

MHCC020175272022



**IN THE COURT OF SESSION FOR GR. BOMBAY AT MUMBAI**

**ANTICIPATORY BAIL APPLICATION NO.2860 OF 2022**

1. Faheemuddin Azimullah Khan

Age : 50 year, Occ : Business,

R/o : Flat No.304, 3<sup>rd</sup> Floor, A Wing,

Ashiyana CHS, LBS Marg, Opp. Fauziya

Hospital, Kurla (W), Mumbai -70.

2. Ms. Mariya Faheemuddin Khan

Age : 21 year, Occp: House wife,

Presently residing at Heritage Building,

Asmita Heritage 2, B-Wing, Flat No.603,

Mira Road, Thane.

... **Applicants**

Versus

The State of Maharashtra

(At the instance of Police Station,

Sir J.J. Marg,

C.R.No.503/2022)

... **Respondent**

And

Razia Suleman Lakadawala

... **Intervener**

**Appearance:**

Mr. Tejas Kothelkar @ Mr. Chetan Pawar, Ld. Adv. for applicants.

Mrs. Kavita Bagal, Ld. Addl. P.P.

Mr. Ghanshyam Mishra, Ld. Adv. for the intervener.

**CORAM :** HIS HONOUR ADDL.SSESSIONS  
JUDGE M. G. DESHPANDE  
(C.R.No.16)

**DATED :** January 9, 2023

**ORDER**

1. Applicants are accused in C.R.No.503/2022 registered with Sir J.J. Marg Police Station under Sec. 420 IPC. They are praying protection under Sec.438 Cr.P.C. The Ld. In-charge vide order dt.30.12.2022 granted interim protection directing the Investigating Officer not to take coercive action till the next date and the same is existing till date. Investigating Officer opposed the said application vide say (Exh.4) on following grounds,

- a. Accused Mumtaz Fahimuddin Khan gave false and fake assurance to the informant and other women of giving 20 percent profit and fetched money on the basis thereof, but when those women including the informant asked return of their money, applicants No.1 and 2 pretended that, said Mumtaz is ill and prohibited them to meet her and protected her from the legal action.
- b. There is no stable address of the applicants.
- c. Detailed statement of the informant has been recorded.
- d. Accused Mumtaz has left her residence and went somewhere else and applicants maintain secrecy for the same.
- e. Mumtaz, her husband Fahim, daughters Fatima and Mariya have cheated various other women on the basis of false and fake promises for earning huge profits.
- f. Applicants have not responded notice under Sec.41(1)(a) of Cr.P.C.
- g. The offence is serious and there is likelihood of pressurizing the witnesses.

On these grounds prosecution contended to reject the application.

2. Heard Ld. Advocate Mr. Tejas Kothelkar for the applicant and Ld. APP Mrs.Kavita Baga. Also heard Ld. Adv. Mr. Ghanshyam Mishra for the intervener. Following points arise for my determination. I am recording following findings thereon for the reasons discussed below :-

<b>POINTS</b>	<b>FINDINGS</b>
1. Whether the applicants have made out a strong prima-facie case to grant protection under Section 438 of Cr.P.C. ?	Yes
2. What Order ?	As per final order.

### **REASONS**

#### **POINT NO.1.**

#### **FACTS INVOLVED IN C.R.NO.503 OF 2022.**

3. Smt. Raziya Suleman Lakadawala on 20.06.2022 lodged FIR alleging that, in 2017 Mumtaz Fahimuddin Khan came to reside on 17<sup>th</sup> floor of their building with whom she developed acquaintance. She was doing clothes business and the informant was also doing the same business. She gave offer to the informant to buy cloths on commission basis, when the informant stated her inability for want of money. She also called the informant to see her clothes which were costly, hence the informant refused to deal with the same. After some days Mumtaz made phone call to the informant and requested her to pay Rs.1 lakh. However, the informant could pay only Rs.80,000/-, which Mumtaz repaid in 17 days and also paid Rs.14,000/- more. The informant refused to accept the same Rs.14,000/-, but Mumtaz told her that it is 30% amount of the profit she had earned from the money lent by the informant. Thereafter, many times Mumtaz took hand-loan of Rs.10-20 thousand and return the same in time.

4. In 2018 Mumtaz shifted her residence to Nulbazar and kept contact with the informant on phone. In 2021 the informant also shifted to K.D. Compound, Patel Arcade, Room 202, Nagpada Junction, Mumbai-8. Still Mumtaz used to take hand-loan from the informant and used to repay the same in time. In May,2021 Mumtaz asked Rs.3 Lakh to the informant for buying the stock. Initially the informant refused to pay the same. She met with Corona twice, therefore she used to cry and request the informant to give her hand-loan for her business. She used to assure to repay the same with smart profit. In this background, the informant paid her Rs.2,85,000/- which she had saved for the marriage of her daughter. She executed writing on a simple paper regarding refund thereof.

5. On 25.06.2021 Mumtaz paid the informant Rs.13,000/- being profit. On 25.07.2021 Mumtaz paid Rs.10,000/- as a profit. That evening Mumtaz again demanded Rs.10 Lakh to the informant, but the informant refused to pay the same. Even thereafter many times Mumtaz used to ask the informant to give money and also used to assure the informant for smart profit. Therefore, on 29.07.2021 the informant transferred Rs.15,000/- through Google pay on the mobile number of Mumtaz. On 30.07.2021 the informant again paid Rs.6 lakh to Mumtaz. In August, 2021 Mumtaz paid Rs.12,000/- to the informant being profit. In September, 2021 Mumtaz had arranged exhibition in Hyderabad, but she said that she had suffered huge loss and further demanded money to the informant.

6. On 12.09.2021 informant transferred Rs.15,000/- twice, total Rs.30,000/-, through Google pay. On 13.09.2021 Rs.10,000/- twice, total Rs.20,000/-. On 25.09.2021 Mumtaz gave her Rs.25,000/- being profit, but the informant was suspicious about her conduct.

Therefore, she asked Mumtaz to refund her whole amount. Mumtaz assured the informant to repay the same in next month. When the informant insisted her for the refund, she used to put forth excuses and ultimately did not repay the same on 17.11.2021 as assured. On that day, the informant went to Nagpada to meet her and found her two legs tied to bed and chair. On asking her daughter Mariya i.e. applicant No.2, stated about the accident. In this way, on many occasions both the applicants prohibited the informant to establish contact with Mumtaz and ultimately did not repay her money, therefore, the informant felt that she had been cheated by Mumtaz. These are the facts.

7. Careful perusal of these facts alleged in the FIR prima-facie indicates that many times Mumtaz had taken money from the informant and also paid her some profits. Prima-facie there is nothing to indicate that Mumtaz had dishonest intention right from the beginning to cheat the informant, which is the basic qualification to attract Sec.420 of IPC. All this what has been alleged in the FIR indicates personal private monetary hand-loan transactions between the informant and accused Mumtaz. Both applicants have no role. Even prima-facie both of them cannot be held liable for an offence of cheating as alleged in the case of the prosecution. Ld. Adv. Mr. Kothalikar placed his reliance on **Dalip Kaur & Ors. Vs. Jagnar Singh & Anr. [Criminal Appeal No.1135 of 2009 (Arising out of SLP (Crl.) No.431 of 2008), dt.07.07.2009]**, wherein the Hon'ble Supreme Court held as, "An offence of cheating would be constituted when the accused has fraudulent or dishonest intention at the time of making promise or representation. A pure and simple breach of contract does not constitute an offence of cheating."

8. At the cost of repetition it has to be noted that it was private transaction between Mumtaz and the informant relating to their business and many times Mumtaz had returned some money as profit to the informant, this aspect cannot be ignored. Therefore, it cannot be said that, the applicants had any dishonest intention right from the beginning in order to constitute an offence under Sec.420 IPC. Law is settled that the investigating officer cannot act as recovery agent. All this prima-facie indicates absence of intention to cheat in order to attract Sec.420 IPC. In my opinion if certain conditions are imposed on the applicants, the interim protection granted by the Ld. In-charge can be made absolute. In this way, I hold that applicants have made out strong prima-facie case. With this, Point No.1 is answered in the affirmative and following order is passed :-

#### ORDER

1. A.B.A. No.2860 of 2022 is allowed.
2. Interim order dt.30.12.2022 passed by the In-charge (C.R.No.46) is hereby made absolute on following conditions,
  - i) In the event of arrest of the applicants No.1 Faheemuddin Azimullah Khan and No.2 Ms. Mariya Faheemuddin Khan in connection with C.R.No.503 of 2022 registered with Sir J.J. Marg Police Station be released on everyone of them furnishing P.R. bond of Rs.15,000/- and surety bond of like amount.
  - ii) The applicants shall attend Sir J.J. Marg Police Station whenever Investigating Officer requires their presence.
  - iii) The applicants shall undertake not to pressurize informant, her family members and prosecution witnesses and shall not tamper with the evidence of prosecution.

Dt.: 09.01.2023



( M.G. Deshpande )  
Addl. Sessions Judge.  
C.R.No.16, Gr.Bombay at Mumbai

<b>“CERTIFIED TO BE TRUE AND CORRECT COPY OF THE ORIGINAL SIGNED JUDGMENT/ORDER”</b>	
<b>10.01.2023 at hours</b> <b>UPLOAD DATE AND TIME</b>	<b>(KISHOR PRAKASH SHERWADE)</b> <b>NAME OF STENOGRAPHER</b>
<b>Name of the Judge</b>	<b>HHJ M. G. DESHPANDE</b> <b>(COURT ROOM NO.16)</b>
<b>Date of pronouncement of judgment/order</b>	<b>09.01.2023</b>
<b>Judgment/order signed by P.O. on</b>	<b>09.01.2023</b>
<b>Judgment/order uploaded on</b>	<b>10.01.2023</b>