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

Criminal Application (BA) No. 972 of 2022

Upendra S/o Gunwantrao Mule
Versus
The State of Maharashtra, through Police Station Officer,
Police Station Risod, Dist. Washim

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

Shri S.V.Manohar, Senior Advocate assisted by
Shri Atharwa Manohar, Advocate for the applicant.
Shri S.P.Dharmadhikari, Senior Advocate assisted by
Shri V.A.Thakare, APP for the non-applicant/State.

CORAM : ANIL S. KILOR, J.
DATED : 5th September, 2022.

The applicant is seeking bail under Section 439 of the Code of Criminal Procedure in connection with Crime No. 389 of 2020 registered with Police Station Risod, Dist. Washim, for the offence punishable under Sections 406, 408, 409, 420, 468, 471, 477-A and 120-B read with Section 34 of the Indian Penal Code and Sections 7, 13(1)(a), 13(1)(b) read with Section 13(2) of Prevention of Corruption Act.

2. It is the prosecution story that, the complainant who is the President of Janshikshan

Sanstha Washim and Mahila Utkarsha Pratisthan Trust, lodged a complaint against the accused including the applicant, alleging that, Ashok Gondole was Secretary of the Trust, who along with Upendra Mule and others named in the FIR, conspired to misappropriate the funds of the Trust to the tune of Rs.18,18,40,867/-. It was also stated that on 7th July 2019, in the morning, Ashok Gondole and others went to the office of the Trust without taking any permission and taking one Bhagwat Chhagan Pedhe into confidence, took away cash of Rs.7,00,00,000/- and certain important documents, such as Registration Certificate, etc. and threatened Bhagwat Chhagan Pedhe. Ashok Gandole was accompanied by Varsha Helaskar, Dinesh Dorsetwar, Bharat Deogire, Mahesh Deogire and other unknown persons. It was further stated that Ashok Gandole was working as a Secretary, and before he resigned, he misappropriated the amount of Rs.9,92,01,067/- from Ayurvedic BAMS Collage, Risod, which was run by Mahila Utkarsha Pratisthan, Risod. The Complainant gave details of the amounts misappropriated, i.e 4,60,69,000/- by Ashok Gandole through cheque and Rs.4,87,82,067/- by cash i.e. total Rs.9,48,51,067/-, Varsha Helaskar misappropriated amount of Rs.37,00,000/- and Dinesh Dorsetwar misappropriated amount of Rs.6,50,000/-. The complainant further stated that these persons misused the important documents of the trust and misappropriated the amounts. It was stated that their activities substantially impacted the financial health of the Trust and, therefore, respondent No.2-complainant, who is President of the Trust, established an Enquiry Committee, which called for all the details from Ashok Gandole, but he did not give satisfactory answers and stated that whatever amount he took away from the trust, was given to the applicant. It was further stated that Ashok Gandole, Upendra Mule, Varsha Helaskar and Dinesh Dorsetwar threatened the Office Bearers of the Trust that they would be implicated in a false case if the information was given to the police or any other person. On these allegations, the First Information Report was lodged against 12 persons.

3. I have heard Shri Sunil Manohar, learned Senior Advocate for the applicant and Shri S.P.Dharmadhikari, learned Senior Advocate for the non-applicant/State.

4. Shri Manohar, learned Senior Advocate for the applicant submits that the present First Information Report is a counter blast of the complaint filed by the

applicant against the complainant before the Enforcement Directorate.

5. It is submitted that the applicant is a Chartered Accountant who has been falsely implicated in the alleged offence. It is submitted that there is nothing to connect the applicant with the alleged offence as whatever amount was received by the applicant, was received by cheque towards his professional fees. It is submitted that the fact that the applicant has received the amount by cheque speaks for itself about its legality and innocence of the applicant.

6. It is further submitted that in the report it is alleged that amount of Rs.16,00,92,147/- was misappropriated by the accused by withdrawing the same from the account of Mahila Uttarsha Pratishthan. However, there is not a single cash voucher in the name of the applicant or there is nothing to show that any amount was received by the applicant in cash.

7. Shri Manohar, learned Senior Advocate further argues that Section 409 of Indian Penal Code would not attract against the applicant as he does not fall in the category of public servant or banker or merchant or agent who has committed criminal breach of trust.

8. It is submitted that the applicant has accounted for the amount he has received, thus keeping the applicant in jail for uncertain period after filing of the chargesheet would amount to pre-trial punishment.

9. He lastly submits that some of the co-accused have been granted bail by the trial Court. It is therefore, prayed that the applicant may be released on bail on the principle of parity.

10. On the other hand, Shri Dharmadhikari, learned Senior Advocate for the non-applicant/State strongly opposed the present application. He submits that, the applicant is a statutory auditor who has admittedly audited the accounts of the Mahila Utkarsha Pratisthan Trust for the years 2013 to 2018. It is submitted that though the accused persons had withdrawn amount in crores by cash, in none of the audit reports objection in this regard was recorded or raised by the applicant.

11. It is submitted that, the complainant who is the President of the society, gave all the powers to co-accused Ashok Gandole. It is submitted that the Trust was receiving grants in aid towards its colleges and schools. He submits that the part of the misappropriated amount was from the grant in aid

received from Government and part amount was from the fees of the students. Therefore, it is submitted that as defined under Section 2(c)(xii) of Prevention of Corruption Act, the applicant is a public servant and hence, Section 409 of Indian Penal Code would attract against the applicant.

12. It is submitted that many irregularities were committed by the applicant as an Auditor in the audit reports of the Trust. The learned Senior Advocate for the State has drawn attention to such alleged irregularities to substantiate his arguments.

13. It is argued that in the audit report prepared by the applicant for the year 2013 to 2019, the total professional fees, is shown as Rs.5,18,490/- and not the amount as received by the applicant in crores. It is further submitted that even if it is taken that the said amount which was received by him towards professional fees, however, no evidence by way of bills raising demand of professional fees are produced by the applicant or any documents to show that he has paid Central and State GST on the said amount. It is therefore, submitted that the transaction is a clandestine transaction.

14. Shri Dharmadhikari, learned Senior Advocate for the non-applicant/State submits that the applicant is a conspirator, therefore, Section 120-B of Indian Penal Code was added on 9th May, 2022.

15. It is submitted that 12 accused persons are absconding and under Section 173(8) of Code of Criminal Procedure further investigation is going on. It is therefore submitted that as and when they will be apprehended the picture will be more clear. It is accordingly submitted that it would be detrimental for the prosecution if the applicant is released on bail at this stage.

16. The learned Senior Advocate for the non-applicant/State submits that the applicant has indulged himself in making complaint against the Investigating Officer, Public Prosecutors and Sessions Judge. It is submitted that he has highly influential and politically connected person, therefore, if he is released on bail, he may pressurize the prosecution witness or tamper with the prosecution evidence.

17. In reply, Shri Manohar, learned Senior Advocate for the applicant submits that, no such documents are filed on record or pleadings made in support of his submission that the applicant is making

complaints against Investigating Officer, Public Prosecutor or the learned Sessions Judge. He, therefore, submits that this Court may not take cognizance of the submission.

18. Further, Shri Dharmadhikari, learned Senior Advocate has drawn attention to the chart filed alongwith the chargesheet to show the difference of amount in bank statement and the amount shown in the accounts of the society. It is accordingly, submitted that the present matter is complicated economic offence and hence, it would be hazardous for the prosecution if the applicant is released on bail. Accordingly, he prays for the rejection of the present application.

19. In the backdrop of submissions made by Shri Manohar, learned Senior Advocate for the applicant and Shri Dharmadhikari, learned Senior Advocate for the non-applicant/State, I have perused the chargesheet, the application and reply of the State.

20. From the chargesheet and the application, it is evident that the applicant is an Auditor of Mahila Utkarsha Pratisthan of which the complainant is the President. The applicant also worked to file Income Tax Return of the said Society/Trust from the period 2013 to 2018, being Chartered Accountant. The

applicant is also auditing accounts of three more Trusts and five Companies related with the complainant and also look after the Income Tax returns of the complainant, co-accused Ashok Gandole and their relatives.

21. It can be seen from the chargesheet that there is a dispute between the complainant, co-accused Ashok Gandole and one Saeed Khan. Record shows that the applicant had made a complaint against the complainant to the Enforcement Directorate, alleging misappropriation of funds by the complainant and others. Thus, *prima facie* it appears that the present crime is the outcome of the said dispute.

22. In the First Information Report it is alleged that on 7th July, 2019 co-accused Ashok Gandole alongwith associates had been to the office of Mahila Utkarsha Pratisthan at Washim and they took away cash Rs.7 crores and important documents.

23. It can further be seen that the allegations as regards taking away Rs.7,00,00,000/- are therefore, made against Ashok Gandole, his wife Varsha Helaskar, Dinesh Dorshetwar, Bharat Deogire, Mahesh Deogire and two unknown persons.

24. It is alleged that Ashok Gandole who was the Secretary of Mahila Utkarsha pratishthan Trust, which runs the BAMS College, his wife Varsha Helaskar, the applicant and Dinesh Dorshetwar, in conspiracy, misappropriated Rs.9,92,01,067/-.

25. It is further alleged that after the incidence dated 07.07.2019, an "Enquiry Committee" was formed to investigate into the alleged frauds and when the Enquiry Committee asked Ashok Gandole for the accounts, he did not give any reply and stated that whatever amount he had taken away from the trust was given to the applicant.

26. Thus, mainly allegation as regards taking away Rs.7,00,00,000/- is against co-accused Ashok Gandole, his wife Varsha Haleskar, Dinesh Dorshetwar, Bharat Deogire, Mahesh Deogire and two unknown persons.

27. As far as the present applicant is concerned, he has been arraigned as an accused on the statement of co-accused Ashok Gandole that whatever amount he took away from the Trust, he gave it to the applicant. Except this, there are no other allegations against the applicant in the First Information Report. Whereas, the allegations of misappropriation are general and vague.

28. During the investigation, it was revealed that the applicant has received Rs.1,80,00,000/- and Rs.34,00,000/- by cheque. As per the version of the applicant this total amount of Rs.2,14,00,000/- was his professional fees. Whereas, as per the prosecution the said amount is not the professional fee for the reason that in the audit report of the period from 2013 to 2015, it was shown as Rs.5,18,490/- and not Rs.2,14,00,000/-.

29. Moreover, it is evident that above referred two cheques were given by the co-accused Ashok Gandole, from his personal account and not from the account of the Trust.

30. Thus, the question whether the amount received by the applicant was the professional fee or it is an amount involved in the alleged crime, is a matter of trial.

31. As far as the allegations that though huge amount was withdrawn by the co-accused by cash during the period from 2013 to 2018, no objection as regards the same was raised by the applicant as an auditor, is concerned, again it would be a matter of trial whether it was mere an irregularity in conducting the audit or it was intentional because there is no voucher to

show that the applicant has received any amount by cash during the period 2013 to 2019.

32. It is the case of the prosecution that the complainant had given power of attorney to the co-accused Ashok Gandole and accordingly he was looking after day to day financial affairs of the Trust. Thus, the allegations against the co-accused Ashok Gandole are need to be seen from the perspective of his status a power of attorney holder of the President of the Trust i.e. the Complainant.

33. The Hon'ble Supreme Court of India in the case of *Suraj Lamp and Industries Pvt. Ltd., Vs. State of Haryana*[1] has held that the power of attorney is creation of an agency whereby the granter authorizes the grantee to do the acts specified therein, on behalf of granter, which when executed will be binding on the granter as if done by him.

34. In the teeth of the above referred well settled law, as regards the power of attorney, it is doubtful whether the complainant can shift her responsibility as President on the shoulder of the power of attorney, by lodging complaint and making allegations against him, particularly when as per settled

1 2011(89)ALR 445(SC)

law whatever acts done by Ashok Gandole as a power of attorney holder of the complainant are binding on the complainant as if all the said acts are done by her. And if all the said acts are considered to be done by her, whether she can lodged a complaint in relation to such acts, would be the question.

35. There is a serious dispute raised whether Section 409 of Indian Penal Code would apply to the applicant in view of the fact that he is not a public servant or banker or merchant or agent who has committed criminal breach of trust.

36. The learned Senior Advocate for the respective parties have argued at length on the point whether the applicant can be termed as a public servant or not. Considering the scope of the present application, I refrain myself to make any comment upon the same as it may prejudice the trial.

37. Shri Dharmadhikari, learned Senior Advocate has pointed out the chart annexed alongwith reply of the State to show the amount time to time received by the applicant from the accounts of the Trust during the period from 2010 till 2019.

38. However, it can be seen that for such a long period no grievance was raised by the complainant or any of the office bearer of the Trust against the applicant. It therefore, creates doubt about veracity of allegations made against the applicant in this regard.

39. Furthermore, if the First Information Report is perused, it can be seen that there are no such allegations made in the First Information Report against the applicant.

40. At this juncture, it is pertinent to note that Treasurer of the Trust Smt. Aruna Halge has been granted anticipatory bail by the learned trial Court. Further, co-accused namely Santosh Gandole and Udhav Gandole have been granted regular bail. The allegations against those co-accused who have been released on bail and the allegations against the applicant are similar. Hence, the applicant is entitled for parity.

41. There is no material available against the applicant to show that he is a conspirator in the present matter. Allegations which are made against the applicant in respect of conspiracy are vague and general. Thus, *prima facie* in absence of any material to show that the applicant is a conspirator, it is doubtful whether

Section 120 B of Indian Penal Code would attract against the applicant.

42. The applicant is in jail from about last six months and the chargesheet has been filed on completion of investigation.

43. Thus, looking to the role attributed to the applicant and the allegations made against the applicant, I am of the opinion that further custody of the applicant is not necessary.

44. Furthermore, all the crime related record and material have already been seized and it is not the case of the prosecution that they want to recover anything from the applicant.

45. There is nothing to show that there is any possibility that the applicant being absconded or not available for trial or there is a flight risk, if the applicant is released on bail.

46. As far as the submission of learned Senior Advocate appearing for the State that, 12 accused persons are absconding and on their arrest some more facts may come to the fore which may make the role of the applicant more clear, the applicant cannot be denied bail for the above referred reason particularly when he

has made out a case for grant of bail and when the remedy for cancellation of bail on further revelation of incriminating material against the applicant, is available.

47. Thus, at this stage considering the nature of allegations, status of the applicant in the society, his possibility of being available for trial and the fact that his further custody is not necessary, I pass the following order.

i. Criminal application is allowed;

ii. It is directed that the applicant shall be released on bail in Crime No. 389 of 2020 registered with Police Station Risod, Dist. Washim for the offence punishable Sections 406, 408, 409, 420, 468, 471, 477-A and 120-B read with Section 34 of the Indian Penal Code and Sections 7, 13(1)(a), 13(1)(b) read with Section 13(2) of Prevention of Corruption Act, on furnishing P.R.Bond of Rs.1,00,000/- with a solvent surety in the like amount.

iii. The applicant shall attend the concerned Police Station as and when his presence is required.

iv. It is made clear that whenever presence of applicant is required, 72 hours notice in advance be given to the applicant.

v. The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case, as also not to tamper with the evidence;

vi. State is at liberty to apply for cancellation of bail, in case the applicant commits similar offence or breach the condition.

[ANIL S. KILOR, J.]

SACHINDANAND K NAIR Digitally signed by SACHINDANAND K NAIR Date: 2022.09.07 15:25:04 +0530