IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPLICATION (BAIL) NO. 54 OF 2019.

Ms. Kuntaben Ashokbhai Rathod,
widow, aged about 53 years,
Indian National,
r/o H.No.70, Crystal Apartments,
Nirmala School Road,
Rajkot – Gujarat. … Applicant.

Versus

1. The State of Goa,
   Through Panjim Town
   Police Station,
   Panaji – Goa.

2. Public Prosecutor,
   Panaji, Goa. ... Respondents

Mr. Yogesh V. Nadkarni, Advocate for the Applicant.

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

Mr. S. D. Lotlikar, Senior Advocate with Mr. Jayant Karn, Advocate for the Intervenor.

Coram : Prithviraj K. Chavan,J.

Reserved on : 8th July 2019.

Pronounced on : 2nd August 2019.

ORDER:

This is an application under Section 438 of Cr.P.C. by the applicant who claims to be a widow, aged about 53 years, against whom crime No.143/2018 has been registered on 28.06.2018 at Panaji police station under Sections 403, 409, 420 of I.P.C.

2. Complainant Mr. Natwarlal Gohil is a distant relative of the applicant. He has partnership firm namely M/s Satt Adhar Builders. He has filed a Special Civil Suit No. 39/2018/B in the Court of Senior Civil Judge, Panaji against the applicant for recovery of Rs.2,63,68,500/- along with interest and for permanent injunction. The suit was filed on 11.09.2018. An application for anticipatory bail filed before the Sessions Judge by the applicant on 24.10.2018 was dismissed by an order dated 06.02.2019.

3. It is the contention of the applicant that the entire dispute between the complainant and herself is of civil nature which is evident from the pleadings and the contents of the complaint. The applicant submits that no amount is due to the complainant. It is contended

that no offences under Section 403, 407 or 420 of I.P.C. is made out and there is no requirement of her custodial interrogation by the police.

4. The applicant denied all the allegations levelled against her in the complaint and FIR.

5. It is the contention of the applicant that she will fully cooperate with the investigating agency and she has been cooperating with them. It is also submitted that all relevant material required by the investigating officer has already been furnished.

6. The applicant is a resident of Rajkot, Gujarat. There are no criminal cases registered against her except the present one.

7. In case of her arrest, the applicant shall suffer severe humiliation and embarrassment not only to her but the entire family. She, therefore, prays for her release in case of her arrest by respondent No.1, in the instant crime.

8. The respondent has opposed the application by contending that the applicant made false and fraudulent representation to the complainant. She had dishonestly induced to part more than 2.30

crores in her name and therefore, criminally misappropriated the same, contrary to the representation made and trust imposed by the complainant, thereby cheated the complainant.

9. It is submitted that the act of the applicant committing financial fraud involving breach of trust, cheating and criminal misappropriation of funds to such huge amount deserves to be taken with utmost seriousness.

10. It is submitted that a summons under Section 41(A) of Cr.P.C. was served upon the applicant on her address, however, she did not comply with the same.

11. During investigation, it revealed that the complainant had transferred the amount in the bank account of the applicant and her associates under RTGS. The relevant details are as under:-

Date	Particulars	Paid
28/09/2011	To RTGS PNB Panaji Ch.No.210498 in name of Shri Ashok Vashrambhai Rathod.	5,000,000

02/12/2011	To RTGS PNB Panaji in name Mrs. Kuntaben Ashok Rathod.	10,000,000
05/12/2011	To RTGS Goa Urban Co-op Bank, Head Branch Ch. No. 077666 in name Mrs. Kuntaben Ashok Rathod.	2,500,000
13/12/2012	To RTGS PNB Mapusa Ch.No. 548015 in name of Mrs. Kuntaben Ashok Rathod.	5,000,000
14/01/2012	To RTGS PNB Mapusa Ch. No.548016 in name of Mrs. Kuntaben Ashok Rathod.	5,000,000
24/01/2012	To RTGS PNB Mapusa Ch. No. 548032 in name of Mrs. Kuntaben Ashok Rathod.	468,500
31/01/2012	To RTGS PNB Panaji Ch. No. 620259 in name of Mrs. Kuntaben Ashok Rathod.	600,000
30/07/2012	To RTGS PNB Panaji Ch.No. 398482 in name of Mrs. Kuntaben Ashok Rathod.	300,000
02/01/2014	To RTGS PNB Panaji Ch.No. 540447 in name of Mrs. Kuntaben Ashok Rathod.	100,000

13. A request was made to the bank to freeze the beneficiary account including the account standing in the name of the applicant in Gujarat, through speed post.

14. Pursuant to the directions of this Court, the applicant reported at the Panaji police station on 28.02.2019 and 01.03.2019 from 10.00 a.m. To 1.00 p.m. before the investigating officer. It is submitted that during interrogation, the applicant confessed of receiving an amount of Rs.2,13,68,500/- through bank transaction from 2011 to July 2012. However, her statements are contrary to the complaint.

15. According to the respondent, it is the claim of the applicant that the complainant Mr. Gohil at the relevant time had surplus funds. He had requested the husband of the applicant to accept the funds for the purpose of investment in different manner by them at his risk and cost. It was agreed at the relevant time that in case any loss incurred at that time, applicant shall not be liable for such losses in any manner and such losses shall shall be borne by the complainant and in case of profit, the applicant and her husband will have to pay the reasonable share to the complainant. On such terms and conditions, the complainant had sent amounts at different intervals from his

partnership firm as shown in the chart.

16. According to the applicant, the amount was invested by her husband in different segments. However, she has not provided any details. The husband of the applicant died on 12.10.2013. The applicant states that she had made some investment in different businesses like real estate and share market which resulted in heavy losses and therefore, she claims that as per the agreed terms with the complainant, nothing is required to be paid to him. On the contrary, the applicant contends that the losses suffered by her are required to be paid by the complainant.

17. According to the respondent, the applicant states that she had paid an amount of Rs.50,00,000/- to the complainant between October, 2015 and March, 2016 towards consideration in respect of land admeasuring about 14,995 sq. yards of Mr. Natwarlal Gohil in village Jaliya, Rajkot, which he agreed upon orally to sell her. According to the applicant, the said amount is not a repayment in respect of the amount sent by the complainant Mr. N. Gohil to her or her husband. Both are different transactions.

18. The respondent has an apprehension that the applicant would

abscond as she is not a local resident. It would be difficult to secure her presence during investigation and trial. The applicant has not produced details of the transactions despite giving her sufficient time and therefore, her custodial interrogation is required.

19. I have heard Mr. Nadkarni, learned Counsel for the applicant, Mr. Rivankar, learned Public Prosecutor and Senior Counsel Mr. Lotlikar for the intervenor/complainant.

20. Mr. Nadkarni submits that its a transaction of civil nature and there is no element of criminality. The applicant is a widow aged about 53 years and is required to come to Goa all the way from Gujarat.

21. He points out that the applicant has been fully cooperating with the investigating agency, as admittedly, she had appeared before the officer on 28.02.2019 and 01.03.2019 pursuant to the directions of this Court. It is submitted by Mr. Nadkarni that the applicant was unaware of any summons issued under Section 41(A) of Cr.P.C. as no such summons has been served upon the applicant. Mr. Nadkarni submits that the applicant has furnished copies of all relevant documents as desired by the investigating officer. The details are as

under:-

- i Balance sheet as on 05/01/2019.
- ii Satt Adhar Builders Ledger Statement showing investment details where Kuntaben A. Rathod has invested money (Share Market and Real Estate);
- iii Sale deed of Lilapur – Ahmedabad land;
- iv Conveyance deed of Ranjitpar agriculture land;
- v Conveyance deeds of Mevasa Kuvadva Plots;
- vi Sale deed of residential flat of Crystal Appt.;
- vii Copy of Judgment of Virendrasinh Solanki's civil suit filed against Kuntaben A. Rathod.
- viii Natwarlal Gohil's village forms of village Ranjitpar, Taluka Jodiya, Gujarat;
- ix All bank account details. (Active and closed);
- x Income tax return for AY 2012-13;
- xi Car registration book copy;
- xii Indian Overseas Bank Statement of Kuntaben A. Rathod.

22. It is submitted that on 19.03.2019, applicant has furnished copies of all details of the share transactions which are reflected in the trading accounts maintained by the broking company and the ledger alongwith letter dated 19.03.2019. Thus, according to the learned Counsel for the applicant, the liberty of the applicant be protected by granting the relief as prayed for in case of her arrest.

23. Mr. Rivankar, learned Public Prosecutor on the other hand reiterated the contents of the reply. It is submitted that the applicant is not producing original documents and therefore, there is no proper cooperation from her side. It is submitted that the applicant admits receipt of such a huge amount and if she is protected by an order of this Court, it would be difficult to interrogate her effectively.

24. Mr. Lotlikar, the learned Senior Counsel for the intervenor has supported the arguments of Mr. Rivankar. According to the learned Senior Counsel, the applicant has come with an afterthought that too after a long time about the alleged terms and conditions which should be discarded. It is a genuine prosecution in which the complainant has lost huge amount and therefore, the applicant is not entitled to be released on anticipatory bail. The learned Senior Counsel, however, admits receipt of Rs. 50,00,000/- by the complainant out of the total amount of around 2.30 crores.

25. Mr. Lotlikar has relied upon a ruling of this Court in the case of **Amina Allahrakha Sarviva Vs. The State of Maharashtra, 2016 SCC On Line Bom 7064**. A single judge of this Court rejected the application seeking anticipatory bail on the ground that the applicant and her son who is co accused represented that they want to sell their

room though they had already sold it to another person and accepted Rs. 9,00,000/- from the complainant. There is no material on record to show that in the instant case, the applicant had in fact already sold the land to any third person. The ratio can be distinguished accordingly.

26. The learned Senior Counsel has expressed his apprehension that there is likelihood of the applicant going to Australia and, therefore, her chances of return are doubtful. It is submitted that the applicant had borrowed money from others also in a similar way.

27. Mr. Nadkarni, the learned Counsel has placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Siddharam Satlingappa Mhetre Vs. State fo Maharashtra and ors. (2011) 1 SCC 694**. This is a well known judgment in which the Hon'ble Supreme Court has discussed the scope of Section 438 Cr.P.C. vis a vis Article 21, 22 and 19 of the Constitution of India. The Hon'ble Supreme Court has discussed the various aspects by taking a survey of various decisions on the subject. The relevant paras are as under:

> *"97. The intention of the legislature is quite clear that the power of grant or refusal of bail is entirely*

discretionary. The constitution Bench in Sibbia case has clearly stated that grant and refusal is discretionary and it should depend on the facts and circumstances of each case. The Constitution Bench in the said case has aptly observed that we must respect the wisdom of the legislature entrusting this power to the superior courts, namely, the High Court and the Court of Session. The Constitution Bench observed as under:(SCC p.589, para33)

"33. We would, therefore, prefer to leave the High Court and the Court of Session to exercise their jurisdiction under Section 438 by a wise and careful use of their discretion which, by their long training and experience, they are ideally suited to do. The ends of justice will be better served by trusting these courts to act objectively and in consonance with principles governing the grant of bail which are recognised over the years, than by divesting them of their discretion which the legislature has conferred upon them, by laying down infexible rules of general application. It is customary, almost chronic, to take a statute as one finds it on the ground that, after all 'the legislature in its wisdom' has thought it fit to use a

particular expression. A convention may usefully grow whereby the High Court and the Court of Session may be trusted to exercise their discretionary powers in their wisdom, especially when the discretion is entrusted to their care by the legislature in its wisdom. If they err, they are liable to be corrected."

***100**. Section 438 Cr.P.C. does not mention anything about the duration to which a direction for release on bail in the event of arrest can be granted. The order granting anticipatory bail is a direction specifically to release the accused on bail in the event of his arrest. Once such a direction of anticipatory bail is executed by the accused and he is released on bail, the court concerned would be fully justified in imposing conditions including the direction of joining the investigation.*

Scope and ambit of anticipatory bail

***109**. A good deal of misunderstanding with regard to the ambit and scope of Section 438 Cr.P.C. could have been avoided in case the Constitution Bench decision of this Court in Sibbia case was correctly understood, appreciated and applied. This Court in Sibbia case laid down the following principles with regard to anticipatory bail:*

(a) Section 438(1) is to be interpreted in the light of Article 21 of the Constitution of India.

(b) Filing of FIR is not a condition precedent to exercise of power under Section 438.

(c) Order under Section 438 would not affect the right of police to conduct investigation.

(d) Conditions mentioned in Section 437 cannot be read into Section 438.

(e) Although the power to release on anticipatory bail can be described as of an "extraordinary" character this would "not justify the conclusion that the power must be exercised in exceptional cases only". Powers are discretionary to be exercised in the light of the circumstances of each case.

(f) Initial order can be passed without notice to the Public Prosecutor. Thereafter, notice must be issued forthwith and question ought to be re-examined after hearing. Such ad interim order must conform to requirements of the section and suitable conditions should be imposed on the applicant.

Relevant consideration for exercise of the power

111. *No inflexible guidelines or straijacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide right and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualised for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on the facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia case that the High Court or the Court of Session has to exercise their jurisdiction under Section 438 Cr.P.C. by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.*

112. *The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:*

(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or other offences;

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people ;

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution because overimplication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of

anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused.

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail

***113**. Arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case. The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record."*

28. The basic principles of anticipatory bail have been enunciated in the constitution bench of the Hon'ble Supreme Court in the case of **Gurbaksh Singh Sibbia Vs. State of Punjab, (1980) 2 SCC 565**.

29. Keeping in mind the relevant conditions for exercise of the powers under Section 438 Cr.P.C. it would be pertinent to note that the FIR in this case came to be lodged on 28.06.2018 i.e. more than a year ago. No doubt, a huge amount is involved in this case, however, it cannot be lost sight of the fact that the complainant is prosecuting his civil remedy by filing a civil suit for recovery of money and for permanent injunction, in the Court of Senior Civil Judge, Panaji. Involvement of huge amount itself would not be a ground to refuse anticipatory bail in the light of the fact that the applicant has supplied the aforesaid necessary documents/material required by the investigating officer and also remained present as per the directions of this Court on 28.02.2019 and 01.03.2019.

30. It is also an admitted fact that the applicant had returned 50,00,000/- to the complainant.

31. It appears that the amount was invested by the applicant and her husband, who is no more and therefore, the exact role of the applicant is required to be determined by way of investigation. It reveals from the complaint of which an undated copy is furnished on record that the complainant had similarly duped one Mr. Deepak Joshi and Mr. Virendra Singh, who disclosed about it to the complainant, when the complainant was on a visit to Ahmadabad. The complaint indicates that the said Mr. Joshi and Mr. Singh informed that the applicant had also taken substantial money from them on a representation that she would purchase for them a very part of the same property 50% of which the applicant was to buy for herself and balance of which was to be bought for the complainant. Mr. Deepak Joshi informed this complainant that the applicant had received money from them on an identical representation. However, there seems to be neither any report lodged by Mr. Joshi nor anything is produced by the complainant about the alleged modus-operandi of the applicant.

32. Be that as it may. It cannot be said at this stage that there are certain antecedents to her discredit.

33. As regards possibility of the applicant fleeing away from justice,

suitable care can be taken by imposing conditions.

34. Custodial interrogation of the applicant according to me would not be of much assistance to the investigating agency in the light of the fact that it is not the contention of the respondent/State that she has absconded and is absolutely not cooperating. Rather, it is apparent that she is making all the documents and material available to the investigating officer and undertakes to assist in future also.

35. While exercising such jurisdiction, a balance is required to be maintained by protecting the personal liberty of the applicant as enumerated in Articles 21 and 22 of the Constitution of India vis a vis the interest of the complainant. Whether the ingredients of Sections 403, 409 and 420 are attracted or otherwise, will be decided at the appropriate stage in the light of the fact that a civil dispute is already pending before a competent Court.

36. It is not a case wherein a large number of people have been duped and is a case of large magnitude.

37. The learned Counsel for the applicant has placed on record two conversations dated 02.04.2019 and 13.05.2019 made by the

applicant to the investigating officer.

38. By the communication dated 02.04.2019, the applicant had stated that she has produced share certificates and share transactions reflecting the trading account maintained with the broking company and ledger of share stock maintained by investor and invoices of sales and purchases for kind perusal of the investigating officer. She makes it clear that in case of any further information or document if required, she would provide the same.

39. Similarly, by her communication dated 13.05.2019, the applicant had furnished the entire set of documents to the investigating officer.

40. In view of the parameters laid down by the Hon'ble Supreme Court in the case of **Siddharam Mhetre** (supra) and in the light of the aforesaid circumstances, the applicant is entitled to be released on bail in the event of arrest.

41. I, therefore, proceed to pass the following:-

O R D E R

The application is allowed.

In the event of her arrest in Crime No. 143/2018 registered with the respondents, the applicant shall be released on furnishing a P.R. bond in the sum of Rs. 50,000/- with two solvent sureties in the like amount on the following conditions:

i. The applicant shall attend Panaji Town Police Station as and when required to do so;

ii. The applicant shall not tamper with the evidence in any manner whatsoever;

iii. The applicant shall surrender her Passport with the investigating officer;

iv. The applicant shall not leave the jurisdiction of the Sessions Court, Panaji without seeking prior permission;

v. The applicant shall not leave India without the previous permission of the Sessions Court.

vi. The applicant shall furnish her cell number as well as email and permanent address of residence;

vii. The applicant shall cooperate with the investigation officer.

Application stands disposed of.

PRITHVIRAJ K. CHAVAN, J.

MF/-