

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION (ABA) NO. 226/2022

(Firoz Khan Azab Khan Vs State of Maha., thr. P.S.O., Umarkhed, Tq. Umarkhed,
Dist. Yavatmal.)

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Shri J.S.Wankhede, counsel for the Applicant.

Shri S.A.Ashirgade, APP for the Non-applicant/State.

Shri Chavhan, counsel for Assist to Prosecution.

CORAM : ANIL S. KILOR, J.

DATED : 25/04/2022.

1. A contractor of Umarkhed Municipal Council has approached to this Court by filing this application for grant of pre-arrest bail in Crime No.54/2022, dated 07/02/2022 registered with the Police Station Umarkhed, Dist. Yavatmal for the offences punishable under Sections 409,420, 465, 467, 468 and 471 read with Section 34 of the Indian Penal Code,1860.

2. The above referred crime was registered upon the directions of the Hon'ble Minister.

3. The learned counsel for the applicant submits that the applicant is a Contractor. It is submitted that whole responsibility in the alleged irregularity, illegality and misappropriation of funds of Municipal Council, Umarkhed is of the President, Chief Officer and

other accused persons. He, therefore, submits that as the main accused has already been released, the applicant is entitled for parity.

4. It is submitted that crime was registered on the basis of inquiry conducted in this matter. Thus, the complete record is in the custody of the Police and there is nothing to recover or seize from the applicant in the alleged offence. Accordingly, he submits that the custody of the applicant is not necessary in this case. He lastly argues that the applicant was granted ad-interim anticipatory bail by this Court vide order dated 12/04/2022, and he has been attending the Police Station as directed by this Court. It is further submitted that there is no complaint about abuse of concession by the applicant. Accordingly, he prays for grant of pre-arrest bail.

5. On the other hand, Shri Ashirgade, learned APP strongly opposes the application. He has made available the case diary. From the case diary, he has pointed out the inquiry conducted in the alleged offence at the level of Sub Divisional Officer and the detailed report of each point namely the illegalities and irregularities committed by the applicant in the alleged offence. It is submitted that no procedure has been followed while awarding the work to the contractors. There was no verification by the accused persons about the work done by the contractor and similarly without verifying the correctness of the vehicle numbers submitted by the contractors used for carrying out the work awarded by the contractors, the bills were released and thereby huge amount of the Municipal Council has been misappropriated by the accused persons.

6. It is submitted that the applicant cannot claim the parity with the President, as role of the President of the Municipal Council and the role of the Contractors are completely different. Accordingly, learned APP prays for rejection of the present application.

7. Shri Chavhan, learned counsel who is representing the complainant and seeking permission to assist the prosecution, has reiterated the submission of the learned APP and submits that it is not the only case of non-compliance of certain procedure while awarding work to the contract under a particular scheme, but it is the matter wherein all the accused persons have misappropriated the huge amount. He, therefore, prays for rejection of the present application.

8. I have perused the case diary, the inquiry report submitted by the Sub Divisional Officer, Umarkhed conducting the inquiry and the contents of the FIR.

9. Prima facie, on the basis of the material, it is clear that this is not the case only about some irregularities in following the procedure by the Municipal Council in awarding the work for the contracts or releasing the payment. However, there is material which *prima facie* shows that huge amount of misappropriation has been committed by the accused persons. It has come on record that while giving vehicle numbers of Proclaim Machine by the Contractor, the contractor had given Two Wheeler registration numbers of or Four Wheeler and Car, and on the basis of such information submitted by the contractors, huge amount was released by showing that work has

been properly done. *Prima-facie*, I am of the opinion that such illegality cannot be committed unless the involvement of contractors and Higher Authorities are there, and therefore, in such matters when already sufficient material is collected and *prima-facie* incriminating material is available on record to show the involvement of the applicant in the alleged offence, custodial interrogation is necessary.

10. The Hon'ble Supreme Court of India in the case of *P. Chidambaram v/s Directorate of Enforcement*¹ has observed thus:

69. Ordinarily, arrest is a part of procedure of the investigation to secure not only the presence of the accused but several other purposes. Power under Section 438 Cr.P.C. is an extraordinary power and the same has to be exercised sparingly. The privilege of the pre-arrest bail should be granted only in exceptional cases. The judicial discretion conferred upon the court has to be properly exercised after application of mind as to the nature and gravity of the accusation; possibility of applicant fleeing justice and other factors to decide whether it is a fit case for grant of anticipatory bail. Grant of anticipatory bail to some extent interferes in the sphere of investigation of an offence and hence, the court must be circumspect while exercising such power for grant of anticipatory bail. Anticipatory bail is not to be granted as a matter of rule and it has to be granted only when the court is convinced that exceptional circumstances exist to resort to that extraordinary remedy.

71. Article 21 of the Constitution of India states that no person shall be deprived of his life or personal liberty except according to procedure prescribed by law. However, the power conferred by Article 21 of the Constitution of India is not unfettered and is qualified by the later part of the Article i.e. "...except according to a procedure prescribed by law." In State of M.P. v. Ram Kishna Balothia, the Supreme Court held that the right of anticipatory bail is not a part of Article 21 of the Constitution of India and held as under(SCC p.226, para 7)

1 (2019) 9 SCC 24

“7. ... We find it difficult to accept the contention that Section 438 of the Code of Criminal Procedure is an integral part of Article 21. In the first place, there was no provision similar to Section 438 in the old Criminal Procedure Code. The Law Commission in its 41st Report recommended introduction of a provision for grant of anticipatory bail. It observed:

“We agree that this would be a useful advantage. Though we must add that it is in very exceptional cases that such power should be exercised.”

In the light of this recommendation, Section 438 was incorporated, for the first time, in the Criminal Procedure Code of 1973. Looking to the cautious recommendation of the Law Commission, the power to grant anticipatory bail is conferred only on a Court of Session or the High Court. Also, anticipatory bail cannot be granted as a matter of right. It is essentially a statutory right conferred long after the coming into force of the Constitution. It cannot be considered as an essential ingredient of Article 21 of the Constitution. And its non-application to a certain special category of offences cannot be considered as violative of Article 21.” [emphasis supplied]

72. *We are conscious of the fact that the legislative intent behind the introduction of Section 438 Cr.P.C. is to safeguard the individual’s personal liberty and to protect him from the possibility of being humiliated and from being subjected to unnecessary police custody. However, the court must also keep in view that a criminal offence is not just an offence against an individual, rather the larger societal interest is at stake. Therefore, a delicate balance is required to be established between the two rights-safeguarding the personal liberty of an individual and the societal interest. It cannot be said that refusal to grant anticipatory bail would amount to denial of the rights conferred upon the appellant under Article 21 of the Constitution of India.*

11. In the light of the above referred observations made by the Hon’ble Supreme Court of India in the case of *P.Chidambaram (supra)* and having considered the inquiry report and the allegations

made in the FIR coupled with the involvement of the applicants, I have no hesitation to hold that the applicant is not entitled for grant of pre-arrest bail. Accordingly, I pass the following order:

The criminal application is **rejected**.

[JUDGE]

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