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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on : 08th September, 2021
Delivered on : 17th September, 2021

\+ **BAIL APPLN. 1303/2021**

DR. ASHISH NAITHANI ..... Petitioner
Through : Mr.Pramod Kr Dubey Sr. Advocate with Mr.Sanjay Abott, Mr.Amit Sinha, Ms.Pinky Dubey, Mr.Koustubh Chauhan, Mr.Anurag Andley, Mr.Shashank Dewan, Mr.Vikalp Sharma and Mr.Askshat Sharma, Advocates.

versus

THE STATE GOVT OF NCT DELHI ..... Respondent
Through : Mr.M.S.Oberoi, APP for State with Inspector Satya Prakash, EOW.
Mr.Puneet Bajaj, Advocate for complainant.

CORAM:
HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J. *(Though Video Conferencing)*

1. This petition is filed under Section 439 Criminal Procedure Code (hereinafter referred as *Cr P C*) for regular bail to petitioner in case FIR No.*165/2018* registered under Section *409/420/120B* IPC at police station EOW, Mandir Marg, New Delhi.

2. The allegations are the petitioner was inducted as a director in *M/s.Realcraft Buildtech Private Limited* since 02.07.2012 to the extent of 86% share holdings and also director in *M/s Primerose Infratech Private*

Limited since 26.07.2021 to the extent of 36% share holding. The grievance of the complainants are they had invested in the projects to be raised by *M/s Realcraft Buildtech Private Limited* and despite making the payments of money, they never received the flats and their money have been siphoned off.

3. The learned senior counsel for the petitioner submit this FIR was registered on 13.08.2018 and petitioner though initially joined the investigation, but later was arrested on 09.11.2019. The charge sheet has since been filed before learned Trial Court and investigation is thus complete. It is argued after filing of the charge sheet, there is no progress in the case; the charges have not been framed against the petitioner; 83 witnesses have been cited to prove 3661 odd documents during trial, which would certainly take a long period.

4. It is submitted there were five directors of the companies namely – *a)* petitioner herein; *b)* Parmod Kumar Aggarwal; *c)* Brij Bhushan Gupta; *d)* Manmohan Bansal and *e)* Jayesh Sharma; out of whom, Brij Bhushan Gupta has since been granted regular bail per order dated 01.02.2021 by the learned Trial Court on his deposit of Rs.4.00 Crores; and Parmod Kumar Aggarwal has been granted anticipatory bail by learned Trial Court per order dated 05.04.2021; accused Manmohan Bansal and Jayesh Sharma have not been arrested.

5. It is the submission of the learned senior counsel for the petitioner *per* charge sheet, M/s Primerose Infratech Private Limited was having its bank account with Bank of Baroda, Greater NOIDA, UP – 201308 and its authorised signator(ies) were Brij Bhushan Gupta and Manmohan

Bansal. It is argued accused Brij Bhushan Gupta has already been granted bail and Manmohan Bansal was never arrested despite he being an authorised signatory of M/s Primerose Infratech Private Limited. Further, per charge sheet, the role ascribed to the petitioner is of only of being a director in abovesaid two companies. It is alleged he could not justify the bookings made by M/s Realcraft Buildtech Private Limited *prior* to necessary approvals and also qua diversion of funds. The allegations of inducement to the customers are also made against him. All the flat buyers 'agreements have since been signed by him. The petitioner alleges to have received only an amount of Rs.1.62 Crores as salary for five years with effect from March, 2013 to October 2017.

6. Admittedly, there is no allegation/proof of siphoning off of the funds against him and as alleged he was not a signatory of bank account of M/s Primerose Infratech Private Limited, maintained with Bank of Baroda from where diversion of funds is alleged.

7. Admittedly, the bail order dated 01.02.2021 of accused Brij Bhushan Gupta (Annexure *E*) reveal there were allegations of siphoning off the funds, yet was granted regular bail by the Court. The observation made in order dated 01.02.2021 are relevant:-

> *2. xxxx The bail is sought on the following grounds:*
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> *A. xxx*
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> *B. xxx*
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> *C. That the IO even after custodial interrogation of the accused and detailed investigation, has not brought on record any details of the alleged siphoned off amount of 55 crores (approximately). The IO has failed to file the exact extent of amount which has been siphoned off, in order to bridge the gap between the initial report of the IO which stated the*

siphoned amount as Rs 2 crores and the consequent report of the RP which stated the alleged siphoned amount as Rs. 55 crores approx.

D. It is submitted that since the alleged siphoned amount was Rs. 2 crores and the accused who enjoys respectable status in the society, had voluntarily offered to deposit Rs. 4 crores before the Hon'ble High Court of Delhi, which offer was duly accepted by the Hon'ble High Court and interim protection was granted to the applicant vide order dated 29.06.2020. The applicant/accused duly joined the investigation. Since, the applicant could not deposit the amount of Rs. 4 crores, which was the condition precedent, due to the shortfall of funds and the pandemic situation, the interim protection was withdrawn vide order dated 09.09.2020 and the applicant was subsequently arrested on 08.11.2020. It is submitted that now the family members have arranged the requisite funds and are ready to deposit Rs. 4 Crores before the court.

E. xxx

F. xxxx The proposed project completion date is April 2022 and out of the total saleable area which is 9,80,365 sq ft, only the area measuring 5,26A95 sq. ft. has been sold. Out of the total 754 units, only 435 units have been sold and around 319 units are still unsold. The total amount received from the sold units is Rs 96 crores only and the balance amount of Rs. 70 crores from the said sold units is yet to be recovered/ received. Even the amount expected from the unsold units is Rs. 160 crores.

9. The picture which emerges from the above submissions is that the land was initially taken by M/s. Primrose, in which applicant is one of the director. The bookings were taken in the new company M/s Realcraft in which applicant is not the director. The bookings were subsequently transferred to M/s. Primrose. As per the documents placed on record, only 70 buyers have joined the investigation and the alleged cheated amount is Rs. 20 crores qua the said 70 buyers. There is no dispute to the fact that as per the initial report filed by the IO before the Hon'ble High Court of

Delhi, the amount siphoned off by the applicant was stated to be Rs.2 crores. It is in the report of the RP, he disclosed that the siphoned off amount is Rs.SS crores. Specific directions were issued to the investigating agency to carry out the investigation qua the exact amount siphoned off as the difference between the amount quoted by RP and in the initial report of the IO was quite vast. Even after the lapse of around three months from the previous report dated 29.10.2020, and the custodial interrogation of the accused, no new fact has been brought on record by the IO. The reports filed by the 10 in the present application are replica of the reports filed before the Hon'ble High Court of Delhi.

8. Even accused Parmod Kumar Aggarwal, was granted anticipatory bail by learned Session's Court per order dated 05.04.2021 and the order notes:-

1. xxxx Thereafter the co-accused Brij Bhushan Gutpa was arrested in the present case 08.11.2020 and was thereafter released on bail in the present case vide order dated 02.02.2021 by the Ld. Sessions Court thereby imposing some conditions and looking into the fact that the investigation of the case has already been conducted by thepolice. In the charge sheet it has been stated after verification that the shareholding ratio of the accused persons in the company namely M/s Primorose Infratech Pvt. Ltd. is in the ratio of:

Dr. Ashish Naithani-36%
Brij Bhushan Gupta- 45%
Pramod Aggarwal- 14%
Manmohan Bansal-5%
Jayesh Sharma-not Mentioned.

5. In continuation of previous submission, today Ld. Counsel for applicant/accused submitted that as per admission of the 10 that the present applicant/accused had already been joined the investigation despite that the NBW and thereafter, Process u/s 82 and 83 Cr. PC has been got issued to harass the present applicant/accused.

6. xxx

7. Further, Ld. Counsel for applicant/accused submitted that as per the Forensic Audit Report of Primrose Pvt. Ltd. by UPRERA, The percentage of project's work were completed though it has not been as per the project as it *has been clearly mentioned in the project report Total Saleable area in the project is 9,80,365 sq. Ft out which 5,26.495 sq. ft. area is sold. Sold units in the project are 435 as per the information shared by the developer. Unsold units in the project is 319. Amount received from sold units is 1NR 96 cr. And amount to be received from sold units is INR 70 crore as at May 2019. Amount expected to be received from unsold units is Inr 160 crore assessed at an average selling price of INR 3300/sq.Ft.*

8. Considering total future cash inflows and future cash outflows, the project is estimated to have surplus of INR 18 crore which leads us to the assumption that the project may not face difficulty in project completion.

25.Here it is important to note here that at the time of considering the bail of co-accused Brij Bhushan Gupta, it was observed that there is no change to the fact in respect to the siphoning of funds that as per the initial report filed by the IO before the Hon'ble High Court the Amount siphoned by the co-accused Brij Bhushan Gupta was stated to be two crores, whereas report of RP, it was alleged to be siphoned of amount of Rs.55,00,00,000/- (fifty five crore), therefore a specific direction is given to the investigating agency to carry out the investigation qua the exact amount siphoned as the difference between the amount quoted by RP and initial report of IO was quite vast. Even after the lapse of around 3 months from the previous report dated 29.10.2020 and even the custodial interrogation of co-accused Ashish Naithani and Brij Bhushan Gupta, no new facts has been brought on record by the IO.

9. While, referring to above bail orders, it was argued by the learned senior counsel for the petitioner, as per prosecution case, the siphoning of the fund, if any, per Resolution professional is Rs.*55.00* Crores and bare perusal of the orders would show, out of 750 units, 438 units were sold for Rs.96.00 Crores and Rs.70.00 Crores is yet to be paid by the investors. It is argued had the investors paid the entire sum, the project could have been completed, but instead they filed the FIR and it led to confusion all around and ultimately the projects were delayed.

10. Admittedly, *Resolution Professional* has been appointed and the project is to restart very soon.

11. The learned counsel also referred to *Forensic Audit Report* (*annexure H*) attached to this petition, prepared as ordered by UPRERA and it notes:-

> ***6.1 Fund Utilization***
> ***6.1.1 Current Project Health***
> *I. Revenue collected from customers as at May-19 is INR 96 Cr.*
> *II. Fund infused from other income sources and promoter's contribution is INR 7 Cr.*
> *III. Amount Infused from loan/finance in the project is INR29 Cr.*
> *IV. Total cash inflows in the project stands at INR 132 Cr.*
> *V. Amount paid towards land dues is INR 10 Cr., however in the payment intimation shared by GNIDA amount paid by the developer is shown as INR 9.55 Cr. because approximately INR 80 Lakh has been paid by the developer towards the stamp duty and other charges which is not included in the payment intimation. Payment Intimation is Annexed as Annexure B.*
> *VI. Cost incurred in construction including other cost such as marketing, admin & overheads etc is estimated at INR 85 Cr. on standard market parameters.*
> *VII. Amount paid towards availed loan/finance stands at INR 37 Cr.*
> *VIII. Total cash outflows in the project (cost incurred) is estimated at INR 132 Cr.*
> *IX. Considering total cash Inflows and cash outflows, the project is estimated to have surplus of INR 0 Cr.*
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> ***6.1.2 Future Project Health***
> *I. Future revenue from customers is estimated at INR 230 Cr.*
> *II. Amount to be paid towards land dues Is INR 51 Cr. as per the payment Intimation dated 4th April 2019. Payment intimation is Annexed as AnnexureB.*
> *III. Cost to be incurred in construction including other cost such as marketing, admin & overheads etc is estimated at INR 161 Cr. based on standard market parameters.*

IV. Total cash future outflows in the project (cost to be incurred) is estimated at INR 212 Cr.

*V. Considering total future cash inflows and future cash outflows, the project is estimated to have surplus of **INR 18** Cr, which leads us to the assumption that the project may not face difficulties in project completion.*

12. Thus, it was argued future health of the project is strong and if it is restarted it shall make profit of Rs.18.00 Crores, and hence, there is no cause for worrying for the investors.

13. Admittedly, the petitioner is in custody since 09.11.2019 and investigation qua him is complete; the petitioner has taken only Rs.1.62 Crores as his salary for a period of *55* months and there is no evidence against him of siphoning off funds; rather it is alleged petitioner has invested Rs.1,28,30,000/- in *M/s Primerose Infratech Private Limited* and Rs.1,20,00,000/- in *M/s Realcraft Buildtech Private Limited,* per status report dated 03.06.2021; there being 83 witnesses to be recorded though even the charges have not yet been framed.

14. If one peruse internal page *4* of status report dated 27.08.2021 it confirms not a single penny was transferred in the account of this petitioner. It is also a fact on 21.12.2018 the NCLT had appointed an *Interim Resolution Professional* on *M/s Primerose Infratech Private Limited* wherein the Committee of Creditors (COC), majorly comprising of home buyers, have approved the resolution plan proposed by the resolution applicant namely *One City Infrastructure (P) Limited* per para *3* of status report dated 03.09.2021 submitted by EOW.

15. Thus, considering the facts stated above and relying upon *Sharad Kumar & Others vs CBI* 2011(126) DRJ 525, where bail was granted for an offence under Section *409* IPC, and also considering the accused is in custody since 09.11.2019, for almost two years and the investigation being complete, the accused is hereby admitted to bail on his executing a personal bond in the sum of Rs.1.00 Lac with one surety of the like amount to the satisfaction of the learned Trial Court/Duty Magistrate on following conditions:-

a) he shall not temper with the evidence;

b) he shall not influence the witnesses;

c) he shall not visit abroad except with prior permission of the learned Trial Court; and

d) he shall always keep his mobile location app open and shall inform the Investigating Officer of all the mobile phone/s he is using.

16. In view of above, the petition stands disposed of. Pending application, if any, also stands disposed of.

17. Copy of this order be communicated to learned Trial Court/Jail Superintendent for information and compliance.

YOGESH KHANNA, J.

SEPTEMBER 17, 2021

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