IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.2197 OF 2014

HASSAN ALI KHAN)...APPLICANT

V/s.

DEPUTY COMMISSIONER OF INCOME TAX)
AND ANOTHER)...RESPONDENTS

Mr.A.H.H.Ponda a/w. Mr.Ranjit Sangle a/w. Mr.Prashant Patil a/w. Mr.Saurabh Patil i/b. Mr.Saurabh Patil and Mr.Hitesh Sangle, Advocates for the Applicant.

Mr.J.R.Solanki, Public Prosecutor for Respondent No.1 - Union of India / Income Tax Department.

Mr.Deepak Thakre, APP for Respondent No.2 - State.

CORAM : ABHAY M. THIPSAY, J.

DATE : 31st AUGUST 2015.

<u>ORAL ORDER</u> :

1 The applicant is the accused in seven cases pending before the Additional Chief Metropolitan Magistrate, 38th Court, Ballard Pier. The allegation against the applicant in all these cases

is that he has committed an offence punishable under Section 276CC of the Income Tax Act. The applicant is in custody in all these cases. The applicant, who was denied bail in these cases by the Magistrate and by the Court of Sessions, has now approached this court praying for his release on bail in all these cases.

2 I have heard Mr.A.H.H.Ponda, the learned counsel for the applicant. I have heard Mr.J.R.Solanki, the learned Public Prosecutor for respondent no.1 – Union of India. I have heard Mr.Deepak Thakre, the learned APP for the State.

3 Section 276CC of the Income Tax Act provides for punishment on failure to furnish returns of income within the prescribed period. It provides for a maximum punishment of imprisonment for a period of seven years. It is non-cognizable.

4 The prosecution in all these cases has been initiated on a complaint filed by the Deputy Commissioner of Income Tax, on behalf of the Income Tax Department. The complaints have been

filed on 31st March 2009 and process was ordered to be issued on 1st July 2009.

5 The applicant is in custody in these cases, since 20th January 2012. It transpires that the applicant was in custody in connection with case under the Prevention of Money Laundering Act since 7th March 2011, and as such, could not remain present before the Magistrate on the dates of hearing of the said complaints. The applicant was produced before the Magistrate from the prison on 20th January 2012. He was then taken in custody on the ground that 'he had not asked for bail.'

6 It is not in dispute that a notice as contemplated under Section 148 of the Income Tax Act was served upon the applicant on 23rd May 2007, and the applicant has, thereafter, filed the returns of his income for the relevant period within the period stipulated by the said notice. The complaints – which are for failure to furnish the returns of income within the prescribed period – came to be filed much after the returns had been filed.

7 The assessment orders have been passed and steps for recovery of the amount of tax are being taken.

8 In this background, Mr.Ponda, the learned counsel for the applicant, submitted that considering that the applicant is in custody for a period of more than 3½ years, he may now be released on bail. He submitted that the applicant was in custody in a case under the Prevention of Money Laundering Act, but recently, by an order dated 12th August 2015, he has been released on bail in that case by this court (Coram : Smt.Sadhana Jadhav, J.)(Bail Application No.2335 of 2014).

9 Mr.Ponda submitted that the offence punishable under Section 276CC of the Income Tax Act is non-cognizable. It is also compoundable. He, therefore, submitted that, in view of the law declared by the Supreme Court of India in the case of **Om Prakash & Anr. vs. Union of India & Anr.**[1], and on the same reasoning, the offences in question ought to be treated as bailable.

1 (2011) 14 SCC 1

He has taken me through the relevant observations made by Their Lordships in the aforesaid judgment.

10 Mr.J.R.Solanki, the learned Public Prosecutor for respondent no.1, on the other hand, contended that there was no case for the release of the applicant on bail. He submitted that considering the magnitude of the alleged offences, the applicant should not be released on bail. He also submitted that the offences in question cannot be construed as bailable, and that, the observations made by Their Lordships in the aforesaid case of **Om Prakash (supra)**, which related to the offences punishable under the Central Excise Act and Customs Act, are not applicable to the offences in the present case, which are under the Income Tax Act. He submitted that, since after the said decision was rendered by the Supreme Court of India, the legislature amended the relevant provisions of the Customs Act to nullify the effect of the said judgment, the intention of the legislature to treat the offences of this kind as of a higher gravity is apparent.

11 I have carefully considered the matter.

12 All these cases, as aforesaid, have been instituted on complaints. Ordinarily, a person accused of having committed an offence punishable under Section 276CC of the Income Tax Act, not being subjected to arrest, would not be in custody. As a matter of fact, when in the course of arguments this aspect came to be discussed, Mr.Solanki, the learned counsel for respondent no.1 fairly conceded that ordinarily, no person accused of having committed an offence punishable under Section 276CC of the Income Tax Act would be in custody. On a specific question by the court, he further agreed that he has not come across even a single case – barring these cases – where a person accused of not furnishing the returns of income within the prescribed period, has been detained in custody without granting bail. He, however, submitted that in these cases, a different view of the matter has to be taken, because the income of the applicant for the relevant period, as has been assessed, is too huge i.e. of Rs.1 Lac Crore.

13 I have gone through the order passed by the Magistrate on 20th January 2012, whereby the applicant was taken in custody in these cases. A reading of the order shows that the applicant was produced before the Magistrate from the prison. It has already been observed that the applicant was, at the material time, in custody in a case under the Prevention of Money Laundering Act. There is substance in the contention of Mr.Ponda that the Magistrate has taken the applicant in custody in these cases reluctantly, and as he had no other alternative, 'because the applicant (who was produced from prison) had not filed any Vakalatnama and had not filed any Bail application.' The order shows that the Magistrate (wrongly) thought himself to be helpless, in such a situation, to grant bail, and that, that is why he took the applicant in judicial custody. Thus, it is not the gravity or magnitude of the offence, or any possibility of the applicant absconding or fleeing from justice that landed the applicant in prison, so far as these cases are concerned.

14 The applicant had approached the court of Sessions seeking bail as contemplated under Section 439 of the Code of Criminal Procedure (Code) in these cases, but the learned Additional Sessions Judge refused to grant him bail. While narrating the facts of the case in his order, the learned Additional Sessions Judge, *inter alia,* observed that 'the applicant had been taken in custody as he failed to appear before the Magistrate', though the learned Additional Sessions Judge was clearly aware that the applicant being already in prison, in another case, could not have, on his own, remained present before the Magistrate.

15 It is also a fact that the applicant is in custody in these cases for a period of about 3 years and 8 months. Since a reference to the provisions of Section 436A of the Code was made by the learned counsel for the applicant, the learned counsel for respondent no.1 submitted that the provisions of Section 436A of the Code would not apply to the present cases. According to him, in computing the period during which the applicant has been in custody in these cases, a certain period i.e. after 12th May 2015,

should be excluded from computing the said period; and if so calculated, the period of detention would be less than 3½ years. It is submitted that, being aggrieved by the order of the Magistrate for framing of charge, the applicant approached the court of Sessions in revision and secured a stay on the trial proceedings on 12th May 2015. The argument of the learned counsel for respondent no.1 is that 'since the proceedings have been stayed by the court of Sessions by an order dated 12th May 2015, the period thereafter shall not be computed while considering *whether the applicant has been in custody for a period of 3½ years.*' According to him, the period should be reckoned from 20th January 2012 to 12th May 2015 which is less than 3½ years by about 2 months. The learned counsel for respondent no.1 based this contention on the explanation to Section 436A of the Code which provides that 'in computing the period of detention under the said section for granting bail, the period of detention passed due to delay in proceeding caused by the accused shall be excluded.'

16 It is difficult to accept such a proposition. It is nobody's case that the contention raised by the applicant in the revision proceedings are frivolous, and it is extremely doubtful-to say the least – as to whether the orders passed by the Sessions Court staying the trial proceedings should be construed as delay caused by the party, who has approached the Sessions court for the redressal of its grievance.

17 Mr.Ponda, the learned counsel for the applicant submitted that though he was not pressing his prayer for bail solely with reference to the provisions of Section 436A of the Code, the contention advanced by the learned counsel for respondent no.1 has no substance, in as much as no motion had been made by the Public Prosecutor for the continued detention of the applicant for a period longer than 3½ years, and in the absence of any such motion, it would not be permissible for the learned counsel for respondent no.1 to raise such a contention. The contention of Mr.Ponda is that the period actually spent by the applicant in custody is to be taken into consideration and the

Public Prosecutor's inaction in not making any motion for the continued detention of the applicant, cannot be justified on the ground that the trial proceedings have been stayed by the order passed by the court of Sessions in revision proceedings.

18 Without finally concluding on the question of the applicability of the provisions of Section 436A of the Code to the case of the applicant, and without going into the question as to whether the offences in question are to be treated as bailable by virtue of the pronouncement of the Supreme Court of India in the aforesaid case of **Om Prakash (supra),** what needs to be observed is that there is absolutely no reason to permit further and continued detention of the applicant in custody. At the cost of repetition, it must be observed that the applicant came to be detained in these cases merely because he was already in custody in a case under the Prevention of Money Laundering Act, and therefore, could not remain present before the court in obedience to the summons. Even then, the order passed by the Magistrate is clear that had the applicant sought for bail, it would have been

given to him at that time. The only reason for detaining the applicant in this case is given as 'non-filing of vakalatnama and non-seeking of bail.' Thus, the applicant came to be detained in custody in these cases only because he was in custody in another case pending against him. Had the applicant not already been in custody in that case, he would have been on bail in these cases also.

19 In the case under the Prevention of Money Laundering Act, the applicant has been released on bail. The gravity of the offences, allegedly committed by the applicant in the said case, is much more. When the applicant has been released on bail in that case, there seems to be no justification for detaining him in custody in the present cases, which as aforesaid, are only in respect of non-filing of the returns of Income Tax within the stipulated period. It cannot be ignored that before the complaints came to be filed, the applicant had already filed the returns pursuant to a notice under Section 148 of the Income Tax Act, which was served upon him. The returns were filed in the year

2007, whereas the complaints came to be filed only on 31st March 2009. The learned counsel for respondent no.1 contended that it would be permissible for the department to file such complaint even after the returns are filed, because the filing of the returns was not done within the period stipulated. Certainly, the learned counsel is right in that regard, but the question is not of maintainability of the complaint, but of the degree of criminality that is sought to be attached to the behaviour of the applicant.

20 There is also substance in the contention of Mr.Ponda that the period after 12th May 2015 also needs to be taken into consideration while computing the period during which the applicant has remained in custody in these cases. *Prima facie,* it does not seem proper to exclude the period thereafter, on the strength of the explanation to Section 436A of the Code. Approaching court of Sessions and securing stay on trial proceedings cannot be treated as delay in trial proceedings caused by the applicant, when there is nothing to show that the revision applications that have been filed are frivolous and without any genuine grievance.

21 Lastly, the learned counsel for respondent no.1 contended that the income of the applicant which is assessed for the purpose of income tax, being huge, and since the bail granted to the applicant in the Prevention of Money Laundering case previously, was cancelled by the Supreme court of India, the gravity of the said offence should be taken into consideration for refusing to release the applicant on bail in the present cases also. I am unable to agree with this contention. When the applicant has been released on bail in a case which involved more serious allegation, he cannot be detained in these complaint cases, for which, at the cost of repetition it may be observed, ordinarily a person would not be in custody. Rather, such detention is unheard of – and it is so conceded by the learned counsel for respondent no.1.

22 It is obvious that the prayer for bail in the present cases is being objected to, not on the basis of the seriousness of the offences in this case, but on the basis of the applicant's alleged involvement in a case under the Prevention of Money Laundering Act, in which case, as aforesaid, he has been released on bail.

23 In my opinion, considering all the relevant aspects of the matter, the applicant should be released on bail.

24 The application is allowed.

25 In each of the said cases, the applicant shall be released on bail in the sum of Rs.1 Lac, with one surety in like amount, or two sureties in the sum of Rs.50,000/- each, on the following conditions :

i) the applicant shall attend the office of the concerned Income Tax department, as and when called upon by the concerned officer/s.

ii) The applicant shall abide by all the conditions imposed upon him by this court's order dated 12th August 2015 passed in Criminal Bail Application No.2335 of 2014.

26 The application is disposed of in the aforesaid terms.

(ABHAY M. THIPSAY, J.)