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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 22nd August, 2023

\+ BAIL APPLN. 229/2023 and CRL.M.A. 17291/2023 (directions)

MOHD IRFAN @ RAJJI ..... Petitioner

Through: Mr. Rajiv Maini and Ms. Shriya Maini, Advocates alongwith Pairokar.

versus

STATE OF NCT OF DELHI ..... Respondent

Through: Mr. Aman Usman, APP for the State. Inspector Raj Kumar Singh, PS– Hauz Qazi.

CORAM:
HON'BLE MR. JUSTICE AMIT SHARMA

JUDGMENT

AMIT SHARMA, J.

1. This is a second application under Section 439 of the Code of Criminal Procedure, 1973 ('CrPC') on behalf of the applicant seeking regular bail in FIR No. 30/2021, under Sections 420/406/120B of the Indian Penal Code, 1860 ('IPC'), Sections 4/20/21/25 of the Indian Telegraph Act, 1885 and Section 65 of the Information Technology Act, 2000, registered at P.S. Hauz Qazi.

2. The case of the prosecution is that the present applicant, alongwith co-accused persons had entered into a conspiracy and established an illegal telephone exchange. It is alleged that by way of establishing the said exchange, huge monetary loss was caused to the government exchequer and telecommunication sector, as international calls can be terminated in India through Department of Telecom ('DOT') licensed operators only. It is the case of the prosecution that the said telephone exchange was set up in Chawri Bazar, Delhi and run by the present applicant. It is alleged that the present applicant was using 'New Era Software Driver Technology' for routing calls from countries like United States of America, Canada, United Arab Emirates and Australia, *via* an illegal route over the internet, by-passing the legal international and national call gateways of India. It is alleged that the said set-up was being run by the name of 'Adeeba Enterprises'.

3. On prior information regarding commission of the alleged offences, a team of police officials raided the premises and seized the articles used in running of the said telephone exchange. The present applicant was arrested on 07.10.2021 and has been in custody since then.

4. Learned counsel appearing on behalf of the applicant submitted that the first application for bail on behalf of the applicant was dismissed *vide* order dated 15.09.2022 passed by a learned Single Judge of this Court in BAIL APPLN. 1243/2022. It was submitted that the aforesaid application was dismissed with the observation that apart from the seriousness of the offence, the likelihood of the applicant tampering with the evidence at that stage was not ruled out. It was submitted that in the present case, the chargesheet was filed on 08.04.2021 and thereafter two supplementary chargesheets have been filed on 26.11.2021 and 25.02.2022. It was pointed out that all the evidence in the present case is documentary in nature and that despite passage of so many years of judicial custody, charges have not been framed. It was further submitted that the prosecution has cited 49 witnesses and therefore, the trial is not likely to conclude in the near future.

5. Learned counsel appearing on behalf of the applicant submitted that two of the accused persons in the present case have been granted bail by this Court. It was further submitted that after the dismissal of the bail application by a learned Single Judge of this Court, as recorded hereinabove, the FSL reports have been received and as per the latest status report filed by the State, investigation is still continuing with regard to certain deposits of money which have come to surface after the FSL report was received.

6. *Per contra,* learned APP for the State submitted that the applicant committed an offence of a huge magnitude. It was further submitted that the previous application for bail was dismissed by a learned Single Judge of this Court on merits and since then, there has been no change in circumstances. It was pointed out that the present applicant had purchased 04 IBM and 01 HP SIP server from one Montu Mandal for Rs. 2,90,000/-. It was further stated in the status report that a *hawala* transaction of Rs. 90 lakhs was involved and out of the said amount, Rs. 45 lakhs was allegedly given by the present applicant to one Irfan Ali.

7. To corroborate the said allegation, it was pointed out that in the FSL report in relation to the phone used by the present applicant, chats with one Murtaza have been retrieved, showing that the present applicant was dealing with *hawala* transaction. It has also come on record that at the instance of the present applicant, various amounts were deposited into accounts belonging to persons known to him, as part of the said *hawala* transactions. It was further stated that investigation with respect to the said accounts is still underway.

8. Heard learned counsel for the parties and perused the record.

9. The first bail application on behalf of the present applicant was dismissed by learned Single Judge of this Court *vide* order dated 15.09.2022 passed in BAIL APPLN. 2059/2022 titled 'Mohd Irfan @ Rajji v. State of NCT of Delhi'.

10. In the present case, the prosecution has filed a chargesheet *qua* the accused persons, including the present applicant for offences punishable under Sections 420/406/120B of the IPC, Sections 20/21/25 of the Indian Telegraph Act, 1885 and Section 65 of the Information Technology Act, 2000. So far as the offence under Section 420 of the IPC is concerned, the definition of 'cheating' as per Section 415 of the IPC, is as under:

> "**415. Cheating.—**Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any proper-ty to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".
> *Explanation.*—A dishonest concealment of facts is a deception within the meaning of this section."

It is thus, clear that the basic ingredient of cheating is fraudulently or dishonestly inducing someone to deliver any property to any person, or to consent that any person shall retain any property. It is the case of the prosecution that the applicant, alongwith other co-accused persons was running a telephone exchange and was using software to route calls from abroad *via* an illegal channel, thereby by-passing the legal national and international telecommunication gateways of India. It is not the case of the prosecution that the complainant in the present case was in any way, deceived by the applicant. The allegation is that huge monetary loss has been caused to the government exchequer and the telecommunication sector on account of the aforesaid illegal telephone exchange. The Hon'ble Supreme Court, in **Mohammed Ibrahim and Others v. State of Bihar and Another, (2009) 8 SCC 751**, held as under:

> *"Section 420 IPC*
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> **18.** Let us now examine whether the ingredients of an offence of cheating are made out. The essential ingredients of the offence of "cheating" are as follows:
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> (*i*) deception of a person either by making a false or misleading representation or by dishonest concealment or by any other act or omission;
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> (*ii*) fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived; and
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> (*iii*) such act or omission causing or is likely to cause damage or harm to that person in body, mind, reputation or property.
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> **19.** To constitute an offence under Section 420, there should not only be cheating, but as a consequence of such cheating, the accused should have dishonestly induced the person deceived
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> (*i*) to deliver any property to any person, or
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> (*ii*) to make, alter or destroy wholly or in part a valuable security (or anything signed or sealed and which is capable of being converted into a valuable security).
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> **xxx**
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> **21.** It is not the case of the complainant that any of the accused *tried to deceive him* either by making a false or misleading representation or by any other action or omission, nor is it his case that they offered him any fraudulent or dishonest inducement to deliver any property or to consent to the retention thereof by any person or to intentionally induce

him to do or omit to do anything which he would not do or omit if he were not so deceived. Nor did the complainant allege that the first appellant pretended to be the complainant while executing the sale deeds. Therefore, it cannot be said that the first accused by the act of executing sale deeds in favour of the second accused or the second accused by reason of being the purchaser, or the third, fourth and fifth accused, by reason of being the witness, scribe and stamp vendor in regard to the sale deeds, deceived the complainant in any manner.

22. As the ingredients of cheating as stated in Section 415 are not found, it cannot be said that there was an offence punishable under Sections 417, 418, 419 or 420 of the Code."

11. Similarly, Section 406 of the IPC provides for punishment for criminal breach of trust, which has been defined in Section 405 of the as under:

"**405. Criminal breach of trust.—**Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

Explanation 1.—A person, being an employer of an estab-lishment whether exempted under section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), or not who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

Explanation 2.—A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and admin-istered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 (34 of 1948), shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid."

As pointed out hereinabove, it is not the case of the prosecution that the present applicant, in any way, was entrusted with any property or dominion of the property belonging to anyone, including the complainant in the present FIR.

12. Be that as it may, the allegations in the present matter are for commission of offences under Sections 420 and 406 of the IPC which are punishable with imprisonment for a maximum of seven years and three years, respectively. Offences under Sections 20 and 25 of the Indian Telegraph Act, 1885 are punishable with imprisonment for a maximum of three years and offence under Section 21 of the said Act is punishable with a maximum fine of rupees fifty. Offence under Section 65 of the Information Technology Act, 2000 is punishable with imprisonment for a maximum of three years. Chargesheet in the present case was filed on 08.04.2021 and thereafter two supplementary chargesheets have been filed on 26.11.2021 and 25.02.2022.

13. In **Satender Kumar Antil v. Central Bureau of Investigation and Another, (2022) 10 SCC 51**, the Hon'ble Supreme Court held as under:

"**Economic offences (Category D)**

90. What is left for us now to discuss are the economic offences. The question for consideration is whether it should be treated as a class of its own or otherwise. This issue has already been dealt with by this Court in *P. Chidambaram* v. *Directorate of Enforcement* [*P. Chidambaram* v. *Directorate of Enforcement*, (2020) 13 SCC 791 : (2020) 4 SCC (Cri) 646] , after taking note of the earlier decisions governing the field. The gravity of the offence, the object of the Special Act, and the attending circumstances are a few of the factors to be taken note of, along with the period of sentence. After all, an economic offence cannot be classified as such, as it may involve various activities and may differ from one case to another. Therefore, it is not advisable on the part of the court to categorise all the offences into one group and deny bail on that basis. Suffice it to state that law, as laid down in the following judgments, will govern the field:

Precedents

91.*P. Chidambaram* v. *Directorate of Enforcement* [*P. Chidambaram* v. *Directorate of Enforcement*, (2020) 13 SCC 791 : (2020) 4 SCC (Cri) 646] : (SCC pp. 804-805, para 23)

"*23*. **Thus, from cumulative perusal of the judgments cited on either side including the one rendered by the Constitution Bench [*Gurbaksh Singh Sibbia* v. *State of Punjab*, (1980) 2 SCC 565 : 1980 SCC (Cri) 465] of this Court, it could be deduced that the basic jurisprudence relating to bail remains the same inasmuch as the grant of bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial.** However, while considering the same the gravity of the offence is an aspect which is required to be kept in view by the Court. The gravity for the said purpose will have to be gathered from the facts and circumstances arising in each case. Keeping in view the consequences that would befall on the society in cases of financial irregularities, it has been held that even economic offences would fall under the category of "grave offence" and in such circumstance while considering the application for bail in such matters, the Court will have to deal with the same, being sensitive to the nature of allegation made against the accused. One of the circumstances to consider the gravity of the offence is also the term of sentence that is prescribed for the offence the accused is alleged to have committed. Such consideration with regard to the gravity of offence is a factor which is in addition to the triple test or the tripod test that would be normally applied. **In that regard what is also to be kept in perspective is that even if the allegation is one of grave economic offence, it is not a rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence pro*vide* so.** Therefore, the underlining conclusion is that irrespective of the nature and gravity of charge, the precedent of another case alone will not be the basis for either grant or refusal of bail though it may have a bearing on principle. **But ultimately the consideration will have to be on case-to-case basis on the facts**

involved therein and securing the presence of the accused to stand trial."

92._Sanjay Chandra_ v. _CBI_ [_Sanjay Chandra_ v. _CBI_, (2012) 1 SCC 40 : (2012) 1 SCC (Cri) 26 : (2012) 2 SCC (L&S) 397] : (SCC pp. 62-64, paras 39-40 & 46)

"_39_. Coming back to the facts of the present case, both the courts have refused the request for grant of bail on two grounds : the primary ground is that the offence alleged against the accused persons is very serious involving deep-rooted planning in which, huge financial loss is caused to the State exchequer; the secondary ground is that of the possibility of the accused persons tampering with the witnesses. **In the present case, the charge is that of cheating and dishonestly inducing delivery of property and forgery for the purpose of cheating using as genuine a forged document. The punishment for the offence is imprisonment for a term which may extend to seven years. It is, no doubt, true that the nature of the charge may be relevant, but at the same time, the punishment to which the party may be liable, if convicted, also bears upon the issue.** Therefore, in determining whether to grant bail, both the seriousness of the charge and the severity of the punishment should be taken into consideration.

_40_. The grant or refusal to grant bail lies within the discretion of the court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the court, whether before or after conviction, to assure that he will submit to the jurisdiction of the court and be in attendance thereon whenever his presence is required.

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_46_. We are conscious of the fact that the accused are charged with economic offences of huge magnitude. We are also conscious of the fact that the offences alleged, if proved, may jeopardise the economy of the country. At the same time, we cannot lose sight of the fact that the investigating agency has already completed investigation and the charge-sheet is already filed before the Special Judge, CBI, New Delhi. Therefore, their presence in the custody may not be necessary for further investigation. We are of the view that the appellants are entitled to the grant of bail pending trial on stringent conditions in order to ally the apprehension expressed by CBI."

Role of the court

93. The rate of conviction in criminal cases in India is abysmally low. It appears to us that this factor weighs on the mind of the Court while deciding the bail applications in a negative sense. Courts tend to think that the possibility of a conviction being nearer to rarity, bail applications will have to be decided strictly, contrary to legal principles. **We cannot mix up consideration of a bail application, which is not punitive in nature with that of a possible adjudication by way of trial. On the contrary, an ultimate acquittal with continued custody would be a case of grave injustice.**

94. Criminal courts in general with the trial court in particular are the guardian angels of liberty. Liberty, as embedded in the Code, has to be preserved, protected, and enforced by the criminal courts. Any conscious failure by the criminal courts would constitute an affront to liberty. It is the pious duty of the criminal court to zealously guard and keep a consistent vision in safeguarding the constitutional values and ethos. A criminal court must uphold the constitutional thrust with responsibility mandated on them by acting akin to a high priest."

(emphasis supplied)

14. In **Sanjay Chandra v. Central Bureau of Investigation, (2012) 1 SCC 40**, the Hon'ble Supreme Court held as under:

"**21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.**

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson."

(emphasis supplied)

15. In **Vaman Narayan Ghiya v. State of Rajasthan, (2009) 2 SCC 281**, the Hon'ble Supreme Court held as under:

"**7.** Personal liberty is fundamental and can be circumscribed only by some process sanctioned by law. Liberty of a citizen is undoubtedly important but this is to balance with the security of the community. A balance is required to be maintained between the personal liberty of the accused and the investigational right of the police. It must result in minimum interference with the personal liberty of the accused and the right of the police to investigate the case. It has to dovetail two conflicting demands, namely, on the one hand the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence viz. the presumption of innocence of an accused till he is found guilty. Liberty exists in proportion to wholesome restraint, the more restraint on others to keep off from us, the more liberty we have. (See *A.K. Gopalan* v. *State of Madras* [1950 SCC 228 : AIR 1950 SC 27])

8. The law of bail, like any other branch of law, has its own philosophy, and occupies an important place in the administration of justice and the concept of bail emerges from the conflict between the police power to restrict liberty of a man who is alleged to have committed a crime, and presumption of innocence in favour of the alleged criminal. An accused is not detained in custody with the object of punishing him on the assumption of his guilt."

16. In **Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav and Another, (2005) 2 SCC 42**, the Hon'ble Supreme Court had held as under:

> "18. It is trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a constitutional guarantee. However, Article 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorised by law. But even persons accused of non-bailable offences are entitled to bail if the court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail where fact situations require it to do so. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases if the circumstances then prevailing require that such persons be released on bail, in spite of his earlier applications being rejected, the courts can do so."

17. As per the nominal roll dated 12.05.2023, the applicant has been in judicial custody for 01 year 07 months and 05 days, since his arrest on 07.10.2021. He is not involved in any other offence. The chargesheet, as well as the supplementary chargesheets in the present case stand filed. No useful purpose will be served by keeping the applicant in judicial custody any further.

18. In totality of the facts and circumstances of the case, the present application is allowed.

19. The applicant is admitted to bail upon his furnishing a personal bond in the sum of Rs. 50,000/- alongwith two sureties of like amount to the satisfaction of the learned Trial Court/Link Court, further subject to the following conditions:

i. The memo of parties shows that the applicant is residing at House No. C - 48/8, Gali No. 14/5, Chauhan Bangar, Seelampur, New Delhi - 110053. In case of any change of address, the applicant is directed to inform the same to the learned Trial Court and the Investigating Officer.

ii. The applicant shall not leave India without the prior permission of the learned Trial Court.

iii. The applicant is directed to give all his mobile numbers to the Investigating Officer and keep them operational at all times.

iv. The applicant shall not, directly or indirectly, tamper with evidence or try to influence the witnesses in any manner.

v. The applicant shall join the investigation, as and when required by the Investigating Officer.

vi. In case it is established that the applicant tried to tamper with the evidence, the bail granted to the applicant shall stand cancelled *forthwith*.

20. The application stands disposed of along with all the pending application(s), if any.

21. Needless to state, nothing mentioned hereinabove is an opinion on the merits of the case.

22. Let a copy of this judgment be communicated to the concerned Jail Superintendent.

23. Judgment be uploaded on the website of this Court, *forthwith.*

AMIT SHARMA
JUDGE

AUGUST 22, 2023/*nk*