IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

ANTICIPATORY BAIL APPLICATION NO. 1434 OF 2024

Naresh Jagumal Karda ...Applicant
Versus
State of Maharashtra and anr. …Respondents
WITH
ANTICIPATORY BAIL APPLICATION NO. 1284 OF 2024

1. Ashok Motilal Kataria
2. Satish Dhondulal Parakh ...Applicants

Versus
The State of Maharashtra and anr. …Respondents
WITH
ANTICIPATORY BAIL APPLICATION NO. 1345 OF 2024

Anup Subhashchandra Kataria ...Applicant
Versus
The State of Maharashtra and anr. …Respondents

(Set I FIR No.139 of 2024)

WITH
ANTICIPATORY BAIL APPLICATION NO. 1234 OF 2024
WITH
INTERIM APPLICATION NO. 2070 OF 2024

Naresh Jagumal Karda ...Applicant
Versus
State of Maharashtra and anr. …Respondents
WITH
ANTICIPATORY BAIL APPLICATION NO. 1285 OF 2024

1. Ashok Motilal Kataria
2. Satish Dhondulal Parakh ...Applicants

Versus
State of Maharashtra …Respondent

WITH
ANTICIPATORY BAIL APPLICATION NO. 1351 OF 2024

Anup Subhashchandra Kataria ...Applicant
Versus
State of Maharashtra and anr. …Respondents
(Set II FIR No.127 of 2024)

Mr. Sanjeev Kadam, a/w Prashant Raul, Varsha Thorat, Pratik Deshmukh, Mayur Sanap, Viraj Sakhare, i/b. Vikas Shivarkar, for the Applicants in ABA No.1434 of 2024.
Mr. Amit Desai, Senior Advocate a/w Mr. Kamlesh Ghumre a/w. Mr. A. R. Kapadnis and Sonali Jadhav, for the applicants in ABA/1284/2024.
Mr. Shirish Gupte, Senior Advocate a/w Mr. Kishan Chaudhary and M. Ansari, for the Applicants in ABA/1234/2024.
Mr. Kamlesh Ghumre a/w. Mr. A. R. Kapadnis and Sanket Patil and Sonali Jadhav for the Applicants in ABA Nos. 1285 of 2024, 1351 of 2024 and 1345 of 2024.
Mr. A. A. Naik, APP for the Respondent – State.
Mr. Devvrat Singh a/w Aashutosh Rathod, for the Respondent – first informant.

CORAM: N. J. JAMADAR, J.
DATED: 14th DECEMBER, 2024

ORDER:-

1. These two sets of applications are preferred for pre-arrest bail.

2. The first set comprisres applications i.e. ABA/1434/ 2024, ABA/1284/2024 and ABA/1345/ 2024, which are filed in connection with CR No.139 of 2024 registered with Upnagar Police Station, Nashik, for the offences punishable under Sections 406, 409 and 420 read with Section 34 of the Indian Penal Code, 1860 ("the Penal Code") and Section 3 of the Maharashtra Protection of Interest of Depositors (in Financial Establishments) Act, 1999 ("the MPID Act, 1999").

3. The second set comprises applications i.e. ABA/1234/ 2024, ABA/1285/2024 and ABA/1351/2024 which are filed in connection with CR No.127 of 2024 registered with Upnagar Police Station, Nashik, for the offences punishable under Sections 406 and 420 read with Section 34 of the Penal Code and Section 3 of the MPID Act, 1999.

4. In both the sets, the applicants are common. The transactions during the course of which the aforesaid offences have allegedly been committed have also an element of similarity. Therefore, both these sets of applications are decided by this common order.

Allegations in FIR No.127/2024

5. Colonel Rakesh Kaliya (the first informant) had known the applicants. Naresh Karda, the applicant in ABA/1234/ 2024 is the Director of Karda Construction, Builders and Developers, which has been rechristened as KBC Global Limited. Ahsok Kataria, the applicant No.1 in ABA/1285/2024, is the Director of Viva Highways Limited. Katarias and Kardas joined hands to form 'Shri Sainath Land and Development (India) Pvt. Ltd.' ("Shri Sainath"). A joint development agreement was executed between Shri Sainath and Viva Highways Ltd. Narsh Karda, Manohar Karda and Anup Kataria were the Directors of Shri Sainath, which started a housing project "Hari Nakshatra". The first informant booked a flat in Hari Nakshatra Project. A sum of Rs.30,00,000/- was paid by cheques to Naresh Karda, the Director of Shri Sainath.

6. The first informant alleged in February, 2019, Naresh Karda induced the first informant to invest a sum of Rs.20,00,000/- in cash with Shri Sainath by making a false representation that the first

informant would get lucrative returns. Initially to instill confidence Naresh Karda executed a Memorandum of Understanding (MOU) creating security over Flat No.707 in his another project Hari Sanskriti Phase-II and paid a sum of Rs.30,000/- per month by way of return on investment till the year 2021. Thereafter Naresh Karda committed default in payment. The first informant further alleged, by making false representations, Naresh Karda induced him to invest a total amount of Rs.38,00,000/-. Return of Rs.51,300/- p.m. was paid thereon till the yer 2022. Thereafter the cheques drawn by Naresh Karda towards the return on investment were dishonored. There was default in delivery of possession of the flat booked in Hari Nakshatra, as agreed. Upon enquiry, the first informant learnt that the applicants had deceived other investors also. Hence, the report.

Allegations in FIR No.139/2024

7. Manoj Lekhraj Hariyani, the first informant, had booked two shops in the project Destination One, developed by Shri Sainath. Agreements for Sale were executed. The first informant paid a sum of Rs.10,09,450/- by cheque towards part consideration. Naresh Karda demanded the balance consideration in cash. The first informant thus paid the balance amount of Rs.47,90,550/- in cash, in installments to Naresh Karda.

8. The first informant alleged Naresh Karda induced him to invest amount with Shri Sainath by promising to pay profit at the rate of 12% p.a. Believing the representations of Naresh Karda the first

informant claimed to have invested Rs.31,80,000/- by cheques and Rs.10,09,450/- in cash, with Shri Sainath. A sum of Rs.6,84,900/- was repaid by way of profit till 22nd June, 2023. Since July, 2023 there was default in payment. Naresh Karda issued cheques towards repayment of the amount. Those cheques were dishonored. The first informant alleged that there was no progress in the development of Destination One Project beyond plinth. Inquires revealed that Naresh Karda had made a false declaration to RERA that 60% work of Destination – One was completed. Alleging that, like the first informant, other investors were also duped, the first information report came to be lodged.

Interim Orders:

9. When ABA/1234/2024 (arising out of CR No.127/2024) was listed before this Court on 6th May, 2024, this Court was persuaded to grant interim protection observing *inter alia* as under:

> "6. The allegations in the first information report indicate that there were two transactions between the parties. The first appears to be the one of booking of the flat in the project developed by the applicant; the second is the advance upon a promise of return on investment as evidenced by the MOU. So far as the offence punishable under section 420 of the IPC is concerned, as the applicant has been developing properties in and around Nashik, the question as to whether the intention of the applicant was dishonest since inception of the transaction, may warrant consideration. The MOU indicates that the applicant had to return the amount at defined rates and intervals. Thus, whether the first informant was induced to invest the amount with intent to defraud, is also a matter for investigation.

> 7. In these circumstances, I am inclined to protect the liberty of the applicant by directing him to join in the investigation. In the backdrop of the nature of accusation, it may also be expedient to implead the first informant as a party respondent."

10. In view of the aforesaid order, on 10th May, 2024 interim protection was granted to the applicants in ABA/1284/2024, ABA/1285/2024, ABA/1345 of 2024 and ABA/1351/2024.

11. By an order dated 21st May, 2024 interim protection was granted in ABA/1434/2023 arising out of CR No.139/2024.

12. Affidavits-in-reply and further Affidavits were filed by the parties.

Submissions :

13. Mr. Shirish Gupte, learned Senior Advocate for the Applicant – Naresh (ABA No.1234 of 2024) submitted that the applicant is not a fly by night operator. The applicant has firm roots in Nashik. A number of real estate projects have been developed by the applicant. The projects in question could not be developed within the stipulated period on account of disputes inter se directors/entities involved in the development projects and the financial constraints, which the company faced, resulting in multiple proceedings including before the NCLT. However, it is not a case that the applicant has no means to develop the projects. In fact, the projects in question have reached an advanced stage. Satisfied with the financial viability of the proposal submitted by Shri Sainath, LIC Housing Finance Ltd., the financial creditor of Shri Sainath, has filed an application to withdraw the Company Petition No.312/MB/-IV/2023 filed under Section 7 of the Insolvency and Bankruptcy Code, 2016. Therefore, at this stage, there is no necessity of arrest and custodial interrogation of the applicant.

14. As regards the allegations of the first informant regarding fraudulent inducement, Mr. Gupte submitted that on the own showing of the first informant, monthly interest was paid upto 2022. That rules out the dishonest intention since inception of the transaction. As the investigating agency is in custody of all the documents and the applicant has rendered necessary co-operation during the course of investigation, the order of interim bail deserves to be made absolute.

15. Mr. Kadam, learned Counsel for the Applicant – Naresh in ABA No.1434 of 2024 supplemented the submissions of Mr. Gupte. It was urged that the project in question where the first informant booked the shops is still being developed by the applicant. LIC Housing Finance, the financial creditor, has found the project financially viable. Moreover, as the dispute is purely of commercial nature the custodial interrogation of the applicant is not warranted.

16. Mr. Amit Desai, learned Senior Advocate for the Applicants – Ashok and Satish (ABA No.1284 of 2024) submitted that there is no nexus between the applicants and the alleged fraudulent acts of Naresh. Taking the Court through the FIR, Mr. Desai submitted that the entirety of the allegations is against Naresh. The applicants have been simply named as the directors of Viva Highways and Shri Sainath, without attributing any role in the alleged transactions. Neither is it alleged that the applicants made an inducement. Nor that the applicants received the amounts from the first informant and other investors. Thus, the offences punishable under Sections 406, 409 and 420 of IPC are not at all attracted. Nor, there is any basis to invoke the provisions of Section 3 of MPID Act.

17. Initially, an endeavour was made to draw home the point that the applicants were the non-executive directors of Shri Sainath. However, when the first informant placed material on record to show that the applicants were subsequently inducted as executive directors of Shri Sainath, an effort was made to explain away the induction of the applicants as the executive directors of the company.

18. Mr. Ghumre, learned Counsel for the Applicants in ABA Nos.1285 of 2024, 1345 and 1351 of 2024, substantially adopted the submissions of Mr. Desai. Additionally, an effort was made to draw home the point that the applicants were, at best, the nominee directors and had no role in the day to day management of the affairs of Shri Sainath.

19. Learned APP resisted the prayer for pre-arrest bail. It was submitted that the applicants have duped numerous innocent and unsuspecting flat/unit purchasers and investors. There are two sets of victims. First, the flat/unit purchasers who have not been provided flat/units, despite receipt of consideration and lapse of substantial time. Second, the investors who were induced to invest the amount by making fraudulent representations of lucrative returns. The quantum of fraud is to the tune of Rs.40 Crores. There is material to show that the accused had issued promissory notes / cheques and did not honour the same. Thus, the provisions contained in Section 3 of MPID Act, are clearly attracted.

20. In addition, the accused are guilty of making false declaration before RERA and utilizing the amount paid by the flats/units purchasers. There is no progress at site in Hari Nakshtra. Only one phase has been completed, and three other phases are yet to be completed. In Destination One project, the construction had reached upto first floor only. Therefore, it is necessary to have custodial interrogation of the applicants to trace the money which has been fraudulently diverted. Learned APP tendered a list of investors in both the projects along with the amounts allegedly invested by them.

21. Mr. Devvrut Singh, learned Counsel for the First Informant, stoutly contested the prayers for pre-arrest bail. First and foremost, Mr. Singh would urge, the Applicants representing Kataria Group (Applicants in ABA Nos.1284 of 2024, 1345 of 2024, 1285 of 2024 and 1351 of 2024) have approached the Court with a patently false case that they were the non-executive directors of the company.

Taking the Court through the Form No.12, which indicates that the applicants were the executive Directors of the company with effect from 30 September 2015 till they tendered resignations in the year 2021, Mr. Singh would urge that, on this count alone, the applications for pre-arrest bail deserve to be rejected.

22. Secondly, there is a clear inconsistency in the stand of the applicants with regard to the utilization of the amount of Rs.90 Crores availed from LIC Housing Finance Ltd. When the first informant brought material on record, feeble attempts were made to offer explanations which are ex-facie untenable.

23. Mr. Singh submitted with a degree of vehemence that the applicants representing Kataria group cannot be permitted to wriggle out of the situation by asserting that the allegations in the FIR are against Naresh Karda only. When the representations were made by Naresh for and on behalf of Shri Sainath and the amounts were invested with Shri Sainath, the applicants representing Kataria group were the executive directors of Shri Sainath. Not only the amounts were invested with Sainath, but even the initial return thereon was paid from the account of Shri Sainath.

24. Mr. Singh also made strenuous effort to demonstrate that the transaction of transfer of land of Katarias to Sainath and diversion of the amount which was availed from LIC Housing Finance Ltd., clearly reveal the fraudulent intention of the applicants representing the Kataria group. The fraudulent withdrawal of huge amount to the tune of Rs.40 Crores from the said financial assistance of Rs.90 Crores, which was to be used for the project development only, was the prima cause for the fall of Shri Sainath. The custodial interrogation of all the applicants is, therefore, indispensable for an effective investigation, urged Mr. Singh.

Consideration :

25. I have carefully perused the allegations in the FIR and the material placed on record by the parties. In view of the institution of Corporate Insolvency Resolution Petition against Shri Sainath by the financial creditor and the apparent disputes between Kardas, on the one part, and Katarias, on the other part, a number of documents in the nature of the annual reports, declarations made before the Registrar of Companies and the disclosures before the RERA were placed on record.

26. Bharti Karda, wife of Manohar Karda, the brother of the Applicant – Naresh, who allegedly died by suicide on account of the persistent harassment by a number of persons, including Ashok Kataria, has lodged a report leading to registration of C.R.No.158 of 2024 at Upanagar Police Station for the offences punishable under Sections 306, 323, 386, 504, 506, 507 read with Section 34 of the Indian Penal Code and Sections 39 and 45 of the Maharashtra Money Lending (Regulations) Act, 2014. This prima facie shows that the erstwhile partners / joint developers – Kardas and Katarias, have turned astray on account of the disputes which arose between them. Keeping the aforesaid backdrop in view, the prayer for pre-arrest bail is required to be appreciated.

27. To begin with, there is substance in the submission of Mr. Desai, learned Senior Advocate for the Applicants in ABA No.1284 of 2024 that both the FIR Nos.127 of 2024 and 139 of 2024 primarily implicate Naresh Karda. Colonel Rakesh Kaliya, first informant in FIR No.127 of 2024 categorically asserted that the booking amount of Rs.30 Lakhs was paid to Naresh Karda and it was Naresh Karda who had made inducement to invest money with Shri Sainath. Naresh Karda had executed MOU, thereby giving security of a flat at Hari Sanskriti. All the further allegations in the FIR are against Naresh Karda alone, including that of inducement to invest the money, payment of monthly amount by way of return thereon, issue of cheques towards the balance amount and the dishonour thereof. It is only in the concluding part of the FIR, the Kataria and other persons are sought to be roped in, in the capacity of the directors of Shri Sainath.

28. The allegations in the FIR lodged by Mr. Manoj Hariyani, leading to registration of C.R.No.139 of 2024 proceed by and large on similar lines. The representation to sell the shops, acceptance of part consideration, execution of articles of agreements, further representation to invest the amounts, acceptance of money in cash and by way of cheques, payment of return thereon for few months and subsequent dishonour of the cheques, are all against Naresh Karda.

29. Prima facie, it appears that the allegations in both the FIRs are primarily and singularly against Naresh Karda. Conversely, neither there is an allegation of dishonest inducement qua rest of the applicants nor that of delivery or entrustment of property to them.

30. In this view of the matter, a distinction is required to be drawn regarding the liability of rest of the applicants. First the liability for the offences punishable under the Indian Penal Code. Second the liability for the offence punishable under Section 3 of the MPID Act.

31. With regard to the liability for the offences under the Penal Code, there ought to be material to show that the other applicants shared the common intention with Naresh. Constructive criminal liability cannot be imposed under the provisions of IPC in the absence of a specific provision which creates such a constructive liability by a legal fiction. It is trite law that wherever by a legal fiction the principle of vicarious liability is attracted and a person who is otherwise not personally involved in the commission of an offence is made liable for the same, it has to be specifically provided in the statute concerned. **(Maharashtra State Electricity Distribution Co. Ltd. and Anr V/s. Datar Switchgear Ltd. and Ors. (2010) 10 SCC 479)**.

32. A useful reference can also be made to the decision of the Supreme Court in the case of **S.K.Alagh V/s. State of Uttar Pradesh and Ors.**[1] wherein the following observations have been made :

> "16.The Penal Code, save and except some provisions specifically providing therefor, does not contemplate any vicarious liability on the part of a party who is not charged directly for commission of an offence.
>
> 19. As admittedly, drafts were drawn in the name of the company, even if the appellant was its Managing Director, he cannot be said to have committed an offence under Section 406 of the Penal Code. If and when a statute contemplates creation of such a legal fiction, it provides specifically therefor. In absence of any provision laid down under the statute, a Director of a company or an employee cannot be held to be vicariously liable for any offence committed by the company itself. (see Sabitha Ramamurthy V/s. R.B.S. Channabasavaradhya[2])"

33. Prima facie, the allegations in both the FIRs qua the applicants representing Kataria group do not proceed beyond the point that the entities, they represented, were the joint developers of the projects in question.

34. However, with regard to the offence punishable under Section 3 of the MPID Act, different consideration may come into play, as Section 3 makes every person including the promoter, partner, director, manager or any other person or an employee responsible for the management of or conducting of the business or affairs of the

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1 (2008) 5 SCC 662
2 (2006) 10 SCC 581

Financial Establishment which has committed fraudulent default, liable for the punishment thereunder.

35. Mr. Naik, learned APP and Mr. Singh, learned Counsel for the first informant, would thus urge that the material on record indicates that rest of the applicants were the directors of Shri Sainath and had, in fact, siphoned off substantial part of the loan availed from LIC Housing Finance Limited.

36. In this application, I do not deem it necessary to delve into the manner in which the loan availed from the LIC Housing Finance Limited was utilized, whether the disbursal of the amount to the applicants representing Kataria group from the said loan or the funds generated by Shri Sainath by the sale of the units, as claimed by Katarias, or for that matter, the very entitlement of the Katarias to the amounts which were paid to them.

37. In the context of the allegations in the FIR, the determination of the issues which bear upon the disputes inter se applicants and the liability of the entities which constituted Shri Sainath, does not seem necessarily warranted. From the perusal of the allegations in the FIRs, as noted above, the fraudulent inducement as well as the default in repayment of the amount, as promised, are primarily attributable to Naresh Karda. In this backdrop, even from the perspective of the offence punishable under Section 3 of the MPID

Act, the custodial interrogation of the applicants, apart from Naresh Karda, does not seem warranted.

38. Mr. Gupte, learned Senior Advocate for Naresh Karda would urge that despite allegations in the FIRs qua Naresh Karda, his custodial interrogation is also not warranted. Strong reliance was placed on the decision of LIC Housing Finance Ltd. to withdraw CIRP against Shri Sainath, upon being satisfied that the proposal of Shri Sainath was now financially viable.

39. It is imperative to note that the aspect of fraudulent diversion of the funds availed from LIC Housing Finance Ltd., emerged during the course of investigation. However, the gravamen of indictment against the applicant – Naresh Karda was that apart from the failure to develop the projects and delivery of possession of the flats/units within the stipulated period, Naresh Karda induced unsuspecting investors to invest the amounts in the projects by making promises of lucrative returns.

40. The said allegation is de hors the resolution of the dispute with the financial creditor. Even if the court proceeds on the premise that the financial creditor has decided not to proceed against Shri Sainath, yet the allegations in the FIR qua Naresh Karda, in his individual capacity, are such that they warrant effective investigation. It is pertinent to note that such fraudulent inducement and deception was not restricted to first informants herein.

Investigation has revealed that the applicant Naresh Karda has induced as many as 30 persons to invest an amount to the tune of Rs.9,74,28,416/- in Destination One project and seven investors to invest an aggregate amount of Rs.2,70,80,628/- in Hari Nakshtra. The number of investors and the attendant circumstances, prima facie, indicate that there was an element of system, continuity and repetition in the deception allegedly practiced by Naresh Karda.

41. The material on record further indicates that Naresh Karda was the key person of Shri Sainath. It appears, a number of innocent and unsuspecting flat/unit purchasers have been left in the lurch despite having invested substantial amount. The facts of the case, prima facie, reveal that the reputation of Naresh Karda as a developer has been abused to induce innocent persons to part with the amounts and book the flats/units.

42. I am, therefore, inclined to hold that the custodial interrogation of Naresh Karda is indispensable to facilitate an effective investigation. The Custodial interrogation would be warranted to unearth the fraud in all its facets, identify and unmask the persons who were privy to the fraud and also have a money trail. It is well recognized that the custodial interrogation is qualitatively different from the investigation when the accused is armed with a protective order.

43. Resultantly, the applications of Naresh Karda deserve to be rejected. The other applicants are, however, entitled to pre-arrest bail.

44. Hence, the following order:

: O R D E R :

(i) ABA Nos.1234 of 2024 and 1434 of 2024 filed by Naresh Karda stand rejected.

(ii) ABA Nos.1285 of 2024, 1284 of 2024, 1345 of 2024 and 1351 of 2024 stand allowed.

(iii) The order of interim bail dated 10 May 2024 in ABA Nos.1284 of 2024 and 1345 of 2024 arising out of FIR No.139 of 2024 and in ABA Nos.1285 of 2024 and 1351 of 2024 arising out of C.R.No.127 of 2024 is made absolute on the terms and conditions incorporated therein.

(iv) In addition, the applicants shall henceforth appear before the Investigating Officer as and when directed.

(v) In the event, the chargesheet is lodged, the applicants shall regularly attend the proceedings before the jurisdictional Court.

(vi) In view of the disposal of the ABAs, Interim Application also stands disposed.

(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 pre-arrest bail only.

Applications disposed.

[N. J. JAMADAR, J.]