

Court No. - 19

Case :- CRIMINAL MISC ANTICIPATORY BAIL APPLICATION
U/S 438 CR.P.C. No. - 1090 of 2024

Applicant :- Sanjay Kumar Jha

Opposite Party :- Union Of India Thru. Directorate Of Enforcement
Thru. Assistant Director

Counsel for Applicant :- Ayodhya Prasad Mishra A.P. Mishra, Ayush
Shukla, Chanchal Kumar Pandey, Jaylaxmi Upadhyay, Rituraj Mishra

Counsel for Opposite Party :- Rohit Tripathi

Hon'ble Subhash Vidyarthi J.

1. Heard Sri Ayodhya Prasad Mishra, the learned counsel for the applicant as well as Sri Rohit Tripathi, learned counsel for the respondent- Directorate of Enforcement and perused the records.
2. The learned counsel for the application has filed a rejoinder affidavit which is taken on record.
3. The second anticipatory bail application filed by the applicant seeking anticipatory bail in Session Case No. 160/2023 in the Court of Special Judge, C.B.I. – 3, Lucknow, arising out of ECIR No. 01/ALSZO/2018 under Sections 3/4 and 45 of Prevention of Money Laundering Act, 2002, registered at Police Station Enforcement of Directorate. The first bail application No. 1411 of 2023 was rejected by a detailed order dated 28.11.2023.
4. While rejecting the first anticipatory bail application of the applicant, this Court had dealt with the submission of the learned counsel for the applicant that a co-accused Sunil Kumar Asthana had been granted interim anticipatory bail by means of an order dated 26.09.2023 passed in Criminal Misc. Anticipatory Bail Application No. 2106 of 2023. This Court observed that while granting interim anticipatory bail to Sunil Kumar Asthana this fact was not placed before the Court that a huge amount had been transferred to his bank account and the same had been withdrawn there from, whereas the complaint states that Rs. 1,11,86,000/- had been illegally transferred to two saving

banking accounts, in one of which Sunil Kumar Asthana was a joint account holder.

5. The Second application has been moved *inter alia* on the ground that the interim anticipatory bail granted to Sunil Kumar Asthana has been confirmed by means of an order dated 15.02.2024. A perusal of the order dated 15.02.2024 confirming the interim anticipatory bail granted to Sunil Kumar Asthana indicates that it records the following submission of the learned Counsel for the Directorate of Enforcement:

“Shri Kuldeep Srivastava, learned counsel for the Directorate of Enforcement on the other hand opposes the prayer for anticipatory bail of the applicant. He informs that no amount misappropriated in pursuance to the alleged offenses has been transferred in the bank account of the applicant.”

6. Apparently, the co-accused Sunil Kumar Asthana has been granted anticipatory bail on the basis of a wrong information furnished by the learned counsel for the Directorate of Enforcement that had been transferred to the bank account of Sunil Kumar Asthana, whereas the complaint filed by the directorate of enforcement states that a huge amount had been transferred to the bank account of Sunil Kumar Asthana. Therefore, the grant of anticipatory bail to a co-accused person on the basis of a wrong factual premise, cannot be a ground for allowing the second anticipatory bail to the applicant.
7. The learned counsel for the applicant next relied upon a judgment of the Hon’ble Supreme Court in **Tarsem Lal Vs. Directorate of Enforcement Jalandhar Zonal Office**: 2024 SCC OnLine 971, in which the Court has recorded the following conclusions:-

“23. Now, we summarise our conclusions as under:

a) Once a complaint under Section 44 (1)(b) of the PMLA is filed, it will be governed by Sections 200 to 205 of the CrPC as none of the said provisions are inconsistent with any of the provisions of the PMLA;

b) If the accused was not arrested by the ED till filing of the complaint, while taking cognizance on a complaint under Section 44(1)(b), as a normal rule, the Court should issue a summons to the accused and not a warrant. Even in a case where the accused is on bail, a summons must be issued;

c) After a summons is issued under Section 204 of the CrPC on taking cognizance of the offence punishable under Section 4 of the PMLA on a complaint, if the accused appears before the Special Court pursuant to the summons, he shall not be treated as if he is in custody. Therefore, it is not necessary for him to apply for bail. However, the Special Court can direct the accused to furnish bond in terms of Section 88 of the CrPC;

d) In a case where the accused appears pursuant to a summons before the Special Court, on a sufficient cause being shown, the Special Court can grant exemption from personal appearance to the accused by exercising power under Section 205 of the CrPC;

e) If the accused does not appear after a summons is served or does not appear on a subsequent date, the Special Court will be well within its powers to issue a warrant in terms of Section 70 of the CrPC. Initially, the Special Court should issue aailable warrant. If it is not possible to effect service of theailable warrant, then the recourse can be taken to issue a nonailable warrant;

f) A bond furnished according to Section 88 is only an undertaking by an accused who is not in custody to appear before the Court on the date fixed. Thus, an order accepting bonds under Section 88 from the accused does not amount to a grant of bail;

g) In a case where the accused has furnished bonds under Section 88 of the CrPC, if he fails to appear on subsequent dates, the Special Court has the powers under Section 89 read with Sections 70 of the CrPC to issue a warrant directing that the accused shall be arrested and produced before the Special Court; If such a warrant is issued, it will always be open for the accused to apply for cancellation of the warrant by giving an undertaking to the Special Court to appear before the said Court on all the dates fixed by it. While cancelling the warrant, the Court can always take an undertaking from the accused to appear before the Court on every date unless appearance is specifically exempted. When the ED has not taken the custody of the accused during the investigation, usually, the Special Court will exercise the power of cancellation of the warrant without insisting on taking the accused in custody provided an undertaking is furnished by the accused to appear regularly before the Court. When the Special Court deals with an application for cancellation of a warrant, the Special Court is not dealing with an application for bail. Hence, Section 45(1) will have no application to such an application;

h) When an accused appears pursuant to a summons, the Special Court is empowered to take bonds under Section 88 of the CrPC in a given case. However, it is not mandatory in every case to

direct furnishing of bonds. However, if a warrant of arrest has been issued on account of nonappearance or proceedings under Section 82 and/or Section 83 of the CrPC have been issued against an accused, he cannot be let off by taking a bond under Section 88 of the CrPC, and the accused will have to apply for cancellation of the warrant;

i) After cognizance is taken of the offence punishable under Section 4 of the PMLA based on a complaint under Section 44 (1)(b), the ED and its officers are powerless to exercise power under Section 19 to arrest a person shown as an accused in the complaint; and

j) If the ED wants custody of the accused who appears after service of summons for conducting further investigation in the same offence, the ED will have to seek custody of the accused by applying to the Special Court. After hearing the accused, the Special Court must pass an order on the application by recording brief reasons. While hearing such an application, the Court may permit custody only if it is satisfied that custodial interrogation at that stage is required, even though the accused was never arrested under Section 19. However, when the ED wants to conduct a further investigation concerning the same offence, it may arrest a person not shown as an accused in the complaint already filed under Section 44(1)(b), provided the requirements of Section 19 are fulfilled.”

8. Although the learned Additional Solicitor General had placed reliance on the decision rendered by a Bench consisting of three Hon’ble Judges of the Supreme Court in the case of **Vijay Madanlal Choudhary v. UOI**, 2022 SCC OnLine SC 929, it has not been dealt with in **Tarsem Lal** (Supra). **Vijay Madanlal Choudhary** explains the object of enactment of the Prevention of Money Laundering Act, 2002 as follows: -

*“19. The Act was enacted to address the urgent need to have a comprehensive legislation, inter alia, for preventing money-laundering, attachment of proceeds of crime, adjudication and confiscation thereof including vesting of it in the Central Government, setting up of agencies and mechanisms for co-ordinating measures for combating money-laundering and also to prosecute the persons indulging in the process or activity connected with the proceeds of crime. **This need was felt world over owing to the serious threat to the financial systems of the countries, including to their integrity and sovereignty because of money-laundering.** The international community deliberated over the dispensation to be provided to address the serious threat posed by the process and activities connected with the proceeds*

of crime and integrating it with formal financial systems of the countries. The issues were debated threadbare in the United Nation Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Basle Statement of Principles enunciated in 1989, the FATF established at the summit of seven major industrial nations held in Paris from 14th to 16th July, 1989, the Political Declaration and Noble Programme of Action adopted by United Nations General Assembly vide its Resolution No. S-17/2 of February 23, 1990, the United Nations in the Special Session on countering World Drug Problem Together concluded on the 8th to 10th June, 1998, urging the State parties to enact a comprehensive legislation. This is evident from the introduction and Statement of Objects and Reasons accompanying the Bill which became the 2002 Act. The same reads thus :

“Introduction

Money-laundering poses a serious threat not only to the financial systems of countries, but also to their integrity and sovereignty. To obviate such threats international community has taken some initiatives. It has been felt that to prevent money-laundering and connected activities a comprehensive legislation is urgently needed. To achieve this objective the Prevention of Money-laundering Bill, 1998 was introduced in Parliament. The Bill was referred to the Standing Committee on Finance, which presented its report on March 4, 1999 to the Lok Sabha. The Central Government broadly accepted the recommendation of the Standing Committee and incorporated them in the said Bill along with some other desired changes.

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23. The Preamble of the 2002 Act reads thus :

“An Act to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto.

Whereas the Political Declaration and Global Programme of Action, annexed to the resolution S-17/2 was adopted by the General Assembly of the United Nations at its seventeenth special session on the twenty-third day of February, 1990 ;

And whereas the Political Declaration adopted by the Special Session of the United Nations General Assembly held on 8th to 10th June, 1998 calls upon the Member States to adopt national money- laundering legislation and programme ;

And whereas it is considered necessary to implement the aforesaid resolution and the Declaration.”

Even the Preamble of the Act reinforces the background in which the Act has been enacted by Parliament being commitment of the country to the international community. It is crystal clear from

the Preamble that the Act has been enacted to prevent money-laundering and to provide for confiscation of property derived from or involved in money-laundering and for matters connected therewith or incidental thereto. It is neither a pure regulatory legislation nor a pure penal legislation. It is amalgam of several facets essential to address the scourge of money-laundering as such. In one sense, it is a sui generis legislation.

9. Regarding the question of grant of bail in cases involving commission of offences under PMLA, it was held in **Vijay Madanlal Chaudhary** (Supra) that: -

“115. The relevant provisions regarding bail in the 2002 Act can be traced to sections 44(2), 45 and 46 in Chapter VII concerning the offence under this Act. The principal grievance is about the twin conditions specified in section 45 of the 2002 Act. Before we elaborate further, it would be apposite to reproduce section 45, as amended. The same reads thus :

“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 under this Act 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, or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees, 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 a State Government authorised in writing in this behalf by the Central Government by a general or 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 authorised, 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 sub-section (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.

Explanation.—For the removal of doubts, it is clarified that the expression “Offences to be cognizable and non-bailable” shall mean and shall be deemed to have always meant that all offences under this Act shall be cognizable offences and non-bailable offences notwithstanding anything to the contrary contained in the Code of Criminal Procedure, 1973 (2 of 1974), and accordingly the officers authorised under this Act are empowered to arrest an accused without warrant, subject to the fulfilment of conditions under section 19 and subject to the conditions enshrined under this section.”

* * *

139. Therefore, as noted above, investigation in an economic offence, more so in case of money-laundering, requires a systematic approach. Further, **it can never be the intention of Parliament to exclude the operation of section 45 of 2002 Act in the case of anticipatory bail, otherwise, it will create an unnecessary dichotomy between bail and anticipatory bail which not only will be irrational but also discriminatory and arbitrary. Thus, it is totally misconceived that the rigours of section 45 of the 2002 Act will not apply in the case of anticipatory bail.**

140. Suffice it to observe that it would be preposterous and illogical to hold that if a person applies for bail after arrest, he/she can be granted that relief only if the twin conditions are fulfilled in addition to other stipulations predicated in the 1973 Code ; but another person, who is yet to be arrested in connection with the same offence of money-laundering, will not be required to fulfil such twin conditions whilst considering application for grant of bail under section 438 of the 1973 Code. The relief of bail, be it in the nature of regular bail or anticipatory bail, is circumscribed by the stipulations predicated in section 45 of the 2002 Act. The underlying principles of section 45 of the 2002 Act would get triggered in either case before the relief of bail in connection with the offence of money-laundering is taken forward. Any other view would be counterproductive and defeat the purposes and objects behind the stringent provision enacted by Parliament for prevention of money-laundering and to combat the menace on account of such activity which directly impacts the financial systems, including the sovereignty and integrity of the country.

141. As a result, we have no hesitation in observing that in whatever form the relief is couched including the nature of proceedings, be it under section 438 of the 1973 Code or for that matter, by invoking the jurisdiction of the Constitutional Court, the underlying principles and rigours of section 45 of the 2002 Act must come into play and without exception ought to be reckoned to uphold the objectives of the 2002 Act, which is a special legislation providing for stringent regulatory measures for combating the menace of money-laundering.”

10. In **Satender Kumar Antil v. CBI**, (2022) 10 SCC 51 the following principles were laid down regarding grant of bail in economic offences: -

“Economic offences (Category D)

90. What is left for us now to discuss are the economic offences. The question for consideration is whether it should be treated as a class of its own or otherwise. This issue has already been dealt with by this Court in P. Chidambaram v. Directorate of Enforcement (2020) 13 SCC 791, after taking note of the earlier decisions governing the field. The gravity of the offence, the object of the Special Act, and the attending circumstances are a few of the factors to be taken note of, along with the period of sentence. After all, an economic offence cannot be classified as such, as it may involve various activities and may differ from one case to another. Therefore, it is not advisable on the part of the court to categorise all the offences into one group and deny bail on that basis. Suffice it to state that law, as laid down in the following judgments, will govern the field:

Precedents

91. P. Chidambaram v. Directorate of Enforcement (2020) 13 SCC 791

*“23. Thus, from cumulative perusal of the judgments cited on either side including the one rendered by the Constitution Bench of this Court [Gurbaksh Singh Sibbia versus State of Punjab, (1980) 2 SCC 565], it could be deduced that the basic jurisprudence relating to bail remains the same inasmuch as the grant of bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial. However, **while considering the same the gravity of the offence is an aspect which is required to be kept in view by the Court. The gravity for the said purpose will have to be gathered from the facts and circumstances arising in each case. Keeping in view the consequences that would befall on the society in cases of financial irregularities, it has been held that even economic offences would fall under the category of “grave offence”***

and in such circumstance while considering the application for bail in such matters, the Court will have to deal with the same, being sensitive to the nature of allegation made against the accused. One of the circumstances to consider the gravity of the offence is also the term of sentence that is prescribed for the offence the accused is alleged to have committed. Such consideration with regard to the gravity of offence is a factor which is in addition to the triple test or the tripod test that would be normally applied. In that regard what is also to be kept in perspective is that even if the allegation is one of grave economic offence, it is not a rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence provide so. Therefore, the underlining conclusion is that irrespective of the nature and gravity of charge, the precedent of another case alone will not be the basis for either grant or refusal of bail though it may have a bearing on principle. But ultimately the consideration will have to be on case-to-case basis on the facts involved therein and securing the presence of the accused to stand trial.”

11. As per the submission made by the learned Counsel for the applicant, the applicant cannot be arrested in view of the judgment in the case of **Tarsem Lal** (Supra). In case the submission of the learned Counsel for the applicant is accepted, then the applicant has no apprehension of being arrested and the application for anticipatory bail has become infructuous.
12. However, since the learned Counsel for the applicant has placed reliance on Section 88 Cr.P.C., it is observed that Section 88 is contained in Chapter VI of the Code of Criminal Procedure, 1973 titled “Processes to Compel Appearance”. Chapter VI is divided in four sections – (a) summons, (b) warrant of arrest, (c) proclamation and attachment and (d) other rules regarding processes. Section 88 provides as follows:

“88. Power to take bond for appearance.—When any person for whose appearance or arrest the officer presiding in any court is empowered to issue a summons or warrant, is present in such court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such court, or any other court to which the case may be transferred for trial.”

13. In **Pankaj Jain v. Union of India**, (2018) 5 SCC 743, the Hon'ble Supreme Court held that: -

“22. Section 88 CrPC does not confer any right on any person, who is present in a court. Discretionary power given to the court is for the purpose and object of ensuring appearance of such person in that court or to any other court into which the case may be transferred for trial. Discretion given under Section 88 to the court does not confer any right on a person, who is present in the court rather it is the power given to the court to facilitate his appearance, which clearly indicates that use of the word “may” is discretionary and it is for the court to exercise its discretion when situation so demands. It is further relevant to note that the word used in Section 88 “any person” has to be given wide meaning, which may include persons, who are not even accused in a case and appeared as witnesses.

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30. We thus conclude that the word “may” used in Section 88 confers a discretion on the Court whether to accept a bond from an accused from a person appearing in the court or not. The both Special Judge, CBI as well as the High Court has given cogent reasons for not exercising the power under Section 88 CrPC. We do not find any infirmity in the view taken by the Special Judge, CBI as well as the High Court in coming to the conclusion that the accused was not entitled to be released on acceptance of bond under Section 88 Cr.P.C. We thus do not find any error in the impugned judgment of the High Court.”

14. The first anticipatory bail application No. filed by the applicant 1411 of 2023 was rejected by a detailed order dated 28.11.2023, but the applicant neither challenged the order dated 28.11.2023, nor did he appear before the trial Court. This conduct of the applicant indicates that although he is charged with commission of a grave economic offence, he has not cooperated with the trial in spite of rejection of his anticipatory bail application and, therefore, he is not entitled to be granted anticipatory bail at this stage.
15. Accordingly, the second anticipatory bail application is **dismissed**.

(Subhash Vidyarthi J.)

Order Date :- 25.05.2024

Preeti.