(Proceedings through video conferencing)

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

MCRC (A) No. 1039 of 2021

1. Mr. Komaraiah Malka, aged about 60 years, S/o Late Shri Venkataiah Malka, R/o 07 Floor, Minerva Hills, 94 S D Road, Secundrabad.

2. Mr. Naveen Malka, aged about 33 years, S/o Shri Mallesham Malka, R/o 07 Floor, Minerva Hills, 94 S D Road, Secundrabad.

3. Vidya Nambirajan, aged 55 years, D/o Nambirajan, R/o H.No.37-95/54, Road No.4, Mathura Nagar, Neredmet, Paramount House, Sainikpuri, Hyderabad, Telangana- 500094

4. J. Laxmikanth, aged about 67 years, S/o Lt. Shri J. Narsing Rao, R/o Plot No.169, Balramrai Colony, Mahendra Hills Road No.4, East Maredpally, Secundrabad, Hyderabad, Andhra Pradesh - 5000026.

---- Applicants

Versus

- State of Chhattisgarh Through the Station House Officer, Police Station Katghora, District Korba (CG)

---- Non-applicant

For Applicants	:	Ms. Sameksha Gupta & Mr. Shrestha Gupta, Advocates
For Non-applicant	:	Mr. B.P. Banjare, Dy. Govt. Advocate

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

1/9/2021

1. This is first application under Section 438 of CrPC for grant of anticipatory bail to the applicants as they apprehend their arrest in connection with Crime No.98/2021 registered at Police Station Katghora, District Korba (CG) for commission of offence punishable under Section 420 r/w 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. Learned counsel representing the applicants would submit that allegations against applicants are that they are Directors of Shalivahana Green Energy Limited incorporated under the Companies Act, 1956. Shalivahana Green Energy Limited executed document 'Memo of Understanding (MoU)' with Rituraj Steel Private Limited, Bilaspur in which Shalivahana Green Energy Limited is shown as '1st Party (seller)' and Rituraj Steel Private Limited is shown as '2nd Party (buyer)'. MoU was executed on 9.10.2020 wherein 1st Party agreed to sell Shalivahana Hydro Power Project situated at village Chevdhara, Tehsil Podi-uprora, District Korba (CG) to the 2nd Party on slump sale basis. 2nd Party - complainant has deposited total amount of Rs.3 Crores out of agreed consideration of Rs.6,35,00,000/-. After execution of MoU, 1st Party received an offer of Rs.8 Crores for Shalivahana Hydro Power Project. 1st Party intimated this fact to 2nd Party and had offered to purchase the project on the offer price received by 1st Party i.e. Rs. 8 Crore. When 2nd Party not responded to new offer of 1st Party, the agreement was terminated and amount deposited by 2nd Party was returned, as is appearing from Annexure A-5. She submits that the project, which is subject matter of MoU, is self-identified by seller, who has every right to sell the project on better price/consideration. Dispute, if any, of termination of contract/ MoU will have civil consequences and the complainant-2nd party can sue for damages if any suffered. There is no criminality attached in action of termination of MoU/agreement executed between the parties. She submits co-accused Abhishek Kumar has already been enlarged on anticipatory bail by this Court in M.Cr.C. (A) No.573/2021 vide order dated 8.7.2021 and case of applicants also stands on similar footing. Hence, applicants may also be extended benefit of anticipatory bail.

4. Mr. B.P. Banjare, learned Deputy Government Advocate for the State opposes the submissions made by learned counsel for applicants and submits that company of applicants has accepted Rs.3,00,00,000/- from complainant / 2nd Party in two installments i.e. Rs.1 Crore & Rs.2 Crore. Termination of agreement is unilateral. Case of co-accused Abhishek Kumar stands on different footing as he has been shown to be 'nominee Director' of the Company. However, upon putting a specific query with regard to allegations levelled against applicants and co-accused Abhishek Kumar, learned State Counsel would submit that allegations against all are similar.

5. I have heard learned counsel for the parties.

6. Allegation in FIR is 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 first offered complainant/ 2nd Party to enhance the consideration of project from Rs.6,35,00,000/- to Rs.8,00,00,000/- and when 2nd party did not act upon that offer, 1st Party terminated the agreement entered with 2nd party and returned the amount deposited by complainant / 2nd Party.

7. Hon'ble Supreme Court in case of **Hiralal Hari Lal Bhagwati vs. CBI, New Delhi** reported in **(2003) 5 SCC 257** 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 vs. State of Bihar & anr** reported in **(2005) 10 SCC 336** 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 vs. Anil Kumar Agarwal & another** reported in **(2007) 7 SCC 373** 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."

8. In **S.V.L. Murthy vs. State** reported in **(2009) 6 SCC 77** 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."

9. 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.

10. 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 1st 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 1st Party upon getting better price/consideration has indisputably not only informed about the same but also offered to the 2nd party and when the 2nd party has not responded to the new offer, the agreement entered between the parties was terminated and the 1st party entered into agreement with other party. Amount deposited by Party No.2 (complainant) is returned. This Court in M.Cr.C. (A) No.573/2021 has extended benefit to one of accused persons by name Abhishek Kumar wherein Party No.2 (Complainant) was represented by an advocate.

11. For the foregoing discussions, *prima facie* the applicants have made out a case for grant of anticipatory bail. Accordingly, application filed under Section 438 of CrPC for grant of anticipatory bail is allowed. It is directed that in the event of arrest of applicants in connection with crime in question, they

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

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

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

(iv) that they 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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