

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

901 ANTICIPATORY BAIL APPLICATION NO.739 OF 2021
WITH APPLN/1923/2021 IN ABA/739/2021

MIRZA NISAR BAIG S/O. MIRZA AZIZ BAIG
VERSUS
THE STATE OF MAHARASHTRA

...
Advocate for Applicant : Mr. Avinash R. Borulkar
APP for Respondents: Mr. V.S. Badakh
Advocate to assist APP : Mr. C.C. Deshmukh
...

CORAM : PRAKASH D. NAIK J.

DATE : 26TH OCTOBER, 2021.

PER COURT:

1] The applicant is seeking pre-arrest bail in connection with Crime No. 134 of 2021 registered with Phulambri police station, Dist. Aurangabad for the offences punishable under Section 420, 504, 506 r/w. 34 of IPC. The FIR was lodged on 21st May, 2021 by Shaikh Zakir Shaikh Rashid.

2] The case of the prosecution is that Shaikh Naim Shaikh Chand had agreed to sell land admeasuring 3 acres in Gat No. 104 for a consideration of Rs. 27 Lakhs to applicant. The vendor acknowledged receipt of Rs. 15 Lakhs by cash. This transaction was executed on 26.7.2019. The balance consideration was to be given to vendor at the time of registration of sale deed in the name of any

person of applicant's choice. Isar Pavati was signed by both of them. On 30th July, 2019 Shaikh Naeem and applicant called complainant and told him that they intend to sell their property. The complainant informed about the said fact to his father and they decided to hold discussion for the purpose of executing the transaction. It was decided to execute transaction of sale of property to complainant by all the parties for Rs. 22,50,000/-. Isar Pavati was executed on 30.7.2019 between applicant and complainant. Shaikh Naeem Shaikh Chand was present at the time of execution of Isar Pavati and he consented for it. The complainant handed over cheque for Rs. 12 Lakhs to the applicant. It was agreed between the parties that the sale deed would be registered within 10 days and balance of Rs. 10 lakhs was to be given by the complainant to the applicant during registration. However, despite repeated requests, the document was not registered. On the contrary, the accused threatened the complainant of dire consequences. Both accused had acted in connivance. Being aggrieved by the fact that despite making payment of Rs. 12 Lakhs document was not registered, the complainant approached the police and lodged the FIR on 21st May, 2021.

3] The applicant had preferred application before the court of sessions for anticipatory bail, which has been rejected by order dated 23.6.2021. While rejecting the application, it was observed by

the learned Additional Sessions Judge, that on perusal of the application, say and documents on record, allegations in FIR, it can be seen that the applicant represented that he is owner of land plot No. 104 situated at village Naigaon. On 30th July, 2019, the document was notarized in presence of the notary by the applicant. The informant paid the amount. As per the agreement, it was decided to execute the registered sale deed within 10 days. However, the applicant had avoided to execute the sale deed intentionally and cheated the informant. The applicant executed agreement to sale of the same land in favour of other persons. Hence, investigation is required to be conducted.

4] The applicant was granted interim protection vide order dated 16.7.2021 by this court. The order refers to the nature of transaction between the parties. The order further mentions submissions of the learned advocate or the applicant that the performance of the agreement dated 30th July, 2019 was contingent with Shaikh Naeem and he could not execute the sale deed in favour of the complainant. The learned advocate for the applicant had submitted that the applicant is willing to pay or deposit Rs. 12 Lakhs in this court. The learned counsel for the complainant had submitted that the complainant is interested in the land and not money. The court further observed that complainant may initiate appropriate proceeding to protect his interest. However, custodial interrogation

of the applicant will not advance prosecution case and instead, since the applicant is willing to deposit Rs. 12 Lakhs, he is permitted to deposit the said amount in the Registry of this court within 3 weeks from the date of the order to show his bonafides.

5] The aforesaid order indicate that the applicant had volunteered to deposit an amount of Rs. 12 Lakhs within the stipulated period and he was permitted to do so by this court. The amount has not been deposited by the applicant. The application was thereafter listed on 6th August, 2021. The applicant sought extension of 4 weeks to deposit the amount. The applicant had preferred Criminal Application No. 1687 of 2021 seeking extension of time to deposit the amount. This court vide order dated 6th August, 2021 had observed that on 16.7.2021 the applicant at his free will had agreed to deposit Rs. 12 Lakhs in the Registry of this court within 3 weeks, whereupon, pre-arrest protection was granted to him. By way of indulgence, time to deposit Rs. 12 Lakhs was extended by 3 weeks. Despite of extension of time, the amount was not deposited. On 2.9.2021, the application was adjourned to 20.9.2021. Subsequently, the application was adjourned to 6th October, 2021 and interim relief was continued. It is pertinent to note that the applicant had preferred criminal application No. 1923 of 2021 seeking extension of time to deposit the amount. The said application was preferred on 25th August, 2021. The application does

not specify as to for how much period extension should be granted. In fact, interim relief was granted from time to time although the applicant had not deposited the amount. The application for extension was pending from 25.8.2021. On 6th October, 2021, the application was again adjourned to 20th October, 2021. During the course of hearing of the said application, on 6.10.2021 it was made clear that the applicant should abide by the statement made before this court. The application was adjourned for taking instructions to 20th October, 2021. The learned counsel for the applicant had submitted that the communication could not be established with the applicant. It was also submitted that the applicant was intending to sell the property and collect the amount to be deposited in this court. It is further submitted that the applicant has good case on merits and although the amount is not deposited, the application be heard on merits. It was apparent that the applicant was not interested in depositing the amount in this court. Arguments of both the sides were heard.

6] The contention of the learned counsel for the applicant is that the dispute is purely of civil nature. The applicant and the original owner had executed Isar Pavti on 26th July, 2019. Subsequently, it was agreed that the property was to be sold to the complainant and Isar Pavati in that regard was executed on 31st July, 2019. The execution of sale deed with the complainant was

contingent upon initial transaction executed with the original owner of the property. The applicant had paid Rs. 15 Lakhs to original owner. Custodial interrogation of the applicant is not necessary. Vide interim order dated 16th July, 2021 the applicant was protected. Hence, the application be allowed and relief under section 438 of Cr.P.C. be granted to the applicant.

7] The learned advocate for the applicant relied upon the decision of the Supreme Court in the matter of **Amarjitsingh vs. City of NCT, Delhi reported in 2002(1) SC 291**, the decision of this court in Criminal Application No. 3127 of 2016 dated 17th October, 2016. The order passed by this court in Criminal Application No. 4043 of 207 in the case of Chandrakant Choudhari Vs. State of Maharashtra, and decision in the case of **Sanjeev Nagpaul and others Vs. State of Tamilnadu MANU/SC/1606/2001** and submitted that the accused could not be directed to deposit the amount and that the dispute in relation to the sale of the property is purely of civil nature in which custodial interrogation is not necessary. Direction to deposit the amount as a condition for grant of bail is an onerous condition.

8] The learned APP submitted that the bonafides of the applicant are not clean. Although he had agreed to deposit the amount, he has not complied his statement. The applicant and the co-accused were acting in connivance with each other. False

representation and inducement was made to the complainant jointly by the applicant and co-accused. The contention of the applicant that execution of document with the complainant is contingent precedent to the previous transaction with the original owner, cannot be accepted. The applicant had accepted the amount of Rs. 12 Lakhs by way of cheque. This cannot be termed as a dispute of civil nature. Dishonest intention of the applicant is apparent in the facts of this case.

9] The learned counsel for the complainant reiterated the submissions of the learned APP. It is submitted that the document which was executed with the complainant was not subject to contingency as claimed by the applicant. The complainant was not represented that the sale deed would be executed subject to completion of the previous transaction. The complainant had parted an amount of Rs. 12 Lakhs by cheque which has not not been denied. The applicant cannot be allowed to accept the amount of Rs. 12 Lakhs and then say that he could not execute the sale deed on account of his previous transaction with the original owner. The false representation was made by the applicant and co-accused.

10] On perusal of the FIR, it is apparent that the applicant had executed two transactions. The first transaction was executed by the applicant with original owner and immediately thereafter representation was made by both the accused to the complainant

that the property is available for sale and by inducing him to execute the Isar Pavti, which was notarized, the complainant was made to part with the amount of Rs. 12 Lakhs by way of part consideration towards the sale of property. The payment was made by cheque. Sale deed was to be executed within 10 days which has not been done. The transaction is of July, 2019. The Isar Pavati executed on 30.7.2021 between applicant and complainant has no connection with any contingency as claimed by applicant. It was independent transaction. It is pertinent to note that the applicant has not come with clean hands. The order dated 16th July, 2021 indicate that he had volunteered to deposit the amount of Rs. 12 Lakhs. It is not in dispute that the amount was accepted by the applicant. It is in these circumstances the interim protection was granted to the applicant vide order dated 16th July, 2021. An observation was made therein with regard to factum of custodial interrogation. Thereafter, from time to time, the application was adjourned and extension of time was sought by the applicant to deposit the amount. Apparently, the applicant has taken a "U-Turn" and now claiming that it is not possible to deposit money and he is avoiding the compliance of a voluntary statement made before this court. The applicant had preferred Criminal Application No. 1923 of 2021, wherein, prayer is made for extension of time on 25.8.2021 without disclosing as to how much extension of time is required by him. When the application was heard, it was disclosed that the applicant intend to

contest this application on merits. It is surprising to note that the contention of the applicant is that the direction to deposit the amount is onerous condition. Even in the criminal application which is referred to herein-above, it is mentioned that the applicant that he was directed to deposit the amount. The order dated 16th July, 2021 clearly mentions that it is the applicant, who had volunteered to deposit the amount of Rs. 12 Lakhs. Even the subsequent order dated 6th August, 2021 mentions that on 16.7.2021 the applicant at his free will had agreed to deposit Rs. 12 Lakhs in the Registry of this court. The first Isar Pavati was executed between applicant and Shaikh Naeem original owner. Immediately within short time Isar Pavati was executed between applicant and complainant. The original owner is signatory to this notarized document. It is apparent that both the accused were acting in connivance. The conduct of the applicant and the factual aspects of this case as stated above, are sufficient to reject the application for anticipatory bail. Hence, the order.

: O R D E R :

Anticipatory bail application No. 739 of 2021 is rejected and stands disposed of. Criminal application No. 1923 of 2021 stands disposed of.

**[PRAKASH D. NAIK]
JUDGE**

GRT/-