

PMB

Digitally
signed by
PRADNYA
MAKARAND
BHOGALE
Date:
2022.04.04
21:54:52
+0530

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

ANTICIPATORY BAIL APPLICATION NO. 655 OF 2018

Rafique Maqbool Qureshi .. Applicant

VS.

The State of Maharashtra and anr. .. Respondents

**WITH
INTERIM APPLICATION NO. 2189 OF 2021
IN**

ANTICIPATORY BAIL APPLICATION NO. 655 OF 2018

Suhail Ahmed Shaikh .. Applicant

IN THE MATTER BETWEEN

Rafique Maqbool Qureshi .. Applicant

VS.

The State of Maharashtra and anr. .. Respondents

**WITH
INTERIM APPLICATION NO. 2262 OF 2021
IN**

ANTICIPATORY BAIL APPLICATION NO. 655 OF 2018

Abdulla Allauddin .. Applicant

IN THE MATTER BETWEEN

Rafique Maqbool Qureshi .. Applicant

VS.

The State of Maharashtra and anr. .. Respondents

**WITH
INTERIM APPLICATION NO. 758 OF 2020
IN**

ANTICIPATORY BAIL APPLICATION NO. 655 OF 2018

Parvez Kamruzzama Khan and anr. .. Applicants

IN THE MATTER BETWEEN

Rafique Maqbool Qureshi .. Applicant

VS.

The State of Maharashtra and anr. .. Respondents

**WITH
INTERIM APPLICATION NO. 2187 OF 2021
IN
ANTICIPATORY BAIL APPLICATION NO. 655 OF 2018**

Mohammed Farooq Khatri .. Applicant

IN THE MATTER BETWEEN

Rafique Maqbool Qureshi .. Applicant

VS.

The State of Maharashtra and anr. .. Respondents

Mr. G. S. Godbole i/b. Mr. Anand H. Singh for Applicant in
ABA/655/2018.

Mr. Fakhruddin Khan a/w Mr. Salman Palasara, Ms. Saima Ansari
for Applicants in IA/2262/2021, IA/2189/2021 and IA/758/2020.

Dr. Abhinav Chandrachud a/w Mr. Imran Farooqui i/b Mr. Salman
Palasara for Applicant in IA/2187/2021.

Smt. S. V. Sonawane, APP for State.

Mr. Pralhad Jamadar, PSI, Santacruz Police Station, Mumbai
present.

Mr. Imran Farooqui i/b Mr. Kaustubh Thipsay for Respondent
No.2.

Mr. Jagdish G. Aradwad (Reddy) for SRA.

CORAM : M. S. KARNIK, J.

DATE : APRIL 1, 2022

P.C. :

1. This is an application filed by the applicant-Rafique
Maqbool Qureshi for grant of pre-arrest bail in respect of
FIR No.261 of 2017 registered by Santacruz Police Station
on 31.05.2017 for the offence punishable under Sections

406, 420 of the Indian Penal Code ("IPC", for short) and under Sections 3 and 4 of Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 ('MOFA' for short) on the complaint of respondent no.2-Umar Ilyas Khatri ('complainant', for short). The said FIR is lodged on the basis of a written complaint lodged by Umar Ilyas Kharti on 05.10.2016. The FIR came to be filed on the following set of allegations :-

(a) The complainant came to know in the year 2006 that the applicant was to construct a building at Daulat Nagar, Santacruz West and accordingly the respondent no.2-first informant along with his father Ilyas Khatri, in the year 2007, met the applicant at his office and got the information about the building to be constructed on the "I" Plot.

(b) The first informant was informed that the building would be completed in 18 months comprising of 1 BHK, 2BHK, 3 BHK flats. The building was to be of Ground + 7 floors and a plan of the building was shown.

(c) The complainant booked flat no.B-203 ("the said flat" for short) admeasuring 1023 sq.ft for a consideration of Rs.60.96 lakhs. The flat was booked in the name of his wife Rafat Umar Khatri.

(d) On 02.01.2007, a cheque of Rs.40 lakhs was handed over to the applicant. Over and above, an amount of Rs.20 lakhs was paid in cash.

(e) Allotment letter dated 30.06.2009 was issued in respect of the said flat.

(f) The first informant's brother-Asif Ilyas Khatri also booked a flat no.B-303 towards which he has paid an amount of Rs.60 lakhs to the applicant.

(g) It is alleged that the building has been constructed but the possession of the flat is not handed over as the I.O.D. and C.C. in respect of the building has not been issued in favour of the developer. It is alleged that the building has been constructed without approval and consequently there is failure to give the possession of the said flat resulting in the alleged offence.

2. Mr. Godbole, learned counsel on behalf of the applicant submitted that the applicant is one of the Directors of 'Pioneer India Developers Private Limited'. The developer company has never refused to allot the said flats in the building which has been constructed on "I" Plot. The possession obviously could be handed over only after the occupancy certificate is issued by the Slum Rehabilitation Authority which is the Planning Authority. It is further submitted that in view of the delay, the applicant has agreed to refund the amount with interest of 9% per annum from 30.06.2009. It is submitted that there is no intention to cheat since inception as the construction of the building is completed and the developer is ready to hand over the flats. It is contended that as the Slum Rehabilitation Scheme was sanctioned in favour of M/s. HDIL, upon M/s. HDIL running into trouble on account of proceedings filed at the instance of Enforcement Directorate ('ED' for short); that statutory permissions in respect of the said building is getting delayed. The said building is a part of the scheme. It is contended that this is not a case of cheating or

dishonest use of property so as to attract the offences punishable under Sections 406 and 420 of the IPC. Learned counsel denied the receipt of cash component but admits that they have received the consideration paid by cheque. It is submitted that present is not a case where money is accepted without undertaking any work of the building or that the developer has fled leaving the flat purchasers high and dry, nor is it a case that the said flats have been allotted to some other persons. The developer owns up his responsibility to hand over the possession of the flats once the statutory permissions are obtained. Learned counsel further submitted that even the complainant is interested in the possession of the said flats.

3. My attention is then invited to the Memorandum of Understanding (page 75 of the paper book) which was executed between the applicant and the first informant in respect of the said flats on 06.04.2018 before a notary, whereby the complainant and his brother agreed to accept compensation and withdraw all claims and allegations against the applicant. It was further agreed that the written

complaint dated 05.10.2016 and that FIR no. 261 of 2017 registered on 31.05.2017 shall stand immediately withdrawn and that the first informant will render necessary assistance in the proceedings for quashing of the complaint that would be filed in this Court by the applicant.

4. My attention is also invited to the affidavit filed on behalf of the present complainant, in Criminal Writ Petition filed by the applicant in this Court for quashing, stating that the complainant has no objection for quashing of FIR as he does not intend to continue with FIR no.261 of 2017 registered with the Santacruz Police Station.

5. During the pendency of this application, it is informed that there is no order of attachment by the ED in respect of the said building. The applicant was bonafide under the impression that there is an attachment order of ED in respect of the building as a result he did not take any steps for regularisation. The applicant thereupon immediately applied for regularisation of the said building. Learned counsel submitted that the said application for regularisation was made some time in 24.03.2022 and the

same is pending consideration before the competent authority. Learned counsel submitted that all compliances will be duly made as and when called upon by the competent authority including the payment of statutory fees. Learned counsel submitted that as the applicant is now facing a financial crunch, he would be requesting the competent authority for paying the fees in installments as the charges for regularisation are quite exorbitant. Learned counsel therefore submitted that as the building is ready, the only question that remains is of obtaining necessary permissions whereupon the flats would be handed over to the purchasers including the complainant. It is therefore submitted that the custodial interrogation of the applicant is not at all necessary in the present facts as there is no question of tampering with the witnesses, more so when the applicant is admitting his liability. Learned counsel submits that every possible effort is being undertaken by the applicant to ensure that the said flats are handed over to the first informants and hence the alleged offences are not attracted. Learned counsel relied upon the following

decisions of the Supreme Court in support of his case :-

(i) **Dilip Singh vs. State of Madhya Pradesh and Another¹.**

(ii) **Arnesh Kumar vs. State of Bihar and Another².**

6. Learned counsel for the applicant objected to the interim applications for intervention filed on behalf of various flat purchasers. It is submitted that the complainant/other flat purchasers who have filed intervention applications have no locus to be heard. In support of his submission, learned counsel relied upon the following decisions :-

(i) **Shiv Kumar Vs. Hukam Chand and another³**
(Paragraphs 12 to 18).

(ii) **Sundeep Kumar Bafna vs. State of Maharashtra and another⁴** (Paragraphs 28 to 32).

(iii) **Smt. Indu Bala and others vs. Delhi Administration and others⁵** (Paragraphs 1 to 7).

1 (2021) 2 SCC 779

2 (2014) 8 SCC 273

3 (1999) 7 SCC 467

4 (2014) 16 SCC 623

5 1991 Cri.L.J. 1774

7. In support of his submission that the applicant could never have been charged under Sections 406 and 420 of the IPC simultaneously, as the offences contemplated therein are antithetical to each other, the following decisions are relied upon by the learned counsel :-

(i) **Mahindra and Mahindra Financial Services Ltd. and anr. vs. Delta Classic (P.) Ltd.**⁶ (Paragraphs 13 to 17).

(ii) **Jalpa Parshad Aggarwal vs. State of Haryana and anr.**⁷ (Paragraph 3).

(iii) **Wolfgang Reim & ors. vs. State & anr.**⁸ (Paragraph 34).

8. It is then contended that no offence of cheating can be made out against the applicant, as there has never been any dishonest and/or fraudulent intention on the part of the applicant inter alia at the time of booking (inception of the transaction) and/or even thereafter, and that the entire thrust of the first informant and other flat purchasers' case is merely that there is a delay on the part of the applicant in handing over possession making out a case of contractual

6 2010 Cri.L.J. 4591

7 1987 SCC OnLine P & H 580

8 2012 SCC OnLine Del 3341

breach. Tthe following decisions are relied upon by the learned counsel in support of this submission :-

- (i) **Murari Lal Gupta vs. Gopi Singh**⁹ (Paragraphs 1 to 7).
- (ii) **Pradeep Bhupatrai Vasa vs. Bombay Builders Pvt. Ltd. and others**¹⁰ (Paragraphs 30 to 34).
- (iii) **S.W. Palanitkar and others vs. State of Bihar and another**¹¹ (Paragraphs 9 to 13).
- (iv) **Hridaya Ranjan Prasad Verma and others vs. State of Bihar and another**¹² (Paragraphs 14 to 16).
- (v) **International Advanced Research Centre for Powder Metallurgy and New Materials (ARCI) and others vs. Nimra Cerglass Technics Private Limited and another**¹³ (Paragraphs 15, 16 and 22).
- (vi) **Anil Mahajan Vs. Bhor Industries Ltd. and another**¹⁴ (Paragraphs 6 to 10).

9. It is then contended that no offence of criminal breach of trust is made out against the applicant on a reading of

9 2005(13) SCC 699
10 1985 SCC OnLine Bom 315
11 2002(1) SCC 241
12 (2000) 4 SCC 168
13 2016(1) SCC 348
14 2005(10) SCC 228

the statement made by the first informant and in support of this contention, the following decisions are relied upon by the learned counsel :-

- (i) **Satishchandra Ratanlal Shah vs. State of Gujarat and another**¹⁵ (Paragraphs 11 to 14).
- (ii) **Ghanshyam vs. State of Rajasthan**¹⁶ (Paragraphs 8 to 10).

10. Interim Application Nos.2262 of 2021, 2189 of 2021, 758 of 2020 and 2187 of 2021 are filed by various flat purchasers alleging similar offence as that of the complainant.

11. I have heard learned APP on behalf of the State and also learned counsel appearing on behalf of complainant. I have also briefly heard learned counsel appearing on behalf of the applicants in the aforestated interim applications filed by the interveners. Learned counsel for the interveners made submissions similar to and in support of what was submitted by the learned APP and the complainant. As the interest of the interveners is

¹⁵ 2019(9) SCC 148

¹⁶ 2014(2) SCC 683

adequately protected by the contentions raised on behalf of the State and respondent no.2, I do not propose to pass any orders on the interim applications for intervention and all interim applications stand disposed of.

12. It is submitted on behalf of APP and complainant that the applicant had an intention to cheat the flat purchasers from the inception of the transaction. The developer had issued a letter of allotment on different dates as far back in the year 2006 and has constructed the building without any approvals or building permissions from the planning authority. The developer has not taken any steps to hand over the possession of the said flats despite accepting substantial consideration of the said flats as far back in the year 2006-2007. The developer has not complied with the statutory obligations under Section 4 of the MOFA. Following decisions are relied by the respondents in support of their contentions :-

(i) **Hira Lal Hari Lal Bhagwati v. C.B.I., New Delhi¹⁷.**

¹⁷ (2003) 5 SCC 257

(ii) **Supertech Limited vs. Emerald Court Owner Resident Welfare Association and ors.**¹⁸

(iii) **Dilip Singh** (*supra*).

(iv) **Nathu Singh vs. State of Uttar Pradesh and others**¹⁹.

13. Before dealing with the submissions of learned counsel on merits, it would be apposite to seek guidance regarding the principle governing grant of pre-arrest bail postulated by the Supreme Court. Their Lordships in **Dilip Singh** (*supra*) have laid down thus :-

“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

18 Civil Appeal No.5041 of 2021 (Judgment dated 31.08.2021) of the Supreme Court of India.

19 (2021) 6 SCC 64

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.”

14. Keeping these principles in mind, I proceed to deal with the submissions advanced on behalf of learned counsel. The developer had accepted substantial consideration towards the purchase of the flats some time in the year 2006-2007. The applicant had only shown the conceptual plan. Letters of allotment are issued by the developer indicating the number of the flats and the area thereof after accepting the consideration. Without Intimation of Disapproval (IOD), commencement certificate and other statutory permissions, the developer went ahead with the construction of the building comprising of Ground + 7 floors. From 2006 till completion of the construction of the unauthorised building in 2015/2016 not a single permission was applied for. The only case made out is that as the ED proceeded against M/s. HDIL and as the present

building is a part of the scheme sanctioned in favour of M/s. HDIL, this building also ran into trouble. It is, therefore, apparent that the entire building is constructed without obtaining a single permission/sanction. No steps whatsoever are taken by the developer to obtain the statutory approvals.

15. It is relevant to place on record that, during the course of hearing of this application, as the applicant suggested that he is always ready and willing to hand over the flats and in the alternate even offer compensation, the parties agreed to find an amicable resolution if possible. Such resolution was not forthcoming. The applicant suggested that he would apply for regularisation. Accordingly, now on 24.03.2022 an application for regularisation is made by the applicant. However, it is contended that atleast one year's time will be required by the applicant to pay the necessary fees and statutory charges for regularisation as the applicant is facing severe financial crunch. The applicant expressed that the amount demanded towards fees for regularisation would be paid in installments and such

request would be made to the competent authority. The aspect of regularisation is not within the scope of the application for pre-arrest bail, suffice it to observe that the submissions as made are placed on record.

16. According to learned counsel for the applicant, the applicant did not have any intention to cheat at the very inception of the transaction and this is a mere breach of contract. Let me test this argument.

17. In **Hira Lal Hari Lal Bhagwati** (*supra*), the Supreme Court has held that in order to make out a case of cheating under Section 420 of the IPC, it must be established that the accused had an intention to cheat at the very inception of the transaction. In other words, a mere breach of contract does not constitute cheating. If the accused develops an intention to cheat subsequently, that does not constitute cheating either.

18. In **Supertech Limited** (*supra*), the Supreme Court has held that there is often an “unholy nexus” between developers and planning authorities pursuant to which innocent home buyers suffer due to the mushrooming of

unauthorised constructions. The Supreme Court has held that in such cases, it is the Court which must step in for protecting the legitimate interests of innocent flat purchasers.

19. In **Dilip Singh** (*supra*), the Supreme Court has held that 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 circumstances which are peculiar and larger interest of the public or the State are some of the factors to be considered. A word of caution indicated by Their Lordships is that 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.

20. The circumstances thus reveal that the developer has accepted substantial consideration from the complainant and other flat purchasers even before obtaining a single permission/approval as far back as in the year 2006-2007. The construction was to come up some where in Santacruz which is a prime area in Mumbai. The construction of the

entire building is completed in 2015/2016 without a single statutory approval or permission of the planning authority. No steps were taken by the applicant to apply for any permission/regularisation for long number of years. The application for regularisation is made only during the course of hearing of this application when this Court in the interest of justice, at the request of the parties, granted them time to arrive at an amicable settlement. The matter was not settled. Except for stating that the applicant is willing to hand over the possession, the applicant has done nothing since 2006 to ensure that the building permissions are obtained. The entire building is constructed without a single permission or approval. This Court has refused to quash the FIR against the developer though the complainant consented to the quashing. The application for regularisation is made on 24.03.2022 and even here the developer has indicated that almost a year's time will be needed to pay the necessary statutory charges for regularisation. I find substance in the contention of respondents that the developer had no intention of

obtaining statutory approvals right from inception from the planning authority for constructing the building. The construction was commenced and the building completed without a single approval/statutory permission. In my opinion, prima facie, the developer never had any intention of obtaining statutory approvals from the planning authority for constructing the building, as is evidenced by the fact that the developer commenced construction and completed the building without obtaining a single approval from the planning authority. I find substance in the contention of learned APP that this could not be done without the collusion of the applicant and planning authority, thus prima facie indicating an unholy nexus between the developer and the planning authority. Learned counsel pointed out that Writ Petition No.1617 of 2018 filed before this Court for quashing FIR by the applicant was rejected by this Court. The custodial interrogation is therefore necessitated in the present facts. I am, therefore, inclined to reject the application.

21. In ordinary course, in the present facts, I would not have been persuaded to continue the interim protection any longer. Even otherwise, I would have done so for a very limited period as the interim protection in favour of the applicant is operating since 05.04.2018. However, I am inclined to continue the interim protection already in operation for duration of 10 weeks given the peculiar circumstances and the distance of time since the commission of the offence, given that the complainant is also keen on getting possession of the flat now that the applicant has filed for regularisation.

22. Learned APP opposed such a course. Though the consideration was paid as far back in the year 2006-2007, the FIR is filed by the complainant only in the year 2017. The applicant entered into a Memorandum of Understanding with the complainant thereafter, who agreed to accept some compensation and in fact had given his no objection for quashing of the FIR. This Court however did not accept the prayer for quashing of the FIR and the Writ Petition is rejected.

23. Even during the course of the present application, the complainant negotiated with the applicant. All this definitely does not absolve the applicant from the criminality of the transaction, but it is obvious that the complainant is interested in possession of his flat which the applicant submits that he is willing to hand over once the permissions are obtained. Though belated, the application for regularisation has in fact been made on 24.03.2022 by the applicant before the competent authority. The said application obviously will be considered in accordance with law and cannot be a subject of the present application. While exercising this discretion, I seek guidance from what has been explained by Their Lordships in case of **Nathu Singh** (*supra*). In this context, it would be profitable to reproduce paragraphs 23 to 26 in the case of **Nathu Singh** (*supra*) which reads thus :-

"**23.** We cannot be oblivious to the circumstances that courts are faced with day in and day out, while dealing with anticipatory bail applications. Even when the court is not inclined to grant anticipatory bail to an accused, there may be circumstances where the High Court is of the opinion that it is necessary to protect the person

apprehending arrest for some time, due to exceptional circumstances, until they surrender before the trial court. For example, the applicant may plead protection for some time as he/she is the primary caregiver or breadwinner of his/her family members, and needs to make arrangements for them. In such extraordinary circumstances, when a strict case for grant of anticipatory bail is not made out, and rather the investigating authority has made out a case for custodial investigation, it cannot be stated that the High Court has no power to ensure justice. It needs no mentioning, but this Court may also exercise its powers under Article 142 of the Constitution to pass such an order.

24. However, such discretionary power cannot be exercised in an untrammelled manner. The Court must take into account the statutory scheme under Section 438 CrPC, particularly, the proviso to Section 438(1) CrPC, and balance the concerns of the investigating agency, the complainant and the society at large with the concerns/interest of the applicant. Therefore, such an order must necessarily be narrowly tailored to protect the interests of the applicant while taking into consideration the concerns of the investigating authority. Such an order must be a reasoned one.

25. The impugned orders passed by the High Court, in the present appeals, do not meet any of the standards as laid out above. We say so for the following reasons: firstly, after the dismissal of the anticipatory bail application, on the basis of the nature and gravity of the

offence, the High Court has granted the impugned relief to the respondents without assigning any reasons. Secondly, in granting the relief for a period of 90 days, the Court has seemingly not considered the concerns of the investigating agency, the complainant or the proviso under Section 438(1) CrPC, which necessitates that the court pass such an exceptional discretionary protection order for the shortest duration that is reasonably required. A period of 90 days, or three months, cannot in any way be considered to be a reasonable one in the present facts and circumstances.

26. The impugned orders therefore do not withstand legal scrutiny. The resultant effect of the High Court's orders is that neither are the respondents found entitled to pre-arrest bail, nor can they be arrested for a long duration. During the said duration they can roam freely without being apprehensive of coercive action. We are thus of the view that the High Court committed a grave error in passing such protection to the respondents-accused. Such a direction by the High Court exceeds its judicial discretion and amounts to judicial largesse, which the Courts do not possess."

(emphasis supplied by me)

24. Bearing in mind the principles stated by Their Lordships, the circumstance that if the application for regularisation is favourably considered, the complainant would be put in possession of his flat, persuaded me to

provide this window to the applicant to pursue the application which would be in the interest of all concerned. This in my opinion would balance the concerns of the investigating agency and that of the complainant. Though I had expressed that I am inclined to continue the interim protection for 6 months, upon the decision in **Nathu Singh** (*supra*) being brought to my notice, that the interim protection is continued for 10 weeks. For the reasons aforestated, I am inclined to continue the interim protection period already in operation in favour of the applicant for a period of ten weeks from today.

25. The Anticipatory Bail Application is dismissed.

26. In view of the disposal of the Anticipatory Bail Application, nothing survives for consideration in the Interim Applications and the same are disposed of.

(M. S. KARNIK, J.)