IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

ANTICIPATORY BAIL APPLICATION NO. 185 OF 2020

Rahul Radheshyam Bhomavat .. Applicant

v/s.

The State of Maharashtra .. Respondent

Mr. Ashok Mundargi, Senior Counsel a/w Mr. Advait Sethna i/b Mulla Mohammed Naved for the applicant
Mr. D.P. Adsule, Special P.P. a/w Ms. M.H. Mhatre, APP for the respondent State

CORAM : PRITHVIRAJ K. CHAVAN, J.

RESERVED ON : 21st FEBRUARY, 2020
PRONOUNCED ON : 17th MARCH, 2020

P.C.

1. Feeling aggrieved with an order of rejection of an application for Anticipatory Bail by the Additional Sessions Judge, Raigad-Alibaug, the present application has been preferred amongst following facts and grounds. The learned Additional Sessions had rejected the second application of the applicant by the impugned order.

2. The case has a chequered history. The applicant has been booked under Sections 409, 418, 420, 465, 467, 468, 471, 477, 163,

120B r/w Section 34 of the Indian Penal Code, under Sections 3 and 4 of the Maharashtra Protection of Interest of Depositors Act, 1999, under Section 147 of the Maharashtra Co-operative Societies Act, 1960 and under Section 65 and 66 of the Information Technology Act, 2000 in C.R. No.34 of 2011. There are as many as 44 accused chargesheeted by the Pen Police Station.

3. Shishir Prabhakar Dharkar is the prime accused, who was the Chairman of the Pen Co-operative Urban Bank Ltd., Tal. Pen, District Raigad (for short "Pen Bank"). Rest of the accused are either office bearers or are connected with the Pen Bank in some capacity. An FIR came to be lodged on 22.03.2011 by one Tushar Kakade, Special Auditor of Co-operative Societies. As per the report, accused Shishir Dharkar and other office bearers of Pen Bank along with the Auditors, had conspired, colluded and created bogus accounts in fictitious names and thereby siphoned monies from those fictitious accounts and put the Pen Bank to a monetary loss of INR 598.72 crores. The offences are said to have committed during the period 2008 to 24.09.2010. Accordingly, C.R. No. 34 of 2011 came to be registered against the accused persons as above. It appears from the

record, more particularly, the charge-sheet laid by the Investigating Agency that accused Shishir Dharkar is the kingpin, who has payed a leading role in the entire scam running into 598.72 crores. He and his wife Mrs. Gul Raihana Omar, were the owners of one M/s. Space Mercantile Co. Pvt. Ltd. (for short "Space Mercantile"). The applicant is said to have purchased entire shares of this Space Mercantile and was the Additional Director of the company during 2007 to 2010. The said Space Mercantile had two accounts bearing Account Nos. 208 and 357 in the Pen Bank. The applicant accused is said to have in collusion with Shishir Dharkar and others committed the offences as alleged.

4. The Investigation revealed that on 29.09.2008, nine bogus accounts were opened in the Pen Bank and an amount of Rs. 5.95 crores was disbursed as a loan amount in each of these accounts. One of such accounts was opened in the name of Rahul Pharma of which, admittedly, the applicant-accused is the Director. On 01.06.2008 another 6 bogus loan accounts were opened and again an amount of Rs. 5.95 crores was deposited in each of these accounts as loan amounts. Thus, an amount of Rs.89.25 crores was shown to be

disbursed as a loan in these accounts. The entire amount of Rs.89.25 crores was then transferred to the Account Nos. 208 and 357, which are standing in the name of Space Mercantile, of which the applicant-accused is the additional Director. Thereafter, this amount was transferred to Dhruv Electricals. From Dhruva Electricals, the amount was transferred to the bogus accounts and then the accounts were shown as closed. Undisputedly, the applicant-accused is not the office bearers of Pen Bank but admittedly is the Additional Director of Space Mercantile and also Director of Rahul Pharma.

5. The learned Senior Counsel appearing for the applicant-accused has, painstakingly taken me through the record in order to buttress his point as to how the applicant, who was in fact, a witness in earlier charge-sheet and who is being interrogated by the Investigating Agency for 8 years, has been arraigned as an accused suddenly by way of this case. It is also submitted that there are no allegations against the applicant-accused in the FIR. The learned Senior Counsel questioned as to how a person who was made a witness in earlier charge-sheet, can be made an accused suddenly in the same matter. It is contended that the applicant has nothing to

do with all the bogus accounts opened in the Pen Bank and that it is the handiwork and the brain child of accused – Shishir Dharkar. The learned Senior Counsel submits that the applicant was Additional Director of Space Mercantile and not the Managing Director. The learned Senior Counsel also drew my attention to the charge-sheet filed by the CBI. He has drawn my attention to the fact that the applicant has been thoroughly interrogated by the same police station on several occasions in connection with the same crime. Even the Additional Sessions Judge, Raigad by an order dated 23.08.2019 protected the liberty of the applicant by directing the police agency to give 72 hours notice before his arrest.

6. He has further drawn my attention to Case No. CC-II 89 of 2012 filed by the applicant in Co-operative Court against the Pen Urban Co-operative Bank. My attention is drawn to a Writ Petition No. 3644 of 2011, wherein, according to the learned Counsel, there is absolutely no whisper or reference of the applicant. He submits that there is no iota, much less documentary evidence to show the nexus or involvement of the applicant, even remotely, with the alleged offences. The learned Senior Counsel has also drawn my

attention to page 720 and 721, which is the objection raised by the prosecution to grant bail to the applicant wherein it has been stated that the applicant has also been prosecuted by CBI, Mumbai in RC/38(A)/2010.

7. From the say, it is apparent that the applicant was the Director of Space Mercantile having Account No. 208 and 357 wherein there is a reference of 89.25 crores. It seems that there were 34 bogus accounts which were closed between 22.10.2008 to 26.10.2008 in which the applicant is shown to be one of the co-conspirators. However, it appears that because the applicant had stated that he was not involved in any such offences and, therefore, initially, he was made a witness. Thus, the learned Senior Counsel has prayed for grant of pre-arrest bail to the applicant-accused.

8. *Per contra*, the learned APP strongly objected the prayer of the applicant by taking me through various documents on record, copies of charge-sheets, statements of the witnesses as well as other particulars. It is contended by the Special Public Prosecutor that all the accounts are operated by the applicant who has already been

found involved in the following cases and, therefore, in case of his release, he would not be available for investigation and interrogation as his custodial interrogation is very much essential. The learned Special Public Prosecutor has furnished the following cases pending against the applicant :-

> *"1. R.C. No.38(A) / 2010 u/s 120B, 420, 467, 468, 478 IPC r/w 13(2), 13(1)(c) of P.C. Act on 20.10.2010 which is transferred to Mumbai C.B.I. In the said offence charge sheet is submitted on 22.02.2013.*
> *2. RC AC-1 2014 A007, CBI, ACI, New Delhi.*
> *3. P.M.L.A. Special Case No. 13/2008 (in ECIR 13/MZO/2013)."*

9. From the affidavit-in-reply filed by one Gitaram Laxman Shewale, API, presently attached to Pen Police Station, it reveals that the total amount involved in this scam is around Rs.598.72 crores, which was deposited by several investors from Raigad district and other places. There are voluminous documents involved in the present case and further investigation is required to be carried out with the help of Chartered Accountants, Forensic Auditors as well as Computer Experts without whose help, it would be difficult to unearth the truth.

10. It is contended that the applicant has entered into a criminal

conspiracy with some unknown officials of Maharashtra State Trading Corporation (MSTC) and Pen Bank during 2007 and had submitted fake documents which were accepted by the officials of MSTC and they released 85% of the invoice value by discounting the export bills, as advance to the exporters and caused loss to the tune of Rs.500 crores and thereby cheated MSTC. The Central Bureau of Investigation had obtained the relevant documents and hard-disk for the purpose of investigation. Thus, the documents and hard-disk are required by this Investigating Agency without which it would be difficult for them to get all the transaction details as well as *modus-operandi* and role played by this applicant. The hard-disk and other documents are required to be scanned with the help of auditor / forensic expert.

11. It is further contended that Shishir Dharkar is the main accused in the present case along with his wife, who were the owners of the Space Mercantile, of which admittedly the applicant is the additional Director. It is further contended that the applicant in connivance with the other accused had purchased one K.A. Mallya Pharmaceutical Company situated at Ankaleshwar, Gujarat. From

the bank account of Space Mercantile, which was in the Pen Bank, an amount of Rs. 11 crores had been paid for the purpose of purchasing the said pharmaceutical company from 23.11.2007 to 10.07.2008. The amount of Rs.7,11,97,491/- was paid to K.A. Mallya Pharmaceutical Co. and from 06.02.2008 to 11.04.2009 an amount of Rs. 3,87,90,000/- was given to Shri. F. R. Mesman from Account No.208 standing in the name of Space Mercantile Ltd. It is specifically alleged that all the monies were used by the applicant and others from the bogus account for purchasing the said pharmaceutical company.

12. It is further brought to my notice that a land situated at Nere, Tal. Panvel, Dist. Raigad was purchased on 18.03.2008 from one Supriya Enterprises. An amount of Rs.5,24,78,387.50 was deposited in the account of Supriya Enterprises, which was a bogus account. The said amount was transferred in the account of Supriya Enterprises from the account of Space Mercantile which is in the Pen Bank. Thus, *prima facie*, there is very strong material on record indicating complicity and nexus of the applicant in a scam of such a magnitude. Merely because the applicant-accused was neither an

employee of the Pen Bank nor an employee of the Audit firm, does not *ipso facto* mean that he would not be in a position to play any role in creating bogus accounts as is evident from the material on record. The argument of the learned Senior Counsel is rather an unproved dogmatic assumption, which cannot be taken at this stage as a gospel truth.

13. It cannot be lost sight of the fact that the applicant is the additional Director of the Space Mercantile as well as Director of Rahul Pharmaceutical Company. If an amount of Rs.89 crores was transferred to the account of Space Mercantile Ltd. which is alleged to be the money transferred from bogus loan accounts then, no sane man will believe that the applicant is not at all concern or unaware of the opening of the bogus account. Rather, no sane man will believe and accept the statement of the applicant in that regard that such a huge transactions was being carried out without his knowledge or *dehors* of his consent. The Investigating Agency, indeed requires an interrogation to probe as to whether the applicant had, in fact, any role to play in creating such huge bogus accounts and then transfer the amount of Rs.89 crores to the account of Space Mercantile, of

which he is the additional Director. The stand of the applicant that he had issued the cheques in question under the instructions and direction of co-accused Shishir Dharkar takes his case nowhere in the light of the fact that he cannot shirk the responsibility of signing the cheques. He has no answer for all the queries. By merely filing a declaratory suit in the Co-operative Court would not *ipso facto* exonerate the applicant from the charges.

14. It reveals from the record that the applicant had paid Rs.3,87,90,000/- to one F.R. Mesman from the Account No.208 standing in the name of Space Mercantile Ltd. The applicant does not dispute this fact. On the contrary, he admits that he had paid the amount from the account of Space Mercantile Ltd. but he contends that he had repaid the amount to the Space Mercantile by one of his company namely Sai Ashray Industries Ltd. The applicant further admits paying an amount of Rs.1,53,83,745/- from Account No.208 standing in the name of Space Mercantile to one Strategic Consultant. According to him, he had paid the consultancy charges.

15. From the over all facts and circumstances, it appears that as the Investigation progressed, the Investigating Agency, which earlier

could not lay its hand on the applicant, could subsequently trace out the role of the applicant to a considerable extent. This is perhaps the reason as to why earlier his statement was recorded as a witness. It is also *prima facie* apparent from the record that the applicant with hand in gloves with other co-conspirators adopted a *modus operandi* of opening bogus accounts and then dealing with those in the manner as stated hereinabove. It is indeed a deep rooted conspiracy appears to have been hatched meticulously resulting into duping lakhs of investors. The Investigating Agency has, therefore, rightly arraigned the applicant as an accused *albeit* after a period of 8 years.

16. It cannot be lost sight of the fact and as has been rightly submitted by the learned APP that more than 1,76,000 investors have been affected by this scam, out of which more than 400 investors have already died due to shock and financial difficulties. Since they had lost their hard earned money and life savings kept with the Pen Bank, many have come on road and became penny less due to the fraud of this magnitude, committed by the applicant and other accused. All these aspects require a systematic and thorough investigation which could only be possible by interrogating the

applicant. The interrogation would result in successfully finding out the truth. The success would not be possible if the applicant is protected by a pre-arrest bail order.

17. It is brought to my notice by the learned Special Public Prosecutor that an Administrator has been appointed qua Pen Bank by the Government. In Writ Petition No. 3644 of 2011, this Court has directed to pay some amount to the depositors. The Reserve Bank of India has imposed condition on transaction of the Pen Bank. As per the directions of this Court, a Special Action Committee has been formed wherein the Collector of Raigad is the Chairman, the Superintendent of Police of Raigad is the Secretary, one Narendra Jadhav is appointed on behalf of the investors and the other Government officials are in the Special Action Committee. It is pointed out that the Special Action Committee is holding meetings as per the directions of this Court.

18. It would not be out of place to refer to a latest decision of the Hon'ble Supreme Court in the case of ***P. Chidambaram Vs. Directorate of Enforcement, (2019) 9 SCC 24.*** Paragraph 72 and 74 of the said judgment reads as under :-

"72. We are conscious of the fact that the legislative intent behind the introduction of Section 438 CrPC is to safeguard the individual's personal liberty and to protect him from the possibility of being humiliated and from being subjected to unnecessary police custody. However, the court must also keep in view that a criminal offence is not just an offence against an individual, rather the larger societal interest is at stake. Therefore, a delicate balance is required to be established between the two rights – safeguarding the personal liberty of an individual and the societal interest. It cannot be said that refusal to grant anticipatory bail would amount to denial of the rights conferred upon the appellant under Article 21 of the Constitution of India.

73. …..

74. Ordinarily, arrest is a part of the process of the investigation intended to secure several purposes. There may be circumstances in which the accused may provide information leading to discovery of material facts and relevant information. Grant of anticipatory bail may hamper the investigation. Pre-arrest bail is to strike a balance between the individual's right to personal freedom and the right of the investigating agency to interrogate the accused as to the material so far collected and to collect more information which may lead to recovery of relevant information. In State V. Anil Sharma (1997) 7 SCC 187, the Supreme Court held as under :-

"6. We find force in the submission of CBI that

custodial interrogation is qualitatively more elicitation – oriented than questioning a suspect who is well-ensconced with a favourable order under Section 438 of the Code. In a case like this, effective interrogation of a suspected person is of tremendous advantage in disinterring many useful information and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order 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 needs 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 a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders."

19. The Hon'ble Supreme Court has taken a survey of the following land-mark judgments pertaining to Section 438 of the Criminal Procedure Code :-

1. *Siddharam Satlingappa Mhetre Vs. State of Maharashtra & Ors. (2011) 1 SCC 694.*
2. *Sudhir Vs. State of Maharashtra, (2016) 1 SCC 146*

3. *King Emperor Vs. Khwaja Nazir Ahmad, 1994 SCC OnLine PC 29.*
4. *Subramanian Swamy Vs. CBI (2004), 8 SCC 682.*
5. *Balakram Vs. State of Uttarakhand (2017), 7 SCC 668.*
6. *Romila Thapar Vs. Union of India (2018) 10 SCC 753*

20. The Hon'ble Supreme Court in the case of *Siddharam Satlingappa Mhetre* (surpa) has laid down the following parameters while entertaining an application under Section 438 of the Criminal Procedure Code :-

"(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 the 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 accused is implicated with the help of Sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication 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 stuck 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."*

21. The ratio is squarely applicable to the present set of facts. This is a case wherein there is a question of societal interest in which more that 1,76,000 investors have had deposited their hard earned money with a trust that they would not be defrauded or cheated by the Pen Bank. It is shocking to know that more than 400 of them have already died. It is nothing but betrayal of trust reposed by a common man with the said bank.

22. Looking to the gravity and magnitude of the offences, it would not at all be just and proper to grant relief of pre-arrest bail to the applicant. Of course, a balance is required to be established between the personal liberty under Article 21 of the Constitution of India vis-

a-vis over all interest of more than 1,76,000 investors. In the given set of facts and circumstances, refusal of grant of anticipatory bail would not amount to denial of the right of the applicant under Article 21 of the Constitution of India.

23. I have taken into consideration the gravity and complex nature of investigation as well as the fact that the possibility of the applicant fleeing away from justice or influencing the witnesses, cannot be totally ruled out. The offences as alleged have affected a large number of people as already stated hereinabove. The Investigating Agency has, to a considerable extent, shown the role played by the applicant. This cannot be said to be a totally frivolous or false case. In the cases of such nature, grant of anticipatory bail would, in fact, cause prejudice to the Investigating Agency. Unless the Investigating Agency is given a free, fair and full scope, it would be very difficult to nab the culprits involved in such white collared scams. The learned Additional Sessions Judge, in the impugned order, has rightly considered all the aspects while rejecting the application for pre-arrest bail. In the circumstances, the following order is expedient :-

ORDER

(i) The application for Anticipatory Bail is rejected.

(ii) The applicant shall forthwith surrender his pass-port with the Investigating Agency / Officer.

(PRITHVIRAJ K. CHAVAN, J.)

After pronouncing the order, the learned Counsel appearing for the applicant prays for an interim protection for a period of four weeks to enable the applicant to approach the Hon'ble Supreme Court.

The learned Special Public Prosecutor is absent. However, in the light of the observations made in the order, I am not inclined to grant the relief as prayed for. Prayer is rejected.

(PRITHVIRAJ K. CHAVAN, J.)