

HIGH COURT OF PUNJAB AND HARYANA**Bench: Justice Deepak Gupta****Date of Decision: November 30, 2023**

CRM-M-57841-2023

Dharampal Jain and another**...Petitioners****Versus****State of Haryana****...Respondent****Legislation:**

Section 41, 438 of the Criminal Procedure Code (Cr.P.C.)

Sections 406 and 420 of the Indian Penal Code (IPC)

The Arbitration and Conciliation Act, 1996

Subject :

Application for Anticipatory Bail in a Case of Alleged Misappropriation and Cheating under a Government Contract

Headnotes:

Anticipatory Bail – Application under Section 438 Cr.P.C. for grant of anticipatory bail in a case involving alleged misappropriation and cheating in a government contract – Petitioners accused of not delivering the agreed quantity of rice, leading to financial loss to the department. [Para 1, 2]

Arbitration Clause – Reliance on an arbitration clause in the contract by petitioners – Clause not applicable in cases of fraud, theft, or misappropriation, as per the agreement terms – Petitioners' failure to invoke arbitration for disputed claims within the specified period. [Para 6, 7]

Criminal Proceedings – Argument by State counsel on non-applicability of arbitration in cases of fraud, theft, or misappropriation – Petitioners' non-delivery of required rice amount prima facie constituting misappropriation. [Para 4, 8]

Arrest and Custodial Interrogation – Consideration of necessity for arrest or custodial interrogation under Sections 41 and 41A Cr.P.C. – Factors such as existing cooperation with the investigation, partial recovery of claimed amount, and attached property for remaining recovery. [Para 9, 14]

Grant of Anticipatory Bail – Application allowed based on circumstances including deposit of a significant amount post-FIR, no prior service of Section 41A notice, and attachment of land for recovery – Conditions for bail and continued cooperation with the investigation stipulated. [Para 16]

Referred Cases:

Satinder Kumar Antil v. Central Bureau of Investigation reported in (2022)10 SCC 51.

Arnesh Kumar v. State of Bihar (2014) 8 SCC 273.

Representing Advocates:

Mr. P.S. Ahluwalia, Advocate for the petitioners.

Mr. Randhir Singh, Additional Advocate General, Haryana, for the respondent.

DEEPAK GUPTA , J .

By way of present petition filed under Section 438 Cr.P.C, petitioners pray for grant of anticipatory bail in a case arising out of FIR No.23 dated 27.01.2020, under Sections 406 and 420 of IPC, registered at Police Station Ambala Sadar, Ambala.

2. (i) According to the petitioners, they are proprietors of firm M/s Mahavir Rice and Dal Mills, Ambala City, established in 1973. The firm is in the business of procuring paddy from the District Food and Supply Department and milling it into rice. The firm of the petitioners entered into an agreement with District Food and Supply Controller on 01.10.2018, whereby it was agreed to procure 6933.64 metric tonnes of paddy for Kharif Marketing Season 2018-19, for milling into rice. The firm was required to deliver 4645.51 metric tonnes of milled rice.

(ii) FIR has been lodged by the Food Inspector against the petitioners alleging that against 4645.51 metric tonnes of milled rice, which was required to be delivered by the firm of the petitioners up to 30.06.2019, 3532.45 metric tonnes of rice was supplied and thus, there has been deficiency of 1113.06 metric tonnes of rice, causing loss to the tune of 3,85,23,530/- to the Department and thus, offences of cheating ₹ and misappropriation of funds have been committed.

3. Learned counsel for the petitioners contends that the agreement dated 01.10.2018 (Annexure P-3) entered between the parties includes an arbitration clause, despite which authorities proceeded to initiate criminal proceedings in a bid to give civil dispute, a criminal colour. It is further contended that an amount of 96,84,643/- has already ₹ been recovered from the firm of the petitioners by the authorities after registration of the FIR, as is evident from Annexure P-5 and this fact has also been noticed in the order passed by learned Addl. Sessions Judge, Ambala (Annexure P-4) dismissing the application for anticipatory bail. Besides, the authorities have already attached the land measuring 27 Kanals 19 Marlas situated at village Dhurkada, Hisar Road, District Ambala belonging to the firm of the petitioners, so as to recover the amount. Learned counsel further submits that ever since registration of the FIR on 27.01.2020, petitioners have been co-operating with the investigation and voluntarily paid significant amount. It is more than three years from the date of registration of the FIR that petitioners are sought to be arrested despite co-operation. Learned counsel further contends that ever since registration of the FIR, no notice as required

under Section 41A Cr.P.C. was ever served upon the petitioners, which is imperative in view of the guidelines issued by Hon'ble Apex Court in "Satinder Kumar Antil v. Central Bureau of Investigation", reported in (2022)10 SCC 51. Learned counsel contends further that FIR fails to make out the ingredients required for commission of offences under Sections 406 and 420 of IPC and still, petitioners are ready to join the investigation.

4. Opposing the petition, learned State counsel contends that non-delivery of 1113.06 metric tonnes of milled rice, as per the agreement, on the part of the petitioners, caused loss of more than 3.85₹ crores to the complainant-department. Learned state counsel has then drawn attention towards the agreement executed between the parties, as per which demand for arbitration in respect of any claim of the miller under the contract is required to be made in writing within a period of one year from the date of completion or expiry of the period of contract and if no such demand is made, the miller is deemed to have waived off and released of all the liabilities under the contract in respect of the claims. Learned State counsel has further drawn attention towards another clause in the agreement, as per which cases of fraud, theft or mis-appropriation etc. on the part of second party/miller are not covered under Arbitration Clause and in such cases, legal proceedings as deemed fit may be initiated by the first party/ department. Learned State counsel has further drawn attention towards the status report (copy Annexure P-7), which was filed before the Court of learned Addl. Sessions Judge, Ambala and which learned State counsel has requested to consider as the status report in the present petition also, so as to contend that interrogation of the petitioners is required in order to recover the embezzled money. With these submissions, prayer is made for rejecting the petition.

5. I have considered submissions of both the sides and have also perused the record carefully.

6. Agreement (Annexure P-3) relied by the petitioners contain the following clauses, as have been referred by Ld. State counsel: -

"Provided that any demand for arbitration in respect of any claim(s) of the Miller/Second Party, under the contract shall be in writing and made within one year of the date of completion or expiry of the period of the contract. If the demand is not made within the period, the claim(s) of the Miller/Second Party shall be deemed to have been waived off and released of all liabilities under the contract in respect of these claims. The cost for and in connection

with arbitration shall be the discretion of the arbitrator who may make suitable orders in his award.

Subject as aforesaid, the Arbitration and Conciliation Act, 1996, shall apply to the arbitration provided under the clause. However, the cases of fraud, theft or misappropriation etc. on the part of Second party are not covered under this clause and in such cases legal proceedings as deemed fit will be initiated by the First party against the Second party as well as against the sureties.” 7. In the present case, it is not the contention of the petitioners that they ever raised any demand for arbitration in respect of disputed claim or how the amount has been calculated, within the period specified under the contract.

8. Further, though commission of offence under Section 420 IPC is debatable in the facts and circumstances of the case in hand, but it is not in dispute that petitioners had failed to deliver the required quantity of milled rice as per the agreement and thus, prima facie misappropriated the paddy and so as per agreement, the case is not covered under the Arbitration Clause.

9. However, at the same time, as the offences in question are punishable up to 7 years imprisonment, so the question is that whether the arrest of the petitioners or their custodial interrogation is required in the facts and circumstances of the present case, so as to deny the benefit of anticipatory bail to them.

10. The relevant part of Section 41 Cr.P.C. reads as under: -

“41. When police may arrest without warrant. — (1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person—

- (a) who commits, in the presence of a police officer, a cognizable offence;
- (b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:

—

- (i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;
- (ii) the police officer is satisfied that such arrest is necessary—

(a) to prevent such person from committing any further offence; or (b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or (d) to prevent such person from making any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured, and the police officer shall record while making such arrest, his reasons in writing: Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest.; xxxxxxxxxxxxxxxx”

11. Section 41A Cr.P.C further reads as under:

41A. Notice of appearance before police officer. —

(1) The police officer shall], in all cases where the arrest of a person is not required under the provisions of sub-section (1) of section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

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(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice.”

12. The Hon'ble Supreme Court in Satinder Kumar Antil's case (supra), while explaining the scope of Section 41 and 41-A of Cr.P.C. as held as under: -
“21. Section 41 under Chapter V of the Code deals with the arrest of persons. Even for a cognizable offense, an arrest is not mandatory as can be seen from the mandate of this provision. If the officer is satisfied that a person has

committed a cognizable offense, punishable with imprisonment for a term which may be less than seven years, or which may extend to the said period, with or without fine, an arrest could only follow when he is satisfied that there is a reason to believe or suspect, that the said person has committed an offense, and there is a necessity for an arrest. Such necessity is drawn to prevent the committing of any further offense, for a proper investigation, and to prevent him/her from either disappearing or tampering with the evidence. He/she can also be arrested to prevent such person from making any inducement, threat, or promise to any person according to the facts, so as to dissuade him from disclosing said facts either to the court or to the police officer. One more ground on which an arrest may be necessary is when his/her presence is required after arrest for production before the Court and the same cannot be assured.

22. This provision mandates the police officer to record his reasons in writing while making the arrest. Thus, a police officer is duty-bound to record the reasons for arrest in writing. Similarly, the police officer shall record reasons when he/she chooses not to arrest. There is no requirement of the aforesaid procedure when the offense alleged is more than seven years, among other reasons.

23. The consequence of non-compliance with Section 41 shall certainly inure to the benefit of the person suspected of the offense. Resultantly, while considering the application for enlargement on bail, courts will have to satisfy themselves on the due compliance of this provision. Any non-compliance would entitle the accused to a grant of bail.

24. Section 41A deals with the procedure for appearance before the police officer who is required to issue a notice to the person against whom a reasonable complaint has been made, or credible information has been received or a reasonable suspicion exists that he has committed a cognizable offence, and arrest is not required under Section 41(1). Section 41B deals with the procedure of arrest along with mandatory duty on the part of the officer.”

13. Hon'ble Supreme Court in Satinder Kumar Antil's case

(supra), further referred to “Arnesh Kumar v. State of Bihar”, reported as

(2014) 8 SCC 273, wherein it was held as under: -

“7.1 From a plain reading of the aforesaid provision, it is evident that a person accused of offence punishable with imprisonment for a term which may be

less than seven years or which may extend to seven years with or without fine, cannot be arrested by the police officer only on its satisfaction that such person had committed the offence punishable as aforesaid. Police officer before arrest, in such cases has to be further satisfied that such arrest is necessary to prevent such person from committing any further offence; or for proper investigation of the case; or to prevent the accused from causing the evidence of the offence to disappear; or tampering with such evidence in any manner; or to prevent such person from making any inducement, threat or promise to a witness so as to dissuade him from disclosing such facts to the Court or the police officer; or unless such accused person is arrested, his presence in the court whenever required cannot be ensured. These are the conclusions, which one may reach based on facts.

7.2 The law mandates the police officer to state the facts and record the reasons in writing which led him to come to a conclusion covered by any of the provisions aforesaid, while making such arrest. Law further requires the police officers to record the reasons in writing for not making the arrest.

7.3 In pith and core, the police officer before arrest must put a question to himself, why arrest? Is it really required? What purpose it will serve? What object it will achieve? It is only after these questions are addressed and one or the other conditions as enumerated above is satisfied, the power of arrest needs to be exercised. In fine, before arrest first the police officers should have reason to believe on the basis of information and material that the accused has committed the offence. Apart from this, the police officer has to be satisfied further that the arrest is necessary for one or the more purposes envisaged by sub-clauses

(a) to (e) of clause (1) of Section 41 Cr.P.C., 1973.”

14. By keeping in mind the legal position as above in the instant case, it is noticed that FIR was lodged way back on 27.01.2020. It is not disputed by learned State counsel that after registration of the FIR, firm of the petitioners has already deposited an amount of 96,84,643/-₹. Contention of the petitioners to the effect that they have already joined the investigation, has also not been refuted. The respondent-State wants to arrest the petitioners for the purpose of recovery of the remaining amount as per the status report (Annexure P-7), but it is not in dispute that 27 Kanals 19 Marlas of the land belonging to the firm of the petitioners, has already been attached as is evident from the communication dated 03.02.2020 sent by the Tehsildar, Ambala to the Collector, Ambala, copy of which is Annexure P-6.

15. In view of the above circumstances, learned State counsel is unable to convince this Court as to for what purpose, the arrest or custodial interrogation of the petitioners is required, particularly, considering the fact that at no point of time, any notice under Section 41ACr.P.C. has ever been served upon the petitioners, and now they are sought to be arrested after more than three years from the date of lodging of the FIR.

16. In view of the aforesaid discussion, this petition is hereby allowed. It is directed that in the event of the arrest of the petitioners, they shall be released on bail on their furnishing personal/surety bonds to the satisfaction of the Arresting Officer/Investigating Officer. However, they shall abide by conditions as envisaged under Section 438(2) Cr.P.C. They shall also continue to join the investigation, as and when required by the Investigating Officer.

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