

(2011) 08 BOM CK 0099

In the Bombay High Court

Case No : Criminal Application (Bail) No. 159 of 2011

Shri Jitendra Deshprabhu through Brother and Next Friend,
Shri Devendra R. Deshprabhu

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 16-08-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 438, 439
Goa (Prevention of Illegal Mining, Transportation and Storage of Minerals) Rules, 2004 — Rule 7
Mines and Minerals (Development and Regulation) Act, 1957 — Section 21, 22
Penal Code, 1860 (IPC) — Section 120, 120B, 217, 218, 34
Prevention of Corruption Act, 1988 — Section 10, 11, 12, 13, 13(2)
Town and Country Planning Act, 1974 — Section 17A, 17B

Citation : (2012) BomCR(Cri) 672

Hon'ble Judges : A.P. Lavande, J

Bench : Single Bench

Advocate : D. Pangam, for the Appellant; C.A. Ferreira, Public Prosecutor, R. Menezes, for the Respondent

Judgement

A.P. Lavande, J.—Heard learned Counsel for the applicant and the interveners and learned Public Prosecutor at length.

2. By this application u/s 439 of Code of Criminal Procedure, the applicant seeks bail. Bail application bearing No. 208/2011 filed by the applicant has been rejected by the Sessions Judge, Panaji by order dated 6.8.2011. The applicant is presently in police custody.

3. Pursuant to the order dated 7.5.2011 passed in Criminal Miscellaneous Application No. 32/2011 by the Judicial Magistrate, First Class, Pernem in an application u/s 156(3) of Code of Criminal Procedure filed by the interveners FIR was registered against the applicant and Ors. for the offences punishable under Sections 217, 218, 405, 409, 420, 468, 471, 120-B and Section 34 of I.P.C, Sections 7, 8, 9, 10, 11, 12, 13 of the Prevention of Corruption Act, Sections 17A

and 17B of the Town and Country Planning Act and Rule 7 of the Goa (Prevention of Illegal Mining, Transportation and Storage of Minerals) Rules, 2004, The Forest Act, The Water Act and the Environment Act. The applicant filed an application seeking relief u/s 438 of Code of Criminal Procedure before the Sessions Judge, North Goa, at Panaji, which was dismissed by the Sessions Judge by order dated 4.8.2011. Thereafter, applicant filed an application for bail bearing No. 208/2011 seeking bail which was dismissed by the Sessions Court. The applicant has approached this Court for bail.

4. Mr. Pangam, in support of the application submitted that No. prima facie case has been made out against the applicant under Sections 217, 218, 405, 409, 420, 468, 471, 120(b) and Section 34 of I.P.C. He further submitted that No. prima facie case has been made out against the applicant under any of the provisions of the Prevention of Corruption Act, 1988. He further submitted that FIR does not disclose any offence having been committed u/s 17A of the Town and Country Planning Act and Rule 7 of the Goa (Prevention of Illegal Mining, Transportation and Storage of Minerals) Rules, 2004 or Rules framed there under.

According to Mr. Pangam, FIR itself discloses that the applicant has not committed the offence as a public servant as such none of the Sections under the Prevention of Corruption Act, 1988 are attracted against the applicant. Learned Counsel further submitted that there is absolutely No. material available with the investigating agency to establish even prima facie the offence u/s 12 of the Prevention of Corruption Act. Learned Counsel further submitted that u/s 21 of the Mines and Minerals (Development Regulation) Act, 1957 the punishment prescribed is two years imprisonment or with fine which may extend to Rs. 25,000/- or with both and as such the said offence is bail able. Learned Counsel further submitted that under Rule 7 of the Goa (Prevention of Illegal Mining, Transportation and Storage of Minerals) Rules, 2004 the maximum punishment is for a term of one year or with fine which may extend to Rs. 5000/- or with both and as such offence is bail able. Learned Counsel further submitted that the investigation undertaken by investigating agency is without jurisdiction inasmuch as learned Magistrate had No. jurisdiction to direct registration of FIR under Prevention of Corruption Act, since it is only the Special Judge under the Prevention of Corruption Act, 1988 who can direct registration of FIR. Mr. Pangam, further submitted that learned JMFC, Pernem could have directed only an officer in charge of the police station within her jurisdiction to register the FIR against the accused and No. direction could have been issued to C.I.D. Crime Branch, Panaji. Learned Counsel further submitted that registration of FIR against the applicant is patently illegal and as such investigation carried out pursuant to the said FIR is also illegal. Mr. Pangam, further submitted that major offences alleged against the applicant in the FIR are not made out even prima facie against the applicant. Mr. Pangam, further submitted that in so far as the provisions in terms of Section 22 of Mines and Minerals (Development and Regulation) Act, 1957 are concerned a complaint in respect of the offence under the Act has to be filed by a person authorised on behalf of the Central

Government or State Government and a private complainant has No. right to file a complaint or seek direction u/s 156(3) of Code of Criminal Procedure In so far as the offence u/s 17A of the Town and Country Planning Act, 1974 is concerned in terms of Section 17(B) maximum punishment is one year or fine or with both and as such the said offence is also bail able. In so far as Goa, Daman and Diu Preservation of Trees Act, 1984 is concerned, Mr. Pangam submitted that punishment prescribed u/s 25 is one year or fine which may extend to Rs. 1,000/- or both and as such said offence is also bail able.

5. Mr. Pangam, learned Counsel further submitted that applicant has been suffering from heart ailment and diabetes which is evident from the medical records. Mr. Pangam further submitted that further detention of the applicant in the custody is not warranted and No. purpose would be served by rejecting bail to the applicant. According to the learned Counsel, applicant has all the time cooperated with the investigating agency and when he was asked to appear before investigating agency by communication dated 11th July, 2011, he had informed the investigating agency that on account of urgent personal work he had to leave Goa and he will be available only after 18th July, 2011 and thereafter, he made himself available for investigation before Crime Branch. Learned Counsel further submitted that co-accused Geetesh Naik has been released by the Special Judge and on the ground of parity also the applicant is entitled for bail. Learned Counsel therefore submitted that the applicant be released on bail on such terms and conditions as this Court deems fit and proper.

6. Mr. Pangam further submitted that although in terms of the settled law the interveners have No. right to oppose the bail application filed by the applicant, he would have No. objection if interveners are heard so that hearing of the bail application is not adjourned thereby causing serious prejudice to the applicant. In support of his submissions, Mr. Pangam placed reliance upon the following judgments:

- i. Bhojraj Kisan Bhagai v. State of Maharashtra and Ors. 2005 (2) Bom. C.R. (Cri.) 631.
- ii. Khemlo Sakham Sawant v. State 2002(1) Bom. C. Rule 689.
- iii. Siddharam Satlingappa Mhetre Vs. State of Maharashtra and Others, .
- iv. A.R. Antulay Vs. Ramdas Srinivas Nayak and Another, .
- v. Swati Sachin Mahajan v. State of Maharashtra 2007 (2) Bom. C.R. (Cri.) 20.
- vi. Central Bureau of Investigation v. Devendra S. Doctor and Anr. 2008 (1) Bom. C.R. (Cri.) 314.
- vii. Ashok Gyanchand Vohra and Ors. v. State of Maharashtra 2006 (1) Bom. C.R. (Cri.) 183.
- viii. Prahlad Singh Bhati Vs. N.C.T. Delhi and Another, .

ix. Joginder Kumar v. State of U.P. 1994 SCC 260.

7. Mr. Ferreira, learned Public Prosecutor submitted that considering the nature and gravity of the offences committed by the applicant, the applicant is not entitled to be released on bail. According to learned Public Prosecutor, huge quantity of the ore has been extracted illegally from the property of the applicant from 2006 onwards without seeking necessary approvals from the appropriate authorities. According to the learned Public Prosecutor, the applicant has not co-operated with the investigating agency prior to filing of anticipatory bail before the Sessions Judge, Panaji. According to learned Public Prosecutor, investigation is at preliminary stage and in the event the applicant is released on bail he may tamper with the evidence and hamper further investigation. According to learned Public Prosecutor, at this stage of investigation, the investigating agency has not been able to collect any material against any of the Government officials mentioned in the FIR. Learned Public Prosecutor, therefore, further submitted that the applicant was admitted in Goa Medical College soon after his arrest on 4.8.2011 and he was in Critical Care Unit(CCU) as per medical advise and he was discharged from the hospital on 9.8.2011 and as such applicant was not in actual custody of investigating agency, in order to carry out effective investigation. Learned Public Prosecutor, further submitted that No. case has been made out for grant of bail by the applicant.

8. Mr. R. Menezes, learned Counsel for the interveners submitted that the applicant is not entitled to challenge the FIR in this application as the applicant has already availed of the remedy by filing revision before the Sessions Court to challenge the registration of FIR. Learned Public Prosecutor further submitted that having regard to the nature of the offences committed and the material collected by the investigating agency the offences alleged in the FIR are prima facie made out against the applicant and therefore it would be appropriate to reject the bail application and in the event the applicant is released on bail, the applicant is likely to tamper with the evidence. He further submitted that the applicant is not entitled for bail on the ground of parity inasmuch as another accused Geetesh Naik, was only the contractor and his role was not major as compared to the applicant. Learned Counsel invited my attention to paras 48 to 56 of the order passed by the learned Sessions Judge dismissing the anticipatory bail application filed by the applicant and submitted that having regard to these observations the applicant is not entitled for bail. Mr. Menezes, placed reliance upon the order dated 4.6.2010 passed by the Delhi High Court in the case of Dr. Ketan Dessai v. State and order dated 8.6.2011 in the case of Sharad Kumar and Kanimozhi Karunanithi v. Central Bureau of Investigation. According to the learned Counsel the order passed by the Delhi High Court in the case of Sharad Kumar has been upheld by the Apex Court by dismissing the SLP filed by the applicant. According to learned Counsel considering the status of the applicant his further detention in the custody is warranted and the same would facilitate smooth investigation as the persons acquainted with the commission of the offences which are serious are likely to come forward and give their statements

which would establish commission of serious offences by the applicant and others.

9. I have carefully considered the rival submissions, perused the record and the judgments relied upon.

10. In so far as the submissions made by Mr. Pangam, that learned JMFC, Pernem had No. jurisdiction to pass an order u/s 156(3) of Code of Criminal Procedure and therefore FIR filed against the applicant and Ors. is without jurisdiction is concerned, I do not deem it necessary to deal with the same inasmuch as admittedly applicant has challenged the said order by filing revision before Sessions Court which is pending. Any finding on merits on the said issue in the present bail application would seriously prejudice the parties before the Sessions Court. I also deem it not necessary to deal with the said submission in view of the order which I propose to pass.

11. In the case of Prahlad Singh Bhati(supra), in para 8 the Apex Court observed thus:

The jurisdiction to grant bail has to be exercised on the basis of well settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the Court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behavior, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words " reasonable grounds for believing" instead of " the evidence" which means the Court dealing with the grant of bail can only satisfy it(sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt.

12. In the case of Joginder Kumar (supra), the Apex Court has held that a person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the officer affecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if police officer issues notice to the person to attend the station house and not to leave station without permission.

13. In the present case it is not the case of the prosecution that the applicant has committed the alleged offences as a public servant but the case is that he has abetted the commission of offence under 7 of the Act. According to the prosecution the material collected so far in the course of investigation does not prima facie establish commission of any offences under the Prevention of Corruption Act by any public servant. Therefore at this stage there is No.

material to establish commission of any offence u/s 7 of the Act. Similarly, so far the investigating agency has not been able to collect material against the applicant in respect of the offences under Sections 217, 218, 205, 209, 420, 468 and 471 of I.P.C. In my considered opinion, since FIR was registered on 9.5.2011 the prosecution had sufficient time to collect some material establishing the commission of various offences under different Acts mentioned in the FIR.

14. In the present case, the accused was arrested on 4.8.2011 and he has been in police custody since then. The applicant was in Goa Medical College soon after his arrest on 4.8.2011 up to 9.8.2011 but from 9.8.2011 the applicant has been in actual police custody for a period of seven days. In my view, having regard to the material already collected and the fact that the applicant has been in actual police custody for a period of seven days, it would be just and proper to release the applicant on bail by imposing appropriate conditions. In my considered view No. purpose would be served by extending the custody, police or judicial, of the applicant and the applicant deserves to be released on bail by imposing appropriate conditions.

15. Mr. Pangam, is right in contending that the offences under The Goa, Daman and Diu Town and Country Planning Act, The Goa (Prevention of Illegal Mining, Transportation and Storage of Minerals) Rules, 2004, The Forest Act, The Water Act and The Environment Act are bail able offences and as such bail cannot be denied to the applicant in respect of the said offences.

16. Having regard to the principles laid down by the Apex Court in the case of Pralhad Singh Bhati(supra), regarding grant or refusal of bail, I am of the considered opinion that this is fit case in which the applicant deserves to be released on bail by imposing appropriate conditions.

17. In so far as the submissions made on behalf of the prosecution that the applicant did not co-operate with the investigating agency is concerned, I find that the record does not disclose that in the initial stage of investigation the applicant did not co-operate. Thereafter investigating agency chose to issue notice to the applicant and at one stage the applicant informed the investigating agency that he would be out of station and at that stage investigating agency did not choose to take the accused in custody for the purpose of investigation. The record does not disclose that at any point of time the applicant was absconding. Moreover, the applicant has roots in the society. Therefore, I am not inclined to dismiss the bail application on the ground alleged by the prosecution that the applicant did not co-operate with the investigating agency.

18. The interveners were heard on merit solely on the ground that Mr. Pangam, learned Counsel for the applicant had given No. objection for the same and therefore this order should not be construed as laying down the law that the informant has right to be heard in a bail application filed by the accused.

19. The Order passed by the Delhi High Court in the case of Dr. Chetan Desai, does not advance the case of the prosecution or the interveners inasmuch as in

the said case, the applicant who was president of Medical Council of India was arrested under several provisions of Prevention of Corruption Act and there was sufficient material against the applicant establishing prima facie his complicity in commission of serious offences under Prevention of Corruption Act. In the cases of Sharad Kumar and Kanimozhi Karunanithi, the Delhi High Court rejected the bail applications filed by the applicants on the ground that offences u/s 120(b) of the I.P.C. and Section 13(2) read with Section 13(a) and (d) of the Prevention of Corruption Act were made out against the applicants. Having regard to the nature and gravity of the offences alleged to have been committed by the applicants, Delhi High Court refused to grant bail to the applicants. SLP preferred to the Apex Court against the said order was dismissed. The factual matrix in the cases of Sharad Kumar and Kanimozhi Karunanithi are clearly distinguishable from the present case. It is well settled that each case has to be decided on the basis of materials produced in the case. Therefore, the two orders upon which reliance has been placed by Mr. Menezes are of little help to the intervene Ors.

20. I do not want to express any opinion on the merits of the claims made by the informants and the applicant since I am dealing with the bail application filed by the applicant. It is the case of the prosecution that the investigation carried out so far prima facie discloses that large quantity of ore were illegally extracted for a period of almost five years without obtaining appropriate permissions. Needless to observe that such an action would surely have adverse effect on the environment and would also result in loss of substantial revenue to the State. It is therefore expected of the State Government to investigate into the matter in right earnest and find out the complicity of the person/persons involved in the commission of the offences under different statutes. It is also needless to mention that while carrying out such investigation, the investigating agency need not confine itself to the accused mentioned in the FIR but it is expected to find out if any person/persons, other than those mentioned in the FIR are involved in the commission of the offences. Thus it is expected of the State Government to take appropriate steps and ensure that the investigation is carried out to its logical conclusion irrespective of the position and status of the persons involved in the commission of such offences. It is expected of the investigating agency to carry out investigation expeditiously so that the collection of the evidence does not become difficult.

21. In the course of arguments, Mr. Ferreira, learned Public Prosecutor submitted that the investigation in the present case is being carried out by DYSP, Crime Branch under the supervision of S.P. Crime Branch and DIG. Considering the nature of the offences committed, the investigating agency to carry out investigation expeditiously.

22. It is made clear that the observations made above are for the limited purpose for disposing of bail application and the same should not be construed as expressions of opinion on merits.

23. In view of the order, I propose to pass, I do not deem it necessary to refer to

all the authorities relied upon by Mr. Pangam, learned Counsel for the applicant in support of his submissions.

24. In the result therefore, the bail application is granted. The applicant Shri Jitendra Deshprabhu is ordered to be released on bail in connection with FIR No. 17/2011 registered at CID Crime Branch, Donapaula, on the following terms and conditions:

- i. The applicant will execute bail bond in sum of Rs. 50,000/- with two sureties in the like amount to the satisfaction of Judicial Magistrate, First Class, Pernem.
- ii. The applicant shall report at Crime Branch, Donapaula, initially for a period of seven days from 10.00 a.m to 1.00 p.m after he is released on bail and thereafter as and when directed by the investigating agency till the filing of the charge sheet.
- iii. The applicant shall neither tamper nor influence prosecution witnesses directly or indirectly.
- iv. The applicant shall not leave State of Goa without seeking prior permission from this Court, till filing of the charge sheet.

25. Both the applications stand disposed of.