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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Pronounced on: 07.08.2024

\+ BAIL APPLN. 3004/2021

V HANSPRAKASH ..... Petitioner

Through: Mr Akshay Bhandari, Mr Anmol Sachdeva and Ms Megha Saroha, Advocates along with petitioner in person.

versus

STATE GOVT OF NCT OF DELHI ..... Respondent

Through: Mr Ritesh Kumar Bahri, APP for the State with SI Niranjan Kumar, PS EOW.
Mr D. N. Goburdhun, Sr. Advocate with Mr Viren Bansal and Mr Manav Mitra, Advocates for R-2/complainant

CRL.M.C. 1911/2021

MS. DALMIA CEMENT (BHARAT) LTD ...... Petitioner

Through: Mr. Viren Bansal, Advocate.

versus

STATE & ANR. ..... Respondents

Through: Mr Ritesh Kumar Bahri, APP for the State with SI Niranjan Kumar, PS EOW.

CORAM:
HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J.

BAIL APPLN. 3004/2021

1. The present petition has been filed by the petitioner under Section 439 CrPC seeking regular bail in connection FIR no. 46/2019 under Sections 420/409/467/468/471/120-B/34 IPC registered at Police Station EOW.

2. The case of the prosecution as borne out from the record is that M/s Dalmia Cements Bharat Ltd filed a complaint against M/s Allied Financial Service Pvt. Ltd &Ors regarding fraudulent transfer of mutual funds units/securities worth Rs.344.07 crores of the complainant.

3. It is alleged in the complaint that subsidiaries of the complainant company *viz.* OCL India Limited [OCL] and Dalmia Cement East Limited [DCEL] were interested in making mutual fund investments in May 2017 and thus, they opened Demat accounts with National Securities Depository Limited (NSDL) through its participant Allied Financial Services Pvt. Ltd (AFSPL).

4. Accordingly, Account Opening Forms (AOFs) were signed and Demat accounts in the name of OCL India Limited [OCL] and Dalmia Cement East Ltd (DCEL) were opened. After making initial investment, several further investments and redemptions were made in the said accounts from time to time and the complainants were holding securities worth Rs.344.07 crores in the above accounts as on 28.12.2018.

5. Later on, the above two companies were merged into Dalmia

Cements Bharat Ltd (DCBL) and DCBL became the owner of securities.

6. It is alleged that the complainant submitted redemption on 27.12.2018 but despite various requests, the redemption amount was not credited in the accounts. On 17.09.2019, the complainants reported the matter to NSDL and the NSDL *vide* its reply dated 25.01.2019 informed that there were no securities available in the DEMAT accounts of the complainants.

7. At the same time, the main accused/Sh.Awanish Kumar Mishra, director of AFSPL *vide* his email dated 31.01.2019 confirmed to the complainants the holdings in the above DEMAT Accounts and regretted delay in processing of redemption request and assured that the same would be processed by 06.02.2019.

8. It is alleged that Sh. Awanish Kumar Mishra fraudulently transferred the credentials of the complainant in the account opening form and fed wrong credentials on NSDL server to deprive the complainant from getting an alert message for each transaction and that the accused Awanish Kumar Mishra/main accused further fraudulently transferred the mutual fund units of the complainant worth Rs.344.07 crores by using delivery instruction slips bearing forged signatures of authorized signatories of the complainant companies.

9. It is further alleged that during investigation, it was found that the accused/petitioner herein being the head of business department and chief business strategy officer of the IL&FS Securities Services Ltd. [ISSL] malafidely facilitated the main accused in using the said fraudulently transferred mutual fund units for margin.

10. During the course of investigation, the petitioner joined the

investigation as and when required and no recovery or discovery of new facts was required on his part. Owing to this reason, he was not arrested during investigation in the case.

11. Sequel to above, a charge sheet was filed against the petitioner/accused on 14.03.2019 and he was taken into custody.

12. Before proceeding further, it is necessary to mention that *vide* order dated 28.04.2021 passed in BAIL APPLN. 1259/2021, the petitioner was granted interim bail for a period of two weeks on account of his parents contracting COVID, which was thereafter extended from time to time in terms of the orders passed in the ***Courts on its own motion vs State (Govt. of NCT of Delhi) WP(C) 4921/2021***. During the operation of the directions passed in ***Courts on its own Motion*** (supra), the petitioner filed the present petition.

13. *Vide* order dated 10.11.2021 passed in the present petition, the petitioner was granted extension of interim bail, which was therefore extended time to time by this Court. Thus, the petitioner continues to be on interim bail.

14. The learned counsel on behalf of the petitioner submits that the petitioner was the Vice President, Business Development of ISSL and has no concern with the funds of the complaint as ISSL was engaged in the business of being a clearing member registered with the exchange. He further submits that the petitioner has duly joined investigation when called by the Investigating officer and submitted his reply dated 26.09.2019 and 07.10.2019, stating that his domain of work was concerned only with marketing and he was never a director and acted on the instruction of his superiors received by him.

15. He contends that Clearing Member i.e. ISSL does not have any access to the end client of the trading member. The clearing member only receives securities/collaterals towards the total obligation of the concerned stock broker from a pool account of the stock broker in which securities towards the total obligation of all the clients are put together and then forwarded to the clearing agent.

16. He submits that the entire forgery of documents was committed by the main accused, namely, Awanish Kumar Mishra on the very first day when the DEMAT accounts were opened by manipulating the credentials of the complainant. He further submits that the main accused namely, Awanish Kumar Mishra has been granted regular bail by this Court *vide* order dated 25.10.2021 passed in BAIL APPLN.1947/2021 and prays that the concession of regular bail be granted to the petitioner on the ground of the parity.

17. He further submits that there is no allegation against the petitioner that any trail of money pertaining to the said transactions leads to him or any money had been received by the petitioner pertaining to the transactions in question. To buttress his contention, the learned counsel for the petitioner has impressed upon the Forensic audit of AFSPL to contend that payout/premium has been received and used by AFSPL and not by petitioner.

18. He contends that the petitioner has remained in custody for 15 months, even though he was not arrested during the investigation. After filing the chargesheet, when the petitioner appeared before the Magistrate court pursuant to summons issued to him, his bail application was rejected and he was taken into custody. He draws attention of the Court to the

decision in ***Satender Kumar Antil vs. CBI and Anr. (2022) 10 SCC 51*** to submit that the Hon'ble Supreme Court has already deprecated the practice of arresting an accused after charge-sheet has been filed without his arrest.

19. The learned counsel for the petitioner submits that mutual funds that were the subject matter of the present FIR have already been returned to the complainant by the orders of the Hon'ble Supreme Court on furnishing a bank guarantee.

20. He submits that the petitioner has been roped in with the aid of Section 120B IPC, which requires meeting of minds whereas the petitioner did not even communicate with the main accused prior to 02.01.2019, therefore, there is no possibility of the petitioner being complicit with the main accused.

21. He contends that there is no reason to keep the petitioner in custody in terms of the settled parameters of bail. He states that the evidence is primarily documentary in nature and, as per the chargesheet, all the relevant documents are already in the custody of police and nothing is required to be recovered from the petitioner. He, therefore, prays that the petitioner be granted bail.

22. *Per contra*, the learned Senior Counsel for the complainant submits that the present application is not maintainable. He submits that the present petitioner has abused the process of law, violated his unconditional undertaking and orders of this Hon'ble Court to surrender before the jail authorities as he had filed a petition under seeking grant of interim bail, not on account of the merits of the case or his ill health, but on the ground of his father's purported illness. This Hon'ble Court granted him interim bail of two weeks. He adds that the Petitioner violated his undertaking and

did not surrender and is still not in custody.

23. He submits that the present petitioner is in gross contempt as he has violated the orders of the Full Bench of this Hon'ble Court in W.P.(C) 4921/2021 whereby extension of interim bail was granted to all with the directions to surrender by 20.11.2021. In Para 7(iv) of the said Full Bench Order, all the prisoners were granted liberty to move applications for extension of interim bail, and such applications for extension of their interim bail would be considered on its own merit. The Petitioner yet again played a fraud on this Court as no application for the extension of the interim bail granted was filed.

24. He submits that present Application is under Section 439 Cr.P.C. directly to the High Court. The judicial discipline and proprietary demands that in a case triable by a Magistrate, bail application should be first filed in the said Court, and then, follow the hierarchy by approaching the Sessions Court and then to this Hon'ble Court. Thus, this Petition is misconceived.

25. He invites attention of the Court to Section 439 Cr.P.C. to contend that before the Court could consider regular bail plea, the applicant should be 'in custody' whereas the present petitioner is out on bail. He submits that reliance by the Petitioner on ***Sundeep Kumar Bafna v. State of Maharashtra & Anr (2014) 16 SCC 623*** is misplaced as it was peculiar to its own facts.

26. He further submits that the merits of the present bail application cannot be considered at this stage as this Court already held in two orders dated 29.11.2021 and 12.01.2022 that the maintainability of this petitionwould be considered first.

27. I have heard the learned counsel for the petitioner, as well as, the learned APP for the State and have perused the record.

28. Before appreciating the rival contentions of the parties, it is imperative to note that the petitioner was not arrested during the course of investigation and he was taken into custody only after he appeared pursuant to issuance of summons post filing of charge-sheet. Given the fact that the charge-sheet was filed by the police without arresting the petitioner, he ought to have been granted the concession of regular bail. Reference in this regard may be had to the judgment of this Court by the learned Single Judge in ***Court on its own motion vs. CBI (2004) 109 DLT 494***, the relevant paragraph of which reads as under:

> *"The Court shall on appearance of an accused in non-bailable offence who has neither been arrested by the police/Investigating Agency during investigation nor produced in custody as envisaged in Section 170, Cr.P.C. call upon the accused to move a bail application if the accused does not move it on his own and release him on bail as the circumstance of his having not been arrested during investigation or not being produced in custody is itself sufficient to entitle him to be released on bail. Reason is simple.* ***If a person has been at large and free for several years and has not been even arrested during investigation, to send him to jail by refusing bail suddenly, merely because charge-sheet has been filed is against the basic principles governing grant or refusal of bail****."*
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> (emphasis supplied)

29. In subsequent judgment the Division Bench of this Court in ***Court on its own motion vs. State, (2018) 254 DLT 641*** again observed it is not essential in every case involving a cognizable and non-bailable offence that an accused be taken into custody when the charge-sheet / final report

is filed.

30. The Hon'ble Supreme Court in ***Siddharth v. State of U.P., (2022) 1 SCC 676***, gave its imprimatur to the aforesaid decisions of this Court. The aforesaid decision was also affirmed by the Hon'ble Supreme Court in its subsequent decision in ***Satender Kumar Antil*** (supra) and it was observed that there needs to be a strict compliance of the mandate laid down in the judgment in ***Siddharth*** (supra).

31. The contention of the learned Senior Counsel for the respondent that the present petition seeking regular bail cannot be considered till the time the petitioner surrenders also does not hold much water for the following reasons:

(i) Firstly, in view of the law laid down in ***Court on its own Motion*** (supra) and approved by the Division Bench of this Court as well as by the Supreme Court in ***Siddharth*** (supra) and ***Satender Kumar Antil*** (supra), the petitioner ought to have been granted regular bail upon him appearing pursuant to issuance of summons, as he was never arrested during investigation;

(ii) Secondly, in the instant case, the petitioner has been on interim bail for a period of almost three years and no complaint had been filed by any party regarding misuse of the said concession granted to the petitioner; and

(iii) Thirdly, and more important, that during his interim bail, the petitioner has remained present on each date of hearing and even when the bail application was finally heard by this Court, the petitioner was present in Court, therefore the petitioner was in the constructive custody of the Court when the application for regular bail was taken up for consideration.

32. In ***Sundeep Kumar Bafna v State of Maharashtra & Anr (2014) 16 SCC 623***, wherein a case was registered with the police against the appellant-accused therein in respect of offences punishable under section 288, 304, 308, 336, 388 read with section 34 and 120-B IPC. The accused's application for grant of anticipatory bail was rejected by the High court and his SLP thereagainst was also dismissed by the Supreme Court. While declining to grant anticipatory bail to the appellant, the Supreme Court granted him a period of 4 weeks to enable him to apply for regular bail. Accordingly, the accused filed an application under section 439 CrPC before the High Court seeking permission to surrender to its jurisdiction and for grant of regular bail. The High Court held that the accused was not in custody, hence the application for bail under Section 439 CrPC was held to be not maintainable. This conclusion was reached notwithstanding the fact that the appellant was present in Court and had pleaded in writing that he be permitted to surrender to the jurisdiction of the High Court.

33. In appeal before the Supreme Court,while setting aside the order of the High Court, the Apex Court held as under:

> ***"In this analysis, the opinion in the impugned judgment incorrectly concludes that the High Court is bereft or devoid of power to jurisdiction upon a petition which firstly pleads surrender and, thereafter, prays for bail. The High Court could have perfunctorily taken the appellant into its custody and then proceeded with the perusal of the prayer for bail****; in the event of its coming to the conclusion that sufficient grounds had not been disclosed for enlargement on bail, necessary orders for judicial or police custody could have been ordained. A Judge is expected to perform his onerous calling impervious of any public pressure*

that may be brought to bear on him."

(emphasis supplied)

34. The Hon'ble Supreme Court in ***Sundeep Kumar Bafna*** (supra) relied upon its earlier decision in ***Niranjan Singh v. Prabhakar Rajaram Kharote, (1980) 2 SCC 559,***wherein it was observed as under:

> *"8. **Custody, in the context of Section 439**, **(we are not, be it noted, dealing with anticipatory bail under Section 438) is physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and orders of the court**.*
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> *9. He can be in custody not merely when the police arrests him, produces him before a Magistrate and gets a remand to judicial or other custody. **He can be stated to be in judicial custody when he surrenders before the court and submits to its directions**."*

(emphasis supplied)

35. Similarly, in ***Kanaksinh Mohansinh Mangrola Vs State of Gujarat (2006) 9 SCC 540,*** it was held that *"when bail application was filed the accused was in custody as he was then on interim bail."*

36. Having noted the aforesaid *dicta*, it could be said that the petitioner was 'in custody' of the Court without actual physical detention in jail as he had been directed by the Full Bench in **WP(C) No. 4921/2021** entitled **Court on its Own Motion v. State (Govt. of NCT of Delhi)** to surrender on 20.11.2021 and thereafter this Court vide order dated 10.11.2021 extended the interim bail till 22.11.2021 with further direction to the petitioner to be present in court on 22.11.2021. Thereafter, the petitioner had been regularly appearing before the courtand the interim orders were continued from time to time by the Court. Thus, the petitioner had

submitted to the directions of this court.

37. In so far as contention that the petitioner should have first approached the Magistrate, is concerned, it is apposite to note that initially the petitioner had filed his bail application before the learned Magistrate under section 437 CrPC, which was dismissed *vide* order dated 04.02.2020. Thereafter, bail application filed under section 439 CrPC was also dismissed by the learned Additional Sessions Judge on 12.02.2020. It is trite law that powers of the High Court under section 439 CrPC are untrammelled. There are no restrictions on the High Court to entertain an application for bail directly on subsequent occasions provided always that the accused is in custody, and this position obtains as soon as the accused actually surrenders himself to the Court, therefore, directing the accused to appear and apply for the bail first before the Magistrate is not legally warranted. Reference in this regard may be had to the decision of the Hon'ble Supreme Court in ***Sundeep Kumar Bafna*** (supra).

38. Undoubtedly, this Court had dismissed the regular bail [Bail Appln. 1097/2020] of the petitioner earlier on 01.12.2020, but since then there have been change in circumstances –

i. Firstly, the main accused namely, Awanish Kumar against whom serious allegations had been made has already been granted regular bail *vide* order dated 25.10.2021 by this Court in BAIL APPLN. 1947/2021. It is also seen that the role of the petitioner is much less serious than that of the main accused, which fact is not in dispute. Even as per the case of prosecution the role of petitioner is subsidiary to that of main accused namely, Awanish Kumar Mishra.

Incidentally, the clearing agent would not have the information of each individual client of a stock broker on whose behalf the stock broker is purchasing or selling the stock. Further, it has also come on record that the petitioner was the Vice President, Business Development of ISSL (being the clearing agent). Furthermore, the job of a clearing agent is not that of a stock broker and the clearing agent merely acts as a facilitator between the stock exchange and the broker.

ii. Secondly, the mutual funds in question in the present case have already been returned to the complainant/DCBL pursuant to the order dated 16.03.2021of the Hon'ble Supreme Court in I.A. No.100812/2020 in Civil Appeal Nos. 5395-5398 of 2019, on furnishing a bank guarantee.

39. In so far as allegations of forgery are concerned, the same are yet to be established during trial. It is well settled that at the pre-conviction stage, there is presumption of innocence. The object of keeping a person in custody is to ensure his availability to face the trial and to receive the sentence that may be awarded to him. Detention is not supposed to be punitive or preventive. The seriousness of allegations or the availability of material in support thereof are not the only considerations for declining bail. Delay in the commencement and conclusion of the trial is a factor to be taken into account and the accused cannot be kept in custody for an indefinite period if the trial is not likely to be concluded within a reasonable time.[1]

40. It also cannot be ignored that the petitioner has already undergone15 months in custody. Further, in the given situation when the trial is going to

[1] Vinod Bhandari v. State of Madhya Pradesh, (2015) 11 SCC 502

be a protracted one, no useful purpose will be served in the sending the petitioner back to judicial custody to await the outcome of trial.

41. At this juncture, it is also apposite to refer to the following observations of the Hon'ble Supreme Court made in ***Sanjay Chandra v. CBI, (2012) 1 SCC 40***, which read as under:

> "*21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon.* ***The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship.*** *From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.* ***Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson.***
>
> *xxxx xxxx xxxx*
>
> *40. The grant or refusal to grant bail lies within the discretion of the court. The grant or denial is regulated, to a large extent, by*

the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. ***The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the court, whether before or after conviction, to assure that he will submit to the jurisdiction of the court and be in attendance thereon whenever his presence is required.***

xxxx xxxx xxxx

46. We are conscious of the fact that the accused are charged with economic offences of huge magnitude. We are also conscious of the fact that the offences alleged, if proved, may jeopardise the economy of the country. At the same time, we cannot lose sight of the fact that the investigating agency has already completed investigation and the charge-sheet is already filed before the Special Judge, CBI, New Delhi. Therefore, their presence in the custody may not be necessary for further investigation. We are of the view that the appellants are entitled to the grant of bail pending trial on stringent conditions in order to ally the apprehension expressed by CBI."

(emphasis supplied)

42. In ***P. Chidambaram v. Directorate of Enforcement, (2020) 13 SCC 791***, it was observed by the Supreme Court that even if the allegation is of commission of a grave economic offence, it is not a rule that bail should be denied in every case and ultimately the consideration will have to be on case-to-case basis on the facts involved therein and securing the presence of the accused to stand trial.

43. In ***Satender Kumar Antil v. State of Maharashtra, (2022) 10 SCC 51****,* the Supreme Court, after noticing the law as laid down in ***Sanjay Chandra*** (supra) and ***P. Chidambaram*** (supra), deprecated the approach of deciding the bail application strictly, contrary to legal principles. The

Supreme Court also emphasized the role of criminal courts as guardian angels of liberty. The relevant observations reads thus:

> "*93. The rate of conviction in criminal cases in India is abysmally low. It appears to us that this factor weighs on the mind of the Court while deciding the bail applications in a negative sense.* ***Courts tend to think that the possibility of a conviction being nearer to rarity, bail applications will have to be decided strictly, contrary to legal principles. We cannot mix up consideration of a bail application, which is not punitive in nature with that of a possible adjudication by way of trial. On the contrary, an ultimate acquittal with continued custody would be a case of grave injustice****.*
>
> ***94. Criminal courts in general with the trial court in particular are the guardian angels of liberty. Liberty, as embedded in the Code, has to be preserved, protected, and enforced by the criminal courts. Any conscious failure by the criminal courts would constitute an affront to liberty. It is the pious duty of the criminal court to zealously guard and keep a consistent vision in safeguarding the constitutional values and ethos. A criminal court must uphold the constitutional thrust with responsibility mandated on them by acting akin to a high priest****.*"

(emphasis supplied)

44. Notably, the investigation is now complete and the charge-sheet as well as a supplementary charge-sheet stands filed. The present case is otherwise based on documents and all incriminating documents have already been recovered by the investigating agency and made part of the charge-sheet. Evidently, the custody of the petitioner is no longer required. In the given circumstances, no useful purpose will be served in keeping the petitioner behind bars.

45. It is also not the case of the prosecution that the petitioner has a criminal record. Further, the petitioner was never arrested during investigation till the filing of charge-sheet nor he misused his interim bail, therefore, he does not seem to be a flight risk.

46. In view of the circumstances discussed above, this court is of the view that the petitioner is entitled to grant of regular bail pending trial. Accordingly, the petitioner is admitted to bail subject to his furnishing a personal bond in the sum of Rs. 50,000/- with one surety of like amount, subject to the satisfaction of the Trial Court/Duty Magistrate/CMM, further subject to the following conditions:

a) Petitioner shall appear before the learned Trial Court as and when the matter is taken up for hearing.

b) The petitioner shall not contact, nor visit, nor offer any inducement, threat or promise to the complainant or any of the prosecution witnesses or other persons acquainted with the facts of the case. The petitioner shall not tamper with evidence nor otherwise indulge in any act or omission that is unlawful or that would prejudice the proceedings in the pending trial.

c) He shall provide the address where he would be residing during the period of bail and shall not change the address without informing the concerned IO/SHO;

d) He shall, upon his release, give his mobile number to the concerned IO/SHO and shall not change his mobile phone number without informing the concerned IO/SHO.

47. The petition stands disposed of.

48. It is made clear that the observations made herein are only for the purpose of considering the bail application and the same shall not be deemed to be an expression of opinion on the merits of the case.

49. Copy of the order be forwarded to the concerned Jail Superintendent for necessary compliance and information.

50. Order *dasti* under signatures of the Court Master.

51. Order be uploaded on the website of this Court.

CRL.M.C. 1911/2021

52. This matter was tagged/listed along with the aforesaid Bail Application, therefore, vide common order dated 05.04.2024 judgment was inadvertently reserved in this matter as well, though no arguments were addressed by the parties in this matter. Accordingly, this matter is released.

53. List before the Roster Bench for directions on 23.08.2024.

VIKAS MAHAJAN, J.

AUGUST 07, 2024
N.S.ASWAL