(Proceedings through video conferencing)

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

MCRCA No. 573 of 2021

- Mr. Abhishek Kumar S/o Bijoy Bahadur Sinha, aged about 45 years, R/o Flat No.1901, Anmol Prestige Tower, Excel Estate, Near BMC Garden/Jain Mandir, Govindji Shroff Road, Off. S.V. Road Goregaon (West) Mumbai- 400104.

---- Applicant

Versus

- State of Chhattisgarh Through the SHO, P.S. Katghora, District Korba (CG)

---- Non-applicant

For Applicant	:	Dr. Abhinav Chandrachud, Advocate with Mr. Aman Saxena, Advocate
For Non-applicant	:	Mr. Vimlesh Bajpai, Govt. Advocate
For Objector	:	Mr. Vivek Sharma, Advocate

Hon'ble Mr. Justice Parth Prateem Sahu
Order On Board

8/7/2021

1. This is first application under Section 438 of CrPC for grant of anticipatory bail to the applicant as he apprehends his arrest in connection with Crime No.98/2021 registered at Police Station Katghora, District Korba (CG) for commission of offence punishable under Section 420/34 of the Indian Penal Code.

2. Case of the prosecution story, in brief, is that complainant Mohammed Usman Khan, stating himself to be an employee of Rituraj Steels Private Limited, Bilaspur (hereinafter shall be referred to as '2nd Party') and power of attorney holder of Shri Rahul Bajpayee, Director of Rituraj Steels Private Limited, Bilaspur to deal with the court proceedings, has filed a written complaint in the police station mentioning therein that the 2nd party received a proposal from the Asset Reconstruction Corporation of India (for brevity '1st Party') regarding sell of

Shalivahana Hydro Power Project located at Village Chevdhara, Tehsil Podi-uprora, District Korba (CG). The 1st Party accepted that proposal and agreed to purchase the project for Rs.6,35,00,000/- as Special Purpose Vehicle (SPV) on slump sale basis. Pursuant to agreement executed between the parties, the 2nd party had deposited Rs.1,00,00,000/- (Rupees One Crore) in the account of 1st Party. On 9.10.2020 the Memo of Understanding (MoU) was executed between the 1st party and the 2nd party. As per terms of the MoU, the 1st party had deposited Rs.2,00,00,000/- (Rupees Two Crore) on 26.10.2020 in the bank account of 2nd party. Thereafter on 11.11.2020 sale-purchase and business transfer agreement was executed between both the parties. The 2nd party has installed CCTV cameras and deployed security guards at the plant and intimation in this regard as also other details, which were required to be forwarded as per MoU, was forwarded to the 1st party. The 2nd party wrote a letter to the 1st party requesting to discharge its liability in terms of MoU, which remained unreplied. Subsequently, the 1st party with intent to cheat and cause loss to the 2nd party, had entered into agreement to sell the power project to a third party. It is further alleged in the complaint that instead of accepting the agreed amount of consideration of Rs.6,35,00,000/-, the 1st party started demanding Rs.8,00,00,000/- as consideration. The said act on the part of the 1st party comes within the purview of offence as defined under Section 420 of IPC. Based on the aforementioned written complaint, FIR was registered by police station concerned against present applicant and four others on 16.4.2021.

3. Dr. Abhinav Chandrachud, learned counsel representing the applicant would submit that perusal of the contents of complaint itself would show that 1st party had entered into a contract by executing MoU for purchase of Shalivahana Hydro Power Project located at Village Chevdhara, Tehsil Podi-

uprora, District Korba. Pursuant to said agreement, the 2nd party has initially deposited Rs.1,00,00,000/- (Rupees One Crore) and after execution of MoU, further amount of Rs.2,00,00,000/- (Rupees Two Crore) was deposited. He submits that present applicant is only a nominee Director in Shalivahana Green Energy Limited and he is not involved in the business activities of the 1st party. He further submits that contents of written complaint & FIR would show that, an attempt has been made to convert the contractual dispute, if at all any, into criminal case. He further submits that the 1st party vide letter dated 7.3.2021 has terminated the agreement dated 29.10.2020 i.e. sale-purchase and business transfer agreement. In the letter dated 7.3.2021 there is specific mention that the 1st party will refund the earnest money deposited by the 2nd party with accrued interest thereon. Referring to Clauses-A, B, D & E of the MoU submitted that the project was self-identified by the seller- Party No.1, who intends to incorporate a company as Special Purpose Vehicle (SPV), therefore, agreed for transfer of project on 'slump sale basis' for total consideration of Rs.6,35,00,000/- to the 2nd party. He further referred to Clause 15 of MoU to submit that as per terms of MoU, the 1st Party has returned the amount deposited by the 2nd Party with interest. He also submits that as the project was self-identified by the Seller, he has every right to sell the project on a better price / consideration. After receipt of the offer of Rs.8,00,00,000/-, the 1st Party keeping in mind the MoU entered with the 2nd Party, had offered the 2nd Party to pay consideration, as offered to 1st party by the third party. When the 1st party did not receive any response from the 2nd party, the agreement was terminated vide Annexure A-8 and the advance amount was also returned to the 2nd Party. He submits that dispute raised is purely of civil nature. The complainant / 2nd Party can sue for damages, if any, suffered by 2nd Party. To support the submission of refund of money to 2nd Party, learned Counsel has referred to the bank statement filed at Page No.72 & 73 of the application. He further submits that for alleging offence of cheating as defined under Section 420 of IPC, there should be intention of a party to cheat from inception of entering into agreement, there is no such allegation against present applicant in the complaint. In support of his submissions, learned counsel places his reliance on the decisions of Hon'ble Supreme Court in cases of **Hiralal Hari Lal Bhagwati vs. CBI, New Delhi** reported in **(2003) 5 SCC 257**; **Uma Shankar Gopalika vs. State of Bihar & anr** reported in **(2005) 10 SCC 336**; **Vir Prakash Sharma vs. Anil Kumar Agarwal & another** reported in **(2007) 7 SCC 373** and **S.V.L. Murthy vs. State** represented by CBI, Hyderabad reported in **(2009) 6 SCC 77**.

4. Mr. Vimlesh Bajpai, learned Government Advocate for the State opposing the submissions made by learned counsel for the applicant, submits that the complainant has lodged written complaint stating that after execution of MoU and acceptance of Rs.3,00,00,000/- in two installments, the 1st party has unilaterally cancelled the agreement. Referring to Clause-15 of MoU it is argued that as per Clause 15, the agreement can be cancelled only by mutual consent, whereas in the case at hand, the cancellation of agreement is unilateral. Hence, submission of learned counsel for applicant that the 1st Party is having right to cancel the agreement is not correct. He further argued that after entering into agreement with the 2nd Party/ complainant, accepting part consideration and further entering into agreement for sale-purchase of share & transfer of business, the 1st Party has entered into agreement to sell the project with some other party which itself shows that the 1st Party has cheated the 2nd party/complainant.

5. Shri Vivek Sharma, learned counsel for the Objector would argue that unilateral cancellation of agreement is not provided under Clause 15 of MoU. It is specifically mentioned in Clause 15 of MoU that cancellation/termination of agreement can be

done by mutual consent. He further submitted that after agreeing to sell the power project for Rs.6,35,00,000/- and accepting huge amount of Rs.3,00,00,000/- in two installments, the 1st Party started demanding Rs.8,00,00,000/- as consideration of power project and on non-fulfilment of said demand, the 1st Party entered into agreement with other company during the subsistence of agreement with the 2nd party. He submits that by the aforementioned acts the 1st party has cheated the 2nd party. Hence, present applicant is not entitled for benefit of anticipatory bail under Section 438 of CrPC.

6. I have heard learned counsel for the parties and perused the case diary as also record of bail application.

7. Perusal of FIR would reveal that in pursuance of deposit of Rs.3,00,00,000/- by complainant/ 2nd Party, MoU was executed between the 1st Party & 2nd Party and thereafter share purchase & business transfer agreement was executed between them. It is not in dispute that the 1st Party had entered into a MoU for the purpose of sale of self-identified project for Rs.6,35,00,000/-, this itself shows that the complainant and the 1st party had entered into a commercial transaction. There is no allegation in FIR/complaint that since inception the 1st Party was having intention to cheat the 2nd Party/complainant. There is further no dispute that upon getting better offer / price of project, the 1st Party has firstly offered the complainant/ 2nd Party to enhance the consideration of project from Rs.6,35,00,000/- to Rs.8,00,00,000/- and when the 2nd party did not act upon that offer, the 1st Party terminated the agreement entered with the 2nd party and returned the amount deposited by complainant / 2nd Party.

8. The Hon'ble Supreme Court in case of **Hira Lal Hari Lal Bhagwati (supra)** has held as under:-

> “40. It is settled law, by catena of decisions, that for establishing the offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. From his making failure to keep up promise subsequently, such a culpable intention right at the beginning that is at the time when the promise was made cannot be presumed. It is seen from the records that the exemption certificate contained necessary conditions which were required to be complied with after importation of the machine. Since the GCS could not comply with it and, therefore, it rightly paid the necessary duties without taking advantage of the exemption certificate. The conduct of the GCS clearly indicates that there was no fraudulent or dishonest intention of either the GCS or the appellants in their capacities as office bearers right at the time of making application for exemption. As there was absence of dishonest and fraudulent intention, the question of committing offence under Section 420 of the Indian Penal Code does not arise. We have read the charge sheet as a whole. There is no allegation in the First Information Report or the Charge sheet indicating expressly or impliedly any intentional deception or fraudulent/dishonest intention on the part of the appellants right from the time of making the promise or misrepresentation. Nothing has been said on what those misrepresentations were and how the Ministry of Health was duped and what where the roles played by the appellants in the alleged offence. The appellants, in our view, could not be attributed any mens rea of evasion of cus toms duty or cheating the Government of India as the cancer society is a non profit organization and, therefore, the allegations against the appellants leveled by the prosecution are unsustainable. Kar Vivad Samadhan Scheme Certificate along with the Duncan's and Sushila Rani's judgments clearly absolve the appellants herein from all charges and allegations under any other law once the duty so demanded has been paid and the alleged offence has been compounded. It is also settled law that once a civil case has been compromised and the alleged offence has been compounded, to continue the criminal proceedings thereafter would be an abuse of the judicial process.”

In case of **Uma Shankar Gopalika (supra)** the Hon'ble Supreme Court has held thus:-

> “6.Now the question to be examined by us is as to whether on the facts disclosed in the petition of complaint any criminal offence whatsoever is made out much less offences under Section 420/120B of the Indian Penal Code. The only allegation in the complaint petition against the accused persons is that they assured the complainant that when they receive the insurance claim amounting to Rs. 4,20,000/-, they would pay a sum of Rs. 2,60,000/- to the complainant out of that but the same has never been paid. Apart from that there is no other allegation in the petition of complaint. It was pointed out on behalf of the complainant that the accused fraudulently persuaded the complainant to agree so that the accused persons may take steps for moving the Consumer Forum in relation to claim of Rs. 4,20,000/-. It is well settled that every breach of contract would not give rise to an offence of cheating and only in those cases breach of contract would amount to cheating where there was any deception played at the very inception. If the intention to cheat has developed later on, the same cannot amount to cheating. In the present case it has nowhere been stated that at the very inception there was any intention on behalf of the accused persons to cheat which is condition precedent for an offence under Section 420 IPC."

In **Vir Prakash Sharma's case (supra)** the Hon'ble Supreme Court has observed thus:-

> "13. The ingredients of Section 420 of the Penal Code are as follows:
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> (i) Deception of any persons;
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> (ii) Fraudulently or dishonestly inducing any person to deliver any property; or
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> (iii) To consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit.”

9. In **S.V.L. Murthy's case (supra)** it was observed as under:-

> “41. An offence of cheating cannot be said to have been made out unless the following ingredients are satisfied:
> (i) deception of a person either by making a false or misleading representation or by other action or omission;
> (ii) fraudulently or dishonestly inducing any person to deliver any property; or
> (iii) to consent that any person shall retain any property

> and finally intentionally inducing that person to do or omit to do anything which he would not do or omit.
> For the purpose of constituting an offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in the absence of a culpable intention at the time of making initial promise being absent, no offence under Section 420 of the Penal Code can be said to have been made out."

10. The Hon'ble Supreme Court in case of **Sushila Agrawal & ors Vs State (NCT of Delhi) & another** reported in **(2020) 5 SCC 1** has considered the issue of grant of anticipatory bail in detail.

11. If the contents of written complaint / FIR are taken into consideration in the light of above judgements of the Hon'ble Supreme Court, *prima facie* it is apparent that there is no mention that there was fraudulent or dishonest intention on the part of 1^{st} party since inception, that is to say, at the time of entering into MoU. This is an agreement with regard to sale-purchase of a project in terms of agreement and MoU executed between the parties. The 1^{st} Party upon getting better price/consideration has indisputably not only informed about the same but also offered to the 2^{nd} party and when the 2^{nd} party has not responded to the new offer, the agreement entered between the parties was terminated and the 1^{st} party entered into agreement with other party. Learned counsel for the complainant has not disputed the refund of amount deposited by them, as submitted by them, but his submission is that the 1^{st} Party could not have terminated the agreement and they have entered into the contract with third party during the subsistence of the contract with them.

12. For the foregoing discussion, *prima facie* the applicant has made out a case for grant of anticipatory bail. The bail application filed under Section 438 of CrPC for grant of anticipatory bail is allowed. It is directed that in the event of arrest of applicant in connection with the crime in question, he

shall be released on anticipatory bail by the officer arresting him on his executing a personal bond in the sum of Rs.1,00,000/- (Rupees One Lakh) with one surety in the like sum to the satisfaction of the Arresting Officer. The applicant shall also abide by the following conditions :

(i) that he shall make himself available for interrogation before the Investigating Officer as and when required;

(ii) that he shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him / her from disclosing such facts to the Court or to any police officer;

(iii) that he shall not act, in any manner, which will be prejudicial to fair and expeditious trial; and

(iv) that he shall appear before the trial Court on each and every date given to him by the said Court till disposal of the trial.

Sd/-

(Parth Prateem Sahu)
Judge

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