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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Delivered on: 06.03.2025

+ BAIL APPLN. 1497/2024

KUNDAN KUMAR @ GORE

..... Petitioner

Through: Mr. Akshat Sharma, Mr. Siddharth Arora, Ms. Shalini Singh, Mr. Himanshu Bhandari and Mr. Prajanya Rathore, Advs.

versus

CENTRAL BUREAU OF INVESTIGATION

..... Respondent

Through: Mr. Ripudaman Bhardwaj, SPP with Mr. Kushagra Kumar, Mr. Abhinav Bhardwaj, Mr. Amit Kumar Rana and Mr. Himanshu Kaushik, Advs.

CORAM:

HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J.

1. The present petition has been filed under Section 438 read with Section 482 CrPC seeking anticipatory bail in connection with FIR No. RC 221/2023/E0005 under Section 120B read with Section 420 IPC and Sections 66C/66D of IT Act, 2000 registered at Police Station EO-III Delhi, CBI, New Delhi.



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2. The case of the prosecution is that the instant RC was registered by the CBI on the basis of a written complaint received from Constable Sh. Kuldeep Kumar Hemrom posted at CBI Head Office at New Delhi. It has been alleged therein that the complainant had booked a courier from DSK Xpress Service, New Delhi, for Lucknow. Upon checking the courier's status, the complainant discovered that the same was being reflected as mis-located and the complainant attempted to look up the customer care number of Blue Dart on the internet.

3. On 05.02.2023, upon searching the internet, the complainant saw a mobile number which was shown as the customer care number of Blue Dart. Upon contacting the same he spoke to someone who identified himself as a representative of Blue Dart. Subsequently, this representative then told the complainant that he would be receiving a phone call from his senior. After a short while the complainant received a phone call from a different number. The caller claimed to be calling from Blue Dart to resolve the complainant's grievance regarding his courier. He further asked the complainant to make a transaction of Rs.2/- in order to locate the courier. The complainant, however, did not pay anything.

4. Subsequently the complainant received another call from a third mobile number. This time the caller identified himself as Sanjay Kumar, Senior Executive Officer from Blue Dart. He told the complainant that he would be sending a link over SMS and the complainant should fill all the details as may be required. Upon receiving the link through SMS, the complainant filled in all the details as were required and also provided the



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name of his bank, mobile number, the amount of Rs.2/- and his UPI PIN pertaining to his bank account. The caller thereafter told him that his courier had been located. When the complainant attempted to verify the same, the status of the consignment still showed as mis-located. The complainant then again called Sanjay Kumar who in turn assured the complainant that his courier would be delivered by evening.

5. On 08.02.2023, when the complainant checked his account statements, he realized that Rs.99,963/- was debited on 06.02.2023 and Rs.98,965/- was debited from his account on 07.02.2023. Aggrieved by the same, the complainant lodged a complaint with the Superintendent of Police, Cyber Crime Investigation Division, EO-III Delhi, CBI, New Delhi. The same then culminated into the aforesaid FIR.

6. During the course of investigation, on the basis of specific information from reliable sources, accused Amit Kumar was caught red handed while withdrawing the allegedly duped funds from an ATM. Hence, he was arrested on 02.06.2023. While in custody he was interrogated and he provided certain information in respect of his associate Kundan Kumar @ Gore (present petitioner) and stated that he is part of a syndicate which is involved in defrauding and cheating the innocent people across India by an organised *modus operandi*.

7. Accused Amit Kumar also revealed that the petitioner used to purchase ATM cards and SIM cards of mobile numbers which are linked to bank accounts and would provide the same along with the PIN to him (Amit Kumar) with the direction to withdraw the money from HDFC Bank ATM



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situated at the said bank's main branch in Nawada. He further revealed that upon withdrawing the money by using ATM cards, he used to hand over total cash withdrawn to the petitioner, who would give commission to him.

8. In connection with investigation of the case, the present petitioner was issued a notice under Section 160 CrPC for his appearance in CBI Office on 03.08.2023. However, he did not appear for his examination nor any information was received from him.

9. In the meanwhile, the petitioner filed an anticipatory bail application in the Court of Special Judge, CBI (PC Act), New Delhi but the same was dismissed *vide* order dated 11.09.2023.

10. Subsequently, on 01.03.2024 another notice under Section 160 CrPC was issued to the petitioner for his appearance in CBI Office on 19.03.2024 followed by yet another notice dated 22.03.2024 for his appearance on 08.04.2024. Both these notices were again not complied with by the petitioner, however, the petitioner filed the present bail application on 08.04.2024 seeking anticipatory bail.

11. Simultaneously, another petition being CRL.M.C. 2826/2024 was also filed by the petitioner praying for quashing and setting aside of notice dated 22.03.2024 issued to him under Section 160 CrPC seeking his presence before the Investigating Officer of CBI on 08.04.2024.

12. During the pendency of aforesaid CRL.M.C. 2826/2024, the CBI withdrew the notice under Section 160 CrPC stating that the same was issued inadvertently and that a notice under appropriate section would be issued. In view of the withdrawal of aforesaid notice, this Court observed



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that no further orders were required in the said petition and the same was accordingly, disposed of.

13. The learned counsel for the petitioner submits that though, the petitioner has been alleged to be an accused but no notice under Section 41A CrPC has ever been served upon him. He submits that the offence under Section 420 IPC is punishable with imprisonment up to seven years and before proceeding to arrest an accused for an offence punishable for a period up to 07 years, it is mandatory to serve the accused with a notice under Section 41A CrPC. He further submits that Section 41A CrPC gives protection to the accused from unlawful arrest, if he complies with the terms of the notice issued under the said section. In support of his submission, the learned counsel has placed reliance on the decision of the Hon'ble Supreme Court in *Arnesh Kumar vs. State of Bihar, (2014) 8 SCC 273*.

14. He further contends that the respondent/CBI had given notices to the petitioner under Section 160 CrPC, however, the same were subsequently withdrawn which shows the ill-intent of the Investigation Agency. He submits that Section 160 CrPC applies to witnesses or possible witnesses and attendance of an accused cannot be required by giving such a notice. He places reliance on the decision of the Hon'ble Supreme Court in *State vs. N.M.T. Joy Immaculate, 2004 SCC OnLine SC 635*.

15. He further submits that the petitioner has been implicated only on the basis of disclosure statement of co-accused which is inadmissible in evidence.

16. *Per contra*, the learned SPP for the respondent/CBI argued on the



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lines of the status report. He submits that the investigation is still open and at an initial stage, thus, the CBI will serve the petitioner with an appropriate notice as and when required.

17. While reserving the judgment on 28.01.2025, the respondent/CBI was directed by this Court to file a Status Report confined to the aspect whether notice under Section 41A CrPC was given to the present petitioner or not, within a period of one week. The said status report came to be filed on 04.02.2025 and is part of the record.

18. I have heard the learned counsel for the petitioner, as well as, the learned SPP for the CBI and have perused the record.

19. The thrust of the petitioner's submission was that no notice under Section 41A CrPC has ever been given to him, rather the notices were issued under Section 160 CrPC, therefore, the petitioner cannot be called upon to join investigation without being served with a notice under section 41A CrPC, as laid down in *Arnesh Kumar* (supra).

20. Considering the above stand taken by the petitioner, this Court had specifically directed the respondent/CBI to file a Status Report confined to the aspect as to whether notice under Section 41A CrPC has been given to the petitioner or not. As noted above, the Status Report has been filed by the respondent/CBI on 04.02.2025, the relevant extract of the same reads thus:

“11. That on 03.10.2024, in pursuance to order dated 21.08.2024 passed the Hon'ble High Court of Delhi in anticipatory bail application. No. 1497/2024, accused Kundan Kumar @Gore joined investigation at CBI Office, New Delhi. Therefore, no further notice has been issued.



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12. That no notice under Section 41A CrPC has been given to the present petitioner.

13. That investigation of the present case is underway and accused Kundan Kumar @Gore would be required to join investigation as and when required, for which appropriate notice will be issued.”

21. Concededly, no notice under Section 41A CrPC has been given by the respondent/CBI to the petitioner, however, it has been clarified that the petitioner has already joined investigation. Further, the investigation of the case is underway and the petitioner would be required to join investigation as and when called upon, for which appropriate notice will be issued.

22. The law is clear that a person accused of a cognizable offence punishable with imprisonment for a term which may be less than 07 years or which may extend to 07 years whether with or without fine can be arrested by the police officer without an order from a Magistrate and without a warrant if the conditions mentioned in Section 41(1)(b)(ii) are satisfied. However, where the arrest of a person is not required under the provisions of Section 41(1), the investigating officer is obliged to follow the procedure as provided in Section 41A CrPC. A Co-ordinate Bench of this Court has observed that except as provided under Section 41(1)(a) and (b) CrPC, it is mandatory for the police to first issue a notice under Section 41A and arrest only when there is no cooperation from the noticee/suspect.¹

23. At this stage, apt would it be to refer to the relevant provisions of the Code of Criminal Procedure, 1973 i.e. Sections 41A and 160. The same are reproduced hereinunder:

¹ Mukesh Khanna vs. State of NCT Delhi, 2022 SCC OnLine Del 1032.



41A. Notice of appearance before police officer.—(1) *The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.*

(2) *Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.*

(3) *Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.*

(4) *Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice.*

160. Police officer's power to require attendance of witnesses.—(1) *Any police officer making an investigation under this Chapter may, by order in writing, **require the attendance before himself of any person** being within the limits of his own or any adjoining station who, **from the information given or otherwise, appears to be acquainted with the facts and circumstances of the case; and such person shall attend as so required:***

Provided that no male person under the age of fifteen years or above the age of sixty-five years or a woman or a mentally or physically disabled person shall be required to attend at any place other than the place in which such male person or woman resides.

(2) *The State Government may, by rules made in this behalf, provide for the payment by the police officer of the reasonable expenses of every person, attending under sub-section (1) at any place other than his residence.”*

(emphasis supplied)



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24. Undisputedly, the notice under Section 41A CrPC is given to a person who is suspected to be involved in any cognizable offence. In contrast, notice under Section 160 CrPC is issued to witnesses to require their attendance before the police officer. Intriguingly, in the present case, no notice has been given to the petitioner under Section 41A CrPC, rather he was served with three (03) notices under Section 160 CrPC.

25. The first notice under Section 160 CrPC was given to him on 03.08.2023, however the petitioner did not appear in response to the said notice. Instead, he filed an application seeking anticipatory bail before the learned Trial Court. In reply to the application seeking the said anticipatory bail, the respondent/CBI took a stand that accused Amit, during interrogation, had provided certain information in respect of his associates including the present petitioner.

26. Further, during the course of arguments, the learned PP appearing on behalf of the respondent/CBI ascribed a definite role to the present petitioner, which was suggestive of the petitioner being a suspect in commission of the offence.

27. Thereafter, the anticipatory bail was dismissed on 11.09.2023 primarily on the ground that '*there appears to be clear involvement of the applicant in the commission of the alleged offences and the custodial interrogation of the applicant may be necessary*'.

28. Notwithstanding the stand taken by it, as well as, the finding of the learned Special Judge in order dated 11.09.2023, the respondent/CBI again issued two (02) notices under Section 160 CrPC.



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29. As noted above, the notices under Section 160 CrPC were challenged by the petitioner by filing CRL.M.C. 2826/2024. In the said petition, the learned SPP appearing on behalf of the respondent/CBI on instructions from the IO had stated that *'the complicity of the petitioner in the commission of the offence is still not certain and thus Notices under Section 160 Cr.P.C. are being given to ascertain complete facts in the case.'* This submission of the learned SPP is duly recorded in the order dated 03.09.2024 passed in aforesaid CRL.M.C. 2826/2024. However, subsequently this Court *vide* order dated 01.10.2024 disposed of the said petition after noting the submission of the learned SPP that the notices under Section 160 CrPC were inadvertently issued and the same stood withdrawn.

30. The above narration shows that the respondent/CBI has no clarity as to the role of the present petitioner. On one hand, a stand has been taken that the present petitioner is an associate of the co-accused Amit who was arrested red handed, whereas on the other hand, in CRL.M.C. 2826/2024 the stand taken was that the complicity of the petitioner in the commission of offence is not certain. Even in the two status reports dated 24.01.2025 and 04.02.2025, it is not the case of the prosecution that custodial interrogation of the petitioner is required, rather, it has been stated that the petitioner has joined investigation once but no further notice has been issued to him under Section 41A CrPC and that the investigation of the present accused is underway and the petitioner would be required to join investigation as and when required, for which appropriate notice will be issued.

31. Further on the merits of the case, the allegations against the petitioner



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are based solely on the disclosure statement of the co-accused Amit. Although, co-accused Amit has been caught red handed withdrawing the duped funds from an ATM, and he has alleged that the present petitioner is also involved in the syndicate which perpetrates cyber-crime, however, the prosecution has not been able to show any evidence on record which would establish the involvement of the petitioner directly other than the aforesaid disclosure statement. It is also not the case of the prosecution that any recovery has been made from the present petitioner. Even the bank accounts allegedly linked to the ATM cards and the SIM cards in which duped funds have been received, are not shown to be under the petitioner's name.

32. Having regard to aforesaid circumstances; the contradictory stand taken by the respondent/CBI; issuance of notices under Section 160 CrPC to the petitioner and non-issuance of any notice under Section 41A CrPC to the petitioner till date, this Court deems it appropriate to grant protection from arrest of the petitioner in the present case.

33. Accordingly, it is directed that in the event of petitioner's arrest, he be released on bail subject to his furnishing personal bond in the sum of Rs. 25,000/- each and a surety bond of the like amount to the satisfaction of the Investigating Officer / Arresting Officer and further subject to the following conditions that:-

- (i) Petitioner shall join investigation as and when directed by the I.O concerned.
- (ii) Petitioner shall not influence the witnesses in any manner or try to contact the complainant or tamper with the evidence.



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34. With the aforesaid directions, the petition stands disposed of.
35. Order be uploaded on the website of this Court.
36. Nothing stated hereinabove shall be construed as an expression of opinion on the merits of this case.

MARCH 6, 2025/dss

VIKAS MAHAJAN, J