IN THE HIGH COURT OF DELHI AT NEW DELHI

Bail Appl.No.2284/2004

Avnish Bajaj ...Petitioner through
Mr.Arun Jaitley & Mr.Dinesh Mathur, Sr.Advocates with Mr.Rajiv Talwar, Mr.Shushil Bajaj, Mr.Vijay Sardni, Mr.Sudhir Sharma, Mr.Rishi Bhatnagar, Mr.Varun Pareekh & Mr.Anurag Rajan, Advocates.

Versus

State (N.C.T. of Delhi) ...Respondent through
Ms.Mukta Gupta, Mr.V.K.Malik, & Mr.M.N.Dudeja, Advocates.

Date of Hearing : December 21, 2004

Date of Decision: December 21, 2004

CORAM:
HON'BLE MR. JUSTICE VIKRAMAJIT SEN

1. Whether reporters of local papers may be allowed to see the Judgment?

2. To be referred to the Reporter or not?

3. Whether the judgment should be reported in the Digest?

: VIKRAMAJIT SEN, J. (Oral)

C.M.No.10381/2004

1. Allowed, subject to all just exceptions.

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2. The accused is the CEO of Baaze.com, which Company facilitates the sale of any property, for which it receives

commission and also generates revenue from advertisements carried on its web pages. There is no gainsaying that it does not own the items offered for sale, the payment and delivery of which can be via a wholly independent agency. In the present case, Counsel for the State has argued that the accused was remiss, at the pain of culpability, in not stopping payment through Banking channels after learning of the illegal nature of the transaction. This prima facie indicates that, at the present stage of investigation the sale consideration was not routed through the accused. It is also not the case of the prosecution that the actual recording was viewable on the website. She, however, contends that the Item's description "DPS Girl having fun" should have raised alarm.

3. It has been strenuously contended that if bail is not granted it will adversely impact e-commerce, for which India may be the eventual loser. These are not considerations which would prevail or tamper the Courts decision whether to grant or reject bail.

4. A preliminary objection has been raised to the effect that the petitioner should have first approached the Sessions Judge, although this Court has concurrent jurisdiction under Section 439 of the Code of Criminal Procedure, 1973. My

attention has been drawn to K.C. Jyya and etc. v. State of Karnataka, 1985 Crl. L.J. 214, Rameshchandra Kashiram Vora and etc. v. State of Gurajat and another, 1988 Crl. L.J. 210 and Hajialisher v. The State of Rajasthan, 1976 Crl. L.J. 1658 where the Karnataka, Gujarat and Rajasthan High Courts have favoured this view. Per contra, in Sri Ram v. Panna Lal, ILR (1976) II Delhi 401 this Court has struck down its own High Court Rules which prohibited the filing of revisions in non-appealable cases unless the Sessions Judge had been approached. The Notification dated 15.12.2004 must receive similar consideration. Since High Courts enjoys concurrent jurisdiction it would be a salutary practice to direct the petitioners to approach the Sessions Judge first, but that would remain a self-imposed constraint, akin to the exercise of the extraordinary jurisdiction reposed in it by virtue of Article 226 of the Constitution. The matter has been argued at great length and the State ought to have articulated this objection at the very first instance, on the previous date of hearing.

5. Mr. Jaitley, has underscored that in Section 67 of the Information Technology Act, 2000 an offence is committed by a person who publishes or transmits any material which is lascivious or appeals to the prurient interest. Sections 292

and 294 of the Indian Penal Code have also been mentioned which contemplate the selling, letting on hire, distribution or public exhibition of obscene matter. He has emphasised that the provision does not bring within its sweep the causing of the transmission in contradistinction to the publication of obscene material. Prima facie it has not been established from the evidence that has been gathered till date that any publication took place by the accused, directly or indirectly. The actual obscene recording/clip cannot be viewed on the portal of Baaze.com. This question will have to be decided . It has been argued on behalf of the accused that on coming to learn of the illegal character of the sale, remedial steps were taken within 38 hours, since the intervening period was a weekend. Prima facie Baaze.com has endeavoured to plug the loophole although it is to be expected that similarly placed persons should do so with immediate alacrity. This case will indubitably bring to the fore the dangers endemic in this business, which must be addressed forthwith.

6. It has also been shown that only 14 days J/C General had been requested for on the submission that "investigation reveal that same MMS clipping was listed for sale on 27th November, 04 in the name of DPS Girl having fun". It has also

been contended that initially the prosecution had conceded the grant of bail, but it was subsequently argued to the contrary.

7. Learned counsel for the accused relies on Gurcharan Singh and others, V. State (Delhi Administration), AIR 1978 SC 179. The normal rule is that ordinarily bail should be granted, and its refusal should not act as a substitute for punishment.

8. The accused has actively participated in the investigations, and even before me it has not been suggested to the contrary by counsel for the State. The nature of the alleged offence is such that the evidence has already crystalised and may even be tamper proof. Even though the accused is no longer an Indian National, he is of Indian origin with family roots in our country. It cannot possibly be argued that a foreign national is disentitled to the grant of bail. Reference to **Ram Govind Upadhyay v. Sudarshan Singh and others**, AIR 2002 SC1475 may not be relevant at this stage since the evidence that has been collected indicates only that the obscene material may have been unwittingly offered for sale on the website; and that heinous nature of the alleged crime may be attributable to some other person.

9. The accused is enlarged on bail subject to furnishing two sureties in the sum of Rs.1,00,000/- each to the satisfaction

of the concerned Court/Metropolitan Magistrate/Duty Magistrate. The accused shall also not leave the territories of India without the leave of the Court and for this purpose shall surrender his passport to the Magistrate. It is implicit in the grant of bail that he shall participate and assist in the investigation.

10. In view of the aforesaid directions, the Bail Application stands disposed of.

11. A copy of this Order be given Dasti to counsel for both the parties.

(VIKRAMAJIT SEN)
VACATION JUDGE

December 21, 2004
'n'

Crl. Misc(A) 3690/05 (Modification)

Crl. Misc(A) 3693/05 (Exemption)

Sr. No.	Date	Orders

%22.07.2005

Present: Mr.Sidharth Luthra for the petitioner.
Ms.Mukta Gupta for the State.

+Crl.M.9696/2005 in Bail Application No.2284/04
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1. Petitioner prays for modification of a condition imposed w granting bail to the petitioner vide order dated 21.12.2005.

2. While admitting the petitioner to bail vide order d 21.12.2004, apart from other conditions, following condition imposed:-

> "The accused shall also not leave the territories of India without the leave of the court and for this purpose shall surrender his passport to the Magistrate."

3. As per the application, though petitioner is not an In national, he is of Indian origin with family roots in India. After o dated 21.12.2004 was passed by this Court admitting the petitioner to he had cooperated with the investigating agency. He had deposited passport in the Trial Court. Since petitioner was the Chairman of e India Pvt.Ltd., his job requires his movement across the globe frequency. Condition vide order dated 21.12.2004 required the petiti

Sr. No.	Date	Orders
		to repeatedly take permission from the learned Metropolitan Magistra get the passport released, make an application to FRRO. FRRO, as p their procedure, would refer the application for comments to the Minist of Home Affairs. After receiving the comments, single entry visa w granted. Entire process took between 7 to 12 days. Since Immigrati Authorities in the foreign countries would find a single ent endorsement on the visa, they would get suspicious. Petitioner had face questioning and embarrassment. 4. Shri Sidharth Luthra, learned counsel for the petitioner subm that as a result of of the unfortunate events in London where bomb blas have taken place at public places, person of Asian origin are being p under greater scrutiny in European countries when they arrive in sa countries. Counsel states that while granting bail purpose of the conditi was to secure the presence of the petitioner in India and to prevent h from being a fugitive. Counsel urges that the petitioner has availed t bail. He has gone abroad and returned thereafter. Petitioner's wife a children are Indian nationals and reside at Bombay. Counsel submits t the petitioner is willing to enhance the amount of personal bond and surety bond.

Sr. No.	Date	Orders
		5. Ms.Mukta Gupta, learned Standing Counsel for the Sta urges that inconvenience is no ground to vary a condition imposed. Th the condition was imposed thoughtfully by the learned Single Judge wl admitted the petitioner to bail. That there was no legal ground to vary t condition. 6. Events in London and greater suspicion on persons of orig from Asia in European countries is a reality to which this Court cann shut its eyes. Unfortunate incident in respect of which the petitioner h become an accused has been committed in a manner where the obsce material being unwittingly put for sale on the web site of the company which the petitioner was a C.E.O. cannot be ruled out. This was noted the order dated 21.12.2004. 7. It is not a case of mere hardship and inconvenience. It is case of petitioner being unnecessarily questioned in foreign country due the single entry visa granted to the petitioner each time as the passp requires to be taken back from the Court concerned and procedures of t Government of India being complied with. 8. Nobody is to face humiliation and harassment, much less i foreign country.

Sr. No.	Date	Orders
		9. Object of putting conditions is to secure the presence of t accused admitted to bail. In the facts and circumstances of the prese case, presence can be ensured by waiving the condition imposed vi order dated 21.12.2004 that the petitioner shall surrender his passport the Magistrate and modifying some other. 10. The said condition noted in para 2 above imposed vide ord dated 21.12.2004 is accordingly vacated. However, following conditio stand imposed as a term of the grant of bail to the petitioner : a) The bail bond and surety bonds stand enhanced from Rs.1 la to Rs.5 lakh. b) The term of the order dated 21.12.2004 not to leave t territories of India without the leave of the Court is modifie in that, petitioner shall inform the Trial Court, a week advance of the visit. He shall state therein the country(s) to visited by the petitioner. City where the petitioner would staying. Address at which petitioner would be stayi Telephone contact number. The airport from where petitioner would leave India and the airport at which petitioner would return to India.

Sr. No.	Date	Orders
		10. Application stands disposed of Dasti. July 22, 2005 pu PRADEEP NANDRAJOG, J.