Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

ANTICIPATORY BAIL APPLICATION NO. 3638 OF 2022

Nainesh Mohan Katke ...Applicant

Versus

The State of Maharashtra ...Respondent

WITH
INTERIM APPLICATION NO. 1487 OF 2023
IN
ANTICIPATORY BAIL APPLICATION NO. 3638 OF 2022

Priyanka Subhash More ...Applicant

In the matter between

Nainesh Mohan Katke ...Applicant

Versus

The State of Maharashtra ...Respondent

Mr. S. A. Shaikh, a/w Shafi Shaikh and Afsar Ansari, for the Applicant.
Mr. S. H. Yadav, APP for the State/Respondent.
Ms. Vilasini Balsubramanian, for Respondent No.2.
PSI M. K. Varhadi, NRI Sagari Police Station, Navi Mumbai, present.

CORAM: N. J. JAMADAR, J.
DATED: 6th DECEMBER, 2023

ORDER:-

1. Heard the learned Counsel for the applicant and the learned APP for the State.

2. This is an application for pre-arrest bail in connection with CR No.233 of 2021, registered with NRI Police Station, Navi Mumbai, for an offence punishable under Section 420 read with Section 34 of the Indian Penal Code, 1860 ("the Penal Code").

3. The indictment against the applicant is that the applicant and his wife Mrs. Aruna Katke, the co-accused, who is the proprietress of Ashray Enterprises, are Builders and Developers. The applicant and co-accused entered into a Development Agreement with Yogesh Mhatre, who was the owner of the land bearing Survey No.21/22 and despite being apprised by the owner that building permission could not be granted for development at the said site, the applicant and co-accused constructed a building comprising 59 flats and five shops sans any permission. By making false representations, the first informant and the other investors were induced to purchase the flats and shops in the said building. The first informant and other purchasers availed loan from Banks and Financial Institutions. Post sale, the purchasers were delivered possession. As the building was erected sans any permission from the Competent Planning Authority, in the month of January, 2019, CIDCO displayed a board at the said site that the building was illegal. When the first informant and other purchasers approached the applicant and other co-accused, some amount was repaid. However, despite promises, the applicant and the co-accused did not clear the amount of loan raised by the purchasers. Hence, the report.

4. The learned Counsel for the applicant submitted that the applicant has no concern with M/s. Ashray Enterprises, of which his wife is the proprietress. Attention of the Court was invited to the Agreement for Sale executed between Ashray Enterprises, the first informant and the purchasers and the subsequent Deed of Cancellation after the building was declared illegal. It was submitted that the applicant had been roped in only for being the husband of co-accused Aruna. In any event, according to Mr. Shaikh, the learned Counsel for the applicant, at this length of time the custodial interrogation of the applicant is not warranted as the investigation is complete and charge-sheet has already been lodged. Co-accused Aruna was arrested. She has been released on bail. Mr. Shaikh would further urge that though the applicant had filed an undertaking before this Court to deposit the loan amount of Rs.1,62,00,000/- with the respective Banks and Financial Institutions and could not comply with the said undertaking on account of the circumstances beyond his control, yet, the applicant cannot be deprived of the relief of pre-arrest bail on the said count.

5. The learned APP submitted that the applicant was the key person. Co-accused Aruna was the nominal proprietress of M/s. Ashray. It was the applicant, who had made all the false representations and induced persons to part with the amounts and enter into the transactions. Therefore, the applicant cannot be permitted to wriggle out of the situation by simply asserting that he had no role in the alleged transactions. Attention of the Court was invited to the statements of the witnesses/victims, who have stated about the role played by the applicant. The learned APP further submitted that in the face of the undertaking, on an affidavit, to deposit a sum of Rs.1,62,00,000/- with Banks and Financial Institutions to clear the loans raised by the purchasers (and thereby obtaining the orders of pre-arrest bail on the basis of the said undertaking), it is now not open to the applicant to resile therefrom and seek relief on merits.

6. Ms. Balsubramanian, the learned Counsel for respondent No.2; the first informant, submitted that innocent and unsuspecting home buyers were deceived by the applicant and the co-accused. They had invested their life's savings. The brazen act of constructing the building without any permission and thereby inducing the home buyers to purchase the flats therein can only be in pursuance of a dishonest design.

7. It would be suffice to note that the applicant had filed an undertaking to deposit a sum of Rs.1,62,00,000/- in the loan accounts of the purchasers with the Banks and Financial Institutions, within a period of six months from 3rd July, 2023. As the applicant failed to comply with the said undertaking, by an order dated 18th October, 2023 the interim protection came to be vacated.

8. It is true an application for pre-arrest bail cannot be rejected only on the ground that the applicant has not deposited the amount as ordered by the Court or as undertaken. However, the conduct of the applicant accused in making the Court believe that the undertaking would be honoured and thereby obtaining the relief and, later on, committing default in compliance with the said undertaking bears upon the exercise of the discretionary relief. Nonetheless, in the case at hand, I propose to appreciate the prayer for pre-arrest bail on the merits of the matter.

9. First and foremost, there are statements of the witnesses which show that the applicant had played a pivotal role in inducing the first informant and purchasers to book the flats and part with the amount. The role attributed to the applicant is stated to by the prosecution witnesses with sufficient clarity. The applicant thus cannot be permitted to wriggle out of the liability by simply asserting that his wife is the proprietress of M/s. Ashray Enterprises.

10. Secondly, *prima faice* complicity lies not only in inducing the purchasers to book the flats and committing default in the performance of the contract, but also in erecting a huge building sans any permission of the Competent Planning Authority. It is this element which aggravates the offence. The first informant and other purchasers were made to avail loan believing the representation that they were purchasing a unit in a lawfully constructed building. Eventually, the purchasers are saddled with home loan and the liability to pay interest thereon. As noted above, a sum of Rs.1,62,00,000/- is the outstanding loan amount availed by the purchasers to acquire the units in the building, which was illegally erected by the applicant and the co-accused.

11. In the aforesaid view of the matter, I find it difficult to accede to this submission that since the co-accused has been arrested and released on bail and charge-sheet has been lodged, the applicant deserves the exercise of discretion. In the totality of the circumstances, as dishonest intention on the part of the applicant and the co-accused is *prima facie* evident since entering into the transaction of development agreement with the holder of the land and erecting a huge building sans permission, this is not a fit case in which an accused can be granted the dispensation of pre-arrest bail. The conduct of the applicant in filing the undertaking and committing breach thereof also dissuades the Court from granting the discretionary relief.

12. Hence the following order:

: O R D E R :

(i) Application stands rejected.

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

[N. J. JAMADAR, J.]