IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 706 OF 2021

KISHORE KUMAR AGARWAL@GUPTAJI)...APPELLANT
V/s.
NATIONAL INVESTIGATION AGENCY)
AND ANOTHER)...RESPONDENTS

Mr. Mihir Desai, Senior Advocate i/by. Mr.Mihir Joshi, Advocate for the Appellant.
Mr. Sandesh Patil a/w. Mr. Chintan Shah, Advocate for Respondent No.1 – National Investigating Agency.
Mr. V. B. Konde Deshmukh, APP for the Respondent - State.

CORAM : REVATI MOHITE DERE &
V. G. BISHT, JJ.

DATE : 8th JUNE 2022

ORDER : (PER : V. G. BISHT, J.)

1 Heard. Admit. By consent, heard finally at the stage of admission.

2 This is an appeal preferred by the applicant-accused under Section 21 of the National Investigation Agency Act read with Section 43-D(5) of Unlawful Activities (Prevention) Act, 1967 against the order passed below Exhibit 4 in NIA Special Case No.255 of 2021 along with Special Case No.681 of 2020 thereby rejecting the bail application.

2 Brief relevant facts are as under :

(a) C.R.No.43 of 2020 was registered by Sahar Police Station, Mumbai on 9th February 2020 under Sections 489B, 489C, 120B and 34 of the Indian Penal Code (IPC). It is the case of prosecution that genuine Indian currency of Rs.350 and 1193 Fake Indian Currency Notes (FICN for short) in denomination of Rs.2,000/- having total face value of Rs.23,86,000/- were recovered from one Mr.Javed Gulamnabi Shaikh, who was arrested by the police on 9th February 2020. The Central Government in exercise of its powers under Section 6(5) read with 8 of the National Investigation Agency Act, 2008 (NIA Act for short) suo moto directed the NIA to take up the investigation and accordingly, a case came to be re-registered at NIA Police Station, Mumbai, vide RC-03/2020/NIA/MUM for alleged offences 489B, 489C, 120B and 34 of the IPC.

(b) During the course of investigation, the said recovered FICN were sent to the Currency Note Press, Nasik, for examination and opinion. Currency Note Press, Nasik, opined that the said seized FICN were “High Quality Counterfeit Notes” as the key security features as specified in the Third Schedule of the Unlawful Activities (Prevention) Act, 1967 (UAP Act for short) had been “imitated” in the said FICN. Accordingly, Section 15(1)(a)(iiia) read with Sections 16 and 18 of UAP Act were invoked.

(c) The prosecution alleges that accused Javed Gulamnabi Shaikh was smuggling said FICN in collusion with Surinder Kumar Bharose Lal @ Sardar and the said FICN were to be handed over to the appellant and one Jairam.

(d) NIA then raided the appellant’s house in Jharkhand and seized mobile phone and four sim cards. The prosecution claims that during investigation appellant disclosed that he had meeting with the arrested accused in December 2019. Even mobile phone number of the appellant was stored in the mobile phone of Javed Gulamnabi Shaikh. Accused Javed Gulamnabi Shaikh, during interrogation, disclosed the name of the appellant as someone who deals with FICN.

(e) It is further alleged that appellant had sent to accused Javed Gulamnabi Shaikh a video of FICN stock from his mobile number 8406855102.

(f) Accordingly, after conclusion of investigation, a charge-sheet and supplementary charge-sheet were submitted by the NIA.

3 Mr. Mihir Desai, learned senior counsel for the appellant, after narrating the factual background of the prosecution case, put forth before us three material aspects of the prosecution case, which according to him, the prosecution is relying on. These facts are thus :

(i) that the appellant had met accused Javed Gulamnabi Shaikh

(ii) the appellant had sent a video to accused Javed Gulamnabi Shaikh which contained stock of FICN, and

(iii) an envelope recovered from PW50 that had certain counterfeit notes

4 Elaborating on these three material facts, the learned senior counsel strenuously submits that all the above noted facts were

also wrongly relied on by the learned Special Judge, NIA, and on that ground, wrongly rejected the bail application. According to the learned senior counsel, there is no satisfactory evidence gathered by the NIA even to prima facie suggest that the appellant had any meeting with accused Javed Gulamnabi Shaikh in connection with the FICN. Similarly, there is no cogent and convincing evidence to show that the alleged video of FICN found in mobile phone of accused no.1 and supposedly sent by the appellant, was indeed a video of FICN.

5 The learned senior counsel then invited our attention to the statement of PW50 and pointed out how the evidence of said witness does not, in clear terms, shows any kind of complicity of the appellant in the alleged crime. Even it is not the case of prosecution that the FICN was seized from the possession of the appellant. The learned senior counsel also invited our attention to the statement of prosecution witnesses, namely, Chandrakumar Saw @ Chandu S/o. Sukhdev Saw, Supriya Hembram W/o. Poulush Hembram and Ajay Kumar Baranwal and would submit

that none of these witnesses say as to what exactly transpired in the meeting. Thus, for all these reasons, as there is no overwhelming evidence against the appellant, the appellant deserves to be enlarged on bail, during pendency of his trial, argued learned senior counsel.

6 Per contra, Mr. Sandesh Patil, learned counsel for NIA, opposed the submissions advanced by learned senior counsel for the appellant and vehemently submitted that having regard to the seriousness of the offence and there being prima facie evidence showing the involvement of the appellant, the appellant does not deserve to be enlarged on bail. The learned counsel also placed reliance on the statements of prosecution witnesses, namely, Chandrakumar Saw @ Chandu S/o. Sukhdev Saw, Supriya Hembram W/o. Poulush Hembram and Ajay Kumar Baranwal. Except that, the learned counsel for respondent-NIA has nothing to offer.

7 We may note from the impugned order that the prosecution had relied upon certain circumstances, which are as under :

“(i) that the name of the applicant and the co-accused was found stored in the mobile handset of the accused Javed.

(ii) That the applicant has sent video to accused Javed, which contained stock of counterfeit currency notes.

(iii) That the statement of Vishnu establishes connection of the applicant with the accused Javed, from whose possession 1193 counterfeit currency notes of Rs.2000/- denomination having face value of Rs.23,86,000/- were seized.

(iv) That the applicant had shown the spot of meeting under disclosure statement.

(v) Statements of the witnesses namely Ajay Kumar, Chandrakumar Saw and Supriya have confirmed that the applicant was dealing in the counterfeit currency notes and that he had a meeting with the accused Javed.

(vi) In the disclosure statement accused Javed had disclosed that the seized counterfeit currency notes were to be handed over to the applicant and Jairam.

(vii) The call details record of mobile connection of accused Javed and the applicant, revealed that they were in contact with each other."

It is quite disturbing that without analysing all the above said circumstances individually, which were pressed into service by the prosecution, the learned NIA Judge held that the aforesaid circumstances prima facie disclose that the appellant was having knowledge about the possession and circulation of FICN and he was also involved in the business of FICN.

8 To appreciate the case of prosecution in proper perspective, we propose to go straightaway through the statements of prosecution witnesses which have been heavily relied upon by the learned counsel for the NIA. The first such statement is that of Chandrakumar Saw @ Chandu. Paragraph 4 of his statement shows that initially this witness was not aware of the involvement of the appellant in circulation of FICN but later on he came to know when the appellant told him about his interest in the FICN available with him for circulation. Except this, there is nothing.

Interestingly, according to this witness, the appellant had purportedly told him about his interest in the FICN available with him for circulation. However, it is not his case that not only the appellant had evinced his interest in the FICN but had also shown him the FICN. Moreover, this statement is yet to be tested by cross-examination and even prima facie does not suggest that the appellant was actively involved in the business of FICN.

9 The next statement is of Supriya. In paragraph 3, she states that she came to know that the appellant was involved in some illegal activity of circulation of FICN as he was discussing about FICN with the parties who had come to Nepal for meeting. It may be noted here that this witness had visited Nepal on two occasions with the appellant alongwith Ajay Kumar Baranwal and Kaushal Kumar Singh. It seems this witness has also drawn her own inferences about the involvement of the appellant in illegal activity of circulation of FICN, as the appellant, during the course of meeting at Nepal, was discussing about FICN with the parties, who had come for meeting. Merely on the basis of discussion

without elaborating the nature of discussion, she formed an opinion about the appellant of he being involved in circulation of FICN. The immediate next paragraph of her statement shows that a meeting was scheduled in a hotel near Patna Railway Station in December 2019 and according to her, appellant had told her about the meeting to be held in Patna regarding FICN, in which a party would be coming from Mumbai and a deal would be fixed at Indian currency of Rs.2,50,000/- for Rs.5,00,000/- FICN. She also had gone for the meeting but did not attend the same as she was asked to remain down in the car of the appellant parked near Patna Railway Station. According to her, this meeting was attended by the appellant and Kaushal Kumar Singh with Javed @ Sachin. Naturally, she did not witness the deal between the appellant and party in respect of FICN.

10 The next paragraph of her statement shows that on being asked about the Mughalsarai FICN case, she revealed that FICN was brought by the appellant and handed over to her in presence of Ajay Kumar Baranwal as an amount to be handed over to the

party during the meeting. It may not be out of place to mention here that in Mughalsarai FICN case, she also has been made an accused, which is not disputed by the prosecution.

11 The last witness Ajay Kumar Baranwal is almost on similar lines as that of Supriya.

12 We have also gone through the statement of PW50 at page 87. According to his statement, this witness received an envelope sent by one Sunil KR Gupta containing 02 Indian Currency Notes of denomination of Rs.100/- and one Indian Currency Note of denomination of Rs.50/-. The said envelope was handed over to him at his residence by Shri. Javed (accused). Later on, he heard that Javed was arrested by Mumbai Police at Airport for possession of FICN. Thus, this statement also, does not, in any manner, or rather remotely, shows the connection of the appellant with the alleged trading of FICN.

13 The prosecution is also relying on the fact that the mobile number of the appellant was saved in the mobile handset of

accused Javed Gulamnabi Shaikh. At page 47 of the supplementary charge-sheet an analysis of various mobile numbers are given in a tabular form which shows that mobile number 8406855102 was used by the appellant. However, the column pertaining to the chats against his number shows “absent”. Merely because the mobile number of the appellant was found in the mobile handset of accused Javed Gulamnabi Shaikh, that in itself, will not enable us to draw any adverse inference, particularly, in absence of any retrieval of chats having been taken place, purportedly between them.

14 It is also alleged by the prosecution that the appellant had forwarded the said FICN video to accused Javed Gulamnabi Shaikh but there is nothing to show that the alleged video was sent by the appellant through his mobile number. Even assuming for the sake of argument that it was sent, then there is no prima facie evidence to show that the said video was only and only in respect of FICN.

15 For the aforesaid reasons, we are satisfied that the appellant has made out a case for bail. Hence, the following order :

ORDER

i) The appellant be enlarged on bail on furnishing P.R. Bond in the sum of Rs.2,00,000/- (Rs. Two lakhs Only) with one or more solvent sureties.

ii) The appellant shall attend the National Investigation Agency, Mumbai on the first Saturday of every month from 12.00 a.m. to 2.00 p.m., till the conclusion of the trial.

iii) The appellant shall surrender/deposit his passport, if any, in the trial Court, before his release.

iv) The appellant shall inform their latest place of residence and mobile contact number immediately after being released and/ or change of residence or mobile details, if any, from time to time to the trial Court as well as to the concerned Police Station, in writing.

v) The appellant shall not tamper with the evidence or attempt to influence or contact the complainant, witnesses or any person concerned with the case.

vi) The appellant shall co-operate in the conduct of the trial and shall attend the trial Court on every date of hearing, unless exempted by the trial Court.

15 It is clarified that observations made in this order are prima facie observations only made for the purpose of deciding the instant appeal moved by the appellant. None of the observations in this order shall be construed to mean any expression of opinion on merits of the case. Similarly, observations made in this order shall have no bearing on trial of the case.

16 All concerned to act on the authenticated copy of this order.

(V. G. BISHT, J.) **(REVATI MOHITE DERE, J.)**