IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

ANTICIPATORY BAIL APPLICATION NO. 2451 OF 2022

Harnish Surendra Chadderwala ...Applicant
Versus
The State of Maharashtra and anr. ...Respondents

Mr. Raja Thakare, a/w Siddharth Jagushte, for the Applicant.
Mr. S. H. Yadav, APP for the State.
Mr. Ashutosh Kulkarni, a/w Ms. Sheetal Sabnis and Rushil Mathur, i/b Kochhar & Co., for Respondent No.2.
PSI Mahesh Khamkar, Rabodi Police Station, present.

CORAM: N. J. JAMADAR, J.
DATED: 1st NOVEMBER, 2023

ORDER:-

1. This is an application for pre-arrest bail in connection with CR No.143 of 2022, registered with Rabodi Police Station, Thane City, for the offences punishable under Sections 379, 381, 409 and 420 of Indian Penal Code, 1860 ("the Penal Code") and Sections 43, 65, 75, 66C and 66E of the Information Technology Act, 2000.

2. The applicant was working as a Commercial Manager with Valiant Pacific LLC Ltd. ("Valiant"), based in Dubai. The applicant had joined the said company in the month of

March, 2003. The applicant tendered resignation on 1st December, 2018. It was accepted on 8th January, 2019.

3. After the applicant resigned from the company, it allegedly transpired that during the period 2003 to 2018 in pursuance of a criminal conspiracy the applicant defrauded Valiant to the tune of Rs.80 Crores. On 13th January, 2019, the applicant allegedly had an access to the computer system of Valiant remotely and had destroyed the data stored in the desktop, which was being used by the applicant by employing anti-forensic tools such as “Disk Wipe” and “Eraser”. The books of account would have otherwise revealed the complicity of the applicant, and were thus destroyed. Valiant claimed to have obtained forensic audit reports from Pyramid Cyber Security and Forensic Pvt. Ltd. and PKF Accountants and Business Advisers in the month of December, 2019 and April, 2021, respectively.

4. Valiant gave a Power of Attorney to Manoj Sawant, the first informant. Armed with the said Power of Attorney, the first informant lodged report against the applicant with the aforesaid allegations. It was further alleged that the applicant during the course of employment used to unlawfully deal in the business of watches without the permission of the employer. As there were significant differences in the inter company balances in the year 2016 – 2017 and 2017 – 2018, the applicant was called upon to prepare reconciliation statements. Despite repeated requests the applicant failed to furnish reconciliation statements. In the wake of the aforesaid, suddenly, the applicant tendered resignation on 1st December, 2018. It was further alleged that from the data contained in the old computers used by the applicant from the year 2003 to 2014 – 2015 it was revealed that the applicant had made false entries in the account books and siphoned off huge amount from Valiant. Thus, the first informant alleged the applicant committed criminal breach of trust and siphoned off an amount in excess of Rs.80 Crores from Valiant, over a period of 10 years.

5. Initially after the report came to be lodged, the applicant was called upon to join in the investigation. The applicant claimed to have appeared and furnished all the requisite information and documents. Yet, the Investigating Officer proceeded to summon the applicant repetitively. Hence apprehending arrest, the applicant approached the Court of Session. As the learned Additional Sessions Judge declined to exercise the discretion in favour of the applicant, this application for pre-arrest bail.

6. On 26th September, 2022 this Court was persuaded to grant interim protection calling upon Investigating Officer to file an affidavit on the aspect of the jurisdiction to investigate into the alleged offences as well.

7. The Investigating Officer has filed an affidavit. Respondent No.2 - the first informant has also filed an affidavit contesting the claim for pre-arrest bail.

8. I have heard Mr. Raja Thakare, the learned Senior Advocate for the applicant, Mr. Yadav, the learned APP for the State and Mr. Kulkarni, the learned Counsel for respondent No.2/first informant. With the assistance of the Counsel for the parties, I have perused the material on record.

9. Mr. Thakare submitted that all the alleged offences have taken place at Dubai. The applicant does not reside within the local limits of the jurisdiction of Rabodi Police Station. Yet, on the basis of the FIR lodged by the person has no concern with Valiant, Rabodi Police has registered the offences. It was submitted that the first informant has no personal knowledge of any of the alleged incidents nor access to the record of the company. He claims to deal in the business of sale and purchase of old four wheelers. Therefore, no semblance of credence can be attached to the allegations in the FIR. Secondly, Mr. Thakare would urge since the prosecution alleges the commission of offences punishable under Information Technology Act, 2000, the applicant cannot be prosecuted for the offences punishable under Sections 379, 381, 409 and 420 of the Penal Code on the strength of the same set of allegations. To buttress this submission Mr. Thakare placed reliance on a judgment of the Division Bench of this Court in the case of ***Gagan Harsh Sharma and ors. vs. The State of Maharshtra and ors.***[1]. Thirdly, Mr. Thakare would urge, the sequence of events and the time-lag between the date of resignation and the lodging of FIR unmistakably indicate that the applicant is being hounded by the former employer. Resignation tendered by the applicant on 1st December, 2018 was accepted after 39 days on 8th January, 2019, without any demur. The FIR came to be lodged on 9th August, 2022. This delay itself erodes the credibility of the prosecution version. Lastly, Mr. Thakare submitted, the very forensic audit reports on which the prosecution banks upon indicate that it was impossible to

1 2018 SCC Online Bom 17705.

access the computer system of Valiant remotely without the help of a local person. There is no material to indicate that any investigation has been carried out to identify the unknown associate of the applicant. Therefore, the applicant deserves pre-arrest bail.

10. As against this, the learned APP would submit that the allegations against the applicant are grave. A huge amount of Rs.80 Crores has allegedly been siphoned off. There is material to show that the applicant was using the BlackBerry mobile handset which was employed to remotely access the computer system of Valiant. The applicant has not cooperated with the investigation in the sense that he has feigned ignorance of the said mobile phone handset. Therefore the custodial interrogation of the applicant is indispensable.

11. Mr. Kulkarni, the learned Counsel for the first informant/respondent No.2 heavily banked upon the forensic audit reports especially that of PKF Accountants and Business Advisers. Taking the Court through the contents of the said report, it was submitted that the suspicion against the applicant is credible and, at this stage, that is sufficient.

12. Mr. Kulkarni joined the issue of the tenability of the FIR lodged by the first informant on the strength of Power of Attorney by submitting that it is well recognised that anybody can set the criminal law in motion and there is material to show that the first informant is operating as a commission agent of Valiant. Reliance was sought to be placed on the decisions of the Supreme Court in the cases of ***Shankar Finance and Investments vs. State of Andhra Pradesh and ors.***[2] and ***Vishwa Mitter of Vijay Bharat Cigarette Stores, Dalhousie Road, Pathankot vs. O. P. Poddar and ors.***[3].

13. Mr. Kulkarni also contested the position sought to be canvassed on behalf of the applicant that after invocation of the offences punishable under Information Technology Act, 2000, the applicant cannot be charged for commission of the offences punishable under Penal Code by placing reliance on the decisions of the Supreme Court in the cases ***State of Arunachal Pradesh vs. Ramchandra Rabidas alias Ratan Rabidas and another***[4] and ***State of Uttar Pradesh vs. Aman Mittal and another***[5].

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2 (2008) 8 Supreme Court Cases 536.
3 (1983) 4 Supreme Court Cases 701.
4 (2019) 10 Supreme Court Cases 75.
5 (2019) 19 Supreme Court Cases 740.

14. Mr. Kulkarni would submit that without the custodial interrogation of the applicant the huge fraud committed by the applicant cannot be unearthed.

15. I have given careful consideration to the aforesaid submissions. So far as the challenge to the jurisdiction of Rabodi Police to investigate into the offences which were allegedly committed at Dubai, it would be suffice to note that the position that the applicant is an Indian citizen is not disputed. In view of the provisions contained in Section 188 of the Code of Criminal Procedure if an Indian citizen, who has allegedly committed offence beyond India, is found anywhere in India, the offence can be enquired into and tried by any Court that may be approached by the victim. The decision of the Supreme Court in the case of ***Om Hemrajani vs. State of UP and anr.***[6] sets the controversy at rest.

16. It is true the FIR is lodged by a person, who claimed to be the Power of Attorney of the Valiant. In the FIR, the first informant has not disclosed the fact that he is connected with the affairs of the company. However that should not detain the Court any more. In the Power of Attorney the first informant is described as a person, who is operating as a

6 2005 Cri. LJ 665.

commission agent of the company. At this stage, I am not persuaded to delve deep into this aspect of the matter as it would be a matter of appreciation at the trial.

17. The ground of impermissibility of prosecution for the offences punishable under Sections 379, 381, 409 and 420 of the Penal Code when the applicant is facing prosecution, for the offence punishable under Section 43, 65, 75, 66C and 66E of the Information Technology Act, 2000, however deserves to be briefly dealt with.

18. In the case of ***Gagan Sharma*** (supra) the Division Bench of this Court held that if a special enactment like the Information Technology Act, 2000, contains a special mechanism to deal with the offences falling within the purview of the Information Technology Act, 2000, namely Sections 43 and 66, then the invocation and application of the provisions contained in Sections 379, 420 and 408 of the Penal Code in the same set of facts is totally uncalled for. It was observed that the ingredients of the offences punishable under Sections 420, 408 and 379 of the Penal Code are covered by Section by 66 of the Information Technology Act, 2000 and prosecuting the petitioners under both Penal Code and Information Technology Act would be brazen violation of protection against double jeopardy.

19. It would be contextually relevant to note that in the case of ***Ramchandra Rabidas*** (supra) the Supreme Court considered the justifiability of the direction by the Gauhati High Court that road traffic offences shall be dealt with only under the provisions of Motor Vehicles Act, 1988 and that in cases of road traffic or motor vehicle offences, prosecution under the provisions of the Penal Code is without sanction of law, and recourse to the provisions of the Penal Code would be unsustainable in law.

20. Disagreeing with the aforesaid directions of the Gauhati High Court, the Supreme Court, after referring to the provisions contained in Section 26 of the General Clauses Act, 1897, which envisages the consequences where an act and omission constitutes an offence under two or more enactments, held that it is well settled that an act or omission can constitute an offence under Penal Code and, at the same time, be an offence under any other law. The finding of the High Court that the prosecution of offenders under two statutes i.e. the MV Act and Penal Code, is unsustainable and contrary to law, was, therefore, set aside.

In the said case, the Supreme Court referred to its decision in the cases of ***T. S. Baliah vs. T. S. Rangachari***[7] and ***State of Maharashtra vs. Sayyed Hassan***[8]***.*** It was thereafter enunciated that if a prosecution, if otherwise maintainable, would lie both under Penal Code and MV Act, since both the statues operate with full vigour, in their own independent spheres. Even assuming that some of the provisions of the MV Act and Penal Code are overlapping, it cannot be said that the offences under both the statutes are incompatible.

21. The decision of the Supreme Court in the case of ***Aman Mittal*** (supra) arose in the context of the prosecution under the provisions of the Legal Metrology Act, 2009 and Penal Code, in the same set of facts. The Supreme Court referred to its decision in the case of ***Sharat Babu Digumarti vs. State (NCT of Delhi)***[9] and the decision of the Division Bench in the case of ***Gagan Sharma*** (supra) and thereafter observed:

> "**25**. That the Bombay High Court in *Gagan Harsh Sharma* has found that even a dishonest and fraudulent act falls within the scope of Section 66 of the IT Act. We are not called upon in the present appeals to examine whether an accused can be tried for an offence under IPC in view of Section 66 of the IT Act. Such question can be raised and decided in appropriate case."

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7 (1969) 3 SCR 65.

8 (2019) 18 SCC 145.

9 (2017) 2 SCC 18.

22. The aforesaid observations of the Supreme Court indicate that the Supreme Court considered it appropriate not to pronounce on the correctness of the decision in ***Gagan Sharma*** (surpa) and left the said question to be raised and decided in an appropriate case.

23. In the case at hand, it is imperative to note that apart from the allegations that the applicant had without permission of the Valiant accessed the computer system of Valiant and destroyed the information residing in a computer resource within the meaning of Section 43(a)(i) of the Information Technology Act, 2000 and the said access to computer system and destruction of the data therein was dishonest or fraudulent, punishable under Section 66 of the Information Technology Act, 2000, there are allegations that the applicant had committed criminal breach of trust and siphoned off huge amount by falsification of the record. Therefore, *prima facie,* the pronouncement in the case of ***Gagan Sharma*** (supra) does not govern the facts of the instant case with full force.

24. This takes me to the merits of the matter. Incontrovertibly, the applicant served with Valiant from 2003 till the acceptance of his resignation. The applicant tendered resignation on 1st December, 2018. Valiant accepted the resignation on 8th January, 2019. Evidently, there was an interval of time in the acceptance of the resignation. It does not appear that when the resignation was accepted Valiant took any umbrage or reserved right to initiate any action. *Prima facie,* the interval of time assumes significance as it provided Valiant with the opportunity to examine the affairs of the applicant qua the company.

25. This also assumes significance as in the FIR and the affidavit-in-reply on behalf of respondent No.2 an endeavour was made to allege that in the month of June 2018 the applicant was called upon to prepare a reconciliation statement as there were significant differences in the inter-company balances for the year 2016 – 2017 and 2017 – 2018 and the applicant failed to furnish the reconciliation statement despite repeated requests and soon tendered resignation.

26. This would, *prima facie,* imply that Valiant had an inkling about the alleged misfeasance, in the least, on the part of the applicant. Thus the said prelude ought to have, normally, put Valiant on guard. It is imperative to note that the allegations are of falsification of accounts for about 10 years preceding the cessation of employment. Therefore, acceptance of severance of the employer – employee relationship without any demur after about 39 days of the resignation cannot be brushed aside as inconsequential.

27. Secondly, the allegation is that on 15th January, 2019, Valiant learnt about the destruction of data in the desktop which was being used by the applicant. The lodging of the report on 9th August, 2022 in wake of the alleged discovery on 15th January, 2019, *prima facie* suffers from the vice of inordinate delay. The submission that the fraud could be unearthed after Valiant had the forensic audit deserves to be appreciated in the light of the fact that the first forensic audit report by Pyramid Cyber Security was submitted on 16th December, 2019, which was substantially same as was given by PKF Accountants and Business Advisers in the month of April, 2021, that Valiant's desktop was accessed remotely by unknown user (possibly Harnish), the applicant, on 13th January, 2021 using Disk Wipe software. Valiant also claimed to have learnt about the falsification of the record during the period of employment by the applicant upon accessing old computers. Yet, the FIR was lodged on 9th August, 2022.

28. The gravamen of indictment against the applicant of access to the desktop at Dubai remotely on 13th January, 2019 hinges upon a rider given by the forensic auditors that it could not have been accessed remotely without a local agent. In fact, the PKF Accountants and Business Advisers, in their report, under the caption, "Way forward to Management", clearly opined that VPL system could be accessed by an outsider on 13th January, 2019 only with the help of someone in the office. And for that purpose, Valiant must secure the support of local investigating agency. From the perusal of the FIR it does not appear that the Valiant had carried out any such exercise.

29. It is true, at this stage, the case of the applicant that he was using a different BlackBerry mobile phone handset, a receipt of which was tendered before the Investigating Officer, is a matter of defence and cannot be delved into. However, at the same time, the forensic report also deserves to be considered with the rider with which the auditors opined that it was possibly the applicant who had remotely accessed the desktop on 13th January, 2019.

30. On the core of the accusation of criminal breach of trust of the huge amount of Rs.80 Crores, over a period of 10 years, *prima facie,* the FIR does not contain any particulars. Indeed, FIR is not an encyclopedia. However, the fact that FIR came to be lodged after a considerable period of the alleged discovery of the fraud, may bear upon the absence of particulars. Thus, the endeavour on the part of respondent No.2 to furnish the statements of particulars of the alleged falsification of the accounts (page Nos.156 to 168 of the affidavit-in-reply) does not merit acceptance unreservedly.

31. In the circumstance of the case, whether an offence punishable under Section 409 of the Penal Code is made out appears to be debatable. None of the rest of the offences entails punishment exceeding seven years. The applicant has been on interim protection since 26th September, 2022. The applicant has appeared before the Investigating Officer. The applicant also appears to have roots in society. Possibility of fleeing away from justice appears to be remote. Likewise, Valiant being in the custody of the entire record, the possibility of tampering with evidence also appears remote. Even otherwise, appropriate conditions can be imposed to take care of apprehension on these counts.

32. For the foregoing reasons, I am persuaded to exercise the discretion in favour of the applicant.

33. Hence the following order:

: O R D E R :

(i) In the event of arrest of the applicant in CR No.143 of 2022, registered with Rabodi Police Station, Thane City, the applicant be released on bail on furnishing a PR Bond in the sum of Rs.30,000/- with one or two sureties in the like amount.

(ii) The applicant shall cooperate with the investigation and attend Rabodi Police Station on 9th and 10th November, 2023 in between 10.00 am. to 1.00 pm. and, thereafter, as and when directed.

(iii) The applicant shall not tamper with the prosecution evidence and/or give threat or inducement to the first informant or any of the persons acquainted with the facts of the case.

(iv) The applicant shall hand over the instruments and documents, which are in his custody, as may be directed by the Investigating Officer.

(v) The applicant shall not leave India without the prior permission of the jurisdictional Magistrate.

(vi) The applicant shall regularly attend the proceedings before the Jurisdictional Court.

(vii) It is clarified that these *prima facie* observations are confined to determine entitlement to pre-arrest bail only.

Application stands disposed.

[N. J. JAMADAR, J.]