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IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

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CRM-15352-2023 &
CRM-17163-2023 in/and
CRM-M-37738-2021 (O&M)
Date of Decision: 02.06.2023

Shikha Gupta and another

..... Petitioners

Versus

State of Haryana

..... Respondent

CORAM: HON'BLE MR. JUSTICE HARSH BUNGER

Present: Mr. Anuj Saxena, Advocate,
Mr. Anuj Ruhela, Advocate and
Mr. Birinder Pal, Advocate
for the petitioners.

Mr. Amrik Narwal, DAG, Haryana
for the respondent/State.

Mr. B.S. Rana, Senior Advocate assisted by
Mr. Yogesh Goel, Advocate
for the complainant.

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<u>HARSH BUNGER J.</u>

1. Petitioners have filed the present petition under Section 438 of the Code of Criminal Procedure seeking grant of anticipatory bail in case bearing FIR No.147 dated 30.08.2021, under Sections 406, 420 and 506 of the Indian Penal Code, registered at Police Station Sector-9, Ambala City, Ambala.

2. Briefly, the aforesaid FIR was registered on the complaint of Mohit Gupta s/o Surender Gupta, wherein it was stated that the complainant runs a Company in the name of 'Sunshine Industries J.K. Exim Private

Limited and Gutpa Steel' in Ambala and the said company takes Government contracts. As per the complainant, his brother Anish Gupta met accused Satish Gupta in the year 2017 at ISKCON Temple, Delhi, where he introduced himself by saying that he takes railways contracts and the name of his company is 'Girivar Global Solutions and Services LLP'. It was alleged that the aforesaid accused in order to rope in the complainant, made tall claims that he has big orders of Indian Railways and in case the complainant and his brother would invest money in their company (Girivar Global Solutions and Services LLP) then they can earn huge profits from the contracts of Indian Railways, wherein they can have a share holding. Upon this, brother of complainant informed him that he is in service but in case the accused was ready to include his brother and father then they can invest money as they are also doing their business in Ambala. It was further stated that the brother of complainant came in the talks of accused and called accused No.1 to Ambala and introduced him to his father (Sh. Surender Gupta) and at that time, accused No.1 and 2 came together to meet the father of complainant and both discussed regarding the share holding and profit sharing and assured the complainant and his father that they can earn good profits out of the contracts of railways. It is stated that the complainant and his family members came in the sweet talks of the accused and thereafter the complainant started investing in the Firm of aforesaid accused and on several occasions, the complainant sent the money from his Firm (Sunshine Industries J.K. Exim Private Limited and Gutpa Steel) to the Firm of accused (details of accounts can be provided, if required). It was also alleged that on several occasions, accused No.1 came to Ambala and took cash amount from the father of complainant and thereafter, the accused made the brother of complainant as a partner in the Firm in question. As per the complainant, the accused had bad intentions from the very beginning and they had got transferred the money into their Firm, only to embezzle the money of complainant. It is stated that the accused took undue advantage of the fairness of complainant and extracted about an amount of Rs.2 Crores from the complainant, however, when the complainant asked about the profit from the accused then they started threatening the complainant and his family members that they will implicate the complainant in some false case and will also get all the contracts cancelled and the complainant would suffer loss of Rs.2 Crores, whereupon the complainant got frightened. As per the complainant, a meeting was convened with the accused in the presence of respectables of the society, wherein a written settlement was executed between the complainant and aforesaid accused on 18.11.2019, according to which, the accused undertook that they will pay an amount of Rs.99,08,670/- along with stock worth of Rs.15,00,000/-, three F.D.R(s) of Rs.40,00,000/-, Rs.5,00,000/- and Rs.6,00,000/- and T.D.S. etc to the complainant. As per the complainant, even according to the aforesaid settlement, the complainant had already suffered a loss of Rs.1 Crore, however, he agreed to the same, so as to save his balance amount. It is stated that even at that time, the accused had bad intentions and despite there being a written settlement, the aforesaid accused kept on cheating the complainant and now they have flatly refused to pay any money to the complainant and have rather threatened the complainant that in case he would ask for the money then they will implicate him in some false case and in case the complainant party tries to come to Delhi then they will not return to Ambala. Accordingly, legal action was sought against the accused with a prayer to get the embezzled amount recovered from them.

3. The petitioners applied for the grant of anticipatory bail before the Court of Additional Sessions Judge, Ambala, however the same was dismissed vide order dated 07.09.2021. Accordingly, the instant petition has been filed by the petitioners for grant of anticipatory bail in the FIR in question.

4. On 10.09.2021, a co-ordinate Bench of this Court passed the following order:-

> "*Prayer in the present petition is to grant anticipatory bail to the petitioners in FIR No.147 dated 30.08.2021 registered under Sections 406, 420 and 506 of the Indian Penal Code, 1860 at Police Station Sector-9, Ambala City, Ambala.*
>
> *Learned counsel for the petitioners inter alia contends that the present dispute has civil tappings and has submitted that even as per the Memorandum of Understanding (for short "MOU") dated 18.11.2019, there were certain conditions which were required to be fulfilled by the complainant party and he has specifically referred to Clause Nos.(iii), (iv) and (xvi) of General Provisions of the said MOU. Further by referring to affidavit dated 28.01.2020 as well as list of tenders shown at page 102 of the paper book, learned counsel for the petitioners has tried to make out a case that complainant party has also breached the MOU. It is also submitted that with respect to dishonour of the cheque, complaints under Section 138 of the Negotiable Instruments Act, 1881 have already been filed.*
>
> *Notice of motion.*
>
> *On asking of the Court, Mr. Praveen Bhadu, AAG, Haryana, appears and accepts notice on behalf of State of Haryana and seeks time to get instructions. Mr. Navkiran Singh, Advocate appears on behalf of the complainant and has*

stated that in the present case, the petitioner has duped the complainant of an amount of Rs.1 crore.

At this stage, learned counsel for the parties have submitted that the parties are even ready to resolve the whole dispute in case this matter is sent to Mediation and Conciliation Centre of this Court.

Learned counsel for the petitioner has submitted that on behalf of the petitioners, petitioner No.2 would be appearing in the Mediation Centre.

List this matter before the Mediation and Conciliation Centre of this Court on 21.09.2021.

For report of the Mediator, adjourned to 12.10.2021.

In the meantime, in the event of arrest, the petitioners shall be released on interim bail subject to furnishing personal bonds and surety to the satisfaction of Arresting/Investigating Officer. However, the petitioners shall join the investigation as and when called upon to do so and shall abide by the conditions as provided under Section 438(2) Cr.P.C."

5. In pursuance of the aforesaid order, the parties appeared before the Mediation and Conciliation Centre of this Court, however, the mediation proceedings failed and accordingly the case was sent back to the Court.

6. Status report by way of affidavit dated 23.11.2022 of Mr. Ramesh Kumar, Deputy Superintendent of Police, Hqs, Ambala, has already been filed on behalf of State of Haryana, which is already on record.

7. Learned counsel for the petitioners submits that the petitioners have been falsely implicated in the present case, which is nothing but a sheer abuse of the process of law as the matter is purely civil in nature inasmuch as that it relates to the violation of the Memorandum of Understanding executed between the parties. Learned counsel submits that in pursuance to the aforesaid Memorandum of Understanding dated 18.11.2019, the

petitioners had made certain payments, however, while the petitioners were making the agreed payments then at the same time, the complainant and his brother Anish Gupta fraudulently violated the terms of the said Memorandum of Understanding dated 18.11.2019 and procured tenders for their Company (Sunshine Industries J.K. Exim Private Limited and Gutpa Steel) by using the credentials of 'Girivar Global Solutions and Services LLP'. It is submitted that on account of violation of the Memorandum of Understanding dated 18.11.2019, a petition, being O.M.P.(I) (COMM.) 47/2023, under Section 9 of the Arbitration and Conciliation Act was filed before the Hon'ble High Court of Delhi and further Section 11 of the Arbitration proceedings is also pending before the Hon'ble High Court of Delhi. Photocopy of order dated 13.03.2023 passed by the Delhi High Court in the aforesaid petition is handed over in Court today, which is taken on record, subject to all just exceptions. The same reads thus:-

> "*1. Learned counsel for the respondents seeks some time to file reply. Let the same be filed within a period of four weeks from today. Rejoinder thereto, if any, be filed within a period of two weeks thereafter.*
> *2. In the meantime, learned counsel for the respondents undertake that the respondent No.1 shall continue to remain bound with the covenant contained in clause 6(xvi) of the Memorandum of Understanding dated 18.11.2019, which reads as under:-*
> *'"xvi) Second Party shall not further file any tender in Railways or at any forum or portal in the name of Girivar Global Solutions & Services LLP."*
> *3. List on 6th April, 2023.*"

8. Learned counsel for the petitioners next submits that the cases filed against the petitioners under the Negotiable Instruments Act with regard to the bouncing of cheques, which payments had also arisen out of

the Memorandum of Understanding dated 18.11.2019, have been stayed by this Court as well as Hon'ble Delhi High Court. In respect of the allegations of siphoning of amounts from 'Girivar Global Solutions and Services LLP', it is submitted by learned counsel for the petitioners that as per the ledger accounts of 'Rasika International and Girivar Global', it would be apparent that the petitioners and Anish Gupta (complainant's brother) solely operated two different accounts of 'Girivar Global Solutions and Services LLP'. It is further submitted that there has been no allurement of complainant at the instance of petitioners. It is stated that since the arbitration proceedings are already pending between the parties and in pursuance to interim protection granted to the petitioners by this Court, they have already joined the investigation and have not violated any condition of bail, accordingly, it is prayed that interim bail granted to the petitioners vide order dated 10.09.2021, may be made absolute.

9. Per contra, learned State counsel as well as learned senior counsel representing the complainant has opposed the prayer of the petitioners for grant of anticipatory bail by submitting that the petitioners have committed fraud with the complainant and hence they are not entitled to any indulgence regarding anticipatory bail by this Court.

10. Learned State counsel while referring to the status report has submitted that the petitioners were already having *mala fide* intentions to cheat the complainant and his family members by alluring them of high rate of profits, in case they invested the money and on the said representations, the complainant party had invested their money with the petitioners, however, the petitioners neither returned the amount of the complainant party nor their share in the profit was given to them. It is further submitted

that instead of returning the amount to the complainant party, the petitioners started threatening them and further demanded more money from them and thereafter, the petitioners made the complainant agreed for the settlement, which was entered into by the complainant under the fear of loosing his whole investment, accordingly vide the mutual agreement dated 18.11.2019, petitioner No.2 (Satish Gupta) agreed to pay an amount of Rs.99,00,000/- plus stock profit of Rs.15,00,000/-, F.D.Rs. of Rs. 15 Lacs, Rs.40.7 Lacs, 7.7 Lacs and TDS along with other dues. It is conceded that the petitioners have paid Rs.8,00,000/- to the complainant. Learned State counsel has further referred to paragraph No.13 of the status report, which reads thus:-

> "*13. That it would be relevant to submit here that during the period of their agreement between the accused-petitioner and complainant, the accused-petitioner received the payment from the railway department of Rs.3,39,02,122/- (Rs. Three Crore Thirty Nine Lacs Two Thousand One Hundred Twenty Two Only) but did not pay any amount to the complainant being their actual investment or the profit of above said received amount. The accused-petitioners to cheat the complainant transferred Rs.75,05,000/- to their another firm namely Rasika Internation account, the Director of the company was petitioner No.1 Shikha Gupta. The accused-petitioner Satish Gupta has withdrawn an amount of Rs.31,25,000/- from the payment received from the railway and also transferred Rs.43,00,000/- through NEFT in the account of Summit Vij, Rs.4,00,000/- in the account of Ramit Sharma and Rs.4,26,526/- in the account of Arshad without consultation of the complainant and even without any information. Moreover, the accused-petitioners did not make the payment to the complainant and thereby, misappropriated the funds of Girivar Global Company and Service and thereby cheated the complainant.*"

11. Learned State counsel next submits that the petitioners were

joined in the investigation and were also interrogated, however, they did not cooperate in the investigation and the cheated amount could not be recovered from them. It is stated that admittedly the agreement/Memorandum of Understanding dated 18.11.2019 stands executed between the parties, wherein the petitioners agreed to make payment of Rs.54,74,670/- to the complainant and in security of the said payment, nine cheques were given to the complainant by petitioner No.2 (Satish Gupta). Thereafer, in pursuance to the said Memorandum of Understanding, the petitioner had paid an amount of Rs.8,00,000/- to the complainant and in lieu of the same, one cheque was returned to the petitioners, however, thereafter they intentionally stopped the payment of remaining amount of Rs.46,00,000/- and thus, petitioners have cheated the complainant. Accordingly, prayer has been made for dismissal of the present petition.

12. Learned Senior counsel representing the complainant has reiterated the objections raised by learned State counsel and also prayed for dismissal of the instant petition.

13. I have heard learned counsel for the parties and perused the paper book as well as status report.

14. 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 dose 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.

15. In the case in hand, it is apposite to note that the complainant party had allegedly made certain investments to earn profits with the Firm of the petitioners in question and on account of certain *inter se* disputes, a further Memorandum of Understanding dated 18.11.2019 is stated to have been executed, wherein both the parties agreed to certain terms and conditions to be performed at their ends. Presently, both the parties are alleging violation of the terms of said Memorandum of Understanding on each other's part and concededly certain proceedings under the Arbitration and Conciliation Act as well as certain cases under the Negotiable Instruments Act are stated to be pending before this Court as well as Delhi High Court. As per the status report, it is conceded that in pursuance to the agreement/Memorandum of Understanding dated 18.11.2019, the petitioners agreed to make certain payments, which are claimed to have not been made. In my considered view, the failure on the part of the petitioners to make certain payments in pursuance of the said Memorandum of Understanding dated 18.11.2019 would not *prima facie* justify an interference that the intention of the petitioners was dishonest since the very inception of the said agreement, especially when both the parties are claiming violation of the terms of Memorandum of Understanding dated 18.11.2019 on the part of each other and parties have taken recourse to their legal remedies. Undisputedly, the complainant party has parted with the substantial amount

and on the other hand, claim of the petitioners to withhold the amount may be contentious, however eventually, it may turn out that the petitioners are not entitled to retain the said amount, but crucial question would be that whether there is an element of criminality as would warrant the custodial interrogation of the petitioners. There is no dispute regarding the proposition that custodial interrogation may be required to facilitate effective investigation, however in my opinion, if the offence primarily revolves around documents and all the material facts are already laid before the Investigating Agency, as in the instant case, in that eventuality, custodial interrogation may not seem necessary.

16. In view of the aforesaid discussion, I am persuaded to confirm order dated 10.09.2021 passed by a co-ordinate Bench of this Court, extending interim bail to the petitioners, however, with a direction to the petitioners that they shall cooperate with the Investigating Agency and appear before the Investigating Officer concerned, as and when directed to do so.

17. Present petition is accordingly disposed of.

18. Nothing expressed hereinabove shall be construed to be an observation on merits of the case and the facts and circumstances recorded above are only for consideration of the prayer for bail at this stage.

19. All pending application(s), if any, shall also stand closed.

02.06.2023 **(HARSH BUNGER)**
Apurva **JUDGE**

1. Whether speaking/reasoned : Yes/No

2. Whether reportable : Yes/No