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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 07th February, 2014

\+ **CRL.M.C.1635/2013**

STATE ..... Petitioner

Through: Mr. Dayan Krishnan, ASC with Ms. Manvi Priya, Advocate

versus

RAJESH GOSAIN & ANR. ..... Respondent

Through Mr. Mukesh Kumar, Insp./ Cyber Cell/EOW.
Mr. Sudhir Nandrajog, Sr. Advocate with Mr. Anurag Ahluwalia & Mr. Prashant Ghai, Advocates for R-2

CRL.M.C.1012/2013 & Crl.M.A.3158/2013

VIJAY GOVIND ..... Petitioner

Through: Mr.Aman Lekhi, Sr. Advocate with Mr. Rajat Wadhwa, Advocate

versus

STATE & ANR. ..... Respondent

Through: Mr. Dayan Krishnan, ASC with Ms. Manvi Priya, Advocate
Mr. Mukesh Kumar, Insp./ Cyber Cell/EOW
Mr. Sudhir Nandrajog, Sr. Advocate with Mr. Anurag Ahluwalia & Mr. Prashant Ghai, Advocates for R-2

CRL.M.C.1022/2013 & Crl.M.A.3187/2013

VIJAY GOVIND ..... Petitioner

Through: Mr. Aman Lekhi, Sr. Advocate with Mr. Rajat Wadhwa, Advocate

versus

STATE & ORS. ..... Respondent

Through: Mr. Dayan Krishnan, ASC with Ms. Manvi Priya, Advocate
Mr. Mukesh Kumar, Insp./ Cyber Cell/EOW
Mr. Sudhir Nandrajog, Sr. Advocate with Mr. Anurag Ahluwalia & Mr. Prashant Ghai, Advocates for R-2

CORAM:
HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. Vide this common order, I shall dispose of Crl.M.C. No.1635/2013, Crl.M.C. No. 1012/2013 and Crl.M.C. No. 1022/2013 as Crl.M.C. No. 1635/2013 has been filed by the State u/s 482 Cr.PC. r/w Section 439(2) Cr.P.C. seeking setting aside of order dated 26th February, 2013 passed by learned Additional Sessions Judge, New Delhi whereby the respondents were granted anticipatory bail in case FIR No. 154/2011 registered at PS Economic Offences Wing u/s 66/66C Information Technology Act, 2000 r/w Section 408/420/120B/IPC whereas Crl.M.C.No.1012/2013 and Crl.

M.C.No.1022/2013 have been filed by the complainant against respondent No. 2 seeking the same relief. For the sake of convenience, I shall take up Crl.M.C. No.1635/2013 filed by the State.

2.1. It is the case of the petitioner that FIR No.154/2011 came to be registered on the complaint of Mr. Vijay Govind Saxena, General Manager (HR), M/s. Vogueserv International Pvt. Ltd. alleging that their ex-employees, namely, Mr. Rajesh Gosain, Mr. Alok Gupta, Mr. Abhishek Arvind and Mr. Mohit Kothiwal had committed theft of data by way of unauthorised access to the computer system, network and e-mails of the company and also took wrongful possession of sensitive and confidential information entrusted to them in their capacity. It was further alleged that the aforesaid persons diverted business from Vogueserv International Pvt. Ltd. to their newly formed company.

2.2. During the course of investigation, raids were conducted at the residential as well as office premises of the Respondents. From Respondent No.1 two hard discs, one laptop, five mobile phones, three CDs and seven DVDs were seized. From Respondent No.2 one hard disc, and from their office located at 101, Kundan Kutir, Ashram Chowk two laptops and one mobile phone were seized.

2.3. The data so seized was sent to the CFSL on 27.8.2012. The CFSL provided its report in respect of the said data on 26.1.2013. On comparison and analysis of the data recovered from the various exhibits sent to the CFSL, it is found that certain data belonged to the complainant company and should not have been present in the system of the accused persons.

2.4. It is evident that the accused persons had copied the information through pen drive or external hard disc from the system of the complainant company to their personal system with the objective of using the same in their own business. The pen drive and external hard disc through which the accused persons would have used to unauthorizedly copy/download the data is still in the possession of accused persons and must be recovered.

2.5. During investigation, from the *e-mails* recovered, it is found that the newly incorporated company of the accused persons was dealing with the clients of the complainant company while still in its employment. The business of the complainant company is such that being a trading agency it works as mediator/agent between foreign buyers and Indian manufacturers. The complainant company as well

as the company newly incorporated by the Respondents herein inspect for quality control the goods being manufactured by Indian vendors on behalf of the foreign buyers. Therefore, the contacts, the data and earned relationships become highly important.

2.6. The learned Trial Court while granting anticipatory bail to the respondents herein overlooked the fact that a strong prima facie case is made out during investigation and that to make further progress in the investigation, custodial interrogation of the respondents is necessary.

2.7. The learned Trial Court also failed to appreciate that offences under Sections 408, 420 and 120B IPC were added only in October, 2012 and the report of the CFSL was received in January, 2013.

2.8. It is submitted that though the Respondents herein have joined investigation, they have not fully cooperated. The Respondents herein have failed to deposit the pen drives/hard drives for verification or provide a satisfactory reply in regard thereto.

2.9. In light of the above, it is submitted that cancellation of bail is necessary for the Investigating Agency to effectively conclude the investigation. While a *prima facie* case is made out against the

Respondents herein during investigation, to discover the methodology adopted by the Respondents in transferring the data to their laptops/hard discs, custodial interrogation is necessary.

2.10. It is submitted that in a case of cyber crime custodial interrogation is imperative as only the accused persons would be in a position to disclose the full nature of the conspiracy. Moreover, it is only after the report of CFSL and analysis of the data is received that further investigation can be made. It is further submitted that in all likelihood, the accused persons are likely to tamper with evidence.

3. The applications have been contested by the respondents by filing separate replies.

4. I have heard Sh. Dayan Krishnan, Additional Standing Counsel for the State, Sh. Aman Lekhi, Sr. Advocate duly assisted by Sh. Rajat Wadhwa, Advocate for the complainant and Sh. Sudhir Nandrajog, Sr. Advocate assisted by Mr. Anurag Ahluwalia, Advocate for the respondents and have perused the record.

5. It is submitted by the learned Additional Standing Counsel for the State that the State is seeking setting aside of the order granting anticipatory bail to the respondents, inasmuch as, the learned Trial

Court has passed the impugned order without due consideration of the submissions made by the State. Learned Trial Court failed to appreciate that non-bailable offences were added to the FIR only in October, 2012 and the report of the CFSL was received in January, 2013. During investigation, upon analysis of the data received from the CFSL, it was found that the laptop and hard disk recovered from the respondents contained unauthorized data belonging to the complainant company. In a case involving cyber crime, it is only after seizure, retrieval and analysis of huge amounts of data, investigation can progress.

6. In exercise of powers u/s 482 Cr.P.C. r/w Section 439(2) Cr.P.C., the Court has the power to set aside the order granting anticipatory bail to correct the arbitrary exercise of discretion by the learned Trial Court.

7. Reliance was placed on ***Puran vs. Rambilas***, (2001) 6 SCC 338 where it was observed as under:-

> "11. *Further, it is to be kept in mind that the concept of setting aside the unjustified illegal or perverse order is totally different from the concept of cancelling the bail on the ground that accused has misconducted himself or because of some new facts requiring such cancellation. This position is made clear by this Court in*

Gurcharan Singh v. State (Delhi Admn.), *(1978) 1 SCC 118. In that case the Court observed as under:-*

> *"If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that Court. The State may as well approach the High Court being the superior Court under S. 439(2) to commit the accused to custody. When however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existing, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-a-vis the High Court."*

8. It was further submitted that custodial interrogation is necessitated in cases involving Information Technology as the mode of transfer, the extent of transfer and details of all the transferees can only be obtained from the unauthorized transferor. The case of the complainant is that the accused diverted huge amount of information having commercial value from the complainant company without any authority taking advantage of the association, the accused had with the complainant company. Moreover, the respondents have failed to cooperate in the investigation. Most evasive replies were received in the interrogation which was specially conducted on the directions of

the Court. Bank Account details were not given on one pretext or the other. It was only in August, 2013, i.e., 2 years after the first raid and seizure that one of the respondents deposited a laptop which has been sent for analysis. The conduct of the respondents and the difficulties faced by the Investigating Agency during investigation necessitate custodial interrogation of the respondents.

9. Learned senior counsel for the complainant also submitted that while granting anticipatory bail, the learned Trial Court has ignored the material evidence available on record and gravity and seriousness of the offence. Furthermore, in a case of cyber crime, custodial interrogation is imperative as only the accused would be in a position to disclose full nature of conspiracy. Moreover, co-accused Pankaj Johri, who was not even an employee of the complainant company, was arrested and released on bail only after 4-5 days. Further, the witnesses in the case are likely to be employees of the company who can be easily influenced by the accused being former employees and their release on bail even before the conclusion of the investigation can adversely affect the case.

10. Reliance was placed on ***State vs. Anil Sharma,*** (1997) 7 SCC 187, where Hon'ble Supreme Court held that custodial interrogation is qualitatively more elicitation oriented then questioning a suspect who is well ensconced with favourable order under Section 438 of Code. In a case like this effective interrogation of the suspected person is of tremendous advantage in disinterring many useful information and also material which could 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 will reduce to a ritual.

11. Reliance was also placed on ***Anwari Begum vs. Sher Mohammad & Ors.***, (2005) 7 SCC 326, wherein it was held that though detailed examination of the evidence and elaborate documentation of the merits of the case is to be avoided by the courts while passing orders on Bail Applications, yet a court dealing with the Bail Application should be satisfied as to whether there is prima facie case, but exhaustive exploration of the merits of the case is not necessary. The Court dealing with the application of Bail is required

to exercise its discretion in a judicious manner and not as a matter of course.

12. ***Narendra K. Amin vs. State of Gujarat***, (2008) 13 SCC 584 was also relied upon wherein a three judge bench of the Hon'ble Supreme Court observed that when irrelevant materials have been taken into consideration the same makes the order granting bail vulnerable. If the order is perverse, the same can be set aside at naught by the superior court.

13. ***Puran*** (supra) which was also relied upon by the Additional Standing Counsel for the State for submitting that anticipatory bail granted to the respondents is liable to be cancelled.

14. These submissions were countered by learned senior counsel for the respondents. It was submitted that the respondents were the employees working at the post of Merchandiser and Senior Merchandiser of the complainant company. They wanted to leave the complainant company and start their own business but were threatened by the complainant company. They had to resign from the service in the second week of July, 2011 on account of bad behaviour of senior staff members. While doing so, they did not breach any

condition of agreement of the department. Apprehending involvement in false case, the respondents filed complaint against the Managing Director of the complainant company on 1st August, 2011 with PS Gautam Budh Nagar, UP. On 19th August, 2011, the present FIR was registered against the respondents u/s 66/66C of IT Act, at the instance of the company. On 20th August, 2011, the police seized all the laptops, mobile phones, hard disks, CDs, and DVDs from the residence as well as the offices of respondents. During the whole process of seizure of materials, respondents fully cooperated with the investigation and did not show any kind of reluctance or apprehension. A 'Look Out Circular' was issued against the respondents by the Investigating Officer against which writ petitions were filed, however, the same was dismissed by this Court as the 'Look Out Circular' issued against the respondents was discontinued by the investigating agency. Thereafter, an anticipatory bail application was moved before the learned Sessions Judge. However, the same was disposed of with the observation that there was no occasion for admitting the accused on bail as the FIR has been registered under bailable offences. Respondent No.1 fully co-

operated and showed his intention to join the investigation on numerous occasions whenever required by the Investigating Officer. The complainant company filed a writ petition before this Court for amendment of the offences in the FIR. A Civil Suit was also filed for permanent injunction and mandatory injunction and for recovery of money amounting to Rs.25,00,000/- only. The writ petition was disposed of in view of the statement of Investigating Agency that investigation is also being done after alleged offences under Section 408/420/120B/34 IPC were added.

15. It was further submitted that during the pendency of the writ petition, various status reports were filed by the police wherein it was categorically stated that there is not enough evidence against the respondents. Moreover, the material which was seized was sent to CFSL and the analysis revealed that no clear information was given by CFSL as data cannot be extracted, hence, the material again was sent to CFSL for analysis. Apprehending arrest, respondents filed an application for grant of anticipatory bail before the learned Sessions Judge. Vide an interim order, respondents were granted anticipatory bail and were further directed to join the investigation. In pursuance

to the order, the respondents sent letter to the Investigating Officer and to the higher ranked police officials for joining investigation. However, no response was given by the Investigating Officer nor they were called to join the investigation. A status report dated 12th February, 2013 was filed. The respondents personally visited the office of the Investigating Officer and voluntarily made themselves available for investigation. The Investigating Officer got some questionnaires filled by respondents but did not provide a copy of the same despite request.

16. Another status report was filed by the Investigating Officer on 20th February, 2013 wherein it was stated that some information data has been found on the computer systems of the respondent No. 1 and he has copied the information on to his hard drive/pen drive, which are yet to be recovered. In the earlier status report, there was no such mention of hard drive or pen drive. Keeping in view the fact that all the seizures have been made and the respondents had undertaken to cooperate with the Investigating Agency as and when required, vide impugned order dated 26th February, 2013, anticipatory bail was granted to the respondents. It is submitted that respondents have fully

cooperated and joined the investigation on numerous occasions whenever they were required by the Investigating Officer which is fairly conceded by the petitioners in the petitions. From 30th March, 2012 to 9th February, 2013, respondents sent a total of 17 letters to various police officials including the Investigating Officer showing their intention to join the investigation.

17. Subsequent to the grant of anticipatory bail, 15 letters were sent between 5th March, 2013 to 29th September, 2013 to various police officials including the Investigating Officer pertaining to joining of investigation by them. On four different occasions, respondents filled the questionnaires as required by the Investigating Officer. The respondents have never misused the concession of anticipatory bail. There is no need for custodial interrogation as alleged. In the status report dated 29th June, 2013, it was alleged that custodial interrogation is required to recover the laptop from respondent No. 2 and also to recover the data/information from respondent No. 1. Vide seizure memo dated 2nd August, 2013, the 'Benq' laptop has already been seized by the Investigating Officer from respondent No.2 and Bank account details of alleged 'Spark Buying Services Pvt. Ltd.' and other

companies has been furnished to the Investigating Officer. In a case of cyber crime, the accused person can be interrogated by the Investigating Officer without taking him in custody. Since the entire evidence is in the nature of documents, hence, custodial interrogation is not required. It is further submitted that in fact the investigation is not being conducted fairly and therefore, even writ petition has been filed by the respondents directing the petitioners to conduct fair investigation in the matter. As regards hard drive/pen drive, it is submitted that neither the respondents were ever asked to deposit any pen drive/hard drive for verification nor they are in possession of the same. It was further submitted that it is not the case of prosecution that there was any exclusive contract between the complainant company and foreign buyers. The information which complainant company claim as trade secrets are not trade secrets as the information was readily available in the public domain and in the absence of any patent or proprietary rights of the company over the alleged trade secrets or confidential information, the said information cannot be said to be trade secrets.

18. Reliance was placed on ***Dolat Ram & Ors. vs. State of Haryana***, (1995) 1 SCC 349 where it was held as under:-

> *"Rejection of bail in a non-bailable case at the initial stage and the cancellation of bail so granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking the grounds of cancellation of bail, broadly (illustrative and not exhaustive) are: interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the Court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial."*

19. Reliance was also placed on ***Samrendra Nath Bhattacharjee vs. State of West Bengal & Anr.*** (2004) 11 SCC 165 where cancellation of bail was sought on the ground of intimidation which was not subsequently proved, hence order of High Court cancelling the bail was set aside.

20. Reliance was also placed on ***Kamaljeet Singh vs. State of Punjab & Anr.*** (2005) 7 SCC 226 and ***Parumal vs. State of Govt. of NCT of Delhi***, 2008 (3) JCC 1631 for submitting that co-accused Neeaj Johri has also been granted anticipatory bail, whose cancellation is not sought by the prosecution. On parity, there is no

ground for cancelling the anticipatory bail granted to the respondents, as such, petitions are liable to be dismissed.

21. We have noted the submissions of learned senior counsel for the petitioners as well as the respondents. In the present case, we are concerned with the question as to whether the order passed by the learned Trial Court in granting anticipatory bail to the respondents was unjustified, illegal and perverse inasmuch as in view of ***Puran*** (supra), this Court has the power under Section 439 (2) Cr.P.C. to set aside an unjustified, illegal or perverse order granting bail. This is an independent ground for cancellation as against the ground of the accused misconducting himself.

22. The present case was registered on the complaint of Mr. Vijay Govind Saxena, GM(HR) of the complainant company dealing in trading/commission agency alleging that their ex employees Mr. Rajesh Gosain, Mr. Alok Gupta, Mr. Abhishek Arvind and Mr. Mohit Kothiwal had committed data theft by way of unauthorizedly assessing the computer system, network and e-mails etc. of the company and also took wrongful possession of some confidential information from the computer system entrusted to them in their

official capacity. It is further the allegation that they diverted the business from the complainant company to their newly owned company, i.e., Spark Buying Services Pvt. Ltd. by way of unauthorized access of *e mail* and computer network system of the complainant company. As per the case of prosecution, Rajesh Gosain, while in service of the complainant company, secretly started the alleged company with other persons. Some purchase orders of the overseas companies, which were supposed to be performed through the complainant company were transferred to the alleged company.

23. As seen above, it is the case of respondent that FIR was registered on 19th August, 2011. On the very next day, i.e., 20th August, 2011, the police seized laptops, mobile phones, hard disks, CDs, DVDs from the residence and office of respondents. Considering the fact that seizure had already taken place, vide impugned order dated 26th February, 2013 anticipatory bail was granted by the Additional Sessions Judge. At the same time, respondents were directed to join investigation. It is the case of the respondent that from 30th March, 2012 to 9th February, 2013, as many as 17 letters were sent by them to various police officials including

Investigating Officer to join investigation. Even after grant of anticipatory bail as many as 15 letters were sent during the period 5th March, 2013 to 29th September, 2013 offering themselves for investigation. On four different occasions, they also filled the questionnaire as required by the Investigating Officer. It is not even disputed by the petitioner that the respondents are not joining investigation. It is only alleged that they are not cooperating in the investigation which fact is disputed by the respondent by submitting that besides filing the questionnaire given to them during investigation, they have also provided requisite information in respect of the bank account details of the company, namely, Spark Buying Services Pvt. Ltd. which shows that no transactions were made in this account. Hence no profit as alleged was made by the respondents. In the status report dated 20th June, 2013, it was alleged that custodial interrogation is required to recover the laptop from respondent No. 2 and to recover the data/information from respondent No. 1. As per the seizure memo dated 2nd August, 2013 'Benq' laptop has already been seized by the Investigating Officer from respondent No. 2, which according to the prosecution, has been sent for analysis. Under the

circumstances, keeping in view the fact that recovery has already been effected, respondents are not only joining investigation as and when required but are also volunteering themselves to join investigation by writing various letters to the Investigating Officer and senior police officials, the impugned order dated 26.2.2013 cannot be said to be illegal or perverse. As held in ***Dolat Ram's*** case (supra), very cogent and overwhelming circumstances are necessary for an order directing cancellation of bail already granted. Further in ***Sidharam Satlingappa Mhetre vs. State of Maharashtra & Ors.,*** 2011 (1) SCC 694, it was observed that where the accused has joined the investigation and is cooperating with the Investigating Agency and is not likely to abscond, custodial interrogation should be avoided.

24. As regards the submission that most of the witnesses are the employees of the company, hence, there is likelihood of their being influenced by the respondents being former employees, the submission does not appear to have substance because the proposed witnesses are still in the employment of the company, therefore, it is very unlikely that they will be influenced by the former employees. In any case, it is only a presumption of the complainant and there is

nothing on record to suggest that during the course of investigation any such instance has come to the notice of the complainant or the Investigating Agency. Above all, complainant has already filed civil suit against the respondent for permanent and mandatory injunction and recovery of money and necessary restraint order has been passed against the respondent thereby safeguarding the interest of the complainant. Moreover, although it is alleged that the complainant has suffered a loss of approximately 40 crores due to acts of the respondents but in the civil suit, relief of recovery of money is confined to Rs.25 lacs only. Further, one of the co-accused Neeraj Johri has also been released on anticipatory bail but neither the State nor complainant is aggrieved by the same as they are not seeking cancellation of his anticipatory bail.

25. Under the circumstances, neither the order of Trial Court granting anticipatory bail can be said to be perverse nor any cogent or overwhelming circumstances exists for cancellation of bail.

26. Before we conclude, we make it clear that the observations made herein are for the purpose of deciding whether the Trial Court was in any way in error in granting anticipatory bail. This order is

being passed on the basis of the material that has been brought on record for that purpose. Needless to state, it is made clear that as and when the trial is conducted, it will be decided on the basis of the evidence which will be brought on record during the course of trial.

27. The petitions are accordingly dismissed. Pending applications, if any, stand disposed of.

SUNITA GUPTA, J

FEBRUARY 07, 2014
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