



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
BAIL APPLICATION NO.3772 OF 2023**

Malcolm Aspy Captain ... Applicant
versus
The Senior Inspector of Police and Anr. ... Respondents

WITH
INTERIM APPLICATION NO.4501 OF 2023
IN
BAIL APPLICATION NO.3772 OF 2023

Sanjay Didwania ... Applicant/Intervener
and
Malcolm Aspy Captain ... Applicant
versus
The State of Maharashtra and Anr. ... Respondents

WITH
INTERIM APPLICATION NO.4499 OF 2023
IN
BAIL APPLICATION NO.3772 OF 2023

Shashidhar M. Suvarna ... Applicant/Intervener
and
Malcolm Aspy Captain ... Applicant
versus
The State of Maharashtra and Anr. ... Respondents

Mr. Rizwan Merchant with Mr. Swapnil Wagh, Ms. Vinita Dandekar, Mr. Prathamesh Bhosale, for Applicant.

Mr. S.R.Aagarkar, APP for State.

Mr. Akshay Malvia, Mr. Kailash B. i/by Mr. Prathamesh Chachad, for Original complainant.

Mr. Ram Prasad Gupta i/by Mr. Rohit Vaishya for Sanjay Didwania – Victim.
PSI Chetan More, Khar Police Station present.

CORAM: N.J.JAMADAR, J.

DATE : 20 MARCH 2024

P.C.

1. Heard the learned Counsel for the parties.
2. The applicant who is arraigned in C.R.No.1426 of 2022 registered with Khar Police Station for the offences punishable under Sections 409 and 420 of the Indian Penal Code and Section 4 of the The Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963, has preferred this application to enlarge him on bail.
3. The first informant lodged a report with the allegations that the applicant who is a proprietor of Unicolor Reality had made a representation that he was executing a redevelopment project at Sangam Co-op. Hsg. Soc. Khar (W), Mumbai, and induced the first informant to book three flats in the project 'Aura' and part with a sum of Rs.6 Crore. The applicant allegedly did not execute registered agreement with the first informant. Neither the applicant commenced the construction, as represented. Nor the amount paid by the first informant was refunded.
4. Mr. Merchant, learned Counsel for the Applicant, submitted that in fact the transaction between the parties was cancelled and towards repayment of the amount, the applicant had drawn cheques for Rs.6.70 Crores and Rs.1,07,00,000/-. However, those cheques were dishonoured on presentment and the applicant is facing a prosecution for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881. But, by no stretch of imagination, a case of cheating or

criminal breach of trust is made out. The applicant could not execute the project on account of ad-interim order passed by the City Civil Court in a suit instituted by Sangam Co-op. Hsg. Soc. The applicant had, in fact, incurred expenses in excess of Rs.2 Crores towards the development and other charges required to be paid to carry out the development.

5. Mr. Aagarkar, learned APP submitted that the investigation has revealed that IOD was cancelled on 23 June 2017 and, thereafter, the applicant entered into a transaction with the first informant and executed Articles of Allotment Letter on 4 August 2017. Mr. Aagarkar would urge that as the applicant had induced the first informant to part with the amount after the IOD was cancelled, the intention to defraud can be inferred. Investigation has further revealed that the applicant had induced Sanjay Gidwani, another victim, to part with a sum of Rs.1,02,25,000/-.

6. Mr. Merchant countered by canvassing a submission that the said transaction was in the year 2014-15.

7. Mr. Malviya, learned Counsel for the first informant, also resisted the prayer for bail. It was submitted that the applicant had induced the first informant to part with huge amount of Rs.6 Crores. Attention of the Court was invited to the letter dated 15 January 2018, whereby IOD was cancelled. A clear case of cheating and breach of trust is made out. The applicant, therefore, does not deserve to be enlarged on bail.

8. From the perusal of the material on record, it appears that the applicant and the society had initially entered into a development agreement. Necessary instruments were executed in favour of the applicant. In the capacity of the developer, the applicant had issued allotment letter on 4 August 2017 to the first informant, which incorporated the terms of the contract between the parties. The submission of Mr. Aagarkar that the letter of allotment was executed after the IOD was cancelled does not seem to be borne out by the record. It appears that the IOD was granted on 23 June 2017. The communication from the Municipal Corporation relied upon by Mr. Aagarkar does not indicate that the IOD was cancelled on 23 June 2017. However, CC was not issued.

7. Mr. Merchant invited the attention of the Court to a letter dated 26 September 2017, whereby the IOD was granted for the proposed redevelopment project.

8. Prima facie, it cannot be said that the applicant executed Allotment Letter sans IOD. The documents placed on record (pages 356 to 368) evidence the payment in the range of Rs.2 Crores by the applicant to the Municipal Corporation towards the development charges and premium etc. The submission on behalf of the applicant that the applicant was restrained from executing redevelopment project by an order passed by the City Civil Court in a suit instituted by Sangam Co-op. Hsg. Soc., is borne out by the copy of the order dated 9 January 2020 .

9. It is true, the cheques drawn by the applicant upon the cancellation of the allotment, were dishonoured. However, it is trite, there is a distinction between the failure to perform a promise and cheating. For the latter, the intention of the party should be dishonest since the inception of the transaction.

10. In the circumstances of the case and the factors noted above, whether the intention of the applicant was dishonest since the inception of the transaction appears to be debatable and a matter for trial. In any event, since the investigation is complete, chargesheet has been lodged, offences revolve around the documents and the applicant has been in custody since 4 July 2023, further detention of the applicant does not seem to be warranted. I am, therefore, inclined to exercise the discretion in favour of the applicant.

11. Hence, the following order :

ORDER

(i) The Application stands allowed.

(ii) The Applicant – Malcom Aspy Captain be released on bail in C.R.No.1426 of 2022 registered with Khar Police Station on furnishing a PR bond in the sum of Rs.30,000/- and one or two sureties in the like amount to the satisfaction of the trial Court.

(iii) The applicant shall mark his presence before Khar Police Station on first Monday of every alternate month in between 11 am to 1 pm for a period of three years

or till the conclusion of the trial, whichever is earlier.

(iv) The applicant shall not tamper with the prosecution evidence. The applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing the facts to Court or any police officer.

(v) On being released on bail, the applicant shall furnish his contact number and residential address to the investigating officer and shall keep him updated, in case there is any change.

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

(vii) By way of abundant caution, it is clarified that the observations made hereinabove are confined for the purpose of determination of the entitlement for bail and they may not be construed as an expression of opinion on the guilt or otherwise of the applicant and the trial Court shall not be influenced by any of the observations made hereinabove.

(viii) In view of the disposal of the bail application, Interim Applications stand disposed.

(N.J.JAMADAR, J.)

SSP (corrected order as per Speaking to Minutes of Order dated 28 March 2023) 6/6