

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

ANTICIPATORY BAIL APPLICATION NO. 603 OF 2024

Sunil Malharrao Pande

..Applicant

Versus

The State of Maharashtra

..Respondent

Mr. Ashok M. Saraogi for Applicant.

Ms. Mahalakshmi Ganapathy, APP for State/Respondent.

CORAM :- SARANG V. KOTWAL, J.

DATE :- 5 APRIL 2024

P.C. :-

1. The Applicant is seeking anticipatory bail in connection with C.R.No.949 of 2023 registered at Dindoshi Police Station, Mumbai, on 20.12.2023, under Sections 406 and 420 of the Indian Penal Code and under Section 74(2) of the Maharashtra Value Added Tax Act, 2002 (hereinafter referred to as 'MVAT').

2. Heard Mr. Ashok Saraogi, learned counsel for the applicant and Ms. Mahalakshmi Ganapathy, learned APP for the State.

3. The F.I.R. is lodged by the Assistant Sales Tax

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Commissioner Sachin Chikhle. The present applicant was the owner of M/s. Malhar Shanti Enterprises. The informant's jurisdiction covered the applicant's establishment which had its registered office at Malad (East). The nature of business of the applicant's establishment was dealing in goods which were used in construction business. The applicant was required to pay the tax on the goods sold by him. But the applicant had not deposited the tax with the Government. He was repeatedly sent the letters in that behalf, but he did not respond and he did not pay the tax. The F.I.R. mentions that, from the year 2009 to 2017 the total tax which was due and payable from him was to the tune of Rs.1,47,56,486/-. The authorities had freezed various bank accounts of the applicant. The informant had gone to the address of the applicant, but he was not found there. He was issued a show-cause notice dated 13.10.2022, but he did not make the payment of the tax. Hence, he committed the offence punishable U/s.74(2) of the MVAT and under sections 420 and 406 of the I.P.C. On this basis the F.I.R. was lodged.

4. Shri. Saraogi, learned counsel for the applicant made

the following submissions.

There is a distinction between the MVAT and the GST. Under the GST, the concerned establishment had to pay the tax whether it was received from its customers or not. However, Under the MVAT, a person was required to pay the tax only when he had received the tax from his customers. In this case, there was huge payment due and payable from M/s. CAN Enterprises Private Limited. The applicant had invoked Section 9 of the Insolvency & Bankruptcy Code, 2016 (IBC) by filing the proceedings vide CP (IB) 3753/MB/C-IV/2018 before the National Company Law Tribunal, Mumbai Bench (hereinafter referred to as 'NCLT') against CAN Enterprises; as a corporate debtor. Shri. Saraogi submitted that, these proceedings are still going on and a huge amount is due and payable by that entity to the present applicant. That was the reason why the applicant could not make the payment of the tax; as alleged in the F.I.R. Therefore, the F.I.R. against the applicant was not legal.

Shri. Saraogi further submitted that, MVAT is a

complete code in itself. There is a special procedure prescribed under the said Act and, therefore, registration of the F.I.R. under the Cr.p.c. and applicability of Sections 406 and 420 of the I.P.C. was not permissible under the law. In any case, from the allegations in the F.I.R., neither Section 420 of the I.P.C. nor Section 406 of the I.P.C. is made out. Nobody was cheated and was induced into parting with the property; as required under section 420 of the I.P.C. Similarly, there was no entrustment to the applicant and, therefore, Section 406 of the I.P.C. is also not made out.

The provisions of the Indian Penal Code could be applied only if the allegations in that behalf were different from the offences prescribed under the Special Act. Whenever there is a conflict between the I.P.C. and the Special law, the provisions of the Special Law would prevail. Therefore, in this case, at the highest, only Section 74(2) of the MVAT would be applicable; which is a bailable offence. In support of his contention, he relied on the Judgment of the Division Bench of this Court in the case of

Gagan Harsh Sharma & Anr. Vs. The State of Maharashtra¹. He submitted that the Division bench had held that the ingredients of the offences U/s.420, 408 and 379 of the I.P.C. were covered by Section 66 of the Information Technology Act, 2000, and prosecuting those petitioners under the I.P.C. and the I.T. Act would be a brazen violation of protection against double jeopardy. Shri. Saraogi submitted that, those observations are applicable to the present case, as well, because in the facts of this case also it would not be permissible to prosecute the present applicant under both, the I.P.C. and under the MVAT. Shri. Saraogi further submitted that the said order was challenged before the Hon'ble Supreme Court in SLP (Cri.) Nos.10264-10265 of 2018. The said SLP was dismissed; meaning thereby the ratio of ***Gagan Sharma*** (supra) was upheld.

5. Learned APP, on the other hand, opposed these submissions relying on the various judgments of the Hon'ble Supreme Court and of this Court. She made the following submissions:

1 Criminal W. P. No.4361 of 2018 : Decided on 26.10.2018.

The proceedings preferred by the applicant before the NCLT are not bonafide. The allegations in the F.I.R. pertain to the period from 2009 to 2017 and the proceedings before the NCLT referred to herein above were preferred by the applicant in the year 2018. This shows that, it was filed with a malafide intention. The said proceedings were filed only against one entity namely M/s. CAN Enterprises Private Limited. However, evasion of the MVAT is in respect of the Applicant's business transactions with the four other entities namely Kavya Mira Realty, Vijaya Monterio, Gaula Closure and Vijayaben Kanji Asher.

She submitted that, the investigation has revealed that the sale has been shown in the name of these four entities by the applicant's firm and, therefore, MVAT was payable to the Government in respect of those transactions, as well. She submitted that, various amounts were taken from the applicant's customers on the premise that those amounts would be paid as tax to the State Government. Thus, ingredients of inducement in parting with property are made out, as far as, Section 420 of the I.P.C. is concerned. Apart from that, the money which was taken

from these entities was misappropriated by the applicant. Therefore, the offence U/s.406 of the I.P.C. is also made out.

Learned APP further submitted that the investigation has revealed that the applicant had filed returns up to the year 2014 and, thereafter, even the returns were not filed. The figures mentioned in the F.I.R. are taken from the captured data and the other figures upto the year 2014 are taken from the returns filed by him. The applicant has not made payment of any tax and thus, the offence U/s.74(2) of the MVAT, as well as, U/s.406 and 420 of the I.P.C. are clearly made out.

6. In support of her submissions, she relied on various judgments, as follows:

(i) ***State of Uttar Pradesh Versus Aman Mittal and another***². She contended that, it is held in this Judgment that, dismissal of Special Leave Petition does not mean that the order of the High Court which is challenged in the S.L.P. is merged with the Supreme Court's order and that it becomes the Supreme Court order. She further submitted that the said Judgment also lays down that the prosecution under two

2 (2019) 19 Supreme Court Cases 740

different enactments can go on simultaneously.

(ii) *State of Maharashtra and another Versus Sayyed Hassan Sayyed Subhan and others*³; wherein, the Hon'ble Supreme Court had referred to Section 26 of the General Clauses Act and had held that, there was no bar to a trial or conviction of an offender under two different enactments.

(iii) *State of W. B. Versus Narayan K. Patodia*⁴. In this case, the provisions of the West Bengal Sales Tax Act 1994 were considered and it was held that the investigation by the police officers after registration of the F.I.R. can be continued. In that case, the offences under sections 468, 471 and 420 of the I.P.C. were also applied.

(iv) The Division Bench Judgment of this Court in the case of *G. S. Oils Ltd. Versus The State of Maharashtra*⁵. In this case, registration of F.I.R. for the offences under the I.P.C. together with those under MVAT were challenged on the premise that, both these Acts were different. Learned APP submitted that, in this case, the division bench had referred to the case of *State of W.B. V/s. Narayan Patodia (supra)* and had not quashed the F.I.R.

(v) Lastly, she relied on the order of a Single Judge bench of

3 (2019) 18 Supreme Court Cases 145

4 (2000) 4 Supreme Court Cases 447

5 Criminal W.P.No.396 of 2012 with Criminal Application No.494 of 2012: decided on 11.10.2012.

this Court in the case of *Ashok S/O. Vittahalrao Sable Versus The State of Maharashtra in A.B.A.No.790 of 2020, decided on 18.01.2021*. She submitted that, the facts in that particular case are very similar to the present case. It was also an anticipatory bail application and there were allegations of evasion of tax. In that order, applicability of Sections 406 and 409 of the I.P.C. was considered in favour of the prosecuting agency.

Lastly, she submitted that, Section 74(2) of the MVAT refers to willful attempt to evade any tax or payment of any tax. Both these eventualities are covered under section 74(2) of the MVAT.

7. In response to the legal submissions made by learned APP, Shri. Saraogi added his few submissions, as follows:

He submitted that the order in *Ashok Sable's case (supra)* is not binding and there is no discussion of the legal provisions in that order. The case of *G. S. Oils Ltd. (supra)* dealt with the role of the accused and it is not in respect of the question of law involved in this case. *Narayan K. Patodia's case (supra)* was in respect of the investigating agency conducting the

investigation. In that case, there was a direct reference to Section 403 of the I.P.C. and Section 88(6) of the West Bengal Sales Tax Act, 1994. There is no specific mention of I.P.C. in MVAT, therefore, the observations in the said case are not applicable to the present case.

8. I have considered these submissions. For ready reference, Section 74(2) of the MVAT can be reproduced as under:

“74. Offences and penalty.

(1) -----

(a)

(b)

(c)

(d)

(e)

(f)

(g)

(1A) (i)

(ii)

(2) Whoever wilfully attempts in any manner whatsoever to evade any tax leviable under this Act or payment of any tax, penalty or interest under this Act shall on conviction be punished with rigorous imprisonment which shall not be less than three months but which may extend to one year and with fine.”

9. Under Section 76 of the MVAT the offences under that Act were bailable. Therefore, question of grant or refusal of anticipatory bail would arise only if Sections 406 and 420 of the I.P.C. are made applicable in the present case.

10. The F.I.R. and the investigation carried out so far reveals that, there was evasion of tax or non payment of tax to the tune of Rs.1,47,56,486/-; as mentioned earlier. There is no dispute that this amounts to an offence U/s.74(2) of the MVAT. The main question is, whether in this background, simultaneously, the applicant can be prosecuted for commission of the offence punishable under sections 420 and 406 of the I.P.C. as well, or as to whether there is a bar in conducting investigation and prosecution for the offences under the I.P.C. in this case.

11. Paragraph 7 of the Judgment in *Sayyed Hassan's case (supra)* is relevant in this case; which reads thus:

“7. There is no bar to a trial or conviction of an offender under two different enactments, but the bar is only to the punishment of the offender twice for the offence. Where an act or an omission constitutes an offence under two enactments, the offender may be prosecuted and punished under either or both enactments but shall not be liable to

be punished twice for the same offence. The same set of facts, in conceivable cases, can constitute offences under two different laws. An act or an omission can amount to and constitute an offence under the Indian Penal Code and at the same time, an offence under any other law. The High Court ought to have taken note of Section 26 of the General Clauses Act, 1897 which reads as follows:

26. Provisions as to offences punishable under two or more enactments - Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.”

These observations are with respect to Section 26 of the General Clauses Act. Thus, it is clearly laid down that, there was no bar to a trial or conviction of an offender under two different enactments. Same set of facts can constitute the offence under two different laws. This view was also taken in the case of ***Aman Mittal's case*** (supra). In that case, the Hon'ble Supreme Court considered the provisions of the Legal Metrology Act, 2009, Standards, Weights and Measures Act, 1976, The Essential Commodities Act and also the offences under the I.P.C. In that particular case, the Hon'ble Supreme Court had held that the scheme of the Legal Metrology Act, 2009 was for the offences for

use of weights and measures which are non standard and for tampering with or altering any standards, secondary standards or working standards of any weight or measure. That Act did not foresee any offence related to cheating as defined in section 415 of the I.P.C. or the offences under sections 467, 468 and 471 of the I.P.C. Since such offences were not punishable under the provisions of that Act, therefore, the prosecution for such offences could be maintained since the trial of such offences is not inconsistent with any of the provisions of that Act.

This observation of the Hon'ble Supreme Court is squarely applicable to the present case; as the MVAT does not provide any punishment for such offences, as Sections 420 and 406 of the I.P.C.

12. The same Judgment of *Aman Mittal's case (supra)* discussed *Gagan Sharma's case* (supra) in the context of dismissal of special leave petition. In paragraph-24 of *Aman Mittal's case* (supra), it was held that, dismissal of the special leave petition does not amount to merger of the order of the High Court with the

order passed in the special leave petition.

13. In *Narayan Patodia's case* (supra) the Hon'ble Supreme Court had dealt with the question of continuation of investigation by the police officers in respect of the special procedure and the investigating agency provided under the West Bengal Sales Tax Act, 1994. After analysing the relevant provisions, the Hon'ble Supreme Court had held that the offence falling under the I.P.C. and committed by a person while committing the offence contemplated U/s.88(c) of the said Act would not get displaced for the sole reason that the accused had committed the offence falling under Section 88(c) of the said Act. This Judgment was followed by the Division Bench of this Court in *G.S.Oils Ltd.'s case (supra)*. In that case, the provisions of the MVAT and the different provisions of the I.P.C. were specifically in issue. One of the sections of the MVAT was Section 74(2) and the I.P.C. sections were 406, 409, 420, 465, 471, 468, 120-B and 34. In the discussion made by the Division Bench, *Narayan Patodia's case (supra)* was relied on and the Division bench had refused to quash the F.I.R. when there were allegations that the accused had evaded

the tax liability by preparing the false record. In paragraph 16 of the Judgment, the Division Bench held thus:

“The Apex Court has in clear terms has held that merely because the accused has committed an offence falling under the special statute would not mean that the offences under the Indian Penal Code would get displaced. As already discussed herein above, the accused are also charged additionally for the offence punishable under Sections 465 and 471 of I.P.C. which are not common with any of the offences as provided under the VAT Act.”

14. Thus, the ratio of the Division Bench Judgment in the case of *G.S.Oils Ltd.'s (supra)* is squarely applicable to the present facts of the case. The said Judgment in *G.S.Oils Ltd.'s case (supra)* specifically refers to the I.P.C. offences U/s.406 and 420, as well as, to Section 74(2) of the MVAT. In this view of the matter, it is not necessary to refer to the ratio in *Gagan Sharma's case (supra)* which was in respect of a different statute altogether. *G.S.Oils Ltd.'s case (supra)*, as well as, *Narayan Patodia's case (supra)*, in turn, were followed by a single Judge bench of this Court in *Ashok Sable's case (supra)*. In that case, there were similar allegations of evasion of tax and there were allegations of commission of the

offences punishable under sections 406 and 409 of the I.P.C. After considering both these judgments, the learned Single Judge held in paragraph-8 as under:

“As far as the ingredients of offence punishable under Section 406 and 409 of the Indian Penal Code are concerned conceptually, a dealer like the applicant would act as an agent of the Government for recovering the tax and depositing it with the latter. It would thus tantamount to creating a relationship of a principal and an agent between the Government and the dealer. If the dealer is supposed to recover the tax it would come with a consequential liability to credit it to the Government. In my considered view it is in this manner *prima facie* the applicant can be said to be entrusted with the money which he was liable to pay to the Government but has failed to do so.”

This particular observation squarely covers the present case before this Court. The learned Single Judge has held that the dealer like the applicant acted as an agent of the Government for recovering the tax and depositing it with the latter. It would thus tantamount to creating a relationship of a principal and an agent between the Government and the dealer. There was an ingredient of entrustment, as well.

15. As a result of the above discussion, I am of the opinion that, in this particular case, investigation and the prosecution under both the enactments i.e. the MVAT and the I.P.C. can go on simultaneously. The ingredients of section 74(2) of the MVAT, as well as, Sections 420 and 406 of the I.P.C. are clearly made out. Evasion of the tax is of a huge amount. There is no acceptable justification offered by the applicant. His custodial interrogation is necessary to trace all these transactions. Besides this, the offence is quite grave and serious; considering the amount involved. In this view of the matter, no protection U/s.438 of the Cr.p.c. can be granted to the applicant.

16. The Application is rejected.

(SARANG V. KOTWAL, J.)