

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 26th November, 2014

Date of Decision: 03rd December, 2014

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+ BAIL APPLN. 2354/2014

GAUTAM KHAITAN

..... Petitioner

Through: Mr. P.V. Kapur with Mr. Siddarth Luthra and Ms. Geeta Luthra, Sr. Advocates with Mr. K.K. Manan, Mr. P.K. Dubey, Advocates.

versus

ENFORCEMENT DIRECTORATE

..... Respondent

Through: Mr. Sanjay Jain, ASG with Mr. Ajay Digpaul, CGSC and Mr. Akash Nagar, Advocate with Mr. Vikas Singh, Dy. Director/ I.O.

CORAM:

HON'BLE MR. JUSTICE VED PRAKASH VAISH

1. By this application filed under Section 439 read with Section 482 of Cr.P.C., the petitioner is seeking bail in ECIR No.DLZO/15/2014/AD(VM)/CBI/ACU-V/NEW DELHI under Section 120B read with Section 420 of IPC and Sections 7/8/9/12/13(2) read with Section 13(1)(d) of PC Act, 1988 (hereinafter referred to as 'PC Act') read with Sections 3 and 4 of Prevention of Money Laundering Act, 2002 (for short, 'PMLA') registered by the

Enforcement Department, New Delhi on 03.07.2014.

2. The facts of the case as borne out from Enforcement Case Information Report (for short, 'ECIR') are that on 08.02.2010 Ministry of Defence, Government of India signed a Contract No. Air (HQ)/S 96062/6/ASI with M/s. Agustawestland International Ltd. (hereinafter referred to as 'AWIL') for the supply of 12 AW 101 VVIP/VIP Helicopters with Associated Engineering Package at an aggregated price of Euro 556.262 million (Rs.3726.96 crores @ Rs.67 per Euro). M/s. Agustawestland started paying kickbacks to Mr. Haschke and Mr. Gerosa under the guise of several consultancy contracts executed between M/s. Agustawestland S.P.A. and M/s. Gordian Services Sarl, Tunisia. M/s. Agustawestland S.P.A. in one such contract also agreed to appoint M/s. Gordian Services Sarl as consultant in the matter of 12 VVIP Helicopters, if the deal with MoD, India was sealed. Subsequently, Mr. Giuseppe Orsi, CEO, M/s. Finmeccania, Italy and Mr. Bruno Spagnolini, CEO, M/s. Agustawestland, UK apparently with the purpose to pump these amounts in India and abroad, signed engineering contracts with IDS Infotech, India and IDS Tunisia which were established with the main purpose of providing illegal gratification to the concerned public officials and the intermediaries. Agustawestland paid kickbacks worth Euro 51 million out of which Mr. Christian Michael James (a British citizen) was allegedly paid Euro 30 million and the remaining amount was paid to Mr. Guido Ralp Haschke and Mr. Carlo Gerosa.

3. For facilitating the aforesaid transfer of kickbacks Mr. Gautam

Khaitan (the present petitioner), Legal Advisor of M/s. IDS Infotech, India introduced Mr. Haschke and Mr. Gerosa to Mr. Satish Bagrodia and Mr. Pratap K. Agarwal, Chairman and Managing Director respectively of IDS Infotech Ltd., India. This firm received an amount of approximately Euro 2.166 million from Agustawestland during the period November, 2007 to April, 2010. Subsequently, IDS Tunisia was incorporated as 100% subsidiary of IDS Infotech, India, however the Indian company sold the Tunisian company to Mr Haschke and Mr Gerosa, after a few months of its incorporation. Thereafter, the business of M/s IDS Infotech, India was transferred to M/s Aeromatrix which was incorporated in Delhi vide a business transfer agreement (BTA) and Mr. Haschke and Mr. Gerosa along with Mr. Gautam Khaitan were appointed as its Directors. Besides the above, Mr. Praveen Bakshi was appointed as the CEO (Chief Executive Officer) in this company who allegedly has an important role in channelizing money for illegal gratification. Mr. Haschke and Mr. Gerosa along with Mr. Gautam Khaitan were also shareholders in M/s Aeromatrix through their company IDS Mauritius, and they brought money through this company by way of fictitious/over invoices.

4. The alleged business which M/s IDS, India was getting from M/s Augusta Westland, went to IDS Tunisia after its incorporation. Initially, M/s IDS Infotech, India started receiving the alleged work through M/s. IDS Tunisia, but after incorporation of M/s Aeromatrix Info Solution Pvt. Ltd, M/s IDS Tunisia stopped entrusting any work to IDS Infotech, India and started giving it to M/s Aeromatrix. M/s Aeromatrix received purchase orders from IDS Tunisia and after

execution of alleged work, invoiced product was delivered directly to M/s Agustawestland, but the payments for the same were received through M/s IDS Tunisia. It was also revealed that about 82% shares of M/s Aeromatrix are held by M/s Infotech Design System (IDS) Mauritius and about 17% by Mr. Gautam Khaitan. M/s Aeromatrix also placed some of its engineers at the premises of M/s Agustawestland for on-site engineering activities for which payments were made to M/s Aeromatrix directly. It was also revealed that M/s IDS Tunisia raised bills amounting to Euro 24.37 million on M/s Agustawestland. However, M/s IDS Infotech, India and M/s Aeromatrix were paid only Euro 1.88 million and 3.8 million respectively for the same work for which M/s IDS, Tunisia raised bills on M/s Agustawestland amounting to Euro 24.37 million. Hence, M/s IDS, Tunisia inflated the invoices and this money was eventually brought to India through Mauritius route by Mr. Gautam Khaitan for payment of illegal gratification.

5. Based on the aforesaid allegations the Directorate of Enforcement arrested the petitioner on 23.09.2014. Thereafter, the petitioner was produced before learned Chief Metropolitan Magistrate, New Delhi and an application under Section 167(2) of Cr.P.C. read with Section 65 of PMLA seeking custody remand was filed and the custody remand for a period of 7 days was granted vide order dated 23.09.2014. The petitioner was produced before Duty Metropolitan Magistrate, New Delhi on 30.09.2014, the Directorate of Enforcement again moved an application seeking custody of the petitioner for further interrogation. Vide order dated 30.09.2014 Duty Metropolitan

Magistrate, New Delhi remanded the petitioner to the custody of the respondent for a period of 5 days. On 01.10.2014 petitioner moved an application seeking bail. Vide order dated 07.10.2014 learned Chief Metropolitan Magistrate observed that the power to grant bail for the offences under PMLA lies with the concerned Special Judge/ Additional Sessions Judge and the said application was referred to learned District & Sessions Judge, New Delhi, who marked the same to learned Special Judge (PC Act) CBI-2, New Delhi. Vide order dated 20.10.2014 learned Special Judge (PC Act) CBI-2, New Delhi dismissed the said application for bail.

6. Subsequently, the complaint under Section 44 read with Section 45 of PMLA for the offences punishable under Sections 3 and 4 of PMLA was filed.

7. Learned senior counsel for the petitioner contended that during the period of inquiry whenever the petitioner was called for interrogation, he appeared and cooperated. Thereafter, CBI registered RC No.217/2013-A0003/CBI-ACU(V) for the offences under the PC Act. Vide order dated 10.04.2013, learned Special Judge (PC Act) CBI-01, Patiala House Courts, New Delhi suspended the lookout circular issued against the petitioner.

8. Learned senior counsel for the petitioner also submitted that the provisions of Section 45 of PMLA apply to the offences under Part A of the Schedule under the Act. As per provisions of PMLA the investigation is to be conducted by Directorate of Enforcement and not by CBI. He had also pointed out that according to Directorate of

Enforcement there are 19 accused persons and out of them only petitioner has been arrested. The charge-sheet against 5 accused persons have been filed and no other accused has been arrested except the petitioner.

9. Mr. Kapur, learned senior counsel for the petitioner further submitted that the petitioner has disclosed the sources of income and there are no illicit proceeds, and, therefore, the PMLA is not applicable.

10. Learned senior counsel for the petitioner has relied upon judgment in '**Shivkant Tripathi vs. State of U.P. & Ors.**', 2013 (6) ADJ 672: MANU/UP/0935/2013 to contend that from proviso to Section 17(1) and 18(1) of PMLA, it *prima facie*, appears that the Directorate of Enforcement comes into action in respect of the money laundering allegations only after a charge-sheet is submitted by the police investigating the question whether any of the Scheduled offence has been committed. He has also submitted that the complaint has been filed and the petitioner is entitled to bail. In support of his submission he has also relied upon judgment in '**Anil Mahajan vs. Commissioner of Customs & Anr.**', 84 (2000) DLT 854; '**Sanjay Chandra vs. Central Bureau of Investigation**', AIR 2012 SC 830; '**Binoy Jacob vs. Central Bureau of Investigation**', 49 (1993) DLT 640 and '**Gurcharan Singh and Ors. vs. State (Delhi Administration)**', AIR 1978 SC 179.

11. *Per contra*, learned Additional Solicitor General appearing for respondent urged that CBI is an independent agency. The CBI

registered the case for the offences under Sections 7/8/9/12/13 of PC Act.

12. Learned Additional Solicitor General also contended that as per Section 24 of PMLA burden of proof that the proceeds of crime are not involved in money laundering lies upon the accused. He had also submitted that according to Section 45 of the PMLA, the petitioner is not entitled to bail unless an opportunity is afforded to the public prosecutor to oppose the application and where the public prosecutor opposes the said application, the Court has to be satisfied that there are reasonable grounds for believing that he is not guilty of such offence and he is not likely to commit any offence while on bail. The statement of Manish Jain, Nidhi Mathur, Arihant Jain, Parveen Bakshi, Pratap Aggarwal, Deepak Goel, Suparna Sachar, Sumit Jain, Anand Prakash, Ritu Khaitan and Sanjeev Tyagi under Section 50 of PMLA were recorded.

13. Learned Additional Solicitor General also submitted that the petitioner was engaged in incorporating business in India for foreign/ local clients by executing a *modus operandi* that initially the company was incorporated on the address of M/s. O. P. Khaitan & Co. by appointing the employees as Directors and shareholders of the said incorporated company and subsequently the incorporated company is sold to foreign/ local clients. The same is confirmed by the statements recorded by Directorate of Enforcement. He had also pointed out that the petitioner incorporated M/s. Incrust Infotechno Solutions Pvt. Ltd. with initial paid up capital of Rs.1,00,000/- (Rupees One lakh) for

taking over the IT Division from IDS, Chandigarh for doing the work of Agustawestland SPA in which initially the petitioner and his employee Mr. Arihant Jain were shareholders and Directors and subsequently on receipt of FDI from M/s. Infotech Design System Ltd., Mauritius, Mr. Carlos Gerosa and Mr. Guido Ralph Haschke were also appointed Directors of the company and the name of the company was changed to M/s. Aeromatrix Info Solutions Pvt. Ltd. The petitioner was instrumental in incorporating M/s. IDS, Tunisia in which Mr. Guido Ralph Haschke, Mr. Carlos Gerosa and Mr. Gautam Khaitan (the petitioner) generated proceeds of crime in connivance with M/s. Agustawestland SPA in the form of payments towards inflated/increased invoices against IT related work done by M/s. IDS Infotech, Chandigarh and M/s. Aeromatrix Info Solutions Pvt. Ltd.

14. It was also submitted on behalf of respondent from the copies of documents obtained from Ministry of Defence that a total of Euro 70 million was paid as kickbacks. The search of residential house and office premises of the petitioner was conducted on 22.09.2014, in which copies of various documents including a copy of order by an Italian Court on 05.08.2014 on the petition filed by the petitioner against issue of his arrest warrant, rejecting the said appeal and copy of a document which was seized by the Italian authorities from the house of Haschke's mother, which contained details of various payments made to several persons including the petitioner. The hard disk of laptop of Mr. Manish Jain, one of the employees of M/s O. P. Khaitan & Co. was also seized. Later on the said employee surrendered his laptop to the officers of Directorate of Enforcement. Copies of the

documents, from the hard disk of Mr. Manish Jain's laptop were retrieved in his presence along with two independent witnesses. The retrieved documents are copies of various invoices raised by M/s Interstellar, Mauritius which is controlled by the petitioner, some invoices raised upon M/s Interstellar, Mauritius, some blank format of invoices belonging to M/s Interstellar, Mauritius and bank statements of Barclays Banks, Mauritius, and Bramer Banking Corporation, Mauritius of M/s Interstellar, Mauritius, which shows transfer of money through swift messages to the accounts of Ms. Ritu Khaitan w/o Mr. Gautam Khaitan.

15. It was further submitted that Ms. Nidhi Mathur, another employee of M/s O.P. Khaitan & Co. whose computer was seized and copies of documents were retrieved by the officers of Directorate of Enforcement in her presence and two other independent witnesses, in her statement recorded under Section 50 of PMLA, inter alia, stated that the documents related to M/s. Interstellar Mauritius retrieved from the hard disk of a computer were related to Mr. Arihant Jain, one of the Directors of M/s. Aeromatrix Info Solutions Pvt. Ltd., who was earlier using the said computer. Statements of Mr. Manish Jain, Ms. Nidhi Mathur, Mr. Arihant Jain, Mr. Praveen Bakshi and Mr. Pratap Aggarwal under Section 50 of PMLA were recorded.

16. Mr. Jain, learned Additional Solicitor General submitted that the petitioner is not entitled to bail and he has relied upon judgment of Hon'ble Supreme Court in '**Union of India vs. Hassan Ali Khan & Anr.**', 2011 (4) JCC 2758 and '**Narender Mohan Singh and Ankita**

Singh vs. Directorate of Enforcement and Anr., 2014 (2) AJR 670: MANU/JH/0515/2014.

17. I have given my thoughtful consideration to the submissions of learned senior counsel for the petitioner and learned Additional Solicitor General for the respondent and have also gone through the material on record.

18. Before advertng to the merits of the case, it is necessary to consider the relevant provisions of PMLA. The “offence of money laundering” is defined under Section 3 of PMLA, which reads as under: -

“3. Offence of money-laundering. – Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering.”

19. The expression “proceeds of crime” is defined under clause (u) of Section 2 of PMLA, which reads as under: -

“(u) “proceeds of crime” means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property.”

20. Section 24 of PMLA assigns the burden of proof relating to proceeds of crime under PMLA, which reads as under: -

“24. In any proceeding relating to proceeds of crime

under this Act, -

(a) In the case of a person charged with the offence of money-laundering under section 3, the Authority or Court shall, unless the contrary is proved, presume that such proceeds of crime are involved in money-laundering; and

(b) In the case of any other person the Authority or Court, may presume that such proceeds of crime are involved in money-laundering.”

21. Section 45 of PMLA deals with offences to be cognizable and non-bailable, which reads as under: -

“45. Offences to be cognizable and non-bailable. –

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his own bond unless –

(i) The Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) Where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

Provided that a person who is under the age of sixteen years or is a woman or is sick or infirm, may be released on bail, if the special court so directs:

Provided further that the Special Court shall not take cognizance of any offence punishable under section 4 except upon a complaint in writing made by –

(i) The Director; or

(ii) Any officer of the Central Government or State Government authorized in writing in this behalf by the Central Government by a general or a special order made in this behalf by that Government.

(1A) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or any other provision of this Act, no police officer shall investigate into an offence under this Act unless specifically authorized, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed.

(2) The limitation on granting of bail specified in subsection (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.”

22. In **Shiv Kant Tripathi’s** case (supra), the Apex Court held as under: -

“5. It prima facie appears from the proviso to Section 17(1) and more importantly the proviso to Section 18(1) of the Prevention of Money-Laundering Act, 2002 that the Directorate of Enforcement comes into action in respect of the money laundering allegations only after a charge-sheet is submitted by the police/ agency investigating the question whether any of the ‘scheduled offences’ has been committed. We will assume that even if the police submits a final report, alleging that no scheduled offence has been committed, but the Magistrate does not accept the same and issues process, even then the directorate can initiate investigation into money-laundering allegations. In that view the investigation done by the directorate under the interim orders passed herein, even before a charge-sheet by the police regarding any scheduled offence having been committed, was premature.”

23. In **Narender Mohan Singh's** case (supra), Hon'ble Supreme Court observed as under: -

“5. Further, it was submitted that the provision as contained in section 3 of the Prevention of Money Laundering Act, never does stipulate that only when one commits scheduled offence particularly offence under Section 13 of the Prevention of Corruption Act, when it was incorporated in the statute by way of amendment, projection of the proceeds of the crime by the person would be liable to be prosecuted, rather the offence of money laundering is committed on the date when the proceeds of crime is being projected as untainted property, which proposition has been laid down by this Court in a case of “Hari Narayan Rai v. Union of India & Other”, W.P.(Cr.) No.325 of 2010. Learned counsel, in order to buttress his stand, has also referred to a decision rendered in a case of “Sajjan Singh v. State of Punjab”, MANU/SC/0085/1963 : AIR 1964 (SC) 464 and also in a case of “Union of India v. Hassan Ali Khan and another”, (2011) 10 SCC 235.

Thus, it was submitted that this application is devoid of any merit and, hence, it is fit to be dismissed.

24. In **Hassan Ali Khan's** case (supra), the accused was arrested for having committed an offence punishable under Section 4 of PMLA and while cancelling the bail the Hon'ble Supreme Court of India observed as under: -

“23. Having carefully considered the submissions made on behalf of the respective parties and the enormous amounts of money which the Respondent No.1 had been handling through his various bank accounts and the contents of the note signed by the Respondent No.1 and

notarized in London, this case has to be treated a little differently from other cases of similar nature. It is true that at present there is only a nebulous link between the huge sums of money handled by the Respondent No.1 and any arms deal or intended arms deals, there is no attempt on the part of the Respondent No.1 to disclose the source of the large sums of money handled by him. There is no denying the fact that allegations have been made that the said monies were the proceeds of crime and by depositing the same in his bank accounts, the Respondent No.1 had attempted to project the same as untainted money. The said allegations may not ultimately be established, but having been made, the burden of proof that the said monies were not the proceeds of crime and were not, therefore, tainted shifted to the Respondent No.1 under Section 24 of the PML Act, 2002. For the sake of reference, Section 24 is extracted hereinbelow: -

24. Burden of proof. – When a person is accused of having committed the offence under Section 3, the burden of proving that proceeds of crime are in tainted property shall be on the accused.”

24. it is true that having a foreign bank account and also having sizeable amounts of money deposited therein does not *ipso facto* indicate the commission of an offence under the PML Act, 2002. However, when there are other surrounding circumstances which reveal that there were doubts about the origin of the accounts and the monies deposited therein, the same principles would not apply.....”

25. There is no hard and fast rule regarding grant or refusal of bail. Each case has to be considered on its own merits. The matter always calls for judicious exercise of discretion by the Court. Where the

offence is of serious nature, the Court has to decide the question of grant of bail in the light of considerations such as nature and seriousness of offence, nature and character of evidence in support thereof, the severity of the punishment for which conviction will entail the character of the accused, circumstances which are peculiar to the accused, a reasonable possibility of securing the presence of the accused at the trial, the reasonable apprehension of influencing the witness and tampering with the evidence and the larger interest of the public or such similar other considerations.

26. The economic offences constitute a class apart and need to be vested with different approach in the matter of bail. The economic offences having deep rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as a grave offence affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.

27. At this juncture, it is relevant to mention here that the economic offences have serious repercussions on the development of the country as a whole. The Apex Court in '**State of Gujarat vs. Mohanlal Jitamalji Porwal and Anr.**', (1987) 2 SCC 364, while considering a request of the prosecution for adducing additional evidence, *inter alia*, observed as under: -

“5. The entire Community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit

regardless of the consequence to the Community. A disregard for the interest of the Community can be manifested only at the cost of forfeiting the trust and faith of the Community in the system to administer justice in an even handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the national economy and national interest.....”

28. After going into all the details furnished by the respondent/ Directorate of Enforcement in the form of reply, without expressing any opinion on merits, I feel that at this stage, the release of the petitioner would hamper further investigation as it may influence the witnesses. Though, it is pointed out by learned senior counsel for the petitioner that the petitioner is in no way connected with this case, however, in my view, the apprehension raised by the respondent cannot be ignored considering the fact that the petitioner is the beneficiary and the prime conspirator in the said money laundering transactions.

29. It has also to be kept in mind that for the purpose of granting bail the legislature has used the words “reasonable grounds for believing” instead of “the evidence” which means the Court dealing with the grant of bail can only be satisfied as to whether there is a genuine case against the accused if the prosecution will be able to produce *prima facie* evidence in support of the charge. At this stage, it is not expected to have the evidence establishing the guilt of the accused beyond reasonable doubt.

30. Having considered in totality the facts and circumstances of the

case, without expressing any opinion on the merits of the case and also with regard to the claim of the respondent, in my view, the petitioner cannot be released on bail at this stage. Accordingly, the application is dismissed.

31. However, the respondent (Directorate of Enforcement) is directed to complete the investigation as early as possible and thereafter, the petitioner would be at liberty to move an application for bail before the trial court and the trial court will consider the same independently on its own merits.

Crl. M.B. No.10813/2014

The application is dismissed as infructuous.

**(VED PRAKASH VAISH)
JUDGE**

DECEMBER 03, 2014

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