

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL APPLICATION (APPP) NO.1873 OF 2019
IN
CRIMINAL APPLICATION (APL) NO.1001 OF 2018
(DECIDED ON 02.04.2019)

(Pankaj s/o Maheshkumarji Rathi and another Vs. State of Maharashtra thr. PSO PS
Dhantoli, Nagpur and another)

*Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.*

Court's or Judge's orders.

Mr. Anil S. Mardikar, Senior Counsel assisted by Mr. Rishabh Khemuka,
Counsel for Applicants.
Mr. M. K. Pathan, Addl. Public Prosecutor for Non-Applicant 1/State.
Mr. Girish Kunte, Counsel for Non-Applicant 2.

CORAM: ROHIT B. DEO, J.

DATE: 24th SEPTEMBER, 2021.

This application seeks modification of condition
(iv) imposed vide order dated 02.04.2019 in Criminal
Application (APL) 1001/2018.

2. The condition of which modification is sought,
directs the applicant to furnish bank guarantee of
Rs.1,00,00,000/- (Rupees One Crore Only) in lieu of the
condition imposed by the learned Sessions Judge while
allowing the pre-arrest bail application, to deposit the
amount of Rs.1,17,00,000/- (Rupees One Crore Seventeen
Lacs Only) in the account of the MAHAJENCO
(complainant).

3. It would be necessary to note the factual backdrop.

4. The applicants are arraigned as accused in Crime 220/2018 registered at Dhantoli Police Station, Nagpur for offences punishable under Sections 406, 409, 420 and 379 read with Section 34 of the Indian Penal Code (IPC). The accusation is that the applicants committed theft of cheques of the value of Rs.2,27,10,502/- (Rupees Two Crores Twenty Seven Lacs and Ten Thousand Five Hundred Two Only) from an officer of the complainant and encashed the same. It is alleged that the accused were contractually bound to supply steel worth Rs.2,68,69,842/- (Rupees Two Crores Sixty Eight Lacs and Seventy Nine Thousand Eight Hundred Forty-Two Only), however, after supplying steel worth Rs.41,59,340/- (Forty One Lacs and Fifty Nine Thousand Three Hundred Forty Only) the accused took possession of the cheques worth Rs.2,27,10,502/- (Rupees Two Crores Twenty Seven Lacs and Ten Thousand Five Hundred Two Only), and encashed the same without supplying the balance quantity of steel.

5. The accused approached the Sessions Court under Section 438 of the Criminal Procedure Code, 1973 (Code) seeking pre-arrest protection. The learned Additional Sessions Judge, Nagpur granted pre-arrest protection vide order dated 30.08.2018, subject to certain conditions. The operative part of the order granting

pre-arrest protection reads thus:

“1) Application Exhibit 1 is allowed.

2) In the event of arrest of applicants in Crime No.220/2018 under Sections 406, 409, 420, 379 read with Section 34 of the Indian Penal Code registered with P.S. Dhantoli, Nagpur they be released on bail on P.R. bond of Rs.1,00,000/- each and furnishing solvent surety in like amount, subject to following conditions :

i) Applicants are directed to attend the Police Station, Dhantoli on every Sunday in between 10.00 a.m. to 12.00 p.m. till filing of the charge-sheet.

ii) They shall not tamper with the prosecution evidence or witnesses in any manner.

iii) They shall not leave India or the jurisdiction of Nagpur District without prior permission of this Court or of the trial Court.

iv) They shall deposit the amount of Rs.1,17,00,000/- (One Crore Seventeen Lacs Only) by R.T.G.S. in the account of the complainant MAHAGENCO COMPANY, within 45 days from today and for that purpose the Investigating Officer shall facilitate the operation of frozen account to the tune of said amount. The remaining amount shall remain deposited in the seized account and shall be subject to final decision in the case. The amount so paid to Maharashtra State Power Generation Company Ltd. (MSPGCL) shall be adjusted in any liability as may be established between either of the parties and shall be without prejudice to the right of applicants or their defence in the criminal case.

v) The applicants shall file an undertaking before this court and before the Investigating Officer that they shall not withdraw the balance disputed amount of Rs.1,10,10,502/- till further

directions. Said undertaking shall be filed on or before 3-9-2018.

vi) They shall attend the dates of hearing at the trial after filing of charge-sheet regularly.

3) Issue letter accordingly.”

6. The accused approached the learned Sessions Judge seeking modification of the conditions of anticipatory bail, which application is rejected by order dated 16.10.2018. Dissatisfied, the accused approached this Court in Criminal Application (APL) 1001/2018. The learned counsel for the accused did argue, relying on various decisions of the Hon'ble Supreme Court, that the conditions of pre-arrest protection cannot be so onerous as would render the right to obtain bail illusory. It was further argued that the proceedings under Section 438 of the Code cannot be converted into recovery proceedings and it would be legally impermissible for the Court to act as the recovery agent of the complainant. Without prejudice to the said submission, the accused undertook to furnish a bank guarantee of Rs.1,00,00,000/- (Rupees One Crore Only) within six months, as a substitute to condition (iv) imposed by the learned Sessions Judge, which is reproduced *supra*. An affidavit dated 02.04.2019 was filed on record which reads thus:

“I Pankaj s/o Maheshkumarji Rathi, Aged about 48 years, applicant No.1, R/o Gandhi Nagar, Nagpur herein do hereby go on oath and solemnly affirm as under :

1. I affirm and say that I have authorised to swear on behalf of applicant No.2 also.

2. I further affirm and say that I will submit bank guarantee of Rs.1 Crore within a period of six months from today which shall be treated as a substitute condition for condition No.iv of the impugned order.

Hence this affidavit.”

7. This Court noted the undertaking of the accused and the statement made on behalf of the complainant that a civil suit would be filed to recover the amount. The statement of the learned counsel for the accused that the bank guarantee shall be kept alive till the final determination in the civil suit, was also noted. In view of the undertaking to furnish bank guarantee, this Court substituted condition (iv) imposed by the learned Sessions Judge with a direction to furnish bank guarantee. The submission of the learned counsel for the accused that the conditions imposed by the learned Sessions Judge militate against settled law, was not dealt with on merit, in view of the undertaking of the accused to furnish bank guarantee.

8. The accused then preferred Criminal Application (APPP) 1421/2019 seeking modification of the substituted direction to furnish bank guarantee. Criminal Application (APPP) 1421/2019 was heard by Shri V.M. Deshpande, J., who rejected the same vide order dated 30.09.2019. The only reason recorded in the said order of rejection is

that the substituted condition was imposed in view of the undertaking given by the accused.

9. The accused contend that pursuant to the orders of this Court rendered on 02.04.2019 and 30.09.2019 accused 1 did not spare any effort to secure the bank guarantee, however, every bank which the accused approached refused to oblige since the accused did not meet the eligibility parameters. The accused have placed on record the correspondence made with the banks and the response.

10. The accused further contend that an attempt was made to secure bank guarantee by offering the security of land, with clear and marketable title, situated at village Tumni (Borgaon). According to the accused, while the ready reckoner value of the said land as on 06.10.2015 was Rs.59,92,600/- (Rupees Fifty Nine Lacs Ninety Two Thousand and Six Hundred Only) its market value as on the said date was Rs.1,80,00,000/- (Rupees One Crore and Eighty Lacs Only). The accused have placed on record copy of the 7/12 extract and the valuation report.

11. In a nutshell, the contention of the accused is that despite making every possible effort to obtain the bank guarantee, the accused have found it impossible to comply with the direction to furnish bank guarantee. The accused, therefore, contend that instead of bank guarantee the

accused are ready to mortgage the agricultural property referred to *supra* in favour of the complainant. Prayer (i) reads thus:

(1) allow the present application thereby modifying condition No. (iv) in order dt.02.04.2019 passed in Criminal Application (APL) No. 1001/2018 by directing applicants to keep their agricultural land mentioned in Para No. 11 as a mortgage with respondent No. 2 complainant's company on the terms and conditions stated in order dt. 02.04.2019.

12. The maintainability of the application was the subject matter of some debate. The learned counsel for the complainant Mr. Girish Kunte submitted that in the teeth of the earlier refusal of this Court to modify the condition of furnishing bank guarantee, the successive request for modification is not maintainable. Mr. Girish Kunte would rely on the decision of the Hon'ble Supreme Court in ***Atul Shukla v. State of Madhya Pradesh and another (2019) 17 SCC 299***. The said decision is rendered in the context of the High Court having reviewed its earlier order of rejecting an application seeking quashment of the first information report. The Hon'ble Supreme Court held that in view of the specific bar incorporated in Section 362 of the Code, the High Court could not have reviewed its earlier order. In rebuttal, the learned Senior Counsel Mr. Anil Mardikar submits that it is well settled that a successive application under Section 482 of the Code is maintainable under

changed circumstances. The extension of the submission, is that an application which is preferred in view of either relevant subsequent events or change in circumstances or on the basis of relevant material which the Court was not called upon to consider while rejecting the earlier application, does not attract the bar of Section 362 of the Code and, indeed such application cannot be branded as a repeat application on the same facts and circumstances. Mr. Anil Mardikar heavily relied on the decision of the Hon'ble Supreme Court in *Anil Khadkiwala v. State (Government of NCT of Delhi) and another Criminal Appeal 1157/2019*, which distinguishes the decision in *Atul Shukla*, relied on by Mr. Girish Kunte.

13. It would be apposite to note the factual backdrop of *Anil Khadkiwala*. The High Court dismissed an application under Section 482 of the Code seeking to quash the summons issued in complaint under Section 142 of the Negotiable Instruments Act on the ground that earlier application for the same relief was dismissed. The Hon'ble Supreme Court noted that the accused, in the earlier application, took the defence that he had resigned as the Director without any proof of the resignation and that while preferring the second application the accused did place on record and relied on Form 32 issued by the Registrar of Companies. The Hon'ble Supreme Court observed that it did not appear that the attention of the High Court was drawn to Form 32, when the first application was dismissed. It was

observed that the subsequent application, strictly speaking, was not a repeat application on the same facts and circumstances.

14. I am satisfied, that the present application cannot be said to be a repeat application on the same set of facts and circumstances, and since the earlier rejection of the modification request is even otherwise not on merit, but is on the ground of maintainability, the bar of Section 362 of the Code is not attracted. I may note, that perusal of the order dated 30.09.2019 rendered by Shri Justice V.M. Deshpande does not reveal that the modification was sought on the premise that the accused were not able to obtain bank guarantee and that the accused are offering to mortgage their land as a substitute. Rather, the modification was sought on the premise that it is revealed that nothing is due and payable to the complainant. The present application is clearly maintainable.

15. Adverting to the merit of the prayer for modification and the substitution of the condition, I note, with some sense of surprise, that the complainant has instructed Mr. Girish Kunte that it would not be possible to accept a mortgage of land in favour of the complainant. It is not necessary to delve deeper in the thought process of the complainant as is discernible from the correspondence placed on record by Mr. Girish Kunte. Suffice it to observe, that *prima facie* the stand of the complainant that being a

public body, there is no provision to accept a mortgage of land, appears to be questionable.

16. Mr. Girish Kunte would argue, inviting my attention to the affidavit in response that the accused have committed breach of the other conditions of pre-arrest protection too, and considering the conduct of the accused the complainant has no faith in the assurances and undertaking extended by the accused. It is made abundantly clear, that the only issue which is addressed herein is the prayer for substitution of the condition directing the accused to furnish the bank guarantee. If the accused have not complied with any other condition, or have otherwise rendered, by their conduct, themselves vulnerable to cancellation of pre-arrest protection, the issue will be addressed by the appropriate Court, at the appropriate time, uninfluenced by any observation in this order.

17. It is true that while considering the challenge to the condition imposed by the learned Sessions Judge, this Court did not render any finding on the submission that the Court cannot act as a recovery agent for the complainant. No finding was recorded since the accused voluntarily undertook to furnish bank guarantee in lieu of cash deposit. However, it would be appropriate, while deciding this application, to be alive to the consistent articulation of the Hon'ble Supreme Court, that the Court cannot impose a condition for grant of bail or pre-arrest protection, which

tends to convert proceedings under Section 482 of the Code into virtually a recovery suit. In a relatively recent decision in *Dilip Singh v. State of Mahdya Pradesh and another Criminal Appeal 53/2021*, while setting aside the condition imposed by the High Court to deposit Rs.41,00,000/- (Rupees Forty One Lacs Only), the Hon'ble Supreme Court observed thus:

5. *It is well settled by a plethora of decisions of this Court that criminal proceedings are not for realization of disputed dues. It is open to a Court to grant or refuse the prayer for anticipatory bail, depending on the facts and circumstances of the particular case. The factors to be taken into consideration, while considering an application for bail are the nature of accusation and the severity of the punishment in the case of conviction and the nature of the materials relied upon by the prosecution; reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant or the witnesses; reasonable possibility of securing the presence of the accused at the time of trial or the likelihood of his abscondence; character behaviour and standing of the accused; and the circumstances which are peculiar or the accused and larger interest of the public or the State and similar other considerations. A criminal court, exercising jurisdiction to grant bail/anticipatory bail, is not expected to act as a recovery agent to realise the dues of the complainant, and that too, without any trial.*

18. The accused are held entitled to pre-arrest

protection. The Court is obligated to strike a balance between the right of liberty of the accused and the interest of the Investigating Agency or the complainant. It would be a mockery of justice to deprive the accused of personal liberty, due to the failure to secure bank guarantee and satisfy the condition of pre-arrest protection, particularly since the accused have offered to mortgage their land in favour of the complainant, which offer the complainant has rejected. The accused have then offered to voluntarily undertake, to appear in the civil suit instituted by the complainant, and to invite the Civil Court to attach the agricultural land, during the pendency of the suit for recovery. I am therefore, inclined to modify the condition (iv) in the order dated 02.04.2019 and to substitute the same with a direction that the accused shall appear in Special Civil Suit 26/2020 which is filed by the complainant seeking recovery of the amount, on 04.10.2021 and shall submit on record an undertaking that the accused – defendants in the civil suit have no objection if the property described in paragraph 11 of the instant application is attached in favour of the complainant. Accordingly, the following order is passed:

Condition (iv) in the order dated 02.04.2019 is modified and substituted by the following condition.

The applicants – accused, who are

defendants in Special Civil Suit 26/2020 instituted by the complainant – MAHAGENCO, undertake to appear before the Civil Court on 04.10.2021 and to submit on record an undertaking that the applicants – defendants in the said civil suit, have no objection if the property is described in paragraph 11 in the instant application, is attached in favour of the complainant – plaintiff. It shall be open to the Civil Court to pass consequential or formal order, if deemed fit.

19. The application is allowed in the aforestated terms.

JUDGE