

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL BAIL APPLICATION No.1779 of 2013

Sayed Mohammed Masood

.. Applicant

Versus

Nilkanth Shelke & Anr

.. Respondents

Mr.Mahesh Jethmalani, Sr. Advocate with Mr.Dinesh Tiwari and Swapnil Ambure i/b Dinesh Tiwari & Associates for the applicant.

Mr.S.K.Shinde, Public Prosecutor with Ms.Rebecca Gonsalves for Respondent no.1.

Ms.S.S.Kaushik, APP for the State.

CORAM : ABHAY M. THIPSAY, J.

ORDER RESERVED : 10th NOVEMBER 2014

ORDER PRONOUNCED : 19th JANUARY 2015

ORAL ORDER :-

1 The applicant is one of the accused in PMLA Special Case No.1 of 2013 pending before the Special Court constituted under the Prevention of Money Laundering Act, 2002 (for short, 'PMLA Act'), at Mumbai. The allegation against him is that he has committed the offence of Money Laundering as defined in section 3 of the PMLA Act, and punishable under section 4 thereof. By the present application, he seeks bail.

2 I have heard Mr.Mahesh Jethmalani with Mr.Dinesh Tiwari, the learned counsel for the applicant. I have heard Mr.S.K.Shinde, Public Prosecutor with Ms.Rebecca Gonsalves, learned counsel for the respondent no.1. I have heard Ms.S.S.Kaushik, APP for the State.

3 The complaint that has been filed before the Special Court runs into 61 pages. An affidavit in reply to the Bail Application that came to be filed by the respondent no.1 also runs into 34 pages. The applicant has also filed additional affidavit in support of the Bail Application, and again, an additional affidavit- in-reply came to be filed on behalf of the respondent no.1. Additionally, a compilation of a number of documents has been tendered by the parties.

4 In brief, the case against the applicant may be stated as follows :-

That the applicant was, at the material time, Chairman and Managing Director of M/s.City Limosins (India) Ltd, City Realcom Ltd, and some other companies described as 'City Group of Companies'. That, 90% of the share capital of M/s.City Limosin

India Ltd is held by the applicant and the Razaki family, two from which family are also accused in the said case. The applicant, through the said companies, floated various schemes offering unrealistic returns to the investors/depositors. A large number of people throughout the country invested sums in these companies. After securing substantial amounts from the investors, the Companies shut their operations. The cheques issued by the Companies to the investors, purporting to return the amounts invested by them, bounced. It is alleged that the number of cheques that bounced, is more than 42,000. Various criminal cases came to be registered against the applicant and other Directors of the aforesaid Companies, alleging cheating and criminal conspiracy. 42 criminal cases, based on 42 First Information Reports have been registered against the applicants, the said Companies and other Directors of the said Companies. These cases are not only in Mumbai or Maharashtra, but also in Karnataka, Andhra Pradesh, Rajasthan and Delhi. In some cases, the investigation is over and charge-sheets have been filed. That, the said companies have cheated investors to the tune of more than Rs.500 crores. That, some of the amounts from investors were received by the applicant in cash, but the same were not deposited in banks, and were utilised by the applicant for his

personal use and expenses. That, the applicant purchased immovable and movable properties in his name out of the amounts invested by the investors. That, the applicant has thus, committed various offences of criminal breach of trust, cheating, criminal conspiracy etc, and has laundered the money earned by committing the offences in question.

5 The complaint gives details of various transactions which allegedly show the activities of the applicant amounting to money laundering as mentioned in section 3 of the PMLA Act, and claims that the applicant has committed an offence punishable under section 4 of the PMLA Act. An attempt has been made by the applicant to refute such claims by offering explanations with respect to such transactions, and a further attempt has been made by the Directorate of Enforcement – investigating and prosecuting agency – to again refute the explanations that are being given by the applicant. It would be wholly unnecessary to discuss the rival contentions in depth, so far as the present application is concerned. It cannot be disputed at this stage that the applicant is alleged to have committed offences of cheating and is alleged to have laundered the proceeds of the said crimes, which are said to be around Rs.500 crores.

6 The hearing of the present application was somewhat protracted because of the pendency of another Bail Application filed by the applicant which was arising out of a case of cheating and/or criminal breach of trust registered against him at Nagpada Police Station (Bail Application No.216/14 arising out of C.R.No.205/10 of Nagpada Police Station). The investors had sought intervention in the said application, and due to the vehement opposition to the said application for bail by the person claiming to be the President of the Investors Association who, through her counsel, raised a number of contentions, the substance of which was, however only one i.e. *that the applicant should not be released on bail till he pays back the money to the investors*. It was contended that the applicant has sufficient resources to repay such amounts, and that he has some properties even abroad, and that the applicant is still deliberately not repaying those amounts. In that case, the applicant had been initially released on bail on certain terms and conditions, but the bail granted to him was cancelled, as the applicant had failed to comply with the terms and conditions imposed on him. By pointing it out, it was contended that the applicant would do the same again, if released on bail. It was also put forth that the

cancellation of bail, as ordered by this Court, was upheld by the Supreme Court of India. That application (Criminal Application No.216/14) has already been decided by me by an order dated 9th January 2015.

7 According to the applicant, there is no substance in the allegations against him. It is submitted that the applicant had no dishonest intention at any time while introducing various schemes on behalf of his Companies, and while inviting money to be invested in such schemes. It is submitted that initially the schemes worked well to the satisfaction of all concerned, but later, at one point of time, due to some difficulties, it became impossible for the applicant to return the amounts to the investors though efforts were made to do so. It is submitted that it is because of the arrest of the applicant, the working of the Companies came in danger, and it became difficult for the applicant to fulfil his obligations towards the investors. It is submitted that inspite of this, efforts are still being made to repay the amounts received from investors and 16 cases filed against the applicant have already been compounded on payment of the amounts due and payable to the investors concerned in those cases. It is also submitted that proceedings for winding up of the applicant's

Companies are going on, and Official Liquidator has been appointed. That, adjudication of the claims is going on. It is also submitted that all the properties of the applicant and his Companies have been attached in the course of investigation of various cases that are pending against the applicant, and also in the present case under the PMLA Act. It is submitted, lastly, that since the applicant is in custody for a period of more than three years, and since there is no likelihood of the trial of the case proceeding, the applicant be released on bail on such terms and conditions as the Court may think fit to impose.

8 The emphasis of the learned Public Prosecutor and the learned counsel for the Respondent no.1 has been only on the magnitude of the offences allegedly committed by the applicant. As aforesaid, since the application for bail filed by the application in the case registered at Nagpada Police Station was heard along with present application and as the investors were allowed to intervene in the said application, the arguments that were advanced in connection with the application of bail in the present case and the application of bail in that case were got somewhat mixed. It is because, the investors while opposing the said bail application (Bail Application No.216 of 2010 arising out of

C.R.No.205 of 2010 of Nagpada Police Station) did not confine themselves only to the facts of that case and in order show the magnitude of the offences allegedly committed by the applicant referred to the allegations levelled against the applicant in the present case also. Though, the investors had not sought intervention in the present case – and rightly so – since the arguments advanced by the counsel for the intervenors in that bail application touched some general aspects about the desirability of releasing the applicant on bail, I have taken the same into consideration while deciding the question of bail in the present case also. Thus, it is submitted by referring to the facts of C.R.No. 205 of 2010 of Nagpada Police Station that the applicant in that case did not comply with the conditions imposed upon him by the Court at the time of his release on bail and, therefore, bail granted to him was cancelled. Thus, it is also submitted that the applicant committed a breach of the direction to hold meeting with the investors, and make an attempt to repay the amounts due and payable to the investors, but the applicant had willfully failed to hold any such meeting with the investors.

9 While arguing on behalf of the intervenors and while opposing the Bail Application No. 216 of 2014, Mr.Solkar

submitted that the applicant has dishonestly managed to divert the illegal gains for purchasing properties abroad, and that, if released on bail, the applicant is likely to leave India and abscond. It is also submitted that while in custody, the applicant has managed to dispose of certain properties, and has not utilised the amount earned by disposing of these properties for paying to the investors.

10 I have carefully considered the matter.

11 To remove the vagueness or ambiguity with respect to some important aspects of the matter, that remained even after the arguments were heard, I had called upon the learned counsel for the parties to be precise, and give details regarding some relevant aspects of the matter. Accordingly, such details have been given. The following facts are not indispute.

(a) The applicant is in custody in this case from 14th December 2012.

(b) Pursuant to the provisional attachment orders passed, property worth more than Rs.133 crores belonging to the applicant and his Companies has been attached in the course of investigation of this case, and adjudication proceedings are going on.

(c) Search for other properties, if any, of the applicant and/or his Companies which are liable to be attached is going on as the investigation continues, and leave has been taken by the Investigating Agency to file additional/supplementary complaints.

(d) Two supplementary complaints i.e. Complaint no.3/13 and complaint no.6/13 against the applicant have already been filed on 15th January 2014.

(e) 53 criminal cases apart – from the cases under the PMLA Act – were registered against the applicant and his Companies on similar allegations i.e. of the investors having been deceived and cheated. These cases are pending in various parts of the country. 16 cases out of these have been compounded.

(f) The applicant was initially arrested in the year 2010. He continued to remain in custody till October 2011 when he came to be released on bail. This was prior to the filing of the present case. The applicant was re-arrested on 14th December 2013 consequent to the order of cancellation of bail, and thereafter, has remained in custody.

It in this background that the prayer of the applicant for release on bail ought to be considered.

12 It was submitted by Mr.Tiwari, the learned counsel for the applicant that the criminal cases filed against the applicant in respect of the offences of cheating etc. which are supposed to have generated the 'proceeds of crime' will have to be tried along with the Special case/cases under the PMLA Act. He submitted that these cases have not been forwarded to the Special Court under the PMLA Act at Mumbai, and as such, there is not even a likelihood of the trial commencing in near future.

13 The learned Public Prosecutor, and the counsel for the respondent no.1 did not dispute this aspect. Even otherwise, it is clear from the scheme of PMLA Act that the scheduled offence/offences, and the offence of Money Laundering both shall be tried by the Special Court constituted under the PMLA Act. Section 44 of the PMLA Act makes this clear. Therefore, admittedly, there is no likelihood of the trial of the PMLA Special case commencing within a reasonable time. The only contention that is put forth by the learned Public Prosecutor while opposing the bail application, *inspite of admitting the position that the trial is not likely to commence within a reasonable time*, is that there is a bar to release the applicant on bail in view of the provisions of

section 45 of the PMLA Act. The learned counsel for the applicant submitted that this bar or restriction on the powers of the Court in the matter of releasing a person accused of an offence under the PMLA Act, is not attracted in the instant case.

14 The question that arises is whether the provisions of section 45 of the PMLA Act which restrict the powers of the Court in the matter of grant of bail to a person accused of an offence punishable under the PMLA Act, are attracted in this case. Section 45, inter alia, provides that '*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 unless the Public Prosecutor has been given an opportunity to oppose the application for such release, and unless (where the Public Prosecutor opposes the application) the Court is satisfied that there are reasonable grounds for believing that such person is not guilty of such offence, and that he is likely to commit any offence while on bail*'. Thus, the powers of the Court in the matter of grant of bail are indeed restricted in case of the accusation being of an offence listed in Part-A of the schedule.

15 The contention advanced by the learned counsel for the applicant is that the scheduled offence/s in this case are of cheating and that the offence of cheating did not find a place in Part A of the Schedule at the material time. It is submitted that the offence of cheating was brought in Part A only after the complaint had been filed. According to him, therefore, in the present case, the bar provided under section 45 of the PMLA Act is not attracted.

16 It is not in dispute that the complaint has been filed on 11 February 2013. It is also not in dispute that the scheduled offences which, allegedly, generated the 'proceeds of crime' in this case are said to be offences punishable under section 420 of the IPC. It is also not in dispute that at the point of time when the alleged offences were committed, and also at the point of time when the complaint was filed, the offence punishable under section 420 of the IPC was mentioned in Part-B of the schedule. It is by the Prevention of Money Laundering (Amendment) Act 2012 (Act 2 of 2013) that the schedule was amended, and the offence punishable under section 420 of the IPC was brought in Part-A of the Schedule. It is not in dispute that this change was brought into force with effect from 15th February 2013.

17 The learned Public Prosecutor however, contended that since the offence punishable under section 420 of the IPC now finds a place in Part-A of the schedule, the restrictions contained in section 45 would come in play. According to him, the offence of money laundering being a continuing offence, the applicant cannot benefit by the fact that at the material time, the offence punishable under section 420 of the IPC did not fall in Part-A of the schedule. In support of this proposition, the learned Public Prosecutor has placed reliance on a decision given by a learned Single Judge of this Court in ABA No.823 of 2012 decided on 1st April 2014.

18 Indeed, in that case, the learned Judge observed that the offence punishable under the Money Laundering Act is a continuing offence, but the proposition as spelt out by the learned Public Prosecutor, cannot be seen to have been laid down in the said decision. Moreover, in that case, the applicant before this Court had approached this Court for Anticipatory Bail, and investigation into the matter was yet to be carried out.

19 The question as to whether a person who is alleged to have committed the offence of money laundering in respect of

proceeds of crime generated by committing a scheduled offence mentioned in Part-B of the Schedule, would, by the subsequent amendment of the Schedule, be treated as a person who has generated the proceeds of crime by committing a scheduled offence falling in Part-A of the schedule, would be a rather complex question, needing thorough discussion in the context of the constitutional provisions, and the settled principles of interpretation of penal statutes. Penal statutes which create offences, or which have the effect of increasing penalties for existing offences will only be prospective – not only by reason of the restriction imposed by Article 20 of the Constitution – but even otherwise, on the principle of fairness and justice. In fact, it is the principle that it would be shocking to one's sense of justice that an act legal at the time of doing it, should be made unlawful by some subsequent enactment, that has been recognized in the said constitutional provision. In this case, the change brought about by amending the schedule cannot be said to be merely procedural, as it would affect the rights of a person to be released on bail substantially and drastically. Anyway, an elaborate discussion on this, is not necessary in the present case, as in this case, the complaint, after investigation had already been filed, before the offence punishable under section 420 of the IPC was included in

Part-A of the Schedule. In fact, as pointed out by the learned counsel for the applicant, the complaint itself proceeds on the basis that the offences allegedly committed by the applicant, were covered under Part-B of the Schedule(para 8). As such, it cannot be said that the provisions curtailing the discretion of the Court in the matter of grant of bail found in section 45 of the PMLA Act are attracted in the present case. In my opinion, since the offence punishable under section 420 of the IPC did not fall in Part-A of the Schedule at the time when it was allegedly committed; and also at the time when the investigation into offences punishable under the PMLA Act commenced; and even at the time when the complaint case came to be filed against the applicant, the provisions curtailing the discretion of the Court in the matter of grant of bail, as found in section 45 of the PMLA Act are not applicable in the instant case. There is, therefore, no bar to release the applicant on bail, even on the basis that there exists a prima facie case against him.

20 The question that now arises is whether the applicant should be released on bail.

21 As aforesaid, the applicant is in custody for a period of more than 3 years in connection with this case and the cases relating to

the scheduled offences. The properties belonging to him and the aforesaid companies, have already been attached in various criminal cases pending against him and also in this case. The number of criminal cases registered against the applicant is too high. It is not clear whether investigation in all these cases has been completed. In view of the provisions of section 44 of the PMLA Act, the offences allegedly committed by the applicant – the scheduled offences which are said to have generated the proceeds of crime that are alleged to have been laundered by the applicant – would be required to be tried by the Special Court. The complaint in this case is only with respect to the offence punishable u/s.4 of the PMLA Act, and not with respect to the scheduled offences. If the scheduled offences are to be tried by the Special Court, as required, the chargesheets filed against the applicant in respect of the said offences would be required to be forwarded to the Special Court at Mumbai. However, admittedly, the chargesheets in all these cases have not been forwarded to the Special Court at Mumbai. Interestingly, it may be observed that even the case relating to the bail application no.216/14, (relating to C.R.No.205/10 of Nagpada Police Station) that has been referred to earlier, is still before the Magistrate, and no stand that it was required to be forwarded to the Special Court, and could

not be kept before the Magistrate has been taken. In fact, from the arguments advanced by Mr.Solkar on behalf of the investors while opposing the said Bail Application, it appears that the investors are not really happy with the idea of the said case being tried by the Special Court as relating to the Scheduled offences that generated the proceeds of crime that are allegedly laundered. The reason is that according to Mr.Solkar, the learned counsel for the intervenors/ investors in that case, the attachment of the properties of the applicant and his Companies by the Enforcement Directorate in connection with the present case does not help the investors in any manner, inasmuch as such properties would vest in the Government. He submitted that this will not enable the investors to get their monies back.

22 I have considered the grievance of the investors. Basically, what the investors want is only that their money should be repaid, and they expect this to be achieved by keeping the applicant in detention. I have also considered their contention that the attachment of properties under the provisions of the PMLA Act would not help them. Even if this is accepted to be the correct legal position, I am unable to see as to how this can be taken as a factor against the applicant as a circumstance justifying refusal to

release him on bail. It would be for the concerned authorities to see as to in what manner the money of the investors can be recovered from the applicant and/or his companies. As aforesaid, the Official Liquidator has already been appointed, and the adjudication proceedings are going on. How much property belonging to the applicant has been seized in the criminal cases that have been filed by the police in respect of cheating, criminal breach of trust etc, is not clear, but these properties would be available to the investors, if at all the allegations against the applicant are ultimately proved. That, the investors are prejudiced by attachment of the properties belonging to the applicant and/or his Companies under the provisions of the PMLA Act, - as, according to them such properties would not be available for satisfying the claim of the investors by the sale of such properties, - would indeed be rather paradoxical, but, as aforesaid, this cannot weigh against the applicant. If the interest of the investors are to be kept in mind, it would be open for the different Investigating Agencies to arrive at a proper course to be adopted in the matter by mutual consultation.

23 That the trial of this case not likely to proceed or even commence within a reasonable time cannot and has not been

disputed. How much time it would take for the Investigating/Prosecuting Agency to have the chargesheets in the case of the Scheduled offences placed before the Special Court is not at all clear and no commitment, except that 'steps are being taken to do so', has been made in that regard. Even otherwise, there are certain legal issues on which there is no clarity. For instance, Section 44 speaks of a *Special Court constituted for the area in which the offence has been committed*. It is not clear whether the Special Court at Mumbai has been constituted also for the areas of the State of Karnataka, Andhra Pradesh, Rajasthan and Delhi, as no light was thrown on this in the course of arguments.

24 The anxiety on the part of the investors can very well be understood, but in the circumstances, the remedy is not to keep the applicant under detention for an indefinite period. In the case of *Sanjay Chandra Vs CBI, AIR 2012 S.C 830*, the Supreme Court of India re-iterated the principles regarding grant of bail after having taken a review of various decisions rendered by the Supreme Court in bail matters, including that in *Babu Singh Vs. State of Uttar Pradesh (1978) 1 SCC 579*, *Moti Ram Vs. State of Madhya Pradesh (1978) 4 SCC 47* and *Siddharam*

Satligappa Mhetre Vs. State of Maharashtra (2011) 1 SCC 694.

The observations made by Their Lordships leave no manner of doubt that there has been no change in the legal principles or legal position with respect to the grant of bail. There is no change in the basic principle that power to refuse bail is not to be exercised as and by way of inflicting punishment. The following observations made by Their Lordships in the aforesaid judgment are worth quoting.

“..... one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any Court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an un-convicted person for the purpose of giving him a taste of imprisonment as a lesson”.

(paragraph 14 of the judgment)

In the same paragraph, Their Lordships have expressed that 'the Courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and duly found guilty'.

25 In this case, not only that the applicant is in custody for a period more than 3 years, but there is absolutely no

possibility of the trial of this case commencing within a reasonable time. This is not disputed by the learned Public Prosecutor who submitted that steps for bringing the cases in respect of the scheduled offences allegedly committed by the applicant are before the Special Court under the PMLA Act, are being taken. As aforesaid, the properties belonging to the applicant and his Companies have already been attached, and the process of attachment is still being undertaken. Considering the volume of evidence that would be required to be adduced before the Special Court, it can be easily said that the trial would take several years for getting completed, after it commences; and presently even the commencement thereof is nowhere in sight. The applicant would be required to give sureties/securities not only in the present case if released on bail, but also in all the other cases of scheduled offences, though they would form a part of the present case only. As such, it would not be easy for him to abscond. In any case, appropriate conditions can be imposed upon the applicant to ensure that he would not abscond. Detaining the applicant further in custody without granting bail, in the circumstances, would be unfair, unreasonable and would violate the provisions of Article 21 of the Constitution of India.

26 Considering all the relevant aspects of the matter, I am inclined to release the applicant on bail, subject to certain conditions.

27 Application is allowed.

28 Applicant is ordered to be released on bail in the sum of Rs.5,00,000/- with one surety in like amount, on the following conditions :-

(i) The applicant shall report to the office of the Enforcement Directorate on the first and third Monday of every calender month, between 11.00 a.m to 2.00 p.m, unless on any such Mondays, he is required to remain present - and actually remains present - before the trial court, till the disposal of the case against him, or until further orders of the trial court, whichever is earlier.

(ii) The applicant shall deposit his passport with the Directorate of Enforcement and consent for its retention by them, till the disposal of the case against him. If the applicant does not hold a passport, or if the same is already in custody of the Directorate of Enforcement, or some other Investigating Agency, the applicant shall file an affidavit to that effect in the trial court, within a period of 10 days from today.

(iii) The applicant shall not leave the limits of Brihan Mumbai and District Thane, except with the express permission of the Special Court under the PMLA Act. This condition, however, shall not operate when the appellant would be required to leave the limits of Brihan Mumbai and District Thane for the purpose of attending the Court/Courts in which cases against him are pending, or where his presence is required by any Investigating Agencies in connection with the investigation. He shall, however, in such cases, give a written intimation about the same to the Enforcement Directorate.

29 At this stage, Ms.Rebecca Gonsalves prays for stay on the operation of this order saying that the Directorate of Enforcement intends to challenge the same by approaching the Supreme Court of India. I find that the applicant is also in custody in two other cases under the PMLA Act. It is not in dispute that the applicant has not applied for bail in those cases as yet. The applicant is, therefore, not likely to be actually released from custody immediately. As such, the Enforcement Directorate can have sufficient time to move the Hon'ble Supreme Court for challenging this order before the applicant is actually released from custody.

30 In the circumstances, prayer rejected.

(ABHAY M.THIPSAY, J)