

VRJ

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

ANTICIPATORY BAIL APPLICATION NO.1332 OF 2023

Parasmal S/o Motilal Jain

... Applicant

V/s.

The State of Maharashtra

... Respondent

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Mr. Panditrao Anerao for the applicant.

Mr. Pandurang H. Gaikwad, APP for the respondent/State.

Mr. Niranjan Bhavake with Mr. Siddhesh G. Shetty i/by Bhavake and Associates for respondent No.2/complainant.

Mr. Tanaji Shankar Bhogam, Sangvi Police Station, Pimpri-Chinchwad.

CORAM : AMIT BORKAR, J.**DATED : AUGUST 3, 2023****P.C.:**

1. Apprehending arrest in connection with C.R. No.113 of 2022 registered with Sanghvi Police Station for offences punishable under sections 406, 420 read with section 34 of the Indian Penal Code, 1860, the applicant is seeking relief under section 438 of the Criminal Procedure Code, 1973.

2. According to the informant, the applicant is engaged in business of supplying goods of Intex Company. The applicant's business is to purchase goods of Intex Company and sell it to

retailers and wholesalers. The manufacturers do not provide facility of sale of goods to either retailers or wholesalers except distributors like the applicant. The informant, therefore, transferred amount of Rs.11,65,295/- for purchase of various goods. The applicant promptly supplied the goods to gain confidence of the informant. Immediately thereafter on 28th September 2020, the informant sent an amount of Rs.13,80,939/- to the applicant and goods in the amount of Rs.11,54,606/- were supplied to the informant. Thereafter, various amounts were paid by the informant for purchase of goods; however, the applicant refused to supply the goods. According to the informant, the intention of supplying goods promptly at the initial stage was to gain confidence and, thereafter, refuse to supply the remaining goods. Therefore, report is lodged.

3. The applicant applied for relief under section 438 of the Criminal Procedure Code, 1973, which came to be rejected by order dated 6th December 2022.

4. According to learned advocate for the applicant, essential ingredients of the offence under sections 406, 420 are not fulfilled. The transaction between the informant and the applicant is civil in nature. The Civil Suit for recovery of amount is already filed. There is delay in lodging the report. In support of his contentions, he relied on following judgments of the Apex Court:

i) Prof R. K. Vijayasathya and Another vs. Sudha Seetharam and Another in Criminal Appeal No.238 of 2019 decided on 15th February 2019.

ii) Vijay Kumar Ghai and Others vs. The state of West Bengal and Others in Criminal Appeal No.463 of 2022 decided on 22nd March 2022.

iii) Prem Shankar Prasad vs. The State of Bihar and Another in Criminal Appeal No.1209 of 2021 decided on 21st October 2021.

5. Per contra, learned advocate for the informant and learned APP submitted that the intention of the applicant at the inception was not to supply the goods. He gained confidence by supplying the goods initially, however, after receiving substantial amount, the applicant refused to supply goods. Therefore, according to them, right from inception the fraudulent and dishonest intention of the applicant was evident. In support of his contention learned advocate for the informant relied on the recent judgment of the Apex Court in Criminal Appeal No.1209 of 2021 in the case of **Prem Shankar Prasad vs. State of Bihar and Another.**

6. With the assistance of learned advocate for the parties, I have perused the material on record including the case diary. Prima facie, it appears that the informant had paid various amounts to the applicant or his wife. Prima facie, it appears that amount of Rs.54,11,309/- was deposited by the informant with the applicant, however, goods worth Rs.40,45,817/- were not supplied. During the course of hearing, the applicant showed his inability either to repay the amount or to supply goods.

7. The material collected by the investigating officer shows that despite the receipt of amount, the applicant never intended to transfer the goods. The applicant's statement recorded by the

investigating officer indicates that he acknowledged facts of receipt of amount; however, he neither refunded the amount nor supplied the goods. It therefore appears that the intention of the applicant at the inception of transaction was fraudulent and dishonest.

8. The judgment relief upon by the learned advocate for the applicant arise out of proceedings under section 482 of the Criminal Procedure Code, 1973. The parameters for adjudication of the application under section 482 are entirely different that the parameters for the adjudication of the application under section 438. It is well settled that in such cases, each case needs to be decided on its own facts and circumstance. In the cases involving application of section 406 read with section 420, the peculiar facts of the case distinguished another case. Therefore, distinction on facts makes the judgment relied upon by the advocate for the applicant inapplicable to the facts of the present case. Per contra, the judgment in the case of **Prem Shankar Prasad vs. State of Bihar and Another** arises out of proceedings under section 438 of the Criminal Procedure Code, where the issue involved was non-supply of goods. The Apex Court held that merely because the allegations are in respect of business transaction that itself is no ground to grant relief under section 438 of the Criminal Procedure Code, 1973. What is required to be considered is the nature of allegation and the accusation and not the nature of accusation is arising out of business transaction.

9. Therefore, I am satisfied that the no case for relief under section 438 is made out.

10. The anticipatory bail application stands rejected.

(AMIT BORKAR, J.)