IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

ANTICIPATORY BAIL APPLICATION NO.2433 OF 2019
WITH
INTERIM APPLICATION NO.970 OF 2019

Kawaljit Singh Walia ...Applicant
vs.
The State of Maharashtra and Another ...Respondents

Mr. Sanjeev Kadam a/w. Ms. Varsha Thorat and Ms. Vilasini Balasubramanian, for the Applicant
Mrs. Jyoti Lohokare, APP for the Respondent-State.
Mr. Vikram Sutaria, for the Intervener.

CORAM : **N.J. JAMADAR, J.**
ORDER RESERVED ON : **27th NOVEMBER, 2021**
ORDER PRONOUNCED ON : **18th JANUARY, 2022**

ORDER:

1. The applicant, who is arraigned in C.R. No.174 of 2017 registered with Cuffe Parade police station, Mumbai for the offences punishable under sections 120(b), 406, 409, 418, 420 read with 34 of the Indian Penal Code, 1860 (the Penal Code) has preferred this application for pre arrest bail.

2. Gautam Budhrani (hereinafter referred to as the “first informant”) lodged a report against the applicant and others with the allegations that the applicant and other Directors of Commando Caterers Private Limited (CCPL), in pursuance of a criminal

conspiracy, made a false representation that M/s. Sky High Dinner LLP (SHD), of which the first informant was a partner, would be appointed as a franchisee for hosting the dinner in the sky event at Mumbai and Pune, and the 'Sky Goa Event LLP' would be appointed as a franchisee to host the events in rest of Maharashtra and Goa. The applicant deceived the abovenamed entities by inducing them to part with a huge sum of Rs. 6,97,43,268/- over a period of time commencing from 17th October, 2015 to 13th April, 2017. The applicant misappropriated the aforesaid amounts and made no arrangement to facilitate holding of the event 'Dinner in the Sky' by the abovenamed entities. For the said event, the above entities were made to incur huge expenses to the tune of Rs. 1,46,83,480/-, inter alila, for obtaining requisite permissions from Municipal Corporation and the State Government and also pay the fees to brand ambassadors etc.

3. Thus, the applicant Kawaljit Walia and Lakhvir Kaur Walia and Gursimran Singh Walia entered into a conspiracy to defraud M/s. Sky High Dinner LLP (SHD) and Sky Goa Event LLP by making a false representation that the dinner in the sky event would be held in Mumbai, Pune and Goa by a Belgium based company 'Dinner in the Sky' and duped the informant to the tune of Rs. 8,44,26,748/-. Upon unearthing the fraud, the applicant flatly refused to repay the

amount. Hence, the first informant lodged report bearing C.R. No. 174 of 2017.

4. The applicant initially approached the learned Sessions Judge for pre arrest bail. By an order dated 15th January, 2019, in Anticipatory Bail Application No. 2118 of 2018, the interim protection was granted to the applicant. However, the learned Additional Sessions Judge, Greater Bombay after hearing the prosecution, by an order dated 19th October, 2019, was persuaded to reject the application for pre arrest bail. The learned Additional Sessions Jude was of the view that the first informant and his associates were allegedly defrauded to the tune of Rs. 8,44,26,748/-, a huge amount, and the custodial interrogation was required to recover the documents which were allegedly in the custody of the applicant and the said huge amount.

5. The applicant thus approached this Court by preferring the instant application. By an order dated 8th November, 2019 this Court granted interim anticipatory bail to the applicant subject to certain conditions.

6. The substance of the application is that the applicant is the Managing Director of CCPL. Dinner in the Sky is a Belgium based

company. The said company deals in the business of organizing special dinners, in the air, at the height of 50 meters (164 feet) above the ground, by raising a special platform. The said platform bears TUV certification, which is one of the toughest Security Standard Safety Certificate granted in the world. In June, 2008 CCPL become the Indian partner of the "Dinner in the Sky".

7. Mr. Shantanu Shashikant Lele, who represented Sparkin Neurons, approached the Dinner in the Sky, by email dated 14th April, 2012 showing interest to organize an event in Pune and Mumbai. Dinner in the Sky redirected Mr. Shantanu Lele to CCPL, who was stated to be the exclusive Indian partner of the said company.

8. After exchange of correspondence between CCPL and Mr. Shantanu Lele, initially a MOU was executed on 20th January, 2015 between CCPL and M/s. Showtime Events and Marketing and certain terms and conditions were agreed upon. Certain payments were made to CCPL in various installments.

9. Eventually, the first informant came in the frame. An entity M/s. Sky High Dinner LLP (SHD), represented by the first informant Gautam Budhrani, Mr. Shashikant Lele (M/s. Showtime Events and

Marketing) and Mr Gaurav Gite, was formed and MOU was executed between CCPL and M/s. Sky High Dinner LLP (SHD) on 2nd April, 2016. Reciprocal obligations were incorporated in the said agreement, including the expenses to be incurred by SHD, the responsibility to be discharged by CCPL and resolution of the disputes through arbitration.

10. It is the case of the applicant that scheduled events could not be organized on account of failure on the part of the SHD and its partners to honour the commitment to pay the amount upfront, to obtain the consent of Mumbai Indians, an IPL franchise, for participation in the event and the resultant cancellation of the event leading to loss to CCPL and, thus, the CCPL was justified in withholding the amount as it was agreed between the parties that in the event of failure on the part of the SHD and its associates, the amount already paid would not be refunded.

11. The applicant further avers that the first information report came to be lodged as a counterblast to the complaints lodged by CCPL against the first informant and the partners of SHD under section 138 of Negotiable Instruments Act, 1881 consequent to failure to meet the demand to pay the amount covered by the cheques drawn in favour of CCPL. No offence is prima facie made out.

The first informant has made an endevour to give a colour of criminal prosecution to a purely civil dispute. In any event, the alleged offences revolve around the documents executed between the parties and the payments which are through banking channels. Thus, to facilitate further investigation the custodial interrogation of the applicant is not at all warranted. Hence, the applicant deserves to be enlarged on bail, in the event of arrest.

12. The prosecution has resisted the prayer for pre arrest bail.

13. In the light of the aforesaid facts and material on record, I have heard Mr. Sanjeev Kadam, learned counsel for the applicant, Mrs. Jyoti Lohokare, learned APP and Mr. Vikram Sutaria, learned counsel for the first informant, who has taken out the Interim Application No. 970 of 2019 seeking to intervene in the application, and also prayed for the dismissal of the application.

14. Mr. Kadam, learned counsel for the applicant would urge that in the backdrop of the transactions, which have unfolded over a period of almost five years, during the course of which agreements were executed by and between the parties and correspondence was exchanged, it becomes clear that the dispute is purely of a civil nature. The entire exercise of lodging the first information report

against the applicant and Directors of CCPL is actuated by a design to bring the applicant to terms. Mr. Kadam would further urge that the material on record indicates that the events could not be organized on account of failure on the part of the first informant and his associates, to honour the commitment of payments, as agreed, and obtain the necessary consent and approvals for holding the event. The question as to whether the applicant is justified in withholding the amount which has been paid by the first informant and his associates, constitutes a pure civil dispute.

15. Laying emphasis on the fact that the instant first information report came to be lodged long after the applicant initiated proceedings under section 138 of N.I.Act against the first informant and the partners of SHD at Chandigarh, Mr. Kadam would submit that the instant prosecution is nothing but a counterblast to the said action initiated by the applicant. To bolster up these submissions, Mr. Kadam, took the Court through the series of correspondence exchanged between the parties.

16. In opposition, Mrs. Lohokare, learned APP, would urge that the applicant and co-accused have duped the first informant and his associates in pursuance of a well designed conspiracy. The first informant and his associates were made to part with huge amount

by making promises which the the applicant had no intention to perform. To facilitate further investigation, especially the recovery of the relevant documents and the huge amount, custodial interrogation is necessary. Mr. Lohokare, further submitted that the money trial has revealed that the amount received from the first informant and his associates has been utilized by the applicant and his associates for personal use and there is no material to show that the said amount was transferred to the parent Belgium company as alleged. In the circumstances, the applicant does not deserve the exercise of discretion in his favour.

17. Mr. Sutaria, learned counsel for the intervener/ first informant, stoutly submitted that the facts of the case indicate that the intention of the applicant was dishonest since the inception of the transaction. The copy of the agreement which was executed by parent Belgium company in favour of CCPL, allegedly appointing the later as its partner in India, did not see the light of the day. On the contrary, correspondence exchanged between the parties indicates that the applicant had at no point of time obtained the confirmation of the Belgium company for hosting the event in India. Nor the material indicates that any preparations were made to either bring the crew to India or transport the equipment required to set up the platform. Therefore, a clear case of cheating is made out.

18. Mr. Sautaria, further submitted that the economic offences stand as a class apart and where grave allegations of financial fraud are made, the exercise of the discretion under section 438 of the Code is not warranted. Refuting the submission on behalf of the applicant that the offences revolve around the documents, Mr. Sutaria urged that there can be no substitute for custodial interrogation where such egregious fraud is, prima facie, made out. Mr. Sutaria, lastly submitted that the fact remains that the first informant and his associates did not get any opportunity to organize any event, despite parting with the huge sum of Rs. 8 Crores. In this view of the matter, according to Mr. Sutaria, the custodial interrogation of the applicant is indispensable.

19. To start with, few facts which appear to be un-controverted. The applicant claims to be the Manager Director of CCPL. The transaction has its genesis in an event which was to be organized as a part of the concept of "Dinner in the Sky"; dinner at an elevated pedestal. There is not much controversy over the fact that initially an understanding was arrived at between CCPL and M/s. Showtime Events and Marketing, through Mr. Shantanu Lele on 20th January, 2015. Likewise, the execution of the MOU dated 2nd April, 2016 is not in contest. Indisputably, the said MOU was executed by the applicant in the capacity of Managing Director of CCPL and for SHD, the

signatories were, the first informant Gautam Budhrani, Gaurav Gite and Shantanu Lele. By and large there is not much controversy over the fact that the sum of Rs. 6,97,43,268/- came to be credited to the account of CCPL/applicant over a period of time. It is also not in contest that the applicant lodged complaints against the partners of SHD for dishonour of the cheques drawn on 5th May, 2016, 30th May, 2016, 30th June, 2016 and 30th July, 2016 for varying amounts in the Court of learned Magistrate at Chandigarh.

20. The gravamen of indictment against the applicant is that, the applicant and other Directors of CCPL dishonestly induced the first informant and his associates to part with the amount without any intention of organizing the events as promised. The amounts so credited in the account of CCPL/applicant were systematically diverted to the personal accounts of the applicant and his associates. The fact that no tangible effort was made by the applicant to either bring the crew from the parent company to hold the event or transport the requisite equipment indicates that the intention of the applicant was dishonest since the inception of the transaction.

21. It is trite that mere failure to perform a contractual obligation does not amount to an offence of cheating. To bring the act or omission within the tentacles of offence of cheating, where the case

rests on failure to perform contractual obligation, it has to be shown that the intention of the accused was dishonest since inception of the transaction and the agreement, in whatever form, was an instrument to defraud the victim. In a given set of facts, an act or omission on the part of a party may give rise to civil action as well as furnish a ground for criminal prosecution. It is not an immutable rule of law that a purely civil dispute does not involve any element of criminality, in all the cases. However, the distinction between a mere failure to perform the promise, and inducing a party to enter into a transaction with dishonest intention needs to be kept in view.

22. In the case at hand, it is imperative to note that the parties were pursuing transaction for almost five years before lodging of the report by the first informant. The first communication, emanating from Shantanu Lele in the form of an email to the "Dinner in the Sky", was dated 14th April, 2012. Mr. Lele evinced interest to get in touch with India partners of the said company and understand how the said concept could be brought into Pune / Mumbai. By a reply Mr. Lele was informed that his request would be transferred to the exclusive Indian partner of the said company. On the following day, a mail was addressed by the applicant to Mr. Lele claiming that CCPL was Indian partner for the Dinner in the Sky. Initially, MOU was executed between CCPL and M/s. Showtime Events and Marketing

on 20th January, 2015. The material on record further indicates that certain payments were made to CCPL; whereas cheques drawn in favour of CCPL, in the intervening period, were also dishonored. Subsequently, after the first informant came in the frame, MOU dated 2nd April, 2016 came to be executed.

23. The terms of payment to be made by SHD were incorporated in paragraph 1.1.1. The proforma invoices raised by CCPL and the cheques drawn by SHD, against those invoices, were specifically mentioned in the said clause. The obligations of CCPL as regards the events, were stipulated in paragraph 1.5. The corresponding responsibilities of SHD were stipulated in paragraph 1.6. Under clause 5.0 the parties, specifically agreed as regards payment schedule of franchisee fee and two DITS platform (table). It was acknowledged by CCPL that 250 lakhs had already been received as advance. Two more cheques were drawn under the said agreement towards the franchisee fee. Under clause 5.1.4.E to 5.1.4.I it was further acknowledged that towards franchisee fee three cheques for Rs.50 lakhs each and two cheques for Rs. 2,00,25,000/- each, were drawn. Clause 11 dealing with “term and termination”, inter alia, recorded that if the event could not be organized as agreed CCPL shall not be obliged to refund any part of the amount that has been paid to it. Clause 13.0 provided for resolution of dispute through

arbitration by a retired Judge of Punjab and Harayana High Court.

24. In the backdrop of the aforesaid stipulations in the MOU, it is pertinent to note that, the trigger for the dispute between the parties seems to be organizing the event involving the participation of Mumbai Indians, IPL franchisee. The communication dated 5th April, 2016 addressed by the first informant to the applicant indicates that the applicant was requested to postpone the travel plans of Belgium team. The first informant sought to assert that the event was not to be treated as cancelled. In response, the applicant asserted that the cancellation charges were 100%, as per the terms of the agreement between the parties. There was also dispute as to whether the indemnity should be furnished by the Belgium based partners "Dinner in the Sky".

25. In the aforesaid context, in the first information report, the first informant alleged that on 2nd April, 2016 three post dated cheques drawn for Rs. 50 lakhs each, one cheque drawn for Rs. 1,25,00,000/- and two cheques drawn for Rs. 2,00,25,000/- each were delivered by way of security. When the first informant insisted for indemnity about the security of the guests who would participate in the event of Dinner in the Sky, the applicant demanded a sum of Rs. 1.33 Crore for obtaining the indemnity from Belgium company.

By 16th April, 2016 the first informant transferred the sum of Rs. 1.33 Cores. On 20th April, 2016, the first informant claimed to have deposited a sum of Rs. 1.25 Crores in the account of CCPL after negotiation for appointing SHD as franchisee for rest of India. Thereafter the applicant declined to give indemnity. At the same time, on account of policy of the Government of Maharashtra the scheduled IPL matches in Maharashtra were cancelled. Though the first informant and his associates did not owe any amount to the applicant, the later deposited the aforesaid cheques which were delivered by way of security and when those cheques were dishonored, on presentment, lodged false complaints.

26. The first informant further alleges that a meeting was held on 12th April, 2017 at Chandigarh for which a sum of Rs. 55 lakhs was demanded by and paid to the applicant as a pre-condition. In the said meeting draft agreement, was shared by the applicant. Since its terms were onerous, the first informant and his associates refused to execute the said agreement and demanded the refund of Rs. 55 lakhs paid on 13th April, 2017 and all the amounts which were paid to the applicant till date. However, the applicant did not refund any amount.

27. The aforesaid allegations in the first information report, if

considered in the light of the sequence of the events, prima facie, indicate that a dispute arose between the parties over the causes for not holding the event as planed in the month of April, 2016. The first informant claimed that the applicant failed to get the indemnity. The applicant, in turn, alleged that there was no confirmation about the participation of Mumbai Indians and all the arrangements made by the applicant for flying the overseas crew to India and transport the equipment were rendered futile.

28. Secondly, the dispute arose between the parties over the payment of franchisee fees. The first informant claimed that the cheques, which are the subject matter of the prosecutions under section 138 of N.I.Act, in the Courts at Chandigarh were drawn by way of security only. Clause 5 referred above, suggests to that contrary, it indicates the three cheques drawn for Rs. 50 lakhs and two cheques for Rs. 2,00,25,000/- were issued towards part payment of franchise fee. What is of significance is the fact that even after the initiation of those prosecutions, there was a meeting between the parties, and an endevour was made to organize events. First information report further indicates that there was no consensus over the terms of the fresh agreement to be executed between the parties. The first informant and his associates thought the conditions to be onerous.

29. The allegations against the applicant are required to be considered in the aforesaid context. First and foremost, the communication made by Shantanu Lele in the year 2012 was not directly to the applicant. It is not the allegation that the applicant approached the associates of the first informant and induced them to enter into the transaction. Secondly, the parties engaged in deliberations and communications from the year 2012 till the execution of MOU on 2nd April, 2016. Thirdly, the payments were made and cheques were drawn in accordance with the bargain reduced into writing. As indicated above, the question essentially revolves around the party who was at fault for not holding the event. Whether the applicant is liable to refund the amount paid to him or the applicant is justified in withholding the amount on the ground that it was agreed that the amount so paid would be non-refundable are the matters which warrant adjudication. However, in my considered view, the failure to refund the amount would not justify an inference that the intention of the applicant was dishonest since the inception of transaction, when there is a competing claim based on the contract between the parties.

30. Indisputably the first informant and his associates have parted with a substantial amount. The claim of the applicant to withhold the said amount may be contentious. Eventually, it may turn out that

the applicant is not entitled to retain the said amount. However, the crucial question is whether there is such an element of criminality as would warrant the custodial interrogation of the applicant.

31. Mr. Sutaria, the learned counsel for the first informant placed reliance on the judgments of the Supreme Court in the cases of **State vs. Anil Sharma**[1]**; Jay Prakash Singh vs. State of Bihar and Another**[2]**; Union of India vs. Padam Narain Aggarwal and Others**[3] to bolster up the submission that the custodial interrogation is warranted for effective interrogation and the anticipatory bail can be granted only in exceptional circumstances where the Court is prima facie of the view that the applicant has falsely been roped in the crime and would not misuse the liberty. Reliance was also placed on the judgments of this Court in the cases of **Ashok Motilal Saraogi vs. State of Maharashtra**[4] and **Harshad S. Mehta vs. Union of India and Ors.**[5].

32. As a second limb, Mr. Sutaria urged that economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. To lend support to this submission, Mr. Sutaria placed reliance on the judgments of the Supreme Court

1 (1997) 7 Supreme Court Cases 187.
2 (2012) 4 Supreme Court Cases 379.
3 (2008) 13 Supreme Court Cases 305.
4 2016 (1) Bom.C.R.(Cri.) 414
5 1992 Cri.L.J. 4032.

in the cases of **State of Bihar and Anr. vs. Amit Kumar**[6]; **Y.S. Jagan Mohan Reddy vs. C.B.I.**[7]; **Nimmagadda Prasad vs. CBI**[8] and **SFIO vs. Nitin Johari**[9].

33. The necessity of custodial interrogation to facilitate effective investigation can hardly be overemphasized. However, the question as to whether in a given case custodial interrogation is warranted is essentially rooted in facts. If the offence primarily revolves around documents and all the material facts have already been brought to the notice of the investigating agency, custodial interrogation may not seem necessary. It thus turns upon the facts of a given case.

34. The submission on behalf of the first informant that anticipatory bail can only be granted in exceptional cases, however, does not merit acceptance. In the case of **Sushila Aggarwal and Others vs. State (NCT of Delhi) and Another**[10] the Constitution Bench of the Supreme Court, dispelled the insistence on such requirement as not in consonance with law. The principles were culled out in paragraph 52.3 to 52.7 as under:

> *52.3 The accused is not obliged to make out a special case for grant of anticipatory bail; reading an otherwise wide power would fetter the Court's discretion. Whenever*

6 (2017) 13 SCC 751.
7 (2013) 7 SCC 439.
8 (2013) 7 SCC 466
9 (2019) 9 SCC 165.
10 (2020) 5 SCC 1

an application (for relief under section 438) is moved, discretion has to be always exercised judiciously, and with caution, having regard to the facts of every case.

52.4 While the power of granting anticipatory bail is not ordinary, at the same time, its use is not confined to exceptional cases.

52.5 It is not justified to require courts to only grant anticipatory bail in special cases made out by accused, since the power is extraordinary, or that several considerations- spelt out in Section 437 – or other considerations, are to be kept in mind.

52.6 Overgenerous introduction (or reading into) of constraints on the power to grant anticipatory bail would render it constitutionally vulnerable. Since fair procedure is part of Article 21, the Court should not throw the provision open to challenge "by reading words in it which are not to be found therein"

52.7 There is no "inexorable rule" that anticipatory bail cannot be granted unless the applicant is the target of mala fides. There are several relevant considerations to be factored in, by the Court, while considering whether to grant or refuse anticipatory bail. Nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the accused's presence not being secured during trial; a reasonable apprehension that the witnesses might be tampered with, and "the larger interests of the public or the State" are some of the considerations. A person seeking relief (of anticipatory bail) continues to be a man presumed to be innocent.

35. The aforesaid pronouncement enunciates that power to grant anticipatory bail is not confined to exceptional cases. Nor is it the requirement of law that anticipatory bail can be granted only when special case is made out by the accused. There is no "inexorable" rule that anticipatory bail cannot be granted unless the applicant is the target of malafide.

36. As regards the submission on behalf of the first informant that economic offences constitute a class apart and they are required to be approached in a cautious manner in the matter of grant of anticipatory bail, there can be no quarrel with the said proposition. However, it is necessary to note that the cases relied upon by the first informant in which aforesaid proposition was enunciated arose out of the financial frauds committed by the functionaries holding public offices or the public servants. Evidently, different considerations come into play in such cases. In contrast, in the case at hand, as observed above, the dispute has its genesis in the commercial transaction between the parties. A period of almost more than nine years has elapsed since the inception of negotiation for the transaction between the parties. The applicant, in the intervening period, has lodged prosecutions against the first informant and his associates. In this view of the matter, the fact that there is an allegation of defrauding the first informant, of a huge amount, does not ipso facto dis-entitle the applicant from the exercise of the discretion.

37. It is imperative to note that the transactions have been effected by the parties through banking channels. There are documents to evidence the transactions as well as the exchange of correspondence. Mr. Kadam, on instructions, submitted that the

agreement between the parties has been placed on the record of the Court, at Chandigarh. In the circumstances of the case, the possibility of tampering with the evidence and fleeing away from justice appears to be remote. It does not appear that the applicant has no roots in the society. Nonetheless the concern of the prosecution can be addressed by directing the applicant to cooperate with the investigation.

38. For the foregoing reasons, I am persuaded to exercise the discretion in favour of the applicant and confirm the order of interim bail granted by this Court on 8th November, 2019.

Hence, the following order.

ORDER

1] The application stands allowed.

2] The interim order passed by this Court on 8th November, 2019 stands confirmed on the terms and conditions incorporated therein.

3] In addition, the applicant shall cooperate with the investigating agency and appear before the investigating officer as and when directed by the investigating officer.

4] The applicant shall not tamper with the prosecution evidence/ witnesses.

5] The applicant shall attend the proceeding before the jurisdictional Magistrate, in the event the charge-sheet is lodged, regularly.

(N.J. JAMADAR, J.)