BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Criminal Jurisdiction)

Thursday, the Sixteenth day of November Two Thousand Seventeen

PRESENT

The Hon`ble Mr.Justice M.DHANDAPANI

CRL OP(MD) Nos.6767 and 6768 of 2017

JOHNEY MOTHA ... PETITIONER / ACCUSED(A2)
in both the petitions

Vs

STATE OF TAMIL NADU REPRESENTED BY
THE SUB INSPECTOR OF POLICE,
DISTRICT CRIME BRANCH,
THOOTHUKUDI ... RESPONDENT / COMPLAINANT
in both the petitions

For Petitioner : Mr.A.L.SUNDARESAN, Senior Counsel for
Mr.RAGUVARAN GOPALAN Advocate
in both the petitions

For Respondent : Mr.K.ANBARASAN, Govt. Advocate (Crl. Side)
in both the petitions

For Intervenor : Mr.NITHAESH NATARAJ Advocate for
Mr.NITHAESH AND VAIBHAV, Advocate

PETITION FOR ANTICIPATORY BAIL Under Sec. 438 Cr.P.C.

ORDER : The Court Made the following order :-

The petitioner, who is arrayed as Accused No.2, apprehends arrest at the hands of the respondent police for the offences punishable under Section 420 I.P.C., in Crime Nos.26 and 27 of 2017, on the file of the respondent police and hence, seeks anticipatory bail.

2.1.The case of the prosecution in Crl.O.P.(MD)No.6767 of 2017 [Crime No.26 of 2017] is that the de-facto complainant *viz.*, Prasant Kumar Sahoo, Proprietor of Sri Ram Cashew, Resident of Ray Bahadur Lane, Balagandi, Puri, Odisha, purchased 10 containers of raw cashew nuts in two Bills of Lading, dated 29.07.2016, vide Bill of Lading No.95734771C, for a consignment of 81.050 mts. Net weight (950 Bags) for Rs.76,87,593/- [Rupees Seventy Six Lakhs Eighty Seven Thousand Five Hundred and Ninety Three only] and another Bill of Lading No.95734771B, for a consignment of 80.380 mts. Net weight (950 Bags) for Rs.76,24,043/- [Rupees Seventy Six Lakhs Twenty Four Thousand and Forty Three only] from one Safeer Babu, Proprietor of AVS Enterprises, Kollam, who is the first accused, through two numbers of High Sea Sale Agreements, dated 03.08.2016. When the containers reached the Tuticorin Port on 04.10.2016 and the de-facto complainant came to clear the cargo, he came to know from the Department of Customs, Tuticorin Port and Transworld CFS that there is some problem with the cargo in the containers. The Exporter is the Jabag Multihaven (P) Ltd. Accra, Ghana and the importer is AVS Enterprises, Kollam and the Shipping Agent Carrier is MAERSK Line and the de-facto complainant is the High Sea Sale Buyer. When the de-facto complainant filed his documents to the Customs Department for clearing the goods, they called for a joint survey of the containers in the presence of all the parties except the MAERSK Line representatives and the Importer. The said AVS Enterprises knowing the full facts, with an intention of cheating, did not come for the joint survey. During the survey, the de-facto complainant came to know that there was heavy shortage of cargo, which comes around 150.47 metric tons, worth about Rs.1,33,11,786/-. Again, the Importer AVS Enterprises additionally received Rs.30,00,000/- (Rupees Thirty Lakhs only) for further supply of cashew nuts, which was not yet refunded to the de-facto complainant. Therefore, totally, AVS Enterprises cheated Rs.1,63,11,786/- [Rupees One Crore Sixty Three Lakhs Eleven Thousand Seven Hundred and Eighty Six only) from the de-facto complainant. The Shipping Agent Carrier MAERSK Line willfully evaded to follow the rules and regulation for loading the containers. Therefore, they are unable to provide the VGM Certificate [Verified Gross Mass Certificate], which is a mandatory document for loading of any container to any ship as per International Maritime Law. The said AVS Enterprises jointly colluded with MAERSK Line with an intention to cheat the de-facto complainant, had done all sorts of criminal activities and cheated him and the Proprietor of AVS Enterprises, viz., Saffer Babu informed the de-facto complainant that VGM Certificate was not properly received by MAERSK Line and one Johney Motha, the petitioner herein/A2, a responsible person from MAERSK Line, Tuticorin Office told the de-facto complainant to wait for two months and shortage of goods will be supplied in two installments *i.e.*, within 25.03.2017. Even after repeated demands, the said VGM Certificate is not produced till today. Hence, the de-facto complainant has filed the present complaint for the offence punishable under Section 420 I.P.C.

2.2.The case of the prosecution in Crl.O.P.(MD)No.6768 of 2017 [Crime No.27 of 2017] is that the de-facto complainant's company *viz.*, Vareli Tecnac Private Limited, Badabazar P.O., Khetrajpur, Sambalpur, Odisha, had entered into three High Seas Sale Agreements in respect of dried raw cashew nuts in shell with one AVS Enterprises, Kollam, Kerala. The said dried raw cashew nuts in shell were in the containers in the ship of the said shipping company MAERSK Line and the said containers reached the Tuticorin Port in between 4th and 9th October 2016. After arrival of the said goods, the de-facto complainant was called upon by the Department of Customs, Tuticorin Port and they submitted that there were certain problems with the cargo in the containers. Upon receiving such information, the de-facto complainant's company representatives filed all necessary papers and documents with the Department of Customs and the Department of Customs called for a joint survey of the containers. On 24.10.2016 and 25.10.2016, all the parties except the representative of the Liner MAERSK Line and the importer AVS Enterprises were present and their representatives intentionally avoided the said joint survey. In the said survey, it was found that there were heavy shortages of cargo at the time of weighment. Thereafter, the Surveyors surveyed the cargo and have given a report to the de-facto complainant and immediately, the same was informed to AVS Enterprises through its Proprietor Safeer Babu, who refused to talk with the de-facto complainant. Further, the VGM Certificate (Verified Gross Mass Certificate] is a mandatory document as per International Maritime Law, for loading of any container to any ship. However, the said MAERSK Line with an intention to cheat the de-facto complainant, had done all sorts of criminal activities and cheated him and one Johney Motha, the petitioner herein/A2, an important person from MAERSK Line, Tuticorin Office, told the de-facto complainant that the shortage of cargo would be supplied in two installments *i.e.*, the first installment by 25.02.2017 and the second installment by 25.03.2017. However, even after repeated requests, the said VGM Certificate has not been provided nor the shortage of goods has been supplied as committed and thereby, the said AVS Enterprises, Jabag Multi Haven Enterprises and the MAERSK Line along with its Directors and authorized personnel have committed criminal breach of trust and cheated a sum of Rs.1,67,33,209/- [Rupees One Crore Sixty Seven Lakhs Thirty Three Thousand Two Hundred and Nine only] and caused financial loss to the de-facto complainant's company. Hence, the de-facto complainant has filed the present complaint for the offence punishable under Section 420 I.P.C.

3.The learned Senior Counsel appearing for the petitioner drew the attention of this Court to Bill of Lading Nos.95734771B, 95734771C, 957347712 95734771A and 957437656, wherein it has been stated that the particulars therein as declared by the Shipper, but without responsibility of or representation by Carrier. The learned Senior Counsel further submitted that if any damage is caused, the Shipper is not responsible for the same and his duty is to upload the container in the ship and thereafter to deliver the same and the petitioner is an employee of M/s.MAERSK Line India Private Ltd. The learned Senior Counsel also submitted that since the cause of action arose on 24.10.2016, the complaints were lodged by the de-facto complainants on 24.05.2017 after a delay of 7 months, which shows that the petitioner is not responsible for the commission of offence as alleged by the de-facto complainants and there is no specific overt act attributed against the petitioner and he is ready to co-operate with the investigation and therefore, the learned Senior Counsel prays for anticipatory bail in favour of the petitioner.

4.The learned counsel for the Intervenor drew the attention of this Court to the World Shipping Council, SOLAS Container Weight Verification Requirement, January 2015, submitted that the International Maritime Organization (IMO) has amended the Safety of Life at Sea Convention (SOLAS) to require, as a condition for loading a packed container on a ship for export. He further submitted that the Courier's responsibility were narrated in detail in the World Shipping Council, Partners in Trade and therefore, it is the responsibility of the Courier before loading containers in the ship to verify the measurement and weight. He also submitted that the de-facto complainants entered into an agreement with A1 and they have paid the entire amount to A1 and A1 transferred the same to A3. Thereafter, A3 exported cashew nuts through A2 to deliver the same to de-facto complainants. However, there was a shortage of cashew nuts. Aggrieved over same, the de-facto complainants filed complaints before the Law Enforcing Agency and the accused cannot escape from the clutches of law and the criminal conspiracy hatched between the accused would reveal only after investigation.

5.The learned Government Advocate (Criminal side) appearing for the respondent submitted that the investigation is at preliminary stage and if the petitioner is granted anticipatory bail, he will abscond and tamper the witnesses and hamper the investigation process and therefore, he prays for dismissal of the Criminal Original Petitions.

6.This Court considered the rival submissions and perused the materials available on record.

7.Since the nature of crime involved in overseas contract and one of the accused is in foreign country and the present petitioner is the Manager of the international company and the investigation is at preliminary stage, if anticipatory bail is granted to the petitioner, it will affect the progress of the investigation. Hence, I am not inclined to grant anticipatory bail to the petitioner. Accordingly, these Criminal Original Petitions are dismissed. However, after completion of investigation, it is open to the petitioner to work out his remedy in the manner known to law.

sd/-
16/11/2017

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Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.

TO

1 THE SUB INSPECTOR OF POLICE,
DISTRICT CRIME BRANCH,
THOOTHUKUDI

2 THE ADDITIONAL PUBLIC PROSECUTOR,
MADURAI BENCH OF MADRAS HIGH COURT, MADURAI

+2. CC to Mr.RAGUVARAN GOPALAN Advocate SR.Nos.34570 & 34571

+1 cc to Mr.NITHYEASH NATARAJ, Advocate, Sr.No.34591

JAM/29/11.17/RR/SAR 1/ 5p-6c

ORDER
IN
CRL OP(MD) Nos.6767 and 6768 of 2017
Date :16/11/2017