(2023) 04 DEL CK 0104

In the Delhi High Court

Case No : Bail Application No. 804 Of 2023

Ajay Khera APPELLANT

Vs

State Of GNCTD RESPONDENT

Date of Decision : 20-04-2023

Acts Referred:

Constitution Of India, 1950 — Article 21
Indian Penal Code, 1860 — Section 120B, 408, 420, 465, 467, 468, 471
Code Of Criminal Procedure, 1973 — Section 41A, 82

Citation : (2023) 04 DEL CK 0104

Hon'ble Judges : Anish Dayal, J

Bench : Single Bench

Advocate : Vikas Pahwa, Sumer Singh Bopari, Sidhant Saraswat, Arun Kumar, Varun Bhati, Namisha Jain, Suyash Goverdhan, Yudhivir Singh Chauhan, Ankur Chawla, Mudit Jain, Aamir Vihan, C.B. Bansal, Rudraksh Nakra, Garima Singh

Final Decision : Disposed Of

Judgement

Anish Dayal, J

1. By this petition regular bail is being sought for the petitioner in FIR No.14/2022 lodged under sections 408/420/467/468/471/120B IPC with PS Economic Offences Wing. The petitioner is a senior citizen of 67 years of age and has been in custody since 23rd September, 2022. Charge sheet has been filed on 19th December, 2022.

2. As per the case of the prosecution, M/s. Seagull Maritime Agencies Private Limited (Complainant Company / Seagull) deals in the Freight Forwarding business in India and had started a branch in USA in 2010. It was alleged that the petitioner (an ex-employee of a group company) who was working with the Seagull as a legal consultant, requested the ex-promoters of Seagull to employ his son Siddharth Khera to look after the USA branch of Seagull. Accordingly, Siddharth Khera was appointed as Business Development Manager at the USA branch of Seagull. Seagull's management suspected that its revenue per annum

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was declining steadily from the highs in 2018 to the severe low in July 2021 and it was revealed that the alleged persons had incorporated two companies viz. Azure Freight & Logistics LLP (in November 2020) and Azure International LLC (in June 2020). They had started a parallel business that was taking away the clientele of Seagull by misrepresentation & forgery. It was alleged under the leadership of the petitioner and his son Siddharth Khera, payments were funneled made by clients of Seagull for shipments to the accounts of Azure International LLC. This apparently was being done by making wrong representations to Seagull clients that Azure is a group company of Seagull and they changed the name of the shipper in the bill of lading from Seagull to Azure. It is alleged that a wrongful loss of approximately Rs.30 crores was caused to Seagull.

3. An investigation ensued and it was revealed that Siddharth Khera was indeed the Director of Azure International LLC and had been in employment of Seagull up to 30th June, 2021. He submitted his resignation on 1st July, 2021. Azure International LLC was incorporated in the month of June, 2020 in which allegedly Siddharth Khera and his wife Shruti Arora were the directors. It is further alleged that in the act of diversion of the business and funds, the ex-employees of Seagull and the present employees of the accused Azure were also actively involved in this conspiracy. The employees were using the IDs of Seagull even after their resignation from it and were using them for placing orders and delivery of consignments. It was further alleged that the amounts which were collected in Seagull’s account in the USA were being sent back to India and being collected by the petitioner. As regards the role of the petitioner, it has been alleged that he was serving as Group President in a promoter company - World Window Group, of Seagull and was employed from 1st April, 2019 to 31st August, 2021. It was alleged that before handing over his laptop to the investigation agencies, the data in the laptop had been deleted. The petitioner had been assigned to provide consultancy services to Seagull.

4. A former director of Seagull also stated that he was contacted by the Kheras and was asked to work with Azure and make submissions before the police. The investigation has further recorded statements of other persons and also analyzed the WhatsApp chats of Siddharth Khera, Ajay Khera and other persons regarding such business. Further investigation has revealed that monies were dishonestly routed from the USA through Dubai to India, which was handed over to Ajay Khera amounting to around Rs. 18/19 crores. The prosecution alleges that the Khera family including Ajay Khera, Charu Khera, Aadhar Khera, Siddharth Khera and Shruti Arora are under the leadership of the petitioner and have carried out this fraud. As per statements of the witness, the petitioner had assured the management of Seagull that he would settle all the disputes. Scrutinies of various bank accounts of Azure International, India as well as the USA had been taken into account.

5. In the charge-sheet the names of accused persons namely, Siddharth Khera,

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Charu Khera, Aadhar Khera, and Shruti Arora and others who were allegedly the employees, who were taken away from Seagull and were clandestinely working for Azure, have been kept in Column 12 and investigation against these alleged persons is still going on. Ld. Trial Court has taken cognizance against all these accused persons except Kristey Coley and Rachel Groogan, and a process under section 82 Cr.P.C. had been issued against accused Siddharth Khera. The bail petitions of the petitioner were dismissed by the Ld. ACMM and Ld. ASJ vide orders dated 27th February, 2023 and 3rd March, 2023.

6. It has been submitted by the Ld. Senior Counsel for the petitioner that considering that the charge-sheet has already been filed and no further investigation is pending, there was no likelihood of trial to be concluded, the entire case being based on documentary evidence which has already been taken into custody, the petitioner would be entitled to be enlarged on bail. Allegations relating to threatening of witnesses, inter alia by Mr. Amit Goyal, were patently false since the petitioner was arrested on 22nd September, 2022 while statement of Mr. Amit Goyal was recorded on 18th November, 2022 when the petitioner was in custody. According to the petitioner’s counsel, the statement has been manufactured so that the petitioner could be denied bail and allegations were being without any specifics. Thus, Mr. Goyal was not a reliable witness.

7. Reliance placed by the prosecution on the Ernst and Young (E&Y) report to state that the petitioner had deleted the data and replaced the hard disk, is countered by submitting that the laptop did not belong to Seagull and it was in fact given by the petitioner’s employer, the Group Company. The said laptop was neither seized nor sent for FSL. E&Y report was paid for by Seagull and based on the device supplied by it and therefore, its veracity is questionable. Regarding the allegation that the petitioner was a flight-risk since his son and daughter-in-law are absconding, it has been stated that the petitioner was in the USA when he received section 41A notice from the investigation agencies and especially returned to India on 9th August, 2022 only to join and cooperate with the investigation on 10th August, 2022. Just because the proceedings under section 82 Cr.P.C. are pending qua his son and daughter-in-law, who are residents in the US, he could not be incarcerated.

8. It is contended that the investigation agency had conducted a lopsided investigation without verifying facts and acted like a post office and believed the complainant’s version as gospel truth. The entire investigation is based on 19 representations made by Seagull and a majority of witnesses are employees of Seagull and draw a salary from it. No independent verification of E&Y report has been done which has been prepared as per instructions of Seagull. The laptops have not been seized by the IO and no electronic evidence has been sent to the FSL and complaint was registered on 30th October, 2021 and after 17 months, the IO had not carried out any investigation in the foreign jurisdiction.

9. As regards the allegation of siphoning off the monies, the petitioner’s son vide representation dated 21st November, 2022 brought to the notice of the IO that

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the siphoning was being conducted at the behest and instructions of managers and employees of Seagull and the Group Company but no investigation has been carried out in that regard. Moreover, the petitioner was never an employee of Seagull and only used to provide consultancy services on legal matters, therefore, there was no entrustment in terms of section 408 IPC qua the petitioner. Also, there is no document on record to suggest that the petitioner contacted any employee of Seagull and therefore the offence of cheating under section 420 IPC cannot be made out. The petitioner was not the maker of the document which has been alleged as a forged Bill of Lading but was made by employees of Seagull, therefore offences under sections 467/468/471 IPC can also be not made out. No phones have been recovered and reliance on WhatsApp messages without FSL reports is inadmissible.

10. Various decisions have been relied upon in support of the above submissions by the Ld. Senior Counsel for the petitioner.

(a) Zahur Haider Zaidi v. CBI, (2019) 20 SCC 404;

(b) Radhe Shyam v. State, (2021) 284 DLT 522;

(c) Suresh Kalmadi v. CBI, ILR (2012) ii Delhi 630;

(d) Lamber Kroger v. Enforcement Directorate, (2000) 85 DLT 62;

(e) R. Vasudevan v. CBI, New Delhi, (2010) 166 DLT 583;

(f) Sheila Sebastian v. R. Jawaharaj & Anr., (2018) 7 SCC 581;

(g) Bharat Choudhary v. UOI, (2021) SCC OnLine SC 1235; &

(h) Sujit Tiwari v. State of Gujarat, (2020) 133 SCC 447

11. A perusal of the charge-sheet would show that the representation dated 9th November, 2021 had been made post the complaint where certain details had been provided. Further, another representation was made on 18th November, 2021 and further details had been provided to the investigating agency. This was followed by representations dated 18th January, 2022, 11th March, 2022 and 22nd July, 2022. In assessing the role of the accused petitioner, the contents from these representations had been reproduced. This is also evident from the list of documents on which the charge-sheet relies upon, which shows from Sr. No.4 to Sr. No.22 are reliance on the representations filed by the complainant. Aside from that are scrutiny of bank accounts, representations of the petitioner and representation of Siddharth Khera. There is no witness which has been cited from the said E&Y who had apparently prepared the report nor any other material witness who had been able to independently assess the material.

12. Learned counsel for the complainant has vehemently refuted these contentions of the petitioner’s counsel by stating that there was sufficient incriminating evidence against the petitioner since he was one of the beneficiaries of the forged bills of landing. This apparently had also been noted

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by the Ld. ACMM where it has been pointed out that the argument that the petitioner was not involved in the alleged transactions cannot be accepted since money was apparently credited from Seagull, US to India to be received apparently by the petitioner. As also, Siddharth Khera, against whom proceedings were initiated under section 82 Cr.P.C., had not joined the proceedings.

13. Ld. APP for the State has also contended that considering that the allegations were relating to a huge amount of money and that investigation was still continuing with respect to all other employees who have been arrayed in Column 12, there was a risk of petitioner tampering with the evidence.

14. In rebuttal, Ld. Senior Counsel for the petitioner adverted to the decision of the Hon’ble Supreme Court in Zahur Haider Zaidi (supra) where it was stated that “We are of the view that the bail ought not to be denied on the aforesaid ground and in the event of any such conduct, the prosecution can always approach the competent court for cancellation of bail.” This observation was made on the apprehension expressed on behalf of CBI that the appellant therein could influence the prosecution, and the Hon’ble Supreme Court granted bail.

15. Learned counsel for the complainant has relied upon the decision of the Hon’ble Supreme Court in State of Bihar v. Amit Kumar, (2017) 13 SCC 751 to contend that Hon’ble Supreme Court had in cases where the investigation agency was to file an additional charge-sheet, denied bail considering there was an offence under sections 409/465/467/468/471 IPC in relation to cheating and examination. Reliance has also been placed on Kalyan Chandra Sarkar v. Rajesh Ranjan, (2004) 7SCC 528.

16. Notwithstanding the respective contentions of the parties and considering that the petitioner is a senior citizen of 67 years of age and has fully cooperated during investigation, including joining the inquiry through VC when he was in USA on 17th January, 2022, giving a representation pursuant to registration of the FIR, responding vide email to the first section 41A notice issued on 16th June, 2022 seeking more time to appear before the IO and offering to join through VC, coming back to India pursuant to second section 41A notice issued on 5th July, 2022 and was detained at the airport and taken to EOW where he was investigated overnight from 1:30 A.M. to 2:30 A.M. and then appeared again before the IO on 10th August, 2022, and submitted a detailed reply to the questionnaire given by the IO on 16th August, 2022 and subsequently appeared on multiple occasions before the IO, as also the fact that the charge-sheet has now been filed and cognizance has been taken and as per the investigation agency, the investigation is complete as regards the petitioner, in the considered opinion of this Court, the petitioner is entitled to be enlarged on bail.

17. This Court has also perused the records before it as adverted to by the learned counsels for the parties and it is evident that the evidence is documentary in nature and has been comprehensively supplied by Seagull through its multiple representations to the IO, which in fact has reproduced

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those facts as stated by Seagull and scrutiny of various bank accounts, even as per the Status report has already been done.

18. As regards other employees, they have been arrayed in Column 12 and their role may be ascertained by a detailed investigation, however, that should not be a reason to deny bail to the petitioner and keep him in custody pending trial.

19. Further Seagull is a corporate entity and is not vulnerable to any influence, as is being alleged by it. Other allegations of tampering with the evidence as provided by one Mr. Amit Goyal, prima facie seems not specific and may be not relevant in any event considering the investigation is based on documentary evidence relating to alleged transfer of funds and business and routing back the said monies.

20. The Hon'ble Supreme Court in Satender Kumar Antil v. CBI, (2022) 10 SCC 51 observed as follows:

"12. The principle that bail is the rule and jail is the exception has been well recognised through the repetitive pronouncements of this Court. This again is on the touchstone of Article 21 of the Constitution of India…"

(emphasis added)

The Hon'ble Supreme Court also noted the observations made by Krishna Iyer, J., in Gudikanti Narasimhulu v. Public Prosecutor, (1978) 1 SCC 240 as under:

"1. … the issue [of bail] is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitised judicial process. … After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of "procedure established by law. The last four words of Article 21 are the life of that human right."

(emphasis added)

The Hon'ble Supreme Court further made note of their observations in Sanjay Chandra v. CBI, (2012) 1 SCC 40 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 is 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.

22.From the earliest times, it was appreciated that 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

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pending trial to secure their attendance at the trial but in such cases, “necessity” is the operative test. In this country, 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.

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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 added)

21. Relying on Sanjay Chandra (supra), the Hon’ble High Court of Delhi made the following observation in Sunder Singh Bhati v. State, 2022 SCC OnLine Del 134 as under:

“19. Therefore, the magnitude of the offence cannot be the only criterion for denial of bail. The object of bail is to secure the presence of the accused at the time of trial; this object is, thus, neither punitive nor preventative, and a person who has not been convicted should only be kept in custody if there are reasons to believe that they might flee from justice or tamper with the evidence or threaten the witnesses. If there is no apprehension of interference in administration of justice in a criminal trial by an accused, then the Court should be circumspect while considering depriving the accused of their personal liberty. Mere vague belief that the accused may thwart the investigation cannot be a ground to prolong the incarceration of the accused.”

(emphasis added)

22. In light of the above, and that the trial in the matter is likely to take some time, and it would not be prudent to keep the petitioner behind bars for an indefinite period, this Court finds it to be a fit case for grant of bail to the petitioner. Consequently, the petitioner is directed to be released on bail on furnishing a personal bond in the sum of Rs.2,00,000/- (Rupees Two Lacs Only) with one surety of the like amount subject to the satisfaction of the Ld. Trial Court, further subject to the following conditions:

i. Petitioner will not leave the country without prior permission of the Court.

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ii. Petitioner will deposit his passport with the Ld. Trial Court.

iii. Petitioner shall report to the IO, through VC, every Saturday at 4:00 P.M. and he will not be kept waiting for more than an hour.

iv. Petitioner shall provide permanent address to the Ld. Trial Court. The petitioner shall intimate the Court by way of an affidavit and to the IO regarding any change in residential address.

v. Petitioner shall appear before the Court as and when the matter is taken up for hearing.

vi. Petitioner shall join investigation as and when called by the IO concerned.

vii. Petitioner shall provide all mobile numbers to the IO concerned which shall be kept in working condition at all times and shall not switch off or change the mobile number without prior intimation to the IO concerned. The mobile location be kept on at all times.

viii. Petitioner shall not indulge in any criminal activity and shall not communicate with or come in contact with any of the prosecution witnesses, the complainant/ victim or any member of the complainant/victim's family or tamper with the evidence of the case.

23. Needless to state, but any observation touching the merits of the case is purely for the purposes of deciding the question of grant of bail and shall not be construed as an expression on merits of the matter.

24. Copy of the order be sent to the Jail Superintendent for information and necessary compliance.

25. Accordingly, the petition is disposed of. Pending applications (if any) are disposed of as infructuous.

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

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