Santosh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

ANTICIPATORY BAIL APPLICATION NO. 2179 OF 2023

Dr. Umesh Krushnaji Joshi ...Applicant

Versus

State of Maharashtra ...Respondent

WITH

INTERIM APPLICATION NO. 3806 OF 2024

IN

ANTICIPATORY BAIL APPLICATION NO. 2179 OF 2023

Dr. Umesh Krushnaji Joshi ...Applicant

Versus

State of Maharashtra ...Respondent

Mr. Abid Mulani, through VC, a/w Chinmay Patil, for the Applicant.
Mr. Kirti Dabir, for the Intervener.
Mr. A. A. Naik, APP for the State.

CORAM: N. J. JAMADAR, J.
DATED: 18th NOVEMBER, 2024

ORDER:-

1. This is an application for pre-arrest bail in connection with CR No.176 of 2023, registered with Khadak Police Station, Pune, for the offences punishable under Sections 406 and 420 of Indian Penal Code, 1860 ("the Penal Code").

2. Initially, by an order dated 29th August, 2023, this Court was persuaded to grant interim pre-arrest bail to the applicant observing, *inter alia,* as under:

> "6. The learned Counsel for the applicant, on instructions, submitted that the applicant is still willing to deposit the advance, which was parted with by the first informant. In the circumstances of the case, the question as to whether the intention of the applicant was dishonest since the inception of the transaction or there was a mere failure to perform the promise on account of supervening circumstances, would arise for consideration. Since the applicant is willing to deposit the amount of Rs.1,38,84,826/- in this Court, it may be expedient to protect the liberty of the applicant by way of ad-interim relief."

3. By a subsequent order dated 3rd October, 2023 this Court rejected the application for pre-arrest bail ascribing reasons.

4. The applicant preferred Special Leave to Appeal (Cri) No.13339 of 2023. Initially interim protection was granted to the petitioner. By an order dated 27th August, 2024, the Supreme Court allowed Criminal Appeal No.3520 of 2024 and directed this Court to hear and decide the matter afresh on merits. The Supreme Court observed, *inter alia,* as under:

> "9. We have considered the submissions. In the facts of the given case, we are of the view that the High Court may consider the matter afresh irrespective of whether the appellant is ready and willing to make the deposit or not. The High Court will examine the merits of the matter independent of any issue of deposit of the alleged amount and decide the same purely on merits as to whether the case for anticipatory bail is made out or not."

5. Pursuant to the aforesaid directions, I have heard Mr. Abid Mulani, the learned Counsel for the applicant, Mr. Naik, the learned APP for the State, and Ms. Kirti Dabir, the learned Counsel for the first informant – intervener.

6. At the outset, Mr. Naik, the learned APP submitted that, the applicant has made an incorrect statement before the Supreme Court that this Court had rejected the prayer for anticipatory bail upon failure to comply with the undertaking given before this Court to deposit the sum of Rs.1,38,84,826/-. Mr. Naik was at pains to demonstrate that this Court had in fact passed the order on merits recording elaborate reasons. Though the Court had noted that the applicant was not willing to deposit the amount, as undertaken, yet, the Court proceeded to decide the matter on merits and not for the said default. Therefore, the applicant, who has obtained aforesaid order dated 27th August, 2024 for afresh hearing of the application by making an incorrect statement before the Supreme Court, does not deserve any discretionary relief.

7. To appreciate the import of the aforesaid submission and also note the reasons which weighed with this Court in rejecting the application for pre-arrest bail, it may be apposite to extract the relevant part of the order dated 3rd October, 2023, which reads as under:

“3. The indictment against the applicant is that the applicant induced the first informant to part with a sum of Rs.1,38,84,826/- by way of advance towards supply of 5,400 ton sugar. The applicant committed default in the supply of the commodity resulting in the cancellation of the deal of the first informant with a third party and wrongful loss to the first informant. The applicant did not return the said advance even after the order was cancelled by the first informant on 1 May 2022. The first informant thus realized that the applicant had dishonestly cheated the first informant.

……..

8. At the outset, it is necessary to note that the applicant had voluntarily made the statement showing willingness to deposit the amount which was indisputably credited to the account of the applicant. Nonetheless, the non-deposit of the said amount, as undertaken, cannot be arrayed against the accused so as to deny the relief of pre-arrest bail. The Court, therefore, proceeded to hear the application on merits.

9. An endeavour was made by the learned Counsel for the Applicant that the first informant had only paid the advance and since the balance amount was not paid, the applicant could not secure and deliver the sugar, as promised. It was submitted that the applicant had, in turn, placed an offer letter with Sai priya Sugar Limited to purchase the sugar and had also obtained confirmation from Nirani Sugar Limited. It was further submitted that as the goods were tried to be supplied to Pakistan and not Afghanistan as earlier represented, the goods could not be supplied.

10. As against this, the learned APP would urge that the applicant has been habitually deceiving persons by luring them to enter into transaction. Attention of the Court was invited to the statements of two of the witnesses who have stated about having been cheated by the applicant.

11. It is imperative to note that after the transaction fell through for non-payment of balance consideration, as alleged by the applicant, it would have been evidenced by the correspondence emanating from the applicant. It does not appear that the applicant had demanded the balance payment. On the contrary, in the communication addressed on 30 May 2022, the liability to remit back 10% advance was acknowledged. It is also not the case that 10% advance was transferred by the applicant to Sugar Mills from whom Sugar was to be purchased. Prima facie, it appears that the said amount has been diverted to other persons/entitles.

12. It is true that there is a distinction between cheating, which involves dishonest intention since inception of the transaction and the failure on the part of a person to perform

> the promise. The attendant circumstances, however, throw light on the intent of the party in default. In the case at hand, the concomitant circumstances indicate that the intention of the applicant was dishonest since the inception of the transaction. The amount received from the purchaser was not transferred to the supplier. Nor a demand for balance price of the goods was made. Nor there is material to show that the applicant took earnest steps to secure the supply of goods. Having acknowledged the liability to refund the amount, the applicant has not repaid the said amount.
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> 13. The custodial interrogation of the applicant seems to be warranted to unearth the fraud in all its facets and identify the entities / persons to whom the said amount has been transferred and have the money trail and, if possible, recover the said amount. Indeed, there are statements of the witnesses which show that the applicant had allegedly donned the role of a conman. Even if those statements are not give much weight, at this stage, yet they indicate, in the least, the *modus operandi* of deceiving persons by entering into apparently legitimate transactions. It is true the offence entails punishment which may extend to 7 years. However, having regard to the quantum of the amount defrauded and the *modus operandi*, the applicant does not deserve the exercise of discretion. The application, therefore, deserves to be rejected."

8. The aforesaid consideration, especially paragraphs 8 to 13, indicates that this Court did not reject the application for pre-arrest bail for the reason that there was a failure on the part of the applicant to comply with the undertaking to deposit the advance parted with by the first informant, which was taken into account while granting interim bail. On the contrary, the aforesaid observations indicate that this Court was alive to the fact that the prayer for pre-arrest bail cannot be denied for failure to comply with the undertaking and proceeded to consider the merits of the case. Nonetheless, at this stage, I do not deem it appropriate to delve into the question as to whether the applicant made an incorrect statement before the Supreme Court.

9. I propose to consider the prayer of the applicant for pre-arrest bail on merits.

10. Mr. Mulani submitted that the dispute between the parties was purely of a civil nature. At best, it was a case of failure of consideration as the applicant did not supply the goods after accepting the advance payment. No element of criminality can, thus, be attributed to the applicant. Mr. Mulani made an endeavour to draw home the point that the intention of the applicant cannot be said to be dishonest since the inception of the transaction as the applicant had placed orders with the Sugar Mill. A sum of Rs.10,00,000/- was transferred to the account of Nirani Sugars Limited, the supplier. Attention of the Court was invited to the communication dated 24th March, 2021 (Exhibit-F) and the statement of accounts of M/s. Auro Enterprises (Exhibit-G) to lend support to the aforesaid submission. Mr. Mulani urged that the transaction fell through as the applicant did not transfer 20% of the price of the goods, as promised, and, therefore, the supplier refused to supply the goods.

11. Mr. Mulani further submitted that, at this stage, the custodial interrogation of the applicant is not at all warranted. The applicant had appeared before the Investigating Officer for more than 25 occasions. Statements of the witnesses have been recorded. The applicant has furnished all the documents. Therefore, the contention on behalf of the prosecution that the applicant has not co-operated with the investigation, and custodial interrogation of the applicant is warranted to facilitate further investigation cannot be countenanced. Thus, the applicant deserves to be enlarged on pre-arrest bail.

12. The learned APP and the learned Counsel for the first informant stoutly resisted the prayer for pre-arrest bail.

13. At the outset, it is necessary to note that the material on record *prima facie* indicates that the initial term of contract between the parties was that of payment of 10% advance and balance against copy of OBL (Exhibit-C). The submission that the transaction fell through as the first informant did not pay the balance, as agreed, is, *prima facie,* not borne out by the material on record.

14. What accentuates the situation is the fact that at no point of time till the registration of the FIR the applicant had made a grievance that there was a default on the part of the first informant in payment of the balance consideration. On the contrary, the communication dated 16th may, 2024 (page 22) indicates that the applicant had confirmed that the advance would be returned in the ensuing week and instructions were given to the banker to reverse the transaction.

15. It is in the backdrop of these facts, this Court, had observed in the order dated 3rd October, 2023, that had the transaction failed for non-payment of balance consideration, it would have been evidenced by the correspondence emanating from the applicant. On the contrary, the liability to remit back the advance was acknowledged. This Court had also noted the distinction between cheating, which involves a dishonest intention since inception of the transaction, and mere failure to perform the promise. In the light of the attendant circumstances, the Court found that the intention of the applicant appeared to be dishonest since the inception of the transaction.

16. Pertinently, it is not the case that the entire amount of Rs.1,38,84,826/- was transferred by the applicant to the supplier. On the own showing of the applicant, only a sum of

Rs.10,00,000/- was transferred to the supplier. It would be contextually relevant to note that the copy of the extract of the statement of account of the applicant maintained with ICICI Bank indicates that the balance in the said account on the day prior to the deposit of a sum of Rs.1,34,37,330/- by the first informant was Rs.1,058/- only. Immediately after the said deposit, substantial amounts were transferred to the accounts of various entities and amounts were also withdrawn in cash. By the end of 31st March, 2021, the said account had a credit balance of Rs.2,05,770/- only. Out of the said multiple transfers/withdrawals only a sum of Rs.10,00,000/- appeared to have been transferred to Nirani Sugars. Rest of the amount was, in a sense, diverted to different entities and purposes. Thus, the manner in which the huge amount of Rs.1.38 crores was utilized throws light on the animus of the applicant.

17. To add to this, the applicant never raised any dispute about non-receipt of balance consideration. Nor a demand for the balance price of the goods was ever made. Instead, despite having acknowledged the liability to refund the advance, the applicant committed default. Cumulatively these factors, in my considered view, justify a *prima facie* inference that the intention of the applicant was dishonest since the inception of the transaction.

18. The learned APP and the learned Counsel for the first informant attempted to canvass a submission that there is material which demonstrates that the applicant has been habitually defrauding persons under the cloak of legitimate financial transactions. The averments in the affidavits filed before the Supreme Court in opposition to the prayer for pre-arrest bail were sought to be relied upon to show that the applicant has defrauded a number of persons. Indeed, the Investigating Officer had recorded statements of few persons, who have made allegations that the applicant deceived them under colour of legitimate transactions.

19. Mr. Mulani submitted that few of those transactions have resulted in a complaint for the offence punishable under Sections 138 of the Negotiable Instruments Act, 1881. Issue of non-bailable warrant in the said case cannot be arrayed against the applicant to deprive him of pre-arrest bail. Mr. Mulani laid emphasis on the fact that, at this stage, the investigation is complete and custodial interrogation of the applicant is not warranted.

20. I am afraid to accede to this submission. The material on record *prima facie* indicates the complicity of the applicant. The fact that an interval time has passed on account of interim orders or otherwise does not by itself imply that the necessity of custodial interrogation does not subsist. In the peculiar facts of the case, the custodial interrogation of the applicant appears to be warranted to unearth the fraud in all this facets; identify the entities/persons to whom the amounts have been transferred and also have the money trail. The custodial interrogation, it is well recognized, is qualitatively different. Appearance of an accused before the Investigating Officer ensconced with a protective order cannot be a substitute for an effective investigation. The fact that the applicant has been allegedly indulging in defrauding persons by entering into legitimate commercial transactions further exacerbates the situation. It is not a case where the Court can exercise the discretion in favour of the applicant.

21. To conclude, on an appraisal of the material against the applicant afresh, I am inclined to reject the application.

22. Hence the following order:

: O R D E R :

(i) ABA/2179/2023 stands rejected.

(ii) It is clarified that these *prima facie* observations are confined to determine entitlement to pre-arrest bail only.

(iii) In view of disposal of the ABA, IA/3806/2024 stands disposed.

[N. J. JAMADAR, J.]