2023 STPL(WEB) 34 SC
SUPREME COURT OF INDIA

(S. RAVINDRA BHAT AND DIPANKAR DATTA JJ.)

RAMESH KUMAR

Appellant

VERSUS

STATE OF NCT OF DELHI

Respondent

Criminal Appeal No. 2358 of 2023 [Arising Out of Slp(Crl.) No.2358 of 2023] –Decided on 4-7-2023

Bail Condition to deposit amount – Criminal Law cannot be transformed into processes for recovery

Cases Referred:
Munish Bhasin vs. State (NCT of Delhi) [(2009) 4 SCC 45]
Gurbaksh Singh Sibbia and others vs. State of Punjab[(1980) 2 SCC 565]
Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 1 SCC 248],
Mahesh Candra vs. State of U.P. [(2006) 6 SCC 196]
Sumit Mehta vs. State (NCT of Delhi) [(2013) 15 SCC 570]
Dilip Singh vs. State of Madhya Pradesh[(2021) 2 SCC 779]
Bimla Tiwari vs. State of Bihar[(2023) SCC OnLine SC 51]

JUDGMENT

Dipankar Datta, J.-Leave granted.

2. A disquieting trend emerging over the years which has gained pace in recent times necessitates this opinion. It has been found by us in multiple cases in the past several months that upon First Information Reports being lodged inter alia under section 420 of the Indian Penal Code, 1860 ("the IPC", hereafter), judicial proceedings initiated by persons, accused of cheating, to obtain orders under Section 438 of the Code of Criminal Procedure, 1973 ("the Cr. PC", hereafter) are unwittingly being transformed into processes for recovery of the quantum of money allegedly cheated and the courts driven to impose conditions for deposit/payment as pre-requisite for grant of pre-arrest bail. The present case is no different from the others and it is considered appropriate to remind the high courts and the sessions courts not to be unduly swayed by submissions advanced by counsel on behalf of the accused in the nature of undertakings to keep in deposit/repay any amount while seeking bail under section 438 of the Cr. PC. and incorporating a condition in that behalf for deposit/payment as a pre-requisite for grant of bail.

3. The bare facts relevant for a decision on this appeal, gathered from the impugned judgment of the Delhi High Court, are these. The appellant before us is the owner of an immovable property. With an intention to redevelop the same, he had entered into three agreements with one Ashwani Kumar ("the builder", hereafter) dated 10th and 19th December, 2018 and 30th January, 2019. In terms of the agreement dated 19th December, 2018, the builder was required to construct a multi-storied building in which the appellant would have ownership rights in respect of the 3rd floor and the upper floor, apart from Rs.55,00,000/- (Rupees fifty-five lakh) to be paid to him by the builder, whereas the builder would have rights to deal with the 1st and the 2nd floors together with other rights as described therein. In pursuance of the aforesaid agreement, the builder entered into an agreement to sell and purchase/bayana dated 14th December, 2018 with Vinay Kumar and Sandeep Kumar ("the

complainants", hereafter) in respect of the 2nd floor of the proposed building (without roof rights) but other rights as described therein for a sum of Rs. 60,00,000/- (Rupees sixty lakh). The complainants had allegedly paid to the builder Rs. 11,00,000/- (Rupees eleven lakh) [Rs. 1,00,000/- (Rupees one lakh) as token money and Rs. 10,00,000/- (Rupees ten lakh) as earnest money], at the time of execution of the agreement dated 14th December, 2018. Thereafter, on the instructions of the builder, the complainants on different dates allegedly made payments of additional amounts to the appellant as well as the builder, in cash as well as by cheques, totaling to Rs. 35,00,000/- (Rupees thirty-five lakh).

4. Allegedly, the complainants failed to comply with the terms and conditions of the agreement dated 14th December, 2018 triggering institution of a civil suit by the builder against the complainants seeking cancellation of such agreement and forfeiture of the amount of Rs. 13,00,000/- (Rupees thirteen lakh). This was purportedly upon invocation of clause 8 of the said agreement. It is also a matter of record that the builder has instituted another civil suit inter alia against the appellant for specific performance of the agreements dated 10th and 19th December, 2018. However, from the materials on record, we have failed to ascertain the dates of institution of the civil suits.

5. The complainants were not handed over possession of the second floor which they intended to purchase. As late as on 18th November, 2021, the complainants sought to put the investigative machinery in motion by lodging a complaint with the Station House Officer, Police Station Gulabi Bagh, Delhi. The said complaint was registered as FIR No.322 of 2021 under sections 420/406/34 of the IPC. Therein, the appellant, the builder and a broker were shown as accused.

6. It is worthwhile to note from the FIR that despite there being an agreement to sell executed by and between the builder and the complainants, the complainants had made payment of Rs. 17,00,000/- (Rupees seventeen lakh) by issuing cheques favouring the appellant allegedly on the instructions of the builder.

7. Since the complainants had effected payment of substantial amount of money to the appellant and the builder having failed to deliver possession of the second floor of the proposed building, the complainants felt cheated and urged the police to investigate the crime committed inter alia by the appellant and the builder.

8. Apprehending arrest, the appellant moved the relevant criminal court [MACT-02 (CENTRAL)] seeking an order under section 438 of the Cr. PC. Initially, on 30th November, 2011, the Presiding Officer granted interim protection from arrest to the appellant, subject to his cooperating with the investigating agency, upon being informed by the investigating officer that no agreement was executed by and between the appellant and the complainants. However, for reasons assigned in the subsequent order dated 18th January, 2022, the application was dismissed by the Presiding Officer and interim protection earlier granted to the appellant was withdrawn.

9. In the background of the aforesaid facts and circumstances, the appellant approached the High Court seeking an order under section 438 of the Cr. PC. Similar approach was made by the builder. The High Court by its common order dated 24th November, 2022 granted bail to the appellant and the builder, subject to certain conditions. One of the conditions imposed by the High Court for grant of bail reads as follows:

> "(e) as undertaken, the petitioners/builder Ashwani Kumar shall deposit a sum of Rs. 13,00,000/- (Rs. Thirteen lacs only) and the owner Ramesh Kumar shall deposit a sum of Rs. 22,00,000/- (Rs. Twenty-two lacs), with the learned Trial Court, in the form of FDR in the name of the Court initially for a period of one year with an automatic renewal clause, within 4 weeks."

The undertaking referred to in the aforesaid extract is traceable to paragraph 6 of the impugned judgment, reading as follows:

> "6.0. In rebuttal, Ld. Counsel for the petitioners submitted that the petitioners are ready to join investigation and explain. Ld. Counsel also submitted that without prejudice to their respective rights and contentions, the builder undertakes to deposit a sum of Rs. 13 lacs within 8 weeks and owner Ramesh Kumar is ready to deposit a sum of Rs. 22 lacs with the Court."

10. Expressing his difficulty in arranging for funds to deposit Rs. 22,00,000/- (Rupees twenty-two lakh), the appellant had applied before the High Court under section 482 of the Cr. PC seeking extension of time to make the requisite deposit. By an order dated 8th February, 2023, the said application was disposed of by the High Court granting extension of time by 3 (three) days, failing which it was directed that anticipatory bail granted to the appellant shall automatically stand revoked.

11. The appellant is aggrieved by the aforesaid condition [clause(e) of paragraph 9.0. of the impugned judgment and order] imposed by the High Court and is now before us seeking revocation of the same while urging that the other part of the order be maintained.

12. According to counsel for the appellant, the condition imposed is onerous and is not called for having regard to the satisfaction recorded by the High Court in paragraph 8.0. that the appellant has joined investigation and that both the appellant and the builder are ready to provide any clarification/explanation for the purpose of completion of investigation. It is further contended on behalf of the appellant that he is a victim of a conspiracy hatched by and between the builder and the complainants with the result that he is still unable to enjoy his own property which was required to be redeveloped by the builder within the time stipulated in the relevant agreement. Finally, it has been contended on behalf of the appellant that having regard to the decision of this Court in Munish Bhasin vs. State (NCT of Delhi) *[(2009) 4 SCC 45]* , the impugned condition imposed for grant of bail requiring deposit of Rs.22,00,000/- (Rupees twenty-two lakh) in the form of FDR in the Trial Court is bad in law and liable to be set aside.

13. The appeal has been opposed by counsel for the State. According to him, the impugned condition was imposed because the appellant through his counsel had volunteered to keep in deposit Rs. 22,00,000/- (Rupees twenty-two lakh) without prejudice to his rights and contentions. Now that the High Court had proceeded to make its order based on such undertaking and also that the appellant had applied for extension of time which was granted, it is not an appropriate case where this Court should interfere in the exercise of its jurisdiction.

14. Having heard the parties and on perusal of the materials on record, there seems to be little doubt that the appellant had volunteered to deposit Rs. 22,00,000/- (Rupees twenty-two lakh) without prejudice to his rights and contentions and that he had also applied for extension of time to make such deposit which was also granted; but having failed to arrange for sufficient funds, he is questioning the condition imposed by the High Court for grant of pre-arrest bail.

15. In course of hearing before the High Court, a status report had been submitted with regard to the progress of investigation. Such report disclosed that the construction of the proposed building had progressed only up to the 1st floor and obviously, therefore, the 2nd and the 3rd floors were still not in existence. From such status report, it is therefore clear that neither was the floor which the complainants intended to purchase is complete nor the floors in respect whereof the appellant could exercise his rights were in existence.

16. A striking feature of the case is that although the appellant through his counsel had undertaken to deposit a sum of Rs. 22,00,000/- (Rupees twenty-two lakh) with the trial court, the FIR version is that the appellant had received separate cheques in his name for a total amount of Rs.17,00,000/- (Rupees seventeen lakh) [Rs. 5,00,000/- (Rupees five lakh) on 20th December, 2018, Rs. 2,00,000/- (Rupees two lakh) on 28th December, 2018, Rs. 4,00,000/- (Rupees four lakh) on 28th December, 2018, Rs. 1,00,000/- (Rupees one lakh) on 28th December, 2018, and Rs.5,00,000/- (Rupees five lakh) on 21st February, 2019]. That the appellant had received through cheques a total amount of Rs.17,00,000/-

(Rupees seventeen lakh) was also noticed by the Presiding Officer while dismissing the appellant's application by the order dated 18th January, 2022. However, there can be no doubt that counsel on behalf of the appellant had submitted before the High Court that he was ready to deposit a sum Rs. 22,00,000/- (Rupees twenty-two lakh), which prima facie happens to be in excess of what the appellant is alleged to have received from the complainants by cheques drawn in his favour on the instructions of the builder. We are not concerned at this stage with alleged payments made by the complainants to the builder.

17. Legality of the impugned condition is what we are now tasked to examine and decide.

18. It would be appropriate at this stage to note certain precedents in the field governing the discretion of the courts to grant anticipatory bail.

19. We start with Gurbaksh Singh Sibbia and others vs. State of Punjab*[(1980) 2 SCC 565]* , a Constitution Bench decision of this Court. It was held there as follows:

> "26. We find a great deal of substance in Mr Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over-generous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned. No doubt can linger after the decision in Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 1 SCC 248], that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the legislature, is open to no exception on the ground that it prescribes a procedure which is unjust or unfair. We ought, at all costs, to avoid throwing it open to a Constitutional challenge by reading words in it which are not to be found therein."

20. This Court in Mahesh Candra vs. State of U.P. *[(2006) 6 SCC 196]* was dealing with a case where the relevant high court had directed payment of Rs.2,000/- (Rupees two thousand) to be made to the victim (daughter-in-law) as a condition for grant of anticipatory bail. It was ruled by this Court as follows:

> "3. As a condition for grant of anticipatory bail, the High Court has recorded the undertaking of the petitioners to pay the victim daughter-in-law a sum of Rs 2000 per month and failure to do so would result in vacation of the order granting bail. […] We fail to understand how they can be made liable to deposit Rs 2000 per month for the maintenance of the victim. Moreover, while deciding a bail application, it is not the jurisdiction of the court to decide civil disputes as between the parties. We, therefore, remit the matter to the High Court to consider the bail application afresh on merit and to pass an appropriate order without imposing any condition of the nature imposed by the impugned order."

21. This Court in Munish Bhasin (supra), referred to by counsel for the appellant, had the occasion to observe as follows:

> "10. It is well settled that while exercising discretion to release an accused under Section 438 of the Code neither the High Court nor the Sessions Court would be justified in imposing freakish conditions. There is no manner of doubt that the court having regard to the facts and circumstances of the case can impose necessary, just and efficacious conditions while

enlarging an accused on bail under Section 438 of the Code. However, the accused cannot be subjected to any irrelevant condition at all.

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12. While imposing conditions on an accused who approaches the court under Section 438 of the Code, the court should be extremely chary in imposing conditions and should not transgress its jurisdiction or power by imposing the conditions which are not called for at all. There is no manner of doubt that the conditions to be imposed under Section 438 of the Code cannot be harsh, onerous or excessive so as to frustrate the very object of grant of anticipatory bail under Section 438 of the code.

13. In the instant case, the question before the Court was whether having regard to the averments made by Ms Renuka in her complaint, the appellant and his parents were entitled to bail under Section 438 of the Code. When the High Court had found that a case for grant of bail under Section 438 was made out, it was not open to the Court to direct the appellant to pay Rs. 3,00,000 for past maintenance and a sum of Rs. 12,500 per month as future maintenance to his wife and child. In a proceeding under Section 438 of the Code, the Court would not be justified in awarding maintenance to the wife and child."

22. Sumit Mehta vs. State (NCT of Delhi) *[(2013) 15 SCC 570]* arises out of a decision of the High Court granting anticipatory bail but inter alia on the condition that the appellant, accused of commission of offences punishable under sections 420/467/468/471 of the IPC, deposits an amount of Rs.1,00,00,000/- (Rupees one crore) in fixed deposit in the name of the complainant. The point that fell for consideration is captured in paragraph 6, which reads as follows:

"6. The only point for consideration in this appeal is whether the condition of depositing an amount of Rs 1,00,00,000 in fixed deposit for anticipatory bail is sustainable in law and whether such condition is outside the purview of Section 438 of the Code?"

After hearing the parties, this Court made the following pertinent observations:

"11. While exercising power under Section 438 of the Code, the court is duty-bound to strike a balance between the individual's right to personal freedom and the right of investigation of the police. For the same, while granting relief under Section 438(1), appropriate conditions can be imposed under Section 438(2) so as to ensure an uninterrupted investigation. The object of putting such conditions should be to avoid the possibility of the person hampering the investigation. Thus, any condition, which has no reference to the fairness or propriety of the investigation or trial, cannot be countenanced as permissible under the law. So, the discretion of the court while imposing conditions must be exercised with utmost restraint.

12. The law presumes an accused to be innocent till his guilt is proved. As a presumably innocent person, he is entitled to all the fundamental rights including the right to liberty guaranteed under Article 21 of the Constitution.

13. We also clarify that while granting anticipatory bail, the courts are expected to consider and keep in mind the nature and gravity of accusation, antecedents of the applicant, namely, about his previous involvement in such offence and the possibility of the applicant to flee from justice. It is also the duty of the court to ascertain whether accusation has been made with the object of injuring or humiliating him by having him so arrested. It is needless to mention that the courts are duty-bound to impose appropriate conditions as provided under sub-section (2) of Section 438 of the Code.

14. Thus, in the case on hand, fixed deposit of Rs 1,00,00,000 for a period of six months in the name of the complainant and to keep the FDR with the investigating officer as a condition

precedent for grant of anticipatory bail is evidently onerous and unreasonable. It must be remembered that the court has not even come to the conclusion whether the allegations made are true or not which can only be ascertained after completion of trial. Certainly, in no words are we suggesting that the power to impose a condition of this nature is totally excluded, even in cases of cheating, electricity pilferage, white-collar crimes or chit fund scams, etc.

15. The words 'any condition' used in the provision should not be regarded as conferring absolute power on a court of law to impose any condition that it chooses to impose. Any condition has to be interpreted as a reasonable condition acceptable in the facts permissible in the circumstance and effective in the pragmatic sense and should not defeat the order of grant of bail. We are of the view that the present facts and circumstances of the case do not warrant such extreme condition to be imposed."

23. We may next take note of two decisions of this Court of recent origin.

24. In Dilip Singh vs. State of Madhya Pradesh*[(2021) 2 SCC 779]* , this Court sounded a note of caution in the following words:

"3. By imposing the condition of deposit of Rs 41 lakhs, the High Court has, in an application for pre-arrest bail under Section 438 of the Criminal Procedure Code, virtually issued directions in the nature of recovery in a civil suit.

4. It is well settled by a plethora of decisions of this Court that criminal proceedings are not for realisation of disputed dues. It is open to a court to grant or refuse the prayer for anticipatory bail, depending on the facts and circumstances of the particular case. The factors to be taken into consideration, while considering an application for bail are the nature of accusation and the severity of the punishment in the case of conviction and the nature of the materials relied upon by the prosecution; reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant or the witnesses; reasonable possibility of securing the presence of the accused at the time of trial or the likelihood of his abscondence; character, behaviour and standing of the accused; and the circumstances which are peculiar or the accused and larger interest of the public or the State and similar other considerations. A criminal court, exercising jurisdiction to grant bail/anticipatory bail, is not expected to act as a recovery agent to realise the dues of the complainant, and that too, without any trial."

25. Yet again in Bimla Tiwari vs. State of Bihar*[(2023) SCC OnLine SC 51]* , this is what the Court said:

"9. We have indicated on more than one occasion that the process of criminal law, particularly in matters of grant of bail, is not akin to money recovery proceedings but what has been noticed in the present case carries the peculiarities of its own.

10. We would reiterate that the process of criminal law cannot be utilised for arm-twisting and money recovery, particularly while opposing the prayer for bail. The question as to whether pre-arrest bail, or for that matter regular bail, in a given case is to be granted or not is required to be examined and the discretion is required to be exercised by the Court with reference to the material on record and the parameters governing bail considerations. Putting it in other words, in a given case, the concession of pre-arrest bail or regular bail could be declined even if the accused has made payment of the money involved or offers to make any payment; conversely, in a given case, the concession of pre-arrest bail or regular bail could be granted irrespective of any payment or any offer of payment.

11. We would further emphasize that, ordinarily, there is no justification in adopting such a course that for the purpose of being given the concession of pre-arrest bail, the person

apprehending arrest ought to make payment. Recovery of money is essentially within the realm of civil proceedings."

26. Law regarding exercise of discretion while granting a prayer for bail under section 438 of the Cr. PC having been authoritatively laid down by this Court, we cannot but disapprove the imposition of a condition of the nature under challenge. Assuming that there is substance in the allegation of the complainants that the appellant (either in connivance with the builder or even in the absence of any such connivance) has cheated the complainants, the investigation is yet to result in a charge-sheet being filed under section 173(2) of the Cr. PC, not to speak of the alleged offence being proved before the competent trial court in accordance with the settled procedures and the applicable laws. Sub-section (2) of section 438 of the Cr. PC does empower the high court or the court of sessions to impose such conditions while making a direction under sub-section (1) as it may think fit in the light of the facts of the particular case and such direction may include the conditions as in clauses (i) to (iv) thereof. However, a reading of the precedents laid down by this Court referred to above makes the position of law clear that the conditions to be imposed must not be onerous or unreasonable or excessive. In the context of grant of bail, all such conditions that would facilitate the appearance of the accused before the investigating officer/court, unhindered completion of investigation/trial and safety of the community assume relevance. However, inclusion of a condition for payment of money by the applicant for bail tends to create an impression that bail could be secured by depositing money alleged to have been cheated. That is really not the purpose and intent of the provisions for grant of bail. We may, however, not be understood to have laid down the law that in no case should willingness to make payment/deposit by the accused be considered before grant of an order for bail. In exceptional cases such as where an allegation of misappropriation of public money by the accused is levelled and the accused while seeking indulgence of the court to have his liberty secured/restored volunteers to account for the whole or any part of the public money allegedly misappropriated by him, it would be open to the concerned court to consider whether in the larger public interest the money misappropriated should be allowed to be deposited before the application for anticipatory bail/bail is taken up for final consideration. After all, no court should be averse to putting public money back in the system if the situation is conducive therefor. We are minded to think that this approach would be in the larger interest of the community. However, such an approach would not be warranted in cases of private disputes where private parties complain of their money being involved in the offence of cheating.

27. Turning to the facts here, what we find is that the version in the FIR, even if taken on face value, discloses payment through cheques of Rs.17,00,000/- (Rupees seventeen lakh) in the name of the appellant and not Rs.22,00,000/- (Rupees twenty-two lakh). We have not been able to comprehend how the High Court arrived at the latter figure as payable by the appellant and why the appellant's counsel as well agreed with such figure. Prima facie, there appears to be some sort of a calculation error. Also, prima facie, there remains some doubt as regards the conduct of the appellant in receiving cheques from the complainants without there being any agreement inter se. Be that as it may, the High Court ought to have realized that having regard to the nature of dispute between the parties, which is predominantly civil in nature, the process of criminal law cannot be pressed into service for settling a civil dispute. Even if the appellant had undertaken to make payment, which we are inclined to believe was a last ditch effort to avert losing his liberty, such undertaking could not have weighed in the mind of the High Court to decide the question of grant of anticipatory bail. The tests for grant of anticipatory bail are well delineated and stand recognized by passage of time. The High Court would have been well-advised to examine whether the appellant was to be denied anticipatory bail on his failure to satisfy any of such tests. It does seem that the submission made by counsel on behalf of the appellant before the High Court had its own effect, although it was far from being a relevant consideration for the purpose of grant of bail.

28. It also does not appear from the materials on record that the complainants have instituted any civil suit for recovery of money allegedly paid by them to the appellant. If at all the offence alleged against the appellant is proved resulting in his conviction, he would be bound to suffer penal consequence(s) but despite such conviction he may not be under any obligation to repay the amount allegedly

received from the complainants. This too is an aspect which the High Court exercising jurisdiction under section 438 of the Cr. PC did not bear in mind.

29. Under the circumstances, we hold that the High Court fell in grave error in proceeding on the basis of the undertaking of the appellant and imposing payment of Rs.22,00,000/- (Rupees twenty-two lakh) as a condition precedent for grant of bail.

30. We are not unmindful of the fact that the High Court was led by the appellant himself to an order granting bail with imposition of the impugned condition; hence, we are inclined to remit the matter to the High Court in line with the approach adopted by this Court in Mahesh Chandra (supra) and direct re-consideration of the application for prearrest bail and a decision on its own merits in the light of the observations made herein, as early as possible but preferably within 31st August, 2023. It is ordered accordingly.

31. Till such time further orders are passed by the High Court, the appellant's liberty shall not be infringed by the investigating officer. In the meanwhile, however, the appellant shall be bound to cooperate with the investigating officer, as and when he is called upon to do so.

32. Before concluding, we need to dispose of IA 94276 of 2023. It is an application for intervention at the instance of the complainants, who seek to assist the Court on the ground that any order passed on the appeal without giving opportunity of hearing to them would cause grave prejudice.

33. We hold that at this stage, the complainants have no right of audience before this Court or even the High Court having regard to the nature of offence alleged to have been committed by the appellant unless, of course, a situation for compounding of the offence under Section 420, IPC, with the permission of the Court, arises.

34. The appeal stands disposed of on terms as aforesaid. The application for intervention stands dismissed.

35. There shall be no order as to costs.
