

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

**CRIMINAL APPLICATION NO. 143 OF 2017
WITH
INTERIM APPLICATION NO.399 OF 2019
WITH
INTERIM APPLICATION NO.413 OF 2019
WITH
INTERIM APPLICATION NO.449 OF 2019**

Rakesh Natwarlal Patel ... Applicant

Versus

1. Ganesh Badal Mana
2. State of Maharashtra ... Respondents

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Mr. Ashok Kumar Dubey i/b. SAVJ Law Solutions, Advocate for the Applicant in Criminal Application.

Mr. Kedar Patil, Advocate for the applicant in I. A. No. 399 of 2019.

Mr. Vikramsing Parmar, Advocate for the applicant in I. A. No. 413 of 2019.

Mr. Ujwal R. Agandsurve, Advocate for the applicant in I. A. No. 449 of 2019.

Ms. Sapna Krishnappa, Advocate for Respondent No.1.

Mr. A. R. Kapadnis, APP for the Respondent – State.

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CORAM : PRAKASH D. NAIK, J.

DATE : 10th MARCH, 2021

PER COURT:

1. This is an application for cancellation of anticipatory bail granted by the Sessions Court vide order dated 9th February, 2017. The application is preferred by the original complainant. The First

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Information Report (for short “FIR”) was lodged vide C.R. No. 13 of 2017 registered with Kandivali Police Station, Mumbai for offences under Sections 406 and 420 of Indian Penal Code (for short “IPC”).

2. The case of the complainant is that he used to provide gold for manufacturing ornaments to Chandrakant Patel who was conducting business in the name of P. B. Jewellers at Borivali. The complainant was acquainted with Sonal Makwana and Sanjay Bhadankar were working in the said factory. Ganesh Badal Mana was also working with them. P. B. Jewellers closed their business and shifted to Ahemadabad/Gujrat. Thereafter, Sonal Makwana, Sanjay Bhadankar and Ganesh Mana started the factory in the premises at Borivali. Sonal Makwana informed the complainant that she is working with Ganesh Mana (accused/respondent) and they are prepare ornaments and selling the same in the market. The complainant believed Sonal Makwana and handed over the gold for manufacturing ornaments to Ganesh Mana. On 12th October, 2016 gold weighing 1 Kg. valued Rs. 30,05,640/- was handed over to him in presence of Sonal Makwana and Sanjay Bhadankar. Similarly on 13th October, 2016, 1 Kg. gold was handed over to the accused valued Rs. 30,10,700/-. Sonal and Sanjay were present. Bill invoices were issued to the complainant. Sonal Makwana and Sanjay Bhadankar were available. The complainant was informed that

accused is not attending place of work. Wife of the accused was called. She came to factory and abused the complainant. She stated that she is not aware about any transactions. Subsequently, complainant learnt that the accused have cheated others adopting similar modus. FIR was lodged against the accused for misappropriating the gold valued Rs.60,16,340/-.

3. The accused/respondent No.1 preferred an application for anticipatory bail before the Sessions Court. Interim protection was granted. The application was then finally heard and vide order dated 9th February, 2017 application was allowed.

4. The order granting anticipatory bail to respondent No.1 is under challenge in this application by original complainant. This application was preferred on 9th March, 2017. Notice was issued to respondent No.1 on 1st July, 2017. The notice was returned 'unserved' with remark "respondent is not found". The respondent No.1 was resident of West Bengal, Madinipur. Subsequently, notice was served upon respondent No.1 and the advocate representing him had appeared on 20th December, 2018. Thereafter, the application was adjourned from time to time. On 8th February, 2019 time was granted to respondent No.1 to file reply. Thereafter, application was again adjourned and sometimes due to paucity of time matter did

not reach for hearing. The respondent No.1 through his advocate had filed affidavit-in-reply on 11th February, 2019, opposing the prayers in this application on.

5. Learned counsel for the applicant submitted that there is total non application of mind by the learned Judge while granting anticipatory bail to Respondent No.1. The custodial interrogation of Respondent No.1 was necessary. Gold weighing 2 Kg. was entrusted to him. Huge loss is caused to the complainant. Other persons were also cheated in similar offence. After grant of anticipatory bail, two other FIRs were registered against Respondent No.1 vide C.R. No. 936 of 2020 at Kandivali Police Station for offences under Sections 420 & 406 of IPC and C.R. No. 29 of 2021 registered with Malad Police Station for offences under Section 420 & 406 of IPC. It is submitted that the learned Sessions Judge had misread the FIR. The tax invoices dated 13th October, 2016 were in the name of buyer i.e. respondent No.1 and document also mentioned that 60 days credit was given for payment. In spite of clear evidence to support the case of the complainant that the gold was entrusted to the accused, the learned Judge has not considered the same. The respondent No.1 was conducting business of making gold ornaments from the premises at Borivali. Gold was handed over in the presence of two other persons. Reliance is placed on the balance sheet of financial

year 2016-17. Learned advocate relied upon the decisions of the Supreme Court in the case of *Bharatbhai Bhimabhai Bharwad Vs. State of Gujrat and others*¹ and *Anil Kumar Yadav Vs. State (NCT) of Delhi & Anr.*² He also relied upon the decision of this Court in the case of *Court on its own motion V/s. Manisha w/o Krishnakant Deshmukh*. It is submitted that principle enunciated in the said decisions, interim protection granted to respondent No.1 may be cancelled.

6. Learned APP supported the application. It is submitted that on account of grant of anticipatory bail, the investigation could not be conducted. There was no recovery of gold. Custodial interrogation of the respondent No.1 was necessary. Since there was no progress in the investigation and although the FIR was registered in 2017 charge-sheet is not filed. Recovery of Gold could not be effected. There is no cooperation from the respondent No.1. After granting relief of anticipatory bail, two other cases were registered against respondent No.1.

7. Learned Advocate for Respondent No.1 disputed the submissions of complainant. It is submitted that learned Sessions Judge has considered the document on record and granted relief. No

1 2019 0 Supreme (SC) 796

2 2017 0 AIR (SC) 5398

case for setting aside order granting anticipatory bail which was passed on 9th February, 2017 is made out. Respondent No.1 has cooperated with the investigation by attending the Investigating Officer. He relied upon the acknowledgment reflected in the diary about his attendance. Respondent No.1 has cooperated with the investigation. He is permanent resident of West Bengal. He relied on Aadhar Card, Pan Card, Election Voter ID Card ect. Since the market condition was not improved he had go back to West Bengal where he is conducting farming. Gold was not entrusted to respondent No.1 by the complainant. Learned Sessions Judge has considered the said aspect. It is however, submitted that as far as claim of Sonal Makwana is concerned. Gold weighing 180 Grams was accepted by him and he is willing to make the payment within period of six months.

8. I have perused the FIR. The complainant has specifically stated that on two occasions 1 Kg. each gold was handed over to the respondent No.1. The value of total gold according to complainant is Rs. 60,16,340/-. The complainant has relied upon the tax invoices which reflects the transaction. It is stated that 1 Kg. gold worth Rs.30,10,700/- was handed over to Ganesh Mana (respondent No.1). Another tax invoice refers to 1 Kg gold worth Rs. 30,05,640/- being handed over to respondent No.1. Pursuant to the registration of FIR

the respondent No.1 had moved an application before the Sessions Court for anticipatory bail. In the said application he stated that he is apprehending arrest on the complaint filed by Sonal Makwana for offence under Section 420 & 409 of IPC. He stated that he had accepted gold from her and since he was unable to return the gold, he paid Rs. 4,80,000/- to her. He also stated that he is willing to return gold of 180 grams or liable to make the payment. The application was however silent with regards to the claim of the complainant in the present FIR. Learned Sessions Judge while granting anticipatory bail had proceeded with the observations that Sonal Makwana, Hitesh Wasani and Sapan Banerjee had also given gold of 180 grams, 600 grams, & 428 grams respectively in similar manner. Police is investigating the matter. The Court then observed that respondent No.1 is willing to return gold 180 grams to the complainant. Although the respondent No.1 claimed that he would return the gold to Sonal Makwana, since last three years he did not take any steps to return the gold. The Court has observed that there are some transactions between Rakesh (applicant), complainant and respondent No.1 and gold weighing 2 Kg. was handed over to respondent No.1. It is acknowledged by two receipts dated 12th October, 2016 and 13th October, 2016. The Court observed that receipts titled as tax invoices bear signatures of Sanjay Bhadankar to

the effect that the gold has been delivered to him. Name of Respondent No.1 is mentioned as buyer. These documents give inferences that there was some transaction in respect to sale of gold to respondent No.1 on credit of 60 days. The Court however observed that gold was entrusted to the accused with promise of returns thereof to the complainant is not supported by these invoices. As far as of other persons are concerned, there is no document in support of these allegations. The Court failed to take note of the fact that the invoices does supports the claim of the complainant. The investigating machinery ought to have been given opportunity to investigate in that regard. The inferences drawn by the Court are contrary to evidence on record, relief was granted. The Court also observed that as far as three other aggrieved persons there are no documents. It ought to have been considered that respondent No.1 had himself admitted that he is supposed to return gold to Sonal Makwana. I am conscious of the fact that the anticipatory bail was granted to the respondent No.1 vide order dated 9th February, 2017. Complainant was deligent to move this Court for cancellation of anticipatory bail. The application has remained pending. Since the respondent No.1 is resident of West Bangal, it took time to serve upon him. Subsequently he was served. This application was preferred immediately after the impugned order was passed by the

Sessions Court. It is true that for cancellation of bail considerations are different. In the present case cancellation of anticipatory bail was sought on merits. The investigation is required to be conducted in respect to the 2 Kg. gold entrusted to respondent No.1 by complainant as well as the other aggrieved persons. Intervention applications are preferred by Sonal Makwana, Hitesh Wasani and Sapan Banerjee supporting this application. It also appears that two other cases are registered against respondent No.1 after he was granted anticipatory bail. Order granting anticipatory bail can be set aside on merits or even in the case of breach of conditions. The order passed by the Sessions Court shows non application of mind. The learned Judge ought to have taken into consideration the fact that there are documents which indicate that gold was entrusted to respondent No.1. The property was to be recovered. The value of the gold was around Rs. 60 Lakhs. Hence, the order is required to be set aside.

ORDER

- (i) Criminal Application No. 143 of 2017 is allowed;
- (ii) The impugned order dated 9th February, 2017 in Anticipatory Bail Application No. 136 of 2017 passed by the learned Additional Sessions Judge, Borivali Division, Dindoshi, granting anticipatory bail to respondent No.1 is set aside.

(iii) Criminal Application as well as Interim applications are disposed of accordingly.

9. At this stage the the learned counsel for respondent No.1 submits that to enable the respondent No.1 to challenge this order before higher Court, operation of this order may be stayed for period of twelve weeks.

10. The impugned order was passed on 9th February, 2017. The respondent No.1 was enjoying the protection since then. Twelve weeks time will be a long time. Considering the fact the respondent No.1 intends to challenge this order before higher Court, operation of this order is stayed for a period of four weeks.

(PRAKASH D. NAIK, J.)