Andreza

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 271 OF 2022
WITH
INTERIM APPLICATION NO. 501 OF 2022

BAIL APPLICATION NO. 271 OF 2022

Alnesh Akil Somji … Applicant
Versus
The State of Maharashtra …Respondent

WITH

INTERIM APPLICATION NO. 501 OF 2022
IN
BAIL APPLICATION NO. 271 OF 2022

Yogesh Vishnu Dixit … Intervenor

Mr. Subodh Desai, Mr. Kartik Garg, Mr. Ajay Vazirani, Mr. Dhiren Durante, Mr. Sahil Namavati i/b. Laxicon Law Partners *for the Applicant.*

Mr. A. R. Kapadnis, APP *for the Respondent-State.*

Mr. Amit Desai, Senior Advocate i/b. Mr. Shailesh Mhaske & *Mr. Arfat Shaikh, for the Intervenor in IA No. 501/2022.*

Mr. Satyavrat Joshi, *for the Intervenor*

CORAM: C. V. BHADANG, J
Reserved for Order on : 12 April 2022
Pronounced on : 25 April 2022

(*Through Video Conference***)**

ORDER

1. By this application the applicant (Accused no1) is seeking bail under section 167(2) of the Criminal Procedure Code (Cr.P.C.) in Crime no 153/2021 PS Koregaon Park Pune, for the offence punishable under section 406, 409,420 read with Section 34 of Indian Penal Code (IPC) and Section 3 and 4 of the Maharashtra Protection of Depositors Act (MPID Act). The learned Special Judge at Pune by order dated 07.01.2022 has refused to release the applicant on default bail under Section 167(2) of CrPC.

2. The aforesaid crime is registered on the basis of the complaint dated 27.10.2021 lodged by the intervenor Yogesh Vishnu Dixit. The applicant is a builder by profession. According to the informant the applicant with his wife Dimple Somaji (Accused no 2) had induced him to invest amount in their venture M/s M.G. Enterprises and had accepted deposits from the informant and others assuring 24% p.a. returns. The informant claims to have invested a total amount of Rs.4000000/- for which returns were paid from 2016 to 2018. The informant had inverted a further amount of Rs. 500000/- in 2019. The applicant and the co-accused had failed to repay the principle and the interest amounting to Rs.66,90,000/-. The informant claims that the applicant and the co-accused had also defaulted in the matter of repayment of the principle and interest to Kiran Shetty, Maya Dwarkadas and others.

3. It appears that the applicant and his wife were arrested at Delhi Airport on 1.11.2021 and were produced before the Patiala Court at Delhi on 2.11.2021 and 48 hours transit remand was obtained. On 3.11.2021 they were produced before the Special Court (MPID) at

Pune, when they were remanded to police custody (PCR) till 8.11.2021 which was further extended till 11.11.2021. From 11.11.2021, the applicant is in magisterial Custody Remand(MCR). The accused no.2 Dimple Somji has been released on temporary bail *interalia* on condition of payment of certain amount by the learned Special Court.

4. It appears that on 3.1.2022 the investigating officer filed a remand application dt.31.12.2021 intimating the special Court about addition of Section 409 of IPC on account of following circumstances which were revealed during the investigation.

> (i) Under a Memorandum of understanding (MoU) dt 20.6.2015 one Vijay Damechya being owner of Flat no 6 in building Gagan Utopia at Pune being part of Palash Cooperative Housing Society (Said Society) had transferred the rights in respect of the said flat in favour of co accused Dimple Somji to which the said Society was a Consenting Party. The said building was constructed by builders Gagan Buidscapes LLP of which the applicant is one of the partners. Dimple Somji in turn had executed an allotment letter in respect of the said flat in favour of one Ritwik Sanghvi which is signed by the applicant as promoter/confirming party on behalf of the builders Gagan Buidscapes LLP (said LLP for short).
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> (ii) The statement of Ritwik Sanghavi and his brother Shailendra Saghavi came to be recorded

during the course of the investigation in which it was revealed that these witnesses had invested a total amount of Rs.53,00,000/- in M G Enterprises of the applicant and his wife in the year 2018 by transfer in the account of Dimple Somji in Kotak Mahindra Bank. The applicant and the co-accused had assured interest @18% p.a. on the said amount and had failed to pay a total amount of Rs.1,01,89,886/- to the said witnesses including interest for the period from June 2018 to December 2021.

(iii) According to these witnesses, the allotment letter executed by Dimple in favour of Ritwik Sanghavi was by way of security for the amount invested and its return with interest. When a demand for the amount with interest was made the applicant avoided to repay the same. These witnesses claimed that when they went to the site of the flat they found that the building was constructed till four floors only as it had no sanction for higher floors. Thus the said flat which was supposed to be on the six floor was not even constructed.

(iv) The material allegation is that the applicant without authority or consent of other partners of the said LLP had signed the allotment letter as builder/consenting party which according to the prosecution is an offence under section 409 of IPC.

(v) Incidently Gagan Buidscape LLP has in all six partners namely (i) Sushil Agarwal (ii) Gaurav Maini, (iii) Anil Jain, (iv) Pritpalsingh Khandari (v) Gagan Lifescape LLP and (vi) the applicant, Alnesh Somji.

5. On 4.1.2022 the applicant filed an application under section 167(2) of CrPC availing his indefeasible right to be released on bail, as the prosecution had failed to file the chargesheet within the statutory period of 60 days. The application was opposed on behalf of the prosecution claiming that on account of the invocation of section 409 of IPC the period for filing chargesheet is 90 days and not 60 days.

6. The learned Special Court has rejected the application by order dt.7.1.2022 interalia on the ground that section 409 of IPC is applicable and the prosecution has filed application invoking the said section on 3.1.2022 that is prior to the applicant seeking default bail on 4.1.2022.

7. I have heard learned Counsel for the parties. Perused Record.

8. It is submitted by Mr Subodh Desai the learned counsel for the applicant that admittedly chargesheet has not been filed within the statutory period of 60 days going by the sections/offences initially invoked. It is submitted that the invocation of section 409 of IPC on 3.1.2022 is misconceived, as it does not arise on facts. It is submitted that a partner of a partnership firm cannot be held liable for the offence under section 409 of IPC inasmuch as there is a communion of ownership over the partnership property/assets of all the partners and thus in absence of any entrustment the said offence is not made out as held by the Supreme Court in ***Velji Raghavji Patel vs State Of Maharashtra***[1]. It is submitted that the Special Court has not passed any order on the application/intimation filed by the prosecution adding section 409 of IPC permitting such addition/invocation. It is submitted that there has to be an order passed by the Special Court extending the period which is not forthcoming in this case. Reliance in this regard is placed on the decision of the Supreme Court in ***Achpal @ Ramswaroop & Ors. vs. State of Rajasthan***[2]**.** It is submitted that even otherwise section 409 of IPC is not attracted in facts of the case. It is submitted that going by the sections invoked initially, the statutory period for filing the chargesheet upon completion of investigation is 60 days in this case. It is submitted that once the right has accrued to the applicant which is also availed of before filing of the chargesheet, within 60 days, the same cannot be defeated by any means, much less, by any subterfuge. The learned counsel has placed further reliance on the decision of the Supreme Court in ***Rakesh Kumar Paul vs. State of Assam***[3] and ***Gautum Navlakha vs. National Investigating Agency***[4]. He therefore submitted that the applicant be released on default bail

9. The learned APP and the learned Senior Counsel for the respondent/intervenor has submitted that there is no requirement of any formal order permitting the addition of the new section as it is the

1 1965 AIR 1433

2 2019(14) SCC 599

3 (2017) 15 SCC 67

4 2021 SCC OnLine SC 382

prerogative of the investigating officer and matter of investigation is within exclusive jurisdiction and domain of the investigating agency. It is submitted that section 409 of IPC was added/invoked prior to the applicant seeking bail under section 167(2) of CrPC. Reliance is placed on the decision of the Calcutta High Court in ***Sayantan Chatterjee vs. The State of West Bengal & anr.***[5]. It is submitted that the principle laid down in Veljee Raghavajee has been explained away by the Supreme Court in subsequent decisions. It is submitted that the same is qualified and would not apply where there is a special entrustment. In other words it is submitted that in a case where the property of the partnership is specially entrusted to one or more of the partners they can in a given case be held liable for misappropriation of such property. It is submitted that the magistrate/special court cannot look into this aspect at the stage of consideration of the application under section 167(2) of CrPC once the investigating officer invokes a section admitting 90 days for completion of the investigation.

10. I have considered the submissions made. It is not in dispute that going by the initial sections invoked (excluding section 409 of IPC) the period for completion of the investigation and filing of the chargesheet was 60 days. It is also not in dispute that charge sheet is no filed within 60 days. The charge sheet was filed on 21.1.2022 that is within 90 days. Further it is a matter of record that by the remand application dt. 31.12.2021 (filed on 3.1.2022) it was intimated to the Special Court about addition/invocation of Section 409 of IPC on which the Special Court has passed an order '*Seen, note be taken*'. It is also a matter of record that the applicant filed application on 4.1.2022 availing the indefeasible right to be released on bail under section 167(2) of CrPC.

5 2016 SCC OnLine Cal 4573

11. It was not disputed during the course of the arguments at bar that the right conferred by section 167(2) of CrPC is an important right. The violation of the said right results into illegal detention which is in violation of the right conferred by Article 21 of the Constitution of Inia (See the decision in ***Rajkumar Bhagchand Jain vs. Union of India & anr[6])***. It was submitted by the learned counsel for the applicant that the said right has been practically elevated to the status of a fundamental right under Article 21 of the Constitution of India as it affects the personal liberty of the accused.

12. The provision setting out a time line for completion of the investigation and the corresponding right of the accused to be released on bail when the investigation is not completed within the stipulated period, aims at balancing the interest, both of the investigation and the personal liberty of the accused.

13. There is no manner of doubt that the investigation is within the province and domain of the investigating agency. However that does not mean that the court, in almost all cases, would be bound by the invocation of a particular section against the accused by the prosecuting agency. This is because the label of the section or the provision invoked would not be decisive. To hold otherwise, would amount to placing the said right at the mercy of the investigating agency and would indirectly result in the magistrate abdicating the duty to enforce the right wherever necessary. Thus the court would be required to look into the generality of the allegations made and the material collected. In a given case where *exfacie* the provision is not attracted the court may not be bound by the same. Although there is no

6 (2019) 3 AIR Bom R. (Cri)(NOC 93) 30 requirement for the investigating officer to obtain permission from the magistrate for such addition, as held by the Calcutta High Court in ***Sayantan Chatterjee*** (supra), the Magistrate is not precluded from looking into the facts and the material collected, whether the offence is *ex facie* made out or not. The matter depends on the facts and circumstances of each case. For instance, where the investigating officer invokes section 326 of IPC, however the medical report does not *ex facie* show that the victim has suffered a 'grievous injury', within the meaning of Section 320 of IPC. OR a case where section 409 of IPC is invoked and admittedly the accused does not fall under any of the seven categories mentioned in the said section namely the accused is neither a public servant a banker etc. I would hasten to add that where however the facts and the material collected prima facie indicate the ingredients of a particular offence the court obviously cannot examine or appreciate the same the same at that stage in order to arrive at a different conclusion.

14. Coming back, the issue in the present case squarely turns on the question of invocation/applicability of Section 409 of IPC. If it applies obviously the period is ninety days within which the charge sheet is filed. If not the investigation was not completed within the statutory period entitling the applicant to release on default bail.

15. As noticed earlier the gist of the offence against the applicant and the co accused is that the applicant had accepted various amounts from the informant and others assuring returns in which there was a default. Thus the said offence is qua the informant and other depositors and investors. Even the allegation by Ritweek Saghavi and his brother about the execution of the allotment letter without the flat being found to be constructed is claimed to be an offence under section 420 of IPC qua these witnesses. The alleged offence, if any, about the applicant having signed the allotment letter by Dimple Somji as a consenting party on behalf of the said LLP is presumably qua the other partners of the said LLP. It is in this context it is claimed on behalf of the applicant that the said offence, if any, is an independent offence qua the LLP and other partners unconnected with the principle offence of failure to pay the amount deposited/invested with interest.

16. The learned Senior Counsel for the Intervenor did not dispute that in a case where the invocation of such a section providing for a larger period for investigation is found to be malafide i.e. only in order to frustrate the right of the accused or a case where the offence is not *ex facie* made out, the Court would be entitled to look into the same. However, it is submitted that cases lying in between the Court will have to abide by the claim of the Investigating Officer.

17. It was submitted by the learned Senior Counsel for the intervenor that the allegation insofar as the offence under Section 409 of IPC is concerned, is not only limited to the applicant signing as a consenting party on the allotment letter but it is also about misappropriation of the amount deposited by Ritwik Sanghvi and his brother.

18. I am afraid *prima facie* this cannot be accepted for the reason that in the remand application dated 31.12.2021, no such claim has been made.

19. The Supreme Court in the oft quoted decision in the case of ***Velgee Raghavaji*** has held that a partner cannot be found to be guilty of an offence under section 409 of IPC. The contention on behalf of the intervenor is that this may not apply if there is a special entrustment. Atleast *prima facie* it is not shown that there was such special entrustment in favour of the applicant. The Special court has not adverted to these aspects except saying that the offence under section 409 of IPC is attracted.

20. It can further be seen that till the filing of the chargesheet on 21.01.2022, the Investigating Officer had not recorded statements of any of the other partners of Gagan Buidscapes LLP. It was submitted during the course of the arguments that subsequent to the filing of the chargesheet, such statements are recorded. If that be so, on the date on which the remand application dated 31.12.2021 was filed invoking section 409 of IPC, there were no statements of the other partners claiming that the allotment letter is signed by the applicant as consenting party without the authority from the other partners. That apart, it is also pointed out by the learned Counsel for the applicant that the flat was owned by Mr. Vijay Damechya and not by the said LLP.

21. The Supreme Court in the case of ***Rakesh Kumar Paul*** (supra) has held thus in para 38 and 39 of the judgment, thus :

> "38. This Court also dealt with the decision rendered in Sanjay Dutt and noted that the principle laid down by the Constitution Bench is to the effect that if the charge sheet is not filed and the right for 'default bail' has ripened into the status of in-defeasibility, it cannot be frustrated by

> the prosecution on any pretext. The accused can avail his liberty by filing an application stating that the statutory period for filing the charge sheet or challan has expired and the same has not yet been filed and therefore the indefeasible right has accrued in his or her favour and further the accused is prepared to furnish the bail bond.
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> 39. This Court also noted that apart from the possibility of the prosecution frustrating the indefeasible right, there are occasions when even the court frustrates the indefeasible right. Reference was made to Mohamed Iqbal Madar Sheikh v. State of Maharashtra wherein it was observed that some courts keep the application for 'default bail' pending for some days so that in the meantime a charge sheet is submitted. While such a practice both on the part of prosecution as well as some courts must be very strongly and vehemently discouraged, we reiterate that no subterfuge should be resorted to, to defeat the indefeasible right of the accused for 'default bail' during the interregnum when the statutory period for filing the charge sheet or challan expires and the submission of the charge sheet or challan in court."

22. I thus find that the indefeasible right accrued to the applicant on expiry of 60 days on account of failure to file the chargesheet can not be defeated by mere invocation of section 409 of IPC claiming that the period for completion of the investigation and filing of the chargesheet is 90 days.

23. In the result the following order is passed.

ORDER

(i) The Applicant Alnesh Akil Somji, be released on bail on execution of a PR Bond in the sum of ₹ 1,00,000/- with one or two solvent sureties in the like amount to the satisfaction of the Trial Court.

(ii) The Applicant shall undertake to remain present during the course of the trial unless exempted.

(iii) The Applicant shall surrender his passport, if any, before the Trial Court.

(iv) The Applicant shall not leave India without the prior permission of the Special Court.

(v) The Applicant shall not directly or indirectly make any attempt to contact or to influence the prosecution witnesses or to otherwise tamper with the prosecution evidence.

(vi) The Applicant shall cooperate with the Investigating Agency in the further investigation, if any.

(vii) In the event of breach of any of the conditions, the bail is liable to be cancelled.

24. It is however made clear that the observations here in are only for the limited purpose of deciding the plea for bail on default and the magistrate shall not be influenced by the same at the trial

C. V. BHADANG, J

ANDREZA PEREIRA Digitally signed by ANDREZA PEREIRA Date: 2022.04.27 12:05:56 +05'30'