

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

CRIMINAL BAIL APPLICATION NO. 1167 OF 2019

Irfanullah Habibullah Faruqi ...Applicant

Versus

The State of Maharashtra ...Respondent

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Mr. Rizwan Merchant i/b Abdul K. Millwala,
Advocate for the Applicant.

Mr. Aabad Ponda a/w Mr. Mubin Solkar i/b Ms. Sushma
Soni, Advocate for Respondent No.2

Mrs. Sharmila Kaushik, A.P.P. for the State-
Respondent No.1.

...

CORAM : SANDEEP. K. SHINDE, J.
DATE : 08th JANUARY, 2020.

P.C.

Heard.

1. It is an application under Section 439 of Code
of Criminal Procedure, 1973.

2. Applicant is accused in Crime no. 682 / 2008
registered with Oshiwara Police Station, at the

instance of his paternal uncle Mr. Kifayatullah Faruqui for the alleged offences punishable under Sections 420, 465, 467, 468, 471, 452, 427, 504 read with 34 of the Indian Penal Code, 1860 ('IPC' for short).

3. Dispute relates to a family property/Bungalow, in respect of which, the proceedings under Section 145 of the Criminal Procedure Code, 1973 ('Cr.P.C.' for short), were initiated, but dropped somewhere in 1992. It appears, the applicant is claiming right over the property in dispute, on the basis of the gift deed and the Power of Attorney executed by Mrs. Ahmedunissah Samiullah Faruqui, wife of his another paternal uncle, Mr. Samiullah.

4. Be that as it may, since the applicant was apprehending the arrest in Crime no.682/2008, he had approached the learned Sessions Judge, who had then granted the pre-arrest bail vide order dated

24.03.2008 on certain terms and conditions. Relevant terms and conditions were as under :

(i) Applicant shall attend the Oshiwara Police Station, twice a month on 1st and 3rd Monday between 03:00 pm to 06:00 pm and co-operate with investigating officer; (ii) he shall produce the alleged Power of Attorney before investigating officer, who shall seize it under the panchanama;

It may be stated, Mrs. Ahmedunissah Samiullah Faruqui had filed an affidavit in the Anticipatory Bail proceeding and stated that out of love and affection, towards the applicant and his two brothers, she had gifted, the subject property bearing unit no.16/01 by gift deed, registered with Sub-Registrar on 30.01.2009.

5. Kifayatullah Faruqui, complainant in Crime no.682/2008 sought cancellation of pre-arrest Bail, granted to the applicant. This Court cancelled the pre-arrest bail on 15.01.2019, principally, on following two grounds; (i) Applicant did not attend

the Police Station as directed, while granting pre-arrest bail ; (ii) Applicant did not produce the alleged Power of Attorney before the investigating officer, then directed while granting the pre-arrest bail.

On the aforesaid premise, this Court thus held; "conduct of the applicant reflects his disrespect and disregard to the order of the Court".

6. In view of the order dated 15.01.2019, applicant was committed to the custody.

7. Applicant seeks his enlargement on bail.

8. It appears, applicants' successive bail applications were rejected by the learned Metropolitan Magistrate Court as well by the learned Sessions Court. It emerges from record that on 08.02.2019, the Metropolitan Magistrate Court rejected his bail application, followed by the rejection on 28.03.2019 by the learned Sessions Court on the foremost ground that the possibility of

tampering with the evidence and the witness at the hands of the applicant cannot be ruled out.

9. Applicant thus approached this Court for bail on 08.04.2019. Record shows pending the applications before this Court, applicant had approached the Court of Metropolitan Magistrate on 14.05.2019 for bail without disclosing the pending bail application before this Court. The bail application was rejected on 16.05.2019. It further appears, another application was filed before the learned Sessions Court on 22.05.2019, which was withdrawn on 26.06.2019.

10. Mr. Ponda, learned counsel for the complainant, has placed on record all these applications and pointed out the incorrect statements made therein, that "no bail applications are pending in any other Court". In other words, the applicant did not disclose either to the Court of Metropolitan Magistrate or to the Court of Sessions, about this

application, which was filed on 08.04.2019. Mr. Ponda submits, it is a classic example of forum shopping inasmuch as applicant had approached one Court for relief, but since did not get the desired relief and then approached another Court for same relief, and that too by suppression of material fact, that application for bail was filed for the same relief in the High Court. Mr. Ponda submits that the applicants' conduct is deplorable and completely unacceptable. He thus opposed the bail, on this ground. He has placed a reliance on judgment of the Hon'ble Apex Court in the case of **Kamini Jaiswal Vs. Union of India (2018) 1 SCC 156.**

11. Mr. Ponda, learned counsel for the complainant, opposed the bail application also on the ground that applicant did not produce original Power of Attorney allegedly executed by Mrs. Ahmedunissah Samiullah Faruqui in his favour in respect of disputed property bearing unit no. 16/01, despite the fact that, it was one of the conditions, imposed while

granting him pre-arrest bail. Besides, he submits, initially, Mrs. Ahmedunissah Samiullah Faruqui (paternal aunt of the applicant) had disowned the power of attorney dated 18.04.2006 executed by her in favour of the applicant on the basis of which, applicant was claiming/asserting his rights in the disputed property; however later, she changed her stand and filed an affidavit in March, 2009, and accepted the power of attorney. Submission is, this itself, is indicative of the fact that the applicant is influencing the prosecution witnesses. Mr. Ponda therefore submits that the applicant may not be enlarged on bail, at least till the prosecution witnesses are examined.

12. Mr. Rizwan Merchant, learned counsel for the applicant, however submits that the original Power of Attorney was produced and submitted to the investigating officer, as directed by the learned Sessions Court while granting the pre-arrest bail to the applicant. It may be stated that this fact is

disputed by the investigating officer Mr. Khade. Mr. Merchant submits besides the Power of Attorney, Mrs. Ahmedunissah Samiullah Faruqui had executed a registered gift deed on 30th January, 2009 in respect of the disputed property in favour of the applicant and a dispute relates to the said property is pending before the Civil Court. Mr. Merchant has relied on the gift deed and also on a statement dated 20.01.2014 of Ahmedunissah, recorded under Section 161 of the Cr. P.C. Mr. Merchant further submits, it is essentially a family dispute over the property between three brothers and infact Mrs. Ahmedunissah Samiullah Faruqui had filed a complaint against Irfanullah for forging certain documents relating to the property in dispute. Mr. Merchant therefore, submits Civil Court of competent jurisdiction is seized with the issue of title relating to the disputed property. He therefore submits that the applicant be released on bail.

13. Mr. Merchant has brought to my notice affidavit of the applicant wherein paragraph no.15, he

has stated thus :

Without prejudice to the above I hereby place on record that although the original Power of Attorney dated 7th April 2006 has been already produced by me before the earlier I.O. Mr. Khade, who is disputing the same, yet, without entering into any further controversy, I am willing and voluntarily of my own sweet will recording herein that to prevent any prejudice to be caused to the case of the First Informant/ Complainant, I am hereby on oath recording my consent and permission to allow the prosecution to use a photocopy of the Power of Attorney as "Primary Evidence" at the trial before the trial Court, and that I shall not object or obstruct the production of photocopy of the said Power of Attorney in trial as "Primary Evidence". I undertake to proceed with the recording of evidence including Cross Examination on the said document on all other issues save and except questioning the production of Photocopy of the said Power of Attorney as primary evidence. I say that I shall not take or attempt to take any advantage during trial for non-availability and/or non production of original Power of Attorney.

14. Admittedly, it is a dispute between the family members over the property allegedly purchased by the complainant and his brother in the name of their wives. Dispute also gave rise to a proceeding under Section

145 of the Cr. P.C. The subject offence came to be registered in the year 2008. Applicant was granted pre-arrest bail in March, 2009; however it was cancelled by this Court in January, 2019 and since then, the applicant is in the custody. The investigation in the case is over. Though the applicant was directed to produce original power of attorney executed by Mrs. Ahmedunnisah to the Investigating Officer, the same has not yet been produced. Inasmuch as Mr. Khade, Investigating Officer, disputes production of the power of attorney by the applicant, the fact also emerges from the record that, Mrs. Ahmedunnisah had executed a registered gift deed in favour of the applicant and his two brothers on 30.01.2009 and had gifted 35% of the share in the residential unit bearing no. 16/01 (disputed property) to the applicant and the remaining share to Gufranullah and Shoukatullah. I am unable to understand as to why this registered gift deed was not produced by the applicant for the consideration, when he was granted pre-arrest bail and subsequently when

the bail was cancelled. It is informed from across the bar, that the civil suit in respect of disputed property is pending in the Court of competent jurisdiction. In view of this fact merely because it is alleged that the applicant did not produce the power of attorney to the Investigating Officer, does not in itself deter this Court from releasing the applicant on the bail. It may be stated that the applicant has filed an affidavit sworn on 01.08.2019 and permitted the prosecution to use a photocopy of power of attorney as primary evidence at the trial. I have reproduced the relevant paragraph of the said affidavit herein above. In view of this, the trial Court may consider as it deems appropriate to read the photocopy of the power of attorney in evidence. So far as successive bail applications filed by the applicant in the respective Courts and that too, without disclosing that the application was filed in the High Court for a similar enlargement on bail are concerned, the conduct of the applicant is definitely deplorable. Though applicant attempted to justify his conduct, the justification is

rejected. The applicant was directed to tender an unconditional apology which he has tendered in paragraph no.14 of his affidavit dated 01.08.2019. It is accepted.

15. In view of the facts of the case and for the reasons stated; the applicant is directed to be released on bail.

ORDER

(i) The applicant is directed to be released on bail in Crime no. 682/2008 corresponding with case no. 59/PW/2019 pending before the Metropolitan Magistrate Railway Mobile Court at Andheri on furnishing P.R. Bond in the sum of Rs.50,000/- with the one or more sureties in the like amount;

(ii) The applicant shall not directly or indirectly make any inducement threat or promise to any person acquainted with the facts of the case, so as to dissuade him from

disclosing such facts to the Court or to any police officer or tamper with the evidence;

16. The application is disposed off.

17. All concerned to act on the authenticated copy of this order.

(*SANDEEP. K. SHINDE, J.*)