

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

CRIMINAL APPLICATION NO.306 OF 2018

Vaidehi Sharadchandra Mhaispurkar ... Applicant

Vs

1 The State of Maharashtra

2 Shirish Girish Dikshit ... Respondents

...

Mr. C.K.Pendse i/by Mr. S.M. Mangaonkar for the Applicant.

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

Mr. Ashish Chavan with Mr. A.R.Iyer with Mr. Kunal Shinde for Respondent No.2.

PI Kerkar attached to EOW present.

CORAM : SANDEEP K. SHINDE J.

DATE : 17TH JANUARY, 2020.

P.C. :

It is an application under Section 439 (2) of the Code of Criminal Procedure, 1973 filed by the complainant seeking to quash and set aside the order dated 25th May, 2018 passed by the learned Additional Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai in Bail Application No.133 of 2018 in EOW CR No.10 of 2017 in CC

No.256/PW/2018.

2 Facts of the case in nutshell are as under:

In 2013, applicant was in search of a residential accommodation for herself and her sisters in Dadar/Mumbai area. Applicant was introduced to respondent no.2 as a reputed builder, who was in the construction business in Mumbai. It is applicant's case that respondent no.2 represented that he had acquired development rights from owner of the property known as 'Janki Niwas' situated at Matunga, Mumbai and had negotiated with the tenants therein, who had agreed to vacate the premises and would be accommodated in a new building to be constructed at the same location. It is the applicant's case that the respondent represented that subject property had a marketable title and that he had obtained a '*No Objection*' from the Mumbai Building Repairs and Reconstruction Board in the name of its owner, for re-development of the said property and that he would approach the Planning Authority for necessary approval for constructing the building in

accordance with amended provisions of the Development Control Rules.

3 Respondent No.2 further assured the applicant that the building would be completed within 24 months from the date of obtaining required permissions. In the backdrop of these facts, it is applicant's case that the respondent no.2 offered her premises admeasuring 750 sq.ft. in the proposed building along with car parking at the price of Rs.1,60,00,000/- each. Accordingly, separate agreements were entered into by the applicant and her sisters with the respondent no.2 on 22nd May, 2013 and in consideration thereof, a sum of Rs.5,60,00,000/- was paid. However, the applicant and other flat purchasers were neither given flats as promised nor was the consideration returned by respondent no.2 and, therefore, Crime No.10 of 2017 came to be registered against him.

4 It may be stated that another Crime No.7 of 2018 was also caused to be registered against respondent no.2 on somewhat similar grounds.

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5 It appears, respondent no.2 filed two separate bail applications bearing Application No.133 of 2018 in Crime No.10 of 2017 and another Application No.134 of 2018 in Crime No.7 of 2018.

6 Furthermore, it appears, complainant in Crime No.7 of 2018 has filed Suit No.1097 of 2015 in this Court wherein on 4th March, 2018 after perusing the report of the EOW, passed the following order:

“2. The wife as well as son of the Defendant No.1 are present in Court. They undertake that they shall within a period of six weeks from today, vacate the residential flat no.502/770 at Vimal Smruti, Dr. Ghanti Road, Dadar Parsee Colony, Mumbai-400 014, which is agreed to be sold within a period of six weeks from today. They further undertake to visit Defendant No.1, who is in the Arthur Road Prison and obtain his undertaking/no objection to vacate the said flat within a period of six weeks from today and handover the same to the Court Commissioner within two weeks from today. The undertaking is accepted.

3. The vacant possession of the said flat shall therefore, be handed over to the Commissioner within a period of six weeks from today.”

7 Bail Application No.133 of 2018 in Crime No.10 of 2018 was heard by the learned Additional Chief Metropolitan Magistrate wherein, following order was

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passed:

“1. The applicant Shirish G. Dikshit be released on P.B. of Rs.5,00,000/- (Rs. Five Lakhs) with solvent surety of like amount in addition to cash security of Rs.2,00,000/- (Rs. Two Lakhs) and on condition that he will abide conditions in the order dated 04/05/2018 passed by Hon’ble High Court in Suit No.1097 of 2015.”

8 Thus, the learned Additional Chief Metropolitan Magistrate in consideration of the order dated 4th May, 2018 passed by this Court in Suit No.1097 of 2015 released the accused on bail vide order dated 25th May, 2015.

9 The learned counsel for the applicant has taken me through the impugned order dated 25th May, 2018 and the order passed by this Court in Suit No.1097 of 2015. It is submitted that the order dated 4th May, 2018 was passed by this Court, in a suit instituted by one Sunil Kishanlal Soi and others, who had also filed complaints in reference to Crime No.7 of 2018. It thus, appears that the order dated 4th May, 2018 had no bearing over the transaction between the

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applicant and the respondent no.2, which gave rise to EOW Crime No.10 of 2017. Admittedly, applicant herein was not party to Suit No.1097 of 2015. It appears, the learned Additional Chief Metropolitan Magistrate has relied on the order dated 4th May, 2018 passed in Suit No.1097 of 2015, and considered the Undertakings of respondent no.2. These are two distinct crimes registered against respondent no.2 by two different complainants, under different facts and circumstances. Applicant is complainant in EOW Crime No.10 of 2017.

10 Material on record shows, the learned Additional Chief Metropolitan Magistrate as aforesaid, had released the applicant on bail in consideration of the order dated 4th May, 2018 passed by this Court in Suit No.1097 of 2015. Record shows, this suit was filed by the complainant in Crime No.7 of 2018. Admittedly, the applicant was not party in the said suit. Therefore, order passed in the suit was not relevant material for

consideration while releasing the applicant on bail.

11 It is settled law that if the Court granting bail ignores 'relevant material' indicating prima-facie involvement of the accused or takes into account 'irrelevant material', which has no relevance to the granting of bail to the accused, High Court or Sessions Court would be justified in cancelling the bail. Such orders are against the well recognised principles underlying the power to grant bail. In the case of **Rizwan Akbar Hussain Syed v. Mehmood Hussain and Ors. 2007 Cri. L.J. 3255**, the Apex Court has held thus:

"8..... Where it appears to the superior Court that the Court granting bail acted on irrelevant materials or there was non-application of mind or where Court does not take note of any statutory bar to grant of bail, order for cancellation of bail can be made. These circumstances are illustrative and not exhaustive. The Court considering the application for cancellation of bail has to take note of all relevant aspects."

12 In the case in hand, the learned Additional Chief Metropolitan Magistrate had taken into account

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irrelevant materials, i.e, recognising order passed in Suit No.1097 of 2015 as relevant material for releasing the applicant on bail. In view of this fact and the law as settled by the Hon'ble Supreme Court, the order dated 25th May, 2018 passed in Bail Application No.133 of 2018 in Crime No.10 of 2018 is cancelled.

13 The learned counsel for the respondent no.2 could not point out as to how the order dated 4th May, 2018 passed in the Suit No.1097 of 2015 was relevant while granting bail to the respondent no.2 in EOW Crime No.10 of 2017.

14 Crime No.7 of 2018 and EOW Crime No.10 of 2017 are distinct and neither overlaps over the other.

15 As a result, respondent no.2 is directed to surrender to the respondent no.1 on or before 6th February, 2020.

16 It is clarified that if the applicant prefers an application for bail, the learned Trial Court shall decide it on merits expeditiously.

17 Application is allowed and disposed of in
the aforesaid terms.

(SANDEEP K. SHINDE, J.)