

Deepak Kindo vs State Of Odisha ... Opposite Party on 17 February, 2023

Author: G. Satapathy

Bench: G. Satapathy

IN THE HIGH COURT OF ORISSA AT CUTTACK

BLAPL No.9025 of 2022

(In the matter of application under Section 439 of the Code of Criminal Procedure).

Deepak Kindo Petitioner

-versus-

State of Odisha . . . Opposite Party

For Petitioner : Mr. G.Mishra,
Sr. Advocate

For Opposite Party : Mr. S.S.Pradhan, A.G.A.
Mr.B.P.Pradhan, Advocate
for (Informant)
Mr.S.R.Mohapatra,
Advocate for (Intervenor)

CORAM:

JUSTICE G. SATAPATHY

DATE OF HEARING :03.02.2023

DATE OF JUDGMENT: 17.02.2023

G. Satapathy, J.

1. This is an application U/S. 439 of Cr.P.C. by the Petitioner for grant of bail in connection with EOW-CID, CB P.S. Case No. 17 of 2021 corresponding to C.T. Case No. 07 of 2022 for commission of offence U/Ss. 406/420/467/468/ 471/120-B of the IPC pending in the Court of learned S.D.J.M., Bhubaneswar.

2. The allegation against the petitioner in precise are the petitioner was the Managing Director of Sambandh Finservice Private Limited (hereinafter referred to as "SFPL"), a non-banking financial

company having its corporate office at civil township, Rourkela and had the permission of R.B.I. to carryout business of non-banking financial services and the petitioner being the Managing Director of SFPL approached to another non-banking financial company registered with RBI namely, Annapurna Financial Private Limited (hereinafter referred to as, "AFPL") for financial support to carryout financial activities effectively by giving loans to different individual entities and Joint Liabilities Groups and agreeing with the proposal, AFPL, accordingly, sanctioned two term loans amounting to Rs.3crores and Rs.2crores, total Rs.5crores @ interest 15.50% per annum with condition of repayment in 12 equal monthly installments starting from two months after disbursement of the amount in favour of SFPL on execution of two agreements by SFPL(borrower) and AFPL(lender) on 28thSeptember, 2020 at Bhubaneswar and accordingly, Rs.5 crores was credited to the account of SFPL, but subsequently AFPL coming to know about the fiscal fraud committed by SFPL, approached the petitioner to repay the loan, to which the petitioner only repaid Rs.50 lakhs with assurance to pay back the balance loan amount and thereafter, the petitioner did not repay the rest of the amount even after one year. It is also alleged that SFPL had not utilized the loan amount for lending loan to women joint liability groups and managed to embezzle the entire loan amount with dishonest intention and deceived AFPL in not paying the loan.

On this issue, the head of Inorganic business of AFPL namely, Mr.Sabyasachi Rout lodged an FIR before the S.P., E.O.W., CID, C.B., Orissa, Bhubaneswar against the petitioner for deceitfully cheating AFPL by stating that prior to sanction of loan, SFPL had submitted one bank statement from 1st July, 2020 to 28th September, 2020 showing closing balance Rs.17,51,33,609/- as on 25th September, 2020 by manipulating document instead of providing the actual correct balance of Rs.15,28,829/- as on that day and thereby, such bank statement of SFPL was found to be fake and fabricated to avail the loan by producing forged documents deliberately. On receipt of the F.I.R., EOW, Bhubaneswar P.S. Case No. 17 dated 31.12.2021 was registered for offences U/Ss. 406/420/467/468/471/120-B of IPC and the matter was investigated into by DSP, Sasmita Sahoo and accordingly, the petitioner was arrested and forwarded to the Court and the investigation accordingly progressed.

3. Mr.G.Mishra, learned Senior Counsel while urging to grant bail to the petitioner has argued and highlighted the following points in support of his contention to grant bail to the petitioner:-

- (i) The dispute between the parties arises out of an inter corporate civil dispute.
- (ii) No general public is duped/cheated.
- (iii) After noticing irregularities in his company, the petitioner himself had informed the police through e-mail which shows his bonafide conduct.
- (iv) Charge sheet has already been submitted and the petitioner has also surrendered to the custody after availing the interim bail pursuant to an order of this Court and, thereby, the conduct of the petitioner is above board.

(v) Petitioner has been granted bail by different Courts in the States of Tamilnadu, Karnataka and Telengana by taking note of the fact that the disputes are purely civil in nature.

(vi) The allegation against the petitioner is for breach of contract and accordingly, no criminal liability can be fastened upon him and the petitioner absolutely poses no flight risk in this case.

In addition to above grounds, learned Senior Counsel has also placed reliance upon the relevant paragraphs of the following decisions in the case of

(i) Satischandra Ratanlal Shah Vrs. State of Gujarat and another; (2019) 9 SCC 148

(ii) P. Chidambaram Vrs. Directorate of Enforcement; (2020) 13 SCC 791 (iii) Arnab Manoranjan Goswami Vrs. the State of Maharashtra & Others; (2021) 2 SCC 427

(iv) Satendra Kumar Antil Vrs. Central Bureau of Investigation; (2021) 10 SCC 773 and

(v) Mitesh Kumar J. Sha Vrs. the State of Karnataka & others; AIR 2021 SC 5298.

4. Mr. S. S. Pradhan, learned AGA in reply by placing the facts of the case has submitted the followings:-

(i) Initially on being approached, AFPL had sanctioned two term loans to SFPL for an amount of Rs.5 crores @ interest 15.50% per annum with a condition for repayment in 12 equal monthly instalments on execution of two agreements, but the petitioner being the MD of SFPL intending to embezzle the entire loan amount with dishonest intention had deceived AFPL by not repaying its loan by diverting the amount to other sister entities of SFPL namely, Diya Dairy and Agro Processing Unit (DDAPL), Kshamata Foundation, Krushi Shakti, Diya Cattle Feeds and Deepak Kindo Enterprises.

(ii) In the course of investigation, it was ascertained that the petitioner has misappropriated an amount of Rs.109 crores from DCB Bank and SIDBI, Diya Vikas Capital Private Limited.

(iii) In securing the loan, the petitioner has forged document by showing inflated bank balance to the tune of Rs.17,51,33,609/- as against the real balance of Rs.15,28,829/- as on 25th September, 2020, which shows his dishonest intention to cheat by forging documents.

(iv) Around 30 numbers of bank accounts had been created in the names of the staff of the company and the funds received were credited in such accounts to defraud different person which shows the prima facie intention of the petitioner to cheat different persons.

(v) After registration of the case, the petitioner had absconded to evade police arrest and lookout circular was also issued to apprehend him and the petitioner was apprehended near Orissa-Chhatisgarh border while he was trying to flee away to Visakhapatnam.

(vi) There is reasonable apprehension against the petitioner to influence the witnesses.

(vii) Petitioner has travelled history of 11 countries and thereby, there is a reasonable apprehension of flight risk of the petitioner.

(viii) The involvement of the petitioner in five other cases for similar offences of cheating and defrauding the innocent depositors/companies in three different States prima facie disclose the conduct of the petitioner for repeating the offence. In addition to above objection, learned AGA has also relied upon the decisions in the case of

(i)Y.S.Jagamohan Reddy Vrs. Central Bureau of Investigation; (2013) 7 SCC 450 and

(ii)Nimmagada Prasad Vrs. Central Bureau of Investigation; (2013) 7 SCC 466 to reject the bail application of the petitioner.

5. Mr.B.P.Pradhan, learned counsel for the informant by placing the facts of the case and relying upon the decisions in the case of

(i)Y.S.Jagan Mohan Reddy (supra) and (ii) Serious Fraud Investigation Officer Vrs. Nittin Johari & another; (2019) 9 SCC 165 has prayed to reject the bail application of the petitioner.

6. Mr.S.R.Mohapatra, learned counsel representing BOPA PTE Limited and Dia-Vikas Capital Private Limited as intervenor has opposed the bail application of the petitioner by relying upon the decisions of (i)Y.S.Jagan Mohan Reddy(supra) (ii)State of Gujarat Vrs. Mohanlal Jitmalji Porwal; AIR 1987 SC 1321 and(iii) State of Orissa Vrs. Mahimananda Mishra; AIR 2019 SC 302.

7. A careful exercise of scrutiny of material placed on record in the light of rival submissions, there appears hardly any dispute about an FIR being lodged in this case against the company "SFPL" and the petitioner as MD of that company and others on the allegation of cheating by using forged documents, records and also committing criminal breach of trust by entering into conspiracy and after such FIR being registered by EOW, Orissa in FIR No. 17 dated 31.12.2021, the investigation commenced in the course of which the investigating agency found the petitioner as CEO & MD of "SFPL" and others for misappropriating Rs.109 crores by cheating the lenders and investors and misutilizing their funds by committing forgery. It is also alleged in the FIR that SFPL availed two term loan of Rs.5 crores by producing fake bank statement of accounts of the company showing inflated bank balance of Rs.17,51,33,609/- as against actual balance Rs.15,28,829/- at the instance of the petitioner. It is, however, argued by learned Senior Counsel that the FIR allegation disclose inter corporate dispute between two companies for an amount of Rs.4.5 crores as the petitioner has already paid an amount of Rs.50 lakhs as against term loan of Rs.5 crores which was obtained on execution of agreements and, thereby, a mere breach of agreement or contract, which ipso facto

does not constitute any offence of criminal breach of trust or cheating. In support of his contention, learned Senior Counsel has also relied upon Satischandra Ratanlal Shah(supra) wherein the Apex Court after taking note of the breach of dispute arising out of a loan transaction between the parties have quashed the FIR, but the Apex Court in that case in Paragraph-13 has held that mere inability of the appellant to return the loan amount cannot give rise to a criminal prosecution for cheating, unless fraudulent or dishonest intention is shown right at the beginning of the transaction, as it is this mens rea which is the crux of the offence. In this case, it is alleged in the FIR that SFPL has manipulated the bank statement at the behest of the petitioner by inflating the bank balance to the tune of Rs.17,51,33,609/- as against the actual balance of Rs.15,28,829/- as on 25th September, 2020 to avail the loan, as ascertained by the I.O. from the statement of one employee of SFPL namely, Sandip Mohanty and thereby, there is prima facie allegation appearing against the petitioner for cheating, of course which is subject to proof in the course of trial. The FIR in this case, however, discloses disputes between two companies for repayment of loan amount, but in the course of investigation, the IO has also allegedly found other companies and financial institutions like SIDBI, DCB Bank, Bhubaneswar, BOPA PTE Limited (Foreign Investors), Dia Vikas Capital Private Limited to have invested huge amounts in SFPL as well as sanctioned loan to it and, therefore, at this stage, prima facie the dispute cannot be said to be inter corporate dispute between two parties.

8. Moving further, the petitioner has also relied upon the observation made by Apex Court in Mitesh Kumar J.Sha(supra) to contend that the dispute between the parties is entirely civil in nature, but as already discussed above that there is allegation against the petitioner for forging documents in the form of submitting fake bank statement showing manifold bank balance than the actual balance to secure the loan from the informant-company and, thereby, there is allegation of dishonest or fraudulent intention on the part of the petitioner from the very inception. In the same strain, the petitioner has also relied upon the decision in P.Chidambaran(supra) to contend that even if allegation is of grave economic offence, it is not a rule that bail should be refused in every case since there is no bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence provides for it. This Court is definitely alived with the principles laid down by the Apex Court in P.Chidambaran(supra) wherein the Apex Court at Paragraph-16 has held as under:-

"Though we have heard the matter elaborately and also have narrated the contention of both sides in great detail including those which were urged on the merits of the matter we are conscious of the fact that in the instant appeal the consideration is limited to the aspect of regular bail sought by the appellant under Section 439 of Cr.PC. While stating so, in order to put the matter in perspective it would be appropriate to take note of the observation made by us in the case of this very P.Chidambaram vs. CBI, in Criminal Appeal No. 1603/2019 which reads as hereunder;

"21.The jurisdiction to grant bail has to be exercised on the basis of the well-settled principles having regard to the facts and circumstances of each case. The following factors are to be taken into consideration while considering an application for bail:-

(i) the nature of accusation and the severity of the punishment in the case of conviction and the nature of materials relied upon by the prosecution;

(ii) reasonable apprehension of
tampering with the witnesses or

apprehension of threat to the
complainant or the witnesses;

(iii) reasonable possibility of securing the presence of the accused at the time of trial or the likelihood of his abscondence;

(iv) character behaviour and standing of the accused and the circumstances which are peculiar to the accused;

(v) larger interest of the public or the State and similar other considerations (vide *Prahlad Singh Bhati v. State (NCT of Delhi)*).

22. There is no hard and fast rule regarding grant or refusal to grant bail. Each case has to be considered on the facts and circumstances of each case and on its own merits. The discretion of the court has to be exercised judiciously and not in an arbitrary manner."

9. What are the factors to be borne in mind while considering an application for bail has also been discussed in *Prasanta Kumar Sarkar V. Ashis Chatterjee and another*; (2010) 14 SCC 496 wherein the Apex Court after referring to several precedents has held thus:-

" 9. ...However, it is equally incumbent upon the High Court to exercise its discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in a plethora of decisions of this Court on the point. It is well settled that, among other circumstances, the factors to be borne in mind while considering an application for bail are:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behavior, means, position and standing of the accused;

- (vi) likelihood of the offence being repeated;
- (vii) reasonable apprehension of the witnesses being influenced; and
- (viii) danger, of course, of justice being thwarted by grant of bail."

A harmonious reading of the factors and consideration for grant or refusal of bail as stated by the Apex Court in P.Chidambaran(supra) and Prasanta Kumar Sarkar(supra) would persuade to consider the character, behaviour and standing of the accused and the circumstance which are peculiar to the accused and likelihood of the offence being repeated as well as larger interest of the public or the State as some of the factors amongst others while considering the bail to the applicant.

10. In Mahimananda(supra), the Apex Court in Paragraph-16 has held that at the time of considering an application for bail, the Court must take into account certain factors such as:-

- (i) existence of a prima facie case against the accused;
- (ii) the gravity of the allegations;
- (iii) position and status of the accused
- (iv) the likelihood of accused fleeing from justice and repeating the offence.
- (v) the possibility of tampering with witnesses and obstructing the Court
- (vi) criminal antecedent of the accused.

In this case, it is not disputed by any of the parties about registration of five number of cases of similar nature against the petitioner in three different States as well as his apprehension in this case after issuance of lookout circular, in addition to the other allegations of committing financial defalcation and, thereby, these factors appear to be significantly adverse against the conduct of the petitioner.

11. This Court is also conscious of the fact that personal liberty of an individual cannot be taken away, except in accordance with the procedure established by law inasmuch as personal liberty is a constitutional guarantee, but criminal laws of this country authorises the law enforcement agency to take a person accused of non-bailable offences to custody during the pendency of investigation and trial, unless such person is enlarged on bail in accordance with law and such detention cannot be considered as a violative of Article 21 of Constitution of India. It is no doubt true, a person accused of non-bailable offences may also be entitled for bail if such person otherwise make out a case for grant of bail, even when there exists a prima facie case against such person, provided there is a need

to release such person on bail where facts demand so. Personal liberty of a person is precious, but it is not absolute in every situation. In this context, it is considered apt to refer to the decision of Apex Court in Ash Mohammad Vrs. Shiv Raj Singh @ Lalla Babu and another; (2012) 9 SCC 446 wherein it has been held at Paragraph-17 as under:-

"17. We are absolutely conscious that liberty of a person should not be lightly dealt with, for deprivation of liberty of a person has immense impact on the mind of a person. Incarceration creates a concavity in the personality of an individual. Sometimes it causes a sense of vacuum. Needless to emphasise, the sacrosanctity of liberty is paramount in a civilised society. However, in a democratic body polity which is wedded to the rule of law an individual is expected to grow within the social restrictions sanctioned by law. The individual liberty is restricted by larger social interest and its deprivation must have due sanction of law. In an orderly society an individual is expected to live with dignity having respect for law and also giving due respect to others' rights. It is a well-accepted principle that the concept of liberty is not in the realm of absolutism but is a restricted one. The cry of the collective for justice, its desire for peace and harmony and its necessity for security cannot be allowed to be trivialised. The life of an individual living in a society governed by the rule of law has to be regulated and such regulations which are the source in law subserve the social balance and function as a significant instrument for protection of human rights and security of the collective. It is because fundamentally laws are made for their obedience so that every member of the society lives peacefully in a society to achieve his individual as well as social interest. That is why Edmond Burke while discussing about liberty opined, "it is regulated freedom".

12. Chapter "V" of the Cr.P.C. provides for arrest of persons, but such provision does not command for routine arrest of persons even for commission of cognizable offence, however, if the police officer is satisfied that such arrest is necessary to prevent such person from committing any further offence which is one of the grounds as provided in Section 41(1)(b)(ii)(a) of the Cr.P.C., in such event, the police officer is authorised to arrest by recording the reasons in writing. Similarly, Section 437(3)(b) of the Cr.P.C. provides that when a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the IPC or abetment of, or conspiracy or attempt to commit any such offence, is released on bail under sub-section (1), the Court shall impose the condition that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected. It is, therefore, clear that while considering the bail application of an accused for commission of offence as indicated, one of the dominant consideration is to prevent repetition of the offence, but the petitioner in this case has undisputedly found implicated for similar offences in five cases in three different States and, thereby, prima facie the same appears against the petitioner to prevent repetition of the offence.

13. The petitioner also heavily relies upon the decision in the case of Satendra Kumar Antil(supra) wherein the Apex Court in Paragraphs-1 and 12 has been pleased to hold as under:-

The trial Courts and the High Courts will keep in mind the aforesaid guidelines while considering bail applications. The caveat which has been put by learned ASG is that where the accused have not cooperated in the investigation nor appeared before the Investigating Officers, nor answered summons when the Court feels that judicial custody of the accused is necessary for the completion of the trial, where further investigation including a possible recovery is needed, the aforesaid approach cannot give them benefit, something we agree with.

12. Further this Court in *Sanjay Chandra v. CBI* (2012) 1 SCC 40, has observed that:

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."

14. On scrutinizing the facts involved in this case keeping in mind the above observations of the Apex Court in *Satendra Kumar Antil*(supra), it is not denied on behalf of the petitioner that the petitioner was arrested in Orissa and Chattisgarh border after lookout circular was issued and the wife of the petitioner, who is a co-accused in this case, has stated in her affidavit about registration of five cases against the petitioner in three different States for more or less similar type of offences. These factors cumulatively weighed heavily against the petitioner to suggest for his non-cooperation with the investigation as well as reasonable apprehension for avoiding trial and there also appears from the record about keeping up investigation open U/S. 173(8) of Cr.P.C.

15. In *Mohanlal Jitmalji*(supra), the Apex Court in Paragraph-5 has held as follows:-

"The entire Community is aggrieved if the economic offenders who ruin the economy of the State are not brought to books. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the Community. A disregard for the interest of the Community can be manifested only at the cost of forfeiting the trust and faith of the Community in the system to administer justice in an even handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the National Economy and National Interest.

16. In *Y.S. Jagan Mohan Reddy*(supra), the Apex Court at Paragraphs- 34 and 45 has held as under:-

"34. Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offence having deep rooted conspiracies and involving huge loss of public funds needs to be viewed seriously and considered

as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.

35. While granting 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 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/State and other similar considerations."

17. In Nimmagadda Prasad (supra), the Apex court at Paragraph-24 has held as under:-

"24. While granting 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 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/State and other similar considerations. It has also to be kept in mind that for the purpose of granting 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 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."

18. In Christian Michel James Vrs. Central Bureau of Investigation; SPL(CrI) No. 4327 of 2022 disposed of on 07.02.2023, while refusing to extend the benefit of Section 436A of the Cr.P.C. to grant bail to the petitioner, the Apex Court has been pleased to observe at Paragraph-12 as under:-

"12. In the backdrop of the above discussion, it has emerged before the Court that the fundamental basis on which the petitioner has sought bail, namely, under the provisions of Section 436A, cannot be accepted as valid. Besides the provisions of Sections 415 and 420 read with Section 120-B and Section 8 of the PC Act, the petitioner is alleged to have committed offences under Section 467 IPC which is punishable with up to life imprisonment. In this backdrop, the provisions of Section 436A would not stand attracted in the present case."

19. It is of course true that at the stage of grant or refusal of bail, a detailed and meticulous examination of evidence and elaborate documentation of the merit of the case should not be undertaken, however, there is need to indicate sound reasoning for the order and any order devoid of any reasoning would suffer non- application of mind. It is imperative for the Court to evaluate the materials on record to checkout whether prima facie case is there against the accused applying for bail or not while granting or refusing bail and one of the dominant consideration in granting bail to

prevent repetition of the crime or offence. A careful perusal of record in this case would go to disclose prima facie allegation against the petitioner for commission of economic offence and the conduct of the petitioner poses a flight risk. This Court is conscious of the principle laid down by Apex Court in Arnab Manoranjan Goswami(supra), but the allegation on record against the petitioner not only discloses a prima facie allegation against the petitioner for commission of fraud and cheating by forging documents, but also the enormity of amount of embezzlement involved in this case to the tune of Rs.109 crores add to the worries of investors and depositors of the company which assumes further significance when investigation is kept open U/S. 173(8) of Cr.P.C. Besides, the offence alleged against the petitioner are U/Ss. 406/420/467/468/471/120-B of the IPC, out of which offence U/S. 467 is punishable with up to life imprisonment and the alleged manner in which the funds received by the petitioner were credited in a number of accounts created in the names of staff of the company of the petitioner to defraud different persons which prima facie speaks against the intention of the petitioner to cheat different persons.

20. In view of the discussions made hereinabove and taking into consideration the enormity of allegations levelled against the petitioner in committing fraud involving more than Rs.100 crores and the alleged mode and manner of cheating the investors and lenders as well as the alleged involvement of the petitioner for similar offences in five cases instituted in three different States and keeping in view the conduct of the petitioner necessitating the investigating agency to issue lookout circular and continuation of further investigation, this Court does not find any justification at present to consider the bail application of the petitioner affirmatively.

Hence, the bail application of the petitioner stands rejected.

Accordingly the BLAPL stands disposed of.

(G. Satapathy) Judge Orissa High Court, Cuttack, Dated the 17th of February, 2023/Kishore