



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**BAIL APPLICATION NO.712 OF 2023
WITH APPLN/1663/2023 IN BA/712/2023**

IRFAN MOIUDDEEN SAIYED AND OTHERS
VERSUS
THE STATE OF MAHARASHTRA

...
Advocate for Applicants : Mr. R. N. Dhorde, Senior Counsel
instructed by Mr. V.R. Dhorde i/b Mr. Vikram R. Dhorde
APP for Respondent/State : Mr. K. S. Patil
Advocate for Assist to Public Prosecutor : Mr. A.B. Ghule (Absent)

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CORAM : S. G. MEHARE, J.
Reserved on : 28.04.2023
Pronounced on : 03.05.2023

ORDER :

1. The applicants are seeking default bail under Section 167(2) (a)(ii) of the Code of Criminal Procedure. The learned Additional Sessions Judge-5, Jalna (Designated Court for M.P.I.D cases), recording its reasons, declined bail to the applicant under Section 167(2)(a)(ii) of the Code of Criminal Procedure by its order dated 12.04.2023.
2. Heard the learned Senior counsel Mr. Dhorde for the applicant and the learned A.P.P for the respondent/State.
3. Though the learned counsel Mr. A.B. Ghule, filed an application to assist the public prosecutor and intervene. However, he did not appear.

4. The brief facts necessary for appreciating the prayers in the application is:-

Crime No. 28/2023 registered with Taluka Jalna Police Station, Dist. Jalna for the offences under Sections 420, 120-B, 504, 506, 406, 409 read with Section 34 of the Indian Penal Code and Sections 3, 4 and 5 of Maharashtra Protection of Interest of Depositors Act 2002. The complainant alleged in the report that one Mr. Kiran Kharat and Dipti Kharat induced him to invest the money in Global Digital Crypto Currency for attractive returns. They represented the complainant that the Global Digital Crypto Currency was under their management and control, which was likely to introduce in December 2022 and allured him to invest the amount in it with a promise of hefty returns. The complainant invested a huge amount, but the crypto currency's price was far lower than expected, as assured by the said Kharat family.

5. The applicants were also arraigned as accused. The Police arrested the accused on 03.02.2023 and produced them before the Court. They were remanded to police custody till 17th February 2023. Since then, they have been in judicial custody. Their bail applications were rejected on 4.4.2023, and their remand was extended regularly after every 15 days. However, when a few days remained to complete 60 days to file the charge sheet, the Police, on 27th March 2023, wrote a letter addressed to the learned

Sessions Court, informing that Sections 406 and 409 of the Indian Penal Code have been added in the crime. The learned Judge passed an order thereon as "seen". Thereafter, on 31st March 2023, the investigating officer submitted a letter addressed to the learned Additional Sessions Judge, seeking time to extend further 30 days to submit the investigation completing report under Section 173 of the Cr.P.C. (charge sheet). The learned Additional Sessions Judge, Jalna, passed an order thereon "*seen and filed* at 5.40 p.m. Considering Sections applied, Investigating Officer, do needful as per laws".

6. It has been vehemently argued on behalf of the applicants that without submitting any remand papers, barely a letter was submitted to the learned Additional Sessions Judge, Jalna, regarding adding Sections 406 and 409 of the Indian Penal Code against the applicants without their knowledge. Before adding the sections, no judicial remand was extended, and no fresh statements of the witnesses or material were produced, showing *prima facie* the ingredients of Sections 406 and 409 of the Indian Penal Code. Merely adding sections in such a way would not sustain or authorize the police officer to claim that time to file the investigation completion report is extended from 60 days to 90 days. The learned Additional Sessions Judge, Jalna, did not pass a speaking order on the said letter. As per the charges levelled

against the applicants in the First Information Report, the charge sheet was to be submitted to the Court within 60 days. However, there was no prayer or request to extend the remand after the statutory period of 60 days. Therefore, detention of the applicants after 60 days is illegal, and they deserve bail as they had applied for default bail on 05.04.2023. To bolster the arguments, the Senior learned counsel Mr Dhorde relied on the cases of:-

- (i) ***Alnesh Akil Somji Vs. The State of Maharashtra- 2022(3)Criminal Court Cases 198***
- (ii) ***Rajkumar Bhagchand Jain Vs. Union of India and another 2019(3)ABR (CRI)(NOC)93 (Bom.)***

7. The learned Senior counsel Mr Dhorde for the applicant, has also vehemently argued that the indefeasible right of 'default bail' cannot be frustrated by the prosecution on any pretext, and no subterfuge should be resorted to defeat the indefeasible right. To bolster the argument, he relied on the cases of,

- (i) ***Rakesh Kumar Paul Vs. State of Assam, AIR 2017 SC 3948***
- (ii) ***S. Kasi Vs. The State through Inspector of Police, 2020 Cri. L. J. 3588.***

8. It has also been argued that in any event, Section 409 of the Indian Penal Code could not attract as the applicants are not the person mentioned in the said section. To support his contention, he relied on the case of

- (i) ***Velji Raghavji Patel Vs. State of Maharashtra, AIR 1965 SC 1433,***
- (ii) ***Mahindra and Mahindra Co. Ltd and others Vs. State of Maharashtra and Another, 2008 ALL MR Cri 3039,***
- (iii) ***The Savada Merchant Co-op. Society Ltd and Others Versus The State of Maharashtra and Another, 2015 ALL MR Cri 3160.***

9. Per contra, the learned A.P.P has vehemently argued that Sections 406 and 409 of the Indian Penal Code were applied before completing 60 days. Therefore, the claim of the applicant for default bail does not arise. The material to attract Sections 409 and 406 of the Indian Penal Code was already on record, but inadvertently, those sections remained to be applied or written in the F.I.R. Considering the role attributed to the applicants, they were the agents for the main accused, and they have played an active role. Hence, Section 409 of the Indian Penal Code is correctly applied as the remand date was due on the next date. In the circumstances of the case, the judicial custody remand was automatically extended. Even if the sections are not applied, the Court should consider the material produced before it and decide what offence is made out and which penal law sections were to be applied. Therefore, the claim of the applicants for default bail cannot be said to be frustrating.

10. To bolster his arguments, he relied on the case of ***Abdul Salim Shaikh (Siddique) and another Vs. State of Maharashtra 2014(1)Bom.C.R. (Cri.)114.***

11. It is not in dispute that no remand papers were produced before the learned Special Judge, Jalna, for adding sections 406 and 409 of the Indian Penal Code. In the letter addressed to the Court for adding the above sections, the Court did not pass a *speaking order* extending further judicial remand as required under Section 167 of the Code of Criminal Procedure.

12. Section 167 of the Cr. P.C. provides that when the investigation cannot be completed within 24 from the arrest of the accused, the Investigation Officer, believing that the information or accusation is well-founded, shall produce the accused before the competent Court for the extension of the police custody of the accused for further investigation. Thereupon the Magistrate or the competent Court, after considering the necessity of further custody, may grant police custody. However, the Court cannot extend such Police custody exceeding 15 days in whole.

13. Reading the above section carefully, it is clear that granting Police custody after 24 hours of the arrest of the accused is not a bare formality. The Investigating Officer has to satisfy the Court that the accusation and information are well-founded. The

standard practice of remand is well known that soon after producing the accused before the Court, the Court hears the accused on his further detention to police custody. The Court examines the papers of accusation and information and then decides whether further detention of the accused in Police custody is essential. We have an adversarial justice system. The accused has a right to know what has been alleged against him, and the Court must hear him. Sub-Section 2(a) (i) and (ii) of Section 167 of Cr.P.C. has prescribed the period of imprisonment that determines the time limit for submitting the charge sheet to the Court and the power of the Court to extend the detention of the accused. It has been provided that the Magistrate or the Court may extend judicial custody not for a total period exceeding ninety days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years and sixty days where the investigation relates to any other offence. On the expiry of the said period of ninety days or sixty days as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail if the charge sheet has not been filed between the said period.

14. It is not in dispute that the Sections applied on the basis of allegations in the first information report; the imprisonment was

not with death, imprisonment for life or a term not less than ten years.

15. In view of the aforesaid rival contentions, the question is whether barely addressing a letter to the Court and adding further sections for which the punishment is death/imprisonment for life or imprisonment for a term of not less than ten years is sufficient to believe that the period of judicial custody has been automatically extended?

16. The Bombay High Court has dealt with a similar issue in the case of ***Alnesh Akil Somji Vs. The State of Maharashtra*** (*supra*). In that application also, the default bail was claimed. The Special Judge rejected it on the ground that section 409 of IPC is applicable, and the prosecution had filed an application invoking section 409 of the Indian Penal Code. The Special Judge held that the period for filing the charge sheet was ninety days, not sixty days. In the said case, the applicants were in the Magistrate custody remand till 11.11.2021 after their arrest on 03.11.2021. The investigating officer, by remand application dated 31st December 2021 (filed on 3.1.2022) intimated to the Special Judge about adding/invocation of section 409 of the Indian Penal Code. The Special Court had passed an order "Seen, note be taken". Considering these facts, the Bombay High Court held that in paragraph No. 13 read thus:-

“13. There is no manner of doubt that the investigation is within the province and domain of the investigating agency. However, that does not mean that the Court, in almost all cases, would be bound by the invocation of a particular section against the accused by the prosecuting agency. This is because the label of the section or the provision invoked would not be decisive. To hold otherwise, would amount to placing the said right at the mercy of the investigating agency and would indirectly result in the Magistrate abdicating the duty to enforce the right wherever necessary. Thus, the Court would be required to look into the generality of the allegations made and the material collected. In a given case where ex facie the provision is not attracted the Court may not be bound by the same. Although there is no requirement for the investigating officer to obtain permission from the Magistrate for such addition, as held by the Calcutta High Court in Sayantan Chatterjee (supra), the Magistrate is not precluded from looking into the facts and the material collected, whether the offence is ex facie made out or not. The matter depends on the facts and circumstances of each case. For instance, where the investigating officer invokes section 326 of IPC, however the medical report does not ex facie show that the victim has suffered a grievous injury, within the meaning of Section 320 of IPC OR a case where section 409 of IPC is invoked and admittedly the accused does not fall under any of the seven categories mentioned in the said section namely the accused is neither a public servant, a banker etc. I would hasten to add that where however the facts and

the material collected prima facie indicate the ingredients of a particular offence the Court obviously cannot examine or appreciate the same at that stage in order to arrive at a different conclusion.”

17. In paragraph No.13 above, relying on the case of **Sayantana Chatterjee Vs. State of West Bengal and Another, 2016 SCC online Calcutta 4573**, it has been held that the Magistrate is not precluded from looking into the facts and the material collected, whether the offence is ex facie made out or not. In sum and substance, it was the ratio of the said order that merely producing the remand for extension of detention is not sufficient. The Magistrate/Court has to look into the facts, circumstances, and material collected and satisfy whether the section applied by the Investigating Officer is supported with material and makes out the same offence.

18. The police custody or judicial remand is not a bare formality. Suppose the Investigating officer brings new material constituting a new offence under a particular section during the judicial custody of the accused before the charge sheet. In that case, the Police must bring it to the notice of the accused by submitting fresh remand papers before the Court. So the accused may have an opportunity to oppose the further extension of the judicial

custody for the new offence on the basis of the material brought during his judicial custody.

19. In the case at hand, the letter dated 27th March 2023 stated that the accused in the crime had created cryptocurrency and cheated the persons. They also cheated the people by promising through the seminars that investors would get big prizes. Similar were the allegations in FIR on the basis of which the crime was registered and the accused, after arrest, were produced before the Magistrate. The Investigating officer did not produce new material collected during the investigation against the accused.

20. The Division Bench of the Bombay High Court in the case of **Rajkumar Bhagchand Jain Vs. Union of India and another** (*supra*), in paragraph No.8 has observed thus;

“The son applied for release on bail only on this ground on 20.11.2017 but that was rejected. That was rejected on the ground that during the course of investigations the prosecution invoked Sections 465, 467, 468 and Section 471 of the Indian Penal Code and Section 13(2) r/w section 13(1)(d) of the Prevention of Corruption Act, 1988 in the same CBI case. On that basis, it was argued by the CBI that the period for filing the charge sheet is 90 days instead of 60 days. However, the statutory bail application being rejected, the petitioner made inquiries as to whether there was any remand application or any request made by the prosecution to extend the judicial custody upon invocation and

addition of the provisions of the Prevention of Corruption Act, 1988. However, there is no record of any such extension.”

21. In view of the above observations, the Bombay High Court held that the detention beyond the period of 60 days is in clear violation of Section 167(2) of the Code of Criminal Procedure.

22. Considering the facts of the case at hand, it is assumed that the Court has examined the material produced before it at the time of first remand and based on it, the police custody was granted, and then the accused were taken in judicial custody. However, in the absence of submitting the remand papers without knowledge of the accused, the prosecution cannot by a bare letter addressed to the Court, seek the extension of remand more than the period prescribed under Section 167 of the Cr.P.C. As discussed above, the extension of remand, particularly after adding new sections constituting the serious offence, is not a bare formality. The Court extending the detention of the accused for a period more than prescribed under the law has to pass a speaking order after hearing both sides, which was not done in this case. The prosecution did not produce before this Court material to believe that the accused fall under any of the seven categories mentioned in Section 409 of the Indian Penal Code that the accused are public servants, bankers etc. In view of that matter,

the investigating officer cannot seek an extension of time to file a charge sheet, as the period of filing the charge sheet has to be determined from the material and papers produced before the Magistrate/Judge.

23. In view of the above, the Court is of the view ratio laid down in the above cases of **Alnesh Akil Somji** (*supra*) and **Rajkumar Bhagchand Jain** (*supra*) by the applicants, is squarely applicable to the case in hand. As far as other case laws are concerned, there is no dispute about the ratio. Once the right to claim the default bail arises, the accused is entitled to release on bail, and no subterfuge should have resorted to defeat the indefeasible right. The case relied on by the learned A.P.P. appears on the different facts is not useful to him.

24. Admittedly, the charge sheet was not filed within sixty days. Therefore, the Magistrate extending the judicial custody becomes *functus officio*. In other words, his power to extend the remand ceases as soon as the prescribed period for filing the charge sheet is over.

25. The material reveals that the investigating officer failed to file the charge sheet within sixty days as prescribed under Section 167 of the Cr. P.C. Therefore, the applicant deserves default bail. Hence, the order:-

ORDER

- (i) The application is allowed.
- (ii) The accused Irfan S/o Moiuddeen Saiyyed, Amod S/o Vasantrao Mhetar, Venkatesh S/o Dashrath Bhoi, and Ramesh S/o Baburao Uttekar be released on bail under Section 167 (2)(a)(ii) of the Cr. P.C., for the offences punishable under Sections 420, 120-B, 504, 506, 406, 409 read with Section 34 of the Indian Penal Code and Sections 3, 4 and 5 of Maharashtra Protection of Interest of Depositors Act 2002 in Crime No.28 of 2023 registered with Taluqa Jalna Police Station, on executing PB and SB of Rs.1,00,000/- each with one or two solvent sureties of Rs.50000/- (fifty thousand) each in the like amount on the conditions that:-
- (a) They shall attend the concerned police station as and when called on written notice by the investigating officer till filing the charge sheet.
- (b) They shall submit their passports to the investigating officer, if any.
- (c) They shall submit their address proofs and furnish undertaking that they shall intimate the investigating officer about their address if changed till the conclusion of the trial.
- (iii) Criminal Application No.1663 of 2023 stands disposed of.

**(S. G. MEHARE)
JUDGE**

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