IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

ANTICIPATORY BAIL APPLICATION NO. 819 OF 2018

Chintanbhai Prakashbhai Shah ....Applicant
V/s.
The State of Maharashtra ....Respondent

WITH
CRIMINAL APPLICATION NO. 571 OF 2018
IN
ANTICIPATORY BAIL APPLICATION NO. 819 OF 2018

Dattatray Ananda More ....Applicant
V/s.
The State of Maharashtra ....Respondent

Mr. Prashant G. Pandey for the applicant.
Mr. Sachin Deokar i/b. Mr. Vinod U. Shete for the intervenor/Applicant in APPP 571/2018.
Mr. Ajay Patil, APP for the State.

CORAM: SMT. ANUJA PRABHUDESSAI, J.
DATED: 25th SEPTEMBER, 2018.

P.C.:

. This is an application for anticipatory bail under section 438 of Criminal Procedure Code, filed by the aforesaid applicant, apprehending his arrest in C.R.No.346/2017 registered with Swargate Police Station, District Pune for offences punishable under sections 406 and 420 of the Indian Penal Code.

2. The aforesaid crime was registered pursuant to the first information report lodged by Mr. Dattatraya More, one of the partners of M/s. Kesar Agro and Food Products (for short 'M/s. Kesar Agro'), which deals in import and export business. The gist of the first information report is as under :-

(i) M/s. Kesar Agro had received an order from a Russian company for supply of 1000 MT cashew nuts. The first informant was looking for a dealer to supply bulk cashew nuts and hence, posted the requirements on the website of Trade India. The applicant who is a proprietor of Pratik Enterprises contacted the first informant and expressed his willingness to supply the cashew nuts. The first informant, after approving the quality of the samples shown by the applicant and being satisfied that the applicant would be able to supply the required quantity, placed an order for supply of cashew nuts. In this regard, the applicant issued two invoices dated 28/08/2017 and 07/09/2017 in favour of M/s. Kesar Agro for supply of 12,000 kgs cashewnuts for total sum of Rs.48,60,000/- and 26,000 kg cashewnuts for Rs.98,94,300/-. As per the agreed terms, M/s. Kesar Agro transferred an amount of Rs.67,68,000/- towards 30% advance, in the account of the applicant by RTGS.

(ii) The applicant was to supply the cashewnuts within two days from the date of payment of advance. The applicant did not supply the cashewnuts as agreed and when questioned, started giving evasive replies. He later informed the first informant that he had placed an order with M/s. Reliable cashewnuts for supply of cashewnuts. When the first informant contacted the said Company, he was informed that the applicant had not purchased or agreed to purchase cashewnuts from the said company. The first informant, therefore, called upon the applicant to refund the money.

(iii) The applicant assured to transfer the amount by two cheques dated 06/10/2017 for Rs.39,18,000/- and Rs.29,00,000/-. When the first informant checked his bank account, he learnt that the applicant had not transferred any amount in the account. When the first informant contacted the applicant, he forwarded an e-mail allegedly received by him from M/s. Reliable Company and requested for time of two days. Later, the applicant informed the first informant that he was unable to supply the cashewnuts and sent a fake UTR number on whatsapp stating that an amount of Rs.68,08,000/- was transferred in the account of M/s. Kesar Agro. Upon inquiry with the bank, the first informant was informed that no such amount was deposited/

transferred in the account of M/s. Kesar Agro. When contacted, the applicant refused to pay the amount and threatened the first informant with dire consequences if he were to lodge a police complaint. The first informant, therefore, lodged the report for cheating and misappropriation.

3. Mr. Prashant Pandey, learned counsel for the applicant contends that the dispute is predominantly of civil nature. He contends that M/s. Kesar Agro has already filed a civil suit against the applicant for recovery of Rs.67,68,000/-. He submits that the applicant herein had placed an order with the supplier to supply to him the said cashew nuts. He contends that the money that was received from the first informant / partnership firm was paid to the supplier who was to supply cashew nuts. He submits that the said supplier with whom the applicant had placed an order of cashewnuts failed to supply the cashewnuts as there was hike in the price. He claims that the supplier had refused to refund the amount paid by the applicant and on the contrary lodged a false case against him for offence under section 392, 385, 365, 323, 506(2) of the Indian Penal Code. The learned counsel submits that the applicant was ready to repay the advacne amount with the interest of 1.5 % p.a. However, the first informant was claiming

interest at the rate of 10% and hence, the matter could not be settled. He submits that the applicant has no intention of cheating or misappropriating the amount and hence, no case under section 406 and 420 is made out against the applicant.

4. Per contra, Mr. Ajay Patil, learned APP as well as Mr. Sachin Deokar, learned counsel for the intervenor submitted that there is no *prima facie* material to indicate that the applicant had placed an order with M/s. Reliable cashew nuts or any other firm or company for supply of cashewnuts. He contends that there is no *prima facie* material to show that the applicant has paid the money to any such firm. Furthermore, no such ground was raised in the bail application filed before the Sessions Court. Even in the present application, the applicant has not given any details of the firm with whom the applicant has placed an order of cashewnuts or to whom the amount was paid. They contend that the material on record clearly indicates that from the inception, the intention of the applicant was to cheat the first informant/M/s. Kesar Agro and to misappropriate the amount.

5. I have perused the records and considered the submissions advanced by the learned counsels for the respective parties.

6. It is not in dispute that the applicant had agreed to supply cashew nuts to M/s. Kesar Agro. It is also not in dispute that as per the condition incorporated in the invoice, M/s. Kesar Agro had transferred an amount of Rs.67,68,000/- in the account of the applicant by RTGS, towards 30% advance. The applicant was to supply cashew nuts within two to three days from the date of payment of the advance money. Undisputedly, the applicant had not supplied the cashew nuts. He had issued two cheques both dated 06/10/2017 for Rs.39,18,000/- and Rs.29,00,000/- each towards repayment of the said advance. It is not in dispute that both these cheques were dishonoured. The material on record further reveals that though the applicant had sent UTR number on whatsapp stating that the amount of Rs.68,08,000/- was transferred in the account of M/s. Kesar Agro in fact no such amount was transferred.

7. The applicant had claimed that he had placed an order with Reliable cashewnuts and that he had paid Rs.63,50,000/- to M/s. Reliable Cashew nuts. There is no prima facie material on record to show that the applicant had paid or transferred the said amount in favour of M/s. Reliable cashews. The learned counsel for the applicant has relied upon the order passed by the Gujarat High Court in Criminal

Miscellaneous Application (for Anticipatory Bail) No.3748 of 2018. A perusal of the said order indicates that C.R.No.I-21/2018 has been registered against the applicant at Vastrapur Police Station at Ahmadabad for offences under sections 392, 385, 365, 323, 294(KH) and 506(2) r/w. 114 of the Indian Penal Code. While granting pre-arrest bail, the Court had taken into consideration the fact that the applicant is a good friend of the first informant in the said crime. They had entered into a business agreement. A dispute in respect of the said transaction had cropped up and the applicant had to recover Rs.10 lakhs. The allegation in the said first information report were that the first informant was forcibly picked up from a particular place and was forced to part with Rs.10 lakhs. The first informant in the said crime had informed that the dispute was resolved.

8. This order, in my considered view, does not prima facie indicate that the first information report in the said case was in relation to the recovery of Rs.68,500/- which was allegedly paid to M/s. Reliable cashew or that it has any nexus with the business transaction between the applicant and M/s. Kesar Agro.

9. The records reveal that the applicant had forwarded to M/s. Kesar Agro an email dated 06th October, 2017 allegedly sent to him by

one J. Venkatraman, Export Division of M/s. Reliable Cashew which reads thus :-

> *" Thanks for your interest in our product.*
> *We have sent u quotation of W320 cashew kernels for your export to Russia.*
> *We are exporting in so many countries.*
> *We have received your payment of Rs.63,50,000/-(sixty three lacs fifty thousand rupees) on dated 05/10/2017 as an advance for your order dated 01/10/2017.*
> *Now as per your request material will be ready in 2-3 days and also as per our talk vessel is on Thursday so better to ship on Wednesday from factory.*
> *Thanks*
> *J. VENKATRAMAN*
> *Export Division. "*

10. There is no written correspondence or any other prima facie material to show that the applicant had placed an order with M/s. Reliable cashew for supply of cashew nuts or that he had paid Rs.63,50,000/- to M/s. Reliable Cashew. On the contrary, the first information report prima facie indicates that when the first informant had visited the office of M/s. Reliable cashew, Mangalore, Karnataka, he was informed that the applicant had not placed any such order for

supply of cashew nuts. The learned APP has brought to my notice the statement of the Export Division Head of Cashew Co-operation Pvt. Ltd wherein he has categorically stated that they have not received any such order either from the applicant herein or M/s. Pratik enterprises as regards supply of cashew nuts and that they have not received any money from the applicant or his company towards the price of cashew nuts. This witness has further stated that venkatraman@reliablecashew.co.in is not a registered email ID of the said company. He has further stated that there is no person by the name Venkatraman working in the said company. The statement of this witness *prima facie* indicates that the email dated 06/10/2017 which was forwarded by the applicant to the first informant is fake and fabricated and the contents of the same are false.

11. The learned counsel for the applicant has placed on record the statement of account which shows that the applicant has transferred Rs.5 lakhs in the account of Bhoomi Marketing. The learned counsel for the applicant has also submitted that the said statement of account shows that the applicant had made several cash withdrawals to the tune of Rs.19,20,000/-. He claims that the said cash was paid as purchase price to several suppliers with whom the applicant had placed

an order for supply of cashew nuts.

12. There is no prima facie material to indicate that the applicant herein had placed an order with Bhoomi Marketing or any other supplier or that he had paid money to Bhoomi Marketing or any other supplier for supply of cashew nuts. The applicant has also not given the details of the suppliers to whom the cash payment was made. The applicant has also not been able to state whether the said company/firm with whom he had placed the said order and to whom he had paid such huge amount had issued any receipts or whether he had taken any action against them for not supplying the cashewnuts despite receiving said huge amount. Furthermore, no such ground was raised in the application for pre-arrest bail filed before the Sessions Court. On the contrary, in the application filed before the Sessions Judge, the applicant had claimed that M/s. Kesar Agro had initially placed an order for supply of 100 tonnes of cashew nuts which was later reduced to 36 tonnes. He had stated that M/s. Kesar Agro was required to deposit Rs.1.2 crores as advance but had deposited only Rs.67,68,000/-. The applicant had claimed that the price of cashew nuts has gone up due to the festival season of Diwali. He had stated that he was ready to supply cashew nuts on payment of difference in

price.

13. The records reveals that during the pendency of the bail application, the learned Additional Sessions Judge, Pune had referred the matter for mediation. Both parties had appeared before the mediator and had agreed to compound the matter and accordingly entered into terms of compromise which are at Exhibit 'E' (page no.22) of the Intervention Application No.571 of 2018 and the same read thus :-

> *(a) That the applicant is ready to supply Cashew of 9433 kg at a rate of Rs.700/- (Rupees Seven Hundred) and in addition to the same 50% of GST will be paid by both parties equally.*
>
> *(b) That the Applicant is ready to supply the said quality of Cashews above mentioned in 4 installments commencing from 20th February 2018 and the last installment will be on 20th May 2018.*
>
> *(c) The Applicant has given assurance to the original complainant that he will supply said material within the time stipulated above.*
>
> *(d) The quality of the supplied Cashews will be having SGS Certification and the Performa Invoice and terms regarding*

quality mentioned therein will apply.

(e) It is decided between the parties that the cost of the SGS Certification will be borne as the prior communication between the parties.

14. It is not in dispute that the applicant did not abide by the consent terms and as such the offence was not compounded and consequently, the application for pre arrest bail was dismissed on merits. In the application before this Court, the applicant has come out with another story that he was ready to refund the advance amount with interest @ 1.5% p.a. However, the complainant was demanding interest @ 10% p.a. This statement also appear to be an assurance on paper, as when the intervenor had told the applicant to show his bonafides by depositing only the advance amount, without any interest, the applicant declined to deposit any such amount on the ground that the intervenor has already filed a suit for recovery of the said amount.

15. I am not inclined to accept the contention of the learned counsel for the applicant that the first informant has converted a civil dispute into a criminal case. It may be mentioned that the money allegedly misappropriated by the applicant cannot be recovered in a criminal proceedings. The only remedy available for such recovery is through a

civil suit. Hence, the fact that the M/s. Kesar Agro has filed a civil suit for recovery of the said amount would not *per se* amount to converting a civil dispute into a criminal case.

16. It is to be noted that in ***Hridaya Ranjan Prasad Verma & ors v/s. State of Bihar and anr (2000) 4 SCC 168,*** wherein the Apex Court has observed thus :-

> *" It is held time and again that the distinction between mere breach of contract and the offence of cheating is a fine one. It would depend upon the intention of the accused at the time of inducement, which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of transaction that is the time when the offence is said to have been committed. Therefore, it is the intention which is gist of the offence. To hold a person guilty of cheating, it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such an culpable intention right at the beginning that is when he made the promise cannot be presumed. "*

17. In the instant case, the records prima facie reveal that the applicant had agreed to supply cashew nuts. He had received sum of

Rs.63,50,000/- towards advance. He has not supplied the cashew nuts and has also not refunded the money. The records prima facie reveal that the cheques issued by the applicant towards refund of advance have been dishonoured. The records prima facie reveal that the applicant had falsely stated that he had placed an order for cashew nuts with M/s. Reliable cashews and had forwarded a fake and fabricated email to M/s. Kesar Agro. The applicant had also sent a false message on whatsapp that the amount was transferred in the account of M/s. Kesar Agro. In the proceedings before the Sessions Court, the applicant after having expressed his desire to compound the case and having entered in the consent terms recorded in the mediation proceedings, failed to abide by the said terms. In the application before this Court, the applicant claimed that he is ready to refund the money with interest at the rate of 1.5% but declined to show his bonafides by depositing even the principal amount. The records prima facie reveal that the applicant has been making false and misleading statements and is infact trying to take the administration of justice for a ride.

18. The aforesaid circumstances prima facie reveal that the applicant had intention of cheating from the inception. Thus there is prima facie

material to show the involvement of the applicant in commission of the said crime. Granting the pre-arrest bail to the applicant in such circumstances will embolden the applicant and will put the investigating agency into a disadvantaged position and thus hinder thorough and proper investigation. Keeping in mind the above facts and circumstances, this is not a fit case to exercise discretion under section 438 of the Criminal Procedure Code. Hence, the Application is dismissed.

19. Suffice it to say that the aforesaid observations are prima facie in nature and shall not be construed as an expression of opinion on merits.

20. At this stage, learned counsel for the applicant submits that the interim bail be extended for one week.

21. Interim bail granted by order dated 23/04/2018 is extended by a period of one week.

(SMT. ANUJA PRABHUDESSAI, J.)