

(2015) 06 BOM CK 0113

In the Bombay High Court

Case No : Criminal Application No. 1455 of 2015

Jivaraj

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 17-06-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 319, 41, 438
Penal Code, 1860 (IPC) — Section 120-B, 420, 467, 468, 471

Citation : (2015) 3 BomCR(Cri) 333

Hon'ble Judges : T.V. Nalawade, J

Bench : Single Bench

Advocate : Rajendra S. Deshmukh, for the Appellant; R.K. Ladda, APP, Advocates for the Respondent

Final Decision : Dismissed

Judgement

T.V. Nalawade, J.—The application is filed under section 438 of Criminal Procedure Code for anticipatory bail in RCC No. 158/2013 which is presently pending in the Court of Judicial Magistrate, First Class, Ambajogai. The case is filed for offences punishable under sections 420, 467, 468, 471 etc. of Indian Penal Code and it can be said that section 120-B of I.P.C. can also be used in view of the nature of allegations. Initially the chargesheet was filed against 42 accused persons, but only four persons faced trial as their case was separated as they were available and they are convicted and sentenced for offences of creating false record and cheating the complainant Society. From the evidence given in that case and during trial of that case against four accused, the learned J.M.F.C. passed order against applicant under section 319 of Cr.P.C. and non bailable warrant is issued against the present applicant. The crime was registered in aforesaid case on the basis of report given by present applicant and now he is to face the trial for the same offences. The order made by the learned J.M.F.C. under section 319 of Cr.P.C. was challenged by the applicant by filing the revision in Sessions Court and by filing further proceeding in this Court. He could not succeed in the said proceedings and it can be said that he has not challenged the

said order further. Both the sides are heard.

2. The learned counsel for applicant mainly submitted that as the order is made under section 319 of Cr.P.C., there will be entire trial which can be called as de-nova trial against the present applicant and there will be no reason for the arrest of the accused and he can be made available after taking bond from him. He placed reliance on the case reported as Harinarayan G. Bajaj Vs. State of Maharashtra and Others, (2010) 1 JT 10 : (2010) 1 SCALE 46 : (2010) 11 SCC 520 : (2011) 1 SCC(Cri) 207 : (2010) 1 SCR 171 : (2010) 2 UJ 623 . In this case, the Apex Court has discussed the procedure which needs to be followed when a person is made accused by using the provision of section 319 of Cr.P.C. There cannot be dispute over the proposition made. The present matter involves altogether different point. The point is whether the applicant is entitled to be released on anticipatory bail under section 438 of Cr.P.C. when the Criminal Court has used the section 319 of Cr.P.C. and has issued warrant as process against the present applicant.

3. For ascertaining the right of the present applicant, something needs to be said about the case itself. Present applicant has been working as a Chairman of Seva Sahakari Sanstha from Aswalamba, Tahsil Parli Vajinath, District Beed. There is allegation that as many as 36 false loan proposals were made by this Society and loan was obtained from District Bank, Beed. The amount of loan was around Rs. 28,57,616/-. There is allegation that when the applicants were not agriculturists, false record was created, including the record of 7/12 extract, declarations and the loan proposals were processed for getting crop loan. The amount was actually shown to be disbursed.

4. The submissions made and the papers of investigation show that when chargesheet could have been filed against 42 persons, police could trace only four persons. Present applicant gave report to police on 25.2.2013 and he made allegations against the persons in whose name the loan was taken. He made allegations against Secretary also. The Secretary and most of other persons in whose names the loan was obtained and shown to be disbursed, are absconding.

5. The learned J.M.F.C. has observed that the material available and the evidence which was available for him for using section 319 of Cr.P.C. is sufficient to show that it is the applicant, who was responsible for processing the proposals. Applicant is disputing that he has signed on the proposals and he wants to rely on the report given by hand writing expert. At this stage and for present purpose, it can be said that the proposals could not have been processed unless and until the Chairman and the Secretary had joined hands. Thus, it is a serious case of creation of false record for obtaining loan from District Bank and misappropriation of that loan amount. Prosecution may not require to prove that the proposals were signed by this applicant.

6. Relief of anticipatory bail can be granted when there are grounds as mentioned in section 438 of Cr.P.C. and the factors which are mentioned

specifically are required to be considered by the Court. The Court is expected to consider the gravity of accusation, the antecedents of the applicant, the possibility of the applicant to flee from justice and whether the accusation has been made with the object of injury or humiliating the applicant by so arresting. After considering the aforesaid circumstances and facts of the case, it cannot be said that there are false allegations against applicant. He is the person who is apparently responsible for the entire fraud, but he tried to put blame on others. Four persons are already convicted by the Trial Court and they are sentenced to jail turn. The grounds which are similar to the grounds mentioned in section 438 of Cr.P.C. can be considered. The facts of the present case show that it cannot be said at present in favour of the applicant that he is innocent person and he needs to be given protection of section 438 of Cr.P.C. Only on this ground, it can be said that it is not a fit case to grant relief of anticipatory bail in favour of the accused. It is discretionary power.

7. The power given under section 438 of Cr.P.C. can be used by the Court when there is apprehension of arrest. The apprehension can be under two circumstances. Under the first circumstance, there is apprehension when the investigating agency wants to exercise the power under section 41 of Cr.P.C. to arrest the accused for the purpose of investigation. There can be second circumstance like present one when Criminal Court has formed the opinion that it is necessary to issue non bailable warrant against the accused. It can be said that when the police wants to exercise the power, there is much scope to the Criminal Court for using the powers under section 438 of Cr.P.C. and the Court can form independent opinion. However, when there is non bailable warrant issued by the Criminal Court, it needs to be presumed that the Court using power under section 319 of Cr.P.C. and issuing N.B.W. had applied judicial mind and has considered the relevant material. In such cases, it is not that easy to grant relief of anticipatory bail by using section 438 of Cr.P.C. In very rare cases, when N.B.W. is issued against the accused by the Criminal Court, the Court can use power under section 438 of Cr.P.C.

8. In view of the aforesaid discussion, this Court has no hesitation to observe that no relief of nature of anticipatory bail can be given to the applicant. Warrant issued cannot be cancelled, it needs to be executed. The applicant has failed in the challenge made against the order made by the Criminal Court under section 319 of Cr.P.C. The police papers show that after issuing of the warrant, he was not available and he was absconding.

9. It appears that when the matter came before this Court on 23.3.2015, after hearing the learned counsel for the applicant, this Court was not inclined to grant interim relief and only notice was issued to other side. The matter again came before this Court on 30.3.2015 and 8.5.2015. Thus, this Court, undersigned, was not inclined to grant interim relief. The matter was taken before another Hon''ble Judge of this Court, who was sitting in vacation on 12.5.2015 and on that day also, no interim relief was given to the applicant. Before the same Hon''ble Judge

the matter was taken on 15.5.2015 and on that day, the learned APP sought time and the matter was adjourned. It appears that on 22.5.2015 when the matter was taken before the third Hon''ble Judge of this Court, who was sitting in vacation, submissions were again made for interim relief and the third Hon''ble Judge gave interim relief. This Court has no hesitation to observe that this practice is against the propriety. If the vacation Court had decided the matter finally, the things would have been different. However, when this Court had refused the interim relief when the matter had come before this Court in the past, it was not proper on the part of applicant to make again submission for interim relief before new Hon''ble Judge. Liberty was given to move the matter before the vacation Court, but that does not mean that liberty was given again to request for interim relief. This circumstance also needs to be noted as such instances are called as forum shopping and they are increasing.

10. With these observations, the application is disposed of as rejected. The observations are only for the present proceeding.