IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

ANTICIPATORY BAIL APPLICATION NO.2193 OF 2017

MITESH VAGERIYA)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA AND ANR.)...RESPONDENTS

WITH

CRIMINAL APPLICATION NO.1195 OF 2017
IN
ANTICIPATORY BAIL APPLICATION NO.2193 OF 2017

AJAY MURLIDHAR BATHEJA)...INTERVENOR

IN THE MATTER BETWEEN

MITESH VAGERIYA)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA AND ANR.)...RESPONDENTS

WITH

ANTICIPATORY BAIL APPLICATION NO.2196 OF 2017

GURJOT SANDHU)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA AND ANR.)...RESPONDENTS

WITH

CRIMINAL APPLICATION NO.1194 OF 2017
IN
ANTICIPATORY BAIL APPLICATION NO.2196 OF 2017

AJAY MURLIDHAR BATHEJA)...INTERVENOR

IN THE MATTER BETWEEN

GURJOT SANDHU)...APPLICANT
V/s.
THE STATE OF MAHARASHTRA AND ANR.)...RESPONDENTS

Mr.Rahul Rao and Mr.Manish Bohra i/b. Mr.A.S.Khan and Associates, Advocate for the Applicant in ABA No.2193 of 2017.

Mr.Subhash Jha i/b. Ms.Gunjan Thakkar, Advocate for the Applicant in ABA No.2196 of 2017.

Mr.Pranav Badheka i/b. Mr.Amit Ghag, Advocate for the Intervenor in Criminal Application Nos.1195 of 2017 and 1194 of 2017.

Mr.A.R.Kapadnis, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 6th JUNE 2018

P.C. :

1 Both these anticipatory bail applications are listed before this court in view of the Standing Order as well as the

specific order dated 19th December 2017 passed by the Honourable Justice A.S.Gadkari, in the light of the fact that earlier anticipatory bail applications moved by the applicants/accused were decided by this court.

2 Criminal Application Nos.1195 of 2017 and 1194 of 2017 are moved by the First Informant for intervening in the subject anticipatory bail applications. As the applications are moved by the First Informant, the same are allowed by permitting the learned counsel for the First Informant to advance his arguments opposing the anticipatory bail applications.

3 Anticipatory Bail Application No.2193 of 2017 is filed by applicant/accused Mitesh Vageriya whereas Anticipatory Bail Application No.2196 of 2017 is filed by applicant/accused Gurjot Singh Sandhu. Crime No.252 of 2017 was initially registered against them with Police Station Azad Maidan and the same is now investigated by the Senior Inspector of Police, Economic Offences Wing, vide its C.R.No.61 of 2017 for offences punishable

under Sections 408, 420, 465, 467, 468, 471, 477A and 120B of the Indian Penal Code (IPC) and under Section 65 of Information Technology Act, 2000. The First Information Report (FIR) came to be registered at the instance of First Informant Ajay Batheja, the Chief Executive Officer of M/s.Xalted Information Systems Pvt. Ltd. (hereinafter referred to as the "Xalted" for the sake of brevity).

4 Applicant/accused Mitesh Vageriya was working as Implementation Manager from the year 2006 whereas applicant/accused Gurjot Sandhu was working as Assistant Manager, Pre-Sale, with the Xalted. In September 2015, applicant/accused Mitesh Vageriya resigned whereas in April 2016, applicant/accused Gurjot Sandhu resigned from the Xalted and they both had joined a Company named Pert Telecom Sales Pvt. Ltd. (hereinafter referred to as Pert for the sake of brevity) of which Priyanka Vageriya – wife of applicant/accused Mitesh Vageriya and Impaldeep (brother-in-law of applicant/accused Gurjot Sandhu) are the Directors. They both were running

another partnership firm in the name and style as Smart World Intel Solution (hereinafter referred to as Swis for the sake of brevity). This partnership firm of both applicants/accused was dealing with the Xalted.

5 Case of the prosecution is reflected from the FIR lodged after examining the record by First Informant Ajay Batheja. He alleged that in the year 2014, the Company named BSNL had given a contract of supply of hardware i.e. EMC VMAX storage to a Company named ZTE. The ZTE, in turn, gave subcontract to the the Xalted i.e. the Company owned by the First Informant for supply of that material. As per this contract, EMC VMAX storage was to be supplied to the Company named the BSNL. The said material was not available with the Xalted – Company owned by the First Informant Ajay Batheja. Applicants/accused Mitesh Vageriya and Gurjot were employees of the Xalted i.e. the Company of the First Informant. They were dealing with this contract as seen from the FIR.

6 First Informant Ajay Batheja further averred that for fulfilling the obligations arising out from this contract, applicant/accused Mitesh Vageriya decided to purchase EMC VMAX storage from the Company named Redington. He informed the Xalted that this hardware is costing US$ 1205000 (Rs.7,36,20,000/-). It is stated in the FIR that the Xalted was not having that much amount and therefore, the Company directed its employee i.e. applicant/accused Mitesh Vageriya to arrange for money from the Elite i.e. the Company of which the co-accused Gaurav Gandhi is the Chief Executive Officer. It is averred in the FIR that as per the Purchase Agreement between the Xalted and the Elite, the Elite supplied the hardware from the Redington on 25th August 2014. That Company then supplied hardware to the ZTE. The Xalted then made payment of purchase price to the Elite on several dates, the last being 11th February 2015.

7 Next part of the FIR deals with allegations against applicants/accused and co-accused Gaurav Gandhi. The First Informant averred that subsequently, when he was having

discussion with the co-accused Gaurav Gandhi, the co-accused Gaurav Gandhi informed him that in the year 2014, the Company of the First Informant had purchased the hardware at a very inflated price. The First Informant averred that the co-accused Gaurav Gandhi had informed him that the actual cost of the hardware procured from the Redington was US$ 705000 i.e. Rs.4,30,73,452/-. However, it was purchased by the Company of the First Informant for US$ 1205000 i.e. Rs.7,36,20,000/-. In this way, the First Informant averred that he has been cheated by his ex-employees named Mitesh Vageriya and Gurjot Singh i.e. present applicants/accused. It is further averred that both applicants/accused indulged in conspiracy with the co-accused Gaurav Gandhi and committed breach of the trust reposed by their employees.

8 It is case of the prosecution that both applicants/ accused being employees of the Xalted were expected to procure hardware named EMC VMAX storage for the purpose of supplying it to the ZTE. They have represented to the Xalted that cost of the

said hardware is US$ 1205000 and applicant/accused Mitesh Vageriya had even submitted forged quotation of Redington to show that its costing is US$ 1205000 to the Xalted and as the Xalted was not having financial capacity to purchase it by payment of money, it employed services of the Elite on commission basis. Both applicants/accused had represented their employer that the cost of the hardware which was to be procured by the Xalted for being supplied to the ZTE was US$ 1205000.

9 According to the prosecution case, an amount of Rs.3,64,42,890/- came to be paid by the Xalted i.e. employer of applicants/accused to the Elite of co-accused Gaurav Gandhi on 19th September 2014. Similarly, on receipt of this amount by co-accused Gaurav Gandhi of the Elite, it is seen that he had transferred a huge amount in favour of applicants/accused and their relatives. On 20th September 2014, an amount of Rs.45 lakh was transferred by the Elite to the account of Rajbeer Sandhu – father of applicant/accused Gurjot Sandhu. On 22nd September 2014, an amount of Rs.45 lakh was transferred to the account of

Navdeep Kaur Sandhu – wife of applicant/accused Gurjot Sandhu. On 23rd September 2014, the Elite had transferred an amount of Rs.38 lakh to the account of Priyanka Vageriya – wife of applicant/accused Mitesh Vageriya. On the very same day, the Elite had transferred an amount of Rs.52 lakh in the account of applicant/accused Mitesh Vageriya. Thus, both applicants/ accused had received an amount of Rs.90 lakh each from co-accused Gaurav Gandhi of the Elite, immediately after their employer paid an amount of more than Rs.3.50 crore to the Elite of co-accused Gaurav Gandhi.

10 Applicant/accused Mitesh Vageriya, then sent an email dated 5th September 2015 to co-accused Gaurav Gandhi of the Elite enclosing the revised worksheet with it. This was for settling the accounts. This revised worksheet shows that both applicants/ accused had charged an amount of Rs.2.38 crore as liaisoning fees. Total margin in the EMC VMAX deal is also calculated in this revised worksheet. Net share of both applicants/accused is shown as Rs.24,62,069/-. This has reference to the purchase value of

Rs.7,36,20,000/- i.e. roughly US$ 1205000. Apart from the deal in respect of purchase of EMC VMAX hardware, this revised worksheet forwarded by applicant/accused Mitesh Vageriya to co-accused Gaurav Gandhi of the Elite further shows that both applicants/accused have also received their share in atleast two other deals of their employer the Xalted with the Elite of Gaurav Gandhi. This prima facie shows that, both applicants/accused were dealing with co-accused Gaurav Gandhi of the Elite on behalf of their employer i.e. Ajay Batheja of the Xalted and were earning hefty kick backs on such transactions.

11 On the backdrop of this prosecution case, reflected from papers of investigation, it needs to be noted that on earlier occasion, both applicants/accused had prayed for anticipatory bail by moving Anticipatory Bail Application No.1987 of 2017 and Anticipatory Bail Application No.1988 of 2017 respectively, which were ultimately rejected by this court after hearing the parties including the First Informant, on 5th December 2017. Thereafter, both these applications are moved by applicants/accused by

contending that further development and change in fact situation warrants entertainment of their applications.

12 Heard Shri Subhash Jha and Shri Rao, the learned counsel appearing for both applicants, at sufficient length of time. They argued that after rejection of anticipatory bail applications of both applicants, they had deposited an amount of more than Rs.3 crore with the Investigating Officer apart from the fact that both of them had refunded the entire amount of Rs.1.80 crore to the Elite, which according to the prosecution case, is the amount of kick back, allegedly received by both of them. The learned counsel appearing for applicants/accused placed reliance on judgment of Honourable Apex Court in the matter of **Babu Singh and Others vs. State of Uttar Pradesh**[1] as well as judgment of this court in **Devi Das Raghu Nath Naik vs. State**[2] and **Joseph Paul vs. Mrs.Shelly Dhall w/o.Sanjesh**[3] to demonstrate that parameters which govern the question of maintaining successive bail applications under Section 439 of the Code of Criminal

1 (1978) 1 Supreme Court Cases 579
2 1988(1) Bom.C.R. 22
3 2008 ALL MR (CRI) 1010

Procedure will apply with same force to the applications for anticipatory bail under Section 438 of the Code of Criminal Procedure. For contending that principles analogous to *res judicata* have no application with regard to the criminal cases, the learned counsel for applicants/accused relied on **Fatima Bibi Ahmed Patel vs. State of Gujarat and Another**[4]. Some bail orders passed by this court, on depositing the amount which is the subject matter of the crime, are also relied by the learned counsel appearing for applicants/accused to buttress their contention that on depositing of the amount involved in the subject crime, custodial interrogation of the present applicants/accused is not warranted. Reliance is also placed on judgment of the Honourable Supreme Court in the matter of **Sureshchandra Ramanlal vs. State of Gujarat and Another**[5] for pointing out that in similar offences, after rejection of successive anticipatory bail applications by the High Court, the Honourable Supreme Court had granted anticipatory bail on depositing of amount of Rs.40 lakh. With this, it was argued by the learned counsel appearing

4 (2008) 6 Supreme Court Cases 789
5 (2008) 7 Supreme Court Cases 591

for applicants/accused that now custodial interrogation of both applicants/accused is not at all warranted, and therefore, because of change of fact situation and subsequent development, applicants/accused are entitled for anticipatory bail, as they are co-operating the Investigating Officer in all possible manner.

13 The learned APP has tendered across the bar say of the Investigating Officer in vernacular and the same is taken on record. On the basis of say given by the Investigating Officer, the learned APP argued that both applicants/accused have deposited the amount of Rs.3,05,48,548/- with the Investigating Officer and after house search of applicants/accused, laptops and hard disks are seized and those are sent for chemical analysis to the Regional Forensic Laboratory. The learned APP further argued that both applicants/accused have co-operated the Investigating Officer and if they co-operate the Investigating Officer in future, their custodial interrogation is not at all warranted.

14 The learned counsel appearing for the First Informant vehemently opposed the applications by contending that there is no change in fact situation to warrant entertainment of subsequent anticipatory bail applications. He placed reliance on judgment of this court in the matter of **Kamlesh s/o. Dhirajlal Gandhi vs. State of Maharashtra and Another**[6] and **Rajanigandha @ Rita Singh vs. The State of Maharashtra**[7]. The learned counsel appearing for the First Informant submitted that this court has rejected the earlier applications by concluding that applicants/accused have received hefty kick backs in the deal with the Elite and the revised worksheet shows that there are two other similar deals.

15 I have carefully considered the rival submissions and also perused the record made available. At the cost of repetition, it needs to be reiterated that as argued by the learned APP in tune with the say of the Investigating Officer, after house search of applicants/accused, laptops and hard disks are already seized and

6 2007(2) MH.L.J.850
7 2016 SCC Online Bom 6376

are sent for forensic examination. Amount of more than Rs.3 crore is already deposited by both applicants/accused before the Investigating Officer. The statement made at bar by the learned counsel for applicants/accused that the amount of Rs.1.80 crore is also refunded by them by account payee cross cheque to the Elite, is also not disputed by the learned APP or the learned counsel appearing for the First Informant. The learned APP, on the basis of say of the Investigating Officer, has also submitted that applicants/accused have co-operated the Investigating Officer and if they continue to co-operate, then their custodial interrogation is not at all warranted. The learned counsel appearing for both applicants/accused have stated that applicants/accused have co-operated the Investigating Officer and they will co-operate the Investigating Officer in the manner directed by him.

16 Effective interrogation of an accused is of tremendous advantage in getting useful information and material which would have been otherwise concealed. Similarly, order of anticipatory bail, to some extent, causes encroachment on the power of the

Investigator. Such directions are, therefore, required to be issued with caution. However, in the case in hand, the Investigating Officer himself has come up with a stand that now custodial interrogation of both applicants/accused is not warranted because of deposit of the amount and seizure of the record.

17 Undisputedly, earlier applications for similar relief moved by both applicants/accused were rejected by this court by order dated 5th December 2017. The question which falls for consideration is whether successive applications for anticipatory bail filed by both applicants/accused, in such circumstance, are maintainable. The Honourable Apex Court in the matter of **<u>Babu Singh (supra)</u>** has held thus, in paragraph 2 of the order :

> "2 Briefly we will state the facts pertinent to the, present petition and prayer and proceed thereafter to ratiocinate on the relevant criteria in considering the interlocutory relief of bail. Right at the beginning, we must mention that, at an earlier stage, their application for bail was rejected by this, Court on September 7, 1977. But an order refusing an application for bail does not necessarily preciude

> another, on a later occasion, giving more materials, further, developments and different considerations. While we surely must set store by this circumstance, we cannot accede to the faint plea that we are, barred from second consideration' at a later stage. An interim direction is not a conclusive adjudication, and updated reconsideration is not over turning an earlier negation. In this view, we entertain the application and evaluate the merits pro and con."

Thus, subsequent application for bail can be entertained on later occasion if the same is giving more materials, explaining further developments and if it is moved on different considerations. The question whether filing of successive anticipatory bail application is permissible or not is considered by this court in two decisions viz. **Devi Das Raghu Nath Naik (supra)** and **Joseph Paul (supra).** It is held therein by this court that principles that govern Section 439 of the Code of Criminal Procedure, as regards the maintainability of the application, are also attracted to an application under Section 438 of the Code of Criminal Procedure. Judgment in the matter of **Devi Das Raghu Nath Naik (supra)** was, infact, followed in the latter judgment of this court in the matter of **Joseph Paul (supra)** by holding that the parameters which govern the question of maintaining successive bail applications under Section 439 of the Code of Criminal Procedure will apply with same force to the applications for anticipatory bail under Section 438 of the Code of Criminal Procedure. In the matter of **Kamlesh (supra)**, following are the observations of this court in paragraphs 19 and 20 thereof, in respect of factors on which successive such applications are maintainable. Those read thus :

> "19 In my view, therefore, the provision of section 438 cannot be interpreted in such a manner, which would impose unnecessary restrictions on the said power. The Apex Court in Gurubaksh Singh's case (supra) has held that denial of bail amounts to deprivation of personal liberty and the Court should lean against imposition of unnecessary restrictions on the scope of section 438 especially when not imposed by the Legislature. It was further observed thus:
>
> > "Since denial of bail amounts to deprivation of personal liberty, the court should lean against

> the imposition of unnecessary restrictions on the scope of section 438, especially when not imposed by the legislature. An over-generous infusion of constraints and conditions which are not to be found in section 438 can make it provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in section 438 must be saved, not jettisoned. "

"20 As already discussed hereinabove, it is well settled that insofar as the application under section 439 of the Code is concerned, successive application on new fact situations or change in law could be entertained. As already discussed above, the provisions of sections 438 and 439 of the Code are almost analogous. The Constitution Bench of the Supreme Court in Gurubaksh Singh's case has held that since denial of bail amounts to deprivation of personal liberty the Court should lean against imposition of unnecessary restrictions on the scope of section 438 of the Code especially when not imposed by the legislature, I am, therefore, inclined to hold that successive applications for anticipatory

> bail, after rejection of earlier application, would be tenable in law. However, as held in Kalyan Chandra Sarkar's case the said application is tenable only when there is a change in the facts situation or law which requires earlier view being interfered with or where the earlier view has become obsolete. In that view of the matter, the present applications are tenable in law."

Similar view is taken in the matter of **Rajanigandha @ Rita Singh (supra)** by holding that second or successive applications for anticipatory bail are maintainable if there is change in fact situation or in law which requires earlier view being interfered with or where earlier finding has become obsolete. Thus, it is crystal clear that second or successive applications for anticipatory bail are maintainable, provided more material, further developments and different considerations are demonstrated.

18 In the case in hand, after rejection of earlier anticipatory bail applications, applicants/accused have refunded the amount, allegedly received by them as kick back, to the Elite.

They had deposited the amount of more than Rs.3 crore with the Investigating Officer and the Investigating Officer has already effected necessary seizures in this case relating to the documentary evidence. These are, certainly, subsequent developments, on the basis of which the Investigating Officer has submitted in his say that custodial interrogation of both applicants/accused is now not warranted. This, in my opinion, certainly amounts to change in the fact situation because of subsequent developments which took place, due to which even the Investigator is of the opinion that now custodial interrogation of both applicants/accused is not warranted. Thus, when the Investigating Officer himself is not desirous of having custody of both applicants/accused on effecting their arrest, I see no justifiable reason for rejecting the applications moved by both applicants/accused for anticipatory bail. Therefore, the order :

ORDER

(i) Criminal Anticipatory Bail Application No..2193 of 2017 and Criminal Anticipatory Bail Application No.2196 of 2017 are allowed.

(ii) In the event of their arrest in C.R.No.61 of 2017 for offences punishable under Sections 408, 420, 465, 467, 468, 471, 477 of the Indian Penal Code as well as under Section 65 of the Information Technology Act registered with Economic Offences Wing, General Cheating Unit-2, Mumbai, applicants/ accused be released on bail on their executing P.R. Bond in the sum of Rs.25,000/- each, and on furnishing one or two solvent sureties in like amount, by each of them.

(iii) As a condition of this order, applicants/accused shall not make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer.

(iv) Applicants/accused should not leave India without permission of the trial Court.

(v) Applicants/accused shall co-operate the Investigating Officer by attending him, as and when directed by him, for the purpose of investigation.

(vi) All applications are disposed of accordingly.

(A. M. BADAR, J.)