

Applications Under Sections 438 And 439 CrPC Not Maintainable For Offences Under Karnataka Protection of Interest of Depositors Act: High Court

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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

RAJENDRA BADAMIKAR; J.

CRIMINAL PETITION NO.9971/2022; 10 NOVEMBER, 2022

SHREESHA SASITHOTA PRABHAKARAN versus STATE OF KARNATAKA

Petitioner by Chandrashekara K.A., Advocate

Respondent by V.S. Hegde, SPP-II a/w sri. K. Nageshwarappa, HCGP

ORDER

This petition is filed by the petitioner/Accused No.1 under Section 439 of Cr.P.C. for enlarging him on bail in Crime No.11/2022 of Shankarapura Police Station, Bengaluru City, registered for the offences punishable under Sections 420, 419, 406, 403, 120-B and 506 of IPC; under Sections 4 and 9 of the Karnataka Protection of Interest of Depositors in Financial Establishments Act, 2004 (for short, 'KPIDFE Act') and also Sections 5 and 21(3) of Banning of Un-Regulated Deposit Schemes Act, 2019 (for short, 'BURDS Act'), which is now pending on the file of Principal City Civil and Sessions Judge at Bengaluru, in Spl.C.C. No. 1792/2022

2. The brief factual matrix of the prosecution case are that, the complainant and her family members have invested Rs.17,50,00,000/- towards purchase of high value shares through a company called M/s Sunness Capital India Pvt. Ltd., having its registered office at 213, II Floor, V-Main, Opp.: Bank of India, RPC Layout, Vijayanagar, Bengaluru. The present petitioner/Accused No.1 and others are Directors of the company. After investment of said money, the authorities of the said company have neither issued any share nor repaid the invested amount and an enquiry, they alleged to have given vague and untenable excuses in order to shirk from responsibility and avoided payments with the sole intention of defrauding the complainant and several other investors. It is further alleged that, the petitioner/Accused No.1 and other accused by colluding with their staff members were alleged to have diverted the entire funds to utilize the same for their personal use and not for the purpose for which the funds were collected from various other investors. In that context, a complaint came to be lodged against this petitioner/Accused No.1 and others in the jurisdictional Police Station.

3. On the basis of the said complaint, a case in Crime No.11/2022 came to be registered against the petitioner/Accused No.1 and in that context, he was arrested and remanded to judicial custody. Hence, the petitioner/Accused No.1 has approached the learned Sessions Judge with a bail petition seeking regular bail and that bail petition came to be rejected. Therefore, the petitioner is before this Court by filing a petition under Section 439 of Cr.P.C..

4. Heard the learned counsel for the petitioner/Accused No.1 and the learned SPP-II, who appeared along with learned HCGP for the respondent/State. Perused the records.

5. Learned counsel for the petitioner/Accused No.1 would contend that, the KPIDFE Act does not bar filing of any petition under Section 439 of Cr.P.C. and the petitioner has not challenged the order of rejection of his bail petition by the learned Special Judge. The learned counsel would also contend that, right of liberty under Article 21 of the Constitution of India is involved and under Section 16 of the Act, the right cannot be deprived. Hence, he would contend that, this Court is having concurrent jurisdiction under the provisions of

439 of Cr.P.C. and it can entertain this petition and the bar under Section 16 is not applicable.

6. Per contra, the learned SPP-II has seriously opposed the bail petition on the ground of its maintainability and invited the attention of the Court to Section 16 of the KPID Act. He would contend that the KPID Act is a special enactment and the provisions of the special enactment will prevail over general provisions. The learned SPP-II would also invites the attention of the Court towards intention of the Legislation in enacting the Special Act and scope and scheme of the Act and he would further assert that the intention of the Legislation is to protect the interest of the depositors. He would also invites the attention of the Court to Section 18 of the KPIDFE Act, which was having over-riding effect and as such, he would contend that, in view of over-riding effect under Section 18 of the KPIDFE Act and when there is an alternative remedy provided under the Act, the provisions under Section 439 of Cr.P.C. cannot be invoked for grant of bail. Hence, he would contend that the present petition is not maintainable and the petitioners are required to file an appeal.

7. Having heard the arguments and after perusing the records, it is an undisputed fact that, initially the complaint was filed under Section 420 of IPC and FIR was issued only for the offence under Section 420 of IPC, which is in respect of cheating the depositors by the Directors of the said Co-operative Society, by not issuing any shares or without repayment of the deposited amount. However, as noted above, subsequently the Investigating Officer has submitted a requisition to the Court on 18.06.2022 for incorporating the provision of Section 9 to the KPIDFE Act, along with Section 120 of IPC. The document further discloses that the learned Magistrate by order dated 18.06.2022 by exercising his powers under Section 155(2) of Cr.P.C. has granted permission to register the case under the provisions of KPIDFE Act and proceed with the investigation.

8. There is no dispute of the fact that, the bail petition under Section 439 of Cr.P.C. was not barred, when initially offence was alleged only under Section 420 of IPC. But, the issue has been raised only when the provisions of KPIDFE Act have been incorporated.

9. In view of the above contentions, now it is necessary to consider Section 16 of the KPIDFE Act. For the sake of convenience, said provision of Section 16 is re-produced herein below:-

“16. Appeal. - Any person including the competent authority, if aggrieved by an order of the Special Court, may appeal to the High Court within thirty days from the date of the order.”

Hence, the provisions of Section 16 makes it very clear that, any person who is aggrieved by order of the Special Court, make an appeal to the High Court within 30 days from the date of the said order.

10. Though initially it is argued that the petitioner is not challenging the order passed by the learned Special Court, but, it is evident from the pleadings that he is aggrieved by the order of the learned Special Court, which can be borne-out from pleadings made in his petition. Hence, now relief sought is only regarding bail. But, in fact, the petitioner/accused No.1 is aggrieved by the order passed by the learned Sessions Judge/Special Judge. Apart from that, it is also important to note here that the bail being sought pertaining to offence under Section 420 of IPC and under Section 9 of the KPIDFE Act, 2004. Any order regarding KPIDFE Act required to be passed by the Special Court, whether it is under Section 439 of Cr.P.C. and otherwise is appealable. The order of the learned Special Judge is pertaining to rejection of the bail petition for the offence under Section 9 of the KPIDFE Act itself. Hence, it is evident that the petitioner is aggrieved by the order of the Special Court in respect of rejection of the bail for the offence under

Section 9 of the KPIDFE Act. Hence, under Section 16 of KPIDFE Act, there is a specific bar for challenging or to entertain any petition, other than the appeal.

11. Learned counsel for the petitioner would contend that the statutory restriction under the KPIDFE Act would per-se does not oust the jurisdiction of the Court under Section 439 of Cr.P.C. In this context, he placed reliance on a decision of the Hon'ble Apex Court reported in **2021 (3) SCC 713 [Union of India Vs. K.A. Najeeb]** and contended that the Constitutional Courts are having power to grant bail and the provision of the KPIDFE Act, cannot oust the power of the Constitutional Courts. But, it is important to note here that the said decision was in respect of the Statutory Restriction under Section 43(D)(5) of Unlawful Activities (Prevention) Act, 1967 (for short, 'UAPA Act'. The Apex Court has observed that, the statutory restriction is not material, considering the fact of long period of incarceration and unlikelihood of trial would be completed any time in the near future along with right of liberty. It is observed that, when there is no restriction under the Act for grant of bail, the Hon'ble Apex Court has held that the Constitutional powers for exercising discretion to grant bail by the High Court cannot be restricted. But here, there is specific bar under KPIDFE Act, to seek bail, but the remedy was by way of an appeal. But, under the UAPA Act, no such alternative remedy was available and there is complete restriction for grant of bail or to entertain bail petition. But, in the instant case, under Section 16 of KPIDFE Act, there is a specific provision for challenging the order passed by the Special Court granting or rejecting bail.

12. The learned SPP would also bring to the notice of the Court, the provisions of Section 19 of the Act and Section 19 has over-riding effect on other laws. Section 19 reads as under:

“19. Act to override other laws. - Save as otherwise provided in this Act, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any custom or usage or any instrument having effect by virtue of any such law.”

Hence, it is evident that when any provisions of any other Act are inconsistent with the provisions of this Act, then the provisions of this Act will prevail, as this section has over riding effect.

13. Though the provision of Section 18 of KPIDFE Act deals with special powers regarding offence under Section 18(1), the statute stipulates that, without committing matter to the Court, the Court shall try the case and shall follow the procedure provided under the Cr.P.C. for trial of warrant case. By incorporating this provision, the Legislators have shown their inclination as to what extent provisions of Cr.P.C. can be made applicable. The same is again incorporated in subSection (2) wherein it is held that the provisions of 438 of Cr.P.C are not applicable to the provisions under this Act, which bars the relief of anticipatory bail. But, the tone of Sections clarifies that, KIPDFE Act has overriding effect, over all other provisions of Law. In this regard, the learned SPP has placed reliance on a decision of the Hon'ble Apex Court reported in **2008 (3) SCC 874 [Suresh Nanda Vs. CBI]** and invites the attention of the Court to Para Nos. 8, 9 and 15 of the said judgment.

14. In the said decision, the Hon'ble Apex Court had an occasion to deal with the powers and jurisdiction of the Court to impound passport in exercise of powers under the Passport Act and it is clearly held that, the Act being a Special Act, whereas Section 104 of Cr.P.C. is a general provision for impounding any document or thing, it shall prevail over that sections in the Cr.P.C. as regards the passport. Thus, by necessary implication, the power of the Court to impound any document or thing produced before it, would exclude

passport. But, it has held that the specific provision is being made in special enactment, the same shall prevail.

15. This issue is again considered by the Division Bench of this Court reported in *ILR 2021 KAR 4783 [Lokesh Vs. State of Karnataka]*, wherein a similar issue arose in pursuance of Section 14(A) of SC/ST (POA) Act and the Court has framed a point as to whether the Criminal Petition or Criminal Appeal is maintainable against an order of the Special Court or exclusive Court in granting or refusing bail. This aspect has been dealt in detail. The division Bench of this Court has specifically observed that, since SC/ST Act is a special enactment under Section 14(A)(2) of Act, the appeal provision is available and in view of the availability of remedy of appeal under Section 14(A)(2), it will not be open to the High Court to exercise original concurrent jurisdiction under Section 438 and 439 of Cr.P.C.. The Division Bench's decision of this Court in *Lokesh's* case (cited supra), covers the entire issue, which is also involved in the present case and answers the same holding that the provisions of Special Act will prevail, when a specific provision is made by granting an alternative remedy.

16. Looking to the above facts and circumstances, the petition under Section 438 or 439 of Cr.P.C is not maintainable when offences under KPIDFE Act are incorporated and the only remedy available is to file an appeal under Section 16 of the KPIDFE Act. Hence, the petition does not survive for consideration and accordingly, the petition stands **dismissed** with liberty to the petitioners to file an appeal under Section 16 of the KPIDFE Act.

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