

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO.817 OF 2018

Bhanubhai Sharma

.. Applicant

Vs.

Vikas Kalyanam Narayan & Anr.

.. Respondents

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Mr.Aabad Ponda a/w. Mr.Swapnil Ambure, Edith Dey and Mikhail Dey i/b. M/s.Dinesh Tiwari & Associates, Advocate for the Applicant.

Mr.Rafique Shaikh a/w. Mr.Sharif Khan & Mr.Deepak, Advocate for Respondent No.1.

Mr.Y.M. Nakhwa, APP for the Respondent – State.

PI Pramod R. Khopikar & PSI Yogesh R. Khanure, Cyber Police Station, Crime Branch, Mumbai, present.

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CORAM : PRAKASH D. NAIK, J.

DATED : JULY 17, 2018.

:: O R D E R :

By invoking inherent powers of this Court under Section 482 of Cr.P.C., the applicant seeks to challenge the order dated 10th July, 2018, passed by the Additional Chief Judicial Magistrate 37th Court, Esplanade, Mumbai, in RA No.71/2018 granting judicial custody to respondent no.1 till 21st July, 2018.

2 Respondent no.1 was arrested on 7th July, 2018, in connection with C.R.No.3 of 2018, registered with Cyber Police Station. Respondent no.1 was produced before the Court for remand on 8th July, 2018. He was remanded to police custody till 10th July, 2018. On the next date i.e. on 10th July, 2018, police custody was sought by the investigating officer by producing the accused for further remand. However, learned Magistrate refused to extend the police custody and granted judicial custody to respondent no.1.

3 The applicant is the original complainant representing M/s.Tata Motors Insurance Broking and Advisory Services Limited, upon whose complaint the aforesaid FIR was registered on 14th April, 2018, for the offences punishable under Sections 419, 500, 501, 502, 504 read with Section 120-B and 34 of IPC as well as Section 66 C and D of the Information Technology Act. It is the case of the complainant that respondent no.1 is an ex-employee of the complainant's company whose services were terminated on 5th August, 2016, due to insubordination and loss of confidence. Respondent no.1 is the resident of Kolkata and along with the other accused committed crime which is the subject matter of First Information Report (FIR) bearing No.3 of 2018.

4 Applicant's contention is that respondent no.1 has committed a serious crime, as stated in the FIR. It is alleged that the accused had circulated various E-mails knowing the same to be false for the purpose of causing annoyance, inconvenience and maligning the reputation as well as prestige of M/s.Tata Motors Insurance Broking and Advisory Services Limited. Mr.Tarun Samant is the former CEO of the complainant company. While issuing Graduation Degree Certificate, Choudhary Charan Singh University misspelled his name as "Sawant" instead of "Samant". Capitalising on the said error, Arise Foundation has addressed innumerable E-mail complaint and letters to various authorities which were malicious, defamatory, baseless and made with intention of maligning defaming and harassing company and Mr.Samant and by said criminal act wrongful gain caused to accused and wrongful loss to company by way of loss of business. It is alleged that due to large number of E-mails containing false and frivolous statements received by IRDA from Arise India Foundation, IRDA conducted their own inquiries into the matter of Tarun Samant's educational qualifications and certificates as well as other defamatory allegations made in the E-mails. Extensive correspondence was exchanged between Mr.Samant, said Company, IRDAI and Chaudhary Charan Singh University to

ascertain the truth of the matter and the same was resolved and the truth ascertained to the satisfaction of all concerned parties. Arise India claims to be a NGO but appears to be acting at the behest of vested interest. It is further alleged that accused Dr. Kodur Venkatesh and Raghvendra Kowalgi were founder and Western India head of the said NGO. The company was forced to file suit in the High Court on 28th March, 2017. The High Court directed Deputy Commissioner of Police, Cyber Crime Investigation Cell to investigate the matter and submit report to Court. The High Court vide order dated 22nd May, 2017, granted liberty to file appropriate proceedings under provisions of IPC and Information Technology Act. It is alleged that the accused are engaged in circulating printed material, E-mails etc. to malign and to defame the company name as well as board members/senior officers of complainant company and board members/officers of Tata Group of Companies and accordingly committed offences under Section 34 and 120-B with Sections 419, 500, 501 and 502 of IPC and Section 66 - C and 66 - D of Information Technology Act.

5 Learned counsel for the applicant submitted that the learned Magistrate has completely ignored the grounds of police

custody sought in the remand application by the investigating officer. It is submitted that the Court has failed to take into consideration the seriousness of the crime and the need for further investigation by interrogating the accused in the police custody. It is submitted that the High Court while dealing with Notice of Motion filed in Suit directed Deputy Commissioner of Police to carry out necessary investigation and submit report. He also pointed out the order of this Court dated 10th May, 2018, passed in Notice of Motion, wherein it was directed that Special team of police officer be formed to investigate the matter. He also pointed out the affidavit filed by respondent no.1 in the aforesaid civil proceedings before this Court wherein he has denied his involvement. It is submitted that the learned Magistrate failed to appreciate that the investigating officer in his remand report had highlighted numerous circumstances and reasons for further investigation and remanding the accused to police custody. Remand application indicated that investigation is to be conducted for procurement of passwords pertaining to the E-mails, recovery of documents and mobile numbers used for creating E-mails and further investigation in respect to how the entire crime was committed including visit to Kolkata from where E-mails have been suspected to be created or operated. It is

submitted that the accused could not be interrogated in custody in detail within a short span of time after the grant of police custody. The respondent was in police custody only for few days and had not cooperated with the investigation and refused to part with any information to the investigating officer relating to crime. It is submitted that despite admitting sending of questionable E-mails, the accused refused to provide password to the investigating agency. The learned Magistrate ought to have granted police custody remand in respect to the respondent no.2. it is submitted that the reasons assigned by the learned Magistrate for police/Magistrate custody were cryptic and the Court has not taken into consideration several grounds set out in the remand application by the investigating officer. It is submitted that, the application for anticipatory bail preferred by respondent no.1 was rejected on 7th July, 2018 and on the same day in the evening he was arrested. The respondent was produced before holiday Court on 8th July, 2018, which was Sunday and he was remanded to police custody for two days. On the next date, the Court refused to extend police custody and granted judicial custody. The impugned order was passed without considering seriousness and complexity of crime. The Court ignored the report of Akbar Pathan, Deputy Commissioner of Police, Crime,

Mumbai, which was submitted in High Court and involvement of respondent no.1 was disclosed.

6 He placed reliance on the decision of this Court in the case of ***Narendra Bhatia Vs. Pushpak Tarachcand Meshram & Ors.***¹. Relying upon the said decision, it was pointed out that this Court in the said decision has conceded the issue relating to maintainability of such application by the *defacto* complainant, and need for police custody for conducting investigation. This Court directed the investigating officer to file a fresh remand application seeking police custody and the Special Court was directed to consider the same on its merits. It is further submitted that the police custody is required to be granted for the first 15 days after arrest and in such a situation the applicant had no other option but to approach this Court seeking relief and could not wait for investigating machinery to apply for such a relief in this Court. He also pointed out the decision of Supreme Court of India in the case of ***State represented by CBI Vs. Anil Sharma***². My attention was drawn to observations made in paragraph 6 of the said decision which reads as follows:

1 2016 SCC Online Bom 1691

2 1997 (7) SCC 187

“6 We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation oriented than questioning a suspect who is well ensconced with a favorable order under Section 438 of the code. In a case like this effective interrogation of suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Succession such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The court has to presume that responsible Police Officers would conduct themselves in task of disinterring offences would not conduct themselves as offenders.”

7 On the basis of the said observation, it is contended by learned counsel for applicant that the custody of the accused is required to be granted for the purpose of investigation by effective interrogation. He also relied upon the decision in the case of ***Dinesh M.N. (S.P.) Vs. State of Gujarat***³. Learned

counsel stressed on the observations of the Court that the Court while passing order of bail had kept out of consideration relevant material and taken into account irrelevant material. It is submitted that similar situation had arisen in the present case while passing impugned order. Reliance is also placed on the decision in the case of **Narendra K. Amin (Dr.) Vs. State of Gujarat & Anr.**⁴, which reiterated the observation made in the aforesaid decision. Learned counsel also pointed out the decision of this Court in the case of **Harshad S. Mehta Vs. Union of India & Ors.**⁵. To draw support to the relief sought in this application on the basis of observations of this Court that the public interest lies in giving the investigating authority proper opportunity to question the accused vis-a-vis the leads that it has obtained, and that the technique of interrogation involves confrontation either with a person or documents and that is possible and at least more effective, when the person being interrogated is in the custody.

8 In the light of the aforesaid submissions and the factual aspects involved in the matter, it is submitted that the accused have committed serious crime, as highlighted in the

4 (2008) 13 SCC 584

5 1992 Cr.L.J. 4032

remand application and the FIR. In the circumstances, it was an error on the part of the trial Court to refuse police custody to the accused. Mr.Ponda had also pointed out that the grounds for police custody reflected in the remand application which were according to him were not considered by the learned Magistrate while granting judicial custody to respondent no.1.

9 Learned APP appearing for the State supported the prayers made in this application. It is submitted that the investigating officer had made out several grounds in the remand application which were not considered by the Court and the accused was remanded to judicial custody. It is submitted further police custody is necessary for investigation. While in police custody for short time, the respondent had not cooperated with investigation. For effective investigation, further custody for interrogation is necessary for all the reasons stipulated in remand application.

10 Per contra, learned counsel Mr.Shaikh appearing for respondent no.1 submitted that initially the offences which were registered against the accused were bailable in nature. However, subsequently, offence punishable under Section 468 of IPC was

added, which is a non bailable offence. He further submitted that the applicant was arrested on 7th July, 2018, immediately after his application for anticipatory bail was rejected by the Sessions Court. Thereafter, he was produced before the Court for remand on 8th July, 2018 and police custody was granted. He was again produced for further remand before the Court on 10th July, 2018 and since the learned Magistrate was not satisfied with the reasons assigned for police custody, the accused was directed to be remanded to the judicial custody. He also took recourse to Section 167(2) of Cr.P.C. and submitted that grant or refusal of custody is a prerogative of the learned Magistrate and such an order cannot be interfered with unless it is perverse. The accused was in police custody from 7th July, 2018 till 10th July, 2017. It is further submitted that the applicant had preferred an application for bail before the trial Court which is pending for consideration. He also pointed out order dated 24th May, 2018, passed by Sessions Court preferred by respondent no.1, wherein he was directed to report the concerned police station as and when he is called by concerned police station and submitted that he has complied the said direction. It is further submitted that the co-accused Pijushkanti Roy was arrested on 21st May, 2018, and, he remained in custody for substantial time till he was granted bail

by the Sessions Court on 7th July, 2018. It is submitted that, while granting bail to the said accused, it was observed that crime shows involvement of documentary evidence. It is, thus, submitted that the substantial investigation was conducted by the investigating machinery while the co-accused was in custody who was subsequently granted bail. Learned counsel further submitted that the application preferred by complainant is not maintainable. The complainant has no locus to prefer such an application. The State has not preferred such application. He placed reliance on the decision of the Apex Court in the case of ***Sandeep Kumar Bafna Vs.State of Maharashtra***⁶, in support of his submission. However, Mr.Ponda, learned counsel for the applicant has pointed out the observations of this Court in the case of ***Narendra Vishwamitra Bhatia Vs. Pushkar Tarachand Meshram & Ors.(Supra)***, and submitted that similar submission which was advanced by the counsel appearing for the accused therein was turned down by the Court and it was held that such an application is maintainable in law. Counsel for respondent no.1 relied on order passed by this Court in Criminal Application No.1067 of 2013, wherein application challenging order passed by learned Magistrate refusing police custody was

6 Criminal Appeal No.689 of 2014, decided on 27.03.2014

preferred by complainant was rejected. It is submitted that Respondent no.1 is an educated person and not having criminal background. He belong to respectable family. It is submitted that High Court while dealing with civil proceedings had not directed registration of FIR. The investigation relates to documents for which custodial interrogation is not necessary. Further investigation can be carried out even without accused being in police custody. The complainant is interested in the police custody. It is submitted that complaint which is purported statement of complainant was forwarded through covering letter of advocate, and the same is treated as FIR. Hence, the application be rejected.

11 Having heard both sides and perusing documents on record, the relevant facts which emerge for consideration are that, respondent no.1 was allegedly employed as Assistant Vice President with complainant company and his services were terminated on 5th August, 2016. Mr.Tarun Samant was former CEO of the company and taking undue advantage of spelling error in the certificate used to him several E-mail/complaints/letters were addressed by Arise India Foundation. The correspondence was allegedly defamatory.

According to complainant the accused circulated large number of E-mails maligning reputation of company. The suit was filed by complainant in which orders referred to above were passed by this Court in its civil jurisdiction. The complaint/statement of complainant prepared in advance was forwarded through covering letter of advocate dated 13th April, 2018, to Cyber Crime Investigation Cell, which was apparently treated as FIR. In the written complaint/statement it was alleged that the accused have committed offences under Sections 419, 499, 500, 501 and 502 of IPC read with Section 120-B, 34 of IPC and Section 66-C and 66-D of I.T. Act. The FIR was registered on 14th April, 2018 for the said offences. The offences under penal code, as stated above were all bailable in nature and some of them were non cognizable. The applicant has annexed letter dated 24th April, 2018, addressed to Deputy C.P. Cyber Crime Cell, mentioning that offences punishable under Section 465, 468, 469, 471 and 474 of IPC have been committed by accused. During course of investigation co-accused Piyushkanti Roy was arrested on 21st May, 2018. He was remanded to police custody till 24th May, 2018. The police custody was extended upto 31st May, 2018. From the remand application dated 31st May, 2018, annexed to this application, it appears that additional offences were invoked

under Sections 465, 468, 469, 471 and 474 of IPC. Except the offence under Section 468 of IPC all other offences were bailable in nature. Further police custody of the said accused was sought. However, the Court granted Magisterial custody upto 12th June, 2018. While passing order dated 31st May, 2018, it was observed by Court that, since 22nd May, 2018 till this date the accused is in police custody. However, prosecution is again seeking further police custody of accused for same reason of opening 7 E-mail accounts. Respondent no.1 had preferred an application for anticipatory bail bearing No.666 of 2018, before Sessions Court. The said application was rejected on 17th April, 2018 on the ground of maintainability as FIR was registered for bailable offences. Since further charge under Section 465, 468, 469, 471 and 474 of IPC were added, respondent no.1 preferred another application viz. ABA No.871 of 2018. Interim relief was granted on 24th May, 2018. However, on 7th July, 2018, the application was rejected and on 7th July, 2018, co-accused was granted bail by Sessions Court.

12 The applicant was arrested on 7th July, 2018. He was in police custody till 10th July, 2018. It is also noted that the learned Magistrate while granting the judicial custody had

observed that, on perusal of remand report as well as case diary, it appears that the accused has been arrested on 7th July, 2018. On 8th July, 2018, he was produced and police custody was extended till 10th July, 2018. Case diary and remand report nowhere shows the satisfactory progress of the investigation. Most of the reasons in the remand report of accused no.1 and the present accused are similar. It is further mentioned that whatever information sought by the investigating officer from the present accused can be available by mode of scientific investigation without custodial interrogation. Accused is in police custody since 7th July, 2018, and, sufficient opportunity was granted to the investigating officer. The Court further observed that there was no justifiable reason for further extension of police custody and the accused was taken in judicial custody.

13 Although in the remand application, certain grounds were made seeking police custody for the purpose of investigation, and also stated that the accused did not cooperate with the investigation, the Court was not satisfied with the reasons mentioned in the remand application for grant of police custody. The co-accused arrested in connection with the same case was in custody for substantial period. Subsequently, bail was granted to him. The inquiry in relation to the subject matter of

the present case is going on since 2017, however, FIR was registered in April 2018. Apparently, the FIR was initially registered for all bailable offences under penal code. The offence is under Section 468 is the only non bailable offence under IPC which was added subsequently. The offence under Section 468 of IPC relates to offence of forgery for the purpose of cheating. In the case of **Narendra Bhatiya (Supra)**, this Court had dealt with objection raised by the accused with regards to maintainability of application challenging judicial custody by complainant. It was observed that the complainant was concerned with investigation and in the facts and circumstances of the case, he would be concerned with investigation, and hence the application was entertained. The investigating authority had not moved any application for seeking police custody of the applicant. It is the prerogative of the investigating machinery to conduct investigation. However, no steps were taken in challenging the order passed by the Court remanding the accused. However, during the course of hearing the prosecution had supported the application preferred by the original complainant. In the factual circumstances, this application could be entertained and cannot be rejected on ground of maintainability.

14 In the case of **Narendra Bhatia (Supra)**, this Court set aside order of judicial custody on the ground that, the complaint refers to involvement of atleast two more officers of Municipal Corporation, in the demand of bribe, the origin of 19 notices under Section 488 of Mumbai Municipal Corporation Act is yet to be found out. The Special Court without being alive to unique facts dealt with remand application in a pedantic manner. In the decisions of Supreme Court in the case of **Narendra Amin (Supra) and Dinesh M.V. (Supra)**, the Court observed that the Court below had taken into consideration irrelevant material and kept out relevant material. The Supreme Court was dealing with application for cancellation of bail under Section 439(2) Cr.P.C. and even in facts of this case, the same are not applicable. In the case of **State Vs. Anil Sharma**, Supreme Court had dealt with order granting pre arrest bail which was assailed before the Supreme Court. In the circumstances, it was observed that custodial interrogation is qualitatively more elicitation - oriented than questioning suspect who is well ensconced with favourable order under Section 438 of the Code. The accused was a member of Legislative Assembly and charged for offences under Section 13(2) of P.C. Act. It was observed by Court that effective

interrogation of suspected person gives advantage to collect useful information. The decision of this Court in the case of ***Harshad Mehta (Supra)*** was relating to application for anticipatory bail. Thus, the said decision was delivered in different context. The order of this Court relied by counsel for respondent in the case of Rubina Ansari (M.L. Tahilramani, J.), related to rejection of application on the ground that investigating officer stated before Court that further custody of accused is not required. Thus, it is not applicable in this case. The order granting bail to co-accused Roy, placed for reference by advocate for respondent no.1 indicate that relevant material is seized by investigating officer. The crime shows involvement of documentary evidence. Record does not show that further custody is required for any recovery or discovery. Although there is sufficient material available against the applicant looking to the nature of evidence required to prove that it is collected by prosecution.

15 Taking into consideration all the aforesaid aspects, I find no reason to interfere in the order passed by the learned Magistrate. The offences are registered under IPC and IT Act. The non bailable offence under Section 468 of IPC apparently

invoked subsequently. For conducting further investigation, police custody is not necessary. The learned Magistrate has assigned reasons for refusing police custody. The co-accused was interrogated extensively. Considering nature of investigation to be conducted, I do not find any reason to set aside the impugned order. Since investigation is in progress, it would not be appropriate to deal with applicability of Section 468 of Criminal Procedure Code, which was added subsequently. It is the prerogative of the remand Court to pass such an order in the light of Section 167 of Cr.P.C. Section 167 Cr.P.C. relates to procedure when investigation cannot be completed within twenty four hours. Sub-section (1) and (2) reads thus:

“167. Procedure when investigation cannot be completed in twenty-four hours. -

(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest

Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction."

Sub-section (3) of Cr.P.C. requires the Magistrate to record his reasons under this Section for authorising detention in custody of the police. It thus clear that grant of police custody is not a mechanical process. In the present case, the Court refused police custody for the reasons mentioned therein. The burden to assign reasons for police custody is stipulated in aforesaid provision. Hence, if the Court is not satisfied with reasons for grant of police custody, it is appropriate to remand the accused to judicial custody. The Court has taken into consideration the progress of

investigation and in the light of observations made in the order dated 10th July, 2018, no interference is called for. Hence, the application deserves to be dismissed.

16

Criminal Applications stands dismissed.

(PRAKASH D. NAIK, J.)