 5 of the Act of 1999.

(viii) It is submitted that the prosecution had claimed that one Subhash Patil who is a shareholder of Company AGL to the extent of 70 %, was the kingpin and the brain behind the offence. It is submitted that there is no material to show that the intention of the applicants since inception was to deceive or to cheat and thus, prima facie, no offence under Section 420 of IPC can be said to be made out. It is submitted that there is no prima facie case even to show complicity of the applicants in the offences under Sections 406 and 409 of IPC. It is submitted that the entire record of the Company was seized and a search was carried out on 20/07/2017 and as such, the continued incarceration of the applicants is not necessary.

11. Shri Rivankar, the learned Public Prosecutor has submitted that the offence is serious and there is prima facie case to show the involvement of the applicants in the offence. Although it was not disputed that there was some delay in the registration of the FIR, it is submitted that the investors were not coming forward possibly on account of the fact that they were influenced by the applicants. It is submitted that after some of the investors came forward that a complaint was lodged on behalf of the State by Mr. Fadte and the investigation is in progress. The learned Public Prosecutor has then referred to the definition of “Financial Establishment” in Section 2(c) of the Act of 1999, in order to show that it includes an individual. It is submitted that thus, the fact that the Company was included in the said establishment on 29/08/2017 would be inconsequential. It is submitted that in any event, the offence would be committed on the day on which there is a default, in the repayment of the deposit and interest and as such, the

offence would be of a continuing nature.

It is submitted that there is likelihood of the applicants tampering or influencing the prosecution witnesses and the evidence and/or of indulging into similar offence. The learned Public Prosecutor has referred to certain incidents in which Mr. Patil, who is one of the shareholders of the company, is alleged to be previously involved in similar offence in Maharashtra.

12. Shri Rivankar has placed reliance on the decision of the Supreme Court in the case of ***Virupaksha Gauda and another Vs. State of Karnataka;*** 2017(5) SCC 406, in order to submit that factors such as the nature of accusation, severity of the punishment, reasonable apprehension of tampering with the witnesses or threat to the complainant, prima facie case to support the charge, are some of the considerations, which are relevant while considering a prayer for bail. It is submitted that the societal impact of such release is also a relevant consideration. He, therefore, submits that the applications for bail be dismissed.

13. I have given my anxious considerations to the rival circumstances and the submissions made.

14. Although several contentions have been raised both on

behalf of the applicants and the State, it is neither necessary nor appropriate to examine them in depth so as to record any final or binding opinion so as to prejudice either prosecution or the applicants/ accused in as much as the investigation is still in progress. The principles for grant or refusal of bail are too well settled to be restated. Suffice it to mention that while considering a prayer for bail, the Court is required to balance the conflicting considerations of personal liberty and a need for a fair and proper investigation of the offence.

15. In the case of ***Virupaksha Gouda*** (Supra), the Supreme Court had noted its earlier decision in the case of ***Prasanta Kumar Sarkar Vs. Ashis Chattarjee and another;*** (2010)14 SCC 496, in which the following principles have been stated to be relevant for considering such a prayer :

> *(i) whether there is prima facie case or reasonable ground to believe that the accused had committed offence;*
> *(ii) nature and gravity of the accusation;*
> *(iii) severity of the punishment in the event of conviction;*
> *(iv) danger of the accused absconding or fleeing, if released on bail;*
> *(v) character, behaviour, means, position, standing of the accused;*
> *(vi) likelihood of the offence being repeated;*

(vii) reasonable apprehension of the witnesses being influenced;
(viii) danger of course, of justice being thwarted by grant of bail."

16. Coming back to the present case, a perusal of the case diary would prima facie show that the contention about non-compliance with Section 41 of the Cr.P.C. or about the absence of any lady police personnel, when the applicant Delcy was arrested, cannot be accepted. It is neither necessary nor appropriate to set out the contents of the case diary in detail, as the investigation is still in progress. However, I find that prima facie the said contention on behalf of the applicant Delcy cannot be accepted.

17. The material allegations against the applicants are about the Company of which they are the Directors having lured the investors with exorbitant returns on investment and after having accepted the deposits, the same being misappropriated to their own use. Prima facie, there are certain cheques to show payment of the return for some period. However, according to the applicants, they were in the hospitality business and were offering tours to the travelers on a discounted price and certain commission was paid to those persons/ agents, who were bringing such travelers to the Company. The applicants had denied that they were accepting any

deposits as such. It is for the Investigating Agency to investigate this aspect in detail. However, the fact remains that the raid was conducted on the establishments of the applicants in the month of July, 2017 on the basis of a search warrant obtained from the Magistrate. However, no action was taken thereafter for about six months and only when some of the investors came forward that Mr. Fadte lodged a complaint on behalf of the State and the investigation was started. Prima facie, at this stage, there is no explanation for the delay as to why in spite of a raid and certain seizure being effected, no FIR came to be registered for about six months. The Investigating Agency had seized the entire record, including the details of the website of the Establishments of the applicants. However, the seized articles have been ordered to be returned in an application filed under Section 457 of Cr.P.C. The Investigating Agency has not taken any action to challenge the said order. Looking to the nature of the offence, the evidence is bound to be of documentary nature. The applicants are in judicial custody and their continued incarceration may not be necessary for purposes of the investigation. Appropriate conditions can be imposed to secure their presence and co-operation with the Investigating Agency. The offences under the Indian Penal Code except the offence under Section 409 are not punishable in excess of seven years imprisonment. The offence under Section 409 is also not the one which is exclusively punishable with imprisonment for life. Now so far as the offences under the Act of 1999 are concerned, the learned Counsel for the applicants are right in contending that Section 3 does not provide for any offence as such. It only provides for attachment of the properties on default of the return of de posits. Section 5 provides for default in repayment of deposits and interests, by any Financial Establishment and every person responsible for the management and the affairs of the Financial Establishments shall be punishable with imprisonment, which may extend to 10 years and fine. Financial Establishment is defined in Section 2(c) of the Act. The said Act came to be amended by Act of 13 of 2017 with effect from 29/08/2017. Section 2(c) as it stood prior to its amendment reads thus :

> *"2(c). "financial establishment" means an individual, an association of individuals or a firm carrying on the business of receiving deposits under any Scheme or arrangement or in any other <u>manner but does not include a company registered under the Companies Act, 1956, or a corporation or a co-operative society owned or controlled by any State Government or the Central Government, or a banking company as defined under section 5(c) of the Banking Regulation Act</u>, 1949 (Central Act X of 1949) or a non-banking financial company as defined in clause (f) of section 45-I of the Reserve Bank of India Act, 1934 (Central Act 2 of 1934)."*
>
> *(Emphasis supplied)*

The amendment by Act No.13 of 2017 has now included a Company, carrying on a business of receiving deposits under any scheme or arrangements in the definition of 'Financial Establishment'. Prima facie, it appears that the date when the Company was incorporated i.e. prior to the amendment, it was not included in the definition of 'Financial Establishment Prima facie, it does appear that the liability of the Directors can only arise if the Company has committed the offence under Section 5 of the Act of 1999. However, even assuming that the offence under Section 5 is made out, the same, as noticed earlier, is punishable with imprisonment upto 10 years. Considering the overall circumstances, in my considered view, the applicants can be enlarged on bail, subject to strict conditions as their continued incarceration is not necessary for carrying out further investigation. It is, however, made clear that observations herein are only of a prima facie nature and are for the limited purpose of deciding the application for bail.

18. In the result, the following order is passed :

<u>ORDER</u>

1) The applications are allowed.

2) The applicants be released on bail on furnishing a PR Bond in the sum of Rs.1 Lakh each, with one or two

sureties in the like amount.

3) The applicants shall surrender their passports with the Investigating Officer.

4) The applicants shall not leave the State of Goa without intimation and prior permission of the Investigating Officer.

5) The applicants shall attend the Investigating Agency once in every week on Monday between 10.00 a.m. and 1.00 p.m. and as and when required by the Investigating Officer.

6) The applicants shall co-operate with the Investigating Agency and shall not tamper or influence the prosecution evidence or witnesses in any manner.

7) The applicants shall not indulge into any similar activity, which is subject matter of investigation while on bail.

8) In the event of breach of any of the conditions, liberty to the prosecution to apply for cancellation of bail.

C. V. BHADANG, J.

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