IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

ANTICIPATORY BAIL APPLICATION NO.690 OF 2019

Sameer Subhash Vhora .... Applicant

versus

The State of Maharashtra .... Respondent

…....

- Mr.A.P. Mundargi, Senior Advocate i/b. Mr.Kuldeep Nikam, Advocate for Applicant.
- Ms.A.A. Takalkar, APP for the State/Respondent.
- Sr.P.I. Sambhaji Nimbalkar, Marketyard Police Station, Pune, present.

CORAM : SARANG V. KOTWAL, J.
DATE : 21st JUNE, 2019

P.C. :

1. The Applicant is seeking anticipatory bail in connection with C.R.No.219/18 registered with Marketyard Police Station, Pune, under sections 420, 406 of the Indian Penal Code and under sections 43-A, 66, 66C, 85 of the Information Technology Act, 2000 (hereinafter referred to as IT Act).

2. The facts in the present application are as follows;

The FIR is lodged by one Dharmendra Paraschand Jain on 14/12/2018. He was a Chartered Accountant. He was having a Savings Bank Account in ICICI Bank, Bundgarden Branch, bearing Account No.000501044345.

3. The first informant was working as a Chartered Accountant with M/s Galaxy Transmission Pvt. Ltd. from period 18/02/2013 to 14/03/2014. The present Applicant is the Managing Director of the said company. According to the first informant, he resigned from his job on 14/03/2014. He had informed the company on 27/03/2014, that, they should take away the car and laptop belonging to the company and he should be given his due payment and shares which were promised to him.

4. On 19/09/2014, the present Applicant filed FIR against the first informant with Kupwad Police Station, Miraj, Sangli, under sections 406 and 408 of IPC. He was arrested and was subsequently released on bail.

5. The first informant had filed company Petition in this Court on the original side on 23/09/2015 against the said company. Since there was an arbitration clause in the agreement between the first informant and the company, the said clause was invoked and arbitration proceedings commenced which were going on. In those proceedings the Applicant wanted to refer to certain transactions entered into by the first informant. Therefore, according to the first informant, the Applicant had illegally procured the bank transactions statement of the first informant for the period between 01/04/2013 to 31/01/2017 in respect of the savings account mentioned earlier. The FIR mentions that the account statement was obtained through a detective. It is the grievance of the first informant that the bank statement was obtained without his permission thereby he was cheated and therefore he had lodged his FIR. The FIR is lodged u/s 420, 406 of IPC and u/s 43(a), 66, 66(C) and 85 of the Information Technology Act, 2000 (for short 'IT Act'). The present Applicant is apprehending his arrest in connection with this offence.

6. I have heard learned Senior Counsel Mr.A.P. Mundargi for the Applicant and Ms. A.A. Takalkar, APP for the State.

7. Mr.Mundargi invited my attention to various documents annexed to this application, indicating the previous dispute between the parties and also indicating as to how the bank statement in question was relevant for the arbitration proceedings. He invited my attention to the proceedings before the Arbitrator dated 25/10/2016 and in particular to the question Nos.65 to 67 and their answers, which read as follows;

> *"Q.65. Could you tell us what bank accounts do you have and operate since March, 2014 till now?*
>
> *A. I am maintaining my account with ICICI Bank.*
>
> *Q.66. Can you produce a passbook of this bank account from March, 2014 till date?*
>
> *A. No. This is my personal information.*
>
> *Q.67. I put it to you that just before you being relieved*

from the Respondent Company and till date you have work with the competitors of the Respondent Company and therefore you are not disclosing details of your bank account.

A. I disagree."

8. Mr.Mundargi further invited my attention to the notice dated 21/03/2017 issued by the Advocate for the Company to the first informant making reference to the Account Summary and mentioning that the Applicant intended to rely on that summary. Thus, in short there is no dispute that the account statement was in fact obtained by the present Applicant. The question arises as to whether he was entitled to procure it without permission of the first informant or without following due process of law and as to whether any non-bailable offence was committed by the present Applicant.

9. To answer these questions, Mr.Mundgari made a few legal submissions. The first submission of Mr.Mundargi was that the application of the provisions of IT Act, shows that all the

offences alleged in the FIR under IT Act were bailable by virtue of section 77(b) of that Act.

10. His next submission was that once the provisions of IT Act, were invoked then the investigating agency was precluded from investigating into the allegations of commission of offence under the Indian Penal Code on the same set of allegations. In support of his submissions Mr.Mundargi relied on the Judgment of the Hon'ble Supreme Court in the case of ***Sharat Babu Digumarti Vs. Govt. of NCT Delhi,*** as reported in ***AIR 2017 Supreme Court 150***. He also relied on the judgment of a Division Bench of this Court in the case of ***Gagan Harsh Sharma and others Vs. State of Maharashtra and others, as reported in 2019(1) ABR (Cri) 201***. According to Mr.Mundargi, both these judgments lay down the law that once offences under IT Act are applied, the investigating agency was precluded from applying any other offences under the Indian Penal Code. Mr.Mundargi further submitted that the account statement record is maintained by the bank for its own purpose

as to show the transaction in the account maintained with the bank by the account holder. On request the bank supplies the bank statement to the account holder. He emphasized that bank account statement is the “property” of the bank alone and not of the account holder. He submitted that the account holder has nothing to do with the bank statement and therefore no offence in respect of bank statement can be committed against the account holder.

11. Mr.Mundargi submitted that though it is an accepted legal position that the bank account is the property of the account holder as held in the judgment of Hon'ble Supreme Court in the case of ***State of Maharashtra Vs. Tapas D. Neogy,*** as reported in ***(1999) 7 Supreme Court Cases 685***. However, according to him the bank account statement is not a part of the bank account and therefore it is not a property of the account holder.

12. As against these submissions, the learned APP

submitted that the offence is clearly made out. She submitted that there was no inconsistency between the provisions which are applied in respect of the offences under the IT Act and the Indian Penal Code in this case. Therefore the judgments relied on by the learned Senior Counsel have no application in the present set of facts. She further submitted that the Applicant has not cooperated with the investigating agency and is changing his version. The Applicant is not coming out with the case to explain as to how he obtained that bank statement and therefore his custodial interrogation is necessary.

13. I have considered these contentions very carefully. I am unable to agree with Mr.Mundargi that the bank account statement is not part of the account of the account holder.

14. The Bankers' Books Evidence Act, 1891 defines Bankers Books in section 2(3) as follows;

> *2(3) -: "bankers' books" include ledgers, day-books, cash-books, account-books and all other records used in the*

ordinary business of a bank, whether these records are kept in written form or stored in a micro film, magnetic tape or in any other form of mechanical or electronic data retrieval mechanism, either onsite or at any offsite location including a back-up or disaster recovery site of both;"

15. Thus all the records used in the ordinary business of the bank will be covered by that definition. Section 2(8) defines certified copy in relation to such record as follows;

2(8) -: "certified copy" means when the books of a bank -

(a) are maintained in written form, a copy of any entry in such books together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business and that such book is still in the custody of the bank, and where the copy was obtained by a mechanical or other process which in itself ensured the accuracy of the copy, a further certificate to that effect, but where the book from which such copy was prepared has been destroyed in

the usual course of the bank's business after the date on which the copy had been so prepared, a further certificate to that effect, each such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title; and

(b) consist of printouts of data stored in a floppy, disc, tape or any other electro-magnetic data storage device, a printout of such entry or a copy of such printout together with such statements certified in accordance with the provisions of section 2-A.

(c) a printout of any entry in the books of a bank stored in a micro film, magnetic tape or in any other form of mechanical or electronic data retrieval mechanism obtained by a mechanical or other process which in itself ensures the accuracy of such printout as a copy of such entry and such printout contains the certificate in accordance with the provision of section 2-A."

16. Section 2-A provides for the necessity of the certificate by the authorized officer when the printout of entry or a copy of printout referred to in section 2(8) is taken. The certificate is

required to mention as to what were the safeguards adopted to ensure that the data was safe.

17. The bank statement is referred to under one more statute i.e. Prevention of Corruption Act, 1988. Section 18 thereof reads as under;

> *“18. Power to inspect bankers' books -:*
>
> *If from information received or otherwise, a police officer has reason to suspect the commission of an offence which he is empowered to investigate under section 17 and considers that for the purpose of investigation or inquiry into such offence, it is necessary to inspect any bankers' books, then notwithstanding anything contained in any law for the time being in force, he may inspect any bankers' books in so far as they relate to the accounts of the persons suspected to have committed that offence or of any other person suspect to be holding money on behalf of such person, and take or cause to be taken certified copies of the relevant entries therefrom, and the bank concerned shall be bound to assist the police officer in the exercise of his powers under this section:*

Provided that no power under this section in relation to the accounts of any person shall be exercised by a police officer below the rank of a Superintendent of Police, unless he is specially authorised in this behalf by a police officer of or above the rank of a Superintendent of Police.”

18. These provisions indicate beyond any doubt that the account summery statement or the bank statement is a part of the bank account held by account holder. It can be obtained only in accordance with law. Mr.Mundargi submitted that though the bank account is the property of the account holder, however the statement of the bank account is not his property. This submission cannot be accepted. Bank account statement is definitely part of the bank account and therefore is a property of the account holder, though it is in possession of the bank.

19. Mr.Mundargi has further submitted that once the provisions of IT Act are invoked, then the investigating agency was precluded from invoking the offences under Indian Penal Code. The first judgment which is relied on, was the case of

Sharat Babu Digumarti (referred to hereinabove). In the said judgment the Hon'ble Apex Court has posed the question in paragraph No.10 as thus;

> *"10. The central issue that arises for consideration is whether the appellant who has been discharged under Section 67 of the IT Act could be proceeded under Section 292 IPC."*

After an elaborate discussion the Hon'ble Apex Court has recorded the finding in paragraph No.34 as follows;

> *"34. In view of the aforesaid analysis and the authorities referred to hereinabove, we are of the considered opinion that the High Court has fallen into error that though charge has not been made out under Section 67 of the IT Act, yet the appellant could be proceeded under Section 292 IPC."*

20. Thus, in that case application of section 67 of IT Act was set aside and thereafter, the Hon'ble Supreme Court held that proceedings under section 292 of IPC could not independently stand. Sharat Babu Digumarti's case (supra) was

referred to by a Division Bench of this Court in the case of Gagan Sharma (Supra). Mr.Mundargi relied on that judgment to contend that once the provisions of IT Act are invoked, then offence under the Indian Penal Code could not be proceeded with. The facts of Gagan Sharma's case (Supra) show that the accused in that case had misused software of the complainant company and the accused had unauthorisedly accessed the server of the complainant company. In that context, the Division Bench held that section 408 and 420 could not be proceeded with once the offence u/s 43, 65, 66 and 81 of IT Act were applied. During the discussion in that judgment it was observed that when there was inconsistency between the provisions of the two statutes, then the special statute would prevail. Obviously when there is inconsistency then by virtue of section 81 of the IT Act the provisions of IT Act will have to prevail. However, in the present case there is no inconsistency. The manner of obtaining bank statement is not revealed. In this context, the observations of the Hon'ble Supreme Court in the case of ***State of Maharashtra and another Vs. Sayyed Hassan Sayyed Subhan***

& Ors. as reported in ***AIR 2018 SC-5348*** are important; wherein it is held that, where an act or an omission constitutes an offence under two enactments, the offender may be prosecuted and punished under either or both enactments but shall not be liable to be punished twice for the same offence. The same set of facts, in conceivable cases, can constitute offences under two different laws. An act or an omission can amount to and can constitute an offence under the IPC and at the same time, an offence under any other law.

21. The core question is, whether there is any inconsistency between the offences under Indian Penal Code and those under Information Technology Act in this particular case; and I find no such inconsistency.

22. Though, in this case sections 408 and 406 as well as 420 of IPC are applied, the entire allegations in the FIR make out a case of commission of offence punishable u/s 379 of IPC. The offence of theft is defined u/s 378 wherein it is provided

that whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

23. The bank account, as already mentioned earlier, is the property of the account holder. The money is entrusted by the account holder with the bank for safe custody and therefore if any part of the bank account is removed without its consent, that may fall within the definition of theft. Therefore though the said section is not applied by the investigating agency, the allegations in the FIR make out commission of such offence which is also a non-bailable warrant. In any case, the statement was taken away from possession of the bank; so the offence u/s 380 is definitely made out.

24. In this view of the matter, the Applicant has committed a non-bailable offence. In the facts of this particular case it is necessary to find out as to how that offence was committed. The

offence alleged is a serious offence because if such bank statements are easily made available to third persons, it affects the account holder adversely and such instances cannot be tolerated. Procuring bank account without permission of the bank account holder will lead to disastrous effects affecting the account holder adversely. Therefore lenient view cannot be taken in this matter. Custodial interrogation is necessary. It is necessary to find out how that statement was obtained by the Applicant and to find out who were the other persons involved in the offence. In view of the above discussion, the application has no merit and hence is rejected.

(SARANG V. KOTWAL, J.)