(2008) 09 BOM CK 0033

In the Bombay High Court

Case No : Criminal Application (Bail) No. 190 of 2008

Mr. Satish Shripad Saudagar — APPELLANT

Vs

State — RESPONDENT

Date of Decision : 08-09-2008

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) — Section 438
- Evidence Act, 1872 — Section 27
- Penal Code, 1860 (IPC) — Section 467, 471
- Prevention of Corruption Act, 1988 — Section 13(2)

Citation : (2008) 09 BOM CK 0033

Hon'ble Judges : N.A. Britto, J

Bench : Single Bench

Advocate : J.P. D''Souza, for the Appellant; Winnie Coutinho, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

N.A. Britto, J.—The applicant herein is a practicing advocate who is involved in Mapusa Police Station Crime No.172/08 under Sections 467, 471 I.P.C., and, has approached this Court by application dated 2-8-2008 for anticipatory bail, after the same has been denied to him by the Court of Sessions, by Order dated 30-7-2008. There is no dispute that the property admeasuring 875 sq. meters surveyed under No.91/12 in the name of Smt. Ana Paul D''Souza e De Sa belongs to her and she expired in Singapore on or about 6-5-1985.

2. The applicant as advocate on or about 6-1-2008 published a notice stating that his client intended to purchase the said property from the said Smt. Ana Paul D''Souza e De Sa. The name of the client was not disclosed. Subsequently, a power of attorney came to be executed by a lady who till date has not been identified, impersonating the said Smt. Ana Paul D''Souza e De Sa before Shri P. G. Narulkar, advocate and notary, and who is stated to be the senior of the applicant. The said power of attorney is purported to have been executed by the said Smt. Ana Paul D''Souza e De Sa in favour of Ms. Thereza D''Souza. The

applicant is instrumental in identifying the said woman, till now unknown, as the said Mrs. Ana Paul D''Souza e De Sa.

3. Thereafter on 22-1-2008 advocate Mrs. U. R. Parab published another notice that her client had agreed to purchase from the said Smt. Ana Paul D''Souza e De Sa the said property. Here again, no name of the client was mentioned and apparently there was no client, till then but only a broker. Pursuant to the said power of attorney a sale deed was executed on 31-1-2008 for a sum of Rs.15,00,000/-in favour of John Dolphin Sequeira, whose statement is yet to be recorded, and, it was submitted on behalf of the respondent, that presently he is unavailable, as he has proceeded to China.

4. The said crime came to be registered upon a complaint filed by Edwin D''Souza on 17-7-2008 in which he alleged that on 15-1-2008 in the office of the said notary Shri Narulkar at Mapusa, the said Ms. Thereza D''Souza dishonestly forged the power of attorney in the name of the late said Ana Paul D''Souza e De Sa and by virtue of the same the said property was sold by deed registered in the office of the Sub Registrar, Mapusa. The said Ms. Thereza D''Souza was arrested and it appears that she is an illiterate woman of about 62 years of age and was subsequently released on bail. It also appears that another advocate by name J. P. Simon Fernandes who works as a junior of the applicant identified the said lady whose photograph can be seen on the said power of attorney and the said J. P. Simon Fernandes who is also an accused in this crime approached the Court of Sessions for anticipatory bail and his application came to be rejected by Order dated 4-8-2008, and, it is again stated on behalf of the respondent that since then he is absconding. It is not unknown that more often than not some police officers act as Mizaru, one of the three proverbial monkeys.

5. As far as the involvement of the present applicant is concerned, it is stated by Shri Narulkar, the notary, that on the relevant date the applicant came to his office and mentioned to him that he has a power of attorney to be attested and the donor of the power of attorney being old woman would be unable to climb up the stairs, as his office was on the first floor and he requested him to come down and obtain the signature of the parties who would be waiting under the porch of the building and after a short while, advocate Shri Simon Fernandes came to his office along with the power of attorney drafted and printed on the requisite stamp paper informing him that the parties are waiting below his office and accordingly he obtained their signatures on the power of attorney and so also the signature of the donor of the power of attorney on the register after ensuring that both of them were aware of the contents of the said power of attorney and advocate Shri Simon Fernandes identified both the said persons and put his signature on the power of attorney with the endorsement that he had identified the parties.

6. There is also no dispute that the original power of attorney has not been traced so far but copies of the same attested by different notaries were used at two different stages, namely at the time of execution of the sale deed and at the

time of mutation proceedings. One of the said copies is purported to have been attested by advocate/notary Shri N. S. Parab but he has denied that the said copy is attested by him. The other copy was attested before a notary by name Shri Gaitonde at Mumbai whose statement is again yet to be recorded.

7. Mr. J. P. D''Souza, learned Counsel appearing on behalf of the applicant has submitted that the family of the said Ms. Thereza D''Souza was the applicant''s client and it is at her behest that the advertisement dated 5-1-2008 was published. Learned Counsel further submits that all that the applicant had done was to prepare a draft power of attorney at the behest of the said Ms. Thereza D''Souza and beyond that the applicant did not prepare the power of attorney nor purchase the requisite stamp paper on her behalf. Pointing out to an affidavit executed on 24-3-2008 before Notary Advocate Prabhakar J. Karkera by the said Ms. Thereza D''Souza, learned Counsel submits that this shows that the said Ms. Thereza D''Souza was also acting independently of the applicant. Learned Counsel further submits that the only mistake the applicant might have committed is to identify the said woman who had appeared before Shri Narulkar as the said Smt. Ana Paul D''Souza e De Sa through his junior the said Simon Fernandes whom he trusted. Learned Counsel further submits that the applicant does not even know whether the power of attorney was executed as per the very draft made by the applicant. Referring to the reply filed, learned Counsel submits that the price at which the property was sold could always be found out from the purchaser and further submits that the applicant could not be keeping the original of the said power of attorney even in case he had one, the same could have been destroyed. Pointing out to the copy issued by notary Shri Gaitonde, learned Counsel submits that this is a sure sign that the original is not with the applicant. Learned Counsel further submits that till date the respondent did not even conduct a search of his office premises to find out the whereabouts of the original power of attorney and that the applicant is always willing to co-operate with the Investigation Officer, and, therefore be admitted to bail.

8. Learned Counsel has placed reliance on the decisions in the case of Jagannath v. State of Maharashtra (1981 CRI. L.J. 1808), Roshanlal Biharilal Obrai v. The State of Maharashtra (1981 Bom.C.R. 57) and Surendra Kumar Sahu v. State of Chhattisgarh (2004 (2) Crim 86).

9. In the case of Jagannath v. State of Maharashtra (supra) this Court held that the jurisdiction conferred u/s 438 was concurrent i.e. with the Court of Sessions as well as with this Court and further held that anticipatory bail should not be refused merely because prosecution claims that they want the accused in police custody for the purpose of investigation and the genuineness of the alleged need for police custody has to be examined and it must be balanced against the duty of Courts to uphold the dignity of every man and to vigilantly guard his right to liberty without jeopardizing the State objective of maintenance of law and order. In the second case, it was submitted before the Court that there was likelihood of some discovery u/s 27 of the Evidence Act and this Court held that such a

submission was pregnant with serious implications as it was unheard of that the police knew before hand the accused would discover certain documents u/s 27 of the Evidence Act if he is taken in custody. These observations may have to be seen in the light of the observations of the Apex Court in Adri Dharan Das (infra). The third case at first flush appears to be little closer to the facts of the case at hand but it is not really so. In that case a practicing advocate had identified one Gulal as Mayaram when in fact the person who stood surety was Mayaram''s son Gulal and having regard to the aforesaid facts and circumstances the learned Single Judge of Chhattisgarh High Court ordered the grant of anticipatory bail. The learned Single Judge took note that as per the prevailing practice in Courts the advocates are sometimes, under the compelling circumstances, per force, when no other person is available as a regular practice without verifying the surety they have to identify the surety believing the statement of the concerned person and the applicant therein had performed his duty without any intention to commit crime and thus had become a victim of the system and therefore the benefit of Section 438 of the Code should be extended to him.

10. Two factors which are now required to be considered whilst granting or rejecting an application for anticipatory bail u/s 438 of the Code clearly go against the applicant herein and that is to say the gravity of the accusation and in the light of that need for custodial interrogation; this is not a case which has been made with the object of the injury or humiliating the applicant since there is enough material on record to prove the applicant''s involvement in the crime registered against him and others.

11. The Apex Court in Balchand Jain v. State of Madhya Pradesh (AIR 1977 SC 367) has observed that Section 438 of the Code is an extraordinary remedy and should be resorted to only in special cases. The same view has been echoed by the Supreme Court in the case of Bharat Chaudhary and another v. State of Bihar and another (2003 AIR SCW 5092) wherein the Apex Court stated that the object of Section 438 is to prevent undue harassment of the accused persons by pre-trial arrest and detention. The Apex Court has further stated that the gravity of the offence and the need for custodial interrogation are important factors to be taken into consideration.

12. In State Rep. by the C.B.I. Vs. Anil Sharma, on which reliance is placed by learned Public Prosecutor, the Apex Court stated that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well ensconced with a favourable order u/s 438. The Apex Court has reiterated that the considerations should weigh with the Court while dealing with a request for anticipatory bail need not be the same as for an application to be released on bail after arrest. That was a case u/s 13(2) of the Prevention of Corruption Act, 1988 and was based on an allegation that the accused had acquired wealth far in excess of his known sources of income, and, the Apex Court noted that in a case like that effective interrogation of a suspected person was of tremendous advantage in disinterring many useful informations and also materials which

would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order at the time he is interrogated as often interrogation in such a condition would reduce to a mere ritual. The Apex Court also rejected the contention that custodial interrogation was fraught with the danger of the person being subjected to third-degrees methods since the Court was bound to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders. The view held by the Apex Court in Adri Dharan Das Vs. State of West Bengal, is not different. The Apex Court observed that ordinarily, arrest is a part of the process of investigation intended to secure several purposes. The accused may have to be questioned in detail regarding various facets of motive, preparation, commission and aftermath of the crime and the connection of other persons, if any, in the crime. There may be circumstances in which the accused may provide information leading to discovery of material facts. It may be necessary to curtail his freedom in order to enable the investigation to proceed without hindrance and to protect witnesses and persons connected with the victim of the crime, to prevent his disappearance, to maintain law and order in the locality. For these or other reasons, arrest may become an inevitable part of the process of investigation. The legality of the proposed arrest cannot be gone into in an application u/s 438 of the Code. The Court ordinarily will not interfere with the investigation of a crime or with the arrest of the accused in a cognizable offence. The Court also noted that an interim order restraining arrest, if passed while dealing with an application u/s 438 of the Code will amount to interference in the investigation, which cannot, at any rate, be done u/s 438 of the Code

(emphasis supplied).

13. In matters of anticipatory bail a delicate balance is required to be maintained whereby the liberty of the citizen and the operation of the criminal justice system have both to be equally safeguarded. As regards the first aspect, Earl Warren, the learned Chief Justice of U.S.A. would say "our system faces no theoretical dilema but a single continuous problem, how to apply to the ever changing conditions, the never changing principles of freedom". As stated by the Apex Court in Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan and Another, a Judge is not to be unduly influenced by the concept of liberty, disregarding the facts of the case. It is now well settled that though liberty should occupy the place of pride, it should suffer eclipse when personal freedom turns a menace, like in the present case.

14. Learned Counsel on behalf of the applicant is right in contending that many more people are involved in this conspiracy; otherwise there is no explanation as to why copies of the power of attorney had to be attested at different places and before different notaries? Why Rs.5,00,000/-were paid to one individual out of sale price of Rs.15,00,000/-? Why an illiterate woman should have withdrawn Rs.2,00,000/- within three days?

15. It is more than evident that the I.O. has been dragging his feet in the investigations of the case. It is also clear that the investigating agency has been more than unwilling to arrest the applicant thus far and when a query was raised as to why the applicant was not arrested, it was submitted that the applicant was not found in his office and in this regard there appears to have been a solitary entry made in the case diaries that is on 30-7-2008. It has been submitted on behalf of the applicant that the applicant has been throughout attending the Courts and in fact a statement has been produced on behalf of the applicant showing the dates of his appearance in Courts and there has been no rejoinder to that, on behalf of the respondent. If the said Ms. Thereza D''Souza could have been arrested promptly without any intimation there is no reason why the applicant could not have been so arrested. Intimation letter was sent to the applicant for no other reason but to give him an opportunity to approach the Court.

16. Admittedly, till date the woman who impersonated the deceased Smt. Ana Paul D''Souza e De Sa is not identified. The said Ms. Thereza D''Souza has claimed that she does not know her. The statement of the purchaser Shri Sequeira is not yet recorded and all that is stated is that he is presently unavailable. No efforts have been made to find out how the money paid by the purchaser has been utilized. It is impossible to accept at this stage on the basis of the material on record that the applicant''s role was only to prepare a draft of power of attorney and give it to the said Ms. Thereza D''Souza. Applicant''s brooding omnipresence can be seen everywhere. Firstly, by publication of the notice when there was no purchaser. Thereafter, in negotiating the sale price from Rs.20,00,000/-to Rs.15,00,000/-followed by facilitating the impersonation of the deceased Smt. Ana Paul D''Souza e De Sa, and, then remaining present in person before the Sub Registrar, for execution of sale deed, helping the opening of account in the name of the said Ms. Thereza, etc. This is a case where the charge against the applicant is very serious. The ramifications of the crime can come to light only by custodial interrogation. One of the leading newspapers published from this State in its edition of 28-8-2008 reports that there were five similar cases, where land belonging to others have been sold. Such cases are on rise.

17. Considering the seriousness of the offence and the need for custodial interrogation which is required to unearth all angles of the conspiracy, including finding out who is the impersonator, which otherwise will not be possible, in my view, this is not a fit case to admit the applicant to anticipatory bail. The fact that the respondent has chosen not to arrest the applicant thus far would not be a factor to allow the application, since in doing so it would mean playing into the hands of the I.O.

18. Since the Investigation Officer has now been changed, it is hoped that the investigations will proceed in the right direction and in accordance with law. With the above observation the application is dismissed.

