IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.102 OF 2022
WITH
INTERIM APPLICATION NO. 1131 OF 2022
IN
BAIL APPLICATION NO. 102 OF 2022

(corrected as per order dated 8/7/2022)

Aaliya Faisal Agarbattiwala and Anr .. Applicants

Versus

The State of Maharashtra .. Respondent

…

Mr.Aabad Ponda, Sr. Advocate with Pranav Avhad and Ms.Darshna Naval for the applicants.
Mr.Akshay R. Pai i/b Maansi R. Gupta, Atharva Sane, Prajakta S, and Gauri Patil for the intervenor.
Mrs.Anamika Malhotra, APP for the State.

CORAM: BHARATI DANGRE, J.
DATED : 28th JUNE, 2022

P.C:-

1 The three applicants came to be arrested on 15/9/2021 in connection with C.R.No.20/2019 registered with Nehru Nagar Police Station on 14/1/2019. On completion of investigation and charge-sheet being filed, they face accusation u/s.406, 420, 468, 506 r/w Section 34 of the IPC.

2 By the present application, they seek their release on bail on the ground that the nature of transactions with which they

are accused are, money lending transactions and appropriate proceedings are already instituted by the complainant for recovery of his money and therefore, it is sought to be argued on behalf of the applicants that their incarceration is unnecessary.

3 The case of the prosecution, as emerging from the FIR lodged by one Manoj Dattatray Mistry against the applicants, is to the effect that they share a cordial relationship as in the past, the applicants had purchased a shop from the complainant for consideration of Rs.One Crore ten lakhs.

The complainant allege that since the two families were on good terms, the applicant no.2 Faizal borrowed money for conducting his business from time to time and even repaid the said amount. This conduct of the applicant no.2 created a feeling of trust in the complainant. Therefore, on 10/2/2017, when the applicants visited him, seeking a huge loan of Rs.One Crore ten lakhs, since it was projected that applicant no.2 had sustained loss in the business, he made arrangements for the loan amount. On 15/2/2017, he delivered cheques in the name of applicants, each in the sum of Rs.55 lakhs drawn on Sahakari Bank. On 28/2/2017, the cheques were cleared.

4 The case of the complainant is, on the day when he advanced the loan to the applicants, the applicants in turn delivered two undated cheques by way of security, each in the sum of Rs.55 lakhs. Since the amount was very high, he took an

undertaking from the applicants that the cheque will not bounce and the applicants will ensure that they are cleared. Out of the said amount, Rs.Ten lakhs was repaid to the complainant by applicant no.2 by way of a cheque. When the complainant desired to present the other cheques, he was asked to wait for some time. As per the instructions of the applicants, when he deposited the cheques, the cheque issued by applicant no.2 bounced on the same day, whereas the cheque issued by applicant no.1 was also dishonored after a gap of time, on the ground that the signature on the cheque did not match with the original signature.

5 The aforesaid incident resulted in lodging of the complaint. The complainant state that despite his persuasion, since the amount was not repaid, on 10/8/2018, he sent a legal notice through a counsel and also instituted proceedings in the Court of Magistrate, Kurla, by invoking Section 138 of the Negotiable Instruments Act. The complainant thus allege that by playing forgery, he was duped of huge amount of Rs.One crore advanced to him.

6 Heard learned Senior counsel Mr.Ponda for the applicants, Mr.Akshay Pai for the intervenor and learned APP Ms.Anamika Malhotra for the State.

The nature of allegations faced by the applicant apparently arise out of the money lending transaction as the complainant narrate that on several occasions, the applicants have borrowed money from him and even repaid it along with the accrued interest. The complainant, however, allege fraudulent and dishonest intention on part of the applicants in failing to repay a sum of Rs.One crore which was borrowed.

The learned Senior Counsel Mr.Ponda for the applicants, however, refer to the application, containing a statement on oath to demonstrate that out of the amount of Rs.One crore, a sum of Rs.29,50,000/- has been repaid to the complainant through bank transaction, and further sum of Rs.50 lakhs have been paid by cash. The bifurcation of the said amount is also set out in the application, when distinct amounts are alleged to be paid to the complainant on different dates.

7 Perusal of the complaint and the material compiled in the charge-sheet, would clearly reveal that the transaction complained of, is a loan transaction and on failure to repay the amount of loan, cheques were issued, but they were dishonored. The complainant has already filed a complaint u/s.138 of the Negotiable Instruments Act, 1881 as regards the same. Even the complainant has instituted a civil suit in the City Civil Court, seeking injunction against the applicants in respect of the property belonging to them in form of Room no.5, admeasuring 500 sq.ft situated at Maratha Mandir, Mumbai Central, as well as in respect of the commercial property situated at Mandvi, Mumbai.

8 From the complaint, it is apparent that there has been multiple transactions between the applicant no.2 and the complainant and since they are in the nature of loan transactions, it can be referred to a transaction which is civil in nature and in any case, the appropriate proceedings for dishonor of the cheques, are already instituted by the complainant.

9 As far as the offence u/s.406 is concerned, which prescribe a punishment for criminal breach of trust, it is to be noted that there is a distinction between simple payment/ investment of money and entrustment of any money or property. The Hon'ble Apex court in case of *Satishchandra Ratanlal Shah Vs. State of Gujarat, 2019(9) SCC, 148,* has clearly held that in context of contracts, distinction is to be drawn between mere breach of contract and cheating would depend upon the fraudulent inducement and *mens rea,* for sustaining the charges u/s.406 it has been held that existence of fraudulent or dishonest intention right from the beginning of the transaction must be shown and only in case of contractual obligations which are accompanied by fraudulent, dishonest or deceptive inducements resulting in involuntary an inefficient transfers u/s.415 of IPC.

10 As far as the other charge faced by the applicants is concerned, as per the complainant, in the past, the applicants have cleared the loan amount and this time, the applicants had expressed their inability to the complainant to repay the amount on account of the financial crunch, and had asked him to wait.

Prima facie, it can be seen that there was no dishonest intention when the amount was advanced. As far as Section 420 of IPC is concerned, the applicant no.1 faced the charge that she had intentionally issued the cheque by affixing the distinct signature and that is why the cheque could not be honored. Prima facie, it cannot be said that this would attract an offence of cheating, since it is not uncommon that on account of the variation in signatures without any intention, the cheques are not cleared by the Bank. Unless and until the prosecution establish by cogent evidence that she had intention to cheat when she put her signature on the cheque which could not be honored, she cannot be prima facie accused of Section 420.

11 In the wake of the above, when the nature of transactions between the parties as emanating from the complaint appear to be civil in nature, but have been given a cloak of criminal offence, it do not warrant further incarceration of the applicants in judicial custody, when the complainant has already lodged a complaint u/s.138 of the Negotiable Instruments Act and it is pending.

The applicants would suffer the consequences if offence u/s.138 is proved against them. In any case, the charge u/s.406/420 would be established during the course of the trial.

It is not the case of the prosecution that the applicants have any antecedents or they are not likely to face the trial and are at flight risk.

12 In the wake of the accusations faced by them with a *prima facie* observation that the proceedings are instituted for recovery of the amounts by the complainant, though he has already instituted independent proceedings, seeking refund of the loan at the instance of the applicants, further incarceration of the applicants is unnecessary. Hence, they are entitled to be released on bail.

The observations made above are restricted only for determining the application for bail and shall, in no way, be construed as opinion expressed on merits of the case of the prosecution. Hence, the following order :-

O R D E R

(a) The Applicant No.1 Aaliya Faizal Agarbattiwala and applicant no.2 Faizal Agarbattiwala and Applicant No.3 Suhel Mohammad Hussain Agarbattiwala in connection with C.R.No.20/2019 registered with Nehru Nagar Police Station shall be released on bail on furnishing P.R. bond to the extent of Rs.50,000/- each with one or two sureties of the like amount.

(b) The applicants shall not directly or indirectly make any inducement, threat or promise to any person acquainted with facts of case so as to dissuade him from disclosing the facts to Court or any Police Officer. The Applicant should not tamper with evidence.

(c) The applicants shall attend the trial on regular basis, unless and until exempted".

13 The Application is allowed in the aforestated terms.

In view of the disposal of Bail Application, Interim Application No.1131/2022 do not survive and is disposed off.

(SMT. BHARATI DANGRE, J.)

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