



Sayali Upasani

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

ANTICIPATORY BAIL APPLICATION NO. 2052 OF 2023

WITH

INTERIM APPLICATION NO.2819 OF 2023

Shambhu Dhondiram Pawar

...Applicant

Vs.

The State of Maharashtra

...Respondent

Mr. Chaitanya Pendse i/b Mr. Prashant D. with Mr. Sagar B., for Applicant.

Mr. S. H. Yadav, APP for State.

Mr. Subhas Jha i/b Mr. Chaitanya Malgaonkar, for Intervenor.

Mr. Amol Dere, PSI, Chakan Police Station.

CORAM:- N. J. JAMADAR, J.

DATED:- 18th OCTOBER, 2023

ORDER:-

1) This is an application for pre-arrest bail in connection with CR No. 542 of 2023, registered with Chakan Police Station, Pimpri Chinchwad, for the offences punishable under Sections 409 and 420 of Indian Penal Code, 1860 ("the Penal Code").

2) When the application was first listed before this Court on 21st July, 2023, this Court was persuaded to grant interim bail as *prima facie* it appeared that as on the date of the execution of the Sale-deeds, the applicant was the owner of the properties conveyed thereunder.

3) The first informant has filed an application for intervention, seeking to resist the prayer of grant of pre-arrest bail.

4) The indictment against the applicant runs as under:-

(a) The first informant, who is the Chairman of Futura Global Ventures Pvt. Ltd., was induced by the applicant to purchase about 100 acres of agricultural land situated at Kuruli, Tal. Khed, Pune by making a representation that the sale of the said land by converting it into plots would fetch huge returns.

(b) On 24th September, 2004, Fort City Developers, a partnership firm, was constituted with the first informant having 56% and the applicant having 44% shares in the profits of the said firm. To facilitate the acquisition of lands, the first informant executed a power of attorney in favour of the applicant as the first informant and the firm, not being the agriculturist, could not have purchased the agricultural land. Eventually, the firm was registered with the Registrar of Firm on 3rd March,

2005 and an account was opened in the name of the firm with HDFC Bank, Fort Branch, Mumbai.

(c) On 27th September, 2004, a MOU was executed between the first informant and the applicant whereby it was agreed that the lands would be initially purchased in the name of the applicant and after compliance of due process of law, the same would be transferred in the name of the firm. It was further agreed that in the event of failure on the part of the applicant to contribute capital, as agreed, within a period of three years, the first informant would become the owner of the land and the applicant would transfer the said land in the name of the first informant.

(d) The first informant claimed that from the year 2005 till the year 2007, the first informant transferred an amount of Rs.1,06,70,000/- in the account of the firm and/or the applicant. Likewise, an amount of Rs.71,29,000/- was paid in cash in 15 tranches from 28th September, 2004 to 25th February, 2017. The applicant entered into transaction to purchase 73.225 acres land. However, only 37.4 acres land could be actually transferred in the name of the applicant, and his name came to be mutated to the record of rights of the said lands.

(e) Alleging breach of the terms of the contract between the parties, the first informant lodged a report to the effect that out of the said 37.4 acres of land acquired for the firm, the applicant alienated land admeasuring 196.9 guntha by executing conveyances in favour of various parties, without the consent of the first informant. The applicant was not entitled to sell the land of the firm. The applicant received and misappropriated the huge consideration. It was alleged that with intent to deceive the first informant by taking undue advantage of the mutation of his name to the record of rights, the applicant executed the conveyances for wrongful gain.

5) The applicant approached the Court of Session. As the learned Additional Sessions Judge declined to exercise the discretion, the applicant has preferred this application.

6) I have heard Mr. Chaitanya Pendse, the learned Counsel for the applicant, Mr. S. H. Yadav, the learned APP for the State and Mr. Subhash Jha, the learned Counsel for the intervenor – first informant.

7) Mr. Pendse would submit that the dispute is essentially of a civil nature. In accordance with the terms of the contract and as alleged in the FIR, the applicant had lawfully purchased the agricultural lands. Without controverting the execution of the

instruments to transfer a few parcels of the said land, Mr. Pendse would urge that whether the applicant has executed those instruments in breach of the contract between the parties and whether there is an element of criminality in the transactions, are matters for adjudication. Mr. Pendse would further urge that in the backdrop of the allegations in the FIR, the transaction in question would be covered by the provisions contained in Section 4 of the Prohibition of Benami Property Transactions Act, 1988 ("the Act, 1988") (as it stood before the said Act came to be amended by Act No.43 of 2016 with effect from 1st November, 2016). Since the legality of the claim of the first informant is debatable and the alleged offences revolve around documents, custodial interrogation of the applicant is not warranted, submitted Mr. Pendse.

8) The learned APP resisted the prayer for pre-arrest bail by submitting that there are receipts passed by the applicant acknowledging receipt of the cash amount and the custodial interrogation of the applicant is warranted to confront the applicant with those receipts and unearth the fraud. It was submitted that the applicant has committed fraud to the tune of Rs.2,77,99,000/-. Thus, having regard to the gravity of the allegations, the applicant does not deserve pre-arrest bail.

9) Mr. Jha, the learned Counsel for the first informant stoutly resisted the prayer for pre-arrest bail, it was submitted that a clear case of criminal breach of trust under Section 409 of the Penal Code, which entails punishment of life imprisonment is made out. Taking the Court through the partnership deed, the power of attorney and the MOU, Mr. Jha would urge that the fraudulent disposition of the property of the firm is writ large. In such serious offences, according to Mr. Jha, relief of pre-arrest bail cannot be granted, lest the investigation would suffer prejudicially. Mr. Jha controverted the submission of Mr. Pendse on the applicability of the provisions of the Act, 1988. Inviting the attention of the Court to the object of the said enactment, it was urged that to allow the applicant to take the said defence would amount to putting a premium on dishonesty.

10) I have carefully perused the allegations in the FIR and the material on record. It is imperative to note that there is not much controversy over the fact that the first informant and the applicant had entered into a partnership and the agricultural lands were acquired. As alleged, acquisition was, however, in the name of the applicant as in view of the provisions contained in Section 63 of the Maharashtra Tenancy and Agricultural Lands Act, 1948, a non-agriculturist cannot purchase agricultural

land. There is prima facie material to indicate that the applicant has executed instruments to convey portions of the said land.

11) Under Section 405 of the Penal Code, a person commits criminal breach of trust, if after being in any manner entrusted with property or with any dominion over property, he dishonestly disposes of that property, or dishonestly uses or disposes of that property in violation of any legal contract, express or implied, which he has made touching the discharge of such trust.

12) Prima facie, the MOU contains clauses which indicate that after the acquisition of the land, the applicant would transfer the land in the name of the firm, and in the event of non-contribution of the capital, in the name of first informant. Disposition of the property by the applicant in breach of the said contract and alleged misappropriation of the sale proceeds may, prima facie, fall within the dragnet of the offence of criminal breach of trust.

13) At this juncture, however, the question as to whether the offence punishable under Section 409 of the Penal Code is made out appears to be debatable. Whether the status of the applicant as borne out by the jural relationship formed by contracts between the parties would fall within the category of the persons covered by Section 409 and whether, in the circumstances of the

case, Section 409 of the Penal Code can be resorted to would be a matter for trial.

14) At this juncture, the submission on behalf of the applicant that the transaction would be covered by provisions contained in Section 4 (1) of the Act, 1988, deserves to be considered. It would be suffice to note that even if the transaction is held to be covered by provisions of Section 4 (1) of the Act, 1988, Clause (b) of sub Section (3) of the said Act, which came to be deleted by the Amendment Act, 2016, prima facie saves the transactions from the mischief covered by the said Section. It read as under:-

“...(3) Nothing in this section shall apply-,

.....

(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity....”

15) In the case of **P. V. Sankara Kurup Vs. Leelavathy Nambiar**¹, the Supreme Court held that as under:-

“.....3. That apart under Section 88 of the Indian Trusts Act, an agent or other person bound in a fiduciary character to protect the interests of the principal and the former would hold the property for the benefit of the principal or the person on whose behalf he acted as an agent. The question of benami, therefore, does not arise, though Section 4 of the Benami Transactions (Prohibition) Act, prohibits such a plea. Sub-section (3) provides that “nothing in the said section would apply where the person in whose name the property is held is a trustee or other person

1 AIR 1994 SC 2694

standing in a fiduciary capacity and the property is held for the benefit of another person for whom he is a trustee or towards whom it stands, in such capacity". Section 7 does not repeal Section 88 of Trust Act. When an agent was employed to purchase the property on behalf of his principal and does so in his own name, then, upon conveyance or transfer of the property to the agent, he stands as a trustee for the principal. The property in the hands of the agent is for the principal and the agent stands in the fiduciary capacity for the beneficial interest he had in the property as a trustee. The petitioner has acted as an agent, as a cestui que trust, is a trustee and he held the property in trust for the respondent in his fiduciary capacity as an agent or trustee and he has a duty and responsibility to make over the unauthorised profits or benefits he derived while acting as an agent or a trustee and properly account for the same to the principal."

4. Therefore, the High Court is clearly right in its holding that the petitioner as an agent and trustee acted in the fiduciary capacity on behalf of the respondent-plaintiff as general power of attorney. He held the property in cestui que trust for and on behalf of the respondent though he fraudulently got inserted his name in the sale certificate issued by the court without the respondent's knowledge and consent. Section 4 of the Benami Transactions (Prohibition) Act does not stand in the way for the declaration of title and possession of the plaint schedule property....."

(emphasis supplied)

16) At this juncture, the necessity of the custodial interrogation of the applicant wrenches to the fore. The transactions have been executed from the year 2005 till the year 2017. All the transactions are evidenced by documents. The legality and validity of the alienation made by the applicant in

his own name as an absolute owner of the said lands, in alleged breach of the terms of the contract, between the first informant and applicant, would also be a matter for adjudication.

17) In the totality of the circumstances of the case, the custodial interrogation of the applicant does not seem to be warranted to facilitate further investigation. I am, therefore, impelled to make the order of interim bail absolute.

18) Hence, the following order.

ORDER

I) The order of interim bail dated 21st July, 2023 is made absolute on the terms and conditions incorporated therein.

II) The applicant shall henceforth appear before the Investigating Officer as and when directed and furnish the specimen handwriting and signature.

III) The applicant shall regularly attend the proceedings before the jurisdictional Court.

IV) The application stands disposed.

V) In view of the disposal of the ABA, the Interim Application also stands disposed.

[N. J. JAMADAR, J.]