

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

+ **BAIL APPL. NO.1135/2011**

Date of Decision : 18.8.2011

HARISH KATHURIA & ANR.

..... Petitioners

Through: Mr. R.P.Luthra, with
Mr.Vikas Chadha and
Mr.Rahul Singh, Adv.

Versus

STATE

..... Respondent

Through: Mr. Naveen Sharma,
APP
Mr.B.S.Dhir, Adv. for
Respondent no.2

CORAM :

HON'BLE MR. JUSTICE V.K. SHALI

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. (Oral)

1. This is the 7th application rather seventh attempt by the petitioners to obtain the anticipatory bail.
2. At the outset it must be stated that the petitioners have

indulged in the gross abuse of the processes of law and therefore, deserve to be dealt with heavily for misusing the processes of law of the Court.

3. Briefly stated the facts given by the learned Sessions Judge in order dated 01.11.2010 are as under:

"1. The present case has been registered under sections 406/409/420/120B IPC on the basis of a complaint dated 20.05.2010 filed by the complainant- Shri Ashok Verma. It is stated that complainant is resident of England UK and he had entered into a collaboration agreement with the accused persons whereby the parties had agreed to construct three multiplexes at 2nd and 3rd floor in the name of Harsha K3C Mall at P1, Sector 12, Karnal, Haryana. It is stated that the complainant, his friend and relatives made a total payment of ₹3,26,82,931/- by way of cheques and DDs between 04.10.2006 to 09.09.2008 in favour of M/s Harsha Associates Pvt. Ltd. i.e. a company of accused persons which owning commercial land at Karnal on which the multiplex was to be built. It is also stated that on 30.06.2008 the parties had executed written collaboration agreement wherein the accused persons had admitted receipt of payment made by the complainant and admitted that both parties have invested for multiplex land, constructions gadgets, equipments and other assets required for running multiplex cinema at floor no. 2nd and 3rd of the complex and share of complainant was calculated at 35% of total multiplex super area of 22,000 sq. ft. It is alleged that accused persons were neither executing the registered deed in respect of 35% share of the

complainant the said multiplex nor returning amount to the complainant.

2. It is also alleged that the complainant has now come to know that accused persons had earlier entered into an agreement with one M/s Techsoft Global Ltd. on 18.09.2005 for selling out the entire second and third floor along with roof rights in the same complex for total amount of ₹4.75 crores and an initial payment of ₹11 lakh was made by M/s Techsoft Global Ltd. in favour of M/s Harsha Associates Pvt. Ptd. through a cheque dated 18.09.2005 which was encashed by M/s Harsh Associates Pvt. Ltd. on 20.09.2005, it is stated that a dispute arose between accused persons and said M/s Techsoft Global Ltd. in the court of Civil Judge (Jr. Division), Karnal, Haryana. It is further stated that vide order dated 19.10.2006 Ld. Civil Judge in that suit restrained the accused persons to alienate the suit property i.e. multiplexes at 2nd and 3rd floor in Harsha K3C Mall situated at P1 Sector 12 Karnal, Haryana by way of sale/mortgage charge/lien gift etc which order was confirmed by appellate court and by the Hon'ble high Court of Punjab & Haryana in Crl. Rev. No. 22/07 and 23/07.

3. The case of the complainant in the complaint is that the fact of pendency of litigation in respect of subject matter was not disclosed to the complainant by the accused persons and complainant along with family members and relatives paid a sum of ₹3,26,82,931/- between 04.10.2006 to 09.09.2008 to the accused persons and thus, the accused persons are guilty of committing offence of cheating. It is also stated that when the complainant asked to return of the money, the accused persons obstructed the

entry of the complainant in the premises.

4. It is also alleged that the amount received by the accused persons from the complainant was to be utilized towards liquidating liability of the accused persons towards HUDCO but this was not done by the accused persons."

4. On the basis of the aforesaid allegations, FIR no.121/2010, under Section 406/409/420/120-B IPC was registered by the Economic Offences Wing, Delhi Police and the matter is still at the investigation stage.

Ist Anticipatory Bail Application

5. The Petitioners apprehending their arrest, filed an application for grant of anticipatory bail before the Court of Sessions which was disposed of on 01.11.2010 by an elaborate order running into almost five pages, where it was observed that the collaboration agreement dated 30.6.2008 which was entered into by the petitioners was silent about the pendency of the civil suit between the petitioner's company and M/s Techsoft Global Ltd., in which the petitioners were restrained from creating any third party interest. Yet they had entered into collaboration agreement with the complainant and induced them to pay a total sum of ₹3.26 crores.

Consequently, the application for grant of anticipatory bail was rejected.

IIInd Application

6. (a) The petitioners feeling dissatisfied, filed second application for grant of anticipatory bail in the High Court bearing Bail Application no. 1762/2010 which came up for hearing on 12.11.2010. On the said date the matter was adjourned on the request of the counsel for the petitioners for obtaining instructions from his client and the matter was renotified for 15-11-2010. Although, the notice was issued to file the status report. On 15-11-2010 the counsel for the petitioners sought adjournment on the ground that the petitioners are willing to arrive at a negotiated settlement with the complainant. The complainant was present in the Court along with his counsel and the matter was adjourned to 24-11-2010.

(b) On 24-11-2010 adjournment was sought on the ground that the parties are still negotiating and the matter was further adjourned to 16-12-2010.

(c) On 16-12-2010, the learned counsel representing the petitioners stated that the brief has been taken back by the

petitioners and he has not received any instructions in the matter and consequently he was not able to assist the court on merits.

(d) So far as the, counsel for the complainant is concerned, he made his submission that despite the assurance having been given by the petitioners that they are willing to explore the possibility of arriving at a settlement no concrete proposal was offered by the petitioners and it was alleged that the petitioners are deliberately dragging the matter for one reason or the other.

(e) It was also pointed out that Civil Judge, Karnal had restrained the petitioners from creating any third party interest in the property in question on 19-10-2006 which order was upheld by Punjab and Haryana High Court. This was much prior to the date of entering into the collaboration agreement yet the petitioners received a sum of ₹3,26,82,931/- from the complainant for agreeing to transfer the 2nd and 3rd floor of the said property or the interest therein in favour of the complainant, in gross violation of the injunction order, when they could not have done so. Having regard to the aforesaid facts and circumstances of the case,

the application was dismissed.

(f) No doubt, when this order was passed the counsel for the petitioners stated that his brief has been taken back, but that does not make it an order of dismissal in default or non-prosecution. It was an order passed on merits. It is a common knowledge that ordinarily while granting or refusing the bail, the Court refrain from examining the statement of the witnesses or other evidence gathered, minutely, as it may prejudice either of the parties.

IIIrd Application

7. Thereafter, the petitioners made a 3rd attempt for grant of anticipatory bail by filing bail application bearing No.1964/2010 which was dismissed as withdrawn while reserving the right to seek their remedies in accordance with law. Since, copy of the said application is not placed on record it is not clear as to whether the factum of the rejection of the earlier two bail applications was mentioned there or not. Further, our own High Court in case titled **Rajkumar Vs. State (NCT of Delhi)** 128 (2006) DLT 264 has held that as a matter of fact, dismissal of bail application as withdrawn should be treated as rejection on merits because as a matter

of practice, the counsel withdraws the bail application only if he finds that the Court is not inclined to exercise the discretion in his favour.

IV Application

8. (a) Thereafter, the petitioners filed an application bearing Crl.M.A.no. 325/2011 in bail application no. 1762/2010 which had already been dismissed on merits for revival of the bail application (IInd application) on the ground that the said bail application was not dismissed on merit as the counsel on 16-12-2010 had stated that he had no instructions. Though notice on the said application was issued by this Court but perusal of the order dated 16-12-2010 does not show that the said order was not passed on merit. As has been observed by me herein above that it was a dismissal on merits and it was a mistake in my view to have entertained such an application. The application ought to have been dismissed summarily leaving the petitioners to seek such other remedy as is permissible in law.

(b) Be that as it may, the petitioners were successful in reviving the bail application no. 1762/2010 by getting the notice issued and thereafter stating that the petitioners are

prepared to settle the matter with the complainant in order to purchase peace. It seems that it was perhaps the offer of the petitioners to settle the matter that may have prompted the Court to issue the notice on the application.

(c) The matter was taken up on 12-01-2011 wherein the counsel for the respondent/complainant made a statement that the petitioners have informally agreed to pay to the complainant a total sum of ₹7.35 crores towards full and final settlement of the inter se disputes and the learned counsel for the petitioners also stated that the petitioners are ready and willing to deposit 50% of the said amount i.e. ₹7.35 crores in the Registry without prejudice to their rights and contentions. The learned counsel for the petitioners further stated that ₹20 lac shall be deposited in the Registry on 12-1-2011 itself and additional sum of ₹30 lacs shall be deposited on next day i.e. 13-1-2011 and remaining amount shall be deposited in three equal installment of ₹1 crore each. First installment was payable on 01-02-2011. The matter was adjourned to 2nd February, 2011.

(d) On 2nd February, 2011, the learned counsel for the

petitioners stated that an amount of ₹50 lacs stands deposited with the Registry and insofar as the first installment for sum of ₹1 crore payable by the petitioners on or before 01-02-2011 is concerned, he has got a demand draft prepared and the same shall be deposited in the Registry during the course of the day. The matter was referred to the Mediation Centre in order to arrive at a settlement and it was adjourned to 03.03.2011 with a view to report about the settlement. On 03.03.2011, it was observed by the Court that the second installment of ₹1 crore which was due and payable on 01.03.2011 could not be deposited by the petitioners. Instead, an application bearing CrI.M.A. no.2451/2011 was filed seeking modification of the order dated 12.01.2011 on the ground that the petitioners are facing a financial crunch and therefore, they are not in a position to deposit the balance amount of ₹2 crores. The said miscellaneous application was dismissed with observation that there is no justification for entertaining such an application for modification of the order in less than two months. Obviously, and rightly so, the application was not to be entertained as the petitioners, right from the first day, were using flip flop

method to obtain anticipatory bail. The matter was adjourned to 18th March, 2011.

(e) On 18th March, 2011, the petitioners made a fresh attempt and sought further time to deposit the second installment of ₹ 1 crore. The petitioners were granted indulgence by the Court and an opportunity was granted to deposit a pay order of ₹25 lacs on or before 22.03.2011 and the balance amount of ₹75 lacs before the next date of hearing. The matter was adjourned to 06.04.2011 with the observations that in case the second installment is not deposited by the petitioners, they shall be present on the next date.

(f) Though by 06.04.2011 the amount of ₹25 lacs was deposited by the petitioners but the balance sum of ₹75 lacs as undertaken by them was not deposited and consequently the matter was adjourned to 02.5.2011 for direction as the learned counsel for the petitioners once again requested for listing the matter before the learned mediator as the petitioners were willing to explore the possibility of arriving at a negotiated settlement with the complainant.

(g) On 2nd May, 2011, the learned counsel stated that the settlement talks between the parties have failed and balance

amount of ₹75 lacs could not be deposited and consequently, the matter was adjourned to 30th May, 2011.

(h) On 30th May, 2011, the learned counsel for the petitioners sought the permission to withdraw the petition with liberty to approach the 'Trial Court'. Accordingly, the petition was dismissed as withdrawn with liberty to approach the 'Trial Court'.

Vth Application

- 9(a). It may be pertinent here to observe that the petitioners instead of approaching the trial court made a fresh attempt by filing an application for grant of anticipatory bail under Section 438 Cr.P.C. before the court of Sessions and it was mentioned in the said application that this is a first application for grant of anticipatory bail though after some submissions it was stated that due to the inadvertence, the application has been shown as the first application for grant of anticipatory bail though four attempts had already been made by the petitioners before the Court of Sessions and the High Court.
- (b) It may be pertinent here to mention that the order dated 30.05.2011 clearly granted permission to withdraw the application with liberty to approach the 'Trial Court'.

(c) The offences under Section 406, 409, 420 and 120B IPC which was registered against the petitioners are offences which can be tried by the Metropolitan Magistrate and therefore, the said Court would be a 'Trial Court'. Meaning, thereby that the application was permitted to be withdrawn with the liberty that the petitioners would either approach the Trial Court that is the Magisterial Court or surrender before the said Court in terms of Section 437 Cr.P.C. and apply for grant of regular bail.

(d) Section 437 clearly lays down that a person who is brought or who appears of his own can apply for grant of regular bail. Seen in this light when the petitioner sought the withdrawal of the application with liberty to go to the 'Trial Court', obviously, it was clear that he would surrender before the Trial Court and apply for regular bail. On the contrary, the petitioners tried to act smart and instead of appearing before the trial court they chose to file an anticipatory bail application before the Court of Sessions and tried to mislead the Court by showing it as first bail application when they fully knew that this is not so.

Vith Application

10. After withdrawal of the so called misleading first bail application another anticipatory bail application was filed on 16.06.2011 and after arguments, the said petition was permitted to be withdrawn. It has been observed by our own High Court in **Rajkumar's case** (supra) that when a counsel feels that the Court is not inclined to give the relief, he seeks to withdraw the petition/application as he does not want to suffer an adverse order but such disposal are in effect on merits.

VIIth application

11. Still not feeling satisfied the petitioners filed yet another anticipatory bail application before the Court of Sessions which was dismissed on 28.7.2011 by Ms. Sarita Birbal, learned Additional Sessions Judge by a long speaking order. The learned Additional Sessions Judge has also taken note of the repeated bail application having been filed by the petitioners apart from the fact that they are not keeping their assurances given to the Court to make the payment.

VIIIth Application

12(a) The petitioners have now chosen to file the present petition before the High Court for grant of anticipatory bail which is

the 8th attempt in succession without there being any change of circumstances between the first and the last application. It has been contended by the learned counsel for the petitioners that the present application for grant of anticipatory bail is still maintainable on account of the fact that the criminal law cannot be made an engine of oppression. It is contended that the dispute between the petitioners and the complainant is essentially a civil dispute and therefore, they deserve to be enlarged on anticipatory bail. It was also contended that merely because the petitioners or their counsel could not appear earlier, the correct facts should not debar the consideration of the present bail application.

(b) Learned counsel for the petitioner sought to place reliance on the judgment of the Apex Court in case titled **Madhavrao Jiwaji Rao Scindia and another Vs. Sambhajirao Chandrojirao Angre and others** AIR 1988 Supreme Court 709

(c) I have gone through the judgment. In the aforesaid judgment the question which was before the Court was whether a complaint which was registered against the trustee and the office bearers of a trust for offences under Section

406, 467 IPC deserves to be quashed in the facts and circumstances of the said case or not. The Apex Court had observed that the Court cannot be utilized for any oblique purpose and where in the opinion of the Court, chances of an ultimate conviction are bleak, no useful purpose is likely to be served by allowing a criminal prosecution to continue, therefore, the FIR was quashed.

13. The judgment cited by the learned counsel is not applicable to the facts of the present case as there is a distinction between the quashing of an FIR and the grant of anticipatory bail. Different considerations are to be borne in mind while considering these two separate reliefs. Therefore, this contention of the petitioners is without any merit. So far as the other two submissions, the criminal law being used as an engine of oppression or the dispute being civil in nature, are concerned, they are only a desperate and crude attempt of the petitioners to insulate their liberty which cannot be permitted to be done by raising these frivolous and belated pleas. On the contrary, the conduct of the petitioners had been highly reprehensible. Firstly, by cheating the complainant, an NRI and then by repeatedly filing applications

for grant of anticipatory bail on one pretext or the other without there being any change in circumstances. The petitioners are harbouring an impression that merely because they have the money and the resources and thereby, frequently changing the counsel they can come out of the dragnet of the criminal law. The conduct as well as the modes adopted by the petitioners is nothing but gross abuse of the processes of law. The petitioners have wasted valuable time of the Court. It is this kind of frivolous petitions which have clogged the arteries of justice and consequently, the cases where the accused are in custody, they get relegated to the background for want of engaging counsel or proper legal assistance.

14. The power to grant anticipatory bail is concurrent both with the Court of Sessions and the High Court. As a matter of practice, the counsel files an application before the Court of Sessions and on not finding favour there, a second application is immediately filed in the High Court. Successive bail applications can be filed as has been held in the catena of judgments but then it has been observed that there must be change in circumstances which warrant fresh consideration of

the application. Successive bail applications without there being any change in circumstances is not only to be deprecated but is in effect a gross abuse of the processes of law which must be visited with some amount of sanction by way of cost for wasting the time of the Court. There are cases of persons who are languishing in jail for wanting their appeals to be heard for want of time while as unscrupulous persons like the petitioners, who have embarked on a forum shopping or rather be called a bench hopping, are wasting the time of the Court.

15. Keeping in view the aforesaid facts, I feel that once the bail application is rejected by the court of sessions the accused may file second bail application in the High Court without there being any change in circumstances but after having availed of the aforesaid two remedies, the petitioner shall henceforth clearly indicate the number of anticipatory bail applications filed by him after taking into consideration the first two applications (one before the Court of Sessions and the other before the High Court). This number must be given irrespective of the forum in which it is filed. Secondly a paragraph should be specifically incorporated in the beginning

or in the last of the application indicating clearly the change in circumstances which has necessitated the filing of the fresh anticipatory bail application after the rejection of the last one.

16. At this stage, the learned counsel for the petitioners has contended that the petitioners or their counsel might have committed blunder in not presenting the facts in proper perspective, but still this Court must examine that on the basis of the allegations made by the complainant, no offence under various Sections in which the FIR was registered, is made out.
17. At this stage, I do not intend to go into the question of examination on the merits of the case, however, keeping in view the fact that this is the 8th attempt of the petitioners seeking grant of anticipatory bail before different Sessions Judge and High Court. Moreover, it is too late now to contend that no case is made out.
18. I feel that the petitioners have indulged in forum shopping and have grossly abused the processes of law. The purpose of Section 438 Cr.P.C. is not to grant anticipatory bail to a person who tries to play with the processes of law. Moreover, the point which is sought to be urged by the learned counsel

for the petitioners should have been urged by him before different Judges when the application was filed.

19. I do not find this as a fit case for exercise of discretion in favour of the petitioners, in enlarging them on bail. On the contrary, I feel that it is a fit case as contended by the learned APP, for custodial interrogation.
20. Normally, while rejecting the anticipatory bail application, Courts do not impose any cost on the petitioner but since it has been pointed out that the application has been filed not only under Section 438 Cr.P.C. but also under Section 482 Cr.P.C, I feel that the Court will be failing in its duty in case the petition is dismissed without imposition of any cost in the light of the facts narrated above.
21. I accordingly, impose a cost of ₹1,00,000/- each on both the petitioners. The aforesaid cost of ₹1,00,000/- shall be recovered from the petitioners by the learned CMM, after expiry of 90 days by invoking Section 421 of Cr.P.C.
22. Expression of any opinion may not be treated as an expression on the merits of the case. Further, a copy of this order be sent to the Registrar General of this Court to bring it to the notice of the Deputy Registrar (Filing) so that in future

anticipatory bail contains the requisite information as stated above.

23. Dismissed.

V.K. SHALI,J

AUGUST 18, 2011
B/RN