IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO.794 OF 2023

Gilbert Paustine Baptist ..Applicant
Versus
The State of Maharashtra ..Respondent

WITH
INTERIM APPLICATION NO.3734 OF 2024
IN
CRIMINAL BAIL APPLICATION NO.794 OF 2023

Lovina Oswald Dmello ..Applicant (Intervenor)

IN THE MATTER BETWEEN

Gilbert Paustine Baptist ..Applicant
Versus
The State of Maharashtra ..Respondent

Mr. Tapan Thatte a/w Ravi S. Kotian, Mallika Pujari, Saritha Suvarna i/by Jayshree Tripathi, for the Applicant.
Mr. S. Punamiya, Special PP a/w Sagar R. Agarkar, APP for the Respondent/State.
Mr. Edgar Braganga, for the Applicant in IA/3734/2024.

CORAM : MANISH PITALE, J.

DATE : 20th SEPTEMBER, 2024

P. C.

1. Heard learned counsel for the Applicant, learned Special Public Prosecutor for the Respondent/State and learned counsel for the Intervenor (first informant).

2. The Applicant is seeking bail, as he was arrested on 01.12.2020 in connection with FIR No.224 of 2020 dated 02.10.2020 registered with Mira Road Police Station, District Thane for offences under Sections 406 and 420 r/w 34 of the IPC and Section 3 and 4 of the Maharashtra Protection of Interest of Depositors (In Financial Establishments) Act, 1999 (MPID Act). On completion of investigation, charge-sheet was filed on 26.02.2021 and the Applicant, along with nine other co-accused persons, is facing prosecution for offences under Sections 406, 409, 420, 465, 468, 471, 120B r/w 34 of the IPC and Sections 3 and 4 of the MPID Act.

3. The statement of the informant, which led to registration of the FIR, shows that the grievance of the informant was that the Applicant as a director of the Multi-State Co-operative Society along with his wife, who was also stated to be one of the directors, induced and allured the informant into investing substantial amounts on a promise of return with rate of interest higher than that offered by the banks. It was alleged that having been induced and allured by the Applicant and other accused persons, substantial amounts were invested, but eventually the promise of return never materialized and immense financial loss was caused to the informant.

4. The investigations revealed that a large number of such innocent investors were duped by the accused persons and the

extent of the scam ran into multiple crores. In that context, the provisions of the MPID Act were also invoked.

5. Learned counsel for the Applicant submitted that as on today, the Applicant has undergone incarceration for about four years and even if the case of the prosecution based on the charge-sheet is taken into consideration, offence under Section 409 of the IPC cannot be said to be made out, and at the most, it may be claimed by the prosecution that ingredients of other offences, including offences under Section 420 of the IPC and Section 3 of the MPID could be made out. It was emphasized that the provisions of the IPC, other than Section 409 of the IPC provide for punishment with imprisonment ranging from three years to seven years. It was emphasized that the Applicant having undergone more than half the period of seven years of incarceration, is entitled to benefit under Section 479 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS).

6. It is specifically submitted that the ingredients of the offence under Section 409 of the IPC are not even *prima-facie* made out, taking into consideration the material upon which the prosecution has placed reliance. Reference is made to judgment of the Supreme Court in the case of ***Delhi Race Club & Ors. Vs. State of Uttar Pradesh & Anr. decided on 23.08.2024 passed in Criminal Appeal No.3114 of 2024***, wherein the Supreme Court has reiterated the fine distinction between the offences under Sections 409 and

420 of the IPC. It is laid down therein that the two offences cannot co-exist simultaneously. By relying upon the ratio of the said judgment, it is contended that the prosecution has failed to make out even a *prima-facie* case under Section 409 of the IPC and therefore, it cannot be claimed that the Applicant may be punished with sentence as prescribed under Section 409 of the IPC, which is between a period of ten years to life imprisonment.

7. It is submitted that in such a situation, this Court may consider enlarging the Applicant on bail, as he undertakes to abide by conditions that may be imposed, while granting such relief. Reference is also made to orders granting bail to co-accused persons, wherein it has been specifically recorded that even according to the prosecution the case against the Applicant is of having lured investors and having induced them into investing huge amounts, thereby indicating that such a situation would at the most fall within the four corners of offence under Section 420 of the IPC.

8. On the other hand, learned Special Public Prosecutor submitted that the record sufficiently indicates that during the course of investigation, material has come on record indicating the manner in which the Applicant and co-accused persons diverted and siphoned off amounts deposited by innocent investors, thereby indicating that the basic ingredients of the offence of criminal breach of trust as defined under Section 405 of the IPC are made out. It was submitted that the investigation revealed the fact that

the amounts entrusted by the innocent investors with the Applicant and the co-accused persons were dishonestly misappropriated, converted and illegally put to personal use by the Applicant and the co-accused persons. Reference was made to the charge-sheet to indicate that the amounts were diverted to four entities in which the Applicant himself and his relatives have vital interest. The amounts were further ploughed back for personal use of the accused persons and in this manner offence under Section 409 of the IPC was committed. Reference was made to the judgment of the Supreme Court in the case of ***K. K. Bhaskaran Vs. State [(2011) 3 SCC 793]*** to emphasize upon the seriousness of offences in the present case, including offences under the MPID Act. Reliance was placed on the judgment of the Supreme Court in the case of ***R. K. Dalmia ETC Vs. Delhi Administration (AIR 1962 SC 1821)*** to contend that in a similar situation, the Supreme Court had deliberated upon the role of an agent who was entrusted with property and who misused and diverted property, leading to offence under Section 409 of the IPC. Reliance was also placed on a recent judgment and order dated 28.08.2024 passed by the Supreme Court in the case of ***Manik Madhukar Sarve & Ors. Vs. Vithal Damuji Meher in Criminal Appeal No.3573 of 2024***, wherein the Supreme Court cancelled the bail granted to accused persons, who were facing prosecution under provisions of the MPID Act.

9. It was submitted that, considering the large number of innocent investors, who had suffered in present case, this Court may

not show any indulgence to the Applicant.

10. Learned counsel appearing for the Intervenor (first informant) supported the contentions raised by the learned Special Public Prosecution and he further submitted that the material available on record along with the charge-sheet indicates that huge amounts were ploughed back for personal use of the Applicant and other accused persons, thereby indicating their intent and the ingredients of the offence under Section 409 of the IPC. It was brought to the notice of the Court that although properties have been attached by the concerned Court by exercising power under the provisions of the MPID Act, it has come to light that such properties were already mortgaged to banks and that the banks are also raising claims in respect of such properties. The attachment of the properties is therefore, rendered meaningless.

11. On this basis, the learned Special Public Prosecutor as well as learned counsel appearing for the Intervenor (first informant) prayed for dismissal of the Application.

12. This Court has considered rival submissions in the light of the material available on record. The Applicant is indeed facing prosecution, *inter-alia* for offences under both Sections i.e. Section 409 and Section 420 of the IPC. While the offence under Section 420 of the IPC can lead to a maximum sentence of imprisonment of seven years, for the offence under Section 409 of the IPC, the

convict can be sentenced to imprisonment for a period of ten years or life imprisonment. Therefore, a *prima-facie* view on the applicability of the said provision, in the facts of the present case, becomes crucial for examining the contention raised on behalf of the Applicant that he has undergone substantial period of incarceration amounting to more than half of the sentence that he may have to suffer on conviction, particularly in the light of the trial not likely to be concluded within a reasonable period of time. In that regard, it was brought to the notice of this Court that although the charge-sheet was filed as far as back in 26.02.2021, charges have not yet been framed. The charge-sheet cites 659 witnesses, but in the order granting bail to co-accused person i.e. wife of the Applicant, it has been stated before this Court that as many as 1409 investors would be examined as witnesses.

13. In order to examine the rival submissions, this Court has considered the statement of the informant leading to registration of FIR, as also the claims of the investigating authority manifested in the charge-sheet filed before the competent Court.

14. The statement of the informant, which led to the registration of the FIR, shows that even according to the informant, she was lured and induced into investing substantial amounts of money with the Multi-State Co-operative Society, of which the Applicant was an active director. It was specifically stated that the inducement or allurement was on the basis that such deposited

amounts would be returned with rate of interest much higher than that offered by banks. In fact, the statement repeatedly uses the word 'inducement/allurement' and attractive interest as the impetus for the informant to invest such substantial amounts of money, starting from the year 2015.

15. The contents of the charge-sheet also show that upon completion of investigation, it was found that the Applicant and co-accused persons induced and allured investors into depositing substantial amounts with the said society on the promise of attractive rates of interest, much higher than those offered by banks. There is also a reference made to programs being organized by the said society through the Applicant and the co-accused persons, in order to make such promises and inducements, which led to a large number of investors depositing their amounts with the said society. Such investors hoped for handsome returns on deposits, but eventually the promise of returns never materialized and hence, they were constrained to put the criminal law into motion.

16. The said grievance of the informant and other investors *prima-facie* falls within the four corners of the definition of cheating under Section 415 of the IPC. A perusal of the said provision shows that a person is said to have committed the offence of cheating when he or she by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person etc., so as to cause damage or harm to such a person who

has delivered the property. The basic ingredient of the said offence is inducement or allurement and that is writ large in the grievance raised by the informant and other investors and also recorded by the Investigating Agency in its conclusion in the final report/charge-sheet. In fact, while reaching conclusions against the accused persons and raising charges against them, the Investigating Authority itself has specifically stated that the Applicant and other accused persons induced/allured the investors including the informant into investing huge amounts by promising attractive returns.

17. The Supreme Court in the case of ***Delhi Race Club (supra)*** has deliberated upon the question as to whether the offences of criminal breach of trust and cheating can co-exist simultaneously in a given set of facts. While addressing the said question, the Supreme Court held as follows :-

> "30. The distinction between mere breach of contract and the offence of criminal breach of trust and cheating is a fine one. In case of cheating, the intention of the accused at the time of inducement should be looked into which may be judged by a subsequent conduct, but for this, the subsequent conduct is not the sole test. Mere breach of contract cannot give rise to a criminal prosecution for cheating unless fraudulent or dishonest intention is shown right from the beginning of the transaction i.e. the time when the offence is said to have been committed. Therefore, it is this intention, which is the gist of the offence. Whereas, for the criminal breach of trust, the property must have been entrusted to the accused or he must have dominion over it. The property in respect of which the offence of breach of trust has been committed must be either the property of some person

> other than the accused or the beneficial interest in or ownership' of it must be of some other person. The accused must hold that property on trust of such other person. Although the offence, i.e. the offence of breach of trust and cheating involve dishonest intention, yet they are mutually exclusive and different in basic concept. There is a distinction between criminal breach of trust and cheating. For cheating, criminal intention is necessary at the time of making a false or misleading representation i.e., since inception. In criminal breach of trust, mere proof of entrustment is sufficient. Thus, in case of criminal breach of trust, the offender is lawfully entrusted with the property, and he dishonestly misappropriated the same. Whereas, in case of cheating, the offender fraudulently or dishonestly induces a person by deceiving him to deliver any property. In such a situation, both the offences cannot co-exist simultaneously."

18. In the final conclusion, the Supreme Court further observed as follows :-

> "41. Before we close this matter, we would like to say something as regards the casual approach of the courts below in cases like the one at hand. The Indian Penal Code (IPC) was the official Criminal Code in the Republic of India inherited from the British India after independence. The IPC came into force in the sub-continent during the British rule in 1862. The IPC remained in force for almost a period of 162 years until it was repealed and replaced by the Bharatiya Nyaya Sanhita ("BNS") in December 2023 which came into effect on 1^{st} July 2024. It is indeed very sad to note that even after these many years, the courts have not been able to understand the fine distinction between criminal breach of trust and cheating."

19. The above quoted portion of the judgment shows the expression of regret by the Supreme Court that Courts have not been able to understand the fine distinction between criminal breach of trust and cheating, even after so many years. It has been

clarified that both the offences cannot co-exist simultaneously.

20. Once this Court has reached a *prima-facie* finding that thrust of the grievance of the informant and other investors appears to fall within the four corners of the offence of cheating, as defined under Section 415 of the IPC and punishable under Section 420 thereof, invocation of Section 409 of the IPC simultaneously would be misplaced.

21. In any case, the material on record as regards alleged diversion of funds by the society at the behest of the accused persons and the Applicant into certain entities in which the Applicant and his relatives had an interest, is an aspect which appears to have come to the fore during the course of investigation. It has to be appreciated as to what was the grievance of the informant and other investors when the criminal process was set in motion. *Prima-facie*, it appears that thrust of grievance was that such investors were induced or allured on the basis of false promises made by the accused persons into investing huge amounts with the aforesaid society. If the promise of attractive return had not been given to the informant and other investors, there would have been no occasion for the criminal law being set into motion. When viewed from this angle, the insistence on the part of the prosecution that ingredients of the offence under Section 409 of the IPC are made out, cannot be accepted at this stage.

22. In any case, since both the offences cannot co-exist simultaneously, this Court having found a *prima-facie* case regarding cheating, invoking Section 409 of the IPC simultaneously would not be possible. Hence, reliance placed on judgment of Supreme Court in the case of ***R. K. Dalmia etc. (supra)***, on behalf of the Respondent/State is of no consequence.

23. Once such a conclusion is reached, the specific contention regarding long incarceration raised on the part of the Applicant deserves consideration. It is undisputed that the Applicant was arrested on 01.12.2020, indicating that he has suffered incarceration for almost four years. The maximum sentence that can be imposed upon the Applicant, even if he is found guilty under Section 420 of the IPC is seven years imprisonment. If he is found guilty for the offence under Section 3 of the MPID Act, the maximum sentence that could be imposed is six years imprisonment and the sentence that can be imposed on the Applicant for other IPC offences, other than Section 409 thereof, would be for imprisonment for a period of less than six years.

24. Thus, the Applicant has indeed made out a *prima-facie* case in his favour, as he has already undergone more than half of the maximum sentence that can be imposed upon him, in the facts and circumstances of the present case. This would squarely take the case of the Applicant within 479 of the BNSS, 2023, as it is alleged that the Applicant does have criminal antecedents as two other offences

have been registered against him, one in Mumbai and the other in Karnataka. Section 479 of the BNSS would apply to the Applicant in the context of having already undergone incarceration for more than half of the maximum sentence that can be imposed upon him. Considering the period of incarceration already suffered by the Applicant and the fact that maximum sentence that can be imposed under the MPID Act is six years, the judgments of the Supreme Court in the cases of ***K. K. Bhaskaran (supra)*** and ***Manik Madhukar Sarve (supra)***, cannot aid the submissions made on behalf of the Respondent/State.

25. Apart from this, the Supreme Court in the case of ***Union of India Vs. K. A. Najeeb*** reported in ***(2021) 3 SCC 713*** and judgments rendered thereafter including in the case of ***Javed Gulam Nabi Vs. State of Maharashtra & Anr.*** reported in ***2024 SCC Online SC 1693***, has held that Constitutional Courts have to give full effect to the right of speedy trial of accused undertrials, as a facet of fundamental right guaranteed under Article 21 of the Constitution of India. In fact in the aforesaid judgments, the Supreme Court has shown indulgence to accused undertrials who were facing prosecution under special statutes, where the scope of granting bail has been narrowed down due to stringent statutory requirements. Yet, the Supreme Court has proceeded on the basis that Constitutional Courts are not fettered by the statutory requirements in such cases, where the accused under trial has undergone substantial period of incarceration and there is remote possibility of

the trial being completed within a reasonable period of time. Merely because the accused undertrial is facing prosecution for serious offences, cannot be a ground for the Constitutional Courts not to exercise such power.

26. In the present case, the charge-sheet itself gives a list of as many as 659 witnesses. In the bail order passed in favour of the wife of the Applicant, a statement was made before this court that 1409 investors would be examined as witnesses. The charge is yet to be framed, despite the fact that the charge-sheet was filed as far as back as on 26.02.2021. On the of touchstone of the aforesaid position of law laid down by the Supreme Court and followed subsequently by this Court, a case for granting bail is made out on the ground of the Applicant having already undergone substantial period of incarceration and there being no likelihood of the trial being completed within a reasonable period of time.

27. Hence, the Application is allowed in the following terms :-

(a) The Applicant shall be released on bail in connection with FIR No.224 of 2020 dated 02.10.2020 registered with Mira Road Police Station, District Thane, on his executing PR bond in the sum of Rs.1,00,000/- with one or two sureties in the like amount.

(b) The Applicant shall report to Mira Road Police Station on first Monday of every month between 10:00 a.m. to 12:00 noon during the pendency of the trial;

(c) The Applicant shall deposit his Passport, if any, before the concerned Court within one week of his release on bail and he shall not travel out of India during the pendency of trial;

(d) The Applicant shall not tamper with the evidence of the prosecution. He shall not influence the informant, witnesses or any other person concerned with the case;

(e) The Applicant shall co-operate with the proceedings before the Trial Court and he shall attend each and every date, unless specifically exempted by the Trial Court for reasons to be recorded in writing;

(f) Upon being released on bail, within two weeks, the Applicant shall communicate the details of his contact number and residential address to the Trial Court and update the same in case of any change.

28. Needless to say, violation of any of the aforesaid conditions would make the Applicant liable to face proceedings for cancellation of bail. It is also clarified that the observations made in

this order are limited to the question of grant of bail to the Applicant in the present Application and that the Trial Court shall proceed further, without being influenced by the observations made in this order.

29. The Application stands disposed of.

30. The pending Interim Application also stands disposed of.

(MANISH PITALE, J.)