(2022) 05 SHI CK 0052

In the High Court Of Himachal Pradesh

Case No : Criminal Miscellaneous Petition (Main) No. 313 Of 2022

Mhabeni Envy APPELLANT

Vs

State Of Himachal Pradesh RESPONDENT

Date of Decision : 18-05-2022

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 437, 438, 439
Indian Penal Code, 1860 — Section 120B, 201, 420
Foreigners Act, 1946 — Section 14

Citation : (2022) 05 SHI CK 0052

Hon'ble Judges : Vivek Singh Thakur, J

Bench : Single Bench

Advocate : N.K. Thakur, Divya Raj Singh Thakur, Hemant Vaid

Final Decision : Disposed Of

Judgement

Vivek Singh Thakur, J

1. This petition has been filed seeking regular bail under Section 439 Cr.P.C. in case FIR No. 236 of 2019, dated 4.7.2019, under Sections 420, 120-B, 201 IPC and Section 14 of Indian Foreigner Act, registered at Police Station Sadar, Una, District Una, H.P.

2. Status report stands filed, wherein manner, in which offence alleged to have been committed by petitioner alongwith co-accused Martin James John and Nicolas Chinedu causing the victim to transfer/transmit about Rs.27,00,000/- in the account number supplied by the accused person during 11th January, 2019 to 7 th March, 2019, has been narrated in detail.

3. In brief, as per status report, complainant, serving as Head Mistress, had come in contact of some unknown person through Face Book, who was claiming himself to be resident of United Kingdom. After some time she received a call purporting to be a call from Airport Custom Department informing that one parcel sent to her from United Kingdom was lying with them and for release of

which she had to deposit Rs.93,000/- in the account number communicated by them. At first instance, complainant had refused by saying that she had not been expecting any such parcel. But thereafter, she received a message from resident of United Kingdom, came in her contact through Face Book, disclosing that he had sent the parcel to her and had advised to receive it, whereupon complainant had deposited Rs.93,000/- in the account number communicated to her. Thereafter, complainant received another call claiming it to be a call from Airport Custom Department to inform her that parcel contained number of dollars and huge Gold and, therefore, she had to pay Rs.1,75,000/- in addition to the amount deposited by her earlier. After couple of days, complainant again received a message from resident of United Kingdom that he had been coming to India, but he was detained by Custom Department at Mumbai Airport as he was possessing huge quantity of dollars and gold, and Custom Department was asking for money and he was not in a position to exchange the dollars and Gold into Rupees, therefore, he asked complainant to send money to the account communicated by him. Complainant transferred the amount to the account communicated by the accused person under compulsion as she thought that in case she would not send money, then the person would remain in detention and her money, already transferred by her, would not be recovered. On last occasion of demand of money complainant asked for Rs.2,00,000/- from her husband, who was not aware about this entire episode and thereupon her husband had inquired about the matter and when complainant asked resident of United Kingdom to refund her money, then the said person switched off the phone. Whereupon complainant, on 4.7.2019, approached the Police and FIR was lodged.

4. Complainant had reported that she had been receiving messages and calls from phone Nos. 7303637393, 7065518321, 9711196438, 447511750525, 4474677112886, 447543152214 and 447448352202.

5. After registration of FIR, investigation was carried out and co-accused Martin James John was detained on the basis of phone call and location of shop and mobile phone through which he had been recharging his phone and he, on finding involved in commission of offence, was arrested on 20.2.2021, however he was enlarged on bail by the Court on 29.4.2021 by extending benefit of default bail as the Investigating Agency was not able to file challan within prescribed period.

6. During investigation account numbers to which amount was transferred were verified. These account numbers were of different branches of State Bank of India located in Nagaland. Complainant had transferred Rs.27,78,794/- to these accounts. On inquiry, all these accounts were found opened against fake identity.

7. During investigation it was found that from SIM No. 70655-18321 complainant had 42 calls, for commission of offence and this SIM Card/number was used in phone sets having IEMI No. 865146020660770 and 355821093999270. These Mobile sets were used for large number of SIM/Mobile phone numbers and this mobile set was also being used by Martin James John (a Nigerian Citizen) and

Investigating Agency reached to Martin James John and he was arrested.

8. During investigation SIM No. 98620-97938 having tower location Mohan Garden, Uttam Nagar, Delhi belonging to petitioner Mhabeni Envy and another SIM Card No. 84488-18565 of Mhabeni Envy were also found used in mobile Set 355821093999270. With the aforesaid clue petitioner Mhabeni Envy was traced and she was found residing in Mohan Garden, Uttam Nagar, Delhi along with her husband Nicolas Chinedu co-accused.

9. During search of the room of the petitioner, Mobile Phone used for commission of offence was found without SIM Card and apart from aforesaid Phone, currency of Rs.3,50,000/ - , eight other Mobile Phones alongwith number of SIM Cards and a laptop were recovered. The Mobile Phones used for commission of offence were found in possession of petitioner. Petitioner Mhabeni Envy is originally resident of Nagaland and fake account numbers used for commission of offence were also found to be opened in various branches of SBI on fake identity and in these circumstances petitioners have been arrested and produced before the court on 5.8.2021. Thereafter, they after remaining in Police custody, are now in judicial custody. It was claimed by petitioner Mhabeni Envy that Rs.3,50,000/- had been withdrawn by her from her own account No. 31714378551 SBI Ranga Pahar Deemapur Nagaland. During investigation, this account number was found in the name of Mhabeni Envy, however, after obtaining the account statement of that account this claim of Mhabeny was found false, which substantiated the claim that petitioner was involved in illegal transaction of amount in deceitful manner.

10. Learned counsel for the petitioner has contended that offence at the most, in case considered to be true, committed by the petitioners is under Section 420 IPC, for which petitioner should not be detained in jail without conviction, particularly when co-accused Martin James John has been enlarged on bail on 29.4.2021.

11. In case of Mhabeni Envy, it has also been contended that she is also entitled to be enlarged on bail being a lady as envisaged under Section 437 of Cr.P.C., especially for the reason that she is Indian National and there is no possibility of her absconding.

12. It has been submitted by learned counsel for the petitioner that first transaction of amount had taken place in January, 2019 and date of last transaction is March, 2019 whereas FIR has been lodged in July, 2019 without any explanation for delay and petitioners have been arrested after more than two years and on this count also prayer for granting bail has been made.

13. It has been contended that nothing has been recovered from petitioners except mobile phone, laptop and cash unconnected to offence in present case and beneficiary of alleged offence is on bail and challan has been presented in the Court, therefore, petitioners cannot be refused bail for pre conviction punishment particularly keeping in view pronouncement of the Supreme Court in

Dataram Vs. State of U.P., (2018) 3 SCC 22 especially when for conduct of Police/ Investigator Martin James John has been enlarged on bail. It has also been canvassed that when main accused is on bail, accomplice cannot be kept behind the bars.

14. Learned Additional Advocate General has submitted that co-accused Martin James John has not been released on bail on merits, but he has been granted default bail for not filing challan within the period as investigation could not be completed, because Investigator had to visit Nagaland and Delhi etc. and during that period statutory time for filing challan had expired. According to him, involvement of petitioners in the crime is evident from the material on record, particularly from the recovery of nine Mobile Phones and number of SIMs, and also fake accounts opened in the State of Nagaland. Lastly, it has been submitted that cyber crimes are increasing day-by-day and innocent people are being duped by culprits, like present case, where complainant has lost not only her lifelong earning but has also borrowed huge money for transferring to accused persons. It has also been contended by learned Additional Advocate General that there is no delay in lodging FIR as it is natural conduct and behavior of a lady, who had transferred the amount without taking into confidence her husband, to transfer further amount, instead of reporting the matter, with a hope that after making further payment she would be getting/recovering entire amount.

15. Learned Additional Advocate General has contended that Mhabeni Envy is main accused as entire amount has been routed through fake bank accounts opened in Nagaland wherefrom she hails and thus she is not entitled for benefit being a lady for main and active role in commission of offence. Further that default bail to one co-accused does not entitle other co-accused arrested later on to get bail on the said ground.

16. It has been submitted by learned Additional Advocate general that menace of duping innocent persons through cyber crime leading to irreparable and unbearable loss to victim is increasing day by day and, therefore, petitioners do not deserve any leniency.

17. Learned counsel for the petitioner submits that earlier also, petitioner had approached this Court by filing Bail Application Cr.MP(M) No. 2773 of 2021 in November 2021 which was dismissed by this Court vide order dated 29.12.2021 by taking into consideration facts and circumstances and weighing personal interest of petitioner with societal interest and impact on society of enlarging the petitioner on bail at that stage. It has been further submitted that petitioner has been arrested on 5.8.2021 and at the time of previous bail application, petitioner was behind the bars for about four months, but, now she is behind the bars since last about more than 9 months and even if prosecution case is considered to be true then her role is limited and further that she is Indian National and permanent resident of Nagaland having roots in the society, therefore, there is no possibility of jumping over the bail by petitioner. It has been further submitted that petitioner is ready to abide by any condition imposed upon her at the time

of enlarging the petitioner on bail.

18 It has been submitted by learned Additional Advocate General that co-accused Martin James John, after entitlement for default bail, was enlarged on bail on furnishing personal bond as well as surety bond of local surety for Rs.1 lac, but since then he is absconding and is not traceable and steps for his proclamation under Sections 82 and 83 of Cr.PC have been initiated and case has been listed in the trial Court on 13.5.2022. Therefore, enlargement of petitioner on bail has been opposed.

19. Learned counsel for petitioner submits that co-accused Martin James John was a resident of Nigeria whereas petitioner is resident of India and she has no other place to go except her native place Nagaland and, therefore, there is no possibility of disappearance of petitioner to avoid the trial and she cannot be equated with co-accused Martin James John and for any lapse on the part of Martin James John, petitioner should not be punished by detaining her in custody during trial.

20. No doubt, Section 437 Cr.PC deals with situation when accused is produced before the Magistrate and Section 439 Cr.PC devolves special power on the High Court and/or Court of Sessions regarding the bail and both Sections deal with different situations in different Courts, but it is also settled position that provisions contained in Sections 437 and 438 Cr.PC can also be taken into consideration at the time of considering bail under Section 439 Cr.P.C. In fact, Section 437 Cr. P.C refrains the Court, other than the High Court or Court of Sessions, from releasing a person, accused or suspect of commission of any non-bailable offence, who is arrested or detained without warrant, or appears, or is produced before such Court and there appears reasonable ground for believing that he is guilty of an offence punishable with death, or imprisonment for life. However, an exception has been carved out enabling such Court to release such a person on bail, in case, such person is under the age of sixteen years, or is a woman, or is sick, or infirm, with further provision that no such person shall be released without giving an opportunity of hearing to the Public Prosecutor, which means that the persons under the age of sixteen years, or woman, or sick, or infirm are also not to be released in all cases, but after considering facts and circumstances brought in the notice of the Court by Public Prosecutor. Therefore, a woman accused cannot claim her entitlement for bail only for her womanhood, but discretion has been given to the Court to decide the bail application of a woman after considering facts and circumstances of the case, particularly nature and gravity of the offence and role of the woman in commission thereof.

21 Learned counsel for petitioner has submitted that for absconding one of co-accused Martin James John, petitioner may be subjected to furnish surety bonds for a value of twice or thrice of the value of surety furnished by the said absconding accused and further that petitioner is ready to furnish local surety as well as surety of close relative to assure her presence during the trial before the Court and to serve the sentence in case she is convicted on conclusion of trial.

22 In the given facts and circumstances without commenting on merits, but considering factors and parameters as propounded by the Supreme Court and this Court, required to be considered at the time of adjudication of bail application and also keeping in view the submissions made by learned counsel for petitioner, case of petitioner can be considered differently than the other accused involved in the case, one of which is behind the bars and other is absconding and therefore, she may be enlarged on bail at this stage subject to terms and conditions narrated hereinafter.

23 Accordingly, petitioner is ordered to be enlarged on bail, at this stage, subject to furnishing personal bond in the sum of Rs. 2 lacs with two sureties with in the like amount each, one of them should be a local surety and another should be close relative from maternal/paternal side, as undertaken by the petitioner, to the satisfaction of trial Court within a period of two weeks from today and also subject to any further conditions to be imposed by trial Court for assuring his presence during trial including the following further conditions:-

(i) That the petitioner shall make herself available during the investigation as well as trial on each and every date as and when required;

(iii) That the petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade her from disclosing such facts to Court or to any police officer or tamper with the evidence. She shall not, in any manner, try to overawe or influence or intimidate the prosecution witnesses;

(iv) That the petitioner shall not obstruct the smooth progress of the investigation as well as trial;

(v) That the petitioner shall not jump over the bail and shall inform, in writing, regarding change of address, land line number and/or mobile number, if any, in advance, to concerned Police Station;

(vi) That the petitioner shall not commit the offence similar to the offence to which she is accused or suspected or the commission of which she is suspected;

(vii) In the event of repetition of commission of offence, bail granted in present case shall be liable to be cancelled on taking appropriate steps by prosecution/ police;

(viii) That the petitioner shall not leave India without prior permission of Court;

(ix) That petitioner shall not misuse her liberty in any manner.

24 It will be open to the prosecution to apply for imposing any such other or further condition on the petitioner as deemed necessary in the facts and circumstances of the case and in the interest of justice. It will also be open to the trial Court/Magistrate to impose any other or further condition on the petitioner as it may deem necessary in the interest of justice.

25 In case the petitioner violates any condition imposed upon him, his bail shall be liable to be cancelled. In such eventuality, prosecution may approach the competent Court of law for cancellation of bail in accordance with law.

26 Learned trial Court is directed to comply with the directions issued by the High Court, vide communication No. HHC/VIG/Misc.Instructions/93-IV.7139 dated 18.3.2013.

27 Any observation made in this order shall not affect the merits of case in any manner and will strictly confine for the disposal of this bail application filed under Section 439 of Code of Criminal Procedure 1973.

The petitioner is permitted to produce copy of order downloaded from the High Court website and the trial Court shall not in sist for certified copy of the order, however, they may verify the order from the High Court website or otherwise.

Petition stands disposed of.

Dasti copy on usual terms.

