

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRM-M-38394-2022 (O&M)

Date of Decision:- 2.3.2023

Ashish Kumar

... Petitioner

Versus

State of Haryana

... Respondent

CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL

Present:- Ms. Mandavi Pandey, Advocate,
Mr. Sanjeet Mishra, Advocate for
Mr. Vikas Tripathi, Advocate and
Mr. Girraj Singh, Advocate for the petitioner.

Mr. Gurmeet Singh, AAG, Haryana

Ms. Supriya Arora, Advocate/complainant-in-person.

GURVINDER SINGH GILL, J.

1. The petitioner seeks grant of regular bail in a case registered vide FIR No.72 dated 15.5.2020 under Sections 406, 420, 120-B IPC at Police Station Sector 37, Gurugram, District Gurugram.
2. The FIR in question was lodged at the instance of Supriya Arora wherein it is alleged that on 7.5.2020, she contacted Sagar, who claimed himself to be a partner of M/s Rythm Divine Healthcare, Ahmedabad, on his mobile phone No.9374540857, which deals in face masks as the complainant was interested in purchasing face masks on account of spread of pandemic COVID-19. The complainant's husband Abhisek Verma was also having business of surgical equipment under the name and style of S.P. Surgical Equipment, Chennai. Since the complainant and her husband were scared to

have any business dealing in Ahmedabad as they did not know anybody out there, Sagar introduced them to one Ashish in Gurugram stating that Ashish is his business partner. The complainant sent their associate Jaipreet Singh to meet Ashish and to inspect the stock at the site where he met Ashish and Rajat Deep. However, Ashish and Rajat Deep told Jaipreet that some token money would be required before inspecting stock and making video of the stock. When Jaipreet again met Ashish, he paid an amount of ` 4 lacs in cash and after taking the money, Ashish took Jaipreet to residence of Rajat Deep who was residing in Dwarka. Jaipreet made a video of the stock lying therein. Rajat Deep told Jaipreet that they have received an amount of `4 lacs and that the balance amount is to be paid in the account of M/s Rythm Divine Healthcare through Vishal and Sagar. Consequently, the complainant transferred another amount of ` 2 lacs from her personal savings account. Later, on 8.5.2020 and 11.5.2020, more amount was transferred in the account of M/s Rythm Divine Healthcare from current account of company of complainant's husband M/s S.P. Surgical Equipment and as such a total `44,60,000/- was transferred to the account of M/s Rythm Divine Healthcare, Ahmedabad. Thus, in all an amount of ` 86,025/- remained unpaid. Accordingly, the complainant sent her transport person to the site from where the stock was to be collected but the accused totally denied having received any money and did not give any masks. The complainant alleged that Rajat Deep claimed to be highly influential and had been threatening her that his father was a retired Commissioner and that he has good links with higher officials. The complainant, thus, alleged that Rajat Deep, Ashish, Vishal and Sagar had all cheated her and had deprived her of huge

money on the pretext of giving stock of face mask but they neither give the face mask nor had refunded the money.

3. Before proceeding further, the matter as regards maintainability of the instant petition under provisions of Section 439 Cr.P.C. needs to be discussed as the petitioner is presently not in custody and there is no order, at the moment, on the strength of which it could be said that he is enjoying any kind of protection from his arrest. As a matter of fact, the petitioner had previously been granted interim bail on account of spread of pandemic COVID-19 but despite the said instructions having been withdrawn since long, the petitioner not chosen to surrender.

4. Section 439 Cr.P.C. reads as under:

“439. Special powers of High Court or Court of Session regarding bail.-- (1) A High Court or Court of Session may direct-

- (a) that any person accused of an offence **and in custody** be released on bail, and if the offence is of the nature specified in subsection (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that subsection;
- (b) that any condition imposed by a Magistrate when releasing an person on bail be set aside or modified:

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life,

give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.”

5. The petitioner had initially been released on interim bail on 15.5.2021 pursuant to directions of High Powered Committee of this Court with a direction to surrender on 31.8.2021. The said directions were extended thereafter from time to time but all such directions were ultimately withdrawn vide order dated 7.3.2022 passed in CWP-PIL No. 77 of 2021.
6. It may here be mentioned that Hon’ble Supreme Court was also seized of a *Suo- Motu* Writ Petition i.e. SMW(C) No. 1/2020 titled as ‘In Re : Contagion of Covid 19 Virus in Prisons’, wherein several directions had been issued including grant of interim bails to under-trials, prisoners etc. Certain applications had been filed in the said SMW petition but ultimately the said SMW petition came to be finally disposed of on 3.6.2022, when the following order was passed :-

“ INTERLOCUTORY APPLICATION NOS. 80311, 80314 & 80316 OF 2022 IN SUO MOTU WRIT PETITION (CIVIL) NO. 01 OF 2020

AND

SLP (Crl.) Nos. 5507-5508/2022 AND 5516/2022

The Interlocutory Applications as well as Special Leave Petitions are dismissed. Pending application(s) including I.A. No.82937/2022-Intervention Application shall stand disposed of.

However, 15 days time is granted to the applicants/petitioners/prisoners to surrender before the prison authorities.”

7. When the matter was taken up by this Court on 18.11.2022, pursuant to an application for preponement, having been moved on behalf of the petitioner, the following order was passed :-

“By way of filing the instant application, the applicant/petitioner seeks preponement of the main case, which stands fixed for 27.2.2023.

It has been informed by learned State counsel that the applicant/petitioner had earlier been granted interim bail on account of spread of pandemic COVID-19 but has not surrendered though interim bail had come to an end since long. In other words, the applicant/petitioner is evading his arrest till date. It has further been informed by learned State counsel that his non-bailable warrants have already been issued.

In view of the aforestated position, the very maintainability of petition under provisions of Section 439 Cr.P.C. seeking grant of regular bail, would be a debatable question. No ground for preponement of main case i.e. CRM-M-38394-2022 is made out particularly when the applicant/petitioner has chosen not to surrender.

The applicant/petitioner would be well advised to surrender before the jail authorities immediately. Upon his surrender, it shall be open to him to move afresh for early hearing.

The instant application stands disposed off accordingly.”

(emphasis supplied)

8. It has been informed that the petitioner till date has not surrendered despite the fact that all such interim bails, as had been granted earlier on account of COVID-19 have come to an end. The petitioner cannot even *feign* ignorance about withdrawal of all such orders, as the said fact is specifically referred to in order dated 18.11.2022. The petitioner cannot even be said to be in any kind of ‘protective custody’. As such, the instant petition under Section 439

Cr.P.C., wherein the petitioner is neither in custody nor is there any order to show that he is on interim-bail, is hereby dismissed, being not maintainable.

2.3.2023
kamal

(Gurvinder Singh Gill)
Judge

Whether speaking /reasoned	Yes / No
Whether Reportable	Yes / No