IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPLICATION (ABA) NO. 440 OF 2016
(*Jakir Husain Sheikh Vs. The State of Maharashtra)*
AND
CRIMINAL APPLICATION (ABA) NO. 441 OF 2016
(Uttam Dwarkaprasad Malu Vs. The State of Maharashtra)

Office Notes, Office Memoranda of Coram, appearances, Court's orders of directions and Registrar's orders	Court's or Judge's orders

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Shri Shyam Dewani, Advocate for the applicants.
Shri S. S. Doifode, A. P. P. for the State.

CORAM : S. B. SHUKRE, J.
DATED : 02 SEPTEMBER, 2016

Heard learned Counsel for the applicants and learned A.P.P. for the State.

Both these applications are being disposed of by this common order as the applicants in these applications are accused No.1 and 2 respectively in Crime No. 154/2016 registered against them at Police Station, Lakadganj, Nagpur for the offences punishable under Section 420 read with Section 34 of the Indian Penal Code and also under Section 23(1) of the Securities Contracts (Regulation) Act, 1956 (for short, the Act of 1956).

The allegation is that, in the office premises of one concern, J. K. Trading, run by Jakir Husain Sheikh, accused No.1 and Uttam Dwarkaprasad Malu, accused No.2

together were carrying on business of trading in shares in an illegal manner. It is alleged that these accused were not the registered brokers and they carried on the share trading business not by using the floor of a recognized Stock Exchange but some illegal platform and thus evaded Government taxes of huge amount. A raid was conducted on 12/5/2016 in the office of J. K. Traders, Ambedkar Chowk, Jagat Chambers, Nagpur and some material, indicating transactions made in illegal sale and purchase of the shares, list of customers, various entries pertaining to illegal share trading and also three C.P.Us and one hard disk and some other documents were found and were seized by the Investigating Officer. Further investigation disclosed that the business of illegal share trading was being carried on in a clandestine manner through some unrecognized software by both these applicants.

Learned Counsel for the applicants has submitted that there is no material available on record from which it could be prima facie said that accused No.1 either owns or keeps or has control over the concern J. K. Trading, which is an essential ingredient of an offence punishable under Section 23(1) of the Act of 1956, particularly the Clauses (e) and (f). He submits that this ingredient is not prima facie made out in this case. He also submits that the word, "keeps" used in Clause-(e) of Section 23(1) must be interpreted by application of the principle of *ejusdem generis*, to mean something akin to ownership, possession or control over the premises, which meaning could be understood from the preceding word, "owns". In support, he places his reliance upon the cases of; (1) *Thakur Amar Singhji and others Vs. State of Rajasthan and others* - **A.I.R. (42) 1955 S.C. 504** (2) *M. Narayanan Nambiar Vs. State of Kerala* - **1963 (2) Cri. L. J. 186** and (3) *Kamlesh Kumar Sharma Vs. Yogesh Kumar Gupta and others* - **AIR 1998 S.C. 1021**.

So far as the accused No.2, the applicant in application No. 441/2016 is concerned, he submits that there is no evidence available on record indicating that this applicant was prima facie assisting the accused No.1 or even carrying on the business of illegal share trading from his own premises.

Learned A.P.P. for the State submits that no occasion for interpreting the word "keeps" used in Section 23(1)(e) would arise in this case if the evidence so far collected by the Investigating Officer is seen. He submits that it prima facie suggests that the accused No.1 is the owner of J. K. Trading and he along with accused No.2 has done great volume of business of illegal share trading.

On going through the case diary, I find that there is a statement of a witness, the servant of accused No.1, showing that the premises of J. K. Trading belong to or at least were used by the accused No.1 for various activities, out of which, the main activity was of share trading. It discloses that this accused No.1 used to sit in the office of J. K. Trading on regular basis for fixed hours and also used to meet and entertain various customers. Then, there is also a certificate issued under the provisions of the Shops and Establishment Act, showing that J. K. Trading is owned by the accused No.1. The conduct of the accused No.1 in visiting the office of J. K. Trading when the raid was being conducted also prima facie goes against him. If the said concern or the office premises had nothing to do with the accused No.1, prima facie, he had no reason to personally go to the place subjected to the raid. If he was called on telephone by the Investigating Officer to come there, prima facie, he could have said to him that he had no connection whatsoever with the said concern or the premises. Afterall, he is not a panch witness whose duty would make him obey the command of the Investigating Officer. Therefore, at this stage, there is prima facie material showing that the concern as well as its premises that were subjected to raid belonged or were under the control of accused No.1. This being the factual position, I do not think, as rightly submitted by the learned A.P.P. for the State, there is no occasion for considering the import of the word, "keeps" employed in Section 23(1)(e) of the Act, 1956 and therefore need for considering application of the ratio of cases of *Thakur Amar Singhiji, M. Narayanan Nambiar and Kamlesh Kumar Sharma* (supra) would also not arise.

According to the learned Counsel for the applicants, the material recovered from the office of J. K. Trading does not connect them with the alleged crime in any manner and in any case that material is not sufficient to show their prima facie involvement in this crime. In the opinion of learned A.P.P. this very material shows the position to be otherwise and it discloses prima facie involvement of both these applicants i.e. accused No.1 and 2 in the crime.

Learned A.P.P. is right. I have perused the case diary including the search and seizure panchanama dated 12/5/2016. Several documents including rough notes, computer printouts, statements of accounts, registers, diaries, some hardware and other material have been seized by the Investigating Officer. The rough notes and computer printouts as well as various noting made in the personal diaries kept by accused No.1, all indicate that not only accused No.1 but accused No.2 also, in association with each other, prima facie indulged in share trading. This trading in shares, it is further seen, was prima facie carried out in a clandestine manner, bye-passing the recognized Stock Exchange. During the pendency of this application, both the applicants were on interim protection and had even attended the Police Station on the directions given by this Court. According to the prosecution, the Investigating Officer had called upon the applicants to explain these entries and notings. However, it appears, the applicants have not given any explanation so far or have not shown that these transactions disclosing clandestine trading in shares, in fact, related to legal business of sale and purchase of shares through a recognized Stock Exchange. They have also not given any other explanation about these transactions disclosing in reality some other dealings and not the dealings in shares. Then, these transactions are not occasional, but quite regular, as seen from the notings and entries in these documents. Therefore, I find that there is sufficient material in this case prima facie pointing an accusatory finger towards both the applicants.

Learned Counsel for the applicants, relying upon the case of *Bhadresh Bipinbhai Sheth Vs. State of Gujrat and another* - **(2016) 1 S.C.C. 152,** has submitted that the main object of bail is to secure the attendance of the accused at the trial and the proper test to be applied in such cases would be whether or not it is probable to show that the party will appear to take his trial or otherwise the refusal of the bail would turn into a pre-trial punishment of the accused. He also submits that since both the applicants have cooperated with the Investigating Officer and have also given the details of their accounts, no need for their custodial interrogation has been left and, therefore, the applicants are entitled to be released on anticipatory bail. He points out from the observations of the Hon'ble Apex Court in the case of *Bhadresh* (supra) that there is no requirement that the accused must make out a “special case” for the exercise of the power to grant anticipatory bail and any such requirement would reduce the solitary power conferred by Section 438 of the Criminal Procedure Code to a dead letter. Therefore, he further submits, if the applicants have deep roots in the society and are not likely to abscond and are also cooperating with the Investigating Officer, they should be enlarged on bail.

Learned A.P.P., relying upon the cases of *Director of Enforcement and another Vs. P. V. Prabhakar Rao* – **AIR 1997 S. C. 3868** and *Sudhir Vs. State of Maharashtra and another* – **(2016) 1 S.C.C. (Cri) 234**, submits that not only the prima facie involvement of the applicants is required to be seen, but also the magnitude of the offence, its impact on the society and other well settled parameters must be considered while exercising the discretionary powers under Section 438 Cri. P. C.

The principles of law laid down in the cases relied upon by both the sides and which have been referred to in the earlier paragraphs, are well settled. The Court is not only required to examine the prima facie worth of accusations made against the accused but also such other parameters as seriousness and gravity of the crime, character and antecedents of the accused, likelihood of committing of a similar offence by the accused, misuse of liberty by the accused, impact of crime on the society, magnitude of the crime and so on and so forth. It is also well settled that if prima facie involvement of the accused in the crime is not seen, the question of considering other parameters would not arise as other parameters come into picture only when the role of the accused is determined and prima facie found to be inculpatory or at least when the material available on record is of such a nature that it raises in a reasonable manner an accusatory finger towards the accused.

I have already noted earlier that upon examination of the material available on record, an accusatory finger is pointed towards both the applicants indicating their having played some or the other role in the illegal trading of shares. So far as the offence punishable under Section 420 of the Indian Penal Code is concerned, however, I must say, there is no material so far collected by the Investigating Officer showing that any false representation or inducement has been given by both or any of these applicants so as to cheat or deceive another person and, therefore, for this offence, no prima facie involvement of both the applicants, at this stage, is seen. But, the fact remains that the material present on record does show that these applicants have prima facie played some or the other role in committing an offence which would fall within the sweep of Section 23(1), Clauses (e) and (f), of the Act, 1956. This offence, having regard to the transactions so far discovered, suggest at exchange of substantial amounts of money and, therefore, the possibility of the offence having high economic magnitude at least at this stage cannot be ruled out. Such an offence would, therefore, require a deeper investigation, which, in my opinion, would be possible through the custodial interrogation of these applicants. The applicants, as stated earlier, have not given any explanation about various notings and entries regarding the transactions in share trading. It appears that the crime may possibly have a larger network and, therefore, only inquisitorial interrogation would not be enough. Therefore, following the principles of law discussed earlier, I find that the applicants are not entitled to be enlarged on anticipatory bail.

Learned Counsel for the applicants submits that the offence punishable under Section 23(1) of the Act, 1956 cannot be considered to be a grave economic crime as there is no mandatory punishment of imprisonment prescribed. He further submits that the prescribed punishment is in the nature of imprisonment for a term which may extend to ten years or with fine, which may extend to rupees twenty-five crore or with both.

I must say, the punishment prescribed is just one factor for determining the seriousness or gravity of the crime. There are also other elements, such as the impact of the crime on the society, magnitude of the crime, faith of the society in the legal system and so on and so forth which also determine the seriousness of the crime. I have already taken this view in the case of *State of Maharashtra Vs. Suraj Pal Jagmohan @ Chhacha* – **2015(1) Bom.C.R.(Cri.) 576**. Therefore, the argument cannot be accepted.

In the result, I am of the opinion that both the applications deserve to be rejected.

Criminal applications (ABA) No. 440 and 441 of 2016 stand rejected.

At this stage, learned Counsel for the applicants prays for extension of the interim protection granted to the applicants, in order to enable the applicants to approach the Hon'ble Apex Court.

The prayer is opposed by the learned A.P.P. for the State. However, considering the fact that both the applicants have been on the interim protection since 08/7/2016, I am of the view that it could be extended for a further period of four weeks, in the interest of justice, subject to the condition that the applicants shall continue to attend the Office of the Economic Wing of the Crime Branch as and when required by the Investigating Officer.

JUDGE

WWL

CERTIFICATE

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