IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

CRM-M-7336-2018

Date of Decision: April 03, 2018

Sunil Kumar alias Sonu

..... Petitioner

Versus

State of Haryana

..... Respondent

CORAM: HON'BLE MR. JUSTICE SUDIP AHLUWALIA

Present: Mr. M.S.Dhindsa, Advocate for the Petitioner.

Mr. Manish Bansal, D.A.G. Haryana with
Mr. Sandeep Vashisht, DAG Haryana with ASI Vinod Kumar.

Mr. Kunal Dawar, Advocate for the complainant.

SUDIP AHLUWALIA, J.

This is an Application for Anticipatory Bail under Section 438 Cr.PC on behalf of Petitioner/accused Sunil Kumar alias Sonu in FIR No.738 dated 25.12.2017, registered at Police Station Hodal, District Palwal under Sections 120-B, 406, 420 and 506 of the IPC.

2. The gist of the allegations made by the complainant Kashmiri Lal, Proprietor of the Firm M/s Malwia Brothers is that the said Firm is engaged in the business of Cereals and also works as Commission Agent, and that the Petitioner along with one Kare, claiming to be employees of Delhi

Based Firm namely 'S.S.Sales Corporation' owned by one Rajesh Kumar approached the complainant for purchase of Paddy on behalf of 'S.S.Sales Corporation'. The deal was finalized between them upon payment after expiry of twenty days. The petitioner and his companion Kare thereafter removed Paddy from the premises of the complainant and transported the same in their Trucks to Delhi. In this manner, 21 Trucks were loaded from the premises of the complainant, the details of which have been separately mentioned in the FIR. On expiry of the agreed period of twenty days, when the complainant demanded payment from the petitioner, he was allegedly assured that the same would be secured from the owner of 'S.S.Sales Corporation'. He thereafter left Hodal on the pretext of going to Delhi for securing such payment, but later on became inaccessible and also switched off his Cell Phone. The complainant thereafter directly approached the consignee 'S.S.Sales Corporation', but was informed that they had no connection with the complainant and that the goods were supplied to them by the Petitioner himself. After realizing the cheating practiced upon the complainant in this manner, the FIR was lodged.

3. It may be mentioned that 'S.S.Sales Corporation' in whose favour the consignments of Paddy were sent, happens to be owned by co-accused Rajesh Kumar, who had separately applied for bail, which was granted to him in lieu of the fact that he paid an amount of Rs.35 lacs to the complainant/Firm, which was the balance of the total accumulated amount of Rs.1,32,00,000/- for the total quantity of Paddy supplied, as he had represented that the balance amount of Rs.97 Lacs had been delivered by

him directly to the petitioner.

4. From the Order passed by Ld. Additional Sessions Judge (1) Palwal on 14.2.2018 (Annexure P-5), it is seen that the Petitioner's application for Anticipatory Bail was dismissed with certain detailed observations, although it transpires that on an earlier date (6.2.2018), it was submitted on his behalf that he wanted to return the amount in question to the complainant, in consideration of which, the Ld. Court below had directed staying of his arrest in the meantime. But thereafter the prayer for Anticipatory Bail was dismissed on 14.2.2018. He thereafter approached this Court and on 20.2.2018, a similar submission was made on his behalf to the effect that “he is willing to cooperate with the investigation and also to pay the outstanding dues which may be found against him, if so detected during investigation”. He was thereafter granted interim bail by this Court in view of such submission. But when the matter subsequently came up for consideration on 27.03.2018, the petitioner denied any liability to make the payment and it was submitted on his behalf that he is being victimized by the Police Authorities who have refused to accept the receipts shown by him to indicate acknowledgments of payments on behalf of the complainant.

5. This Court then perused some of the purported documents relied on by the Petitioner. *Prima facie* the same do not appear to be in the nature of any formal receipts showing acknowledgments/acceptance of money by any specific person representing the complainant. On the other hand, documents available in the Police case diary indicate a peculiar *modus operandi* followed in the present case by way of which the consignments were

apparently sent in the name of “S.S.Sales Corporation”, Delhi, against which payments were allegedly received by the petitioner from the said Consignee, and Ld. counsel for the Petitioner who was shown copies of those receipts (even though an accused is not entitled to be privy to the material collected in a pending investigation), was not in a position to admit or deny his signatures on the relevant receipts.

6. Thereafter, the contentions raised on behalf of the petitioner have taken a rather different colour and direction. It has now been stressed on his behalf that in the given circumstances it is now only a case of no payment having been made for the goods allegedly consigned by the complainant, for which civil remedies are available to the complainant, and there is no element of deception involved in the deal arrived at between the parties. A number of decisions in support of this contention have been cited on behalf of the petitioner. This Court has gone through the same carefully apart from the Written Submissions filed on his behalf separately.

7. It has been specifically denied in the Written Submissions that Petitioner is an employee of “M/s S.S.Sales Corporation”, and it is asserted that he is doing his own business of sale and purchase of Paddy as a Commission Agent. It has also been asserted on his behalf that the story of the complainant having delivered Paddy worth Rs.1,32,00,000/- to him by merely relying upon his statement of being such an employee is unbelievable, as also that the complainant did not have any business dealing with any one else during the crucial period of twenty days between 6.11.2017 to 25.11.2017, during which, the Paddy consignments were

allegedly made/delivered.

8. This Court is however, not inclined to accept these contentions at face value, particularly in view of the fact that some of the consignment slips available in the Police Case file happen to be issued directly in the name of the petitioner himself, although the consignments were delivered in the Warehouse at Delhi in the account of "S.S.Sales Corporation". The genuineness or otherwise of the documents in such circumstances can be ascertained only after a proper investigation, and not by way of any pre mature guess work by the Court.

9. We may now refer to the decisions relied upon by the petitioner. In **'Binod Kumar & Ors. Versus State of Bihar & Anr.' Criminal Appeal No.2327 of 2014,** the Supreme Court had quashed the criminal proceedings in which charges u/s 406 IPC have been framed by observing inter-alia -

> *"18. In the present case, looking at the allegations in the complaint on the face of it, we find no allegations are made attracting the ingredients of Section 405 IPC. Likewise, there are no allegations as to cheating or the dishonest intention of the appellants in retaining the money in order to have wrongful gain to themselves or causing wrongful loss to the 14 Page 15 complainant. Excepting the bald allegations that the appellants did not make payment to the second respondent and that the appellants utilized the amounts either by themselves or for some other work, there is no iota of allegation as to the dishonest intention in misappropriating the property. To make out a case of criminal breach of trust, it is not sufficient to show that money has been retained by the appellants. It must also be shown that the appellants dishonestly disposed of the same in some way or dishonestly retained the same. The mere fact that the appellants did not pay the money to the complainant does not amount to criminal*

breach of trust.

19. Even if all the allegations in the complaint taken at the face value are true, in our view, the basic essential ingredients of dishonest misappropriation and cheating are missing. Criminal proceedings are not a short cut for other remedies. Since no case of criminal breach of trust or dishonest intention of inducement is made out and the essential ingredients of Sections 405/420 IPC are missing, the prosecution of the appellants under Sections 406/120B IPC, is liable to be quashed."

10. A Single Bench of Jharkhand High Court in **'M/s Ramsarup Lohh Udyog & Anr. Vs. State of Jharkhand and another' Cr.M.P.No.1533 of 2012 with Cr.M.P.No.1557 of 2012** had similarly quashed the proceedings under sections 406/420/34 of the IPC by observing inter-alia -

"Thus, the first element necessary for constituting the offence of cheating is deception of the complainant by the accused. Unless there is deception, the offence of cheating never gets attracted. After deception has been practiced the persons deceived should get induced to do or omit to do something. Then, the question arises as to what is the deception ?"

11. In **'Kironkumar Lulla & Ors. Vs. State, Rep. By, Inspector of Police E.O.W.II, Chennai' Criminal Original Petition No.10765 of 2004 and Crl. M.P. Nos. 3649 and 3650 of 2004,** the criminal proceedings involving the offences u/ss 420/34 IPC were quashed by the Madras High Court with the observations -

"17. As laid down in the decision reported in AIR 2001 SUPREME COURT 2960 (referred to supra) in order to constitute an offence of cheating, the intention to deceive should be in existence at the time when the inducement was made. It is necessary to show that a person had fraudulent or dishonest

intention at the time of making the promise to say that he committed an act of cheating. A mere failure to keep up promise subsequently cannot be presumed as an act leading to cheating. If, in the light of the above said legal principle laid down by the Apex Court, the allegations contained in the complaint and in the statement of witnesses L.W.1 and L.W.2 are considered, it could be seen that admittedly even as per the allegations contained, the petitioners were prompt in making payments for the purchases made by them at the beginning and they have committed default in making the payment for the purchases made by them only during the course of commercial transaction between them. Thus, it is clear that there is an amount due between the petitioners and the defacto complainant, the second respondent herein. If, during the course of commercial transaction, there is any default on the part of the petitioners in making the payment of the price of the fabrics supplied by the defacto complainant, it cannot be said that they have committed an offence of cheating. The allegations contained in the complaint and in the statement of witnesses, L.W.1 and L.W.2, do not disclose that the petitioners had an intention to deceive at the time when the commercial transaction commenced. At best, it could be seen that there was a failure on the part of the petitioners to keep up the promise subsequently and that cannot be presumed to be an act leading to cheating.

18. ....Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is, the time when the offence is said to have been committed. Therefore, it is the intention which is the 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."

12. Similarly, the proceedings of the complaint case under sections 406

and 420 IPC were quashed by the Allahabad High Court in **'K.L.Agarwal vs. State of U.P. And Another' Application No.39907 of 2013** with the observations -

> *"26. Even if all the allegations in the complaint are taken at the face value, in my view, the basic essential ingredients of dishonest misappropriation and cheating are missing. Criminal proceedings are not a short cut for other remedies. Since no case of criminal breach of trust or dishonest intention of inducement is made out and the essential ingredients of Sections 405/420 IPC are missing, the prosecution of the accused persons under Sections 406/420 IPC, is liable to be quashed."*

13. There is no dispute regarding the legal position that mere non payment of price after a commercial deal arrived at between the parties is not a ground enough to sustain criminal proceedings in the absence of any material indicating that there was an intention from the very beginning of not making payment at a later stage. In the present case however, in the opinion of this Court, it cannot be said that the element of deception is found to be altogether non-existent from the very beginning on going through the allegations in the FIR. It is not disputed that the consignments were ultimately delivered to, and taken over by the Delhi based Firm 'S.S.Sales Corporation'. The petitioner on the other hand, claims that he had taken delivery on his own account as a Commission Agent, and was within his right to pass on the consignments to the aforesaid consignee at a later stage. But there is no material available to indicate that he has made a single payment towards even one of the 21 consignments assuming that he was

directly acquiring the Paddy from the complainant. Therefore, his contention that in any case an amount of Rs.35 Lacs has been subsequently paid directly to the complainant (after registration of the FIR) by “S.S.Sales Corporation”, who by his own contention had no privity with the complainant, and that on account of such payment the outstanding dues if any against himself become a mere civil liability, amounts to blowing hot and cold in the same breath, particularly considering that the available material in the case diary indicates that he had received rest of the payments directly from “S.S.Sales Corporation”, but no part of the same was ever passed on to the complainant supplier at any stage, which would therefore, go to indicate the possibility of dishonest intention from the very beginning, more particularly considering that he had allegedly represented himself to be only an employee of the consignee, the veracity or otherwise of which allegations cannot be determined except by way of his custodial interrogation.

14. For the aforesaid reasons, this Court finds no justification to grant the extra ordinary protection of anticipatory bail to the petitioner at this stage of investigation.

Dismissed.

April 03, 2018 **(SUDIP AHLUWALIA)**
AS **JUDGE**

1. Whether speaking/ reasoned : Yes/ No
2. Whether reportable : Yes/ No