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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO. 3027 OF 2018

Binod Sitaram Agarwal ....Applicant

Vs.

The State of Maharashtra ....Respondent

Mr. Aabad Ponda a/w Mr. Abhijit Desai & Mr. M. Amanullah I/b Ms. Vrushali Maindad Advocate for the applicant
Mr. Benny Chatterjee, senior advocate I/b Ms. Priyanka V. Pandit for intervener
Mrs. G. P. Mulekar APP for the State.

CORAM : PRAKASH D. NAIK, J.

DATED : 21st DECEMBER, 2018

P.C.

This is an application for bail under section 439 of Code of Criminal Procedure, 1973. Applicant was arrested on 24/10/2018 in connection with crime no. 93 of 2018 registered with M.I.D.C. Police Station. Offences were registered under sections 43 & 66C of the Information Technology Act 2000. Subsequently, section 70 of the said Act was added and while filing the charge-sheet, section 408 of

the Indian Penal Code was also invoked.

2 The case of the prosecution is that the complainant is the Assistant Development Commissioner with M/s. Seepz, Sez, Special Economic Zone, Central Road, M.I.D.C., Andheri, Mumbai. Complaint was forwarded to the said police station on 08/09/2018. The complainant was called by the police for inquiry in respect to the said complaint and his statement was recorded on 11/09/2018 which is treated as F.I.R. It is stated that Seepz, Sez is a Central Project having its office at Central Road, M.I.D.C, Andheri. The undertaking provides financial assistance to Special Economic Zones in Maharashtra, Dadra Nagar Haveli, Daman and Diu and Goa. The Deputy Development Commissioner was provided email-id viz. "**ddcseepz-mah@nic.in"** which is used for discharging day to day affairs of the undertaking. The said email-id is used by Deputy Commissioner himself or any other person authorized by him. It is further alleged that 4-5 months ago, the Deputy Development Commissioner Shri Mahesh Yadav had informed Development Commissioner that the aforesaid email-id is being misused by some

unknown person. Hence directions were issued by the Development Commissioner to make appropriate inquiry in that regard. It is further stated that the said fact was brought to the notice of NIC stating that the aforesaid email id is being misused by unknown persons. It is stated that on scrutiny by NIC, it was noticed that during 22/09/2017 to 24/07/2018, IP addresses of the Gio Infocom Company mentioned in the F.I.R. were found to be suspicious and therefore, report was submitted to Seepz on 13/08/2018 with a view to submit the complaint to the concerned police station and hence, the complaint was forwarded to M.I.D.C. Police Station. On the basis of the said statement FIR was registered on 11/9/2018 for aforesaid offences. It is further alleged that the applicant had hacked and unauthorizedly assessed e-mail address of Deputy Development Commissioner. No one is allowed unauthorizedly to open the email-id. Applicant was arrested on 24/10/2018.

3 Applicant was produced before the competent court for remand. Initially he was remanded to police custody and thereafter remanded to Judicial custody. Although F.I.R. was initially

registered for offence under section 43, 66C of the Information Technology Act, subsequently, section 70 was applied.

4 Applicant preferred an application for bail before the court of the learned Magistrate which was rejected on 01/11/2018. Subsequently, applicant preferred an application befoe the Sessions Court which was rejected on 14/11/018.

5 Mr. Ponda, the learned counsel for applicant submitted that applicant has been falsely implicated in this case. Prosecution lodged against the applicant is motivated. Applicant had made complaints against corruption in the said office against concerned persons and in retaliation, F.I.R. was registered against him. The F.I.R. was registered against unknown persons and subsequently applicant has been implicated in this case. In respect to the complaints forwarded by the applicant, he was called for inquiry. Reference was made to the letter issued by CVC dated 10/10/2018 in respect to the complaint of the applicant wherein he was asked to attend the said office on 15/11/22018. It is submitted that applicant has been dragged into this prosecution on account of

complaints lodged by him. He had also filed a writ petition in the High Court seeking appropriate reliefs in respect of the alleged corrupt practices which is pending. It is further submitted that the applicant has been detained in custody by invoking provisions which are not tenable in law. The offence under section 43 and 66C of the Information Technology Act are bailable in nature. It is submitted that the punishment provided for section 66C is maximum punishment of three years. The learned counsel for applicant drew my attention to section 77 (b) which stipulates that the offences punishable up to three years are bailable in nature. Thus, F.I.R. was registered for offences which are bailable in nature. It is submitted that subsequently section 70 was invoked with a view to apply provisions of non-bailable offence. The learned counsel submitted that section 70 relates to protected system and sub clause 3 of the said provision provides for punishment for imprisonment with either description for a term which may extend to 10 years and fine. It is submitted that to attract provisions of section 70, there is requirement of notification published in Official Gazette declaring system as protected system and in the absence of such notification,

said provisions cannot be applied. It is submitted that admittedly in the charge-sheet which is filed against the applicant, there is no such notification. The learned counsel also pointed out Rule 2(k) of Information Technology (Information Security Practices and Procedures for Protected System) Rules, 2018 and drew my attention which defines protected system. It is submitted that in the light of definition of the protected system, notification is required qua the concerned system which is required to be declared as protected system and there is no such notification in respect to the system which is subject matter of the present case. It is further submitted that section 408 of the Indian Penal Code was invoked belatedly at the time of filing of charge-sheet which also shows malafide on the part of investigating machinery. Although, F.I.R. was lodged on 11/09/2018, provisions of section 408 of the Indian Penal Code were applied only at the time of filing the charge-sheet. It is submitted that the said provision has been applied mechanically without there being any offence or case made out by the prosecution to satisfy requirements of section 408 of the Indian Penal Code. There is no dominion or entrustment which are pre-requisites to

constitute the said offence. He further submitted that while investigation had proceeded for offence under the IT Act, invoking provisions of Indian Penal Code was not warranted and not permissible in law. The learned counsel relied upon the decision of this Court in **Writ Petition No. 4361 of 2018** wherein it is observed that if the special enactment in form of Information Technology Act contains special mechanism to deal with the offences falling within the purview of Information Technology Act, then, the invocation and application of provisions of IUPC being made applicable to the same set of facts is uncalled for. The Court while analyzing the provisions of law and the principles of double jeopardy, set aside the invocation of the penal provisions. The learned counsel further submitted that there has to be specific notification qua subject system in the light of the section 70 of the IT Act. He pointed out notifications wherein certain systems were declared as protected system and therefore submitted that in the present case also, there was necessity of such notification which does not exist and therefore section 70 would not be attracted. Other offences are bailable in nature. Applicant is in custody from the date of arrest. Investigation is completed and

charge-sheet has been filed.

6 The learned APP submitted that the applicant is involved in committing act of hacking the email id and theft of data which was sensitive in nature. It is further submitted that although, F.I.R. was lodged against unknown persons, subsequently, involvement of the applicant came to light and it was found that applicant is involved in the said crime. Learned APP further submitted that applicant was appointed by contract dated 20/01/2017 as IT professional. The said contract was for a period of 12 months. Clause 6 of the said contract states that the appointee shall undertake not to divulge the confidential information viz. not to use or permit or enable any person to use any of the confidential information in any manner, not to disclose or divulge any confidential information to any person unauthorized by the authority and shall limit access to the confidential information to only such personnel authorised by the competent authority. It is further submitted that the said contract also mentions that the obligations under the aforesaid clause to the extent provided shall continue to apply even after termination or

expiry of this Contract. It is submitted that the applicant was engaged on the basis of the said contract and by taking undue advantage of the situation, had committed the acct as stated above. The applicant has assessed sensitive information. If the applicant is released on bail, there is likelihood that he may tamper with the evidence.

7 The learned senior counsel Mr.Chatterjee appearing for the intervener/first informant opposed the application for bail. It is submitted that Seepz is a Government of India undertaking. There was sensitive and confidential information which was retrieved by the accused. The opinion of the expert is still awaited and it is not clear what was the nature of data of which theft is committed by the accused. It is further submitted that the applicant used the email-id which amounts to breach of trust and therefore, provisions of section 408 of the Indian Penal Code in this case. It is further submitted that every information of the Seepz-Sez undertaking is confidential and it is presumed to be protected. Reliance was placed on notification dated 18/02/2015 issued by Ministry of

Communication and Information Technology (Department of Electronics and Information Technology) and the learned senior counsel pointed out clause 2.1 of the said notification wherein it is stated that only email services provided by NIC, the implementing Agency of the Government of India shall be used for official communications by all organizations except those exempted under Clause 14 of this policy. Email service is provided by other service providers shall not be used for any official communication. It is thus submitted that all the emails of NIC are protected and this can be considered as notification within the requirement of section 70 of the Information Technology Act.

8 The learned senior counsel drew my attention to section 8 of the Right to Information Act, 2005 which refers to exemption from disclosure of information. It is submitted that requested information was confidential and the provisions of section 70 are clearly applicable in this case. He also relied upon the contract of appointment of the applicant which puts conditions upon him. It is therefore submitted that the applicant is involved in a serious

offence and bail may not be granted.

9 Heard both sides. I have also perused the F.I.R. as well as documents tendered by both sides. F.I.R. was lodged against unknown persons on 11/09/2018 while lodging F.I.R., section 43 & 66C of the Information Technology Act were invoked. Section 43 relates to penalty and compensation, damage to computer, computer system etc. Provision stipulates the nature of prohibited acts and further mentions that whoever contravenes the provisions is liable to pay damages by way of compensation to the person so affected. Section 66C provides for punishment for identity theft. It contemplates that whoever fraudulently or dishonestly make use of the electronic signature, password or any other unique identification feature of any other person, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to one lakh.

10 It would be relevant to consider section 77B of the IT Act which stipulates that the offence punishable with imprisonment of three

years and above shall be cognizable and offence punishable with imprisonment of three years shall be bailable. In the light of the aforesaid, it is apparent that the offences invoked in F.I.R. were bailable in nature. Section 70 was invoked during the course of investigation. Applicant was arrested on 24/10/2018. It would be relevant to refer to section 70 of the IT Act. The provisions relates to protected system which reads as follows:

> "***70 Protected system***. - *[(1) The appropriate Government may, by notification in the Official Gazette, declare any computer resource which directly or indirectly affects the facility of Critical Information Infrastructure, to be a protected system. Explanation. -For the purposes of this section, "Critical Information Infrastructure" means the computer resource, the incapacitation or destruction of which, shall have debilitating impact on national security, economy, public health or safety.]*
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> *(2) The appropriate Government may, by order in writing, authorise the persons who are authorised to access protected systems notified under sub-section (1).*

(3) Any person who secures access or attempts to secure access to a protected system in contravention of the provisions of this section shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

(4) The Central Government shall prescribe the information security practices and procedures for such protected system.

11 P*rima facie* On plain reading of the said provision, it appears that invocation requires determining particular system as protected system. The aforesaid provision can be read in consonance with Rule 2 (K) of Information Technology (Information Security Practices and Procedures for Protected System) Rules, 2018 which defines "Protected System" means any computer, computer system or computer network of any organisation as notified under section 70 of the Act, in the official gazette by appropriate Government. The charge-sheet does not contain any such notification. The learned counsel for the informant, however submitted that the notification relied by him suffice the requirement of notification contemplated

under section 70. Mr. Ponda had also placed for consideration the notification dated 26/07/2010 wherein the system which is the subject matter of the said notification was declared to be a protected system for the purpose of Information Technology Act. Prosecution invoked section 408 of the Indian Penal Code while filing the charge-sheet, although the said provision was not invoked at the time of registration of the F.I.R. or at the time when the applicant was arrested or also during the course of investigation. Charge-sheet was filed on 17/12/2018.

12 Learned APP submitted that the facts of the case before the Division Bench were distinct in nature and the said decision is not applicable in this case. This Court is dealing with the application for bail and this is not the stage to give any finding with regards to merits of the case. However, prima facie, it is apparent that to satisfy requirement of section 70 of the IT Act, there was no notification. Whether the provisions of section 408 are applicable or not will be decided at the appropriate stage. However, in the factual matrix of the case, it is noted that the applicant is in custody from

24/10/2018. F.I.R. proceeded with registration of offences under sections 43 and 66 of the I.T. Act. subsequently, offence under section 70 was invoked and at the time of filing of charge-sheet, section 408 of the Indian Penal Code has been invoked. Charge-sheet is already filed. Further custody of the applicant is not necessary. Taking into consideration of the aforesaid facts and circumstances, case for bail is made out. Hence, I pass following order:

O R D E R

(I) Criminal Bail Application No. 3027 of 2018 is allowed.

(II) Applicant is directed to be released on bail in crime no. 93 of 2018 registered with M.I.D.C. Police Station on furnishing P. R. bond in the sum of Rs. 50,000/- with one or more sureties in the like amount.

(III) Applicant shall report to M.I.D.C. Police Station, Andheri once in a month on first Saturday between 11.00 am to 01.00 p.m. till further orders.

(IV) Applicant shall not tamper with the evidence and shall attend the Trial Court on the date of hearing of the case regularly, unless exempted by the Court.

(V) Applicant is permitted to furnish cash security in the sum of Rs. 50,000/- for a period of 6 weeks.

(VI) The observations made in this order are *prima facie* and the trial Court shall deal with the case in accordance with law.

13 Application stands disposed of.

[PRAKASH D. NAIK, J.]