Sayali Upasani

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

ANTICIPATORY BAIL APPLICATION NO.350 OF 2020

Mr. Abhijit Ramnath Gunjal ...Applicant

Versus

The State of Maharashtra & Anr ...Respondents

Mr. A. P. Mundargi, Senior Counsel i/b Ajay A. Joshi, for Applicant
Ms. P.N.Dabholkar, APP for the State/Respondent.
Mr. Ajit Anekar a/w Ashlesha Modak i/b Auris Legal, for - Respondent No. 2

CORAM: N. J. JAMADAR, J.
RESERVED ON: 8th JULY, 2022
PRONOUNCED ON: 24th AUGUST, 2022

ORDER:-

1. This is an application for pre-arrest bail in connection with C.R. No. 248 of 2018, registered with Kothrud Police Station, Pune, for an offence punishable under Section 420 of the Indian Penal Code, 1860 (“the Penal Code”).

2. The prayer of the applicant for protection from arrest, in the instant case, took a peculiar trajectory. The applicant approached the learned Sessions Judge, Pune, twice. This is a second round of litigation before this Court, though not in strict sense.

3. The indictment against the applicant can be stated in brief as under.-

(a) Mr. Vilas Joshi (the first informant), is a Branch Manager of The Dharmpeth Mahila Multi-State Co-Operative Society Ltd., Karve Road Branch, Pune. In the month of September, 2015, the applicant and his late father Ramnath Gunjal had availed mortgage loan of Rs.5 Crores. To secure the loan amount, Mr. Ramnath Gunjal, the proprietor of Nirman Construction and his son Abhijit Gunjal, applicant herein, had executed a registered mortgage in respect of three properties namely; (i) Showroom No.1, Survey No.25/1B, situated at Karve Nagar, Pune; (ii) land bearing No.82/A/35, admeasuring 8R, situated at Hadpsar, Pune and (iii) Plot No.1, situated at Sadashiv Peth, Pune. As the borrowers committed default in payment of the installments, as per agreed schedule, the accounts became NPA.

(b) In the month of June, 2018, it transpired that out of the above three mortgaged properties, late Ramnath Gunjal and the applicant had sold the first property i.e. Showroom No.1, Survey No.25/1B, Karve Nagar, Pune (the subject property) to Mr. Amar Vilas Patil, a partner of M/s. Atlas Construction by executing an instrument, on 31st December, 2015, in breach of an express stipulation in the mortgage deed that the borrower/mortgagors would not create any interest over the mortgaged property till the mortgage loan is not repaid. The borrowers had neither obtained the consent of the bank for, nor gave any intimation of, the said transaction. Ramnath Gunjal, the proprietor of M/s Nirman Construction, passed away on 2nd February, 2017. Hence, the first informant lodged report against the applicant alleging that he was a co-proprietor of M/s. Nirman Construction and a co-borrower.

(c) Apprehending arrest, the applicant approached the learned Sessions Judge, Pune, for pre-arrest bail. By an order dated 26th June, 2019, the learned Additional Sessions Judge, was persuaded to allow the application for pre-arrest bail, opining, *inter alia*, that the prosecution was based on documents and the applicant had shown readiness to deposit the balance loan amount. The learned Additional Sessions Judge, however, imposed condition that the applicant shall pay the dues of the complainant-bank within a period of three months of the said order.

(d) Evidently, the applicant could not comply with the said condition. Thus, the applicant moved this Court in Criminal Application No.1323 of 2019. By an order dated 1st October, 2019, the applicant was permitted to withdraw the said application with liberty to approach the learned Sessions Judge for the relief claimed in the application before this Court.

(e) Availing the said liberty, the applicant again approached the Court of Session and sought relaxation of the condition of deposit of the due amount of the complainant – bank. This time, the learned Additional Sessions Judge was not persuaded to exercise the discretion in favour of the applicant. It was, *inter alia*, observed that the said order of pre-arrest bail dated 26th June, 2019, was conditional one. On account of default on the part of the applicant to comply with the said condition, the said order stood automatically cancelled. Since investigation had been completed and charge-sheet lodged, according to the learned Additional Sessions Judge, the applicant could approach the trial Court for regular bail. Thus, the application came to be rejected by an order dated 17th January, 2020.

4. The applicant has again approached this Court seeking pre-arrest bail.

5. By an order dated 5th February, 2020, interim protection was granted to the applicant, while issuing notice to the respondent No.2 - first informant as well.

6. I have heard Mr. Mundargi, the learned Senior Counsel for the applicant, Ms. P. N. Dabholkar, the learned APP for the State and Mr. Ajit Anekar, the learned Counsel for respondent No.2 - first informant, at some length. With the assistance of the learned Counsels for the parties, I have perused the allegations in the first information report and the documents placed on record by the applicant as well as respondent No.2, including the instruments executed by the applicant and late Ramnath Gunjal in favour of respondent No.2 - Bank and Mr. Amar Patil, partner of M/s. Atlas Construction.

7. Mr. Mundargi submitted that the indictment against the applicant is required to be appreciated in the backdrop of the attendant circumstances and *bona fide* desire of the applicant to discharge the liability of the respondent No.2 - Bank, by selling his other assets. Proposals for settlement submitted by the applicant were not considered by the respondent No.2 - Bank. Instead an attempt was made to put hindrances in the efforts of the applicant to bring in an investor, who was ready to infuse the capital so that the applicant could tide over the financial crisis. Bona fide efforts were made by the applicant though, in fact, the applicant was not the proprietor of M/s. Nirman Construction, of which, indisputably, late Ramnath Gunjal, the father of the applicant, was the sole proprietor.

8. Mr. Mundargi further submitted that since the late father of the applicant had brought to the notice of the respondent No.2 vide communications dated 20th December, 2016 and 24th January, 2017 that an instrument was executed in respect of the subject property and it was expressly mentioned therein that the borrowers were willing to pay the outstanding amount and close the loan accounts, it can not be inferred that the late father of the applicant, much less the applicant, had dishonest intention since the inception of the transaction. Thus there is a genuine doubt as to the fulfillment of the prime ingredient of the offence punishable under Section 420 of Penal Code.

9. Lastly, Mr. Mundargi urged that while releasing the applicant on anticipatory bail by the first order dated 26th June, 2019, the learned Additional Sessions Judge had specifically observed that the offence revolved around the documents and the applicant had made out a case for anticipatory bail. With the completion of investigation and lodging of the charge-sheet, at this juncture, the custodial interrogation of the applicant, is not at all warranted. Therefore, on this count as well, the applicant deserves the exercise of discretion, submitted Mr. Mundargi.

10. In opposition to this Ms. Dbholkar, the learned APP, submitted that the applicant and his late father had executed the Agreement to Sale under three months of the execution of mortgage of the subject property. The haste with which the conveyance was executed, in clear breach of an express condition of the mortgage, points to the complicity of the applicant. Ms. Dabholkar would further urge that the submission on behalf of the applicant that he had been ready to deposit the outstanding amount is neither unqualified nor *bona fide*. The applicant had succeeded in obtaining an order of pre-arrest bail by making a statement which he knew he could not honour and, therefore, the learned Additional Sessions Judge was justified in declining to relax the said condition. Hence, the applicant does not deserve any relief.

11. Mr. Anekar, the learned Counsel for respondent No.2, stoutly submitted that none of the submissions on behalf of the applicant merits acceptance. Amplifying the objection, Mr. Anekar submitted that first and foremost, the applicant cannot wriggle out of the liability by taking a convenient stand that he was not the proprietor of M/s. Nirman Construction. Indisputably the applicant is not only the co-mortgagor of the subject property but also the co-vendor as well as the codeveloper in whose favour a development agreement was executed by the original holder of the premises on 23rd September, 2015. Secondly, the execution of the conveyance in favour of Mr. Amar Patil is incontrovertible. The fact that the said conveyance was executed in flagrant breach of Clause 17 of the Deed of Mortgage is also incontestable. Thirdly, there is no material to show that the applicant and late Ramnath Gunjal had brought the said fact to the notice of the respondent No.2, till the fraud was unearthed. Fourthly, the alleged efforts to pay the outstanding amount by selling the other assets of the applicant is a mere eyewash. Lastly, the falsity of the claim that the applicant had cancelled the Agreement to Sale in favour of Mr. Amar Patil, is borne out by the documents annexed to the additional affidavit. The applicant claims that the said conveyance dated 1st December, 2015, was sought to be terminated by addressing a letter dated 30th April, 2019. However, copy of the postal receipt, annexed to the said letter, indicates that the article therein was dispatched on 12th January, 2019, almost four months before the said communication.

12. I have carefully considered the submissions canvassed across the bar. At the outset, I deem it apposite to note that the orders passed by the Additional Sessions Judge bear upon the determination, as this Court is not called upon to consider the entitlement for pre-arrest bail, where the Court of Session has declined to exercise the discretion, which is often the case. Usual considerations for grant of pre-arrest bail may not be strictly germane in this case. It would be expedient to note the reasons which weighed with the learned Additional Sessions Judge in initially ordering the release of the applicant on pre-arrest bail. Paragraph No.7 of the order passed by the learned Additional Sessions Judge, dated 26th June, 2019, reads as under:

> "In view of the documents on record it is clear that the loan was obtained by the applicant's father Ramnath Parbat Gunjal and the present applicant was just a co-morgaged and co-borrower as one of the three properties mortgaged with the complainant's bank was on his name. Ramnath Gunjal died. No doubt after the death of Ramnath Gunjal it is the responsibility of his legal representatives/successors to repay the amount and applicant being a son is also responsible. Some of the loan amount has been deposited by the borrowers and applicant is ready to clear the loan. It is also to be noted here that, other two properties mortgaged with the bank is having v alue more than the loan amount and therefore it can be said that the interest of bank is secured. Be that as it may, it is clear from the First Information Report and documents on record that, there was no intention of the applicant at the time of contract to deceive the complainant bank. This case is based on documents. The applicant shown readiness to deposit the remaining loan amount. Considering these facts and circumstances in my opinion, applicant had made out case for anticipatory bail."

13. The learned Sessions Judge was of the view that the applicant was just a co-borrower and co-mortgagor as one of the three properties mortgaged to the bank stood in his name. Secondly, security interest was created over two other properties of the applicant and, therefore, the interest of the respondent No. 2 - Bank was adequately secured. Thirdly, the offence revolved around the documents. Fourthly, the Sessions Judge adverted to the fact that Ramnath Gunjal, the proprietor of the M/s Nirman Construction, passed away and the applicant had shown readiness to deposit the balance loan amount.

14. Considering the aforesaid readiness of the applicant to deposit the loan amount, the learned Additional Sessions Judge proceeded to make the order of pre-arrest bail conditional by directing that the balance amount shall be paid within a period of three months. At it turned out, this condition operated onerously qua the applicant and consequent to non compliance of the said condition, the learned Additional Sessions Judge by the subsequent order dated 17th January, 2020, declined to relax the said condition opining that the breach of the said condition entailed the consequence of cancellation the order of pre-arrest bail automatically.

15. In the intervening period, as the record indicates, the applicant made efforts to remedy the situation by soliciting the consent of the Bank to bring in an investor and permit either the sale of, or creation of further interest in, the mortgaged assets. Mr. Anekar, the learned Counsel for the respondent No.2, was justified in canvassing a submission that the respondent No. 2 - Bank was within its right in declining to dilute or give up its security.

16. In this proceeding and at this stage, I am not persuaded to delve deep into the aforesaid aspects. However, what is of salience is whether there is an element of *bona fide* on the part of the applicant, which, *prima faice,* touches upon the existence of dishonest intention at the inception of the transaction.

17. It is imperative to note that the respondent No.2 - Bank has sought to implicate the applicant as a co-proprietor of M/s Nirman Construction. Plainly such an endeavor is not sustained by the jural relationship which a proprietary concern gives rise to. Undoubtedly, the applicant was a co-borrower and co-mortgagor and also co-vendor of the subject property to Mr. Amar Patil. Nonetheless the submission on behalf of the applicant, which found favour with the learned Additional Sessions Judge, as is evident from the order dated 26th June, 2019, that it was the late father of the applicant who was the principal borrower, cannot be said to be inconsequential.

18. The stage of the proceedings assumes critical significance. Indisputably, investigation is complete for all intent and purpose. Charge-sheet has been lodged. Offence, by its a very nature, revolves around execution of the instrument in favour of Mr. Amar Patil. Custodial interrogation of the applicant, at this stage, does not seem imminently warranted.

19. Since the applicant professed to terminate the said registered agreement executed in favour of Mr. Amar Patil, it can only be by way of another registered instrument. B*ona fide* of the applicant hinges upon his earnest endeavor to set the clock back and make the payment of the outstanding loan. However, making the order of pre-arrest bail conditional upon such action on the part of the applicant is fraught with the risk of the consequence of cancellation of the order, in the event of non-compliance of such a condition.

20. A factor which lends support to the claim of the applicant that he had been making *bona fide* efforts to bring in the investor and settle the dispute with the applicant is the communication dated 19th March, 2022, whereby the respondent No.2 was informed that the applicant had found a potential buyer to purchase the subject property and settle all the dues. A request was made to the respondent No.2 – Bank, to issue a Non Objection Certificate. The transaction fell through as, according to the applicant, the respondent No. 2 published a notice in the newspaper on 11th April, 2022, forewarning the public in general from dealing with the mortgaged property. According to the applicant, the potential investor (Mr. Rahul Dhisle) backed out of the transaction. Copies of the communications are annexed to the affidavit on 7th July, 2022. As observed above, the respondent No. 2 -Bank may well to be justified in initiating measures to ensure that its security is not diminished. However, the aforesaid documents do indicate that the applicant had been making efforts to settle the dispute and thereby underscore his *bona fide*.

21. In the aforesaid view of the matter, at this length of time, where the order of interim protection is in operation for more than three years and investigation is complete, I am persuaded to exercise the discretion in favour of the applicant. Though I am not inclined to put any condition of the applicant setting the clock back, by canceling the instrument executed in favour of Mr. Amar Patil, yet I deem it in the fitness of things to record that in the event the applicant does not remedy the situation by either cancelling the instrument executed in favour of Mr. Amar Patil and/or otherwise satisfying the claim of the respondent No.2 - Bank with regard to the loan advanced against the subject property, within a reasonable period, the trial Court would be at liberty to draw an appropriate inference, as permissible in law.

22. Hence, the following order.-

:ORDER:

(a) The application stands allowed.

(b) The order of interim pre-arrest bail dated 5th February, 2020, is made absolute on the terms and conditions incorporated therein.

(c) In addition;

(i) The applicant shall not tamper with the prosecution evidence and/or give threat or inducement to any of the prosecution witnesses and,

(ii) The applicant shall regularly attend the proceedings before the jurisdictional Court.

[N. J. JAMADAR, J.]