

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

+ **BAIL APPLICATION NO.2339/2007**

Reserved on : 20.08.2009
Date of Decision : 23.12.2009

KAMAL KHANNA & ANR.

.....Petitioners

Through: Mr.D.K.Rustagi,
Advocate.

Versus

STATE & ANR.

..... Respondents

Through: Mr.T.K.Ganju, Sr.Adv.
with Mr.A.K.Thakur, Adv.
for respondent
no.1/NAFED.
Mr.Pawan Bahl, APP for
the State.

**CORAM :
HON'BLE MR. JUSTICE V.K. SHALI**

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| 1. | Whether Reporters of local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the Reporter or not ? | YES |
| 3. | Whether the judgment should be reported in the Digest ? | YES |

V.K. SHALI, J.

1. This is an anticipatory bail application filed by the petitioners Kamal Khanna and his son Sandeep Khanna in respect of FIR No.474/2006 for an offence under Section 406/420/120B IPC registered at P.S. Srinivaspuri.
2. Briefly stated the facts of the prosecution case against the accused persons are that on 26.8.2006, a complaint was made by the National Agricultural Co-operative Marketing Federation of India Ltd. (hereinafter referred to as complainant) having its head office at NAFED Building,

Sidharth Enclave, Ashram Chowk, Ring Road, New Delhi to the effect that they were introduced by one Sh. Adarsh Bhushan Mitra, Director of M/s Pylon Traders Pvt. Ltd. to one M/s Kripa Overseas, a proprietor concern of Sandeep Khanna-petitioner no. 2 herein doing business in khari Baoli. It was represented that they are carrying business of trading in agricultural and non-agricultural items like food grains, edible oils, dry fruits, spices, metal ore, metal scrap, chemicals, petroleum products etc. and that they have a licence to import Asafoetida (Heeng) and Pistachio (Kaju) and they expressed their desire to become business associate of the complainant for import of these items from CIS countries. For this purpose, they invited financial support from the complainant. On the basis of this representation, the complainant is purported to have entered into a Memorandum of Understanding on 20.9.2004 with M/s Kripa Overseas for the purpose of import of Asafoetida (Heeng) and dry fruits from CIS countries and accordingly, gave an advance of Rs.10 crores to M/s Kripa Overseas Company. This advance was to carry an interest @7% per annum upto four months, 7+1% for next four months and 7+2% for more than eight months. The said rates of interest were to be enforced till the revision was made by the complainant. There were various other clauses in the agreement but one notable clause was that M/s Kripa Overseas was to give a bank

guarantee/cash deposit of 10% amounting to Rs.1 crore for the release of the advance money of Rs.10 crores. It is alleged that after obtaining the amount of Rs.10 crores, the said advance was utilized by the accused persons for their own private and personal benefit and it was not put to any use for business dealings. Out of the said advance, a cheque for a sum of Rs.1 crore was also given by way of deposit to the complainant but the said cheque got dishonoured. It is alleged that since there was no licence in favour of the accused M/s Kripa Overseas or its proprietor Sandeep Khanna, therefore, they had dishonest intentions of cheating the complainant company right from inception. It is also alleged that the amount of advance was also diverted to various private and personal accounts including one company named M/s Pylon Traders and its Director Sh.Adarsh Bhushan Mitra therefore, an offence under Section 406 IPC of breach of trust apart from cheating was committed. This is in sum and substance of the allegation of the prosecution against the petitioners and against M/s Pylon Traders & its Director, Adarsh Bhushan Mitra.

3. The petitioner Sandeep Khanna's anticipatory bail application was rejected by the Court of Sessions on 17.10.2007, on which the present petition was filed.
4. On the very first date i.e. 25.10.2007, the learned counsel for the petitioner had expressed his willingness to pay a sum of Rs.50 lacs by way of bank draft to the respondent

no.1 and further a sum of Rs.1 crore after Diwali in order to show his bonafides to settle the dispute. The learned counsel for the complainant had made a statement that as on that particular date, a sum of Rs.60 crores was due and payable and one of the properties at Noida in Special Economic Zone which was furnished as the security has been sold by the petitioners surreptitiously and all proceeds have been appropriated by them without payment of single penny to the complainant.

5. My learned predecessor, keeping in view the facts and circumstances, directed the petitioners to pay a sum of Rs.50 lacs by way of draft drawn on 25.10.2007 and another 50% within one week and thereafter Rs.2 crores by 30.11.2007 and subject to these conditions, the petitioners were granted interim protection that in the event of his arrest till the next date, he shall be released on bail on personal bond for a sum of Rs.1 lakh each with one surety for the like amount to the satisfaction of IO/Arresting Officer. Thereafter, orders have been passed from time to time indicating that the petitioners have signed a settlement deed with the complainant on 3.5.2007 in pursuance to which various properties, the list of which was attached, were to be made available to the complainant for the purpose of disposal, so as to adjust the sale proceeds of the said properties towards total amount of money due and payable by the petitioners to the

complainant. It may be pertinent here to mention that by this time the complainant was claiming an amount of Rs.61 crores.

6. It has been contended by the learned counsel for the petitioner that in pursuance to the said settlement, the petitioners have already paid a sum of Rs.8.85 crores and have further co-operated with the complainant in disposal of all the properties as far as possible so as to enable them to realize the sale proceeds so that the same could be adjusted towards outstanding amount due and payable to the complainant. It has also been contended that the petitioners have also joined the investigation from time to time and therefore, there is no pressing reasons as to why they should be denied the benefit of anticipatory bail at this stage when they are prepared to comply with all the terms and conditions which this Court may like to impose while enlarging them on anticipatory bail. It was also contended by the learned counsel for the petitioner that almost for two years the complainant and the prosecution requested for custodial interrogation of the petitioners and accordingly this plea raised by them is only an afterthought.
7. It was contended by the learned counsel for the petitioner that the entire dispute between the petitioners and the complainant essentially was a dispute of a civil nature where the aforesaid amount of Rs.10 crores was given by

way of loan as it was to carry an interest @7%. It is further contended that disputes having arisen between the parties the said disputes are already pending adjudication between the parties in Civil Court or Arbitrator in terms of the agreement, therefore, this FIR essentially is a method of pressurizing the petitioners by the complainant to subject them to their dictates. It is further contended that the respondent/complainant has arrived at a settlement and therefore there is no reason to deny them.

8. It was contended by the learned counsel for the petitioner that the demand for custodial interrogation has been made by the respondent/complainant and the APP for the first time only on 20th August, 2009. This is only an afterthought on account of the fact that although interim protection was given to the petitioner on 25th October, 2007, but no demand was made since then, nor was any application filed for variation of the said order. It is also contended that the reason for demand of custodial interrogation is raised to trace the trail of diverted funds of M/s Kripa Overseas while as the investigations are already complete and the diversion is attributed not to the petitioner No.1 but to Rital Impex and the petitioner No.1 is only one of the Directors of the said company. It is contended that the petitioner is still prepared to cooperate with the investigating agency in whatever manner the said

agency requires the petitioner to assist them, but his liberty may not be taken by denying the anticipatory bail.

9. Lastly, it was contended that the ground for availing of anticipatory bail is urged on the ground that the petitioner has created obstructions in the sale of the property and therefore he tried to hamper the investigation and also tried to back out from the settlement signed by him on 3rd May, 2007. It was contended by the learned counsel that the word which has been used by the learned Sole Arbitrator, Justice Sharda Aggarwal (Retd.) is merely a resistance which cannot be taken to be as an obstruction or creation of a hurdle. It was also contended that the petitioner's filing applications seeking judicial recourse cannot be construed as creating hurdles.
10. The learned Senior Counsel for the complainant Mr.T.K.Gaju, as well as learned APP for the State have contested the prayer of the petitioners for grant of anticipatory bail. It has been contended by the learned Senior Counsel for the complainant that in the first instance the petitioners not only persuaded the complainant with a dishonest intention to part with a huge amount of Rs.10 crores for the purpose of importing Asafoetida (Heeng) and Pistachio (Kaju) from CIS countries even when it did not have the requisite licence but the said amount was also diverted by the petitioners for their own private and personal use. It is contended that the

dishonest intention can be seen from the fact that a cheque for a sum of Rs.1 crore which was issued by the petitioners apart from the said amount in cash which was to be deposited equivalent to 10% of the advance, even that was dishonoured.

11. So far as the factum of settlement having been entered by the complainant with the petitioner is concerned, the said fact is not denied but it is denied that in terms of the said settlement, the petitioners have co-operated with the complainant in realization of the sale proceeds from the sale of the said properties. On the contrary, it has been urged that the entire ploy of the petitioners after entering into the settlement with the complainant is to get anticipatory bail. It is alleged by the complainant that the accused persons tried their level best to create hurdle in the sale of the property itself by raising false and frivolous objections from time to time to the sale of the properties by the Court observer as well as by filing applications in the OMPs which were filed between the parties before the Court for appointment of the Arbitrator.
12. The learned counsel has specifically drawn the attention of this Court to the orders dated 16.5.2007 passed in OMP No.291/2006 and the averments made in IAs No.11592/2007 & 5743/2007 in the same OMP as well as to show that after having signed a settlement with the complainant, they would cooperate with the complainant in

the sale of the properties but the entire exercise of the petitioners was to create hurdles in disposal of the property by raising objections at various stages.

13. The learned counsel has drawn this Court's attention to the fact that Justice Sharda Aggarwal (Retd.) who was appointed as a Court Observer for sale of properties of the petitioner has also recorded in her report dated 03.05.2007 that the petitioners were creating hurdles in the disposal of the property on the basis of the same, it was urged by the learned Senior counsel that the conduct of the petitioners was not only dishonest right from the beginning but it was also non-cooperative which was actuated with a view to delay the disposal of the properties in order to deprive the complainant of its rightful claim. It may be pertinent here to mention that the learned counsel for the petitioner in the written submissions has denied this allegation that there was any hurdle or objection created but it is stated that observation is only about resistance having been offered by the petitioners and secondly it was contended that availing of judicial remedies of filing application could not be said to be creating hurdles or resistance.
14. It has also been pointed out by the learned Senior Counsel for the complainant that in terms of the settlement dated 03.5.2007, the petitioner no.2, the sole proprietor along with his father petitioner no.1 who was the sole proprietor of Rital Impex have confirmed that the balance outstanding

as on that date was Rs.8.47 crores apart from interest of Rs.2.6 crores as on 30.4.2007. Apart from that Sandeep Khanna petitioner no.2 along with Rajesh Khanna confirmed the outstanding balance of Rs.34.74 crores as on 30.4.2007 and an interest of Rs.15.85 crores in respect of M/s Rital Impex and thus the total outstanding amount due and payable from the accused persons was to the tune of Rs.61.67 crores out of which the petitioners were still required to make payment of approximately Rs.43 crores till October, 2007 which obviously as on date has further enhanced on account of accrual of interest in terms of Memorandum of Understanding.

15. All these facts clearly shows that not only the ramification of the non-payment of the amount by the petitioners were very serious and grave as it constitutes essentially offence of cheating but the petitioners do not have the intention to pay the amount and by one reason or the other they only want to insulate their liberty. It was contended by the learned Senior Counsel for the complainant as well as the learned APP that in a case of this nature, the custodial interrogation is very essentially in order to recover the documents and the remaining money from the petitioners and therefore, their conduct & the facts do not warrant the exercise of discretion by the Court in their favour.

16. I have carefully considered the submissions made by the learned counsel for the petitioner and gone through the record.
17. No doubt, there is a growing tendency on the part of the complainant to give a colour of a criminal offence to a civil transaction emanating from breach of contract or sale of goods or sale of property, but every breach of contract or sale of property may not necessarily result in commission of a criminal offence. To that extent, the submission of the learned counsel for the petitioner is correct. The reference of the learned counsel for the petitioner in this regard to the judgment of the Apex Court in **Anil Mahajan Vs. Bhor Industries Ltd. & Anr.** (2005) 10 SCC 228 is correct, but the question which arises for consideration is that as to whether in the instant case there is a dishonest intention on the part of the petitioners at the beginning of the transaction or not because it is this dishonest intention which if found in existence at the time of threshold itself then it will amount to a criminal offence or breach of trust or a cheating provided other conditions are satisfied. The word 'dishonestly' has been defined in Section 24 of the Indian Penal Code as whoever does anything with intention of causing wrongful gain to one person and wrongful loss to other person is to do that thing dishonestly. Therefore, the essential element of dishonest intention is the intention of a person to cause wrongful gain to himself or wrongful loss to

the other person. This dishonest intention can further be gathered only from the circumstances of the each case. So far as **K. Jayaram's** case 134 (2006) DLT 390 is concerned, the grant of anticipatory bail could not be treated as precedent for grant of bail in the present case. Each case has to be decided on its own facts.

18. Coming back to the facts of the present case, prima facie there was a dishonest intention on the part of the present petitioners for committing the offence of cheating or breach of trust as the case may be in the present case. This is on account of the following three reasons :

- i) The petitioners represented themselves that they had a licence to import Heeng and Kaju from CIS country while as they had none.
- ii) The petitioners on the basis of this representation obtained an advance of Rs.10 crores and they were under an obligation to furnish a bank guarantee or a cash security of an advance equivalent to 10% of the advance taken by them which comes to Rs.1 crore. The petitioners issued a cheque for a sum of Rs.1 crore in favour of the complainant and the said cheque was dishonoured.
- iii) The funds which were given to the petitioners for the purpose of import of Kaju and Heeng were diverted either by the petitioners or by Rital Impex or Adarsh Bhushan Mitra, co-accused. The aforesaid facts clearly

showed that the petitioner had dishonest intention at the threshold itself to cheat the complainant which is a cooperative society and thus dealing with the public money. The observations of the Apex Court with regard to conversion of civil transaction into criminal with a view to pressurize the opposite side would not be applicable to the present case because it was not a dealing between two private parties but one of the parties who was subjected to pecuniary loss was a body dealing with public funds and secondly there was existence of dishonest intention at threshold. Thus the judgments which have been relied upon by the learned counsel for the petitioners, namely **Anil Mahajan and K. Jayaram's** (supra) are not applicable to the facts of the present case.

19. The second submission of the learned counsel for the petitioner that he cannot be denied the benefit of anticipatory bail as he has complied with the terms and conditions of giving a sum of Rs.8.5 crore or so or that the request for custodial interrogation at this belated stage is an afterthought also does not impress the Court. The entire facts of the case not only shows dishonest intention at the threshold of commission but even after registration of the FIR and during the pendency of the cases, the effort of the petitioners seem to be actuated by dishonest intention. This is on account of the fact that firstly the

petitioner allured not only the complainant but also gained the sympathy of the Court by offering to settle the matter by offering to liquidate the amount and made payments allegedly to the tune of Rs.8 crore approximately or so, but after having made the part payment, the petitioner created all kinds of hurdles which one may call obstruction or resistance in order to implement the settlement dated 3rd May, 2007 entered into with the complainant to have the entire outstanding amount liquidated. It may be pertinent here to mention that there is no dispute about the fact that at the time of arguments the petitioners had to liquidate approximately Rs.70 to Rs.75 crores while as only a part of the said payment was made by them. The resistance which was created was by way of filing objections not only to the advertisements floated by the Court Commissioner but also by filing repeatedly applications to stall the auction of the properties. The High Court has been converted by the petitioner into an office of an accountant as to what payment has been received or not, whether obstruction is caused or not. This is not the purport of the application of within the scope of the powers of the Court to supervise the settlement between them. Therefore, irrespective of the terminology which the petitioner may chose to use, the fact of the matter remains that the petitioners after having signed the agreement did not seem to be bona fide in their intention to get it implemented and were only trying to gain

time or avoid their obligation which does not entitle them to any discretionary relief for extending or confirming of anticipatory bail on them.

20. The last point which has been raised by the petitioners is regarding the custodial interrogation. Their contention that custodial interrogation is not required or that this is only an afterthought, cannot be accepted. The Supreme Court in **Anil Sharma's** case 1997 (7) SCC 187 categorically approved the efficacy of custodial interrogation by observing that it makes lot of difference when a person who is interrogated has the protection of his liberty and in such a situation he is insulated by pre-arrest bail order, his interrogation becomes more of a ritual than an effective tool to lead to the trail of crime as compared to an interrogation which is done in custody where there is nobody around the accused where effective results are yielded. The relevant observations of Anil Sharma's case are reproduced as under :

“6. We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well ensconced with a favourable order under Section 438 of the Code. In a case like this effective interrogation of a suspected person is if a tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would

reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third-degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders.”

21. For the reasons mentioned above, I am of the considered opinion that merely because the petitioners have paid a part of the loan amount does not entitle them to anticipatory bail as a matter of right. This was a matter of discretion for the Court to grant them anticipatory bail, however I find it difficult to exercise the said discretion in their favour on account of the reason that after having obtained the interim bail, the petitioners have neither cooperated with the investigating agency, nor have they tried to sincerely liquidate the entire outstanding amount which is to the tune of Rs.75 crores approximately despite having entered into an agreement to do so. I accordingly feel that this is not a fit case where the benefit of anticipatory bail should be given on them. Accordingly, the application is dismissed, however keeping in view the fact that the petitioners were on interim anticipatory bail from 27th October, 2007 which is well over two years, I feel that it is a fit case where despite the dismissal of the anticipatory bail application of the petitioners, the petitioners must be given 15 days to surrender before the

learned Metropolitan Magistrate and seek such redressal of their grievance by filing bail application as it may deem fit and simultaneously the prosecution may also, if it so desires, apply to the Court concerned for custodial interrogation of the petitioners. This order has been passed keeping in view the fact that the Courts are closing on account of new year and will be opening only on 6th January, 2010.

22. Accordingly, the application is dismissed.
23. Expression of any opinion given hereinbefore shall not be treated as an opinion expressed on the merits of the case.

DECEMBER 23, 2009
RN/skw

V.K. SHALI, J.