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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO. 853 OF 2025

Kinner Kanu Nayak .. Applicant
Versus
The State of Maharashtra .. Respondent

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- Mr. Mithilesh Mishra, Advocate for Applicant.
- Ms. Savita M. Yadav, APP for Respondent – State.
- Mr. Garendra Kshirsagar, PI, EOW, Unit V, Mumbai.

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CORAM : MILIND N. JADHAV, J.
DATE : APRIL 24, 2025.

P.C.:

1. This is an Application under Section 483 of the Bharatiya Nagarik Suraksha Sanhita, 2023 seeking Regular Bail in connection with C.R.No. 1260 of 2022 registered with Santacruz Police Station for offences punishable under Sections 406, 409, 420 read with 34 of Indian Penal Code, 1860. The same was transferred to EOW and re-registered as C.R. No. 157 of 2022. Applicant is arraigned as Accused No. 1. He is arrested on 04.09.2023 and incarcerated for the past 1 year 7 months and 20 days pending trial in the present crime.

2. It is prosecution case that First-Informant's father was a proprietor of the firm namely 'A.S. Builders and Developers' a Construction firm. Applicant and First-Informant's father were well acquainted with each other since the year 2012 as they were in the same business of Construction. It is prosecution case that in January 2014 Applicant was in need of funds / finance for his redevelopment project namely ‘Govardhangiri CHS’ in Goregaon, Mumbai. Therefore he approached First-Informant’s father for a loan of Rs. 32 crores. It is prosecution case that First-Informant’s father agreed to lend an amount of Rs. 32 crores however in return Applicant agreed to give 35 flats in the said project against the said loan. It is prosecution case that First-Informant’s father had transferred an amount of Rs. 25,32,22,667/- to the bank accounts of Applicant, his wife and M/s. Taksha Spaces Pvt. Ltd. during the period from 28.03.2014 to 01.09.2015. It is prosecution case that First-Informant’s father paid Rs. 5 crores in cash to the Applicant however in the interregnum First-Informant’s father requested Applicant to execute an Agreement regarding the said transaction but Applicant delayed the same and when First-Informant’s father visited Applicant’s office he tried to induce the First-Informant’s father to lend more money and by doing so he would make him a 50% partner in the said project to which he refused and demanded repayment of loan with 18% interest or 35 flats as agreed. It is prosecution case that on 13.08.2016 First-Informant’s father passed away. Thereafter in the month of October 2016 First-Informant alongwith his elder brother visited Applicant's office to inquire about the Agreement, Applicant did not respond to them. Thereafter in December 2018 when First-Informant once again visited

Applicant he said that he and First-Informant's father had already entered into a partnership deed and was currently facing losses in the said project which even First-Informant would have to bear as his father was a partner in the said project. It is prosecution case that on 15.03.2019 First-Informant came across an advertisement in the newspaper wherein Applicant's company alongwith a new partnership firm were developing the said project. It is prosecution case that First-Informant's father was not a partner but was an investor in the said project. It is prosecution case that Applicant since inception had an intention to cheat First-Informant's father and therefore took undue advantage of his situation and neither repaid the loan amount nor did he allot the promised 35 flats in the project as agreed. Hence the FIR.

3. Mr. Mishra, learned Advocate for Applicant would submit that Applicant is falsely implicated in the present case. He would at the outset draw my attention to the FIR appended at page No.108 of the Application and would submit that from perusal of statement of First Informant at page Nos.111 to 116, no offence whatsoever under Sections 406, 409 or 420 of IPC is made out against Applicant. He would submit that none of the ingredients of Sections 406, 409 or 420 of IPC are present in the crime.

3.1. He would submit that First – Informant's father invested in the project from the year 2014 to 2015 as one of the partner in the said project. The project however failed and suffered losses due to various unavoidable reasons, First – Informant father sustained loss as sustained by the Applicant. He would submit that there was no deception at the stage of inception, if at all it is prosecution case that Applicant cheated First – Informant's father then from 01.09.2015 till 13.08.2016, in the interregnum no complaint was filed against the Applicant by First Informant's father which is casts a serious doubt on the prosecution case. He would submit that First – Informant after an unexplained delay of almost 8 years filed the present complaint against the Applicant. He would submit that very basis of the grievance raised by the First – Informant could at the highest, give rise to a civil dispute, which is sought to be given the colour of criminality only because the civil remedy would be hit by delay and laches and the law of limitation.

3.2. He would submit that First – Informant initially filed a complaint with Santacruz Police Station which was refused to be registered. Next the First – Informant approached the Magistrate under Section 156 (3) of the Cr.P.C. for seeking directions to lodge the complaint which once again came to be rejected. He would submit that despite the two aforementioned orders appended at page No. 45 and 90 of the Application and failed attempts, First – Informant registered the present FIR with Santacruz Police Station suppressing the aforementioned orders. Hence he would submit that First - Informant has not approached the Court with clean hands.

3.3. He would submit that essential elements to constitute an offence under Section 409 of IPC are *prima facie* not established by the prosecution case. He would submit that on examination of record essential ingredients of Section 409 do not stand prima facie proved and there is no material to show that Applicant was individually entrusted with any 'property' coupled with criminal breach of trust in his capacity as a public servant, banker, merchant or agent, as required under Section 409 of the IPC. Hence the prosecution case falls to the ground.

3.4. He would submit that offences under Sections 406 and 420 cannot run together or coexist for the same set of facts as these offences are distinct and require different elements to be proven and this facet is squarely covered by the judgement of the Supreme Court in the case of ***Delhi Race Club Ltd. and Ors. Vs. State of U.P. and Anr.***[1]

3.5. To support his above submissions he has referred to and relied upon the following decisions of the Supreme Court and this Court:-

i. ***Abdulmajid Abdulsattar Memon Vs. The State of Gujarat***[2]

ii. ***Kishore Raman Yadav Vs. The State of Maharashtra*** [3]

1 2024 SCC OnLine SC 2248
2 Cri. Appeal NO. 3525 of 2024 decided on 27.08.2024.
3 Bail Application No. 2917 of 2024 decided on 05.09.2024

iii. *Amit Harish Dave Vs. The State of Maharashtra*[4]

iv. *Arvind Kejriwal Vs. Central Bureau of Investigation*[5]

v. *Priyavrat Madhana Vs. Directorate of Enforcement and Ors.*[6]

vi. *Deepak Appasaheb Deshmukh Vs. . Directorate of Enforcement and Ors*[7]

3.6. He would submit that investigation in the matter is completed; charge-sheet is filed but till date trial before the Court has not commenced and even charges are not framed. He would submit that though FIR is registered on 20.12.2022 Applicant was arrested on 04.09.2023 which is after more than 8 months from registration of the FIR which makes it clear that Applicant co-operated with the investigation carried out by the prosecuting agency and he undertakes to extend further co-operation, if any, to the prosecution. He would submit that Applicant has been granted bail in three other FIRs pertaining to the said project wherein similar allegations were levelled against him which also need to be considered by the Court. He would therefore persuade the Court to consider the Applicant's case in the above facts which is also squarely covered by the decision of this Court in the case of ***Rakesh Brijlal Jain and Ors. Vs. State of Maharashtra and Ors.***[8]

4 Bail Application No. 2994 of 2024 decided on 09.01.2025
5 2024 SCC OnLine SC 2550
6 WP (ST) No. 16175 of 2024
7 WP (ST) No. 20120 of 2024
8 Criminal Revision Application No. 379 of 2016 decided on 21.01.2025.

3.7. He would submit that Applicant has deep roots in Society and he has already suffered pre-trial incarceration for 1 year 7 months and 20 days pending trial, the investigation being completed and chargesheet being filed and no charge being framed till date entitles the Applicant to pray for bail. He would submit that therefore his further custodial interrogation is not necessary and considering the overall *prima facie* facts the Bail Application of Applicant be allowed on terms and conditions deemed fit by the Court.

4. Ms. Yadav, learned APP for the State would vehemently oppose grant of bail to the Applicant. She would draw my attention to the Affidavit – in – Reply appended at page No. 164 of the Application dated 13.03.2025 filed by Mr. Gajendra R. Kshirsagar, Police Inspector, Economic Offences Wing, Unit V, Mumbai and contend that Applicant is indicted for an economic offence involving an amount of Rs. 30,32,22,667/-. She would submit that economic offences are offences against the economy of the nation and affects the financial fabric of the Society at large. She would submit that there is sufficient material placed on record in the charge-sheet which establishes complicity of Applicant in the crime.

4.1. She would submit that if Applicant states that First – Informant's father was a partner in the said project then no Agreement or any other documentary evidence regarding the alleged partnership is placed on record to corroborate the same. She would submit that Applicant received funds on behalf of M/s. Taksha Spaces Pvt. Ltd. for development of the said project. Hence Applicant being the Director of M/s. Taksha Spaces Pvt. Ltd. has received the aforementioned amounts which were further utilized by him for his personal use for purchasing properties and payment of his personal loans. She would submit that it is pertinent to note that Applicant has not denied the amount received from First – Informant's father. She would submit that Applicant since inception had an intention of cheating, hence he did not execute any partnership deed or agreement if at all First – Informant's father was a partner to the said project.

4.2. She would submit that Applicant has 3 criminal antecedents to his discredit pertaining to the said project, out of which two FIRs have been filed by the flat purchasers and one by his partner in the same project. Hence she would submit that if Applicant is released on bail there is a possibility of Applicant tampering with evidence and influencing the witnesses which cannot be ruled out, hence she would urge the Court to reject the present Application.

5. I have considered the rival submissions advanced by the learned Advocates at the bar and perused the record of the case with their able assistance.

6. In the present case it is seen that dispute between the parties essentially arises out of a commercial business transaction between First – Informant's father and Applicant. *Prima facie* on perusal of the record it is seen that the said commercial business transaction dates back to the year 2014. *Prima facie* it is seen that no documentary evidence is placed on record by either parties to corroborate the contentions made by them. If at all prosecution case is to be considered *prima facie* then the fact that First – Informant's father not filing any complaint against Applicant between the years 2014 to 2015 coupled with the unexplained delay of almost 8 years by First – Informant after demise of his father is fatal to the prosecution case. There is no explanation for the delay in taking steps either since the charge is very serious. *Prima facie*, present case admittedly arises out of a commercial business transaction between parties as the entire case of prosecution is solely based on the verbal agreement between the First - Informant's father and Applicant and their financial transactions and nothing more. *Prima facie* there is no material placed on record to show that Applicant was individually entrusted with any 'property' either. *Prima facie* in the facts of the present case Applicant does not fall under the category of public servant, banker, merchant or agent, as required under Section 409 of the IPC. Hence the essential ingredients to constitute offence under Section 409 of IPC are *prima facie* not established by prosecution. Considering the decision of the

Supreme Court in the case of ***Delhi Race Club Pvt. Ltd (1st supra)*** it is held that Sections 406 and 420 cannot run together or coexist for the same set of facts as these offences are distinct and require different elements to be proven.

7. Record also *prima facie* shows that as alleged by the prosecution it is a case of complete inaction on the part of Applicant with regard to alleged non-payment of the loan amount given by First-Informant's father to Applicant for the said project as also failure to allot 35 flats as against the alleged loan. In my *prima facie* opinion, this being a purely civil dispute, the First - Informant was rightly denied permission to lodge the FIR in the first instance by the Police Station and even by the concerned Magistrate, despite which by suppressing the said two orders, First - Informant has surreptitiously lodged the present FIR.

8. With regard to other offences against Applicant also it is seen that they arise from commercial business transactions. It is an admitted fact that Applicant has been granted bail by this Court and Sessions Court in the other three aforementioned offences. This is also a factor that needs to be taken into consideration. Regarding allegation of misappropriation of monies and routed to his Company, wife's account and to his own account, undoubtedly that will be a case for trial if proved on the basis of evidence. Needless to state that complicity of the Applicant can be proved by the prosecution in trial.

9. In the present case, investigation is completed, charge-sheet is filed however charges have not been framed till date. Prosecution have cited probable 19 witnesses to be examined in the charge-sheet. Hence commencement and completion of trial in the near foreseeable future is bleak which is another factor that impels me to consider the bail Application of Applicant.

10. It is settled law that a Court while deciding a Bail Application has to keep in mind the principal rule of bail which is to ascertain whether the Accused is likely to appear before the Court for trial. There are other broad parameters also like gravity of offence, likelihood of Accused repeating the offence while on bail, whether he would influence the witnesses and tamper with the evidence, his antecedents are required to be considered in such cases.

11. In this regard, support is drawn from the decision of the Supreme Court in the case of ***Sanjay Chandra Vs. Central Bureau of Investigation***[9] wherein the Supreme Court has held that in economic offences while considering an application for bail, the nature of charge may be relevant but at the same the punishment to which the party may be liable, if convicted is also a significant aspect and therefore both, the seriousness of the charge and the severity of the punishment

9 (2012) 1 SCC 40

should be taken into consideration for arriving at decision of grant of bail. It further observed that deprivation of liberty must be considered a punishment unless it is absolutely necessary in the interest of justice and that object of bail is merely to secure appearance of accused at the trial (*emphasis supplied*).

12. Next, the decision of the Supreme Court in the case of ***P. Chidambaram Vs. Directorate of Enforcement*** [10] is also relevant in the facts of the present case. The Supreme Court observed that economic offences would fall under the category of 'grave offences' and in such circumstances while considering application for bail, the Court will have to deal with the same being sensitive to the nature of allegations made against the accused, however the term of sentence that is prescribed for the offence which is in addition to the triple test or the tripod test that would be normally applied. In that regard the Supreme Court has further held that even if the allegation is one of 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.

13. In so far as the apprehension of the Applicant influencing the outcome of the trial is concerned, it seems that all evidence and material relevant to the prosecution's disposition is already in their

10 (2020) 13 SCC 791

possession, negating the likelihood of any tampering by the Applicant.

14. In view of my above *prima facie* observations and findings and facet of pre-trial incarceration for the past 1 year 7 months and 20 days pending trial, charge not being framed and no possibility of the trial commencing and for that matter concluding in the near foreseeable future, invoking the right of Applicant to speedy justice and personal liberty as enshrined in Article 21 of the Constitution of India, I am of the opinion that Applicant can be released on bail.

15. Hence, Bail Application stands allowed subject to the following terms and conditions:-

(i) Applicant is directed to be released on bail on furnishing P.R. Bond in the sum of Rs.50,000/- with one or two sureties in the like amount;

(ii) Before his actual release from jail, Applicant shall furnish his address where he proposes to reside after his release from jail to the concerned Police Station and also to the trial Court;

(iii) After his release from jail, Applicant shall report to the Investigating Officer as and when called for;

(iv) Applicant shall attend the trial Court on first Tuesday of every month between 11.00 a.m. and 1.00 p.m. to mark his presence. If the first Tuesday of the said month falls on a holiday and / or non Court working day, the Applicant shall mark presence on the next working day;

(v) Applicant shall co-operate with the conduct of trial and attend the trial Court on all dates unless specifically exempted and will not take any unnecessary adjournments, if he does so, it will entitle the prosecution to apply for cancellation of this order;

(vi) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court;

(vii) Applicant shall not influence any of the witnesses or tamper with the evidence in any manner; and

(viii) In case of any infraction of the above conditions and / or two consecutive defaults in marking his attendance before trial Court, it shall attract the provisions of Section 439(2) of Cr.P.C. i.e. for cancellation of bail.

16. It is clarified that the observations made in this order are limited for the purpose of granting Bail only. They shall not be construed as observations on merit. The trial shall be adjudicated on the strength of evidence led by parties and strictly on its own merits being uninfluenced with any of the *prima facie* observations made herein above in this order.

17. Bail Application is allowed and disposed.

[MILIND N. JADHAV, J.]